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.

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.

[SIGNED]

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[SIGNED]

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