



SUBJECT: Consider information related to 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

There is no fiscal impact associated with this request for Council direction. The fiscal impact of the Tobacco Retail License (TRL) Ordinance is discussed in the attached staff report.

BACKGROUND

The City Council discussed possible new tobacco regulations and provided direction to staff at the April 30, 2024, City Council meeting (staff report attached). Among other things, the City Council provided direction to include the following items in the new TRL Ordinance:

- A 500 foot separation between other tobacco retailers and from youth-oriented facilities¹, to apply to all retailers, not just new retailers;
- A cap of 42 licenses in the City; and
- A prohibition on tobacco sales at all pharmacies.

Council also directed staff to return to the Council with additional information related to possible processes for issuing licenses to address the possibility of the City receiving more applications than the cap would allow, or retailers within 500 feet of each other competing for a license.

Staff has been working with Contra Costa Health (CCH) and outside counsel to draft the new TRL ordinance and it is almost complete. (The draft ordinance is attached with sections staff is requesting direction on highlighted in yellow.) CCH provided the

¹ Defined as a private or public elementary, middle, junior high, or high school; a library open to the public; a youth center, defined as a facility where children, ages up to 17, come together for programs and activities; any business establishment likely to be frequented by minors, such as, but not limited to, video game arcades, skating rinks, bowling alleys, etc.



attached chart summarizing the tobacco licensing policies of jurisdictions in Contra Costa County. The direction Council provided on April 30, 2024, would result in an ordinance, if adopted, that would raise Brentwood's score from zero to between 9-11.

Staff is requesting that Council provide direction on the process for issuing licenses and on tobacco sales at pharmacies in order to finalize the ordinance. Once staff receives Council direction, staff and outside counsel will finalize the ordinance and will bring it back to City Council for adoption as soon as possible, depending on the type of direction received. Staff would also notify all existing tobacco related businesses of the possible new regulations and the upcoming hearing.

PROCESS FOR ISSUING LICENSES

At the April City Council meeting, the Council directed that all of the new tobacco regulations (including the separation requirements between retailers and between youth-oriented facilities) should apply to all tobacco retailers – both existing businesses and new businesses. If the numeric cap and distance requirements apply to all potential applicants for a TRL, then there would be some existing businesses within 500 feet of each other that would be competing for a license. Staff requested Council provide direction on how to apply the new tobacco license policies in this circumstance and in the event that the number of applications for licenses exceeded the numeric cap of 42 licenses. Several options to address these circumstances were discussed, including issuing licenses through a random lottery process, a first come/first served process, and a competitive "scoring" type process. The Council directed staff to research various methodologies for Council to consider.

Staff worked with CH to find more information about competitive processes to issue tobacco retail licenses, and did not identify any other jurisdiction that utilizes a competitive approach. The jurisdictions in Contra Costa County with tobacco retail licenses have implemented a ministerial process for issuing licenses; e.g. a license is issued if the applicant provides the required materials and meets the objective requirements of the ordinance, similar to a business license process. CCH found that the majority of districts that adopt separation requirements from other uses and other retailers make exceptions for existing retailers – i.e. grandfathering in existing businesses. Some jurisdictions have a set deadline for applications to be submitted every year (e.g. [Contra Costa County](#)) and others issue licenses on a first come/first served basis (e.g. [Concord](#)).

Outside counsel raised potential legal concerns with a competitive-based process, including potential disputes over the fairness or reasonableness of the selection process, and possible takings claims. Staff is also concerned about possessing the



appropriate technical knowledge to review objectively types of materials that might be required for a competitive scoring process, and that a random lottery process could result in two businesses that are too close to each other both “winning” the lottery. In this circumstance, yet another process would have to be developed to determine which business would be awarded a license and which business would not. This process would likely be subjective in nature and potentially create legal vulnerability for the City.

Staff's Recommended Process

In order to avoid a process that would be difficult for staff to implement and to avoid subjectivity that might create legal vulnerability for the City, staff and outside counsel recommend implementing a ministerial process to issue new TRLs, similar to the process for processing business tax certificates. This ministerial process could be implemented on a first come/first served basis, as discussed in more detail below. This option would be the most objective and fair to tobacco retailers, would be the least time intensive for City staff to implement, and would be the least vulnerable to successful legal challenges.

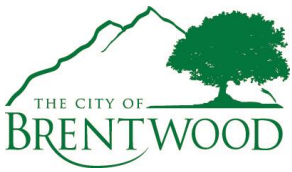
Proposed TRL Application Process

First Come, First Served Process

In order to implement a first come, first served application process, staff would begin accepting applications on the effective date of the ordinance (30 days after Council adoption or another time frame specified by Council). Staff recommends that existing tobacco retailers in the City be given the opportunity to apply for the TRL before businesses that are not currently operating in the City. In order to do this, the draft TRL ordinance requires all existing businesses to apply for a TRL within 30 days of the effective date of the ordinance. Businesses that are new to the City would be able to apply for licenses any time after that period if the numeric cap has not been reached.

Once the application period begins, staff would stamp all applications with a date and time stamp as they are received (emailed and faxed applications would not be accepted). Staff would review and process applications as they come in and no more licenses would be issued once the numerical cap of 42 is reached. Staff would keep an updated log of all applications and their status so that they are aware of the number of licenses issued relative to the 42 license cap. Staff would conduct the two compliance checks and one decoy operation required by the ordinance on a quarterly basis, similar to the enforcement schedule used for business tax certificates.

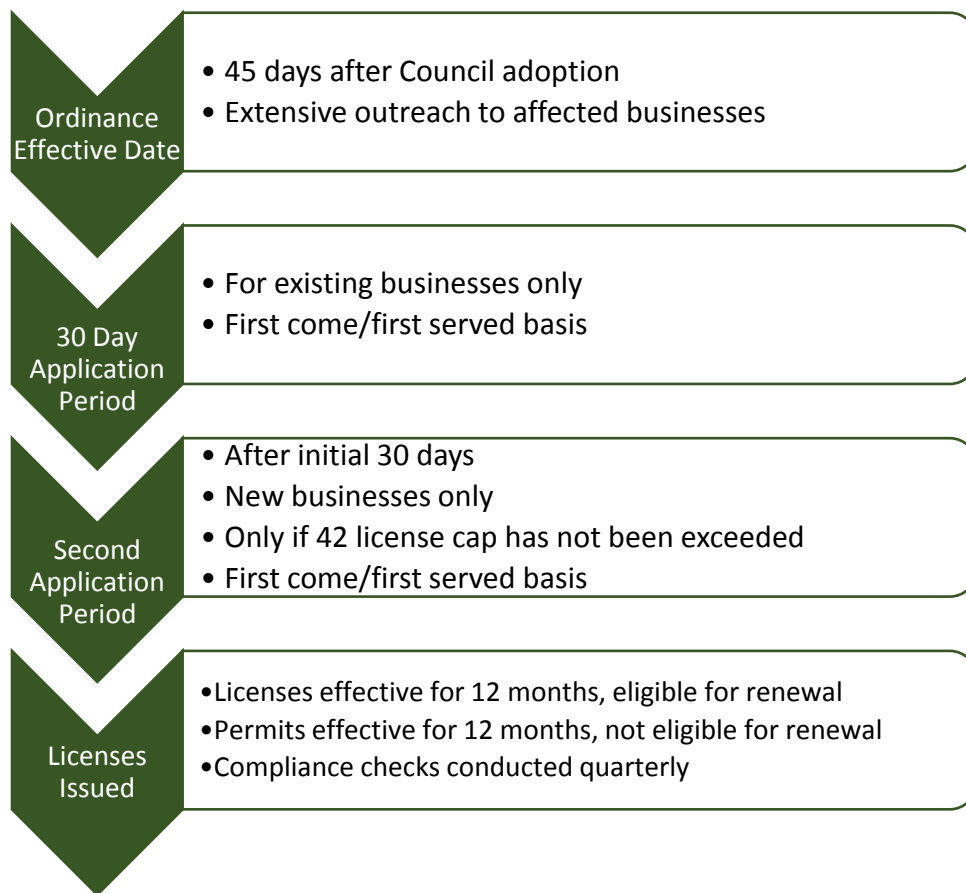
Permit for Noncompliant Businesses



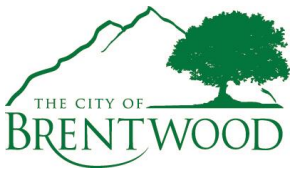
**CITY COUNCIL AGENDA ITEM NO. I.4
09/24/2024**

Based on Council direction, the TRL Ordinance will require licenses to be issued for 12 month periods. Also based on Council direction, there would be no exceptions from the new requirements for existing businesses. Council directed that existing businesses that cannot comply with the locational requirements of the new ordinance would be issued one 12-month license, which would not be renewed if the business cannot comply with the new regulations. In this circumstance, staff recommends that businesses be issued a non-renewable “permit” rather than the same license that other compliant businesses would be issued. The permit would be good for 12 months as Council directed. Retailers receiving a permit should use this 12-month period as an “amortization period” to sell off all of their prohibited inventory by the permit’s expiration date. Outside counsel also recommends a 12-month amortization period based on court decisions related to similar circumstances.

The below flow chart summarizes the proposed application process:



PHARMACY CLARIFICATION



**CITY COUNCIL AGENDA ITEM NO. I.4
09/24/2024**

At the April City Council meeting, the Council directed that the TRL Ordinance should prohibit tobacco sales at all pharmacies. The draft ordinance will include the following definition of pharmacy:

“Pharmacy” means any retail establishment in which the profession of pharmacy is practiced by a pharmacist licensed by the State of California in accordance with the Business and Professions Code and where prescription pharmaceuticals are offered for sale, regardless of whether the retail establishment sells other retail goods in addition to prescription pharmaceuticals, and whether or not the sale of prescriptions pharmaceuticals is the primary purpose, incidental, or otherwise to the purpose of the retail establishment.

This proposed definition would include grocery stores with pharmacies, drug stores, and convenience stores with pharmacies. Staff is seeking clarification of whether it is Council’s intent to prohibit tobacco sales at grocery stores with pharmacies, or to limit the prohibition to just stand alone pharmacies and convenience/drug stores. Staff is seeking this clarification in order to finalize the ordinance and determine how many existing businesses the new 500’ separation requirement will impact.

SUMMARY

Staff is requesting that Council provide direction on the following items in order to bring the draft Tobacco Retail License Ordinance to City Council for consideration:

1. Whether to implement a first come, first served application process;
2. Whether to issue a tobacco retail permit for one year only to retailers that are noncompliant with new regulations rather than the tobacco retail license;
3. Whether the definition of pharmacy should include grocery stores with pharmacies, or just stand alone convenience stores, pharmacies and drug stores.

CITY COUNCIL STRATEGIC INITIATIVE

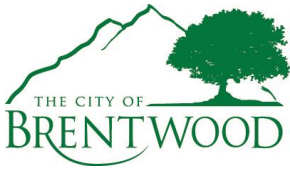
Not Applicable.

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. Do not approve staff's recommendation for a first come/first served process and direct staff to develop another process for issuing tobacco retail licenses.
2. Continue the item with direction for staff to return with additional information.

ATTACHMENT(S)

1. Previous Action
2. April 30, 2024, City Council Staff Report
3. Draft Tobacco Regulations
4. Tobacco Regulations of Contra Costa County Jurisdictions