

SC Counties COVID-19 FAQs

Q1. What authority does a county have to control access or close public buildings in the county?

SCAC legal staff is of the opinion that county council has broad authority to control either public access to or the closure of public buildings or property owned by the county, other than the offices or property of directly elected officials such as the courthouse and Sheriff's operations.

Various provisions within Title 4 (Counties) of the S.C. Code of Laws grants counties authority over their own property. First § 4-1-10(4) grants the county the authority [t]o do all acts in relation to the property and concerns of the county necessary thereto. Next, counties have been granted broad police powers related to the health, safety, of county citizens pursuant to § 4-9-25, which reads in part:

“All counties of the State, in addition to the powers conferred to their specific form of government, have authority to enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of these powers in relation to health and order in counties or respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them.”

These two sections together strongly suggest that counties have the authority to undertake actions necessary to control their property in order to maintain the health, general welfare, and order of the county's citizens. The last paragraph of § 4-9-25 directs that the powers granted to counties in that section are to be liberally construed in favor of the county.

It should be noted that while the S.C. Code of Laws grants control of the county courthouse to the Clerk of Court, a [memorandum](#) by the Chief Justice of the S.C. Supreme Court has directed county and municipal employees working within the unified court system should follow the directives of their specific counties.

Should a county be forced to close offices/public buildings and release employees to alternate work sites, the U.S. Department of Labor has provided a [website](#) to provide information on legal issues involving the Fair Labor Standards Act and other federal labor laws.

Q2. What authority does county council have to cancel or postpone council meetings?

SCAC legal staff is of the opinion that absent a declaration of a state of emergency by the Governor, county councils must meet at least once in each and every calendar month. Section 4-9-110 of the S.C. Code provides in part that county council after public notice shall meet at least once each month but may meet more frequently in accordance with a schedule prescribed by the council and made public. That section also provides that council determines its own rules and order of business.

The Attorney General has opined that § 4-9-110's provision that councils determine their own rules applies only to rules of procedure or order and does not act to circumvent conflicting state laws. In an opinion issued last year, the Attorney General wrote that "a court likely would hold that S.C. Code Ann. § 4-9-110 requires county councils to hold publicly noticed meetings at least once in each and every calendar month." 2019 WL 3243868 (S.C.A.G.)

The underlying issue in that 2019 opinion did not implicate the authority of the Governor to act after the declaration of a state of emergency pursuant to Article 7, Chapter 3 of Title 1 of the S.C. Code. §§1-3-410 to 490.

Governor McMaster's [Executive Order 2020-09](#) dated March 15, 2020, included Section 4 to recommend the cancellation, postponement, or rescheduling of public gatherings of 100 persons or greater. Section 4 however, specifically excluded state or local government meetings. Therefore, SCAC legal staff's opinion is that county council must continue to meet at least once in each and every calendar month, including those months during which the state is under a declaration of a state of emergency.

Q3. What authority does county council have in conducting public meetings?

If a county decides to continue conducting public meetings there are alternatives to address the health of members and the public. Section 30-4-20(d) of the Freedom of Information Act (FOIA) defines a public meeting as including both physical and electronic means. A county can choose to hold a meeting by electronic means such as telephone or video, as long as the public has the means to attend. Governor McMaster's [Executive Order 2020-10](#) provides in Section Five that "to the extent possible state or local government bodies should utilize any available technology or other reasonable procedures to conduct such meetings and accommodate public participation via virtual or other remote or alternate means." Prior Attorney General opinions have opined that the public attendance is met if those attending by alternate means have the ability to fully hear what is being discussed and to be heard during any public comment period. All meetings held by alternative means must be conducted by the usual public meetings provisions of FOIA such as notice, agenda, and minutes.

Q4. What authority do counties have to restrict public gatherings, control access to or close private facilities, or enact local curfews?

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 S.C. 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 U.S. 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: Governor McMaster's [Executive Order 2020-10](#) provides in Section 4 that restaurants must suspend on-premises or dine-in consumption beginning Wednesday, March 18, 2020, through Tuesday, March 31, 2020.

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.

Q5. What authority do counties have to shift county employees to different jobs, including EMS and law enforcement positions?

Law enforcement: The ability of Class III officers to perform class I activities is prohibited and we don't know of a work around. We believe you can use reserves and state constables as long as the reserves are supervised by Class I officers and as long the state constables are on the "work list" for that department as approved by SLED.

The ability to extend city police jurisdiction is covered under local governments ability to enter into mutual assistance agreements. This could be covered in your emergency ordinance as long as the city is in agreement.

Emergency Medical Services: The ability to alter staffing of ambulances to include volunteer staff is covered under DHEC regulations. Please note that Governor McMaster issued [Executive Order 2020-10](#) on March 17th and directs state agencies to suspend regulations that hinder response to COVID-19. We suggest you contact DHEC and ask that you be provided relief from any regulation limiting flexibility in staffing ambulances.

The ability to use nonessential personnel to back fill 911 dispatch and other emergency logistics falls within the county's general authority. If a license is required to perform the function, we suggest contacting the overseeing agency and ask for relief from the regulation requiring the license pursuant to the Executive Order. Even though we opine that you can generally shift personnel under non-emergency circumstances you can still put these measures in your emergency ordinance.

Hiring retired government employees: The Senate approved a 6-month suspension of the earnings limitation for return to work retirees who are being rehired to address COVID-19. SCAC staff expects the House to adopt this provision and for the Governor to quickly approve it. Assuming the provision is enacted, counties will be able to rehire any retirees in any department as long as the purpose of the rehire is to combat and address COVID-19. The rehired retirees will not be subject to the earnings limitation pursuant to this provision.

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.