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Thank you Judge Moore, Judge Barnett, and Director Henderson for inviting me here today, and thank you to KACO for its leadership during this time. I appreciate the invitation to be with you today, and I look forward to discussing with you the powers held by a county judge/executive during emergency situations such as the one we currently face. Today’s conversation will focus primarily on KRS Chapters 39A, 39B, 39D, and 67, though we will touch on other laws as well. You should consult your county attorney as you implement any of these emergency provisions.

For local officials, the first line of defense in combatting the spread of the Coronavirus is the power of persuasion. County officials, due to their close connections with their constituents, have a unique ability to educate citizens on the benefits and necessity of social distancing. You can do this in a variety of ways, ranging from official statements encouraging social distancing, to adopting temporary policies allowing certain employees to work remotely if appropriate.

To this end, Kentucky law gives counties the latitude to craft county-specific responses to many of the problems that you are seeing or might see in short order. Keep in mind, however, that cooperation between state and local officials is of paramount importance during an emergency.

In considering what counties can do to address this crisis, you should start with KRS 67.083. This provision, which is one of the general founts of power for counties, recognizes that counties are “units of general purpose local government with the necessary latitude and flexibility to provide and finance various government services within [specified] functional areas.”

Importantly, those specified “functional areas” touch on various issues that are particularly relevant to fully responding to the current crisis. By way of example, counties have a role to play in regulating “public gatherings” (KRS 67.083(3)(b));

“public sanitation” (KRS 67.083(3)(c)); and the “[p]rovision of hospitals, ambulance service, programs for the health and welfare of the aging and juveniles, and other public health facilities and services” (KRS 67.083(3)(d)). On all of these important topics, Kentucky law—in particular, KRS 67.083—vests counties with the authority to employ personnel, enact ordinances, and issue regulations.

### **COUNTY EMERGENCY DECLARATIONS**

But in emergency situations, enacting an ordinance or resolution through normal channels may simply take too long. For that reason, Kentucky law permits a county judge/executive or the county fiscal court to declare an emergency and take immediate action.

Under KRS Chapter 39A, an emergency may take many forms, including natural disaster, fire, terrorist attack, riot, energy shortage, building collapse, hazardous materials spill, and yes, widespread disease. In other words, it’s almost any situation that poses a major threat to public safety so as to cause or threaten loss of life, serious injury, significant property damage, or major harm to public health or the environment.

In such a situation, the fiscal court is empowered to declare an emergency under KRS 67.078 without regard to the normal formalities set forth in KRS 67.077. Of course, if fiscal courts are dispensing with the requirements of KRS 67.077 (such as the publication and two readings rules), consider best practices even during time of emergency. For example, if dispensing with the requirements of reading the ordinance or publishing an ordinance under KRS 67.077, determine how the fiscal court may be able to utilize its website or other method to make the information available to the public. Keep material so that it can be published and a record made following the emergency situation.

Now for one of the direct questions at hand. Yes, a county judge/executive is empowered to declare a state of emergency under KRS 39A.100(2) and 39B.070(1). Such a declaration must be in writing. These two statutes, KRS 39A.100(2) and KRS 39B.070, provide powerful tools for a county judge/executive to combat an emergency.

Specifically, KRS 39A.100(2) permits a county judge/executive:

- (a) To enforce all laws and administrative regulations relating to disaster and emergency response and to direct all local disaster and emergency response forces and operations in the affected county;

- (b) To exclude all nonessential, unauthorized, disruptive, or uncooperative personnel from the scene of the emergency, and to command persons or groups of persons at the scene to disperse. A person who refuses to leave an area in which a written order of evacuation has been issued in accordance with a written declaration of emergency or a disaster may be forcibly removed to a place of safety or shelter, or may, if this is resisted, be arrested by a peace officer. ***Forcible removal or arrest shall not be exercised as options until all reasonable efforts for voluntary compliance have been exhausted;***
- (c) To declare curfews and establish their limits;
- (d) To order immediate purchase or rental of, contract for, or otherwise procure, without regard to procurement codes or budget requirements, the goods and services essential for protection of public health and safety or to maintain or to restore essential public services; and
- (e) To request emergency assistance from any local government or special district and, through the Governor, to request emergency assistance from any state agency and to initiate requests for federal assistance as are necessary for protection of public health and safety or for continuation of essential public services.

Note that all of these powers are “subject to any orders of the Governor” pursuant to KRS 39A.100(2). In other words, as a general matter, county judge/executives should not issue orders contrary to those issued by the Governor.

Moreover, KRS 39B.070 permits a county to take a variety of other actions during a declared state of emergency. These include the appropriation and expenditure of funds, establishment of emergency operations centers, and the waiver of procedures otherwise required for:

1. the performance of public work;
2. entering into contracts;
3. the incurring of obligations;
4. the employment of permanent and temporary workers;
5. the utilization of volunteer workers;

6. the rental of equipment;
7. the purchase and distribution, with or without compensation, of supplies, materials, and facilities;
8. the appropriation and expenditure of public funds; and
9. the demolition and removal of damaged public and private structures.

In short, county judge/executives and fiscal courts have a wide variety of tools in their arsenal during declared states of emergency.

### **COUNTY PLANNING**

I also want to spend a few moments talking about what I think counties should do prior to an emergency situation so that they are prepared.

#### **Continuity Plan**

First, the county should have continuity plans in place. Under KRS 39D.030, the governing body of each county and city is supposed to enact ordinances or resolutions “necessary to provide for the continuity of government throughout the duration of a state of emergency.” Those documents should provide “a method by which temporary emergency appointments to public office are made, except as limited by express constitutional provisions, and shall define the scope of the powers and duties which may be exercised, and provide for termination of the appointment so made.” *Id.* You should locate these continuity of operations plans, or COOP plans, refresh your memory, and share these documents with your employees and other local officials.

Relatedly, it may be necessary to designate an alternate seat of government. Know that this can be accomplished under KRS 39D.020.

Pursuant to KRS 39D.040, counties should also enact ordinances governing the manner in which vacancies of offices and employment are filled in an emergency situation. Under that provision, legislative bodies must appointment “not fewer than three (3) nor more than seven (7) emergency interim successors for each local office, department, and agency specified in the Kentucky Emergency Operations Plan and local emergency operations plans.” KRS 39D.040(4). It would be good to refamiliarize yourself with those plans (or establish them now) and the order of succession because the interim successors have “the full power to exercise all powers of the office, department, or agency and to commit its resources during a time of emergency or disaster if the person normally exercising the position is unavailable.” Of course, a

good first step is to ensure that you have appointed a deputy judge/executive pursuant to KRS 67.735. If the judge and his or her deputy are not available, then the duties of the county judge are assumed by a member of the fiscal court. KRS 67.740. Confer with your fiscal court to identify a plan of operation in the event the authority must devolve to one of the members of the fiscal court. This is an important and crucial step to ensure the **orderly** continuity of operations.

Next, be sure you have a local emergency management director, and lean heavily on that person. The director is charged with significant authority under KRS 39B.030. The local emergency management director may represent the county judge/executive on “all matters pertaining to the comprehensive emergency management program and the disaster and emergency response of the county.” KRS 39B.030(1). And each director has specific and broad authority in responding to a state of emergency.

### **County Emergency Operations Plan**

Each county should have an emergency operations plan that includes procedures to assess, mitigate, prepare for, respond to, and recover from all disaster or emergency incidents. The local emergency management director is charged with submitting the plan to the county judge/executive for approval through an executive order pursuant to KRS 39B.060. Note that these plans can be joint plans with neighboring counties.

Among other things, your local emergency operation plans should provide for how the county judge/executive may “prohibit or limit the use of motor vehicles on public highways during any disaster or emergency.” KRS 39A.150(1)(c). You should consider, in consultation with the state, whether and when it will be appropriate to limit traffic patterns. At this point, self-isolation is largely voluntary. But there may be a point at which travel must be limited to further hedge against the spread of contagious infections.

### **Limits on Authority**

Keep in mind that there are limits to emergency authority. Remember that although local governments may exercise certain authority in times of emergency, the local governments still remain liable for loss or damage to equipment used subject to certain procedural requirements set forth in KRS 39B.090. And, government must still compensate individuals for property that is seized. *See, e.g.*, KRS 39A.110.

Moreover, multiple provisions of KRS Chapter 39A and B prohibit any person, unit of government, or governmental organizations from taking, seizing, confiscating, or impounding a “firearm, firearm part, ammunition, ammunition component, or any

deadly weapon or dangerous instrument from any person.” *See also* KRS 39A.295; KRS 39A.100(3).

### Quarantines, Isolation, and Curfew

I now want to spend time discussing quarantines because I am sure you have received questions on this topic. County judges have a multitude of options at their disposal for requiring and enforcing quarantines and preventing mass crowds for the purpose of slowing the spread of communicable disease.

The most generalized power is found in KRS 67.040(2), which provides that “if any person fails to comply with a lawful order of the fiscal court, the Circuit Court, on application by the county judge/executive, may compel obedience by proceedings for contempt.” Thus, it is conceivable that a fiscal court could issue an order requiring the quarantine or isolation of those who have been exposed to—or tested positive for—the Coronavirus, and the county judge could then compel recalcitrant citizens to obey that order by initiating contempt proceedings in circuit court. However, because there are much more specific grants of authority pertaining to emergency situations and quarantines, it is not clear that KRS 67.040(2) should be a county judge’s first line of defense in combatting the Coronavirus epidemic.

KRS 39A.100(2), mentioned before, is one such specific grant of authority. It allows county judges, after declaring a state of emergency, to “declare curfews and establish their limits.” KRS 39A.100(2)(c). If drafted carefully, a curfew order can be an effective means of enforcing social distancing while simultaneously preserving citizens’ abilities to provide for their families. For example, a curfew order could prohibit citizens from being in a public place except when engaged in their occupations or seeking medical care or purchasing food or emergency supplies, or when traveling to or from their homes for the purposes of engaging in such activities.

The county judge’s orders during a state of emergency are enforceable through civil means or arrest. For example, KRS 39A.190 specifically provides that “[a] peace officer, when in full and distinctive uniform or displaying a badge or other insignia of authority, may arrest without a warrant any person violating or attempting to violate in the officer's presence any order or administrative regulation made pursuant to this chapter, or KRS Chapter 39B, 39C, 39D, 39E, or 39F.” Remember, however, that according to KRS 39A.100(2)(a), “***Forcible removal or arrest shall not be exercised as options until all reasonable efforts for voluntary compliance have been exhausted.***”

Speaking even more specifically to communicable diseases, 902 KAR 2:030 and 2:050, in conjunction with KRS 212.245, allow local health departments to implement

quarantines and isolation requirements. These provisions do not authorize county judges on their own to take any measures regarding quarantines or isolations. However, county judges sit on their local health boards under KRS 212.020(1). And, pursuant to KRS 212.140, the local health boards are responsible for governing their respective local health departments. Thus, county judges can use their positions on the local health boards to ensure that local health departments adequately implement quarantine and isolation requirements.

902 KAR 2:030 § 1(2)(b) authorizes health departments to “establish and maintain quarantine, isolation or other measures as required by law or by administrative regulations . . . relating to communicable disease control.” To the extent that a health department has not already adopted such measures, it is imperative to do so now.

Additionally, 902 KAR 2:050 § 2 authorizes health departments to “employ such measures as are necessary to secure adequate isolation” when “any person has been implicated as a possible reservoir or possible source of infection of any communicable disease.” Finally, KRS 212.245(5) authorizes local health departments to issue and execute “such orders as it considers expedient to prevent the outbreak and spread of communicable diseases, and to this end bring the infected population under prompt and proper treatment.” And KRS 212.245(6) allows local health departments to enforce those orders through actions for injunctive relief in circuit court.

I hope this overview of a county’s powers during a state of emergency has been helpful. Again, I urge everyone to review KRS Chapters 39A, 39B, 39D, and 67, while also keeping in mind a local health department’s powers during a state of emergency.

At this time, we would welcome any questions.