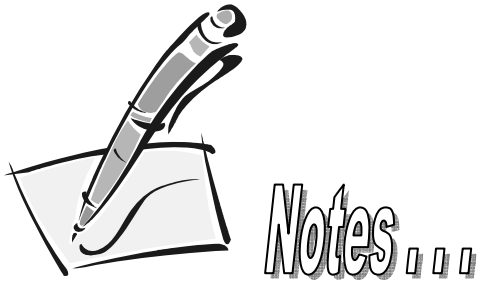




# **Liquor Stores, Bars and Nightclubs: Conditional Use Permits and Best Practices for Regulating Alcohol Sales**

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# **LIQUOR STORES, BARS & NIGHTCLUBS:**

**Conditional Use Permits and Best Practices for  
Regulating Alcohol Sales**

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## **I. Introduction**

Alcohol sales at liquor stores, bars and nightclubs create social and economic challenges for California's communities. Neighborhoods where bars, restaurants, liquor stores and retail outlets that sell alcohol are close together or concentrated suffer more frequent incidences of violence, social dislocation, medical emergencies and property crimes.<sup>1</sup> However, direct regulation of alcohol outlets by local governments is limited by California's existing regulatory framework.

Upon the ratification of the Twenty-First Amendment, states became empowered to regulate alcohol sales, consumption, production and transportation. California gave exclusive jurisdiction to the state over manufacture, sale, purchase, possession and transportation of alcoholic beverages. In California, this regulatory authority is vested in the Department of Alcoholic Beverage Control ("Department"), which has the dual responsibility for both the issuance of liquor licenses and the regulation of existing licensees. The Department issues two broad categories of alcohol licenses. On-sale licenses are issued for businesses that sell alcohol for consumption on the premises, such as bars and restaurants. Off-sale licenses are issued for businesses that sell alcohol for consumption off the site, such as grocery stores, liquor stores, and corner markets. Additionally, one-day licenses are issued for the sale of alcohol at special events.

Because local authority to regulate alcohol sales and related activity is largely preempted by the Department, the challenge that cities face is how to properly regulate the ancillary aspects of alcohol sales without regulating in areas of exclusive state authority. Cities' land use and police powers function as the effective tools in exercising local control over alcohol sales and its secondary effects.<sup>2</sup>

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<sup>1</sup> Pacific Institute for Research and Evaluation. Accessed online at: <http://resources.prev.org/documents/AlcoholViolenceGruenewald.pdf> (visited July 25, 2011).

<sup>2</sup> Special Thanks to Stacy L. Saetta of Monterey County Counsel's Office for her advice and recommendations concerning best practices for comprehensive ordinance adoption.

## II. State Regulation of Alcohol Sales

### Limited Local Authority and State Preemption

In 1955, the California Constitution was amended to establish a uniform framework for licensing alcoholic beverage sales throughout the state. The Constitution provides that “[t]he State of California. . . shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of alcoholic beverages within the State.”<sup>3</sup> The sale of alcohol is also regulated by the Alcoholic Beverage Control Act (Bus. & Prof. Code §§ 23000-25762). Accordingly, the Department was established to oversee the licensing process and it was given both the power to issue and revoke liquor licenses.<sup>4</sup> The Department has specific criteria upon which it is permitted to issue and revoke licenses, and cities’ ability to participate in the Department’s license regulation is limited. Nevertheless, cities may participate in the Department’s licensing in a limited fashion, but also impose regulations pursuant to valid police power and/or land use authority. Local government regulation beyond those areas that have been specifically authorized by state law is preempted.

### State License Issuance

Article XX, §22, of the California Constitution grants the Department the exclusive power to license the sale of alcoholic beverages in California. Section 22 grants the Department

the power, *in its discretion*, to deny, suspend or revoke any specific alcoholic beverage license if it shall determine *for good cause* that the granting or continuance of such license would be contrary to public welfare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct

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<sup>3</sup> Cal. Const., art XX §22.

<sup>4</sup> *Stroh v. Midway Restaurant*, (1986) 180 Cal. App. 3d 1040, 1047.

involving moral turpitude. It shall be unlawful for any person other than a licensee of said department to manufacture, import or sell alcoholic beverages in this State. [Emphasis added.]

The Legislature gave the Department the responsibility to “ensure a strict, honest, impartial, and uniform administration and enforcement of the liquor laws throughout the State.”<sup>5</sup> In delegating regulatory authority to the Department, the Legislature also provided guidance for overseeing the licensing process. When issuing licenses, the Department may only grant a license if it determines that the license will not be contrary to the “public welfare or morals.” Additionally, the Department is authorized to refuse issuing any retail license for premises located within the immediate vicinity of churches and hospitals.<sup>6</sup> The Department is also specifically authorized to refuse to issue a license for any premises located within 600 feet of “schools and public playgrounds or nonprofit youth facilities, including, but not limited to, facilities serving Girl Scouts, Boy Scouts, or Campfire Girls.”<sup>7</sup> However, this legislative authorization gives the Department the authority, but not the mandate to issue licenses. Therefore, the determination of whether an applicant is within the “immediate vicinity” of a church or hospital lies within the discretion of the Department.

#### No “Undue Concentration”

State law, however, directs the Department to deny a license if, “issuance of that license would tend to create a law enforcement problem, or if issuance would result in or add to an undue concentration of licenses, except as provided in Section 23958.4.”<sup>8</sup> “Undue concentration” is a key standard in evaluating state and local responsibilities in controlling the adverse consequences of alcohol sales. An “undue concentration” exists when an “applicant’s premises are located in a crime reporting district that has a 20 percent or greater number of Reported Crimes...than the average number of reported crimes as determined from all the crime Reporting

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<sup>5</sup> Bus. & Prof. Code § 23049.

<sup>6</sup> Bus & Prof. Code § 23789.

<sup>7</sup> *Id.*

<sup>8</sup> Bus. & Prof. Code §23958.

Districts within the jurisdiction,” or when the census tract in which the applicant’s store is located “exceeds the ratio of on sale retail licenses to population in the county in which the applicant premises are located.”<sup>9</sup> A city may determine that there is an "undue concentration" of off-sale beer and wine licenses in a given location and that the public convenience and necessity would not be served by approval of the proposed license.

#### Licensee Cannot Conflict with Local Zoning Ordinance

In addition, under Bus & Prof. Code §23790, The Department may not issue a liquor sales license for premises located in an area where the terms of the license conflict with a valid zoning ordinance, unless the following are met: (1) the premises were licensed before adoption of the zoning ordinance, (2) the license will be of the same type and classification as the prior license, and (3) the licensed premises have operated continuously without substantial change in mode or character of operation. Accordingly, a city ordinance denying a use permit for a cocktail bar in a shopping center was upheld because it was supported by findings that the bar would disrupt the peace, health, and general welfare of the people in the area, and more specifically because of the proximity of the bar to surrounding residences.<sup>10</sup> Similarly, a court upheld an ordinance that grandfathered an existing restaurant with only a beer and wine license in a residential zone while barring an expansion of the license to include the sale of distilled liquors.<sup>11</sup> Also, Bus & Prof Code § 23800 authorizes the Department to impose conditions prepared by the Department or requested by a city or county on liquor licensees in certain situations, including the transfer of a license. In fact, license applicants are required to provide a zoning affidavit affirming that issuance of the license will not be contrary to applicable zoning standards. Assuming the license is consistent with local zoning, in order to carry out its mandate to protect the public welfare and morals, the Department is required to conduct a “thorough

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<sup>9</sup> Bus. & Prof. Code §23958.4(a).

<sup>10</sup> *Floresta, Inc. v City Council of the City of San Leandro* (1961) 190 Cal.App.2d 599.

<sup>11</sup> *Town Council of the Town of Los Gatos v State Board of Equalization* (1956) 141 Cal.App.2d 344.

investigation” to determine that the license will comply with all statutory criteria for the issuance of a liquor license.<sup>12</sup>

### Department Discretion

However, despite this seemingly clear mandate, the Department tends not to err on the side of the community and issues licenses amidst opposition from local government and community leaders. In such instances the Department’s broad discretion can undermine a local jurisdiction’s ability to manage alcohol related social and police problems. In practice, it is also difficult to overturn a decision of the Department. While the Department may delegate the power to hear from all parties and decide a licensing question to an Administrative Law Judge, the Department must render the final decision: whether it is to adopt the recommendation of the Administrative Law Judge, or to render a decision notwithstanding the Administrative Law Judge’s recommendation.<sup>13</sup>

If a party seeks to challenge a decision by the Department regarding its decision on a liquor license, the petitioner must bring its challenge before the Alcoholic Beverage Control Appeals Board (“Appeals Board”) to determine whether there is substantial evidence to reasonably support the findings of the Department. However, the Appeals Board “will indulge all legitimate inferences in support of the Department’s determination.”<sup>14</sup> If, after reviewing the Department’s decision, the Appeals Board determines there is substantial evidence in the record to support the Department’s decision, the Appeals Board will uphold the Department’s decision. The courts will also review the Department’s decisions under the same standard of review.<sup>15</sup> However, such review is wholly discretionary with the court and the courts are under no obligation to accept such cases. There is, therefore, no guarantee that the Department’s decisions

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<sup>12</sup> Bus. & Prof. Code §23958.

<sup>13</sup> Bus. & Prof. Code §24210.

<sup>14</sup> *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2004) 118 Cal.App.4th 1429, 1437.

<sup>15</sup> Bus. & Prof. Code § 23090.2.



will be subject to judicial review. As a result, this deferential standard of review protects the Department's interpretations and decisions with regard to fulfilling its statutory mandate.

A local agency may also file accusations against license holders with the Department. The Department then has discretion to decide whether to proceed with a formal accusation against a license holder.<sup>16</sup> The grounds for suspension or revocation are that the continuance of the license would be contrary to public welfare or morals; the licensee failed to take reasonable steps to correct objectionable conditions on the licensee's premises or immediately surrounding area including public sidewalks and streets within 20 feet of premises; or the failure to abate nuisances, such as disturbance of the peace, public drunkenness, drinking in public and harassment to passersby, after notification by the city attorney.<sup>17</sup> Reasonable steps are defined as timely calls to law enforcement asking for assistance in abating nuisance conditions, asking persons engaging in nuisance activities to cease such activities and the removal of items that facilitate nuisances, such as furniture.<sup>18</sup> Courts have ruled that the existence of a public nuisance, regardless of fault by the license holder, may support the revocation of a license.<sup>19</sup>

Business and Professions Code section 24203 also provides that "accusations may be filed with the Department by the legislative body. . . of any city. . . requesting the suspension or revocation of a retail license. Upon the filing of the accusation, the Department shall provide for a public hearing. . . and determine whether or not the license should be revoked or suspended." Furthermore, if the local legislative body certifies that "the public safety, health, or welfare requires immediate hearing of the accusation; the public hearing shall be held within 60 days after the filing of the accusations with the Department."<sup>20</sup> Using this provision allows the city to directly file an accusation against a license holder and entitles the city to a hearing in front of the

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<sup>16</sup> Bus. & Prof. Code §24201.

<sup>17</sup> Bus. & Prof. Code §24200.

<sup>18</sup> *Id.*

<sup>19</sup> *Yu v. Alcoholic Beverage Appeals Bd.* (1992) 3 Cal.App.4th 286.

<sup>20</sup> Bus. & Prof. Code §24203.

Department to determine whether or not to revoke or suspend a liquor license. The Department does not have discretion to deny a hearing if it is requested by the City Council.<sup>21</sup>

This course of action, however, like the original license issuance decision also places a great deal of discretion in the hands of the Department. Moreover, as with other Department decisions, the Department's decision is difficult to overturn through a legal challenge. In order to successfully proceed with an accusation against a license holder, a city will have to accumulate substantial evidence that a license holder is creating a public nuisance or creating a law enforcement problem as a result of its sale of liquor.

### Miscellaneous Local Regulation

Lastly, cities retain limited authority to regulate the consumption of alcoholic beverages.<sup>22</sup> Regulation of mere possession of alcohol, however, is unconstitutional absent specific legislative authorization.<sup>23</sup> Penal Code Section §647(e), however, authorizes city regulation of possession of open container on certain licensed premises, and Bus & P C §25620 authorizing city regulation of open container in city-owned public place. Cities also have limited authority to regulate the concurrent sale of gasoline and beer or wine at a given location as defined by statute.<sup>24</sup>

### **III. Nuisance Regulation**

A city can exert a certain degree of control over alcohol outlets through its inherent authority to regulate nuisances. A city can adopt an ordinance directed at the abatement of potential nuisance activity around businesses that sell alcoholic beverages, even though such adopted regulations may in fact prohibit the sale of alcohol at particular locations.<sup>25</sup> The right to

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<sup>21</sup> *Id.*

<sup>22</sup> *People v Brewer* (1991) 235 Cal.App.3d 909; *People v Butler* (1967) 252 Cal.App.2d.Supp 1053.

<sup>23</sup> *People v Duran* (1995) 43 Cal.App.4th.Supp 1.

<sup>24</sup> Bus. & Prof. Code §23790.5.

<sup>25</sup> *Korean Am. Legal Advocacy Found. v. City of Los Angeles* (1994) 23 Cal.App.4th 376.

control and abate nuisance and criminal activities by ordinance applies to all alcoholic beverage establishments, including those in operation before an ordinance's effective date.

### Traditional Nuisance Abatement

Cities may also regulate alcohol outlets on an individual basis through the traditional nuisance abatement authority by declaring a building or place where liquor is unlawfully sold a public nuisance.<sup>26</sup> The Unlawful Liquor Sale Abatement Law (Pen Code §§ 11200 – 11207) provides cities with the ability to declare and abate a nuisance when an establishment is selling liquor unlawfully.<sup>27</sup> Recently, the Second Appellate District upheld a permanent injunction against a café that was found to be unlawfully selling alcohol to its patrons.<sup>28</sup> The City of Los Angeles sought and obtained an injunction against a café that was selling alcohol to visibly intoxicated patrons based on a finding of nuisance under the Unlawful Liquor Sale Abatement Law.<sup>29</sup> In upholding the injunction, the Court of Appeal stated that Penal Code section 11200 has a broad reach which encompasses unlicensed liquor sales and unlawful sales, even if lawful sales also occur on the premises.<sup>30</sup> Thus, if a city finds that off-sale alcohol sales establishments are violating laws, and they have a negative effect on the health, safety, and general welfare of those living and working in the area, one available course of action is to declare the activity a public nuisance. The city attorney may then maintain an action to abate and prevent the nuisance.<sup>31</sup> However, this approach is time intensive and must regulate problem alcohol outlets on a case by case basis.

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<sup>26</sup> Pen C §11200.

<sup>27</sup> Pen C § 11200-11207.

<sup>28</sup> See *People v. Schlimbach* (2011) 193 Cal.App.4th 1132.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 1141-1144.

<sup>31</sup> Pen C §§11200-11201.

## The City of Oakland “Deemed Approved” Model

The City of Oakland (“Oakland”) tested the limits of the state preemption issue by instituting a “deemed approved” program for existing licensees. Oakland’s program was created as a means of imposing operating standards on legal nonconforming retail alcohol outlets established prior to adoption of the Oakland’s conditional use permit requirements. As part of its program, Oakland adopted a comprehensive code enforcement scheme that the California Court of Appeals has upheld as a permissible use of a city’s police power and authority to regulate nuisances and criminal activities in the areas surrounding alcoholic beverage retail sellers.<sup>32</sup> Oakland’s ordinance was challenged as to whether it could apply its deemed approved program to licensees that had sold liquor prior to the adoption of the ordinance. Specifically, at issue was whether the deemed approved ordinance violated Business and Professions Code section 23790, which prohibits new zoning regulations barring the sale of liquor at a site from being applied to “grandfathered” establishments. The court ruled that the regulations were not intended to control the sale of alcoholic beverages, but instead were intended to eliminate nuisance and criminal activities.<sup>33</sup> Although the ordinance did not prohibit licensees from selling alcoholic beverages, it did prevent licensees from creating nuisances and facilitating criminal activity at their stores and in the surrounding areas.

The Oakland Ordinance establishes that the sale of alcoholic beverages in Oakland is deemed to be an approved commercial activity, so long as the seller complies with the “Deemed Approved Performance Standards.” The performance standards require that the sale of liquor at a site does not:

1. result in adverse effects to the health, peace, and safety of persons residing or working in the surrounding areas;
2. jeopardize or endanger the public health or safety of persons working in or residing in the

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<sup>32</sup> *City of Oakland v. Superior Court* (1996) 45 Cal.App.4th 740.

<sup>33</sup> *Id.* at 765.

surrounding area;

3. result in repeated nuisance activities within the premises or close proximity of the premises, including but not limited to illegal drug activity, public drunkenness, drinking in public, harassment of passersby, gambling, prostitution, the sale of stolen goods, public urination, thefts, assaults, littering, loitering, police detentions, arrests;
4. violate any city, state, or federal regulation, ordinance, or statute; or
5. have upkeep or operating characteristics that are incompatible with the surrounding area or adversely affect the liability of appropriate development of abutting properties.<sup>34</sup>

If the sale of liquor causes a violation of one of the established performance standards, then an administrative hearing is held to review the complaint. Complaints can come from the police department or the general public. The administrative hearing officer then holds a hearing to determine whether the standards have been violated, and at that point, may impose conditions on the merchant in order to enforce the Deemed Approved standards. If the merchant violates those conditions, the Deemed Approved status may be revoked. Once appeals of the administrative hearing officer's decision to the city council are exhausted, the City may seek to have the activity abated as a nuisance. The city may also refer the matter to the Department for revocation of the liquor license. Lastly, to pay for the enforcement of the ordinance, Oakland imposes a \$600 fee on liquor licensees.

Violations of the ordinance do not result in the forfeiture of the merchant's liquor license, because only the Department has the constitutional authority to revoke a liquor license. A violation, however, does prevent the merchant from selling liquor at the location where the violation occurred. Furthermore, violations can be forwarded to the Department for possible revocation.

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<sup>34</sup> *City of Oakland Deemed Approved Alcoholic Beverage Sale Regulations*, Title 17 Planning, §§17.156 et seq.

## IV. Regulation through Local Zoning Ordinance

The Department of Alcoholic Beverage Control may not issue an alcoholic beverage retail license for any business located in a zone where the exercise of the rights conferred by that license would be contrary to a valid local zoning ordinance.<sup>35</sup> When enacting a zoning ordinance, a key distinction involves the status of the specific licensed premise as a “new” or “pre-existing” outlet at the time a city enacts a new ordinance or regulation. A retailer whose business is already in place receives far greater protection under state law than outlets that are proposed following enactment of a valid zoning ordinance.<sup>36</sup> Thus, a city that wants to restrict alcohol outlets from locating near schools cannot impose the new restriction on an existing outlet, but can prohibit a new outlet from locating in the restricted zone or selling a restricted product.

### Los Angeles’ Ordinance

In an attempt to define the limitations local government may impose on alcohol-serving establishments, courts have consistently held that local ordinances that do not directly affect the sale of alcohol are not preempted by the powers granted to the Department. In 1994, in *Korean American Legal Advocacy Foundation v. City of Los Angeles*,<sup>37</sup> the California Court of Appeal examined the extent to which the state had preempted the field of alcohol regulation. The case was set against the backdrop of the 1992 Los Angeles riots and the effort to rebuild stores destroyed during that period of civil unrest. Since 1985, the City of Los Angeles had required business engaged in the sale of off-site alcoholic beverages to obtain conditional use permits. In 1987, the city adopted a specific plan, which required conditional use approvals for establishments dispensing alcohol in South Central Los Angeles, and provided that approval was contingent on specified findings. Businesses in operation before the effective dates of either ordinance enjoyed “deemed approved” conditional use status. In the aftermath of the riots, the city adopted ordinances to facilitate rebuilding, with expedited procedures to process building

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<sup>35</sup> Bus. & Prof. Code § 23790; *City of Oakland v Superior Court* (1996) 45 Cal.App.4th 740.

<sup>36</sup> Bus. & Prof. Code § 23790

<sup>37</sup> *Korean American Legal Advocacy Foundation v. City of Los Angeles* (1994) 23 Cal.App.4th 376.

permits in conformity with existing code provisions. However, all conditional uses, including conditional uses selling alcoholic beverages for off-site consumption, had to submit plans for approval before rebuilding. Such approval could be made contingent on conditions (such as graffiti removal, adequate lighting, trash removal, security guards and limited hours of operation) imposed on the same basis as for new conditional uses. In addition to the plan approval process, the city instituted “revocation hearings” to revoke or condition an owner’s deemed approved status or use permit in the event the business threatened to become, or had become, a nuisance or law enforcement problem. The plaintiffs, many of whom had stores destroyed during the riots, brought suit, challenging the validity of the ordinance imposing the plan approval process and establishing revocation hearings. They alleged that Los Angeles’ plan approval and revocation processes were completely preempted by the state constitution, which specified that the state had exclusive authority to regulate the sale of alcoholic beverages and exercised this exclusive jurisdiction through the Alcoholic Beverage Control Act.<sup>38</sup>

In addressing the preemption challenge, the court examined the purpose of the ordinance and noted that the conditions imposed by the city did not have the effect, either direct or indirect, of regulating the “manufacture, sale, purchase, possession or transportation” of alcoholic beverages.<sup>39</sup> Rather, the conditions imposed under the plan approval process were aimed at controlling or eradicating the negative secondary impacts often associated with establishments that sell alcoholic beverages.<sup>40</sup> Accordingly, the ordinance was deemed permissible as it was aimed at land use and zoning - to abate or eradicate nuisance activities in a particular geographic area by imposing conditions aimed at mitigating those effects - rather than the regulation of alcohol. The validity of the ordinance was underscored by the fact it focused on the negative conduct occurring in the immediate vicinity of businesses selling alcohol for off-site consumption; “[t]hat the conditions imposed under the ordinance may have some indirect impact on the sale of alcoholic beverages does not transmute the purpose and scope of the ordinance into

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<sup>38</sup> *Id.* at 385.

<sup>39</sup> *Id.* at 385-87.

<sup>40</sup> *Id.* at 387.

a regulations merely seeking to control alcohol sales.”<sup>41</sup> Thus, provided that an ordinance imposes land use and zoning regulations, and applies them properly, the zoning regulation should be valid.

## **V. Recommended Practices**

Any local zoning ordinance aimed at regulating retail alcohol outlets should comprehensively seek to regulate, by including both conditional use permit (“CUP”) and Deemed Approved provisions. By including both of these provisions, the city will properly distinguish between pre-existing and new alcohol outlets. Both of these provisions are also flexible enough to vary according to each city’s needs. The recommended approach for regulating pre-existing alcohol outlets, both for on-sale and off-sale outlets is the Oakland Deemed Approved model, as described above. This provides a city with as much regulatory control over existing outlets as is permissible under the state statutory framework. Further, this approach has been upheld by courts as valid.

### Findings and Statement of Purpose

The ordinance should contain specific findings that will give the proper justification for any conditions and/or operating standards that are imposed. As is the case with other conditions imposed on a property, the conditions imposed must be related to the goals of the ordinance. The findings establish the need for the ordinance, listing the specific problems that are to be alleviated. These should be adapted to local circumstances, including any local data regarding alcohol problems and their link to retail alcohol sales. The purposes section can augment the findings from the introductory section, such as focusing on the rationale for requiring CUPs for new alcohol outlets. Carefully drafted findings and purpose sections are important to establish the city’s rationale and authority to take action.

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<sup>41</sup> *Id.*



## Regulation of Retail Outlet Locations

The Department may not issue alcohol licenses for premises located in the immediate vicinity of churches and hospitals.<sup>42</sup> In addition to the state law restrictions concerning location of outlets near those sensitive uses, a local ordinance can further restrict outlet locations through a valid zoning ordinance. Zoning ordinance restrictions regarding the location of outlets could restrict the outlets to certain zones, by defining the alcohol sales use and then restrict alcohol outlets from a zone within the city's zoning ordinance, such as residential zones. Conversely, the ordinance could restrict alcohol outlets only to certain commercial zones. In addition, the adopted ordinance may want to require spacing requirements by imposing specific distances from sensitive uses, such as playgrounds, schools, hospitals, high crime districts, etc. Lastly, the ordinance could require distance requirements between outlets. For example, no more than four alcohol retail outlets can be allowed within a 1,000 foot radius of each other. The location requirements may also choose to focus on particular types of alcohol outlets. For example, restaurants or grocery stores with relatively limited alcohol sales may be treated differently from bars, nightclubs, or liquor stores.

## Conditional Use Permit Provisions

An ordinance containing CUP provisions is an effective tool for local regulation of retail alcohol outlets. When regulating new outlets, establishing specific CUP provisions is the most effective method to impose local conditions and sanction those that do not comply with the enacted conditions. Additionally, the CUP allows cities to take much swifter action than if a city was forced to rely on the Department to take action. Lastly, the CUP provides individuals and groups within the community a voice in the decision-making process with respect to how proposed retail alcohol outlets would impact the community.

Any adopted CUP ordinance must be cognizant of the areas upon which state law has exclusive jurisdiction which is, "the manufacture, sale, purchase, possession and transportation of alcoholic beverages."<sup>43</sup> However, when acting within those restrictions, a city can properly adopt and enforce operating restrictions that will meet the particular needs of its communities.

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<sup>42</sup> Bus. & Prof Code § 23789.

<sup>43</sup> Cal Const. Art. XX, § 22.

Operational standards and conditions of approval can work in conjunction to comprehensively regulate new outlets. Operational standards are mandatory requirements that apply to all outlets, are typically general in nature, and can often be similar to the Deemed Approved operating standards. For example, operating standards can have restrictions against public nuisance activities and activities that violate state or local laws.

Although related to operating standards, conditions of approval are more specific and should be tailored to local issues. The conditions can be either standard or discretionary. If standard, they apply to all new outlets automatically; if discretionary, the permitting agency considers their applicability on a case-by-case basis and tailored to the specific application and the surrounding neighborhood. Erring on the side of over inclusion is recommended; if it is uncertain whether a given condition is relevant, it can be treated as discretionary and used only if warranted for particular retail outlets. Some conditions to consider are as follows:

- Soundwalls
- Prohibited Products
- Graffiti Removal
- Chilled Alcoholic Beverages
- Exterior Lighting
- Hours of Operation
- Trash Receptacles
- Paper or Plastic Cups
- Pay Telephones
- Size of alcohol signage
- Complaint Response – Community Relations Program
- Loitering
- Prohibited Activities (e.g. pool tables)
- Security Cameras
- Prohibited Vegetation
- Limitations on signs and advertising on windows of doors in off-sale outlet

#### Provisions Specific to On-Sale Outlets

Although the regulatory framework for on-sale and off-sale alcohol outlets are the same, on-sale outlets can present different issues than off-sale outlets. Because of this variation, cities may want to consider specific regulation for on-sale outlets. For example, nightclubs present operational issues that regulations tailored to liquor stores may not adequately cover. Operating hours restrictions would presumably be different for nightclubs. Additionally, requiring security and noise restrictions for nightclubs is also recommended.

Some cities have a cluster of on-sale outlets within one area that becomes a focal point for entertainment and tourism. Whether a city desires this “entertainment zone” or not, when such zones emerge, including additional provisions for those zones may help to minimize some of the impacts from several inebriated customers streaming out of closing bars all at once. Additionally, some potential conditions for Entertainment Zones could be restricting the number of alcohol licenses within a defined zone and prohibition of transferring a permit from one zone to another zone.

Other on-sale outlets that may present unique issues are restaurants. Cities may want to consider whether or not to include “full service restaurants” as an outlet subject to the CUP ordinance. Some cities, for example, exclude restaurants from their ordinances, provided that they meet strict criteria in terms of food sales, hours of operation, kitchen facilities, among other factors, to ensure that a restaurant does not transform into a more problematic mode of business. Regardless of a city’s desire to subject a full service restaurant to CUP ordinance regulations, the ordinance’s definitions should clearly define what constitutes a full service restaurant. Adopting restaurant specific operational requirements can prevent businesses from opening under the guise of a full service restaurant, but not actually operating as such, and in effect operate as a bar with little regulatory oversight. Some options for regulating restaurants include: treating restaurants similarly to other types of outlets; exempting them from the ordinance entirely; or developing separate standards applicable to restaurants.

#### Additional Ordinance Considerations

Some jurisdictions also charge an annual business license renewal fee to any bar, nightclub, restaurant, or grocery store permitted by the state to sell alcohol. The money generated pays for police officer(s) assigned to moderate the excesses associated with the sale of alcohol. If the exaction is imposed as a "fee," rather than a tax or an assessment, no election is required. Businesses that will likely generate more police response would pay more than those that do not. For example, large nightclubs with dance permits that stay open until 2:30 a.m. pay around \$1,700 per year, and small corner markets that sell beer and wine would pay close to \$300 per year.

## **VI. Conclusion**

While the State has express authority over the licensing and regulation of alcohol sales, local governments retain the right, under the police power, to regulate the impact of alcohol availability on the public health, safety and welfare of the community. When the existence of licensed alcoholic beverage establishments creates negative secondary impacts, local governments must continue to address these impacts while not treading in the exclusive area of the State's authority.

Although there are limited opportunities for cities to play a role in the state regulatory process, cities can nonetheless use their land use and police powers to exert control over retail alcohol outlets. When regulating pursuant to land use and/or police power authority, cities are able to employ a strategic approach to managing alcohol sales and affiliated issues. Any adopted ordinance should distinguish between pre-existing outlets and new outlets, with the deemed approved program and conditional use permit requirements.

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