MEMORANDUM

LOCAL CONTROL OF ALCOHOL RETAIL AVAILABILITY IN GEORGIA: A LEGAL ANALYSIS

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Note: This memorandum was prepared as background to a larger study on the state preemption doctrine that is submitted for publication.

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 Georgia. 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, and alcohol-related motor vehicle crashes, among other health and safety problems.[1] Large numbers of alcohol outlets in small geographic areas increase the risks of these problems.[2] 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.[3]

The Centers for Disease Control (CDC) Task Force on Community Preventive Services[4] has reviewed the research regarding alcohol retail density 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.[5]

As noted by the Task Force, alcohol retail density can be addressed through licensing and zoning regulations, which can be applied at both state and local levels. This report analyzes the interplay between these two levels of government in the regulation of alcohol outlet density and the role of the state preemption doctrine in determining the extent of local authority. It then provides a detailed examination of the application of the state preemption in Georgia and concludes with recommendations for steps local authorities can take to help limit the negative impact of liquor retail activity in their jurisdictions.

II. The State Preemption Doctrine

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[1] C. Campbell et al., The *Effectiveness of Limiting Alcohol Outlet Density as a Means of Reducing Excessive Alcohol Consumption and Alcohol-Related Harms*, 37 American Journal of Preventive Medicine 556-59 (2009); D. Gorman et al, *Spatial Dynamics of Alcohol Availability, Neighborhood Structure and Violent Crime*, 62 Journal of Studies on Alcohol, 628-36 (2001); R. Scribner et al., *The Risk of Assaultive Violence and Alcohol Availability in LA County*, 85 American Journal of Public Health 335-40 (1995); Shelley Ross Saxer, *Down with Demon Drink!": State Strategies for Resolving Liquor Outlet Overconcentration in Urban Areas*, 35 Santa Clara L. Rev. 123 (1995); R. Parker and L. Rebhun, *Alcohol and Homicide: A Deadly Combination of Two American Traditions* (Albany, NY: State University of New York Press, 1995).

[2] D. Gorman et al., *supra* n. 1.

[3] T. Babor et al., *Alcohol: No Ordinary Commodity* (New York, NY: Oxford University Press, 2003).

[4] The Task Force is an independent, non-federal, volunteer body 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 webpage, *The Task Force on Community Preventive Services*, at http://www.thecommunityguide.org/about/task-force-members.html (accessed March 14, 2011).

[5] Task Force on Community Preventive Services, *Recommendations for Reducing Excessive Alcohol Consumption and Alcohol-Related Harms by Limiting Alcohol Outlet Density*, 6 American Journal of Preventive Medicine 570-71 (2009).

All states have developed comprehensive legal structures for regulating alcohol retail outlets. 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 establish minimum operational standards and practices. In some states (control states), the state directly operates some retail stores that sell for consumption off the premises (off-sale).[6]

This licensing authority may be augmented with local zoning/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 plans, implemented through local zoning ordinances.[7] 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.[8] Alcohol outlet density can therefore be regulated through either a licensing or local zoning system and the two systems may be complementary, with the licensing system usually superseding zoning requirements if conflicts between the two systems arise.

A critical aspect of a state's alcohol retail statutory scheme is the extent to which it allows local governments to use licensing and zoning powers to regulate alcohol outlets. The 21st Amendment to the U.S. Constitution grants these powers to the states; the extent to which the powers are delegated to local authority is a function of state law. "State preemption" is the legal doctrine that addresses this delegation of authority.[9] There are four general categories of state preemption as it applies 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.

- **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 the state licensing decisions. States vary widely in the degree to which they allow local regulations.[10]

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[6] See National Institute on Alcohol Abuse and Alcoholism (NIAAA), Alcohol Policy Information System (APIS), at www.alcoholpolicy.niaaa.nih.gov (accessed March 7, 2011).

[7] M. Ashe et al., *Land Use Planning and the Control of Alcohol, Tobacco, Firearms, and Fast Food Restaurants*, 93 American Journal of Public Health 1404 (2003).

[8] J. Mosher & S. Saetta, *Best Practices in Municipal Regulation to Reduce Alcohol-Related Harms from Licensed Alcohol Outlets* (Oxnard CA: Ventura County Behavioral Health Department, 2008), 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).

[9] J. Mosher, E. Gorovitz, and M. Pertchuk, *Preemption or Prevention? Lessons from Efforts to Control Firearms, Alcohol and Tobacco*, 19 J. Pub. Health Policy 37-50 (1998). For additional discussion about state/local preemption, *see* Paul Diller, *Intrastate Preemption*, 87 B.U.L. Rev. 1113 (Dec. 2007). This memorandum addresses only state/local preemption, not federal/state preemption.

[10] 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.

- **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 authority may be augmented with local zoning regulations.

- **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 might also be used by local governments, which may be subject to limitations established in state law.

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.[11]

In general, restricting local authority to regulate alcohol outlet density undermines the ability of local governments to fulfill one of their primary responsibilities – land use planning. This planning is usually treated as a local function because it requires an understanding of local conditions. For example, is a particular proposed land use type compatible with surrounding land uses, will it create law enforcement problems, and will it cause undue strain on other municipal resources, such as fire protection or water delivery? These questions are best answered by local decision makers, with input from local residents. The state has an important role, by establishing broad guidelines and procedures that local governments must follow, but the state is not in a good position to determine whether a particular land use is appropriate to a particular location.

III. Georgia's Structure for Alcohol Regulation[12]

Georgia uses a joint local/state licensing and regulatory structure for regulating alcohol retail outlets. This section describes this structure and the application of the state preemption doctrine, including an analysis of how courts have applied preemption in specific contexts. Finally, it describes specific types of local control.

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[11] For further discussion, *see* J. Mosher, *The Perils of Preemption* (Chicago, IL: American Medical Association, no date), available at: http://www.alcoholpolicymd.com/pdf/Policy_Perils.pdf (accessed March 11, 2011).

[12] Research on laws governing Georgia is somewhat complicated by the fact that Georgia's Alcoholic Beverage Code was restructured so that it is sometimes difficult to determine the extent to which provisions cited under the old law are incorporated into revised one. It is also worth noting that Georgia is now in the Federal 11th Circuit, which adopted as binding precedent all 5th Circuit decisions handed down prior to October 1, 1981. Bo'Maz Unlimited, Inc. v. City of Walthourville, 2009 U.S. Dist. LEXIS 24562, at 19 n.10 (S.D. Ga. Mar. 26, 2009)(citation omitted).

A. State and Local Licensing of Alcohol Retail Outlets

Georgia recognizes that government regulation of the distribution and sale of alcoholic beverages are important exercises of police power to protect the health and safety of its citizens.[13] Towards this end, the state grants local governments concurrent authority to license and regulate retail alcohol outlets, augmenting the authority that the state grants to the local governments over other matters, including zoning.

Georgia's Alcoholic Beverage Code[14] includes most of the statutory provisions specifically addressing alcohol control and includes the statutory provision that grants local[15] governments authority (referred to in this memorandum as the "local powers provision").[16] In most instances, alcohol retailers must obtain two licenses, one from the state revenue commissioner and one from the local government where they are located; the state cannot issue a license until the applicant first receives a local license,[17] and the state defers to local governments in most regulatory matters.

The local powers provision also includes due process requirements that local governments must follow.[18] Decisions by the local entity are appealable through the Georgia judicial system and are not subject to review by the state licensing entity (Georgia revenue commissioner).[19] This approach ensures that local licensing decisions are distinct procedures from those conducted at the state level.

B. The Application of the State Preemption Doctrine to Local Alcohol Retail Licensing Authority

Even though Georgia law grants local governments broad authority for alcohol regulation, courts have sometimes narrowed its scope by finding that the state law preempts specific local laws.

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[13] *See, e.g.*, City of Hapeville v. Anderson, 272 S.E.2d 713 (Ga. 1980); Bradshaw v. Dayton, 514 S.E.2d 831 (Ga. 1999). *See also* Bo'Maz Unlimited, Inc. v. City of Walthourville, 2009 U.S. Dist. LEXIS 24562 (S.D. Ga. Mar. 26, 2009)(citations omitted).

[14] Ga. Code Ann. Title 3, also referred to the Georgia Alcoholic Beverage Code. Ga. Code Ann. § 3-1-1.

[15] Unless otherwise indicated, "local" refers to both counties and municipalities (in this memo, municipalities is used interchangeably with cities). Although there are some provisions that treat counties differently from cities, most of the authorities this memorandum cites apply to both counties and cities.

[16] Ga. Code Ann. § 3-3-2 ("Except as otherwise provided for in [the Alcoholic Beverage Code], the manufacturing, distributing, and selling by wholesale or retail of alcoholic beverages shall not be conducted in any county or incorporated municipality of this state without a permit or license from the governing authority of the county or municipality. Each such local governing authority is given discretionary powers within the guidelines of due process set forth in this Code section as to the granting or refusal, suspension, or revocation of the permits or licenses").

[17] Ga. Code Ann. §§ 3-1-2, 3-2-1, 3-2-5, 3-3-3, 3-7-20.

[18] Local licensing laws must "set forth ascertainable standards in the local licensing ordinance upon which all decisions pertaining to these permits or licenses shall be based," describe their licensing decisions in writing, and provide a post-decision hearing for applicants who want to challenge the decision and submit a timely request. Ga. Code Ann. § 3-3-2. Unless otherwise indicated, this memo refers to the written policies that the local government takes as regulations, rules, or ordinance, even if the specific local government discussed uses a different term.

[19] *See, e.g.*, Consolidated Gov't of Columbus v. Barwick, 549 S.E.2d 73 (Ga. 2001).

Georgia's Constitution sets forth the state's preemption principles in a provision sometimes referred to as the "uniformity clause," which provides that "Laws of a general nature shall have uniform operation throughout this state." It prohibits "local or special law…in any case for which provision has been made by an existing general law, except that the General Assembly may by general law authorize local governments by local ordinance or resolution to exercise police powers which do not conflict with general laws."[20]

The Georgia Supreme Court has held that this provision will preempt local ordinances on subjects where state general law exists unless: 1) the state law authorizes the local government to act and 2) the local ordinance does not conflict with or "impair" a state law's operation, but rather augments and strengthens state law (referred to in this memorandum as the *Franklin* test).[21] The local powers provision described in the previous section satisfies the first prong of the *Franklin* test as to local governments' authority to license alcohol outlets– the state has specifically delegated this authority. There are two areas of debate and uncertainty. First, a local law regulating alcohol availability may do so in conjunction with other types of activities (e.g., requirements for serving as a security guard in certain entertainment venues that may or may not include alcohol sales). If regulating the second activity is preempted, it may result in the entire regulation being preempted. Second, the local regulation may not satisfy the second prong – when does a local ordinance, including local licensing provisions, conflict with the state's regulation of alcoholic beverages?

Below are illustrations of the courts' application of the preemption principles to various cases involving local restrictions on alcohol retailers, first describing cases in which the local ordinance was not preempted, and then describing those that were preempted. The section concludes with an analysis of the implications of the cases for local control in the future.

1. Local Ordinances Not Preempted

The Supreme Court of Georgia has issued several opinions during the last 45 years addressing this issue. One line of cases suggest that local governments may impose stricter standards on local retail establishments than found in state law – doing so does not conflict with state law.[22] For example, in *Powell v. Board of Commissioners of Gwinnett County*, decided in 1975, a local government prohibited issuing a license to a beer and wine retailer or wholesaler if its entrance was within 1,700 feet from a church or school. A state statute prohibited selling beer and wine within 100 yards of a school. The court held that the state law did not preempt the local law

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[20] Ga. Const. Art. III, § VI, Para. IV(a). The uniformity clause in its current form was the result of a 1983 amendment. For a history of the uniformity clause, *see* Franklin County v. Fieldale Farms Corp., 507 S.E.2d 460 (Ga. 1998).

[21] Franklin, 507 S.E.2d at 463. *See also* Pawnmart, Inc. v. Gwinnet County, 608 S.E.2d 639 (Ga. 2005)(applied *Franklin* test to conclude that local pawnbroker ordinance not preempted).

[22] Grovenstein v. Effingham County, 414 S.E.2d 207 (Ga. 1992); Mullins v. DeKalb County, 339 S.E.2d 258 (Ga. 1986); Powell v. Board of Comm'rs of Gwinnett County, 214 S.E.2d 905 (Ga. 1975). *Cf.* Kariuki v. deKalb County, 324 S.E.2d 450 (Ga. 1985), *overruled on other grounds*, Russell v. East Point, 403 S.E.2d 50 (1991) (cited in both *Grovenstein* and *Mullins*)(did not refer to the general uniformity clause, focusing instead on a similar provision in the "home rule" portion of the constitution); Regency Club v. Stuckey, 324 S.E.2d 166 (Ga. 1984)(prohibited state from enacting a "special law," since it allowed cities of certain size population from issuing private club licenses without voter approval when the general law required voter approval before private club licenses could be issued).

because the state law established only a *minimum* distance from a school or schoolhouse.[23] The local government could therefore establish a greater distance requirement if it so chose since it augmented and strengthened the state's distance requirements.[24]

In *Grovenstein v. Effingham County*, a 1992 case, a beer and wine retailer used a state preemption claim to challenge a local ordinance prohibiting sales to anyone under 21 years of age. The ordinance provided that a violation of the ordinance was grounds for license revocation, a stricter penalty than that imposed by state law.[25] As in *Powell*, the Georgia Supreme Court concluded that the local prohibition did not conflict, but rather strengthened and augmented the state law.[26] These cases suggest that the courts have given local governments relatively wide latitude to impose stricter controls on alcohol retail licenses than those found in state law.

2. Local Ordinances Preempted

Two more recent Supreme Court cases, however, have cast doubt on the scope of the earlier decisions. In *Willis v. City of Atlanta*, a 2009 decision, women between the ages of 18 and 21 who worked as adult entertainers at an establishment with an alcoholic beverage license challenged a local ordinance that prohibited people under the age of 21 from, among other things, entering premises licensed to sell alcoholic beverages by the drink or for consumption on the premises.[27] The challengers argued that the ordinance was preempted by a state law that provided: "[n]o person shall allow or require a person in his employment under 18 years of age to dispense, serve, sell, or take orders for any alcoholic beverages."[28] As in the earlier cases cited above, a lower court upheld the local ordinance, concluding that the state law did not *mandate* that people over the age of 18 must be allowed to serve alcohol, so the local government was free to pass an ordinance that effectively prohibited those over 18 but not yet 21 from doing so.

The Georgia Supreme Court disagreed, stating that the lower court had failed to take into consideration a second state statute that provides: if "conduct is not otherwise prohibited

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[23] Powell v. Board of Comm'rs of Gwinnett County, 214 S.E.2d 905 (Ga. 1975).

[24] *Id*. Although *Powell* was decided before the current uniformity clause was adopted (in 1983) and was discussed in *Franklin*, 507 S.E.2d at 462 n.9, as an example of one of the differing ways the previous uniformity clause had been interpreted, *Powell* continues to be cited with approval, indicating that the changes in 1983 did not affect the conclusion in that case. *See* Consolidated Gov't of Columbus v. Barwick, 549 S.E.2d 73, 75 (Ga. 2001); Mullins v. DeKalb County, 339 S.E.2d 258, 259 (Ga. 1986).

[25] Grovenstein v. Effingham County, 414 S.E.2d 207 (Ga. 1992).

[26] *Id.* See also Ga. Code Ann. § 3-3-2.2 (certain limits on amount of fines for violating local ordinances, but "[n]othing in this Code section shall prohibit the governing authority of a county or municipality from imposing a penalty that is otherwise allowed by law, unless such law is a **l**ocal law in conflict with this Code"). *Cf.* Horne v. City of Cordele, 329 S.E.2d 134 (Ga. 1985); Akin v. Hardison, 262 S.E.2d 814 (Ga. 1980) (rule--that local government may not penalize acts that state penal law forbids unless there is an "essential" or "characterizing" ingredient in the municipal offense which is not essential to or contained in the state offense--only applies when there is a general law on the same subject and there was no express legislative authorization for the local law).

[27] Willis v. City of Atlanta, 684 S.E.2d 271 (Ga. 2009).

[28] *Id.* (citing Ga. Code Ann. § 3-3-24).

pursuant to *Code Section 3-3-24*, nothing contained in this Code section shall be construed to prohibit any person *under 21 years of age* from: (1) Dispensing, serving, selling, or handling alcoholic beverages as a part of employment in any licensed establishment." [emphasis supplied in the decision].[29] According to the court, "[W]hen these two statutes are read together, it is clear that the Legislature's intent is to allow persons who are over the age of 18 but not yet 21 years old to dispense, serve, sell or handle alcoholic beverages as part of their employment."[30] Since the local ordinance prohibited those people from being able to work (because they could not enter), it "impair[ed] the operation of these general statutes by prohibiting persons aged 18 to 21 from entering in or remaining at the premises of licensed establishments where they are legally entitled to hold jobs that involve dispensing, serving, selling or handling alcoholic beverages." A unanimous court therefore found that the state provisions impliedly preempted the local ordinance.[31]

A divided Supreme Court reached a similar decision in *City of Atlanta v. S.W.A.N. Consulting & Sec. Servs.*, a 2001 case.[32] The local ordinance required that workers, including private security personnel, in adult entertainment establishments with certain types of beverage licenses needed to obtain a permit issued by the local police department. A state law (the Georgia Private Detective and Security Agencies Act, referred to in this memo as the PDSA) established detailed qualifications for private security businesses.[33] The PDSA also stated that it did not prevent local authorities from using their police power and imposing local regulations "upon any street patrol, special officer, or person furnishing street patrol service, including regulations requiring registration with [a locally designated agency]."[34]

The challengers to the local ordinance contended that the local ordinance was preempted by the PDSA. The city contended that its provision was not preempted because it regulated only the sale of alcohol, not the private security industry, and the state had delegated such authority for alcohol control to local governments through the local powers provision.

The court agreed with the challengers, concluding that the city provision applied to any kind of employment at adult entertainment establishments and was not limited to alcohol regulation, even though it only applied to employment in establishments with alcohol licenses. The court noted that the "manifest intent of this otherwise unrestricted provision is the broad regulation of employment at certain adult establishments, and not the limited regulation of alcoholic

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[29] *Id.* (citing Ga. Code Ann. § 3-3-23(e)).

[30] Willis, 684 S.E.2d at 273.

[31] *Id.*, citing Franklin County v. Fieldale Farms Corp., 507 S.E.2d 460 (Ga. 1998). Franklin, 507 S.E.2d at 463 (citation omitted) noted that preemption could be implied, when, for example, a statute extensively and exhaustively regulated all aspects of the insurance industry at the state level.

[32] City of Atlanta v. S.W.A.N. Consulting & Sec. Servs., 553 S.E.2d 594 (Ga. 2001).

[33] *Id.* (citing Ga. Code §§ 43-38-6, 43-38-7 as requiring that the company receive a permit from the state Board of Private Detective and Security Agencies, establishing qualifications for the company's employees, and requiring that the employees register with the Board).

[34] SWAN, 553 S.E.2d at at 596 (citing Ga. Code Ann. § 43-38-14(c)).

beverages," concluding that the local powers provision relating to alcohol control did not apply to this type of ordinance.[35]

The court also addressed state regulation of the private security field. It noted that preemption is based on legislative intent, which "can be fairly implied from the sweeping language and broad scope" of a general act regulating an industry on a statewide basis.[36] In addition, the state law also expressly authorized additional local regulation related to street control described above, but did not expressly address adult entertainment establishments, which the court interpreted as impliedly preempting the city's regulation of those services in its adult entertainment establishments. Because the PDSA did not explicitly delegate to local governments the authority to regulate private security staff at adult entertainment establishments, the court held that the first prong of the *Franklin* test was not satisfied and the local ordinance was preempted. The court concluded, "Because the City sought to establish a duplicate regulatory system which was not authorized by the comprehensive general law applicable to those engaged in the private detective and security business, the trial court was correct in its limited holding that the Act preempts by implication the City's enforcement of [the section] of the municipal code against SWAN."[37]

The dissent disagreed, contending that the majority incorrectly focused on the constitution's uniformity clause, when it should have been focusing instead on the constitutional provision adopted in 1994. That provision deals expressly with regulating activities involving nudity and the sale and consumption of alcohol, granting the state the police power to limit First Amendment expressive rights through state regulation of alcohol sale, and delegates the authority to local governments.[38] The 1994 provision specifically authorizes local regulation of activities involving alcoholic beverages and the exhibition of nudity, and requires a local ordinance to be in *direct conflict* with general law for the general law to preempt the local ordinance. The dissent concluded that, since there was no evidence that the city's ordinance at issue directly conflicted with the general law enacted by the General Assembly regulating private security businesses, the local ordinance should not have been preempted.[39] The majority decision

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[35] SWAN, 553 S.E.2d at 596.

[36] SWAN, 553 S.E.2d at 596 (citation omitted).

[37] SWAN, 553 S.E.2d at 597.

[38] Const. Art. III, § VI, Para. VII ("The State of Georgia shall have full and complete authority to regulate alcoholic beverages and to regulate, restrict, or prohibit activities involving alcoholic beverages. This regulatory authority of the state shall include all such regulatory authority as is permitted to the states under the *Twenty-First Amendment to the United States Constitution.* This regulatory authority of the state is specifically delegated to counties and municipalities of the state for the purpose of regulating, restricting, or prohibiting the exhibition of nudity, partial nudity, or depictions of nudity in connection with the sale or consumption of alcoholic beverages; and such delegated regulatory authority may be exercised by the adoption and enforcement of regulatory ordinances by the counties and municipalities of this state. A general law exercising such regulatory authority shall control over conflicting provisions of any local ordinance but shall not preempt any local ordinance provisions not in direct conflict with general law"). This provision was upheld against a First Amendment challenge in Goldrush II v. City of Marietta, 482 S.E.2d 347 (Ga.), *cert. denied*, Shretta v. City of Marietta, 522 U.S. 818 (1997). For a history of the 1994 amendment, see Chambers v. Peach County, 467 S.E.2d 519, 522 n.2 (Ga. 1996) (explaining that provision was meant to mirror the 21st amendment, which allowed states to limit expressive conduct, authorizing local jurisdictions to so limit). Although the court found the local ordinance unconstitutionally infringed on First Amendment rights, the ordinance was revised and withstood the court's constitutional scrutiny. Chambers v. Peach County, 492 S.E.2d 191 (Ga. 1997). For note on the 1994 enactment of this paragraph, *see* 11 Ga. St. U.L. Rev. 33 (1994).

in SWAN did not analyze the 1994 provision (merely distinguishing it from PDSA),[40] and there is little case law discussing the history of the provision, so it is difficult to understand why the majority rejected the dissent's approach.

3. Can the Preemption Cases be Reconciled?

Although these cases rely on a consistent framework for analyzing alcohol-related preemption cases in Georgia, they create some uncertainty regarding how that framework will be applied in specific instances. The fact that the Georgia Supreme Court most recent opinions appear to restrict local control raises some concerns regarding how future cases will be analyzed.

In *Willis*, for example, the court determined that the second prong of the *Franklin* test was not met: When construing all relevant provisions of the Alcohol Beverage Code, the local provision "impaired the general law's operation," because it effectively prohibited people 18 and not yet 21 from working in an adult entertainment establishment. Yet the legislature did not expressly preempt local governments from imposing stricter rules for people 18 and not yet 21, and the local ordinance appears to "strengthen" and "augment" the state law in a manner similar to the local laws reviewed in the *Powell* and *Grovenstein* cases.

Similar ambiguity exists in the *SWAN* case in its application of the first prong of the *Franklin* test. The local law was limited to the regulation of private security personnel in certain alcohol establishments, which would appear to fall within the scope of the local powers provision, which in turn should satisfy the *Franklin* test. The court refused to adopt this approach, which appears even more surprising given the existence of a state constitutional provision that explicitly gives local governments authority to regulate adult entertainment venues. Other aspects of alcohol control may be subject to ancillary state laws. For example, food handling laws might apply to wait staff in alcohol establishments – would such laws then preempt local restrictions on wait staff practices?

It is difficult to draw conclusions from these two cases regarding the extent to which the court will limit local control over alcohol licensing in the future. The cases involve a more complex interaction of state statutes that might make their application limited in future cases. Nevertheless, they do raise some concerns that the court is less willing to delegate authority to local jurisdictions than would be anticipated based on earlier cases.

C. Related Limitations on Local Licensing Authority

Despite the concerns raised by the *Willis* and *SWAN* cases, there appears to be several aspects of local control that are generally accepted as permitted under state law. This conclusion is based on cases that do not address preemption directly, but rather focus on challenges based on other

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[39] SWAN dissent, 553 S.E.2d at 596-98.

[40] SWAN, 553 S.E.2d at 596 (distinguishing the PDSA from local powers provision discussed in *Grovenstein* and the 1994 constitutional provision discussed below; unlike the local powers provision, which expressly delegates the state authority (here, for alcohol licensing) to local government, the PDSA "does not exempt from its regulatory scheme" (i.e., delegate to the local entities) adult entertainment establishments serving alcohol in Georgia municipalities).

legal doctrines, including due process,[41] equal protection, [42] commercial speech,[43] and avoidance of ex post facto laws.[44] This section examines these cases in the context of specific types of restrictions as a means to determine aspects of local control that do not appear to be in dispute.

1. Location and Density

This section describes the extent of local control to limit alcohol density using four distinct regulatory strategies: (1) categorical denials of alcohol licenses; (2) limitations on the number of alcohol outlets; (3) distance requirements between alcohol outlets; and (4) distance requirements between alcohol outlets and other sensitive uses (e.g., residential areas, schools, and churches).[45]

a. Categorical Denials of Alcohol Licenses

Courts have upheld the right of local governments to *categorically* deny certain types of alcohol licenses (usually beer and wine licenses) within their borders even if the denials are made

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[41] It is difficult to define specifically the scope of ordinances that fulfill the due process requirements. In general, local licensing ordinances that grant the local government unbridled discretion with no ascertainable standards usually are considered to violate due process, ordinances that do not create protectable property interests in licenses are more likely to be upheld than those that create such interests, and ordinances are more likely to be upheld when they have ascertainable standards. Cases addressing due process include: Foxy Lady, Inc. v. City of Atlanta, 347 F.3d 1232 (11th Cir. 2003); Cheek v. Gooch, 779 F.2d 1507 (11th Cir. Ga. 1986); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964); Scoggins v. Moore, 579 F. Supp. 1320 (N.D. Ga.), *aff'd,* 747 F.2d 1466 (11th Cir. 1984); Bo'Maz Unlimited, Inc. v. City of Walthourville, 2009 U.S. Dist. LEXIS 24562 (S.D. Ga. Mar. 26, 2009); Top Shelf v. Mayor & Aldermen for Savannah, 840 F. Supp. 903 (S.D. Ga. 1993); McCollum v. Powder Springs, 720 F. Supp. 985 (N.D. Ga. 1989); Folsom v. City of Jasper, 612 S.E.2d 287 (Ga. 2005); Bradshaw v. Dayton, 514 S.E.2d 831 (Ga. 1999); Chu v. Augusta-Richmond County, 504 S.E.2d 693 (Ga. 1998); Goldrush II v. City of Marietta, 482 S.E.2d 347 (Ga.), *cert. denied*, Shretta v. City of Marietta, 522 U.S. 818 (1997); Soerries v. City of Columbus, 476 S.E.2d 64 (Ga. App. 1996); S.J.T., Inc. v. Richmond County, 449 S.E.2d 868 (Ga. App. 1994), *cert. denied*, 1995 Ga. LEXIS 297 (Ga. Feb. 20, 1995); S.J.T., Inc. v. Richmond County, 430 S.E.2d 726 (Ga.), *cert. denied*, 510 U.S. 1011 (1993); Grovenstein v. Effingham County, 414 S.E.2d 207 (Ga. 1992); Sego v. Peachtree City, 392 S.E.2d 877 (Ga. 1990); Arras v. Herrin, 334 S.E.2d 677 (Ga. 1985); Bryant v. Mayor & City Council of Americus, 311 S.E.2d 174 (Ga. 1984); City Council of St. Marys v. Crump, 308 S.E.2d 180 (Ga. 1983); City of Hapeville v. Anderson, 272 S.E.2d 713 (Ga. 1980); Bozik v. Cobb County, 242 S.E.2d 48 (Ga. 1978); Levendis v. Cobb County, 250 S.E.2d 460 (Ga. 1978); Page v. City of Hapeville, 208 S.E.2d 142 (Ga. App. 1974). For a discussion of retail liquor licenses and due process, *see* comment, *Retail Liquor Licenses and Due Process: The Creation of Property Through Regulation*, 32 *Emory L.J.* 1199 (1983).

[42] Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964); Bo'Maz Unlimited, Inc. v. City of Walthourville, 2009 U.S. Dist. LEXIS 24562 (S.D. Ga. Mar. 26, 2009); Chu v. Augusta-Richmond County, 504 S.E.2d 693 (Ga. 1998); Top Shelf v. Mayor & Aldermen for Savannah, 840 F. Supp. 903 (S.D. Ga. 1993); McCollum v. Powder Springs, 720 F. Supp. 985 (N.D. Ga. 1989); Parham v. Hix, 608 F. Supp. 546 (M.D. Ga. 1985); Scoggins v. Moore, 579 F. Supp. 1320 (N.D. Ga.), *aff'd without opinion*, 747 F.2d 1466 (11th Cir. 1984); Consolidated Gov't of Columbus v. Barwick, 549 S.E.2d 73 (Ga. 2001); Bradshaw v. Dayton, 514 S.E.2d 831 (Ga. 1999); S.J.T., Inc. v. Richmond County, 430 S.E.2d 726 (Ga.), *cert. denied*, 510 U.S. 1011 (1993); Gravely v. Bacon, 429 S.E.2d 663 (Ga. 1993); Tipton v. City of Dudley, 251 S.E.2d 545 (Ga. 1979); Bozik v. Cobb County, 242 S.E.2d 48 (Ga. 1978). *Cf.* State v. Heretic, 588 S.E.2d 224 (Ga. 2003)(state statute allowing some types of establishments, but not others, to serve alcohol on Sunday did not violate equal protection).

[43] *See* the adult entertainment references below.

[44] *See, e.g.,* Goldrush II v. City of Marietta, 482 S.E.2d 347 (Ga.), *cert. denied*, Shretta v. City of Marietta, 522 U.S. 818 (1997); Bryant v. Mayor & City Council of Americus, 311 S.E.2d 174 (Ga. 1984); Harmon v. State, 423 S.E.2d 301 (Ga. App. 1992).

[45] In addition, the state grants local authority by requiring that certain types of licenses can only be issued in a local jurisdiction after a local election authorizing such issuance. *See, e.g.*, Ga. Code Ann. §§ 3-4-40 to 3-4-48; Price v. City of Snellville, 317 S.E.2d 834 (Ga. 1984); Tipton v. City of Dudley, 251 S.E.2d 545 (Ga. 1979). *Cf.* Regency Club v. Stuckey, 324 S.E.2d 166 (Ga. 1984)(prohibited state from enacting a "special law," since it allowed cities of certain size population from issuing private club licenses without voter approval when the general law required voter approval before private club licenses could be issued).

without any express standards or criteria. Categorical denials do not automatically violate local powers due process provisions, constitutional procedural due process, or equal protection. If, however, the ordinance describes standards for issuing licenses and states that licenses will be granted upon fulfilling certain conditions, the government may not then deny an application to one who fulfills those conditions.

In *Scoggins v. Moore*,[46] for example, a local commissioner responsible for local licensing decisions refused to issue any beer and wine licenses during his tenure. An applicant challenged the denial of his application in part on the grounds that the commissioner's failure to promulgate any standards for making his licensing decisions violated procedural federal due process. The court disagreed. So long as the commissioner's policy amounted to a categorical denial of all applications, the court held that there was no protectable property interest and no due process violation.[47] Due process concerns might arise if the commissioner were issuing licenses to some but not all applicants. Other cases have adopted a similar approach to categorical denials, also upholding the local ordinances.[48]

b. Limitations on the Number of Alcohol Outlets

The Georgia Supreme Court has explicitly held that local governments may limit the number of alcohol outlets (outlet density restrictions) based on specific measures of population in the jurisdiction and that such restrictions do not violate the due process rights of applicants.[49] In *City of Hapeville v. Anderson*,[50] for example, the court upheld an ordinance limiting the issuance of "consumption on the premises" liquor licenses to one per each one thousand residents. It noted that the most recent U.S. census is a "rational, logical and consistent means of determining population" when there are population requirements in statutes or ordinances and concluded that the ordinance was not vague either in standard it set or the method of ascertaining it.[51]

c. Distance Requirements Between Alcohol Outlets

The court has also upheld local ordinances that impose distance requirements between alcohol outlets. In *Consolidated v. Barwick*, a city ordinance prohibited issuing certain types of on-premise alcohol beverage license within 600 feet of locations already holding such licenses.[52] The ordinance challengers did not question the city's right to have such a general restriction, but

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[46] 579 F. Supp. 1320 (N.D. Ga.), *aff'd without opinion*, 747 F.2d 1466 (11th Cir. 1984).

[47] *Id.* The court noted that the applicant plaintiffs may have had a cause of action under the state Alcoholic Beverage Code due process statute because the commissioner had not promulgated an ordinance pursuant to this section, but also noted that this violation does not necessarily mean that federal due process guarantees have been violated. Scoggins, 579 F. Supp. at 1326 n. 9.

[48] *See* Cheek v. Gooch, 779 F.2d 1507 (11th Cir. Ga. 1986); Grandpa's Store, Inc. v. City of Norcross, 275 S.E.2d 59 (Ga. 1981); Tipton v. City of Dudley, 251 S.E.2d 545 (Ga. 1979).

[49] Bradshaw v. Dayton, 514 S.E.2d 831 (Ga. 1999); City of Hapeville v. Anderson, 272 S.E.2d 713 (Ga. 1980).

[50] 272 S.E.2d 713 (Ga. 1980).

[51] *Id.*

[52] Consolidated Gov't of Columbus v. Barwick, 549 S.E.2d 73 (Ga. 2001).

claimed it violated equal protection because it exempted from this restriction locations in a city district created to encourage commercial activity. The Georgia Supreme Court held the ordinance was constitutional. It noted that a local government "in the exercise of its police power may formulate rules and regulations for the licensing of the liquor business, even to the extent of prohibiting the licensed activity in a specified area."[53] It then upheld the ordinance with the exemption because attracting revenue to the created district is a "legitimate end of government…by ensuring the prosperity of the City by attracting business" to that district.[54]

d. Distance Requirements Between Alcohol Outlets and Other Sensitive Areas

Several local jurisdictions have imposed distance requirements between alcohol outlets and other sensitive areas (e.g., residential areas, schools, and churches). As noted in the preemption section, local jurisdictions may adopt ordinances that are even stricter than related state statutes.[55] Furthermore, distances can be further limited (beyond those imposed by ordinance) if jurisdictions exercise their discretion in a manner consistent with due process.[56] A comparison of two cases highlights the due process requirements in the context of distance limitations provisions.

In *Arras v. Herrin*, the court invalidated a local ordinance that granted the board "full and sole authority, in its absolute discretion," to determine whether an applicant was fit to operate the business, and whether the location was "proper and to the best welfare and in the best interests" of the county.[57] The court held that the ordinance violated the applicant's due process rights because it contained no standard to control the discretion of the board.[58] Other cases have similarly found that local ordinances violated due process when they did not adequately describe standards for exercising discretion or impermissibly delegated the discretion to the public (by prohibiting licenses merely because certain members of the public object).[59]

Chu v. Augusta-Richmond County provides a contrasting ordinance and court decision.[60] There, the applicant sought a retail license for selling beer and wine across the street from where she had previously been licensed. At hearings the county conducted, community members opposed the application in part because of proximity to churches and a proposed new high school. The local government denied the application, based on a county ordinance stating that the local commission "may, *in its discretion*, issue or deny any license when there is evidence that the

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[53] *Id.*, 549 S.E.2d at 75.

[54] *Id.*

[55] Powell v. Board of Comm'rs of Gwinnett County, 214 S.E.2d 905 (Ga. 1975).

[56] Chu v. Augusta-Richmond County, 504 S.E.2d 693 (Ga. 1998); Levendis v. Cobb County, 250 S.E.2d 460 (Ga. 1978).

[57] Arras v. Herrin, 334 S.E.2d 677 (Ga. 1985).

[58] *Id.*

[59] McCollum v. Powder Springs, 720 F. Supp. 985 (N.D. Ga. 1989); Bozik v. Cobb County, 242 S.E.2d 48 (Ga. 1978).

[60] 504 S.E.2d 693 (Ga. 1998).

type and number of schools, churches, libraries or public recreation areas in the vicinity of the place of business of the licensee causes minors to frequent the immediate area, *even though there is compliance with the minimum distances as provided herein*." [Emphasis added.][61] The ordinance included a list of factors to consider, including local traffic issues, character of the neighborhood, number of licenses already granted in the area for similar businesses, and likelihood to encourage minors to congregate.[62]

The applicant challenged the license refusal relying in part on the *Arras* decision – claiming that the ordinance impermissibly gave the commission "unbridled discretion."[63] The *Chu* court, however, rejected the applicant's analysis, finding that, unlike in *Arras*, the ordinance set forth "sufficient objective standards to control the discretion of the governing authority and adequate notice to applicants of the criteria for issuance of a license" [quoting from *Arras*]. It thus concluded that the ordinance was constitutional and that the commission "exercised its discretion within those plain, ascertainable standards."[64]

These cases support the position that local governments may adopt ordinances that limit the location of retail outlets to certain parts of their jurisdiction, even when the ordinances are more restrictive than state requirements.

2. Operational Standards

Local jurisdictions have also imposed, and courts have upheld as valid, different types of operational restrictions on retail outlets in their jurisdictions, provided that they meet other constitutional requirements mentioned above. These types of operational restrictions include: limiting hours and days of operation;[65] additional restrictions on adult entertainment establishments;[66] and advertising restrictions.[67]

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[61] Chu, 504 S.E.2d at 695-96.

[62] *Id.*

[63] Chu, 504 S.E.2d at 696. The applicant also challenged the ordinance as applied to her violated equal protection because the commission denied her a license when she had already received a license across the street several years earlier. The court rejected that claim, in part because of the impending construction of a high school nearby. *Id.*

[64] *Id.*

[65] Bo'Maz Unlimited, Inc. v. City of Walthourville, 2009 U.S. Dist. LEXIS 24562 (S.D. Ga. Mar. 26, 2009); *Cf.* State v. Heretic, 588 S.E.2d 224 (Ga. 2003)(state statute allowing some types of establishments, but not others, to serve alcohol on Sunday did not violate equal protection); Cheshire Bridge Enters v. State, 472 S.E.2d 6 (Ga. App. 1996)(city cannot by ordinance authorize Sunday sales expressly prohibited by state statute).

[66] Cases addressing local restrictions on adult entertainment establishments with alcoholic beverage licenses include Foxy Lady, Inc. v. City of Atlanta, 347 F.3d 1232 (11th Cir. 2003); Bo'Maz Unlimited, Inc. v. City of Walthourville, 2009 U.S. Dist. LEXIS 24562 (S.D. Ga. Mar. 26, 2009); Top Shelf v. Mayor & Aldermen for Savannah, 840 F. Supp. 903 (S.D. Ga. 1993); Willis v. City of Atlanta, 684 S.E.2d 271 (Ga. 2009); City of Atlanta v. S.W.A.N. Consulting & Sec. Servs., 553 S.E.2d 594 (Ga. 2001); Goldrush II v. City of Marietta, 482 S.E.2d 347 (Ga.), *cert. denied*, Shretta v. City of Marietta, 522 U.S. 818 (1997); Chambers v. Peach County, 492 S.E.2d 191 (Ga. 1997); Club S. Burlesque v. City of Carrollton, 457 S.E.2d 816 (Ga. 1995); S.J.T., Inc. v. Richmond County, 430 S.E.2d 726 (Ga.), *cert. denied*, 510 U.S. 1011 (1993); S.J.T., Inc. v. Richmond County, 449 S.E.2d 868 (Ga. App. 1994), *cert. denied*, 1995 Ga. LEXIS 297 (Ga. Feb. 20, 1995); Gravely v. Bacon, 429 S.E.2d 663 (Ga. 1993); Yarborough v. City of Carrollton, 421 S.E.2d 72 (Ga. 1992); Harmon v. State, 423 S.E.2d 301 (Ga. App. 1992).

There are also several provisions in the Georgia Alcoholic Beverage Code granting local governments the authority to impose various types of taxes and fees, usually with statutory limits on the amounts of the fees or taxes.[68] These provisions probably limit local governments' authority to tax alcoholic beverage sales and impose fees on retailers. Courts are likely to hold that a local ordinance that attempts to impose a tax or fee that exceeds the state statutory limits is not permitted because it is expressly preempted by state law.

IV. Conclusion and Recommendations

As discussed above, the *Willis* and *SWAN* cases raise some doubts regarding the extent of the authority of Georgia's cities and counties to regulate alcohol outlets. Although the cases may signal a philosophical shift in judicial protection of local regulation of alcohol retailers, it is also reasonable to argue that they should be interpreted narrowly based on specific state statutes at issue: 1) the additional provision in Georgia's Alcoholic Beverage Code addressing the ability of people who are over 18 and not yet 21 to work in establishments with alcoholic beverage licenses (in *Willis*) and 2) the PDSA, with its comprehensive scope and explicit statement about local authority for street patrols (in *SWAN*). This interpretation is bolstered by the fact that several aspects of local control appear to be generally accepted as permitted under state law. These areas include the authority to: categorically deny alcoholic beverage licenses, limit the density and location of certain types of alcohol retailers, limit the hours and days of retailer operations and sales, limit the operations of adult entertainment establishments, limit alcohol advertising, and impose additional fees and taxes, even providing for additional penalties.

In exercising their authority, local governments need be mindful of the parameters delineated in state law and the requirements associated with the due process, equal protection, and freedom of expression rights of applicants and licensees. In particular, local ordinances should include findings that document the manner in which new restrictions augment and enhance state laws and well as clear, ascertainable procedural standards for exercising administrative discretion in the licensing process.

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[67] *See, e.g.*, Folsom v. City of Jasper, 612 S.E.2d 287 (Ga. 2005).

[68] *See, e.g.*, Ga. Code Ann. §§ 3-4-50, 3-4-130 to 3-4-132, 3-6-60, 3-7-60, 3-8-1, 3-13-3; City of Atlanta v. Henry Grady, 138 S.E.2d 362 (Ga. 1964).