BOARD of SUPERVISORS

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M E M O R A N D U M

TO: Katy Tang, Director
Small Business Commission, City Hall, Room 448

FROM: John Carroll, Assistant Clerk, Land Use and Transportation Committee

DATE: April 29, 2024

SUBJECT: REFERRAL FROM BOARD OF SUPERVISORS
Land Use and Transportation Committee

The Board of Supervisors' Land Use and Transportation Committee has received the following legislation, which is being referred to the Small Business Commission for comment and recommendation. The Commission may provide any response it deems appropriate within 12 days from the date of this referral.

File No. 240407

Ordinance amending the Police Code to create a two-year pilot program, during which retail food and tobacco establishments in a high-crime area of the Tenderloin police district are prohibited from being open to the public from 12:00 a.m. to 5:00 a.m.; and authorizing the Department of Public Health to impose administrative fines for violation of the hours restriction, declaring an establishment's operation in violation of the hours restriction to be a public nuisance, authorizing enforcement actions by the City Attorney, and creating a private right of action for persons harmed by a violation of the hours restriction.

Please return this cover sheet with the Commission's response to me at the Board of Supervisors, City Hall, Room 244, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102.

c:
Office of Chair Melgar
Kerry Birnbach, Senior Policy Analyst/Commission Secretary

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RESPONSE FROM SMALL BUSINESS COMMISSION - Date: _____

____ **No Comment**

____ **Recommendation Attached**

_____
Chairperson, Small Business Commission

[Police Code - Tenderloin Retail Hours Restriction Pilot Program]

Ordinance amending the Police Code to create a two-year pilot program, during which retail food and tobacco establishments in a high-crime area of the Tenderloin police district are prohibited from being open to the public from 12:00 a.m. to 5:00 a.m.; and authorizing the Department of Public Health to impose administrative fines for violation of the hours restriction, declaring an establishment's operation in violation of the hours restriction to be a public nuisance, authorizing enforcement actions by the City Attorney, and creating a private right of action for persons harmed by a violation of the hours restriction.

NOTE: **Unchanged Code text and uncodified text** are in plain Arial font.
Additions to Codes are in *single-underline italics Times New Roman font*.
Deletions to Codes are in ~~*strikethrough italics Times New Roman font*~~.
Board amendment additions are in double-underlined Arial font.
Board amendment deletions are in ~~strikethrough Arial font~~.
Asterisks (* * * *) indicate the omission of unchanged Code subsections or parts of tables.

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

Section 1. The Police Code is hereby amended by adding Article 58, to read as follows:

ARTICLE 58: TENDERLOIN RETAIL ESTABLISHMENT PILOT PROGRAM

SEC. 5800. FINDINGS AND PURPOSE.

(a) There is a worsening epidemic of opioid addiction and use in San Francisco, as in other major U.S. cities.

(b) San Francisco's Tenderloin police district (the "Tenderloin") has the City's highest rate of drug-related crime, including narcotics offenses and gun-related crimes frequently connected with

drug offenses. The Tenderloin is also home to a high density of low- and middle-income families, including many families with children.

(c) The high rate of drug-related crime in the Tenderloin leads individuals and families that live, work, and attend school in the neighborhood to believe they face health and safety risks, including exposure to drugs, needles, human waste, uncontained refuse, and other hazardous materials that are left on sidewalks and streets. People who live, work, and attend school in the neighborhood have also expressed fear about exposure to drug sales and use, gunshots, physical assault and intimidation by individuals or groups engaged in illegal activity, and property crimes such as theft and damage to storefronts and vehicles.

(d) The prevalence of drug sales and use in the Tenderloin prompted the City to launch the Drug Market Agency Coordinated Command, led by the Police Department, to coordinate City, state, and federal resources to abate drug sales and use, and related criminal conduct, in the Tenderloin.

(e) Outdoor, public drug sales and use in the Tenderloin are common and cause particularly acute public health and safety risks late at night (including in the very early hours of the morning), when large groups gather in lighted areas adjacent to open retail food and tobacco businesses to engage in drug sales and use.

(f) Large gatherings of people engaged in drug sales and use are particularly prevalent in the area of the Tenderloin bounded to the north by O'Farrell Street, to the south by McAllister Street, to the east by Jones Street, and to the west by Polk Street (an area referred to in this Article 58 as the "Tenderloin Public Safety Area"). The Police Department has analyzed 2023 incident reports for narcotics crimes and other crimes frequently connected with drug activity in the Tenderloin, and determined that a relatively high concentration of these incidents between the hours of 12:00 a.m. and 5:00 a.m. were reported in the Tenderloin Public Safety Area. The Police Department has also observed that, as compared with similar-sized areas in the City, including other areas in the Tenderloin, the Tenderloin Public Safety Area has the highest concentration of large groups engaged in

drug sales and use in public, outdoor spaces during late night (which includes very early morning) hours.

(g) Large groups of people engaged in drug sales and use in the Tenderloin Public Safety Area generally form and congregate in the vicinity of retail businesses selling food and tobacco products that are open to the public during those hours. By being open so late, these retail food and tobacco establishments in effect facilitate the late nighttime drug market by providing a lighted gathering point for drug users and dealers, by enabling drug user and dealers to take cover indoors to avoid police patrols, and, in some cases, by selling tobacco, tobacco paraphernalia, and other retail goods used by people engaged in drug use and sales.

(h) The Police Department compared 2023 data regarding narcotics offenses and other serious crimes often connected with narcotics – including homicide, rape, robbery, assaults, and shootings – that occurred between 12:00 a.m. and 5:00 a.m. in the Tenderloin Public Safety Area with the same data from an area around Portsmouth Square in Chinatown. The selected Portsmouth Square area is equivalent to the Tenderloin Public Safety Area in size and in its combination of commercial and residential uses, but in contrast to the Tenderloin Public Safety Area, the Portsmouth Square area has few or no retail food and tobacco businesses open to the public late at night. The Police Department found that the rate of serious crime between 12:00 a.m. and 5:00 a.m. was significantly higher in the Tenderloin Public Safety Area than in the Portsmouth Square area: Approximately 190 incidents of serious crime occurred in the Tenderloin Public Safety Area between 12:00 a.m. and 5:00 a.m. during 2023, as compared with approximately 30 such incidents in the targeted Portsmouth Square area.

(i) The gatherings of large groups engaged in drug activity late at night in the Tenderloin Public Safety Area present particular health and safety risks and give rise to feelings of insecurity and fear on the part of local residents. The large groups contribute to property crimes and violent crime in the area. They leave large amounts of debris on the streets and sidewalks, creating unsanitary

conditions. Residents living closest to congregation points for these groups, especially seniors and families with children, have expressed that they are so anxious about the hostile conditions they encounter on neighborhood sidewalks that they feel fearful to walk outdoors during the nighttime and early morning hours, when they are likely to encounter these groups engaged in drug-related activity and the debris generated by the groups. Residents must move past and through these large crowds in order to access or leave their homes; they describe feeling threatened and unsafe.

(j) Large groups engaged in drug use and sales late at night also present serious challenges to effective law enforcement. Large groups are difficult for the police to control and pose safety risks for officers, as the people engaged in illegal activity typically outnumber police officers on patrol. It is more difficult for police officers to observe and document behavior by individuals that would establish the reasonable suspicion or probable cause required for officers to initiate enforcement actions when individuals engaged in criminal conduct are embedded in a large crowd. Individuals are easily lost or concealed in a crowd, particularly when the crowd is comprised of many people engaging in illegal activity. And proximity to open retail businesses enables individuals engaged in criminal activity to take cover inside the open retail business when a police patrol appears.

(k) Barring retail food and tobacco establishments from being open to the public between 12:00 a.m. and 5:00 a.m. is likely to yield public safety gains for local residents and visitors. Eliminating the nighttime safety problems is likely to increase the overall vibrancy of the Tenderloin, which could yield economic benefits to businesses impacted by the restriction on hours of operation.

(l) Based on the foregoing, the requirements imposed in this Article 58 are likely to improve public safety in the Tenderloin. This pilot program, prohibiting for two years retail food and tobacco establishments in the Tenderloin Public Safety Area from being open to the public between 12:00 a.m. and 5:00 a.m., will enable the Police Department to evaluate the effectiveness of this restriction in improving public safety in the Tenderloin. This will inform the judgment of the Police Department and policymakers as to next steps to take to maintain public safety in the Tenderloin.

SEC. 5801. DEFINITIONS.

"City" shall mean the City and County of San Francisco.

"Director" shall mean the Director of the Department of Public Health, or the Director's designee.

"DPH" shall mean the Department of Public Health.

"Restricted Hours" shall mean the period between 12:00 a.m. and 5:00 a.m., seven days a week, and including holidays.

"Retail Establishment" shall mean any business in the Tenderloin Public Safety Area that operates as either or both of the following: 1) a market that sells any prepackaged food items and/or produce, including but not limited to any establishment that has or qualifies for a permit from the Department of Public Health to operate as a Food Product and Marketing Establishment, as defined in Section 440 of the Health Code; and/or 2) an establishment that sells any Tobacco Product, as defined in Section 19H.2 of the Health Code.

"Tenderloin Public Safety Area" shall mean the area of the City bounded to the north by O'Farrell Street, to the south by McAllister Street, to the east by Jones Street, and to the west by Polk Street, including both sides of the boundary streets.

SEC. 5802. ESTABLISHMENT OF TWO-YEAR PILOT PROGRAM TO PROHIBIT OPERATION OF RETAIL ESTABLISHMENTS IN THE TENDERLOIN PUBLIC SAFETY AREA DURING RESTRICTED HOURS.

For a two-year period beginning on the effective date of this Article 58, no Retail Establishment in the Tenderloin Public Safety Area may be open to the public during Restricted Hours.

SEC. 5803. ADMINISTRATIVE ENFORCEMENT – DEPARTMENTS.

(a) Enforcing Department. This Article 58 shall be administered and enforced by the Department of Public Health (DPH). The Director may adopt rules, regulations, and guidelines to carry out the provisions and purposes of this Article.

(b) Supporting Department. The Police Department shall ensure that its members document violations of Section 5802 in incident reports or other formats, such as body-worn camera footage, provided those other formats capture the information typically included in an incident report, and shall refer documented violations to DPH for enforcement. The Police Department shall assist in DPH's administrative enforcement as requested by DPH, including by providing incident reports or equivalent documentation and other evidence when requested by DPH, and by making Police Department members available to provide declarations and/or testimony at hearings when requested by DPH.

SEC. 5804. ADMINISTRATIVE ENFORCEMENT PROCEDURE – NOTICE OF VIOLATION, HEARING, AND ORDER.

(a) If the Director determines that a Retail Establishment has violated Section 5802, the Director may issue a Notice of Violation to the Retail Establishment, the owner of real property where the violation occurred, and/or other person(s) the Director deems responsible for causing the violation (collectively, "Responsible Parties"). The issuance of the Notice of Violation may be by hand delivery, registered mail, or electronic mail. The Notice of Violation may be directed at one or more Responsible Parties; use herein of the singular term "Responsible Party" is merely for ease of reference.

(b) The Notice of Violation shall include the following information:

(1) That the Director has determined that the Retail Establishment has operated in violation of this Article 58;

(2) The alleged acts or failures to act that constitute the basis for the Director's determination;

(3) That the Director intends to take enforcement action against the Responsible Party, and the nature of that action, including the administrative penalty and enforcement costs to be imposed;

(4) That the Responsible Party has the right to request a hearing before the Director within 15 days after the Notice of Violation is issued, which request must be made in writing.

(c) If no request for a hearing is filed with the Director within the appropriate period, the right to request a hearing shall be deemed waived, and the Director's determination shall become final and effective 15 days after the Notice of Violation was issued. The Director shall issue an order imposing the enforcement action, and shall send the order to the Responsible Partys by hand delivery, registered mail, or electronic mail. In subsequent civil proceedings, such violations shall be deemed not to have been corrected. The failure of the Responsible Party to request a hearing shall constitute a failure to exhaust administrative remedies and shall preclude the Responsible Party from obtaining judicial review of the validity of the enforcement action.

(d) Upon a timely request for a hearing, the Director shall, within 15 days of the request, notify the Responsible Party of the date, time, and place of the hearing. Such notification may be made by hand delivery, registered mail, or electronic mail. The Director shall make available to the Responsible Party any evidence obtained in support of the Notice of Violation. Such hearing shall be held no later than 60 days after the Director receives the request, unless time is extended by mutual agreement of the Responsible Party and the Director.

(e) The Director shall serve as hearing officer and conduct the hearing, or the Director shall designate another person to serve as hearing officer, who shall have the same authority as the Director to hear and decide the case and make any orders consistent with this Article 58. The Responsible Party may present evidence for consideration, subject to any rules adopted by the hearing officer for the orderly conduct of the hearing. Within 60 days of the conclusion of the hearing, the hearing officer shall render a decision in the form of a written order, which the Director shall promptly serve on the

Responsible Parties. Service of the written order may be made by hand delivery, registered mail, or electronic mail. The order shall state whether the Notice of Violation has been upheld (in whole or in part), and the enforcement action taken against each party.

(f) If the order directs the Responsible Party to pay an administrative penalty and/or enforcement costs, such amount shall be paid within fifteen days from the mailing of the order; the order shall inform the Responsible Party of such deadline for payment.

SEC. 5805. VIOLATIONS, ADMINISTRATIVE PENALTIES, AND ENFORCEMENT COSTS.

(a) Violations Subject to Penalties. For purposes of assessing penalties for violation of Section 5802, each one-hour period within Restricted Hours during which, at any time, a Retail Establishment is open to the public in violation of Section 5802 is a separate violation. A Responsible Party may not be cited or found civilly liable for multiple violations of Section 5802 in a single 12 a.m.-to-5 a.m. period unless (1) the violations are at least one hour apart from one another, and (2) at the time of the preceding violation, the Responsible Party receives warning of its violation of Section 5802 and continues to operate or operates again in violation of Section 5802 after such warning has been given.

(b) Penalty Amounts. In setting the amount of the administrative penalty, which shall not exceed $1,000 per violation, the Director may consider any one or more mitigating or aggravating circumstances presented, including, but not limited to, the following: the nature and seriousness of the misconduct giving rise to the violation, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the Responsible Party's misconduct, and the responsible party's assets, liabilities and net worth.

(c) Enforcement Costs. In any action where a violation is found, the Director shall assess DPH's costs of enforcement against the Responsible Party.

(d) Payment and Collection of Administrative Penalty and Enforcement Costs. Any administrative penalty and/or enforcement costs assessed under this Article 58 is a debt to the City and shall be paid to the Treasurer of the City and County of San Francisco. Any amount paid late shall be subject to an additional late fine of 10% on the unpaid amount. The sum of the unpaid amount and the 10% late fine shall accrue interest at the rate of 1% per month (or fraction thereof) until fully paid; any partial payments made shall first be applied to accrued interest. The City may file a civil action or pursue any other legal remedy to collect such unpaid amount, fine, and interest. In any civil action for collection, the City shall be entitled to obtain a judgment for the unpaid amounts, fine, and interest, and for the costs and attorneys' fees incurred by the City in bringing such civil action.

(e) Lien for Administrative Penalty. Where an activity or condition on San Francisco real property has caused, contributed to, or been a substantial factor in causing the violation, the Director may initiate proceedings to make any unpaid administrative penalty, enforcement costs, fine, and interest, and all additional authorized costs and attorneys' fees, a lien on the property. Such liens shall be imposed in accordance with Administrative Code Sections 10.230-10.237, or any successor provisions. Before initiating lien proceedings, the Director shall send a request for payment under Administrative Code Section 10.230A.

SEC. 5806. PUBLIC NUISANCE.

A Retail Establishment's operation in violation of Section 5802 shall be a public nuisance, which may be remedied as provided by law, including, but not limited to, the provisions of Article 3 (commencing with Section 11570) of Chapter 10 of Division 10 of the California Health and Safety Code.

SEC. 5807. ENFORCEMENT BY CITY ATTORNEY.

(a) The City Attorney may at any time institute civil proceedings for injunctive and monetary relief, including civil penalties, against any Retail Establishment for violation of this Article 58, without regard to whether the Director has issued a notice of violation, instituted abatement proceedings, scheduled or held a hearing on a notice of violation, or issued a final decision.

(b) At any time, the Director may refer a case to the City Attorney's Office for civil enforcement, but a referral is not required for the City Attorney to bring a civil action under subsection (a).

(c) Action for Injunction and Civil Penalty. Any Retail Establishment that violates Section 5802 shall be enjoined and shall be subject to a civil penalty in an amount not to exceed $1,000 per violation, subject to the limitations set forth in Section 5805(a), above. Such penalty shall be assessed and recovered in a civil action brought in the name of the people of the City and County of San Francisco by the City Attorney in any court of competent jurisdiction. In assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including but not limited to, the following: the nature and seriousness of the misconduct giving rise to the violation, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities and net worth.

(d) Attorneys' Fees. The City Attorney shall recover reasonable attorneys' fees if the City is the prevailing party in any court case or special proceeding to enforce this Article 58 and if the City Attorney elects, at the initiation of the action, to seek recovery of attorneys' fees and provides notice of such intention to the adverse party or parties.

(e) Remedies under this Section 5807 are non-exclusive and cumulative to all other remedies available at law or equity.

SEC. 5808. PRIVATE RIGHT OF ACTION.

(a) Any Retail Establishment that violates Section 5802 may be liable for damages in a civil action brought by any person that has been harmed by the Retail Establishment's operation in violation of Section 5802. Such damages shall be in addition to any other rights and remedies that may be available to the person bringing a civil action under this Section 5808.

(b) This Article 58 shall not create any private right of action against the City.

SEC. 5809. NO CONFLICT WITH FEDERAL OR STATE LAW.

Nothing in this Article 58 shall be interpreted or applied so as to create any requirement, power, or duty in conflict with any federal or state law.

SEC. 5810. UNDERTAKING FOR THE GENERAL WELFARE.

In enacting and implementing this Article 58, the City is assuming an undertaking only to promote the general welfare. It is not assuming, nor is it imposing on its officers and employees, an obligation for breach of which it is liable in money damages to any person who claims that such breach proximately caused injury.

SEC. 5811. SEVERABILITY.

If any section, subsection, sentence, clause, phrase, or word of this ordinance, or any application thereof to any person or circumstance, is held to be invalid or unconstitutional by a decision of a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions or applications of the ordinance. The Board of Supervisors hereby declares that it would have passed this ordinance and each and every section, subsection, sentence, clause, phrase, and word not declared invalid or unconstitutional without regard to whether any other portion of this ordinance or application thereof would be subsequently declared invalid or unconstitutional.

SEC. 5812. REMOVAL FROM CODE.

At or after two years from the effective date of this ordinance, the City Attorney is authorized to cause this Article 58 to be removed from the Administrative Code, unless it has been re-enacted or extended by ordinance.

Section 2. Effective Date. This ordinance shall become effective 30 days after enactment. Enactment occurs when the Mayor signs the ordinance, the Mayor returns the ordinance unsigned or does not sign the ordinance within ten days of receiving it, or the Board of Supervisors overrides the Mayor's veto of the ordinance.

APPROVED AS TO FORM:
DAVID CHIU, City Attorney

By: */s/ Sarah Crowley*
SARAH CROWLEY
Deputy City Attorney

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FILE NO. 240407

LEGISLATIVE DIGEST

[Police Code - Tenderloin Retail Hours Restriction Pilot Program]

Ordinance amending the Police Code to create a two-year pilot program, during which retail food and tobacco establishments in a high-crime area of the Tenderloin police district are prohibited from being open to the public from 12:00 a.m. to 5:00 a.m.; and authorizing the Department of Public Health to impose administrative fines for violation of the hours restriction, declaring an establishment's operation in violation of the hours restriction to be a public nuisance, authorizing enforcement actions by the City Attorney, and creating a private right of action for persons harmed by a violation of the hours restriction.

Amendments to Current Law

This ordinance would establish a two-year pilot program during which food markets and tobacco establishments in a section of the Tenderloin bounded to the north by O'Farrell Street, to the south by McAllister Street, to the east by Jones Street, and to the west by Polk Street (the "Tenderloin Public Safety Area") would be prohibited from being open to the public between the hours of 12:00 a.m. and 5:00 a.m.

The Department of Public Health would be responsible for administrative enforcement of the prohibition, with support from the Police Department. A violator could be liable for administrative fines of up to $1000 per violation, together with enforcement costs, with a single violation defined on a per-hour basis, though a violator could face multiple citations in a single 12:00 a.m. - to - 5:00 a.m. period only if they received written warning following the first violation and again operated in violation of the hours restriction. A violator could also be liable for civil penalties pursued by the City Attorney in a civil action, and attorneys' fees and costs. The ordinance also declares a business's operation in violation of the ordinance to be a public nuisance, and creates a private right of action for a person able to prove in a civil action that they were harmed by an establishment's operation in violation of the hours restriction.

Background Information

The Police Department has documented through crime data, photographs, and patrol officers' observations that large groups of people engaged in illicit drug sales and use congregate close to open food markets and tobacco establishments in the late night and early morning hours in the Tenderloin Public Safety Area. These late-night gatherings contribute to various types of criminal activity, impede law enforcement operations, leave behind significant debris and unsanitary waste, and lead residents of the area to feel unsafe and reluctant to venture outside during nighttime hours.

The Police Department believes that prohibiting food markets and tobacco establishments in the Tenderloin Public Safety Area from being open to the public between the hours of 12:00 a.m. and 5:00 a.m. will help limit the congregation of large groups engaged in drug activity, and thereby facilitate effective law enforcement in the area, reduce the accumulation of unsafe and unsanitary debris, and reduce residents' fear and insecurity related to these nighttime conditions.

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