

January 29, 1998

REPORT TO THE COMMITTEE ON PUBLIC  
SAFETY AND NEIGHBORHOOD SERVICES

PROPOSED TOBACCO ORDINANCE

**INTRODUCTION**

At the PS&NS Committee meeting of November 19, 1997, the Committee directed the City Attorney's Office to prepare a report detailing feasible options for an ordinance restricting tobacco advertising and sales, as outlined in the proposed E-TASK ordinance. This report presents several options available to City Council for a tobacco ordinance.

**I. Factual Background**

The following points outline existing state and local laws regulating tobacco sales and advertising, and some of the many recent studies addressing tobacco advertising and access issues. These facts form the basis for Council action.

A. Existing Laws Regulating Tobacco Sales and Advertising

1. Section 308(a) of the California Penal Code makes it unlawful for any person, firm or corporation to sell, give, or furnish cigarettes to any person under the age of 18 years.
2. Section 308(b) of the California Penal Code makes it unlawful for any person under the age of 18 years to purchase, receive or possess cigarettes.
3. Section 308.2 of the California Penal Code makes it unlawful for any person to sell one or more cigarettes, other than in a sealed package containing the required federal warning label.
4. Section 58.04 of the San Diego Municipal Code makes it unlawful for any person under the age of 18 years to use or possess cigarettes in the City of San Diego.
5. Section 22961 of the STAKE Act<sup>1</sup>, effective January 1, 1998, prohibits billboards with tobacco advertising within 1000 feet of any school or

playground.

6. Section 22952 of the STAKE Act requires that retailers of tobacco products post conspicuous signs stating that it is illegal to sell cigarettes to anyone under the age of 18 and the penalties for doing so. The signs must also state identification is required for anyone who appears to be under 18 years of age. The sign must also include a toll free number for reporting unlawful sales.
7. Section 22956 of the STAKE Act requires that all persons engaging in the retail sale of tobacco products check the identification of purchasers who appear to be under the age of eighteen.
8. Section 48901(a) of the California Education Code prohibits public school students from smoking or using tobacco products while on campus or attending school-sponsored activities.
9. Federal law prohibits the advertising of tobacco products on television or radio (15 U.S.C. 1331-1340).

B. Factual Findings regarding the Addictive Nature of Cigarettes

1. The United States Surgeon General has declared that nicotine, a key ingredient of cigarettes and tobacco products, is as addictive as cocaine or heroin. Despite its addictive nature, no other drug is as accessible to minors or as heavily advertised and promoted to minors as tobacco products.<sup>2</sup>
2. The Surgeon General's report points out that early addiction is the primary means for renewing the pool of smokers.<sup>3</sup> Most adolescent smokers are addicted to nicotine and report that they want to quit but are unable to do so.<sup>4</sup>

C. Regional Findings regarding Sales of Tobacco to Minors and Advertising

1. A survey of tobacco sales to youth conducted in the County of San Diego in October 1996 found that in San Diego County<sup>5</sup>:
  - a. Cigarette sales to minors were less likely to occur when identification was requested by the store clerk, store clerks were least likely to request identification from 17 year olds, and store clerks were most likely to sell cigarettes to 17 year olds;
  - b. Cigarette sales to minors were less likely to occur when legally required signs were posted in the store;

- c. Cigarette sales to minors occurred more often at small markets, gas stations, and liquor stores; and
  - d. One in five stores surveyed (21percent) were willing to sell cigarettes to minors. This number may be unrealistically low given that the youths who attempted to buy cigarettes in the survey were instructed to respond honestly to questions about their age.
- 2. Between 1993 and 1995 teen smoking in California increased 30.8 percent, rising from 9.1 percent to 11.9 percent. During that same time period, smoking among adults in California dropped.<sup>6</sup>
- 3. A survey of 5,773 retail businesses in fifty-two counties in California in 1995 found that retail stores near schools were significantly more likely to place tobacco advertising next to candy.<sup>7</sup> (See photographs accompanying this report for recent examples in San Diego.) That survey also found:
  - a. More than half of retail stores displayed tobacco advertising at three feet or lower from the floor, and 46 percent of stores placed tobacco advertising next to candy;
  - b. Stores near schools had significantly more tobacco advertising and promotions overall, and more tobacco advertising on the outside of the store, than stores not near schools; and
  - c. An average of more than twenty-five tobacco advertisements and promotions per retail store.
- 4. In San Diego, Camel and other cigarette brands advertised on billboards continue to feature themes attractive to minors. (See photographs.) For example, recent Camel billboards in San Diego feature the outline of a camel against a tie-dyed, psychedelic colored backdrop, Benson & Hedges billboards feature personified cigarettes having “fun in the sun,” Lucky Strikes billboards show young adults lounging in an artist’s loft-type apartment, Marlboro has continued its rugged cowboy Marlboro man campaign, while Winston billboards use in-your-face messages promoting the purity of their cigarettes (“100%,” “No bull,” “No additives,”) and bemoaning cigarette regulation (“At least you can still smoke in your car”).

D. Money Spent by the Tobacco Industry in California on Advertising and Promotions

1. In 1993, the tobacco industry spent \$600 million on advertising in California, a rate of \$1.7 million per day.<sup>8</sup> Most of this money was spent on coupons and retail value added promotions, promotional allowances and slotting fees paid to store owners, specialty item distribution, and point-of-sale promotions.<sup>9</sup>
2. Contracts between store owners and tobacco companies sometimes require store owners to place posters and signs advertising tobacco below counter level near candy and snack displays.<sup>10</sup> Others require that three out of five tobacco advertising posters or banners be placed within three feet of the floor.<sup>11</sup>
3. The United States Supreme Court has long recognized that outdoor advertisements are a unique and distinguishable medium of advertising which subjects the general public to involuntary and unavoidable forms of solicitation.<sup>12</sup>

#### E. Relationship Between Advertising and Minors' Smoking

Several studies have shown that a strong relationship exists between cigarette advertising and promotion and the uptake of smoking among minors.

1. Documents recently produced in litigation show that R. J. Reynolds aimed advertising campaigns' cigarette promotions at teens as young as thirteen years of age.<sup>13</sup>
2. Cigarette advertising encourages youth to smoke. Twelve- and thirteen-year-old children have a higher recall rate for tobacco advertising than any other segment of California's population. Within that group, children who are considering taking up smoking have an even higher recall rate for tobacco advertising.<sup>14</sup>
3. Adolescent smokers consistently smoke the most advertised brands of cigarettes. The most heavily advertised brands of cigarettes, Marlboro and Camel (RJR Nabisco), have 80 percent of the market share among twelve-through seventeen-year-old smokers in California.<sup>15</sup> From 1989 to 1993, during the Joe Camel advertising campaign, Camel's market share among smokers aged 12 to 18 years increased 64 percent.<sup>16</sup> At the same time, the overall market share for Camel remained nearly unchanged.<sup>17</sup> A study published in 1991 showed that ninety percent of six-year-olds recognized Old Joe Camel, the same recognition rate as for Mickey Mouse.<sup>18</sup>
4. Tobacco marketing may be a stronger influence in encouraging twelve- to 17-year-olds to begin smoking than exposure to peer or family smokers,

demographic characteristics, or perceived school performance.<sup>19</sup> Sixty percent of twelve- to seventeen-year-olds in California who have never smoked can name a favorite cigarette advertisement.<sup>20</sup> Forty percent can name a brand of cigarettes that they would prefer to purchase.<sup>21</sup> Most often, the brands named are the most heavily advertised brands.<sup>22</sup>

5. Children derive positive images of smoking from tobacco advertising.<sup>23</sup>
6. When tobacco advertising budgets increased, smoking among minors increased.<sup>24</sup>
7. Tobacco advertising targets new smokers.<sup>25</sup> The average age of a new smoker is thirteen years.<sup>26</sup>
8. In 1993, tobacco companies spent more than \$6 billion on advertising and promotion.<sup>27</sup> Of this, \$756 million was spent on distributing items advertising tobacco brands (e.g., t-shirts, lighters, hats, product catalogs) and \$2.6 billion was spent on coupons and value-added promotions at the point of purchase.<sup>28</sup> Minors who are aware of tobacco promotions are twice as likely to use tobacco.<sup>29</sup> Children who participate in tobacco promotions are nine times more likely to use tobacco.<sup>30 31</sup>
9. In a student survey conducted in San Francisco in April and May of 1996, 24.1 percent of high school and 21.6 percent of middle school students said that they had bought or received tobacco promotional items. Almost half said that they had worn or brought the item to school within the last week.<sup>32</sup>
10. An estimated 7.4 million minors in the United States have participated in tobacco promotion campaigns.<sup>33</sup> From 1990 to 1992, tobacco company spending on the distribution of specialty items has increased dramatically from \$307 million in 1990 to \$756 million in 1993.<sup>34</sup> Expenditures for coupons and retail value-added promotions (i.e., give-aways at the time of purchase) doubled between 1990 and 1993, from \$1.2 billion to \$2.6 billion.<sup>35</sup>
11. The exposure of children and teenagers to cigarette advertising can be reduced by, among other things, prohibiting tobacco sponsorship of events with a substantial youth audience, prohibiting tobacco billboards in areas frequented by youth, and prohibiting tobacco advertising on promotional items.<sup>36</sup>

## **II. Preamble**

The ordinance should contain a preamble setting forth the purpose for the ordinance and findings supporting the action being taken in the ordinance. The preamble will not become part

of the language in the Municipal Code, but plays a crucial role in providing legal support for the regulations contained in the ordinance. In order to avoid preemption by federal law (as discussed in City Atty. MOL No. 97-30 (Nov. 18, 1997), Regulating Tobacco Advertising in the City of San Diego), the reasons stated in the preamble should be aimed at the goal of preventing minors from breaking existing law by purchasing or possessing cigarettes. Council findings can restate more of the factual information stated above, but should include at least the following.

A. The Council of the City of San Diego finds:

1. That there is strong and compelling evidence supporting a direct correlation between tobacco advertising and promotion and under-age smoking.
2. That tobacco advertising promotes smoking by using images and messages that appeal to youth; youth are particularly susceptible to these images and messages; and youth have greater recall for and are more influenced by tobacco advertising than the adult population.
3. That tobacco advertising in public places is inimical to the enforcement of laws enacted by the State of California and the City of San Diego that are designed to limit the purchase and use of tobacco products to the adult population.
4. That advertising signs promoting the use of tobacco products displayed on or in retail stores below four feet from the floor or next to candy, snack and soda displays target under-aged youth and are inimical to the enforcement of laws enacted by the State of California and the City of San Diego that are designed to limit the purchase and use of tobacco products to the adult population.
5. That tobacco advertising is unavoidable by youth, is a threat to the safety and welfare of the young, is a strong inducement to violate the laws concerning the purchase and possession of tobacco by minors, and is a strong inducement for minors to begin and continue to use tobacco products.

B. Statement of Purpose of Ordinance

The ordinance should clearly state its purpose in a way that shows that the ordinance is not preempted by federal law, and is narrow enough to withstand challenge under the First Amendment of the United States Constitution. To do this, the ordinance should state that its purpose is to discourage and reduce illegal sales and furnishing of tobacco products to minors, that the City has a substantial interest in reducing illegal sales of tobacco products to persons under the age of 18, and that this interest outweighs the First Amendment right to commercial speech implicated therein. Further, the City should find that the proposed ordinance directly advances the City's substantial interest, by narrow and appropriate means, since it restricts

tobacco advertising and promotion that, because of its nature and placement, adversely affects minors and encourages minors to violate state law.

For example:

It is the intent of the Council in the enactment of this ordinance to discourage and reduce illegal sales and furnishing of tobacco products to minors by the restriction [and/or elimination] of advertising that encourages and induces minors to buy or steal and use cigarettes and other tobacco products in violation of state and local laws. It is further the intent of the Council to discourage and reduce illegal sales and furnishing of tobacco products to minors by requiring retailers to implement identification and other procedures designed to reduce the likelihood of sales to minors.

The Council recognizes that First Amendment rights may be implicated by the restriction of tobacco advertising and promotion, a form of commercial speech. Nonetheless, the Council finds that the City has a substantial interest in reducing illegal sales of tobacco products to persons under eighteen years of age. The Council further finds that this regulation directly advances that substantial interest, by narrow and appropriate means, since it restricts tobacco advertising and promotion that, because of its nature and placement, targets minors and encourages minors to violate state law. [Moreover, the regulation prohibits tobacco advertising and promotion only in those areas of the City where minors are likely to congregate and to be exposed to, and thus be influenced by, such advertising and promotion.] The regulation also promotes the public welfare by discouraging commercial exploitation of potential underage smokers.

Further, in order to protect legitimate business activities and to narrowly focus the restrictions on those advertisements which most directly affect minors, the Council has determined not to restrict advertisements of cigarettes in certain designated commercial and industrial zones, with reasonable and appropriate setbacks from adjoining zones.

### **III. Outside Advertising Restrictions**

Beginning January 1, 1998, state law under the STAKE Act prohibits tobacco advertising on billboards within 1000 feet of schools and playgrounds. The STAKE Act does not prevent local government from adopting more restrictive regulations on outdoor advertising. There are two main approaches to advertising restrictions that have been or are being considered by cities. The first is to restrict all tobacco advertising but carve out specific areas where advertising is permitted (the Baltimore Model). This is the approach used by the proposed E-TASK ordinance. The second is to focus on schools, parks, and playgrounds, limit advertising within a given radius of these sites, and include some exceptions (the San Francisco Model<sup>37</sup>). This is a more conservative approach.

### Option A: The Baltimore Approach.

The E-TASK ordinance proposes advertising restrictions loosely based on City of Baltimore's ordinance, which restricts tobacco advertising and has withstood constitutional challenge. The Baltimore ordinance prohibits all outdoor tobacco advertising with exceptions designed to limit advertising in areas frequented by minors while permitting advertising in business zones less likely to attract minors. The exceptions included in the Baltimore ordinance are more extensive than those suggested by the E-TASK proposal. Some of the exceptions contained in the Baltimore ordinance are not applicable to San Diego, whereas other exceptions not included in the Baltimore ordinance may be appropriate for San Diego. In order to pass constitutional muster, San Diego's ordinance, like Baltimore's, should contain significant exceptions tailoring the ordinance to meet its stated goal of preventing purchase and possession of tobacco by minors in San Diego.

The Baltimore ordinance is incorporated into that city's zoning code, and the ordinance identifies different zones in its exceptions to the advertising restrictions. San Diego recently adopted a new Land Development Code that redefines zones and use restrictions within San Diego. The Land Development Code is not yet in effect, but has been adopted. Accordingly, the advertising restrictions will need to incorporate the terms and definitions used in the new Land Development Code. There are different types of commercial zones, some of which permit retail stores in residential or mixed residential neighborhoods. The advertising restrictions should apply to these zones, and not apply to areas that are strictly commercial and/or industrial, and less likely to be frequented by unaccompanied minors. The ordinance would include and/or incorporate definitions clarifying these terms.

1. No person, firm, corporation, partnership, or other organization shall place or cause to be placed in any manner any advertising or promotion of cigarettes or tobacco products on a billboard, sign, poster, banner, placard or other form of advertising in a publicly visible location.
2. Exceptions.

At least the following exceptions should be included in the ordinance.

- a. [Except as provided below,] this section shall not apply to advertising or promotions for tobacco products located inside commercial establishments such as stores and restaurants where tobacco products are sold, as long as such advertising or promotions are not visible to the public from outside the establishment.
- b. This section shall not apply to commercial establishments where access to the premises by persons under 18 years of age is prohibited by law.
- c. This section shall not apply to any sign located:
  - (1) in an industrial zone;



- (2) in a commercial zone and more than 1000 feet from the boundary of any zone that is not a commercial or industrial zone; and
  - (3) in a commercial zone and more than 500 feet from the boundary of any zone that is not a commercial or industrial zone, provided such sign faces away from the adjoining non-commercial non-industrial zone.
- d. This section shall not apply to commercial vehicles used to transport cigarettes and other tobacco products.
  - e. This section shall not apply to any advertising or public service message sponsored by a federal, state, or local government entity, or by a non-profit entity, designed to communicate the hazards of smoking or to encourage minors to refrain from smoking or buying cigarettes or other tobacco products.
  - f. This section shall not apply to signs that contain a generic description of cigarettes., i.e., signs designed to convey the fact that cigarettes are sold in the store, but do not include logos or graphics.

### 3. Additional Exceptions.

The following exceptions are examples of additional exceptions that have been included in ordinances for other cities. The Council should determine whether the following or other exceptions are appropriate and should be included in the ordinance.

- g. This section shall not apply to signs on businesses that sell cigarettes that identify the business by name or slogan.
- h. This section shall not apply to neon or electric signs at retail stores that promote a particular brand of cigarettes.
- i. This section shall not apply to signs on mass transit vehicles or cabs.
- j. This section shall apply to signs at public facilities within the City's jurisdiction unless a contract, entered into by the City, specifically allowing such advertising, exists and was made effective prior to the adoption of this section.
- k. This section shall not apply to signs adjacent to an interstate highway.

### 4. Grandfather Clause.

The ordinance should contain a clause including existing uses for a period of time in order to avoid claims that the City has effectively taken private property without due

compensation.

This section does not apply to preexisting contracts, or contracts entered into within thirty days of the enactment of this section.

OR

This section shall become operative six months after the ordinance is adopted.

Option B: The San Francisco Model

As stated earlier, the STAKE Act already prohibits tobacco advertising within 1000 feet of any school or park. This prohibition can be strengthened by adding other sites frequented by minors. The proposed language below, uses the sites identified in the E-TASK ordinance, i.e., “schools, playgrounds, parks, daycare centers and libraries” and adds recreational centers and facilities, and community centers. Many branch libraries are located on commercial streets and the Council may want to consider excluding some libraries depending on their locations and surrounding uses. “Daycare centers” should be defined in the ordinance to exclude daycare centers operated out of a residence, since it will be difficult to track the locations of home care providers. Recreational centers and facilities should be defined as those operated by the Parks and Recreation Department of the City of San Diego. The Council may also consider whether to include other facilities that primarily provide programs for children such as the Boys and Girls Clubs and local YMCAs and YWCAs.

1. No person, firm, corporation, partnership, or other organization shall place or cause to be placed in any manner any advertising or promotion of cigarettes or tobacco products on a billboard, sign, poster, banner, placard or other form of advertising within 1000 feet of the premises of any school, park, playground, recreation center or facility, daycare center, library or community center in the City.
  
2. Exceptions.

The San Francisco Model includes the following exceptions.

- a. [Except as provided below,] This section shall not apply to advertising or promotions for tobacco products located inside commercial establishments such as stores and restaurants where tobacco products are sold, as long as such advertising or promotions are not visible to the public from outside the establishment.
  
- b. This section shall not apply to commercial establishments where access to the premises by persons under 18 years of age is prohibited by law.

- c. This section shall not apply to commercial vehicles used to transport cigarettes and other tobacco products.
- d. This section shall not apply to any advertising or public service message sponsored by a federal, state, or local government entity, or by a non-profit entity, designed to communicate the hazards of smoking or to encourage minors to refrain from smoking or buying cigarettes or other tobacco products.

### 3. Grandfather Provision.

The San Francisco Model provides that the restrictions shall become operative six months after the ordinance is adopted. This provision provides a clearer deadline and less opportunity for game playing than the provision included in the Baltimore Ordinance.

#### Option C: Cincinnati--A Combined Approach

The City of Cincinnati, Ohio, adopted two ordinances in June 1994 addressing tobacco advertising and sales. The advertising ordinance combines the two approaches discussed above by providing limited restrictions effective immediately, and then a two-year phase in period for a complete ban on outdoor tobacco advertising. The Cincinnati ordinance reads as follows:

No person shall advertise any tobacco product on any outdoor advertising sign, whether constructed prior to or since the adoption of this chapter, intended to be read from, or within 500 feet of established places of worship, primary and secondary schools and hospitals. This restriction will be operative for and during the period prior to June 1, 1996.

No person shall advertise any tobacco product on any outdoor advertising sign, whether constructed prior to or since the adoption of this chapter. This restriction shall be operative on and after June 1, 1996.

A similar two-step process could be adopted in San Diego. A San Diego ordinance should use a 1000 foot ban in the first step, to be consistent with current state law, and could include additional areas.

#### **IV. Inside Advertising Restrictions**

As mentioned in the Recitals above, recent surveys in California have shown that retail stores near schools are more likely to position cigarette advertising within stores so as to attract the attention of minors, and are more likely to sell cigarettes to minors. The E-Task Ordinance proposes to ban all tobacco advertising and promotional displays *inside* retail stores that are located within 1000 feet of schools, playgrounds, parks, day care centers, and libraries. The following language is more narrowly tailored than the E-TASK proposal to limit only that advertising aimed at attracting a minor's attention.

We are not aware of any city that has adopted this type of restriction, however, such restrictions should be constitutional and enforceable because they are narrowly tailored to achieve the goal of reducing sales to minors.

- A. No person, firm, corporation, partnership, or other organization shall place or cause to be placed in any manner any advertising or promotion of cigarettes or tobacco products in the following locations inside stores or businesses that sell cigarettes or tobacco products and are located within 1000 feet of the premises of any school, park, playground, recreation center or facility, daycare center, or library in the City.
  - a. Below three feet from the floor;
  - b. [or][Below four feet from the floor];
  - c. Next to candy, snack, or non-alcoholic beverage displays;
  - d. [or][Within two feet of candy, snack, or non-alcoholic beverage displays];
- B. Exceptions.

The same exceptions would apply to this provision as proposed for the San Francisco Model, discussed above at pages 14 to 15.

## **V. Restrictions on Minors' Access to Cigarettes**

a. Identification Checks. Requiring identification checks for persons who appear to be under the age of 27 years is directly related to the goal of reducing sales to minors. This provision is included in section 897.14 of Title 21 of the Code of Federal Regulations, and is currently in effect. However, including this provision in a city ordinance is not preempted and would permit enforcement by local police.

b. Self-Service Displays. By prohibiting self-service sales and displays, the E-TASK Ordinance would require hand-to-hand sales from the clerk to the customer of all tobacco products, thereby decreasing the likelihood of sales to minors. Other cities' ordinances have excluded bulk or carton sales, items less likely to be purchased by minors. Retailers have objected to this prohibition because they receive some of their compensation from tobacco companies for allowing these displays in their stores. Representatives of the American Lung Association indicated at the PS&NS meeting of October 29 that tobacco suppliers are now providing retailers with a plexiglass panel that fits over the self-service display to convert it to a non-self-service display.

c. Out-of-Package Sales. Prohibiting out-of-package sales is also directed at minors on the premise that minors are more likely than anyone else to purchase a single cigarette. California Penal Code section 308.2, however, already prohibits the sale of single cigarettes to anyone. Since this section is enforceable by local police, there is no advantage in enacting this

provision as part of the ordinance. Section 897.14 of the Code of Federal Regulations also requires that cigarettes be sold in full packages.

d. Information Signs. The California STAKE Act already requires retailers to post signs stating that sales of tobacco products to minors are illegal and that identification is required for those under 18. The sign proposed by the E-TASK ordinance would use the same language as that of the STAKE Act. Thus, the City would not be adding a new requirement, but would be gaining local enforcement powers.

## **VI. Specialty Stores**

We have identified one discount cigarette store located in the Balboa Mesa shopping center at Genesse and Balboa. We are also aware of a few cigar and pipe tobacco stores located in commercial areas, such as, the Gaslamp, Horton Plaza, and University Town Center shopping areas. Without more information, it does not appear that tobacco specialty stores pose a significant problem in San Diego. Accordingly, other than the advertising restrictions discussed above, we do not recommend any provisions directed at these stores at this time.

Respectfully submitted,

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