

**CITY OF ALBANY
CITY COUNCIL AGENDA
STAFF REPORT**

Agenda Date: January 21, 2009

Reviewed by: BP

SUBJECT: Ordinance No. 09-02 Incorporating Article 5-24 Tobacco Retailer Licensing Program Into Chapter 5 of the Albany Municipal Code and Ordinance No. 09-03 Incorporating Tobacco Retailer Land Use Regulations Into Chapter 20 of the Albany Municipal Code

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PLANNING AND ZONING COMMISSION RECOMMENDATION

That Council approve for First Reading Ordinance No. 09-02 incorporating Article 5-24 Tobacco Retailer Licensing Program into Chapter 5 of the Albany Municipal Code and Ordinance No. 09-03 incorporating Tobacco Retailer Land Use Regulations into Chapter 20 of the Albany Municipal Code.

BACKGROUND

An individual approached the Community Development Department in the spring of 2008, inquiring about opening a tobacco-oriented retail business in an existing building on San Pablo Avenue. In researching the zoning ordinance, staff discovered that tobacco-oriented uses were not specifically mentioned, instead being considered as either a “neighborhood retail” or “community retail” use, both of which would be permitted on San Pablo Ave without discretionary review.

To allow the city to draft regulations for tobacco-oriented retail businesses, an interim urgency ordinance was approved by the City Council on May 19, 2008, establishing a 45-day moratorium on approval of tobacco related retail establishments. On July 3, 2008, the moratorium was extended for a period of 10 months and 15 days to allow staff to identify possible amendments to the municipal code.

The Planning and Zoning Code requires that the Commission initiate amendments to the Planning and Zoning Code by acting on a Resolution of Intention. On November 11, 2008, the Planning and Zoning Commission reviewed the proposed ordinance, provided amendments to the proposed land use regulations, and approved a Resolution of Intention.

DISCUSSION & ANALYSIS

Staff has developed an approach that would regulate both existing and new tobacco related uses with the adoption of two different ordinances. The first ordinance, the “Tobacco Retailer Licensing Program” would create a regulatory system for the licensing of merchants who sell tobacco products, serving to make tobacco retailers more aware and more responsible when selling tobacco products.

As proposed, the Tobacco Retailer License would function as follows:

- Any retail establishment selling Tobacco Products or Tobacco Paraphernalia will be required to obtain a Tobacco Retailer License. The license is good for one year, and has to be renewed annually.
- If the Tobacco Retailer does not violate any of the applicable laws, all they have to do is make sure they properly renew the license every year.
- If the Tobacco Retailer does violate an applicable law, their license can be revoked for a specified period (1st violation – 10 days, 2nd violation – 30 days, etc).

The City of Berkeley adopted a similar licensing program in December 2002, in response to compliance surveys completed in 1996 and 2002 that found 36-38% of tobacco retailers visited selling to minors. By 2004, the rate had dropped to 14%, and in 2006, the rate was 5.8%. Many other jurisdictions have had similar results.

Key elements of the proposed ordinance include:

- The definition of Tobacco Products is written broadly to include nontraditional tobacco and nicotine products such as nicotine water and nicotine lollipops, but without interfering with the FDA’s mission of approving products intended to benefit public health, such as nicotine patches and other nicotine cessation products.
- The definition of Tobacco Retailer reaches only persons who sell Tobacco Products, exchange them for something of value, or distribute samples of Tobacco Products or Tobacco Paraphernalia. As written, the definition includes the distribution of free samples, such as at tobacco company-sponsored “bar nights”. The distribution of other products affiliated with a tobacco company or product, such as t-shirts or coasters, is not included and should not be. due to significant First Amendment issues.
- Each retail location that sells tobacco must have a license, and defines those locations that sell without a license as a public nuisance, which allows use of nuisance abatement ordinance if needed.
- Those that do not have a license or that have their license revoked to remove from public view all tobacco-related products and advertising. This simplifies enforcement as it makes the mere display of tobacco products or tobacco

paraphernalia evidence of sales and does not require enforcement officials to witness an actual sale.

- The “Positive Identification Required” provision as eliminates the excuse that a purchaser arguably looked to be 18 years old. It also allows compliance checks to be conducted with persons who are 18 or 19 years old, which eliminates the need for youth to act as decoys in operations testing a retailer’s compliance with youth access laws.
- The “Minimum Age for Persons Selling Tobacco” provision is similar to alcohol regulations in that you have to be of age to legally possess to be able to sell.
- In the event of a violation, the proposed ordinance uses revocation procedures rather than suspension procedures. A retailer may seek a new license after a set period of time depending upon the number of past violations, but the burden is put on the retailer to seek to sell tobacco again. It also avoids legal uncertainties during a suspension period.

Land Use Regulations for Tobacco Retailers

The portion of the ordinance that would come under the purview of the Planning and Zoning Commission are the proposed land use regulations for significant tobacco retailers. Currently, a retail establishment that focuses on sales of tobacco is classified in the zoning ordinance as either “neighborhood retail” or “community retail” depending on size. If such a development met all other zoning regulations (i.e. design review, parking), the use would be permitted without discretionary review by the City.

Key elements of the proposed ordinance include:

- The proposed definition for “Significant Tobacco Retailer” is the same wording as that included in the Smoking Prohibition ordinance that the City Council recently adopted (Ord #08-03). In addition, the terms “Tobacco Product” and “Tobacco Paraphernalia” are included as terms that relate to tobacco retailers.
- In addition, the proposed amendment would add a land use classification for “Significant Tobacco Retailer” to the “Permitted Land Uses by District” table (20.12.040). The use would be allowed, subject to a conditional use permit, in the Solano Commercial, San Pablo Commercial and Commercial Mixed Use districts.
- The regulations would also require that there be separation between uses and would establish basic operating standards. These standards are based on those created for Medical Marijuana Dispensaries (20.20.110.E), with two primary differences. First, there is no limit on the number of Significant Tobacco Retailers that can be located within the city. Second, the distance from sensitive land uses has been reduced from 1,000 feet to 500 feet.

California Environmental Quality Act (CEQA) Determination

The proposed regulations will not have a direct or indirect physical change in the environment, and thus no further CEQA review is required.

SUSTAINABILITY IMPACT

The proposed ordinances will help ensure that tobacco sales are properly conducted and located away from youth-oriented facilities. In conjunction with other state and local efforts, the proposed regulations will contribute to improving public health, which is one of the principal goals of the City's sustainability programs.

FINANCIAL IMPACT

The Master Fee Schedule will be amended to incorporate the Tobacco Licensing Program. Applicants for a conditional use permit will be required to pay standard processing fees.

Attachments:

1. Ordinance #09-02
2. Ordinance #09-03