



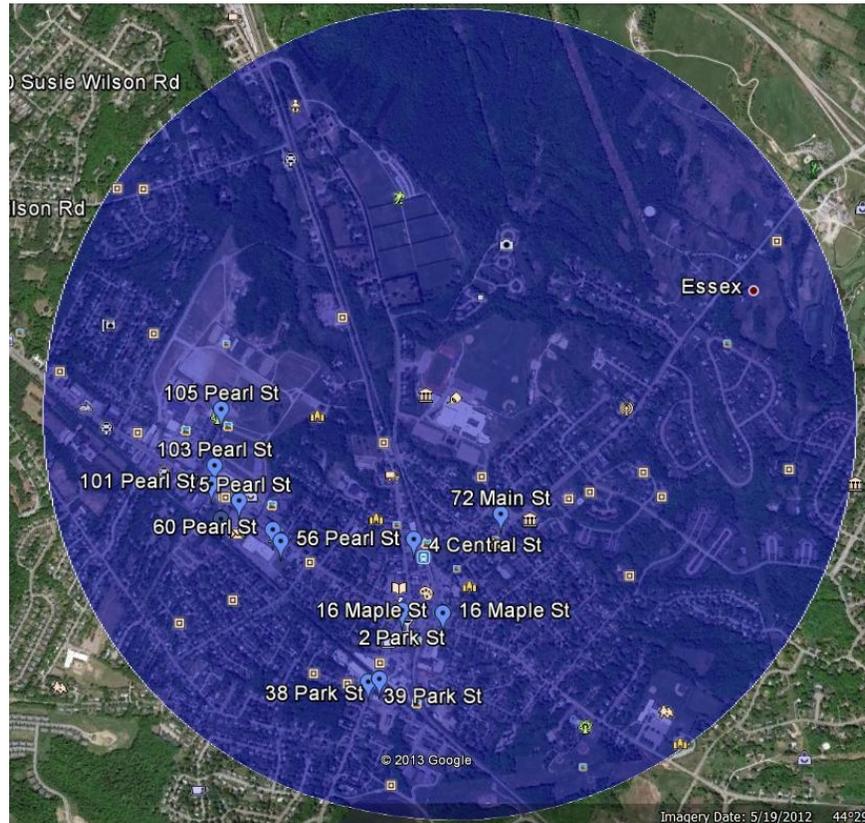
TRUSTEES MEETING NOTICE & AGENDA
TUESDAY, APRIL 9, 2013 at 6:30 PM
LINCOLN HALL MEETING ROOM, 2 LINCOLN STREET

1. **CALL TO ORDER/PLEDGE OF ALLEGIANCE TO FLAG** [6:30 PM]
2. **AGENDA ADDITIONS/CHANGES** [6:30 PM]
3. **GUESTS, PRESENTATIONS AND PUBLIC HEARINGS** [6:30 PM]
 - a. Comments from Public on Items Not on Agenda
4. **NEW BUSINESS** [6:35 PM]
 - a. Discussion and follow up of April 8, 2013 meeting with Essex Selectboard
 - b. Discussion of possible tobacco or "head shop" ordinance
5. **CONSENT AGENDA** [8:25 PM]
 - a. Approve Warrants including checks #10046865 through #10046932 totaling \$75,263.69.
 - b. Letter of Support for VT Rte 2A Proposed Shared Use Path.
6. **ADJOURN** [8:30 PM]

Meetings of the Trustees are accessible to people with disabilities. For information on access or this agenda, call the Village Manager's office at 878-6944. Times on the agenda on approximate.

There are 13 tobacco retail outlets within a 1-mile radius of Essex High School.

There are 25 tobacco retail outlets in Essex (More than 3 per 5 square miles)



Do we really need more?

“Schools with higher rates of student smoking tend to be surrounded by a larger number of tobacco retailers in the neighborhood around the school.” *Scott T. Leatherdale & Jocelyn M. Strath, Tobacco Retailer Density Surrounding Schools and Cigarette Access, Behaviors Among Underage Smoking Students, 33 ANNALS OF BEHAV.MED., 105, 109 (2007).*

“Increased density of tobacco retailers is correlated with increased tobacco use, including youth smoking.” *Scott P. Novak et al., Retail Tobacco Outlet Density and Youth Cigarette Smoking: A Propensity-Modeling Approach, 96 AM. J.PUB.HEALTH 670, 673-4 (2006); Lisa Henriksen et al., Is adolescent smoking related to the density and proximity of tobacco outlets and retail cigarette advertising near schools?, 47 PREV.MED. 210-214 (2008)*

“The more tobacco retailers, the greater the access for young people and the more likely young people are to obtain and use tobacco products.” *TobaccoFreeNYS.org, supra note 3.*

“Youth exposure to tobacco advertising can lead to an increase in youth initiation of smoking, especially when tobacco retailers are located near schools.” *Scott P. Novak et al., Retail Tobacco Outlet Density and Youth Cigarette Smoking: A Propensity-Modeling Approach, 96 AM. J.PUB.HEALTH 670, 673 (2006).*

THE LEGAL LANDSCAPE: VERMONT'S TOBACCO CONTROL LAWS



CENTER FOR PUBLIC HEALTH AND TOBACCO POLICY

NEW ENGLAND LAW  BOSTON

This work provides educational materials and research support for policy initiatives and does not constitute and cannot be relied upon as legal advice.

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Funded by a grant from the Vermont State Department of Health.

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The Center for Public Health & Tobacco Policy is a resource for the Vermont tobacco control community. It is funded by the Vermont State Department of Health and works with the Vermont Tobacco Control Program and its contractors to develop and support policy initiatives that will reduce tobacco-related morbidity and mortality in Vermont.

Executive Summary

Tobacco companies spend millions of dollars every year marketing their deadly products to Vermont residents. While Vermont has made considerable progress in reducing tobacco use, additional policy measures are needed to help counteract the tobacco industry's continued marketing efforts within the state. This report reviews the current legal landscape in Vermont, with a focus on the authority of the state government and local governments to adopt and enforce tobacco control measures.

Part I discusses relevant federal law, with a particular focus on the Family Smoking Prevention and Tobacco Control Act (FSPTCA). This law, enacted by Congress in 2009, granted the U.S. Food and Drug Administration the ability to regulate tobacco products. At the same time, it provided state and local governments with new authority to limit tobacco advertising and promotion. This authority, however, is still subject to limits imposed by the First Amendment of the U.S. Constitution. Tobacco companies may file lawsuits claiming that laws restricting tobacco marketing violate the First Amendment. Communities interested in enacting such laws should carefully consider their ability to prepare for and respond to such a legal challenge.

Part II reviews Vermont's state laws addressing tobacco sales and use. Vermont has laws in place that license tobacco retailers, restrict youth access to tobacco, limit second hand smoke exposure, and tax tobacco products. The report's overview of these laws includes the following findings:

- The state's tobacco retail licensing system is overseen by the Vermont Department of Liquor Control. A tobacco license costs \$10 per year, and there are currently no limits on the number of tobacco licenses that can be issued or on the type or location of retail stores that can obtain tobacco licenses. However, local governments have the authority to object to the issuance of new tobacco retail licenses in their communities.
- State law prohibits selling tobacco products to anyone under 18 years of age, and the Vermont Department of Liquor Control conducts random inspections to ensure compliance.
- Vermont has a comprehensive smoke-free law that prohibits smoking in all indoor public places, including bars and restaurants. The law does not preempt local ordinances that may be even more protective than the state law.
- In 2011, Vermont increased its cigarette excise tax by \$0.38 to \$2.62 per pack. This is well above the national average, but still considerably less than New York State's tax, which stands at \$4.35 per pack.

Part III examines the authority of municipal government to enact tobacco control measures. Municipal governments in Vermont possess only those authorities delegated to them by state law. Some Vermont communities have governance charters that provide them with broad authority to regulate tobacco marketing and retailing. For communities without such charters, the general provisions of state law delegate to municipalities some "police power" authority to regulate tobacco use and sales, but the scope of this authority is unclear. State law also provides municipal governments with zoning authority that can be used to limit the number and location of tobacco retailers.

Local boards of health, which are a cross between a state and a local entity, are also discussed in Part III. These boards are technically a part of the state government, but they operate at the local level. Local boards of health are authorized to make and enforce rules and regulations that address issues of public health concern. Using this authority, boards of health could restrict or prohibit conduct that increases tobacco use by minors or exposes the public to secondhand smoke.

In sum, the current legal landscape provides Vermont and its local governments with both challenges and opportunities. The FSPTCA provides state and local governments with more expansive authority to regulate tobacco advertising and promotion, but policymakers must carefully consider First Amendment limitations before proceeding. At the local level, Vermont's law limits the authority of municipal governments to a greater extent than other states, but local communities still have numerous legal options available if they wish to enact tobacco control measures.

Over the coming months, the Center for Public Health and Tobacco Policy will be developing model policies that take Vermont's legal landscape into account and provide local communities with effective responses to the tobacco industry's aggressive marketing.

Introduction

The tobacco industry spends approximately \$19 million a year marketing its deadly products in Vermont.¹ This marketing has been shown to play a significant role in prompting youth smoking.² Although Vermont has made considerable progress in reducing smoking among youth and adults, additional policy measures are needed in order to counteract the impact of the tobacco industry's continued marketing efforts. Fortunately, Congress's recent enactment of the Family Smoking Prevention and Tobacco Control Act (FSPTCA) provides state and local governments with expanded authority to adopt laws that limit tobacco advertising and promotion.

This report examines the relevant provisions of the FSPTCA, and it also carefully reviews the relevant legal landscape in Vermont. Although the State of Vermont now possesses broad authority to adopt a wide range of tobacco control measures, local governments are more narrowly circumscribed in their authority. As detailed in this report, however, local governments have at their disposal a variety of legal tools that can be used to regulate tobacco use and tobacco marketing. By thinking creatively about how these different legal mechanisms can be utilized, local communities in Vermont should be able to accomplish most – if not all – of their tobacco control goals.

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Part I – Federal Law: The FSPTCA and the FCLAA

The federal government recently expanded the ability of state and local governments to regulate tobacco marketing when Congress passed the Family Smoking Prevention and Tobacco Control Act (FSPTCA) in 2009.³ Prior to enactment of the FSPTCA, the Federal Cigarette Labeling and Advertising Act (FCLAA) provided that the federal government held the exclusive authority to regulate tobacco advertising and promotion.⁴ Congress passed the FCLAA in 1965. The act required packages of cigarettes to be labeled with health warnings.⁵ In 1970, the FCLAA was amended to require stronger warning labels.⁶ At the same time, the act was modified to include expanded preemption language that prevented state and local governments from regulating or limiting the “advertising or promotion” of cigarettes.⁷ (In this context, preemption means that the federal government reserved to itself the power to regulate in this area, barring state and local governments from doing so.⁸)

Although the federal government maintained the exclusive ability to regulate tobacco advertising and promotion under the FCLAA, it did little to place limits on the advertising and promotion of cigarettes between the act's amendment in 1970 and the passage of the FSPTCA. Throughout this time period, tobacco companies aggressively targeted youth with promotional campaigns such as R.J. Reynolds' infamous “Joe Camel” campaign.⁹

Although the FSPTCA was primarily concerned with providing the U.S. Food and Drug Administration (FDA) with authority to regulate tobacco products,¹⁰ it also contained provisions that altered the ability

of state and local governments to regulate tobacco marketing. The act modified the preemption provision of FCLAA, such that federal law now allows states, in addition to the federal government, to regulate tobacco advertising and promotion.¹¹ The FCLAA, modified by the FSPTCA, now reads:

No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter. . . . Notwithstanding [the preceding], *a State or locality may enact statutes and promulgate regulations, based on smoking and health...imposing specific bans or restrictions on the time, place, and manner, but not content, of the advertising or promotion of any cigarettes.*¹²

According to this modified preemption provision, state and local governments are now able to regulate the “time”, the “place”, and the “manner” in which cigarette companies can advertise their products. A “time” regulation is one that restricts the time of day or day of the week that advertising occurs. A “place” regulation is one that restricts where advertising can be displayed. A “manner” regulation is one that restricts the types of marketing that are allowed. For instance, a law that prohibits the free distribution of tobacco products would likely be considered a “manner” regulation.¹³ State and local governments are still barred from regulating the “content” of tobacco advertisements. Thus, for example, states cannot require separate, state-specific health warnings to be placed on tobacco advertisements.

Prior to the passage of the FSPTCA, many state and local advertising restrictions were invalidated because they violated the FCLAA’s preemption of state and local action. In Vermont, a 1998 federal court found that portions of a Burlington city ordinance that aimed to regulate advertising and sales of tobacco products in the city were preempted by the FCLAA.¹⁴ Now that the FCLAA’s preemption scheme has been altered by the FSPTCA, state and local governments will have more leeway to craft regulations on tobacco advertising. For instance, under the revised preemption provision, states and localities will not be preempted by federal law from restricting the visible display of tobacco products at the point of sale because this type of restriction is a “place” and “manner” regulation. Nonetheless, any restriction on tobacco advertising or promotion could still be subject to a First Amendment challenge (see text box below).

It is important to note that the FSPTCA did not affect state and local authority to regulate tobacco products in other areas where they were already allowed to do so. For example, the FSPTCA did not interfere with state and local authority to enact smoke-free laws, raise tobacco taxes, restrict the sale of tobacco products, or fund counter-marketing campaigns.¹⁵

First Amendment and Tobacco Control

Although the FSPTCA provides states with expanded authority to regulate the advertising and promotion of tobacco products, such laws are still subject to limitations imposed by the First Amendment of the U.S. Constitution. First Amendment challenges – claiming that the law violates the First Amendment’s protection of “commercial speech” – are often filed against tobacco control measures in an attempt to prevent the law from going into effect or to discourage other communities from adopting the same law.

Commercial speech is the communication of information for economic reasons, including promotions and advertising intended to increase demand for consumer products. The degree to which such speech is protected by the First Amendment is subject to debate. When deciding whether a certain law violates the First Amendment’s commercial speech protections, the most commonly applied test is the four-pronged test developed in a case called *Central Hudson* (the “*Central Hudson test*”).¹⁶

Under the *Central Hudson* test, the court first considers whether the product at issue is legal and the communication being restricted is truthful. If so, then the government must establish that (a) the government has a substantial interest in what it seeks to achieve; (b) the law directly advances the government’s interest(s); and (c) a more limited restriction on commercial speech could not advance the government’s interest(s).

In tobacco-related cases, it is usually the last two prongs of the test – whether the restriction at issue advances the government’s interest and whether a more limited restriction could have sufficed – that are most heavily contested.

Tobacco companies raised First Amendment challenges to numerous portions of the FSPTCA in a case filed in Kentucky. In 2010, a district court judge upheld most portions of the law against First Amendment challenges, including restrictions on tobacco-branded merchandise and prohibitions on the sponsorship of athletic activities.¹⁷ However, the judge ruled that the section of the law prohibiting the use of colors and graphics in tobacco packaging and advertising was too restrictive, because a more narrowly framed restriction could have accomplished the same objectives. The case has been appealed to the Sixth Circuit Court of Appeals, which should issue a ruling within the next few months. It is likely that the case will subsequently be appealed to the U.S. Supreme Court. If the Supreme Court considers the case, its ruling should provide clearer guidance about how the First Amendment applies to restrictions on tobacco marketing.

States or communities considering restrictions on tobacco marketing or advertising should consider how they can best develop a strong record of evidence demonstrating why the restriction is needed and why a more narrow restriction would be incapable of accomplishing the same goal.

Part II – Vermont State Law

Vermont has enacted a variety of state-level tobacco control laws that provide a very strong foundation for future tobacco control efforts. Among Vermont’s many statutes addressing tobacco use in the state are licensing laws, youth access laws, clean indoor air laws, and tobacco tax laws.

Vermont Tobacco Retailer Licensing

A retailer must obtain a tobacco license in order to sell tobacco products in Vermont.¹⁸ A license is also required to operate a vending machine that sells tobacco products.¹⁹ For the purposes of this statute, “tobacco products” are defined as:

[C]igarettes, cigars, cheroots, stogies, periques, granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco, snuff, snuff flour, Cavendish, plug and twist tobacco, fine-cut, and other chewing tobaccos, shorts, refuse scraps, clippings, cuttings, and sweepings of tobacco, and other kinds and forms of tobacco prepared in a manner suitable for chewing or smoking in a pipe or otherwise, or both for chewing and smoking.²⁰

While this definition was clearly intended to be broad, because of its focus on “chewing or smoking,” it might not cover newly-emerging tobacco products such as dissolvable tobacco (sticks, orbs, etc.) and e-cigarettes. Thus, it is not clear that a

tobacco license is currently required in order to sell such products.

Applicants must apply to the “legislative body of the municipality” to receive either a tobacco license or a joint liquor-tobacco license.²¹ Tobacco license applicants must pay a \$10.00 fee for a new tobacco license or to renew an existing tobacco license.²² Once approved by the municipality, the municipal clerk forwards the application to the Vermont Department of Liquor Control and the department issues the tobacco license.²³ Each license is valid through April 30th of the following year.²⁴

Liquor-tobacco license applicants are only required to pay the liquor license fee to obtain a liquor-tobacco license.²⁵ The fee for a first class liquor license is \$100, and the fee for a second class liquor license is \$200.²⁶ A tobacco license may be issued with either a first or a second class liquor license. First class licenses are issued to restaurants where beer and wine will be consumed on the premises. Second class liquor licenses are issued to businesses that sell beer and wine that will be consumed off the premises.²⁷ Fifty percent of the license fee for a first or a second class license is paid to the municipality where the licensed premises are located, unless the municipality contracts with the department to be responsible for enforcing the licenses, in which case it is entitled to more than fifty percent of the fee.²⁸

There are currently no limits on the number of tobacco licenses that can be issued or on the type or location of retail stores that can obtain tobacco licenses. However, it appears that local governments do have the authority to decide whether or not to issue a tobacco license (or a liquor-tobacco license) to an applicant, even if all of the minimum

requirements for a license are met.²⁹ Similarly, the Department of Liquor Control also has the authority to deny a license, even if the minimum requirements are met, and even if the applicant has obtained a license in the past.³⁰ It is less clear whether either municipalities or the department have the authority to impose additional conditions to licenses that are issued (in addition to the minimum requirements imposed by state law).³¹

Display Requirement

Each tobacco licensee is required to “prominently” display its tobacco license at the location where it is licensed to sell tobacco products.³² Additionally, each licensee must display a “plainly printed copy of the provisions of sections 1004 and 1005 . . . in a conspicuous place on the premises identified in the tobacco license and on any vending machine located on the premises.”³³ Section 1004 requires proof of age for the sale of tobacco products, and Section 1005 prohibits the sale of tobacco to any person under the age of 18.³⁴

Education Requirement

Tobacco license applicants who do not already have a liquor license must meet with a liquor control investigator before the applicant will be granted a tobacco license.³⁵ During this meeting, the liquor control investigator will provide the applicant with information regarding the laws governing the purchase, storage, and sale of tobacco products in Vermont.³⁶ Additionally, tobacco licensees that do not also hold a liquor license must complete the enforcement seminar offered by the department every three years, at a minimum.³⁷ Furthermore, before an employee may sell or provide tobacco products, that employee must complete a department approved training program. Each employee selling or providing tobacco

products must complete this training at least every 24 months.³⁸ The licensee may hold this training on its own premises as long as the licensee uses materials and information provided by the department.³⁹ A retailer’s tobacco license will not be renewed if the Department’s records show that the licensee failed to satisfy the education requirements.⁴⁰

Penalties

If a tobacco licensee violates the legal conditions of the tobacco license, the local legislative body or the liquor control board are authorized to suspend or revoke the license.⁴¹ The tobacco licensee may also be fined for the violation with an administrative penalty up to \$100 for a first violation and up to \$1000 for successive violations.⁴² However, a tobacco licensee will not have its license suspended or revoked on the first violation of the license.⁴³ For a first violation of a tobacco license during a tobacco compliance check in any three year period, the licensee will receive a warning and must attend a “department server training class.”⁴⁴ Before a tobacco license may be suspended, the licensee is entitled to notice and “a hearing before the liquor control board or the local governing body, whichever applies.”⁴⁵ A tobacco license may not be revoked until the licensee is provided with notice and a hearing, unless the licensee has received a court conviction for violating the legal conditions of the tobacco license.⁴⁶

If a retailer sells tobacco without first applying for and obtaining a tobacco license, that retailer can be fined up to \$200 for the first offense and up to \$500 for subsequent offenses.⁴⁷

If a licensed tobacco retailer fails to make certain that each employee completes the Department of Liquor Control’s approved

training prior to selling tobacco products (and at least once every two years thereafter), the retailer will have its license suspended for at least one day.⁴⁸ If a tobacco license is suspended, the retailer may not “sell, serve, allow the consumption of, make orders for, or receive deliveries of tobacco products on the premises.”⁴⁹

Tobacco Wholesalers

Wholesale dealers and distributors of tobacco products must obtain a license from the Commissioner of Taxes before they can sell tobacco products in Vermont.⁵⁰ If a wholesaler owns or controls more than one wholesale outlet, that wholesaler must apply for separate licenses for each wholesale outlet.⁵¹ Unlike retail licenses, wholesaler licenses have no set expiration or renewal date. Licenses issued to tobacco wholesalers are “valid as long as the licensee continues to do business at the place named unless revoked or suspended by the commissioner[.]”⁵² Tobacco wholesaler licenses are issued by the Commissioner of Taxes for no fee.⁵³ The license must be displayed at the location for which it is issued.⁵⁴ If a wholesaler sells tobacco products without a license, the wholesaler will be fined up to \$25 for the first offense and between \$25 and \$200 for any later offense.⁵⁵

Enforcement

The Vermont Department of Liquor Control is responsible for enforcement of liquor and tobacco laws in the state.⁵⁶ The liquor control board has the authority to make any rules or regulations it deems necessary to enforce the liquor and tobacco control laws.⁵⁷ As of 2010, there were over 900 retailers licensed to sell tobacco products in Vermont.⁵⁸ The Department of Liquor Control surveys tobacco retailers for compliance each month to see if selected

retailers will sell tobacco to a minor.⁵⁹ The department tracks results of the compliance surveys on its website.⁶⁰

Vermont Youth Access Laws

Purchase, Sale, and Possession of Tobacco Products

There are many Vermont statutes that restrict youth access to tobacco. To begin with, tobacco retailers are prohibited from selling tobacco products to anyone less than 18 years of age.⁶¹ Likewise, no one younger than 18 years of age is permitted to purchase or possess tobacco products unless he or she is the employee of a licensed tobacco retailer and is in possession only for purposes of selling tobacco during employment.⁶² A person must be at least 16 years old to sell tobacco products in Vermont.⁶³

When purchasing tobacco products, on request of the retailer, a person must show proof that he or she is of legal age to purchase tobacco products.⁶⁴ Sufficient proof to demonstrate a purchaser is of legal age to purchase tobacco products may be in the form of a driver’s license, a passport, or a non-driver ID card.⁶⁵ If a person who is not of legal age is found to be in possession of tobacco products, that person may be fined a civil penalty of \$25.00.⁶⁶ Also, if someone under the age of 18 presents false identification to purchase tobacco products, that person may be fined up to \$50.00 and/or may be required to provide up to ten hours of community service.⁶⁷

If tobacco products are sold or otherwise provided to a person younger than 18 years old, the person who provided tobacco products may be penalized with fine up to \$100 for the first offense and a fine up to \$500 for any later offense.⁶⁸ The

Department of Liquor Control conducts compliance checks each month of randomly selected licensed tobacco retailers.⁶⁹ For each compliance check, a youth, typically 15 to 16 years old, enters a licensed tobacco retail outlet and asks to purchase tobacco.⁷⁰ The participating minors are instructed to be honest about their ages and to not pressure the store clerk to sell them tobacco products.⁷¹ In 2009, 10.7% (79) of 742 licensed tobacco retailers sold tobacco products to minors during a compliance check, and in 2010, 11.6% (106) of 909 tobacco retailers surveyed sold to minors during a compliance check.⁷²

Tobacco Use on School Grounds

Tobacco use is prohibited on public school grounds, and students are prohibited from using tobacco at any public school sponsored function.⁷³ Public school boards are charged with adopting policies that prohibit student use and possession of tobacco products any time they are under school supervision.⁷⁴ The school boards' policies must include "confiscation and appropriate referrals to law enforcement authorities."⁷⁵

Vermont Clean Indoor Air Laws

In Vermont, smoking is not allowed in any indoor public places, including bars and restaurants.⁷⁶ Smoking is defined as "[t]he possession of lighted tobacco products in any form."⁷⁷ The law explicitly provides that it does not preempt local ordinances that may be even more protective than the state law.

The smoke-free law does not assign enforcement responsibility to any agency. Business proprietors are required to ask people in violation of the law to stop smoking, and, if they refuse, to leave the

premises.⁷⁸ If the person refuses to leave when asked, the proprietor – or any member of the public – can call local law enforcement for assistance.

Under a separate law protecting employees, an employee may file a complaint with the Department of Health if an employer allows smoking in a workplace.⁷⁹ If the Commissioner of Health finds that the employer violated the law, the employer can be fined \$100.⁸⁰ An employer may not retaliate against an employee because the employee sought to enforce the protections of Vermont's smoke free workplace laws.⁸¹

Vermont Tobacco Tax Laws

The current tax on cigarettes in Vermont is \$2.62 per pack, effective July 1, 2011.⁸² This is above the national average of \$1.46 per pack.⁸³ In neighboring states, New York taxes cigarettes at \$4.35 per pack, Massachusetts at \$2.51 per pack, and New Hampshire at \$1.68.⁸⁴ Under the Vermont tax laws, a cigarette is defined as:

- (A) any roll of tobacco wrapped in paper or any substance not containing tobacco; and
- (B) any roll of tobacco wrapped in substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely offered to, or purchased by consumers as a cigarette described in subdivision (A) of this subsection.⁸⁵

Little cigars, which are taxed at the same rate as cigarettes, are defined as "any rolls of tobacco wrapped in leaf tobacco or any substance containing tobacco (other than any roll of tobacco which is a cigarette

within the meaning of subdivision (1) of this section) and as to which one thousand units weigh not more than three pounds.”⁸⁶

A snuff tax is imposed on tobacco products which are not intended to be smoked, have moisture content of forty-five percent or higher, or are not offered in individual single dose or single-use units, at a rate of \$1.87 per ounce, or \$2.24 per 1.2 ounce package.⁸⁷ For larger packages, the rate is \$1.87 per ounce.

A tobacco tax is imposed on all other tobacco products at the wholesale level. The tax on cigars is determined based on the wholesale price of the cigar. If the wholesale price of a cigar is \$2.17 or less, the tax is 92% of the wholesale cost. If the wholesale price is between \$2.18 and \$10.00 the tax is \$2.00 per cigar.⁸⁸ If the wholesale price of the cigar is above \$10.00 per cigar the tax is \$4.00 per cigar.⁸⁹ For all remaining tobacco products, the wholesale tax rate is 92% of the wholesale price.⁹⁰ A 2% discount is permitted if the tax is paid within ten days.⁹¹

Part III – Vermont Local Law

Municipal Authority to Enact Tobacco Control Laws

The authority of Vermont’s municipal governments to act is delegated to the locality from the state government. In a majority of states, local governments act pursuant to “home rule,” which provides municipal governments with wide latitude to create local policies.⁹² A minority of states, including Vermont, follow Dillon’s Rule, which is more restrictive.⁹³ Under Dillon’s Rule, the powers of a municipal government include, “(1) powers expressly conferred by

the constitution, statutes, or charter; (2) powers necessarily or fairly implied in, or incident to, the powers expressly granted; and (3) powers essential to the declared objects and purposes of the municipality, the latter often being classified as among the implied powers.”⁹⁴ Vermont courts have strictly applied Dillon’s Rule, finding that if there is any question of whether or not the municipality has authority to act, judgment must be against the municipality.⁹⁵ In short, the general rule is that municipalities only have the authority to regulate with respect to a particular topic if a state law has expressly delegated that power to municipalities.⁹⁶ The exception to this general rule is that local governments may adopt governance charters that allow for the exercise of more expansive authority.

Governance Charters

If a municipality has a governance charter, the charter may contain provisions that provide it with broader authority than state law otherwise grants to municipalities.⁹⁷ Approximately eighty-five municipalities in Vermont operate under a governance charter.⁹⁸ Typically, a governance charter is adopted by the voters of a municipality and afterwards is sent to the state legislature for approval and adoption into state law.⁹⁹ When a municipal charter is adopted, its provisions take precedence over otherwise applicable state law.¹⁰⁰

Municipalities that operate under governance charters should review their charter to determine whether there is an express grant of authority within the charter to regulate the tobacco retailers within their municipality. At least three municipalities with governance charters in Vermont provide the explicit authority to regulate the location where tobacco products can be sold.

- Under the Town of St. Johnsbury’s municipal charter, the town’s selectmen possess the authority to “make, establish, impose, alter, amend or repeal ordinances and regulations” that regulate “all places where tobacco, cigars and cigarettes are manufactured or sold[.]”¹⁰¹
- The Village of Lyndonville maintains authority over “[t]he construction, establishment, location, use, operation and the licensing . . . all places where tobacco, cigars and cigarettes are sold or disposed of[.]”¹⁰²
- The Village of Wells River has authority “to enact and adopt ordinances, bylaws, and other regulations respecting the following matters within the village limits: . . .(B) The construction, location, and use, and the licensing of . . . all places where tobacco, cigars, and cigarettes are sold or disposed of[.]”¹⁰³

Other municipal charters may grant municipalities broader authority to regulate for purposes related to the public health and welfare without explicitly mentioning tobacco. These charters may also provide sufficient authority to regulate tobacco retailers.

Police Power

States possess the power to regulate to protect the health and safety of its citizens under the “police power” inherent in state authority.¹⁰⁴ Vermont’s police power is understood as “the general power of the legislative branch to enact laws for the common good of all the people.”¹⁰⁵ Vermont delegates police power authority to

municipalities within the state via state statutes.¹⁰⁶ As discussed above, some municipalities may also be delegated police power authority under their governance charters.¹⁰⁷ The Vermont legislature has delegated some police power authority to municipalities to act in specified areas under Vt. Stat. Ann. tit. 24, § 2291. For example, pursuant to this statute, municipalities have the authority to “define what constitutes a public nuisance, and to provide procedures and take action for its abatement or removal as the public health, safety or welfare may require.”¹⁰⁸ Both secondhand smoke and tobacco use by minors could reasonably be defined as “public nuisances.” Therefore, a strong argument can be made that state law provides local governments with the authority to adopt measures that address either problem.¹⁰⁹ (Note, however, that any policy measures adopted may be subject to a First Amendment challenge if they restrict the tobacco companies’ ability to communicate with potential customers.)

At the state level, Vermont is able to license tobacco retailers under the state’s tobacco licensing legislation. Although currently there are no local tobacco retail licensing requirements, local licensing schemes can be an effective tobacco control tool. Local tobacco retail licensing can be used as a means to regulate the location, number, and type of establishments that sell tobacco products. In Vermont, some localities may be able to implement local tobacco retail licensing requirements, in addition to state license requirements, under authority delegated to them in their governance charter. In the absence of government charter, is it not clear that municipal governments would have the authority to adopt their own licensing systems. However, as discussed above, municipal legislatures could play a more active role in

the decision to grant or deny tobacco licenses issued by the state.

Zoning

Municipalities may also have the authority to limit the number and location of tobacco retailers through zoning laws. Zoning means dividing an area into districts and applying different land use regulations to each district.¹¹⁰ Through zoning ordinances, municipalities can restrict the ways different areas of land, or districts, within the municipality are used.

Municipalities in Vermont derive authority to enact zoning ordinances from a state law, the Vermont Planning and Development Act.¹¹¹ The Vermont Planning and Development Act includes a section outlining its purposes. One such purpose is to encourage municipalities and regions inside of Vermont to develop land in a manner that will promote the public health.¹¹² Using this authority, a community could, for example, enact a zoning ordinance that prohibits new tobacco retailers in a zone that contains a school, playground, or other youth oriented facilities. The establishment of tobacco free zones around schools or other youth oriented facilities is a means of reducing tobacco use and therefore promotes public health.

Municipalities in Vermont carry out their community planning efforts through a planning commission, a planning director, or a regional planning commission.¹¹³ Planning commissions and directors make zoning recommendations and proposals to the legislative bodies of their municipalities.¹¹⁴ The legislative bodies are typically responsible for actually enacting zoning ordinances after a public hearing on the bylaw or amendment.¹¹⁵

Regional planning commissions may be established by a popular vote or by the legislative bodies of multiple adjoining municipalities, with the approval of the Vermont Agency of Commerce and Community Development.¹¹⁶ These commissions then prepare regional plans, and prepare guidelines for the municipal implementation of the plans.¹¹⁷ Vermont state law requires that regional plans be created in a manner that will “best promote the health, safety, order, convenience, prosperity and welfare of the inhabitants[.]”¹¹⁸ The legislative body of a municipality may adopt the entire regional plan or portions of the plan.¹¹⁹ Regional planning commissions could create regional plans that include tobacco free zones around youth facilities and could encourage municipalities to adopt these plans in the interest of the health and safety of their inhabitants.

A municipality may establish zoning districts and classify some uses of the land within that district as permissible and others as conditional uses.¹²⁰ The uses that are classified as “conditional uses” are not allowed without permission from the municipality.¹²¹ A conditional use is one that is not allowed as a matter of right in a particular zoning district. For example, a municipality may grant a conditional use permit (CUP) to a health care clinic in an area that is zoned for residential use. The grant of a CUP is discretionary. In implementing a tobacco free zoning ordinance, the municipality would designate tobacco sales as a conditional use of the land in a specified area. This type of zoning ordinance may be less likely to face a legal challenge if it grandfathers in existing businesses instead of prohibiting already existing retailers from continuing to operate. In this way, the zoning ordinance will reduce the number and density of tobacco

retail outlets in a district over time as no new retailers will be permitted in the district. Potentially, a zoning ordinance could also be used to place conditions on existing retailers and to prohibit them from expanding their tobacco businesses or transferring them to new owners. More legal research is needed to evaluate the feasibility of such options.

Board of Health Authority

Local boards of health are responsible for creating policies and making recommendations that benefit the public's health. In Vermont, local boards of health consist of the local health officer and the selectmen of a town or the city council of a city.¹²² The local health officer is appointed by the Vermont Commissioner of Health based on a recommendation from the local legislature.¹²³ Additionally, upon a town or city's request, the Commissioner can appoint one or more deputy local health officers.¹²⁴ With the Commissioner's permission, towns and cities can come together to form health districts. In such cases, the Commissioner (with input from the towns and cities in the district) appoints a health district officer responsible for the entire district.¹²⁵

Local boards of health in Vermont are authorized under state law to make and enforce rules and regulations related to the prevention, removal, or destruction of public health hazards and the mitigation of public health risks.¹²⁶ However, the rules enacted by a local board of health must be approved by the state Commissioner of Health before they can be enforced. Boards can enforce their rules and the state's health laws by issuing "health orders" (or "emergency health orders" in cases where there is an imminent risk to the public's health).¹²⁷ Also, local boards of health may file a lawsuit in the county where a public health hazard or public health risk has occurred or

is occurring in order to enforce the provisions of Vermont's health laws.¹²⁸ There are stiff penalties for failure to comply with a health order. If a person fails to comply or if the person violates a provision of the health laws, that person can be fined as much as \$5,000.¹²⁹ If the violation is continuing, each day will be considered a separate violation and the violator can be fined up to \$25,000.¹³⁰

As mentioned earlier, both secondhand smoke and tobacco use by minors could reasonably be defined as a "public nuisance," and secondhand smoke is clearly a public health risk. With this in mind, an argument can be made that local boards of health are authorized to issue health orders, make regulations and provide public health recommendations to address either problem, as long as those actions do not conflict with any previously enacted state or federal law.¹³¹ (However, as stated above, board of health regulations must be approved by the state Commissioner of Health.) Moreover, local health officers can help facilitate adoption of tobacco control measures by providing expert guidance to their communities and to local legislators.

Conclusion

The enactment of the Family Smoking Prevention and Tobacco Control Act is one of the most significant tobacco control developments in recent years. This law provides state and local governments with expanded authority to regulate tobacco advertising and promotion. The new authority granted by the FSPTCA is, however, limited by the First Amendment and by applicable state law.

At the state level, Vermont already has numerous tobacco control laws in place. These laws could, however, be modified to make them stronger and more effective. For example, the state's tobacco retail licensing law currently requires an annual fee of only \$10.00. A higher fee would provide the state with additional funding to enforce its tobacco-related laws, and it might dissuade some retailers from seeking to sell tobacco products. The state's licensing law could also be amended to prohibit the issuance of new retail licenses to retailers locating near schools. This measure could help protect kids from exposure to tobacco marketing.¹³²

Vermont limits the authority of municipal governments to a greater extent than other states. Local governments must be able to connect every tobacco control law or regulation to a state law that provides them with the authority to enact such a measure.

Many communities have governance charters, and these charters may provide some communities with broader authority to regulate tobacco retailers or tobacco marketing. Communities without such charters still have numerous legal options to explore. They can (1) regulate tobacco marketing as a "public nuisance" under the police powers delegated to them by the state; (2) work with their local planning director or planning commission to enact tobacco-related zoning rules; or (3) they can work with their local board of health to adopt health regulations. In addition, local governments can use their role in the state's tobacco licensing system to object to the issuance of new licenses to tobacco retailers in their communities. Working with local legal counsel, municipal governments should be able to accomplish their tobacco control objectives by using a combination of these legal tools.

Citations

¹ Ann Boon, Campaign for Tobacco-Free Kids, *State-Specific Tobacco Company Marketing Expenditures, 1998-2008* (Aug. 2, 2011), available at <http://www.tobaccofreekids.org/research/factsheets/pdf/0271.pdf>.

² See NATIONAL CANCER INSTITUTE, *THE ROLE OF MEDIA IN PROMOTING AND REDUCING TOBACCO USE* (Monograph 19) (2008), available at <http://www.cancercontrol.cancer.gov/tcrb/monographs/19/index.html>.

³ Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009).

⁴ Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. §§ 1331-1341).

⁵ *Id.*

⁶ Federal Cigarette Labeling and Advertising Act, Pub. L. No. 91-222 (1970) (codified as amended at 15 U.S.C. § 1334).

⁷ *Id.* § 5(b) (“No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.”).

⁸ U.S. CONST. art. VI, cl.2 (stating that the laws of the United States are the “supreme law of the land” and enjoy legal superiority over any conflicting provision of a state constitution or law).

⁹ Joseph R. DiFranza et al., *RJR Nabisco’s Cartoon Camel Promotes Camel Cigarettes to Children*, 266 J. AM. MED. ASS’N 3149 (1991).

¹⁰ Previously, the Supreme Court had determined that the FDA was unable to regulate tobacco products without express congressional authorization, *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 121 (2000) (“Considering the FDCA as a whole, it is clear that Congress intended to exclude tobacco products from the FDA’s jurisdiction.”).

¹¹ Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776, 1786 (2009) (codified at 21 U.S.C. §387p(a)(1) (2010)).

¹² Federal Cigarette Labeling and Advertising Act, Pub. L. No. 91-222 (1970) (codified as amended at 15 U.S.C. § 1334 (2010)) (emphasis added).

¹³ Prior to the enactment of the FSPTCA, several courts had invalidated restrictions on the free distribution of tobacco products, on the grounds that they were preempted by the FCLAA. *Jones v. Vilsack*, 272 F.3d 1030 (8th Cir. 2001); *R.J. Reynolds Tobacco Co. v. Seattle-King County Department of Health*, 473 F. Supp. 2d 1105 (W.D. Wash. 2007); *R.J. Reynolds Tobacco Co. v. McKenna*, 445 F. Supp. 2d. 1252 (W.D. Wash. 2006); *Rockwood v. City of Burlington*, 21 F. Supp. 2d 411 (D. Vt. 1998).

¹⁴ *Rockwood v. City of Burlington*, 21 F.Supp.2d 411 (D. Vt. 1998).

¹⁵ See 21 U.S.C. § 387p(a)(1) (2011) (“Except as provided in paragraph (2)(A), nothing in this subchapter, or rules promulgated under this subchapter, shall be construed to limit the authority of a Federal agency (including the Armed Forces), a State or political subdivision of a State, or the government of an Indian tribe to enact, adopt, promulgate, and enforce any law, rule, regulation, or other measure with respect to tobacco products that is in addition to, or more stringent than, requirements established under this subchapter, including a law, rule, regulation, or other measure relating to or prohibiting the sale, distribution, possession, exposure to, access to, advertising and promotion of, or use of tobacco products by individuals of any age, information reporting to the State, or measures relating to fire safety standards for tobacco products. No provision of this subchapter shall limit or otherwise affect any State, tribal, or local taxation of tobacco products.”).

¹⁶ *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 564 (1980). Different First Amendment standards may apply if the law it issue *compels* speech instead of limiting it (as in the case of mandated health warnings). A less rigorous standard also applies if the law at issue is intended to regulate conduct and has only an incidental effect on the communication of information (such as restrictions on the use of vending machines).

¹⁷ *Commonwealth Brands v. United States*, 678 F. Supp. 2d 512 (W.D. Ky. 2010).

¹⁸ VT. STAT. ANN. tit. 7, § 1002(a) (2011).

¹⁹ VT. STAT. ANN. tit. 7, § 1001(5) (2011). Vending machines can only be located in adults-only locations; *see also* VT. STAT. ANN. tit. 7, § 1003(b) (2011).

²⁰ VT. STAT. ANN. tit. 7, § 1001(3) (2011).

²¹ VT. STAT. ANN. tit. 7, § 1002(d) (2011).

²² VT. STAT. ANN. tit. 7, § 1002(d) (2011). The municipal clerk will keep \$5.00 of the fee, and the remaining \$5.00 will be deposited in the treasury of the municipality.

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- ²³ VT. STAT. ANN. tit. 7, § 1002(d) (2011).
- ²⁴ VT. STAT. ANN. tit. 7, § 1002(a) (2011).
- ²⁵ VT. STAT. ANN. tit. 7, § 1002(d) (2011).
- ²⁶ See First/Second Class Liquor License and Tobacco Application, <http://www.state.vt.us/dlc/licensing/applications/1st2nd.pdf>.
- ²⁷ VT. STAT. ANN. tit. 7, § 222(1)&(2) (2011); and First/Second Class Liquor License and Tobacco Application, <http://www.state.vt.us/dlc/licensing/applications/1st2nd.pdf.A>
- ²⁸ VT. STAT. ANN. tit. 7, § 231(b)(2) (2011).
- ²⁹ See State ex rel. Billardo v. Control Comm’rs of South Burlington, 114 Vt. 350 (Vt. 1946) (holding that the decision regarding whether to grant a liquor license is within the discretion of the local legislative body, so long as its actions are not “arbitrary or capricious”).
- ³⁰ See Carousel Grill v. Liquor Control Bd., 123 Vt. 93, 94 (Vt. 1962) (holding that state has discretionary authority to deny renewal of liquor license, and noting that a license “is at most a privilege which of necessity is subordinate to the public interest and the police power of the state”).
- ³¹ The Department of Liquor Control does have the authority to condition the grant of license on compliance with a local ordinance that regulates a public nuisance. VT. STAT. ANN. tit. 7, § 167(b) (2011). However, this authority appears to be limited to first class liquor licenses. The department also possesses more general authority to impose terms and conditions on the issuance of liquor licenses. VT. STAT. ANN. tit. 7, § 104(8) (2011). But this statutory provision discusses only liquor licenses and does not mention tobacco licenses.
- ³² VT. STAT. ANN. tit. 7, § 1002(c) (20011).
- ³³ VT. STAT. ANN. tit. 7, § 1006(a) (2011).
- ³⁴ VT. STAT. ANN. tit. 7, § 1004 (2011); and VT. STAT. ANN. tit. 7, § 1005 (2011)
- ³⁵ VT. STAT. ANN. tit. 7, § 1002a (2011); see also VT. CODE R. §14-1-10(2) (2011).
- ³⁶ VT. STAT. ANN. tit. 7, § 1002a (2011).
- ³⁷ VT. STAT. ANN. tit. 7, § 1002a(b)(1) (2001).
- ³⁸ VT. STAT. ANN. tit. 7, § 1002a(b)(2) (2001); see also VT. CODE R. § 14-1-10(3)(b) (2011).
- ³⁹ VT. STAT. ANN. tit. 7, § 1002a(b)(2) (2001).
- ⁴⁰ VT. CODE R. §14-1-10(3)(c) (2011).
- ⁴¹ VT. STAT. ANN. tit. 7, § 236(a) (2011) (“(a)The control commissioners or the liquor control board shall have power to suspend or revoke *any permit or license granted pursuant to this title* in the event the person holding such permit or license shall at any time during the term thereof so conduct his or her business as to be in violation of this title, the conditions pursuant to which such permit or license was granted or of any rule or regulation prescribed by the liquor control board.”) (emphasis added).
- ⁴² VT. STAT. ANN. tit. 7, § 236(b) (2011).
- ⁴³ VT. STAT. ANN. tit. 7, § 236(a) (2011).
- ⁴⁴ VT. STAT. ANN. tit. 7, § 236(b) (2011).
- ⁴⁵ VT. STAT. ANN. tit. 7, § 236(a) (2011); see also VT. STAT. ANN. tit. 7, § 101(b) (2011) (“The liquor control board shall consist of three persons, not more than two members of which shall belong to the same political party. Biennially, with the advice and consent of the senate, the governor shall appoint a person as a member of such board for the term of six years, whose term of office shall commence on February 1 of the year in which such appointment is made. The governor shall biennially designate a member of such board to be its chairman.”).
- ⁴⁶ VT. STAT. ANN. tit. 7, § 236(a) (2011).
- ⁴⁷ VT. STAT. ANN. tit. 7, § 1002(e) (2011).
- ⁴⁸ VT. STAT. ANN. tit. 7, § 1002a(b)(2) (2011).
- ⁴⁹ VT. CODE R. §14-1-3 (2011).
- ⁵⁰ VT. STAT. ANN. tit. 32, § 7731 (2011).
- ⁵¹ VT. STAT. ANN. tit. 32, § 7732(a) (2011).
- ⁵² VT. STAT. ANN. tit. 32, § 7735 (2011).
- ⁵³ VT. STAT. ANN. tit. 32, § 7732(b) (2011).
- ⁵⁴ VT. STAT. ANN. tit. 32, § 7732(b) (2011).
- ⁵⁵ VT. STAT. ANN. tit. 32, § 7734 (2011).
- ⁵⁶ VT. STAT. ANN. tit. 7 § 108 (2011).
- ⁵⁷ VT. STAT. ANN. tit 7, § 108 (2011).

⁵⁸ VT DEPT. OF LIQUOR CONTROL, REP. TO THE GENERAL ASSEM. ON TOBACCO COMPLIANCE TESTS CONDUCTED DURING CALENDAR YEAR 2010 (January 15, 2011), <http://liquorcontrol.vermont.gov/reports/act58-2010.pdf>

⁵⁹ Vermont Department of Liquor Control, Compliance Test Results, <http://liquorcontrol.vermont.gov/enforcement/compliance/> (last visited Dec. 30, 2011).

⁶⁰ *Id.*

⁶¹ VT. STAT. ANN. tit 7, § 1003(a) (2011).

⁶² VT. STAT. ANN. tit. 7, § 1005(a) (2011).

⁶³ VT. STAT. ANN. tit. 7, § 1002(f) (2011).

⁶⁴ VT. STAT. ANN. tit. 7, § 1004(a) (2011).

⁶⁵ VT. STAT. ANN. tit. 7, § 1004(a) (2011).

⁶⁶ VT. STAT. ANN. tit. 7, § 1005(a) (2011).

⁶⁷ VT. STAT. ANN. tit. 7, § 1005(b) (2011).

⁶⁸ VT. STAT. ANN. tit. 7, § 1007 (2011).

⁶⁹ VT DEPT. OF LIQUOR CONTROL, REP. TO THE GENERAL ASSEM. ON TOBACCO COMPLIANCE TESTS CONDUCTED DURING CALENDAR YEAR 2010 13-15 (January 15, 2011), <http://liquorcontrol.vermont.gov/reports/act58-2010.pdf>.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ VT. STAT. ANN. tit. 16, § 140 (2011).

⁷⁴ VT. STAT. ANN. tit. 16, § 140 (2011).

⁷⁵ VT. STAT. ANN. tit. 16, § 140 (2011).

⁷⁶ VT. STAT. ANN. tit. 18, §1741 et seq. (2011).

⁷⁷ VT. STAT. ANN. tit. 18, § 1741 (2011).

⁷⁸ VT. STAT. ANN., tit. 18, § 1745 (2011).

⁷⁹ VT. STAT. ANN. tit. §1426(a) (2011).

⁸⁰ VT. STAT. ANN. tit. §1426(b) (2011).

⁸¹ VT. STAT. ANN. tit. §1427 (2011).

⁸² VT. STAT. ANN. tit. 32, §7771 (2011). (“The tax imposed under this section shall be at the rate of 131 mills per cigarette or little cigar and for each 0.0325 ounces of roll-your-own tobacco.”); *see also* Vermont Department of Taxes, <http://www.state.vt.us/tax/majorvttaxescigarette.shtml> (last visited Dec. 2, 2011).

⁸³ ANN BOON, CAMPAIGN FOR TOBACCO FREE KIDS, MAP OF CIGARETTE TAX RATES (Oct. 7, 2011)

<http://www.tobaccofreekids.org/research/factsheets/pdf/0222.pdf>.

⁸⁴ ANN BOON, STATE CIGARETTE EXCISE TAXES AND RANKINGS (Dec. 23, 2011)

<http://www.tobaccofreekids.org/research/factsheets/pdf/0097.pdf>.

⁸⁵ VT. STAT. ANN. tit. 32, §7702 (2011).

⁸⁶ VT. STAT. ANN. tit. 32, §7771 (2011).

⁸⁷ VT. STAT. ANN. tit. 32, §7811 (2011); *see also* Vermont Department of Taxes, <http://www.state.vt.us/tax/majorvttaxescigarette.shtml> (last visited December 2, 2011).

⁸⁸ VT. STAT. ANN. tit. 32, §7811 (2011).

⁸⁹ VT. STAT. ANN. tit. 32, §7811 (2011).

⁹⁰ Vermont Department of Taxes, <http://www.state.vt.us/tax/majorvttaxescigarette.shtml> (last visited December 2, 2011).

⁹¹ VT. STAT. ANN. tit. 32, §7811 (2011).

⁹² James G. Hodge, *Regulating Food Retail for Obesity Prevention: How Far Can Cities Go?*, 39 J.L. MED. & ETHICS 89, 89 (2011).

⁹³ OFFICE OF THE SECRETARY OF STATE (VT), MUNICIPAL LAW BASICS 2 (2009),

http://www.sec.state.vt.us/municipal/pubs/municipal_law_basics.pdf.

⁹⁴ McQuillin The Law of Municipal Corporations, 2A McQuillin Mun. Corp. § 10:10 Scope of Powers – Dillon’s Rule (3rd ed.) (2011).

⁹⁵ OFFICE OF THE SECRETARY OF STATE (VT), MUNICIPAL LAW BASICS 2 (2009),

http://www.sec.state.vt.us/municipal/pubs/municipal_law_basics.pdf;

citing Valcour v. Village of Morrisville, 104 Vt. 119, 131-32 (1932); *also* Hinesburg Sand & Gravel Co. v. Town of Hinesburg, 135 Vt. 484, 486 (1977).

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- ⁹⁶ OFFICE OF THE SECRETARY OF STATE (VT), MUNICIPAL LAW BASICS 2 (2009), http://www.sec.state.vt.us/municipal/pubs/municipal_law_basics.pdf; *citing* Morse Vermont Division of State Buildings, 136 Vt. 253 (1978) “as between the state and local units of government, the municipal bodies’ power is derivative, based upon an allocation of authority from the state. Where conflict occurs, and no resolution is statutorily prescribed, the municipality must yield.”
- ⁹⁷ OFFICE OF THE SECRETARY OF STATE (VT), MUNICIPAL LAW BASICS 3 (2009), http://www.sec.state.vt.us/municipal/pubs/municipal_law_basics.pdf.
- ⁹⁸ *See* VT. STAT. ANN. tit. 24A.
- ⁹⁹ OFFICE OF THE SECRETARY OF STATE (VT), MUNICIPAL LAW BASICS 2 (2009), http://www.sec.state.vt.us/municipal/pubs/municipal_law_basics.pdf; *see also* VT. STAT. ANN. tit. 17, §2645 (2011).
- ¹⁰⁰ OFFICE OF THE SECRETARY OF STATE (VT), MUNICIPAL LAW BASICS 2 (2009), http://www.sec.state.vt.us/municipal/pubs/municipal_law_basics.pdf; *citing* Town of Brattleboro v. Garfield (2006) *citing* Looker v. City of Rutland, 144 Vt. 344, 346 (1984).
- ¹⁰¹ VT. STAT. ANN. tit. 24A §151-8.
- ¹⁰² VT. STAT. ANN. tit. 24A §237-4.
- ¹⁰³ VT. STAT. ANN. tit. 24A § 285-4.
- ¹⁰⁴ Ian McLaughlin, Tobacco Control Legal Consortium, *License to Kill?: Tobacco Retailer Licensing as an Effective Enforcement Tool 2* (2010) *citing* LAWRENCE GOSTIN, PUBLIC HEALTH LAW AND ETHICS: A READER 185 (Lawrence Gostin ed., University of California Press 2002).
- ¹⁰⁵ State of Vermont v. James Curley-Egan, 180 Vt. 305, 309 (2006) *citing* State v. Theriault, 70 Vt. 617, 625, 41 A. 1030, 1033 (1898).
- ¹⁰⁶ Ian McLaughlin, Tobacco Control Legal Consortium, *License to Kill?: Tobacco Retailer Licensing as an Effective Enforcement Tool 2* (2010).
- ¹⁰⁷ State of Vt. v. James Curley-Egan, 180 Vt. 305, 309 (2006) *citing* State v. Theriault, 70 Vt. 617, 625, 41 A. 1030, 1033 (1898) *referencing* Elliott v. Vt. State Fish & Game Comm’n, 117 Vt. 61, 68, 84 A.2d 588, 592-93 (1951) (recognizing that Legislature can validly delegate police power to state fish and game commission); Carty’s Adm’r v. Vill. of Winooski, 78 Vt. 104, 108, 62 A. 45, 46 (1905) (upholding delegation to towns and incorporated villages of authority to construct and maintain jails).
- ¹⁰⁸ VT. STAT. ANN. tit. 24, § 2291(14) (2011).
- ¹⁰⁹ *See, e.g.,* Rockwood v. City of Burlington, 21 F. Supp. 2d 411, 416 (D. Vt. 1998) (suggesting that tobacco use by minors may be considered a public nuisance). *But cf.* Napro Development Corp. v. Town of Berlin, 135 Vt. 353, 358 (1977) (“We believe that the concept of public nuisance is vague and amorphous, and we are cautious to employ it in circumstances where its application might intrude in the arena of speech and expression protected by both the First and Fourteenth Amendments of the United States Constitution and the Vermont Constitution[.]”).
- ¹¹⁰ *See* BLACK’S LAW DICTIONARY (9th ed. 2009).
- ¹¹¹ VT. STAT. ANN. tit. 24, § 4301 et seq. (2011).
- ¹¹² VT. STAT. ANN. tit. 24, § 4302(a) (2011).
- ¹¹³ VT. STAT. ANN. tit. 24, § 4321(a)&(b) (2011).
- ¹¹⁴ *See* VT. STAT. ANN. tit. 24, § 4325 (2011).
- ¹¹⁵ VT. STAT. ANN. tit. 24, § 4442 (2011).
- ¹¹⁶ VT. STAT. ANN. tit. 24, § 4341 (2011).
- ¹¹⁷ *See* VT. STAT. ANN. tit. 24, § 4345(a) (2011).
- ¹¹⁸ VT. STAT. ANN. tit. 24, § 4347 (2011).
- ¹¹⁹ VT. STAT. ANN. tit. 24, § 4349(a)(2011).
- ¹²⁰ VT. STAT. ANN. tit. 24, § 4414 (1) (2011).
- ¹²¹ VT. STAT. ANN. tit. 24, § 4414 (1) (2011); and VT. STAT. ANN. tit. 24, § 4449 (2011).
- ¹²² VT. STAT. ANN. tit. 18, §2(5) (2011).
- ¹²³ VT. STAT. ANN. tit. 18, § 601 (2011).
- ¹²⁴ VT. STAT. ANN. tit. 18, § 601 (2011).
- ¹²⁵ VT. STAT. ANN. tit. 18, § 601 (2011).
- ¹²⁶ VT. STAT. ANN. tit. 18, § 613 (2011).
- ¹²⁷ VT. STAT. ANN. tit. 18, §§ 126-27, 613 (2011).
- ¹²⁸ VT. STAT. ANN. tit. 18, § 131 (2011).
- ¹²⁹ VT. STAT. ANN. tit. 18, § 131 (2011).

¹³⁰ VT. STAT. ANN. tit. 18, § 131 (2011).

¹³¹ See VT. STAT. ANN. tit. 18, § 126 (2011); and VT. STAT. ANN. tit. 18, § 613 (2011).

¹³² Studies have suggested that the more retailers there are near schools, the more likely students are to smoke. See Lisa Henriksen et al., *Is Adolescent Smoking Related to the Density and Proximity of Tobacco Outlets and Retail Cigarette Advertising Near Schools?*, 47 PREVENTIVE MED. 210 (2008).

Appendix A: Vermont Communities with Municipal Charters

TITLE 24A¹
TITLE TWENTY-FOUR
APPENDIX

Municipal Charters

PART 1

CITIES

1. City of Barre
3. City of Burlington
5. City of Montpelier
7. City of Newport
9. City of Rutland
11. City of St. Albans
13. City of South Burlington
15. City of Vergennes
17. City of Winooski

PART 2

TOWNS

101. Town of Barre
103. Town of Bennington
105. Town of Berlin
106. Town of Bradford
107. Town of Brattleboro
108. Town of Bristol
- 108A. Town of Cabot
109. Town of Cavendish
111. Town of Chester
113. Town of Colchester
114. Town of Danville
115. Town of Enosburgh
117. Town of Essex
123. Town of Hardwick
- 123A. Town of Hartford
- 123B. Town of Jamaica
124. Town of Jericho
127. Town of Middlebury

¹ Michie's Legal Resources, <http://www.michie.com/> (last visited Feb. 7, 2012).

- 129. Town of Milton
- 130. Town of Pittsford
- 131. Town of Plainfield
- 133. Town of Poultney
- 135. Town of Proctor
- 137. Town of Putney
- 141. Town of Readsboro
- 142. Town of Richford
- 143. Town of Richmond
- 147. Town of Shelburne
- 149. Town of Springfield
- 151. Town of St. Johnsbury
- 153. Town of Stowe
- 155. Town of Underhill
- 155A. Town of West Rutland
- 155B. Town of Westminster
- 156. Town of Williston
- 157. Town of Windsor

PART 3

VILLAGES

- 203. Village of Alburgh
- 205. Village of Barton [Reserved]
- 207. Village of Bellows Falls
- 209. Village of Bradford [Reserved]
- 211. Village of Cabot
- 213. Village of Cambridge
- 215. Village of Derby Center
- 217. Village of Derby Line
- 219. Village of Enosburg Falls
- 221. Village of Essex Junction
- 223. Village of Groton
- 225. Village of Hyde Park
- 227. Village of Jacksonville
- 229. Village of Jeffersonville [Reserved]
- 231. Village of Jericho [Reserved]
- 233. Village of Johnson [Reserved]
- 235. Village of Ludlow
- 237. Village of Lyndonville
- 239. Village of Manchester
- 241. Village of Marshfield [Reserved]

- 245. Village of Morrisville
- 247. Village of Newbury
- 249. Village of Newfane
- 251. Village of North Bennington
- 253. Village of North Troy
- 257. Village of Northfield
- 259. Village of Old Bennington [Reserved]
- 261. Village of Orleans
- 267. Village of Pittsford
- 269. Village of Poultney
- 271. Village of Richford [Reserved]
- 273. Village of Saxtons River [Reserved]
- 275. Village of South Ryegate [Reserved]
- 277. Village of Stowe
- 279. Village of Swanton
- 281. Village of Townsend
- 283. Village of Waterbury
- 285. Village of Wells River
- 289. Village of Westminster
- 291. Village of Woodstock

Center for Public Health and Tobacco Policy
154 Stuart Street | Boston, MA 02116



The Vermont Statutes Online

Title 7: Alcoholic Beverages

Chapter 40: TOBACCO PRODUCTS

§ 1001. Definitions

As used in this chapter:

- (1) "Board" means the liquor control board.
- (2) "Commissioner" means the commissioner of the department of liquor control.
- (3) "Tobacco products" mean cigarettes, cigars, cheroots, stogies, periques, granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco, snuff, snuff flour, Cavendish, plug and twist tobacco, fine-cut, and other chewing tobaccos, shorts, refuse scraps, clippings, cuttings, and sweepings of tobacco, and other kinds and forms of tobacco prepared in a manner suitable for chewing or smoking in a pipe or otherwise, or both for chewing and smoking, or for delivery into the body through inhaling heated vapor or in any other manner.
- (4) "Vending machine" means any mechanical, electronic, or other similar device which dispenses tobacco products for money.
- (5) "Tobacco license" means a license issued by the department of liquor control under this chapter permitting the licensee to engage in the retail sale of tobacco products or locate a vending machine on the premises identified in the license.
- (6) "Bidis or Beedies" means a product containing tobacco that is wrapped in temburni leaf (*diospyros melanoxylon*) or tendu leaf (*diospyros exculpra*), or any other product that is offered to, or purchased by, consumers as bidis or beedies.
- (7) "Tobacco paraphernalia" means any device used, intended for use, or designed for use in smoking, inhaling, ingesting, or otherwise introducing tobacco products into the human body, or for preparing tobacco for smoking, inhaling, ingesting, or otherwise introducing into the human body, including devices for holding tobacco, rolling paper, wraps, cigarette rolling machines, pipes, water pipes, carburetion devices, bonges, and hookahs.
- (8) "Tobacco substitute" means products including electronic cigarettes or other electronic or battery-powered devices that contain and are designed to deliver nicotine or other substances into the body through inhaling vapor and that have not been approved by the United States Food and Drug Administration for tobacco cessation or other medical purposes. (Added 1991, No. 70, § 2, eff. May 1, 1992; amended 1999, No. 89 (Adj. Sess.),

§ 1; 2007, No. 114 (Adj. Sess.), § 3; 2011, No. 166 (Adj. Sess.), § 2.)

§ 1002. License required; application; fee; issuance

(a) No person shall engage in the retail sale of tobacco products or provide a vending machine for their sale in his or her place of business without a tobacco license obtained from the department of liquor control. Tobacco licenses shall expire midnight, April 30, of each year.

(b) The board shall prepare and issue tobacco license forms and applications. These shall be incorporated into the liquor license forms and applications prepared and issued under this title. The licenses issued under this section shall be entitled "LIQUOR LICENSE," "LIQUOR-TOBACCO LICENSE" or "TOBACCO LICENSE," as applicable. The board shall also provide simple instructions for licensees designed to assist them in complying with the provisions of this chapter.

(c) Each tobacco license shall be prominently displayed on the premises identified in the license.

(d) A person applying simultaneously for a tobacco license and a liquor license shall apply to the legislative body of the municipality and shall pay to the department only the fee required to obtain the liquor license. A person applying only for a tobacco license shall submit a fee of \$10.00 to the legislative body of the municipality for each tobacco license or renewal. The municipal clerk shall forward the application to the department, and the department shall issue the tobacco license. The municipal clerk shall retain \$5.00 of this fee, and the remainder shall be deposited in the treasury of the municipality.

(e) A person who sells tobacco products without obtaining a tobacco license in violation of this section shall be guilty of a misdemeanor and fined not more than \$200.00 for the first offense and not more than \$500.00 for each subsequent offense.

(f) No individual under the age of 16 may sell tobacco products. (Added 1991, No. 70, § 2, eff. May 1, 1992; amended 1997, No. 58, § 2; 2007, No. 114 (Adj. Sess.), § 4.)

§ 1002a. Licensee education

(a) An applicant for a tobacco license that does not hold a liquor license issued under this title shall be granted a tobacco license pursuant to section 1002 of this title only after the applicant has met with a liquor control investigator for the purpose of being informed about the Vermont tobacco laws pertaining to the purchase, storage and sale of tobacco products. A corporation, partnership or association shall designate a director, partner or manager to comply with the requirements of this subsection.

(b) The holder of a tobacco license that does not also hold a liquor license issued pursuant to this title for the same premises shall:

(1) Complete the department's enforcement seminar at least once every three years. A corporation, partnership or association shall designate a director, partner or manager to comply with this subdivision.

(2) Ensure that every employee involved in the sale of tobacco products completes a

training program approved by the department of liquor control before the employee begins selling or providing tobacco products, and at least once every 24 months thereafter. A licensee may comply with this subdivision by conducting its own training program on its premises using information and materials furnished by the department of liquor control. A licensee who fails to comply with the requirements of this subsection shall be subject to suspension of the tobacco license for no less than one day. (Added 2001, No. 147 (Adj. Sess.), § 2, eff. June 21, 2002.)

§ 1003. Sale of tobacco products; requirements; prohibitions

(a) A person shall not sell or provide tobacco products, tobacco substitutes, or tobacco paraphernalia to any person younger than 18 years of age.

(b) Beginning August 28, 1997, vending machines selling tobacco products are prohibited. This subsection shall not apply to a vending machine that is located in a commercial establishment in which by law no person younger than 18 years of age is permitted to enter at any time. A single vending machine may not be used to sell other commodities in combination with tobacco products. A violation of this subsection shall result in the seizure of the vending machine.

(c) Beginning January 1, 2001, and subject to receiving any necessary exemption from preemption from the U.S. Food and Drug Administration, all vending machines selling tobacco products are prohibited.

(d) No person holding a tobacco license shall display or store tobacco products or tobacco substitutes where those products are accessible to consumers without direct assistance by the sales personnel. This subsection shall not apply to the following:

(1) A display of tobacco products that is located in a commercial establishment in which by law no person younger than 18 years of age is permitted to enter at any time.

(2) Cigarettes in unopened cartons and smokeless tobacco in unopened multipack containers of 10 or more packages, any of which shall be displayed in plain view and under the control of a responsible employee so that removal of the cartons or multipacks from the display can be readily observed by that employee.

(3) Cigars and pipe tobacco stored in a humidor on the sales counter in plain view and under the control of a responsible employee so that the removal of these products from the humidor can be readily observed by that employee.

(e) The sale and the purchase of bidis is prohibited. A person who holds a tobacco license who sells bidis as prohibited by this subsection shall be fined not more than \$500.00. A person who purchases bidis from any source shall be fined not more than \$250.00.

(f) No person holding a tobacco license shall sell cigarettes or little cigars individually or in packs that contain fewer than 20 cigarettes or little cigars.

(g) As used in this section, "little cigars" means any rolls of tobacco wrapped in leaf tobacco or any substance containing tobacco, other than any roll of tobacco which is a

cigarette within the meaning of 32 V.S.A. § 7702(1), and as to which 1,000 units weigh not more than three pounds. (Added 1991, No. 70, § 2, eff. May 1, 1992; amended 1997, No. 58, § 3; 1999, No. 89 (Adj. Sess.), § 2; 2001, No. 108 (Adj. Sess.), § 1, eff. May 15, 2002; 2011, No. 166 (Adj. Sess.), § 1.)

§ 1004. Proof of age for the sale of tobacco products

(a) A person shall exhibit proper proof of his or her age upon demand of a person licensed under this chapter, an employee of a licensee or a law enforcement officer. If the person fails to provide such proof of age, the licensee shall be entitled to refuse to sell tobacco products to the person. The sale or furnishing of tobacco products to a person exhibiting proper proof shall be prima facie evidence of a licensee's compliance with section 1007 of this title.

(b) As used in this section, "proper proof" means a photographic motor vehicle operator's license, a valid passport, a United States Military identification card or a photographic nondriver motor vehicle identification card obtained from the department of motor vehicles. (Added 1991, No. 70, § 2, eff. May 1, 1992; amended 1997, No. 58, § 4.)

§ 1005. Persons under the age of 18; possession of tobacco products; misrepresenting age or purchasing tobacco products; penalty

(a) A person less than 18 years of age shall not possess or purchase tobacco products unless the person is an employee of a holder of a tobacco license and is in possession of tobacco products to effect a sale in the course of employment. A person less than 18 years of age shall not misrepresent his or her age to purchase tobacco products. A person who possesses tobacco products in violation of this subsection shall be subject to having the tobacco products immediately confiscated and shall be further subject to a civil penalty of \$25.00. In the case of failure to pay a penalty, the judicial bureau shall mail a notice to the person at the address in the complaint notifying the person that failure to pay the penalty within 60 days of the notice will result in either the suspension of the person's operator's license for a period of not more than 90 days or delay the initial licensing of the person for a period of not more than one year. A copy of the notice shall be sent to the commis

sioner of motor vehicles, who after expiration of 60 days from the date of notice and unless notified by the judicial bureau that the penalty has been paid, shall either suspend the person's operator's license or cause initial licensing of the person to be delayed for the periods set forth in this subsection and the rules. An action under this subsection shall be brought in the same manner as a traffic violation pursuant to chapter 24 of Title 23. The commissioner of motor vehicles shall adopt rules in accordance with the provisions of chapter 25 of Title 3 to implement the provisions of this subsection, which may provide for incremental suspension or delays not exceeding cumulatively the maximum periods established by this subsection.

(b) A person less than 18 years of age who misrepresents his or her age by presenting false identification to purchase tobacco products shall be fined not more than \$50.00 or provide up to 10 hours of community service, or both. (Added 1991, No. 70, § 2, eff. May 1, 1992; amended 1997, No. 58, § 5; 1997, No. 121 (Adj. Sess.), § 26.)

§ 1006. Posting of signs

(a) A person licensed under this chapter shall post in a conspicuous place on the premises identified in the tobacco license a warning sign stating that the sale of tobacco products, tobacco substitutes, and tobacco paraphernalia to minors is prohibited. The board shall prepare the sign and make it available with the license forms issued under this chapter. The sign may include information about the health effects of tobacco and tobacco cessation services. The board, in consultation with a representative of the licensees when appropriate, is authorized to change the design of the sign as needed to maintain its effectiveness.

(b) A person violating this section shall be guilty of a misdemeanor and fined not more than \$100.00. (Added 1991, No. 70, § 2, eff. May 1, 1992; amended 2011, No. 166 (Adj. Sess.), § 3.)

§ 1007. Furnishing tobacco to persons under eighteen

An individual who sells or furnishes tobacco products to a person under 18 years of age shall be subject to a civil penalty of not more than \$100.00 for the first offense and not more than \$500.00 for any subsequent offense. An action under this section shall be brought in the same manner as for a traffic violation pursuant to chapter 24 of Title 23 and shall be brought within 24 hours of the occurrence of the alleged violation. (Added 1991, No. 70, § 2; amended 1997, No. 58, § 6.)

§ 1008. Rulemaking

The board shall adopt rules for the administration and enforcement of this chapter. (Added 1991, No. 70, § 2, eff. May 1, 1992.)

§ 1009. Contraband and seizure

Any cigarettes or other tobacco products that have been sold, offered for sale, or possessed for sale in violation of section 1003 of this title, 20 V.S.A. § 2757, 32 V.S.A. § 7786, or 33 V.S.A. § 1919, and any commercial cigarette rolling machines possessed or utilized in violation of section 1011 of this title, shall be deemed contraband, and shall be subject to seizure by the commissioner, the commissioner's agents or employees, the commissioner of taxes, or any agent or employee thereof, or by any peace officer of this state when directed to do so by the commissioner. All cigarettes or other tobacco products seized shall be destroyed. (Added 2003, No. 14, § 6; amended 2005, No. 68, § 2; 2011, No. 166 (Adj. Sess.), § 7.)

§ 1010. Internet sales

(a) As used in this section:

- (1) "Cigarette" has the same definition as that found at 32 V.S.A. § 7702(1).
- (2) "Distributor" has the same definition as that found at 32 V.S.A. § 7702(4).
- (3) "Licensed wholesale dealer" has the same definition as that found at 32 V.S.A. § 7702(5).
- (4) "Little cigars" has the same definition as that found at 32 V.S.A. § 7702(6).

(5) "Retail dealer" has the same definition as that found at 32 V.S.A. § 7702(10).

(6) "Roll-your-own tobacco" has the same definition as that found at 32 V.S.A § 7702(11).

(7) "Snuff" has the same definition as that found at 32 V.S.A. § 7702(13).

(b) No person shall cause cigarettes, roll-your-own tobacco, little cigars, or snuff, ordered or purchased by mail or through a computer network, telephonic network, or other electronic network, to be shipped to anyone other than a licensed wholesale dealer, distributor, or retail dealer in this state.

(c) No person shall, with knowledge or reason to know of the violation, provide substantial assistance to a person in violation of this section.

(d) A violation of this section is punishable as follows:

(1) A knowing or intentional violation of this section shall be punishable by imprisonment for not more than five years or a fine of not more than \$5,000.00, or both.

(2) In addition to or in lieu of any other civil or criminal remedy provided by law, upon a determination that a person has violated this section, the attorney general may impose a civil penalty in an amount not to exceed \$5,000.00 for each violation. For purposes of this subsection, each shipment or transport of cigarettes, roll-your-own tobacco, little cigars, or snuff shall constitute a separate violation.

(3) The attorney general may seek an injunction to restrain a threatened or actual violation of this section.

(4) In any action brought pursuant to this section, the state shall be entitled to recover the costs of investigation, of expert witness fees, of the action, and reasonable attorney's fees.

(5) A person who violates this section engages in an unfair and deceptive trade practice in violation of the state's Consumer Protection Act, 9 V.S.A. §§ 2451 et seq.

(6) If a court determines that a person has violated the provisions of this section, the court shall order any profits, gain, gross receipts, or other benefit from the violation to be disgorged and paid to the state treasurer for deposit in the general fund.

(7) Unless otherwise expressly provided, the penalties or remedies, or both, under this section are in addition to any other penalties and remedies available under any other law of this state. (Added 2007, No. 119 (Adj. Sess.), § 1; amended 2011, No. 109 (Adj. Sess.), § 3, eff. May 8, 2012; No. 136 (Adj. Sess.), § 1b.)

§ 1011. Commercial cigarette rolling machines

(a) A person shall not possess or use a cigarette rolling machine for commercial purposes.

(b) A person who knowingly violates subsection (a) of this section shall be subject to the

following civil penalties:

(1) The revocation or termination of any license, permit, appointment, or commission under this chapter.

(2) A civil penalty of up to \$50,000.00 in any action brought by the department of taxes, the department of liquor control, or the attorney general.

(c) Penalties assessed under subsection (b) of this section shall be paid into the general fund.

(d) A person who violates subsection (a) of this section shall be imprisoned for not more than three years or fined not more than \$100,000.00 or both.

(e) This section shall not apply to the possession of a cigarette rolling machine intended solely for personal use by individuals who do not intend to offer the resulting product for resale.

(f) A cigarette rolling machine capable of rolling 200 cigarettes in fewer than 15 minutes is presumed to be for commercial purposes. (Added 2011, No. 166 (Adj. Sess.), § 6.)

VILLAGE OF LUDLOW, VERMONT

ORDINANCE PROHIBITING MEDICAL MARIJUANA DISPENSARIES AND ESTABLISHMENTS THAT SELL OR DISPLAY DRUG AND TOBACCO PARAPHERNALIA

1. Purpose of Ordinance
2. Definitions
3. Severability
4. Publication and Effective Date

ARTICLE I: PURPOSE & ENABLING AUTHORITY

WHEREAS, the Village of Ludlow Board of Trustees feels that protecting children from exploitation by those promoting the illegal consumption of marijuana, tobacco and tobacco related products by minors and trafficking in drugs and drug-related products is a goal of highest priority within the Village of Ludlow; and

WHEREAS, prohibiting businesses selling or displaying drug and tobacco paraphernalia in the Village of Ludlow fosters the communities' goal by regulating exposure of impressionable minors to the commercial exploitation by businesses seeking to expand illegal consumption of tobacco and drug use by minors; and

WHEREAS, establishments that sell or display drug paraphernalia and other items promoting the use of illegal drugs characterize such paraphernalia as intended for use with tobacco products; and

WHEREAS, such regulations promote the general welfare and temperance of children and are intended to help reduce the illegal consumption and purchase of tobacco and tobacco related products and illegal drugs and drug related products by children by limiting their exposure to tobacco and drug paraphernalia and items promoting illegal tobacco and drug use; and

WHEREAS, such businesses should be treated in the same fashion as prohibited uses in the Village of Ludlow;

NOW, THEREFORE, pursuant to the authority granted them by 24 V.S.A. § 1971 of the Vermont Statutes Annotated, the Village of Ludlow Board of Trustees hereby adopts this ordinance to prohibit the establishment of medical marijuana dispensaries and drug and tobacco paraphernalia shops in the Village of Ludlow.

ARTICLE II. DEFINITIONS

As used in this ordinance, the following terms shall have the respective meanings here assigned to them:

- 2.01 Medical marijuana dispensary or dispensary is defined as: any facility or location where marijuana is acquired, possessed, cultivated, manufactured, transferred, supplied or sold or, made available to and/or distributed by any of the following: a registered caregiver, a registered patient, or a person with an identification card.
- 2.02 Drug and Tobacco Paraphernalia Establishment is defined as: any premises where drug and tobacco paraphernalia is displayed for sale and/or offered for sale.
- 2.03 Drug and tobacco paraphernalia is defined as: including but not limited to one or more of those items identified in that list set forth in Subdivision 2.04 (a) below, shall mean any device designed primarily for use by individuals for the smoking or ingestion of tobacco, marijuana, hashish, hashish oil, cocaine or any other "controlled substance," as that term is defined in the Health and Safety Code of the State of Vermont.
- 2.04 A device "designed primarily for" the smoking or ingestion set forth in Subdivision 2.03 above, is a device which has been fabricated, constructed, altered, adjusted, or marked especially for use in the smoking or ingestion of tobacco, marijuana, hashish, hashish oil, cocaine or any other "controlled substance," and is peculiarly adapted to that purposes by virtue of a distinctive feature or combination of features associated with tobacco or drug paraphernalia, notwithstanding that it might also be possible to use the device for some other purpose.
 - a. Includable items or devices:
 - 1). Metal, wooden, acrylic, glass, stone, plastic or ceramic pipes, with or without screens, permanent or otherwise, heads or punctured metal bowls;
 - 2). A device constructed so as to prevent the escape of smoke into the air and to channel smoke into a chamber where it may be accumulated to permit inhalation or ingestion of larger quantities of smoke that would otherwise be possible, whether the device is known as a "bong," or otherwise;
 - 3). A pipe designed for smoking constructed with a receptacle or container in which water or other liquid may be placed into which smoke passes and is cooled in the process of being inhaled or ingested;
 - 4). A pipe designed for smoking which contains a heating unit, whether the device is known as an "electric pipe," or otherwise;
 - 5). A device constructed so as to permit the simultaneous mixing and ingestion of smoke and nitrous oxide or other compressed gas, whether the device is known as a "buzz bomb," or otherwise;
 - 6). A canister, container or other device with a tube, nozzle or other similar arrangement attached and so constructed as to permit the forcing of accumulated smoke into the user's lungs under pressure;

- 7). A device for holding burning material, such as a cigarette that has become too small or too short to be held in the hand, whether the device is known as a "roach clip," or otherwise;"
- 8). Lighters and matches shall be excluded from the definition of tobacco and drug paraphernalia.

ARTICLE III: ENFORCEMENT AND PENALTIES:

- 3.01 This shall be a criminal ordinance which shall be enforced in accordance with the provisions in 24 VSA Ch. 59 or through any Vermont court having proper jurisdiction.
- 3.02 Any person found to be in violation of any provision of the ordinance shall be subject to a fine of not less than one hundred (\$100.00) and not more than five hundred (\$500.00). Each day's failure to comply with an order to cease and desist shall constitute a separate offense.

ARTICLE IV: SEVERABILITY

- 4.01 If any section, sentence, clause or phrase of this Ordinance is for any reason held to be invalid or unconstitutional by a decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Ordinance. The Village of Ludlow hereby declares that it would have passed this ordinance and adopted this Ordinance and each section, sentence, clause or phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases be declared invalid or unconstitutional.

ARTICLE V: PUBLICATION & EFFECTIVE DATE

- 5.01 No section of this ordinance shall be construed to supersede or replace any Vermont Statute.
- 5.02 This ordinance shall be entered in the minutes of the Village Board of Trustees meeting, and posted in at least five conspicuous places within the Village of Ludlow and published in a newspaper circulating in the Village on a day not more than fourteen (14) days following the date when the ordinance is so adopted.
- 5.03 This Ordinance shall become effective on February 2, 2013, sixty (60) days after the date of its adoption by the Village Board Trustees, unless a petition is filed with the Village Clerk by January 17, 2013, forty-four (44) days after the date of its adoption. The petition should be addressed to the Village Trustees, should be signed by at least five percent (5%) of the qualified voters of this municipality, and should ask for a special meeting to be called on the question of disapproving the ordinance.

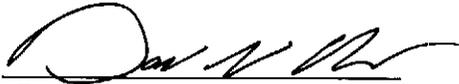
Questions about the Ordinance may be directed to the Municipal Manager, Ludlow, Vermont, or by calling telephone number (802)228-2841.

The foregoing ordinance is hereby adopted by the Board of Trustees of the Village of Ludlow, Vermont on this 14th day of December, 2012.

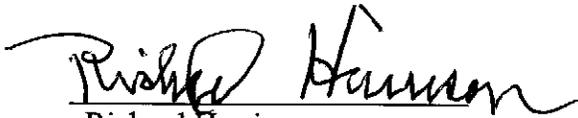
**VILLAGE OF LUDLOW
BOARD OF TRUSTEES**



Robert Gilmore, Chairman



David Rose



Richard Harrison

Appendix A: Model Zoning Ordinance

Model Zoning Ordinance Regulating the Location of Retail Establishments Selling Tobacco Products

Section 1: Title.

An Ordinance Amending the Zoning Code to Provide Regulations for Retail Establishments Selling Tobacco Products.

Section 2: Findings.

The Village of Essex Junction Trustees finds and declares that:

- In Vermont, 15.4% of the adult population, 13% of high school students, and 3.0% of middle school students currently smoke; and 6.2% of adult males and 11% of high school males use smokeless or spit tobacco.
- Although it is unlawful to sell tobacco products to minors, 11.6% of tobacco retailers sold to minors during compliance checks conducted by the Vermont Department of Liquor Control in 2010.
- Nationally, despite laws in every state making it illegal to sell tobacco to minors, each year an estimated 800 million packs of cigarettes are consumed by youth.
- The Village of Essex Junction has a substantial interest in reducing the number of individuals of all ages who use cigarettes and other tobacco products, and a particular interest in protecting adolescents from tobacco dependence and the illnesses and premature death associated with tobacco use.
- An overwhelming majority of Americans who use tobacco products begin using such products while they are adolescents and become addicted to those products before reaching the age of 18.
- Studies have found that a higher concentration of tobacco retailers in a geographic area is associated with higher rates of youth smoking.

Zoning controls and a requirement that tobacco retailers obtain a conditional use permit will not unduly burden legitimate business activities of tobacco retailers who sell cigarettes or distribute tobacco products to adults. It will, however, allow the Village of Essex Junction to regulate the operation of lawful businesses to avoid circumstances which facilitate violations of state, federal, and local laws.

A purpose of the Vermont Planning and Development Act is to encourage municipalities to develop land in a manner that promotes the public health. Zoning regulations are necessary to control the location and operation of the sale or exchange of tobacco products for the protection of public health, safety and welfare.

The Village of Essex Junction Trustees intends to limit the number of tobacco retailers in the Village of Essex Junction for the protection of public health, safety, and welfare; and The Village of Essex Junction Trustees intends to declare any violation of this ordinance to be a public nuisance pursuant to Vt. Stat. Ann. tit. 24, § 2291(14), and will take action for its abatement or removal as the public health, safety or welfare may require.

Section 3: Authority.

This ordinance is adopted pursuant to the authority contained in the Vermont Planning and Development Act, also designated as Title 24, V.S.A. Chapter 117. Whenever any provision of this ordinance refers to or cites a section of Title 24 V.S.A. Chapter 117, and this section is later amended or superseded, this ordinance shall be deemed to refer to the amended section or the section that most nearly corresponds to the superseded section.

Section 4: Severability.

The provisions of this Chapter are declared to be severable, and if any section of this Chapter is held to be invalid, such invalidity shall not affect the other provisions of this Chapter that can be given effect without the invalidated provision.

Section 5: [Article / Chapter] is Hereby Added to [Article / Section] of the Zoning Code of the [City] and is to be Read as Follows:

5.1. Definitions. The following words and phrases, whenever used in this [article / chapter] shall have the meanings defined in this section unless the context clearly requires otherwise:

- ZONING ADMINISTRATOR means the Administrative Officer responsible for zoning administration and enforcement in the municipality.
- TOBACCO PRODUCT means any manufactured product containing tobacco or nicotine, including but not limited to cigarettes, cigars, pipe tobacco, snuff, chewing tobacco, dipping tobacco, bidis, snus, dissolvable tobacco products, and electronic cigarette cartridges, whether packaged or not. However, "Tobacco Product" does not include any product that has been approved by the U.S. Food and Drug Administration, pursuant to its authority over drugs and devices, for sale as a tobacco use cessation product or for other medical purposes and is being marketed and sold solely for that approved purpose.
- TOBACCO RETAILER means any business that sells or offers for sale any Tobacco Product.
- EXISTING TOBACCO RETAILER means any Tobacco Retailer that is engaged in the legal sale of Tobacco Products as of the effective date of date of this [article / chapter].
- NEW TOBACCO RETAILER means any Tobacco Retailer that is not engaged in the legal sale of Tobacco Products as of the effective date of date of this [article / chapter].
- SCHOOL means a public or private kindergarten, elementary, middle, junior high, or high school. (Should we add daycares?)

5.2. Zoning Regulations. The following zoning controls shall regulate the siting of New Tobacco Retailers.

(a) A New Tobacco Retailer may be located only within an area zoned for light industrial or industrial use. In addition, no Tobacco Retailer shall be located within a 1-mile radius of the boundary of any residential zone or a parcel occupied by a school, playground or other youth facility.

(b) No New Tobacco Retailer may be located within [XXXX] feet of any other Tobacco Retailer, as measured in a straight line from parcel boundary to parcel boundary.

5.3. Conditional Use Permits.

(a) A conditional use permit shall be required for all New Tobacco Retailers. A separate

permit is required for each location where Tobacco Products are sold. A new conditional use permit is also required for any Existing Tobacco Retailer that seeks to sell tobacco products at a location other than or in addition to where such Existing Tobacco Retailer sold tobacco product as of the effective date of this [article / chapter]. The application review and approval procedures set forth in section [cross reference local conditional use permit procedures] of the zoning code shall apply to all applications for a use permit under this ordinance.

(b) **Limited Number of Tobacco Retailers: The number of conditional use permits approved under this ordinance shall be no more than [XXXX].**

(c) For New Tobacco Retailers, each application for a permit to conduct business shall include, in addition to such other information as reasonably required by the [Board of Selectmen], a plan for demonstrating the means by which the applicant will comply with the requirements of paragraph (d) of this section.

(d) **Standard Conditions of Approval:** In addition to any conditions of approval imposed by the [Board of Selectmen] every Tobacco Retailer permitted under this Section, and every employee of such Tobacco Retailer, shall comply with all local, state, and/or federal laws regarding the sale, advertising or display of Tobacco Products.

5.4. Suspension or Revocation of a Conditional Use Permit.

(a) **Grounds for Suspension or Revocation:** A Tobacco Retailer's conditional use permit shall be suspended or revoked if the Zoning Administrator finds, after notice and opportunity to be heard, that the Tobacco Retailer has violated any of the use permit conditions of approval, including without limitation the Standard Conditions of Approval set forth in 5.3(d) or of this [article / chapter].

(b) A suspension shall suspend the privilege of selling tobacco products for a stated period pursuant to paragraph (c) of this Section. Revocation shall be without prejudice to the filing of a new application for a conditional use permit following correction of the conditions that required the revocation of the conditional use permit.

(c) **Suspension or Revocation of Conditional Use Permit:** If the Zoning Administrator finds that there are grounds for the suspension or revocation of a conditional use permit, the following sanctions may be imposed: (i) amendment of the conditional use permit to impose additional conditions or restrictions to ensure present and future compliance with the conditions of the permit; and/or (ii) revocation of the Tobacco Retailer's conditional use permit; and/or (iii) suspension of operations or closing the retail outlet; and/or (iv) instituting in the name of the municipality any appropriate action, injunction, process of contempt or other proceeding to rectify the situation and to restrict or prevent operation until the situation has been rectified. Such penalties shall be in addition to any others authorized by State Statute or Local Ordinance.

(d) **Appeal of Suspension and/or Revocation:** The decision of the Zoning Administrator is appealable to the [secretary of the board of adjustment or development review board of the municipality or with the clerk of the municipality if no such secretary has been elected] and must be filed within 15 days of receipt of the determination of violation.

5.5. Administrative Fine/Penalties.

(a) If the Zoning Administrator finds, based on substantial record evidence, that any Tobacco Retailer has violated this ordinance or the terms and conditions of the Tobacco Retailer's conditional use permit, the Zoning Administrator may fine that Tobacco Retailer up to \$100 for each offense.

5.6. Enforcement.

(a) Causing, permitting, aiding, abetting, or concealing a violation of any provision of this ordinance or a conditional use permit issued hereunder shall constitute a violation of this ordinance.

(b) Violations of this [article / chapter] and any conditional use permit issued hereunder are hereby declared to be public nuisances.

(c) In addition to other remedies provided by this [article / chapter] or by other law, a violation may be remedied by any appropriate action brought by the Zoning Administrator.

Section 6: Effective Date.

The effective date of this ordinance shall be ninety (90) days from the date of its enactment. (Can we make this much shorter – say 30 days?)

DRAFT

Check Register Report

BL 4/9/13

Date: 04/04/2013

Time: 4:04 pm

Page: 1

Village of Essex Junction

BANK:

Check Number	Check Date	Status	Void/Stop Date	Vendor Number	Vendor Name	Check Description	Amount
Checks							
10046865	04/03/2013	Printed		10541	THE HUNGRY DUTCHMAN	ANNUAL MTG DINNER-ADMIN	1,100.00
10046866	04/04/2013	Printed		0268	BRODART CO.	CIRC MATERIALS-LIB/LIB REPLAC	1,900.97
10046867	04/09/2013	Printed		10508	ADVANCED DISPOSAL	GRIT REMOVAL-WWTF	335.65
10046868	04/09/2013	Printed		10408	BAY STATE ELEVATOR COMPANY	SERVICE CALL-LIBRARY	485.00
10046869	04/09/2013	Printed		0173	BEARINGS SPECIALTY CO., INC.	GASS COMPRESSOR BEARINGS-WWTF	40.12
10046870	04/09/2013	Printed		9376	PATRICIA BENOIT	MILEAGE REIMBURSEMENT-ADMIN	14.13
10046871	04/09/2013	Printed		10249	BLUETARP FINANCIAL INC.	SUPPLIES-VARIOUS	112.87
10046872	04/09/2013	Printed		0239	BOND AUTO PARTS, INC.	VEHICLE MAINT-STREET	63.63
10046874	04/09/2013	Printed		0268	BRODART CO.	CIRCULATION MATERIALS-LIBRARY	815.49
10046875	04/09/2013	Printed		0457	CARGILL, INC SALT DIVISION	DEICER ROAD SALT-STREET	10,631.03
10046876	04/09/2013	Printed		9743	CARQUEST AUTO PARTS	VEHICLE PARTS- VARIOUS DEPTS	581.70
10046877	04/09/2013	Printed		10283	CATAMOUNT WEB SOLUTIONS,LLC	WEB HOSTING&SUPPORT-ADMIN	567.50
10046878	04/09/2013	Printed		0503	CHAMPLAIN OIL COMPANY, INC.	VEHICLE GAS-VARIOUS	4,129.03
10046879	04/09/2013	Printed		05070	CHARLEBOIS TRUCK PARTS INC.	SWEEPER DRIVE SHAFT-STREET	166.18
10046880	04/09/2013	Printed		0525	CHITTENDEN SOLID WASTE DISTRIC	SUPPLIES-STREET	7.50
10046881	04/09/2013	Printed		2305	CLARK'S TRUCK CENTER	VEHICLE MAINT-STREET	1,006.66
10046882	04/09/2013	Printed		9788	COMCAST	CABLE TV-STREET	62.29
10046883	04/09/2013	Printed		10505	DAVE A. CRAWFORD	FEB&MARCH SERVICES-WWTF REFURB	1,325.00
10046884	04/09/2013	Printed		10539	DISCOUNT SCHOOL SUPPLIES	ART SUPPLIES-LIBRARY	90.89
10046885	04/09/2013	Printed		0653	PAUL DOUGLASS	CDL REIMBURSEMENT-WWTF	27.00
10046886	04/09/2013	Printed		0700	EAST COAST PRINTERS	SHIRTS/HOODIES-STREET	79.00
10046887	04/09/2013	Printed		0710	ENDYNE, INC.	QTRLY EFFLUENT TESTING-WWTF	54.00
10046888	04/09/2013	Printed		10134	ENVIRONMENTAL RESOURCES ASSOC.	ANNUAL EPA TESTING-WWTF	1,333.46
10046889	04/09/2013	Printed		07657	ESSEX CHIPS	DONATION SR/TEEN LUNCH-ADMIN	50.00
10046890	04/09/2013	Printed		0780	ESSEX EQUIPMENT SALES	PAINT SUPPLIES-STREET/WATER	23.17
10046891	04/09/2013	Printed		9885	ESSEX RESCUE, INC.	EMS SUPPLIES-FIRE	804.84
10046892	04/09/2013	Printed		0795	TOWN OF ESSEX	11 RECORDINGS-PLANNING	110.00
10046893	04/09/2013	Printed		10011	FAIR POINT COMMUNICATIONS,INC.	PHONE-FIRE	28.58
10046894	04/09/2013	Printed		1935	FERGUSON WATERWORKS #590	CLAMP FOR RAS LINE-WWTF	228.26
10046895	04/09/2013	Printed		0751	FISHER AUTO PARTS	SUPPLIES-STREET	56.39
10046896	04/09/2013	Printed		10226	G & K SERVICES	SHOP TOWELS-STREET	52.48
10046898	04/09/2013	Printed		0965	GREEN MOUNTAIN POWER CORP.	ELECTRICITY-VARIOUS	16,038.86
10046899	04/09/2013	Printed		1010	HACH COMPANY	CHEMICAL SUPPLIES-WWTF	751.49
10046900	04/09/2013	Printed		1035	DONALD L. HAMLIN	ENG SVCS -DEVELOPMENT	1,103.63
10046901	04/09/2013	Printed		1031	HANNAFORD BROTHERS CO.	DISTILLED WATER-WWTF	73.41
10046902	04/09/2013	Printed		9769	KEMIRA WATER SOLUTIONS	SODIUM ALUMINATE-WWTF	6,520.99
10046903	04/09/2013	Printed		1257	HOWARD KIMBALL	MILEAGE REIMB-WWTF	66.44
10046904	04/09/2013	Printed		9822	KLEARWATER	BAGS ON BOARD-STREET	2,312.70
10046905	04/09/2013	Printed		13631	LYNN PUBLICATIONS	LEGAL NOTICES- ADMIN/PLAN	962.63
10046906	04/09/2013	Printed		10245	MAILFINANCE	POST MTR LEASE-ADMIN	254.91
10046907	04/09/2013	Printed		1636	NEW ENGLAND MUNICIPAL	PRESSURE GAUGE VAC TRK-VARIOUS	62.09
10046908	04/09/2013	Printed		1661	NORTH CENTRAL LABORATORIES	LAB SUPPLIES-WWTF	606.76
10046909	04/09/2013	Printed		1660	NORTHEAST DELTA DENTAL	INSUR PREM-VARIOUS DEPTS	2,180.47
10046910	04/09/2013	Printed		1174	PERMA-LINE CORP OF NEW ENGLAND	THERMO PADS-STREET	46.65
10046911	04/09/2013	Printed		1891	QUEEN CITY STEEL CO.	STEEL -STREET	226.19
10046912	04/09/2013	Printed		1908	THE RADIO NORTH GROUP, INC.	LADDER TRUCK SERVICE-FIRE	450.00



MEMORANDUM

TO: Village Trustees *smh*
FROM: Susan McNamara-Hill and Lauren Morrisseau, Co-Village Managers
DATE: April 5, 2013
SUBJECT: Letter of Support for Route 2A Shared Use Path

The Town of Essex is asking for a letter of support from the Trustees for their grant application for a shared use path on Rte 2A. The path would start at Pinecrest Drive and end across the road from the entrance to Old Colchester Road. A pedestrian crossing would connect with the existing path on Old Colchester Road. A map and details are included in the Trustees meeting materials information.

Staff recommends the Trustees approve this request and sign the letter of support.

EDGE OF EXISTING
PAVEMENT

2' - 0"
SHOULDER

10' - 0"
SHARED-USE PATH

5' - 0"
GREEN STRIP

VT ROUTE 2A

2.0%

2.0%

2.0%

1:3

1:3

2" BITUMINOUS CONCRETE
PAVEMENT, TYPE III

12" SUBBASE OF DENSE
GRADED CRUSHED STONE

VT ROUTE 2A SHARED-USE PATH TYPICAL

NOT TO SCALE

STATION 4+81.4 TO 15+37.6, LT

PHOTOS



**Photo No. 1 Intersection of Old Colchester Road and VT RT 2A, facing east.
Terminus of existing multiuse path on Old Colchester Road.**



**Photo No. 2 Intersection of Old Colchester Road and VT RT 2A, facing west.
Terminus of existing multiuse path on Old Colchester Road.**



Photo No. 3 Facing south on the west side of VT RT 2A



Photo No. 4 Facing south on the east side of VT RT 2A



Photo No. 5 Facing north on the west side of VT RT 2A



Photo No. 6 Facing north on the west side of VT RT 2A



Photo No. 7 Pinecrest Drive Facing north at intersection with VT RT 2A



Photo. 8 South side of intersection of Pinecrest Drive and
VT RT 2A facing north on the west side of VT RT 2A