

ADDRESSING THE POINT OF SALE: OPTIONS FOR REDUCING YOUTH TOBACCO USE IN VERMONT



CENTER FOR PUBLIC HEALTH AND TOBACCO POLICY

NEW ENGLAND LAW  BOSTON

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Addressing the Point of Sale: Options for Reducing Youth Tobacco Use in Vermont

Introduction

Cigarette use kills more than 400,000 Americans – and approximately 800 Vermonters – every year, while leaving millions more with chronic illnesses.¹ But the disease and premature death caused by tobacco is entirely preventable. As Congress recently stated, tobacco use is primarily a “pediatric disease,” because “[v]irtually all new users of tobacco products are under the legal age to purchase such products.”² If tobacco use by youth could be prevented, tobacco use rates would dramatically decrease.

Tobacco companies are well aware that their continued existence depends on their ability to recruit new, young smokers to replace those killed by tobacco products. That is why they spend more than \$10 billion a year – approximately \$19 million in Vermont alone – marketing their products.³ Because of restrictions on tobacco advertising in other venues, the vast majority of the tobacco industry’s marketing efforts focus on the “point of sale” – the retail stores where tobacco is sold.⁴ The most recent data shows that the tobacco industry spent more than 90% of its marketing dollars at the point of sale, through a combination of advertising, price discounts, and incentive payments to retailers.⁵ **A rapidly-growing body of research demonstrates that this point of sale marketing is a major cause of youth smoking.**⁶

Table of Contents

<i>Introduction</i>	1
<i>Zoning</i>	2
<i>Display Restrictions</i>	3
<i>Conclusion</i>	5
<i>Appendix A: Model Zoning Ordinance</i>	
<i>Appendix B: Model Display Restriction Ordinance</i>	

Years of experience have established that laws prohibiting tobacco sales to minors are not enough to prevent youth smoking. This is in part because nearly every time an adolescent (or younger child) enters a retail store that sells tobacco products, he or she is bombarded with tobacco marketing.⁷ In most of these stores, there is a prominent, eye-catching display of tobacco products and advertisements, usually located directly behind the counter.⁸ These “power walls,” which typically contain hundreds of cigarette packs, are carefully designed by tobacco companies to grab attention and stimulate purchases.⁹ The vast majority of stores that sell tobacco products also contain tobacco advertisements posted around the store.¹⁰ Together, these power walls and advertisements are intended to make tobacco products look tempting and appealing.¹¹ Studies show that the more often youth are exposed to this marketing, the more likely they are to experiment with smoking and become regular tobacco users.¹²

There are, however, policy measures that can reduce youth exposure to tobacco marketing – and, consequently, youth smoking rates. This report discusses two such options. First, local communities could consider restricting where tobacco products can be sold. Using the authority provided by Vermont’s zoning laws, localities could limit the number and location of tobacco retail outlets. Secondly, local communities could also consider prohibiting the “power walls” that play an important role in promoting youth smoking. This report contains model policies that could be used to implement these two policy options.

Section One – Using Zoning to Regulate the Location of Tobacco Retailers

Local governments in Vermont should consider available strategies for restricting the number and location of tobacco retailers. Currently, Vermont does not limit the number or location of tobacco retailers: any business may apply to the state for a tobacco retail license. However, municipalities could begin restricting tobacco retail density through zoning. Zoning means dividing an area into districts and applying different land use regulations to each district.¹³

Municipalities in Vermont derive authority to enact zoning ordinances from a state law, the Vermont Planning and Development Act.¹⁴ The model zoning ordinance included with this report is designed for use by local governments around Vermont. It is designed to be adapted to each municipality's needs.

Using local regulations to limit the number and location of tobacco retailers is important because research suggests that the density of tobacco outlets in a neighborhood has an impact on the prevalence of smoking, including smoking among youth.¹⁵ One study found that youth living in areas with the highest tobacco outlet density were 20 percent more likely to have smoked in the past month than those in areas with the lowest density.¹⁶ Also, a California study observed that smoking prevalence among high school students is higher when there are more walkable tobacco retail outlets near their schools.¹⁷

Currently, there are close to 1,000 tobacco retail outlets located in Vermont.¹⁸ Considering that there are around 76,400 adult smokers in the state, this means that there is approximately one tobacco retail outlet for every 76 adult smokers in Vermont.¹⁹ This also means that on

average, tobacco companies spend approximately \$19,000 per store on tobacco advertising and promotions in the state.²⁰

Restricting the number and location of tobacco outlets will help to reduce the accessibility of tobacco products and exposure to point of sale marketing. This will in turn help to reduce youth tobacco use.²¹

Using the model policy included here, municipalities can use zoning ordinances to begin limiting the number of retail tobacco outlets. The model ordinance is designed to allow local communities to decide how many new tobacco retailers they will permit. Once that maximum level is reached, no more tobacco retailers will be permitted to open. This type of regulation will not affect businesses currently in operation, but will cap the number of retailers operating in the community.

Municipalities can also use the model zoning ordinance to restrict the location of retailers. For example, the zoning ordinance can be implemented so that new tobacco retailers cannot locate within a specified distance of a school, playground or other youth oriented facilities. While retailers currently operating within that distance of a school or youth oriented facility will be allowed to continue in operation, over time (as current retailers close or go out of business) a tobacco-free zone will be created. Each municipality can decide how large or small a buffer zone is necessary to meet the community's needs. Limiting tobacco sales near schools is important because when there are more tobacco retailers near schools, students are more likely to smoke.²²

The model ordinance also provides that new retailers cannot locate within a specified distance from an existing retailer. Each municipality may decide what distance best

meets the needs of the community. By limiting the ability of new retailers to locate in close proximity of existing retailers, tobacco retail outlet density will be reduced.

Legal Considerations

Municipalities are not preempted by federal tobacco control laws such as the Family Smoking Prevention and Tobacco Control Act (FSPTCA) from using zoning to regulate the location and number of tobacco retailers in the community. Indeed, the FSPTCA explicitly provides that states and local governments maintain the authority to regulate the sale and distribution of tobacco products.²³

Furthermore, municipal zoning authority is well established under state law, as the Vermont Planning and Development Act delegates zoning authority to municipalities in the state.²⁴ Municipalities implementing new zoning ordinances should be careful to follow the zoning procedures outlined under the Act. While there is always a possibility that a municipal ordinance could be challenged in court, the model ordinance minimizes the likelihood of a successful legal challenge by limiting its application to new tobacco retailers. While this limitation reduces the immediate impact of the ordinance, it makes it difficult for any retailer to claim that the measure “takes” property in violation of the Fifth Amendment of the U.S. Constitution.



Section Two – Restrictions on the Display of Tobacco Products

Another policy option municipal governments might consider is enacting an ordinance that would prohibit the display of tobacco products prior to sale. Such an ordinance would disallow the “power walls” discussed above. Tobacco companies pay retailers “promotional allowances” in exchange for which retailers are required to display their products on eye-catching power walls typically located directly behind the cash register.²⁵ These power walls have been shown to encourage youth smoking – even in the absence of other advertising – and to trigger tobacco purchases.²⁶

Studies have found a direct, positive relationship between tobacco advertising and the likelihood of youth smoking.²⁷ Indeed, youth who shop at convenience stores filled with tobacco advertisements are “twice as likely to start smoking,” in comparison with their peers who do not.²⁸ More specifically, numerous research findings support the conclusion that tobacco power wall displays increase youth smoking. For example, in a 2006 study, researchers found that “[t]he presence of cigarette displays at the point-of-sale, even in the absence of cigarette advertising, has adverse effects on students’ perceptions about ease of access to cigarettes and brand recall, both

factors that increase the risk of taking up smoking.”²⁹

Power walls prompt youth smoking by normalizing the use of tobacco products, making them appear popular and acceptable.³⁰ Youth are far more likely than adults to notice and remember tobacco product displays, and continued exposure to tobacco brand images weakens their desire to avoid smoking and instead triggers their curiosity.³¹ Tobacco power walls also, prompt “impulse purchases,” making it difficult for youth who have begun smoking to quit.

The model ordinance included with this report is designed to be adopted at the municipal level. The purpose of the ordinance is to reduce youth exposure to tobacco product displays. Therefore, the ordinance is designed to apply only to retail establishments open to youth. Under the ordinance, the display of tobacco products is prohibited, but retailers are given flexibility in determining how to rearrange their stores in order to comply with this requirement. The tobacco products could be placed behind a curtain, under the counter, or behind closed cabinets.

In order to minimize the likelihood of a successful First Amendment challenge, the model ordinance does not otherwise limit advertising in retail stores. While the display of tobacco products will be prohibited, adult customers can learn what products are available from any remaining advertising, or they can request a “tobacco menu” that provides a listing of available products and their prices. Although this model ordinance will not eliminate tobacco marketing at the point of sale, removing the “power wall” displays of tobacco products will significantly transform the retail environment.

Legal Considerations

Federal Law

The Family Smoking Prevention and Tobacco Control Act (FSPTCA) which came into effect in 2009, provides state and local governments with expanded authority to regulate tobacco marketing. Prior to the enactment of the FSPTCA, the Federal Cigarette Labeling and Advertising Act (FCLAA) provided that the federal government held the exclusive authority to regulate cigarette advertising and promotion.³² The FSPTCA modified the preemption provision of FCLAA, such that federal law now allows states, in addition to the federal government, to regulate in this area.³³

According to this modified preemption provision, state and local governments are now able to regulate the “time, place, and manner” in which cigarette companies can advertise their products. (State and local governments still cannot regulate the “content” of cigarette advertisements or promotions.) A restriction on the display of tobacco products would likely be considered a “place” or a “manner” restriction that is allowed under the FSPTCA.

Although the FSPTCA clearly authorizes states and localities to act, opponents of a law restricting the display of tobacco products may claim that the regulation violates the First Amendment’s protection of commercial speech. Commercial speech is the communication of information for commercial reasons, which includes promotions and advertising intended to increase demand for consumer products. In the past, tobacco companies have filed lawsuits asserting that tobacco control measures violated their commercial speech rights.

Any law alleged to unlawfully restrict commercial speech in violation of the First Amendment will be evaluated under a four-pronged test developed in a case called *Central Hudson* (the “Central Hudson test”).³⁴ Under the *Central Hudson* test, the court first considers (1) whether the product at issue is legal and the communication being restricted is truthful. If so, then the government must establish that (2) the government has a substantial interest in what it seeks to achieve; (3) the law directly advances the government’s interest(s); and (4) a more limited restriction on commercial speech could not advance the government’s interest(s). In tobacco-related cases, it is usually the last two prongs of the test – whether the restriction at issue advances the government’s interest and whether a more limited restriction could have sufficed – that are most heavily contested. States or communities considering restrictions on the display of tobacco products should consider how they can best develop a strong record of evidence demonstrating why the restriction is needed and why a more narrow restriction would be incapable of accomplishing the same goal. The model ordinance is designed with these restrictions in mind. As discussed above, the ordinance prohibits the tobacco product displays that have been shown to contribute to youth smoking initiation, but it still allows tobacco companies and tobacco retailers to communicate advertising and price information to legal, adult customers through other channels.

State Law

Under Vermont state law, municipal governments possess only those authorities delegated to them by state law.³⁵ Some Vermont communities operate under governance charters that may provide them

with broader authority to act than state law otherwise provides.³⁶ For communities without such charters, the general provisions of state law delegate to municipalities the authority to regulate nuisances, which could include the illegal use of tobacco products by minors.³⁷ State law provides municipalities with the power to “define what constitutes a public nuisance, and to provide procedures and take action for its abatement or removal as the public health, safety or welfare may require.”³⁸ Considering the correlation between the retail environment and youth uptake in tobacco use, this provision should provide municipalities with ample authority to adopt an ordinance that defines the display of tobacco products as a public nuisance and restricts their use.

Conclusion

This report discusses two policy options available to municipalities that want to address and minimize the tobacco retail environment’s effect on youth tobacco use:

- **Municipal zoning ordinances** can be used to place limits on the number and location of tobacco retailers. This will have the effect of significantly reducing exposure to point of sale marketing. In addition, research suggests that the prevalence of smoking will be reduced if the density of tobacco retail outlets is reduced.
- **Point of sale display restrictions** will eliminate the “power walls” that prompt youth use of tobacco products. Product displays are a powerful marketing tool used by the tobacco industry. Restricting these displays in retail establishments open

to youth will help reduce youth tobacco use.

The retail environment has become the primary focus of the tobacco companies' marketing efforts. In Vermont alone, tobacco companies spend approximately \$19 million a year marketing their tobacco

products, and the vast majority of that money is spent at the point of sale. There is an urgent need for policy measures that respond to and minimize this point of sale marketing, which is a major cause of youth smoking. This report – and the associated model ordinances – provides policymakers with two promising options to consider.

Citations

- ¹ *Toll of Tobacco in Vermont*, CAMPAIGN FOR TOBACCO FREE KIDS, Nov. 28, 2011, http://www.tobaccofreekids.org/facts_issues/toll_us/vermont.
- ² Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, §§ 2(1), 2(4) (2009).
- ³ FED. TRADE COMM’N, CIGARETTE REPORT FOR 2007 AND 2008, at 1 (2011), <http://www.ftc.gov/os/2011/07/110729cigarettereport.pdf>; *see also*, FED. TRADE COMM’N, SMOKELESS TOBACCO REPORT FOR 2007 AND 2008, at 2 (2011), <http://www.ftc.gov/os/2011/07/110729smokelesstobaccoreport.pdf>; *Toll of Tobacco in Vermont*, CAMPAIGN FOR TOBACCO FREE KIDS, Nov. 28, 2011, http://www.tobaccofreekids.org/facts_issues/toll_us/vermont.
- ⁴ Richard W. Pollay, *More than Meets the Eye: On the Importance of Retail Cigarette Merchandising*, 16 TOBACCO CONTROL 270, 271 (2007).
- ⁵ CIGARETTE REPORT FOR 2007 AND 2008, *supra* note 3, at tbl.2D; *see also* SMOKELESS TOBACCO REPORT FOR 2007 AND 2008, *supra* note 3, at 3-5. “Tobacco industry” consists of the 5 largest cigarette manufacturers and 5 major smokeless tobacco companies.
- ⁶ *See* Lisa Henriksen et al., *A Longitudinal Study of Exposure to Retail Cigarette Advertising and Smoking Initiation*, 126 PEDIATRICS 232, 236 (2010); Reiner Hanewinkel et al., *Cigarette Advertising and Adolescent Smoking*, 38 AM. J. PREVENTATIVE MED. 359, 366 (2010); Melanie Wakefield et al., *An Experimental Study of Effects on Schoolchildren of Exposure to Point-of-Sale Cigarette Advertising and Pack Displays*, 21 HEALTH EDUC. RES. 338, 346 (2006).
- ⁷ *See* Melanie Wakefield et al., *Changes at the Point of Purchase for Tobacco Following the 1999 Tobacco Billboard Advertising Ban* (University of Chicago, Research Paper Series, No. 4, 2000) (noting that almost 80% of tobacco retailers contain at least one piece of tobacco advertising).
- ⁸ Pollay, *supra* note 4 (explaining that “power walls” are carefully designed for maximum impact).
- ⁹ *Id.*; *see also* O. B. Carter et al., *The Effect of Retail Cigarette Pack Displays on Unplanned Purchases: Results for Immediate Post-purchase Interviews*, 18 TOBACCO CONTROL 218, 220 (2009) (explaining how shelves of products at the point of sale influence nearly four times as many unplanned purchases as planned purchases of tobacco products).
- ¹⁰ Wakefield et al., *supra* note 7.
- ¹¹ Pollay, *supra* note 4.
- ¹² Melanie Wakefield et al., *An Experimental Study of Effects on Schoolchildren of Exposure to Point-of-Sale Cigarette Advertising and Pack Displays*, 21 HEALTH EDUC. RES. 338, 346 (2006).
- ¹³ *See* BLACK’S LAW DICTIONARY (9th ed. 2009).
- ¹⁴ VT. STAT. ANN. tit. 24, § 4301 et seq. (2011).
- ¹⁵ Scott P. Novak et al., *Retail Tobacco Outlet Density and Youth Cigarette Smoke: A Propensity-Modeling Approach*, 96 AM. J. PUB. HEALTH 670, 674 (2006); *see also* Andrew Hyland et al., *Tobacco Outlet Density and Demographics in Erie County NY*, 93 AM. J. PUB. HEALTH 1075, 1075 (2003).
- ¹⁶ Novak et al., *supra* note 15.
- ¹⁷ Lisa Henriksen et al., *Is Adolescent Smoking Related to the Density and Proximity of Tobacco Outlets and Retail Cigarette Advertising Near Schools?*, 47 PREVENTATIVE MED. 210, 213 (2008).
- ¹⁸ Vermont Dept. of Liquor Control, Tobacco Licensees, <http://liquorcontrol.vermont.gov/download/tobacco.txt> (last visited Feb. 23, 2012).
- ¹⁹ *Toll of Tobacco in Vermont*, CAMPAIGN FOR TOBACCO FREE KIDS, Nov. 28, 2011, http://www.tobaccofreekids.org/facts_issues/toll_us/vermont.
- ²⁰ *Id.*; Vermont Dept. of Liquor Control, *supra* note 18.
- ²¹ *See* Andrew Hyland et al., *supra* note 15; *see also* N. Andrew Peterson, John B. Lowe & Robert J. Reid, *Tobacco Outlet Density, Cigarette Smoking Prevalence, and Demographics at the County Level of Analysis*, 40 SUBSTANCE USE & MISUSE 1627, 1630 (2005).
- ²² Scott T. Leatherdale & Jocelyn M. Strath, *Tobacco Retailer Density Surrounding Schools and Cigarette Access Behaviors Among Underage Smoking Students*, 33 ANNALS OF BEHAV. MED. 105, 106 (2007).
- ²³ Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 916(a)(2)(B) (2009) (codified as amended at 21 U.S.C. 387p (2010)).
- ²⁴ VT. STAT. ANN. tit. 24, § 4301 et seq. (2011).

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- ²⁵ Kurt M. Ribisl, *Presentation at the Triennial Meeting of the National Association of Attorneys General: Retail Tobacco Advertising: Significance and Solutions* (Oct. 16, 2007), available at http://www.naag.org/backpages/naag/tobacco/naag_tobacco/Presentations/Ribisl%20Triennial.pdf.
- ²⁶ See Melanie Wakefield et al., *The Effect of Retail Cigarette Pack Displays on Impulse Purchase*, 103 ADDICTION 322, 325 (2007).
- ²⁷ Hanewinkel et al., *supra* note 6.
- ²⁸ See Henriksen et al., *supra* note 6.
- ²⁹ Wakefield et al., *supra* note 6.
- ³⁰ Pollay, *supra* note 8; see also Wakefield et al., *supra* note 6.
- ³¹ Wakefield et al., *supra* note 6; see also *Tobacco Company Marketing to Kids*, CAMPAIGN FOR TOBACCO FREE KIDS, Aug. 2, 2011, available at <http://www.tobaccofreekids.org/research/factsheets/pdf/0008.pdf>. (“While only 25 percent of all adults recalled seeing a tobacco ad in the two weeks prior to the survey, 43 percent of kids aged 12 to 17 reported seeing tobacco ads.”).
- ³² Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. §§ 1331-1341).
- ³³ Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776, 1786 (2009) (codified at 21 U.S.C. §387p(a)(1) (2010)); and Federal Cigarette Labeling and Advertising Act, Pub. L. No. 91-222 (1970) (codified as amended at 15 U.S.C. § 1334 (2010)) The FCLAA, modified by the FSPTCA, now reads: No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter...Notwithstanding [the preceding], a State or locality may enact statutes and promulgate regulations, based on smoking and health...imposing specific bans or restrictions on the time, place, and manner, but not content, of the advertising or promotion of any cigarettes. (emphasis added).
- ³⁴ See *Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 564 (1980).
- ³⁵ OFFICE OF THE SECRETARY OF STATE (VT), MUNICIPAL LAW BASICS 2 (2009), http://www.sec.state.vt.us/municipal/pubs/municipal_law_basics.pdf (“[A]s between the state and local units of government, the municipal bodies’ power is derivative, based upon an allocation of authority from the state. Where conflict occurs, and no resolution is statutorily prescribed, the municipality must yield.” (quoting *Morse Vermont Division of State Buildings*, 136 Vt. 253 (1978))).
- ³⁶ OFFICE OF THE SECRETARY OF STATE (VT), MUNICIPAL LAW BASICS 2 (2009), http://www.sec.state.vt.us/municipal/pubs/municipal_law_basics.pdf.
- ³⁷ See VT. STAT. ANN. tit. 24 § 2291(14) (2011).
- ³⁸ See VT. STAT. ANN. tit. 24 § 2291(14) (2011).

Appendix A: Model Zoning Ordinance

Model Zoning Ordinance Regulating the Location of Retail Establishments Selling Tobacco Products^{*}

Section 1: Title.

An Ordinance Amending the Zoning Code to Provide Regulations for Retail Establishments Selling Tobacco Products.

Section 2: Findings.

The [Board of Selectmen] of [City] finds and declares that:

In Vermont, 15.4% of the adult population, 13% of high school students, and 3.0% of middle school students currently smoke; and 6.2% of adult males and 11% of high school males use smokeless or spit tobacco;

Although it is unlawful to sell tobacco products to minors, 11.6% of tobacco retailers sold to minors during compliance checks conducted by the Vermont Department of Liquor Control in 2010. Nationally, despite laws in every state making it illegal to sell tobacco to minors, each year an estimated 800 million packs of cigarettes are consumed by youth;

[City] has a substantial interest in reducing the number of individuals of all ages who use cigarettes and other tobacco products, and a particular interest in protecting adolescents from tobacco dependence and the illnesses and premature death associated with tobacco use;

An overwhelming majority of Americans who use tobacco products begin using such products while they are adolescents and become addicted to those products before reaching the age of 18;

Studies have found that a higher concentration of tobacco retailers in a geographic area is associated with higher rates of youth smoking;

Zoning controls and a requirement that tobacco retailers obtain a conditional use permit will not unduly burden legitimate business activities of tobacco retailers who sell cigarettes or distribute tobacco products to adults. It will, however, allow [City] to regulate the operation of lawful businesses to avoid circumstances which facilitate violations of state, federal, and local laws;

A purpose of the Vermont Planning and Development Act is to encourage municipalities to develop land in a manner that promotes the public health;

Zoning regulations are necessary to control the location and operation of the sale or exchange of tobacco products for the protection of public health, safety and welfare;

^{*} This model ordinance is based in part on models developed by Public Health Law & Policy (www.phlpnet.org) for the California Tobacco Control Program. Adapted for use with the permission of the California Department of Health, California Tobacco Control Program.

The [Board of Selectmen] intends to limit the number of tobacco retailers in [City] for the protection of public health, safety, and welfare; and

The [Board of Selectmen] intends to declare any violation of this ordinance to be a public nuisance pursuant to Vt. Stat. Ann. tit. 24, § 2291(14), and will take action for its abatement or removal as the public health, safety or welfare may require.

Section 3: Authority.

This ordinance is adopted pursuant to the authority contained in the Vermont Planning and Development Act, also designated as Title 24, V.S.A. Chapter 117. Whenever any provision of this ordinance refers to or cites a section of Title 24 V.S.A. Chapter 117, and this section is later amended or superseded, this ordinance shall be deemed to refer to the amended section or the section that most nearly corresponds to the superseded section.

Section 4: Severability.

The provisions of this Chapter are declared to be severable, and if any section of this Chapter is held to be invalid, such invalidity shall not affect the other provisions of this Chapter that can be given effect without the invalidated provision.

Section 5: [Article / Chapter] is Hereby Added to [Article / Section] of the Zoning Code of the [City] and is to be Read as Follows:

5.1. Definitions. The following words and phrases, whenever used in this [article / chapter] shall have the meanings defined in this section unless the context clearly requires otherwise:

ZONING ADMINISTRATOR means the Administrative Officer responsible for zoning administration and enforcement in the municipality.

TOBACCO PRODUCT means any manufactured product containing tobacco or nicotine, including but not limited to cigarettes, cigars, pipe tobacco, snuff, chewing tobacco, dipping tobacco, bidis, snus, dissolvable tobacco products, and electronic cigarette cartridges, whether packaged or not. However, “Tobacco Product” does not include any product that has been approved by the U.S. Food and Drug Administration, pursuant to its authority over drugs and devices, for sale as a tobacco use cessation product or for other medical purposes and is being marketed and sold solely for that approved purpose.

TOBACCO RETAILER means any business that sells or offers for sale any Tobacco Product.

EXISTING TOBACCO RETAILER means any Tobacco Retailer that is engaged in the legal sale of Tobacco Products as of the effective date of date of this [article / chapter].

NEW TOBACCO RETAILER means any Tobacco Retailer that is not engaged in the legal sale of Tobacco Products as of the effective date of date of this [article / chapter].

SCHOOL means a public or private kindergarten, elementary, middle, junior high, or high school.

5.2. Zoning Regulations. The following zoning controls shall regulate the siting of New Tobacco Retailers.

(a) A New Tobacco Retailer may be located only within an area zoned for light industrial or industrial use. In addition, no Tobacco Retailer shall be located within [XXXX] feet of the boundary of any residential zone or a parcel occupied by a school.

(b) No New Tobacco Retailer may be located within [XXXX] feet of any other Tobacco Retailer, as measured in a straight line from parcel boundary to parcel boundary.

5.3. Conditional Use Permits.

(a) A conditional use permit shall be required for all New Tobacco Retailers. A separate permit is required for each location where Tobacco Products are sold. A new conditional use permit is also required for any Existing Tobacco Retailer that seeks to sell tobacco products at a location other than or in addition to where such Existing Tobacco Retailer sold tobacco product as of the effective date of this [article / chapter]. The application review and approval procedures set forth in section [cross reference local conditional use permit procedures] of the zoning code shall apply to all applications for a use permit under this ordinance.

(b) Limited Number of Tobacco Retailers: The number of conditional use permits approved under this ordinance shall be no more than [XXXX].

(c) For New Tobacco Retailers, each application for a permit to conduct business shall include, in addition to such other information as reasonably required by the [Board of Selectmen], a plan for demonstrating the means by which the applicant will comply with the requirements of paragraph (d) of this section.

(d) Standard Conditions of Approval: In addition to any conditions of approval imposed by the [Board of Selectmen] every Tobacco Retailer permitted under this Section, and every employee of such Tobacco Retailer, shall comply with all local, state, and/or federal laws regarding the sale, advertising or display of Tobacco Products.

The number of approved Conditional Use Permits should be determined based on factors such as the population of the municipality and the number of existing tobacco retailers.

5.4. Suspension or Revocation of a Conditional Use Permit.

(a) Grounds for Suspension or Revocation: A Tobacco Retailer's conditional use permit shall be suspended or revoked if the Zoning Administrator finds, after notice and opportunity to be heard, that the Tobacco Retailer has violated any of the use permit conditions of approval, including without limitation the Standard Conditions of Approval set forth in 5.3(d) or of this [article / chapter].

(b) A suspension shall suspend the privilege of selling tobacco products for a stated period pursuant to paragraph (c) of this Section. Revocation shall be without prejudice to the filing of a new application for a conditional use permit following correction of the conditions that required the revocation of the conditional use permit.

(c) Suspension or Revocation of Conditional Use Permit: If the Zoning Administrator finds that there are grounds for the suspension or revocation of a conditional use permit, the following sanctions may be imposed: (i) amendment of the conditional use permit to impose additional conditions or restrictions to ensure present and future compliance with the conditions of the permit; and/or (ii) revocation of the Tobacco Retailer's conditional use permit; and/or (iii) suspension of operations or closing the retail outlet; and/or (iv) instituting in the name of the municipality any appropriate action, injunction, process of contempt or other proceeding to rectify the situation and to restrict or prevent operation until the situation has been rectified. Such penalties shall be in addition to any others authorized by State Statute or Local Ordinance.

(d) Appeal of Suspension and/or Revocation: The decision of the Zoning Administrator is appealable to the [secretary of the board of adjustment or development review board of the municipality or with the clerk of the municipality if no such secretary has been elected] and must be filed within 15 days of receipt of the determination of violation.

5.5. Administrative Fine/Penalties.

(a) If the Zoning Administrator finds, based on substantial record evidence, that any Tobacco Retailer has violated this ordinance or the terms and conditions of the Tobacco Retailer's conditional use permit, the Zoning Administrator may fine that Tobacco Retailer up to \$100 for each offense.

5.6. Enforcement.

(a) Causing, permitting, aiding, abetting, or concealing a violation of any provision of this ordinance or a conditional use permit issued hereunder shall constitute a violation of this ordinance.

(b) Violations of this [article / chapter] and any conditional use permit issued hereunder are hereby declared to be public nuisances.

(c) In addition to other remedies provided by this [article / chapter] or by other law, a violation may be remedied by any appropriate action brought by the Zoning Administrator.

Section 6: Effective Date.

The effective date of this ordinance shall be ninety (90) days from the date of its enactment.

Appendix B: Model Display Restriction Ordinance

Model Ordinance Prohibiting the Display of Tobacco Products in Facilities Open to Minors

Section 1: Purpose.

It is the purpose of this ordinance to promote and protect the public health, safety and general welfare by reducing tobacco use among minors through the establishment of enforceable standards for the display of tobacco products inside tobacco retail establishments, and to assure compliance of retailers within the city limits.

Section 2: Authority.

The [Board of Selectmen] hereby adopts the following civil ordinance pursuant to the [City's] authority under Vt. Stat. Ann. tit. 24 § 2291(14) to define what constitutes a public nuisance, and to provide procedures and take action for its abatement or removal as the public health, safety or welfare may require.

Section 3: Findings.

The [Board of Selectmen] of [City] hereby finds and declares that: Tobacco use is the foremost preventable cause of premature death in the United States, causing over 400,000 deaths in the United States each year;

In Vermont, 800 adults die each year from smoking, and, if current trends continue, 12,000 children now under 18 and alive in Vermont will ultimately die prematurely from smoking;

Tobacco companies sell products that are addictive and inherently dangerous, causing cancer, heart disease, and other serious illnesses;

In Vermont, 15.4% of the adult population, 13% of high school students, and 3.0% of middle school students currently smoke; and 6.2% of adult males and 11% of high school males use smokeless or spit tobacco;

[City] has a substantial interest in reducing the number of individuals of all ages who use cigarettes and other tobacco products, and a particular interest in protecting adolescents from tobacco dependence and the illnesses and premature death associated with tobacco use;

An overwhelming majority of Americans who use tobacco products begin using such products while they are adolescents and become addicted to those products before reaching the age of 18;

Tobacco product displays lead minors to develop favorable beliefs about tobacco use, overestimate the prevalence of tobacco use, and engage in illegal purchases of tobacco products;

The [Board of Selectmen] desires to reduce adolescent smoking and the public health consequences of smoking without prohibiting the sale of tobacco products to adult consumers;

The display of tobacco products plays a crucial role in the decision of individuals, and adolescents in particular, to begin using tobacco products;

Tobacco companies recognize the effectiveness of tobacco product displays in increasing product sales and therefore pay tobacco retailers for prominent display locations;

Research suggests that preventing the display of tobacco products will lead to a significant decrease in the number of adolescents becoming addicted to those tobacco products and will assist individuals in their efforts to quit smoking;

The World Health Organization has endorsed removing retail tobacco product displays as an effective method of reducing tobacco use;

Preventing the display of tobacco products still affords tobacco companies numerous ways to communicate product information and otherwise market to their legal adult customers;

Prior efforts by the city and state to limit tobacco use, while effective, have not precluded the need for further efforts to reduce tobacco use by adolescents;

The Centers for Disease Control recognizes that a comprehensive, multi-faceted approach is necessary to adequately address the issue of youth tobacco use;

Due to federal preemption, [City] lacked the legal authority to limit the display of tobacco products prior to the enactment of the Family Smoking Prevention and Tobacco Control Act in 2009;

The purpose of this legislation is to further the strong governmental interest in protecting the health of its citizens, and particularly its children, by restricting the display of tobacco products in retail environments that are open to children; and

This measure does not restrict expressive conduct any more than necessary and will leave tobacco companies with reasonable and adequate ways to communicate non-misleading commercial information to their legal adult customers.

Section 4: Definitions.

As used in this Chapter, the following terms shall have the meanings indicated:

(A) ADULT-ONLY ESTABLISHMENT means a facility where the operator ensures or has a reasonable basis to believe (such as by checking the identification of any person appearing to be under the age of 25) that no person under the Legal Age is permitted entrance.

(B) AGE-VERIFIED CUSTOMER means any individual who has presented a photographic motor vehicle operator's license, a valid passport, a United States Military identification card or a photographic nondriver motor vehicle identification card obtained from the department of motor vehicles indicating that the individual is of Legal Age.

(C) LEGAL AGE means the minimum age at which individuals are permitted to legally purchase tobacco products.

(D) DEPARTMENT means the [appropriate municipal department].

(E) PERSON means any natural person, company, corporation, firm, partnership, business, organization, or other legal entity.

(F) TOBACCO MENU means a booklet, pamphlet, or list that contains a listing of tobacco products offered for sale by the Tobacco Retailer and the price of such products. The Tobacco Menu may contain pictures of and advertisements for Tobacco Products.

(G) TOBACCO PRODUCT means any manufactured product containing tobacco or nicotine, including but not limited to cigarettes, cigars, pipe tobacco, snuff, chewing tobacco, dipping tobacco, bidis, snus, dissolvable tobacco products, and electronic cigarette cartridges, whether packaged or not; any packaging that indicates it might contain any substance containing tobacco or nicotine; or any objects utilized for the purpose of smoking or inhaling tobacco or nicotine products, including but not limited to pipes, hookahs, cigarette or cigar wrapping papers, and electronic cigarettes. However, "Tobacco Product" does not include any product that has been approved by the U.S. Food and Drug Administration, pursuant to its authority over drugs and devices, for sale as a tobacco use cessation product or for other medical purposes and is being marketed and sold solely for that approved purpose.

(H) TOBACCO RETAILER means any Person who sells or offers for sale any Tobacco Product, or any employee of such a person.

Section 5: Adult-Only Establishments Exempted.

Sections 6 through 9 of this Chapter shall not apply to Adult-Only Establishments.

Section 6: Display of Tobacco Products Prohibited.

(A) No Tobacco Retailer shall display or permit the display of any Tobacco Product in a manner that permits a consumer to view any Tobacco Product prior to purchase. Except as provided for in Subsection 4(B), this Section is not violated if:

- (1) at the direct request of an Age-Verified Customer, such a customer handles a Tobacco Product to inspect the product prior to purchase; or
- (2) Tobacco Products are temporarily visible during restocking, the sale of the Tobacco Products, or the carriage of the Tobacco Products into or out of the premises.

(B) No Tobacco Retailer shall display or permit the display of any Tobacco Product for any longer than necessary to complete the purposes identified in Subsection 4(A)(1) or Subsection 4(A)(2).

Section 7: Use of Tobacco Menu.

(A) No Tobacco Retailer shall store any Tobacco Menu in a location where it is visible to customers or accessible to customers without the assistance of a Tobacco Retailer.

(B) No Tobacco Retailer shall provide any Tobacco Menu to any individual other than an Age-Verified Customer.

(C) After a customer has completed viewing a Tobacco Menu, the Tobacco Retailer shall immediately return the Tobacco Menu to its storage location.

(D) Any tobacco advertisements included in the Tobacco Menu shall include any warning labels required by federal law or regulation.

Section 8: Enforcement.

(A) The Department or its authorized designee(s) shall enforce the provisions of this Chapter. The Department may conduct periodic inspections to ensure compliance with this Chapter.

(B) In addition to the remedies provided by the provisions of this Chapter, the [Board of Selectmen] may seek injunctive relief against the violator to enforce the provisions of this Chapter and prevent future violations.

Section 9: Penalties.

(A) Any Tobacco Retailer found to be in violation of Section 4 of this Chapter shall be liable for civil penalty of not more than \$500 for the first violation, and each day the violation continues shall constitute a separate violation.

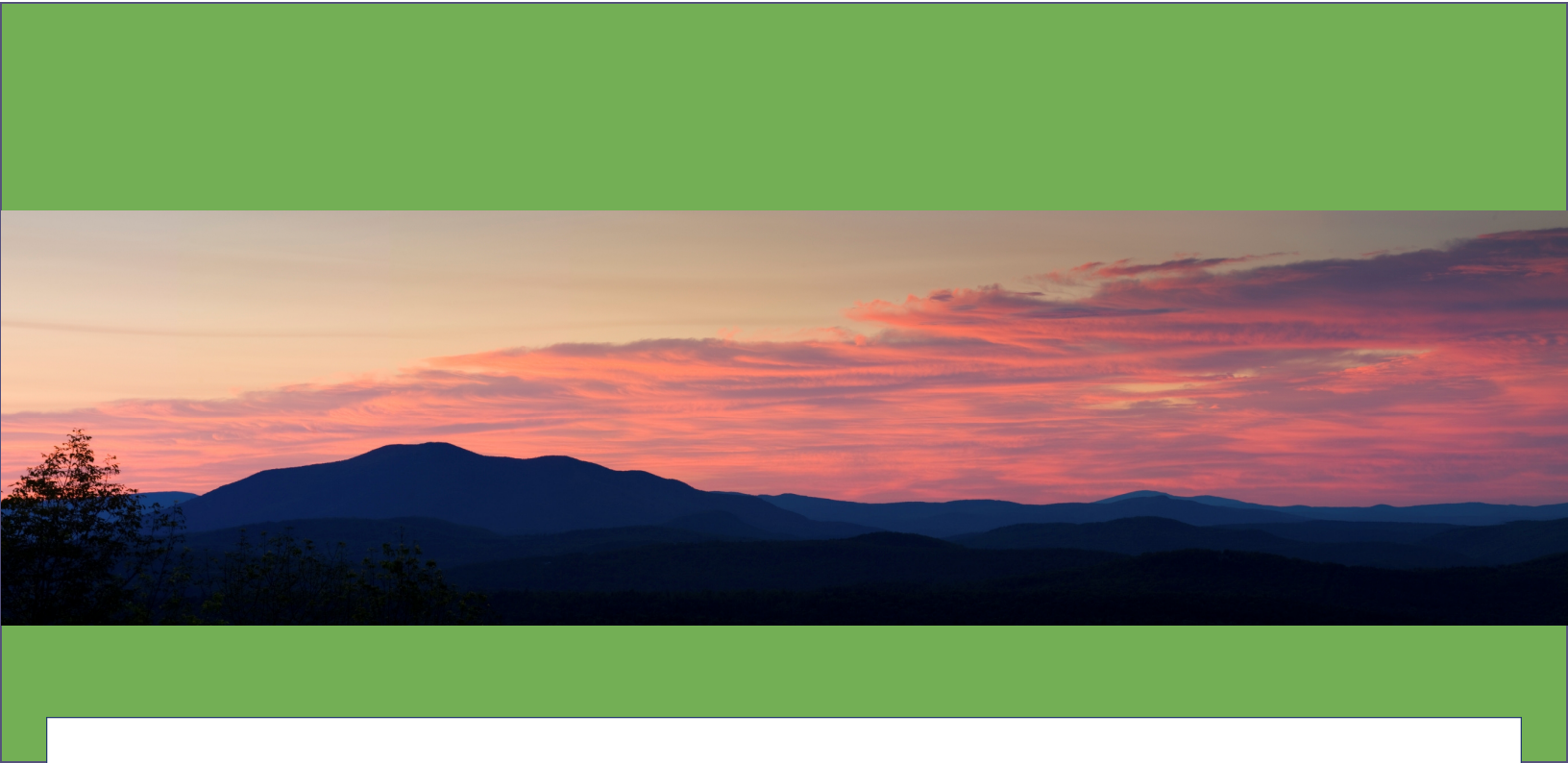
(B) All civil penalties and fines recovered by under this Chapter shall be provided to the Department for use in enforcing this Chapter and other city laws relating to Tobacco Products.

Section 10: Severability.

The provisions of this Chapter are declared to be severable, and if any section of this Chapter is held to be invalid, such invalidity shall not affect the other provisions of this Chapter that can be given effect without the invalidated provision.

Section 11: Effective Date.

The effective date of this ordinance shall be one hundred and eighty (180) days from the date of its enactment.



Center for Public Health and Tobacco Policy
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