Atascadero City Council
Staff Report - Police Department

Tobacco Retail Business Compliance Plan

RECOMMENDATIONS:

Council:

1. Direct staff to initiate intermediate steps by firmly working with the tobacco business retailers in Atascadero to explore and implement alternatives, options, and opportunities to comply with State law concerning the sale of tobacco products; and,

2. Direct staff to return to Council with their findings in June 2011.

REPORT-IN-BRIEF:

At the September 14, 2010, City Council Meeting, the Council directed staff to place the issue of tobacco retail licensing, and other available options, on a future agenda as an action item. Further, there was Council consensus to give staff direction to create a letter to the businesses that were cited, warning them that if they continue to violate the laws, the City will adopt a tobacco retail licensing ordinance. This letter has been sent.

The City of Atascadero, in partnership with the County Public Health Department, conducts compliance checks of tobacco retailers within the City to ensure retailers are not selling tobacco to persons under the legal age of 18. Through these compliance checks, an increase in the purchase and use of tobacco products by youth under the age of 18 has been identified. These compliance checks have resulted in determining that City tobacco retailers are selling tobacco to underage purchasers at a rate higher than the State and local average. Currently under State law, both the seller and the under-age buyer are cited for misdemeanor violations. However, under current law, and without a City Licensing Ordinance, the business retailer is not cited unless a direct connection to the buyer can be established.
DISCUSSION:

Background: Statistics detailing Atascadero Police Department enforcement efforts show that from January 2009 to the present, 137 criminal citations were issued to underage youth who purchased, received, or possessed tobacco products. Also during this time period, 19 citations were issued to tobacco retail employees who sold tobacco products to underage youths.

In November of 2009, March of 2010, and August of 2010, Police Department compliance checks were conducted within the City of Atascadero using a decoy to purchase tobacco products. A statistical analysis of tobacco retailers in Atascadero determined that illegal sales of tobacco products to underage buyers have been steadily increasing. Sales of tobacco products to teens State-wide has decreased over the past fifteen years from 38% in 1995 to 8.6% in 2009 due in part to tobacco retailer licensing laws.

<table>
<thead>
<tr>
<th>COMPLIANCE CHECK RESULTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>November 19, 2009</td>
</tr>
<tr>
<td>18 retailers</td>
</tr>
<tr>
<td>4 citations</td>
</tr>
<tr>
<td>22%</td>
</tr>
<tr>
<td>March 16, 2010</td>
</tr>
<tr>
<td>17 retailers</td>
</tr>
<tr>
<td>4 citations</td>
</tr>
<tr>
<td>23%</td>
</tr>
<tr>
<td>August 9, 2010</td>
</tr>
<tr>
<td>25 retailers</td>
</tr>
<tr>
<td>8 citations</td>
</tr>
<tr>
<td>32%</td>
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California State law states that it is a violation to sell tobacco products to buyers under the age of 18 years old and a violation for persons under the age of 18 years old to purchase tobacco products. City compliance checks identify business retail employees who sell tobacco products to an under-age decoy buyer. As a result, the sales clerk illegally selling the tobacco product to a buyer under the age of 18 is guilty of a misdemeanor criminal offense. The clerk is issued a criminal citation to appear in court.

In cases where a police officer, without the use of a decoy, identifies an under-age buyer, that buyer is guilty of a misdemeanor criminal offense. The buyer is issued a criminal citation to appear in court. However, the tobacco retailer is not issued a criminal citation unless the investigating officer can show circumstances in which the retailer has knowledge, or should otherwise have grounds for knowledge, and sells, gives, or in any way furnishes another person who is under the age of 18 years.

After the last compliance check on August 9, 2010, based on an increase in the sales rate to underage buyers, the City’s Community Response Team personally delivered invitations to every tobacco retailer in town (25) for a scheduled tobacco retailer’s workshop conducted on September 14th at the Pavilion. The Police Department wrote an article asking for help in reducing minors’ accessibility to tobacco products and urged retailers to attend the upcoming no-cost workshop. The article was published in the Atascadero Chamber of Commerce September 2010 edition of the “Business Reporter.” This workshop was conducted in partnership with the County Health Department. Five retailers being represented by 10 employees attended the event. One of the retailer businesses was located in Santa Margarita.
The City Council has continued to express concerns about sales of tobacco products to minors and on the impacts of a tobacco licensing program if one were enacted. Specifically the Council has:

**Voiced concerns regarding the impact on the Police Department**

- A licensing program will result in an increase of staff hours. The Community Response Team is tasked with the Tobacco Retail program. Two officers currently conduct an educational training workshop, two compliance checks per year, and resulting enforcement actions in partnership with the County Public Health Department. Increasing the number of educational workshops, compliance checks, and enforcement actions to firmly work with tobacco retail businesses will increase CRT staff time and take time from other investigative, enforcement, and proactive duties.

**Voiced concerns regarding the Police Department hours and expense**

- Firmly working with the tobacco retailers to the level described will necessitate an increase in education, compliance, and enforcement.

- Currently, each of the two CRT officers devote approximately 36-42 hours of on-duty time per year to the retailer workshop, twice yearly compliance checks, and resulting enforcement actions. This includes the time spent with tobacco retailers and the planning, coordination, execution, and report writing aspect of the existing program. Expanding the current program will require a commensurate increase in CRT on-duty time and may require the use of additional officers at an overtime rate for compliance checks and enforcement.

**Voiced concern regarding cost to tobacco business retailers**

**Analysis:** Despite these concerns, the City of Atascadero is committed to working with local tobacco retailers to foster a partnership toward voluntary compliance and self-policing attitudes in light of additional regulations and thus reduce sales to minors. There are other alternatives that could be taken to see if sales to minors could be reduced. These include:

- Having a firm letter from the Police Chief hand-delivered that outlines the commitment to explore alternatives and the importance of reducing the sales of tobacco to minors.

- Providing up to two more educational training workshops (total of four) geared towards reducing the sale of tobacco to minors. The Police Department could partner with the Chamber of Commerce, Department of Public Health, or other interest groups.
Conducting additional unannounced compliance checks per calendar year, with two prior to July 2011.

Making the Community Response Team (CRT) more accessible to tobacco retail businesses to answer relevant questions.

Continuing to issue (and encouraging the display of) certificates of compliance to retail businesses upon passing each compliance check.

Visiting businesses that fail to pass compliance checks that result in a criminal citation. The Police Department Community Response Team will meet with the business owner, review the compliance check and offer prevention suggestions.

Working through the Chamber of Commerce to produce newsletter and magazine information regarding the importance of reducing sales to minors and creating a type of “peer pressure” to tighten up sales.

Exploring tobacco retail business incentive programs through the Office of Economic Development to include issuing another letter through the Office of Economic Development that while the City is trying to allow local businesses the opportunity to correct themselves, a Tobacco Licensing Program could be imminent should sales to minors not be reduced immediately.

Staff will return to the Council with their findings in June 2011. Should improvement not be demonstrated, Staff would return with a recommendation to implement a Tobacco Licensing Program.

Tobacco Licensing Programs

As of June 2010, more than 100 communities throughout the State have enacted local tobacco retailer licensing ordinances. The American Lung Association recommends the following four components within such an ordinance:

- A License that all retailers must obtain in order to sell tobacco products and that must be renewed annually.

- A fee set high enough to sufficiently fund an effective program including administration of the program and enforcement efforts. An enforcement plan that includes compliance checks should be clearly stated.

- Coordination of tobacco regulations so that a violation of any existing local, state, or federal regulation violate the license.
- A financial deterrent through fines and penalties including the suspension and revocation of the license. Fines and penalties should be outlined in the ordinance.

With regard to Tobacco Retail Licensing locally, the cities of San Luis Obispo, Arroyo Grande, and Grover Beach and the County of San Luis Obispo have enacted Tobacco Retail License Ordinances. The following chart compares those ordinances:

<table>
<thead>
<tr>
<th>Community</th>
<th>Fee</th>
<th>Enforcement Activities</th>
<th>Suspension/ Revocation Schedule</th>
<th>Fine Schedule</th>
<th>Additional Provisions</th>
</tr>
</thead>
</table>
| City of San Luis Obispo  | $278 Annual  | Three police officers and one police sergeant will conduct 4 compliance checks per-retailer per-year on a part time basis. It was written into the law that at least four compliance checks must be conducted each year and the cost of compliance monitoring shall be incorporated into the license fee. | 1<sup>st</sup> violation within 5 years – 30 day suspension  
2<sup>nd</sup> violation within 5 years – 90 day suspension  
3<sup>rd</sup> violation within 5 years – 1 year suspension  
4<sup>th</sup> violation within 5 years – the license shall be revoked. | $100 for the first violation  
$200 for the second violation  
$500 for the third violation and any other violation following | Bans mobile sales  
Bans sales at locations licensed to sell alcoholic beverages for consumption on the premises (bars).  
Requires that all tobacco products must be removed from public view during periods of suspension or revocation. |
| Arroyo Grande            | $208 Annual  | The Arroyo Grande Police Department will conduct at least 4 compliance checks of each tobacco retailer each year | 1<sup>st</sup> violation within 5 years – 30 day suspension  
2<sup>nd</sup> violation within 5 years – 90 day suspension  
3<sup>rd</sup> violation within 5 years – one year suspension  
4<sup>th</sup> violation within 5 years the license shall be revoked | $100 for the first violation within a one (1) year period  
$200 for the second violation with a one (1) year period  
$500 for the third violation within a one (1) year period | Bans mobile sales.  
Bans sales at locations to sell alcoholic beverages for consumption on the premises (bars).  
Requires that all tobacco related products and advertising must be removed from public view during periods of suspension or revocation. |
| Grover Beach             | $224 Annual  | Compliance shall be monitored by the Grover Beach Police Department. At least four compliance checks of each tobacco retailer shall be conducted during each twelve-month period. | 1<sup>st</sup> violation within 5 years – 30 day revocation.  
2<sup>nd</sup> violation within 5 years – 90 day revocation.  
3<sup>rd</sup> violation within 5 years - 1 year revocation. | $100 for the first violation within a one (1) year period  
$200 for the second violation with a one (1) year period  
$500 for the third violation within a one (1) year period | Bans mobile sales.  
Bans sales in businesses that sell alcohol for consumption on the premises (restaurants and bars).  
Requires retailers to check the ID of all persons purchasing tobacco products. |
| County of San Luis Obispo | $342 Annual | The Sheriff’s Department will be responsible for compliance. At least four compliance checks per year will be conducted | 1
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violation within 5 years – 5 year period | $200.00 - $1,000.00 | Bans mobile sales |

4
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violation within 5 years – 5 year revocation. |

5
year
revocation.

1
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violation within 5 years – 30 day suspension |

2
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violation within 5 years – 90 day suspension |

3
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violation within 5 years – 1 year suspension |

4
th
violation within 5 years – 5 year suspension |

Requires all tobacco-related products and advertising must be removed from public view during periods of license revocation. |

Requires that no license may be granted to any business whose main purpose is offering food or alcoholic beverages for sale for consumption on the premises. |

Requires retailers to check the age of purchasers who appear to be under the age of 30. |

Requires that clerks are the minimum legal age to purchase tobacco products (currently 16). |

The Tobacco Retail License violation process varies between each of the Cities and SLO County. With regards to sellers and under-age buyers, prosecution practices remain the same and all appear in criminal court and are prosecuted by the District Attorney’s Office for violation of a State statute. A review of the local cities and County with regards to the retail ordinance violations reveals the following:

Cities:

San Luis Obispo
The retailer violating the City Ordinance is issued an administrative citation. The Police Department hears the appeal and renders a decision. The decision may be appealed to the City Manager and ultimately to Superior Court.

Arroyo Grande
The retailer violating the City Ordinance is issued a city ordinance violation citation which goes directly to the Court. The retailer appears in court to answer to the charge. The Police Department presents a prosecution case in Court for violation of the City Ordinance and appears in place of the City Attorney.
Grover Beach
The retailer violating the City Ordinance is issued an administrative citation. The Police Department hears the case and renders a decision. The decision may be appealed to the City Manager and ultimately to Superior Court.

San Luis Obispo County
The County Health Department initiates an administrative hearing against the retailer. If a negative finding is sustained, the retailer may file an appeal with the Public Health Officer and ultimately to Superior Court.

The cities certainly have an option of inserting their individual city attorney's office in the process to the point of prosecuting the case in criminal court. The District Attorney's Office does not generally prosecute city ordinances.

Conclusion: The City of Atascadero, in partnership with the County Health Department, continues to desire to concentrate on Atascadero tobacco retailer education, compliance, and enforcement, however should retail sales to minors not be reduced in the coming months, a licensing program could be eminent.

FISCAL IMPACT:
There will be minor costs including increased staff hours resulting from the additional focus placed on educating and warning tobacco retailers.

ALTERNATIVES:

1. Council could direct staff to draft an ordinance identifying licensing fees, administrative citation process, fines, suspension/revocation, and appeal process.

2. Council could take no action. This alternative is not recommended at this time due to an increase in sales to underage buyers by tobacco retail sales employees.

3. Council provide alternative direction to staff.

ATTACHMENT:

1. State Penal Code Section 308
California Penal Code Section 308
Selling Cigarettes or Tobacco to Minor

(a) (1) Every person, firm, or corporation that knowingly or under circumstances in which it has knowledge, or should otherwise have grounds for knowledge, sells, gives, or in any way furnishes to another person who is under the age of 18 years any tobacco, cigarette, or cigarette papers, or blunts wraps, or any other preparation of tobacco, or any other instrument or paraphernalia that is designed for the smoking or ingestion of tobacco, products prepared from tobacco, or any controlled substance, is subject to either a criminal action for a misdemeanor or to a civil action brought by a city attorney, a county counsel, or a district attorney, punishable by a fine of two hundred dollars ($200) for the first offense, five hundred dollars ($500) for the second offense, and one thousand dollars ($1,000) for the third offense.

Notwithstanding Section 1464 or any other provision of law, 25 percent of each civil and criminal penalty collected pursuant to this subdivision shall be paid to the office of the city attorney, county counsel, or district attorney, whoever is responsible for bringing the successful action, and 25 percent of each civil and criminal penalty collected pursuant to this subdivision shall be paid to the city or county for the administration and cost of the community service work component provided in subdivision (b). Proof that a defendant, or his or her employee or agent, demanded, was shown, and reasonably relied upon evidence of majority shall be defense to any action brought pursuant to this subdivision. Evidence of majority of a person is a facsimile of or a reasonable likeness of a document issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, a motor vehicle operator's license, a registration certificate issued under the federal Selective Service Act, or an identification card issued to a member of the Armed Forces. For purposes of this section, the person liable for selling or furnishing tobacco products to minors by a tobacco vending machine shall be the person authorizing the installation or placement of the tobacco vending machine upon premises he or she manages or otherwise controls and under circumstances in which he or she has knowledge, or should otherwise have grounds for knowledge, that the tobacco vending machine will be utilized by minors.

(2) For purposes of this section, "blunt wraps" means cigar papers or cigar wrappers of all types that are designed for smoking or ingestion of tobacco products and contain less than 50 percent tobacco.

(b) Every person under the age of 18 years who purchases, receives, or possesses any tobacco, cigarette, or cigarette papers, or any other preparation of tobacco, or any other instrument or paraphernalia that is designed for the smoking of tobacco, products prepared from tobacco, or any controlled substance shall, upon conviction, be punished by a fine of seventy-five dollars ($75) or 30 hours of community service work. (c) Every person, firm, or corporation that sells, or deals in tobacco or
any preparation thereof, shall post conspicuously and keep so posted in his, her, or their place of business at each point of purchase the notice required pursuant to subdivision (b) of Section 22952 of the Business and Professions Code, and any person failing to do so shall, upon conviction, be punished by a fine of fifty dollars ($50) for the first offense, one hundred dollars ($100) for the second offense, two hundred fifty dollars ($250) for the third offense, and five hundred dollars ($500) for the fourth offense and each subsequent violation of this provision, or by imprisonment in a county jail not exceeding 30 days.

(d) For purposes of determining the liability of persons, firms, or corporations controlling franchises or business operations in multiple locations for the second and subsequent violations of this section, each individual franchise or business location shall be deemed a separate entity.

(e) It is the Legislature's intent to regulate the subject matter of this section. As a result, no city, county, or city and county shall adopt any ordinance or regulation inconsistent with this section.