

'Home Rule' Conflicts Likely As NJ Reopens

By **Kevin Weber and Michael DeLoreto**

New Jersey's 565 separate municipalities have a long and proud history of "home rule," which "permits each municipality to act in a way it believes will best meet the local need."^[1] One limitation is during a state of emergency, pursuant to the New Jersey Civilian Defense and Disaster Control Act, or CDDCA, which provides that local governments cannot enforce rules or regulations that may be "at variance" with the governor's emergency declarations.^[2]



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During the COVID-19 pandemic, Gov. Philip Murphy utilized this provision in order to consolidate power at the state level, stating that "[w]e have got to run this state with one set of rules."^[3] Specifically, in Executive Order No. 108 issued on March 21, the governor heavily relied on the CDDCA's provisions when ordering that:

Any county or municipal restriction imposed in response to COVID-19 that in any way will or might conflict with any of the provisions of Executive Order No. 107 (2020) [directing residents to stay at home and closing most businesses], or which will or might in any way interfere with or impede its achievement, or the achievement of Administrative Orders issued as authorized by my Executive Orders, is hereby invalidated.^[4]



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In the early weeks of the COVID-19 pandemic, the governor's use of this power to create statewide uniformity made practical sense. Municipalities taking action on business closures were creating a patchwork of rules leading to public confusion and uncertainty for many businesses.

As the governor begins to consider lifting restrictions, however, it remains unclear whether there will be room for a return to New Jersey's traditional "home rule" governance, and whether the governor will allow municipalities to enact their own, more stringent rules. When the reopening of the state occurs in the near future, it may be inevitable that New Jersey courts will be placed in the position of ruling on municipal actions that seek to maintain or extend restrictions after the governor lifts those statewide mandates.

Home Rule and State Law Preemption

So far, it appears that only one municipality has ended up in court with the state regarding COVID-19 regulations. The city of Jersey City sought to close all daycare centers in the city, while Murphy ordered certain centers serving essential workers to remain open.^[5] The controlling legal issues that courts would grapple with in such matters touch on long-standing issues of preemption.

The basic framework is that "municipalities may enact regulatory ordinances on any subject matter of local concern which are reasonably related to a legitimate object of public health, safety, or welfare, provided that the state has not preempted the field."^[6] The preemption analysis is driven by the factors established in *Overlook Terrace Management Corp. v. Rent Control Board of West New York*:

1. Does the ordinance conflict with state law, either because of conflicting policies or operational effect (that is, does the ordinance forbid what the Legislature has permitted or does the ordinance permit what the Legislature has forbidden)?
2. Was the state law intended, expressly or impliedly, to be exclusive in the field?
3. Does the subject matter reflect a need for uniformity? For example, subject matter inherently in need of statewide treatment in terms of jurisdictional power, posing the question of whether the state constitution has prohibited delegation to the municipality of power to enact ordinances in a certain sphere.
4. Is the state scheme so pervasive or comprehensive that it precludes coexistence of municipal regulation?
5. Does the ordinance stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the Legislature?[7]

Courts viewing preemption challenges have noted that "not all problems that have generated a concern throughout the state demand uniform and homogeneous treatment at the state level. A subject in need of statewide uniformity is one in which the needs with respect to those matters do not vary locally in their nature or intensity." [8] And, even if "the evil is of statewide concern," it is arguable that "practical considerations may warrant different or more detailed local treatment to meet varying conditions or to achieve the ultimate goal more effectively." [9]

The COVID-19 pandemic has not stricken all towns equally, and the longer the pandemic continues, the likelihood increases that municipalities will clamor for "more detailed local treatment" rather than state-level regulation. It is hard to imagine that a court would allow municipalities to override the governor and permit the reopening of businesses that the governor has ordered to close.

But, assuming that in the coming weeks the governor allows certain businesses to reopen (e.g., barber shops, restaurants, etc.) and a municipality enacted an ordinance requiring that same class of businesses to remain closed, or subject to some other limitation on which the governor's executive order is silent, would the Overlook factors find the entire field to be preempted?

On the one hand, the pervasiveness of regulation at the state-level arguably shows an intent to be exclusive in the field of business regulation, and likely makes coexisting local regulation impossible. As with the early days of the pandemic, varying municipal regulations could again lead to confusion and enforcement problems, and incentivize unnecessary travel from town to town.

On the other hand, however, health issues and some local business regulation (e.g., hours of operation) have always been squarely within municipal "home rule." It is foreseeable then that a municipality could argue that the governor's actions merely set the floor, and not the ceiling, for business regulation, thus allowing the enactment of more detailed and restrictive regulations than what the governor permits.

Governor's Emergency Powers Over Municipalities

Even if the municipality's inherent public health powers arguably provide a vehicle to argue

against Overlook preemption, the governor's powers under the CDDCA seemingly make any inconsistency with state-level orders intolerable. The CDDCA provides that:

it shall be unlawful for any municipality or other subdivision or any other governmental agency of this state to adopt any rule or regulation or to enforce any such rule or regulation that may be at variance with any such order, rule or regulation established by the Governor. In the event of a dispute on the question of whether or not any such rule or regulation is at variance with an order, rule, or regulation established by the Governor under this act, the determination of the Governor shall control.[10]

Arguably, the "at variance" determination represents a different test than traditional Overlook preemption, and one that tends to favor a broader finding of preemption. The governor's executive order likewise said that any local ordinance that "will or might in any way interfere with [the executive order directing residents to stay at home and closing businesses] or impede its achievement" will be invalidated,[11] arguably articulating a broader theory of preemption than the traditional Overlook factors.

But just as important as finding an actual conflict or "variance," that the Legislature gave the governor the broad authority to determine whether a local ordinance is "at variance" with the governor's executive orders leaves little room for an Overlook preemption test while the state of emergency continues.

This comprehensive power comes directly from the underlying purpose of the CDDCA, which speaks to "centralizing control of all civilian activities" and to give the governor "control over such resources of the state government and of each and every political subdivision thereof as may be necessary" to combat the emergency.[12]

In light of these powers, as long as the state of emergency continues — which appears to be for the foreseeable future, even as some restrictions are modified or lifted — any local regulation that deviates from the governor's executive orders is likely to be viewed as "at variance" and therefore invalidated.

Conclusion

As the COVID-19 pandemic continues, local officials will likely be agitating for a return to "home rule" and away from state regulation of matters that were historically a local concern, and as noted above, at least one challenge is already underway.[13] Ultimately, there may be further challenges that will require a court to examine the outer bounds of the governor's ability to preempt areas of regulation that were, until this pandemic, within the municipality's public health police powers.

However, as long as the state of emergency remains in effect, the Legislature's grant of broad powers to the governor in the CDDCA to essentially invalidate local orders via executive authority will make municipal challenges to the governor's directives exceedingly difficult.

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[1] Fraternal Order of Police, [Newark Lodge No. 12 v. City of Newark](#), 459 N.J. Super. 458, 488-89 (App. Div. 2019) (quoting *W. Morris Reg'l Bd. of Educ. v. Sills*, 58 N.J. 464, 477 (1971)).

[2] N.J.S.A. App. A:9-40.

[3] <https://www.nj.com/coronavirus/2020/04/murphy-has-issued-24-executive-orders-to-help-slow-coronavirus-outbreak-in-nj-heres-the-timeline.html>.

[4] <https://nj.gov/infobank/eo/056murphy/pdf/EO-108.pdf>.

[5] <https://www.nj.com/hudson/2020/04/jersey-city-forced-to-open-daycare-centers-for-essential-workers-kids-after-murphy-files-lawsuit.html>.

[6] [LDM, Inc. v. Princeton Reg. Health Com'n](#), 336 N.J. Super. 277, 291 (Law Div. 2000) (citing *New Jersey Builders Ass'n v. Mayor & Township Council of East Brunswick*, 60 N.J. 222, 227 (1972), [Overlook Terrace Management Corp. v. Rent Control Board of West New York](#), 71 N.J. 451, 460 (1976)).

[7] *Overlook Terrace Mgmt. Corp.*, 71 N.J. at 461-62 (1976) (citations and quotations omitted).

[8] [Mack Paramus Co. v. Paramus](#), 103 N.J. 564, 577 (1986) (quotation omitted).

[9] [Inganamort v. Fort Lee](#), 62 N.J. 521, 528 (1973).

[10] N.J.S.A. App. A:9-40.

[11] <https://nj.gov/infobank/eo/056murphy/pdf/EO-108.pdf>.

[12] N.J.S.A. App. A:9-33.

[13] <https://www.nj.com/hudson/2020/04/jersey-city-forced-to-open-daycare-centers-for-essential-workers-kids-after-murphy-files-lawsuit.html>.