



Using Licensing and Zoning to Regulate Tobacco Retailers

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.

Introduction

Given the tobacco industry's focus on the retail environment and strong evidence that retailer location, density, and compliance with youth access laws significantly impact overall tobacco use and youth initiation, a growing number of states and local communities have turned to licensing and zoning policies as part of comprehensive tobacco control programs. States and many local governments have broad legal authority to regulate the sale and distribution of tobacco products in their jurisdictions. This brief guide offers pointers on how governments can use retail licensing and land use regulations, such as zoning, as effective tobacco control tools.



Licensing and Zoning

Licensing and zoning laws are two long-accepted methods of regulation that governments use to control the location of tobacco retailers, reduce the rates of youth initiation, curb consumption of tobacco products, and monitor and increase tobacco retailer compliance with tobacco control laws.² Many governments already have a history of applying licensing or zoning laws to businesses such as liquor establishments or gun shops. These regulatory systems might provide a tried-and-true framework that could be adapted to the tobacco control context.

Licensing. State and many local governments have the authority to require tobacco retailers to obtain a license from the government. Governments can put conditions on the sale of tobacco and require licensed businesses to comply with tobacco control laws, such as not selling tobacco products to minors or not selling tobacco products within a certain distance of schools. Retailers who fail to comply with those requirements can face fines and other consequences, including having their “privilege” to sell tobacco suspended or revoked.

Most states already require retailers that sell cigarettes and other tobacco products to obtain a license or permit from the state or local government where they do business. Increasingly, states are requiring the same of retailers of electronic cigarettes.³ Unfortunately, some state retailer licensing programs are used more as tools to enforce compliance with tobacco excise taxes than as strong regulatory elements of a comprehensive tobacco control program.

Zoning. Zoning is the primary way in which governments shape a community's land use. Zoning ordinances are used to separate incompatible uses of land, regulating how land can be used – both in terms of the physical nature of the buildings (such as height) and the kind of activities or “uses” that are permitted in different zoning classifications or districts (for example, commercial, industrial, or residential). Generally, in each zoning district certain uses are permitted, prohibited, or “permitted subject to certain conditions,” which requires what is known as a “conditional use permit.” The conditional use permit process gives local decision makers an added level of review regarding uses or activities that might conflict with surrounding uses and creates the opportunity to attach additional conditions that must be agreed to if the conditional use is permitted. Zoning laws can prohibit the sale or distribution of tobacco products within certain zoning districts, as well as establish density or proximity restrictions between tobacco retailers.

Differences. A key difference between zoning and licensing is that zoning grants rights that are attached to the land, while licensing grants rights to the person holding the license. A license is a limited, non-transferable grant of authority from the government to engage in the licensed activity. If licensing laws are changed, existing license holders are required to follow the new rules. The license is also tied to the business itself. If a business closes, relocates, is sold, or otherwise terminates, its license ends as well. If a new business seeks to conduct the same activity, it must apply for a new license, even if it occupies the same location as the previously licensed business. Unlike licensing, zoning laws run with the land, not the business.⁴ This means that zoning requirements continue to apply when business ownership changes. At the same time, legal “nonconformities” (uses that were legal before the zoning laws were amended or adopted) generally have a right to continue. As such, it can take time to see the impact of changes to zoning laws.

Policy Benefits

Ordinances that control access to tobacco products can benefit the public in several ways. For example, both licensing and zoning ordinances can enable governments to place conditions on tobacco retailers, such as requiring compliance with tobacco control laws, restricting the use of coupons, regulating the placement of products or advertising, and other options that advance public health. These laws can also facilitate the creation of comprehensive lists of tobacco retailers, which government inspectors can then use to monitor retailer compliance with tobacco laws. Licensing provides governments with a direct and effective enforcement mechanism by which non-compliant retailers can face consequences for their conduct, including being prohibited from selling tobacco products altogether.

Licensing and zoning laws can also control the location, density or number of retailers, which in turn can benefit public health by lowering the rate of youth initiation.⁵ For example, a licensing ordinance can be structured to prohibit a license from being issued for retailers seeking to be

located within 1,000 feet of youth-oriented facilities. Similarly, a zoning ordinance could prohibit tobacco retailers in residential zones or near facilities frequented by youth. The same licensing and zoning laws could also lower the density and quantity of tobacco retailers. For instance, a law could require tobacco retailers to be located a certain distance from one another, could limit or cap the total number of retailers allowed in an area, and could prohibit the transfer or expansion of existing tobacco retailer buildings.

Policy Elements

Effective licensing and zoning ordinances generally contain several common components.

- **Clear definitions and concise language:** As with any law, tobacco control laws must be worded clearly and concisely. Carefully avoid vague or ambiguous language.
- **Well-crafted implementation process:** Licensing and zoning laws should also specify the means by which a retailer applies for, receives, and maintains permission to sell tobacco products. These provisions can include the type of forms to be filed, deadlines and fees for filing, an annual renewal process, and the ramifications of any failure to meet such requirements.
- **Appropriate fees:** The fees assessed to a tobacco retailer should be set at an amount that takes into account the government's cost of administering and enforcing the law. For example, annual licensing fees can be used to offset employee salaries, the cost of performing compliance checks and related inspections, and other overhead and logistical aspects of properly administering, implementing, and enforcing the law.
- **Robust enforcement options:** The law should clearly describe the type of conduct it prohibits. Laws can be broad and require compliance with any and all federal, state and local requirements that apply to the retail sale of tobacco and related devices and products, or they can be much narrower and address specific conduct, such as sales to minors, taxation, promotional restrictions, and the like.
- **Fines, penalties and appeals process:** Licensing or zoning laws should explain the penalties for violations. For instance, a licensing law could include a graduated system of warnings and fines. Further penalties for certain violations could result in the suspension or revocation of the ability to sell tobacco products. Additional provisions could explain how violations and penalties can be challenged or appealed.

Note: Governments must generally satisfy certain procedural requirements when licensing or zoning laws are adopted or amended. Occasionally, the government must notify affected parties (e.g., licensees and adjoining property owners) and/or the general public a certain number of days before the governmental body meets to consider a proposed law.⁶ Because notice and other procedural requirements vary by jurisdiction, it is important to be aware of their existence and to comply with their specifications.

Challenges

Tobacco licensing and zoning laws can face several legal challenges, including issues involving:

- **Authority:** The governmental unit needs to have the power to carry out a licensing or zoning scheme. Preemption occurs when a “higher” level of government eliminates or limits the authority of a “lower” level of government to regulate a certain issue.⁷ While states generally have licensing and zoning power, a local government’s authority depends largely upon the authority a state has preserved for itself and granted to communities through special legislation, home rule charters, or similar laws. That a governmental unit is not currently using licensing or zoning to regulate tobacco businesses does not mean the power does not exist. The power may exist, but simply may not have been put to use.
- **Political and Administrative Realities:** If a government has the authority to license or adopt land use restrictions, policymakers then need to determine which policy options are the best fit. Some options may be more politically viable than others. Also, if the government has an existing licensing or zoning framework, it might be helpful to consider whether tobacco control efforts can be effectively incorporated into those administrative and enforcement programs.
- **Existing Businesses:** Regardless of the option chosen, the process should include a comprehensive analysis of how the proposed requirements would treat those existing businesses whose location or activity would be out of compliance. Drafters should fully understand the legal ramifications of placing these conditions on such businesses.
- **Constitutional Challenges:** Local governments need to anticipate potential constitutional challenges and design regulations accordingly. For example, tobacco retailers may allege violations of the Equal Protection Clause, the Due Process Clause, the Takings Clause, and the First Amendment right to free speech.⁸

Examples and Select Policies

Below are a few examples of zoning and licensing policies for tobacco retailers. If you consider adapting any language from these policies, take care to ensure the provision in question is practical and legal in your jurisdiction. Please note that the Tobacco Control Legal Consortium does not endorse or recommend any of the following policies. These examples are included simply to illustrate how various jurisdictions have approached similar issues.

Policy Type	Location	Name
Licensing	City Ordinance Boston, MA (2015)	A regulation limiting tobacco and nicotine access by youth ⁹
Licensing	City Ordinance San Francisco, CA (2015)	Permits for the sale of tobacco ¹⁰

Licensing	City Ordinance Homer Glen, IL (2005)	An ordinance licensing retailers of tobacco and tobacco products in the village of Homer Glen ¹¹
Zoning	City Ordinance Mountain View, CA (2016)	Regulating significant tobacco retailers ¹²
Zoning	City Ordinance Henderson, NV (2016)	Requiring zoning of tobacco retailers in relation to youth dancehalls ¹³

Other Helpful Resources

The Tobacco Control Legal Consortium and [Public Health Law Center](#)'s website includes several publications that discuss tobacco licensing and zoning laws in detail, including a factsheet on [retail license fees](#).¹⁴ ChangeLab Solutions has a [Tobacco Retailer Licensing Playbook](#) on its website and the [Center for Tobacco Policy & Organizing](#) maintains a webpage that contains resources related to strong local licensing ordinances in California.

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 implementing such a policy.

Last updated: September 2016

Notes

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

² Janine Paynter et al., *Point of Sale Tobacco Displays and Smoking Across 14-15 Year Olds in New Zealand: A Cross Sectional Study*, 18 TOBACCO CONTROL 268, 272 (2009). The article discusses, in part, how youth exposure to tobacco marketing “at the point-of-sale is significantly associated with being susceptible to smoking, experimenting with smoking and current smoking.”

³ See Tobacco Control Legal Consortium, *U.S. E-Cigarette Regulations – 50-State Review* (2016) (including state license requirements for e-cigarette retailers), <http://publichealthlawcenter.org/sites/default/files/tclc-50state-The-Legal-Landscape-for-Electronic-Cigarettes-2016.pdf>.

⁴ Heather Wooten et al., *Zoning and Licensing to Regulate the Retail Environment and Achieve Public Health Goals*, 5 DUKE FORUM FOR LAW & SOCIAL CHANGE 65-96 (2013).

⁵ Scott P. Novak et al., *Retail Tobacco Outlet Density and Youth Cigarette Smoking: A Propensity-Modeling Approach*, 96 AM. J. PUB. HEALTH 670, 673 (2006).

⁶ See, e.g., MINN. STAT. § 461.19 (30-day notice to retailers of proposed changes to local licensing regulations), <https://www.revisor.mn.gov/statutes/?id=461.19>.

⁷ For more information regarding the impact of preemption and governmental authority, see the Consortium's [Preemption: The Biggest Challenge to Tobacco Control](#).

⁸ See generally Amy Ackerman et al., [Reducing the Density and Number of Tobacco Retailers: Policy Solutions and Legal Issues](#), NICOTINE & TOBACCO RESEARCH doi:10.1093/ntr/ntw124 (2016).

⁹ BOSTON PUBLIC HEALTH COMMISSION AUTHORITY, A REGULATION LIMITING TOBACCO AND NICOTINE ACCESS BY YOUTH (December 17, 2015). The Boston Public Health Commission Authority has to authority to impose these regulations from the Boston Code. [BOS., MASS., CODE 16-40.5](#).

¹⁰ S.F., CAL., CODE ART. 19H (2015).

¹¹ HOMER GLEN, ILL., ORD. NO. 05-063 (Dec. 20, 2005).

¹² MOUNTAIN VIEW, CAL. CODE § 36.30.20 (2016).

¹³ HENDERSON, NEV. CODE § 19.5 (2016).

¹⁴ Publications on the Public Health Law Center's website that discuss tobacco retail licensing and zoning include: [Regulating Tobacco Retailers: Options for State and Local Governments](#); [Location, Location, Location: Regulating Tobacco Retailer Locations for Public Health](#); [Licensed to Kill: Tobacco Retailer Licensing as an Effective Tobacco Control Tool](#); and [Local Land Use Regulation for the Location and Operation of Tobacco Retailers](#).