



## Location, Location, Location:

### Regulating Tobacco Retailer Locations for Public Health

The Tobacco Control Legal Consortium has created this series of legal technical assistance guides to serve as a starting point for organizations interested in implementing certain tobacco control measures. We encourage you to consult with local legal counsel before attempting to implement these measures.<sup>1</sup> For more information, please contact the Consortium.

Both the Institute of Medicine<sup>2</sup> and the U.S. Surgeon General<sup>3</sup> have recommended that communities take steps to limit the number and restrict the location of tobacco retailers as an effective tobacco control measure. This publication explains how regulating tobacco retailer locations benefits public health and provides policy options and legal issues to consider.

#### Policy Rationale – Why the Location of Tobacco Retailers Matters for Public Health



When tobacco retail outlets are concentrated in certain neighborhoods or around schools, there are negative consequences for tobacco control and public health. Communities that are densely populated with tobacco retailers make it easier for youth to get tobacco products. Also, because retail outlets are a key marketing channel for tobacco products, a high density of tobacco retailers in a neighborhood creates a concentration of tobacco marketing, meaning children, youth, and adults living in those neighborhoods will be exposed to multiple environmental cues designed to encourage tobacco use.

Studies have shown that tobacco advertising is more prevalent in stores located near schools and where adolescents are likely to shop.<sup>4</sup> Tobacco retailers are an important marketing channel for reaching and attracting potential new users, the vast majority of which are teenagers under 18 years old.<sup>5</sup> Convenience stores – which are popular with teenage shoppers<sup>6</sup> – vigorously participate in tobacco marketing activities and tend to feature significantly more tobacco advertising and promotions compared to other types of stores.<sup>7</sup> Exposure to these marketing and promotional activities has been shown to affect tobacco use initiation rates among adolescents, particularly when the stores are close to schools.<sup>8</sup> Thus, studies have documented that youth who live or go to schools in neighborhoods with the highest density of tobacco outlets (or with the highest density of retail tobacco advertising) have higher smoking rates compared to youth who live, or attend school, in neighborhoods with fewer or no tobacco outlets.<sup>9</sup>

Tobacco retailer location is also a factor in tobacco use by adults, particularly for low-income or minority communities. Neighborhoods with relatively large low-income and/or minority populations tend to have higher numbers or densities of tobacco retail outlets.<sup>10</sup> The Surgeon General has found that the tobacco industry's retail outlet advertising targets people with the lowest income and education and that there is more in-store tobacco advertising in minority and low-income neighborhoods.<sup>11</sup> High densities of tobacco retailers have been linked to increased smoking rates among adults living in the surrounding neighborhoods.<sup>12</sup>

The evidence demonstrates that restrictions on the number and locations of tobacco retail outlets within a community have clear public health benefits, particularly for youth, young adults, and for low-income and other populations disparately impacted by the chronic diseases caused by tobacco use. Communities interested in regulating the quantity, location, or density of tobacco retailer locations have several options, including regulating the types of retailers that can sell tobacco products and where they can be located.

### Policy Options

Licensing and zoning laws are two common local government tools that can be used to regulate tobacco retailers in various ways, including *how* they do business and *where* they can do business. These kinds of laws regulate business conduct by conditioning the grant or renewal of a license or permit on the performance or non-performance of specific activities. For more information about how licensing and zoning authority can be used to regulate tobacco retailers, please see the Consortium's publication [\*Using Licensing and Zoning to Regulate Tobacco Retailers\*](#).<sup>13</sup> This publication focuses on options that could be implemented in conjunction with tobacco licensing or zoning laws or through stand-alone laws that directly regulate tobacco retailer locations. The following approaches could be used singly or in combination to limit the number of tobacco retail outlets, control where they are located, and reduce retailer density within neighborhoods.

- **Restrict the types of businesses that can sell tobacco and related products:** One way to reduce the number or restrict the location of tobacco retailers in a community is to limit the types of retailers that may sell tobacco products. For example, dozens of communities around the nation have prohibited pharmacies and other healthcare institutions from serving as tobacco retail outlets because selling those products is incompatible with their health and medical mission.<sup>14</sup> Some companies, including CVS, have taken this step voluntarily.<sup>15</sup> Some communities have also prohibited educational institutions from serving as retail outlets for tobacco, because youth are particularly at risk for becoming smokers, and the sale of tobacco would be incompatible with an educational mission to educate the younger population about social, environmental and health risks and harms.<sup>16</sup> Although a number of jurisdictions have restricted tobacco outlet options as part of a tobacco licensing law, the same goal can be accomplished through a separate regulation. Communities considering a broader approach could restrict tobacco sales to specialty shops where minors are prohibited from entering, as some jurisdictions do with alcohol retailers.<sup>17</sup> Restricting the types of stores that sell tobacco could reduce the raw number of tobacco retailers within a community and also lessen the density of tobacco retailers.

- **Regulate where tobacco retail outlets can be located:** Several communities prohibit health care or educational institutions from selling tobacco products and housing tobacco retailers on their properties. Additionally, communities can restrict how close tobacco retailers can be to each other, or to schools or other areas where large numbers of children and adolescents are frequently present. With this kind of spacing restriction, it would be important to consider whether the regulation causes retailers to concentrate in certain areas outside of the prohibited areas. While licensing and zoning regulations often have the benefit of existing enforcement mechanisms, a direct regulation may need to create a new enforcement process.

## Policy Elements

Well-crafted restrictions on tobacco retailer locations are explicit about how tobacco retailer locations will be restricted, and how communities will implement and enforce the restrictions. Here are a few elements found in such policies:

- **Timely, community-specific findings and clear statement of purpose:** Findings are brief statements of fact or statistics that outline the issue being addressed, support the need for the policy, and help clarify the policy goals. If data is available or can be collected about the density, locations, and numbers of tobacco retailers within specific areas of a community, this data should be included to make the findings as relevant and strong as possible.
- **Statement of authority:** A clear and concise (but well-researched) statement explaining the local government unit's authority (whether it be a city council, board of health, or other local government entity) to enact the law may be useful to include either in the findings or in a separate provision of the law. Including this statement could help avoid arguments that the local government lacks the authority to pass the law because of preemption, lack of home rule authority, or for some other reason (see below for more discussion on this point).
- **Clear definitions and concise language:** Clearly define critical terms such as "tobacco product," "health care institution" or "educational institution." Draft the definition of "tobacco product" appropriately to include products such as flavored cigars, little cigars, spit/chewing tobacco, e- cigarettes, dissolvable tobacco products, flavored tobacco lozenges, and other emerging smokeless products.
- **Clear statement of how the law will be enforced:** The law should clearly describe the restrictions on tobacco retail locations. The enforcement provision should state who or what department is responsible for enforcing the law. The penalties section of the policy should clearly identify when persons can be found in violation of the policy, and the penalties or fines imposed for first, second and subsequent violations, as appropriate.
- **Well-planned implementation process:** Because any of these options are likely to affect existing retail outlets, a practical and well-thought out plan for implementation will

be important. When setting a date for the policy to take effect, consider how much time the responsible authorities will need to establish the necessary procedures for implementation and enforcement, to notify affected businesses of their obligations under the policy, and for businesses to take the steps necessary to comply. Establish a process for publicizing the policy and educating the community about why it is needed and how it will be implemented, and include procedures for receiving, tracking and following up on complaints.

## Challenges

The tobacco industry and its allies have a history of challenging tobacco control measures in court, particularly when novel approaches are tried. In the context of tobacco retailer location restrictions, however, these challenges have not been very successful.

Past cases indicate that limitations on what kinds of institutions or businesses can serve as tobacco retail outlets will be on solid legal footing so long as the following conditions apply: the jurisdiction has the authority to pass the law; there is a rational basis for the restriction; and the law applies uniformly to similar types of businesses (i.e., all stores with pharmacies, regardless of their size or type of inventory). The first set of laws to prohibit retailers with pharmacies from also serving as tobacco retail outlets was passed by San Francisco, and was challenged in a series of lawsuits on First Amendment, Equal Protection, Due Process, and state law preemption grounds.<sup>18</sup> These challenges were largely unsuccessful—the only successful case was an Equal Protection challenge brought by a drug store chain on the grounds that an exemption in the law for “big box” and grocery stores was unfair.<sup>19</sup> After the exemption was removed, however, the law was upheld.<sup>20</sup>

Generally, jurisdictions considering options for restricting tobacco retailer locations should consider the following legal issues:

- **Authority:** The governmental unit needs to have the power to enact the law. While states often have the power to pass these kinds of retailer restrictions, a local government’s authority to do so depends largely upon what authority a state has preserved for itself and what it has delegated to local governments through special legislation, home rule charters, or similar laws. Additionally, for local governments, it is important to assess whether local authority has been preempted by state law. Preemption occurs when a higher level of government (e.g., federal or state) eliminates or limits the authority of a lower level of government (e.g., state or local) to regulate a certain issue. Preemption is a frequent tobacco industry strategy. For example, the industry has pushed to include language in state youth access laws that could preempt local government authority to pass any tobacco control laws.<sup>21</sup> As noted above, the San Francisco law prohibiting stores with pharmacies from selling tobacco products was challenged as being preempted by state pharmacy regulations.<sup>22</sup> Although this argument did not win in California, preemption arguments are jurisdiction-specific so there could be different outcomes in other states.

- Existing businesses:** Regardless of the policy option chosen, part of the process should include an analysis of how the proposed restrictions would affect existing businesses whose location would be out of compliance. Drafters should fully understand the legal ramifications of placing restrictions on such businesses, and be prepared to address arguments that retailers have a vested property interest or rights in selling tobacco products at that location. Generally, a license to sell products is considered a privilege, not a right, but how courts treat licenses can vary across jurisdictions. Drafters may also wish to consider ways to implement the law that would mitigate the impact on existing businesses, such as by allowing staggered implementation dates.

### Select Legislation and Policies

A state or local government considering whether to adapt any language from the following policies should take care to ensure that the language is appropriate, practical, and legal for its jurisdiction. Please note that the Tobacco Control Legal Consortium does not endorse or recommend any of the following policies. We have included these examples simply to illustrate how various jurisdictions have regulated tobacco retailer locations.

Jurisdiction	Ordinance/Statute	Excerpts from law
West Hollywood, CA	<a href="#">West Hollywood Municipal Code, Chapter 7.32, Tobacco Sales Near Schools</a>	<p><b>7.32.010 Purpose.</b>            It is the policy of the state of California to reduce smoking by young people. . . . The sale of tobacco in close proximity to schools frustrates the successful implementation of state policy by facilitating sales to young people who regularly congregate in the vicinity of and pass by these retailers on their way to and from their schools. . . . Although it is unlawful to sell tobacco products to minors, studies show that eight and six-tenths percent of California retailers surveyed do sell to minors. . . . The purpose of the ordinance codified in this chapter is to protect the health and welfare of the community by curtailing the grave public health consequences of early addiction to nicotine.</p> <p>. . . .</p> <p><b>7.32.030 Tobacco Sales Near Schools Prohibited.</b>            It is unlawful to sell or dispense cigarettes or tobacco products within six hundred feet of any public or private school, measured from the nearest point of the property line of the school to the nearest of the property line of the tobacco retailer.</p> <p>. . . .</p>
Groton, CT	<a href="#">Groton Code of Ordinances, Chapter 8.5, Article III</a>	<p><b>Sec. 8.5-81. - Findings.</b>            The Town of Groton finds:            (1) G.S. §§ 53-344 and 53-344a make it unlawful for any person engaged in the manufacture of sale of cigarettes to sell, barter, give or deliver cigarettes to any individual under the age of 18 years; and</p>

(2) Cigarettes are the most heavily advertised consumer product in the United States and the tobacco industry spends more than \$8.24 billion on advertising and promotion of cigarettes; and

(3) Connecticut medical costs related to treating smoking related diseases exceeds \$1 billion every year; and

...

(6) In Connecticut nearly one of every three high school students and 13 percent of middle school children used tobacco within the last 30 days; and

(7) Every year, 12,000 Connecticut children become daily smokers; and

(8) The average start smoking age in Connecticut is 11 years old; and

(9) Current laws and regulations have proved ineffective and inadequate in preventing the illegal purchase of cigarettes by children under the age of 18 years, particularly from cigarette vending machines; and

(10) G.S. § 12-289a(h) authorizes a town or municipality to ban or significantly restrict the placement of vending machines for cigarettes, tobacco or smokeless tobacco products.

**Sec. 8.5-82. - Prohibited.**

No person shall dispense, or cause to be dispensed, cigarettes, tobacco or smokeless tobacco products from vending machines at any location within the town. A vending machine means a machine used for the purpose of automatically merchandising packaged cigarettes, tobacco or smokeless tobacco products after the proper amount of payment by the purchaser.

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Boston, MA	<a href="#">Boston Public Health Commission Regulation</a>	<p><b>Section I: Definitions</b></p> <p>...</p> <p><b>Health care institution:</b> An individual, partnership, association, corporation or trust or any person or group of persons that provides health care services and employs health care providers licensed, or subject to licensing, by the Massachusetts Department of Health under M.G.L. c. 112. Health care institution includes hospitals, clinics, health centers, pharmacies, drug stores and doctors' and dentists' offices.</p>
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	<p>...</p> <p><b>Educational institution:</b> any public or private college, normal school, professional school, scientific or technical institution, university or other institution furnishing a program of higher education.</p> <p><b>Retail establishment:</b> any store that sells goods or articles of personal services to the public.</p> <p><b>Tobacco products:</b> any substance containing tobacco leaf, including but not limited to cigarettes, cigars, pipe, tobacco, snuff, chewing tobacco and dipping tobacco.</p> <p><b>Section II: Prohibition Against the Sale of Tobacco Products by Health Care Institutions</b></p> <p>No health care institution located in the City of Boston shall sell or cause to be sold tobacco products. Additionally, no retail establishment that operates or has a health care institution within it, such as a pharmacy or drug store, shall sell or cause to be sold tobacco products.</p> <p><b>Section III: Prohibition Against the Sale of Tobacco Products by Educational Institutions</b></p> <p>No educational institution located in the City of Boston shall sell or cause to be sold tobacco products. This includes all educational institutions as well as any retail establishments that operate on the property of an educational institution.</p> <p>....</p>
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### Other Helpful Resources

The parent organization for the Tobacco Control Legal Consortium, the [Public Health Law Center](#), has a webpage dedicated to Consortium publications that discuss tobacco point-of-sale policy options, including resources relating to [licensing](#) and [zoning](#) laws, [retail sales restrictions](#), [marketing and distribution restrictions](#), and [preemption](#). For more information about how federal law impacts the retail environment, please see the Consortium's publication [Federal Regulation of Tobacco and Its Impact on the Retail Environment](#). In addition, the Consortium's publication, [Cause & Effect: Tobacco Marketing Increases Youth Tobacco Use](#), summarizes findings from the 2012 U.S. Surgeon General's Report on Youth and Young Adult Tobacco Use, including findings related to how tobacco retailer location and density impact public health.

## Contact Us

Please feel free to contact the Tobacco Control Legal Consortium at [publichealthlaw@wmitchell.edu](mailto:publichealthlaw@wmitchell.edu) with any questions about the information included in this guide or to discuss local concerns you may have about implementing such a policy.

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## Notes

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<sup>1</sup> The information contained in this document is not intended to constitute or replace legal advice.

<sup>2</sup> RICHARD J. BONNIE ET AL., INST. OF MED., ENDING THE TOBACCO PROBLEM: A BLUEPRINT FOR THE NATION (National Academies Press, 2007).

<sup>3</sup> U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES. PREVENTING TOBACCO USE AMONG YOUTH AND YOUNG ADULTS: A REPORT OF THE SURGEON GENERAL 545 (2012) [hereinafter 2012 U.S. SURGEON GENERAL'S REPORT].

<sup>4</sup> *Id.* at 600.

<sup>5</sup> People are most likely to start smoking when they are 15 or 16 years old, and 88% of all adult daily smokers tried their first cigarette by the age of 18 years old. *Id.* at 164, 165.

<sup>6</sup> Teenagers are an important customer segment for convenience stores, with 70% of adolescents shopping at them at least weekly. *Id.* at 543.

<sup>7</sup> E.g., Ellen C. Feighery et al., *An Examination of Trends in Amount and Type of Cigarette Advertising and Sales Promotions in California Stores, 2002–2005*, 17 TOBACCO CONTROL 93 (2008).

<sup>8</sup> 2012 U.S. SURGEON GENERAL'S REPORT, *supra* note 3, at 543. See also 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, 211-212 (2008); William J. McCarthy et al., *Density of Tobacco Retailers Near Schools: Effects on Tobacco use Among Students*, 99 AM. J. OF PUB. HEALTH 2006, 2011-2012 (2009); and Sandy J. Slater et al., *The Impact of Retail Cigarette Marketing Practices on Youth Smoking Uptake*, 161 ARCH. PEDIATR. ADOLESC. MED. 440, 440 (2007).

<sup>9</sup> Henriksen et al., *supra* note 8; 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); McCarthy et al., *supra* note 8; and Joshua H. West, et al., *Does Proximity to Retailers Influence Alcohol and Tobacco Use Among Latino Adolescents?* 12 J. IMMIGRANT & MINORITY HEALTH 626, 631 (2010).

<sup>10</sup> E.g., Andrew Hyland et al., *Tobacco Outlet Density and Demographics in Erie County NY*, 93 AM. J. OF PUB. HEALTH 1075, 1075 (2003); Michael B. Laws et al., *Tobacco Availability and Point of Sale Marketing in Demographically Contrasting Districts of Massachusetts*, 11 TOBACCO CONTROL ii71 (2002) (Massachusetts study); Scott P. Novak et al., *Retail Tobacco Outlet Density and Youth Cigarette Smoking: A Propensity-Modeling Approach*, 96 AM. J. PUB. HEALTH 670, 673-74 (2006) (Chicago study); 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) (Iowa study); and West et al., *supra* note 9, (California study).

<sup>11</sup> 2012 U.S. SURGEON GENERAL'S REPORT, *supra* note 3, at 542-43.

<sup>12</sup> Novak et al., *supra* note 10, at 674-75; and Ying-Chih Chuang et al., *Effects of Neighbourhood Socioeconomic Status and Convenience Store Concentration on Individual Level Smoking*, 59 J. EPIDEMIOLOGY & COMMUNITY HEALTH 568, 570-71 (2005).

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<sup>13</sup> See also Ian McLaughlin, *Tobacco Control Legal Consortium, License to Kill?: Tobacco Retailer Licensing as an Effective Enforcement Tool* (2010), available at <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-syn-retailer-2010.pdf>.

<sup>14</sup> Tobacco Control Legal Consortium, *Prohibiting the Sale of Tobacco Products in Pharmacies – Tips & Tools* (2014), available at [http://publichealthlawcenter.org/sites/default/files/resources/tclc-guide-prohibiting-tobacco-pharmacies-2014\\_0.pdf](http://publichealthlawcenter.org/sites/default/files/resources/tclc-guide-prohibiting-tobacco-pharmacies-2014_0.pdf).

<sup>15</sup> See Campaign for Tobacco-Free Kids, *Tobacco-Free Retailers*, for a list organized by location, available at <http://shoptobaccofree.org>.

<sup>16</sup> Boston Public Health Commission, *Regulation Restricting the Sale of Tobacco Products in the City of Boston* (Feb. 2009), available at [http://www.bphc.org/whatwedo/tobacco-free-living/Documents/TobaccoRestrictionRegulation\\_12\\_08.pdf](http://www.bphc.org/whatwedo/tobacco-free-living/Documents/TobaccoRestrictionRegulation_12_08.pdf).

<sup>17</sup> See, e.g., MINN. STAT. §340A.503, subd. 4 (prohibiting adults under 21 from entering premises of licensed alcohol retailers with limited exceptions).

<sup>18</sup> SAN FRANCISCO CITY AND COUNTY ORDINANCE NO. 194-08 (approved Aug. 7, 2008) and SAN FRANCISCO CITY AND COUNTY ORDINANCE NO. 245-10 (approved Oct. 6, 2010). The cases were: *Philip Morris USA v. City & County of San Francisco*, 2008 WL 5130460 (N.D. Cal. Dec. 5, 2008) *aff'd sub nom.* *Philip Morris USA, Inc. v. City & County of San Francisco*, 345 F. App'x 276 (9th Cir. 2009) (affirming denial of temporary injunction based on claim that law restricted tobacco company's First Amendment right to advertise its products); *Walgreen Co. v. City & County of San Francisco*, 185 Cal. App. 4th 424, 110 Cal. Rptr. 3d 498 (2010) (reversing denial of temporary injunction on grounds that law which exempted certain types of retailers with pharmacies could raise Equal Protection concerns); *Safeway Inc. v. City & County of San Francisco*, 797 F. Supp. 2d 964 (N.D. Cal. 2011) (dismissing claims that amended law violated grocery chain's substantive due process and equal protection rights, and that it was preempted by state laws regulating pharmacies).

<sup>19</sup> *Walgreen Co.*, 185 Cal. App. 4th 424, *supra* note 18.

<sup>20</sup> *Safeway Inc.*, 797 F. Supp. 2d 964, *supra* note 18.

<sup>21</sup> ROBIN HOBART, AM. MED. ASS'N, *PREEMPTION: TAKING THE LOCAL OUT OF TOBACCO CONTROL* 7 (2003), available at <http://www.rwjf.org/content/dam/supplementary-assets/2006/09/SLSPreemption2003.pdf>. (“We could never win at the local level. The reason is, all the health advocates, the ones that unfortunately I used to call ‘health Nazis,’ they’re all local activists who run the little political organizations. They may live next door to the mayor, or the city councilman, and they say ‘Who’s this big-time lobbyist coming here to tell us what to do?’...So the Tobacco Institute and tobacco companies’ first priority has always been to preempt the field, preferably to put it all on the federal level, but if they can’t do that, at least on the state level, because the health advocates can’t compete with me on a state level.” Victor Crawford, former Tobacco Institute lobbyist); At least 22 states have laws that preempt local authority over access to tobacco products, according to a 2011 study by the Centers for Disease Control and Prevention (CDC). CDC, U.S. Dep’t of Health and Human Services, *State Preemption of Local Tobacco Control Policies Restricting Smoking, Advertising, and Youth Access – United States, 2000-2010*, 60 MORBIDITY & MORTALITY WEEKLY REP. 1124 (Aug. 26, 2011), available at <http://www.cdc.gov/mmwr/pdf/wk/mm6033.pdf>.

<sup>22</sup> *Safeway Inc.*, 797 F. Supp. 2d 964, *supra* note 18.