

BOH Questions - Draft TRL Ordinance

1. Why not progressive enforcement penalties which are most effective? These are found in many cities and counties as well as Columbia's current ordinance.

Progressive enforcement is the most effective means of obtaining compliance; however, legislatively mandated penalties do not allow for discretion in imposition of the appropriate penalty based on the circumstances of the violation. The most effective enforcement allows for holistic approach utilizing a combination of administrative, prosecutorial and judicial resources. A penalty that is too great for the circumstances will result in dismissal of the charge. A penalty that is too small for the circumstances will in essence not serve as a penalty for egregious behavior (ex. - selling to 12 year old vs. selling to a 20 year old with a really good fake ID). Often in municipal court a large fine is imposed with a suspended imposition of sentence (SIS), which is automatically imposed in the event of a subsequent violation within a specified period of time. An SIS is incredibly effective tool in obtaining compliance from a one-time offender and may carry conditions such as education or training requirements.

2. Do violations of any other city licensure ordinances result in a "public nuisance" charge, or do they have specific, progressive enforcement penalties?

The trend (and best practice) is to move away from specific, progressive enforcement penalties mandated by city code as such mandatory fine schedule does not allow for consideration of the facts and circumstances of the violation to be taken into account in assessing the penalty. The classification as a "public nuisance" allows in extreme situations the potential to prosecute the violation as a nuisance and/or declare the business as a whole in violation of the city code and seek to revoke the business license – not just the TRL.

3. Why is there no provision for compliance checks by city officials or volunteers? Inspections alone are inadequate if there is no way to identify which stores continue to sell to people under 21 (regardless of whether their signs are correct).

The means and methods of compliance checks are not required to be included in the city code and would be limiting factors when written as a part of the code provisions. The ability to conduct compliance checks is an implied administrative function that may be delegated by policy and is included within the scope of Sec 11-318. Establishment of the details of a comprehensive administrative enforcement program that would meet minimum requirements necessary to ensure constitutional protections and evidentiary needs for enforcement by city staff occurs without city council approval or inclusion in the city code. The more means and methods are set out in the city code, the less discretionary authority that may be exercised in establishing a comprehensive compliance and enforcement program.

4. Why not a uniform definition of what is a tobacco product to be used throughout the ordinance. Some sections refer to “tobacco products, tobacco product paraphernalia, alternative nicotine products or vapor products” while others refer to only some of these?

The goal in drafting the amendments was to disrupt as little as possible the existing language previously adopted by council relating to Tobacco 21 and the inclusion of alternative nicotine/vapor products into the regulations. It is my recommendation to focus on the licensing aspects and not try to re-write the existing provisions to attempt to define alternative nicotine/vapor products as a tobacco product.

5. Does a violation of federal or state law serve as prima facie evidence of a City ordinance violation and allow for a fine to be imposed or just revocation of license?

Only if there is a witness available who can provide testimony and background support – the presumption of “prima facie evidence” can be rebutted by the licensee and in order to overcome the rebuttal there must be direct evidence presented.

6. How does the business services administrator determine when to suspend or revoke a license?

Revocation/suspension will be based on the facts and circumstances of the violation or series of violations. A single isolated incident is not normally a reason for suspension or revocation, but may be in the event of a single egregious act – such as selling to a 12 year old. In such a circumstance a suspension may be warranted on the first offense with progressive suspensions and revocation coming based on future violations by the same business. Likewise, if the facts and circumstances lead the business license administrator to believe the violation(s) reflect the policy or practice of the license holder vs. a single act by an employee who was disciplined or terminated, it will be a factor. Over time, the business license administrator will need to balance the severity of the act with the violation history of the licensee.

7. For what length of time is the license suspended?

It will vary based on the facts and circumstances of the violation. It is important to have discretion as not all violations are the same.

8. Why does the ordinance not designate a specific department or departments as having the responsibility for compliance checks and enforcement?

There is no department listed in the ordinance in order to allow the city manager discretion in delegating the enforcement functions to one or more departments based on available resources. If a department is named in the ordinance it will be a limiting factor – the goal is to provide ongoing flexibility in enforcement options without having to seek a city code amendment.

9. Why no educational component such as educational material to licensee or availability of online training?

That is a program implementation concern – not a city code requirement.

10. Why not specify that money collected from the fines will be used to fund compliance checks?

Again, while burdens of conducting compliance checks and associated revenues collected from fines imposed by municipal court is an argument that may be made by the applicable departments for budgeting purposes; it is not a provision which should be attempted to be included in the city code. TRL licensing and enforcement will impact several different departments who will all have varying levels of expenses related to the compliance activities (finance, health, police, law, municipal court) so funding compliance checks may require an allocation of any identified revenue sources among the various departments.

The underlying purpose of municipal court fines is to impose a punishment as a disincentive for violations of the law. The municipal court is required to adjudicate each case fairly and independently and may not do so based upon revenue concerns or the cost of compliance checks – nor may any department be incentivized through the imposition of fines and forfeitures to raise revenue for keeping the community safe. Municipal court is not to be utilized as a revenue generation tool for a municipality. The allocation of revenues from fines occurs during budget process and as a matter of policy is not tied to and divvied up among the various enforcement officials based on enforcement actions.

11. Why no mention of partnering with other agencies or organizations to fund and implement compliance checks?

This is a programmatic concern, not a city code requirement.

12. Section 11-310 a (8) – Last sentence notes that the definition is without regard to quantities. Was the absence of “alternative nicotine products or vapor products” in that sentence purposeful? If so why?

This is the definition which was included in the original draft from the health department so a representative from the health department will need to speak as to whether or not it was purposeful. The suggested edit can easily be made and would result in more consistency.

13. Section 11-317 c – Need to ask for ID for persons that appear to be under the age of 27. Why was 27 selected?

The age of 27 was included in the original draft from the health department. I presume it was selected for consistency with state law in the event an inspection from a state enforcement official is utilized. The failure to ID is not likely to be the subject of primary enforcement if the individual is over the age of 21 at the time of sale. The representative of the coalition suggested increasing to 30, I recommend keeping at 27 for consistency with state law since it is not an area of primary enforcement (ie – not carding someone who is actually 25, but appears to be under the age of 30, will not be the subject of a citation for failure to ask for identification because it is a subjective requirement).

14. Section 11-317 c – The last words in the article are “within the city.” If licensing only applies to tobacco retailers within the city and if “city” has not been mentioned anywhere else in the ordinance was there a reason why it was included in this section?

The phrase was added to ensure there was no argument that the positive identification was required for ensuring the purchaser met the minimum age as defined by the city and there was no argument the standard might be the minimum age as defined by the State of Missouri. It is probably not necessary, but also does not cause any harm by its inclusion in the paragraph.

15. Section 11-317 e – Last sentence references “false and misleading advertising.” What are the implications of being deemed “false and misleading advertising?”

This is a phrase and concept that was included in the original draft from the health department. The display of false and misleading advertising by a tobacco retailer would be a city code violation and subject to prosecution or further suspension or revocation of the TRL.

16. Section 11-317 g – Notes that the tobacco retailer shall permit all reasonable inspections of the business and examination of records the business services administrator. What does inspections of the business mean? How does it differ from the inspections noted in Sec 11-318.

The two sections are similar and included in both places to ensure in 11-317 that there is a “duty” on the part of the licensee to permit reasonable inspections while in 11-318 the city is provided the “right” to inspect. The language in 11-318 was previously redrafted to make it clear that compliance checks during normal business hours in areas open to the public are allowed at any time. Inspections beyond those areas open to the public require the compliance/enforcement officer to obtain a warrant.

17. Secs 11-319 – Who is responsible for bringing the retailer to municipal court?

The administrative official who performs the inspection would prepare a violation report and file it with the Prosecutor who will review to determine if sufficient evidence exists to charge a municipal ordinance violation. If a volunteer compliance check program is established, the city staff person responsible for administration of the volunteer program would coordinate the filing of reports with the Prosecutor; however, the volunteer would need to be available as a witness.

18. Sec 11-320 – What is the rationale for not putting the penalties which were initially under Sec 11-316 f here even as suggested penalties?

The city code does not contain “suggestions”. The city code is a local law and needs to be definite and precise in its terms. “Suggestions” are better left for reports or policies, but I would caution against any document that would seek to restrict the ability of the administrative officials involved in the various enforcement actions to exercise discretion. As an alternative, perhaps the BOH could annually review the enforcement practices and provide feedback from time to time. There is not a need to include any such review or recommendation in the city code as it is a matter that simply may occur under existing provisions.

19. Section 11-321 – Can suspension or revocation of the license (Sec. 11-321) take place without a conviction on a public nuisance charge (Sec. 11-319-320), or must a conviction take place first?

Yes – suspension or revocation may take place without a conviction of public nuisance as they are two separate and distinct actions.

20. Section 11-321 – Is it correct to say that the retailer’s license could be automatically revoked if they are found in violation during a federal compliance check?

No – competent and substantial evidence must be presented to support the taking of any adverse action. A presumption may be created, but it will likely require direct evidence from the federal official in order to have sufficient facts in the record to revoke the license.

21. Sec 11-321 b – The last sentence appears to be cut and pasted from Sec 11-315 b which discusses denial of license application appeals. Should this sentence refer to suspension or revocation rather than granting of licenses?

Yes – it should be amended to read: The appellant may submit to the director of finance a position statement explaining why appellant believes the license should not be suspended or revoked. The business services administrator may also submit to the director a position statement explaining why the administrator believes the license should be suspended or revoked.

22. Sec 11-322 a – Does the last sentence allow for the Board to implement rules that would establish penalties such as those that were deleted in Sec 11-316 or to designate who would do the inspections as the relevant section only refers to the city?

No – the BOH has no independent authority to make rules pertaining to business licensing and city code enforcement. The BOH may review practices and provide recommendations and reports to staff and council.

23. Section 11-323 – Rules/procedures will be needed to implement the whole ordinance. Can the review board (Sec. 11-322) establish rules and procedures for the whole ordinance, or only for the appeals process? If the latter, who is responsible for establishing general procedures?

City administration is responsible for implementation of the procedures for the entire ordinance. The review board only establishes rules and procedures for its appeals.

24. Sec 11-323 b – In the last sentence “or vapor products” was not included. Was this purposeful? If so why?

No – it was not purposeful and should be included here. It should be amended to read: Any person who violates any provision of the Tobacco Retailer regulations or licensing requirements is guilty of a separate offense for each day or part of a day during which the violation is committed, continued, or permitted. In addition, each individual retail sale of tobacco products, tobacco paraphernalia, alternative nicotine product and/or vapor product shall constitute a separate violation of this article.