

The Impact of Strict State Preemption on the Regulation of Alcohol Outlet Density: The Case of New York State

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I. Introduction

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

Recognizing the relationship between alcohol outlet density and excessive alcohol consumption and related harms, the independent Task Force on Community Preventive Services⁵ reviewed the scientific evidence on the effectiveness of limiting alcohol outlet density as a strategy for preventing this public health problem and concluded:

“On the basis of the reviewed evidence, the Task Force found sufficient evidence of a positive association between outlet density and excessive alcohol consumption and related harms to recommend limiting alcohol outlet density through the use of regulatory authority (e.g., licensing and zoning) as a means of reducing or controlling excessive alcohol consumption and related harms.”⁶

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

The purpose of this report, therefore, is to introduce the State preemption doctrine and describe the effect it has on the regulation of alcohol outlet density in communities to public health practitioners, members of State and community coalitions, healthcare providers, and other interested groups. The report also specifically discusses strict State preemption in New York State and how this level of control has limited local efforts to address alcohol outlet density in different communities (i.e., Oyster Bay/Long Beach; Syracuse; and Manhattan’s Lower East Side).

II. The State Preemption Doctrine

A. Description and Application to Alcohol Outlet Density Regulation

The State and Federal preemption doctrine refers to the authority of higher levels of government to mandate the practices of lower levels of government. It has often been used to advance public health goals, for example, in the enactment of Federal and State mandates related to vaccination policy and the establishment of quarantines to prevent the spread of disease. Local governments must adopt the policies mandated at the higher levels of government and are precluded from deviating from the policies in question.⁷ The Federal government's ability to preempt State and local action is limited by the U.S. Constitution – under the 10th Amendment, all authority not expressly granted to the Federal government is delegated to the States.⁸ This includes the regulation of alcohol availability; in fact, the 21st Amendment explicitly grants States this authority.⁹ State preemption of local governmental action is a matter left to each State, and States vary widely in how they exercise this authority.

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

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

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

Determining the appropriate use of particular land parcels is typically delegated to local governments, usually in the context of a comprehensive land use plan implemented through local

zoning ordinances.¹⁴ The zoning ordinance may require that new businesses obtain a conditional use permit (CUP), and the number, location, and operation of particular types of businesses (including alcohol retail outlets) can be regulated through mandatory or discretionary requirements found in the CUP provisions.¹⁵ For example, a CUP ordinance can prohibit alcohol outlets within a certain distance of sensitive land uses, such as schools, or allow the local planning board the option to impose such a condition on a case-by-case basis. Alcohol outlet density can therefore be regulated through either a licensing or local zoning system, and the two systems may be complementary.

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

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

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

There are four general categories of State preemption relative to the regulation of alcohol outlets:

- **Exclusive or near-exclusive State preemption:** Many States exclude local governments from the retail licensing process and strictly limit or prohibit the use of local land-use zoning provisions. A small number of States, including New York and North Carolina, have adopted this form of State preemption.¹⁶
- **Exclusive State licensing authority, concurrent local regulatory authority:** Many States retain exclusive authority to license alcohol outlets but allow local governments to use their local zoning and police powers to restrict certain aspects of State licensing decisions. States vary widely in the degree to which they allow local regulations. Most States fall within this category, which should be viewed as a continuum from extensive to limited preemption of local regulatory authority.¹⁷
- **Joint local/State licensing and regulatory powers.** In these States, alcohol retailers must obtain two licenses, one from the State and one from the municipality where they are located. In most cases, this gives the primary responsibility for determining alcohol availability to local governments, subject to minimum standards established by the State. Typically, local jurisdictions rely on their licensing authority to regulate alcohol outlet density, although this

may be augmented with local zoning regulations. A small number of States have dual licensing systems, including Georgia and Louisiana.

- **Exclusive local licensing with State minimum standards:** The remaining States delegate licensing authority entirely to local governments and do not issue State licenses at all. Instead, the State establishes limitations on how that licensing authority is exercised. Local zoning regulations can also be used by local governments, which may be subject to limitations established in State law. Hawaii, Nevada, and Wisconsin are among the States that have this structure. Nevada does not have a State Alcoholic Beverage Control agency, although there are State laws that may affect how local governments regulate alcohol outlets.¹⁸

Although States generally fall into one of these categories of preemption, there are a variety of permutations. States may assign differing levels of preemption for differing aspects of alcohol retail regulation. For example, the State may permit local governments to determine the location of new retail outlets but deny them any authority to regulate retailers' operating practices.¹⁹ Other States grant local authority only to certain cities, for example, those that have a city charter. States may also adopt a hybrid system. For example, Maryland has established local Alcoholic Beverage Control Boards that have primary responsibility for licensing decisions. Some of these boards are appointed by local governments, but others are appointed by the State and in effect operate as State entities.

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

III. The New York State Preemption Doctrine

A. Exclusive State Licensing Authority

The New York State Alcoholic Beverage Control Law (ABC Law) is the foundation for regulating alcohol outlets in the State. Its purpose is "to regulate and control the manufacture, sale and distribution within the State of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to law."²⁰ Through its provisions, it regulates virtually all aspects of the sale and distribution of alcohol, including the location, number, and operating practices of retailers and the hours of distribution.²¹ The State Liquor Authority (SLA) is authorized to administer the ABC Laws and has the exclusive authority to issue alcohol retail licenses, subject only to the right of judicial review.

The ABC Law specifically prohibits local governments from issuing licenses to alcohol retailers. However, the ABC law and the State Constitution are ambiguous regarding whether localities can exercise their zoning powers. There are no provisions that explicitly permit or prohibit this authority, and Article IX of the New York State Constitution states, in part, that local governments are permitted to adopt and amend laws that are not inconsistent with any general law. New York courts have held that this includes the authority to adopt zoning resolutions in an effort to foster productive land use.²²

B. Local Zoning Authority Preemption

Localities have attempted to impose regulations on alcohol-related activity based on this provision of the State Constitution, arguing that the zoning restrictions augment and are not inconsistent with the provisions of the ABC Law. However, the State courts have rejected this argument. In the seminal case *People v. De Jesus*,²³ the New York Court of Appeals (the highest court in New York State, equivalent to other State’s Supreme Courts) held that the ABC Law preempts virtually all local regulation of alcohol retail activities. The 125 defendants had been arrested at an after-hours unlicensed club in the city of Rochester and charged with violating a local ordinance prohibiting any person from patronizing an establishment that sold alcoholic beverages after 2:00 a.m. The city argued that the ordinance was not inconsistent with the ABC Law and therefore not preempted because it only targeted patrons of retail establishments and did not regulate alcohol sales.

The court disagreed. It held that the degree of authority a local government can exercise over the regulation of alcohol retail practices is limited only to those activities that have been delegated by the State (e.g., providing advisory input to the SLA during the licensing process), and that a local government was therefore precluded from acting unless it receives “clear and explicit” authority from the State to the contrary. The court also found that the ABC Law was “both comprehensive and detailed” and that there was no such delegation of authority – determining, in effect, that the regulations are invalid due to the implied preemption doctrine described above. It concluded:

“[T]he State made a studied decision that the problems to which the [ABC law] was directed ... would be more effectively met not at the local community level but by State action alone...[T]he Alcoholic Beverage Control Law is exclusive and statewide in scope and ... no local government may legislate in this field.”
[Citations omitted.]²⁴

This is an unusually broad application of the preemption doctrine. Although the case addressed the limited issue of a city’s authority to restrict retailers’ hours of operation, the opinion suggests that the State has expressly preempted local governments from regulating any aspect of alcohol control, including alcohol outlet density restrictions and retailer operating practices.

A long line of New York State cases since *De Jesus* have applied the decision in precisely this manner: *Lansdown Entertainment v. NY City Dept. of Consumer Affairs* (local “cabaret” law preempted because it required that a discotheque close at 4 a.m., which conflicted with the State ABC law allowing alcohol licensees to remain open until 4:30 a.m.);²⁵ *Louhal Properties v. Strada* (local zoning ordinance preempted because it required convenience stores within specified distances of residences to be closed between certain hours);²⁶ *People v. Courtesy Mobil*

(local ordinance prohibiting gasoline station convenience stores from maintaining an inventory of more than 45 percent grocery items preempted by SLA requirement that retailer maintain a grocery inventory of 50 percent to hold beer license);²⁷ and *Amerada Hess Corp. v. Town of Oyster Bay* (conditions imposed by zoning board that a convenience store not sell alcohol in order to receive special permit preempted by ABC law – discussed below as part of Case Study #1, page 9).²⁸

Given the scope of these decisions, there can be little doubt that New York localities do not have the authority to regulate alcohol outlet density directly through restrictions permitted in many States. This includes: distance requirements between outlets and between outlets and sensitive land uses such as schools and playgrounds; restrictions on the number of outlets within particular geographic areas; and limitations on the total number of alcohol outlets based on a population ratio. The decisions also strictly limit the extent to which they can regulate the operational practices of retail outlets to minimize the health and social problems associated with alcohol outlet density.²⁹

C. The *De Jesus* Dissenting Opinion: An Alternative Interpretation of the State Preemption Doctrine

The dissenting opinion in *De Jesus* offered an alternative analysis that gives more deference to local land use powers. Judge Gabrielli argued that the court should draw a distinction between ordinances that regulate alcohol and those that protect the “peace, comfort and decency of the neighborhood.” He concluded that local government should have the power to adopt ordinances to deal with local problems so long as they do not interfere with the State’s power to regulate alcohol.³⁰

Judge Gabrielli’s view that local governments should have the power to adopt local ordinances that do not infringe on the State’s regulatory authority, which was rejected by the Court’s majority in New York State, has been adopted in California. The California Constitution and ABC law provide that, as with New York, the State has exclusive authority to license and regulate alcohol outlets.³¹ Nevertheless, California courts have interpreted State law to allow local ordinances to regulate alcohol outlets even when explicitly authorized by State law so long as they “do not directly affect the licensee’s ability to sell alcoholic beverage[s] to a willing purchaser.”³² For example, local ordinances that require alcohol outlets to obtain a “deemed approved” permit, adhere to specific public nuisance abatement standards, and pay a fee to cover the cost of enforcing compliance have been upheld in California based on this alternative interpretation.³³

The differing approaches taken by the New York and California courts reflect a more fundamental difference in their interpretation of the role of local governments in the regulation of alcohol availability. The *De Jesus* majority concluded that in the absence of explicit authority, local matters are secondary to State concerns. The California courts have recognized the importance of local zoning for metropolitan and regional land use planning and treat it as a distinct governmental function that should be recognized as independent of the State’s licensing authority.³⁴ California courts have therefore not required that State legislation explicitly allow localities to use the deemed approved approach described above; rather, they have assumed that

these powers are protected absent an explicit provision to the contrary.

D. Exceptions to the New York Preemption Doctrine

Despite the strict limits on local control established by the New York courts, there is still a limited window for local regulation of alcohol outlets. The *De Jesus* court stated that “local laws of general application – such as, ones requiring smoke alarms in all business premises, forbidding dumping of refuse on city sidewalks, or prohibiting disorderliness at any ‘place of public resort’” – are permissible.³⁵ Thus, local governments can regulate alcohol outlets so long as the regulation applies to businesses generally and not to alcohol outlets specifically.

A second exception appears to be applicable only to “adult establishments” (i.e., those that feature topless or nude dancing). In *DJL v. City of New York*, the local government sought to limit the locations where such establishments could operate.³⁶ An adult establishment operator that had a retail alcohol license challenged the zoning regulation on the grounds that it constituted a regulation of alcohol and was preempted under *De Jesus* and related cases. He highlighted the fact that the ABC Law has specific provisions related to the operation and location of adult entertainment venues with alcohol licenses, and these provisions conflicted with provisions found in the New York City ordinance.

The Court of Appeals rejected the operator’s argument despite the conflict between State and local location requirements. In contrast to the *De Jesus* case, the Court emphasized the important function of local zoning:

“One of the most significant functions of a local government is to foster productive land use within its borders by enacting zoning ordinances... [T]he “purpose of a municipal zoning ordinance in dividing a governmental area into districts and establishing uses to be permitted within the districts is to regulate land use generally.” The [New York City ordinance] does just that, and stands in contrast to laws that regulate alcoholic beverages.³⁷

The court noted that land use regulation “inevitably exerts an incidental control over any of the particular uses or businesses” and that a State statute does not preempt a local law just because it has a “tangential” impact on the State’s interest.³⁸ Although the zoning regulation limited where some alcohol retailers could locate, it applied generally to all “adult establishments” irrespective of whether they dispensed alcohol.³⁹ The business simultaneously engaged in two distinct activities involving independent realms of governance.⁴⁰ Thus, the fact that there was some overlap between the zoning ordinance and ABC law was only peripheral.⁴¹

This deference to local zoning is notably absent in other cases, and it appears that the Court adopted the reasoning of the *De Jesus* dissenting opinion. Several of the previous cases focused on businesses engaged in two distinct activities involving independent realms of governance. For example, the *Louhal* case (decided a year after the *DJL* case) invalidated restrictions on the hours of sale of convenience stores in residential areas. It clearly addressed “productive land use” (the protection of the peace and quiet of residential properties) in a manner that did not directly affect alcohol sales and was applicable to all convenience stores without regard to whether they sold alcohol. On what basis is nude dancing determined to be tangential or peripheral to the State interest in regulating alcohol, whereas the regulation of hours of sale for convenience stores in

residential areas is not? Most if not all adult entertainment businesses have alcohol licenses, so the fact that most convenience stores are licensed is not a distinguishing factor. This inconsistency might lead to a conjecture that New York courts are willing to give localities more control over activities in alcohol outlets that the courts determine are socially disfavored, such as adult entertainment.

The *DJL* case nevertheless reinforces the suggestion found in *De Jesus* that localities may be able to exert some control over alcohol retail practices if the ordinance does not single out either alcohol outlets or alcohol sales practices directly. A local public nuisance abatement ordinance, for example, may be used to regulate alcohol outlets so long as the ordinance on its face applies to both alcohol retail outlets and other businesses. For example, the ordinance could apply the public nuisance standards to all businesses in a given retail district, both those that sell alcohol and those that do not. The extent to which a local ordinance must include other businesses and the types of sales practices in alcohol establishments that might be deemed tangential to alcohol sales is unclear without more guidance from the courts. The following New York case studies provide additional insights into how the State ABC law affects the local regulation of alcohol outlet density.

IV. New York State Case Studies

A. Introduction

By any measure, New York State is remarkably diverse. Its population densities range from intensely urban (the borough of Manhattan at 54,900 people per square mile) to very rural (Hamilton County in the State's Adirondack Park at just 3 people per square mile).⁴² New York State is home to a wide range of population subgroups that vary with regard to their race, ethnicity, countries of origin, and socioeconomic status. Queens County, in particular, has been cited as the most ethnically diverse county in the United States.⁴³ The State features wealthy suburban communities (Westchester and Nassau Counties are two of the wealthiest counties in the United States)⁴⁴ and pockets of persistent rural poverty in the State's Appalachian Region.⁴⁵

This diversity provides the opportunity to assess the impact of a strict State preemption doctrine in demographically distinct communities. Three types of communities – suburban, small urban, and large urban – have been selected for this purpose. The case studies are based on key informant interviews with community coalition leaders, reviews of relevant documents, reports found in the academic literature, and independent legal research.

B. Case #1 - Suburban: Oyster Bay and Long Beach, Long Island, NY

1. Introduction

Oyster Bay and Long Beach are two communities in Long Island's Nassau County, which is relatively wealthy (it has the lowest rate of persons in poverty of any county in New York⁴⁶). Consistent with national studies that show binge drinking to be more prevalent in higher-income households,⁴⁷ excessive alcohol use is a problem in Nassau County. Nearly 18 percent of adults

reported binge drinking (men having five or more drinks and women having four or more drinks on one occasion) in the past 30 days.⁴⁸

2. Oyster Bay

Oyster Bay is located on Nassau County's north shore. In 1999, an automobile service station owned by the Amerada Hess Corporation ("Hess") applied for a special use zoning permit to remodel for the purposes of adding a 1,680-square-foot convenience store.⁴⁹ Because of the station's proximity to the Oyster Bay Boys and Girls Club and other youth locations (concerns voiced by the Oyster Bay-East Norwich school board⁵⁰), the Town of Oyster Bay included a stipulation that Hess sign a covenant agreeing not to sell alcoholic beverages. The concern and stipulation were prompted in part by reports that Hess stations were well-known for selling toy trucks, which were considered to be attractive to children.⁵¹ Furthermore, several other service stations in the town had previously agreed not to sell alcohol due to concerns that co-located sales of gasoline and alcohol would encourage alcohol-impaired driving, providing a precedent for requiring that Hess sign the covenant.⁵²

After signing the agreement, receiving the special use permit, and undergoing the renovations in 2002, Hess acquired an SLA liquor license and began selling beer and wine cooler products. A year later, town officials, angered by Hess' failure to comply with the negotiated agreement, served the station with a summons (for violating the covenant) and revoked its special use permit.⁵³ Hess sued Oyster Bay, winning the case and subsequent appeals, leaving the city no recourse but to allow Hess to sell alcohol at its service station.⁵⁴ One official commented that the court ruling significantly eroded the town's zoning authority, a fear that had prompted the town to seek a negotiated agreement through the covenant process.⁵⁵

3. Long Beach

Long Beach, as its name implies, is a resort community located on Long Beach Barrier Island on the south shore of Nassau County. It is a small city (with 42,000 residents) but is relatively self-contained with its own city council, medical center, and school district.

The Coalition to Reduce Underage Drinking at Long Beach Medical Center ("the Coalition") has been at the forefront of efforts to address the large concentration of alcohol outlets in the community. Long Beach has rates of underage drinking above the State average and the highest rate of adult binge drinking in the county.⁵⁶ Even so, the Coalition has been unable to prevent new outlets from appearing in already dense areas; in fact, new outlets have appeared in the community before advocates were even aware that applications were made for liquor licenses, and SLA personnel have stated that the agency has initiated an accelerated approval process in response to complaints of SLA application backlogs. Community members have also expressed frustration with the SLA's failure to impose adequate sanctions on outlets that sell to minors and violate other State laws designed to protect community health and safety. One bar in the community, an establishment that had multiple citations for liquor law violations, had its liquor license revoked for failure to pay a fine but not for the violations themselves. The coalition concluded that it had no recourse but to continue to work within the SLA process or to seek revisions to State law.

C. Case #2 - Upstate Small Urban: Syracuse

Syracuse is the fifth-largest city in New York State (pop. 129,000), situated in Onondaga County in the State's geographic center. Alcohol outlet densities vary widely throughout the city, with some Census tracts featuring fairly intense densities (such as the Armory Square entertainment district and the Little Italy and Westcott neighborhoods) and others having relatively few on-premise alcohol outlets. The economic disinvestment and poverty faced by these neighborhoods is in stark contrast to the affluent communities discussed in the first case study.

Established in 1977, Syracuse United Neighbors (SUN) is a grassroots community organization dedicated to improving the lives of families living in the neighborhoods of Syracuse's south, southwest, and near-west sides, with a particular focus on establishing crime- and drug-free streets and neighborhoods. Problem alcohol outlets are therefore a serious concern for the organization.

A representative of SUN reports that the organization's primary focus is on addressing problem outlets, especially small groceries with beer/wine licenses (commonly referred to as corner stores).⁵⁷ Many of these stores function as magnets for criminal activity, loitering, and a host of quality-of-life issues.⁵⁸ SUN and its allies in the Syracuse Common Council (Councilors Bill Ryan, Tom Seals, and Pat Hogan) and Syracuse Mayor Matthew Driscoll, according to the SUN representative, have had to "find a way around preemption," which limits the city's ability to regulate these problem outlets.⁵⁹

SUN worked with police and city officials to strengthen the city's Nuisance Abatement Ordinance in a manner that they hoped would not trigger a preemption challenge by enacting a Certificate of Use Ordinance (COU) in 2004.⁶⁰ The COU establishes a point system that is used as a basis for closing down problem outlets. Points are given for property code violations, noise violations, trash, loitering, operating at illegal hours, food stamp fraud, and being the site of weapons, drug, gambling, or prostitution offenses among other types of nuisances. All bars, food stores, drugstores, and restaurants are required to obtain a COU permit.⁶¹ Alcohol outlets are therefore the primary focus for enforcement, although the ordinance applies to all such businesses whether or not they have an alcohol license. Yet, despite its promise, SUN has been unable to convince city leaders to implement the ordinance, probably due at least in part to concerns regarding costs and potential legal challenges, and has no legal recourse to require implementation. The legality of using the ordinance to regulate alcohol outlets under the State preemption doctrine has therefore not yet been tested.

D. Case #3 - Downstate Urban: Manhattan's Lower East Side

Perhaps the most dramatic example of alcohol outlet proliferation and overconcentration in New York State is that of the Lower East Side of Manhattan (LES).⁶² The history that has led to this situation illustrates the impact of the State preemption doctrine on the health and safety of particular communities and neighborhoods, an impact that is made even more complex by the layered government of New York City.

Ocejo (2008) documents that the number of bars in the 1.8 square mile area of the LES increased by over 1000% in a 22-year period (from 35 in 1985 to 393 in 2007).⁶³ This increase in outlet

density has been fueled by a number of factors, including the gentrification of the LES and what Oejo describes as “a public/private partnership between the New York State Liquor Authority (SLA) and ... real estate actors, property developers, and bar owners.”⁶⁴

The high alcohol outlet density, particularly with regard to on-premise establishments, has resulted in serious quality-of-life concerns among LES residents, most notably environmental noise.⁶⁵ Other problems reported by area residents include property crime, traffic congestion, public drunkenness, disorderly conduct, public urination, vomiting, and problems with garbage and vermin resulting from overwhelmed infrastructure. Even bar owners in the neighborhood have complained that the overconcentration of outlets has had an adverse economic impact by lowering the value of their individual businesses.⁶⁶

Manhattan’s Community Board No. 3 has led the effort to alleviate these problems. New York City community boards function as advisory bodies with regard to “land use and zoning matters, the City budget, municipal service delivery, and many other matters relating to their communities’ welfare.”⁶⁷ This includes participation in the SLA licensing process. Applicants for alcohol retail licenses must notify the relevant community board 30 days prior to filing with the SLA.⁶⁸ The boards are also mandated to act as consultants and fact-finders for the SLA in 500-foot rule hearings.⁶⁹ (The SLA must conduct a special hearing for a new on-sale alcohol outlet applicant if the proposed location is within 500 feet of certain types of existing licensed establishments.) Although the boards play a role in the licensing process, their influence is limited. The New York City Mayor’s Community Advisory Unit makes clear that community boards serve as advisors, advocates, and service coordinators but have no real authority in that “they cannot order any City agency or official to perform any task.”⁷⁰ Community board input is also “not binding” on the SLA and “community opposition alone is not sufficient to disapprove an application.”⁷¹

Some community boards have leveraged their knowledge and community organizing skills to at least slow down the exponential growth in alcohol outlet density in their districts. For example, Community Board No. 3 has developed expertise pertaining to numerous ordinances, rules, and regulations and provides regular input into the SLA licensing process. Nevertheless, key informants report serious problems in developing effective strategies for reducing problems associated with alcohol retail density.⁷² For example, the SLA in New York State has historically responded to citizens’ quality of life complaints by referring them to the New York Police Department (NYPD), and the NYPD has responded by stating that problems associated with alcohol retail outlets are the jurisdiction of the SLA,⁷³ thus frustrating concerned citizens and compromising the enforcement of liquor laws in the LES. Furthermore, the complexities of State licensing, city planning, and zoning processes have led to, among other problems, the placement of alcohol outlets in residential-only zoned areas.⁷⁴

Several bills currently up in the New York State Assembly and New York State Senate would grant community boards a somewhat larger role in the alcohol retail licensing process,⁷⁵ although none of them fundamentally change the top-down nature of the process.

E. Implications for Public Health Practice

These case studies highlight three important themes regarding the effects of strict State preemption on the regulation of alcohol outlet density and problem alcohol outlets in New York State: (1) limited local access to SLA licensing decisions; (2) lack of attention to local circumstances; and (3) structural flaws associated with the SLA.

1. Limited local access to SLA licensing decisions

As noted in Section III, New York places all alcohol outlet licensing decisions with the SLA and strictly limits local zoning powers. As a result, local governments and community organizations play only an advisory role in the SLA process. They can raise objections or seek targeted enforcement, but decisionmaking authority is exclusively at the State level.

Retailers have several advantages in the process. According to key informants, individual licensees and license applicants are typically highly motivated to protect and advance narrow economic interests. They hire lawyers and lobbyists who specialize in SLA procedures to navigate the complex licensing and enforcement system. Community interest in protecting public health and public safety, by contrast, is diffuse. Even highly motivated community members often have neither the means nor the opportunity to engage effectively in the licensing and enforcement processes.

Key informants also report that an alcohol outlet application challenge requires a community organization to: 1) proactively monitor the SLA by using the Public License Query function; 2) research the issue extensively; and 3) organize local citizens to attend hearings on a voluntary basis, taking time from work, family, or both. Several informants described such campaigns, commenting on the difficulty inherent to the amount of time and energy required and the lack of resources and legal expertise.

The complexity of the appeals process contributes further to the licensees' disproportionate power and access when compared with community organizations. One informant noted that the SLA faces intense pressure to accede to industry demands because of the threat of lawsuits from those who are denied licenses or face disciplinary action. Community organizations lack the resources to mount similar challenges when no action is taken in response to their protests. As illustrated in the Oyster Bay case study, cities that enact ordinances designed to circumvent the SLA process also face the threat of lawsuits. These suits can be costly and time consuming, a significant problem for the SLA and local governments with limited and shrinking resources. (See Discussion section below for potential steps public health departments and community coalitions can take in light of these issues associated with the SLA licensing process.)

2. Lack of attention to local circumstances and problems

The case studies also showcase the diversity found in New York State communities, including the problems associated with increased alcohol outlet density. Each community has distinct economic development plans and business climates and needs alcohol retail licensing and enforcement decisions that are tailored to their local planning processes and neighborhood

characteristics. As one community leader noted in her insistence on greater local control over the licensing process, “There is no ‘one size fits all’ for the State.”⁷⁶ The State laws, regulations, and administration have failed to meet this challenge due, in large measure, to the structural flaws in the system, as described below.

3. Structural flaws associated with the ABC law and SLA

Most key informants identified structural flaws with State regulatory systems, including problems with State laws and regulations and inadequate resources to enforce laws and regulations even if appropriately designed as the most important factors limiting the influence of communities over the number of retail alcohol outlets in their neighborhoods. The SLA’s statutory mission and mandates combine two potentially conflicting goals – protecting the public health and safety on the one hand, and promoting economic development and maximizing revenue on the other. The informants stated that the SLA is the impossible position of having both regulatory and “economic partnership” roles; the latter too often trumps the former.

A concrete example of the law’s tilt toward the economic development goal is found in the “burden of proof” provisions in the ABC law that apply to new license applications. As stated in an SLA document provided to the public: “When the SLA receives an application, there is a general presumption that it will be approved unless there is a good reason not to approve it.”⁷⁷ Although the ABC law offers some guidance as to what constitutes a “good reason,” protestors must still overcome the presumption that issuing licenses fulfills a fundamental goal of the ABC law and the SLA.

This is the case even when applying statutes designed to protect community health. For example, in the 500-foot hearings described above, the SLA must allow community input and the applicant has a more rigorous burden of proof. However, the rule allows the SLA to consider the “public convenience and advantage, as well as the public interest” in its final determination. Key informants report that when the SLA applies this standard, they often give more weight to even the most minimal economic benefits asserted by applicants than to the health and safety concerns raised by community groups.

SLA’s lack of resources exacerbates these problems. This is perhaps best illustrated by the dramatic erosion in SLA enforcement staff. In 2006, the New York SLA had 28 investigators who were responsible for overseeing 27,062 on-premise liquor licenses,⁷⁸ or about 900 on-premise licenses per investigator. In 2005, the National Highway Traffic Safety Administration reported that, in the previous year, the NY SLA had the second-worst ratio of enforcement personnel to licensed establishments of all the States,⁷⁹ and the Office of the New York State Comptroller concluded in an audit that the SLA Enforcement Division did not “routinely conduct follow-up investigations to ensure that violations have been corrected.”⁸⁰ Furthermore, given the severe budget crisis the State currently faces, it appears unlikely that additional enforcement positions will be created.

V. Discussion and Conclusions

As noted at the beginning of this report, States vary quite widely in the extent to which they allow local control over liquor licensing and the placement of retail alcohol outlets in communities. Unfortunately, in States like New York with strict State preemption, communities are often left with few options for controlling the number of retail alcohol outlets in their neighborhoods. State and local public health agencies and community coalitions need to inform policymakers about these limitations and the effects they have on their ability to implement the Task Force on Community Preventive Services' recommendation to regulate alcohol outlet density as a strategy for preventing excessive alcohol consumption and related harms.

State officials in New York have recognized these weaknesses in the State system. In 2007, then-Governor Eliot Spitzer instructed the New York State's Law Revision Commission to review the ABC law. The commission is a standing body that reviews large portions of New York State law and makes recommendations to the legislature.⁸¹ It initially focused largely on the need to modernize and streamline SLA practices and procedures, partly reflecting the fact that the commission received extensive comments and recommendations from alcohol industry interests. This changed when the Council on Addiction of New York State (CANYS) organized public health and safety groups to engage in the process and emphasize the importance of the SLA's mandate to protect public health and safety. The commission's staff ultimately made this a key aspect of their final report.⁸²

The New York case studies and legal analyses also show that there may be some strategies that communities located in States with strict preemption over the regulation of alcohol outlet density can still use to assert some control over this environmental risk factor for excessive alcohol use. The Syracuse public nuisance ordinance provides a concrete example of such a strategy, although its legality has yet to be tested. Public nuisance abatement laws may provide an important basis for addressing problems associated with alcohol outlet density, so long as they do not include provisions that can be interpreted as directly regulating the sale of alcohol. In addition to supporting the use of these local strategies to help regulate alcohol outlet density, public health practitioners and State and community coalitions residing in States with strict State preemption, such as New York, can conduct public health surveillance on alcohol outlet density and help inform community leaders about the problems associated with increased density. Specific steps that public health practitioners and coalitions can take include the following:

1. *Collecting data that links alcohol outlet density with community public health and safety problems.* This can include collection, analysis, and reporting of data related to the number, types, and locations of alcohol outlets, as well as patterns of excessive alcohol use and harms associated with alcohol outlet density (e.g., alcohol-impaired driving and alcohol-related assault and crime). Surveys of local residents regarding problems associated with retail outlets are also useful in making the case for regulating alcohol outlet density. Establishing a baseline to define the problems associated with alcohol outlet density is critical to understanding the nature of the problem and identifying potential policy solutions.
2. *Identifying and mapping alcohol retail outlet practices that may contribute to community problems.* For example, resident surveillance can be conducted to identify and document

outlets that allow loitering in adjacent sidewalks, sell drug paraphernalia, have large numbers of alcohol advertisements on their windows and outdoor walls, and fail to monitor behavior in parking lots. The resulting data, although requiring some subjective judgments, can be used to graphically illustrate the problems associated with alcohol retail density.

3. *Organizing residents, meeting with local policy makers, sponsoring colloquia, and conducting other activities that promote public discussion and debate.* The adverse effects of alcohol outlet density are not well understood and are frequently taken as a given of community life. Public health practitioners and State and local coalitions can take a leadership role in educating key constituencies and leaders regarding the nature and scope of the problem and strategies for addressing it.

Taken together, these actions can inform the discussion about the regulation of alcohol outlet density in States with strict preemption with the ultimate goal of preventing excessive alcohol consumption and the many health and social harms that are related to it.

¹ Centers for Disease Control and Prevention (2008). *Alcohol-Related Disease Impact (ARDI)*. Atlanta, GA: CDC. Available at: <http://www.cdc.gov/alcohol/ardi.htm>. Accessed April 18, 2011.

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

³ D. Gorman, et al., *supra* n. 1.

⁴ Babor, T. F., Caetano, R., Casswell, S., Edwards, G., Giesbrecht, N., Graham, K. et al. (2003). *Alcohol: No ordinary commodity. Research and public policy*. New York, NY: Oxford University Press.

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

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

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

⁸ U.S. Constitution, 10th Amendment.

⁹ U.S. Constitution, 21st Amendment.

¹⁰ See National Institute on Alcohol Abuse and Alcoholism (NIAAA), Alcohol Policy Information System (APIS). <http://www.alcoholpolicy.niaaa.nih.gov> (accessed March 7, 2011).

¹¹ Gorovitz, E., Pertschuk M., & Mosher, J. (1998). Preemption or prevention? Lessons from efforts to control firearms, alcohol and tobacco. *Journal of Public Health Policy*, 19(1), 37–50; Mosher, J. (2001). *The perils of preemption*. Chicago, IL: American Medical Association. Available at: http://alcoholpolicyamd.com/pdf/Policy_Perils.pdf (accessed April 18, 2011).

¹² *Id.*

¹³ NIAAA, *supra* n. 10.

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- ¹⁴ Ashe, M., Jernigan, D., Kline, R. & Galaz, R. (2003). Land use planning and the control of alcohol, tobacco, firearms, and fast food restaurants. *American Journal of Public Health*, 93(9), 1404–1408.
- ¹⁵ Mosher, J. & Saetta, S. (2008). *Best practices in municipal regulation to reduce alcohol-related harms from licensed alcohol outlets*. Oxnard, CA: Ventura County Behavioral Health Department. Available at: <http://www.venturacountylimits.org/resources/article/F85A2D/policy-briefing-02-best-practices-in-municipal-regulation-to-reduce-alcohol-related-harms-from-licensed-alcohol-outlets>. Accessed March 7, 2011.
- ¹⁶ New York, see discussion, Section III *infra*; North Carolina, see *State v. Williams*, 283 NC 550, 196 SE2d 756 (1973). There are no systematic analyses of State/local alcohol licensing structures. These descriptions are based on independent legal research conducted by the authors. For further discussion, see Mosher (2001), *supra* n. 10.
- ¹⁷ GA Stat. Ann. § 3-3-2(a); LA Stat. Ann. § 26:493. Unless otherwise indicated, this memorandum uses the term “regulation” generally to refer to the legal authority governing the area, i.e., it is not limited to administrative regulations; similarly, “law” is not limited to statutes.
- ¹⁸ HI Stat. § 281-17; NV Stat. § 244.350; WI Stat § 125.25.
- ¹⁹ For further discussion, see Mosher (2001), *supra* n. 10.
- ²⁰ N.Y. Alcoholic Beverage Control (ABC) Law § 2.
- ²¹ N.Y. ABC Law §§ 30-43, 64, 106.
- ²² *DJL Restaurant Corp. v. City of New York*, 96 N.Y.2d 91 (2001) at 96.
- ²³ 54 N.Y.2d 465 (1981).
- ²⁴ *Id.* at 470-471
- ²⁵ 74 N.Y.2d 761 (1989).
- ²⁶ 191 Misc. 2d 746 (2002).
- ²⁷ 3 Misc. 3d 11 (2003).
- ²⁸ 36 A.D.3d 729 (2007). This case is the subject of a case study in the next section of this report.
- ²⁹ Campbell et al., *supra*, n. 2.
- ³⁰ 54 N.Y.2d at 473.
- ³¹ California State Constitution, Article XI, § 7; California Alcoholic Beverage Control Act, Cal. Bus. & Prof. Code §§ 23000 et seq.
- ³² *City of Oakland v. Superior Court*. (1996) 45 Cal.App. 4th 740, 764 citing *California Restaurant Assn. v. City of Los Angeles* (1987) 192 Cal.App.3d 405, 411.
- ³³ *Id.*; for discussion, see Mosher, J., Cannon, C., & Treffers, R. (2009). *Reducing community problems associated with alcohol sales: The case of deemed approved ordinances in California*. Oxnard, CA: Ventura County Behavioral Health Department. Available at: <http://www.venturacountylimits.org/resources/article/B881CB/reducing-community-alcohol-problems-associated-with-alcohol-sales-the-case-of-deemed-approved-ordinances-in-california>. Accessed March 20, 2011.
- ³⁴ *Floresta v. City Council of the City of San Leandro*, 190 Cal.App.2d 599 at 605.
- ³⁵ *De Jesus* at 469.
- ³⁶ 96 N.Y.2d 91 (2001).
- ³⁷ *Id.* at 96-97.
- ³⁸ *DJL* at 97 citing *Incorporated Vil. of Nyack v. Daytop Vil.*, 78 N.Y.2d 500.
- ³⁹ *DJL* at 97.
- ⁴⁰ *Id.*
- ⁴¹ *DJL* at 98
- ⁴² New York Department of Health (2003). *Strengthening New York's Public System for the 21st Century, Appendix D*. Report of the Public Health Infrastructure Working Group to the Public Health Council. Albany, NY: Department of Health. Available at: http://www.health.state.ny.us/press/reports/century/phc_appd.htm. Accessed March 20, 2011.
- ⁴³ Copquin, C.G. (2007). *The neighborhoods of Queens*. New Haven, CT: Yale University Press.
- ⁴⁴ Census Bureau, American Community Survey, 2009
- ⁴⁵ Black, D.A. & Sanders, S.G. (2004). Labor market performance, poverty, and income inequality in Appalachia. *Demographic and Socioeconomic Change in Appalachia*. Washington, DC: Appalachian Regional Commission.
- ⁴⁶ U.S. Department of Agriculture, Economic Research Service (2009). *County-level poverty rates for New York*. Available at: <http://www.ers.usda.gov/data/povertyrates/PovListpct.asp?st=NY&view=Percent&longname=New%20York>. Accessed March 20, 2011.

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- ⁴⁷ Centers for Disease Control and Prevention (2010). *CDC Vital Signs: Binge Drinking*. Available at: <http://www.cdc.gov/vitalsigns/BingeDrinking/>. Accessed April 20, 2011.; New York State Office of Alcoholism & Substance Abuse Services (n.d.). *Prevention risk indicator services monitoring system for alcohol and substance abuse*, 2005 Risk Profile for Nassau County. Available at: http://www.oasas.state.ny.us/hps/datamart/2005_PRISMS_Profiles/Nassau.pdf (accessed March 29, 2011).
- ⁴⁸ Centers for Disease Control and Prevention (CDC). *Behavioral risk factor surveillance system survey data*. Atlanta, GA: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, 2009.
- ⁴⁹ Albin, S. (2003). "A fill-up, a 6-Pack and a toy truck." *The New York Times*, 2(L), October 19, 2003; Williams, L. (2005). "Gas station wins brew-ha-ha; Town's bid to ban sale of liquor nixed." *New York Daily News*, June 1, 2005.
- ⁵⁰ Albin, *supra* n. 40.
- ⁵¹ *Id.*
- ⁵² *Id.*
- ⁵³ *Id.*
- ⁵⁴ 36 A.D.3d 729 (2007). See discussion, previous section.
- ⁵⁵ Albin, *supra* n. 49.
- ⁵⁶ Vining, personal communication, March 2, 2011.
- ⁵⁷ Prehn, personal communication, March 5, 2011.
- ⁵⁸ Lane, S., Keefe, R. H., Rubinstein, R., Levandowski, B. A., Webster, N., Cibula, D. A., et al. (2008). Structural violence, urban retail food markets, and low birth weight. *Health & Place*, 14(3), 415-423.
- ⁵⁹ Prehn, personal communication; Sieh, M. (2003). SUN asks city for audit, licenses - Group questions spending of housing money, seeks licensing of corner stores. *Syracuse Post-Standard*, B2, May 30, 2003. Key support for the ordinance also came from the Greater Syracuse Chamber of Commerce (Munno, 2006).
- ⁶⁰ Syracuse, NY Code of Ordinances, Chapter 49.
- ⁶¹ Syracuse, NY Code of Ordinances, Chapter 49, Article 1, §§49-3, 49-4.
- ⁶² The LES is bounded by 14th Street on the north, the East River on the east and the south, and Fourth Avenue and the Bowery on the west, extending to Baxter and Pearl Streets and the Brooklyn Bridge south of Canal Street.
- ⁶³ Ocejo, R.E. (2008). The uses of nightlife disorder: Flexible regulation and the urban nighttime economy. Paper presented at the annual meeting of the American Sociological Association, Sheraton Boston and the Boston Marriott Copley Place, Boston, MA, July 31, 2008. Available at: http://www.allacademic.com/meta/p_mla_apa_research_citation/2/4/1/4/8/pages241481/p241481-1.php. Accessed March 25, 2011.
- ⁶⁴ *Id.*
- ⁶⁵ The noise is multifactorial, and comes from "patrons on the street in front of licensed establishments, in the backyards of licensed establishments, traveling between licensed establishments and emanating from the businesses themselves, as well as from taxis and limousines dropping off and picking up people patronizing these establishments" (Community Board No. 3 (n.d.). *CB3 restrictions for liquor licenses in certain areas* [resolution]. Available at: http://www.nyc.gov/html/mancb3/html/sla/reso_area.shtml. Accessed February 11, 2011.
- ⁶⁶ Communications at meeting of SLA subcommittee, February 16, 2011.
- ⁶⁷ New York City Mayor's Community Affairs Unit (2011). *Community boards: Responsibilities*. Available at: <http://www.nyc.gov/html/cau/html/cb/responsibility.shtml>. Accessed February 23, 2011.
- ⁶⁸ New York State Liquor Authority (n.d.). *Community board Q & A*. Available at: http://www.abc.state.ny.us/system/files/CB_Q-n-A.pdf. Accessed February 1, 2011.
- ⁶⁹ The 500-foot law restricts the granting of a new SLA license if the proposed location is within 500 feet of "certain other establishments with on-premise liquor licenses."
- ⁷⁰ NYCMCAU, *supra* n. 69.
- ⁷¹ NYSLA, *supra* n. 59.
- ⁷² Stetzer, personal communication.
- ⁷³ Stetzer, Testimony to Community Board #3 Task Force on SLA Policy
- ⁷⁴ These outlets remain in operation as grandfathered noncompliant businesses (Stetzer, personal communication).
- ⁷⁵ See, e.g., A01053, A00505, A00583, A00584, A00675, A03467, & S03122
- ⁷⁶ Stetzer, personal communication. These comments reflect Ms. Stetzer's personal experience and do not represent official positions of the Community Board.
- ⁷⁷ NYSLA, *supra* n. 70 at 2.

78 O'Toole, C. (2006). In New York, 28 investigators try to watch 27,062 bars - state liquor authority depends on police for tips, but officers often too busy." *Syracuse Post-Standard*, October 5, 2006, p. A1.

79 National Highway Traffic Safety Administration (2005). *The role of alcohol beverage control agencies in the enforcement and adjudication of alcohol laws*. Washington, DC: NHTSA. Available at:

<http://www.nhtsa.gov/people/injury/enforce/abcroleweb/images/ABCFinal.pdf>. Accessed March 28, 2011.

80 New York State Office of the Comptroller (2005). *State liquor authority: Division of alcoholic beverage control. oversight of wholesalers' compliance with the alcoholic beverage control law*. Report 2005-S-33, p. 10.

81 For a description of the commission, see <http://www.lawrevision.state.ny.us/>. Accessed March 28, 2011.

82 New York State Law Revision Commission (2009). *Report on the alcoholic beverage control law and its administration*. Albany NY: NYSLRC, September 30, 2011. Available at:

<http://www.lawrevision.state.ny.us/FinalReportPartOne.pdf>. Accessed March 28, 2011.