

Legal Issues: Tobacco Retail Licensing

Issuing licenses to retailers wishing to sell tobacco products is an effective way to regulate tobacco sales and thereby reduce youth access to tobacco products.¹ Tobacco retail licenses (with varying degrees of restrictions) have become common and have been tested – and upheld – by the courts.² The discussion below outlines some of the legal issues relating to tobacco retail licensing that courts have considered.

- **Denial of a license does not constitute a Fifth Amendment taking.**
 - Licenses are privileges not property.³ New York courts have clearly stated that licenses are not property.⁴ Therefore, denial of a license (including lack of renewal) does not trigger a takings issue.
- **Licensing fees are not taxes and are therefore legal.**
 - Licensing fees are permissible, so long as the cost of the license corresponds to the cost of enforcement.⁵ Licensing fees may be assessed to cover the associated costs of administering and enforcing the license; fees may not be assessed simply to raise general revenue, as the latter is an (impermissible) tax.⁶
- **Denying licenses to retailers does not trigger an Equal Protection claim, so long as the ordinance is not discriminatory.**
 - Similarly-situated retailers should be treated alike and follow the same regulations.⁷ Legal issues could arise if exceptions are made without a valid public policy justification. Importantly, licensing restrictions that treat all similarly-situated businesses the same (e.g., all pharmacies) have been upheld.⁸
- **Prohibiting retailers from selling tobacco products does not violate tobacco companies' First Amendment freedom of speech guarantee.**
 - Prohibiting tobacco *sales* is distinguishable from prohibiting *speech* about tobacco and is therefore permissible.⁹ Accordingly, denying a retailer a license to sell tobacco does not impermissibly restrict free speech.
- **It is legal to identify zones in which tobacco retail licenses are restricted (school zones).**
 - A tobacco retail license scheme may include restricting the issuance of a license in defined zones, such as areas frequented by youth (schools, recreation centers, etc.). This may be accomplished through either licensing restrictions or zoning ordinances.¹⁰

(For a more detailed analysis of these issues, please contact the Center or visit our website.)

The Public Health and Tobacco Policy Center provides educational materials and research support for policy initiatives. This work does not constitute and cannot be relied upon as legal advice.

References

¹ Scott P. Novak et al., *Retail Tobacco Outlet Density and Youth Cigarette Smoking: A Propensity-Modeling Approach*, 96 AM. J. PUB. HEALTH 670, 674 (2006).

² See eg. *Clubhouse, Inc. v. N.Y. State Liquor Auth.*, 521 N.Y.S.2d 190 (N.Y. App. Div. 1987); *ATM One, L.L.C. v. Incorporated Village of Freeport*, 714 N.Y.S.2d 721 (N.Y. App. Div. 2000); *N.Y. Telephone Co. v. City of Amsterdam*, 613 N.Y.S.2d 993 (N.Y. App. Div. 1994); *Walgreen Co. v. City & County of S. F.*, 110 Cal. Rptr. 3d 498 (Cal. Ct. App. 2010).

³ See *People ex rel. Lodes v. Dep't of Health of City of N.Y.*, 82 N.E. 187 (N.Y. 1907); *New York ex rel. Lieberman v. Van De Carr*, 67 N.E. 913 (N.Y. 1903); *Clubhouse, Inc. v. N.Y. State Liquor Auth.*, 521 N.Y.S.2d 190 (N.Y. App. Div. 1987); *Philip Morris USA, Inc. v. City & County of S.F.*, No. C 08-04482, 2008 U.S. Dist. LEXIS 101933, at *5 (N.D. Cal. Dec. 5, 2008), *aff'd*, No. 08-17649, 2009 U.S. App. LEXIS 20142 (9th Cir. Sept. 9, 2009).

⁴ See *Lodes*, 82 N.E. at 192; see also *Clubhouse*, 521 N.Y.S.2d at 191 (—A license to sell alcoholic beverages is not a property right, but simply permission granted in the State's discretion after weighing the dangers posed to the community if the license is issued[.] (internal citations omitted)).

⁵ See *Suffolk County Builders Ass'n v. County of Suffolk*, 389 N.E.2d 133, 134-37 (N.Y. 1979).

⁶ *Nitkin v. Adm'r of Health Servs. Admin. of City of N.Y.*, 91 Misc. 2d 478, 479 (N.Y. Sup. Ct. 1975).

⁷ *Walgreen Co. v. City & County of S. F.*, 110 Cal. Rptr. 3d 498, 504, 506 (Cal. Ct. App. 2010).

⁸ *Safeway Inc., v. City & County of S.F.*, No. 11-0761 CW, 2011 U.S. Dist. WL 2784169 (N.D. Cal. July 15, 2011).

⁹ *Philip Morris USA, Inc. v. City & County of S.F.*, No. C 08-04482, 2008 U.S. Dist. LEXIS 101933, at *5 (N.D. Cal. Dec. 5, 2008), *aff'd*, No. 08-17649, 2009 U.S. App. LEXIS 20142 (9th Cir. Sept. 9, 2009).

¹⁰ See generally Christopher Banthin, Tobacco Control Legal Consortium, *Regulating Tobacco Retailers: Options for State and Local Governments* (2010); *Village of Euclid, Ohio v. Ambler Realty Co.* 272 U.S. 365, 395 (1926); *Nectow v. City of Cambridge* 277 U.S. 183, 187-88 (1928).

