



Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Joseph Horwedel

SUBJECT: SEE BELOW

DATE: November 2, 2010

Approved

Date

11/4/10

COUNCIL DISTRICT: Citywide
SNI AREA: All

SUBJECT: TOBACCO RETAIL ESTABLISHMENT LICENSING PROGRAM

RECOMMENDATION

Staff recommends that the City Council:

- a. Accept staff's report on licensing and regulating tobacco retail establishments;
- b. Direct the City Attorney to draft an ordinance amending the San Jose Municipal Code to add a new chapter to license and regulate establishments engaged in the sale of tobacco and tobacco related products;
- c. Direct the City Attorney to draft a resolution amending the City's Schedule of Fees and Charges to establish fees associated with the licensing and regulation of tobacco retail establishments; and
- d. Direct the City Attorney to draft a resolution amending the City's Schedule of Administrative Fines to establish fine amounts for violations of the chapter.

OUTCOME

If the City Council approves the above recommendations, the City Attorney will begin drafting the Tobacco Retail Establishment Licensing Ordinance. The Ordinance will require that owners of all retail businesses offering tobacco products and tobacco paraphernalia for sale to the public be subject to annual licensing and inspections by the City. Additionally, the Ordinance will include regulations crafted in a manner to reduce underage access to these products and preventing public nuisances, setting forth requirements for property maintenance, and establishing performance standards for these business that are consistent with those for retail establishments engaging in the sale of alcoholic beverages for off-site consumption. The regulations will also include provisions for enforcement of violations of the regulations including administrative and/or criminal citations and suspension and/or permanent revocation of the licenses for unabated and willful violations.

HONORABLE MAYOR AND CITY COUNCIL

November 2, 2010

Subject: Tobacco Retail Establishment Licensing Program

Page 2

At the October 15, 2010 Joint City Council/Redevelopment Agency Board/County Board of Supervisors Meeting, City Attorney Richard Doyle reported if the City Council so directed, an Ordinance and Resolution would be prepared before the end of the calendar year.

BACKGROUND

The City Council, in adopting the Mayor's Revised June Budget Message dated June 11, 2010, directed the City Manager and City Attorney to "...prepare an analysis for City Council consideration of a potential ordinance requiring retailers to obtain a license from the City in order to sell tobacco products and paraphernalia." This memorandum includes that analysis and recommendations for a proposed ordinance to address the statistics uncovered during staff's research.

Approximately 438,000 people die in the United States from tobacco-related diseases every year, making it the nation's leading cause of preventable death. Each day nearly 4,000 children under 18 years of age smoke their first cigarette, and almost 1,500 children under 18 years of age begin smoking daily. More than 75% of all current smokers in 2001 began smoking before the age of 18. Among middle school students who were current cigarette users in 2004, 70.6% were not asked to show proof of age when they purchased or attempted to purchase cigarettes from a store and 66.4% were not refused purchase because of their age. In 2002, youth smoked approximately 540 million packs of cigarettes, generating nearly \$1.2 billion in tobacco industry revenue. Although state law currently prohibits the sale or furnishing of cigarettes, tobacco products, and smoking paraphernalia to minors and requires that tobacco retail establishments check the identification of tobacco purchasers who reasonably appear to be under 18 years of age, the number of youth having access to tobacco products continues.

The California State Legislature has declared that smoking is the single most important source of preventable disease and premature death in California. As a result, the Legislature has expressly permitted cities and counties to enact local tobacco retail establishment licensing ordinances which require such venues to obtain a license from the city or county they are located in prior to engaging in the sale of any tobacco products or paraphernalia and which allows for the suspension or revocation of a license for a violation of any state tobacco control law.

Approximately 50 California communities have adopted strong tobacco retail establishment licensing ordinances. Those with active programs show that the youth sales rate decreased on average by 68%. In San Francisco once a tobacco retail establishment licensing ordinance was adopted, the percentage of minors who were able to buy tobacco fell from 22.3% in 2004 to 11% in 2008.

ANALYSIS

Tobacco Retail Establishment Licensing Program

Staff estimates that there are approximately 855 tobacco retail establishments within San Jose's

November 2, 2010

Subject: Tobacco Retail Establishment Licensing Program

Page 3

City limits. In light of this number and the above statistics, staff proposes drafting an ordinance establishing a regulatory and inspection program. Specifically, the Tobacco Retail Establishment Licensing Ordinance ("Ordinance") would require businesses to first obtain a Tobacco Retail Establishment License ("License") from the City of San Jose before it is allowed to sell tobacco products or tobacco-related paraphernalia. This License would have a one-year term, and retailers would be required to renew the License on an annual basis. To ensure that the program is 100% cost recoverable, the cost of the License would be approximately \$450.00 annually. The cost would cover the time staff spends reviewing the application for the License and the time staff spends conducting an initial site inspection and one compliance inspection to verify that violations identified during the initial inspection have been corrected. Any additional inspections required due to continuing violations or as the result of a substantiated complaint within the calendar year, would be subject to a reinspection fee, pursuant to Council Resolution 72737, once amended.

The Department of Planning, Building and Code Enforcement currently inspects approximately 491 retail businesses for the Off-Sale of Alcohol (OSA) program using one Code Enforcement Inspector. There are approximately 855 Tobacco retailers in the City of San Jose. While staff believes that the OSA and Tobacco retailer inspections could be combined for those establishments that sell both products, the associated increase in workload would require the Department to augment existing staffing with two additional Code Enforcement Inspectors.

The annual license inspection would determine if the business is in compliance with the conditions enumerated in any approved land use permit and all applicable provisions of the San Jose Municipal Code, including, but not limited to, the proposed new Ordinance.

The proposed Ordinance, if adopted, will include the following:

- Require all retailers of tobacco products or paraphernalia to obtain a City of San Jose Tobacco Retail Establishment License and pay the associated fees.
- Require that a valid Tobacco Retail Establishment License be prominently displayed in a publicly visible location at the licensed location.
- Prohibit the sale or transfer of tobacco products or tobacco paraphernalia to anyone under 18. This would require that retailers must first examine the identification of the recipient to confirm that the recipient is at least the minimum age under state law to purchase and possess the tobacco product or tobacco paraphernalia.
- Prohibit a person who is younger than the minimum age established by state law for the purchase or possession of tobacco products to engage in tobacco retailing
- Prohibit all self-service displays of tobacco products.
- Require all tobacco products and tobacco paraphernalia to be stored or kept out of public view.
- Allow a process for License suspension and revocation for violations of state law and the proposed ordinance, as well as an opportunity for hearing and appeal of the action.

Further, the draft Ordinance would establish operational and maintenance standards for tobacco retail businesses. The Ordinance, coupled with an annual inspection program, will ensure that

tobacco retail businesses will contribute to the vitality of our neighborhoods and business districts instead of detracting from them. The goal is to have all similar establishments governed by the same set of operating conditions to reduce access and sales to youth and to ensure that the businesses do not create a nuisance. These regulations, coupled with an inspection program, would provide the basis for Code Enforcement to utilize the most appropriate enforcement tool available, including administrative and/or criminal citations as well as the ability to suspend or revoke the License.

Administrative Citation

The administrative citation tool is an effective way to resolve violations. It is anticipated that the fine for violations of Property Maintenance Standards (graffiti removal, litter, refuse management, emergency access and lighting) be set at \$250 for the first violation, \$500 for the second violation, and \$1000 for the third and subsequent violations within the same twelve month period.

Further, staff will be proposing that the administrative fine for violation of the Performance Standards (failure to display valid retail license, failure to check identification, underage retail clerks, self service displays, false advertising, failure to keep tobacco products from public view or access) be set at \$500 for the first violation, \$750 for the second violation, and \$1000 for the third and subsequent violations within the same twelve month period.

Administrative citations may be appealed within 30 days of the date of the citation and are heard by an independent administrative hearing officer.

License Suspension and Revocation

Staff proposes that violations of the Ordinance may also subject the business to suspension or revocation of their Tobacco Retail Establishment License. It is anticipated that this tool will only be used on businesses that are causing a nuisance, selling to minors or are repeat violators.

Once a Notice of Intent to Suspend or Revoke ("Notice") is issued, the retailer will be afforded the opportunity to appeal the action to the San Jose Appeals Hearing Board ("Board") by filing an appeal with the Secretary to the Board within 10 days of issuance of the Notice by the Code Enforcement Division Deputy Director. If the Notice is not appealed or is subsequently upheld by the Board, the retailer will be unable to offer or advertise tobacco products for the period as specified in the Notice or as determined by the Board. If the business chooses to appeal the Board's decision, the business would need to file a Writ of Mandamus with Superior Court.

Outreach

Outreach to the approximately 855 known retailers will be a key component of the initial licensing process. FAQ's and sample applications, with instructions in English, Spanish and Vietnamese, will be provided in the initial outreach. First year inspections will focus on bringing the physical environment into compliance with the provisions of the ordinance. The retailers will be made aware of their responsibilities, and any confirmed sale of tobacco products or

HONORABLE MAYOR AND CITY COUNCIL

November 2, 2010

Subject: Tobacco Retail Establishment Licensing Program

Page 5

paraphernalia to those younger than 18 years of age will subject them to immediate enforcement by way of Administrative Citations and/or License suspension or revocation.

General Fund Impact

As a fee for service program, implementation will have no impact on the General Fund. This fee will allow the City to recover the cost of the administration and inspection aspects of the program. Code Enforcement anticipates that 2.0 FTE Code Enforcement Inspector positions will be necessary to implement the Tobacco Retail Establishment Inspection Program. Further, the estimated annual fee for the License of \$450.00 will be reviewed annually during the budget cycle to ensure the costs for reviewing new/renewal applications, inspection and enforcement processes are maintained at 100% cost recoverability.

EVALUTAION AND FOLLOW-UP

Staff will work with the City Attorney's Office and the City Manager's Budget Office to bring forward final analysis on the appropriate staffing and fee levels to the City Council in December 2010. The recommendation will include amendments to the City of San Jose Appropriation Ordinance, recommended amendments to the San Jose Municipal Code, recommended amendments to the Schedule of Fees and Charges, as well as recommended amendments to the Schedule of Administrative Fines.

PUBLIC OUTREACH/INTEREST

- Criterion 1:** Requires Council action on the use of public funds equal to \$1 million or greater. **(Required: Website Posting)**
- Criterion 2:** Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City. **(Required: E-mail and Website Posting)**
- Criterion 3:** Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach. **(Required: E-mail, Website Posting, Community Meetings, Notice in appropriate newspapers)**

This memorandum will be posted on the City's website, and on the front page of the Code Enforcement Division webpage, to provide Code Enforcement customers an opportunity to send comments to staff and participate in the Council meeting.

HONORABLE MAYOR AND CITY COUNCIL

November 2, 2010

Subject: Tobacco Retail Establishment Licensing Program

Page 6

COORDINATION

This memorandum was coordinated with the Office of the City Attorney, the Police Department and the City Manager's Budget Office.

CEQA

Not a project, PP10-068(b).

/s/

JOSEPH HORWEDEL, DIRECTOR
Planning, Building and Code Enforcement

For questions, please contact Michael Hannon, Code Enforcement Official, at (408) 535-7826.