

**OFFICE OF POLICY AND LEGAL ANALYSIS
BILL ANALYSIS**

TO: Members, Joint Standing Committee on Criminal Justice and Public Safety

FROM: Jane Orbeton, Legislative Analyst

DATE: February 17, 2021

LD: 180 An Act To Amend the Storage Requirements for Consumer Fireworks

Summary

This bill was submitted by the Department of Public Safety, Office of the State Fire Marshal and sponsored by Representative Perkins.

This bill was brought forward after a 2020 ruling in *Bryant v. Department of Public Safety, Office of the State Fire Marshal, Big Al's Outlet and Allen and Melissa Cohen*. In that case the court ruled that the Cohens, owners of Big Al's Outlet, are required to secure a license for their building on JB Way in Wiscasset in which they store fireworks to be sold later to consumers from their licensed store on Route 1. The court ruled that under Title 8, section 223-A, subsection 4:

- (1) The Fire Marshal can issue a license for storage and sale of consumer fireworks (building on Route 1); and
- (2) The Fire Marshal cannot issue a license for storage only (building on JB Way).

The court ruling in *Bryant v. Department of Public Safety, Office of the State Fire Marshal, Big Al's Outlet and Allen and Melissa Cohen* has led to the Fire Marshal proposing to the Legislature LD 180 to amend the law so that subsection 4 provides a license to sell and a new subsection 4-A provides a license for storage for someone who is licensed to sell.

In the words of the bill summary: "This bill brings the laws governing the storage of consumer fireworks into conformity with a recent Maine court decision by authorizing the Office of the State Fire Marshal to regulate consumer fireworks storage by those authorized by law to sell consumer fireworks."

Testimony

1. The sponsor, Representative Perkins, presented the bill, which was brought forward by the Office of the State Fire Marshal. Richard McCarthy, Assistant State Fire Marshal, spoke in favor of the bill. Tom and Kathleen Bryant spoke in favor provided the bill is amended to: (1) define residential area, (2) require 1000 feet distance between the storage building and a residence, and (3) require 100 feet distance from a road. The Bryants spoke of a neighbor having homeowners' insurance cancelled because of proximity to the store on Route 1. Their attorney, Jonathan Pottle, supported their position.
2. Curtis Pickard, representing the Retail Association of Maine, stated that the interested parties have been talking. Daniel Peart, representing Phantom Fireworks, supported amending the bill

to allow storage in a container or semi-trailer in addition to the bill language allowing storage in a building or magazine. Anthony Marson spoke of the importance of licensed consumer fireworks retail stores being able to store some inventory on site.

Notes/Issues

1. Information was requested about lawsuits between the parties. Litigation among the parties has lasted through multiple lawsuits and has taken years. Attorney Jonathan Pottle has represented the Bryants. Assistant Attorney General Kent Avery has represented the State. Attorney Chris Neagle has represented Big Al's Outlet and the Cohens.
2. Information was requested on the impact of a property's proximity to a fireworks store or storage facility on the property's insurance rates.
3. Possible amendments to the bill were suggested at the public hearing:
 - A. Defining "residential area" as any area in which the predominant use within a ¼ mile radius is residential, stating that a municipality's zoning designation is not determinative on the issue of what is a "residential area." (Bryant)
 - B. Adding a minimum distance between a storage building and a residence of at least of 1000 feet. When doing that, clarifying that the 60-foot distance on page 1, line 39, between a storage building and another permanent building applies only to nonresidential structures. There would be no change in the 300-foot distance between a storage building and a structure at which gasoline, propane or other flammable material is sold or dispensed. (Bryant)
 - C. Requiring the storage building to meet a setback of 100 feet from a public road or a private road that is open to use by the public. (Bryant)
 - D. Allowing storage in a container or semi-trailer, not just a building or magazine. (Peart for Phantom Fireworks)
 - E. Specifying on page 1 at line 32 that the National Fire Protection Association Standard Section 1124 that will apply to storage buildings, and that the Fire Marshal will use in adopting rules is the 2013 version. (Bryant)
 - F. Clarifying that a license to sell consumer fireworks includes storage of stock in the store. (Marson)

TITLE 8, CHAPTER 9-A, FIREWORKS

§223-A. Sale of consumer fireworks

1. Sale of consumer fireworks. A person may not sell consumer fireworks unless that person is 21 years of age or older and possesses:

- A. A federal permit to sell fireworks under 18 United States Code, Section 843;
- B. A license under subsection 3; and
- C. A municipal permit if required under subsection 2.

2. Municipalities. The legislative body of a municipality may adopt an ordinance to prohibit or restrict the sale or use of consumer fireworks within the municipality. Municipalities that prohibit or restrict the sale or use of consumer fireworks shall provide to the Office of the State Fire Marshal a copy of the relevant restriction or prohibition within 60 days of adoption. A municipality may require that a person obtain a municipal permit for selling consumer fireworks within the municipality. A municipality that chooses to issue

municipal permits under this subsection shall notify the Office of the State Fire Marshal at least 60 days prior to the initiation of its permitting program for the sale of consumer fireworks. A municipal permit may not be issued unless:

- A. The applicant is 21 years of age or older;
- B. The applicant applies for a permit under this subsection on a form prescribed by the commissioner;
- C. The applicant possesses the federal permit required under subsection 1, paragraph A;
- D. The applicant complies with the provisions of subsection 4; and
- E. The application is approved by the municipality's police chief, fire chief and code enforcement officer if those positions exist.

A municipality may require a reasonable fee for a permit issued under this subsection. A person holding a permit issued by a municipality under this subsection may not sell consumer fireworks unless the person satisfies all the requirements of subsection 1.

3. State license. The commissioner may issue a license to sell consumer fireworks to an applicant who:

- A. Is 21 years of age or older;
- B. Possesses the permits required under subsection 1, paragraphs A and C;
- C. Complies with the provisions of subsection 4; and
- D. Has not been convicted of an offense or violated a state, federal or municipal law, rule or regulation involving fireworks or explosives within the 2 years prior to the application.

The commissioner shall charge a fee of \$5,000 for the initial license issued to an applicant and \$1,500 for each annual license renewal. The term of a license is one year. A separate license is required for each location at which an applicant seeks to sell consumer fireworks. Fees collected under this subsection must be deposited in a nonlapsing account of the Office of the State Fire Marshal to be used for the purpose of enforcing this section.

4. Storage and handling. A person authorized to sell consumer fireworks under subsection 1 may store and sell the fireworks only in a permanent, fixed, stand-alone building dedicated solely to the storage and sale of consumer fireworks in accordance with this subsection.

- A. The building must be constructed, maintained and operated, and all consumer fireworks must be stored, in compliance with the requirements of National Fire Protection Association Standard 1124, as adopted by the Office of the State Fire Marshal, relevant building codes, zoning ordinances and other municipal ordinances.
- B. The building may not be less than 60 feet from another permanent building and may not be less than 300 feet from a structure at which gasoline, propane or other flammable material is sold or dispensed.
- C. Cigarettes, tobacco products or lighters or other flame-producing devices may not be permitted in the building.
- D. A person under 21 years of age may not be admitted to the building unless accompanied by a parent or guardian.
- E. Notwithstanding paragraph D, a person at least 18 years of age may handle and sell consumer fireworks if the person is under the direct supervision of a person 21 years of age or older.

5. Insurance. A person authorized to sell consumer fireworks under subsection 1 shall at all times maintain public liability and product liability insurance with minimum coverage limits of \$2,000,000 to cover the losses, damages or injuries that might ensue to persons or property as a result of the person selling consumer fireworks.

6. Advertising. A person may not advertise the sale of consumer fireworks in a way that is misleading about the conditions under which consumer fireworks may be purchased or used or about the requirements of this section. An advertisement for the sale of consumer fireworks must contain the words "Check with your local fire department to see if consumer fireworks are allowed in your community" in a conspicuous location and in a consistent font as approved by the commissioner.

7. Civil liability. A person who violates the provisions of this section is liable in a civil action for damages for bodily injury or property damage resulting from violation, and the defenses under Title 14, section 156 or a defense based on assumption of risk may not be used by the person.

8. Restrictions on use of consumer fireworks. The use of consumer fireworks is governed by this subsection.

A. Consumer fireworks may be used between the hours of 9:00 a.m. and 10:00 p.m., except that on the following dates they may be used between the hours of 9:00 a.m. and 12:30 a.m. the following day:

- (1) July 4th;
- (2) December 31st; and
- (3) The weekends immediately before and after July 4th and December 31st.

B. A person may use consumer fireworks only on that person's property or on the property of a person who has consented to the use of consumer fireworks on that property.

A person who violates this subsection commits a civil violation for which a fine of not less than \$50 and not more than \$500, plus court costs, may be adjudged for any one offense.

9. Enforcement against licensees. The commissioner, a state law enforcement officer, a municipal law enforcement officer, a code enforcement officer or a fire safety official may petition the Superior Court or District Court to seize or remove at the expense of a licensee consumer fireworks sold, offered for sale, stored, possessed or used in violation of this section. The commissioner may immediately suspend a license granted under subsection 3 for a violation of this section. A person whose license is suspended under this subsection must receive a hearing within 10 days of the suspension under Title 5, chapter 375, subchapter 4. A person whose license is suspended under this subsection may not receive a license under subsection 3 for a period of at least one year from the date of suspension.

10. Disclosures to customers. A person authorized to sell consumer fireworks shall provide to the purchaser at the point of sale written guidelines describing the safe and proper use of consumer fireworks, which must include, but are not limited to, guidelines regarding the safe and proper use of consumer fireworks around bodies of water; guidelines regarding the prevention of littering in the use of consumer fireworks; and guidelines regarding the effects from the use of consumer fireworks on wildlife, livestock and domesticated animals. The guidelines must also include the following statements in a conspicuous location: "MAINE LAW EXPRESSLY PROHIBITS PERSONS UNDER 21 YEARS OF AGE FROM PURCHASING, POSSESSING OR USING CONSUMER FIREWORKS" and

"FURNISHING CONSUMER FIREWORKS TO PERSONS UNDER 21 YEARS OF AGE IS A CRIMINAL OFFENSE IN MAINE." Such guidelines must be published or approved by the commissioner prior to distribution.

11. Prohibited acts. This subsection governs prohibited acts.

A. A person may not sell consumer fireworks within the State unless that person holds a valid license or is an employee or agent of a person that holds a valid license.

B. A person licensed to sell consumer fireworks under this chapter may not sell consumer fireworks to a person under 21 years of age or who appears to be under the influence of alcohol or drugs.

C. Except as specifically allowed under subsection 4, paragraph E, a person may not knowingly:

(1) Procure, or in any way aid or assist in procuring, furnish, give, sell or deliver consumer fireworks for or to a person under 21 years of age; or

(2) Allow a person under 21 years of age under that person's control or in a place under that person's control to possess or use consumer fireworks.

D. A person under 21 years of age may not purchase, use or possess consumer fireworks within the State or present to a person licensed to sell consumer fireworks any evidence of age that is false, fraudulent or not actually the person's own for the purpose of purchasing consumer fireworks.

It is an affirmative defense to prosecution for a violation of paragraph B or C that the licensee sold consumer fireworks to a person under 21 years of age in reasonable reliance upon fraudulent proof of age presented by the purchaser.

12. Violations. The following penalties apply to violations of subsection 11.

A. A person who violates subsection 11, paragraph A, B or C commits a Class D crime. If the violation involves furnishing consumer fireworks to a minor, a fine of not less than \$500 must be imposed in addition to any term of imprisonment the court may impose. If a person violates subsection 11, paragraph A, B or C after having been convicted of violating the same paragraph one or more times within the previous 6-year period, a fine of not less than \$1,000 must be imposed in addition to any term of imprisonment the court may impose.

B. A person who violates subsection 11, paragraph D commits a civil violation for which a fine of not less than \$200 and not more than \$400 must be imposed. If the person has been previously convicted of violating subsection 11, paragraph D one or more times, a fine of not less than \$300 and not more than \$600 must be imposed.

Fines collected under this subsection must be deposited in a nonlapsing account of the Office of the State Fire Marshal to be used for the purpose of enforcing this section.

13. Annual report to the Legislature. Beginning in 2013, the Office of the State Fire Marshal shall submit to the joint standing committee of the Legislature having jurisdiction over criminal justice and public safety matters a written report regarding the sale and use of consumer fireworks in this State. The report must, at a minimum, include information on the issuance and oversight of licenses to sell consumer fireworks, reported consumer fireworks-related injuries, reported consumer fireworks-related fires or other property damage and municipal restrictions or prohibitions on the sale or use of consumer fireworks. The report must be submitted not later than March 1st each year.