

Dennis Revell

From: Dennis Revell
Sent: Monday, May 02, 2011 12:25 PM
To: 'alford.nero@ci.tracy.ca.us'
Cc: 'davidbr@ci.tracy.ca.us'; 'leon.churchill@ci.tracy.ca.us'; dwparson1@aol.com; 'council@ci.tracy.ca.us'
Subject: Tracy Suggested Ordinance Changes & Admin Fine Recommendation
Attachments: Tracy Suggested Changes 5-2-11 (00013933).DOCX; Tracy Admin Fines Proposed Ordinance Sections (00013930).DOCX

Importance: High

Chief Nero:

Attached please find a memo containing my suggestions for some minor improvements or changes to the proposed fireworks ordinance. Please feel free to give me a call should you have any questions or concerns.

Best Regards,

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MEMORANDUM

To: Chief Alfred Nero

From: Dennis C. Revell

Cc: Division Chief David Brammell
City Manager Leon Churchill
Mayor Brent H. Ives
Mayor Pro Tem Michael Maciel
Councilmember Robert Rickman
Councilmember Bob Elliott
Councilmember Steve Abercrombie

Date: May 2, 2011

**Re: Our Client: American Promotional Events, Inc. (TNT Fireworks)
Tracy City Council Meeting: Tuesday, May 3, 2011
Agenda Item: 7**

Subj: Suggested Improvements / Changes to Proposed Fireworks Ordinance

On behalf of our client as well as the Tracy nonprofit organizations who have requested their assistance, we have reviewed the proposed ordinance and would respectfully request the following improvements / changes to the draft.

3.04.010 – Definitions

- Add to the definitions section a definition for the term "Principal and Permanent Meeting Place", such as:

"Principal and permanent meeting place" shall include, but not be limited to, a permanent structure, playing field, geographic area or service population which resides in or is located within the City of Tracy."

Justification for this change: The ordinance uses this term as a qualifying criteria for a nonprofit organization, i.e., one which it must meet in order to participate in the lottery selection of those nonprofits who will be able to apply for a permit to sell State-Approved

Fireworks in Tracy. At no time is this term defined or qualified in the proposed ordinance.

3.04.030 – Sale – Discharge – Time Limit – Dangerous Fireworks

- This section is confusing, contains inadvertent typos and is internally inconsistent. It purports in the main paragraph to allow sale and discharge between noon on June 28th through midnight on the 4th of July each year and then in Subsection (a), qualifies the parameters of the authorization to sell to 12:00 A.M. (I believe you meant that to be P.M.) on June 28th through 8:00 P.M. on June 28th; 8:00 A.M. through 8:00 P.M. from June 28th through July 3rd; and 8:00 A.M. through 5:00 P.M. on July 4th.

In addition, as currently written, it places no limitation on the hours during which State-Approved Fireworks can be legally used on the days that they are sold. Most jurisdictions limit use to the hours that the fireworks stands are open plus one or two hours after they close.

And last, but certainly not least, is the fact that all sales at all stands must stop at 5:00 P.M. on July 4th. 70% of fireworks sales generally occur on the 4th of July and a healthy chunk of those sales occur between 4:00 to 10:00 P.M. in most of the communities in California. In addition, all of the cities near Tracy that allow firework sales are open much later than 5:00 P.M. on the 4th of July (i.e., Vernalis: Midnight; Manteca: 10:00 P.M.; Lathrop: 10:00 P.M.; Stockton: 9:00 P.M., etc.)

We would respectfully recommend the following amendment to this section.

3.04.030 – Sale-Discharge-Time Limit-Dangerous Fireworks

Subject to the permitting provisions of this chapter, the provisions of the State Fireworks Law, sections 12500 through 12726 of the Health and Safety Code of the State of California and any regulations promulgated there under and notwithstanding the portions of section 9.06.080 of this code that address fireworks, safe and sane fireworks, as defined in Section 12529 and 12562 of the Health and Safety Code of the State of California, may be sold and discharged within the city limits of the City of Tracy during the period beginning at noon on the twenty-eighth day of June and ending at midnight on the fourth of July, each year—, subject to the limitations set forth in subsections (a) and (b) below It is unlawful and shall be a misdemeanor to possess, sell or discharge fireworks classified as “dangerous fireworks” by Section 12505 of the Health and Safety Code of the State of California within the City of Tracy.

(a) Safe and Sane fireworks may only be sold between the hours of 12:00 a.m. and 8:00 p.m. on June 28, between 8:00 a.m. and 8:00 p.m. from June 29 through July 3, and 8:00 a.m. and 59:00 p.m. on July 4;

(b) —It shall be unlawful to discharge any Safe and Sane Fireworks except during the hours of 9:00 a.m. to midnight on the days in which said Safe and Sane Fireworks may be sold in the City of Tracy.

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3.04.060 – Applications for Safe and Sane Fireworks Sales Permit Lottery

- Subsection (a) is a little bit confusing and inconsistent with the required documentation or paperwork that most nonprofit organizations must maintain in California. We would respectfully suggest that it be changed as follows:

(a) The applicant is ~~any nonprofit association, charity or corporation organized primarily for veteran, patriotic, welfare, civic betterment, religious, athletic or charitable purposes pursuant to the Internal Revenue Code or California Revenue and Taxation Code, or a group which is an integral part of a recognized national organization having such tax-exempt status or an organization affiliated with and officially recognized by an elementary, junior high and/or high school and/or school district that serves, in whole or in part, the residents of the City of Tracy or public and/or private community college, college and/or university which is located within the boundaries of the City of Tracy, a local nonprofit organization which shall mean any nonprofit association, club, or corporation organized for veteran, patriotic, welfare, religious, civic betterment, youth or charitable purposes as defined by Section 501 (c) of the Internal Revenue Code of the United States. Each organization shall provide the City with a copy of their "Letter of Incorporation" as proof of their nonprofit status and establish status as a 501(c)(3) tax-exempt organization as recognized by the Secretary of State.~~

1. Public school organizations shall provide current written verification from an affiliation from the school each year.

2. Each organization may file an application for one sales permit for which there is only one tax ID number.

3.04.070 – Document and Fees Required for Fireworks Sales Permit Issuance

- Add a new subsection (f) that permits joint venture stands by qualified applicants, such as:

(f) "Two (2) or more eligible nonprofit organizations may jointly submit an application pursuant to this ordinance and may jointly receive a permit to sell fireworks pursuant to this ordinance. In addition, if a qualified applicant is selected in the lottery, it may select one or more other qualified applicants from the lottery who were not selected to join it in a joint venture operation of the fireworks stand and jointly receive a permit to sell fireworks pursuant to this ordinance. In such cases, all organizations participating in this joint venture must submit the necessary information outlined in subsection (a) above."

Justification for the change: Obviously, there will be more nonprofits who apply then there will be stands available. In addition, some of those nonprofits may need the help of other nonprofits to run their stands or may wish to operate their stand with another qualified nonprofit. By allowing joint ventures, you help ensure that as many qualified nonprofits as possible will benefit from this fundraiser.

3.04.090 – Requirements of Safe and Sane Fireworks Sales Stand

- We suggest that subsection (k) be replaced with the following language:

“All retail sales of "Safe and Sane Fireworks" shall be permitted from within a temporary fireworks stand, and the retail sales from any other building or structure is hereby prohibited. Temporary stands shall be subject to NFPA 1124 Code for the Manufacture, Transportation, Storage, and Retail Sales of Fireworks and Pyrotechnic Articles, 2006 Edition.”

Absent from the ordinance appears to be any provisions to implement an administrative fine procedure pursuant to Senate Bill 839 which became effective January 1, 2008. I've attached hereto some proposed draft language for that.

I've tried to limit my suggested improvements to only the most critical and essential items so as to avoid the City Council having to do a second first reading because of too many “substantive” changes in the proposed ordinance necessitating same.

I hope the above suggested improvements / changes are helpful. Please feel free to contact me should you have any questions.

ADMINISTRATIVE FINES AND PENALTIES.**I. PURPOSE**

- (a) This Chapter authorizes the imposition of administrative fines on any person who violates any provision of this ordinance in order to encourage and obtain compliance with the provisions of this ordinance for the benefit and protection of the entire community. This Chapter governs the imposition, enforcement, collection and administrative review of all administrative fines, related to: the possession, use, storage, sale and/or display of those fireworks classified as “Dangerous Fireworks” in California Health and Safety Code Section 12500, et seq., with the exception of a pyrotechnic licensee when operating pursuant to that license; and the use of “Safe and Sane Fireworks” as defined in California Health and Safety Code Section 12500 et seq on or at dates, times and/or locations other than those permitted by this ordinance. Said administrative fines are imposed under authority of Government Code Section 53069.4, Health and Safety Code Section 12557, and the police power of the City;
- (b) The issuance of citations imposing administrative fines may be performed at the discretion of the officials of the City authorized hereunder; and the issuance of a citation to any person constitutes but one remedy of the City to redress violations of this code by any person. By adopting this chapter, the City does not intend to limit its authority to employ any other remedy, civil or criminal, to redress any violation of this code by any person, which this City may otherwise pursue;
- (c) The imposition of fines related to “Dangerous Fireworks” under this chapter shall be limited to persons who possess, sell, use and/or display, or the seizure of, less than 25 pounds (gross weight) of such “Dangerous Fireworks”;
- (d) Fines collected pursuant to this Chapter related to “Dangerous Fireworks” shall not be subject to Health and Safety Code Section 12706, which section provides that certain fines collected by a court of the state be deposited with, and disbursed by, the County Treasurer. However, the City shall provide cost reimbursement to the State Fire Marshal pursuant to regulations to be adopted by the State Fire Marshal addressing the State Fire Marshal’s cost for the transportation and disposal of “Dangerous Fireworks” seized by the City, which costs will be part of any administrative fine imposed. Unless and until said regulations have been adopted by the State of California, the City shall hold in trust \$250 or 25% of any fine collected, whichever is greater, to cover the cost reimbursement to the State Fire Marshal for said cost of transportation and disposal of the “Dangerous Fireworks”;
- (e) Because of the serious threat of fire or injury posed by the use of “Dangerous Fireworks” that can result from persistent or repeated failures to comply with the provisions of this code and the effect of such conditions or activities on the safety and the use and enjoyment of surrounding properties and to the public health, safety and welfare, this Chapter imposes strict civil liability upon the owners of residential real property for all violations of this code existing on their residential real property. Each contiguous use, display and/or possession shall constitute a separate violation and shall be subject to a separate administrative fine;
- (f) At least 50% of the fines collected pursuant to this Chapter must be placed in a segregated fund entitled “Tracy Illegal Fireworks Enforcement Fund”. The sole and exclusive purpose of this fund is to pay for increased fire and police deployment, protection and investigation of and against illegal fireworks in the City for the thirty-day period surrounding the 4th of July (June 17 through July 16).

2. ISSUANCE OF ADMINISTRATIVE CITATION-CONTENTS

- (a) Whenever a Code Enforcement Officer (CEO) determines that a violation of the code has occurred, the CEO may issue an administrative citation on a City-approved form listing the code violation(s) and the amount of the administrative fine required to be paid by the responsible person(s) in accordance with the provisions of this chapter;
- (b) Each administrative citation shall contain the following information:
- i. The name, mailing address, date of birth, CDL number, and home or business telephone number of the responsible person charged with any violation of this code;
 - ii. The address or description of the location of the violation;
 - iii. The date or dates on which the person violated this code;
 - iv. The section or sections of this code that were violated;
 - v. A description of the violation(s);
 - vi. The amount of the administrative fine for each violation, the procedure in place to pay the fines, and any late fee and interest charge(s), if not timely paid, and notice that if the City is required to take action to collect such fines, the responsible person may be charged costs and attorney's fees;
 - vii. Notice of the procedure to request an administrative hearing to contest the citation (including the form to be used, how to obtain the form, and the period within which the request must be made in order for it to be considered timely);
 - viii. The name and signature of the CEO who issued the citation and the name and signature of the citee, if he or she is physically present and will sign the citation at the time of its issuance. The refusal of a citee to sign a citation shall not affect its validity or any related subsequent proceedings, nor shall signing a citation constitute an admission that a person is responsible for a violation of the code;
 - ix. Any other information deemed necessary by the director for enforcement or collection purposes.

3. ADMINISTRATIVE FINES.

- (a) Each person who violates any provision of this code as it relates to the possession, use, storage, sale and/or display of "Dangerous Fireworks" shall be subject to the imposition and payment of an administrative fine or fines as provided below:

Number of offense in 1 year period	Amount of Administrative Penalty	Late Charge	Total Amount of Penalty plus Late Charge
First	\$ 1,000	\$ 150	\$ 1,150
Second	\$ 2,000	\$ 250	\$ 2,250
Third	\$ 3,000	\$ 500	\$ 3,500

- (b) Each person who uses "Safe and Sane Fireworks" on or at dates, times and/or locations other than those permitted by this ordinance shall be subject to the imposition and payment of an administrative fine or fines as provided below:

Number of offense in 1 year period	Amount of Administrative Penalty	Late Charge	Total Amount of Penalty plus Late Charge
First	\$ 250	\$ 50	\$ 300
Second	\$ 500	\$ 100	\$ 600
Third	\$ 750	\$ 200	\$ 950

- (c) In the case of a violation of any of the provisions listed above, the administrative fine(s) shall be due and payable within 30 calendar days from the issuance of the administrative fine citation, and the citee shall be required to abate the violation, and surrender all “Dangerous Fireworks” to the CEO, immediately. For penalties not paid in full within that time, a late charge in the amount set forth above is hereby imposed and must be paid to the City by the citee. Fines not paid within the time established by this ordinance shall accrue interest at the prevailing established rate. On the second and each subsequent time that a person is issued a citation for the same violation in any 12-month period, the fine is increased as indicated above and the citee shall be liable for the amount of the new fine until it is paid, in addition to being responsible for payment of previous fines;
- (d) All administrative fines and any late charges and interest due shall be paid to the City at such a location or address as stated on the citation, or as may otherwise be designated by the City Manager. Payment of any fine or fines shall not excuse the citee from complying with the provision of the code so violated. The issuance of the citation and/or payment of any fine shall not bar the City from employing any other enforcement action or remedy to obtain compliance with the provisions of the code so violated including the issuance of additional citations and/or criminal prosecution;
- (e) Upon confirmation of the citation or when the citation is deemed confirmed, all unpaid administrative fines, late fees and/or interest shall constitute a judgment which may be collected in any manner allowed by law for collection of judgments including but not limited to recordation to create a lien on any real property owned by the responsible person. The City shall be entitled to recover its attorney’s fees and costs incurred in collecting any administrative fines, late charges and/or interest;
- (f) Payment of the administrative fine shall not excuse or discharge a citee from the duty to immediately abate and correct a violation of this Chapter, nor from any other responsibility or legal consequences for a continuation or a repeated occurrence(s) of a violation of this Chapter.

4. RIGHT TO AN ADMINISTRATIVE HEARING

- (a) Any citee may contest the violation(s), or that he or she is a responsible person, by filing a request for an administrative hearing on a City-approved form with the City Clerk within 30 calendar days from the issuance date of a citation. If the City Clerk does not receive the request in the required time period, the citee shall have waived a right to a hearing and the citation shall be deemed confirmed and final;
- (b) No fees shall be charged for the filing of a request for a hearing;

- (c) Citees must deposit the full amount of the penalty listed on the citation on or before the request for a hearing is filed. Failure to deposit the full amount of all penalties within the required time period, or the tender of a non-negotiable check, shall render a request for an administrative hearing incomplete and untimely. Penalties that are deposited with the City shall not accrue interest. Penalties deposited shall be returned to the person who deposited them if the citation is overturned;
- (d) A request for a hearing shall contain the following:
 - i. The citation number;
 - ii. The name, address; telephone number and any facsimile numbers and e-mail addresses of each person contesting the citation;
 - iii. A statement of the reason(s) why a citation is being contested;
 - iv. The date and signature of the citee(s).
- (e) The City will notify all persons who filed a request for a hearing in writing by First Class Mail of the date, time and place set for the hearing at least 10 calendar days prior to the date of the hearing. Service of this notice is deemed complete at time of mailing. The failure of a citee to receive a properly addressed notice shall not invalidate the citation or any hearing, City action or proceeding conducted pursuant to this chapter;
- (f) The hearing will be conducted within 60 days of the date a timely and complete request is received by the City Clerk;
- (g) If the CEO submits an additional written report concerning the citation to the City for consideration at the hearing, the CEO shall also serve a copy of such report by First Class Mail on the person requesting an administrative hearing no less than 7 calendar days prior to the date of the hearing. Failure to receive said report shall not invalidate the citation or any hearing, City action or proceeding pursuant to this Chapter.

5. ADMINISTRATIVE HEARING – PROCEDURES

- (a) The hearing officer designated or appointed by the City Manager shall hear all requests for administrative hearings of administrative fines in accordance with the procedures established herein;
- (b) Administrative hearings are informal, and formal rules of evidence and discovery do not apply. The City bears the burden of proof to establish a violation and responsibility therefore by a preponderance of evidence. The citation is prima facie evidence of the violation, however, and the CEO who issued the citation is not required to attend or participate at the hearing. The citee(s) and CEO, if present, shall have an opportunity to present evidence and witnesses and to cross-examine witnesses. A citee may bring an interpreter to the hearing provided there is no expense to the City therefore. The hearing officer may question any person who presents evidence or who testifies at any hearing;
- (c) A citee may appear at the hearing in person or by written declaration executed under penalty of perjury. Said declaration and any documents in support thereof shall be tendered to and received by the City at least 7 business days prior to the hearing. If the citee fails to attend or does not submit a written declaration in a timely manner, he or she shall be deemed to have waived the right to a hearing. In such an instance, the hearing officer shall cancel the hearing and not render a decision. In such instances, the citation shall be deemed confirmed;

- (d) Hearings may be continued once at the request of a citee or the officer who issued the citation. The hearing officer may also continue the hearing for cause.

6. HEARING DECISION – RIGHT OF APPEAL

- (a) After considering all the testimony and evidence submitted at the hearing, the hearing officer shall issue a written decision to uphold or overturn the citation and shall state the reasons therefore;
- (b) The hearing officer shall serve citee(s) by First Class Mail with a copy of the written decision. The date the decision is deposited with U.S. Postal Service shall constitute the date of its service. The failure of a citee to receive a properly addressed decision shall not invalidate any hearing, City action or proceeding conducted pursuant to this Chapter;
- (c) Decisions of the hearing officer may be appealed to the City Council within 30 days after the date of their service. Each decision shall contain a statement advising the citee of this appeal right and the procedure for its exercise. A citee shall file a notice of appeal with the City within 20 calendar days after the date of service of the hearing officers decision;
- (d) If a hearing officer's decision is not appealed in a timely manner, the decision shall be deemed confirmed;
- (e) The City Council is the sole reviewing authority and an appeal from a hearing officer's decision is not appealable to the Superior Court. If a responsible person prevails on appeal, the City shall reimburse his or her fine deposit within 30 calendar days of the City Council's decision on the appeal.