

8/25/15 AGENDA, ITEM 5a: TOBACCO RETAILERS AND E-CIGARETTES ORDINANCE
SUPPLEMENTAL LETTER FROM STEVE DUFFY SUBMITTED TO THE CITY COUNCIL ON
8/24/15 AT 3:06PM

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August 21, 2015

VIA email citycouncil@hermosabch.org
Mayor Petty and Council Members
Hermosa Beach City Council
1400 Highland Avenue
Hermosa Beach, CA 90266

Re: Tobacco Retail Licensing ordinance and e-cigarette use in public

Dear Mayor Pro Tem Petty and Council Members Barragan, DiVirgilio, Fangary and Tucker:

As legal counsel for the National Association of Tobacco Outlets, Inc. (NATO), a national retail tobacco trade association with its principal office in the State of Minnesota (for more information, please see www.natocentral.org), I am providing these comments on behalf of the association and its members located in Hermosa Beach. These comments address issues raised by the draft dated August 12, 2015 which adopts a tobacco retailer license and regulates the use of e-cigarettes.

NATO has a number of serious concerns with the draft ordinance:

- Mandates that single cigars be priced at \$15 or more: effectively prohibiting all single cigar sales in the City.
- Violates retailers civil rights: allows the police to enter businesses without a warrant *even when they are closed* without probable cause.
- Requires retailers to waive rights to avoid extreme penalties: retailers are given a choice between accepting a suspension, a fine and waiving their rights to a hearing, or reserving their rights and be subject to potentially even more harsh, grossly punitive sanctions.
- Takes valuable property rights from retailers: retailers prohibited from transferring a license to willing buyers or even family members.
- Bans tobacco retailing in large areas of the City: devaluing commercial property and setting up a *de facto* prohibition on new businesses.
- Forces consumers to go to other cities for their preferred products: causing citizens to purchase tobacco products elsewhere, harming Hermosa Beach retailers
- Prevents young people from working in many retail stores: hurting the job prospects of young people in an already tough job market for young people.
- Prejudges the public health potential of e-cigarettes: discourages users of combustible tobacco products from switching to e-cigarettes, which many believe provide lower risks

Each of these items is addressed in some detail below.

NATO and its members share the City's stated concern with minors' access to tobacco products. These are adult-only products, and retailers do a remarkably good job of avoiding sales to minors. Please consider the statistics of the U.S. Food and Drug Administration. The FDA's website provides the results of tobacco compliance inspections throughout the country.¹ Inspections typically consist of a minor decoy attempting to buy tobacco products from retailers. The FDA data shows there have been 18 inspections in Hermosa Beach, all in 2014-15, and the retailers passed each inspection. For the State as a whole, from January 2012 through July 2015, 12,491 inspections were made, and 97.3 % of the time the retailers were compliant. There were only eleven repeat offenses.²

The FDA's statistics support the California Department of Public Health (CDPH) 2014 Youth Tobacco Purchase Survey³, which found that tobacco retailers' compliance rate is 91%. Further, in a recent study⁴ minors who regularly used tobacco were asked where they usually obtained tobacco products; 86% said their usual source was people other than retailers.⁵ We respectfully suggest that if the City is sincerely interested in addressing youth smoking, its resources are better spent directed at these social sources of tobacco, mostly friends and relatives, who account for nearly 90% of the problem.

We would now like to address the specifics of the Draft Ordinance.

Tobacco Retail License Required of Both the Business and the Employees of the Business

"Person" is defined in §5.76.030 to include individuals and various forms of business entities, and "Tobacco Retailer" is defined to mean any "Person" who sells tobacco or Tobacco Products. Section §5.76.040 makes it unlawful (indeed criminal) for "any Person to engage in tobacco retailing" without a permit. Although "tobacco retailing" itself is not defined, as written it would not just be the business entity that operates the store that must have such a permit, but every individual that "sells" Tobacco Products. This unnecessarily burdens employees. The definitions and this section should be clearly written so that the business entity operating the tobacco retail operation needs a license, and no one else, just as only one State tobacco license is issued to a business location, and not required of anyone else.⁶ As written, the section is also inconsistent with §5.76.060, detailed below.

¹ The website may be accessed here: http://www.accessdata.fda.gov/scripts/oc/inspections/oc_insp_searching.cfm

² Attached is a spreadsheet of these results.

³ The Survey can be found here:

<http://www.cdph.ca.gov/programs/tobacco/Documents/Resources/Fact%20Sheets/YTPS%20Memo%20Charts%20014.pdf>

⁴ Jones, S.E. and Caraballo, R.S., Usual Source of Cigarettes and Alcohol Among US High School Students, *Journal of School Health*, Vol 84, Issue 8, pp 493-501, August 2014.

⁵ A chart depicting the information from that study is attached.

⁶ Cigarette and Tobacco Products Licensing Act of 2003, California Business and Professions Code Section 22970-22974.8.

Limiting Sales Within 500 Feet of Schools or “Youth-Populated Areas” is Unsupported by Evidence and Will Negatively Impact Commercial Real Estate Values

Section 5.76.050 prohibits retailers from locating within 500 feet of a public or private K-12 school, public library or playground, child care facilities or preschools, or a “youth center.” The last item is defined as a facility where 6 to 17 year olds “come together for programs and activities,” making it vague to the point of being meaningless. Children “come together for programs and activities” at any number of places, both obvious and not. Some obvious examples are Hermosa Beach, Hermosa Pier and the Hermosa Valley Greenbelt. Less obvious ones are churches, which frequently have children’s programs.

A 500 foot radius encompasses over 750,000 square feet of real estate per location.⁷ Given zoning codes, and Hermosa Beach’s one and a half square mile footprint, this may be a prohibition in the guise of a restriction. It reduces the value of commercial properties inside the prohibited area, which may as a practical matter include all commercial property in the City, without compensation to the property owners.

Some of the restricted areas are controlled by the government in one way or another (public schools and parks, for example,) but many are controlled by private actors (child care facilities, day care facilities and “youth centers.”) As many of these privately controlled entities may well locate in a business zone, such as a strip mall, the City would allow other businesses to effectively control where tobacco retailers may operate. Nothing prevents a new “Youth-Populated Area” from moving within the restricted area, in which case the retailer is only allowed to renew its license once under §5.76.050(E)(2), allowing public and private entities to run a retailer out of town just by choosing a location near them. This will no doubt cause some liability for the City as businesses are deprived of value without compensation, and business properties are similarly impacted.

Most importantly, a recent study⁸ of tobacco sales near schools demonstrates there is no basis for such a restriction. The abstract of the study states that “neither the presence of a tobacco outlet within 1000 ft of a high school nor the distance to the nearest tobacco outlet from school was associated with smoking prevalence.” The City has no scientific basis for imposing such a restriction on property rights.

We would suggest that removing §5.76.050 is the fairest solution. However, should the City keep it and risk the inevitable liability that comes with it, the City should clarify the language on what is a “youth center” and prohibit Youth-Populated Areas from locating within 500 feet of a tobacco retailer so that a legally situated retailer does not become within the prohibited zone by the act of government entities or private school operators.

⁷ Calculated as $A = \pi r^2 = 3.14 \times 500 \times 500 = 785,000$ square feet. The actual figure would be much larger as this assumes these youth populated areas have neither length nor width; obviously, all do, and some, such as the Beach and the Greenbelt, have considerable width.

⁸ “Is Adolescent Smoking Related to The Density and Proximity of Tobacco Outlets and Retail Cigarette Advertising Near Schools?” Preventive Medicine Vol 47(2):210-214.

Density Restrictions are Not Supported and Similarly Run the Risk of Exposing the City to Liability

The proposal to prevent retailers from being within 500 feet of one another in §5.76.050(F) is similarly flawed. The same report that found no association between smoking prevalence and distance of tobacco retailers to schools found that the “prevalence of current smoking was 3.2 percentage points higher at schools in neighborhoods with the highest tobacco outlet density (>5 outlets) than in neighborhoods without any tobacco outlets.”⁹ In other words, there is at most a surpassingly weak association (not causation) between density and smoking prevalence, as there is only a 3.2% difference in smoking rates between neighborhoods with the most tobacco stores and those with no tobacco stores at all.

The density restriction creates similar liability issues as those created by the Youth-Populated Area restrictions. Given the weak support for such a provision, and the possible liability to the City, we would suggest removing §5.76.050(F).

Prohibiting Smoking in Tobacco Retailers That Do Not Permit Minors on the Premises is Illogical

Section 5.76.050(H) prohibits smoking in tobacco retailer stores, but no exception is made for those venues that predominantly sell Tobacco Products and do not allow minors inside. (Indeed, subsection G oddly prohibits selling Tobacco Products in a premise that does not allow persons under 21 to enter, namely bars.) If the premise is to protect minors, this restriction is unnecessary, and should be amended to allow an exception for tobacco stores.

The Grandfathering Provision is Vague and Counterproductive

Section 5.76.050(I) allows those who would otherwise be operating unlawfully because of the new restrictions elsewhere in the Section, such as the distance restrictions, to continue to operate under certain conditions, one of which, subsection (iii), is that the retailer has not substantially changed “the business premises or business operation.” This vague provision gives no definition of what constitutes a substantial change to either the premises or operation. If a mom-and-pop operation decides to allow their son or daughter in to the family business, is that a change to the operation? Or if a business, operated as a sole proprietorship, incorporates? As to changes in the premises, this provision discourages retailers from substantially improving their premises, perhaps making a more appealing storefront, better parking or safer lighting. We would suggest removing subsection 5.76.040(I)(iii).

The Application Procedure is Unreasonable

Several parts of §5.76.060 conflict with the provision noted above that every “Person” must have a license (e.g., Subsection (B) references the need for a license at “each location,” signed by the “proprietor or authorized agent thereof;” Subsection C(1) referencing the “proprietor of the business seeking a license”; etc.) Subsection C(6) requires a proprietor/applicant to state whether

⁹ *Ibid.*

they or any of their agents have been determined to have violated “any provision of this Chapter or any State or Federal tobacco-related law,” detailing all such violations over the previous five years. A proprietor with many outlets in many jurisdictions would be significantly burdened by such a requirement. Employees make mistakes, and no matter how rare they may be, if any violation of any State or Federal “tobacco-related law” (whatever that means) regardless of how significant or picayune, for example, filing their license renewal on time for one location in another State, is simply adding burden for burden’s sake.

Licensing Fee Should Clearly Not Include General City Overhead

Although we understand the City’s desire to set the license fees to recover the “reasonable costs of providing the services required by this Chapter, §5.76.060(D), it is important that this is not to also generate general City revenue. We note this because we have seen considerable variation in fees in different jurisdictions that naturally makes one wonder how the costs of similar programs could vary so widely. NATO asks that when the City consider what it needs for these costs it not, for example, stray into costs associated with smoking bans and that it not include any of the City’s general and administrative costs, which are rightly borne by all citizens, not just tobacco retailers.

Grounds for License Denial are Too Broad

Section 5.76.070 allows for denying a license for several reasons, among them that the application information is “inaccurate,” which would include an innocent, even a typographical, error, as opposed to some intentional fraud on the part of the applicant, or if the applicant has violated “any provision of this Chapter or any state law related to the sale of tobacco.” Again, a chain store with multiple outlets may be unable to meet this burden, and would not even be able to move a store from one location to another (if it could find an unrestricted, properly zoned location.) It also does not distinguish between the more significant violations (such as sales to minors where neither employee training nor effort to avoid such sales has been made) to the most technical (size of the “No Sales to Minors” sign.) We would suggest this Section needs to allow for fixing clerical errors in applications and gradation in the kinds of operational errors

Nontransferable Licenses Take Value from Businesses without Compensation

Section 5.76.090 makes licenses nontransferable, meaning a new owner must get a new license and is therefore subject to the distance requirements. Especially if the distance requirements remain, the new applicant should be allowed to apply for a license. To do otherwise deprives businesses of part of the value of their operation. In some instances, tobacco operations keep a store open; if they cannot sell tobacco, they will not be open to sell any of the other things they carry, which will be a detriment to the public.

Many mom-and-pop operators have a considerable amount of their net worth and retirement savings in the equity of their business. If they are not able to realize that by a sale of the business to a third party, or if they cannot leave the business by will or gift to their heirs, they are significantly deprived of their life savings. Making the license itself nontransferable is not the problem; rather, it is the effect of that nontransferability, particularly in light of the distance

restrictions, that causes issues. Licensed businesses should be treated as legal, non-conforming uses as under the zoning code, and new owners should be able to take them over (provided, of course, the new owners themselves are qualified.) Failing to do that would expose the City to liability for unlawful taking.

Prohibiting Persons under the Minimum Legal Sales Age to Act as Work in Tobacco Retailers Causes Problems for Both Retailers and Young Workers

Section 5.76.110(F) requires that persons who “engage in tobacco retailing” must be the state minimum age to purchase and possess, currently 18. However, the language of the Section is a bit unclear, as it prohibits minors from being a person “engaged in tobacco retailing.” Does this include someone only indirectly involved in the transaction of tobacco sales? For example, is a 16 year old stock clerk or bag person in a grocery store considered “engaged in tobacco retailing?”

A larger concern is that banning clerks under the Minimum Legal Sales Age means that 16 and 17 year olds may no longer be able to find work in certain stores. Many retailers, especially smaller or family-owned establishments, need to be able to hire young people to staff their stores adequately. Those duties may include completing transactions that have both tobacco and non-tobacco items. These clerks are trained to avoid sales of tobacco items to minors. Prohibiting younger people from taking these kinds of jobs hurts both them and their potential employers.

Also, by tying it to the Minimum Legal Sales Age, if the State adopts an age higher than 18 (as is currently under consideration at the State Legislature,) some adults could no longer work in these businesses, making it yet harder for businesses to fill these positions and expanding the hardship to a larger pool of potential workers.

Finally, as “Person” includes corporations, associations and other business entities that may well have been formed only a year ago, even though the individuals who work for the retail business are all over the minimum sales age, as drafted those business entities could not engage in tobacco retailing.

We respectfully ask that §5.76.110(F) be removed in its entirety.

Self-Service Displays Should Be Allowed in Adult-Only Environments

The ban in §5.76.110(G) on self-service displays makes no exemption for adult-only environments, for example, tobacco-only stores that do not allow minors to enter. If the premise of the law is to protect minors, such an exemption simply makes sense.

Cigar Minimum Pricing is Not Justifiable

NATO and its retail member stores have a serious legal concern with §5.76.110(J) that requires a minimum retail price of \$15.00 for a single cigar and requires other cigars to be sold in packages of 20. The proposed ordinance is devoid of evidence or support of any kind that setting a minimum price on cigars will achieve a health-related goal either for underage youth or for

adults who buy and smoke cigars. There are hundreds of brands of cigars that are typically sold one or two at a time that would be prohibited by this provision. This would force buyers of these products to go to nearby jurisdictions to obtain their preferred products. When they do that, they will take with them other business, that is, they will buy other products that they purchase when they buy cigars. The City will lose not only the cigar sales revenues but that of the other products as well.

By what legal authority does the City set the retail price of any legal product, including cigars? We would be pleased to see any statutory cite that you are relying on to justify mandating minimum package sizes and product prices. We respectfully request that §5.76.110(J) be deleted.

Licensees Civil Rights are Violated

Section 5.76.120(C) grants the Chief of Police “the right to enter, free of charge or restriction, at any time, any place of business for which a license is required by this Chapter.” As written, the Chief may enter, without a warrant, a closed business. It should not be a condition of licensure that a business give up its civil rights.

The Penalty Provisions are Too Harsh

Section 5.76.130 sets out the penalties, which include an administrative fine under Title 1, Chapter 1.10 of the City’s Code, plus various suspensions. Focusing only on the suspension schedule, it is far too harsh. By way of contrast, the U.S. Food and Drug Administration, which on a federal level insures compliance with tobacco retailing requirements, recently published an amended guidance document for progressive discipline of retailers.¹⁰ The current structure set forth in §§4.118.130 and -.140 are contrasted with the FDA’s guidance in the following table:

Proposed Suspension	FDA Guidance
1 st offense 30 day suspension	1 st offense-warning
2 nd offense in 60 months-90 day suspension	2 nd offense in 12 months-\$250
3 rd offense in 60 months-one year suspension	3 rd offense in 24 months-\$500
4 th offense (or more) in 60 months-revocation	4 th offense in 24 months-\$2,000
	5 th offense in 36 months-\$5,000
	6 th or subsequent offenses within 48 months-\$11,000 as determined by the agency on a case-by-case basis

¹⁰ *Civil Money Penalties and No-Tobacco-Sale Orders for Tobacco Retailers, Responses to Frequently Asked Questions*, May 2015, page 13.

The FDA's guidance suggests that a "No-Tobacco-Sales Order," the equivalent of a suspension, would be issued only after "repeated offenses" in a 36-month period; "repeated offenses" is defined to be five violations.¹¹

The draft, by contrast, calls for a suspension on the first offense. This is significantly harsher than the FDA's recent guidance, which was published after significant study as the agency considers a formal rule on the subject. Moreover, a retailer is not immune from receiving both the City's punishment (fine plus suspension) and the FDA's, making the City's punishment all the harsher.

We note the draft allows a first or second offender to get a one day or ten day suspension and a \$1,000 or \$5,000 fine, respectively, but only at the expense of giving up its due process rights, which is a poor precedent for the City to set.

Retailers take their responsibilities seriously. They are not interested in selling tobacco products to minors. However, most retailers also have employees, and no matter how well-trained the employees may be, everyone can make a mistake. Punishing employers with a suspension for a first violation is simply too punitive, and using a five-year look back period makes it all the harsher.

For this reason, we respectfully ask that the City Council consider how to provide meaningful, proportionate, progressive discipline in light of the FDA's guidance. We would also respectfully suggest that the City Council consider attacking the larger problem, that of the social sources of tobacco from whom kids usually obtain tobacco products.

Ban on E-Cigarette Use Where Combustible Cigarettes are Prohibited is Premature

The proposal to amend the existing smoking regulation to include e-cigarettes

The U.S. Food and Drug Administration is currently in the process of considering the appropriate regulatory framework for e-cigarettes, and the City prejudices that process if it acts now to ban e-cigarettes where traditional smoking is prohibited, as provided in Section 3 of the proposed ordinance. The FDA has held a series of public workshops on this subject and received thousands of comments to the regulatory framework; until they have completed their work, any proposal restricting the use of electronic cigarettes in public places is premature. Restrictions on smoking in public places were adopted after numerous studies were conducted and a significant body of scientific evidence was compiled on secondhand smoke.

Existing smoking bans were only adopted after long study and a general public consensus on the subject; acting now to restrict these products, which many tobacco users see as a way to stop or significantly reduce their use of other tobacco products, may detrimentally affect the public health. We would suggest that the City defer at least until the FDA has acted so that the City is taking into account the most current information about these products that is available.

¹¹ *Ibid.*, page 2.

Hermosa Beach City Council

August 24, 2015

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Thank you for your consideration of these comments.

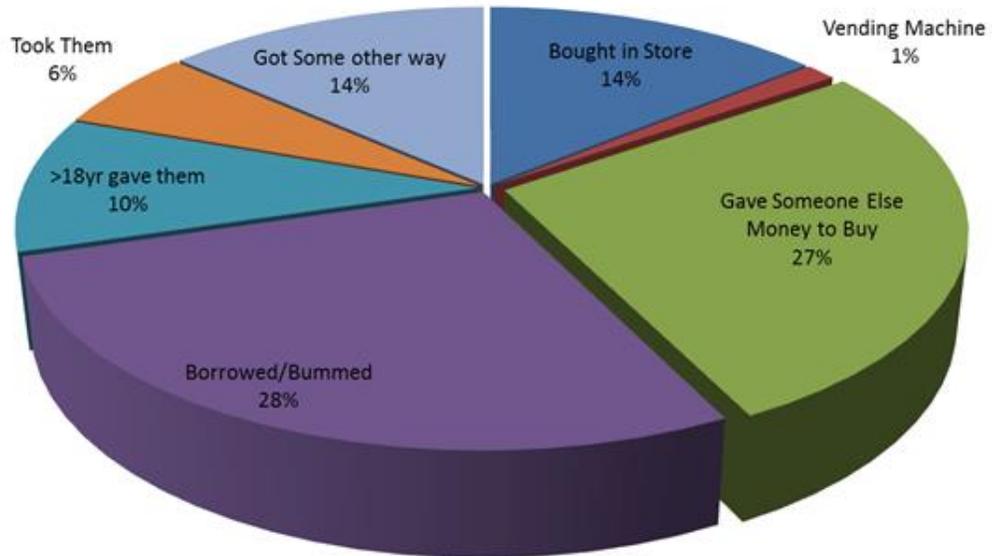
Sincerely,

Steven J. Duffy

For National Association of Tobacco Outlets, Inc.

Attachments: Spreadsheet
Graphic Regarding Usual Source of Tobacco

Usual Source of Cigarettes Among Current Cigarette Users Who Were less than 18 years old



Source: Journal of School Health: Usual Source of Cigarettes and Alcohol Among US High School Students; August 2014, Vol 84, No.8.