



STATE OF ARKANSAS
ASA HUTCHINSON
GOVERNOR

May 20, 2020

Dear Members of the General Assembly:

I write to you in advance of the State Agencies and Governmental Affairs meeting scheduled for Thursday May 21, 2020, to address measures officials in my administration and I have taken to carry out the laws of the State of Arkansas during this extraordinary and unprecedented time.

As I write this letter, 4,923 Arkansans have tested positive for Coronavirus 2019, ("COVID-19") and 102 Arkansans have died from this virus in a span of 70 days. It is difficult to comprehend these statistics in an age of modern medicine and advanced technology where vaccines and cures abound for any number of maladies that strike the world on a yearly basis. Fortunately, past General Assemblies of the State of Arkansas, perhaps drawing on the lessons of previous pandemics and disasters, have equipped elected and appointed officials to not only respond to such disasters; but also, to respond efficiently and effectively in catastrophic times. It is on those past acts of the Arkansas Legislature that we have relied in the past months.

The Arkansas Emergency Services Act of 1973, codified at Ark. Code Ann. 12-75-101 et. seq., charges the Governor with the responsibility of, "meeting and mitigating, to the maximum extent possible, dangers to the people and property of the state presented or threatened by disaster."¹ The Act defines "disaster" as, "any tornado, storm, flood, high water, earthquake, drought, radiological incident, air or surface-borne toxic or other hazardous material contamination, or other catastrophe, whether caused by natural forces, enemy attack, or any other means..."² Arkansans are most accustomed to declarations of disaster for weather-related events, but there can be no denying that in this time of a nationally declared emergency by President Trump, the current outbreak of COVID-19 is a catastrophe unlike any we have seen in decades. During a declared emergency under the Arkansas Emergency Services Act, the Governor is empowered to, "issue executive

¹ See Ark. Code Ann. § 12-75-114(a)

² See Ark. Code Ann. § 12-75-103(2)(A)

orders, proclamations, and rules and amend or rescind them.....[e]xecutive orders, proclamations, and regulations have the force and effect of law.”³ Under this same provision, the Governor, among other measures, may do the following during a declared emergency:

- (1) Suspend the provisions of any regulatory statutes prescribing the procedures for conduct of state business, or the orders or rules of any state agency, if strict compliance with the provisions of any statute, order, or rule would in any way prevent, hinder, or delay necessary action in coping with the emergency;
- (2) Utilize all available resources of the state government and of each political subdivision of the state as reasonably necessary to cope with the disaster emergency;
- (3) Transfer the direction, personnel, or functions of state departments and agencies or units of state departments and agencies for the purpose of performing or facilitating emergency management;
- (4) Subject to any applicable requirements for compensation under § 12-75-124, commandeer or utilize any private property if he or she finds this necessary to cope with the disaster emergency;
- (5) Direct and compel the evacuation of all or part of the population from any stricken or threatened area within the state if the Governor deems this action necessary for the preservation of life or other disaster mitigation, response, or recovery;
- (6) Prescribe routes, modes of transportation, and destinations in connection with evacuation;
- (7) Control ingress and egress to and from a disaster area, the movement of persons within the area, and the occupancy of premises therein;
- (8) Suspend or limit the sale, dispensing, or transportation of alcoholic beverages, explosives, and combustibles; and
- (9) Make provision for the availability and use of temporary emergency housing.⁴

I have not invoked the majority of the powers listed above, but when appropriate, I have invoked those necessary to fulfill my obligation as Governor to assist and protect the citizens of Arkansas and support the directives of the Department of Health.

State Agencies are always called to render assistance during an emergency. The nature of the emergency dictates which agencies are engaged to respond and provide assistance. During a public health emergency, Arkansas law demands that the State Board of Health take specific actions.

The State Board of Health is charged with the general supervision and control of all matters pertaining to the health of citizens. The board is responsible

³ See Ark. Code Ann. § 12-75-114(b)

⁴ See Ark. Code Ann. § 12-75-114(e)

for all quarantine rules and enforcement and has the authority to prevent the entrance and spread of infectious, contagious, and communicable diseases in the state.⁵ Additionally, Arkansas law empowers the State Board of Health to promulgate rules to carry out the public health mandates of the General Assembly.⁶

Pursuant to this authority, the State Board of Health promulgated rules pertaining to reportable disease. Novel Coronavirus is listed as a reportable disease by the board's rules.⁷ The State Board of Health, through its promulgated rules, imposes certain responsibilities upon the Director of the Department of Health, including, "[w]hen the Director has knowledge, or is informed of the existence of a suspected case or outbreak of a communicable disease, [he] shall take whatever steps necessary for the investigation and control of the disease."⁸

Pursuant to these rules, the Director of Health is responsible for the imposition and enforcement of quarantine regulations. The rules require that "[t]he Director shall impose such quarantine restrictions and regulations upon commerce and travel by railway, common carriers, and any other means, and upon all individuals as in his judgment may be necessary to prevent the introduction of communicable disease into the State, or from one place to another within the State."⁹

During this emergency, Dr. Nate Smith has taken measured, data-driven action in accordance with these rules. In the first weeks of this pandemic, with mounting pressure from Arkansans, local governments, and nationwide criticism, Dr. Smith held firm in resisting "stay at home" or "shelter in place" orders. He correctly analyzed the data and statistics worldwide determining that those drastic measures were not necessary to prevent the dramatic spread of COVID-19 in Arkansas. Rather, he took a measured, systematic approach to limiting the activities and businesses that were shown to reduce the spread of COVID-19. In resisting the invocation of the full force of his powers as the Director of Health, Dr. Smith issued measured, narrowly tailored measures that slowed the spread of COVID-19 in Arkansas. In choosing this approach, thousands of jobs were likely saved, and our economic outlook is far better than states that imposed broad restrictions.

I have asked a great deal from the administrative agencies of Arkansas, and they have all responded by doing their part to assist Arkansans during this trying time. The Alcoholic Beverage Control Division ("ABC") has served the citizens of Arkansas in many ways during this emergency - most importantly, by finding creative solutions to assist restaurants in maintaining revenue streams and

⁵ See Ark. Code Ann. § 20-7-110

⁶ See Ark. Code Ann. § 20-7-109

⁷ See *Arkansas State Board of Health: Rules and Regulations Pertaining to Reportable Disease (2019)*, pg. 7.

⁸ *Id.* at pg. 10.

⁹ *Id.* at pg. 11,

employees by enhancing carryout and delivery services when dine-in services were suspended, but most notably, by the agency's assistance with maintaining the enforcement of its own regulations regarding the public health and safety of citizens.

Earlier this month, a Fort Smith venue, licensed by the ABC as a large attendance facility, insisted on conducting a concert with over 200 attendees, prior to the date authorized by the Department of Health's directive.¹⁰ The venue planned and marketed the concert in late April of this year, while all entertainment venues were closed to prevent the spread of COVID-19. The venue had no indication or assurances that the Secretary of Health's directives would be lifted by the date chosen for the concert, yet they persisted. The organizers argued that the date of the concert was only three days away from the date restrictions were to be lifted, but I know this body understands dates matter. Every law passed by the General Assembly has an effective date, by emergency or by the passage of time, and not one day sooner. Effective dates of laws are not changed to accommodate the ill-conceived plans of those whose actions would violate or be vindicated by the law. No such exception was made in this case, nor should it have been where the directives in place were issued during a public health emergency and given the full force of law by executive order under the Arkansas Emergency Services Act.

In Act 695 of 1989, the General Assembly declared that an alcoholic beverage license is a privilege license. There is no right to such a license, and any holder thereof is held to high duty of care in the operation of the licensed establishment. The General Assembly further found that, "it is the duty of every holder of an alcoholic beverage permit to operate the business wherein alcoholic beverages are sold or dispensed in a manner which is in the public interest and does not endanger the public health, welfare, or safety. Failure to maintain this duty of care shall be a violation of this section and grounds for administrative sanctions being taken against the holder of the permit."¹¹ The General Assembly gave the ABC authority to promulgate rules to implement each and every provision of Act 695 of 1989.¹²

ABC Rule 1.47 addresses the procedure for providing notice in the event of a violation of a provision such as the one described above. The rule gives the ABC Director discretion to determine whether or not public safety, health, or welfare requires emergency action. If the Director makes that finding, and incorporates it in the notice, the permit may be immediately suspended.

¹⁰ See Arkansas Department of Health, *Directive Regarding Large Indoor Venues, effective May 18, 2020*, https://www.healthy.arkansas.gov/images/uploads/pdf/directive_large_indoor_venues.pdf

¹¹ See Ark. Code Ann. § 3-3-218

¹² *Id.*

After numerous conversations with health officials, and the delivery of a cease and desist order by the Department of Health, the Fort Smith venue continued to insist that it would go forward with the concert in violation of the health directive. It is inarguable that the violation of a health directive during a public health emergency is a threat to public safety. The dangers in this case were obvious when the purpose of the directive was to slow the spread of a highly contagious virus by preventing large gatherings of people in enclosed spaces.

ABC Director Doralee Chandler took the steps Arkansas law requires her to take when the holder of an alcoholic beverage permit endangers the health and safety of Arkansans. Director Chandler took these steps more than 24 hours prior to the planned concert in order to allow the venue to plan for a concert without the sale of alcoholic beverages and provide notice to concert goers that alcoholic beverages would not be available at a concert conducted contrary to a directive of the Department of Health.

The leaders and employees of Arkansas's agencies have adapted and responded admirably to daily challenges during the course of this emergency. They have upheld their obligations and the rule of law during these uncertain and unprecedented times. I thank them for their dedication and leadership. I also want to thank the General Assembly for the numerous actions taken during this emergency to assist the citizens of the State of Arkansas. I will continue to work with the General Assembly to ensure the stability of our state's economy and the protection of our most valuable asset, the citizens of the State of Arkansas.

Sincerely,

A handwritten signature in black ink, appearing to read "Asa Hutchinson". The signature is fluid and cursive, with a large, sweeping flourish at the end.

Asa Hutchinson