

## **MEMORANDUM**

### **LOCAL CONTROL OF ALCOHOL RETAIL AVAILABILITY IN WISCONSIN: A LEGAL ANALYSIS**

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**December 14, 2011**

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*Note: The intent of this memorandum is to provide educational resources to community coalitions, policy analysts, municipal governments, and others assessing potential responses to the problems created by retail availability of alcohol in Wisconsin. The legal analysis provided by Alcohol Policy Consultations (APC) in this memorandum is not offered or intended to constitute legal advice or to substitute for obtaining legal advice from a licensed attorney, and its use does not imply the creation of an attorney/client relationship with APC. APC provides legal and enforcement policy analyses and is not engaged in the formal practice of law.*

*Acknowledgment: Preparation of this memorandum was supported by Cooperative Agreement Number 5U58DP002027 from The Centers for Disease Control and Prevention. Its contents are solely the responsibility of the authors and do not necessarily represent the official views of the Centers for Disease Control and Prevention.*

## **I. Introduction**

Excessive alcohol consumption, including underage and binge drinking, is a leading cause of preventable death and disability in the United States and globally.<sup>1</sup> Research has found that the number, density, type, location, and operational practices of alcohol outlets can have a significant effect on the health of communities, including the level of violence, unintentional injuries, and alcohol-related motor vehicle crashes.<sup>2</sup> Large numbers of alcohol outlets in small geographic areas increase the risks of these problems.<sup>3</sup> Similarly, outlets that engage in dangerous and illegal serving practices – for example, repeatedly selling alcoholic beverages to intoxicated patrons, underage patrons, or allowing illegal public nuisance activities inside and adjacent to the premises – contribute to a wide variety of neighborhood and community problems.<sup>4</sup>

Recognizing the relationship between alcohol outlet density and excessive alcohol consumption and related harms, the independent Task Force on Community Preventive Services<sup>5</sup> reviewed the scientific evidence on the effectiveness of limiting alcohol outlet density as a strategy for preventing this public health problem and concluded there was:

“...sufficient evidence of a positive association between outlet density and excessive alcohol consumption and related harms to recommend limiting alcohol outlet density through the use of regulatory authority (e.g., licensing and zoning) as a means of reducing or controlling excessive alcohol consumption and related harms.”<sup>6</sup>

In theory, the regulation of retail alcohol outlet density may appear to be a simple matter; however, in practice, it often involves a complex interplay between State and local governments, much of which relates to the amount of control that local governments have over the number, types, locations, and retail practices of retail alcohol outlets in their particular geographic area. In some states, local governments have substantial control over licensing decisions that influence alcohol outlet density, whereas in other states, they have little or no authority. The legal doctrine that determines this level of local control is called *State Preemption*.

The purpose of this report, therefore, is to introduce the state preemption doctrine and describe the effect it has on the regulation of alcohol outlet density in communities to public health practitioners, members of State and community coalitions, healthcare providers, and other interested groups. The report then specifically analyzes the role of state preemption in Wisconsin.

## **II. The State Preemption Doctrine**

### **A. Description and Application to Alcohol Outlet Density Regulation**

The state and federal preemption doctrine refers to the authority of higher levels of government to mandate the practices of lower levels of government. It has often been used to advance public health goals, for example, in the enactment of federal and state mandates related to vaccination policy and the establishment of quarantines to prevent the spread of disease. Local governments must adopt the policies mandated at the higher levels of government and are precluded from deviating from the policies in question.<sup>7</sup> The federal government’s ability to preempt state and

local action is limited by the U.S. Constitution – under the 10<sup>th</sup> Amendment, all authority not expressly granted to the Federal government is delegated to the states.<sup>8</sup> This includes the regulation of alcohol availability; in fact, the 21<sup>st</sup> Amendment explicitly grants states this authority.<sup>9</sup> State preemption of local governmental action is a matter left to each state, and states vary widely in how they exercise this authority.

The state preemption doctrine is conceptually distinct from “local option” laws. Because local governments are subordinate to the state, they are generally prohibited from allowing conduct that the state prohibits. States may, however, decide to expand local authority through local option provisions that permit local governments to loosen state controls. For example, many states prohibit alcohol sales on Sundays but include local option provisions that allow local governments to override the State prohibition on days of sale.<sup>10</sup> State preemption, by contrast, takes away local authority by prohibiting local governments from enacting controls that are stricter than state law.

Although traditionally considered an important tool for promoting public health, state preemption can also be a barrier to protecting the public’s health, particularly when the regulation of potentially dangerous products is involved.<sup>11</sup> For example, many tobacco control initiatives began at the local level, including restrictions on cigarette vending machines and mandates for smoke-free work places. In response, the tobacco industry has sought state legislation to preempt and thereby nullify such local initiatives. This strategy reflects an industry’s ability to influence state legislative decisions, where their lobbying strategies may be more effective than at the local level.<sup>12</sup>

The state preemption doctrine also plays a pivotal role in alcohol policy generally and the regulation of alcohol outlet density specifically. All states have developed comprehensive legal structures for regulating alcohol retail outlets. Retailers typically must obtain a state license to open an alcohol retail business and must comply with licensing laws, which usually set conditions on the operation, location, and number of outlets and establish minimum operational standards and practices. In some states (“control” States), the State directly operates some retail stores that sell alcoholic beverages for consumption off the premises (which some states refer to as off-sale outlets).<sup>13</sup> This licensing authority may, in turn, be augmented with local zoning and land-use regulations.

Determining the appropriate use of particular land parcels is typically delegated to local governments, usually in the context of a comprehensive land use plan implemented through local zoning ordinances.<sup>14</sup> The zoning ordinance may require that new businesses obtain a conditional use permit (CUP), and the number, location, and operation of particular types of businesses (including alcohol retail outlets) can be regulated through mandatory or discretionary requirements found in the CUP provisions.<sup>15</sup> For example, a CUP ordinance can prohibit alcohol outlets within a certain distance of sensitive land uses, such as schools, or allow the local planning board the option to impose such a condition on a case-by-case basis. Local police powers may also be used to reduce the negative impact of nuisance activities associated with retail outlet. Alcohol retail availability can therefore be regulated through either a licensing or local zoning/police power system and the two systems may be complementary, with the licensing system often superseding zoning/police power requirements if conflicts between the two systems arise.

Land use planning constitutes a basic function of local governments. It is usually treated as a local function because it requires an understanding of local conditions. For example, determining if a particular proposed land use type is compatible with surrounding land uses, whether it will create law enforcement problems, and whether it will cause undue strain on other municipal resources, such as fire protection or water delivery, are important questions that are best answered by local decision-makers with input from local residents. The state plays an important role by establishing broad guidelines and procedures that local governments must adhere to, but the state is not in a good position to determine whether a particular land use is appropriate to a particular location.

## **B. Types of State Preemption Applicable to Alcohol Outlet Density Regulation**

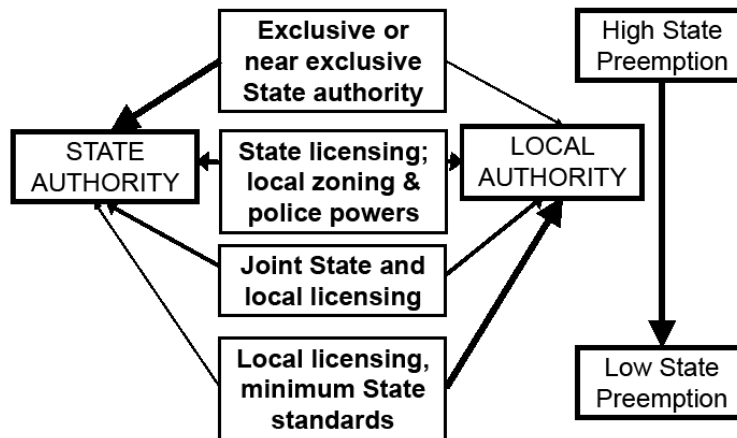
It is important for state and local public health practitioners who are interested in regulating alcohol outlet density to become familiar with the preemption doctrine in their states. Information on state preemption is usually available through State Alcoholic Beverage Control agencies or through secondary data sources that describe a state's licensing process.

As illustrated in Figure 1, there are four general categories of state preemption relative to the regulation of alcohol outlets, ranked from relatively strong to relatively weak in terms of state control:

- **Exclusive or near-exclusive State preemption:** Many states exclude local governments from the retail licensing process and strictly limit or prohibit the use of local land-use zoning provisions. A small number of states, including New York and North Carolina, have adopted this form of State preemption.<sup>16</sup>
- **Exclusive State licensing authority, concurrent local regulatory authority:** Many states retain exclusive authority to license alcohol outlets but allow local governments to use their local zoning and police powers to restrict certain aspects of state licensing decisions. States vary widely in the degree to which they allow local regulations. Most states fall within this category, which should be viewed as a continuum from extensive to limited preemption of local regulatory authority.
- **Joint local/State licensing and regulatory powers.** In these states, alcohol retailers must obtain two licenses, one from the state and one from the municipality where they are located. In most cases, this gives the primary responsibility for determining alcohol availability to local governments, subject to minimum standards established by the state. Typically, local jurisdictions rely on their licensing authority to regulate alcohol outlet density, although this may be augmented with local zoning regulations. A small number of states have dual licensing systems, including Georgia and Louisiana.<sup>17</sup>
- **Exclusive local licensing with State minimum standards:** The remaining states delegate licensing authority entirely to local governments and do not issue state licenses at all. Instead, the State establishes limitations on how that licensing authority is exercised. Local zoning regulations can also be used by local governments, which may be subject to limitations established in state law. Hawaii, Nevada, and Wisconsin are among the states that have this structure. Nevada does not have a State Alcoholic Beverage Control agency, although there are State laws that may affect how local governments regulate alcohol outlets.<sup>18</sup>

**FIGURE 1**

## **Levels of State Preemption**



The authors have assisted the Center on Alcohol Marketing and Youth to develop an on-line “Preemption Tool” with a clickable map that shows the category or categories of preemption into which each state falls. That tool may be found at [http://www.camy.org/action/Outlet\\_Density/preemption-data-tool.html](http://www.camy.org/action/Outlet_Density/preemption-data-tool.html).

Although States generally fall into one of these categories of preemption, there are a variety of permutations. States may assign differing levels of preemption for differing aspects of alcohol retail regulation. For example, the State may permit local governments to determine the location of new retail outlets but deny them any authority to regulate retailers’ operating practices.<sup>19</sup> Other States grant local authority only to certain cities, for example, those that have a city charter. States may also adopt a hybrid system. For example, Maryland has established local Alcoholic Beverage Control Boards that have primary responsibility for licensing decisions. Some of these boards are appointed by local governments, but others are appointed by the State and in effect operate as State entities.

There is also a legal distinction between express and implied preemption. State preemption is said to be “express” when there is State legislation that specifically prohibits local regulation over alcohol outlet density in favor of State regulation. Implied preemption arises when a State regulatory scheme is so extensive that it leaves no room for local regulation, effectively establishing preemption by exclusion. Although logical in principle, application of these concepts by State courts is inconsistent both across and within States, as illustrated in the next section. In many cases, a definitive determination is not possible absent a court ruling. Given these complexities, communities will generally require independent legal research expertise to determine how preemption applies to the regulation of alcohol outlet density in their area.

### **III. Wisconsin's Structure for Alcohol Regulation<sup>20</sup>**

In Wisconsin, alcoholic beverage retailers are licensed exclusively by municipalities; and, through local elections, localities can determine which types of licenses, if any, they will issue.<sup>21</sup> The state, however, determines the type of licenses as well as some procedures for granting, denying, renewing, and revoking the licenses.<sup>22</sup> This section describes this structure and the application of the state preemption doctrine to specific types of local control.

#### **A. Local Licensing of Alcohol Retail Outlets**

Wisconsin grants extensive authority to local governments to control alcohol retailers, through its state constitution<sup>23</sup> and statutes. Under the main home rule police power statutory provision, unless a statute “specifically” provides otherwise, a municipal governing body (the common council) has the power “to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out its powers by license, regulation, . . .tax levy, . . .fine, imprisonment, . . . and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants, and shall be limited only by express language.”<sup>24</sup>

Although the ABC Act provides some limitations on municipal control of retail alcohol availability, it generally conforms to the home rule provisions. Section 125.10(1) of the Wisconsin Statutes provides that:

Any municipality may enact regulations [any rule or ordinance adopted by a municipal governing body<sup>25</sup>] incorporating any part of this chapter [the ABC Code] and may prescribe additional regulations for the sale of alcohol beverages, not in conflict with this chapter. The municipality may prescribe forfeitures or license suspension or revocation for violations of any such regulations. Regulations providing forfeitures or license suspension or revocation must be adopted by ordinance.

As Wisconsin's Supreme Court recently noted, “Licensing the sale of alcohol beverages is the exclusive province of municipalities, so long as it does not conflict with state standards.... Licensing is the primary tool available to municipalities to regulate alcohol sales and consumption.”<sup>26</sup>

Despite these apparently straightforward standards, ambiguity can still arise in determining whether a local ordinance “conflicts” with state law. Conflict clearly exists if state law specifically prohibits local regulation or if a local ordinance attempts to permit activities that are prohibited by the state (e.g., allows sales to underage persons). However, there is no clear guidance from the courts regarding local ordinances that impose stricter requirements than those found in state statutes when the statute does not expressly permit additional local restrictions.

For example, state law permits anyone 18 years or older to possess alcohol if done so as part of their employment in a licensed establishment. The Attorney General has stated that a local ordinance requiring employees to be 21 years of age conflicts with state law and is therefore invalid even though the statute does not expressly prohibit local governments from imposing a stricter standard.<sup>27</sup> State officials have generally agreed with the Attorney General's position

that if a state statute provides a specific restriction on retail outlets local governments cannot enact stricter regulations.<sup>28</sup> However, Wisconsin courts have not provided clear guidance on this issue, and there is precedent in other states that local ordinances that provide restrictions beyond those imposed by state statute are not in conflict or inconsistent with them.<sup>29</sup>

## **B. The Application of the State Preemption Doctrine to Local Alcohol Retail Licensing Authority**

To reduce the negative impact of alcohol retailers, local governments have sought to limit the locations in which retailers do business, as well as to regulate operational practices. As discussed below, municipalities have broad discretion to use either their licensing or zoning authority to address such concerns.<sup>30</sup>

### **1. Local Regulation of Alcohol Density, Types, and Location**

Municipalities (e.g., Racine) have imposed distance requirements between outlets as a means to reduce retail alcohol outlet density.<sup>31</sup> Localities can also impose distance requirements between outlets and sensitive land uses (e.g., schools, houses of worship, and public playgrounds). As noted in the zoning exception above, Chapter 125 has a distance requirement of 300 feet (that municipalities can waive in certain circumstances) for retailers near schools, hospitals, and churches. It is unclear whether municipalities can impose stricter distance requirements from these land uses than those imposed by the state. The state statute neither expressly permits nor prohibits such action at the local level. Some municipalities have imposed distance requirements between outlets and other sensitive locations, such as day care centers, community centers for underage people, or public libraries.<sup>32</sup>

Municipalities can also seek to limit high-risk establishments (e.g., bars and liquor stores). For example, the Village of Ellsworth adopted an ordinance that limited the number of off-sale beer licenses to 1 per 600 residents and required licensees to be primarily in the grocery store business. An appellate court upheld the ordinance against a claim that the ordinance conflicted with the state law because it regulates “licensing” rather than “sale” (the ABC code only authorized ordinances that regulate sales). The court wrote that “Licensing is one of the methods a municipality uses to regulate the sale of alcohol and therefore is contemplated by the statute.”<sup>33</sup>

Municipalities also have broad authority to suspend, revoke or deny renewals of retail licenses. State law requires that such actions be taken only for “good cause”, that is, based on a violation of state or local law or maintaining a disorderly house and must adopt procedures to protect licensees’ due process rights.<sup>34</sup>

### **2. Operational Standards**

Localities can also impose different types of operational restrictions on retail outlets in their jurisdictions, which courts have generally upheld provided they meet constitutional requirements,<sup>35</sup> although the ABC code expressly limits some of the municipal authority in these areas. Several operational restrictions are discussed below.

**a. Limits on Hours and Days of Operation**

In some circumstances, the ABC code explicitly authorizes the local jurisdiction to impose more restrictive hours than specified by state statute and in others it expressly prohibits the practice.<sup>36</sup>

**b. Restrictions on Selling Alcohol at Adult Entertainment Venues or Gas Stations**

Several municipalities restrict the sale of alcohol at adult entertainment venues. Such ordinances have survived court challenges, provided they comply with constitutional requirements concerning freedom of expression, equal protection, and due process.<sup>37</sup> Selling alcohol and gas at the same location can create threats to public safety, and some municipalities have prohibited such practices in certain circumstances.<sup>38</sup>

**c. Restrictions on Consumption-Based Drink Specials or Competitions**

Restrictions on drink specials (e.g., time limited pricing, all-you-can drink flat fee specials, special high-potency drinks containing multiple shots of liquor) and competitions that by design encourage rapid consumption can help reduce such consumption, and some municipalities (e.g., Germantown and Madison) have limited such practices.<sup>39</sup>

In *Eichenseer v. Madison-Dane County Tavern League, Inc.*,<sup>40</sup> customers of several taverns in Madison sued the taverns, claiming that the taverns violated antitrust price-fixing violations when the taverns, in response to the city's pressure to abandon all the taverns' drink specials after 8 p.m., agreed to eliminate them only on Friday and Saturday nights after 8 pm. In that case, all parties agreed that the city had the authority to require either restriction, as it had in fact done. Earlier, in response to the University of Wisconsin's concerns that the drink specials were encouraging high-risk, high-volume drinking by University students, the city imposed license conditions on other licensees, including prohibiting such practices.<sup>41</sup>

In reaffirming the city's authority to require drink special restrictions, the Wisconsin Supreme Court wrote:

The legislature's regulatory scheme. . . intentionally gives municipalities leeway to place significant barriers in the way of alcohol sales and consumption. . . . [The] statutory licensing scheme gives municipalities the power to do what the City did in this case--impose anticompetitive [drink special conditions] on new licenses and license renewals as a means of discouraging over-consumption. See Wis. Stat. § 125.51(1)(a) ("Every municipal governing body may grant and issue 'Class A' and 'Class B' within the municipality to persons entitled to a license under this chapter as the issuing municipal governing body deems proper"). . . . The City's imposition of conditions on taverns it licensed was commonplace; its imposition of [the ] conditions on eight taverns was an official exercise of legislative judgment by the Common Council.

**d. Responsible Beverage Service Training**

The ABC Code requires municipalities to issue operators' licenses for qualified applicants (to serve as licensees and owners of a particular retail establishment).<sup>42</sup> Licensees must complete an RBS training course based on a curriculum established at the state level and municipalities may not require additional training beyond what is required by the state.<sup>43</sup> Municipalities may also require manager licenses. State law does not address whether municipalities may require RBS



training as a condition of receiving a manager's license or require servers to obtain a license or receive training.

State officials have interpreted these ABC provisions to preempt local governments from requiring any form of RBS training for managers and servers.<sup>44</sup> As noted above, this conclusion might be challenged on the basis that such a local regulation would not conflict with state law, which is silent on the topic. Courts have not been asked to review this ambiguity in the law.

#### **e. Beer Keg Registration**

Beer keg registration ordinances facilitate apprehending adults who furnish alcohol to underage youth and also deter future purchases; La Crosse requires such registration.<sup>45</sup>

#### **f. Prohibitions Against Furnishing Alcohol to Underage or Intoxicated Persons**

Some municipalities prohibit selling alcohol beverages to underage or intoxicated people.<sup>46</sup> Chapter 125 expressly limits some aspects of local authority dealing with underage drinkers. For example, it requires local ordinances regulating certain types of conduct (mostly dealing with conduct by underage drinkers, as opposed to retailers) to conform strictly to the requirements set forth in the specific ABC code section addressing that conduct.<sup>47</sup>

#### **g. Prohibitions Against Nuisance Activities**

Some localities consider nuisance activities as grounds for adverse license action. For example, in Madison, grounds for revocation, suspension, or nonrenewal of license include a showing that "The licensed premises has been operated in such a manner that it constitutes a public or private nuisance or that conduct on the licensed premises, including but not limited to raucous noise, has had a substantial adverse effect upon the health and safety of the immediate neighborhood."<sup>48</sup>

#### **h. Imposition of Taxes and Fees**

Local governments collect license fees usually based on a state-specified fee schedule that authorizes local discretion with statutory maximums (and sometimes minimums).<sup>49</sup> For example, the municipality may determine the annual fee for a Class A license to sell intoxicating liquors, provided that it is the same for all such "Class A" licensees and that the minimum fee is \$50 and the maximum is \$100.<sup>50</sup> Sometimes, however, there is no statutory range. For example, the fee for a Class A license to sell beer is determined by the municipality issuing the license; no minimum or maximum is mentioned and the only explicit requirement is that the fee for a license for less than 12 months shall be prorated according to the number of months or fraction thereof for which the license is issued.<sup>51</sup>

Alcohol taxes are state-imposed. Research did not uncover any provisions addressing the ability of local governments to tax the sale of alcohol beverages in the ABC code, tax code, or tax regulations. Given the ABC provisions on taxes (sometimes referred to as occupational taxes), local taxing options do not appear likely.<sup>52</sup>

#### **i. Advertising/Tasting Restrictions**

State law permits beer and wine tastings at off-sale establishments.<sup>53</sup> The relevant provisions specifically permit localities to restrict or prohibit wine tastings but do not have an explicit exception for beer tastings. This creates an apparent anomaly, preempting local regulation of wine tastings but not beer tastings. Local governments appear to have authority to regulate retail advertising practices as part of their licensing authority. Some municipalities (e.g., Fitchburg,

Madison) have restricted advertising by banning amplifying devices (e.g., megaphones) to advertise alcohol.<sup>54</sup>

## **II. Conclusions and Recommendations**

In contrast to most states, Wisconsin's local governments have extensive authority to regulate alcohol retail availability, including alcohol outlet density and retail operating practices. Both licensing and zoning provisions can be used for this purpose. In general, it appears that Wisconsin municipalities are not taking advantage of this authority, which may be a contributing factor to Wisconsin's high rates of binge drinking, underage drinking, and drinking driving problems.<sup>55</sup>

Local governments, public health departments, and community organizations can review best practices recommendations for reducing alcohol outlet density and problems associated with retail alcohol sales and develop strategies for implementing them at the local level. The recommendations set out by the Task Force on Community Preventive Services (discussed in Section I) are a good starting point for this review. As noted in this analysis, many restrictions are already in place in several Wisconsin municipalities, and these may serve as case studies for those interested in replication throughout the state.

## NOTES

<sup>1</sup> Centers for Disease Control and Prevention (2008). *Alcohol-Related Disease Impact (ARDI)*. Atlanta, GA: CDC. Available at: <http://www.cdc.gov/alcohol/ardi.htm>. Accessed December 14, 2011.

<sup>2</sup> Campbell, C. A., Hahn, R. A., Elder, R., Brewer, R., Chattopadhyay, S., Fielding, J. et al. (2009). The effectiveness of limiting alcohol outlet density as a means of reducing excessive alcohol consumption and alcohol-related harms. *American Journal of Preventive Medicine*, 37, 556–559; Gorman, D. M., Speer, P. W., Gruenewald, P. J., & Labouvie, E.W. (2001). Spatial dynamics of alcohol availability, neighborhood structure and violent crime. *Journal of Studies on Alcohol*, 62, 628–636; R. Scribner et al. (1995). The risk of assaultive violence and alcohol availability in Los Angeles County. *American Journal of Public Health*, 85, 335–340; Saxer, S. R. (1995). Down with demon drink!": State strategies for resolving liquor outlet overconcentration in urban areas, *Santa Clara Law Review*, 35, 123; Parker, R. & Rebhun, L. (1995). *Alcohol and homicide: A deadly combination of two American traditions*. Albany, NY: State University of New York Press.

<sup>3</sup> D. Gorman. et al., *supra* n. 1.

<sup>4</sup> Babor, T. F., Caetano, R., Casswell, S., Edwards, G., Giesbrecht, N., Graham, K. et al. (2010). *Alcohol: No Ordinary Commodity. Research and Public Policy: Second Edition*. New York, NY: Oxford University Press.

<sup>5</sup> The Task Force is an independent, non-federal, volunteer-based group of subject experts. It engages in a comprehensive process to review relevant research evidence with a goal of providing public health practitioners a foundation for implementing policy interventions addressing a wide variety of public health problems. The evidence for each intervention is rated as strong, sufficient, or insufficient to support a recommendation. For more information on the Task Force, see The Community Guide Web page, *The Task Force on Community Preventive Services*, at <http://www.thecommunityguide.org/about/task-force-members.html> (accessed December 14, 2011).

<sup>6</sup> Task Force on Community Preventive Services (2009). Recommendations for reducing excessive alcohol consumption and alcohol-related harms by limiting alcohol outlet density. *American Journal of Preventive Medicine*, 6, 570–571.

<sup>7</sup> For further discussion of State/local preemption, see Diller, P. (2007). Intrastate preemption. *Boston University Law Review*, 87, 1114–1175.

<sup>8</sup> U.S. Constitution, 10<sup>th</sup> Amendment.

<sup>9</sup> U.S. Constitution, 21<sup>st</sup> Amendment.

<sup>10</sup> See National Institute on Alcohol Abuse and Alcoholism (NIAAA), Alcohol Policy Information System (APIS). <http://www.alcoholpolicy.niaaa.nih.gov> (accessed December 14, 2011).

<sup>11</sup> Gorovitz, E., Pertschuk M., & Mosher, J. (1998). Preemption or prevention? Lessons from efforts to control firearms, alcohol and tobacco. *Journal of Public Health Policy*, 19(1), 37–50; Mosher, J. (2001). *The Perils of Preemption*. Chicago, IL: American Medical Association. Available at: [http://alcoholpolicy.cymd.com/pdf/Policy\\_Perils.pdf](http://alcoholpolicy.cymd.com/pdf/Policy_Perils.pdf) (accessed December 14, 2011).

<sup>12</sup> *Id.*

<sup>13</sup> NIAAA, *supra* n. 10.

<sup>14</sup> Ashe, M., Jernigan, D., Kline, R. & Galaz, R. (2003). Land use planning and the control of alcohol, tobacco, firearms, and fast food restaurants. *American Journal of Public Health*, 93(9), 1404–1408.

<sup>14</sup> Mosher, J. & Sietta, S. (2008). *Best Practices in Municipal Regulation to Reduce Alcohol-Related Harms from Licensed Alcohol Outlets*. Oxnard, CA: Ventura County Behavioral Health Department. Available at: <http://www.venturacountylimits.org/resources/article/F85A2D/policy-briefing-02-best-practices-in-municipal-regulation-to-reduce-alcohol-related-harms-from-licensed-alcohol-outlets> (accessed December 14, 2011).

<sup>15</sup> Mosher & Sietta, *supra* n. 14.

<sup>16</sup> New York, see Mosher, J., Pezzolesi, R., and Treffers, R. (2011). *The Impact of Strict State Preemption on the Regulation of Alcohol Outlet Density: The Case of New York State*. Felton, CA: Alcohol Policy Consultations. North Carolina, see *State v. Williams*, 283 NC 550, 196 SE2d 756 (1973). There are no systematic analyses of

State/local alcohol licensing structures. These descriptions are based on independent legal research conducted by the authors. For further discussion, see Mosher (2001), *supra* n. 12.

<sup>17</sup> GA Stat. Ann. § 3-3-2(a); LA Stat. Ann. § 26:493.

<sup>18</sup> HI Stat. § 281-17; NV Stat. § 244.350; WI Stat. § 125.25.

<sup>19</sup> For further discussion, see Mosher (2001), *supra* n. 10.

<sup>20</sup> For helpful secondary sources on alcohol retailer law in Wisconsin, see State of Wisconsin Department of Revenue, *Wisconsin Alcohol Beverage and Tobacco Laws for Retailers*, Pub. 302 (rev. May, 2008) (hereinafter Pub. 302), available at <http://www.revenue.wi.gov/html/pubs.html> (last visited Nov. 3, 2011); Wisconsin State Council on Alcohol and Other Drug Abuse, *Changing Wisconsin's Alcohol Environment to Promote Safe and Healthy Lives: Alcohol, Culture and Environment Workgroup Recommendations*, April 2010 (hereinafter SCAODA Report), available at <http://www.scaoda.state.wi.us/> (last visited Nov. 3, 2011).

<sup>21</sup> “Municipalities” include cities, villages, and towns. Wis. Stat. § 125.02. “Local” government or control in this memo usually refers to municipalities, although counties are sometimes included. Sections authorizing the granting of licenses include Wis. Stat. §§ 125.01, 125.02, 125.05, 125(10), 125-51 to 125-65. See also Eichenseer v. Madison-Dane County Tavern League, Inc., 748 N.W.2d 154, 171-72 n. 22 (Wis. 2008) (noting the Village of Ephraim has chosen to be “dry.”); State Ex Rel. Smith v. City of Oak Creek, 407 N.W.2d 901 (Wis. 1987).

<sup>22</sup> See Wis. Stat. §§ 125.04, 125.51. There are three classes of licenses: Class A is limited to off-premise consumption, Class B covers both on-premise and off-premise, and Class C is limited to on-premise wine consumption. See Pub. 302 at 1-2 for a summary of these statutorily mandated classes.

<sup>23</sup> Under the state constitution’s municipal home rule provision, Wis. Const., Art. XI, § 3, municipalities have the power to “determine their local affairs and government, subject only to this constitution and to . . . enactments of the legislature of statewide concern.” However, because the state has regulated the liquor industry by enacting the ABC Code, the Home Rule amendment does not apply, so the statutes determine the city’s authority. See Tavern League of Wisconsin v. Madison, 389 N.W.2d 54, 56 55-56 n.1 (Wis. Ct. App. 1986).

<sup>24</sup> Wis. Stat. § 62.11(5). The scope of this provision is discussed in Eichenseer, 748 N.W.2d at 167-68 nn. 18-19; Tavern; Polka-Dot Dairy-Tom Thumb Markets, Inc. v. Ellsworth, 401 N.W.2d 28 (Wisc. Ct. App. 1986) Tavern League of Wisconsin v. Madison, 389 N.W.2d 54, 56 (Wis. Ct. App. 1986).

<sup>25</sup> Wis. Stat. § 125.02 (definitions).

<sup>26</sup> Eichenseer, 748 N.W.2d at 171-72.

<sup>27</sup> Op. Att’y Gen. Wis. No. 20-87, 1987 Wisc. AG LEXIS 49 (April 7, 1987); 61 Op. Att’y Gen. Wisc. 381, 1972 AG LEXIS 105 (Sept. 21, 1972).

<sup>28</sup> Personal Communication, Roger Johnson, Alcohol and Tobacco Enforcement, Wisconsin Department of Revenue, September 21, 2011.

<sup>29</sup> See, e.g., Phelps, Inc. v. City of Hastings, 152 Neb. 651, 657, 42 N.W.2d 300, 304 (1950); cited with approval in Gas ‘N Shop, Inc. v. Nebraska Liquor Control Commission, 229 Neb. 530, 427 N.W.2d 784 (1988); State ex rel. City of Alma v. Furnas County Farms, 266 Neb. 558, 667 N.W.2d 512.

<sup>30</sup> The ABC code expressly states that it does not affect the power of municipalities to enact or enforce zoning regulations, except as provided in two ABC sections (one dealing with elections authorizing certain classes of licenses, and one prohibiting certain classes of licenses to be issued near schools, hospitals, or churches). Wis. Stat. § 125.10(3).

<sup>31</sup> Racine Code of Ordinances § 6-97(d) (“Notwithstanding any other provisions of this chapter, no new retail ‘Class A’ or Class ‘A’ intoxicating liquor license shall be issued for any establishment located within a radius of 1,000 feet from any other licensed establishment (regardless of the type of Class A alcohol license held). See also Madison Code of Ordinances § 38.05(9)(o) (density plan).

<sup>32</sup> Wis. Stat. § 125.68(3); Madison Code of Ordinances § 38.05(3)(d); Janesville Code of Ordinances § 5.06.040.

<sup>33</sup> Polka-Dot Dairy-Tom Thumb Markets, Inc. v. Ellsworth, 401 N.W.2d 28 (Wis. Ct. App. 1986) unpublished opinion (citation omitted).

<sup>34</sup> Wis. Stat. § 125.12.

<sup>35</sup> Tavern League of Wisconsin v. Madison, 389 N.W.2d 54, 56 (Wis. Ct. App. 1986).

<sup>36</sup> Wis. Stat. §§ 125.32(3), 125.68(4); 125.25.

<sup>37</sup> Ben's Bar, Inc. v. Village of Somerset, 316 F.3d 702 (7<sup>th</sup> Cir. 2003); (Kraimer v. City of Schofield, 342 F. Supp. 2d 807 (W.D. Wis. 2004); Schultz v. City of Cumberland, 536 N.W.2d 192 (Wis. Ct. App.), *review dismissed*, 542 N.W.2d 157 (Wis. 1995).

<sup>38</sup> See SCAODA Report at 8; Madison Code of Ordinance § 38.07(15).

<sup>39</sup> Cf. Germantown, Mun. Code of Ordinances § 21.07 (prohibits promoting or engaging in games or contests “directly involving the consumption of beer and/or alcoholic beverages in any park or parkway; in chapter on parks and public waters, not chapter concerning alcoholic beverages). See also SCAODA Report at 9.

<sup>40</sup> 748 N.W.2d 154, 158-59, 169 (Wis. 2008)(noting that Madison’s home rule powers under Wis. Stat. § 62.11(5) allow it to provide for public health, safety, and welfare by regulating alcohol using “necessary or convenient means,” either by requiring whole ban, or to work with taverns; there was no dispute that the city could impose the restrictions unilaterally).

<sup>41</sup> See Eichenseer, 748 N.W.2d at 154-155 nn. 7-8 (the specific drink special prohibitions were not explicitly set forth in city ordinances, but rather were part of the recommendations of a Committee whose role is described in the ordinances).

<sup>42</sup> Wis. Stat. § 127.17.

<sup>43</sup> Id.

<sup>44</sup> Personal Communication, Roger Johnson, Alcohol and Tobacco Enforcement, Wisconsin Department of Revenue, September 21, 2011.

<sup>45</sup> La Crosse Municipal Code, § 22.02(N). See also SCAODA Report, at 9, 21-22.

<sup>46</sup> Wis. Stat. §§ 125.07, 125.10(2); County of Fond Du Lac v. Derksen, 673 N.W.2d 412 (Wis. Ct. App. 2003).

<sup>47</sup> Wis. Stat. § 125.10(2).

<sup>48</sup> Madison Code of Ordinances § 38.10(12).

<sup>49</sup> See, e.g., Wis. Stat. §§ 125.04(8)(general provisions about fee schedule), 125.04(12)(general provisions about fees for license transfer), 125.26(4)(fee for a Class B license shall be determined by the municipal governing body issuing the license but the fee may not exceed \$ 100 per year; fee for a license for less than 12 months must be prorated).

<sup>50</sup> Wis. Stat. § 125.51(2)(c).

<sup>51</sup> Wis. Stat. § 125.25(4). See also 125.17(3)(municipal government shall establish by ordinance a fee for an operators license, but no limit indicated).

<sup>52</sup> The State of Wisconsin’s Department of Revenue provides a helpful brochure, *Alcohol Beverage Tax Information*, Pub. No. AB-103 (rev. Aug. 2009), available at <http://www.revenue.wi.gov/pubs/ab-103.pdf> (last visited Nov. 3, 2011). See For taxes, see Wis. Stat. §§ 20.566(1), 139.02 to 139.06, 139.25; Wis. Admin. Code Dept. of Revenue, Tax ch. 7 (beer), ch. 8 (intoxicating liquors).

<sup>53</sup> Wis. Stat. §§ 125.13; 125.25.

<sup>54</sup> Fitchburg Code of Ordinances § 60-644; Madison Code of Ordinances § 38.07(8).

<sup>55</sup> See SCAODA Report