



## **The Legal Landscape: Vermont's Tobacco Control Laws**

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## Public Health and Tobacco Policy Center

Contact:

Public Health Advocacy Institute  
at Northeastern University School of Law  
360 Huntington Ave, 117CU  
Boston, MA 02115  
Phone: 617-373-8494  
[tobacco@tobaccopolicycenter.org](mailto:tobacco@tobaccopolicycenter.org)

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## **Executive Summary**

Tobacco companies spend millions of dollars every year marketing their deadly products to Vermont residents. While Vermont has made considerable progress in reducing tobacco use, additional policy measures are needed to help counteract the tobacco industry's continued marketing efforts within the state. This report reviews the current legal landscape in Vermont, with a focus on the authority of the state government and local governments to adopt and enforce tobacco control measures.

Part I discusses relevant federal law, with a particular focus on the Family Smoking Prevention and Tobacco Control Act (FSPTCA). This law, enacted by Congress in 2009, granted the U.S. Food and Drug Administration the ability to regulate tobacco products. At the same time, it provided state and local governments with new authority to limit tobacco advertising and promotion. This authority, however, is still subject to limits imposed by the First Amendment of the U.S. Constitution. Tobacco companies may file lawsuits claiming that laws restricting tobacco marketing violate the First Amendment. Communities interested in enacting such laws should carefully consider their ability to prepare for and respond to such a legal challenge.

Part II reviews Vermont's state laws addressing tobacco sales and use. Vermont has laws in place that license tobacco retailers, restrict youth access to tobacco, limit second hand smoke exposure, and tax tobacco products. The report's overview of these laws includes the following findings:

- The state's tobacco retail licensing system is overseen by the Vermont Department of Liquor Control. A tobacco license costs \$10 per year, and there are currently no limits on the number of tobacco licenses that can be issued or on the type or location of retail stores that can obtain tobacco licenses. However, local governments have the authority to object to the issuance of new tobacco retail licenses in their communities.
- State law prohibits selling tobacco products to anyone under 18 years of age, and the Vermont Department of Liquor Control conducts random inspections to ensure compliance.
- Vermont has a comprehensive smoke-free law that prohibits smoking in all indoor public places, including bars and restaurants. The law does not preempt local ordinances that may be even more protective than the state law.
- In 2011, Vermont increased its cigarette excise tax by \$0.38 to \$2.62 per pack. This is well above the national average, but still considerably less than New York State's tax, which stands at \$4.35 per pack.

Part III examines the authority of municipal government to enact tobacco control measures. Municipal governments in Vermont possess only those authorities delegated to them by state law. Some Vermont communities have governance charters that provide them with broad authority to regulate tobacco marketing and retailing. For communities without such charters, the general provisions of state law delegate to municipalities some "police power" authority to regulate tobacco use and sales, but the scope of this authority is unclear. State law also provides municipal governments with zoning authority that can be used to limit the number and location of tobacco retailers.

Local boards of health, which are a cross between a state and a local entity, are also discussed in Part III. These boards are technically a part of the state government, but they operate at the local level. Local boards of health are authorized to make and enforce rules and regulations that address issues of public health concern. Using this authority, boards of health could restrict or prohibit conduct that increases tobacco use by minors or exposes the public to secondhand smoke.

In sum, the current legal landscape provides Vermont and its local governments with both challenges and opportunities. The FSPTCA provides state and local governments with more expansive authority to regulate tobacco advertising and promotion, but policymakers must carefully consider First Amendment limitations before proceeding. At the local level, Vermont's law limits the authority of municipal governments to a greater extent than other states, but local communities still have numerous legal options available if they wish to enact tobacco control measures.

Over the coming months, the Center for Public Health and Tobacco Policy will be developing model policies that take Vermont's legal landscape into account and provide local communities with effective responses to the tobacco industry's aggressive marketing.

**Introduction**

The tobacco industry spends approximately \$19 million a year marketing its deadly products in Vermont.<sup>1</sup> This marketing has been shown to play a significant role in prompting youth smoking.<sup>2</sup> Although Vermont has made considerable progress in reducing smoking among youth and adults, additional policy measures are needed in order to counteract the impact of the tobacco industry’s continued marketing efforts. Fortunately, Congress’s recent enactment of the Family Smoking Prevention and Tobacco Control Act (FSPTCA) provides state and local governments with expanded authority to adopt laws that limit tobacco advertising and promotion.

This report examines the relevant provisions of the FSPTCA, and it also carefully reviews the relevant legal landscape in Vermont. Although the State of Vermont now possesses broad authority to adopt a wide range of tobacco control measures, local governments are more narrowly circumscribed in their authority. As detailed in this report, however, local governments have at their disposal a variety of legal tools that can be used to regulate tobacco use and tobacco marketing. By thinking creatively about how these different legal mechanisms can be utilized, local communities in Vermont should be able to accomplish most – if not all – of their tobacco control goals.

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**Part I – Federal Law: The FSPTCA and the FCLAA**

The federal government recently expanded the ability of state and local governments to regulate tobacco marketing when Congress passed the Family Smoking Prevention and Tobacco Control Act (FSPTCA) in 2009.<sup>3</sup> Prior to enactment of the FSPTCA, the Federal Cigarette Labeling and Advertising Act (FCLAA) provided that the federal government held the exclusive authority to regulate tobacco advertising and promotion.<sup>4</sup> Congress passed the FCLAA in 1965. The act required packages of cigarettes to be labeled with health warnings.<sup>5</sup> In 1970, the FCLAA was amended to require stronger warning labels.<sup>6</sup> At the same time, the act was modified to include expanded preemption language that prevented state and local governments from regulating or limiting the “advertising or promotion” of cigarettes.<sup>7</sup> (In this context, preemption means that the federal government reserved to itself the power to regulate in this area, barring state and local governments from doing so.<sup>8</sup>)

Although the federal government maintained the exclusive ability to regulate tobacco advertising and promotion under the FCLAA, it did little to place limits on the advertising and promotion of cigarettes between the act’s amendment in 1970 and the passage of the FSPTCA. Throughout this time period, tobacco companies aggressively targeted youth with promotional campaigns such as R.J. Reynolds’ infamous “Joe Camel” campaign.<sup>9</sup>

Although the FSPTCA was primarily concerned with providing the U.S. Food and Drug Administration (FDA) with authority to regulate tobacco products,<sup>10</sup> it also contained provisions that altered the ability

of state and local governments to regulate tobacco marketing. The act modified the preemption provision of FCLAA, such that federal law now allows states, in addition to the federal government, to regulate tobacco advertising and promotion.<sup>11</sup> 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.*<sup>12</sup>

According to this modified preemption provision, state and local governments are now able to regulate the “time”, the “place”, and the “manner” in which cigarette companies can advertise their products. A “time” regulation is one that restricts the time of day or day of the week that advertising occurs. A “place” regulation is one that restricts where advertising can be displayed. A “manner” regulation is one that restricts the types of marketing that are allowed. For instance, a law that prohibits the free distribution of tobacco products would likely be considered a “manner” regulation.<sup>13</sup> State and local governments are still barred from regulating the “content” of tobacco advertisements. Thus, for example, states cannot require separate, state-specific health warnings to be placed on tobacco advertisements.

Prior to the passage of the FSPTCA, many state and local advertising restrictions were invalidated because they violated the FCLAA’s preemption of state and local action. In Vermont, a 1998 federal court found that portions of a Burlington city ordinance that aimed to regulate advertising and sales of tobacco products in the city were preempted by the FCLAA.<sup>14</sup> Now that the FCLAA’s preemption scheme has been altered by the FSPTCA, state and local governments will have more leeway to craft regulations on tobacco advertising. For instance, under the revised preemption provision, states and localities will not be preempted by federal law from restricting the visible display of tobacco products at the point of sale because this type of restriction is a “place” and “manner” regulation. Nonetheless, any restriction on tobacco advertising or promotion could still be subject to a First Amendment challenge (see text box below).

It is important to note that the FSPTCA did not affect state and local authority to regulate tobacco products in other areas where they were already allowed to do so. For example, the FSPTCA did not interfere with state and local authority to enact smoke-free laws, raise tobacco taxes, restrict the sale of tobacco products, or fund counter-marketing campaigns.<sup>15</sup>

### **First Amendment and Tobacco Control**

Although the FSPTCA provides states with expanded authority to regulate the advertising and promotion of tobacco products, such laws are still subject to limitations imposed by the First Amendment of the U.S. Constitution. First Amendment challenges – claiming that the law violates the First Amendment’s protection of “commercial speech” – are often filed against tobacco control measures in an attempt to prevent the law from going into effect or to discourage other communities from adopting the same law.

Commercial speech is the communication of information for economic reasons, including promotions and advertising intended to increase demand for consumer products. The degree to which such speech is protected by the First Amendment is subject to debate. When deciding whether a certain law violates the First Amendment’s commercial speech protections, the most commonly applied test is the four-pronged test developed in a case called *Central Hudson* (the “*Central Hudson test*”).<sup>16</sup>

Under the *Central Hudson* test, the court first considers whether the product at issue is legal and the communication being restricted is truthful. If so, then the government must establish that (a) the government has a substantial interest in what it seeks to achieve; (b) the law directly advances the government’s interest(s); and (c) 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.

Tobacco companies raised First Amendment challenges to numerous portions of the FSPTCA in a case filed in Kentucky. In 2010, a district court judge upheld most portions of the law against First Amendment challenges, including restrictions on tobacco-branded merchandise and prohibitions on the sponsorship of athletic activities.<sup>17</sup> However, the judge ruled that the section of the law prohibiting the use of colors and graphics in tobacco packaging and advertising was too restrictive, because a more narrowly framed restriction could have accomplished the same objectives. The case has been appealed to the Sixth Circuit Court of Appeals, which should issue a ruling within the next few months. It is likely that the case will subsequently be appealed to the U.S. Supreme Court. If the Supreme Court considers the case, its ruling should provide clearer guidance about how the First Amendment applies to restrictions on tobacco marketing.

States or communities considering restrictions on tobacco marketing or advertising 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.

## Part II – Vermont State Law

Vermont has enacted a variety of state-level tobacco control laws that provide a very strong foundation for future tobacco control efforts. Among Vermont’s many statutes addressing tobacco use in the state are licensing laws, youth access laws, clean indoor air laws, and tobacco tax laws.

### Vermont Tobacco Retailer Licensing

A retailer must obtain a tobacco license in order to sell tobacco products in Vermont.<sup>18</sup> A license is also required to operate a vending machine that sells tobacco products.<sup>19</sup> For the purposes of this statute, “tobacco products” are defined as:

[C]igarettes, cigars, cheroots, stogies, periques, granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco, snuff, snuff flour, Cavendish, plug and twist tobacco, fine-cut, and other chewing tobaccos, shorts, refuse scraps, clippings, cuttings, and sweepings of tobacco, and other kinds and forms of tobacco prepared in a manner suitable for chewing or smoking in a pipe or otherwise, or both for chewing and smoking.<sup>20</sup>

While this definition was clearly intended to be broad, because of its focus on “chewing or smoking,” it might not cover newly-emerging tobacco products such as dissolvable tobacco (sticks, orbs, etc.) and e-cigarettes. Thus, it is not clear that a

tobacco license is currently required in order to sell such products.

Applicants must apply to the “legislative body of the municipality” to receive either a tobacco license or a joint liquor-tobacco license.<sup>21</sup> Tobacco license applicants must pay a \$10.00 fee for a new tobacco license or to renew an existing tobacco license.<sup>22</sup> Once approved by the municipality, the municipal clerk forwards the application to the Vermont Department of Liquor Control and the department issues the tobacco license.<sup>23</sup> Each license is valid through April 30<sup>th</sup> of the following year.<sup>24</sup>

Liquor-tobacco license applicants are only required to pay the liquor license fee to obtain a liquor-tobacco license.<sup>25</sup> The fee for a first class liquor license is \$100, and the fee for a second class liquor license is \$200.<sup>26</sup> A tobacco license may be issued with either a first or a second class liquor license. First class licenses are issued to restaurants where beer and wine will be consumed on the premises. Second class liquor licenses are issued to businesses that sell beer and wine that will be consumed off the premises.<sup>27</sup> Fifty percent of the license fee for a first or a second class license is paid to the municipality where the licensed premises are located, unless the municipality contracts with the department to be responsible for enforcing the licenses, in which case it is entitled to more than fifty percent of the fee.<sup>28</sup>

There are currently no limits on the number of tobacco licenses that can be issued or on the type or location of retail stores that can obtain tobacco licenses. However, it appears that local governments do have the authority to decide whether or not to issue a tobacco license (or a liquor-tobacco license) to an applicant, even if all of the minimum

requirements for a license are met.<sup>29</sup> Similarly, the Department of Liquor Control also has the authority to deny a license, even if the minimum requirements are met, and even if the applicant has obtained a license in the past.<sup>30</sup> It is less clear whether either municipalities or the department have the authority to impose additional conditions to licenses that are issued (in addition to the minimum requirements imposed by state law).<sup>31</sup>

#### *Display Requirement*

Each tobacco licensee is required to “prominently” display its tobacco license at the location where it is licensed to sell tobacco products.<sup>32</sup> Additionally, each licensee must display a “plainly printed copy of the provisions of sections 1004 and 1005 . . . in a conspicuous place on the premises identified in the tobacco license and on any vending machine located on the premises.”<sup>33</sup> Section 1004 requires proof of age for the sale of tobacco products, and Section 1005 prohibits the sale of tobacco to any person under the age of 18.<sup>34</sup>

#### *Education Requirement*

Tobacco license applicants who do not already have a liquor license must meet with a liquor control investigator before the applicant will be granted a tobacco license.<sup>35</sup> During this meeting, the liquor control investigator will provide the applicant with information regarding the laws governing the purchase, storage, and sale of tobacco products in Vermont.<sup>36</sup> Additionally, tobacco licensees that do not also hold a liquor license must complete the enforcement seminar offered by the department every three years, at a minimum.<sup>37</sup> Furthermore, before an employee may sell or provide tobacco products, that employee must complete a department approved training program. Each employee selling or providing tobacco

products must complete this training at least every 24 months.<sup>38</sup> The licensee may hold this training on its own premises as long as the licensee uses materials and information provided by the department.<sup>39</sup> A retailer’s tobacco license will not be renewed if the Department’s records show that the licensee failed to satisfy the education requirements.<sup>40</sup>

#### *Penalties*

If a tobacco licensee violates the legal conditions of the tobacco license, the local legislative body or the liquor control board are authorized to suspend or revoke the license.<sup>41</sup> The tobacco licensee may also be fined for the violation with an administrative penalty up to \$100 for a first violation and up to \$1000 for successive violations.<sup>42</sup> However, a tobacco licensee will not have its license suspended or revoked on the first violation of the license.<sup>43</sup> For a first violation of a tobacco license during a tobacco compliance check in any three year period, the licensee will receive a warning and must attend a “department server training class.”<sup>44</sup> Before a tobacco license may be suspended, the licensee is entitled to notice and “a hearing before the liquor control board or the local governing body, whichever applies.”<sup>45</sup> A tobacco license may not be revoked until the licensee is provided with notice and a hearing, unless the licensee has received a court conviction for violating the legal conditions of the tobacco license.<sup>46</sup>

If a retailer sells tobacco without first applying for and obtaining a tobacco license, that retailer can be fined up to \$200 for the first offense and up to \$500 for subsequent offenses.<sup>47</sup>

If a licensed tobacco retailer fails to make certain that each employee completes the Department of Liquor Control’s approved

training prior to selling tobacco products (and at least once every two years thereafter), the retailer will have its license suspended for at least one day.<sup>48</sup> If a tobacco license is suspended, the retailer may not “sell, serve, allow the consumption of, make orders for, or receive deliveries of tobacco products on the premises.”<sup>49</sup>

#### *Tobacco Wholesalers*

Wholesale dealers and distributors of tobacco products must obtain a license from the Commissioner of Taxes before they can sell tobacco products in Vermont.<sup>50</sup> If a wholesaler owns or controls more than one wholesale outlet, that wholesaler must apply for separate licenses for each wholesale outlet.<sup>51</sup> Unlike retail licenses, wholesaler licenses have no set expiration or renewal date. Licenses issued to tobacco wholesalers are “valid as long as the licensee continues to do business at the place named unless revoked or suspended by the commissioner[.]”<sup>52</sup> Tobacco wholesaler licenses are issued by the Commissioner of Taxes for no fee.<sup>53</sup> The license must be displayed at the location for which it is issued.<sup>54</sup> If a wholesaler sells tobacco products without a license, the wholesaler will be fined up to \$25 for the first offense and between \$25 and \$200 for any later offense.<sup>55</sup>

#### *Enforcement*

The Vermont Department of Liquor Control is responsible for enforcement of liquor and tobacco laws in the state.<sup>56</sup> The liquor control board has the authority to make any rules or regulations it deems necessary to enforce the liquor and tobacco control laws.<sup>57</sup> As of 2010, there were over 900 retailers licensed to sell tobacco products in Vermont.<sup>58</sup> The Department of Liquor Control surveys tobacco retailers for compliance each month to see if selected

retailers will sell tobacco to a minor.<sup>59</sup> The department tracks results of the compliance surveys on its website.<sup>60</sup>

#### *Vermont Youth Access Laws*

##### *Purchase, Sale, and Possession of Tobacco Products*

There are many Vermont statutes that restrict youth access to tobacco. To begin with, tobacco retailers are prohibited from selling tobacco products to anyone less than 18 years of age.<sup>61</sup> Likewise, no one younger than 18 years of age is permitted to purchase or possess tobacco products unless he or she is the employee of a licensed tobacco retailer and is in possession only for purposes of selling tobacco during employment.<sup>62</sup> A person must be at least 16 years old to sell tobacco products in Vermont.<sup>63</sup>

When purchasing tobacco products, on request of the retailer, a person must show proof that he or she is of legal age to purchase tobacco products.<sup>64</sup> Sufficient proof to demonstrate a purchaser is of legal age to purchase tobacco products may be in the form of a driver’s license, a passport, or a non-driver ID card.<sup>65</sup> If a person who is not of legal age is found to be in possession of tobacco products, that person may be fined a civil penalty of \$25.00.<sup>66</sup> Also, if someone under the age of 18 presents false identification to purchase tobacco products, that person may be fined up to \$50.00 and/or may be required to provide up to ten hours of community service.<sup>67</sup>

If tobacco products are sold or otherwise provided to a person younger than 18 years old, the person who provided tobacco products may be penalized with fine up to \$100 for the first offense and a fine up to \$500 for any later offense.<sup>68</sup> The

Department of Liquor Control conducts compliance checks each month of randomly selected licensed tobacco retailers.<sup>69</sup> For each compliance check, a youth, typically 15 to 16 years old, enters a licensed tobacco retail outlet and asks to purchase tobacco.<sup>70</sup> The participating minors are instructed to be honest about their ages and to not pressure the store clerk to sell them tobacco products.<sup>71</sup> In 2009, 10.7% (79) of 742 licensed tobacco retailers sold tobacco products to minors during a compliance check, and in 2010, 11.6% (106) of 909 tobacco retailers surveyed sold to minors during a compliance check.<sup>72</sup>

#### *Tobacco Use on School Grounds*

Tobacco use is prohibited on public school grounds, and students are prohibited from using tobacco at any public school sponsored function.<sup>73</sup> Public school boards are charged with adopting policies that prohibit student use and possession of tobacco products any time they are under school supervision.<sup>74</sup> The school boards' policies must include "confiscation and appropriate referrals to law enforcement authorities."<sup>75</sup>

#### *Vermont Clean Indoor Air Laws*

In Vermont, smoking is not allowed in any indoor public places, including bars and restaurants.<sup>76</sup> Smoking is defined as "[t]he possession of lighted tobacco products in any form."<sup>77</sup> The law explicitly provides that it does not preempt local ordinances that may be even more protective than the state law.

The smoke-free law does not assign enforcement responsibility to any agency. Business proprietors are required to ask people in violation of the law to stop smoking, and, if they refuse, to leave the

premises.<sup>78</sup> If the person refuses to leave when asked, the proprietor – or any member of the public – can call local law enforcement for assistance.

Under a separate law protecting employees, an employee may file a complaint with the Department of Health if an employer allows smoking in a workplace.<sup>79</sup> If the Commissioner of Health finds that the employer violated the law, the employer can be fined \$100.<sup>80</sup> An employer may not retaliate against an employee because the employee sought to enforce the protections of Vermont's smoke free workplace laws.<sup>81</sup>

#### *Vermont Tobacco Tax Laws*

The current tax on cigarettes in Vermont is \$2.62 per pack, effective July 1, 2011.<sup>82</sup> This is above the national average of \$1.46 per pack.<sup>83</sup> In neighboring states, New York taxes cigarettes at \$4.35 per pack, Massachusetts at \$2.51 per pack, and New Hampshire at \$1.68.<sup>84</sup> Under the Vermont tax laws, a cigarette is defined as:

- (A) any roll of tobacco wrapped in paper or any substance not containing tobacco; and
- (B) any roll of tobacco wrapped in substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely offered to, or purchased by consumers as a cigarette described in subdivision (A) of this subsection.<sup>85</sup>

Little cigars, which are taxed at the same rate as cigarettes, are defined as "any rolls of tobacco wrapped in leaf tobacco or any substance containing tobacco (other than any roll of tobacco which is a cigarette

within the meaning of subdivision (1) of this section) and as to which one thousand units weigh not more than three pounds.”<sup>86</sup>

A snuff tax is imposed on tobacco products which are not intended to be smoked, have moisture content of forty-five percent or higher, or are not offered in individual single dose or single-use units, at a rate of \$1.87 per ounce, or \$2.24 per 1.2 ounce package.<sup>87</sup> For larger packages, the rate is \$1.87 per ounce.

A tobacco tax is imposed on all other tobacco products at the wholesale level. The tax on cigars is determined based on the wholesale price of the cigar. If the wholesale price of a cigar is \$2.17 or less, the tax is 92% of the wholesale cost. If the wholesale price is between \$2.18 and \$10.00 the tax is \$2.00 per cigar.<sup>88</sup> If the wholesale price of the cigar is above \$10.00 per cigar the tax is \$4.00 per cigar.<sup>89</sup> For all remaining tobacco products, the wholesale tax rate is 92% of the wholesale price.<sup>90</sup> A 2% discount is permitted if the tax is paid within ten days.<sup>91</sup>

### **Part III – Vermont Local Law**

#### *Municipal Authority to Enact Tobacco Control Laws*

The authority of Vermont’s municipal governments to act is delegated to the locality from the state government. In a majority of states, local governments act pursuant to “home rule,” which provides municipal governments with wide latitude to create local policies.<sup>92</sup> A minority of states, including Vermont, follow Dillon’s Rule, which is more restrictive.<sup>93</sup> Under Dillon’s Rule, the powers of a municipal government include, “(1) powers expressly conferred by

the constitution, statutes, or charter; (2) powers necessarily or fairly implied in, or incident to, the powers expressly granted; and (3) powers essential to the declared objects and purposes of the municipality, the latter often being classified as among the implied powers.”<sup>94</sup> Vermont courts have strictly applied Dillon’s Rule, finding that if there is any question of whether or not the municipality has authority to act, judgment must be against the municipality.<sup>95</sup> In short, the general rule is that municipalities only have the authority to regulate with respect to a particular topic if a state law has expressly delegated that power to municipalities.<sup>96</sup> The exception to this general rule is that local governments may adopt governance charters that allow for the exercise of more expansive authority.

#### *Governance Charters*

If a municipality has a governance charter, the charter may contain provisions that provide it with broader authority than state law otherwise grants to municipalities.<sup>97</sup> Approximately eighty-five municipalities in Vermont operate under a governance charter.<sup>98</sup> Typically, a governance charter is adopted by the voters of a municipality and afterwards is sent to the state legislature for approval and adoption into state law.<sup>99</sup> When a municipal charter is adopted, its provisions take precedence over otherwise applicable state law.<sup>100</sup>

Municipalities that operate under governance charters should review their charter to determine whether there is an express grant of authority within the charter to regulate the tobacco retailers within their municipality. At least three municipalities with governance charters in Vermont provide the explicit authority to regulate the location where tobacco products can be sold.

- Under the Town of St. Johnsbury’s municipal charter, the town’s selectmen possess the authority to “make, establish, impose, alter, amend or repeal ordinances and regulations” that regulate “all places where tobacco, cigars and cigarettes are manufactured or sold[.]”<sup>101</sup>
- The Village of Lyndonville maintains authority over “[t]he construction, establishment, location, use, operation and the licensing . . . all places where tobacco, cigars and cigarettes are sold or disposed of[.]”<sup>102</sup>
- The Village of Wells River has authority “to enact and adopt ordinances, bylaws, and other regulations respecting the following matters within the village limits: . . .(B) The construction, location, and use, and the licensing of . . . all places where tobacco, cigars, and cigarettes are sold or disposed of[.]”<sup>103</sup>

Other municipal charters may grant municipalities broader authority to regulate for purposes related to the public health and welfare without explicitly mentioning tobacco. These charters may also provide sufficient authority to regulate tobacco retailers.

#### *Police Power*

States possess the power to regulate to protect the health and safety of its citizens under the “police power” inherent in state authority.<sup>104</sup> Vermont’s police power is understood as “the general power of the legislative branch to enact laws for the common good of all the people.”<sup>105</sup> Vermont delegates police power authority to

municipalities within the state via state statutes.<sup>106</sup> As discussed above, some municipalities may also be delegated police power authority under their governance charters.<sup>107</sup> The Vermont legislature has delegated some police power authority to municipalities to act in specified areas under Vt. Stat. Ann. tit. 24, § 2291. For example, pursuant to this statute, municipalities have the authority 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.”<sup>108</sup> Both secondhand smoke and tobacco use by minors could reasonably be defined as “public nuisances.” Therefore, a strong argument can be made that state law provides local governments with the authority to adopt measures that address either problem.<sup>109</sup> (Note, however, that any policy measures adopted may be subject to a First Amendment challenge if they restrict the tobacco companies’ ability to communicate with potential customers.)

At the state level, Vermont is able to license tobacco retailers under the state’s tobacco licensing legislation. Although currently there are no local tobacco retail licensing requirements, local licensing schemes can be an effective tobacco control tool. Local tobacco retail licensing can be used as a means to regulate the location, number, and type of establishments that sell tobacco products. In Vermont, some localities may be able to implement local tobacco retail licensing requirements, in addition to state license requirements, under authority delegated to them in their governance charter. In the absence of government charter, is it not clear that municipal governments would have the authority to adopt their own licensing systems. However, as discussed above, municipal legislatures could play a more active role in

the decision to grant or deny tobacco licenses issued by the state.

### *Zoning*

Municipalities may also have the authority to limit the number and location of tobacco retailers through zoning laws. Zoning means dividing an area into districts and applying different land use regulations to each district.<sup>110</sup> Through zoning ordinances, municipalities can restrict the ways different areas of land, or districts, within the municipality are used.

Municipalities in Vermont derive authority to enact zoning ordinances from a state law, the Vermont Planning and Development Act.<sup>111</sup> The Vermont Planning and Development Act includes a section outlining its purposes. One such purpose is to encourage municipalities and regions inside of Vermont to develop land in a manner that will promote the public health.<sup>112</sup> Using this authority, a community could, for example, enact a zoning ordinance that prohibits new tobacco retailers in a zone that contains a school, playground, or other youth oriented facilities. The establishment of tobacco free zones around schools or other youth oriented facilities is a means of reducing tobacco use and therefore promotes public health.

Municipalities in Vermont carry out their community planning efforts through a planning commission, a planning director, or a regional planning commission.<sup>113</sup> Planning commissions and directors make zoning recommendations and proposals to the legislative bodies of their municipalities.<sup>114</sup> The legislative bodies are typically responsible for actually enacting zoning ordinances after a public hearing on the bylaw or amendment.<sup>115</sup>

Regional planning commissions may be established by a popular vote or by the legislative bodies of multiple adjoining municipalities, with the approval of the Vermont Agency of Commerce and Community Development.<sup>116</sup> These commissions then prepare regional plans, and prepare guidelines for the municipal implementation of the plans.<sup>117</sup> Vermont state law requires that regional plans be created in a manner that will “best promote the health, safety, order, convenience, prosperity and welfare of the inhabitants[.]”<sup>118</sup> The legislative body of a municipality may adopt the entire regional plan or portions of the plan.<sup>119</sup> Regional planning commissions could create regional plans that include tobacco free zones around youth facilities and could encourage municipalities to adopt these plans in the interest of the health and safety of their inhabitants.

A municipality may establish zoning districts and classify some uses of the land within that district as permissible and others as conditional uses.<sup>120</sup> The uses that are classified as “conditional uses” are not allowed without permission from the municipality.<sup>121</sup> A conditional use is one that is not allowed as a matter of right in a particular zoning district. For example, a municipality may grant a conditional use permit (CUP) to a health care clinic in an area that is zoned for residential use. The grant of a CUP is discretionary. In implementing a tobacco free zoning ordinance, the municipality would designate tobacco sales as a conditional use of the land in a specified area. This type of zoning ordinance may be less likely to face a legal challenge if it grandfathers in existing businesses instead of prohibiting already existing retailers from continuing to operate. In this way, the zoning ordinance will reduce the number and density of tobacco

retail outlets in a district over time as no new retailers will be permitted in the district. Potentially, a zoning ordinance could also be used to place conditions on existing retailers and to prohibit them from expanding their tobacco businesses or transferring them to new owners. More legal research is needed to evaluate the feasibility of such options.

#### *Board of Health Authority*

Local boards of health are responsible for creating policies and making recommendations that benefit the public's health. In Vermont, local boards of health consist of the local health officer and the selectmen of a town or the city council of a city.<sup>122</sup> The local health officer is appointed by the Vermont Commissioner of Health based on a recommendation from the local legislature.<sup>123</sup> Additionally, upon a town or city's request, the Commissioner can appoint one or more deputy local health officers.<sup>124</sup> With the Commissioner's permission, towns and cities can come together to form health districts. In such cases, the Commissioner (with input from the towns and cities in the district) appoints a health district officer responsible for the entire district.<sup>125</sup>

Local boards of health in Vermont are authorized under state law to make and enforce rules and regulations related to the prevention, removal, or destruction of public health hazards and the mitigation of public health risks.<sup>126</sup> However, the rules enacted by a local board of health must be approved by the state Commissioner of Health before they can be enforced. Boards can enforce their rules and the state's health laws by issuing "health orders" (or "emergency health orders" in cases where there is an imminent risk to the public's health).<sup>127</sup> Also, local boards of health may file a lawsuit in the county where a public health hazard or public health risk has occurred or

is occurring in order to enforce the provisions of Vermont's health laws.<sup>128</sup> There are stiff penalties for failure to comply with a health order. If a person fails to comply or if the person violates a provision of the health laws, that person can be fined as much as \$5,000.<sup>129</sup> If the violation is continuing, each day will be considered a separate violation and the violator can be fined up to \$25,000.<sup>130</sup>

As mentioned earlier, both secondhand smoke and tobacco use by minors could reasonably be defined as a "public nuisance," and secondhand smoke is clearly a public health risk. With this in mind, an argument can be made that local boards of health are authorized to issue health orders, make regulations and provide public health recommendations to address either problem, as long as those actions do not conflict with any previously enacted state or federal law.<sup>131</sup> (However, as stated above, board of health regulations must be approved by the state Commissioner of Health.) Moreover, local health officers can help facilitate adoption of tobacco control measures by providing expert guidance to their communities and to local legislators.

#### **Conclusion**

The enactment of the Family Smoking Prevention and Tobacco Control Act is one of the most significant tobacco control developments in recent years. This law provides state and local governments with expanded authority to regulate tobacco advertising and promotion. The new authority granted by the FSPTCA is, however, limited by the First Amendment and by applicable state law.

At the state level, Vermont already has numerous tobacco control laws in place. These laws could, however, be modified to make them stronger and more effective. For example, the state's tobacco retail licensing law currently requires an annual fee of only \$10.00. A higher fee would provide the state with additional funding to enforce its tobacco-related laws, and it might dissuade some retailers from seeking to sell tobacco products. The state's licensing law could also be amended to prohibit the issuance of new retail licenses to retailers locating near schools. This measure could help protect kids from exposure to tobacco marketing.<sup>132</sup>

Vermont limits the authority of municipal governments to a greater extent than other states. Local governments must be able to connect every tobacco control law or regulation to a state law that provides them with the authority to enact such a measure.

Many communities have governance charters, and these charters may provide some communities with broader authority to regulate tobacco retailers or tobacco marketing. Communities without such charters still have numerous legal options to explore. They can (1) regulate tobacco marketing as a "public nuisance" under the police powers delegated to them by the state; (2) work with their local planning director or planning commission to enact tobacco-related zoning rules; or (3) they can work with their local board of health to adopt health regulations. In addition, local governments can use their role in the state's tobacco licensing system to object to the issuance of new licenses to tobacco retailers in their communities. Working with local legal counsel, municipal governments should be able to accomplish their tobacco control objectives by using a combination of these legal tools.

## Citations

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<sup>1</sup> Ann Boon, Campaign for Tobacco-Free Kids, *State-Specific Tobacco Company Marketing Expenditures, 1998-2008* (Aug. 2, 2011), available at <http://www.tobaccofreekids.org/research/factsheets/pdf/0271.pdf>.

<sup>2</sup> See NATIONAL CANCER INSTITUTE, *THE ROLE OF MEDIA IN PROMOTING AND REDUCING TOBACCO USE* (Monograph 19) (2008), available at <http://www.cancercontrol.cancer.gov/tcrb/monographs/19/index.html>.

<sup>3</sup> Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009).

<sup>4</sup> 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).

<sup>5</sup> *Id.*

<sup>6</sup> Federal Cigarette Labeling and Advertising Act, Pub. L. No. 91-222 (1970) (codified as amended at 15 U.S.C. § 1334).

<sup>7</sup> *Id.* § 5(b) (“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.”).

<sup>8</sup> U.S. CONST. art. VI, cl.2 (stating that the laws of the United States are the “supreme law of the land” and enjoy legal superiority over any conflicting provision of a state constitution or law).

<sup>9</sup> Joseph R. DiFranza et al., *RJR Nabisco’s Cartoon Camel Promotes Camel Cigarettes to Children*, 266 J. AM. MED. ASS’N 3149 (1991).

<sup>10</sup> Previously, the Supreme Court had determined that the FDA was unable to regulate tobacco products without express congressional authorization, *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 121 (2000) (“Considering the FDCA as a whole, it is clear that Congress intended to exclude tobacco products from the FDA’s jurisdiction.”).

<sup>11</sup> 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)).

<sup>12</sup> Federal Cigarette Labeling and Advertising Act, Pub. L. No. 91-222 (1970) (codified as amended at 15 U.S.C. § 1334 (2010)) (emphasis added).

<sup>13</sup> Prior to the enactment of the FSPTCA, several courts had invalidated restrictions on the free distribution of tobacco products, on the grounds that they were preempted by the FCLAA. *Jones v. Vilsack*, 272 F.3d 1030 (8th Cir. 2001); *R.J. Reynolds Tobacco Co. v. Seattle-King County Department of Health*, 473 F. Supp. 2d 1105 (W.D. Wash. 2007); *R.J. Reynolds Tobacco Co. v. McKenna*, 445 F. Supp. 2d. 1252 (W.D. Wash. 2006); *Rockwood v. City of Burlington*, 21 F. Supp. 2d 411 (D. Vt. 1998).

<sup>14</sup> *Rockwood v. City of Burlington*, 21 F.Supp.2d 411 (D. Vt. 1998).

<sup>15</sup> See 21 U.S.C. § 387p(a)(1) (2011) (“Except as provided in paragraph (2)(A), nothing in this subchapter, or rules promulgated under this subchapter, shall be construed to limit the authority of a Federal agency (including the Armed Forces), a State or political subdivision of a State, or the government of an Indian tribe to enact, adopt, promulgate, and enforce any law, rule, regulation, or other measure with respect to tobacco products that is in addition to, or more stringent than, requirements established under this subchapter, including a law, rule, regulation, or other measure relating to or prohibiting the sale, distribution, possession, exposure to, access to, advertising and promotion of, or use of tobacco products by individuals of any age, information reporting to the State, or measures relating to fire safety standards for tobacco products. No provision of this subchapter shall limit or otherwise affect any State, tribal, or local taxation of tobacco products.”).

<sup>16</sup> *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 564 (1980). Different First Amendment standards may apply if the law it issue *compels* speech instead of limiting it (as in the case of mandated health warnings). A less rigorous standard also applies if the law at issue is intended to regulate conduct and has only an incidental effect on the communication of information (such as restrictions on the use of vending machines).

<sup>17</sup> *Commonwealth Brands v. United States*, 678 F. Supp. 2d 512 (W.D. Ky. 2010).

<sup>18</sup> VT. STAT. ANN. tit. 7, § 1002(a) (2011).

<sup>19</sup> VT. STAT. ANN. tit. 7, § 1001(5) (2011). Vending machines can only be located in adults-only locations; *see also* VT. STAT. ANN. tit. 7, § 1003(b) (2011).

<sup>20</sup> VT. STAT. ANN. tit. 7, § 1001(3) (2011).

<sup>21</sup> VT. STAT. ANN. tit. 7, § 1002(d) (2011).

<sup>22</sup> VT. STAT. ANN. tit. 7, § 1002(d) (2011). The municipal clerk will keep \$5.00 of the fee, and the remaining \$5.00 will be deposited in the treasury of the municipality.

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- <sup>23</sup> VT. STAT. ANN. tit. 7, § 1002(d) (2011).
- <sup>24</sup> VT. STAT. ANN. tit. 7, § 1002(a) (2011).
- <sup>25</sup> VT. STAT. ANN. tit. 7, § 1002(d) (2011).
- <sup>26</sup> See First/Second Class Liquor License and Tobacco Application, <http://www.state.vt.us/dlc/licensing/applications/1st2nd.pdf>.
- <sup>27</sup> VT. STAT. ANN. tit. 7, § 222(1)&(2) (2011); and First/Second Class Liquor License and Tobacco Application, <http://www.state.vt.us/dlc/licensing/applications/1st2nd.pdf.A>
- <sup>28</sup> VT. STAT. ANN. tit. 7, § 231(b)(2) (2011).
- <sup>29</sup> See State ex rel. Billardo v. Control Comm’rs of South Burlington, 114 Vt. 350 (Vt. 1946) (holding that the decision regarding whether to grant a liquor license is within the discretion of the local legislative body, so long as its actions are not “arbitrary or capricious”).
- <sup>30</sup> See Carousel Grill v. Liquor Control Bd., 123 Vt. 93, 94 (Vt. 1962) (holding that state has discretionary authority to deny renewal of liquor license, and noting that a license “is at most a privilege which of necessity is subordinate to the public interest and the police power of the state”).
- <sup>31</sup> The Department of Liquor Control does have the authority to condition the grant of license on compliance with a local ordinance that regulates a public nuisance. VT. STAT. ANN. tit. 7, § 167(b) (2011). However, this authority appears to be limited to first class liquor licenses. The department also possesses more general authority to impose terms and conditions on the issuance of liquor licenses. VT. STAT. ANN. tit. 7, § 104(8) (2011). But this statutory provision discusses only liquor licenses and does not mention tobacco licenses.
- <sup>32</sup> VT. STAT. ANN. tit. 7, § 1002(c) (20011).
- <sup>33</sup> VT. STAT. ANN. tit. 7, § 1006(a) (2011).
- <sup>34</sup> VT. STAT. ANN. tit. 7, § 1004 (2011); and VT. STAT. ANN. tit. 7, § 1005 (2011)
- <sup>35</sup> VT. STAT. ANN. tit. 7, § 1002a (2011); see also VT. CODE R. §14-1-10(2) (2011).
- <sup>36</sup> VT. STAT. ANN. tit. 7, § 1002a (2011).
- <sup>37</sup> VT. STAT. ANN. tit. 7, § 1002a(b)(1) (2001).
- <sup>38</sup> VT. STAT. ANN. tit. 7, § 1002a(b)(2) (2001); see also VT. CODE R. § 14-1-10(3)(b) (2011).
- <sup>39</sup> VT. STAT. ANN. tit. 7, § 1002a(b)(2) (2001).
- <sup>40</sup> VT. CODE R. §14-1-10(3)(c) (2011).
- <sup>41</sup> VT. STAT. ANN. tit. 7, § 236(a) (2011) (“(a)The control commissioners or the liquor control board shall have power to suspend or revoke *any permit or license granted pursuant to this title* in the event the person holding such permit or license shall at any time during the term thereof so conduct his or her business as to be in violation of this title, the conditions pursuant to which such permit or license was granted or of any rule or regulation prescribed by the liquor control board.”) (emphasis added).
- <sup>42</sup> VT. STAT. ANN. tit. 7, § 236(b) (2011).
- <sup>43</sup> VT. STAT. ANN. tit. 7, § 236(a) (2011).
- <sup>44</sup> VT. STAT. ANN. tit. 7, § 236(b) (2011).
- <sup>45</sup> VT. STAT. ANN. tit. 7, § 236(a) (2011); see also VT. STAT. ANN. tit. 7, § 101(b) (2011) (“The liquor control board shall consist of three persons, not more than two members of which shall belong to the same political party. Biennially, with the advice and consent of the senate, the governor shall appoint a person as a member of such board for the term of six years, whose term of office shall commence on February 1 of the year in which such appointment is made. The governor shall biennially designate a member of such board to be its chairman.”).
- <sup>46</sup> VT. STAT. ANN. tit. 7, § 236(a) (2011).
- <sup>47</sup> VT. STAT. ANN. tit. 7, § 1002(e) (2011).
- <sup>48</sup> VT. STAT. ANN. tit. 7, § 1002a(b)(2) (2011).
- <sup>49</sup> VT. CODE R. §14-1-3 (2011).
- <sup>50</sup> VT. STAT. ANN. tit. 32, § 7731 (2011).
- <sup>51</sup> VT. STAT. ANN. tit. 32, § 7732(a) (2011).
- <sup>52</sup> VT. STAT. ANN. tit. 32, § 7735 (2011).
- <sup>53</sup> VT. STAT. ANN. tit. 32, § 7732(b) (2011).
- <sup>54</sup> VT. STAT. ANN. tit. 32, § 7732(b) (2011).
- <sup>55</sup> VT. STAT. ANN. tit. 32, § 7734 (2011).
- <sup>56</sup> VT. STAT. ANN. tit. 7 § 108 (2011).
- <sup>57</sup> VT. STAT. ANN. tit 7, § 108 (2011).

<sup>58</sup> VT DEPT. OF LIQUOR CONTROL, REP. TO THE GENERAL ASSEM. ON TOBACCO COMPLIANCE TESTS CONDUCTED DURING CALENDAR YEAR 2010 (January 15, 2011), <http://liquorcontrol.vermont.gov/reports/act58-2010.pdf>

<sup>59</sup> Vermont Department of Liquor Control, Compliance Test Results, <http://liquorcontrol.vermont.gov/enforcement/compliance/> (last visited Dec. 30, 2011).

<sup>60</sup> *Id.*

<sup>61</sup> VT. STAT. ANN. tit 7, § 1003(a) (2011).

<sup>62</sup> VT. STAT. ANN. tit. 7, § 1005(a) (2011).

<sup>63</sup> VT. STAT. ANN. tit. 7, § 1002(f) (2011).

<sup>64</sup> VT. STAT. ANN. tit. 7, § 1004(a) (2011).

<sup>65</sup> VT. STAT. ANN. tit. 7, § 1004(a) (2011).

<sup>66</sup> VT. STAT. ANN. tit. 7, § 1005(a) (2011).

<sup>67</sup> VT. STAT. ANN. tit. 7, § 1005(b) (2011).

<sup>68</sup> VT. STAT. ANN. tit. 7, § 1007 (2011).

<sup>69</sup> VT DEPT. OF LIQUOR CONTROL, REP. TO THE GENERAL ASSEM. ON TOBACCO COMPLIANCE TESTS CONDUCTED DURING CALENDAR YEAR 2010 13-15 (January 15, 2011), <http://liquorcontrol.vermont.gov/reports/act58-2010.pdf>.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> VT. STAT. ANN. tit. 16, § 140 (2011).

<sup>74</sup> VT. STAT. ANN. tit. 16, § 140 (2011).

<sup>75</sup> VT. STAT. ANN. tit. 16, § 140 (2011).

<sup>76</sup> VT. STAT. ANN. tit. 18, §1741 et seq. (2011).

<sup>77</sup> VT. STAT. ANN. tit. 18, § 1741 (2011).

<sup>78</sup> VT. STAT. ANN., tit. 18, § 1745 (2011).

<sup>79</sup> VT. STAT. ANN. tit. §1426(a) (2011).

<sup>80</sup> VT. STAT. ANN. tit. §1426(b) (2011).

<sup>81</sup> VT. STAT. ANN. tit. §1427 (2011).

<sup>82</sup> VT. STAT. ANN. tit. 32, §7771 (2011). (“The tax imposed under this section shall be at the rate of 131 mills per cigarette or little cigar and for each 0.0325 ounces of roll-your-own tobacco.”); *see also* Vermont Department of Taxes, <http://www.state.vt.us/tax/majorvttaxescigarette.shtml> (last visited Dec. 2, 2011).

<sup>83</sup> ANN BOON, CAMPAIGN FOR TOBACCO FREE KIDS, MAP OF CIGARETTE TAX RATES (Oct. 7, 2011)

<http://www.tobaccofreekids.org/research/factsheets/pdf/0222.pdf>.

<sup>84</sup> ANN BOON, STATE CIGARETTE EXCISE TAXES AND RANKINGS (Dec. 23, 2011)

<http://www.tobaccofreekids.org/research/factsheets/pdf/0097.pdf>.

<sup>85</sup> VT. STAT. ANN. tit. 32, §7702 (2011).

<sup>86</sup> VT. STAT. ANN. tit. 32, §7771 (2011).

<sup>87</sup> VT. STAT. ANN. tit. 32, §7811 (2011); *see also* Vermont Department of Taxes, <http://www.state.vt.us/tax/majorvttaxescigarette.shtml> (last visited December 2, 2011).

<sup>88</sup> VT. STAT. ANN. tit. 32, §7811 (2011).

<sup>89</sup> VT. STAT. ANN. tit. 32, §7811 (2011).

<sup>90</sup> Vermont Department of Taxes, <http://www.state.vt.us/tax/majorvttaxescigarette.shtml> (last visited December 2, 2011).

<sup>91</sup> VT. STAT. ANN. tit. 32, §7811 (2011).

<sup>92</sup> James G. Hodge, *Regulating Food Retail for Obesity Prevention: How Far Can Cities Go?*, 39 J.L. MED. & ETHICS 89, 89 (2011).

<sup>93</sup> OFFICE OF THE SECRETARY OF STATE (VT), MUNICIPAL LAW BASICS 2 (2009),

[http://www.sec.state.vt.us/municipal/pubs/municipal\\_law\\_basics.pdf](http://www.sec.state.vt.us/municipal/pubs/municipal_law_basics.pdf).

<sup>94</sup> McQuillin The Law of Municipal Corporations, 2A McQuillin Mun. Corp. § 10:10 Scope of Powers – Dillon’s Rule (3rd ed.) (2011).

<sup>95</sup> OFFICE OF THE SECRETARY OF STATE (VT), MUNICIPAL LAW BASICS 2 (2009),

[http://www.sec.state.vt.us/municipal/pubs/municipal\\_law\\_basics.pdf](http://www.sec.state.vt.us/municipal/pubs/municipal_law_basics.pdf);

*citing* Valcour v. Village of Morrisville, 104 Vt. 119, 131-32 (1932); *also* Hinesburg Sand & Gravel Co. v. Town of Hinesburg, 135 Vt. 484, 486 (1977).

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- <sup>96</sup> OFFICE OF THE SECRETARY OF STATE (VT), MUNICIPAL LAW BASICS 2 (2009), [http://www.sec.state.vt.us/municipal/pubs/municipal\\_law\\_basics.pdf](http://www.sec.state.vt.us/municipal/pubs/municipal_law_basics.pdf); *citing* Morse Vermont Division of State Buildings, 136 Vt. 253 (1978) “as 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.”
- <sup>97</sup> OFFICE OF THE SECRETARY OF STATE (VT), MUNICIPAL LAW BASICS 3 (2009), [http://www.sec.state.vt.us/municipal/pubs/municipal\\_law\\_basics.pdf](http://www.sec.state.vt.us/municipal/pubs/municipal_law_basics.pdf).
- <sup>98</sup> *See* VT. STAT. ANN. tit. 24A.
- <sup>99</sup> OFFICE OF THE SECRETARY OF STATE (VT), MUNICIPAL LAW BASICS 2 (2009), [http://www.sec.state.vt.us/municipal/pubs/municipal\\_law\\_basics.pdf](http://www.sec.state.vt.us/municipal/pubs/municipal_law_basics.pdf); *see also* VT. STAT. ANN. tit. 17, §2645 (2011).
- <sup>100</sup> OFFICE OF THE SECRETARY OF STATE (VT), MUNICIPAL LAW BASICS 2 (2009), [http://www.sec.state.vt.us/municipal/pubs/municipal\\_law\\_basics.pdf](http://www.sec.state.vt.us/municipal/pubs/municipal_law_basics.pdf); *citing* Town of Brattleboro v. Garfield (2006) *citing* Looker v. City of Rutland, 144 Vt. 344, 346 (1984).
- <sup>101</sup> VT. STAT. ANN. tit. 24A §151-8.
- <sup>102</sup> VT. STAT. ANN. tit. 24A §237-4.
- <sup>103</sup> VT. STAT. ANN. tit. 24A § 285-4.
- <sup>104</sup> Ian McLaughlin, Tobacco Control Legal Consortium, *License to Kill?: Tobacco Retailer Licensing as an Effective Enforcement Tool 2* (2010) *citing* LAWRENCE GOSTIN, PUBLIC HEALTH LAW AND ETHICS: A READER 185 (Lawrence Gostin ed., University of California Press 2002).
- <sup>105</sup> State of Vermont v. James Curley-Egan, 180 Vt. 305, 309 (2006) *citing* State v. Theriault, 70 Vt. 617, 625, 41 A. 1030, 1033 (1898).
- <sup>106</sup> Ian McLaughlin, Tobacco Control Legal Consortium, *License to Kill?: Tobacco Retailer Licensing as an Effective Enforcement Tool 2* (2010).
- <sup>107</sup> State of Vt. v. James Curley-Egan, 180 Vt. 305, 309 (2006) *citing* State v. Theriault, 70 Vt. 617, 625, 41 A. 1030, 1033 (1898) *referencing* Elliott v. Vt. State Fish & Game Comm’n, 117 Vt. 61, 68, 84 A.2d 588, 592-93 (1951) (recognizing that Legislature can validly delegate police power to state fish and game commission); Carty’s Adm’r v. Vill. of Winooski, 78 Vt. 104, 108, 62 A. 45, 46 (1905) (upholding delegation to towns and incorporated villages of authority to construct and maintain jails).
- <sup>108</sup> VT. STAT. ANN. tit. 24, § 2291(14) (2011).
- <sup>109</sup> *See, e.g.,* Rockwood v. City of Burlington, 21 F. Supp. 2d 411, 416 (D. Vt. 1998) (suggesting that tobacco use by minors may be considered a public nuisance). *But cf.* Napro Development Corp. v. Town of Berlin, 135 Vt. 353, 358 (1977) (“We believe that the concept of public nuisance is vague and amorphous, and we are cautious to employ it in circumstances where its application might intrude in the arena of speech and expression protected by both the First and Fourteenth Amendments of the United States Constitution and the Vermont Constitution[.]”).
- <sup>110</sup> *See* BLACK’S LAW DICTIONARY (9<sup>th</sup> ed. 2009).
- <sup>111</sup> VT. STAT. ANN. tit. 24, § 4301 et seq. (2011).
- <sup>112</sup> VT. STAT. ANN. tit. 24, § 4302(a) (2011).
- <sup>113</sup> VT. STAT. ANN. tit. 24, § 4321(a)&(b) (2011).
- <sup>114</sup> *See* VT. STAT. ANN. tit. 24, § 4325 (2011).
- <sup>115</sup> VT. STAT. ANN. tit. 24, § 4442 (2011).
- <sup>116</sup> VT. STAT. ANN. tit. 24, § 4341 (2011).
- <sup>117</sup> *See* VT. STAT. ANN. tit. 24, § 4345(a) (2011).
- <sup>118</sup> VT. STAT. ANN. tit. 24, § 4347 (2011).
- <sup>119</sup> VT. STAT. ANN. tit. 24, § 4349(a)(2011).
- <sup>120</sup> VT. STAT. ANN. tit. 24, § 4414 (1) (2011).
- <sup>121</sup> VT. STAT. ANN. tit. 24, § 4414 (1) (2011); and VT. STAT. ANN. tit. 24, § 4449 (2011).
- <sup>122</sup> VT. STAT. ANN. tit. 18, §2(5) (2011).
- <sup>123</sup> VT. STAT. ANN. tit. 18, § 601 (2011).
- <sup>124</sup> VT. STAT. ANN. tit. 18, § 601 (2011).
- <sup>125</sup> VT. STAT. ANN. tit. 18, § 601 (2011).
- <sup>126</sup> VT. STAT. ANN. tit. 18, § 613 (2011).
- <sup>127</sup> VT. STAT. ANN. tit. 18, §§ 126-27, 613 (2011).
- <sup>128</sup> VT. STAT. ANN. tit. 18, § 131 (2011).
- <sup>129</sup> VT. STAT. ANN. tit. 18, § 131 (2011).

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<sup>130</sup> VT. STAT. ANN. tit. 18, § 131 (2011).

<sup>131</sup> See VT. STAT. ANN. tit. 18, § 126 (2011); and VT. STAT. ANN. tit. 18, § 613 (2011).

<sup>132</sup> Studies have suggested that the more retailers there are near schools, the more likely students are to smoke. See Lisa Henriksen et al., *Is Adolescent Smoking Related to the Density and Proximity of Tobacco Outlets and Retail Cigarette Advertising Near Schools?*, 47 PREVENTIVE MED. 210 (2008).



## Appendix A: Vermont Communities with Municipal Charters

**TITLE 24A<sup>1</sup>**  
**TITLE TWENTY-FOUR**  
***APPENDIX***

**Municipal Charters**

PART 1

CITIES

1. City of Barre
3. City of Burlington
5. City of Montpelier
7. City of Newport
9. City of Rutland
11. City of St. Albans
13. City of South Burlington
15. City of Vergennes
17. City of Winooski

PART 2

TOWNS

101. Town of Barre
103. Town of Bennington
105. Town of Berlin
106. Town of Bradford
107. Town of Brattleboro
108. Town of Bristol
- 108A. Town of Cabot
109. Town of Cavendish
111. Town of Chester
113. Town of Colchester
114. Town of Danville
115. Town of Enosburgh
117. Town of Essex
123. Town of Hardwick
- 123A. Town of Hartford
- 123B. Town of Jamaica
124. Town of Jericho
127. Town of Middlebury

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<sup>1</sup> Michie's Legal Resources, <http://www.michie.com/> (last visited Feb. 7, 2012).

- 129. Town of Milton
- 130. Town of Pittsford
- 131. Town of Plainfield
- 133. Town of Poultney
- 135. Town of Proctor
- 137. Town of Putney
- 141. Town of Readsboro
- 142. Town of Richford
- 143. Town of Richmond
- 147. Town of Shelburne
- 149. Town of Springfield
- 151. Town of St. Johnsbury
- 153. Town of Stowe
- 155. Town of Underhill
- 155A. Town of West Rutland
- 155B. Town of Westminster
- 156. Town of Williston
- 157. Town of Windsor

### PART 3

#### VILLAGES

- 203. Village of Alburgh
- 205. Village of Barton [Reserved]
- 207. Village of Bellows Falls
- 209. Village of Bradford [Reserved]
- 211. Village of Cabot
- 213. Village of Cambridge
- 215. Village of Derby Center
- 217. Village of Derby Line
- 219. Village of Enosburg Falls
- 221. Village of Essex Junction
- 223. Village of Groton
- 225. Village of Hyde Park
- 227. Village of Jacksonville
- 229. Village of Jeffersonville [Reserved]
- 231. Village of Jericho [Reserved]
- 233. Village of Johnson [Reserved]
- 235. Village of Ludlow
- 237. Village of Lyndonville
- 239. Village of Manchester
- 241. Village of Marshfield [Reserved]

- 245. Village of Morrisville
- 247. Village of Newbury
- 249. Village of Newfane
- 251. Village of North Bennington
- 253. Village of North Troy
- 257. Village of Northfield
- 259. Village of Old Bennington [Reserved]
- 261. Village of Orleans
- 267. Village of Pittsford
- 269. Village of Poultney
- 271. Village of Richford [Reserved]
- 273. Village of Saxtons River [Reserved]
- 275. Village of South Ryegate [Reserved]
- 277. Village of Stowe
- 279. Village of Swanton
- 281. Village of Townsend
- 283. Village of Waterbury
- 285. Village of Wells River
- 289. Village of Westminster
- 291. Village of Woodstock



## *Providing legal expertise to support policies benefiting the public health.*

The Public Health and Tobacco Policy Center is a legal research Center within the Public Health Advocacy Institute. Our shared goal is to support and enhance a commitment to public health in individuals and institutes who shape public policy through law. We are committed to research in public health law, public health policy development; to legal technical assistance; and to collaborative work at the intersection of law and public health. Our current areas of work include tobacco control and childhood obesity and chronic disease prevention. We are housed in Northeastern University School of Law.

### What we do

#### Research & Information Services

- provide the latest news on tobacco and public health law and policy through our legal and policy reports, fact sheets, quarterly newsletters, and website

#### Policy Development & Technical Assistance

- respond to specific law and policy questions from the New York State Tobacco Control Program and its community coalitions and contractors, including those arising from their educational outreach to public health officials and policymakers
- work with the New York State Cancer Prevention Program to design policies to prevent cancer
- assist local governments and state legislators in their development of initiatives to reduce tobacco use
- develop model ordinances for local communities and model policies for businesses and school districts

#### Education & Outreach

- participate in conferences for government employees, attorneys, and advocates regarding critical initiatives and legal developments in tobacco and public health policy
- conduct smaller workshops, trainings webinars, and presentations focused on particular policy areas
- impact the development of tobacco law through *amicus curiae* ("friend of the court") briefs in important litigation

### Find us online

[www.tobaccopolicycenter.org](http://www.tobaccopolicycenter.org)

The Center's website provides information about recent tobacco news and case law, New York tobacco-related laws, and more. Current project pages include: tobacco-free outdoor areas; tobacco product taxation; smoke-free multiunit housing; and retail environment policies. The website also provides convenient access to reports, model policies, fact sheets, and newsletters released by the Center.

<http://twitter.com/CPHTP>

<https://www.facebook.com/CPHTP>

Follow us on Twitter and Facebook for informal updates on the Center and current events.

#### Requests for Assistance

The Center is funded to support the New York State Tobacco Control Program, the New York State Cancer Prevention Program and community coalitions and educators. The Center also assists local governments and other entities as part of contractor-submitted requests. If we can help with a tobacco-related legal or policy issue, please contact us.

The Center provides educational information and policy support. The Center does not represent clients or provide legal advice.



Public Health Advocacy Institute at Northeastern University School of Law  
360 Huntington Avenue, 117CU • Boston, MA 02115  
[tobaccopolicycenter.org](http://tobaccopolicycenter.org)  
617.373.8494