

CITY OF OAKLAND

AGENDA REPORT

FILED
OFFICE OF THE CITY CLERK
OAKLAND

2008 MAR 20 PM 2:36

TO: Office of the City Administrator
ATTN: Deborah A. Edgerly
FROM: Community and Economic Development Agency
DATE: April 1, 2008

RE: Public Hearing and Introduction of An Ordinance Amending the Oakland Planning Code Chapter 17.09 "Definitions" to Define Tobacco Oriented Activities as Those that Sell Any Amount of Tobacco or Tobacco Related Products with the Exception of Stores Over 10,000 Square Feet and Those Associated with a Gasoline Service Station and Amend Chapter 17.134 "Conditional Use Permit Procedures" to Require a Major CUP for Establishing a New Tobacco Oriented Activity

SUMMARY

Vice Mayor Larry Reid has requested staff prepare ordinance amendments to require a conditional use permit for the sales of tobacco and tobacco related products of any quantity in the City of Oakland. Currently, the City of Oakland Planning code only regulates such sales when they comprise more than 20% of the net retail floor area or 75% of the sales receipts. The impetus for this request comes from the high incidence of nuisance activity at small "smoke shops" that are able to comply with the under 20% floor area requirement and thereby escape regulation on location and operational characteristics. The Zoning Update Committee considered the proposed amendments on October 17, 2007 and recommended approval by the Planning Commission. The Planning Commission will consider the text amendments at their March 19, 2008 meeting.

FISCAL IMPACT

This ordinance will have no direct fiscal impact on the City. Existing staffing should be sufficient to process development applications regulated by the zoning code amendments included herein. No additional costs are expected to be incurred by the Development Service Fund.

BACKGROUND

At the request of Councilmember Reid, staff analyzed potential land use problems with smaller tobacco retailers in the City of Oakland. Extensive consultation with the Police Department indicated that smaller sales outlets for tobacco are disproportionately likely to sell untaxed, counterfeit or smuggled tobacco products. They were also more likely to sell individual cigarettes rather than in packs and to sell to minors, both of which are illegal under California

Item: _____
City Council
April 1, 2008

law (Sect. 308.3 PC). The police also indicated that smaller tobacco retailers are more likely to sell paraphernalia that can be used to ingest controlled substances in addition to tobacco.

The proposed text amendments to the Planning Code are a companion piece to the proposed annual tobacco retailer licensing program. That program deals with existing tobacco retailers. These proposed amendments deal with establishment of new tobacco retailers once the moratorium is lifted. The amendments change the regulation of tobacco sales to be substantially similar to the way the City regulates alcohol sales.

KEY ISSUES AND IMPACTS

Two types of outlets are exempt from the general requirement to obtain a major CUP for establishing a tobacco sales outlet. The first is stores over 10,000 square feet in size. Large establishments tend not to cause the level of nuisance activity seen with the smaller outlets. They are often associated with regional or national businesses and often provide their own security for their operations. They also rarely sell paraphernalia and have greater compliance with the prohibition on sales to minors. There is language in the amendments to prevent a large operation from operating as a tobacco only retailer even if it is over 10,000 square feet. No more than 20% of the floor area can be devoted to tobacco sales and no more than 75% of the sales receipts can be derived from the sale of tobacco products if the large store wishes to take advantage of the exemption.

The second outlet type exempt from the proposed requirements is gasoline stations. These outlets tend to have a small kiosk for sales or a convenience market. In the case of convenience markets, they already require a CUP for establishment. If the gasoline station only has a small payment kiosk it limits the amount of tobacco or paraphernalia that can be sold by its size alone. In addition, gasoline stations themselves are highly regulated in terms of where they can locate and the CUP requirements to open a new station. Again, no more than 20% of the floor area can be devoted to tobacco sales and no more than 75% of the sales receipts can be derived from the sale of tobacco products if the gasoline station wishes to take advantage of the exemption.

In both cases, as with all existing outlets of all types, the outlets will be regulated by the annual licensing program. Any new establishments that meet the requirements of the proposed amendments will become part of the annual licensing program.

PROGRAM DESCRIPTION

The proposed amendments in Exhibit A to the attached ordinance will require a major conditional use permit (CUP) for establishing a new tobacco outlet with the exceptions outlined above.

SUSTAINABLE OPPORTUNITIES

No economic, environmental or social equity opportunities have been identified.

DISABILITY AND SENIOR CITIZEN ACCESS

Staff does not anticipate any particular barriers or benefits resulting from the zoning text amendments, regarding access issues for the disabled or for senior citizens.

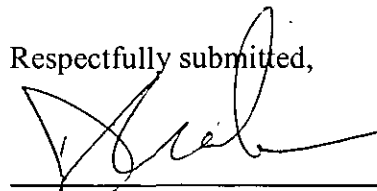
RECOMMENDATION(S) AND RATIONALE

Staff recommends the Council introduce the ordinance amending the Planning Code to increase the regulation of tobacco retailers. These amendments will increase the effectiveness of the annual licensing program by making it difficult to establish new sales outlets. This will increase compliance with the licensing program requirements because operators will not be able to easily shift locations if they are found to be out of compliance with the licensing program requirements. The proposed amendments will also reduce the proliferation of smaller tobacco sales outlets which experience has shown to be nuisance activity generators.

ACTION REQUESTED OF THE CITY COUNCIL

Staff requests that the City Council introduce the attached ordinance amending the Planning Code Sections 17.09 and 17.134.

Respectfully submitted,



Dan Lindheim

Director

Community and Economic Development Agency

Prepared by:

Eric Angstadt, Strategic Planning Manager
Community and Economic Development Agency

APPROVED AND FORWARDED TO THE
CITY COUNCIL:


Office of the City Administrator

Item: _____
City Council
April 1, 2008

INTRODUCED BY COUNCILMEMBER _____

City Attorney

OFFICE OF THE CITY CLERK
CITY OF OAKLAND

2009 MAR 20 PM 2:00

OAKLAND CITY COUNCIL**ORDINANCE No. _____ C.M.S.**

AN ORDINANCE AMENDING THE OAKLAND PLANNING CODE TO:
(1) AMEND CHAPTER 17.09 "DEFINITIONS" TO DEFINE TOBACCO
ORIENTED ACTIVITIES AS THOSE THAT SELL ANY AMOUNT OF
TOBACCO OR TOBACCO RELATED PRODUCTS WITH THE
EXCEPTION OF STORES OVER 10,000 SQUARE FEET OR THOSE
ASSOCIATED WITH A GASOLINE SERVICE STATION; AND (2)
AMEND CHAPTER 17.134 "CONDITIONAL USE PERMIT
PROCEDURES" TO REQUIRE A MAJOR CONDITIONAL USE PERMIT
FOR ESTABLISHING A NEW TOBACCO ORIENTED ACTIVITY

WHEREAS, more than 440,000 people die in the United States from tobacco-related diseases every year, making it the nation's leading cause of preventable death; and

WHEREAS, the World Health Organization (WHO) estimates that by 2030, tobacco will account for 10 million deaths per year, making it the greatest cause of death worldwide; and

WHEREAS, the California Legislature has recognized the danger of tobacco use and has made reducing youth access to tobacco products a high priority, as evidenced by the fact that:

- The Legislature has declared that smoking is the single most significant source of preventable disease and premature death in California (Cal. Health & Safety Code § 118950); and
- 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
- State law requires that tobacco retailers check the identification of tobacco purchasers who reasonably appear to be under 18 years of age (Cal. 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
- State law prohibits the sale of tobacco products and paraphernalia through self-services displays except in adult-only establishments (Cal. Bus. & Prof. Code § 22962); and
- State law prohibits the sale of "bidis" (hand-rolled filter-less cigarettes imported primarily from India and Southeast Asian countries) except in adult-only establishments (Cal. Pen. Code § 308.1); and
- 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, 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 local governments to regulate business activity in order to discourage violations of law; and

WHEREAS, despite the state's efforts to limit youth access to tobacco, minors are still able to access cigarettes, as evidenced by the fact that:

- Nearly half of all youth smokers nationwide buy the cigarettes they smoke, either directly from retailers or vending machines, or by giving money to others to purchase the cigarettes for them; and
- Minors consume 924 million packs of cigarettes each year nationwide, yielding the tobacco industry \$480 million in profits from underage smokers; and
- Most adults who have ever tried smoking have tried their first cigarette under the age of 18, and are on average under the age of 16; and

WHEREAS, research demonstrates that local tobacco retail ordinances dramatically reduce youth access to cigarettes, as evidenced by the following:

- A study of several states found that youth sales of tobacco moved from a baseline of 70% of retailers selling to minors before the adoption of the ordinance to less than 5% in the year and a half after enactment; and
- A study of the effect of licensing and enforcement methods used in the Philadelphia area revealed a decrease in sales to minors from 85% in 1994 to 43% in 1998; and
- A study of several Minnesota cities found that an increased licensing fee in conjunction with strict enforcement of youth access laws led to a decrease from 39.8% to 4.9% in the number of youth able to purchase tobacco; and

WHEREAS, the City 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;

WHEREAS, the City Council finds and determines that the adoption of this ordinance is exempt from CEQA under Sections 15061(b)(3), 15301, 15303 and 15183 of the CEQA Guidelines; now, therefore

THE COUNCIL OF THE CITY OF OAKLAND DOES ORDAIN AS FOLLOWS:

Section 1. The City Council finds and determines the forgoing recitals to be true and correct and hereby makes them a part of this Ordinance.

Section 2. Chapter 17.09 and Chapter 17.134 of the Oakland Planning Code are hereby amended as detailed in **Exhibit A**, attached hereto and hereby incorporated herein by reference.

Section 3. Prior to adopting this Ordinance, the City Council independently finds and determines that this action complies with CEQA because the proposed amendments are exempt under Sections 15061(b)(3) as the proposed amendments will not cause a physical change to the environment. The amendments are also exempt under Sections 15301 and 15303 because they deal with existing structures and/or establishment of new small structures. . As a separate and independent basis, this Ordinance is consistent with CEQA Guidelines section 15183. The Environmental Review Officer is directed to cause to be filed a Notice of Determination with the appropriate agencies.

Section 4. This ordinance shall be effective upon its adoption if it receives at least six affirmative votes; otherwise, it shall be effective upon the seventh day after final adoption.

Section 5. Nothing in this Ordinance shall be interpreted or applied so as to create any requirement, power, or duty in conflict with any federal or state law.

Section 6. If any section, subsection, sentence, clause or phrase of this Ordinance is held to be invalid or unconstitutional, the offending portion shall be severed and shall not affect the validity of the remaining portions which shall remain in full effect.

Section 7. That the record before this Council relating to this Ordinance includes, without limitation, the following:

1. the application, including all accompanying maps and papers;
2. all relevant plans and maps;
3. all final staff reports, decision letters and other documentation and information produced by or on behalf of the City;
4. all oral and written evidence received by the City staff, Planning Commission and City Council before and during the public hearings on the application;
5. all matters of common knowledge and all official enactments and acts of the City, such as (a) the General Plan and the General Plan Conformity Guidelines; (b) Oakland Municipal Code, including, without limitation, the Oakland real estate regulations, Oakland Fire Code; (c) Oakland Planning Code; (d) other applicable City policies and regulations; and, (e) all applicable state and federal laws, rules and regulations.

Section 8. That the custodians and locations of the documents or other materials which constitute the record of proceedings upon which the City Council's decision is based are respectively: (a) Community & Economic Development Agency, Planning & Zoning Division, 250 Frank H. Ogawa Plaza, Suite 3315, Oakland, CA.; and (b) Office of the City Clerk, 1 Frank H. Ogawa Plaza, 1st floor, Oakland, CA.

IN COUNCIL, OAKLAND, CALIFORNIA, _____

PASSED BY THE FOLLOWING VOTE:

AYES- BROOKS, BRUNNER, CHANG, KERNIGHAN, NADEL, QUAN, REID, and PRESIDENT DE LA FUENTE

NOES-

ABSENT-

ABSTENTION-

ATTEST: _____
LaTonda Simmons
City Clerk and Clerk of the Council
of the City of Oakland, California

DATE OF ATTESTATION: _____

EXHIBIT A

Section 17.09 of the Planning Code defines tobacco related activities as follows:

"Tobacco oriented activities" are defined as activities devoting any floor area or display area to or deriving any gross sales receipts from, the sale or exchange of tobacco-related products with the exception of (a) stores with over 10,000 square feet of total sales area, provided the floor area devoted to tobacco sales does not exceed 20% of the overall store area or display area or 75% of gross sales receipts from, the sale or exchange of tobacco-related products, or (b) activities selling tobacco related products in conjunction with Automotive Servicing Commercial Activities as defined in Section 17.10.470 (Gasoline Stations), provided the floor area devoted to tobacco sales does not exceed 20% of the overall store area or display area or 75% of gross sales receipts from, the sale or exchange of tobacco-related products.

Section 17.134.020 of the Planning Code defines major and minor conditional use permits as follows:

17.134.020 Definition of major and minor conditional use permits.

A. Major Conditional Use Permit. A major conditional use permit is one that involves any of the following:

1. Thresholds. Any project that meets any of the following size thresholds:

a. The actual project site (including only portions of the lot actually affected by the project) exceeds one acre;

b. Nonresidential projects involving twenty-five thousand (25,000) square feet or more of floor area, except in the R-80, R-90, C-51, C-55, S-2, or S-15 zones;

c. Residential projects requiring a conditional use permit for density resulting in a total number of dwelling units as follows:

i. Two or more dwelling units in the R-35 zone, except in the case of a Secondary Unit,

ii. Three or more dwelling units in the R-36 or R-40 zone,

iii. Seven or more dwelling units in the R-50 zone.

d. Residential projects requiring a conditional use permit to exceed the basic or permitted density resulting in seven or more dwelling units in the R-60, R-70, R-80, or R-90 zone.

e. Large Scale Developments. Any development which is located in the R-80, R-90, C-51, C-55, S-2, or S-15 zone and results in more than one hundred thousand (100,000) square feet of new floor area, or a new building, or portion thereof, of more than one hundred twenty (120) feet in height.

2. Uses. Any project that involves any of the following activity or facility types except where the proposal involves only accessory parking, the resumption of a discontinued nonconforming activity, or an addition to an existing activity which does not increase the existing floor area by more than twenty (20) percent:

a. Activities:

i. Residential Care Residential,

ii. Service Enriched Housing Residential,

iii. Transitional Housing Residential,

iv. Emergency Shelter Residential,

- v. *Extensive Impact Civic*,
- vi. *Convenience Market Commercial*,
- vii. *Fast-food Restaurant Commercial*,
- viii. *Alcoholic Beverage Sales Commercial or sale of alcoholic beverages at any full-service restaurant in a location described by Section 17.102.210 (B)*,
- ix. *Heavy Manufacturing*,
- x. *Small Scale Transfer and Storage Hazardous Waste Management*,
- xi. *Industrial Transfer/Storage Hazardous Waste Management*,
- xii. *Mining and Quarrying Extractive*;
- xiii. *Tobacco Oriented Activities*
- b. *Facilities*:
 - i. *Drive-Through*,
 - ii. *Advertising Sign, except when the facility meets the requirements of Section 17.11.090.*
 - iii. *Special Health Care Civic Activities.*
- 3. *Special Situations. Any project that involves any of the following situations*:
 - a. *Any project that requires development of an Environmental Impact Report*;
 - b. *Any Commercial or Manufacturing Activity, or portion thereof, which is located in any residential zone and occupies more than one thousand five hundred (1,500) square feet of floor area, except where the proposal involves only the resumption of a nonconforming activity*;
 - c. *Off-Street Parking Facilities in the C-40, C-51, C-52 and S-2 zones serving fifty (50) or more vehicles*;
 - d. *Transient Habitation Commercial Activities in the C-40 and C-45 zones*;
 - e. *Monopole Telecommunication Facilities in, or within three hundred (300) feet of the boundary of, any residential zone*;
 - f. *Any project in the OS zone listed as requiring a major conditional use permit in Chapter 17.11*;
 - g. *Any electroplating activity as defined in Section 17.09.040 subject to the provisions of Section 17.102.340*;
 - h. *Any conditional use permit application referred by the Director of City Planning to the City Planning Commission for decision pursuant to Section 17.134.040(B)(1)*;
 - i. *Any Telecommunications Facility in or within one hundred (100) feet of the boundary of any residential zone*;
 - j. *Any Telecommunications Facility whose antennas and equipment are not fully concealed from view within three hundred (300) feet of the boundary of residential zones R-1 through R-60 inclusive.*
- B. *Minor Conditional Use Permit. A minor conditional use permit is a conditional use permit which does not involve any of the purposes listed in subsection A of this section. (Ord. 12776 § 3, Exh. A (part), 2006; Ord. 12768 § 3 (part), 2006; Ord. 12501 § 80, 2003; Ord. 12450 § 19, 2002; Ord. 12350 § 3 (part), 2001; Ord. 12272 § 4 (part), 2000; Ord. 12237 § 4, 2000; Ord. 12234 § 4, 2000; Ord. 12224 § 7, 2000; Ord. 12205 § 4 (part), 2000; Ord. 12199 § 9 (part), 2000; Ord. 12138 § 4 (part), 1999; Ord. 12078 § 5 (part), 1998; Ord. 12072 § 12, 1998; Ord. 12016 § 2 (part), 1997; Ord. 11904 § 5.91, 1996; Ord. 11892 § 21, 1996; Ord. 11539 § 2, 1993; prior planning code § 9201)*