



## Overview of Local Authority & Preemption for Advocates in Tennessee

*This document provides a summary of local authority and preemption in Tennessee that can inform advocates' efforts to adopt new policies at the city or county level. State preemption laws limit or prohibit local policymaking in different areas. In addition to an overview of how local authority operates in Tennessee, this document provides examples of important policies that are preempted (i.e., prohibited), emergency powers that may be available to local officials, examples of key COVID-19 policies that local governments in Tennessee appear to have the power to implement, and ways in which advocates may expand their local authority through repeal of existing preemption and/or voter-initiated ballot measures.<sup>1</sup>*

### I. Summary of Home Rule in Tennessee

- Tennessee's constitution allows cities and counties to adopt home rule, though few have done so (2 of the state's 95 counties have adopted home rule, as have 14 of the state's 348 cities).
- For counties, home rule primarily allows the jurisdiction to choose its structural form of government. All counties can, however, adopt regulations pursuant to their police powers (the authority to protect the health, welfare, and safety of residents) by a resolution passed by a 2/3 majority,<sup>2</sup> though such regulations will only apply within unincorporated areas of the county.
- For cities, the adoption of home rule "fundamentally change[s] the relationship between the General Assembly and [home rule] municipalities, because such entities now derive their power from sources other than the prerogative of the legislature."<sup>3</sup>

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<sup>1</sup> The information provided in this document does not, and is not intended to, constitute legal advice. Individuals and organizations should contact an attorney licensed to practice in their state to obtain advice with respect to a particular legal matter.

<sup>2</sup> Tenn. Code Ann. § 5-1-118(c)(1).

<sup>3</sup> *S. Constructors, Inc. v. Loudon Cty. Bd. of Educ.*, 58 S.W.3d 706, 714 (Tenn. 2001).

- Municipalities that do not operate under home rule are generally subject to Tennessee’s application of Dillon’s Rule, which strictly and narrowly construes local authority.<sup>4</sup>

## II. What Policies Are Preempted in Tennessee?

The following are examples of subject areas where the state has expressly preempted local action:

- Minimum wage<sup>5</sup>
- Paid or unpaid leave<sup>6</sup>
- Employment nondiscrimination<sup>7</sup>
- Wage theft<sup>8</sup>
- Ban-the-box<sup>9</sup>
- Predictive scheduling<sup>10</sup>
- Local hire<sup>11</sup>
- Requiring contractors to provide employee benefits<sup>12</sup>
- Classifying marketplace contractors (gig workers) as employees<sup>13</sup>
- Project labor agreements<sup>14</sup>

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<sup>4</sup> Courts have applied Dillon’s Rule in Tennessee to hold that “municipal governmental authority should be strictly construed, and . . . that a municipal government may exercise a particular power only when one of the following three conditions is satisfied: (1) the power is granted in the ‘express words’ of the statute, private act, or charter creating the municipal corporation; (2) the power is ‘*necessarily or fairly implied* in, or *incident to*[,] the powers expressly granted’; or (3) the power is one that is neither expressly granted nor fairly implied from the express grants of power, but is otherwise implied as ‘essential to the declared objects and purposes of the corporation.’” *Id.* at 710–11 (emphasis in original). In addition, any “fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation and the power is denied.” *Id.* at 711 (internal quotations and citation omitted).

<sup>5</sup> Tenn. Code Ann. § 50-2-112(a)(1).

<sup>6</sup> Tenn. Code Ann. § 7-51-1802(b)(1)(A).

<sup>7</sup> Tenn. Code Ann. § 7-51-1802(a).

<sup>8</sup> Tenn. Code Ann. § 50-2-113(d).

<sup>9</sup> Tenn. Code Ann. § 7-51-1802(d).

<sup>10</sup> Tenn. Code Ann. § 7-51-1802(f).

<sup>11</sup> Tenn. Code Ann. § 12-4-117(a).

<sup>12</sup> Tenn. Code Ann. § 7-41-1802(b).

<sup>13</sup> Tenn. Code Ann. § 50-8-102(a).

<sup>14</sup> Tenn. Code Ann. § 12-4-903.

- Plastic bags and containers<sup>15</sup>
- Rent control & inclusionary housing<sup>16</sup>
- Short-term rentals<sup>17</sup>
- Transportation Network Companies<sup>18</sup>
- Sanctuary cities<sup>19</sup>
- Firearms<sup>20</sup>

### III. Emergency Powers in Tennessee

- The General Assembly has granted the governor and the Tennessee emergency management agency (TEMA) a wide range of broad powers for emergency situations.<sup>21</sup> The law specifies that “[s]tate policy for responding to disasters is to support local emergency response efforts,” while taking into account that “[i]n the case of a major or catastrophic disaster, . . . the needs of residents and communities will likely be greater than local resources” such that “the state must be capable of providing effective, coordinated, and timely support to communities and the public.”<sup>22</sup>
- The state’s governor is given the power to “[s]uspend any law, order, rule or regulation prescribing the procedures for conduct of state business or the orders or rules or regulations of any state agency, if strict compliance with any such law, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in coping with the emergency.”<sup>23</sup> Case law does not clarify what statutes might pertain to the “conduct of state business,” but the Attorney General has concluded that such laws include, for example, the state laws governing the licensing of health care professionals.<sup>24</sup>
- The state’s emergency powers do not appear to localities with a clear, alternate source of “emergency” authority to adopt local policies that are generally preempted by state statute, such as paid sick leave, minimum wages, contractor standards, and sanctuary policies. However, state law does allow political subdivisions in carrying out the state’s emergency laws to “provide for the health and safety of persons and property, including

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<sup>15</sup> Tenn. Code Ann. § 7-51-2002.

<sup>16</sup> Tenn. Code Ann. § 66-35-102.

<sup>17</sup> Tenn. Code Ann. § 13-7-603.

<sup>18</sup> Tenn. Code Ann. § 65-15-302.

<sup>19</sup> Tenn. Code Ann. § 7-68-103.

<sup>20</sup> Tenn. Code Ann. § 39-17-1314.

<sup>21</sup> See Tenn. Code Ann. § 58-2-101, *et seq.*

<sup>22</sup> Tenn. Code Ann. § 58-2-102(c).

<sup>23</sup> Tenn. Code Ann. § 58-2-107(e)(1).

<sup>24</sup> Tenn. Op. Att’y Gen. No. 07-107 (July 13, 2007).

emergency assistance to the victims of any emergency.”<sup>25</sup> A court may view an exercise of emergency powers (and preemption of a policy enacted through emergency powers) differently from an exercise of powers during non-emergency circumstances, especially if the emergency policy is clearly temporary.<sup>26</sup>

#### **IV. Examples of Key COVID-19 Policies That Cities and Counties May Have Authority to Adopt**

- State law expressly preempts local laws imposing requirements on contractors pertaining to paid leave, health insurance benefits, information that an employer may request from an applicant or as part of the hiring process, employee scheduling, minimum wage, and wage theft. State law does not appear to preempt other contractor standards, such as a local just cause standard, bond requirements, local retaliation protections for workers unable to work due to quarantine requirements, and disclosure requirements involving things like past misconduct or the use of forced arbitration agreements. Additional research would be required to ensure that such a policy does not impermissibly conflict with state law.
- State law does not clearly preempt a local rent or mortgage “freeze” or eviction moratorium. Additional research could identify policy options that would not conflict with state law. Also, state law does not prohibit local governments from managing and controlling their own commercial or residential property.
- Worker health and safety ordinance to protect workers from contracting COVID-19.

#### **V. Repealing Preemption in Tennessee**

- During a time of crisis—and beyond—there may be opportunities to repeal state preemption of local authority.
- Some procedural considerations for repeal include:
  - **Single Subject/Clear Title Rule:**
    - Any effort to repeal existing preemption in Tennessee should take into account the state’s “single subject rule.” The Tennessee Constitution provides that “no bill shall become a law which embraces more than one object, that subject to be expressed in the title.”<sup>27</sup> Ultimately, the subjects

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<sup>25</sup> Tenn. Code Ann. § 58-2-110.

<sup>26</sup> See *Cherokee Country Club, Inc. v. City of Knoxville*, 152 S.W.3d 466, 471 (Tenn. 2004) (striking down an emergency ordinance blocking certain construction permits as conflicting with state land use law, but indicating that a “temporary moratorium” or an ordinance that would “seek to preserve the status quo pending the implementation or consideration of a comprehensive zoning plan” might be viewed differently).

<sup>27</sup> Va. Const. art. IV, § 12.

encompassed in a statute should be “germane to the object and purpose of the act.”<sup>28</sup>

- It is likely that a preemption repeal bill may address preemption of a variety of subject areas as long as all subjects are tied to the expansion or clarification of local authority, but advocates should consult with an attorney who can provide advice on the best approach in order to comply with the single subject rule.

- **Repealing & Granting Affirmative Authority:**

- Nothing in state law appears to preclude a bill that repeals existing preemption legislation and also grants affirmative authority to regulate in that issue area, but advocates should consult with an attorney or legislative sponsor who can consult with legislative staff on bill drafting practices in Tennessee.

For more information on efforts to repeal preemption and lessons learned from successful campaigns in other states, including sample model language, see [this report](#)<sup>29</sup> from the Local Solutions Support Center and the National Employment Law Project.

## **VI. Is There A Ballot Measure Process in Tennessee?**

- Tennessee residents cannot adopt new statewide statutes or constitutional amendments through ballot measures proposed by residents.
- Local charters in Tennessee may give residents the authority to adopt or amend ordinances through a local ballot initiative process. According to Ballotpedia, only two charter counties (Shelby and Knox); 3 metropolitan governments (Nashville-Davidson, Lynchburg-Moore, and Hartsville-Trousdale); and 9 cities (Chattanooga, Knoxville, Algood, Bristol, Cookeville, Eagleville, Gaitlinburg, Jackson, and Murfreesboro) have adopted a local ballot initiative process to adopt or amend local ordinances: Hampton, Lynchburg, Norfolk, and Portsmouth.<sup>30</sup>

## **VII. What Organizations Are Fighting Against Preemption & Supporting Local Democracy?**

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<sup>28</sup> *West v. Industrial Development Bd. of Nashville*, 332 S.W.2d 201, 202 (Tenn. 1960).

<sup>29</sup> Laura Huizar, Local Solutions Support Center and National Employment Law Project, *Repealing Preemption: Defending Local Democracy Now Includes A Growing Focus on Recovering Lost Local Authority* (Dec. 2019), <https://www.abetterbalance.org/wp-content/uploads/2020/01/White-Paper-Repealing-Preemption-FINAL.pdf>.

<sup>30</sup> Ballotpedia, *Laws Governing Local Ballot Measures in Tennessee*, [https://ballotpedia.org/Laws\\_governing\\_local\\_ballot\\_measures\\_in\\_Tennessee](https://ballotpedia.org/Laws_governing_local_ballot_measures_in_Tennessee) (last viewed June 10, 2020).

Advocates interested in working with other organizations in Tennessee focused on protecting local democracy and strengthening local authority can email [LSSC@supportdemocracy.org](mailto:LSSC@supportdemocracy.org).

For additional support, please contact The Local Solutions Support Center at [LSSC@supportdemocracy.org](mailto:LSSC@supportdemocracy.org).