

**Reducing Community Alcohol Problems  
Associated with Alcohol Sales:  
The Case of Deemed Approved Ordinances in California**

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# Reducing Community Alcohol Problems Associated with Alcohol Sales: The Case of Deemed Approved Ordinances in California

## I. INTRODUCTION

Alcohol retail sales establishments may pose serious health and safety risks for neighborhoods and communities. Research has shown that the number, density, location, and operational practices of alcohol outlets affect the level of community violence, drinking-driving incidents, injuries, underage drinking, public nuisance activities, among other social problems.<sup>1</sup> Having large numbers of bars and liquor stores concentrated in a small geographic area is likely to create serious neighborhood disruption, particularly if the outlets promote heavy drinking and are located near sensitive uses such as schools, parks, and private residences.

The link between alcohol retail sales establishments and community health and safety problems has prompted governments to regulate their number, location, and practices. Most States establish minimum guidelines through a licensing system and permit local governments to impose additional restrictions in order to tailor the alcohol availability structure to meet local circumstances, needs, and problems. Typically, local controls are exercised through land use and zoning and/or planning and public safety ordinances. Some States delegate licensing authority to local jurisdictions. However, some States exercise exclusive or near exclusive regulatory authority over alcohol retail sales, prohibiting (or “preempting”) local authority regarding this particular type of land use.<sup>2</sup> California is one such State.

The California Constitution declares that “the State of California ... shall have the exclusive right and power to license and regulate the ... sale ... of alcoholic beverages within the State” to the exclusion of cities and counties.<sup>3</sup> The State legislature has carved an exception to this general rule, by prohibiting alcohol retail licensing from being issued if the issuance would violate a valid local zoning ordinance. The relevant provision states:

“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 specified conditions].”<sup>4</sup>

California courts have upheld this delegation of authority and have interpreted it broadly in recognition of the important traditional role local governments play in regulating land use and protecting public safety. There is a fundamental conceptual difference between land use regulation and alcohol regulation:

“The essence of zoning lies in metropolitan and regional planning; it is the use and treatment of public and private land and its appurtenances in the interest of the community as a whole. The factors and reasons that determine the imposition of metropolitan zoning are entirely different from those which control the regulation of the [production, distribution, sale and] consumption of liquor.”<sup>5</sup>

This conceptual distinction may be difficult to apply in practice since many regulations have aspects of both alcohol and land use regulation.

Beginning in the early 1980s, many California cities became concerned about the public health and safety issues associated with the overconcentration of alcohol outlets, particularly in urban settings.<sup>6</sup> California law provides only minimal controls on the number of alcohol licenses that can be issued at the county level and no restrictions at the municipal level. Local jurisdictions responded by exercising their land use powers through the enactment of Conditional Use Permit (CUP) ordinances specific to alcohol outlets.<sup>7</sup> Today most local jurisdictions have some form of CUP ordinance. CUP ordinances, however, are an imperfect tool. Retail alcohol establishments in existence before their enactment in a particular city or county are exempt (or “grandfathered” or treated as “non-conforming uses”) and must be allowed to continue operation without restrictions on the alcohol sales practices. The large majority of a city’s alcohol outlets fit this category, and the existence of a CUP ordinance encourages existing businesses to maintain their grandfathered status, which can be transferred to new owners.

The inability to regulate grandfathered retail establishments prompted the City of Oakland to enact the first “deemed approved” ordinance (DAO) in 1993.<sup>8</sup> The ordinance exercises authority over these establishments by issuing “deemed approved” permits and establishing “public nuisance standards” that pre-existing retailers must abide by in order to maintain their permit. The standards are monitored by the city through an enforcement and education program which is paid for by a fee on the deemed approved outlets. The standards do not directly regulate the sale of alcohol, but rather address land use and public safety issues associated with alcohol sales, such as loitering, increased police calls, noise, graffiti, and drug sales.

Oakland alcohol retailers challenged the ordinance in court on two grounds: (1) The ordinance constituted regulation of the sale of alcohol and was therefore preempted by the State Constitution; and (2) The fee was in fact a tax, also prohibited under State law. The California Court of Appeal rejected these claims, and the California Supreme Court allowed it to stand without further review.<sup>9</sup> The court concluded that the ordinance did not directly regulate the sale of alcohol so did not violate the State Constitution and that the city was exercising its authority through land use measures. It also held that the fee was permissible because it was assessed based on the city’s costs associated with retail establishments and all revenues from the fee are used to administer and enforce the ordinance and promote retailer education. Taxes and fees are distinguished based on these two factors.

The Oakland DAO became a model for many other cities and counties, with 19 additional cities enacting some form of a DAO ordinance in the last 15 years. In 2008, the Ventura County Behavioral Health Department commissioned a study to develop a “best practices” guide for drafting CUP and deemed approved ordinances.<sup>10</sup> The recommendations were developed based on key informant interviews and a review of relevant research. Yet, despite this increased interest and attention to this form of local control, there has been surprisingly little analysis across jurisdictions or at the statewide level regarding the structure of existing ordinances, enforcement strategies, and impact on community alcohol problems.

This study represents a first step in filling this gap in the research literature. It is a descriptive, comparative analysis of the legal provisions found in 12 DAOs from across California, comparing them to the provisions recommended in the best practices guide developed in 2008. The analysis is limited because the legal provisions themselves will have little or no impact unless they are effectively administered and enforced, topics beyond the scope of this analysis. Enforcement practices are dependent on numerous factors, including the structure and breadth of the ordinance. Our analysis therefore focuses particularly on those provisions that may enhance or hinder effective enforcement practices.

## **II. METHODS**

We conducted a content analysis to identify key provisions, based on the research literature on the impact of alcohol retail establishments on community problems, with particular attention to provisions that would affect enforcement practices. We developed variable definitions based on this review of key provisions.

We searched the secondary literature to identify DAOs in California and located 19 such laws.<sup>11</sup> We reviewed these laws and selected 12 for further analysis based on the following criteria. To be included, ordinances needed to: (1) Target alcohol outlets that were in existence prior to the passage of a CUP ordinance and therefore exempt from the CUP provisions (referred to here as “pre-existing” or “grandfathered” retail establishments); and (2) Authorize (at least implicitly) revocation of a pre-existing retail establishment’s deemed approved status or permit for violations of the deemed approved standards. Typically, a revocation results in the outlet needing to apply for a CUP in order to continue operations. Our selection was further limited based on the breadth to which the ordinances addressed the key variables. Our focus is on the provisions that affect the grandfathered alcohol outlets. We ignored provisions in the ordinances that affected new outlets subject to CUP provisions.<sup>12</sup>

The six categories of variables are defined as follows:

## Types of Alcohol Outlets

A DAO must define which types of retail alcohol establishments the ordinance applies to.

**Off-sale retail licenses:** Deemed approved requirements apply to establishments selling alcohol for off-sale consumption. No jurisdiction distinguishes between licenses that are restricted to beer and wine.

**On-sale retail licenses:** Bar/Nightclub: Deemed approved requirements apply to establishments selling alcohol for on-sale consumption, including bars, nightclubs, and restaurants. Ordinances that exempt some types of restaurants are highlighted in footnotes to Table 1.

## Performance Standards

These are the standards to which all deemed approved establishments will be held.

**Nuisance listing: Extensive/Minimal:** Deemed approved performance standards require that licensed establishments take action to prevent various nuisance activities associated with their businesses. Specific nuisance activities may include: disturbance of the peace, illegal drug activity, public drunkenness, drinking in public, harassment of passersby, gambling, prostitution, sale of stolen goods, public urination, theft, assaults, batteries, acts of vandalism, excessive littering, loitering, graffiti, illegal parking, excessive loud noises (especially in the late night or early morning hours), traffic violations, curfew violations, lewd conduct, or police detentions and arrests. The ordinances in our analysis were rated either comprehensive (listing all or most of those above) or minimal (providing only a general description of nuisance activities). As noted in the finding section, no ordinance fell between these two extremes.

**Close proximity:** Ordinance specifies that the extent of the nuisances to be prevented includes those occurring near to or in close proximity of (as well as within) the establishment.

**Federal/state/local laws:** Performance standards specify that the establishment comply with all federal, state, and local laws.

**Compatibility:** Performance standards specify that the establishment's upkeep and operating characteristics remain compatible with and will not adversely affect the livability or development of abutting properties and surrounding neighborhoods.

## Enforcement and Administration

DAOs may provide standards and guidelines for their enforcement and administration.

**Community engagement:** Ordinance mandates a role for community and industry groups in enforcing or administering the ordinance or provides a formal mechanism for providing input into the process.

**Dedicated enforcement officer:** Ordinance mandates a dedicated officer for the enforcement of deemed approved standards. Ordinance may specify that funding for this position come from annual fees paid by deemed approved establishments.<sup>13</sup>

**Dedicated hearing officer:** Ordinance mandates a dedicated hearing officer for the adjudication of complaints made against deemed approved establishments. Ordinance may specify that funding for this position come from annual fees paid by deemed approved establishments.

**Appeal:** Specifies the municipal body to which an establishment might appeal judgments and penalties:

- Planning/zoning: Appeals go to the planning or zoning commission.
- City Council: Appeals go to the city council or board of supervisors.
- Other: See Notes section for details.

## Type of Ordinance

Describes where the DAO is found in the municipal or county code.

**Land Use:** Found in sections pertaining to land use (Zoning, Planning).

**Nuisance/Police Powers:** Found in sections pertaining to nuisance activities or other responsibilities assigned to local law enforcement agencies (Nuisance, Public Safety, Public Peace, Morals).

## Penalties

Describes the types of penalties imposed on violators of deemed approved standards.

**Remedy opportunity:** Licensee is informed of violations and given the opportunity to remedy before other sanctions are imposed.

**Civil:** Civil penalties (such as citations and fines) may be imposed for violations.

**Criminal:** Criminal penalties may be imposed for violations.

**Costs:** Violators required to pay the city for the costs of enforcement and administration, such as the cost of repeated police or other municipal responses to complaints or re-inspection of establishment following a notification to remedy.

**Revocation, when permitted:** Describes the requirements for revoking an establishment's deemed approved status and/or ordering that the licensee cease and desist conducting business.<sup>14</sup>

## Fee Schedule<sup>15</sup>

Describes the criteria for fees paid to the city or county by deemed approved licensees. Some cities use a combination of criteria (such as risk, hours, and volume) to calculate fees. Note fees may be imposed on a one-time basis.

**Risk:** Fees calculated by degree of risk associated with establishment. Risk may be dependent on the type of business (e.g., bars versus restaurants), past history of complaints, or calls for police service associated with the establishment.

**Hours:** Fees calculated by how late the establishment is open.

**Volume:** Fees calculated by volume of alcohol sales.

**Re-inspection:** Fee charged for re-inspection of an establishment after order to remedy.

**Minimum:** Minimum fee paid to municipality by deemed approved establishments.

**Maximum:** Maximum fee paid to municipality by deemed approved establishments.

## DEEMED APPROVED ORDINANCES: CALIFORNIA CITIES AND COUNTIES

(See Table 1 on page 8.)

## III. FINDINGS

### Types of Alcohol Outlets

**Recommended practice: Include all alcohol outlets in the jurisdiction.**<sup>16</sup>

The recommended practice is based on the potential risks posed by commercial alcohol service generally. Outlet types deemed to be low risk can be charged lower fees while still being subject to the ordinance's provisions.

City/ County	Outlet Type		Performance Standards				Enforcement & Administration				Type of Ordinance		Penalties				Revocation: when permitted					Annual Fee Schedule								
	Off-sale Retail Outlets	On-sale Retail Outlets	Nuisance Listing	Minimal	Close Proximity	Federal/ State/ Local Laws	Compatibility	Community Engagement	Dedicated Enforcement Officer	Dedicated Hearing Officer	Planning/ Zoning Commission	City Council	Other (see notes)	Land Use	Nuisance/Police Powers	Remedy Opportunity	Civil	Criminal	Costs	Hours	Volume	Re-inspection	Minimum	Maximum	Outlet type/ Calls for Service	Hours	Volume	Re-inspection	Minimum	Maximum
Alameda County	X	X	X	X	X	X	X	X <sup>1</sup>	X	X	X			X	X	X	X	X	X			X	\$800	\$800				X	\$800	\$800
Oakland	X	X <sup>2</sup>	X	X	X	X	X		X	X	X <sup>3</sup>			X		X	X	X	X			X	\$1,500	\$1,500				X	\$1,500	\$1,500
Oxnard	X	X	X	X	X	X					X <sup>4</sup>			X	X	X	X	X <sup>15</sup>					\$425	\$425					\$425	\$425
Petaluma	X	X	X	X	X	X	X					X <sup>5</sup>		X	X	X	X	X					No fee	No fee					No fee	No fee
Richmond	X	X	X	X	X						X			X				X					No fee	No fee					No fee	No fee
Rohnert Park	X	X	X	X	X	X	X					X <sup>6</sup>		X	X	X	X	X					\$75	\$1,500			X	X	\$75	\$1,500
San Francisco	X		X	X	X	X						X <sup>7</sup>		X									\$264	\$264					\$264	\$264
San Leandro	X	X <sup>8</sup>	X	X	X	X	X				X			X			X					X	No fee	No fee			X		No fee	No fee
Santa Cruz	X	X	X	X	X	X					X	X <sup>9</sup>		X			16	16	16			X	\$226.38	\$1,674			X	X	\$226.38	\$1,674
Santa Rosa	X	X <sup>10</sup>	X	X	X	X	X			X				X	X		X	X				X	\$100	\$5,000			X	X	\$100	\$5,000
Vallejo	X	X	X	X	X	X	X	X	X	X	X	X <sup>11</sup>	X <sup>12</sup>			X							\$300 <sup>17</sup> (one time only)	\$300 <sup>17</sup> (one time only)					\$300 <sup>17</sup> (one time only)	\$300 <sup>17</sup> (one time only)
Ventura	X	X	X	X	X	X	X					X <sup>14</sup>	X	X								X	\$250 <sup>18</sup>	\$1,400		X	X	\$250 <sup>18</sup>	\$1,400	

With a few exceptions noted below, the localities generally apply their deemed approved ordinances to all alcoholic beverage retailers. Ordinances apply city- or county-wide and are not restricted to certain geographical zones.

San Francisco differs the most significantly from the other localities in that its ordinance applies only to off-sale retailers. With the exception of San Leandro (where the ordinance is unclear), San Francisco is the only locality that does not have a deemed approved ordinance that covers bars and nightclubs. Two cities exempt at least some restaurants. Oakland exempts “full-service” restaurants, which are defined as having facilities to prepare and serve meals on the premises. To qualify for the exemption, the establishment must have at least 60 percent of its revenue derive from food sales. Santa Rosa only includes “restaurants with bars” and exempts restaurants “which serve alcoholic beverages as part of a meal.”

### **Performance Standards**

**Recommended practice: Include a comprehensive list of nuisance activities; include nuisance activities within and in the vicinity of the retail establishment; include provision related to compatibility with surrounding neighborhoods.**

The recommended practice reflects the importance of being both specific and inclusive when drafting ordinances. Including the list of nuisance activities in the DAO itself is recommended to clarify that local planning/zoning officials have primary enforcement and administration responsibility (who need not defer to city attorney or county counsel offices).

The jurisdictions largely hold outlets to similar performance standards. However, there are some notable exceptions. All jurisdictions except Ventura include an extensive list of specific nuisance activities that are prohibited. The Ventura ordinance provides a general prohibition of nuisance activities. San Francisco limits its ordinance’s application to activities within the establishment’s property line. Other ordinances include nuisance activities in “close proximity of” or “near” the retail establishment. Richmond is the only locality that does not require that deemed approved outlets meet all Federal/State/local laws.

Five jurisdictions (Oxnard, Richmond, San Francisco, Santa Cruz, and Ventura) do not include a requirement for outlets to be compatible with other land uses in their neighborhoods. Such a provision gives additional authority to consider the adverse impacts of the retail establishment on the community more generally. San Francisco is the only jurisdiction that does not impose either a proximity or compatibility standard.

### **Enforcement and Administration**

**Recommended practice: Specify a team that has specific responsibility to monitor, administer, and enforce the deemed approved ordinance.**

Decisions regarding who will enforce and administer the ordinance, the methods to be used, the role of community actors, and the priority to be placed are delegated to city/county departments and staff. City Councils and Board of Supervisors can enhance the likelihood of effective enforcement and administration by providing clear standards and guidelines to staff. Establishing mechanisms for engaging community and business groups is an important aspect of effective administration.

Some ordinances identify specific agencies or individuals with primary responsibility for monitoring and enforcing their deemed approved ordinances. The ordinances in Alameda County and Vallejo specify dedicated enforcement and hearing officers; Santa Rosa and Oakland specify dedicated hearing officers only. Vallejo has the most detailed designated enforcement/implementation provisions. Its ordinance creates a three-member complaint response team, including representatives from development services department, police department, and a citizens’ community coalition. It also establishes an alcohol outlet advisory board that must include at least two business owners. The board meets with the dedicated enforcement officer regularly to review complaints and to make recommendations on how to reduce/eliminate problems.



Note that many other cities/counties may meet the best practice standard through administrative decisions and without specific provisions in the ordinance (a topic beyond the scope of this analysis).

All jurisdictions provide specific procedures for the retailer to appeal decisions to impose sanctions. The size of the community may affect the decision regarding what body will hear the appeal, with larger jurisdictions having more pre-existing options. In general, having an initial review occur within the administrative structure of the city or county government (e.g., a planning board) will reduce costs to the city and reduce the likelihood of political pressure being placed on the appeals process.

### Type of Ordinance

**Recommended practice: Not specified.**

Deemed approved ordinances can be either land-use or public safety-based enactments. The jurisdictions are about split between these two options. The decision regarding the location of the DAO in the city or county's municipal code will rest on local policy and political considerations and the structure and practice of the jurisdiction's administrative and law enforcement functions. Choosing between these options should reflect an assessment of which agencies and staff will best insure effective administration and enforcement.

### Penalties

**Recommended practice: Licensee is given notice of violation by enforcement team and provided opportunity to abate prior to hearing. Civil penalties should be given priority over criminal penalties. Penalties should become increasingly severe for either (1) failure to abate despite warnings; or (2) multiple violations, with revocation authorized. Associated costs should be included in civil penalty.**

The recommended practice reflects the importance of imposing penalties that are sufficiently severe to serve as a deterrent. Civil penalties are more effective than criminal penalties because they can be imposed more swiftly and are more likely to be enforced, two critical components of deterrence.

All ordinances provide some penalty for violations except Santa Cruz, which does not specify penalties in the DAO provisions. Half of the localities provide violators the opportunity to remedy a nuisance prior to imposing other sanctions (which can also be permitted administratively, without a specific provision in the DAO). All jurisdictions include civil penalties and five ordinances impose both types of sanctions. Civil penalties take the form of monetary fines and adjudicated by administrative personnel; criminal penalties include misdemeanor convictions that may also carry jail sentences and are adjudicated through the criminal justice system.

Eight localities permit recovery of costs associated with prosecution, appeals, compliance, and abatement of nuisances. Such fees both penalize a violator and provide reimbursement for the city or county's enforcement and administrative costs.

Seven jurisdictions allow for revocation of an outlet's deemed approved permit after the first hearing where a violation is established. Three do not permit revocation until after a second hearing at which a finding is made that the offending outlet failed to meet requirements or conditions established following a finding of a first violation. Two ordinances – in Ventura and Petaluma – do not specify when revocation can occur. Oxnard's ordinance contains two provisions. The first requires the city manager to seek a court order before revocation of permit can occur, and the second states that “any other action available to the city” can be taken, which could include revocation of the deemed approved permit and a requirement that the licensee seek a special use permit (which in turn could be denied). It is therefore coded to permit revocation after the first hearing where a violation is established.

### Fee Schedule

**Recommended practice: Fee should be imposed to defray cost of monitoring and enforcement based on risk factors (amount of fee not specified).**

Fees represent a critical aspect of DAO ordinances because they provide the resources for effective administration and enforcement and for promoting retailer education. Basing the fee structure on risk factors and past history insures an equitable distribution of costs – licensees that create increased risks of health and safety problems pay more reflecting the higher costs of monitoring their businesses.

The jurisdictions are split into three groups with regards to charging fees for monitoring, education and enforcement. Rohnert Park, Santa Cruz, Santa Rosa, and Ventura base their fees on a set of risk factors (type of outlet, police calls for service, hours, and volume of sales), with higher risk establishments paying higher fees. Santa Rosa’s fee is based solely on the volume of sales. Alameda County, Oakland, Oxnard, and San Francisco charge a flat rate fee to all deemed approved outlets. Vallejo charges a one-time flat fee that is imposed at the time an outlet receives its deemed approved permit. Petaluma, Richmond and San Leandro do not charge any fees. The fee amount varies widely between the localities, from zero to \$5,000 annually. The use of a fee schedule or a flat rate does not predict the amount of the fee. Alameda County, Oakland, San Leandro, and Santa Rosa impose re-inspection fees. These are in addition to the cost recovery provisions reported in the Penalties section.

#### **IV. DEEMED APPROVED ORDINANCES IN VENTURA COUNTY**

Two jurisdictions in Ventura County – the cities of Oxnard and Ventura – have DAOs, which share some similarities. Both cities require that all types of alcohol outlets (off-sale, bars/nightclubs, and restaurants) follow deemed approved performance guidelines. They also both include the performance standards provisions that deemed approved establishments are responsible for nuisance activities in close proximity to each establishment, and that establishments follow Federal/State/local laws. Although neither city’s ordinance has mandated a dedicated enforcement or hearing officer for deemed approved violations, both in fact have created such a position in the police department through administrative action. Both cities impose fees. Ventura has established a fee schedule that can vary between \$250 and \$1,400 depending on the type of business, hours of sale, and volume of alcohol sales. Oxnard has a fixed fee of \$427.

While sharing these similarities, the cities differ in their definition of nuisance activities. The Oxnard ordinance specifies 21 separate activities as nuisances that deemed approved establishments are responsible for preventing, compared to the Ventura ordinance, which refers only to “nuisance conditions” and litter and graffiti. The appeals and revocations processes for Oxnard deemed approved establishments are specified in the ordinance, while the Ventura code does not specify how these processes are to be carried out. Oxnard includes civil penalties and cost recovery among the potential penalties accrued by establishments in violation, while the Ventura ordinance refers to civil and criminal penalties.

#### **V. DISCUSSION**

In general, our findings suggest that all twelve ordinances maintain the same core structure and strategies employed by the original Oakland ordinance upheld by the California Court of Appeal. This is not surprising, since any major deviations that imposed significant additional burdens on licensees would likely lead to costly and possibly unsuccessful litigation. All the ordinances provide the basic tools for monitoring grandfathered alcohol establishments and reducing their adverse impact on community health and safety. In most cases, the ordinances provide sufficient enabling authority to support a comprehensive monitoring and enforcement program. San Francisco provides a notable exception to this general observation, since its ordinance exempts on-sale establishments. Jurisdictions that exempt restaurants may also encounter unintended barriers, since the definitions for restaurants may create ambiguity. Unless carefully monitored, exempted restaurants may transform into bars or nightclubs during late night hours. Such transformations (sometimes called “morphing”) have been observed in California communities with large populations of college-age youth.<sup>17</sup> This highlights the importance of having clearly articulated definitions of terms used in the ordinances.

Although the core structures are similar, there remains a good degree of variation that may affect a jurisdiction’s

commitment to monitoring and enforcement. In other words, specific provisions may support or discourage effective implementation. Examples of supportive provisions include:

- Vallejo’s establishment of a complaint response team and advisory board;
- Remedy opportunity provisions, that provide city officials with the authority to seek resolution of the problem without the need for formal hearings;
- Provisions that make retailers responsible for nuisance activities beyond the strict confines of their establishment and include consideration of the compatibility of the business to other land uses in the neighborhood;
- A clearly articulated hearing and appeals process to be followed in instances of serious non-compliance, reinforcing the city’s intent to enforce the ordinance.

Examples of provisions that may discourage effective implementation include:

- San Leandro’s and Richmond’s lack of penalties for violators beyond paying costs;
- Ventura’s lack of a clear definition of what constitutes a public nuisance in the context of alcohol sales.

Ventura County Behavioral Health Department’s best practices analysis is focused at precisely this level – establishing standards for drafting DAOs that will facilitate their effectiveness in reducing community health and safety problems. All of the ordinances met some of the recommended standards, but all have some omissions or weaknesses. The weaknesses are not necessarily fatal and can be addressed through effective administration. For example, a dedicated law enforcement officer position and complaint response team can be established whether or not they are mandated by the ordinance. However, these practices are more likely to occur and less likely to be abandoned or undermined over time if they are formalized in the ordinance.

These observations point to a limitation of our study. Our analysis focuses on the provisions found in specific DAOs. It omits both administrative practice and companion municipal code provisions not included in the DAO. Our findings and conclusions regarding the relative strength of a particular DAO should be interpreted with this limitation in mind. A city with a relatively weak DAO may have companion provisions addressing some of the identified weaknesses and may have a strong program on the ground. Conversely, a city with a relatively strong ordinance may have weak implementation.

## **Fees**

The findings regarding fee schedules deserve special note. California cities and counties face limited and shrinking budgets, creating enormous pressure on local law enforcement officials to maintain staff and meet conflicting demands for service. DAO enforcement may be in jeopardy despite its positive impact on community safety and the likelihood that it reduces costs through preventing crime and violence. The problem may be exacerbated by the fact that many jurisdictions have relied on GAP (Grant Assistance Program) funds from the California Alcoholic Beverage Control Department to fund local enforcement of ABC laws. When the GAP funds end (usually after one year), the enforcement program is often terminated or continued without sufficient resources to maintain it. Fees provide a foundation for insuring that the costs of the deemed approved program are covered, providing ongoing support for local law enforcement programs, and underwriting the costs of retailer education through Responsible Beverage Service programs.

Increased attention is needed to the fee structure. Enforcement and administration of a DAO should be considered a cost associated with alcohol retail sales. Expecting retailers to incorporate the fee into the retail price of alcohol products is an appropriate exercise of local authority. These costs are enormous, particularly if public health costs are included. However, the costs are not equally spread across all alcohol outlets – some create added risks and costs based on the type and size of the outlet and the manner in which they are operated.

These considerations suggest two improvements to current practice. First, cities and counties should monitor on an ongoing basis their costs associated with retail alcohol sales and the costs of administering and enforcing a

comprehensive deemed approved program. The identified and documented costs should be substantially covered through the fee program.

Second, fees should reflect the relative burden placed on the local jurisdiction by each retail establishment. Jurisdictions should track on a routine basis the past performance of retail establishments (e.g., calls for service, past violations, frequency of patron intoxication, and lack of compliance with Responsible Business Practices) and adjust fees to reflect the extent to which city/county resources have been expended. The Alcohol/Drug Sensitive Information Planning System (ASIPS) provides one means to collect such monitoring data.<sup>18</sup> Retail establishment type is a second important factor to be considered in a fee structure, since, in general, some types (e.g., bars, nightclubs) create more risks and costs than others (e.g., restaurants without separate bars). The size of the alcohol outlet in terms of total alcohol sales represents a third factor, with larger outlets paying higher fees. This reflects the fact that the sheer volume of alcohol sales creates public health and safety costs across the jurisdiction.

A carefully structured fee schedule that is tied to the costs associated with the program will also insure that it can withstand a court challenge that the fee is in fact a tax. As discussed in the introduction, linking the fee to the costs being addressed and documenting those costs are critical steps in defending the fee's legality.

In this light, the fees being imposed among these twelve jurisdictions appear generally low and probably insufficient to fund an effective monitoring and enforcement effort. Consideration should be given to raising the fees to insure effective implementation and establishing an equitable fee structure based on the factors listed above. Increased monitoring of past performance should be integrated into the administration of the ordinance both to improve enforcement and to provide data for establishing fees.

## NOTES TO TABLE 1

1. Dedicated enforcement officer is also dedicated hearing officer.
2. Oakland exempts "full service restaurants" that have facilities to prepare and serve meals on the premises. To qualify for the exemption, the establishment must have at least 60 percent of its revenue derive from food sales.
3. City Council only hears appeals of decisions to revoke deemed approved status.
4. City manager sends notice of abatement to property owner. Property owner may appeal notice to a hearing officer. Appeal of hearing officer's decision is filed in court.
5. Appeals filed through city clerk, and are heard by "hearing officer."
6. Public safety director is charged with enforcement and conducts the hearing. Appeal of a decision to revoke goes to the city manager. The decision of the city manager is final.
7. Appeals are to Board of Appeals except for revocation, which is appealed to Board of Supervisors.
8. "Full-service restaurant," fast food establishments, dance halls and "retail establishments" are included. Bars and nightclubs not specifically included.
9. City attorney charged with enforcing all orders from Zoning Board or City Council.
10. Santa Rosa includes "restaurants with bars" in its ordinance. Restaurants "which serve alcohol with meals" are exempt.
11. Designates a three-member complaint response team, including representatives from development services department, police department, and VAPC (community coalition). Designates an alcohol outlet advisory board consisting of business owners to meet with police department to review complaints and to make recommendations on how to reduce/eliminate problems.
12. City Council only hears appeals of revocations.
13. ABC laws are specified; federal and local laws are not specified.
14. Appeal process not specified; default is City Council.
15. There is \$500 fee for appealing an abatement notice.
16. Penalties not specified.
17. Retailers with less than \$1,000 alcohol annual alcohol sales are exempt from fee.
18. There is a \$200 additional permit fee for entertainment venues.

## REFERENCES

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1. For review of research, see: Ventura County Behavioral Health, *Alcohol Retail Outlet Density Affects Neighborhood Crime and Violence*. Ventura, CA: Ventura County Behavioral Health, Alcohol and Drugs Programs Prevention Services Issue Briefing (September 2008). Available at: [http://www.venturacountylimits.org/pdfs/vcl\\_issuebrief\\_alcoholdensity.pdf](http://www.venturacountylimits.org/pdfs/vcl_issuebrief_alcoholdensity.pdf).
2. For discussion, see Mosher, J., *How to Use Local Regulatory and Land Use Strategies to Prevent Underage Drinking*. Washington, DC: Office of Juvenile Justice and Delinquency Prevention (2000). Available at: <http://www.udetc.org/documents/LocalRegulLandUse.pdf>.
3. California Constitution, Art. 20 §22.
4. Cal. Bus. & Prof. Code § 23790.
5. *Floresta Inc. v. City Council*, 190 Cal.App.2d 599, 605 (1961).
6. Wittman, F. and Shane, P., *Manual for Community Planning to Prevent Problems of Alcohol Availability*, Sacramento: California State Dept of Alcohol and Drug Programs (September, 1988).
7. *Id.* at Appendix B: Case Studies, pp. 119-140.
8. For a description of the Oakland ordinance and its enactment, see Mosher, J. and Works, R., *Confronting Sacramento: State Preemption, Community Control, and Alcohol-Outlet Blight in Two Inner-City Communities*. San Rafael, CA: Marin Institute for the Prevention of Alcohol and Other Drug Problems (1994).
9. *City of Oakland v. Superior Court*, 53 Cal. App.4th 740 (1996), review denied.
10. Ventura County Behavioral Health, *Best Practices in Municipal Regulation to Reduce Alcohol-Related Harms from Licensed Alcohol Outlets*. Ventura, CA: Ventura County Behavioral Health, Alcohol and Drugs Programs Prevention Services (2007).
11. We did not attempt to locate all ordinances due to limited resources. Because there is no single repository for city and county ordinances and on-line search capabilities are limited, such a search would require contacting every jurisdiction.
12. Provisions related to Responsible Beverage Service training programs were excluded, since many cities enact RBS requirements in separate ordinances that would not have been captured in our ordinance search. We also excluded an examination of the links between DAO and CUP ordinances for the same reason. The “findings” sections of DAOs constitute an important variable as well because of their potential role in litigation. Our preliminary analysis suggested that the ordinances all had adequate findings sections and we therefore excluded them from our analysis on this basis.
13. Note that the ordinance can specify that a specific hearing officer will hear all DAO-related cases, but the hearing officer so identified must still be “independent”, (i.e., be impartial). *Haas v. San Bernardino*, 27 Cal.4th 1017, Cal. Rptr.2d 341 (2004).
14. Revocation of a deemed approved ordinance may not necessarily result in closure. The business may apply for a Conditional Use Permit under the city’s CUP ordinance that is applied to new businesses. The requirements for obtaining a CUP are typically more stringent than the performance standards applied to deemed approved outlets.
15. Fee schedules are usually not found in the deemed approved ordinances. We retrieved this information from other sources, including administrative fee schedules available from city governmental offices. All fee rates were confirmed by city officials with responsibility for administering the fees.
16. Recommended practice guidelines are drawn from Behavioral Health (2007) document. See note 10, supra.
17. Wittman, F. *Innovation in Planning, Managing and Policing Hospitality Zones: Issues in Local Land-Use Planning and Zoning for On-Sale Alcohol Outlets*. Berkeley, CA: CLEW Associates, December 29, 2008. Presentation at the Responsible Hospitality Institute Networking Conference, San Francisco, CA, November 12-15, 2008.
18. Wittman, F., Community Control of Alcohol and Drug Risk Environments: The California Experience. *Substance Use and Misuse* 42: pp. 1835-1849 (October 2007).