



MEMORANDUM

DATE: July 30, 2013

TO: Standing Ordinance Committee

FROM: Winnie Cai, Deputy City Attorney

SUBJECT: **Tobacco Licensing and Second Hand Smoke Ordinances**

On May 7, 2013, the City Council heard an item on whether the City should adopt local tobacco retailer licensing and second hand smoking regulations, separate from state regulations that already exist in these areas. The City currently does not have local ordinances on the issues. Council voted to have the Ordinance Committee explore the item further.

History of Tobacco Retailer Licensing Regulations

- 2002-2009: City had County of Santa Barbara's ("County") version of ordinance
- Program was called Tobacco Prevention and Settlement Program (TPSP)
- County administered TPSP in City for free – gathered data, conducted 15 license suspension hearings with City retailers
- 38 tobacco retailers in City
- City collected \$30 per retailer

History of Second Hand Smoking Regulations

- 2002-2009: City had County version of ordinance
- No smoking in County buildings and businesses open to the public and 20 feet from them
- No County enforcement for City
- Second hand smoking regulations are typically self-enforced

The first question is whether ordinances should be adopted on tobacco retailer licensing and second hand smoke. The staff report for the Council meeting discusses the pros and cons of adopting and not adopting an ordinance on both issues. In addition, the staff report provides the legal background and existing laws on the issues. (The staff report is attached as Attachment 1.)

The second question is: If the City wishes to adopt one or both ordinances, what should be the content of each ordinance? What type of requirements should there be? Charts outlining plausible requirements for both issues have been created to help the Ordinance Committee answer these broad questions. (The tobacco licensing chart is attached as Attachment 2. The second hand smoking chart is attached as Attachment 3.)

Once the questions in both charts are answered, staff will return to the Ordinance Committee with draft ordinances.

Attachment 1



TO: Mayor and Councilmembers

FROM: Tim W. Giles, City Attorney

CONTACT: Winnie Cai, Deputy City Attorney

SUBJECT: Initiation of Municipal Ordinances to Regulate Tobacco Retailer Licensing and Second Hand Smoke

RECOMMENDATION:

Consider staff report, deliberate and determine whether to initiate and authorize staff to develop draft ordinances to: (1) require tobacco retailers located within the City of Goleta ("City") to obtain a license; and, (2) prohibit smoking in various places within the City.

BACKGROUND:

Local governments may pass an ordinance to require tobacco retailers to obtain a license in order to prevent the sale of tobacco to minors. The City currently does not have an ordinance requiring tobacco retailers to obtain a license specifically to sell tobacco products. The City's regulation over tobacco retailers involves requiring them to obtain a business license. (Goleta Municipal Code, § 5.01.110.) The City was recently requested by Santa Barbara County ("County") staff to adopt a version of the County's current tobacco licensing ordinance, which has been amended since 2002, and participate in its enforcement program for \$379 per retailer per year. The City has 38 tobacco retailers located within its limits.

In addition, local governments may adopt laws to prevent and reduce second hand smoke. The City currently does not have an ordinance on second hand smoke. The State has some limited regulations in place. County staff has also requested the City to adopt its version of second-hand smoke ordinances regulating smoking in public places, places of employment and recreational areas.

DISCUSSION:

When the Council acts as the legislative body, it exercises discretion to adopt ordinances which effectuate the policy goals of the City. The threshold step now before

the Council is to briefly consider some of the primary policy arguments for and against the proposed regulation to determine whether the City Council desires staff and the Ordinance Committee to spend time and resources in further exploring the policy considerations and developing a draft tobacco licensing ordinance.

Laws Regulating Tobacco Sales

State law prohibits the sale of tobacco to minors in a variety of ways. This staff report discusses the state laws directly prohibiting the sale of tobacco products to minors and requiring tobacco retailers to obtain a license.

Sales to Minors

The Penal Code prohibits the sale of tobacco products to minors. A violation may constitute a misdemeanor and is punishable by a fine of \$200 for the first offense, \$500 for the second offense and \$1,000 for the third offense. There is no look-back period, which is the time period upon which an offense will stay on record to determine whether a subsequent offense will be counted as a second or third offense. A city attorney has authority to enforce this section by bringing a civil action against a violator.

The Business and Professions Code also prohibits the sale of tobacco to minors in what is commonly known as the Stop Tobacco Access to Kids Enforcement Act ("STAKE Act"). Civil penalties against any person, firm or corporation are: (1) \$400 to \$600 for the first violation; (2) \$900 to \$1,000 for the second violation; (3) \$1,200 to \$1,800 for the third violation; (4) \$3,000 to \$4,000 for a fourth violation and (5) \$5,000 to \$6,000 for a fifth violation. The look-back period is five years.

While the State Department of Public Health has the primary duty to enforce the STAKE Act, city attorneys can also prosecute violations through an administrative adjudication process.

A violation of the Penal Code and STAKE Act cannot be enforced using both regulations. It must be one or the other. In addition, civil penalties under the STAKE Act may be imposed only on the retailer and not the employees of the retailer. If an employee and retailer were involved in a violation of tobacco laws, the employee can be penalized under the Penal Code while the owner can be penalized under the STAKE Act.

Retailer Licensing

State law requires tobacco retailers to obtain a state license. A retailer must pay a one-time license fee of \$100, timely renew the license at no cost annually or pay a \$100 reinstatement fee if not timely renewed. Any transgression of this law could result in suspension or revocation of the license. The State Board of Equalization is charged with the enforcement of the State's licensing regulations. Therefore, the City cannot enforce the State's tobacco licensing laws.

More relevantly, State law permits cities and counties to enact local tobacco retail licensing ordinances and suspend and revoke a local license for violation of any state tobacco control law.

The County adopted a tobacco retailer licensing program applicable in the unincorporated area of the County by ordinance in 2001 and amended it in 2010 and 2012. Under the current County program, a retailer is required to obtain a license at an annual fee of \$409, which, according to the County's Fee Study, covers the actual cost of administrating the licensing program, including issuance of the licenses, investigations and the administrative enforcement and adjudication of violations.

Violations of this ordinance are penalized in the following ways:

Look back period	5 years
1st Violation	<ul style="list-style-type: none"> • 30 day suspension; or • Negotiated 15 day suspension, at least \$1,000 fine and an admission of the violation, or • Appeal Hearing*
2nd Violation	<ul style="list-style-type: none"> • 90 day suspension; or • Negotiated 45 day suspension, at least \$5,000 fine and an admission of the violation; or • Appeal Hearing*
3rd Violation	1 year revocation of license

* Health Officer must award 30 day suspension if evidence proves a tobacco-related law was violated.

If a city within the County adopts a similar ordinance requiring a tobacco retailer to obtain a license within the city's limits, the city could contract with the County for the County to enforce the city's ordinance at a cost of \$379 per retailer. The cost to enforce the ordinance for cities is \$30 less than that for the County because the cities bear the administrative cost of collecting the fee and issuing the license, which presumably would be included in a city's fee study justifying the license cost if the city decides to go this route.

In a negotiated settlement of a suspension in which a fine is paid, the County proposes to remit the amount of the fine to the city.

Compliance monitoring would be done by the County Sheriff who would check on a tobacco retailer one to three times per twelve-month period. The Sheriff, at his discretion, may check more or less often, depending on a retailer's compliance history.

Also of note is the County's ordinance which prohibits the issuance of a license to any new retailers located within 1,000 feet of a school. Existent retailers may continue to operate with a license. In the City, there is only one tobacco retailer located within 1,000 feet of a school.

Alternatives

1. Take no action.

The benefit of this alternative is no City resources have to be expended to initiate new regulation. In addition, redundancy of State law is avoided. State law already prohibits the sale of tobacco to minors and requires tobacco retailers to obtain a license. Moreover, the City already requires all businesses, including tobacco retailers, to obtain a license for \$101 per year and to pay a \$15 annual renewal fee.

The drawback of taking no action is violators of State law within the City may not be prosecuted at all or as swiftly as desired by the City. According to the County, State enforcement of State law on this issue is inadequate and underfunded.

Another consequence of not having a local licensing ordinance is the City lacks the authority to penalize tobacco retailers for a broad range of activities prohibited under State law. Currently, the City has the authority to penalize a tobacco retailer for failure to obtain a business license. With a local license regulation, the City can penalize retailers for transgression of all State regulations on tobacco. While a City can enforce State law alone, enforcement of a local regulation is more practical and cost effective. (See discussion below.)

2. Direct staff to enforce existing State laws.

The benefit of this alternative is no City resources have to be expended to initiate new regulation and redundancy of State law would be avoided. The drawback of this alternative is local enforcement of existing State law is cumbersome and can be costly.

Currently, to enforce State law prohibitions to sales to minors, a City must bring a "civil action" against a violator. A "civil action" typically means the filing of a lawsuit in superior court, conducting discovery and reaching a final decision through a trial. This route is costly and time consuming. One legal question that arises is whether imposing a penalty and providing for an appeal through the City's administrative citation process constitutes a "civil action" under section 308 of the Penal Code. If the Council decides to direct staff to pursue this alternative, further research would need to be done to determine this legal question. Cost recovery of enforcement is also limited given the civil penalties that can be imposed: \$200 for the first offense, \$500 for the second offense and \$1,000 for the third offense. The Penal Code is silent as to what penalty can be imposed after the third offense.

To enforce the STAKE Act, a local government must issue a violation and prosecute the violation through its administrative adjudicatory process. Cost recovery of enforcement is also limited: (1) \$400 to \$600 for the first violation; (2) \$900 to \$1,000 for the second violation; (3) \$1,200 to \$1,800 for the third violation; (4) \$3,000 to \$4,000 for a fourth violation and (5) \$5,000 to \$6,000 for a fifth violation.

As for the State's retailer licensing regulations, the City has no authority to enforce these.

3. Direct staff to draft a local licensing ordinance and conduct its own enforcement.

The drawback of a local licensing ordinance is that it would be redundant of State law and, to a certain extent, the City's requirement of a business license.

The benefits of having a local licensing ordinance is the City can make the enforcement of State law less cumbersome because a City can impose a penalty for violation of any State tobacco regulation. With its own local licensing regulation, the City may suspend or revoke a local license upon a retailer's transgression of any State or local regulation on tobacco. While an administrative adjudicatory process still needs to be provided in the case where a retailer wants to appeal a suspension or revocation, this is less cumbersome than prosecuting a civil action in superior court as would be the case for enforcement of the Penal Code.

While prosecution of violations of the STAKE Act would involve the same process as would the prosecution of a violation of a local licensing ordinance, a local licensing ordinance is more cost effective. The latter provides a mechanism for the City to recuperate its costs upfront and more easily. The license fee could be set at a rate that will cover all administrative costs of issuing the license, obtaining compliance and prosecuting violations. A local ordinance could also provide for additional fines that may be imposed upon a violator's transgression of the local and State regulations on tobacco. In contrast, the costs of prosecution of a STAKE Act violation are recovered only after an administrative adjudicatory process has been provided and final decision reached, from which victory is not guaranteed.

If the City adopts this alternative, it needs to conduct a study on the costs of administering and enforcing such a program. In creating its own licensing regulation, the City may also adopt parts of the County's licensing regulations where it sees fit.

The benefit of having the City assume its own enforcement is the City can directly control when and how its ordinance is enforced. The City already has protocols in place to enforce the business license ordinance against any retailer. Monitoring the compliance of tobacco retailers to ensure they have a tobacco retailer license would become an integral part of the business license protocols in place. Therefore, if City staff conducts its own monitor and enforcement, action can be taken swiftly without reliance on the County.

4. Direct staff to draft a local licensing ordinance and contract with the County for enforcement.

The benefits and drawbacks of a local licensing ordinance are explained above. The benefit of contracting with the County for enforcement is the County already has all the operations in place to do so. The County has developed educational materials and protocols for undercover buy operations, imposition of penalties, settlement and appeals. The County's study shows that it would cost the County \$379 per retailer per year in order to enforce a city's tobacco retailer license ordinance. In short, the City would need only to draft its ordinance and conduct a fee study on the cost of issuing the licenses and collecting the fees.

Another benefit of County enforcement is any fine paid by a retailer in lieu of suspension would be remitted to the City. However a legal question arises over whether a local government has the authority to settle a suspension by imposing a fine, shortening the suspension and requiring the violator to admit guilt, which are the settlement conditions provided for under the County ordinance. If Council votes for this alternative, more research would need to be conducted to ensure legality of this step.

The drawback of contracting for County enforcement is the City would not have direct control over compliance and enforcement. According to the County's program, the County Sheriff, as opposed to staff or Sheriff deputies acting as City police, monitors 69 retailers in the unincorporated areas of the County. There are 38 tobacco retailers in Goleta. It is not clear what priority the City's retailers would have in terms of monitoring by the Sheriff, undercover buy operations and enforcement.

Miscellaneous

As of the date of this staff report, no city had contracted with the County for enforcement of its tobacco retailer license ordinance. Carpinteria is the closest to doing so as its tobacco retailer license ordinance went to its first reading on April 22, 2013, and the Carpinteria City Council voted to hold its second reading on May 13, 2013. Solvang had already considered and voted not to adopt the County's tobacco retailer licensing program in 2012. Buellton has been approached but has not considered the issue in a public meeting. According to the County, it was not going to approach Santa Barbara until the outcomes in Goleta and Carpinteria were reached. The County has also not approached Lompoc, Santa Maria and Guadalupe on this issue.

Laws Regulating Second-Hand Smoke

State Law

State law currently prohibits smoking in most enclosed spaces in places of employment. Within government property, smoking is prohibited by employees and members of the public inside buildings owned or leased by the state, a county, a city, a city and county, or a California Community College district or within 20 feet of a main exit, entrance, or operable window of these buildings. Smoking is also prohibited in public school facilities. Local agencies may adopt stricter local smoking ordinances.

Any violation of laws governing smoking in the workplace is an infraction, punishable by a fine not to exceed \$100 for the first violation, \$200 for a second violation within one year and \$500 for a third and for each subsequent violation within one year. These laws are enforced by local law enforcement agencies, including local health departments.

County Regulations

The County regulates smoking in government buildings, public places, places of employment and recreational areas. With the exception of recreational areas, the County prohibits smoking in public and private businesses and within 20 feet of them. This prohibition applies in certain designated non-enclosed areas, such as the County courts and jail.

The County defines recreational areas as any outdoor area, owned or operated by the County, open to the general public for recreational purposes, regardless of any fee or age requirement, including, but not limited to: parklands, including portions of parks, such as picnic areas, playgrounds, or sports fields; walking paths; gardens; hiking trails; bike paths; horseback riding trails; athletic fields; skateboard parks; amusement parks; and beaches. No state ban currently exists for state parks, beaches and the like.

In order to prevent the littering of cigarette butts, the County's ordinance states that no ashtray or other smoking or tobacco waste receptacle can be placed in any recreational area. Smoking is allowed in camping parks and within 30 feet of any park employee residence. State law does not cover these areas. State law prohibits smoking within 25 feet of playgrounds and tot lots.

Enforcement of second hand smoke laws are traditionally done through self-enforcement. Local law enforcement and local health departments would not take any special efforts to enforce second hand smoking laws. However, County staff advised that it may be able to provide decals and certain signage if the City decides to pursue its own second hand smoking regulation.

Alternatives

1. Take no action.

The benefit of this alternative is no City resources have to be expended to initiate new regulation. In addition, redundancy of State law is avoided. The drawback of this option is the City misses out on an opportunity to enact stricter laws to protect its citizens from second hand smoke and prevent littering of cigarette butts in its recreational areas.

2. Direct staff to draft second hand smoking ordinance.

The benefit is the City would have the opportunity to enact stricter laws to protect its citizens from exposure to second hand smoke. Prohibiting smoking specifically in recreational areas could prevent forest fires and littering of cigarette butts in natural areas. The consequence of this option is the City must expend resources to create this ordinance.

If Council chooses this alternative, staff requests identification of a list of restrictions that should be studied for inclusion in the proposed ordinance.

CONCLUSION:

Initiation of a municipal code ordinance is a discretionary policy consideration for the City Council. The Council may determine that this matter is not a priority policy goal for the City and not pursue any further action at this time or it may refer the matter to staff and the Ordinance Committee to do the necessary investigation and documentation to support consideration of an appropriate policy and regulatory municipal code ordinance.

FISCAL IMPACTS:

Tobacco Retail License Ordinance – staff anticipates less than 50 hours of staff time to draft and present an ordinance for Council consideration.

Second Hand Smoking – staff anticipates less than 30 hours of staff time to draft and present an ordinance for Council consideration.

Any proposed ordinance will be presented in an attempt to provide full cost recovery. However, the ordinances will provide more detailed analysis of the amount of staff time involved and other potential financial impacts.

Legal Review By:

Reviewed By:

Approved By:

Tim W. Giles
City Attorney

Michelle Greene
Administrative Services
Director

Daniel Singer
City Manager

Attachment 2

Tobacco Retail License

	Yes	No
1. Should the City require a license?		
2. Should the City do its own preventive enforcement? 3. (stings, routine checks)		
4. Should the City do its own punitive enforcement? (citation, administrative hearing, etc.)		
5. What should the penalties be?		
Look back period be 5 years?		
1 st violation: - 30 day suspension; or - 15 day suspension, at least \$1,000 fine and admission of violation; or - Appeal hearing		
2 nd violation: - 90 day suspension; or - 45 day suspension, at least \$5,000 fine and admission of violation; or - Appeal hearing		
3 rd violation - 1 year revocation		
6. Should the City contract with the County for preventive and punitive enforcement for \$379/retailer annually?		
7. Should new retailers be prohibited from operating within 1,000 feet of a school? (currently 1 location meeting such criteria)		
8. Should there be a fee?		
9. Should the fee be annual?		
10. Should there be a late fee?		

Attachment 3

Second Hand Smoke

	Yes	No
1. Should the City adopt an ordinance on second hand smoke?		
2. Should smoking be prohibited in all government buildings? (State law already prohibits this)		
3. Should smoking be prohibited within 20 feet of a government exit, entrance or operable window? (State law already prohibits this)		
4. Should smoking be prohibited in all non-enclosed areas owned, leased or administered by the City? (potentially more than 20 feet away from building)		
5. Should smoking be prohibited in the following enclosed public places and non-enclosed public places:		
<p>a. Smoking and the placement of ashtrays/receptacles within 20 feet of any area or building where smoking is prohibited. Except that, 25% of outdoor seating sections of restaurants and 100% of outdoor seating sections of bars may allow smoking with the following conditions:</p> <p>(1) In the case of restaurants, smoking sections must be designated, the entire smoking section must be in the same area, and be located the furthest distance from the restaurant entrance, so as to minimize the chance of smoke entering the restaurant.</p> <p>(2) Smoking in the outdoor seating sections of restaurants or bars may only take place provided that smoke does not enter adjacent worksites or residences. The smoking section of these outdoor areas must be clearly marked with signs.</p>		
b. Buses or other means of public transit, enclosed or not and ticket, boarding and waiting areas of public transit depots, enclosed or not.		
c. Service lines, enclosed or not. (Service line = line at which people wait for or receive service of any kind.)		
d. Enclosed common areas in apartment buildings, condominiums, housing developments, mobile home parks, retirement facilities and nursing homes.		
e. Sports arenas, enclosed or not.		
f. Areas of the lobby in a hotel, motel, or other similar transient lodging establishment.		
g. Meeting and banquet rooms in a hotel, motel, or other transient lodging establishment similar to a hotel or motel, restaurant, or other public convention center, including the corridors and pre-function areas adjacent to		

