2020 Legislative Summary: Emergency Management

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The North Carolina General Assembly wrapped up its work for the 2020 Short Session in the early hours of June 26, 2020 but did not completely adjourn the session. Under the adjournment resolution, the legislature remains convened in session through July 11th and then will reconvene on September 2, 2020. The adjournment resolution limits legislation eligible for consideration to bills appropriating COVID-19 relief funding or state funding match requirements, making appointments to boards and commissions and filling vacancies, and taking action on gubernatorial nominations or appointments. In keeping with this limited agenda, the adjournment resolution adjourns the General Assembly sine die when it adjourns on September 3, 2020. Of course, the adjournment resolution can be amended, or the General Assembly can call itself into special session if needed. Nonetheless, the legislature appears to have concluded the bulk of its substantive work for this year, at least for now.

This publication summarizes legislation enacted during the 2020 Short Session affecting emergency management including legislation related to COVID-19 vetoed by the Governor.

COVID-19 Legislation Vetoed

The General Assembly passed several bills that would have superseded state and local government restrictions and prohibitions imposed in response to the COVID-19 pandemic. These bills, all of which were vetoed and thus did not become law (none of the vetoes were overridden by the General Assembly), would have allowed the following establishments to resume operations despite restrictions imposed under Gubernatorial Executive Orders and/or county or city state of emergency declarations:

- Skating rinks and bowling alleys (S599)
- Gyms, health clubs, and fitness centers (H594; H806)
- Restaurants and bars (H536)
- Amusement parks, gaming and establishments with video and arcade games, fairs, carnivals, and reception and party venues (H258)

The Governor also vetoed legislation that would have superseded Gubernatorial Executive Orders and/or county or city restrictions that would have applied to July 4th parades and fireworks displays, including exempting such activities from mass gathering restrictions and prohibiting a local government from denying a fireworks display or parade permit, during the period

from July 1st through July 10th except in certain limited circumstances (H686).

Enacted Legislation

Face Mask Exception

Earlier in the 2020 Session, the General Assembly enacted GS 14-12.11(6) which exempted from the prohibition against wearing masks or hoods in public those face masks "worn for the purpose of ensuring the physical health or safety of the wearer or others." (SL 2020-3, Sec. 4.3) This exception was set to expire on August 1, 2020. On the last day of session before adjourning until September, the legislature repealed the August 1 expiration date, thus making the exception permanent law. (SL 2020-93) The act became law on July 10, 2020.

Electronic Publication of Local State of Emergency Declarations

The General Assembly amended the state's emergency management act to impose new publication requirements on county and city state of emergency declarations (S.L. 2020-83, Sec. 11.7). Prior to enactment of HB593 which amended GS 166A-19.31(d), county and city state of emergency declarations went into effect "upon publication." Although "publication" was not specifically defined (other than to exempt declarations from newspaper publication under GS 1-597), the statute allowed publication to include communicating reports of the declaration, including restrictions and prohibitions imposed under the declaration, in the mass media or by other methods to share the information with the public broadly and quickly. The text of the declaration could be disseminated "as soon as practicable" after it was issued. Now, local state of emergency declarations, and any restrictions or prohibitions imposed under those declarations, do not become legally effective and enforceable until the county or city issuing the declaration does two things: (1) posts a written, signed copy of the declaration "conspicuously" on its website (if the jurisdiction has a website); and (2) submits a written, signed copy of the declaration to the state's WebEOC critical incident management system.

The powers granted counties and cities under GS Chapter 166A, the state's emergency management act, have not changed in substance. What has changed is the notice that must be provided before counties and cities may exercise these powers. Prior to the amendment to GS 166A-19.31(d), a county or city could declare a state of emergency and impose restrictions or prohibitions under that declaration without having to immediately memorialize those actions in a written and signed declaration. The law recognized that local officials might need to exercise emergency powers under extraordinary circumstances without access to administrative resources to type and sign a formal declaration or time with which to take these administrative actions in the face of an immediate threat. Sudden events such as tornados, terrorist attacks, explosions, radiological accidents, chemical or other hazardous material incidents, or a sudden eruption of civil unrest (all of which fall within the definition of an emergency under GS 166A-19.3(6)) can occur with little or no warning. In the face of emergencies such as these, local officials might need to take swift action declaring a state of emergency and imposing restrictions to protect public health and safety. While the prior law did require these

actions to be memorialized in writing and distributed "as soon as practicable," having a written, signed declaration in place at the moment the emergency was declared was not required for the declaration to be immediately effective and enforceable. Now, it is.

Under the amendment to GS 166A-19.31(d), before a local state of emergency can take effect and be legally enforceable, the declaration must be:

- Memorialized in writing,
- Signed by the county or city official authorized to do so under the jurisdiction's emergency ordinance, and
- Electronically published in two locations:
  (1) the jurisdiction's website (if it has a website); and
  (2) the Department of Public Safety's WebEOC critical incident management system.

The declaration, and any restrictions or prohibitions imposed under the declaration, cannot go into effect until both electronic publication requirements are satisfied. These requirements also apply to any subsequent amendments to a declaration that impose new restrictions or prohibitions or modify existing ones previously imposed.

Where the local jurisdiction has advance warning of the emergency, as is typically the case in a natural disaster such as a hurricane or winter ice storm, the administrative burden imposed by the new electronic publication is minimal. In fact, it has become common practice for counties to post their state of emergency declarations on their websites and in WebEOC. Some counties also post city declarations in WebEOC. However, counties and cities should evaluate their emergency operations plans to ensure procedures are in place to satisfy the new electronic publication requirements in emergency situations for which there is no advance warning, such as tornados, terrorist attacks, explosions, radiological accidents, chemical or other hazardous material incidents, or a sudden eruption of civil unrest. Counties and cities also should make plans to address other challenges they might face in any emergency, including:

- Power and internet outages (which might impede administratively processing and electronically publishing a written, signed declaration),
- Blocked roads or unsafe travel conditions (which might impede obtaining the local official's signature on the declaration), and
- Evacuation contingencies (which might result in officials and staff not being readily available to administratively process and electronically publish the declaration).

Under the new law, regardless of the immediacy or severity of the emergency event, local declarations are not effective or enforceable until the new electronic publication requirements are satisfied.

In some emergency events, a city will consent to being included under a county's state of emergency declaration. In this instance, it appears that the new electronic publication requirements will be satisfied if the county electronically publishes the declaration on behalf of the city because the county is the issuing jurisdiction (although there is no harm in the city also posting the declaration on the city's website). A city that issues a declaration independent of the county must publish a written, signed copy

of the declaration on the city's website (if it has one). In either instance, the city must rely on the county to post the declaration in WebEOC.

Counties and cities may continue to use other methods to communicate their declarations broadly and quickly. Doing serves the public by making it aware of the imminent or present danger and any restrictions, prohibitions, or other directives included in the declaration. However, these broad communications mechanisms, while important, do no satisfy the new electronic publication requirements.

The amendments to GS 166A-19.31(d) went into effect on July 1, 2020. The electronic publication requirements apply to any new declarations issued on or after July 1, 2020 as well as any amendments or modifications to preexisting declarations. However, the legislation does not address whether the new electronic publication requirements apply to declarations issued *prior* to July 1, 2020 that a county or city wishes to continue to enforce *after* July 1. If a county or city wishes to enforce a restriction or prohibition imposed prior to July 1, it is prudent to comply with the new electronic publication requirements to avoid a legal challenge to those pre-July 1 restrictions and prohibitions on that basis.

GS 166A-19.31(d) states that "prohibitions and restrictions imposed by a declaration...shall take effect in the emergency areas immediately upon publication of the declaration." The statute is unclear as to which "declaration" the publication requirements apply. While the statute can be interpreted to apply only to a declaration or amendment to a declaration that imposes a specific restriction, it also could be interpreted to apply to the original declaration itself that triggers emergency powers to impose restrictions even if no restrictions are imposed under the original declaration (because it is the issuance of a state of emergency declaration that triggers emergency powers under the jurisdiction's local emergency ordinance, all subsequent restrictions or prohibitions imposed are done so under the authority of the original declaration). Given that the statue is subject to varying interpretations and in an abundance of caution to ensure the legal validity of the original declaration upon which subsequent amendments imposing restrictions or prohibitions are based, I recommend erring on the side of caution and complying with the electronic publication requirements even for declarations that do not specifically impose restrictions or prohibitions (at least not at the time issued).

COVID-19 Relief Funding

Earlier in the 2020 Session, the General Assembly appropriated a portion of the state's $3.5 billion Coronavirus Relief Fund (CRF) funding allocated to the state under the CARES Act. Among the CRF funds appropriated in SL 2020-4, $150 million was allocated to counties to pay for eligible COVID-19 response expenses. This funding was expanded in SL 2020-80 by an additional $150 million, bringing the total amount of CRF funds allocated to counties to $300 million. In SL 2020-80, the legislature required counties to share 25% of their allocation with cities within the county (counties determine what amount each city will receive). The CRF funds were distributed to counties on a per capita basis with an

initial allotment of $250,000 per county. Of significance to counties and cities are the penalties imposed in the legislation for misspending CRF funds inconsistent with the purposes allowed under the CARES Act. Counties and cities misspending CRF funds are subject to clawback of the funds and reduction or elimination of other state funds. In addition, local government officers, officials, or employees who misspends CRF funds are subject to a civil action brought by the state and may be held personally liable to reimburse the state. Counties and cities are required to submit plans for how they intend to spend their CRF funds to the NC Pandemic Recovery Office (NCPRO), which is responsible for overseeing administration of the state's CARES Act funding.

In another COVID-19 funding bill (SL 2020-14), the General Assembly appropriated $19.8 million in CRF funds to the Department of Public Safety to fund upgrades to the state's Voice Interoperability Plan for Emergency Responders (VIPER) network. The funding will enhance this communications network which is used by law enforcement and emergency responders statewide.

NC Pandemic Recovery Office (NCPRO)

To oversee and administer COVID-19 relief funds appropriated by Congress in the CARES Act and other federal legislation, the General Assembly created the NC Pandemic Recovery Office, referred to as NCPRO. (SL 2020-4, Sec. 4.3) In addition to oversight and administration, NCPRO is also responsible for providing technical assistance and coordinating federal COVID-19 relief funds received by state agencies and local governments, and ensuring proper reporting and accounting of all funds. NCPRO is a temporary office; its authorization expires May 4, 2021 (one year from the date the legislation creating NCPRO became law). NCPRO provides information, FAQs, reporting instructions, and other guidance for state agencies and local governments on CRF and other CARES Act funding through its website: https://www.nc.gov/agencies/ncpro.

Emergency Landfill Waivers

The Secretary of the Department of Environmental Quality (DEQ) was granted authority to develop and implement emergency measures for managing solid waste during a state of emergency declared by the Governor or a county or city. (SL 2020-74, Sec. 3) GS 130A-303 was amended to grant this authority and establish procedures by which the Secretary may exercise it. Among the emergency measures the Secretary may put in place are restrictions on collection, storage, and transportation of solid waste; modifications to landfill operations; and other measures necessary for proper solid waste disposal within impacted communities. The Secretary must provide written notice to the media and stakeholders of emergency measures. Any emergency measures put in place expire 60 days after the state of emergency declaration under which the Secretary is acting expires. Although enacted during the COVID-19 event, this authorization applies during any state or locally declared emergency. The legislation became law on June 25, 2020.

NCORR Staffing Flexibility

The North Carolina Office of Recovery and Resiliency (NCORR) was created in 2018 to administer ReBuild NC, the state's CDBR-DR program funded by Congress in response to

Hurricanes Matthew and Florence. When originally created, NCORR's staffing level was limited to 30 time-limited state positions. This limitation on the number of positions was eliminated, giving NCORR more staffing flexibility to manage the ReBuild NC program. (SL 2020-78, Sec. 12.5)

Flood Storage Capacity

The responsibilities of the Division of Mitigation Services in the Department of Environmental Quality were expanded to include reducing flood risk by developing plans and funding project to increase flood storage capacity. (SL 2020-79, Sec. 11A) GS 143-214.8 and GS 143-214.9, the Division's enabling statutes, were amended to include this new authorization. A new statute, GS 143-214.11A, was enacted to define a flood storage project as one that creates or restores flood storage capacity through projects such as creation or restoration of wetlands, streams, riparian areas, temporary field flooding, and other nature-based projects that demonstrably increase flood storage capacity. Basinwide river plans must now include plans for increasing flood storage capacity to reduce risk of flooding in flood-prone areas of the state. The Division may fund projects meeting requirements for increasing flood storage capacity through the Ecosystem Restoration Fund. The Division is required to establish an advisory board to guide development of the flood storage capacity enhancement program and provide input on funding of eligible projects. This legislation became law on July 1, 2020.

Radiological Emergency Services Fee Increase

Under GS 166A-29, operators of fixed nuclear electric-generation facilities must pay an annual fee to support planning and implementing emergency response activities for nuclear facility operations required by FEMA. The fee was capped at $36,000 per year. The legislature amended the statute to set $36,000 as the minimum fee and authorized the fee to be increased by an amount not to exceed the cost of the service provided. (SL 2020-83, Sec. 11). This increase is effective July 1, 2020 and applies to fees assessed on or after that date.