Down with Demon Drink: Strategies for Resolving Liquor Outlet Overconcentration in Urban Areas

Shelley Ross Saxer
“DOWN WITH DEMON DRINK!”: STRATEGIES FOR RESOLVING LIQUOR OUTLET OVERCONCENTRATION IN URBAN AREAS

Shelley Ross Saxer*

Hear all the children,
Ragged and starving they cry,
"Close down the Public House
And Demon Drink will die."1

I. INTRODUCTION

Efforts to reduce alcohol related problems and improve the quality of life in the inner city have been hampered by the disproportionately large number of liquor stores allowed within a geographically small area in inner cities.2 Recent studies indicate that there is a "high correlation between the number of liquor stores and a neighborhood's crime rate."3

* Assistant Professor of Law, Pepperdine University School of Law; J.D., 1989, University of California, Los Angeles; B.S., 1980, Pepperdine University.

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1. BRIAN BURTON, THE DRUNKARD, Act III, sc. 2 (1968) (Cambridge Jackson, Ltd.).

2. See Judy Ronningen, Twisting the Tail of Demon Rum: Neighborhoods Go After Drinking, S.F. CHRON., June 3, 1993, at A1 ("The problem is particularly acute in lower-income neighborhoods, which tend to have the highest numbers of liquor outlets"); Caswell A. Evans, Jr., Public Health Impact of the 1992 Los Angeles Civil Unrest, PUB. HEALTH REP., May 1993, at 265, 269.

3. Jill Gottesman, Corking the Bottle; Cities Try to Limit the Sale of Packaged Spirits, L.A. TIMES, July 26, 1992, at J1 (citing Karen Bass, executive director of Community Coalition for Substance Abuse Prevention, referring to a U.S.C. study by Dr. Richard Scribner). According to Dr. Scribner's study, "'crime [is] strongly associated with the density of alcohol outlets' in Los Angeles County and . . . 'reductions in crime may be achieved through policies that reduce alcohol outlet density.'" Opinion, A Local Problem: Cities Must Be Able to Regulate Liquor Stores, SAN DIEGO UNION-TRIB., Oct. 31, 1993, at G2. See also Evans, supra note 2, at 265, 269 ("research has shown a significant correlation between the availability of alcohol to adolescents and adults, the density of liquor stores, the amount people drink, and the occurrence of crime, alcohol-related deaths, and automobile collisions in the community"); Editorial, Dallas Crime, DALLAS MORNING NEWS, June 29, 1993, at 10A, available in LEXIS,
Further, urban neighborhoods are "convinced that a high concentration of liquor stores contributes directly to crime, drug dealing and blight."4 According to the National Institute on Alcoholism and Alcohol Abuse, liquor contributes to 80% of the homicides and 60% of the physical offense injuries in inner cities.5 Many neighborhood nuisance problems such as graffiti, loitering, and prostitution, are linked to the sale of alcohol.6 Alcohol also represents a major contributor to familial problems such as divorce, child abuse, and domestic violence.7 Retail liquor stores are of particular concern to local citizens since the sale of liquor has typically been "regarded as involving a threat or hazard to public morals."8 Therefore, it is reasonable, and even expedient, for neighborhoods to fo-

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4. Mary Kane, Cities Targeting Liquor Stores In Effort To Ease Blight, Crime, Houston Chron., June 20, 1993, at C7, available in LEXIS, Nexis Library, News File. See Opinion, supra note 3, at G2 (violence in cities is linked to alcohol and problem is particularly bad in minority areas); Evans, supra note 2, at 265, 269 (neighborhood frustration was manifested during the 1992 riots when "retail alcohol outlets were specifically targeted by rioters in the impacted areas").


6. Jim Tranquada, Cuts Would Cripple Liquor License Enforcement, Daily News of L.A., Sept. 16, 1991, at N1, available in WESTLAW, Papers Database. See also Mirna Alfonso, Number of Stores Nearly Doubles in 10 Years; South Gate Studies Liquor Sale Controls, L.A. Times, Nov. 3, 1985, at I2 (South Gate city planning aide is quoted as saying that "the problems created by liquor sales, included, public drunkenness and pedestrian obstruction, loitering and littering, increased police calls and blight").


8. Robert M. Anderson, American Law of Zoning § 17.47, at 127 (1986) ("Municipal zoning regulations that restrict the location of package stores and stores which sell beer to take out are justified on the ground that they have a reasonable tendency to serve the morals of the community."). See Editorial, Liquor Store Pollution, Sacramento Bee, May 26, 1993, at B6 (liquor store complaints include: patrons at a nearby liquor store scare away customers; liquor store has been the site of numerous shootings; liquor stores "attract public drunks who panhandle, urinate in public and sleep on the streets").
cus their efforts on remediying alcohol related problems by controlling small liquor outlets.\footnote{9}

Some people view the attempt to control liquor stores in the inner city as an improper and ineffective way to eliminate the social or moral evils of alcohol.\footnote{10} This article takes the view\footnote{11} that the overabundance of liquor stores and the attendant problems such as loitering, littering, graffiti, and prostitution, as well as the visual impact of alcohol abuse on inner city children,\footnote{12} are valid land use issues that can be addressed through appropriate local control.\footnote{13} The type of local control at issue in inner cities is not directed at the drinkers' moral and social behavior, rather it is the exercise of po-

\footnote{9} Gottesman, \textit{supra} note 3, at J1. "If a child on his way to school has to walk past five liquor stores and groups of people drinking, that becomes the norm. ... It becomes the backdrop of that child's life, and the norm is to tolerate substance abuse." \textit{Id.} at J8 (quoting Dr. Richard Scribner).

\footnote{10} See Richard Simon, \textit{Ban on Cheap, Potent Wine Making Little Impact on Skid Row}, \textit{L.A. Times}, Oct. 21, 1990, at B1, B6 (Mike Neely, director of the Homeless Outreach Project, a Skid Row organization staffed by former homeless people, says "Banning alcohol is not the solution. They tried that during Prohibition. What makes them think it will work in the 1990s?"); Thomas B. Griffen, \textit{Note, Zoning Away the Evils of Alcohol}, 61 S. Cal. L. Rev. 1373, 1398 (1988) ("The ineffectiveness of alcohol zoning ordinances indicates that alcohol abuse is not a land use problem, and thus should not be addressed through zoning law"); Ronningen, \textit{supra} note 2, at A1 ("The liquor store and tavern owners say the advocates of tough new controls are seeking scapegoats for inner-city problems stemming from joblessness and poverty.").

\footnote{11} Contrary to the impression which may have been created by the melodramatic title of this article, the author does not believe, nor suggest that eliminating liquor stores will necessarily rehabilitate existing alcoholics.

\footnote{12} See \textit{supra} text accompanying notes 6 and 7.

\footnote{13} Courts have recognized that the overconcentration of liquor licenses in an area can harm the local neighborhood. See \textit{Rathkoff et al., The Law of Zoning and Planning} 2 § 17B.03, at 17B-96 (4th ed. 1983) (citing Department of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd., 184 Cal. Rptr. 367, 370 (Ct. App. 1982) ("there is [a] symbiotic relationship between crime and the increased consumption of alcohol in a given locale that results from an excessive number of competing sources of distribution"); Hapeville v. Anderson, 272 S.E.2d 713 (Ga. 1980) (upholding an ordinance which limited the issuance of liquor licenses to one per each one thousand residents). See also Jones v. City of Troy, 405 F. Supp. 464, 471 (E.D. Mich. 1975) (when considering liquor license applications, a city cannot ignore land use planning and development responsibilities since "[t]he valid exercise of liquor licensing authority necessarily transcends the mere control of the 'evils' traditionally associated with the public sale and consumption of alcohol"); Griffen, \textit{supra} note 10, at 1404 ("Zoning law is an appropriate tool to control the effects of alcohol use only if it addresses land use externalities caused directly by the activity . . . .").
lice power directed at those activities contributing to social blight in the area.14

While the liquor outlet overconcentration problem exists in many major urban areas across the nation,15 South Central Los Angeles has recently emerged as a focal point for resolving this dilemma as a result of the Spring 1992 riots,16 which left about two hundred liquor stores severely damaged and in need of rebuilding.17 The local concern about the overconcentration of liquor stores in South Central Los Angeles is not new. For example, in 1983, community residents organized protests which resulted in the enactment of a conditional use permit ordinance in the city of Los Angeles.18 After the riots, however, there was an unexpected opportunity for local

14. Yu v. Alcoholic Bev. Control Appeals Bd., 4 Cal. Rptr. 2d 280, 282 (Ct. App. 1992) (Department of Alcoholic Beverage Control revoked license based on complaints involving incidents of "drug transactions, fighting and disorderly conduct, disturbances, stolen property, loitering, and 'suspicious circumstances'" that occurred on the premises of a neighborhood market selling liquor); Goat Hill Tavern v. City of Costa Mesa, 8 Cal. Rptr. 2d 385 (Ct. App. 1992) (local apartment tenants complained of noise and fights in the parking lot of the tavern and of "individuals vomiting, urinating and defecating on residents' lawns and fences"); Griffen, supra note 10, at 1404 ("Zoning law is an appropriate tool to control the effects of alcohol use only if it addresses land use externalities caused directly by the activity, and not if it seeks to perform the function of the state liquor licensing scheme"); L.A. Yanks OK to Rebuild Liquor Store, SAN DIEGO UNION-TRIB., March 24, 1993, at A3 (Los Angeles City Council rescinded Planning Commission's approval of a permit to rebuild a liquor store destroyed during 1992 L.A. riots, based on citizen concerns that having too many liquor stores adds to the problems of crime, poverty and public intoxication in their neighborhoods).

15. Ronningen, supra note 2, at A1 ("Neighborhood groups across the country are successfully lobbying for local ordinances to regulate or chase out taverns and liquor stores in what is proving to be the most aggressive alcohol-control movement since Prohibition"); Kane, supra note 4, at C7 (discussing liquor store problems in Indianapolis, Los Angeles, Salinas, and Baltimore); Rob Hotakainen, Squelching Two Neighborhood Blights; Phillips Residents Hail Liquor Store's Demise, STAR TRIB. (Minn.), July 2, 1992, at 1B (south Minneapolis neighborhood celebrates closing of liquor store that has been a "longtime source of frustration for neighborhood activists"); Howard Fischer, A Limit On Liquor Store Drive-ups?, ARIZ. BUS. GAZETTE, Dec. 23, 1993, § 1, at 3 (Phoenix considering revisions to zoning code to minimize impact of liquor stores on neighborhoods).

16. This civil unrest followed the not guilty verdicts rendered in the state case against Los Angeles police officers accused of unlawfully beating Rodney King.

17. Evans, supra note 2, at 265 (civil unrest reopened issue of concentration of liquor stores in South Central Los Angeles and provided opportunity to find ways to limit liquor outlet reopenings); Lacey, supra note 5, at A1.

18. Evans, supra note 2, at 265.
residents to exert greater control. Community leaders called for a reduction in the overall number of liquor outlets by recommending several actions which included “requiring public hearings before the reconstruction of liquor stores and other so-called sensitive-use businesses.” Such community activism has succeeded in slowing the reconstruction of liquor stores in the riot-damaged area.

This article will examine various options available to local citizens to resolve the liquor store overconcentration problem. The “city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. Moreover, the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.” On the other hand, liquor store owners argue that their property rights are being trampled on, and that they should not be held responsible for the societal ills caused by poverty and unemployment.

Los Angeles has been forced to confront this issue directly as a result of the 1992 riots and the subse-

19. Jube Shiver, Jr., Red Tape, Weak Economy Cast Pall Over Rebuilding, L.A. TIMES, Aug. 29, 1992, at A1. The destruction of the liquor stores was viewed by some community leaders “like a miracle” since a large number of the stores they wanted to shut down were instead burned down. Calvin Sims, Under Siege: Liquor's Inner-City Pipeline, N.Y. TIMES, Nov. 29, 1992, § 3, at 1, available in LEXIS, Nexis Library, News File (quoting Karen Bass, director of the Community Coalition for Substance Abuse Prevention and Treatment). “That's not the way we wanted it to happen, but the rioting accomplished in a few days what we have spent decades working to achieve.” Id. (quoting Karen Bass, director of the Community Coalition for Substance Abuse Prevention and Treatment). Mayor Tom Bradley appointed a liquor store task force that called for a moratorium on new licenses in South Central Los Angeles and has recommended support for owners willing to convert their business. Id.

20. Ronningen, supra note 2, at A1. “In South Central Los Angeles, resistance from local residents has slowed the rebuilding of the 150 liquor stores burned in the April, 1992, rioting that came after the acquittal of police officers accused of beating Rodney King.” Id. See infra notes 180-215 and accompanying text for a discussion of L.A.’s use of the conditional use permit process to control retail liquor sales. See also Greg Krikorian, The Bottleneck; Squeezed by Tough Restrictions, Only a Few of the Hundreds of Liquor Stores Damaged During The Riots Have Reopened, L.A. TIMES, Aug. 29, 1993, at 14 (as of August, 1993, only ten of the 200 stores destroyed in the riots have reopened); Eric Schine, Koreatown: Riot Wounds the World Doesn't See, Bus. WK., Apr. 12, 1993, at 24A (few Korean grocers are back in business partly because of new city restrictions on renewing liquor licenses in South Central).


quent rebuilding process. Because of this recent activity, this article often focuses on California's attempts to resolve the problem.

Part II of this article describes several existing models of public regulation of retail liquor sales. Part III explores the role of private control of retail liquor sales, including the application of nuisance law, private covenants, and community activism and redevelopment. Part IV concludes by offering recommendations as to how an inner city can most effectively reduce the social impact of the overconcentration of liquor stores within its community.

II. PUBLIC REGULATION

The states' authority to regulate the use, sale and traffic of liquor within their borders originally emanated from their inherent police power to make regulations upholding public safety, order, health, and morals. Based upon this general police power, the states were given complete discretion to regulate alcohol, subject only to the limitations of the Constitution of the United States. This right to regulate was codified as early as 1890 in the Wilson Act, and also in the Webb-Kenyon Act of 1913, which granted the states power to regulate the sale and transportation of liquor within their territory.

24. See infra part II.
25. See infra part III.
26. See infra part IV.
27. In re Rahrer, 140 U.S. 545, 549 (1891); Hannah & Hogg v. Clyne, 263 F. 599, 603 (N.D. Ill. 1919).
28. 16 Am. Jur. 2d Constitutional Law § 363 (1993). "It is a generally accepted principle of law that the police power resides in the state in its sovereign capacity, and that such power can be possessed and exercised by a municipality only when it has been delegated by the lawmaking power of the state, a municipality ordinarily having no inherent power to enact police regulations." 51 A.L.R.3d 1061, 1063 (1973). State authority to regulate liquor is currently based on the Twenty-First Amendment, the general police power or both. See infra notes 43-46 and accompanying text.
29. Congress was denied the right to infringe on the regulation of the states except as incidental to rights conferred on them by the Constitution. Commonwealth v. Nickerson, 128 N.E. 273, 278 (Mass. 1920); 48 C.J.S. Intoxicating Liquors § 22 (1993).
Despite this initial grant of power to the states to regulate liquor, the temperance movement during the nineteenth century and the growing anti-drink state regulations resulted in a shift to federal control. In January 1919, the Eighteenth Amendment to the United States Constitution was ratified. This Amendment stripped the states of their exclusive power to control the liquor traffic within their borders and granted to Congress the authority to enact legislation to prohibit the manufacture and sale of intoxicating liquor. Further, the Eighteenth Amendment expressly provided that Congress, along with the several states, would be granted a concurrent power to enforce the provisions of the article and thus, invalidated any state legislative attempt to sanction what the Amendment prohibited.

It soon became apparent, however, that blanket federal prohibition of alcohol only increased bootlegging and corruption. So, responsibility for liquor control was returned to the states with the repeal of the Eighteenth Amendment by the ratification of the Twenty-First Amendment in 1933. The Twenty-First Amendment guaranteed that the transportation of intoxicating liquor into a state for the delivery or use therein would be governed by the laws of that state. Both the wording of the Twenty-First Amendment, which resembles the earlier Webb-Kenyon Acts, and the legislative history suggest that the Amendment's framers intended it to reconstitutionalize the regulatory powers held by the states prior to the adoption of the Eighteenth Amendment.

34. U.S. CONST. amend. XVIII, §§ 1-2, repealed by U.S. Const. amend. XXI.
35. U.S. CONST. amend. XVIII, § 2, repealed by U.S. Const. amend. XXI.
38. "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST. amend. XXI, § 2.
cent cases have further reinforced the states' power under the Twenty-First Amendment over core concerns such as the regulation of consumption, importation, and distribution of liquor. This authority to regulate businesses that sell liquor is very broad and confers "something more than the normal state authority over public health, welfare, and morals."\(^{41}\)

As a result of giving control over liquor regulation back to the states, the uniformity inherent in federal regulation was replaced by an assortment of alcohol control laws varying dramatically from state to state. In some states, the broad power to regulate liquor has been delegated to local government.\(^{42}\) However, this power to regulate liquor under the Twenty-First Amendment must be distinguished from the state's general police power to regulate for the benefit of the public health, safety, morals or welfare.\(^{43}\) General police power authority is also typically delegated to municipalities and includes the power to enact zoning ordinances.\(^{44}\) These two bases of authority for liquor regulation are separate and distinct,\(^{45}\) although, because of their common origin, many

40. North Dakota v. United States, 495 U.S. 423 (1990) (noting that state liquor regulations clearly were within a state's power to regulate under the Twenty-First Amendment, and did not violate intergovernmental immunity, since they only indirectly (through suppliers) affected the federal government); 324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987) (discussing federal antitrust question involving state liquor statute). When there is a potential for conflict with a federal interest, however, state liquor statutes have been subjected to exacting scrutiny. Spaeth, supra note 33, at 186. This article does not address federal preemption issues and the relationship between state liquor regulation and federal interests.

41. California v. La Rue, 409 U.S. 109, 114 (1972), reh'g denied, 410 U.S. 948 (1973) (explaining the history and application of the Twenty-First Amendment to states).

42. City of Newport v. Iacobucci, 479 U.S. 92, 96 (1986), reh'g denied, 479 U.S. 1047 (1987) (finding that a state may delegate its powers under the Twenty-First Amendment to local governments).

43. See supra note 28 and accompanying text (explaining how the states' authority to regulate liquor originated from the concept of the states' general police power authority).

44. ANDERSON, supra note 8, § 2.02, at 30. This delegation may be accomplished by home-rule provisions of state constitutions or by a legislative enabling act. Id. § 2.16, at 60.

45. Crownover v. Musick, 509 P.2d 497 (Cal. 1973) (finding that ordinances relating to live entertainment did not conflict with state power to regulate sale of alcohol), overruled on other grounds by Morris v. Municipal Ct., 652 P.2d 51 (Cal. 1982); Lanier v. City of Newton, 842 F.2d 253, 256 (11th Cir. 1988) (City's power to ban topless dancing in business establishments serving alcohol is not based on its general police power, but is instead derived from the Twenty-First
court decisions do not differentiate them.\textsuperscript{46} Regardless of the basis for the states' delegation of authority, local regulations of liquor may be preempted when in conflict with general state law or when the local governing bodies exceed their delegated authority.\textsuperscript{47} Determining whether a restriction on liquor stores in a local area conflicts with state authority requires an examination of the specific ordinance at issue, the state statute under which the landowner is licensed, the state enabling act delegating authority, and any decisional construction of the legislation.\textsuperscript{48}

In order to illustrate how a state's legislative choices in delegating liquor regulation authority affect local interests, the following sections describe existing state statutory schemes and some of the court decisions regarding implementation of these schemes. Section A explores the various models of state and local control that exist with respect to the division of authority under the Twenty-First Amendment to regulate liquor.\textsuperscript{49} Section B discusses the local exercise of

\textsuperscript{46}See, e.g., Davidson v. Clinton, 826 F.2d 1430, 1432 (5th Cir. 1987) (treating the states' right to regulate liquor sales as "a dimension of the police power" to regulate for the public health, welfare, and morals).

\textsuperscript{47}See supra notes 12-14 and accompanying text; Anderson, supra note 8, § 17.47. "[I]t is fundamental that municipal regulations are inferior in status and subordinate to the laws of the state, and that a municipal regulation in conflict with a state law of general character and statewide application is invalid." 51 A.L.R.3d 1061. "[T]he regulation of the liquor industry is frequently an emotionally-charged issue. If . . . present statutes do authorize the existence of a dual system of control, with the State and its agencies having the dominant role, it is indeed unfortunate when conflicts and friction develop between the regulatory bodies." Metropolitan Gov't of Nashville and Davidson County v. Shacklett, 554 S.W.2d 601, 608 (Tenn. 1977). This article does not address the preemption issues with regard to state law and tribal ordinances regulating liquor transactions in Indian country. See generally, Brown v. District Ct., 777 P.2d 877 (Mont. 1989).

\textsuperscript{48}Anderson, supra note 8, § 17.47.

\textsuperscript{49}See Shacklett, 554 S.W.2d at 608:

In the exercise of its very broad powers in this field, the General Assembly could wholly exclude local governments from any role whatever and place exclusive control of the sale and distribution of alcoholic beverages in the state government. It could even provide for a system of state-owned liquor stores, if it felt this were appropriate. On the other hand it could remove state government from regulation, and place the subject entirely in the hands of local government or, of course, it could remove all controls and permit alcoholic beverages to be dispensed in the same manner as ordinary articles of food and drink.

\textit{Id.} See infra notes 52-168 and accompanying text.
power under the general police power to regulate for the benefit of the public health, safety, morals or welfare. Section C discusses some strategies currently used in state statutory schemes to control the overconcentration of liquor stores.

A. State and Local Control Models for Twenty-First Amendment Authority Over Liquor Regulation

States may be grouped into at least four different models illustrating how liquor control jurisdiction and authority under the Twenty-First Amendment is divided between state and local governments. In addition to, and separate from, these models, most states have also provided a "local option" to their citizens allowing restrictive or prohibitive liquor licensing within individual localities. The local option is discussed as a fifth category because this delegation of authority generally acts as an overlay feature, available along with the other four models.

The first jurisdictional control model provides for complete state control of the Twenty-First Amendment authority over liquor licensing, with no local control or input permitted. The second model provides for liquor control at the state level only, but allows for the consideration of local input. The third model grants considerable Twenty-First Amendment authority to the local units. The third model is divided into three categories which reflect how local authority is exercised: (1) state-level control which requires approval at the local level; (2) both state and local licensing authority; and (3) state-level licensing which defers to local zoning authority. Under this third model, any conflict between state and local authority results in state preemption. The fourth, and final model, is exemplified by states which have delegated all liquor control authority to the local level, thus precluding any preemption issues.

50. See infra notes 169-237 and accompanying text.
51. See infra notes 238-64 and accompanying text.
52. See infra notes 150-68 and accompanying text.
53. Local zoning authority is granted to local units by way of "home-rule provisions" contained in either the state constitution or in a legislative enabling act. Anderson, supra note 8, at §§ 2.16, 2.17. See supra notes 43-46 and accompanying text for a discussion of how local zoning authority differs from power delegated from the state to local government based on the Twenty-First Amendment.
54. See supra note 47 and accompanying text.
1. **State Control With No Direct Local Control or Input**

Only a small number of states fall within this model in which the state prohibits local governments from directly regulating the sale and/or distribution of intoxicating liquors.55

55. No direct local control is available in California, District of Columbia, Montana, New Hampshire, New York, Pennsylvania, South Carolina, Utah and West Virginia. See City of Rancho Cucamonga v. Warner Consulting Servs., Ltd., 262 Cal. Rptr. 349, 353-54 (Ct. App. 1989) (finding that delegation of power to local authority would be unconstitutional under the California Constitution); D.C. CODE ANN. § 25-115 (1992) (no issue of local governance, but licensing board does determine whether issuance of a license would "create or contribute to an overconcentration of licensed establishments"); Donnelly v. District of Columbia Alcoholic Bev. Control Bd., 452 A.2d 364 (D.C. 1982) (holding that one factor the Alcoholic Beverage Control Board must consider is neighborhood opinion, but the Board has primary responsibility for decisions about licensing); MONT. CODE ANN., § 16-3-309 (1993) (state authority to regulate liquor under the Twenty-First Amendment has not been delegated to municipalities); City of Billings v. Laedeke, 805 P.2d 1348, 1350 (Mont. 1991) ("policy of the state of Montana to effectuate and ensure the entire control of the manufacture, sale and distribution of alcoholic beverages within the state of Montana"); State ex rel. Libby v. Haswell, 414 P.2d 652 (Mont. 1966) (state has exclusive authority to control liquor sales); N.H. REV. STAT. ANN. § 177:11 (1991) (State commission licenses agency liquor stores only where there is no state liquor store; no provision for local input unless it involves a local option provision); People v. De Jesus, 430 N.E.2d 1260 (N.Y. 1981); Town of Fenton v. Tedino, 356 N.Y.S.2d 397 (1974); PA. STAT. ANN. tit. 47, § 744-907 (1993) (money may be transferred from the State Stores Fund to the Pennsylvania Liquor Control Board for its work in establishing, maintaining and operating state liquor stores and for issuing liquor licenses to hotels, restaurants, clubs, and public service companies); Council of Middletown Township v. Benham, 523 A.2d 311, 314 (Pa. 1987) (total state preemption of local regulation found in "only three areas: alcoholic beverages, banking and anthracite strip mining"); Altieri v. Zoning Hearing Bd., 376 A.2d 261 (Pa. Commw. Ct. 1977) (zoning ordinance regulating liquor business preempted by comprehensive liquor control act which sets forth requirements for restaurants to get liquor license); S.C. CODE ANN. § 61-5-190 (Law. Co-op. Supp. 1993) ("South Carolina Alcoholic Beverage Control Commission is the sole and exclusive authority empowered to regulate the operation of all retail locations authorized to sell beer, wine, or alcoholic beverages ... "); Hilton Head Island v. Fine Liquors, Ltd., 397 S.E.2d 662, 663 (S.C. 1990) ("Alcoholic Beverage Control Act does not prevent local governments from regulating land use pursuant to zoning statutes." (citing City of Norfolk v. Tiny House, Inc., 281 S.E.2d 836 (Va. 1981)); UTAH CODE ANN. § 10-8-42 (Supp. 1994) (cities may prohibit manufacturing, sales, possession, etc. of intoxicating beverages as long as the exercise of this authority does not conflict with Liquor Control Act); Beynon v. St. George-Dixie Lodge # 1743, 854 P.2d 513, 515 (Utah 1993) (Utah Alcoholic Beverage Control Act "imposes extensive regulatory control over the sale and consumption of alcoholic beverages in Utah" which includes approval and operation of "state stores" and licensing of clubs which must be nonprofit and private); Pride Club, Inc. v. State, 481 P.2d 669 (Utah 1971) (finding that the state has power, with consent of local authority, to issue a license to a social club to dispense alcohol); W. VA. CODE § 60-3A-2 (1992) (sale of liquor at retail level is no longer to be by state, but will...
This state-dominated scheme leaves little direct say to local government in the liquor licensing process.\textsuperscript{56} Although local governments may disagree with the utility of this control model, such a scheme lends certainty to the licensing function. Unfortunately, it may also eliminate valuable input from local units which may object to the issuance of certain licenses.\textsuperscript{57} In some cases, states falling within this model have provided for local input by letting the local government exercise its general police power to regulate for the benefit of the public health, safety, morals or welfare, so long as such exercise does not conflict with state authority.\textsuperscript{58}

For example, California retains all power over liquor regulation under the Twenty-First Amendment, but provides indirectly for local input by allowing local governments to exercise their general police power.\textsuperscript{59} The California Constitution "reserves exclusively to the state the powers returned to the state with the enactment of the Twenty-First Amendment."\textsuperscript{60} However, it appears that California may move out of this exclusive control model and into the second model, which allows state consideration of local input, beginning January 1, 1995.\textsuperscript{61} On September 19, 1994, Pete Wilson, California's Governor, signed four bills intended to give local government more control over liquor outlets and increase the enforcement capabilities of the California Department of Alcohol Beverage Control ("California ABC").\textsuperscript{62} Consideration of local input is facilitated by one of the bills, Assembly Bill 2742, which re-
quires the California ABC to send liquor license applications to local agencies for review and comment prior to license approval.63 This new bill will require the state liquor licensing agency "to give more deference to a local government's request to deny or impose operating conditions on a liquor or convenience store."64

While local governments in California have not been delegated Twenty-First Amendment power to regulate liquor, municipalities do have a right to exercise their general police power under Article XI, Section 11 of the California Constitution.65 California, consequently, has limited the power of the state agency responsible for licensing and regulating liquor sales, the California ABC, by providing in Business and Professions Code Section 23790 that: "[n]o retail license shall be issued for any premises which are located in any territory where the exercise of the rights and privileges conferred by the license is contrary to a valid zoning ordinance of any county or city."66 Therefore, the local exercise of police power will be respected by the California ABC as long as the ordinance is valid and does not conflict with state law.67

New York also retains exclusive power, under the Twenty-First Amendment, over the regulation of liquor.68

63. Id.
67. See Floresta, Inc. v. City Council of San Leandro, 12 Cal. Rptr. 182 (Ct. App. 1961) (local ordinance restricting use of cocktail lounge within 200 feet of a residential district was not preempted by state regulation of liquor sales); Mussalli v. City of Glendale, 252 Cal. Rptr. 299, 301 (Ct. App. 1988) (City ordinance restricting sale of liquor at automobile service stations is preempted by state liquor regulation); Cristmat, Inc. v. County of Los Angeles, 93 Cal. Rptr. 325 (Ct. App. 1971) (Los Angeles County ordinance which prohibited people from consuming, using or being under the influence of alcohol while entering or remaining in a model studio providing human models, often nude, for professional and amateur photographers was not preempted by state liquor regulation); Town Council of Los Gatos v. State Bd. of Equalization, 296 P.2d 909, 911 (Cal. Ct. App. 1956) ("zoning ordinances cannot single out and prohibit the sale of liquor"); Jon-Mar Co. v. Anaheim, 20 Cal. Rptr. 350 (Ct. App. 1962) (Anaheim ordinance forbidding operation of tavern unless tavern acquired variance was not invasion into state's jurisdiction over liquor licensing); See also infra notes 180-215 discussing the use of a conditional use permit in California to control liquor sales at the local level.
68. N.Y. ALCO. BEV. CONT. LAW § 43 (Consol. 1993). "The liquor authority of the state is empowered to carry out the policy of the state as to the regulation
The state liquor authority determines "whether public convenience and advantage will be promoted by the issuance of licenses," and also determines the number and location of licensed premises.69 As in California, the New York statutory scheme facilitates some local input by allowing the exercise of local authority under the general police power. Local county or city boards are established and they may recommend to the liquor authority whether a license to sell alcoholic beverages at the retail level should be issued, refused, or revoked.70 In addition, these local boards have general police power authority to regulate the hours of operation for retail liquor outlets.71 This authority, held by local boards under state control, is only advisory in nature. The state liquor agency has exclusive control under the Twenty-First Amendment authority over the issuance and denial of licenses and has discretion to accept or reject the recommendation of a local board.72 In contrast to California, municipalities in New York are prohibited from requiring special permits under zoning regulations because the state preempts the field of liquor licensing.73 New York decisions uniformly hold that local attempts to control liquor sales directly are preempted by state law.74

70. Id. § 43; Fenson v. State Liquor Auth., 273 N.Y.S. 751 (1934), aff'd, 278 N.Y.S. 433 (1935) (local boards created with the power of recommendation only); Trustees of Calvary Presbyterian Church v. State Liquor Auth., 281 N.Y.S. 81 (1935), aff'd, 200 N.E. 288 (1936).
71. N.Y. Alco. Bev. Cont. Law § 43 (Consol. 1993) (power to restrict hours, however, shall not be exercised by the New York City Board).
73. Cannon v. Syracuse, 340 N.Y.S.2d 944 (1973) (local regulation that requires special use permit conflicts with state's exclusive control over the regulation of liquor).
74. See infra notes 173-76 and accompanying text.
The New York and California statutory schemes retain ultimate authority to regulate liquor at the state level. Indirect local control is allowed by permitting the exercise of local police power as long as it does not directly regulate liquor or conflict with state law.

2. State Control With Consideration of Local Input

The second model differs from the first scheme in that cities and counties may have a right to be heard before issuance, suspension, or revocation of a liquor license by the state board. Thus, states in this category permit direct influence by the local authority regarding liquor regulation. Only a few states use this system which allows for direct local input, but does not delegate to cities and counties the state’s power under the Twenty-First Amendment to regulate the sale and distribution of liquor.75

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75. States using this system include Kansas, Mississippi, North Carolina, Ohio, Oregon, and Vermont. See Kan. Stat. Ann. § 41-2651 (1964 & Supp. 1993) (State director must notify city or county prior to granting a license or renewal, and city or county may request that the director hold a hearing on the granting or refusal to grant the license or renewal. At the hearing, the city or county governing body has the right to appear before the director and make recommendations on the granting or refusal to grant the license or renewal and the director will take into consideration the testimony, evidence and recommendations of the governing body); Garten Enters. v. City of Kansas City, 549 P.2d 864, 868 (Kan. 1976) (“Power to regulate all phases of the control of the manufacture, distribution, sale, possession, transportation and traffic in alcoholic liquor and the manufacture of beer regardless of alcoholic content, except as specifically delegated in the act, is vested exclusively in the state.”); Bolin v. Wichita City Council, 771 P.2d 948 (Kan. Ct. App. 1989) (city’s police power extends to the regulation of matters relating to liquor); Miss. Code Ann. § 67-1-37 (1972 & Supp. 1991) (State Tax Commission under the Alcoholic Beverage Control Division has the power to issue or refuse to issue, to revoke, suspend or cancel permits and may “call upon other administrative departments of the state, county and municipal governments, county and city police departments and upon prosecuting officers for such information and assistance as it may deem necessary in the performance of its duties.”); Id. § 67-1-57 (Before a permit is issued, the commission shall consider whether the permit is appropriate considering the “character of the premises and the surrounding neighborhood” and “may give consideration to any recommendations made in writing by the district or county attorney or county, circuit or chancery judge of the county, or the sheriff of the county, or the mayor or chief of police of an incorporated city or town wherein the applicant proposes to conduct his business.”); N.C. Gen. Stat. § 18B-901 (1943 & Supp. 1994) (city or county government must be given notice and opportunity to object to an ABC permit before it is issued by state, but state has sole power to determine suitability of applicant for a permit); In re Melkonian, 355 S.E.2d 503, 508 (N.C. Ct. App. 1987), review denied, 360 S.E.2d 91 (N.C. 1987) (The state Alcoholic Beverage Control Commission has “exclusive authority to determine the suitability of applicants to obtain the appropri-
States using this scheme afford localities a right to be heard regarding the granting, refusal, or renewal of a state liquor license through a written submission procedure or formal hearings.\textsuperscript{76} The state, however, retains the final decision-making authority for all liquor licensing and regulation.\textsuperscript{77} Moreover, local zoning regulations are invalid where the ordinance has the effect of depriving individuals of liquor licenses or privileges granted by the state.\textsuperscript{78} Thus, this liquor regulatory scheme retains the certainty of uniform state control, while also allowing localities to express their concerns regarding liquor sales.\textsuperscript{79}

For example, in Ohio, local authorities must be notified and given an opportunity "for a complete hearing upon the advisability of the issuance, transfer of ownership, or transfer of location of the permit."\textsuperscript{80} Nevertheless, the state has the ultimate authority to decide whether to take a particular local permits and licenses to sell intoxicating beverages."); OHIO REV. CODE ANN. § 4303.26 (Anderson 1989 & Supp. 1993) (State Commission required to give notice of license application to local governing body so recommendations may be heard); OR. REV. STAT. §§ 471.210, 471.295 (1993) (state commission controls licensing based on public interest and protection of public welfare, but considers recommendations from city or county governing body); Sekne v. Portland, 726 P.2d 959, 961 (Or. 1986) (Liquor Control Act fully replaces and supersedes all municipal enactments or inconsistent local ordinances) (citing OR. REV. STAT. § 471.045 (1993)); Verrill v. Dewey, 299 A.2d 182, 186 (Vt. 1972) (state control not delegated to local government, but state uses local commissioners as agents of state to administer state regulations).

76. KAN. STAT. ANN. § 41-2651 (1964 & Supp. 1993) (affording rights, upon request, to city or county governing bodies to present evidence, testimony, and recommendations that the State Director will take into account in making a decision); Miss. CODE ANN. § 67-1-57 (1972 & Supp. 1991) (allowing for certain city or county officials to submit recommendations in writing); N.C. GEN. STAT. § 18B-901 (1943 & Supp. 1994) (requiring State Commission to give notice of license application to local governing body so recommendations may be heard); OHIO REV. CODE ANN. § 4303.26 (Anderson 1989 & Supp. 1993) (similar requirements).

77. See, e.g., In re Melkonian, 365 S.E.2d 503 (N.C. Ct. App.), cert. denied, 360 S.E.2d 91 (N.C. Ct. App. 1987) (ruling in favor of petitioner who argued that the ABC Commission, in granting petitioner a liquor license preempted the localities' denial of a special use permit based on a local ordinance).

78. See, e.g., City of Westlake v. Mascot Petroleum Co., 573 N.E.2d 1068, 1074 (Ohio 1991) ("[A] municipality is without authority to extinguish privileges arising [from state permission] through the enforcement of zoning regulations.").

79. A municipality's opportunity to voice an opinion may be of limited value because the state retains the ultimate authority regardless of local concerns.

80. OHIO REV. CODE ANN. § 4303.26 (Anderson 1989 & Supp. 1993) (the chief peace officer of the political subdivision is also notified and may appear at a hearing).
licensing action. This division of authority is illustrated in *City of Westlake v. Mascot Petroleum Co.*, where the City attended a hearing regarding an automotive service station's liquor permit application to sell beer and wine. Despite the City's opposition to this application, a license was issued. The City later filed suit against the mini-market alleging that it was violating a local ordinance, which prohibited selling alcoholic beverages at service stations. The mini-market, in response, argued successfully that the state's liquor licensing authority allows a community to use only the local option election to control the sale of alcoholic beverages and, thus, state authority preempted the local ordinance.

The *Westlake* court noted that "[w]hile the City may opt to ban liquor sales entirely from selected areas (e.g., residential), it may not selectively prohibit sales of alcoholic beverages within previously permitted zones." The mini-market was located in a general business district and the City allowed the sale of alcoholic beverages as a permitted use in such districts. Therefore, the court held that the "City's attempt to further prohibit such sales conflicts with the state statutory scheme and must fail." This case demonstrates how Ohio has allowed municipalities to exercise local self-government as long as such regulations under the general po-

82. Id. at *1.
83. Id.
84. Id.
85. Id. at *6* (citing amendments to Ohio Revenue Code section 4303.292 which nullified the holding in *Ridgley, Inc. v. Wadsworth Bd. of Zoning Appeals*, 503 N.E.2d 1036 (Ohio 1986), where the court held that the state could not issue a liquor permit since a local zoning ordinance prohibited a gas station from selling beer for carry-out).

In this hearing, no objection to the issuance, transfer of ownership, or transfer of location of the permit shall be based upon the noncompliance of the proposed permit premises with local zoning regulations which prohibit the sale of beer or intoxicating liquor, in an area zoned for commercial or industrial uses, for a permit premises that would otherwise qualify for a proper permit issued by the department of liquor control.

Id.
87. Id.
88. Id.
lice power authority do not conflict with state laws.\textsuperscript{89} In Ohio, the control and regulation of liquor is not part of the local police power and is, instead, regulated exclusively by the state.\textsuperscript{90} States with statutory schemes similar to Ohio retain their exclusive power to regulate liquor under the Twenty-First Amendment, but allow direct local input and the exercise of local police power, provided there is no conflict with state law.

3. Shared State and Local Control With Preemption

The third liquor regulatory model provides for shared control between state and local government based upon the delegation of Twenty-First Amendment power.\textsuperscript{91} This shared control model can be divided into three categories based upon the method in which jurisdiction is shared—local approval, local licensing, and local regulation. Similar to the two previously discussed models, this third model also renders local liquor regulation ineffective if it conflicts with state law.\textsuperscript{92}

\textsuperscript{89} See also Neil House Hotel Co. v. City of Columbus, 58 N.E.2d 665, 667 (Ohio 1944).

\textsuperscript{90} Id. See also City of Lyndhurst v. Compola, 169 N.E.2d 558, 560 (Ohio Ct. App. 1960) ("regulation of the manufacture and sale of liquor in Ohio has been completely preempted by the state").

\textsuperscript{91} Not all states and courts distinguish between authority under the Twenty-First Amendment and general police power authority. See supra note 47 and accompanying text.

\textsuperscript{92} Recognize when viewing these models that the classifications discussed in this article are invented by the author and, therefore, not all state schemes fall neatly into a particular category. For example, Iowa requires local approval and also allows local regulation that does not conflict with the state. See Iowa CODE ANN. § 123.32 (West 1987 & Supp. 1994) (local board approves or disapproves licensing action before state administrator reviews application); Id. § 123.39 (local authorities may suspend liquor license if local ordinance or regulation is violated as long as such local law is not in conflict with state law); Wright v. Town of Huxley, 249 N.W.2d 672, 675 (Iowa 1977) (state delegation of Twenty-First Amendment authority to cities and towns under section 123.39 is proper). Also, Arkansas provides for local licensing as well as local regulation. See infra note 111. Oklahoma requires local approval in the form of a certificate of zoning issued by the municipality, but also delegates the power to municipalities to enact ordinances. See infra note 123. Tennessee requires that a permit be issued by the city and county, but also recognizes a system of dual control allowing local ordinances to regulate the location of retail liquor stores. See infra note 111. Virginia allows local governing bodies to issue licenses, enact ordinances governing location of liquor outlet, and object to issuance of a license by the state. See infra note 111.
a. Local Approval

Several states provide that local governments must approve state licensing decisions before a licensing action will take place.93 The method for obtaining this approval varies slightly among the states employing this scheme. Some

93. The states contained within this model are Alabama, Alaska, Arizona, Delaware, Indiana, Iowa, Maine, Michigan, Nevada, New Mexico, and South Dakota. See ALA. CODE § 28-3A-23(d) (1992) (retail liquor license application must be approved by municipal governing authority before license can be granted); Lanier v. City of Newton, 842 F.2d 253, 256 (11th Cir. 1988) (based on response of Alabama Supreme Court to certified questions, 11th circuit held that local ordinance banning topless dancing in business establishments serving alcohol is not preempted by state regulation of the field or inconsistent with state law); ALASKA STAT. § 04.11.480 (1994) (state may not approve a license action if local governing body protests such action and protest is not arbitrary, capricious, and unreasonable); Stoltz v. City of Fairbanks, 703 P.2d 1155 (Alaska 1985) (finding that the City's protest against liquor store because of overconcentration of bars in proposed location was not arbitrary, capricious, and unreasonable); ARIZ. REV. STAT. ANN. § 4-201 (1993) (local governing body must recommend approval or disapproval of license application within 60 days after application is filed); DEL. CODE ANN. tit. 4, § 543(g) (1992) (applicant for new license or extension must submit documentation showing that premises are properly zoned for intended use and that applicant has complied with all licensing requirements of local governing body); Hooper v. Delaware Alcoholic Beverage Control Comm'n, 409 A.2d 1046 (Del. 1979) (finding that a provision requiring license applicants to first obtain local zoning approval is a reasonable accommodation of jurisdiction conflicts); IND. CODE ANN. § 7.1-3-19-1 (West 1980 & Supp. 1994) ("The commission in its absolute discretion shall issue, suspend, or revoke, except as otherwise provided in this title, a retailer's or dealer's permit of any type"); Id. § 7.1-3-19-11 (requiring state to follow recommendation of a majority of a local board regarding licensing action as long as recommendation is not arbitrary or capricious or contrary to law); IOWA CODE ANN. § 123.32 (West 1987 & Supp. 1994) (local board approves or disapproves licensing action before state administrator reviews application); Id. § 123.39 (local authorities may suspend liquor license if local ordinance or regulation is violated as long as such local law is not in conflict with state law; ME. REV. STAT. ANN. tit. 28-A, § 653 (West 1993) (municipal or county commissioners must approve or deny applications for or transfers of on-premises licenses with appeal to the state available); MICH. COMP. LAWS ANN. § 436.17 (West 1989 & Supp. 1994) (state issues license after local approval and local legislative body may request that state revoke license if licensee has committed violations); NEV. REV. STAT. ANN. § 369.200 (Michie 1991) (local body must approve or disapprove license applications, but state may disregard such recommendation if arbitrary, unreasonable, or unjust); Kochendorfer v. Board of County Comm'n of Douglas County, 566 P.2d 1131, 1132 (Nev. 1977) (state has delegated its power to regulate liquor under the Twenty-First Amendment to local board); N.M. STAT. ANN. § 60-6B-4 (Michie 1994) (local governing body must approve or disapprove liquor license action and recommendation must be followed by state); S.D. CODIFIED LAWS ANN. § 35-2-1.2 (1992 & Supp. 1994) (applications for retail liquor licenses must be submitted to local governing board for approval or disapproval prior to review by the state).
states require that an applicant file an application with the local governing body, which then makes a recommendation to the state before it takes any licensing action. Other states notify the local governing body about the requested action, and if the local authority protests the action then the state cannot approve the action. Most states following this scheme retain the power to override a municipal recommendation if it is arbitrary, capricious, or unreasonable.

The local approval approach offers a great deal of power to municipalities unless municipal and state decisions conflict. However, state decisions do not necessarily preempt local control when state and local findings clash. For example, in a Michigan case, Stafford's Restaurant, Inc. v. City of Oak Park, the court found that the City was not precluded from enacting a resolution prohibiting the consideration of licenses for the sale of liquor for consumption on premises within the City's authority. The court determined that the city ordinance was not preempted by the state because the ordinance was not in direct conflict with the state liquor licensing scheme. In addition, the state did not have exclusive control, because the Michigan Liquor Control Act expressly delegates authority to local legislative bodies to approve a liquor license application before the state Liquor Control Commission grants the license.

When addressing preemption issues, Michigan decisions have differentiated between local power delegated under the Twenty-First Amendment and local power delegated under

97. See, e.g., Stafford's Restaurant, Inc. v. City of Oak Park, 341 N.W.2d 235 (Mich. Ct. App. 1983), appeal denied, 357 N.W.2d 658 (Mich. 1984) (holding that city ordinance was not preempted by state regulatory scheme since the Michigan Liquor Control Act delegated to the local legislative body, the right to approve applications for liquor licenses before the state commission could act); Indiana Alcoholic Bev. Comm'n v. State ex rel. Harmon, 379 N.E.2d 140 (Ind. 1978) (requiring state commission to follow local recommendations when three or more members of a local board vote to deny an application for a permit).
99. Id. at 238.
100. Id. at 237.
101. Id. at 238.
the general police power. In *Fuller Central Park Properties v. City of Birmingham*, the City was allowed to limit the number of liquor licenses it issued to a number below the maximum allowed by state statute. The court noted that municipalities have the power to enact ordinances relating to local concerns as long as such ordinances do not conflict with state law. In this case, the court found that there was no conflict between state and local law, and that the Michigan Liquor Control Act had not preempted the City's ordinance by occupying the field of liquor regulation to the exclusion of local control. Although the Michigan Legislature provides that the state has "the sole right, power and duty to control the alcoholic beverage traffic" in Michigan, this broad power is subject to the requirement that local governing bodies approve licenses before the state issues them. Therefore, the court determined that the state's power to control liquor licensing is not exclusive and that the Legislature did not intend "to pre-empt city action adopting a policy of approving fewer licenses than the maximum number permitted by statute." The City's resolution, which limited the number of liquor licenses to be issued, was not in direct conflict with the Michigan Liquor Control Act and it was not preempted by the Legislature.

102. See, e.g., Mutchall v. Kalamazoo, 35 N.W.2d 245, 248 (Mich. 1948) (local ordinance was adopted for preservation of public safety, health and morals and for "purpose of licensing and inspecting premises not under the jurisdiction of the Michigan liquor control commission"); Johnson v. Liquor Control Comm'n, 254 N.W. 557, 558 (Mich. 1934) ("The very nature of the liquor business is such that local communities, as a matter of policy, should be permitted to regulate the traffic within their own bounds in the proper exercise of their police power, subject to the larger control of the Liquor Commission as to those matters wherein the commission is given exclusive powers by the Legislature"), overruled in part by, Bundo v. Walled Lake, 238 N.W. 2d 154 (Mich. 1976); Raven, Inc. v. City of Southfield, 245 N.W.2d 370, 371 (Mich. Ct. App. 1976), rev'd, 387 N.W.2d 925 (Mich. 1977) ("The regulation of establishments selling alcoholic beverages is a special area and one in which the local community has been given a great deal of control.") (citing Bundo v. City of Walled Lake, 238 N.W.2d 154 (Mich. 1976)).

104. Id. at 90.
105. Id. at 91.
106. Id.
107. Id. at 92 (quoting MICH. STAT. ANN. § 18.971 (Callaghan 1979)).
109. Id. at 93.
Requiring local approval of state liquor licensing actions is one way for communities to control liquor sales in their neighborhood. State decisions may preempt these local findings if there is a direct conflict between state and local law. However, a state court may avoid this preemption conflict by distinguishing between local control under the general police power which may conflict with the state's Twenty-First Amendment authority, and local liquor control under the Twenty-First Amendment. If control has been delegated based on Twenty-First Amendment authority, local exercise of this delegated authority should not be in conflict with any state exercise of authority.

b. Local Licensing

Another method used by states to divide jurisdictional control is to allow local governing bodies to license the liquor outlets. Typically, in states using this scheme, local liquor

110. See supra notes 102-09 and accompanying text.

111. States classified within this subcategory include Arkansas, Colorado, Georgia, Idaho, Illinois, Kentucky, Louisiana, Massachusetts, Minnesota, Missouri, North Dakota, Rhode Island, Tennessee, Virginia, Wisconsin, and Wyoming. See Ark. Code Ann. § 3-4-201 (Michie 1987) (granting Alcoholic Beverage Control Board discretion to determine number of permits to be granted within each county or within limits of any municipality and to determine location based on certain specified conditions); Id. § 3-4-211 (explaining that state cannot issue license until a public hearing has been held if there is a protest against such issuance by a governing official of the city or county to whom the notice of an application for permit has been mailed); Id. § 3-5-213 (granting authority to municipalities to pass ordinances governing the issuance and revocation of licenses for retail sale of liquors and may impose additional restrictions to promote public health, morals and safety); Colo. Rev. Stat. § 12-47-135 (1992) (stating that local licensing authority may issue retail liquor store license); Canjar v. Huerta, 566 P.2d 1071, 1072 (Colo. 1977) ("[S]tatutory scheme in this state vests in the local licensing board the authority to determine the need for the issuance of particular licenses for the sale of alcoholic beverages."); Moschetti v. Liquor Licensing Auth. of Boulder, 490 P.2d 299, 301 (Colo. 1971) (explaining that before a liquor license can be issued or transferred, the state authority must approve the action of the local authority since "[t]he concurrent action of the two authorities is mandatory"); Ga. Code Ann. § 3-3-2 (1991 & Supp. 1994) (granting local governing body has authority to grant, refuse, suspend, or revoke liquor permits or licenses); Page v. Jackson, 398 F. Supp. 263, 265 (N.D. Ga. 1975) (obtaining a local license is a prerequisite to obtaining a state liquor license); Idaho Code § 23-916 (1987 & Supp. 1004) (authorizing each county and incorporated city may license retail sale of liquor by the drink, impose and collect license fees, and regulate as long as regulations do not conflict with state statutory provisions); Id. § 23-1009 (requiring beer retailer to obtain license from municipality, county and state); Ill. Ann. Stat. ch. 235, para. 5/3-14 (Smith-Hurd 1993) (requiring that local license be issued prior
to issuance of state license); Ky. Rev. Stat. Ann. § 243.370 (Michie/Bobbs-Merrill 1981 & Supp. 1994) (requiring applicant for license to sell alcoholic beverages to obtain approval for county or city license prior to applying for state license); Whitehead v. Estate of Bravard, 719 S.W.2d 720, 722 (Ky. 1986) (granting cities authority to impose liquor license fees, but not quotas on the number of licenses issued); La. Rev. Stat. Ann. § 26:284 (West 1993) (explaining that local governing authority makes decision whether or not to issue local permit and then notifies state commissioner, who issues a separate state permit but must withhold issuance of state permit if local permit has been withheld); La. Op. Att'y Gen. 339, 340 (1946-48) ("State Collector of Revenue must give notice to local authorities of application for liquor permit and should refuse to issue state permit where local authorities refuse a permit on legal grounds."); Mass. Gen. Laws Ann. ch. 138, § 67 (West 1976 & Supp. 1994) (authorizing local licensing authorities to grant or refuse to grant licenses and requiring state commission to hold a hearing on any appeal of a refusal to grant); Board of Selectmen v. Alcoholic Bevs. Control Comm'n, 519 N.E.2d 1365, 1367 (Mass. App. Ct. 1988) (Alcoholic Beverage Control "Commission cannot override a decision of the local authorities to deny an application for an original license or an application to transfer an existing license to another location."); review denied, 523 N.E.2d 267 (Mass. 1988); Minn. Stat. Ann. §§ 340A.405, 340A.410 (West 1990 & Supp. 1994) (stating that cities and counties may issue licenses with the approval of the state commissioner, but "a county may not issue a retail license to sell any alcoholic beverage within an organized town unless the governing body of the town has consented to the issuance of the license"); Mo. Ann. Stat. § 312.140 (Vernon 1993) (granting counties, cities, towns and villages authority to issue permits/licenses for nonintoxicating beer as long as control is not inconsistent with state); State v. City of Riverside, 640 S.W.2d 137, 141 (Mo. Ct. App. 1982) ("It is well established that cities may fix standards to be met before issuing a liquor license, the only requirement being that the ordinance must not conflict with the state statute") (quoting State ex rel. Southland Corp. v. City of Woodson Terrace, 599 S.W.2d 529, 530 (Mo. Ct. App. 1980)); State ex rel. Casey's Gen. Stores, Inc. v. Downing, 757 S.W.2d 1, 2 (Mo. Ct. App. 1988) (stating that the rationale for regulation of the sale of nonintoxicating beer under section 312.140 is applicable to sale of intoxicating beverages since, in both instances, the legislature delegated power to regulate to local communities); N.D. Cent. Code §§ 5-02-01, 5-02-02 (1991) (requiring both a state and local retail license, and demanding that the applicant obtain a local license prior to the state license); N.D. Cent. Code § 5-02-09 (1991) (authorizing local governing body by ordinance or resolution to restrict number of licenses granted); R.I. Gen. Laws § 3-5-15 (1989 & Supp. 1993) (explaining that local boards are given power to issue liquor licenses within a fixed maximum number); Tenn. Code Ann. § 57-5-104 (Supp. 1994) (requiring that retail liquor business must obtain permit from the county and/or city where the business is to be conducted); Metropolitan Gov't of Nashville and Davidson County v. Shacklett, 554 S.W.2d 601, 606 (Tenn. 1977) ("Tennessee statutory scheme for regulation of [retail liquor] stores envisions a dual system of control, participated in both by the local governments and by the Commission."); Va. Code Ann. § 4-38 (Michie 1993) (governing body of each county, city or town may issue liquor licenses and charge license taxes in addition to the state license); Id. §§ 4-31(A)(2)(a), 4-31(A)(X3) (explaining that the state may refuse to grant a license if the location does not conform to the requirements of the local governing body and the local governing bodies are notified of the application and given the opportunity to object); City of Norfolk v. Tiny House, 281 S.E.2d 836, 841 (Va. 1981) (clarifying state liquor act does not prevent local governments from regulating land use); Wis. Stat.
licenses are issued in addition to licenses issued by the state. In Illinois, for example, a state liquor license applicant must first obtain a local license for the premises to be used for liquor sales.\textsuperscript{112} Local governing bodies in Illinois are given broad authority over liquor licensing and have the power to grant, suspend, or revoke a local license within their jurisdiction.\textsuperscript{113} The state commission does have the power to “recommend to local commissioners rules and regulations, not inconsistent with the law, for the distribution and sale of alcoholic liquors throughout the state.”\textsuperscript{114} However, the local commissioner has the exclusive power to judge the qualifications of a license applicant, subject only to a right of appeal to the state commissioner.\textsuperscript{115}

The Liquor Control Act in Illinois “created a dual retail liquor licensing system” whereby state and local units have concurrent authority to regulate liquor licensing.\textsuperscript{116} For instance, both the state and local commissioners are empowered by the Liquor Control Act to revoke a retail liquor license.\textsuperscript{117} The Act provides that “[t]he revocation of a local license shall automatically result in the revocation of a State license.”\textsuperscript{118} However, because a licensee is issued “two separate and distinct retail liquor licenses by two separate and

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\textsuperscript{112} ILL. ANN. STAT. ch. 235, para. 5/3-14 (Smith-Hurd 1993); Retail Liquor Dealers Protective Ass’n v. Fleck, 96 N.E.2d 556, 559 (Ill. 1951) (stating that when local license has been obtained and applicant has paid license fee, state must issue state license).


\textsuperscript{114} ILL. ANN. STAT. ch. 235, para. 5/3-12(4) (Smith-Hurd 1993).

\textsuperscript{115} Fleck, 96 N.E.2d at 561.


\textsuperscript{118} Park Liquors, Inc. v. Illinois Liquor Control Comm’n, 259 N.E.2d 331, 335 (Ill. App. Ct. 1970). Nevertheless, the indirect control that is exerted by a local commissioner over the issuance and revocation of state licenses is not present when there is a suspension of the local license. Id. “[T]he legislature did not intend that action by a local commissioner suspending a local retail liquor license should preempt the exercise of jurisdiction by the State Commis-
distinct licensing bodies,” a determination by a local commis-

sioner does not necessarily bar an action by the independent

state body.119 This shared control allows local liquor ordi-
nances to regulate the same subject matter as the state stat-
utes, but only if they are more restrictive or if they place re-
quirements on the licensee in excess of the state re-

quirements.120

In general, dividing jurisdiction by allowing for local li-
censing may provide an effective means of local control over
liquor sales. Local government may also be motivated to use
this scheme in order to obtain revenue through the collection
of licensing fees. States that allow local governmental units
to collect license fees may, however, restrict the amount of
the fee that may be collected.121 While local licensing bene-

fits the locality with its revenue potential, it also provides lo-
cal citizens the opportunity to directly control the licensing
actions concerning liquor sales in their neighborhood.

c. Local Regulation

The final method used in which state and local authori-
ties share control is where the state delegates its Twenty-

First Amendment authority to local government to enact li-

quor control ordinances that do not conflict with the state

statutory scheme. This category is sometimes difficult to dif-

ferentiate from the first model where the state retains com-

119. Id. at 336.


statute except for the effective date of an exemption from a distance regulation,

which was more liberal, rather than more restrictive, than the state statute).

121. See, e.g., ARK. CODE ANN. § 3-4-202 (Michie 1992) (municipalities and
counties may license and tax liquor sales, but amount of license fee is limited to
“an amount equal to one-half (1/2) of the license fee collected” by the state);
COLORADO. REV. STAT. ANN. § 12-47-106 (West 1992) (local license cannot be issued
until share of license fee due the state has been received by department of revenue);
sale of liquor and collect license fees, not to exceed 75% of the amount of the
state license fee); MINNESOTA. STAT. ANN. § 340A.405 (West 1990 & Supp. 1994) (city
may impose an additional license fee in an amount not to exceed 20% of the
county license fee); MISSOURI. REV. STAT. § 312.140 (1992) (county license fee for non-
intoxicating beer may not exceed state fee, and city license fee shall not exceed
one and one-half times amount charged for state license); WISCONSIN. STAT.
ANN. § 125.51 (West 1992) (minimum and maximum fees specified in statute for each
type of retail license).
plete Twenty-First Amendment authority, but allows local regulation based upon the municipalities' general police power. For purposes of this article, states will be tentatively identified under this model if they appear to have delegated their Twenty-First Amendment authority, in addition to their general police power authority, to local governing bodies to authorize local regulation.


123. States included within this subcategory are Connecticut, Florida, New Jersey, Oklahoma, Texas, and Washington. See CONN. GEN. STAT. ANN. § 30-44 (West 1993) ("The department of liquor control shall refuse permits for the sale of alcoholic liquor (1) in no-permit towns and (2) where prohibited by the zoning ordinance of any city or town."); FLA. STAT. ANN. §§ 562.14, 562.45(2) (West 1993) (municipalities have power delegated by legislature to regulate hours of business and location of place of business for liquor licenses); City of Miami Springs v. J.J.T., Inc., 437 So. 2d 200, 205 (Fla. 1983) ("municipality's power over establishments selling alcoholic beverages was not limited, despite the language of the statute, to hours of operation, location of the business, and sanitary regulations, but instead extended to any regulation which did not interfere with some provision of, or affect any purpose in, the Beverage Act") (citing Nelson v. State ex rel. Gross, 26 So. 2d 60 (Fla. 1946); City of Daytona Beach v. Del Percio, 476 So. 2d 197, 201 (Fla. 1985) ("Florida municipalities (and counties . . . ) have the authority to exercise the regulatory power of the Twenty-First Amendment"); N.J. STAT. ANN. § 33:1-40 (West 1990 & Supp. 1994) (Governing board or body of municipality has authority to, by ordinance, limit the number of licenses and place other restrictions on the sale of alcoholic beverages; however, such actions by the municipality are subject to appeal and reversal at the state level); State v. Reid, 87 A.2d 562, 564 (N.J. Essex County Ct. 1952) (finding that the Legislature had delegated to municipalities the authority to make police regulations on liquor traffic; therefore, the city has the power to regulate the sale of alcoholic beverages); OKLA. STAT. ANN. tit. 37 § 503 (West 1992) (Oklahoma Alcoholic Beverage Control Act is an exercise of the police power and gives municipalities the authority to enact ordinances consistent with the Act, but does not authorize any city or town to issue a license); Id. § 523 (certificate of zoning compliance must be issued by the municipality or county before the state will take any license action); Jack's Supper Club, Ltd. v. City of Norman, 361 P.2d 291, 293-94 (Okla. 1961) (finding that the state has exclusive authority to issue and regulate liquor licenses, but city has police power to pass an ordinance to protect public health, safety, morals and general welfare of society as long as it does not conflict with state statutes or rules); Blackman v. City of Big Sandy, 507 F.2d 935, 936 (5th Cir. 1975) (finding that a Texas statute expressly provides that cities and towns may "designate certain zones in the residential section or sections of said cities and towns . . . where such sales (of beer) may be prohibited."); Young, Wilkinson & Roberts v. City of Abilene, 704 S.W.2d 380, 382 (Tex. 1985) (finding that the City granted zoning power to restrict the sale of alcoholic beverages "for the protection of the health, morals, safety, peace and convenience of the public.") (quoting Eckert v. Jacobs, 142
Connecticut is an example of a state which appears to have delegated its Twenty-First Amendment power to local authorities to enact liquor control ordinances. However, there is confusion within the state itself as to whether this is a delegation of power under the Twenty-First Amendment or under the general police power. Connecticut requires that a liquor license applicant comply with local zoning ordinances before a permit is granted by the State Liquor Control Commission. The state has thus delegated to municipalities the authority to restrict the use of buildings for the sale of alcoholic liquor to certain zones.

The Connecticut Supreme Court, in *Karp v. Zoning Board of Stamford*, supported this delegation of authority, holding that a city’s zoning ordinance was not in conflict with the state’s authority to regulate the liquor industry under the Liquor Control Act. The *Karp* dissenting opinion, however, argued that the authority delegated to the city was under the general police power and was not a delegation of Twenty-First Amendment authority. The dissenting judge asserted that the city “cannot by ordinance legislate any limitation upon the exercise of the statutory authority of the [state] liquor control commission or direct what it can or cannot approve.”

Regardless of the actual classification of delegated power, Connecticut courts have recognized that “because of the danger to public health and welfare inherent in liquor traffic, the police power to regulate the liquor trade runs

S.W.2d 374 (Tex. Civ. App. 1940)); City of Seattle v. Hinkley, 517 P.2d 592, 594 (Wash. 1973) (power of state to regulate liquor has been extended to cities and municipalities to the extent specified by statute); Corral, Inc. v. Washington State Liquor Control Bd., 566 P.2d 214, 217 (Wash Ct. App. 1977) (legislature authorizes municipalities and counties to adopt police ordinances and regulations that are “not in conflict” with state power).

124. CONN. GEN. STAT. ANN. § 30-44 (West 1993) (“The department of liquor control shall refuse permits for the sale of alcoholic liquor (1) in no-permit towns and (2) where prohibited by the zoning ordinance of any city or town.”); Karp v. Zoning Bd. of Stamford, 240 A.2d 845, 850 (Conn. 1968) (statutory mandate that zoning ordinances must be complied with before permit can be granted); Town of Greenwich v. Liquor Control Comm’n, 469 A.2d 382 (Conn. 1983) (holding that the Liquor Control Commission must refuse liquor permits where prohibited by zoning ordinance).

125. State ex rel. Haverback v. Thomson, 57 A.2d 259, 261 (Conn. 1948) (holding that municipalities do not, however, have the delegated authority to limit the number of liquor outlets in the town as a whole).

126. 240 A.2d 845 (Conn. 1968).

127. Id. at 847.

128. Id. at 852 (House, J. dissenting).
broad and deep, more so than comparable regulatory powers over other activities."\(^{129}\)

Washington is another example of a state where there appears to be some discrepancy between state courts regarding the interpretation of the extent of power delegated to local government under the state’s liquor control law. In *City of Seattle v. Hinkley*,\(^{130}\) the Washington Supreme Court upheld the validity of a Seattle ordinance prohibiting nudity of female employees in bars and taverns.\(^{131}\) The court explained that “the valid power of the state to promulgate liquor regulations has been extended to cities and municipalities to the extent specified” by two state statutory provisions.\(^{132}\) The court’s language, which “extends” the state’s “power to promulgate liquor regulations” to local authorities, appears to be a delegation of the state’s Twenty-First Amendment power.

In a subsequent Washington state case, *Corral, Inc. v. State Liquor Control Board*,\(^{133}\) the same two statutes discussed in *Hinkley* were at issue. The court in this case agreed that “the valid power of the state to promulgate liquor regulations has been extended to local authorities to the extent specified by both these statutes.”\(^{134}\) The court noted that section 66.28.080, which authorized the regulation of music, dancing, or entertainment on the licensed premises, was not a grant of any power.\(^{135}\) The second statute, on the other hand, “merely extends to municipalities and counties the power to adopt police ordinances and regulations ‘not in conflict’ with” state statutes or Board regulations.\(^{136}\)

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129. Williams v. Liquor Control Comm’n, 399 A.2d 834, 835 (Conn. 1978) (citing Viola v. Liquor Control Comm’n, 260 A.2d 585 (Conn. 1969); Miller v. Zoning Comm’n of Bridgeport, 65 A.2d 577, 578 (Conn. 1949) (“[P]ower of the state, or any subdivision thereof authorized to act in the matter, to regulate and restrict the business of the sale of liquor is far broader than a power to regulate or restrict ordinary lawful business.”).


131. *Id.* at 594.

132. *Id.* (Washington Revenue Code sections 66.08.120 and 66.28.080 provide that “municipalities and counties shall have [the] power to adopt police ordinances and regulations not in conflict with this title or with the regulations made by the board” and that local authorities may issue permits for premises where music and dancing take place.).


134. *Id.* at 217.

135. *Id.* at 218.

136. *Id.* at 217-18 (emphasis added) (discussing Washington Revenue Code Section 66.08.120).
language in *Corral* thus indicates that the state is "merely" delegating its *police power* authority to local government, not delegating its power to regulate liquor under the Twenty-First Amendment.

Determining exactly which power is being delegated by the state is not crucial for most purposes, since generally the courts will uphold the validity of local land use regulations not in direct conflict with state statutory provisions.\(^{137}\) Nevertheless, the distinction between Twenty-First Amendment authority and general police power authority may become critical when there is a constitutional challenge to a local ordinance. The United States Supreme Court has held that in matters of liquor regulation, the Twenty-First Amendment confers "something more than the normal state authority over public health, welfare, and morals."\(^{138}\) Therefore, courts may give greater deference to local liquor ordinances where the municipality's power to regulate is based upon a delegation of the state's *Twenty-First Amendment* authority rather than "merely" a delegation of general police power.

4. **Local Control With No Preemption**

Few states have chosen to delegate completely their authority under the Twenty-First Amendment to regulate liquor.\(^{139}\) Nevertheless, in Hawaii, the state legislature has explicitly delegated this authority to county liquor commis-

\(^{137}\) See supra notes 123-36 and accompanying text; see also Ronald V. Sinesio, Annotated, Zoning Regulation of Intoxicating Liquor as Pre-empted by State Law, 65 A.L.R.4th 555, § 3(g) (1988) ("Courts [have] held . . . that a municipal ordinance which permitted establishments to sell alcoholic beverages only if the property was located in a use district was a valid exercise of the city's police power and that nothing in the state liquor law pre-empted a city's zoning power.").

\(^{138}\) California v. La Rue, 409 U.S. 109, 114 (1972).

\(^{139}\) See, e.g., Md. ALCO. BEV. CODE ANN. § 60 (1993) (liquor license is approved and issued by county board of license commissioners, except in Baltimore City, which has its own board of license commissioner; in certain counties, approval of the city is required); Valentine v. Board of License Comm’rs, 435 A.2d 459, 460 (Md. 1981) (finding that the County Board of License Commissioners is not an agency of the state); Jabine v. Priola, 412 A.2d 1277, 1283 & n.12 (Md. Ct. Spec. App. 1980) ("Zoning matters and the regulation of alcoholic beverages are encompassed by the City’s police power . . . . In maintaining control over the granting of liquor licenses, the City is exercising the police power delegated to it by the General Assembly"). But see Montgomery County v. Board of Supervisors of Elections for Montgomery County, 451 A.2d 1279, 1280 (Md. Ct. Spec. App. 1982) ("We think it clear that the Act makes manifest that the State, and the State alone, shall regulate and control, within Maryland, the
The legislature declared that such regulation of liquor within a county is a local concern rather than a state function. When such a complete delegation of Twenty-First Amendment power has occurred, generally, there will not be an issue of preemption by the state. In fact, in *Hawaii Government Employees' Ass'n v. County of Maui,* the court held that county provisions regarding liquor control superseded state laws, which were in conflict. The Hawaii State Constitution provides that the legislature has the power to enact laws of *statewide* concern. The *Hawaii Gov't* Court explained that because liquor control administration is delegated to the counties, this area is no longer a matter of statewide concern.

Nebraska has also vested authority in local governing bodies "to regulate and control the manufacture, distribution, sale and traffic of alcoholic liquor." The state legislature has declared its policy "that the business of retailing alcoholic liquor is a business affected with the public health, safety, and welfare such that it must be regulated locally." Unlike Hawaii, however, the state retains some control by requiring that the local governing bodies consider requirements and criteria specified by the Nebraska Liquor Control Act when taking any liquor licensing action. Nevertheless, if the state is not specifically authorized by statute to take an in-

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140. HAW. REV. STAT. § 281-17 (1992) ("The liquor commission, within its own county, shall have the sole jurisdiction, power, authority, and discretion, subject only to this chapter: (1) To grant, refuse, suspend, and revoke any licenses for the manufacture, importation, and sale of liquors . . . .").

141. Id. at 1038.

142. 576 P.2d 1029 (Haw. 1978) (holding that the state legislature delegated to the counties the administration of liquor control and state law is superseded by conflicting provisions of the county).

143. Id. at 1038.

144. HAW. CONST. art. VIII, § 6.

145. Hawaii Gov't, 576 P.2d at 1038.


147. Id. § 53-101.01 (statutory statement of policy also notes that the citizens of Nebraska are concerned about "the issuance of additional retail licenses in areas already adequately served by existing retail licensees").

148. Id. §§ 53-134, 53-134.02. ("Local governing bodies shall only have authority to approve applications and deny licenses pursuant to [the criteria specified in] the Nebraska Liquor Control Act.").
dependent licensing action, the municipality is free to legislate in the area and the state may not intervene.149

5. The Local Option

A local option law authorizes a state subdivision to determine whether to adopt a restrictive or prohibitive liquor licensing law within its locality.150 This determination is not made by traditional legislative enactment, but is instead carried out by a popular vote of the people.151 The local option principle is discussed in this section as a supplement to the four jurisdictional models, since it may be available in a particular state regardless of the way jurisdictional control is divided.

Local option provisions are found in forty-two states and the District of Columbia.152 Only eight states—Arizona, Cal-

149. Jetter v. Nebraska Liquor Control Comm’n, 283 N.W.2d 5, 6 (Neb. 1979) (holding that the Nebraska Liquor Control Act does not specify authority for the state commission to revoke or cancel a license; therefore, the court held that the state’s cancellation of a license was an invalid action).


151. Id.

ifornia, Hawaii, Iowa, North Dakota, South Carolina, Utah, and Wyoming—do not include local option provisions within their state statutes.\textsuperscript{153} Local option laws grant extensive liquor regulation control to localities and avoid conflicts which are present in other jurisdictional schemes. This broad state delegation of power to local citizens side-steps preemption problems. Furthermore, procedural due process problems are also avoided because the decision to prohibit liquor in a particular locality is based on popular vote and is, therefore, considered to be legislative in nature.\textsuperscript{154}


153. Century Plaza Hotel Co. v. City of Los Angeles, 87 Cal. Rptr. 166, 168 (Ct. App. 1970) (before Prohibition, California permitted local option, but with repeal, California "chose not to reinstate this local option and control was put under state regulation"); 48 C.J.S. Intoxicating Liquors § 32 (1983).

154. \textit{See, e.g.,} Philly's v. Byrne, 732 F.2d 87, 94 (7th Cir. 1984) ("referendum is a constitutionally permissible method of regulating the local sale of liquor,[]" assuming that the referendum is conducted fairly and honestly and the procedure does not deprive plaintiffs of property without due process of law).

155. 732 F.2d 87 (7th Cir. 1984).

156. \textit{Id.} at 89.

rant in the precinct, lost their license as a result of the refer-
endum, and alleged that they were denied property without
due process of law in violation of the Fourteenth Amend-
ment. Judge Posner explained in the majority opinion
that, because the referendum was a legislative procedure, no-
tice and opportunity for a hearing was not required. Therefore, the licensees were not denied procedural due pro-
cess in violation of the Fourteenth Amendment.

Local option liquor laws have also been unsuccessfully
challenged as a violation of equal protection, an unlawful
delegation of legislative authority, and as a taking of prop-
erty without due process of law. The Ohio court in Scioto Trails Co. v. Department of Liquor Control rejected the constitutional challenges of due process and equal protection explaining that:

"[P]laintiffs accepted the liquor permit and commenced op-
eration of the permit premises, including the sale of intox-
icating liquors there, with the knowledge and understand-
ing that the statutes of Ohio . . . provide for the ter-
mination of the sale of intoxicating liquors at that loca-

[U]pon the filing, at least 90 days before the next regularly sched-
uled general election, of a petition signed by 25 percent or more of a
precinct's registered voters, the question whether to ban the retail sale
of alcoholic beverages in the precinct shall be placed on the ballot at
the election. (Except in cities of more than 200,000 people, the electoral
unit is the entire city, town, or village, rather than the individual pre-
cinct. . . . If the vote is to ban, any license to sell liquor in the precinct
lapses automatically 30 days after the election.

Philly's, 732 F.2d at 89 (citation omitted).
158. Id.
159. Id. at 92-93.
160. Philly's v. Byrne, 732 F.2d 87, 93 (7th Cir. 1984). "[A]lthough the appel-
lants did not have notice or an opportunity for a hearing in the sense familiar in
adjudicative proceedings, they of course had ample notice of the forthcoming
election and an opportunity to campaign against the proposition that the pre-
cinct should vote itself dry." Id.

161. See Scioto Trails Co. v. Ohio Dep't of Liquor Control, 462 N.E.2d 1386,
1390-91 (Ohio Ct. App. 1983); see generally Shelley Sazer, License to Sell: Constitu-
tional Protection Against State or Local Government Regulation of Liquor
Licensing, HASTINGS CONST. L.Q. (forthcoming 1995) (manuscript on file with
author).

162. Malito v. Marcin, N.E.2d 262, 265 (1973) (finding the local option not an
unlawful delegation of power because the legislature decided that liquor sales
can be prohibited and voters only determine whether these legislative provi-
sions become operative in any given precinct).

163. Id. (holding that liquor licensing is a privilege, not a right subject to
protection against a regulatory taking).

tion through the exercise of local option by means of a local-option election.\textsuperscript{165} Therefore, the plaintiffs were not deprived of a property right because, by accepting the license, they consented to the condition that the voters could elect to designate the area dry.\textsuperscript{166} The court also pointed out that, under Ohio law, the licensee does not lose the permit as a result of a local option election and, therefore, has not been deprived of a right because the permit can be transferred either to another person or to another location.\textsuperscript{167} "As far back as 1904, the Supreme Court declared that the power of a state to pass a local option law 'is not an open question.'"\textsuperscript{168} Thus, the local option concept may be an effective and constitutionally-accepted strategy to allow local citizens to prohibit the sale of liquor in their community.

B. Local Regulation and Preemption

In addition to using delegated authority under the Twenty-First Amendment to control liquor sales, local governments may enact ordinances under their general police power to regulate the locations where alcoholic beverages are sold.\textsuperscript{169} This local regulation may be allowed under the state statutory scheme\textsuperscript{170} or by court determinations that local authorities have the power under their general police power to pass zoning ordinances affecting liquor stores.\textsuperscript{171} Neverthe-

\begin{itemize}
\item \textsuperscript{165} Id. at 1390.
\item \textsuperscript{166} Id. at 1389.
\item \textsuperscript{167} Id. at 1391.
\item \textsuperscript{168} McDonald v. Brewer, 295 F. Supp. 1135, 1139 (N.D. Ala. 1968) (quoting Lloyd v. Dollision, 194 U.S. 445, 448-49 (1904)).
\item \textsuperscript{169} Floresta, Inc. v. City Council of San Leandro, 12 Cal. Rptr. 182, 186 (Ct. App. 1961) ("Ordinance is a geographic restriction as to place of sale and use of liquor, not an invasion of the state's general regulation and limitation of the consumption of liquors . . .").
\item \textsuperscript{170} See California v. La Rue, 409 U.S. 109 (1972).
\item \textsuperscript{171} See Town of Hilton Head Island v. Fine Liquors, Ltd., 397 S.E.2d 662 (S.C. 1990) (holding that although Alcoholic Beverage Control Commission has exclusive authority to regulate stores selling alcoholic beverages, municipalities are not precluded from passing zoning ordinances affecting liquor stores); Ridgley, Inc. v. Board of Zoning Appeals, 503 N.E.2d 1036, 1037-38 (Ohio 1986) (holding that where state law provided that liquor permit could not be issued in contravention of local ordinance, municipal ordinances limiting retail sales of alcohol were not in conflict with state permit regulations, and were, therefore, not preempted by operation of state law); see generally City of Billings v. Laedeke, 805 P.2d 1348, 1352-54 (Mont. 1991) (Hunt, J., dissenting) (distinguishing between two types of regulation); Mutchall v. Kalamazoo, 35 N.W.2d 245, 249-50 (Mich. 1948) (distinguishing between two types of regulation).
\end{itemize}
less, local ordinances that conflict with state law may be pre-empted by operation of state law.\textsuperscript{172}

For example, New York cases typically find that local regulation is preempted because the "State law indicates a purpose to occupy [the] entire field of regulation" and the regulation at issue either duplicates state law or conflicts with state law.\textsuperscript{173} The court in \textit{Lansdown Entertainment Corp. v. New York City Dept' of Consumer Affairs}\textsuperscript{174} determined that "there [was] a head-on collision between the City ordinance as it . . . applied to establishments also licensed by the State" where the local regulation restricted the hours of operation—a subject matter already regulated by the state.\textsuperscript{175} The court explained that even where a local ordinance merely duplicates a state law, it will be preempted because the state Alco-

\textsuperscript{172} \textit{See} Melkonian v. Board of Adjustment, 355 S.E.2d 503 (N.C. Ct. App. 1987) (ruling that the decision of the state Alcoholic Beverages Control Commission to grant a beer license for a proposed tavern preempted the Town zoning board's denial of special exception use permit for the operation of the tavern). \textit{See also} People v. De Jesus, 430 N.E.2d 1260 (N.Y. 1981) (holding that the State of New York's Alcoholic Beverage Control Law preempts all local regulation). \textit{But see} Sekne v. Portland, 726 P.2d 959, 961 (Or. Ct. App. 1986) (finding that the state liquor statutes do not preempt local ordinance prohibiting nude dancing in places licensed to sell liquor since state statutes "do not forbid or allow nude dancing or nudity or address whether those activities are lewd or criminal"); Davidson v. Clinton, 826 F.2d 1430, 1435 (6th Cir. 1987) (finding that a zoning ordinance, which prohibited sale of beer within five hundred feet of public school, was a "valid and reasonable exercise of the City's police power"); Puntereri v. Pittsburgh, 84 A.2d 516, 518 (Pa. Super. Ct. 1951) ("Municipalities may in the exercise of their police power regulate certain occupations which are in addition to and not in conflict with statutory regulations by the imposition of supplementary restrictions.") (citing Western Pa. Restaurant Ass'n v. City of Pittsburgh, 77 A.2d 616 (Pa. 1951)).

\textsuperscript{173} \textit{Lansdown Entertainment Corp. v. New York City Dep't of Consumer Affairs}, 543 N.E.2d 725, 727 (N.Y. 1989); \textit{see also} \textit{De Jesus}, 430 N.E.2d at 1262 (finding local law preempted by state Alcoholic Beverage Control Law because the regulatory scheme is "comprehensive and detailed"); Town of Onondaga v. Hubbell, 170 N.E.2d 231 (N.Y. 1960) (finding that a zoning ordinance prohibiting extension of a nonconforming use involving a snack bar selling beer was preempted by beer license obtained from the state); Tad's Franchises, Inc. v. Pelham Manor, 345 N.Y.S.2d 136 (App. Div. 1973), aff'd, 319 N.E.2d 202 (N.Y. 1974) (finding a local zoning ordinance invalid insofar as it allowed use of property for service of food and drink, but not alcoholic beverages); Grundman v. Town of Brighton, 150 N.Y.S.2d 326 (1955) (local ordinance with greater distance requirement than that required by state statute preempted).

\textsuperscript{174} 543 N.E.2d 725 (N.Y. 1989).

\textsuperscript{175} \textit{Id.} at 726-27 (citing People v. De Jesus, 430 N.E.2d 1260 (N.Y. 1981)).
holic Beverage Control Law indicates an intent to occupy the entire field of regulation.\footnote{176}{Id. at 727 (here the local ordinance was in direct conflict with the state law and was, therefore, preempted).}

The conditional use or special use permit is a zoning technique employed when a particular land use may be appropriate in a zoning district, but special review is required to determine whether the use will have an adverse impact on the neighborhood.\footnote{177}{DANIEL MANDELKER, LAND USE LAW § 6.49 (2d ed. Michie 1988).} Examples of land uses that may be considered conditional are gas stations, apartments in single-family residential districts, and hospitals.\footnote{178}{Id.} Liquor sales locations may also require special review as a conditional use. Los Angeles, in particular, has used this approach to exercise local control in a state which retains exclusive Twenty-First Amendment power over liquor licensing.\footnote{179}{See infra notes 180-225 and accompanying text. For example, a Los Angeles ordinance requires that a new liquor outlet obtain a $3,000 conditional-use permit (“CUP”), even if the owner has already been issued a California ABC license. Tranquada, supra note 6, at N1.} Generally, the ordinance will identify the findings or conditions necessary to obtain special permission for a use that is not regularly allowed under the basic zoning provisions, but that is essential or desirable for the welfare of the community.\footnote{180}{See Deffenbaugh Indus., Inc. v. Potts, 802 S.W.2d 520 (Mo. Ct. App. 1990) (finding that a special use is beneficial to the community even though it may be incompatible with the neighborhood unless certain conditions are met, and that such a use may be permitted with attached conditions defined by the ordinance). A special or conditional use differs from a variance in that a variance requires a showing of unnecessary hardship in not being allowed a use that is otherwise prohibited, while a special use is allowed in the particular zone as long as certain requirements are met. But see Cannon v. City of Syracuse, 340 N.Y.S.2d 944 (1973) (finding that since state had preempted local control over alcoholic beverages, city zoning regulation, which required a special permit before premises could be used to dispense alcoholic beverages, was preempted by state law).} Included within the local board's authority to grant special or conditional use permits is the power to attach reasonable conditions on granting them.\footnote{181}{ANDERSON, supra note 8, § 21.30, at 748 (citing Nathanson v. District of Columbia Bd. of Zoning Adjustment, 289 A.2d 881 (D.C. 1972)) (stating that reasonable conditions may be applied to insure that the grant of a special exception will be in harmony with zoning regulations and will not tend to injure the use of nearby property); Pearson v. Shoemaker, 202 N.Y.S.2d 779 (1960) (finding that the zoning board has inherent power when granting a special permit to impose reasonable conditions and restrictions directly related to proposed use of property if not in conflict with provisions of local ordinance).} Because special uses are explicitly
provided for in these ordinances, a permit may not be denied unless the denial is based on grounds identified in the ordinance, and conditions may not be attached if they do not serve a zoning purpose.

Recently, a California Court of Appeals had occasion to consider whether a Los Angeles ordinance governing conditional use permits was preempted by state law. As discussed above in section A, part 1, California gives deference to local zoning authority by providing that a liquor license will not be issued if it "is contrary to a valid zoning ordinance of any county or city." In 1985, the City of Los Angeles enacted an ordinance which required that a conditional use permit be obtained for off-site liquor sales anywhere in the city. In addition, a specific plan was adopted by the City in 1987 for control of liquor sales in South Central Los Angeles. Businesses dispensing alcohol, which operated before the 1985 conditional use ordinance or the 1987 specific plan, were "grandfathered" and "deemed approved" for such a conditional use.

A number of the City of Los Angeles' retail liquor establishments were "grandfathered" and, thus, approved for operation under the new ordinances. When some of these same businesses were damaged or destroyed in the Los Angeles riots, however, the approval for their rebuilding was made contingent upon their agreement to conditions that would be re-

182. See Anderson, supra note 8, § 17.47, at 131.
183. See Kulak v. Zoning Hearing Bd., 563 A.2d 978 (Pa. Commw. Ct. 1989); Hoo Chung v. Blase, 1987 U.S. Dist. LEXIS 11859, at *17 (N.D. Ill. Dec. 17, 1987) (holding that conditions imposed on the renewal of a liquor license must have a rational relationship to the benefit sought, and that a condition that a strip of property be given to the state transportation department without compensation in order to receive renewal is not so related); Anderson, supra note 8 § 21.32, at 756 ("[a]bsent specific authority in the ordinance, a board may not impose conditions which relate to the detailed conduct of the applicant's business rather than to zoning limitations on use of the land").
186. KALAF, 28 Cal. Rptr. 2d at 534.
187. Id.
quired under an application for a new conditional use. Some of the conditions required for rebuilding approval provided that the owner “agree to remove graffiti promptly, provide adequate lighting, remove trash, provide a security guard, and in some instances, limit hours of operation.” Other conditions required “stopping sales of small quantities of ice and cups that some patrons use to drink on the street, . . . removing a pay telephone to prevent it from becoming a conduit for drug sales,” limiting the floor space devoted to alcohol, prohibiting sales of single cans or bottles, locating alcohol displays at the back of the store, limiting advertising in print media and on billboards, regulating the distance between outlets, and banning outlets near schools, parks or churches.

Application of the conditional use process can have dire consequences for small businesses attempting to rebuild after the riots. The Korean community, in particular, suffered severe damage in west and south Los Angeles during the riots. Twenty-three months after the riots, only six of the 175 Korean damaged stores were back in operation. In Korean American Legal Advocacy Foundation v. City of Los Angeles (KALAF), the plaintiffs challenged the City’s conditional use process arguing that it should not be applied to retail liquor outlets destroyed or damaged by the civil disturbance. The plaintiffs also asserted that the City’s ordinances were preempted by state statutory and constitutional provisions.

In response to the argument that the state preempted the ordinances, the court agreed that the California Constitu-
tion gives exclusive jurisdiction to the California ABC to regulate alcohol. The court, however, found that the conditions imposed by the ordinances "do not directly, or have as their effect, the regulation of alcohol licenses, nor regulation of the manufacture, sale, purchase, possession or transportation of alcoholic beverages." Instead, the court determined that the purpose of the City's conditional use ordinance was to "abate or eradicate nuisance activities in a particular geographic area by imposing conditions aimed at mitigating those effects. These are typical and natural goals of zoning and land use regulations."

Los Angeles' ordinances may very well result in a restriction or even prohibition of alcohol sales by businesses that are subject to the conditional use process. Not many small business owners can afford to hire security guards, limit their hours of operation, and abide by other such restrictions on their trade. As a result, retail liquor outlets required under the ordinances to obtain a conditional use permit may ignore the conditions imposed, since such conditions make it difficult to compete with existing outlets that are not subject to the same restrictions. Regardless, the court in KALAF concluded that the ordinances did not act as a total prohibition on alcohol sales, and found that they were "not expressly preempted by state law."

The plaintiffs in KALAF claimed alternatively that even if the ordinances did not contradict state law, they were preempted because they imposed conditions on a licensee that duplicated state law provisions allowing the California ABC

199. Id. at 536.
200. Id. at 538.
202. Id. at 539.
203. Id. (the plaintiffs' claimed that ordinances prohibited alcohol sales because conditions imposed were "prohibitively expensive for the typical small business operation").
204. Lacey, supra note 5, at A1 (one store owner states that she is willing to go to court if forced to adhere to the conditions since "[t]here's no way I [store owner] could survive financially if I operated under the permit guidelines ... [because] my competitors in the neighborhood don't have those kinds of restrictions").
205. KALAF, 28 Cal. Rptr. 2d at 540.
to regulate nuisance activities.\textsuperscript{206} A recent California case offers an example of the California ABC’s exercise of authority to regulate nuisance activities. In \textit{Yu v. Alcoholic Beverage Control Appeals Board},\textsuperscript{207} the ABC revoked a retail liquor license in Salinas on the grounds that such a license was “contrary to public welfare and morals.”\textsuperscript{208} The retail market lost its off-site beer and wine license because the California ABC determined that the premises were a public nuisance due to “drug transactions, fighting and disorderly conduct, disturbances, stolen property, loitering, and suspicious circumstances.”\textsuperscript{209}

Section 11 of Article XI of the California Constitution provides that the exercise of local power shall not “conflict” with general state laws.\textsuperscript{210} The term “conflict” is not limited to situations where there is a conflict in language, but applies also to a conflict of jurisdiction which may result from dual regulations covering the same terrain.\textsuperscript{211} The court in \textit{KALAF} agreed that “superficially” the City’s ordinances appeared to overlap with the state law nuisance control provisions, but found that the California ABC did not intend to “exercise sole and exclusive authority to abate nuisances on premises licensed for off-site sales of alcoholic beverages.”\textsuperscript{212}

The court in \textit{KALAF} also held that the plaintiffs were not immune from compliance with the conditional use ordinances, even though the businesses were in existence at the time the City enacted the ordinances.\textsuperscript{213} Section 23790 of the ABCA provides for grandfathering as long as there has not

\textsuperscript{206} Korean Am. Legal Advocacy Found. v. City of Los Angeles (KALAF), 28 Cal. Rptr. 2d 530, 540 (Ct. App. 1994), review denied, S039481, 1994 Cal. LEXIS 3928 (Cal. July 14, 1994). “[U]nder sections 23800 and 23801 [of the Alcoholic Beverage Control Act], the ABC may impose conditions on a licensee [such as] hours of sale, display of signs, . . . and the personal conduct of the licensee.” \textit{Id.} The California ABC, under section 24200, has the right to suspend or revoke a liquor license if a merchant does not abate or control nuisance activities on the licensed or immediately adjacent premises. \textit{Id.}

\textsuperscript{207} 4 Cal. Rptr. 2d 280 (Ct. App. 1992).

\textsuperscript{208} \textit{Id.} at 282.

\textsuperscript{209} \textit{Id.}

\textsuperscript{210} \textit{CAL. CONST} art. XI, § 11.

\textsuperscript{211} Abbott v. Los Angeles, 349 P.2d 974, 979-80 (Cal. 1960).


\textsuperscript{213} \textit{Id.} at 544.
been a break in continuous operation.\footnote{214} Because the grandfathered stores were destroyed in the riot, they were not operated continuously and the court found that they did not qualify under the “act of God” exception.\footnote{215}

A similar state preemption issue was decided in North Carolina, yielding different results. In \textit{In re Melkonian}, the Court of Appeals held that a local decision denying a liquor licensee a special use permit to operate a tavern was preempted by the state Alcoholic Beverage Control Commission (“North Carolina ABC”).\footnote{216} Analogous to California’s statutory scheme, North Carolina retains exclusive state control over liquor regulation, although the North Carolina ABC Commission may consider local objections and zoning laws.\footnote{217} The state exercises sole discretion to determine the fitness of the applicant, the number of outlets permitted in a locality, and whether the liquor permit should be revoked or suspended for cause.\footnote{218} The court in \textit{In re Melkonian} held that if the North Carolina ABC Commission decides to grant an

\footnote{214. California Business & Professions Code section 23790 provides:  
No retail license shall be issued for any premises which are located in any territory where the exercise of the rights and privileges conferred by the license is contrary to a valid zoning ordinance of any county or city. Premises which had been used in the exercise of those rights and privileges at a time prior to the effective date of the zoning ordinance may continue operation under the following conditions:  
(a) The premises retain the same type of retail license within a license classification.  
(b) The licensed premises are operated continuously without substantial change in mode or character of operation.  
For purposes of this subdivision, a break in continuous operation does not include:  
(1) A closure for not more than 30 days for purposes of repair, if that repair does not change the nature of the licensed premises and does not increase the square footage of the business used for the sale of alcoholic beverages.  
(2) The closure for restoration of premises rendered totally or partially inaccessible by an act of God or a toxic accident, if the restoration does not increase the square footage of the business used for the sale of alcoholic beverages.  
\footnote{215.}  
\textit{KALAF}, 28 Cal. Rptr. 2d at 543 (civil disturbance involved “affirmative[,] willful or accidental acts of human beings” and was therefore not an “act of God”).  
\footnote{217.} \textit{Id.} at 508-09 (citing \textit{N.C. Gen. Stat.} § 18B-901 (1943 & Supp. 1994)). North Carolina falls within the second model of Twenty-First Amendment power delegation. \textit{See supra} note 75.  
\footnote{218.} \textit{Melkonian}, 355 S.E.2d at 508-09.}
applicant a liquor permit, the local authority may not deny a special use permit based on the applicant's lack of fitness.219 Thus, in North Carolina, state law preempts a special use permit denial when it "attempt[s] to regulate the sale of alcoholic beverages."220 While the conditional use permit may be an effective means of allowing local control within a state-dominated system, the judiciary must support the exercise of local power by determining that such local regulation is not preempted.

Other cities in California have also attempted to decrease the number of liquor stores by using conditional use permits and other types of zoning ordinances. Sacramento has attempted to manage its liquor problems by increasing local control over stores where customers cause public nuisances and by requiring permits from older stores that expand or change their business.221 Since 1987, Sacramento has required all new liquor outlets and bars to obtain special permits to sell alcohol.222 Under this system, the city can hold public hearings, impose tougher conditions, or eventually revoke a liquor permit if alcohol-related problems persist at the new stores.223 Recently, the city proposed an amendment to the 1987 ordinance that would affect stores in business before 1987.224 This amendment would give the city the same control over older stores as it currently has over new outlets for dealing with alcohol-related problems such as noise, littering, loitering, or public drunkenness.225

In another California city, San Marino, the zoning laws prohibit bars and also prohibit restaurants from selling alcoholic beverages.226 Only three stores in the city have a state license to sell alcohol, but consumption on their premises is prohibited.227 Although this apparent "blanket prohibition"

219. Id.
220. Id.
222. Id.
223. Id.
224. Id.
225. Id.
227. Id.
has not yet been attacked in court,\textsuperscript{228} San Marino’s municipal code provides that if the ban is ever invalidated, another section of the code would “[require] conditional use permits for commercial ventures within 300 feet of a residential zone. City officials say that all the city’s commercial areas are within 300 feet of homes”\textsuperscript{229} and would, therefore, require permits.

Bell City also uses zoning to control the number of liquor stores in its community. The Bell City Council recently created an ordinance requiring 300 feet between each outlet and then denied a permit to an applicant seeking to build a fourth liquor store at one intersection.\textsuperscript{230}

Cities in the greater Los Angeles area have also been limiting liquor outlets. For example, in Compton, a one-year ordinance prohibiting the issuance of new liquor permits was enacted in April 1991, and in South Gate, an ordinance limits the number of stores and mini-markets selling liquor.\textsuperscript{231}

The success of efforts by California cities in exerting local control over the liquor store locations in their communities will depend upon what happens in the state courts and legislature in the future. Recent court decisions have favored local control advocates over liquor store owners.\textsuperscript{232} For example, liquor store owners who lost in \textit{KALAF} were dealt a severe blow when the California Supreme Court refused to review the decision.\textsuperscript{233} However, the “Korean American market owners and their supporters are organizing a campaign to help enact a state law to overcome their plight.”\textsuperscript{234} The “liquor lobby in California is [also] fighting to stop local

\textsuperscript{228} Id. (State Department of Alcoholic Beverage Control maintains that such restrictions are outside the scope of city power).
\textsuperscript{229} Id.
\textsuperscript{230} Gottesman, \textit{supra} note 3, at J1.
\textsuperscript{231} Id.

\textsuperscript{232} See Zamora, \textit{supra} note 61 (Oakland ordinance taxing liquor stores and bars held enforceable by the First District Court of Appeal in San Francisco after initially being blocked by a superior court judge).
\textsuperscript{233} Geoff Boucher, \textit{Koreatown; Korean Grocers Face Legal Setback}, L.A. \textit{TIMES}, July 24, 1994, at City Times 11 (“Koreatown-based advocacy organization received a major setback last week in its campaign to help grocers escape city regulations imposed on rebuilding efforts after the 1992 riots.”).
\textsuperscript{234} K. Connie Kang, \textit{Store Owners to Fight Restrictions on Reopening}, L.A. \textit{TIMES}, July 21, 1994, at B3. The Korean American community is being encouraged to lobby politicians to pass Assembly Bill 1974, which was approved in the Assembly in 1993, but which was placed on inactive status at Mayor Riordan’s request prior to being presented to the state Senate. \textit{Id.} This measure
governments from placing any restrictions on liquor stores."²³⁵ In the meantime, anti-alcohol groups and community-based operations such as Oakland's Coalition on Alcohol Outlet Issues are considering a "statewide initiative to give cities more control over nuisance and crime problems stemming from liquor outlets."²³⁶ Supporters of local control have realized major victories through recent legislative activity strengthening community control over liquor outlets and California ABC enforcement authority.²³⁷

Where authority to control liquor licensing actions has not been delegated to local government under the Twenty-First Amendment, the general police power to regulate for the public health, safety, morals and welfare can be an effective device to facilitate local control. This power can be used to regulate liquor stores' land use by employing conditional use permits and other zoning techniques, provided the regulations are not preempted by state law.

C. Current Statutory Strategies for Controlling Overconcentration of Liquor Outlets

Sharing state and local control through local input, approval, licensing or regulation, and utilizing local option laws and special or conditional use permitting, are strategies that may help combat liquor store overconcentration. States have also attempted to control liquor store density by establishing legislative limits on the number of outlets that are allowed.²³⁸ These limits, however, have not necessarily been

²³⁵ Opinion, supra note 3, at G2.
²³⁶ Ronningen, supra note 23, at A19.
²³⁷ See supra notes 61-64 and accompanying text.
²³⁸ See, e.g., ALASKA STAT. § 04.11.400 (1994); CAL. BUS. & PROF. CODE § 23817 (West 1985); FLA. STAT. ANN. § 561.20 (West 1987 & Supp. 1994); MICH. COMP. LAWS ANN. § 436.19(c) (West 1989 & Supp. 1994); MONT. CODE ANN. § 16-4-201 (1993); Kallay's Inc. v. Katona, 209 A.2d 185 (Conn. 1965) (holding that local zoning ordinance may place limitations on the number of outlets in a particular zone). But see N.J. STAT. ANN. § 33:1-40 (West 1990 & Supp. 1994) (municipality has an option at the local level whether to establish a limit on the number of retail liquor licenses within its jurisdiction which may be overridden on appeal to the state); MD. ALCO. BEV. CODE ANN. § 42 (1983) ("Board of License Commissioners for Baltimore City, and the board of license commissioners for any county, respectively, shall have full power and authority by rules and regulations to limit and restrict, in accordance with a definite standard the number of licenses which they shall consider sufficient for any neighborhood");
effective in resolving problems resulting from inner city over-concentration of liquor stores. For example, in California, Section 23817 of the Business & Professions Code allows one liquor store for every 2,500 residents of a county. Nevertheless, there are no density limitations within each county, and some neighborhoods may greatly exceed the density limitation as long as the county as a whole complies with the state maximums. In addition, this 2,500 limitation only applies to "general" liquor licenses, which allow distilled liquor sales as well as beer and wine sales. The California Legislature has just recently addressed this problem by establishing a moratorium on issuing "beer and wine" licenses in many cities and counties to be in effect through 1998.

Attempts to control the proliferation of liquor outlets, and their attendant annoyances, are not new. State legislatures have permitted the liquor licensing authority to consider factors such as: whether there is an undue concentration of liquor outlets in the area; whether there is an excess of law enforcement problems; or whether additional licenses in the locality will be detrimental to the interest, morals, safety, or welfare of the public. The California ABC initiated an

Karp v. Zoning Bd., 240 A.2d 845 (Conn. 1968) (holding that town may restrict use of buildings for the sale of alcoholic liquor to certain zones or districts, but cannot limit the number of liquor outlets, since that authority is delegated to the Liquor Control Commission); Hudson Bergen County Retail Liquor Stores Ass'n v. Board of Comm'rs, 52 A.2d 668 (N.J. 1947) (ruling that the State Alcoholic Beverage Control Commissioner could reverse orders of city board of commissioners granting licenses to conduct package liquor stores).

239. Lacey, supra note 5, at A14.

240. Id. For example, in South Central Los Angeles there is one license for every 800 residents. Johnson, supra note 5, at A5. In Huntington Park located in southeast Los Angeles, there is one liquor outlet for every 328 adults. Gottesman, supra note 3, at J1. In Michigan, which also limits the number of liquor licenses based on population, the provision which limits licenses to "one license for each 1,500 of population . . . does not mean one license for each 1,500 of population on a statewide basis, but rather refers to allocation of licenses according to population of local governmental units." Alexander v. Michigan Liquor Control Comm'n, 192 N.W.2d 505, 506 (Mich. Ct. App. 1971).


242. See supra note 62; Zamora, supra note 61, at A5 ("The moratorium takes the one-license-per-2,500 residents limit on general licenses and applies it to beer and wine off-sale licenses.")

243. See MacCarder v. Hemstock, 633 S.W.2d 384, 386 (Ark. Ct. App. 1982) (holding that the public policy of the state is that the number of permits for the sale of alcoholic beverages be restricted); CAL. BUS. & PROF. CODE § 23958 (West 1993) (department may deny an application for a license "if issuance of such license would tend to create a law enforcement problem, or if issuance
"undue concentration rule," which prohibits the issuance of liquor licenses to liquor outlets where a neighborhood's crime rate is 20% higher in a census tract than in surrounding areas, and where the number of stores in the neighborhood exceeds the county's ratio.\textsuperscript{244} However, this California ABC rule has not been as helpful as hoped in communities such as South Central Los Angeles because: 1) the rule was approved \textit{after} many of the licenses were already in place; 2) the rule can be waived if an applicant demonstrates that the license will serve "public convenience or necessity,"\textsuperscript{245} a test easily

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\textsuperscript{244} CAL. CODE REGS. tit. 4, § 61.3 (1991) (Undue Concentration). South Central Los Angeles has more liquor stores than 13 individual states. Rhode Island has 228 liquor stores in comparison to South Central's number of 728 even though Rhode Island's population is three times that of South Central. See Johnson, supra note 7, at A1.

\textsuperscript{245} CAL. CODE REGS. tit. 4, § 61.3 (1990).
met by selling groceries in areas with few supermarkets, and 3) the licensing limits only apply to hard liquor—there are no limits on outlets selling beer and wine.

This "undue concentration" approach has just been legislated by a new California bill, Assembly Bill 2897, effective January 1, 1995, which will require the state licensing agency to deny licenses for hard liquor or for beer and wine outlets "if the area where the store would be located has a crime rate 20 percent higher than in neighboring areas or if that area has a higher ratio of licenses to residents than surrounding areas." Local government will have the burden of proving that a liquor store or bar licensee deserves exemption from the rule because it serves a public convenience and necessity while the California ABC will determine the exemption for businesses such as restaurants and hotels.

Distance regulations have also been used to control the location or concentration of retail liquor outlets to promote the general health, safety and welfare of a community.

246. See Johnson, supra note 7, at A1 ("Although cities recognize the need to stem alcohol-related social ills, they are reluctant to discourage any form of business in economically blighted neighborhoods").

247. Lacey, supra note 5, at A14. This represents "a holdover from the days when spirits were viewed as more dangerous than other forms of alcohol." Id.


249. Id.; see supra note 62.

250. Ky. REV. STAT. ANN. § 241.075 (Michie/Bobbs-Merrill 1981 & Supp. 1994) (retail package liquor license may not be issued if proposed business will be within 700 feet of a similar establishment); Me. REV. STAT. ANN. tit. 28-A, § 453(1)(C) (West Supp. 1989 & Supp. 1994) (license will not be issued if proposed agency liquor store is within 2.5 miles of an existing state liquor store or agency liquor store); S.C. CODE ANN. § 61-3-440 (Law. Co-op. Supp. 1993) (license may not be granted if business is located "within three hundred feet of any church, school, or playground situated within a municipality or within five hundred feet of any church, school, or playground situated outside of a municipality"); Utah CODE ANN. §§ 32A-2-101(3)(a), 32A-5-101(5)(a) (Supp. 1994) (state stores and private club licensee's premises "may not be established within 600 feet of any public or private school, church, public library, public playground, or park"); 7-Eleven, Inc. v. McClain, 422 P.2d 455 (Okla. 1967) (holding that ordinance prescribing more stringent standards for distance requirements was preempted by less rigorous state standards); Cunningham v. Oklahoma City, 556 P.2d 1078 (Okla. Ct. App. 1976) (holding that a local ordinance prohibiting establishments which sell beer from being located within 600 feet of public school ground was preempted); Abilene Oil Distrib., Inc. v. City of Abilene, 712 S.W.2d 644, 645 (Tex. Ct. App. 1986) (holding that a city zoning ordinance was not preempted by a state statute because the city's method of measurement imposed a higher standard which required a liquor store to be farther away from a public school than is required by the state).
Regulations governing the distance a liquor outlet may be located from a school have been used to prevent "increased traffic congestion and the increased probability of persons driving under the influence of alcohol in the immediate area" where children play or travel. Concerns about exposing individuals to an undue moral hazard based on the proximity of a liquor outlet to certain parts of the community have also existed for years. For example, in Board of Trustees of Woodland Union High Sch. Dist. v. Munro, neighbors protested against the location of a liquor outlet near a high school, explaining that:

[M]inors would find a way of getting it, either by pilfering it from the store or inducing adults to purchase it, take it out of the store and give it to the minors; that this would happen generally when students were attending various athletic games and contests during evenings such as football and basketball games; that the pilfering and illegal obtaining through intervention of adults would be increased by the propinquity of the market to the school grounds; that handy access to the liquor supply would increase use of intoxicants by adult attendants at the games; that minors would obtain liquor more readily at that market than they would at other markets through misrepresentation of their ages and having obtained it would permit its use by themselves and other students.

While distance regulations have been used to control the degree of exposure to perceived moral hazards and the nuisance problems created by local liquor sales, other regulatory options have also been employed by communities.

Regulating hours of operation has been one means used to control some of the nuisance problems created by retail liquor businesses. Although many such regulations have a

252. 329 P.2d 765, 768 (Cal. Ct. App. 1958) (holding that the issuance of a license would not be contrary to public welfare and morals even though proposed premises was located in a residential area).
253. Id. at 768.
254. COLO. REV. STAT. ANN. § 12-47-128 (West Supp. 1994) (restricting sales of liquor on Sundays and various holidays between specified hours); CONN. GEN. STAT. ANN. § 30-91 (West Supp. 1994) (extensively limiting hours of operation of various liquor providing entities and restricting sales on certain holidays); ME. REV. STAT. ANN. tit. 28-A, § 353 (West 1989 & Supp. 1994) ("State liquor stores and agency liquor stores may be open for the sale and delivery of liquor between the hours of 6 a.m. and 1 a.m. in municipalities and unincorporated
religious origin, as evidenced by restrictions on Sundays and many Christian holidays, states have maintained these laws for many years based on justifications that go beyond religious concerns. As aptly expressed by the Connecticut court in *Griswold Inn, Inc. v. State*, "[t]he consumption of alcohol in immoderate quantities [impairs physical and mental skills in many people, and] persons who are intoxicated have a much higher chance of being involved in or causing highway and recreational accidents resulting in death or serious injury." Such public concerns may be reduced through the use of hour restrictions and the nuisance effects may be reduced or eliminated as well. For example, noise and disorderly conduct on liquor store premises, which offend neighbors at late hours, would likely be eliminated if stores are forced to close between approximately the hours of 8 p.m. to 9 a.m.

In the New Jersey case, *Sea Girt Restaurant v. Borough of Sea Girt*, residents voted in favor of a referendum to limit the sale of liquor in licensed outlets to the hours of 6 a.m. to midnight, seven days a week. In upholding this exercise of power by local voters against constitutional challenges, the *Sea Girt* court remarked that the voters were "well suited" to make decisions about the number of hours liquor may be sold because they are in a position to understand the issues raised by these restrictions. The voters are able to "balance the problems created by alcohol consumption, such as drunk driving, with the inconvenience of having to travel outside their community to purchase liquor." Additionally, the local residents can appreciate the economic concerns of local businesses involved in liquor sales, as well as the potential revenue impact on the community it-
self. Through the use of distance regulations and restrictions on the hours of operation, communities have an opportunity to reduce nuisance problems and social concerns associated with the operation of liquor outlets such as vandalism, traffic, noise, and drunk driving.

III. PRIVATE CONTROL

Modernly, control over liquor outlets is primarily based on public regulation, either at the state or local level, as discussed in Part I. Nevertheless, local residents may be able to use private control mechanisms such as nuisance, private law devices, community activism, and community redevelopment to increase the quality of life in their neighborhoods.

A. Nuisance

The law of nuisance has historically been used to control the use a landowner may make of his or her land so that the landowner's actions do not unreasonably interfere with the property of a neighbor. As one of the earliest land use mechanisms, nuisance has served as the guiding principle for the acceptance of legislative zoning in this country. Over time, however, it has declined in importance as a land use

263. Id. at 1491.

264. See Patch Enterprises, Inc. v. McCall, 447 F. Supp. 1075 (M.D. Fla. 1978) (holding the reduction in the hours of operation of “bottle clubs” to be rationally related to the goal of reducing incidents of drunk driving).

265. Many of the state or local liquor regulations recognize the potential of a nuisance situation occurring on licensed premises, and make provisions for such occurrences. Effective January 1, 1995, California Assembly Bill 2742 will give the California ABC the “power to suspend or revoke a liquor store for objectionable conditions taking place on a sidewalk abutting a licensee's premises where the licensee has failed to take reasonable steps to correct the conditions.” See supra note 62. The liquor licensee will be responsible for nuisances that occur inside the store, in the parking lot, along the street outside the store, and even for those nuisances caused in nearby vacant lots. Zamora, supra note 61. These regulations will not be addressed in this section as they are part of the public regulation discussion. See Ariz. Rev. Stat. Ann. § 4-210 (1993); Petras v. Arizona State Liquor Bd., 631 P.2d 1107 (Ariz. Ct. App. 1981) (finding the revocation of a liquor license proper under nuisance conditions, such as the presence of intoxicated and disorderly persons consistently on premises); Pa. Stat. Ann. tit. 47, § 4-471 (1993); In re Ciro's Lounge, Inc., 358 A.2d 141 (Pa. Commw. Ct. 1976) (holding that revocation “upon any other sufficient cause” includes nuisance activity which disturbs public peace, welfare and morals, such as noise and disorderly conduct).

266. See Euclid v. Ambler Realty Co., 272 U.S. 303 (1926) (upholding the constitutionality of zoning).
control mechanism since most local governments have adopted zoning ordinances. 267

"Land use nuisances are either a nuisance per se or a nuisance per accidens." 268 A nuisance per se is a nuisance regardless of where it is located, 269 while a nuisance per accidens is a nuisance considered with reference to its location or other circumstances. 270 Nuisance has been used to penalize those people illegally engaged in the manufacture and sale of intoxicating liquor. 271 Such an illegal land use may be considered a nuisance per se because it is "prejudicial to public morals or dangerous to life or injurious to public rights." 272 Nonetheless, the lawful operation of a properly licensed retail liquor outlet cannot be considered a nuisance per se, "since that which the law authorizes to be done, if done as the law authorizes, is not such a nuisance." 273 Therefore, in the typical land use nuisance case, the nuisance alleged is per accidens. 274

267. MANDELKER, supra note 177, § 4.02.
268. Id.
269. Id.
270. Id.
271. See Cardinal v. United States, 50 F.2d 166, 169 (8th Cir. 1931) ("A landlord who knowingly allows liquor to be manufactured on his premises in violation of law is guilty of maintaining a nuisance in contravention of section 21 of title 2 of the National Prohibition Act."); Southern Express Co. v. Long, 202 F. 462, 467 (5th Cir. 1913) ("Houses of ill fame, gaming houses, and illegal liquor stores are public nuisances at common law."); National R.R. Passenger Corp. v. Miller, 358 F. Supp. 1321, 1328 (D. Kan. 1973) ("all places of any kind where liquors are sold or given away in violation of Kansas law is declared to be a common nuisance").
274. MANDELKER, supra note 177, § 4.02. See, e.g., Collins v. Lanier, 40 S.E.2d 424 (Ga. 1946):

[I]t is almost impossible to operate a liquor store out of the corporate limits of a town, and without police protection, without the consumption of liquor on the premises, and the attendant hilarity, loud and boisterous talking and shouting, and the noise and confusion of automobiles coming and going at all hours of night and day; and also the danger to life and health of the community to have a condition such as proposed to exist in the community offensive to the senses and renders the enjoyment of life and property uncomfortable.

Id. See also Dubois v. Selectmen of Dartmouth, 319 N.E.2d 735, 738 (Mass. App. Ct. 1974) (finding that a nuisance depends upon the way the business is conducted and that an injunction for a private nuisance will not be granted where allegations are only predictions as to conditions such as noise, traffic congestion, and litter).
When the state or local governing body has licensed a liquor outlet and approved its location, an issue arises as to whether a court may enjoin the approved activity as an unreasonable use under the circumstances, in other words, as a nuisance per accidens. Some courts have held that when a zoning ordinance allows a use, the court may not issue an injunction against the nuisance. However, most courts have held otherwise, finding that a court will not be precluded from holding the use a nuisance per accidens, even if the use is lawful under the zoning ordinance.

California, on the other hand, statutorily provides that an injunction cannot be issued against lawful manufacturing, commercial, or airport uses unless there is "evidence of the employment of unnecessary and injurious methods of operation." In Sierra Screw Products v. Azusa Greens, Inc., a California court upheld an injunction against the owners and operators of a public golf course. The operation of the golf course was determined to be a nuisance because the design of the third and fourth fairways tended "to create a danger of personal injury and property damage to the users of the plaintiffs' property" from golf balls "striking several of plaintiffs' employees, damaging their parked automobiles and breaking windows."

Although the property's use as a golf course was endorsed by the City of Azusa's conditional use permit, the use was enjoined based on a finding of nuisance. The court explained that "[t]he manifest purport of the adoption of section 731a was to eliminate injunctive relief where the business is operated in its appropriate zone and the only showing is an injury and nuisance to the plaintiff in such opera-

275. See Mandelker, supra note 177, § 4.10. See also Click v. State, 176 S.W.2d 920 (Ark. 1944) (allowing state to abate defendant's liquor store as a public nuisance even though other methods outlined under the Alcoholic Control Act, such as the revocation of the defendant's liquor license or holding of a local option election, might have been followed).
276. Mandelker, supra note 177, § 4.10 (citing Kirk v. Mabis, 246 N.W. 759 (Iowa 1933); Winget v. Winn-Dixie Stores, Inc., 130 S.E.2d 363 (S.C. 1963)).
277. Mandelker, supra note 177, § 4.10.
278. Id. (citing Cal. Civ. Proc. Code § 731(a) (West 1993)).
280. Id. at 806.
281. Id. at 802.
282. Id. at 803.
tion.'" However, the lower court found two conditions on the golf course which contributed to the plaintiffs' injury and which could be remedied by fairway redesign and adequate fencing. Therefore, the plaintiffs were able to establish that the owners and operators of the golf course used "unnecessary and injurious methods of operation."  

In California, local citizens seeking to use nuisance principles to shut down a lawful liquor outlet must show that the store could be operated in a manner that will "reduce the conduct or activity causing the nuisance" and that it is being operated in an injurious manner. This showing may be possible, for example, if the outlet is operated pursuant to a conditional use permit and some of the conditions are not being observed. Recent legislation may also help California citizens control nuisance liquor outlets.  

In Pennsylvania, two recent court decisions have caused neighborhood taverns to close down after finding their operation to be a public nuisance. In Commonwealth ex rel. Ness v. Keystone Sign Co., the court found that a licensed liquor establishment was a nuisance, even though it did not violate the Liquor Code and the criminal actions occurred off the licensed premises. The court agreed that the tavern owner could not be held responsible for every act committed by a patron, especially off the premises, but asserted its power to enjoin a nuisance when the "evidence demonstrates a persistent and continuous disturbing of the peace and good order of the neighborhood." Testimony was presented that "patrons of the bar engaged in conduct such as urinating on the street and on the property of neighbors, drinking outside of the tavern, throwing empty beer bottles on the street or on to a neighbor's property, loud and boisterous conduct including loud conversation, yelling, arguing, and fighting, as well as generating loud noises from vehicles especially
motorcycles." The court found a "causal relationship between the situation outside the premises and what went on inside" and held that an injunction should be issued based upon evidence of a "nuisance in law and in fact" in this case of "increasing abhorrent conduct by patrons in a once peaceful neighborhood. . . ."292

Residents in a Philadelphia neighborhood also complained of a nuisance generated by the operation of a local tavern in Commonwealth v. Olney Tavern.293 The court enjoined the operation of the tavern based on evidence that its operation "resulted in a continuing substantial injury and detriment to the quality of life in the immediately surrounding community."294

Given that zoning regulation is the dominant force in modern land use control, the law of nuisance may be a relatively ineffective method of managing retail liquor outlet locations. Nonetheless, individual neighborhoods may be able to use the law of nuisance as a weapon to close down particular liquor outlets when state liquor licensing provisions do not encourage local control or when the neighborhood's political clout with the local governing authority is lacking.

B. Private Law Devices

Another alternative to using public regulation to control land use is the use of private law devices such as defeasible estates and restrictive covenants. Defeasible estates are created by the language of a grant, reservation or conveyance, while covenants and servitudes are based on the language of a promise.295 When land is transferred pursuant to a grant

291. Id. at 1067.
292. Id. at 1069.
294. Id. at 404. The Olney Tavern decision further states:

Resident after resident testified to the continual disturbance and annoyance of loud and obnoxious noise emanating from the premises and the surrounding sidewalks, frequent urination and littering on their property, and being subjected to obscene and vulgar language, all of which were perpetrated by patrons of the Olney Tavern. Based on repeated incidents, residents have testified to their continuing fear of having projectiles thrown through their windows and of having their children, their cars, and/or their houses struck by cars driven by intoxicated patrons of the tavern.

Id.

containing language restricting the transferee's use of the property, the transferee takes ownership with the possibility of forfeiture if the condition restricting the use is violated.\textsuperscript{296}

Because the law abhors forfeitures, using the defeasible fee as a method of land use control is not favored, nor is it recommended as a strategy for regulating land use.\textsuperscript{297} Notwithstanding this admonition, defeasible fees have been used as a way to restrict property from being used for the sale of liquor.\textsuperscript{298} However, courts may refuse to apply these restrictions by finding changed circumstances or a waiver of the restriction. For example, the reversionary interest in a defeasible fee title was held to be unenforceable in \textit{Cole v. Colorado Springs Co.}\textsuperscript{299} The court ordered title to be quieted in the fee owner, based upon the doctrine of changed circumstances.\textsuperscript{300} The court noted that when a condition subsequent contains the potential to destroy an estate, it is not viewed favorably by the law.\textsuperscript{301} Judicial notice was taken of the history of the growth and development of Colorado Springs, as well as the fact that there were many liquor outlets already located within the community.\textsuperscript{302} The grantor of the lots at issue was also deemed to have "waived and relinquished the right to enforce the liquor restriction clause of this deed by the conduct which was pursued by it with respect to other adjacent similar lots constituting a portion of the same tract and plan."\textsuperscript{303}

Restrictive covenants have also been used historically to prevent liquor sales on particular parcels of property.\textsuperscript{304} These covenants have been found in the forms of both lease-

\begin{itemize}
\item \textsuperscript{296} See generally \textit{Cunningham, Stoebuck and Whitman, Law of Property}, § 2.3, (West 1993).
\item \textsuperscript{297} See infra note 301.
\item \textsuperscript{298} Fusha v. Dacono Townsite Co., 153 P. 226 (Colo. 1915) (holding that a prohibition clause and condition of forfeiture contained in a deed which restricted the sale of liquor was not violative of the public good or subversive of the public interests and that the deed was enforceable as a defeasible fee conveyance).
\item \textsuperscript{299} 381 P.2d 13 (Colo. 1963).
\item \textsuperscript{300} Cole v. Colorado Springs Co., 381 P.2d 13, 18-19 (Colo. 1963).
\item \textsuperscript{301} \textit{id.} at 16. "Forfeitures are abhorrent to the law, and hence will be construed with great strictness." \textit{id.}
\item \textsuperscript{302} \textit{id.} at 18.
\item \textsuperscript{303} \textit{id.} at 17.
\item \textsuperscript{304} Covenants not to compete have been used to restrict sales of liquor for purposes of controlling competition. See, e.g., Klein v. Williams, 441 S.E.2d 270 (Ga. Ct. App. 1994) (upholding an injunction against the seller of a liquor store
hold conveyances and conveyances in fee simple. In Jame-
son v. Brown, homeowners in a residential neighborhood
obtained an injunction forbidding the sale of alcoholic drinks
within the neighborhood. The injunction was granted to
enforce a covenant against the liquor sales which had been
incorporated into certain lot conveyances within the land
tract between 1881 and 1889. Finding that the enforce-
ment of the covenant was still beneficial to the homeowners
and that the restriction had not been waived or abandoned,
the court upheld the covenant in 1939. Not all courts, how-
ever, have upheld restrictive covenants against liquor sales.
Courts have refused to enforce these restrictions when there
are changed circumstances in the neighborhood or when
there is a lack of uniformity in the lot restrictions as origi-
nally created.

Restrictive covenants have been respected by some local
authorities which have refused to transfer a liquor license to
a new location that is subject to a restrictive covenant against
liquor outlets. In California, however, a court allowed a

who agreed not to enter into the business of selling liquor in the same town
where the store purchased by the buyer was located).

305. See, e.g., Red Lobster Inns v. Lawyers Title Ins. Corp., 492 F. Supp 933
(E.D. Ark. 1980) (holding that the title insurance company's failure to inform
Red Lobster of a restrictive use covenant prohibiting use of the land as a restaur-
ant or a liquor store was a negligent breach of contract); Armstrong v. Shapiro,
196 N.Y.S. 630, 631, 633 (Bronx County Ct. 1922) (holding that although lease
provided that premises were not to be used for a paint store or a liquor store,
the covenant was waived by the landlord based on the landlord's acceptance of
rent), rev'd, 202 N.Y.S. 305 (1923).

306. 109 F.2d 830 (D.C. Cir. 1939).

307. Id. at 831.

308. Id.

309. Id. at 832. See also King v. Waigand, 117 A.2d 918, 921 (Md. 1955)
(upholding an 1890 covenant prohibiting the sale of spiritsuous liquors in a sub-
vision as enforceable against retail liquor outlet in 1955).

1941) ("The covenant, by reason of changes in the neighborhood, some of them
normal and others resulting from plaintiff's action in releasing under its re-
served right, other property from the same restriction, has become unenforce-
able in equity."); See also In re Giammaria, 70 A.2d 402, 404 (Pa. Super. Ct.
1950) (explaining that although the lot plan prohibited the sale of liquor, the
lower court found ample evidence of waiver and abandonment of the
restriction).

nant unenforceable because it "lacks universality and is not reciprocal" result-
ing in a "checkerboard realty pattern").

312. See, e.g., In re Cohen, 184 A.2d 387 (Pa. Super. Ct. 1962) (stating that
state liquor control board refused request for transfer of liquor license because
license transfer to a location where the deed contained a valid and enforceable covenant against the sale of liquor. The court explained that the only legislative restriction on the Board's licensing power was that retail licenses could not be issued contrary to a valid county or city zoning ordinance. Because the restrictive covenant was a private contract, and not a public zoning ordinance, the Board was not restricted from granting a license transfer.

Given the distaste courts have for forfeiture of property rights, the defeasible fee is probably the least effective private land use control strategy. On the other hand, restrictive covenants prohibiting liquor sales on a particular premises may be respected by courts as enforceable promises. A court may, however, find that the neighborhood has changed sufficiently to preclude enforcement or may refuse to enforce such private agreements when they conflict with the state or local liquor licensing authority.

C. Community Activism

Community activism has been used as an effective tool in pressuring state or local officials to deny new permits or to encourage existing store owners to modify their businesses through reduced hours and other means. For example,
community activists in Pacoima, California recently honored a local liquor store owner for providing an outstanding example of the value of local control over liquor outlets. Six years prior, community activists had demanded that the store owner's city liquor permit be revoked because the store was a neighborhood nuisance. Under pressure from the community, the owner agreed to follow self-imposed operating guidelines that were proposed by the activists. The owner, a board member of the Korean American Grocers Association, “said he stopped fighting the protesters and started working with the community when he realized it was in his own interest to do so.”

San Diego community activists also have put pressure on local liquor stores in order to address the nuisance problems that they cause. One San Diego liquor store agreed to stop selling liquor in order to keep the California ABC from revoking its license. Residents had filed complaints with the California ABC after becoming “outraged when drunks tanked up outside the store at 37th Street and National Avenue and began harassing young girls attending St. Jude Academy.” Activists, working with neighborhood residents and St. Jude’s Shrine, had been pushing the California ABC officials to close the market and liquor store, alleging it was nuisance. The store owner eventually succumbed to comment of Liquor Control on a proposed transfer, but churches do not have the right to appeal department decisions or otherwise to compel the department to take any particular action.

318. Id.
319. Id.
320. Id.
322. Ronald W. Powell, Troubled City Area Inspired by Priest: Cleric Helps Revive His Boyhood Home, SAN DIEGO UNION-TRIB., May 14, 1994, at B1; Opinion, Shut them down: Get tougher on nuisance liquor stores, SAN DIEGO UNION-TRIB., Mar. 20, 1994, at G2 (“Woody’s has long been a bane to the neighborhood—a hangout for street drunks and junkies, its parking lot and the street littered with wine bottles, malt liquor cans and even hypodermic syringes. Parents were afraid to let their kids walk past it to go to school.”).
324. Kathryn Balint, Key Meeting About Liquor Store Evaporates, SAN DIEGO UNION-TRIB., Dec. 8, 1993, at B3 (one activist claimed “[t]here’s prostitution,
munity pressure and settled with the California ABC in order to keep his license, an alienable asset in California.\textsuperscript{325} However, the owner expressed dismay at being “unfairly targeted” and protested that if he were forced to close down, he would have to go on welfare.\textsuperscript{326}

Even young people have taken up the fight against blight in their communities. Students in South Dallas began a class project in the fall of 1992 to clean up their neighborhood and convince city and state authorities to close down liquor stores that were operating within 1,000 feet of their school in violation of city law.\textsuperscript{327} The need for this project was expressed by one South Dallas eighth-grader who described walking past “drug dealers, prostitutes and drunks” on his way home from school.\textsuperscript{328} “Some are begging, some fighting, some swearing and some urinating on the ground.”\textsuperscript{329} City officials were unable to enforce the distance regulation until a suit filed by the Liquor Merchants Group was resolved in court.\textsuperscript{330} Only one owner of the area liquor stores agreed to meet with the students. The attorney for this owner explained to the students that “his employer was trying to maintain a clean and safe store and contribute to the school’s well-being.”\textsuperscript{331}

In Los Angeles, community activism has been effective in delaying the reconstruction of liquor stores after the riots of 1992. Shortly after the riots, which resulted in the destruction of about two hundred liquor stores, Democratic Assemblywoman Marguerite Archie-Hudson declared that, “we will boycott out of existence” any liquor businesses that rebuild in her district.\textsuperscript{332} Community pressure forced the Los Angeles City Council “to exclude owners of liquor stores from emer-

\begin{itemize}
  \item \textsuperscript{325} See Roehm v. County of Orange, 196 P.2d 550, 552 (Cal. 1948) (holding that a liquor license has value and may be sold).
  \item \textsuperscript{326} Id. “I am alone here, running the store,’ he said. ‘These people (the neighborhood activists), I don’t know why they hate me like that. I am a Christian. I have done nothing wrong. I have a family. If they close me down, I’ll have to go on welfare.’” Id.
  \item \textsuperscript{327} Anna Macias, A Class Project: Students Press City to Oust Liquor Stores Near S. Dallas School, DALLAS MORNING NEWS, Feb. 19, 1993, at 23A, available in LEXIS, Nexis Library, News File.
  \item \textsuperscript{328} Id.
  \item \textsuperscript{329} Id.
  \item \textsuperscript{330} Id.
  \item \textsuperscript{331} Id.
  \item \textsuperscript{332} Johnson, supra note 5, at A5.
\end{itemize}
gency code exemptions designed to help businesses rebuild quickly." Also, in March of 1993, the City Council voted to rescind the Planning Commission’s approval of a permit to rebuild a liquor store destroyed in the riots. The City Council required the liquor store owner to obtain an environmental impact study before reconsideration of the rebuilding project. Although this condition was later rejected by the courts, more than 100 South Los Angeles residents attended the City Council meeting to convey their concern about the effects of having too many liquor stores in their neighborhood. The author of the approved motion, Councilman Mark Ridley-Thomas, maintained that “[t]his is a 10-year-plus struggle to get a handle on the overconcentration of liquor outlets and licenses in south L.A.” Activists opposing local liquor stores acknowledge that closing them down will not instantly resolve all the crime problems in the area, but they do believe that the overconcentration of these outlets is a liability which contributes to attracting and retaining the criminal element.

Religious leaders and organizations have also actively participated in resolving problems created by the overconcentration of liquor stores. Ministers in New York have assisted in redevelopment projects in Harlem by reaching agreements with developers to prohibit the leasing of commercial properties in the projects to liquor store owners. Reverend Glen Missick, chairman of the Manhattan division of the New York African-American City-Wide Clergy Council, is even willing

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333. Id.
337. Id.
338. Krikorian, supra note 20, at 14. Activist Sylvia Castillo of the Community Coalition for Substance Abuse Prevention and Treatment explained that: Since the riots, there is an increased optimism that you can make a difference, that you can participate in improving the neighborhood . . . . That doesn’t mean that crime has been wiped out of South-Central or that if you get rid of all liquor stores, there will be no crime. But it does mean that if you use land in a way that doesn’t attract this criminal element . . . that neighborhoods will change.
339. Sims, supra note 19, § 3, at 1.
to try other means, such as demonstrations, to keep liquor stores out of the redevelopment projects.\textsuperscript{340} Chicago ministers have worked with local politicians and the Nation of Islam to create legislation that would compel some regions to go dry.\textsuperscript{341} The group “Standing Up, Taking Back,” led by Reverend Michael Pfleger, has threatened sit-ins and boycotts of liquor stores that fail to comply with liquor laws by selling to minors or selling individual bottles of beer.\textsuperscript{342} In Los Angeles, the 3,000-member Bethel African Methodist Episcopal Church purchased a liquor store across the street from its campus and uses it as an economic-development center.\textsuperscript{343}

Such community activism is not without its foes. The liquor industry has criticized the efforts of these activists as paternalistic and hostile towards efforts to expand business which provides jobs and revenues in areas that desperately need them.\textsuperscript{344} Liquor store owners claim that it is “unfair to blame them for the problems of the inner city.”\textsuperscript{345} Liquor stores are operated in neighborhoods that other businesses have shunned, and such outlets contribute to the local community by hiring residents, sponsoring community events and contributing tax revenue.\textsuperscript{346}

In California, this battle over local control is being waged in the courts and in the state legislature.\textsuperscript{347} The California Beverage Retailers Coalition recently filed a suit to overturn an Oakland city ordinance that imposes an annual fee for a

\begin{thebibliography}{99}
\bibitem{note19} Id.
\bibitem{note19} Id.
\bibitem{note19} Id.
\bibitem{note19} Sims, \textit{supra} note 19, § 3, at 1. William Bitting, executive vice president and general counsel of S & P Company, stated that “for this great democratic society to dictate to the black and Hispanic community what type of businesses they can and cannot have is sheer nonsense and smacks of paternalism.” Id. Robert Sands, vice president of the Canandaigua Wine Company, opines that “[i]t seems to be rather contradictory of the whole cause of trying to improve conditions in these areas if we limit a very viable segment of business that is providing jobs and revenues in an area that so desperately needs them.” Id.
\bibitem{note19} Id.
\bibitem{note19} Tranquada, \textit{supra} note 317, at N4. \textit{See supra} text accompanying notes 232-35.
\end{thebibliography}
municipal liquor license permit. A bill sponsored by the liquor lobby is pending before the Legislature which will preempt cities’ rights “to locally regulate the land use of liquor outlets and take away cities’ right to enact conditional use permits.” The League of California Cities is “vehemently opposed” to this bill and wishes to preserve the cities’ right to “regulate problem retail liquor establishments to lessen the adverse public health and safety impacts to the community.” A statewide coalition consisting of small liquor store owners and industry leaders, such as the California Grocers Association has criticized local regulations as “anti-minority and anti-business.” “A lobbyist for the California Beverage Retailers Association recently told the Assembly’s Government Organization Committee that the organization wants only the state to regulate the liquor industry.” Community activism will be required to counter these efforts by the liquor industry to restrict local control.

D. Community Redevelopment

In addition to using community activism to resolve problems caused by local liquor outlets, community redevelopment efforts can play an important role in cleaning up blighted neighborhoods. For example, in September 1992, the U.S. Department of Housing and Urban Development (HUD) appropriated $4 million to Los Angeles County, the City of Los Angeles and six other local communities to assist them in economic redevelopment following the riots. The money was to be used for planning, and the City of Los Ange-

349. Id.
352. Community activists have won a recent legislative victory with the signing of four key bills designed to give cities and counties more authority in dealing with alcohol-related problems. See supra notes 61-62 and accompanying text.
353. Indianapolis residents contend, however, that “it’s nearly impossible to rebuild a community choked with liquor stores.” Kane, supra note 345, at A22.
354. Marc Lacey, HUD Gives $4 Million in Riot Aid, L.A. TIMES, Sept. 22, 1992, at B4 ($1 million was awarded to both Los Angeles County and the City of Los Angeles, with the remaining $2 million divided among the cities of Long Beach, Compton, Huntington Park, Inglewood, Lynwood and Pasadena).
les planned to use its share to decide how to help damaged businesses, and to attract or expand businesses that provide goods and services needed by the communities.\textsuperscript{355} Part of this planning effort was to identify business opportunities, other than liquor stores, which would be beneficial to the community.\textsuperscript{356} Liquor stores that were destroyed in the 1992 riots have been offered financial incentives to re-open as other types of businesses such as laundromats and franchise fast-food restaurants.\textsuperscript{357} Such enterprises enhance local ownership and provide new and needed services to neglected communities.

Unfortunately, the rebuilding effort has not progressed as quickly as most had hoped. Two years after the riots, nearly half of the properties damaged or destroyed remain empty.\textsuperscript{358} “Landowners and economic analysts say rebuilding efforts have been hampered by financing and insurance woes, fear of crime and renewed civil strife, speculation by absentee landlords, the depressed economy and community groups’ opposition to the return of liquor stores.”\textsuperscript{359} Liquor store owners attempting to rebuild in Los Angeles have had a difficult time. At public hearings for permits, community groups oppose the rebuilding requests by citing problems of drinking and loitering outside the stores. Some owners, in order to obtain approval, have agreed to conditions such as hiring security officers, restricting the hours of operation, and offering to sell fresh meat and produce to a community desperately in need of grocery stores.\textsuperscript{360} In addition to doubts over the success of the rebuilding efforts, concern was expressed after the January 17, 1994, earthquake about the future of the “Rebuild L.A.” organization (“RLA”) because of the potential threat that government funds marked for revitalization might be shifted to earthquake victims.\textsuperscript{361}

\begin{itemize}
\item \textsuperscript{355} Id.
\item \textsuperscript{356} Id.
\item \textsuperscript{357} See Opinion, Neighborhood Cancers: Some Liquor Stores Foster Drugs, Drunkenness, SAN DIEGO UNION-TRIB., July 19, 1993, at B6; Kane, supra note 4, at C7.
\item \textsuperscript{359} Id. at A22 (emphasis added).
\item \textsuperscript{360} Id.
\item \textsuperscript{361} Paul Feldman & Ted Rohrlich, Quake May Erode Efforts To Rebuild Riot-Torn Areas, L.A. TIMES, Jan. 25, 1994, at A30.
\end{itemize}
Although more than $750 million in state and federal funds have been devoted to post-riot revitalization, not all community redevelopment in Los Angeles has been sponsored by the government. Private institutions have also pledged to support the rebuilding effort. Bank of America, California's largest bank, set up a twenty-five million dollar emergency loan fund to provide support for small businesses damaged in the riots. However, certain businesses, such as liquor stores, that the community considers "undesirable" have not been given access to these emergency loans. Private groups have arranged for access to financing to support business expansion and the capital improvements needed to convert liquor store buildings into buildings to be used for other businesses, such as drive-through restaurants or laundromats. For those liquor store owners who agree to convert their business, the liquor license itself remains an asset, which they may choose to sell. Franchisers of more desirable businesses have discounted or waived franchise fees to encourage liquor store conversion. Two years after the riots, officials for RLA reported that corporations had come through with more than half of the $500 million they had pledged for revitalization of the area. It is evident that private enterprise must be involved in any community redevelopment effort, along with government assistance, in order to realize the goal of improving the economic conditions and social fabric of our inner cities.

IV. CONCLUSION

"[N]o national or even regional consensus has emerged with respect to the morality and consequence of alcoholic beverages. It has seemed best, in default of consensus, to leave the matter to local preference as expressed in the voting booth."
The dilemma of how to deal with the overconcentration of liquor outlets in urban areas can be resolved, but only with a concerted effort on several fronts. Primarily, public regulation must be used to effectively address the problem on a universal scale, rather than by launching individual attacks on specific outlets. Public regulation permits planning and proactive control of these outlets as opposed to relying on enforcement authorities and litigation to resolve problems with individual outlets after the detrimental activity occurs. However, exclusive control at the state level is not the answer. Regulation of retail liquor sales must be accomplished at the local level if it is to be successful in resolving the destructive impact that excessive sales have on urban communities.

To facilitate public regulation at the local level, the state must first delegate power to local authorities. Two different types of power exist at the state level. First, the state has power under the Twenty-First Amendment to regulate liquor sales. Second, the state has general police power to regulate for the benefit of the public health, safety, morals and welfare. A delegation of the state's Twenty-First Amendment authority is the most effective way to achieve local control over liquor sales. The local option election, found in most states, is just such a delegation. However, the effectiveness of this local power to prohibit liquor sales in particular localities will depend upon how political subdivisions are defined. The subdivision at which the local election occurs must be small enough to provide meaningful local control.\textsuperscript{368} Another weakness with the local option approach is that it presents an "all or nothing" solution for communities. Residents are not given the power to regulate liquor sales in the community, they are only given the option of either allowing or prohibiting liquor sales.

In addition to local option elections, the referendum process can be used to give voters control over the proliferation of liquor outlets in their neighborhoods. The referendum process allows voters to exercise "their traditional right through direct legislation to override the views of their elected repre-

sentatives as to what serves the public interest.” In Washington, D.C., residents, who are registered voters within 600 feet of a proposed liquor license applicant, may object to the issuance of a liquor license. This allows local residents direct control over liquor sales in their neighborhood.

The most effective method of allowing local control is to comprehensively delegate all state power under the Twenty-First Amendment to local government. However, if a state desires to completely relinquish its control under the Twenty-First Amendment, it may be necessary to totally revamp the state liquor control system. State statutory guidelines can be enacted to supervise the exercise of local power, but no issues of state preemption should arise if the local authorities act within the state statutory guidelines.

When Twenty-First Amendment power is delegated, the state must expressly declare that it is the state’s Twenty-First Amendment power which is being delegated, not just the general police power authority. If local government must rely on the general police power for its authority, there will always be potential preemption issues. These preemption issues may compel litigation due to conflict with a state’s retained power to regulate liquor under the Twenty-First Amendment. By delegating the state’s Twenty-First Amendment power, preemption issues will be avoided and local government regulations may be given more deference by courts.

If the state decides to allow local residents to exert control based only upon a partial delegation of Twenty-First Amendment authority or upon a delegation of the general police power, certain land use strategies may, nonetheless, be

371. This type of objection is allowed in other states as well. See, e.g., Conn. Gen. Stat. § 30-39 (1992) (ten local residents may file a remonstrance “containing any objections to the suitability of [an] applicant or proposed place of business”).
372. See supra notes 139-49 and accompanying text.
373. In California, a constitutional amendment will be required. See also, Kane, supra note 345, at A22 (Mayor of Indianapolis explains that the city offers neighborhoods legal help in their battles with liquor stores because the “state system for liquor control is too entrenched to reform”).
374. In expressly granting power to the states, the Twenty-First Amendment “confer[s] something more than the normal state authority over public health, welfare and morals.” California v. La Rue, 409 U.S. 109, 114 (1972).
effective. Regulating distances between outlets, restricting hours of operation, requiring approval of local government, allowing both state and local authorities to license, or requiring a conditional use permit for liquor outlet locations are methods used to give local residents input and control. Such regulations may impede access to liquor, by making it less convenient to obtain, and thus may impact the amount of liquor consumed in the community. These restrictions will also have a positive impact on the particular land use problems that are associated with a liquor store such as litter, loitering, prostitution, graffiti, harassment of children on their way to school, urinating in public, noise, and vandalism. However, if liquor control authority is shared between the state and local unit, litigation will likely occur whenever there is any appearance of conflict between the jurisdictions.

The liquor industry objects to allowing the state to turn control over to local government. Liquor control is already a "patch-work" of laws because control is at the state level, rather than at the federal level. If states turn their control over to local units, the liquor industry will find little uniformity in the legal structure in which they must operate. This lack of uniformity may or may not affect the product itself, but it will affect the marketing of the product as well as the level at which lobbying must occur to preserve the product's place in our social structure. Individual entrepreneurs and business enterprises argue that there is a demand for liquor stores in urban areas, as evidenced by the profit margin of these outlets in comparison to other businesses. Store owners also argue that they employ local residents and are bringing business establishments to areas where other businesses refuse to locate. The notion of local control is not necessarily adverse to these arguments. Local residents are in the best position to determine whether these outlets are beneficial to their neighborhood despite the attendant land use problems.

Another way to control the blight in neighborhoods saturated with liquor stores is to increase the level of enforcement against those criminal activities and nuisances associated

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375. Revenue from liquor licensing and permitting may also become an issue if control is turned over to local government. It stands to reason that the governmental unit responsible for administering and enforcing a licensing scheme should be provided with the resources necessary to maintain these activities. There are many potential solutions, but the issue must be addressed.
with some of these outlets. The excessive concentration in inner cities, 519 liquor outlets in a 606-square-block area on Chicago's south side, for example, makes it difficult for law enforcement to supply sufficient resources to meet community demands. It has been suggested that the use of available resources must be reconsidered and adjusted to provide more effective protection. When enforcement resources are thin, problems such as litter, loitering, prostitution, and verbal harassment of residents may not be considered a law enforcement priority when police are faced with other neighborhood problems such as drugs, robberies, assaults, and gang-related shootings.

Private control of liquor sales is not a singular solution. It can be effective, however, when used in conjunction with public regulation. Using defeasible fees to transfer property with a prohibition against liquor sales is not a recommended approach since the "law abhors forfeiture." Such conditions are not likely to be enforced because of the resulting forfeiture, a preemption by public regulation, or the doctrines of changed conditions or abandonment. However, the use of restrictive covenants, either in the conveyance of a fee or of a leasehold, may be somewhat more effective in restricting liquor sales on certain property. Private individuals have to be willing to include this type of restriction in their bargaining process and property sellers may be forced to reduce their sales price if they insist on restricting the use of the property in the hands of future owners.

Community activism can be a powerful device to combat the problems that arise with liquor store operations. Residents can influence public regulation by voting, attending public hearings to protest liquor licensing actions, and making their views known to state and local politicians. In addition, community activism may be used to supplement public regulation and enforcement by pressuring local stores, through discussion or boycotts, to retain better control over their premises. This type of encouragement is valuable when

376. See Sims, supra note 19, § 3, at 1.
379. See supra notes 295-315 and accompanying text.
enforcement authorities are not available to police individual outlets or when problems arise that are specific to a particular location. The use of nuisance law may also supplement public regulation by providing a mechanism to control individual locations that are encouraging undesirable activity.\textsuperscript{380}

In order to adequately address the social problems associated with the overconcentration of liquor outlets in urban areas, a state must first review its public regulation scheme to ensure that it has delegated the maximum amount of control possible to local government. Community activism and nuisance law can then be used to police individual outlets which are creating community problems, either by violating local ordinances or by encouraging nuisance-type activity on or near the premises. Finally, community redevelopment must be used to revitalize neighborhoods damaged or destroyed by criminal activity and social blight. This redevelopment will require both government funds and private enterprise contributions to encourage change in the character of the businesses allowed to operate within a community.

Incentives should be used to convince current liquor store owners to convert their businesses to ones which will benefit the community. It may be necessary to compensate liquor store owners for lost profits, relocation, or the loss of a liquor license. Perhaps, with the right amount of planning and funding, a community may be allowed to “buy-back” its neighborhood by purchasing liquor outlet locations and retiring liquor licenses.

There are many avenues that may be used to resolve the overconcentration problem. Public regulation, increased enforcement of existing controls, and private control of land use through nuisance law, restrictive covenants, and community activism will provide the tools to improve the quality of life in urban areas. Communities must be given effective local control over liquor outlets in order to successfully revitalize their neighborhoods and ensure that at least one of several urban life problems has been solved.

\textsuperscript{380} Actions by store owners that encourage unwanted activity include placing couches in the parking lot, selling individual cups, providing pay telephones often used for drug sales, selling cheap, potent beverages, such as malt liquor, and tolerating deviant behavior among patrons. See Sims, supra note 19, § 3, at 1.