How Do You Know if Your Local Government Has the Legal Authority to Adopt Housing and Homelessness Related Policies in Response to the Coronavirus Pandemic?

As the coronavirus pandemic spreads, local elected officials and advocates alike are asking what they can do for their communities across a range of policies—including those that respond to our pressing housing and homelessness needs. This guide can help you determine whether your community has the authority it needs to adopt these kinds of policies. This guide is not intended to be legal advice; rather it aims to encourage communities, city attorneys, and advocates to examine the possibilities for creative local action and solutions.

1. What’s the Policy?

Identify the policy you want to implement.

Some policies might be targeted and short-term, while others might aim to continue long-term.

Across the country, local jurisdictions are considering policies such as: moratoria on evictions and utility shutoffs; rent control and rent freezes; repurposing public property for additional shelter capacity; repeal of preemption laws that block policies such as those prohibiting discrimination based on source of income; and other policies focused on housing stability, affordability and homelessness. (Not all of these examples may be appropriate for your community.)

2. Is there Existing Authority?

Determine whether your local government has the authority to implement this policy using existing powers.

First, look at your state constitution and state statutes to assess what powers have been delegated to local governments.  

Second, if your local government operates under a charter, review the charter to determine if it authorizes the local policy.

Third, if you are considering a policy that may implicate private contractual rights (e.g. moratorium on rent increases) or inter-jurisdictional cooperation (e.g. moratorium on utility shut offs), you may need to engage in additional legal research.

You should carefully assess what state law intends to expressly prohibit and determine whether your policy can avoid preemption.

3. Is the Policy Expressly Preempted?

If you believe you have the legal authority to implement the policy, determine if your state has expressly preempted the policy.

(If your state legislature has expressly preempted the policy, go to STEP 5 to consider whether your local government might have authority using special emergency powers.)

RESOURCES
Some resources to identify state preemption laws (these are not exhaustive and may not answer whether a particular variation on a policy is preempted):

- Local Solutions Support Center (preemption of equitable housing policies) – link;
- Partnership for Working Families preemption tracker (various issues) – link;
- National League of Cities tracking (various issues) – link.

Footnotes

a. Cities and counties get their authority to enact local laws from state constitutions and statutes. Depending on your state, your city, town, or county might have “home rule” powers. Governments operating with “home rule” authority are often granted broad “police powers” to adopt laws that further health, safety, morals, and general welfare. Some states are considered “Dillon’s Rule” states where local governments generally possess only the powers delineated by state code.

b. Beyond the broad grants of power described above, some states grant local governments specific authority to enact certain kinds of policies, such as laws pertaining to land use and zoning, housing quality, etc.

c. In some states, local authority to enact legislation depends on the kind of jurisdiction you are in. For example, sometimes cities have broader authority under state law than special districts or counties.

d. A charter acts as your local government’s constitution and is often found as part of your local Code of Ordinances.

The Local Solutions Support Center has created fact sheets that summarize the powers given to local governments in all 50 states – link.
State law barriers vary state to state. Barriers can include forms of “implied” or “field” preemption or a “private law exception,” which prohibits the regulation of rights and duties between private individuals. There are areas of housing, such as landlord-tenant law, that can have broad state-level regulation, while there are other legal areas, such as land use and zoning, that have been traditionally municipal affairs.

If there is no express preemption, consider whether your local policy would conflict with state law or whether state law imposes other barriers.

RESOURCES
- Consult the Local Solutions Support Center’s summaries of local authority for all 50 states – link.
- Understand different forms of preemption with this ChangeLab Solutions resource – link.

In light of the coronavirus, New Jersey just passed a law that would prohibit residential tenant eviction and eviction due to residential foreclosure during certain emergencies.

In North Carolina, state law gives local governments authority to declare a state of emergency and enact ordinances that prohibit or restrict a range of activities, including “activities or conditions the control of which may be reasonably necessary to maintain order and protect lives or property during the state of emergency.” N.C. Gen. Stat. Ann. § 166A-19.31. In Wisconsin, state law allows local governments to order “whatever is necessary and expedient for the health, safety, protection, and welfare of persons and property within the local unit of government in the emergency . . . .” Wis. Stat. Ann. § 323.14.

In Austin, TX, for example, the local law states that if a local disaster is declared by the mayor under state law, “the mayor may issue public orders and direct City employees to take action necessary to: . . . protect public health, safety, and welfare.” Austin, TX, Code tit. 2, ch. 2-6, art. 3, § 2-6.23. In Durham, NC, the Durham charter authorizes the mayor to declare a state of emergency and “impose the prohibitions or restrictions that he or she deems necessary or suitable to a particular state of emergency.” Durham, NC, Code ch. 22, art. 1, § 22-3.

If you find that state law preempts the policy you are considering, consider whether your state and local government’s emergency powers may provide authority.

First, look at the emergency powers in your state law. A number of states give governors and legislatures expansive powers for emergencies. A number of states also appear to give local governments broad powers to declare and address emergencies.

Second, assess whether your local charter or code addresses emergency declarations and/or other emergency powers. These local charters and codes may shed light on what your mayor and local governing body have the power to do during the coronavirus crisis.

NOTE: Whether emergency powers can overcome existing state preemption will depend on your particular state’s law. Check with an attorney licensed to practice in your state to determine how emergency powers may impact your ability to pursue a local policy.

Consider calling on the governor and legislature to take executive, legislative, or administrative action.

Demands for action by a governor or legislature can include calling for the repeal of preemption or expanded local powers. A governor, legislature, or other state actor may also be able to temporarily suspend enforcement of state laws or temporarily lift bans.

RESOURCE
Local Solutions Support Center resources for effective repeal of preemption can be found here: link and link.

For additional support, please contact The Local Solutions Support Center at LSSC@supportdemocracy.org