

REDUCING TOBACCO RETAILER DENSITY: A LOCAL TOOL TO PREVENT TOBACCO USE

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In Summer 2016, Health Care Foundation of Greater Kansas City hosted Maggie Turek, a third-year law student as our Summer Health Law Fellow. Ms. Turek was invited to research local policies that could advance health. This is one such research piece. It is our hope that sharing this document will provide local nonprofits, public health entities, and lawmakers with creative options to advance health in our community.

Introduction

In 2015, youth use of traditional cigarettes dropped to an all-time low of 7.0%, down from a peak of 28.6% in 1997.ⁱ In Missouri and Kansas, tobacco use continues to be an enormous health problem, with the percentage of adult smokers in both states -- 22 percent 20 percent, respectively -- well above the national average.ⁱⁱ The higher incidence translates into about \$3 billion spent annually on tobacco-related health care in Missouri and more than \$1 billion spent in Kansas.ⁱⁱⁱ

More than 95% of adult smokers started smoking before the age of 21 and more than two-thirds started smoking before the age of 18.^{iv} Preventing the initiation of tobacco use among youth is critical to reducing the health burden of tobacco, which continues to be the single most preventable cause of disease, disability and death.^v

E-cigarettes represent a rapidly emerging and dangerous new avenue for nicotine addiction. E-cigarette use has more than tripled among youth between 2013 and 2014 and now surpasses traditional cigarettes in terms of prevalence.^{vi} Unfortunately, e-cigarettes are not currently regulated by the FDA, allowing manufacturers to make health claims that are oftentimes inaccurate. E-cigarettes contain nicotine, the most addictive element of traditional tobacco products and research suggests that, for young people, e-cigarettes are a gateway to other tobacco products.^{vii} Since they are a relatively new delivery device, state and county-level data on electronic cigarette usage is not widely available.



Licensing and Zoning, Generally

Licensing and zoning are both tools that may be used to impact tobacco retailers. Both licensing and zoning enable governments to condition retailing, as well as to control the number or location of retailers. Licensing is commonly used to regulate business operations, and zoning is used to regulate the use of land and buildings.

Differences between licensing and zoning:

- Zoning requirements run with a piece of land, even when ownership changes
- Licenses are issued for a certain amount of time and may have to be renewed
- Licenses generally cannot be transferred to a new owner; the rights are given to the individual only

Licensing and Zoning can achieve similar public health goals, as seen with the goal of limiting the location or density of tobacco retailers.

- Licensing: require a license for stores/restaurants that sell tobacco, and prohibit licenses from being issued to these retailers if they're located near schools and areas frequented by youth or if the density of such retailers is too high
- Zoning: amend zoning code, or require Conditional Use Permits, for tobacco retailers to control density or to keep these retailers away from schools and youth-populated areas

Licensing

Licensing can be an effective tool used to enforce tobacco taxes, control laws, or other point of sale regulations by revoking the licenses of retailers who have violated those provisions. Retailers that hold licenses must comply with 'all relevant laws' in order to maintain their license privileges. Licensing, and the threat of license revocation, can sometimes be more effective than fines or fees, which some retailers may be willing to absorb at times.

"Local licensing in California has proven very effective in reducing sales rates to minors. In one study of twenty-six communities with strong licensing laws, the sales rate to minors decreased dramatically in all but one of the communities, and the decrease was often quite substantial; in eleven communities, the youth sales rate dropped by over 30 percent."^{viii}

Although the idea is fairly new to tobacco, retailer licensing has been used to control the density and location of tobacco sales. Localities can set caps on the number of new licenses granted, restrict the proximity of tobacco retailers, or restrict the type of businesses that may be a tobacco retailer (pharmacies, for example).

Another advantage of licensing programs is that, when done correctly, they can be a self-funding mechanism to enforce a municipality's tobacco control laws. Increasing a tobacco license fee, or enacting one where there wasn't one previously, theoretically could provide the money needed to utilize various enforcement mechanisms.



Zoning

Zoning is used quite often in regards to alcohol and firearm sales and has been successful, but it is relatively new to the tobacco scene. Weapon dealers are not only frequently limited to commercial zoned areas, but are also often prohibited from locating near schools, liquor stores, bars, and residential zones. Studies have shown that reducing the physical availability of alcohol through limiting the number and placement of outlets results in fewer alcohol related problems, such as the onset of chronic disease, violence, harmful relationships, and physical and mental wellbeing. It is likely that tobacco would see similar results.

Zoning and land use planning have been used at the local level for a long time, and have been especially successful when justified by public health or safety. One of the first zoning initiatives created out of a need to separate industrial areas and residential areas in order to prevent factory fires from destroying homes. Another early example of a locality using its zoning and land use power is when cities made changes to land use and public services as a response to outbreaks of tuberculosis and cholera.

Zoning laws are generally upheld when they're justified on the four police power purposes: public health, safety, morals, welfare. Welfare is considered synonymous to public health and safety, and courts seem unwilling to rely on morals alone.^x States have authority to restrict private and economic interests, in these cases, so long as the restrictions do not violate Constitutional rights.

State constitutions often delegate police powers to localities, which is where local governments get zoning powers. While there has not been much litigation on this subject in the 8th or 10th Circuits (Missouri and Kansas, respectively), the U.S. Supreme Court has touched on state and local zoning power. The leading case in this field is *Euclid v. Ambler Realty Company*,^{xi} in which the Court affirmed that municipalities have the police powers necessary to regulate public and private land for legitimate purposes. This case held:

- A local government is acting constitutionally when it establishes a zoning ordinance so long as the rationale for zoning has a rational public policy purpose related to public safety, health, or welfare.
- Excluding certain businesses and trades from residential areas is likely related to the health and safety of the community.
- Before a zoning ordinance can be declared unconstitutional, it must be said that its provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.

In regards to tobacco, zoning can be used to:

- Restrict tobacco retailers from operating in certain zones, such as residential zones
- Limit tobacco retailers to operating in certain zones, such as industrial
- Limit the number or density of tobacco retailers in certain zones by not allowing new establishments
 - Reduces the number over time by attrition
- Restrict tobacco retailers from operating in certain areas through Conditional Use Permits (CUPs), such as near youth-oriented facilities or health facilities, or within a certain distance from other retailers
 - Schools, public parks, day care centers, churches, sports fields, playgrounds, hospitals
- Limit the proximity of tobacco retailers to each other
- Restrict operating hours



Zoning can be used to restrict tobacco retailers from operating in certain zones, such as areas zoned as residential; limit tobacco retailers to operating in certain zones, such as industrial or light industrial; limit the number or density of tobacco retailers through attrition; and restricting tobacco retailers through Conditional Use Permits.



Conditional Use Permits

A Conditional Use Permit (CUP) is a zoning power in which the government makes exceptions for specific uses of land as long as certain conditions are met. They are a zoning tool in which the presiding government can make individualized determinations about retail applications, or can impose additional requirements on retailers.

With a CUP requirement, a local government can make an individualized determination and provide flexibility. Governments are then able to deny a zoning request if the applicant cannot show a community need for the proposed use. CUPs allow a locality to control certain uses which have the potential to have negative effects in the community, such as hazardous chemicals or excessive noise.

For example, a conditional use permit may require the retailer to be located in a certain zone, prohibit a retailer from operating within 500 feet of a church, day care, public park or recreational area, school, other tobacco retailer, or area zoned as residential. It can also put additional requirements into place, such as no smoking inside the building if the retailer shares a wall with another retailer or business (only an issue for non-smoke free states).

CUP requirements are seen as favorable over traditional zoning ordinances, which do not allow for any wiggle room and do not adapt to individual circumstances.



Problems with Zoning

Time Frame: One of the biggest things to consider is that zoning typically takes a while to make an impact. This is because new zoning requirements typically do not reach existing businesses. When zoning laws change or are enacted, existing businesses or residences that do not comply are deemed “non-conforming” and the government has three options:

1. Grandfathering - allow the non-conforming use to continue to operate until it goes out of business or substantially changes the nature of its activities
 - a. Most common
2. Amortization – allow the non-conforming use to continue to operate for a specific period of time
3. Require the owner to immediately cease operation or conform to zoning regulations
 - a. Least common
 - b. In many cases, the government may have to pay reasonable compensation

Takings: Although unlikely if done correctly, a zoning ordinance could face a legal challenge based on takings. Takings come from the Just Compensation Clause of the 5th Amendment. A taking (or a physical taking) is when the government acquires/ purchases private land, via eminent domain. A regulatory taking is when a government imposes laws or regulations on the use of property that are so restrictive that they result in no economically viable use of the property. Neither of these takings are likely to present strong legal challenges against a tobacco zoning regulation. A partial regulatory taking, however, could have a stronger case. A partial regulatory taking occurs when a government imposes policies or regulations that have a negative economic impact on a property or business.

When there is a regulatory takings challenge, the court will likely first determine if the imposed restrictions eliminated the economic use or value of the property. This is a high bar—it is unlikely that a regulation will take away every possible economic use of the land. If not, it will evaluate a partial regulatory takings claim based on three factors: the economic impact of the government action; the degree to which the action interferes with reasonable, investment-backed expectations, and the character of the government action. This is essentially a balancing test between the business’s economic interests and the government’s purpose and benefits of enacting the regulation.

In the case of zoning regulations that impact tobacco retailers, local governments have an interest in restricting tobacco purchasing and use because of the harms tobacco causes when used as directed.

Problems with Licensing

Opposition: In contrast with the extended time frame that zoning regulation requires before producing the desired effects, licensing can look appealing because it has a more immediate impact. However, because current business owners are more likely to be affected by licensing rules, they often see much more political opposition. This can add time and money to efforts, as well as damage public opinion of the measure.

Hancock Amendment/Preemption: Additionally, and importantly, there are likely some valid legal arguments preempting localities from enacting a tobacco retail licensing fee. Article X, Section 22 of the Missouri Constitution is the Hancock Amendment. The Hancock Amendment requires that taxes, licenses, or fees enacted by a locality requires a public vote. The purpose of the Amendment is to prohibit “fee increases that are taxes in everything but name.” *Keller v. Marion County Ambulance Dist.*^{xii}

Not all fees are subject to the Hancock Amendment. For example, user fees are not subject to the Amendment. The test, therefore, is whether something is a true user fee or whether it is actually a tax that has been labeled a fee. *Keller* established a five factor test to determine whether a revenue increase by a local government is considered a user fee or is otherwise not considered a tax, license, or fee that is subject to a vote in accordance with the Hancock Amendment. If, after applying the five factors, there is genuine doubt as to whether it constitutes a “tax, license, or fee” in accordance with the Hancock Amendment, the uncertainty defaults to the side of requiring a vote.^{xiii}

Avanti Petroleum challenged a St. Louis County ordinance that, among other things, established annual license fees for tobacco retail establishments. The County argued that the licensing fee was not the type of tax, license, or fee that is subject to the Hancock Amendment. On appeal, the Court of Appeals of the Eastern District of Missouri agreed with the trial court’s holding that the amount in question was a “tax, license, or fee” subject to the Hancock Amendment. As to the five factors, the court found that the fees were to be paid on a periodic (annual) basis, they are paid by all retailers of tobacco products, the amount of fees was not affected by the delivery of a county good or service, the county is not delivering a public good or service, and both enforcement and public health functions historically and exclusively belonged to the government. Because the ordinance was passed by the county without a vote, it was struck down in violation of the Hancock Amendment.^{xiv}

This is vital for two reasons: first, a tobacco retail license at the local level will likely be subject to the Hancock Amendment, meaning it must be put to a vote. Second, regardless of whether the vote passes, additional taxes are preempted by the 1993 tobacco tax law, which includes a very explicit clause preempting local governments from increasing the tobacco tax.^{xv} If a court is willing to consider a licensing fee a “tax, license, or fee” that is subject to the Hancock Amendment, it is likely that it is also preempted by the 1993 legislation. Therefore, increasing the tobacco license fee would likely need to come at the state level.

ⁱ University of Michigan. Monitoring the Future Survey. “Teen cigarette smoking drops to historic low in 2015.”

ⁱⁱ National Health Interview Survey. Centers for Disease Control and Prevention.

ⁱⁱⁱ Campaign for Tobacco-Free Kids. “The Toll of Tobacco in Kansas” and “The Toll of Tobacco in Missouri.”

^{iv} Calculated based on data in the National Survey on Drug Use and Health, 2013. Accessed through Campaign for Tobacco-Free Kids “Increasing the Minimum Legal Sale Age for Tobacco Products to 21.”

^v Centers for Disease Control and Prevention. “Fast Facts on Smoking & Tobacco Use.”

^{vi} Centers for Disease Control and Prevention. “E-cigarette use triples among middle and high school students in just one year.” April 16, 2015.

^{vii} Brian A. Primack, MD, PhD; Samir Soneji, PhD; Michael Stoolmiller, PhD; Michael J. Fine, MD, MSc; James D. Sargent, MD. JAMA Pediatrics. “Progression to Traditional Cigarette Smoking After Electronic Cigarette Use Among US Adolescents and Young Adults.” November 2015 Vol. 169, No. 11.

^{viii} Ian McLaughlin, Tobacco Control Legal Consortium, License to Kill?: Tobacco Retailer Licensing as an Effective Enforcement Tool (2010).

Caveat: the study mentioned was not cited.

^{ix} Griffith Edwards et al., Alcohol Policy and the Public Good.

^x seen in *Lawrence v. Texas*, which arguably eliminated police power justified by morality when the Supreme Court struck down sodomy laws (Legitimate Objectives of Zoning, 91 Harv. L. Rev. 1443, 1445–1446 (1978))

^{xi} 272 U.S. 365 (1926)

^{xii} 820 S.W.2d 301, 305 (Mo. Banc 1991)

^{xiii} *Beatty v. Metropolitan St. Louis Sewer Dist.*, 867 S.W.2d 217, 221 (1993).

^{xiv} *Avanti Petroleum v. St. Louis County*, 974 S.W.2d 506 (1998).

^{xv} 149.192 R.S.Mo.