



## West Virginia

### I. Summary of Home Rule in West Virginia

- The West Virginia Constitution and legislature grant general home rule authority to municipalities, but the judiciary has historically interpreted the scope of local autonomy narrowly.
- The establishment of the Home Rule Pilot Program has provided municipalities with an additional mechanism through which to implement local initiatives in recent years.
- Municipalities may still be preempted by state legislation and the constitution. Any municipal ordinance that conflicts or is inconsistent with a state statute or the state Constitution is void.

### II. Source and Scope of Municipal Home Rule Authority

#### *General Home Rule Authority:*

Municipalities derive their home rule authority from the 1936 Municipal Home Rule Amendment to the West Virginia Constitution. W. VA. Const. art. VI, § 39(a). In 1969, the legislature recodified the state’s municipal laws, indicating that the statute’s provisions would supersede conflicting provisions in a municipal charter, in order to achieve uniformity in the powers granted to municipalities.<sup>1</sup> In rewriting the state’s municipal code, the legislature clearly intended to “confer on cities a substantial degree of local autonomy, subject to legislative override through general laws.”<sup>2</sup>

The West Virginia Code grants all cities the plenary power and authority “to provide for the government, regulation and control of the city’s municipal affairs.”<sup>3</sup> The Code defines “municipal affairs” broadly, including eleven areas, such as “[t]he transaction of the city’s business,” “[t]he government, protection, order, conduct, safety, and health of persons or property therein,” and “[t]he adoption and enforcement of local police, sanitary, and other similar regulations.”<sup>4</sup>

Beyond these general powers granted to home rule municipalities, the Code gives all municipalities a range of express powers, including the power to “provide for the elimination of hazards to public health and safety and to abate or cause to be abated anything which in the

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<sup>1</sup> 1969 W. Va. Acts ch. 86 (codified in relevant part at W. VA. CODE § 8-1-6 (2017)).

<sup>2</sup> Robert M. Bastress, Jr., *Localism and the West Virginia Constitution*, 109 W. VA. L. REV. 683, 699 (2007).

<sup>3</sup> W. VA. CODE ANN., § 8-12-2(a).

<sup>4</sup> W. VA. CODE ANN., § 8-12-2(a).

opinion of a majority of the governing body is a public nuisance” and to “protect and promote the public morals, safety, health, welfare and good order.”<sup>5</sup>

However, in spite of the legislature’s broad delegations, the West Virginia Supreme Court of Appeals, the state’s highest court, has interpreted the scope of local autonomy narrowly, often by invoking the Dillon’s Rule canon.<sup>6</sup> That said, judicial interpretations of local authority point to the court’s willingness to recognize, at least in some cases, that municipalities do have statutorily-delegated plenary powers even in the absence of an explicit grant of authority.<sup>7</sup>

#### *Home Rule Pilot Program:*

In March 2007, the West Virginia legislature enacted the Municipal Home Rule Pilot Program to 1) allow municipalities to explore new ideas and determine whether they should be implemented statewide and 2) determine the viability of broadening municipalities’ home rule authority.<sup>8</sup> The Pilot allowed pilot cities to implement changes in all matters of local governance without regard for state laws or rules as long as the changes did not violate the U.S. Constitution, the West Virginia Constitution, federal law, and state and local laws related to taxation, the environment, and marriage and divorce laws.<sup>9</sup>

A Home Rule Board selects municipalities for the program, reviewing and evaluating recommendations for the plan, and authorizing amendments.<sup>10</sup> Municipalities apply and proposed specific initiatives; as of January 2019, the Board had approved over 200 proposals from thirty-four cities.<sup>11</sup> Through the original Pilot, municipalities successfully implemented local initiatives in a wide array of areas, including a municipal sales tax, ordinances regulating real property, “brunch bills” to loosen restrictions on serving alcohol, streamlining bidding and

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<sup>5</sup> W. VA. CODE ANN. § 8-12-5 (23), (44).

<sup>6</sup> See, e.g., *State ex rel. Charleston v. Hutchinson*, 176 S.E.2d 691, 696 (W. Va. 1970) (explaining that “[a] city has only the powers granted to it by the legislature, and it must be expressly granted or necessarily or fairly implied or essential and indispensable” and that “[i]f any reasonable doubt exists as to whether a municipal corporation has a power, the power must be denied”); *Rogers v. City of S. Charleston*, 256 S.E.2d 557, 561 (W. Va. 1979) (holding that the state statute allowing municipalities to “purchase, hold and sell” real property does not allow a municipality to execute an option to buy that property, explaining, in part, that “a public corporation created by statute is vested only with such powers and authority as are expressly given by the Legislature or as fairly arise by necessary implication from the express statutory grant or as are requisite to enable the corporation to carry out the function” and noting that the language of W. Va. Code Ann. § 8-1-7 “relaxes the common law rule of strict construction somewhat but it does not lift all restrictions on the exercise of power”).

<sup>7</sup> See, e.g., *Sharon Steel Corp. v. City of Fairmont*, 334 S.E.2d. 616, 625 (W. Va. 1985) (finding that the City of Fairmont had the authority to define hazardous waste as a nuisance despite no *explicit* grant of power to do so); *but see City of Morgantown v. Nuzum Trucking Co.*, 786 S.E.2d 486, 493 (W. Va. 2016) (holding that because the state law addressing the regulation of traffic by local authorities does not grant explicit authority to a municipality to regulate the weight or size of vehicles traveling upon a state road, the municipality lacked the authority to regulate the weight or size of vehicles on connecting parts of the state road system).

<sup>8</sup> West Virginia Legislative Auditor: Performance Evaluation & Research Division, Special Report: Municipal Home Rule Pilot Program [hereinafter Special Report] 7 (Nov. 2012), <http://revenue.wv.gov/homerule/Documents/Resources/jahomerulelegislativeaudit2012.pdf> (citing W.V. Code § 8-1-5a(a)).

<sup>9</sup> W.VA. CODE ANN., § 8-1-5a.

<sup>10</sup> Special Report, *supra* note 8, at 9.

<sup>11</sup> Data compiled from documents located at <https://revenue.wv.gov/homerule/Resources/Pages/Resources.aspx> and <https://revenue.wv.gov/homerule/Pages/Home-Rule-Cities.aspx>.

contracting processes, ordinances to issue on-the-spot citations for public nuisance, health, and safety code violations, land bank creation, and zoning changes.<sup>12</sup>

In 2019, the state legislature passed Senate Bill 4, establishing the Municipal Home Rule Pilot Program as a permanent program, providing for the continuation of plans and amendments approved during the Pilot and expanding eligibility to all 232 municipalities.<sup>13</sup> The Program Guidelines list specific plan requirements and areas that local authorities may not regulate through the program.<sup>14</sup> In addition, the now-permanent program prohibits certain categories of local laws entirely, including, laws that “affect[] persons or property outside the boundaries of the municipality,” “enact[] an occupation tax, fee, or assessment payable by a nonresident,” or “prohibit or effectively limit the rental of a property . . . or regulate the duration, frequency, or location of such rental” (although cities “may regulate activities that arise when a property is used as a rental” if the regulation applies uniformly “to all properties, without regard to whether such properties are used as a rental”).<sup>15</sup>

#### IV. County Home Rule

Counties in West Virginia have some authority to structure their elected government,<sup>16</sup> but they do not possess the broader home rule powers granted to municipalities.<sup>17</sup>

#### V. Preemption

West Virginia’s grant of home rule authority to municipalities does not include any immunity from state preemption.<sup>18</sup> Consistent with the provisions of the Municipal Home Rule Amendment, any municipal ordinance that conflicts or is inconsistent with a state statute or the state constitution is void.<sup>19</sup> The state’s Supreme Court appears to use the terms “conflict” and “inconsistent” interchangeably.<sup>20</sup> The fact that the provisions of a municipal ordinance do not

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<sup>12</sup> See LEAP Memorandum, Mar. 29, 2017, at 128–39 (on file with author); see also West Virginia Municipal Home Rule Board, *West Virginia Municipal Home Rule Pilot Program: Summary Report 2018* (Jan. 2019), <https://revenue.wv.gov/HomeRule/Documents/AnnualSummaryReports/HomeRule.AnnualSummaryReport.2018.pdf> (for 2018 summary).

<sup>13</sup> W.VA. CODE ANN., § 8-1-5a.

<sup>14</sup> Municipal Home Rule Program Guidelines (2019), <https://revenue.wv.gov/HomeRule/Documents/HomeRule.Guidelines.pdf>.

<sup>15</sup> W.VA. CODE ANN., § 8-1-5a; see also Municipal Home Rule Program Guidelines (2019) at 2–3, <https://revenue.wv.gov/HomeRule/Documents/HomeRule.Guidelines.pdf>.

<sup>16</sup> W. Va. Const. art. IX, § 13.

<sup>17</sup> See Robert M. Bastress, Jr., *Localism and the West Virginia Constitution*, 109 W. Va. L. Rev. 683, 723 (2007).

<sup>18</sup> See, e.g., *Am. Tower Corp. v. Common Council of City of Beckley*, 557 S.E.2d 752, 756 (W. Va. 2001) (declaring it a “fundamental” legal principle that “where an ordinance is in conflict with a state law the former is invalid”) (internal quotations and citations omitted).

<sup>19</sup> *Id.*

<sup>20</sup> See, e.g., *Vector Co. v. Bd. of Zoning Appeals of City of Martinsburg*, 184 S.E.2d 301, 304 (W. Va. 1971) (holding that a municipal zoning ordinance requiring a four-fifths vote to obtain an exception was invalid because it “creates an inconsistency or conflict” with a state law requiring a majority vote.); *Phillips v. City of Morgantown*, 19 S.E.2d 603, 606 (W. Va. 1942) (holding that a Morgantown ordinance imposing restrictions on the sale of beer was invalid because it forbade and permitted beer to be sold within hours different from those specified by state law).

correspond exactly to the provisions of a state law does not necessarily render the ordinance invalid, particularly if the ordinance’s provisions are “well within the limits set under [state law].”<sup>21</sup>

Local governments can also try to enact an ordinance through the Municipal Home Rule Program, as long as the proposed policies do not conflict with federal and state laws in the 24 policy areas enumerated in the pilot program statute.<sup>22</sup>

## **VI. Local Legislative Immunity**

Forty-three state constitutions have some sort of “speech or debate” clause, which essentially provides *absolute immunity* to state legislators for their legislative acts. Federal legislators enjoy the same immunity. These constitutional provisions ensure that legislators cannot be held liable for their actual speech or debate on the legislative floor, nor for other legislative acts such as voting and participating in committee meetings.

The West Virginia Constitution contains a speech or debate clause affording state legislators immunity from civil suits,<sup>23</sup> and the state Code confers absolute immunity to state legislators for all “legislative acts” and “all actions within the legislative sphere.”<sup>24</sup> It is unclear whether this constitutional or statutory immunity applies to local elected officials. No case appears to have applied these protections to local officials. Notably, Section 4-1A-1 states that “[t]he protections provided by the Speech or Debate Clause and the Separation of Powers Doctrine were not written into the national and state Constitutions simply for the personal or private benefit of members of Congress, the state Legislatures and *local governing bodies*, but were intended to protect the integrity of the legislative process by insuring the independence of individual legislators.”<sup>25</sup>

## **VII. Other Relevant Considerations**

### *Single Subject Rule:*

Article VI, § 30 of the West Virginia Constitution requires all laws to contain only one “object.”<sup>26</sup>

### *Special & Local Laws:*

The West Virginia Constitution and the legislature distinguish between local laws (or special laws) and general laws. The state constitution prohibits local or special laws pertaining to

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<sup>21</sup> *Town of Burnsville v. Kwik-Pik, Inc.*, 408 S.E.2d 646, 653 (W. Va. 1991).

<sup>22</sup> See W.VA. CODE ANN., § 8-1-5a.

<sup>23</sup> W. Va. Const. art. VI, § 17.

<sup>24</sup> W.VA. CODE ANN., § 4-1A-6.

<sup>25</sup> W. Va. CODE ANN. § 4-1A-1.

<sup>26</sup> W. Va. Const. art. VI, § 30.

18 enumerated categories of legislation<sup>27</sup> and requires general laws “for all other cases for which provision can be so made.”<sup>28</sup> Courts have explained that “[i]f a statute enacted by the legislature applies throughout the state and to all persons, entities or things within a class, and if such classification is not arbitrary or unreasonable, the statute must be regarded as general rather than special.”<sup>29</sup> The ban on special legislation does not “preclude the legislature from enacting legislation designed to affect specific classes of political subdivisions, where . . . each entity within that particular class of political subdivision is dealt with equally.”<sup>30</sup> Courts will more generally ask “whether the classification is reasonably related to the purpose of the legislation.”<sup>31</sup>

#### *Unfunded Mandates:*

While some state constitutions prohibit the legislature from passing unfunded mandates onto counties or municipalities, the West Virginia Constitution does not appear to include such a prohibition. That said, legislators have been careful not to include language that might be perceived as a potential unfunded mandate for counties or municipalities in proposed legislation.<sup>32</sup> In 1998, House legislators introduced a bill prohibiting unfunded mandates pertaining to education, but they were unsuccessful.<sup>33</sup>

#### *Private Laws:*

An additional consideration in assessing whether a local government has the authority to adopt a particular policy is whether state law recognizes a “private law exception.” Private law can generally be defined as law that “establishes legal rights and duties between and among private entities.”<sup>34</sup> Some states, either by constitutional provision, statute, or case law, prohibit municipalities from regulating private law. This can take the form of a “subject-based” exception prohibiting any regulation of “private law” or a narrower exception prohibiting private rights of action.<sup>35</sup>

West Virginia does not appear to clearly prohibit municipalities from passing “private” legislation or creating private rights of action. However, given the enduring legacy of Dillon’s Rule in West Virginia and the courts’ historical reluctance to recognize local governments’ broader home rule authority, courts may find that municipalities may only have the authority to create a private right of action when expressly permitted to do so by state law.<sup>36</sup>

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<sup>27</sup> W. Va. Const. art. VI, § 39.

<sup>28</sup> *Id.*

<sup>29</sup> *State ex rel. Appalachian Power Co. v. Gainer*, 143 S.E.2d 351, 363 (W.Va. 1965).

<sup>30</sup> *Gallant v. Cty. Comm'n of Jefferson Cty.*, 575 S.E.2d 222, 229 (W.Va. 2002).

<sup>31</sup> *Id.* at 230.

<sup>32</sup> *See, e.g.*, Matthew Umstead, W.Va. House panel removes unfunded mandate from classroom cameras bill, HERALD-MAIL MEDIA (Mar. 4, 2019), [https://www.heraldmillmedia.com/news/tri\\_state/west\\_virginia/w-va-house-panel-removes-unfunded-mandate-from-classroom-cameras/article\\_78119c3d-2046-5d0d-a2a3-44bdaa49754c.html](https://www.heraldmillmedia.com/news/tri_state/west_virginia/w-va-house-panel-removes-unfunded-mandate-from-classroom-cameras/article_78119c3d-2046-5d0d-a2a3-44bdaa49754c.html).

<sup>33</sup> W.Va. H.B. 4710, 1998 Leg. Sess. (W. Va. 1998).

<sup>34</sup> Gary T. Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 UCLA L. Rev. 671, 688 (1973).

<sup>35</sup> *See* Paul A. Diller, *The City and the Private Right of Action*, 64 Stan. L. Rev. 1109 (2012).

<sup>36</sup> *Id.* at 1129-30.

### *Emergency Powers:*

In West Virginia, the governor or the legislature may declare a state of emergency in the event of an emergency that “exists or may be imminent due to a large-scale threat beyond local control, and that the safety and welfare of the inhabitants” of the state require such a declaration.<sup>37</sup>

During a state of emergency, the governor may exercise additional emergency powers. Most notably, the governor has the authority “[t]o suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders, rules of any state agency, if strict compliance therewith would in any way prevent, hinder or delay necessary action in coping with the emergency,”<sup>38</sup> and “[t]o perform and exercise other functions, powers and duties that are necessary to promote and secure the safety and protection of the civilian population.”<sup>39</sup>

State law provides political subdivisions of the state, including municipalities, with the authority to establish a “local organization for emergency services.”<sup>40</sup> Furthermore, each political subdivision in carrying out the state’s emergency laws has the “power to . . . protect the health and safety of persons and property and provide emergency assistance.”<sup>41</sup> In addition, political subdivisions have the authority to exercise their emergency powers “without regard to time-consuming procedures and formalities prescribed by law (excepting mandatory Constitutional requirements) pertaining to the performance of public work, entry into contracts, . . . employment of temporary workers, . . . purchase of supplies and materials, . . . and appropriation and expenditure of public funds.”<sup>42</sup>

The charters or codes of municipalities may give local governments the authority to declare a state of emergency and to exercise specific emergency powers.<sup>43</sup>

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<sup>37</sup> W.VA. CODE ANN., § 15-5-6(a).

<sup>38</sup> W.VA. CODE ANN., § 15-5-6(c)(7).

<sup>39</sup> W.VA. CODE ANN., § 15-5-6(c)(11).

<sup>40</sup> W.VA. CODE ANN., § 15-5-8.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *See, e.g.*, CHARLESTON, W. VA., CODE § 42-82, 83 (granting Charleston’s mayor the authority to declare a state of emergency and to implement any or all of seven enumerated restrictions); MORGANTOWN, W. VA., CHARTER § 2.14 (allowing Morgantown authorities to enact an ordinance without complying with the usual procedural requirements for enacting an ordinance “in the case of a pressing public emergency.”).