

# ZONING AND LICENSING TO REGULATE THE RETAIL ENVIRONMENT AND ACHIEVE PUBLIC HEALTH GOALS

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## I. INTRODUCTION

Picture a grocery store or corner store in your community. Ask yourself:

How did you get there? Is the store close to your home so you can easily walk or bike there? Are there sidewalks, street crossings, or bicycle paths and trails that make it safe and comfortable to do so?

How does it look from the outside? Are there clean windows, lighting, and friendly signage?

What do you see when you walk in? Are the shelves stocked with fresh, appealing produce, healthy snacks, and grocery staples?

Does the store provide healthy options at an affordable price?

In too many neighborhoods, the answers to these questions reveal major barriers to improving public health. Grocery stores are often located in areas that are difficult or impossible to reach by active transportation, such as walking and biking. Corner stores may be poorly maintained, with broken lighting, graffiti, and windows covered by junk food, liquor, and cigarette ads. Instead of fresh produce, many stores are stocked with junk food, alcohol, and tobacco products. Healthy food is less available and more expensive than unhealthy options. This is the reality confronting community residents across the country who are working to make changes in their local stores.

Meanwhile, public health advocates are missing the opportunity to fuse related goals for the retail environment into more holistic policy change. Existing

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public health efforts reflect a “siloed” approach to community health, separated by funding streams and issues. The tobacco control movement is focused on ensuring that stores follow rules aimed at prohibiting sales to youth. Community members concerned about crime, violence, and alcohol addiction are fighting to close down existing liquor stores and stop new ones from opening. Public health departments alarmed by rising rates of obesity are partnering with mom-and-pop grocers to get more healthy options on shelves and to promote these options with cooking demonstrations and marketing campaigns. Each of these efforts tackles different challenges associated with the retail environment, and each can be supported by policy strategies. This article articulates a vision for how policy can be used in a more holistic way to improve community health outcomes broadly, instead of addressing one harmful product at a time.

Specifically, the article discusses two policy approaches—zoning and licensing—that communities can take to improve the public health impact of brick-and-mortar food retailers. Zoning and licensing are not new tools for public health. For instance, zoning policies have long been used to shield residents from harmful and polluting land uses. In addition, states have historically used licensing to ensure that professionals, such as doctors and beauticians, have the knowledge and skill to practice without endangering the people they serve. These tools, however, have not been applied to the retail environment with the aim of preventing chronic disease. This article proposes new ways to use zoning and licensing to address the health harms associated with retailers who sell unhealthy products and who contribute to a built environment that discourages physical activity.

Section 0I describes the connection between the retail environment and public health. Section III sets out the basics of zoning and licensing. The crux of the article is section IV, which explores examples of how zoning and licensing policies directed at retail food outlets can achieve six distinct public health goals: (1) limiting the location or density of retailers who sell unhealthy products, (2) regulating the mix and types of products sold by retailers, (3) leveraging participation in federal food assistance programs, (4) ensuring that retailers are designed in a way that supports safe, walkable and bikeable communities, (5) enforcing federal and state laws, and (6) introducing incentives to encourage storeowners to adopt additional measures to improve health. Finally, section V touches on legal issues that may arise when applying zoning or licensing in the retail food context.

## II. CHRONIC DISEASE, COMMUNITY CONDITIONS, AND THE RETAIL FOOD ENVIRONMENT

Chronic, preventable diseases such as heart disease, stroke, diabetes, and cancer are the leading cause of death and disability in the nation, responsible for seven out of ten deaths annually and over three-quarters of healthcare spending.<sup>1</sup> More than two-thirds of American adults, and almost one third of children and

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1. *Chronic Diseases: The Power to Prevent, The Call to Control: At a Glance 2009*, CENTERS FOR DISEASE CONTROL & PREVENTION, [www.cdc.gov/chronicdisease/resources/publications/AAG/chronic.htm](http://www.cdc.gov/chronicdisease/resources/publications/AAG/chronic.htm) (last updated Dec. 17, 2009).

teens, are overweight or obese<sup>2</sup> and thus at increased risk for a range of serious illnesses.<sup>3</sup> Tobacco use remains the nation's leading cause of preventable death, with nearly 440,000 deaths each year in the United States attributable to tobacco-related disease.<sup>4</sup> About one in six Americans aged eighteen years and older engaged in binge drinking in the past thirty days, and nearly forty-five percent of U.S. high school students report having had at least one drink of alcohol in the past thirty days.<sup>5</sup> Frequent, heavy alcohol use can elevate the risk of developing a number of immediate and longer-term health conditions. The effects of excessive alcohol use include higher morbidity and mortality rates related to accidents and injuries, alcohol poisoning, birth defects and miscarriages, and domestic violence.<sup>6</sup> Over time, chronic alcohol use can lead to the development of a variety of mental and physical health conditions, such as: liver diseases, mental health issues (including depression and suicide), cardiovascular conditions, and impaired neurological function.<sup>7</sup> In the United States, excessive alcohol use is responsible for more than 79,000 deaths annually and \$24.6 billion in healthcare costs.<sup>8</sup>

Health education and medical care alone cannot solve our nation's chronic disease epidemic because our health status is inextricably linked to our social, economic, and physical environments.<sup>9</sup> The neighborhoods we live in, the educational and career opportunities that are available to us, and our

2. *FastStats: Obesity and Overweight*, CENTERS FOR DISEASE CONTROL & PREVENTION, [www.cdc.gov/nchs/fastats/overwt.htm/](http://www.cdc.gov/nchs/fastats/overwt.htm/) (last updated Oct. 10, 2012); *Adolescent and School Health: Childhood Obesity Facts*, CENTERS FOR DISEASE CONTROL & PREVENTION, [www.cdc.gov/healthyyouth/obesity/facts.htm](http://www.cdc.gov/healthyyouth/obesity/facts.htm) (last updated Feb. 19, 2013).

3. See Div. of Nutrition, Physical Activity, & Obesity, Ctrs. for Disease Control & Prevention, *Obesity: Halting the Epidemic by Making Health Easier: At a Glance* (2011), available at [www.cdc.gov/chronicdisease/resources/publications/aag/pdf/2011/Obesity\\_AAG\\_WEB\\_508.pdf](http://www.cdc.gov/chronicdisease/resources/publications/aag/pdf/2011/Obesity_AAG_WEB_508.pdf) (noting the health problems associated with obesity).

4. U.S. Dep't of Health & Human Servs. & Ctrs for Disease Control & Prevention, *Annual Smoking - Attributable Mortality, Years of Potential Life Lost, and Productivity Losses - United States 1997-2001*, 54 MORBIDITY & MORTALITY WKLY. REP. 625, 625-28 (2005), available at [www.cdc.gov/mmwr/preview/mmwrhtml/mm5425a1.htm](http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5425a1.htm).

5. *Chronic Diseases*, *supra* note 1 (qualifying binge drinking as five or more drinks for men and four or more drinks for women during a single occasion).

6. Gordon Smith et al., *Fatal Nontraffic Injuries Involving Alcohol: A Metaanalysis*, 33 ANN. OF EMERGENCY MED. 659, 659-68 (1999); Lawrence A. Greenfeld, *Alcohol and Crime: An Analysis of National Data on the Prevalence of Alcohol Involvement in Crime* (1998), available at [bjs.ojp.usdoj.gov/content/pub/pdf/ac.pdf](http://bjs.ojp.usdoj.gov/content/pub/pdf/ac.pdf); Sanap M. Chapman, *Severe Ethanol Poisoning: A Case Report and Brief Review*, 5 CRITICAL CARE & RESUSCITATION 106 (2008); Ulrick Kesmodel et al., *Moderate Alcohol Intake in Pregnancy and the Risk of Spontaneous Abortion*, 37 ALCOHOL & ALCOHOLISM 87 (2002).

7. Melonie Heron, *Deaths: Leading Causes for 2004*, 56 NAT'L VITAL STAT. REP. 2, 3 (2004); Ricardo Castaneda et al., *A Review of the Effects of Moderate Alcohol Intake on the Treatment of Anxiety and Mood Disorders*, 57 J. CLINICAL PSYCHIATRY 207, 207-12 (1996); Jurgen Rhem, *Alcohol-Related Morbidity and Mortality*, 27 ALCOHOL RES. & HEALTH 39, 39 (2003).

8. Div. of Adult & Cmty. Health, Ctrs. for Disease Control & Prevention, *Excessive Alcohol Use: Addressing a Leading Risk for Death, Chronic Disease, and Injury* 2 (2011), available at [www.cdc.gov/chronicdisease/resources/publications/aag/pdf/2011/Alcohol\\_AAG\\_Web\\_508.pdf](http://www.cdc.gov/chronicdisease/resources/publications/aag/pdf/2011/Alcohol_AAG_Web_508.pdf); Ellen Bouchery et al., *Economic Costs of Excessive Alcohol Consumption in the U.S.*, 41 AM. J. PREVENTIVE MED. 516, 618 (2006).

9. GÖRAN DAHLGREN & MARGARET WHITEHEAD, *EUROPEAN STRATEGIES FOR TACKLING SOCIAL INEQUITIES IN HEALTH: LEVELING UP PART 2* at 6-7 (2007), available at [www.euro.who.int/\\_data/assets/pdf\\_file/0018/103824/E89384.pdf](http://www.euro.who.int/_data/assets/pdf_file/0018/103824/E89384.pdf).

interpersonal networks and cultural norms may affect health at least as much as our individual biology and personal choices.<sup>10</sup> Low-income communities and people of color are more likely to be exposed to unhealthy conditions, such as environmental pollution, neighborhood crime, low-quality housing, and high concentrations of fast food outlets and liquor stores.<sup>11</sup> Conversely, they are less likely to have access to local resources that promote healthful living such as good schools, stable employment, affordable health care, safe parks and recreational spaces, places to buy healthy food, and meaningful opportunities for civic engagement.<sup>12</sup> These disparities are emphasized when comparing life expectancy rates across small geographical areas. For example, the life expectancy for people living in one zip code in the affluent city of Walnut Creek, California is 87.4 years, while twelve miles away in inner-city Oakland, the life expectancy is as low as 71.2 years—a difference of sixteen years.<sup>13</sup>

The retail environment is emerging as a priority for advocates pursuing local policy interventions to address structural inequities associated with high chronic disease rates in underserved neighborhoods. Twelve million Americans now live in “food deserts”—places where access to full-service grocery stores is severely limited.<sup>14</sup> Many of these same communities have also been dubbed “food swamps” because they are heavily saturated with fast food outlets, liquor stores, and convenience markets selling mainly junk food, alcohol, and tobacco.<sup>15</sup>

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10. See Office of Minority Health, Ctrs. for Disease Control & Prevention, *CDC Health Disparities & Inequalities Report (CHDIR)*, 60 MORBIDITY & MORTALITY WKLY. REP. SUPP., Jan. 14, 2011, at 16, 21, 31, available at <http://www.cdc.gov/mmwr/pdf/other/su6001.pdf>.

11. *Id.*; Kimberly B. Morland et al., *Neighborhood Characteristics Associated with the Location of Food Stores and Food Service Places*, 22 AM. J. OF PREVENTIVE MED. 23, 23 (2002).

12. James B. Kirby & Toshiko Kaneda, *Neighborhood Socioeconomic Disadvantage and Access to Health Care*, 46 J. HEALTH & SOC. BEHAV. 15, 15–16 (2005); Morland, *supra* note 11, at 26–29; Andrea Altschuler et al., *Local Services and Amenities, Neighborhood Social Capital, and Health*, 59 SOC. SCI. & MED. 1219, 1227–29 (2004); Richard M. Carpiano, *Neighborhood Social Capital and Adult Health: An Empirical Test of a Bourdieu-Based Model*, 13 HEALTH & PLACE 639, 649–55 (2007).

13. Suzanne Bohan & Sandy Kleffman, *Shortened Lives: Where You Live Matters, Day 1: Three East Bay ZIP Codes, Life-and-Death Disparities*, CONTRA COSTA TIMES, Jan. 26, 2010, available at [www.insidebayarea.com/life-expectancy/ci\\_13913952](http://www.insidebayarea.com/life-expectancy/ci_13913952).

14. ECON. RESEARCH SERV., ACCESS TO AFFORDABLE AND NUTRITIOUS FOOD: MEASURING AND UNDERSTANDING FOOD DESERTS AND THEIR CONSEQUENCES (2009), available at [www.ers.usda.gov/media/242675/ap036\\_1\\_.pdf](http://www.ers.usda.gov/media/242675/ap036_1_.pdf); Sarah Treuhaft & Allison Karpyn, *The Grocery Gap: Who Has Access to Healthy Food and Why It Matters* 6 (2010), available at [www.policylink.org/atf/cf/%7B97C6D565-BB43-406D-A6D5-ECA3BBF35AF0%7D/FINALGrocery Gap.pdf](http://www.policylink.org/atf/cf/%7B97C6D565-BB43-406D-A6D5-ECA3BBF35AF0%7D/FINALGrocery%20Gap.pdf); see Samina Raja et al., *Beyond Food Deserts: Measuring and Mapping Racial Disparities in Neighborhood Food Environments*, 27 J. PLANNING EDUC. & RES. 469, 479–82 (2008), available at [www.ppgbuffalo.org/wp-content/uploads/2010/06/Raja-Beyondfooddeserts.pdf](http://www.ppgbuffalo.org/wp-content/uploads/2010/06/Raja-Beyondfooddeserts.pdf); Manuel Franco et al., *Neighborhood Characteristics and Availability of Healthy Foods in Baltimore*, 35 AM. J. PREVENTIVE MED. 561, 561 (2008), available at <http://deepblue.lib.umich.edu/bitstream/2027.42/61835/1/Neighborhood%20Characteristics%20and%20Availability%20of%20Healthy%20Foods%20in%20Baltimore.pdf>; Latetia V. Moore & Ana V. Diez Roux, *Associations of Neighborhood Characteristics with the Location and Type of Food Stores*, 96 AM. J. OF PUB. HEALTH 325, 325 (2006), available at <http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2004.058040>.

15. *Obesity Food Deserts Have Given Way to Food Swamps*, POLICYMIC, <http://www.policymic.com/articles/7176/obesity-food-deserts-have-given-way-to-food-swamps> (last visited Apr. 9, 2013); see, e.g., MARI GALLAGHER RESEARCH & CONSULTING GROUP, EXAMINING THE IMPACT OF FOOD DESERTS ON PUBLIC HEALTH IN DETROIT 3 (2007), available at [www.marigallagher.com/site\\_media/dynamic/project\\_files/1\\_DetroitFoodDesertReport\\_Full.pdf](http://www.marigallagher.com/site_media/dynamic/project_files/1_DetroitFoodDesertReport_Full.pdf) (noting Detroit as a food swamp).

Evidence is mounting that the local retail environment affects diet and health outcomes. For instance, in contrast with food deserts, the presence of a nearby full-service grocery store or supermarket is linked with increased fruit and vegetable intake and lower body mass index and obesity rates among residents.<sup>16</sup> A small study of households in pre-Katrina New Orleans found that the presence of a store selling fresh vegetables within 100 meters of a household significantly increased vegetable consumption.<sup>17</sup> Conversely, in communities that lack accessible grocery stores, people without the time or resources to travel to a grocery store make do with fatty, salty and sugary fare available at nearby fast food restaurants and convenience stores.<sup>18</sup> Greater prevalence of fast food restaurants is associated with higher individual-level weight status and higher state-level obesity prevalence.<sup>19</sup> The variety and quality of foods in convenience stores tends to be lower than in grocery stores, with many small food retailers selling no fresh produce at all.<sup>20</sup>

The in-store environment can also affect health. For instance, research has shown that greater shelf space dedicated to fresh produce and other healthy food items is associated with better diets among local residents.<sup>21</sup> Exposure to retail advertising for tobacco products leads to smoking initiation in adolescents. In addition, this form of advertising increases all smokers' daily consumption by reducing current smokers' will to quit and inducing former smokers to resume the habit. Since the ads are located in the retail environment, they boost sales significantly.<sup>22</sup> The presence of outlets selling alcohol is associated with higher

16. Kimberly Morland et al., *The Contextual Effect of the Local Food Environment on Residents' Diets: The Atherosclerosis Risk in Communities Study*, 92 AM. J. OF PUB. HEALTH 1761, 1761 (2002), available at <http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.92.11.1761>; Melissa Ahern et al., *A National Study of the Association Between Food Environments and County-Level Health Outcomes*, 27 J. RURAL HEALTH 367, 367 (2011).

17. Nicholas Bodor et al., *Neighbourhood Fruit and Vegetable Availability and Consumption: The Role of Small Food Stores in an Urban Environment*, 11 PUB. HEALTH NUTRITION 413, 413 (2007), available at [http://prc.tulane.edu/uploads/Neighbourhood%20F%20and%20V%20availability%20and%20consumption\\_Role%20of%20small%20food%20stores%20in%20urban%20env.pdf](http://prc.tulane.edu/uploads/Neighbourhood%20F%20and%20V%20availability%20and%20consumption_Role%20of%20small%20food%20stores%20in%20urban%20env.pdf).

18. See Moore & Roux, *supra* note 14, at 329–30; see also Jason P. Block et al., *Fast Food, Race/Ethnicity, and Income: A Geographic Analysis*, 27 AM. J. PREVENTIVE MED. 211, 211 (2004), available at [http://thrive.preventioninstitute.org/sa/enact/neighborhood/documents/food\\_bevmarketing\\_evidencebase.Fast\\_Food\\_RaceEthnicityand\\_Income.pdf](http://thrive.preventioninstitute.org/sa/enact/neighborhood/documents/food_bevmarketing_evidencebase.Fast_Food_RaceEthnicityand_Income.pdf).

19. Morland, *supra* note 16, at 1764–67; Ahern, *supra* note 16, at 367; Neil K. Mehta & Virginia W. Chang, *Weight Status and Restaurant Availability: A Multilevel Analysis*, 34 AM. J. PREVENTIVE MED. 127, 127–33 (2008), available at [www.ncbi.nlm.nih.gov/pmc/articles/PMC2440344/?tool=pubmed](http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2440344/?tool=pubmed); Jay Maddock, *The Relationship Between Obesity and the Prevalence of Fast food Restaurants: State-Level Analysis*, 19 AM. J. HEALTH PROMOTION 137, 137 (2004).

20. CTR. FOR HEALTH POLICY, UNIV. OF CAL. L.A., *Designed for Disease: The Link Between Local Food Environments and Obesity and Diabetes 2* (2008), available at [www.healthpolicy.ucla.edu/pubs/files/Designed\\_for\\_Disease\\_050108.pdf](http://www.healthpolicy.ucla.edu/pubs/files/Designed_for_Disease_050108.pdf); Kelley E. Borradaile et al., *Snacking in Children: The Role of Urban Corner Stores*, 124 PEDIATRICS 1293, 1293 (2009), available at <http://pediatrics.aappublications.org/content/124/5/1293.full.pdf>.

21. J. Nicholas Bodor et al., *Neighbourhood Fruit and Vegetable Availability and Consumption: The Role of Small Food Stores in an Urban Environment*, 11 PUB. HEALTH NUTRITION 413, 413 (2008), available at [http://prc.tulane.edu/uploads/Neighbourhood%20F%20and%20V%20availability%20and%20consumption\\_Role%20of%20small%20food%20stores%20in%20urban%20env.pdf](http://prc.tulane.edu/uploads/Neighbourhood%20F%20and%20V%20availability%20and%20consumption_Role%20of%20small%20food%20stores%20in%20urban%20env.pdf).

22. Lisa Henriksen et al., *Is Adolescent Smoking Related to the Density and Proximity of Tobacco Outlets and Retail Cigarette Advertising Near Schools?*, 47 PREVENTIVE MED. 210, 213 (2008); Ellen Feighery, *Cigarette Advertising and Promotional Strategies in Retail Outlets: Results of a Statewide Survey*

alcohol-related injuries and neighborhood crime.<sup>23</sup> If a store contributes to local residents' fears of safety by being a source of trash, graffiti, loitering, or even aggressive car traffic, it can damage health further by discouraging residents from walking in their communities, increasing safety-related stress, and reducing opportunities for social interaction.<sup>24</sup>

All retailers—and especially food retailers—have a profound influence on their surrounding neighborhoods. Local governments and community groups can encourage stores to serve the needs of people living nearby through education programs and voluntary incentives. To institutionalize healthier retailer practices, however, policy interventions must also be part of the picture. This is because codified regulations outlast changes in public and private leadership and apply across the board, not just to willing participants. Moreover, government can mandate compliance with regulations and take enforcement measures when needed.<sup>25</sup>

### III. ZONING AND LICENSING: KEY LOCAL REGULATORY TOOLS

Zoning and licensing are two powerful regulatory tools that communities use to shape the way land is used and how businesses operate; they hold tremendous potential for achieving public health goals. There are similarities and differences in how these tools work, so one may be better suited than another to meet community goals. This section lays a foundation for discussing specific examples of how the tools can promote health in the retail context, defining zoning and licensing, and describing how each typically functions.

#### A. Local Authority to Regulate

Before considering any local policy options to improve public health, a local government must first determine whether it has been granted the authority to regulate on a particular topic.

Zoning and licensing both stem from the police power,<sup>26</sup> which is the authority of state governments to regulate in order to protect the health, safety, and welfare of the general public.<sup>27</sup> Accordingly, states have substantial discretion to identify threats to public health and to determine how to ameliorate

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in California, 10 TOBACCO CONTROL 184, 188 (2001).

23. Carla Alexia Campbell et al., *The Effectiveness of Limiting Alcohol Outlet Density as a Means of Reducing Excessive Alcohol Consumption and Alcohol-Related Harms*, 37 AM. J. PREVENTIVE MED. 556, 566 (2009), available at [www.thecommunityguide.org/alcohol/EffectivenessLimitingAlcoholOutletDensityMeansReducingExcessiveAlcoholConsumptionAlcohol-RelatedHarms.pdf](http://www.thecommunityguide.org/alcohol/EffectivenessLimitingAlcoholOutletDensityMeansReducingExcessiveAlcoholConsumptionAlcohol-RelatedHarms.pdf).

24. Anastasia Loukaitou-Sideris, *Is it Safe to Walk? Neighborhood Safety and Security Considerations and Their Effects on Walking*, 20 J. PLAN. LITERATURE 219, 228 (2006); H.F. Guite et al., *The Impact of the Physical and Urban Environment on Mental Well-Being*, 120 PUB. HEALTH 1117, 1117–26 (2006).

25. Samantha K. Graff et al., *Policies for Healthier Communities: Historical, Legal, and Practical Elements of the Obesity Prevention Movement*, 33 ANN. REV. PUB. HEALTH 307, 314 (2012).

26. See 6A MCQUILLIN MUN. CORP. § 24:2 (3d ed.).

27. LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 91–92 (Univ. of Cal. Press, 2nd ed. 2008); Paul A. Diller & Samantha Graff, *Regulating Food Retail for Obesity Prevention: How Far Can Cities Go?*, 39 J.L. MED. & ETHICS 89, 89–90 (2011), available at [www.aslme.org/media/downloadable/files/links/2/0/20.Diller.pdf](http://www.aslme.org/media/downloadable/files/links/2/0/20.Diller.pdf).

these threats.<sup>28</sup>

The police power is said to be innate in the states—a power they possessed as sovereigns before the formation of the United States.<sup>29</sup> Upon the creation of the U.S. Constitution, states retained the police power, ceding only a set of discrete, specific powers to the federal government.<sup>30</sup> Meanwhile, each state delegates some amount of power to local governments, whose form and existence are entirely determined by the state in which they reside.<sup>31</sup>

The most common—and most expansive—form of delegation is a “home-rule” system,<sup>32</sup> under which local governments have broad police power authority to enact health, safety, and welfare regulations so long as those regulations do not conflict with relevant federal and state laws.<sup>33</sup> The least common—and narrowest—form of delegation is a “Dillon’s rule” system, by which states grant local governments regulatory authority over only those topics which are expressly delegated.<sup>34</sup> Localities in Dillon’s Rule states have a more limited ability to enact innovative policies than those in home-rule states.<sup>35</sup>

Having local authority to regulate is only the first hurdle; communities should be aware of other legal issues that could restrain the ability of local governments to regulate for public health. Section V covers the legal issues most likely to arise in the context of zoning and licensing, including: preemption, the dormant Commerce Clause, and constitutional rights regarding property, free speech, equal protection, and due process.

## B. Zoning Basics

Zoning is the fundamental mechanism that localities use to shape land use and the built environment.<sup>36</sup> Zoning laws govern what can be built, how it can be built, and what activities can take place in a given area.<sup>37</sup> In other words, zoning laws dictate both the physical nature of buildings—including their size, height,

28. GOSTIN, *supra* note 27, at 91; *see* Patrick v. Riley, 209 Cal. 350, 354 (1930) (“[T]he preservation of the public health is universally conceded to be one of the duties devolving upon the state as a sovereignty, and whatever reasonably tends to preserve the public health is a subject upon which the Legislature, within its police power, may take action.”).

29. GOSTIN, *supra* note 27, at 92.

30. *Id.* State governments have broad police power authority pursuant to the “reserved powers” doctrine, under which states may exercise all powers that are neither expressly reserved for the federal government nor prohibited from state intervention by the United States Constitution. *See* U.S. CONST. amend. X.

31. Diller & Graff, *supra* note 27, at 89.

32. *Id.*

33. GOSTIN, *supra* note 27, at 94; Diller & Graff, *supra* note 27, at 90. For a more in depth discussion of constitutional authority and rights, *see infra* Section V.

34. Diller & Graff, *supra* note 27, at 90.

35. *Id.* Alabama, Arkansas, Nevada, New Hampshire, Vermont, Virginia, West Virginia, Idaho, North Carolina, and Tennessee still adhere to Dillon’s Rule, at least in part. *Id.* (citing DALE KRANE ET AL., HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK (CQ Press ed., 2000)).

36. For a brief history of zoning law, *see* 8 MCQUILLIN MUN. CORP. § 25:3 (3d ed.); *see also* LISA M. FELDSTEIN, GENERAL PLANS AND ZONING: A TOOLKIT FOR BUILDING HEALTHY, VIBRANT COMMUNITIES 91 (ChangeLab Solutions 2007), available at <http://changelabsolutions.org/sites/changelabsolutions.org/files/finalbook.pdf>.

37. FELDSTEIN, *supra* note 36, at 91.

location, and appearance—as well as the ways in which buildings may be used.<sup>38</sup>

In the simplest sense, zoning divides a city into separate zones for different purposes: residential areas, commercial areas, industrial areas, open spaces, and so on.<sup>39</sup> Limits are put on the kinds of uses according to the zone. For example, only houses may be allowed in residential areas, stores and services in commercial areas, and factories in industrial areas.<sup>40</sup> Traditionally, the idea was to separate uses that were considered “incompatible” with each other, like a single family home and an industrial plant.<sup>41</sup>

Typically, zoning categorizes land uses in one of three ways: those that are *permitted*, those that are *prohibited*, and those that are *permitted subject to conditions* via a conditional use permit (“CUP”). Local governments require CUPs when they want an added level of review over certain uses that potentially conflict with surrounding uses, including uses that could have negative impacts on public health or safety. Governments also use CUPs to attach certain conditions to the use of land, even if that use is consistent with zoning laws, in order to mitigate any potential disruption. For example, a city might require all gas stations within a commercial district to obtain a CUP setting requirements about traffic flow and pedestrian safety. Violating a CUP can result in revocation of the permit.

Zoning codes can also create financial incentives for certain preferred uses or types of development, such as the creation of affordable housing or new businesses in undeveloped areas. To encourage such development, the code could, for example, offer a density bonus, allowing developers to build taller buildings or buildings with additional floor area than otherwise would be allowed by right, thus adding to the potentially sellable space in a development. Also, the code could reduce the number of required parking spots, thereby freeing up additional space to put to more profitable uses.

Because zoning laws govern a piece of property, any rights conveyed through zoning attach to the land and continue on with the land, even when ownership changes. Therefore, when zoning laws impose new conditions or prohibit a previously permitted use, an important question arises as to how governments can deal with existing uses that were formerly allowed but are now “nonconforming” with the law. Local governments have three options to address nonconforming uses. First, governments may allow the nonconforming use to

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38. *Id.* Zoning codes can regulate the size, height, or shape of a building, including where on a lot the building can be. They can be contrasted with building codes which also regulate the physical nature of buildings, but are focused primarily on regulating construction so as to adequately protect safety and health and, increasingly, to promote other general welfare goals such as energy efficiency and accessibility. See U.S. ENVTL. PROT. AGENCY, BUILDING CODES - A PRIMER, available at [www.epa.gov/radon/rrnc/buildingcodes\\_primer.html#what%20are](http://www.epa.gov/radon/rrnc/buildingcodes_primer.html#what%20are).

39. 8 MCQUILLIN MUN. CORP. § 25:1 (3d ed.).

40. *Id.* In the context of zoning, “uses” may refer to “any possible use on or of lands or buildings” and “to a building itself or to the use of that building for a business or activity.” *Id.*

41. Segregating uses in this way is referred to as “Euclidean” zoning, named after a landmark court case that affirmed the practice. Through its implementation, the practice dramatically changed the appearance and lifestyle in neighborhoods across America and is generally thought to have spurred urban sprawl. In recent years, “mixed-use” zoning, which allows complimentary uses like homes, shops, and offices in the same building, is gaining in popularity and thought to promote healthier and more walkable neighborhoods. FELDMAN, *supra* note 36, at 92–93.



continue until it naturally ends, usually when it goes out of business or substantially changes the nature of its activities. This practice is known as grandfathering. The second option is to create a “phase out” period that would allow the use to continue for a specific period of time, usually enough so that the owner can recover its investment. This is known as amortization. Last, governments can require the owner to comply immediately with the law and cease the nonconforming use. Under this option (as described in section V), governments may have to pay reasonable compensation to the owner.

Zoning codes generally are enforced prospectively through city or county agencies that have the power to deny a permit for construction that does not accord with code requirements. These agencies also have the authority to penalize individuals or businesses that are violating land use laws after initial permit approval, but this type of enforcement tends to be rare because it is driven by complaints from the community rather than proactive enforcement efforts. While residents may feel motivated to complain about a neighbor’s addition that violates code, they are likely to be less aware of whether or not a business is following practices that were required during initial approval, especially when grandfathering leads to different businesses following different rules.

### C. Licensing Basics

Licensing is a legal tool that governments can use to regulate business operations. A license gives permission “to engage in some business or occupation, to do some act, or to engage in some transaction” that would be considered illegal without a license.<sup>42</sup> Thus, state (and often local) governments can require individuals or institutions that are engaged in specific types of business to obtain a license in order to operate legally.

Licensing regimes can serve different purposes. States commonly require people in certain lines of work—including lawyers, doctors, and beauticians—to obtain professional licenses. This regulatory approach gives states a mechanism to set and monitor compliance with basic professional qualifications, safeguarding laypeople from alleged specialists who are positioned to cause serious financial or physical harm. Another type of license, often called a permit, helps state and local governments ensure that residents are not depleting or overusing scarce resources.<sup>43</sup> Yet another category of licenses entails certificates of registration, which allow state and local governments to track business activity and collect taxes in their jurisdictions.

This article focuses on a form of licensing that gives state and local governments a tool to manage businesses that sell products or provide services

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42. See *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1978 (2011) (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1304 (2002)); see also *Gibbons v. Ogden*, 22 U.S. 1, 213 (1824) (“The word ‘license’ means permission, or authority; and a license to do any particular thing, is a permission or authority to do that thing . . .”).

43. The terms “licenses” and “permits” are often viewed as being synonymous. According to one source, “the term ‘license’ is more commonly employed to designate official municipal authorization of a continuing business or activity while the term ‘permit’ is more commonly, but not strictly, used to refer to municipal authorization of an act or activity that will be completed.” 9 MCQUILLIN MUN. CORP. § 26:2 (3d ed.).

that tend to generate negative externalities. Examples include regulation of escort services and massage parlors to discourage prostitution,<sup>44</sup> regulation of adult arcades to discourage lewd conduct,<sup>45</sup> and regulation of tobacco retailers to ensure compliance with sales-to-youth laws, tax laws, and other state tobacco control laws.<sup>46</sup> Governments may put conditions on this type of license.<sup>47</sup> These conditions can require that businesses comply with certain standards—such as limited hours of operation or adherence to state nuisance or prostitution laws—to help guarantee safety and well-being for those around them. Failure to comply can result in penalties, including fines, suspension, or revocation of the license. License violations also can be punished by criminal or civil penalties.<sup>48</sup>

State and local governments may impose fees on licensees and applicants in order to cover the costs of implementing and enforcing licensing programs.<sup>49</sup> While fees may be calculated so as to fully fund enforcement efforts, including inspections and prosecutions, they may not exceed the cost of services needed to administer and enforce the licensing system.<sup>50</sup> The ability to collect fees to cover or offset the cost of implementation makes licensing policies particularly appealing, especially given financial constraints facing many local governments.

A key difference between zoning and licensing is that zoning requirements run with a piece of land perpetually no matter whether ownership changes hands. In contrast, licenses are issued for a discrete amount of time and usually grant rights only to the individual licensees. Licenses generally cannot be transferred or sold, so new business owners cannot take over a seller's license but instead must apply for their own.<sup>51</sup> Moreover, whenever a license expires, the licensee must obtain a new license which may well come with new conditions. Assuming an annual renewal requirement, it will take one year for all licensees to come into compliance with whatever new conditions are imposed by the licensing scheme.

Table 1, below, summarizes the key regulatory characteristics of zoning and licensing discussed in this section.

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44. See, e.g., *Cohen v. Board of Supervisors*, 40 Cal. 3d 277, 304 (1985) (upholding regulation of escort services); *Brix v. City of San Rafael*, 92 Cal. App. 3d 47, 53 (1979) (upholding regulation of massage parlors).

45. See, e.g., *EWAP, Inc. v. City of Los Angeles*, 97 Cal. App. 3d 179, 191 (1979).

46. See, e.g., *DUTCHESS CNTY., N.Y., SANITARY CODE* § 25.3.

47. 9 MCQUILLIN MUN. CORP. § 26:9 (3d ed.); see *GOSTIN, supra* note 27, at 466.

48. See, e.g., *Tobacco Retailer Licensing: Matrix of Strong Local Tobacco Retailer Licensing Ordinances*, CENTER FOR TOBACCO POLICY & ORG., [www.center4tobaccopolicy.org/CTPO/\\_files/\\_file/Matrix%20of%20Strong%20Local%20Tobacco%20Retailer%20Licensing%20Ordinances%20June%202012.pdf](http://www.center4tobaccopolicy.org/CTPO/_files/_file/Matrix%20of%20Strong%20Local%20Tobacco%20Retailer%20Licensing%20Ordinances%20June%202012.pdf) (last visited Apr. 11, 2013).

49. 9 MCQUILLIN MUN. CORP. §§ 26:2, 26:4 (3d ed.).

50. *GOSTIN, supra* note 27, at 466.

51. See *Kafka v. Mont. Dep't of Fish, Wildlife, & Parks*, 201 P.3d 8, 20 (Mont. 2008) ("Courts which have directly considered the question . . . have taken a dim view of the notion that government-issued licenses are compensable property interests."); *Conti v. United States*, 291 F.3d 1334, 1340 (Fed. Cir. 2002) ("[C]ourts have held that no property rights are created in permits and licenses.").

**Table 1: Comparing Zoning and Licensing<sup>52</sup>**

<b>Characteristic of Regulation</b>	<b>Zoning</b>	<b>Licensing</b>
Regulations apply to a specific parcel of land, regardless of what individual business locates there	✓	
Can control the location of businesses within a community	✓	✓
Can control density or overall number of certain types of businesses	✓	✓
Can control the design and form of sites and buildings	✓	
Can impose operational standards (e.g., hours of operation, products sold, etc.) on businesses	✓	✓
Applies standards to existing businesses as well as future businesses	*	✓
Grants rights that apply for a finite period of time		✓
Provides regular enforcement of required conditions and standards; fees may be charged to cover the cost of enforcement		✓
* = Possible, but politically and practically difficult; see discussion of “grandfathering” in section III.		

Public health advocates may find themselves looking to zoning to address their goals because it tends to be a familiar concept. However, a big drawback of zoning as a policy lever is that new rules typically do not reach existing businesses. In contrast, the broad and immediate impact of a new licensing scheme can make licensing a more appealing public health policy lever than zoning, but this same characteristic can make licensing politically infeasible. Because current business owners are likely to be affected by new licensing rules but not new zoning requirements, the intensity of political opposition to licensing proposals will generally be much higher. Existing retailers will almost surely protest any increased regulatory burden, claiming that new mandates make it more difficult to run a business and stifle economic development.

Advocates must also weigh the importance of ensuring ongoing enforcement when selecting a tool. Zoning is particularly well suited to address goals that are related to the design, form, and location of new businesses within a community, since each of these are issues that are addressed at the start of a new business or development. The reality is that, unlike licensing, where fees are charged upon license renewal, zoning does not have a source of funding for ongoing enforcement. With licensing, enforcement is funded by and almost synonymous with the process of regular renewal. When the purpose of the regulation is to ensure business practices are followed over time, a licensing

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52. See *Licensing and Zoning: Tools for Public Health*, CHANGE LAB SOLUTIONS, [http://changelab.solutions.org/sites/default/files/Licensing%26Zoning\\_FINAL\\_20120703.pdf](http://changelab.solutions.org/sites/default/files/Licensing%26Zoning_FINAL_20120703.pdf) (last visited Apr. 11, 2013).

regime with ongoing, proactive enforcement may be more effective.

#### **D. A Word on Direct Regulation**

Typically, state and local governments address public health concerns through policies that directly regulate practices and products. Examples include vaccination requirements, bans on dangerous consumer goods, and water fluoridation regimes.<sup>53</sup> In many cases, direct regulations are very effective, but sometimes legal and political realities, such as preemption, render them impractical.<sup>54</sup> If communities have the option to use an existing regulatory tool that accommodates a particular policy goal, they may find it easier to do so rather than inventing a new regime. For example, for a city interested in imposing new controls on the location or design of retailers, it would make more sense to amend the zoning code rather than create a stand-alone regulation that might not harmonize with existing land use requirements and administrative systems. Similarly, if a city wishes to impose new standards on restaurants and it already operates a restaurant licensing and inspection program, adding these standards to the existing program can save both the government and the businesses time and resources.

### **IV. USING ZONING AND LICENSING TO IMPROVE THE RETAIL ENVIRONMENT: COMMUNITY EXAMPLES**

As discussed in section III, zoning and licensing both have their regulatory roots in the police power—the innate authority of state government to advance public health, safety, and welfare. Communities can use these tools creatively to tackle burgeoning rates of chronic disease. This section of the article features existing and hypothetical examples of how zoning and licensing policies can spur retailers to contribute to six public health goals: (1) limiting the location and density of retailers that sell harmful products, (2) regulating product mix and availability, (3) requiring participation in federal food assistance programs, (4) supporting safe, walkable and bikeable neighborhoods, (5) enforcing federal and state laws, and (6) using incentives to promote healthy retail.

#### **A. Limiting the Location and Density of Retailers That Sell Harmful Products**

Communities apply both zoning and licensing to regulate uses of land that have an impact on residents' health. Either approach may limit where uses can occur or how many businesses of a certain kind can be located in a particular area, in order to minimize negative spillover effects such as pollution, hazardous traffic concerns, or eyesores.<sup>55</sup>

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53. See generally GOSTIN, *supra* note 27.

54. See, e.g., GOSTIN, *supra* note 27, at 165 (explaining that state preemption of restrictions on gun sales led cities and counties to adopt “innovative methods to regulate firearm violence through . . . traditional zoning and licensing authority”).

55. Marice Ashe et al., *Land Use Planning and the Control of Alcohol, Tobacco, Firearms, and Fast Food Restaurants*, 93 AM. J. PUB. HEALTH 1404, 1404 (2003), available at [www.ncbi.nlm.nih.gov/pmc/articles/PMC1447982/](http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447982/); see *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 121 (1982) (“there can be little doubt about the power of a state to regulate the environment in the vicinity of schools, churches, hospitals and the like by exercise of reasonable zoning laws”); JULIE SAMIA MAIR ET AL., *THE USE OF*

Because a core regulatory purpose of zoning is to control where uses are permitted, zoning is a natural tool for restricting the location and density of businesses of concern. A number of communities across the country have used zoning to prescribe the location or density of retailers selling fast food, tobacco, and alcohol.<sup>56</sup> For example, the community of Calistoga, California, prohibits all formula restaurants,<sup>57</sup> and Concord, Massachusetts, bans all fast food and drive-through restaurants.<sup>58</sup> Other communities regulate the density of formula restaurants by limiting the total number of formula restaurants permitted or by mandating a certain distance between formula restaurants.<sup>59</sup> Local jurisdictions in some states use zoning ordinances to restrict the location of tobacco retailers near schools.<sup>60</sup> In a majority of states, liquor stores or adult businesses may not be located near schools.<sup>61</sup> Courts have upheld zoning code provisions limiting chain restaurants, as well as those restricting the location of adult businesses and liquor stores near schools.<sup>62</sup>

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ZONING TO RESTRICT FAST FOOD OUTLETS: A POTENTIAL STRATEGY TO COMBAT OBESITY 1 (2005), available at [www.publichealthlaw.net/Zoning%20Fast%20Food%20Outlets.pdf](http://www.publichealthlaw.net/Zoning%20Fast%20Food%20Outlets.pdf); *Matrix of Local Ordinances Restricting Tobacco Retailers with a Certain Distance of Schools*, CENTER FOR TOBACCO POLICY & ORG., [www.center4tobaccopoly.org/CTPO/\\_files/\\_file/Matrix%20of%20Local%20Ordinances%20Restricting%20Tobacco%20Retailers%20Within%20a%20Certain%20Distance%20of%20Schools%20April%202011.pdf](http://www.center4tobaccopoly.org/CTPO/_files/_file/Matrix%20of%20Local%20Ordinances%20Restricting%20Tobacco%20Retailers%20Within%20a%20Certain%20Distance%20of%20Schools%20April%202011.pdf) (last visited Apr. 12, 2013).

56. EDWARD H. ZIEGLER ET AL., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 24:48 (4th ed. 2009) ("A majority of states have now enacted statutes prohibiting liquor outlets within a prescribed distance of various categories of protected institutions, with certain exceptions and variations.").

57. CALISTOGA, CAL., MUN. CODE §§ 17.22.040, 17.04.616 (2009) (defining formula restaurant). A formula restaurant is "an eating establishment devoted to the preparation and offering of food and beverages for sale to the public for consumption either on or off the premises which, by contractual or other arrangement, established or recognized business practice, or membership affiliation, maintains any of the following: [1] Business name common to a similar business located elsewhere; [2] Standardized menus, ingredients, food preparation, uniforms, or other standardized features common to a restaurant located elsewhere; [3] Interior decor common to a similar business located elsewhere; [4] Architecture or exterior signs common to a similar business located elsewhere; [5] Use of a trademark or logo common to a similar business located elsewhere (but not including logos or trademarks used by chambers of commerce, better business bureaus, or indicating a rating organization including, but not limited to, AAA, Mobile or Michelin . . .)." *Id.*

58. TOWN OF CONCORD, MASS., ZONING BY-LAWS § 4.7.1 (2008). *But see* *Island Silver & Spice, Inc. v. Islamadora*, 542 F.3d 844, 848 (11th Cir. 2008) (striking down a local prohibition on big chain stores because its drafting and application made it clear that the purpose was to exclude out of state businesses).

59. *See* ARCATA, CAL., LAND USE CODE § 9.42.164 (2008) (limiting the total number of formula restaurants permitted within the community to nine); City of L.A. Planning Dep't, *Westwood Village Specific Plan* § 5B, (Oct. 6, 2004), <http://cityplanning.lacity.org/complan/specplan/sparea/wwdvillagepage.htm> (regulating the density of fast food establishments to every 400 feet, with one exception).

60. *See, e.g., Matrix of Local Ordinances, supra* note 55.

61. *See* *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 121 (1982) ("there can be little doubt about the power of a state to regulate the environment in the vicinity of schools, churches, hospitals and the like by exercise of reasonable zoning laws"); ZIEGLER ET AL., *supra* note 56.

62. *See, e.g., Augusta-Richmond Cnty. v. Lee*, 592 S.E.2d 71, 71 (2004) (upholding denial of liquor license, on basis that there were already several stores in the area and that the proposed store was close to several schools and churches); *Taste Me Concepts v. City of New York*, 762 N.Y.S.2d 390, 391 (2003) (holding that denial of liquor license was not arbitrary and capricious when petitioner's establishment was within 200 feet of a church in violation of local law); *Columbia Oldsmobile v. City of Montgomery*, 564 N.E.2d 455, 461 (Ohio 1990) ("This court has held several times that a . . . 'city

Although there is nothing new about using zoning to circumscribe fast food, tobacco, and alcohol outlets, chronic disease prevention is an unprecedented motivation for such ordinances. Instead, issues such as traffic safety, littering, community aesthetics, and local economic development are some of the most commonly cited rationales.<sup>63</sup> Moreover, despite the fact that using zoning to restrict potentially harmful retailers is an established practice, a recent study of 175 communities from across the U.S. found that ninety-three percent of communities allowed fast food restaurants as a permitted use in their zoning code.<sup>64</sup> Part of the reason for this may be that city planners are still reluctant to see zoning as a public health tool. Take, for example, the City of Los Angeles, which adopted a policy in 2011 that limits new fast food restaurants in South Los Angeles.<sup>65</sup> While the media coverage of this policy included a discussion of the role fast food plays in increasing obesity rates, the city's rationale for approval failed to include it.<sup>66</sup> Instead, planning reports focused on quality of life and other benefits unrelated to chronic disease.<sup>67</sup> As planners, residents, and decision-makers become more aware of the links between land use and health, zoning code provisions prescribing the location and density of retailers selling harmful products may become more prevalent and public health rationale more widely employed to justify such policies.

Licensing can also be used to limit the location and density of retailers selling unhealthy products, although historically, this has not been the primary function of licensing schemes. There are a few exceptions that serve as examples for future public health action, specifically in the area of alcohol and tobacco retailer licensing. Alcohol retailer licensing generally occurs at the state level,<sup>68</sup> and local communities may be preempted from imposing additional licensing requirements.<sup>69</sup> But licensing has been used effectively at the local level to ensure that tobacco outlets are not located near schools and other sensitive places, and

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may lawfully regulate [safety hazards] pursuant to its police powers: protection of pedestrians and drivers, elimination of traffic congestion and reduction of air and noise pollution.'").

63. SAMIA MAIR ET AL., *supra* note 55, at 43, 65.

64. *Zoning for Healthy Food Access Varies by Community Income*, BRIDGING THE GAP, 2 (Apr. 2012), [www.bridgingthegapresearch.org/\\_asset/n5qtpc/btg\\_food\\_zoning\\_final-0612.pdf](http://www.bridgingthegapresearch.org/_asset/n5qtpc/btg_food_zoning_final-0612.pdf).

65. CITY OF LOS ANGELES, CAL., COUNCIL FILE 10-1843 (2010), *available at* <http://cityclerk.lacity.org/lacityclerkconnect/index.cfm?fa=ccfi.viewrecord&cfnumber=10-1843>.

66. Jennifer Medina, *In South Los Angeles, a New Fast Food Spot Gets a 'No, Thanks'*, N.Y. TIMES, January 15, 2011, at A17, *available at* [www.nytimes.com/2011/01/16/us/16fastfood.html](http://www.nytimes.com/2011/01/16/us/16fastfood.html).

67. *See* City of Los Angeles, Cal., City Planning Case No. CPC-2010-2278-GPA. 180103, *Communication of Planning Department* (December 7, 2010), [http://clkrep.lacity.org/online/docs/2010/10-1843\\_misc\\_plum\\_12-7-10.pdf](http://clkrep.lacity.org/online/docs/2010/10-1843_misc_plum_12-7-10.pdf).

68. Eighteen states are control states. *The Control States*, NAT'L ALCOHOL BEVERAGE CONTROL ASS'N, [www.nabca.org/States/States.aspx#](http://www.nabca.org/States/States.aspx#) (last visited Apr. 12, 2013).

69. State preemption of local alcohol retailer license schemes has left local governments little option for regulating alcohol retailers outside of zoning, which is a difficult tool to apply when dealing with an existing population of retailers. However, "deemed approved" ordinances are one example of a local ordinance that requires performance standards for alcohol retailers and is implemented at the local level. *See* OAKLAND, CAL., MUN. CODE, ch. 17.56, *available at* [www2.oaklandnet.com/oakca/groups/ceda/documents/report/oak032032.pdf](http://www2.oaklandnet.com/oakca/groups/ceda/documents/report/oak032032.pdf); *City of Oakland v. Super. Ct.*, 45 Cal. App. 4th 740, 758-64 (1996) (holding that a city ordinance addressing nuisance problems associated with alcoholic beverage sale establishments does not improperly regulate preexisting grandfathered licensees or tax licensees for regulatory purposes). For more information on preemption, see Section IV.

to limit tobacco retailer density.<sup>70</sup>

Licensing might appear to be an attractive option for restricting the location and density of retailers selling harmful products because its impact is more immediate than that of new zoning code provisions, which generally grandfather in existing businesses and only apply to new ones (see the discussion of grandfathering in section III). But the political resistance in this scenario might be particularly high because new restrictions on where retailers can locate or how many retailers are allowed in a given area could necessitate that some current stores either move or go out of business.

## B. Regulating Product Mix and Availability

Policies that increase access to fresh produce and other healthy foods while decreasing the availability and appeal of unhealthy products have great potential to improve health outcomes, especially for the millions of people living in food desert and food swamp communities.

Across the United States, public health advocates are encouraging individual food retailers to sell healthier foods, usually by offering financial incentives, technical assistance, and promotional materials.<sup>71</sup> These programs can be effective, but they have limited impact, as only the stores that are directly involved in the program are likely to change their product mix. Moreover, these types of programs typically are vulnerable to funding cuts because each store requires a large investment of human and financial resources. In contrast, a jurisdiction-wide law that requires food retailers to carry certain healthy products and reduce the amount of unhealthy products on the shelves will have a much broader effect on the food landscape throughout a community.<sup>72</sup> A law requiring public sector action is also less vulnerable to budget reductions that may cut short public health programs.

This type of law conceivably could be accomplished through the zoning code by requiring businesses to obtain a Conditional Use Permit (CUP) that requires stocking of produce and other healthy foods. The City of Watsonville, California, adopted such a policy in its “general plan”—a local policy document that cities and counties must adopt under California law to guide growth and development—which states that the city will “condition neighborhood markets (convenience stores) at the time of development review to incorporate the sale of fresh fruits and vegetables.”<sup>73</sup> However, there are some real challenges to using this approach. Planning agencies, who oversee CUPs, are unlikely to have the expertise to assess the nutritional offerings of food retailers. Additionally, such a

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70. *Case Studies on the Implementation & Enforcement of Local Tobacco Retailer Licensing Ordinances in Cal.*, CHANGE LAB SOLUTIONS, <http://changelabsolutions.org/publications/case-studies-implementation-and-enforcement-local-tobacco-retailer-licensing-ordinances> (last visited Apr. 12, 2013).

71. ED BOLEN & KENNETH HECHT, NEIGHBORHOOD GROCERIES: NEW ACCESS TO HEALTHY FOOD IN LOW-INCOME COMMUNITIES (Cal. Food Policy Advocates 2003), available at <http://healthycornerstores.org/wp-content/uploads/2009/08/Neighborhood-Groceries-New-Access-to-Healthy-Food-in-Low-Income-Communities.pdf>.

72. See Graff et al., *supra* note 25, at 314 (describing the advantages of policies over programs).

73. CAL. GOV'T CODE § 65300; WATSONVILLE, CAL., GENERAL PLAN § 3.5.21, available at [http://cityofwatsonville.org/download/cdd/GENERAL%20PLAN/General\\_Plan/03\\_Land\\_Use\\_06-2012.pdf](http://cityofwatsonville.org/download/cdd/GENERAL%20PLAN/General_Plan/03_Land_Use_06-2012.pdf).

requirement will be difficult to enforce on an ongoing basis since zoning enforcement is complaint-based and thus often haphazard.

Licensing presents a more efficient strategy for creating meaningful, immediate changes in the retail food environment. A local government can require all food retailers to obtain a local license to operate.<sup>74</sup> This license can come with a condition that licensees carry a minimum amount of healthy staples (i.e., proteins, dairy, and whole grains) and produce, measured by selling area or shelf space, which are relatively easy to verify. The licensing scheme also can offer incentives for retailers that exceed the mandatory minimums. One city, Minneapolis, Minnesota, has already adopted an ordinance that requires licensed grocery stores to stock specific categories of staple foods that match the product mix required under the federal Supplemental Nutritional Assistance Program.<sup>75</sup>

The license conditions can be flexible while being strong enough to ensure that retailers do not attempt to meet the requirements by stocking only a few varieties of produce with the longest shelf life, such as a crate of potatoes and onions. One possibility is establishing a minimum square footage of shelf space or floor area that must be dedicated to fresh produce.<sup>76</sup> Another is to require that stores meet or exceed stocking standards established under federal nutrition programs (discussed in more detail, below). In addition, the licensing scheme could incorporate and complement any existing small food retailer programs, by offering outreach, education, and technical assistance necessary to maximize compliance with the licensing requirements.<sup>77</sup> Finally, because it is legal in most states for localities to charge a license fee,<sup>78</sup> the fee proceeds can be used to fund some or all of government's costs for implementation and enforcement.

In addition to requiring a minimum offering of healthy foods, a licensing scheme can be used to reduce the availability of unhealthy products, and to impose other requirements related to responsible retailing, which can all be incorporated into a single license. For example, conditions of the license could require retailers to reduce or limit the amount of sugar-sweetened beverages or tobacco a store carries or to maintain the businesses' premises in a nuisance-free condition (e.g., providing adequate lighting, removing trash and graffiti, preventing loitering, etc.).<sup>79</sup> Virtually any requirement in the retail environment

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74. Such an approach could be implemented at the state level as well.

75. MINNEAPOLIS, MINN., CODE OF ORDINANCES ch. 203; §§ 203.10-203.30. See subsection 0 below for a discussion of stocking requirements that align with federal food assistance programs.

76. *Model Licensing Ordinance for Healthy Food Retailers*, CHANGELAB SOLUTIONS, 16 (July 9, 2012), [http://changelabsolutions.org/sites/default/files/HFR\\_Licensing\\_Ordinance\\_FINAL\\_20120709\\_1.docx](http://changelabsolutions.org/sites/default/files/HFR_Licensing_Ordinance_FINAL_20120709_1.docx).

77. Small food retailer programs, often called "healthy corner store" initiatives, are run by non-profits and public agencies in a number of communities throughout the country. These initiatives, which generally involve voluntary agreements with storeowners, typically provide free or low-cost support (such as equipment, marketing materials, grants, loans, or technical assistance) in exchange for stocking and marketing healthier options. See *Healthy Corner Stores Q & A*, HEALTHY CORNER STORES NETWORK 3-4, 7 (Feb. 2010), [http://www.healthycornerstores.org/wp-content/uploads/resources/Corner\\_Stores\\_Q+A.pdf](http://www.healthycornerstores.org/wp-content/uploads/resources/Corner_Stores_Q+A.pdf). See, generally HEALTHY CORNER STORES NETWORK, [www.healthycornerstores.org](http://www.healthycornerstores.org) (last visited Jan. 5, 2013).

78. See, e.g., CAL. CONST., art. XIII C, § (1)(e); CITY OF NEW YORK, N.Y., ADMIN. CODE § 20-202(c) (West 2012).

79. *Model Licensing Ordinance*, *supra* note 76.



can be efficiently implemented and enforced through a licensing system, so long as the requirement accords with the legal principles discussion in section IV.

### C. Requiring Participation in Federal Food Assistance Programs

Access is about more than the physical presence of healthy food retailers. It is also about whether low-income individuals can spend federal food assistance dollars at healthy food retailers in their neighborhoods. Many low-income people are eligible for at least one of two federal food assistance programs: the Supplemental Nutrition Assistance Program (SNAP, formerly food stamps) and the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC).<sup>80</sup> These programs provide financial benefits to eligible individuals that can only be used to purchase food at approved retailers. Zoning or licensing policies can improve food access for low-income families by requiring retailers to accept federal food assistance benefits or at least to meet the food stocking standards set by the federal food assistance programs. Retailers also potentially benefit from such policies because these programs bring customers who have monthly benefits that can only be spent on food.

SNAP is the largest federal food assistance program, serving fourteen percent of the U.S. population in 2011.<sup>81</sup> It is an entitlement program open to households with incomes less than 130% of the federal poverty line. SNAP participants receive monthly cash allotments on debit cards, known as Electronic Benefits Transfer (EBT) cards.<sup>82</sup> EBT cards can be used to purchase most foods and beverages at approved retailers.<sup>83</sup> In order to accept SNAP benefits, retailers must meet criteria established by Congress.<sup>84</sup>

WIC benefits are for low-income pregnant, postpartum, and breastfeeding women, infants, and children up to age five. In 2011 it served approximately nine million women and children.<sup>85</sup> WIC participants receive vouchers for foods that

80. See Food & Nutrition Serv., *Supplemental Nutrition Assistance Program*, U.S. DEP'T OF AGRIC., [www.fns.usda.gov/snap/applicant\\_recipients/eligibility.htm](http://www.fns.usda.gov/snap/applicant_recipients/eligibility.htm) (last modified Feb. 28, 2013); Food & Nutrition Serv., *WIC Eligibility Requirements*, U.S. DEP'T OF AGRIC., [www.fns.usda.gov/wic/howtoapply/eligibilityrequirements.htm](http://www.fns.usda.gov/wic/howtoapply/eligibilityrequirements.htm) (last modified Nov. 20, 2012).

81. *The History of SNAP*, SNAP TO HEALTH, [www.snaptohealth.org/snap/the-history-of-snap](http://www.snaptohealth.org/snap/the-history-of-snap) (last visited Jan. 5, 2013); see Food & Nutrition Serv., *Supplemental Nutrition Assistance Program Participation and Costs*, U.S. DEP'T OF AGRIC., [www.fns.usda.gov/pd/SNAPsummary.htm](http://www.fns.usda.gov/pd/SNAPsummary.htm) (last modified Jan. 4, 2013) (highlighting that in 2011, an average of 44.7 million people participated in the program).

82. Many states refer to EBT by a state-specific program name; for example, in California, EBT is called "CalFresh." See CALFRESH PROGRAM, [www.calfresh.ca.gov](http://www.calfresh.ca.gov) (last visited Jan. 5, 2013).

83. See 7 C.F.R. § 271.2 (2012). The current federal food stamp program regulations define eligible foods as "any food or food product intended for human consumption except alcoholic beverages, tobacco, and hot foods and hot food products prepared for immediate consumption," or "seeds and plants to grow food for the personal consumption of eligible households." *Id.*

84. Stores must qualify through one of two criteria, known as Criterion A and Criterion B. Criterion A requires stores to offer at least three varieties of food in each of four staple food categories: (1) meat, poultry, or fish; (2) bread or cereals; (3) vegetables or fruits; and (4) dairy products. Under Criterion A, stores must also offer perishable products in at least two of the four staple food categories. Criterion B requires stores to "have more than 50 percent of the total gross retail sales" from the staple foods categories. See 7 C.F.R. § 278.1(b)(1)(i)(A) (2012).

85. Food & Nutrition Serv., *Special Supplemental Nutrition Program for Women, Infants and Children (WIC)*, U.S. DEP'T OF AGRIC., [www.fns.usda.gov/pd/37WIC\\_Monthly.htm](http://www.fns.usda.gov/pd/37WIC_Monthly.htm) (last visited Apr. 12, 2013).

provide specific nutrients that they need to maintain a healthy diet or avoid nutrition-related pregnancy complications.<sup>86</sup> Typical foods include iron-fortified adult cereal, milk, fruits, and vegetables.<sup>87</sup> States establish retailer eligibility criteria, within a federal framework, and may limit the number of retailers that participate in the program.<sup>88</sup>

Food access research suggests that some federal food assistance program participants do not have easy access to retailers that sell fruits and vegetables and that ease of access correlates with consumption of fruits and vegetables. Twenty-five percent of SNAP participants in a nationally-representative survey did not have easy access to a supermarket. The presence of a supermarket within five miles of the SNAP household was associated with greater consumption of fruit.<sup>89</sup>

Local governments can require retailers to conform to the retailer standards (including stocking requirements) for one or both of these programs through either zoning or licensing laws.<sup>90</sup> Such a requirement could make it easier for low-income households to access fruits, vegetables, and other healthy products in their neighborhood, reducing the time and financial burden of traveling to a supermarket outside of the neighborhood and potentially increasing consumption of healthy foods. The Minneapolis retailer licensing law discussed above requires retailers to meet healthy food stocking standards that align with the SNAP retailer requirements, although it does not explicitly require participation in the program.<sup>91</sup> Requiring retailers to meet existing standards set by federal food assistance programs provides small retailers with an almost guaranteed customer base—program participants—and therefore potentially less risk in changing the mix of products they offer.<sup>92</sup> Retailers may find it difficult to navigate the WIC or SNAP application process. This requirement would ideally be paired with support from the local government or a local food access or anti-hunger non-profit, reducing the participation barriers that may have kept the retailer out of the program in the first place.

While the concept of requiring retailers to accept SNAP and WIC benefits through a zoning or licensing condition may be new, communities are imposing

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86. Food & Nutrition Serv., *WIC – The Special Supplemental Nutrition Program for Women, Infants and Children*, U.S. DEP'T OF AGRIC., [www.fns.usda.gov/wic/WIC-Fact-Sheet.pdf](http://www.fns.usda.gov/wic/WIC-Fact-Sheet.pdf) (last modified Dec. 2012).

87. *Id.*

88. See 7 C.F.R. § 246.12(a) (2012).

89. Donald Rose & Rickelle Richards, *Food Store Access and Household Fruit and Vegetable Use Among Participants in the US Food Stamp Program*, 7 PUB. HEALTH NUTRITION 1081, 1085 (2004).

90. Federal regulations permit states to limit the number of WIC retailers. 7 C.F.R. § 246.12(g) (2012). Communities should work with the state agency that administers WIC to determine if it is reasonable to require stores to become WIC certified. WIC requires stores to stock more healthy products than SNAP, which would increase customer access to healthy foods. See Food & Nutrition Serv., *About WIC*, U.S. DEP'T OF AGRIC., <http://www.fns.usda.gov/wic/aboutwic/>. Communities may consider requiring stores to meet the state WIC standards, even if the state does not accept new applications from stores.

91. See MINNEAPOLIS, MINN., CODE OF ORDINANCES ch. 203 (2012), available at [http://library.municode.com/HTML/11490/level3/COOR\\_TIT10FOCO\\_CH203GRSTSPFOST.html/#TOPTITLE](http://library.municode.com/HTML/11490/level3/COOR_TIT10FOCO_CH203GRSTSPFOST.html/#TOPTITLE).

92. For model licensing language requiring retailers to accept SNAP and apply to be a WIC retailer, see *Model Licensing Ordinance*, *supra* note 76.

such requirements on farmers' markets. The county of Los Angeles and the city of San Jose, California, require farmers' markets to accept federal food assistance benefits through their zoning code.<sup>93</sup> As discussed in section III, enforcing business practices through zoning is typically done through a CUP when a new business is established, and ongoing enforcement is typically limited. If politically feasible, licensing would be a superior policy approach since accepting federal food assistance benefits should be an ongoing business practice to which all retailers adhere.

#### D. Supporting Safe, Walkable and Bikeable Neighborhoods

Achieving community wellness and cohesion means looking beyond the interior of the store and into the street, neighborhood, and broader context in which retailers are located. If a locality is interested in promoting healthy eating and active living, it should consider not only whether healthy foods are available in local stores, but also whether residents can easily walk and bike to those stores. By adopting policies that promote active living, safety, and "eyes on the street" (a term for design that encourages people to naturally monitor the street and each other), communities can achieve more bang for their policy buck.

Zoning ordinances can impose a range of design requirements to ensure that retailers support healthy neighborhoods. For example, Louisville's zoning code requires the primary entrance for stores to be oriented towards the street (rather than a parking lot), making it easier and safer for people to enter by foot.<sup>94</sup> In 2011, the City of Philadelphia adopted a comprehensive update of its zoning code to mandate a design review of all projects exceeding a certain size to determine their effect on pedestrians. Philadelphia also passed new parking regulations that set a maximum for car spaces and required that spaces also be provided for bicycles.<sup>95</sup> In Seattle, retailers located on designated "pedestrian streets" and "green streets" must locate their parking in the rear of buildings or otherwise conceal it from the street, reducing unappealing "dead spaces" that contribute to pedestrians feeling unsafe or uncomfortable.<sup>96</sup> Each of these strategies contributes to pedestrian and bicyclist comfort and safety; ensuring that retailers support active transportation and are not designed purely with cars in mind.<sup>97</sup>

Adopting zoning codes that promote a mix of residential, civic, employment, and retail uses within close proximity to one another and

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93. See *Healthy Design Ordinance*, L.A. CNTY. (FEB. 5, 2013), <http://planning.lacounty.gov/hdo>; LOS ANGELES COUNTY, CAL., CODE OF ORDINANCES § 22.52.2620 (2013); CITY OF SAN JOSE, CAL., CODE OF ORDINANCES § 20.80.270 (2012). For model zoning language requiring farmers markets to accept SNAP and WIC, see *Establishing Land Use Protections for Farmers' Market*, PUB. HEALTH LAW & POLICY 12-14 (Dec. 2009), [http://changelabsolutions.org/sites/default/files/documents/Establishing\\_Land\\_Use\\_Protections\\_for\\_Farmers\\_Markets\\_FINAL\\_WEB\\_20091203.pdf](http://changelabsolutions.org/sites/default/files/documents/Establishing_Land_Use_Protections_for_Farmers_Markets_FINAL_WEB_20091203.pdf).

94. LOUISVILLE, KY., LAND DEV. CODE § 5.5.1(A)(1) (2006).

95. PHILA. ZONING CODE COMM'N, THE FINAL REPORT 8-25 to -26 (November 2011), available at [http://zoningmatters.org/sites/zoningmatters.org/files/zcc\\_final\\_report.11.17.2011\\_amended.pdf](http://zoningmatters.org/sites/zoningmatters.org/files/zcc_final_report.11.17.2011_amended.pdf).

96. SEATTLE, WASH., MUN. CODE § 23.49.019(B)(1) (2011). Note that screening cannot be an imposing blank wall. *Id.*

97. James F. Sallis et al., *Community Design for Physical Activity*, in MAKING HEALTHY PLACES: DESIGNING AND BUILDING FOR HEALTH, WELL-BEING, AND SUSTAINABILITY 33 (Island Press 2011).

encourage medium- to high-density buildings can also ensure that retail development supports public health goals. Portland, Oregon, establishes a “neighborhood commercial zone” that encourages small-scale retail and service uses like coffee shops and drug stores within residential areas.<sup>98</sup> Zoning ordinances like these provide a two-fold benefit: they encourage new healthy food retailers to locate in neighborhoods, and they promote active transportation by ensuring that people can live or work within walking distance of their daily needs.

Just as licensing is less commonly used to address retailer location and density, it also is not widely employed to achieve safe, walkable and bikeable community design. This is largely due to the regulatory nature of licensing, which tends to focus on business practices rather than building design. However, there are some interesting examples, such as a tobacco retailer licensing requirement in Santa Clara County, California, designed to promote public safety. The license requires that tobacco retailers limit their storefront signage to 15 percent of total square footage of windows and clear doors, allowing pedestrians and passerbys to see into stores and similarly allowing store owners and shoppers to be able to monitor activity on the street.<sup>99</sup> Natural surveillance is one of the central principles of “crime prevention through environmental design” (CPTED), which seeks to enhance perceptions of safety and reduce the likelihood that crime will occur through design strategies such as lighting, windows, etc.<sup>100</sup>

These examples illustrate that communities may wish to consider adopting mutually supporting licensing and zoning ordinances that together address both the business practice aspects of healthy retail, as well as best practices for retailer design that integrates it into an active, safe community.

### **E. Enforcing Federal and State Laws**

Many local governments are seeking ways to strengthen enforcement of existing federal and state laws that apply within their jurisdictions. Licensing has proven to be an effective tool for localities to ensure that businesses comply with relevant federal and state laws.<sup>101</sup> A local government will issue a license that, among other things, requires the licensee to follow the federal and state laws applicable to her business. If she breaks one of these laws, she will face a fine or even a suspension or revocation of the license. Technically, the local government is enforcing local licensing requirements and not the underlying federal or state law.

This approach, commonly used for businesses that sell potentially harmful products or are likely to foster illegal activity (discussed in section III), has

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98. See PORTLAND, OR., ZONING CODE § 33.130.030(A) (2009).

99. SANTA CLARA COUNTY, CAL., MUN. CODE div. A18, § 369(g) (2010).

100. Greg Saville & Mona Mangat, *SafeGrowth: Creating Safety and Sustainability Through Community Building and Urban Design*, LOCAL INITIATIVES SUPPORT CORP. (2008), [http://www.lisc.org/csi/images/strategies\\_&\\_solutions/asset\\_upload\\_file3\\_16229.pdf](http://www.lisc.org/csi/images/strategies_&_solutions/asset_upload_file3_16229.pdf).

101. Although it is feasible to use CUPs to incorporate federal and state laws into the local municipal code, licensing is the more logical approach as zoning laws typically focus on local land use conditions.

several advantages. First, it gives localities flexibility to determine what kinds of conditions to impose on a license, even on topics which the state may have preempted local government from regulating directly. For instance, Oakland, California's tobacco retailer licensing ordinance requires licensees to abide by various federal and state laws regarding tobacco products, store signage, nuisances, and the display or sale of drug paraphernalia, the last of which localities are prohibited by the state from regulating directly.<sup>102</sup>

Second, federal and state laws are usually enforced through onerous procedures in a court of law. Local licensing ordinances typically set forth streamlined, efficient enforcement procedures—often through an administrative proceeding—that allow people accused of licensing violations to refute the charges while taking far less time and fewer resources than any court proceeding.<sup>103</sup> Usually, all issues related to an alleged violation of the license can be determined in a single proceeding.<sup>104</sup>

Third, since in many states it is legal to charge a licensing fee to cover the costs of enforcing license conditions, a licensing law can raise revenue for enforcement operations that otherwise may not occur at all. Especially in lean economic times of shrinking government, the police may choose to attend to the most pressing or serious crimes, overlooking crimes like illegal alcohol and tobacco sales.<sup>105</sup> In such instances, a licensing law can supplement the scarce resources available for enforcement in a community, funding either additional police officers or a licensing enforcement team from another government agency.

## F. Using Incentives to Promote Healthy Retail

Local governments can also use zoning and licensing to offer incentives to those who go beyond minimum legal requirements to operate their stores. Incentives reward businesses by lowering the financial or bureaucratic burdens associated with adopting a new practice. In general, local governments offer incentives in one of five scenarios: (1) When they want to spur businesses to try out something innovative; (2) When they want to help offset the risk of pursuing a potentially expensive practice; (3) When universal adoption of a business practice is not necessary; (4) When incentives are more politically feasible than mandates; or (5) When policymakers want to encourage businesses to adopt practices—such as limiting advertising for harmful products—that might be unconstitutional if mandated by the government.<sup>106</sup> Local jurisdictions can offer

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102. See OAKLAND, CAL., MUN. CODE § 5.91.090 (2012); CAL. HEALTH & SAFETY CODE § 11364.7 (2012).

103. See *Case Studies on the Implementation and Enforcement of Local Tobacco Retailer Licensing Ordinances in California*, TECHNICAL ASSISTANCE LEGAL CTR. 14 (June 2006), [http://changelabsolutions.org/sites/default/files/documents/Case%20Studies%20on%20the%20Implementation%20and%20Enforcement%20of%20Local%20Tobacco%20Retailer%20Licensing%20Ordinances%20in%20CA\\_6\\_06.pdf](http://changelabsolutions.org/sites/default/files/documents/Case%20Studies%20on%20the%20Implementation%20and%20Enforcement%20of%20Local%20Tobacco%20Retailer%20Licensing%20Ordinances%20in%20CA_6_06.pdf).

104. See LOS ANGELES COUNTY, CAL., CODE OF ORDINANCES § 11.35.110 (2010).

105. OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUSTICE, THE IMPACT OF THE ECONOMIC DOWNTURN ON AMERICAN POLICE AGENCIES (Oct. 2011), available at [www.cops.usdoj.gov/files/RIC/Publications/e101113406\\_Economic%20Impact.pdf](http://www.cops.usdoj.gov/files/RIC/Publications/e101113406_Economic%20Impact.pdf).

106. *Putting Business to Work for Health: Incentive Policies for the Private Sector*, CHANGELAB SOLUTIONS 2 (2012), [http://changelabsolutions.org/sites/default/files/documents/Incentives\\_FINAL](http://changelabsolutions.org/sites/default/files/documents/Incentives_FINAL)

incentives to retailers through zoning or licensing in neighborhoods with few healthy food options.

Zoning incentives reduce the burden of land use regulations, for example, by expediting the review process or waiving certain development requirements. These incentives can attract new retailers to an area by lowering the cost of developing a parcel. For example, New York City offers a package of zoning incentives to retailers and developers who place stores in underserved neighborhoods. The city waives some parking requirements for new developments that include grocery stores.<sup>107</sup> This incentive is appealing to developers in places where real estate prices are high and space is limited, because parking takes up valuable footage that does not yield revenue. New York also allows developers to add more residential square footage to buildings that include a food retailer.<sup>108</sup> This incentive increases potential revenue from the property since the developer can add more units to or increase the size of units in the building. Philadelphia offers a similar package of incentives to new fresh food retailers, including minimum parking waivers and density bonuses for developers.<sup>109</sup>

Licensing incentives may include reduced business license fees or expedited review of business license renewal applications or renovation permit applications. Local governments can use these incentives to reward existing businesses for offering more healthy products or selling fewer unhealthy products than required by the mandatory licensing standards. Incentives could be tied to voluntary promotion of fruits and vegetables through posters and coupons; reductions in sales of tobacco, alcohol, and junk food; or increased prices for junk food.

As noted earlier, licensing is not yet a common approach for promoting healthy food in the retail environment. Licensing incentives for similar businesses illustrate how licensing could offer incentives for voluntary adoption of healthy retail practices. In 2008, New York City created a new type of permit for fresh fruit and vegetable mobile vendors, called green carts. The vendors must agree to operate within defined neighborhoods in which residents eat very few fruits and vegetables.<sup>110</sup> New York has a cap on mobile vending permits and the waiting list for any type of permit can be long.<sup>111</sup> Prospective mobile vendors who were on a waiting list for a mobile vending permit when the law was enacted received priority consideration for a green cart permit, providing an incentive through the licensing process for vendors to choose to sell fruits and vegetables.<sup>112</sup>

Another potential approach to offering incentives related to zoning and licensing is to broadly streamline the regulatory process for businesses, or create

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107. *Food Retail Expansion to Support Health*, NYC.GOV, [www.nyc.gov/html/misc/html/2009/fresh.shtml](http://www.nyc.gov/html/misc/html/2009/fresh.shtml) (last visited Apr. 13, 2013).

108. *Id.*

109. PHILA. ZONING CODE COMM'N, *supra* note 95, at 4-24, 5-92.

110. CITY OF NEW YORK, N.Y., LOCAL LAW 9, § 6 (2008).

111. June M. Tester et al., *An Analysis of Public Health Policy and Legal Issues Relevant to Mobile Food Vending*, 100 AM. J. PUB. HEALTH 2038, 2039 (2010).

112. NEW YORK, N.Y., LOCAL LAW 9, § 6(e) (2008).

a gateway agency dedicated to helping businesses obtain the necessary government approvals and understand and comply with conditions of operation.<sup>113</sup> New York City, for example, created a gateway agency called the New Business Acceleration Team (NBAT) that helps new eating and drinking establishments open for business.<sup>114</sup> NBAT assists individuals and groups opening eating and drinking (food and beverage) establishments by navigating City agency processes and reducing the time needed to open. NBAT provides client management services, an accelerated plan review process, and coordination of necessary inspections by regulatory agencies. NBAT also engages in research and information dissemination to assist the small business community.

A community could use a similar approach to make it easier for health-promoting businesses, like healthy food retailers, to open in certain neighborhoods. The need for this type of assistance is evident in many corner store programs; one of the specific recommendations of the Los Angeles Food Policy Council to scale their Community Market Conversion work is to create a “healthy corner store business association” to help store owners navigate the city regulatory environment.<sup>115</sup>

As discussed throughout this section, the use of zoning or licensing to offer incentives will depend on the overall public health goals of the community. For neighborhoods without healthy food retail options or that are being newly developed, waiving certain zoning requirements for preferred businesses or mixed-use developments will ensure that the area promotes health from the start. For established neighborhoods, incentives offered through a licensing scheme will reward existing businesses for going above and beyond the minimum license requirements.

## V. NAVIGATING POTENTIAL LEGAL ROCKS AND SHOALS

To have a full picture of how zoning and licensing might be used to advance key public health goals for the retail environment, it is important to touch on two broadly divided categories of relevant laws: those that establish the supremacy of federal and state law over local law; and those that protect certain individual and group rights from government intrusion. Because local policy development is circumscribed by a larger legal context, understanding this context is neither trivial nor purely academic.<sup>116</sup> Instead, it helps ground and frame the options and examples discussed in section IV.

Because this article highlights innovative uses of zoning and licensing, many of the proposals have not been implemented and are subject to legal challenge. This section describes legal claims that might foreseeably arise.

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113. See *Changes in the WIC Food Packages: A Toolkit for Partnering with Neighboring Stores*, CHANGLAB SOLUTIONS (2009), <http://changelabsolutions.org/publications/WIC-toolkit>.

114. See generally *New Business Acceleration Team*, NYC.GOV, [www.nyc.gov/html/nbat/html/home/home.shtml](http://www.nyc.gov/html/nbat/html/home/home.shtml) (last visited Apr. 13, 2013).

115. See JESSIE AZRILIAN ET AL., L.A. FOOD POLICY COUNCIL, *CREATING HEALTHY CORNER STORES: AN ANALYSIS OF FACTORS NECESSARY FOR EFFECTIVE CORNER STORE CONVERSION PROGRAMS* (May 2012) (on file with author).

116. See Graff et al., *supra* note 25, at 315-16 (describing the importance of legal feasibility in the policymaking process).

## A. Federal and State Supremacy over Local Law

### 1. Local Authority

As described above, a local government seeking to enact new zoning or licensing requirements must first determine whether it has been granted authority by the state to do so.<sup>117</sup> Depending on the state, local authority to pursue one of these proposals could derive from the delegation of home-rule powers or from an explicit, limited delegation such as a state's zoning enabling act.<sup>118</sup>

### 2. Preemption

Assuming the locality has the delegated authority to pass a zoning or licensing ordinance, it must then determine whether any federal or state laws "preempt" – that is, trump – the particular requirements the locality is seeking to impose.<sup>119</sup> Preemption can be either express or implied. Express preemption is a straightforward concept: A federal or state law explicitly provides that no lower tier of government may regulate in a given area.<sup>120</sup> Implied preemption occurs when a federal or state law contains no express preemption but a court nonetheless invalidates an ordinance on the basis of a conflict with a higher law, or because the ordinance invades a "field" (a particular subject area) deemed completely occupied by a higher law. For example, a court struck down a New York City ordinance setting a closing time for dance clubs with bars because the ordinance conflicted with a comprehensive state law regulating when, where, and how alcohol can be sold.<sup>121</sup>

Federal preemption problems should be few and far between since land use planning and retailer licensing are quintessential police power activities under the purview of states and their subdivisions. It is conceivable, however, that conditions placed on a zoning permit or retail license could contravene a federal statute. For example, a license requirement that retailers post health warnings on cigarette packs or soda shelves may well be preempted by federal tobacco and nutrition labeling laws.<sup>122</sup>

It is difficult to generalize about the risk of state preemption because the dynamics of state and local power vary widely across the states, as do the statutory schemes affecting local retailers. But it is worth touching on three observations about state preemption.

First, local zoning policies are less likely to raise preemption problems than local licensing policies. Across the country, zoning is considered a core function of local government. The presumption is that policymakers familiar with local conditions are best positioned to determine what types of land should be used

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117. See Diller & Graff, *supra* note 27, at 89–93.

118. See *Res. Conservation Mgmt., Inc. v. Bd. of Supervisors of Prince William Cnty.*, 380 S.E.2d 879, 882 (Va. 1989) (analyzing a state law that confers upon localities that do not enjoy home rule authority the more limited authority to enact zoning ordinances).

119. Diller & Graff, *supra* note 27, at 90.

120. See *Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985).

121. *Lansdown Entm't Corp. v. N.Y.C. Dep't of Consumer Affairs*, 543 N.E.2d 725, 726 (N.Y. 1989).

122. See 15 U.S.C. § 1334 (2011); 21 U.S.C. § 343-1(a)(4) (2011).



for what purposes and to guide growth and development in their communities.<sup>123</sup> Licensing, on the other hand, is a tool employed by states to regulate a range of businesses and professions. Depending on the state, a local healthy retailer licensing proposal may be expressly or impliedly preempted by an applicable statewide licensing scheme.<sup>124</sup> For example, in many states alcohol retailer *licensing* is an exclusive state function but localities freely employ *zoning* tools to limit the density of alcohol outlets in a neighborhood or to prohibit alcohol outlets within a set distance of schools and other sensitive land uses.<sup>125</sup>

Second, opponents may claim that state retail food codes preempt local healthy zoning and licensing policies. Almost all states have retail food codes,<sup>126</sup> largely patterned on the Food and Drug Administration's model code, setting forth health and sanitation requirements for restaurants and other food establishments.<sup>127</sup> A store operator might make an implied preemption argument that her state's retail food code has occupied the field, precluding local ordinances promoting access to healthy food. Such arguments have a good chance of failing because state retail food codes aim to ensure that food sold to the public is not contaminated or spoiled in order to stave off communicable disease.<sup>128</sup> In contrast, local healthy zoning and licensing ordinances regulate foods considered "safe" under the state food code for the entirely separate objective of preventing chronic disease.<sup>129</sup> Moreover, many state retail food codes expressly give local boards of health the authority to enact their own regulations so long as they are consistent with the state code.<sup>130</sup> These explicit grants of local power weigh heavily against the prospects of an implied preemption claim.<sup>131</sup>

A third observation—or more accurately, a prediction—is that as more local healthy zoning and licensing policies proliferate, affected industries will increasingly lobby for specially-tailored state preemption legislation. This is a tactic drawn from the tobacco industry playbook. Since it has been difficult for the tobacco industry to compete against the relationships health advocates have with local policymakers, the industry has steadfastly focused on lobbying for

123. See JAMES F. MOSHER ET AL., *THE IMPACT OF STRICT STATE PREEMPTION ON THE REGULATION OF ALCOHOL OUTLET DENSITY: THE CASE OF NEW YORK STATE* 4-5 (2011), available at [www.scribd.com/doc/62031746/NY-Preemption-Report-8-3-11-Final](http://www.scribd.com/doc/62031746/NY-Preemption-Report-8-3-11-Final).

124. See RICHARD BRIFFAULT & LAURIE REYNOLDS, *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW* 428-29 (West, 7th ed. 2008) (noting that licenses are often seen as affirmative permission from the state to engage in a certain activity and that additional local regulations of that activity may be legally suspect).

125. MOSHER, *supra* note 123, at 5.

126. See *Real Progress in Food Code Adoptions*, U.S. FOOD & DRUG ADMIN., [www.fda.gov/Food/FoodSafety/RetailFoodProtection/FederalStateCooperativePrograms/ucm108156.htm](http://www.fda.gov/Food/FoodSafety/RetailFoodProtection/FederalStateCooperativePrograms/ucm108156.htm) (last updated Jul. 7, 2011) (noting that 49 of 50 states have adopted retail food codes premised on FDA versions going back to 1993).

127. *FDA Food Code 2009: Preface*, U.S. FOOD & DRUG ADMIN. § 2(A), [www.fda.gov/Food/FoodSafety/RetailFoodProtection/FoodCode/FoodCode2009/ucm188264.htm](http://www.fda.gov/Food/FoodSafety/RetailFoodProtection/FoodCode/FoodCode2009/ucm188264.htm) (last updated Feb. 9, 2012).

128. See Diller & Graff, *supra* note 27, at 92.

129. See *id.*

130. E.g., WASH. REV. CODE § 70.05.060(3) (1991).

131. See Diller & Graff, *supra* note 27, at 92-93 (noting that proponents of obesity-prevention strategies should remain aware of federal and state attempts to trump local regulation).

state level preemption of local smoke-free and other tobacco control laws.<sup>132</sup> The food industry has already followed suit. For example, when jurisdictions around the country began adopting laws requiring calorie labeling on fast food menus, the state restaurant associations in both Georgia and Tennessee managed to push through legislation expressly preempting localities from enacting menu-labeling ordinances.<sup>133</sup> This left a regulatory vacuum because the states declined to impose any menu-labeling requirements while simultaneously forbidding localities from doing so.<sup>134</sup> The same dynamic has played out in reaction to the passage of two local ordinances in California that prohibit the distribution of toys with restaurant meals that fail to meet specified nutritional standards.<sup>135</sup> Arizona, Florida, and Ohio enacted state laws prohibiting municipalities from restricting toys or games offered with children's meals.<sup>136</sup>

The fundamental lesson to be drawn about preemption is that each state has a unique statutory scheme that affects the ability of local governments to use zoning and licensing as public health tools.

### 3. Dormant Commerce Clause

The "dormant" Commerce Clause (DCC) may be raised in challenges to local healthy retail laws. It is well settled case law that the Commerce Clause of the U.S. Constitution<sup>137</sup> – which grants Congress the power to regulate commerce among the states – includes an implicit, or "dormant," limitation on the ability of states and their subdivisions to impede the free flow of interstate commerce. Courts use a two-tier method when reviewing DCC claims.

First, a court will consider whether the regulation discriminates against interstate commerce on its face, in its purpose, or in its effect.<sup>138</sup> The DCC is

132. See Graff et al., *supra* note 25, at 313 ("[B]ig tobacco's first priority has always been to preempt the field, preferably to put it all on the federal level, but if they can[not] do that, at least on the state level, because the health advocates can[not] compete there.").

133. GA. CODE ANN. § 26-2-373(a) (West 2012); TENN. CODE ANN. § 68-14-303(3) (West 2012).

134. Eventually, state and local menu-labeling laws became so prevalent that the industry was willing to support a federal menu-labeling law regulating chains with twenty or more locations. 21 U.S.C. § 343(q)(5)(H) (2011). The federal law contains its own preemption provision forbidding states and localities from imposing different menu-labeling requirements on those restaurants covered by the federal law. *Id.* There still remains a regulatory vacuum in Georgia and Tennessee with regard to smaller chains and other establishments that do not fall under the purview of the federal law. See GA. CODE ANN. § 26-2-373(a) (West 2012); TENN. CODE ANN. § 68-14-303(3) (West 2012).

135. See SAN FRANCISCO, CAL., HEALTH CODE §§ 471.1-471.9 (Ord. 290-10, File No. 101096) (2010); SANTA CLARA, CAL., CODE §§ A18-350 to -355 (2010).

136. ARIZ. REV. STAT. ANN. § 44-1380 (2011); FLA. STAT. § 509.032(7)(a)(2009); OHIO REV. CODE ANN. § 3717.53 (West 2011). Ohio's law also contains a broad provision banning local regulation of food service operations "based on the existence or nonexistence of food-based health disparities." OHIO REV. CODE ANN. § 3717.53(c)(5). Cleveland challenged the Ohio law as a violation of the home rule and single-subject rule provisions of the state constitution. A state trial court ruled in Cleveland's favor, striking down the law. *City of Cleveland v. Ohio*, No. CV-12-772529, 2012 WL 2377490 (Cuyahoga Cnty. Ct., June 11, 2012).

137. U.S. CONST. art. I, § 8, cl. 3.

138. See, e.g., *Hughes v. Oklahoma*, 441 U.S. 322, 336-38 (1979) (finding a state statute facially discriminatory when it prohibited the transportation of natural minnows outside of the state for the purpose of sale); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 352-54 (1977) (finding a state statute banning the display of other states' apple grades on containers shipped into the state to be discriminatory in purpose and effect).

intolerant of in-state protectionism, so discriminatory regulations are subject to “a virtually *per se* rule of invalidity.”<sup>139</sup> A healthy zoning or retailer licensing ordinance is unlikely to be discriminatory because it is focused on promoting community wellness, not on shielding in-state interests at the expense of out-of-staters. But it could be vulnerable to a discrimination claim if it contains requirements preferring locally-grown or locally-processed products<sup>140</sup> or if it provides preferential treatment to locally-owned businesses.<sup>141</sup>

Under the second tier of DCC review, non-discriminatory laws are subject to a balancing test assessing whether the burden on interstate commerce clearly exceeds the local benefits claimed for the law.<sup>142</sup> State and local regulations typically survive this test unless challengers demonstrate both massive costs to interstate commerce and negligible benefits to the local jurisdiction.<sup>143</sup> As such, the DCC typically should not stand in the way of healthy zoning and licensing policies.

## B. Individual and Group Rights Limitations

### 1. Regulatory Takings

Since a healthy zoning or licensing ordinance could impose new obligations on existing businesses, some retailers might argue that it constitutes a “regulatory taking.” The Takings Clause of the U.S. Constitution along with similar provisions in state constitutions, protects private landowners from government intrusion.<sup>144</sup> Thus, the government has “eminent domain” power to seize private property so long as it pays “just compensation” (i.e., a fair market price) and puts the property to public use (e.g., constructing a roadway, school, or park).<sup>145</sup> But what if, instead of forcing a sale, the government burdens a landowner with onerous regulatory requirements in order to benefit the public at large? And what if these burdens substantially impair the market value of a piece of property or a landowner’s freedom to determine the best use of the property? In extreme circumstances, this could amount to what is known as a “regulatory taking,” requiring the government to pay just compensation.<sup>146</sup>

139. See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

140. See, generally Amy S. Ackerman, *Buy Healthy, Buy Local: An Analysis of Potential Legal Challenges to State and Local Government Local Purchase Preferences*, 43 URB. LAW. 1015, 1019–22 (2011); Brannon P. Denning et al., *Laws to Require Purchase of Locally Grown Food and Constitutional Limits on State and Local Government: Suggestions for Policymakers and Advocates*, 1 J. AGRIC., FOOD SYS. & COMMUNITY DEV. 139, 142–45 (2010) (analyzing the DCC implications of locally-grown requirements).

141. E.g., *Island Silver & Spice, Inc. v. Islamadora*, 542 F.3d 844, 848 (11th Cir. 2008) (striking down a local prohibition on big chain stores because its drafting and application made it clear that the purpose was to exclude out of state businesses).

142. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

143. BORIS I. BITTKER & BRANNON P. DENNING, *BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE* 166–68 (Aspen Law & Business 1999 & 2010 Supp.).

144. See U.S. CONST. amend V.

145. See generally *Berman v. Parker*, 348 U.S. 26 (1954); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

146. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123–37 (1978) (establishing a somewhat ad hoc balancing test for determining when a regulation causes such an extreme economic injury that it rises to the level of a compensable taking).

Retailers are unlikely to prevail in regulatory takings challenges against new licensing requirements because courts are disinclined to view licenses as the type of property protected by the Takings Clause.<sup>147</sup> Since licenses entail temporary permission from the government to engage in certain business practices, courts tend to view them as a privilege rather than an inherent property right in the takings context.<sup>148</sup> Thus, the imposition of new conditions should not trigger a takings problem, especially if the change takes effect upon renewal of the license.<sup>149</sup>

The regulatory takings doctrine can come up in the land use context when the government—either in the zoning code itself or via a development permit—specifies or restricts certain uses of a given property.<sup>150</sup> State takings law tends to be more protective of private property interests than federal law in at least two ways.

First, under the federal takings doctrine, the economic deprivation has to be extreme to require just compensation from the government.<sup>151</sup> Take, for example, a code provision prohibiting new liquor stores in a particular zone, diminishing the value of a landlord's property by twenty-five percent by limiting her pool of prospective tenants. The landlord most probably will not prevail on a federal claim but depending on where she does business, she may have a better chance under state law since some states require a much smaller deprivation to be compensated.<sup>152</sup>

Second, many states have laws shielding existing businesses from new land use requirements. Some states provide that existing businesses must be allowed to continue operating as they were (i.e., grandfathering in “prior nonconforming uses”).<sup>153</sup> Others require local governments to give existing businesses a grace period before they must start conforming to the new regulations (i.e., an

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147. See, e.g., *Kafka v. Mont. Dep't of Fish, Wildlife & Parks*, 201 P.3d 80, 96 (Mont. 2008) (“Courts which have directly considered the question . . . have taken a dim view of the notion that government-issued licenses are compensable property interests.” (citing *United States v. Fuller*, 409 U.S. 488 (1973))); *Conti v. United States*, 291 F.3d 1334, 1340 (Fed. Cir. 2002) (“[C]ourts have held that no property rights are created in permits and licenses.” (citing *United States v. Fuller*, 409 U.S. 488, 493 (1973); *Alves v. United States*, 133 F.3d 1454, 1457 (Fed. Cir. 1998))).

148. See Francis Amendola et al., *Franchises and Privileges – Licenses and Permits*, 16A C.J.S. Const. L. § 398 (West 2012).

149. See, e.g., *Goldrush II v. City of Marietta*, 482 S.E.2d 347, 358–60 (1997) (finding an adult entertainment club had a “vested right” in a liquor license for one-year term, but no “vested right” to renew after the city changed the license requirements).

150. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (setting forth a *per se* rule that compensation is required when the government imposes a “permanent physical occupation” on private property); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (noting compensation may be necessary when a permit condition required a landowner to dedicate flood plain for a hike and bike trail).

151. See, e.g., *Hadacheck v. Sebastian*, 239 U.S. 394, 411–12 (1915) (finding no compensable regulatory taking under federal law when a brick-making ban allegedly reduced the value of a landowner's property from \$800,000 to \$60,000); *Hawkeye Commodity Promotions v. Vilsack*, 486 F.3d 430, 441 (8th Cir. 2007) (holding under federal law that no compensation was owed to the owner of lottery machines when the state outlawed the game played on those machines).

152. See, e.g., ARIZ. REV. STAT. ANN. § 12-1134(A) (2012); FLA. STAT. ANN. § 70.001(1) (West 2012).

153. Christopher Serkin, *Existing Uses and the Limits of Land Use Regulations*, 84 N.Y.U. L. REV. 1222, 1231 (2009).

amortization schedule).<sup>154</sup> So in some states, a new CUP requiring retailers to provide bike parking would apply only to outlets opened in the future, while in other states, the CUP must give existing outlets a five-year grace period.

### 2. First Amendment: Freedom of Speech

A healthy zoning or retailer licensing law could be challenged under the First Amendment if it imposes requirements regarding advertising signs or other forms of promotion.<sup>155</sup> The First Amendment to the U.S. Constitution, along with free speech clauses from state constitutions, forbids the government from making laws “abridging the freedom of speech.”<sup>156</sup> Over the past thirty years, the Supreme Court has extended substantial First Amendment protection to “commercial speech” (i.e., advertising), significantly limiting the ability of policymakers to regulate advertising for harmful products.<sup>157</sup> Examples of laws that could be vulnerable to a free speech challenge include: making a retailer post a message with which he disagrees (e.g., a sign saying “Children should not drink soda”); prohibiting advertising for some products (e.g., tobacco, alcohol, and junk food) but not others; and allowing the distribution of promotional materials only for products designated as healthy.<sup>158</sup> The application of the First Amendment to various industry marketing techniques is a complex and evolving area of law,<sup>159</sup> so policies that implicate advertising or other types of promotion should be vetted by a knowledgeable attorney.

### 3. Equal Protection

A retailer could conceivably level an equal protection claim against a healthy zoning or retailer licensing law because the law imposes burdens, for example, on convenience stores and not on larger supermarkets. The Fifth and Fourteenth Amendments to the U.S. Constitution as well as analogous provisions

154. *Id.* at 1236–38.

155. The Unconstitutional Conditions Doctrine prohibits the government from doing indirectly that which it may not do directly. *See* *Speiser v. Randall*, 357 U.S. 513, 528–29 (1958). This doctrine comes up not infrequently in the First Amendment context. *See, e.g., Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 833–34 (1995) (holding that a university’s denial of funds to a Christian student group amounted to viewpoint discrimination); *Alliance for Open Soc’y Int’l, Inc. v. U.S. Agency for Int’l Dev.*, 651 F.3d 218, 238 (2d Cir. 2011) (invalidating requirement that recipients of government HIV prevention funds pledge to oppose prostitution).

156. U.S. CONST. amend I.

157. *See, e.g., Va. State Pharm. Bd. v. Va. Citizens Consumer Council*, 425 U.S. 748, 770 (1976) (extending First Amendment protection to commercial speech); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980) (utilizing a four-part test for content-based regulations of commercial speech); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 529 (2001) (striking down state restrictions on tobacco advertising within 1000 feet of a school).

158. *See Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 655 (1985) (applying a lower level of scrutiny to factual disclosure requirements than to regulations compelling citizens to express an opinion); *Lorillard Tobacco Co.*, 533 U.S. at 570–71 (striking down regulations targeting tobacco advertisements); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2669–72 (2011) (disapproving of regulations that discriminate against commercial speakers based on the content of their messages).

159. *See, e.g., Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 522–25 (6th Cir. 2012) (discussing the free speech afforded tobacco companies); *R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin.*, 845 F. Supp. 2d 266, 271 (D.D.C. 2012) (discussing the legality of requiring tobacco companies to put graphics on their products).

in state constitutions, guarantee that no person may be denied the equal protection of the laws.<sup>160</sup> This means that the government cannot arbitrarily discriminate against a person or group just because they fall into a particular category. Courts generally uphold social and economic regulations against equal protection challenges so long as the government is not discriminating on the basis of a suspect class like race, national origin, or gender.<sup>161</sup> Since store owners are not a suspect class, the city will prevail so long as it can establish a “rational basis” for the law.<sup>162</sup> Providing a rational basis is not difficult because the city needs to show only a reasonable justification for the law.<sup>163</sup> Therefore, in most cases an equal protection claim will not pose a serious challenge to zoning and licensing laws that promote public welfare through, say, requiring retailers to provide more fresh food or better outdoor lighting.<sup>164</sup>

#### 4. *Procedural and Substantive Due Process*

The Due Process Clause of the Fifth and Fourteenth Amendments prohibits all levels of government from depriving individuals of “life, liberty, or property without due process of law.”<sup>165</sup> Due process refers to the right of fair treatment under law. State constitutions have identical or similar guarantees. The Due Process Clause has spawned two distinct categories of individual protections: procedural due process and substantive due process.

Procedural due process requires that the government use fair procedures before depriving someone of life, liberty, or property. The basic principles of procedural due process are notice of the deprivation and a means to object to it (often referred to as a right to be heard).<sup>166</sup> The extent of procedural due process required depends on the nature and degree of the deprivation; someone contesting a parking ticket is entitled to fewer procedural safeguards than someone facing a jail sentence.<sup>167</sup> To the extent that they affect business owners’

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160. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

161. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (noting that statutes which classify on the basis of race, alienage, or national origin are subject to strict scrutiny and will only be sustained if the government can show the statute is “suitably tailored to serve a compelling state interest”). Gender, on the other hand, is considered to be a “quasi-suspect” classification; statutes which classify on the basis of gender are subject to intermediate scrutiny and will be sustained only if the government can show the statute is substantially related to achieving important governmental objectives. *United States v. Virginia*, 518 U.S. 515, 532–33 (1996).

162. See *Cent. State Univ. v. Am. Ass’n of Univ. Professors*, Cent. State Univ. Chapter, 526 U.S. 124, 127–28 (1999).

163. See *Fed. Commc’ns Comm’n v. Beach Commc’ns, Inc.*, 508 U.S. 307, 314–15 (1993); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

164. See *Beach Commc’ns, Inc.*, 508 U.S. at 314–15 (holding that, for the purposes of franchise requirements, a distinction between cable facilities that serve separately owned and managed buildings and those that serve buildings under common ownership had a rational basis). *But see Walgreen Co. v. City & Cnty. of San Francisco*, 185 Cal. App. 4th 424, 443–44 (2010) (striking down a tobacco retailer licensing program prohibiting pharmacies from selling tobacco but exempting grocery stores and big box stores with pharmacies). San Francisco ultimately amended the ordinance to remove the exemptions, and this time the ordinance was upheld. *Safeway, Inc. v. City of San Francisco*, 797 F. Supp. 2d 964, 973 (N.D. Cal. 2011).

165. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

166. *Mathews v. Eldridge*, 424 U.S. 319, 348–49 (1976).

167. See *id.* at 334 (noting that “[d]ue process is flexible and calls for such procedural protections

property interests, zoning and licensing regulations must comport with procedural due process standards. Local governments generally have administrative procedures in place that take due process considerations into account, and it often makes sense for new regulations to be incorporated into these existing procedures. For example, violations of a new healthy retail requirement can be handled under the standard business license suspension procedure.

Substantive due process allows people to demand that the government have an adequate justification for laws that affect life, liberty, or property.<sup>168</sup> In an echo of the equal protection doctrine, courts are inclined to uphold social and economic regulations against substantive due process challenges unless a “fundamental right” is at stake. Core fundamental rights include privacy in matters relating to marriage, procreation, contraception, family relationships, and child rearing.<sup>169</sup> Economic rights—including the ability to run a retail food store—are not “fundamental,” and therefore restrictions on economic rights are subject to less scrutiny.<sup>170</sup> The lenient “rational basis” test will apply to a typical substantive due process complaint against a healthy zoning or licensing ordinance. As stated above, public health regulations often pass a rational basis test easily.

In sum, a zoning or licensing ordinance may encounter any number of legal challenges, depending on how it squares with related federal and state law and with special individual constitutional rights. The purpose of exploring likely legal objections is not to cast a pall over the proposals highlighted in the prior section but rather to recognize that zoning and licensing strategies are subject to certain legal limitations that nonetheless leave most localities with a lot of flexibility.

## VI. CONCLUSION

As this article describes, there are many ways zoning and licensing can be used to promote public health goals via the retail environment. If advocates and policymakers take the opportunity to start seeing the retail environment through a holistic health lens, these tools can be crafted in mutually supportive ways that achieve multiple health goals.

Good policy drafting will also go a long way toward ensuring that community health goals are met. Well-drafted zoning and licensing laws consider both the legal issues implicated by the policy as well as practical issues of implementing and enforcing it. Policy development is generally more successful when done in collaboration with both the businesses that will be subject to the law and all government agencies that will have a role in

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as the particular situation demands” (citation omitted) (internal quotation marks omitted)).

168. See Seth E. Mermin & Samantha K. Graff, *A Legal Primer for the Obesity Prevention Movement*, 99 AM. J. PUB. HEALTH 1799, 1803 (2009).

169. See, e.g., *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 926 (1992) (addressing reproductive rights); *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (addressing sexual privacy in one’s own home).

170. See *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (noting that the rational basis test applies in the area of economics and social welfare).

implementing and enforcing the law, in addition to community residents and advocates who have a stake in improving health outcomes and quality of life in their neighborhoods. Of course, zoning and licensing are not the only policy tools available to communities. A broad range of land use, economic development, transportation, crime prevention, and other policies not directly discussed here should be considered when zoning and licensing are insufficient or would be more effective when combined with other approaches.

Any new zoning or licensing policy strategy will come with costs, including the burden on government staff to develop, draft, implement, and enforce the policy, as well as the regulatory and financial burdens on those subject to the new law. However, the burden of chronic disease imposes significant long-term costs on communities. In many communities, the existing retailer regulatory environment, which supports business models built on peddling unhealthy products, externalizes these costs onto individuals, businesses, and taxpayers through increased spending on healthcare, lost productivity, and shortened life-spans. Retailers should not be blamed for following the rules as they currently exist, but the rules need to change if public health goals are going to be met. This means establishing policies that nudge businesses towards practices that promote health and discourage practices that undermine it. Communities considering a healthy retailer zoning or licensing law must educate policymakers and stakeholders about the value of policies that protect the public's health, and encourage them to see zoning and licensing as explicitly health-promoting tools.