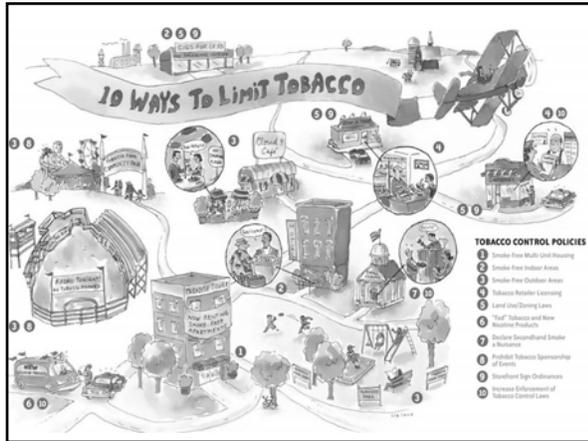


Regulating Tobacco Retailer Infestation



Marice Ashe, JD, MPH
Public Health Law Program
(510) 302-3380 — www.phlaw.org





Land Use Tools Strengthen Other Tobacco Control Efforts

- Land Use complements other tobacco control laws like:
 - Licensing tobacco retailers
 - Self Service Display bans
 - General sign ordinances
 - State tobacco control laws

- Land Use adds enforcement options:
 - CUP can enforce any other tobacco law (condition = “comply with all laws”)



Which Tobacco Retailers are Affected?

- All tobacco retailers may be subject to land use regulation
 - Mom 'n Pops
 - Gas stations
 - Grocery stores
 - Pharmacies



and

- A community may wish to impose additional land use to regulations for "Tobacco Stores"



What is a "Tobacco Store?"



"Tobacco Store" Definition Oakland, CA

- 20% or more of floor space or display area for tobacco-related products,
or
- 75% or more of gross sales receipts from tobacco-related products
- Many definitions are possible depending on community needs



Zoning

- Regulate location: keep tobacco retailers away from children
 - Restrict to certain zones (e.g., industrial)
 - Require set-offs of x ft from:
 - Youth oriented areas and facilities
 - Residential zones
- Limit the number of tobacco retailers:
 - Limit density (x stores per y population)
 - Limit proximity (stores must be x ft apart)



Conditional Use Permits (CUPs)

- An individual determination of suitability for a particular location
 - Use must be legal under zoning laws
 - Can deny permit based on site-specific factors
 - Can condition permit on following certain rules:
 - No self-service displays
 - Clerks selling tobacco must be at least 18 years old
 - Tobacco stores prohibit minors without parent
 - Retailer complies with all state and local tobacco laws
- Permit can be suspended if conditions violated



Eliminating Existing Stores

- **Buy** them out
 - Fast, but **costly**
- **Legal non-conforming uses**
 - **Cannot expand** or change business
- **Amortize**
 - Close operations after several months or years, no cost, but **high risk of litigation**
 - Not legal in every state
- **Wait** for stores to voluntarily close
 - No cost, no risk of litigation, but **slow**



Improving Existing Stores

- “Deemed Approved” status
 - If business is a Legal Nonconforming Use
 - Grant CUP status *if* business conforms to new standards
 - If business does not conform, declare the business a public nuisance
 - Government has authority to close public nuisances after appropriate findings and due process



Deemed Approved con't

- Novel legal approach; strategy upheld in:
 - *City of Oakland v. Superior Court*, 45 Cal. App. 4th 740 (1996). (Existing alcohol retailers subject to new zoning regulations despite state preemption of alcohol sales and licensing)
 - *Hotel & Motel Assoc. of Oakland v. Oakland*, 344 F3d 959 (2003), *cert. denied* 542 U.S. 904 (2004). (New maintenance and habitability standards upheld for existing hotels)



Constitutional Considerations

- Takings
 - Physical takings
 - Regulatory takings: *if all* economically viable use of the land
- Preemption
 - Federal preemption not at issue re: sales of tobacco or generally local land use; however
 - Some states preempt local authority re: land use, amortization, etc.



Land Use Summary

- Zoning can be used to limit the conduct, location, density, and proximity of tobacco retailers
- Conditional Use Permits (CUPs) can require tobacco retailers to conform to special rules relating to the sale of tobacco
- Land use tools can eliminate existing stores but is best used before a problem arises



For More Information

Public Health Law Program
www.phlaw.org
Land use materials related to tobacco:
<http://talc.phi.org/>
Model Land Use Ordinance
Municipal Land Use Authority Memo
Special Authority under California Financing
Laws