



Local Authority Overview

Eviction Moratorium, Other Tenant Protections, and Related Housing Laws

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The Local Solutions Support Center (LSSC) is a national hub that coordinates and creates efforts to counter the abuse of preemption and strengthen local democracy. Our goals are to raise awareness of the consequences of state preemption and strengthen the power of local governments to advance policies that promote equity, inclusion, public health, and civic participation. In keeping with this mission, this memo summarizes some critical legal considerations for local governments seeking to protect tenants affected by the COVID-19 pandemic.

With significant challenges still facing tenants across the country in the current crisis, cities and counties have instituted a range of protections including eviction moratoria, grace periods for the repayment of rent, temporary rent freezes, tenant notice requirements, limitations on late payment fees, rent regulation, and right-to-counsel programs, among others. Determining whether local governments have authority to implement local tenant protections, particularly in the face of potential state preemption, remains a challenge.

This memo summarizes analysis by LSSC in a sample of states—Florida, Minnesota, Mississippi, Pennsylvania, Tennessee, Texas, Washington, and West Virginia—suggesting there may be areas where local governments across the country are empowered to act, notwithstanding notes of caution with respect to state preemption that must be examined for any given policy. Although preemption is state—and policy—specific, LSSC identified common considerations for local governments when deciding whether to pursue tenant protections. Local governments have much latitude to respond to the ongoing eviction crisis, but any proposed policy should be carefully constructed to minimize potential state preemption.

Background

In 2020, cities and counties across the country prepared for an unprecedented wave of evictions due to COVID-19. With millions of jobs lost due to the pandemic, many tenants found it impossible to pay their rent on time. From the outset, local officials pursued efforts to mitigate evictions.¹ Seattle Mayor Jenny Durkan, for example, issued her first emergency order in March of 2020 establishing a “moratorium on residential evictions for non-payment,” limiting the ability of landlords to issue notices of termination or charge late fees.² Los Angeles Mayor Eric Garcetti issued a similar public order prohibiting landlords from evicting residential tenants in the city during the emergency “if the tenant is able to show an inability to pay rent due to circumstances related to the COVID-19

¹ Dima Williams, *U.S. Cities and Counties Halt Evictions Amid Coronavirus Pandemic*, Forbes, Mar. 14, 2020, <https://www.forbes.com/sites/dimawilliams/2020/03/14/cities-and-counties-halt-evictions-to-fight-the-coronavirus/#5e0e14b214b8>.

² City of Seattle, *City Emergency Order: Moratorium on Residential Evictions* at 3, https://durkan.seattle.gov/wp-content/uploads/sites/9/2020/03/Civil-Emergency-Order-Moratorium-on-Residential-Evictions_final_3.14.2020.pdf.

pandemic,” and providing up to six months after the emergency period to repay back due rent.³ In Texas, cities required landlords to provide tenants with notice (e.g., 60-90 days) before initiating eviction proceedings.⁴ And several cities, even before the pandemic, implemented right-to-counsel programs for eviction proceedings, an approach that has been shown to reduce the number of evictions.⁵

With the expiration of the federal eviction moratorium and many states no longer providing statewide protections, the last remaining protections keeping many tenants safely and stably housed during the pandemic require local governments to decide the housing fate of vulnerable citizens. For instance, Philadelphia implemented an Eviction Diversion Program allowing tenants and landlords to resolve disputes outside of court and requiring that landlords apply for rental assistance before filing an eviction.⁶ On September 21, 2021, Mayor Durkan of Seattle signed an executive order for the sixth extension of the city’s moratorium, providing protection into January 2022.⁷ And most recently, the DeKalb County Board of Commissioners voted to recommend extending the rent assistance in their county, making it the only county in Georgia attempting to provide continued protections for their residents.⁸ Local governments across the United States continue to grapple with whether they have authority to adopt policies to keep tenants in their homes.⁹

Authority to Act

Local governments derive their authority from state constitutional provisions and state statutes that can vary significantly from state to state and across cities, counties, or other political subdivisions. Local governments under what is known as Dillon’s Rule possess only the powers that are expressly delegated to them by state and courts construe such delegations narrowly.¹⁰ Under home rule, by contrast, state constitutional law (and/or state statutes) grants local governments broader authority to govern, generally as long as local policies do not conflict with state law.¹¹ While many states subscribe to Dillon’s Rule for at least some local governments, home rule provisions have become increasingly common.¹² Moreover, local governments in all jurisdictions tend to have authority to act on matters of local concern or in the event of an emergency.

³ City of Los Angeles, Public Order Under City of Los Angeles Emergency Authority (Mar. 15, 2020), <https://www.lamayor.org/sites/g/files/wph446/f/article/files/Mayor%20Garcetti%20Emergency%20Order%20-%20March%2015%202020.pdf>.

⁴ See Audrey McGlinchy, Austin City Council Approves 60-Day ‘Grace Period’ For Owed Rent, KUT 90.5, Mar. 26, 2020, <https://www.kut.org/post/austin-city-council-approves-60-day-grace-period-owed-rent>; Austin, Tex., Ordinance No. 20200326-090, <https://www.austintexas.gov/edims/document.cfm?id=338086>; Evelin Garcia, Renters In San Marcos Will Have Additional Time To Pay Rent Citing Economic Relief Efforts, Community Impact Newspaper, Apr. 10, 2020, <https://communityimpact.com/austin/san-marcos-buda-kyle/coronavirus/2020/04/10/renters-in-san-marcos-will-have-additional-time-to-pay-rent-citing-economic-relief-efforts/>; Lori Brown, Proposal That Would Give Dallas Tenants 60-day Grace Period For Evictions Due to COVID-19 Referred To Committee, FOX 4 KDFW, Apr. 1, 2020, <https://www.fox4news.com/news/proposal-that-would-give-dallas-tenants-60-day-grace-period-for-evictions-due-to-covid-19-referred-to-committee>.

⁵ Office of Civil Justice, New York City Human Resources Administration, Universal Access to Legal Services: A Report on Year One of Implementation in New York City (fall 2018), <https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ-UA-2018-Report.pdf>

⁶ City of Philadelphia, Philadelphia Launches Eviction Diversion Program. <https://www.phila.gov/2020-08-31-philadelphia-launches-eviction-diversion-program/>

⁷ City of Seattle, Executive Order 2021-07: COVID-19 Civil Emergency – Extensions of City Closures and Relief Measures at 3. <https://durkan.seattle.gov/wp-content/uploads/sites/9/2021/09/Executive-Order-2021-07-Continued-Extension-of-COVID-19-Closures-and-Relief-Policies.pdf>

⁸ Zachary Hansen, *DeKalb plans to extend COVID-19 aid program for renters, landlords*, The Atlanta Journal-Constitution, Sept. 8, 2021, <https://www.ajc.com/neighborhoods/dekalb/dekalb-plans-to-extend-covid-19-aid-program-for-renters-landlords>

⁹ See, e.g., Apartment Association of Los Angeles County, Inc. v. City of Los Angeles et al. (C.D. Cal., filed June 11, 2020); Homeowners Association of Philadelphia v. City of Philadelphia (E.D. Pa., filed July 6, 2020).

¹⁰ See *City of Clinton v. The Cedar Rapids & Missouri River Railroad Co.*, 24 Iowa 455 (1868).

¹¹ See generally National League of Cities, Principles of Home Rule for the 21st Century (2020), <https://www.nlc.org/sites/default/files/2020-02/Home%20Rule%20Principles%20ReportWEB-2.pdf>.

¹² All the states LSSC analyzed for this memorandum have enacted home rule for at least some local governments.

The police power, granted to local governments through home rule or delegated by state statute, generally encompasses policies designed to promote health, safety, or the general welfare. Most tenant-protection policies arguably fall within this authority because they are designed to counteract the negative effects of evictions on both public health and the general welfare. That said, some courts have struck down local rent control ordinances on the grounds that such ordinances go beyond the scope of local authority because they implicate matters of state concern.¹³ Some states place weight on the distinction between matters of state concern and matters of local concern, although the approach differs from state to state, and some states do not find the distinction relevant. Advocates and officials considering local tenant protections should evaluate whether this question affects local authority to act on a particular issue.¹⁴ Local tenant protections should thus be tailored to address local housing needs and to limit extraterritorial effects. Temporary anti-eviction policies, such as eviction moratoria, grace periods, rent freezes, notice requirements, and caps on late payments for tenants affected by the pandemic, are particularly well-suited to local authority because they address the immediate needs of local tenants without significantly impacting regional or state housing markets. However, even long-term solutions such as right-to-counsel programs and rent control ordinances could potentially be within local authority depending on the specifics.

Alternatively, local governments may be able to invoke local emergency powers as a basis for enacting tenant protections during the pandemic. Like other forms of local authority, local emergency powers are ultimately derived from the state, but broad emergency powers in various states appear to allow for local emergency actions that would otherwise be expressly preempted or for which local authority is unclear. Texas's emergency law, for example, allows a county judge or mayor to control the "movement of persons and the occupancy of premises,"¹⁵ a power that appears to include housing protections tied to controlling the movement of persons and occupancy of premises. Minnesota's emergency laws give political subdivisions the power in emergencies to "enter into contracts and incur obligations necessary to combat the disaster by protecting the health and safety of persons and property."¹⁶ Pennsylvania law gives political subdivisions the authority to declare local disaster emergencies themselves "upon finding a disaster has occurred or is imminent."¹⁷ Tennessee's emergency laws allow political subdivisions in carrying out the state's emergency laws to "provide for the health and safety of persons and property, including emergency assistance to the victims of any emergency."¹⁸ West Virginia similarly allows political subdivisions to "protect the health and safety of persons and property and provide emergency assistance to the victims of such disaster."¹⁹ In order to invoke local emergency powers, local governments must demonstrate the existence of an actual emergency as defined by state law. In some states, disease outbreaks and epidemics are expressly considered within the statutory definition of an emergency.²⁰ In states where this is not the case, the legal definition of an emergency is often sufficiently open-ended to include a pandemic.²¹ Some local governments also have broad authority to declare a state of emergency.²²

¹³ See, e.g., *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30 (Colo. 2000), as modified on denial of reh'g (Feb. 26, 2000) (holding that rent control is matter of both state and local concern and therefore beyond local authority).

¹⁴ *Id.*

¹⁵ Tex. Gov't Code Ann. § 418.108.

¹⁶ Minn. Stat. Ann. § 12.37.

¹⁷ 35 Pa. Cons. Stat. § 7501(b).

¹⁸ Tenn. Code Ann. § 58-2-110.

¹⁹ W. Va. Code Ann. § 15-5-8.

²⁰ "Emergency means an occurrence, or threat thereof, whether natural, technological, or manmade, in war or in peace, that results or may result in substantial injury or harm to the population, or substantial damage to or loss of property; provided, that natural threats may include disease outbreaks and epidemics." Tenn. Code Ann. § 58-2-101 (7).

²¹ "Emergency means any occurrence, or threat thereof, whether natural, technological, or manmade, in war or in peace, which results or may result in substantial injury or harm to the population or substantial damage to or loss of property." Fla. Stat. Ann. § 252.34 (internal quotations omitted).

²² *Id.*

State Preemption

Regardless of the scope of their local authority, local governments are generally subject to preemption by state legislative enactments that directly or indirectly curtail local authority. A local action is expressly preempted when state law explicitly prohibits local governments from taking that action.

Even without express preemption, local policies in most states may run afoul of what is known as conflict, where a local policy makes pursuing state law practically difficult, or field preemption, where states are found to displace local authority by occupying an entire area of regulation or policy. Notably, it is possible that a court may view an exercise of emergency powers (and the 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.

In six of the states LSSC examined, most local tenant-protection policies have not been expressly preempted, with the exception of rent control, which is expressly preempted in many states.²³ Rent control is often broadly defined to include any policy that affects the amount of rent landlords can charge, but even in states where local rent control ordinances are expressly preempted, local governments may still be able to implement temporary versions of rent regulation through express emergency powers.²⁴ Both Texas and Florida, for example, allow local rent control policies in the case of local housing emergencies.²⁵ Emergency exceptions to state rent control preemption statutes are not only relatively common in the states LSSC looked at, but they effectively amount to a grant of local authority in the context of a global pandemic. Furthermore, given the apparent lack of state laws regarding eviction moratoria and other tenant protections, express preemption is unlikely to be a major concern for local governments work to prevent evictions.

Implied preemption, whether conflict or field preemption, may pose a challenge for local governments attempting to implement local anti-eviction policies, given that most states have regulated contracts, rental housing, and evictions extensively. In Pennsylvania, Philadelphia's temporary city code amendment prohibiting late fees and interest on rent paid late due to COVID-19 pandemic was not preempted by the state's Landlord-Tenant Act allowing landlords to recover rent in arrears.²⁶ The court's determination that it would be inequitable to require tenants facing financial hardship due to the pandemic to pay interest and late fees was consistent with the Act.²⁷ Advocates should consider consulting with local housing and local-government experts to determine what policies might address tenants' needs while avoiding conflicts with state law.²⁸ That said, temporary tenant protections designed to mitigate the effects of the pandemic are less likely to conflict with state laws than longer-term anti-eviction programs if they modify state regulatory schemes rather than displacing them altogether. A local rent freeze, notice requirement, or eviction moratorium, for instance, might temporarily limit a landlord's right to evict tenants for the nonpayment of rent under state law, but those policies arguably do not fundamentally alter that right and in some states would not appear to conflict with the eviction process available to landlords. Thus, while states differ in how they define and resolve conflicts between local and state law, local governments likely have a range of policy options available to address the eviction crisis.

²³ See, e.g., Fla. Stat. Ann. § 166.043; Tenn. Code Ann. § 66-35-102; Tex. Loc. Gov't Code Ann. § 214.902(a); Miss. CodeAnn. § 21-17-5(2)(h).

²⁴ Fla. Stat. § 166.043.

²⁵ Tex. Loc. Gov't Code Ann. § 214.902; Fla. Stat. Ann. § 125.0103 (allowing cities to adopt rent control in housing emergencies); Fla. Stat. Ann. § 166.043 (allowing counties to adopt rent control in housing emergencies).

²⁶ HAPCO v. City of Philadelphia, 482 F. Supp. 3d 337 (E.D. Pa. 2020).

²⁷ *Id.*

²⁸ Tex. Const. art. I, § 16 (contract clause); Minn. Stat. Ann. §§ 507.01 & 508.01 et seq. (state housing laws).