

Code Enforcement

One Size Doesn't Always Fit All

By: Frank M. Johnson, Assistant City Attorney, Gaithersburg, Maryland

Most would agree that civil code enforcement in the United States, involving basic quality of life issues in our neighborhoods and communities, ought to be considered within the primary purview of the government closest to its residents – that is, municipal and county governments. That's in part because code enforcement issues are often made up of local complaints about a specific problem, involving a particular person or business within the community. That's also in part because enforcing basic home maintenance codes, noise ordinances, sign ordinances seem to be most effectively handled within comamunities at the local level, where local officials and government staff know best what the community needs – and wants.

In fact, as described below, many aspects of code enforcement are mandated, and that's true both in the United States and Canada. In Canada, municipal governments, as in the United States, have local planning and zoning authority, but provinces, such as Ontario, may specify planning and development processes and civil code enforcement procedures, as well as establish building codes and even lay out standards for weed control requirements. While the government structure of the United States may allow more local autonomy in theory, in fact, mandates may include some of the same procedural and notice requirements as from Canadian provinces. These are usually imposed by states on counties and municipalities and as noted below, in many cases states and the federal government go further to lay out the specific code that is to be enforced.

Local Code Enforcement in the United States. As Robert F. Kennedy once said, "every community gets the kind of law enforcement it insists on," meaning that one size does not fit all, either as to what local codes require, or how those requirements are enforced. What each community demands, through voters' election of local mayors and town and city councils, depends on local needs as well as local culture, values and characteristics. Thus many municipalities have ordinances limiting or prohibiting farm animals, such as roosters and pigs, while more rural communities would not consider such a limitation. It's not a restriction rural residents would want, or need.

Local enforcement is also more convenient, as residents and businesses generally will not want to call the state or federal government when they have a complaint about someone violating a home maintenance requirement or noise ordinance. They will look to their local government for help, where staff will likely know better how to reply and address the problem.

Dillon's Rule. It's axiomatic, at least since broad acceptance of "Dillon's Rule," that local ordinances typically cannot conflict with federal or state law. This is the basic concept, first established in an 1868 Iowa case, that municipalities are essentially creatures of the state legislature and have only those powers expressly so granted. *See Clinton v Cedar Rapids and the Missouri River Railroad*, 24 IA 455, 475 (1868). Almost all courts have adopted the "Dillon" rule, and the Supreme Court has long held that municipalities are "political subdivisions of the state." *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907). As such, the Court held that municipal powers are "in the absolute discretion of the state," and may be expanded, modified or withdrawn "at its pleasure." *Hunter*, 207 U.S. at 178-79.

Even so, it falls to the towns, cities and counties to handle code enforcement violations and complaints within their communities. As such, code enforcement is almost universally seen as a primary local government function. Even the smallest towns will enforce their laws and may issue civil citations. Larger cities and counties often have departments devoted to code enforcement – as well as attorneys who will prosecute citations in court.

Mandates That One Size Fits All, Even If It Doesn't. While code enforcement may be considered a local priority, in many ways local officials and staff increasingly must work within a "one size fits all" environment, as the laws we enforce, and how we go about enforcing them, are often dictated by the state legislature. And in many ways, local laws must follow mandates passed by the U.S. Congress and enforced by Federal agencies.

Examples of Federal Mandates. For example, at the Federal level, disability access requirements are imposed under the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq*. The Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §2000cc *et seq*. limits local zoning or land use regulations which impose a substantial burden on a person's religious practices. And the Federal Communications Commission has limited the ability of local and state government to regulate satellite dishes and small cell or distributed-antenna systems in many ways, starting with a prohibition on any local ordinance prohibiting the ability of any entity to provide wireless services. 47 U.S.C. §332(c)(7). These provisions all limit or specify requirements for local ordinances.

Examples of State Mandates. States have also passed a number of mandates which, in many ways, dictate not only the laws to be enforced thorough code enforcement, but also the manner in which local governments can do so. For example, where I practice in Maryland, municipalities have, as in most states, been granted home rule under the Maryland Constitution, Article XI-E, §3. But also, as in other states, no local law can conflict with state law. Md. Constitution, Article XI-E, §6; Md. Local Government Code Ann., §5-203(b). Town, city and county staff handle code enforcement matters within their jurisdictions and, in most cases, they are enforcing the local ordinances – even as the content of those laws is often mandated, to some extent, by federal or state law. Local rather than statewide building codes are in place, and indeed authorized for municipalities by Md. Local Government Code §5-211(a). Even so, state law imposes certain basic requirements, such as, for example, specifying local storm water management requirements and reviewing local inspection programs. Md. Environmental Code Ann., §§4-203 and 4-206. While issuing notices and handling initial complaints are largely handled at the local level, once an actual civil citation is issued, under Maryland law all local governments must all follow the state's Municipal Infractions process under Title 6 of the Local Government Article, Md. Local Government Code Ann., §6-101 *et seq*., which has generally been in place since 1987. This process dictates what is included on the citation and the process thereafter, including how long defendants have to pay the fine, and the court hearing thereafter. *See* Md. Local Government Code Ann., §§ 6-103, 6-106, 6-109.

The State of California similarly allows local governments to establish their own building and property maintenance codes, but specifies, in some detail, the fine limits counties and municipalities may impose. Thus, Cal. Government Code §25132 specifies that each violation of a county ordinance is limited to a fine of $100 for the first violation; $200 for the second, and not more than $500 for the third, except that local building and safety code violations have maximum fines of $100 for the first, $500 for the second, and $1,000 for the third. The same limits are imposed for municipalities, at Cal. Government Code § 36900.

Many states go further than proscribing processes for code enforcement. Indeed, building and property maintenance codes may seem to be local issues, but in many cases even plumbing codes are now dictated by state law. Oregon's state building code, including the mechanical, heating and ventilating code, applies statewide, and municipalities are prohibited from enacting or enforcing any differing requirements without Department of Consumer and Business Services approval. Or. Rev.Stat., Title 36 §455.040. While local enforcement and permitting is in place, the state also requires uniform permit and inspection requirements. Or. Rev. Stat., Title 36 §455.055. Pennsylvania has similarly adopted the Uniform Construction Code statewide, 34 Pa. Cons. Stat. §403.1(a), but allows municipalities to enact their own building codes which at least meet (or exceed) the statewide standards. 34 Pa. Cons. Stat. §403.102(i).

In Virginia, however, the state's construction code expressly supersedes any local regulations, allowing enforcement only of those local construction code provisions which do not conflict with state law. Va. Code Ann. §36-98. While most states permit local regulations which do not conflict with state law, that's not always the case. For example, municipal regulations in New Hampshire must be specifically authorized by state law. *Girard v. Allenstown*, 121 N.H. 268, 271 (1981). As such, they are unenforceable, even if not in conflict, unless a specific provision of state law enables local governments to act, *Girard*, 121 N.H. at 271-272, in which case the courts find that municipalities are "not estopped from creating more restrictive rules" such as for wetlands. *Cherry v. Town of Hampton Falls*, 150 N.H. 720, 725 (2004).

Along the lines of Virginia, the State of Michigan, in 1999, passed a statewide "Single State Construction Act" which adopted the International Code Council's Residential Code, Building Code, Mechanical Code and Plumbing Code, as well as the National Electrical Code and the Michigan Uniform Energy Code. Mich. Comp. Laws Ann. §125.1504(2). The Act specified it applied statewide and precluded local governments from enacting their own local building codes. Mich. Comp. Laws Ann. §125.1508(a). While local enforcement is permitted, the law proscribes the process a local government must follow in doing so, such as by requiring notice to the alleged person or business in violation and authorizing emergency action to correct the violation when health or safety is threatened. Mich. Comp. Laws Ann. §125.1508(b). Interestingly, in Michigan there was one exception to the ban on local building codes, which actually involved a maintenance code. This was the International Property Maintenance Code, which was not specifically adopted by the Michigan Single State Construction Act. Even so, the state agency handling building code enforcement asserted it had been adopted by reference, at Section 101.4.5 of the Michigan Building Code, and was thus part of the mandated set of state codes. Accordingly, when a few years later the City of Grand Rapids attempted to enforce its own building maintenance code, the defendant challenged the City in court and asserted that law had been preempted. Only because the IPMC was not specifically adopted did the Michigan Court of Appeals find the Grand Rapids property maintenance code still applied, as the single exception to the overall state building code mandates. *Azzar v. City of Grand Rapids and Schaeffer*, No. 260438 (MI Ct. App. Sept. 22, 2005), 2005 WL 2327076 (unpublished) at 3.

In New York, the state has, like Michigan, passed a number of uniform building codes, including the Residential Code, Building Code, Plumbing Code, Mechanical Code, Fuel Gas Code, Fire Code and the Property Maintenance Code. N.Y. Executive Law §§377, 378. As such, it is applicable statewide rather than being adopted by each local government. Even so, while considering building codes entirely a state responsibility, municipalities must enforce the state's building code – unless they opt out by passing a local law declining to handle such enforcement, in which case enforcement would pass to the

Continued on page 34

Avoiding The Walk of Shame Cont'd from page 33

95. *Id.*
96. U.S. CONST. amend. VIII.
97. Locklear v. Florida Fish & Wildlife Conservation Comm'n, 886 So.2d 326, 327 (Fla. 5th DCA 2004).
98. *Id.* at 329.
99. *Id.*
100. Jim Waymer, *Net ban turns 20 on July 1, but was it a success?*, Florida Today (Jun. 30 2015) *available at* http://www.floridatoday.com/story/news/local/2015/06/30/net-ban-turns-july-success/29532739/.
101. State v. Jones, 180 So.3d 1085, 1089 (Fla. 4th DCA 2015), citing Gordon v. State, 139 So.3d 958, 960 (Fla. 2d DCA 2014).
102. State v. Cotton, 198 So.3d 737 (Fla. 2d DCA 2016), citing Coyote Publ'g, Inc. v. Miller, 598 F.3d 592, 600 (9th Cir.2010) (citing U.S. Department of State, The Link Between Prostitution and Sex Trafficking (November 24, 2004)).
103. Aguila, *supra* note 66.
104. Hererra, *supra* note 1.
105. Jerry Iannelli, *Unlike Miami Beach Mayor Levine, 94 Percent of South Floridians Want Legal Airbnb*, MIAMI NEW TIMES (Mar. 7, 2017) *available at* http://www.miaminewtimes.com/news/unlike-miami-beach-mayor-levine-94-percent-of-south-floridians-want-legal-airbnb-9190438.
106. *Id.*
107. *Id.*
108. Hererra, *supra* note 1.
109. Iannelli, *supra* note 105.
110. Miami Beach should seek a State Attorney General's opinion to ensure the State does not view an annual percentage restriction as regulating the frequency of vacation rentals, implicating 509.032 preemption.
111. Lara Major, Comment, *There's No Place Like (Your) Home: Evaluating Existing Models and Proposing Solutions for Room-Sharing Regulation*, 53 SAN DIEGO L. REV. 469, 503 (Spring 2016). Citing, Charles Gottlieb, *Residential Short-Term Rentals: Should Local Governments Regulate the "Industry"?*, 65 PLAN. & ENVTL. L. 4, 6 (2013).
112. *Id.*
113. Laine Doss, *Fighting Back: Airbnb Says Its Guests Spent $50 Million at Local Restaurants Last Year* MIAMI NEW TIMES (Oct. 24, 2016) *available at* http://www.miaminewtimes.com/restaurants/fighting-back-airbnb-says-its-guests-spent-50-million-at-local-restaurants-last-year-8866832. ML

Code Enforcement Cont'd from page 25

applicable county – and if the county passes a local law declining enforcement, the New York Department of State would seek to enforce the building code. N.Y. Executive Law §381. But under these provisions, even if the local government does not pass a local law declining enforcement of the state's building code, the municipality or county will have to pass a local ordinance empowering a local enforcement program for the building code.

Impact of Local Enforcement. Clearly, counties and municipalities in the United States are generally required to follow state law in enacting their own ordinances, if not enforce state law directly, as in New York. In some cases, there is little local option, such that the presumption is that "one size fits all," regardless of local preferences. Even so, anyone involved in the code enforcement process knows that discretion in actual enforcement almost always remains. Indeed, the person who as a practical matter has the most discretion when it comes to code enforcement is the inspector or code enforcement officer – the person out in the community, interacting directly with persons who may be complaining about violations as well as those who are allegedly committing code violations.

What this means is that despite state and federal mandates in the United States – or, for that matter, provincial mandates in Canada – it still remains a matter of local discretion how a law will be enforced. It remains for the inspector, the person initially communicating with the alleged violator, to determine whether a violation exists. It falls to that inspector or code enforcement officer to attempt to solve the problem – to gain compliance – and then to follow up to check on that compliance. And it falls to that inspector or officer to conclude whether an alleged violator is, in good faith, making sincere and effective efforts to address the problem leading to the complaint. The primary focus of any successful code enforcement effort will always remain: to solve the problem by having the violation corrected. Thus, state, provincial or federal law may specify the standard to be enforced, but cannot dictate how a violation of that standard is addressed, such as requiring immediate issuance of citations, any more than it can dictate the actual facts or what steps will actually solve the problem. That still falls to those of us in the trenches, if you will, in towns, cities and counties, where we can – mandates aside – still make a difference. ML



HAVE A JOB POSITION THAT YOU NEED TO FILL?

Use IMLA's job board to reach top quality candidates.
. Visit www.imla.org and click on the job board tab.

Phone: 202.466.5424
Fax: 202. 785.0152
E-mail: info@imla.org
Website: www.imla.org

51 Monroe Street,
Suite 404
Rockville, MD 20850