

FOR INFORMATIONAL PURPOSES ONLY

TO: Dru Levasseur
FROM: Lauren Wallace
DATE: July 24, 2018
RE: Doraville, GA Non-Discrimination Ordinance

Summary

Currently, there are twenty-nine states that provide no explicit prohibitions for discrimination based on sexual orientation or gender identity in state law. Without this protection, cities assert their sovereignty through their Home Rule authority. As dictated by state law, the Home Rule power provides local governments the freedom to institute local protections on behalf of their constituents. As such, Home Rule grants cities the power to act without prior state authorization. Notwithstanding the autonomy that the Home Rule power provides, the extent of this freedom is unclear. Due to a lack of judicial interpretation of municipalities' home rule power, the degree to which ordinances can enforce public accommodation laws is unknown. Still, in the wake of inaction at the state and federal law, innovative policies constructed by local governments stimulate change by the higher levels of government.

Discussion

Currently, Georgia is one of five states without laws to protect citizens from discrimination in places of public accommodation.¹ Public accommodation laws generally prohibit businesses from discriminating on the basis of sex, race, color, religion, ancestry, national origin, disability, or medical condition.² Some states further prohibit discrimination on

¹ Alabama, Georgia, Mississippi, North Carolina and Texas do not have state public accommodation laws. See <http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx>; http://www.lgbtmap.org/equality-maps/non_discrimination_laws/public-accommodations.

² See 42 U.S.C. § 12181(7)(1990)(defining private entities considered public accommodations).

FOR INFORMATIONAL PURPOSES ONLY

the basis of sexual orientation or gender identity.³ With inaction by the state, municipal governments have sought protections for LGBTQ+ communities through the state's constitutional and statutory home rule provisions. As such, cities have become instrumental to extending protections to citizens under their Home Rule authority.

The Municipal Home Rule Act of 1965

The Georgia Constitution authorizes the General Assembly to set forth laws allowing municipalities to self-govern “without the necessity of action by the General Assembly.”⁴ Georgia was “adamant[ly] resistan[t] to the home rule movement,” until the passage of the Municipal Home Rule Act of 1965 (“the Act”).⁵ The Act authorizes municipalities to legislate over matters not expressly in the power of the Georgia General Assembly.⁶ Specifically, municipal governments have the power to “adopt clearly reasonable ordinances, resolutions, or regulation for which no provision has been made by general law and which are not inconsistent with the Constitution or any charter provision...”⁷ If a city's charter is inconsistent with a charter provision, the home rule power allows the city to amend its charter.⁸

Limitations of Home Rule

Despite the broad authority the Act extends to municipalities, Home Rule is not without limits. As dictated by the Act, municipal corporations may not: enact legislation that the General Assembly has enacted by general law, affect the “composition and form of the municipal government authority,” define any offense that is deemed an offense under the criminal laws of

³ See, e.g., C.R.S. §24-34-601 (2008); see also MAP, Non-Discrimination Laws (last visited July 24, 2018), <http://www.lgbtmap.org/img/maps/citations-nondisc-public-accom.pdf>.

⁴ Ga. Const. Art. 9, § 2, ¶ II (1976).

⁵ See R. Perry Sentell, Jr., *The Georgia Home Rule System*, 50 Mercer L. Rev. 99 (1998)

⁶ *Id.*

⁷ O.C.G.A. § 36-35-3(a)(1998).

⁸ O.C.G.A. § 36-35-3(b)(1998).

FOR INFORMATIONAL PURPOSES ONLY

Georgia, request fines in excess of \$1,000.00, adopt any form of taxation beyond what is authorized by law or by Constitution, or take any action affecting the private or civil law governing private or civil relationships.⁹

The Power of the General Assembly & Intrastate Preemption

The Act provides that the General Assembly, by general law, may “define ... broaden, limit, or otherwise regulate...” a municipality’s home rule power.¹⁰ Due to the political nature of public accommodations laws and the swell of religious freedom laws across the country, it is possible that the Georgia legislature could attempt to pass a law that limits the local government’s ability to enforce an innovative non-discrimination ordinance. Without case law precedent of the type, it is unclear how probable or successful this strategy would be.

Additionally, cities may not adopt legislation for which the General Assembly has preempted or may preempt.¹¹ While there is no state law preempting cities from enacting a non-discrimination ordinance, Georgia’s constitution contains a “uniformity clause.”¹² Thus, a local ordinance is preempted only when it is in conflict with an existing state law. Because Georgia is without a law prohibiting discrimination in places of public accommodation, it is clear that no statutory language exists to preempt local governments from passing their own ordinance.

The Private-Law Exception

The Act’s private-law exception is one area where an innovative public accommodations law may be limited. This exception provides that Home Rule “shall not include the power to take any action affecting the private or civil law governing private or civil relationships,” unless

⁹ See O.C.G.A. § 36-35-6(2015).

¹⁰ O.C.G.A. § 36-35-3(a)(1998).

¹¹ O.C.G.A. §36-35-6(a)(2015)

¹² Ga. Const. Art. 3, § 6, ¶ IV (1976).

FOR INFORMATIONAL PURPOSES ONLY

the power is “incident to the exercise of an independent governmental power.”¹³ Albeit ambiguous under Georgia law, “private law” has popularly adopted a complainant-based meaning.¹⁴ Under this approach, private law “focuses on who has the power to initiate legal action.”¹⁵ Thus, a city’s non-discrimination ordinance could not grant private citizens the power to sue businesses who violate a public accommodations ordinance. Rather, the ordinance could only be enforced by the city.

Even with the private-law exception in place, there is no Georgia case law to interpret this provision of the statute. Without litigation to clarify the availability of municipally created private rights of action, it is possible that Georgia courts would scrutinize the legislature’s intent to the authority that cities have under the Home Rule Act.

The Home Rule Power in Practice

Atlanta and Macon-Bibb County are the only Georgia localities that prohibit discrimination based on sexual orientation and gender identity in private employment, housing, and public accommodations.¹⁶ In 2008, the Atlanta City Council adopted an ordinance designed to prohibit discrimination in places of public accommodation.¹⁷ The ordinance established a Human Relations Commission (“the Commission”), tasking the Commission with “receiving, investigating, and making recommendations” regarding complaints alleging violations of the public accommodations ordinance.¹⁸ The Commission maintains extensive enforcement powers, including the ability to “recommend revocation of [a liquor] license,” revoke a license or

¹³ OCGA 36-35-6(b)(2015).

¹⁴ See Paul A. Diller, *The City and the Private Right of Action*, 64 Stan. L. Rev. 1109 (2012).

¹⁵ *Id.* at 1116.

¹⁶ MAP, Georgia’s Equality Profile (last visited July 24, 2018), www.lgbtmap.org/equality_maps/profile_state/GA.

¹⁷ Atlanta, Georgia Code of Ordinances § 94-68 (2000).

¹⁸ See Atlanta, Georgia Code of Ordinances § 94-41 (2000).

FOR INFORMATIONAL PURPOSES ONLY

contract to conduct business with the city, issue enforcement orders, and require the payment of fines.¹⁹ In addition to filing a complaint with the Commission, an aggrieved individual “may seek prosecution of alleged violations of the Human Relations Code” in Atlanta Municipal Court; but “if the person filing the complaint agrees to a conciliation agreement, the basis of an ordinance violation is limited to the enforcement of the terms of the agreement or settlement.”²⁰ The ordinance also allows an individual to proceed directly to municipal court to seek remedies for relief; however, there is no indication whether this action would be likely to succeed²¹ Because Georgia law does not provide an explicit right to sue a business for civil rights discrimination, individuals may largely be left to sue under a tort claim. This provides its own unique set of barriers and challenges.

In practice, it is clear that the Commission has the authority to fine violators of the public accommodations ordinance; however, the ordinance leaves the cost of the fine to the discretion of the Mayor and City Council. While fines incentivize the city to conduct a thorough investigation, it does not promote individuals who have experienced discrimination to come forward with their complaint.

Things to Consider

In the absence of state law, municipalities should pass ordinances that protect local citizens. In constructing a non-discrimination ordinance, localities must consider ways to promote compliance by local businesses. Even without financial remedies to incentivize citizens

¹⁹ See Atlanta Georgia Code of Ordinances § 62-37(1977); Atlanta Georgia Code of Ordinances § 94-121(o)

²⁰ See Atlanta Georgia Code of Ordinances § 94-120; See also City of Atlanta, GA Human Relations Commission (last visited July 24, 2018), <https://www.atlantaga.gov/government/mayor-s-office/executive-offices/office-of-constituent-services/human-relations-commission>.

²¹ Atlanta Georgia Code of Ordinances § 94-120(2002).

FOR INFORMATIONAL PURPOSES ONLY

to come forth with their complaints, local governments still maintain considerable authority to remedy discrimination. Fines and the threat of losing a business license could promote substantial compliance with public accommodations laws, especially if the municipality educates the community about their role in the process. Nevertheless, municipal governments must also be ready to face the threat of litigation by business owners who believe that the city is violating their rights. In this case, it is likely that the Home Rule power may gain some traction amongst the General Assembly and Georgia Courts.

CONFIDENTIAL