



CITY OF SANTA BARBARA

COUNCIL AGENDA REPORT

AGENDA DATE: September 21, 2021

TO: Mayor and Councilmembers

FROM: City Attorney's Office

SUBJECT: Introduction Of Off Sale Alcohol Regulations Ordinances

RECOMMENDATION: That Council:

- A. Introduce and subsequently adopt, by reading of title only, an Ordinance of the Council of the City of Santa Barbara Amending the Santa Barbara Municipal Code by Adding Chapter 28.80 to Regulate Alcoholic Beverage Retail Establishments in the Coastal Zone and Amending Various Sections Within Title 28 to be Consistent with this Intent; and
- B. Introduce and subsequently adopt, by reading of title only, an Ordinance of the Council of the City of Santa Barbara Amending the Santa Barbara Municipal Code by Amending Sections 30.20.020, 30.25.020, 30.30.020, 30.35.020; Adding Section 30.185.075; Amending Section 30.205.150 and Amending Section 1.25.050 Pertaining to Regulations for Alcoholic Beverage Retail Establishments in the Non-Coastal Zone of the City.

BACKGROUND

On January 24, 2017, the City Council directed staff to develop regulations for off-sale alcohol establishments in order to address nuisance impacts to the surrounding areas from the sale and consumption of alcohol. Off-sale consumption licenses are issued for businesses that sell alcohol for consumption off the premises, such as liquor stores and grocery stores, while on-site consumption licenses are issued for businesses that sell alcohol for consumption on the premises, such as bars and restaurants.

The ability of a city to regulate alcohol is limited by the California Constitution, which provides the state exclusive jurisdiction over the manufacture, sale, purchase, and transportation of alcohol. The California Department of Alcoholic Beverage Control ("ABC") is responsible for regulating retail alcohol sales and it uses specific criteria to base decisions related to the issuance, enforcement, and revocation of liquor licenses.

The ABC can place conditions on a license such as restriction of hours, entertainment, or any condition that will mitigate impacts on nearby residential, churches or schools.

The ABC must also notify the local governing agency and surrounding property owners of any business that wants to modify or remove conditions in their license. The local agency or property owner can request a hearing and protest the license before the ABC. A zoning affidavit is required for any new license signed by the local governing agency. The ABC may deny a license if there is a law enforcement problem or if the issuance of the license would create an undue concentration of licenses based on a high number of crimes and excess ratio of licenses to population. The ABC may also issue a license if the local governing agency determines that the business requesting a license would serve the public convenience or necessity.

Cities are limited in their ability participate in or to influence the aforementioned decisions. Despite the limitations imposed by state law, many cities have effectively regulated secondary aspects of alcohol beverage sales without interfering with the exclusive authority of ABC through its land use powers. A city for example can regulate secondary effects such as crime, noise, trash, traffic, and parking that impact health, safety and welfare of the community. Thus, local alcohol regulations aimed at eliminating nuisances and criminal activities are allowed and are not in conflict with State law. Local regulations have been exercised through tools such as Conditional Use Permits (CUP) and Deemed Approved Ordinances (DAO). CUPs are the primary local regulatory tool for regulating new alcohol outlets, while DAOs constitute the basic tool for regulating pre-existing outlets.

A Deemed Approved Ordinance is a concept that originated in the early 1990s from Oakland as a way to use local control to cope with problem retailers. For the large majority of alcoholic beverage establishments without conditional use permits, the City of Oakland proposed to “deem” these outlets “approved,” provided they meet the conditions described as basic non-nuisance deterrents such as no littering, loitering, graffiti, drug dealing, prostitution, gambling etc. In a nutshell, all grandfathered alcohol establishments are “deemed approved” and can continue sales of alcohol provided they comply with the performance standards and are not operated as nuisances. If a store were to be found in violation of these standards, they could potentially lose their land use permit.

Since that time, dozens of California cities have iterated upon and adopted a Deemed Approved Ordinance, with many providing operational standards, such as prohibiting establishments from selling beer or malt beverage products in bottles or cans greater than 32 ounces in volume or alcohol that is considered “airline bottle” in size.

As mentioned, CUPs are the primary regulatory tool for cities to regulate new alcohol outlets, relying on a locality’s authority to regulate land uses through its zoning powers. California Business and Professions Code Section 23790 provides that a city can require that an alcohol retail establishment applicant obtain a CUP before it can be licensed by the ABC.

While Business and Professions Code Section 23790 grants cities the ability to impose land use regulations upon new alcohol establishments, it also restricts their ability to impose new conditions upon existing operations, including legal nonconforming establishments. However, a city can exert a certain degree of control over existing alcohol retailers through its inherent authority to regulate nuisances through the adoption of ordinances designed to prevent and abate nuisance activity around businesses that sell alcoholic beverages. The right to control and abate nuisance and criminal activities by ordinance applies to all alcoholic beverage establishments, including those in operation before an ordinance's effective date. Cities may also regulate alcohol outlets on an individual basis through the traditional nuisance abatement authority by declaring a building or place where alcohol is unlawfully sold a public nuisance. The Unlawful Liquor Sale Abatement Law (California Penal Code Sections 11200 – 11207) provides cities with the ability to declare and abate a nuisance when an establishment is selling liquor unlawfully.

Consideration of negative impacts to the community can go beyond issues such as graffiti or litter. The University of California Riverside conducted a study in 2011 that found that businesses with more than 10% of their displays being single beverage alcohol had a higher rate of crime than other communities. In 2014, the California Department of Public Health conducted a study to determine the impact of alcohol outlets in communities around California as part of their Healthy Communities Data and Indicators Project. The study found that a high density of alcohol outlets and proximity to alcohol outlets in neighborhoods is associated with higher rates of binge drinking and associated harms, like drinking and driving, motor vehicle-related pedestrian injuries, child abuse and neglect, youth drinking, intimate partner violence, and violent crime. Moreover, the Department's study revealed that low income neighborhoods are especially affected by the impacts of alcohol outlet density.

LEGAL CHALLENGES

City ordinances regulating off-sale alcohol land uses have been challenged in Court but ultimately found to be legal and enforceable. With Oakland being the first to initiate such an ordinance it was unsurprisingly the first City to face a legal challenge. In *City of Oakland v. Superior Court* (1996) 45 Cal.App.4th 740, an association of alcoholic beverage retailers and related parties filed complaint challenging validity of Oakland's ordinance regulating alcoholic beverage sale establishments. The Court of Appeal found the ordinance lawful as it merely created administrative mechanism for enforcing nuisance and criminal laws and did not violate rights of grandfathered businesses under licensing statute. In addition, the municipal fee assessed to pay for costs of regulation was not unconstitutional license tax.

A more recent case was brought forth in Federal Court concerning the City of El Cajon's ordinance. In *HSH, Inc. v. City of El Cajon* (S.D. Cal. 2014) 44 F.Supp.3d 996, operators of small liquor stores in residential areas brought equal protection, due process, and vagueness challenges to El Cajon's ordinance requiring that they obtain conditional use

permits, while exempting larger stores with more than 10,000 square feet of floor space that dedicated no more than 10% of their floor space to the sale of alcohol. The U.S. District Court dismissed the suit finding that the ordinance was rationally related to legitimate government interest as the goal of preventing alcohol-related nuisances is rationally furthered by treating retailers substantially dedicated to alcohol sales differently than retailers with less than ten percent of their floor space dedicated to alcohol sales. These cases illustrate the unquestioned ability of a city has to declare a public nuisance and require the abatement of such a nuisance for the benefit of the community.

These proposed ordinances are aimed at regulating retail alcohol outlets in a comprehensive fashion through both conditional use permit (CUP) and Deemed Approved provisions. By including both of these provisions, the City will distinguish between pre-existing and new alcohol outlets.

PLANNING COMMISSION MEETINGS

The Planning Commission met twice on May 13th and June 10th to review and provide input on the proposed Ordinance. The Commission offered several suggestions that were adopted such as: adding language for clarification that the Ordinance will not apply to on-sale establishments such as restaurants and bars; providing a definition of a nuisance; allow for an applicant to obtain a modification and subsequent Commission approval to be located within 500 feet of a sensitive area; mandatory annual meetings in which the Planning Commission reviews all new and existing alcoholic beverage retail establishments for compliance; and amended the required findings for obtaining a CUP for a new establishment to include that the proposed use shall not significantly adversely affect the crime rate in the area of the proposed site.

At those meetings, the Planning Commission received numerous public comment that enforcement of the Ordinance should not be staffed through the Police Department. No action was taken because the purview of the Commission is to make recommendations and changes to the land use aspect of the Ordinance and not administrative functions.

ORDINANCE COMMITTEE MEETING

The Ordinance Committee met on July 20th to review the proposed Ordinance. The Committee requested amendments that prevent new and existing establishments from placing alcoholic beverage containers within five feet back from any store entrance or cash register and check-out portions of the premises. The basis for the request was the important health and safety factor of not making alcohol enticing for minors near other product displays such as candy or gum. These changes are found under sections 28.80.060 (E), 28.80.150, 30.185.075 (F)(3), and 30.185.075(K).

PROPOSED ZONING CODE AMENDMENTS

The stated purpose of these amendments to the zoning code are to promote a healthy and safe business environment in the City of Santa Barbara that protects residents from the public nuisances attributable to the retail sales of alcoholic beverages. The ordinances only apply to businesses with a ABC Type 20 or 21 License such as liquor stores, beer and wine stores, convenience markets, mini-markets, markets, neighborhood markets, retail sales establishments, wine shops, and service stations. A type 20 license authorizes the sale of beer and wine for consumption off the premises, while a type 21 license authorizes the sale of beer, wine and distilled spirits for consumption off the premises. The ordinance amendments do not apply to alcohol beverage manufacturers such as a winery, brewery or micro-brewery that sells alcohol for off-site consumption.

The heart of the amendments are contained in Chapter 28.80 for retail establishments in the coastal zone and Chapter 30.185.075 for retail establishments that are inland. These amendments are described in detail below:

Existing Alcohol Establishments

The attached ordinances grant all existing alcohol establishments a deemed approved status under section 28.80.100 and 30.185.075 (J). That status may continue on provided there is no substantial modification in operations, a discontinued use for a period over year, the establishment ceases to be licensed by the ABC, or the use does not create nuisance conditions. If the right to the continued use for an existing alcoholic beverage retail establishment is revoked by the City, the owner of the business must obtain a CUP in order to sell alcohol again. Every owner has the right to appeal any revocation to the Planning Commission.

New Alcohol Outlets

Any alcohol retail establishments that starts their business after the ordinance becomes effective are required to obtain a CUP through the City's existing process: Chapter 28.94 for those in the Coastal Zone and 30.215 for those establishments that are located inland. The CUP must be approved by the Planning Commission, which is required to make specific findings. The specific findings for new off-sale outlets are in addition to the typical conditional use permit findings and are designed to complement conditional use permit findings and give proper justification for any conditions and operating standards that may be imposed on a new establishment. These requirements are under section 28.80.070 and 30.185.075 (G) of the proposed ordinances.

In addition, the Planning Commission has the authority to impose conditions of approval under the CUP. Examples of some conditions include restricting outdoor storage and displays, requiring a security plan, or requirements for buffering, screening, lighting, planting areas, or other site elements to avoid adverse impacts on adjacent lots or the surrounding area. These optional conditions of approval have been included to ensure

compatibility when needed and can be applied on a case-by-case basis and tailored to the specific application and the surrounding neighborhood. These provisions can be found under 28.80.080 and 30.185.075 (H) of the proposed ordinances.

Operational Standards & Public Nuisance Prevention Measures for New Outlets

Operational standards are included in the Ordinance for new alcohol retail establishments. The standards are contained in sections 28.80.060 and 30.185.075 (F). The following are some of the standards contained in the Ordinances:

- New alcohol retail establishments requesting a new licenses can only be permitted on a site located in an area with capacity for additional off-sale licenses, as defined by ABC, with low to average crime rates, as defined annually by the Santa Barbara Police Department, provided that the site is not subject to a moratorium.
- New alcohol retail establishments can only be located on a lot that is a minimum of 500 feet away from any residentially zoned lot, or any lot that contains a public or private elementary or high school, health care facilities, Social Services Facility as defined in 30.295.030, substance abuse treatment centers, religious facilities, parks or playgrounds.
- Product sales limitations for new alcohol retail establishments include wine in less than 750 milliliter containers, airline bottles (must be in a container with a volume of 375 milliliters or greater in size), and beer, ale or malt liquor in containers greater than 32 ounces, except containers of two gallons or more, which are intended to dispense multiple servings.
- Public nuisance prevention measures such as adequate external lighting, responsibility of the retailer to keep area clean of liter, prohibition of pay phones, no advertising of alcohol products visible from the exterior of the building, and no window obstruction.
- The Ordinance also provides for the Planning Commission to make modifications to the standards in order to prevent an unreasonable hardship which is defined as significant difficulty or expense when considered in light of a number of factors such as the nature and cost of the standard imposed in relation to the size, resources, nature, and structure of the alcohol retailer operation.

Subsequent Nuisance Provisions for Existing Establishments

An off-sale outlet's existing status could change if the establishment is declared a nuisance (detailed under 28.80.300 & 30.185.075 (L)) and corrective measures are unsuccessful. Only after notice and a hearing before the Planning Commission, whereby if the outlet is found not in compliance by the Commission, the Commission may suspend, modify or revoke the existing status. If revoked, an existing outlet would be required to obtain a CUP to resume selling alcohol. The aforesaid provisions are contained in section 28.80.100 and 30.185.075 (J) of the proposed ordinances.

Regulatory Fee

Any fees imposed under that ordinance must strictly be limited to the reasonable costs of administering the enforcement program and cannot be used to generate revenue for other purposes. Cal. Const. art XIII C, § 1 (Prop. 26). The proposed ordinance is within the City's regulatory power and is the type of alcohol related regulation that has been validated by the courts. *Korean American Legal Advocacy Foundation v. City of Los Angeles* (1994) 23 Cal. App. 4th 376. The proposed ordinance includes a regulatory fee that would be established by a future City Council resolution. The fee would be applied to all off-sale alcohol establishments that either have an existing status or obtained a CUP after the effective date of this ordinance. The fee would provide for the administration and enforcement of the proposed ordinance so as to recover the total cost to implement the program. The fee sections are contained in sections 28.80.500 and 30.185.075 (N).

Letter of Public Necessity and Mandatory Training

The proposed ordinances also authorizes the Chief of Police to issue a Public Convenience or Necessity (PCN) whenever an applicant is required to obtain one by the ABC. In addition, all store managers and employees are required to complete the Responsible Beverage Service (RBS) Training within 6 months of the effective date of the Ordinances of 60 days from the start of their business or employment.

Enforcement

Enforcement of the Ordinance by the City shall be conducted by the City staff who not only are able to bring forth a suspension or revocation at a hearing before the Planning Commission but also have the ability to issue less drastic enforcement measures such as Notices of Violation or Administrative fines pursuant to Chapter 1.25 of the Municipal Code.

CONCLUSION

Staff believes that the proposed ordinance meets the City Council's intent in reducing nuisance activity and protecting the surrounding community. The Ordinances bring existing and new alcohol retail establishments under positive control of the Zoning Ordinances and allow the City quicker resolution of nuisance violations.

PREPARED BY: John Doimas, Assistant City Attorney

SUBMITTED BY: Ariel Calonne, City Attorney

APPROVED BY: City Administrator's Office