

How Do You Know if Your Local Government Has the Legal Authority to Expand Broadband Access in Response to the Coronavirus Pandemic?

As the coronavirus pandemic spreads, local elected officials and advocates alike are asking what they can do for their communities across a range of policies—including to ensure that everyone has broadband Internet access available. This guide can help you determine whether your community has the authority it needs to adopt a particular policy. This guide is not intended to be legal advice; rather it aims to encourage communities, city attorneys, and advocates to examine the possibilities for creative local action.

1 What's the Policy?

Identify the policy you want to implement.

Some policies might be targeted and short-term, while others might aim to continue long-term.

Across the country, local jurisdictions are considering both short and long-term solutions to expand broadband Internet access. Some short-term solutions, for example, are focused on expanding publicly available Wi-Fi access in parking lots, elevating low-income programs from existing providers, and ensuring public housing facilities have affordable and adequate service. Long-term solutions include trying to build networks that will directly connect households to the Internet in their homes. (These examples may not be appropriate for your community.)

2 Is there Existing Authority?

Determine whether your local government has the authority to implement this policy using existing powers.

(If you cannot identify existing authority under Step 2, continue to Step 5 to consider whether your local government might have authority using special emergency powers.)

First, look at your state constitution and state statutes to assess what powers have been delegated to local governments. ^{a, b, c}

Second, if your local government operates under a charter, review the charter to determine if it authorizes the local policy. ^d

The final consideration is how to finance a network or partnership. If you have a partner in mind, what does that partner need? Relevant considerations are existing fiber owned by the city (often to connect its own facilities but with excess fiber available), conduits, expedited or special permitting processes, and financial contributions. Some states limit how local governments can finance broadband networks and how partnerships may be structured.

RESOURCE

The Local Solutions Support Center has created fact sheets that summarize the local powers given to local governments in all 50 states. – [link](#).

3 Is the Policy Expressly Preempted?

If you believe you have the legal authority to implement the policy, determine if your state has expressly preempted the policy.

(If your state legislature has expressly preempted the policy, go to STEP 5 to consider whether your local government might have authority using special emergency powers.)

You should carefully assess what state law intends to expressly prohibit and determine whether your policy can avoid preemption. 19 states have limited how local governments can build/operate/partner for broadband networks.

If your state limits local broadband, you may still be able to expand Internet access with a limited set of policies or after overcoming procedural hurdles. Be sure to understand the difference between providing service for a fee (like a cable company does) and providing service at no charge (as libraries often do). State laws that severely restrict service for a fee allow networks that are available at no charge to the user. If your state is not listed as one of the 19 states that impose limits, you may still have some hurdles to overcome, especially in financing.

RESOURCES

Here is a document from the firm Baller Stokes & Lide explaining state broadband restriction. – [link](#).

Footnotes

a. Cities and counties get their authority to enact local laws from state constitutions and statutes. Depending on your state, your city, town, or county might have “home rule” powers. Governments operating with “home rule” authority are often granted broad “police powers” to adopt laws that further health, safety, morals, and general welfare. Some states are considered “Dillon’s Rule” states (e.g., NV, VA, and AR) where local governments generally possess only the powers delineated by state code.

b. Beyond the broad grants of power described above, some states grant local governments specific authority to enact certain kinds of policies regarding utilities. Broadband networks may be classified as telecommunications or cable networks depending on context.

c. In some states, local authority to enact legislation depends on the kind of jurisdiction you are in. For example, sometimes cities have broader authority under state law than special districts or counties.

d. A charter acts as your local government’s constitution and is often found as part of your local Code of Ordinances.

4

Is There a Conflict with State Law or Other Barrier?

If there is no express preemption, consider whether your local policy would conflict with state law or whether state law imposes other barriers.

State law barriers vary state to state. Barriers can include forms of “implied” or “field” preemption or a “private law exception” prohibiting the regulation of rights and duties between private individuals, such as contracts. The law may be ambiguous.

RESOURCES

- Consult the Local Solutions Support Center’s summaries of local authority for all 50 states – [link](#).
- Understand different forms of preemption with this ChangeLab Solutions resource – [link](#).

5

What Is the Extent of Emergency Powers?

If you find that state law preempts the policy you are considering, consider whether your state and local government’s emergency powers may provide authority.

First, look at the emergency powers in your state law. Most states give governors and legislatures expansive powers for emergencies. A number of states also appear to give local governments broad powers to declare and address emergencies.^f

Second, assess whether your local charter or code addresses emergency declarations and/or other emergency powers. These local charters and codes may shed light on what your mayor and local governing body have the power to do during the coronavirus crisis.^g

NOTE: Whether emergency powers can overcome existing state preemption will depend on your particular state’s law. Check with an attorney licensed to practice in your state to determine how emergency powers may impact your ability to pursue a local policy.

6

Demand State Action

Consider calling on the governor and legislature to take executive, legislative, or administrative action.

Demands for action by a governor or legislature can include calling for the repeal of preemption or expanded local powers. A governor, legislature, or other state actor may also be able to temporarily suspend enforcement of state laws or temporarily lift bans.

RESOURCE

Local Solutions Support Center resources for effective repeal of preemption can be found here: [link](#) and [link](#).

Conclusion

This document will hopefully guide initial analysis, encourage creativity, and prompt more conversation about the need for strong local authority to address local needs.

ADDITIONAL RESOURCES

Some broadband-related resources that may also be of help include:

- National Digital Inclusion Alliance Covid-19 Resources – [link](#).
- Community Broadband Networks – Institute for Local Self-Reliance – [link](#).
- Coalition for Local Internet Choice – [link](#).
- Next Century Cities – [link](#).

For additional support, please contact The Local Solutions Support Center at

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f. In North Carolina, for example, state law gives local governments authority to declare a state of emergency and enact ordinances that prohibit or restrict a range of activities, including “[u]pon . . . activities or conditions the control of which may be reasonably necessary to maintain order and protect lives or property during the state of emergency.” N.C. Gen. Stat. Ann. § 166A-19.31. In Wisconsin, state law allows local governments to order “whatever is necessary and expedient for the health, safety, protection, and welfare of persons and property within the local unit of government in the emergency” Wis. Stat. Ann. § 323.14.

g. In Austin, TX, for example, the local law states that if a local disaster is declared by the mayor under state law, “the mayor may issue public orders and direct City employees to take action necessary to: . . . protect public health, safety, and welfare.” Austin, TX, Code tit. 2, ch. 2-6, art. 3, § 2-6-23. In Durham, NC, the Durham charter authorizes the mayor to declare a state of emergency and “impose the prohibitions or restrictions that he or she deems necessary or suitable to a particular state of emergency. Durham, NC, Code ch. 22, art. 1, § 22-3.