



For The Record

Public Education: A Complement -- and Sometimes an Alternative -- to Regulation



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Local governments serve numerous, disparate roles: constructing and maintaining physical infrastructure such as streets, sidewalks, water mains, sewage treatment systems, and parks; providing services to the community such as police, fire, road plowing and maintenance, recreation programs; and representing the interests of the community politically. In addition to these functions, local governments also regulate activity, businesses, and land uses within their jurisdictions. Sometimes these regulations are imposed as a common practice (traffic and parking regulations, for example), and sometimes they are imposed as a result of the local officials' own initiative or at the request of the public.

While regulation is a valuable tool for local officials, establishing a regulatory program to address issues within a municipality is not without its limitations. Public education campaigns can, in many instances, be as effective as adopting a regulatory program to address an issue a community is facing. In my last “For the Record Article” discussing the State’s preemption of local sex offender residency restrictions, I ended the article encouraging local officials to consider employing a public education campaign to dispel misconceptions that can amplify the public’s concerns about sex offenders. This article will provide an overview of the general authority for cities and villages to adopt regulations, as well as the pros and cons of regulation and the benefits of public education campaigns. Examples will demonstrate how public education campaigns can be used to complement regulatory programs or even replace them altogether.

The Authority to Regulate

Cities, villages, and towns have extensive authority under New York State Law to regulate activities within their jurisdictions. Municipal Home Rule Law § 1(ii)(a)(12) provides in relevant part that local governments may adopt local laws relating to the government, protection, order, conduct, safety, health, and well-being of persons or property therein, including laws regulating or licensing occupations or businesses. There are several important caveats to this authority. Local laws must not be inconsistent with any provision of the New York State Constitution, nor may they be inconsistent with any general law of the State. The authority of towns under this section is limited to the area of the town outside of the village(s) located therein.

To facilitate the implementation of such regulations, Municipal Home Rule § 10(4)(b) also provides that local governments may “provide for the enforcement of local laws by legal or equitable proceedings which are or may be provided or authorized by law, to prescribe that violations thereof shall constitute misdemeanors, offenses or infractions and to provide for the punishment of violations thereof by civil penalty, fine, forfeiture or imprisonment, or by two or more of such punishments.”

In addition to this broad authority to regulate activity within a municipality, many other provisions of State law address and authorize local governments to impose regulations on specific subject matters. For example, zoning and land use regulations are authorized in the General City and Villages Laws.¹ The New York State Vehicle and Traffic Law authorizes cities and villages to regulate traffic and parking.² And while the State has preempted the field with respect to building and fire code regulations, enforcement and administration of the *Uniform Fire Prevention and Building Code* is delegated to local governments.³

Local regulatory schemes come in different shapes and

sizes. Some regulations simply impose standards, violations of which can result in civil penalties or fines imposed via a criminal court proceeding. Other regulations create more elaborate systems that require individuals or businesses to submit applications which are then reviewed by local government officials before a permit is issued and the requested activity is allowed to proceed. In many instances, an inspection by a local official may be required as a condition precedent to a permit being issued.

Why Regulate?

Before imposing and administering any local regulations, local officials should always consider why they want to impose regulations. Articulating the goals and objectives that local officials are seeking to achieve as a result of imposing the regulation can help not only to craft the regulation but also to evaluate its effectiveness once implemented. Regulations serve multiple valuable purposes. They can inform the public about expected behavior and conduct. They can protect the public from harm or correct a failure of the free market system. They can be used to efficiently allocate the use of a common public resource.

Regulations accomplish these goals by first establishing standards, thereby creating a framework within which the public and local officials operate. Penalty provisions serve the important role of providing justice to victims, protecting the public from individuals who are likely to reoffend, and deterring individuals and businesses from committing the undesirable behavior in the future.

The Costs of Regulation

Administrative and Enforcement Costs

Regulatory programs are not without their costs, however. Local governments have to dedicate municipal resources to implement regulations, with the type of regulation dictating the amount of municipal resources that must be tasked to implement the program. Staff may be needed to issue permits, conduct inspections, and enforce violations. Municipalities may have to spend fiscal and human resources acquiring, developing, and maintaining information technology systems to implement the regulation. And in the tax cap era, spending resources implementing and enforcing a regulation generally means cutting resources from another municipal program.

Societal Costs: The Importance of Considering a Regulation’s Effectiveness

The cost of a regulatory program to a local government is not the only cost local officials should consider when determining whether a regulation should be adopted. Regulations can have significant costs to society and the local economy as well, such as causing costly delays or requiring businesses to dedicate resources to complying with the regulation instead of spending those resources on growing

their business. Whether the cost of implementing a regulation is worth its benefits depends upon the program's effectiveness. Consequently, local officials should consider conducting a cost-benefit analysis to determine if the regulations are worth the effort.

Simply adopting a regulatory scheme will not necessarily achieve the desired results. For example, local officials attempting to address complicated issues generally adopt complicated regulations. Unfortunately, the more complicated the regulation, the more difficult it is to administer. Additionally, new regulations invariably result in unforeseen and unintended consequences. For example, many communities that implemented sex offender residency restrictions (prior to the Court of Appeals decision in *People v. Diack* (2015)) experienced backlash from those parts of their municipality into which the sex offenders were pushed as a result of the residency restriction.

The Benefits of Public Education Campaigns

Regulations are intended to affect public behavior (or sometimes the behavior of a select audience). If the public or the targeted audience is unaware of the regulation, it is unlikely that they will behave in a manner the local officials intend. Consequently, to be effective, regulatory schemes must include a public education element. However, public education campaigns can be implemented independently from a regulatory scheme. Municipal websites, newsletters, pamphlets, and social media can all be effective methods of reaching out to the public. In addition, local officials may issue press releases or hold community forums to address an issue.

Sex Offenders

One type of regulation that was relatively popular over the last decade was the sex offender residency restriction. Sex offender residency programs generally prohibited convicted sex offenders from living within a certain distance of a school, church, park, or playground. But as discussed in the Spring 2016 issue of the *NYCOM Bulletin*, local governments are preempted from adopting local sex offender residency restrictions. When faced with impassioned residents who want their local elected officials to do something about the

sex offender(s) in their city or village, local officials are faced with a tough political issue. The fact that local officials are preempted from adopting a sex offender residency restriction or even that sex offender residency restrictions have not been shown to protect the public, is of little consolation to the public or the local officials who must face their political wrath.

One way for local officials to *do something* about sex offenders is to educate the public about the facts. Specifi-

Thus, not only must local officials have a compelling government interest if they impose content-based regulations, but such regulations must be carefully crafted so that they are neither under- nor over-inclusive.

cally, local officials may wish to provide information about the State's sex offender registry program, including what the various levels mean. Moreover, local officials may wish to educate the public about the prevalence of sexual assaults. With cable news channels peddling sensationalist shows such as "To Catch a Predator," it is no wonder that the public is clamoring for sex offender residency restrictions. Local officials may also wish to provide information to the public about how irrational it is to fear being sexually attacked by a stranger, when individuals are far more likely to be sexually attacked or abused by someone they know than by a stranger. Numerous organizations and initiatives, including RAINN (Rape, Abuse & Incest National Network at www.rainn.org), No More (<http://nomore.org/>), and the New York State Coalition Against Sexual Assault (<http://nyscasa.org/>) offer information, material, and assistance to educate the public to prevent and fight sexual assault. Such programs will have a much greater benefit to the community than spending time and money trying to adopt, enforce, and defend in court regulations that dictate where sex offenders may live and travel.

Drones

Another area that is presenting local officials with practical and legal challenges is drones. The proliferation of drones has sparked an uptick in complaints to local officials about noise and invasion of privacy. As noted in the winter 2016 *NYCOM Bulletin*, drones are heavily regulated by the FAA. Consequently, local governments are substantially preempted from regulating drone operations (e.g., the registering of drones, the method of drone operation). However, simply because the FAA has preempted the field of regulating drone operations does not mean that drone operators may fly their drones wherever they want. Consequently, local officials who are faced with ubiquitous drone activity may wish to launch a public education campaign via their website, newsletter, and pamphlets letting their residents know that they should contact the police if drones are flying over their property without their permission.

Moreover, city and village officials may wish to also reach out to drone operators to make sure that they are aware of the FAA regulations and the standards for operating drones,

as well as the need to obtain property-owner approval before flying over private property, airport approval before operating near an airport, and municipal approval before operating over municipally-owned and controlled property such as parks and streets. Information that may be useful to disseminate to drone operators include FAA drone regulations and guidance, which can be found on the FAA website (www.faa.gov/uas/) as well as the best practices promulgated by Association for Unmanned Vehicle Systems International and the Academy of Model Aeronautics (<http://knowbeforeyoufly.org/for-recreational-users/>).

Door-to-Door Solicitors

Door-to-door solicitations are another regular cause of concern for local officials. Complaints about aggressive and harassing door-to-door salesmen are not uncommon. Local officials frequently look to impose door-to-door registration programs to respond to resident's complaints. Because of first amendment protections, door-to-door solicitation regulations can be difficult to implement and frequently do nothing to address the aggressive and harassing nature of many of the solicitors. A public education campaign can be a more cost-effective solution to dealing with this issue. City and village officials may wish to provide fraud prevention training to their residents, particularly the elderly who are frequently targets of unscrupulous people, educating them about what to be on the lookout for from door-to-door, as well as telephone and email scams. Fraud and scam prevention materials are available from a variety of sources including the Federal Trade Commission (www.ftc.gov/) and the National Fraud Information Center (www.fraud.org/). Additionally, local officials should consider distributing pamphlets or newsletters reminding the public that they can always ask door-to-door solicitors to leave their property and that they should contact the police if a door-to-door solicitor refuses to leave their property.

Conclusion

Local regulations serve multiple valid purposes. But imposing and enforcing a regulation is not always the best solution to addressing a problem facing the community. Local officials should consider employing public education regularly to better educate their constituents and to achieve goals and objectives both with and without a complementary regulatory component.

Endnotes

1. See "Sex Offenders: An Overview of Sex Offenders Laws and the Prohibition Against Local Residency Restrictions," *NYCOM Municipal Bulletin*, Spring 2016.
2. See *Vehicle and Traffic Law* §§ 1640, 1640-a, and 1643.
3. See *Executive Law* §§ and NYCRR.