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May 15, 2020

**ATTORNEY/CLIENT PRIVILEGE**

George Bailey, Chairman  
Gratiot County Board of Commissioners  
214 E. Center Street  
Ithaca, MI 48847

***Sent Via Email***

Re: Executive Orders

Dear Chairman Bailey:

You have requested an opinion from this Office concerning the authority of the County Board of Commissioners to pass a resolution authorizing businesses to resume operations notwithstanding the current Executive Orders issued by Governor Whitmer. It is my understanding that a proposed resolution has been suggested that would approve the opening of Gratiot County businesses notwithstanding the current Executive Orders, conditioned on the businesses' compliance with the recommendations of the Mid-Michigan District Health Department COVID-19 for operating safety. As discussed below, neither the Board of Commissioners, nor the District Health Officer is authorized to issue directives contrary to the State requirements.

The County Board of Commissioners derives its powers and authority from the Michigan Constitution and statutes implementing the Constitution enacted by the State Legislature. As held in *Taylor v Currie*, 277 Mich App 85 (2007):

**“The general rule, with regard to municipal officers, is that they have only such powers as are expressly granted by statute or by sovereign authority or those which are necessarily to be implied from those granted.”** Presnell v [Wayne Co] Bd of Co Rd Comm'rs, 105 Mich App. 362, 368, 306 N.W.2d 516 (1981), quoting \*95 56 Am. Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions, § 276, p. 327. **Or as our Supreme Court has stated, “[t]he extent of the authority of the people's public agents is measured by the statute from which they derive their authority, not by their own acts and assumption of authority.”** Sittler v. Michigan College of Mining & Tech. Bd. Of Control, 333 Mich 681, 687, 53 NW2d 681 (1952) (citations and punctuation

omitted). **As such, “[p]ublic officers have and can exercise only such powers as are conferred on them by law....”** *Id.* (citations and punctuation omitted) (*emphasis added*)

This legal rule is expressly applicable to County Board of Commissioners. The Court in *County Com'rs of Oakland County v Oakland County Executive*, 98 Mich App 639, 650 (1980), in pertinent part, held:

Lastly, nowhere in the Constitution of 1963 is it expressly stated that the board is the sole repository of county power. **...the board of commissioners possesses no inherent constitutional power to act either legislatively or administratively but receives such power through legislative enactment, ....** (*emphasis added*)

There is no such State legislation which directly authorizes the County Board of Commissioners authority to override State Executive Orders. Moreover, County Boards of Commissioners lack authority to adopt “police power” type ordinances or regulations. The authority of the County to adopt regulations and ordinances is more limited than that of other political subdivisions which possess health, safety, morals and welfare powers. The general authority to adopt County ordinances is set forth at MCL 46.11, or if there is specific State law authorizing particular regulations. The Michigan Attorney General has reviewed this issue in the context of an attempt by a non-chartered county, such as Gratiot County, to adopt health related regulatory ordinances (air pollution) in OAG, 1998, No. 6992 (August 13, 1998). That Opinion confirmed that although cities, villages, and townships have been granted the authority to adopt “police power” type ordinances protecting the “public health, safety, and welfare,” counties have only such powers as are granted them by law. *Mosier v Wayne County Bd of Auditors*, 295 Mich 27, 29; 294 NW 85 (1940); *Hanslovsky v Leland Twp*, 281 Mich 652; 275 NW 720 (1937). Non-charter counties possess only the more limited authority to adopt ordinances or regulations pursuant to MCL 46.11. MCL 46.11 only allows ordinances relating to “...to county affairs and do not contravene the general laws of this state or interfere with the local affairs of a township, city, or village within the limits of the county.”

The County Board of Commissioners therefore has very limited authority to directly address public health related safety issues of the type now occurring. Rather, the Legislature has delegated those powers to the State Health Department, the County’s District Health Department, and more broadly to cities, villages, and townships through their respective “police power” authorities. Under the Michigan Public Health Code, if the MDHHS Director determines that control of an epidemic is necessary to protect the public health, the Director also has the authority by Emergency Order to prohibit the gathering of people for any purposes, and may establish procedures to be followed during the epidemic to insure continuation of essential public health services and enforcement of health laws. MCL 333.2253(1). (A local health officer has the same authority to issue a local emergency order to control an epidemic under MCL 333.2453). The Director of the Michigan Department of Health and Human Services (MDHHS), Robert Gordon, has issued such an Emergency Order that incorporates the Governor’s Executive “Stay at Home” Orders at issue and any future

Executive Order that may be issued that rescinds and replaces those orders, including expressly those that prohibit certain public assemblages and business activity. (MDHHS Emergency Order, dated April 2, 2020) This MDHHS Emergency Order also authorizes local health departments to carry out the terms of the Order and authorizes enforcement by chiefs of police, sheriffs, and other local law enforcement leaders. The determinations of the State and its public health officials are considered controlling in the event there are differences between local public health department regulations or local municipal or township ordinances or regulations.

With regard to the current COVID-19 pandemic situation, the Michigan Governor issued an initial statewide Declaration of State of Emergency on March 10, 2020. Pursuant to that Declaration, the Governor has now issued in excess of 80 Executive Orders. The authority for these Executive Orders is set forth by Michigan statute in the *Emergency Powers Of Governor Act*, 1945 PA 302, as amended (MCL 10.31 *et seq*), and the *Emergency Management Act*, 1976 PA 390, as amended (MCL 30.401 *et seq*). The first cited law was adopted in 1945 and provides that the emergency “...shall cease to be in effect upon declaration by the governor that the emergency no longer exists.” The second law provides that Executive Orders will have a duration of until the “disaster conditions no longer exist,” or for up to 28 days, whichever is shorter, unless extended through resolutions with the approval of each house of the Legislature. The Michigan Legislature did provide such an extension of the March 2020 Emergency Declaration through April 30, 2020. However, the Executive Orders have nevertheless been continued beyond that point by the Governor and their validity is currently being tested through litigation filed by the State Legislature against the Governor. However the Governor’s position, apparently, rests on the fact that the authority granted in 1945 law has no specific duration time limits and that her Executive Orders therefore continue to be valid. The lawsuit is currently scheduled for oral arguments in the Michigan Court of Claims today (May 15, 2020). Unless these Executive Orders are held to be invalid by the Courts, it remains the position of this Office that the Orders remain enforceable state wide. Thus, the Executive Orders as of the writing of this correspondence remain legally effective. (It may be also noted that the Prosecuting Attorneys Association of Michigan, which represents the County Prosecutors authorized to enforce the Executive Orders has recently announced that a consensus of its member have reach the same conclusion.)

[See: <https://www.detroitnews.com/story/news/local/michigan/2020/05/14/michigan-prosecutors-association-directs-members-enforce-whitmer-orders/5194838002/> ]

One of the Executive Orders at issue is Executive Order 2020-77, which provides for what the Governor labels “Stay Home, Stay Safe Order” restrictions on Michigan businesses, as well as citizens which indicates it is intended to “*suppress the spread of COVID-19*”. As indicated above, the County Board of Commissioners possesses no legal authority to either close businesses because of such an epidemic threat, nor to open businesses. These are simply issues for which the County Board of Commissioners has been granted no legal authority and no power to control. Therefore, similarly the Board of Commissioners would have no authority to alter the Governor’s statewide restrictions on businesses, including within Gratiot County itself.

It should also be noted that the referenced Emergency Powers Act, being MCL 30,401 *et seq*, does also vest authority in the County Emergency Management Coordinator in the context of local emergencies and to assist in State declared emergencies. If a County Emergency Management Coordinator is not designated or in his absence, the Chairman of the County Board of Commissioners serves in that Coordinator capacity. The Emergency Management Coordinator is authorized to issue County emergency directives under this legislation, and it is my understanding that has occurred in Gratiot County's case. Those directives remain in effect for seven (7) days, unless confirmed by the legislative body, being the full Board of Commissioners. It is my understanding that has also occurred in Gratiot County. However, the Emergency Management Act does not authorize the local Emergency Management Coordinator or the County Board of Commissioners to establish directives contrary to the State's Emergency Executive Orders in the event the State also declares a State of Emergency. Thus, while there can be local emergency directives to supplement or support or implement the State Orders in an emergency situation, such directives must be consistent with the State's requirements.

The County should also consider that non-compliance with the Executive Orders under both pieces of the above-noted emergency legislation laws constitutes a criminal infraction. [MCL 10.33, MCL 30.405(3)] Thus, County law-enforcement, including the County Sheriff and the County Prosecuting Attorney, do have a legal role in the enforcement of these restrictions on businesses and the public. However, the Sheriff and Prosecuting Attorney are separate Constitutional officers. Therefore, how they elect to utilize their authority in enforcing the Executive Orders is a matter of their discretionary powers and beyond the scope of any authority of the County Board of Commissioners to provide direction or requirements.

Therefore, it is the undersigned's opinion that although the Board of Commissioners could issue a political statement requesting that the State Emergency Orders of the Governor be revised or rescinded, the County Board would have no authority to issue any binding directive, resolution, or declaration that would be contrary to the State's Executive Orders. Moreover, issuing such a contrary action could create potential liability. Persons relying on such a County declaration or resolution and acting accordingly could be subject to criminal prosecution. Moreover, persons relying on such a County declaration or resolution that then become infected with the COVID-19 could likewise assert liability claims against the County. Thus, not only does the County Board of Commissioners lack legal authority to issue a resolution, directive, or declaration contrary to State Executive Orders that would have any binding effect, such as an action could generate potential liability exposure for the County.

In summary, State law does not provide any authority for the County Board of Commissioners to adopt any binding resolution, directive, or resolution to authorize businesses within Gratiot County open contrary to the State Governor's Executive Orders. Rather, the authority would be limited to recommending to the Governor and/or Legislature that changes be made in those Executive Orders or that some, or all, of them be rescinded.

Let me know if there are any further questions.

Very Truly Yours,

COHL, STOKER & TOSKEY, PC

  
David G. Stoker 

DGS/gmk

cc: Gratiot County Board of Commissioners  
Tracey Cordes, County Administrator