

**MEMORANDUM**  
**[Final]**

**LOCAL CONTROL OF ALCOHOL AVAILABILITY IN**  
**NEBRASKA:**  
**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 Nebraska. 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.*

## I. Introduction

Alcohol retail establishments pose serious health and safety risks for neighborhoods and communities. Research has found that the number, density, type, location and operational practices of alcohol outlets affect the level of community violence, injuries, public nuisance activities, alcohol-related motor vehicle crashes, among other health and safety problems.<sup>1</sup> Large numbers of alcohol outlets in small geographic areas increase the risks of these problems.<sup>2</sup> Similarly, outlets that have irresponsible business practices – for example, repeated sales to intoxicated and underage patrons and public nuisance activities inside and adjacent to the premises – contribute to a wide variety of neighborhood and community disruption and harm.<sup>3</sup>

All States have developed comprehensive legal structures to regulate alcohol retailers as a means to reduce the problems associated with their operations. Retailers typically must obtain a license to open an alcohol retail business, with licensing laws that may set conditions on the operation, location, and number of outlets and establishing minimum operational standards and practices. In Control States, the State operates some retail off-sale stores directly.<sup>4</sup>

A critical aspect of a State’s alcohol retail statutory scheme is the extent to which authority is delegated to local governments. This varies widely by State. Local governments may have: (1) Primary authority, following general State guidelines; (2) Concurrent authority, where retailers are subject to two sets of regulations; or (3) Limited or no authority, so that the State reserves all or most decisions to State agencies. “State preemption” is the legal term used to describe laws that give the State exclusive authority to regulate a particular aspect of alcohol retail availability.<sup>5</sup> Adding to the complexity, States may assign differing levels of preemption for differing aspects of alcohol retail control. For example, the State may permit local governments to determine the location of new retail outlets but deny them any authority to determine at least some aspects of the retailers’ operating practices.<sup>6</sup>

Alcohol retail regulation involves primarily land use and police powers. These are traditionally considered to be the domain of local governments, which are better positioned to determine community needs and to develop detailed plans for land development and public safety.

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<sup>1</sup> Campbell, C., 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(6):556-9; Gorman, D., Speer, P., Gruenewald, P., and Labouvie, E. (2001) Spatial dynamics of alcohol availability, neighborhood structure and violent crime, *Journal of Studies on Alcohol*, 62: 628–636. Scribner, R. et al. (1995) The risk of assaultive violence and alcohol availability in LA County, *American Journal of Public Health*, 85:335–340; Parker, R., and Rebhun, L. (1995) *Alcohol and Homicide: A Deadly Combination of Two American Traditions*. Albany, NY: State University of New York Press.

<sup>2</sup> Gorman, D. et al., *supra* n. 1.

<sup>3</sup> Babor, T. et al. (2003). *Alcohol: No Ordinary Commodity*. New York, NY: Oxford University Press.

<sup>4</sup> See National Institute on Alcohol Abuse and Alcoholism (NIAAA), Alcohol Policy Information System (APIS). [www.alcoholpolicy.niaaa.nih.gov](http://www.alcoholpolicy.niaaa.nih.gov) (accessed February 19, 2010).

<sup>5</sup> Mosher, J., Gorovitz, E., and Pertchuk, M. (1998) “Preemption or prevention? Lessons from efforts to control firearms, alcohol and tobacco. *J. Pub. Health Policy* 19(1):37-50 (1998).

<sup>6</sup> For further discussion, see Mosher, J. (no date). *The Perils of Preemption*. Chicago, IL: American Medical Association. Available at: [http://www.alcoholpolicy.com/pdf/Policy\\_Perils.pdf](http://www.alcoholpolicy.com/pdf/Policy_Perils.pdf) (accessed February 19, 2010).

Typically, States provide guidelines that local governments must follow when making land use decisions but allow local governments considerable leeway in how these are implemented.<sup>7</sup>

Nebraska has created a hybrid system that gives local governments at least some powers to regulate alcohol retail outlets but places primary authority with the Nebraska Liquor Control Commission (“Commission”), a State Agency. Nebraska courts have also limited both State and local control of alcohol availability through an unusual application of the Constitutionally-based Equal Protection doctrine, further eroding local action.

Experience in other States suggests that even in States with strong State preemption laws, there may still be limited local authority that can be exercised. California, for example, has concentrated even more authority at the State level than is the case in Nebraska. Yet, over the last thirty years, local government officials and community groups in California have developed a comprehensive set of local land use controls that are used to complement and augment the State regulatory structure. While limited in scope compared to States without State preemption, these controls have nevertheless been effective in addressing alcohol problems associated with retail outlets.<sup>8</sup>

This report analyzes Nebraska law to determine what local powers exist to regulate alcohol retail availability. It concludes by providing a guide for how Nebraska communities can proceed within the confines of State law.

## **II. Nebraska’s Structure for Regulating Retail Alcohol Availability**

The Nebraska Constitution includes the following provision regarding the regulation of alcohol retail outlets:

“Notwithstanding any other provision of this Constitution, the governing bodies of municipalities and counties are empowered to approve, deny, suspend, cancel, or revoke retail and bottle club liquor licenses within their jurisdictions as authorized by the Legislature.”<sup>9</sup>

Although the Constitution authorizes local licensing powers, the Legislature must determine the extent of that authority. It has in turn strictly limited the role of local governments in licensing decisions, placing primary authority with the Commission. This preemption policy is stated explicitly in the Nebraska Liquor Control Act (“Act”):

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<sup>7</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: 1404-1408 (2003).

<sup>8</sup> See Mosher, J., C. Cannon, R. Treffers, *Reducing Community Alcohol Problems Associated with Alcohol Sales: The Case of Deemed Approved Ordinances in California*. Oxnard, CA: Ventura County Behavioral Health Department, September 2009. Available at: [http://www.venturacountylimits.org/pdfs/VC\\_CommAlcProb\\_1upPress\\_FNL.pdf](http://www.venturacountylimits.org/pdfs/VC_CommAlcProb_1upPress_FNL.pdf).

<sup>9</sup>Neb. Const. art. XV, sec. 19.

“The power to regulate all phases of the control of the manufacture, distribution, sale and traffic of alcoholic liquor, except as specifically delegated in the Nebraska Liquor Control Act, is vested exclusively in the Nebraska Liquor Control Commission.”<sup>10</sup>

In general, the regulation of alcohol retail availability can be divided into two categories: (1) restrictions on the ability to open a new retail alcohol outlet; and (2) restrictions on the business practices of retail outlets that are in operation. The latter set of regulations typically includes the power to suspend or revoke licenses/permits, thus leading to closure of the business. Nebraska cities and counties have at least some authority in both of these arenas. The Act provides:

“Local governing bodies shall only have authority to approve applications and deny licenses pursuant to the Nebraska Liquor Control Act. ... The governing bodies of cities and villages are authorized to regulate by ordinance, not inconsistent with the Nebraska Liquor Control Act, the business of all retail ... licensees carried on with the corporate limits of the city or village.”<sup>11</sup>

Ordinances that impose stricter standards than those found in the Act are not “inconsistent” with the Act. Local governments, however, cannot enact provisions that would create requirements or restrictions that conflict with the Act. This distinction has been clarified by the Nebraska Supreme Court:

“[W]here both an ordinance and a statute are prohibitory and the only difference between them is that the ordinance goes further in its prohibition, but not counter to the prohibition under the statute, and the municipality does not attempt to authorize by the ordinance what the legislature has forbidden or forbid what the legislature has expressly licensed, authorized, or required, there is nothing contradictory between the provisions of the statute and the ordinance because of which they cannot coexist and be effective. Unless legislative provisions are contradictory in the sense that they cannot coexist, they are not deemed inconsistent because of mere lack of uniformity in detail.”<sup>12</sup>

When the legislature has, as here, expressly permitted local ordinances to regulate a particular activity that is also regulated by the State, the courts will seek to avoid preempting the local provision:

“When reviewing preemption claims, the court is obligated to harmonize, to the extent it legally can be done, state and municipal enactments on the identical subject. ... When an ordinance is susceptible of two constructions, under one of which it is clearly valid, while under the other its validity may be doubtful, that

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<sup>10</sup> NE Stat. Ann. § 53-116.

<sup>11</sup> NE Stat. Ann. §§ 53-134.02, 53-134.03. The Nebraska Supreme Court has affirmed that local jurisdictions can adopt reasonable regulations beyond those of the Commission if not in conflict with the Act or the Commission’s regulations. *Phelps, Inc. V. City of Hastings*, 152 Neb. 651, 42 N.W.2d. 300 (1950); *Gas ‘n Shop, Inc. v. Nebraska Liquor Control Commission*, 229 Neb. 530, 427 N.W.2d 784 (1988).

<sup>12</sup> *Phelps, Inc. v. City of Hastings*, 152 Neb. 651, 657, 42 N.W.2d 300, 304 (1950); cited with approval in *Gas ‘N Shop, Inc. v. Nebraska Liquor Control Commission*, 229 Neb. 530, 427 N.W.2d 784 (1988); *State ex rel. City of Alma v. Furnas County Farms*, 266 Neb.558, 667 N.W.2d 512.

construction which makes the ordinance clearly valid will be given.” [Citations omitted]<sup>13</sup>

Two Nebraska cases involving alcohol policy illustrate these general principles. In *Gas ‘N Shop, Inc. v. Nebraska Liquor Control Commission*,<sup>14</sup> a local ordinance prohibited alcohol retailers from selling most other retail items, including gasoline and food products. State law had no such prohibition. The Nebraska Supreme Court held that the ordinance did not contradict State law and therefore was not preempted (although, as discussed below, the ordinance was held unconstitutional on other grounds).<sup>15</sup> In *Bodkin v. State*, State law prohibited retailers from furnishing alcohol to a minor knowing that the person receiving the alcohol was a minor. The local ordinance did not contain the knowledge requirement. The Court held that the local ordinance was valid because it was more restrictive than the State law but did not contradict it.

As these cases suggest, the statutory provision explicitly authorizing local governments to enact ordinances that regulate alcohol retail operations provides a strong basis for local action. However, as discussed below, the extent of this local authority can be outlined but not definitively determined. Nebraska law is silent or ambiguous regarding several key aspects of local/State alcohol availability authority, with only limited or confusing interpretation of the relevant provisions provided by Nebraska courts.

#### **A. Local Regulation of New Alcohol Outlets**

Nebraska law clearly provides that the Commission has exclusive authority to issue licenses to new alcohol outlets; local governments are prohibited from issuing concurrent alcohol retail licenses. The Act nevertheless gives Nebraska’s local governments an important role in the licensing process. When the Commission considers issuing a new retail license it must, among other findings, make a determination that the “applicant is fit, willing, and able to properly provide the service” proposed within the local jurisdiction.<sup>16</sup> In making that determination, it must consider 10 factors related to the circumstances in the local jurisdiction, one of which is the existence of zoning restrictions.<sup>17</sup>

The Supreme Court of Nebraska considered the scope of these statutes in *City of Lincoln v. Nebraska Liquor Control Commission*.<sup>18</sup> Lincoln enacted a zoning ordinance that required that, among other provisions, alcohol retailers obtain a special use permit if the business was located in specific zoning districts.<sup>19</sup> The permit would not be issued in those districts if the proposed retail outlet was within 100 feet of residences and if the adverse effects of such a location could

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<sup>13</sup> *State ex rel. City of Alma v. Furnas County Farms*, 266 Neb. at 568, 667 N.W.2d at 522.

<sup>14</sup> *Gas ‘N Shop, Inc. v. Nebraska Liquor Control Commission*, 229 Neb. 530, 427 N.W.2d 784 (1988).

<sup>15</sup> See *infra* at n. 31.

<sup>16</sup> Neb. Stat. § 53-132.

<sup>17</sup> Neb. Stat. § 53-132(3)(h). The legislature enacted the current language in response to a Nebraska Supreme Court decision that held that the statute establishing criteria for local review of new licenses was unconstitutionally vague and an unconstitutional delegation of power. *Kwik Stop, Inc. v. City of Lincoln*, 243 Neb. 178, 498 N.W.2d 102 (1993).

<sup>18</sup> *City of Lincoln v. Nebraska Liquor Control Commission*, 261 Neb. 783, 626 N.W.2d 518 (2001).

<sup>19</sup> The ordinance also imposed restrictions on outlets’ physical layout, noise levels, among other restrictions. See Lincoln Zoning Code § 27.63.680.

not be mitigated. The city denied a special permit for off-sale alcohol sales to Kabredlo’s Inc., a convenience store operator, because the store’s location did not meet these requirements.

The Commission, however, issued the license despite the lack of a local special use permit, holding that it was only required to “consider” the zoning ordinance but was not bound by it. The Commission, assessing all the factors listed in the State statute, determined that the applicant was “fit, willing, and able” to serve as a retailer at the location despite the city’s ordinance and the inability of the applicant to obtain a special use permit.

The city’s appeal reached the Nebraska Supreme Court, which reversed the Commission’s decision. It found that the retailer “was not ‘able’ to provide the proposed service because the proposed service was located in a zoning district which prohibited the proposed service and that [the retailer] had not been granted relief from such restriction.”<sup>20</sup> In effect, the retailer’s failure to obtain the special permit from the city required by the city’s local zoning ordinance barred the Commission from issuing a State license.

The Lincoln ordinance addressed the location of alcohol outlets in a residential area. However, nothing in the Court’s opinion suggested that a different result would have occurred if the ordinance had involved a commercial district or some other aspect of alcohol retail operation. The decision therefore appears to be a significant victory for local control in Nebraska. A city may enact a local ordinance that requires a proposed new alcohol retail outlet to obtain a special permit from the local government. So long as the ordinance and its application of the special use permit requirements are valid, the Commission must deny a State alcohol retail license unless the special permit is obtained.

The question remains: What other types of conditions can be required before issuing a special permit (e.g., density and number restrictions, other types of location restrictions, or operational conditions such as minimum sales of food)? The fact that the Court did not investigate the validity of the underlying ordinance is noteworthy, particularly in light of the Supreme Court’s previous decisions, discussed in Section III below.<sup>21</sup>

## **B. Local Regulation of Existing Alcohol Outlets**

Nebraska law also permits cities to regulate existing alcohol outlets through local ordinances although the scope of this authority is unclear, as there is little guidance from the Nebraska courts for making this determination. The Act states that local governments have the power:

“(1) To cancel or revoke for cause retail ... licenses to sell or dispense alcoholic liquor issued to persons for premises within its jurisdiction, subject to the right of appeal to the commission; ...

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<sup>20</sup> *Id.* at 792-793. The decision was based on a prior version of the statute. However, the “zoning restrictions” provision remains in the current statute.

<sup>21</sup> The Act also provides local governments authority over special designated licenses – short term licenses issued to for special events (that may be applied for by existing licensees, caterers, non-profit groups and other community entities). Any special-event license applicant must first obtain approval from the local governing body where the event is to be located. Lincoln, Nebraska, has established a procedure for reviewing such applications that involves an assessment by law enforcement and other local agencies. See Lincoln Zoning Code § 53-124.11.

“(6) To cancel or revoke on its own motion any license if ... it determines that the licensee has violated any of the provisions of the act or any valid and subsisting ordinance, resolution, rule, or regulation duly enacted, adopted, and promulgated *relating to alcoholic liquor*. Such order of cancellation or revocation may be appealed to the commission within thirty days after the date of the order by filing a notice of appeal with the commission.”<sup>22</sup> (Emphasis added.)

There are several possible interpretations of this statutory provision. Clearly, any decision by a local government to cancel or revoke an alcohol retail license based on the violation of a local ordinance<sup>23</sup> “related to alcoholic liquor” can be appealed to the Commission. If the revocation involves a violation of any provision in the Act, then the Commission has primary jurisdiction and can overrule the local jurisdiction’s order. In these circumstances, the local government’s “cancellation” or “revocation” is really just a recommendation to the Commission.

If the ordinance provision that has been violated is outside the purview of the Act and is not inconsistent with the Act’s provisions, then the Commission’s authority is not clear. It has the authority and responsibility to determine whether the local ordinance was in fact violated. If it determines that a violation did in fact occur, can the Commission refuse to revoke the license because it determines through its independent review that the offense is not sufficient to warrant revocation? The *City of Lincoln* case suggests that the Commission does not have such discretion, but the Courts have not addressed this issue directly.

An additional ambiguity arises if the local ordinance in question does not “relate to alcoholic liquors.” First, the statute does not define this term and it is not clear what activities are and are not related to alcoholic liquors. For example, is an ordinance provision that sets noise limits or restricts types of entertainment in a retail establishment “related” to alcoholic liquor?

Second, if the ordinance is not related to alcoholic liquors, it appears that the local government cannot revoke the alcohol retail license. However, can the local government impose another type of penalty, e.g., the revocation of a local use permit that would in effect close the business thus having the same effect as a license revocation?

A 2002 case, *DHL, Inc. v. Lancaster County Board of Commissioners*,<sup>24</sup> provides some guidance regarding these ambiguities. Lancaster County sought to regulate nude dancing at retail alcohol outlets by means of a county resolution. The Board of Commissioners found that DHL had violated the resolution and forwarded the case to the Commission seeking revocation of the retailer’s license. The Commission suspended the license and scheduled a revocation hearing. DHL then sued Lancaster County (and not the Commission). Although the Court ruled against the county (due to the restriction being imposed by resolution rather than by ordinance), the

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<sup>22</sup> Neb. Stat. Ann. § 53-134. Until 1999, local governments had full authority to revoke licenses based on violations of the Act or local ordinances.

<sup>23</sup> For purposes of this memorandum “ordinance” includes all of the possible local regulatory options listed in the statute (ordinance, resolution, rule, or regulation).

<sup>24</sup> 264 Neb. 358, 648 N. W.2d 277 (2002).

Court appeared to uphold the county's authority to regulate the activity and potentially accomplish the revocation of the license if proper procedures are used.<sup>25</sup>

The *DHL* case suggests that the Court, the Commission, and the parties interpreted Section 53-134 as requiring the Commission to revoke the license for such a violation upon a determination that the county's resolution had been violated. The licensee did not seek relief with the Commission, filing its appeal directly with the Court. The Court accepted jurisdiction and did not require Commission review of the resolution and the revocation determination. Interestingly, the Court apparently assumed that restrictions on nude dancing in alcohol retail outlets are "related to alcoholic liquors" even though they do not address alcohol sales directly.

If this interpretation of Nebraska law is correct, then a similar approach can be taken by local governments for addressing public nuisance activities. The Act states that a violation of any of the Act's provisions constitutes a public nuisance.<sup>26</sup> The Act, however, does not address public nuisance activities that do not involve violations of the Act's provisions (including noise, loitering, littering, drug dealing, other legal violations, violent incidents, and other disturbances to the surrounding properties). Such provisions would not be preempted because they do not contradict State provisions.<sup>27</sup> Local governments potentially have the authority to regulate these activities and impose sanctions, including possible revocation of licenses or local permits, on retailers who do not comply.<sup>28</sup>

Many States have established this bifurcated approach, where the State has exclusive licensing authority and local governments can regulate alcohol licenses through local zoning ordinances. In Iowa, for example, local governments have explicit authority to enact local ordinances that may affect retail outlet location and business practices. The State cannot issue a license if the issuance would violate local laws and regulations, and local authorities may suspend, revoke or impose a civil fine on licensees for any violations of local provisions.<sup>29</sup>

Although the relevant Nebraska provisions are not as explicit as those found in Iowa, it appears that Nebraska cities may also have similar authority to use local ordinances to regulate problematic activities associated with retail alcohol outlets (such as public nuisance activities, nude dancing, illegal behavior, etc.). As suggested in the *DHL* case, local governments can take action pursuant to local regulations that are not inconsistent with the Act. Localities appear to have the authority to require retail license revocation (assuming the Courts determine that the nuisance ordinance is "related to alcoholic liquor") and/or establish a process through its zoning powers to require retailers to obtain a local permit, and then act against that permit in case of violations. In fact, Lincoln's Zoning Code includes a provision that authorizes revocation of an

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<sup>25</sup> The statute was subsequently amended to permit revocation based on resolutions in addition to regulations and ordinances. Nebraska Laws 2004, LB 485 § 23. Because the Court ruled against the County, it did not address the First Amendment issues involved in the case, including the "secondary effects" doctrine discussed *infra* at n. 48.

<sup>26</sup> Neb. Stat. Ann. § 53-198.

<sup>27</sup> See preemption discussion, *supra* at n. 12.

<sup>28</sup> Lancaster County, for example, has a public nuisance/disorderly house ordinance that could be applied to alcohol outlets. Lancaster County Ordinance: Offenses Against Public Peace, §§ 9.20.010 et seq. Under this scenario, such an ordinance could be directed specifically at alcohol retail outlets.

<sup>29</sup> Iowa Stat. Ann. §§ 123.30, 123.39.

alcohol retailer’s special permit for just this type of violation.<sup>30</sup> Unfortunately, as discussed above, the extent of this authority is somewhat speculative because of the ambiguity of the Act’s provisions and the lack of guidance from Nebraska courts.

### **III. The Extent of Local Control: The Nebraska Supreme Court and the Application of the Equal Protection Doctrine**

The preceding section addresses the extent of local control in light of Nebraska’s State preemption doctrine. The inquiry does not end here, however, as local control may also be constrained by other legal doctrines and provisions. Nebraska Courts have confirmed that local jurisdictions can use local zoning ordinances to regulate alcohol outlets, but they have also imposed conditions on the use of that authority that reach beyond the preemption doctrine.

#### **A. The Gas ‘N Shop Cases**

A series of Nebraska Supreme Court cases have invalidated attempts by Nebraska cities to restrict or prohibit alcohol sales in convenience stores, gas stations, drug stores, and grocery stores. Although addressing the authority of cities to restrict the new licenses, the cases have implications for controlling existing outlets as well. Four separate decisions on this issue involve attempts by the cities of Lincoln, Norfolk, and Kearney to deny licenses to franchises of Gas ‘N Shop, a gas station/convenience store through the application of State statutory and local ordinance provisions.

In the first decision (*Gas ‘N Shop I*<sup>31</sup>), the Commission denied the license based on a violation of Lincoln’s local ordinance (but not a zoning ordinance) that requires alcohol sales to be made only from premises “which are separate and distinct from any other business activity” – that is, the proposed alcohol retail business cannot sell food or any other commodity other than ice, tobacco, and other beverages (also referred to as bans on “dual purpose” businesses). The ordinance explicitly exempted bowling alleys, hotels, motels, and clubs.

The Supreme Court held that the ordinance violated the State’s Equal Protection clause because there was no legitimate difference between convenience stores and the businesses that were exempted. Quoting a previous case, the Court stated:

“There is no rationale for treating a chain restaurant ... any differently from a chain of convenience stores .... The only distinction is that the alcoholic beverages purchased at the convenience store will be drunk off the premises. This difference, however, presents no distinctive corollary to furthering temperance, as an individual may drink as much in a private restaurant as he may at home or elsewhere.”<sup>32</sup>

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<sup>30</sup> Lincoln Zoning Code § 27.63.680 (f). The Nebraska Supreme Court upheld the validity of the ordinance in *City of Lincoln v. Nebraska Liquor Control Commission* (see discussion *infra* at n. 12). The case did not address the validity of this specific portion of the ordinance.

<sup>31</sup> *Gas ‘N Shop v. Nebraska Liquor Control Commission*, 229 Neb. 530, 427 N.W.2d 784 (1988) (Gas ‘N Shop I).

<sup>32</sup> *Id.* at 539, quoting *Casey’s General Stores v. Nebraska Liquor Control Commission*, 220 Neb. 242, 369 N.W.2d 85 (1985).

The Court noted that there had been citizens' protests had been filed and that the city council had found that the license was not required by the "present or future public convenience and necessity." However, there was apparently no evidence in the record to contradict the Court's determination that there was an equal protection violation because the city had not shown a basis for distinguishing Gas 'N Shop from other types of alcohol outlets.

In *Gas 'N Shop II*<sup>33</sup> and *Gas 'N Shop III*<sup>34</sup>, decided on the same day, the Court again reversed decisions of the Commission which had denied Gas 'N Shop licenses in Kearney and Norfolk. The two cities had petitioned the Commission to deny the licenses relying on local policies in these cities similar to the Lincoln ordinance that was invalidated in *Gas 'N Shop I*.

In *Gas 'N Shop II*, Kearney presented the following evidence in support of its recommendation to the Commission that the license be denied:

- Opposition from two ministers, in part because a church was planned to be built within 230 feet of the proposed location;
- Opposition from the city's Board of Education because the proposed location was close to schools;
- Opposition from the Chief of Police because of concerns regarding sufficient police personnel to deal with new alcohol outlets;
- Testimony from experts that increasing the number of alcohol outlets increases alcohol consumption and that convenience store outlets tend to have a more dramatic impact on consumption than some other types of outlets.<sup>35</sup>

In *Gas 'N Shop III*, Norfolk presented the following evidence:

- A public opinion poll of Norfolk citizens that showed that 75 percent of those with an opinion believed the city had enough off-sale liquor outlets and 73 percent believed that gas stations, grocery stores, and other dual-purpose businesses should not be allowed to sell alcoholic beverages;
- Testimony from the Chief of Police that there may not be sufficient police presence to deal with additional alcohol outlets.<sup>36</sup>

The Court conducted an independent, de novo review of the evidence in both cases and determined that neither city's evidence was sufficient to deny the license. In *Gas 'N Shop II*, the Court stated that the fact that the Board of Education had objected was not sufficient because there were other alcohol outlets near schools; the fact that the Chief of Police objected was not sufficient because "there is no evidence which establishes that illegal activity increases merely because a new license is issued;" and the testimony of the expert was insufficient because "the commission's own statistics demonstrate that while the number of liquor licensees in the state

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<sup>33</sup> *Gas 'N Shop Inc. v. Nebraska Liquor Control Commission*, 241 Neb. 898, 492 N.W.2d 7 (1992) (*Gas 'N Shop II*).

<sup>34</sup> *Gas 'N Shop Inc. v. Nebraska Liquor Control Commission*, 241 Neb. 905, 492 N.W.2d 12 (1992) (*Gas 'N Shop III*).

<sup>35</sup> *Gas 'N Shop II* at 902-903.

<sup>36</sup> *Gas 'N Shop III* at 908-909.

has increased, consumption of alcohol has decreased.”<sup>37</sup> It concluded that issuing the license was in the public interest.<sup>38</sup>

Similarly, in *Gas ‘N Shop III*, the court stated:

“The foregoing evidence does not establish that granting the license sought would be other than in the public interest. The results of the public opinion poll have no more bearing on the legal issues presented by the application than does the city’s aversion to the type of license requested or its policy disfavoring the placing of liquor licenses in businesses which sell other things. Neither is the city’s concern over a potential lack of law enforcement personnel persuasive; there are adequate procedures in place to revoke licensed businesses which do not operate within the law. Nor does the city’s belief that there are sufficient licenses in existence, standing alone, justify the denial of an otherwise valid application.”<sup>39</sup>

The Court did not explicitly find an equal protection violation in either *Gas ‘N Shop II* or *III*. Instead, it reviewed all the evidence that had been presented to the Commission, conducted an independent review, and determined that the license should be issued based on the statutory provisions applicable to the issuance of licenses. It is unclear from the decision whether Norfolk or Kearney had ordinances similar to the one found in Lincoln that was invalidated in *Gas ‘N Shop I*. In none of the first three cases did the city require a special use permit that was denied, as was the case in the 2001 *City of Lincoln* case described *infra*.

In *Gas ‘N Shop IV*,<sup>40</sup> Kearney attempted to overcome the Court’s objections by using just this tactic – inserting a “separate and distinct” business activity requirement for alcohol retailers in its zoning ordinance. The ordinance allowed dual purpose businesses in some but not all zoning districts. The city denied Gas ‘N Shop a permit required by the zoning ordinance as a condition of opening the business in the district where the gas station/convenience store was to be located.

The city provided the following evidence to support its zoning provisions and prohibited “separate and distinct” businesses in certain zones:

- Testimony of the Chief of Police that off-sale licenses generate more calls than on-sale premises;
- Expert testimony from two medical professionals regarding the public health advantages of limiting alcohol purchases in off-sale premises;

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<sup>37</sup> *Gas ‘N Shop II* at 902-903.

<sup>38</sup> The Court heard a similar case a year later, *Kwik Shop, Inc. v. City of Lincoln*, 243 Neb. 178, 498 N.W.2d 10 (1993). There the Commission denied licenses to Kwik Shop in the City of Lincoln based on objections raised by Lincoln within categories specified by statute. The Court held that the statute establishing the standards used by the Commission to make licensing decisions were unconstitutionally vague and an unconstitutional delegation of power from the legislature to the Commission and local governments. The decision did not address the issue of zoning powers and the statute that was ruled unconstitutional has subsequently been amended. See also *Bosselman, Inc. v. State*, 230 Neb. 471, 432 N.W. 226 (1988) (a previous version of the statute, which provided an option to local jurisdictions to make binding recommendations to the Commission was unconstitutional for the same reasons), and *Hy-Vee Food Stores v. Nebraska Liquor Control Commission*, 242 Neb. 752, 497 N.W.2d 647 (1993) (separate and distinct business requirement for alcohol retailers in municipal ordinance violates equal protection clause).

<sup>39</sup> *Id.* at 908-909.

<sup>40</sup> *Gas ‘N Shop Inc. v. City of Kearney*, 248 Neb. 747, 539 N.W.2d 423 (1995).

- Expert testimony by Dr. Friedner Wittman regarding the importance of distinguishing between on-sale and off-sale establishments and regarding the special benefits of the ordinance’s restrictions in terms of reduced impulse buying, increased control over alcohol sales, and improved staff training.<sup>41</sup>

Gas ‘N Shop did not seek a Commission review and sued the city directly. The city argued that the decision in *Gas ‘N Shop II* was not binding because the city had greater authority and discretion to determine land use and public safety issues under its local zoning powers. The Supreme Court ruled against the city, stating that the equal protection violation identified in previous cases still existed and applies equally to zoning as well as licensing provisions. It also concluded that the Chief of Police testimony was not sufficient to justify the distinction being made between convenience stores/gas stations and other types of alcohol outlets.

The Court discounted or ignored the city’s evidence justifying its special treatment of convenience stores/gas stations. For example, regarding Dr. Wittman’s testimony, the Court stated:

“[Dr. Wittman’s testimony] actually supported the position that the zoning restriction was meant to [illegally] discriminate against dual business operators such as Gas ‘N Shop. Dr. Wittman testified that studies indicate there is a direct correlation between the density of minimarts and restaurants and an increase in traffic accidents. The special and distinct premises zoning requirement does not affect restaurant on-sale alcohol service, and, yet, Dr. Wittman identified both restaurants and minimarts as the source of increased traffic accidents.”<sup>42</sup>

The Court ignored those parts of Dr. Wittman’s testimony that documented the fact that convenience stores create increased risks to public health and safety when compared to restaurants.

The Court also appeared to discount the role of local zoning in protecting public health and safety.

“Aside from general concerns of health, safety, and welfare of the people, Kearney’s zoning code sets forth provisions dealing with adequate light and air, and proper planning to prevent overcrowding or misuse of land. Kearney did not adduce evidence demonstrating that the separate and distinct premises requirement was rationally related to furthering a legitimate governmental purpose of proper land use planning or any other legitimate purpose unique to zoning. Instead, the evidence offered by Kearney in support of the separate and distinct premises requirement related solely to the general concerns of health, safety, and welfare of the people. Concerns such as control and distribution of alcoholic beverages, impulse buying, and the correlation between the number of alcohol outlets and automobile-related injuries, are general health, safety, and welfare concerns that are not unique to zoning and must be viewed under the same constitutional standard, whether in the context of

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<sup>41</sup> *Id.*, Appellant City of Kearney Brief, pp. 18-20.

<sup>42</sup> *Gas ‘N Shop Inc. v. City of Kearney* at 428.

liquor licensing or zoning provisions. Kearney did not present evidence which would allow this court to find sufficient justification for Kearney's disparate treatment of dual business operators such as Gas 'N Shop, for the differing treatment bears no reasonable relationship to the city's policies set forth in its zoning code.”<sup>43</sup>

### **B. Orchard Hill Case**

Twelve years after the last Gas 'N Shop case, in 2007, the Nebraska Supreme Court again addressed the evidentiary requirements for denying an alcohol license in *Orchard Hill Neighborhood Association v. Orchard Hill Mercantile*.<sup>44</sup> The Commission had issued a retail license within the neighborhood in part because the City Council had recommended its issuance, and the neighborhood association and many of its residents appealed to the District Court, which reversed. On appeal, the Supreme Court affirmed the lower court holding denying the license.

The decision rested on the review of the evidence, particularly that of two experts who provided the following testimony:

- Research establishes a correlation between crime and liquor establishments, finding that an increase in liquor stores in a given block is associated with an increase in assaults;
- There is already a liquor store within a block and a half of the proposed location for the new liquor store;
- The neighborhood is in an “advanced state of decline” as evidenced by vacant lots, decline in housing values, and a population decrease;
- The deteriorated commercial strip showed promise for revitalization efforts, but “putting a liquor store there would be a ‘disservice’ to the Neighborhood.”
- A survey of the neighborhood found 42 percent of respondents have concerns about illegal alcohol use.

Based on these factors, both experts concluded that the proposed location for the new alcohol outlet would not serve the public’s interest and would negatively affect the surrounding community.

Citing the 2001 *City of Lincoln* case,<sup>45</sup> the Court concluded that the District Court had properly weighed all the factors listed in the Act<sup>46</sup> for making the determination of the public interest, specifically approving the reliance on the expert testimony:

“Expert testimony establishes that a liquor license would negatively affect the Neighborhood and that crime would likely increase. The record contains a petition signed by more than 400 Neighborhood residents opposing the liquor license.”<sup>47</sup>

The Equal Protection doctrine was not at issue because the case did not involve a denial of a license based in part on differentiating types of retail outlets. Nevertheless, the *Orchard Hill* case suggests an important departure from the *Gas 'N Shop* cases in its assessment of what evidence is considered relevant for making licensing decisions. In the *Gas 'N Shop* cases,

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<sup>43</sup> *Id.* at 429-430.

<sup>44</sup> 274 Neb. 154, 738 N.W.2d 820 (2007).

<sup>45</sup> *City of Lincoln*, *supra* at n. 11.

<sup>46</sup> Neb. Stat. Ann. § 53-132(3).

<sup>47</sup> *Orchard Hill Neighborhood Association v. Orchard Hill Mercantile*, 274 Neb. at 167.

the Court held that public opinion data was irrelevant and that expert testimony regarding the link between outlet density and crime as unreliable. In *Orchard Hill*, this same evidence was crucial to the Court’s determination that the license should be denied. The Court may have been swayed by the fact that the retail outlet was to be located in a residential neighborhood, where adverse impacts can be more readily shown.

### **C. Local Zoning Powers and the “Secondary Effects” Doctrine**

Although not explicitly addressed, the *Orchard Hill* Court appeared to be applying a form of the “secondary effects” doctrine first explicated by the U.S. Supreme Court in addressing zoning restrictions on adult-oriented businesses (e.g., nude dancing, adult book stores).<sup>48</sup> Under this doctrine, local governments can use their zoning powers to restrict the types, number, and locations of certain businesses even if the provisions have the effect of limiting protected speech under the First Amendment. To be valid, the local government must show that the purpose of the restriction is to limit the adverse impacts of the businesses on the surrounding neighborhoods (e.g., crime, noise, traffic, etc.).<sup>49</sup> The U.S. Supreme Court in *Young v. American Mini Theatres* acknowledged the importance of local zoning powers in addressing community quality of life problems:

“It is not our function to appraise the wisdom of its decision to require adult theaters to be separated rather than concentrated in the same areas. In either event, the city’s interest in attempting to preserve the quality of urban life is one that must be accorded high respect. Moreover, the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.”<sup>50</sup>

A similar approach has been used by the Federal courts in addressing zoning restrictions on group homes (e.g., for disabled individuals). Fair housing laws and the U.S. Constitution limits local governments’ authority to discriminate against group homes through overly restrictive zoning provisions. However, zoning restrictions can be used to limit their location provided the local government establishes adequate justification in terms of legitimate governmental interests in health and safety.<sup>51</sup>

### **D. Discussion**

The *Gas ‘N Shop* and related cases provide an expansive and unusual application of the Equal Protection doctrine. The U.S. Supreme Court has established a three tiered-approach for determining whether a law violates the doctrine, based on the level of scrutiny that is applied. “Strict scrutiny” is used when a suspect class has been established (e.g., based on race) or when the classification puts fundamental rights into jeopardy (e.g., the right to vote).<sup>52</sup> Governments are rarely able to meet the strict scrutiny test. A middle-tier scrutiny is applied to certain quasi-suspect classes such as gender.<sup>53</sup>

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<sup>48</sup> See *Young v. American Mini Theatres*, 427 U.S. 50 (1976); *City of Erie v. Pap’s A.M.* 120 S.Ct. 1382 (2000).

<sup>49</sup> *Young v. American Mini Theatres*, *id.*

<sup>50</sup> *Id.* at 71.

<sup>51</sup> *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985); *Familystyle of St. Paul, Inc. v. City of St. Paul*, 923 F.2d 91 (8<sup>th</sup> Circ. 1991).

<sup>52</sup> *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817 (1967).

<sup>53</sup> *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451 (1976); *U.S. v. Virginia*, 518 U.S. 515, 116 S.Ct. 2264 (1996).

All other classifications are subject to the “rational basis” test – the government need only show that the classification is rationally related to serving a legitimate state interest. This test is highly deferential to the government’s justification. As stated by the U.S. Supreme Court:

“[T]he Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.”<sup>54</sup>

The test requires only that the government “consider to be true” the underlying facts establishing a rational basis for the classification. As a practical matter, Equal Protection challenges subject to the rational basis test are rarely successful.

The “secondary effects” doctrine provides added weight to the deference usually afforded to local governments when applying zoning restrictions on business activities. The U.S. Supreme Court has allowed local governments to restrict (but not prohibit) businesses and activities protected under the First Amendment (adult entertainment) and the Federal Fair Housing Act (group homes) if adverse effects on surrounding neighborhoods are adequately shown.<sup>55</sup> Zoning restrictions placed on alcohol outlets would require even less justification since there are no Constitutional rights or Federal anti-discriminatory laws involved.

The Nebraska Supreme Court adheres to the same Equal Protection analysis in applying the State’s Equal Protection clause.<sup>56</sup> *Gas ‘N Shop IV* itself states that it is applying a rational basis test in the context of zoning ordinance classifications, stating that the regulation in question will be upheld unless the classification “bears no relationship to the purpose sought to be accomplished by the ordinance. ... The validity of a zoning ordinance will be presumed in the absence of clear and satisfactory evidence to the contrary.”<sup>57</sup>

The Court’s dismissal of substantive evidence supporting the differential treatment of alcohol outlets appears unusual in light of the use of the rational basis test in other Equal Protection cases. The fact that similar evidence was considered not only relevant but determinative in a later alcohol outlet zoning case could suggest that if the Court were to reconsider the issue, it might either overrule the *Gas ‘N Shop* cases or limit their application to the specific classification at issue – convenience/gas stations vs. other types of alcohol outlets. At a minimum, the Court’s treatment of the evidence in those cases should not be considered determinative when similar evidence is brought to bear in other zoning disputes.

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<sup>54</sup> *Fitzgerald v. Racing Association of Central Iowa*, 539 U.S. 103, 107, 123 S.Ct. 2156, 2159 (2003) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 11-12, 112 S.Ct. 2326 (1992)).

<sup>55</sup> See text accompanying n. 41, *supra*.

<sup>56</sup> *Citizens of Decatur for Equal Education v. Lyons-Decatur School District*, 274 Neb. 278, 739 N.W.2d 742 (2007).

<sup>57</sup> *Gas ‘N Shop Inc. v. City of Kearney* at 427-428.

The conclusion that the *Gas 'N Shop* and related cases should be interpreted narrowly gains support from the fact that the City of Lincoln has since enacted a comprehensive zoning ordinance addressing new alcohol outlets. The ordinance includes the following provisions:

- Sale of alcohol at on- and off-sale requires a separate special permit;
- Limitations on the location of new retail outlets near youth-oriented land uses, churches, and residential districts, with the limitations varying by type of alcohol outlet;
- On- and off-sale outlets are subject to distinct sets of zoning requirements;
- Restaurants are allowed in certain residential districts where other types of outlets are not allowed;
- Restaurants must demonstrate that alcohol sales account for 40 percent or less of the business' gross sales;
- Restaurant hours of sale are restricted;
- The City Council may revoke a licensee's special permit based on evidence of repeated violations related to the operation of the business and/or repeated or continuing failure to take reasonable steps to prevent disturbances and anti-social behavior, including violence, drunkenness, vandalism, solicitation, or litter.<sup>58</sup>

By applying differential standards based on the type of alcohol outlet, Lincoln's provisions appear to be in conflict with the Nebraska Supreme Court's interpretation of the Equal Protection doctrine found in the *Gas 'N Shop* cases. Yet the ordinance apparently has not been challenged, and its provisions appear to be fully operational.

As noted above, the Lincoln ordinance and the *Orchard Hill* case both involve restrictions on alcohol retail outlets in residential neighborhoods. The Nebraska Supreme Court did not condition its decision in *Orchard Hill* on this fact. However, the adoption of a local ordinance to regulate alcohol outlets in commercial districts would be an expansion of current practice in Nebraska that has not been specifically reviewed by the Nebraska Courts since the *Gas 'N Shop* decisions.

## **VI. Conclusion and Recommendations**

Nebraska law appears to provide local governments with several options for regulating alcohol outlets within their boundaries independent of the Commission's authority. The *Gas 'N Shop* and related cases constrained that authority to a significant degree. Those opinions held that cities cannot distinguish between types of alcohol outlets without risk of running afoul of the Supreme Court's application of the Equal Protection clause. The *Gas 'N Shop* cases, however, may have no or only limited applicability today. They occurred 15 years ago and more recent Supreme Court cases appear to be more deferential to evidence linking alcohol outlets to community problems, a key component of the earlier cases. Moreover, the Court's application of the Equal Protection doctrine in those cases appears contrary to other legal precedents, including guidelines established by the U.S. Supreme Court.

The City of Lincoln has enacted a comprehensive zoning ordinance that creates numerous distinctions between types of alcohol outlets. Local governments may want to avoid the specific classification ruled unconstitutional (convenience store/gas stations treated differently than other

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<sup>58</sup> Lincoln Zoning Code § 27.63.680.

types of alcohol retail outlets), but other classifications based on a strong evidentiary foundation will likely survive a Constitutional challenge today. They would clearly survive a typical “rational basis” analysis using standard Equal Protection doctrine review.

There are therefore several options for local control in Nebraska. For new licenses, local governments may, through local zoning ordinances, limit the location and density of alcohol outlets in specific local districts. It can also enact a process that requires an applicant for a new alcohol license to obtain a special permit from the local government before opening its business. The ordinance can establish criteria for determining whether the proposed outlet meets minimum health and safety standards and can condition issuance of the permit on the applicant agreeing to specific retail practices. The restrictions can impose stricter standards than found in the Act but cannot be inconsistent with the Act’s provisions, and courts will interpret local provisions to avoid a finding of inconsistency when possible. These restrictions can be applied on a case-by-case basis or may apply to all types of retail outlets. Violation of the restrictions can lead to revocation of the special permit and discontinuance of the business’ operation.

For existing alcohol outlets, Nebraska law states that local governments can enact ordinances that restrict retail practices so long as they are not inconsistent with the Act. This appears to include restrictions on public nuisance activities and appears to grant localities authority to enforce their ordinances either by filing a notice with the Commission to revoke the license or by establishing a separate, local procedure for determining violations and penalties.

These conclusions are somewhat speculative because of the lack of clear guidance from Nebraska courts regarding the interpretation of key statutory provisions. Nevertheless, Nebraska law and recent Nebraska court opinions provide a foundation for expanding local authority and put into question court opinions from before this millennium that frustrated local action.

As noted in the introduction, alcohol retail availability is associated with serious community public health and safety problems. Employing local control mechanisms for regulating alcohol retail outlets will provide communities with important tools for addressing these problems.