

Center for Public Health and Tobacco Policy



Tobacco Retail Licensing: *Local Regulation of the Number, Location, and Type of Tobacco Retail Establishments in New York* October 2010

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Tobacco Retail Licensing:

Local Regulation of the Number, Location, and Type of Tobacco Retail Establishments in New York

This report focuses on the ways that tobacco retail licensing can be used by the state and by local governments in New York to address the serious problems and negative health impacts caused by the proliferation and clustering of tobacco retail establishments. Under a “licensing system” or “licensing scheme,” a retailer cannot legally sell tobacco products unless the retailer has obtained a tobacco retail license. Local governments can then use their licensing system to control the (a) number, (b) location, and (c) type of tobacco retailers in order to protect the health and welfare of their communities. In addition, because the revocation or suspension of a license would be a significant sanction, licensing requirements are powerful legal tools that can be used to improve enforcement of existing tobacco-related laws.

Although the Center for Public Health and Tobacco Policy (CPHTP) recommends that New York communities explore the use of tobacco retail licensing, localities interested in achieving these policy objectives—addressing the number, location, and type of tobacco retail outlets—may have other legal options at their disposal that do not involve the creation of licensing systems. These include zoning ordinances and other types of land use regulations.¹ Interested New York communities may contact the CPHTP to discuss these alternatives.



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Part One—Why Focus on Tobacco Retail Outlet Density and Licensing?

The purpose of this section is to provide an overview of a tobacco licensing system, including the ability to control the (a) number, (b) location, and (c) type of tobacco retailers, and the resulting health benefits that each of these regulations provide.

Licensing Generally

With over 25,000 smoking-related deaths in the State of New York each year,² local New York governments have a strong interest in decreasing the availability of tobacco products and prohibiting their sale to minors.³ A tobacco licensing system provides an important tool to forward these goals. By requiring a license for the sale of tobacco, the government can then set limits on the number, location, and types of tobacco retailers in its jurisdiction. As research has shown, these limits can be effective tools for limiting the prevalence of smoking, particularly by youth.

For example, research suggests that the density of tobacco retail outlets in a neighborhood has an impact on the prevalence of smoking, including smoking by youth.⁴ One study found that youth living in areas with the highest tobacco outlet density were 20 percent more likely to have smoked in the past month than those in areas with the lowest density.⁵ To protect public health, states and localities can use a licensing scheme to reduce the density of tobacco retail outlets and prohibit the sale of tobacco products in certain locations and in some types of businesses.

Tobacco retail licensing systems can also help state and local governments ensure compliance with federal and state



requirements such as the federal Synar Amendment, which requires states to monitor underage tobacco sales with compliance checks,⁶ and New York State's Adolescent Tobacco Use Prevention Act (ATUPA), which prohibits tobacco sales to minors.⁷ Furthermore, tobacco retail licensing can help localities keep track of local retailers and enforce their own tobacco control laws.⁸ A well-enforced licensing system provides strong incentives to tobacco retailers to comply with tobacco control laws because they may face fines or a revocation of their license if they are found in violation.⁹ For both states and localities, tobacco retail licensing systems are economically feasible and sustainable, since licensing fees may be used to fund both the administration of the licensing system and related tobacco control enforcement efforts.¹⁰

Using tobacco retail licensing as a tobacco control tool is gaining traction. In fact, the Institute of Medicine (IOM) recommends licensing to regulate the sale of tobacco products.¹¹ The IOM suggests:

All states should license retail sales outlets that sell tobacco products. Licensees should be required to (1) verify the date of birth, by means of photographic

identification, of any purchaser appearing to be 25 years of age or younger; (2) place cigarettes exclusively behind the counter and sell cigarettes only in a direct face-to-face exchange; and (3) ban the use of self-service displays and vending machines. Repeat violations of laws restricting youth access should be subject to license suspension or revocation. States should not preempt local governments from licensing retail outlets that sell tobacco products.¹²

The IOM further recommends that governments should explore more innovative uses of licensing schemes that could “transform[] the retail environment for tobacco sales,” such as “restricting the number and location of the retail outlets”¹³ The IOM contends that public health agencies should be responsible for determinations concerning the acceptable level of retail density and where tobacco retail outlets may be located.¹⁴

Licensing to Limit the Number of Tobacco Retailers: Protecting the Public’s Health and Creating Healthier Communities

A tobacco retail licensing scheme is more powerful and effective if it not only requires each tobacco retailer to obtain a license, but if it also limits the *number* of tobacco retail outlets. By using a licensing system, a locality can limit the number of retailers by controlling the number of licenses it awards, thereby reducing the density of tobacco retailers in its jurisdiction. A locality may not wish to dramatically reduce the number of tobacco retailers at the outset, but to slowly reduce the number of tobacco licenses over time. For example, the locality may wish to reduce the number of

licenses by not issuing new licenses when current retailers close their doors. In this way, which is exemplified by the model ordinance described in Part Three, local governments can address tobacco-related health issues, without unduly harming local businesses. As the model ordinance describes, there also could be a process for new business to obtain tobacco retail licenses, while still ensuring that the total number of licenses steadily decreases.

Reducing the density of retail outlets helps to reduce tobacco use. When customers need to make a greater effort to find and obtain tobacco products, research shows that this will lead to a decrease in tobacco use, particularly among youth.¹⁵ Consumers—and youth in particular—are cost-sensitive to cigarette prices, meaning that they will purchase fewer cigarettes as the cost increases.¹⁶ In effect, reducing the density of tobacco retailers increases the cost of the products because customers must spend more time and money (including money spent on transportation) in order to purchase them.

In addition, limiting the number of tobacco retail outlets helps to denormalize both the purchase and sale of tobacco products which, because of their addictive and deadly nature, should not be treated as just another consumer product that is readily available in every store.¹⁷

In regard to alcohol, licensing has been applied not only to limit retail density, but also to control the hours the retail outlet is able to sell alcohol, the kind of alcohol sold, and the size of the container the alcohol is sold in.¹⁸ Using licensing to reduce the number of alcohol retailers has been shown to lower consumption of wine and spirits. One study showed that a 10 percent reduction in density of alcohol outlets led to a 1–3 percent decrease in the consumption of spirits and a 4 percent decrease in the consumption of wine.¹⁹

Licensing to Address the Location of Retail Outlets: Protecting Youth Near Schools

States and localities may also set limits on the *location* of tobacco retail outlets by prohibiting the issuance of licenses in a particular area, such as within a specified distance of K–12 schools. This type of restriction furthers a primary goal of tobacco control efforts: to protect youth from tobacco addiction. In New York, 14.7 percent of high school and 3.8 percent of middle school students smoked in 2008, well over New York’s goal of reducing teen smoking to 10 percent or lower.²⁰ Although retailers are legally prohibited from selling tobacco products to minors, 8.3 percent of retailers in New York sold tobacco products to minors during compliance checks in the period between October 2007 to September 2008—an increase from 7.6 percent during the period between October 2006 to September 2007.²¹

A locality may wish to exempt current tobacco retailers near schools from this distance restriction. As the model ordinance describes, licenses could be awarded to those retailers selling tobacco products near schools in the first year of the licensing scheme, but no *new* licenses would be awarded in that area. In that way, the availability of tobacco products near schools would slowly diminish (as some businesses inevitably close their doors) without harming local businesses already in existence.

Limiting tobacco sales within a specified distance from educational facilities is a measure that can be used to help prevent youth from being able to buy and experiment with cigarettes and other tobacco products.²² A California study observed that smoking prevalence among high school students is higher when there are more walkable tobacco retail outlets



near their schools.²³ This correlation was related to density, as the same study did not observe a similar connection if there was just one outlet within walking distance of a school.²⁴ The study concluded that “regulating the minimum distance between schools and tobacco outlets could effectively reduce their density in school neighborhoods. Thus, limiting the density of tobacco outlets [and] their proximity to schools . . . may all be plausible strategies to reduce adolescent smoking.”²⁵

If it is more difficult for youth to gain access to tobacco products, it may be less likely that they will become addicted to those products.²⁶ A recent study in the *American Journal of Public Health* found a “small but nonetheless significant relationship between the density of retailers within 1 mile of a school and students’ report of smoking initiation.”²⁷ It noted that the study’s findings support the use of legal tools to address the proximity of tobacco retailers to schools.²⁸ Another study “report[ed] that retail tobacco outlet density was significantly associated with youth smoking.”²⁹ A 2007 study showed that higher tobacco retail density near schools correlates to higher student smoking prevalence³⁰ and that a high tobacco retail density within a six-block

radius of schools relates to an increased likelihood that underage smokers will purchase their own cigarettes.³¹

In addition to decreasing access to tobacco products, the absence of tobacco retailers in areas children frequent will help prevent young people from picking up on “environmental cues” to start smoking that might come from an abundance of retail outlets that offer access to tobacco.³² Limiting tobacco retail outlets near schools sends a message that society does not support tobacco sales to youth.³³ For these reasons, since early 2009, Boston has restricted the sale of tobacco products on educational institution properties in its city.³⁴ The Boston Public Health Commission found that selling tobacco products is inconsistent “with the mission of educational institutions which educate the younger population about social, environmental and health risks and harms” and that young people are especially vulnerable to becoming addicted smokers.³⁵

Such limitation of tobacco retail outlets at or near schools also helps prevent underage students from getting older students or other adults to purchase tobacco products for them, which likely

will continue to occur even in the face of strict enforcement of the age laws.³⁶ An additional community benefit is that restricting tobacco outlets near schools will reduce tobacco retail density in some neighborhoods, providing a public health benefit to everyone in that area.³⁷

Licensing to Address Types of Retail Outlets: Maintaining Pharmacies as Health Care Establishments

Localities may also consider using a licensing system to prohibit tobacco sales by certain *types* of retailers. In particular, pharmacies can and should be prohibited from selling tobacco products. Currently, the United States is the only country in the world where tobacco products can be found for sale in a pharmacy.³⁸ The primary rationale for banning the sale of tobacco products in pharmacies is that such sales send an incongruent message.³⁹ Pharmacies are retail locations that focus on offering products and services to help consumers lead healthier lives. Because tobacco is inherently dangerous and deadly, it sends a “mixed message” to sell such a product in a place where consumers go for medications and other healthcare-related needs.⁴⁰



“The marked ease in which youth report accessing cigarettes from retailers and social sources suggest that point of sale restrictions are ineffective in their current form.”

“Retailer compliance would have to reach 100% to prevent these youth from accessing cigarettes through commercial sources because research suggests that youth will continue to try purchasing tobacco until they identify a noncompliant retailer. Because there are no enforcement strategies that have achieved complete, sustained compliance among retailers to date, it seems clear that a new approach to retailer point-of-sale restriction enforcement is required.”

– Leatherdale & Strath 2007 (studying the effect of tobacco retail outlet density near schools on youth tobacco use and related behavior)



Tobacco sales in pharmacies also imply that pharmacists approve of tobacco use.⁴¹ In surveys, pharmacists have voiced ethical and moral concerns about working in establishments that sell tobacco products. Many pharmacists believe that “[i]t’s a shame we promote health and dispense medications for asthma, emphysema, and cancer, and then turn around and sell the causes[.]”⁴² Despite the large number of pharmacies that sell tobacco products, pharmacists have historically and consistently been opposed to the sale of tobacco products in pharmacies.⁴³ In March 2010, the American Pharmacists Association adopted as official policy the goal of discontinuing tobacco sales in pharmacies.⁴⁴ Its policy urges pharmacies to stop selling tobacco products and, in a corollary move to restrictive retail licensing, “urges state boards of pharmacy to discontinue issuing and renewing licenses to pharmacies that sell tobacco products and to pharmacies that

are in facilities that sell tobacco products.”⁴⁵

Prior to the national association’s adoption of its policy, in June 2009 the Pharmacists Society of the State of New York passed resolution number 4-0609 to “support the effort to ban the sale of tobacco products in pharmacies”⁴⁶ For information about pharmacies in New York State and the growing support for prohibiting tobacco sales in pharmacies, see Appendix B.⁴⁷

In 2008, San Francisco, CA became the first city in the nation to prohibit the sale of tobacco products in pharmacies. The law originally created an exception for grocery and big box stores with pharmacies found inside them.⁴⁸ The San Francisco Board of Supervisors recently voted to expand the law to prohibit tobacco sales in any store containing a pharmacy, eliminating all exceptions.⁴⁹ The revised law became effective in early October 2010.⁵⁰



Boston prohibited tobacco sales by all pharmacies in 2009, finding that “[t]he sale of tobacco products is incompatible with the mission of health care institutions because it is detrimental to the public health and undermines efforts to educate patients on the safe and effective use of medication[.]”⁵¹ Several other Boston-area localities have also banned tobacco sales in pharmacies.⁵²

Legal challenges to the restriction of tobacco product sales in pharmacies are addressed in Part Four.

Part Two—Current Law Related to Tobacco Retail Licensing

This section provides an overview of existing state, federal, and local laws related to the licensing of tobacco retailers. New York already requires a certificate of registration in order to sell tobacco products. There are 22,991 registered tobacco retailers in New York.⁵³ In addition, New York City and Dutchess County have local laws that require tobacco retailers to obtain a local license or permit in addition to the state registration requirement. However, current state and local licensing or registration systems do not yet address the number, location, and type of retail establishments permitted to sell tobacco.

Federal Law

Federal laws do not prevent states and localities from requiring retailers to obtain a license to sell tobacco products. Congress can reserve to itself the power to regulate a specific area and thereby “preempt” state and local governments from creating laws in that area.⁵⁴ Although the federal government recently expanded its own regulatory authority over tobacco products, it is clear that local licensing laws are not preempted.

In 2009, Congress passed the Family Smoking Prevention and Tobacco Control Act (FSPTCA),⁵⁵ granting the Food and Drug Administration (FDA) limited authority to regulate tobacco products.⁵⁶ The FSPTCA explicitly recognizes states’ and localities’ continued authority to regulate the sale of tobacco products. With a few exceptions not relevant here, the FSPTCA does not “limit the authority of . . . a State or political subdivision of a state . . . to enact, adopt, promulgate, and enforce any law, rule regulation or other measure with respect to tobacco products that is in addition to, or more stringent

than, requirements established under this chapter”—this includes “requirements relating to the sale, distribution, . . . [or] access to . . . tobacco products by individuals of any age”⁵⁷ Thus, Congress has explicitly made clear that the FSPTCA does not constrain state and local authority to enact tobacco control laws related to the sale, distribution, and accessibility of tobacco products, so long as those laws are stricter than federal law.

State Law

Current New York statutory laws related to tobacco retail licensing include (a) the state tobacco retail registration requirement and (b) the Adolescent Tobacco Use Prevention Act.

State Tobacco Retail Registration

Under New York Tax Law section 480-a, retailers must register yearly with the state in order to sell tobacco products.⁵⁸ The Department of Taxation and Finance issues tobacco retail certificates of registration, and these certificates must be publicly displayed where tobacco products are sold.⁵⁹ The Commissioner of Taxation and Finance must deny and may revoke or suspend registration if the applicant was convicted of a violation of state youth-related tobacco laws under ATUPA or other specified criminal violations involving minors.⁶⁰ A tobacco retailer that sells unstamped or illegally tax-stamped packages of cigarettes faces suspension or revocation of its registration.⁶¹ As a consequence of having a tobacco retail registration suspended or revoked, a retailer’s lottery or alcohol licenses could also be affected.⁶² Violations of section 480-a can be punished with significant fines that range up to \$35,000 for repeat violations.⁶³

License | Permit | Registration

For purposes of broad policy discussion, the terms license, permit, and registration are interchangeable.

License: A license gives someone legal permission to do something that would otherwise be illegal. A license also refers to the document that proves the legal permission. Licensing requirements typically set standards or requirements for engaging in an activity.

Permit: Similar to a license, a permit is a certificate that offers proof that someone has obtained legal permission to do something.

Registration: Registration statutes require those who wish to engage in an activity to sign up (register) with the government. These laws typically place few limits on who can engage in an activity, and are instead geared towards collecting and recording data.

Currently, New York tax law characterizes retail tobacco sale requirements as “registration” and wholesale tobacco sale requirements as “licensing.”

Registration certificates are issued within ten days after the application submission, and a fee is required for each tobacco retail outlet registered.⁶⁴ The section currently requires retailers to pay an application fee of \$1,000 if their gross retail sales are less than one million dollars; \$2,500 if gross retail sales are between one million and ten million dollars; and \$5,000 if gross retail sales are over ten million dollars.⁶⁵ Because of ongoing litigation, discussed in Part Four, these fee amounts are not currently being enforced.

Similar rules apply to tobacco vending machines, which must also be registered under this tax law.

Adolescent Tobacco Use Prevention Act
Licensing and registration requirements can be a powerful tool to ensure compliance with public health measures. Currently, New York’s tobacco retail registration system helps to support enforcement of the Adolescent Tobacco Use Prevention Act, which was enacted in 1992. ATUPA prohibits tobacco sales to minors and, with a few exceptions,

restricts retailers from distributing tobacco products for free and from issuing certain kinds of coupons for tobacco products.⁶⁶ ATUPA also requires that tobacco packaging includes all mandated health warnings and that packs of cigarettes do not contain less than twenty cigarettes.⁶⁷

If a tobacco retailer is found to be in violation of ATUPA, the statute outlines penalties to be applied to that retailer.⁶⁸ A tobacco retailer that is not in compliance with ATUPA risks losing its state tobacco retail registration certificate, in addition to possible fines and revocation its authority to sell lottery tickets.⁶⁹ If the tobacco retailer sells tobacco products while the retailer’s registration is suspended or revoked, the retailer will be fined \$2,500.⁷⁰

Enforcement officers assign “points” if it is determined after a hearing that an ATUPA violation has occurred.⁷¹ Points assigned to retailers that violate ATUPA remain on the retailer’s record for three years.⁷² Any tobacco retailer with points will be re-inspected at least twice a year until they no longer have points on their record.⁷³ Retailers with three points or more will face a six-month suspension of their

registration, and the points will be erased at the end of the six month period.⁷⁴ If after a hearing it is decided that a tobacco retailer violated ATUPA while its registration was suspended, the retailer will have its registration permanently revoked and will have no ability to obtain a new certificate of registration.⁷⁵

Local Law

State and local licensing systems can effectively work in conjunction with one another. If a local government implements a licensing system, then in order to sell tobacco products in that locality, retailers would have to possess a license for both the state and the locality and comply with both systems. Local requirements can be stricter than state requirements.

Currently New York City and Dutchess County are two localities in the state that require tobacco retailers to obtain a local license or permit in addition to the state registration requirement.

New York City

Retailers selling cigarettes in New York City must be licensed under the city's Tobacco Product Regulation Act (TPRA), section 20-202 of its Administrative Code.⁷⁶ Unlike state law, which requires registration to sell any tobacco product, New York City's code requires a license only for the sale of cigarettes. Cigarette retail license applications are filed with the Commissioner of Consumer Affairs.⁷⁷ The license fee is \$110 biannually. Licenses with an even number expire on December 31 of even-numbered years, and licenses with an odd number expire on December 31 of odd-numbered years.⁷⁸

The TPRA, which regulates the sale of tobacco products and prohibits their sale to minors, requires retail cigarette dealers to obtain a license pursuant to section 20-

202.⁷⁹ Primarily, the Department of Consumer Affairs and the Department of Mental Hygiene enforce TPRA.⁸⁰ In New York City, if a licensed cigarette retailer is found to be in violation of TPRA, the retailer will be penalized with up to a \$1,000 fine for the first violation and additional fines of up to \$1,000 for any other violations occurring on the same day.⁸¹ Further violations of TPRA that occur within the next two years will be penalized by a mandatory revocation of the tobacco retail dealer's cigarette retail license and a fine of up to \$2,000 for each violation.⁸²

Dutchess County

Dutchess County's sanitary code includes a tobacco retail permit scheme requiring a "permit" for the retail sale of tobacco in the county.⁸³ The county uses the permit requirement as a means of enforcing state requirements under ATUPA.⁸⁴ At least twenty-one days before starting business, tobacco retailers must submit their permit application with the required fee.⁸⁵ Permits are valid for two years and must be renewed no less than thirty days before expiring.⁸⁶ In Dutchess County, the Department of Health may "withhold, suspend, or revoke" a permit if it finds that the tobacco retail permit application contained false or incomplete information, that the permit fee was not paid, that the applicant was noncompliant with New York State tax and public health tobacco-related laws, or that the applicant did not sign a statement of understanding regarding the ATUPA law.⁸⁷ The tobacco retail permit of any business determined by an administrative hearing to be in violation of state or the local public health tobacco laws will be suspended for forty-eight hours, and the department must post a sign at the business that states, "This business sold a tobacco product to someone under 18 years of age and may not sell tobacco products again until _____. (specified date and time)[.]"⁸⁸

Part Three—Overview of the Model Ordinance

The Center for Public Health and Tobacco Policy's annotated model ordinance is designed for use by New York local governments. It sets up a strong, enforceable system to regulate the number, location, and type of retail establishments that may legally sell tobacco. The model constructs a comprehensive system designed to address tobacco retailer density while also keeping in mind the requirements and limitations of the U.S. and New York legal systems. The full text of the model ordinance can be found in Appendix A.

The model ordinance is written flexibly so that it can be enacted by a county or a municipality (city, town, or village). It is intended to be a model that can be modified or tailored to fit the needs of particular communities and is designed for enactment by a local legislative body, such as a city council. A county health department could potentially institute tobacco retail licensing and density reduction measures by incorporating such requirements into the county's sanitary code, and the model could be adapted for that purpose. Advocates should contact the Center for Public Health and Tobacco Policy if they are seeking to educate their New York localities about tobacco retail density reduction solutions initiated by public health departments.

Section One: Findings

The first section of the model ordinance contains "findings" that express the reasons for the government's decision to enact such a law. These findings are important because courts reviewing the law may look to the findings to see if the government had sufficient reasons and justifications for adopting such a measure. The findings should focus on explaining

why the proliferation of tobacco retail outlets, particularly near schools, is a problem and why the proposed law is needed to address it.

Some courts have expressed a preference for localized findings that include facts about the problem at the local level. To illustrate how local findings can be integrated, the model provides one finding with blank figures. It is advisable to add other localized findings that are compelling to the local community such as a map illustrating the number of tobacco retail outlets near schools or regional surveys about youth purchases of tobacco products. Additional supporting information and exhibits can also be introduced at government hearings where the ordinance is considered. This supporting information can be referenced in the findings.

Section Two: Definitions

The second section defines the terms that are used in the model ordinance. Already-existing definitions could also be used. For example, the definition of "pharmacy" points to the definition of that term under state education law. If the licensing system is integrated into a larger body of law, common terms like "person" may already exist. Such redundant definitions could then be eliminated from the licensing law.

"Department" is left to be determined. It will be the government entity that administers the licensing system. This entity should be specified, and discussions with that government agency should occur well before the ordinance is introduced to ensure its support and cooperation. The Department should be a health-oriented department, if possible, as the licensing system is a public health measure. Alternatively, the licensing

system could be administered by another department that already issues licenses and conducts inspections.

“Tobacco Product” is defined so that a license is required for the sale of any tobacco product, including smokeless tobacco, cigars, and mini-cigars; a license is not required for the sale of FDA-approved cessation devices like Nicorette gum and Nicoderm CQ patches.

“Renewed Tobacco Retail License” is a license issued for the same location to the same applicant that held a license the year before. “New Tobacco Retail License” is a catch-all; it is the term for any license that is not considered a renewed license. After the first year of the licensing system, the definitional distinction between “new” and “renewed” licenses is important to determine orders of priority in density reduction measures.

Section Three: Tobacco Retail License

Section Three requires all retail establishments selling tobacco products to possess a license from the Department by a specified date, the “Enforcement Date.” This date is important because it determines the yearly date when licenses must be issued or reissued. When selecting this date, there should be sufficient time allowed between the enactment and enforcement of the law, so that there will be adequate time to set up the licensing system, review the first round of applications, and issue the licenses.

The licenses only are valid for a specific establishment and applicant. The section sets the licenses to expire yearly on the day and month of the Enforcement Date. The Department is charged with creating

the license application, which must be submitted with the licensing fee.

Section Four: Issuance of Licenses

Section Four provides that as part of the application process, the Department must inspect the retail location seeking a license. The licensing fee can support the initial application inspection and subsequent enforcement inspection costs.

Section Four also lists specific circumstances in which the Department may choose to deny a license, such as the applicant lying on the application, not submitting the fee, or being found to have broken tobacco control laws. Licenses would not be issued once the maximum number allowed is reached and would not be allowed at the types of locations where the model ordinance disallows tobacco retail establishments, as discussed below.

Sections Five: Limitation on Number of Licenses Issued

Section Five gives the licensing system control over the density of tobacco retailers. During the first year of the licensing system, licenses are only issued to applicants and locations that already had a valid New York state retail registration to sell tobacco approximately six months before the law was passed. This will capture a “snapshot” of the current tobacco retail environment and help curtail an influx of last-minute state certificate registrants that would worsen tobacco retail density. Every year thereafter, the total number of licenses that may be issued is capped at the number of licenses issued the previous year.

Starting from the second year of the licensing system, all licenses seeking renewal will generally be granted renewal.

For new licenses, involving a new applicant or new location, one new license may be granted for every two licenses that were revoked or not renewed the previous year. This will gradually reduce the number of tobacco retailers without requiring existing licensees to give up their ability to sell tobacco products.

The model ordinance sets up a priority and lottery system for when there are more applications for new licenses than there are licenses available. Top priority for a new license is given to applicants who voluntarily give up a prior license for a tobacco retail establishment near a school. This allows current tobacco retailers located near schools the chance to move to another location away from the school without potentially having to forfeit their ability to sell tobacco products. Second priority for a new license is given to adult-only establishments where youth are not allowed entrance. Then, all other applications will be considered. If there are more applicants within each applicant grouping than there are licenses available, licenses are distributed by lottery.



Measures for Number of Licenses to Issue

- A maximum number of licenses allowed is set yearly based on the number issued the previous year.
- The number of new licenses released is dependent on the number of previous licenses that are not renewed.
- Priorities are set for issuing licenses.



Section Six: Certain Locations

Section Six specifies establishment types and locations which will not be issued licenses. No licenses will be issued to establishments with pharmacies. As discussed in Part One, pharmacies are healthcare institutions and should not be in the business of selling tobacco products. Additionally, no licenses will be issued to mobile vendors. Tobacco retailers that are not in fixed, permanent locations would be difficult for the licensing system to regulate and monitor.

No *new* licenses will be issued to establishments near schools. Tobacco retailers who obtained a license during the first year of the licensing system may continue to renew their license, even if located near a school, but no new retail establishments locating near a school will be able to obtain a license to sell tobacco products. As tobacco retailers near schools close their doors, tobacco availability in these areas will slowly diminish.

Localities can tailor the school proximity limitation—the exact distance around a school within which no new licenses will be granted—to best fit their communities' needs. To that end, a specific distance has not been set so that an appropriate distance can be assessed and determined by each locality. Further specifications can be added such as more detail about how the distance between a school location and a tobacco retail location will be calculated.

Section Seven: Required Fee

Section Seven sets the fee amount that must be accompanied with each license application. The fee amount is left blank because it reflects the amount necessary to implement, run, and enforce the licensing system. This amount will vary by

locality and requires localized analysis to best calculate and estimate the costs of the licensing system.

This section also allows the Department to adjust the fee beginning two years from the start of the licensing system. When the costs of administering and enforcing the licensing system increase or decrease, the agency running the system will have the ability to adjust the fee amount to reflect the fiscal needs of the licensing system.

Section Eight: Required License Display

Section Eight requires that the license certificate for the retail sale of tobacco be publicly displayed at the establishment. Current state law similarly requires that a tobacco retail registration permit be displayed. This helps customers and inspectors verify that an establishment is legally allowed to sell tobacco products. A retailer that does not properly display the license can incur penalties and fines.

Sections Nine and Ten: Revocation of Licenses & Violations and Enforcement

Sections Nine and Ten address enforcement and penalties. The Department charged with enforcement can conduct inspections to ensure compliance with the licensing system. Violations of the licensing system's requirements and constraints could result in the suspension or revocation of the license to sell tobacco products. The Department also may suspend or revoke a license for violations of other federal, state, or local tobacco control laws.

Upper limits for fines are set at \$250 for the first violation, \$500 for a second

violation within two years, and \$1,000 for a third or subsequent violation within two years. Violations are counted on a per-day basis. The fine amounts may be adjusted to match similar existing fines or to conform to legal requirements. For example, fines could be adjusted to be commensurate with other fines that an inspector has the authority to issue. (Note that if the licensing provisions are enacted through a county sanitary code, state law provides that fines allowable under a sanitary code are limited to \$500.)



Section Eleven: Rules and Regulations

Section Eleven makes it plain that the Department can create further guidance, requirements, and procedures not addressed in the model ordinance in order to effectively implement and run the licensing system.

Sections Twelve and Thirteen: Severability & Effective Date

Sections Twelve and Thirteen, the final two sections of the model ordinance, are technical provisions included in many pieces of law. The first is a severability provision, which provides that if any piece of the law is struck down in court, the remaining portions of the law remain valid. This is an important provision to include, because without such a provision, a court decision invalidating even a small portion of the law could potentially nullify the entire ordinance.

The final section provides that the law will go into effect thirty days after the ordinance is enacted. After the effective date, the Department has the authority to act on the ordinance sections and begin implementing its licensing system. Remember, this date is different from the “Enforcement Date,” which is when the licensing system should be in place with licenses already issued. There will therefore be a phase-in period after the effective date of the ordinance during which the Department can create the licensing system and educate retailers regarding compliance with the new law. This phase-in period also provides the Department with sufficient time to plan for inspections and enforcement.

Questions or concerns about the model ordinance can be addressed to the Center for Public Health and Tobacco Policy at tobacco@nesl.edu.



Part Four—Legal Considerations and Potential Challenges

The State of New York possesses broad “police powers” to promote the public health and welfare of its residents. Through state law, New York has conveyed its police powers to localities, giving them the authority to protect their residents by regulating the sale of tobacco products through means such as tobacco retail licensing requirements.

This section addresses pertinent New York court decisions about licenses. It also discusses potential legal challenges to the implementation of a licensing system that incorporates tobacco retail outlet density reduction measures. Tobacco companies have consistently used legal challenges to resist regulation that is detrimental to their economic interests. Governments that plan to enact tobacco retail outlet density reduction measures should be aware that tobacco companies or other interested entities may file a legal challenge to the law.

Licenses Are Not Property: Potential Takings Challenges

Legal challenges to licensing schemes sometimes occur when a license application is denied or when an entity’s license to operate its business is revoked. Often these “takings” challenges are made on the grounds that the license is property and the government cannot take a person’s property without offering due process protections and/or compensation. However, New York courts have consistently held that licenses are not property⁸⁹—they are personal privileges that do not carry any property rights.⁹⁰ Because a license to do something is not considered a property right in New York, a person denied a license will likely fail if challenging that an illegal “taking” took place—or that the “taking” was done in an unconstitutional manner.

New York's highest court held in 1907 that "a license is not a contract or property, but merely a temporary permit issued in the exercise of the police powers to do that which otherwise would be prohibited."⁹¹ In that case, the Department of Health in New York City had revoked a milk vendor's permit to sell and deliver milk after the vendor was convicted four times for selling unsafe milk.⁹² The vendor sued, arguing he was entitled to notice and a hearing.⁹³ The vendor claimed that his milk distribution business was his property and that through the revocation of the permit he was deprived of his property.⁹⁴ The Court rejected this argument, explaining that:

. . . [T]he good will of his business, so established, must not be confounded with the permits granted to him to engage in that business. He was never licensed to sell impure and adulterated milk, and after he had obtained his permits to sell and undertook the securing of customers, he knew that he was engaging in a business which must be conducted under the supervision of the board of health of the city subject to the police powers of the state, and that such permits were subject to revocation. He knew that the permits contained no contract between the state, or the board of health, and himself, giving him any vested right to continue the business, and that it become the duty of the board to revoke his license, in case he violated the statute, or the conditions under which it was granted.⁹⁵

In a subsequent case, a New York City ordinance set distance requirements between garages holding certain

hazardous substances and specific types of buildings such as schools. As a result of the ordinance, an applicant was denied a license for his garage, which stored flammable liquids and was too close to a school and dwellings. The applicant challenged the license denial, arguing that the license denial unfairly impacted his economic and property interests.⁹⁶ New York's highest court held that the law and the corresponding license denial were valid even if the garage had held flammable liquids and been issued licenses to do so in the past.⁹⁷

In another case regarding licensing, the New York State Liquor Authority denied a restaurant owner's application for a liquor license because the restaurant was associated with illegal gambling.⁹⁸ A New York appeals court held, "A license to sell alcoholic beverages is not a property right, but simply permission granted in the State's discretion after weighing the dangers posed to the community if the license is issued."⁹⁹ In a factually similar case, the New York State Liquor Authority denied an application for a liquor license due to past violations of the Alcoholic Beverage Control Law.¹⁰⁰ Again, the court determined that a license to sell liquor is not a property right and only grants the applicant authority to sell alcohol without creating a contractual relationship.¹⁰¹

Although New York courts have never ruled on the precise issue, it appears likely that the courts would similarly conclude that tobacco registrations or licenses are not property and that the refusal to issue or renew a tobacco license does not raise taking issues.

License Fees

When state governments collect taxes, they raise general revenue for the state that can be used to finance various state-run operations. When a government sets a license fee, the fee may have to be used specifically to fund the regulation of the industry being licensed. In New York, taxes can be used to raise revenue for the government to fund general operations, but licensing fees cannot. Localities should be cautious and may want to determine whether they have authority to administer certain types of local taxes. For the most part, New York localities cannot tax cigarettes and other tobacco products unless granted special permission to do so. Therefore, care should be taken about how tobacco-related fees are treated so that the fees are not challenged as illegal “taxes” for general revenue-generating purposes.

Licensing fees have been challenged in the courts as illegal taxes. The resulting

New York case law indicates that license fees should be set at an amount that will fund the cost of administering and enforcing the licensing scheme.¹⁰² For example, when building permit fees set by the Commissioner of Health Services were challenged in court, New York’s highest court found that the fee was valid because the commissioner set the fees based on a study that established the department’s costs in issuing the permits.¹⁰³ The study presented information regarding the number of inspections conducted, related enforcement services, and the department’s expenses.¹⁰⁴ The court held that the fee was legal as there was a “reasonable correspondence” between the cost of enforcement and the amount of the permit fee.¹⁰⁵

A lower New York court held that an ordinance that required the payment of a license fee by peddlers and transient merchants was valid because “[a] license



Current Challenge: State Registration Fees

In 2009, the New York State Assembly made changes to the tax law that raised the registration fees for tobacco retailers.¹ The prior registration fee for selling tobacco products was \$100.¹ The amended tax law set the registration fees on a sliding scale based on the gross sales of the retailer.¹ Under the new fee requirements, retailers with sales less than one million dollars would pay a \$1,000 registration fee; retailers with sales between one million and ten million dollars would pay \$2,500; and retailers with sales over ten million would pay \$5,000.¹

A group of five trade associations, made up of gas stations, mini-marts, and convenience stores, sued the state arguing that the new fee scale was “an unconstitutional tax” and violated equal protection and due process rights under the federal and the state constitutions.¹ The court did not address whether the fees were an unconstitutional tax because it first found that the plaintiffs did not have standing to bring the claim in court.¹ Because the plaintiffs failed to show the new fees caused even one of their members any actual harm, the case was dismissed.¹ The decision to dismiss the case for lack of standing has been appealed, and the appeals court has ordered that the new fees not be enforced temporarily while the appeal is in process.



fee may be imposed under such an ordinance which is sufficient to compensate the municipality for the expense of issuing and recording the license, for securing police control over the matter licensed, and for the cost of inspecting and regulating such business. To that extent any fee imposed is not a tax on the business.”¹⁰⁶ Because the fee specifically funded the municipality’s costs in implementing and enforcing the licensing program, the court found that the fees were not a tax.

In another New York case regarding the legality of licensing fees, medical doctors challenged registration fees required by the Department of Health for X-ray equipment and radioactive materials installations.¹⁰⁷ In that instance, the court found that licensing fees must be narrowly tailored to fund the cost of enforcement, reasoning:

In dealing with a licensing or registration fee imposed by an administrative agency, as in the case at bar, such a fee may not exceed the sum which will compensate the licensing or registration authority, for issuing and recording the license or registration and pay for the inspection to see the enforcing of the licensing or registration provisions.¹⁰⁸

These cases highlight the importance of researching licensing and enforcement costs in order to reasonably determine the license fee.

When it cannot be established that a fee is used to satisfy the cost of the licensing program, the court may find it to be an illegal tax. For instance, when a village in New York increased residential permit fees and the fees were challenged, an appeals court found that because the

village did not provide sufficient supporting documentation to justify the new fee, the fee was not valid.¹⁰⁹

Nevertheless, despite this restriction, license fees can be used to fund a wide range of activities that are necessary to successfully maintain a tobacco retail licensing program. For example, fees may be used, among many other things, to fund the cost of issuing licenses, educate the regulated businesses and the public, hire additional needed staff, train inspectors, conduct enforcement inspections, and produce related signage and materials.

Equal Protection & Free Speech: San Francisco Pharmacy Law Challenges

The City and County of San Francisco faced two court challenges after it passed an ordinance amending its health code to prohibit tobacco sales in all pharmacies except for those found in grocery and big box stores. One lawsuit was based on equal protection grounds and the other focused on free speech claims. The equal protection claim was based the Fourteenth Amendment of the Constitution, which helps assure “that persons similarly situated with respect to the legitimate purpose of the law receive like treatment.”¹¹⁰ The free speech claim was based on the First Amendment, which helps assure an entity’s ability to legitimately communicate truthful information about its products.¹¹¹

Equal Protection

In September 2008, Walgreens filed a lawsuit challenging San Francisco’s ordinance that prohibited it from selling tobacco products. The court denied its motion for an injunction to prevent the ordinance’s enforcement, and the law went into effect.¹¹² Walgreens amended its complaint and, in part, challenged the

city's ordinance as an equal protection violation under the federal and state constitutions, claiming that it was unreasonably being treated differently from other similar entities because the differential treatment was "not rationally related to a legitimate legislative end."¹¹³

Walgreens contended that "the ordinance 'prohibits some retail establishments with [licensed] pharmacies from selling tobacco products, but arbitrarily exempts from this prohibition other retail establishments with [licensed] pharmacies, namely, general grocery stores and big box stores,' in violation of constitutional equal protection guarantees."¹¹⁴ The city insisted that the distinction between free-standing pharmacies and those located in big box and grocery stores was justified because people are more likely to go to pharmacies for health-related needs and, because tobacco is an inherently unhealthy product, this sends mixed messages to consumers.¹¹⁵ The trial court agreed with the city that even if all the facts Walgreens alleged were true, there was still no valid case.¹¹⁶

On June 8, 2010, a California appellate court reversed the trial court's decision, determining that Walgreens' equal protection claim should not be dismissed and instead should proceed to a trial.¹¹⁷ The appellate court reasoned that there may not be enough of a meaningful difference between the "implied message" from different types of stores selling tobacco to justify the ordinance's exclusion of supermarkets and big box stores.¹¹⁸ The appellate court sent the issue back to the trial court to determine if there was an equal protection claim. It stated that—if Walgreens ultimately won its case—as the remedy, the lower court would need to decide whether to bar enforcement of the ordinance or to eliminate the exceptions, thereby

prohibiting the sale of tobacco in all pharmacies in the city.¹¹⁹

Rather than wait for the trial to proceed, San Francisco's Board of Supervisors took immediate action. On September 28, 2010, the board passed its final vote to approve an ordinance to amend its health code "to eliminate the exemptions for general grocery stores and big box stores from the general ban on the sale of tobacco products in pharmacies."¹²⁰ Thus this legal challenge resulted in strengthening the law limiting the type of stores that may sell tobacco products in San Francisco.

The experience of San Francisco suggests that the safest path for local governments is to prohibit the sale of tobacco products in *all* retail stores containing a pharmacy. The Boston pharmacy ordinance—which applies comprehensively to all pharmacies within the city limits—has not been challenged in court. Even though a law that prohibits tobacco sales in some pharmacies but not others would likely prevail against an equal protection challenge, a comprehensive ordinance avoids the need to litigate this issue while also providing for a greater public health benefit.¹²¹

First Amendment

In September 2008, Philip Morris filed a lawsuit claiming that San Francisco's ordinance prohibiting tobacco sales in pharmacies infringed on the company's freedom of speech because it interfered with Philip Morris's ability to communicate with customers.¹²² Philip Morris contended that the "product itself is a form of advertisement" and that pharmacies not carrying its products affected the company's decision to keep the pharmacies in its "Retail Leaders" program, which provides retailers with

advertising and promotional materials.”¹²³ U.S. District Judge Claudia Wilken agreed with the city that the ordinance only “prohibits conduct, tobacco sales, not speech about tobacco.”¹²⁴ According to the judge’s decision, there was “nothing inherently expressive about selling tobacco products in pharmacies that would warrant First Amendment protection.”¹²⁵ Furthermore, it was a “voluntary business decision” for Philip Morris to stop paying to advertise in pharmacies.¹²⁶ The court denied Philip Morris’s request for a temporary restraining order that would have prevented enforcement of the ordinance until the case went to trial.¹²⁷ The Ninth Circuit Court of Appeals agreed that the ordinance did not raise free speech concerns and affirmed the lower court’s decision regarding the temporary restraining order in September 2009.¹²⁸ That October, Philip Morris decided to dismiss its claim.¹²⁹

This experience demonstrates that a tobacco company may resort to litigation in an attempt to stop a law that limits

tobacco sales, even if its arguments are legally without any merit. Such lawsuits may be filed in an attempt to delay the law from going into effect or to intimidate the city into repealing the law. As San Francisco demonstrated, however, a city determined to defend its law in court can prove that the tobacco industry’s arguments are unpersuasive and lack legal foundation.

Part Five—Implementation and Enforcement

It is important for localities to carefully plan each aspect of the implementation and enforcement of a tobacco retail licensing scheme. The locality will need to address (a) which agency will be in charge of implementing the system and issuing the licenses, (b) where the financial resources to support the program will come from, and (c) how the tobacco retail licensing scheme will be enforced.

Implementation

In New York, a tobacco retail licensing system could be enacted at the county level or by a city, village, or town.¹³⁰ In addition, local boards of health have the authority to pass regulations “necessary and proper for the preservation of public health.”¹³¹ The powers and limitations of the particular government entity seeking to implement a licensing system must be carefully considered when determining the shape and substance of the system. The approval process will also depend on the type of government enacting the measure and the specifics of the local government’s procedures.



Regardless of the level of government involved, a public hearing should occur before the law is approved. This provides the public with an opportunity to comment on the proposed law. This is also an opportunity for tobacco control advocates to provide research and data—including local data—demonstrating the importance of implementing a tobacco retail licensing system to reduce tobacco retailer density and, in turn, protect youth and public health. While the concerns of retailers should not be dismissed, advocates should try to keep the focus on health and on the law's objective of protecting children from an addictive and deadly product. Once the public hearings have taken place and the measure has been approved, there should be a period of time, as specified in the law, between enactment and enforcement of the law.

Each locality must decide who will issue tobacco retail licenses. In several communities that license tobacco retailers, a single agency took a lead role in addressing the challenges of implementation.¹³² For example, in Los Angeles, California, the city attorney's office took the lead on implementing its local tobacco retail licensing ordinance.¹³³

Some localities chose to have an agency that already administers commonly held licenses—like business licenses or police or fire permits—administer tobacco retail licenses.¹³⁴ We strongly recommend considering that the local health agency run the licensing system, since that agency has the strongest public health policy interests and related expertise.

The licensing agency should begin working on retailer education immediately after the law is enacted. A list of local retailers could be compiled from state tobacco retail registration records. A pamphlet describing what is required and what is permissible under the new law can be sent to all the retailers and published online. This pamphlet should also discuss the reasons behind the licensing system in order to put the law in the proper health context. Retailers could be invited to contact the agency for more information on compliance with the law, and the enforcement agency should be prepared to answer questions and to assist retailers with compliance.



Tracking and Monitoring

When setting up the licensing system, consider what kind of information is necessary or important to collect and how best to set up the system to evaluate its effectiveness and its impact on public health. Carefully think about what information should be requested on the licensing application and what information needs to be gathered during compliance checks. Best practices include assigning the same license tracking number for the same applicant and location during the renewal process and requiring regular compliance reporting from the licensing agency. Speak with enforcement, evaluation, and public health policy experts during the planning and implementation processes in order to create the most effective and sustainable licensing system possible. Remember that tracking, monitoring, and related data collection requirements can be sustained through the licensing fees, so the cost of those requirements should be factored into determining such fees.



Funding

In order to implement a tobacco retail licensing program, each locality must establish a funding source for the administration of the licenses. In addition to the licensing fee itself, some assistance may be available from federal sources. Under the Synar Amendment, which Congress enacted in 1992, the states must pass and enforce tobacco control laws, conduct inspections of tobacco retailers, and report their findings to the Secretary of the U.S. Department of Health and Human Services.¹³⁵ The Substance Abuse and Mental Health Administration, the federal agency responsible for putting the Synar Amendment into practice, collaborates with states to find opportunities for funding enforcement of tobacco control laws like tobacco retail licensing.¹³⁶ Further resources may be available through the Food and Drug Administration via a provision in the Family Smoking Prevention and Tobacco Control Act.¹³⁷

Other funding sources for localities may include state grants, funds from local/county health departments, city funds, litigation settlement funds, or some combination of these funding sources.¹³⁸ However, the bulk of the money needed to implement and enforce the licensing system will likely come from the licensing fees. As discussed in Part Four, New York case law suggests that the license fee and the cost of enforcement should be closely related. Localities should conduct research and compile data that supports and substantiates the amount of the license fee.

Enforcement

A licensing system by its nature includes strong mechanisms for enforcement of its restrictions and other ancillary laws. Licensing fees may pay for periodic

inspections to ensure compliance. To conserve resources and reduce additional costs, consider whether the enforcement agency can collaborate with other agencies or combine the tobacco retail licensing inspections with other mandatory inspections. For example, explore whether inspections could be combined with ATUPA compliance inspections.

Licensing systems are powerful tools in part because the two most common penalties employed—fines and the suspension or revocation of the tobacco retail license—provide substantial incentives to comply with the law. Regular, consistent, and fair enforcement of the law is required to ensure that the licensing system works effectively to deter illegal conduct.

Identifying Challenges

Localities face various challenges when implementing and enforcing a tobacco licensing system. Although a local licensing scheme requires retailers selling tobacco to identify themselves to the administering agency, many retailers fail to do so, making it difficult for the agency to find such retailers.¹³⁹ It is especially hard to find unconventional retailers, like doughnut shops, which sell tobacco products without a license.¹⁴⁰ It also might be difficult for the enforcement agency to keep track of retailers in larger localities, where keeping an updated list is more challenging. For example, Los Angeles found it particularly demanding to maintain an updated list of retailers because the city is so large and there are so many retailers.¹⁴¹

In May 2009, several law enforcement agencies from the San Francisco Bay area met together to discuss best practices, challenges, and solutions in

tobacco retail licensing enforcement.¹⁴²

These jurisdictions identified the common challenges they faced in enforcing tobacco retail licensing, which included lack of communication between agencies, failure to follow through on citations and prosecutions, failure to make enforcement a priority, inaccurate and incomplete retailer lists, lack of retailer education, lack of program funding, and low retailer compliance.¹⁴³ The report from this meeting can be reviewed for more information about potential enforcement problems that should be anticipated or addressed.

Tobacco control policies often bring tensions between competing interests to a head, and for this reason it is essential that local governments that plan to enact tobacco control laws have a well-defined strategy to implement and enforce these local laws. Throughout the enactment and enforcement process, tobacco control advocates and local government representatives must be receptive to the legitimate concerns of retailers, yet the focus must remain on achieving the public health objectives of the licensing system.



Conclusion

It has long been clear that tobacco retail licensing is a powerful tool that can help ensure compliance with youth access laws and other tobacco-related laws. Tobacco control advocates are now recognizing that tobacco retail licensing can also be an effective tool to limit the number, location, and type of tobacco retail outlets. A growing body of evidence suggests that the density of tobacco retail outlets has a significant impact on youth smoking rates. In particular, limiting the number of tobacco retail outlets near schools can help to reduce youth use of tobacco. In addition, many localities are looking to follow the lead of San Francisco and Boston in preventing pharmacies from selling tobacco products.

In sum, local governments have compelling policy reasons to:

- Limit the total number of tobacco retail outlets;
- Prohibit new tobacco retail outlets from locating near schools; and
- Bar pharmacies from selling tobacco products.

Local tobacco retail licensing laws are one effective way to achieve all of these objectives. Other legal mechanisms could be available as well. New York communities interested in learning more about their options may contact the Center for Public Health and Tobacco Policy.

CITATIONS

¹ See generally Randolph Kline, Tobacco Control Legal Consortium, Local Land Use Regulation for the Location and Operation of Tobacco Retailers (2004).

² Center for Disease Control, State-Specific Smoking-Attributable Mortality and Years of Potential Life Lost – United States, 2000-2004, MMWR Weekly, Jan. 23, 2009, at Table 1, available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5802a2.htm>.

³ Cf. Ian McLaughlin, Tobacco Control Legal Consortium, License to Kill?: Tobacco Retailer Licensing as an Effective Enforcement Tool 1 (2010) (“[G]overnment has a strong interest in ensuring that tobacco products are not sold or marketed to minors . . .”).

⁴ Scott P. Novak et al., *Retail Tobacco Outlet Density and Youth Cigarette Smoking: A Propensity-Modeling Approach*, 96 AM. J. PUB. HEALTH 670, 674 (2006).

⁵ *Id.*

⁶ Substance Abuse & Mental Health Servs. Admin. (SAMHSA), U.S. Dep’t of Health and Human Servs., FFY 2008 Annual Synar Report: Youth Tobacco Sales 3, available at <http://prevention.samhsa.gov/tobacco/synarreportfy2008.pdf>.

⁷ N.Y. PUB. HEALTH LAW §§ 1399-aa - 1399-mm (2010).

⁸ Substance Abuse & Mental Health Servs. Admin. (SAMHSA), U.S. Dep’t of Health and Human Servs., Strategy 10 (2009) (on file with author).

⁹ See *id.*

¹⁰ See *id.*

¹¹ INST. OF MED., ENDING THE TOBACCO PROBLEM: BLUEPRINT FOR THE NATION (2007), available at http://books.nap.edu/openbook.php?record_id=11795. An independent nonprofit organization, the IOM strives to offer unbiased expert opinions to decision-makers and the public in order to improve the nation’s health. Inst. of Med., About the IOM, <http://www.iom.edu/About-IOM.aspx> (last visited Oct. 13, 2010).

¹² INST. OF MED., ENDING THE TOBACCO PROBLEM, *supra* note 11, at 20.

¹³ *Id.* at 304; see also *id.* at 307 (“Recommendation 32: State governments should develop and, if feasible, implement and evaluate legal mechanisms for restructuring retail tobacco sales and restricting the number of tobacco outlets.”).

¹⁴ *Id.* at 307.

¹⁵ See Andrew Hyland et al., *Tobacco Outlet Density and Demographics in Erie County NY*, 93 AM. J. PUB. HEALTH 1075, 1075 (2003); Robert L. Rabin, *Tobacco Control Strategies: Past Efficacy and Future Promise*, 41 LOY. L.A. L. REV. 1721, 1762 (2008).

¹⁶ See, e.g., U.S. DEP’T OF HEALTH & HUMAN SERVICES, REDUCING TOBACCO USE: A REPORT OF THE SURGEON GENERAL 326-23, 337 (2000); F. J. Chaloupka et al., *Tax, Price and Cigarette Smoking: Evidence from the Tobacco Documents and Implications for Tobacco Company Marketing Strategies*, 11 TOBACCO CONTROL i62, i63-i64 (Supp. I 2002).

¹⁷ See Hyland et al., *supra* note 15, at 1075; N. Andrew Peterson, John B. Lowe & Robert J. Reid, *Tobacco Outlet Density, Cigarette Smoking Prevalence, and Demographics at the County Level of Analysis*, 40 SUBSTANCE USE & MISUSE 1627, 1630 (2005).

¹⁸ See INST. OF MED., ENDING THE TOBACCO PROBLEM, *supra* note 11, at 306.

¹⁹ *Id.*

²⁰ N.Y. State Dep’t of Health, Youth Access Tobacco Enforcement Program Annual Report: October 1, 2007 – September 30, 2008 7, available at http://www.health.state.ny.us/prevention/tobacco_control/docs/tobacco_enforcement_annual_report_2007_2008.pdf.

²¹ *Id.* at 9.

²² William J. McCarthy et al., *Density of Tobacco Retailers Near Schools: Effects on Tobacco Use Among Students*, 99 AM. J. PUB. HEALTH 2006, 2011-12 (2009).

²³ Lisa Henriksen et al., *Is Adolescent Smoking Related to the Density and Proximity of Tobacco Outlets and Retail Cigarette Advertising Near Schools?*, 47 PREVENTATIVE MED. 210, 213 (2008).

²⁴ *Id.* at 212.

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- ²⁵ *Id.* at 213.
- ²⁶ See Novak et al., *supra* note 4, at 673.
- ²⁷ McCarthy et al., *supra* note 22, at 2011.
- ²⁸ *Id.* at 2012 (“Our results confirm the plausibility of the notion that zoning restrictions can help reduce tobacco use initiation by students attending secondary schools.”).
- ²⁹ Novak et al., *supra* note 4, at 673-674.
- ³⁰ Scott T. Leatherdale & Jocelyn M. Strath, *Tobacco Retailer Density Surrounding Schools and Cigarette Access Behaviors Among Underage Smoking Students*, 33 ANNALS OF BEHAV. MED. 105, 106 (2007).
- ³¹ *Id.* at 109.
- ³² Henriksen et al., *supra* note 23, at 211-12.
- ³³ See U.S. DEP’T OF HEALTH AND HUMAN SERVS., PREVENTING TOBACCO USE AMONG YOUNG PEOPLE: A REPORT OF THE SURGEON GENERAL 147 (1994).
- ³⁴ BOSTON PUB. HEALTH COMM’N, CITY OF BOSTON, MASS., BOSTON PUBLIC HEALTH COMMISSION REGULATION RESTRICTING THE SALE OF TOBACCO PRODUCTS IN THE CITY OF BOSTON (2008) (effective Feb. 9, 2009), *available at* http://www.bphc.org/programs/cib/healthyhomescommunitysupports/tobaccocontrol/tobaccoregs/Forms%20%20Documents/regs_TobaccoRestrictionRegulation_12-11-08.pdf.
- ³⁵ *Id.*
- ³⁶ Cf. Novak et al., *supra* note 4, at 670 (“[B]etter law enforcement of youth purchasing bans . . . , although potentially important, is not completely effective, because when legal age limits are strictly enforced, minors may seek out adult smokers to procure cigarettes in local stores.”).
- ³⁷ Cf. *id.* at 674 (“A final contribution of this study is that previous research focused primarily on the link between retail tobacco access and underage smoking, but retail outlets also provide a source of cigarettes to those legally permitted to purchase tobacco. Past studies have suggested that retail access becomes a more important determinant of smoking behavior as youths grow older. We found no difference in the effect of retail tobacco outlet density and rates of smoking between minors and those legally permitted to purchase cigarettes.”).
- ³⁸ See American Heart Association, *Eliminating the Sale of Tobacco Products in Pharmacies 1* (2009), *available at* <http://www.americanheart.org/downloadable/heart/1254499772418Tobacco%20sales%20and%20pharmacies.pdf> (“The California Department of Health notes that the United States is the only place in the world where tobacco products are sold in pharmacies.”).
- ³⁹ See K. Suchanek Hudmon et al., *Tobacco Sales in Pharmacies: Time to Quit*, 15 TOBACCO CONTROL 35, 37 (2006).
- ⁴⁰ *Id.*
- ⁴¹ See *Id.*
- ⁴² Jerome E. Kotecki et al., *Pharmacists’ Concerns and Suggestions Related to the Sale of Tobacco and Alcohol in Pharmacies*, 23 J. COMMUNITY HEALTH 359, 364 (1998).
- ⁴³ American Heart Association, *supra* note 38, at 1.
- ⁴⁴ See American Pharmacists Association, 2010 Actions of the APhA House of Delegates, Washington, DC, March 12–15, 2010 (2010), *available at* http://www.pharmacist.com/AM/Template.cfm?Section=House_of_Delegates&Template=/CM/ContentDisplay.cfm&ContentID=23014.
- ⁴⁵ *Id.*
- ⁴⁶ Pharmacists Society of the State of New York House of Delegates, Minutes 2, June 25, 2009, *available at* http://www.pssny.org/documents/pdfs/minutes/10midwinter/hod_annual09.pdf.
- ⁴⁷ Currently there are over 4,000 pharmacies in New York State. Just over half (52 percent) of all pharmacies in New York sell tobacco products. However, most of the pharmacies that sell tobacco products are part of chain drug stores. Very few independent pharmacies in New York sell tobacco products. Tobacco Free NYS, Prescription for Change: New York Pharmacy Facts (2010), *available at* <http://www.tobaccofreenys.org/pdf/New-York-Pharmacy-Facts.pdf>; Center for Disease Control, State-Specific Smoking-Attributable Mortality and Years of Potential Life Lost – United States, 2000-2004, MMWR Weekly, Jan. 23, 2009, at Table 1, *available at* <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5802a2.htm>.
- ⁴⁸ SAN FRANCISCO, CAL., HEALTH CODE art. 19J, §1009.93 (2008).

⁴⁹ Bd. of Supervisors, S.F., Meetings Minutes – Draft (Sept. 28, 2010), <http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/bosagendas/minutes/2010/m092810.pdf> (last visited Oct. 1, 2010).

⁵⁰ Bd. of Supervisors, S.F., File No.1 01 056, Ordinance No. 245-10, <http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/ordinances10/o0245-10.pdf> (last visited Oct. 15, 2010).

⁵¹ See BOSTON PUB. HEALTH COMM'N, CITY OF BOSTON, MASS., *supra* note 34.

⁵² See, e.g., EVERETT, MASS., REGULATION RESTRICTING THE SALE OF TOBACCO PRODUCTS (2010); NEEDHAM, MASS., BOARD OF HEALTH REGULATIONS art. 1 (2009); NEWTON, MASS., ORDINANCE no. Z-55 (2009).

⁵³ Figures on file with author (based on July 2009 data). For additional information, see the Center for Public Health and Tobacco Policy's "New York Retail Licensing Fact Sheet," prepared March 2010 in conjunction with the New York State Tobacco Control Program. The fact sheet contains information about related New York state and local law, and it provides additional figures regarding the state tobacco retail registration requirement.

⁵⁴ U.S. CONST. Art VI, cl. 2 (providing that the laws of the United States "shall be the Supreme Law of the Land").

⁵⁵ Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776, 1776 (2009) (codified at 21 U.S.C. § 301 (2010)).

⁵⁶ Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776, 1786 (2009) (codified at 21 U.S.C. § 387a(a)(2010)).

⁵⁷ Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776, 1823-24 (2009) (codified as 21 U.S.C. § 387p (2010)).

⁵⁸ N.Y. TAX LAW § 480-a(1)(c) (2010).

⁵⁹ N.Y. TAX LAW § 480-a(1)(a) (2010).

⁶⁰ N.Y. TAX LAW § 480-a(1)(d)(i) (2010).

⁶¹ N.Y. TAX LAW § 480-a(4)(a) (2010).

⁶² See N.Y. TAX LAW § 480-a(d) (2010).

⁶³ N.Y. TAX LAW § 480-a(3)(a) (2010).

⁶⁴ N.Y. TAX LAW §§ 480-a(1)(a) & 480-a(2)(b) (2010).

⁶⁵ N.Y. TAX LAW § 480-a(2)(a)(ii) (2010).

⁶⁶ N.Y. PUB. HEALTH LAW § 1399-bb(1) (2010).

⁶⁷ N.Y. PUB. HEALTH LAW § 1399-gg (2010).

⁶⁸ See N.Y. PUB. HEALTH LAW § 1399-ee (2010).

⁶⁹ See N.Y. PUB. HEALTH LAW § 1399-ee(3) (2010); N.Y. State Dep't of Health, Tobacco: Current Policies, http://www.health.state.ny.us/prevention/tobacco_control/current_policies.htm (last visited Oct. 10, 2010).

⁷⁰ N.Y. PUB. HEALTH LAW § 1399-ee(2) (2010).

⁷¹ N.Y. PUB. HEALTH LAW § 1399-ee(3) (2010).

⁷² N.Y. PUB. HEALTH LAW § 1399-ee(3) (2010).

⁷³ N.Y. PUB. HEALTH LAW § 1399-ee(3)(d) (2010).

⁷⁴ N.Y. PUB. HEALTH LAW §§ 1399-ee(2) & 1399-ee(3)(e) (2010).

⁷⁵ N.Y. PUB. HEALTH LAW § 1399-ee(4)(a) (2010).

⁷⁶ N. Y. CITY, N.Y. ADMIN. CODE § 20-202 (2010).

⁷⁷ N. Y. CITY, N.Y. ADMIN. CODE § 20-202 (2010).

⁷⁸ N. Y. CITY, N.Y. ADMIN. CODE § 20-202 (2010).

⁷⁹ N. Y. CITY, N.Y. ADMIN. CODE § 17-703 (2010).

⁸⁰ N. Y. CITY, N.Y. ADMIN. CODE § 17-709 (2010) ("The department of health and mental hygiene and the department of consumer affairs shall enforce the provisions of this subchapter. In addition, designated enforcement employees of any authorizing agency and the department of finance shall have the power to enforce the provisions of this subchapter.").

⁸¹ N. Y. CITY, N.Y., ADMIN. CODE § 17-710 (2010).

⁸² N. Y. CITY, N.Y., ADMIN. CODE § 17-710 (2010).

⁸³ DUTCHESS COUNTY, N.Y., SANITARY CODE art. 25, § 25.1 (2010) (effective Dec. 1, 1997).

⁸⁴ DUTCHESS COUNTY, N.Y., SANITARY CODE art. 25, § 25.1 (2010) (effective Dec. 1, 1997).

⁸⁵ DUTCHESS COUNTY, N.Y., SANITARY CODE art. 25, § 25.3 (2010) (effective Dec. 1, 1997).

⁸⁶ DUTCHESS COUNTY, N.Y., SANITARY CODE art. 25, § 25.3 (2010) (effective Dec. 1, 1997).

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- ⁸⁷ DUTCHESS COUNTY, N.Y., SANITARY CODE art. 25, § 25.3 (2010) (effective Dec. 1, 1997).
- ⁸⁸ DUTCHESS COUNTY, N.Y., SANITARY CODE art. 25, § 25.3 (2010) (effective Dec. 1, 1997).
- ⁸⁹ See *People ex rel. Lodes v. Dep't of Health of City of N.Y.*, 82 N.E. 187 (N.Y. 1907); *New York ex rel. Lieberman v. Van De Carr*, 67 N.E. 913 (N.Y. 1903); *Clubhouse, Inc. v. N.Y. State Liquor Auth.*, 521 N.Y.S.2d 190 (N.Y. App. Div. 1987).
- ⁹⁰ See *Lodes*, 82 N.E. at 192; see also *Clubhouse*, 521 N.Y.S.2d at 191 ("A license to sell alcoholic beverages is not a property right, but simply permission granted in the State's discretion after weighing the dangers posed to the community if the license is issued[.]" (internal citations omitted)).
- ⁹¹ *Lodes*, 82 N.E. at 192.
- ⁹² *Id.* at 189.
- ⁹³ *Id.* at 188.
- ⁹⁴ *Id.* at 190.
- ⁹⁵ *Id.* at 190-91.
- ⁹⁶ *In re McIntosh*, 105 N.E. 414, 415 (N.Y. 1914).
- ⁹⁷ *Id.*
- ⁹⁸ See *Clubhouse*, 521 N.Y.S.2d at 190.
- ⁹⁹ *Id.* at 190-91.
- ¹⁰⁰ *Pizzaguy Holdings, L.L.C. v. N.Y. State Liquor Auth.*, 833 N.Y.S.2d 769, 770 (N.Y. App. Div. 2007).
- ¹⁰¹ *Id.*
- ¹⁰² See *Suffolk County Builders Ass'n v. County of Suffolk*, 389 N.E.2d 133 (N.Y. 1979); *ATM One, L.L.C. v. Incorporated Village of Freeport*, 714 N.Y.S.2d 721 (N.Y. App. Div. 2000); *N.Y. Telephone Co. v. City of Amsterdam*, 613 N.Y.S.2d 993 (N.Y. App. Div. 1994); *Torsoe Bros. Construction Corp. v. Bd. of Trustees of Monroe*, 375 N.Y.S.2d 612 (N.Y. App. Div. 1975); *Town of N. Hempstead v. Colonial Sand & Gravel Co.*, 178 N.Y.S.2d 579 (N.Y. Sup. Ct. 1958); *Sperling v. Valentine*, 28 N.Y.S.2d 788 (N.Y. Sup. Ct. 1941); *Dugan Bros. of N. J. v. Dunnery*, 269 N.Y.S. 844 (N.Y. Sup. Ct. 1933).
- ¹⁰³ *Suffolk County Builders Ass'n*, 389 N.E.2d at 134-37.
- ¹⁰⁴ *Id.*
- ¹⁰⁵ *Id.*
- ¹⁰⁶ *Dugan Bros.*, 269 N.Y.S. at 845.
- ¹⁰⁷ *Nitkin v. Adm'r of Health Servs. Admin. of City of N.Y.*, 91 Misc. 2d 478, 479 (N.Y. Sup. Ct. 1975).
- ¹⁰⁸ *Id.*
- ¹⁰⁹ *ATM One*, 714 N.Y.S.2d at 722.
- ¹¹⁰ *Walgreen Co. v. City & County of S. F.*, 110 Cal. Rptr. 3d 498, 504, 506 (Cal. Ct. App. 2010) (internal citations and quotation marks omitted).
- ¹¹¹ See *Philip Morris USA, Inc. v. City & County of S.F.*, No. C 08-04482, 2008 U.S. Dist. LEXIS 101933, at *4 (N.D. Cal. Dec. 5, 2008), *aff'd*, No. 08-17649, 2009 U.S. App. LEXIS 20142 (9th Cir. Sept. 9, 2009).
- ¹¹² *Walgreen*, 110 Cal. Rptr. 3d at 504.
- ¹¹³ *Id.* at 506.
- ¹¹⁴ *Id.* at 504 (brackets in original).
- ¹¹⁵ *Id.* at 503.
- ¹¹⁶ *Id.* at 505.
- ¹¹⁷ *Id.* at 514.
- ¹¹⁸ *Id.* at 501-02.
- ¹¹⁹ *Id.* at 514. Despite the appellate court's statement, it is questionable whether the lower court would have the legal authority to extend the law to retail outlets not covered in the original version of the ordinance.
- ¹²⁰ Bd. of Supervisors, S.F., Meetings Minutes – Draft (Sept. 28, 2010), <http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/bosagendas/minutes/2010/m092810.pdf> (last visited Oct. 1, 2010).
- ¹²¹ *Justiana v. Niagara County Dep't of Health*, 45 F. Supp. 2d 236, 242 (W.D.N.Y. 1999) ("[A] legislature can address a perceived problem incrementally if in its judgment that is the best way to address the problem.").
- ¹²² News Release, Office of the City Attorney [S.F.], Phillip Morris USA Ends Legal Assault on S.F.'s Tobacco Sales Ban in Pharmacies: Dismissal Concludes Tobacco Giant's Federal Challenge, But

Litigation by Walgreens Remains Underway in California Court of Appeal (Oct. 15, 2009), <http://www.sfcityattorney.org/index.aspx?page=229> (last visited Oct. 10, 2010).

¹²³ Philip Morris USA, Inc. v. City & County of S.F., No. C 08-04482, 2008 U.S. Dist. LEXIS 101933, at *4 (N.D. Cal. Dec. 5, 2008), *aff'd*, No. 08-17649, 2009 U.S. App. LEXIS 20142 (9th Cir. Sept. 9, 2009).

¹²⁴ *Id.* at *5.

¹²⁵ *Id.* at *6.

¹²⁶ *Id.* at *8.

¹²⁷ *Id.* at *10.

¹²⁸ Philip Morris USA Inc. v. City & County of San Francisco, 345 Fed. Appx. 276, 277 (9th Cir. 2009) (“Selling cigarettes isn’t [protected activity] because it doesn’t involve conduct with a ‘significant expressive element.’” (quoting *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 701-02 (1986))).

¹²⁹ See News Release, Office of the City Attorney [S.F.], *supra* note 122.

¹³⁰ N.Y. MUN. HOME RULE LAW § 10(1)(ii)(a)(12) (2010) (“Every local government . . . shall have power to adopt and amend local laws . . . relating to . . . [t]he government, protection, order conduct, safety, health and well-being of persons therein. This provision shall include but not be limited to the power to adopt local laws providing for the regulation or licensing of occupations or businesses . . .”).

¹³¹ N.Y. PUB. HEALTH LAW § 308 (2010).

¹³² Technical Assistance Legal Ctr. (TALC), Case Studies: On the Implementation and Enforcement of Local Tobacco Retailer Licensing Ordinances in California 8 (2006).

¹³³ *Id.*

¹³⁴ *Id.* at 11.

¹³⁵ Substance Abuse & Mental Health Servs. Admin. (SAMHSA), U.S. Dep’t of Health and Human Servs., FFY 2009 Annual Synar Reports, Youth Tobacco Sales 3 (2010), *available at* <http://prevention.samhsa.gov/tobacco/synarreportfy2008.pdf>.

¹³⁶ See Press Release, Substance Abuse & Mental Health Servs. Admin. (SAMHSA), All 50 States and DC Continue to Achieve Goals in Restricting Tobacco Sales to Minors Under Synar Program – A State/Federal Partnership (June 4, 2010), *available at* <http://www.samhsa.gov/newsroom/advisories/1006035646.aspx>.

¹³⁷ See *Id.*

¹³⁸ See TALC, Case Studies, *supra* note 132, at 10.

¹³⁹ *Id.* at 11.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Tobacco Enforcement Best Practices Roundtable, Walnut Creek Police Department, Tobacco Enforcement Roundtable: Best Practices, Challenges, and Solutions May 2009 (May 8, 2009), *available at* <http://www.tcsstore.org/appendix/Roundtable%20Outcomes%20final.pdf> (last visited Oct. 10, 2010).

¹⁴³ *Id.*

Appendix A: Model Ordinance

Appendix B: Prescription for Change New York Pharmacy Facts

NEW YORK MODEL ORDINANCE FOR TOBACCO RETAIL LICENSING

Section 1: Findings

The [Common Council] of [City] hereby finds and declares that:

Tobacco use is the foremost preventable cause of premature death in the United States, causing over 400,000 deaths in the United States each year;

More than XXX high school age youth and XXX adults in [City] currently smoke, and smoking kills approximately XXX adults in [City] each year;

Tobacco companies sell products that are addictive and inherently dangerous, causing cancer, heart disease, and other serious illnesses;

[City] has a substantial interest in reducing the number of individuals of all ages who use cigarettes and other tobacco products, and a particular interest in protecting adolescents from tobacco dependence and the illnesses and premature death associated with tobacco use;

An overwhelming majority of Americans who use tobacco products begin using such products while they are adolescents and become addicted to those products before reaching the age of 18;

[City] has a substantial and important interest in reducing the illegal sale of tobacco products to minors;

Although it is unlawful to sell tobacco products to minors, 8.3% of New York retailers surveyed do sell to minors [New York State Department of Health, 2008 Youth Access Tobacco Enforcement Program Annual Report]; and 20% of underage smokers in New York report that they usually purchase their cigarettes from a retail store [New York Youth Tobacco Survey 2008].

Research has found that higher tobacco retail outlet density is significantly associated with higher rates of youth smoking initiation and experimentation;

Restricting the number and the location of tobacco retailers in the City is necessary to protect the public health, safety, and welfare of our youth;

A local licensing system for tobacco retailers is necessary and appropriate to protect the public health, safety, and welfare of our residents;

A local licensing system for tobacco retailers will help ensure that retailers comply with the Adolescent Tobacco Use Prevention Act, other tobacco control laws, and the business standards of the [City];

Consider Who Will Adopt the Law: In addition to cities, counties and county boards of health may possess the legal authority to create a licensing system for tobacco retailers.

County boards of health can adopt such a rule by adding it to the county's sanitary code. However, this model would have to be adapted somewhat for that purpose. Please contact the Center for Public Health and Tobacco Policy to discuss this option further.

Add Localized Findings: Communities can add more localized facts into the findings and can add other findings compelling to the community. It is also important to introduce supporting materials into the record during common council hearings. Those materials can be referenced in the findings.

Examples of Localized Findings: The number of tobacco retail outlets near schools, surveys of students about the ease of purchasing tobacco products, and data on youth use of tobacco products.

Studies have found a higher prevalence of current smoking at schools with more tobacco outlets within walking distance, and researchers suggest that limiting the proximity of tobacco outlets to schools may be an effective strategy to reduce youth smoking rates;

Licensing laws in other communities have been effective in reducing the number of illegal tobacco sales to minors;

The sale of tobacco products is incompatible with the mission of pharmacies because tobacco product sales are detrimental to the public health;

The American Pharmacists Association and the Pharmacists Society of the State of New York have called for the adoption of state and local prohibitions of tobacco sales in pharmacies; and

It is the intent of the [City] to implement effective measures through this Chapter to reduce the number of tobacco retail outlets, regulate the location of tobacco retail outlets, stop the sale of tobacco products to youth, prevent the sale or distribution of contraband tobacco products, and facilitate the enforcement of tax laws and other applicable laws relating to tobacco products.

Section 2: Definitions

As used in this Chapter, the following terms shall have the meanings indicated:

ADULT-ONLY ESTABLISHMENT means a facility where the operator ensures or has a reasonable basis to believe (such as by checking the identification of any person appearing to be under the age of 25) that no person under the Legal Age is permitted entrance.

APPLICANT means an individual, partnership, limited liability company, corporation, or other business entity seeking a Tobacco Retail License.

DEPARTMENT means the [Department of XXX].

LEGAL AGE means the minimum age at which individuals are permitted to legally purchase tobacco products.

NEW TOBACCO RETAIL LICENSE means any Tobacco Retail License that is not a Renewed Tobacco Retail License.

PERSON means any natural person, company, corporation, firm, partnership, business, organization, or other legal entity.

***Taxes:** Licensing can also be used to facilitate enforcement of local tax laws, for those jurisdictions that have their own tobacco taxes or are considering seeking taxing authority.*

***Department:** This will be the entity responsible for implementing and enforcing the law. Depending on the city, this could be the Health Department, the Department of Permit and Inspection Services, the Department of Code Enforcement, or another similar department. It should be either a health-oriented department, if possible, or another department that already issues licenses and conducts inspections.*

PHARMACY means a registered pharmacy as defined in Section 6802 of New York Education Law.

RENEWED TOBACCO RETAIL LICENSE means a Tobacco Retail License issued to an Applicant for the same location at which the Applicant possessed a valid Tobacco Retail License during the previous year.

SCHOOL means a public or private kindergarten, elementary, middle, junior high, or high school.

TOBACCO PRODUCT means any manufactured product containing tobacco or nicotine, including but not limited to cigarettes, cigars, pipe tobacco, snuff, chewing tobacco, dipping tobacco, bidis, snus, dissolvable tobacco products, and electronic cigarette cartridges. However, “Tobacco Product” does not include any product that has been approved by the U.S. Food and Drug Administration, pursuant to its authority over drugs and devices, for sale as a tobacco use cessation product or for other medical purposes and is being marketed and sold solely for that approved purpose.

TOBACCO RETAIL LICENSE means a license issued by the Department to a Person to engage in the retail sale of Tobacco Products in [City].

Section 3: Tobacco Retail License

(A) Starting [EnforcementDate], no Person shall sell, offer for sale, or permit the sale of Tobacco Products to consumers in [City], without a valid Tobacco Retail License issued by the Department. A Tobacco Retail License is not required for a wholesale dealer who sells Tobacco Products to retail dealers for the purpose of resale only and does not sell any Tobacco Products directly to consumers.

(B) All Tobacco Retail Licenses issued pursuant to this section are nontransferable and non-assignable and are valid only for the Applicant and the specific address indicated on the Tobacco Retail License. A separate Tobacco Retail License is required for each address at which Tobacco Products are sold or offered for sale. Any change in business ownership or business address requires a new Tobacco Retail License.

(C) All Tobacco Retail Licenses issued pursuant to this section are valid for no more than one year and expire on the [Day of Month (of EnforcementDate)] following the effective date of the Tobacco Retail License. As set forth in Section 9, a Tobacco Retail License may be revoked by the Department prior to its expiration date for cause.

(D) Applications for a New or Renewed Tobacco Retail License shall be submitted to the Department in writing upon a form provided by the Department. The Department may require such forms to be signed and verified by the Applicant or an authorized agent thereof.

***Tobacco Products:** A license is required for the sale of any tobacco products, including smokeless tobacco, cigars, and mini-cigars. A license is not required for the sale of FDA-approved cessation aids.*

***Enforcement Date:** This is the date on which all retailers will need to have a valid license. The licenses will expire one year from that date. The Enforcement Date should be set so that it provides the Department with enough time to implement the law and review applications.*

***One Year Licenses:** For example, if the Enforcement Date is July 1, 2011, then licenses will expire on the following 1st of July (“day of month”).*

(E) Applications for a new or renewed Tobacco Retail License shall be accompanied by the fee set forth in Section 7.

(F) The issuance of any Tobacco Retail License pursuant to this Chapter is done in [City's] discretion and shall not confer upon licensee any property rights in the continued possession of such a license.

Section 4: Issuance of Licenses

(A) Upon the receipt of a completed application for a New or Renewed Tobacco Retail License and the fee required by Section 7, the Department shall inspect the location at which tobacco sales are to be permitted. The Department may also ask the Applicant to provide additional information that is reasonably related to the determination of whether a license may issue.

(B) The Department may refuse to issue a Tobacco Retail License to an Applicant if it finds that one or more of the following bases for denial exists:

- (1) The information presented in the application is incomplete, inaccurate, false, or misleading;
- (2) The fee for the application has not been paid as required;
- (3) The Applicant does not possess a valid certificate of registration as a tobacco retail dealer from the New York State Department of Taxation and Finance;
- (4) The application seeks a New Tobacco Retail License at a location for which this Chapter prohibits the issuance of a New Tobacco Retail License;
- (5) The total number of applications exceeds the number permitted by Section 5 of this Chapter;
- (6) The Applicant has previously had a Tobacco Retail License issued under this Chapter revoked;
- (7) A Tobacco Retail License issued under this Chapter for the same address or location has previously been revoked;
- (8) The Applicant has been found by a court of law or administrative body to have violated any federal, state, or local laws pertaining to (a) trafficking in contraband Tobacco Products or illegal drugs, (b) the payment or collection of taxes on Tobacco Products, (c) the display of Tobacco Products or of health warnings pertaining to Tobacco Products, or (d) the sale of Tobacco Products;

***Inspections:** The cost of inspections can be paid for by the permit fee (see Section 7).*

***Previous Revocation:** Paragraph 4(B)(7) is intended to prevent repeat violators from re-registering for a license under a different name. Note that the department may grant a license if it finds that there is no connection between the new applicant and the previous owner.*

(9) The Applicant has not paid to [City] outstanding fees, fines, penalties, or other charges owed to the [City]; or

(10) The Department determines, in accordance with written criteria established to further the purposes of this Chapter, that the Applicant is otherwise not fit to hold a Tobacco Retail License.

Section 5: Limitation on Number of Licenses Issued

(A) For the first year subsequent to the effective date of this Chapter, a Tobacco Retail License shall only be issued to an Applicant for the same location at which the Applicant possessed a valid certificate of registration as a tobacco retail dealer from the New York State Department of Taxation and Finance 180 days prior to the effective date of this Chapter.

(B) With the exception of the first year subsequent to effective date of this Chapter, the total number of New and Renewed Tobacco Retail Licenses issued by the Department in a given year (measured from **EnforcementDate** to **EnforcementDate**) shall not exceed the number of Tobacco Retail Licenses that were issued during the previous year.

(C) Starting on [**EnforcementDate** + 1 year], the Department shall issue only one New Tobacco Retail License for every two Tobacco Retail Licenses that were revoked during the previous year or for which no renewal application was submitted.

(D) Whenever the number of valid applications for New Tobacco Retail Licenses exceeds the maximum number of such new licenses that may be issued pursuant to this section, the Department shall grant such licenses using the following priorities:

(1) Tobacco Retail Licenses shall be granted, first, to any Applicant that held a valid Tobacco Retail License in the prior year for an establishment within [XX feet] of the nearest point of the property line of a School and who is not seeking to renew that license. If there are more valid applications from such sellers for new licenses than the number of available new licenses, the licenses shall be granted to those Applicants by lottery;

(2) Tobacco Retail Licenses shall be granted, second, to any person who will sell Tobacco Products at an Adult-Only Facility. If there are more valid applications from such sellers for new licenses than the number of available new licenses, the licenses shall be granted to those Applicants by lottery; and

(3) Any remaining available New Tobacco Retail Licenses shall be granted to Applicants by lottery.

***Other Reasons for Denial:** Other criteria under Paragraph 4(B)(10) could, for example, include other criminal convictions (e.g., fraud) or a belief that the applicant is a straw man for an ineligible applicant (person is applying on behalf of someone who would not qualify).*

***First year:** Under Paragraph 5(A), during the first year of this law no local licenses will be issued to any retailer who did not previously hold a New York State tobacco retail permit.*

***Subsequent years:** For each successive year, only one new license will be granted for each two that are revoked or not renewed, so the total number of Tobacco Retail Licenses will gradually decline. The year is “measured from EnforcementDate to EnforcementDate,” meaning, for example, July 1st to Jun 30th of the licensing cycle.*

***Preferences:** Paragraph 5(D)(1) allows retailers who stop selling tobacco products near schools to be put first in line for a tobacco retail license at a different location.*

Section 6: Certain Locations

(A) No Tobacco Retail License shall be issued to any seller of tobacco products that is not in a fixed, permanent location.

(B) No Tobacco Retail License shall be issued for any establishment that has or operates a Pharmacy within it.

(C) With the exception of the first year subsequent to effective date of this Chapter, no New Tobacco Retail License shall be issued to any establishment within [XX feet] of the nearest point of the property line of a School.

Section 7: Required Fee

(A) Each application for a New or Renewed Tobacco Retail License shall be accompanied by a fee of \$[FeeAmt].

(B) Starting two years after the effective date of this Chapter, the Department may, on an annual basis, modify the fee required pursuant to Section 7(A). The fee shall be calculated so as to recover the cost of administration and enforcement of this Chapter, including, for example, issuing a license, administering the license program, retailer education, retailer inspection and compliance checks, documentation of violations, and prosecution of violators, but shall not exceed the cost of the regulatory program authorized by this Chapter. All fees and interest upon proceeds of fees shall be used exclusively to fund the program. Fees are nonrefundable except as may be required by law.

Section 8: Required License Display

(A) Any Tobacco Retail License issued pursuant to this chapter shall be displayed prominently at the location where the Tobacco Products are sold so that it is readily visible to customers.

(B) Selling, offering for sale, or permitting the sale of any Tobacco Product without a valid Tobacco Retail License displayed in accordance with Section 8(A) constitutes a violation of this Chapter.

Section 9: Revocation of Licenses

(A) The Department may suspend or revoke a Tobacco Retail License issued pursuant to this Chapter for violations of the terms and conditions of this Chapter or for violation of any federal, state, or local law or regulation pertaining to (a) trafficking in contraband Tobacco Products or illegal drugs, (b) the payment or collection of taxes on Tobacco Products, (c) the display of Tobacco Products or of health warnings pertaining to Tobacco Products, or (d) the sale of Tobacco Products.

***Pharmacies:** This model ordinance prohibits pharmacies from selling tobacco products. Speak with the Center for Public Health and Tobacco Policy if you would like to discuss phasing in this prohibition.*

***Distance from Schools:** This distance will be tailored to your community. Please work with the Center for Public Health and Tobacco Policy and the NY Tobacco Control Program to determine a recommended distance before using this model ordinance as an educational tool in your outreach.*

***Retailers near Schools:** Paragraph 6(C) allows current retailers near schools to continue selling tobacco products, but prohibits new retailers from locating near schools.*

(B) The Department may revoke a Tobacco Retail License if the Department finds that one or more of the bases for denial of a license under Section 4 existed at the time application was made or at any time before the license issued.

Section 10: Violations and Enforcement

(A) The Department or its authorized designee(s) shall enforce the provisions of this chapter. The Department may conduct periodic inspections in order to ensure compliance with this Chapter.

(B) In addition to the penalties provided for in Section 9, any Person found to be in violation of this Chapter shall be liable for civil penalty of not more than \$250 for the first violation, not more than \$500 for the second violation within a two-year period, and not more than \$1000 for the third and each subsequent violation within a two-year period. Each day on which a violation occurs shall be considered a separate and distinct violation.

Section 11: Rules and Regulations

The Department may issue and amend rules, regulations, standards, guidelines, or conditions to implement and enforce this Chapter.

Section 12: Severability

The provisions of this Chapter are declared to be severable, and if any section of this Chapter is held to be invalid, such invalidity shall not affect the other provisions of this Chapter that can be given effect without the invalidated provision.

Section 13: Effective Date

The effective date of this ordinance shall be thirty (30) days from the date of its enactment.

License Revocation:
The Department can create its own procedural rules (or use existing ones) to implement this section.

Revocation could be integrated with City's current public health or licensing rules/procedures.

The Center for Public Health and Tobacco Policy can work with communities to ensure that our model does not conflict with existing licensing requirements in the city.

Penalties: *Penalties could be tailored to reflect other similar local laws. The penalties section would have to be modified before inclusion in a county sanitary code. (Fines allowable under a county sanitary code cannot exceed \$500.*

The Center for Public Health & Tobacco Policy
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The Center for Public Health and Tobacco Policy is a new resource for the New York tobacco control community. It is funded by the New York State Department of Health and will be working with the New York State Tobacco Control Program and its contractors to develop and support policy initiatives that will reduce tobacco-related morbidity and mortality in New York.

This work provides educational materials and research support for policy initiatives and does not constitute and cannot be relied upon as legal advice.

Prescription FOR CHANGE[®]



New York Pharmacy Facts

- There are approximately 4,300 licensed pharmacies in New York, including those located in independent pharmacies, hospitals, clinics, chain drugstores, discount and warehouse retail outlets and grocery stores.
- Currently, no tobacco products are sold at hospital or clinic pharmacies, Target and Wegmans stores and 85% of independent pharmacies.
- Currently 52% (2,236) of all pharmacies in New York sell tobacco.
- 99% (1,440) of large, chain drug stores in New York State are licensed to sell tobacco.

Detailed Breakdown of Pharmacies in New York State

Type of Pharmacy	# of Stores	Total # in NY	% of Tobacco Free Pharmacies	% of Pharmacies Sell Tobacco
INDEPENDENT <i>(Too large to list)</i>		1,935	85%	15%
HOSPITALS/CLINICS		231	100%	0%
DISCOUNT/WAREHOUSES		193	47%	53%
Kmart	36			
Wal-mart/Sams	95			
Target	62		(100% of Target stores)	
GROCERY		334	12%	88%
Tops	59			
Stop & Shop	42			
Price Chopper	39			
Pathmark	39			
Wegmans	35		(100% of Wegmans stores)	
Other	120			
SMALL CHAINS		176	40%	60%
Kinney Drugs	67			
The Medicine Shoppe	20			
Thriftway Pharmacy	10			
Other	79			
LARGE CHAINS		1,455	1%	99%
Rite Aid	640			
CVS	396			
Duane Reade	234			
Walgreens	185			
TOTAL PHARMACIES		4,324 <i>Licensed in NY</i>	2,088 <i>Tobacco Free</i>	2,236 <i>Sell Tobacco</i>

The Siena College Research Institute compiled data for this table on April 15, 2010 by comparing information from the New York State Department of Health and the New York State Department of Taxation & Finance. Pharmacy data was collected from the NYS Department of Health website. The New York State Department of Taxation & Finance supplied all retail locations with a tobacco license who were registered in New York State in 2009.

Now is the time to end tobacco sales at pharmacies in New York State.

Here's why:

- "Pharmacies are the face of neighborhood healthcare. Americans rely on their neighborhood pharmacies and pharmacists as easily accessible and trusted points of care."¹
- It is a conflict of interest for pharmacies, providers of health care, to also profit from the sale of harmful products such as tobacco, known to cause cancer, heart and pulmonary diseases.²
- Tobacco sales in pharmacies raises ethical questions since tobacco is the only consumer product that, when used as intended, will kill at least one half of its long term users.³
- Tobacco products are highly addictive and responsible for the preventable death of 25,400 people in New York each year.⁴

¹ National Association of Chain Drug Stores, Statement on Health Care Reform, November 19, 2008 Available at: <http://www.nacds.org/userassets/pdfs/newsrelease/2008/NACDS%20Finance%20Committee%20HCR%20Hearing%20Statement%20Nov%202008.PDF> [Accessed: April, 13, 2010]

^{2,3} Bero L, Corelli R, Hudmon K, Kroon L. Position paper on amending the San Francisco Health Code to prohibit pharmacies from selling tobacco products. July 14, 2008. Available at: <http://www.no-smoke.org/pdf/Pharmacy%20UCSF-TobaccoSalesPositionPaper-v14-%28on%20letterhead%291.pdf> [Accessed: 05/12/2010]

⁴ State-Specific Smoking-Attributable Mortality and Years of Potential Life Lost --- United States, 2000—2004, MMWR Weekly, CDC, January 23, 2009/58(02);29–33, Table 1. Available at: <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5802a2.htm> [Accessed: May 5, 2010.]

Prescription FOR CHANGE.



New Yorkers Support Tobacco-Free Pharmacies

69% in the **Capital Region** thought that pharmacies should not sell tobacco products¹

73% in **Broome County** thought that pharmacies should not sell tobacco products²

56% in the **Hudson Valley and Long Island** thought that pharmacies should not sell tobacco products³

58% in **NYC** favored a law that would prohibit the sales of tobacco products at pharmacies⁴

Pharmacists Support Tobacco-Free Pharmacies

In July 2009, the Pharmacist Society of the State of New York (PSSNY), House of Delegates passed a resolution supporting efforts to end the sale of tobacco products in pharmacies.

PSSNY is a 125 year old not-for-profit incorporated society which represents the pharmacist's profession and is the largest pharmacy association in New York State, representing nearly 2,700 pharmacists.

Notable Quotes

"It is important for the sale of tobacco products in pharmacies to stop. As health care professionals, we need to provide one message to our patients. We are available as a resource and as an advocate to assist our patients in quitting."

Nicole M. Lodise, Pharm.D.
Associate Professor of Pharmacy Practice
Albany College of Pharmacy and Health Sciences

"To put it as forcefully as I possibly can, pharmacies selling cigarettes is a disgrace. Any other product in these stores that killed even one one-thousandth of the number of people cigarettes kill every year would be pulled from their shelves instantly. Yet these stores continue to carry a product, that, when used as instructed, kill half the people using it."

Frank Vitale
National Director Pharmacy Partnership for Tobacco Cessation

"Over the last twenty plus years as a pharmacist, I have seen too many patients go to an early grave because of tobacco use. I have always been wholeheartedly against the sale of tobacco in pharmacies. There is nothing more convincing than filling medications for someone who has set themselves on fire due to smoking with oxygen on their face."

Karen Hogue, RPh., Owner, Corning

"I have never understood why pharmacies would sell tobacco products. These products are a leading cause of death and disease in our society and selling them goes against everything we should be as pharmacists. Please urge pharmacies to STOP putting tobacco profits ahead of people's health and well-being."

Michael Steed, RPh., Corning

"After watching my father and brother die horrific deaths both caused by cigarette smoking, we could no longer, in good conscience, continue to sell cigarettes in our pharmacies. Seeing the countless families blown apart by the devastation of lung cancer, it made no sense to try and ease their suffering in the back of the store and encourage cigarette smoking in the front of the store."

Mark J Quackenbush, Pharm D, Windham Pharmacy, Windham

"I was a pharmacist in Cortland for over 40 years and was, and am, perplexed by the contradictions one can observe about our pharmacies here in New York State and around the country. Selling tobacco products, known to cause cancer, heart disease and emphysema is in direct conflict with the mission of our pharmacies."

Richard Menapace, Retired Pharmacist, Cortland

¹ Tobacco Free Coalitions Study: 2009, Siena College Research Institute (SRI), July 2009, pg. 4-5

² Community Tobacco Survey of Adult Residents of Broome County, December 2009, Joel LaLone Consulting, pg. 44.

³ Long Island/Hudson Valley Tobacco Survey 2009, Baruch College Survey Research, June-July 2009

⁴ NYC Coalition For A Smoke-free City Report: Zogby International, August 2009

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