

File No. 090962

Committee Item No. 5

Board Item No. _____

COMMITTEE/BOARD OF SUPERVISORS

AGENDA PACKET CONTENTS LIST

Committee: Land Use and Economic Development Date December 7, 2009

Board of Supervisors Meeting

Date _____

Cmte Board

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| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Legislative Digest |
| <input type="checkbox"/> | <input type="checkbox"/> | Budget Analyst Report |
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| <input type="checkbox"/> | <input type="checkbox"/> | Grant Information Form |
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| <input type="checkbox"/> | <input type="checkbox"/> | Form 126 – Ethics Commission |
| <input type="checkbox"/> | <input type="checkbox"/> | Award Letter |
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OTHER

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Completed by: Alisa Somera Date December 4, 2009
 Completed by: _____ Date _____

An asterisked item represents the cover sheet to a document that exceeds 25 pages.
 The complete document can be found in the file and the online version.

1 [Zoning – Amending the Citywide Definition of Tobacco Paraphernalia Establishments by
 2 Lowering the Threshold for Retail Stores to Be Considered Tobacco Paraphernalia
 3 Establishments, and Making Tobacco Paraphernalia Establishments a Non-Permitted Use in
 4 the Polk Street Neighborhood Commercial District.]

5 **Ordinance amending the Planning Code to amend the definition of Tobacco**
 6 **Paraphernalia Establishments in Section 227(v), to lower the threshold for retail stores**
 7 **to be considered Tobacco Paraphernalia Establishments from 15% of the square**
 8 **footage of the establishment to 10% of the occupied floor area, as defined in Section**
 9 **102.10, or 10 linear feet of display area in total, whichever is less; amending Sections**
 10 **790.123 and 890.123 to reflect this amended definition; amending Section 723.1 and the**
 11 **Table at Section 723, to make Tobacco Paraphernalia Establishments, as defined, not**
 12 **permitted in the Polk Street Neighborhood Commercial District; amending Section**
 13 **186.1, to change the period of non use for a non conforming Tobacco Paraphernalia**
 14 **Establishment use to be deemed discontinued in the Polk Street Neighborhood**
 15 **Commercial District from three years to eighteen months, and making findings,**
 16 **including findings of consistency with the priority policies of Planning Code Section**
 17 **101.1 and environmental findings.**

18 NOTE: Additions are *single-underline italics Times New Roman*;
 19 deletions are *strike-through italics Times New Roman*.
 20 Board amendment additions are double-underlined;
 21 Board amendment deletions are ~~strikethrough-normal~~.

22 Be it ordained by the People of the City and County of San Francisco:

23 Section 1. Findings. The Board of Supervisors of the City and County of San
 24 Francisco hereby find and determine that:

25 (a) Pursuant to Planning Code Section 302, the Board of Supervisors finds that this
 ordinance will serve the public necessity, convenience and welfare, for the reasons set forth in
 Planning Commission Resolution No. 17902, and incorporates such reasons by this

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reference thereto. A copy of said resolution is on file with the Clerk of the Board of Supervisors in File No. 090962.

(b) Pursuant to Planning Code Section 101.1, the Board of Supervisors finds that the ordinance is consistent with the Priority Policies of Section 101.1(b) of the Planning Code and with the General Plan and hereby incorporates a report containing those findings as if fully set forth herein. A copy of said report is on file with the Clerk of the Board of Supervisors in File No. 090962.

(c) The Planning Department concluded environmental review of this ordinance pursuant to the California Environmental Quality Act, Public Resources Code Section 2100 et seq. Documentation of that review is on file with the Clerk of the Board of Supervisors in File No. 090962.

Section 2. The San Francisco Planning Code is hereby amended by amending Section 227, to read as follows:

SEC. 227. OTHER USES.

C-1	C-2	C-3	C-3	C-3	C-3	C-M	M-1	M-2	
		O	R	G	S				
									SEC. 227. OTHER USES.
P*	P*				P	P	P	P	(a) Greenhouse or plant nursery.
P*	P*					P	P	P	(b) Truck gardening, horticulture.
	C			C	C	P	P	P	(c) Mortuary establishment, including retail establishments that predominantly sell or offer for sale caskets, tombstones, or other funerary goods.

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P	P	P	P	P	P	P	P	P	(d) Public structure or use of a nonindustrial character, when in conformity with the General Plan. Such structure or use shall not include a storage yard, incinerator, machine shop, garage or similar use.
P*	P*	C	C	P	P	P	P	P	(e) Utility installation, excluding Internet Services Exchange (see Section 227(t)); public service facility, excluding service yard; provided that operating requirements necessitate location within the district.
C*	C*	C	C	C	C	C	C	C	(f) Public transportation facility, whether public or privately owned or operated, when in conformity with the General Plan, and which does not require approval of the Board of Supervisors under other provisions of law, and which includes:
									(1) Off-street passenger terminal facilities for mass transportation of a single or combined modes including but not limited to aircraft, ferries, fixed-rail vehicles and buses when such facility is not commonly defined as a boarding platform, bus stop, transit shelter or similar ancillary feature of a transit system; and
									(2) Landing field for aircraft.
C*	C*	C	C	C	C	C	P	P	(g) Public transportation facility, when in conformity with the General Plan, other than as required in (f) of this Section or as in Sections 223 and 226 of this Code.
P	P	P	P	P	P	P	P	P	(h) Commercial wireless transmitting, receiving or relay facility, including towers, antennae, and related equipment for the transmission, reception, or relay of radio, television, or other electronic signals where:

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										(1) No portion of such facility exceeds a height of 25 feet above the roof line of the building on the premises or above the ground if there is no building, or 25 feet above the height limit applicable to the subject site under Article 2.5 of this Code, whichever is the lesser height; and
										(2) Such facility, if closer than 1,000 feet to any R District (except for those R Districts entirely surrounded by a C-3, M or a combination of C-3 and M Districts), does not include a parabolic antenna with a diameter in excess of three meters or a composite diameter or antennae in excess of six meters. (See also Section 204.3.)
C	C	C	C	C	C	C	C	C	C	(i) Commercial wireless transmitting, receiving or relay facility, as described in Subsection 227(h) above, where:
										(1) Any portion of such facility exceeds a height of 25 feet above the roof line of the building on the premises or above the ground if there is no building, or 25 feet above the height limit applicable to the subject site under Article 2.5 of this Code, whichever is the lesser height; or
										(2) Such facility, if closer than 1,000 feet to any R District (except for those R Districts entirely surrounded by a C-3, M or combination of C-3 and M Districts), includes a parabolic antenna with a diameter in excess of three meters or a composite diameter of antennae in excess of six meters. (See also Section 204.3.)
P*	P*	P	P	P	P	P	P	P	P	(j) Sale or lease sign, as defined and regulated by Article 6 of this Code.
	P*	P	P	P	P	P	P	P	P	(k) General advertising sign, as defined and regulated by

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									Article 6 of this Code.
P*	P*	P	P	P	P	P	P	P	(l) Access driveway to property in any C or M District.
C	C						C	C	(m) Planned Unit Development, as defined and regulated by Section 304 and other applicable provisions of this Code.
								P	(n) Any use that is permitted as a principal use in any other C or M District without limitation as to enclosure within a building, wall or fence.
SEE SECTIONS 205 THROUGH 205.2									(o) Temporary uses, as specified in and regulated by Sections 205 through 205.2 of this Code. (*See Section 212(a).)
P	P	P	P	P	P	P	P	P	(p) Subject to Section 233(a), live/work units, provided that one or more arts activities as defined in Section 102.2 of this Code are the primary nonresidential use within the unit and that other nonresidential activities are limited to those otherwise permitted in the district or otherwise conditional in the district and specifically approved as a conditional use.
P	P	P	P	P	P	P	P	P	(q) Subject to Section 233(a), live/work units not included above but satisfying the conditions of Section 233(b) of this Code.
P	P	P	P	P	P	P	P	P	(r) Arts activities.
	P							P	(s) Waterborne commerce, navigation, fisheries and recreation, and industrial, commercial and other operations directly related to the conduct of waterborne commerce, navigation, fisheries or recreation on property subject to

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									public trust.
C	C	C	C	C	C	C	C	C	(t) Internet Services Exchange as defined in Section 209.6(c).
P	P	P	P	P	P	P	P	P	(u) Fringe financial services, as defined in Section 249.35, and subject to the restrictions set forth in Section 249.35, including, but not limited to, that no new fringe financial service shall be located within a 1/4 miles of an existing fringe financial service.
C	C	C	C	C	C	C	C	C	v) Tobacco Paraphernalia Establishments, defined as retail uses where more than 45% <u>10%</u> of the gross-square footage of the establishment <u>square footage of occupied floor area, as defined in Section 102.10, or more than 10 linear feet of display area in total, whichever is less</u> , is dedicated to the sale, distribution, delivery, furnishing or marketing of Tobacco Paraphernalia from one person to another. For purposes of Sections 719, 719.1, and 786, <u>723 and 723.1</u> of this Code, Tobacco Paraphernalia Establishments shall mean retail uses where Tobacco Paraphernalia is sold, distributed, delivered, furnished or marketed from one person to another. "Tobacco Paraphernalia" means paraphernalia, devices, or instruments that are designed or manufactured for the smoking, ingesting, inhaling, or otherwise introducing into the body of tobacco, products prepared from tobacco, or controlled substances as defined in California Health and Safety Code Sections 11054 et seq. "Tobacco Paraphernalia" does not include lighters, matches, cigarette holders, any device used to store or preserve tobacco, tobacco, cigarettes, cigarette

papers, cigars, or any other preparation of tobacco that is permitted by existing law. Medical Cannabis Dispensaries, as defined in Section 3201(f) of the San Francisco Health Code, are not Tobacco Paraphernalia Establishments.

Section 3. The San Francisco Planning Code is hereby amended by amending Section 790.123, to read as follows:

SEC. 790.123. TOBACCO PARAPHERNALIA ESTABLISHMENT.

A Tobacco Paraphernalia Establishment shall be, as established in Section 227(v) of this code, a retail use where more than ~~15%~~ 10% of the ~~gross square footage of the establishment~~ square footage of occupied floor area, as defined in Section 102.10, or more than 10 linear feet of display area in total, whichever is less, is dedicated to the sale, distribution, delivery, furnishing or marketing of Tobacco Paraphernalia from one person to another. For purposes of Sections 719, 719.1, and 786, 723 and 723.1 of this Code, Tobacco Paraphernalia Establishments shall mean retail uses where Tobacco Paraphernalia is sold, distributed, delivered, furnished or marketed from one person to another. "Tobacco Paraphernalia" means paraphernalia, devices, or instruments that are designed or manufactured for the smoking, ingesting, inhaling, or otherwise introducing into the body of tobacco, products prepared from tobacco, or controlled substances as defined in California Health and Safety Code Sections 11054 et seq. "Tobacco Paraphernalia" does not include lighters, matches, cigarette holders, any device used to store or preserve tobacco, tobacco, cigarettes, cigarette papers, cigars, or any other preparation of tobacco that is permitted by existing law. Medical Cannabis Dispensaries, as defined in Section 3201(f) of the San Francisco Health Code, are not Tobacco Paraphernalia Establishments.

1 Section 4. The San Francisco Planning Code is hereby amended by amending Section
2 890.123, to read as follows:

3 **SEC. 890.123. TOBACCO PARAPHERNALIA ESTABLISHMENT**

4 A Tobacco Paraphernalia Establishment shall be, as established in Section 227(v) of
5 this code, a retail use where more than ~~15%~~ 10% of the ~~gross square footage of the~~
6 ~~establishment~~ square footage of occupied floor area, as defined in Section 102.10, or more than 10
7 linear feet of display area in total, whichever is less, is dedicated to the sale, distribution, delivery,
8 furnishing or marketing of Tobacco Paraphernalia from one person to another. "Tobacco
9 Paraphernalia" means paraphernalia, devices, or instruments that are designed or
10 manufactured for the smoking, ingesting, inhaling, or otherwise introducing into the body of
11 tobacco, products prepared from tobacco, or controlled substances as defined in California
12 Health and Safety Code Sections 11054 et seq. "Tobacco Paraphernalia" does not include
13 lighters, matches, cigarette holders, any device used to store or preserve tobacco, tobacco,
14 cigarettes, cigarette papers, cigars, or any other preparation of tobacco that is permitted by
15 existing law. Medical Cannabis Dispensaries, as defined in Section 3201(f) of the San
16 Francisco Health Code, are not Tobacco Paraphernalia Establishments.

17
18 Section 5. The San Francisco Planning Code is hereby amended by amending Section
19 723.1, to read as follows:

20 **SEC. 723.1. POLK STREET NEIGHBORHOOD COMMERCIAL DISTRICT.**

21 Sitting in the gulch between Nob and Russian Hills and Pacific Heights, the Polk Street
22 Neighborhood Commercial District extends for a mile as a north-south linear strip, and
23 includes a portion of Larkin Street between Post and California Streets. Polk Street's dense
24 mixed-use character consists of buildings with residential units above ground-story
25 commercial use. The district has an active and continuous commercial frontage along Polk

1 Street for almost all of its length. Larkin Street and side streets in the district have a greater
2 proportion of residences than Polk Street itself. The district provides convenience goods and
3 services to the residential communities in the Polk Gulch neighborhood and to the residents
4 on the west slopes of Nob and Russian Hills. It has many apparel and specialty stores, as well
5 as some automobile uses, which serve a broader trade area. Commercial uses also include
6 offices, as well as movie theaters, restaurants, and bars which keep the district active into the
7 evening.

8 The Polk Street District controls are designed to encourage and promote development
9 which is compatible with the surrounding neighborhood. The building standards monitor large-
10 scale development and protect rear yards at residential levels. Consistent with Polk Street's
11 existing mixed-use character, new buildings may contain most commercial uses at the first
12 two stories. The controls encourage neighborhood-serving businesses, but limit new eating,
13 drinking, other entertainment, and financial service uses, which can produce parking
14 congestion, noise and other nuisances or displace other types of local-serving convenience
15 goods and services. They also prohibit new adult entertainment uses. Restrictions on drive-up
16 and most automobile uses protect the district's continuous retail frontage and prevent further
17 traffic congestion.

18 Housing developed in new buildings is encouraged above the second story, especially
19 in the less intensely developed portions of the district along Larkin Street. Existing housing
20 units are protected by limitations on demolitions and upper-story conversions.

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23 **SEC. 723. POLK STREET NEIGHBORHOOD COMMERCIAL DISTRICT ZONING**

24 **CONTROL TABLE**

25

	Polk Street
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No.	Zoning Category	§ References	Controls
BUILDING STANDARDS			
723.10	Height and Bulk Limit	§§ 102.12, 105, 106, 250– 252, 260, 270, 271	65-A, 80-A, 130-E See Zoning Map
723.11	Lot Size [Per Development]	§§ 790.56, 121.1	P up to 9,999 sq. ft. C 10,000 sq. ft. & above § 121.1
723.12	Rear Yard	§§ 130, 134, 136	Required at residential levels only § 134(a) (e)
723.13	Street Frontage		Required § 145.1
723.14	Awning	§ 790.20	P § 136.1(a)
723.15	Canopy	§ 790.26	P § 136.1(b)
723.16	Marquee	§ 790.58	P § 136.1(c)
723.17	Street Trees		Required § 143
COMMERCIAL AND INSTITUTIONAL STANDARDS AND USES			
723.20	Floor Area Ratio	§§ 102.9, 102.11, 123	2.5 to 1 § 124(a) (b)
723.21	Use Size [Non-Residential]	§ 790.130	P up to 1,999 sq. ft.; C 2,000 sq. ft. & above § 121.2
723.22	Off-Street Parking, Commercial/Institutional	§§ 150, 153– 157, 159– 160, 204.5	Generally, none required if occupied floor area is less

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			than 5,000 sq. ft. §§ 151, 161(g)
723.23	Off-Street Freight Loading	§§ 150, 153– 155, 204.5	Generally, none required if gross floor area is less than 10,000 sq. ft. §§ 152, 161(b)
723.24	Outdoor Activity Area	§ 790.70	P if located in front; C if located elsewhere § 145.2(a)
723.25	Drive-Up Facility	§ 790.30	
723.26	Walk-Up Facility	§ 790.140	P if recessed 3 ft.; C if not recessed § 145.2(b)
723.27	Hours of Operation	§ 790.48	P 6 a.m.– 2 a.m. C 2 a.m.– 6 a.m.
723.30	General Advertising Sign	§§ 262, 602– 604, 608, 609	
723.31	Business Sign	§§ 262, 602– 604, 608, 609	P § 607.1(f)2
723.32	Other Signs	§§ 262, 602– 604, 608, 609	P § 607.1(c) (d) (g)

No. Zoning
Category §
References
Polk Street

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Controls by Story					
		§ 790.118	1st	2nd	3rd+
723.38	Residential Conversion	§ 790.84	P	C	
723.39	Residential Demolition	§ 790.86	P	C	C
Retail Sales and Services					
723.40	Other Retail Sales and Services [Not Listed Below]	§ 790.102	P	P	
723.41	Bar	§ 790.22	C		
723.42	Full-Service Restaurant	§ 790.92	C		
723.43	Large Fast Food Restaurant	§ 790.90			
723.44	Small Self-Service Restaurant	§ 790.91	C		
723.45	Liquor Store	§ 790.55	C		
723.46	Movie Theater	§ 790.64	P		
723.47	Adult Entertainment	§ 790.36			
723.48	Other Entertainment	§ 790.38	C		
723.49	Financial Service	§ 790.110	C	C	
723.50	Limited Financial Service	§ 790.112	P		
723.51	Medical Service	§ 790.114	P	P	

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723.52	Personal Service	§ 790.116	P	P	
723.53	Business or Professional Service	§ 790.108	P	P	
723.54	Massage Establishment	§ 790.60, § 1900 Health Code	C		
723.55	Tourist Hotel	§ 790.46	C	C	C
723.56	Automobile Parking	§§ 790.8, 156, 160	C	C	C
723.57	Automotive Gas Station	§ 790.14			
723.58	Automotive Service Station	§ 790.17			
723.59	Automotive Repair	§ 790.15	C		
723.60	Automotive Wash	§ 790.18			
723.61	Automobile Sale or Rental	§ 790.12			
723.62	Animal Hospital	§ 790.6	C		
723.63	Ambulance Service	§ 790.2			
723.64	Mortuary	§ 790.62			
723.65	Trade Shop	§ 790.124	P	C	
723.66	Storage	§ 790.117			
723.67	Video Store	§ 790.135	C	C	
723.68	Fringe Financial Service	§ 790.111	#	#	#

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1	723.69	Tobacco Paraphernalia Establishments	§ 790.123	C#	#	#
2						
3	723.69A	Self-Service Specialty Food	§ 790.93	C		
4						
5	Institutions and Non-Retail Sales and Services					
6						
7	723.70	Administrative Service	§ 790.106			
8						
9	723.80	Hospital or Medical Center	§ 790.44			
10						
11	723.81	Other Institutions, Large	§ 790.50	P	C	C
12						
13	723.82	Other Institutions, Small	§ 790.51	P	P	P
14						
15	723.83	Public Use	§ 790.80	C	C	C
16						
17	723.84	Medical Cannabis Dispensary	§ 790.141	P		
18						
19	RESIDENTIAL STANDARDS AND USES					
20	723.90	Residential Use	§ 790.88	P	P	P
21						
22	723.91	Residential Density, Dwelling Units	§§ 207, 207.1, 790.88(a)	Generally, 1 unit per 400 sq. ft. lot area § 207.4		
23						
24	723.92	Residential Density, Group Housing	§§ 207.1, 790.88(b)	Generally, 1 bedroom per 140 sq. ft. lot area § 208		
25						
	723.93	Usable Open Space [Per Residential Unit]	§§ 135, 136	Generally, either 60 sq. ft. if private, or 80 sq. ft. if		

			common § 135(d)		
723.94	Off-Street Parking, Residential	§§ 150, 153– 157, 159– 160, 204.5	Generally, 1 space for each dwelling unit §§ 151, 161(a) (g)		
723.95	Community Residential Parking	§ 790.10	C	C	C

SPECIFIC PROVISIONS FOR THE POLK STREET DISTRICT

Article 7 Code Section	Other Code Section	Zoning Controls
723.68	§249.35	FRINGE FINANCIAL SERVICE RESTRICTED USE DISTRICT (FFSRUD) Boundaries: The FFSRUD and its 1/4 mile buffer includes, but is not limited to, properties within the North of Market Residential Special Use District; and includes some properties within the Polk Street Neighborhood Commercial District. Controls: Within the FFSRUD and its 1/4 mile buffer, fringe financial services are NP pursuant to Section 249.35. Outside the FFSRUD and its 1/4 mile buffer, fringe financial services are P subject to the restrictions set forth in Subsection 249.35(c)(3).
§ 723.69	§ 790.123 § 186.1	<u>Tobacco Paraphernalia Establishments – the special definition of "Tobacco Paraphernalia Establishments" applicable to the Polk Street Neighborhood Commercial District shall be repealed three years after its initial effective date, unless the Board of Supervisors, on or before that date, extends or re-</u>

1 enacts it.

2 In the Polk Street Neighborhood Commercial District, the period of non-use
3 for a non-conforming Tobacco Paraphernalia Establishment to be deemed
4 discontinued shall be 18 months.

5
6 Section 6. The San Francisco Planning Code is hereby amended by amending Section
7 186.1, to read as follows:

8 **SEC. 186.1. EXEMPTION OF NONCONFORMING USES IN NEIGHBORHOOD**
9 **COMMERCIAL DISTRICTS.**

10 The purpose of this Section is to provide for the further continuance in NC Districts of
11 nonconforming uses created by adoption of Ordinance No. 69-87, as herein described, and
12 subsequent ordinances that change the uses allowed in NC Districts, which are beneficial to,
13 or can be accommodated within the neighborhood commercial areas in which they are
14 located.

15 It is hereby found and declared that certain uses which traditionally have been
16 permitted to locate in neighborhood commercial areas can be beneficial to a neighborhood
17 commercial area in small or limited numbers, but which if allowed to proliferate, can disrupt
18 the balanced mix of neighborhood-serving retail stores and services. It is further found and
19 declared that in order to prevent undesirable over concentrations of such uses, the
20 establishment of additional such uses shall be prohibited pursuant to controls governing uses
21 in NC Districts. At the same time, however, it is desirable to provide for the further
22 continuance, expansion, enlargement, alteration, changes, discontinuance, and relocation of
23 such existing uses, which are nonconforming as a result of zoning controls governing uses in
24 NC Districts.
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1 The following provisions shall govern with respect to nonconforming uses and features
2 located in Neighborhood Commercial Districts to the extent that there is a conflict between the
3 provisions of this Section and other Sections contained in this Article 1.7.

4 (a) Expansion. A nonconforming use may expand: (1) in floor area as provided in
5 Subsection (b) below, but may not expand beyond the lot which it occupies, nor may the
6 boundaries of such lot be expanded for purposes of expanding the use; nor may the use
7 expand upward above the story or stories which it lawfully occupies, except as provided in
8 Section 186.2 below.

9 (b) Enlargements or Alteration.

10 (1) A nonconforming use may not be significantly altered; enlarged or intensified,
11 except upon approval of a conditional use application pursuant to the provisions of Article 3 of
12 this Code, provided that the use not have or result in a greater height, bulk or floor area ratio,
13 less required rear yard or open space, or less required off-street parking space or loading
14 space than permissible under the limitations set forth in this Code for the district or districts in
15 which such use is located.

16 (2) A nonconforming use may expand to include public sidewalk space provided that
17 such space is only occupied with tables and chairs as permitted by this Municipal Code.

18 (3) No existing use or structure which fails to meet the requirements of this Code in any
19 manner as described above in this Subsection (b) shall be constructed, reconstructed,
20 enlarged, altered or relocated so as to increase the discrepancy, or to create a new
21 discrepancy, at any level of the structure, between existing conditions on the lot and the
22 required standards for new construction set forth in this Code.

23 (c) Changes in Use. A nonconforming use may be changed to another use or feature
24 as described below.

1 (1) A nonconforming use may be changed to a use listed in Article 7 of this Code as a
2 principal use for the district in which the property is located, and the new use may thereafter
3 be continued as a permitted principal use.

4 (2) A nonconforming use may be changed to a use listed in Article 7 of this Code as a
5 conditional use for the district in which the use is located, only upon approval of a conditional
6 use application pursuant to the provisions of Article 3 of this Code, and the new use may
7 thereafter be continued as a permitted conditional use, subject to the provisions of Section
8 178 of this Code.

9 (3) A nonconforming use may be changed to a use which is not permitted in that
10 Neighborhood Commercial District as described below, only upon approval of a conditional
11 use application, pursuant to the provisions of Article 3 of this Code:

12 (A) Any use described in zoning categories .41, .42, .43 or .44, as defined in Sections
13 790.22, 790.92, 790.90 and 790.91, respectively, may change to another use described in
14 zoning categories .41, .42, or .44, even though such other use is not permitted in that
15 Neighborhood Commercial District, unless such other use is located in an Alcohol Restricted
16 Use Subdistrict and is prohibited by the provisions governing that Alcohol Restricted Use
17 Subdistrict.

18 (B) Any use described in zoning categories .51, .52 or .53, as defined in Sections
19 790.114, 790.116 and 790.108 respectively, may change to another use described in zoning
20 categories .51, .52 or .53, even though such other use is not permitted in that Neighborhood
21 Commercial District.

22 (C) Any use described in zoning categories .57, .58 or .59, as defined in Sections
23 790.14, 790.17 and 790.15 respectively, may be demolished and reconstructed as the same
24 use or may change to another use described in zoning categories .57, .58 or .59, even though
25 such other use is not permitted in that Neighborhood Commercial District.

1 The new use shall still be classified as a nonconforming use.

2 The changes in use described in this Paragraph 3 shall include remodeling activities
3 involving the demolition and replacement of structures which result in a change of use.

4 (4) In the North Beach Neighborhood Commercial District, any use that exceeds the
5 use size provisions of Section 121.2(a) or 121.2(b) may be changed to a new use only upon
6 the approval of a new conditional use application. The Commission's approval of such
7 conditional use application shall explicitly address the use size findings of Section 303(c). In
8 the North Beach Neighborhood Commercial District, a nonconforming use cannot be changed
9 to any use which is not a permitted use under Section 722 (North Beach Controls).

10 (5) In the Castro Street Neighborhood Commercial District, any use in this district that
11 exceeds the maximum use size limit of Section 121.2(b), may be not changed to a new use.
12 The only method for changing a nonconforming use identified in this Subsection is to reduce
13 the nonconforming use:

14 (A) to a conforming use size or

15 (B) to a size specified in Subsection 121.2(a) pursuant to conditional use authorization.

16 Notwithstanding the above, any use in this District that exceeds the maximum use size
17 limit of Section 121.2(b) and is categorized in the Other Retail Sales and Services zoning
18 classification, as defined in Section 790.102, may change to another use category
19 enumerated in Section 790.102 as long as the use size is not increased and the Commission
20 approves a conditional use application for such change. The Commission's approval of such
21 conditional use application shall explicitly address the use size findings of Section 303(c).

22 (d) Discontinuance. A nonconforming use which is discontinued for a period of three
23 years, or otherwise abandoned or changed to another use which is listed in Article 7 of this
24 Code as a principal or conditional use for the district in which the use is located shall not be
25 reestablished. For purposes of this Subsection, the period of nonuse for a nonconforming use

1 to be deemed discontinued in the North Beach and Castro Street Neighborhood Commercial
2 Districts, and in the Haight Street Neighborhood Commercial District, ~~and~~ the Lower Haight
3 Street Tobacco Paraphernalia Restricted Use Subdistrict, and the Polk Street Neighborhood
4 Commercial District for Tobacco Paraphernalia Establishments, as defined in Sections 227(v)
5 and 790.123 of this Code, only, shall be eighteen (18) months, except in the North Beach
6 Neighborhood Commercial District, the period of non use for a full service restaurant use, as
7 defined in Section 790.91, to be deemed discontinued shall be three years.

8 (e) Relocation. A nonconforming use in a Neighborhood Commercial District may be
9 reestablished at another location within that Neighborhood Commercial District only upon
10 approval of a new conditional use application pursuant to the provisions of Article 3 of this
11 Code, provided that the following conditions are met:

12 (1) The original premises shall not be occupied by an establishment of the same type
13 of use as the relocating use unless by another establishment that is relocating from within the
14 district; and

15 (2) No final permits to operate the relocated use at the new premises are granted prior
16 to the issuance of a certificate of final completion of any work to the original premises which is
17 required as conditions attached to the approval of the conditional use application; and

18 (3) Deed restrictions are recorded for the original premises in the Official Records of
19 the City and County of San Francisco, which restrictions prohibit for the duration of the Code
20 sections prohibiting the use for the district in which the use is located, the establishment and
21 operation of a new use of the same type of use as the relocated use, unless such new use is
22 relocating from within the district.

1 APPROVED AS TO FORM:
2 DENNIS J. HERRERA, City Attorney

3 By:

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5 _____
6 ANDREA RUIZ ESQUIDE
7 Deputy City Attorney
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Supervisor Chiu
BOARD OF SUPERVISORS

LEGISLATIVE DIGEST

[Zoning – Amending the Citywide Definition of Tobacco Paraphernalia Establishments by Lowering the Threshold for Retail Stores to Be Considered Tobacco Paraphernalia Establishments, and Making Tobacco Paraphernalia Establishments a Non-Permitted Use in the Polk Street Neighborhood Commercial District.]

Ordinance amending the Planning Code to amend the definition of Tobacco Paraphernalia Establishments in Section 227(v), to lower the threshold for retail stores to be considered Tobacco Paraphernalia Establishments from 15% of the square footage of the establishment to 10% of the occupied floor area, as defined in Section 102.10, or 10 linear feet of display area in total, whichever is less; amending Sections 790.123 and 890.123 to reflect this amended definition; amending Section 723.1 and the Table at Section 723, to make Tobacco Paraphernalia Establishments, as defined, not permitted in the Polk Street Neighborhood Commercial District; amending Section 186.1, to change the period of non use for a non conforming Tobacco Paraphernalia Establishment use to be deemed discontinued in the Polk Street Neighborhood Commercial District from three years to eighteen months, and making findings, including findings of consistency with the priority policies of Planning Code Section 101.1 and environmental findings.

Existing Law

Until recently, the City had no planning controls to address the proliferation of establishments that sell devices that are designed and manufactured for the smoking, ingesting or inhaling tobacco, products prepared from tobacco, or controlled substances ("Tobacco Paraphernalia").

This situation changed last November, with the enactment of Ordinance No. 08-0244 (Board of Supervisors File No. 080567). Ordinance 08-0244 applies city-wide, in all of the City's Neighborhood Commercial and Mixed Use Districts. It creates a conditional use requirement for Tobacco Paraphernalia Establishments, defined in that legislation as "retail uses where more than 15% of the gross square footage of the establishment is dedicated to the sale, distribution, delivery, furnishing or marketing of Tobacco Paraphernalia from one person to another."

Since then, these controls have been amended to delete the 15% threshold for stores selling "Tobacco Paraphernalia" to be considered "Tobacco Paraphernalia Establishments" in the Haight Neighborhood Commercial District and in the newly-created Lower Haight Street Tobacco Paraphernalia Restricted Use Subdistrict. In addition, Tobacco Paraphernalia Establishments, thus defined, are now considered a non-permitted use in the Haight

FILE NO.

Neighborhood Commercial District and in the Lower Haight Street Tobacco Paraphernalia Restricted Use Subdistrict. (See Ordinance 151-09, Board of Supervisors File 090141.)

In addition, concurrently with this Ordinance, interim controls are being proposed under Planning Code Section 306.7 for retail stores that sell Tobacco Paraphernalia in the Polk Street Neighborhood Commercial District, for a one year period.

Amendments to Current Law

This Ordinance intends to amend the current law primarily in two ways. First, it amends the City-wide definition of "Tobacco Paraphernalia Establishments" by lowering the threshold for retail stores to be considered Tobacco Paraphernalia Establishments from 15% of the square footage of the establishment to 10% of the occupied floor area, as defined in Section 102.10, or 10 linear feet of display area in total, whichever is less.

Second, the Ordinance amends the definition of "Tobacco Paraphernalia Establishments" that applies to the Polk Neighborhood Commercial District to mimic the legislation recently passed for the Haight Street Neighborhood Commercial District and the Lower Haight Street Tobacco Paraphernalia Restricted Use Subdistrict. This means that any new stores intending to sell Tobacco Paraphernalia in the Polk Street Neighborhood Commercial District would be considered "Tobacco Paraphernalia Establishments", even if they devote less than 15% of their gross square footage to these items. The Ordinance also makes Tobacco Paraphernalia Establishments, thus defined, a non-permitted use in the Polk Street Neighborhood Commercial District, for a period of three years.

Background Information

This Ordinance seeks to address the marked increase in the number of enterprises selling Tobacco Paraphernalia City-wide, and in the Polk Street Neighborhood Commercial District in particular. The proliferation of these enterprises appears to contribute directly to numerous problems in the City, including violations of the peace, and health, safety, and general welfare problems. Drug use, drug sales, drug trafficking, and other crimes associated with drug use, including loitering, and littering, as well as traffic circulation, parking, and noise problems on public streets and neighborhood lots appear to be directly related to the proliferation of these establishments. These problems, in turn, adversely impacts the health, safety, and welfare of residents of nearby areas, including fear for the safety of children, elderly and disabled residents, and visitors to San Francisco.



SAN FRANCISCO PLANNING DEPARTMENT

November 18, 2009

Ms. Angela Calvillo, Clerk
Board of Supervisors
City and County of San Francisco
City Hall, Room 244
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

1650 Mission St.
Suite 400
San Francisco,
CA 94103-2479

Reception:
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Fax:
415.558.6409

Planning
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415.558.6377

Re: **Transmittal of Planning Department Case Number 2009.0784T:
Tobacco Paraphernalia Establishments in the Polk NCD
Planning Commission Recommendation:
Approval with Modifications**

Dear Ms. Calvillo,

On November 12, 2009, the San Francisco Planning Commission (hereinafter "Commission") conducted a duly noticed public hearing at a regularly scheduled meeting to consider the proposed Ordinance;

The proposed Ordinance introduced by Supervisor Chiu would amend Planning Code doing the following:

1. Amend 227(v) to redefine the definition of Tobacco Paraphernalia Establishments;
2. Amend 790.123 and 890.123 to reflect this new definition;
3. Amend 723 (Polk Street Neighborhood Commercial District) to make Tobacco Paraphernalia Establishments not permitted; and
4. Amend Section 186.1 (Exemption of Non-Conforming Uses in NCDs) to change the period of non-use for a nonconforming Tobacco Paraphernalia Establishment in the Polk Street NCD from 3 years to 18 months.

The proposed changes have been determined to be categorically exempt from environmental review under the California Environmental Quality Act Section 15060(c)(2).

At the November 12th hearing, the Commission voted to recommend **approval with modifications** of the proposed Ordinance. Specifically, the Commission recommends the following change to the proposed Tobacco Paraphernalia Establishment definition (proposed is in **double-underline Ariel**):

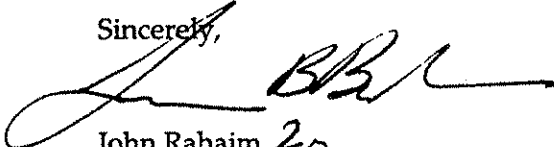
1. A retail use where more than 10% of the square footage of the occupied floor area, as defined in Section 102.10, or more than 10 linear feet of display area projected to the

www.sfplanning.org

floor, whichever is less, is dedicated to the sale, distribution, delivery, furnishing, or marketing of Tobacco Paraphernalia from one person to another.

Please find attached documents relating to the Commission's action. If you have any questions or require further information please do not hesitate to contact me.

Sincerely,



John Rahaim
Director of Planning

cc: Supervisor Chiu

Attachments (one copy of the following):

Planning Commission Resolution No. 17982

Planning Commission Executive Summary for Case No. 2009.0784T



SAN FRANCISCO PLANNING DEPARTMENT

Planning Commission Resolution No. 17982

HEARING DATE: NOVEMBER 12, 2009

1650 Mission St.
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Project Name: Amendments to the Planning Code:
Tobacco Paraphernalia Establishments in the Polk NCD

Case Number: 2009.0784T [Board File No. 09-0962]
Initiated by: Supervisor Chiu / Introduced July 28, 2009
Staff Contact: Tara Sullivan, Legislative Affairs
tara.sullivan@sfgov.org, 415-558-6257

Reviewed By: AnMarie Rodgers, Manager of Legislative Affairs
anmarie.rodgers@sfgov.org, 415-558-6395

90-day Deadline: October 28, 2009

Recommendation: Recommend Approval with Modifications

RECOMMENDING THAT THE BOARD OF SUPERVISORS ADOPT AN ORDINANCE WITH MODIFICATIONS THAT WOULD AMEND PLANNING CODE BY AMENDING 227(V) TO REDEFINE THE DEFINITION OF TOBACCO PARAPHERNALIA ESTABLISHMENTS; AMENDING 790.123 AND 890.123 TO REFLECT THIS NEW DEFINITION; AMENDING 723 (POLK STREET NEIGHBORHOOD COMMERCIAL DISTRICT) TO MAKE TOBACCO PARAPHERNALIA ESTABLISHMENTS NOT PERMITTED; AND AMENDING SECTION 186.1 (EXEMPTION OF NON-CONFORMING USES IN NCDs) TO CHANGE THE PERIOD OF NON-USE FOR A NONCONFORMING TOBACCO PARAPHERNALIA ESTABLISHMENT IN THE POLK STREET NCD FROM 3 YEARS TO 18 MONTHS.

PREAMBLE

Whereas, on July 28, 2009, Supervisor Chiu introduced a proposed Ordinance under Board File Number 09-0962 that would amend Planning Code Section amend 227(v) to redefine the definition of Tobacco Paraphernalia Establishments; amend 790.123 and 890.123 to reflect this new definition; Amend 723 (Polk Street Neighborhood Commercial District) to make Tobacco Paraphernalia Establishments not permitted; and amend Section 186.1 (Exemption of Non-Conforming Uses in NCDs) to change the period of non-use for a nonconforming Tobacco Paraphernalia Establishment in the Polk Street NCD from 3 years to 18 months; and

Whereas, on October 21, 2008, the Board of Supervisors passed Ordinance No. 244-08 (BOS File No. 080567), which created a new use category in the Planning Code for Tobacco Paraphernalia Establishments. This use now requires a Conditional Use Authorization from the Planning Commission in all Commercial and Industrial districts throughout San Francisco; and

Whereas, on June 30, 2009, the Board of Supervisors passed Ordinance No. 151-09 (BOS File No. 09-0141). Created for the upper and lower Haight Street, the legislation lowered the threshold that a retail establishment will be considered to be a Tobacco Paraphernalia Establishment. In these two areas, if a store sells ONE piece that qualified as paraphernalia, then it was a Tobacco Paraphernalia Establishment. It also made this use not permitted in the Haight Street NCD and created a Lower Haight Street Tobacco Paraphernalia Restricted Use District; and

Whereas, on October 6, 2009, the Board of Supervisors passed an interim zoning controls (BOS File No. 09-0963), requiring a conditional use authorization for all Tobacco Paraphernalia Establishments in the Polk Street NCD. These controls are in effect for one year, or until they are supplanted by additional controls.

Whereas, on October 22, 2009 and November 12, 2009, the San Francisco Planning Commission (hereinafter "Commission") conducted duly noticed public hearings at a regularly scheduled meetings to consider the proposed Ordinance; and

Whereas, the proposed zoning changes have been determined to be categorically exempt from environmental review under the California Environmental Quality Act Section 15060(c)(2); and

Whereas, the Commission has heard and considered the testimony presented to it at the public hearing and has further considered written materials and oral testimony presented by Department staff, and other interested parties; and

Whereas, the all pertinent documents may be found in the files of the Department, as the custodian of records, at 1650 Mission Street, Suite 400, San Francisco; and

Whereas, the Commission has reviewed the proposed Ordinance; and

MOVED, that the Commission hereby recommends that the Board of Supervisors recommends *approval with modifications of the proposed ordinance* and adopts the attached Draft Resolution to that effect.

FINDINGS

Having reviewed the materials identified in the preamble above, and having heard all testimony and arguments, this Commission finds, concludes, and determines as follows:

1. It has been a year since the new use category "Tobacco Paraphernalia Establishment" was put into the Planning Code. When it was first proposed, the Department recommended that this definition was unnecessary and would be difficult to enforce. The Department's position has not changed and is supported by the Commission.
2. The current definition of a Tobacco Paraphernalia Establishment does not work. In addition to a few establishments finding loopholes in the gross square footage requirement, the 15% threshold is high. The Department has consistently maintained that it can be extremely difficult to regulate these

establishments, as they often open without any referral to the Planning Department. Unless these projects are referred to Planning for review, there is no opportunity to the Department to catch them and require a Conditional Use hearing.

3. The definition as proposed in the Ordinance tightens up this definition considerably.
4. The Department does believe that the Polk Street Neighborhood Commercial District does contain a high number of Tobacco Paraphernalia Establishments and placing tight controls on that NCD will help contain some of the nuisance issues associated with this use.
5. Therefore, the Commission recommends *approval with modifications of the proposed Ordinance* and that the Board of Supervisors adopt the proposed Ordinance with the following modifications (proposed is in double-underline Ariel):
 - a. A retail use where more than 10% of the square footage of the occupied floor area, as defined in Section 102.10, or more than 10 linear feet of display area projected to the floor, whichever is less, is dedicated to the sale, distribution, delivery, furnishing, or marketing of Tobacco Paraphernalia from one person to another.
 - b. NOTE: there is a technical amendment that the Department is recommending. Section 723 - the Polk Street NCD control table – must be amended to reflect the new lower threshold of a Tobacco Paraphernalia Establishment. This amendment is not substantive in nature.
6. **General Plan Compliance.** The proposed Ordinance is, on balance, consistent with the following Objectives and Policies of the General Plan:

I. COMMERCE & INDUSTRY ELEMENT

THE COMMERCE AND INDUSTRY ELEMENT OF THE GENERAL PLAN SETS FORTH OBJECTIVES AND POLICIES THAT ADDRESS THE BROAD RANGE OF ECONOMIC ACTIVITIES, FACILITIES, AND SUPPORT SYSTEMS THAT CONSTITUTE SAN FRANCISCO'S EMPLOYMENT AND SERVICE BASE.

GOALS

THE THREE GOALS OF THE COMMERCE AND INDUSTRY ELEMENT OF THE GENERAL PLAN RELATE TO CONTINUED ECONOMIC VITALITY, SOCIAL EQUITY, AND ENVIRONMENTAL QUALITY.

POLICY 1.1

Encourage development which provides substantial net benefits and minimizes undesirable consequences. Discourage development which has substantial undesirable consequences that cannot be mitigated.

OBJECTIVE 6

MAINTAIN AND STRENGTHEN VIABLE NEIGHBORHOOD COMMERCIAL AREAS EASILY ACCESSIBLE TO CITY RESIDENTS.

POLICY 6.1

Ensure and encourage the retention and provision of neighborhood-serving goods and services in the city's neighborhood commercial districts, while recognizing and encouraging diversity among the districts.

The goal of the proposed Ordinance is to combat the detrimental effects of Tobacco Paraphernalia Establishments, such as peace, health, safety and general welfare problems along Polk Street and the surrounding areas. Prohibiting new tobacco paraphernalia establishments for a 3-year period will help ensure that other neighborhood-serving uses will locate there.

1. The proposed replacement project is generally consistent with the eight General Plan priority policies set forth in Section 101.1 in that:

- A) The existing neighborhood-serving retail uses will be preserved and enhanced and future opportunities for resident employment in and ownership of such businesses will be enhanced:

The proposed Ordinance to regulate Tobacco Paraphernalia Establishments would not significantly impact existing neighborhood-serving retail uses or opportunities for employment in or ownership of such businesses.

- B) The existing housing and neighborhood character will be conserved and protected in order to preserve the cultural and economic diversity of our neighborhoods:

The proposed Ordinance may strengthen neighborhood character in regulating Tobacco Paraphernalia Establishments thus ensuring that there is no over-concentration of these uses or detrimental effects of these uses.

- C) The City's supply of affordable housing will be preserved and enhanced:

The proposed Ordinance will have no adverse effect on the City's supply of affordable housing.

- D) The commuter traffic will not impede MUNI transit service or overburden our streets or neighborhood parking:

The proposed Ordinance will not result in commuter traffic impeding MUNI transit service or overburdening the streets or neighborhood parking.

- E) A diverse economic base will be maintained by protecting our industrial and service sectors from displacement due to commercial office development. And future opportunities for resident employment and ownership in these sectors will be enhanced:

The proposed Ordinance would not adversely affect the industrial or service sectors or future opportunities for resident employment or ownership in these sectors.

- F) The City will achieve the greatest possible preparedness to protect against injury and loss of life in an earthquake.

Preparedness against injury and loss of life in an earthquake is unaffected by the proposed amendments. Any construction or alteration associated with Tobacco Paraphernalia Establishment use would be executed in compliance with all applicable construction and safety measures.

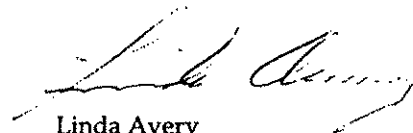
- G) That landmark and historic buildings will be preserved:

Landmarks and historic buildings would be unaffected by the proposed amendments. Should a potential Tobacco Paraphernalia Establishment use be located within a landmark or historic building, such site would be evaluated under typical Planning Code provisions and comprehensive Planning Department policies.

- H) Parks and open space and their access to sunlight and vistas will be protected from development:

The proposed Ordinance will not impact the City's parks and open space.

I hereby certify that the Planning Commission ADOPTED the foregoing Resolution on November 12, 2009.


Linda Avery
Commission Secretary

AYES: Miguel, Olague, Antonini, Moore, Sugaya, Borden, Lee

NAYS:

ABSENT:

ADOPTED: November 12, 2009



SAN FRANCISCO PLANNING DEPARTMENT

REVISED Executive Summary Planning Code Text Change

HEARING DATE: NOVEMBER 12, 2009
CONTINUED FROM: OCTOBER 22, 2009

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Project Name: Amendments to the Planning Code:
Tobacco Paraphernalia Establishments in the Polk NCD

Case Number: 2009.0784T [Board File No. 09-0962]
Initiated by: Supervisor Chiu / Introduced July 28, 2009
Staff Contact: Tara Sullivan, Legislative Affairs

Reviewed By: AnMarie Rodgers, Manager Legislative Affairs
anmarie.rodgers@sfgov.org, 415-558-6395

90-day Deadline: October 28, 2009
30-day Extension: November 28, 2009

Recommendation: Approval with Modifications

PLANNING CODE AMENDMENT

The proposed Ordinance introduced by Supervisor Chiu would amend Planning Code doing the following:

1. Amend 227(v) to redefine the definition of Tobacco Paraphernalia Establishments;
2. Amend 790.123 and 890.123 to reflect this new definition;
3. Amend 723 (Polk Street Neighborhood Commercial District) to make Tobacco Paraphernalia Establishments not permitted; and
4. Amend Section 186.1 (Exemption of Non-Conforming Uses in NCDs) to change the period of non-use for a nonconforming Tobacco Paraphernalia Establishment in the Polk Street NCD from 3 years to 18 months.

The Way It Is Now:

On October 21, 2008, the Board of Supervisors passed Ordinance No. 244-08 (BOS File No. 080567), which created a new use category in the Planning Code for Tobacco Paraphernalia Establishments. This use now requires a Conditional Use Authorization from the Planning Commission in all Commercial and Industrial districts throughout San Francisco.

A Tobacco Paraphernalia Establishment is defined as: (emphasis added)

"A retail use where more than 15% of the gross square footage of the establishment is dedicated to the sale, distribution, delivery, furnishing or marketing of Tobacco Paraphernalia from one person to another. "Tobacco Paraphernalia" means paraphernalia, devices, or instruments that are designed or manufactured for the smoking, ingesting, inhaling, or otherwise introducing into the body of tobacco, products prepared from tobacco, or controlled substances as defined in California Health

and Safety Code Sections 11054 et seq. "Tobacco Paraphernalia" does not include lighters, matches, cigarette holders, any device used to store or preserve tobacco, tobacco, cigarettes, cigarette papers, cigars, or any other preparation of tobacco that is permitted by existing law. Medical Cannabis Dispensaries, as defined in Section 3201(f) of the San Francisco Health Code, are not Tobacco Paraphernalia Establishments."

On June 30, 2009, the Board of Supervisors passed Ordinance No. 151-09 (BOS File No. 09-0141). Created for the upper and lower Haight Street, the legislation lowered the threshold that a retail establishment will be considered to be a Tobacco Paraphernalia Establishment. In these two areas, if a store sells ONE piece that qualified as paraphernalia, then it was a Tobacco Paraphernalia Establishment. It also made this use not permitted in the Haight Street NCD and created a Lower Haight Street Tobacco Paraphernalia Restricted Use District.

On October 6, 2009, the Board of Supervisors passed an interim zoning controls (BOS File No. 09-0963), requiring a conditional use authorization for all Tobacco Paraphernalia Establishments in the Polk Street NCD. These controls are in effect for one year, or until they are supplanted by additional controls.

The Way It Would Be:

The proposed Ordinance would redefine a Tobacco Paraphernalia Establishment and create specific controls for the Polk Street NCD. Specifically, it would do the following:

1. Amend 227(v) to redefine the definition of Tobacco Paraphernalia Establishments as (italics underlined is new):
 - a. A retail use where more than 10% of the square footage of the occupied floor area, as defined in Section 102.10, or more than 10 linear feet of display area in total, whichever is less, is dedicated to the sale, distribution, delivery, furnishing, or marketing of Tobacco Paraphernalia from one person to another.
 - b. NOTE: this definition will apply city-wide.
2. Amend 790.123 and 890.123 (Tobacco Paraphernalia Establishments) to reflect this new definition;
3. Amend 227(v) and 790.123 to lower the threshold of a Tobacco Paraphernalia Establishment in the Polk Street NCD to remove the 10% requirement – therefore, if a retail store sold any tobacco paraphernalia then they would meet this definition;
4. Make Tobacco Paraphernalia Establishments (as redefined in #3 above) not permitted in the Polk Street NCD;
5. Amend 186.1 (Exemption of Non-conforming Uses in NCDs) to change the period on non-use for a nonconforming Tobacco Paraphernalia Establishment in the Polk Street NCD from 3 years to 18 months; and
6. Amend 723 (Polk Street Neighborhood Commercial Districts) reflect these new controls and to incorporate a 3 year sunset clause.

REQUIRED COMMISSION ACTION

The proposed Resolution is before the Commission so that it may recommend adoption, rejection, or adoption with modifications to the Board of Supervisors.

RECOMMENDATION

The Department has a preliminary recommendation of *approval with modifications*. Specifically, the Department is recommending the following change to the proposed Tobacco Paraphernalia Establishment definition (proposed is in double-underline Ariel):

1. A retail use where more than 10% of the square footage of the occupied floor area, as defined in Section 102.10, or more than 10 linear feet of display area projected to the floor, whichever is less, is dedicated to the sale, distribution, delivery, furnishing, or marketing of Tobacco Paraphernalia from one person to another.

The Department is recommending approval of the proposed modifications to the Polk Street NCD.

NOTE: there is a technical amendment that the Department is recommending. Section 723 - the Polk Street NCD control table – must be amended to reflect the new lower threshold of a Tobacco Paraphernalia Establishment. This amendment is not substantive in nature.

BASIS FOR RECOMMENDATION

At the October 22nd hearing, the Commission expressed concern with the viability of the Planning Department being able to enforce the definition of a Tobacco Paraphernalia Establishment. A request was made for the Department to investigate whether the proposed definition was sufficient or whether modifications were necessary.

The Department analyzed several options of regulating Tobacco Paraphernalia Establishments. An investigation into creating special use districts was examined; creating a zero-threshold definition (that is, if a store sold one piece of paraphernalia then they would be subject to these controls); to mirroring the controls in place for Medical Cannabis Dispensaries; and with clustering mechanisms.

While the Department shares the Commission's enforcement concerns, ultimately, the Department is recommending the original solution proposed in Ordinance 09-0962 and outlined above, which was developed with Supervisor Chiu and the Mayor's Office of Economic & Workforce Development. There is clearly a need to amend the current definition, as it allows a store to stock well over 15% of paraphernalia merchandise yet not technically meet the definition of a Tobacco Paraphernalia Establishment. The definition proposed closes the loophole, requiring a measurement of all occupied floor area¹ as well as linear feet of display area. It also lowers the threshold of the amount of

¹ SEC. 102.10. FLOOR AREA, OCCUPIED. Floor area devoted to, or capable of being devoted to, a principal or conditional use and its accessory uses. For purposes of computation, "occupied floor area" shall consist of the gross floor area, as defined in this Code, minus the following:

- (a) Nonaccessory parking and loading spaces and driveways, and maneuvering areas incidental thereto;
- (b) Exterior walls of the building;

paraphernalia products from 15 to 10%, which the Department believes is a more manageable threshold. We want the number to be low enough to capture the majority of stores that sell tobacco paraphernalia products, yet allow a retail store to sell a reasonable amount of products without having to go through a long regulatory process.

The Department has always recommended approval of the amendments to the Polk Street NCD. Like the Upper and Lower Haight Streets, there does appear to be a concentration of these establishments on Polk Street, and like Haight Street, the concentration of these stores prevents other neighborhood-serving uses from locating on the street. The proposed controls will sunset in three years from date of enactment, which will allow the neighborhood and the Department to monitor these stores impacts.

In sum, the Planning Department supports the proposed Ordinance and believes that the new definition is a great improvement over the existing flawed definition and supports the proposed three-year moratorium on Polk Street of new Tobacco Paraphernalia Establishments.

ENVIRONMENTAL REVIEW

The proposal to amend Planning Code would result in no physical impact on the environment. The proposed amendment is exempt from environmental review under Section 15060(c)(2) of the CEQA Guidelines.

PUBLIC COMMENT

As of the date of this report, the Planning Department has received no letters in support or opposition to the proposal from the public.

RECOMMENDATION:	Approval with Modifications
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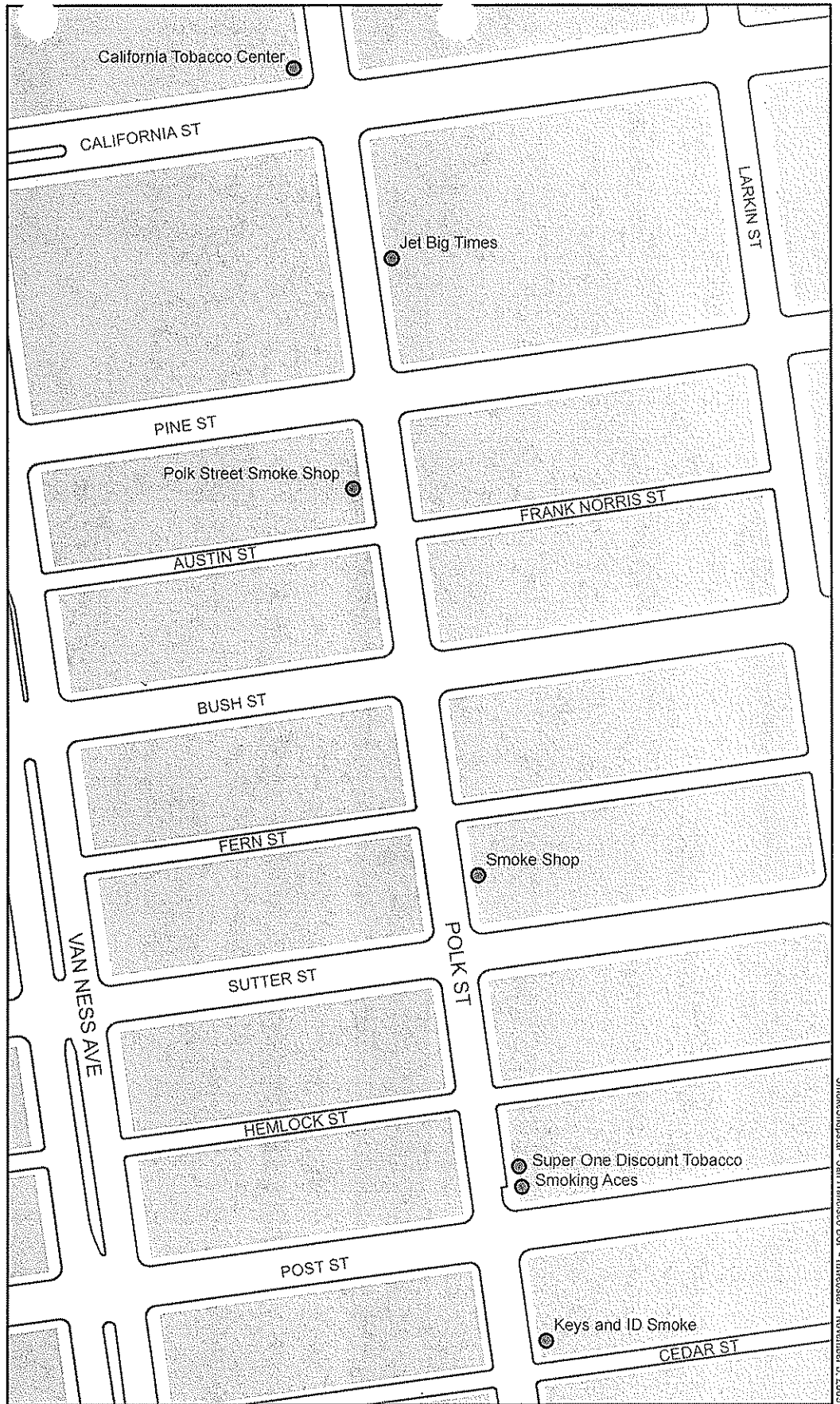
Attachments:

- Exhibit A: Draft Planning Commission Resolution
- Exhibit B: Draft Board of Supervisors Ordinance
- Exhibit C: Map of Tobacco Paraphernalia Establishments on Polk Street, 11/09
- Exhibit D: Planning Department Executive Summary for October 22, 2009

-
- (c) Mechanical equipment, appurtenances and areas, necessary to the operation or maintenance of the building itself, wherever located in the building;
 - (d) Restrooms, and space for storage and services necessary to the operation and maintenance of the building itself, wherever located in the building;
 - (e) Space in a retail store for store management, show windows and dressing rooms, and for incidental repairs, processing, packaging and stockroom storage of merchandise for sale on the premises; and
 - (f) Incidental storage space for the convenience of tenants.

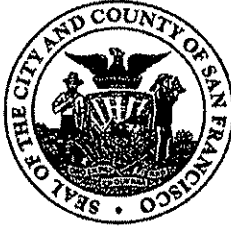
TOBACCO
PARAPHERNALIA
ESTABLISHMENTS

ON
POLK STREET



250 Feet

BOARD of SUPERVISORS



City Hall
Dr. Carlton B. Goodlett Place, Room 244
San Francisco 94102-4689
Tel. No. 554-5184
Fax No. 554-5163
TDD/TTY No. 554-5227

July 31, 2009

Planning Commission
1660 Mission Street, 5th Floor
San Francisco, CA 94103

Dear Commissioners:

On July 28, 2009, Supervisor Chiu introduced the following proposed legislation:

File: 090962. Ordinance amending the Planning Code to amend the definition of Tobacco Paraphernalia Establishments in Section 227(v), to lower the threshold for retail stores to be considered Tobacco Paraphernalia Establishments from 15% of the square footage of the establishment to 10% of the occupied floor area, as defined in Section 102.10, or 10 linear feet of display area in total, whichever is less; amending Sections 790.123 and 890.123 to reflect this amended definition; amending Section 723.1 and the Table at Section 723, to make Tobacco Paraphernalia Establishments, as defined, not permitted in the Polk Street Neighborhood Commercial District; amending Section 186.1, to change the period of non-use for a non-conforming Tobacco Paraphernalia Establishment use to be deemed discontinued in the Polk Street Neighborhood Commercial District from three years to eighteen months, and making findings, including findings of consistency with the priority policies of Planning Code Section 101.1 and environmental findings.

The proposed ordinance is being transmitted pursuant to Planning Code Section 302(b) for public hearing and recommendation of approval or disapproval. The ordinance is pending before the Land Use & Economic Development and will be scheduled for hearing upon receipt of your response.

Angela Calvillo, Clerk of the Board

Handwritten signature of Linda Laws in cursive.

By: Linda Laws, Committee Clerk
Land Use & Economic Development Committee

Attachment

cc: John Rahaim, Director of Planning
Larry Badiner, Zoning Administrator
AnMarie Rodgers, Legislative Affairs
Tara Sullivan, Legislative Affairs
Brett Bollinger, Major Environmental Analysis
Kate Stacy, Deputy City Attorney

*NON-PHYSICAL EXCEPTION.
CEQA, ARTICLE 5, SECTION 15060
(c)(2)
Marie R. Sumell
August 3, 2009*