

Local Government Emergency Management

3/16/2020

Should our mayor declare a local state of disaster in relation to the coronavirus?

Texas Governor Greg Abbott has issued a [statewide disaster declaration](#) and President Donald Trump has declared a [state of national emergency](#). Whether to declare a local state of disaster related to the virus is up to each mayor in the first instance, with the extension of the declaration beyond seven days requiring city council approval. That being said, the Centers for Disease Control and Prevention has recommended the [cancellation of all mass gatherings](#) for at least eight weeks. Some Texas cities have included that recommendation in their disaster declarations as a recommendation, while others have made compliance mandatory. Here is an [example proclamation](#) of disaster that includes mandatory mass gathering cancellation.

If we decide to declare a state of disaster, what does that process look like?

The mayor is authorized to declare a local state of disaster if a disaster has occurred or is imminent. TEX. GOV'T CODE § 418.108(a). An order or proclamation declaring, continuing or terminating a local disaster must be given prompt general publicity and must be promptly filed with the city secretary. *Id.* § 418.108(c). The declaration of a local disaster activates applicable provisions of local or interjurisdictional emergency management plans and authorizes the furnishing of aid and assistance under the declaration. *Id.* § 418.108(d). A disaster declaration lasts for no more than seven days unless continued or renewed by city council or a joint board, as applicable. *Id.* § 418.108(b).

3/18/2020

What is meant by the prohibition against "mass gatherings" in a local disaster declaration or order?

The answer to this question will depend on the language of the declaration or an order issued pursuant to the declaration. If the declaration or order states only that "mass gatherings" or "gatherings" of more than a certain number of people are prohibited, it would - [according to CDC guidance](#) - arguably apply only to conferences, festivals, parades, concerts, sporting events, weddings, and other types of assemblies. Without an express provision otherwise, it would not apply to close businesses such as bars and restaurants or grocery stores, and it would not prohibit people from going to work at large companies.

In most cases, the county's orders relating to the occupation of premises will control over a city's order. Texas Government Code Section 418.103 resolves many conflicts in relation to emergency management orders:

"(a) The governor shall determine which municipal corporations need emergency management programs of their own and shall recommend that they be established and maintained. The

governor shall make the determinations on the basis of the municipality's disaster vulnerability and capability of response related to population size and concentration.

(b) The emergency management program of a county must be coordinated with the emergency management programs of municipalities situated in the county but does not apply in a municipality having its own emergency management program."

But, with regard to the occupancy of premises, the more specific provisions of Section 418.108 control:

"(f) The county judge or the mayor of a municipality may order the evacuation of all or part of the population from a stricken or threatened area under the jurisdiction and authority of the county judge or mayor if the county judge or mayor considers the action necessary for the preservation of life or other disaster mitigation, response, or recovery.

(g) The county judge or the mayor of a municipality may control ingress to and egress from a disaster area under the jurisdiction and authority of the county judge or mayor and control the movement of persons and the occupancy of premises in that area.

(h) For purposes of Subsections (f) and (g):

(1) the jurisdiction and authority of the county judge includes the incorporated and unincorporated areas of the county; and

(2) to the extent of a conflict between decisions of the county judge and the mayor, the decision of the county judge prevails."

Is a city required to declare a local state of disaster in order to be eligible for federal reimbursement of expenses?

Yes. Although the President and the Governor have issued an emergency declaration and a state of disaster, respectively, state regulations provide that the mayor must have declared a local state of disaster before a city may request disaster recovery assistance. 37 TAC §7.41. Thus, if a city anticipates requesting financial assistance in response to the COVID-19 pandemic (see below), the mayor should declare a state of local disaster and submit it as soon as possible to the governor, via the Texas Division of Emergency Management by email at soc@tdem.texas.gov or facsimile at 512-424-5587. Requests for recovery assistance must be made by the mayor in writing to the governor through the Texas Division of Emergency Management. *Id.* §7.42. The request must indicate that the disaster is of such magnitude that local resources are inadequate to deal with it and the affected locality cannot recover without state and/or federal assistance. *Id.* Requests may be transmitted to the division via the [Disaster Summary Online](#). *Id.* The Texas Department of Emergency Management has developed a [resource](#) for local officials on how to track and report costs associated with COVID-19.

Beyond the need to seek disaster recovery assistance, a declaration of local disaster also allows a city to exercise extraordinary emergency powers, to activate the appropriate recovery and rehabilitation aspects of all applicable local or interjurisdictional emergency management plans, and, in certain instances, to provide additional liability protection to employees, officers, or volunteer emergency workers. TEX. GOV'T CODE §§ 418.006; 418.185(e).

Are cities eligible for reimbursement from the federal government for expenses related to COVID-19?

On March 13, 2020, the President declared an emergency in response to the COVID-19 pandemic. As a result, local governments, including cities, are eligible to apply for federal assistance.

The declaration provides that eligible emergency protective measures taken to respond to the COVID-19 emergency at the direction or guidance of public health officials may be reimbursed under Category B of FEMA's public assistance program. More detailed information on the eligibility of expenses can be located in the [FEMA Public Assistance Policy Guide](#).

Additionally, the Texas Department of Emergency Management has developed a [resource](#) for local officials on how to track and report costs associated with COVID-19. A city that plans on filing a claim for reimbursement of expenses with FEMA and/or the state should work with its city attorney to ensure any expenditures incurred are in accordance with federal and state regulations so as to reduce the likelihood of disallowance of such claim.

3/20/2020

What if a hospital won't release a patient's coronavirus test results so that treating or transporting first responders can potentially return early from self-quarantine?

Some hospitals and other caregivers have reportedly been withholding COVID-19 test results from first responder agencies, citing HIPAA privacy laws. First, hospitals should be reminded that treating agencies may choose to waive a patient's HIPAA privacy to anyone if the information is necessary to prevent or lessen a serious and imminent threat to the health and safety of a person or the public (see p. 3 of this [DHHS bulletin](#)). Second, first responders may request that patients sign a [HIPAA waiver](#) during treatment or transport. Agencies should pre-populate the section of the form stating who can receive the information with the name and information of the agency, then print out and carry several copies with them on their duties. The signed forms can be presented to the hospital or other caregiver when test results are needed to clear first responders from self-quarantine or for other COVID-19 purposes. Finally, TML has requested that President Trump use emergency powers to expand the federal HIPAA exception so that disclosure of COVID-19 test results to first responders is mandatory rather than discretionary by hospitals. We will report back in a future review if that request is granted.

3/23/2020

Has the state or any city or county issued a “shelter-in-place” order?

Yes, Dallas County became the first entity to issue [such an order](#) yesterday. The City of Waco [followed suit](#) today, and it appears that other cities will be doing so shortly. The governor has thus far chosen not to do so. He did take action related to cancelling elective surgeries to free up hospital beds. With regard to further local shelter-in-place orders, “Local officials have the authority to implement more strict standards than I as governor have implemented in the state of

Texas,” Abbott said. “If they choose to do so I would applaud them for doing so, but at this time it is not the appropriate approach to mandate that same strict standard across every area of the state...”

If a city decides to issue a shelter-in-place order, should certain businesses and activities be exempt from the order?

The [Dallas County order](#) or [City of Waco](#) order could serve as a template for other local orders. It appears to follow what other states and localities have done with regard to exemptions. For example, certain “[critical infrastructure](#)” is typically exempted. In addition, the Texas construction industry, including the Texas Association of Homebuilders and other associations, has issued an [open letter](#) to elected officials asking that their work be allowed to continue. (The Dallas County order contains their suggested language.) Finally, the Federal Aviation administration has issued guidance to airports related to attempted [airport](#) closures.

What is a “public health authority” under Texas law?

In Texas, a public health authority is called a “local health authority.” A local health authority (LHA) is a competent and reputable physician licensed to practice medicine in Texas who is appointed by a municipality or county to administer state and local laws relating to public health within the appointing authority’s applicable jurisdiction. Tex. Health & Safety Code §§ 121.002; 121.022. Cities that have established local health departments, a public health district, or that receive grants from Department of State Health Services (DSHS) for essential public services are required to appoint an LHA. Id. §§ 121.028(b); 121.033; 121.041. In a city that has a local health department, the local health department director serves as the city’s LHA, provided that the director is a physician. Id. § 121.033(d). If the local health department director is not a physician, he or she is required to appoint a physician as the LHA, subject to approval by the DSHS and city council. Id. A city that does not have a local health department may appoint an LHA. Id. § 121.028(a).

An LHA has supervisory authority and control over the administration of communicable disease control measures within his or her jurisdiction unless specifically preempted by the state. Id. § 81.082. The LHA is also authorized to perform each duty that is necessary to implement and enforce a law to protect the public health or prescribed by DSHS, including the right of entry to real property and a right of access to an individual that is in isolation or quarantine. Id. §§ 121.024; 81.065. The LHA’s responsibilities also include, among others: (1) establishing, maintaining, and enforcing quarantine in the LHA’s jurisdiction; (2) aiding DSHS with local quarantine, inspection, disease prevention and suppression, birth and death statistics, and general sanitation within the LHA’s jurisdiction; (3) reporting the presence of contagious, infectious, and dangerous epidemic diseases in the city; (4) reporting to the DSHS on any subject on which it is proper for a report to DSHS to be made; and (5) aiding DSHS in enforcing proper rules, requirements, ordinances, sanitation laws, quarantine rules, and vital statistics collection. Id. § 121.024.

Does Texas law allow for disclosure of protected health information to local health authorities or individuals?

Yes. The Texas Communicable Disease Prevention and Control Act (Health & Safety Code Chapter 81) allows for disclosure of information linking a person who is exposed to a person with a communicable disease as well as required disclosure of monitored individuals to first responders. Information related to a person with a communicable disease can be released generally for statistical purposes so long as the release protects the identify of the any person. Id. § 81.046(c)(1). Medical or epidemiological information, including information linking a person who is exposed to a person with a communicable disease, may be released:

1. for statistical purposes if released in a manner that prevents the identification of any person;
2. with the consent of each person identified in the information;
3. to medical personnel treating the individual, appropriate state agencies in this state or another state, a health authority or local health department in this state or another state, or federal, county, or district courts to comply with this chapter and related rules relating to the control and treatment of communicable diseases and health conditions or under another state or federal law that expressly authorizes the disclosure of this information;
4. to appropriate federal agencies, such as the Centers for Disease Control and Prevention, but, except as provided under Subsection (c-3), the information must be limited to the name, address, sex, race, and occupation of the patient, the date of disease onset, the probable source of infection, and other requested information relating to the case or suspected case of a communicable disease or health condition;
5. to medical personnel to the extent necessary in a medical emergency to protect the health or life of the person identified in the information;
6. to a designated infection control officer;
7. to governmental entities that provide first responders who may respond to a situation involving a potential communicable disease of concern and need the information to properly respond to the situation; or
8. to a local health department or health authority for a designated monitoring period based on the potential risk for developing symptoms of a communicable disease of concern.

Id. § 81.046(c)(1)-(8). Only the minimum necessary information may be released to first responders and local health departments or LHAs for a designated monitoring period, as determined by an LHA, local health department, governmental entity, or DSHS. Id. § 81.046(c-2).

Does the Health Insurance Portability and Accountability Act (HIPAA) allow protected health information to be disclosed to a local health authority without the individual’s consent?

Yes. HIPAA provides that health plans, health care clearinghouses, and health care providers may use or disclose protected health information without the written authorization of the individual or the opportunity for the individual to agree or object to:

- (i) A public health authority that is authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury, or disability, including, but not limited

to, the reporting of disease, injury, vital events such as birth or death, and the conduct of public health surveillance, public health investigations, and public health interventions; or, at the direction of a public health authority, to an official of a foreign government agency that is acting in collaboration with a public health authority.

...

(iv) A person who may have been exposed to a communicable disease or may otherwise be at risk of contracting or spreading a disease or condition, if the covered entity or public health authority is authorized by law to notify such person as necessary in the conduct of a public health intervention or investigation

45 C.F.R. § 164.512(b)(i), (iv). See this U.S. Department of Health and Human Services [bulletin](#) as well.

Public health authority means an agency or authority of the United States, a State, a territory, a political subdivision of a State or territory, or an Indian tribe, or a person or entity acting under a grant of authority from or contract with such public agency, including the employees or agents of such public agency or its contractors or persons or entities to whom it has granted authority, that is responsible for public health matters as part of its official mandate. 45 C.F.R. § 164.501.

What can a city official say publicly about local cases of COVID-19?

A city official can say how many cases exist in the city so long as they do not identify any individuals. Tex. Health & Safety Code § 81.046(c)(1). A city should not disclose any additional information to the public about the cases to avoid disclosing protected health information. In addition to local resources a city may have, the Department of State Health Services has a [web page](#) with cases in each Texas county.

Must a LHA disclose information about COVID-19 to first responders?

Yes. A local health department or health authority shall provide to first responders the physical address of a person who is being monitored by the local department or authority for a communicable disease for the duration of the disease's incubation period. Id. § 81.046(c-1). The local health department, health authority, or other governmental entity, as applicable, shall remove the person's physical address from any computer-aided dispatch system after the monitoring period expires. Id. The Department of State Health Services has [this Q&A](#) on information to be disclosed to first responders.

Reports, records, and information relating to cases or suspected cases of diseases or health conditions may be released to the extent necessary during a public health disaster, including an outbreak of a communicable disease, to law enforcement personnel and first responders solely for the purpose of protecting the health or life of a first responder or the person identified in the report, record, or information. Id. § 81.046(f). Only the minimum necessary information may be released under this subsection, as determined by the health authority, the local health department, or the department. Id.

Who is considered a first responder for the purposes of the Texas Communicable Disease Prevention and Control Act?

First responders are defined as public safety employees or volunteers whose duties include responding rapidly to an emergency. Examples of first responders include peace officers, fire protection personnel, certified firefighters or members of an organized volunteer firefighting unit, and individuals certified as emergency medical services personnel by DSHS. Tex. Gov't Code § 421.095(1).

Is information received under the Texas Communicable Disease Prevention and Control Act considered public information under the Public Information Act?

No. Reports, records, and information relating to cases or suspected cases of diseases or health conditions are not public information under Chapter 552 of the Government Code. Tex. Health & Safety Code § 81.046(b). This also includes investigations by local health authorities into suspected cases of diseases. [Open Records Decision No. 577 \(1990\)](#) (concluding that any information acquired or created during an investigation under Chapter 81 of the Health and Safety Code is confidential and may not be released unless an exception set out in the statute applies); Op. Tex. Att'y Gen. No. OR2009-10186 (2009) (concluding information gathered or created by the city's health department pursuant to the provisions of chapter 81 were not subject to disclosure under the Public Information Act).

Can hotels in our city be used to quarantine or treat COVID-19 patients?

The Texas Hotel and Lodging Association (THLA) has reached out to TML to offer some member hotels to cities for that purpose. THLA recommends the following:

1. Each city should work with its national CDC contact and the city's local health authorities to determine the potential worst case need for separate living accommodation units (e.g.; separate hotel rooms) for quarantined individuals, recovering individuals, other at-risk populations, and for medical and emergency providers.
2. THLA can provide a list of hotels that are willing to work with their local government entity to lease their facilities for that purpose. THLA already has a list of over 600 hotels statewide that are willing to enter into such a lease agreement and can expand that list exponentially.
3. THLA has a sample lease document that has been used for this purpose in other states that we have adapted for Texas and we can provide to your city legal department. The leases can be edited and adjusted to meet the particular needs of the community and the hotel.
4. Each city should determine NOW the specific duties that it would contract for in such accommodation lease scenarios, and with what entities for items such as food service, staffing, maintenance, etc. A city will not want to have to figure out these items in the height of the health crisis.
5. Lodging industry leaders are ready to work with each city's leadership on developing working protocols in advance on all of these items.
6. If done successfully, each city will already have an option contract for all of the potential quarantine and recovery space that it may need in the worst case scenario. This will help

get the community through this crisis and keep hospitals and medical workers safer and focused on treating the most critical care patients.

According to THLA, “we are ready to provide this partnership and want to do everything we can to ensure readiness and the optimal resources for this health crisis. Please contact us as soon as possible to ensure and formalize this resource.” THLA can be reached at 512-474-2996.

3/24/2020

If a city decides to issue a shelter-in-place order, should certain businesses and activities be exempt from the order?

The [Dallas County order](#) or [City of Waco order](#) issued earlier could serve as a template for other local orders. It appears to follow what other states and localities have done with regard to exemptions. For example, certain “[critical infrastructure](#)” is typically exempted. That list from the U.S. Department of Homeland Security is fairly broad. In addition, several industry groups (some of which are already covered in the list) have reached out to the League asking that we share their information with city officials. Here is a list of those industries and requests:

- The **Texas Hotel & Lodging Association** has offered the lease of certain hotels if needed by a city to respond to the virus. The association also asked that any order contain a specific provision that will allow hotels to continue to operate as “essential critical infrastructure,” as they are [classified as such](#) by the U.S. Department of Homeland Security. More is available on the association’s [coronavirus web page](#).
- The Texas **construction industry**, including the Texas Association of Homebuilders and other associations, has issued an [open letter](#) to elected officials asking that their work be allowed to continue.
- Animal rights groups** have issued letters relating to [companion animals](#) and the **National Animal Care and Control Association** has issued guidance on [animal control functions](#).
- The U.S. Department of Homeland Security has issued a [letter for telecommunications providers](#) to show government that they are working on critical communications equipment.
- Dollar Tree** has [asked that](#) government classify them as critical infrastructure.
- Airlines** have asked cities to consider Federal Aviation administration guidance to airports related to attempted [airports](#) closures.
- The **Texas Association of Realtors** has asked that they be [exempted](#) from any shelter-in-place orders.
- The Texas **insurance industry** has referred cities back to the U.S. Department of Homeland Security’s [critical infrastructure list](#) and some sent a [letter](#) to the governor as well.
- The **Texas Automobile Dealers Association** has [asked](#) that motor vehicle dealers be classified as essential infrastructure.
- A group of **healthcare companies** has [asked](#) that drug research and similar activities be exempted from any shelter-in-place orders.
- The **Association of Electric Companies of Texas** has sent the governor a [letter](#) asking that electric companies be classified as essential infrastructure.
- The **railroad industry** has issued [guidance](#) on their status as critical infrastructure.
- The Texas **self-storage industry** has sent a [letter](#) to the governor asking to be classified as critical infrastructure.

-The **Texas Bankers Association** has [asked](#) that cities classify them as critical infrastructure.

3/25/2020

Does a city's business closure order apply to a gun store?

Some cities have enacted non-essential business closure disaster orders. In response to one city doing so while not expressly exempting gun stores, State Representative Dustin Burrows (R – Lubbock) has [requested an opinion](#) from the attorney general. The request quotes existing state law preempting municipal regulation of firearms, and asks whether that existing law means gun store owners are automatically exempt from a city's order. The answer is thus unclear at this time.

If a city decides to issue a shelter-in-place order, should certain businesses and activities be exempt from the order?

This question was originally addressed in the [March 24, 2020, update](#). Certain “[critical infrastructure](#)” is typically exempted. That list from the U.S. Department of Homeland Security is fairly broad. In addition, several industry groups (some of which are already covered in the list) have reached out to the League asking that we share their information with city officials. One group that just missed the deadline yesterday is the American Council of Engineering Companies of Texas, which asked in a [letter](#) that engineers be exempted from state and local orders. We will continue to supplement the list in future updates.

3/26/2020

In the event of conflicting orders from the governor's office and local jurisdiction, which controls?

Depending on the subject matter, the answer to this question could get complicated. In any case, the Texas attorney general issued a [letter](#) yesterday providing that: (1) state agencies and their contractors are not subject to local declarations; and (2) the governor's orders are superior to cities and counties.

Each city should consult local legal counsel with specific conflict-of-law questions.

If a city decides to issue a shelter-in-place order, should certain businesses and activities be exempt from the order?

This question was originally addressed in the [March 24, 2020, update](#). Certain “[critical infrastructure](#)” is typically exempted. That list from the U.S. Department of Homeland Security is fairly broad. In addition, others (some of which are already covered in the list) have reached out to the League asking that we share their information with city officials.

The Railroad Commission has provided certain employees with a [letter](#) designating them as essential for the continued operation of critical infrastructure. This letter has gone to oil and gas field inspectors, pipeline inspectors, and some permitting staff. The letter informs law

enforcement, should they detain an RRC employee who is performing RRC duties, that they are designated as essential for critical infrastructure operation.

3/27/2020

Does a city's "stay home/work home" order apply to gun shops?

According to an opinion released today by the Texas attorney general, it does not. In [Opinion No. KP-0296](#), the attorney general concluded that legislation passed last session exempts gun shops from any municipal disaster order if the order violates the legislation. The legislation, [H.B. 3231](#), amended [Local Government Code Section 229.001](#) to provide in relevant part that:

Notwithstanding any other law, . . . a municipality may not adopt regulations relating to:

- (1) the transfer, possession, wearing, carrying, ownership, storage, transportation, licensing, or registration of firearms, air guns, knives, ammunition, or firearm or air gun supplies or accessories;
- (2) commerce in firearms, air guns, knives, ammunition, or firearm or air gun supplies or accessories; or
- (3) the discharge of a firearm or air gun at a sport shooting range.

Attorney general opinions are persuasive, but they are not binding legal precedent. Because of that, each city should consult with local legal counsel about the effect of the opinion on its orders.

3/30/2020

Has there been litigation relating to how conflicts between city and county emergency orders are resolved?

Yes. For example, the County Judge in the North Texas County of Collin issued a social distancing order that appeared to be lax in its directives. The Mayor of the City of McKinney, located in Collin County, issued a more stringent order. Shortly thereafter, a local realtor sued the city, claiming that the county order – even though less stringent – controls over any city order.

A district court judge will consider whether to impose a temporary restraining order prohibiting enforcement of the mayor's order on Tuesday, March 31, pending further proceedings on the merits. The League has previously shared the relevant conflicts provisions from the Texas Disaster Act. Here they are again.

Texas Government Code Section 418.103 resolves many conflicts in relation to emergency management orders:

"(a) The governor shall determine which municipal corporations need emergency management programs of their own and shall recommend that they be established and maintained. The

governor shall make the determinations on the basis of the municipality's disaster vulnerability and capability of response related to population size and concentration.

(b) The emergency management program of a county must be coordinated with the emergency management programs of municipalities situated in the county but does not apply in a municipality having its own emergency management program."

In some case, however, the more specific provisions of Section 418.108 may control:

"(f) The county judge or the mayor of a municipality may order the evacuation of all or part of the population from a stricken or threatened area under the jurisdiction and authority of the county judge or mayor if the county judge or mayor considers the action necessary for the preservation of life or other disaster mitigation, response, or recovery.

(g) The county judge or the mayor of a municipality may control ingress to and egress from a disaster area under the jurisdiction and authority of the county judge or mayor and control the movement of persons and the occupancy of premises in that area.

(h) For purposes of Subsections (f) and (g): (1) the jurisdiction and authority of the county judge includes the incorporated and unincorporated areas of the county; and (2) to the extent of a conflict between decisions of the county judge and the mayor, the decision of the county judge prevails."

The interplay between the provisions above and other law should also be an issue in the lawsuit. For example, the Health and Safety Code provides that:

Sec. 122.005. POWERS OF TYPE A GENERAL-LAW MUNICIPALITY.

(a) The governing body of a Type A general-law municipality may take any action necessary or expedient to promote health or suppress disease, including actions to:

(1) prevent the introduction of a communicable disease into the municipality, including stopping, detaining, and examining a person coming from a place that is infected or believed to be infected with a communicable disease;

(2) establish, maintain, and regulate hospitals in the municipality or in any area within five miles of the municipal limits; or

(3) abate any nuisance that is or may become injurious to the public health.

(b) The governing body of a Type A general-law municipality may adopt rules:

(1) necessary or expedient to promote health or suppress disease; or

(2) to prevent the introduction of a communicable disease into the municipality, including quarantine rules, and may enforce those rules in the municipality and in any area within 10 miles of the municipality.

(c) The governing body of a Type A general-law municipality may fine a person who fails or refuses to observe the orders and rules of the health authority.

Sec. 122.006. POWERS OF HOME-RULE MUNICIPALITIES. A home-rule municipality may:

(1) adopt rules to protect the health of persons in the municipality, including quarantine rules to protect the residents against communicable disease; and

(2) provide for the establishment of quarantine stations, emergency hospitals, and other hospitals.

The League will report on further developments in the case. In the meantime, each city should consult with its attorney about the interaction between city and county orders.

Has the federal government issued additional guidance with respect to which jobs are classified as “critical infrastructure?”

Yes. The White House issued the following information last Saturday (March 28):

“Functioning critical infrastructure is imperative during the response to the [COVID-19](#) emergency for both public health and safety, as well as community well-being. Certain critical infrastructure industries have a special responsibility in these times to continue operations. On Saturday, March 28, the Department of Homeland Security (DHS) – Cybersecurity & Infrastructure Security Agency (CISA) – released [updated guidance on the essential critical infrastructure workforce](#) (see [Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response](#)). [The guidance and accompanying list](#) are intended to support state, local, and industry partners in identifying the critical infrastructure sectors and the essential workers needed to maintain the services and functions Americans depend on daily and need to be able to operate resiliently during the COVID-19 pandemic response.

State, local, tribal, and territorial governments are responsible for implementing and executing response activities, including decisions about access and reentry, in their communities, while the Federal Government is in a supporting role. Officials should use their own judgment in issuing implementation directives and guidance.”

3/31/2020

Where do we stand right now with regard to federal and state guidance and orders, including the new order in the question above?

The federal government has not “ordered” anything. Instead, President Trump and the Center for Disease Control issued the following [guidance](#), which is in effect through April 30: (1) listen to and follow the direction of your state and local health authorities; (2) if you feel sick, stay home; (3) if someone in your household has tested positive for coronavirus, keep the entire household at home; (4) if you are an older person, stay home and away from other people; (5) if you are a person with a serious underlying health condition putting you at risk, stay home and away from other people; (6) work or engage in schooling from home whenever possible; (7) if you work in a [critical infrastructure](#) industry, you have a special responsibility to continue to go to work; (8) avoid social gatherings in groups of more than 10 people; (9) avoid eating and drinking at bars, restaurants, and food courts—use drive thrus, pick up, or delivery options; (10) avoid discretionary travel, shopping trips, and social visits; (11) do not visit nursing homes or retirement or long-term care facilities unless to provide critical assistance; and (12) practice good hygiene.

With regard to state-level orders, Governor Abbott has today [ordered](#) compliance with the items in the bulleted list in the first question above.

Because the federal government has issued only guidance, the only non-local (e.g. city or county) mandatory restrictions are those imposed by Governor Abbott's new order.

4/1/2020

Has the governor or attorney general issued any further clarifications on the governor's latest executive order and how it interacts with local orders?

Not beyond the religious information provided above. However, the Hood County attorney [requested an attorney general opinion](#) asking for clarification on the scope of local orders. From the tone of the request, it appears the county attorney thinks local orders go beyond a city's or county's authority:

“In the wake of the Covid-19 virus, Governor Greg Abbott issued an executive order on March 19, 2020, and many counties and cities have issued more far-reaching orders since that time. The question is whether the contents of such orders are legal under the statute, Texas Constitution, and United States Constitution. An order from Hood County, dated March 25, 2020, is attached as Exhibit A. It is substantially similar to other orders issued in counties such as Tarrant, Dallas, Travis, Bexar, and Harris.”

The county attorney goes on to ask several questions about local authority. But the attorney general, citing litigation on those issues, is declining to provide an opinion. As an example of such litigation, the County Judge in the North Texas County of Collin issued a social distancing order that appeared to be lax in its directives relative to a city in the county. The Mayor of the City of McKinney, located in Collin County, issued a more stringent order. Shortly thereafter, a local realtor sued the city, claiming that the county order – even though less stringent – controls over any city order. Earlier this week, a district court judge refused to issue a temporary restraining order against the mayor's order. The refusal served as a victory for city authority, but how it interplays with the governor's most recent order remains unclear.

The attorney general indicates that he will answer one question that the county attorney submitted, that being: “May local governments commandeer private property under [Government Code Section] 418.108, when this authority is only vested in the governor under [Section] 418.017(c)?”

What's the answer? In the past, the League has taken the position that a mayor may do so in certain, limited circumstances. That reasoning was based on previous executive orders declaring hurricane disasters. Those typically provided that “*These mayors...shall serve as the Governor's designated agents in the administration and supervision of the Act, and may exercise the powers, on an appropriate local scale, granted the Governor therein.*”

But the governor's most recent order doesn't contain language like that. In fact, it does the opposite: It actually suspends some part (it doesn't expressly say which part) of a mayor's authority to issue local disaster. We will report back when the attorney general issues the opinion.

4/2/2020

Where can a city obtain guidance regarding whether a particular provision in its local order is enforceable in light of the governor's most recent order?

According to the [attorney general's office](#):

“Authorized local officials may now receive legal advice from the Office of Attorney General concerning Coronavirus.

In light of the Governor's recent disaster declaration, the following local officials may now request legal advice from the Office of the Attorney General concerning the coronavirus:

- the emergency management director designated under Section 418.1015 for the political subdivision;
- the county judge or a commissioner of a county subject to the declaration; or
- the mayor of a municipality subject to the declaration.

Only these officials are authorized to request advice. Moreover, legal advice may only be requested concerning issues related to disaster mitigation, preparedness, response, and recovery concerning the coronavirus. Authorized local officials may request such legal advice by sending an email to disaster-counsel@oag.texas.gov, or by making a [web request online](#).”

It's unclear whether the limiting language above means a mayor can or can't ask about whether provisions in a local order conflict with those in the governor's most recent order.

In any case, city officials should always remember that the city attorney's advice should always be the final word on advice related to your city. If your city decides to submit a question, please copy gencounsel@tml.org.

4/8/2020

Do we have to competitively bid the purchase of Personal Protective Equipment (PPE) for first responders during the Coronavirus disaster and how does that relate to possible FEMA reimbursement?

Chapter 252 of the Texas Local Government Code requires a city to competitively procure purchases that exceed \$50,000. However, [Section 252.022\(a\)](#) provides various exceptions to that requirement, including:

- a procurement made because of a public calamity that requires the immediate appropriation of money to relieve the necessity of the municipality's residents or to preserve the property of the municipality.
- a procurement necessary to preserve or protect the public health or safety of the municipality's residents.
- a procurement of items that are available from only one source.

The above would allow a city council to forgo competitive procurement required by **state law** for PPE, assuming the purchase fit into one of the listed exceptions. Home rule cities should also check their charter, and any city should also check their local purchasing policies, for more restrictive requirements.

Of course, how the state law exemption interacts with FEMA reimbursement (and any accompanying competitive procurement requirements) is a critical issue. Those rules are very complex, and each city should carefully review with local legal counsel. The League has posted a [summary of the FEMA reimbursement requirements](#), and FEMA has also issued [specific guidance](#) related to emergency purchases and reimbursement.

Very generally, the guidance provides that a city need not comply with the usual federal procurement requirements associated with reimbursement when a public exigency or emergency exists. However, the city must document its justification for using noncompetitive procurements and must still comply with other procurement requirements and ensure that costs are reasonable. Further, the guidance provides that:

“Use of the public exigency or emergency exception is only permissible during the actual exigent or emergency circumstances. Exigency or emergency circumstances will vary for each incident, making it difficult to determine in advance or assign a particular time frame when noncompetitive procurements may be warranted. Exigent or emergency circumstances may exist for two days, two weeks, two months, or even longer in some cases. Non-state entities must ensure that work performed under the noncompetitively procured contracts is specifically related to the exigent or emergency circumstance in effect at the time of procurement. **Importantly, because the exception to competitive procurement is available only while the exigent or emergency circumstances exist, non-state entities should, upon awarding a noncompetitive contract, immediately begin the process of competitively procuring similar goods and services in order to transition to the competitively procured contracts as soon as the exigent or emergency circumstances cease to exist.**”

The key with FEMA reimbursement is to document, document, document.

4/13/2020

Must a local health authority disclose information about COVID-19 to first responders?

Yes. A local health department or health authority shall provide to first responders the physical address of a person who is being monitored by the local department or authority for a communicable disease for the duration of the disease’s incubation period. Id. § 81.046(c-1). The local health department, health authority, or other governmental entity, as applicable, shall remove the person’s physical address from any computer-aided dispatch system after the monitoring period expires. Id. The League [previously reported](#) on required disclosures, and the Department of State Health Services recently released [this Q&A](#) reaching the same conclusions.

Reports, records, and information relating to cases or suspected cases of diseases or health conditions may be released to the extent necessary during a public health disaster, including an

outbreak of a communicable disease, to law enforcement personnel and first responders solely for the purpose of protecting the health or life of a first responder or the person identified in the report, record, or information. Id. § 81.046(f). Only the minimum necessary information may be released under this subsection, as determined by the health authority, the local health department, or the department. Id.

How can cities prepare locally for a “new normal” when the re-opening of business and other activities begins?

City officials may want to consider forming a local taskforce composed of local business leaders, religious and civic leaders, and healthcare professionals. The taskforce can assist a mayor or city council with communications with the public and serve as a united front between government and the private sector. League staff will compile and share ideas as they become available.

4/20/2020

Does GA-16 supersede local orders?

Yes, at least partially. It provides verbatim that:

“This executive order shall supersede any conflicting order issued by local officials in response to the COVID-19 disaster, but only to the extent that such a local order restricts essential services or reopened services allowed by this executive order or allows gatherings prohibited by this executive order. I hereby suspend Sections 418.1015(b) and 418.108 of the Texas Government Code, Chapter 81, Subchapter E of the Texas Health and Safety Code, and any other relevant statutes, to the extent necessary to ensure that local officials do not impose restrictions inconsistent with this executive order, provided that local officials may enforce this executive order as well as local restrictions that are consistent with this executive order.”

What does the legalese above mean?

Let’s break it down and see if we can make sense of it:

-The first part provides that “This executive order shall supersede any conflicting order issued by local officials in response to the COVID-19 disaster, but only to the extent that such a local order restricts essential services or reopened services allowed by this executive order or allows gatherings prohibited by this executive order.”

That means a city may not define essential services differently than TDEM and the U.S. Department of Homeland Security. For example, can a city impose additional requirements on “retail to go” establishments authorized by the order? It’s possible, but which additional requirements we can’t definitively say.

-The governor then suspended Sections 418.1015(b) and 418.108 of the Texas Government Code (The Texas Disaster Act). Those sections are the ones that delegate authority to county judges and mayors to act locally during a disaster.

Section 418.1015(b) provides that: “An emergency management director [i.e., county judge or mayor] serves as the governor's designated agent in the administration and supervision of duties under this chapter. An emergency management director may exercise the powers granted to the governor under this chapter on an appropriate local scale.” Prior COVID-19 orders did not suspend this section. Because of that, GA-16 appears to be more restrictive with respect to local actions.

[Section 418.108](#) is much longer, so it's not included here in its entirety. But it is the core authority for county judges and mayors to declare, and city councils and commissioners courts to extend, local states of disaster, including movement of persons and occupation of premises. It has many other provisions also, and the order is unclear as to which of them are being suspended.

This suspension would appear to mean that a county's or city's stay home/work home order is superseded by the order's edict that “every person in Texas shall, except where necessary to provide or obtain essential services, minimize social gathering and minimize in person contact with people who are not in the same household.”

-The governor then suspended “Chapter 81, Subchapter E, of the Texas Health and Safety Code, and any other relevant statutes.” Subchapter E relates to how the Department of State Health Services imposes disease protection controls. Presumably, he suspended that chapter to give the state more flexibility with disease control measures.

-Most importantly, the order states that the statutes above are suspended “**to the extent necessary to ensure that local officials do not impose restrictions inconsistent with this executive order, provided that local officials may enforce this executive order as well as local restrictions that are consistent with this executive order.**”

That language is difficult to decipher. If local action is “consistent” with the order, but it can't be “inconsistent,” what does that leave? It would appear to mean that a city should essentially be enforcing the governor's order on a local scale. Any mayor or city council who wishes to impose additional local requirements should consult with their city attorney prior to doing so.

Also, the Texas attorney general previously issued a [letter](#) providing that: (1) state agencies and their contractors are not subject to local declarations; and (2) the governor's orders are superior to cities and counties. And the Hood County attorney [requested an attorney general opinion](#) asking for clarification on the scope of local orders. From the tone of the request, it appears the county attorney thinks some local orders go beyond a city's or county's authority. The attorney general, citing litigation, declined to answer all of his questions except “May local governments commandeer private property under [Government Code Section] 418.108, when this authority is only vested in the governor under [Section] 418.017(c)?”

Finally, it's unclear whether the governor is suspending [Chapter 122](#) of the Health and Safety Code as “other relevant statutes.” That chapter contains broad authority for general law and home rule cities in relation to disease control.

In any case, neither the governor nor the attorney general have expressed much concern thus far over various local regulations, other than those relating to gun shops, churches, and golf courses.

What resources are available to help us with budget planning during the virus emergency?

Last Thursday (April 16), FEMA released the “[Disaster Financial Management Guide](#)” to support jurisdictions with establishing and implementing sound disaster financial management practices, which are critical for successful response and recovery. The guide takes an all-hazards approach and addresses a broad range of issues and contains concepts, principles, and resources applicable to the coronavirus (COVID-19) pandemic response environment.

The guide identifies the capabilities and activities necessary to prepare and successfully implement disaster financial management, while maintaining fiscal responsibility throughout response and recovery operations. This includes considerations and practices necessary to track, calculate, and justify the costs of an emergency; support local reimbursement reconciliation; avoid de-obligation of grant funding; and effectively fund and implement recovery projects and priorities.

The principles, concepts, and resources contained in the guide can support jurisdictions with identifying the resources needed to support their community, increase the efficiency of recovery efforts, and reduce the likelihood of audits and financial penalties for the jurisdiction.

4/21/2020

We’ve seen some cities issue orders that are either more restrictive or less restrictive than the governor’s orders. For example, some cities may wish to add a business to the list of essential services, while other cities may wish to expand the availability of all services, with certain restrictions. Can they do that?

As reported in previous updates, opinions vary. Because of that, the League’s attorneys will – as always – defer to each city attorney’s advice to their client. Yesterday’s (April 20) update stated that “a city may not define essential services differently than TDEM and the U.S. Department of Homeland Security.”

Some city attorneys disagree with that black-and-white statement. Their position is that, by carefully parsing the preemptive language in GA-16, a city can – as a legal proposition – add to the TDEM/CISA list of essential services locally. That opinion is based on the following language:

“This executive order shall supersede any conflicting order issued by local officials in response to the COVID-19 disaster, **but only to the extent that such a local order restricts essential services or reopened services allowed by this executive order or allows gatherings prohibited by this executive order.** I hereby suspend Sections 418.1015(b) and 418.108 of the Texas Government Code, Chapter 81, Subchapter E of the Texas Health and Safety Code, and any other relevant statutes, to the extent necessary to ensure that local officials do not impose

restrictions inconsistent with this executive order, provided that local officials may enforce this executive order as well as local restrictions that are consistent with this executive order.”

(Emphasis added.) In other words, the city attorneys argue that allowing a local business that is not on the TDEM/CISA list to re-open is not “restricting” essential services. Rather, it is expanding essential services.

Of course, the order states that the statutes listed in it are suspended **“to the extent necessary to ensure that local officials do not impose restrictions inconsistent with this executive order, provided that local officials may enforce this executive order as well as local restrictions that are consistent with this executive order.”**

(Emphasis added.) That language is difficult to decipher. If local action is “consistent” with the order, but it can’t be “inconsistent,” where does that leave cities? At a press conference this afternoon (April 21), the governor was asked about an [order issued by the mayor of the City of Colleyville](#), and whether it was congruent with his order. The Colleyville order allows, for example: (1) retail services that are not “essential services” to open and make sales through in-person appointments, so long as distancing is followed; (2) gyms, massage establishments, and salons to re-open for one-on-one appointments only, with appropriate precautions; and (3) restaurants with patios can allow outside dining, so long as distancing is followed.

In response to the question, the governor said that:

“I had the chance to read his [the mayor’s] proclamation. From everything that I can tell, what he wrote in the proclamation he made deference to my executive order, and was trying to write policies in a way that would parallel or be in agreement with my order. To the extent that there may be a strategy that he thinks is consistent with my order, my staff will talk to him and see what’s in agreement. If there’s something not in agreement, we will be happy to talk to him about it.”

The governor also mentioned that his Strike Force is reviewing which types of businesses can safely reopen and will have recommendations in a few days, which will lead to a new order on April 27. (Order GA-17 states that those recommendations should be made in time for the governor to issue a new order relating to business openings by May 30.)

What’s the bottom line? We are witnessing a rapidly-changing landscape with differing legal and political opinions. While we try to provide the basic information you need, these updates are not meant to be legal advice to any particular city. That’s why city officials should always base their ultimate decisions on the advice of their local legal counsel. That counsel is in a unique position to understand the goals of their city officials, explain the local costs and benefits of a particular course of action, and advise based on that and more local information.

City attorneys should contact Scott Houston, TML general counsel, at 512-231-7464 or gencounsel@tml.org with questions or comments.

4/23/2020

What are examples of grant and loan programs established by economic development corporations (EDCs) to support small businesses?

The Texas Economic Development Council has gathered some example documents related to a handful of small business assistance programs from EDCs across the state, and posted them on their [COVID-19 resource webpage](#).

Despite various requests to suspend some of the state laws related to the expenditure of EDC sales tax dollars to allow more flexible use of that money, the governor has not taken action to do so.

Consequently, EDCs must continue to spend money in strict compliance with state law. As seen in the examples linked above, some believe that state law currently allows for the use of EDC funds to support small businesses under certain circumstances. City and EDC officials should consult with local legal counsel to determine if a similar program is appropriate in their communities.

Is a city authorized by the Public Funds Investment Act to invest in PPP loans made pursuant to the CARES Act?

On April 22, Senator Donna Campbell [submitted a request](#) to the attorney general's office on this issue. The request states that public entities should be able to purchase pooled loans from banks that are sold into the secondary market, and argues that allowing that practice will support local and community banks. The League will report when the opinion is issued.

4/24/2020

Has any local government been sued for its disaster orders?

Yes, a resident of Harris County sued the county judge. The [lawsuit](#) claims, among other things, that the judge's order mandating the wearing of a mask, washing of hands, and six foot distancing exceeds her authority under the Texas Disaster Act. The lawsuit also claims the order violates the Texas Constitution's "[due course of law](#)" provision, which is similar to the due process requirement in the U.S. Constitution.

Oddly, the poorly-drafted lawsuit pleadings also claim that the county judge's order violates [Article XI, Section 5](#), of the Texas Constitution, which is the **municipal** home rule section. That section has no effect on a county whatsoever. Further updates will be provided as they come available.

4/27/2020

Has another request for an attorney general opinion related to local government emergency authority been submitted?

Yes. Representative Dade Phelan (R – Beaumont) [requested an opinion](#) as to “Whether a local governmental entity under an emergency declaration has the authority to prevent an owner of a second home from occupying that property or limiting occupancy of housing based on length of the occupancy’s term.” The League will report on the opinion when it is released.

4/27/2020

Have cities developed new resident assistance programs in response to Coronavirus?

Yes. For example, the City of San Antonio has created a \$25 million assistance program for residents impacted by COVID-19.

Funds will help residents struggling with rent and mortgage payments. As an added benefit, those who receive assistance for rent and mortgage will also receive assistance for utilities, groceries, medicine, and fuel. Direct cash assistance is available for groceries, medicine, and fuel through a partnership between the City and the Family Independence Initiative.

Other funding for the program comes from a variety of sources, including the City’s FY 2020 affordable housing budget’s risk mitigation fund, affordable housing fund, HUD community development block grant (CDBG) program, and Coronavirus Aid, Relief, and Economic Security (CARES) Act CDBG funds. The remaining money has been requested from the San Antonio Housing Trust Foundation and the San Antonio Housing Trust Public Facilities Corporation.

Additional funding comes from the parking enterprise fund, various tax increment reinvestment zones, San Antonio Housing Trust Public Facility Corporation funds, the San Antonio Housing Trust Finance Corporation, and funds from the COVID-19 emergency housing assistance program.

These funding sources will provide a total \$25 Million for the COVID-19 Emergency Housing Assistance Program.

To learn more about the program, visit the City’s [main Coronavirus web page](#). For housing assistance information, go to <https://www.sanantonio.gov/NHSD/Programs/FairHousing>.

4/28/2020

Should a city continue its disaster declaration in light of Executive Order GA-18? What about local disaster orders?

Whether to declare a local state of disaster related to the virus is up to each mayor in the first instance, with the extension of the declaration beyond seven days requiring city council approval. Whether to issue any particular order is a local decision as well.

What about FEMA or other reimbursement? Although the President and the governor have issued an emergency declaration and a state of disaster, respectively, state regulations provide that the mayor must have declared a local state of disaster before a city may request disaster

recovery assistance. 37 TAC §7.41 (“Requests for state or federal recovery assistance must be initiated by local government. The chief elected official of the jurisdiction must have declared a local State of Disaster before requesting disaster recovery assistance.”).

Thus, if a city anticipates requesting financial assistance in response to the COVID-19 pandemic, the safest course is for a mayor to at least declare a state of local disaster and submit it to the governor, via the Texas Division of Emergency Management by email at soc@tdem.texas.gov or fax at 512-424-5587.

In light of Executive Order GA-18, some cities have decided to stop issuing separate, complex local orders and ordinances. Instead, they will reference the governor’s current order and provide for enforcement (in addition to the Class B misdemeanor penalties in the Texas Disaster Act) through a Class C misdemeanor. We must stress that, because of the lack of clarity in GA-18’s superseding/preemption language, no action should be taken without consulting with local legal counsel.

Here’s a possible example of a city’s ordinance language that simply incorporates – and allows for enforcement of, a governor’s order:

“That effective immediately, and continuing through May 15, 2020, the City hereby adopts the provisions of Executive Orders GA-18 and GA-19 issued by Governor Greg Abbott on April 27, 2020. The provisions of GA-18 and GA-19 are incorporated herein by reference as if written word for word. For clarity, nothing in the ordinance is intended to impact the provisions related to the continuation of the local state of disaster as specified in Ordinance No. _____.

Any person, firm, corporation, agent, or employee thereof who violates any of the provisions of this ordinance commits an offense that is considered a class C misdemeanor and each day the violation continues shall be a separate offense punishable by a fine of not more than \$500. A culpable mental state is not required for the commission of an offense under this ordinance and need not be proved. The penalty provided for in this ordinance is in addition to any other remedies that the City may have under City ordinances and state law.”

Again, some mayors and city councils may wish to do more or less, and we defer absolutely to their choice.

4/30/2020

Have additional Texas cities and counties been sued based on their COVID-19 orders?

Yes. State Representative Briscoe Cain (R – Deer Park) and another attorney, on behalf of several businesses (e.g., vape shops, a drag strip, an axe-throwing facility, hair salons, a gym, and a martial arts and yoga studio), two individuals, and all those “similarly situated” filed a [“petition for writ of mandamus”](#) with the Texas Supreme Court yesterday (April 29). The lawsuit comes on the heels of others filed by vape shops against the cities of McAllen, San Antonio, and Dallas.

A writ of mandamus is, in plain English, a request to the court to order government officials to stop some action that is alleged to be such an abuse of discretion that immediate, emergency action by the state's highest court should be taken. Instead of going to a trial court, appealing to an appeals court, and then asking the Texas Supreme Court to review the case, the writ is filed directly with the Texas Supreme Court. That court can then decide quickly whether to issue a command that is binding on local officials.

According to the petition, the plaintiffs "seek a writ of mandamus and injunction to enjoin local authorities from enforcement of vague executive orders masquerading as Texas law, particularly when they are enforced unequally and arbitrarily...many Texans find themselves with the uneasy recognition that they have lost rights held inviolate only weeks ago, and are now threatened by fine and imprisonment for acts that are constitutionally protected."

The petition alleges that the following local officials, through various enforcement actions that are representative of others across the state, violated the governor's order, the Texas Disaster Act, and other laws:

Dallas County Judge Clay Jenkins
Dallas Mayor Eric Johnson
Kaufman County Chief Appraiser Sarah Curtis
Cleburne Mayor Scott Cain
Henderson County Judge McKinney
Smith County Judge Nathaniel Moran
Tarrant County Judge Glen Whitney
Hurst Mayor Henry Wilson
Abilene Mayor Anthony Williams
Snyder Mayor Tony Wofford
Scurry County Judge Don Hicks
San Antonio Mayor Ron Nirenberg

The petition also alleges that the governor's order does not, in fact, order any business to close. Rather, the lawsuit claims, it provides only that people shall avoid those businesses. In addition, it claims that the Texas Disaster Act provisions authorizing a mayor or county judge to control ingress and egress to an area, and to regulate occupancy of premises, are arbitrary and violate state law and the Texas Constitution. As an example, the petition states that:

"Condom Sense is allowed to operate in Dallas and other jurisdictions, albeit by curbside service. The Court is invited and requested to take judicial notice that condoms are available at many grocery stores."

The lawsuit claims the proper approach to deal with COVID-19 is to call an immediate special session of the legislature to deal with the emergency. Of course, courts in other states, such as one in Michigan just this week, have held that reasonable, emergency pandemic measures are allowable and generally don't violate constitutional protections against due process and equal protection.

The League will monitor and report on the case as information becomes available.

5/5/2020

Do you have an update on the lawsuit filed last week against several cities and counties based on their COVID-19 orders?

Yes. The Court poured out the plaintiffs and instructed them to start at the district court level. The dismissal states that:

“Ideally, these debates would play out in the public square, not in courtrooms. No court should relish being asked to question the judgment of government officials who were elected to make difficult decisions in times such as these. However, when constitutional rights are at stake, courts cannot automatically defer to the judgments of other branches of government. When properly called upon, the judicial branch must not shrink from its duty to require the government’s anti-virus orders to comply with the Constitution and the law, no matter the circumstances.”

The case came about when State Representative Briscoe Cain (R – Deer Park) and another attorney, on behalf of several businesses (e.g., vape shops, a drag strip, an axe-throwing facility, hair salons, a gym, and a martial arts and yoga studio), two individuals, and all those “similarly situated” filed a “[petition for writ of mandamus](#)” with the Texas Supreme Court on April 28.

A writ of mandamus is, in plain English, a request to the court to order government officials to stop some action that is alleged to be such an abuse of discretion that immediate, emergency action by the state’s highest court should be taken. Instead of going to a trial court, appealing to an appeals court, and then asking the Texas Supreme Court to review the case, the writ is filed directly with the Texas Supreme Court. That court can then decide quickly whether to issue a command that is binding on local officials. As stated above, the justices decided quickly, but not in the way the plaintiffs would have liked.

The Court’s denial further provides that:

“Those who object to these restrictions should remember they were imposed by duly elected officials, vested by statute with broad emergency powers, who must make difficult decisions under difficult circumstances. At the same time, all of us – the judiciary, the other branches of government, and our fellow citizens – must insist that every action our governments take complies with the Constitution, especially now. If we tolerate unconstitutional government orders during an emergency, whether out of expediency or fear, we abandon the Constitution at the moment we need it most...”

Any government that has made the grave decision to suspend the liberties of a free people during a health emergency should welcome the opportunity to demonstrate – both to its citizens and to the courts – that its chosen measures are absolutely necessary to combat a threat of overwhelming severity...

When the present crisis began, perhaps not enough was known about the virus to second-guess the worst-case projections motivating the lockdowns. As more becomes known about the threat and about the less restrictive, more targeted ways to respond to it, continued burdens on constitutional liberties may not survive judicial scrutiny.”

5/11/2020

What additional virus-related opinions has the attorney general released?

Several were released last week. The questions and conclusions are as follows:

-Residency Restrictions and Superseding Orders: [Opinion No. KP-0308](#) answered the question of whether a local governmental entity can “prevent an owner of a second home from occupying their property” or “limit occupancy of housing based on length of the occupancy’s term.”

The opinion concludes that:

“The Texas and United States Constitutions prohibit government action that unlawfully discriminates on the basis of residence. They also ensure citizens receive due process and that the government does not act arbitrarily. To the extent a local ordinance restricting access to or limiting occupancy of private property exceeds these boundaries, it is unconstitutional. In addition, the Governor declared a state of disaster in Texas due to COVID-19 on March 13, 2020, and issued executive orders related to the provision of essential services. Executive Order GA-21 supersedes any conflicting order issued by local officials in response to the COVID-19 disaster to the extent that such a local order restricts essential services, such as obtaining residential housing. GA-21 therefore prohibits a local governmental entity, acting under the authority of its emergency powers, from issuing an order that limits occupancy of housing based on length of the occupancy’s term.”

-Appraisal Review Board Hearings: [Opinion No. KP-307](#) answered “multiple questions about the appraisal review procedures available for property owners to protest changes in an appraisal record that adversely impact the property owner.”

The opinion concludes that:

“Subsection 41.41(a) of the Tax Code entitles a property owner to protest the determination of the appraised value of the owner’s property, in addition to other adverse determinations made by a chief appraiser. Subsection 45.45(n) of the Tax Code gives property owners a right to appear in person at a protest hearing. Subsection 41.45(o) of the Tax Code and title 34, subsection 9.805(d) of the Texas Administrative Code do not allow appraisal review boards to require protest hearings be conducted by videoconference in lieu of in-person hearings when requested by a property owner.

Subsection 41.461(a)(3) of the Tax Code requires a chief appraiser to deliver a copy of the protest hearing procedures to property owners initiating a protest. The appraisal district does not satisfy this requirement by only posting the protest procedures on the appraisal district website.

Subsection 41.12(a) of the Tax Code requires an appraisal review board, among other things, to approve the appraisal records by July 20. No later than the date it does so, the board must also deliver written notice to a property owner of any change in the records ordered by the board pursuant to subsection 41.11(a) that will result in an increase in the tax liability of the property owner. The board's failure to deliver notice to a property owner required by section 41.11 nullifies the change in the records to the extent the change is applicable to that property owner. However, the nullification is limited to that subsection and does not apply to all failures to give notice required by the Property Tax Code."

-Pawnshop Regulation and Superseding Orders: [Opinion No. KP-306](#) answered the question of "whether the Dallas County Judge has authority to issue emergency orders regulating the business of pawnshops during a declared disaster."

The opinion concludes that:

"Section 371.005 of the Finance Code provides that the Legislature has exclusive authority regarding the operation of pawnshops. A local official lacks authority to rewrite state law that the Legislature has expressly removed from local control. A court would likely find that the portions of Dallas County's order purporting to regulate pawnshops by limiting the fees those businesses can charge and changing the length of time they must hold pledged goods are invalid and unenforceable.

After declaring a state of disaster in Texas due to COVID-19, the Governor issued Executive Order GA-21, which "supersedes any conflicting order issued by local officials in response to the COVID-19 disaster, but only to the extent that such a local order restricts essential services or reopened services allowed" under the executive order. Operating a pawnshop provides essential lending services. Thus, Executive Order GA-21 prohibits a political subdivision from issuing a conflicting local order that restricts the operation of pawnshops. Whether a local order may limit the number of customers inside the premises of a pawnshop is a fact question. However, to the extent a pawnshop can operate under DSHS guidelines and consistent CDC recommendations with more than one customer on the premises at a time, a local order that purports to limit the occupancy of the premises to only one customer at a time, without regard to the size of the premises, conflicts with Executive Order GA-21 and, therefore, is superseded."

-Local Commandeering of Property during Disaster: [Opinion No. KP-304](#) answered the question of "whether, when operating under a local disaster declaration, local governments may commandeer private property under Government Code section 418.108."

The opinion concludes that:

"Section 418.108 of the Government Code authorizes the presiding officer of the governing body of a political subdivision to declare a local state of disaster and grants local authorities certain

powers to respond to the disaster. Section 418.108 does not authorize a county judge, a mayor of a municipality, or any other local government official to commandeer private property to respond to a disaster.”

The opinion, in footnote 6, also added the following:

“Our conclusion does not foreclose the possibility that local government officials could possess authority to commandeer private property in certain limited circumstances when serving as the Governor’s designated agent to respond to local disasters. The Governor, through the disaster declaration, could authorize the designated “emergency management director,” which is the presiding officer of the governing body of an incorporated city or a county, to “commandeer or use any private property” upon determining that it is necessary to cope with the disaster subject to the compensation requirements. *Id.* §§ 418.017(c), .1015(a)–(b), .152. In considering a predecessor statute to chapter 418, this office concluded that a specific executive order activated the Governor’s emergency powers for local officials such that a county judge could use county equipment on private land if he reasonably deemed it necessary to meet or prevent a locally declared disaster. See *Tex. Att’y Gen. Op. No. MW-140 (1980)* at 3. Whether and to what extent local officials possessed the authority to commandeer private property would be decided on a case-by-case basis, considering the language of any relevant executive orders as well as the circumstances surrounding the disaster in question.”

What is an attorney general opinion and is a city official required to rely on the conclusions therein?

What exactly is an “AG opinion?” Put simply, it is a letter containing the Texas attorney general’s [written interpretation](#) of the law on a matter. Opinions are written only at the request of certain state officials, called “authorized requestors (e.g., the governor, the head of a department of state government or a committee of a house of the Texas Legislature, etc.).”

When the attorney general receives a request, it goes to a small group of assistant attorneys general known as the “opinion committee.” The committee accepts briefs from persons and groups who may be affected by the opinion; TML often files briefs in support of its member cities. The committee’s opinion is reviewed and signed by the attorney general before it is issued, making it his opinion, as well. Thus, an attorney general opinion is just a written letter from an attorney (the attorney general): (1) to a state official (rather than to a city official); (2) who may or may not have your city’s best interests in mind; (3) who doesn’t represent your city; and (4) who doesn’t regularly practice municipal law.

Why should city officials care about the opinion of an attorney who does not represent them? While it is true that attorney general opinions are merely advisory in nature, Texas courts often give deference to their conclusions. Thus, an opinion containing a conclusion that is detrimental to cities is something of concern.

The good news is that Texas cities are very lucky to have an outstanding group of attorneys, both in-house and with private firms, who represent them. Some of the finest lawyers in the state

practice municipal law. However, the law is rarely crystal clear. The TML legal services department has, for many years, used the following disclaimer:

“Lawyers give opinions, and no lawyer’s opinion is a guarantee. Your city attorney gives you an opinion believing it to be a defensible one. Some areas of the law are more uncertain than others and are therefore open to interpretation. When the law is especially unclear, we will suggest that you talk to your local counsel to get an answer from the one who will be following through as an advocate for that answer.”

Most attorneys are taught in law school that the way to address a legal problem is through some variation of “IRAC.” IRAC (issue, rule, application, conclusion) is a way of solving legal problems by: (1) identifying the legal issue by understanding the facts; (2) determining which legal rule governs; (3) applying that legal rule to the facts; and (4) concluding the best course of action. The AG opinion process leaves out the most important part of legal advice: the practical application of the law to the facts. That step, along with the client’s level of risk aversion and other factors, is crucial to recommending the best course of action in any given situation.

To be fair, the attorney general is mandated by statute to respond to requests for opinions, and over the years his office has issued several opinions with conclusions that are beneficial to cities. That being said, city officials should rely on their local legal counsel. That counsel is mandated by professional rules to be competent in municipal law. More importantly, however, that counsel can apply the law to the facts of each particular situation to help a city council decide whether and how to legally accomplish its objectives.

5/12/2020

What action did the Texas attorney general take today (May 12) with regard to his opinion of certain cities’ disaster orders?

He issued this press release:

“AG Paxton Warns County Judges and Local Officials on Unlawful COVID-19 Orders

AUSTIN – Attorney General Ken Paxton today issued letters to three Texas counties (Dallas, Bexar, and Travis) and two mayors (San Antonio and Austin), warning that some requirements in their local public health orders are unlawful and can confuse law-abiding citizens. These unlawful and unenforceable requirements include strict and unconstitutional demands for houses of worship, unnecessary and onerous restrictions on allowing essential services to operate, such as tracking customers who visit certain restaurants, penalties for not wearing masks, shelter-in-place demands, criminal penalties for violating state or local health orders, and failing to differentiate between recommendations and mandates.

‘Unfortunately, a few Texas counties and cities seem to have confused recommendations with requirements and have grossly exceeded state law to impose their own will on private citizens and businesses. These letters seek to avoid any public confusion as we reopen the state,’ said

Attorney General Paxton. ‘I trust that local officials will act quickly to correct any orders that unlawfully conflict with Texas law and Governor Abbott’s Executive Orders.’

Read the [letter to Bexar County and the City of San Antonio](#).

Read the [letter to Travis County and the City of Austin](#).

Read the [letter to Dallas County](#).”

5/14/2020

Have additional Texas cities been sued based on their enforcement of the governor’s orders?

Yes. In two separate federal court lawsuits, a “strip club” and a softball/volleyball complex sued the City of Houston for enforcement of the governor’s order. You read that right: A city is being sued for locally enforcing the governor’s (not the city’s) order.

The judge in the sports complex case granted the owner's temporary restraining order, which prevents the city from enforcing the governor’s order. The court will hold a hearing on the preliminary injunction on June 26th.

In the other case, the strip club claimed to be operating as a restaurant that provides “additional entertainment (i.e., dancers confined to stages throughout the establishment).” The court denied the club’s request for an injunction because, in spite of also serving food, the strip club was still operating as a “sexually-oriented business” in violation of the governor’s orders. In the denial, the judge stated:

“The series of orders issued by the Governor, together with the fact that his top law enforcement officer unethically rebuked some of those orders, has caused a state of confusion that rests clearly on the Governor’s doorstep. The orders of the Governor raise serious First Amendment and equal protection issues, however, the Plaintiff has chosen in this action to raise only First Amendment, Fourth Amendment, and due process claims related to the City of Houston’s enforcement of those various orders. The Court will accordingly only address the Plaintiff’s claims against the City of Houston...

[T]he Court feels compelled to point out the constitutional problems raised by the Governor’s various orders. The fact that the Governor has now apparently decided that jail time is too harsh a penalty for a violation of his orders is little comfort, as even that action seems to have been motivated by the impact of his order on a single violator, Dallas salon owner Shelley Luther, leaving many business owners unsure, even now, if the orders would be equally applied to them. This uncertainty is exacerbated by the fact that Texas Lt. Governor Dan Patrick has now chosen to pay the fine owed by Shelley Luther.”

The League will monitor and report on the cases as information becomes available.

5/15/2020

What has the Texas District and County Attorneys Association written about enforcement of the governor's executive orders?

The [Texas District & County Attorneys Association](#) (TDCAA), a non-profit organization dedicated to serving Texas prosecutors and their staff as well as attorneys in government representation, provides regular COVID-19 updates to state prosecutors. City officials may be interested in this [update from May 7](#):

“We have gone on record several times over the past two months – such as [here](#) and [here](#) and [here](#) and...well, you get the idea – to recommend that criminal enforcement of these orders should be a last option, but this latest cause célèbre [the Dallas salon owner debacle] should effectively put an end to any further debate over the wisdom of that option. As it's been pointed out before, if the governor is going to keep changing the tune he plays as he leads the state out of this pandemic, there is little incentive to put your own necks on the line to enforce an order that could be invalidated the next day. If you do that, you may simply be making someone else's problem your problem, and that rarely ends well for the one at the bottom of the marionette's strings. But as always, the ultimate decision is up to you—after all, that's why you ran for this job, right? LOL”

TDCAA also includes “quotes of the week” in its updates. These seemed particularly apropos:

“We've got an entire legal system that was developed to deal with a world that doesn't exist anymore.”

-Lawyer quoted in Dallas Morning News regarding [re-opening during a pandemic](#).

“These are Colosseum rules, where the fate of the gladiators is determined not by law but by the roar of the crowd. Sometimes the partisans yell for the lions, sometimes for the hairstylists. You don't know what's going to happen until you're in the ring.”

-Ross Ramsey, executive editor of *The Texas Tribune*, in a recent [commentary](#).

5/18/2020

What does Executive Order GA-23 provide in regard to enforcement and superseding language?

The order eliminates confinement in jail as an available penalty for any violation of any executive order. It provides that:

“No jurisdiction can confine a person in jail as a penalty for violating any executive order, or any order issued by local officials, in response to the COVID-19 disaster. To the extent any order issued by local officials in response to the COVID-19 disaster would allow confinement in jail, that order is superseded, and I hereby suspend all relevant laws to the extent necessary to ensure that local officials do not confine people in jail for violating any order issued in response to the COVID-19 disaster.”

It also provides that it supersedes any contrary local or state order.

What has the governor asked paid fire departments to do with regard to nursing home virus testing?

The governor issues the following press release last Friday (May 15):

“Governor Abbott, TDEM Announce Partnership With Local Fire Departments To Expand Testing In Nursing Homes:

Governor Greg Abbott and the Texas Division of Emergency Management (TDEM) today announced that local fire departments in Texas are partnering with local public health authorities to provide testing in nursing homes throughout the state. This partnership has been developed and is being implemented through an ongoing collaboration between TDEM, the Texas Commission on Fire Protection, the Texas Health and Human Services Commission, and the Texas Department of State Health Services. Costs associated with providing these tests are eligible for federal reimbursement.

‘This partnership builds upon our efforts to expand COVID-19 testing in the Lone Star State, especially among our most vulnerable Texans,’ said Governor Abbott. ‘I thank our local fire departments for continuing to serve their fellow Texans throughout the COVID-19 response. By serving their communities in this new capacity, we will continue to contain the spread of this virus and protect the health and safety of all Texans.’”

Following the press release and a conference call with some fire departments and others, the executive commissioner of the Texas Department of Health and Human Services issued a letter to paid fire departments:

“To All Fire Departments:

On May 11, 2020, Governor Greg Abbott directed that 100 percent of staff and residents in Texas nursing facilities be tested for SARS-CoV-2, the virus that causes COVID-19, in accordance with White House guidance.

Texas nursing facilities are licensed under the authority of the Texas Health and Human Services Commission (HHSC). The testing teams may consist of state and/or local government personnel, including first responders from local fire departments.

As the Executive Commissioner of HHSC, I authorize fire department personnel to enter licensed nursing facilities for the purpose of collecting specimens for testing for SARS-CoV-2, the virus that causes COVID-19.

Testing teams must self-screen before entering the nursing facility and are expected to bring their own personal protective equipment. The teams are implementing the governor’s direction and are authorized to enter the nursing facility.

If a nursing facility has questions about this authorization they should contact the HHSC Long Term Care Regulatory region for assistance.”

In addition HHS provided a [FAQ document](#) related to the program.

A regional TDEM representative emailed the following to emergency management coordinators regarding nursing home testing options for fire departments:

- Texas Commission on Fire Protection (TCFP) certified fire departments have been asked to assist with the testing process, if willing and able.
- This is not a mandate.
- It applies only for those fire departments that are willing and able.
- HHSC will be coordinating the process and TDEM will provide support and supplies necessary for the testing.
- Fire department testing processes will need to be closely coordinated to ensure timely delivery of compatible testing kits, lab processing, etc.

According to the TCFP, the San Antonio Fire Department prepared a [video](#) showing testing protocols for fire fighters, and the City of Austin prepared a [resolution](#) to implement testing by its Fire Department.

The League will continue to provide information on this developing partnership as it becomes available.

5/26/2020

Did the governor say anything of interest on his call with mayors and county judges last Friday (May 22)?

The call was reserved for Q&As based on questions submitted by mayors and county judges. On it, the governor discussed swimming pools, and reiterated that the owner (including a city) decides whether to open (in accordance with guidelines of course). “I would not order a local government to open their pool,” he said. “I leave that to the discretion of the local government.”

He concluded his comments by saying that, “**you [local officials] know better than I do what the facts are on the ground in your particular location.**” Hopefully, that philosophy continues into the future, especially into the legislative session.

The governor’s office has created an email address for mayors and county judges to express their views on anything related to the virus. Mayors should email the governor’s office at Local.input@gov.texas.gov with questions or concerns.

You answered a question from the TML COVID-19 webinar relating to use of CRF funds for first responder activities and concluded that the guidelines are very strict in that regard. Do you have an update on the nuances related to that answer?

Yes. The question posed at the webinar was this: “If you have a first responder who is an FTE (in the budget) and they spent all of their time on COVID-19 response, is their straight time eligible under the CARES Disaster Relief Fund?”

The answer we provided was this: “As of right now, the federal CARES Act requires any expenditure of coronavirus relief fund revenue to be spent only to cover expenses that were not accounted for in a city’s most recently approved budget as of March 27, 2020. In other words, regardless of expenditure limitations in the state and federal guidelines referenced above, the revenue can go only towards unbudgeted expenses paid by the city due to the public health emergency in connection with COVID-19...”

That answer is correct, but perhaps incomplete. The following Q&As are from the [U.S. Department of Treasury Q&A](#) on CRF expenditures.

“The Guidance says that a cost was not accounted for in the most recently approved budget if the cost is for a substantially different use from any expected use of funds in such a line item, allotment, or allocation. What would qualify as a ‘substantially different use’ for purposes of the Fund eligibility?”

Costs incurred for a ‘substantially different use’ include, but are not necessarily limited to, costs of personnel and services that were budgeted for in the most recently approved budget but which, due entirely to the COVID-19 public health emergency, have been diverted to substantially different functions. This would include, for example, the costs of redeploying corrections facility staff to enable compliance with COVID-19 public health precautions through work such as enhanced sanitation or enforcing social distancing measures; the costs of redeploying police to support management and enforcement of stay-at-home orders; or the costs of diverting educational support staff or faculty to develop online learning capabilities, such as through providing information technology support that is not part of the staff or faculty’s ordinary responsibilities.

Note that a public function does not become a ‘substantially different use’ merely because it is provided from a different location or through a different manner. For example, although developing online instruction capabilities may be a substantially different use of funds, online instruction itself is not a substantially different use of public funds than classroom instruction.”

“The Guidance states that the Fund may support a ‘broad range of uses’ including payroll expenses for several classes of employees whose services are ‘substantially dedicated to mitigating or responding to the COVID-19 public health emergency.’ What are some examples of types of covered employees?”

The Guidance provides examples of broad classes of employees whose payroll expenses would be eligible expenses under the Fund. These classes of employees include public safety, public health, health care, human services, and similar employees whose services are substantially dedicated to mitigating or responding to the COVID-19 public health emergency. Payroll and benefit costs associated with public employees who could have been furloughed or otherwise

laid off but who were instead repurposed to perform previously unbudgeted functions substantially dedicated to mitigating or responding to the COVID-19 public health emergency are also covered. Other eligible expenditures include payroll and benefit costs of educational support staff or faculty responsible for developing online learning capabilities necessary to continue educational instruction in response to COVID-19-related school closures. Please see the Guidance for a discussion of what is meant by an expense that was not accounted for in the budget most recently approved as of March 27, 2020.”

City officials should always consult with local legal counsel regarding appropriate uses of CRF funds.

Have additional Texas cities been sued based on their enforcement of the governor’s orders?

Yes. A local restaurant sued the City of Galveston and several city officials on May 19. The [lawsuit](#) alleges that:

- Under the governor’s previous order (GA-18), bars are not “closed.” Rather, the order provides only that people shall avoid them. (Editor’s note: The attorney general has [previously advised](#) that the “shall avoid” language in the orders does, in fact, mean that related businesses must remain closed.)
- The Texas Disaster Act does not allow city officials to close down bars.
- The city violated the home rule amendment to the Texas Constitution when it closed bars because that action is inconsistent with GA-18.
- The city violated other provisions of the Texas Constitution relating to creating offenses and due process.

The icing on the cake of the poorly-drafted pleadings is that Executive Order GA-18 expired prior to the plaintiff’s filing. The latest order (GA-23) allows bars to be open pursuant to certain guidelines.

[6/17/2020](#)

What is all of the hullabaloo about big city mayors, face masks, the governor’s press conference yesterday, the statement the governor made today (June 17), and county judge authority?

Well, what’s happened in the last two days is difficult to reconcile as a legal proposition, and it’s fair to say that statements made by the governor about his “plan” may not be supported by the text of his executive order. Let’s walk through this.

[The Texas Tribune](#) reported yesterday (June 16) in an article titled “[Texas' big-city mayors ask Gov. Greg Abbott for power to impose face mask rules](#)” that “the mayors of nine of Texas' biggest cities urged Gov. Greg Abbott in a letter Tuesday to grant them the ‘authority to set rules and regulations’ mandating face masks during the coronavirus pandemic.”

The [mayors' letter](#) includes the following:

“We are writing to you for the authority to set rules and regulations on the use of face coverings in each of our cities. A one-size-fits-all approach is not the best option. We should trust local officials to make informed choices about health policy. And if mayors are given the opportunity to require face coverings, we believe our cities will be ready to help reduce the spread of this disease.”

According to the *The Texas Tribune* article linked above, which was posted yesterday (June 16), the governor said that “local officials wanting to slow the spread of the virus have other tools at their disposal. For example, while they can't impose fines related to masks, they can fine businesses or individuals for violating rules on gatherings.”

But today, the governor told a television news station verbatim that:

“There has been a plan in place all along. **All that was needed was for local officials to actually read the plan that was issued by the State of Texas. It turned out earlier today that the county judge in Bexar County finally figured that out. They finally read what we had written** and they finally realize they are capable of doing what we want to make sure that individual liberty is not infringed on by government, and hence government cannot require individuals to wear masks. **However, pursuant to my plan, local governments can require stores and businesses to require masks.** That’s what was authorized in my plan. That’s what the Bexar County judge has now realized, and so what Bexar County is doing and what every county is authorized to do, and that is to impose requirements on business operations. Businesses...they’ve always had the opportunity and ability, just like they can require people to wear shoes and shirts, these businesses can require people to wear facemasks if they come into their businesses. **Now local officials are just now realizing that that was authorized.** So here’s the bottom line: I had two standards: One, no Texan can be put in jail for failing to follow these standards. Two, no government can mandate that individuals wear face masks. That said, when people go out and about, as they are walking around town, they don’t need to wear a face mask, but when they do go in a store or other business, those businesses can require, and that’s exactly what it looks like local governments will begin to do.”

It’s always been clear that a private business can require a mask. Beyond that, according to the governor, city and county officials (and League staff) just haven’t read his orders and accompanying guidance. But one county’s officials “finally read what we had written,” and now local governments can require a business to require a patron to wear a mask. Following the above interview, the governor’s staff provided League staff with the following statement:

“Judge Wolff’s order is not inconsistent with the Governor’s executive order. Our office urges officials and the public to adopt and follow the health protocols for businesses established by doctors that are available at open.texas.gov.”

The text of the governor’s current order ([Executive Order GA-26](#)) provides that:

“In providing or obtaining services, every person (including individuals, businesses, and other legal entities) should use good-faith efforts and available resources to follow the minimum standard health protocols recommended by DSHS. Nothing in this executive order or the DSHS minimum standards precludes requiring a customer to follow additional hygiene measures when obtaining services. **Individuals are encouraged to wear appropriate face coverings, but no jurisdiction can impose a civil or criminal penalty for failure to wear a face covering.**”

The order further provides that:

“All existing state executive orders relating to COVID- 19 are amended to eliminate confinement in jail as an available penalty for violating the executive orders. To the extent any order issued by local officials in response to the COVID-19 disaster would allow confinement in jail as an available penalty for violating a COVID-19-related order, that order allowing confinement in jail is superseded, and I hereby suspend all relevant laws to the extent necessary to ensure that local officials do not confine people in jail for violating any executive order or local order issued in response to the COVID-19 disaster.”

Moreover, the Texas attorney general, in a [May 12- letter](#) to San Antonio and Bexar County regarding his opinion of the their orders, stated that – with regard to masks – “individuals are free to choose whether to wear one or not.”

The [Bexar County order](#) that the governor references states that:

“[A]ll commercial entities in Bexar County providing goods or services directly the public must develop and implement a health and safety policy. . . **The Health and Safety Policy must require, at a minimum, that all employees or visitors to the commercial entity's business premises or other facilities wear face coverings when in an area or performing an activity which will necessarily involve close contact or proximity to co-workers or the public where six feet of separation is not feasible.** . . . Failure to develop and implement the Health and Safety Policy required by this Executive Order within five (5) calendar days following the Effective Date may result in a fine not to exceed \$1,000 for each violation.

Face Coverings - General Public. That all people 10 years or older shall wear a face covering over their nose and mouth when in a public place where it is difficult to keep six feet away from other people or working in areas that involve close proximity with other coworkers.

Consistent with Executive Order GA-26 issued by Governor Greg Abbott, no civil or criminal penalty will be imposed on individuals for failure to wear a face covering.”

So where does that leave us? The governor’s order still prohibits any type of penalty for the failure to wear a mask, but do the governor’s words trump the governor’s order? Each city will need to draw its own conclusions based on the information above, and any future clarifications provided by the governor. (Note: The Texas Tribune posted a [second article](#) regarding the above information moments before this email was distributed.)

6/18/2020

What are the latest developments regarding the governor's comments on mask requirements?

In a television interview yesterday (6/17), the governor indicated his belief that local governments can require businesses to require customers to wear masks, and that doing so is consistent with [Executive Order GA-26](#). Although the governor's order prohibits a local jurisdiction from imposing a civil or criminal penalty for failure to wear a face covering, according to the governor this prohibition only applies to regulating the behavior of individuals, not businesses. In other words, cities may issue local orders imposing fines on businesses for failure to require employees and customers to wear masks, but may not issue local orders imposing fines on individuals for not wearing masks.

Governor Abbott's comments were made in reference to [an order](#) issued by Bexar County Judge Nelson Wolff. Since those comments, a handful of other mayors and county judges have issued similar orders.

In spite of the governor's comments yesterday voicing support for these orders, any city interested in imposing similar public health measures is strongly encouraged to consult its city attorney before doing so.

6/22/2020

What's the latest with regard to county authority to require face masks?

The Harris County attorney [requested an attorney general opinion](#) to answer four questions relating to county-owned buildings and county courthouses. The response should be instructive with regard to city facilities as well. The 18-page request includes the following questions:

1. Given a county judge's authority under her emergency powers to control the movement of persons and the occupancy of premises in her county during a declared state of disaster, may a county judge require any person entering a courthouse or other county-owned or controlled building in the county to wear a facial covering in those county buildings during the COVID-19 disaster? If so, and the person fails to wear a facial covering, may a county judge bar entry to or order removal of that person from the courthouse or other county-owned or controlled building? What other remedies, if any, are alternatively available to a county judge to protect the health and safety of county employees, customers and the public when a person declines to wear a facial covering in a courthouse and other buildings owned or controlled by a county?
2. Given a commissioners court's authority to regulate the use of and control county buildings, may a commissioners court require any person entering a courthouse or other county-owned or controlled building in the county to wear a facial covering in those county buildings during the COVID-19 disaster? If so, and a person declines to wear a facial covering, what other remedies, if any, are alternatively available to a commissioners court to protect the health and safety of county employees, customers and the public?

3. Given the Office of Court Administration’s guidance and the powers vested in a court to exercise its jurisdiction and enforce its lawful orders, may any court presiding over a courtroom in a county owned or controlled courthouse in the county require any person who enters the courthouse to wear a facial covering while in that courthouse during the COVID-19 disaster? Does a court’s authority extend beyond the courtroom to allow the entry of an order requiring facial coverings throughout the entire courthouse? If so, and a person declines to wear a facial covering, what remedies are permitted?

4. In the event of the issuance of conflicting orders during the COVID-19 pandemic, whose order regarding the use of facial coverings outside a courtroom, jury room, and judge’s chambers in a county owned courthouse controls - the order of a county judge, a commissioners court or a judge presiding over a courtroom in the courthouse?

The League will report on the opinion when it is issued.

6/24/2020

What information has FEMA released in light of COVID-19 guidance for the hurricane season?

The Federal Emergency Management Agency’s [2020 Hurricane Pandemic Plan](#) provides guidance to state and local officials to prepare for response and recovery operations, and it encourages personal preparedness measures amidst the ongoing COVID-19 pandemic. While the document focuses on hurricane season preparedness, most planning considerations can be applied to any disaster operation in the COVID-19 environment, including no-notice incidents, spring flooding, and wildfire seasons.

FEMA's National Preparedness Directorate is conducting webinars on the plan. Space is limited, so interested city officials should register soon:

June 25: [FEMA Adobe Connect](#)

6/25/2020

All this information about what’s going on and what a city can and can’t do has become very complicated. Can you give us a very basic, short-form explanation of the major issues as they stand today (June 25)?

Sure! Let’s take a gander.

The Governor’s Current Order: Phase III of Reopening

[Executive Order GA-26](#) implements this phase of the state’s re-opening. The order is much different than previous orders. At its core, it provides that:

“Except as provided in this executive order or in the minimum standard health protocols recommended by DSHS, found at www.dshs.texas.gov/coronavirus, people should not be in

groups larger than ten and should maintain six feet of social distancing from those not in their group.”

Beyond that, the order allows people to access various businesses and take part in various activities. The best way for a city official to determine what’s open and which guidelines apply is to visit the governor’s Open Texas [web page](#). That page indicates which activities are now allowed according to the guidance document linked for each type of business or activity.

The order supersedes local orders and prohibits confinement in jail for a violation.

As mentioned above, the governor announced today a temporary pause in the re-opening of Texas.

Face Masks

Individuals: According to [Executive Order GA-26](#), “individuals are encouraged to wear appropriate face coverings, but no jurisdiction can impose a civil or criminal penalty for failure to wear a face covering.” Based on that, some cities that adopt orders generally providing that individuals “should” wear masks when they can’t social distance. Others include the language from GA-26 that no penalties will be sought against an individual who refuses to wear a mask.

Businesses: The governor has verbally indicated his belief that local governments can require businesses to require customers to wear masks, and that doing so is consistent with [Executive Order GA-26](#). Although the governor’s order prohibits a local jurisdiction from imposing a civil or criminal penalty for failure to wear a face covering, according to the governor this prohibition applies only to regulating the behavior of individuals, not businesses. In other words, he appears to be saying that a city may issue a local order imposing fines on businesses for failure to require employees and customers to wear masks, but may not issue local orders imposing fines on individuals for not wearing masks.

His comments were made in reference to [an order](#) issued by Bexar County Judge Nelson Wolff. More precisely, the order provides that all commercial entities providing goods or services directly to the public must develop and implement a “health and safety policy,” and that policy must require, at a minimum, that “all employees or visitors to the commercial entity’s business premises or other facilities wear face coverings when in an area or performing an activity which will necessarily involve close contact or proximity to co-workers or the public where six feet of separation is not feasible.” The order also provides for a \$1,000 fine on a business that fails to “develop and implement” the policy.

City Authority Relating to City Facilities

Executive Order GA-26 provides that “local government operations, including county and municipal governmental operations relating to licensing (including marriage licenses), permitting, recordation, and document-filing services, [may resume] as determined by the local government.” Moreover, the order provides that “nothing in this executive order or the DSHS minimum standards precludes requiring a customer to follow additional hygiene measures when obtaining services.” Those two provisions indicate that a city has broad authority over its own facilities.

Fourth of July Celebrations

Of particular interest to many is the “[outdoor events](#)” category on the Open Texas web page, which allows for Fourth of July celebrations in a city. The guidance linked in the previous sentence incorrectly provides that gatherings of 500 or more require a mayor’s approval. The 500 number is incorrect because the governor issued a subsequent proclamation that modifies Executive Order GA-26. **The modification grants more authority to mayors and judges by lowering the crowd threshold from 500 to 100.** Interested city officials should read the actual language of [Executive Order GA-26](#) as modified by [proclamation](#) prior to taking action relating to outdoor celebrations.

The [guidance](#) further provides for the following “local approval factors.” Again the guidance may still say it applies to gatherings of 500 or more, but the subsequent proclamation lowers that number to 100:

-Local approval for large outdoor gatherings (those with an estimated attendance exceeding 100 individuals) is appropriate in this instance because a statewide standard is unable to take into account the various factors needed to ensure such a gathering in varied locations is safe and will minimize the spread of COVID-19. Further, business parity is not an issue at large outdoor events.

-In evaluating large gatherings (those with an estimated attendance exceeding 100 individuals), the county judge or the mayor, as applicable, in consultation with the local public health authority, should consider the following factors:

1. The overall number of projected attendees;
2. The likelihood of individuals over the age of 65 attending;
3. The density of the forum and the ability to ensure social distancing of 6 feet between individuals; and
4. The level of transmission in the county.

-Gatherings of less than 100 individuals may proceed consistent with all the health protocols above without approval of the county judge, local health authority, or mayor, as applicable.

Voting by Mail

Most city elections have been moved to November, but a few will have elections sooner and many city officials will likely vote in the July 14 primary runoff election. With regard to voting by mail, the attorney general issued a [warning to county officials](#), which may be a preview of what city election officials will be dealing with in November. The warning essentially states that his position is that the fear of contracting COVID-19, without more, isn’t a sufficient reason for a voter to request a mail-in ballot. The Texas Supreme Court largely agreed, but litigation in federal court is still pending.

Open Meetings Act:

Earlier this year, the governor [suspended various provisions of the Open Meetings Act](#) to facilitate videoconference and teleconference virtual meetings and to allow cities control over who attends in-person meetings. The guidance associated with the suspension provides that:

“These suspensions are in effect until terminated by the office of the governor, or until the March 13, 2020, disaster declaration is lifted or expires.” The March 13 declaration has been extended for successive 30-day periods, including the [current 30-day extension](#) effective until July 11. That means the relevant open meetings laws remain suspended until at least that date (or until affirmatively rescinded). We can’t be certain, but it is highly likely that the governor will continue to repeatedly extend his declarations. We’ve heard from his staff that they have no immediate plans to rescind the suspensions, which are sensible and seem to be working well, but that can’t be guaranteed.

CRF funds

Federal funds to combat COVID-19 have been made available to every city in Texas. Cities in a county of 500,000 or more population received their money from that county. The funds may be used as provided in [U.S. Treasury Department guidance](#) and in accordance with any further restrictions included in an agreement with the county. All other cities (except the few with 500,000 or more population that received a direct allocation) can draw down their funds from the state through the [Texas Division of Emergency Management](#). Those funds are subject to the Treasury guidance and [further restrictions that have been imposed by TDEM](#).

Whew, that’s like drinking from a fire hose! Let us know if you’d like a short summary of other topics by emailing Scott Houston, TML general counsel, at gencounsel@tml.org.

6/26/2020

What actions did the governor take today (June 26) regarding the spread of COVID-19 in Texas and in my community?

He issued a new executive order. The new order, [GA-28](#), supersedes GA-26, which we summarized yesterday. Relative to previous orders, the new order does the following of most significance to city residents: (1) closes bars; (2) reduces maximum restaurant occupancy from 75 percent to 50 percent; and (3) limits outdoor gatherings to 100 persons (other than those expressly allowed by the order – see below), unless the mayor authorizes more.

Getting into specifics, the new order retains the core features of the previous order:

-“Except as provided in this executive order or in the minimum standard health protocols recommended by DSHS, found at www.dshs.texas.gov/coronavirus, people should not be in groups larger than ten and should maintain six feet of social distancing from those not in their group.”

-“In providing or obtaining services, every person (including individuals, businesses, and other legal entities) should use good-faith efforts and available resources to follow the minimum standard health protocols recommended by DSHS.”

-“Nothing in this executive order or the DSHS minimum standards precludes requiring a customer to follow additional hygiene measures when obtaining services. Individuals are

encouraged to wear appropriate face coverings, but no jurisdiction can impose a civil or criminal penalty for failure to wear a face covering.”

Beyond those, the order allows people to access various businesses and take part in various activities. **It adds the following new restriction: “Every business establishment in Texas shall operate at no more than 50 percent of the total listed occupancy of the establishment...” But it then exempts various businesses, activities, and outdoor events from the restriction. In fact, the exemptions are too voluminous to paste in here.**

The order also prohibits people from visiting bars, and an updated, city-related provision regarding outdoor gatherings bears repeating:

“For any outdoor gathering in excess of 100 people, other than those set forth above in paragraph numbers 1, 2, or 4, **the gathering is prohibited unless the mayor of the city in which the gathering is held, or the county judge in the case of a gathering in an unincorporated area, approves of the gathering, and such approval can be made subject to certain conditions or restrictions not inconsistent with this executive order.**”

[Note: according to correspondence between the League and the governor’s office, an individual mask mandate would be allowed as a condition of approving a gathering in excess of 100 people, but no penalty of any type could be imposed on an individual who refuses to comply. What other conditions would be allowed remains to be seen.]

The exemptions in GA-28’s paragraph numbers 1, 2, or 4 are many. Pursuant to GA-28 #1, a county judge or mayor has no express authority over the following outdoor gatherings:

1. any services listed by the U.S. Department of Homeland Security’s Cybersecurity and Infrastructure Security Agency (CISA) in its Guidance on the Essential Critical Infrastructure Workforce, Version 3.1 or any subsequent version;
2. religious services, including those conducted in churches, congregations, and houses of worship;
3. child-care services;
4. youth camps, including but not limited to those defined as such under Chapter 141 of the Texas Health and Safety Code, and including all summer camps and other daytime and overnight camps for youths; and
5. recreational sports programs for youths and adults.

In other words, the above events can take place by right with no occupancy limits.

Pursuant to GA-28 #4, amusement parks are subject to a 50 percent occupancy limit.

Pursuant to GA-28 #2 and #5 regarding outdoor gatherings, the order is confusing. After much internal debate, the bottom line as interpreted by League attorneys is this:

1. Any outdoor gathering in the city limits in excess of 100 people is prohibited by the order (GA-28 #5), unless a mayor allows it.

2. A mayor may allow a gathering in excess of 100 people in the city limits, and may impose allowable conditions on the gathering (other than penalties for individuals who don't wear a mask)(GA-28 #5). The best way to do that would probably be a written proclamation.
3. The order's 50 percent occupancy limit does not apply to outdoor events, except those expressly listed in number 4 below (GA-18 #2).
4. A mayor has no control over the following, which can operate at a maximum of 50 percent of the normal operating limits as determined by the owner: (a) professional, collegiate, or similar sporting events; (b) swimming pools; (c) water parks; (d) museums and libraries; (e) zoos, aquariums, natural caverns, and similar facilities; and (f) rodeos and equestrian events (GA-28 #2).

Interested city officials should review the complicated new order in its entirety to determine what's open and with what restrictions. As before, the best way for a city official to determine what's open and which guidelines apply is to visit the governor's Open Texas [web page](#). That page indicates which activities are now allowed according to the guidance document linked for each type of business or activity.

The order continues to supersede local orders and prohibits confinement in jail for a violation.

How does the new order (explained above) work with regard to Fourth of July Celebrations?

Executive Order GA-28 provides that:

“For any outdoor gathering in excess of 100 people... the gathering is prohibited unless the mayor of the city in which the gathering is held, or the county judge in the case of a gathering in an unincorporated area, approves of the gathering, and such approval can be made subject to certain conditions or restrictions not inconsistent with this executive order.”

[Note: according to correspondence between the League and the governor's office, an individual mask mandate would be allowed as a condition of approving a gathering in excess of 100 people, but no penalty of any type could be imposed on an individual who refuses to comply. What other conditions are allowed remains to be seen.]

The “[outdoor events](#)” guidance states verbatim that:

“Outdoor events, such as July 4 celebrations and other large outdoor gatherings with estimated attendance of 100 or more, are permissible to hold in Texas. The county judge or the mayor, as appropriate, in coordination with the local public health authority, must give approval to such an outdoor gathering or event prior to it being held.”

The following are the “local approval factors:”

-Local approval for large outdoor gatherings (those with an estimated attendance exceeding 100 individuals) is appropriate in this instance because a statewide standard is unable to take into account the various factors needed to ensure such a gathering in varied locations is safe and will

minimize the spread of COVID-19. Further, business parity is not an issue at large outdoor events.

-In evaluating large gatherings (those with an estimated attendance exceeding 100 individuals), the county judge or the mayor, as applicable, should consider the following factors:

1. The overall number of projected attendees.
2. The likelihood of individuals over the age of 65 attending.
3. The density of the forum and the ability to ensure social distancing of 6 feet between individuals.
4. The level of transmission in the county.

-Gatherings of less than 100 individuals may proceed consistent with all the health protocols above without approval of the county judge, local health authority, or mayor, as applicable.

6/29/2020

How have mayors responded to the rise in COVID-19 cases?

Mayors all over the state are doing what they perceive is right for their community to protect their residents. Two developments are of particular interest.

In central Texas, the City of Round Rock [issued an order](#) that becomes effective June 30 and requires individuals 10 years of age or older to wear, with some exceptions, masks: (1) inside any building that is open to the public; and (2) outside with a group of people where it is difficult to keep six feet away from others in the group. The order provides for a verbal or written warning for the first infraction and an escalating monetary penalty for subsequent violations.

In addition, the *McAllen Monitor* [reported](#) on Saturday (June 27) that

The mayors of Hidalgo County's largest four cities – Jim Darling of McAllen, Dr. Ambrosio Hernandez of Pharr, Richard Molina of Edinburg, and Armando O'Caña of Mission – all signed a letter to the governor outlining their desire for more pandemic autonomy. "Specifically, the mayors petitioned for the ability to create local size restrictions on gatherings and to decide locally whether to enforce mask wearing and how to enforce it, framing those desires against the backdrop of the Rio Grande Valley's dramatic uptick in COVID-19 cases over the last month."

7/2/2020

What's the latest with regard to city mask requirements for individuals?

Businesses

With regard to requiring a business to have a policy that requires masks for employees and patrons, several cities have adopted orders or ordinances. The governor has verbally indicated his belief that local governments can do so, and that doing so is consistent with his executive orders.

Although the governor’s order prohibits a local jurisdiction from imposing a civil or criminal penalty for failure to wear a face covering, according to the governor this prohibition applies only to regulating the behavior of individuals, not businesses. In other words, he appears to be saying that a city may issue a local order imposing fines on businesses for failure to require employees and customers to wear masks, but may not issue local orders imposing fines on individuals for not wearing masks.

His comments were made in reference to [an order](#) issued by Bexar County Judge Nelson Wolff. That order provides that all commercial entities providing goods or services directly to the public must develop and implement a “health and safety policy,” and that policy must require, at a minimum, that “all employees or visitors to the commercial entity’s business premises or other facilities wear face coverings when in an area or performing an activity which will necessarily involve close contact or proximity to co-workers or the public where six feet of separation is not feasible.” The order also provides for a \$1,000 fine on a business that fails to “develop and implement” the policy.

Individuals

Many cities have a provision in their orders or ordinances that encourages individuals to wear a mask when social distancing isn’t possible. At least one city (and perhaps one or two others), the City of Round Rock, [issued an order](#) that requires individuals 10 years of age or older to wear, with some exceptions, masks: (1) inside any building that is open to the public; and (2) outside with a group of people where it is difficult to keep six feet away from others in the group. The order provides for a verbal or written warning for the first infraction and an escalating monetary penalty for subsequent violations.

But does a city have the authority to do what Round Rock did? League staff, along with the city’s attorney, prepared an email to the governor’s office explaining why we think a city can and asking for his blessing. His staff declined to answer, and suggested we submit the issue to the attorney general’s office for review. We did so yesterday (July 1). (Remember that any mayor can ask disaster-related questions of the attorney general by emailing disaster-counsel@oag.texas.gov.)

The argument for city authority is spelled out in detail in the next Q&A, but the attorney general’s office – without much legal support – disagreed. The city attorney received a call yesterday afternoon from two assistant attorneys general.

Essentially, they said “you raised some interesting questions,” but that their view is that the governor’s power over cities is “unlimited.” For home rule cities at least, that can’t be true because Article XI, Section 5, of the Texas Constitution grants them the power of local self-government. And The League is in no way suggesting that any city should or should not take any particular action related to the virus. We are just providing information, which is what we’ve been doing all along. As in every case, city officials should consult with local legal counsel regarding local action.

So, what's the argument that a city can impose an individual mask requirement and attach a penalty for noncompliance?

Again, the League is in no way suggesting that any city should or should not take any particular action related to the virus. The following is the email that was sent by the Round Rock city attorney to the attorney general's "disaster counsel" email. The attorney general's office doesn't usually respond in writing to those emails, and that was true here as well.

"I am the City Attorney for the City of Round Rock. The Mayor of the City has authorized and requested me to send this email to you, on his behalf. The purpose of this email is to request your thoughts regarding the authority of a city council of a home rule city to declare a public health emergency and to adopt an emergency ordinance pursuant to its home rule charter.

For your convenience, I have attached a copy of section 3.14 of the Round Rock Home Rule Charter, as well as the Emergency Ordinance unanimously adopted by the Round Rock City Council this past Monday. As I am sure you are aware, the authority of the citizens of Round Rock to adopt a home rule charter flows from Article XI, Section 5, of the Texas Constitution. This authority is completely separate from Chapter 418 of the Government Code.

In addition to our charter, state law (Texas Health and Safety Code Sections 122.005 and 122.006) provides express authority for the governing bodies of cities to protect residents from communicable diseases. The authority granted to the governing body by this state statute is separate and independent from a mayor's "executive" power pursuant to his or her disaster/emergency-related authority under Chapter 418 of the Govt Code.

Since the authority for a city council of a home rule city to deal with a local public health emergency flows from the Constitution, Sec. 122.06 of the Health and Safety Code, and its home rule charter, this authority is not subject to any limiting authority of the governor.

Executive Order GA-28's superseding language provides that:

"This executive order shall supersede any conflicting order issued by local officials in response to the COVID-19 disaster, but only to the extent that such a local order restricts services allowed by this executive order, allows gatherings prohibited by this executive order, or expands the list or scope of services as set forth in this executive order. **Pursuant to Section 418.016(a) of the Texas Government Code, I hereby suspend Sections 418.1015(b) and 418.108 of the Texas Government Code, Chapter 81, Subchapter E of the Texas Health and Safety Code, and any other relevant statutes**, to the extent necessary to ensure that local officials do not impose restrictions in response to the COVID-19 disaster that are inconsistent with this executive order, provided that local officials may enforce this executive order as well as local restrictions that are consistent with this executive order."

Let's break down the suspended statutes:

-Suspended Government Code Section 418.1015(b) provides that "[a]emergency management director serves as the governor's designated agent in the administration and supervision of duties

under this chapter. An emergency management director may exercise the powers granted to the governor under this chapter on an appropriate local scale.”

-Suspended Government Code Section 418.108 allows a mayor to declare a local state of disaster and issue orders pursuant to his or her declaration and emergency management plan.

-Suspended Health and Safety Code Chapter 81, Subchapter E, relates to the state’s and a local health authority’s power to issue quarantine orders and similar measures.

The order and statutory provisions above all relate to a **mayor’s or a local health authority’s powers** in a disaster, and the governor has clearly taken steps to restrict that power.

HOWEVER, as stated above the Texas Health and Safety Code provides separate authority for a city council to adopt disease prevention measures:

Sec. 122.005. POWERS OF TYPE A GENERAL-LAW MUNICIPALITY. (a) The governing body of a Type A general-law municipality may take any action necessary or expedient to promote health or suppress disease, including actions to:

(1) prevent the introduction of a communicable disease into the municipality, including stopping, detaining, and examining a person coming from a place that is infected or believed to be infected with a communicable disease;

(2) establish, maintain, and regulate hospitals in the municipality or in any area within five miles of the municipal limits; or

(3) abate any nuisance that is or may become injurious to the public health.

(b) The governing body of a Type A general-law municipality may adopt rules:

(1) necessary or expedient to promote health or suppress disease; or

(2) to prevent the introduction of a communicable disease into the municipality, including quarantine rules, and may enforce those rules in the municipality and in any area within 10 miles of the municipality.

(c) The governing body of a Type A general-law municipality may fine a person who fails or refuses to observe the orders and rules of the health authority.

Sec. 122.006. POWERS OF HOME-RULE MUNICIPALITIES. A home-rule municipality may:

(1) adopt rules to protect the health of persons in the municipality, including quarantine rules to protect the residents against communicable disease; and

(2) provide for the establishment of quarantine stations, emergency hospitals, and other hospitals.

The statutory provisions above grant authority to a city council to take action to prevent the spread of communicable diseases, such as COVID-19. That council authority is separate and apart from a mayor’s (or local health authority’s) power that flows from the suspended provisions in Texas Government Code Chapter 418 (The Texas Disaster Act) or Health and Safety Code Chapter 81. In other words, they allow the governing body of a city to take action – including a mandatory mask requirement with a class C criminal penalty or a civil penalty – completely outside the purview of Executive Order GA-18 or the Disaster Act.

In the case of the City of Round Rock, the city posted a public agenda of the time and place of the emergency meeting and gave the public detailed notice of the emergency ordinance that was going to be considered and acted upon. The City Council held a public meeting during which the ordinance was presented, discussed, debated, and voted upon. The emergency ordinance received the affirmative vote of all seven members of the city council.

While GA-18 also suspends “any other relevant statutes,” it doesn’t expressly state that the governor has suspended the provisions in Health and Safety Code Chapter 122. Moreover, even though Executive Order GA-28 provides that “[i]ndividuals are encouraged to wear appropriate face coverings, but no jurisdiction can impose a civil or criminal penalty for failure to wear a face covering,” that relates to the authority granted by the order and the Disaster Act. It doesn’t limit a city council’s authority under other law, i.e. the Home Rule Charter and Health and Safety Code Chapter 122.

When asked about Round Rock’s individual mask mandate Monday night on KXAN, the governor said “that part seemed like it would contradict my executive order, without me having seen what you’re talking about. That said, **I do want to applaud the City of Round Rock for stepping up [and imposing] a mask requirement.**” (Emphasis added.)

On more than one occasion, the governor has expressed concern that local jurisdictions will arrest people and throw them in jail for violating executive orders of mayors or county judges. Round Rock’s ordinance is enforced by warnings and fines only. There will be no confinement in jail of anyone found violating this ordinance.

In closing, the city council agrees 100 percent with the governor that wearing a mask is essential to stop the spread of Covid-19. However, a “mandatory requirement” in an executive order with no actual enforcement will not accomplish the desired goal.

Texas Municipal League staff has shared the above analysis with the governor’s office, and the governor’s general counsel requested that we send this to you. We believe that the process we followed allows for the local legislative body to deal with a local issue without violating either the letter or spirit of the Governor’s orders under Chapter 418 of the Government Code.

It seems like a win-win for the citizens of Texas cities like Round Rock, and we hope you agree.”

As stated in the previous question, they did not.

Two days ago, we surveyed whether mayors believe that Fourth of July celebrations in excess of 100 people should be allowed. How did the survey go?

The results showed that some mayors appear to be much more cautious right now. Asked whether they would allow private outdoor gatherings in excess of 100 people, 68 percent (76) of the 112 responding mayors said no. (The League has 1,160 member cities). Respondent city populations ranged from 482-2.3 million. The following questions were asked:

-Will you be approving PRIVATE outdoor gatherings in excess of 100 people (with or without conditions)? Out of 112 responding mayors, 76 said no and 36 said yes. Of the 36 responding yes, 21 reported that they will impose conditions or restrictions on the gathering.

-Will your city be conducting a CITY (e.g., city-sponsored, city-funded, on city property, etc.) Fourth of July celebration (including a parade and/or fireworks)? Out of 111 responding mayors, 84 said no and 27 said yes. Of the 27 responding yes, 19 reported that they will impose conditions or restrictions on the gathering.

Did the governor take any virus-related action relating to face masks heading into the Fourth of July weekend?

Yes. He issued [Executive Order GA-29](#), a face covering order, which becomes effective at 12:01 p.m. on July 3 and provides that:

“Every person in Texas shall wear a face covering over the nose and mouth when inside a commercial entity or other building or space open to the public, or when in an outdoor public space, wherever it is not feasible to maintain six feet of social distancing from another person not in the same household; provided, however, that this face-covering requirement does not apply [in 11 enumerated circumstances listed in the order].”

Certain counties are exempted from the requirement, and the order provides that TDEM will keep a list of those counties on its website at <https://tdem.texas.gov/ga29/>.

According to the order:

“Following a verbal or written warning for a first-time violator of this face covering requirement, a person’s second violation shall be punishable by a fine not to exceed \$250. Each subsequent violation shall be punishable by a fine not to exceed \$250 per violation.

Local law enforcement and other local officials, as appropriate, can and should enforce this executive order, Executive Order GA-28, and other effective executive orders, as well as local restrictions that are consistent with this executive order and other effective executive orders.

But no law enforcement or other official may detain, arrest, or confine in jail any person for a violation of this executive order or for related non-violent, non-felony offenses that are predicated on a violation of this executive order; provided, however, that any official with authority to enforce this executive order may act to enforce trespassing laws and remove violators at the request of a business establishment or other property owner. This executive order hereby prohibits confinement in jail as a penalty for the violation of any face-covering order by any jurisdiction.”

Did the governor take any virus-related action relating to large gatherings heading into the Fourth of July weekend?

Yes. He issued a [proclamation](#) amending [Executive Order GA-28](#) granting mayors additional authority over smaller gatherings. The proclamation becomes effective at 12:01 p.m. on July 3 and continues the social distancing requirement:

“Except as provided in this executive order or in the minimum standard health protocols recommended by DSHS, found at www.dshs.texas.gov/coronavirus, people shall not be in groups larger than 10 and shall maintain six feet of social distancing from those not in their group.”

And it lowers the mayoral approval threshold for outdoor gatherings from those in excess of 100 to those in excess of 10:

“For any outdoor gathering in excess of 10 people, other than those set forth above in paragraph numbers 1, 2, or 4, the gathering is prohibited unless the mayor of the city in which the gathering is held, or the county judge in the case of a gathering in an unincorporated area, approves of the gathering, and such approval can be made subject to certain conditions or restrictions not inconsistent with this executive order.”

The exemptions in GA-28’s paragraph numbers 1, 2, or 4 are many. Pursuant to GA-28 #1, a county judge or mayor has no express authority over the following outdoor gatherings:

1. any services listed by the U.S. Department of Homeland Security’s Cybersecurity and Infrastructure Security Agency (CISA) in its Guidance on the Essential Critical Infrastructure Workforce, Version 3.1 or any subsequent version;
2. religious services, including those conducted in churches, congregations, and houses of worship;
3. child-care services;
4. youth camps, including but not limited to those defined as such under Chapter 141 of the Texas Health and Safety Code, and including all summer camps and other daytime and overnight camps for youths; and
5. recreational sports programs for youths and adults.

In other words, the above events can take place by right with no occupancy limits.

Pursuant to GA-28 #4, amusement parks are subject to a 50 percent occupancy limit.

Pursuant to GA-28 #2 and #5 regarding outdoor gatherings, the order remains confusing. After much internal debate, the bottom line as interpreted by League attorneys is this:

1. Any outdoor gathering in the city limits in excess of 10 people is prohibited by the order (GA-28 #5), unless a mayor allows it.
2. A mayor may allow a gathering in excess of 10 people in the city limits, and may impose allowable conditions on the gathering (including a now-enforceable mask requirement)(GA-28 #5). The best way to do that would probably be a written proclamation.
3. The order’s 50 percent occupancy limit does not apply to outdoor events, except those expressly listed in number 4 below (GA-18 #2).

4. A mayor has no control over the following, which can operate at a maximum of 50 percent of the normal operating limits as determined by the owner: (a) professional, collegiate, or similar sporting events; (b) swimming pools; (c) water parks; (d) museums and libraries; (e) zoos, aquariums, natural caverns, and similar facilities; and (f) rodeos and equestrian events (GA-28 #2).

7/6/2020

May our mayor ask the state to provide legal counsel regarding the statewide mask mandate in Executive Order GA-29, or other disaster-related questions?

Yes. The Texas Disaster Act of 1975 provides that a mayor may request the attorney general to provide legal counsel to a city subject to a declared state of disaster "on issues related to disaster mitigation, preparedness, response, and recovery applicable to the area subject to the disaster declaration" during the declared state of disaster and the 90-day period following expiration or termination of the disaster declaration. Tex. Gov't Code § 418.193.

Mayors can email the attorney general's disaster counsel using [this webpage](#).

What do recent polls say about local government responses to COVID-19 in Texas?

According to June [polling data released today](#) by the University of Texas and the Texas Politics Project, Texans trust local governments to respond to the pandemic more than any other level of government. Though the overall approval numbers for all levels of government have decreased as the pandemic continues, local governments have maintained the highest level of approval throughout. As stated in a University of Texas blog post accompanying the release of the new polls: "Texans' approval of [governments' handling of the pandemic](#) decreased for all levels of government – federal, state, and local – though Texans overall still give the most positive ratings to local governments, as they did in April. State government saw the largest decrease in net approval in part due to a 15-point increase in those who disapproved."

This data reinforces what city officials already knew – that Texans in communities all across this state are looking primarily to their local leaders for guidance during these difficult times. City officials should feel encouraged to continue to provide pragmatic and collaborative solutions to help guide the state's recovery. The League will continue to do all that we can to assist in those efforts.

Is a local government operating under a local disaster declaration authorized to issue orders or adopt ordinances impacting the eviction process?

Senator Brandon Creighton (R-Conroe) recently [requested an attorney general opinion](#) to answer this question. Specifically, Senator Creighton submitted the following question: "[W]hether orders and ordinances adopted by local governmental entities pursuant to emergency declarations that have the effect of prohibiting, delaying, or restricting the eviction process as set forth in Chapter 24 of the Texas Property Code and the 500-510 rules of the Texas Rules of Civil Procedure are valid under Texas law."

Cities interested in submitting briefs on the opinion request may do so electronically by emailing briefs to opinion.committee@oag.texas.gov. Because Senator Creighton requested an expedited response, briefs should be submitted by no later than July 17, 2020.

7/7/2020

If a person knowingly refuses to obey a control order issued by a local health authority (LHA), can local law enforcement enforce the LHA order given the language in the governor’s recent executive order generally prohibiting jail time as a penalty for violating local orders?

Likely so. A city recently received an email from the attorney general’s office indicating that criminal penalties are an option when a person refuses to obey an LHA control order. According to the email, “GA-26 does not prohibit local authorities from enforcing Chapter 81 of the Health and Safety Code when a person with positive COVID-19 diagnosis knowingly refuses to obey a control order by the local health authority.” (Note: [GA-26](#) has since been superseded by [GA-28](#). But GA-28 contains essentially the same language regarding preemption of local orders.)

The email above is not a formal ruling from the attorney general’s office, so the exact reasoning supporting the statement is unclear. That being said, one possible reason for this conclusion is spelled out in detail in the [request for the opinion](#) from Maverick County and the City of Eagle Pass. This request explains that Chapter 81 of the Health and Safety Code, Subchapter E, gives LHAs the ability to issue orders with control measures for individuals who have been exposed to, or are carriers of a communicable disease. The statute provides that an individual commits a Class B misdemeanor if he or she knowingly refuses to comply with an LHA’s control order. Although the governor’s executive order suspended Health and Safety Code Chapter 81, Subchapter E “to the extent necessary to ensure that local officials do not confine people in jail for violating any executive order or local order issued in response to the COVID-19 disaster,” an arrest under Health and Safety Code Chapter 81 for knowingly refusing to comply with control measures is authorized pursuant to state statute, not a local order.

Any city that has appointed an LHA should consult its city attorney prior to taking any action regarding the enforcement of an LHA control order.

7/13/2020

What happened today with regard to the Republican Party of Texas state convention at the George R. Brown Convention Center in Houston and why does it matter to city officials?

Citing concerns over the spread of Coronavirus in the Houston area, Mayor Sylvester Turner relied on a force majeure clause to cancel the contract with the Republican Party of Texas and refuse the use of the city’s convention center. The Party sued the City in district court and lost, and then sought an opinion from the Texas Supreme Court. The Supreme Court issued a [short opinion](#) denying the Party’s request that it order the mayor and City to allow the convention.

The case is obviously highly-politicized, and the League doesn't weigh in on such political issues. But the Court's opinion does provide some guidance with regard to municipal facilities. The governor's current executive order allows local government "operations, including county and municipal governmental operations relating to licensing (including marriage licenses), permitting, recordation, and document-filing services, as determined by the local government." And there is no occupancy limit on those operations.

So what happened with the lawsuit? The Party essentially claimed that the governor's orders and the U.S. and Texas Constitutions allowed them, by right, to use the City's facility. The Court's opinion rebuked those claims, and it would seem to solidify the notion that city officials maintain control over their facilities. The logic applies to any city facility: a sports field complex, a park, a library, etc.

Whether that means opening them up or keeping them closed, it's another good opinion from the Court for city discretion. The governor's order also provides that "Nothing in this executive order or the DSHS minimum standards precludes requiring a customer to follow additional hygiene measures when obtaining services." That means a city can open its facilities with whichever protocols are deemed appropriate.

Where can I go to see exactly what business and activities are allowed by the governor's orders as of now?

Check out www.open.texas.gov. This is the governor's Open Texas web page. On it, you'll find a list of each allowable business or activity, along with a link to the Department of State Health Services guidance on allowable occupancy limits, the most recent statewide mask order, and more.

7/20/2020

We've heard differing interpretations about whether a city can enforce the governor's mandatory mask order. Does it all hinge on whether a police officer may "detain" a person to issue a citation?

It does, and the answer remains unclear. On July 2, Governor Abbott issued Executive Order [GA-29](#), which is his order that requires face coverings, with certain exceptions. The order was adopted pursuant to [Section 418.173 of the Texas Government Code](#) (The Texas Disaster Act), which allows criminal penalties in the form of fines and jail time up to 180 days for a violation of an order issued under Chapter 418. Executive Order GA-29, however, limits the punishment to a fine only:

"Following a verbal or written warning for a first-time violator of this face covering requirement, a person's second violation shall be punishable by a fine not to exceed \$250. Each subsequent violation shall be punishable by a fine not to exceed \$250 per violation."

However, the order also provides that:

“[N]o law enforcement or other official may detain, arrest, or confine in jail any person for a violation of this executive order or for related non-violent, non-felony offenses that are predicated on a violation of this executive order; provided, however, that any official with authority to enforce this executive order may act to enforce trespassing laws and remove violators at the request of a business establishment or other property owner.”

According to the [Texas District & County Attorneys Association](#) (TDCAA):

“[T]he order specifically states that ‘no law enforcement or other official may detain, arrest, or confine in jail any person for a violation of this executive order . . .’ (emphasis added). That language does perhaps leave the door open for a consensual encounter and a warning – although the word ‘perhaps’ is doing a lot of work in that statement – but we cannot for the life of us figure out how a law enforcement officer is supposed issue a citation to someone they are not allowed to detain for that purpose. Not only is this a problem for enforcing the statewide mask edict, but if an officer’s initial mask-based encounter elevates to an investigation of a jailable offense (possession of a controlled substance, for example), that type of contraband evidence may be suppressed before trial if the sole basis for the encounter was a mask violation under GA-29.”

The above is why we’ve seen news articles related to law enforcement refusing to even attempt to criminally enforce the governor’s mask mandate.

Does law enforcement have any options with regard to enforcement?

Maybe. The TDCAA has an interesting twist on the subject, and the following is entirely their analysis:

“Just as every mask has two loopholes for your ears, GA-29 has two loopholes for potentially getting around the problems it creates, if you or your community are so inclined.

First, by its own terms, GA-29 still allows officers to ‘enforce trespassing laws and remove violators at the request of a business establishment or other property owner.’ That has been the preferred practice under [GA-28](#), which in paragraph 15 said:

‘Nothing in this executive order or the DSHS minimum standards precludes requiring a customer to follow additional hygiene measures when obtaining services. Individuals are encouraged to wear appropriate face coverings, but no jurisdiction can impose a civil or criminal penalty for failure to wear a face covering.’

This was the original loophole that allowed local governments to rely on – or in some places, require – businesses to enforce mask requirements, and it remains one avenue for enforcement under GA-29. However, GA-29 also includes the following new provision:

‘Executive Order GA-28 is hereby amended to delete from paragraph number 15 [see above] the phrase: *but no jurisdiction can impose a civil or criminal penalty for failure to wear a face covering.*’

As a result, even though the statewide mask mandate may largely be a sham, local jurisdictions MAY now impose direct penalties for failure to wear a face covering, in addition to penalties on businesses that fail to enforce their own mask mandates on their premises. And furthermore, the limitation on detentions in GA-29 says, ‘No law enforcement or other official may detain, arrest, or confine in jail any person for a violation of this executive order’ (emphasis added), but it silent as to detention, arrest, or confinement for the purposes of enforcing a local mask order.

So, while the local penalties for violating local orders must still be limited to fines or other non-jailable remedies under other language in GA-28 that bars jail as a punishment for violating any executive order during the pandemic, the “no detention” language apparently does not apply to local mask orders, making them enforceable. As of yesterday, this is apparently what the City of Austin will do, and the same governor who overrode Austin and other urban jurisdictions’ local mask ordinances back in April is apparently on board with them now.” (End analysis by TDCAA).

City officials should consult with local legal counsel regarding any action related to the above.

7/29/2020

What’s the latest on school reopening this fall?

We thought figuring out what to do about golf courses and masks was a tough question. Those are simple puzzles compared to the saga of public school re-opening procedures. The plan for public school re-openings has changed at least four times this month. The governor’s first few disaster orders closed down public schools indefinitely, but that changed with his more recent one. The following guidance outlines the plans and how they’ve changed:

1. On July 7, the Texas Education Agency released health guidelines for the 2020-2021 school year. (The link to those original guidelines is now deleted.) Among other things, the guidance required school districts to offer daily on-campus instruction, but also allowed parents to opt-in to virtual instruction from a school district that offered it.
2. On July 14, local health authorities – in conjunction with school districts – began to take local action related to the fall school start date. The authority for the City of Austin and Travis County [issued an order](#) that school districts should not reopen schools for face-to-face instruction until after Sept. 7. Several local health authorities around the state issued similar orders. After initial resistance, the TEA at that time confirmed that local public health officials could close schools for in-person instruction this fall without losing state education funding, so long as they offered online learning for all students.
3. On July 17, the TEA issued additional reopening guidance that gave tacit approval to what the LHAs mentioned above had been doing. (The link to those additional guidelines is now deleted.) School systems would have been able to temporarily limit access to on-campus instruction for the first four weeks of school. After the first four weeks, a school system could

have continued to limit access to on-campus instruction for an additional four weeks, if needed, with a board-approved waiver request to TEA.

4. On July 28, the attorney general stepped into the fray by issuing “[legal guidance](#)” on school reopening. The guidance letter concluded that “local health authorities may not issue sweeping orders closing schools for the sole purpose of preventing future COVID-19 infections.” As a legal matter, the “informal” letter should have been irrelevant. “Should” being the operative word. Shortly after the letter was released, the TEA once again revised its [guidance](#) to fall in line with the letter. The guidance was updated in several places, but this is probably the most relevant FAQ:

“My Local Education Agency (LEA) was subject to a blanket closure order issued by my local health authority. Will solely remote instruction be funded for the time period of the order?”

No. The Texas Attorney General issued a guidance letter on July 28, 2020, that stated that “... local health authorities may not issue blanket orders closing all schools in their jurisdiction on a purely prophylactic basis.” The guidance letter further provides that health authority orders may not conflict with executive orders of the governor and must apply control measures required by statute. Consequently, a blanket order closing schools does not constitute a legally issued closure order for purposes of funding solely remote instruction as described in this document. However, another valid funding exception may apply, such as a start-of-year transition period as described further below, that would be available to the LEA if it did not offer on-campus instruction.”

Some local health authorities, in conjunction with their districts, may ignore the letter and TEA guidance and do what they believe will protect teachers, students, and others. Because school opening is largely governed by the local health authority, the state, and each individual district, the League won’t report on it in great detail going forward. As always, city (and county, health authority, and school for that matter) officials should rely on the advice of their attorney, who has a fiduciary and ethical responsibility to them.

7/31/2020

We thought there wouldn’t be an update today?

So did we, but the governor likes to take action on Friday afternoons.

What’s the very latest with regard to public schools opening this fall?

We reported on July 29 that the plan for re-opening public schools changed four times in the last couple of weeks. It started with Texas Education Agency (TEA) guidance, then some local health authorities and school districts wanted something different, which the TEA agreed with. But then the attorney general swooped in with something new.

This afternoon (July 31), several additional folks – Governor Abbott, Lt. Governor Patrick, Speaker Bonnen, Chairman Taylor, and Chairman Huberty (the Texas Senate and House education committee chairs) – decided to weigh in. So far as we can tell, these state leaders’

and legislators' determination is that: (1) school boards control when school opens; (2) school boards should consult with the local health authority to make the decision; and (3) neither a city, a county, nor a local health authority can issue blanket school closure orders. According to them, the only authority at all lies with a local health authority, who can "during the course of the school year, determine that a school building must be closed in response to an outbreak."

The folks mentioned above released the following joint "Statement on School Re-Openings." We bolded the most important portions:

"The Texas Education Agency's (TEA) guidance for opening public schools in Texas for the 2020-21 school year **remains the same as announced two weeks ago**. This guidance followed a letter issued jointly by the Governor, Lieutenant Governor, Speaker, and Chairs of the Senate and House Education Committees.

The top priority is protecting the safety and health of students, teachers, staff, and families. To achieve that goal, the TEA provided local school boards the flexibility they need to open schools in ways that ensure public safety while also providing the best education options for students during this challenging school year.

The TEA guidance applies long-standing state law and Executive Orders to conclude that the authority to make decisions about when and how schools safely open rests with the constitutionally and statutorily established local school boards.

The authority to decide when the school year will begin lies with local school boards. They can choose dates in August, September, or even later. But, whenever the local school board chooses to open, the board must comply with the requirement to provide the necessary number of days and hours of instruction for students.

The authority to decide how schools will safely open this year, again, lies with local school boards. It can be with students in schools, it can be through remote learning, or a combination of the two. In making that decision, **school boards have the ability to base their decisions on advice and recommendations by local public health authorities but are not bound by those recommendations.**

As the TEA previously announced, school boards have up to a 4-week back to school transition period during which they can offer a solely remote instructional setting if that is deemed needed for the health and safety of students, teachers, staff and parents. After 4 weeks, the school district can extend the transition period up to another 4 weeks with a vote of the school board and receiving a waiver. If any school district believes they need an extension beyond 8 weeks due to COVID-19 related issues, the TEA will review that request on a case-by-case basis.

If at any time during the school year a COVID-19 case is confirmed on a school campus, the school board has the ability to close the campus for up to 5 days to sanitize the campus. Schools that close under this scenario will continue to be funded for providing remote-only instruction.

Additionally, during the course of the school year, a local public health authority may determine that a school building must be closed in response to an outbreak. If that occurs, that school will continue to receive funding for providing remote-only instruction during the period of that closure.

Local school boards also have the flexibility to achieve health and safety goals by offering alternating on-campus/remote instruction for high school students in order to reduce the number of students in campus buildings at one time.

The TEA and the Attorney General correctly note that local health authorities play an important role in school closure determinations during the course of a school year if it is determined that a contamination has occurred necessitating closure, but **local health authorities do not have the power to issue preemptive, blanket closures of schools weeks or months in advance of when a school may open its doors to students. Pre-existing Executive Orders have repeatedly made clear that local government operations, such as public schools, are permitted to be open.**

School boards established by the Texas legislature play a unique and pivotal role in school decisions that must not be superseded by other local authorities unless expressly allowed. It is clear that school boards can and should work collaboratively with, but not be subject to the advance directives of, local public health authorities, to ensure a safe and effective learning environment for Texas students."

At present, the TEA has nothing about the above on its website.

Have a nice weekend.

8/5/2020

Has the attorney general issued more virus-related opinions?

Yes. He issued two formal attorney general opinions yesterday (August 4). Both opinions are favorable to local government authority during the pandemic as it relates to masks in their facilities:

[-Opinion KP-0323](#) concludes that “[i]f wearing a facial covering in a transit authority vehicle or facility is necessary for the safe and efficient operation of the Metropolitan Transit Authority of Harris County during the COVID-19 pandemic, the Authority may require any person medically capable of doing so to wear a facial covering when entering its vehicles or facilities.”

[-Opinion KP-0322](#) concludes that “[c]ounty authority to require facial coverings in courtrooms, courthouses, and county buildings can be found in in the Texas statutes, and in emergency and executive orders.

Judges possess broad inherent authority to control orderly proceedings in their courtrooms, and pursuant to that authority they could require individuals in the courtroom to wear facial

coverings if necessary to maintain order and safety. In addition, the Texas Supreme Court has issued an emergency order requiring all judges to comply with guidance promulgated by the Office of Court Administration, which requires facial coverings by all individuals while in the courthouse. Thus, courts may require any person entering the courthouse in which they preside to wear a facial covering while in the courthouse.

Government Code section 418.108 authorizes a county judge to declare a local state of disaster and upon such declaration, vests the county judge with authority to control the occupancy of premises in the disaster area. Pursuant to this emergency authority, a county judge operating under a local disaster order could require a person to wear a facial covering when occupying a courthouse or other county-owned or controlled building.

Executive Order GA-29 allows local law enforcement and local officials to impose a fine not to exceed \$250 for an individual's second violation of a mask requirement. In addition, public officials may require facial coverings for those entering the courthouse or other county buildings and may deny entry to those individuals refusing to wear a facial covering inside those premises."

8/17/2020

What's the latest with school openings, and how does it relate to cities?

The school re-opening debate is, apparently, a gift that keeps on giving. Last Friday (August 14), the Cy-Fair American Federation of Teachers [sued](#) the Cypress-Fairbanks Independent School District. The teacher's union alleged that the district is in violation of a joint order issued by the Harris County/City of Houston health authorities prohibiting in-person instruction/professional development until September.

The trial court granted the union's request for a temporary restraining order the same day the lawsuit was filed. The judge's order stated that, no matter what the district says, the joint local health authority order means teachers can't be made to attend in-person professional development before September 7.

Why should city officials care? The underlying issue in the lawsuit is whether a city's or county's health authority can shut down a school district based on local metrics and local health and safety authority.

So far as we understood (or thought we understood) it, the governor's and TEA's position remains that: (1) school boards control when school opens; (2) school boards should consult with the local health authority to make the decision; and (3) neither a city, a county, nor a local health authority can issue blanket school closure orders. According to them, the only authority at all lies with a local health authority, who can "during the course of the school year, determine that a school building must be closed in response to an outbreak."

The attorney general, who *really* likes writing letters, wrote yet another one today (August 17) in the form of an [amicus \("friend of the court"\) letter](#) to the trial judge. We assumed his letter

would state that the local orders are preempted by the governor's order, statements, and TEA actions. He didn't.

He argues that the Health and Safety Code provisions relied on by the city and county don't authorize a blanket closure. Why he left out executive order preemption is anyone's guess. Perhaps he doesn't think those suspensions would hold up in court?

"Teachers' unions have no authority to override the decisions of schools administrators about how to return to school safely," said the attorney general. That's a mischaracterization of the dispute. The union isn't suggesting that "it" should determine how to return to school safety. Through its lawsuit, rather, the union is suggesting that doctors should.

The whole thing has folks confused. Seems like listening to two doctors might be better than one attorney? (Let the jokes commence: Two doctors and an attorney walk into a bar...)

In any case, we'll let the courts sort it out and go from there.

8/20/2020

What's the deal with outdoor gatherings conducted by colleges and universities?

You thought golf courses were bad? Get a load of the complex analysis needed for higher education outdoor events. (That sounds like a "Big Bang Theory" episodic title: "The Higher Ed Outdoor Events Complexity.")

What's the bottom line (so you can just read the next sentence and stop here)? Neither a mayor nor a city council has the authority to regulate outdoor gatherings of any type of any college or university, public or private, except maybe at a private college that is not affiliated with any particular religion. (By the way, private non-religious colleges are hard to come by in Texas.) Let's break it down.

We start with the governor's [unnumbered proclamation](#) of July 2, 2020, which amends [Executive Order GA-28](#) and governs mayoral authority over outdoor gatherings in general. (This is the one he approved heading into the Fourth of July weekend, and it is still in effect.) It provides in relevant part that:

"For any outdoor gathering in excess of 10 people, other than those set forth above in paragraph numbers 1, 2, or 4, the gathering is prohibited unless the mayor of the city in which the gathering is held, or the county judge in the case of a gathering in an unincorporated area, approves of the gathering, and such approval can be made subject to certain conditions or restrictions not inconsistent with this executive order."

The exemptions in GA-28's paragraph numbers 1, 2, or 4 are many. Pursuant to GA-28 #1, a mayor has no express authority over the following outdoor gatherings:

1. religious services, including those conducted in churches, congregations, and houses of worship (see GA-28 #1.b.);
2. professional, collegiate*, or similar sporting events, which can operate at a maximum of 50 percent of the normal operating limits as determined by the owner (see GA-28 #2.a.); and
3. local government operations, including county and municipal governmental operations relating to licensing (including marriage licenses), permitting, recordation, and document-filing services, as determined by the local government (see GA-28 #1.c.).

In other words, the above outdoor events can take place by right with no occupancy limits. How does the above specifically relate to outdoor events conducted by a community college, college, or university?

-Community Colleges: “Junior college districts,” which is the antiquated statutory name for these institutions, “are political subdivisions of the State of Texas.” Op. Tex. Att’y Gen. No. M-707 (1970) at 3; LO-97-076 (1997). For purposes of this analysis, we will assume that “political subdivision” is synonymous with “local government.” See Tex. Education Code §§ 130.011; 130.002 (Public junior colleges “serv[e] their local taxing districts” and “[a]ll authority not vested [in the state] is reserved and retained locally in each of the respective public junior college districts or in the governing boards of such junior colleges...”). These would probably also include a Texas State Technical College campus.

Executive Order GA-28 provides that “local government operations [may take place] as determined by the local government...with no occupancy limits.” **As such, a mayor probably has no authority over an outdoor gathering conducted by a community college.**

-State Colleges and Universities: These entities are arguably “state agencies.” *Whitehead v. Univ. of Tex. Health Science Center at San Antonio*, 854 S.W.2d 175, 180 (Tex. App. - San Antonio 1993, no writ) (“A state agency, as an arm of the state, is shielded by the sovereign immunity available to the state government.”); *Nat’l Sports & Spirit, Inc. v. Univ. of N. Tex.*, 117 S.W.3d 76, 81 (Tex. App. - Fort Worth 2003, no pet.) (“As an agency of the State, UNT enjoys the protection afforded by this sovereign immunity, except in instances where immunity has been expressly waived by statute.”); Op. Tex. Att’y Gen. No. C-690 (1966) (University of Houston, a state agency, not required to secure municipal building permit).

On March 25, the Texas attorney general issued a [letter](#) providing that: (1) state agencies and their contractors are not subject to local declarations; and (2) the governor’s orders are superior to cities and counties. He expressly stated that “political subdivisions may not restrict the ability of any state agency...to provide governmental services.” **Thus, a mayor probably has no authority over an outdoor gathering conducted by a public college or university.**

-Private Religious Colleges: These entities are probably governed by the Texas attorney general’s letter “[To Religious Private Schools in Texas](#).” While some envisioned the letter as applying to elementary and secondary schools, we have no reason to believe it is so limited. The letter states: “as protected by the First Amendment and Texas law, religious private schools may continue to determine when it is safe for their communities to resume in-person instruction free

from any government mandate or interference. Religious private schools therefore need not comply with local public health orders to the contrary.”

Moreover, outdoor gatherings at religious schools frequently begin with a prayer. Because of that, the governor’s and attorney general’s “[third revised joint guidance for houses of worship during the COVID-19 crisis](#)” memo states: “when state or local governments issue orders prohibiting people from providing or obtaining certain services, they must ensure that these orders do not violate these constitutional and statutory rights.”

Finally, Executive Order GA-28 expressly states that “religious services” may continue with no occupancy limits (GA-28 #1.b.). **Based on the governor’s and attorney general’s positions, a mayor probably has no authority over an outdoor gathering conducted by a private religious college.**

We are not saying that the attorney general’s informal letters are binding. To the contrary, we aren’t even acknowledging that they are correct statements of the law. At this time, however, it probably makes sense to defer to them to avoid municipal entanglement in the virus/religious debate.

-Private Non-Religious Colleges: No provision of GA-28 or any other order or proclamation exempts a non-religious private college from the more than 10 person outdoor gathering limit. **Thus, this type of college would need to seek mayoral approval for such a gathering.**

A fun drinking game is trying to name one of the 60-plus private colleges in Texas that are NOT affiliated with a religion. That is, only if you DON’T like to drink! (Rice maybe? Which else?)

*The analyses here relates to gatherings that are *not* collegiate sporting events. As noted above, any college or university sporting event is exempt from city regulation and can operate at a maximum of 50 percent of the normal operating limits as determined by the owner (see GA-28 #2.a.).

8/25/2020

What’s the latest on the Gulf storms?

Hurricane Laura, which is expected to hit somewhere along the Texas or Louisiana coast sometime late Wednesday or early Thursday, is forecast to turn into a Category 3 storm or higher by landfall, according to [The Weather Channel](#).

A handful of counties and the Cities of Port Arthur and Galveston have issued mandatory evacuation orders. Go to the following website for up-to-date information: <https://gov.texas.gov/hurricane>.

The Texas Municipal League Intergovernmental Risk Pool (IRP) has [resources available for cities](#), including a link to the main TML’s [emergency management web page](#).

City officials who need immediate assistance from TML legal can contact Scott Houston, TML general counsel, at gencounsel@tml.org or by phone at 512-231-7464. If you need TML IRP assistance, please contact one of the following:

- Mike Rains 512-491-2342
- David Nix 512-491-2426
- David Goldston 512-491-2347

Stay safe everyone.

8/26/2020

What's the latest on the Gulf storms?

Hurricane Laura is now a category 4 (at least) hurricane and appears to moving slightly east as it approaches the Texas/Louisiana border, according to [The Weather Channel](#). Many more cities have issued voluntary evacuation orders since yesterday. Visit this website for up-to-date information: <https://gov.texas.gov/hurricane>.

We'll be thinking of all of those in her path tonight. The Texas Municipal League Intergovernmental Risk Pool (IRP) has [resources available for cities](#), including a link to the main TML's [emergency management web page](#). If you need further TML IRP assistance, please contact one of the following:

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The Governor [announced](#) that [he has added 36 counties](#) to his State Disaster Declaration due to the threat of severe rain, wind, and flooding. He also discussed evacuation efforts throughout the state, and announced that reception centers in San Antonio, Dallas-Fort Worth, and Austin will open later today. The state is providing buses to transport Texans who are evacuating. There are also over 225,000 hotel rooms available across the state to provide shelter to evacuees. A full list of mandatory and voluntary evacuations can be found on the [Texas Hurricane Center](#) web page. Governor Abbott urged Texans to take action now to protect themselves and their property.

8/27/2020

What's the latest on the Gulf storms?

Based on [very preliminary reports](#), officials in Southeast Texas are “sounding optimistic that their corner of the state had escaped the worst of the hurricane's impact.” Even so, more than 100,000 Texans are without power in the East Texas counties of Jefferson, Orange, and Hardin.

If you need hurricane-related assistance, the Texas Municipal League Intergovernmental Risk Pool has [resources available for cities](#), including a link to the main TML’s [emergency management web page](#). If you need further TML IRP assistance, please contact one of the following:

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City officials who need immediate assistance from TML legal can contact Scott Houston, TML general counsel, at gencounsel@tml.org or by phone at 512-231-7464.

8/31/2020

What’s the latest on the Gulf storms?

If you need hurricane-related assistance, the Texas Municipal League Intergovernmental Risk Pool has [resources available for cities](#), including a link to the main TML’s [emergency management web page](#). If you need further TML IRP assistance, please contact one of the following:

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9/8/2020

What’s the latest virus-related threatening letter from the attorney general to a local government?

Nothing like a threatening letter to a county to welcome us back from a much-needed long weekend. According to a [press release](#) from the attorney general last Friday (September 4):

“Attorney General Ken Paxton today [issued a letter](#) to Cameron County Judge Eddie Trevino warning against a control order issued jointly by Judge Trevino and the county’s health authority that specifically dictates how religious private schools may operate. The order, which attempts to prohibit in-person instruction at religious private schools until September 28, 2020, violates the United States and Texas Constitutions and the Texas Religious Freedom Restoration Act. ‘The order prohibiting in-person instruction blatantly disregards the religious freedoms guaranteed by federal and state law, rendering it invalid,’ said Attorney General Paxton. ‘There are robust constitutional and statutory protections unique to religious individuals and communities, specifically including religious private schools. Religious private schools may determine for themselves when to reopen free from any government mandate or interference.’”

The press release above is pasted in verbatim. As we've said before, we are not saying that the attorney general's informal letters are binding. To the contrary, we aren't even acknowledging that they or his previously-issued [guidance to religious private schools](#) are correct statements of the law. But a city enacting regulations contradicting them could face action by the attorney general.

With cities being asked to do so much in relation to the pandemic, is there one, single thing that really gets your goat?

Oh yes, indeed there is: irresponsible college students. Let's begin with this: what is the purpose of attending college? Each student will likely have a different answer, but the key points have been: (1) to prepare for finding a job; and (2) just as important, to help with the transition from being a no-cares teen to a thoughtful adult.

Forbes [describes the second point](#) this way: “[C]ollege is about more broadly preparing a person for success in life – to be an engaged and enlightened citizen capable of thinking critically and communicating clearly, ultimately able to thrive in their well-being.”

That's what makes this [The Texas Tribune article](#) about students flaunting virus protocols by “partying off campus” so frustrating:

“Schools, desperate to keep their doors open but worried about health risks to their students, are being put in the uncomfortable position of having to govern young adult behavior that is mostly happening off university property.

But while reports of those crackdowns are beginning to increase, most Texas universities aren't penalizing individual students for partying that takes place off-site.

Instead, **those schools are relying heavily on cities**, property managers, national organizations and the students themselves **to combat risky off-campus behavior that threatens to increase community spread of the coronavirus.**”

Is the idea here that cities should “babysit” college students, which needlessly diverts city law enforcement resources from more pressing tasks? Perhaps the colleges and universities should make a student infraction of virus protocols (i.e., the “law”), no matter where it occurs, a part of their code of conduct. That would allow schools to enforce violations of the code with suspension or expulsion.

Of course, just like with most other facets of preventative measures, the issue seems to now be politicized. According to the [New York Times](#), “a civil liberties lawyer raised a concern that, having invited students back to campus, it was unfair of colleges to punish nonconforming behavior too harshly. The schools have a responsibility to persuade students to put public health above their impulse to have a good time...”

Agreed. We are officially party-poopers, but never before have partying students been so acutely dangerous to others.

9/10/2020

What's the latest virus-related cautionary letter from the attorney general to a local government?

The attorney general couldn't let a county get all his attention, so he also sent a letter to a *city* to close out the week. According to a press release from the attorney general yesterday (September 9):

“Attorney General Ken Paxton today [warned the City of Brownsville](#) against its invalid order limiting all restaurant capacity to less than 25 percent of total listed occupancy. As it stands, the city's order directly contradicts Governor Greg Abbott's orders and exceeds the city's lawful authority. Executive Order GA-28 expressly allows certain restaurants to “operate at up to 50 percent” and allows restaurants, and not cities, to decide whether to operate at a capacity at or below this limitation.

‘The City of Brownsville’s order clearly conflicts with Governor Abbott’s order. It is imperative that we remain consistent in our application of limitations, and that the restaurants operating within the state’s limitations are allowed to do so,’ said Attorney General Paxton. ‘The city should immediately review and revise this unlawful order.’

Here's our usual disclaimer that you've seen many times now: The press release above is pasted in verbatim. We are not saying that the attorney general's informal letters are binding. To the contrary, we aren't even acknowledging that they are correctly reasoned. But a city enacting regulations contradicting them could get sued by the attorney general or others.

9/24/2020

How should cities treat COVID-19 health screening records?

Luckily, the Texas State Library and Archives Commission (TSLAC) is here to help with the answer. Earlier this week, TSLAC [posted on their blog](#), *The Texas Record*, some helpful guidance on how cities handle COVID-19 screening records.

9/30/2020

Is my city in “an area with high hospitalizations” so that restaurants, gyms, libraries, and other establishments can't open up to 75 percent of the listed occupancy?

Pursuant to [GA-30](#), the governor authorized the following establishments to re-open to 75 percent occupancy, up from 50 percent, so long as the establishment is not located in “an area with high hospitalizations”:

1. in-store, non-CISA retail establishments;

2. dine-in restaurants, defined as “[o]nly restaurants that have less than 51 percent of their gross receipts from the sale of alcoholic beverages, and whose customers eat or drink only while seated.”
3. non-CISA office buildings;
4. non-CISA manufacturers;
5. museums and libraries; and
6. gyms and exercise facilities and classes.

The governor’s office characterizes “an area with high hospitalizations” as a [Trauma Service Area](#) in which the percentage of hospitalizations due to COVID-19 exceeds 15 percent for seven consecutive days. Once that happens, a Trauma Service area cannot lose its high-hospitalization designation until it experiences seven consecutive days in which the COVID-19 hospitalization rate is 15 percent or less.

At the moment, four Trauma Service Areas (out of 22 total Trauma Service Areas) are designated as having high hospitalizations, [according to the Texas Department of State Health Services](#). Those four regions are:

1. Trauma Service Area M (Waco area);
2. Trauma Service Area S (Victoria area);
3. Trauma Service Region T (Laredo area); and
4. Trauma Service Region V (Lower Rio Grande Valley area).

The establishments listed above may only open to 50 percent occupancy in these four regions, while the same establishments in every other region of the state may open to 75 percent occupancy. Additionally, pursuant to [GA-31](#), elective surgeries are postponed in hospitals within these four regions.

Interested city officials can access up-to-date data on the hospitalization rate within their Trauma Service Area [here](#) (first click on “Combined Hospital Data over Time by Trauma Service Area (TSA)” and then, within the Excel Spreadsheet, select “COVID Hospitalizations (%)”).

10/1/2020

How can cities use Coronavirus Relief Fund (CRF) revenue to assist their school districts with the connectivity technology needed for remote learning?

Back in July, as part of the [Operation Connectivity](#) initiative, Governor Abbott [announced](#) the allocation of \$200 million in state CRF funds “for the purchase of eLearning devices and home internet solutions to enable remote learning during the COVID-19 pandemic for Texas students that lack connectivity.” The state’s \$200 million is designed to match \$200 million in funding from local school districts for Wi-Fi hotspots and personal devices.

The Texas Education Agency (TEA) is encouraging local school districts to reach out to their cities to use a portion of city CRF allocations to assist with local match funding. TEA has prepared [this flyer](#) to help explain the role that cities can play to fund remote learning initiatives

in their communities. U.S. Department of Treasury CRF [guidance](#) indeed authorizes cities to use CRF revenue on “[e]xpenses of actions to facilitate compliance with COVID-19-related public health measures, such as...[e]xpenses to facilitate distance learning, including technological improvements, in connection with school closings to enable compliance with COVID-19 precautions.”

One caveat bears mentioning. Cities that receive their CRF allocations through the Texas Division of Emergency Management (TDEM) must comply with the [terms and conditions document](#) limiting the use of those funds in a way that is more stringent than federal guidelines. More specifically, TDEM requires at least 75 percent of a city’s allotment be spent on the following three categories: (1) medical expenses; (2) public health expenses; and (3) payroll expenses for employees substantially dedicated to mitigating or responding to the public emergency. Funding to facilitate remote learning does not fit any of these categories. Instead, it fits within the group of authorized expenditures for which a city may only use up to 25 percent of its allotment of CRF money. In other words, cities receiving their CRF allocations through TDEM are restricted in how much can be used to support remote learning.

Yesterday, Senator Robert Nichols (R-Jacksonville) sent [this letter](#) to Senator Jane Nelson (R-Flower Mound), who chairs the Senate Finance Committee, asking her to work with other state leaders to eliminate TDEM’s 75 percent limitation so that local governments can gain the flexibility to assist their local school districts and students.

City officials in cities that are limited by the 75 percent restriction are encouraged to continue working with their state officials to lessen restrictions on use of CRF revenue.