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Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 236-6220

DATE: September 13, 2007
TO: City Clerk
FROM: City Attorney
SUBJECT: Item 150 of the September 10, 2007 City Council Meeting
Amendments to the Tobacco Retailer Ordinance (O-2007-128 REV.)

On September 10, 2007, the City Council voted unanimously to approve the Tobacco Retailer Ordinance (O-2007-128). During Council deliberations, a motion was made and passed to include two amendments to the ordinance. Neither amendment changes the substance of the ordinance. The revised sections are summarized below by the source of the changes. The revised language to those sections is underlined.

I.

As proposed by the City Attorney, an amendment to section 33.4501 includes an additional sentence reiterating that the permit fee will be used to cover the costs of enforcing the ordinance. Section 33.4501 should now read as follows:

§33.4501 Purpose and Intent

It is the purpose and intent of this Division to provide for local regulation of tobacco retail businesses by requiring police permits. The intent is to discourage violations of law prohibiting the sale or distribution of tobacco products to minors to protect their health, welfare, and safety. It is also the intent that all costs associated with the administration and enforcement of this Division be borne by tobacco retailer applicants and permittees. It is further the intent that recoveries hereunder shall be used to pay the costs of enforcement of this Division.

II.

Councilmember Maienschein offered an amendment to section 33.4518, clarifying the mandatory annual reporting to the Committee on Public Safety and Neighborhood Services. Councilmember Maienschein's amendment ensures transparency in the administration and enforcement of this ordinance. Section 33.4518 should now read as follows:

§33.4518 Reporting

The *Chief of Police* shall, on a yearly basis or as requested by the Public Safety and Neighborhood Services Committee, report to the Public Safety and Neighborhood Services Committee the following information:

- (a) A summary of activity related to the administration and enforcement of this Division, including:
 - (1) Number of violations,
 - (2) Number and amount of fines,
 - (3) Number and type of penalties,
 - (4) How the fine revenues are being used, and
 - (5) Detailing the program budget; and
- (b) An accounting of all funds received and used for the administration and enforcement of this Division; and
- (c) The estimated rate of illegal sales of *tobacco products* to minors within the City of San Diego.

Attached are the revised ordinance and digest. Please add these documents to the record for this item prior to the hearing to adopt the ordinance. This ordinance is scheduled to be adopted on Tuesday, September 25, 2007. If you have any questions regarding this matter, please contact this office directly.

MICHAEL J. AGUIRRE, City Attorney

By 

Linda L. Peter
Deputy City Attorney

CITY ATTORNEY DIGEST

ORDINANCE NUMBER O-_____ (NEW SERIES)

DATE OF FINAL PASSAGE _____

EFFECTIVE DATE _____

AN ORDINANCE AMENDING CHAPTER 3, ARTICLE 3, OF THE SAN DIEGO MUNICIPAL CODE BY ADDING DIVISION 45, SECTIONS 33.4501 TO 33.4518, TITLED "PERMITS FOR TOBACCO PRODUCT SALES," RELATING TO REQUIREMENTS FOR PERMITS FOR TOBACCO PRODUCT SALES

This ordinance amends the Municipal Code by adding Division 45, Sections 33.4501 to 33.4518, relating to requirements for permits for tobacco product sales. State Assembly Bill 71, codified in California Business and Professions Code section 22971.3, created a state licensing program for the sale of tobacco products, and authorizes local governments to adopt their own ordinances to provide for the suspension or revocation of a local license for any violation of a state tobacco control law.

This ordinance provides for local regulation of tobacco retail businesses by requiring police permits. The intent is to discourage violations of law prohibiting the sale or distribution of tobacco products to minors to protect their health, welfare, and safety. It is also the intent that all costs associated with the administration and enforcement of this Division be borne by tobacco retailer applicants and permittees. It is further the intent that recoveries hereunder shall be used to pay the costs of enforcement of this Division.

This ordinance contains a notice that a full reading of this ordinance is dispensed with prior to passage, since a written copy was made available to the City Council and the public prior to the day of its passage.

This ordinance shall take effect and be in force on the one hundred and eightieth day from and after its final passage.

A complete copy of the ordinance is available for inspection in the Office of the City Clerk of the City of San Diego, 2nd Floor, City Administration Building, 202 C Street, San Diego, CA 92101.

LLP
03/23/07
09/11/07 REV.
09/13/07 COR.COPY
Or.Dept:Police
O-2007-128

ORDINANCE NUMBER O-_____ (NEW SERIES)

DATE OF FINAL PASSAGE _____

AN ORDINANCE AMENDING CHAPTER 3, ARTICLE 3, OF THE SAN DIEGO MUNICIPAL CODE BY ADDING DIVISION 45, SECTIONS 33.4501 TO 33.4518, TITLED "PERMITS FOR TOBACCO PRODUCT SALES," RELATING TO REQUIREMENTS FOR PERMITS FOR TOBACCO PRODUCT SALES

WHEREAS, according to the National Institutes of Health, minors face social, psychological, and educational challenges, exposing them to various risk factors for drug abuse, including the underage use of legal drugs like tobacco; and

WHEREAS, minors who use tobacco products face profound consequences, including illness, cancer, addiction, increased drug use, poor school performance, and a host of other similar maladies; and

WHEREAS, according to the American Cancer Society, nearly all first use of tobacco products by minors occurs before high school graduation, and if such use is curtailed, then minors are likely to not use tobacco at all; and

WHEREAS, state law (Penal Code section 308) prohibits the sale or furnishing of cigarettes, tobacco products and smoking paraphernalia to minors, as well as the purchase, receipt, or possession of tobacco products to minors; and

WHEREAS, state law requires tobacco retailers to check the identification of tobacco purchasers who reasonably appear to be under 18 years of age (Business and Professions Code

section 22956) and provides procedures for onsite sting inspections of tobacco retailers using persons under 18 years of age (Business and Professions Code section 22952); and

WHEREAS, despite these restrictions, minors continue to obtain cigarettes and other tobacco products at alarming rates; and

WHEREAS, a 2004 purchase survey by the American Lung Association of San Diego and Imperial Counties showed that 43.6 percent of 264 stores surveyed in the City of San Diego sell cigarettes to minors; and

WHEREAS, the City Council of the City of San Diego has a substantial interest in promoting compliance with state law prohibiting the sale of cigarettes and tobacco products to minors; promoting compliance with federal, state, and local laws intended to discourage the purchase of tobacco products by minors; and in protecting children from being lured into illegal activity through the misconduct of adults; and

WHEREAS, the California courts in cases such as *Cohen v. Board of Supervisors*, 40 Cal. 3d 277 (1985) and *Bravo Vending v. City of Mirage*, 16 Cal. App. 4th 383 (1993), have affirmed the power of local governments to regulate business activity in order to discourage violations of the law; and

WHEREAS, state law (Health and Safety Code section 11364.7) authorizes revocation of a business license if a person possesses with intent to furnish drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to inject, ingest, inhale, or otherwise introduce into the human body a controlled substance; and

WHEREAS, State Assembly Bill 71, chaptered on October 12, 2003, (Business and Professions Code section 22971.3) created a state licensing program for the sale of tobacco

products and authorizes local governments to adopt their own ordinances to provide for the suspension or revocation of a local license for any violation of a state tobacco control law;

WHEREAS, the City Council of the City of San Diego finds and declares that the purpose of the ordinance is:

- (1) To regulate tobacco retail businesses by requiring police permits; and
- (2) To discourage violations of law which prohibit or discourage the sale or distribution of tobacco products to minors; and
- (3) To protect the health, welfare, and safety of minors; NOW, THEREFORE,

BE IT ORDAINED, by the Council of the City of San Diego, as follows:

Section 1. That Chapter 3, Article 3, of the San Diego Municipal Code be and is hereby amended by adding Division 45, Sections 33.4501 through 33.4518, titled "Permits for Tobacco Product Sales," to read as follows:

§33.4501 Purpose and Intent

It is the purpose and intent of this Division to provide for local regulation of tobacco retail businesses by requiring police permits. The intent is to discourage violations of law prohibiting the sale or distribution of tobacco products to minors to protect their health, welfare, and safety. It is also the intent that all costs associated with the administration and enforcement of this Division be borne by tobacco retailer applicants and permittees. It is further the intent that recoveries hereunder shall be used to pay the costs of enforcement of this Division.

§33.4502 Definitions

Except as otherwise provided, for purposes of this Division:

“*Person*” has the same meaning as used in Section 11.0210.

“*Police permit*” has the same meaning as used in Municipal Code section 33.0201. For purposes of this Division, the City Treasurer may endorse a business tax certificate with “*Tobacco Retailer Endorsement*” indicating a *police permit* to operate as a *tobacco retailer* has been issued.

“*Tobacco products*” means any substance containing tobacco leaf, including, but not limited to, cigarettes, pipe tobacco, snuff, chewing tobacco, dipping tobacco, or any other preparation of tobacco.

“*Tobacco retailer*” means any *person* who owns or operates, in whole or in part, a business for profit or not for profit who engages in *tobacco retailing*.

“*Tobacco retailing*” means selling, offering for sale, or offering to exchange for any form of consideration, tobacco, *tobacco products* or tobacco paraphernalia.

“*Tobacco retailer endorsement*” shall have the same meaning as “*Police Permit*” except that it may also be issued by the City Treasurer.

§ 33.4503 Police Permit Required for Tobacco Retailer

- (a) It is unlawful for any *person* to operate as a *tobacco retailer* without a *police permit*.
- (b) It is unlawful for any *person* to engage in *tobacco retailing* unless the owner or operator has been issued a *police permit* to operate as a *tobacco retailer* at that location.

- (c) A *tobacco retailer* shall obtain a separate *police permit* for each fixed location from which he or she engages in *tobacco retailing*.
- (d) No *police permit* shall be issued for any *person* operating as a *tobacco retailer* at any location other than a fixed location.
- (e) This section does not apply to sales or exchanges not made to the public.

§33.4504 Enforcement Authority

- (a) The administration and enforcement of this Division shall be divided between the City Treasurer and the *Chief of Police*. Subject to approval from the *Chief of Police*, the City Treasurer shall be responsible for accepting applications for a *police permit* to operate as a *tobacco retailer*, and for issuing the permit by endorsing the applicant's business tax certificate to indicate that a *police permit* has been issued authorizing the *permittee* to operate a *tobacco retailing* business. The *Chief of Police* shall be responsible for determining the fitness of applicants for a *police permit* to operate as a *tobacco retailer*, investigating any violations of this Division, and for taking administrative action against any *police permit* issued under this Division.
- (b) The City Treasurer shall accept an application to operate as a *tobacco retailer* and, subject to approval from the *Chief of Police*, endorse a *tobacco retailer's* business tax certificate with "*Tobacco Retailer Endorsement*," indicating a *police permit* to operate as a *tobacco retailer* has been issued.

- (c) Any information provided to or gathered by the City Treasurer under this Division shall also be shared with and made available to the *Chief of Police*.

§33.4505 Tobacco Retailer Permit Application Contents

- (a) Each applicant for a *police permit* to operate as a *tobacco retailer* shall furnish the following information to the City Treasurer:
- (1) The full true name and any other names ever used by the applicant.
 - (2) The current residential address and telephone number of the applicant.
 - (3) The address of the proposed *tobacco retailer* business location.
 - (4) Each residential address of the applicant for the five years immediately preceding the date of the application, and the inclusive dates of each address.
 - (5) All fictitious business names ever used by applicant and the respective addresses of those businesses.
 - (6) Written proof that the applicant is at least eighteen years of age.
 - (7) A valid social security number.
 - (8) Applicant's height, weight, and color of eyes and hair.
 - (9) Photographs of the applicant as specified by the *Chief of Police*.

- (10) Applicant's business, occupation, and employment history for the five years immediately preceding the date of application, including addresses and dates of employment.
- (11) Whether the applicant has ever had any *license* or *permit* issued by any agency or board, or any city, county, state or federal agency suspended or revoked, or has had any professional or vocational *license* or *permit* suspended or revoked within five years immediately preceding the application, and the reason for the suspension or revocation.
- (12) All criminal *convictions*, including those dismissed pursuant to Penal Code section 1203.4, except traffic infractions, and a statement of the dates and places of such *convictions*.
- (13) The name and address of the current owner and lessor of the real property upon which the proposed *tobacco retailing* business is to be conducted, and a copy of the lease or rental agreement.
- (14) All business tax certificates.
- (15) Information regarding *licenses* required under the "Cigarette and Tobacco Products Licensing Act of 2003," found in Business and Professions Code sections 22970, et seq., including, but not limited to, copies of applications for

licenses, licenses issued, and any documentation regarding the reasons for the denial of such *license*.

- (16) Such other identification and information, including fingerprints, as may be required in order to discover the truth of the matters herein specified as required to be set forth in the application.

(b) In addition to the information required by Municipal Code section 33.4505(a), an applicant for a *tobacco retailing permit* shall furnish the following information to the City Treasurer:

- (1) If the applicant is a corporation, the name of the corporation exactly as shown in its Articles of Incorporation or Charter, together with the state and date of incorporation, and names and residential addresses of each of its current officers and directors, and of each stockholder holding more than 25 percent of the stock of the corporation;
- (2) If the applicant is a partnership, the name and residential address of each of the partners, including limited partners;
- (3) If the applicant is a limited partnership, a copy of the limited partnership's certificate of limited partnership as filed with the County Clerk;

- (4) If one or more of the limited partners is a corporation, the applicant shall provide the information about that partner required by Municipal Code section 33.4505(b)(1);
 - (5) If the applicant is a corporation or partnership, the name of the responsible managing officer.
- (c) An applicant for a *police permit* to operate as a *tobacco retailer* shall submit a signed declaration certifying that he or she has not been convicted of or faced administrative action based on violations of the offenses listed in Municipal Code section 33.4510.

§33.4506 Corporate Officers and Partners Deemed Applicants

Each corporate officer or partner of a *tobacco retailing* business is deemed an applicant and each shall provide the information required in Municipal Code section 33.4505.

§33.4507 Designation of Responsible Managing Officer, Signature on Applications

An applicant that is a corporation or partnership shall designate one of its officers or general partners to act as its responsible managing officer. The responsible managing officer may complete and sign all applications on behalf of the corporate officers and partners.

§33.4508 Proof of State Licenses, Permits, and Certifications Required Before Issuance of Tobacco Retailer Permit

In addition to the requirements of Municipal Code section 33.4505, any *person* desiring a *police permit* to operate as a *tobacco retailer* shall furnish to the City Treasurer copies of all state *licenses, permits,* and certifications related to the sale of *tobacco products* and alcoholic beverages at the fixed location of the proposed *tobacco retailing* business.

§33.4509 Investigation Prior to Issuance of Tobacco Retailer Permit

- (a) The *Chief of Police*, or other designated official, shall make an investigation as may be deemed sufficient as stated in Municipal Code section 33.0301 to determine an applicant's fitness to operate as a *tobacco retailer*. The *Chief of Police* shall have authority to grant or deny a *police permit*, and to determine whether to take administrative action against a *police permit* under this Division.
- (b) An investigation for a permit to operate as a *tobacco retailer* shall be conducted as prescribed in Municipal Code sections 33.0302, 33.0303(a), 33.0304, 33.0306, 33.0307, 33.0308, 33.0309, 33.0310, 33.0311, 33.0312, and 33.0313.

§33.4510 Grounds for Denial of Tobacco Retailer Permit

In addition to the grounds for denial stated in Municipal Code section 33.0305(a)-(f), an application for a *police permit* to operate as a *tobacco retailer* shall be denied for any of the following reasons: The applicant has within five years immediately preceding the date of the filing of the application been *convicted of*, suffered any civil penalty, or faced

administrative action against any type of *license* for violations of any tobacco control law, including, but not limited to, the following offenses: Penal Code section 308, Business and Professions Code sections 22950, et seq. (“Stop Tobacco Access to Kids Enforcement Act” or the “STAKE Act”), Business and Professions Code sections 22970, et seq. (“Cigarette and Tobacco Products Licensing Act of 2003”), or a charge of violating a lesser-included or lesser-related offense including, but not limited to, Penal Code section 415, in satisfaction of, or as a substitute for, an original charge of any of the offenses listed in this section.

§33.4511 Right to Appeal Denial of Tobacco Retailer Permit

Any applicant denied a permit to operate as a *tobacco retailer* shall be afforded an appeal as prescribed in Municipal Code sections 33.0501, 33.0502, 33.0503, 33.0504, 33.0505, and 33.0508.

§33.4512 Permit Fees

- (a) All costs associated with administration and enforcement of this Division including, but not limited to, investigating *permit* applications, processing *permit* applications, inspecting, regulating, and enforcing this Division, and providing for appeals, shall be borne by applicants and *permittees*. The Mayor shall assess a fee for a *police permit* to operate as a *tobacco retailer* according to the schedule set in the City Clerk’s Composite Rate Book. Fees will be reviewed annually.
- (b) A *permit* issued under this Division shall be valid for a period of one year from the date of issuance.

§33.4513 Tobacco Retailer Operating Requirements

- (a) *A tobacco retailer shall keep and post his or her police permit, issued under this Division, in the manner prescribed in Municipal Code sections 33.0105(a) and (c). This subsection is regulatory only.*
- (b) *Tobacco retailers shall not allow, at any location for which they have a police permit to operate as a tobacco retailer, a violation of any tobacco control law including, but not limited to, the offenses listed in Municipal Code section 33.4510. Tobacco retailers shall be responsible for the acts of others who violate tobacco control laws at any location for which the tobacco retailer possesses a police permit to operate as a tobacco retailer. This subsection is regulatory only.*
- (c) *A tobacco retailer shall display in a conspicuous and prominent location near tobacco products, information, in a manner established by the Chief of Police, on how to report violations of tobacco control laws including, but not limited to, reporting sales of tobacco products to minors, to the Chief of Police.*
- (d) *Clerks who transact tobacco products sales in tobacco retailer establishments shall themselves be the minimum legal age to purchase tobacco products (currently 18 years of age). This subsection is regulatory only.*

- (e) *Tobacco retailers* shall check the age of purchasers of *tobacco products* who reasonably appear to be under the age of 27. This subsection is regulatory only.

§33.4514 Penalties and Regulatory Action

- (a) All penalties and regulatory action related to a *police permit* issued to operate as a *tobacco retailer* shall be conducted as prescribed in Municipal Code sections 33.0401 to 33.0406.
- (b) If a *police permit* issued under this Division is suspended or revoked, the *permittee* shall post, consistent with section 33.4513(a), written notice of such revocation for the duration of the suspension or revocation with their business tax certificate showing a *tobacco retailer endorsement*.
- (c) If a *police permit* issued under this Division is suspended or revoked, all *tobacco products* and tobacco paraphernalia shall be removed from public view for the duration of the suspension or revocation.

§33.4515 Additional Penalties

Pursuant to Health and Safety Code section 11364.7, a business license shall be revoked if a *person* possesses with intent to furnish drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to inject, ingest, inhale, or otherwise introduce into the human body a controlled substance.

§33.4516 Tobacco Retailer Permit Not Transferable

A *police permit* issued under this Division is not transferable.

§33.4517 Grandfather Clause

Notwithstanding Section 33.4510, *convictions* for offenses listed in Section 33.4510 shall not be used to deny an application for a *police permit* under this Division if the date of the *conviction* was prior to the passage of this Division.

§33.4518 Reporting

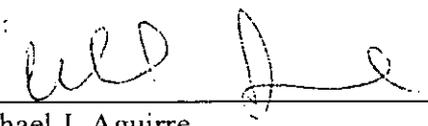
The *Chief of Police* shall, on a yearly basis or as requested by the Public Safety and Neighborhood Services Committee, report to the Public Safety and Neighborhood Services Committee the following information:

- (a) A summary of activity related to the administration and enforcement of this Division, including:
 - (1) Number of violations,
 - (2) Number and amount of fines,
 - (3) Number and type of penalties,
 - (4) How the fine revenues are being used, and
 - (5) Detailing the program budget; and
- (b) An accounting of all funds received and used for the administration and enforcement of this Division; and
- (c) The estimated rate of illegal sales of *tobacco products* to minors within the City of San Diego.

Section 2. That a full reading of this ordinance is dispensed with prior to passage, a written copy having been available to the City Council and the public prior to the day of its passage.

Section 3. This ordinance shall take effect and be in force on the one hundred and eightieth day from and after its final passage.

APPROVED: MICHAEL J. AGUIRRE, City Attorney

By 
Michael J. Aguirre
City Attorney

LLP
03/23/07
09/11/07 REV.
09/13/07 COR.COPY
Or.Dept:Police
O-2007-128

I hereby certify that the foregoing Ordinance was passed by the Council of the City of San Diego, at this meeting of _____.

ELIZABETH S. MALAND
City Clerk

By _____
Deputy City Clerk

Approved: _____
(date)

JERRY SANDERS, Mayor

Vetoed: _____
(date)

JERRY SANDERS, Mayor

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COMMITTEE ACTION SHEET

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9/25

COUNCIL DOCKET OF

Sept 10, 2007

Supplemental Adoption Consent Unanimous Consent Rules Committee Consultant Review

R -

O - 2006-161 Version C

Proposed Tobacco Retailer Ordinance Version C

Reviewed Initiated By PS&NS On 7/12/06 Item No. 3

RECOMMENDATION TO:

Forward this item to the full City Council without a recommendation subject to analysis by the Independent Budget Analyst and the City Attorney, working with stakeholders, to incorporate the issues raised.

NOTE: Ordinance version D, prepared by the City Attorney in response to the Committee's referral and questions, has neither been reviewed nor opined on by the Committee.

VOTED YEA: Maienschein, Faulconer, Young, Hueso

VOTED NAY:

NOT PRESENT:

CITY CLERK: Please reference the following reports on the City Council Docket:

REPORT TO THE CITY COUNCIL NO.

COUNCIL COMMITTEE CONSULTANT ANALYSIS NO.

OTHER:

City Attorney's June 29, 2006, report; Molly Bowman's July 12, 2006, e-mail; and Auday P. Arabo, Esq.'s July 12, 2006, letter

COUNCIL COMMITTEE CONSULTANT

John Rivera

000009

OFFICE OF

THE CITY ATTORNEY

CITY OF SAN DIEGO

PS&NS JUL 1 2 2006 #3
1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

Michael J. Aguirre

CITY ATTORNEY

June 29, 2006

REPORT TO THE COMMITTEE ON PUBLIC
SAFETY AND NEIGHBORHOOD SERVICES

TOBACCO RETAILER ORDINANCE

References: Manager's Report to the Committee on Public Safety and Neighborhood Services, dated April 7, 2005, "Proposed Police Permit for Tobacco Sales in San Diego," report number 05-091, with attachments

City Attorney Report to the Committee on Public Safety and Neighborhood Services, dated April 7, 2005, "Tobacco Ordinance," with attachments

City Attorney Supplemental Report to the Committee on Public Safety and Neighborhood Services, dated April 8, 2005, "Proposed Tobacco Retailer Ordinance," with attached Draft Ordinance "Version B"

REQUESTED ACTION

APPROVE PROPOSED TOBACCO RETAILER ORDINANCE VERSION C--AN ORDINANCE AMENDING CHAPTER 3, ARTICLE 3, OF THE SAN DIEGO MUNICIPAL CODE BY ADDING DIVISION 45, SECTIONS 33.4501 TO 33.4519, TITLED "PERMITS FOR TOBACCO PRODUCT SALES," RELATING TO REQUIREMENTS FOR PERMITS FOR TOBACCO PRODUCT SALES

INTRODUCTION

The sale of tobacco products to minors is a public health and safety concern. In 2004, the American Lung Association of San Diego and Imperial Counties conducted a purchase survey of 264 stores in the City of San Diego. The survey found that 43.6 % of the stores sold cigarettes to minors who attempted to make a purchase. Current state laws prohibit the sale of tobacco products to minors (Penal Code section 308), require retailers to check the identification of tobacco purchasers who appear to be under the age of 18 (Business and Professions Code section 22956), and authorize onsite sting inspections of tobacco retailers using persons under the age of 18 (Business and Professions Code section 22952). Nonetheless, the state legislature felt more could be done.

In 2003, the California Cigarette and Tobacco Products Licensing Act (AB 71) was passed, establishing a state-wide licensing requirement for the sale of tobacco products. AB 71, codified in Business and Professions Code section 22971.3, also authorized local jurisdictions to enact their own tobacco control laws. That statute states, "Nothing in this division preempts or supersedes any local tobacco control law other than those related to the collection of state taxes. Local licensing laws may provide for the suspension or revocation of the local license for any violation of a state tobacco control law."

In response to AB 71, in 2004, the Public Safety and Neighborhood Services Committee ["the Committee"] met to discuss a proposed local ordinance. The local ordinance would require all tobacco retailers in the City of San Diego to possess a police permit for the sale of tobacco products. The intent of the ordinance was to discourage the sale of tobacco products to minors to protect their health, welfare, and safety. A violator of the ordinance would risk suspension or revocation of his or her tobacco retailer permit.

The American Lung Association found that tobacco retail licensing ordinances, when coupled with enforcement, is an effective tool. In March 2006, communities throughout the state reported dramatic decreases in tobacco sales to minors after enacting their ordinances. For example, in Berkeley, rates dropped from 38 percent to 14 percent; in Contra Costa County, rates dropped from 37 percent to 7 percent; in Pasadena, rates dropped from 19 percent to 5 percent; in the City of Sacramento, rates dropped from 27 percent to 7 percent; and in the City of San Luis Obispo, rates dropped from 17 percent to 2 percent.

In April 2005, the Committee was presented with two versions of a proposed Tobacco Retailer Ordinance (O-2005-65-DRAFT and O-2005-65-DRAFT-Version B). The proposed ordinances were the result of numerous meetings with various stakeholders, including members of the community, law enforcement, health advocates, and local retailers. The draft ordinances were identical except that Version B included language for mandatory inspections of tobacco retail establishments. Version B added a subdivision (c) to Section 33.4512 and stated, "To insure [sic] compliance with this Division, the Chief of Police shall be required to inspect at least 20 percent of tobacco retailers per year." Neither ordinance received enough support from the Committee to advance it to the City Council.

DISCUSSION

The City Attorney believes it is important to have a local ordinance that complements and supplements existing state laws. The City Attorney's Office is proposing a revised version of the ordinance, designated Draft C. Draft C reflects the original proposed draft ordinance of last year in that it does not require mandatory police inspections of tobacco retail establishments. Similarly, it is intended that permit fees will cover all costs associated with administration and enforcement of the ordinance. However, the previously proposed permit fee of \$30 is now insufficient because the city can no longer rely on tobacco settlement funds to offset costs associated with this ordinance. It is currently estimated that a permit fee of \$100 is reasonable and realistic, and is still well below the average annual permit fee of \$247.50, based on 16 jurisdictions that have similar ordinances.

Finally, Draft C specifically includes by incorporation state law authorizing the suspension or revocation of a police permit if a retailer also sells drug paraphernalia. Section 33.4515 of proposed ordinance Draft C states, "Pursuant to Health and Safety Code section 11364.7, a business license may be revoked if a person possesses with intent to furnish drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to inject, ingest, inhale, or otherwise introduce into the human body a controlled substance."

CONCLUSION

Attached is proposed ordinance Draft C for your consideration. The City Attorney's Office recognizes it cannot satisfy the needs of all stakeholders. However, the ordinance is a step in the right direction given the need to do something rather than maintain the status quo.

Respectfully submitted,


MICHAEL J. AGUIRRE
City Attorney

LLP
Attachments

July 12, 2006



The Honorable Brian Maienschein, Chair
Public Safety and Neighborhood Services Committee
City of San Diego, 202 C Street, 12th Floor
San Diego, CA 92101

Your Family In The Industry

BOARD OF DIRECTORS

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Market To Market
Ramzi Murad, Secretary
A Mart
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Mission Gorge Arco
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Tom Hannawa
San Ysidro Market & Deli
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Ranch House Liquor

PRESIDENT/CEO

Auday Arabo, Esq.

Dear Chairman Maienschein and Honorable Committee Members:

On behalf of the California Independent Grocers and Convenience Stores (IGCS), the largest not-profit independent grocers trade association in the State of California, we must respectfully oppose the proposed tobacco permitting ordinance, which would create yet another licensing scheme and additionally unnecessary annual fees for retailers.

Illegal sales of tobacco products to minors is a very serious concern and that is why our association was the only association in the entire state to support legislation (AB 71) creating a state run tobacco licensing scheme. AB 71 became law on January 1, 2004 and has been enforcing its provisions through the State Board of Equalization. Some retailers have already received 30-day suspension of their state tobacco license because of AB 71, which provides for tobacco licensing and fines and penalties in order to stop the illegal sales of tobacco products by some unscrupulous so-called businesses.

The State of California already licenses all tobacco retailers via AB 71 in a more than adequate manner and the penalty structure that currently exists for those who sell tobacco to minors is in place and is effective. This bill also required all tobacco retailers to pay a \$100 fee for the tobacco license.

IGCS has endorsed many of our members actively participate in the WeCard program (a nationally recognized anti-youth program) and strongly advocate for full adherence to the STAKE Act, which provides civil penalties of up to \$6,000 to anyone found to have sold tobacco products to a minor. Tobacco licensing should be left to the state and we should not overburden the San Diego Police Department with another task and duplicate state efforts.

When you consider all the law that are already on the books governing tobacco sales to minors, from the criminal realm, Penal Code 308 which is a misdemeanor, to the Stake Act to AB 71, it is clear that a local ordinance which further licenses and penalizing all retailers is duplicative, unwarranted and further burdens the hundreds of legitimate businesses who abide by the law. Furthermore, we should not unnecessarily burden our local law enforcement with another task considering our budget shortfall.

We respectfully request that you oppose any proposed local tobacco licensing ordinance. We ask that you allow the recently passed state law (AB 71) to run its course and spare small business from yet another illegitimate "tax."

Thank you for your time and attention to this request. We gladly welcome the opportunity to answer any questions you may have on this issue. For the reasons stated above, California IGCS respectfully opposes the proposed tobacco ordinance.

Sincerely,
Auday P. Arabo, Esq.
President & CEO

STAKE STOP TOBACCO ACCESS TO KIDS ENFORCEMENT ACT

Summary Of Tobacco Laws Controlling Tobacco Sales And Distribution To Minors

SALES TO MINORS

Penal Code Section 308 (Added in 1891; last amended in 1990)

- ☐ It is unlawful to knowingly sell, give, or in any way furnish cigarettes or tobacco products to persons under 18 years of age. In the case of vending machines, the person who authorizes the installation or placement of a tobacco vending machine is liable for any sale to a minor.
- ☐ Each offense is subject to either criminal action as a misdemeanor or to civil action, punishable by a fine of \$200 for the first offense, \$500 for the second offense, and \$1,000 for the third offense.
- ☐ A minor who purchases or receives any tobacco products may be punished by a fine of \$50 or 25 hours of community service.
- ☐ Businesses that sell tobacco products must keep a copy of Penal Code § 308 conspicuously posted. The Secretary of State provides copies of Penal Code § 308 upon request.
- ☐ Any business that fails to post Penal Code § 308 shall, upon conviction, be punished by a fine of \$10 for the first violation and \$50 for each succeeding violation, or by imprisonment of no more than 30 days.
- ☐ A city or county may not adopt an ordinance or regulation inconsistent with this section.

SINGLE CIGARETTES

Penal Code Section 308.2 (Added in 1991)

- ☐ It is illegal to sell one or more cigarettes separately. Cigarettes must be sold in the manufacturer's package, sealed and properly labeled, according to federal requirements.

STOP TOBACCO ACCESS TO KIDS ENFORCEMENT (STAKE) ACT

Business and Professions Code Sections 22950-22960 (Added in 1994; amended in 1995)

- ☐ The STAKE Act:
 1. Prohibits the sale or provision of tobacco products to persons under 18 years of age;
 2. Requires the California Department of Health Services to enforce laws prohibiting the sale, distribution, or provision of tobacco products to persons under 18 years of age;
 3. Requires retail sellers to check the identification of anyone attempting to buy tobacco who appears to be under 18 years of age;
 4. Requires retailers of tobacco products to post a warning sign at each point of sale and on each vending machine, stating that selling tobacco products to minors is illegal and subject to penalties. Warning signs must include a toll-free telephone number (1-800-5 ASK-4-UD) that customers may use to report observed tobacco sales to youth under the age of 18;

5. Requires any tobacco product distributor or wholesaler and any vending machine operator to ~~annually provide the California Department of Health Services the names and addresses~~ of the tobacco product retailers that they supply and the name and address for each location where cigarette vending machines are placed; and

6. As of January 1, 1996, prohibits the sale of tobacco products from all vending machines except in businesses holding an on-sale public premise liquor license. This includes places such as barrooms, taverns, saloons and cocktail lounges. Vending machines must be located at least 15 feet from these entrances.

- Investigators from the California Department of Health Services, Food and Drug Branch will conduct on-site compliance checks with the assistance of minors 15-16 years of age who will be granted immunity from prosecution.
- The owner of a business where tobacco is sold or provided to a minor is subject to civil penalties of \$200 to \$300 for the first violation; \$600 to \$900 for the second violation; \$1,200 to \$1,800 for the third violation; \$3,000 to \$4,000 for the fourth violation; and \$5,000 to \$6,000 for a fifth or subsequent violation within a five-year period.

TOBACCO ADVERTISING AND PROMOTION

Business and Professions Code Section 17537.3 (Added in 1986)

It is unlawful to:

1. Promote offers of smokeless tobacco products that require proof of smokeless tobacco products purchase, unless the offer indicates it is not available to minors and requires the purchaser to verify being 18 years of age or older;
2. Promote offers of smokeless tobacco products by mail or telephone unless appropriate efforts are made to determine that the purchaser is over 18 years of age, e.g., requesting purchaser's birth date;
3. Distribute free samples of smokeless tobacco products within a two block radius of facilities serving persons under 18 years of age, such as schools, clubhouses, and youth centers; and
4. Mail unsolicited samples of smokeless tobacco products.

TOBACCO SAMPLING

Health and Safety Code Section 25967 (Added in 1991)

- It is unlawful to give smokeless tobacco or cigarettes, or coupons or rebate offers for smokeless tobacco or cigarettes, at no cost or at nominal cost to the general public in a public place.
- Violators incur a civil penalty of \$200 for the first violation; \$500 for the second violation; and \$1,000 for three or more violations.
- Exemptions are as follows:
 1. Public areas where persons under 18 years of age are prohibited;
 2. Public areas leased for private functions where access is denied to persons under 18 years of age by a peace officer or licensed security guard; and
 3. Distribution of tobacco products or coupon rebate offers in connection with the sale of another item including tobacco products, cigarette lighters, magazines, or newspapers.
- Cities and counties may enact stronger sampling ordinances.

000017

From: John Rivera
To: Lori Witzel
Date: 7/12/2006 11:46:14 AM
Subject: Fwd: Tobacco Retail Licensing Ordinance Update

Hi Lori,

Could you provide this to Councilmembers with note this just came in. Thx-j

>>> "Molly Bowman" <mbowman@lungsandiego.org> 7/12/2006 11:19 AM >>>
Hi, John!

I look forward to attending this afternoon's committee hearing, and testifying on behalf of the San Diego Tobacco-Free Communities Coalition's Model Ordinance Workgroup.

While we support the initiative to revisit tobacco retail licensing as a policy solution to prevent the sale of tobacco products to children, our workgroup would support the ordinance if it includes a definitive schedule of penalties, including permit suspension. Based on our policy discussions with the Technical Assistance Legal Center (TALC), a legal clearinghouse, funded by the California Department of Health Services, to provide California communities with free technical assistance on tobacco control policy issues, we believe our concerns could be addressed by inserting a stipulation in the ordinance that explicitly would empower the City Attorney to seek a civil injunction to enforce a violation of the ordinance, or bring a civil suit under the Business and Professions Code sections 17200. Should the City attorney prevail, the penalty schedule would apply to offending retailers (ten days for a first suspension in five years; 30 days for a second suspension in five years; 120 days for a third suspension in five years; and five years for a fourth suspension in five years.)

Our workgroup members also request the incorporation of several other policies into the final version of the tobacco retail licensing ordinance. We outlined our policy recommendations in a letter to the City Attorney, which you will find in the attachment.

I've also included TALC's suggested revisions to the ordinance. You may access a matrix comparing strong local tobacco retailer licensing laws in California by visiting The Center for Tobacco Policy & Organizing's website: <http://www.californialung.org/thecenter/>. The matrix is located under "Local Hot Topics," in the lower right hand corner of the website.

Thank you so much for your consideration, John. Please don't hesitate to

000018

contact me should you have any questions. I look forward to seeing you
this afternoon!

Warmest Regards,

Molly

Molly Bowman-Styles

Policy Manager

American Lung Association

2750 Fourth Avenue

San Diego, CA 92103

619-297-3901

mbowman@lungsandiego.org

000019



THE CITY OF SAN DIEGO

OFFICE OF THE INDEPENDENT BUDGET ANALYST REPORT

Date Issued: September 7, 2007

IBA Report Number: 07-85

Docket Date: September 10, 2007

Item Number: 150

Subject: Tobacco Retailer Ordinance – Version D, Relating to Requirements for Permits for Tobacco Project Sales

OVERVIEW

On September 10, 2007, the City Council is being requested to approve the Tobacco Retailer Ordinance – Version D, Relating to Requirements for Permits for Tobacco Project Sales. The proposed Ordinance would amend the Municipal Code to require a police permit to operate as a tobacco retailer in the City of San Diego. A permit fee would be implemented to recover the cost of administering and enforcing the Ordinance. Previous versions of the ordinance had been reviewed at the Public Safety & Neighborhood Services Committee (PS&NS). PS&NS voted to forward the item to the full City Council without a recommendation subject to an analysis by the Independent Budget Analyst and the City Attorney, working with stakeholders, to incorporate issues raised.

Per Municipal Code Section 33.0201 "Permit," "police permit," or "license" are synonymous and each means a permit issued by, or under the authority of, the *Chief of Police* that authorizes a particular business or activity to operate, or authorizes an individual to engage in a regulated occupation.

FISCAL/POLICY DISCUSSION

State Law, AB 71, requires licensing to sell tobacco products and imposes penalties on individuals and businesses that violate tobacco-related laws and laws prohibiting tobacco-related sales to minors. Fines range from \$250 to \$1000 and a license can be revoked after the eighth violation within a 24-month period. Some believe that current regulations have not been effective in deterring the sell of tobacco to minors.

State law also authorizes local governments to establish and implement their own ordinances to provide for the suspension or revocation of a local license for any violation of a state tobacco control law. PS&NS initiated a discussion on this topic in 2004 and multiple versions of the ordinance have been heard by the committee. The current version of the ordinance has not been reviewed by the committee.

Office of Independent Budget Analyst

202 C Street, MS 3A • San Diego, CA 92101
Tel (619) 236-6555 Fax (619) 236-6556



In a brief study of how other municipalities manage this issue, the IBA believes the ~~City's proposed policies would be consistent with other municipalities that have taken~~ steps to deter the sale of tobacco products to minors. In an article in *Western City Magazine*, the League of California Cities found that "enforcement is the most effective way to stop tobacco sales to minors." As such, numerous municipalities within California have established and implemented permit fees associated with enforcement of state tobacco laws. Los Angeles' annual permit fee ranges from \$208 to \$274 for a retailer; Contra Costa County charges \$160; City of Sacramento charges \$300; and San Francisco's fee is \$175. Costs are generally calculated on a yearly basis to recover the cost of administration and enforcement of the permit.

The City's proposed ordinance would establish a cost recoverable fee (for administration and enforcement) of \$163. The IBA has reviewed the methodology for the Police Department's portion of the fee and believes that the fee was developed accurately. It should be noted that their estimate assumes utilizing overtime for existing employees and does not include initial start-up costs of establishing new positions (i.e. new computer, new vehicles). If new positions are required, versus the utilization of existing personnel, the permit fee may not be sufficient. It is our understanding the Treasurer's Office portion of the fee is an estimate and will be adjusted in the future to reflect actual costs. The calculation of the fee should be reviewed annually, as part of the proposed budget development for Police and Treasurer, to ensure that the fee remains cost recoverable.

The permit fee would recover the costs associated with administering the fee as part of the Business Tax Program in the Treasurer's Office and enforcing the ordinance by the Police Department. Earlier versions of the ordinance proposed an enforcement program initiated by complaints; whereas the proposed version would be more proactive and includes approximately six stings per year. This proactive enforcement would be conducted on an overtime basis. The IBA agrees that, in order for the program to be successful, proactive enforcement is needed. Before approving the proposed ordinance, the Mayor and Police Chief should provide information to the Council on the Police Department's ability to provide proactive enforcement, given the current capacity and the priorities of the department.

As a means of enforcement, the Chief of Police will have the ability to impose sanctions/penalties as a result of violating the ordinance. To provide discretion to the Chief, specific sanctions/penalties are not described in this ordinance. An earlier City Manager's Report (05-091, dated April 7, 2005) proposed guidelines for the appropriate administrative action as follows:

- First violation of a tobacco control law - a permit may be suspended for a period of up to 60 days.
- Second violation of a tobacco control law within 5 years - a permit may be suspended for a period of up to 90 days.

- Third violation of a tobacco control law within 5 years - a permit may be suspended for a period of up to 180 days.
- ~~Fourth violation of a tobacco control law within 5 years - a permit may be revoked.~~
- In lieu of a suspension or revocation, the Chief of Police may also negotiate a civil penalty, in the amount of \$150 per day of suspension.

The current version refers to Municipal Code sections 33.0401 to 33.0406 for penalties and regulatory action. This section of the Municipal Code identifies guidelines for penalties and regulatory action for all Police Regulated Occupations and Businesses. The plan may be to utilize the above guidelines; however these guidelines are not specified in the ordinance. The IBA recommends that the guidelines be reviewed annually to determine appropriateness and effectiveness. Also, it is our understanding that the Auditor's Office has agreed to establish a special revenue account within the general fund for the permit fee; the IBA recommends that any monies received as a result of a civil penalty for violating the ordinance be earmarked in this account to provide additional funding for a proactive enforcement program.

The IBA noted that a sunset clause (of five years) that was included in earlier versions of the ordinance has been removed. The language in this clause identified that this ordinance "be repealed five years from and after the final passage..., unless this section is repealed." The IBA has not been able to discern a justification for eliminating the sunset clause. We recommend this be reviewed as part of any further discussion. The IBA believes that a recurring review should be conducted to ensure the objectives of the program are being achieved.

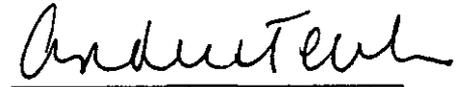
CONCLUSION

The IBA is supportive of strong efforts to deter the sale of tobacco products to minors provided that 1) the City has determined that the Police Department has the capacity to enforce them and 2) it has been determined that this is a priority action for the use of officer resources at this time. The IBA proposes the following be discussed prior to approving the proposed action:

- The calculation of the fee should be reviewed annually, as part of the proposed budget development for Police and Treasurer, to ensure that the fee remains cost recoverable. Also, this review should be included in the annual reporting requirements identified in section 33.4518 of the proposed ordinance.
- Information should be provided, by the Mayor and Police Chief, on the Police Department's ability to provide proactive enforcement, given the current capacity and the priorities of the department.
- Guidelines for enforcement of penalties and regulatory action should be specified or reviewed annually.

- Any monies received as a result of a civil penalty for violating the ordinance be earmarked in the special revenue account established by the Auditor's Office to provide additional funding for the proactive enforcement program.
- Discuss possible inclusion of sunset clause.


Lisa Celaya
Fiscal and Policy Analyst


APPROVED: Andrea Tevlin
Independent Budget Analyst

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07 SEP - 7 PM 12:39
CITY CLERK'S OFFICE
SAN DIEGO, CA

THE CITY ATTORNEY
CITY OF SAN DIEGO

1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

Michael J. Aguirre
CITY ATTORNEY

May 4, 2007

SUPPLEMENTAL REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

TOBACCO RETAILER ORDINANCE, VERSION D – UPDATED COSTS

References: City Attorney Report to the Honorable Mayor and City Council, dated March 23, 2007, "Tobacco Retailer Ordinance – Version D"

Exhibit A, Tobacco Retailer Ordinance – Version D, dated November 20, 2006

Tobacco Retailer Ordinance, Version D, proposes that a police permit be required for retailers to sell tobacco products. The ordinance states administration will be handled by the Treasurer's Office through the existing Business Tax Certificate process, while investigations and enforcement will be handled by the San Diego Police Department. As proposed, administration and enforcement costs are borne by permittees, through a tobacco retailer permit fee. Version D requests the fee be set at \$156 to allow for full cost recovery.

The San Diego Police Department has recalculated its costs for Fiscal Year 2008. The permit fee must now be set at \$163 to reflect increased costs. Attached is Exhibit B, showing the Department's actual costs for Fiscal Year 2008. Costs will be reviewed annually, and the permit fee adjusted, as necessary, to reflect true costs.

I respectfully request approval of the Tobacco Retailer Ordinance, Version D, and a permit fee of \$163 for Fiscal Year 2008.

Respectfully submitted,



MICHAEL J. AGUIRRE
City Attorney

LLP

Attachment:

Exhibit B, Tobacco Retailer Ordinance – Version D, Cost Recovery Worksheet (May 4, 2007)

TOBACCO RETAILER ORDINANCE – VERSION D

 COST RECOVERY WORKSHEET
 (Prepared by SDPD / Fiscal Management)

According to the proposed Tobacco Retailer Ordinance, administration and enforcement will be divided between the City Treasurer and the Chief of Police.

Treasurer will:

- (1) Accept applications
- (2) Issue permits / endorse business tax certificates

SDPD will:

- (1) Determine fitness of applicants (background checks)ⁱ
- (2) Investigate violations
- (3) Take administrative action

SDPD recently completed a cost-work up for enforcement of the proposed Tobacco Retailer Ordinance. SDPD made the following assumptions in calculating its costs:

- One full-time PCCO (a new position)
- One partial-position Clerical Assistant II
- Pro-Active Enforcement of 6 stings per yearⁱⁱ
 - Assuming Overtime
 - Assuming 6 PO II Detectives
 - Assuming 1 Sergeant Detective
 - Averaging 6 hours per sting operation (multiple businesses)
- Plus non-personnel expenses (ongoing and for new position)

\$180,693	SDPD Costs Annually	(\$133 per permit)
\$ 40,000	Treasurer Costs Annually ⁱⁱⁱ	(\$ 30 per permit)
<u>\$220,693</u>	Total Estimated Costs	

$$\$220,693 / 1363 \text{ (estimated retail establishments)} = \$161.92$$

Therefore, proposed permit fee (conservative) = \$163

San Diego's proposed permit fee at \$163 is still significantly lower than \$247.50, the average permit fee based on a survey of 16 jurisdictions with similar ordinances (June 2006).

ⁱ SDPD estimates \$55 for background investigative fee.

ⁱⁱ SDPD will conduct six undercover stings per year, targeting multiple businesses, but retains discretion to use its resources as situations warrant and time and resources permit.

ⁱⁱⁱ According to the Manager's Report dated April 7, 2005, that accompanied the previously proposed ordinance, it was stated that the permit would be administered as part of the Business Tax Certificate Process by the City Treasurer. At that time, it was conservatively estimated that \$20K annually would cover costs to process the permits, and \$20K annually would cover the costs of conducting administrative hearings. At that time (April 2005), it was proposed that enforcement would be "folded into" SDPD's current responsibilities. Thus, there were no identified SDPD costs associated with the ordinance. Therefore, the initial \$30 permit fee was calculated assuming annual costs of only \$40K and 1,363 retail establishments ($\$40,000 / 1363 = \29.35).

THE CITY ATTORNEY

CITY OF SAN DIEGO

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FAX (619) 236-7215

Michael J. Aguirre

CITY ATTORNEY

March 23, 2007

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

TOBACCO RETAILER ORDINANCE – VERSION D

References: Manager's Report to the Committee on Public Safety and Neighborhood Services, dated April 7, 2005, "Proposed Police Permit for Tobacco Sales in San Diego," report number 05-091, with attachments

City Attorney Report to the Committee on Public Safety and Neighborhood Services, dated April 7, 2005, "Tobacco Ordinance," with attachments

City Attorney Supplemental Report to the Committee on Public Safety and Neighborhood Services, dated April 8, 2005, "Proposed Tobacco Retailer Ordinance," with attached Draft Ordinance "Version B"

City Attorney Report to the Committee on Public Safety and Neighborhood Services, dated June 29, 2006, "Tobacco Retailer Ordinance," with attached Draft Ordinance "Version C"

REQUESTED ACTION

APPROVE PROPOSED TOBACCO RETAILER ORDINANCE VERSION D--AN ORDINANCE AMENDING CHAPTER 3, ARTICLE 3, OF THE SAN DIEGO MUNICIPAL CODE BY ADDING DIVISION 45, SECTIONS 33.4501 TO 33.4518, TITLED "PERMITS FOR TOBACCO PRODUCT SALES," RELATING TO REQUIREMENTS FOR PERMITS FOR TOBACCO PRODUCT SALES

INTRODUCTION

Tobacco use is the single most avoidable cause of disease, disability, and death in the United States. This fact was first published by the Surgeon General in 1964, and confirmed in 27 later reports. The Surgeon General's 2004 Report, "The Health Consequences of Smoking," concluded that diseases caused by smoking has been expanded to include abdominal aortic aneurysm, acute myeloid leukemia, cataract, cervical cancer, kidney cancer, pancreatic cancer, pneumonia, periodontitis, and stomach cancer. These are in addition to diseases previously known to be caused by smoking, including bladder, esophageal, laryngeal, lung, oral, and throat cancers, chronic lung diseases, coronary heart and cardiovascular diseases, and reproductive effects and sudden infant death syndrome.

Tobacco use by children and adolescents pose particular health concerns. Children and adolescents who smoke are less physically fit and have more respiratory illnesses than their nonsmoking peers. Smoking by children and adolescents hastens the onset of lung function decline during late adolescence and early adulthood. And smoking by children and adolescents is related to impaired lung growth, chronic coughing, and wheezing. Of those youth who try their first cigarette today, nearly one-third will become daily smokers. Teens who smoke are three times more likely than non-smokers to use alcohol, eight times more likely to use marijuana, and 22 times more likely to use cocaine. One in three young people who begin smoking in adolescence will die from a smoking-related disease.

Lawmakers have enacted a statutory scheme aimed at reducing children's exposure to tobacco products and penalizing businesses that sell tobacco products to minors. In 1992, Congress passed the Synar Amendment, Section 1926 of the Public Health Service Act, requiring states to implement and enforce laws barring the distribution of tobacco products to minors. In response to the Synar Amendment, in 1994, California enacted Business and Professions Code sections 22950 through 22963, the STAKE Act (Stop Tobacco Access to Kids Enforcement). The STAKE Act prohibits the sale of tobacco products to persons under the age of 18; requires ID checks of anyone appearing to be under the age of 18; requires signs be posted at points of sale; authorizes sting operations using 15 and 16 year old children; and imposes penalties on clerks and merchants who sell to minors. In 1996, California Penal Code section 308 penalized minors who purchased, received, or possessed tobacco products. Penal Code section 308 was amended in 2001 to penalize persons who knowingly furnished tobacco products to minors. Then, in 2003, Business and Professions Code sections 22970 through 22971.4 (AB 71, Cigarette and Tobacco Products Licensing Act of 2003) was adopted to require a state license for the sale of tobacco products. AB 71 specifically authorizes local governments to enact tobacco control laws. That statute states, "Nothing in this division preempts or supersedes any local tobacco control law other than those related to the collection of state taxes. Local licensing laws may provide for the suspension or revocation of the local license for any violation of a state tobacco control law."

The American Lung Association found that tobacco retail licensing ordinances, when coupled with enforcement, are an effective tool in combating sales of tobacco products to minors. Since 2004, the City of San Diego has met with stakeholders to consider various forms of a local ordinance. The local ordinance would require all tobacco retailers in the City of San Diego to possess a police permit for the sale of tobacco products. A violator of the ordinance would risk suspension or revocation of his or her tobacco retailer permit.

In April 2005, the Committee on Public Safety and Neighborhood Services was presented with two versions of a Tobacco Retailer Ordinance, designated O-2005-65-DRAFT, and O-2005-65-DRAFT-Version B. These versions lacked support because of a perceived permit fee that was too low to deter noncompliance; a permit fee that was perceived to be an additional tax; and law enforcement's inability to commit resources to proactive enforcement. In July 2006, Version C was presented to the Committee. That version provided for complaint-driven enforcement, but no regimen of regularly-scheduled inspections. While Version C received enough votes to move forward without recommendation, members of the Committee requested clarification on several issues. Those issues are now addressed in this report.

DISCUSSION

1. Mr. Young asked whether the tobacco retailer permit fee could be earmarked specifically for ordinance administration and enforcement.

The City Auditor's Office has agreed to establish a special revenue account within the General Fund. The revenue collected from the tobacco permit fees will be deposited into this separate revenue account. The Police Department will establish internal accounting measures and controls to track the cost for the administration and enforcement of this ordinance. The costs will be reviewed annually, and the permit fee adjusted, as necessary, to reflect true costs. Costs, including those associated with the addition of one Police Code Compliance Officer, will be included in the Police Department's fiscal year appropriation.

2. Mr. Hueso asked how state laws are currently enforced and what the current penalties are for violations.

The STAKE Act (Cal. Bus. & Prof. Code § 22950, et seq.) requires signs be posted at each point of purchase stating sales of tobacco products to minors is illegal. The Department of Health Services is authorized to conduct sting inspections using 15 and 16 year olds. Inspections are conducted in response to public complaints or at locations where there have been previous violations.

Penal Code section 308 targets sellers of tobacco products to minors, and minors that illegally purchase or possess tobacco products. Section 308(a) prohibits a person from knowingly selling or furnishing tobacco products or paraphernalia to a minor. A violation may be prosecuted criminally or civilly. A misdemeanor violation carries a fine of up to \$1,000 and/or up to six months in jail. A civil action may result in a fine of \$200 for a first offense, \$500 for a second offense, and \$1,000 for a third offense. A minor who purchases or possesses any tobacco product or paraphernalia in violation of Section 308(b) may be fined \$75 or required to perform 30 hours of community service.

AB 71 (Cal. Bus. & Prof. Code § 22970, et seq.) requires tobacco retailers to be licensed by the state Board of Equalization. State inspectors are authorized to conduct inspections. Failure to display a state license is punishable by a \$500 fine. A retailer who sells tobacco products without a license or when a license is suspended is a misdemeanor punishable by a fine of up to \$5,000 and/or up to one year in jail.

3. Mr. Faulconer wanted to know how the permit fee would be allocated and whether SDPD would actually enforce the ordinance.

The original version of the ordinance and Version B anticipated that permit administration would be handled by the Treasurer's Office through the existing Business Tax Certificate process. It was estimated that administration would cost \$20,000 annually, and the cost of conducting administrative hearings would be \$20,000 annually. Assuming 1,350 retailers in the city, the cost of the permit was calculated to be \$30. Originally, no costs were allocated to SDPD because enforcement was going to be strictly complaint driven and folded into

existing police duties. Version C of the ordinance proposed a permit fee of \$100, in response to complaints that a \$30 fee was too low to deter noncompliance. Again, \$30 was apportioned to the City Treasurer's Office, and the balance was apportioned to SDPD to cover costs of enforcement. Still, the Department anticipated complaint-driven enforcement.

Version D of the ordinance now proposes a permit fee of \$156 which accounts for true cost recovery. Costs of administration are still estimated at \$40,000 per year for the Treasurer's Office, and SDPD estimates its annual costs will be \$173,235, for a total cost of \$213,235. Assuming 1,363 retail establishments in the city, the permit fee is calculated to be \$156.45, for the first year. A cost recovery worksheet is attached as Exhibit A.

Part of SDPD's costs include conducting six under-cover sting operations per year, targeting multiple businesses. However, SDPD retains discretion to use its resources as situations warrant, and as time and resources permit. Therefore, while SDPD agrees to conduct proactive enforcement, they reserve the right to determine when and where the operations will be conducted.

4. Mr. Hueso asked the City Attorney to consider a fee schedule and penalties for violations as part of the ordinance.

The proposed ordinance Version D, Section 33.4514, imposes penalties and regulatory action consistent with other police regulated occupations and businesses. Any person who violates a criminal provision is guilty of a misdemeanor punishable by a fine of not more than \$1,000, and/or custody in jail for not more than six months. Regulatory violations allow the Chief of Police to take appropriate action consistent with the severity of the violation or the frequency of the violations.

Under the City's Municipal Code (sections 33.0401 et seq), violation of a police permit already carries a graduated scale of penalties. Regulatory provisions are enforceable through the issuance, denial, suspension, placing conditions upon, or revocation of the permit, and through the issuance of verbal or written warnings, and notices of violation. Penal provisions are enforceable through criminal proceedings. Injunctive remedies are applicable to either. Regulatory and penal enforcement provisions may proceed separately and independently of each other, and the selection of one method does not preclude other enforcement methods of proceedings, including injunctive relief, when appropriate.

CONCLUSION

Attached is proposed ordinance Version D for your consideration and approval. The permit fee of \$156 allows for full cost recovery, and the San Diego Police Department is committed to proactive enforcement of the ordinance. I am confident these improvements satisfy the concerns of members of the Public Safety and Neighborhood Services Committee, and I ask for your full support of the ordinance.

Respectfully submitted,



MICHAEL J. AGUIRRE
City Attorney

LLP
Attachments

TOBACCO RETAILER ORDINANCE – VERSION D

 COST RECOVERY WORKSHEET
 (Prepared by SDPD / Fiscal Management)

According to the proposed Tobacco Retailer Ordinance, administration and enforcement will be divided between the City Treasurer and the Chief of Police.

Treasurer will:

- (1) Accept applications
- (2) Issue permits / endorse business tax certificates

SDPD will:

- (1) Determine fitness of applicants (background checks)ⁱ
- (2) Investigate violations
- (3) Take administrative action

SDPD recently completed a cost-work up for enforcement of the proposed Tobacco Retailer Ordinance. SDPD made the following assumptions in calculating their costs:

- One full-time PCCO (a new position)
- One partial-position Clerical Assistant II
- Pro-Active Enforcement of 6 stings per yearⁱⁱ
 - Assuming Overtime
 - Assuming 6 PO II Detectives
 - Assuming 1 Sergeant Detective
 - Averaging 6 hours per sting operation (multiple businesses)
- Plus non-personnel expenses (ongoing and for new position)

\$173,235	SDPD Costs Annually	(\$127 per permit)
\$ 40,000	Treasurer Costs Annually ⁱⁱⁱ	(\$ 30 per permit)
<u>\$213,235</u>	Total Estimated Costs	

$$\$213,235 / 1363 \text{ (estimated retail establishments)} = \$156.45$$

Therefore, proposed permit fee (conservative) = \$156.45

San Diego's proposed permit fee at \$156.45 is still significantly lower than \$247.50, the average permit fee based on a survey of 16 jurisdictions with similar ordinances (June 2006).

ⁱ SDPD estimates \$55 for background investigative fee.

ⁱⁱ SDPD will conduct six undercover stings per year, targeting multiple businesses, but retains discretion to use its resources as situations warrant and time and resources permit.

July 6, 2006

The Honorable Mike Aguirre
City Attorney
City of San Diego
1200 Third Avenue, #1620
San Diego, CA 92101

Dear Mr. Aguirre:

Thank you so much for taking the initiative to revisit tobacco retail licensing as a policy solution to prevent the sale of tobacco products to youth. Your commitment to protecting children from illegal tobacco sales – and a potential life-time addiction to nicotine – is commendable. We are pleased to have the opportunity to work with you, Councilmember Young, and other council members on this vital effort.

The American Lung Association and our partners in the Tobacco-Free Communities Coalition have been working closely with elected officials to reduce the alarming rates of illegal tobacco sales to youth in communities across San Diego County. We share your belief that the city of San Diego's 43.6 percent illegal sales rate of tobacco to children is unacceptable.

Research in California has shown that effective local tobacco retail licensing laws are the best way to hold accountable unscrupulous retailers who sell tobacco products to minors. On behalf of the thirty agency members of Tobacco-Free Communities Coalition, our Model Ordinance Workgroup has analyzed the proposed ordinance, and its findings are presented in this letter.

Position of Tobacco-Free Communities Coalition

The next meeting of the coalition will be July 20, so it has not been possible to adopt a position in time for the July 12th meeting of the PS & NS Committee. However, the Model Ordinance Workgroup recommends the following position:

Ordinance Strengths

The Center for Tobacco Policy & Organizing has been funded by the state of California to identify which components in tobacco retail licensing policies contribute the most to reducing illegal sales. We applaud the proposed ordinance for including two of the four components recommended by the Center:

- *Requirements that all retailers who sell tobacco products must obtain a license and renew it annually.*
- *Coordination of tobacco regulations so that a violation of any existing local, state or federal regulation violates the license.*

Our Workgroup members also appreciate the inclusion of provisions that will further discourage violations of tobacco control laws and reduce problems associated with drug paraphernalia:

- Banning mobile tobacco sales
- Extensive background checks of potential tobacco retailers
- Requiring the conspicuous display of information about how to report violations of tobacco control laws to the Chief of Police
- The revocation of a business license if a person possesses the intent to furnish drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to inject, ingest, inhale, or otherwise introduce into the human body a controlled substance
- Requiring an annual summary report, to the Public Safety and Neighborhood Services Committee, of activity related to the administration and enforcement of the ordinance; and accounting of all funds received and used for the administration and enforcement of the ordinance; and the estimated rate of illegal sales of tobacco products to minors within the City of San Diego

Ordinance Weaknesses

In its current form, the ordinance does not include the following two policy components that the Center has identified:

- *A fee set high enough to sufficiently fund an effective program, including administration of the program and enforcement efforts. An enforcement plan, that includes compliance checks, should be clearly stated.*

The Model Ordinance Work Group understands the fiscal constraints and staffing shortages experienced by the San Diego Police Department. Although we are pleased that the proposed \$30 annual tobacco retailer permit fee has been increased to \$100, we would appreciate receiving a summary of how the revenue generated by the fee would be allocated between administration and enforcement. In addition, since the Police Chief is afforded exclusive responsibility for the enforcement provisions set forth in the draft ordinance, the Workgroup would like to understand the specific role the city attorney will play in discouraging the sale of tobacco to minors.

- *A financial deterrent, through fines and penalties, including the suspension and revocation of the license. Fines and penalties should be outlined in the ordinance.*

Municipal Code Article 3, Division 4, spells out the criminal penalties and regulatory actions that may be taken against violators of the proposed ordinance. Lacking a defined penalty structure, these actions are left to the sole

discretion of the Police Chief. In order to provide certainty to the level of ~~enforcement-discipline, Model Ordinance Workgroup members request the~~ incorporation of the City of Vista or City of El Cajon's Suspension/Revocation Schedule into the draft ordinance. (Please refer to pages 5 and 8 of *Strong Local Tobacco Retail Licenses in California: A Comparison*.)

Additionally, the ordinance could stipulate the prerogative of the City Attorney to seek a civil injunction to enforce the ordinance, or to prohibit a violation of a police permit, or may bring a civil suit under Business and Professions Code sections 17200, et seq. – Unlawful, Unfair or Fraudulent Business Act or Practice. (Please see page 14 of *Technical Assistance Legal Center's (TALC) suggested revision to draft ordinance*.)

The Model Ordinance Workgroup also recommends the inclusion of the following provisions:

- Require that clerks be the minimum legal age to purchase tobacco products (currently 18 years old)
- Require retailers to check the age of purchasers who “reasonably appear” to be under the age of 27
- Require that all tobacco-related products and paraphernalia be removed from public view during periods of suspension and revocation
- Prohibit tobacco retailers from providing a venue for smoking or consuming any tobacco product anywhere at the permitted location, either outdoors or indoors. (This would help control the growing menace of hookah lounges)
- Provide for alternative enforcement mechanisms, such as empowering Neighborhood Code Compliance officers to conduct store inspections and cite offending tobacco retailers

Conclusions

Although we recognize the commendable provisions set forth in the proposed ordinance, the Model Ordinance Workgroup cannot support it without the incorporation of a definitive schedule of penalties, including permit suspension and revocation. Based on our discussions with Technical Assistance Legal Center (TALC), a legal clearinghouse, funded by the California Department of Health Services, to provide California Communities with free technical assistance on tobacco control policy issues, we believe our concerns could be addressed by adding the following language to the draft ordinance:

§33.4515 Civil Suit

- (a) Notwithstanding any other provision of this Division or this Code, the City Attorney or City Prosecutor [NOTE: define these in definitions section?] may seek a civil injunction to

enforce this Division or to prohibit a violation of a *police*

permit or may bring a civil suit under Business and Professions

Code sections 17200, et seq. (unlawful, unfair or fraudulent

business act or practice) for a violation of this Division or a

violation of a *police permit*. If the City Attorney or City

Prosecutor prevails, in addition to any other remedies ordered

by the court, any *police permit* at issue shall be suspended for a

minimum of: ten days for a first suspension in five years; 30

days for a second suspension in five years; 120 days for a

third suspension in five years; and five years for a fourth

suspension in five years. The City Attorney and City

Prosecutor shall recoup any expenditure made to enforce this

Division from the permit fee proceeds and the permit fee

shall be calculated to include such reimbursements. [NOTE:

This gives the city attorney an express role in enforcement, to

back up any strong talk to the retailers.]

- (b) Any violation of this Division or of a *police permit* is hereby declared to be a public nuisance. [NOTE: This adds another enforcement possibility: civil suit for nuisance abatement.]

The Technical Assistance Legal Center's (TALC) suggested revisions to the ordinance, and The Center for Tobacco Policy & Organizing comparison of strong local tobacco retailer licensing laws in California, are enclosed for your reference.

Thank you so much for your consideration, Mr. Aguirre. We are confident you will appreciate our efforts to establish an effective tobacco retail licensing law in the City of San Diego that will protect children, from illegal tobacco sales, for years to come.

Please don't hesitate to contact us should you have any questions.

Warm Regards,

Debra Kelley
V.P. of Government Relations

Molly Bowman-Styles
Policy Manager

Attachments:

Strong Local Tobacco Retailer Licensing Laws in California, The Center for Tobacco Policy & Organizing

Suggested Revision to Draft Tobacco Retail Licensing Ordinance, Technical Assistance Legal Center (TALC)

000041

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

CIVIL DIVISION
1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

MICHAEL J. AGUIRRE
CITY ATTORNEY

April 8, 2005

Committee on Public Safety and Neighborhood Services
City Administration Building
202 C Street
San Diego, CA 92101

RE: Proposed Tobacco Retailer Ordinance

Dear PS&NS Committee Members:

The Tobacco-Free Communities (TFC) Model Ordinance Working Group has identified an issue of concern regarding the proposed Tobacco Retailer Ordinance currently set before the Public Safety and Neighborhood Services Committee on April 13, 2005. The TFC believes the proposed ordinance, as written, fails to provide for a consistent level of enforcement activity. It is felt that without consistent enforcement, the proposed ordinance will not be effective. Accordingly, the City Attorney's Office has prepared an alternative draft ordinance which would address the concerns of the TFC for the Committee's consideration.

The alternative draft ordinance adds subdivision (c) to section 33.4512 of the proposed ordinance and states, "(c) To ensure compliance with this Division, the *Chief of Police* shall be required to inspect at least twenty percent of *tobacco retailers* per year." The twenty (20) percent figure was discussed during the various working groups as a "statistically significant" percentage in terms of encouraging compliance with the ordinance, providing sufficient information to determine the efficiency of the ordinance, and providing sufficient information to correctly determine the rate of illegal sales of tobacco products to minors. A copy of the alternative draft ordinance is attached to this letter for your review.

Thank you for your consideration in this matter.

Sincerely yours,


MICHAEL J. AGUIRRE,
City Attorney

SS:jrp
Attachment

Michael J. Aguirre

CITY ATTORNEY

April 7, 2005

REPORT TO THE COMMITTEE ON PUBLIC
SAFETY AND NEIGHBORHOOD SERVICES

TOBACCO ORDINANCE

INTRODUCTION

On June 9, 2004, the Public Safety and Neighborhood Services Committee ["the Committee"] met to discuss a proposed ordinance requiring all tobacco retailers in the City of San Diego to possess a police permit to sell tobacco products. The Committee directed that several questions related to the ordinance be answered and that "stakeholders" be brought into the drafting process of the proposed ordinance. This report answers several questions: (1) what current laws deal with sales of tobacco products to minors and are they sufficient to reduce tobacco sales to minors; (2) what is AB 3092 and what other legislation dealing with sales of tobacco products to minors is currently before the state Legislature; (3) may the cost recovery fee be based on the size of the business; (4) which businesses were surveyed in the American Lung Association Survey; and (5) how many prospective applicants are covered by the proposed tobacco ordinance.

DISCUSSION

I. What Current Laws Impact the Sales of Tobacco Products to Minors and Are They Sufficient?

The Committee has asked what the current laws governing the sale of tobacco products to minors and whether such laws are sufficient in deterring the sales of tobacco products to minors. A review of the existing tobacco control laws reveals that they have limitations that hinder their effectiveness to deter illegal sales of tobacco products to minors.

The following is a description of relevant State laws that deal with the sales of tobacco products to minors:¹

¹ Copies of California Penal Code section 308, the STAKE Act, and AB 71 are attached as Attachment 1.

A. California Penal Code Section 308 et seq

- Penal Code section 308(a) makes it unlawful to knowingly sell, give, or in any way furnish cigarettes or tobacco products or paraphernalia to persons under 18 years of age. In the case of vending machines, the person who authorizes the installation or placement of a tobacco vending machine is liable for any sale to a minor.
- Penal Code section 308(a) provides that each offense is subject to either a criminal action as a misdemeanor or to civil action, punishable by a fine of \$200 for the first offense, \$500 for the second offense, and \$1,000 for the third offense. Twenty-five percent of each civil and criminal penalty collected is to be paid to the Office of the City Attorney, County Counsel, District Attorney, or whoever is responsible for bringing the successful action and 25 percent is to be paid to the City or County for administration of the cost of community service work. Cal. Penal Code § 308(a).
- Penal Code section 308(b) provides that a minor who purchases, receives or possesses any tobacco products may be punished by a fine of \$75 or 30 hours of community service.
- Penal Code section 308(c) provides that businesses that sell tobacco products must post the notice required by California Business and Professions Code section 22952, also known as "The Stop Tobacco Access to Kids Enforcement [STAKE] Act". Such notices include a warning sign posted at each point of sale stating that selling tobacco products to minors is illegal and subject to penalties and that minors will be asked for identification. Warning signs must include a toll-free telephone number [1-800-ASK-4-ID] that customers may use to report observed tobacco sales to youths under the age of 18. The section imposes a fine of \$50 for the first offense, \$100 for the second offense, \$250 for the third offense, and \$500 for the fourth offense and each subsequent violation of the provision, or by imprisonment for not more than 30 days.
- Penal Code section 308(d) treats each franchise location or seller of tobacco products as a separate entity for purposes of determining liability for violations.
- Penal Code section 308.2 makes it illegal to sell one or more cigarettes separately. Cigarettes must be sold in the manufacturer's package, sealed and properly labeled, according to federal requirements.

B. Stop Tobacco Access to Kids Enforcement (STAKE) Act
California Business & Professions Code Sections 22950 – 22963.

- The STAKE Act created a statewide enforcement program to take regulatory action against businesses that illegally sell tobacco to minors. Authority for enforcement and responsibility for implementation of the program was delegated to the Department of Health Services [DHS], Food and Drug Branch.
- The STAKE act requires retailers of tobacco products to post a conspicuous notice at each point of sale and on each vending machine stating that selling tobacco products to minors is illegal and subject to penalties, that retailers are required to check the identification of anyone attempting to buy tobacco that appears under 18 years of age, and must include a toll-free number (1-800-5-ASK-4-ID) that customers may use to report sales to under age youth. Cal. Bus. & Prof. Code §§ 22952(b) and 22956.
- Investigators from DHS, Food and Drug Branch, may conduct on-site compliance checks with the assistance of minors 15 to 16 years of age who are granted immunity from prosecution. The STAKE Act requires DHS to adopt and publish guidelines for the use of persons less than 18 years of age in inspections. DHS may also conduct investigations based on complaints in addition to random checks. Cal. Bus. & Prof. Code §§22952(c)-(d)
- Section 22957 of the Act permits DHS to enter into “delegation agreements” with local law enforcement agencies to assist in the enforcement of the STAKE Act. Local agencies must agree to comply with state regulations in enforcement efforts.
- The STAKE Act provides that any civil penalties imposed pursuant to Section 22958 be enforced against the owner(s) of the retail business and not the employees. Cal. Bus. & Prof. Code § 22952(f).
- Civil penalties according to the schedule stated (ranging from \$200 to \$6,000) may be assessed against the owner of a business that violates the statute by selling or providing tobacco products to minors. This includes a civil penalty of from \$200 to \$300 for the first violation; a civil penalty of from \$600 to \$900 for the second violation within a five-year period; a civil penalty of from \$1,200 to \$1,800 for a third violation within a five-year period; a civil penalty of from \$3,000 to \$4,000 for a fourth violation within a five-year period; or a civil penalty of from \$5,000 to \$6,000 for a fifth or subsequent violation within a five-year period. Cal. Bus. & Prof. Code § 22958.

- Violations at one retail location are not accumulated against other retail locations of the same owner. Cal. Bus. & Prof. Code § 22958 (e).
- The STAKE Act requires any tobacco product distributor or wholesaler and any vending machine operator to annually provide DHS with the names and addresses of the tobacco product retailers that they supply and the name and address of each location where cigarette vending machines are placed. Cal. Bus. & Prof. Code § 22954.
- Business and Professions Code section 22967 of the STAKE Act prohibits tobacco billboards within 1,000 feet of schools and public playgrounds.
- The STAKE Act requires the annual transfer of \$2 million dollars from the Department of Alcohol and Drug Programs' [ADP] SAPT Block Grant to the Sale of Tobacco to Minors Control Account. These funds are used by DHS to administer and enforce the provisions of the Synar Amendment, which requires states to implement programs to curb underage tobacco use.
- The STAKE Act also requires DHS to prepare an annual report regarding its enforcement activities and their effectiveness for the federal government, state legislature, and Governor. Cal. Bus. & Prof. Code § 22952(e).

C. California Cigarette and Tobacco Products Licensing Act of 2003 [Assembly Bill 71] California Business & Professions Code section 22970 et seq.

- The California Cigarette and Tobacco Product Licensing Act of 2003 [AB 71] mandates that retailers, wholesalers, distributors, cigarette manufacturers and importers cannot sell tobacco products in California unless they are licensed by the California State Board of Equalization [BOE]. AB71, intended to decrease tax evasion on the sale of cigarettes and tobacco products in California, also includes provisions for new recordkeeping requirements, inspection and seizure of any untaxed cigarettes or tobacco products, and imposes civil and criminal penalties for violations. The law provides for suspending or revoking a tobacco retailer's license if they are convicted a certain number of times for selling tobacco to minors. The Act provides for the following.
- AB71 assigns to the BOE the administration of a statewide program to license manufacturers, importers, distributors, wholesalers, and retailers of cigarettes and tobacco products. Cal. Bus. & Prof. Code § 22970.2.
- Retailers of cigarettes or tobacco products must apply for and obtain a license by June 30, 2004, for each retail location owned or controlled by the retailer.

BP
22970-
22975

The license must be conspicuously displayed at each retail location and renewed annually. Cal. Bus. & Prof. Code §§ 22972 (a)-(d).

- A one-time license fee of \$100 is required with each application. Cal. Bus. & Prof. Code § 22973 (d).
- Licensing will be monitored by the BOE. Cal. Bus. & Prof. § 22971.2.
- Local law enforcement officers are authorized to enter and conduct inspections at retail locations no more than once in a 24-hour period. Cal. Bus. & Prof. Code § 22980 (a).
- A person or entity that engages in the business of selling cigarettes without a license is guilty of a misdemeanor punishable as provided in Section 22981. Cal. Bus. & Prof. Code § 22980.2.
- Any violation of the division is a misdemeanor. Each offense shall be punished by a fine not to exceed \$5,000, or imprisonment not exceeding one year in a county jail, or both the fine and imprisonment. Cal. Bus. & Prof. Code § 22981.
- Any prosecution for a violation of any of the penal provisions of the division must be instituted within four years after commission of the offense. Cal. Bus. & Prof. Code § 22982.
- Administrative action that could lead to revocation or suspension of a retailer's license for selling tobacco to minors only go into effect in years when the statewide sales to minors rate is greater than 13 percent or more, as determined by the DHS survey pursuant to Business and Professions Code section 22952. Cal. Bus. & Prof. Code § 22974.8 (d).
- In years when the illegal sales rate of tobacco products to minors is greater than 13 percent, upon a first conviction of either the STAKE Act or Penal Code Section 308, the retailer shall receive a warning letter from the BOE delineating the circumstances under which the retailer's license may be suspended or revoked. Upon a second conviction within a 12 month period, the retailer is subject to a \$500 fine. Upon a third conviction, the retailer is subject to a fine of \$1,000. Upon a fourth through seventh violation, a retailer's license can be suspended for a period of 90 days. After an eighth violation of the STAKE Act or Penal Code section 308, a license shall be revoked. Cal. Bus. & Prof. Code § 22974.8 (b).

- The Act specifically does not preempt local governments from passing their own tobacco control laws. Cal. Bus. & Prof. Code § 22971.3.

The above described state tobacco control laws have several limitations which constrain their effectiveness in curbing sales of tobacco products to minors. First, most of the state tobacco control laws are fine based. For example, Penal Code section 308 has fines that range from \$250 to \$1000. The STAKE Act has civil penalties that range from \$200 to \$6000, based on the number of violations. Finally, the first three violations of AB 71, has fines that range from \$500 to \$1000, based on the number of violations. The use of fine based sanctions has limited effectiveness, given that paying the fines may be seen by violators as a cost of doing business, particularly given the profits made from the selling of tobacco products. Proponents of the proposed ordinance have stated that there is about a forty-five cent profit made on each package of cigarettes sold and that an average retailer makes about \$160 per day in tobacco sales. Accordingly, laws which rely solely on fines as a means to deter tobacco sales have significant limitations. The proposed ordinance would resolve this limitation by focusing on stopping the retailer's ability to sell tobacco products, either by suspension or revocation.

Second, the STAKE Act is limited because enforcement is primarily vested with the Department of Health Services, Food and Drug Branch. This is a problem because local law enforcement agencies may not assist the state in enforcing the STAKE Act absent a delegation agreement. However, even if a delegation agreement were to exist, the local agency would be bound to follow state rules when assisting the State. State Legislators have recognized this weakness and considered amendments to the STAKE Act to permit law enforcement agencies other than DHS to enforce the STAKE act. See State Assembly Bill [AB] 2443 described further below. However, AB 2443 did not pass. The proposed ordinance would further the STAKE Act's intended purpose by providing a mechanism by which local entities could hold violators accountable.

Third, both the STAKE Act and the AB 71 Licensing program are limited because the State is responsible for pursuing administrative action and/or civil penalties for violations of these laws. A local agency is excluded from determining whether administrative action should be taken and what the appropriate sanction should be. The proposed ordinance allows the City of San Diego to determine whether administrative action should be taken and what the appropriate sanction should be for violations of tobacco control laws.

In sum, existing state laws have significant limitations which reduce their effectiveness in curbing illegal tobacco sales to minors. In addition, given the various high rates of illegal sales of tobacco products, the proposed ordinance would assist reducing illegal sales of tobacco products to minors.

II. What is AB 3092 and What State Legislation Exists That Deals With Sales of Tobacco Products to Minors?

At the Committee hearing, a speaker stated that State Assembly Bill [AB] 3092 would address what the proposed ordinance sought to achieve. As a result, the Committee requested a summary of AB 3092 and other pending state legislation. In both the 2003-2004 and the 2005-2006 State Legislative Sessions the State Legislature examined various bills dealing with tobacco sales to minors. The following is a summary of the State's legislative efforts:

A. 2004-2005 Legislative Session:

1. AB 3092 - Amends Sections of the Cigarette and Tobacco Products Licensing Act

Assembly Bill 3092 was chaptered on September 27, 2004. The bill exempts any person or entity from AB71 who is exempt from regulation under the U.S. Constitution, federal law, or the California Constitution. It requires a distributor subject to the act to specify in each invoice that all taxes on cigarette and tobacco products are included in the total amount of the invoice. Existing law authorizes the BOE, effective January 1, 2005, to replace stamp or meter impressions with ones that can be read by a scanning device. It further states the intent of the Legislature that the authority of the BOE to implement these changes by regulation does not affect commerce within the state. Every business must post the required notice of fines for failure to comply. The bill also increases the amounts of the fines to \$50 for the first offense; \$100 for the second offense, \$250 for the third offense, and \$500 for the fourth offense and each subsequent offense. It incorporates additional changes made to Penal Code section 308, as proposed to be made by AB 384, discussed below, to be operative only if AB 384 and this bill are both enacted and take effect.

2. AB 384 - Prohibits tobacco use at youth correctional facilities

Assembly Bill 384 was chaptered on September 27, 2004. The bill prohibits possession or use of tobacco products by inmates and wards under the jurisdiction of the Department of Corrections and Department of Youth Authority.

3. SB 1173 - Tobacco products self-service display

Senate Bill 1173 was chaptered on September 27, 2004. The bill amends Business and Professions Code section 22962. Currently, the STAKE Act is designed to reduce the availability of tobacco products to minors through sales restrictions and enforcement activities. Specifically, the STAKE Act prohibits a person engaged in the retail sale of tobacco products to sell, offer for sale, or display for sale, cigarettes by self-service display, as defined. This bill broadens that prohibition to include the sale of any tobacco product or tobacco paraphernalia by self-display and exempts certain products, including cigars, not generally sold in a sealed package. Violation of the section is subject to civil penalties specified in the schedule in Section 22958(a).

4. SB 1016 -- Jenkins Act and sale of cigarettes in interstate commerce

Senate Bill 1016 was chaptered on September 29, 2004. The bill requires that all tobacco sales be vender assisted face to face sales unless: (1) the vender fully complies with the federal Jenkins Act, which requires that any person who ships cigarettes subject to state taxes into the state provide a copy of the invoice to the BOE; and (2) that all applicable taxes are paid or posts a notice stating the purchaser is responsible for the payment of taxes. The bill further authorizes the BOE to provide information related to a failure to comply by a seller with the bill's requirements to the Attorney General.

5. AB 2491 - Amends Cigarette and Tobacco Products Licensing Act

Assembly Bill 2491 was chaptered on June 30, 2004. The bill amended Business and Professions Code sections 22971, 22974.7, 22979, 22979.4 and 22980.2 and adds sections to the Revenue and Taxation Code. The bill authorizes the BOE to issue temporary license to retailers and allow posting on its website of the identity of wholesalers or distributors whose licenses have been suspended or revoked. The Cigarette and Tobacco Products Tax Law requires a tax to be imposed on distributors through the use of stamps or meter register settings affixed to each package sold. The BOE is authorized under the current law to seize products that do not have the stamp or have not paid the tax and to give notice by registered mail or publication. The bill changes the requirement allowing the BOE to give notice by certified mail and by posting on the BOE's website.

6. AB 1666 -Taxation and distributors of tobacco products

Assembly Bill 1666 was chaptered on October 12, 2003. The bill amends sections of Cigarette and Tobacco Products Tax Law and Revenue Code sections requiring distributors to pay taxes through use of stamps or meter register settings with reference to dates for filing payment and reporting of payments. It further allows distributors who defer payments to remit payments either on a monthly or twice-monthly basis. Until January 1, 2007, it requires distributors of cigarettes and tobacco products to elect to file returns and remit taxes, as specified, either on a monthly or twice-monthly basis.

7. SB 1821 - Raises minimum legal age to 21; advertising, display, and distribution limitations

Senate Bill 1821 was considered but failed because of the end of the legislative session. The bill would have raise the minimum legal age required to purchase cigarettes and tobacco products from 18 to 21 years and make corresponding changes in the STAKE Act. These conforming changes would have also be applicable to the restrictions on tobacco promotions and enforcement of tobacco sales bans. The STAKE Act authorizes the assessment of civil penalties for violations of the Act and makes the violation of certain provisions of the Act a criminal offense. Existing law also makes it a crime to engage in activities for which civil penalties may

be imposed under the Act. This bill would have extended the applicability of the Act and the criminal law described above to persons under the age of 21 years, except for those who were born before January 1, 1987. In addition, the measure would have authorized DHS to enlist the assistance of 15 and 16 year olds for onsite sting inspections until January 1, 2007, and after that to use anyone under the age of 21

8. AB 2443 - Tobacco products and minors

Assembly Bill 2443 was considered but failed because of the end of the legislative session. The bill would have authorized an enforcing agency, other than DHS, to conduct inspections and assess penalties for violations. The bill would have made changes to the civil penalty amounts for the first and second violation and would have authorized not only DHS, but any enforcing agency to assess those civil penalties. The bill would have required all civil penalties collected under the act by local law enforcement to be used to pay their costs of enforcement. Local enforcing agencies would have included District Attorney, City Attorney, and County counsel. Finally, the bill would have made changes in the STAKE Act regarding the published guidelines for using minors in sting operations.

9. SB 676 - Tobacco manufacturer fees; Tobacco Mitigation Trust Fund

Senate Bill 676 was considered but failed because of the end of the legislative session. The bill would have imposed a fee, to be determined by the State Department of Health Services, by regulation, on specified cigarette manufacturers who did not sign the Master Settlement Agreement [MSA] entered into between Attorney General and various tobacco product manufacturers in settlement of litigation. The State has entered into a Memorandum of Understanding providing for allocation of the state's share to be received under the MSA. Existing law requires any tobacco product manufacturer that sells cigarettes in California and who does not participate in the MSA to place specified amounts into a qualified escrow fund by April 15th of each year. The proposed bill would have established the Tobacco Mitigation Trust Fund, to receive moneys derived from the imposition of the fee.

10. SB 433 - Licensing of retailers

Senate Bill 433 was considered but failed because of the end of the legislative session. The Cigarette and Tobacco Products Licensing Act of 2003 requires the State Board of Equalization to take certain actions prior to suspending or revoking a retailer's license to sell cigarettes. Existing law prescribes penalties for the fourth through eighth convictions and limits when the Board has authority to take action against retailers. The bill would have made changes to those penalties for convictions by requiring the Board to revoke a licensee's license for specified periods upon multiple convictions. The bill would have provided that convictions for violations at one retail location or against a prior retail owner could not be accumulated against other locations of the licensee or against a new retail owner. The bill would have repealed the limitations on the board's authority to take action against retailers.

11. AB 1276 - Tobacco Settlement Agreement; escrow compliance

Assembly Bill 1276 was considered but failed because of the end of the legislative session. The bill would have required the Attorney General to post a website identifying tobacco product manufacturers who complied with requirements of the Cigarette and Tobacco Products Tax Law and the requirement for non-participants under the Tobacco Settlement Agreement to make payments into a qualified escrow fund, and would have prohibited any stamp or meter to be affixed to a product not included on the list. The bill would have given the Attorney General specified authority and duties in this regard, and would have imposed specified penalties for failure to comply. The bill would have also made it a misdemeanor for a tobacco manufacturer to make false representations, or to sell, distribute, or import cigarettes in violation of the bill. The bill would have further deemed it unfair competition for any person to affix a tax stamp or meter impression in violation of the bill's requirements, and would have added to the existing forfeiture list products to which cigarette tax stamps or meter impressions are affixed in violation of the prohibition specified.

12. AB 221 - Tobacco products, minimum age, advertising

Assembly Bill 221 failed because of the end of the legislative session. The bill would have extended the prohibitions of the STAKE Act to persons under 21 years of age, except those born before January 1, 1986. In addition to increasing the buying age for tobacco products, the bill would also restrict advertising or sale of promotional items to persons less than 21 years of age. The bill would have changed the definition of a crime, creating a state-mandated local program. The STAKE Act currently requires DHS to enlist 15 and 16 year olds in sting inspections. The bill would have authorized DHS until January 1, 2007, to enlist the assistance of persons who are 15 and 16 years of age, and after January 1, 2007, to enlist the assistance of persons less than 21 years of age for the inspections.

13. AB 1040 - Cigarette taxes

Assembly Bill 1040 failed because of the end of the legislative session. Existing law authorizes local government entities to levy specified taxes, but prohibits imposition of taxes by any charter city, or counties with regard to sale, use, ownership, holding, or other distribution of cigarettes and tobacco products, except as provided. The bill would have authorized the board of supervisors of a county to impose a tax, in addition to other local taxes, on the privilege of selling cigarette and tobacco products within their boundaries.

14. AB 1239 - Cigarette taxation

Assembly Bill 1239 failed because of the end of the legislative session. The bill would have imposed after January 1, 2004, a fee, to be determined by DHS as prescribed on specified tobacco manufacturers who did not sign the Master Settlement Agreement (MSA), creating the

Nonparticipating Tobacco Manufacturing Mitigation Trust Fund to receive monies derived from the fee. Fund monies are to be used to reimburse DHS and to fund smoking cessation programs.

B. 2005-2006 Legislative Session:

1. SB 400:

Senate Bill 400 is currently set for a hearing on April 6, 2005. The bill would allow the BOE to validate state, local, and county convictions for violation of the cigarette licensing laws under Business and Professions Code sections 22950 *et seq.* The BOE could then impose the following penalties: first violation: 30-day suspension; second violation: 90-day suspension; third violation: 120-day suspension; fourth violation: 365-day suspension; and, fifth violation: Permanent revocation. A party would then have 30 days to appeal the administrative action. The violations are applied to the location and not the person and thus are not cumulative as to other retail locations owned by the same owner. Violations by a previous owner at one location cannot be accumulated against a new owner of the same location. The bill would further require local law enforcement agencies to contact the State Board within 30 days of any judgment finding a seller, retailer, etc., to be in violation. The bill also provides for a State-mandated program to supervise the implementation of this bill. The bill also provides for reimbursements to local agencies and school districts.

2. AB 1749 :

Assembly Bill 1749 is currently set for a hearing on April 8, 2005. The bill would require tobacco vendors, distributors, etc. to provide the correct excise tax, instead of an itemized list of sales, along with their sales invoices verifying to the BOE the amount of their total sales of tobacco products in California. The bill further empowers the BOE or any state or local agency to seize any tobacco products that do not comply with the invoice reporting requirements. The section allows the BOE to revoke or suspend licenses of distributors, wholesalers, importers or manufacturers and, upon further offenses, to impose a fine of five times the value of the retail cigarettes in question or \$5000, whichever is less. The bill requires all manufacturers and importers to pay a fee proportional to their market share as of January 1, 2004. Finally, the bill requires a refund or remission to the State of all excess taxes/fees collected

3. AB 1612:

The bill is in the Assembly Natural Resources Committee. The bill would enact the Cigarette Pollution and Litter Act of 2005 and add Public Resources Code section 19000, *et seq.* The bill would require that an additional fee be paid by manufacturers to the BOE starting July 1, 2006 to fund cigarette pollution prevention and education measures and educational programs. Under Public Resources Code section 19003, the manufacturer will pay a cigarette pollution and litter prevention fee to the State Board of Equalization for each pack sold. Under section

19004(a) the moneys collected will go into a fund managed by the State Treasury to be used by both the Department of Health and the Department of Conservation as per section 19004(b.) The purpose of this fund as per section 19004(b)(1)-(8) is to assist local governments in clean-up and educational efforts relating to smoking and cigarette pollution; to reimburse the expenses incurred by the Board for collecting the fees; and, to pay for implementing this statute.

4. AB 17:

The bill was referred to the Assembly Committee on Governmental Organization. The bill would add section 516 to Public Resources Code and make it an infraction punishable by \$100 fine to smoke within 25 feet of playgrounds and on State beaches. The bill would exclude adjacent parking lots or campgrounds that are not on the sand.

5. AB 1029:

The bill was referred to the Assembly Committee on Revenue and Taxation. The bill would amend Revenue and Taxation Code section 30101.7 by requiring the vendor of non-face-to-face sales to comply with all federal (Jenkins Act) and state requirements involving the sale of cigarettes including providing the State Board of Equalization with a verification of all taxes having been paid as per Revenue and Taxation section 30101.7(d)(3); verification that the seller is in compliance with the provisions of Health and Safety Code section 104557(a)(2); requiring an out-of-state seller to include a printed label informing the buyer that their identity has been reported to the Board and that the buyer is responsible for all unpaid state taxes. The bill further allows for a separate cause of action by local entities and the Attorney General against retail sellers who fail to pay taxes on face to face transactions.

III. Because the Cost to Administer and Enforce the Proposed Ordinance Does Not Change Because of the Size of the Business, the Fee Must Be the Same for Small and Large Businesses

The Committee was concerned about the equity of assessing the same permit fee for small and large businesses. As a result, it asked whether the fee for a permit may be based on the size of the business - where a smaller business would pay a lower permit fee. The cost in administering and enforcing the proposed ordinance is the same for both large and small businesses. As a result, any permit fee imposed must be the same for both large and small businesses.

Government Code section 66016 states, in pertinent part: "Unless there has been voter approval, as prescribed by [Government Code] [s]ection[s] 66013 or 66014, no local agency shall levy a new fee or service charge or increase an existing fee or service charge to an amount which exceeds the estimated amount required to provide the service for which the fee or service

charge is levied." *See also Sinclair Paint Co. v. Board of Equalization*, 15 Cal.4th 866 (1997) [Fees may include costs of enforcement]. As a result, the sole criteria that may be considered to determine the cost of a fee is the cost to administer and enforce the service.

Permit fees for the proposed ordinance will be used to pay for the processing of the permit applications, and to provide for administrative appeals. The costs for activities are the same for all businesses regardless of size, particularly because each location which sells tobacco products will be required to possess a permit. As a result, a fee based on the size of the business in this case would not be proper.

IV. American Lung Association Survey Results

At the Committee meeting the results of the American Lung Association survey were discussed. In the course of the discussion, the Committee asked which businesses were surveyed and how did those businesses fare. Attachment 4 contains the survey results requested by the Committee. The survey results identify which businesses were surveyed and which sold tobacco products to minors. Also, attached is a copy of the American Lung Association report generated as a result of the survey.

V. Number of Prospective Applicants

The Committee also asked how many tobacco retailers would be required to obtain the proposed police permits. At the meeting, based on information from the Palaver Tree Organization, an estimate of 3500 applicants was given. However, it was cautioned that the number was solely an informal estimate. The Committee directed that efforts be made to obtain more accurate information related to the number of prospective applicants.

In response to the Committee's query, the City Attorney's Office contacted the State Board of Equalization, which is tasked with ensuring that tobacco retailers obtain State Tobacco Retailer licenses [AB 71 licenses]. After conversations with Victor Day, Principal Compliance Supervisor, the Board of Equalization provided to the City Attorney's Office, a list of all persons who had been issued a state tobacco retailer license in the City of San Diego, which numbered in March 2005 at 1363. Accordingly, because tobacco retailers required to obtain a state license would also be required to obtain a City permit, the number of prospective City permittees is the same and numbers about 1363.

VI. Illegal Sale Rates to Minors Supports the Need for the Proposed Ordinance

A review of the tobacco sales rates of tobacco products to minors supports the conclusion that the proposed ordinance would assist in reducing tobacco sales to minors. There are at least three tobacco sales rates to minors which may be examined. The first is found in the State of

April 7, 2005

California's 2004 Youth Tobacco Survey.² In that survey, the sales of tobacco products rate to minors is currently at 14 percent, a slight increase from the prior year which was at 12.2 percent. The second is a rate calculated by DHS. DHS has reported an illegal sales rate, as of June 24, 2004, of 29 percent.³ The rate they calculated for Fiscal Year 2003-2004 was at 34 percent. However, they caution that the rates they have developed are not official statewide results. Nonetheless, they are significantly high rates. Finally, the American Lung Association conducted a survey of tobacco retailers in the City of San Diego.⁴ They determined that 43.8 percent of 244 surveyed businesses sold tobacco products to minors. Accordingly, in light of the above rates, which range from 14 percent to 43.8 percent, additional efforts, such as the proposed ordinance, to hold retailers who sell tobacco products to minors accountable, are needed to assist in reducing the rate of illegal sales to minors.

The San Diego Tobacco Free Communities Coalition is opposed to the ordinance as written because it does not provide the Police Department with adequate funds to enforce the proposed ordinance and sales to minor laws. The Coalition strongly believes the ordinance should be adopted in a more viable form.

CONCLUSION

This memorandum was intended to address the questions presented by the Committee. The information provided further supports the conclusion that the proposed tobacco ordinance is a lawful and proper exercise of the City's police power.

Respectfully submitted,



MICHAEL J. AGUIRRE
City Attorney

SS:jrp
Attachments
RC-2005- 08

² A copy of the "California Department of Health Services, Tobacco Control Section, 2004 California Youth Purchase Survey, Executive Summary" is attached as Attachment 2.

³ A copy of DHS's findings, obtained from their website is attached as Attachment 3.

⁴ A copy of the American Lung Association survey results, including an identification of surveyed businesses, is attached as Attachment 4.

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ATTACHMENT 1

307. Every person, firm, or corporation which sells or gives or in any way furnishes to another person, who is in fact under the age of 21 years, any candy, cake, cookie, or chewing gum which contains alcohol in excess of 1/2 of 1 percent by weight, is guilty of a misdemeanor.

308. (a) Every person, firm, or corporation that knowingly or under circumstances in which it has knowledge, or should otherwise have grounds for knowledge, sells, gives, or in any way furnishes to another person who is under the age of 18 years any tobacco, cigarette, or cigarette papers, or any other preparation of tobacco, or any other instrument or paraphernalia that is designed for the smoking or ingestion of tobacco, products prepared from tobacco, or any controlled substance, is subject to either a criminal action for a misdemeanor or to a civil action brought by a city attorney, a county counsel, or a district attorney, punishable by a fine of two hundred dollars (\$200) for the first offense, five hundred dollars (\$500) for the second offense, and one thousand dollars (\$1,000) for the third offense.

Notwithstanding Section 1464 or any other provision of law, 25 percent of each civil and criminal penalty collected pursuant to this subdivision shall be paid to the office of the city attorney, county counsel, or district attorney, whoever is responsible for bringing the successful action, and 25 percent of each civil and criminal penalty collected pursuant to this subdivision shall be paid to the city or county for the administration and cost of the community service work component provided in subdivision (b).

Proof that a defendant, or his or her employee or agent, demanded, was shown, and reasonably relied upon evidence of majority shall be defense to any action brought pursuant to this subdivision. Evidence of majority of a person is a facsimile of or a reasonable likeness of a document issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, a motor vehicle operator's license, a registration certificate issued under the federal Selective Service Act, or an identification card issued to a member of the Armed Forces.

For purposes of this section, the person liable for selling or furnishing tobacco products to minors by a tobacco vending machine shall be the person authorizing the installation or placement of the tobacco vending machine upon premises he or she manages or otherwise controls and under circumstances in which he or she has knowledge, or should otherwise have grounds for knowledge, that the tobacco vending machine will be utilized by minors.

(b) Every person under the age of 18 years who purchases, receives, or possesses any tobacco, cigarette, or cigarette papers, or any other preparation of tobacco, or any other instrument or paraphernalia that is designed for the smoking of tobacco, products prepared from tobacco, or any controlled substance shall, upon conviction, be punished by a fine of seventy-five dollars (\$75) or 30 hours of community service work.

(c) Every person, firm, or corporation that sells, or deals in tobacco or any preparation thereof, shall post conspicuously and keep so posted in his, her, or their place of business at each point of purchase the notice required pursuant to subdivision (b) of Section 22952 of the Business and Professions Code, and any person failing to do so shall, upon conviction, be punished by a fine of fifty dollars (\$50) for the first offense, one hundred dollars (\$100) for the second offense, two hundred fifty dollars (\$250) for the third offense, and five hundred dollars (\$500) for the fourth offense and

violation of this provision, or by imprisonment in a county jail not exceeding 30 days.

(d) For purposes of determining the liability of persons, firms, or corporations controlling franchises or business operations in multiple locations for the second and subsequent violations of this section, each individual franchise or business location shall be deemed a separate entity.

(e) ~~It is the Legislature's intent to regulate the subject matter of this section. As a result, no city, county, or city and county shall adopt any ordinance or regulation inconsistent with this section.~~

108.1. (a) Notwithstanding any other provision of law, no person shall sell, offer for sale, distribute, or import any tobacco product commonly referred to as "bidis" or "beedies," unless that tobacco product is sold, offered for sale, or intended to be sold in a business establishment that prohibits the presence of persons under 18 years of age on its premises.

(b) For purposes of this section, "bidis" or "beedies" means a product containing tobacco that is wrapped in temburni leaf (*diospyros melanoxylon*) or tendu leaf (*diospyros exculpra*).

(c) Any person who violates this section is guilty of a misdemeanor or subject to a civil action brought by the Attorney General, a city attorney, county counsel, or district attorney for an injunction and a civil penalty of up to two thousand dollars (\$2,000) per violation. This subdivision does not affect any other remedies available for a violation of this section.

108.2. (a) Every person who sells one or more cigarettes, other than in a sealed and properly labeled package, is guilty of an infraction.

(b) "A sealed and properly labeled package," as used in this section, means the original packaging or sanitary wrapping of the manufacturer or importer which conforms to federal labeling requirements, including the federal warning label.

108.3. (a) A person, firm, corporation, or business may not manufacture for sale, distribute, sell, or offer to sell any cigarette, except in a package containing at least 20 cigarettes. A person, firm, corporation, or business may not manufacture for sale, distribute, sell, or offer to sell any roll-your-own tobacco, except in a package containing at least 0.60 ounces of tobacco.

(b) As used in subdivision (a), "cigarette" means any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of, or contains any of, the following:

(1) Any roll of tobacco wrapped in paper or in any substance not containing tobacco.

(2) Tobacco, in any form, that is functional in the product, that, because of its appearance, the type of tobacco used in the filler, its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette.

(3) Any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in this division.

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(c) Any person, firm, corporation, or business that violates this section is liable for an infraction, or in an action brought by the Attorney General, a district attorney, a county counsel, or a city attorney for a civil penalty of two hundred dollars (\$200) for the first violation, five hundred dollars (\$500) for the second violation, and one thousand dollars (\$1,000) for each subsequent act constituting a violation.

308.5. (a) No person or business shall sell, lease, rent, or provide, or offer to sell, lease, rent, or otherwise offer to the public or to public establishments in this state, any video game intended for either private use or for use in a public establishment and intended primarily for use by any person under the age of 18 years, which contains, in its design and in the on-screen presentation of the video game, any paid commercial advertisement of alcoholic beverage or tobacco product containers or other forms of consumer packaging, particular brand names, trademarks, or copyrighted slogans of alcoholic beverages or tobacco products.

(b) As used in this section, "video game" means any electronic amusement device that utilizes a computer, microprocessor, or similar electronic circuitry and its own cathode ray tube, or is designed to be used with a television set or a monitor, that interacts with the user of the device.

(c) A violation of this section is a misdemeanor.

308b. (a) Except as provided in subdivision (b), every person who knowingly delivers or causes to be delivered to any residence in this state any tobacco products unsolicited by any person residing therein is guilty of a misdemeanor.

(b) It is a defense to a violation of this section that the recipient of the tobacco products is personally known to the defendant at the time of the delivery.

(c) The distribution of unsolicited tobacco products to residences in violation of this section is a nuisance within the meaning of Section 3479 of the Civil Code.

(d) Nothing in this section shall be construed to impose any liability on any employee of the United States Postal Service for actions performed in the scope of his employment by the United States Postal Service.

309. Any proprietor, keeper, manager, conductor, or person having the control of any house of prostitution, or any house or room resorted to for the purpose of prostitution, who shall admit or keep any minor of either sex therein; or any parent or guardian of any such minor, who shall admit or keep such minor, or sanction, or connive at the admission or keeping thereof, into, or in any such house, or room, shall be guilty of a misdemeanor.

310. Any minor under the age of 16 years who visits or attends any prizefight, cockfight, or place where any prizefight, or cockfight, is advertised to take place, and any owner, lessee, or proprietor, or the agent of any owner, lessee, or proprietor of any place where any prizefight or cockfight is advertised or represented to take place who admits any minor to a place where any prizefight or cockfight is advertised or represented to take place or who admits, sells or gives to any such minor a ticket or other paper by which

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~~22950. This Division shall be known and may be referred to as the
Stop Tobacco Access to Kids Enforcement Act or the STAKE Act.~~

22951. The Legislature finds and declares that reducing and eventually eliminating the illegal purchase and consumption of tobacco products by minors is critical to ensuring the long-term health of our state's citizens. Accordingly, California must fully comply with federal regulations, particularly the "Synar Amendment," that restrict tobacco sales to minors and require states to vigorously enforce their laws prohibiting the sale and distribution of tobacco products to persons under 18 years of age.

22952. On or before July 1, 1995, the State Department of Health Services shall do all of the following:

(a) Establish and develop a program to reduce the availability of tobacco products to persons under 18 years of age through the enforcement activities authorized by this division.

(b) Establish requirements that retailers of tobacco products post conspicuously, at each point of purchase, a notice stating that selling tobacco products to anyone under 18 years of age is illegal and subject to penalties. The notice shall also state that the law requires that all persons selling tobacco products check the identification of any purchaser of tobacco products who reasonably appears to be under 18 years of age. The warning signs shall include a toll-free telephone number to the state department for persons to report unlawful sales of tobacco products to minors.

(c) Provide that primary responsibility for enforcement of this division shall be with the state department. In carrying out its enforcement responsibilities, the state department shall conduct random, onsite sting inspections at retail sites and shall enlist the assistance of persons that are 15 and 16 years of age in conducting these enforcement activities. The state department may conduct site sting inspections in response to public complaints or at retail sites where violations have previously occurred, and investigate illegal sales of tobacco products to minors by telephone, mail, or the Internet. Participation in these enforcement activities by a person under 18 years of age shall not constitute a violation of subdivision (b) of Section 308 of the Penal Code for the person under 18 years of age, and the person under 18 years of age shall be immune from prosecution thereunder, or under any other provision of law prohibiting the purchase of these products by a person under 18 years of age.

(d) In accordance with Chapter 3.5 (commencing with Section 11340) Part 1 of Division 3 of Title 2 of the Government Code, the state department shall adopt and publish guidelines for the use of persons under 18 years of age in inspections conducted pursuant to subdivision (c) that shall include, but not be limited to, all of the following:

(1) The state department and any local law enforcement agency or an enforcement delegation contract with the department may use persons under 18 years of age who are 15 or 16 years of age in random inspections to determine if sales of cigarettes or other tobacco

products are being made to persons under 18 years of age.

(2) A photograph or video recording of the person under 18 years of age shall be taken prior to each inspection or shift of inspections and retained by the department or the local law enforcement agency under an enforcement delegation contract with the department for purposes of verifying appearances.

(3) The state department or a local law enforcement agency under an enforcement delegation contract with the department may use video recording equipment when conducting the inspections to record and document illegal sales or attempted sales.

(4) The person under 18 years of age, if questioned about his or her age, need not state his or her actual age but shall present a true and correct identification if verbally asked to present it. Any failure on the part of the person under 18 years of age to provide true and correct identification, if verbally asked for it, shall be a defense to any action pursuant to this section.

(5) The person under 18 years of age shall be under the supervision of a regularly employed peace officer during the inspection.

(6) All persons under 18 years of age used in this manner by the department or a local law enforcement agency under an enforcement delegation contract with the department shall display the appearance of a person under 18 years of age. It shall be a defense to any action under this division that the person's appearance was not that which could be generally expected of a person under 18 years of age, under the actual circumstances presented to the seller of the cigarettes or other tobacco products at the time of the alleged offense.

(7) Following the completion of the sale, the peace officer accompanying the person under 18 years of age shall reenter the retail establishment and inform the seller of the random inspection and following an attempted sale, the department shall notify the retail establishment of the inspection.

(8) Failure to comply with the procedures set forth in this subdivision shall be a defense to any action brought pursuant to this section.

(e) Be responsible for ensuring and reporting the state's compliance with Section 1926 of Title XIX of the federal Public Health Service Act (42 U.S.C. 300x-26) and any implementing regulations adopted in relation thereto by the United States Department of Health and Human Services. A copy of this report shall be made available to the Governor and the Legislature.

(f) Provide that any civil penalties imposed pursuant to Section 22958 shall be enforced against the owner or owners of the retail business and not the employees of the business.

22953. (a) Except as provided in subdivision (b), all moneys collected as civil penalties pursuant to this division shall be deposited in the State Treasury to the credit of the Sale of Tobacco to Minors Control Account that is hereby established.

(b) Notwithstanding subdivision (a), all funds collected within any one fiscal year as civil penalties pursuant to this division that exceed the sum of three hundred thousand dollars (\$300,000) shall be deposited in the General Fund.

22954. Any cigarette or tobacco products distributor or wholesaler as defined in Sections 30011 and 30016 of the Revenue and Taxation Code, and licensed under Article 1 (commencing with Section 30140) of

or Article 3 (commencing with Section 30155) of Chapter 3 of Part 13 of Division 2 of the Revenue and Taxation Code, and any cigarette vending machine operator granted a seller's permit under the Sales and Use Tax Law (Part 1 (commencing with Section 6001) of Division 2 of the Revenue and Taxation Code), shall annually provide to the State Department of Health Services, the names and addresses of those persons to whom they provide tobacco products, including, but not limited to, dealers as defined in Section 30012 of the Revenue and Taxation Code, for the purpose of identifying retailers of tobacco to ensure compliance with this division.

Cigarette vending machine operators granted a seller's permit under the Sales and Use Tax Law (Part 1 (commencing with Section 6001) of Division 2 of the Revenue and Taxation Code), shall annually provide to the department their name and the address of each location where cigarette vending machines are placed, in order to ensure compliance with this division.

The data provided, pursuant to this section, shall be deemed confidential official information by the department and shall be exempt from disclosure under the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code).

2955. Agents of the state department, while conducting enforcement activities pursuant to this division, are peace officers and are subject to all of the powers and immunities granted to Food and Drug Section inspectors pursuant to Section 106500 of the Health and Safety Code in the same manner as are any Food and Drug Section inspectors of the state department.

2956. All persons engaging in the retail sale of tobacco products shall check the identification of tobacco purchasers, to establish the age of the purchaser, if the purchaser reasonably appears to be under 18 years of age.

2957. (a) The state department may enter into an agreement with local law enforcement agencies for delegation of the enforcement of this division within their local jurisdictions. The contract shall require the enforcement activities of the local law enforcement agencies to comply with this division and with all applicable laws and the guidelines developed pursuant to Section 22951.

(b) In cases where enforcement has been delegated to local law enforcement agencies pursuant to this section, any enforcement by the state department in those jurisdictions shall be coordinated with the local law enforcement agencies and the state department may not duplicate enforcement activities, so as to result in a duplication of civil penalties or assessments under this division.

(c) The state department shall reimburse local law enforcement agencies for enforcement costs pursuant to delegation contracts, not to exceed the projected costs to the department for enforcement of this division in those jurisdictions. Reimbursements shall be made from the Sale of Tobacco to Minors Control Account.

2958. (a) The state department may assess civil penalties against any person, firm, or corporation that sells, gives, or in any way furnishes to another person who is under the age of 18 years, any

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tobacco, cigarette, or cigarette papers, or any other instrument or paraphernalia is designed for the smoking or ingestion of tobacco, products prepared from tobacco, or any controlled substance, according to the following schedule: (1) a civil penalty of from two hundred dollars (\$200) to three hundred dollars (\$300) for the first violation, (2) a civil penalty of from six hundred dollars (\$600) to nine hundred dollars (\$900) for the second violation within a five-year period, (3) a civil penalty of from one thousand two hundred dollars (\$1,200) to one thousand eight hundred dollars (\$1,800) for a third violation within a five-year period, (4) a civil penalty of from three thousand dollars (\$3,000) to four thousand dollars (\$4,000) for a fourth violation within a five-year period, or (5) a civil penalty of from five thousand dollars (\$5,000) to six thousand dollars (\$6,000) for a fifth or subsequent violation within a five-year period.

(b) The state department shall assess penalties in accordance with the schedule set forth in subdivision (a) against any person, firm, or corporation that sells, offers for sale, or distributes tobacco products from a cigarette or tobacco products vending machine, or any person, firm, or corporation that leases, furnishes, or services these machines in violation of Section 22960.

(c) The state department shall assess penalties in accordance with the schedule set forth in subdivision (a) against any person, firm, or corporation that advertises or causes to be advertised any tobacco product on any outdoor billboard in violation of Section 22961.

(d) If a civil penalty has been assessed pursuant to this section against any person, firm, or corporation for a single, specific violation of this division, the person, firm, or corporation shall not be prosecuted under Section 308 of the Penal Code for a violation based on the same facts or specific incident for which the civil penalty was assessed. If any person, firm, or corporation has been prosecuted for a single, specific violation of Section 308 of the Penal Code, the person, firm, or corporation shall not be assessed a civil penalty under this section based on the same facts or specific incident upon which the prosecution under Section 308 of the Penal Code was based.

(e) (1) In the case of a corporation or business with more than one retail location, to determine the number of accumulated violations for purposes of the penalty schedule set forth in subdivision (a), violations of this division by one retail location shall not be accumulated against other retail locations of that same corporation or business.

(2) In the case of a retail location that operates pursuant to a franchise as defined in Section 20001, violations of this division accumulated and assessed against a prior owner of a single franchise location shall not be accumulated against a new owner of the same single franchise location for purposes of the penalty schedule set forth in subdivision (a).

(f) Proceedings under this section shall be conducted in accordance with Section 100171 of the Health and Safety Code.

22959. (a) The sum of two million dollars (\$2,000,000) shall be transferred annually from the portion of the federal Substance Abuse Prevention and Treatment block grant moneys allocated to the State Department of Alcohol and Drug Programs for administrative purposes related to substance abuse programs, to the Sale of Tobacco to Minors Control Account.

(b) Upon appropriation by the Legislature, moneys in the Sale of Tobacco to Minors Control Account shall be expended by the state department to administer and enforce this division.

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22960. (a) ~~As provided in subdivision (b), no cigarette or tobacco product shall be sold, offered for sale, or distributed from a vending machine or appliance, or any other coin or token operated mechanical device designed or used for vending purposes, including, but not limited to, machines or devices that use remote control locking mechanisms.~~

~~(b) (1) Commencing January 1, 1996, cigarette or tobacco product vending machines or appliances may be located at least 15 feet away from the entrance of a premise issued an on-sale public premises license as defined in Section 23039 by the Department of Alcoholic Beverage Control to sell alcoholic beverages.~~

(2) As used in this subdivision "at least 15 feet away from the entrance" means within the premises of the licensed establishment and not outside those premises.

(c) This section and subdivision (b) of Section 22958 set forth minimum state restrictions on the sale of cigarettes or tobacco products from vending machines or devices and do not preempt or otherwise prohibit the adoption of a local standard that further restricts access to and reduces the availability of cigarette or tobacco products from vending machines or devices or that imposes a complete ban on the sale of cigarettes or tobacco products from vending machines or devices. A local standard that further restricts or imposes a complete ban on the sale of cigarettes or tobacco products from vending machines or devices shall control in the event of an inconsistency between this section and a local standard.

2961. (a) No person, firm, corporation, partnership, or other organization shall advertise or cause to be advertised any tobacco products on any outdoor billboard located within 1,000 feet of any public or private elementary school, junior high school, or high school, or public playground.

(b) This section sets forth minimum state restrictions on the advertisement of any tobacco products on outdoor billboards near schools and public playgrounds and does not preempt or otherwise prohibit the adoption of a local standard that imposes a more restrictive or complete ban on billboard advertising or on tobacco-related billboard advertising. A local standard that imposes a more restrictive or complete ban on billboard advertising or on tobacco-related billboard advertising shall control in the event of an inconsistency between this section and a local standard.

(c) This section shall not be construed to prohibit the display of a message or advertisement opposing the use of tobacco products. However, this subdivision shall not be construed to permit an advertisement promoting the use of tobacco products by including a message opposing the use of tobacco products within that advertisement.

62. (a) For purposes of this section, the following terms have the following meanings:

(1) "Self-service display" means the open display of tobacco products or tobacco paraphernalia in a manner that is accessible to the general public without the assistance of the retailer or employee of the retailer.

(2) "Tobacco paraphernalia" means cigarette papers or wrappers, ashtrays, holders of smoking materials of all types, cigarette rolling machines, or other instruments or things designed for the smoking or consumption of tobacco products.

(3) "Tobacco product" means any product containing tobacco leaf, including, but not limited to, cigarettes, cigars, pipe tobacco, snuff, chewing tobacco, dipping tobacco, bidis, or any other preparation of tobacco.

(4) "Tobacco store" means a retail business that meets all of the following requirements:

(A) Primarily sells tobacco products.

~~(B) Generates more than 60 percent of its gross revenues annually from the sale of tobacco products and tobacco paraphernalia.~~

(C) Does not permit any person under 18 years of age to be present or enter the premises at any time, unless accompanied by the person's parent or legal guardian, as defined in Section 6903 of the Family Code.

(D) Does not sell alcoholic beverages or food for consumption on the premises.

(b) Except as permitted in subdivision (b) of Section 22960, it is unlawful for a person engaged in the retail sale of tobacco products to sell, offer for sale, or display for sale any tobacco product or tobacco paraphernalia by self-service display. A person who violates this section is subject to those civil penalties specified in the schedule in subdivision (a) of Section 22958.

(c) Subdivision (b) shall not apply to the display in a tobacco store of cigars, pipe tobacco, snuff, chewing tobacco, or dipping tobacco, provided that in the case of cigars they are generally not sold or offered for sale in a sealed package of the manufacturer or importer containing less than six cigars. In any enforcement action brought pursuant to this division, the retail business that displays any of the items described in this subdivision in a self-service display shall have the burden of proving that it qualifies for the exemption established in this subdivision.

(d) The Attorney General, a city attorney, a county counsel, or a district attorney may bring a civil action to enforce this section.

(e) This section does not preempt or otherwise prohibit the adoption of a local standard that imposes greater restrictions on the access to tobacco products than the restrictions imposed by this section. To the extent that there is an inconsistency between this section and a local standard that imposes greater restrictions on the access to tobacco products, the greater restriction on the access to tobacco products in the local standard shall prevail.

22963. (a) The distribution or sale of tobacco products directly or indirectly to any person under the age of 18 years through the United States Postal Service or through any other public or private postal or package delivery service at locations, including, but not limited to, public mailboxes and mailbox stores, is prohibited.

(b) Any person selling or distributing tobacco products directly to a consumer in the state through the United States Postal Service or by any other public or private postal or package delivery service, including orders placed by mail, telephone, facsimile transmission, or the Internet, shall comply with the following provisions:

(1) (A) Before enrolling a person as a customer or distributing or selling the tobacco product through any of these means, the distributor or seller shall verify that the purchaser is 18 years of age or older. The distributor or seller shall attempt to match the name, address, and date of birth provided by the customer to information contained in records in a database of individuals whose age has been verified to be 18 years or older by reference to an appropriate database of government records kept by the distributor, a direct marketing firm, or any other entity. The distributor or seller shall also verify that the billing address on the check or credit card offered for payment by the purchaser matches the address

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(B) If the distributor or seller is unable to verify that the purchaser is 18 years of age or older pursuant to subparagraph (A), he or she shall require the customer to submit an age-verification kit consisting of an attestation signed by the customer that he or she is 18 years of age or older and a copy of a valid form of government identification. For the purposes of this section, a valid form of government identification includes a driver's license, state identification card, passport, an official naturalization or immigration document, such as an alien registration receipt card (commonly known as a "green card") or an immigrant visa, or military identification. The distributor or seller shall also verify that the billing address on the check or credit card provided by the consumer matches the address listed in the form of government identification.

(2) The distributor or seller shall impose a two-carton minimum on each order of cigarettes, and shall require payment for the purchase of any tobacco product to be made by personal check of the purchaser or the purchaser's credit card. No money order or cash payment shall be received or permitted. The distributor or seller shall submit to each credit card acquiring company with which it has credit card sales identification information in an appropriate form and format so that the words "tobacco product" may be printed in the purchaser's credit card statement when a purchase of a tobacco product is made by credit card payment.

(3) The distributor or seller shall make a telephone call after 5 a.m. to the purchaser confirming the order prior to shipping the tobacco products. The telephone call may be a person-to-person call or a recorded message. The distributor or seller is not required to speak directly with a person and may leave a message on an answering machine or by voice mail.

(4) The distributor or seller shall deliver the tobacco product to the purchaser's verified billing address on the check or credit card used for payment. No delivery described under this section shall be permitted to any post office box.

(c) Notwithstanding subdivisions (a) and (b), if a distributor or seller complies with all of the requirements of this section and a purchaser obtains a tobacco product by any of the means described in subdivision (b), the seller or distributor is not in violation of this section.

(d) For the purposes of the enforcement of this section pursuant to Section 22958, the acts of the United States Postal Service or any other common carrier when engaged in the business of transporting and delivering packages for others, and the acts of a person, whether compensated or not, who transports or delivers a package for another person without any reason to know of the package's contents, are not unlawful and are not subject to civil penalties.

(e) (1) For the purposes of this section, a "distributor" is any person or entity, within or outside the state, who agrees to distribute tobacco products to a customer within the state. The United States Postal Service or any other public or private postal or package delivery service are not distributors within the meaning of this section.

(2) For the purpose of this section, a "seller" is any person or entity, within or outside the state, who agrees to sell tobacco products to a customer within the state. The United States Postal Service or any other public or private postal or package delivery service are not sellers within the meaning of this section.

(3) For the purpose of this section, a "carton" is a package or container that contains 200 cigarettes.

(f) A district attorney, city attorney, or the Attorney General may assess civil penalties against any person, firm, corporation, or other entity that violates this section, according to the following

schedule:

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(1) A civil penalty of not less than one thousand dollars (\$1,000) and not more than two thousand dollars (\$2,000) for the first violation.

(2) A civil penalty of not less than two thousand five hundred dollars (\$2,500) and not more than three thousand five hundred dollars (\$3,500) for the second violation.

~~(3) A civil penalty of not less than four thousand dollars (\$4,000) and not more than five thousand dollars (\$5,000) for the third violation within a five-year period.~~

(4) A civil penalty of not less than five thousand five hundred dollars (\$5,500) and not more than six thousand five hundred dollars (\$6,500) for the fourth violation within a five-year period.

(5) A civil penalty of ten thousand dollars (\$10,000) for a fifth or subsequent violation within a five-year period.

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22970. This division shall be known as and may be cited as the ~~Cigarette and Tobacco Products Licensing Act of 2003.~~

22970.1. The Legislature finds and declares all of the following:

(a) The State of California has enacted excise taxes on the distribution of cigarettes and tobacco products to provide funding for local and state programs, including health services, antismoking campaigns, cancer research, and education programs.

(b) Tax revenues have declined by hundreds of millions of dollars per year due, in part, to unlawful distributions and untaxed sales of cigarettes and tobacco products conducted by organized crime syndicates, street gangs, and international terrorist groups.

(c) The enforcement of California's cigarette and tobacco products tax laws is necessary to collect millions of dollars in lost tax revenues each year.

(d) The licensing of manufacturers, importers, wholesalers, distributors, and retailers will help stem the tide of untaxed distributions and illegal sales of cigarettes and tobacco products.

22970.2. The board shall administer a statewide program to license manufacturers, importers, distributors, wholesalers, and retailers of cigarettes and tobacco products.

22970.3. The board may create a Tobacco Tax Compliance Task Force for the purpose of advising the board on cigarette and tobacco products tax compliance issues that may include, but not be limited to, representatives from the following:

- (a) The board.
- (b) The office of the Attorney General.
- (c) The Franchise Tax Board.
- (d) The Department of Alcoholic Beverage Control.
- (e) The State Department of Health Services.
- (f) Federal agencies necessary to coordinate programs to combat tobacco tax evasion, smuggling, and counterfeiting.
- (g) One person from each of the categories of persons required by this division to have a license.
- (h) Other states engaged in tobacco tax compliance efforts.
- (i) Local law enforcement agencies.

22971. For purposes of this division, the following terms shall have the following meanings:

- (a) "Board" means the State Board of Equalization.
- (b) "Importer" means an importer as defined in Section 30019 of the Revenue and Taxation Code.
- (c) "Distributor" means a distributor as defined in Section 30011 of the Revenue and Taxation Code.
- (d) "Manufacturer" means a manufacturer of cigarettes sold in this state.

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(e) "Retailer" means a person who engages in this state in the sale of cigarettes or tobacco products directly to the public from a retail location. Retailer includes a person who operates vending machines from which cigarettes or tobacco products are sold in this state.

(f) "Retail location" means both of the following:

(1) Any building from which cigarettes or tobacco products are sold at retail.

(2) A vending machine.

(g) "Wholesaler" means a wholesaler as defined in Section 30016 of the Revenue and Taxation Code.

(h) "Cigarette" means a cigarette as defined in Section 30003 of the Revenue and Taxation Code.

(i) "License" means a license issued by the board pursuant to this division.

(j) "Licensee" means any person holding a license issued by the board pursuant to this division.

(k) "Sale" or "sold" means a sale as defined in Section 30006 of the Revenue and Taxation Code.

(l) "Tobacco products" means tobacco products as defined in subdivision (b) of Section 30121 and subdivision (b) of Section 30131.1 of the Revenue and Taxation Code.

(m) "Unstamped package of cigarettes" means a package of cigarettes that does not bear a tax stamp as required under Part 13 (commencing with Section 30001) of Division 2 of the Revenue and Taxation Code, including a package of cigarettes that bears a tax stamp of another state or taxing jurisdiction, a package of cigarettes that bears a counterfeit tax stamp, or a stamped or unstamped package of cigarettes that is marked "Not for sale in the United States."

(n) "Person" means a person as defined in Section 30010 of the Revenue and Taxation Code.

(o) "Package of cigarettes" means a package as defined in Section 30015 of the Revenue and Taxation Code.

(p) (1) "Control" or "controlling" means possession, direct or indirect, of the power:

(A) To vote 25 percent or more of any class of the voting securities issued by a person.

(B) To direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract (other than a commercial contract for goods or nonmanagement services), or otherwise provided; however, no individual shall be deemed to control a person solely on account of being a director, officer, or employee of such person.

(2) For purposes of subparagraph (B) of this subdivision, a person who, directly or indirectly, owns, controls, holds, with the power to vote, or holds proxies representing 10 percent or more of the then outstanding voting securities issued by another person, is presumed to control such other person.

(3) For purposes of this division, the board may determine whether a person in fact controls another person.

(q) "Law enforcement agency" means a sheriff, a police department, or a city, county, or city and county agency or department designated by the governing body of that agency to enforce this chapter or to enforce local smoking and tobacco ordinances and regulations.

(r) "Brand family" has the same meaning as that term is defined in paragraph (2) of subdivision (a) of Section 30165.1 of the Revenue and Taxation Code.

22971.1. Commencing January 1, 2006, the Bureau of State Audits

performance audit of the licensing and enforcement provisions of this division, and shall report its findings to the board and the Legislature by July 1, 2006. The report shall include, but not be limited to:

- 000072
- (a) The actual costs of the program.
 - (b) The level of additional revenue generated by the program compared to the period before its implementation.
 - (c) Tax compliance rates.
 - ~~(d) The costs of enforcement at the varying levels.~~
 - (e) The appropriateness of penalties assessed in this division.
 - (f) The overall effectiveness of enforcement programs.

22971.2. The board shall administer and enforce the provisions of this division and may prescribe, adopt, and enforce rules and regulations relating to the administration and enforcement of this division.

22971.3. Nothing in this division preempts or supersedes any local tobacco control law other than those related to the collection of state taxes. Local licensing laws may provide for the suspension or revocation of the local license for any violation of a state tobacco control law.

22971.4. No person is subject to the requirements of this division if that person is exempt from regulation under the United States Constitution, the laws of the United States, or the California Constitution.

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22972. (a) Commencing June 30, 2004, a retailer shall have in place ~~and maintain a license to engage in the sale of cigarettes or tobacco products.~~ A retailer that owns or controls more than one retail location shall obtain a separate license for each retail location, but may submit a single application for those licenses.

(b) The retailer shall conspicuously display the license at each retail location in a manner visible to the public.

(c) A license is not assignable or transferable. A person who obtains a license as a retailer who ceases to do business as specified in the license, or who never commenced business, or whose license is suspended or revoked, shall immediately surrender the license to the board.

(d) A license shall be valid for a 12-month period, and shall be renewed annually.

22972.1. (a) Notwithstanding Section 22972 or Section 22973, the board may issue to a retailer a temporary license with a scheduled expiration date, as determined by the board, that occurs on or before September 30, 2004.

(b) A temporary license issued pursuant to this section shall be automatically terminated upon the board's issuance of a license pursuant to Section 22973.1.

(c) A temporary license issued pursuant to this section is subject to the same suspension, revocation, and forfeiture provisions that apply to licenses issued by the board pursuant to Section 22973.1.

22973. (a) An application for a license shall be filed on or before April 15, 2004, on a form prescribed by the board and shall include the following:

(1) The name, address, and telephone number of the applicant.

(2) The business name, address, and telephone number of each retail location. For applicants who control more than one retail location, an address for receipt of correspondence or notices from the board, such as a headquarters or corporate office of the retailer, shall also be included on the application and listed on the license. Citations issued to licensees shall be forwarded to all addressees on the license.

(3) A statement by the applicant affirming that the applicant has not been convicted of a felony and has not violated and will not violate or cause or permit to be violated any of the provisions of this division or any rule of the board applicable to the applicant or pertaining to the manufacture, sale, or distribution of cigarettes or tobacco products. If the applicant is unable to affirm this statement, the application shall contain a statement by the applicant of the nature of any violation or the reasons that will prevent the applicant from complying with the requirements with respect to the statement.

(4) If any other licenses or permits have been issued by the board or the Department of Alcoholic Beverage Control to the applicant, the license or permit number of such licenses or permits then in effect.

(5) A statement by the applicant that the contents of the

statement pursuant to this subdivision that asserts the truth of any material matter that he or she knows to be false is guilty of a misdemeanor punishable by imprisonment of up to one year in the county jail, or a fine of not more than one thousand dollars (\$1,000), or both the imprisonment and the fine.

(6) The signature of the applicant.

(7) Any other information the board may require.

~~(b) The board may investigate to determine the truthfulness and completeness of the information provided in the application. The board may issue a license without further investigation to an applicant for a retail location if the applicant holds a valid license from the Department of Alcoholic Beverage Control for that same location.~~

(c) The board shall provide electronic means for applicants to download and submit applications.

(d) (1) A one-time license fee of one hundred dollars (\$100) shall be submitted with each application. An applicant that owns or controls more than one retail location shall obtain a separate license for each retail location, but may submit a single application for those licenses with a one-time license fee of one hundred dollars (\$100) per location.

(2) The one-time fee required by this subdivision does not apply to an application for renewal of a license for a retail location for which the one-time license fee has already been paid.

2973.1. (a) The board shall issue a license to a retailer upon receipt of a completed application and payment of the fees prescribed in Section 22973, unless any of the following apply:

(1) The retailer, or if the retailer is not an individual, any person controlling the retailer, has previously been issued a license that is suspended or revoked by the board for violation of any of the provisions of this division.

(2) The application is for a license or renewal of a license for a retail location that is the same retail location as that of a retailer whose license was revoked or is subject to revocation proceedings for violation of any of the provisions of this division, unless:

(A) It has been more than five years since a previous license for the retail location was revoked.

(B) The person applying for the license provides the board with documentation demonstrating that the applicant has acquired or is acquiring the premises or business in an arm's length transaction. For purposes of this section, an "arm's length transaction" is defined as a sale in good faith and for valuable consideration that reflects the fair market value in the open market between two informed and willing parties, neither under any compulsion to participate in the transaction. A sale between relatives, related companies or partners, or a sale for the primary purpose of avoiding the effect of the violations of this division that occurred at the retail location, is presumed not to be made at "arm's length."

(3) The retailer, or if the retailer is not an individual, any person controlling the retailer, has been convicted of a felony pursuant to Section 30473 or 30480 of the Revenue and Taxation Code.

(4) The retailer does not possess all required permits or licenses required under the Revenue and Taxation Code.

(b) (1) Any retailer who is denied a license may petition for a determination of the board's denial of the license within 30 days after service upon that retailer of the notice of the denial of the license. If a petition for redetermination is not filed within the

30-day period, the determination or denial becomes final at the expiration of the 30-day period.

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(2) Every petition for redetermination shall be in writing and shall state the specific grounds upon which the petition is founded. The petition may be amended to state additional grounds at anytime prior to the date on which the board issues its order or decision upon the petition for redetermination.

(3) If the petition for redetermination is filed within the 30-day period, the board shall reconsider the determination of the denial and, if the retailer has so requested in the petition, shall grant the retailer an oral hearing and shall give the retailer at least 10 days' notice of the time and place of the hearing. The board may continue the hearing from time to time as may be necessary.

(4) The order or decision of the board upon a petition for redetermination becomes final 30 days after mailing of notice hereof.

(5) Any notice required by this subdivision shall be served personally or by mail. If by mail, the notice shall be placed in a sealed envelope, with postage paid, addressed to the retailer at the address as it appears in the records of the board. The giving of notice shall be deemed complete at the time of deposit of the notice in the United States Post Office, or a mailbox, subpost office, substation or mail chute or other facility regularly maintained or provided by the United States Postal Service, without extension of time for any reason. In lieu of mailing, a notice may be served personally by delivering to the person to be served and service shall be deemed complete at the time of such delivery. Personal service to a corporation may be made by delivery of a notice to any person designated in the Code of Civil Procedure to be served for the corporation with summons and complaint in a civil action.

22973.2: The board shall, upon request, provide to the State Department of Health Services, the office of the Attorney General, a law enforcement agency, and any agency authorized to enforce local tobacco control ordinances, access to the board's database of licenses issued to retailers within the jurisdiction of that agency or law enforcement agency. The agencies authorized by this section to access the board's database shall only access and use the board's database for purposes of enforcing tobacco control laws and shall adhere to all state laws, policies, and regulations pertaining to the protection of personal information and individual privacy.

22974. A retailer shall retain purchase invoices that meet the requirements set forth in Section 22978.4 for all cigarettes or tobacco products the retailer purchased for a period of four years. The records shall be kept at the retail location for at least one year after the purchase. Invoices shall be made available upon request during normal business hours for review inspection and copying by the board or by a law enforcement agency. Any retailer found in violation of these requirements or any person who fails, refuses, or neglects to retain or make available invoices for inspection and copying in accordance with this section shall be subject to penalties pursuant to Section 22981.

22974.3. (a) Notwithstanding any other provision of this division, upon discovery by the board or a law enforcement agency that a

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retail sale of an unstamped package of cigarettes, the board or the law enforcement agency shall be authorized to seize unstamped packages of cigarettes at the retail, or any other person's location.

Any cigarettes seized by a law enforcement agency shall be delivered to the board, or its designee, within seven days, unless the cigarettes will be destroyed by that law enforcement agency, or unless the cigarettes are otherwise required to be used as evidence in an administrative, criminal, or civil proceeding, or as part of an ongoing law enforcement operation.

Any cigarettes seized by the board or delivered to the board by a law enforcement agency shall be deemed forfeited and the board shall comply with procedures set forth in Part 13 (commencing with Section 30436) of Division 2 of Chapter 7.5 of the Revenue and Taxation Code. In addition to the inventory of unstamped packages of cigarettes of a retailer or of any other person that is subject to forfeiture and seizure, the possession, storage, ownership, or retail sales of unstamped packages of cigarettes by a retailer or other person, as applicable, shall constitute a misdemeanor punishable by the following actions:

(1) A first violation involving seizure of a total quantity of less than 20 packages of unstamped cigarettes shall be a misdemeanor punishable by a fine of one thousand dollars (\$1,000) or imprisonment not to exceed one year in a county jail, or both the fine and imprisonment.

(2) A second violation within five years involving a seizure of a total quantity of less than 20 packages of unstamped cigarettes shall be a misdemeanor punishable by a fine of not less than two thousand dollars (\$2,000) but not to exceed five thousand dollars (\$5,000) or imprisonment not to exceed one year in a county jail, or both the fine and imprisonment, and shall also result in the revocation of the license.

(3) A first violation involving seizure of a total quantity of 20 packages of unstamped cigarettes or more shall be a misdemeanor punishable by a fine of two thousand dollars (\$2,000) or imprisonment not to exceed one year in a county jail, or both the fine and imprisonment.

(4) A second violation within five years involving seizure of a quantity of 20 packages of unstamped cigarettes or more shall be a misdemeanor punishable by a fine of not less than five thousand dollars (\$5,000) but not to exceed fifty thousand dollars (\$50,000) or imprisonment not to exceed one year in a county jail, or both the fine and imprisonment, and shall also result in the revocation of the license.

(b) Upon discovery by the board or a law enforcement agency that a retailer or any other person possesses, stores, owns, or has made a retail sale of tobacco products on which tax is due but has not been paid to the board, the board or law enforcement agency is authorized to seize such tobacco products at the retail, or any other person's location. Any tobacco products seized by a law enforcement agency shall be delivered to the board, or its designee, within seven days, unless otherwise required to be used as evidence in an administrative, criminal, or civil proceeding, or as part of an ongoing law enforcement operation. Any tobacco products seized by the board or delivered to the board by a law enforcement agency shall be deemed forfeited and the board shall comply with procedures set forth in Part 13 (commencing with Section 30436) of Division 2 of Chapter 7.5 of the Revenue and Taxation Code. It shall be presumed that tax has not been paid to the board on all tobacco products in the possession of a retailer or of any other person until the contrary is established by a proof of payment to the board or by a purchase invoice that shows that the retailer or other person, as applicable, paid the tax included purchase price to a licensed distributor, wholesaler, manufacturer, or importer as described in

Section 22978.4. The burden of proof that tax has been paid on tobacco products shall be upon the retailer or the other person, as applicable, in possession thereof. Possession of untaxed tobacco products on which tax is due but has not been paid as required is a violation of this division and subjects the retailer or other person, as applicable, to the actions described in Section 22981.

22974.4. The board shall revoke the license, pursuant to the provisions applicable to the revocation of a license as set forth in Section 30148 of the Revenue and Taxation Code, of any retailer or any person controlling the retailer that has:

(a) Been convicted of a felony pursuant to Section 30473 or 30480 of the Revenue and Taxation Code.

(b) Had any permit or license revoked under any provision of the Revenue and Taxation Code.

22974.5. Any retailer who fails to display a license as required in Section 22972 shall, in addition to any other applicable penalty, be liable for a penalty of five hundred dollars (\$500).

22974.7. In addition to any other civil or criminal penalty provided by law, upon a finding that a retailer has violated any provision of this division, the board may take the following actions:

(a) In the case of the first offense, the board may revoke or suspend the license or licenses of the retailer pursuant to the procedures applicable to the revocation of a license set forth in Section 30148 of the Revenue and Taxation Code.

(b) In the case of a second or any subsequent offense, in addition to the action authorized under subdivision (a), the board may impose a civil penalty in an amount not to exceed the greater of either of the following:

(1) Five times the retail value of the seized cigarettes or tobacco products.

(2) Five thousand dollars (\$5,000).

22974.8. (a) (1) The board shall take action against a retailer, convicted of a violation of either the Stake Act (Division 8.5 (commencing with Section 22950) or Section 308 of the Penal Code, according to the schedule set forth in subdivision (b).

(2) Convictions of violations by a retailer at one retail location may not be accumulated against other locations of that same retailer.

(3) Convictions of violations accumulated against a prior retail owner at a licensed location may not be accumulated against a new retail owner at the same retail location.

(4) Prior to suspending or revoking a retailer's license to sell cigarette and tobacco products, the board shall notify the retailer. The notice shall include instructions for appealing the license suspension or revocation.

(b) (1) Upon the first conviction of a violation of either the STAKE Act (Division 8.5 (commencing with Section 22950) or Section 308 of the Penal Code, the retailer shall receive a warning letter from the board that delineates the circumstances under which a retailer's license may be suspended or revoked and the amount of time

the license may be suspended or revoked. The retailer and its employees shall receive training on tobacco control laws from the Department of Health Services upon a first conviction.

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(2) Upon the second conviction of a violation of either the STAKE Act (Division 8.5 (commencing with Section 22950)) or Section 308 of the Penal Code within 12 months, the retailer shall be subject to a fine of five hundred dollars (\$500).

~~(3) Upon the third conviction of a violation of either the STAKE Act (Division 8.5 (commencing with Section 22950)) or Section 308 of the Penal Code within 12 months, the retailer shall be subject to a fine of one thousand dollars (\$1,000).~~

(4) Upon the fourth to the seventh conviction of a violation of either the STAKE Act (Division 8.5 (commencing with Section 22950)) or Section 308 of the Penal Code within 12 months, the board shall suspend the retailer's license to sell cigarette and tobacco products for 90 days.

(5) Upon the eighth conviction of a violation of the STAKE Act (Division 8.5 (commencing with Section 22950)) or Section 308 of the Penal Code within 24 months, the board shall revoke the retailer's license to sell cigarette and tobacco products.

(c) The decision of the board to suspend or revoke the retailer's license may be appealed to the board within 30 days after the notice of suspension or revocation. All appeals shall be submitted in writing.

(d) The board's authority to take action against retailers, as set forth in this section, commences on the date of the release of the results from the survey undertaken by the Department of Health Services pursuant to Section 22952 of the Business and Professions Code Section 22952 to comply with Section 1926 of Title XIX of the Federal Public Health Service Act (42 U.S.C. 300x-26), and any implementing regulations adopted in relation thereto by the United States Department of Health and Human Services, showing that the youth purchase survey finds that 13 percent or more of youth were able to purchase cigarettes. The board's authority to take action under this section is inoperative on or after the date of the subsequent release of the results from the survey showing that less than 13 percent of youth were able to purchase cigarettes.

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ATTACHMENT 2

California Department of Health Services, Tobacco Control Section

~~2004 California Youth Tobacco Purchase Survey~~

Executive Summary

Background

The California Department of Health Services, Tobacco Control Section (CDHS/TCS) conducts an annual Youth Tobacco Purchase Survey (YTPS) to determine California's illegal tobacco sales rate to youth, as required by the federal Synar Amendment¹ and the Stop Tobacco Access to Kids Enforcement (STAKE) Act.² CDHS/TCS reports this data every year to the federal Substance Abuse and Mental Health Services Administration (SAMHSA) via the Department of Alcohol and Drug Programs.

The Synar Amendment requires all states to: 1) enact and vigorously enforce laws prohibiting tobacco sales to minors; 2) conduct annual scientific random inspections to assess the illegal sales rate; and 3) report progress to SAMHSA. States that fail to maintain an illegal sales rate no higher than 20 percent risk a penalty withholding of up to 40 percent of block grant funds for alcohol and substance abuse prevention and treatment programs. For California, this is equivalent to more than \$100 million for local community programs.

The 2004 YTPS was conducted in March through June by the Behavioral Health Institute of the San Diego State University Foundation, a contractor of CDHS/TCS. Youth participants (45.2% of which were 15 year-olds, 54.8% were 16 year olds) were trained and ethnically matched to sampled neighborhoods, and a consummated "actual buy" protocol was used. One purchase was made per store, and seven hundred and twenty-five (725) stores were surveyed.

Survey Findings

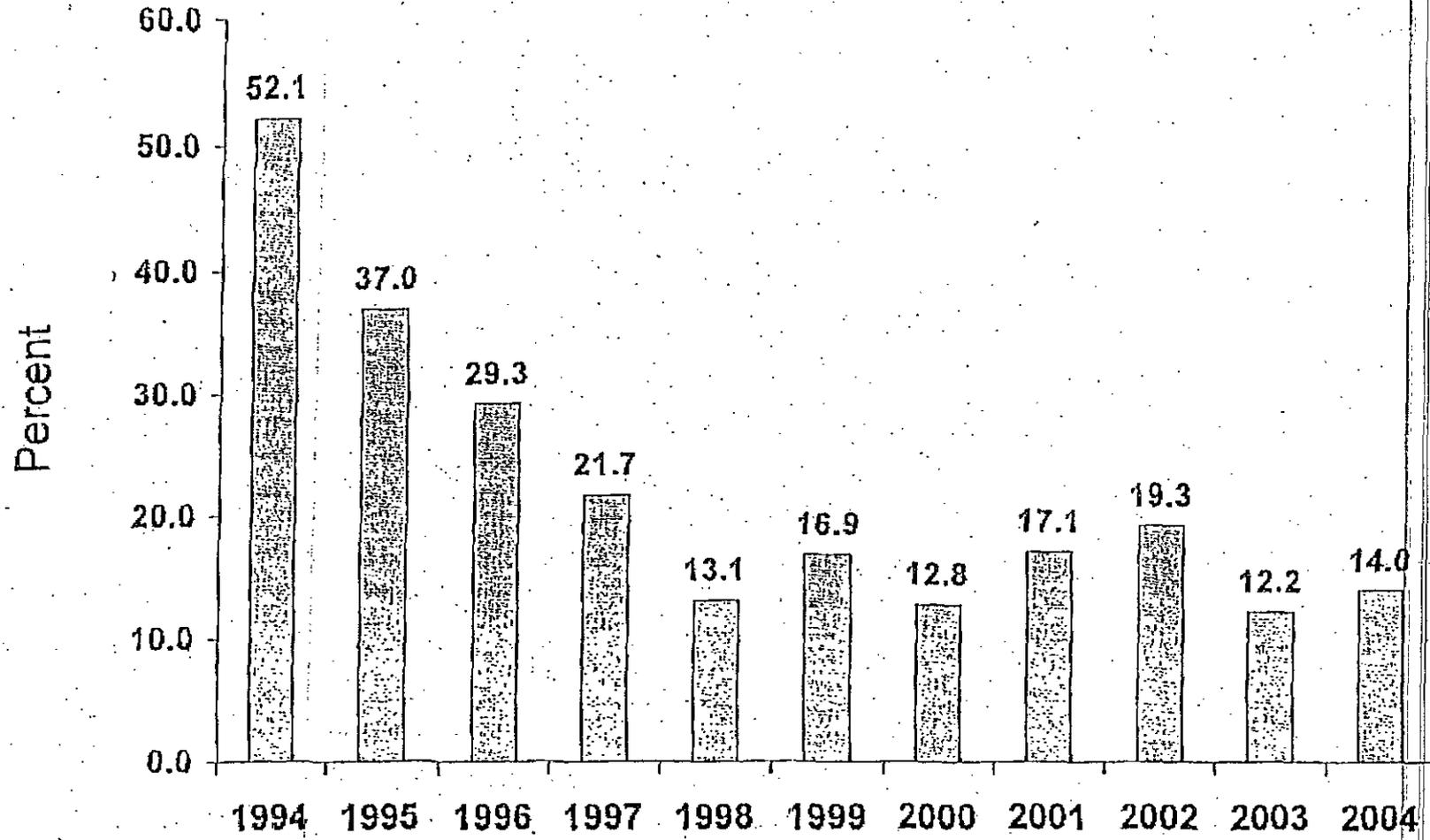
- The illegal tobacco sales rate to youth increased from 12.2 percent in 2003 to 14.0 percent in 2004 (non-statistically significant increase).
- Deli, meat and produce markets had the highest illegal sales rate at 31.5 percent in 2004; followed by "other" types of stores, such as discount "dollar stores", gift stores, and doughnut shops, at 23.7 percent. Drugstores and pharmacies sold the next highest at 18.1 percent.
- Small grocery and convenience stores sold at the lowest rate of 7.3 percent.
- The presence of STAKE Act mandated age-of-sale warning signs increased marginally from 50.4% in 2003 to 50.7% in 2004.

¹ Federal 1992 Synar Amendment (Section 1926, Federal Public Health Act 1992).

² Business and Professions Code Section 22950-22963 prohibits the selling or giving of tobacco products to minors, and requires retailers to check the ID of youthful-appearing tobacco purchasers and post age-of-sale warning signs, with specified language, at all points of purchase. Also see Penal Code 308(a).



Percent of retailers selling tobacco to youth, 1994-2004

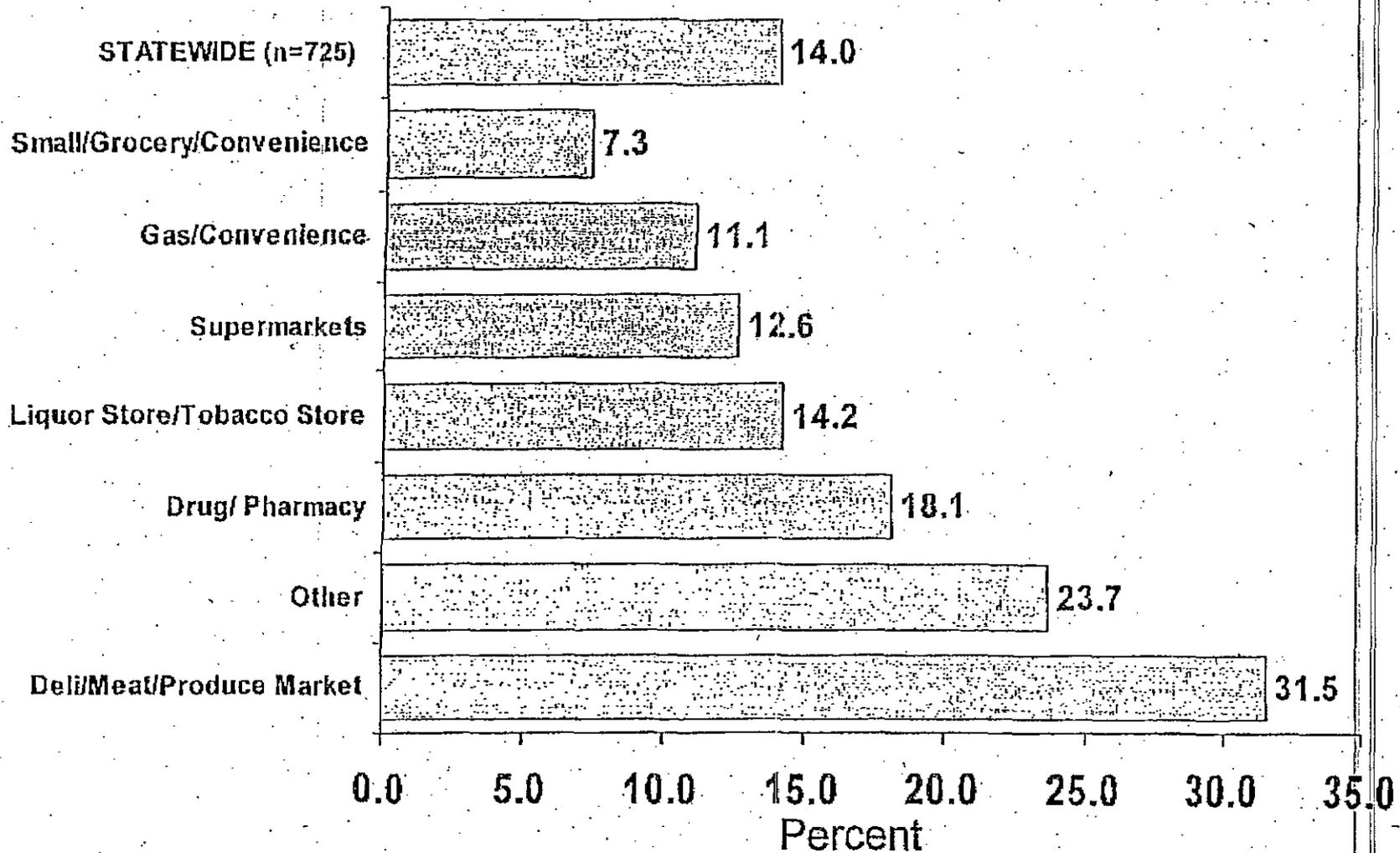


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Attempted buy protocol 1994-1996; Actual buy protocol 1997-2004.
Due to different methodologies 1994 survey results may not be comparable to the 1995-2004 results.
Source: California Youth Purchase Survey, 1994-2004.
Prepared by: California Department of Health Services, Tobacco Control Section, July 2004.



Percent of retailers selling tobacco to youth by store type, 2004



Source: Youth Purchase Survey, 2004.

Prepared by: California Department of Health Services, Tobacco Control Section, July 2004.

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Facsimile



California Department of Health Services
Tobacco Control Section
1616 Capitol Avenue, Suite 74.516
P.O. Box 997413, MS 7206
Sacramento, CA 95899-7413
Fax: (916) 449-5505 / (916) 449-5517



*** Please Deliver Fax to Addressee Immediately ***

To: Sharon Wood From: April Roeseler

Company: San Diego City Attny Phone: 916-449-5324

Fax: 619-533-5856 Pages: (w/cover) 4

Phone: _____ Date: 3-17-04

Comments: Statewide Youth Tobacco Purchase
Survey Data

If you have any questions with this transmission, please call _____ at (916) 449-5500.

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ATTACHMENT 3



[CDHS Home](#)

Food and Drug Branch

My CA This Site

[Printer Friendly Version](#)

Stop Tobacco Access to Kids Enforcement

[Drug Safety Program](#)

June 24, 2004

[Export Document Program](#)

STAKE STATS

[Organic Processed Products Program](#)

* Compliance checks began December 27, 1995.

[Food Safety Program](#)

* To date there have been 17,356 compliance checks conducted statewide (all 58 counties).

[Medical Device Safety Program](#)

* Of the 17,356 visits, 5,107 have resulted in illegal sales of tobacco to minors resulting in a 29% illegal sales rate. The sales rate for FY 02/03 was 34%.**

[S.T.A.K.E. Program](#)

* To date 4,669 cases have been closed during the penalty assessment phase (fines paid).

[Sherman Food, Drug, and Cosmetic Law \(pdf\)](#)

* The amount of fines collected to date is \$1,389,925.00.

[Application Instructions and Forms](#)

* To date 561 cases have been referred to Legal for further action, of which 52 are still pending administrative hearings. (358 paid fine after receiving notice from Legal, 99 cases have resulted in Default judgments, 3 cases closed via settlement agreements, & 47 cases have been closed for various reasons upon recommendation of counsel).

[Consumer Complaints](#)

* To date we have had 72 administrative hearings. All final decisions have been in favor of DHS, with the exception of three, and the penalty assessments have been paid or are pending.

[Comments and Questions](#)

* Our 800# Public Complaint Line has been operational since late September 1995 and has generated over 32,500 calls to date.



The Adobe Reader is required to view several documents contained on his website

** These figures are the result of STAKE compliance checks conducted by the Food & Drug Branch STAKE Program. The sales rate is not to be confused with the official statewide sales rate to minors, which is determined by the results of Youth Purchase Surveys conducted by the state Tobacco Control Section.

* Tobacco Billboard Enforcement: Over 220 California cities and towns have been visited to ascertain if violative tobacco billboards existed (signs within 1,000 feet of schools and playgrounds). 18 violation notices have been served, all have paid their penalty assessment and the signs removed.



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ATTACHMENT 4

County of San Diego Tobacco Sales to Minors Study

March 2004

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I. Description of Data Collection

A. Training of Data Collectors

On December 11, 2003, 17 representatives from 11 community health agencies attended a three-hour Youth Purchase Survey Train the Trainer session to learn about the survey methodology and how to train youth and adult volunteers to conduct the survey in their own communities. Two trainers with extensive experience in the implementing purchase surveys conducted the training. All attendees received a complete packet training materials including information on:

- Youth Purchase Survey Purpose and Timeline
- Roles and Responsibilities
- Youth Purchase Survey Methodology
- Media Strategy
- Anatomy of a Youth Purchase Survey
- Recruiting Youth and Adult Volunteers

B. Selection of Stores

The County of San Diego Department of Environmental Health Services provided an Excel spreadsheet listing 2,478 retail markets likely to sell tobacco products. Areas with <5 stores per area (*Bonita, Bonsall, Boulevard, Campo, Descanso, Guatay, Jacumba, Leucadia, Mt. Laguna, Pauma Valley, Pine Valley, Potrero, Rainbow, Ranchita, Rancho Santa Fe, San Ysidro, Santa Ysabel, Tecate, Warner Springs*) and stores in geographically outlying areas (*Borrego Springs, Fallbrook, Jamul, Julian*) were eliminated from the study sample. This left a subsample of 2,209 stores. To obtain city- and region-wide illegal sales estimates, 1,065 stores were targeted for surveying and store lists were provided to the community agencies participating in the assessment.

C. Data Collection

Ten (10) community agencies participated in the survey, all were members of the San Diego County Tobacco Control Coalition and the Tobacco-Free Communities Coalition and included the American Lung Association, Communities Against Substance Abuse, Coronado SAFE, Palavra Tree, Institute for Public Strategies, Labor's Community Service Agency, North Inland Community Prevention Program, San Dieguito Alliance for Drug-Free Youth, Union of Pan Asian Communities and Vista Community Clinic. Prior to the survey, local law enforcement was notified and a letter granting minors immunity from prosecution was obtained from the San Diego District Attorney's office.

Using a modification of a purchase survey used throughout the state by researchers for a number of years, 62 minors and 31 adult volunteers attempted to buy tobacco products at 1,044 stores throughout San Diego County between January – March 2004. Almost all (97%) of surveys were completed during January and February. About 2 in 3 (62%) of stores were surveyed after school during the hours of 4:00 – 5:00 p.m. by 17 year olds (60% of attempts) and 16 year olds (40% of attempts). Girls completed about twice the number of surveys than did boys (61.5% and 38.5%, respectively). Youth participating in the youth purchase survey received cash or incentives (e.g., music store gift certificates) equivalent to about \$10 per hour of work for their time and effort.

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D. Purchase Attempt Protocol

The same protocol was used in all purchase attempts to enhance data reliability. However, participating agencies were allowed to tailor the protocol to their community. For example, youth participating in the surveys conducted in southeast San Diego tried to purchase blunts, swishers and small cigars, as these products are very popular in that part of the city.

After adult volunteers drove youth to stores, minors entered the store and asked store clerks for tobacco products (usually a pack of name brand cigarettes). If the clerk asked for identification and the youth had one, it was presented to the clerk. If the youth did not have an ID, he or she stated so and then claimed that he or she was "old enough." This protocol was employed to most accurately reflect how teens actually obtain tobacco from stores. State law prohibits retailers from selling tobacco to minors but a recent statewide survey found that 62% of kids in California who use tobacco think that it is easy to obtain it.

E. Completed Surveys

Of the 1,065 purchase attempts, completed surveys were returned from 885 (83.1%) retail stores. The sample included both chain/franchise (n=470) and independent (n=415) stores from 16 of the county's 18 cities (Escondido and San Marcos were not included due to resource limitations), as well as three communities in the unincorporated areas. The most common reason to not complete a survey was that the store did not sell tobacco products (just under 10% of original store list) (see Table 1).

Table 1. Number of stores not surveyed by reason

Reason Not Surveyed	N	%
Store does not sell tobacco	97	53.9
Can't find store	33	18.3
Store closed	31	17.2
Unsafe environment	3	1.7
Blank/incomplete	16	8.9
Total	180	100.0

II. Description of Survey Results

Illegal Sales Outcome

Minors were able to purchase tobacco products in 299 out of 885 stores, yielding an illegal sales rate of 33.8%.

Factors Related to Illegal Sales

Minors' ability to buy cigarettes illegally varied significantly between communities, regions and store types. Illegal sales rates were significantly different by community ($X^2=58.3$, $df(18)$, $p=.000$), ranging from 0% in Coronado, Del Mar and Solana Beach to 54% in La Mesa (see Table 2). Rates varied significantly by region ($X^2=32.8$, $df(1)$, $p=.000$) from 17.9% in a small North County Inland sample to 44.5% in the City of San Diego (see Table 3). Illegal sales by store type also ranged widely ($X^2=36.4$, $df(10)$, $p=.000$) with higher sales rates in deli/meat/produce markets, gas stations and discount stores and lower rates in drug store/ pharmacies and tobacco shops (see Table 4). Statistical analyses revealed that although both region and store type were related to illegal sales, region of the county was the *strongest* predictor of minor's ability to buy tobacco products.

Table 2. Sales Rate by Community

Community	N. of Stores Surveyed	% Sold
La Mesa	46	54.3
Alpine	6	50.0
San Diego	265	44.5
El Cajon	105	41.0
National City	48	35.4
Imperial Beach	15	33.3
Carlsbad	33	30.3
Encinitas	44	29.5
Vista	61	27.9
Santee	16	25.0
Lakeside	13	23.1
Spring Valley	23	21.7
Chula Vista	82	19.5
Oceanside	70	18.6
Solana Beach	5	17.9
Lemon Grove	13	15.4
Coronado	7	00.0
Del Mar	5	00.0
Poway	28	00.0
TOTAL	885	33.8%

Table 3. Sales Rates by Region

Region	N. of Stores	% Sold
City of San Diego	265	44.5
East County	222	38.3
South Bay	152	25.0
North Coastal	218	24.3
North Inland*	28	17.9
TOTAL	885	33.8%

* not all cities surveyed

Table 4. Sales Rate by Store Type

Store Type	N. of Stores Surveyed	% Sold
Deli/Meat/Produce	20	70.0
Other	3	66.7
Gas Station Only	42	47.6
Discount	24	45.5
Convenience (w/gas)	205	38.0
Independent market	130	36.4
Convenience (w/o gas)	99	31.3
Liquor	203	29.1
Supermarket	100	29.0
Drug/Pharmacy	53	13.2
Tobacco Shop	6	0.0
TOTAL	885	33.8%

Factors Unrelated to Illegal Sales

In this study, two factors were *not* related to minors' ability to buy tobacco products, namely store status (chain vs. independent) and minors age. ~~Chain/franchise stores had an illegal sales rate of 32.1% compared to 35.7% at independents; this difference was not statistically significant.~~ (Appendix A lists chains by name and sales rates.) The illegal sales rate procured by 17 year olds was 33.1% compared to a rate of 34.8% by 16 year olds; this difference was not statistically significant.

The Impact of Clerk Behavior on Sales (Asking for ID. Asking Minor's Age)

Salesclerks asked for minors' identification 74.1% of the time. Asking for ID was significantly related to sales outcome ($\chi^2=416.9$, $df(21)$, $p=.000$). When salesclerks asked for IDs, the sales rate was the lowest at 14.2%. Being asked for ID and lying about one's age improved "success" only slightly, yielding a 15.9% illegal sales rate. In contrast, 88.1% of clerks that *failed* to ask for ID sold tobacco to minors. In instances when salesclerks failed to ask minors age *or* for an ID (17% of purchase attempts), the sales rate was an astonishing 94%.

Overall, salesclerks asked minors about their age during 25.3% of purchase attempts. Surprisingly, retailers that asked the minor's age proceeded to sell tobacco to the youth 39.7% of the time. If asked for their age *and* minors lied and claimed that they were 18 years old, then illegal sales jumped to 44.0%. (Appendices B & C contain comments from clerks during sales transactions.)

Impact of Minor's Behavior on Sales (Lying about Age. Showing Real ID)

During this study, lying about one's age or furnishing one's own ID did not significantly impact minors' ability to purchase cigarettes illegally. During 34.8% of sales transactions, minors claimed to be 18 years old yielding a 31.4% sales rate. In 21.1% of transactions, minors furnished their own (underage) IDs yielding a sales rate of 29.0%.

III. Discussion

Despite 15 years of effort by tobacco control advocates to address the problem of tobacco sales to minors, a survey of 885 stores throughout San Diego County revealed that one in three sales clerks (about 34%) were still willing to do so. Over the years, advocates at both the state and local level have educated merchants on tobacco sales laws via mailed educational materials and to a lesser extent, personal visits. Advocates have also called for increased enforcement of the state law that prohibits sales to persons under the age of 18. A lack of time and resources among law enforcement agencies has yielded little activity in this arena.

Finally, advocates feel the only recourse is to educate elected officials on the benefits of a retailer licensing program. Such programs include licensing fees to cover the cost of regular enforcement and include provisions for suspension of licenses for those retailers caught selling tobacco products to minors. Armed with the alarming results of this youth purchase survey, advocates will be hitting the streets with renewed energy to fight for effective local policies to keep cigarettes out of the hands of children.

Why are sales rates still so high? There are many reasons including profit, negligence and apathy. Advocates and youth that conducted the survey debriefed afterwards to discuss the results. Here is an example of a one community's perspective:

The Union of Pan Asian Communities (UPAC) surveyed 124 stores in a variety of cities as far north as Oceanside, in the San Diego communities of Linda Vista and City Heights and the South Bay cities of National City and Chula Vista. Results from these stores yielded an overall sales rate of ~~32%, almost identical to the countywide rate.~~ UPAC staff attributed the illegal sales rate to: 1) a lack of English proficiency among clerks, 2) the appearance of youth volunteers, and 3) older aged salesclerks.

In the majority of the stores surveyed, youth were not asked to show an ID. However, when they were asked, it was usually with standard phrases such as, "Are you 18?" It appeared that the clerks were in a hurry to get the youth out of the store as quickly as possible, to avoid getting caught in the act of a sale. Many of the Asian American and Pacific Islander (AA/PI) store clerks were not proficient in English, so when salesclerks asked youth for identification and the youth looked confused, the clerks weren't sure what to do. Plus, they appeared to feel more compelled to sell when other customers were waiting.

In the stores not outside of the AA/PI community, the youth appearance may have contributed to the sales rate. One of the volunteer youth of Samoan ethnicity, who is 17, looks older than his actual age. Not knowing that many Pacific Islander teens are taller and larger in size, thus appearing to be older than they are, may have caused clerks to sell without requesting ID. Also contributing to the youths "success" was that the youth matched the ethnicity, appearance, and mannerisms of youth in the neighborhoods the stores were located. Staff believed that this minimized any suspicions clerks had that youth were actually conducting compliance checks.

Another factor impacting the rate of sales occurred in the low-socioeconomic status neighborhoods where stores had older clerks. Given that these neighborhoods have higher crime rates and youth crime in particular, older clerks might have been willing to sell to minors to avoid confrontation.

Regardless of the reasons that the sales occurred, a licensing program would be a strong reminder to retailer of the need to stop underage sales in order to retain the privilege of selling tobacco products. Given the high profit margin of cigarettes, loss of a license may be the only incentive necessary for salesclerks to ask for and check ID of any tobacco buyer appearing to be under that age of 25.

Appendix A

Illegal Sales Rate by Selected* Store Chains

Chain/Franchise	N of Stores Surveyed	% Sold
Food 4 Less	5	60.0
Shell	29	44.8
99 Cent Stores	7	42.9
7-11	113	40.7
Arco	20	40.0
Chevron	25	40.0
G&M	5	40.0
Mobil	22	36.4
Albertson's	24	33.3
AM/PM	30	33.3
Exxon	12	33.3
Vons	33	27.3
Ralph's	15	26.7
76	8	25.0
Circle K	12	25.0
Rite Aid	20	20.0
Thrifty	9	11.1
Sav-On Drugs	19	5.3
Long's Drugs	13	0.00
Stater Bros.	5	0.00
Wal-Mart	7	0.00

* (≥ 5 stores surveyed)

Appendix B

Frequent Comments Noted by Youth from Sales Clerks That Did Not Sell

Come back in...3 more days... two months...four months

I can't sell to you without an ID

We believe you, but you still need ID

An employee handed me the cigarettes and sent me to the cashier who asked for ID

Apologized the he couldn't sell to me

Called manager to ask if military ID was OK.

Clerk said, "Get out of here."

Clerk checked birthdate and then said no

Clerk said, "Don't do that again."

Clerk was ready to give pack but said, "Sorry, camera's watching me."

Clerk said, "Smoking is not good for you."

Store had been busted 3 times this month.

He said "Show me your ID once and then I'll sell them to you."

He said I was 17 and it was not worth the \$2000 fine.

He scanned my ID and said "you're 16, go home".

I almost got sale, but manager walked up and reminded cashier to card me

I said it was for my dad, he said to go and get him

Clerk refused to sell and attempted to keep ID

Merchant kept ID and threatened to call Police.

She laughed!!!

The manager told me not to come back to the store

Frequent Comments Noted by Youth from Sales Clerks That Sold

The only question was "Are you old enough?" I said yes.

Asked if I was 18, I said yes, and then he sold to me

Ask for ID, said I didn't have it, then sold it to me.

I showed ID, he laughed and took money.

Clerk warned me to bring ID next time.

Clerk said no but then he slid them to me.

Cashier skipped register entry asking for ID entry.

Asked if I wanted matches.

Offered to get another pack—buy one get one free sale.

I didn't have enough money so the clerk asked if I wanted a cheaper pack.

Cashier charged \$5 and didn't ring it in the cash register.

Cashier said to Hurry Up!

Thank you, come again.

000101

Survey #	Agency	Store Name	Type of Store	Address	Name of Street	Month	Day	Year	Time	AM PM	Did Store Sell?	Did Clerk Ask Age?	Did Clerk Ask for ID?	Ask If Tobacco Was for You?	Did Decoy Lie About Age?	Did Decoy Show ID?	San Diego City Council District
332	ALA	7-Eleven	Convenience (w/o gas)	12890	Rancho Penasquitos Blvd/	Feb.	27	2004	11	a.m.	No	No	Yes	No	No	No	1
335	ALA	7-Eleven	Convenience (w/o gas)	14391	Penasquitos Drive	Feb.	27	2004	11	a.m.	No	No	Yes	No	Yes	No	1
334	ALA	Albertson's	Supermarket	14340	Penasquitos Drive	Feb.	27	2004	11	a.m.	No	No	Yes	No	No	No	1
965	SD Alliance	Arco	Gas Station Only	3170	Carmel Valley Road	Jan.	8	2004	5	p.m.	No	No	Yes	No	No	Yes	1
340	ALA	Circle K	Convenience (w/gas)	17011	Bernardo Drive	Feb.	27	2004	12	p.m.	No	No	Yes	No	No	No	1
778	ALA	Courtesy Liquor	Independent Market	3963	Governor Drive	Feb.	24	2004	4	p.m.	No	No	Yes	No	Yes	No	1
969	SD Alliance	Del Mar Wine	Liquor	2654	Del Mar Heights Road	Jan.	8	2004	4	p.m.	No	No	Yes	Yes	No	Yes	1
967	SD Alliance	Liquor Store Deli	Liquor	12750	Carmel Country Road	Jan.	8	2004	4	p.m.	No	No	Yes	No	No	Yes	1
973	SD Alliance	Longs Drugs	Drug/Pharmacy	2662	Del Mar Heights Road	Jan.	8	2004	4	p.m.	No	No	Yes	No	No	Yes	1
312	ALA	Longs Drugs #310	Drug/Pharmacy	7525	Eads Avenue	Feb.	26	2004	4	p.m.	No	No	Yes	No	Yes	No	1
317	ALA	Mobil	Convenience (w/gas)	2204	Torrey Pines Road	Feb.	26	2004	3	p.m.	No	No	Yes	No	#NULLI	No	1
316	ALA	Neighbor Savor Market	Liquor	2144	Ave De La Playa	Feb.	26	2004	3	p.m.	No	#NULLI	No	Missing Data	#NULLI	No	1
968	SD Alliance	Ralph's	Supermarket	3455	Del Mar Heights Road	Jan.	8	2004	4	p.m.	No	No	Yes	No	No	Yes	1
900	SD Alliance	Rite Aid #5666	Drug/Pharmacy	3515	Del Mar Heights Road	Jan.	8	2004	4	p.m.	No	No	Yes	No	No	Yes	1
947	SD Alliance	Shell	Convenience (w/gas)	2205	Via De La Valle	Jan.	8	2004	5	p.m.	No	No	Yes	No	Yes	No	1
966	SD Alliance	Shell	Gas Station Only	3060	Carmel Valley Road	Jan.	8	2004	5	p.m.	No	No	Yes	No	No	Yes	1
313	ALA	The Liquor Box	Liquor	6980	La Jolla Blvd	Feb.	26	2004	4	p.m.	No	Yes	Yes	No	Yes	No	1
777	ALA	University C	Liquor	3328	Governor Drive	Feb.	24	2004	4	p.m.	No	No	Yes	No	No	No	1
972	SD Alliance	Vons	Supermarket	2806	Del Mar Heights Road	Jan.	8	2004	4	p.m.	No	No	Yes	No	No	Yes	1
185	ALA	Vons #2081	Supermarket	13255	Black Mountain Road	Feb.	23	2004	4	p.m.	No	No	Yes	No	Yes	No	1
309	ALA	Vons #2323	Supermarket	7544	Girard Avenue	Feb.	26	2004	#NULLI	####	No	No	Yes	No	Yes	No	1
310	ALA	Wine Barrel	Liquor	1030	Torrey Pines Road	Feb.	26	2004	4	p.m.	No	No	Yes	No	Yes	No	1
901	SD Alliance	7-Eleven #13628B	Convenience (w/o gas)	13835	Mango Drive	Jan.	8	2004	4	p.m.	Yes	No	Yes	Missing Data	No	Yes	1
187	ALA	7-Eleven #2011	Convenience (w/o gas)	6953	La Jolla Blvd	Feb.	23	2004	4	p.m.	Yes	No	No	No	No	No	1
775	ALA	Albertson's #6703	Supermarket	8510	Genesee Avenue	Feb.	24	2004	3	p.m.	Yes	Yes	No	No	Yes	No	1
346	ALA	Chevron	Gas Station Only	110995	Carmel Mountain Road	Feb.	27	2004	11	a.m.	Yes	Yes	No	No	Yes	No	1
341	ALA	Exxon #1029	Convenience (w/gas)	12929	Rancho Penasquitos Blvd.	Feb.	27	2004	12	p.m.	Yes	Yes	No	No	Yes	No	1
311	ALA	La Jolla Liquor	Liquor	7402	La Jolla Blvd	Feb.	26	2004	4	p.m.	Yes	Yes	Yes	No	Yes	No	1
945	SD Alliance	Mobil #11455	Gas Station Only	2750	Via De La Valle	Jan.	8	2004	5	p.m.	Yes	No	Yes	No	No	No	1
315	ALA	Spirits of St. Germain	Liquor	3251	Holiday Court	Feb.	26	2004	4	p.m.	Yes	Yes	Yes	No	Yes	No	1
964	SD Alliance	Vons	Supermarket	3850	Valley Center Drive	Jan.	8	2004	5	p.m.	Yes	No	No	No	No	No	1
776	ALA	Vons #2012	Supermarket	7788	Regents Road	Feb.	24	2004	4	p.m.	Yes	Yes	No	No	Yes	No	1
116	ALA	7-Eleven	Convenience (w/o gas)	4101	W. Point Loma Blvd.	Feb.	19	2004	4	p.m.	No	Yes	No	No	No	No	2
186	ALA	7-Eleven	Convenience (w/o gas)	2275	Garnet Avenue	Feb.	23	2004	4	p.m.	No	Yes	Yes	No	Yes	No	2
323	ALA	7-Eleven	Convenience (w/o gas)	3185	Midway Drive	Feb.	26	2004	4	p.m.	No	No	Yes	No	No	No	2
789	UPAC	7-Eleven #13596F	Convenience (w/o gas)	1906	Balboa Avenue	Feb.	16	2004	11	a.m.	No	#NULLI	#NULLI	Missing Data	#NULLI	#NULLI	2
189	ALA	7-Eleven #13609A	Convenience (w/o gas)	4340	Mission Blvd.	Feb.	23	2004	3	p.m.	No	No	Yes	No	Yes	No	2
110	ALA	7-Eleven #2121-18824B	Convenience (w/o gas)	4205	Voltaire Street	Feb.	19	2004	4	p.m.	No	Yes	Yes	No	No	Yes	2
109	ALA	7-Eleven #2121-24133A	Convenience (w/o gas)	2180	Bacon Street	Feb.	19	2004	4	p.m.	No	No	Yes	No	No	No	2
119	ALA	ABC Liquor	Liquor	4693	Voltaire Street	Feb.	19	2004	4	p.m.	No	No	Yes	No	Yes	No	2

Survey #	Agency	Store Name	Type of Store	Address	Name of Street	Month	Day	Year	Time	AM PM	Did Store Sell?	Did Clerk Ask Age?	Did Clerk Ask for ID?	Ask if Tobacco Was for You?	Did Decoy Lie About Age?	Did Decoy Show ID?	San Diego City Council District
302	ALA	Broadway Deli	Liquor	927	Broadway	Feb.	26	2004	4	p.m.	No	No	Yes	No	No	No	2
173	ALA	Chips Liquor	Liquor	1926	Garnet Avenue	Feb.	23	2004	3	p.m.	No	No	Yes	No	No	No	2
181	ALA	Criscola's Liquor	Independent Market	4641	Mission Blvd.	Feb.	23	2004	3	p.m.	No	Yes	Yes	No	Yes	No	2
295	ALA	Exxon #1027	Convenience (w/gas)	1666	1st Street	Feb.	26	2004	3	p.m.	No	No	Yes	No	No	No	2
321	ALA	Fuller Liquor	Liquor	3896	Rosecrans Street	Feb.	26	2004	3	p.m.	No	No	Yes	No	No	No	2
85	ALA	Gaslamp Liquor	Liquor	837	Market Street	Feb.	7	2004	1	p.m.	No	Yes	Yes	No	Yes	No	2
298	ALA	Heavenly Mar	Independent Market	349	Cedar Street	Feb.	26	2004	4	p.m.	No	No	Yes	No	No	No	2
175	ALA	Heidi's Deli	Independent Market	980	Turquoise Street	Feb.	23	2004	4	p.m.	No	No	Yes	No	Yes	No	2
107	ALA	Litlicker's Liquor	Liquor	4955	Voltaire Street	Feb.	19	2004	5	p.m.	No	No	Yes	No	No	No	2
320	ALA	Longs Drugs	Drug/Pharmacy	3210	Rosecrans Place	Feb.	26	2004	3	p.m.	No	No	Yes	No	No	No	2
182	ALA	Longs Drugs #347	Drug/Pharmacy	4445	Mission Blvd.	Feb.	23	2004	3	p.m.	No	No	No	No	No	No	2
183	ALA	Magic Market	Independent Market	4825	Cass Street	Feb.	23	2004	4	p.m.	No	No	Yes	No	No	No	2
180	ALA	Mission Bay	Liquor	1580	Garnet Avenue	Feb.	23	2004	3	p.m.	No	No	Yes	No	Yes	No	2
111	ALA	OB Quick Sto	Convenience (w/o gas)	4984	Voltaire Street	Feb.	19	2004	4	p.m.	No	No	Yes	No	Yes	Yes	2
108	ALA	Olive Tree Market	Independent Market	4805	Narragansett Avenue	Feb.	19	2004	3	p.m.	No	No	Yes	No	No	No	2
114	ALA	Pat's Liquor	Liquor	5096	Voltaire Street	Feb.	19	2004	4	p.m.	No	No	Yes	No	No	No	2
112	ALA	Shell	Convenience (w/gas)	3425	Midway Drive	Feb.	19	2004	5	p.m.	No	No	Yes	No	No	No	2
118	ALA	Sonny's Liquor	Liquor	3604	Midway Drive	Feb.	19	2004	5	p.m.	No	Yes	Yes	No	Yes	No	2
120	ALA	Stump's Mark	Supermarket	3770	Voltaire Street	Feb.	19	2004	4	p.m.	No	No	Yes	No	Yes	No	2
300	ALA	Super Jr. Ma	Independent Market	1036	7th Avenue	Feb.	26	2004	4	p.m.	No	No	Yes	No	No	No	2
188	ALA	Thrifty	Convenience (w/gas)	833	Turquoise Street	Feb.	23	2004	4	p.m.	No	No	Yes	No	Yes	No	2
113	ALA	Thrifty #09751	Convenience (w/gas)	1902	Sunset Cliffs Blvd.	Feb.	19	2004	4	p.m.	No	No	Yes	No	Yes	No	2
117	ALA	Victory Wine	Liquor	1775	Sunset Cliffs Blvd.	Feb.	19	2004	3	p.m.	No	No	Yes	No	No	No	2
322	ALA	Vons	Supermarket	3645	Midway Drive	Feb.	26	2004	4	p.m.	No	No	Yes	No	Yes	No	2
179	ALA	Vons #2116	Supermarket	1702	Garnet Avenue	Feb.	23	2004	3	p.m.	No	Yes	Yes	No	Yes	No	2
294	ALA	1st & Ivy M	Liquor	2170	1st Street	Feb.	26	2004	3	p.m.	Yes	Yes	No	No	Yes	No	2
177	ALA	7-Eleven	Convenience (w/o gas)	1305	Garnet Avenue	Feb.	23	2004	4	p.m.	Yes	Yes	Yes	No	Yes	No	2
178	ALA	Albertson's #6788	Supermarket	730	Turquoise Street	Feb.	23	2004	3	p.m.	Yes	No	Yes	No	Yes	No	2
293	ALA	Bi-Rite Mark	Independent Market	2228	1st Street	Feb.	26	2004	3	p.m.	Yes	Yes	No	No	Yes	No	2
297	ALA	City Liquor	Liquor	1801	5th Avenue	Feb.	26	2004	3	p.m.	Yes	Yes	Yes	No	Yes	No	2
301	ALA	Cortez Hill	Independent Market	1301	9th Avenue	Feb.	26	2004	4	p.m.	Yes	No	No	No	No	No	2
299	ALA	Ferris & Fer	Independent Market	630	5th Avenue	Feb.	26	2004	4	p.m.	Yes	No	No	No	No	No	2
296	ALA	G S Market	Independent Market	1440	4th Street	Feb.	26	2004	3	p.m.	Yes	No	No	No	No	No	2
303	ALA	Murphy's Market	Liquor	449	Broadway	Feb.	26	2004	4	p.m.	Yes	No	No	No	No	No	2
115	ALA	Newport Farm	Independent Market	5004	Newport Avenue	Feb.	19	2004	3	p.m.	Yes	No	No	No	No	No	2
861	UPAC	7-Eleven	Convenience (w/gas)	2404	University Avenue	Feb.	25	2004	6	p.m.	No	Yes	No	No	No	No	3
1069	ALA	7-Eleven #19628E 2121	Convenience (w/o gas)	2101	Fem Street	Mar.	6	2004	3	p.m.	No	No	Yes	No	No	No	3
67	ALA	7-Eleven #20551C	Convenience (w/gas)	1602	University Avenue	Jan.	24	2004	11	a.m.	No	Yes	No	No	No	No	3
1054	ALA	7-Eleven #21790C	Convenience (w/o gas)	3436	Adams Avenue	Feb.	9	2004	4	p.m.	No	No	Yes	No	No	Yes	3
62	ALA	7-Eleven #26910D	Convenience (w/o gas)	1995	El Cajon Blvd.	Jan.	24	2004	10	a.m.	No	Yes	Yes	No	Yes	No	3

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Survey #	Agency	Store Name	Type of Store	Address	Name of Street	Month	Day	Year	Time	AM PM	Did Store Sell?	Did Clerk Ask Age?	Did Clerk Ask for ID?	Ask if Tobacco Was for You?	Did Decoy Lie About Age?	Did Decoy Show ID?	San Diego City Council District
1072	ALA	97 Supermarket	Supermarket	4679	University Avenue	Mar.	6	2004	2	p.m.	No	No	Yes	No	No	No	3
1074	ALA	Albertson's	Supermarket	4421	University Avenue	Mar.	6	2004	2	p.m.	No	Yes	Yes	No	Yes	No	3
863	UPAC	Apple Tree Market	Deli/Meat/Produce	4404	University Avenue	Feb.	25	2004	6	p.m.	No	No	Yes	No	Yes	No	3
1075	ALA	Bargain Mart	Discount	4647	University Avenue	Mar.	6	2004	1	p.m.	No	No	Yes	No	No	No	3
1070	ALA	Big Save/Fer	Independent Market	1749	Fern Street	Mar.	6	2004	3	p.m.	No	No	Yes	No	No	No	3
1055	ALA	Corner Liquor & Deli	Liquor	3355	Adams Avenue	Feb.	9	2004	4	p.m.	No	Yes	Yes	No	Yes	Yes	3
87	ALA	Cost Mart	Independent Market	3347	El Cajon Blvd.	Feb.	7	2004	2	p.m.	No	No	Yes	No	No	No	3
1071	ALA	Fairway Market	Independent Market	4232	Poplar	Mar.	6	2004	2	p.m.	No	No	Yes	No	#NULL	No	3
797	UPAC	Hoa Hing Mar	Supermarket	4149	University Avenue	Feb.	18	2004	3	p.m.	No	Yes	Yes	No	No	No	3
1078	ALA	Kwik Stops	Other	3028	Upas	Mar.	6	2004	1	p.m.	No	No	Yes	No	No	No	3
1061	ALA	Maddox Liquor	Liquor	3243	Fairmount Avenue	Feb.	9	2004	5	p.m.	No	No	Yes	No	Yes	No	3
1068	ALA	Max's and Ad	Independent Market	3925	Ohio Street	Mar.	6	2004	3	p.m.	No	#NULL	#NULL	Missing Data	#NULL	#NULL	3
1056	ALA	Mini Market	Independent Market	3334	Adams Avenue	Feb.	9	2004	5	p.m.	No	No	Yes	No	No	Yes	3
89	ALA	Minute Mart	Convenience (w/o gas)	5006	El Cajon Blvd.	Feb.	7	2004	2	p.m.	No	No	Yes	No	Yes	No	3
81	ALA	Sam's Super	Independent Market	4111	Home Avenue	Jan.	31	2004	2	p.m.	No	No	Yes	No	Yes	No	3
1062	ALA	The General Store	Convenience (w/o gas)	3086	Fairmount Avenue	Feb.	9	2004	5	p.m.	No	Yes	Yes	Missing Data	Yes	No	3
1060	ALA	Tutti Frutti	Independent Market	3502	Fairmount Avenue	Feb.	9	2004	5	p.m.	No	No	Yes	No	Yes	No	3
1058	ALA	Z & Z Market	Independent Market	3276	Monroe Avenue	Feb.	9	2004	5	p.m.	No	No	Yes	No	No	No	3
77	ALA	43rd Produce	Deli/Meat/Produce	4020	43rd Street	Jan.	31	2004	1	p.m.	Yes	No	No	No	No	No	3
66	ALA	Big City Liquor	Liquor	4749	University Avenue	Jan.	24	2004	11	a.m.	Yes	No	No	No	No	No	3
1076	ALA	Carniceria L	Independent Market	4011	46th Street	Mar.	6	2004	1	p.m.	Yes	Yes	Yes	No	Yes	No	3
1077	ALA	Chevron	Convenience (w/gas)	3359	University Avenue	Mar.	6	2004	1	p.m.	Yes	No	No	No	No	No	3
1067	ALA	Chris's Market	Independent Market	3402	Myrtle Avenue	Mar.	6	2004	4	p.m.	Yes	No	No	No	No	No	3
65	ALA	Citlaly's Produce	Deli/Meat/Produce	4738	University Avenue	Jan.	24	2004	11	a.m.	Yes	Yes	No	No	Yes	No	3
1079	ALA	City Heights	Convenience (w/gas)	4055	University Avenue	Mar.	6	2004	11	a.m.	Yes	No	No	No	No	No	3
64	ALA	Eagles Market	Independent Market	4651	University Avenue	Jan.	24	2004	11	a.m.	Yes	Yes	No	No	Yes	No	3
86	ALA	El Cajon Blv	Independent Market	3504	El Cajon Blvd.	Feb.	7	2004	1	p.m.	Yes	No	No	No	No	No	3
69	ALA	G & M Oil SS#73	Convenience (w/gas)	3602	El Cajon Blvd.	Jan.	24	2004	12	p.m.	Yes	No	No	No	No	No	3
74	ALA	Handy Liquor	Liquor	4688	30th Street	Jan.	31	2004	11	a.m.	Yes	Yes	No	No	Yes	No	3
20	ALA	Market On Myrtle	Independent Market	3233	Myrtle Avenue	Mar.	6	2004	9	a.m.	Yes	No	No	No	No	No	3
1059	ALA	Monroe Market	Independent Market	4127	Monroe Avenue	Feb.	9	2004	5	p.m.	Yes	No	No	No	No	No	3
895	UPAC	Park Blvd Liquor	Deli/Meat/Produce	4504	Park Blvd.	Feb.	16	2004	3	p.m.	Yes	No	No	No	No	No	3
75	ALA	Ray's Liquor	Liquor	3041	30th Street	Jan.	31	2004	12	p.m.	Yes	No	No	No	No	No	3
1053	ALA	Rite Aid #5652	Drug/Pharmacy	3650	Adams Avenue	Feb.	9	2004	4	p.m.	Yes	No	Yes	No	No	Yes	3
71	ALA	Rodeo's Meat	Deli/Meat/Produce	4511	El Cajon Blvd.	Jan.	24	2004	1	p.m.	Yes	No	No	No	No	No	3
1057	ALA	S & N Market	Independent Market	2936	Monroe Avenue	Feb.	9	2004	5	p.m.	Yes	No	No	No	No	No	3
96	ALA	Tomboy mkt	Independent Market	1709	39th Street	Feb.	8	2004	11	a.m.	Yes	No	No	No	No	No	3
59	ALA	Tony's Produce	Deli/Meat/Produce	3546	Euclid Avenue	Jan.	18	2004	11	a.m.	Yes	No	Yes	No	Yes	No	3
862	UPAC	99 Cent	Discount	3530	National Blvd.	Feb.	25	2004	6	p.m.	No	Yes	Yes	No	No	No	4
17	ALA	Rainbow Market	Independent Market	4727	Federal Blvd.	Mar.	6	2004	10	a.m.	No	Yes	Yes	No	Yes	No	4

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58	ALA	Rite Aid #5646	Drug/Pharmacy	1735	Euclid Avenue	Jan.	18	2004	11	a.m.	No	Yes	Yes	No	Yes	No	4
80	ALA	United Market	Independent Market	1960	54th Street	Jan.	31	2004	2	p.m.	No	No	Yes	No	Yes	No	4
790	UPAC	Wrigley's Market	Independent Market	1731	Euclid Avenue	Feb.	16	2004	11	a.m.	No	#NULL	#NULL	Missing Data	#NULL	#NULL	4
83	ALA	99 Cent	Discount	4686	Market Street	Feb.	8	2004	11	a.m.	Yes	Yes	No	No	Yes	No	4
1082	ALA	AM/PM #598	Convenience (w/gas)	1817	Euclid Avenue	Mar.	6	2004	10	a.m.	Yes	No	No	No	No	No	4
55	ALA	Arco AM/PM	Convenience (w/gas)	6311	Imperial Avenue	Jan.	17	2004	5	p.m.	Yes	No	No	No	No	No	4
104	ALA	Base Liquor	Liquor	996	Cardiff Street	Feb.	8	2004	12	p.m.	Yes	Yes	No	No	Yes	No	4
103	ALA	Danny's Liquor	Liquor	470	S. Meadowbrook	Feb.	8	2004	12	p.m.	Yes	Yes	No	No	No	No	4
99	ALA	Encanto Ligu	Liquor	6555	Imperial Avenue	Feb.	8	2004	11	a.m.	Yes	Yes	No	No	Yes	No	4
18	ALA	Exxon #1035	Convenience (w/gas)	5109	Imperial Avenue	Mar.	6	2004	10	a.m.	Yes	Yes	No	No	Yes	No	4
53	ALA	Food Bargain	Independent Market	6281	Imperial Avenue	Jan.	17	2004	4	p.m.	Yes	Yes	No	No	Yes	No	4
98	ALA	Green Cat LI	Liquor	5102	Imperial Avenue	Feb.	8	2004	11	a.m.	Yes	Yes	No	No	Yes	No	4
47	ALA	Hermes Market	Independent Market	4219	Market	Jan.	17	2004	3	p.m.	Yes	Yes	No	No	Yes	No	4
54	ALA	Homeland Petroleum	Convenience (w/gas)	4704	Imperial Avenue	Jan.	17	2004	5	p.m.	Yes	Yes	No	No	Yes	No	4
100	ALA	Howell's Liquor	Liquor	6841	Imperial Avenue	Feb.	8	2004	12	p.m.	Yes	No	No	No	No	No	4
101	ALA	Joe's Expres	Convenience (w/gas)	1050	Cardiff Street	Feb.	8	2004	12	p.m.	Yes	Yes	No	No	Yes	No	4
1081	ALA	Louie's Market	Independent Market	5409	Redwood Street	Mar.	6	2004	11	a.m.	Yes	Yes	No	No	Yes	No	4
49	ALA	Mike's Market	Independent Market	3676	Ocean View Blvd.	Jan.	17	2004	3	p.m.	Yes	No	No	No	No	No	4
102	ALA	Moonlight MK	Independent Market	101	Meadowbrook Drive	Feb.	8	2004	12	p.m.	Yes	No	No	No	No	No	4
52	ALA	Muang Lao Ma	Independent Market	4704	Market Street	Jan.	17	2004	4	p.m.	Yes	No	No	No	No	No	4
97	ALA	Oceanview Liquor	Liquor	3744	Oceanview Drive	Feb.	8	2004	11	a.m.	Yes	Yes	No	No	Yes	No	4
106	ALA	Oscar's Mkt	Independent Market	4210	Market Street	Feb.	9	2004	5	p.m.	Yes	Yes	No	No	Yes	No	4
91	ALA	Par Liquor	Liquor	5055	Federal Blvd.	Feb.	9	2004	6	p.m.	Yes	No	No	No	No	No	4
78	ALA	Perry Liquor	Liquor	4704	Federal Blvd.	Jan.	31	2004	6	p.m.	Yes	Yes	No	No	Yes	No	4
63	ALA	Talia Liquor	Liquor	5837	Market Street	Feb.	9	2004	5	p.m.	Yes	Yes	No	No	Yes	No	4
79	ALA	The Tradewind	Liquor	3111	54th Street	Jan.	31	2004	1	p.m.	Yes	Yes	No	No	Yes	No	4
56	ALA	Valencia Park Market & Deli	Independent Market	5061	Churchward Street	Jan.	18	2004	11	a.m.	Yes	No	No	No	Yes	No	4
43	ALA	7-Eleven #25629A	Convenience (w/gas)	11205	Camino Ruiz	Feb.	12	2004	4	p.m.	No	No	Yes	No	Yes	Yes	5
327	ALA	7-Eleven #29144B	Convenience (w/o gas)	15817	Bernardo Center Drive	Feb.	27	2004	12	p.m.	No	No	Yes	No	No	No	5
331	ALA	7-Eleven 2011-19883C	Convenience (w/o gas)	16703	Bernardo Center Drive	Feb.	27	2004	12	p.m.	No	No	Yes	No	No	No	5
326	ALA	Arco AM/PM #5296	Convenience (w/gas)	12640	Sabra Springs Parkway	Feb.	27	2004	12	p.m.	No	Yes	No	No	Yes	No	5
45	ALA	Azteca Mexic	Independent Market	11277	Camino Ruiz	Feb.	12	2004	4	p.m.	No	Yes	Yes	No	Yes	No	5
344	ALA	Beverages & More	Independent Market	11475	Carmel Mountain Road	Feb.	27	2004	12	p.m.	No	Yes	Yes	No	Yes	No	5
35	ALA	Chevron	Convenience (w/gas)	9936	Mercy Road	Feb.	11	2004	6	p.m.	No	No	Yes	No	No	No	5
342	ALA	Mobil	Gas Station Only	11898	Rancho Bernardo Road	Feb.	27	2004	11	a.m.	No	No	Yes	No	No	No	5
339	ALA	Ralph's	Supermarket	11875	Carmel Mountain Road	Feb.	22	2004	11	a.m.	No	No	Yes	No	Yes	No	5
358	ALA	Ralph's #183	Supermarket	15727	Bernardo Heights Parkway	Feb.	27	2004	11	a.m.	No	No	Yes	No	Yes	No	5
336	ALA	Sav-On Drugs	Drug/Pharmacy	16773	Bernardo Center Drive	Feb.	27	2004	12	p.m.	No	No	Yes	No	No	No	5
184	ALA	Sav-On Drugs #9192	Drug/Pharmacy	14589	Camino Del Norte	Feb.	23	2004	4	p.m.	No	No	Yes	No	No	No	5
333	ALA	Shell	Convenience (w/gas)	11813	Carmel Mountain Road	Feb.	27	2004	12	a.m.	No	No	Yes	No	No	No	5

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44	ALA	Village Liquor	Liquor	11265	Camino Ruiz	Feb.	12	2004	4	p.m.	No	No	Yes	No	No	No	5
347	ALA	Albertson's	Supermarket	12475	Rancho Bernardo Road	Feb.	27	2004	11	a.m.	Yes	No	No	No	No	No	5
892	UPAC	AM/PM #06195	Convenience (w/gas)	8320	Mira Mesa Blvd	Feb.	16	2004	2	p.m.	Yes	No	No	No	No	No	5
870	UPAC	Big Lots #4127	Discount	9340	Mira Mesa Blvd	Feb.	16	2004	2	p.m.	Yes	No	No	No	Yes	No	5
865	UPAC	C's Deli & Icecream	Deli/Meal/Produce	9969	Mira Mesa Blvd	Feb.	16	2004	2	p.m.	Yes	Yes	Yes	No	Yes	No	5
41	ALA	Galleria liq	Liquor	6780	Miramar Road	Feb.	11	2004	6	p.m.	Yes	No	No	No	No	No	5
866	UPAC	Scripps Ranch Liquor	Liquor	9969	Mira Mesa Blvd	Feb.	16	2004	2	a.m.	Yes	Yes	Yes	No	Yes	No	5
337	ALA	Shell	Convenience (w/gas)	12507	Rancho Bernardo Road	Feb.	27	2004	11	a.m.	Yes	No	No	No	No	No	5
786	UPAC	Arco AM/PM	Convenience (w/gas)	8820	Clairemont Mesa Blvd.	Feb.	16	2004	1	p.m.	No	#NULL	#NULL	Missing Data	#NULL	#NULL	6
780	ALA	Circle K #5095	Convenience (w/gas)	4360	Genesee Avenue	Feb.	24	2004	4	p.m.	No	No	Yes	No	No	No	6
307	ALA	Comstock Mar	Independent Market	2145	Comstock Avenue	Feb.	26	2004	5	p.m.	No	No	Yes	No	No	No	6
318	ALA	Del Mesa Foo	Liquor	6090	Friars Road	Feb.	26	2004	4	p.m.	No	Yes	Yes	No	Yes	No	6
787	UPAC	Exxon #1031	Convenience (w/gas)	7737	Balboa Avenue	Feb.	16	2004	11	a.m.	No	#NULL	#NULL	Missing Data	#NULL	#NULL	6
330	ALA	Food 4 Less #333	Supermarket	7730	Hazard Center Drive	Feb.	27	2004	9	a.m.	No	No	Yes	No	No	No	6
174	ALA	International Groceries	Independent Market	3548	Ashford Street	Feb.	23	2004	4	p.m.	No	No	Yes	No	No	No	6
779	ALA	Jimbo's Liquor #1	Liquor	4411	Genesee Avenue	Feb.	24	2004	4	p.m.	No	Yes	Yes	No	Yes	No	6
308	ALA	Keg & Bottle	Liquor	3565	Mount Acadia Blvd.	Feb.	26	2004	5	p.m.	No	No	Yes	No	No	No	6
801	UPAC	Linda Liquor	Liquor	6950	Linda Vista Road	Feb.	16	2004	2	p.m.	No	Yes	Yes	No	No	No	6
795	UPAC	Mann Convent	Convenience (w/o gas)	3090	Clairemont Drive	Feb.	16	2004	11	a.m.	No	#NULL	#NULL	Missing Data	#NULL	#NULL	6
794	UPAC	Mobil	Gas Station Only	8380	Clairemont Mesa Blvd.	Feb.	16	2004	12	p.m.	No	#NULL	#NULL	Missing Data	#NULL	#NULL	6
782	ALA	Ralph's	Supermarket	4239	Genesee Avenue	Feb.	24	2004	5	p.m.	No	No	Yes	No	No	No	6
798	UPAC	Sav-On Drugs	Drug/Pharmacy	4829	Clairemont Drive	Feb.	16	2004	12	p.m.	No	#NULL	#NULL	Missing Data	#NULL	#NULL	6
343	ALA	Stadium Mark	Independent Market	2677	Mission Village Drive	Feb.	27	2004	10	a.m.	No	No	Yes	No	No	No	6
781	ALA	7-Eleven #13587	Convenience (w/o gas)	2404	University Avenue	Feb.	24	2004	4	p.m.	Yes	No	No	No	No	No	6
36	ALA	7-Eleven #32606	Convenience (w/gas)	8609	Aero Drive	Feb.	11	2004	4	p.m.	Yes	No	No	No	No	No	6
872	UPAC	99 Cent	Discount	6882	Linda Vista Road	Feb.	16	2004	2	p.m.	Yes	No	No	No	No	No	6
324	ALA	AM/PM	Convenience (w/gas)	6899	Friars Road	Feb.	26	2004	5	p.m.	Yes	No	No	No	No	No	6
329	ALA	Charger's Liquor	Liquor	3252	Greyling Drive	Feb.	27	2004	10	a.m.	Yes	#NULL	#NULL	Missing Data	#NULL	#NULL	6
345	ALA	Chevron	Gas Station Only	2290	Camino Del Norte N.	Feb.	27	2004	9	a.m.	Yes	Yes	No	No	Yes	No	6
868	UPAC	Chevron	Gas Station Only	7070	Clairemont Mesa Blvd.	Feb.	16	2004	12	p.m.	Yes	Yes	No	No	Yes	No	6
869	UPAC	Golden Lina	Discount	4498	Clairemont Mesa Blvd.	Feb.	16	2004	12	p.m.	Yes	No	Yes	No	No	No	6
897	UPAC	La Tiendita	Independent Market	3851	Clairemont Mesa Blvd.	Feb.	16	2004	12	p.m.	Yes	Yes	No	No	Yes	No	6
877	UPAC	Par Liquor	Liquor	5199	Clairemont Mesa Blvd.	Feb.	16	2004	12	p.m.	Yes	No	No	No	No	No	6
893	UPAC	Parsian Int'	Deli/Meal/Produce	5911	Balboa Avenue	Feb.	16	2004	11	a.m.	Yes	Yes	Yes	No	Yes	#NULL	6
874	UPAC	Rite Aid	Drug/Pharmacy	5270	Balboa Avenue	Feb.	16	2004	11	a.m.	Yes	No	No	No	No	No	6
867	UPAC	Starshine Ma	Supermarket	4475	Clairemont Mesa Blvd.	Feb.	16	2004	12	p.m.	Yes	Yes	No	No	Yes	No	6
168	ALA	7-Eleven	Convenience (w/gas)	3603	College Avenue	Feb.	24	2004	4	p.m.	No	Yes	Yes	No	Yes	No	7
169	ALA	7-Eleven	Convenience (w/o gas)	5141	College Avenue	Feb.	24	2004	4	p.m.	No	No	Yes	No	Yes	No	7
1047	ALA	Albertson's	Supermarket	5185	Waring Road	Feb.	9	2004	3	p.m.	No	No	Yes	No	No	No	7
864	UPAC	AM/PM	Convenience (w/gas)	6098	University Avenue	Feb.	25	2004	7	p.m.	No	Yes	Yes	No	Yes	No	7

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170	ALA	Chevron	Convenience (w/gas)	6301	Del Cerro Blvd.	Feb.	24	2004	4 p.m.		No	No	Yes	No	No	No	7
90	ALA	Dukes Liquor	Liquor	7029	El Cajon Blvd.	Feb.	7	2004	3 p.m.		No	No	Yes	No	Yes	No	7
167	ALA	Longs Drugs	Drug/Pharmacy	3450	College Avenue	Feb.	24	2004	3 p.m.		No	No	Yes	No	Yes	No	7
1052	ALA	Longs Drugs #154	Drug/Pharmacy	10350	Friars Road	Feb.	9	2004	4 p.m.		No	No	Yes	No	No	Yes	7
38	ALA	Rite Aid #5660	Drug/Pharmacy	10631	Tierrasanta Blvd.	Feb.	11	2004	4 p.m.		No	#NULL	#NULL	Missing Data	#NULL	#NULL	7
1048	ALA	Sav-On Drugs #3462-9162	Drug/Pharmacy	5826	Mission Gorge Road	Feb.	9	2004	4 p.m.		No	Yes	Yes	No	Yes	Yes	7
40	ALA	Ulramar #766	Convenience (w/gas)	5970	Santo Road	Feb.	11	2004	5 p.m.		No	No	Yes	No	No	No	7
785	UPAC	Vons #2134	Supermarket	10460	Clairemont Mesa Blvd.	Feb.	16	2004	1 p.m.		No	#NULL	#NULL	Missing Data	#NULL	#NULL	7
70	ALA	Vons #2352	Supermarket	6155	El Cajon Blvd.	Jan.	24	2004	1 p.m.		No	Yes	Yes	No	No	No	7
68	ALA	7-Eleven #16852E-2121	Convenience (w/gas)	4919	University Avenue	Jan.	24	2004	12 p.m.		Yes	No	No	No	No	No	7
39	ALA	Albertson's #6760	Supermarket	10633	Tierrasanta Blvd.	Feb.	11	2004	4 p.m.		Yes	No	Yes	No	No	Yes	7
61	ALA	Best \$1	Other	5975	El Cajon Blvd.	Jan.	24	2004	10 a.m.		Yes	Yes	Yes	No	Yes	No	7
88	ALA	Discount Liq	Liquor	4815	El Cajon Blvd.	Feb.	7	2004	2 p.m.		Yes	Yes	No	No	Yes	No	7
894	UPAC	Mobil	Gas Station Only	10496	Clairemont Mesa Blvd.	Feb.	16	2004	1 p.m.		Yes	No	No	No	No	No	7
171	ALA	Ralph's	Supermarket	6670	Montezuma Blvd.	Feb.	24	2004	4 p.m.		Yes	Yes	No	No	Yes	No	7
1080	ALA	SNR Market &	Independent Market	3663	Euclid Avenue	Mar.	6	2004	11 a.m.		Yes	No	No	No	No	No	7
37	ALA	Tierrasanta W	Liquor	10601	Tierrasanta Blvd.	Feb.	11	2004	4 p.m.		Yes	Yes	No	No	Yes	No	7
1050	ALA	Thrifty #09564	Convenience (w/gas)	6404	Mission Gorge Road	Feb.	9	2004	4 p.m.		Yes	No	Yes	No	No	Yes	7
1049	ALA	Ulramar	Convenience (w/gas)	6011	Mission Gorge Road	Feb.	9	2004	4 p.m.		Yes	No	Yes	No	No	Yes	7
1051	ALA	Vons#2359	Supermarket	6555	Mission Gorge Road	Feb.	9	2004	4 p.m.		Yes	No	Yes	No	No	Yes	7
32	ALA	7-Eleven #26909A	Convenience (w/gas)	4210	Beyer Blvd.	Feb.	11	2004	3 p.m.		No	No	Yes	No	Yes	No	8
26	ALA	7-Eleven #27771A-2131	Convenience (w/gas)	1771	Oro Vista Road	Feb.	11	2004	3 p.m.		No	No	Yes	No	Yes	No	8
29	ALA	Albertson's	Supermarket	1860	Coronado Avenue	Feb.	11	2004	3 p.m.		No	No	Yes	No	No	No	8
636	ALA	Albertson's	Supermarket	1860	Coronado Avenue	Feb.	11	2004	4 p.m.		No	No	Yes	No	No	No	8
792	UPAC	AM/PM #5408	Convenience (w/gas)	2255	Palm Avenue	Feb.	16	2004	4 p.m.		No	No	Yes	No	No	No	8
30	ALA	AM/PM Mini Market Paulettes's #	Convenience (w/gas)	2290	Coronado Avenue	Feb.	11	2004	3 p.m.		No	No	Yes	No	Yes	No	8
305	ALA	Arnadon's Mar	Independent Market	1793	National Avenue	Feb.	26	2004	5 p.m.		No	No	Yes	No	No	No	8
791	UPAC	Arco AM/PM	Convenience (w/gas)	4604	Palm Avenue.	Feb.	16	2004	4 p.m.		No	No	Yes	No	No	No	8
25	ALA	Circle K #8585	Convenience (w/o gas)	2036	Dairy Mart Road	Feb.	11	2004	4 p.m.		No	No	Yes	No	No	No	8
27	ALA	Circle K/ 76 #2702987	Convenience (w/gas)	1291	Hollister Street	Feb.	11	2004	3 p.m.		No	No	Yes	No	No	No	8
1085	ALA	Del Sol Market	Independent Market	4270	Del Sol Blvd.	Feb.	11	2004	4 p.m.		No	No	Yes	No	Yes	No	8
995	ALA	El Tigre Foods	Independent Market	2909	Coronado Avenue	Feb.	11	2004	3 p.m.		No	No	Yes	No	No	No	8
24	ALA	Exxon	Convenience (w/o gas)	108	San Ysidro Blvd.	Feb.	11	2004	4 p.m.		No	Yes	Yes	No	Yes	No	8
73	ALA	Fruteria Nay	Deli/Meat/Produce	915	26th Street	Jan.	31	2004	11 a.m.		No	Yes	Yes	No	Yes	No	8
306	ALA	Golden Gale	Independent Market	3807	National Avenue	Feb.	26	2004	5 p.m.		No	No	Yes	No	No	No	8
33	ALA	La Bodeguita	Independent Market	4174	Beyer Blvd.	Feb.	11	2004	3 p.m.		No	No	Yes	No	Yes	No	8
304	ALA	La Posta Mar	Independent Market	2796	K Street	Feb.	26	2004	4 p.m.		No	Yes	Yes	No	Yes	No	8
1066	ALA	Mercado International 88	Independent Market	747	San Ysidro Blvd.	Feb.	11	2004	4 p.m.		No	No	Yes	No	No	No	8
28	ALA	Nestor Liquor	Liquor	1134	Hollister Street	Feb.	11	2004	3 p.m.		No	No	Yes	No	No	No	8
76	ALA	Sawaya Bros	Independent Market	425	30th Street	Jan.	31	2004	12 p.m.		No	Yes	Yes	No	Yes	No	8

000107

Survey #	Agency	Store Name	Type of Store	Address	Name of Street	Month	Day	Year	Time	AM PM	Did Store Sell?	Did Clerk Ask Age?	Did Clerk Ask for ID?	Ask if Tobacco Was for You?	Did Decoy Lie About Age?	Did Decoy Show ID?	San Diego City Council District
1064	ALA	Shell	Convenience (w/gas)	2435	Olay Center Drive	Feb.	11	2004	4	p.m.	No	No	Yes	No	Yes	No	8
22	ALA	Shell Station Attisha II	Convenience (w/gas)	314	San Ysidro Blvd.	Feb.	11	2004	4	p.m.	No	No	Yes	No	No	No	8
793	UPAC	Thrifty #09563	Convenience (w/gas)	1890	Palm Avenue	Feb.	16	2004	5	p.m.	No	No	Yes	No	No	No	8
1063	ALA	7-Eleven #27163B 2131	Convenience (w/o gas)	2295	Palm Avenue	Feb.	11	2004	5	p.m.	Yes	No	Yes	No	Yes	Yes	8
57	ALA	Acapulco's	Drug/Pharmacy	1034	25th Street	Jan.	18	2004	11	a.m.	Yes	No	No	No	No	No	8
92	ALA	AI's Market	Independent Market	2995	K Street	Feb.	8	2004	10	a.m.	Yes	No	No	No	No	No	8
21	ALA	Bottle & Bas	Liquor	1178	Imperial Avenue	Mar.	6	2004	9	a.m.	Yes	No	No	No	No	No	8
23	ALA	Chevron	Convenience (w/gas)	104	San Ysidro Blvd.	Feb.	11	2004	4	p.m.	Yes	No	No	No	No	No	8
896	UPAC	Farm Fresh	Supermarket	1879	Palm Avenue	Feb.	16	2004	5	p.m.	Yes	No	No	No	No	No	8
48	ALA	Gigante Market	Supermarket	3175	National Avenue	Jan.	17	2004	3	p.m.	Yes	No	No	No	No	No	8
84	ALA	Gloria's Produce	Deli/Meat/Produce	2665	Market Street	Feb.	7	2004	12	p.m.	Yes	No	Yes	No	Yes	No	8
93	ALA	Ideal Mkt	Independent Market	2996	National Avenue	Feb.	8	2004	10	a.m.	Yes	Yes	No	No	Yes	No	8
94	ALA	Ideal Mkt 1	Independent Market	3101	National Avenue	Feb.	8	2004	10	a.m.	Yes	No	No	No	No	No	8
60	ALA	Jaroco Disco	Independent Market	1148	25th Street	Jan.	18	2004	11	a.m.	Yes	No	No	No	No	No	8
34	ALA	K & M Newport	Liquor	2957	Beyer Blvd.	Feb.	11	2004	3	p.m.	Yes	Yes	No	No	Yes	#NULLI	8
72	ALA	La Chiquita	Deli/Meat/Produce	1135	25th Street	Jan.	31	2004	11	a.m.	Yes	Yes	No	No	Yes	No	8
50	ALA	Mr D's	Liquor	4101	Market Street	Jan.	17	2004	3	p.m.	Yes	No	No	No	Yes	No	8
105	ALA	Mullin	Liquor	3011	Imperial Avenue	Feb.	9	2004	5	p.m.	Yes	No	No	No	No	No	8
875	UPAC	Palm Plaza Liquor	Liquor	3404	Plaza Drive	Feb.	16	2004	4	p.m.	Yes	Yes	No	No	Yes	No	8
82	ALA	Prestige #9560	Gas Station Only	2502	Imperial Avenue	Feb.	7	2004	11	a.m.	Yes	No	No	No	No	No	8
46	ALA	Produce For	Deli/Meat/Produce	3793	National Avenue	Jan.	17	2004	2	p.m.	Yes	Yes	Yes	No	Yes	No	8
898	UPAC	Shell	Gas Station Only	1881	Palm Avenue	Feb.	16	2004	5	p.m.	Yes	No	No	No	No	No	8
51	ALA	Tony's Produce	Deli/Meat/Produce	3140	Market Street	Jan.	17	2004	4	p.m.	Yes	No	No	No	Yes	No	8

000109



THE CITY OF SAN DIEGO
MANAGER'S REPORT

DATE ISSUED: April 7, 2005 REPORT NO. 05-091
ATTENTION: Public Safety & Neighborhood Services Committee
Agenda of April 13, 2005
SUBJECT: Proposed Police Permit for Tobacco Sales in San Diego
REFERENCE: Companion City Attorney Report

SUMMARY

Issue – Should the City Council adopt an ordinance to amend the San Diego Municipal Code to require a police permit to operate as a tobacco retailer in the City of San Diego, direct that the permit be administered as part of the Business Tax Certificate process, direct the San Diego Police Department (SDPD) to enforce it as situations warrant and time and resources permit, and impose a \$30 fee upon tobacco retailers to fund the associated permit administration and administrative hearing costs?

Manager's Recommendation – Adopt an ordinance to amend the San Diego Municipal Code to require a police permit to operate as a tobacco retailer in the City of San Diego, direct that the permit be administered as part of the Business Tax Certificate process, direct the San Diego Police Department (SDPD) to enforce it as situations warrant and time and resources permit, and impose a \$30 fee upon tobacco retailers to fund the associated permit administration and administrative hearing costs.

Other Recommendations – The stakeholder group consisting of health advocates and business representatives specifically recommended dedicating staff to enforcement and funding costs associated with the ordinance through tobacco Master Settlement Agreement (MSA) funds the City receives annually.

Fiscal Impact – There are three components to implementing the proposed ordinance including permit administration, enforcing the law, and conducting administrative

hearings in the case of violations. If the proposed tobacco ordinance is approved, costs would be associated with the permit administration and administrative hearing components. ~~The enforcement as proposed would be folded into the SDPD's current responsibilities and handled as situations warrant and time and resources permit.~~ The permit administration can be handled via the existing Business Tax Certificate process with estimated costs of approximately \$20,000. The cost of administrative hearings has been estimated at \$20,000 annually. Given the budget challenges facing the City going into the FY 2006 budget process, it is recommended that a fee be imposed to recover the costs associated with the ordinance. Based upon approximately 1,350 tobacco retailers in the City of San Diego, it is estimated that a fee be \$30 to recover the associated costs. The fee would be evaluated annually for cost recovery.

BACKGROUND

On October 12, 2003, State Assembly Bill 71 was chaptered creating a state licensing program for the sale of tobacco products and permitting local governments to create their own ordinances discouraging violations of tobacco law, specifically as they relate to the sale of tobacco to minors. In response to a request for assistance from the late Councilmember Lewis with support from Dr. Cleo Malone, the San Diego Police Department (SDPD) and City Attorney staff began to draft an ordinance to help address the issue of minors obtaining tobacco products within the City of San Diego. At the June 9, 2004 Public Safety & Neighborhood Services (PS&NS) Committee meeting, staff proposed that an ordinance be developed to create a requirement that all persons who sell tobacco products have a police permit.

In broad terms, an ordinance requiring all persons selling tobacco to obtain a police permit would create a new category of police regulated business. It would require that tobacco retailers have a police permit to operate as such and that they do so from a fixed location. A tobacco retailer is defined as any person who owns or operates a business, for profit or not, that sells, offers to sell or offers to exchange for consideration tobacco or tobacco products. The intent of requiring a permit to sell tobacco is to ensure that persons who are inclined to sell tobacco products to minors are discouraged from doing so and to provide a mechanism to hold those that do sell to minors accountable for their actions. During the June 9th Committee discussion, a draft ordinance was presented as a starting point and the stakeholders on both sides of the issue raised concerns.

The State has attempted to curb the illegal sale of tobacco products to minors, but those in support of a City ordinance, to be referred to generally as "health advocates", argue that the state laws have been insufficient. Currently, under California Penal Code section 308, one of several state laws in place to regulate tobacco sales, it is illegal to sell tobacco products to minors. The health advocates argue that this current regulation does not adequately address the issue because the progressive fines which could be imposed (ranging from \$250 to \$1,000) are not considered a strong enough deterrent to the illegal activity of selling tobacco to minors. As a result, the proponents argue that local regulation is required.

Business representatives state that sufficient regulatory instruments are already in place. They argue that implementation of a new local ordinance essentially punishes the entire retail industry

for the unlawful actions of a limited number of vendors. Representatives of the retail industry are in favor of implementing a system that would directly impose sanctions on the specified violators.

During the Committee discussion in which concerns were expressed from stakeholders on both sides of the issue, staff was directed to follow up on several issues and return to Committee with additional information. The follow up included:

1. Meet with stakeholders to allow for development of an ordinance that takes into account the concerns of the affected parties
2. Determine the number of potential permittees
3. Prepare a cost breakdown for employer costs
4. Draft a grandfather clause and determine a grace period
5. Obtain Lung Association Survey Data
6. Develop a process that is complaint driven to focus on the problems rather than all businesses
7. Provide information on Assembly Bill 3092 and other relevant legislation
8. Indicate why other, existing laws are insufficient
9. Determine and indicate whether there are other ways to fund tobacco enforcement
10. Research the County's role in prohibiting tobacco sales and enforcing existing laws
11. Provide an accounting of the Tobacco Settlement Funds the City receives
12. Address equity issues with regard to charging small stores and large stores the same permit fee
13. ID businesses who sold tobacco products to minors

Some of these issues are addressed in the body of this Manager's Report while the remaining issues are addressed in the companion City Attorney Report.

DISCUSSION

An ordinance has been developed as a proposal to address the issue of minors obtaining tobacco products within the City of San Diego. The proposed ordinance, a copy of which is provided to the Committee as part of the companion City Attorney Report, adds a new division (Division 45) to Chapter 3, Article 3, of the San Diego Municipal Code, Police Regulated Businesses. As a police regulated business, all persons who own or operate a business, for profit or not, which sells tobacco products would be required to possess a police permit. Such persons would be considered tobacco retailers and there are approximately 1,350 within the City of San Diego. It would be a misdemeanor to be a tobacco retailer and operate without a police permit. The proposed ordinance would set criteria to obtain a police permit to operate as a tobacco retailer, set operating requirements, set administrative sanctions for violating tobacco control laws (including suspensions and revocations of police permits), and provide for appeal rights when administrative action is taken.

To develop the language of the ordinance as now proposed, staff met with stakeholders and conducted research to address the issues raised previously by the Committee. Below, each area of Committee direction is addressed specifically.

1. Meet with stakeholders to allow for development of an ordinance that takes into account the concerns of the affected parties:

In response to the Committee's direction, a number of meetings involving "stakeholders" were conducted. Representatives of the retail industry and public health advocates were invited to the meetings to identify issues related to the ordinance, draft solutions to those issues, and document alternatives. Small Business Advisory Board (SBAB) members joined the process in the fall. A list of those who participated is attached to this report as Attachment 1. Coordinated first by the City Attorney's Office and later by the City Manager's staff, these stakeholders met on several occasions to try to come to agreement on a regulatory ordinance. In addition to meetings, e-mail discussions on various topics were also conducted in an effort to ensure all parties had a full and fair opportunity to participate. The goal was to make it an equitable process for all concerned.

When the stakeholder meetings began, the health advocates and business representatives had differing views of many aspects of an ordinance that needed to be addressed to begin to come to agreement on the content. Ultimately, with compromises on both sides, the language of the ordinance was revised to the satisfaction of both groups of stakeholders, and the main focus of the discussions became funding the costs of the ordinance and the enforcement provided. A commitment was made to the stakeholders to convey their positions and alternatives to the various parts of the ordinance. While a summary of the ordinance, funding and enforcement issues are described herein, a more detailed description of the stakeholders process including positions and concerns addressed along the way to reaching consensus is provided in Attachment 2.

The proposed ordinance as drafted assists in discouraging the sale of tobacco products to minors by imposing significant penalties for violating the various tobacco control laws and provides an additional tool for enforcement to combat the sale of tobacco products to minors. Without some level of enforcement, which is described below, there is a greater likelihood that businesses would not be inspected to determine if they are violating tobacco control laws. A sunset clause has been included to provide that the permit requirement expire in five years. During this period, data would be gathered to evaluate the need for such an ordinance and whether it was helpful in curbing tobacco sales to minors. The City could then repeal the sunset clause if it desired to continue the permitting requirement.

While originally anticipated to include a full background check, much discussion ensued regarding the invasiveness of such a check and it was proposed by the City Attorney's Office and SDPD that there be less emphasis on background checks. In lieu of requiring an initial background check for all permit applicants, the ordinance contains the requirement that a permittee has to certify that he or she has not been convicted of or faced administrative action for any license involving the violation of a tobacco control law. Untruthful or misleading certifications would constitute a misdemeanor. However, the right and ability of SDPD to conduct background checks as deemed necessary, including obtaining fingerprints, is included in the ordinance. Such a tool is needed to investigate untruthful or misleading certifications, to investigate complaints of illegal tobacco sales, and to determine the appropriate course of administrative action.

~~The proposed ordinance gives the Chief of Police the discretion to determine the sanctions to impose if a permittee violates the terms of the permit. Such sanctions range from written warning to suspension to revocation of the permit. The Chief may also negotiate a civil penalty in lieu of a suspension or revocation. Such discretion permits the Chief to make a case by case determination as to the appropriate level of sanction - thus the Chief could consider aggravating and mitigating factors. However, it is recognized that all parties want some certainty as to the level of discipline. As a result, SDPD will develop a policy which provides general guidelines as to the appropriate administrative action. The following are the proposed guidelines:~~

First violation of a tobacco control law - a permit may be suspended for a period of up to 60 days.

Second violation of a tobacco control law within 5 years - a permit may be suspended for a period of up to 90 days.

Third violation of a tobacco control law within 5 years - a permit may be suspended for a period of up to 180 days.

Fourth violation of a tobacco control law within 5 years - a permit may be revoked.

In lieu of a suspension or revocation, the Chief of Police may also negotiate a civil penalty, in the amount of \$150 per day of suspension.

It is proposed that the Chief of Police be given the discretion to determine the appropriate level of administrative action to take against a person who violates the conditions of his or her permit as set forth in the proposed ordinance.

Once the language of the ordinance was refined, discussions focused on funding and enforcement levels. An original goal of an ordinance was to generate revenue so that enforcement of the ordinance would be ensured, preferably through the addition of dedicated staff resources from the stakeholders' perspective. While health advocates would support a fee based ordinance with dedicated enforcement, the business representatives have been opposed to any additional fees being imposed upon retailers. Their position is that businesses are already overburdened by taxes and fees, and a fee unfairly punishes those retailers complying with the law.

The costs associated with implementation of an ordinance include permit administration, enforcing the law, and conducting administrative hearings in the case of violations. As the City is facing significant budget challenges going into the FY 2006 budget process, it is not prudent to add new resources to take on additional duties at this time. However, should the policy decision be that implementation of this ordinance is a priority, a manner in which it could be implemented with minimal cost impact has been identified.

Of the three components of the ordinance implementation, the enforcement could be conducted without incurring additional costs. Enforcement could be folded into the SDPD's current

responsibilities and handled by existing staff as situations warrant and time and resources permit, as is the case when any new law goes into effect. Enforcement would include conducting minor ~~decoy operations, or stings, to inspect the businesses and following-up-on-complaints.~~ SDPD currently conducts sting operations in regard to enforcing the alcohol laws prohibiting sales to minors, and those for tobacco could be handled similarly using younger cadets as the minor decoys. Given the limited resources of the SDPD and their unfunded needs, the SDPD has not committed to a specified number of inspections, but having the law on the books would give them the tool to conduct enforcement as other priorities allow. To ensure that the program is run effectively, SDPD would document its activities under the ordinance and report to PS&NS periodically.

If the proposed tobacco ordinance is approved, there would be costs associated with the other two components, the permit administration and administrative hearings. It has been determined that incorporation of permit administration into the existing Business Tax Certificate process would be a cost efficient method of authorizing retailers to sell tobacco. Specifics of this process are still being refined and may require additional review from the City Attorney's office with regard to new procedures. Staff will continue to work to refine the process in anticipation of proceeding to full City Council. It should be clarified that while this report and the ordinance consistently refer to a police permit, administering the authorization to sell tobacco through the existing Business Tax Certificate process would provide for an endorsement for retailers to sell tobacco on the face of the Business Tax Certificate. There would not technically be a separate, paper police permit document provided to the businesses. The endorsement on the face of the Business Tax Certificate would act in that capacity.

If the proposed ordinance is approved, the application form currently used by new businesses to apply for a Business Tax Certificate would be modified to allow a retailer to indicate whether or not tobacco is sold and that the retailer has not violated any tobacco-related laws as specified within the ordinance. Once a new business applicant submits the form indicating their intention to sell tobacco, an addendum would be sent out to request the additional data needed to comply with the ordinance provisions. Estimated costs associated with administering the permit through the Treasurer's Tax Collection System (TTCS) are approximately \$20,000.

Business Tax Certificates are renewed annually. Any existing businesses that sell tobacco would be expected to provide the new tobacco-related information upon the effective date of the ordinance. Letters would be sent to all the existing businesses explaining the new ordinance, and requesting the business owners certify they have not violated any tobacco-related laws and the additional data needed to comply with the ordinance provisions. Upon receipt of this information and payment of the proposed fee, described further below, a business would be issued a new Business Tax Certificate of payment with an endorsement on its face indicating that the business is authorized as a tobacco regulated business.

Once the new certificates are in place, any violations of the tobacco law by a business would result in the SDPD posting a notice of suspension of the authorization to sell tobacco products alongside the Business Tax Certificate. Since the endorsement is on the face of the Business Tax Certificate, which serves dual purposes, the Certificate would not be revoked or taken away from the business. However, the ability to sell tobacco would be impacted in accordance with the

penalties as outlined in the provisions of the ordinance and indicated to the public by the visible posting of the notice of suspension.

The other cost associated with the ordinance would be for administrative hearings. An administrative hearing would be an option for a retailer found to be in violation of the law. The number of administrative hearings that would occur annually would depend upon the number of retailers inspected (via minor decoy operations) by SDPD, the number of those found to be in violation of the law, and the number of those that chose to request an administrative hearing rather than just accepting the penalty.

Any retailer found in violation of the law would be entitled to an appeal hearing. The SDPD cannot conduct the appeal hearings because Due Process prohibits the police from both undertaking the enforcement of the ordinance and trying the facts with respect to alleged violations. As a result, the City Manager via his designee is responsible for the appeals process. The Executive Director of the Citizens' Police Review Board is responsible for administering the appeals process. After a notice of appeal is filed, the appeals process begins. The appellant is offered an opportunity to have a hearing before a City hired hearing officer. However, if the appellant objects to the City hired Hearing officer, then the hearing is referred to the State Office of Administrative Hearings so the matter may be heard by a state administrative law judge. The hearing before the State Office of Administrative Hearings follows City Ordinances and Policies related to the conduct of hearings. At the hearings, the SDPD has the burden of proving a violation occurred and that the level of sanction is appropriate. After the hearing officer renders his or her decision there are no further City appeal rights. However, the permittee may file a writ in the Superior Court to contest the hearing officer's decision. The City Attorney's Office responds to the writ and any subsequent Court appellate remedies.

It is difficult to know how many administrative hearings would occur annually, thus it is difficult to pinpoint an exact cost. Associated costs include the hearing officer, a filing fee, and the police officer's time. However, an estimate has been developed based upon the level of stings conducted to enforce alcohol laws. If tobacco stings are conducted at half the rate of alcohol related stings, 43.9% of retailers are found in violation, which is the rate of non-compliance indicated by the Lung Association Survey, and all of those retailers chose to have a hearing, the cost would be approximately \$20k annually. This is a conservative estimate.

Total costs of \$40k are estimated to be associated with implementation of the proposed tobacco ordinance in this minimal cost manner. As indicated above, the health advocates were originally supportive of a fee based ordinance with dedicated enforcement, though the business representatives were not. During stakeholder discussions, the stakeholders came to consensus on recommending that the tobacco Master Settlement Agreement (MSA) funds be utilized to fund the ordinance. At that time, prior to acknowledgement of the fiscal challenges, the focus was on dedicated staffing for enforcement and the group proposed that \$350,000 be reallocated from MSA funds unrelated to the current SDPD allocation to cover enforcement. SDPD has subsequently indicated that full time staffing at that level would be excessive from an operational standpoint even without the fiscal challenges, which further impact that level of resource allocation, hence the recommendation described herein.

In regard to the funding recommended by the stakeholders, the City receives approximately \$10m annually in MSA funds and these funds are committed to various programs in the City per ~~previous Council direction (attachments 3 and 4). Given the City of San Diego's challenging FY~~ 2006 budget outlook, reallocation of tobacco funding to new or enhanced programs such as this ordinance could create additional stress on the General Fund. Given the negative effect reallocating funds would have on the General Fund, a cost recovery fee is recommended to cover permit issuance and administrative hearing costs associated with the ordinance. With approximately 1,350 local retailers selling tobacco, a fee to cover the costs described above would be approximately \$30. The fee is subject to annual review for cost recovery and as the specifics of administration of the tobacco permit through the Business Tax Certificate process are refined, it may be found that the fee could be reduced in the future as the result of initial start up costs. It is proposed that the \$30 be assessed upon the effective date of the ordinance in conjunction with the letter notifying all existing businesses of the new ordinance and requesting the owners' certification of no tobacco-related violations. Beginning the following year the fee would be collected as part of the annual Business Tax Certificate renewal process for each business. New businesses would pay the fee with their initial Business Tax Certificate application fee. While the business community has not been supportive of a fee, the \$30 proposed fee included within this report is much lower than the earlier recommendation of \$250 and is a compromise solution in light of the City's budget constraints.

As just described, the recommendation for addressing this ordinance as proposed within this report differs from the recommendation developed by consensus of the stakeholders group, both in terms of level of enforcement and funding, due to the budget issues facing the City. Should the ordinance be implemented with the lower level of enforcement as recommended herein, revisiting this issue and the stakeholders' vision for a higher level of enforcement in the future would be recommended.

2. Determine the number of potential permittees

The committee asked for an improved estimate of retailers that would be required to obtain a police permit to operate as a tobacco retailer. The City Attorney's Office gathered such information from the state Board of Equalization, determined the number to be approximately 1,350, and the list is available upon request.

3. Prepare a cost breakdown for employer costs

Businesses face a myriad of taxes and fees from federal, state, and local governments to operate their businesses. These costs can be divided into four general categories: (1) taxes; (2) health and safety inspection charges; (3) product specific fees; (4) and business operation fees. Such costs vary depending upon a variety of factors, including location of business and type of products sold. Also, some fees are one time costs while others are recurring costs. Among the common taxes and fees are:

- Taxes generally include: state and federal income taxes, sales taxes, excise taxes, workers compensation insurance costs, and employment costs (social security). Costs depend on income and type of item sold.

- Health and safety fees generally include: State and Local Agricultural and Health inspection/certificate fees, Fire Department inspection fees, and Building/Code compliance-inspection fees.
- Product specific fees generally include: ABC licenses (including PCN and CUP fees), AB 71 [State Tobacco Retailer License], and Federal Alcohol and Tobacco Product fees. For example, AB 71 imposes a one time fee of \$100.
- Business operation fees generally include: City of San Diego Zoning Use Certificate, Business Tax certificates, DBA certificate fees, Signage Postage Fees, Alarm Permit fees, and etc.

It is acknowledged that imposing a fee for the permit has an impact on businesses. However, the amount proposed is minimal in comparison to that originally proposed and would provide the SDPD a tool to conduct enforcement as resources permit.

4. Draft a grandfather clause and determine a grace period

The Committee asked that a “grandfather clause” and a “grace period” be included in the proposed ordinance. As a result, the City Attorney’s Office added both items to the proposed ordinance. The “grandfather clause” is added as section 33.4413. Under the “grandfather clause” section, convictions which occurred before the effective date of the proposed ordinance would not be used to preclude a person from obtaining a police permit to operate as a tobacco retailer. The “grace period” was added as Section 3 of the proposed ordinance. Under the “grace period” the ordinance would not go into effect until 180 days from its passage. During this time period, SDPD would make preparations to assume its duties under the ordinance. Additionally, efforts to educate potential permittees as to the requirements under the ordinance would be undertaken.

5. American Lung Association Survey Data

The City Attorney’s Office, at the request of the Committee, obtained the requested American Lung Association Data. Such information is attached to the companion City Attorney Report.

6. Develop a process that is complaint driven to focus on the problems rather than all businesses

As described above, the enforcement activities conducted by the Vice unit would be based, in part, upon complaints. These procedures attempt to address the concerns of the stakeholders as well as enable the Police Department to conduct enforcement within the budget constraints faced by the City.

7. Provide information on Assembly Bill 3092 and other relevant legislation

The City Attorney’s Office, at the request of the Committee, obtained the requested information on AB 3092 and other relevant legislation. Such information is attached to the companion City Attorney Report.

8. Indicate why other, existing laws are insufficient –

~~The health advocates assert, and retailers disagree, that state fines and sanctions are too low to be a deterrent. The existing state laws governing tobacco sales include Penal Code Section 308(a), AB 71, and the STAKE Act. Penal Code Section 308(a) generally makes it illegal to sell tobacco products to minors. AB 71 generally requires tobacco retailers to obtain a state license. The STAKE Act requires retailers to post various notices regarding the sale of tobacco products to minors, requires the Department of Health Services to enforce the Act, and provides for civil penalties for violations of the Act.~~

Fines for violating Penal Code Section 308(a) (selling tobacco products to minors) range from \$250 to \$1,000 based upon the number of violations. Administrative sanctions by the State Board of Equalization for selling tobacco products to minors in violation of AB 71 license requirements, when there is a statewide illegal sales rate of 13% or greater, are as follows: first conviction is issued a warning; second conviction within 12 months is a fine of \$500; third conviction within 12 months is a fine of \$1,000; fourth through seventh convictions within 12 months result in suspension of license for period of up to 90 days; and for the eighth conviction within 12 months, the license may be suspended. Civil penalties for violating the STAKE Act range from \$200 to \$6,000, based upon the number of violations, but can be only enforced by the Food and Drug Branch of the California Department of Health Services. Proponents stated that there are only five Food and Drug Branch officers assigned to 20,000 retail outlets in Southern California. Finally, in support of their position, proponents pointed to the American Lung Association Youth Tobacco Survey which showed that 43.9% of retailers which were surveyed in the City of San Diego sold tobacco products to minors. Proponents of the ordinance provided a copy of the Tobacco-Free Communities Model Licensing Ordinance (Attachment 5), which provides for universal licensure and was used to help draft the City's proposed ordinance.

9. Determine and indicate whether there are other ways to fund tobacco enforcement:

During the stakeholder process, a number of potential funding options were identified during a brainstorming session (described in attachment 2). As indicated above, the only funding idea that the stakeholders agreed upon was reallocation of the MSA funds, which are currently allocated to various General Fund programs and services. This is not being recommended by the City Manager given the budget constraints. There was no consensus among the stakeholders about the other funding ideas and some would have had an impact to the General Fund, thus they are not recommended either.

On an ongoing basis, SDPD works to obtain grants to fund department needs. SDPD will continue to seek funding from foundation, private and federal grant sources and Philip Morris endowments that may be available to assist with the enforcement effort as necessary. Since the grant sources are not guaranteed, a minimal cost way of implementing the ordinance has been developed and it is recommended that a \$30 permit fee be implemented to fund the associated costs.

10. Research the County's role in prohibiting tobacco sales and enforcing existing laws

~~The County of San Diego primarily combats tobacco use, including underage use and sales,~~ through its Department of Health and Human Services Agency (HHSA), Tobacco Control Resource Program (TCRP). TCRP receives funding from Proposition 99 funds and Tobacco Settlement funds. The TCRP has several programs to reduce tobacco use. They include: tobacco cessation programs, collaborating with other public health entities to educate about the perils of smoking, and tobacco control law enforcement activities. In the area of tobacco control law enforcement TCRP monitors smoke-free worksite laws and public smoke-free laws, provides a complaint hot-line to report smoke-free area violations, and has a TCRP Enforcement Officer. In addition, TCRP also provides funds to local agencies to conduct tobacco control law enforcement. TCRP is on the County's website at www.sdcounty.ca.gov/HHSA.

The County of San Diego had also entered into an MOU with the Sheriff's Department to obtain dedicated staffing to enforce laws related to a smoke-free work place and Penal Code section 308 (sales of tobacco products to minors). However, because of a lack of funding, resources were not able to be committed to the MOU for enforcement activities.

11. Provide an accounting of the Tobacco Settlement Funds the City receives:

In February 1999, the City Council approved via resolution R-291262 Mayor Golding's "Smart and Healthy San Diego Plan", outlined in a memo dated February 2, 1999, for use of tobacco settlement funds resulting from the national tobacco litigation settlement. The City of San Diego's portion of the settlement funds totals \$312 million over 25 years. While the national Master Settlement Agreement placed no restrictions on how the funds could be used, the funding plan approved by the City Council designated spending priorities consistent with City responsibilities and the original reasons the City intervened in the lawsuit. Further, the attorney representing the original plaintiff stated that he believed the "Smart and Healthy San Diego Plan" was consistent with the original intent of the litigation, which was to penalize tobacco companies for any profits they may have wrongly earned as a result of dishonest business practices, specifically, attempts to mislead the public about the harmful health effects of smoking.

Attachment 3 is a spreadsheet outlining the way the Tobacco Settlement Funding has been allocated. The attachment reflects the funding plan as approved by the City Council in February 1999. The spreadsheet reflects the original proposal in the top section, with the actual allocation, as approved each fiscal year by the City Council, in the bottom section. Attachment 4 includes a description of each of the programs receiving tobacco settlement funding.

12. Address equity issues with regard to charging small stores and large stores same permit fee

This issue is addressed in the companion City Attorney Report.

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13. Identify businesses who sold tobacco products to minors during the American Lung Association Survey.

The City Attorney's Office, at the request of the Committee, obtained information as to who was surveyed under the American Lung Association survey, including the results of how each surveyed business fared. Such information is attached to the companion City Attorney Report.

Summary

Several stakeholder meetings took place between SDPD, the City Attorney's office, members of the retail industry and health advocates as directed at the June 9, 2004 PS&NS Committee meeting. The City sought ways to strike a balance between the needs of retailers and the health and safety of the communities being provided Police services, while taking into account the budget constraints currently faced by the City. It is recommended that the proposed ordinance be adopted to amend the San Diego Municipal Code to require a police permit to operate as a tobacco retailer in the City of San Diego, administer the permit through the existing Business Tax Certificate process, direct the San Diego Police Department (SDPD) to enforce it as situations warrant and time and resources permit, and impose a \$30 fee upon tobacco retailers to fund the associated permit administration and administrative hearing costs.

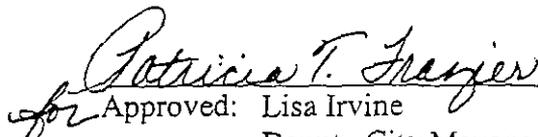
ALTERNATIVES:

1. Impose a higher fee upon retailers to provide additional funding for SDPD enforcement efforts.
2. Postpone approval of the ordinance until grant funding can be obtained.
3. Do not approve the ordinance at this time.

Respectfully submitted,



Libby Coalson
Special Projects Manager


for Approved: Lisa Irvine
Deputy City Manager

Irvine/LKC

- Attachments:
1. List of stakeholders
 2. Summary of Stakeholders Process
 3. Tobacco Settlement Funding
 4. Tobacco Settlement Program Description
 5. Model Licensing Ordinance

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Tobacco Ordinance Stakeholders

Gilbert Canizales
Director, Local Govt. Relations

Kristin Harms
Policy Mgr, Tobacco-Free Communities

~~California Grocers Association~~

~~American Lung Association~~

Sam Salem
President
SGM Investment

Molly Bowman MB
Senior Advocacy Director
American Heart Association

Cleo Malone, Ph.D.
Executive Director
The Palavra Tree Inc

Arkan Somo
Retailer

Larry Malone
Focus Project

Kevin Hauck
Mid-City CAN

Lynda Barbour
Health Promotion Director
Border Sierra Region, American
Cancer Society

Auday P. Arabo, Esq.
President & CEO
California IGCS
(Indep. Grocers & Convenience Stores)

Frank Lopez
South Bay Partnership

Leif Ozier, Case Manager III
Catholic Charities, Diocese of San Diego
New Americans Against Tobacco Project

Yenni Lamas/Dana Richardson
South Bay Partnership

Candice Porter, Program Director
San Dieguito Alliance for
Drug Free Youth

Susan Caldwell
Vista Community Clinic

Veronica Baeza, MPA, Deputy Director
San Diego-Tijuana Border Initiative

Evelyn Hogan

Debra Kelley
Vice President, Government Relations
American Lung Association of San Diego
and Imperial Counties

Diane Ake

Lorenzo Higley

Warren Simons
Executive Director
Hillcrest Association

Rick Sims
Small Business Advisory Board (SBAB)

Scott Kessler
BID Council

4/5/2005

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Tobacco Ordinance Stakeholder Process

~~In response to the PS&NS Committee's direction, several meetings involving~~
"stakeholders" were conducted to allow for development of an ordinance that takes into account the concerns of the affected parties. Representatives of the retail industry and public health advocates were invited to the meetings to identify issues related to the ordinance, draft solutions to those issues, and document alternatives. Small Business Advisory Board (SBAB) members joined the process in the fall. A list of those who participated is attached to this report as Attachment 1.

Coordinated first by the City Attorney's Office and later by the City Manager's staff, these stakeholders met on several occasions to try to come to agreement on a regulatory ordinance. In addition to meetings, e-mail discussions on various topics were also conducted in an effort to ensure all parties had a full and fair opportunity to participate. The goal was to make the process equitable for all concerned.

The following areas were discussed in the meetings: (A) is an ordinance needed; (B) background checks; (C) enforcement activity levels and staffing needs; (D) fees and costs of enforcement, (E) level of penalty for violations; and, (F) private causes of action.

A. Is An Ordinance Needed?

The working group discussed whether or not an ordinance is needed. The public health advocates, or "proponents", argued that the ordinance is needed because existing state law and existing state efforts are insufficient to combat the problem of sales of tobacco products to minors. It was asserted that state fines and sanctions are too low to be a deterrent. The existing state laws governing tobacco sales include Penal Code Section 308(a), AB 71, and the STAKE Act. Penal Code Section 308(a) generally makes it illegal to sell tobacco products to minors. AB 71 generally requires tobacco retailers to obtain a state license. The STAKE Act requires retailers to post various notices regarding the sale of tobacco products to minors, requires the Department of Health Services to enforce the Act, and provides for civil penalties for violations of the Act.

Fines for violating Penal Code Section 308(a) (selling tobacco products to minors) range from \$250 to \$1,000 based upon the number of violations. Administrative sanctions by the state Board of Equalization for selling tobacco products to minors in violation of AB 71 license requirements, when there is a statewide illegal sales rate of 13% or greater, are as follows: first conviction is issued a warning; second conviction within 12 months is a fine of \$500; third conviction within 12 months is a fine of \$1,000; fourth through seventh convictions within 12 months result in suspension of license for period of up to 90 days; and for the eighth conviction within 12 months, the license may be suspended. Civil penalties for violating the STAKE Act range from \$200 to \$6,000, based upon the number of violations, but can be only enforced by the Food and Drug Branch of the California Department of Health Services. Proponents stated that there are only five Food and Drug Branch officers assigned to 20,000 retail outlets in Southern California. Finally, in support of their position, the public health advocates pointed to the American

Lung Association Youth Tobacco Survey which showed that 43.9% of retailers which were surveyed in the City of San Diego sold tobacco products to minors. The proponents provided a copy of the Tobacco-Free Communities-Model-Licensing-Ordinance (Attachment 5) which provides for universal licensure.

Retail industry representatives, or "opponents", disagreed and asserted it was unfair to punish all tobacco retailers for the acts of a few. They also questioned the methodology of the American Lung Association Survey. Retailers assert that compliance rates are much higher than what the Lung Association Survey indicates. Finally, in lieu of the current permitting proposal, opponents identified an ordinance used by several smaller Northern-California cities. Under the ordinance used by these cities a permit would only be required if a person was convicted of a tobacco control law violation. Thus, only those who violated tobacco control laws would be required to be permitted and inspected. Those that did not would not be required to have a permit.

The proposed ordinance and a comparison of the ordinance language used in the Northern California cities identified by the opponents have been reviewed by City staff. The proposed ordinance as drafted assists in discouraging the sale of tobacco products to minors by imposing significant penalties for violating the various tobacco control laws and provides for an additional tool for enforcement to combat the sale of tobacco products to minors. With regard to the proposed alternative of requiring permits only for those that are caught selling tobacco products to minors, such a proposal is insufficient because it does not provide for adequate monitoring of all businesses. Without some level of enforcement, there is a greater likelihood that businesses would not be inspected to determine if they are violating tobacco control laws.

In addition, a sunset clause was added to ameliorate the concerns of the opponents. Under the sunset clause, the permitting requirement would expire in five years. During this period, data would be gathered to evaluate the need for such an ordinance and whether it was helpful in curbing tobacco sales to minors. The City could then repeal the sunset clause if it desired to continue the permitting requirement.

Alternative 1: Re-draft the ordinance to be modeled as recommended by the opponents.

Alternative 2: Do not adopt the proposed ordinance.

B. Background Checks

The topic of background checks was discussed during the stakeholder meetings. Initially, a detailed background check was proposed in the ordinance. The purpose was to weed out persons who may have a criminal history which could signal a propensity to sell tobacco products to minors. This included those who had previously violated tobacco control laws, those who sold alcoholic beverages to minors, and those who sold "brown bags" (drug paraphernalia). Opponents to the ordinance felt that such a background check was invasive and would unfairly punish owners who had bad employees,

particularly because a background check permitted the taking of fingerprints. Opponents also noted that other jurisdictions did not have extensive background check requirements.

After discussion, it was proposed by the City Attorney's Office and SDPD that there be less emphasis on background checks. In lieu of an initial background check, a permittee would have to certify that he or she had not been convicted of or faced administrative action for any license involving the violation of a tobacco control law. Untruthful or misleading certifications would constitute a misdemeanor. However, the right and ability to conduct background checks as deemed necessary, including obtaining fingerprints, would remain in the ordinance. Such a tool is needed to investigate untruthful or misleading certifications, to investigate complaints of illegal tobacco sales, and to determine the appropriate course of administrative action.

In summary, the ordinance as proposed allows SDPD to have the ability to conduct background checks, including fingerprinting as indicated above, with the understanding that background checks will not be required of every applicant.

Alternative 1: Do not require background checks.

Alternative 2: Require background checks for all applicants.

C. Enforcement Activity Levels

Another area discussed by the stakeholder group was enforcement activity and the associated staffing levels. The parties agreed that the emphasis of any ordinance should be enforcement and not administrative tasks. Initially, enforcement activity levels were discussed in terms of adding new resources to SDPD with funding from a fee charged to the businesses. It was proposed that SDPD respond to all complaints regarding illegal tobacco sales and conduct minor decoy operations to inspect the businesses.

The early discussion involved an estimation of annual inspection of at least 20% of the prospective permittees. The 20% number was chosen because it was "statistically significant" and would establish a statistically valid rate of illegal sales to minors among permittees. Once it was determined that the number of businesses is approximately 1,350, the level of enforcement was estimated to require two Detectives and one Police Code Compliance Officer (PCCO). However, SDPD has indicated that full time staffing at that level would be excessive from an operational standpoint.

Subsequent to the discussions described above regarding new resources for enforcement, the City's budget constraints going into Fiscal Year 2006 became more apparent. With the City's challenging budget outlook, it is not prudent to recommend adding to the budget to take on new responsibilities. In light of that situation, the SDPD has indicated that, as with any law put into effect, they could conduct minor decoy operations as situations warrant, and time and existing staff resources permit to provide some enforcement of the ordinance, should the City Council approve the implementation of the

ordinance. Some community members have indicated a commitment to helping with these efforts.

Enforcement activity levels have not been specifically written into the proposed ordinance language at this time. However, to ensure that the program is run effectively, SDPD would document its activities under the ordinance and report to PS&NS periodically.

D. Fees

As initially discussed, the proposed ordinance was to include a fee to cover the expenses associated with the ordinance. As permitted by law, a fee was to be developed based on cost recovery of the expenses associated with implementing and enforcing the ordinance. These costs include issuance of permits, staffing and operational costs of enforcing, and administrative hearings for the violators.

The fee first estimated and presented to PS&NS previously was \$185 annually per business. That fee would have provided staffing of two (2) Detectives, three (3) Police Code Compliance Officers and one (1) clerical assistant needed for the estimated 3,500 businesses to enforce and inspect at a statistically relevant level. However, after research (further described in the companion City Attorney Report) it was determined that the actual number of prospective permittees is closer to 1,350. At 1,350 permittees, the cost per permit would have increased to \$600 to fully recover the costs of that same staffing level of six enforcement staff. The opponents felt that a fee of \$600 was excessive. After discussion, it was proposed that a fee of \$250 dollars might be more reasonable. A fee at that level would have generated approximately \$300,000 in revenue which would have covered three staff for the inspection of 20% of 1,350 businesses.

However, opponents continued to express concern about businesses being overburdened by fees already and objected to any new fee being imposed. The result is that the stakeholder discussion turned to other potential funding sources. The group brainstormed a list of funding sources including:

1. Increase San Diego Police Department MSA allocations
2. Cost Recovery Fee of \$125 to generate approximately \$150,000 for two staff
3. Fixed Fee of \$125.00, or another number
4. Penalty Driven Fee – only violators pay fee
5. Complete Cost Recovery – maximum number of officers and cost
6. General Fund – fund expenses every year
7. One-time General Fund start up and penalties/fines thereafter
8. One time fee of \$125.00 then penalties/fines thereafter
9. Cost recovery – create fee starting at \$125.00

After much discussion, the group came to consensus on one of the options, recommending a proposal to reallocate existing MSA funds from uses not currently related to SDPD to cover the expense of the ordinance.

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MSA funds are currently allocated for various City programs (see attachments 3 and 4) ~~and any reallocation to new or enhanced programs could create additional stress on the~~ General Fund. It was discussed that any reallocation should proceed as part of the annual budget process to ensure that Council priorities are considered in light of all General Fund needs (MSA funds are further addressed in the body of the City Manager's Report). Following the discussion by the group, the Small Business Advisory Board (SBAB) voted to support the use of MSA funds to fund the proposed ordinance and specifically stated that they do not believe that an additional fee should be imposed on businesses.

The health advocates support the use of MSA funds for the proposed permit program as long as they are not committed to other City program. If unallocated MSA funds for the proposed permit program are not a viable options, proponents support a full annual, cost-recovery permit fee, based upon inspection of a representative sample of 20% of stores each year. They do not support any of the other options identified above.

Subsequently, the group met regarding the impact of the budget challenges facing the City for the upcoming year on the ability to add to the budget for new responsibilities, as described under the enforcement section above. As described in the body of the report, a minimal cost impact manner of enforcing the ordinance is recommended to be implemented and funded with a \$30 fee upon the businesses.

E. Administrative Sanctions

The issue of "administrative sanctions" was discussed in the working groups. Proponents recommended that a mandatory level of discipline be incorporated in the proposed ordinance, consistent with the penalties set forth in the Tobacco-Free Communities Model Licensing Ordinance and in the effective licensing ordinances adopted by other jurisdictions.

Opponents agreed that those who sell tobacco products to minors should be held accountable. However, it was felt that if a business takes steps to correct the problem, such steps should be considered as mitigating. Finally, opponents wanted to be included in any planning by SDPD in developing its recommended sanctions.

Currently, the proposed ordinance gives the Chief of Police the discretion to determine the sanctions to impose if a permittee violates the terms of the permit. Such sanctions range from written warning to suspension to revocation of the permit. The Chief may also negotiate a civil penalty in lieu of a suspension or revocation. Such discretion permits the Chief to make a case by case determination as to the appropriate level of sanction - thus the Chief could consider aggravating and mitigating factors. However, it is recognized that all parties want some certainty as to the level of discipline. As a result, SDPD will develop a policy which provides general guidelines as to the appropriate administrative action. The following are the proposed guidelines:

First violation of a tobacco control law - a permit may be suspended for a period of up to 60 days.

Second violation of a tobacco control law within 5 years - a permit may be suspended for a period of up to 90 days.

Third violation of a tobacco control law within 5 years - a permit may be suspended for a period of up to 180 days.

Fourth violation of a tobacco control law within 5 years - a permit may be revoked.

In lieu of a suspension or revocation, the Chief of Police may also negotiate a civil penalty, in the amount of \$150 per day of suspension.

It is proposed that the Chief of Police be given the discretion to determine the appropriate level of administrative action to take against a person who violates the conditions of his or her permit as set forth in the proposed ordinance.

Alternative: Require a set level of administrative sanctions be written into the ordinance.

F. Private Causes of Action

At the meeting, the proponents requested that a private cause of action clause be added to the proposed ordinance. Under the proponents' proposal, private individuals would be able to sue for damages and declaratory relief to enforce the tobacco ordinance.

Opponents to the ordinance were adamantly opposed to adding the proposal to the request. The City Attorney's Office and SDPD expressed concern about the proposal in that it removed, in part, the City's ability to participate in any legal challenges to the ordinance and it might lead to vigilantism and abuse of lawsuits.

The ordinance has been drafted without a private cause of action. However, as the ordinance develops, the issue may be revisited.

Alternative: Include a private cause of action in the proposed ordinance.

Tobacco Settlement Funding

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Allocation of Funding per Mayor Golding's Memorandum to the City Council, February 2, 1999						
Approved on February 9, 1999 by Resolution R-291262						
Allocation	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005
Healthy Kids (6 to 6 Program)	\$ 1,000,000	\$ 2,000,000	\$ 2,000,000	\$ 2,000,000	\$ 1,000,000	\$ 500,000
Parks/MSCP	728,125	3,228,125	3,500,000	3,000,000	2,214,000	200,000
Enforcement	250,000	250,000	250,000	250,000	250,000	250,000
Main Library - Construction	500,000	1,000,000	1,500,000	1,700,000	9,675,000 *	9,675,000 *
Main Library - Operating	-	-	-	-	2,000,000	1,000,000
Scholarship	271,875	271,875	-	-	-	-
Reserve Contribution	1,079,000	3,230,000	3,547,000	3,064,000	1,000,000	550,000
Total Allocation	\$ 3,829,000	\$ 9,980,000	\$ 10,797,000	\$ 10,014,000	\$ 16,139,000	\$ 12,175,000

Budgeted Tobacco Settlement Funding						
	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005
Budgeted Tobacco Revenue	\$ 3,557,125	\$ 8,827,032	\$ 9,578,035	\$ 11,757,880	\$ 12,128,422	\$ 10,018,206
Total Budgeted Tobacco Revenue	\$ 3,557,125	\$ 8,827,032	\$ 9,578,035	\$ 11,757,880	\$ 12,128,422	\$ 10,018,206

Actual Allocation/Expenditure of Tobacco Settlement Funds						
Allocation	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005
Healthy Kids (6 to 6 Program)	\$ 1,000,000	\$ 2,000,000	\$ 2,000,000	\$ 2,000,000	\$ 1,000,000	\$ 500,000
Parks/MSCP	728,125	3,228,125	3,500,000	3,000,000	2,214,000	200,000
Enforcement	250,000	250,000	250,000	250,000	250,000	250,000
Main Library Fund (102216)	-	-	-	-	1,405,705	2,231,345
Scholarship	-	-	-	-	-	-
Reserve Contribution	1,579,000	3,348,907	3,828,035	1,700,000	-	-
Transfer to General Fund**	-	-	-	4,807,880	7,258,717	6,836,861
Total Allocation/Expenditure	\$ 3,557,125	\$ 8,827,032	\$ 9,578,035	\$ 11,757,880	\$ 12,128,422	\$ 10,018,206

* Mayor Golding's plan assumed that the main library would be funded primarily with tobacco funds. Per Resolution R-291262, the City Council opted to use TOT revenue as the main funding source, with tobacco funds being used as a backup.

** Over 53% of the City's General Fund expenditures are for Public Safety services such as Police and Fire. The FY03 Transfer includes \$407,880 that was used as part of the FY04 General Fund carryover.

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Tobacco Settlement Revenue Program Descriptions

Healthy Kids (6 to 6 Program)

Community & Economic Development

The "6 to 6" Extended School Day Care Program within the Community Services Division of Community & Economic Development Department (C&ED) uses tobacco settlement revenue for the following purposes: 1) Expand program services to previously unfunded schools; 2) Increase the capacity of existing 6 to 6 programs that are funded by the City; and 3) Provide funding for tobacco-related curriculum, awareness and education for all City-funded 6 to 6 programs.

The City of San Diego's 6 to 6 Extended School Day Program works with various community agencies to provide Alcohol, Tobacco and Other Drug (ATOD) trainings. Some of these agencies and trainings include:

- American Cancer Society and American Heart Association "Teens Kick Ash!"
- American Lung Association "T.A.T.U." Teens Against Tobacco Use
- CNYD - Community Network for Youth Development
- 5 A Day Power Play
- Harmonium, Inc., "Kick Butts"
- Say, San Diego – Just Say I Know How, A-STEP After School Tobacco Education
- San Diego's "6 to 6" – Tobacco Prevention Curriculum Program
- YMCA of San Diego County – PRYDE Program, Anti-Tobacco Curriculum

San Diego's "6 to 6" programs provide on-going ATOD trainings at each site.

Parks/Multiple Species Conservation Program (MSCP)

The Healthy Kids Park and Open Space Fund is shared between the Park and Recreation Department and the Planning Department (MSCP-related programs). The Healthy Kids Park and Open Space Fund was approved by the City Council on February 9, 1999 (Resolution R-291262) in order to allocate a portion of the annual tobacco settlement funding to improve the City's park and open space needs, including the MSCP.

Park and Recreation

In Fiscal Year 2004 the Park and Recreation Department expended tobacco settlement revenue for the following purposes: 1) To increase hours and staffing for Recreation Centers to provide additional opportunities and programs for youths; 2) Provide funding for MSCP management as required by the MSCP Implementing Agreement; and 3) To increase hours and staffing at the Colina Del Sol and Memorial Pools to provide year-round operations. These programs provide enhanced opportunities and programs for the City's youth in order to promote healthy lifestyle choices.

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In past years, tobacco settlement revenue was also used for playground repair, and to provide funding for Community Matching Funds and matching grants programs, such as the acquisition ~~of land for park and recreation purposes. These programs have been modified, and are no longer~~ funded with tobacco settlement revenue.

Planning

The Multiple Species Conservation Program aims to preserve a network of habitat and open space, protect bio-diversity, and enhance the region's quality of life. In Fiscal Year 2004 the Planning Department used tobacco settlement revenue for the following MSCP purposes: 1) To provide funding for monitoring and implementation as mandated by the Implementing Agreement; 2) To provide funding for the management of MSCP-related grants; and 3) To increase support for staff that implements elements of the MSCP work program, including land acquisition, which are mandated by the Implementing Agreement. In the past, tobacco settlement revenue has also provided funding for appraisal and acquisition of land in accordance with the Mayor's Goal #10: Complete MSCP Open Space Acquisition.

Enforcement

Per Mayor Golding's memorandum to the City Council on February 2, 1999, a portion of the tobacco settlement revenue was to be used for enforcement of the City's anti-smoking and anti-substance abuse laws. Currently, the Police Department and the City Attorney are allocated tobacco settlement revenue for this purpose.

Police

The San Diego Police Department has received tobacco settlement funds since Fiscal Year 2000. The Department expends the money for juvenile services, a youth conference, the annual School Safety Patrol Summer Camp Program, which includes an anti-tobacco/substance abuse component, and for anti-smoking videos.

City Attorney

The City Attorney's Office uses tobacco settlement revenue to partially fund the position of one Deputy City Attorney, who is dedicated full-time to conveying the City's anti-smoking and crime deterrent messages to students through the Peer Court Program. The Peer Court Program is a joint partnership between the City of San Diego, the City Attorney's Office, the San Diego Police Department, Office of the Public Defender, and the San Diego Unified School District, to reduce juvenile crime by keeping first-time non-violent juvenile offenders between the ages of 13 and 17 from committing future crimes, and deterring non-offenders from criminal conduct. Peer Court targets juveniles who violate the City's tobacco laws; there is at least one such offender in every court session.

Main Library Reserve

Mayor Golding, in her February 2, 1999 memorandum to the City Council, recommended that tobacco settlement revenue be used to fund the new Main Library instead of revenue from the

Transient Occupancy Tax (TOT). The memo also presented two other options, B and C, for providing funding for the main library. The City Council approved and adopted Mayor Golding's ~~memo on February 9, 1999, but opted instead to implement option B as the means for funding~~ the new main library. Under option B, TOT revenue would be used to fund the new main library, with tobacco settlement revenue used as a backup source of revenue in direct proportion to any unavailability of TOT.

The current library system financing plan uses a combination of TOT and tobacco settlement revenue. For example, in Fiscal Year 2004, \$1.4 million in tobacco settlement funding is being used, and in Fiscal Year 2005 \$2.4 million in tobacco settlement funding is planned.

General Fund Reserve

In the past, tobacco settlement revenue has been used to make contributions to the General Fund Reserve. This reserve, also known as the Unappropriated Reserve, was established to fund major General Fund emergencies and to assist in maintaining a favorable bond rating. Specific expenditures are not budgeted within this reserve, which is mandated to be maintained at a minimum of 3% of the General Fund by Council Policy 100-20. In Fiscal Year 2003, over \$2.3 million in tobacco settlement funding was contributed to the General Fund Reserve.

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**San Diego Model Ordinance Requiring a
Tobacco Retailer License
(with Annotations)**

April 14, 2004

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The Technical Assistance Legal Center is a project of the Public Health Institute.
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AN ORDINANCE OF THE [CITY / COUNTY] OF [____]
~~REGARDING THE LICENSURE OF TOBACCO RETAILERS~~
 AND AMENDING THE [____] MUNICIPAL CODE

The [City Council of the City / Board of Supervisors of the County] of [____] does ordain as follows:

|| COMMENT: This is introductory boilerplate language that should be adapted to the conventional form used in the jurisdiction.

SECTION I. FINDINGS. The [City Council of the City / Board of Supervisors of the County] of [____] hereby finds and declares as follows:¹

WHEREAS, state law prohibits the sale or furnishing of cigarettes, tobacco products and smoking paraphernalia to minors, as well as the purchase, receipt, or possession of tobacco products by minors (Cal. Pen. Code § 308); and

WHEREAS, state law requires that tobacco retailers check the identification of tobacco purchasers who reasonably appear to be under 18 years of age (Bus. & Prof. Code § 22956) and provides procedures for using persons under 18 years of age to conduct onsite compliance checks of tobacco retailers (Cal. Bus. & Prof. Code § 22952); and

WHEREAS, state law requires that tobacco retailers post a conspicuous notice at each point of sale stating that selling tobacco products to anyone under 18 years of age is illegal (Cal. Bus. & Prof. Code § 22952, Cal. Pen. Code § 308); and

WHEREAS, state law prohibits the sale or display of cigarettes through a self-service display and prohibits public access to cigarettes without the assistance of a clerk (Cal. Bus. & Prof. Code § 22962); and

WHEREAS, state law prohibits the sale of "bidis" (hand-rolled filterless cigarettes imported primarily from India and Southeast Asian countries) except in adult-only establishments (Cal. Pen. Code § 308.1); and

WHEREAS, state law prohibits the manufacture, distribution, or sale of cigarettes in packages of less than 20 and prohibits the manufacture, distribution, or sale of "roll-your-own" tobacco in packages containing less than 0.60 ounces of tobacco (Cal. Pen. Code § 308.3); and

WHEREAS, state law prohibits public school students from smoking or using tobacco products while on campus, while attending school-sponsored activities, or while under the supervision or control of school district employees (Cal. Educ. Code § 48901(a)); and

¹ Each of the authorities identified in this model ordinance can be obtained from the Technical Assistant Legal Center at the address, phone, and e-mail address indicated on the first page of this model ordinance.

~~[WHEREAS,] [discuss any local ordinances regulating the sale of tobacco products, such as a complete self-service display ban, a ban on cigarette vending machines, or a conditional use permit or other land use restriction on tobacco sales] [: and]~~

WHEREAS, despite these restrictions, minors continue to obtain cigarettes and other tobacco products at alarming rates. Each year, an estimated 924 million packs of cigarettes are consumed by minors 12 to 17 years of age, yielding the tobacco industry \$480 million in profits from underage smokers;² and

WHEREAS, in a 2001 California youth-buying survey, 17.1% of retailers surveyed unlawfully sold tobacco product to minors;³ and

WHEREAS, in a 2004 San Diego County youth-buying survey, 33.4% of retailers surveyed unlawfully sold tobacco products to minors; and

WHEREAS, 88% of adults who have ever smoked tried their first cigarette by the age of 18 and the average age at which smokers try their first cigarette is 14;⁴ and

WHEREAS, [City / County] has a substantial interest in promoting compliance with federal, state, and local laws intended to regulate tobacco sales and use; in discouraging the illegal purchase of tobacco products by minors; in promoting compliance with laws prohibiting sales of cigarettes and tobacco products to minors; and finally, and most importantly, in protecting children from being lured into illegal activity through the misconduct of adults; and

WHEREAS, the California courts in such cases as *Cohen v. Board of Supervisors*, 40 Cal. 3d 277 (1985), and *Bravo Vending v. City of Rancho Mirage*, 16 Cal. App. 4th 383 (1993), have affirmed the power of the [City / County] to regulate business activity in order to discourage violations of law; and

WHEREAS, a requirement for a tobacco retailer license will not unduly burden legitimate business activities of retailers who sell or distribute cigarettes or other tobacco products to adults. It will, however, allow the [City / County] to regulate the operation of lawful businesses to discourage violations of federal, state, and local tobacco-related laws; and

² DiFranza & Librett, *supra*, at 1106 n.2.

³ Cal. Dep't Health Servs., Tobacco Control Section, *Youth Tobacco Purchase Survey 2001* (forthcoming 2002) (upon release, survey results are expected to be available at <http://www.dhs.ca.gov/tobacco/html/pressreleases.htm>). Note that the youth sales rate cited above is a statewide average. Youth sales rates for a particular city or county may be significantly higher. Check with your local tobacco prevention project, usually located in the county Health Department, to see if local figures are available.

⁴ U.S. Dep't of Health & Human Servs. et al., *Preventing Tobacco Use Among Young People: A Report of the Surgeon General* 67 (1994).

WHEREAS, 65% of California's key opinion leaders surveyed support implementation of ~~tobacco-licensing requirements.~~⁵

NOW THEREFORE, it is the intent of the [City Council / Board of Supervisors], in enacting this ordinance, to encourage responsible tobacco retailing and to discourage violations of tobacco-related laws, especially those which prohibit or discourage the sale or distribution of tobacco products to minors, but not to expand or reduce the degree to which the acts regulated by federal or state law are criminally proscribed or to alter the penalty provided therefore.

COMMENT: These findings lay out the policy rationale for the ordinance. California Penal Code section 308(e) preempts local laws that are "inconsistent" with the state law that prohibits tobacco sales to minors and provides civil and criminal penalties. By regulating businesses in order to discourage violations of federal or state law but not increasing the penalties established by such laws, the City or County is staying within the safe harbor created by the *Cohen and Bravo Vending* cases. *Cohen* upheld San Francisco's regulation of escort services to discourage prostitution, while *Bravo Vending* upheld Rancho Mirage's ban on tobacco vending machines, which was intended to discourage tobacco sales to minors. In addition to the *Cohen* and *Bravo Vending* cases, helpful authorities are *EWAP, Inc. v. City of Los Angeles*, 97 Cal. App. 3d 179, 191 (1979) (regulation of adult arcade to discourage lewd conduct), and *Brix v. City of San Rafael*, 92 Cal. App. 3d 47, 53 (1979) (regulation of massage parlors to discourage prostitution).

SECTION II. SEVERABILITY. If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this Ordinance, or its application to any person or circumstance, is for any reason held to be invalid or unenforceable, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases of this Ordinance, or its application to any other person or circumstance. The [City Council / Board of Supervisors] of the [City / County] of [_____] hereby declares that it would have adopted each section, subsection, subdivision, paragraph, sentence, clause or phrase hereof, irrespective of the fact that any one or more other sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases hereof be declared invalid or unenforceable.

COMMENT: This is standard language. Often this "boilerplate" is found at the end of an ordinance but its location is irrelevant. It is placed here to simplify updating cross-references should the City or County wish to customize this model by adding or deleting sections.

⁵ Cal. Dep't of Health Servs., Tobacco Control Section, *Independent Evaluation of the California Tobacco Control Prevention & Education Program: Wave 2 Data, 1998, Wave 1 & Wave 2 Data Comparisons 1996-1998 (2001)*, available at <http://www.dhs.ca.gov/tobacco/documents/Wave2IEreport.pdf> (last updated April 24, 2001).

SECTION III. [Article / Section] of the [_____] Municipal Code is hereby amended to
 read as follows:

Sec. [____ (*1)]. **DEFINITIONS.** The following words and phrases, whenever used in this article, shall have the meanings defined in this section unless the context clearly requires otherwise:

(a) "Department" means [____].

|| COMMENT: This term is used in the ordinance to refer to the City or County agency charged with issuing licenses and possibly enforcing the ordinance. In some areas, more than one agency may be involved in administering and/or enforcing the ordinance.

(b) "Person" means any natural person, partnership, cooperative association, private corporation, personal representative, receiver, trustee, assignee, or any other legal entity.

|| COMMENT: The Municipal Code likely contains a definition of "person" and, if so, the definition provided here can be omitted.

(c) "Proprietor" means a Person with an ownership or managerial interest in a business. An ownership interest shall be deemed to exist when a Person has a ten percent (10%) or greater interest in the stock, assets, or income of a business other than the sole interest of security for debt. A managerial interest shall be deemed to exist when a Person can or does have, or can or does share, ultimate control over the day-to-day operations of a business.

|| COMMENT: This term is defined in attempt to prevent sham ownership changes made for the sole purpose of evading the license penalty provisions.

(d) "Tobacco Product" means: (1) any substance containing tobacco leaf, including but not limited to cigarettes, cigars, pipe tobacco, snuff, chewing tobacco, dipping tobacco, bidis, or any other preparation of tobacco; and (2) any product or formulation of matter containing biologically active amounts of nicotine that is manufactured, sold, offered for sale, or otherwise distributed with the expectation that the product or matter will be introduced into the human body but does not include any product specifically approved by the Federal Food and Drug Administration for use in treating nicotine or tobacco product dependence.

|| COMMENT: This definition is based upon a common definition used in many tobacco control laws but also includes non-tobacco nicotine products such as nicotine water and nicotine lollipops.

(e) "Tobacco Paraphernalia" means cigarette papers or wrappers, pipes, holders of smoking materials of all types, cigarette rolling machines, and any other item designed for the smoking or ingestion of Tobacco Products.

COMMENT: This definition draws on the language of Penal Code section 308(a). Whether to regulate sales of Tobacco Paraphernalia in addition to sales of Tobacco Products is a question of local policy. If only tobacco sales are to be regulated, both this definition and the words "Tobacco Paraphernalia" as used in the operative sections below, should be omitted.

(f) "Tobacco Retailer" means any Person who sells, offers for sale, or does or offers to exchange for any form of consideration, tobacco, Tobacco Products, or Tobacco Paraphernalia; "Tobacco Retailing" shall mean the doing of any of these things. This definition is without regard to the quantity of tobacco, Tobacco Products, or Tobacco Paraphernalia sold, offered for sale, exchanged, or offered for exchange.

COMMENT: These definitions only reach persons who sell Tobacco Products or exchange them for something of value. Tobacco-related products, such as t-shirts and the like, are not included.

Sec. [____ (*2)]. REQUIREMENT FOR TOBACCO RETAILER LICENSE.

(a) It shall be unlawful for any Person to act as a Tobacco Retailer without first obtaining and maintaining a valid Tobacco Retailer's license pursuant to this [article / chapter] for each location at which that activity is to occur.

(b) No license may issue to authorize Tobacco Retailing at other than a fixed location. For example, Tobacco Retailing by Persons on foot and Tobacco Retailing from vehicles are prohibited.

(c) No license may issue to authorize Tobacco Retailing at any location that is licensed under state law to serve alcoholic beverages for consumption on the premises (e.g., an "on-sale" license issued by the California Department of Alcoholic Beverage Control) and no license may issue to authorize Tobacco Retailing at any location offering food for sale for consumption by guests on the premises. For example, Tobacco Retailing in bars and restaurants is prohibited.

(d) The license fee established pursuant to Section [____ (*6)] confers paid status upon a license for a term of one year. Each Tobacco Retailer shall apply for the renewal of his or her Tobacco Retailer's license no later than thirty (30) days prior to expiration of the payment term.

COMMENT: The payment term of licenses is a matter for local policy. If this ordinance is adopted as an amendment to a local, regulatory business license ordinance, many administrative details, such as the term of licenses, may be covered by the existing license ordinance. It may be best to

|| rely on those provisions to avoid unintended inconsistencies
 || ~~that can complicate enforcement of the ordinance.~~

(e) Nothing in this [article / chapter] shall be construed to grant any Person obtaining and maintaining a Tobacco Retailer's license any status or right other than the right to act as a Tobacco Retailer at the location in the [City / County] identified on the face of the license. For example, nothing in this [article / chapter] shall be construed to render inapplicable, supercede, or apply in lieu of any other provision of applicable law, including, without limitation, any condition or limitation on smoking in enclosed places of employment made applicable to business establishments by California Labor Code section 6404.5.

|| COMMENT: Subsection (c) makes explicit the fact that granting a Tobacco Retailer license does not affect a Tobacco Retailer's status under other local, state, or federal law. For example, obtaining a local license does not transform a business into a "retail or wholesale tobacco shop" in which smoking is allowed pursuant to California Labor Code 6404.5(d)(4).

Sec. [____ (*3)]. **APPLICATION PROCEDURE.** Application for a Tobacco Retailer's license shall be submitted in the name of each Proprietor proposing to conduct retail tobacco sales and shall be signed by each Proprietor or an authorized agent thereof. It is the responsibility of each Proprietor to be informed of the laws affecting the issuance of a Tobacco Retailer's license. A license that is issued in error or on the basis of false or misleading information supplied by a Proprietor may be revoked pursuant to Section [____ (*9)(c)] of this [article / chapter]. All applications shall be submitted on a form supplied by the Department and shall contain the following information:

1. The name, address, and telephone number of each Proprietor.
2. The business name, address, and telephone number of the single fixed location for which a Tobacco Retailer's license is sought.
3. The name and mailing address authorized by each Proprietor to receive all license-related communications and notices (the "Authorized Address"). If an Authorized Address is not supplied, each Proprietor shall be understood to consent to the provision of notice at the business address specified in subparagraph 2. above.
4. Whether or not any Proprietor has previously been issued a license pursuant to this [article / chapter] that is, or was at any time, suspended or revoked and, if so, the dates of the suspension period or the date of revocation.
5. Such other information as the Department deems necessary for the administration or enforcement of this ordinance.

COMMENT: Again, if the ordinance is included in a comprehensive licensing ordinance, this section might be omitted. The fourth requirement is intended to allow the administrative agency to identify applicants who have previously had licenses suspended or revoked. The fifth requirement authorizes administrative and enforcement staff to establish application forms that require various types of information to aid effective operation and enforcement of the ordinance. For example, it may be useful to include in the application a statement, perhaps made under penalty of perjury, that the applicant has familiarized himself or herself with the legal requirements applicable to tobacco retailing. It would, of course, be helpful to provide information about those requirements to those who apply.

Sec. [____ (*4)]. ISSUANCE OF LICENSE. Upon the receipt of an application for a Tobacco Retailer's license and the license fee, the Department shall issue a license unless substantial record evidence demonstrates one of the following bases for denial:

(a) the application is incomplete or inaccurate; or

(b) the application seeks authorization for Tobacco Retailing by a Proprietor for which or whom a suspension is in effect pursuant to Section [____ (*8)] of this [article / chapter]; or by a Proprietor which or who has had a license revoked pursuant to Section [____ (*9)(a)(4)] of this [article / chapter]; or

(c) the application seeks authorization for Tobacco Retailing at a location for which a suspension is in effect pursuant to Section [____ (*8)] of this [article / chapter]; or at a location which has had a license revoked pursuant to Section [____ (*9)(a)(4)] of this [article / chapter] provided, however, this subparagraph shall not constitute a basis for denial of a license if the applicant provides the [City / County] with documentation demonstrating by clear and convincing evidence that the applicant has acquired or is acquiring the premises or business in an arm's length transaction. For the purposes of this subparagraph, an "arm's length transaction" is defined as a sale in good faith and for valuable consideration that reflects the fair market value in the open market between two informed and willing parties, neither under any compulsion to participate in the transaction. A sale between relatives, related companies or partners, or a sale for the primary purpose of avoiding the effect of the violations of this [article / chapter] that occurred at the location, is presumed not to be an "arm's length transaction";

(d) the application seeks authorization for Tobacco Retailing that is prohibited pursuant to Section [____ (*2)] of this [chapter / article (e.g., mobile vending)], that is unlawful pursuant to this Code [[chapter / article] [____] (e.g., the zoning code)], or that is unlawful pursuant to any other local, state, or federal law.

|| COMMENT: Although a license technically should not be issued if prohibited elsewhere in the City or County code, it is valu-

able to make note of what other tobacco ordinances staff should take into consideration. For example, if the code contains a zoning or conditional use permit ordinance affecting tobacco retailers, the licensing ordinance should refer to it directly to assist staff in implementing the ordinance.

This section makes issuance of licenses a mandatory, ministerial duty of staff unless record evidence can be developed supporting one of the four justifications for denial of the ordinance can be shown. "Substantial record evidence" is oral or written evidence within the City's or County's records that is sufficiently reliable and persuasive that a court will accept it. The usual test is that it must be the kind of evidence upon which responsible people rely in making important business, personal and other decisions.

It is lawful to establish a discretionary license system, where licenses are issued only after some form of hearing (which could be a "paper" hearing conducted by mail) and individually tailored conditions of approval are imposed. However, given the likely volume of such licenses in most communities, this ordinance takes a less ambitious approach and will require less staff time and money to implement.

Providing record evidence of the bases for denial under subsections (b) and (c) should be simple and can take the form of a memo from planning staff or from staff members who maintain the records of suspensions and revocations. Proving that an application is incomplete also will be simple. Proving that an application contains false information will be more difficult and greater attention to the quality of evidence (i.e., its persuasiveness and reliability) is therefore appropriate. If oral evidence is to be relied upon, it should be reduced to writing, as by a staff memo to the file that reports the oral complaint of a resident.

Sec. [____ (*5)]. **OTHER REQUIREMENTS AND PROHIBITIONS.**

(a) **DISPLAY OF LICENSE.** Each license shall be prominently displayed in a publicly visible location at the licensed premises.

(b) **POSITIVE IDENTIFICATION REQUIRED.** No Person shall engage in Tobacco Retailing without first examining the identification of the purchaser, if the purchaser reasonably appears under the age of twenty-seven (27) years old, and confirming that the proposed sale is to a purchaser who is at least the minimum age in state law for being sold the Tobacco Product or Tobacco Paraphernalia.

(c) **MINIMUM AGE FOR PERSONS SELLING TOBACCO.** No Person shall engage in Tobacco Retailing if the Person is younger than the minimum age in state law for being sold or for possessing any Tobacco Product.

Sec. [____ (*6)]. **FEES FOR LICENSE.** The fee to issue or to renew a Tobacco Retailer's license shall be established by resolution of the [City Council / Board of Supervisors]. The fee

shall be calculated so as to recover the total cost of both license administration and license enforcement, including, for example, issuing the license, administering the license program, retailer education, retailer inspection and compliance checks, documentation of violations, and prosecution of violators, but shall not exceed the cost of the total program. All fees shall be used to fund the program. Fees are nonrefundable except as may be required by law.

COMMENT: California Government Code sections 66016-66018.5 govern the establishment of fees; other local requirements established by charter or ordinance, may apply as well. The Government Code requires a noticed public hearing. This ordinance provides that fees are established by resolution both because the Government Code permits the use of a resolution rather than an ordinance and because many cities and counties adopt an annual master fee-setting resolution that can be amended to include this fee.

It is lawful to impose a fee on applicants in an amount sufficient to offset the cost of the entire tobacco enforcement program of the locality under such cases as *Sinclair Paint Co. v. Board of Equalization*, 15 Cal. 4th 866 (1997).

The license fee can incorporate the cost of enforcing all tobacco laws because a violation of any tobacco-related law is a basis for revocation or suspension of a license. For example, if the enforcing agency is the police department, a new officer could be hired and the cost of hire included in the fee so long as the efforts of a full-time officer (or the equivalent number of staff hours) are used to monitor and enforce tobacco laws in connection with monitoring compliance with the license.

One approach to setting the fee is to estimate the cost of administration and enforcement of the licensing program. For example, estimate the number of stores in the city or county and how much time it will take a government employee to review applications and issue licenses. The fraction of that employee's time can then be used to calculate the annual cost, based on the cost of that employee's salary, benefits, and his or her share of administrative overhead such as rent, insurance, legal advice, etc. As for enforcement costs, calculate, for example, how many yearly inspections are necessary (ideally one to four per retailer) and how much staff time each inspection demands. It is important to document these calculations for two reasons: to provide support for the fee amount; and, to refute a potential legal challenge claiming the fee exceeds the cost of administration and enforcement. Please contact TALC for an example of a fee calculation performed by the county of Santa Barbara prior to passage of that county's licensing ordinance.

Note that the City or County can avoid having to calculate staff time by mandating that a set amount of time, e.g., 15 hours a week, shall be spent on license enforcement activity (including enforcing the tobacco laws that give rise to a license violation). New staff could be hired to meet this mandate and the cost can be incorporated into the license fee.

Sec. [(*7)]. **LICENSES NONTRANSFERABLE.** A Tobacco Retailer's license is nontransferable. If the information required in the license application pursuant to Section [(*3)], items 1, 2, or 3, changes, a new Tobacco Retailer's license is required before the business may continue to act as a Tobacco Retailer. For example, if a Proprietor to whom a license has been issued changes business location, that Proprietor must apply for a new license prior to acting as a Tobacco Retailer at the new location. Or if the business is sold, the new owner must apply for a license for that location before acting as a Tobacco Retailer.

Sec. [(*8)]. **LICENSE VIOLATION AND COMPLIANCE MONITORING.**

(a) **VIOLATION OF TOBACCO-RELATED LAWS.** It shall be a violation of a Tobacco Retailer's license for a licensee or his or her agent or employee to violate any local, state, or federal tobacco-related law.

COMMENT: This provision makes licensing an effective tool for comprehensively enforcing tobacco control laws. A city or county can use the suspension/revocation provisions of a license to encourage compliance with all tobacco-related laws, even laws that the city or county might not otherwise have authority to enforce, such as the Stop Tobacco Access to Kids Enforcement Act ("STAKE Act," Bus. & Prof. Code § 22958). This provision also gives a city or county additional enforcement options: enforcing an underlying tobacco law, such as not selling tobacco to minors (Penal Code 308); and/or discouraging illegal behavior by suspending or revoking a license. Losing the right to sell tobacco will likely be a bigger financial deterrent than an occasional fine imposed under other laws.

(b) **LICENSE COMPLIANCE MONITORING.**

(1) Compliance with this [chapter / article] shall be monitored by [enforcement agency]. Any peace officer or code enforcement official also may enforce this [chapter / article].

(2) The [enforcement agency] shall check the compliance of each Tobacco Retailer at least [] times per twelve (12) month period and shall conduct additional compliance checks as warranted within that period so that the total number of compliance checks equals no less than an average of [] checks per Tobacco Retailer. The compliance checks shall be conducted to determine, at a minimum, if the Tobacco Retailer is complying with tobacco laws regulating underage sales. The [enforcement agency] shall use youth decoys and comply with protocols for the compliance checks developed in consultation with the San Diego County Department of Health and Human Services and the San Diego District Attorney. When appropriate, the compliance checks shall determine compliance with other tobacco-related laws.

COMMENT: It is important to designate who will monitor license compliance, or in other words, who will enforce the license.

Unless an enforcing authority is explicitly set forth, the license may not be enforced at all. ~~Multiple agencies may be given authority to enforce the license, but it is probably a good idea~~ to provide some clear division of authority between them to discourage conflicts and situations in which each agency defers to the other and neither enforces the ordinance.

It is also a good idea to recommend a minimum number of compliance checks to ensure that at least some level of enforcement will take place. One to four checks per year may be appropriate depending on the number of Tobacco Retailers in a community and the level of funding established through the license fee.

(3) The [City / County] shall not enforce any tobacco-related minimum-age law against a Person who otherwise might be in violation of such law because of the Person's age (hereinafter "youth decoy") if the potential violation occurs when:

(i) the youth decoy is participating in a compliance check supervised by a peace officer or a code enforcement official; or

(ii) the youth decoy is participating in a compliance check funded in part by the San Diego County Department of Health and Human Services or funded in part, either directly or indirectly through sub-contracting, by the California Department of Health Services.

Sec. [____ (*9)]. SUSPENSION OR REVOCATION OF LICENSE.

(a) SUSPENSION OR REVOCATION OF LICENSE FOR VIOLATION. In addition to any other penalty authorized by law, a Tobacco Retailer's license shall be suspended or revoked if the Department finds, after notice to the licensee and opportunity to be heard, that the licensee or his or her agents or employees has or have violated the requirements or prohibitions of this [article / chapter] including the conditions of the license imposed pursuant to Section [____ (*8)] above.

(1) Upon a finding by the Department of a first license violation within any sixty-month (60) period, the license shall be suspended for thirty (30) days unless, at the election of the Tobacco Retailer, the Tobacco Retailer pays a penalty of [two thousand five hundred dollars (\$2500)]. The payment of a penalty in lieu of suspension does not expunge the violation and the violation will be counted for the purposes of a future finding that a second or subsequent violation has occurred.

(2) Upon a finding by the Department of a second license violation within any sixty-month (60) period, the license shall be suspended for ninety (90) days.

~~(3) Upon a finding by the Department of a third license violation within any sixty-month (60) period, the license shall be suspended for one (1) year.~~

(4) Upon a finding by the Department of a fourth license violation within any sixty-month (60) period, the license shall be revoked and the Proprietor or Proprietors who had been issued the license shall never again be issued a Tobacco Retailer's license pursuant to this [chapter / article].

COMMENT: Stronger or more lenient penalties may be provided as a matter of local policy. For example, in lieu of an initial 30-day suspension, the retailer could be required to provide training for all sales employees on all tobacco-related laws, and techniques to ensure future compliance with the law. If such an option is offered, the training plan would need to be pre-approved by the Department; the training would need to be completed within a time specified by the Department; and, after the training, the retailer would have to submit satisfactory evidence within a specified period of time that the training described in the training plan was completed. Alternatively, some local ordinances direct enforcement staff simply to warn retailers after the first violation.

This model ordinance does not impose fines upon Tobacco Retailers for license violations related to state tobacco laws in order to avoid potential preemption by state law. Penal Code section 308(a) prohibits the sale of tobacco to minors and establishes criminal and civil penalties for violation. Penal Code section 308(e) prohibits local governments from passing ordinances "inconsistent" with this law. Therefore, local governments may not be able to increase the fines for illegal sale of tobacco to minors but they may provide for suspension of a retailer's license to encourage compliance with Penal Code section 308.

By providing mandatory penalties, this model does not provide any discretion to enforcement staff. This lack of discretion makes for a simple ordinance and standardized, even-handed enforcement. If discretion with respect to penalties is desired, the ordinance must state the standard by which that discretion is to be exercised. One formula might be: "the license shall be suspended for up to 90 days, depending on the willfulness of the violations and the need to deter further violations." Note, too, that these penalty provisions do not prevent the use of other legal tools, such as criminal prosecution under Penal Code section 308, enforcement of the Stop Tobacco Access to Kids Enforcement Act ("STAKE Act," Bus. & Prof. Code § 22950-22962), or the administrative and judicial remedies discussed below.

This ordinance provides a broad range of enforcement devices, ranging from suspension and revocation of licenses to fines, criminal law suits, civil law suits, etc. It is unlikely that every remedy would be used in a single case, although multiple remedies might be used against a particularly egregious violator over time. If more than one penalty is to be imposed, attention should be given to the possibility of a violation of the double jeopardy clauses of the state and federal constitu-

~~tions, which forbid multiple criminal sanctions for a single misdeed. That doctrine does not, however, prevent both civil and criminal remedies for a single misdeed. Thus someone convicted of violating Penal Code section 308 could also face the civil penalty of license suspension or revocation.~~

(5) A Tobacco Retailer with a suspended or revoked license:

(i) shall remove all Tobacco Products and Tobacco Paraphernalia from public view; and

(ii) shall not display any advertisement relating to Tobacco Products or Tobacco Paraphernalia that promotes the sale or distribution of such products at the Tobacco Retailer location or that would lead a reasonable consumer to believe that such products can be obtained at the Tobacco Retailer location;

(iii) except that for a first [or second] suspension within any sixty-month (60) period, instead of complying with subsections (i) and (ii) above, the Tobacco Retailer may elect to post a clear and legible sign at each point of sale and at every public entrance stating in seventy two (72) point type or larger: "TOBACCO PRODUCTS NOT FOR SALE because this store has violated a public health law regulating tobacco" and such signs must be present and remain free of obstructions for the entire duration of the suspension period.

(b) **SUSPENSION OF LICENSE FOR FAILURE TO PAY RENEWAL FEE.** A Tobacco Retailer's license that is not timely renewed pursuant to Sec. [____ (*2)(d)] shall automatically be suspended by operation of law. If not renewed, a license shall be automatically revoked two (2) years after the renewal date. To reinstate the paid status of a license that has been suspended due to the failure to timely pay the renewal fee, the proprietor must:

(1) submit the renewal fee plus a reinstatement fee of ten percent (10%) of the renewal fee; and

(2) submit a signed affidavit affirming that the Proprietor has not sold any Tobacco Product or Tobacco Paraphernalia during the period the license was suspended for failure to pay the renewal fee.

COMMENT: This provision closes loopholes that can occur if a license is not renewed during the course of a license violation investigation or suspension period.

(c) **REVOCAION OF LICENSE ISSUED IN ERROR.** A Tobacco Retailer's license shall be revoked if the Department finds, after notice and opportunity to be heard, that one or more of the bases for denial of a license under Section [____ (*4)] existed at the time application was made or at anytime before the license issued. The revocation shall be without prejudice to the filing of a new application for a license.

COMMENT: This provision allows the City or County to revoke a license that should not have been granted but it is not a punitive revocation like subsection (a) above. For example, if information provided in an application turns out to have been incorrect, the license can be revoked. Another example is if a zoning ordinance prohibits Tobacco Retailing in certain locations, but staff issue a license by mistake, the license can be revoked.

(d) APPEAL OF SUSPENSION OR REVOCATION. A decision of the Department to revoke or suspend a license is appealable to the [____] and must be filed with the [____] within ten days of mailing of the Department's decision. An appeal shall stay all proceedings in furtherance of the appealed action. A suspension or revocation pursuant to Section [____(*9)(b)] is not subject to appeal.

COMMENT: Some appeal right should be provided to ensure due process and to permit the City or County to correct any errors that may occur in the administrative process. How many levels of appeal to permit, which officer or body should hear the appeal, what officer should receive the notice of appeal, the time limits to set, etc. are local policy questions. If the ordinance is adopted as an amendment to a broader licensing ordinance, appeal provisions with all the necessary details will very likely be provided by existing ordinances. Local governments would do well to trigger the 90-day statute of limitations for legal challenges by complying with the notice requirements of Code of Civil Procedure 1094.6(f) in making and giving notice of determinations under this ordinance.

Sec. [____ (*10)]. ADMINISTRATIVE FINE.

(a) GROUNDS FOR FINE. In addition to any other remedies available at law or in equity, if the Department finds, based on substantial evidence, that any unlicensed Person, including a Person named on a revoked or suspended license, has engaged in Tobacco Retailing in violation of Section [____(*2)] of this [article / chapter], the Department shall fine that Person as follows:

1. a fine not exceeding one hundred dollars (\$100) for a first violation in any twelve-month (12) period; or
2. a fine not exceeding two hundred dollars (\$200) for a second violation in any twelve-month (12) period; or
3. a fine not exceeding five hundred dollars (\$500) for a third or subsequent violation in any twelve-month (12) period.

Each day that such a Person engages in Tobacco Retailing shall constitute a separate violation.

COMMENT: This provision provides a mandatory remedy against a Tobacco Retailer who sells Tobacco Products without a license or with a suspended license. Selling without a license or with a suspended license may be the most serious violation of the ordinance, as it undermines the entire licensing scheme. It may be possible to pursue these violators through criminal prosecution under the criminal penalty section set out below in Section (*11). Again, if the retailer is selling Tobacco Products to a minor, the City or County may still choose to rely on other tools, such as criminal prosecution under Penal Code section 308, enforcement of the Stop Tobacco Access to Kids Enforcement Act ("STAKE Act," Bus. & Prof. Code § 22950-22962). Higher or lower fines may be provided as a matter of local policy, although fines cannot be so high as to be confiscatory or to violate the Eighth Amendment prohibition on "excessive fines and forfeitures." Note that if in Section (*11)(b), the City or County chooses to allow the prosecution of violations as infractions, the fines imposed in this section can not be greater than the maximum fine for an infraction. Cal. Gov. Code § 53069.4. This model incorporates the current maximum limits. See Cal. Gov. Code § 25132. The last sentence of this section commonly appears in City and County codes and may be unnecessary.

(b) NOTICE OF VIOLATION. A notice of violation and of intent to impose a fine shall be personally served on, or sent by certified mail to, the Person or Persons subject to the fine. The notice shall state the basis of the Department's determinations and include an advisement of the right to request a hearing to contest the fine. Any request for a hearing must be in writing and must be received by the Department within ten (10) calendar days of personal service of the notice on the Person or Persons subject to a fine or within fifteen (15) calendar days if the Person or Persons subject to a fine are served by mail.

(c) IMPOSITION OF FINE. If no request for a hearing is timely received, the Department's determination on the violation and the imposition of a fine shall be final and payment shall be made within thirty (30) calendar days of written demand made in the manner specified above for a notice of violation. If the fine is not paid within that time, the fine may be collected, along with interest at the legal rate, in any manner provided by law. In the event that a judicial action is necessary to compel payment of the fine and accumulated interest, the Person or Persons subject to the fine shall also be liable for the costs of the suit and attorney's fees incurred by the [City / County] in collecting the fine.

(d) NOTICE OF HEARING. If a hearing is requested pursuant to subsection (b) of this section, the Department shall provide written notice, within forty-five (45) calendar days of its receipt of the hearing request, to the Person or Persons subject to a fine of the date, time, and place of the hearing in the manner specified above for a notice of violation.

(e) HEARING DECISION. The hearing officer shall render a written decision and findings within twenty-(20)-working-days-of-the-hearing. Copies of the decision and findings shall be provided to the Person or Persons subject to a fine in the manner specified above for a notice of violation.

(f) FINALITY OF THE HEARING OFFICER'S DECISION. The decision of the hearing officer shall be the final decision of the [City / County].

(g) APPEAL TO SUPERIOR COURT OF LIMITED JURISDICTION. Notwithstanding the provisions of section 1094.5 or section 1094.6 of the Code of Civil Procedure, within twenty (20) days after personal service of the hearing officer's decision and findings, or within twenty-five (25) days if served by mail, any Person subject to a fine may seek review of the hearing officer's decision and findings by the superior court of limited jurisdiction. A copy of the notice of appeal to the superior court shall be timely served in person or by first-class mail upon the Department by the contestant. The appeal shall be heard de novo, except that the contents of the Department's file in the case shall be received in evidence. A copy of the records of the Department of the notices of the violation and of the hearing officer's decision and findings shall be admitted into evidence as prima facie evidence of the facts stated therein.

COMMENT: As discussed below, cities and counties have the power to impose fines administratively only if the ordinance expressly provides for effective judicial review. As an alternative to subsection (g), a City or County may choose to simply authorize a writ of administrative mandamus under Code of Civil Procedure sections 1094.5 and 1094.6. The language provided in subsection (g) is intended to shorten the time in which to seek judicial review and to specify other procedural details and is substantially similar to Gov't Code Section 63069.4(b)(1).

(h) FAILURE TO PAY FINE. If no timely notice of appeal to the superior court is filed, or the Department is not timely served with a copy of a notice of appeal, the hearing officer's decision and findings shall be deemed confirmed and the fine shall be collected pursuant to subsection (c) of this Section.

COMMENT: Cities and counties have the power to impose fines administratively in addition to civil actions for injunction or nuisance abatement and criminal prosecutions for violations of the Code. To do so, however, it is necessary to satisfy the requirements of *McHugh v. Santa Monica Rent Control Board*, 49 Cal. 3d 348 (1989), which the procedures spelled out in this section are designed to do. This language of this section is substantially similar to the provisions of Gov't Code Sections 53069.4(c) and (d).

Sec. [____ (*11)]. ENFORCEMENT. The remedies provided by this [article / chapter] are cumulative and in addition to any other remedies available at law or in equity.

COMMENT: The following section is designed to offer a variety of options to the drafter and to the enforcing agency. Drafters may choose to include some or all of these options. Once the ordinance is enacted, the enforcing agency will have the discretion to choose which enforcement tools to use. As a practical matter, these enforcement options would not be applied simultaneously. Additional comment regarding considerations about the choice of remedy appears above with respect to administrative fines.

(a) Causing, permitting, aiding, abetting, or concealing a violation of any provision of this [article / chapter] shall constitute a violation.

COMMENT: This is standard language that is typically included in a City or County Code and may be omitted if duplicative of existing Code provisions.

(b) Violations of this [article / chapter] may, in the discretion of the [City Prosecutor / District Attorney], be prosecuted as infractions or misdemeanors.

(c) Any Person violating this [article / chapter] is subject to a civil action brought by the [City Prosecutor / District Attorney] or the [City Attorney / County Counsel], punishable by:

1. a fine not less than one hundred dollars (\$100) and not exceeding five hundred dollars (\$500) for a first violation in any twelve-month (12) period; or
2. a fine not less than five hundred dollars (\$500) and not exceeding one thousand dollars (\$1,000) for a second violation in any twelve-month (12) period; or
3. a fine not less than one thousand dollars (\$1,000) and not exceeding three thousand dollars (\$3,000) for a third or subsequent violation in any twelve-month (12) period.

COMMENT: The amount of the fines may be adjusted. This model presents two choices: (1) enforcement under the code section for an infraction (like a parking ticket); and (2) enforcement under the code section for a misdemeanor (like vandalism). Other possibilities exist. For instance, the ordinance could be enforced under the code section for the City's or County's "wobbler" ordinance, which gives the prosecutor discretion whether to charge a particular violation as an infraction or a misdemeanor. Or it could be enforced using a sliding scale that provides for infraction enforcement in most cases, with misdemeanor enforcement against repeat violators. Fines and other criminal penalties are established by the Penal Code and are typically reflected in the general punishments provision of a local code. Note that if violations are defined as infractions, the fines imposed under Section (*10)(a) cannot exceed the relatively low penalties authorized by the Penal Code for infractions. Accordingly, it may be

~~preferable to define these violations as misdemeanors and rely on a "wobbler" ordinance to authorize prosecution as an infraction in appropriate cases.~~

(d) Violations of this [article / chapter] are hereby declared to be public nuisances.

COMMENT: By expressly stating that violations are public nuisances, this provision allows enforcement of the ordinance via the administrative nuisance abatement procedures commonly found in municipal codes. In addition, together with the provision for injunctive relief below, this provision authorizes a civil public nuisance action as an enforcement device.

(e) Violations of this [article / chapter] are hereby declared to be unfair business practices and are presumed to at least nominally damage each and every resident of the community in which the business operates.

COMMENT: This express statement serves to emphasize the fact that a violation of this ordinance can be enforced using Business & Professions Code section 17200.

(f) In addition to other remedies provided by this [article / chapter] or by other law, any violation of this [article / chapter] may be remedied by a civil action brought by the [City Attorney / County Counsel], including, for example, administrative or judicial nuisance abatement proceedings, civil or criminal code enforcement proceedings, and suits for injunctive relief.

COMMENT: It is common to provide that the local government's lawyers may go to court to seek injunctions and other penalties in addition to fines. The express provision for injunctive relief lowers the showing required to obtain a preliminary or permanent injunction as described in *IT Corp. v. County of Imperial*, 35 Cal. 3d 63 (1983).

Think carefully about the nuisance abatement procedure you choose. A local government may provide for treble damages for the second or subsequent nuisance abatement judgment within a two-year period, as long as the ordinance is enacted pursuant to Government Code section 38773.5. Treble damages are not available, however, under the alternative nuisance abatement procedures in Government Code section 38773.1 and Health & Safety Code section 17980. Government Code section 38773.5 (authorizing treble damages) establishes a procedure for nuisance abatement where the cost of the abatement can be collected via the property tax roll as a special assessment against the property on which the violation occurs.

(g) Any Person acting for the interests of itself, its members, or the general public may bring an action for injunctive relief to prevent future such violations or to recover such actual damages as he or she may prove.

~~COMMENT: In addition to the remedies provided above, local governments may wish to provide for enforcement by private parties. If so, the right of private action must be expressly provided. Note that injunctions are issued only by the Superior Court of unlimited jurisdiction and, practically speaking, require an attorney. The language in this section providing who may bring an action tracks the language of California Business & Professions code section 17200 and is intended to allow almost anyone to act as a private enforcement officer.~~

Sec. [____ (*12)]. PRIVATE ENFORCEMENT.

COMMENT: For further explication of the rationale behind and potential impact of this provision, please see TALC's memorandum entitled "The Benefits of Adding a Private Right of Action Provision to Local Tobacco Control Ordinances" available from TALC at (510) 444-8252 or by e-mail at talc@phi.org or from our website at <http://talc.phi.org>.

(a) Any Person acting for the interests of itself, its members, or the general public (hereinafter "the Private Enforcer") may bring a civil action to enforce this [article / chapter]. Upon proof of a violation, a court shall award the following:

(1) Damages in the amount of either:

(i) upon proof, actual damages; or

(ii) with insufficient or no proof of damages, \$[500] for each violation of this [article / chapter] (hereinafter "Statutory Damages"). Unless otherwise specified in this chapter, each day of a continuing violation shall constitute a separate violation. Notwithstanding any other provision of this chapter, no Private Enforcer suing on behalf of the general public shall recover Statutory Damages based upon a violation of this chapter if a previous claim brought on behalf of the general public for Statutory Damages and based upon the same violation has been adjudicated, whether or not the Private Enforcer was a party to that adjudication.

COMMENT: This provision allows for the collection of damages even if it is difficult or impossible to prove the actual amount of damages that resulted from the given violation. Statutory damages can add up to a substantial sum because each day of a continuing violation counts as a separate violation. However, if an action is brought in small claims court, the total amount of damages sought must fall below \$5,000. So, when considering the amount at which to set statutory damages in a given ordinance, it is worth considering whether a typical case brought under the ordinance will involve a claim for less than \$5,000. Note that this provision protects a retailer from being sued multiple times on behalf of the general public for the same violation.

(2) Restitution of the gains obtained in violation of this [article / chapter].

COMMENT: This provision can prevent a person operating illegally from keeping the profits of the illegal acts. Restitution is a remedy that entails "making good," in that it forces the defendant to give the plaintiff an equivalent value for any loss, damage, or injury. (See 1 Witkin, *Summary 9th Contracts* § 91 (1990).)

(3) Exemplary damages, where it is proven by clear and convincing evidence that the defendant is guilty of oppression, fraud, malice, or a conscious disregard for the public health.

COMMENT: Exemplary damages are also known as "punitive damages." They are designed to punish and deter a defendant in a tort case who has acted in an outrageous manner.

(b) The Private Enforcer may also bring a civil action to enforce this [article / chapter] by way of a conditional judgment or an injunction. Upon proof of a violation, a court shall issue a conditional judgment or an injunction.

COMMENT: In order to get an injunction, a plaintiff would have to sue in another division of superior court and not the small claims division. However, a plaintiff could seek a conditional judgment in small claims court. Note that the difference between an injunction and a conditional judgment is that with the latter, the defendant is not directly ordered to do something (or to refrain from doing something). Rather, the defendant is given a choice between fulfilling certain conditions (e.g., ceasing the illegal conduct) or suffering a different judgment (e.g., paying monetary damages). (See 1 *Consumer Law Sourcebook for Small Claims Court Judicial Officers* (California Department of Consumer Affairs 1996) §§ 12.32-12.34.) A conditional judgment could serve as an alternative to damages or restitution, or it could be in addition to damages or restitution. For example, a small claims court could order some monetary damages along with a conditional judgment giving the defendant a choice between ceasing the violations or paying even more money.

(c) Notwithstanding any legal or equitable bar against a Private Enforcer seeking relief on its own behalf, a Private Enforcer may bring an action to enforce this [article / chapter] solely on behalf of the general public. When a Private Enforcer brings an action solely on behalf of the general public, nothing about such an action shall act to preclude or bar the Private Enforcer from bringing a subsequent action based upon the same facts but seeking relief on its own behalf.

COMMENT: This is an important clause, so exercise care when considering whether to modify or eliminate it. This clause accomplishes two distinct goals:

First, the clause permits a Private Enforcer with a special relationship to a particular defendant to sue the defendant even

though the Private Enforcer might otherwise be prohibited from doing so. Attorneys often refer to such prohibitions as "legal and equitable bars." For example, an employee may be required to arbitrate—not litigate—any employment dispute, such as a dispute involving smoking in the workplace. Under this clause, such an employee may be required to arbitrate any personal claims (e.g., damages for personal injury from secondhand smoke) but can nevertheless sue the employer in court as a representative member of the general public. In such a circumstance, the Private Enforcer could only make the claims that every member of the general public could make (e.g., sue for Statutory Damages on behalf of the general public for the employer's violation of a workplace smoking law).

Second, the clause permits a Private Enforcer who first sues *solely* on behalf of the general public to sue the same defendant later on any personal claims (although such personal claims might still be subject to legal or equitable bars as described above). Normally, repetitive suits based upon essentially the same facts and circumstances are prohibited. Attorneys often use the terms "res judicata," "issue preclusion," and "collateral estoppel" for such prohibitions. Under this clause, however, an employee subjected to smoking in the workplace can first sue her employer *solely* on behalf of the general public, receiving the Statutory Damages amount for each violation. If the employee is made ill by the secondhand smoke, she can sue the employer later for personal injury.

This clause is not intended to modify well established legal rules concerning when a plaintiff may bring personal claims. Rather, it simply incorporates the logical line of reasoning that when a Private Enforcer brings a claim *solely* on behalf of the general public, the plaintiff is acting as a "private attorney general;" thus, the existence of personal claims is irrelevant and such claims are unaffected.

(d) Nothing in this [article / chapter] shall prohibit the Private Enforcer from bringing a civil action in small claims court to enforce this [article / chapter], so long as the amount in demand and the type of relief sought are within the jurisdictional requirements of small claims court as set forth in California Code of Civil Procedure section 116.220.

COMMENT: This clause is legally superfluous, but it serves to flag for plaintiffs and courts that small claims court would be an appropriate forum for resolving disputes under this provision.

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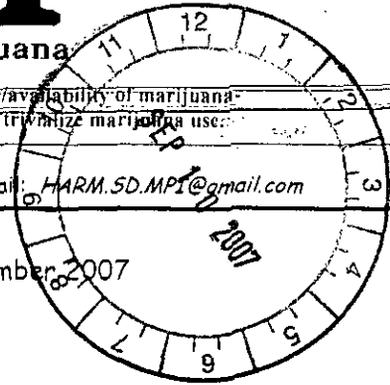
000159

HARM

Health Advocates Rejecting Marijuana

The goal of HARM is to decrease the accessibility of marijuana and accessibility/availability of marijuana-related paraphernalia and to minimize messages that encourage, normalize or trivialize marijuana use.

Mailing Address: PO Box 2448, Del Mar, CA 92014 Fax: (858) 755-6598 Email: HARM.SD.MPI@gmail.com



- Facilitator: Judi Strang,
San Dieguito Alliance
- Policy Co-Chair: Rebecca Hernandez,
SWACC (Safety Wellness Advocacy
Community Coalition)
- Policy Co-Chair: Lisa Silverman,
Social Advocates for Youth
- Media Co-Chair: Dannah Hosford,
North Inland Community Prevention
Program
- Media Co-Chair: Victoria Carlborg,
Tri-City Prevention
Collaborative/Vista Community Clinic
- HARM Membership:
Balboa Park Collaborative
- Californians for Drug Free Youth
- Coronado SAFE Foundation
- County of San Diego, HHS
Alcohol and Drug Services
- East County Collaborative Project
- El Cajon CASA
- Institute for Public Strategies
- Mid City CAN
- National Marijuana Initiative
- Ninth District PTA
- North City Prevention Coalition
- North Inland Community
Prevention Program
- Palavra Tree
- Phoenix House
- Safety Wellness Advocacy
Community Coalition
- San Dieguito Alliance
for Drug Free Youth
- San Diego County Office Education /
Friday Night Live
- San Diego County Youth
Leadership Project
- San Diego Prevention Coalition
- South Bay Partnership
- Telesis
- Tri-City Prevention Collaborative/
Vista Community Clinic
- US Drug Enforcement Administration
- Vitality San Diego

City Council, City of San Diego 10 September 2007
202 "C" Street, San Diego, CA 92101

Dear City council members,

HARM (Health Advocates Rejecting Marijuana), a county wide prevention initiative, thanks you for this opportunity to share our concerns regarding the proliferating of headshops in the city of San Diego.

The HARM Initiative was formed in San Diego County in 2004 to address the problem of youth marijuana use. In San Diego County:

- More teens smoke marijuana than cigarettes;
- Marijuana use is the number one reason youth enter treatment;
- 90% of all marijuana use begins before age 18, 10% before the age of 12.

The goal of HARM is to reduce marijuana use by youth, to lessen the problems associated with the accessibility and use of marijuana by youth, and to change the perception that marijuana is harmless.

Over the last year, the community based organizations involved with HARM have been contacted by numerous members of the community concerning headshops in their neighborhoods where youth and others can purchase drug paraphernalia. Sometimes these establishments are near schools and other youth frequented areas.

The number of headshops in San Diego county is 93, 48 of which are in the city of San Diego.

On the reverse side of this letter is a list of the headshops in the City of San Diego. Of special note are the headshops that are **bolded and blue**; they are the new headshops within the last 16 months. San Diego has 22 new headshops since April of 2006. This proliferation of headshops in San Diego is alarming.

HARM and its member prevention agencies support the tobacco retailers licensure ordinance presented to city council today as a good first step in addressing the serious problem of retailers selling drug paraphernalia.

With regard,

Judi Strang, Faciliator for HARM
judistrang@earthlink.net 858.382.6598 cell

San Diego Headshops - 'T' indicates the headshops that sell tobacco also

000160

NAME ADDRESS CITY ZIP % Paraphernalia Tobacco

BEACH AREAS

Highland Smoke Shop	4799 Voltaire St	San Diego	92107	95	T
The Black	5017 Newport Ave	San Diego	92107	30	T
Visions	5038 Newport Ave	San Diego	92107	90/50	T
Crossroads Smokeshop	972 Garnet	San Diego	92109	20	T
Godfather	1138 Garnet Ave	San Diego	92109	50/90	T
The Funky Monkey	1346 Garnet	San Diego	92109	90	O
PB Smokeshop	1449 Garnet	San Diego	92109	70	T
Da Glassworks	1438 Garnet Ave	San Diego	92109	90	O
High Road	1463 Garnet Ave	San Diego	92109	50/90	T
Gypsy Corner/Love Boutiques and Smoke Shop	1570 Garnet	San Diego	92109	65	O
420 Smokeshop	1753 Garnet Ave	San Diego	92109	99	O
Smokeshop	705 Turquoise St	San Diego	92109	80	T
Illusions	841 Turquoise	San Diego	92109		
Get It On Shoppe	3219 Mission Blvd	San Diego	92109	99	T
Freak Factory	3742 Mission Blvd	San Diego	92109	75	T
Saco's Smoke Shop	3837 W Mission Bay Drive	San Diego	92109	50	T
Visions	3148 Midway Dr	San Diego	92110	75	T
Midway Cigar Lounge Smoke	3555 Rosecrans #105B	San Diego	92110	30	T
Smoke N Stuff	2372 Barnett	San Diego	92110	90	T

CITY AREA

ABC Smokeshop	4101 Market	San Diego	92102	assessed	
Inhale	805 F Street	San Diego	92101	95	T
Inhale	410 University Avenue	San Diego	92103	60	T
Puff N Stuff	3837 Park Blvd	San Diego	92103	75	O
Universal Smoke Shop	550 University Ave	San Diego	92103	60	T
Franky's	4506 30th Street	San Diego	92104	60/75	T
Up in Smoke	2516 University Avenue	San Diego	92104	95	O
Reggae World	2540 University Avenue	San Diego	92104		
420 Smoke Shop	2551 University Ave	San Diego	92104	60	O
Puffs and Snuffs	2849 University	San Diego	92104	50	O
Smokers Choice/Discount Cigarettes	3018 University Avenue	San Diego	92104	20	T
Smoke for Less	4640 University Avenue	San Diego	92105	10	T
USA Depot Discount Tobacco Shop	4726 University Ave	San Diego	92105	40	T
Smoke N Stuff	2372 Barnett	San Diego	92110	90	T
Illusions	5525 Clairemont Mesa	San Diego	92111	35	T
Aztec Smokeshop	5969 El Cajon Blvd	San Diego	92115	70	T
The High Road	6166 El Cajon Blvd.	San Diego	92115	90	T
Puff N Stuff	6663 El Cajon Blvd	San Diego	92115	80/90	T
Glass Act	6737 El Cajon Blvd	San Diego	92115	95	O
Smoke and Save 420 Smokeshop	6957 El Cajon Blvd	San Diego	92115		
Up in Smoke	7200A El Cajon Blvd	San Diego	92115		
Woody's	3214 Adams Avenue	San Diego	92115	90	T
U Save Smokeshop & Cellular	3452 Adams Avenue	San Diego	92115	25/40	T
Smoke and Go	6519 University Ave	San Diego	92115	75/99	T
Eddies Cigarettes Cheaper	5065A Clairemont Dr	San Diego	92117	15	T
Smoker's Outlet	3093 Clairemont Dr	San Diego	92117	15	T
Smoke N Stuff	5945 Mission Gorge Rd #2	San Diego	92120	80	O
Up in Smoke	6904 Miramar Road #209	San Diego	92121	95	O
Cigarettes Depot	Sandrock Road	San Diego	92123	30	T

Blue headshops new since April 2006