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Local Land Use Regulation for the Location and Operation of Tobacco Retailers

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Local Land Use Regulation for the Location and Operation of Tobacco Retailers

Randolph Kline

The best predictor of adolescent experimentation with cigarettes is the perception by youth that cigarettes are easily available.¹ Not only does youth smoking have life-long and life-ending health implications, but it is also a leading indicator of other high-risk behaviors among youth.² As a result, local communities have a vested interest in the availability and placement of tobacco products, particularly with respect to youth access and exposure to these products. One option to reduce youth access to tobacco may be to use local land use regulations, such as zoning laws, to control the location and operation of tobacco retailers.

Section I of this law synopsis describes local authority for land use regulation and lists a few types of local land use regulation. Section II presents examples in which California communities have employed land use regulation to control the placement of tobacco-only stores. Section III briefly reviews two important issues local governments should consider in this area of the law. For example, land use regulation is a tool that traditionally affects only future uses of land and rarely is used to eliminate existing uses. Finally, section IV highlights the manner in which land use regulation has been successfully applied to other areas of public health—alcohol and firearms.

Section I — Local Land Use Regulation and Authority

Local Land Use Authority

The constitutional “police power” is the inherent authority of the state (and, through delegation, local governments) to enact law and promulgate regulation to protect the health, safety, morals and general welfare of the people. To this end, the state retains the power to restrict private interests, such as personal interests in association and liberty, as well as economic interests in freedom to contract and use property, so long as the restrictions comply with federal and state constitutional limitations.

Courts have upheld the delegation of these broad powers to state and local governments based first on the Tenth Amendment to the U.S. Constitution, which reserves police power to the states, and second on state constitutions, which often delegate police powers to local governments.³ Local laws based upon this delegation are legitimate so long as they “rationally relate” to a legitimate state purpose, such as protecting the public’s health, morals, safety and general welfare.⁴ Local governments have broad discretion in choosing exactly how to protect the health, safety, welfare and morals of their community. Courts rarely find local governments abuse such discretion. Indeed, assuming

a local law does not offend any specific constitutional provision, courts will conclude a local government has abused this discretion only if the law is arbitrary, capricious or entirely lacking in evidentiary support.⁵

In *Euclid v. Ambler Realty*, the United States Supreme Court affirmed that municipalities possessed the necessary state police powers to regulate public and private land use for the “health, safety, welfare, and morals” of the people.⁶ The Court stated the need for zoning regulations “is so apparent that they are now uniformly sustained” and the “scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation.”

Key Points

- Youth access to tobacco products commonly leads to addiction and is associated with other risk behaviors.
- Land use regulation authority can allow municipal control over the location, density, and type of future tobacco retail outlets.
- Municipalities may designate existing tobacco retail outlets as “nonconforming” or take other steps to eventually eliminate them.

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Traditional Zoning Ordinances

The traditional tool employed by local communities to control the use of land is the zoning ordinance, which is enacted to ensure a proposed use is compatible with the surrounding community. Zoning ordinances establish a range of property uses in different areas or zones. For example, residential, commercial, industrial or agricultural zones determine where housing, shopping, manufacturing and farming may or may not occur within the community. Mixed-use zones allow a variety of overlapping activities to occur in the same area. Ideally, zoning ensures that activities that should be near each other, such as housing and grocery stores, can be near each other, and that those activities that should be separated, such as housing and heavy industry, are indeed separate.

Land use regulation is first and foremost a matter of local concern because local governments are, quite literally, in the best position to understand the lay of the land. Local governments have wide discretion in determining which property uses are compatible with the interests of the community. For example, courts have upheld the following zoning ordinances:

- A Lafayette, California ordinance requiring firearm dealers to be located in the city's commercial, rather than residential, zones.⁷
- A Detroit, Michigan ordinance limiting the location of adult theaters to areas that are at least 500 feet away from residential zones,⁸ and a similar Oakland, California ordinance prohibiting adult entertainment businesses within 1,000 feet of residential zones.⁹
- A Jackson, Mississippi regulation restricting adult entertainment businesses to areas zoned for light industrial use in order to control "secondary effects," such as crime, deterioration of retail trade, and decreased property values,¹⁰ and a Long Beach, California ordinance, using the same secondary effects rationale, restricting adult bookstores to industrial zones.¹¹
- A Los Altos Hills, California ordinance "which eliminate[d] virtually all commercial uses of property within the city."¹²

Modern Zoning Ordinances and Conditional Use Permits

Modern land use regulation includes conditional use permits (CUP), also called supplemental use permits. With a CUP requirement, local governments can make an *individualized* determination as to the suitability of a proposed business or other use in a neighborhood.¹³ A CUP requirement also provides flexibility to determine if particularized conditions can be imposed on a proposed business to mitigate potential problems. The conditions for acquiring a CUP can be extensive, such as architectural design requirements, limits on the hours of operation of a business, and further location-related restrictions beyond mere zoning designation.

CUP requirements are often favored over traditional zoning. Traditional zoning is not adaptable to individual or unforeseen circumstances. For example, a traditional zoning ordinance may prohibit all adult entertainment businesses within 500 feet of schools, playgrounds or libraries, but this ordinance might still allow a strip club to open next to a former warehouse currently used as a local Boys and Girls Club. In contrast, if a CUP is required for adult entertainment businesses, the application to open a strip club next to a Boys and Girls Club can be denied or can be conditioned on operating only after the Boys and Girls Club moves or closes.

The following examples illustrate the different kinds of restrictions and conditions that may be imposed through CUP requirements:

- In addition to restricting the location of firearms dealers to commercial zones, the City of Lafayette, California requires gun dealers to obtain permits. Dealers are not automatically prohibited near elementary, middle and high schools, preschools, day care centers, other firearms sales businesses, liquor stores, bars, and residentially zoned areas, but the planning commission is specifically directed to consider the proximity of such uses in issuing a permit, and has the authority to reject a permit if the firearm dealer is located too closely to sensitive existing uses.¹⁴

- The City of Milpitas, California, can deny a CUP for an automobile service station in an area specifically zoned for service stations if the city determines that a sufficient number of service stations already exist in the community.¹⁵
- The City of Los Angeles, California, requires a CUP for liquor sales and requires as a condition of issuance that liquor stores conform to specific public health and safety requirements, such as limits on hours of operation, trash and graffiti removal, and adequate lighting.¹⁶
- The City of Oakland imposes similar conditions on liquor stores and declares violators to be public nuisances. The city thereby has additional authority to permanently close any liquor store that has received multiple citations for violations.¹⁷

Controlling Existing Uses of Land

New or amended land use regulations generally apply only to proposed businesses or other potential property uses. Existing property owners or occupants often have a vested right to continue a lawfully established business or other use of land.¹⁸ However, zoning requirements can sometimes be applied retroactively to existing uses of land through such concepts as *legal nonconforming uses*, *deemed approved status*, and *amortization*. These tools and concepts are explained below.

Legal Nonconforming Uses: When a municipality establishes a new zoning ordinance for a neighborhood, all existing property uses are generally allowed to continue. The property use that existed lawfully before the zoning ordinance and that no longer conforms to the new ordinance is then classified as a legal nonconforming use. For example, if a city declares that all adult entertainment businesses must be located in an industrial zone of the city, an existing adult entertainment business located in a commercial zone would become a legal nonconforming use and be permitted to continue operating. This categorization may be expressly provided for in the zoning ordinance regulating adult businesses or may

exist more generally in the law of the jurisdiction for all uses that have or may become nonconforming. Likewise, an existing property use that was allowed without a CUP when it was established is also considered a legal nonconforming use if a CUP becomes required for the use under an updated zoning ordinance.

From a business's perspective, there are many disadvantages to becoming classified as a legal nonconforming use. Generally, a legal nonconforming use is not allowed to expand or change the nature of its business operations, or to make any significant alterations to the existing building other than necessary repairs and maintenance. If a legal nonconforming use is abandoned for a period of time or is destroyed by fire or another calamity, it may be prohibited from rebuilding without a CUP. Ultimately, local governments expect to eliminate legal nonconforming uses over time through attrition via abandonment, obsolescence or destruction.

Deemed Approved Status: A relatively new strategy, and somewhat novel legal approach, is to re-categorize a legal nonconforming use as "deemed approved." Under this approach, an existing business in an otherwise unlawful location is deemed approved; that is, the business is essentially considered to have been granted a CUP under the new law, provided the business conforms to new land use regulatory standards. The new standards would also be applied to *new* businesses as conditions of their CUPs. The California cities of Los Angeles, Oakland, Vallejo and others have successfully used this approach to ensure the operating standards for existing liquor stores meet basic contemporary community health and safety requirements.¹⁹

The deemed approved status is especially powerful when coupled with a declaration that businesses failing to meet the new standards are public nuisances. (Public nuisance is a legal finding that the conduct unreasonably interferes with a right that is common to the general public.) Because local governments typically have authority to close businesses that are public nuisances, the deemed approved option affords local governments the opportunity to apply new regulatory standards on all businesses, including preexisting

businesses.

Amortization: Communities can also terminate an existing use of property immediately through the payment of cash compensation or after a period of time through “amortization.” In general, amortization is the paying down of a financial obligation over time. A government has a constitutional obligation to pay just compensation if it takes private property (or reduces the property’s value to an impermissible extent). In the context of land use, allowing the nonconforming use to continue for a set period enables the private property owner to recoup his or her investment (i.e., to satisfy his or her expectation interest) without receiving any cash payments from the government.

The amortization period or amount of compensation needed to buy out an existing business is calculated on a case-by-case basis. A property owner who files a judicial challenge to an amortization period has the burden of proving that the period is unreasonable. Note that although amortization is legal in many states, affected landowners frequently file court challenges to gain, at the least, more time to operate.²⁰

Section II — Land Use as a Tool in Tobacco Control

Although no court has yet addressed tobacco-related land use regulations, using local land use regulation to advance public health policy is likely a valid exercise of a local government’s police power. Given that tobacco products produce a significant negative impact on the health and welfare of a community and also are associated with illegal behavior, it is reasonable—and certainly should meet the very low legal bar of being “rational”—for local governments to use their land use authority to regulate the location, density, and even type of tobacco retailers. This governmental role is especially important where youth access is concerned.

Lessons learned from the successful application of land use regulation in other areas of public health suggest a variety of tobacco-related land use policies. For example, to diminish the harm caused by tobacco

in a community, local governments can use zoning and CUPs to:

- Require that tobacco retailers be located in areas distant from places frequented by children. Such a proximity restriction could include prohibitions against tobacco retailers within a certain distance of schools, playgrounds, libraries, churches, youth centers, recreational facilities, youth-focused businesses (e.g., video arcades) and residential areas.
- Restrict new tobacco retailers to areas zoned for light industrial or industrial use to control the effects of easily available tobacco, such as increased youth smoking rates. This restriction has an effect similar to the proximity restriction above in keeping tobacco retailers away from youth-oriented or residential areas.
- Limit the number of all tobacco retailers in any community. Once a city or town determines it has enough tobacco retailers, the city or town can prohibit new retailers from opening. Public health research supports limiting the number of retailers to reduce rates of tobacco use.²¹ These types of controls are analogous to the controls currently imposed by state law to regulate the density of alcohol retailers in a community.²² Such controls may be most easily enforced through a CUP or license requirement.
- Limit the proximity of tobacco retailers to each other. For example, require that tobacco retailers be located no closer than 500 feet from each other. This at least ensures that a tobacco retailer does not occupy every corner at an intersection. Again, such controls may be most easily enforced through a CUP or license requirement.

Section III — Constitutional Concerns

Government Takings

The Fifth Amendment of the U.S. Constitution states that “private property [shall not] be taken for public use, without just compensation.” Traditionally applied to the *physical* taking of property, courts have extended this constitutional protection to some *regulatory* takings. Regulatory takings can occur when a government prohibits landowners from using their properties in a certain way, and are therefore relevant to local land use regulation.²³

A government must always compensate a landowner in two circumstances: when the government physically takes an interest in property, and when a government action deprives the landowner of *all* economically viable use of the land (or business). However, when a regulation limits only *some* uses of land, courts must perform a balancing test to weigh the economic interests affected against the form and purpose of the government’s action. Because tobacco use remains a primary public health concern, and because depriving a landowner of the ability to sell tobacco is unlikely to seriously affect the overall economic value of a business, courts called upon to balance the relative interests could likely determine that the local government’s interests in regulating tobacco retail prevails.

Preemption

Federal preemption refers to the authority of Congress under the Supremacy Clause of the U.S. Constitution to enact laws that supersede state and local laws. Congress’ authority to preempt is subject to constitutional limits on the powers of the federal government. Likewise, state preemption refers to the authority of state governments to enact laws that displace local laws. State authority to preempt local laws is typically limited only by a state’s constitution and the U.S. Constitution.

No federal law directly preempts state or local controls regulating where tobacco retailers may operate, how many may operate, and which types may operate. However, local governments wishing to employ land use regulation of tobacco retailers should first examine

state law to determine if such regulation is wholly or in part preempted. For example, in Minnesota, restricting the location of new tobacco retailers is probably not preempted, while using amortization to close an existing retailer is (see below).

Examples of preemption in the context of land use include:

- An Ohio law deems a state permit sufficient for locating a major utility complex on a particular piece of land and expressly exempts the utility from local control, thus preempting local land use regulations on the utility.²⁴
- A Minnesota law preempts the ability of local governments to amortize existing uses by explicitly prohibiting amortization based on zoning laws.²⁵
- The Federal Highway Beautification Act effectively prohibits, and thereby preempts, the use of amortization of signs along nonconforming federal highways by state and local governments.²⁶

Section IV — Analogous Land Use Regulation in Other Areas of Public Health

The Analogy to Alcohol

Since the mid-1970s, public health research has validated the hypothesis that even relatively small increases in the availability of alcohol generally lead to increases in alcohol consumption, which in turn increases alcohol-related problems.²⁷ The World Health Organization has concluded that reducing the physical availability of alcohol through limitations on the number and placement of outlets will reduce alcohol-related problems.²⁸

In the 1980s, alcohol control advocates began community-based campaigns to limit the proliferation of retail alcohol outlets and to address the secondary effects of alcohol sales, such as public and domestic violence, driving while intoxicated, high-risk sexual activity and illegal drug sales. Advocates secured passage of innovative local ordinances, subjected them

to testing in the courts, and compiled substantial experience in their implementation.

Early in the campaign, California communities took the lead in passing zoning and CUP regulations affecting the location and operations of alcohol outlets.²⁹ By 1993, approximately half of the state's 475 cities had CUP requirements for on- and off-sale alcohol outlets.³⁰ Such ordinances place restrictions on new alcohol outlets, including, for example, limits on the number and concentration of outlets in a neighborhood, limits on outlet placement in proximity to each other or to schools or playgrounds and restrictions on hours of service and the amount and nature of signage visible from the street.

Courts have confirmed that local governments may impose alcohol-related land use restrictions, even in jurisdictions where states have preempted local control over the related issue of the sale of alcohol.³¹ A rational relationship exists between alcohol availability and its secondary effects on public health, safety and welfare. Accordingly, local officials have a legitimate governmental interest in controlling alcohol sales.

For example, in the aftermath of the 1992 Los Angeles riots, liquor store owners in the city's heavily damaged South Central neighborhood sought to rebuild. However, in years prior to the riots, the City of Los Angeles, like many other California communities, began requiring CUPs for all new alcohol outlets. The CUP requirement essentially blocked many previously grandfathered stores from reopening because, having been closed for a certain period of time, the law considered them new stores. Affected owners challenged the CUP ordinance as being both preempted by state law and unconstitutional.³² The California Court of Appeal upheld the city's ordinance, confirming the "local regulation is a valid exercise of the City's authority to enact zoning and land-use regulations."

A similar challenge followed the enactment of the City of Oakland's CUP ordinance.³³ Existing alcohol outlets claimed the imposition of performance standards for the operation of *existing* liquor stores was preempted by state law and unconstitutional. The California Court of Appeal again validated the local government's authority to regulate land use, holding that "a city may properly enact a local ordinance to

control and abate nuisance activities, despite the fact that the business that would be regulated by the ordinance possessed grandfather rights that might ordinarily render it immune from compliance with local ordinances." Illustrating the importance of being able to declare a non-complying business a public nuisance, the court went on to say "no business—not even an alcoholic beverage sales establishment regulated by state law—has a vested right to conduct its business in a manner that attracts public nuisances and encourages criminal activities near its premises."

The Analogy to Firearms

Several California communities have used their land use authority to limit the location of firearms dealers to commercially zoned areas. The City of Lafayette enacted an ordinance that not only limited firearm dealers to commercial zones, but also prohibited dealers from locating near elementary, middle and high schools; preschools; day care centers; other firearms dealers; liquor stores and bars and residentially zoned areas.³⁴

In upholding the city's ordinance, the California Court of Appeal confirmed that local governments may not only confine commercial activities to certain districts, but that they may further limit activities within those districts by requiring CUPs.³⁵ "It is well settled that a municipality may divide land into districts and prescribe regulations governing the uses permitted therein, and that zoning ordinances, when reasonable in object and not arbitrary in operation, constitute a justifiable exercise of police power. . . ." The legal issue, once again, is whether a rational basis exists for the zoning decision.

Conclusion

While land use regulation is a relatively uncharted area of tobacco control law, it may offer communities another way to control the location and operation of tobacco retailers. Local governments might use their land use authority, for example, to prevent tobacco retailers from locating across the street from schools or playgrounds. Optimally, communities should adopt land use controls *before* a tobacco retailer seeks to locate within a local government's geographic jurisdiction.

About the Author

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Endnotes

- ¹ Leslie A. Robinson et al., *Predictors of Risk for Different States of Adolescent Smoking in a Biracial Sample*. 65 J. CONSULTING CLINICAL PSYCH. 653, 657 (1997).
- ² CDC, *Youth Surveillance Summaries*, 51 (No. SS-4) MMWR 1 (June 28, 2002), available at <http://www.cdc.gov/mmwr/pdf/ss/ss5104.pdf>.
- ³ LAW IN PUBLIC HEALTH PRACTICE chap. 9 (Richard Goodman et al. eds., 2003).
- ⁴ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).
- ⁵ *Strumsky v. San Diego County Employees Retirement Ass'n*, 11 Cal.3d 28, 34-35 (1974) (judicial review of quasi-legislative acts is limited to whether the action taken was arbitrary, capricious, or entirely lacking in evidentiary support, or contrary to required legal procedures); see also *Arnel Development Co. v. City of Costa Mesa*, 28 Cal.3d 511, 514, 521-24 (1980) (holding that zoning is a legislative act reviewable only under traditional mandate principles, that is, for arbitrary and capricious action); *Lockard v. City of Los Angeles*, 33 Cal.2d 453, 460 (1949) (zoning legislation is presumed to be constitutional and this presumption can only be overcome by a clear showing of arbitrariness and irrationality).
- ⁶ *Village of Euclid*, 272 U.S. at 387.
- ⁷ *Suter v. City of Lafayette*, 57 Cal. App. 4th 1109 (1997). The reason for the city's regulation was to prohibit access by minors to firearm dealerships in areas where minors would congregate or likely be attracted. In a legal challenge to the ordinance, the court determined that the regulation was appropriate because firearm dealerships "can be the targets of persons who are or should be excluded from possessing weapons."
- ⁸ *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976).
- ⁹ *Castner v. City of Oakland*, 129 Cal. App. 3d 94, 97-98 (1982).
- ¹⁰ *Lakeland Lounge of Jackson, Inc. v. City of Jackson, Miss.*, 973 F.2d 1255, 1258-59 (5th Cir. 1992).
- ¹¹ *Lim v. City of Long Beach*, 12 F. Supp. 2d 1050, 67 (C.D. Cal., 1998). But see *Levi v. City of Ontario*, 44 F. Supp. 2d 1042 (C.D. Cal., 1999) (holding that alternative business sites must be available to adult bookstore owner and city carries burden of proving site existence and suitability).
- ¹² *Town of Los Altos Hills v. Adobe Creek Props., Inc.*, 32 Cal. App. 3d 488, 491 (1973).
- ¹³ *Saad v. City of Berkeley*, 24 Cal. App. 4th 1206 (1994).
- ¹⁴ *Suter*, 57 Cal. App. 4th at 1122-26, 1131-32.
- ¹⁵ *Van Sicklen v. Browne*, 15 Cal. App. 3d 122, 123-26 (1971).
- ¹⁶ *Korean American Legal Advocacy Found. v. City of Los Angeles*, 23 Cal. App. 4th 376, 382-83, 390 (1994).
- ¹⁷ *City of Oakland v. Superior Court*, 45 Cal. App. 4th 740, 747-49, 756 (1996).
- ¹⁸ This right resides primarily in the Takings Clause of the Fifth Amendment, which establishes the right of private property owners to just compensation when their property is taken for public use. "The rights of users of property as those rights existed at the time of the adoption of a zoning ordinance are well recognized and have always been protected." *Hansen Brothers Enterprises, Inc. v. Board of Supervisors*, 907 P.2d 1324 (Cal. 1996).
- ¹⁹ *City of Oakland*, 45 Cal. App. 4th at 740 (upholding use in City of Oakland).
- ²⁰ *Bohannon v. City of San Diego*, 30 Cal. App. 3d 416, 426 (1973).
- ²¹ Robinson, *supra* note 1.
- ²² See, e.g., Cal. Bus. & Prof. § 23816 (1997) (limiting alcohol sales to one on-sale alcohol outlet, i.e., a bar, per 2,000 people in California); also Mass. Gen. Laws c. 138, §17 (2001) (generally limiting Massachusetts municipalities to one license to sell liquor, beer and wine for consumption elsewhere for each increment of 5,000 residents).
- ²³ *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).
- ²⁴ OHIO REV. CODE § 4906.13.
- ²⁵ MINN. STAT. § 394.21 SUBD. 1A.
- ²⁶ 23 U.S.C. § 131 (2000).
- ²⁷ DAN BEAUCHAMP, BEYOND ALCOHOLISM: ALCOHOL AND PUBLIC HEALTH POLICY (1980); James Mosher & David Jernigan, *Making the Link: A Public Health Approach to Preventing Alcohol-Related Violence and Crime*, 6 J. SUBST. USE 273-89 (2001); Robin Room & Ingeborg Rossow, *Share of Violence Attributable to Drinking*, 6 J. SUBST. USE 218-28 (2001).
- ²⁸ ALCOHOL POLICY AND THE PUBLIC GOOD (Griffith Edwards et al. eds., 1995).

- ²⁹ Friedner Wittman & Michael Hilton, *Uses of Planning and Zoning Ordinances to Regulate Alcohol Outlets in California Cities*, CONTROL ISSUES IN ALCOHOL ABUSE PREVENTION: STRATEGIES FOR STATES AND COMMUNITIES 337-66 (Harold Holder, ed., 1987).
- ³⁰ ALCOHOL: MINIMISING THE HARM 43-71 (Martin Plant, Eric Single & Tim Stockwell eds., 1997).
- ³¹ *E.g. Korean American*, 23 Cal. App. 4th at 382-83, 390; *City of Oakland*, 45 Cal. App. 4th 740, 747-49, 756 (1996).
- ³² *Korean American*, 23 Cal. App. 4th at 383.
- ³³ *City of Oakland*, 45 Cal. App. 4th at 752, 758.
- ³⁴ *Suter*, 57 Cal. App. 4th 1109 (1997).
- ³⁵ *Id.* at 1131 (*citing Lockard*, 33 Cal.2d 453, 460 (1949)).



About the Tobacco Control Legal Consortium

The Tobacco Control Legal Consortium is a national network of legal programs supporting tobacco control policy change by giving advocates better access to legal expertise. The Consortium's coordinating office, located at William Mitchell College of Law in St. Paul, Minnesota, fields requests for legal technical assistance and coordinates the delivery of services by the collaborating legal resource centers. Legal technical assistance includes help with legislative drafting; legal research, analysis and strategy; training and presentations; preparation of friend-of-the-court legal briefs; and litigation support. Drawing on the expertise of its collaborating legal centers, the Consortium works to assist communities with urgent legal needs and to increase the legal resources available to the tobacco control movement.