

SUBJECT: Discuss Possible New Tobacco Regulations and Provide Direction to Staff

DEPARTMENT: Community Development

STAFF: Alexis Morris, Director of Community Development

TITLE/RECOMMENDATION

Consider information related to possible new tobacco regulations and provide direction to staff on the options provided in the staff report.

FISCAL IMPACT

If a tobacco retailer licensing (TRL) ordinance is approved, the new license fees would be submitted for approval by the City Council at a future meeting. The amount of revenue collected will depend on the fee amount proposed and the number of businesses required to be licensed and is not expected to have a material impact on General Fund revenues.

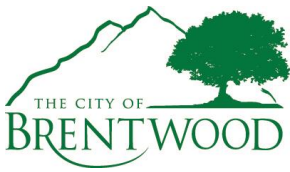
License fees and any potential revenue generated by administrative citations for enforcement of an ordinance would be deposited into the General Fund. General Fund legal fees to draft a new TRL ordinance are estimated to be between \$5,000-\$10,000, including approximately \$2,000 in legal fees already incurred, and are expected to be expended in FY 2023/2024 and FY 2024/2025. There is sufficient General Fund budget for the expenditure in both fiscal years.

Finally, staff will pursue any available grant funding from the State of California Department of Justice (DOJ) Tobacco Grant Program that may be used to enforce local ordinances, including a TRL ordinance, if approved.

BACKGROUND

TOBACCO URGENCY ORDINANCE AND COUNCIL REQUESTED INFORMATION

In 2022, the City Council directed staff to regulate new tobacco smoke shops that sell products for off-site consumption. This use is currently (and has historically been) considered to be a general retail use under the Brentwood Municipal Code, and therefore permitted by right in any zoning district that allows general retail uses. On September 27, 2022, the City Council adopted an interim urgency ordinance



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implementing a moratorium on new tobacco smoke shops, and extended the interim urgency ordinance one final time on August 22, 2023 (staff report attached). The interim urgency ordinance will expire on September 8, 2024.

At the August 22, 2023, City Council meeting, the Council directed staff to provide additional information on the following items related to potential new tobacco regulations:

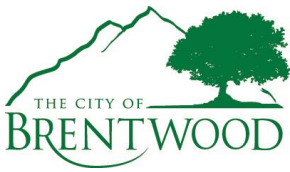
1. implementing a local tobacco retail license system, including maximum amount that can be charged, and how those fees will be spent;
2. 100% flavor ban on tobacco sales;
3. prohibiting vaping product sales;
4. maximum distance between tobacco retailers and schools allowed by law;
5. minimum sales sizes (e.g., pack/carton);
6. strictest laws for proximity between retailers;
7. all tobacco sales banned at pharmacies;
8. working with law enforcement on decoy purchasers;
9. any means to retroactively revoke licenses (if applicable);
10. minimum prices on tobacco;
11. prohibit coupons/discounts;
12. cap on smoke shops and tobacco retailers in total;
13. DOJ grants to support code enforcement;
14. require CUP for tobacco sales;
15. potential penalties available; and
16. best practices from other cities for Council consideration.

LAND USE AND DEVELOPMENT COMMITTEE (LUD) RECOMMENDATIONS

On March 18, 2024, staff presented LUD with information on the above 16 items and requested LUD provide recommendations on each item for City Council to consider. LUD provided recommendations on each of the 16 items and requested information be provided to City Council on additional items. All of LUD's recommendations and requests for additional information are summarized in the table attached to the staff report and are included in the staff report discussion below.

PUBLIC HEALTH CONTEXT

Tobacco use is the United States' leading cause of preventable death. Each year, tobacco-related diseases cause the deaths of approximately 40,000 Californians and



nearly half a million individuals in the United States.¹ Further, Centers for Disease Control and Prevention (CDC) estimates suggest that 441,000 Californians under 18 today will die from tobacco-related diseases.²

REGULATORY CONTEXT

There are multiple state and federal laws that regulate the retail sale of tobacco products and the licensing of tobacco retailers. For example, California Penal Code 308 prohibits the selling, giving, or furnishing of tobacco products and tobacco paraphernalia to most individuals under the age of 21.³ The Stop Tobacco Access to Kids Enforcement Act (“STAKE Act”) also prohibits tobacco sales to most individuals under the age of 21, restricts tobacco self-service displays and vending machine sales, and requires retailers to post signs at the point of sale about illegal underage tobacco sales.⁴ The Public Health Law Center publishes a digest titled “Tracking Tobacco Laws: A California Digest” that summarizes the major tobacco-related laws and regulations that affect the State of California⁵.

Business and Professions Code § 22971.3 provides that nothing in the state’s Cigarette and Tobacco Products Licensing Act of 2003 (which sets out the statewide framework for tobacco licensing) “preempts or supersedes” local tobacco control law. This evidences an intent by the state to allow localities to study and legislate with respect to the tobacco regulations that work best for their own jurisdiction. A 2010 appellate case expressly held that a local regulatory scheme requiring tobacco retailers to obtain a city (in addition to state) license to sell tobacco, and authorizing the suspension or revocation of a tobacco retailer license for violations of the local ordinance, was not preempted by state law. (*Prime Gas, Inc. v. City of Sacramento* (2010) 184 Cal.App.4th 967.)

EXISTING ENFORCEMENT EFFORTS AND COSTS

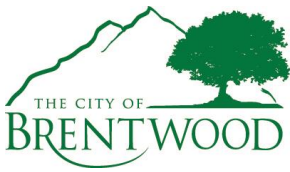
¹ U.S. Department of Health and Human Services. The Health Consequences of Smoking: 50 Years of Progress. A Report of the Surgeon General. Atlanta, GA: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health. 2014. Available at: <https://www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf>.

² Centers for Disease Control and Prevention. *Best Practices for Comprehensive Tobacco Control Programs—2014*. U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health. 2014. Available at: https://www.cdc.gov/tobacco/stateandcommunity/best_practices/pdfs/2014/comprehensive.pdf.

³ Cal. Penal Code § 308(a)(1)(A).

⁴ Cal. Bus. & Prof. Code §§ 22950-22964.

⁵ <https://www.publichealthlawcenter.org/sites/default/files/resources/CA-Tracking-Tobacco-Laws-Digest.pdf>



Currently, enforcement of tobacco related laws within the City's jurisdiction is conducted by the Police Department. Enforcement activities are primarily complaint-driven; however, the Police Department occasionally conducts proactive enforcement operations related to underage tobacco stings using persons between 16-20 years of age (i.e., decoy purchasers). The Department also occasionally works with outside agencies on enforcement operations. Enforcement is conducted as part of normal operations and is funded by the Department budget, therefore, it is difficult to determine the exact costs.

POTENTIAL NEW TOBACCO REGULATIONS

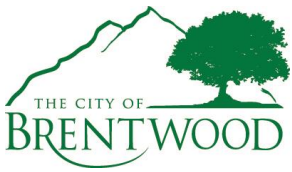
The attached table lists 16 possible new tobacco regulations regarding which the City Council requested additional information. Staff worked with outside counsel and Contra Costa Health to research the 16 items and provide analysis for each, including the regulatory context, implementation strategies, areas where Council direction is needed and staff's recommendation related to that item. This information is provided in the attached table due to the large volume of information requested and in an attempt to keep the staff report to a reasonable length. The discussion below provides additional analysis of specific items on the list that merit more detailed discussion, as well as LUD's recommendations on each item.

Model Tobacco Retailer Licensing ("TRL") Ordinance (#1)

A TRL ordinance requires a local license (in addition to the mandatory state license) in order for any business to sell tobacco products. Contra Costa Environmental Health supports a TRL as an effective tool to ensure compliance with laws and to reduce youth access to tobacco. According to Contra Costa Health, a 2019 California study found that youth in communities with a strong TRL policy were 33% less likely to have initiated cigarette use and 26% less likely to initiate e-cigarette use compared to youth in cities that had no TRL or insufficient compliance checks.⁶

Attached to this staff report is a Model Tobacco Retailer Licensing Ordinance ("Model Ordinance") prepared by the Public Health Law Center and the American Lung Association of California, who are contracted by the California Tobacco Control Program ("CTCP") to support commercial tobacco control professionals and advocates in their work to end the commercial tobacco epidemic in California.

⁶ Roe L. Astor, MPH; Robert Urman, PhD; Jessica L. Barrington-Trimis, PhD; et al. Tobacco Retail Licensing and Youth Product Use. *Pediatrics* (2019) 143 (2): e20173536. <https://doi.org/10.1542/peds.2017-3536>



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The Model Ordinance requires all businesses that sell tobacco products to obtain a license from the local agency in exchange for the permission to sell these products to consumers. With a TRL, local governments may require licensed retailers to pay an annual fee, which can fund administration and enforcement activities, such as store inspections and compliance checks pertaining to youth purchases. The Model Ordinance also includes: a minimum package size and a minimum price for tobacco products; a prohibition on flavored tobacco sales; a prohibition on tobacco sales in pharmacies; and proximity requirements between “youth-oriented facilities” and other tobacco retailers. The Model Ordinance also contains several blanks where there is opportunity to customize language for the City of Brentwood. Use of this existing vetted template ordinance is strongly recommended to avoid running afoul of any applicable state and/or federal laws. In summary, the attached Model Ordinance would create much stricter regulations related to tobacco sales than currently exist in the City and would address many of the 16 issues regarding which the Council requested information.

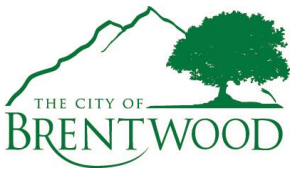
Definitions

The attached Model Ordinance defines a tobacco retailer as:

any person who sells, offers for sale, or exchanges or offers to exchange for any form of consideration, tobacco products. This definition is without regard to the quantity of tobacco products sold, offered for sale, exchanged, or offered for exchange.

According to this definition, any business in the City that sells “tobacco products” would be considered a tobacco retailer in a TRL ordinance, including grocery stores, pharmacies, convenience stores, and liquor stores. Tobacco products are defined as:

- (1) any product containing, made of, or derived from tobacco or nicotine that is intended for human consumption or is likely to be consumed, whether inhaled, absorbed, or ingested by any other means, including but not limited to, a cigarette, a cigar, pipe tobacco, chewing tobacco, snuff, or snus;
- (2) any electronic smoking device and any substances that may be aerosolized or vaporized by such device, whether or not the substance contains nicotine; or
- (3) any component, part, or accessory of (1) or (2), whether or not any of these contains tobacco or nicotine, including but not limited to filters, rolling papers, blunt or hemp wraps, hookahs, mouthpieces, and pipes.



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“Tobacco product” does not mean drugs, devices, or combination products authorized for sale by the U.S. Food and Drug Administration, as those terms are defined in the Federal Food, Drug, and Cosmetic Act.

- **LUD Recommendation:** LUD recommended that the City Council adopt a TRL program using the model ordinance as a basis for a new City ordinance.

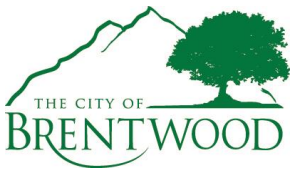
Compliance Monitoring

The Model Ordinance contains requirements for regularly monitoring licensees for compliance with requirements and compliance checks for underage sales using decoy purchasers. If a TRL Ordinance were adopted by the City Council, regular monitoring of licenses would be conducted by Community Enrichment staff and decoy operations would be conducted by the Police Department with the assistance of Community Enrichment staff. Due to limited staff resources, staff recommended to LUD conducting monitoring of licensees for compliance with license requirements once a year and conducting separate compliance checks for underage sales once a year. This would result in a licensee being inspected a minimum of twice a year at different times. Separate inspections would occur if a complaint was received and the Police Department could still conduct occasional underage enforcement operations throughout the year, if necessary. As discussed below, the City may charge tobacco retailers an annual fee to help fund the cost of these enforcement/compliance monitoring efforts.

- **LUD Recommendation:** LUD recommended that the City’s new TRL require three annual compliance checks and one annual decoy operation for each licensee; a total of four annual compliance checks for each licensee.

Penalties (#9, #15)

If a TRL Ordinance is adopted, the City will have stricter and more effective enforcement tools than it currently has. The Model Ordinance includes provisions for the suspension or revocation of a TRL if it is determined that a licensee violated any of the requirements of the ordinance. A license could be suspended for a period of 30-90 days, depending on the number of violations within a five-year period. Alternatively, a license could be revoked after four or more violations within a five year period. Decisions to suspend or revoke a license would be appealable, which is consistent with the City’s existing procedures for other types of Municipal Code violations. Other potential penalties include civil or administrative fines, ineligibility to apply for a new license for a specified period of time, seizure and forfeiture in some cases of products offered for sale in violation of the law, and/or treatment of violations as a public nuisance, allowing for more types of local enforcement.



- **LUD Recommendation:** LUD recommended that the TRL include a maximum limit of three violations after which a TRL license would be revoked, rather than the four violations recommended by the model TRL. LUD also recommended that the new administrative fines established for the TRL program should be as high as possible and, if possible, the administrative fines should be used for providing tobacco education to the community, which is discussed in more detail below.

Drug Paraphernalia

The Model Ordinance does not include a prohibition on the display or sale of drug paraphernalia. If a TRL Ordinance is implemented, staff recommends adding this prohibition along with penalties, such as the revocation of a tobacco retailer license, if it is determined that a retailer sells drug paraphernalia.

- **LUD Recommendation:** LUD recommended that the new TRL include a prohibition on the sale of drug paraphernalia.

Prohibiting Vaping Product Sales (#3)

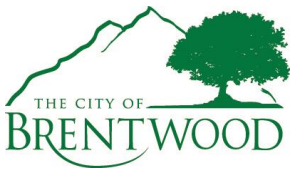
The Model Ordinance does not prohibit sales of electronic smoking devices (“e-cigarettes” or “vapes”) and related products. It does include definitions for electronic smoking devices in the definitions of smoking, tobacco products, etc. If a TRL ordinance is implemented, staff recommends incorporating a prohibition on electronic smoking devices and related products and incorporating a one year “phase-out” period for tobacco retailers to conclude sales.

- **LUD Recommendation:** LUD recommended that the new TRL include a prohibition of the sale of electronic smoking devices. LUD did not directly address whether to implement a phase out period specifically for electronic smoking devices, but did recommend a one year phase-out period for tobacco retailers that would not be compliant with the new regulations once adopted, as discussed below.

Impacts to Existing Businesses

According to the California Department of Tax and Fee Administration⁷, there are approximately 42 state-licensed business selling tobacco in some form in the City. Many of these businesses are permitted by right in their zoning districts – meaning that only a business tax certificate is required to operate. On August 22, 2023, the

⁷ <https://www.cdtfa.ca.gov/taxes-and-fees/cigarette-licensees.htm>



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City Council extended an urgency ordinance to stop the establishment of new, stand-alone smoke shops in the City. This ordinance expires September 8, 2024. The City has received no applications for new smoke shops since the adoption of the urgency ordinance.

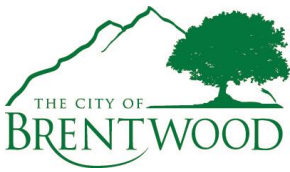
According to the definition of a “tobacco retailer” provided above, any business in the City that sells “tobacco products” would be considered a tobacco retailer in a TRL ordinance; including grocery stores, pharmacies, convenience stores, and liquor stores.

Distance Requirements from Sensitive Uses and Other Retailers (#4, 6)

A separation requirement from sensitive uses (e.g., youth oriented facilities) and from other tobacco retailers can be implemented as part of a TRL Ordinance. The model ordinance suggests a distance requirement of 1,000 feet from youth oriented facilities and other businesses. The model ordinance defines “Youth Oriented Facility” as a parcel in a city that is occupied by:

- (1) a private or public kindergarten, elementary, middle, junior high, or high school;
- (2) a library open to the public;
- (3) a playground open to the public;
- (4) a youth center, defined as a facility where children, ages 6 to 17, inclusive, come together for programs and activities;
- (5) a recreation facility open to the public, defined as an area, place, structure, or other facility that is used either permanently or temporarily for community recreation, even though it may be used for other purposes;
- (6) a park open to the public or to all the residents of a private community;
- (7) a licensed child-care facility or preschool [other than a small-family day care home or a large-family day care home, as defined in California Health & Safety Code § 1596.78]

The attached map prepared by Contra Costa Health shows tobacco retailers and their proximity to certain youth sensitive facilities in Brentwood. The map was provided by Contra Costa Health using data from the California Department of Tax and Fee Administration. Also attached for reference is an example of what a 300, 500, and 1,000 foot separation distance from a Youth Oriented Facility would look like, using Liberty High School as an example. The attached “Matrix of Local Ordinances Restricting Tobacco Retailers Near Schools” prepared by the Center for Tobacco Policy and Organizing of the American Lung Association shows that many cities have



separation requirements between tobacco retailers and youth oriented areas and between other retailers with varying distance requirements. As shown on the matrix, the 1,000 foot separation recommend by the Model Ordinance is common in other cities.

- **LUD Recommendation:** LUD recommended a 1,000 foot separation requirement between tobacco retailers and between “youth oriented facilities” as defined in the model ordinance.

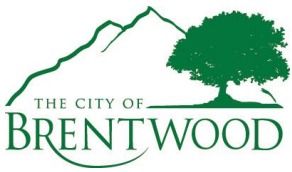
Cap on Number of Tobacco Retailers and Applying Regulations to Existing Retailers (#12)

A numeric cap on the total number of tobacco retailers can be included in a TRL and the cap can be placed city-wide or it can be placed over particular areas of a city. A separation requirement between tobacco retailers, as discussed above, can also effectively limit the number of retailers in the City, whether or not a numeric cap is in place.

The Model Ordinance suggests limiting tobacco retailer licenses by placing a cap on the total number of licenses allowed based on the population of a city. While that may be an effective way to limit tobacco retailers in larger cities, staff does not recommend this approach for Brentwood. Brentwood has relatively few commercially zoned areas compared to its overall population. Therefore, limiting the number of licenses based on population would not effectively address potential over concentration of retailers in commercial areas of the city. Whatever method is used, implementing a numeric cap on licenses would have implications for existing businesses in the city if the chosen cap is lower than the existing number of tobacco retailers and could become complicated to administer.

If a cap were included in a TRL Ordinance, staff would require Council direction on how the cap should be applied (e.g., whether the cap would be applied city-wide or in a specific area of the City) and whether the cap would be calculated based on the overall population or another method. Staff would also need direction on policies to be established in the event applications for licenses exceeded the numeric cap (e.g., through a competitive process or on first-come first-served basis).

- **LUD Recommendation:** LUD recommended not including a numeric cap in a new TRL, but to limit new tobacco retail licenses to only existing tobacco retailers at the time the ordinance takes effect and not allow any retailers not currently operating in the City to be licensed.

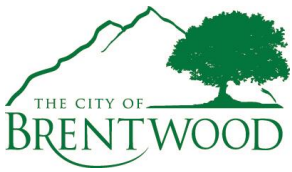


Applying New Regulations to Existing Retailers

Unfortunately, the Model Ordinance does not contain policies related to existing tobacco retailers that are operating lawfully prior to a new TRL Ordinance being adopted, but which would be out of compliance with some or all of the new regulations. For example, it is possible that existing tobacco retailers that are currently legally operating may not meet new requirements for separation from other tobacco retailers and would, through no fault of their own, be out of compliance with the new ordinance as soon as it is adopted and would not be eligible to apply for a license.

If the City Council directs staff to prepare a TRL Ordinance, staff recommends adding policies addressing how the new regulations apply to existing retailers. There are several approaches that could be implemented as part of a TRL Ordinance, detailed below. Each of these methods is allowed; therefore, staff would need City Council's direction on which to implement, or if there is another approach Council would prefer.

- "Grace Period" for existing retailers: This approach would allow tobacco retailers operating lawfully on the date the ordinance is adopted that would become ineligible to receive or renew a Tobacco Retailer's license pursuant to the new ordinance to apply for and receive a one-time, non-renewable license for the location. The length of the grace period would be at the City Council's discretion; although, staff would not recommend a grace period shorter than one year. A one year time frame or longer would allow businesses time to change their operations or seek other locations for their businesses. Retailers would have to cease all tobacco sales once the grace period expired.
- "Grandfather" existing retailers: This option would exempt existing retailers from a TRL ordinance's new requirements, such as the separation requirements, that might otherwise prevent them from qualifying for a license. This option would create two different types of tobacco retailers in the City (e.g., those subject to the ordinance and those exempt from it) and two sets of regulations to enforce. These disparate regulations would be difficult and time intensive for staff to manage over time. It also would make it difficult to enforce a cap on tobacco retailers because it would rely on staff being able to track when grandfathered retailers go out of business.
- "Cap and winnow" existing retailers: If a cap on licenses were implemented, this option would gradually reduce the number of tobacco retailers by, among other things, prohibiting transferring a tobacco business to another party or re-establishing a tobacco business in the same location as one that has closed.



Existing retailers could be licensed under the cap and winnow approach, but would eventually be reduced over time through attrition rather than within the specified time frame that is used by the “grace period” approach.

- **LUD Recommendation:** LUD recommended a combination of the above approaches. Specifically, LUD recommended that businesses that are currently operating but would be out of compliance with new regulations once they were adopted be allowed to obtain a TRL for one year only, after which time they would have to cease selling tobacco products. Further, LUD recommended that licenses not be transferrable to other parties after a location has closed. This approach would significantly reduce the number of tobacco retailers in the City after the initial one year period due to the 1,000 foot separation requirements recommended to be included in the new ordinance.

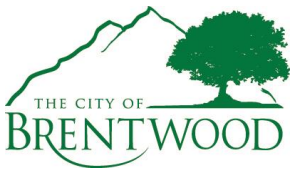
REQUIRING A CONDITIONAL USE PERMIT FOR TOBACCO RETAILERS (#14)

The City can require new tobacco retailers to obtain a conditional use permit (CUP), which can set restrictions such as limiting amount of storefront signage or banning sale of single cigars (among other things). However, if the City Council implements a TRL Ordinance, it would include many strict operating standards for tobacco retailers and provisions for suspension and revocation of licenses. Many of these license requirements would be similar to conditions of approval for the same uses under a CUP. However, the process for suspending or revoking a TRL would be quicker and simpler than the process for revoking a CUP. Therefore, staff recommends implementing a TRL program rather than a CUP requirement, as the TRL would create operational and locational requirements with which all tobacco retailers would have to comply. If the Council would like to require a CUP for future tobacco retailers, the City Council should direct staff to prepare an amendment to the Zoning Ordinance (Title 17).

- **LUD Recommendation:** LUD recommended that a CUP not be required for tobacco retailers and that a TRL be established instead.

REGULATING SIGNAGE AND ADVERTISING (#17)

LUD requested that staff provide additional information and recommendations related to how the City can regulate the content of tobacco retailers’ signs and also comply with various laws related to signage. In general, the City’s sign regulations must be consistent with First Amendment principles of free speech; however, the City does have more leeway to regulate commercial speech, as would be the case for tobacco

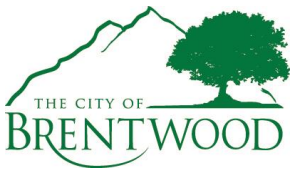


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retailer signage. The City could continue to enforce its existing Sign Ordinance (BMC Chapter 17.640) against tobacco retailers, which requires retailers to obtain sign permits or comply with the regulations for exempt signs. There are also various state laws affecting tobacco retailer signage; for instance, under a Master Settlement Agreement between California and the major tobacco companies, signs advertising cigarettes and smokeless tobacco that are displayed outside a retail store or in an outward-facing window may not be more than 14 square feet. The Master Settlement Agreement also prohibits the settling manufacturers from targeting youth with their ads, using cartoons, using brand-name merchandise, sponsoring youth-oriented events, and paying for product placement in the media. Further, state law currently prohibits any person, company, or organization to advertise any tobacco products on an outdoor billboard located within 1,000 feet of schools or public playgrounds, and specifies that cities *may* adopt local standards that impose a more restrictive or complete ban on tobacco-related billboard advertising. And state law also states that no more than 33% of the square footage of windows and glass doors of alcohol retailers may have advertising signs of any sort, including tobacco.

From the local perspective, as long as the City limits its sign regulations to size, height, number, location, and physical attributes (these being content-neutral considerations), the City has strong legal authority to enforce its own regulations. To go further in regulating tobacco-specific advertisements, the City would first have to analyze the regulations in the context of First Amendment protections for “commercial speech,” meaning the right of corporations to advertise and promote their products and services. Recognizing these limitations, the same organization that developed the model tobacco retailer license ordinance used by staff here has also developed a model ordinance for reducing storefront window signage, in compliance with state and federal law.

To avoid running afoul of First Amendment principles relating to commercial speech, staff recommends that (1) the City continue to enforce its existing Sign Ordinance against all tobacco retailers; (2) the City continue to enforce state laws that control certain elements of tobacco advertising, as discussed herein; and (3) the City Council consider whether it wants to adopt a “storefront window signage” ordinance to supplement and bolster its existing Sign Ordinance. If Council directs staff to adopt a “storefront window signage” ordinance, staff could bring that ordinance to City Council for consideration at the same time as a TRL ordinance.



STAFF TIME AND COSTS

If a TRL ordinance is approved, the new license fees would be submitted for approval by the City Council at a future meeting. The amount of revenue collected will depend on the fee amount proposed and the number of businesses required to be licensed and is not expected to have a material impact on General Fund revenues. License fees and any revenue generated by administrative citations for enforcement of the proposed ordinance would be deposited in the General Fund.

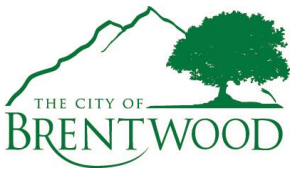
TRL Fees and Fines

The California Constitution places some limits on how much a jurisdiction can charge in a fee, deeming excessive fees to be taxes that require a vote of the people. Nonetheless, without a referendum, it is lawful to impose a fee on applicants in an amount sufficient to offset the reasonable regulatory cost of the entire tobacco retailer enforcement program of a locality⁸.

A successful TRL program depends on vigorous enforcement. The cost of enforcement will depend on the scope of the TRL program, which department administers the TRL program, and the number of annual inspections/compliance checks, etc. A new TRL program would also require extensive outreach to existing businesses initially. The Public Health Law Center created a Tobacco Retail Licensing Calculator that staff can use to help calculate what fee to charge to cover the costs of running the TRL program. For reference, the City of San Pablo and Contra Costa County have TRL programs – San Pablo charges an annual TRL fee of \$197 and Contra Costa County charges a \$287 annual fee for its TRL. It is unlikely that fees this low would cover the cost of issuing licenses and conducting compliance checks in Brentwood.

A new TRL fee can incorporate the cost of enforcing all tobacco laws related to tobacco retailing because a violation of any tobacco-related law is a basis for suspension of a license. If Council directs staff to prepare a TRL Ordinance, staff would calculate a fee that would cover the costs of tobacco retailer license issuance and renewal, tobacco control inspections, including youth decoy stings, ongoing maintenance of the TRL system, and enforcement, including processing citations and handling hearing requests or cases in court. Staff would also create fines and penalties that could act as financial deterrents to violators. The Council would consider the new fee at a future meeting when considering updates to the City's Cost Allocation Plan.

⁸ *Sinclair Paint Co. v. Board of Equalization* (1997) 15 Cal. 4th 866 (1997); *Griffith v. City of Santa Cruz* (2012) 207 Cal. App. 4th 982.



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Any revenue generated by administrative citations for enforcement of the proposed ordinances would be deposited in the General Fund. The fee could not be used for purposes other than covering the cost of the enforcement program. Even with a new fee in place, full cost recovery is not likely to be achieved, as it is possible there will be enforcement actions against businesses that never applied for a TRL or paid the fee or there will be some enforcement actions that exceed the time estimates used to develop the fee.

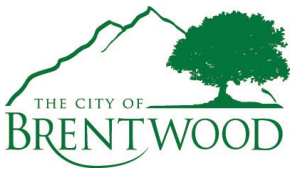
- **LUD Recommendation:** LUD recommended that new administrative fines established for the TRL program should be as high as possible.

Use of TRL Fines

As discussed above, LUD requested information regarding whether fines related to the TRL could be used for educational purposes. Any fine amounts collected will be deposited into the General Fund, and may thereafter be used by the City to focus on education outreach efforts (or, more generally, to continue to work towards a tobacco-free community in whatever manner the City deems fit). The guiding principle is to ensure any funds earmarked specifically for tobacco education or related purposes bears a “public purpose,” which is a determination specifically left up to the City’s discretion and requires only a “reasonable basis.” Staff requests the City Council provide direction on whether TRL related fines should be used for the “public purpose” of tobacco prevention education. If this is Council’s direction, staff recommends partnering with Contra Costa Health’s Tobacco Prevention Project (TPP). The TPP’s purpose is to reduce and ultimately eliminate tobacco use and exposure in the entire County. Leveraging Contra Costa Health’s extensive expertise and public education resources related to tobacco prevention would allow tobacco education in Brentwood to happen more frequently and reach a much wider audience than the amount of money received through tobacco fines would.

Staff Resources

Contra Costa County has a dedicated Tobacco Prevention Project (TPP) that reviews TRL applications and the applications are issued by the County’s Business License Tax Division. San Pablo has a tobacco enforcement unit made up of one Police Officer and one Police Services Technician, which operate under the City’s Code Enforcement Unit. San Pablo has received DOJ grants to fund the program in the past. A TRL program in Brentwood would likely be administered by the Community Development Department and Community Enrichment staff with the additional involvement of the Police Department and the Finance Department.



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As discussed above, LUD recommended the new TRL program require three annual compliance checks and one annual decoy operation for each licensee; a total of four annual compliance checks for each licensee. If there are 42 initial licensees in the program, then that would total 168 compliance checks a year, or an average of three compliance checks a week. This volume of compliance checks combined with preparing required documentation and processing possible appeals would take up a significant amount of Community Enrichment staff's time in the early years of the program. The amount of time would decrease as the number of licensees decreased through attrition. There is currently no capacity to absorb that work with current staffing levels.

The Community Development Department will be requesting one new full-time Community Enrichment Officer at the 2024/25 – 2025/26 Operating Budget Workshop in May of 2024 to assist with the Division's current and anticipated future workload. If approved, the funding for this position would be from the General Fund. The estimated annual cost of the additional Community Enrichment Officer would be \$156,800, plus one-time vehicle and equipment costs of \$43,500. If approved, this position would provide the Community Enrichment division with additional resources to enforce new tobacco regulations, among other things. If a TRL program is created but a new FTE is not funded, then significant adjustments would need to be made to re-prioritize Community Enrichment staff's current workload in order to absorb the work associated with a new TRL program.

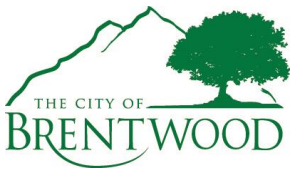
Outside Legal Assistance

Because of limited staff resources, outside legal assistance will be required if the City Council directs staff to draft a new Tobacco Retailer Licensing (TRL) ordinance. General Fund legal fees to draft the ordinance are estimated to be between \$5,000-\$10,000, including approximately \$2,000 in fees already incurred.

Department of Justice Grants (#13)

Local agencies (including local law enforcement and school districts) are eligible to apply for grants through the State of California Department of Justice (DOJ) Tobacco Grant Program⁹ that may be used to enforce local ordinances and/or state laws relating to sale or marketing of tobacco products, including e-cigarettes. Supported enforcement efforts may include (but are not limited to) retailer compliance checks, public education outreach, and retailer license inspections. According to the DOJ, approximately \$170 million in grant funding has been distributed through a competitive process.

⁹ <https://oag.ca.gov/tobaccogrants>



Contra Costa Health provided the attached information on the DOJ grant program that they created specifically for the City of Brentwood. Contra Costa agencies that have received the DOJ grant in the past include Contra Costa County and the cities of Martinez, Pinole, Pittsburg, and San Pablo in various amounts as shown in the attachment.

It is likely that having a TRL in place would make a jurisdiction more competitive in the grant process, although the grant guidelines do not explicitly state that. The DOJ grant must be applied for annually and it is a competitive process, therefore, receipt of funds is not guaranteed. Application and funding information for the upcoming fiscal year has not yet been posted on the program's website but it is likely information will be posted in April with an application deadline sometime in June. Staff will stay informed on additional funding opportunities that may arise.

BEST PRACTICES FROM OTHER CITIES (#16)

Many cities in the state have local regulations related to tobacco sales and the laws vary greatly in subject and scope. For example, the attached "Matrix of Local Ordinances Restricting Tobacco Retailers Near Schools" prepared by the Center for Tobacco Policy and Organizing of the American Lung Association shows that many cities have separation requirements between tobacco retailers and youth-oriented areas and between other retailers, but the distance requirements vary.

In Contra Costa County, San Pablo¹⁰ and Contra Costa County¹¹ have robust TRL programs that are similar to the Model Ordinance; although San Pablo's ordinance is not up to date in terms of new flavored tobacco regulations. Contra Costa County also bans the sale of electronic smoking devices and "e-liquids." Santa Clara County adopted strict tobacco retail requirements in 2022¹². Recently, the cities of Beverly Hills¹³ and Manhattan Beach¹⁴ adopted ordinances that ban the issuance of any new tobacco retailer licenses in those cities, with a way to apply for a hardship exemption from the ban and timelines to phase-out existing retailers. The Beverly Hills ban may be the first of its kind in the United States. Both of these ordinances are relatively new and have not faced legal challenges.

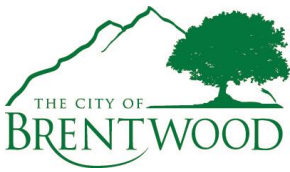
¹⁰ <https://www.codepublishing.com/CA/SanPablo/html/SanPablo05/SanPablo0506.html>

¹¹ https://library.municode.com/ca/contra_costa_county/codes/ordinance_code?nodeId=TIT4HESA_DIV445SESMTOPRCO_CH445-10TORELI

¹² https://library.municode.com/ca/santa_clara_county/codes/code_of_ordinances?nodeId=TITBRE_DIVB11ENHE_CHXXIIPERETOPR

¹³ <https://codelibrary.amlegal.com/codes/beverlyhillscalatest/beverlyhillscalatest/0-0-0-3174>

¹⁴ https://library.municode.com/ca/manhattan_beach/codes/code_of_ordinances?nodeId=TIT4PUWEMOCO_CH4.118PRRESATOPRELSMDE

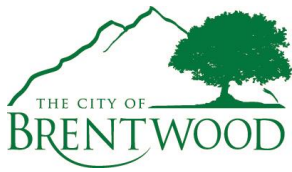


SUMMARY OF LUD RECOMMENDATIONS AND COUNCIL DIRECTION NEEDED

The table below lists each of the 16 items City Council requested additional information on and lists the Council direction needed for each item along with staff’s and LUD’s recommendations. A TRL ordinance based on the Model Ordinance and incorporating LUD’s recommendations would create much stricter regulations than the City currently has and would result in a significant decrease in the number of businesses selling tobacco in the City. If the City Council directs staff to prepare a TRL ordinance, staff would work with outside legal to draft the Ordinance with the goal of bringing it back to City Council for consideration before the Tobacco urgency ordinance expires September 8.

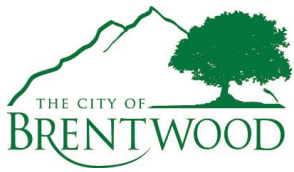
Table 1: Council Requested Tobacco Items

#	Information Requested by City Council	Council Direction Needed	Staff Recommendation	LUD Recommendation
1	Implementing a local tobacco retail license (TRL) system, including maximum amount that can be charged, and how those fees will be spent	Whether to implement a TRL Ordinance?	If TRL is implemented, require two annual inspections of licensees-one inspection for compliance and one decoy operation. Utilize outside counsel to draft new ordinance.	Yes, fee to cover implementation, 3 compliance checks and 1 decoy, revocation after 3 violations.
2	100% flavor ban on tobacco sales	Whether to implement TRL Ordinance? Alternatively, whether to implement a stand-alone ban on flavored tobacco?	If TRL is implemented, incorporate language suggested by Model Ordinance (p. 10)	Yes, include in TRL.
3	Prohibiting vaping product sales	-Whether to prohibit ESDs. -What length of phase out period?	The Model Ordinance does not prohibit sales of ESDs. If Council would like to prohibit ESDs, staff recommends including the prohibition in a TRL ordinance drafted by outside counsel. Include a minimum one year phase out period.	Yes.



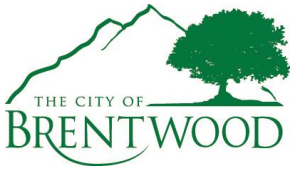
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#	Information Requested by City Council	Council Direction Needed	Staff Recommendation	LUD Recommendation
4	Maximum distance between tobacco retailers and schools that's allowed by law	Whether to create a buffer and if so, how large?	Include a maximum 1,000 ft. buffer in a new TRL ordinance. Expand the separation requirements to other "youth-oriented facility" in addition to schools per the suggestions in model ordinance (p. 12) which is more consistent with Council's previous direction related to alcohol sales.	1,000 ft. separation and no renewal of license after one year if business is non-compliant with new regulations.
5	Minimum sales sizes (e.g. pack/carton)	Whether to restrict pack size and if so, to what sizes?	Incorporate minimum pack sizes suggested by Model Ordinance (p. 10).	Require minimum pack size of 20 cigars/cigarettes.
6	Strictest laws for proximity between retailers	-Whether to adopt proximity regulations and if so, what distance? -Whether to grandfather existing retailers or phase them out?	Incorporate maximum 1,000 ft. proximity regulations between retailers and add policies for existing retailers, to be drafted by outside counsel based on Council direction.	1,000 ft. separation and no renewal of license after one year if business is non-compliant with new regulations.
7	All tobacco sales banned at pharmacies	Whether tobacco sales should be banned at all pharmacies?	IF TRL is implemented, include prohibition of sales at pharmacies suggested by Model TRL Ordinance (p. 11).	Yes, ban tobacco sales at all pharmacies.
8	Working with law enforcement on decoy purchasers	How often to monitor licensees for compliance?	If TRL is implemented, recommend 1 annual inspection for compliance with license requirements and 1 additional annual compliance check related to underage sales.	TRL should include 3 compliance checks and a minimum of 1 decoy operation per year.



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#	Information Requested by City Council	Council Direction Needed	Staff Recommendation	LUD Recommendation
9	Any way to retroactively revoke licenses (if applicable)	See direction need for #1 above.	The City does not currently have tobacco licenses it can revoke. If TRL is implemented, staff recommends revocation provisions suggested by Model TRL Ordinance (p. 17)	TRL should include a limit of 3 violations before a license is revoked.
10	Minimum prices on tobacco	Whether to incorporate minimum prices as suggested by Model TRL Ordinance?	Include minimum price regulations suggested by Model TRL Ordinance. Staff recommends working with Contra Costa Health's Tobacco Prevention program to determine a minimum price that is consistent with others in the County and escalates by CPI.	Require a minimum price of \$10.00 and add language to escalate the price annually per the CPI.
11	Prohibit coupons/discounts	Whether to prohibit discounts/coupons/promotions as suggested by Model TRL Ordinance?	IF TRL is implemented, include suggested discount prohibition in the Model TRL Ordinance (p. 10).	Yes, prohibit coupons/discounts in TRL Ordinance.
12	Cap on smoke shops and tobacco retailers in total	-Whether to create a cap on tobacco retailers? -Whether to grandfather existing retailers or phase-out existing?	IF TRL is implemented, implement a cap on total number of tobacco retailers/licenses with requirements for existing retailers.	Cap and winnow-no more than current 42 licenses should be issued; licenses should be non-transferrable; include a 1 year grace period for non-compliant businesses.
13	DOJ grants to support code enforcement	None.	Staff will apply for future DOJ grants if the program is funded. Funds could be used for enforcement whether or not the City has a TRL.	Yes, staff should apply for DOJ grants.



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#	Information Requested by City Council	Council Direction Needed	Staff Recommendation	LUD Recommendation
14	Require CUP for tobacco sales	Whether to require a CUP for new tobacco retailers?	Do not require a CUP, only a TRL. A TRL has strict operating standards and can be more easily revoked than a CUP.	No separate CUP requirement. Implement TRL instead.
15	Potential penalties available	None.	Adoption of any new ordinances as detailed above would include language related to license suspension, seizure of products, penalties, fines etc. as appropriate.	Fines should be as high as possible. Research if it is possible to repurpose fines for education or alternative purposes.
16	Bring other best practices from other cities for Council consideration	SEE DISCUSSION IN STAFF REPORT		
ADDITIONAL INFORMATION REQUESTED BY LUD ON 3/18				
17	N/A	Whether to adopt additional regulations restricting tobacco advertisements and prohibiting the sale of drug paraphernalia?	Utilize outside legal to draft a TRL ordinance and update applicable sign regulations.	Provide recommendations on how to regulate sign content within the law. Prohibit the sale of drug paraphernalia in TRL.

CITY COUNCIL STRATEGIC INITIATIVE

Not Applicable.

PREVIOUS ACTION

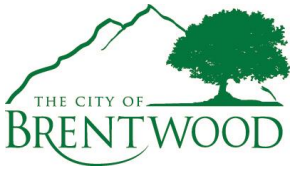
Previous Action by the City Council is included on Attachment 1.

DATE OF NOTICE

Not Applicable.

ENVIRONMENTAL DETERMINATION

Not Applicable.



ALTERNATIVE OPTION(S)

Alternative Options to the Staff Recommendation:

1. Direct staff not to develop new tobacco regulations for the City.
2. Continue the item with direction for staff to return with additional information.

ATTACHMENT(S)

1. Previous Action
2. August 22, 2023, City Council Staff Report
3. Council Requested Tobacco Items LUD March 18, 2024
4. Model TRL Ordinance
5. Brentwood Tobacco Retailers and Youth Sensitive Areas
6. Map of Separation Distances from Liberty HS
7. Matrix of Ordinances Restricting Retailers Near Schools
8. Contra Costa Health DOJ Tobacco Grant Presentation