

Ask A Lawyer

Q “I’m the director of a local public health department interested in making tobacco products less available in our community. Can you explain the role licensing or zoning might play in our efforts?”

A Issuing licenses and controlling the use of land (often referred to as zoning) are powers that communities across the country use to place conditions on a variety of business activities. Common examples you might recognize are controlling the location of gun shops or the hours that liquor stores can be open.

One reason to consider using licensing or zoning is that they are effective. The objective of many tobacco control laws is generally to protect the health and welfare of the public by reducing tobacco use. Used properly, both licensing and zoning can advance those objectives. Studies have shown that reducing the number and location of tobacco retailers, particularly near schools, can reduce youth initiation rates and reduce the accessibility of tobacco products for anyone trying to quit smoking.

Another reason is that these types of laws can be relatively easy to implement, especially if your community has a history of licensing or zoning other businesses. Your community might have a tried-and-true framework in place that can be readily adapted to fit the needs of a tobacco control law, and there may be staff well-versed in the process who can share their insights with you.

Licensing

The general concept with licensing is that, consistent with its police power to protect and promote the health of the community, a government requires all businesses that sell tobacco to apply for and purchase a license from the government. The government can then use the license to place conditions on the retailer and enforce laws that apply to the retailer. For example, a licensing ordinance could assert that if the licensee violates any federal, state or local law, such as by selling tobacco products to minors, it risks being fined or having its license revoked.

Licenses can also be used to control the locations where tobacco is sold. For example, an ordinance might prohibit the issuance of a tobacco retailer license for stores that are within 1,000 feet of a school. Similarly, a licensing ordinance might help reduce the overall number of tobacco retailers in a community by limiting the distance between tobacco retailers; limiting the number of licenses that can be issued within the community; reducing the number of licenses each year up to a certain point; or preventing licenses from being transferred when a tobacco retailer business is sold.

Zoning

Similar to licensing, the exercise of land use power is a function of the government’s police power. The general concept is to keep incompatible uses of



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If you have a question about a tobacco law-related issue that you’d like us to address in this column, or a topic you’d like us to cover in future publications, please send us an e-mail at tobaccolaw@wmitchell.edu. Thank you!

land apart from one another. In the context of tobacco control, a zoning ordinance could prohibit retailers from doing business within a certain distance from schools or playgrounds; require that tobacco retailers only be allowed in areas that are zoned for industrial use; or limit the number of tobacco retailers or their proximity to one another.

Which option is best for us?

Both might work. But in making your decision, it is important to gather answers to some important questions.

You should first determine whether your community has the power to carry out a licensing or zoning scheme. This depends largely upon state and local laws, and the authority they preserve for themselves or grant to communities. Pay significant attention to any preemptive language related to tobacco products and any home rule powers that have been granted to your community. But simply because you do not see your community using licensing or zoning to regulate businesses does not mean the power does not exist. It may be that the power exists, but simply hasn't been used.

You should also note whether your community has a strong and active licensing framework or zoning authority. And give some thought to which route might be more politically feasible, and which governmental unit might be most receptive to working with you on drafting your ordinance, helping administer it, enforcing it, etc.

Regardless of the option you choose, part of your process should include a comprehensive analysis of potential legal challenges you might face. Existing businesses whose location or activity is out of compliance with your new ordinances may have legal claims. Seek input from your attorney on these questions and your proposed course of action.

Licensing and Zoning Checklist

Determine your goals

- Regulating location
 - Require that tobacco retailers not be located within a certain distance of schools, playgrounds, or youth centers
 - Restrict new tobacco retailers to areas zoned for light industrial or industrial use, to keep retailers away from youth-oriented or residential areas
- Regulating density
 - Prohibit retailers from being too close to each other
 - Limit or reduce the number of retailers in a community
- Regulating other factors
 - Prohibit new tobacco retailers from opening
 - Restrict the hours of operation of existing tobacco retailers

Determine your authority

- Do you have the power to license or zone?
- If not, can you obtain the power?
- Has the power been used in the past for other business models?

Match your objectives and authority to the possible tools

- Is one option better suited to achieving your goal?
- Is one option more politically appealing within your community?
- Is one option more practical?
- Who are possible enforcement agencies?

Tobacco 101 Training

The Tobacco Technical Assistance Consortium (TTAC) is offering an updated training kit for presenters and a 2-day on-site training program, including tools, presentations, fact sheets and related resources, on how to develop a plan for tobacco control and prevention in a community. The training kit is designed to help a trainer provide an interactive experience with visual aids, group exercises, guided group discussions and individual learning activities. It can also be used as a self-teaching tool for individuals who want to master the fundamentals of tobacco control.

» [Read](#) the Training Kit material, including PowerPoint presentations, script, Presenter's Guidebook, Essential Resources Guide, fact sheets, and activity work sheets.

» [Learn](#) more about inviting a TTAC expert to work with your organization.

ANR's latest Smoke-free Model Ordinance Now Available

Americans for Nonsmokers' Rights has released its most recent comprehensive smoke-free model ordinance prohibiting smoking in all workplaces and public places for use in the field. ANR's latest (April 2010) model ordinance includes new studies on the harmful effects of secondhand smoke, new provisions increasing the smoke-free protections in the law, and amendments to tighten and clarify several provisions.

Among the new ANR amendments is language defining "e-cigarette" as follows: "E-cigarette means any electronic oral device, such as one composed of a heating element, battery, and/or electronic circuit, which provides a vapor of nicotine or any other substances, and the use or inhalation of which simulates smoking. The term shall include any such device, whether manufactured, distributed, marketed,

or sold as an e-cigarette, e-cigar, e-pipe, or under any other product name or descriptor.

» [Read ANR's new model ordinance.](#)

Also, check out ANR's latest [Fundamentals of Smoke-free Workplace Laws](#) – guiding principles and recommendations for developing and implementing effective smoke-free policies based on experiences and lessons learned from tobacco control advocates throughout the country over the past several decades.

New Edition of ALA's State Tobacco Law Summaries

The American Lung Association recently released the latest edition of State Legislated Actions on Tobacco Issues (SLATI), its comprehensive compilation/summary of state tobacco control laws, which reflects tobacco control laws as they stood on January 2, 2010. According to the SLATI online report, most states are falling short on tobacco policies. The SLATI report includes state information on smoke-free laws and policies, cigarette taxes, tobacco prevention and cessation programs, and other tobacco-related state-specific data. The report is updated regularly to reflect changes in laws occurring throughout the year.

» [Visit the SLATI website.](#)

Tobacco Industry Resources from the Public Health Advocacy Institute

The Public Health Advocacy Institute has several resources available on the tobacco industry, including a new one-hour archived webinar titled "[Tag! You're It: How Big Tobacco Shifts Blame Back Onto the Public.](#)" Other resources, such as issue briefs on "The Tobacco Industry's Use of Corporate Social Responsibility Rhetoric & Tactics" and "Denormalization of Tobacco Industry Corporate Social Responsibility Initiatives," are available at the Institute's website at www.phaionline.org.

The International Legal Consortium: A Global Tobacco Law Resource

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Five other highly experienced Legal Advisers work also work at the International Legal Consortium: **Rose Nathan, Liz Candler, Monique Muggli, Yu Xiuyan, and Aaron Schwid**, as well as Executive Assistant **Daniel Vidikan**.

For more information about the Campaign for Tobacco-Free Kids' International Resource Center, please visit <http://tobaccofreecenter.org/>.

Upcoming Events

FDA's Tobacco Retailer Training Sessions

The Food and Drug Administration is hosting a series of live retailer training sessions on federal tobacco regulations. Retailers who sell tobacco are encouraged to participate in the training session in person, by phone, or by webcast. The first session was held in Boston on July 19. The remaining four retailer training sessions will be held this summer in Atlanta, Georgia; Chicago, Illinois; Dallas, Texas; and Los Angeles, California.

» [Visit the FDA website for more information.](#)

NALBOH's 18th Annual Conference

The National Association of Local Boards of Health will hold its 18th annual conference August 5-7, 2010, in Omaha, Nebraska. The focus of this year's conference is "The Journey to the Future: Facing Public Health Challenges Today for a Healthier Tomorrow."

» [Visit the event website for conference and registration information.](#)

National Conference on Public Health Law

The Public Health Law Association, the American Society of Law, Medicine & Ethics and the Centers for Disease Control and Prevention will hold a national conference September 13-15, 2010, in Atlanta, Georgia. The conference goals are to (1) examine the role of law and policy in promoting, protecting and improving global and domestic public health; and (2) help build effective partnerships to accomplish public health law and policy objectives. Public Health Law Center and Tobacco Control Legal Consortium staff will present on federal regulation of tobacco products, and preemption and movement building in public health.

» [Visit the conference website for conference and registration information.](#)



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Disclaimer: While we make every effort to ensure the information in this newsletter is accurate and complete, the Tobacco Control Legal Consortium is unable to guarantee this information. Material is provided for informational purposes and is not intended as legal advice. We encourage readers with questions to consult an attorney familiar with the laws of their jurisdictions.

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