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## Bringing Down The Walls Of State Pre-emption: California Cities Fight For Local Control Of Alcohol Outlets

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### I.

#### INTRODUCTION

Many low-income minority neighborhoods are saturated with liquor stores. They serve as poignant reminders of inner-city problems, and contribute to crime while discouraging business development. Often problem stores in overconcentrated areas go unchecked, due to limited law enforcement resources.

Under California law, the State issues and revokes liquor licenses, and local governments cannot directly restrict existing licenses.<sup>1</sup> City government and police have the responsibility to respond to criminal activities around the stores,<sup>2</sup> but uncertain authority to set operating stan-

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1. CAL. BUS. & PROF. CODE § 23790 (West 1997).

2. See generally DEPARTMENT OF ALCOHOLIC BEVERAGE, 16-24 (1994)(questions and responses concerning enforcement and violations of the Act).

dards for existing problem liquor store owners. The challenge for local governments is to utilize land use tools to set operating standards for stores while forcing store owners to pay related law enforcement expenses.

Part I of this piece will explain the importance of land use restrictions for areas with a high concentration of liquor stores. This paper uses the term, problem store<sup>3</sup> to refer to a store where patrons or others engage in nuisance activities around the store such as harassing passersby, dealing drugs, or soliciting prostitution.<sup>4</sup> A store may also be a problem store where people who are not even patrons participate in nuisance and criminal activities openly and notoriously; further, to qualify as a problem store these nuisance and criminal activities must be "of a continuing nature [such] that the licensees should have known of the activity."<sup>5</sup> Next this piece will argue that, because these stores create an environment that exacerbates social problems, cities need authority to regulate the operation of liquor stores.

Part II will explain the conflict between State pre-emption and local control. Originally, state pre-emption was intended to limit local control of regulation and to promote the development of a unified alcohol market. Therefore, authority to issue and police alcohol licenses was originally given to the State Department of Alcoholic Beverage Control (ABC). Currently, the ABC primarily issues and investigates new licenses and does little policing of problem stores. This section examines the ABC's oversight of problem liquor stores and recent legislative attempts to improve ABC's regulation while supporting local law enforcement around stores.

Part III will discuss the City of Oakland's controversial 1993 Education, Monitoring, and Enforcement Ordinance. This legislation made store owners responsible for nuisance activities around their stores, thereby expanding the limits of State pre-emption of alcohol regulation.<sup>6</sup> The Oakland ordinance identified all existing liquor stores as "deemed approved" and required all liquor stores to comply with new performance standards.<sup>7</sup> In addition, the City of Oakland imposed a \$600 fee on liquor licenses to pay for enforcement of the restrictions. This section will also discuss *Korean-American Legal Advocacy Found. v. City of Los Angeles*,<sup>8</sup>

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3. This paper uses the term "problem liquor store" instead of "nuisance liquor store," because activities around these liquor stores may not meet the legal definition of the term nuisance as defined in land use jurisprudence.

4. See, e.g., DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, ABC ENFORCEMENT MANUAL 35-36 (1995).

5. *Id.* at 36.

6. Oakland, Cal., Ordinance 11,624 (July 27, 1993).

7. *Id.*

8. 28 Cal. Rptr. 2d 530 (1994).

a case involving restrictions placed on owners who were rebuilding stores destroyed during the 1992 Los Angeles riots. This case may have implications concerning a city's ability to both impose conditions on existing liquor stores and require store owners to pay public costs associated with their businesses. The conclusion will propose that general nuisance abatement actions are not effective alternative approaches to addressing existing problem liquor stores in high concentration areas. In a general nuisance abatement action, a city brings suit against a landowner in court or in an administrative hearing alleging that the property is a public nuisance and asks that the nuisance be abated. Taking on each store one at a time may prohibit effective regulation of problem stores. Requiring all stores to meet performance standards to prevent known problems is more likely to result in effective enforcement in a high concentration area. Local governments that set and enforce performance standards are better equipped to address neighborhood concerns about the stores.

## II.

### AN OVERCONCENTRATION OF LIQUOR STORES LEADS TO VARYING PROBLEMS

Many different types of retailers, including major grocery stores and major drug stores, have licenses to sell alcohol. However, the debate over problems with alcohol outlets generally focuses on "mom and pop" markets. Many mom-and-pop markets are important in low-income communities where no grocery or drug stores exist. However, a number of these small markets opened before strict restrictions on alcohol were implemented and therefore comprise the majority of the problem stores.

#### A. *Problem Liquor Stores Share Common Characteristics*

Problem liquor stores primarily hold Type 20 licenses, sell fortified wines while selling few other amenities and market their products to minority youth. In California, liquor stores typically hold a Type 20 (off-sale beer and wine license) or a Type 21 (off-sale beer, wine and distilled spirits) liquor license. A store can sell fortified wines with either type of license.<sup>9</sup> However, low-income neighborhoods are saturated with Type 20 beer and wine licenses that permit a store to sell wines with high alcohol contents while bypassing the stricter Type 21 licenses.

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9. The Type-21 license, also known as the high-alcohol-content license, is more difficult to obtain.

Fortified wines are sold almost exclusively in minority neighborhoods and target the most vulnerable segments of those communities.<sup>10</sup> These wines are cheaply priced and have an extra-high alcohol content. They target the "misery market" within those communities. It has been claimed that on the day welfare checks are dispersed, the price of Cisco increases.<sup>11</sup>

Wine and beer products sold in the inner city generally have high alcohol content. For example, most wine is nine percent to ten percent alcohol, and wine coolers are five percent alcohol.<sup>12</sup> Fortified wine Mad Dog contains 13.5% alcohol and Cisco is twenty percent alcohol.<sup>13</sup> In addition, Cisco comes in a variety of fruit flavors, "including strawberry, kiwi, black cherry, orange, peach, berry and 'Caribbean sunset'"<sup>14</sup> and looks and tastes like soda. Consequently, these cheap fortified wines are marketed primarily to minority youth. A popular brand of malt liquor, St. Ides, uses well-known rappers to market its product. Such figures are often seen as role models for black youth.<sup>15</sup> One high-alcohol-content beer commercial is aired on Black Entertainment Television, but not on other television stations. The commercial portrays the malt liquor as a part of young black life. Resembling a music video, the commercial opens with a scene of young people dancing, playing dominoes and drinking alcohol. The camera turns to one black man sitting on the porch drinking the beer who says, "Yeah, things are back to the way they used to be."

### *B. Minority Liquor Store Ownership Has Changed In Low-Income Communities*

The alcohol industry portrays liquor stores as a way for minorities to own businesses. During the early 1980s, the U.S. Small Business Administration granted significant numbers of alcohol outlet loans to minority businesses because they were seen as likely successes.<sup>16</sup> Liquor stores

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10. Jim Gogek, *Racism in a Bottle: Selling Cisco to Children*, SAN DIEGO UNION-TRIB., July 26, 1993, at A2. (Canadaigua Wine Co. Inc. targets minority neighborhoods. Most people in San Diego's white neighborhoods have probably never heard of Cisco, but Cisco is available at most liquor stores in black neighborhoods.)

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. Ice Cube, a popular rap star, is a spokesperson for St. Ides. Ice Cube is generally seen as a positive role model for black youth. He starred in "Boyz in the Hood," a movie about black men growing up in a Los Angeles ghetto, and later in "Higher Learning," a movie about racial tension on a college campus.

16. JAMES F. MOSHER & ROSE M. WORKS, *CONFRONTING SACRAMENTO: STATE PRE-EMPTION, COMMUNITY CONTROL, AND ALCOHOL-OUTLET, BLIGHT IN TWO INNER-CITY COMMUNITIES* 7 (1994).

require little capital and generate a lot of cash, therefore an owner of a small liquor store needs only a few shelves and a cash register to open. Additionally, distributors often provide refrigeration for their products and most provide advertisement free of charge. Thus, liquor stores are viewed as a quick way to turn capital into cash.

While small businesses in low-income neighborhoods tend to rely on local people for patrons, they do not employ large numbers of area residents.<sup>17</sup> Furthermore, the quality of jobs is fairly low, providing little opportunity for upward mobility.<sup>18</sup>

Ownership of the liquor stores has passed from one ethnic group to the next over the years. A case study examining efforts to stop the proliferation of liquor stores in Oakland and Los Angeles explains that African-Americans began to own liquor stores in Oakland in the early 1950s and 1960s because of various economic development efforts.<sup>19</sup> During the 1980s African-Americans began to sell their stores to Middle Eastern immigrants. Today, the stores are primarily owned by people of Middle Eastern descent. While the alcohol industry portrays local efforts to control problem liquor stores as racism against some ethnic groups, there have always been problems associated with the stores regardless of who owned them.

What has changed over the years, however, are the methods available to communities to hold store owners accountable for nuisance activities around their stores. Mosher and Works note that when store owners no longer shared the same ethnic background as the community where they did business, they were less responsive to community demands.<sup>20</sup> Presumably, when the store owners and residents shared common social groups and institutions, residents were better able to impose restrictions on the store owners through informal means. To the extent that there are racial tensions between residents and store owners, the two parties may be unable to resolve issues surrounding the liquor store.

Alternatively, some suggest that the lack of responsiveness to the community may be due to the fact that many owners of businesses in low-income neighborhoods do not actually live in the neighborhoods where they do business. As Consumer Union reported, "It is interesting to note where the owners of the business in low-income areas actually live: elsewhere, regardless of race."<sup>21</sup> The argument is that store owners who live and participate in the community where they do business have

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17. David D. Troutt, *The Thin Red Line: How the Poor Still Pay More*, CONSUMERS UNION, 1993, at 35. (Small businesses typically employ less than 20 people).

18. *Id.*

19. MOSHER & WORKS, *supra* note 16, at 26.

20. *Id.*

21. TROUTT, *supra* note 17, at 27.

better relationships with the community. Thus, the store owner and the community are better able to resolve issues surrounding alcohol outlets.

*C. Physical, Environmental, And Operational Factors Affect the Incidence of Crime*

In addition to the physical layout, the operating standards of liquor stores may have an impact on the crime rate. However, there are non-confrontational actions, such as providing better lighting, earlier store closure, and clearing windows to increase visibility for the police, that would aid in reducing crime near liquor stores. Studies have explored whether the environmental design of liquor stores can create a situational risk for criminal activities, though the crime may not be alcohol related per se.<sup>22</sup> In 1975, Crow & Bull studied 120 stores — 60 experimental and 60 control stores to examine:

cash handling procedures which limited cash; signs indicating limited cash; enhanced visibility inside and out; elimination of escape routes; use of security devices; encouraging visits from police and cab drivers; enhancing employee alertness; and keeping the stores clean.

The study concluded that the experimental stores had fewer robberies than the controlled stores. In 1983, another study examined whether crime was more likely to occur during overnight hours (11 p.m. to 6 a.m.). The study produced contradictory results, finding that the peak hours for crime were generally 9 p.m. to 11 p.m. in one year, and peak hours were 11 p.m. to 6 a.m. in another year. Further, the study found that although the success rate of robberies did not depend on the number of victims, most convenience store robberies involved only one person.

Last, in 1986, White studied seventy-two stores to determine whether "the lighting of the store and premises, visual obstructions to cashiers, and the number of clerks on duty"<sup>23</sup> influenced others to rob the store. He found that the number of clerks on duty was the determinative factor in whether the store was robbed. A later study confirmed White's results. In the later study, a researcher asked sixty-five convenience store robbers to rank the most desirable characteristics in robbing a store. These studies suggest that the number of clerks on duty, cash handling procedures, elimination of concealed access, enhanced exterior visibility, early closing time, and location of the cashier are among the

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22. R.D. Hunter & C.R. Jeffery, *Preventing Convenience Store Robbery Through Environmental Design*, in *SITUATIONAL CRIME PREVENTION: SUCCESSFUL CASE STUDIES 194-204* (Clarke RV, ed. 1992)(summation of studies examining conditions that make convenience stores more vulnerable to crime).

23. *Id.*

factors that reduce crime.<sup>24</sup>

Another factor in crime rates is the imposition of conditional use permits. Where cities have been able to impose conditions on new liquor stores applying for land use permits, they note a difference between the stores with the conditional use permits and those without them. For example, "[t]he cities of Los Angeles, Berkeley and Stockton all report virtually no trouble with alcohol outlets operating under [conditional use permits], but continue to have problems with outlets operating without the [conditional use permits]."<sup>25</sup>

### *1. Studies Have Examined Whether The Environment Around Stores Makes Crime More Likely*

At times, store owners need to take safety precautions to compensate for the unsafe environment around the store. For example, one study examined whether convenience stores are more likely to become victims of violence under four circumstances: (1) if the store was near a major transportation route, (2) if there was light traffic around the store, (3) if the store was in a residential or vacant land use area, and (4) if there were few other commercial activities around the store.<sup>26</sup> The study looked at thirty-nine stores in Tallahassee, Florida, and found that none of the factors were determinative of the potential for crime alone, but all four factors were significant when combined.<sup>27</sup> Other studies have confirmed that a store in a commercial or residential area or on a busy street is less likely to experience crime than stores in isolated areas.<sup>28</sup>

### *2. A High Concentration Of Liquor Stores In Low-Income Neighborhoods Further Encourages Crime*

Distinguishing areas with a high concentration of liquor stores from other areas requires a case-by-case analysis. In practice, local planning departments should identify overconcentrated areas. From legislative attempts to define concentration, studies regarding alcohol availability, and a study of the City of Oakland, one can discern factors which determine whether there is an overconcentration of liquor stores. Oakland, Califor-

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24. *Id.* at 201.

25. The Marin Institute for the Prevention of Alcohol and Other Drug Problems, Information Sheet: Alcohol Availability, Economic Development and Local Zoning Ordinances: Key Facts (citing Friedner Wittman et al., *CUPs, Redevelopment, Stings and Coordination with the ABC: Experience in Preventing Problems with Retail Alcohol Outlets in Seven California Cities* (1992)).

26. Hunter and Jeffery, *supra* note 22, at 196-97.

27. *Id.*

28. *Id.* at 199.

nia is a particularly important municipality to study because it pioneered the State's most aggressive anti-problem liquor store ordinance in response to community concerns. To help identify high concentration areas, one should also examine other factors such as: the ratio of stores to the population, character of stores, geographic area, character of area (residential or business) and the nature of the crime around that store.

A case study of problems associated with overconcentration is helpful, because quantitative legal studies of overconcentration often combine college towns and rural communities together with inner cities, although each of these communities experiences different kinds of social problems associated with an overconcentration of stores. Recent legislation defines an "undue concentration of liquor stores" to be either (1) a report district with twenty percent more crime than the average of all reporting districts in its police jurisdiction, or (2) areas where the ratio of liquor licenses in a census tract exceeds the ratio of licenses to the population for the county as a whole.<sup>29</sup> In determining the ratio of licenses to the population, the entire population is counted, including minors who cannot legally buy alcohol. Thus, in counties with many children, the population ratio will not accurately reflect the extent of the overconcentration. Similar problems have arisen with legislative attempts to define overconcentration of outlets for the purposes of a moratorium on new Type 20 licenses in overconcentrated areas.<sup>30</sup> Legislation has defined overconcentration as an incorporated city or a county where the licenses ratio of Type 20 beer and wine licensees exceeds one per 2,500 residents, or a city and county where the ratio of the total number of beer and wine licenses and general licenses exceeds one per 1,250 residents.<sup>31</sup>

Studies have demonstrated that there is a direct correlation between the number of liquor stores and crime.<sup>32</sup> An early study examined the relationship between a high concentration of alcohol outlets and the number of alcohol-related crimes.<sup>33</sup> The researchers looked at an urban area with a population of 400,000 (259,000 were of age to legally purchase alcohol) and 215 liquor establishments (stores and bars).<sup>34</sup> The study

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29. CAL. BUS. & PROF. CODE § 23958.4 (West 1994).

30. CAL. BUS. & PROF. CODE § 23817.5 (WEST 1994).

31. See Cal. Regulatory Law Rptr. (Center for Pub. Interest Law, Univ. of San Diego Sch. of Law) Vol. 15 No. 4, at 138 (Fall 1995).

32. See generally Lowel W. Gerson & Donald A. Preston, *Alcohol Consumption and the Incidences of Violent Crime*, 40 J. OF STUD. ON ALCOHOL 307-31 (1979); R. Watts & J. Rabow, *Alcohol Availability and Alcohol-Related Problems in 213 California Cities*, 7:1 ALCOHOLISM: CLINICAL AND EXPERIMENTAL RESEARCH 47-58 (1983); Richard A. Scribner et al., *The Risk of Assaultive Violence and Alcohol Availability in Los Angeles County*, 85:3 AM. J. OF PUB. HEALTH 335 (1995); R. PARKER & L.A. REBHUN, *ALCOHOL AND HOMICIDE A DEADLY COMBINATION OF TWO AMERICAN TRADITIONS* (1995).

33. Gerson & Preston, *supra* note 32, at 307.

34. *Id.* at 308.



classified a crime as alcohol-related if it: (1) violated a specific alcohol law; (2) the victim was drinking; (3) occurred in connection with an alcohol establishment; or (4) alcohol was described in the police report.<sup>35</sup> The study reported that of 50,009 offenses reported in one year, 12.2% were alcohol related.<sup>36</sup> Further, 32.8% of the 5,178 aggressive acts were alcohol related and 3.2% of violations of drug statutes were alcohol related.<sup>37</sup> There were too few homicides for the study to draw conclusions about the correlation between alcohol and murders.<sup>38</sup> The study concluded that alcohol consumption is highly associated with crime.<sup>39</sup>

A more recent study determined that a community with 100 or more outlets and a population of 50,000 will experience an annual increase of 2.5 violent crimes for every new alcohol outlet.<sup>40</sup> The researchers took into account other variables of crime such as the level of poverty, race of victims, the age of perpetrators, whether the area is urban and the social structure of the community.<sup>41</sup> That study classified homicide, rape, robbery and aggravated assault as violent crimes. Another study confirmed that there is a causal link between the number of distilled spirit outlets and homicide.<sup>42</sup> In addition, drinking and driving studies have demonstrated that neighborhoods near highly concentrated areas have high levels of drinking and driving.<sup>43</sup> These studies only confirm what residents and police have known for years.

The City of Oakland has a high concentration of liquor stores in its low-income neighborhoods. As of June 1994, the City of Oakland had issued 911 alcohol licenses; of these, 385 were for liquor stores.<sup>44</sup> A 1993 Consumers Union study of where low-income consumers in Los Angeles and Oakland "go for their basic needs, how they get there, and what they pay relative to middle-income households in the same city" found that residents in poor neighborhoods are paying more for basic necessities.<sup>45</sup> When comparing West Oakland to Piedmont the study found that there was one liquor store per 298 residents in less affluent West Oakland versus one liquor store per 3,000 residents in the more affluent

35. *Id.*

36. *Id.* at 309.

37. *Id.*

38. *Id.*

39. *Id.* at 311.

40. Scribner et al., *supra* note 32, at 335.

41. *Id.*

42. PARKER & REBHUN, *supra* note 32, at 77-101.

43. Paul J. Gruenewald et al., *The Geography of Availability and Driving After Drinking* 967-983 (1996).

44. Diana M. Williams, *New Age Of Enforcement: Oakland Launches Concerted Attack On Liquor Store Loitering*, OAKLAND TRIB., Mar. 30, 1997, at C1.

45. TROUTT, *supra* note 17, at 12.

Piedmont area.<sup>46</sup>

The crime around liquor stores in low-income Oakland neighborhoods is typical of the kind found in high concentration areas. The Oakland City Council found that liquor stores created land use problems like "traffic problems, blight, escalated noise levels and high rates of crime," as well as public nuisance problems like "litter, loitering, prostitution, drug transactions, public urination, and public drunkenness."<sup>47</sup> In Oakland, "the ten worst [liquor stores], all in the inner city, accounted for 288 offenses in 1993, including 78 drug arrests."<sup>48</sup>

Some blame the higher crime rates on the sale of high-alcohol-content fortified wines.<sup>49</sup> Police note that even selling common household items like Brillo pads, baking soda, and plastic bags (frequently used by crack addicts) exacerbates neighborhood problems by encouraging drunkenness and drug use.<sup>50</sup>

### *3. Neighborhoods With A High Concentration Of Liquor Stores Lack Other Essential Businesses*

Oakland's City Council was motivated to address the problem of liquor outlets because the high concentration of liquor stores in pockets of the City affected economic growth and the City's image.<sup>51</sup> The City of Oakland is 44% black, 32.5% white, 14.9% Asian, and remaining 8.6% of other ethnic groups.<sup>52</sup> The median household income of Oakland is \$27,095 as compared to the state median income of \$35,798.<sup>53</sup>

Low-income communities have difficulty attracting businesses other than liquor stores, because there is a perception that low-income communities cannot support other kinds of businesses. The concentration of liquor stores in many low-income areas furthers negative stereotyping about the consumer habits of people living in those areas. However, Troutt's study for Consumers Union determined that residents in low-income neighborhoods had comparable buying power to residents in more affluent Oakland neighborhoods. Yet, because few businesses are

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46. *Id.* at 25.

47. Oakland, Cal., Ordinance 11,624 (July 27, 1993).

48. JIM MOSHER, THE MODEL CALIFORNIA STATE ALCOHOL BEVERAGE CONTROL STATE/LOCAL PARTNERSHIP ACT 2 (1995).

49. Phillip Babich, *Neighbors Force Oakland Liquor Stores to Clean Up: New City Program Takes Aim at Liquor Stores*, EXPRESS, Feb. 7, 1997, at 3.

50. *Id.*

51. MOSHER & WORKS, *supra* note 16, at 27 (quoting Colette Winlock, Executive Director of National Black Alcoholism Council).

52. 1990 U.S. Census Data, (Apr. 29, 1997) <<http://cedr.lbl.gov/cdrom/lookup>>.

53. *Id.*

located in their neighborhoods, low-income residents are forced to leave their communities to buy basic necessities.

When asked what kinds of stores and services low-income residents wanted in their neighborhood, they responded:

A major chain supermarket, a general retail store, gas stations, drugstores, a post office, banks, and bulk shopping warehouses. Finally, several requested that the remaining malls in their neighborhoods . . . "be fixed up."<sup>54</sup>

In West Oakland there is only one major grocery store, Acorn Supermarket; that is one supermarket per 16,445 people.<sup>55</sup> For a full month supply of groceries for a family of four, Acorn Supermarket is between fifteen percent and twenty-eight percent more expensive than the stores in Rockridge.<sup>56</sup> Consequently, residents in West Oakland consistently leave their neighborhood to buy essentials at grocery stores in more affluent neighborhoods which provide less expensive, better quality products.

Consumers Union found that the perception that low-income communities could not support profitable business was unwarranted. The report noted that businesses in low-income areas were remarkably stable.<sup>57</sup> It also found that crime was a problem particular to liquor stores and check cashing centers in low-income areas,<sup>58</sup> and that other types of businesses did not experience any higher crime rates than those in middle-income areas.<sup>59</sup>

#### *4. Closing Problem Liquor Stores In High Concentration Areas Can Allow Other Kinds Of Business To Develop*

If authorities close problem liquor stores in high concentration areas or require more stringent operating standards, other types of business can move in. After the 1992 riot in Los Angeles, community activists demanded that owners seeking to rebuild their liquor stores comply with new operating standards. Holding store owners responsible for taking measures to make their stores safe made it more difficult to rebuild stores. Thus, the per capita ratio of liquor stores to residents in thirteen South Central zip codes was significantly lower three years after the riots.<sup>60</sup> In addition, a coalition of community groups developed the Liquor

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54. Troutt, *supra* note 17, at 29.

55. *Id.* at 42.

56. *Id.* (Rockridge is an affluent neighborhood of Oakland).

57. *Id.* at 31.

58. *Id.*

59. *Id.*

60. David P. Mackinnin et al., *Development and Applications of a City-Level Alcohol Availability and Alcohol Problems Database*, STATISTICS IN MEDICINE, 591-604 (1995).

Store Conversion Program with a grant from the City of Los Angeles to encourage former liquor store owners to open different kinds of businesses.<sup>61</sup> The community celebrated when a Laundromat was built in the location of a former liquor store.<sup>62</sup>

Of course, Los Angeles differs from Oakland in that the Los Angeles Riot provided a unique opportunity for that city to start over. The challenge for Oakland and other California cities is to use available land use tools to close problem liquor stores and convert those properties to land uses which better meet community needs. A local administrative agency which sets operating standards and efficiently revokes land use permits will not revitalize inner-city neighborhoods by itself, however. The goal of local regulations aimed at existing liquor stores is to ensure liquor store owners comply with operating standards and pay costs associated with policing their stores. Such an administrative system which sets and enforces operating standards is particularly important in a high concentration area where police and other officials are unable to prosecute each store individually because of limited resources. As studies have demonstrated, store owners can take various actions to reduce crime around their stores.<sup>63</sup> Cities that have been able to impose operating standards on new stores through conditional use permits report almost no problems with those stores.<sup>64</sup> By making store owners pay the costs associated with their businesses, cities can alleviate blight related to liquor stores in high concentration neighborhoods.

### III.

#### THE CONFLICT BETWEEN STATE PRE-EMPTION AND LOCAL CONTROL

State pre-emption of alcohol regulation is embedded in both the California Constitution and state law. Article XX, section 22 of the California Constitution provides "[t]he State of California . . . shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of alcoholic beverages within the State."<sup>65</sup> However, state law also recognizes local governments' right to zone for land uses. Business and Professional Code Section 23790 provides:

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61. K. Connie Kang, *Plan To Convert Liquor Stores Unveiled; Rebuilding: Using A \$260,000 City Grant, A Coalition Of Community Groups Intends To Help Owners Whose Markets Were Destroyed In The Riots Switch To Other Businesses*, L.A. TIMES, June 3, 1993, at B1.

62. Edward J. Boyer, *A New Cycle; A Laundry Rises From the Rubble of a Liquor Store Burned in Riots*, L.A. TIMES, Oct. 27, 1994, at B1.

63. See e.g., *supra* note 61, at B1.

64. *Id.*

65. CAL. CONST., Art. XX, § 22.

No licenses shall be issued for any premises which are located in any territory where the exercise of the rights and privileges conferred by the license is contrary to a valid zoning ordinance of any county or city.

Business and Professional Code Section 23791 provides that nothing in the ABC Act interferes with the powers of local governments to zone for land use. Nonetheless, local governments' power to enact land use and zoning restrictions relating to the operation of liquor stores is limited. Business and Professional Code Section 23790 also ensures that existing stores are grandfathered from new zoning ordinances provided that they "retain the same type of retail liquor licenses within a license classification" and "are operated continuously without substantial change in the mode or character of operation." An existing store is considered continuously operating if it closes for less than thirty days for repair or closes for repair due to destruction by an Act of God or toxic accident provided that repairs do not "change the nature of the licensed premises and [do] not increase the square footage of the business used for the sale of alcoholic beverages."<sup>66</sup> This statute has been interpreted as grandfathering existing liquor licenses from many new local regulations.

Given these statutes, the pre-emption issue becomes what rights the State has reserved for itself with respect to existing licenses; or, stated differently, to what extent can local governments police liquor stores. The general rule of State pre-emption is that local governments can enact regulations regarding the operations of existing liquor stores provided that the regulations do not directly affect the sale of liquor.<sup>67</sup> What constitutes a "direct" versus an "indirect" regulation is unclear. A court in Los Angeles held that a local ordinance requiring the posting of health warning signs wherever alcohol is sold was not pre-empted, because it did not directly affect the sale of alcohol.<sup>68</sup> Courts have also upheld ordinances that restrict entertainment on licensed premises,<sup>69</sup> require stores to collect deposits on bottles of alcoholic beverages,<sup>70</sup> and restrict drinking in public and in certain kinds of private business as not directly affecting the sale of alcohol.<sup>71</sup> In contrast, another court overturned a city ordi-

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66. CAL. BUS. & PROF. § 23790 (West 1996).

67. *Crownover v. Music*, 9 Cal. 3d 405, 417 (1973).

68. *California Restaurant Ass'n. v. City of Los Angeles*, 237 Cal. Rptr. 415, 418-19 (1987).

69. *City of Rancho Cucamonga v. Warner Consulting Servs.*, 213 Cal. App. 3d 1388 (1989)(city regulation of entertainment in clubs licensed to sell alcohol); *Daniel v. L.A. Board of Police Comm'n. of the City of Los Angeles*, 190 Cal. App. 2d 566 (1961)(permit requirement for live entertainment at alcoholic beverages sales); *Carolina Lanes v. City of Los Angeles*, 253 Cal. App. 2d 831 (1967)(no stripping); *Robins v. County of Los Angeles*, 248 Cal. App. 2d 1 (1966) (topless waitress).

70. *Park & Shop Markets v. City of Berkeley*, 116 Cal. App. 3d 78 (1981)(city may require licensed establishment to collect deposits on bottles of alcoholic beverages).

71. *People v. Brewer*, 223 Cal. App. 3d 990, (1991)(drinking in public); *Christmat, Inc. v.*

nance which prohibited the sale of alcohol at gas stations as being pre-empted by state law because it directly affected alcohol sales.<sup>72</sup> These cases suggest that courts will look at the purpose of the local ordinance. On the one hand, courts generally uphold regulations intended to address health concerns, criminal activities, public nuisances or other legitimate purposes unrelated to alcohol sales. On the other hand, local regulations that address the sale, purchase, possession and transportation of alcohol are invalid because of State pre-emption.

*A. State Pre-emption Of Alcohol Regulation Was Intended To Protect The Alcohol Industry In California*

After the repeal of Prohibition in 1933, power to regulate the taxation, distribution and manufacture of alcohol was delegated to the states in the Twenty-first Amendment to the United States Constitution. Article XX, section 22 of the California Constitution was adopted by a voter initiative that ended Prohibition in California.<sup>73</sup> The purpose of the provision was to prevent local communities from enacting legislation that would prohibit or severely restrict alcohol sales.<sup>74</sup> The alcohol industry actively campaigned for State control, because it insisted that local control would undermine the development of a state alcohol market.<sup>75</sup> "A major motivation in repealing Prohibition, from the state and federal government's standpoint, was the creation of a new revenue source."<sup>76</sup> At first, the Board of Equalization, which also collects taxes, regulated alcohol sales in California. But in 1954, the Department of Alcoholic Beverage Control was created to license and regulate alcohol sales in response to corruption within the Board of Equalization.<sup>77</sup>

Centralized control of alcohol allowed the alcohol industry to set state alcohol availability policy by successfully lobbying the state legislature. The Governmental Organization committees in the Assembly and Senate hear most industry related bills.<sup>78</sup> Both committees, along with a few others, are called "juice committees" because of their ties to the industry and the deference the committees grant the industry.<sup>79</sup>

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County of Los Angeles, 15 Cal. App. 3d 590 (1971)(banned drinking in modeling studios).

72. *Mussalli v. City of Glendale*, 205 Cal. App. 3d 524 (1988).

73. *MOSHER & WORKS*, *supra* note 16, at 11.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. Marin Institute for the Prevention of Alcohol and Other Drug Problems claims that during the first half of 1993, the California Beer & Wine Wholesalers Association contributed \$151,198 to 90 California legislators; the California Restaurant Association contributed \$117,500 to 65 California

The ABC views the investigation of suspected violations of law by current licensees as a secondary responsibility.<sup>80</sup> The department is understaffed and geographically distant from the local stores it regulates. "The small number of ABC field officers makes it difficult for the department to do preventative surveillance and puts extra enforcement burdens on communities."<sup>81</sup> Complaints against a nuisance liquor store must be brought under Business and Profession Code Section 25601 as a disorderly house which involves time consuming hearings and provides several opportunities for store owners to object to evidence presented.<sup>82</sup> To collect necessary evidence ABC officials must observe the establishment on several occasions and at several different times to establish every element of the statute.<sup>83</sup> Where there is a high concentration of stores, the evidentiary burden required to bring an enforcement action against an individual store may prohibit any enforcement.

Because of the shortage of ABC investigators, the residents and police often bear the burden of putting together a case against a problem store. Generally, there would need to be significant public outcry or outrageous activity around the store before the ABC initiates its own actions.

### B. New Legislation Leaves ABC Problems Unresolved

Recognizing the problems associated with alcohol outlets, the 1994 state legislature passed laws aimed at increased law enforcement around alcohol outlets, three strikes for sale to minors, and new operating standards for stores.<sup>84</sup> Part of the package of bills was aimed at stopping the

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legislators; Anheuser-Busch contributed \$68,250 to 54 California legislators; and the California Grocers Association contributed \$23,500 to California Legislators. It also claims that California Governor Pete Wilson owns over \$100,000 in Anheuser-Busch stock. Marin Institute for the Prevention of Alcohol and Other Drug Problems, *Relationship Between the Alcohol Indus. and Elected Officials: Key Facts* (1994) (internal citations omitted).

80. STATE OF CALIFORNIA, DEPT. OF ALCOHOLIC BEVERAGE CONTROL, *supra* note 4, at 13.

81. Freidner Wittman, *Issues in Controlling Alcohol Availability*, 62 WESTERN CITY 9, 10 n.11, (1986).

82. "Every licensee, or agent or employee of a licensee, who keeps, permits to be used ... any disorderly house or place in which people abide or to which people resort, to the disturbance of the neighborhood, or ... for purposes which are injurious to the public morals, health, convenience, or safety ..." CAL. BUS. & PROF. CODE 25601; see, also, STATE OF CALIFORNIA, DEPT. OF ALCOHOLIC BEVERAGE CONTROL, *supra* note 4, at 34.

83. *Id.*

84. Four bills were a part of the 1994 legislation. A.B. 2897, 1993-94, Reg. Sess., 1994 Cal. Legis. 2576 (West)(redefines overconcentration); A.B. 2742, 1993-94, Reg. Sess., 1994 Cal. Legis. 2572 (West)(sets operating standards for existing outlets); A.B. 463, 1993-94, Reg. Sess., 1994 Cal. Legis. 2565 (West); A.B. 987, 1993-94, Reg. Sess., 1994 Cal. Legis. 2571 (West)(provide money for local law enforcement); see also Jim H. Zomora, *New Laws Draw Bead on the "Bad" Liquor Stores; State Curbs Beer and Wine Sales, Pressures Owners to Roust Crooks*, S.F. EXAMINER, Sept.

proliferation of new liquor licenses in communities with an already high concentration of licenses and giving local communities more control over nuisance liquor stores. A moratorium prevents new licenses from being issued in several counties through 1998. The 1994 legislation also prohibits new licenses from being issued in high concentration areas unless the liquor store owners prove that the store serves "public necessity or convenience." The Caldera bill redefined the ABC rule for "undue concentration of liquor stores" to be either: (1) the areas with twenty percent more crime than the average reported crime for the police jurisdiction in which it is located, or (2) areas where the ratio of liquor licenses exceeds the ratio of licenses to the population as a whole for the jurisdiction. New licenses cannot be issued in areas of undue concentration as defined by the act unless the local government believes that the new store will serve public necessity or convenience.<sup>85</sup>

In addition, the term "public necessity or convenience"<sup>86</sup> has led to considerable debate statewide as groups try to determine its meaning. Critics argue that the public convenience or necessity provisions put resident on the defense when fighting a new liquor store. Owners of liquor stores always argue that their store serves public convenience or necessity. The "public necessity or convenience" test is "easily met by selling groceries in areas with few supermarkets."<sup>87</sup> The 1994 legislation was signed into law that September by Governor Pete Wilson. The minimum operating standards for all liquor licenses set by the 1994 legislation include:

- 1) posting "NO LOITERING" signs and "NO OPEN CONTAINER" signs;
- 2) no drinking outside the premises;
- 3) exterior of the building must be well lit;
- 4) owners must remove litter and graffiti within limits and
- 5) limited number of signs are allowed on windows so that police can see into the store.<sup>88</sup>

The law also requires ABC to discipline problem liquor stores for failing to take "reasonable steps" to correct "objectionable conditions" that occur on "abutting public sidewalks" within twenty feet of their store.<sup>89</sup> To date, there are no statistics regarding how many stores have complied with the new state operating standards. However, one would expect that

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21, 1994, at A5.

85. *Id.*

86. Shelley Ross Saxon, "Down with the Demon Drink": *Strategies for Resolving Liquor Outlet Overconcentration in Urban Areas*, Santa Clara Law Rev., 168-9, (1995).

87. *Id.*

88. CAL. BUS. & PROF. CODE § 24200 (West 1994).

89. *Id.*



the State still does not have enough enforcement officers to ensure that store owners comply with operating standards. The state arguably is not the best agency to enforce claims of violations of law against store owners. The local police department and city planning department are probably more familiar with the location and operation of liquor stores.

*C. Joint State And Local Authority Is Needed To Address Problem  
Liquor Stores*

Promoting liquor industry growth may no longer be a relevant goal; the current concerns are crime and business development. Accordingly, many argue that the State should now delegate more power to the local governments to police the liquor stores. The Model California State Alcohol Beverage Control State/Local Partnership Act explores potential state laws that could be enacted to give more power to local governments.<sup>90</sup> Mosher suggests that the State should set minimum standards and allow local governments to set tougher restrictions. The state would still issue liquor licenses, but local governments would issue land use permits. Thus, the State and local governments would work in tandem to police the licensees.<sup>91</sup>

It is also in the public interest to support joint state and local control of liquor licenses. For example, efforts to regulate smoking in public demonstrate the problems with weak state regulations and different local ordinances. In 1993, the City of Santa Clara passed the toughest anti-smoking law in the state. The following year, the state legislature passed Assembly Bill 13,<sup>92</sup> which set minimum standards on smoking regulations, but allowed cities to pass tougher regulations. The state legislation allowed smoking in bars attached to restaurants until 1997, whereas Santa Clara's ban on smoking in those bars became effective immediately. Many Santa Clara restaurants, bars and clubs lost business to competitors in nearby San Jose. One restaurant reported a twenty-five percent loss in business, and a lodge reported a ten percent loss in business.<sup>93</sup> In 1995, the city, not surprisingly, repealed its anti-smoking law.<sup>94</sup>

Similarly, in the context of alcohol regulation, one city may have difficulty setting operating standards for liquor stores and maintaining convenience stores where neighboring cities set less exacting standards. Store owners not subject to the same operating standards may also have

90. *Id.*

91. *Id.*

92. David A. Sylvester, *Santa Clara May Repeal Strict Anti-smoking Law — Non-smokers' Groups Fear Start Of Trend*, S. F. CHRONICLE, May 15, 1995, at A11.

93. *Id.*

94. *Id.*

more competitive pricing. Furthermore, in areas where the city limits do not reflect the social connection between residents, the problems in a high concentration area are likely to affect neighboring cities. A joint state-local partnership would ensure that stores throughout the state follow minimum operating standards and would allow local jurisdictions to set specific operating standards when conditions around the stores warrant them. The Model Act also assumes that parts of the Business and Professional Code which grandfather existing businesses from new city codes will be repealed.<sup>95</sup> It also provides that local governments may require existing liquor stores to comply with new operating standards within a specified time frame provided that store owners' due process rights are protected.<sup>96</sup>

#### IV.

#### OAKLAND ORDINANCE IS AN EXAMPLE OF A LOCAL EFFORT TO MAKE STORE OWNERS PAY THE PUBLIC COSTS ASSOCIATED WITH THEIR BUSINESSES

State law clearly allows cities to establish prospective regulations for new licenses. Many California cities have aggressively used land use techniques to control the number of liquor stores in their communities and have created operating standards for these liquor stores. Recognizing the environmental impact of liquor stores on the surrounding community, the Los Angeles City Council reversed the Planning Department's approval of a land use permit for the rebuilding of two liquor stores destroyed by the Los Angeles riots, and demanded that the store owners prepare environmental impact reports pursuant to the California Environmental Quality Act (CEQA).<sup>97</sup> Courts have held that local governments can also enact zoning ordinances that regulate the distance between new liquor stores provided that the regulations do not effectively prohibit al-

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95. MOSHER, *supra* note 48, at 11. CAL. BUS. & PROF. CODE § 23790 (existing liquor stores are grandfathered from new zoning ordinances); CAL. BUS. & PROF. CODE § 23790.5 (governing the concurrent sale of alcohol and gasoline).

96. MOSHER, *supra* note 48, at 20. The Act specifies that operating standards include, but are not limited to (1) the physical layout and condition of the building and area immediately surrounding the building, including parking lots; (2) entertainment facilities and activities, food service, and noise levels; and (3) alcoholic beverage sales and service practices, including the hours of sale, staff training, products offered for sale, and promotional activities. MOSHER & WORKS, *supra* note 16, at 26-27. By specifying allowable operating standards that may be imposed by local governments, the Act seeks to eliminate the confusion over direct and indirect regulation of alcohol sales in case law. The Act also acknowledges municipalities' right to charge a fee for city services used to police stores.

97. *City of Los Angeles v. Super. Ct. of Los Angeles County*, 95 C.D.O.S. 8929 (1995). (On appeal, the court refused to consider the store owners' arguments that liquor stores are categorically exempt from CEQA and alternatively, that their stores did not significantly affect the environment, because the trial court had not decided either issue.)

cohol sales altogether.<sup>98</sup> Additionally, cities can issue conditional use permits which set operating standards for new liquor stores.

In high concentration areas, the regulations do little to stop problems around pre-existing liquor stores. In Oakland, for example, nearly seventy-five percent of liquor stores were opened before the City of Oakland began requiring conditional use permits in 1977 and were not required to have such a permit.<sup>99</sup> The City created the Education, Monitoring and Enforcement Program as a means of setting operating standards for the liquor stores not covered by the 1977 conditional use permit ordinance. An existing store was considered "deemed approved," having the appropriate land use permit, provided that the store complied with new operating conditions. The City of Oakland acknowledged that the "deemed approved" status is the functional equivalent of a conditional use permit. The issue was whether the "deemed approved" ordinance is a legitimate means of imposing operating standards on pre-existing liquor stores that are grandfathered from conditional use permit laws.

#### A. *Oakland Ordinance 11,624 Pushed the Limits Of State Pre-emption*

The City of Oakland created a one year pilot program to test the affects of the "deemed approved" ordinance. Under the "deemed approved" ordinance, all liquor stores and patrons of liquor stores were required to "avoid creating a public nuisance, endangering public health or safety, or violating criminal laws."<sup>100</sup> Each liquor store also had to notify its patrons by posting operating standards.

Oakland also created an Alcoholic Beverage Sales Administrative Hearing Officer to hear complaints against liquor stores. The Alcohol Beverage Action Team was created to conduct License Education on Alcohol and Drugs (LEAD) jointly with ABC and to prevent violations of the operating standards. If an investigation found that a reasonable basis existed for the complaint, a hearing would follow. If an Alcoholic Beverage Sales Administrative Hearing Officer determined that a violation had occurred, specific conditions could be imposed on the establishment. If the liquor store violated the conditions, its deemed approved status could be revoked on public nuisance grounds. Store owners or any interested party could then appeal the decision to the Planning Commission and then eventually to the Oakland City Council.<sup>101</sup> The hope was that the Planning Commission and the Oakland City Council would listen to testi-

98. See *Floresta Inc. v. City Council of San Leandro*, 190 Cal. App. 3d 599, 605 (1961).

99. Diane M. Williams, *New Age of Enforcement*, OAKLAND TRIB., Mar. 30, 1997, at C2.

100. Oakland, Cal., Ordinance 11,624 (July 27, 1993)(findings).

101. *Id.*

mony from residents regarding stores and would be more responsive to community concerns.

The Ordinance imposed a \$600 tax-deductible fee on all licenses to raise \$360,000, the anticipated cost of law enforcement activities around liquor stores. Additional fees were only assessed when an inspection was required. In cases of financial hardship, a licensee could make quarterly payments. The alcohol industry did not dispute whether the fee covered only the cost of the program in their brief to the Superior Court. They simply argued that state pre-emption of alcohol regulation prohibited the City from charging a fee.<sup>102</sup> They further argued that the statute violated their equal protection rights because it singled them out for special regulations.

Businesses such as pool halls, pawn shops, transient hotels, housing projects, all-night restaurants, donut shops, used car lots, gun stores, lottery outlets, porn stores and movies houses, as well as parks and schools, all act as 'magnets' for criminal and nuisance activities.<sup>103</sup>

The alcohol industry also argued that they should not be held singularly responsible for crime in their neighborhoods. They argued that the City of Oakland must show that their stores cause the nuisance activities, "as opposed to being caused by homeless or unemployed people who frequent the area."<sup>104</sup> Moreover, the industry asserted that the regulations unjustly applied to all liquor licenses:

from Safeway to Quik Stop and every restaurant, gas station or other establishment which sells alcoholic beverages in the city whether (liquor is) only 10 percent or 90 percent of its business.<sup>105</sup>

The Oakland Ordinance's failure to distinguish between "mom and pop" markets and major grocery store chains, on its face, appeared to support the alcohol industry's position.

The alcohol industry further argued that their due process rights were violated because the ordinance allowed their "deemed approved" status to be revoked without a court trial or ABC hearing. They felt that their vested rights in liquor store ownership were too important to be extinguished by a non-judicial body. Last, they argued that the ordinance

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102. Brief for the California Beverage Retailer Coalition, at 4, *California Beverage Retailer Coalition v. City of Oakland*, No. 726329-3, (Ca. Ct. App., Jan. 25, 1997)(motion for preliminary injunction against enforcement of the Oakland ordinance).

103. *Id.* at 15.

104. *Id.* at 13.

105. Don Martinez, *Oakland Ordinance on Liquor Stores Shot Down in Court, Many California Cities Hoped to Imitate Measure*, S.F. EXAMINER, Dec. 22, 1993, at C19 (quoting Renee Wasserman, Attorney for the California Beverage Retailer Association).

was vague because it did not specify under what conditions their business permit would be revoked.

As a result, the alcohol industry sought an injunction against enforcement of the ordinance. At the beginning of 1995, Alameda County Superior Court Judge Lambden granted the store owners summary judgment based on State pre-emption grounds and issued a preliminary injunction against enforcement of the Oakland ordinance.<sup>106</sup> The court interpreted *Korean-American Legal Advocacy Found. v. City of Los Angeles*,<sup>107</sup> the leading case on State pre-emption of alcohol sales, to imply that "section 23790 does pre-empt local zoning ordinances at least insofar as such ordinances purport to regulate previously existing businesses." Judge Lambden stated that *Boccatto v. City of Hermosa Beach*,<sup>108</sup> a later case interpreting *Korean-American*, supported a narrow interpretation of *Korean-American*. The judge also found that there was no precedent in alcoholic beverage law which would allow a city to impose fees only on liquor store owners.<sup>109</sup>

In July of 1996, the court of appeals overturned the preliminary injunction and heard arguments in the Oakland case. It found that the ordinance was not pre-empted by state law, because it targeted nuisance activities around alcohol outlets and did not directly affect the sale of alcohol.<sup>110</sup> The California Supreme Court denied review, leaving the City's right to implement its ordinance intact. Thereafter, the City and the alcohol industry settled. This left the issues of equal protection, due process and the right of the State to regulate exclusively with the ABC unresolved.<sup>111</sup> Notwithstanding these unresolved issues, the Oakland case and other legal precedents affirm the right of local governments to set operating standards on liquor stores.

### B. *Korean-American Upheld Local Government Authority to Regulate Nuisance Activities Around Liquor Stores*

Courts in recent cases have attempted to define the limitations a city may impose on existing liquor stores. *Korean-American*, the leading case on State pre-emption of alcohol regulation, affirmed the general rule that

106. Tanya Schevitz, *Judge Throws out Oakland's Liquor Store Crime Law*, S.F. EXAMINER, Jan. 6, 1995, at A7.

107. 23 Cal. App. 4th 376 (1994).

108. 29 Cal. App. 4th 1797 (1994).

109. *California Beverage Retailer Coalition v. City of Oakland*, No. 726329-3 (Alameda Super. Ct., Jan. 5, 1995)(order granting preliminary injunction).

110. *City of Oakland v. Super. Ct of Alameda County*, 45 Cal. App. 4th 740, 767 (1996).

111. *Letter from the City Attorney to the Oakland City Council Re: Calif. Beverage Retailer Coalition v. City of Oakland Alameda County Super. Ct. No. 726329-3* (Apr. 1, 1997).

local ordinances which do not directly affect the sale of alcohol are proper.

In *Korean-American*, the City of Los Angeles had adopted "deemed approved" standards similar to Oakland's for new and existing liquor stores. Some of the plaintiffs were owners of stores destroyed during the riots that occurred after the 1992 Rodney King verdict. When the City of Los Angeles imposed the operating standards on liquor stores seeking to rebuild after the riots, store owners argued that they were again being victimized. Here, the court of appeals held that Business Code section 23790 did not apply because the stores had not "operated continuously" due to the riots. The Business Code only exempts stores closed for less than thirty days or stores closed because of an Act of God.<sup>112</sup> The stores that were burned down during the riots did not fall into either of these categories.<sup>113</sup> The court also ignored the fact that some of the plaintiffs' stores were not burned down during the riots.<sup>114</sup>

The court in *Korean-American* stated that the Los Angeles ordinance was not invalid merely because a liquor store owner may lose her "deemed approved" status. The court also noted that the language of Business Code section 23790 demonstrates that the State did not intend to exclusively hold the power to abate nuisance activities around liquor stores. Moreover, the court found that the legislature intended to strictly limit the circumstances where a liquor store would escape local control.

The court further noted that the focus of the ordinance is to abate nuisance activities around liquor stores. It found that the conditions imposed on store owners seeking to rebuild do not "directly, or have as their effect, the regulation of alcohol licenses, nor regulation of the manufacture, sale, purchase, possession or transportation of alcoholic beverages."<sup>115</sup> Rather, the conditions seek to control illegal and nuisance activities around liquor stores. The court stated, "[t]hese are typical and natural goals of zoning and land use regulations."<sup>116</sup>

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112. Under the Model Act, local regulation regarding the concentration of licenses would not apply to pre-existing licenses that operate without a substantial change in character unless the store closed for more than 90 days. The cause of the closure does not matter under the Act. The act seeks to avoid the result of *Korean-American*, where store owners whose stores were destroyed by arson were not protected because only closures due to an Act of God are protected under the current law. Ninety days is a reasonable period for closure for repairs.

113. The Korean-American community lobbied the state legislature to pass Assembly Bill 1974, which would have exempted liquor store owners, burned out in the riots, from the Los Angeles conditions. Saxer, *supra* note 86, at 165, n.234. This bill was approved by the Assembly in 1993, but was put on hold at Mayor Riordan's request before it was introduced to the state senate. *Id.*

114. Brief for the City of Oakland and Coalition on Alcohol Outlet Issues, City of Oakland v. Super. Ct. of Alameda, Case No. 726329-3 (1995).

115. *Korean-American*, 23 Cal. App. at 388.

116. *Id.*

Moreover, the court found that the conditions have the effect of reducing nuisance activities, as intended. It stated, "that the conditions imposed under the ordinance may have some indirect impact on the sale of alcoholic beverages does not transmute the purpose or scope of the ordinance into a regulation merely seeking to control alcohol sales."<sup>117</sup> Thus, the court found that any incidental effect on alcohol sales did not undermine the ordinance's purpose. Later, the court in *Boccatto*,<sup>118</sup> interpreting *Korean-American*, struck down an ordinance by the City of Hermosa Beach that would have required all existing liquor stores to obtain conditional use permits within a certain period of time.

### C. Cities Should Ensure That Local Regulations Address Reported Problems

The nexus test used to evaluate land ordinances was established in *Dolan v. City of Tigard*.<sup>119</sup> The United States Supreme Court decided *Dolan* under the Takings Clause of the Fifth Amendment. In *Dolan*, the store owner wished to expand her business and applied to the city of Tigard for a land use permit. Approval of the building permit was conditioned on the distribution of land for a flood plain and a bike route according to the city's conservation law. The Court then found that the city's conditions were improper. In so deciding, the Court rejected the rational basis test followed by the majority of the states and established the nexus test. Under the nexus test, a local government has the burden of establishing that the conditions imposed upon a property owner are related to the goals of the ordinance. The Court stated, "no precise mathematical calculation is required," but a city must establish more than a rational basis.<sup>120</sup> It felt that a rough proportionality was required by the Fifth Amendment.<sup>121</sup> The Court stated that the conditions placed on the owner in *Dolan* failed the nexus test, because a flood plain could be established by prohibiting development along the river. Moreover, dedication of a bike path *could* further conservation efforts, but there was no proof that it *would*.<sup>122</sup>

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117. *Id.* at 389.

118. 29 Cal. App. 4th 1797 (1994).

119. 114 S. Ct. 2309 (1994); cf. Friedner D. Wittman, *Development and Use of Conditional Use Permits to Prevent Problems Related to Retail Alcohol Outlets: An Overview*, in ESTABLISHING A PARTNERSHIP: ABC, LOCAL JURISDICTIONS, LAW ENFORCEMENT, LICENSEES, AND THE COMMUNITY, May 12, 1995.

120. 114 S. Ct. at 2319.

121. *Id.*

122. *Id.* at 2320-22.

The Court distinguished *Dolan* from previous cases, noting that *Dolan* involved an adjudicatory hearing where the City of Tigard made an adjudicatory decision in respect to the owner's property.<sup>123</sup> Other cases involved a legislative rule of general application. In the context of local governments regulating liquor stores, a city's adjudicatory hearing, which determines that a store owner must comply with new operating standards as a condition of continuing to do business, may implicate some of the Takings concerns of *Dolan*. However, the conditions imposed on liquor store owners are more likely to pass the nexus test. In a case where the city has determined that a store is a public nuisance, there is no Takings issue. Further, cities can place operating conditions on a store with no finding of a public nuisance. Studies demonstrate that conditions such as providing more lighting and better security are specifically related to problems associated with liquor stores. Moreover, the conditions placed on liquor store owners are less oppressive than those imposed upon the owner in *Dolan*.

Generally, the most salient issue surrounding local liquor ordinances is whether it is fair to single out liquor store owners as a class and force them to take precautions to reduce crime. As an equal protection concern, the proper standard is a rational basis test. Under this test, the plaintiff bears the burden of proving that the law is not rationally related to the goals it is meant to achieve. In contrast, under the Takings Clause analysis of *Dolan*, the burden of proof is on the local government and a higher evidentiary standard must be satisfied.

### 1. Store Owners Are Concerned About Protecting Due Process Rights

Though store owners retain and may transfer their liquor license after the city revokes their land use permit, transferring liquor licenses has become more difficult. "Transfer must be approved by ABC, which now must notify local governmental agencies, in addition to local law enforcement, of the application."<sup>124</sup> Also, the ABC must hear any protest before it decides whether to grant the transfer.<sup>125</sup> In addition, transferred licenses often are required to meet the land use regulation of their new location.<sup>126</sup> Though revoking a land use permit may significantly affect the value of a license, a city may still revoke the land use permit where there has been a public nuisance finding.

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123. *Id.* at 2316.

124. Cal. Regulatory Law Rptr. (Center for Pub. Interest Law, Univ. of San Diego Sch. of Law) Vol. 15 No. 1, at 101 (Winter 1995).

125. *Id.*

126. *Id.*



The California Supreme Court has held that a county may revoke the right of an existing business to continue to operate where the finding of a public nuisance was based on a legitimate use of police powers.<sup>127</sup> In that case, the ordinance rezoning an area provided that non-conforming uses would not be permitted where there was a finding of a nuisance. The court found that such action was a legitimate exercise of the city's police powers.

Furthermore, the United States Supreme Court upheld a city ordinance that prohibited excavating below the water table and imposed an affirmative duty to refill an excavation even though the ordinance had the effect of prohibiting a dredging and pit excavation.<sup>128</sup> In another case, the court upheld the power of a city to declare an existing building which failed to meet new safety standards a public nuisance.<sup>129</sup> In all of these cases, a city's authority to declare a business a public nuisance was upheld even though substantial investments were at stake.

The alcohol industry has also argued that their due process rights were violated because it was unclear what store owners needed to do to comply with the law. For example, the state law specifies certain acts to be taken, such as posting signs and removing graffiti. State law also provides for a specific distance around the store for which store owners are responsible. The Oakland Ordinance is less specific, requiring store owners to be responsible for the conduct of individuals beyond the 20 foot state limit.<sup>130</sup> As stated above, this issue was unresolved by the litigation regarding the Oakland Ordinance. Most likely, it will be determined as individual store owners begin to be prosecuted under the Oakland Ordinance.

## *2. City of Oakland Permitted To Charge Fees To Fund Administrative Services*

Local governments cannot tax alcohol sales,<sup>131</sup> but under their police power, local governments can charge regulatory fees for the supervision of businesses that use an extraordinary amount of municipal services. The general rule is that "a regulatory license or permit fee levied cannot exceed the sum reasonably necessary to cover the cost of the regulatory

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127. *Livingston Rock & Gravel Co. v. County of Los Angeles*, 43 Cal. 2d 121, 128 (1954).

128. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 597 (1962).

129. *City of Bakersfield v. Miller*, 64 Cal. 2d 93, 100 (1966).

130. CAL. BUS. & PROF. CODE § 24200 (West 1994).

131. *Los Angeles Brewing Co. v. City of Los Angeles*, 8 Cal. App. 2d 391 (1935); *Century Plaza Hotel Co. v. City of Los Angeles*, 7 Cal. App. 3d 616 (1970) (holding that a city ordinance imposing a five percent excise tax on the purchase price of alcohol is invalid).

purpose."<sup>132</sup> Such costs include all incidental costs of regulating particular businesses.<sup>133</sup>

One court upheld a city ordinance requiring a house moving business to pay a city inspection fee and administrative costs even though the Public Utilities Code provides for a house moving license fee where such a business imposes an unusual burden on city services.<sup>134</sup> The court made a distinction between municipal revenues taxes and fees imposed by a city under its regulatory power to control and supervise a business that imposes an unusual burden on the city for such services. It follows that a city can charge liquor store owners for the extraordinary police costs around liquor stores even though liquor licenses are governed by the Alcohol Beverage and Control Act. The court of appeals decision in the Oakland case also upholds a city's right to charge fees.<sup>135</sup>

#### *D. Nuisance Abatement Actions Avoid State Pre-emption Problems*

Both California state law and municipal laws allow for an action to abate nuisances. A general nuisance abatement action would escape the State pre-emption and due process problems of the Oakland ordinance. Both the City of Berkeley and the City of Los Angeles bring actions against problem liquor stores under their general nuisance abatement ordinances. Nonetheless, a general nuisance abatement action would have the same drawbacks as bringing a case through the ABC administrative process.

In Berkeley "mom and pop" stores tend to have legal non-conforming uses or are subject to permits that do not contain alcohol specific provisions.<sup>136</sup> Consequently, the city must bring actions against

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132. *United Business Comm'n. v. City of San Diego*, 91 Cal. App. 3d 156, 165 (1979)(sign inventory fee was a regulatory fee and not a special tax); *see also Pennell v. City of San Jose*, 42 Cal. 3d 365 (1986)(upholding the City's fee on rental units as a regulatory fee and not a special tax).

133. *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.*, 203 Cal. App. 3d 1132 (1988), the court stated:

To show a fee is a regulatory fee and not a special tax, the government should prove (1) the estimated costs of the service or regulatory activity, and (2) the basis for determining the manner in which the costs are apportioned, so that charges allocated to a payor bear a fair or reasonable relationship to the payors' burdens on or benefits from the regulatory program.

134. *Housemoving Contractor Ass'n. v. City of Glendale*, 123 Cal. App. 3d 673 (1981).

135. Recently, voters of California passed an initiative that requires voter approval of local taxes. Voter approval for local tax levies, Prop. 218, (codified as amended Cal. Const. Article XIII C & XIII D)(effective July 1, 1997). This may affect the ability of other local governments to charge a fee. However, the Oakland Ordinance was enacted prior to the passage of this proposition.

136. *'Cutting Edge' Enforcement Techniques in Berkeley*, in *ESTABLISHING A PARTNERSHIP: ABC, LOCAL JURISDICTIONS, LAW ENFORCEMENT, LICENSES, AND THE COMMUNITY* (1995).

the stores under its general nuisance ordinance.<sup>137</sup> This ordinance represents a conservative approach to nuisance abatement around problem liquor stores. The activities listed as per se public nuisances are uncontroversial. Where a store is found to be a public nuisance, the city has clear authority to impose conditions on stores or revoke their licenses.

The Los Angeles general nuisance abatement ordinance in theory allows the city to ask a store to make changes for activities that do not amount to a nuisance.<sup>138</sup> The advantage of a nuisance abatement ordinance is that problem businesses other than liquor stores may be prosecuted as well. In Los Angeles, businesses closed by the city under its general nuisance abatement ordinance included bars, recycling centers, liquor stores, night clubs and a motel.<sup>139</sup>

However, general nuisance abatement actions have several limitations. First, a general nuisance abatement ordinance does not allow a city to prospectively regulate to prevent nuisance activities around stores. A city must wait until a store becomes a problem before it can set operating standards. Second, the general nuisance abatement action requires that each store be considered individually. This may seem more fair because not all of the liquor stores are problem stores. While closing the worst stores in high concentration areas might significantly reduce crime,

137. BERKELEY, CA., REV. ORDINANCES, CH. 25, SECTION 25.1 (1990). Under the Berkeley ordinance, the owner is given notice of the complaints and an opportunity to be heard. The City can terminate a business or subject it to conditions where the City Council or the Board of Adjustments finds that the business is a public nuisance. A use can be found to be a public nuisance where it is operated and maintained, or by act or omission

(a) has resulted in or facilitated any of the following activities, each of which the City hereby declares to be a public nuisance: disturbance of the peace, illegal drug activity . . . public drunkenness, drinking in public, harassment of passersby, . . .

(b) violates any provision of the Ordinance, or any city, state, or federal regulation, ordinance or statute.

138. LOS ANGELES, CA. ZONING ORDINANCE NO. 168125, SECTION 12.21. The Los Angeles Ordinance provisions modify or discontinue use where the Zoning Administrator finds the use:

(1) adversely impacts nearby agricultural, residential, or commercial uses and,  
 (2) jeopardizes or endangers the public health or safety of persons residing or working on the premises or in the surrounding area, or  
 (3) constitutes a public nuisance; or  
 (4) has resulted in repeated nuisance activities including but not limited to disturbance of the peace, illegal drug activity, public drunkenness, drinking in public . . . or  
 (5) violates any provision of this chapter or any other city, state, or federal regulation, ordinance or statutes.

This ordinance allows the City to modify a use even when there is not a finding of public nuisance.

139. LOS ANGELES ZONING DEPARTMENT FACT SHEET, HISTORY OF PUBLIC NUISANCE CASES REVOKED (1993).

this is not the proper basis of a preventative alcohol policy for all liquor stores.

## V. CONCLUSION

General nuisance abatement actions have many of the same resource and evidentiary problems as the current state ABC process. *City of Oakland v. Alameda Super. Ct.*<sup>140</sup> establishes a local government's right to place restrictions on liquor stores. An ordinance which targets problem stores is potentially an effective, politically feasible way to force store owners to operate their stores responsibly.

Local governments must have separate ordinances for existing and new liquor stores. As California law exempts existing stores from new land use regulations directly effecting their license, a local ordinance that addresses new and existing stores in separate ordinances is less likely to be overturned on State pre-emption grounds. A city stores can impose restrictions on *new* licenses easier.

First, a city must document problems around liquor stores and specify the problems in the findings of its ordinance. The police should keep statistics regarding calls made to liquor stores and records of arrests at problem properties. Documenting problems associated with problem stores is important for two reasons. First, in order to withstand a state pre-emption challenge, a city must prove that the ordinance does not directly affect the sale of alcohol.<sup>141</sup> Second, a city must demonstrate a nexus between the problems and the ordinance in a Takings challenge or a rational basis for the ordinance in an equal protection challenge.<sup>142</sup> Creating a pilot program also enables a city to set standards for a year or two while it compiles more information. The City of Oakland's ordinance was a one-year pilot program. During that year, the City of Oakland was able to assess whether the operating conditions reduced problems at the stores.

Second, cities should exempt businesses which do not cause problems and define those businesses that qualify for the exemption. An ordinance that indiscriminately includes all liquor licenses is likely to be challenged as not satisfying the required nexus test. The ordinance's findings should state that the businesses granted an exemption do not experience the same kind of problems. Defining which businesses qualify for the exemption is important so as not to create a loophole for all liquor

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140. 45 Cal. App. 4th 740 (1996).

141. See *supra* notes 66-71 and accompanying text.

142. See *supra* note 114-19 and accompanying text.

stores. For example, grocery stores should be exempted, because they do not experience the problems associated with corner markets and they serve important community needs.

Third, the ordinance should focus on activities that courts have found do not directly affect the sale of alcohol.<sup>143</sup> Ordinances which focus on the security of the store and nuisance activities associated with the store are appropriate. Ordinances which designate the sale of individual bottles or certain kinds of alcohol to be a violation would likely be found to directly affect the sale of alcohol and thus, violate state pre-emption.

Fourth, the ordinance should seek voluntary cooperation from store owners. The Licensee Education of Alcohol and Drugs Program attempts to serve this purpose.<sup>144</sup> When initial complaints are received about a store, the ordinance should mandate negotiations with the store owners. Store owners should be given the opportunity to voluntarily change their business practices. A mandatory negotiation would also serve as notice to the store owner of complaints against her store and of the response the city expects to avoid action against the store.

Another way to ensure voluntary cooperation from store owners is to offer them financial assistance to convert their stores to other types of businesses as the City of Los Angeles did for store owners rebuilding after the 1992 riots. For example, a city may offer a liquor store owner an interest-free loan through a small business program.

Fifth, the city should charge store owners a fee. The ruling in *City of Oakland v. Alameda Super. Ct.* overturning the trial court's grant of summary judgment suggests that the court is willing to consider the validity of fees levied on liquor store owners. The general rule is that local governments may charge fees provided that the "fee [does not] exceed the sum necessary to cover the cost of the regulatory purpose."<sup>145</sup>

Last, the ordinance should protect the rights of store owners. Store owners should be allowed an adequate amount of time to post signs and make required structural changes. In addition, the city should provide guidance on measures that store owners can take to reduce crime at their store. Offering guidance to store owners can protect the city by ensuring that store owners have notice of ordinance requirements.

Many California communities are saturated with liquor stores. These stores have not succeeded in producing the economic benefits suggested by the alcohol industry. Ownership of liquor stores has passed from African Americans to other ethnic groups and there have always been

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143. See *supra* notes 66-71 and accompanying text.

144. This paper does not examine the LEAD program. It presents no information regarding whether the program is effective.

145. *Id.*

problems, regardless of the ownership. Despite the promise of economic revitalization, these stores are an impediment to the development of other essential businesses. Moreover, the concentration of stores and problematic business practices exacerbates neighborhood problems by encouraging drunkenness and drug use.

While the State ABC is incapable of addressing the concerns of communities of color, *local* control of alcohol outlets could improve the quality of life for these communities. Local government officials are more likely to respond to complaints concerning liquor stores. They are better situated to identify and to respond to neighborhood problems. More importantly, local control potentially provides communities of color with an opportunity to have their concerns heard by an agency that will be responsive to their needs.