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Preemption & the Pandemic: New Trends in State-Local Conflict and the Imperative for
Structural Change

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Local Solutions Support Center

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Can Local Emergency Authority Provide a Basis for Local COVID-19 Policy When State Law Otherwise Preempts?

As the COVID-19 crisis persists, local-government emergency authority has become a critical topic for local governments. Local governments around the country continue to evaluate policies their residents need during this crisis and whether they have local authority to adopt those policies.

In many cases, local officials are finding that their authority to implement urgent policies, such as premium pay for essential workers, may be limited, if not entirely preempted, by state law. In other cases, such as eviction moratoria, they are finding that their authority to adopt COVID-19 responses is not clear and potentially subject to preemption challenges in court.

A number of states grant local governments broad authority to protect the health and safety of residents through the state's emergency powers laws. Given ambiguities about preemption, local officials, advocates, and scholars are asking whether local emergency powers granted by state laws may provide local authority to implement temporary emergency measures. Specifically, questions related to local emergency authority and preemption include:

- Do emergency powers provide clear local authority to act where, in normal circumstances, it is unclear whether state law would preempt a given policy?
- Can emergency powers offer a source of authority for a temporary local policy that state law expressly preempts under normal conditions?

For example, if a state statute expressly preempts local paid sick leave policies, could broad emergency powers granted to localities by a separate state statute authorize a local paid sick leave policy during an emergency like COVID-19?

Courts, in general, do not appear to have clarified the scope and practical consequences of broad state statutory grants of local emergency powers. Assessing statutory text, case law, and attorney general opinions in three states (Arizona, Florida, and Tennessee), the analysis below suggests that it might be plausible to argue, in some states, that a state's broad grant of local emergency authority allows local governments to adopt temporary emergency policies even when state law expressly preempts such policies under normal circumstances or when it is unclear whether a local policy might be preempted by state law.

This memo aims only to engage in a preliminary way with the question of what a state's grant of emergency authority to local governments means for localities facing the COVID-19 crisis. The Local Solutions Support Center (LSSC) encourages city attorneys, academics, and other practitioners to add to this research and potentially look to state courts across the country to clarify the meaning and scope of local emergency authority. LSSC is available to offer additional technical support through our network of academics and practitioners specializing in local government and preemption.

I. Understanding Broad Grants of Local Emergency Authority: Focusing on Arizona, Florida, and Tennessee

In general, state courts around the country have not shed much light on the meaning or scope of broad emergency authority granted to localities in state statutes. This memo therefore focuses on grants of emergency authority in three states: Arizona, Florida, and Tennessee. For each state, this memo illustrates the broad nature of the statutes and highlights case law or attorney general opinions that appear to shed light on how emergency powers might be interpreted by the state's courts should a locality rely on those powers to adopt a local emergency policy that would normally be preempted by other state laws.

In Arizona, language in the statutes granting local governments emergency powers could be read to permit local emergency policies that would normally be preempted. In Florida, state law grants localities broad authority to provide for the health and safety of persons and property in carrying out the state's emergency laws. No case law or attorney general opinions preclude an argument that such a broad grant of authority should allow a locality to adopt a temporary emergency measure like paid sick leave that would be expressly preempted by another state statute under normal circumstances. Finally, in Tennessee, the state grants the same broad authority to local governments that Florida does, and at least one attorney general opinion appears to support the same argument.

A. Arizona

The Arizona Emergency Management Act, Ariz. Stat. Ann. § 26-307 *et seq.*, grants broad local emergency powers to cities and towns in Arizona. This memo focuses on the broad grant of authority in Sections 26-307 and 26-311 as potential sources of authority to adopt temporary emergency policies that would normally be preempted or face uncertainty with regards to preemption.

a) Ariz. Stat. Ann. § 26-307

Ariz. Stat. Ann. § 26-307(A) states that “cities and towns may make, amend and rescind orders, rules and regulations necessary for emergency functions *but such shall not be inconsistent with orders, rules and regulations promulgated by the governor.*”¹ This section also states that once an order, rule, or regulation issued by a “governing body of a county or other political subdivision” is “filed in the office of the clerk of the political subdivision,” that order, rule, or regulation becomes effective.² At that point, “[e]xisting laws, ordinances, orders, rules and regulations *in conflict with [the Emergency Management Act] or orders, rules or regulations issued under authority of [the Emergency Management Act] are suspended during the time and to the extent that they conflict.*”^{3,4}

¹ Ariz. Stat. Ann. § 26-307(A) (emphasis added).

² Ariz. Stat. Ann. § 26-307(B).

³ *Id.* (emphasis added).

⁴ Ariz. Stat. Ann. § 26-307(D) also states that “[i]n the absence of specific authority in state emergency plans and programs, the governing body of each county, city and town of the state shall take emergency measures as deemed necessary to carry out the provisions of this chapter.” Ariz. Stat. Ann. § 26-307(D).

This text of Section 26-307 arguably allows a local government in Arizona to adopt a local policy that would normally be expressly preempted by state statute as long as the local policy is not “inconsistent with orders, rules and regulations promulgated by the governor.”⁵ For example, if a local ordinance requiring landlords to give tenants a 90 day notice before initiating eviction proceedings would normally conflict with the state’s landlord-tenant statute, Section 26-307 could arguably be read to give a local government authority to adopt such a requirement as part of its coronavirus emergency response as long as it did not conflict with any orders, rules, or regulations issued by the governor himself. Subsection (B) provides that once a local government has issued such a policy, it becomes effective when filed with the locality’s clerk, and “[e]xisting laws . . . in conflict with” the local law issued pursuant to the Emergency Management Act “are suspended during the time and to the extent that they conflict.”⁶

The reference to “existing laws” subject to suspension in Section 26-307 could be a reference to *state* laws or *both* state and local laws given that local “ordinances” are also expressly listed. Arizona courts aim to give meaning to each word in a statute so that “no part is rendered void, superfluous, contradictory or insignificant.”⁷ If Section 26-307 only meant to give local governments authority to suspend *local* ordinances, then the word “laws” becomes irrelevant, and the words “orders, rules and regulations” also become irrelevant to the extent that those are issued at the state level.

A 1979 Attorney General opinion might support this reading of Section 26-307 as providing specific emergency powers to political subdivisions that override more general statutes. In addressing the meaning of Section 26-307 after various amendments, the Attorney General clarified that orders issued pursuant to Section 26-307 by political subdivisions do not have to comply with the state’s Administrative Procedure Act and that Section 26-307 constitutes a “special statute” that “takes precedence over a general statute and thus governs the rule-making procedures for political subdivisions.”⁸ As a “special statute” that takes precedence over a general statute, Section 26-307 should arguably take precedence over a general preemption statute not concerned with emergencies, especially when Section 26-307 also expressly provides that “[e]xisting laws . . . are suspended” to the extent that they conflict with a local order, rule, or regulation adopted pursuant to Section 26-307.

b) Ariz. Stat. Ann. § 26-311

Ariz. Stat. Ann. § 26-311 gives localities broad authority to take actions deemed necessary when a local emergency is declared. Once a local emergency is declared, the local mayor or chairman of the board of supervisors, during the emergency, shall “govern by proclamation and shall have the authority to impose all necessary regulations to preserve the *peace and order* of the city, town, or unincorporated areas of the county. . . .”⁹ The statute notes that this authority includes but is “*not limited to*” the power to (1) impose curfews, (2) order the closing of any business, (3) close public

⁵ Ariz. Stat. Ann. § 26-307(A).

⁶ Ariz. Stat. Ann. § 26-307(B).

⁷ See, e.g., *State v. Windsor*, 227 P.3d 864, 865 (Ariz. Ct. App. 2010) (internal quotations and citation omitted).

⁸ Ariz. Op. Att’y Gen. No. I79-264 (Oct. 19, 1979).

⁹ Ariz. Stat. Ann. § 26-311(B) (emphasis added).

access to any public place, (4) call upon “regular or auxiliary” law enforcement agencies and organizations for assistance, or (5) close government agencies.¹⁰

The meaning of “peace and order” under Section 26-311 is unclear. Arguably, it should include a city’s effort to prevent mass homelessness or the exhaustion of health care services, both threats tied to the COVID-19 crisis. The fact that the statute gives local leaders authority to adopt emergency policies to protect the public, even though it might require extreme measures like the closing of businesses that would otherwise be permitted to operate under state law, suggests that the state legislature intended to allow temporary emergency measures despite possible tension with state laws. It also suggests that the state legislature meant to give local leaders broad discretion in determining what is necessary to preserve “the peace and order.”

c) Other Cases, Decisions, and Opinions Related to Local Emergency Police Powers

Only one opinion appears to have addressed local governments and the state’s Emergency Management Act, and that decision—which involved a flood-control district—would not preclude an argument that local policies that would normally be preempted by state law should be upheld if adopted as temporary emergency measures pursuant to Ariz. Stat. Ann. § 26-307 or Ariz. Stat. Ann. § 26-311.¹¹

Should a city or town in Arizona test the argument that Ariz. Stat. Ann. § 26-307 or Ariz. Stat. Ann. § 26-311 allows localities to adopt temporary emergency measures that would normally face preemption, how Arizona courts interpret potentially conflicting state statutes might be relevant. According to the Arizona Supreme Court, when “legislative intent or objectives are unknown,” courts should “construe seemingly conflicting statutes in harmony when possible,” and “when two statutes truly conflict, either the more recent or more specific controls.”¹² Arizona courts have also explained that courts “presume ‘the legislature, when it passes a statute, knows the existing laws,’” and will take note when there is no indication in “the language, history, or purpose” of a statute that it intended to narrow the protections or powers granted in an earlier statute.¹³

In a case involving a local emergency policy adopted pursuant to Ariz. Stat. Ann. § 26-307 or Ariz. Stat. Ann. § 26-311 that would otherwise conflict with state law, a court may begin by assessing the legislative intent behind the state’s broad grant of local emergency authority. Additional research could perhaps show whether the legislature spoke to the scope of those powers in its deliberations. It is also possible that a court would uphold the local policy based on statutory language alone. A court could find that the local policy is only temporary and designed to deal with an emergency using broad emergency powers specifically granted via state statute, while a preemptive statute does not itself address emergencies and could not have intended to curb important emergency powers without explicit language to that effect. But a court could, of course,

¹⁰ *Id.* (emphasis added).

¹¹ See *A Tumbling-T Ranches v. Flood Control Dist. of Maricopa Cty.*, 217 P.3d 1220, 1244 (Ariz. Ct. App. 2009) (holding that flood control districts are not entitled to immunity under the Emergency Management Act).

¹² *Baker v. Gardner*, 770 P.2d 766, 769 (Ariz. 1988) (en banc).

¹³ See *Berndt v. Arizona Dep’t of Corr.*, 363 P.3d 141, 146–47 (Ariz. Ct. App. 2015), *as amended* (Dec. 8, 2015) (citation omitted).

also view an express preemption statute as conflicting with the statute granting local emergency powers and view a more recent preemptive statute as more specific and controlling.

Notably, on March 31, 2020 the Attorney General of Arizona issued an opinion on local emergency authority that, in part, cautioned that “municipal and county law enforcement agencies must be mindful of the constitutional and statutory liberties that Arizonians enjoy.”¹⁴ The opinion thus signals some skepticism, or at least reservations, on the part of the Attorney General regarding local emergency powers. However, the opinion does not preclude an argument that a temporary emergency local policy that would normally be expressly preempted by state law should be upheld if adopted pursuant to Section 26-307 or Section 26-311.

B. Florida

Fla. Stat. Ann. § 252.38 encourages and authorizes localities to establish emergency management programs by granting them broad authority to implement such programs. The statute also expressly gives political subdivisions, in carrying out the provisions of the State Emergency Management Act, the power to “appropriate and expend funds; make contracts; obtain and distribute equipment, materials, and supplies for emergency management purposes; *provide for the health and safety of persons and property*, including emergency assistance to the victims of any emergency; and direct and coordinate the development of emergency management plans and programs in accordance with the policies and plans set by the federal and state emergency management agencies.”¹⁵

Recently, Fla. Stat. Ann. § 252.38 has been invoked by mayors in issuing emergency declarations and orders.¹⁶ However, there is almost no case law regarding Fla. Stat. Ann. § 252.38 and none that sheds light on how to understand a locality’s authority to “provide for the health and safety of persons and property” in carrying out emergency functions.

Should a Florida court entertain the argument that Fla. Stat. Ann. § 252.38 provides sufficient authority for a local policy that would otherwise be preempted by another state statute, Florida courts’ approach to conflicting state statutes might play a role in the court’s decision. The court would assess whether the grant of power in Fla. Stat. Ann. § 252.38 conflicts with the preemption of local authority in another state statute. Notably, in Florida, courts, “in construing a statute, must, if possible, avoid such construction as will place a particular statute in conflict with other apparently effective statutes covering the same general field. . . . And where the courts can, in construing two statutes, preserve the force of both without destroying their evident intent, it is their duty to do so.”¹⁷ Additionally, “a specific statute covering a particular subject area always controls over a statute covering the same and other subjects in more general terms,” and “[t]he more specific statute is considered to be an exception to the general terms of the more comprehensive statute.”¹⁸

¹⁴ Ariz. Op. Att’y Gen. No. I20-006 (Mar. 31, 2020).

¹⁵ Fla. Stat. Ann. § 252.38 (emphasis added).

¹⁶ See, e.g., City of Palm Coast, Florida, Proclamation (Mar. 15, 2020), https://www.floridaleagueofcities.com/docs/default-source/covid-resources/palmcoast_declaration_31520.pdf?sfvrsn=555d5d5_2; City of Tampa, Mayoral Order #1 Issued Pursuant to City of Tampa Executive Order 2020-01 (Mar. 17, 2020), https://www.floridaleagueofcities.com/docs/default-source/covid-resources/tampa_execorder_restaurants_31720.pdf?sfvrsn=f51d5d5_0.

¹⁷ *Markham v. Blount*, 175 So. 2d 526, 528 (Fla. 1965) (per curiam) (internal quotations and citation omitted).

¹⁸ *McKendry v. State*, 641 So. 2d 45, 46 (Fla. 1994).

“[W]hen two statutes are in conflict, the later promulgated statute should prevail as the last expression of legislative intent.”¹⁹

A court could avoid conflict and preserve both a state preemption statute and the broad grant of local emergency powers in Fla. Stat. Ann. § 252.38 in a situation where a local policy would normally conflict with the preemption statute by allowing the policy only insofar as it addresses a temporary emergency. If a court viewed the statutes as conflicting, it is unclear whether a court would view a more recent preemption statute as the more “specific” statute that applies over a more general emergency powers statute or whether it would view the emergency grant of authority as the more “specific” statute that should control, but certainly the argument could be made for the latter approach given the nature of emergency and the fact that exigencies in crisis cross so many policy domains.

C. Tennessee

The scope of local emergency powers in the state of Tennessee is primarily defined by Tenn. Code Ann. § 58-2-110.²⁰ Like Florida’s emergency powers law, Tennessee state law allows 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.”²¹

No court opinions appear to address this particular grant of authority under Tenn. Code Ann. § 58-2-110.²² At least one Attorney General opinion sheds some light on the interpretation of emergency powers, however. In 2008, the Attorney General of Tennessee issued an opinion holding that localities have the authority to adopt burning bans through an emergency management agency.²³ In part, the Attorney General considered preemption, concluding that although local fire regulations are largely preempted under Tenn. Code Ann. 68-201-101 *et seq.*, localities have the authority to adopt fire regulations under various other state statutes, including Sec. 58-2-101, the emergency powers law.²⁴ This opinion suggests even in an area where state law preempts, a delegation of emergency powers can create an “independent” source of authority that can sidestep state preemption.²⁵

The Supreme Court of Tennessee, similarly to the Florida approach, has explained that “[a] construction which places one statute in conflict with another must be avoided; therefore, we must resolve any possible conflict between statutes in favor of each other, so as to provide a harmonious operation of the laws.”²⁶ In addition, “[i]n the event two acts conflict and cannot be reconciled, the prior act will be repealed or amended by implication to the extent of the inconsistency between the two, because the Legislature is presumed to have knowledge of its prior enactments.”²⁷ But “[r]epeals by implication are not favored . . . and will be recognized only when no fair and

¹⁹ *Id.*

²⁰ Tenn. Code Ann. § 58-2-110.

²¹ *Id.*

²² *Id.*

²³ Tenn. Op. Att’y Gen. No. 08-69 (Mar. 31, 2008)

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Cronin v. Howe*, 906 S.W.2d 910, 912 (Tenn. 1995).

²⁷ *Id.*

reasonable construction will permit the statutes to stand together.”²⁸ Where conflict cannot be avoided, “a more specific statutory provision takes precedence over a more general provision.”²⁹

It is possible that a court could reconcile an express preemption statute with the grant of local emergency powers in Tenn. Code Ann. § 58-2-110 by viewing the express preemption statute as a general prohibition for normal times that should not curb a local government’s discretion when addressing a public health emergency temporarily. It is possible a court might decide that a conflict cannot be avoided, however. In such a situation, it is unclear whether a court would view a more recent preemption statute as the more “specific” statute that controls or whether it would view the emergency grant of authority as the more “specific” statute in that it deals with narrow emergency conditions.

II. Conclusion

Ultimately, this memo attempts to better understand how broad grants of emergency authority to local governments might allow for local policies that would normally be preempted by state law, and the analysis here focuses on Arizona, Florida, and Tennessee. Additional research on the meaning and scope of emergency powers may want to consider similarly broad grants of emergency authority. **Appendix A** offers additional examples of seemingly broad grants of emergency authority to local governments (it is not intended to provide an exhaustive list of statutes to consider).

²⁸ *Id.*

²⁹ *Graham v. Caples*, 325 S.W.3d 578, 582 (Tenn. 2010).

APPENDIX A

State	Statute	Excerpted Statutory Language Granting Broad Emergency Authority to Local Governments (Examples)
AL	Ala. Code § 31-9-10	<p>(b) The governing body of each political subdivision shall have the power and authority:</p> <p>(1) To appropriate and expend funds, make contracts, obtain and distribute equipment, materials, and supplies for emergency management purposes; to provide for the health and safety of persons and property, including emergency assistance to the victims of any disaster; and to direct and coordinate the development of emergency management plans and programs in accordance with the policies and plans set by the federal and state emergency management agencies.</p>
GA	Ga. Code Ann. § 38-3-27	<p>(b) Each political subdivision shall have the power and authority:</p> <p>...</p> <p>(2) To provide for the health and safety of persons and property, including emergency assistance to the victims of any emergency or disaster resulting from manmade or natural causes or enemy attack and to direct and coordinate the development of emergency management plans and programs in accordance with the policies and plans set by the federal and state emergency management agencies;</p>
IN	Ind. Code Ann. § 10-14-3-17	<p>(j) Each political subdivision may:</p> <p>(1) appropriate and expend funds, make contracts, obtain and distribute equipment, materials, and supplies for emergency management and disaster purposes, provide for the health and safety of persons and property, including emergency assistance to the victims of a disaster resulting from enemy attack, provide for a comprehensive insurance program for its emergency management volunteers, and direct and coordinate the development of an emergency management program and emergency operations plan in accordance with the policies and plans set by the federal emergency management agency and the department of homeland security established by IC 10-19-2-1;</p>

KY	Ky. Rev. Stat. Ann. § 39B.070	Each city, county, urban-county government, or charter county government may: ... (2) Appropriate and expend funds, make contracts, enact cost-recovery ordinances, obtain and distribute equipment, materials, and supplies for disaster and emergency response purposes; provide for the health and safety of persons and property, including emergency assistance to the victims of any disaster or emergency; review or approve local emergency operations plans; and enact orders or ordinances pertaining to local emergency management programs in accordance with the policies and plans prescribed by the federal and state emergency management agencies and the provisions of KRS Chapters 39A to 39F;
MO	Mo. Ann. Stat. § 44.080	2. In carrying out the provisions of this law, each political subdivision may: (1) Appropriate and expend funds, make contracts, obtain and distribute equipment, materials, and supplies for emergency management purposes; provide for the health and safety of persons; the safety of property; and direct and coordinate the development of disaster plans and programs in accordance with the policies and plans of the federal and state governments;
MS	Miss. Code. Ann. § 33-15-17	(c) Each county and each municipality, or two (2) or more counties acting jointly, shall have the power and authority: (1) To appropriate and expend funds, make contracts, obtain and distribute equipment, materials, and supplies for emergency management purposes; provide for the health and safety of persons and property, including emergency assistance to the victims of any enemy attack or man-made, technological or natural disasters; and to direct and coordinate the development of emergency management plans and programs in accordance with the policies and plans set by the federal and state emergency management agencies;
NC	N.C. Gen. Stat. Ann. § 166A-19.31	(a) Authority to Enact Prohibitions and Restrictions.--The governing body of any municipality or county may enact ordinances designed to permit the imposition of prohibitions and restrictions within the emergency area during a state of emergency declared pursuant to G.S. 166A-19.22. Authority to impose by declaration prohibitions and restrictions under this section, and to impose those prohibitions and restrictions at a

		<p>particular time as appropriate, may be delegated by ordinance to the mayor of a municipality or to the chair of the board of county commissioners of a county.</p> <p>(b) Type of Prohibitions and Restrictions Authorized.--The ordinances authorized by this section may permit prohibitions and restrictions:</p> <p>(1) Of movements of people in public places, including any of the following:</p> <ol style="list-style-type: none"> Imposing a curfew. Directing and compelling the voluntary or mandatory evacuation of all or part of the population from any stricken or threatened area within the governing body's jurisdiction. Prescribing routes, modes of transportation, and destinations in connection with evacuation. Controlling ingress and egress of an emergency area, and the movement of persons within that area. Providing for the closure, within the emergency area, of streets, roads, highways, bridges, public vehicular areas, or other areas ordinarily used for vehicular travel, except to the movement of emergency responders and other persons necessary for recovery from the emergency. In addition to any other notice or dissemination of information, notification of any closure of a road or public vehicular area under the authority of this sub-subdivision shall be given to the Department of Transportation as soon as practicable. The ordinance may designate the sheriff to exercise the authority granted by this sub-subdivision. G.S. 166A-19.70(c) and (d) shall apply to this sub-subdivision. <p>(2) Of the operation of offices, business establishments, and other places to or from which people may travel or at which they may congregate.</p> <p>(3) Upon the possession, transportation, sale, purchase, and consumption of alcoholic beverages.</p> <p>(4) Upon the possession, transportation, sale, purchase, storage, and use of gasoline, and dangerous weapons and substances, except that this subdivision does not authorize prohibitions or restrictions on lawfully possessed firearms or ammunition. As used in this subdivision, the term “dangerous weapons and substances” has the same meaning as it does under G. S. 14-288.1. As used in this subdivision, the term “firearm” has the same meaning as it does under G.S. 14-409.39(2).</p> <p>(5) Upon other activities or conditions the control of which may be reasonably necessary to maintain order and protect lives or property during the state of emergency.</p>
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		The ordinances authorized by this section need not require or provide for the imposition of all of the types of prohibitions or restrictions, or any particular prohibition or restriction, authorized by this section during an emergency but may instead authorize the official or officials who impose those prohibitions or restrictions to determine and impose the prohibitions or restrictions deemed necessary or suitable to a particular state of emergency.
VA	Va. Stat. § 44-146.19	C. Whenever the Governor has declared a state of emergency, each political subdivision within the disaster area may, under the supervision and control of the Governor or his designated representative, control, restrict, allocate or regulate the use, sale, production and distribution of food, fuel, clothing and other commodities, materials, goods, services and resource systems which fall only within the boundaries of that jurisdiction and which do not impact systems affecting adjoining or other political subdivisions, enter into contracts and incur obligations necessary to combat such threatened or actual disaster, protect the health and safety of persons and property and provide emergency assistance to the victims of such disaster. In exercising the powers vested under this section, under the supervision and control of the Governor, the political subdivision may proceed without regard to time-consuming procedures and formalities prescribed by law (except mandatory constitutional requirements) pertaining to the performance of public work, entering into contracts, incurring of obligations, employment of temporary workers, rental of equipment, purchase of supplies and materials, levying of taxes, and appropriation and expenditure of public funds.
WI	Wis. Stat. Ann. § 323.14	(4) Powers during an emergency. (a) The emergency power of the governing body conferred under s. 323.11 includes the general authority to order, by ordinance or resolution, 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 and includes the power to bar, restrict, or remove all unnecessary traffic, both vehicular and pedestrian, from the highways, notwithstanding any provision of chs. 341 to 349.