

Legal Review of Tobacco and Health Foods/Healthy Eating Laws for Portland Maine

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At the request of the City of Portland Public Health Division, Muskie School of Public Service has reviewed Maine and Portland public health laws, focusing on two areas: 1) tobacco and smoking regulation, and 2) nutrition and healthy eating. Our review and comparison of state and local laws in these areas has disclosed some gaps in current laws and opportunities to revise or amend the Portland Municipal Code. In this analysis we have described the status of relevant state and local laws, objectives for new or amended laws, and strategies to develop new or amend existing local ordinances. Links to best practices and models for future laws in each of these areas are referenced below.

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Review of Tobacco Regulation

A. Objectives of new or revised ordinances

1. Strengthen Portland's tobacco regulation to include new smoking devices.
2. Develop a local tobacco licensing program to reduce the density of tobacco retailers and limit youth access.
3. Ban tobacco sales in pharmacies and other health organizations.
4. Reduce access to youth smokers by enhancing existing state regulations regarding product placement and tobacco advertising in stores.
5. Enact a smoke-free ordinance for hotel and motel guest rooms in Portland.

B. Relevant tobacco and smoking laws:

State:

22 MRSA 1541-50: Smoking is prohibited in all enclosed areas of public places, outdoor eating areas, and all public restrooms. Smoking is prohibited in all workplaces with one or more employees.

22 MRSA 1551-1560: Retail tobacco sales and licensing requirements.

22 MRSA 1556: Maine law does not preempt local communities from passing ordinances and further regulation further restricting smoking, youth access to tobacco products, and retail tobacco sales, except notice to licensees at least 30 days prior to consideration of such ordinances.

Local:

Portland Code Sec. 17-70- 17-97: Creates smoke-free zones in city parks, trails, playgrounds, beaches, and athletic facilities. Also bans free distribution or sampling of tobacco.

C. Strategies

1. Strengthen Portland's tobacco regulation to include new smoking devices

Neither Maine nor Portland tobacco regulations cover electronic smoking devices (ESD). The definition of smoking in both state and local laws does not reference vapor emitted by ESD.

By restricting the use of ESD in places where smoking is prohibited, Portland can protect its residents from involuntary exposure to the second-hand byproducts of ESD such as "e-vapor," reduce the likelihood that children will associate the use of ESD with healthful behavior, and reduce the likelihood that smoking in public places and places of employment will become "re-normalized." By regulating how ESD are sold, Portland helps to ensure compliance with local business standards and reduce youth access to ESD.

Portland could update its smoke-free ordinance definition section, cite, to include ESD and their vapor. Alternatively, a stand-alone ordinance can be adopted to prohibit the use of ESD wherever smoking is prohibited by law.

Resources and model ordinances:

<http://www.cascwa.org/documents/2013E-CigCalifOrdance.pdf> (Model California Ordinance Regulating Electronic Smoking Devices)

http://changelabsolutions.org/sites/default/files/CA.ECigDeviceOrdinance-CHECKLIST-FINAL-201307011_0.pdf (ESD Ordinance checklist and policy options)

2. Develop a local tobacco licensing program to reduce the density of tobacco retailers and limit youth access

Currently the state of Maine is the only governmental entity that licenses tobacco retailers (*22 MRSA 1551-1560*). Many communities throughout the country operate local licensing programs to regulate the density and location of tobacco retailers. Public health research has concluded that tobacco retail outlet density is associated with higher rates of youth smoking initiation and experimentation. Limiting the proximity of tobacco outlets around schools and playgrounds can reduce youth smoking rates.

A local tobacco retailer license in Portland would ensure compliance with local business standards, reduce the number of tobacco retail outlets, regulate the location of tobacco retail outlets, restrict youth access to tobacco, and limit the negative public health effects associated with tobacco use. An annual license fee could create a self-financed programs allowing for regular enforcement.

Recognizing that a new tobacco licensing scheme may face considerable resistance from current licensees as well as public opposition, a first step for Portland Public Health may be to map the locations of current tobacco licensees in Portland to assess the density of licensees and their proximity to youth-centered areas such as schools and playgrounds. A feasibility study should be undertaken to consider the benefits and burdens of such a program.

A Portland Tobacco Retailer License might include the following provisions:

- a. Tobacco-free zones around schools and playgrounds. Make issuance of local retail license conditional on retailers not operating within a certain distance (e.g., 1,000 feet) of schools, playgrounds, and other youth-centered places.
- b. Cap the total number of licenses based on population and/or restrict their density relative to other retailers (similar to alcohol licensing).
- c. No licenses for bars or restaurants, or licenses for off-sale alcohol retailers only.

Resources and model ordinances:

http://changelabsolutions.org/sites/default/files/CA.LicensingOrdinance_FINAL_20130724.pdf

(ordinance checklist)

Model California Ordinance Requiring a Tobacco Retailer License with annotations.

Changelabsolutions.org/tobacco control

<http://www.tobaccopolicycenter.org/documents/Licensing-Model-2013.pdf> (New York model ordinance for TRL)

3. Ban tobacco sales in pharmacies and other health organizations

All national pharmacy associations support the restriction of retail sale of tobacco products in pharmacies. In 2010 the American Pharmacists Association adopted a resolution that urged state pharmacy boards to stop issuing and renewing licenses of pharmacies that sell tobacco. Several national chains, such as CVS, have stopped or will soon stop selling tobacco products because the practice is contradictory to their mission of improving health.

Despite opposition from pharmacists and consumers, over half of pharmacies in the country sell cigarettes, and studies show that while cigarette sales have declined nationally, sales of cigarettes in pharmacies have increased. A ban on the sale of tobacco in pharmacies would decrease the normalization of tobacco products and send a clear message that pharmacies do not promote tobacco use. Many cities throughout Massachusetts and California have successfully restricted tobacco sales in pharmacies.

Portland has the authority to enact a law banning tobacco sales in pharmacies either as a stand-alone ordinance or as part of a local licensing ordinance (see No. 2).

Resources:

<http://publichealthlawcenter.org/sites/default/files/resources/tclc-guide-prohibiting-tobacco-pharmacies-2012.pdf>

http://cphss.wustl.edu/Products/Documents/POS_MA_CaseStudy_Final_electronic.pdf

http://www.bphc.org/whatwedo/tobacco-free-living/Documents/TobaccoRestrictionRegulation_12_08.pdf (Boston regulations)

4. Reduce access to youth smokers by enhancing existing state regulations regarding product placement and tobacco advertising in stores

The state has no specific laws regarding tobacco advertising and display. Portland could strengthen existing federal restrictions on tobacco advertising and display in the following ways:

- a. Expand current federal law requiring that retail ads for cigarettes and smokeless tobacco products be limited to black-and-white text.
- b. Restrict or eliminate the display of so-called “power walls” of cigarette packages at retail outlets.
- c. Limit the number and size of tobacco ads at retail outlets.
- d. Require that tobacco products and advertisements be kept a minimum distance from cash registers in order to reduce impulse purchases by smokers trying to quit.

Resources:

<http://publichealthlawcenter.org/sites/default/files/resources/tclc-guide-restricttobadvert-2011.pdf>

5. Enact a smoke-free ordinance for hotel and motel guest rooms in Portland

Maine law specifically exempts hotel and motel rooms from its smoke-free law. Based on the lack of state preemption on tobacco regulation, a local smoke-free hotel law is unlikely to be construed as frustrating or inconsistent with state law, but corporate legal counsel should be consulted to assess any potential conflict of laws.

Nationally, five states have passed smoke-free hotel and motel guest room laws (Indiana, Michigan, Nebraska, North Dakota, and Wisconsin), and more than 100 communities (including Boston and many cities across Massachusetts) have joined this trend. Many national hotel chains, such as Marriott, Ritz-Carlton, Sheraton, Wyndham, Fairfield Inn, and Westin, have voluntarily created 100% smoke-free room policies. Recent studies have shown that second-hand smoke does circulate in non-smoking hotel rooms, endangering the non-smoking population.

To assess needs and feasibility, Portland Public Health may wish to conduct an inventory of Portland hotel and motels to identify those that are not already smoke-free and would be affected by a smoking ban. Then evaluate the current smoking guidelines for those hotels (e.g., percentage of rooms for smokers, any smoking penalties).

Any ban on smoking in all Portland hotel and motel rooms may include an exemption for guesthouses and lodgings under a minimum number of rooms.

Resources:

<http://www.no-smoke.org/pdf/statelocalawshotelrooms.pdf>

Review of Healthy Foods and Healthy Eating Laws

A. Objectives of new and revised ordinances

1. Expand the local food economy and establish a preference for use of local foods in municipal food procurement contracts.
2. Expand access to fresh foods through increasing the numbers of farmers' markets throughout Portland.
3. Promote access to fresh foods in underserved neighborhoods.

B. Strategies

1. Expand the local food economy and establish a preference for use of local foods in municipal food procurement contracts

Maine law - An Act to Support School Nutrition and Expand the Local Foods Economy passed the 126th legislature. The Governor's veto of the bill was sustained. This bill would have supported the expansion and coordination of the use of fresh local foods in public school food service programs.

Local:

No Portland ordinance addresses this topic.

Portland could develop its own procurement tool to encourage purchasing Maine food products for facilities for which Portland purchases food (e.g., Barron Center). The food products would be grown, produced, or harvested in Maine, or food products where any processing took place would be in facilities in Maine. The procurement guidelines could include such provisions as:

- a. Award a particular contract to a bidder offering Maine food products whose prices falls within 10% of the lowest responsive, responsible bidder's price where that low bidder does not offer Maine food products.
- b. Mandate that a particular product come from Maine, thereby limiting competition to bidders that supply such products.
- c. Use "best value" provisions that consider the freshness and perishability of food being purchased, such as the number of days from harvest to delivery.
- d. Consider a group purchasing partnership to leverage purchasing power and reduce administrative costs.

Resources:

http://www.nyc.gov/html/mocs/html/vendors/food_purchasing_guidelines.shtml. New York State procurement guidelines

2. Expand access to fresh foods through increasing the numbers of farmers' markets throughout Portland

State:

7 *MRSA Sec. 415*: Maine law defines a farmers' market as a building, structure, or place used by 2 or more farmers for the direct sale of farm and food products to consumers. Farm and food products means any agricultural, horticultural, forest, or other product of the soil or water, including, but not limited to, fruits, vegetables, eggs, dairy products, meat and meat products, poultry and poultry products, fish and fish products, grain and grain products, honey, nuts, maple products, apple cider, fruit juice, malt liquor, wine, ornamental or vegetable plants, nursery products, fiber or fiber products, firewood, and Christmas trees. At least 75% of the products offered by that person at the farmers' market must be grown or processed by that person or under that person's direction. A product not grown or processed by that person or under that person's direction must have been grown or processed by and purchased directly from another farmer, and the name and location of the farm must be identified on the product or on a sign in close proximity to the displayed product.

Local:

Portland Code Sec 21-1: Farmers' Markets. Details days, locations, and products sold at farmers' markets on Wednesdays in Monument Square, Saturdays in Deering Oaks Park, and in community halls located in R-6 residential zones. Permit by lease or license agreement use of City property for purpose of operating a farmers' market. Review of Portland zoning regulations shows agricultural use and sales allowed only in R-1. Presently farmers' markets or community gardens not identified as permitted or conditional use.

Portland has several robust farmers' markets, but many neighborhoods may not have easy access to fresh food. Amending current land use and zoning laws could make it easier to establish new markets throughout the city. Zoning laws that would allow farmers' markets as a permitted use in selected areas of the community would eliminate the need for a permit and increase the land available for markets.

Portland could expand the access and numbers of its farmers' markets through several legal methods:

- a. Adopt zoning regulations that establish farmers' markets as a permitted use in appropriate locations, subject to regulations.
- b. Identify potential sites on public property, including parks, schools, senior centers, and colleges, and on private property including hospitals and commercial centers.
- c. Partner with schools to allow markets on school grounds. Host markets on weekends or after school hours.
- d. Partner with local organizations. Kaiser Permanente hosts farmers' markets at its hospitals in California, Colorado, Georgia, Hawaii, Oregon, and the District of Columbia. Markets serve hospital visitors, patients, and employees.
- e. Partner with parks. Locating farmers' market on parklands (an expansion of the Deering Oaks model), provided that the market does not significantly interfere with public use and enjoyment

of other areas of park. San Francisco's ordinance requires the Commissioner of Agriculture to work with the Recreation and Parks Department to identify suitable sites for farmers' markets on city parkland.

- f. Encourage developers to provide for the dedication of land for neighborhood centers, public square, or comparable uses that can be used for farmers' markets in new developments.

Resources and model ordinances:

http://www.michigan.gov/documents/mdch/Farmers_Markets_3-09_Public_Health_Law_Policy_303375_7.pdf Model ordinance and guidelines for establishing land use protections for farmers' markets.

http://changelabsolutions.org/sites/default/files/From_the_Ground_Up-Farmers_Markets_FINAL_20130415.pdf Land use policies to protect and expand farmers' markets.

JAFSCDKaiserPermanenteFMProgramMarch2012.pdf. Description of impact and lessons learned from Kaiser Permanente's Farmers' Market program.

3. Promote access to fresh foods in underserved neighborhoods

Local:

Portland Code Ch. 19 regulates street vendors, which includes mobile food trucks. *Ch. 11* regulates mobile food service establishments. Portland could amend or create a new process for permitting or licensing fresh produce carts to increase access to fresh produce. The ordinance could offer incentives to fresh produce mobile vendors who sell in underserved neighborhoods.

Resources and model ordinances:

http://changelabsolutions.org/sites/phlpnet.org/files/nplan/Produce%20Cart%20Ordinance_FINAL_20100222.pdf Model Produce Cart Ordinance.