



Center for Public Health
and Tobacco Policy



Reducing Youth Exposure to Tobacco Marketing

Options for Local Governments in New York

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Authored by:
Micah Berman
Kerry Malloy Snyder

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The Center for Public Health & Tobacco Policy
at New England Law | Boston
www.tobaccopolicycenter.org

NEW ENGLAND LAW  BOSTON

154 Stuart St.
Boston, MA 02116

Contact:
Phone: 617-368-1465
Fax: 617-368-1368
tobacco@nesl.edu

The Center for Public Health & Tobacco Policy is a resource for the New York tobacco control community. It is funded by the New York State Department of Health and works with the New York State Tobacco Control Program and its contractors to develop and support policy initiatives that will reduce tobacco-related morbidity and mortality in New York.

Introduction: Why Address Tobacco Marketing through Local Law?

More than 25,000 smoking-related deaths occur each year in New York State¹—all of which are preventable. Nearly 90% of those who smoke regularly begin smoking by the age of 18.² Therefore, if youth remain tobacco-free through high school, most will never start smoking. While this may seem a daunting task, there are many things communities can do to protect youth.

Although there are many factors that contribute to the decision of an adolescent to begin smoking, tobacco marketing in retail stores where tobacco products are sold (the point-of-sale) has a significant impact. This type of marketing has been shown to have a greater effect on adolescent smoking behavior than peer pressure,³ and nearly as much of an effect as having a household member who smokes.⁴ Tobacco companies know this, and spent \$9.81 billion in point-of-sale marketing in 2008 alone (the most recent year for which data is available).⁵

This presents local communities an excellent opportunity to reduce the likelihood that adolescents will ever smoke—by regulating the sale and marketing of tobacco products. Communities can reduce the exposure of



their young residents to in-store tobacco marketing by requiring tobacco retailers to limit certain tobacco displays, reducing the number of tobacco retailers, or restricting the location and type of tobacco retailers.

The Center for Public Health and Tobacco Policy (Center) has developed two separate model ordinances for New York communities. The first provides a model for local governments to regulate the location, number and type of tobacco retailers through a retail licensing scheme. The ordinance accomplishes these goals by allowing a local government to exercise its lawful authority to determine which businesses may legally sell tobacco products. A local government can limit the number of available licenses for tobacco retailers, determine that licensees must be located a certain distance from schools, and prohibit licensed pharmacies from selling tobacco products. The second model ordinance allows local governments to require that all tobacco products be kept out of sight at retail locations that are open to youth. This addresses the large “powerwall” displays – displays containing hundreds of different tobacco packages – that are commonly found behind the counter in retail outlets.

Table of Contents

| | |
|------------------------------|----------|
| <i>Introduction.....</i> | <i>1</i> |
| <i>Licensing.....</i> | <i>2</i> |
| <i>Zoning.....</i> | <i>2</i> |
| <i>Boards of Health.....</i> | <i>4</i> |
| <i>Conclusion.....</i> | <i>6</i> |

Eliminating these powerwall displays would remove a form of tobacco marketing that has been shown to have a powerful influence on youth.

Together, these model ordinances provide a comprehensive strategy for local governments to reduce youth exposure to point-of-sale tobacco marketing. However, there are other ways in which local governments may accomplish this goal, thereby improving the overall health of their communities. This report explores several other available alternatives: comprehensive licensing schemes, zoning, and board of health rulemaking.

Comprehensive Licensing

Instead of enacting two different ordinances – one to address retail licensing and one to address point-of-sale displays – the two measures could be combined into a single, comprehensive licensing scheme.

A license is a mechanism through which the state or local government grants permission to do something that may otherwise be unlawful.⁶ In the context of tobacco control, a license may be required by a county or local government for anyone wishing to sell tobacco products.⁷ Importantly, that license may impose certain conditions with which the licensee must comply in order to maintain that license. Such conditions may require a licensee to comply with existing tobacco laws (such as the Adolescent Tobacco Use and Prevention Act (ATUPA)) or they may require licensees to adhere to additional requirements, such as warning customers about the dangers of tobacco products.⁸ The licensing system includes a

powerful, built-in enforcement mechanism, because the local community can suspend or revoke the licenses of retailers who do not act in accordance with the required conditions.

In addition to being used to limit the number, type, and location of retailers, a licensing scheme could also be used to require tobacco products to be kept out of sight in retail locations that are open to minors. Combining these measures into a single, comprehensive licensing scheme would address both *where* tobacco products could be sold and *how* they could be sold. The fees generated from the licenses could be used to enforce all of the requirements attached to the license, which would allow for consistent and effective enforcement.

Zoning Regulation

Land use regulations can be a powerful tool through which local governments may regulate the number and location of tobacco retailers. Through its enabling acts, New York State has granted cities, towns and villages⁹ the authority to regulate the use of land within their borders through the adoption of zoning regulations.¹⁰

The purpose of zoning ordinances is to regulate the use of land within a particular jurisdiction. Local governments use zoning ordinances to divide a jurisdiction into certain districts (or zones), and identify the uses permitted within each district. Some uses are specifically permitted as-of-right, meaning that the zoning ordinance itself grants permission and sets forth any restrictions that may be applicable (e.g., setback requirements in a residential zone).

Other uses may be deemed a “conditional” permitted use—the use is generally permitted, but requires a special permit (conditional use permit or CUP), issued only after an individualized review of the proposed use and the particular location for which it is proposed.¹¹ For example, the development of single and multi-family homes might be permitted as-of-right in a particular residential district, while a bed-and-breakfast operated out of the owner’s home may be required to obtain a CUP and comply with certain conditions (such as the provision of off-street parking spaces).¹²

Although it is relatively rare for communities to use their zoning authority to regulate the location of tobacco retailers, it is well within their authority. Communities in New York and elsewhere have already used zoning to regulate the location of adult businesses, liquor stores, and other businesses that may threaten the health or well-being of their residents.¹³

Effect on existing businesses

Local governments must exercise care when adopting zoning laws that affect existing property owners. Depriving a property owner of the right to continue using his or her land in a way that is inconsistent with a newly adopted zoning law may give rise to a legal claim that the community has violated the “Takings Clause” of the Fifth Amendment.¹⁴ However, a municipality can ensure that such continuing use is appropriately limited by recognizing the existing use as a legal nonconforming use, granting the property “deemed approved”

status, or terminating the use through amortization.

A legal nonconforming use is one which legally existed prior to a change in the zoning law which now prohibits the use. Municipalities may allow existing businesses to continue operating in violation of a new ordinance, and place conditions on that continued use.¹⁵ For example, such use is generally not allowed to continue if there is an expansion or significant alteration of the building (other than regular maintenance). Additionally, if the nonconforming use is abandoned for a period of time, the business may not be allowed to resume without obtaining a permit from the municipality.

“Deemed approved” status is a new approach that has been used in some municipalities in California to re-categorize a legal nonconforming use of land.¹⁶ An existing business which is not compliant with a new zoning ordinance is allowed to continue, but must adhere to all the conditions imposed by the new ordinance as if it had been granted a CUP.¹⁷ There is no state law prohibiting the use of this strategy in New York, but it is an as-yet-untested one.¹⁸ Municipalities wishing to pursue such a strategy should contact their municipal attorney or the Center for more information.

Finally, municipalities may terminate an existing nonconforming use of property through amortization. Under amortization, a municipality would allow a nonconforming use to continue for a reasonable period of time in order to allow the property owner to recoup any investment he or she has made in

the property, but such use would be prohibited at the end of that time period. The “reasonable period” of time must be determined on a case-by-case basis and could be challenged by the property owner if he or she believes it is too short a time. New York municipalities have used amortization to end nonconforming uses with mixed success¹⁹; therefore, municipalities wishing to use it to apply land use regulation to existing tobacco retail businesses should do so with caution.



Uses of zoning to regulate tobacco retailers

Zoning can be used to limit the location of tobacco retailers. This has already been done by numerous communities in California. For example, the City of Palmdale requires all new retailers of tobacco products to obtain a conditional use permit and be located at least 500 feet from any school, commercial day care, hospital, public park, library or recreation center.²⁰ The zoning ordinance includes additional conditions, such as a prohibition on the sale of tobacco products through a self-service display or to anyone who appears to be younger than 27 years of age and lacks proper identification.²¹ The basic

requirements contained in the zoning ordinance may be amended through additional conditions imposed by the permit itself after the zoning board has had an opportunity to make an individualized assessment of the application.²²

In sum, local authorities in New York have the power to reduce youth exposure to in-store tobacco marketing by enacting land use regulations. Zoning laws may be used to restrict the location of new tobacco retailers to industrial zones, or to areas more than X feet from residential zones or other locations frequented by children. They may also impose specific requirements for the posting of health warnings, maintaining tobacco products out of sight of consumers, or restricting the number of advertisements posted in windows.²³

Board of Health Rules

New York state law authorizes the establishment of local boards of health at the county, city, town or village level.²⁴ These local boards of health – which are technically part of the *state* government, even though they are located within local communities – are charged with adopting “such orders and regulations, not inconsistent with the provisions of the [state] sanitary code, as it may deem necessary and proper for the preservation of life and health.”²⁵ This delegation of authority is broadly interpreted, and boards of health have used it to regulate a myriad of public health issues, from protecting the local water supply to regulating the disposal of waste to imposing sanitation requirements on body piercing shops.²⁶

Limits on authority

Because boards of health are part of the executive branch of government, boards of health cannot create *new* law (a power which lies solely with the legislative branch of government) but may adopt regulations that assist them to carry out the powers delegated to them by state and local law.²⁷ Such regulations must be based on considerations of public health, and may not take into account other factors, such as political or economic issues (because considering such issues would remove the regulation from the scope of powers delegated to the board).²⁸

In the area of tobacco control, two cases have established some unfortunate, though not insurmountable, precedent for boards of health. The first, *Boreali v. Axelrod*, addressed statewide regulations adopted by the Public Health Council (PHC) which prohibited smoking in public places, with exceptions carved out based on the type of facility or other (non-health related) reasons.²⁹ Because the smoking restrictions imposed by the PHC were more stringent than those embodied in state law at the time, they were challenged as being adopted outside the scope of the PHC's authority—in other words, the PHC was charged with having acted in a legislative capacity by creating new policy in violation of the separation of powers doctrine. The New York Court of Appeals found that there were four factors that, when taken together, caused the justices to conclude that the PHC had indeed exceeded the authority the Legislature had granted to it. Those factors were: 1) the regulatory scheme provided for

exceptions based solely upon economic and social concerns, rather than public health;³⁰ 2) the regulations did not fill in the details of a broad statutory scheme, but rather created a new, comprehensive set of rules “without the benefit of legislative guidance;”³¹ 3) the agency acted in a policy area in which the Legislature had repeatedly and specifically tried to reach agreement but could not;³² and 4) no “special expertise or technical competence in the field of health” was involved in the development of the regulations.³³

It is important to note that the court stated that any of these factors taken alone would be insufficient to warrant a conclusion that the PHC acted erroneously. Thus, it appears that there is room for the PHC or a local board of health to adopt tobacco control regulations, provided they are drafted with the factors articulated by the court in mind.

In *Nassau Bowling Proprietors Association v. County of Nassau*, a federal district court interpreted the *Boreali* decision and applied it to an ordinance adopted by the Nassau County Board of Health (BOH).³⁴ In that case, the BOH adopted smoking restrictions more strict than those adopted by the Nassau County Legislature. The exceptions built into the ordinance, while similar to those overturned in *Boreali*, were taken directly from existing state statute.³⁵ The court, however, found that, despite the fact that the BOH derives its authority from state law, because the BOH was not specifically authorized to adopt the regulations (and exceptions) by the county legislature, the BOH acted outside the scope of its delegated authority.³⁶ The Court did note that the BOH

has the power to adopt health regulations concerning smoking, and could even consider practical concerns, such as economic matters; but those considerations must be incidental and not a major consideration.³⁷

Applying authority of local boards of health to tobacco control

Local boards of health have been granted the authority to enforce several state laws concerning the use and sale of tobacco products. For example, local boards of health enforce the Clean Indoor Air Act³⁸ and ATUPA.³⁹ The Dutchess County Board of Health adopted a licensing scheme for tobacco retailers within its sanitary code in order to more effectively carry out some of these enforcement duties.⁴⁰ Presently, the scheme is one which simply requires licensees to comply with existing tobacco laws; even so, it provides a powerful local enforcement tool to ensure that compliance.

It *may* be possible for a board of health to incorporate additional requirements for tobacco retailers and tobacco marketing within its sanitary code. In the years since the *Boreali* and *Nassau Bowling Proprietors Association* decisions were reached, no other state court decisions have overturned the actions of local health departments on similar grounds.⁴¹ Thus, it may be that these two cases were products of the uniquely contentious debate over clean indoor air laws, and they have limited applicability in other contexts.

Any board of health regulations should be framed based on health and should contain limited exceptions. For example, a local board of health could likely enact a regulation that prohibited tobacco sales by *all* retailers that operated licensed pharmacies. But a similar ordinance that included exceptions (e.g., for grocery stores) might be vulnerable to a challenge. Similarly, a board of health could likely prohibit the visible display of tobacco products at *all* retail outlets open to youth. Again, any exceptions would be problematic.

Conclusion

Exposure to tobacco marketing is a primary cause of youth smoking, and therefore it is important for local governments to consider policy measures that would reduce youth exposure to the tobacco industry's marketing. While the Center for Public Health and Tobacco Policy has provided model ordinances to accomplish this, there is no one policy approach that is right for all communities. Local governments in New York have flexibility in determining the best method for implementing tobacco control policies to protect the health and welfare of their residents: licensing, zoning, and board of health regulations may all be viable options. Any community interested in learning more about these or other legal mechanisms for implementing tobacco control policies should contact the Center for Public Health and Tobacco Policy.

Notes

¹ B. Adhikari et al., CENTER FOR DISEASE CONTROL, *State-Specific Smoking-Attributable Mortality and Years of Potential Life Lost – United States, 2000-2004*, MMWR WEEKLY, Jan. 23, 2009, at 29, tbl.1, available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5802a2.htm>.

² MEG RIORDAN, CENTER FOR TOBACCO-FREE KIDS, TOBACCO COMPANY MARKETING TO KIDS 3 (2011), available at <http://www.tobaccofreekids.org/research/factsheets/pdf/0008.pdf>; see U.S. DEP'T. OF HEALTH & HUMAN SERVS., YOUTH AND TOBACCO: PREVENTING TOBACCO USE AMONG YOUNG PEOPLE 3 (1994).

³ Nicola Evans et al., *Influence of Tobacco Marketing and Exposure to Smokers on Adolescent Susceptibility to Smoking*, 87 J. NAT'L CANCER INST. 1538, 1543 (1995).

⁴ Lisa Henriksen et al., *Association of Retail Tobacco Marketing with Adolescent Smoking*, 94 AM. J. PUB. HEALTH 2081, 2082 (2004).

⁵ FED. TRADE COMM'N, CIGARETTE REPORT FOR 2007 AND 2008 (2011); FED. TRADE COMM'N, SMOKELESS TOBACCO REPORT FOR 2007 AND 2008 (2011). Figures include spending reported by the 5 largest cigarette manufacturers and 5 major smokeless tobacco companies on point-of-sale advertising, price promotions, value-added promotions and promotional allowances paid to retailers and wholesalers.

⁶ More detailed information about licensing may be found in our publication *Tobacco Retail Licensing: Local Regulation of the Number, Location, and Type of Tobacco Retail Establishments in New York*, available at http://www.tobaccopolicycenter.org/documents/Licensing_Report_Combined_October2010.pdf.

⁷ The State of New York, like all states, possesses broad virtue of the New York Constitution and state law. Local governments in New York possess broad “police powers” to promote the public health and welfare of its residents. See N.Y. CONST. art. IX, §2(c) (2011) (granting local governments in New York State the authority to regulate with respect to the “safety, health and well-being” of their residents, so long as local laws do not conflict with state laws.); N.Y. MUN. HOME RULE §10 (2011). This authority can be used to adopt licensing schemes that address public health concerns.

⁸ Cf. NEW YORK CITY HEALTH CODE § 181.19 (2009) (requiring the posting of tobacco health warnings and smoking cessation information in all places where tobacco is sold in New York City). This regulation, which is subject to a pending legal challenge, was not explicitly connected to the City’s licensing authority.

⁹ N.Y. GEN. CITY LAW §§ 20(24), 20(25); N.Y. TOWN LAW §§ 261-285; N.Y. VILLAGE LAW, §§ 7-700 to 7-742. Counties have not been granted the power to adopt zoning regulations.

¹⁰ While this zoning power is limited by the enabling statutes adopted by the New York State Legislature, those statutes include the local adoption of regulations “designed to promote the public health, safety and general welfare” and thus are sufficiently broad to include the regulation of businesses. N.Y. GEN. CITY LAW § 20(25). See also N.Y. TOWN LAW §261; N.Y. VILLAGE LAW § 7-700.

¹¹ Zoning ordinance may also flatly prohibit certain uses of property in a given zone.

¹² See, e.g., Code of the Town of Ithaca, Part II, Chapter 270 (requiring special permit and a parking space for each guest room for bed and breakfasts in residential zones).

¹³ See, e.g., NYC Amended Zoning Resolution §32-01 (restricting adult commercial businesses to light industrial areas in order to control “secondary effects” of such businesses); Lafayette (California) Mun. Code §6-533 (restricting firearm dealers to commercial zones and requiring special permit after consideration of proximity to schools, other firearms dealers, liquor stores, etc.); *Van Sicklen v. Browne*, 15 Cal. App. 3d 122 (1971) (permissible for city to deny CUP for automobile service station in area in which several already existed).

¹⁴ If a new law so diminishes the value of the property to the owner that it constitutes a “taking” of private land in violation of the Fifth Amendment of the U.S. Constitution, the government must pay “just compensation” to the property owner. U.S. CONST. amend. V.

¹⁵ See generally 12 N.Y. JUR. 2D BUILDINGS § 333 (2011).

¹⁶ See, e.g., Contra Costa County (California) Ordinance Code chapter 82-38 (concerning the location of businesses which sell alcoholic beverages).

¹⁷ *Id.*

¹⁸ At the time of publication, no challenge had been made to any California ordinance containing a “deemed approved” provision.

¹⁹ See *Harbison v. City of Buffalo*, 4 N.Y.2d 553, 563 (1958) (holding ordinance requiring termination of nonconforming junkyard within 3 years was not constitutionally invalid per se, but must be evaluated to determine the injury to the property owner (citing *People v. Miller*, 304 N.Y. 105 (1952); trial court ultimately determined

ordinance was unconstitutional as applied). *But see* Vill. of Larchmont v. Sutton, 30 Misc. 2d 245, 249 (1961) (town required removal of nonconforming yard signs within 15 months and required the removal of a sign that had been maintained for 10 years); Suffolk Asphalt Supply, Inc. v. Bd. of Trs. of Vill. of Westhampton Beach, 872 N.Y.S.2d 516 (App. Div. 2009).

²⁰ Palmdale Zoning Ordinance, Ch. 9, Art. 92, § 92.15.

²¹ *Id.*

²² This law was enacted in 1994, did not affect existing businesses and has not yet been challenged.

²³ Such a restriction on advertising must be content neutral; i.e., it must apply to *all* advertisements, not specifically to advertisements of tobacco products.

²⁴ N.Y. PUB. HEALTH LAW §§ 300-312 (2011).

²⁵ *Id.* § 308(d). Any local regulation (e.g., local sanitary code) must be approved by the State Department of Health. *Id.* at § 206(b).

²⁶ *See, e.g.,* Leone v. Paris, 251 N.Y.S.2d 277, 280 (1964), modified on other grounds 261 N.Y.S.2d 656; N.Y. PUB. HEALTH LAW § 465; Sanitary Code of Alleghany County Health District, Arts. III, IV and V.

²⁷ Gen. Elec. Capital Corp. v. NY State Div. of Tax Appeals, 2 N.Y.3d 249, 254 (2004); see also Rent Stabilization Ass'n of New York City, Inc. v. Higgins, 83 N.Y.2d 156, 169 (1993); N.Y. CONST. art. III, § 1 (2011).

²⁸ *Boreali v. Axelrod*, 71 N.Y.2d 1, 6 (1987).

²⁹ The PHC is a regulatory body with the authority to enact and revise the State Sanitary Code. The limits on its powers are comparable to those imposed on local boards of health.

³⁰ *Boreali*, 71 N.Y.2d at 11-12.

³¹ *Id.* at 13.

³² *Id.* It should be noted that this was a departure from precedent. Specifically, the court generally does not attribute significance to legislative inaction as proof of the legislature's intention; however, in this case, the court did just that and concluded that the legislature's inability to reach an agreement on the manner in which to address the problem of second-hand smoke exposure manifested an intent to come up with just such a scheme rather than leave it up to the PHC. Since then, other New York courts have declined to attach such significance to legislative inaction. *See* McKinney v. Commissioner of New York State Dept of Health, 836 N.Y.S.2d 794, 805 (2007); Festa v. Leshen, 537 N.Y.S. 2d 147, 157 (1989); *Higgins*, 83 N.Y.2d at 170; New York State Health Facilities Ass'n Inc v. Axelrod, 77 N.Y.2d 340, 348 n.2 (1991).

³³ *Boreali*, 71 N.Y.2d at 14.

³⁴ Nassau Bowling Proprietors Ass'n v. Cnty. of Nassau, 965 F. Supp. 376, 379 (E.D.N.Y. 1997).

³⁵ *Id.* at 380.

³⁶ *Id.* at 377-78, 380.

³⁷ *Id.* at 380.

³⁸ N.Y. PUB. HEALTH LAW §1399-t.

³⁹ *Id.* §1399-aa.

⁴⁰ Dutchess County Sanitary Code, art. 25.

⁴¹ Other federal district courts have applied the analysis in *Boreali* and *Nassau* to strike down ordinances restricting smoking in public places. *See* Dutchess/Putnam Restaurant & Tavern Ass'n v. Putnam Cnty. Dep't of Health, 178 F. Supp. 2d 396, 401-05 (S.D.N.Y. 2001); Leonard v. Dutchess Cnty. Dep't of Health, 105 F. Supp. 2d 258, 263-68 (S.D.N.Y. 2000); Justiana v. Niagara Cnty. Dep't of Health, 45 F. Supp. 2d 236, 243-45 (W.D.N.Y. 1999). Federal courts have not struck down any other health department regulations based on similar grounds. As suggested in the text, it may be that this line of cases resulted from factors unique to the debate over clean indoor air laws, and courts today may analyze tobacco-related issues differently.



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154 Stuart Street
Boston, MA 02116
T 617-368-1465
F 617-368-1368
tobacco@nesl.edu
www.tobaccopolicycenter.org



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