



Tobacco Control and the Takings Clause

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.¹ For more details about these policy considerations, please contact the Consortium.

Efforts to promote tobacco control can implicate many areas of the law, including constitutional issues involving preemption, the First Amendment, the Commerce Clause, the Equal Protection Clause, and the subject of this publication – the Fifth Amendment’s Takings Clause. Understanding these constitutional issues and how they can apply to tobacco control laws can help advocates draft legislation to avoid possible legal challenges.



Takings Clause

Under the Takings Clause in the U.S. Constitution’s Fifth Amendment, the government can acquire private property for public use as long as the landowner is given just compensation.² The government’s acquisition of property is called a *taking*. Takings can be either physical takings or regulatory takings. A *physical taking* is when the government compels landowners to sell their private property for public use via eminent domain. A *regulatory taking* occurs when a government imposes laws or regulations on the use of private property that are so restrictive that they result in no economically viable use of the property. Also, under the Fourteenth Amendment,³ the Takings Clause is extended to the states, each of which has its own constitutional provisions and regulations that restrict the government’s taking of private property. Often local and state laws are even more protective of individual property rights than federal law.

Communities that are considering tobacco control options such as tobacco retailer licensing or zoning restrictions, or even smoke-free measures, should be aware that opponents may argue that there are takings issues with the proposed regulations, on the basis that the regulations affect the use of private property. This guide provides an overview of common takings challenges to tobacco control policies, explains how the

courts typically view such claims, and offers tips on how to draft policies to make them most likely to withstand such challenges.

Potential Challenges

Most takings challenges to tobacco control policies allege that the policies have (or are likely to have) a negative economic impact on a business (or property). This alleged economic harm is referred to as a *partial regulatory taking* (i.e., by causing a reduction in revenue, the regulation “takes” part of the business’s economic benefit). For example, a bar might claim that a smoke-free policy would reduce the number of customers, which would in turn reduce revenues, or a tobacco retailer might claim that a tobacco licensing or zoning regulation would place limitations on where the retailer’s business can be located, resulting in lost revenue and/or increased costs associated with moving to a permitted location.

When faced with a regulatory takings claim, the court typically looks at whether the regulation has completely eliminated a property’s value.⁴ If the regulations stop short of destroying all value, the court focuses on three factors: (1) the economic impact of the government action; (2) the degree to which the action interferes with reasonable, investment-backed expectations; and (3) the character of the government action.⁵ In other words, the court will weigh the economic interests of the business against the law’s goals and purpose. For example, in the smoke-free context a judge would balance the likelihood and amount of lost revenue for bars that might be caused by adoption of the smoke-free law with the damage to the public health if bars allowed smoking.

Policy Considerations

Tobacco control policies are often challenged on takings grounds because a private business owner (often a bar, restaurant, tobacco retailer, or similar establishment) anticipates that the policy will cause the business economic harm. Although takings challenges to tobacco control policies are rarely successful, communities should be aware of economic arguments, such as the following.

- *“Economic Harm” Claims and Smoke-free Regulations.* Over the last fifteen years, many [peer-reviewed economic studies](#) have demonstrated that smoke-free policies do not result in decreased revenues for bars, restaurants and other hospitality businesses.⁶ Indeed, some studies have shown that when businesses enact smoke-free policies, revenues often rise as a result of increased patronage.⁷ In addition, because smoke-free environments lower maintenance and cleaning costs, costs attributed to property damage (cigarette burns and ashes), and labor costs (decreased health care costs, reduced sick days and fewer workers compensation claims), businesses with smoke-free policies often experience [lower operating expenses](#).⁸ Thus, not only do smoke-free initiatives protect the health and lives of customers and employees, but they also have been shown to be good for business.⁹ Finally, even if an establishment does experience an economic loss that can be shown to be related to a smoke-free policy, courts have

consistently held that business losses alone are not sufficient to constitute a regulatory taking.¹⁰ Moreover, most courts that have been asked to rule on takings arguments and smoke-free laws have rejected the idea that the right to allow smoking is a “property right” that outweighs the public health risk associated with failing to enact the smoke-free restrictions.¹¹ (See the table below for several examples of related rulings.)

- *“Economic Harm” Claims and Tobacco Retailer Regulations.* Land use regulations that restrict the location, number or operation of tobacco retailers may also be subject to takings claims if implementation is not carefully planned.¹² For example, a policy prohibiting tobacco sales from occurring within 1,000 feet from youth-oriented facilities might face legal challenges from gas stations, convenience stores and other retailers arguing that the law causes economic harm. Because of this, communities considering such tobacco control policies will want to be familiar with state and local laws, how similar laws (both for tobacco and other products) have been enforced in their communities, and how legal or policy issues or challenges have been addressed.¹³ They might also want to think about how a licensing or zoning strategy will affect existing businesses as opposed to new businesses.

Policy Elements

As with all tobacco control policies, measures that restrict the use or location of private property need to be carefully drafted. The policy goal and rationale should be evidence-based and the language, including all definitions, should be clear and concise. For policies that would potentially remove a business from its existing location (such as a law preventing tobacco sales from occurring within a certain distance from schools), drafters may want to consider whether to apply the restriction in a way that prevents new retailers from starting to sell tobacco within that range, while grandfathering in existing tobacco retailer sales. If this is done, the community may want to look at other ways to limit the proliferation or expansion of tobacco sales at those grandfathered locations, such as limiting their ability to transfer the tobacco retailer license to a new business owner or expand their property.¹⁴ Drafters of zoning regulations might also want to consider whether to grant businesses *conditional use (or special use) permits*, which allow certain businesses to operate in areas where they would otherwise not be allowed to operate, as long as they follow established conditions designed to limit the public health risks associated with their non-conforming use. Conditional use permits can be suspended or revoked if the business violates the conditions.¹⁵ Although none of these options will guarantee immunity from takings claims, they may help minimize the likelihood or success of such challenges.

Select Takings Challenges to Tobacco Control Laws

Below are a few examples of legal challenges to smoke-free laws based on claims that the laws violated constitutional protections guaranteed under the Takings Clause. We

have included these examples to illustrate various ways in which the courts have addressed takings challenges to tobacco control legislation.

State	Case	Overview & Ruling
Arizona	<i>City of Tucson v. Grezaffi</i> , 23 P.3d 675 (Ariz. Ct. App. 2001)	A restaurant cited for violating Tucson’s smoke-free ordinance challenged its constitutionality on several grounds, including takings. The Arizona Court of Appeals rejected the takings challenge, holding that the plaintiff had failed to show that the ordinance caused any loss in business revenue. Even if such a showing had been made, that would not have been sufficient. As the court explained, “Legislation designed to promote the public welfare . . . often places burdens on some persons more than others.” But “the deprivation of the most beneficial use of property and diminution in value are not sufficient in and of themselves to constitute a taking.”
Kentucky	<i>Lexington Fayette County Food and Beverage Ass’n. v. Lexington-Fayette Urban Cnty. Gov’t</i> , 131 S.W. 3d 745 (2004)	The Kentucky Supreme Court upheld a smoke-free law in restaurants and bars in Lexington against a takings clause/interference with property rights challenge. The court stated that the power to protect public health ranks at the top of the government’s public powers, and where individual property rights run afoul of the reasonable exercise of this power, the right of the individual must yield. ¹⁶ The court also noted that during lengthy public hearings on the ordinance, evidence was presented, based on objective sales data, showing “no adverse economic effect” or “improved business” as a result of smoke-free laws. ¹⁷ (A lone dissenting opinion argued that the health ordinance was “oppressive because it operates as a regulatory partial taking of private property without just compensation.”) ¹⁸
Mississippi	<i>Knight v. City of Tupelo</i> , 2006 WL 3741879 (N.D. Miss. 2006)	A group of restaurants and other businesses alleged that the City of Tupelo’s smoke-free ordinance violated the state and federal constitutions because it created a regulatory taking. The plaintiffs presented testimony that the ordinance had economically impacted their businesses by causing a decrease in profits. The court rejected the takings claim, concluding that “a decrease in business profits

alone is not conclusive of a taking.” The court also analyzed the extent to which the ordinance had interfered with the plaintiff’s “distinct investment backed expectations.” The court found that analysis of this factor weighed against finding that a regulatory taking had occurred, stating: “With an ever increasing number of cities and state around the country banning smoking in public places, it is unreasonable for business owners not to recognize the possibility that their businesses could be subjected to the same sort of regulation.”

Nevada *Fame Operating Co. v. Chanos*,
217 P.3d 546 (Nev. 2009)

Various businesses challenged Nevada’s Clean Indoor Air Act on regulatory and physical takings grounds claiming that (1) prohibiting smoking is a per se regulatory taking of property owners’ airspace because it constitutes government occupation of the air; and (2) the requirement to post no-smoking signs represents the government’s permanent physical invasion of property, requiring just compensation. The Nevada Supreme Court rejected these arguments, stating that “Business owners still maintain possession and control over their property. The fact that [Plaintiffs] are subject to certain regulations does not result in the government taking complete control over their airspace or building property. Thus, [their] takings argument is without merit and cannot serve as a basis for invalidating the NCIAA.”

Ohio *D.A.B.E., Inc. v. City of Toledo*,
292 F. Supp.2d 968 (N.D. Ohio
2003), *aff’d* 393 F.3d 692 (6th
Cir. 2005)

A group of bar, restaurant and bowling alley proprietors appealed the district court’s dismissal of their complaint alleging that Toledo’s smoke-free ordinance was a regulatory taking of their property in violation of the Fifth and Fourteenth Amendments. The ordinance generally prohibited smoking in enclosed public places, except in separate smoking lounges. The Sixth Circuit held that the plaintiffs/appellants had failed to establish that the ordinance denied them an economically viable use of their properties. The proprietors had asserted that they would lose customers as a result of the ordinance. The court held that this speculative claim, even if true, would not constitute a taking. The ordinance merely regulated the conditions

under which smoking was permitted; it did not otherwise interfere with the plaintiffs' ability to operate their businesses.¹⁹ The court recognized that the construction of smoking lounges would require a financial investment, but stated that "an ordinance does not affect a taking merely because compliance with it 'requires the expenditure of money.'"²⁰

Ohio *Buckeye Liquor Permit Holders Ass. v. Ohio Dept of Health, Case No. A0610614 (Common Pleas Ct., Hamilton, Ohio May 2, 2007)*

The plaintiffs alleged that Ohio's statewide smoke-free law interfered with their property rights and operated as an unconstitutional taking. Plaintiffs argued that the right to control and use property is a fundamental right and thus the court should apply strict scrutiny rather than rational basis analysis. The trial court rejected the plaintiffs' takings claim, noting: "Precedent from other jurisdictions has explicitly rejected the concept that smoking bans constitute a taking of property implicating 'strict scrutiny' or compensation analysis under the approach applicable to non-total regulatory takings."²¹

Other Helpful Resources

The Tobacco Control Legal Consortium's parent organization, the [Public Health Law Center](#), features on its website Consortium publications and resources that address takings and tobacco control issues, including [Legal Authority to Regulate Smoking and Common Threats and Challenges](#), [Regulating Tobacco Retailers: Options for State and Local Governments – Tips and Tools](#), and [Local Land Use Regulation for the Location and Operation of Tobacco Retailers](#). Other useful background resources on takings law and public health policies include a [series of materials](#) by Public Health Law & Policy, including [Takings Law: A Primer for Public Health Advocates](#).

Contact Us

Please feel free to contact the [Tobacco Control Legal Consortium](#) with any questions about the information included in this Guide or to discuss local concerns you may have about threats or challenges to tobacco control policies based on takings claims.

Updated: September 2011

Notes

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

² U.S. CONST. ART. V. Determining what compensation is “just” or appropriate is often a subject of litigation. For a brief overview of the power of eminent domain and regulatory takings, see Legal Information Institute, CRS Annotated Constitution, *available at* http://www.law.cornell.edu/anncon/html/amdt5toc_user.html. The idea behind the Takings Clause is to “bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

³ U.S. CONST. ART. XIV. For a brief overview of the state’s obligation to use due process when exercising its police power to take private property for public use, see Legal Information Institute, CRS Annotated Constitution, *available at* http://www.law.cornell.edu/anncon/html/amdt14toc_user.html.

⁴ *Lingle v. Chevron U.S. A. Inc.*, 544 U.S. 528, 539 (2005); *see also* *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 (1992). The Court has emphasized that the Lucas rule only applies to regulations that effect “the complete elimination of a property’s value.” *Lingle*, 544 U.S. at 539.

⁵ *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

⁶ For a compilation of key economic studies, state and local data, scientific research, and other resources related to smoke-free businesses, see the Americans for Nonsmokers’ Rights website, Economic Impact, <http://www.no-smoke.org/getthefacts.php?id=14>.

⁷ Michael Ericksen & Frank Chaloupka, *The Economic Impact of Clean Indoor Air Laws*, 57 *CA: A CANCER JOURNAL FOR CLINICIANS* 6, 367 (2007), *available at* <http://www.rwjf.org/pr/product.jsp?id=26853>.

⁸ Am. Cancer Society Cancer Action Network, *Smoke-free Policies: Good for Business* (2010), *available at* <http://www.acscan.org/content/wp-content/uploads/2010/09/smokefree-business.pdf>.

⁹ *See id.* Some research has even shown that smoke-free restaurants and bars sell for a higher price than comparable businesses that permit smoking. Benjamin C. Alamar & Stanton A. Glantz, *Smoke-free Ordinances Increase Profit and Value*, 22 *CONT. ECON, POL’Y*, 4, 520 (2004), *available at* <http://www.tobaccoscam.ucsf.edu/pdf/SmokefreePremiumFinal.pdf>.

¹⁰ *See, e.g., City of Tucson v. Grezaffi*, 23 P.3d 675, 684 (Ariz. Ct. App. 2001).

¹¹ *See, e.g., Buckeye Liquor Permit Holders Ass’n, Inc. et al. v. Ohio Dep’t of Health*, Case No. A0610614, *12 (Common Pleas Ct. Hamilton, Ohio May 2, 2007).

¹² Licensing strategies may also be subject to taking claims, even though such claims will not necessarily be successful.

¹³ See Tobacco Control Legal Consortium, *Regulating Tobacco Retailers: Options for State and Local Governments* (2010), available at http://publichealthlawcenter.org/sites/default/files/resources/tclc-fs-retailers-2010_0.pdf and Tobacco Control Legal Consortium, *Using Licensing and Zoning to Regulate Retailers – Tips & Tools* (2011), available at <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-guide-licensingandzoning-2011.pdf>.

¹⁴ Grandfathering is also known as “legal nonconforming use,” and allows businesses to continue to operate as they had prior to the new land use regulation, but typically restricts them from expanding, changing or changing ownership unless they obtain a conditional use permit. Through attrition, these retailers are eventually eliminated.

¹⁵ Another option might be to grant existing businesses “deemed approved status,” which means that a business in an otherwise unlawful location is “deemed approved” if the business complies with the new regulatory standards. Public Health Law & Policy, *Land Use for Tobacco Retailers* (2007), available at http://www.phpnet.org/sites/phpnet.org/files/Land%20Use%20Ordinance-%20CHECKLIST_12_07.pdf.

¹⁶ Lexington Fayette Cty. Food & Beverage Ass’n v. Lexington-Fayette Urban Cty. Gov’t, 131 S.W.3d 745, 752 (2004).

¹⁷ *Id.*

¹⁸ *Id.* at 757.

¹⁹ D.A.B.E., Inc. v. City of Toledo, 393 F.3d (N.D. Ohio 2003), *aff’d* 393 F.3d 692 (6th Cir. 2005).

²⁰ *Id.* (citation omitted).

²¹ See Buckeye Liquor Permit Holders, Case No. A0610614 at 12.