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OFFICE OF THE
CITY ATTORNEY

CITY OF SACRAMENTO
CALIFORNIA

812 TENTH STREET
SACRAMENTO, CA
95814-2694

JAMES P. JACKSON
CITY ATTORNEY

June 7, 1989

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TIMOTHY N. WASHBURN
SABRINA M. THOMPSON

Law and Legislation Committee
City Council Chambers
Sacramento, CA 95814

Honorable Members in Session:

SUBJECT: An Ordinance Amending Sections 24.9
Through 24.15 of Chapter 24 of the
Sacramento City Code, Relating to the
Furnishing of Tobacco Products to Minors

SUMMARY

This report recommends enactment of an ordinance which would amend the City's regulations relating to distribution of tobacco products to minors to conform with certain new provisions of State law.

BACKGROUND

On July 27, 1988, the City Council enacted a local ordinance relating to the furnishing of tobacco products to minors. The Sacramento County Board of Supervisors had adopted an identical ordinance on June 14, 1988.

Subsequently, the California Legislature amended Penal Code Section 308, which also relates to the furnishing of tobacco products to minors. The Penal Code amendments necessitate certain adjustments in the local ordinances, as outlined in the attached April 11, 1989 memorandum to Councilmember Robie. The proposed ordinance makes the necessary adjustments, and does not involve any policy change. Those elements of the existing ordinance which are proposed for deletion are now covered by the State law.

FINANCIAL DATA

None.

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POLICY MATTERS

No policy change.

MBE/WBE

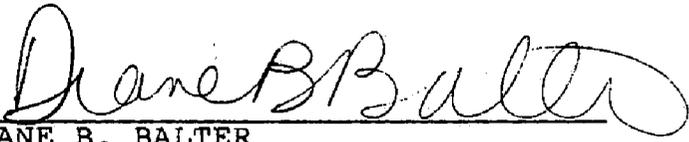
No impact.

RECOMMENDATION

It is recommended that the Law and Legislation Committee endorse the proposed ordinance for enactment by the full Council.

Respectfully submitted,

JAMES P. JACKSON, City Attorney

By: 
DIANE B. BALTER
Deputy City Attorney

June 15, 1989
All Districts

Contact Person to
Answer Questions:

DIANE B. BALTER
Deputy City Attorney
449-5346



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April 11, 1989

916-442-5540

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MEMORANDUM

TO: Lynn Robie, Councilmember

FROM: Diane B. Balter, Deputy City Attorney

RE: Effect of Amended Penal Code Section 308 on
Local Ordinances Relating to Furnishing of
Tobacco Products to Minors

QUESTION PRESENTED

What effect does the 1988 amendment of Penal Code Section 308 have upon Sacramento City Ordinance No. 88-053 adopted on July 26, 1988, and a companion Sacramento County Ordinance, relating to the furnishing of tobacco products to minors?

BRIEF ANSWER

It is the opinion of this office and the Sacramento County Counsel that the amendment of Penal Code Section 308 does not preempt all local regulation of distribution of tobacco products to minors. However, to the extent that the ordinance is inconsistent with Penal Code Section 308, as amended, amendments are required.

BACKGROUND AND ANALYSIS

On July 27, 1988, the Sacramento City Council enacted a local ordinance relating to the furnishing of tobacco products to minors. The Sacramento County Board of Supervisors had adopted an identical ordinance on June 14, 1988. At the time these ordinances were adopted, Penal Code Section 308 made it a misdemeanor to furnish tobacco or smoking paraphernalia to a minor. Penal Code Section 308(c) provided:

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Lynn Robie, Councilmember
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(c) Nothing in this section or any other provision of law shall invalidate an ordinance of, or be construed to prohibit the adoption of an ordinance by, a city or county or a city and county regulating the sale or display to persons under the age of 18 years of items described in this section.

Thus, the Legislature had expressly stated its intent not to preempt any local ordinance on the same subject.

In 1988, the Legislature amended Penal Code Section 308 (Stats 1988 ch 1045 §1). The amendments add a possible civil action for violation, a defense based upon presentation of identification, a provision concerning responsibility for vending machine distribution, and a provision providing for punishment of a minor who purchases or receives tobacco or smoking paraphernalia.

The provision concerning local ordinances is also amended. Now subsection (e), it reads:

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.

The first sentence of the provision is quite unusual, and perhaps ambiguous. But the second sentence provides any necessary clarification, indicating that the Legislature did not intend to preclude all local regulation. A city, county, or city and county may not adopt an ordinance inconsistent with Section 308. By implication, a local government may adopt an ordinance regulating the subject matter of tobacco distribution to minors, so long as the ordinance is not inconsistent with Penal Code Section 308.

The term "inconsistent" is not ordinarily used in discussions of legislative preemption of local regulation, and is not found in the Supreme Court's recent decision involving preemption issues, Cohen v. Board of Supervisors (1985) 40 Cal.3d 277. That case points out that local legislation conflicts with general law if it duplicates, contradicts, or enters into an area fully occupied by general law. 40 Cal.3d at 290-291, citing Lancaster v. Municipal Court (1972) 6 Cal.3d 805, and other cases.

The Cohen decision states the test for determining whether an area of law is fully occupied so as to preclude local regulation.

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The test is whether state law is so formulated as to indicate an intent to preclude local regulation, i.e., whether state law fully or partially covers the subject matter of the ordinance such that no local regulation can be tolerated. [Citation.] (40 Cal.3d at 295.)

Clearly, that test is not satisfied here. Penal Code §308(e) indicates that there is no intent to preclude local regulation, that local regulation can be tolerated so long as it is "not inconsistent." If, in addition, the local regulation neither duplicates¹ nor contradicts general law, it passes all the tests set forth in Cohen and does not conflict with the general law.

It is therefore concluded that the City and County may retain their local regulations relating to the distribution of tobacco products to minors, so long as any portions of the ordinance which duplicate or contradict state law are deleted or revised.

The attached proposal for amending the ordinance incorporates certain necessary changes:

1. Deletes the crime of knowing distribution to minors. This duplicates the state law crime, and also contradicts state law because the state offense is a misdemeanor and the local offense is an infraction.
2. Retains the crime of distribution to minors without knowledge of the minor's age. This crime supplements and does not duplicate or contradict state law.

¹ Note that the Legislature may not, by Penal Code Section 308(e) intend to preclude duplication, since it can be argued that duplication would not be "inconsistent with this section." However, since duplication is not favored (see Cohen v. Board of Supervisors, supra, 40 Cal.2d at 292, fn. 12), and since the existence of the state law can achieve the purpose of a duplicate local regulation in any event, it seems prudent to avoid duplication.

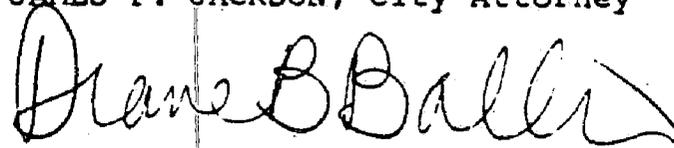
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Lynn Robie, Councilmember
April 11, 1989
Page Four

3. Deletes the crime of purchase of tobacco products by minors. This crime duplicates state law and has a different punishment.
4. Retains (slightly modified) sign posting and ordinance copy distribution requirements. These provisions supplement and do not duplicate or contradict state law.

Very truly yours,

JAMES P. JACKSON, City Attorney



DIANE B. BALTER
Deputy City Attorney

DBB:kc
Attachment

bcc: Lee Elam, County Counsel
Speranza Avram, City Manager's Office
Mike Medema, Revenue Manager
Jim Jackson, City Attorney

ORDINANCE NO.

ADOPTED BY THE SACRAMENTO CITY COUNCIL ON DATE OF

AN ORDINANCE AMENDING SECTIONS 24.9 THROUGH 24.15 OF CHAPTER 24 OF THE SACRAMENTO CITY CODE, RELATING TO THE FURNISHING OF TOBACCO PRODUCTS TO MINORS

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

SECTION 1.

Sections 24.9 through 24.15 of the Sacramento City Code are hereby amended to read as follows:

Sec. 24.9 Purposes.

The protection of the public welfare requires that potential access by minors to all forms of tobacco products be strictly regulated.

Harvard University and the National Institute on Drug Abuse have reported that the nicotine in tobacco is a powerful, habit-forming drug that leads to compulsive use, and produces strong withdrawal symptoms. The U.S. Public Health Service has described nicotine addiction as the most widespread example of drug dependence in our country.

Studies have found that nicotine addiction typically begins in childhood. It has been estimated that thousands of American children smoke for the first time every day. Many youth, particularly male teenagers, use smokeless tobacco. Reported tests have shown that minors as young as 11 years of age have experienced little or no difficulty in purchasing tobacco products.

~~The purpose of this ordinance is to reduce the likelihood of minors obtaining tobacco products in the City of Sacramento by regulation of the potential sources thereof, without unduly interfering with permitted transactions or entirely prohibiting tobacco vending machines. This ordinance enables affected persons to determine for themselves the methods they will employ to achieve compliance herewith.~~

Existing state law prohibits knowing distribution of tobacco products to persons under the age of 18 years. The state law

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scheme does not cover all conduct involving distribution of tobacco to minors because a distributor can avoid prosecution for knowingly distributing to a minor by failing to obtain information about the recipient's age. A local ordinance which makes unknowing distribution an infraction will supplement existing state law, will not be inconsistent with existing state law, and will help to achieve the important purpose of reducing the likelihood of minors' obtaining tobacco products in the City of Sacramento.

Sec. 24.10 Definitions.

For the purposes of Sections 24.11 ~~and 24.12~~ through 24.15, the following terms shall be defined as set forth herein:

- (a) **Distribute:** To sell, give away, or in any way furnish as part of a commercial transaction, including by means of direct retail sale, vending machine sale or promotional free distribution.
- (b) **Person:** An individual, partnership, corporation, unincorporated association, joint venture, or other entity.
- (c) **Tobacco product:** Any tobacco cigarette, cigar, pipe tobacco, smokeless tobacco, snuff or any other form of tobacco which may be utilized for smoking, chewing, inhalation or other manner of ingestion.
- (d) **Tobacco vending machine:** Any electronic or mechanical device the operation of which depends upon the insertion of money, whether in coin or paper bill, or other thing representative of value, which dispenses or vends a tobacco product.
- (e) **Tobacco vending machine owner:** Any person who has an ownership or leasehold interest in a tobacco vending machine and who installs or places, or causes to be installed or placed, such tobacco vending machine on any premises for the purpose of distributing a tobacco product therefrom.

Sec. 24.11 Distribution of tobacco products to minors prohibited.

- (a) Any person who, without knowledge of the minor's age, distributes a tobacco product to a minor who is in fact under the age of 18 years, ~~whether or not the fact of such minority was known to such person at the time of distribution,~~ is guilty of an infraction.

- 6
- (b) Any person who authorizes the installation or placement of a tobacco vending machine on premises which the person manages or controls and who permits or suffers, without knowledge of the minor's age, knowingly or unknowingly, any tobacco product to be distributed from such tobacco vending machine to a minor under the age of 18 years is guilty of an infraction.

~~Sec. 24.12 Purchase of tobacco products by minors prohibited.~~

~~It shall be unlawful and an infraction for any person under the age of 18 years to purchase a tobacco product within the City of Sacramento.~~

Sec. 24.13 Proof of age.

For the purpose of preventing the violation of Section 24.11(a) or 24.11(b), any person may refuse to distribute a tobacco product to a person who is unable to produce adequate written evidence that he or she is over the age of 18 years.

Sec. 24.14 Evidence of age and identity: Proof of demand therefor as defense.

Amend
Proof that the defendant, or his employee or agent, demanded, was shown ~~or~~ acted in reliance upon bona fide evidence of majority and identity in any transaction prohibited by Section 24.11(a) or 24.11(b) shall be a defense to any criminal prosecution therefor or to any civil proceedings based thereon. Bona fide evidence of majority and identity of the person shall be a document issued by a federal, state, county, or municipal government, or subdivision or agency thereof, which contains the name, date of birth, description, and picture of the person, including, without limitation, a motor vehicle operator's license or an identification card issued to a member of the Armed Forces.

Sec. 24.15 Posting of signs required; Copies of Ordinance to be Provided.

- (a) Every person who distributes tobacco products within the City of Sacramento shall post conspicuously and keep so posted in each place of business from which tobacco products are distributed a sign in letters at least one inch (1") high which states as follows:

It is unlawful to distribute tobacco products to any person under the age of 18 years.

It is unlawful for any person under the age of 18 years to purchase or receive tobacco products.

California Penal Code Section 308;
Sacramento City Code Sections 24.11, and 24.12

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- (b) Every tobacco vending machine owner shall affix and keep affixed to the front of each tobacco vending machine within the City of Sacramento a sign as described in subsection (a).
- (c) Every tobacco vending machine owner shall provide a copy of this ordinance to the manager of every premises upon which such owner has a tobacco vending machine in place on the effective date of this ordinance and to the manager of every premises upon which such owner installs or places, or causes to be installed or placed, a tobacco vending machine after the effective date of this ordinance.

DATE PASSED FOR PUBLICATION:

DATE ENACTED:

DATE EFFECTIVE:

MAYOR

ATTEST:

CITY CLERK

ORDINANCE NO.

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ON DATE OF _____

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Studies have found that nicotine addiction typically begins in childhood. It has been estimated that thousands of American children smoke for the first time every day. Many youth, particularly male teenagers, use smokeless tobacco. Reported tests have shown that minors as young as 11 years of age have experienced little or no difficulty in purchasing tobacco products.

Existing state law prohibits knowing distribution of tobacco products to persons under the age of 18 years. The state law scheme does not cover all conduct involving distribution of tobacco to minors because a distributor can avoid prosecution for knowingly

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distributing to a minor by failing to obtain information about the recipient's age. A local ordinance which makes unknowing distribution an infraction will supplement existing state law, will not be inconsistent with existing state law, and will help to achieve the important purpose of reducing the likelihood of minors' obtaining tobacco products in the City of Sacramento.

Sec. 24.10 Definitions.

For the purposes of Sections 24.11 through 24.14, the following terms shall be defined as set forth herein:

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- (e) **Tobacco vending machine owner:** Any person who has an ownership or leasehold interest in a tobacco vending machine and who installs or places, or causes to be installed or placed, such tobacco vending machine on any premises for the purpose of distributing a tobacco product therefrom.

Sec. 24.11 Distribution of tobacco products to minors prohibited.

- (a) Any person who, without knowledge of the minor's age, distributes a tobacco product to a minor who is in fact under the age of 18 years, is guilty of an infraction.
- (b) Any person who authorizes the installation or placement of a tobacco vending machine on premises which the person

FOR CITY CLERK USE ONLY

ORDINANCE NO.: _____

DATE ADOPTED: _____

manages or controls and who permits or suffers, without knowledge of the minor's age, any tobacco product to be distributed from such tobacco vending machine to a minor under the age of 18 years is guilty of an infraction.

Sec. 24.12 Proof of age.

For the purpose of preventing the violation of Section 24.11(a) or 24.11(b), any person may refuse to distribute a tobacco product to a person who is unable to produce adequate written evidence that he or she is over the age of 18 years.

Sec. 24.13 Evidence of age and identity: Proof of demand therefor as defense.

Proof that the defendant, or his employee or agent, demanded, was shown and acted in reliance upon bona fide evidence of majority and identity in any transaction prohibited by Section 24.11(a) or 24.11(b) shall be a defense to any criminal prosecution therefor or to any civil proceedings based thereon. Bona fide evidence of majority and identity of the person shall be a document issued by a federal, state, county, or municipal government, or subdivision or agency thereof, which contains the name, date of birth, description, and picture of the person, including, without limitation, a motor vehicle operator's license or an identification card issued to a member of the Armed Forces.

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It is unlawful for any person under the age of 18 years to purchase or receive tobacco products.

California Penal Code Section 308;
Sacramento City Code Section 24.11.

(b) Every tobacco vending machine owner shall affix and keep affixed to the front of each tobacco vending machine within

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the City of Sacramento a sign as described in subsection (a).

- (c) Every tobacco vending machine owner shall provide a copy of this ordinance to the manager of every premises upon which such owner has a tobacco vending machine in place on the effective date of this ordinance and to the manager of every premises upon which such owner installs or places, or causes to be installed or placed, a tobacco vending machine after the effective date of this ordinance.

Sec. 24.15 Reserved.

DATE PASSED FOR PUBLICATION:

DATE ENACTED:

DATE EFFECTIVE:

MAYOR

ATTEST:

CITY CLERK

FOR CITY CLERK USE ONLY

ORDINANCE NO.: _____

DATE ADOPTED: _____