

Agenda
Shady Cove Planning Commission Meeting
Thursday, February 27, 2025
6:00 PM

<https://zoom.us/j/94380749872?pwd=OjsRcOboVIVvuc3lE5TyAF2kpuv07P.1>

Meeting ID: 943 8074 9872

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I. Call to Order

A. Roll call.

B. Announcements by Presiding Officer.

1. This meeting is being digitally recorded.
2. The next regularly scheduled meeting of the Planning Commission will be held on March 13, 2025, at 6:00 PM both in Council Chambers and via Zoom.
3. The meeting date is subject to change.

II. Old Business

None

III. New Business

- A. Discussion – Zoning, Licensing, Density and Proximity of Retail Businesses near Youth-Oriented Facilities
- B. Additional City Parking

IV. Department Reports

A. Planning Technician Report

V. Public Comment

VI. Commissioner Comments

VII. Adjournment



Land Use Planning and the Control of Alcohol, Tobacco, Firearms, and Fast Food Restaurants

Marice Ashe, JD, MPH, David Jernigan, PhD, Randolph Kline, JD, and Rhonda Galaz, JD

We desired to understand how legal tools protect public health by regulating the location and density of alcohol, tobacco, firearms, and fast food retail outlets. We reviewed the literature to determine how land use regulations can function as control tools for public health advocates.

We found that land use regulations are a public health advocacy tool that has been successfully used to lessen the negative effects of alcohol retail outlets in neighborhoods. More research is needed to determine whether such regulations are successful in reducing the negative effects of other retail outlets on community health. (*Am J Public Health*. 2003; 93:1404–1408)

SINCE THE FIELD OF LAND USE

planning and zoning originally developed in response to public health needs, there is a close intellectual and practical fit between land use goals and sound public health practice.¹ There is both substantial public health experience in and a strong legal basis for using local zoning and land use powers to achieve the public health goal of limiting the availability of consumer products proven to be harmful to health. In this article, we review the history and importance of local government use of its police power to protect public health, describe more recent invocations of police

power to limit the availability of alcoholic beverages, and discuss the prospects for using these policy tools to improve public health by limiting the availability of tobacco, firearms, and nutritionally deficient foods.

POLICE POWERS

“Police power” is the inherent authority of the state (and, through delegation, local governments) to enact laws and promulgate regulations to protect, preserve, and promote the health, safety, morals, and general welfare of the people.² To achieve these communal benefits, the state retains the power to restrict, within federal and state constitutional limits, private interests: personal interests in autonomy, privacy, association, and liberty as well as economic interests in freedom to contract and uses of property.^{2,3}

For more than a century, a government’s police power has been used to justify regulating the use of land.⁴ Courts have upheld the delegation of these broad powers to state and local governments on the basis of, first, the Tenth Amendment to the US Constitution, which delegates police power to the states, and, second, state constitutions, which typically delegate police powers to local governments (see, for example, Article 11 of the Califor-

nia Constitution).⁵ Police power is broad in scope and elastic in nature, expanding to meet the changing needs of modern life.^{6–8}

Subject to federal and state constitutional limits, an ordinance promulgated by a state or local government is legitimate so long as the use of police power has a rational relationship to a legitimate state purpose such as protection of the public’s health, morals, safety, or general welfare.⁸ Governments may find the rational basis for their ordinances in scientific studies or other types of less rigorous data or information that arguably support a legislative body’s conclusion that a regulation is justified. Epidemiological reports and public health data are strong grounds upon which to base government policies or local ordinances. Because government agencies are provided broad discretion in determining which policies or ordinances are needed to protect the health, safety, welfare, and morals of their community, the ordinances will be upheld in court unless they are arbitrary, capricious, or entirely lacking in evidentiary support.^{9–11}

LAND USE CONTROLS

Local governments use police powers to restrict a private property right so as to avoid harm to the public.¹² A primary way that

police powers are expressed is through city planning and public health departments using their respective powers to further the public good. In fact, the modern disciplines of public health and city planning developed from common roots with similar objectives, strategies, and standards.¹

During the 19th century, land use planning emerged as a mechanism designed to address 2 endemic public health problems: tuberculosis and cholera. The spread of disease was associated with pervasive overcrowding, a lack of sanitation, poor hygiene, insufficient water supply, insufficient fresh air, limited opportunity for outdoor recreation, and long working hours in the factories and mills.¹³ Reformers, most notably Edwin Chadwick, were the driving force behind the sanitary laws that formed the basis of both city planning and public health practice. In 1843 in England, these innovative laws culminated in the first comprehensive public health act.¹³ While this act did not include zoning as a specific regulatory function of government, it did call for the mapping of sewage facilities to ensure that new dwellings were equipped with drains and lavatories.¹³

New York City was the forerunner of modern zoning; in the 1890s, it established design standards to ensure that light, air,



water, and sewage were available to residents of tenement houses.¹⁴ Zoning ordinances apply both general and location-specific restrictions on certain uses of property. They establish the uses of property in different areas or “zones” within a government’s geographic boundaries. For example, residential, commercial, industrial, or agricultural zones determine where housing, shopping, manufacturing, and animal husbandry may or may not occur within the jurisdiction. Mixed-use zones allow a variety of 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.

The Standard State Zoning Enabling Act, ultimately enacted in nearly every municipality in the nation (except Houston, Tex),¹³ was developed by the US Department of Commerce in the 1920s to assist in the delegation and spreading of zoning powers from state to local governments, and it included promotion of “health and general welfare” as one goal of zoning.¹⁵ In 1926, the US Supreme Court confirmed that cities and counties possessed the necessary police powers of the state to regulate public and private land uses for the “health, safety, welfare, and morals” of the people of those jurisdictions.¹⁶ The court stated that the need for zoning regulations “is so apparent that they are now uniformly sustained” and that 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.”¹⁶

Conditional use permits (CUPs), sometimes called “special use permits” or “special exceptions,” are a refinement of zoning powers whereby the government makes exceptions for specific uses of land otherwise prohibited by general zoning controls as long as the property owner meets certain conditions.⁴ With a CUP requirement, a local government can make an *individualized* determination as to suitability of a proposed use in a particular location.¹⁷ CUPs give governments additional flexibility to determine whether a particular proposed use is compatible with existing, neighboring uses of property and afford an opportunity to impose particularized conditions to mitigate potential problems posed by the use. They also give governments the ability to deny a zoning request if the applicant cannot show a community “need” for the proposed use.^{18,19}

Public health advocates have reconnected with the historic roots of zoning controls as a mechanism for promoting public health and welfare and have applied the traditional city planning tools of zoning and CUPs to modern issues of public health protection. In addition to a familiar focus on vector control and building codes—which are still pressing public health concerns in communities plagued by antiquated or inadequate public infrastructures or dilapidated housing—public health advocates are using zoning and other land use tools to control the proliferation and negative public health ef-

fects of alcohol, tobacco, and gun sales in urban environments. While there is significant variation among states regarding local authority to control these types of outlets,^{20,21} zoning tools nonetheless offer creative new opportunities for communities to exert control over public health, safety, and welfare as deemed necessary at the local level.

Alcohol Control and Land Use

Since the mid-1970s, a growing international body of 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 produce an increase in alcohol-related problems.^{22–27} While this general link will vary on the basis of changes in the physical, economic, and social availability of alcohol, as well as the social, cultural, and economic contexts in which availability occurs, the public health literature describes a positive association between physical availability of alcohol and increased sales, independent of prices.²⁸ This association has led the World Health Organization to conclude that reducing the physical availability of alcohol through limitations on the number and placement of outlets will result in reductions in alcohol-related problems.²⁹

Following on the promise of early research showing links between alcohol availability limits and rates of liver cirrhosis^{30,31} and drunk driving,³² researchers in the 1990s used increasingly sophisticated methodologies to establish relationships between

alcohol availability and alcohol-related problems. Using 1990 data from 72 cities in Los Angeles County, Scribner et al. found densities of restaurants, liquor stores, and mini-markets (but not bars) to be strongly correlated with motor vehicle crashes causing personal injury.³³

Subsequent studies have also revealed strong links between violence and alcohol availability. Such links are complex, and they are part of the multicausal relationship between alcohol and violence. The increased consumption arising from greater alcohol availability may lead to more frequent incidents of intoxication, in which personal expectations about alcohol’s supportive role in violence or alcohol’s pharmacological effects as a disinhibitor of aggressive impulses may come into play.³⁴ Increased numbers of drinking places may provide situationally appropriate settings for violence³⁵ or for group intoxication, which may increase the possibility of violence occurring.³⁴

Research support for the link between alcohol and violence comes from subsequent work by Scribner et al., who found that, independent of measured confounders such as unemployment, racial/ethnic makeup, income, and age, alcohol outlet density was correlated with violent assault to the extent that one outlet was associated with 3.4 additional offenses in 1990.³⁶ Similarly, Speer et al. found, in analyzing various census tracts in Newark, NJ, that alcohol outlet density was a significant predictor of rates of violent crime.³⁷ Alaniz et al., looking at violence among young people in 3



cities, again found a statistically significant relationship with outlet density.³⁸

Recent studies have refined our understanding of the connection between physical availability by showing a significant relationship between alcohol problems and alcohol availability in census tracts and the even smaller unit of census blocks.³⁹ This new work offers 2 important lessons. For researchers, it suggests the importance of examining alcohol availability in the smallest units possible; aggregating data in large geographic units may mask the connection between availability and associated problems. For practitioners, the research suggests the importance of zoning decisions regarding individual outlets within a particular neighborhood setting.

In the 1980s, alcohol control advocates began community-based campaigns designed to limit the proliferation of retail alcohol outlets and to address the secondary effects of alcohol sales, such as public and domestic violence, drunk driving, loitering, prostitution, illegal drug sales, and the like, based on the public health research just described. Over the past 2 decades, alcohol control advocates have secured passage of innovative local ordinances, subjected them to testing in the courts, and compiled substantial experience in their implementation.

Innovative local ordinances. In the mid-1980s, California communities took the lead in a trend toward passing zoning and CUP regulations affecting the location and operation of alcohol outlets.⁴⁰ By 1993, approximately half of the

state's 475 cities had CUP requirements for on-sale and off-sale alcohol outlets.⁴¹ Such ordinances placed restrictions on new alcohol outlets, including, for example, limits on the number and concentration of outlets in a neighborhood, limits on placement of outlets in proximity to each other and to schools or playgrounds, and restrictions on hours of service and the amount and nature of signage visible from the street.

Testing in the courts. Courts have confirmed that local governments may impose alcohol-related land use restrictions even in localities where the state has preempted local control over the sale of alcohol products. The courts base this determination on the rational relationship between alcohol availability and its secondary effects on public health, safety, and welfare.^{42,43} Courts have found that local power over land use is so strong that it can be used to regulate the operation of alcohol outlets despite the state's exclusive authority over 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 the years before the riots, Los Angeles, like many other California communities, had begun requiring CUPs for all new alcohol outlets in the city.⁴² (Typical prerequisites to rebuilding required an owner "to agree to remove graffiti promptly, provide adequate lighting, remove trash, provide a security guard and, in some instances, limit hours of operation."⁴²) The CUP requirement essentially blocked many stores

from reopening because, having been closed for a certain period of time, they were considered "new" stores under the law and therefore required CUPs.⁴² Affected owners challenged the CUP ordinance as being both preempted by state law and unconstitutional.⁴² The Court of Appeals upheld the city's ordinance, confirming that "the local regulation is a valid exercise of the City's authority to enact zoning and land-use regulations."⁴²

A similar challenge followed the enactment of the city of Oakland's CUP ordinance.⁴³ Existing alcohol outlets claimed that the imposition of performance standards for the operation of existing liquor stores was preempted by state law and unconstitutional.⁴³ The Court of Appeals again confirmed a local government's power in using land use ordinances to protect public health, 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."⁴³ "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."⁴³

In summary, a robust set of research studies demonstrate the link between alcohol availability and alcohol-related problems. Furthermore, court decisions affirm that a local government, in pursuit

of public health goals, may employ land use law to influence alcohol availability. The research findings provide a basis for hypothesizing a similar effect for tobacco availability.

Tobacco Control and Land Use

Many state and local governments have passed measures regulating retail sales practices of tobacco outlets (e.g., laws prohibiting sales to minors, laws banning self-service displays of tobacco products, laws requiring retail clerks to be of legal age to buy tobacco in order to sell tobacco, and even laws regulating the minimum price of tobacco). However, largely unexplored by tobacco control advocates are the zoning tools used in alcohol control that could limit the location and number of tobacco retail outlets.

Although no court has yet issued an opinion directly addressing tobacco-related land use controls, it is likely that regulating land use to further tobacco control policy is on an even stronger legal footing than it is in the case of alcohol control. California and many other states have preemptive state laws governing alcohol sales. As a result, local communities must rely on the secondary effects of alcohol consumption to justify land use restrictions to overcome the legal challenge that state law preempts any local regulation of alcohol sales. Because most states do not have laws that preempt local regulation of tobacco sales,²⁰ communities can impose land use restrictions expressly regulating tobacco sales themselves in addition to regulating the secondary effects of to-



bacco use (such as premature death and disability and the illegal sale of tobacco products to minors).

Given that tobacco products produce a significant negative impact on the health and welfare of a community and are also 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 zoning powers to regulate the location of tobacco retailers. This government role is especially important in instances in which youth access is concerned. One study showed that 57% of 10th graders and 38% of 8th graders perceive that it would be easy for them to obtain cigarettes from a retail source,⁴⁴ and the best predictor of adolescent experimentation with cigarettes is the perception that they are easily available.⁴⁵

The questioning of whether youth access laws control the availability of tobacco to youths⁴⁶ and the near inability of local governments to control tobacco advertising after the US Supreme Court’s decision in *Lorillard v Reilly*⁴⁷ mean that new approaches are needed to control the accessibility, availability, and prominence of tobacco products in local communities. The effectiveness of tobacco-related land use controls in limiting the negative health consequences and illegal behavior associated with tobacco remains to be demonstrated. However, it is the fact that a positive effect is *plausible* that answers the threshold question of whether such controls are *legal*.

In the absence of evidence showing the particular types of tobacco-related land use controls that might produce better results, but with reflection on the lessons learned from the success of land use regulation in alcohol control, a variety of tobacco-related possibilities come to mind. For example, to diminish the harm caused by tobacco in a community, local governments can use zoning and CUPs to:

- Require that tobacco outlets be located away from areas frequented by children (e.g., schools, playgrounds, residential areas, and video arcades)⁴⁸
- Restrict new discount tobacco outlets to light industrial or industrial zones to control access to cheap cigarettes among price-sensitive populations, especially young people⁴⁹
- Limit the total number of tobacco outlets in a community if the city or county determines that sufficient outlets for tobacco products already exist⁵⁰
- Limit the proximity of all tobacco outlets to each other, ensuring, for example, that a tobacco outlet does not occupy each corner at an intersection

Firearms Control and Land Use

Several California communities have invoked their land use authority to limit the location of firearms dealers to commercially zoned areas.⁴⁸ The city of Lafayette, Calif, enacted an ordinance that not only limited firearms 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.⁴⁸ In upholding the city’s ordinance, the California Court of Appeals confirmed that municipalities are entitled to confine commercial activities to certain districts and that they may further limit activities within those districts by requiring use permits: “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.”⁴⁸ The legal issue, once again, is whether there is a rational basis for the zoning decision.⁴⁸

Nutrition and Land Use

The same land use tools that control the location and operation of alcohol outlets, tobacco outlets, and firearms dealers logically can be extended to issues related to nutrition. Child and adolescent obesity is an epidemic in the United States.⁵¹ Poor nutrition and physical inactivity are responsible for more preventable deaths in the United States than AIDS, violence, drugs, alcohol, and car crashes combined.⁵²

The prevalence of “fast food” outlets offering menus filled with nutritionally deficient food and promoting “super-sized” portions, in combination with a scarcity of healthy alternatives, is an important public health issue. It is reasonable—and certainly “rational”—for a local government to

employ its land use powers to mitigate the rising epidemic of poor nutrition. One of many imaginable approaches would be to require restaurants falling below certain nutritional standards—perhaps in combination with other criteria—to obtain a CUP imposing any of a wide variety of restrictions.

The purpose of such a CUP is at least twofold: (1) to encourage restaurants to improve the nutritional quality of their food, or at least provide alternative healthy meals, and (2) to displace those “fast food” outlets that do not improve in an effort to open the marketplace to competition from healthier restaurants. Imagining only what could be done—not necessarily what should be done—local governments could impose on nutritionally deficient “fast food” restaurants land use requirements that:

- Prohibit the distribution of toys and promotional games, the presence of play equipment, or the presence of video or other games at fast food outlets
- Require fast food outlets to locate a minimum distance from youth-oriented facilities such as schools and playgrounds
- Limit the total number or per capita number of fast food outlets in a community
- Limit the proximity of all fast food outlets to each other
- Charge a fee to fast food outlets and use the proceeds to mitigate the impact of poor nutritional content (e.g., construct parks, fund after-school programs, or provide nutrition education)
- Prohibit drive-through service



CONCLUSIONS

As these examples and possibilities demonstrate, the public health field is only beginning to take advantage of the potential inherent in the police powers of local governments to regulate and attach conditions to land use. In this context, further exploration of this promising approach and extension of its application to new arenas, such as tobacco and nutrition, appear even more significant as tools in the hands of public health authorities and advocates. ■

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Contributors

M. Ashe coordinated the team of authors who developed this article. She wrote the sections on police powers and land use controls. D. Jernigan collaborated on the concept and framing of the article and took primary responsibility for the section on alcohol control. R. Kline collaborated on the concept and framing of the article and took primary responsibility for the sections on tobacco control, gun control, and nutrition. R. Galaz provided some of the initial legal research and copyediting for the article.

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Review

Reducing the Density and Number of Tobacco Retailers: Policy Solutions and Legal Issues

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Abstract

Introduction: Because higher density of tobacco retailers is associated with greater tobacco use, U.S. communities seek ways to reduce the density and number of tobacco retailers. This approach can reduce the concentration of tobacco retailers in poorer communities, limit youth exposure to tobacco advertising, and prevent misleading associations between tobacco and health messaging.

Methods: Communities can reduce the density and number of tobacco retailers by imposing minimum distance requirements between existing retailers, capping the number of retailers in a given geographic area, establishing a maximum number of retailers proportional to population size, and prohibiting sales at certain types of establishments, such as pharmacies, or within a certain distance of locations serving youth. Local governments use direct regulation, licensing, or zoning laws to enact these changes. We analyze each approach under U.S. constitutional law to assist communities in selecting and implementing one or more of these methods. There are few published legal opinions that address these strategies in the context of tobacco control. But potential constitutional challenges include violations of the Takings Clause of the Fifth Amendment, which protects property owners from onerous government regulations, and under the Fourteenth Amendment's Equal Protection and Due Process Clauses, which protect business owners from arbitrary or unreasonable regulations that do not further a legitimate government interest.

Conclusion: Because there is an evidentiary basis linking the density of tobacco retailers to smoking rates in a community, courts are likely to reject constitutional challenges to carefully crafted laws that reduce the number of tobacco retailers.

Implications: Our review of the relevant constitutional issues confirms that local governments have the authority to utilize laws and policies to reduce the density and number of tobacco retailers in their communities, given existing public health data. The analysis guides policy makers in crafting laws that comply with constitutional requirements by outlining the most important procedures and evidentiary justifications to use in development, implementation, and enforcement. This perspective also highlights the importance of reviewing state constitutions, statutes, and municipal codes and getting local input from attorneys and community stakeholders to assess the likely success of some methods over others.

Introduction

Policy makers are increasingly interested in reducing tobacco use in their communities by reducing the density and number of tobacco retailers. Greater density and higher numbers of tobacco retailers, and their proximity to schools and other places frequented by youth, have been associated with higher rates of smoking among youth,^{1,2} higher rates of cigarettes smoked per day,³ and lower rates of successful cessation.⁴ In addition, density of tobacco retailers is often disproportionately higher in low income census tracts⁵⁻⁷ and tracts with a higher proportion of African American⁵ or Hispanic residents.⁷

This article first provides an overview of various ways that communities can reduce the density and number of tobacco retailers, by limiting sales in certain types of stores, prohibiting sales in and near places youth frequent, and restricting the number of tobacco outlets. Second, the article suggests three implementation strategies for these policies: licensing, zoning, and stand-alone laws. Finally, because tobacco industry stakeholders—including large manufacturers, trade groups, and even individual store owners—frequently challenge tobacco control measures, this article also briefly describes the types of challenges industry could make under the U.S. Constitution and how a court might assess those challenges. Past claims against tobacco regulations and policies were based on constitutional principles such as commercial speech, preemption, or property rights, among other reasons.^{8,9} While knowledge of local laws is essential to understanding the legality of a given method in a particular community, U.S. constitutional law provides a basic framework for how communities can implement tobacco retailer reduction strategies while minimizing the risk of successful legal challenge.

Policies That Can Reduce the Number of Tobacco Outlets in a Community

Communities interested in reducing the number of tobacco retail outlets have several law and policy alternatives. Many local governments have paved the way for future tobacco control efforts by implementing one or several of the options described here.

Although this article refers to countries outside of the United States that have also implemented strategies to reduce tobacco retailer density,¹⁰ a full review of international law is beyond the scope of this article. The examples discussed below focus primarily on local government action in the United States. Given that this is a relatively new area for policy work in the United States, more research is needed to determine the best policies for reduction of tobacco retailers,¹¹ but each policy is assessed for its proven and projected strengths and weaknesses, based on current data and legal analysis.

Prohibiting Sales in Specific Venues

One successful way to reduce the number of tobacco retail outlets is to ban certain types of retailers from selling tobacco.¹¹ Several communities prohibit pharmacies and educational institutions from selling tobacco because tobacco sales are so clearly inconsistent with their missions to promote health and educate youth. Selling tobacco products promotes the social acceptability of tobacco and conveys tacit approval of its use.¹² There is an inherent conflict of interest for pharmacies that sell tobacco while simultaneously offering medicine and health care services for tobacco-related illnesses, such as asthma, emphysema, heart disease, and cancer.¹³⁻¹⁵ Quitting smoking is also

more difficult when tobacco products are sold near cessation medications at checkout.

Most provinces in Canada have long had laws prohibiting tobacco sales in pharmacies.¹⁶ England,¹⁷ Turkey,¹⁸ and Ghana¹⁹ have also banned the sale of tobacco products in pharmacies. As we discuss more fully later, in 2008, San Francisco became the first U.S. city to do so. After an initial legal challenge and revision, the court of appeals upheld the amended ordinance as a valid exercise of the city's authority to protect the public health and well-being.²⁰⁻²² Since then, other U.S. communities have also enacted tobacco-free pharmacy laws,²³ including over one hundred in Massachusetts alone.²⁴ These laws have led to a remarkable reduction of tobacco retailer density in California and Massachusetts.²⁵ Boston's efforts are noteworthy because the city has banned tobacco sales in educational institutions as well as in pharmacies and health care institutions.²⁶ Extending the ban to educational institutions is critical, as studies have identified college-age students as a vulnerable population particularly at risk for nicotine addiction.²⁷

Prohibiting Sales Near Youth-Populated Areas

Another way to reduce tobacco outlets is to prohibit tobacco sales within a certain distance (eg, 1000 feet) of youth-populated areas such as schools, parks, playgrounds, and childcare facilities. Youth tobacco use rates are higher in cities where more tobacco retailers are located near schools than in other cities.^{1,2,28} In order to help reduce youth initiation and smoking rates, many U.S. cities—for example, in California,^{29,30} Illinois,³¹ Louisiana,³² and New York³³—have implemented “tobacco-free zones” near schools. This strategy or variations of it have been implemented outside of the United States as well: China,³⁴ Turkey,^{18,35} and Ghana¹⁹ have tobacco sales restrictions related to educational institutions and, in 2003, India banned the sale of tobacco within 100 yards of educational institutions.³⁶ Prohibiting tobacco retailers within a certain distance of schools has been shown to reduce retailer density,¹¹ and communities with fewer tobacco retailers near schools have lower youth smoking rates.^{10,36,37} Because this strategy is specifically focused on youth, it can be more difficult for tobacco industry stakeholders to oppose it, because there is often stronger political support for youth-focused tobacco control laws as compared to other methods of regulation.³⁸

Prohibiting Clusters of Outlets

Another way to reduce tobacco outlets is to prohibit tobacco retail outlets from operating within a certain distance from each other. This policy decreases the number of tobacco retailers in a given area^{11,39} and reduces the disproportionate concentration of tobacco retailers in economically disadvantaged neighborhoods.⁴⁰ This approach is commonly used in alcohol control to avoid the clustering of bars in certain areas of a community.

Density limitation strategies will vary by jurisdiction, based on local conditions and the location of existing tobacco retailers. For example, Huntington Park, California restricts tobacco retailers from opening new stores within 200 feet of another store.²⁹ In the unincorporated parts of Santa Clara County, California, that distance is 500 feet.⁴¹

Limiting the Overall Number of Outlets Permitted

Another way to reduce tobacco outlets is to limit the total number of tobacco retailers permitted to operate in a community. A community can simply cap the total number of retailers in a defined geographic

area,^{42,43} as some have done in the fast food context by limiting the number of chain restaurants.⁴⁴ A “cap and winnow” approach gradually reduces density by setting a limit at the current number of existing tobacco retailers, then, for example, allowing two new outlets to open only when three fail to renew their licenses or have them revoked.⁴⁵

A community could also set a maximum number of retailers proportional to population size. For example, if current density is one tobacco retailer for every 1000 residents, a city could reduce the number of retailers to one per 2500 residents.⁴⁶ Hungary has implemented this approach nationwide and restricts the sale of tobacco products to a specific number of “National Tobacco Shops,” allowing only one store for every 2000 residents.^{47,48}

Strictly population-based retailer caps have not been used in the United States in the context of tobacco control, but states have adopted caps on off-site alcohol retailers, for example: in California, one license for every 2500 county inhabitants,⁴⁹ in Kentucky (1500 residents)⁵⁰; Massachusetts (1000 “population units” for on-premises sales, 5000 for off-premises sales)⁵¹; and New Jersey (3000 population).⁵² Charles County, Maryland restricts each license to 1350 residents, with exceptions.⁵³ Some states use a complicated algorithm to determine population-based quotas, using a baseline census reading in the enacting year, as Wisconsin did in 1997.⁵⁴

Unfortunately, limiting the overall number of tobacco retail outlets in a community may still allow disparities in the concentrations of tobacco retailers in particular neighborhoods.²⁵ Accordingly, this strategy is most effective when paired with other policies, such as *also* prohibiting tobacco retailers from operating in close proximity to each other. In 2014, San Francisco enacted a cap on the number of total tobacco retailers allowed to operate within each of the city’s supervisorial districts, which are defined by geographic area and population, and also prohibited any new retailer from operating within 500 feet of an existing retailer.⁵⁵

Tobacco-Only Outlets

Finally, communities can require that tobacco be sold solely by tobacco-only retailers—retailers that do not sell any other products—modeled after some states’ laws (called “control states”) that prohibit alcohol outlets from selling anything except alcohol and related paraphernalia.^{56,57} To date, we are not aware of any U.S. community that uses this approach in the tobacco retail context. The benefit of this approach would be that like alcohol-only stores, tobacco-only stores would help reduce youth and nonsmoker exposure to tobacco products and advertising, since it is legal to prohibit youth from entering stores selling only age-restricted products.^{58,59} Because the policy regulates sales, as opposed to advertising, it avoids First Amendment concerns that have defeated prior efforts to reduce youth exposure to tobacco advertising.⁶⁰

Even though this policy may provide the benefits noted above, there are some downsides to this approach. First, large numbers of retailers and trade groups, particularly small businesses, would oppose the policy because they would risk losing a source of income or have to alter their businesses (potentially at a cost). Second, data from state reports shows that businesses selling primarily tobacco products, or “significant tobacco retailers” (“STRs”), tend to illegally sell tobacco to minors at a higher rate than statewide averages.^{28,61} Third, STRs often sell drug paraphernalia under the pretext that they are intended for tobacco use.⁶² As a result, some cities have adopted temporary moratoriums on STRs, while others have prohibited the establishment and operation of new STRs.⁶³ If STRs may

be any indication of the potential risks associated with tobacco-only retailers, communities that adopt this strategy should ensure vigorous enforcement of all tobacco and drug laws. Enforcement may be easier to facilitate, under this strategy, because there will be fewer tobacco retailers to monitor.

Implementation Strategies for Reducing the Number of Retailers

This section examines three legal mechanisms communities can use to implement the tobacco retailer reduction policies discussed: licensing, zoning, or direct regulation.⁶⁴

Licensing

Tobacco retailer licensing is an efficient tool for ensuring responsible retailing. In a licensing scheme, all retailers that wish to lawfully sell tobacco products to consumers must obtain a license from the jurisdiction and renew that license, usually annually.⁶⁴ In order to both obtain and maintain a license, a retailer must comply with conditions of operation or risk having its license suspended or revoked.⁶⁴ Because the legal rights granted by a license generally are personal to the license holder (rather than creating a property right attaching to the land on which a business is located), a license holder is directly accountable for the performance standards incorporated into the license. By revoking the licenses of retailers who violate their terms, licensing itself can be a strategy for reducing tobacco retailer density.²⁵ One study has shown that the implementation of a tobacco retail license system results in an immediate reduction of tobacco retailers since some of them decide to stop selling tobacco products instead of paying the annual permit fee.⁶⁵ Finally, because the government can require a business to pay a fee to obtain and renew licenses, the process provides a steady stream of funding for enforcement efforts.⁶⁴

Communities in Finland, Canada, and France have already established licensing regimes for tobacco retailers.^{48,66} Many U.S. states also have laws governing tobacco retailer licensing. In some states, the state licensing laws prohibit or “preempt” local licensing in whole or in part. If state law does not preempt local regulation, a city or county may use licensing to implement any of the policies discussed above to reduce the density or number of tobacco retailers.⁶⁴

Zoning and Land Use Law

Another legal mechanism to implement a density reduction strategy is through zoning or other land use laws.^{64,67} While licensing generally regulates the operation of a business, zoning regulates the use of property. At its most basic, use-based zoning laws categorize the potential uses of a property into one of three types of uses: (1) permissible, (2) prohibited, or (3) permitted subject to certain conditions via a conditional use permit (“CUP”).⁴⁴ A CUP imposes additional requirements on a property owner who engages in certain uses of his or her property. Zoning designations apply to the property, so once a city designates a parcel of land for a particular use, the designation will still apply to the parcel of land regardless of any change in ownership.⁴⁴ Assuming the owner complies with the conditions, a CUP similarly applies indefinitely to the location for which it was granted, regardless of changes in ownership.^{44,68}

Zoning has long been considered “a core function of local government,” whereas, generally, states have traditionally controlled licensing of businesses and professions. As a result, state law is more likely to preempt a city from enacting a licensing law than a zoning

law.⁶⁴ But, because zoning laws attach to the land, it can be very difficult—practically and politically—to use zoning to impose new regulations on existing businesses. Once in effect for a given property, zoning can have long-lasting results, but it is unlikely to have any immediate impact on existing tobacco retailer density. Moreover, zoning does not inherently include a funding stream to cover ongoing enforcement costs, as license renewal does.

Direct Regulation

Communities can also use a stand-alone law (ie, neither licensing nor zoning) to implement some of the strategies discussed above to reduce tobacco retailer density. In doing so, they can rely upon existing enforcement mechanisms, as San Francisco did when banning the sale of tobacco products in pharmacies. It adopted a “belt and suspenders” approach by using two overlapping legal methods to implement the change: passing an ordinance mandating the prohibition⁶⁹ and changing its tobacco retail licensing law.⁵⁵

Existing Retailers

Regardless of which strategy a community adopts, it must consider how to regulate existing retailers. As we discuss more fully below, many communities adopt policies that “grandfather”-in existing retailers, allowing their now-nonconforming businesses to continue until they naturally end or “phase-out” (eg, their licenses expire, or their businesses substantially change or close down). Grandfathering existing retailers, however, can drastically slow the effectiveness of policies affecting retailer density.

Alternatively, communities may “amortize” existing tobacco retailers so that the total number comes within the established limit under the new law on a set timeframe.⁶⁴ A business may continue operations for a specific period of time so that the owner may recover his investment. Amortization may reduce nonconforming uses more quickly than grandfathering (though it is still not an immediate reduction) and, as discussed below, has generally been upheld by the courts.

Legal Issues Under the U.S. Constitution

To avoid the risk of a successful legal challenge, communities should consider all constitutional, statutory, or regulatory restrictions and requirements when adopting or amending laws and policies to reduce the number of tobacco retail outlets. As a helpful example of possible legal issues that these policies may raise, this section discusses potential challenges under the U.S. Constitution that a community must consider when considering a density reduction strategy. As a reminder, it is essential to consult local counsel and fully understand the legal implications of all the options.

To date, there are few published legal opinions that address such challenges explicitly in the context of tobacco retailer density and reduction of overall numbers. While it is difficult to predict with certainty the legal strength of these relatively new tobacco control strategies in any given jurisdiction, by carefully crafting zoning or licensing laws according to the principles discussed below, there is a strong argument that the policies discussed would survive constitutional challenge in the United States.

Takings Clause

A likely constitutional challenge to a law that reduces the number of tobacco retail outlets is a challenge under the Fifth Amendment

Takings Clause,⁷⁰ which provides that private property cannot “be taken for public use, without just compensation.”⁷¹ The Takings Clause does not prohibit the government from taking private property for public use, but it requires economic compensation to the property owner. If a city needs to take a parcel of property to complete a roadway, for example, the city must first compensate the property owner. This is known as a “physical taking.” The Fifth Amendment prevents the government from forcing the property owner alone to bear burdens that should be borne by the public as a whole.⁷²

Under certain circumstances, mere regulation of private property may be so onerous that courts find the government’s action rises to the level of a taking because it has deprived the property owner of a significant amount of the value of her business. This type of “regulatory taking” may entitle the property owner to compensation under the Fifth Amendment.⁷¹ To determine whether a law is a regulatory taking, the courts consider the severity of the burden that the government imposes upon private property rights.⁷¹ However, the standard for a regulatory taking is very high—a land use regulation is an unconstitutional taking only if it denies an owner all economically viable use of the land or it extracts a benefit from the owner that should be paid for by the public as a whole.⁶⁸

Takings and Licenses

While the law is not crystal clear, most courts have found that a properly structured business license does not constitute a property interest for purposes of a takings claim, making it much less likely that suspending or revoking the license will constitute a regulatory taking.^{73,74} Governments issue licenses under their police power, imposing conditions to ensure the community’s health, safety, or public welfare. Inherent in the power to issue a license is the government’s authority to revoke it when a license holder violates the conditions designed to protect the public. Similarly, a government generally retains its police-power authority to change the conditions upon which a license is granted.⁷⁵

However, while a license may not constitute a compensable property interest, a license may be viewed as a contract between the city and the license holder.⁷⁶ In that instance, the license holder could be entitled to continue carrying out the licensed activities for the duration of the current license term. Thus, it is important that a license is required to be renewed periodically, and cities should allow license holders to finish out the term of their existing licenses, applying any changes to tobacco retailer licensing laws prospectively.

Takings and Zoning

In contrast to licensing, courts have found that zoning laws that affect the use of a property may implicate the owner’s Fifth Amendment rights.

Land-use planning and zoning laws shape communities over time. For example, as a city’s population grows, residential areas may spread into former commercial or industrial areas. In response, a community may want to rezone land from industrial use to residential, to prohibit a property owner from locating a factory in the area. Uses of land that were previously lawful, but do not meet new regulations, are considered “nonconforming uses.”⁶⁸ A factory that existed prior to the change in zoning law would be a nonconforming use. A tobacco retailer—particularly a tobacco-only retailer—whose business is prohibited by a new zoning law may be considered a nonconforming use.

Generally, under the U.S. Constitution and, in some places, state or local laws, the property owner has a property interest (sometimes referred to as a “vested right”) to continue the nonconforming use.⁶⁸ To avoid a takings claim, cities must consider that property interest prior to terminating nonconforming uses. In general, the standard of loss necessary for a successful takings claim is high—the owner has lost “all economically viable use” of the property.⁷⁷ Even if a retailer can no longer sell tobacco, however, he would likely be able to use his property for a commercially viable use. As such, a successful takings claim is unlikely. In the unlikely event that the change in zoning could rise to the level of a taking, there are mitigation measures. The government must balance the burden or loss to the individual caused by the change, with the public good sought to be achieved.⁷⁸

Courts have upheld several ways to balance a property owner's rights with the public good. As stated in the 5th Amendment, governments can pay compensation to a property owner for the value of the loss caused by the change in zoning law. Alternatively, a community can phase-out a nonconforming business by allowing it to continue as a “legal nonconforming use” until it substantially changes its business operations (eg, if it expands, changes ownership, or ceases and resumes operations). The aim is that over time, prohibited uses will cease to exist in that area,⁶⁸ though that is not always the case in practice.⁶⁸ Finally, a government can allow the nonconforming use to continue for a specified period of time before it must terminate (amortization), to give owners the opportunity to recover the value of their investments in the nonconforming uses.⁶⁸ The amount of time required to allow the nonconforming use to continue varies depending on the type of business and what is prohibited by the new law.^{78–80}

Equal Protection

Section one of the Fourteenth Amendment to the U.S. Constitution provides in part, “[n]o State shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”⁸¹ This clause is the source of several potential challenges to governmental actions: equal protection, procedural due process, and substantive due process.

The Equal Protection Clause prohibits discrimination against a person or entity for belonging to a particular group. In an Equal Protection challenge, a court first determines whether the government has adopted a classification that affects two or more similarly situated groups in an unequal manner.²² If so, the court then considers whether the classification furthers a legitimate governmental interest.²² When the law classifies individuals or groups for an economic regulation (as opposed to a classification that affects race, religion, national origin, or gender), the court must uphold the classification as long as the classification “rationally furthers a legitimate state interest”²²—a fairly low standard.

To survive an Equal Protection challenge, governments should ensure that any classification made is a reasonable one and that it furthers the governmental interest. Introducing exemptions to legislation can open the door to legal challenges that are easily avoidable. For example, in *Walgreen Co. v. City and County of San Francisco*, the California Court of Appeal considered whether the trial court properly dismissed an Equal Protection challenge to a San Francisco law prohibiting certain pharmacies from obtaining licenses to sell tobacco products.²¹ The ordinance prohibited stand-alone pharmacies from obtaining licenses to sell tobacco, but not grocery stores or “big box” stores containing licensed pharmacies.²¹ After finding

that the law treated the two categories of pharmacies differently, the court found no basis for the differential treatment and returned the case to the trial court for further proceedings.²¹

After San Francisco amended the ordinance to prohibit the sale of tobacco by *any* store within San Francisco that contains a pharmacy, Safeway, a supermarket chain—in *Safeway v. City and County of San Francisco*—filed an Equal Protection challenge. Safeway argued that the amended law treated general grocery stores, big box stores, and other retailers without pharmacies (who therefore could sell tobacco products) differently from retailers who did have pharmacies and could not sell tobacco.²² The court held that even if the stores were classified and treated differently, San Francisco had a legitimate basis for treating the two types of retailers differently. As the court stated, “[i]n prohibiting the sale of tobacco products in pharmacies, the amended ordinance accomplishes its purpose by ending any inference that tobacco products may not be harmful because they are sold by a major participant in the health care delivery system.”²² As a result, the court found that the amended law did not violate the Equal Protection Clause.

Provided that any implied classification is reasonable and furthers a valid governmental interest—for example, making tobacco products less available in order to promote public health by reducing smoking—the policies reducing the number of tobacco retailers should survive an Equal Protection challenge.

Due Process

Courts have interpreted two strands of due process under the Fourteenth Amendment: procedural due process and substantive due process.

Procedural Due Process

Procedural due process refers to the requirement that the government provide a “fair procedure” when depriving someone of life, liberty, or property.⁸² In order to prove a violation of procedural due process, a plaintiff must prove that: (1) she had a life, liberty or property interest protected by the Due Process clause; (2) she was deprived of that interest; and (3) the government did not give her adequate procedural rights before depriving her of that interest.⁸³

While courts have generally found that a license is not a property interest for takings-claims purposes, they *have* found that a license is a property interest for purposes of procedural due process. So, before a city may suspend or revoke a license, the city must provide the license holder with a fair process.⁸³ Local governments do this by expressly including within their laws or regulations the grounds for suspension or revocation of a license and the notice and hearing procedures to which the license holder is entitled. To protect against claims of procedural due process, a city should ensure adequate notice and hearing procedures before suspending or revoking licenses for violations of new standards.

In the zoning context, procedural due process claims arise when a governmental body determines the rights of a particular property owner (eg, when deciding whether a landowner is entitled to an exception under zoning law).⁶⁸ Provided that the city follows standard laws and procedures for enacting the new restrictions on tobacco retailers, the tobacco policies described above should survive a procedural due process challenge.

Substantive Due Process

Substantive due process protects individuals from police-power regulations that are not sufficiently justified. In the case of regulations affecting a nonfundamental right like selling tobacco products, this means preventing any regulation that is “arbitrary and capricious.”⁶⁸ Under rational basis review, a law is constitutional even if it is “unwise, improvident, or out of harmony with a particular school of thought.” . . . The law must merely “bear a rational relationship to some legitimate end.”⁸³ Because the standard for “arbitrary and capricious” is so low, a substantive due process challenge to these tobacco retailer policies is unlikely to be successful.

In the licensing context, Safeway, in *Safeway v. City and County of San Francisco*, also claimed that the ordinance prohibiting pharmacies from obtaining a tobacco retail license violated substantive due process by implicitly forcing Safeway to stop using its permit to operate a pharmacy.²² The court noted that “[a] substantive due process claim cannot overturn a valid state statute unless it is ‘clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.’”²² The court held that, even if Safeway could demonstrate that “it has a vested property right in its permits, it cannot overcome the fact that the enactment of the amended ordinance was a reasonable and permissible use of Defendants’ police power,” and rejected the claim.²²

Similarly, to avoid a substantive due process claim a zoning regulation must further a legitimate governmental purpose—such as protecting health, safety, or welfare—and the regulation must reasonably further that purpose. Generally, zoning regulations are challenged on the grounds that the regulation in question does not reasonably further the public purpose.⁶⁸ There are no published opinions addressing substantive due process challenges to zoning laws relating to tobacco retailers. But courts have upheld density restrictions for businesses selling alcoholic beverages and adult-oriented theaters and businesses, finding that these density restrictions reasonably further the purposes of preserving the character and quality of a community.⁶⁸ Limiting the number and density of retailers selling tobacco is an effective tobacco-control policy, so courts would likely find that imposing tobacco retail zoning restrictions reasonably furthers the public purpose of reducing tobacco use.

Conclusion

There are at least five major policy approaches to tobacco retailer reduction and many communities have already implemented one or more of them. Provided that state law allows it, local governments may regulate tobacco retailers through their authority to promote public health and welfare, whether through licensing restrictions, zoning laws, or direct regulation. The U.S. Constitution requires, at base, that any such law be rationally related to legitimate purposes and/or goals, and public health data supports these approaches. When enacting new laws or policies, policy makers should be sure to seek local counsel in assessing these and any other possible legal issues.

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