



Model Land Use Ordinance Regulating the Location and Operations of Tobacco Retailers (with Annotations)

June 2000

(minor modifications made March 2002)

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SECTION I. TITLE.

**AN ORDINANCE OF THE [CITY / COUNTY] OF [_____]
AMENDING THE ZONING CODE TO PROVIDE REGULATIONS FOR
RETAIL ESTABLISHMENTS SELLING TOBACCO PRODUCTS AND
TOBACCO PARAPHERNALIA.**

COMMENT: This model ordinance is intended to amend a jurisdiction’s existing zoning code. A city or county that adopts some or all of its provisions must consider where they would best fit into its existing code, and must cross-reference appropriate existing provisions that stipulate the means of enforcing zoning ordinances, as well as provisions concerning notification, fines and penalties; issuance, denial, suspension, and revocation of a conditional use permit; appeals of conditional use permit denials and other administrative and quasi-judicial decisions; and so forth.

SECTION II. RECITALS.

COMMENT: These recitals are not required to be part of the ordinance and there may be good reasons not to include them there. The information presented below may be included in a staff report prepared for the adoption of the ordinance.

The [City / County] of [_____] finds and declares that:

WHEREAS, in California, 17.1% of the adult population¹ and 7.1% of teenagers² currently smoke; and

WHEREAS, youth tobacco use continues to rise. The prevalence of current cigarette smoking among high school students rose 32% from 1991 to 1997, from 27.5% to 36.4%;³ and

WHEREAS, although it is unlawful to sell tobacco products and/or tobacco paraphernalia to minors,⁴ 17.1% of California retailers surveyed do sell to minors.⁵ In fact, despite laws in every state making it illegal to sell tobacco to minors, each year an estimated 924 million packs of cigarettes are consumed by minors 12 to 17 years of age, yielding the tobacco industry \$480 million in profits from underage smokers;⁶ and

¹ Cal. Dep’t Health Servs, Tobacco Control Sec., Smoking Prevalence Among California Adults (March 2001).
² Cal. Dep’t Health Servs, Tobacco Control Sec., 30-Day Smoking Prevalence Among California Youth (March 2001).
³ Ctr. For Disease Control & Prevention, *Tobacco Use Among High School Students—United States, 1997*, 47(12) *Morbidity & Mortality Wkly. Rep.* 229 (Apr. 3, 1998).
⁴ Cal. Penal Code § 308 (West 1999).
⁵ Cal. Dep’t Health Servs, Tobacco Control Sec., Youth Tobacco Purchase Survey 2001 (forthcoming 2002) (upon release, survey results are expected to be available at <http://www.dhs.ca.gov/tobacco/html/pressreleases.htm>). Note that the youth sale rate cited above is a statewide average. Youth sales rates for a particular city or county may be significantly higher. Check with your local tobacco prevention project, usually located in the county Health Department, to see if local figures are available.
⁶ Joseph R. DiFranza, MD & John J. Librett, MPH, *State and Federal Revenues from Tobacco Consumed by Minors*, 89(7) *Am. J. Pub. Health* 1106 (July 1999).

WHEREAS, while some tobacco retail stores have instituted strong measures aimed at preventing youths from directly purchasing cigarettes, the effectiveness of these measures is cast in doubt by the fact that the vast majority of youths get their cigarettes through indirect sources like friends or siblings;

- In California, 59.0% of 18- and 19-year-olds and 39.3% of 20- to 24-year-olds were approached to buy tobacco for a minor at least once in the past year.⁷
- In surveys, almost all youths say that they get their first cigarette from a friend or a sibling,⁸ and after the first cigarette, friends provide the primary source of tobacco for youths;⁹ and

WHEREAS, if tobacco retailers concentrate in a particular geographic area, market conditions could lead to even more impact on community health and safety. For example, keen competition between retailers can lead to special promotions such as sales or discounts on particular brands. And, manufacturers may offer discounts on their products more frequently in saturated markets; and

WHEREAS, these lower prices can trigger a significant rise in a community's smoking rates. Numerous studies have shown that the price of tobacco products and/or tobacco paraphernalia directly influences both the level of overall tobacco consumption and the numbers of new, almost exclusively young, smokers entering the market. The lower the cost of tobacco to the consumer, the greater its likelihood of use; and

- A 10% drop in the price of cigarettes will result in an approximately 4% increase in adult cigarette consumption (ages 20-74),¹⁰ however, it will result in a 6.8% increase in the number of new youth smokers (ages 12-17) and a 13.1% increase in total youth cigarette consumption.¹¹

⁷ Kurt M. Ribisl, PhD et al, *Which Adults Do Underaged Youth Ask for Cigarettes?*, 89(10) Am. J. Pub. Health 1561 (Oct. 1999).

⁸ J.R. DiFranza et al, *Tobacco Acquisition and Cigarette Brand Selection Among Youth*, 4 Tobacco Control 334-38 (1994).

⁹ J.R. DiFranza et al, *Tobacco Acquisition and Cigarette Brand Selection Among Youth*, 4 Tobacco Control 334-38 (1994). See also J.L. Forster et al, *Sources of Cigarettes for Tenth Graders In Two Minnesota Cities*, 4 Health Educ. Res. 45-50 (1989). See also K.M. Cummings et al, *Where Teenagers Get Their Cigarettes: A Survey of the Purchasing Habits of 13-16 Year Olds in 12 US Communities*, 1 Tobacco Control 264-67 (1992). See also M. Wolfson et al, *Adolescent Smokers Provision of Tobacco to Other Adolescents*, 87 Am. J. Pub. Health 649-51 (1997).

¹⁰ Division of Cancer Prevention and Control, National Cancer Institute, *The Impact of Cigarette Excise Taxes on Smoking Among Children and Adults* (1993).

¹¹ Frank J. Chaloupka & Michael Grossman, *Price, Tobacco Control Policies and Youth Smoking* 17 (National Bureau of Econ. Research Working Paper No. 5740, 1996).

- As the price of cigarettes decreases, young adult cigarette consumption (ages 18-24) will increase at more than twice the rate of overall consumption.¹²
- As the price of cigarettes decreases, youth cigarette consumption (ages 12-17) will increase at three times the rate of overall consumption.¹³
- 88% of adults who have ever smoked tried their first cigarette by the age of 18, and the average age at which smokers try their first cigarette is 14½;¹⁴ and

WHEREAS, zoning controls and a requirement that tobacco retailers obtain a use permit will not unduly burden legitimate business activities of tobacco retailers who sell cigarettes or distribute tobacco products or tobacco paraphernalia to adults. It will, however, allow the [City / County] to regulate the operation of lawful businesses to avoid circumstances which facilitate violations of state, federal, and local laws; and

WHEREAS, [City / County] has a substantial interest in ensuring that any person selling or exchanging tobacco products should be at least of a legal age to purchase such products; and

WHEREAS, the distribution of free tobacco products is likely to encourage the use of tobacco products by underage youth; and

WHEREAS, [City / County] has a substantial interest in promoting compliance with state laws prohibiting the sales of tobacco products to minors; in promoting compliance with federal, state and local laws intended to discourage the purchase of tobacco products by minors; and finally, and most importantly, in protecting children from being lured into illegal activity through the misconduct of adults; and

WHEREAS, the California courts in such cases as *Cohen v. Board of Supervisors*, 40 Cal.3d 277 (1985), and *Bravo Vending v. City of Rancho Mirage*, 16 Cal.App.4th 383 (1993), have affirmed the power of local governments to regulate business activity in order to discourage violations of state law; and

WHEREAS, the requirements of the California Environmental Quality Act (“CEQA”) of 1970, the CEQA Guidelines as prescribed by the California State Secretary for Resources, and the [City / County] Local CEQA Guidelines have been satisfied, and pursuant to Section 15061(b)(3) of Title 14 of the California Code of Regulations, substantial evidence in the record supports the conclusion that this ordinance is exempt from the provisions of CEQA; and

¹² Ctr. For Disease Control & Prevention, *Responses to Increases in Cigarette Prices by Race/Ethnicity, Income, and Age Groups—United States, 1976-1993*, 47(29) *Morbidity & Mortality Wkly. Rep.* 608 (July 31, 1998). See also Frank J. Chaloupka & Henry Wechsler, *Price, Tobacco Control Policies and Smoking Among Young Adults*, 16(3) *J. Health Econ.* 359 (June 1997).

¹³ Frank J. Chaloupka & Michael Grossman, *Price, Tobacco Control Policies and Youth Smoking* 17 (National Bureau of Econ. Research Working Paper No. 5740, 1996). See also E.M. Lewit et al, *The effects of government regulation on teenage smoking*, 24(3) *J.L. & Econ.* 545-69 (1981).

¹⁴ U.S. Dep’t of Health & Human Servs. et al, *Preventing Tobacco Use Among Young People: A Report of the Surgeon General*, 67 (1994).

COMMENT: The adopting jurisdiction's staff may wish to prepare an environmental checklist or other evidence for the administrative record to support the conclusion that the ordinance is exempt from CEQA.

WHEREAS, the California Constitution, Article XI, section 7, provides cities and counties with the authority to enact ordinances to protect the health, safety, welfare, and morals of their citizens; and

WHEREAS, zoning regulations are necessary to control the location and operation of the sale or exchange of tobacco products and/or tobacco paraphernalia for the protection of public health, safety and welfare; and

WHEREAS, [City / County] of [____] intends to limit the number of tobacco retailers in the [City / County] for the protection of public health, safety, and welfare; and

WHEREAS, it is the intent of the [City Council / Board of Supervisors] to discourage violations of laws forbidding distribution of tobacco products to minors, but not to expand or reduce the degree to which the acts regulated by state or federal law are criminally proscribed; and

COMMENT: These findings are intended to lay out the policy rationale for the ordinance and to make clear that the City or County is staying within the safe harbor created by the *Cohen* and *Bravo Vending* cases by regulating businesses in order to discourage violations of state law, but not by increasing the penalties established by state law. *Cohen* upheld San Francisco's regulation of escort services to discourage prostitution, while *Bravo Vending* upheld Rancho Mirage's ban on tobacco vending machines, which was intended to discourage tobacco sales to minors. In addition to the *Bravo Vending* and *Cohen* cases, helpful authorities are *EWAP, Inc. v. City of Los Angeles*, 97 Cal.App.3d 179, 191 (1979) (regulation of adult arcade to discourage lewd conduct), and *Brix v. City of San Rafael*, 92 Cal.App.3d 47, 53 (1979) (regulation of massage parlors to discourage prostitution).

WHEREAS, the [City / County] intends to declare any violation of this ordinance to be a public nuisance; and

COMMENT: By declaring a business a public nuisance, a city or county gains the authority either to close down the business or to disallow the business from selling tobacco products, and may even seek treble damages and attorneys fees incurred in enforcement proceedings. See discussion of enforcement in Section *7(d), infra.

WHEREAS, violations of this ordinance constitute unfair business practices under Business & Professions Code Section 17200 et seq.

COMMENT: By alleging unfair business practices pursuant to Business & Professions Code § 17200, a city attorney or district

| attorney can seek civil penalties up to \$2,500 per day for each violation.

NOW, THEREFORE, THE CITY COUNCIL/BOARD OF SUPERVISORS OF [CITY / COUNTY] DOES ORDAIN AS FOLLOWS that:

| COMMENT: The city or county should insert the appropriate form of enactment clause for their jurisdiction.

SECTION III. SEVERABILITY.

If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this Ordinance is for any reason held to be invalid or unenforceable, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases of this Ordinance or the rules adopted hereby. The [City Council / Board of Supervisors] of the [City / County] of [____] hereby declares that it would have adopted each section, subsection, subdivision, paragraph, sentence, clause or phrase hereof, irrespective of the fact that any one or more other sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases hereof be declared invalid or unenforceable.

| COMMENT: This is standard language.

SECTION IV. [ARTICLE / SECTION] OF THE [CITY / COUNTY] OF [____] ZONING CODE IS HEREBY AMENDED TO READ AS FOLLOWS:

Sec. [____ (*1)]. DEFINITIONS. The following words and phrases, whenever used in this article, shall have the meanings defined in this section unless the context clearly requires otherwise:

(a) “Department” means [____].

| COMMENT: This term is used in the ordinance to refer to the agency of the City or County charged with issuing CUPs and otherwise enforcing the ordinance. In some areas, more than one agency may be involved in administering and enforcing the ordinance.

(b) “Person” means any natural person, partnership, cooperative association, private corporation, personal representative, receiver, trustee, assignee, or any other legal entity.

| COMMENT: The City or County Code likely contains a definition of “person” and, if so, the definition provided here can be omitted.

(c) “Significant Tobacco Retailer” means any tobacco retailer that either devotes 20 percent or more of floor area or display area to, or derives 75 percent or more of gross sales receipts from, the sale or exchange of tobacco products and/or tobacco paraphernalia.

COMMENT: This is based on the definition used in a zoning ordinance passed by Oakland, California. The exact percentages can be changed to meet community needs.

(d) “Tobacco Paraphernalia” means cigarette papers or wrappers, pipes, holders of smoking materials of all types, cigarette rolling machines, and any other item designed for the smoking or ingestion of tobacco products.

(e) “Tobacco Products” means any substance containing any tobacco leaf, including but not limited to cigarettes, cigars, bidis, pipe tobacco, snuff, chewing tobacco, and smokeless tobacco.

(f) “Tobacco Retailer” means any person who sells, offers for sale, exchanges or offers to exchange for any form of consideration, tobacco, tobacco products and/or tobacco paraphernalia; “tobacco retailing” shall mean the doing of any of these things.

Sec. [____ (*2)]. ZONING REGULATIONS. The following zoning controls shall regulate the siting of new Significant Tobacco Retailers.

COMMENT: Three options are provided below to regulate the location of Significant Tobacco Retailers. **Only one should be chosen.** The first option requires Significant Tobacco Retailers to be no closer than 1,000 feet from youth-oriented activities. The second option limits Significant Tobacco Retailers to areas zoned for light industrial or industrial use. The third option is a combination of the first two.

(a) No Significant Tobacco Retailer shall be located within one thousand (1,000) feet of the boundary of any residential zone or a parcel occupied by (i) a public or private kindergarten, elementary, middle, junior high or high school; (ii) a licensed child-care facility or preschool other than a family day care facility; (iii) playground; (iv) youth center; (v) recreational facility; (vi) arcade; (vi) park; or (vii) library.

COMMENT: This is based on the zoning regulations passed by Oakland, California. The setback distance and/or the list of locations can be adjusted to meet community needs.

(b) A Significant Tobacco Retailer may only be located within an area zoned for light industrial or industrial use.

COMMENT: Depending on how the local Zoning Code is structured, it may be best to accomplish this location requirement by listing “Significant Tobacco Retailer” as a permitted use in light industrial and industrial zones; by listing “Significant Tobacco Retailer” as a prohibited use in other zones; or both.

(c) A Significant Tobacco Retailer may be located only within an area zoned for light industrial or industrial use. In addition, no Significant Tobacco Retailer shall be located within one thousand (1,000) feet of the boundary of any residential zone or a parcel occupied by (i) a

public or private kindergarten, elementary, middle, junior high or high school; (ii) a licensed child-care facility or preschool other than a family day care facility; (iii) playground; (iv) youth center; (v) recreational facility; (vi) arcade; (vi) park; or (vii) library.

Sec. [____ (*3)]. CONDITIONAL USE PERMITS.

(a) A use permit shall be required for all new Tobacco Retailers, and for any existing Tobacco Retailer as defined in Sec. [____ (*1)(f)]. The application review and approval procedures set forth in section [cross reference local use permit procedures] of the zoning code shall apply to all applications for a use permit under this ordinance.

COMMENT: Depending on the structure of the local zoning code, it may be best to accomplish the purpose of paragraph (a) by listing “Tobacco Retailer” or “Tobacco Retailing” in the list of conditionally permitted uses for the appropriate zones, perhaps all commercial zones.

(b) Limited Number of Tobacco Retailers: The number of Tobacco Retailers that sell any tobacco products and/or tobacco paraphernalia, shall be limited to one for each [____], or fraction thereof, inhabitants of the [City / County] in which the premises are situated. Once that number of Tobacco Retailers has been reached, no further use permits may be issued pursuant to paragraph (a) of this section except as otherwise provided in this section.

COMMENT: This section is analogous to California Business and Professions Code § 23817.5. That statute regulates the number of off-sale beer and wine retailers in a community to one per 2,500 inhabitants. The number of allowable Tobacco Retailers per inhabitant should be selected to meet the needs of the community. These also could be standardized conditions without a CUP, but they may be more easily enforced via a CUP.

(1) For the purposes of paragraph (b) of this section, the population shall be determined by the most recent United States decennial census or a single subsequent census between United States decennial censuses validated by the Population Research Unit of the California Department of Finance five years after a United States decennial census.

COMMENT: This section is analogous to Business and Professions Code § 23817.9, which dictates how the population will be measured to assist in determining the number of off-sale beer and wine retailers in a community.

(2) Whenever it is made to appear to the Department by satisfactory evidence that the population in [City / County] has increased by more than [____] or multiples of [____] inhabitants, the Department may approve the siting of additional tobacco retailers so long as other terms and conditions of this section are met.

COMMENT: This section is analogous to Business and Professions Code § 23817.10. The number of allowable Tobacco Retailers per inhabitant should be selected to meet the needs of the community.

(c) Limited Density of Tobacco Retailers: No Tobacco Retailer shall be granted a permit to operate on a site which is within five hundred (500) feet of a site occupied by another Tobacco Retailer, as measured in a straight line from parcel boundary to parcel boundary.

COMMENT: This section limits the density of the number of Tobacco Retailers in any particular neighborhood. In essence, it disallows new Tobacco Retailers from occupying more than one corner of an intersection in a typical city grid. The exact number of feet between retailers can be changed to meet the needs of the community.

(d) New Tobacco Retailers: Each application for a permit to conduct business shall include, in addition to such other information as reasonably required by the Planning Director, a plan for demonstrating the means by which the applicant will comply with the requirements of paragraph (f) of this section.

COMMENT: New retailers must submit a plan (which can be as simple as a checklist indicating intention to comply with all delineated conditions) prior to receiving a use permit. The City or County may wish to prepare an application form, or an addendum to the standard CUP application form, to aid in the submission of this information.

(e) Existing Tobacco Retailers: Any Tobacco Retailer legally in existence as of the effect date of this [article / chapter] is subject to the conditions provided in Sec. [____ (*4)] of this [article / chapter].

(f) Standard Conditions of Approval: In addition to any conditions of approval imposed by the [decision maker] every Tobacco Retailer permitted under this Section shall comply with the following:

COMMENT: Conditions (1) – (5) may be enacted most appropriately via the general police powers of the local government to ensure they apply to all retailers. However, they also can be included as a condition to receive a use permit. If these conditions are not part of the general police power ordinances of the local government, they can nonetheless be applied to tobacco retailers via a CUP. As drafted here, they will apply only to newly permitted tobacco retailers. If they are to apply to all tobacco retailers, both existing and new, these rules should be stated outside the Zoning Ordinance, perhaps in a Code chapter governing miscellaneous misdemeanors and violations.

(1) Tobacco products and/or tobacco paraphernalia shall be secured so that only store employees have immediate access to the tobacco products and/or tobacco paraphernalia. Self-service displays are prohibited.

COMMENT: This section imposes a self-service display ban on all Tobacco Retailers.

(2) The Tobacco Retailer shall comply with local, state, and/or federal laws regarding sales, advertising or display of tobacco products and/or tobacco paraphernalia including posting prominently near the cash register or other point of sale the legal age to buy tobacco products and/or tobacco paraphernalia, and checking the identification of all purchasers to ensure they are of legal age.

COMMENT: Note that the no-sales-to-minors provision of this requirement cannot be independently adopted, but may be made a condition of approval of a permit under the *Bravo Vending* and *Cohen* cases discussed above.

(3) No person under 18 years of age may sell or exchange tobacco products or tobacco paraphernalia.

(4) Sampling of tobacco products by individuals under 18 years of age shall not be permitted. Therefore, tobacco products shall not be given or sold to individuals under 18 years of age.

(5) Smoking shall be prohibited in a premises deemed a Tobacco Retailer or Significant Tobacco Retailer as defined in Sec. [____ (*1)] of this ordinance.

Sec. [____ (*4)]. EXISTING RETAILERS: DEEMED APPROVED STATUS.

(a) Pre-existing Tobacco Retailers. Every Tobacco Retailer legally in existence as of the date of enactment of this ordinance is hereby granted a use permit to continue in operation as a Tobacco Retailer. Each such Tobacco Retailer shall retain this status as long as it complies with the “Standard Conditions of Approval” set forth in Sec. [____ (*3)(f)] of this ordinance.

COMMENT: This “Deemed Approved” designation encourages otherwise legal nonconforming uses to comply with the terms and conditions of this ordinance quickly. This language is based on model language used in several California cities to control the conditions of operations for alcohol retailers. See *Korean American Legal Advocacy Foundation v. City of Los Angeles*, 23 Cal.App.4th 376 (1994); *City of Oakland v. Superior Court*, 45 Cal.App.4th 740 (1996).

(b) Regardless of whether a permit is granted upon application under Sec. [____ (*3)(a)] of this [article / chapter], or via paragraph (a) of this Section, that permit can be revoked pursuant to Sec. [____ (*5)] of this [article / chapter] and, in that event, the permittee shall not engage in tobacco retailing unless a new permit is issued pursuant to Sec. [____ (*3)(a)] of this [article / chapter].

Sec. [____ (*5)]. SUSPENSION OR REVOCATION OF A CONDITIONAL USE PERMIT.

COMMENT: This section includes provisions that might already exist within existing CUP provisions, or that might be used to

amend such existing provisions. While the section is included here for completeness, it may very well be duplicative when added to a city or county code. If so, delete this section, and include the appropriate cross-reference in Sec. (*4)(b) above to identify the CUP-revocation provision of the Code.

(a) Grounds for Suspension or Revocation: A Tobacco Retailer's Conditional Use Permit status shall be suspended or revoked if the Department finds, after notice and opportunity to be heard, any of the following:

(1) That the applicant has violated any of the use permit conditions of approval, including without limitation the Standard Conditions of Approval set forth in Sec. [____ (*3)(f)] or of this [article / chapter], or

(2) That the applicant has violated any local, state or federal law governing the sale, advertisement or display of tobacco products or tobacco paraphernalia including [reference local laws here].

(3) Suspension shall suspend the privilege of tobacco retailing for a stated period pursuant to paragraph (b) of this Section. Revocation shall be without prejudice to the filing of a new application for a CUP following correction of the conditions that required the revocation of the CUP.

COMMENT: This provision makes enforcement of the ordinance ministerial and provides a narrow standard for revocation. It may be appropriate to use this language in addition to the standards for revocation found in a broader zoning ordinance to which this is added or it may be appropriate to omit this language and rely solely on the broader ordinance to which this ordinance is added.

While this provision defines the *grounds* for suspension or revocation, the following provision specifies the consequences for a violation.

(b) Suspension or Revocation of CUP: If the Department finds that there are grounds for the suspension of a CUP, the following sanctions shall be imposed:

(1) A first violation of this ordinance shall result in a thirty-day (30) suspension of the right to sell tobacco products and tobacco paraphernalia.

COMMENT: Stronger or more lenient penalties may be provided as a matter of local policy. For example, in lieu of an initial 30-day suspension, the retailer could be required to provide training for all sales employees on all tobacco-related laws, and techniques to ensure future compliance with the law. If such an option is offered, the training plan would need to be pre-approved by the Department; the training would need to be completed within a time specified by the Department; and, after the training, the retailer would have to submit satisfactory evidence within a specified period of time that the training described in the training

plan was completed. Alternatively, some local ordinances choose simply to warn retailers after the first violation.

(2) A second violation of this ordinance within a sixty-month (60) period shall result in a ninety-day (90) suspension of the right to sell tobacco products and tobacco paraphernalia.

(3) A third or subsequent violation of this ordinance within a sixty-month (60) period may result in a revocation of the right to sell tobacco products and tobacco paraphernalia.

COMMENT: Subparagraph(b) is analogous to Business & Professions Code § 25658.1, which regards the revocation of alcohol licenses if there are repeated illegal sales to minors. A community may also link tobacco control conditions to the permit issued to operate a business or to an amendment of a CUP for the business. In such a case, a violation of tobacco control laws could result in the revocation of the right to operate the business, not simply the right to sell tobacco products.

(c) Appeal of Suspension and/or Revocation: The decision of the Department is appealable to the [____] and must be filed with the [____] within 10 days of receipt of the determination of violation. An appeal shall stay all proceedings in furtherance of the appealed action.

COMMENT: Some appeal right should be provided to ensure due process and to permit the City or County to correct any errors that may occur in the administrative process. How many levels of appeal to permit, which officer or body should hear the appeal, what officer should receive the notice of appeal, the time limits to set, etc. are local policy questions. If the ordinance is adopted as an amendment to a broader zoning ordinance, as we recommend, appeal provisions with all the necessary details will very likely be provided by existing zoning and/or municipal code ordinances and should be cross-referenced rather than duplicated.

Sec. [____ (*6)]. ADMINISTRATIVE FINE/PENALTIES.

COMMENT: Again, an equivalent to this section may already be included within the jurisdiction’s zoning code or municipal code. The existing provisions can be either cross-referenced or can be amended to include this section. The suggested time frame for imposing and the amount of the fines delineated below can be increased as suits the needs of a community. Note that fines for the illegal sale of tobacco products to minors are set by state law (Penal Code Section 308(a) and Business and Professions Code Section 22958). Penal Code Section 308(e) specifically prohibits inconsistent local ordinances. Therefore, local governments should not impose additional fines under this ordinance for the illegal sale of tobacco products to minors.

(a) If the Department finds, based on substantial record evidence, that any Tobacco Retailer has violated this ordinance or the terms and conditions of the Tobacco Retailer’s use

permit (except for violations of state laws against sales to minors which are governed by California Penal Code Section 308), the Department may fine that person as follows:

- (1) The first violation within a twelve-month (12) period shall result in a \$100 fine.
- (2) The second violation within a twelve-month (12) period shall result in a \$200 fine.
- (3) Each subsequent violation within a twelve-month (12) period shall result in a \$500 fine.

(b) A notice of violation and of intent to impose a fine shall be personally served on, or sent by certified mail to, the persons subject to the fine. The notice shall state the basis of the Department's determination and include an advisement of the right to request a hearing before the Department to contest the imposition of the fine. Any request for a hearing must be delivered to the Department in writing within ten calendar days of receipt of the notice of violation.

(c) Imposition of Fine. If no timely request for a hearing is filed, the Department's determination on the violation and the imposition of a fine shall be final and payment shall be made within 30 calendar days of written demand made in the manner specified above for a notice of violation. If the fine is not paid within that time, the fine may be collected, along with interest at the legal rate, in any manner provided by law. In the event that judicial action is necessary to compel payment of the fine and accumulated interest, the persons subject to the fine shall also be liable for the costs of the suit and attorneys' fees incurred by the [City / County] in enforcing the fine.

(d) Notice of Hearing. If a hearing is requested pursuant to subsection (b) of this Section, the department shall provide written notice, within 45 calendar days of its receipt of the request, to the persons subject to the fine of the date, time, and place of the hearing in the manner specified above for a notice of violation.

(e) Hearing Procedure. The hearing shall be recorded on audio- or videotape. Any party to the hearing may, at his or her own expense, cause the hearing to be recorded by a certified court reporter. During the hearing, evidence and testimony may be presented to the hearing officer. The person or persons subject to the proposed fine may be represented by counsel and have the right to cross-examine witnesses. All testimony shall be given under oath. The hearing officer shall render a written decision and findings within 20 working days of the hearing. Copies of the decision and findings shall be provided to the person or persons subject to the fine in the manner specified above for a notice of violation.

COMMENT: Whether to include this level of detail in an administrative penalties ordinance, or these particular details, are matters of local policy. Note, however, that administrative penalties ordinance are authorized and governed by Government Code Section 53069.4.

(f) Finality of the Hearing Officer's Decision. The decision of the hearing officer shall be the final decision of the [City / County].

(g) Appeal to Municipal Court. Judicial review of the decision of the Hearing Officer may be had as provided in Government Code Section 53069.4.

COMMENT: Some ordinances duplicate the provisions of Section 53069.4 for the assistance of staff and or applicants. This model relies on a very short cross-reference to avoid the need to update the City Code to account for amendments to the authorizing Government Code sections. The choice between these two approaches is one for local policymakers.

(h) Failure to Pay Fine. If no timely notice of appeal to the municipal court is filed, the hearing officer's decision and findings shall be deemed final and the fine shall be collected pursuant to paragraph (c) of this Section.

COMMENT: In addition to the requirements of Section 53069.5, the city attorney or county counsel may find it helpful to consult *McHugh v. Santa Monica Rent Control Board*, 49 Cal.3d 348 (1989). This case upheld an administrative penalty ordinance adopted by a charter city prior to the enactment of Section 53069.4 and outlines constitutional requirements for administrative penalty ordinances that Section 53069.4 was intended to satisfy.

Sec. [____ (*7)]. ENFORCEMENT.

COMMENT: The following section is designed to offer a variety of options to the drafter and to the enforcing agency. It is likely that some or all of its provisions are already incorporated within the jurisdiction's zoning and/or municipal codes. Drafters may choose to include some or all of these options. Once the ordinance is enacted, the enforcing agency will have the discretion to choose which enforcement tools to use. As a practical matter, these enforcement options would not be applied simultaneously. Additional comments regarding considerations attendant to the choice of remedy appear above with respect to administrative fines.

(a) Causing, permitting, aiding, abetting, or concealing a violation of any provision of this ordinance or a use permit issued hereunder shall constitute a violation of this ordinance.

COMMENT: This, too, is standard language that is typically included in a City or County Code and may be omitted if duplicative of existing Code provisions. However, note that it is uncommon to provide for both criminal and administrative penalties in an ordinance.

(b) In addition to the administrative enforcement procedures provided by Sec. [____ (*5)] and Sec. [____ (*6)] of this [article / chapter], violations of this [article / chapter]

or permit issued hereunder may, in the discretion of the [City / County] prosecutor, be prosecuted as

- infractions, pursuant to section [____] of this code; ... *or* ...
- misdemeanors, pursuant to section [____] of this code; ... *or* ...
- infractions, pursuant to section [____] of this code, for the first and second violations in a twelve (12) month period, and thereafter as misdemeanors, pursuant to section [____] of this code; ... *or* ...
- misdemeanors pursuant to section [____] (the “wobbler” provision of the code)].

COMMENT: This is standard language to provide for criminal enforcement of the ordinance and offers four choices: enforcement as an infraction (like a parking ticket); enforcement as a misdemeanor; enforcement on a sliding scale that provides for infraction enforcement in most cases, with misdemeanor enforcement against repeat violators; and enforcement under a “wobbler” ordinance, which gives the prosecutor discretion whether to charge a particular violation as an infraction or a misdemeanor. The drafter should choose one of these options and delete the others. Fines and other criminal penalties are established by the Penal Code and are typically reflected in the general punishments provision of a local Code.

(c) Violations of this [article / chapter] and any use permit issued hereunder are hereby declared to be public nuisances.

COMMENT: By expressly stating that violations are public nuisances, this provision allows enforcement of the ordinance via the administrative nuisance abatement procedures commonly found in municipal codes. In addition, together with the provision for injunctive relief below, this provision authorizes a civil public nuisance action as an enforcement device.

(d) In addition to other remedies provided by this [article / chapter] or by other law, any violation may be remedied by a civil action brought by the [City Attorney / County Counsel], including but not limited to administrative or judicial nuisance abatement proceedings, civil or criminal code enforcement proceedings, unfair business practice proceedings under Business & Professions Code Section 17200 et seq., and suits for injunctive relief. The remedies provided by this [article / chapter] are cumulative and in addition to any other remedies available at law or in equity.

COMMENT: It is also common to provide that the local government’s lawyers may go to court to seek injunctions and other penalties in addition to fines. The express provision for injunctive relief lowers the showing required to obtain a preliminary or per-

manent injunction as described in *IT Corp. v. County of Imperial*, 35 Cal.3d 63 (1983).

Think carefully about the nuisance abatement procedure you choose. A local government may provide for treble damages for the second or subsequent nuisance abatement judgment within a two-year period, as long as the ordinance is enacted pursuant to Government Code section 38773.5 (see Govt. Code § 38773.7).

Treble damages are not available, however, under the alternative nuisance abatement procedures in Government Code section 38773.1 and Health & Safety Code section 17980. Government Code section 38773.5 establishes a procedure for nuisance abatement where the cost of the abatement can be collected via the property tax roll as a special assessment against the property on which the violation occurs. Treble damages and are authorized by Business & Professions Code section 17200 et seq.

(e) An action for injunction may be brought in a court of competent jurisdiction by any aggrieved person, or any person or entity that will fairly and adequately represent the interests of the class protected by this ordinance.

COMMENT: In addition to the remedies provided above, local governments may wish to provide for enforcement by private parties. If so, the right of private action must be expressly provided, as this section provides.