



CITY OF BEVERLY HILLS
POLICY AND MANAGEMENT

MEMORANDUM

TO: City Council Health and Safety Commission Liaison Committee

FROM: Logan Phillippo, Policy & Management Analyst

DATE: April 9, 2019

SUBJECT: Health and Safety Commission Recommendations Regarding Tobacco Sales Ban Ordinance

ATTACHMENTS: 1. March 25, 2019 Health and Safety Commission Staff Report

INTRODUCTION

The Health and Safety Commission has voted on key provisions for a draft ordinance that would ban the sale of all tobacco products in Beverly Hills. Staff is providing an update to the City Council Liaisons regarding these recommendations, which are scheduled to be presented and discussed at the May 7, 2019 Study Session.

DISCUSSION

At the February 5 Study Session, City Council directed Staff and the Health and Safety Commission to develop and recommend a policy that would ban the sale of all tobacco products in Beverly Hills. The Commission discussed the topic on February 25 and March 25.

On March 25, more than 140 members of the public attended the Commission meeting and the Commission heard public comment from 57 speakers. To date, the City has received 162 letters from the public on this topic. 9 letters have expressed general support for and 7 letters have expressed general opposition to a tobacco sales ban in concept. 146 of these letters, however, have advocated for an exemption (to any future ban) for all cigar lounges in the city. There are three cigar lounges Staff has identified from a list of active permitted retailers: Grand Havana Room, Buena Vista Cigar Club and Nazareth's Fine Cigars. While there were several individuals who submitted letters or spoke in support of Buena Vista Cigar Club or cigar lounges in general, the vast majority of letters and speakers specifically referenced Grand Havana Room.

Tobacco Product Definition

The Beverly Hills Municipal Code ("BHMC") defines a tobacco product as including:

- a) Any product containing, made, or derived from tobacco or nicotine that is intended for human consumption, including, but not limited to, cigarettes, cigars, pipe tobacco, snuff, chewing tobacco, and smokeless tobacco;
- b) Any electronic cigarette; and
- c) **Any component, part, or accessory intended or reasonably expected to be used with a tobacco product, whether or not sold separately.**

The Municipal Code definition of a tobacco product does not include a drug, device, or combination product authorized for sale by the U.S. Food & Drug Administration as a tobacco use cessation product such as nicotine patches, gum or lozenges.

If the City moves forward with a ban on the sale of tobacco products, the inclusion of Subsection C, above, may have some unintended consequences. For example, lighters, ashtrays and cigar papers are all reasonably expected to be used with a tobacco product. However, because these products can come in many various forms (i.e. a cigarette lighter versus a generic lighter, an ashtray versus a generic dish), this clause might present several unintended code enforcement complications where it is unclear whether an item being sold constitutes a tobacco product.

Modifying Subsection C to read **“Tobacco and Electronic Cigarette Paraphernalia”** could add clarity to the items banned from sale. This term is already more narrowly defined in the Municipal Code. “Tobacco and Electronic Cigarette Paraphernalia” is defined as including: cigarette papers or wrappers, pipes, electronic cigarettes and their component parts, holders of smoking materials of all types, cigarette rolling machines, and any other item designed for the smoking or ingestion of tobacco or products prepared from tobacco.

Commission Recommendations

The Commission has discussed key policy recommendations and on March 25 voted on key policy provisions to include in a draft ordinance. These include:

- A carve out for all existing cigar lounges, as of March 25, 2019, in perpetuity; (4-1 vote)
- A carve out for all hotels, existing and new, in perpetuity; (3-2 vote)
- Effective January 1, 2020:
 - Hotels may only sell to guests of the same hotel;
 - Pharmacies shall not sell tobacco products. (5-0 vote)
- Effective January 1, 2021:
 - Gas stations, convenience stores, liquor stores and newsstands shall not sell tobacco products (5-0 vote);
- One year after the effective date of any City Council adopted ordinance:
 - Grocery stores and any other permitted retailer not otherwise enumerated in a category above shall not sell tobacco products (5-0 vote); and
- An immediate moratorium on the issuance of new permits, except for hotels, which have been carved out (5-0 vote).

The Commission voted in unanimous support for all but two of the above-listed provisions.

1. Regarding a carve out for all existing cigar lounges in perpetuity, Commissioner Baker did not vote in support, indicating that existing cigar lounges could continue to promote the same type of comradery and serve as a space for closing business deals without selling tobacco products.
2. Regarding a carve out for all hotels, existing and new, in perpetuity, Commissioners Demeter and Baker did not vote in support. Commissioner Baker indicated that there was no evidence presented on how tourism would suffer. Commissioner Demeter indicated that hotels do not fully depend (as a Cigar lounge would) on revenue from tobacco products and as such should not be subject to a carve out. Chair Ross voted yes on a motion in support of the carve out for hotels in perpetuity, however, will request that the Commission meet to rescind and annul this recommendation. If the Commission

does agree to rescind and annul the motion, a Commission Special Meeting to reconsider a carve out for hotels is tentatively scheduled for April 29.

Hardship Exemption

Any ordinance should include a provision that allows for a “hardship exemption”. This provision is necessary to mitigate any challenges to a ban and offer businesses an opportunity to demonstrate the extent to which they are affected by an impending ban. At least six months prior to the end of the phase-in period, the permitted tobacco retailer/applicant would submit a completed application to the City requesting an extension of the permit. In determining whether to grant the hardship exemption, the hearing officer would consider, among other factors, the following information:

- (1) The term of the requested extension;
- (2) The percentage of the retail sales over the last three years that have been derived from tobacco products;
- (3) The amount of investment in the business;
- (4) The present actual and depreciated value of any business improvements dedicated to the retail sale of tobacco products;
- (5) The applicable Internal Revenue Service depreciation schedule or functional non-confidential equivalent;
- (6) The remaining useful life of the business improvements that are dedicated to the sale of tobacco products;
- (7) The remaining lease term, if any;
- (8) The ability of the tobacco and electronic cigarette retailer to sell other products; and
- (9) The opportunity for relocation of the business and the cost of relocation.

The hearing officer would determine whether to approve or deny the request. If granting the request, the hearing officer would also determine the length of time of the hardship exemption (i.e. how long the business would be permitted to continue selling tobacco products). The hearing officer’s decision could be appealed to City Council.

Permits Non-Transferable

BHMC 4-2-2107 already provides: “a tobacco and electronic cigarette retailer permit is nontransferable and is valid only for the person(s) and location specified in the permit application. If a permittee changes business location, that permittee, prior to the permits expiration, must obtain a new permit prior to acting as a tobacco and electronic cigarette retailer at the new location. If a business permitted to conduct tobacco and electronic cigarette retailing is sold, the new owner must obtain a permit for that location before acting as a tobacco and electronic cigarette retailer.”

Because permits are non-transferable and the City would no longer accept new permit applications, an ordinance should also allow for a hardship exemption from this non-transfer provision. As such, the permitted tobacco retailer would be required to demonstrate that the imposition of the non-transferability clause, above, would constitute an undue hardship on their business. For example, the death of a family-member whose name was originally listed on the permit application might constitute an undue hardship. Or, a landlord with knowledge that a permitted tobacco retailer cannot transfer permits to new locations, might attempt to increase rent substantially at a permitted location above fair market value, recognizing that a permitted

tobacco retailer would have no options to maintain a permit and seek alternate business locations. Staff is finalizing the details of this section.

Enforcement

For existing permitted retailers, BHMC 4-2-2115 already sets forth the enforcement provisions of the existing City's tobacco and electronic cigarette retailer permitting regulations. The proposed ordinance would be subject to these same enforcement provisions. Additionally, the Municipal Code includes a provision for compliance monitoring that allows a "youth decoy" to participate in compliance checks supervised by a peace officer or code enforcement official of the City. On an annual basis, the Police Department conducts sting operations with a youth decoy to monitor compliance.

The City would continue enforcing existing permits in this manner with already established enforcement mechanisms. This includes escalating fines and civil penalties. A first violation is \$250. A second violation within a five-year period is \$750 and suspends the retailer permit for 90 days. A third violation within a five-year period is \$1,000 and revokes the permit. If a non-permitted retailer were to sell tobacco products, enforcement would default to the general provisions of the Municipal Code whereby at the discretion of the City Attorney or City Prosecutor, violations could be prosecuted as infractions or misdemeanors. In addition, the City could impose administrative penalties pursuant to BHMC 1-3-3. The City could also seek to declare the property a public nuisance or bring a civil action against the business.

Outreach

At the February 25 Commission Meeting, Staff introduced a framework for policy discussions on developing/exploring a policy to ban the sale of all tobacco products in Beverly Hills. This included a planned series of four Commission meetings ending on May 20 and a presentation of Commission recommendations to City Council at the first Study Session in June. Mayor Mirisch has since directed Staff to present Commission recommendations to City Council on May 7. Staff subsequently revised the timeframe and provided notice to all appropriate stakeholders.

Staff has continuously provided updates by phone, email, and letter to tobacco retailers and those who have submitted their contact information on public comment cards or emails/letters to the City. Staff has also updated the City's website, including a listing of all relevant City Council and Health and Safety Commission reports and meeting videos. Staff has also coordinated with business community stakeholders, including the Chamber of Commerce and Conference and Visitors Bureau. Upcoming planned outreach includes Staff attendance to discuss the policy at the Chamber of Commerce Government Affairs Committee meeting on April 14, 2019.

RECOMMENDATION

Staff is updating the City Council Liaisons regarding the Commission recommendations, which are scheduled to be presented and discussed at the May 7 Study Session. Staff requests direction from the City Council Liaisons on whether to present a draft ordinance for introduction on the May 7 Consent Agenda, immediately following Study Session discussions or the May 21 Consent Agenda, which would allow for time to incorporate any City Council direction or modifications to the draft ordinance. Because the Commission's recommendations include an immediate moratorium on the issuance of new tobacco retailer permits, Staff also requests direction on whether to present an urgency ordinance.