



REPORT TO LAW & LEGISLATION COMMITTEE City of Sacramento

915 I Street, Sacramento, CA 95814-2671

STAFF REPORT
May 6, 2008

Honorable Members of the
Law and Legislation Committee

Title: An Ordinance Amending Sections 5.138.050, 5.138.060 and 5.138.110 of the Sacramento City Code Regarding Tobacco Retailers

Location/Council District: City-wide

Recommendation: Approve and forward to City Council for adoption of amendments to Sections 5.138.050, 5.138.060 and 5.138.110 of the Sacramento City Code Regarding Tobacco Retailers.

Contact: Max Fernandez, Director of Code Enforcement, (916) 808-7940; Bob Rose, Business Compliance Manager, (916) 808-5947

Presenters: Bob Rose, Business Compliance Manager, (916) 808-5947

Department: Code Enforcement

Division: Business Compliance

Organization No: 4652

Description/Analysis

Issue: If Code Enforcement Officers of the City of Sacramento serve a licensed tobacco retailer with a Notice of Suspension/Revocation for violation of Sacramento City Code, Chapter 5.138, and/or one or more terms or conditions of the tobacco retailer's license, the retailer has a constitutional right to file an appeal and request a hearing on the matter. On certain occasions, the appeal process may overlap with the annual expiration of the tobacco retailer license. In its present form, the tobacco retailer ordinance does not allow a licensee to renew a license if the licensee is currently going through the appeal process even if the licensee's appeal is ultimately successful.

Policy Considerations: The Tobacco Retailer License program, adopted in 2004, has been instrumental in curbing tobacco sales to minors. Some license suspensions have resulted due to sales of tobacco products to minors. These suspensions may be appealed within ten (10) days of the alleged violation. If an appeal is pending prior to the expiration, the license would be extended during the appeal process under these amendments.

Environmental Considerations: This report is not considered a project under the California Environmental Quality Act (CEQA).

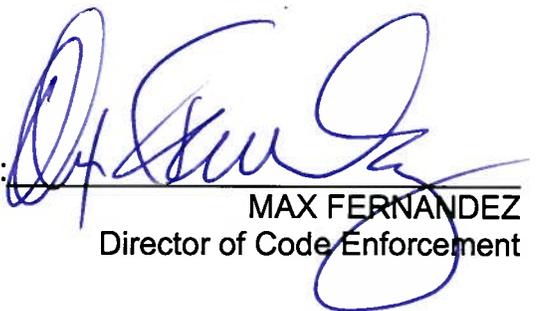
Rationale for Recommendation: The proposed ordinance would keep the license duration of one year but would make exceptions to account for licenses that involve ongoing appeals that are beyond the one year license period. Licensees who do not prevail on appeal would be immediately subject to a revocation or suspension period and the license would expire immediately after that period.

Financial Considerations:

There is no financial impact with this ordinance.

Emerging Small Business Development (ESBD):

Not applicable.

Respectfully Submitted: 
MAX FERNANDEZ
Director of Code Enforcement

Recommendation Approved:


RAY KERRIDGE
City Manager

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Attachment 1**BACKGROUND**

The Tobacco Retailer License program was adopted in 2004 and has been successful in curtailing sales of tobacco products to minors. The program consists of education, business inspections, maintaining a database of all tobacco retailers and conducting underage sting operations. Current tobacco retailers and new business owners selling tobacco products are required to apply for a tobacco retailer license annually.

When a Code Enforcement Officer has sufficient evidence of a tobacco retailer license violation (selling to minors), the retailer has a right to challenge the decision to suspend or revoke said license before a hearing examiner. An appeal must be filed within ten days of the notice of intent to suspend/revoke the tobacco license. The following are suspension/revocation terms within any five-year period: (Sacramento City Code Section 5.138.110):

- First license violation - thirty (30) days;
- Second license violation – ninety (90) days;
- Third license violation – one (1) year;
- Fourth license violation – the license shall be revoked.

In addition, even if the hearing examiner decides against the licensee and determines the license should be suspended or revoked, the licensee is entitled to petition the Superior Court of California within ninety (90) days to challenge the hearing examiner's decision.

During the appeal process, the tobacco license is moving closer to its expiration date. Depending on the time of the alleged violation, the tobacco license may expire before the appeal process is concluded, and a final determination has been rendered. The current ordinance does not address this situation. Consequently, this has resulted in additional staff time to extend a license on a case by case basis. These proposed amendments keep the license duration of one (1) year but would make exceptions to account for the licenses that involve ongoing appeals that are beyond the one (1) year period.

Tobacco retailers who do not ultimately prevail on appeal are subject to a revocation or suspension period and the license would expire immediately after that period. Tobacco retailers who do prevail on appeal may file a renewal application following the decision without an interruption to their status as a holder of an active tobacco retailer license.

ORDINANCE NO.

Adopted by the Sacramento City Council

Date Adopted

AN ORDINANCE AMENDING SECTIONS 5.138.050, 5.138.060, AND 5.138.110 OF THE SACRAMENTO CITY CODE REGARDING TOBACCO RETAILERS

BE IT ENACTED BY THE COUNCIL OF THE CITY OF SACRAMENTO:

SECTION 1. Section 5.138.050 of the Sacramento City Code is amended to read as follows:

5.138.050 Application procedure.

All applications for a license shall be submitted to the city manager in the name of each proprietor proposing to conduct tobacco retailing, and all applications for a license shall be signed by each proprietor or an authorized agent thereof. A proprietor proposing to conduct tobacco retailing at more than one location shall submit a separate application for each location. Every application shall be submitted on a form supplied by the city manager, and every application shall contain the following information:

- A. The name, address, and telephone number of each proprietor;
- B. The business name, address, and telephone number of the fixed location for which a license is sought;
- C. Whether or not any proprietor has previously been issued a license pursuant to this chapter that is, or was at any time, suspended or revoked and, if so, the dates of the suspension period or the date of revocation; and
- D. Such other information as the city manager deems necessary for the administration or enforcement of this chapter.

SECTION 2. Section 5.138.060 of the Sacramento City Code is amended to read as follows:

5.138.060 Issuance, expiration, renewal and denial of license.

- A. Upon the receipt of an application for a license and the applicable license fee, the city manager shall issue a license unless:

1. The application is incomplete or inaccurate;
2. The application seeks authorization for tobacco retailing at an address that appears on a license that is suspended, has been revoked, or is subject to suspension or revocation proceedings for violation of any of the provisions of this chapter; provided, however, this section shall not constitute a basis for denial of a license if either of the following apply:
 - a. The applicant provides the city with documentation demonstrating that the applicant has acquired the premises or business in an arm's length transaction. For the purposes of this subparagraph, an "arm's length transaction" is defined as a sale in good faith and for valuable consideration that reflects the fair market value in the open market between two informed and willing parties, neither under any compulsion to participate in the transaction. A sale between relatives, related companies or partners, or a sale for the primary purpose of avoiding the effect of the violations of this chapter that occurred at the location, is presumed not to be an "arm's length transaction";
 - b. It has been more than five years since the most recent license for that location was revoked;
3. The application seeks authorization for tobacco retailing that is unlawful pursuant to this code, or that is unlawful pursuant to any other local, state, or federal law; or,
4. The city manager has information that the applicant or his or her agents or employees has violated any local, state or federal tobacco control law at the location for which the license or renewal of the license is sought within the preceding thirty-day (30) period.

B. Except as provided in subsections (B) (1) and (B) (2) below, all licenses shall expire one (1) year after the date of issuance of the license unless the license is revoked on an earlier date.

1. If a license is subject to suspension or revocation proceedings one (1) year after the date of issuance of the license, the license shall expire in the following manner:
 - a. If a final adjudication of a notice and order of suspension occurs because the licensee irrevocably waived the right to an administrative hearing by not filing a timely appeal in accordance with Section 5.138.120, the license shall expire upon the full completion of the resulting period of suspension;
 - b. If a final adjudication of a notice and order of revocation occurs because the licensee irrevocably waived the right to an administrative hearing by not filing a timely appeal in accordance with Section 5.138.120, the license shall expire on the date of the final adjudication;

c. If a written decision of the hearing examiner does not affirm a decision by the city manager to suspend or revoke the license, the license shall expire sixty (60) days after the date on which the written decision of the hearing examiner becomes final in the manner described in Section 5.138.150.

d. If a written decision of the hearing examiner affirms a decision by the city manager to suspend the license, the license shall expire upon the full completion of the resulting period of suspension;

e. If a written decision of the hearing examiner affirms a decision by the city manager to revoke the license, the license shall expire on the date on which the written decision of the hearing examiner becomes final in the manner described in Section 5.138.150.

2. If the period of suspension of a suspended license will end later than one (1) year after the date of issuance of the license, the license shall expire upon the completion of the period of suspension.

C. A license may be renewed for an additional period of one (1) year by submitting a renewal application to the city manager and payment of the applicable license fee; provided, however, a license that is suspended, has been revoked, or is subject to suspension or revocation proceedings shall not be renewed.

1. The application and license fee shall be submitted at least thirty (30) days, but not more than sixty (60) days, prior to the expiration of the current license. The applicant shall follow all of the procedures and provide all of the information required by Section 5.138.050.

2. The city manager shall process the application according to the provisions of this section.

D. Where the city manager does not approve a license or renewal of a license, the city manager shall notify the applicant of the specific grounds for the denial in writing. The notice of denial shall be served personally or by mail not later than five calendar days after the date of the denial. If the notice of denial is served by mail, the notice shall be placed in a sealed envelope, with postage paid, addressed to the applicant at the address as it appears on the application. Notice shall be deemed complete at the time of deposit of the notice in the United States mail without extension of time for any reason. If the notice is served personally, the notice shall be delivered to the person to be served and service shall be deemed complete at the time of such delivery. Personal service to a corporation may be made by delivery of the notice to any person designated in the Code of Civil Procedure to be served for the corporation with summons and complaint in a civil action.

SECTION 3. Section 5.138.110 of the Sacramento City Code is amended to read as follows:

A. In addition to any other remedy authorized by law, a license shall be suspended or revoked as provided in this section, if the city manager finds that the licensee or his or her agents or employees has or have violated any of the provisions of this chapter; provided, however, violations by a licensee at one location may not be accumulated against other locations of that same licensee, nor may violations accumulated against a prior licensee at a licensed location be accumulated against a new licensee at the same licensed location.

1. Upon a finding by the city manager of a first license violation within any five-year period, the license shall be suspended for thirty (30) days.

2. Upon a finding by the city manager of a second license violation within any five-year period, the license shall be suspended for ninety (90) days.

3. Upon a finding by the city manager of a third license violation within any five-year period, the license shall be suspended for one (1) year.

4. Upon a finding by the city manager of a fourth license violation within any five-year period, the license shall be revoked.

B. Notwithstanding subsection (A) of Section 5.138.110(A), a license shall be revoked if the city manager finds that either of the following conditions exist:

1. One or more of the bases for denial of a license under subsection (A) of Section 5.138.060 existed at the time application was made or at anytime before the license issued.

2. The information contained in the license application, including supplemental information, if any, is found to be false in any material respect.

C. If the city manager suspends or revokes a license, written notice of the suspension or revocation shall be served upon the licensee within five (5) days of the suspension or revocation in the manner prescribed in subsection (B) of Section 5.138.060. The notice shall contain:

1. A brief statement of the specific grounds for such suspension or revocation;

2. A statement that the licensee may appeal the suspension or revocation by submitting an appeal, in writing, in accordance with the provisions of Section 5.138.120, to the city manager, within ten (10) calendar days of the date of service of the notice; and

3. A statement that the failure to appeal the notice of suspension or revocation will constitute a waiver of all right to an administrative appeal hearing, and the suspension or revocation will be final.

D. A licensee for whom a license suspension is in effect must remove all tobacco products and tobacco paraphernalia from public view at the address that appears on the suspended license.

SECTION 4. Except as amended above, all provisions of Chapter 5.138 shall remain in full force and effect.

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5.138.050 Application procedure.

All applications for a license shall be submitted to the city manager in the name of each proprietor proposing to conduct tobacco retailing, and all applications for a license shall be signed by each proprietor or an authorized agent thereof. A proprietor proposing to conduct tobacco retailing at more than one location shall submit a separate application for each location. Every application shall be submitted on a form supplied by the city manager, and every application shall contain the following information:

- A. The name, address, and telephone number of each proprietor;
- B. The business name, address, and telephone number of the fixed location for which a license is sought;
- C. Whether or not any proprietor has previously been issued a license pursuant to this chapter that is, or was at any time, suspended or revoked and, if so, the dates of the suspension period or the date of revocation; and
- D. Such other information as the city manager deems necessary for the administration or enforcement of this chapter.

SECTION 2. Section 5.138.060 of the Sacramento City Code is amended to read as follows:

5.138.060 Issuance, expiration, renewal and ~~renewal~~ denial of license.

- A. Upon the receipt of an application for a license and the applicable license fee, the city manager shall issue a license unless:

1. The application is incomplete or inaccurate;
2. The application seeks authorization for tobacco retailing at an address that appears on a license that is suspended, has been revoked, or is subject to suspension or revocation proceedings for violation of any of the provisions of this chapter; provided, however, this subsection~~paragraph~~ shall not constitute a basis for denial of a license if ~~either or both~~ of the following apply:
 - a. The applicant provides the city with documentation demonstrating that the applicant has acquired ~~or is acquiring~~ the premises or business in an arm's length transaction after the license was suspended or revoked or after suspension or revocation proceedings had commenced. For the purposes of this subparagraph, an "arm's length transaction" is defined as a sale in good faith and for valuable consideration that reflects the fair market value in the open market between two informed and willing parties, neither under any compulsion to participate in the transaction. A sale between relatives, related companies or partners, or a sale for the primary purpose of avoiding the effect of the violations of this chapter that occurred at the location, is presumed not to be an "arm's length transaction";
 - b. It has been more than five years since the most recent license for that location was revoked;
3. The application seeks authorization for tobacco retailing that is unlawful pursuant to this code, or that is unlawful pursuant to any other local, state, or federal law; or,
4. The city manager has information that the applicant or his or her agents or employees has violated any local, state or federal tobacco control law at the location for which the license or renewal of the license is sought within the preceding thirty-day (30) period.

~~B. A license shall be valid for one year and must be renewed not later than thirty (30) days prior to the expiration of the license, but no earlier than sixty (60) days prior to the expiration of the license. Unless revoked on an earlier date~~ Except as provided in subsections (B) (1) and (B) (2) below, all licenses shall expire one (1) year after the date of issuance of the license unless the license is revoked on an earlier date. ~~A license may be renewed for additional periods of one year by submitting an application to the city manager and payment of the applicable license fee; provided, however, a license that is suspended, has been revoked, or is subject to suspension or revocation proceedings shall not be renewed. The application and license fee shall be submitted at least thirty (30) days, but not more than sixty (60) days, prior to the expiration of the current valid license. The applicant shall follow all of the procedures and provide all of the information required by Section 5.138.050. The city manager shall process the application according to the provisions of this section.~~

1. If a license is subject to suspension or revocation proceedings one (1) year after the date of issuance of the license, the license shall expire in the following manner:

a. If a final adjudication of a notice and order of suspension occurs because the licensee irrevocably waived the right to an administrative hearing by not filing a timely appeal in accordance with Section 5.138.120, the license shall expire upon the full completion of the resulting period of suspension;

b. If a final adjudication of a notice and order of revocation occurs because the licensee irrevocably waived the right to an administrative hearing by not filing a timely appeal in accordance with Section 5.138.120, the license shall expire on the date of the final adjudication;

c. If a written decision of the hearing examiner does not affirm a decision by the city manager to suspend or revoke the license, the license shall expire sixty (60) days after the date on which the written decision of the hearing examiner becomes final in the manner described in Section 5.138.150.

d. If a written decision of the hearing examiner affirms a decision by the city manager to suspend the license, the license shall expire upon the full completion of the resulting period of suspension;

e. If a written decision of the hearing examiner affirms a decision by the city manager to revoke the license, the license shall expire on the date on which the written decision of the hearing examiner becomes final in the manner described in Section 5.138.150.

2. If the period of suspension of a suspended license will end later than one (1) year after the date of issuance of the license, the license shall expire upon the completion of the period of suspension.

~~C. Where the city manager does not approve a license or renewal of a license, the city manager shall notify the applicant of the specific grounds for the denial in writing. The notice of denial shall be served personally or by mail not later than five calendar days after the date of the denial. If by mail, the notice shall be placed in a sealed envelope, with postage paid, addressed to the applicant at the address as it appears on the application. The giving of notice shall be deemed complete at the time of deposit of the notice in the United States mail without extension of time for any reason. In lieu of mailing, the notice may be served personally by delivering to the person to be served and service shall be deemed complete at the time of such delivery. Personal service to a corporation may be made by delivery of the notice to any person designated in the Code of Civil Procedure to be served for the corporation with summons and complaint in a civil action. A license may be renewed for an additional period of one (1) year by submitting a renewal application to the city manager and payment of the applicable license fee; provided, however, a license that is~~

suspended, has been revoked, or is subject to suspension or revocation proceedings shall not be renewed.

1. The application and license fee shall be submitted at least thirty (30) days, but not more than sixty (60) days, prior to the expiration of the current license. The applicant shall follow all of the procedures and provide all of the information required by Section 5.138.050.

2. The city manager shall process the application according to the provisions of this section.

D. Where the city manager does not approve a license or renewal of a license, the city manager shall notify the applicant of the specific grounds for the denial in writing. The notice of denial shall be served personally or by mail not later than five calendar days after the date of the denial. If the notice of denial is served by mail, the notice shall be placed in a sealed envelope, with postage paid, addressed to the applicant at the address as it appears on the application. Notice shall be deemed complete at the time of deposit of the notice in the United States mail without extension of time for any reason. If the notice is served personally, the notice shall be delivered to the person to be served and service shall be deemed complete at the time of such delivery. Personal service to a corporation may be made by delivery of the notice to any person designated in the Code of Civil Procedure to be served for the corporation with summons and complaint in a civil action.

SECTION 3. Section 5.138.110 of the Sacramento City Code is amended to read as follows:

5.138.110 Suspension or revocation of license.

A. In addition to any other remedy authorized by law, a license shall be suspended or revoked as provided in this section, if the city manager finds that the licensee or his or her agents or employees has or have violated any of the provisions of this chapter; provided, however, violations by a licensee at one location may not be accumulated against other locations of that same licensee, nor may violations accumulated against a prior licensee at a licensed location be accumulated against a new licensee at the same licensed location.

1. Upon a finding by the city manager of a first license violation within any five-year period, the license shall be suspended for thirty (30) days.

2. Upon a finding by the city manager of a second license violation within any five-year period, the license shall be suspended for ninety (90) days.

3. Upon a finding by the city manager of a third license violation within any five-year period, the license shall be suspended for one (1) year.

4. Upon a finding by the city manager of a fourth license violation within any five-year period, the license shall be revoked.

B. Notwithstanding subsection (A) of Section 5.138.110(A), a license shall be revoked if the city manager finds that either of the following conditions exist:

1. One or more of the bases for denial of a license under subsection (A) of Section 5.138.060(A) existed at the time application was made or at anytime before the license issued.

2. The information contained in the license application, including supplemental information, if any, is found to be false in any material respect.

C. If the city manager suspends or revokes a license, written notice of the suspension or revocation shall be served upon the licensee within five (5) days of the suspension or revocation in the manner prescribed in subsection (B) of Section 5.138.060(B). The notice shall contain:

1. A brief statement of the specific grounds for such suspension or revocation;

2. A statement that the licensee may appeal the suspension or revocation by submitting an appeal, in writing, in accordance with the provisions of Section 5.138.120, to the city manager, within ten (10) calendar days of the date of service of the notice; and

3. A statement that the failure to appeal the notice of suspension or revocation will constitute a waiver of all right to an administrative appeal hearing, and the suspension or revocation will be final.

D. A licensee for whom a license suspension is in effect must remove all tobacco products and tobacco paraphernalia from public view at the address that appears on the suspended license.