

What authority do counties have to restrict public gatherings, control access to or close private facilities, or enact local curfews?

SCAC legal staff has already opined that various provisions in state law give counties the broad discretion to control access or close buildings and property owned and controlled by the county. SCAC legal staff has recently been asked to research the authority of counties to address local restrictions on public gatherings, local restrictions on access to private facilities, including bars and restaurants during a public health emergency, and the enactment of necessary local curfews.

Restrictions of public gatherings:

SCAC legal staff is of the opinion that the courts would likely hold that a county could not unilaterally restrict public gatherings. Article 5, Chapter 4 of Title 44 (Emergency Health Powers) grants the SC Department of Health and Environmental Control (DHEC) authority over persons or groups concerning the control of the spread of contagious/infectious diseases. DHEC is required by law to seek court orders before acting to restrict individuals or groups. Nothing in the act grants authority to the counties to act in lieu of DHEC. Further, the right of public assembly is a fundamental right protected by the federal and state constitutions. Therefore, any ordinance adopted at the local level infringing on that right will be examined under a strict scrutiny analysis. To survive strict scrutiny, a statute must serve a compelling state interest and be narrowly tailored to serve that interest. *Disabato v. South Carolina Ass'n of School Adm'rs*, 404 S.C. 433746 S.E.2d 329 (2013). The US Supreme Court has consistently held that a fundamental right protected by the constitution can only be abridged if it serves to protect a compelling government interest and is the least restrictive means available. "A governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade area of protected freedom." *Griswold v. Connecticut*, 381 U.S. 47985 S.Ct. 1678 (1965).

Private facilities including bars and restaurants: During a declared State of Emergency, including a public health emergency the powers to control private facilities are granted to DHEC, in coordination with local governments. SECTION 44-4-300 of the Emergency Health Powers Act specifies the powers DHEC possesses in regards to control over both public and private facilities during a health emergency. That section reads in part:

After the declaration of a state of public health emergency, DHEC may exercise, in coordination with state agencies, local governments, and other organizations responsible for implementation of the emergency support functions in the State Emergency Operations Plan for handling dangerous facilities and materials, for such period as the state of public health emergency exists, the following powers over dangerous facilities or materials:

(1) to close, direct and compel the evacuation of, or to decontaminate or cause to be decontaminated, any facility of which there is reasonable cause to believe that it may endanger the public health;

SCAC legal staff is of the opinion that a county does not have the authority to unilaterally order the closure of private facilities, including bars and restaurants. However, § 44-4-300 indicates that DHEC should work in coordination with a particular county or counties that have a significant number of positive Coronavirus cases to consider individual closures as is warranted to protect public health.

Curfews: SCAC legal staff has been asked to research the authority of counties to enact curfews if necessary, and the legal basis for enacting a curfew. It has been traditionally recognized that curfews are a legitimate tool that local governments possess to address public health, safety and order. Section 4-9-25 of the Home Rule Act gives county council the authority to take those actions “necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government.” During the period of a state of emergency or public health emergency, the Home Rule Act provides a statutory procedure for enacting temporary ordinances to address public emergencies. S.C. Code § 4-9-130 provides in part:

To meet public emergencies affecting life, health, safety or the property of the people, council may adopt emergency ordinances; but such ordinances shall not levy taxes, grant, renew or extend a franchise or impose or change a service rate. Every emergency ordinance shall be designated as such and shall contain a declaration that an emergency exists and describe the emergency. Every emergency ordinance shall be enacted by the affirmative vote of at least two-thirds of the members of council present. An emergency ordinance is effective immediately upon its enactment without regard to any reading, public hearing, publication requirements, or public notice requirements. Emergency ordinances shall expire automatically as of the sixty-first day following the date of enactment.

Various state courts have considered the issue of adult curfews on numerous occasions. The temporary imposition of a curfew on all persons in a community, limited in time and made necessary by substantial public necessity, is a legitimate and proper exercise of the police power. Curfews are constitutionally permissible only where there is some real and immediate threat to the public safety which cannot be adequately met through less drastic alternatives and where the curfew itself is tailored in duration and application as to meet the specific crisis without necessary infringement of individual liberties. *Cleveland v. McCardle*, 139 Ohio St.3d 414 12 N.E.3d 1169 2014. The U.S. Fourth Circuit Court has however held that juvenile curfews (curfews for those persons under the age of 18) invokes a lower level of legal scrutiny, and requires that the curfew

is adopted to address a legitimate government interest. *Schleifer by Schleifer v. City of Charlottesville*, 159 F.3d 843 (4th Cir. 1998)

SCAC legal staff is of the opinion that local curfews would likely be upheld by the courts only in those cases where the individual facts indicate a compelling need by the county to control the public access to certain prescribed areas for a defined length of time and the curfew is the least restrictive means to accomplish the county's goals.

The information provided is not considered legal advice. Please consult with your county attorney for answers to specific questions within your county. For general inquires please contact SCAC legal staff at (803) 252-7255 or 1-800-922-6081.