

## **MEMORANDUM**

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

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

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## **I. Introduction**

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

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

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

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

The purpose of this report, therefore, is to introduce the state preemption doctrine and describe the effect it has on the regulation of alcohol outlet density in communities to public health practitioners, members of state and community coalitions, healthcare providers, and other interested groups. The report also specifically analyzes the role of state preemption in Maryland, which has a unique state/local structure for regulating alcohol outlets.

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

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

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

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

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

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

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

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

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

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

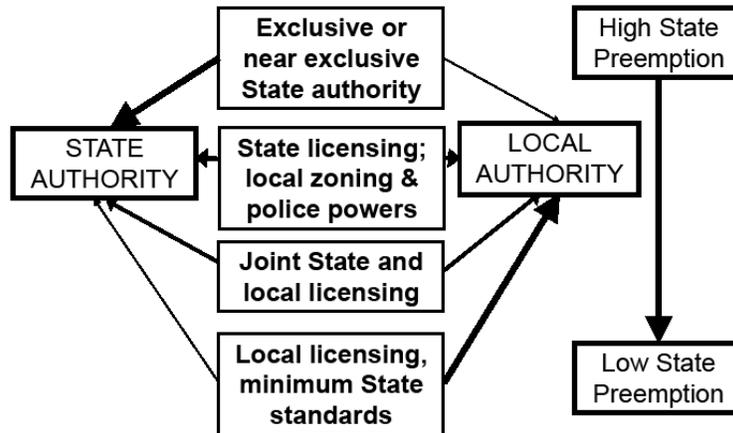
It is important for state and local public health practitioners who are interested in the regulation of alcohol outlet density to become familiar with the preemption doctrine in their states. Information on state preemption is usually available through state Alcoholic Beverage Control agencies or through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

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

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

**FIGURE 1**

**Levels of State Preemption**



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

Although states generally fall into one of these categories of preemption, there are a variety of permutations. States may assign differing levels of preemption for differing aspects of alcohol retail regulation. For example, the state may permit local governments to determine the location of new retail outlets but deny them any authority to regulate retailers’ operating practices.<sup>19</sup> Other states grant local authority only to certain cities, for example, those that have a city charter. States may also adopt a hybrid system. For example, as discussed in Section III, Maryland has established local Alcoholic Beverage Control Boards that have primary responsibility for licensing decisions but which are controlled in large measure by the state.<sup>20</sup>

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

### **III. Maryland’s Structure for Regulating Alcohol Retailers**

Maryland’s Alcoholic Beverages Control Law, Article 2B of Maryland’s Annotated Code (“ABC Law”), sets forth a comprehensive and detailed approach to alcohol regulation.<sup>21</sup> As noted above, it is a unique, hybrid structure. There is no state licensing entity and local boards issue all licenses, although the state exerts considerable control over the local licensing boards including in many cases appointing the commissioners that serve on them. Maryland is sometimes mistakenly characterized as a local licensing system, but this is not accurate since many of the local licensing boards are actually constituted by the state.

This section first summarizes the ABC Law provisions describing local licensing boards and local government’s zoning authority to regulate alcohol retail outlet density and operations. It then focuses specifically on its application to the City of Baltimore, which has a local licensing board that is appointed by the state, as a case study of the impact of state preemption in a hybrid system.<sup>22</sup>

#### **A. ABC Law Provisions Addressing the Authority of Local Licensing Boards**

As noted above, there is no central state licensing board. Instead, Maryland’s ABC Law empowers “the various local boards of license commissioners...with sufficient authority to administer and enforce the provisions of [the ABC Law].”<sup>23</sup> In addition, there is no state administrative review of local licensing board decisions, which are appealed to the state judiciary.<sup>24</sup>

Although local licensing boards have licensing, administration, and enforcement powers, the state strictly limits their authority, which can vary by policy topic and by county or city (referred to here as local jurisdictions or local governments).<sup>25</sup> As stated by Maryland’s Court of Appeal (its highest court – equivalent to State Supreme Courts in other states):

“Rather than providing broad general guidelines, the General Assembly has chosen to closely control by statute even the more detailed aspects of the alcoholic beverages industry. This close regulation is perhaps partly due to the fact that, unlike other regulated areas, there is not a single agency that administers the alcoholic beverages law, but rather numerous local boards that are charged with its enforcement. Regardless of the reason for its enactment, the result of such a comprehensive statutory scheme is that the authority of the administering agencies necessarily is more circumscribed than the typical administrative body. The Liquor Board thus differs fundamentally from those agencies to which the legislature more generously delegates the particulars of a regulatory scheme.”<sup>26</sup>

As noted above, the state appoints commissioners in many local jurisdictions although in some cases the local governments make the appointments, giving them more control over the boards’ operations.<sup>27</sup> The ABC Law has provisions on specific subjects that govern all local boards but then supplements or modifies the rule for individual jurisdictions.<sup>28</sup> For example, it specifically limits the scope of new licenses that the Baltimore licensing board can grant (although recent legislation has expanded the possible exceptions to these limitations).<sup>29</sup>

Local boards can only grant the types of licenses authorized by the ABC Law in the specific jurisdictions and impose statutorily authorized sanctions (revocations, suspensions, and fines). They are not authorized to limit operations (e.g., hours and noise) beyond what is permitted in state law.<sup>30</sup> In short, state law preempts a substantial portion of the local boards' discretionary authority.

## **B. ABC Law Provisions Addressing the Authority of Local Jurisdictions**

State law provides the primary vehicle for regulating alcohol retail availability, and the local licensing boards serve as the implementers of the state law provisions. The state nevertheless explicitly delegates local zoning authority to local jurisdictions. Article 2B, § 9-103, states, "No license or permit under the provisions of [the ABC Law] shall be issued in violation of any zoning rule or regulation as the same may from time to time exist under and by virtue of any ordinance or ordinances passed pursuant to [Art. 66B and other authorities]."<sup>31</sup>

This is a significant local power for addressing alcohol outlet density through restrictions on the number, type, and location of new alcohol outlets over time. Under this state law provision, if a local zoning ordinance prohibits an alcohol outlet in a particular location, then the local board is precluded from issuing a license. The Maryland Constitution also provides many cities, including Baltimore, "home rule" status that includes broad zoning and police power authority. It explicitly prohibits local governments from permitting any act related to alcoholic beverage licensing or sale that state law prohibits<sup>32</sup> but is silent with regard to local authority to impose regulations that are more restrictive than those found in state law. What is the extent of Baltimore's zoning and policy powers with regard to alcohol retail outlets? The next section addresses this issue.

## **IV. Local Control of Alcohol Outlets in Baltimore City (Distinct from State-Controlled Local Licensing Board)**

### **A. Baltimore's Zoning Powers: Applicable State and City Zoning Code Provisions**

The Maryland State Code, Article 66B provides: "To promote the health, security, general welfare, and morals of the community, the Mayor and City Council of Baltimore may regulate and restrict, for trade, industry, residence, or other purposes... the location and use of buildings, signs, structures, and land."<sup>33</sup> It limits the ability of the Mayor and City Council, noting that it does not "[p]reempt or supersede the regulatory authority of any state department or agency under any public general law."<sup>34</sup>

The City of Baltimore exercises this grant of authority from the state through its Zoning Code, which states that its purpose is "to promote safety and general welfare, to encourage the most appropriate use of land throughout the City; and to divide the City into zoning districts of the character, number, shape, and area best suited to effect these purposes."<sup>35</sup> Generally, conflicts among provisions that provide greater or lesser protections are resolved in favor of greater protections.<sup>36</sup> A Zoning Administrator administers and enforces the Zoning Code, including issuing use permits. The Board of Municipal and Zoning Appeals of Baltimore City (also referred to in this memorandum as the zoning board) rules on applications for conditional uses, and decides appeals of Zoning Administrator decisions.<sup>37</sup> The Zoning Code also provides for

enforcement and penalties for zoning code violations, some of which are circumscribed by state law.<sup>38</sup>

The Zoning Code includes three features that either already include alcohol retail sales or could be modified to accomplish this function: (1) restrictions on new alcohol outlets; (2) nonconforming use provisions; and (3) performance standards.

### **1. Restrictions on new alcohol outlets**

As noted in the previous section, state law specifically allows local governments to restrict new alcohol outlets. Baltimore exercises this authority to at least some degree. The Zoning Code includes definitions of specific types of alcohol retail establishments. For example, for an on-sale outlet to qualify as a restaurant it must have a fully equipped kitchen and food sales must be more than 50 percent of its annual average daily receipts (with exceptions).<sup>39</sup> If these requirements are not met, the outlet is treated as a tavern.

The Zoning Code limits where alcohol establishments may be located. In general, they are not allowed in residential districts and permitted in most commercial zones.<sup>40</sup> Baltimore has also established a procedure for conducting special reviews of certain “conditional uses” that has been applied to a limited degree to alcohol retail establishments.<sup>41</sup> If designated as a conditional use, the application cannot be granted without considering, in each case, the impact of those uses on neighboring land and of the public need for the particular use at the particular location and must be approved by the Zoning Board, Mayor, and/or City Council as specified by the Zoning Code. Before approval, the Zoning Board:

“... may impose on the establishment, location, construction, maintenance, and operation of the conditional use any conditions, restrictions, or limitations that the Board or City Council considers necessary or desirable to: (i) reduce or minimize any effect of the use on other properties in the neighborhood; (ii) secure compliance with the standards and requirements of this title; and (iii) better carry out the intent and purposes of this article.”<sup>42</sup>

The Board must also make a finding that: “the establishment, location, construction, maintenance, and operation of the conditional use will not be detrimental to or endanger the public health, security, general welfare, or morals.”<sup>43</sup> In making this finding the board must, among other considerations, assess the nature of the surrounding area and the extent to which the proposed use might impair its present and future development and the proximity of dwellings, churches, schools, public structures, and other places of public gathering.<sup>44</sup>

In general, both on- and off-sale alcohol retail establishments are permitted in most commercial zones without the need for conditional use treatment. Taverns and restaurants with live entertainment are the primary exception to this general rule. Conditions on these outlets can include limits on days and hours of general operation, noise level, proximity of residences, and traffic patterns. Indoor and outdoor security plans may also be required.<sup>45</sup> By contrast, many other types of land uses that pose potential health and safety risks are routinely treated as conditional uses and subject to multiple restrictions, including amusement arcades, gas stations, garages, and massage parlors.<sup>46</sup>

In summary, Baltimore’s Zoning Code provides a structure for addressing alcohol outlet density

issues. However, it has exercised its authority only to a limited degree, leaving room for amendments to the code that could provide a more comprehensive approach to structuring alcohol retail availability in the city.

## **2. Nonconforming uses**

Second, the Zoning Code addresses “nonconforming uses,” including changes in preexisting uses. A “nonconforming use” is “any lawfully existing use of a structure or of land that does not conform to the applicable use regulations of the district in which it is located.”<sup>47</sup> There are several provisions that require nonconforming uses be terminated within a certain time period (some up to three years) after they became nonconforming either because of a change in the zoning ordinance or because the district/property was reclassified.

One of these nonconforming use provisions concerns alcohol retailers. An ordinance effective in 2004 created the distinction between “restaurant” and “tavern” described above. The ordinance provided that a restaurant that became nonconforming at the time of enactment because it does not comply with the new requirements may continue as a nonconforming use for no more than three years, at which time it must fully comply with the Zoning Code requirements or be terminated and discontinued.<sup>48</sup>

Baltimore’s application of its nonconforming use provisions to alcohol retail establishments is significant in part because it is not explicitly permitted by the ABC Law. As discussed below, Maryland courts have approved this application of local authority. It provides a potential tool for addressing problems associated with alcohol retail density by applying new conditions to pre-existing establishments and requiring conformity within a set period of time. This authority is underutilized in the current Zoning Code provisions.

## **3. Performance Standards**

Third, Baltimore has also used the concept of performance standards for certain industrial districts that are adjacent to Business or Residence Districts.<sup>49</sup> Although the current performance standards do not address the type of issues relevant to alcohol retailers, they serve as a precedent for using them for requiring alcohol retailers to adhere to public nuisance abatement standards to protect the integrity of neighboring business or residential districts.

## **B. Judicial Interpretations Concerning Baltimore’s Zoning Authority**

Several court cases address the relationship between state licensing and local zoning regulation. In general, they support broad local authority to regulate alcohol outlets including, in at least some cases, the ability to enact regulations that are stricter than the state ABC provisions or actions by the local licensing board.

In 1962, Maryland’s highest court (the Court of Appeals) decided *Montgomery County v. Mossburg*,<sup>50</sup> which examined a Montgomery County zoning provision similar to Baltimore’s. A restaurant owner with a light wine and beer license had a nonconforming use in a residential zone in Montgomery County. He wanted to extend the restaurant to the adjacent lot he owned and asked the local zoning board to grant a special exception for commercial operation in a residential zone. The zoning board did so, but imposed additional requirements, including closing no later than 11 p.m. every night. The Zoning Code allowed the county to add specific provisions it deemed necessary to protect the neighborhood and stated that a special exception

for a residential zone may be granted for a restaurant upon a finding that the use will not constitute a nuisance because of traffic, noise or number of patrons who visit the restaurant.

The licensee claimed that the county had no authority to regulate the hours of sale of alcoholic beverages or to limit the effectiveness of the liquor license, arguing that Maryland's ABC Law preempts it because it allows licensees to serve light wine and beer until midnight. The court disagreed, holding that: (1) the conditions imposed were designed to insure that the use authorized would be compatible with the neighborhood and not constitute a nuisance; (2) the Zoning Board had the authority to limit the privilege granted by the state liquor license; and (3) because the conditions were valid, the owner could either accept the exception as tendered or be limited to the original non-conforming use. As stated by the court:

“The [Zoning] Board did not purport to restrict or deal with the liquor license as such. It did no more than offer Mossburg the opportunity to expand his business as he desired, provided he did not, after eleven o'clock, exercise the privilege granted by his alcoholic beverage license to sell wine or beer or by his restaurant license to sell food. As Mossburg himself pointed out in his petition for reconsideration, he has the option of expanding, with the shortened hours which would make his use of his land compatible with the residential neighborhood in which it is, or he can 'continue operation under the present lawful non-conforming use in the original facilities...'. He may not, we think, as of right demand an unconditioned special exception.”<sup>51</sup>

The Court of Appeals extended the *Mossburg* case in *Park v. Board of Liquor License Commissioners for Baltimore City*, decided in 1995.<sup>52</sup> It concluded that a provision in Article 2B of the Maryland Annotated Code that required certain businesses in Baltimore City to be considered a “tavern” for zoning purposes was an unconstitutional violation of the Constitutional grant of local authority to Baltimore, in effect concluding that Baltimore's local zoning provision preempted state law.

*Park* involved several Baltimore alcoholic beverage package goods stores without facilities for on-premises alcohol consumption. They held class B-D-7 liquor licenses that permitted selling alcoholic beverages for consumption on or off the premises from 6 a.m. to 2 a.m. seven days a week. To address problems associated with seven-day package goods stores, the state enacted legislation requiring B-D-7 licenses to: (1) have on-premises consumption facilities, or (2) obtain the new class A-2 license, which limited the business to off-premise consumption and imposed more restrictive hours and days of operations.

These new requirements presented zoning problems for many of the package goods stores holding class B-D-7 licenses, selling alcoholic beverages only for off-premises consumption, and holding non-conforming use zoning permits. Adopting either of the two options under state law would arguably violate the non-conforming use permits and requirements in Baltimore's Zoning Code. When the city failed to revise its zoning provisions, the state amended the law and granted the licensees protection from the zoning provisions, stating that “for purposes of zoning in Baltimore City, the operation conducted by a holder of a Class A-2 beer, wine and liquor off-sale package goods license shall be considered to be that of a tavern.”

The Court of Appeals held that the state law was a local zoning statute in violation of the State Constitution:

It is clear that the intent of the Legislature was to mandate that the Zoning Administrator of Baltimore City include Class A-2 package goods stores within the definition of “tavern” for the purpose of enforcing the Baltimore City Zoning Ordinance. . . . The clear intent of the Legislature was to address the growing problems associated with seven-day package goods stores while protecting the interests of those B-D-7 licensees who had operated for many years in such a manner with the tacit approval of the Board. The Legislature knew that without [the provision at issue], the B-D-7 package goods stores could be closed under Baltimore City zoning regulations and a section was added so that “no rezoning will be required in changing the license from a B-D-7 license to the A-2 license.” The intent of the Legislature to make a zoning change is also plain on the face of the statute, and we must give effect to that intent as expressed by the Legislature. . . . Modifying the definition of a “tavern” under the zoning laws, therefore, is a task reserved to the Mayor and City Council of Baltimore.<sup>53</sup>

*Piscatelli*,<sup>54</sup> a 2003 case, limited the *Park* decision to some degree. There, the licensee (*Piscatelli*) operated a tavern with live entertainment and dancing in a zoning district in Baltimore where such use was conditionally permitted for food service and entertainment after 2 a.m. One provision of the ABC Law required that licensees with *Piscatelli*’s type of liquor license cease all operations, including not only serving alcohol, but also serving food and entertainment between 2 a.m. and 6 a.m.<sup>55</sup> *Piscatelli* sought to convert the liquor license to one that would authorize him to sell food (but not liquor) after 2 a.m., but the Licensing Board denied the request and informed him that it would enforce the 2 a.m. closing requirement. *Piscatelli* argued that this ABC Law provision was a zoning law because it effectively limited the times of the conditional use permit, and, as such, violated the Home Rule Amendment.

The Court of Appeals rejected the argument, concluding that the provision was not a zoning law and did not violate the Home Rule Amendment, noting that simply because the General Assembly enactment affected activities otherwise allowed or disallowed under local zoning does not make it a zoning law. The 2 a.m. restriction:

“... is a direct consequence of [plaintiffs] having been granted a liquor license. A liquor license is a privilege, and in granting the license, the Legislature ‘may annex . . . such conditions as are deemed necessary to prevent an abuse of the privilege’ [citations omitted]. The requirement that a liquor licensee cease operations at the same time that liquor sales must cease, clearly helps prevent illegal after hours sales of alcoholic beverages.”<sup>56</sup>

The Court also noted that Licensing Board inspectors testified before the Licensing Board that, after 2 a.m., they had seen patrons at a sushi bar consuming alcoholic beverages, emphasizing that the provision at issue “is *not* [emphasis in the original] ‘totally unrelated’ to the sale or consumption of alcoholic beverages” [quoting from the plaintiff’s brief].<sup>57</sup> The Court also noted that unlike *Park*, the provision “does not in any manner change Baltimore City zoning law. It gives no directions to, and imposes no requirements upon, the Baltimore City zoning authorities.

If [Plaintiff] were not a liquor licensee, he could operate the restaurant and provide entertainment after 2 a.m. in accordance with the applicable zoning.”<sup>58</sup>

Taken together, the three cases provide a complicated analysis that distinguishes the definition, scope and interaction of the state’s licensing authority and the city’s zoning powers. Perhaps the most notable aspect of the cases is the fact that the court would not allow either level of government to loosen the restrictions imposed by the other. Perhaps the underlying rationale is that either the state or the local jurisdiction can impose stricter requirements than what is permitted by the other. In other words the state licensing authority includes the power to restrict alcohol-related provisions found in the local zoning code, and the local zoning authority includes the authority to impose restrictions beyond those contained in the state law.

There are other Maryland cases not involving alcohol-related issues that support Baltimore’s well-settled home rule authority to limit the operations of (or close altogether) existing retailers. The city may impose a new requirement that makes a current retail establishment nonconforming and give the retailer a reasonable period of time to either come into compliance or close. For example, the Court of Appeals in a 1957 case upheld a Baltimore ordinance that banned all outdoor advertising structures in residential districts, allowing newly nonconforming structures to remain for up to five years before requiring that they be removed.<sup>59</sup> A 1966 case upheld Baltimore ordinances that excluded check-cashing operations from residential and office use districts and required existing operations to cease operations within 18 months. The court held such provisions were constitutional.<sup>60</sup>

In summary, both the specific Baltimore zoning provisions and the court cases support Baltimore’s authority to restrict the location and number of new alcohol outlets and impose conditional use requirements on new alcohol outlets that are permitted to open. The city can also impose new requirements on currently existing alcohol outlets through changes in performance standards, conditional use requirements or nonconforming use provisions.

### **C. Police Powers of the City of Baltimore**

State law has augmented Baltimore’s local zoning authority with broad police powers.<sup>61</sup> The ABC Law expressly authorizes Baltimore (and some other local jurisdictions) to regulate alcohol possession and consumption in public places by adopting ordinances or resolutions supplementing the ABC provisions, including “the authority to regulate possession or consumption of any alcoholic beverage on any public property, property used by the public in general, or on any highway.”<sup>62</sup> The Police Ordinance (Article 19 of the Baltimore Revised City Code) includes several provisions explicitly related to alcohol. For example, it prohibits disorderly drinking (being intoxicated and endangering the safety of another person or property, as well as causing a public disturbance while being intoxicated or drinking alcohol in a public place), drinking in public places, providing alcohol to or inducing a minor to drink alcohol, and loitering near liquor retailers, all with possible civil and criminal penalties.<sup>63</sup>

In addition, the Police Ordinance prohibits public nuisances (e.g., any premises that in certain time periods were used for various illegal activities) and neighborhood nuisances. Neighborhood nuisances are defined as follows: Premises where on two or more separate occasions within a six-month period the owner or tenant of the premises engaged in acts or created or maintained conditions that: (i) significantly affected neighboring residents by being disorderly in manner; or

(ii) disturbed the peace of neighboring residents by: (A) making an unreasonably loud noise; or (B) the unreasonable use of profanity, cursing, or swearing. It authorizes the Baltimore Police Commissioner or designee to order that the nuisance be abated and, if not abated, to order closure of the premises.<sup>64</sup>

Research did not uncover any Maryland court cases interpreting these nuisance provisions as applied to alcohol outlets. However, based on the plain meaning of the nuisance ordinances, as well as the judicial interpretations of the Home Rule zoning and police powers constitutional and statutory provisions, it appears that Baltimore can use the ordinances to reduce the negative impact of alcohol retail outlets by limiting their operations or closing them altogether if the activities connected with an alcohol retail outlet fulfill the definitions of “public nuisance” or “neighborhood nuisance” described above. Baltimore may also develop a public nuisance abatement ordinance addressing alcohol outlets specifically that includes performance standards addressing nuisance activities specific to alcohol outlet operations (e.g. prohibiting loitering, sales of drug paraphernalia, etc.). The nuisance activities can be tied to zoning restrictions.

#### **D. Baltimore’s Alcohol Taxing/Fees Authority**

Although Maryland generally grants taxing power to Home Rule jurisdictions, the state has expressly preempted local authority to tax alcoholic beverages.<sup>65</sup> Furthermore, fees charged in connection with licenses are generally set forth in the ABC Law, and, to the extent there is any discretion, the ABC Law gives it to the Licensing Board.<sup>66</sup> State law is specific regarding this limitation regarding local license fees: “A municipal corporation may not impose any additional license fees or taxes, other than the usual property tax, upon alcoholic beverages or upon the exercise of the privileges conferred by the licenses issued under the provisions of this article, except as hereinafter provided in this article [with specific exceptions for certain counties].”<sup>67</sup> Can Baltimore nevertheless charge a fee to cover the costs of enforcing and administering a public nuisance abatement ordinance, treating the fee as separate from an alcohol retailer fee?

Such a fee was upheld in a California case, where local zoning and taxing authority regarding alcohol sales is more restricted than in Maryland. In *City of Oakland v. Superior Court of Alameda County*, the court reviewed a fee imposed by Oakland that covered the costs of enforcing and administering nuisance abatement provisions applied specifically to alcohol retailers.<sup>68</sup> The court first concluded that the fee was regulatory rather than revenue-generating in nature and therefore not an impermissible tax. It then held that the fee did not directly regulate the sale of alcohol but rather addressed public nuisance problems associated with alcohol sales that were within the city’s authority, noting: “If a business imposes an unusual burden on city services, a municipality may properly impose fees pursuant to its police powers.”<sup>69</sup>

Two factors suggest that such a fee would be permissible in Baltimore. First, Baltimore and other Maryland local jurisdictions generally have broader local powers than localities in California. Maryland has strong Home Rule provisions, the ABC Law expressly delegates local zoning and police powers to the city, and the city has zoning and police power provisions, which include industry-specific performance standards and neighborhood nuisance protections.

Second, similar to the holding in *Oakland*, the Maryland Court of Appeal has held that local jurisdictions may impose fees associated with alcohol sales. In 1975, the court upheld the city of Bowie’s ordinance requiring soft drink and malt beverage container deposits, noting that the

ordinance was a “waste control and environmental protection measure, not an attempt to regulate alcoholic beverages.”<sup>70</sup> A similar argument could be made to justify a public nuisance abatement fee on alcohol retailers. The measure is a proper exercise of the city’s police power to prevent public nuisances and is not an attempt to regulate alcoholic beverage sales.

## **V. Conclusion**

Although Maryland preempts licensing of alcohol retailers except through the state-controlled Baltimore licensing board, the state nevertheless provides Baltimore with significant zoning and police power authority to limit alcohol outlet density and the negative consequences associated with alcohol retail sales. In fact, courts have shown considerable deference to Baltimore’s zoning powers so long as the city seeks stricter controls than found in state law and does not attempt to loosen state provisions.

Baltimore already has the mechanisms in place for exercising this authority regarding both new and existing alcohol retailers. It can restrict the number and types of new outlets in particular zones of the city and can use its nonconforming use and performance standards provisions to address existing outlets. This latter authority includes the ability to require alcohol retailers to conform to new requirements so long as a reasonable period of time is given. It also appears that the city could impose a public nuisance abatement fee on alcohol retailers to cover the costs associated with minimizing public nuisance activities of alcohol retailers. Baltimore’s authority is greater than local jurisdictions in most states, including in some states that allow local licensing. These are potentially powerful tools for implementing the prevention strategies described by CDC’s Task Force on Community Preventive Services, thereby reducing problems associated with alcohol retail density and improving the quality of life in Baltimore neighborhoods.

Baltimore has thus far not taken advantage of its potentially broad powers in this arena. Although its zoning and police power codes have various provisions related to alcohol retailers, they do not provide a basis for addressing the issue in a systematic way. Increased attention to these existing powers holds promise for reducing public health and safety problems in the city.

## NOTES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Jurisdictions may differ in their definitions of zoning, land use, police power, and general welfare. Because this memo focuses on the City of Baltimore, unless otherwise indicated, it treats zoning (with land use as a subset of zoning), police power, and general welfare as separate powers, reflecting the Baltimore City structure, with overlaps as noted in the text.

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

<sup>16</sup> New York, see Mosher, J., Pezzolesi, R., and Treffers, R. (2011). *The Impact of Strict State Preemption on the Regulation of Alcohol Outlet Density: The Case of New York State*. Felton, CA: Alcohol Policy Consultations. North Carolina, see *State v. Williams*, 283 NC 550, 196 SE2d 756 (1973). There are no systematic analyses of State/local alcohol licensing structures. These descriptions are based on independent legal research conducted by the authors. For further discussion, see Mosher (2001), *supra* n. 12.

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

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

<sup>19</sup> For further discussion, see Mosher (2001), *supra* n. 12.

<sup>20</sup> See Section II, *infra*.

<sup>21</sup> Md. Ann. Code Art. 2B, §1-101. In this memorandum, “Art. 2B” refer to Md. Ann. Code Art. 2B.

<sup>22</sup> “Baltimore” in this memo refers to the City of Baltimore, not Baltimore County. Baltimore City and Baltimore County are separate jurisdictions; Baltimore City is not within Baltimore County.

<sup>23</sup> Art. 2B, tit. 15, subtit. 1, §§1-101, 9-201. This memo does not address the scope of liquor control boards (state-run stores) in Maryland, a “control” state. Baltimore does not have a liquor control board. For more information on control boards, see Art. 2B, sub. 2, esp. § 15-210.

<sup>24</sup> For scope of review of licensing board decisions, see generally Art. 2B, Tit. 16 (Appeal to Courts), especially §16-101; *Blackburn; Bd. of License Comm’rs for Prince George’s County v. Global Express Money Orders, Inc.*, 896 A.2d 432 (Md. Ct. App. 2006).

<sup>25</sup> Art. 2B, § 1-101(b)(3). See also Art. 2B, § 15-112.

<sup>26</sup> *Board of Liquor License Commissioners for Baltimore City v. Hollywood Productions, Inc.*, 684 A.2d 837, 842-43 (Md. Ct. App. 1996).

<sup>27</sup> The state (governor and senate) appoints the local commissioners in Baltimore and several other jurisdictions, including Alleghany, Anne Arundel, Calvert, and Caroline counties. Art. 2B, § 15-101. The local governments (county commissioner or executive) appoint their own commissioners in other counties, including Carroll and Cecil). Art. 2B, § 15-104.

<sup>28</sup> See, e.g., Art. 2B, §§ 4-201 (Class A wine licenses for all jurisdictions), 4-202 (Class A wine licenses in Baltimore). See generally Art. 2B, Tit. 8 (local licenses and license provisions).

<sup>29</sup> Art. 2B, §§ 9-204 (limits on the number of B and D licenses), 9-204.1 (new licenses in certain areas prohibited); Letter from the Attorney General of Maryland (April 17, 2008) (amendments to Art. 2B, § 9-204.1 provides additional exceptions to prohibition on new licenses in part of Baltimore; three additional licenses in state senate bill prevail over new § 9-204.1(f)(3)).

<sup>30</sup> See, e.g. *Thanner Enterprises, LLC v. Baltimore County*, 995 A.2d 357 (Md. Ct. App. 2010); *Board of Liquor License Commissioners for Baltimore City v. Hollywood Productions, Inc.*, *supra* n. 23.

<sup>31</sup> Art. 2B also specifically permits Baltimore to enact ordinances limiting outdoor alcohol advertising. Art. 2B, § 21-105.

<sup>32</sup> Maryland Constitution Article XI-E §6.

<sup>33</sup> Md. Ann. Code Art. 66B, § 2.01. See also Art. 66B, § 2.

<sup>34</sup> Md. Ann. Code Art. 66B, § 2.01

<sup>35</sup> Baltimore City Zoning Code § 1-401.

<sup>36</sup> Baltimore City Zoning Code § 1-206. S, Md. Ann. Code Art. 66B, § 2.11.

<sup>37</sup> Md. Ann. Code Art. 66B, §§ 2.08, 2.09.

<sup>38</sup> Baltimore City Zoning Code § 14-501 et seq.; Art. 66B, §§ 2.10, 7.01, 7.02, 7.03, 17-109, 17-401, 17-402, 17-508, 17-510.

<sup>39</sup> Baltimore City Zoning Code §1-182.1

- <sup>40</sup> Baltimore City Zoning Code, Table of Zoning Uses.
- <sup>41</sup> Baltimore City Zoning Code § 14-103.
- <sup>42</sup> *Id.*
- <sup>43</sup> Baltimore City Zoning Code § 14-204.
- <sup>44</sup> Baltimore City Zoning Code §14-205.
- <sup>45</sup> Baltimore City Zoning Code §14-309.
- <sup>46</sup> Baltimore City Code, Table of Zoning Uses.
- <sup>47</sup> Baltimore City Zoning Code § 13-101.
- <sup>48</sup> Baltimore City Zoning Code § 1-182.1.
- <sup>49</sup> Baltimore City Zoning Code §§ 12-101 et seq.
- <sup>50</sup> 180 A.2d 851 (1962).
- <sup>51</sup> *Id.* at 854.
- <sup>52</sup> 658 A.2d 687 (Md. 1995).
- <sup>53</sup> *Id.* at 694. Although Baltimore chose not to change the definition of tavern, it subsequently amended its zoning laws concerning nonconforming use possibly to accomplish the same end. See Baltimore City Zoning Code § 13-607 and discussion *infra* at n. 45.
- <sup>54</sup> 837 A.2d 931 (Md. 2003).
- <sup>55</sup> Art. 2B, § 11-304(d).
- <sup>56</sup> 837 A.2d at 941.
- <sup>57</sup> *Id.*
- <sup>58</sup> *Id.*
- <sup>59</sup> *Grant v. Mayor and City Council of Baltimore*, 129 A.2d 363 (Md 1957).
- <sup>60</sup> *Eutaw Enterprises, Inc. v. City of Baltimore*, 217 A.2d 348 (Md. 1966).
- <sup>61</sup> Md. Ann. Code Art 25A, § 5(S); Baltimore City Charter Art. II, §27
- <sup>62</sup> Art. 2B, §§ 19-103, 19-203.
- <sup>63</sup> Baltimore City Code Police Ordinance Art 19, Subtitle 13 (Disorderly Drinking), Subtitle 14 (Drinking in Public Places); Subtitle 33 (Minors –Alcoholic Beverages), 25-2 (loitering liquor establishment).
- <sup>64</sup> Baltimore City Code Police Ordinance, Art 19, Subtitle 43 (Public Nuisances); Art. 43A-1 (Neighborhood nuisances especially §§ 43-1, 43-3, 43A-1, 43A-2.
- <sup>65</sup> Md. Code Ann. Art. 25A, § 5(O); Md. Tax-General Code § 5-102(c).
- <sup>66</sup> See, e.g., Art. 2B, §§ 4-202, 11-503 (license fees in Baltimore).
- <sup>67</sup> Art 2B, § 8-101
- <sup>68</sup> 53 Cal. Rptr. 2d 120, 133-38 (Cal. Ct. App. 1996), review/rehearing denied, Cal. Supreme Court Minute, Aug. 14, 1996.
- <sup>69</sup> *Id.* at 133 (citations omitted).
- <sup>70</sup> *Bowie Inn Inc. v. City of Bowie*, 335 A.2d 679, 690 (1975).