Door-to-Door Peddlers and Solicitors: Is Your Local Regulation Constitutional?

If a tree falls in the woods but no one is there to hear it, does it make a sound? The local government equivalent is, “If a local law violates a provision of the Bill of Rights, but no one challenges it in court, is it unconstitutional?” This question is put to the test on a daily basis throughout not only New York State, but the entire country.

Sometimes no one is undertaking the activity that is being regulated. Sometimes the local governments are not enforcing the regulation. Sometimes individuals or companies comply with the law either because they do not realize that it is unconstitutional or because they determine that complying with the law is easier and more cost-effective than challenging the regulation in court. Regardless of the reason, local governments occasionally enact and enforce regulations that may (a) be preempted by state or federal law or (b) violate someone’s rights. That is, they enforce the regulation until it is challenged.

In the summer of 2019, local governments across New York found themselves facing just such a challenge from a law firm representing a nationwide pest control company whose business model is built on door-to-door sales. The law firm sent letters to local governments with door-to-door peddler regulations that the firm believed violated the First Amendment. The letters enumerated the specific infirmities of each local regulatory scheme. Some of the challenged regulations imposed outright bans of door-to-door solicitation. However, the most commonly cited problem with the local ordinances were provisions that prohibited going door-to-door after 6:00 p.m. or after dusk. These restrictions are problematic from the pest control company’s perspective because most of its sales occur between 5:30 p.m. and 9:00 p.m. These restrictions are problematic from a Constitutional perspective because numerous courts have
struck down regulations that limit door-to-door activity to unreasonable times.

The law firm’s threat of litigation caused municipal officials across New York to re-examine their door-to-door regulations. Unfortunately, regulating door-to-door peddling, soliciting, canvassing, and advocacy is not a simple task. First Amendment jurisprudence is complicated, providing substantial protections to individuals going door-to-door, whether it be to sell a good or service or to communicate social, political, or religious ideas. Despite the challenges and the potential pitfalls of drafting and enforcing door-to-door regulations, local officials frequently adopt such regulations in an effort to respond to residents’ complaints about (a) potential criminal activity; (b) obnoxious, rude, or pushy solicitors or peddlers; and (c) the annoyance of people ringing their door bells late at night, or at any time for that matter.

The First Step to Drafting Door-to-Door Regulations: Understand First Amendment Jurisprudence

The first step in establishing a Constitutional door-to-door regulation is to recognize that local governments have broad authority to enact reasonable time, place, and manner restrictions that are content neutral. It must be noted, however, that the U.S. Supreme Court has acknowledged a relatively broad exception to the content neutral rule, which is that government may treat commercial speech and non-commercial speech differently.

Non-Commercial Speech

Individuals engaging in non-commercial door-to-door activity receive the highest level of First Amendment protection. Whether they are proselytizing their religious faith or advocating for a political or social cause, such activities are strongly protected by the First Amendment, and any regulations of non-commercial speech will be closely scrutinized by the courts. Local governments may impose reasonable time restrictions on non-commercial door-to-door activity. For example, ordinances that prohibit door-to-door activity after 9:00 p.m. have been upheld. However, ordinances that have prohibited door-to-door activity after 5:00 p.m., 6:00 p.m., dusk, sunset, or after dark, have generally been struck down as being unreasonable time restrictions and therefore unconstitutional. Additionally, restrictions that prohibit solicitations and peddling on weekends or limit door-to-door activity to weekends have also been held to violate the First Amendment. Moreover, local governments cannot require licensing or permitting of individuals or groups canvassing solely to communicate their social, political, or religious ideas and positions.

Note, however, that if a group is soliciting funds to further its non-commercial activities (i.e., donations for its religious, political, or social cause), local governments may impose a permitting requirement. The Supreme Court pointed out this distinction between non-commercial speech which involves solicitations and non-commercial speech which does not involve solicitations in Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton.

The text of the Village’s ordinance prohibits “canvassers” from going on private property for the purpose of explaining or promoting any “cause,” unless they receive a permit and the residents visited have not opted for a “no solicitation” sign. Had this provision been construed to apply only to commercial activities and the solicitation of funds, arguably the ordinance would have been tailored to the Village’s interest in protecting the privacy of its residents and preventing fraud.

Commercial Speech (a/k/a Door-to-Door Sales)

Although non-commercial speech is afforded the highest protections under the First Amendment, the U.S. Supreme Court long ago recognized that the First Amendment also “protects commercial speech from unwarranted governmental regulation” because it “not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information.” The Court noted, however, that the Constitution “accords a lesser protection to commercial speech than to other constitutionally guaranteed expression” which “turns on the nature both of the expression and of the governmental interests served by its regulation.”

The Second Step to Drafting Door-to-Door Regulations: Keep It Simple

Even though local governments have some latitude in regulating door-to-door fundraising and commercial activity, because of the complexities involved in regulating First Amendment activity, municipal officials must use caution when establishing any regulations on any type of door-to-door activity. If local government officials decide that they want to go down the road of regulating activities that are clothed in First Amendment protection, their mantra should be “keep it simple.” Time and again, local governments run afoul of the First Amendment by adopting overly complex regulatory schemes that are either overly broad or vague, give too much discretion to an enforcing official, or regulate the content of speech and not simply the time, place, and manner of the speech. The following table highlight the types of acceptable regulation depending upon the type of door-to-door activity.
Local Governments Can Regulate Door-to-Door Sales and Solicitation, But Should They?
While the table above outlines the various ways that local governments may regulate door-to-door activities, it does not answer the question, should local governments adopt such regulations? Regulatory programs, such as door-to-door regulations, are not without their drawbacks. Local governments have to dedicate municipal resources to implement the regulations. Staff may be needed to review applications, issue permits, and enforce violations. When crafting any regulation, local officials should ask themselves what they hope to achieve by enacting and enforcing the local law. Many communities enact door-to-door regulations in response to complaints from residents who are annoyed and sometimes scared of door-to-door vendors and solicitors. However, such concerns are insufficient to curtail the First Amendment rights of individuals who want to go door-to-door. Moreover, simply adopting a regulatory scheme will not necessarily achieve the desired results of preventing individuals from going door-to-door.

The Benefits of a Public Education Campaign
As a supplement or alternate to a door-to-door regulation, local officials may wish to consider implementing a campaign to educate city or village residents about their rights regarding door-to-door peddlers and solicitors. Reminding residents that they can always ask door-to-door solicitors to leave their property and encouraging residents to contact the police if a door-to-door solicitor refuses to leave their property, may serve as a better method of dealing with unwanted door-to-door activity. Municipal websites, newsletters, pamphlets, and social media can all be effective methods of getting this message out to the public. In addition, local officials may issue press releases or hold community forums to address an issue.

Additionally, city and village officials may wish to provide fraud prevention training to their residents, particularly the elderly who are frequently targets of unscrupulous people, by educating them about what to be on the lookout for from door-to-door, 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/).

Conclusion
Note that this article only touches upon a myriad of issues that arise when dealing with door-to-door peddlers and solicitors. Before enacting or amending a local door-to-door regulation, local government officials are strongly encouraged to consult their municipal attorney when drafting any local regulation that has First Amendment implications. Any questions regarding door-to-door regulations specifically or the First Amendment in general can be directed to NYCOM General Counsel Wade Beltramo at (518) 463-1185 or by email at wade@nycom.org.

### Types of Acceptable Door-to-Door Regulations

<table>
<thead>
<tr>
<th>Type of Regulation</th>
<th>Door-to-Door Sales (Commercial Speech)</th>
<th>Door-to-Door Solicitation &amp;/or Advocacy (Non-Commercial Speech)</th>
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<tbody>
<tr>
<td></td>
<td></td>
<td>Soliciting Funds</td>
</tr>
<tr>
<td>Prohibit Door-to-Door Activity Entirely</td>
<td>NO</td>
<td>NO</td>
</tr>
<tr>
<td>Prohibit Door-to-Door Activity Weekdays or Weekends</td>
<td>NO</td>
<td>NO</td>
</tr>
<tr>
<td>Door-to-Door Curfew of 6:00 p.m., Dusk, or Sunset</td>
<td>NO</td>
<td>NO</td>
</tr>
<tr>
<td>Reasonable Time Limitation (e.g. Not after 9:00 p.m.)</td>
<td>YES</td>
<td>YES</td>
</tr>
<tr>
<td>Require a Permit Prior to Going Door-to-Door</td>
<td>YES</td>
<td>YES</td>
</tr>
<tr>
<td>Can a Fee be Imposed for the Permit Program?</td>
<td>YES</td>
<td>YES</td>
</tr>
<tr>
<td>Do Not Solicit List Maintained by the Municipality</td>
<td>YES</td>
<td>YES</td>
</tr>
</tbody>
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Endnotes
4. People v. Gage, 179 Misc. 638 (1942) pamphlets of Jehovah’s Witnesses was not considered as goods, wares, or merchandise.
7. Id. at 563.
8. Note that while local governments may require peddlers and solicitors to obtain a permit prior to engaging in such activity, the regulation imposing the permit requirement must clearly set forth the standards that will be used to determine whether a permit must be issued or denied. As the New York State Court of Appeals noted, “For the City to have acted with such ‘arbitrary discretion vested in some governmental authority’ is ‘inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view’ [citation omitted]. ‘When a city allows an official to ban [a means of communication] in his uncontrolled discretion, it sanctions a device for suppression of free communication of ideas’ [citation omitted]. The constitutional infirmity inherent in such discretion is intolerable and foreboding in its implications.” City of New York v. Am. Sch. Publications, Inc., 69 N.Y.2d 576, 583 (1987).
9. While local governments may require solicitors to obtain a permit prior to going door-to-door, the courts will consider such requirement an impermissible prior restraint if the regulation “places ‘unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship.’ [citations omitted] * * * and if “a prior restraint that is imposed on the free expression of ideas is impermissible unless narrowly drawn to serve a significant government interest.” FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 225–26 (1990), holding modified by City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774 (2004); see also Pub. Citizen, Inc. v. Pinellas Cty., 321 F. Supp. 2d 1275 (M.D. Fla. 2004). Note, however, New Jersey Freedom Org. v. City of New Brunswick, 7 F. Supp. 2d 499 (D.N.J. 1997) which struck down a permitting requirement even for soliciting of funds by a not-for-profit organization.
10. Permit requirements are considered a prior restraint of speech and are unconstitutional if the speaker is merely going door-to-door to proselytize, advocate, or distribute materials and not to solicit funds or sells goods or services. Watchtower Bible & Tract Soc’y of New York, Inc. v. Vill. of Stratton, 536 U.S. 150, 167 (2002).
11. “[T]here is nothing contrary to the Constitution in the charge of a fee limited ... to meet the expense incident to the administration of the [ordinance] and to the maintenance of public order in the matter licensed.” United Youth Careers, Inc. v. City of Annoy, IA, 412 F. Supp. 2d 994, 1039 (S.D. Iowa 2006), citing Cox v. New Hampshire, 312 U.S. 569, 576–77 (1941).
14. Id.
15. See the discussion of prior restraint in footnote 11.