September 3, 1998

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

PROPOSED ORDINANCE RESTRICTING THE SALE, ADVERTISING AND PROMOTION OF TOBACCO PRODUCTS TO MINORS

INTRODUCTION

A proposal for an ordinance to "End Tobacco Advertising and Sales to Kids (E-TASK)" was first brought to the attention of the Public Safety and Neighborhood Services Committee [the Committee] by Councilmember Juan Vargas at the the Committee meeting of July 2, 1997. Thereafter the Committee held public hearings regarding the effect of tobacco advertising on the youth of San Diego and the effect of advertising restrictions on businesses in San Diego. On April 22, 1998, the Committee voted to send to the Mayor and City Council a proposed Ordinance Restricting the Sale, Advertising and Promotion of Tobacco Products to Minors [Ordinance].

A draft Ordinance is attached to this Report and includes both the amendments directed by the Committee and clarifying amendments this office has made since the Committee meeting of April 22, 1998, in an underline and strikeout format for ease of reference. Those changes are discussed below. Also attached to this Report is a letter from the Technical Assistance Legal Center [TALC] of the Public Health Institute analyzing a draft of the Ordinance and suggesting additional substantive changes. TALC is funded by the California Department of Health Services to provide technical legal assistance to cities and counties on the subject of tobacco advertising and promotions.

DISCUSSION

I. Committee Amendments to the Draft Ordinance

At the Committee meeting of April 22, 1998, the Committee was presented with a draft Ordinance. The Committee directed the City Attorney's Office to prepare the Ordinance for consideration by the full City Council, with the following amendments:

A. Amend the advertising restrictions to limit advertising on the doors and windows of retail establishments that is visible from the outside, but permit advertising inside retail establishments that may be visible from the outside;

B. Amend the product display restrictions to prohibit self-service displays of multi-packs as well as single packs of tobacco products;

C. Amend the product display restrictions to permit display racks under four feet (but retain the ban on advertising below four feet);

D. Clarify "line of sight"; and

E. Clarify "self service" and "vendor-assisted."

The revised Ordinance includes the first three amendments described above (in the attached draft, new language is underlined, deleted language is stricken). The Ordinance distinguishes between the display of products and the display of advertising below four feet by prohibiting "advertising display signs for tobacco products" below four feet in stores that are within 1000 feet of any school, playground, recreation center or facility, child care center, arcade, or library. A definition of "advertising" has been added to section 58.0301. "Advertising" is now defined as "printed matter that calls the public's attention to things for sale." This definition is taken from the TALC model ordinance.

The Committee's reference to "line of sight" stems from the surveillance of self-service displays (now permitted for cartons only) contained in section 58.0308. Under that section, self-service displays of cartons are permitted if the products "are under direct surveillance of a store employee," meaning that the "tobacco products themselves . . . are in plain view of the store employee at his or her regular station." At the hearing on April 22, the Committee members requested more definitive language for this requirement, such as a certain distance between the display rack and the employee's regular station. The Grocers' Association representative responded by suggesting a distance of not less than eight feet. That distance has been added to the definition of direct surveillance in section 58.0308(b).

The term "self-service" is used in section 58.0308 in the context of "self-service display" and "self-service merchandising." "Self-service display" is defined in section 58.0301 as "an open display of tobacco products that the public has access to without the intervention of an employee." "Vendor-assisted" is also used in section 58.0305 and defined in section 58.0301 to mean "that only a store employee has access to the tobacco product and assists a customer by supplying the product. The customer does not take possession of the product until it is purchased."

II. Corrections to Draft Ordinance

Several corrections were made to the Ordinance for clarification and consistency with the Municipal Code. These corrections are included in the attached draft Ordinance (new language is underlined, deleted language is stricken). Among those changes are the following:

A. The advertising restrictions contained in the Ordinance refer to advertising display signs more than 1000 feet from the premises of designated sites, and to stores within 1000 feet of designated sites, but do not discuss how the 1000 feet shall be measured. To correct this deficiency, we recommend adopting the method of measurement found in San Diego Municipal Code section 101.1820, used for measuring the distance between an adult entertainment structure and church,

school or other designated site. The method for measuring the 1000 feet is now found in section 58.0302, which reads:

> The distance between any advertising display sign or any store or business that sells tobacco products and any school, playground, recreation center or facility, child care center, arcade, library, or non-commercial or non-industrial zone shall be measured in a straight line, without regard to intervening structures, from the advertising display sign or store or business to the closest property line of the school, playground, recreation center or facility, child care center, arcade, or library, or to the closest boundary of the zone.

B. The subsections listing the exceptions to advertising and display restrictions are assigned separate section numbers for clarification. Other sections are renumbered accordingly.

C. The term "billboard" is deleted from the sections discussing advertising restrictions because it is already included in the definition of "advertising display sign."

D. The term "cigarettes" is deleted where used in conjunction with "tobacco products" because cigarettes are included in the definition of "tobacco products."

E. The term "advertising" is deleted from section 58.0304(c) and 58.0306(c) excepting public service messages from the sign restrictions based on the definition of "advertising" now included in the Ordinance.

F. The term "cigarettes" is corrected to "tobacco products" in section 58.0304(d) discussing generic advertising. Note that TALC offers alternative language to define generic advertising at page 23 of its model ordinance.

G. The sections referring to the "newly adopted Land Development/Zoning Code Update" are deleted so that they will not become part of the Municipal Code at this time. When the Land Development/Zoning Code Update is adopted, this Division will be amended to reflect the new zoning code sections.

H. An additional "WHEREAS" clause is added to the preamble to support the restriction on distribution of promotional items contained in section 58.0309. The research on which this clause is based was cited in the Report to the Committee on Public Safety and Neighborhood Services dated January 29, 1998, at pages 7-8.

I. Language is added to section 58.0311(b) to clarify that requests for extensions of time to comply with the ordinance should be requested within sixty days of the effective date of the ordinance.

III. Recent Case Law

The proposed Ordinance is modeled after the ordinance adopted by the city of Baltimore, Maryland and upheld by the Fourth Circuit Court of Appeals in *Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore*, 63 F.3d 1318 (4th Cir. 1995), *cert. granted,* 518 U.S. 1030 (1996), *decision readopted on remand*, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997).[1] In the recent case of *Federation of Advertising Industry Representatives v. City of Chicago*, No. 97-C 7619, 1998 WL 429874 (N.D. Ill. July 29, 1998), the United States District Court for the Northern District of Illinois struck down a Chicago ordinance that sought to restrict advertising of both cigarettes and alcohol in publicly visible locations. Even though the tobacco portion of the ordinance was fairly similar to Baltimore's ordinance, the Illinois District Court disagreed with the reasoning of the Fourth Circuit, finding that Chicago's ordinance is preempted by the Federal Cigarette Labeling and Advertising Act (15 U.S.C. 1331-1341) [FCLAA]. It is likely that this decision will be appealed to the Seventh Circuit Court of Appeals.

The Ninth Circuit Court of Appeals is preparing to hear a case arising out of a tobacco advertising ordinance adopted by the Tacoma-Pierce County Health Department in Washington. *Lindsey v. Tacoma-Pierce County Health Dep't*, No. C 97-5076 RJB, 1998 WL 385808 (W.D. Wash. Mar. 16, 1998) and 1997 WL 911224 (W.D. Wash. Nov. 6, 1997). In that case, the District Court has twice upheld the ordinance by granting the Health Department's motions for partial summary judgment and denying the plaintiff's motions. The plaintiff has appealed. No date has yet been set for the hearing on the appeal.

In a Memorandum of Law issued by this office to the Committee discussing regulation of tobacco advertising, we advised that, with a couple of exceptions, tobacco regulations promulgated by the United States Food and Drug Administration [FDA] had not been implemented because of a trial court ruling and pending appeal before the Fourth Circuit Court of Appeals. City Att'y MOL No. 97-30, 6 and Appendix A (Nov. 18, 1997) *citing Coyne Beahm, Inc. v. U.S. Food & Drug Admin.*, 966 F. Supp. 1374 (M.D.N.C. 1997). The Fourth Circuit recently issued its opinion in that case, finding that the FDA did not have the authority to regulate cigarettes as a "drug delivery device," effectively striking all of the FDA's regulations relating to cigarettes. *Brown & Williamson Tobacco Corp. v. Food & Drug Admin.*, No. CA-95-665-6, 1998 WL 473320 (4th Cir. Aug. 14, 1998). Had the Court of Appeals agreed with the FDA that it could regulate cigarettes, much of the substance covered in the City's proposed ordinance would have been duplicated. As it stands now, none of the FDA's regulations for cigarettes are enforceable.

CONCLUSION

The draft Ordinance has been revised to include the changes discussed in Committee and to correct non-substantive errors. Additional substantive changes are suggested in the attached letter from TALC. Although a recent decision by the United States District Court for the Northern District of Illinois disagrees with the Fourth Circuit Court of Appeals decision in *Penn Advertising v. Baltimore* allowing local regulation of tobacco advertising, the *Penn Advertising v. Baltimore* decision remains persuasive authority for local regulations seeking to enforce tobacco laws applicable to minors. Further, the United States District Court for the Western

District of Washington has followed *Penn Advertising v. Baltimore*. The Ninth Circuit Court of Appeals has not yet ruled on the issue, but should do so in the coming year.

Respectfully submitted,

CASEY GWINN
City Attorney

CG:jrl:djr(043.1)
Attachment
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