

1980 S.C. Op. Atty. Gen. 142 (S.C.A.G.), 1980 S.C. Op. Atty. Gen. No. 80-93, 1980 WL 81975

Office of the Attorney General

State of South Carolina

Opinion No. 80-93

September 5, 1980

*1 County and municipal governments and officials do not, under existing law, have the authority to direct and compel an evacuation of all or part of their populace when faced with a real or threatened emergency or disaster-related situation.

The Governor or his regular or interim successor, as provided for by law, would be authorized, upon declaring an emergency to exist, to direct and compel an evacuation of all or part of the populace from any stricken or threatened area of the State and to utilize the additional emergency powers granted by law.

To: Director
South Carolina Disaster Preparedness Division

QUESTIONS PRESENTED:

Do 'local' officials or governing bodies have the authority to order and compel an evacuation of all or part of the populace within their respective jurisdictions?

Who is empowered to exercise the emergency powers provided the Governor in the event of his death, disability, etc. or temporary absence from the State?

STATUTES, CASES, ETC. INVOLVED:

Article IV, §§ 6, 7, 11 and 12, Article VII, § 1 and Article VIII, § 7 and 8, South Carolina Constitution, 1895, as amended; §§ 1-3-120 to 1-3-140, § 1-9-90, § 4-9-70, § 4-9-130, § 5-7-30, § 5-7-250, [Code of Laws of South Carolina \(1976\)](#); § 25-1-440, [Code of Laws of South Carolina \(1976\)](#), as amended; Act No. 283, 1975 Acts and Joint Resolutions and Act No. 199, 1979 Acts and Joint Resolutions; 1976-77 Op. Atty. Gen. No. 77-309, p. 236.

DISCUSSION OF ISSUES:

No real imagination is required to envision the potentially destructive and life-threatening nature of a major flood, storm, nuclear accident, or other natural or man-made calamity. The health, welfare, and safety of the lives and property of the people are beyond question matters of public concern, and reasonable regulations and laws designed to preserve and protect the same are clearly contained in the police power inherent in the sovereign. See Article XII, Section 1, Constitution of the State of South Carolina, 1895, as amended. Nevertheless, there is no similar inherent 'police power' in lesser political subdivisions such as counties and municipalities, as each derives its authority from the sovereign. Thus, in South Carolina the General Assembly provides by general law for the structure, organization, powers, duties, functions, and responsibilities of counties and municipalities. See Article VIII, Sections 7 and 8, Constitution of the State of South Carolina, 1895, as amended.

In furtherance of its Constitutional mandate, the General Assembly has provided such general legislation for counties and municipalities. 'Home Rule' was accomplished through the passage of Act No. 283, 1975 Acts and Joint Resolutions of the General Assembly. Pertinent provisions of that Act are now found in Section 4-9-30 and [Section 5-7-30, Code of Laws of South Carolina \(1976\)](#) which set forth the enumerated powers conferred upon counties and municipalities respectively. Each

provision makes clear that the grant of power is subject to the general law of the State. There is no enumerated power expressly conferred upon such political subdivisions as would reasonably include the extraordinary authority to direct and compel a public evacuation. Moreover, other portions of the 'Home Rule' Legislation now codified as Section 4-9-130 and [Section 5-7-250, Code of Laws of South Carolina \(1976\)](#) provide only limited authority to counties and municipalities 'to meet public emergencies affecting life, health, safety, or the property of the people' by empowering their councils to adopt emergency ordinances upon the affirmative vote of at least two-thirds of the council members present, but which automatically expire at the end of sixty days from enactment.

*2 The empowering of any government or officials with the authority to order and compel an evacuation, thereby forcibly separating its citizens from their homes, businesses, property and even families is clearly at odds with the fundamental rights, freedoms and privileges which are the bedrock of our nation. Obviously, within such extraordinary power lies the extraordinary opportunity for abuse. Nevertheless, no one would seriously challenge that such an emergency power may be needed given the ever present potential of enemy attack, epidemic, natural disaster or nuclear accident. Similarly, it should be readily apparent that an evacuation may well involve problems of control and coordination beyond the area or jurisdiction directly involved. It would thus not be surprising to find such extraordinary power sparingly granted and bestowed only upon that authority having the utmost responsiveness and responsibility to all the people.

Apparently recognizing that actual or threatened disaster or public calamity will often extend beyond political boundaries and exceed local capabilities, our General Assembly had previously enacted general legislation dealing with civil defense and disaster preparedness at the State level. Most recently, Act No. 199, 1979 Acts and Joint Resolutions, established the South Carolina Emergency Preparedness Division within the Office of the Adjutant General and seemingly shifted to the State level the overall and final responsibility for emergency preparedness and response.

Retained in the 1979 legislation and now found in [Section 25-1-440, Code of Laws of South Carolina \(1976\)](#) as amended, was the express delegation of emergency powers to the Governor as follows:

(a) The Governor, when an emergency has been declared, as the elected Chief Executive of the State, shall be responsible for the safety, security and welfare of the State and shall be empowered by the following additional authority to adequately discharge this responsibility.

...

(2) Declare a state of emergency for all or part of the State if he finds a disaster has occurred, or that the threat thereof is eminent and extraordinary measures are deemed necessary to cope with the existing or anticipated situation. A declared state of emergency shall not continue for a period of more than fifteen days without the consent of the General Assembly.

...

(7) Direct and compel evacuation of all or part of the populace from any stricken or threatened area if this action is deemed necessary for the preservation of life or other emergency mitigation, response, or recovery; to prescribe routes, modes of transportation and destination in connection with evacuation; and to control ingress and egress at an emergency area, the movement of persons within the area and the occupancy of premises therein. (Emphasis supplied.)

Given the existence of a general law expressly empowering the Governor to direct and compel an evacuation from any part of the State and the uniquely 'non-local' nature of such a course of action, I believe that local governments have been preempted in the matter. Obviously, only the Governor of the State has the clear legislative authority and available resources at his command to order and enforce a public evacuation.

*3 In the event that the Governor is unavailable by reason of death, disqualification, disability, impeachment, resignation or absence from the State, his regular or interim successor in office would be so empowered. The normal order of succession as provided for under the Constitution and statutes of this State would be Lieutenant Governor, President pro-tempore of the Senate and Speaker of the House of Representatives. See Article IV, §§ 6 and 7, 11 and 12, South Carolina Constitution, 1895, as amended; §§ 1-3-120 to 1-3-140, *Code of Laws of South Carolina (1976)*; 1976-77 Op. Atty. Gen., No. 77-309, p. 236.

Additionally, the 'Emergency Interim Executive and Judicial Succession Act', as now contained in [Sections 1-9-10 to 1-9-110, Code of Laws of South Carolina \(1976\)](#) authorizes, in successive order, the Secretary of State, State Treasurer, and Attorney General to act as Governor upon the unavailability of each of the above listed normal successors, but only in the event of an 'attack' upon the United States.

CONCLUSION:

It is accordingly the opinion of this Office that, under existing law, neither a county nor municipal governing body or official has the authority to direct and compel an evacuation of any of its populace. This is not to say, however, that local public officials, including law enforcement, should not continue to warn or encourage evacuation when hazardous or dangerous conditions exist on the local level.

Should the General Assembly decide to expressly grant this extraordinary power on a limited basis to counties and municipalities (i.e. evacuation to other areas within the control and jurisdiction of the entity involved), I see no impediment to such legislation.

Further, it is the opinion of this Office that in the event of the Governor's unavailability by reason of his death, disability, resignation, impeachment, disqualification or temporary absence from the State, the emergency powers established by law for that office may be exercised by his regular or interim successors in the following order: Lieutenant Governor, President pro-tempore of the Senate, Speaker of the House, and in the event of an 'attack' upon the United States, then the Secretary of State, State Treasurer and Attorney General.

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