



## Request for City Council Committee Action from the Department of Regulatory Services

**Date:** March 6, 2012

**To:** Council Member Elizabeth Glidden, Chair, Regulatory, Energy & Environment Committee

**Subject:** Tobacco product sampling pursuant to Minneapolis Code of Ordinances (M.C.O.) Section 281.56, *Sampling*, adopted July 1, 2011.

**Recommendation:** That the city council receive and file this report and its accompanying attachments and citations to authority as a supplemental and additional record to be incorporated into and made a part of the official city council record supporting the adoption of Minneapolis Code of Ordinances (M.C.O.) Section 281.56, *Sampling*, (2011-Or-054, §1, 7-1-11).

**Previous Directives:** Pursuant to a motion adopted by the Regulatory, Energy & Environment Committee on February 13, 2012, Regulatory Services staff was directed "to review Minneapolis Ordinance Section 281.56 regarding tobacco sampling and report back to the R, E & E Committee at its March 19, 2012 meeting."

**Prepared by:** Grant Wilson, Deputy Director for Licenses & Consumer Services

**Approved by:**

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Gregory K. Stubbs, AICP, Director of Regulatory Services

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Henry Reimer, Assistant Director of Regulatory Services

**Presenters in Committee:** Grant Wilson

## Financial Impact

- No financial impact

## Community Impact

- City Goals: *Livable Communities, Healthy Lives.*

## Supporting Information

After providing notice and conducting an extensive public hearing, the city council adopted Minneapolis Code of Ordinances Section 281.56 on July 1, 2011. The ordinance was intended to provide clarifying and additional regulation regarding the practice of tobacco product sampling in licensed tobacco products shops. The Minnesota Clean Indoor Air Act does “*not prohibit the lighting of tobacco in a tobacco products shop by a customer or potential customer for the specific purpose of sampling tobacco products*” but does not define the term sampling or provide any guidance as to how sampling is intended to be interpreted or its practice regulated. See Minn. Stat. § 144.4167, Subd. 4. The Act does, however, specifically empower home rule charter cities such as Minneapolis to enact additional, complimentary or more stringent measures regarding indoor smoking and secondhand smoke. See Minn. Stat. § 144.417, Subd. 4. The Minneapolis sampling ordinance as approved provides, in its entirety, as follows:

**281.56. Sampling.** Pursuant to the authority granted to the City of Minneapolis by Minnesota Statutes, Section 144.417, the operator of any tobacco products shop licensed under Section 281.10 of the Minneapolis Code of Ordinances is hereby prohibited from any of the following:

- (a) Except for a bona fide sale of a smoking device, providing or otherwise making available for use by a customer, potential customer, or any other person a smoking device for the purpose of sampling any tobacco product;
- (b) Providing in exchange for a fee or any other consideration seating within or access to the indoor area of a tobacco products shop; or
- (c) Permitting within the indoor area of a tobacco products shop the sampling of any tobacco product which was not furnished by the tobacco products shop on the date and at the time the sampling occurs.

A tobacco products shop may distribute single service samples of smokeless tobacco products or cigarettes, cigars, pipe tobacco, or other tobacco products suitable for smoking subject to the limitations on indoor sampling or smoking provided in this section.

In the eight months subsequent to the adoption of the ordinance, staff of the Division of Licenses and Consumer Services has had opportunity to make numerous observations, inspections, conclusions and assessments regarding multiple establishments and the practice of tobacco products sampling therein. These opportunities have arisen through the regular course of the inspection and enforcement work completed by staff as well as

attendant to the City's ongoing defense of a lawsuit brought by the owner of a licensed tobacco products shop that operates as a hookah lounge. See *Shiraz Hookah, LLC v. City of Minneapolis*, United States District Court File No. 11-cv-2044; Hennepin County District court File No. 27-cv-11-14685.

The range of establishments which staff has inspected, assessed and observed has been varied, inclusive of:

- Licensed "traditional" tobacco shops which primarily sell cigars, pipe tobacco, loose tobacco, cigarettes and related products with the substantial majority of sales being classified as off-premises retail sales with the products being purchased primarily for consumption off of the business premises; in these establishments the practice of sampling is accessory and subservient to the primary business purpose and model of an off-sale retail tobacco products shop, as envisioned by the ordinance;
- Licensed and unlicensed tobacco product shops operating as hookah lounges in which the vast majority of sales take the form of on-sale hookah pipe rentals and shisha tobacco sales with the tobacco being purchased almost exclusively for extended consumption within the business premises in a specifically-designated smoking lounge which most closely resembles a nightclub or restaurant and not a retail shop; in this type of establishment the practice of "sampling" is plainly not accessory or subservient to off-premises sales but instead represents the primary and nearly exclusive business purpose and model as opposed to an off-sale retail tobacco products shop.

Based on this quantum of inspections, assessments and observations staff reasserts and continues to endorse the legitimate and rational public purposes served by the sampling ordinance, which include, but are not limited to:

- The original legislative history inclusive of the official council record which establishes that "the City enacted the Ordinance to stop tobacco shops from operating sampling rooms that were, in fact, indoor smoking lounges" operating under distinctly separate business models from legitimate retail tobacco shops in that, as referenced above, on-site tobacco sampling represents the primary and nearly exclusive business purpose instead of being accessory and subservient to off-premises retail sales of tobacco products. See *Shiraz Hookah, LLC v. City of Minneapolis*, United States District Court File No. 11-cv-2044 (Memorandum Opinion and Order of Judge Patrick J. Schiltz at 12) (Attachment A to this report);
- The Memorandum Opinion and Order of Judge Schiltz issued December 30, 2011 which recognized that "regulating smoking in public places for the protection of the public health is plainly a legitimate government purpose" and found that several rational reasons could support the adoption of the sampling ordinance. The entirety of Judge Schiltz's opinion is adopted and incorporated into the record in this matter and its proffered rational bases supporting the adoption of the ordinance are specifically endorsed, adopted and found to be altogether valid and supported by the observations and inspections of staff. These rational reasons include observations made by staff indicating that (1) hookah smokers may spend more time "sampling" tobacco products than cigar samplers and that the practice more closely resembles extended social smoking as opposed to bona fide sampling, (2) non-smokers may be more likely to visit hookah lounges based on their functioning as lounges akin to nightclubs and restaurants, and (3) hookah smoke may be more dangerous than cigar or other tobacco smoke as abundantly supported and documented in Attachment B to this report, comprised of studies and citations to studies regarding the heightened health risks of hookah smoking;

- Hookah lounges create unmanageable levels of second hand smoke that is breathed in by the guests of each lounge, the employees, and people visiting surrounding businesses. Inspections staff has received complaints about smoke penetrating into adjacent businesses, even when air filtration systems meant to filter out smoke are installed in the lounges. Compared to the smoke observable from sampling at traditional tobacco shops, the smoke observable in hookah lounges is denser, and has created more complaints;
- Hookah smoking poses unique health risks distinct from the smoking of traditional tobacco products like cigarettes. Due to the nature of how a water pipe is smoked, smokers take longer and deeper inhales of the smoke from a hookah than from a cigarette or other smoking device. This exposes the smoker to greater amounts of tar, nicotine, and other carcinogens or impurities present in smoke. Additionally, as hookah smoke is heated by charcoal, it exposes smokers to increased levels of carbon monoxide, over and above that experienced by a cigarette smoker. Attachment B contains numerous studies supporting this distinction;
- Hookah smoking at hookah lounges also presents a public health concern because of the potential sharing of pipe mouthpieces. In hookah lounges smokers are encouraged to sit for long periods, smoking a pipe with other customers. Sharing mouthpieces presents a risk of spreading disease between smokers. The social nature of hookah smoking encourages the sharing of pipes at a rate greater than people generally share other tobacco products. This is based on the observation of licensing staff and the studies contained in Attachment B;
- Hookah lounges, with their business model based almost exclusively on the smoking of tobacco on the premises, pose a unique challenge in the regulatory context because they clearly violate the nature of the sampling exception written into the Minnesota Clean Indoor Air Act, Minn. Stat. § 144.417. They operate without significant sales of product to be consumed off site, instead, they use “sampling” to justify the operation of exclusive smoking nightclubs. This is not “sampling” in any normal sense of the word. By contrast, as observed by licensing staff, traditional tobacco dealers operate primarily as shops to sell tobacco to be consumed off site. Where sampling is permitted, and in some cases promoted, the amount, and nature of the sampling of traditional tobacco is significantly different, with customers smoking on site and purchasing additional product to smoke off site. One traditional dealer estimates that only 30% to 35% of its product is smoked on site, to include smokers who light their pipes, cigarettes, or cigars and leave the store before finishing the product. Traditional tobacco dealers do not operate as smoking nightclubs like hookah lounges. This distinction is based on the observation of licensing staff as well as input from the public.

Based on the above-referenced observations, assessments and review of the tobacco sampling ordinance staff recommends that the ordinance be retained and enforced as written and that the city council receive and file this report and its accompanying attachments and citations to authority as a supplemental and additional record to be incorporated into and made a part of the official city council record supporting the adoption of Minneapolis Code of Ordinances (M.C.O.) Section 281.56, *Sampling*, (2011-Or-054, §1, 7-1-11).

Attachments (A & B).