

FINAL REPORT

Local Authority to Regulate Retail Alcohol Outlets in North Carolina: A Legal Analysis

James F. Mosher, JD
Ryan Treffers, JD
Alcohol Policy Consultations
June 2012

Note: This report was prepared for the North Carolina Coalition Initiative. It is intended to provide educational resources to Partnerships, Alliances, Coalitions, and Collaboratives (PACCs), policy analysts, municipal governments, and others assessing potential responses to the problems created by retail availability of alcohol in North Carolina. 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.

Local Authority to Regulate Retail Alcohol Outlets in North Carolina: A Legal Analysis

I. Executive Summary

Excessive alcohol consumption, including binge drinking and underage drinking, is responsible for a large array of public health and safety problems leading to 80,000 deaths and 2.4 million Years of Potential Life Lost (YPLL) in the U.S. each year and more than \$220 billion in annual economic costs, much of which is borne by governments.

Research has shown that reducing retail alcohol outlet density will reduce excessive drinking and associated social and economic costs. Strategies for addressing outlet density problems can be implemented at both the state and local level. In general, local communities are in the best position to take action while adhering to state guidelines and minimum standards.

A legal doctrine called state preemption determines the extent to which local governments have authority to address retail alcohol outlet density. States vary widely regarding the extent to which they allow local authority. In North Carolina, the state exercises primary control over alcohol retail outlets, strictly limiting local authority. Local governments play only an advisory role in the state permit-issuing process for new retail outlets. The ABC Commission must take into consideration local factors and local government recommendations but is not required to adhere to them. Local governments are also probably precluded from imposing fees on retailers to mitigate costs to local services (e.g., law enforcement, emergency medical response) associated with the operation of their businesses.

There is, however, a significant exception to these limits on local control in North Carolina. Local governments have authority to review renewal applications of retail establishments with beer or wine state permits on an annual basis and deny renewals if violations of the ABC Code are established. The City of Wilmington has recently adopted a systematic process for reviewing applications for new permits and renewals and providing recommendations to the ABC Commission. It has also reserved the right to deny renewals on its own authority. Chapel Hill has also enacted an ordinance that establishes procedures for reviewing and denying renewal applications. No cases were found where local governments actually exercised this renewal denial authority and there is little guidance from either the state legislature or the courts regarding the process and the evidence that would be required. Nevertheless, the Wilmington and Chapel Hill approach may provide an important means for local communities to reduce alcohol outlet density and problems associated with the operation of retail establishments.

In addition, the City of Greenville has enacted an ordinance regulating bouncers who work for private or public clubs. It includes a provision requiring that bouncers be trained by the city police department. The ordinance provides a model for imposing public nuisance abatement requirements on alcohol retailers so long as the restrictions are imposed on a larger class of businesses that includes but is not limited to alcohol retailers and the restrictions do not regulate the actual sale, purchase or other use of alcohol. This approach is untested in court and may be found to be preempted by state law.

II. Introduction

Excessive alcohol consumption, including binge drinking and underage drinking, is responsible for approximately 80,000 deaths and 2.4 million Years of Potential Life Lost (YPLL) in the U.S. each year, and resulted in \$223.5 billion in economic costs in 2006, or about \$1.90 per drink, 42% of which was paid by government.¹ Binge drinking is responsible for over half the deaths, two-thirds of the YPLL, and three-quarters of the economic costs. Binge drinking is also associated with many other health and social harms, including unintentional injuries (e.g., automobile crashes and drowning); interpersonal violence; HIV infection; unintended pregnancy; alcohol poisoning; and Fetal Alcohol Spectrum Disorders.² The reduction of excessive alcohol consumption is therefore a matter of major public health and economic concern.

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

Recognizing the relationship between alcohol outlet density and excessive alcohol consumption and related harms, the independent Task Force on Community Preventive Services⁴ reviewed the scientific evidence on the effectiveness of limiting alcohol outlet density as a strategy for preventing this public health problem and concluded:

¹ Bouchery, E., Harwood, H., Sacks, J., Simon, C., Brewer, R. (2011). Economic Costs of Excessive Alcohol Consumption in the U.S., 2006. *Am. Journal of Preventive Medicine* 41:516-524; CDC (2004). Alcohol-attributable deaths and years of potential life lost—U.S., 2001. *Morbidity & Mortality Weekly Report* 53: 866–70, September 24, 2004.

² Kanny, D., Liu, Y., Brewer, R., Garvin, W., Bally, L. (2011). Vital signs: Binge drinking prevalence, frequency, and intensity among adults—United States 2010. *Morbidity & Mortality Weekly Report* 61: 14-19, January 13, 2012.

³ 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.

⁴ The Task Force 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 April 12, 2012).

“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

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 and operating practices of retail alcohol outlets in their particular geographic area. In some States, local governments have substantial control over licensing decisions, whereas in other States, they have little or no authority. The legal doctrine that determines this level of local control is called state preemption.⁶

This report introduces the state preemption doctrine and describes its effects on the regulation of alcohol retail outlets as it applies in North Carolina. It is designed for public health practitioners, PACCs, healthcare providers, and others interested in addressing community problems associated with retail availability.

III. The State Preemption Doctrine and its Impact on Alcohol Outlet Density: An Overview

The state and federal preemption doctrine refers to the authority of higher levels of government to mandate the practices and policies 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 and state governments must adhere to the policies mandated at the higher levels of government and are precluded from deviating from the policies in question. 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.⁷ This includes the regulation of alcohol retail outlet density; in fact, the 21st Amendment, which repealed Prohibition, explicitly grants states this authority.⁸ State preemption of local governmental action is therefore a matter left to each state, and states vary widely in how they exercise this authority.⁹

Preemption can be “express” or “implied.” Express preemption exists when the state legislature is explicit regarding its intent to preempt local government action. Implied preemption is an

⁵ 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.

⁶ 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://alcoholpolicymd.com/pdf/Policy_Perils.pdf (accessed May 28, 2012).

⁷ U.S. Constitution, 10th Amendment.

⁸ U.S. Constitution, 21st Amendment.

⁹ Gorovitz et al. *supra* n. 6.

imprecise concept that involves a determination of the state legislature's intent. For example, did the legislature intend to preempt local action because of the comprehensiveness of the statutory scheme that it created or the particular construct of the state law? Due to the subjective nature of these judgments, courts have often ruled inconsistently in their application of the implied preemption doctrine, creating confusion for public health practitioners and PACCs..

Although traditionally considered an important tool for promoting public health, state preemption can also be a barrier, particularly when the regulation of potentially dangerous products is involved.¹⁰ For example, many tobacco control initiatives began at the local level, including restrictions on cigarette vending machines and mandates for smoke-free workplaces. 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.

All states have developed comprehensive legal structures for regulating retail alcohol 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 and/or local governments directly operate retail stores that sell alcoholic beverages for consumption off the premises in addition to issuing licenses for privately-run establishments.¹¹ North Carolina is a control system as to the sale distilled spirits for off-premises consumption, which is sold through state stores operated by local ABC Boards.¹²

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.¹³ For example, is a proposed land use 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 and coordinating enforcement efforts, but the state is not in a good position to determine whether a particular land use is appropriate to a particular location.¹⁴ Yet, despite the importance of local authority in land use regulation generally, many states, including North Carolina, have significantly restricted local control of alcohol outlet density, as discussed below.

¹⁰ *Id.*

¹¹ National Institute on Alcohol Abuse and Alcoholism (NIAAA), Alcohol Policy Information System (APIS), at www.alcoholpolicy.niaaa.nih.gov (accessed April 12, 2012).

¹² *Id.*; N.C.G.S.A. § 18B-700 et seq. This analysis does not address local authority related to the formation and operation of the local ABC Boards.

¹³ Ashe, M. et al. (2003). Land Use Planning and the Control of Alcohol, Tobacco, Firearms, and Fast Food Restaurants. *American Journal of Public Health* 93: 1404-1408.

¹⁴ *Id.*

IV. State Preemption in North Carolina

A. Primary State Control

North Carolina law clearly vests the authority to regulate retail alcohol outlets at the state level:

“This chapter is intended to establish a uniform system of control over the sale, purchase, transportation, manufacture, consumption, and possession of alcoholic beverages in North Carolina, and to provide procedures to insure the proper administration of the ABC laws under a uniform system throughout the State. This Chapter shall be liberally construed to the end that the sale, purchase, transportation, manufacture, consumption, and possession of alcoholic beverages shall be prohibited except as authorized in this Chapter.

“Except as provided in this Chapter, *local ordinances establishing different rules on the manufacture, sale, purchase, transportation, possession, consumption, or other use of alcoholic beverages, or requiring additional permits or fees, are prohibited.*”¹⁵ (Emphasis added.)

The North Carolina Alcoholic Beverage Control Commission (“ABC Commission”) is the governmental agency exercising this primary authority to regulate retail alcohol outlets. North Carolina courts have long upheld the preemptive force of the State alcohol control statutes and the exclusive authority of the ABC Commission. For example, in the 1962 ruling *Staley v. City of Winston-Salem*¹⁶, the State Supreme Court sided with a landowner who was in compliance with State alcohol control laws but not local zoning requirements that otherwise prohibited the sale of alcohol at the location proposed by the landowner. In its decision the court stated:

“The [ABC Commission] exercises sole discretionary powers in determining fitness of the applicant, the number of retail outlets permitted in any locality, and supervision over those who sell wines. . . . Local ordinances cannot override statutes applicable to the entire state.”¹⁷

Twenty-five years later in *Application of Melkonian*¹⁸, the Court of Appeals of North Carolina reaffirmed the *Staley* opinion. In *Melkonian*, petitioner sought to have the denial of a special local zoning permit by the local planning board set aside so he could open a retail establishment with an on-premises permit.¹⁹ Because petitioner subsequently received permits from the ABC Commission the court’s discussion focused on whether the local denial of local permit was preempted by State law. Citing in part the ruling in *Staley*, the court concluded that petitioner was entitled to operate his business because he received the necessary state permits from the ABC Commission. The court stated that the ABC Commission *may* consider objections by local government and provisions of local zoning ordinances but does not have to adhere to them.²⁰

¹⁵N.C.G.S.A. § 18B-100.

¹⁶ 258 N.C. 244.

¹⁷ *Id.* at 247.

¹⁸ 85 N.C.App. 351 (1987).

¹⁹ Unlike most states, North Carolina issues “permits” to alcohol retail establishments, not licenses.

²⁰ 85 N.C. App. at 360 – 361. An exception to this broad state preemption involves the regulation of adult entertainment venues. N.C.G.S.A. § 18B-905.

State permits must be renewed on an annual basis. The ABC Commission also has broad authority to suspend or revoke permits that have been previously issued. Section 18B-904(e) provides:

“The Commission may suspend or revoke a permit issued by it if ... it finds that the location occupied by the permittee is no longer a suitable place to hold ABC permits or that the operation of the business with an ABC permit at that location is detrimental to the neighborhood.”

This provision would appear to grant the ABC Commission the authority to suspend or revoke a renewal when alcohol outlet density problems exist in the neighborhood in question.

B. Local Government Role in the State Permit Issuing Process

Although the ABC Commission has the final authority to issue alcohol retail outlet permits and can ignore local objections, state law clearly intends to give local governments a significant advisory role in the permit-issuing process. The ABC Commission must consider numerous factors that involve local community conditions, including:

- The number of places already holding ABC permits within the neighborhood.
- Parking facilities and traffic conditions in the neighborhood.
- Kinds of businesses already in the neighborhood.
- Whether the establishment is located within 50 feet of a church, public school, or any nonpublic school
- Zoning laws
- Whether the operation of the applicant's business at that location would be detrimental to the neighborhood
- Evidence of illegal drug activity on or about the licensed premises.
- Evidence of fighting, disorderly conduct and other dangerous activities on or about the licensed premises.²¹

The ABC Commission is explicitly required to consider the recommendations of the local government, which must be notified of any application for a permit.²² Neither the state legislature nor the courts have provided guidance regarding the weight the ABC Commission must give to these local conditions or to the recommendations received from local governments. Local governments must file objections to the application within 15 days of receiving this notice, a relatively short time period.

Local governments may wish to consider establishing a process for exercising this advisory function in a systematic manner. Doing so may encourage the ABC Commission to give special consideration to local conditions and may facilitate review of renewal applications, where there is increased local authority, as described below. The Cities of Wilmington, Greenville, and Durham have taken this approach. In Wilmington, concerns over the sale of alcohol in the city's commercial district led the city council to adopt by resolution a set of guidelines for how the city

²¹ N.C.G.S.A. § 18B-901.

²² *Id.*

could best influence and participate in the State permitting process.²³ The city has established a review committee made up of city staff, representatives from the police and fire department, industry representatives, residents, and non-business representatives. The committee collects information regarding the applicant, the applicant's proposed business, and the proposed location and evaluates the suitability of the proposed location and its impact on outlet density. Its recommendations are forwarded to the ABC Commission.

The City of Greenville enacted an ordinance in 2009 that requires all private and public clubs to obtain special use permits, which are subject to revocation if they are responsible for community problems.²⁴ The ordinance defines clubs to include entertainment venues open to the public that do not qualify as restaurants. They may or may not serve alcohol. Special use permits cannot be issued if the proposed establishment is within 500 feet of another club or private residential zoning district, an effort to reduce alcohol outlet density problems. State law would appear to preempt the Greenville ordinance if it is applied to a club that is otherwise qualified to receive a state permit, although the ABC Commission may voluntarily defer to the city's special use permit process.²⁵ The North Carolina appellate courts have not reviewed the validity of the ordinance.

In Durham, city officials have become increasingly active in reviewing applications for new alcohol retail outlets.²⁶ One key informant reports that as a result of community pressure problematic applications have been redrawn and problem outlets have not sought renewals.²⁷

C. Local Authority Related to Renewal of Local Alcohol Licenses

The ABC Commission issues permits to retailers. Once a beer or wine permit is issued, the local government where the new retail establishment is located is required to issue a local license that mirrors the state permit.²⁸ Issuance of the local license is mandatory.²⁹ Local licenses are not issued for mixed drink permits.

Despite the lack of discretion regarding the issuance of the original beer or wine license, local governments are granted more discretion in the license renewal process. Section 105-113.71 states:

²³ City of Wilmington City Council Resolution: Central Business District Policies and Procedures Adopted September 2010. Available at:

<http://www.wilmingtonnc.gov/Portals/0/documents/Development%20Services/Zoning%20and%20Permits/ABC%20Review%20Policy.pdf> (accessed May 25, 2012).

²⁴ City of Greenville Zoning Ordinance No. 09-27 §2.

²⁵ Private clubs, but not public clubs, are qualified to receive beer, wine, and mixed beverage state permits. N.C.G.S.A. § 18B-1001. The ABC Code defines private clubs as: "an establishment that is organized and operated solely for a social, recreational, patriotic, or fraternal purpose and that is not open to the general public, but is open only to the members of the organization and their bona fide guests." N.C.G.S.A. § 18B-1000. Public clubs, as defined by the Greenville ordinance, are not qualified to receive a state permit. Regulations of such venues are therefore not preempted by the state ABC Code.

²⁶ Interview with Wanda Boone, Chair, Durham Together for Resilient Youth, May 22, 2012.

²⁷ *Id.*

²⁸ N.C.G.S.A. §§ 105-113.77, 105-113.78. The terminology used in North Carolina may cause confusion for those from out of state. In most other jurisdictions, the state issues licenses and local governments issue permits.

²⁹ N.C.G.S.A. § 105-113.70.

“[T]he governing board of a city or county may refuse to issue a license if it finds that the applicant committed any act or permitted any activity in the preceding year that would be grounds for suspension or revocation of his [state] permit. Before denying the license, the governing board shall give the applicant an opportunity to appear at a hearing before the board and to offer evidence. The applicant shall be given at least 10 days' notice of the hearing. At the conclusion of the hearing the board shall make written findings of fact based on the evidence at the hearing. The applicant may appeal the denial of a license to the superior court for that county, if notice of appeal is given within 10 days of the denial.”

This statutory provision gives local government independent authority to determine whether the local beer or wine license should be renewed. Although local governments cannot exercise the renewal denial authority as to mixed beverage permits, it appears that establishments that serve mixed beverages must also obtain separate beer and wine permits, since the mixed beverage permit does not by itself authorize sale and service of beer and wine.³⁰ If this is the case, the renewal denial authority can therefore be a considerable deterrent to an establishment with a mixed drink permit even though it would not cut off all alcohol sales.

Renewals can be denied if the local government can establish any action that would be grounds for suspension or revocation under the ABC Code, a very broad delegation of authority. However, there are no guidelines for how this authority can be exercised. How much evidence of ABC violations is sufficient? Could a local government deny a renewal based on the provisions of Section 18B-904(e)? As noted above, this statute allows the ABC Commission to revoke a permit if “location occupied by the permittee is no longer a suitable place to hold ABC permits or ... the operation of the business with an ABC permit at that location is detrimental to the neighborhood.” Would a finding by the ABC Commission of a violation be required? If appealed to the superior court, would the court give deference to the local governments findings of fact? No cases could be found where local governments actually exercised this authority, and these questions have not been addressed by either the state legislature or the state appellate courts.

Despite this uncertainty, the local renewal provisions may provide an important tool for local governments to address alcohol retail outlet density problems. Wilmington and Chapel Hill have enacted ordinances that are instructive. As noted above, Wilmington reviews all applications for new state permits and focuses on density and operational standards. It provides recommendations to the ABC Commission both regarding the original issuance of the permit and its renewal and includes specific reference to Section 18B-904(e), which permits the ABC Commission to suspend or revoke permits if the retail establishment is in an unsuitable location and is detrimental to the neighborhood, as noted above. It also states: “The City reserves the right to refuse to issue a license in accordance with NCGS§105-113.71.”³¹

Chapel Hill has enacted an ordinance that codifies the local authority to deny beer or wine license renewals as provided in section 105-113.71.³² License renewal applications are referred

³⁰ N.C.G.S.A. § 18B-1001.

³¹ City of Wilmington City Council Resolution, *supra* n. 23.

³² Chapel Hill Code of Ordinances § 10-18.1.

to the local police, fire, and inspections departments. If any of the three departments believe there may be grounds for denial of a renewal, the city manager reviews the matter and may refer it to the city council for a hearing. A decision to deny a renewal can be appealed by the licensee to the superior court.

Establishing procedures for reviewing beer or wine license renewals may provide a strong incentive to prospective and current permittees to address local concerns and to choose locations that will not contribute to alcohol outlet density problems. Recognizing this potential, Greenville's Special Task Force on Public Safety recommended adopting a similar ordinance in that city as a means to reduce violence and crime.³³

D. Other Local Land Use and Police Powers Authority

The preemption statute and cases cited above apply to regulations imposed through local zoning based on land use or police power authority. A possible exception to this general rule involves the use of Urban Redevelopment Districts (URDs). Localities have the authority to establish geographic regions as URDs, which by statute restrict sales of alcohol to 50% of business at on- and off-sale retailers located in the URD.³⁴ The local government must first establish a redevelopment commission or housing authority. This body can then adopt a resolution stating that an area requires redevelopment in the interest of public safety, morals or welfare of the residents of the municipality.³⁵

Local governments can therefore use URDs in part to impose sales restrictions on alcohol retailers within their boundaries. However, they require significant and sustained effort, including the adoption and implementation of redevelopment plans.³⁶ Their usefulness as a tool for regulating alcohol availability is limited by their broad application, although they do offer a comprehensive policy strategy for areas that pose a serious problem to the health and safety of the public, including problems associated with alcohol sales.

E. Bouncer Regulations

The city of Greenville enacted an ordinance requiring all bouncers working at clubs within the city to receive training from the city's police department.³⁷ Bouncers are defined as employees or contractors who perform the function of maintaining order, removing disorderly or disruptive patrons, checking identification cards or providing general security. The ordinance states:

“The provisions of this chapter are not intended or designed to establish rules on the manufacture, sale, purchase, transportation, possession, consumption or other use of alcoholic beverages. The provisions of this chapter apply to a public or private club whether or not the public or private club has been issued an, ABC permit by the North Carolina Alcoholic Beverage Control Commission. Any violation of the provisions of this chapter shall not affect any ABC permit issued

³³ City of Greenville, *Special Task Force on Public Safety Final Report*, June 24, 2011. Available at: http://www.greenvillenc.gov/uploadedFiles/Departments/Mayor_and_City_Council/Public_Safety_Task_Force_Report.pdf (accessed June 6, 2012).

³⁴ N.C.G.S.A. § 18B-309 & General Statutes, Chapter 160A, Article 22.

³⁵ N.C.G.S.A. § 160A-504.

³⁶ N.C.G.S.A. § 160A-513.

³⁷ City of Greenville Code of Ordinances § 11-12-1 et seq.

to the public or private club by the North Carolina Alcoholic Beverage Control Commission.”³⁸

As discussed below, this approach to training bouncers might be used to regulate other aspects of retail alcohol establishments’ operations, provided: (1) the regulation applies to a class of businesses that includes but is not limited to alcohol retailers; and (2) it does not directly affect the alcohol sales, possession, purchases or other uses.

F. Public Nuisance Authority

State law permits localities to enact ordinances that intend to define and abate nuisances, although this authority does not extend to regulation subjects that are expressly forbidden to regulate by state law.³⁹ Since the state has clearly preempted the field of alcohol regulation, localities probably cannot enact public nuisance restrictions that single out alcohol retailers, as has been done in other states.⁴⁰ Localities might consider enforcing a general public nuisance abatement ordinance to a problem alcohol outlet, although even this exercise of local authority may run afoul of the state preemption doctrine. It has not been tested in court.

Another possible approach is to establish a public nuisance abatement ordinance that applies to a larger class of businesses that includes but is not exclusive to alcohol retailers, e.g., youth sensitive businesses that might include tobacco and alcohol retailers, adult entertainment, and tattoo parlors. Greenville’s bouncer training ordinance provides a precedent for this approach. The ordinance would need to address public nuisance problems associated with the operations of these businesses that do not directly regulate alcohol sales and purchases (e.g., littering, drug sales, noise, loitering, etc.) The validity of such an approach under North Carolina law is speculative. The bouncer ordinance has not been reviewed by the state courts and it as well as the approach described here for a public nuisance ordinance might be found to be preempted by state law.

Another alternative is to rely on the state’s nuisance statute. It allows for abatement actions to be filed against parties that allow the illegal sale of alcoholic beverages on his or her property as well as allowing prostitution, gambling, and the illegal possession or sale of controlled substances.⁴¹ Abatement actions must be brought on behalf of the state, limiting local authority. Because sales of alcoholic beverages to intoxicated persons⁴² and underage persons⁴³ constitute illegal sales of alcoholic beverages, the state nuisance statute may be used to close retailers that are engaging in these illegal activities. Actions under the state nuisance statute do not raise local preemption issues; however they will require demonstrating in court that a violation occurred. In light of the limitations and uncertainties associated with the application of public nuisance

³⁸ City of Greenville Code of Ordinances § 11-12-6.

³⁹ N.C.G.S.A. § 160A-174. See *Greene v. City of Winston-Salem*, 287 N.C. 66 (1975).

⁴⁰ See, e.g., 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 May 29, 2012).

⁴¹ N.C.G.S.A. § 19-1.

⁴² N.C.G.S.A. § 18B-305

⁴³ N.C.G.S.A. § 18B-302

ordinances and statutes, reliance on the license revocation powers described in the previous section is probably a better vehicle for addressing problem alcohol outlets.

G. Local Authority to Impose Alcohol Taxes or Fees

Local governments in many states have imposed local taxes or fees on alcohol retailers to defray costs of these businesses associated with law enforcement and public health.⁴⁴ North Carolina, however, prohibits the imposition of any additional fees associated with alcohol sales.⁴⁵

Local governments in other states have distinguished “impact” fees, which address ancillary problems associated with alcohol sales (e.g., public nuisance issues, such as littering, loitering drug dealing, etc.) from alcohol permit fees, which are part of the regulation of alcohol sales activities.⁴⁶ North Carolina does not appear to recognize this distinction in light of the express preemption language in the relevant statute and the apparent lack of impact fees in other regulatory activities, although no statutory provisions or case law was found that addressed this issue.

Local governments might consider imposing fees as part of a public nuisance abatement ordinance that applies to a class of businesses that includes but is not limited to retail alcohol establishments, as described in the previous section. The validity of such a fee is speculative. The underlying public nuisance abatement ordinance might be found to be preempted, as noted above, and even if it were held to be valid, the courts might not permit a fee on alcohol retailers because of the specific preemptive language in the applicable statute.

An additional possible option for collecting fees from alcohol retailers involves an *Adequate Public Facilities Ordinance* (APFO). North Carolina cities and counties have used APFOs to exact fees from developers. Supporters of APFOs contend that implicit to the State’s authorization of local governments to regulate land use is the ability to plan when development will take place. Because infrastructure needs may not meet the needs of new development, an APFO allows local governments to delay or deny development permits unless the developer pays a Voluntary Mitigation Payment to offset the added costs to local infrastructure. APFOs have generally involved fees to pay for schools, sewers or roads. However, at least one city, Davidson, imposed an APFO to fund law enforcement, fire services, and parks.

The legality of APFOs has recently been put into question. The Court of Appeals of North Carolina in *Union Land Owners Ass'n v. County of Union* concluded in 2009 that state law does not authorize localities to adopt a “a land use regulation ordinance pursuant to which a developer may be forced to make a payment of money, donate land, or provide for school construction.”⁴⁷ The legality of APFOs outside the school context remains in doubt. The Davidson ordinance has been challenged in court. In the most recent ruling, the U.S. District Court remanded the case back down to the North Carolina Superior Court. In its order the federal court addressed the issue of exactions for public services stating:

⁴⁴ Mosher et al., *supra* n. 40.

⁴⁵ N.C.G.S.A. § 18B-100

⁴⁶ Mosher et al. *supra* n. 40; Mosher, J. (2011). *Local Control of Alcohol Availability in Nebraska: A Legal Analysis*. Omaha, NE: Project Extra Mile.

⁴⁷ *Union Land Owners Ass'n v. County of Union*, 201 N.C.App. 374, 380 (2009).

North Carolina law does appear to be settled on the issue of whether school APFOs are constitutional, but *the Court finds that the law on other APFOs is still a “gray area” under North Carolina law. See MLC Automotive LLC v. Town of Southern Pines, 532 F.3d 269, 284 (4th Cir.2008). Defendant's argument that the Davidson APFO is distinguishable from the others recently examined in the North Carolina courts is a persuasive one.* The North Carolina courts have made clear that (1) the legislature has specifically declined to approve school impact fees, and (2) the North Carolina Constitution places the duty to fund public schools specifically on the legislature and local governments, and “the General Assembly has neither expressly nor impliedly authorized defendant to shift that duty using subdivision ordinances.” *Union Land Owners Ass'n.*, 689 S.E.2d at 508. *The constitutional mandate of government funding for schools differentiates those APFOs from the APFO at hand, which deals not with schools but with adequate public facilities like fire stations and public parks.*⁴⁸ (Emphasis added.)

Given the potential for APFOs to be used fund emergency services, a locality may seek to impose fees on developers that include alcohol retail locations in their plans. While fees cannot be placed solely on new alcohol retail locations given state preemption, they might be placed on the development as a whole and increased because of the inclusion of alcohol retailers. Potential increased costs of including alcohol retailers could be calculated using data on alcohol outlet density and its relation to alcohol related harm. This approach has not been tested in court and remains speculative.

V. Conclusion

North Carolina exercises primary control over alcohol retail outlets, strictly limiting local authority. Local governments play only an advisory role in the state permit-issuing process for new retail outlets. The ABC Commission must take into consideration local factors and local government recommendations but is not required to adhere to them. Local governments are also probably precluded from imposing fees on retailers to mitigate costs to local services (e.g., law enforcement, emergency medical response) associated with the operation of their businesses.

There is, however, a significant exception to these limits on local control. Local governments have authority to review renewal applications of existing beer or wine state permits on an annual basis and deny renewals if violations of the ABC Code are established. At least three cities – Wilmington, Durham, and Chapel Hill – have asserted this authority as a means to address problems associated alcohol retail sales. There may be additional avenues for increasing local control through the use of public nuisance provisions and imposition of conditions of operation that do not directly address the sale of alcoholic beverages.

⁴⁸ *FC Summers Wlk, LLC v. Town of Davidson* (2010 WL 4366287)