

An Example of the Importance of Regulatory Flexibility for Small Business

Lizzy's Ice Cream Parlor: A Case for Common Sense Regulation

Under the Massachusetts Food Protection Program (Program), within state Department of Public Health (MDPH), businesses transporting frozen and/or refrigerated products are required to purchase or lease a mechanically refrigerated vehicle. (105 CMR 561.000) This is a cost of approximately \$50,000 in one time expenses and several thousands of dollars per year in operating costs.

Nick Pappas decided to leave the corporate world and open Lizzy's Ice Cream Parlor in Waltham, Massachusetts. Lizzy's home-made "super premium" ice cream was a hit and Nick eventually decided to sell his product through supermarkets around Greater Boston. Nick however, was unable to afford a mechanically refrigerated vehicle and would only be making a small number of deliveries. Alternatively, he developed a system to operate a refrigerator unit on his own truck using the truck's existing power system. After diligent research Nick determined that his approach was equally effective and would save him thousands of dollars.

Nick was unable to gain approval for his method from MDPH. Nick's greatest frustration was not only that his evidence was ignored, but also that there appeared to be no rational or scientific basis for the standards required by the agency. He found no studies justifying the regulation and no facts of any citizens sickened by ingesting improperly refrigerated ice cream.

MDPH conducted hearings on updating their frozen dessert regulations and Nick, as well as other small businesses, used the opportunity to voice concerns about the adverse impact of the rule on their businesses. As a result of the hearing MDPH revised the regulations to allow any person wanting to use their own method for transporting frozen or refrigerated products to apply for a variance so long as the person could explain how safe temperatures would be maintained. Allowing Nick, and other small businesses affected by the rule, to present alternatives to the rule saved small entities approximately \$50,000 each for a new vehicle plus the annual insurance and operating costs of a new truck.

Although Mass does not require any agency to conduct a review or analysis of the impact of regulations on small business, DPH decided to do so as a matter of good government. Other agencies, as well as small businesses, would benefit greatly by implementing a similar process. This can be accomplished by enacting a strong regulatory flexibility law.

Under a successful regulatory flexibility scheme agencies are required to analyze the economic impact of proposed rules on small business and to consider alternative methods that would lessen the burden on small business while accomplishing the agency's objective. Nick's story validates a key element of regulatory flexibility which is the requirement that agencies review existing regulations periodically to determine whether they should be continued without change or should be amended or rescinded to minimize the economic impact of the rule on small businesses. Choosing a less burdensome alternative for small entities can be achieved without compromising the health, safety and welfare of citizens.

The Ups and Downs of Regulation: Freight Elevator Regulations in Massachusetts

In Massachusetts, the State Board of Elevator Regulators, within the Department of Public Safety, is responsible for regulating elevators. For over 40 years, state law (Chapter 288, Laws of 1962) has exempted freight elevators built before 1962 from certain safety upgrades required of more modern freight elevators. Policymakers have reasoned that it would be impractical and overly costly to bring the old freight elevators – referred to as “Chapter 288 elevators” – up to modern specifications. Instead, every year the freight elevators are vigorously inspected and tested.

Approximately 800 Massachusetts companies, mostly small and medium-sized businesses, operate Chapter 288 freight elevators.

In the spring of 2006, legislation passed to repeal the Chapter 288 exemption. Governor Mitt Romney returned the bill amended so that the final bill (Chap 45, Laws of 2006) directed the Board of Elevator Regulators to “adopt rules and regulations to provide for the safe operation of freight elevators excluded under chapter 288 of the acts of 1962.” This language gave the Board broad discretion in developing appropriate regulations for the affected freight elevators.

Shortly after the law’s passage, the Board issued citations and ordered companies operating the Chapter 288 elevators to come into compliance with the standing regulations for newer elevators. However, after inquiries by several business advocacy groups and the media, it was determined that the Board had issued these new regulations without compliance with the state’s administrative procedure act (Chapter 30A). Therefore, in crafting the rules, no consideration was given to the cost burden of these requirements on owners of the old elevators.

A public hearing was convened in December 2006, and was attended by small businesses, the Associated Industries of Massachusetts, other business advocacy groups, and the print media. During the hearing, the Board learned that the cost of the new regulations could exceed \$150,000 per elevator. The Board also admitted that it had no evidence of any Chapter 288 elevators operating unsafely under existing rules. The Board noted that, beyond legal notices in newspapers, they did not alert elevator owners of the proposed regulations or the public hearing but did alert elevator service companies. As a result of the hearing the Board extended the comment period for the new rules to February 2007.

The final regulations, which became effective in May 2007, reflect steps toward addressing concerns raised by businesses. The final rules eliminated a proposed annual permitting fee of \$25 and simplified elevator operator training requirements. In response to the cost concerns of the new safety requirements, the final regulations: extend the compliance deadline two years from July 2009 to July 2011; and allow for a variance to any applicant who can demonstrate, to the satisfaction of the Board, that compliance would be overly burdensome and that granting of the variance will not compromise public safety.

This example demonstrates the importance of small business activism in assuring that agencies comply with Massachusetts state law requiring agencies to consider how proposed rules may impact small entities. It also shows that reasonable alternatives can be developed without compromising the regulatory goal of public safety. In this case, without the initiative of the small business community and the media, the agency would not have followed the proper procedures and the outcome would have been devastating to small businesses. Strengthening the existing statute to clarify what is expected of agencies when they are developing new rules and to require agencies to review existing rules periodically to make certain that they continue to serve their public purpose, would ensure that sensible rules are developed that address the regulatory concern while at the same time doing the least amount of harm to Massachusetts’ small businesses.