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INTRODUCTION

By late February, the Novel Coronavirus Disease 2019 ("COVID-19") was spreading throughout Florida, prompting Governor DeSantis to issue Executive Order 20-51 on March 1, 2020. Executive Order 20-51 directed the Florida Department of Health to issue a Public Health Emergency and the State Surgeon General and State Health Officer to declare a Public Health Emergency due to COVID-19. By March 9, thousands of Floridians were already infected with COVID-19, and many Floridians had already been killed by COVID-19.[1] Shortly thereafter, on March 9, 2020, Governor DeSantis issued Executive Order 20-52, declaring a state of emergency in the State of Florida due to COVID-19.

The first impacts of COVID-19 were felt in southeast Florida and, in an effort to control the spread of COVID-19 among the population, local governments in southeast Florida took immediate action. Section 252.38, Florida Statutes provides the authority for counties and municipalities to establish emergency management programs. Additionally, in carrying out the provisions of their emergency management programs, Section 252.38(3)(a)5 authorizes counties and municipalities to take the following actions:

... to waive the procedures and formalities otherwise required of the political subdivision by law pertaining to:

- a. *Performance of public work and taking whatever prudent action is necessary to ensure the health, safety, and welfare of the community.*
- b. Entering into contracts.
- c. Incurring obligations.

- d. Employment of permanent and temporary workers.
- e. Utilization of volunteer workers.
- f. Rental of equipment.
- g. Acquisition and distribution, with or without compensation, of supplies, materials, and facilities.
- h. Appropriation and expenditure of public funds.

Pursuant to the Governor's declaration and applicable statutory authority, starting in March, 2020, municipalities and counties issued numerous emergency declarations and orders in an attempt to control the spread and limit the health impacts arising from the health emergency related to COVID-19. Because a majority of the initial infections occurred in southeast Florida, Miami-Dade, Broward, and Palm Beach Counties and their municipalities (the "Tri-County Area") were the first to tackle the COVID-19 crisis.[2]

As provided in the respective county and municipal emergency orders, counties and municipalities were authorized by Section 252.38(3)(a)5.a., Florida Statutes, to "ensure the health, safety, and welfare of the community." Therefore, many of the declarations and the emergency orders issued by South Florida local governments made specific findings related to the need to control the spread of COVID-19, and to protect the public health, safety, and welfare. In addition to the statutory authority, the local government orders also cited Governor DeSantis' Emergency Orders, as well as the respective charters that governed them. Emergency Orders regulating the use of face coverings, gatherings of people outside of their homes, use of public parks, beaches, and facilities, as well as the institution of business closures and curfews were all implemented in an effort to control the spread of COVID-19.

THE SOUTH FLORIDA EMERGENCY ORDERS: Home Rule, then Pre-emption

Florida has over 500 local governments with widely diverging sizes, demographics, cultures, geographic circumstances, and economies. Local elected officials are closest to their residents and businesses, and are therefore best situated to determine the needs of the community. Accordingly, during the COVID-19 pandemic, up until the end of September, the State of Florida generally took the approach of allowing local governments to regulate as they each deemed necessary as long as they were at least as strict as the State. However, there were a few State orders specific to the Tri-County Area. Although each county took a different approach in regulating activities and establishments in an effort to slow the spread of COVID-19, there were some common themes in the Tri-County Area.

At the outset of the pandemic, Miami-Dade County was the first county to act in setting forth restrictions. The State then took the regulations created by Miami-Dade, and applied them to Broward, Palm Beach, and Monroe Counties, while allowing each individual county to deem additional establishments not listed by Miami-Dade County, as "essential." [3] Subsequently, the Governor issued Executive Order 20-91, implementing a "Safer at Home" policy and applying the Miami-Dade County regulations statewide. [4] Executive Order 20-91 also listed attending religious services as an "essential activity." [5] Miami-Dade and Broward Counties did not regulate religious establishments. [6] The State orders allowed local governments to be stricter in their orders, and the county orders similarly allowed their municipalities to be stricter. Eventually, as restrictions began to ease, each county was able to issue its own regulations.

Regulation of Establishments

Because of their common source in Miami-Dade's orders, the Tri-County Area originally shared similar restrictions for establishments. Initially, restaurants were only permitted to operate for pick up or delivery services. As each county began to lift restrictions, restaurants were allowed to have on premises dining, but only up to a certain percentage of their maximum capacity for indoor dining. In an effort to help businesses, many cities took the approach of allowing restaurants to use the adjacent right-of-way for outside dining. Additionally, all bars were initially closed in the Tri-County Area.

On September 25, 2020, a major change came with the Governor's Executive Order 20-244, which pre-empted local governments by establishing the "right to work and operate a business" and prohibited local governments from closing any establishments. While this "right to work and operate a business" provision only applied to individual employees and businesses operated by individuals,[7] most governments applied the pre-emption as though it was also effective against entities. Executive Order 20-244 also restricted local governments from limiting the indoor capacity of restaurants.[8] In response to this order, the Tri-County Area permitted bars to open and allowed greater occupancy of restaurants. Executive Order 20-244 also suspended the collection of fines from individuals, making it harder for local governments to enforce their orders.

Facial Covering Mandates

The State never issued a statewide mandate on the wearing of facial coverings. However, the Tri-County Area issued emergency orders requiring the wearing of facial coverings.[9] Broward and Palm Beach Counties implemented similar facial covering requirements, requiring persons to wear facial coverings at all times in public places when social distancing cannot be maintained and within commercial establishments.[10] Miami-Dade County took a different approach to the facial covering order. Instead of listing every instance a facial covering is required, Miami-Dade required facial coverings at all times when in public, regardless of social distancing, except as set forth in a list of exceptions provided in the order.[11]

All three counties had similar exceptions to the facial covering requirement: for children under the age of two, a person with a disability or medical condition, certain health or public safety officials, persons actively engaged in exercise, and persons receiving services from a business or establishment for which the receipt of the good or service precludes the wearing of a facial covering.[12]

Other Regulations

Other areas of consensus in the Tri-County Area orders included beach and park closures; marina, boating and docking restrictions; curfews; and vacation rental regulations. The State initially took action by closing all beaches throughout the State. Eventually, each county was given the ability to restrict and regulate their own beaches, and all of the Tri-County Area did so. Boaters posed challenges, and mooring orders were crafted to address impromptu gatherings at sand bars and islands in the area where boats rafted together and hosted parties.

The State never imposed a curfew to contain nightlife activities that foster COVID-19 transmission, but each Tri-County Area county government imposed a curfew. In Broward, the curfew was from 11:00 p.m. to 5:00 a.m., while in Miami-Dade County the curfew remains in place from 12:00 a.m. to 6:00 a.m. Due in part to the State's silence on curfew orders, Tootsie's Cabaret challenged Miami-Dade County's curfew order by arguing that it violated the Governor's September Order preempting local governments from closing businesses.[13] Initially, a lower court agreed and granted Tootsie's Cabaret a temporary injunction preventing the County from enforcing the curfew order. However, the Third District Court of Appeal reversed the injunction and held Miami-Dade County designed the curfew to curtail specific nighttime congregations, not to prohibit employees from working as prohibited under Executive Order No. 20-244.[14]

The State did close down vacation rentals and hotels as part of its initial orders, and eventually re-opened them upon State approval of a County re-opening plan. Each County regulated the reopening of vacation rentals, but took different approaches. For example, in Palm Beach County, vacation rentals were permitted to reopen as long as they did so consistent with the County's safety plan.[15] In Broward County, vacation rentals had to submit a reopening plan to the County for approval to operate.[16]

Divergent Regulations – Why a Home Rule Approach is Best

While the Tri-County Area had a consensus on certain areas of regulation, each County also provided for the ability for each municipality to be stricter in their regulations, and to regulate as they deemed fit with their home rule power. Until September 25, this was also the approach from the State. Because the State's initial

response to COVID-19 lagged and deferred to local action, local government leaders had no choice but to develop responses from the bottom up, and coordinated extensively. In Miami-Dade County, the County leadership team and its medical experts eventually established routine meetings with leaders of the County League of Cities and City-County Managers Association to share information and develop strategy. The City Attorneys in both Miami-Dade and Broward Counties began meeting regularly with conference calls or Zoom calls to obtain information, debate novel issues, and share evolving practices. Another example is that within these counties, the coastal mayors met regularly to address their common issues in dealing with beach closures, hotels, and tourism impacts.

With a home rule approach comes the potential for lack of consistency and conflict among local jurisdictions. Despite these extensive efforts at coordination on COVID-19, there was not always consensus. In Miami-Dade County, the Cities of Miami and Miami Beach were often stricter in certain aspects of their orders than the County, and Fort Lauderdale's mayor teamed with Miami Beach's mayor to propose changes to orders in their respective counties. This tension led to political controversies among the leaders of these governments, and made it more challenging to communicate a unified message to the public about the response to COVID-19.

While emergency responses to COVID-19 in the Tri-County Area converged on various COVID-19 flashpoints, the unique characteristics of the many South Florida communities sometimes required localized emergency measures to properly deal with the COVID-19 pandemic. Examples of municipalities exercising home rule authority to address local COVID-19 issues include the City of Hialeah's ("Hialeah") "Ventanitas" Emergency Order addressing the Cuban/Cuban-American restaurant culture; island communities establishing travel restrictions and rules for shared beach amenities; and community-specific efforts to curtail hotspots of social distancing violations within private residences. Each of these uniquely tailored emergency measures responded to specific local challenges in order to address the public health threats posed by COVID-19.

There is perhaps no emergency order that quite so perfectly illustrates this point as Hialeah's "Ventanitas" Emergency Order, which was infamously reported in the Miami Herald with the title "Chisme (Gossiping) is canceled." Ventanitas are walk-up service windows, where one can order a coffee or meal from the sidewalk and often serve as informal community centers. Although it may appear ridiculous at first glance, this Emergency Order was vital to addressing the spread of COVID-19 in a municipality where nearly 75% of the population is of Cuban/Cuban-American heritage accustomed to daily social gatherings at ventanitas. The Emergency Order regulated ventanitas extensively, with regimented procedures including a queue system requiring patrons to wait within parked vehicles until their turn to walk up and place their order. Restaurants were also required to take proactive steps to prevent gatherings in the near vicinity of ventanitas. Local cultural norms, however, were only one aspect that municipalities had to consider in drafting emergency orders.

In island communities, geography was king in shaping emergency orders to address the spread of COVID-19. Because island communities tend to be geographically connected to the mainland by only one or two bridges, it was practically possible to enforce travel restrictions. For example, the Village of Key Biscayne ("Key Biscayne") faced challenges because it shares the island with both a major state park and major county park, bringing a large number of visitors onto the island at height of the early pandemic. For this reason, it restricted non-resident travel onto the island to only "Essential Business Employees" and individuals providing "Essential Government Functions" early in the pandemic. In a similar fashion, Monroe County (the Florida Keys) decided early on that, due to its unique geography and status as a tourist destination, it would close off traffic from "tourists and leisure visitors" entering the Florida Keys through US-1.

Geography also dictated that coastal communities would need to address other issues arising from their proximity to the ocean. For example, in many coastal cities condominiums and hotels were prohibited from providing beach chairs, umbrellas, and similar shared-use items during the pandemic because of the difficulty of assuring that they were sanitized between each user. Orders were also issued to require spacing and regulate rafting of boats in order to shut down the party scene that emerged on the sand bar off of Haulover Beach and other similar areas.

Other communities struggled to carefully tailor emergency orders to control hotspots that would emerge in the form of house parties at private residences. Broward County entered an order limiting such gatherings, but Miami-Dade County did not. In the City of North Miami Beach, summer brought forth an influx of individuals congregating at private residences without regard for social distancing guidelines. In response, the City enacted an emergency order prohibiting the congregation of more than ten individuals in a residential property, holding the property owner liable for any violations. In addition to these restrictions, the City also implemented additional prohibitions on short-term rentals of properties for less than thirty days in order to discourage party homes, an action that was taken by many municipalities facing individuals temporarily entering into municipalities to host parties.

Undoubtedly, the cultural, geographic, and community-specific struggles faced in the Tri-County Area were difficult to curtail, but thanks to statutory emergency powers combined with restraint from the county and state level, local governments were able to fill in the gaps with emergency measures that the state and county could not possibly foresee and that were of unique importance to those communities.

LESSONS LEARNED

As we all have heard during the pandemic, we are in unprecedented times. Not only is this pandemic new to us, issuing all these emergency orders, enacting restrictions, and being in a state of emergency for this long is all new to local governments. In Florida, emergency orders are usually issued when a hurricane is imminent and the state of emergency only lasts a few days or weeks in the worst of circumstances. The State has now been in a state of emergency for about nine months. While this has been, and continues to be, a learning exercise for all local governments, there are a few lessons learned that we can share.

Tracking Emergency Orders

Although it may seem mundane, implementing and maintaining an organized system that tracks emergency orders may be the simplest way to increase public awareness and compliance with emergency orders. For example, the State and counties numbered their emergency orders since the first day. This made it easier to follow and refer back to each individual order. However, some cities labeled their emergency orders by date, making it difficult to refer back to a specific order, especially if more than one order was issued on the same day. A best practice is to faithfully follow and create an emergency order numbering system that accounts for multiple subject matters for all local government emergency orders.

Packaging of Emergency Orders

Miami-Dade County took the approach of publishing a “New Normal Guide” on its website, a consolidated book of all requirements that eventually was hundreds of pages long. The County republished it over time as the rules changed, and encouraged people to always access the guide through the website to assure access to the most up to date version. An advantage of the Miami-Dade County approach was that it included several graphics to illustrate their requirements.

In contrast, Broward County initially took a “kit of parts” approach, issuing a main order with a series of attachments that addressed various uses or activities. It updated the main orders, the attachments, or both as needed over time. However, Broward County later took a similar approach to Miami-Dade County by publishing a Comprehensive Emergency Order, encompassing all regulations and requirements.[17] Both approaches had their advantages and disadvantages, but a best practice would be to pick an approach and stick with it over time to enhance comprehension and predictability.

Some orders helpfully illustrated changes in strikethrough and underline fonts, but others did not, making it more difficult to spot and track the changes. Eventually, some governments improved at issuing press releases with new or amended orders that spotlighted the changes if they did not redline them. Broward County also published Frequently Asked Questions after significant changes in approach, which were quite helpful to attorneys and regulated individuals alike.

Changes to Emergency Orders Over Time

Often, policymakers did not decide until the last minute on the precise course of action, leading to late night Friday orders lacking the luxury of time for careful review or advance notice to other jurisdictions expected to enforce those orders immediately. Given that the situation was constantly changing and new restrictions were required at the beginning of the pandemic, there were times that emergency orders had to be amended or repealed.

Different governments took different approaches to amendments. Some governments issued new orders amending a previous order, while others issued a new order restating a previous order, and sometimes, the same governments did both at different times. When a new order amends previous orders rather than restating them, a reader has to review multiple orders in order to fully understand what the current restrictions were.

For example, in Broward County, Emergency Order 20-21 was issued, which restated all of the restrictions for all establishments, parks, beaches, etc.[18] Subsequently, the County had to make various revisions to certain restrictions, such as the capacity limitations in restaurants, facial covering requirements, and allowing bars to open.[19] Instead of issuing a new order restating all the requirements, there were seven subsequent orders, each amending a part of Emergency Order 20-21. Subsequently, Broward County issued Emergency order 20-29, a Comprehensive Emergency Order, to provide a single point of reference for all COVID related regulations.

Palm Beach County has a list of its emergency orders on their website organized by number.[20] The list of emergency orders includes a reference to the topic and a link to the emergency order itself. If the emergency order amended a prior order, the link on the website states the emergency order that is amended. The website also lists which emergency orders have been repealed. As time goes on, and the emergency continues, you can view the history of the emergency orders and see which remain in place as of the date of a review of the website.

While it is not always possible to foresee how many changes may be coming to a particular order, it is a best practice to draft in a manner that limits the number of different orders that have to be reviewed in order to understand the impact of the latest one.

Access to Emergency Orders

Some other practical tips include having a central government webpage with all local government emergency orders in one place and communicating the orders to the public and media. Most local governments created such a webpage, making it easier for residents to access all of the emergency orders. Many municipalities also posted updates to restrictions on their social media pages. During a state of emergency, maintaining and updating emergency databases may seem like an afterthought; however, an up-to-date online database may be the simplest tool available to raise public awareness and ensure compliance with emergency orders.

CONCLUSION

The pandemic has provided many challenges for all aspects of government. The coherent drafting of emergency orders is a challenge that can be addressed through the use of consistent numbering and consistent language. As other governmental bodies and the public anticipate clear guidance regarding what is prohibited and what is permitted, attorneys for all branches of government need to ensure that the emergency orders contain precise and consistent language. Through the use of precise language in the emergency orders, law enforcement, businesses, members of the public, and other governmental agencies will be able to follow the emergency orders and ensure compliance with facial covering requirements, business operations, and generally allow everyone to live in a manner that protects the public health, safety, and welfare.

Endnotes:

[1] “At some point in December 2019, a highly contagious novel coronavirus (SARS-CoV-2) was first detected in Wuhan, China, and, with human-to-human transmission, quickly spread across the globe. By early-March 2020, the World Health Organization declared a worldwide pandemic and by mid-May 2020, it was in 187 countries, infecting more than 4.31 million people, and accounting for almost 295,000 deaths. In most cases, COVID-19 (the disease caused by the novel coronavirus) causes fever, dry cough, and shortness of breath. In severe cases, however, it requires hospitalization and can leave a patient needing a ventilator to combat life-threatening, extreme compromise of the lungs. The virus spreads primarily through respiratory droplets, which may linger in the air or on surfaces for hours. And the world learns more about this novel disease every day.” *Henry v. DeSantis*, 461 F.Supp.3d 1244, 1248 (S.D. Fla. 2020), *footnotes omitted*.

[2] One of the initial cases in New York involved a man who visited Northeast Miami-Dade County in mid-February, and the earliest diagnosed cases and quarantines included leaders in that community who had been exposed to that New York man. See <https://wsvn.com/news/local/miami-dade/sources-ny-man-diagnosed-with-coronavirus-went-to-bal-harbour-surf-side/>. The Mayor of Miami was exposed to a Brazilian leader in early March. See <https://www.miamiherald.com/news/local/community/miami-dade/article241163311.html>.

[3] Executive Order 20-89. https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-89.pdf

[4] Executive Order 20-91. https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-91-compressed.pdf

[5] *Id.*

[6] The Governor of New York issued executive orders regulating the number of people that could attend religious services. The Supreme Court of the United States recently enjoined the New York Governor from enforcing the executive orders limiting occupancy at religious services during the COVID-19 pandemic, finding that the orders were not “neutral” and of “general applicability,” and struck “at the very heart of the First Amendment’s guarantee of religious liberty.” *Roman Catholic Diocese of Brooklyn, New York v. Andrew M. Cuomo, Governor of New York*, U.S. Supreme Court Case No. 20A87 (November 25, 2020) (enjoined enforcement of New York’s 10- and 25-person occupancy limits on religious services pending disposition of 2nd Circuit appeal, and finding clearly established entitlement to relief because First Amendment claims are likely to prevail, denying relief would lead to irreparable injury, and granting relief would not harm the public interest).

[7] “No COVID-19 emergency ordinance may prevent an individual from working or from operating a business.” Section 2, Executive Order 20-244.

[8] “If a restaurant is limited to less than one hundred percent (100%) of its indoor capacity, such COVID-19 emergency order must on its face satisfy the following: i. quantify the economic impact of each limitation or requirement on those restaurants; and ii. explain why each limitation or requirement is necessary for public health.” Section 3.A., Executive Order 20-244.

[9] Emergency Orders mandating facial coverings have been upheld multiple times, although cases challenging such orders continue to be litigated throughout Florida. See *French v. City of Jacksonville*, 2020-CA-003786 (Fla. 4th Cir. Ct. 2020) (denying temporary injunction against county facial covering emergency order because plaintiff was unlikely to succeed in showing emergency order violated plaintiff’s right to privacy); *Spreitzer v. Palm Beach County*, Fla. Supp. 2806 (Fla. 15th Cir. Ct. 2020) (similar holding).

[10] See Broward County Emergency Order 20-21, as amended; Palm Beach County Emergency Order 2020-012.

[11] Miami-Dade County Emergency Order -20-24.

[12] See Broward County Emergency Order 20-21, as amended; Palm Beach County Emergency Order 2020-012; Miami-Dade County Emergency Order -20-24. Palm Beach County Emergency Order 2020-012 remains in effect pursuant to Emergency Order 20-30, which extended the facial covering requirements until December 21, 2020.

[13] Executive Order 20-244. https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-244.pdf

[14] See *Miami-Dade County v. Miami Gardens Square One, Inc.*, 2020 WL 6472542 (Fla. 3d DCA 2020).

[15] Palm Beach County Emergency Order 2020-019.

[16] Attachment 16 of Broward County Emergency Order 20-21, as amended.

[17] Broward County Emergency Order 20-29.

[18] Broward County Emergency Order 20-21.

[19] See Broward County Emergency Orders 20-22, 20-23, 20-24, 20-25, 20-26, and 20-27.

[20] See Palm Beach County Coronavirus (COVID-19) website:
<https://discover.pbcgov.org/coronavirus/Pages/Orders.aspx#pbcorders>

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