

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.

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.