

CODE ENFORCEMENT

Regulation & Enforcement Local and State?

By David Wesner

My municipality is an Illinois Home Rule Municipality. The Illinois Constitution provides: "Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare, to license, to tax, and to incur debt." Through this provision, home rule municipalities have been granted broad power and authority to provide regulation and enforcement within their corporate limits.

Due to the broad grant of authority, many municipalities choose to enact regulations with respect to certain issues even if the state has enacted the same or similar regulations. The question municipalities have to ask when they are considering the issue is, in light of regulations enacted by the state, should the municipality enact regulations of its own? Some would say that it is unnecessary to duplicate regulations already put in place by the state. On the other hand, some might say that the answer depends on the level of regulation or the degree of enforcement the municipality believes the state would exercise. If the state were to perform consistent, regular enforcement, a municipality may not feel compelled to seek local regulation to achieve that level of enforcement.

However, if a state does not or cannot provide an adequate level of enforcement to assure compliance and avoid community backlash over a problem that is not being addressed, a municipality will likely address the issue through local regulation and enforcement.

A good example of local regulation in the face of state regulation is alcohol. As we know, alcohol is a heavily regulated industry from every level of government. While the state provides regulation and some enforcement, my experience is that the state performs compliance checks on a minimal basis. Due to the nature of alcohol, municipalities play an important role in regulation and enforcement. Local compliance checks can happen frequently, whether at the direction of the local liquor commissioner or police chief or based upon complaints received concerning violations. State enforcement may be able to check for certain violations while they conduct their stings, such as whether minors are present or whether minors have been served alcohol. But, they will likely not check for violations concerning hours of operation or whether certain events have exceeded the scope of limited or temporary liquor licenses or other similar types of violations that directly impact the municipality.

An example where my municipality struggled with whether to enact any local regulation in light of state regulation was with regard to smoking. The Illinois legislature was wrestling with the issue of smoking, including underage smoking, and how to encourage people to stop the habit. At one time it appeared that they were going to leave it up to the local municipalities to enact regulations. However, the state ended up enacting a state-wide ban on smoking. The impact of this legislation was going to be hardest-felt by taverns and restaurants. The state felt that the issue was important enough to force taverns and restaurants to prevent customers from smoking inside their establishments. Once the legislation was enacted, my Mayor and Police Chief questioned the enforcement of the new law. The legislation was not exactly clear. But, county health departments ended up being placed in the position of enforcing the statute. Our county health department was cut drastically a few years ago in budget cuts. So, while the state may not be involved in enforcement, the county would likely provide very limited enforcement. As such, my administration and City Council discussed whether the City should enact any legislation. Due to the health-related nature of the issue, the discussion focused on whether the City should put itself in the position of making business decisions for local businesses. The Mayor and City Council determined that it was not appropriate to force businesses to abide by such a requirement that would likely have a detrimental impact on their business operations. They felt the businesses should make the decision about whether to ban smoking in their establishments. While the state-enacted legislation and enforcement would be extremely limited, my municipality did not feel it necessary to provide regulations or enforcement in this area.

The last example I thought I would share is the one which got me thinking about this column. The example deals with gaming. Illinois has been dealing with possible expansion of gaming for many years. A few years ago, Illinois enacted legislation which would allow video gaming in certain types of businesses. It took the state more than a year to get the system in place to finally allow businesses to apply for the appropriate licenses. Outside of a limited exception, the businesses who could apply for the state license had to have a state and local liquor license. Since gaming is another heavily regulated industry and the gaming license was tied to liquor licenses, we began to discuss whether the city should enact local regulations and provide local enforcement regarding

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pressreleases?ID=be68ad86-a0a4-4486-853f-f8ef7b99e736 (last accessed August 6, 2013)
3. http://www.fas.org/sgp/crs/misc/R42937.pdf (last accessed August 6, 2013)
4. *Id.*
5. http://www.usatoday.com/story/news/nation/2013/07/10/cost-care-aging-prisoners/2479285/ (last accessed August 6, 2013)
6. http://www.capradio.org/news/npr/story?storyid=209253516 (last accessed August 7, 2013)
7. *Id.*
8. http://articles.washingtonpost.com/2013-8-12/world/41333369 3 1 prison-population-prison-reform-prison-costs (last accessed August 25, 2013)
9. http://www.nytimes.com/2013/07/26/us/us-prison-populations-decline-reflecting-new-approach-to-crime.html?pagewanted=all (last accessed August 20, 2013)
10. http://www.sentencingproject.org/map/map.cfm (last accessed August 25, 2013)
11. *Brown v. Plata*, 131 S. Ct. 1910 (2010)
12. http://www.appeal-democrat.com/articles/state-126813-prison-inmates.html#ixzz2cXLHPIPi (last accessed August 25, 2013)

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sures" limiting who can own guns and where they can be used.

In response to Christian's assertion that "strict scrutiny" review should apply to the Ordinance (requiring the showing of a "compelling state interest" and "narrowly tailored" statutes), the Oregon court countered that the majority of federal courts have applied an "intermediate scrutiny" standard in the wake of *Heller*. This required the showing of "an important governmental objective" and means "substantially related" to that objective. Because the Ordinance did not seek to ban all public carry of loaded firearms, strict scrutiny was inapposite, and "intermediate" review was proper. On that basis, the Ordinance passed Constitutional muster: "Applying the standard of intermediate scrutiny, we conclude that the city has demonstrated that it is important to protect the public from the many risks associated with the presence of loaded firearms in public places. We also conclude that enforcement of the ordinance, as carefully drawn, is substantially related to that objective and advances that objective."

State v. Christian, No. S060407 (OR Aug. 15, 2013) http://www.publications.ojd.state.or.us/docs/S060407.pdf (last accessed August 20, 2013)

NOTE: IMLA thanks Larry Rosenthal of Chapman University for writing our brief with Paul C. Elsner, Beery, Elsner & Hammond, LLP, Portland, Chad A. Jacobs, Portland, and John Daniel Reaves, Washington DC. IMLA was joined on its amicus brief by the U.S. Conference of Mayors and the Major Cities Chiefs Association and IMLA thanks them for their support. Thanks too, to Jerry Lidz, Eugene City Attorney's Office, who filed the brief for *amicus curiae* League of Oregon Cities. With him on the brief was Sean E. O'Day, League of Oregon Cities. Finally, IMLA salutes Harry Auerbach, who argued the case for the City of Portland.

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video gaming. The administration felt that we should enact local regulations in order to provide the ability for local enforcement to ensure compliance. The ordinance which was drafted was patterned after the state regulations and also authorized a fee for local licensing of video gaming machines and locations. When the ordinance was presented to the City Council, several aldermen questioned why the City would need to act at all in the face of the state regulations. They felt that the state would provide adequate enforcement. The Mayor and I both indicated during the discussion that we felt it important to have local regulation in order to provide a much more immediate mechanism for enforcement of violations. At the end of the discussion, the City Council enacted the ordinance, but removed the provisions concerning local fees for issuance of the licenses.

While my code book is thick with regulations that mirror state statutes such as traffic regulations, I am not an advocate for enacting local regulations to cover everything possible. However, I do advocate working on an issue and enacting local regulation to provide local enforcement if state regulations and enforcement are not adequate to address a problem that needs resolution. I would encourage those municipalities which have home rule authority to keep an eye on local regulation and enforcement as the potential primary option to address local issues.

