Managing Protests, Large Events and Mass Gatherings: A Primer for Local Government Officials

National politics have made 2017 a year to remember. For many New York communities, the aftermath of the 2016 Presidential campaign has had local repercussions, with protests and marches held in cities and villages throughout the State. Under the best of circumstances, large protests and marches can cause serious disruptions in communities, creating traffic jams and blocking access to businesses and homes. As the tragic events in Charlottesville, VA, in August 2017 highlight, however, when not properly managed, protests can have more serious consequences. Even when there is not intentional violence, marches and rallies that attract as few as a hundred individuals have the potential to create health and safety concerns.

Consequently, local officials should be prepared to handle large gatherings of people, whether it be a local fair, concert, outdoor market, or political rally. A well-drafted regulatory scheme, as well as training and planning for mass gatherings, can minimize the negative impacts such events can have on a community and reduce the risk of serious property damage and personal injuries.

Protests and The First Amendment
Protests, marches, and rallies create both logistical and legal challenges for local government officials. On the legal side, protections granted by the First and Fourteenth Amendments to the U.S. Constitution give individuals substantial rights to assemble, protest, and march on both private property (with the consent of the owner or tenant, of course) and public property where such activities are normally tolerated. While the right to assemble and speak is not without limit, local government officials shoulder a heavy burden when regulating First Amendment activities. The First Amendment, made applicable to State and local governments via the Fourteenth Amendment, establishes protections for speech, peaceable gatherings, and petitioning government officials and provides as follows:
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Municipal parks, public sidewalks, and even public streets, to a degree, are forums imbued with the public trust, where citizens have substantial rights to gather and speak. The First Amendment does not empower individuals to gather on all publicly-owned property, however. Clearly, local officials may restrict access to property dedicated for public business (e.g., municipal office buildings, public works facilities, water and sewer infrastructure, jails, courthouses, etc.). Moreover, even in those areas traditionally held to be used as public commons (parkland, parade grounds, streets, and sidewalks), local government officials may adopt reasonable time, place, and manner restrictions. However, licensing such activities must generally be narrowly tailored, or such regulations are likely to be held facially unconstitutional.

The Local Government Interest in Regulating Protests
What constitutes a reasonable time, place, and manner restriction depends on a variety of factors. The specific location where a protest or march is proposed to take place and the expected size of the event are the first, and perhaps most important, factors dictating what constitutes reasonableness, particularly given the number of people who are expected to attend the event. For example, a park may be able to accommodate hundreds or even thousands of individuals, whereas a sidewalk generally would not. However, a small protest of even a few dozen people may be completely appropriate on a sidewalk, not warranting requiring the group to obtain a permit.

Additionally, the potential impact a gathering would have on surrounding properties may also be a factor to consider when formulating regulations that require permits and when reviewing applications for parade or protest permits submitted thereunder. Finally, the capacity of public infrastructure to handle people traveling to and from the location as well as the availability of food, water, toilets, and emergency medical services to accommodate the anticipated crowds are all factors local officials should consider requiring event organizers to address under protest regulations.

Establishing a Permitting Procedure and Standards
Because outright prohibitions against protests and marches are not allowed (see the First Amendment), local governments that are likely to experience gatherings of more than a handful of people should adopt regulations that establish the process and standards for permitting marches and protests. As previously noted, however, the First Amendment generally prohibits requiring small gatherings to obtain a permit. The trial court in People v. Barrett fleshed out the reasoning for this exception to protest permitting requirements, noting:

“The significant governmental interest justifying the unusual step of requiring citizens to inform the government in advance of expressive activity has always been understood to arise only when large groups of people travel together on streets and sidewalks. Small groups, however, can also ‘march’ and ‘assemble’ for expressive purposes, and can do so without interfering with the free flow of traffic (except in the trivial respect that anyone walking on a public sidewalk or roadway takes up space and therefore prevents someone else from traveling precisely the same route). Without a provision limiting the permitting requirements to larger groups, or some other provision tailoring the regulation to events that realistically present serious traffic, safety, and competing use concerns, significantly beyond those presented on a daily basis by ordinary use of the streets and sidewalks, a permitting ordinance is insufficiently narrowly tailored to withstand time, place, and manner scrutiny.”

In other words, if the proposed location not only has the capacity to handle the expected number of protesters but does in fact regularly accommodate the anticipated number of individuals on a day-to-day basis, requiring individuals to obtain a permit to protest there may be unconstitutional.

Certain circumstances may warrant requiring individuals to obtain a permit regardless of the number of expected participants. For example, local officials should require any individual or group interested in marching in the street in a manner that would obstruct vehicular traffic to obtain a permit. Additionally, events where counter-protesters are expected may be grounds for requiring the event organizers to obtain a protest or parade permit regardless of the anticipated number of participants.

For communities likely to face the possibility of protests, failing to have an established protest or parade permit procedure can be problematic for local government officials because the lack of standards for allowing or denying the event to take place would vest local officials with too much discretion. Even when a local protest permit standard is established, if that standard is not clear, then the process may be subject to challenge on the grounds that it is unconstitutionally vague. As the Barrett court noted in a prosecution of individuals riding in a bicycle ride protest,

“To survive a vagueness challenge, a statute must ‘give the person of ordinary intelligence a reasonable opportunity to know what is prohibited’ and ‘provide explicit standards for those who apply [the statute].’ The degree of constitutional vagueness depends partially on the nature of the enactment. A stringent vagueness test applies to a law that interferes with the right of free speech.”
In ruling in the defendants’ favor in the case before it, the Court noted that the catchall language in the City’s Parade Law, on which the People were basing their prosecution, was unconstitutionally vague because it would “render criminal the otherwise legal activity of bicycling in the streets of New York City, without fair notice to bicyclists.”6

Consequently, when establishing protest and parade permit programs, local officials should clearly identify the locations where and the circumstances when protesters are allowed as of right, without obtaining a permit, as well as those locations where protesters are required to obtain a permit before gathering. Local officials should also establish a threshold number of anticipated participants that trigger the permitting requirement. Additionally, local officials should require event organizers to provide the following information as part of the permitting application:

• A plan for the event, including a layout of activities, times of specific activities, expected number of attendees, whether sound amplification devices will be used, whether food will be sold or provided, and the potential for any confrontation or violence (e.g., counter-protesters);
• The purpose of the protest;7
• Date(s) and time(s) of event;
• Location(s) of rallies and the route of march, if any planned;
• Name of organizing person(s) or group;
• The organizers’ contact information;
• Method to be used to identify organizers and volunteers/monitors at the event (e.g., hats, shirts, armbands); and
• Whether the event organizers want symbolic arrests?
  If so, where and when?

Note that permits for protests and parades should be approved on a first-come, first-served basis, although local officials may need to make reasonable efforts to accommodate counter-protesters.

Management of Protests and Mass Gatherings

Even when local officials have well thought-out, well-crafted ordinances regulating protests, marches, and mass gatherings, managing those events is extremely important. A report analyzing the deadly events of the Charlottesville white supremacist rallies in 2017 noted the following failures on the part of local officials, which led to violence, numerous physical injuries, and the death of Heather Heyer:

• Despite its lack of experience in dealing with protests and counter-protests of that size and scope, local officials did not seek assistance or input from experienced law enforcement personnel in how to handle such events;
• The Charlottesville Police Department (CPD) failed to train its officers in how to handle the complex and unique nature of the large protests and counter-protests;
• When the CPD finally requested assistance from Virginia State officials, it was too late in the process, which limited its effectiveness;
• Elected city officials interfered with the CPD’s handling of planning for the event, specifically dictating the location of the rally, a decision which should be informed by legal analysis and operational planning, neither of which was the province of the elected City Council;
• Local officials failed to provide adequate information to the public about plans for the protests, including information about street closures and safety measures;
• Local officials failed to limit the possession of weapons at the protests;
• The CPD’s operational plan was flawed, in part, because it did not adequately separate protesters and counter-protesters;
• The CPD’s operational plan was also flawed because it failed to provide for intervention in, and thus the de-escalation of, violent incidents because police officers were not deployed to areas where conflict predictably occurred and were not equipped to respond to mass unrest, and because CPD failed to deploy available resources while State police were directed not to enter the area where violence was occurring;
• In attempting to disperse what the CPD declared to be an unlawful assembly, officials pushed protesters and counter-protesters together, thereby exacerbating the confrontation;
• The traffic plan placed insufficient resources in key inter-sections; and
• The various police departments failed to operate under a unified command, which resulted in slowed response times, confusion among officers on the ground, and significantly diminished effectiveness of law enforcement resources.8

The need for local officials to prepare for protests is even more important in the internet age, as protests can arise without a clear organizing group or individual or much warning for local officials.

Other Types of Mass Gatherings

Local officials may wish to adopt a protest or parade regulation that also addresses other types of mass gatherings such as fairs, concerts, and outdoor markets. Alternatively, municipalities may adopt separate regulations for those types of commercial activities. Generally, most of the concerns local officials are seeking to address when regulating protests, rallies, and marches are similar to large commercial events. Consequently, the same process and standards can be used when regulating both types of activities.

A Word About Charging Fees for Mass Gathering Permits

As a general rule, local governments may charge fees for expenses it incurs in administering local programs. Note, however, that fees must be clearly defined so that local officials do not have discretion in whether to apply the fees or how much the fees should be. Moreover, the amount of the fees should be reasonably related to the expenses the local government incurs in administering the regulation. Most fees for mass gathering permits are dependent on the size and scope of the event and the costs to the local government for managing the event. Note that permits for protests and parades should be approved on a first-come, first-served basis, although local officials may need to make reasonable efforts to accommodate counter-protesters.
and not so excessive as to constitute a tax. These restrictions on imposing fees are even more important in the context of First Amendment activities as they constitute a prior restraint of speech, and thus will be closely examined if challenged in court to ensure that the local government regulations are narrowly tailored and advance an important government interest.

**Conclusion**

Dealing with protests and marches can be a difficult challenge under the best of circumstances, let alone when events become confrontational. Consequently, local officials should determine the likelihood that their community will experience mass gatherings, including political protests, marches, and rallies, and adopt a permitting program to facilitate such events and help local law enforcement plan accordingly. Additionally, local officials should plan and prepare for such events, including coordinating with county and state officials when appropriate and necessary to maximize the use of those resources and minimize the risk of disruption to the community, damage to property, and injuries to people. For sample protest, parade, or mass gathering regulations, contact NYCOM General Counsel Wade Beltramo at (518) 463-1185 or via email at wade@nycom.org.

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**Endnotes**

3. People v. Barrett, 13 Misc. 3d at 938 citing Santa Monica Food, Not Bombs v City of Santa Monica, 450 F3d 1022 (9th Cir 2006) and American-Arab Anti-Discrimination Comm. v City of Dearborn, 418 F3d 600 (6th Cir 2005).
4. 13 Misc. 3d 929, 938–39 (Crim. Ct. 2006) citing Santa Monica Food, Not Bombs v City of Santa Monica, 450 F3d at 1039 [citations omitted].
6. People v. Barrett, 13 Misc. 3d at 936.
7. Note that the purpose of the protest may never be the basis for approving or denying a permit. However, the purpose of a protest may be useful to local officials in planning for the event. For example, a protest of a Confederate general statue may be controversial and likely to spur counter-protests which local officials would need to plan for.