



# Municipal Authority to Regulate the Location and Operation of Tobacco Retailers

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## **Background**

Many California communities are seeing an increase in the number of stores that sell tobacco products. This memo addresses how public health can be improved when local governments exercise their constitutional, statutory, and charter authority to regulate the uses of land within their jurisdictions to control tobacco retailing.<sup>1</sup>

### **I. Police Powers**

The California State Constitution grants cities and counties the “police power” to enact ordinances and regulations that protect the health, safety, welfare and morals of their citizens.<sup>2</sup> This police power is broad in scope and elastic in nature, expanding to meet the developments of modern life.<sup>3</sup> A local ordinance is legitimate so long as the police power exercised has a rational relationship to a legitimate state purpose.<sup>4</sup> While not required in an ordinance, legislative findings help demonstrate the rationality and legitimacy of the government’s actions and can be especially beneficial if the ordinance raises First Amendment or preemption concerns.<sup>5</sup> The attached Model Land Use Ordinance includes data that a community may wish to incorporate directly into its own local ordinance or keep on file to defend any legal challenges.

### **II. Land Use Controls**

Controlling land use, through zoning regulations for example, has long been recognized as a fundamental local police power. Zoning ordinances enacted by a City Council or Board of Supervisors determine how land may be used in the city or county as a whole and within a particular zones within the city or county.

Two main land use tools are described below with examples of how each can be used to protect public health and safety. First, zoning ordinances can put general and location-specific

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restrictions on certain uses of property. Second, zoning ordinances also can require conditional use permits for certain purposes, such as tobacco retailing. These tools are generally applied *before* land has been dedicated to a particular use. However, under certain circumstances these tools can be used to control existing land uses, whether through the “legal nonconforming use” and “deemed approved” techniques, or through “amortization” (see below for more information).

### **A. Zoning Ordinances to Regulate the Location of a Tobacco Retailer**

Zoning ordinances are used to establish the uses of property in different areas or “zones” within a city’s or county’s boundaries. Ideally, zoning ensures that activities which should be near each other—such as housing and grocery stores—can be near each other, and that those activities which should be separated—such as housing and heavy industry—are indeed separate. Using the tool of conditional use permits (discussed more fully below), zoning can ensure that individualized decisions are made on the compatibility of certain uses.

Given that tobacco products harm community health and safety, it is reasonable for local government to assess whether the location of tobacco retailers is compatible with residential areas or with other community land uses. This government role is especially important where youth access is concerned, given that 57% of 10<sup>th</sup> graders and 38% of 8<sup>th</sup> graders perceive that it would be easy for them to obtain cigarettes from a retail source,<sup>6</sup> and the best predictor of adolescent experimentation with cigarettes is the perception that they are easily available.<sup>7</sup>

To diminish the harm caused by tobacco in a community, local governments can use zoning to:

- Require that tobacco retailers be located away from areas frequented by children (e.g., schools, playgrounds, video arcades) on the grounds that children are not allowed to purchase tobacco products and should not be tempted to make illegal purchases of tobacco products.<sup>8</sup>
- Restrict new significant tobacco retailers to light industrial or industrial use zones to control the “secondary effects” of such businesses such as increased youth smoking rates.<sup>9</sup>
- Limit the total number of tobacco retailers in any community. If a city or county determines that sufficient outlets for tobacco products already exist in a community, the government can prohibit new retailers from opening.<sup>10</sup>
- Limit the proximity of all tobacco retailers to each other, ensuring, for example, that each corner at an intersection is not occupied by a tobacco retailer.

TALC’s Model Land Use Ordinance applies all of these concepts to tobacco retailers.

### **B. Conditional Use Permits for the Operation of Tobacco Retailers**

Although a community may decide to allow new tobacco retailers to open and existing retailers to continue to operate, it may still impose conditions on all or some retailers. These conditions can be imposed on a standardized basis through a general police power or zoning ordinance, or on an individualized basis through “conditional use permits” (CUPs).

CUPs are used to make an *individualized* determination as to the suitability of a proposed use in a particular, unique location.<sup>11</sup> For example, with appropriate findings linking a decision to

public health and safety, a city can deny a business's CUP application if its location appears harmful to the public welfare, such as a tobacco retailer locating next to a school.<sup>12</sup>

Examples of controls that may be adopted by general police powers, or imposed via zoning or a CUP include:

- Self-service display bans that require the tobacco product to be retrieved by a retail clerk and given to the customer. To apply to existing tobacco retailers, a self-service ban is best imposed in a general police power ordinance.<sup>13</sup> A self-service display ban additionally may be made a condition of a CUP or license.
- Requirements that tobacco retailers post warnings concerning the prohibition against sales to minors, and post signs stating the legal age to buy tobacco products and warning that the retailer will check identification for all purchases. Again, to apply to existing tobacco retailers, these requirements are best imposed in general police power ordinances. To increase enforcement opportunities, the requirements may be made a requirement of a CUP or license.
- Requirement that any store clerk that sells tobacco products be at least 18 years old.
- Requirement that the retailer comply with all local, state, and federal tobacco control laws.
- Prohibition on smoking in retail or wholesale tobacco shops (to eliminate the exception contained in Californian Labor Code section 6404.5).
- Other individualized conditions can be drafted for each CUP. For example, conditions can be imposed related to the floor space devoted to tobacco products, the hours of operation, etc.

TALC recommends that land use ordinances declare that a violation of any standardized or individualized condition or restriction on the business constitutes a public nuisance. This will give the local government the authority to close down a tobacco retailer if there is sufficient evidence that the business is violating any part of the ordinance.

Similarly, a violation of the ordinance—or any other law—constitutes an unfair business act or practice under California Business and Professions Code section 17200.<sup>14</sup> TALC recommends that land use ordinances state this fact explicitly. Section 17200 gives the local government the authority to collect \$2,500 in damages from a tobacco retailer for each violation.<sup>15</sup> TALC's Model Land Use Ordinance includes these recommended statements.

### **C. Options for Regulating Existing Tobacco Retailers**

Unlike general police power ordinances, new zoning ordinances or amendments usually only apply to *new* businesses (e.g., they have *prospective* application). This is because an existing property owner or occupant may have a legal right to continue a lawfully established business or other use of land.<sup>16</sup> However, zoning requirements can sometimes be applied *retrospectively* to existing uses of land through such tools and concepts as legal nonconforming uses, amortization, and deemed approved status.

**Legal Nonconforming Uses:** A legal nonconforming use is one that was legal when it began, but is now prohibited by an ordinance. Zoning ordinances generally cannot and do not require the immediate termination of legal nonconforming uses. Rather, the nonconforming uses are “grandparented”—e.g., they are allowed to remain despite the new law.<sup>17</sup>

**Amortization:** Communities can either terminate an existing use of property immediately, through a cash payment, or after a period of time, through “amortization.” In the context of land use, amortization is the “paying down” of a financial obligation over time—like paying down a mortgage. The constitutional obligation that a public entity pay “just compensation” for property it appropriates or makes unusable is satisfied by allowing the nonconforming use to continue for a set period of time. The appropriate “amortization period” depends upon many factors and is calculated on a case-by-case basis.<sup>18</sup> Many localities already have zoning ordinances that include amortization procedures and standardized formulae. In fact, many ordinances amortize a business over the course of six months or a year (and in some instances even less time), and give the business owner the burden of showing why a longer period of time may be needed due to unique circumstances pertaining to his/her business.

**Deemed Approved Status:** A relatively new government tool is to declare an existing business that would otherwise be a “legal nonconforming use” to be “deemed approved” (e.g., no longer a legal nonconforming use) *if* the business conforms to new regulatory standards. The new standards would be the same as those applied to *new* businesses in the conditions of their CUPs.

Several jurisdictions have successfully regulated existing alcohol retailers by granting them “deemed approved” status if they comply with new conditional use permit standards (e.g., graffiti abatement, limited hours or operation, and outside lighting requirements). TALC’s Model Land Use Ordinance applies this tool by requiring existing tobacco retailers to conform to “Deemed Approved Performance Standards,” which are identical to the “Conditional Use Permit” conditions (e.g., self-service display ban, minimum age for clerks, and compliance with all tobacco laws (see section II.B above)). A tobacco retailer who fails to meet the new standards is declared a “public nuisance” and can be shut down. While successfully used to control the secondary effects of alcohol sales (such as loitering, public drunkenness, graffiti, etc.), this new tool is untested as a method to control the secondary effects of tobacco sales (e.g., increased youth smoking rates).

## Conclusion

A land use ordinance is a powerful tobacco control tool and is uniquely suited to controlling the *location* of tobacco retailers. Land use controls, just like other regulations, can be adopted by a community at any time. It may be most advantageous if the controls are adopted *before* a tobacco retailer seeks to open in an unsuitable location within the community. This way a city or county can lawfully prevent a tobacco retailer from opening across the street from a school or playground, while at the same time avoiding potential legal challenges from existing retailers.

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- <sup>1</sup> For purposes of this memo, “tobacco retailer” means a store that sells tobacco products. Each community must develop a definition of a tobacco retailer before it enacts an ordinance to regulate such retailers, which may change to meet the particular needs or goals of a city or county. The model ordinance attached to this memorandum suggests two definitions, based on Oakland’s Planning Code. See Oakland Planning Code, § 17.09.40.
- <sup>2</sup> See Cal. Const. art. XI, § 7.
- <sup>3</sup> See *Miller v. Board of Public Works*, 195 Cal. 477, 484 (1925); *Birkenfield v. City of Berkeley*, 17 Cal. 3d 129 (1976). See also, *Consolidated Rock Products v. City of Los Angeles*, 57 Cal. 2d 515, 522 (1962).
- <sup>4</sup> See *Stubblefield Constr. Co. v. City of San Bernardino*, 32 Cal. App. 4th 687, 712-13 (1995). For instance, if a city zones an area of the city to preclude a proposed development solely because the developer had political differences with the mayor, it has performed an arbitrary or capricious act without rational basis because there is no link between the developer’s political beliefs and the use of the property for a development. However, if there is any reason to preclude development in the area, such as increased traffic, neighborhood opposition or protection of a wetland, the zoning must be upheld. See, e.g., *Village of Willowbrook v. Olech*, 120 S.Ct. 1073 (2000) (concluding that arbitrary and discriminatory zoning also can violate equal protection).
- <sup>5</sup> See *Arnel Development Co. v. City of Costa Mesa*, 28 Cal. 3d 511, 520 (1980) (noting that zoning is a legislative act reviewable only under traditional mandate principles, that is, for arbitrary and capricious action). See also, *Lockard v. City of Los Angeles*, 33 Cal. 2d 453, 460 (1949) (holding that zoning legislation is presumed to be constitutional, and this presumption can only be overcome by a clear showing of arbitrariness and irrationality).
- <sup>6</sup> Tobacco Control Section, Cal. Dep’t of Health Servs., *Independent Evaluation of the California Tobacco Control Prevention & Education Program: Wave 2 Data, 1998, Wave 1 & Wave 2 Data Comparisons 1996-1998 76* (2001), available at <http://www.dhs.ca.gov/tobacco/documents/Wave2IEReport.pdf> (last updated Apr. 24, 2001).
- <sup>7</sup> Leslie A. Robinson et al., *Predictors of Risk for Different States of Adolescent Smoking in a Biracial Sample*. 65 J. of Consultative Clinical Psychol. 653,657 (1997).
- <sup>8</sup> Cf. *Suter*, 57 Cal. App. 4th at 1133 (upholding prohibition on minors entering store whose “primary” business is selling firearms, on the grounds that minors are barred from owning firearms).
- <sup>9</sup> Cf. *Lakeland Lounge of Jackson, Inc.*, 973 F.2d at 1258-59 (upholding the regulation of adult businesses premised on the bad “secondary effects” of those establishments such as crime, deterioration of retail trade, and a decrease in property values).
- <sup>10</sup> Cf. *Van Sicklen*, 15 Cal. App. 3d at 127-28 (upholding denial of use permit for gas station on the grounds that there was a sufficient number of stations in the area).
- <sup>11</sup> See *Saad v. City of Berkeley*, 24 Cal. App. 4th at 1206 (1994) (upholding a denial of a permit to build a single-family residence based on an individualized design review process).
- <sup>12</sup> *Id.* at 1259.
- <sup>13</sup> See *Bravo Vending v. City of Rancho Mirage*, 16 Cal. App. 4th 383 (1993).
- <sup>14</sup> *Hewlett v. Squaw Valley Ski Corp.*, (1997) 54 Cal. App. 4th 499, 529-33 (1997) (holding that ongoing violation of a conditional use permit violated the local zoning ordinance and was basis for unfair business practice. “The unfair competition statute is not confined to anticompetitive business practices, but is also directed toward the public’s right to protection from fraud, deceit, and unlawful conduct”); Cal. Bus. & Prof. Code § 17200 (1997) in pertinent part states, “unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice.” See, e.g., *Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy*, (1992) 4 Cal. App. 4th 963, 967 (1992) (finding an unfair business practice action based on a violation of Alameda County ordinance regulating sale of raw milk).
- <sup>15</sup> Cal. Bus. & Prof. Code § 17206 (1997).
- <sup>16</sup> See *Bauer v. San Diego*, 75 Cal. App. 4th 1281 (1999); *Hansen Bros. Enterprise v. Board of Supervisors*, 12 Cal. App. 4th 533, 552 (1996) (stating “a provision which exempts existing nonconforming uses ‘is ordinarily included in zoning ordinances because of the hardship and doubtful constitutionality of compelling the immediate discontinuance of nonconforming uses.’”); *Goat Hill Tavern v. City of Costa Mesa*, 6 Cal. App. 4th 1519 (1992).
- <sup>17</sup> If a legal nonconforming use is considered to be seriously injurious to public health, welfare, and safety over and above its nonconforming status, it may be terminated as a public nuisance. For example, a city may not be able to close down an existing mining operation simply by rezoning the area but could close it down if it endangered several new residential subdivisions.
- <sup>18</sup> *Bohannon v. City of San Diego*, 30 Cal. App. 3d 416, 426 (1973).