



Model California Ordinance Requiring a Tobacco Retailer License (with Annotations)

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(revised July 2006)

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Model California Ordinance Requiring a Tobacco Retailer License (with Annotations)
Revised, July 2006

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This model is provided for general information only and is not offered or intended as legal advice. Readers should seek the advice of an attorney when confronted with legal issues and attorneys should perform an independent evaluation of the issues raised.

Introduction

This Model Ordinance was developed by the Technical Assistance Legal Center (TALC) to help California cities and counties that wish to require a local tobacco retailer license to reduce youth access to tobacco and to limit the negative public health effects associated with tobacco use.¹

This Model Ordinance offers a variety of options to a community. Communities may choose some or all of the options offered in the Model Ordinance. In some instances alternate language is offered (e.g., [black / white]) or blanks have been left (e.g., [____]) for the language to be customized to fit the needs of a specific community. In other instances the options are followed by annotations (“comments”) to the legal provisions describing the provisions in more detail. Some degree of customization will be necessary in order to correlate the provisions of the ordinance to other local ordinances.

Model Ordinance History

The Model Ordinance was first issued in September 1998, revised in March 2002, and revised again extensively in May 2005, with some minor technical changes made in July 2006. This version of the Model Ordinance differs from the March 2002 version in a number of important ways, including:

- The findings have been updated with newer statistical information.
- The definition of “Tobacco Product” has been expanded to include any new tobacco and nicotine product, including so-called “harm reduction” products.
- The prohibition on sham ownership transfers of tobacco retail outlets has been strengthened.
- If a retailer violates a tobacco-related law, his license is revoked rather than suspended. However, a tobacco retailer may reapply for a license after a set ineligibility period, the length of which is essentially a “suspension” period.
- The ineligibility periods have been reduced in length compared to the previous corresponding suspension periods (e.g., a 10 day ineligibility period for a first violation versus a 30 day suspension period for a first violation in the March 2002 version of the ordinance). This change is based on the experiences of communities that have begun suspending tobacco retailer licenses and question whether a 30 day suspensions might be an undue financial burden for a typical retailer.
- City attorneys and county counsel are provided express authority to settle claims with tobacco retailers who violate their license, rather than proceeding to an administrative hearing and imposing a nondiscretionary ineligibility period.
- Selling tobacco or paraphernalia *without* a license results in longer ineligibility periods than the ineligibility periods associated with violating the terms of a license (because possessing a valid license is the fundamental requirement of a licensing ordinance).

¹ TALC has developed model ordinances on other tobacco issues, such as regulating the location of tobacco retailers and prohibiting the self-service display of tobacco products. For copies of TALC publications or questions about this ordinance, please contact TALC at (510) 444-8252 or by e-mail: talc@phi.org. Additionally, all materials are available on our website at <http://talc.phi.org>.

- Tobacco products and paraphernalia offered for sale without a license can be seized and destroyed.
- Unlicensed tobacco retailers may not display or advertise tobacco products or paraphernalia for sale.
- New “Significant Tobacco Retailers” (retailers who primarily sell tobacco products or paraphernalia) are not allowed to open after the ordinance takes effect.
- Tobacco sales at restaurants and bars are prohibited.
- No person under the age of 18 may sell tobacco.
- Retailers must check identification of purchasers who appear to be under the age of 27.
- Self-service displays are prohibited for all forms of tobacco and nicotine products (that are not regulated by the FDA).
- Smoking is prohibited both inside and outside of a tobacco retail outlet.
- Violations of applicable storefront sign laws are also violations of the license.
- A minimum number of compliance checks of tobacco retailers is explicitly established.
- Youth decoys are provided limited, automatic immunity from criminal prosecution for tobacco possession.
- A retailer’s plea of “no contest” to a tobacco control law violation in an unrelated proceeding may result in revocation.
- Emphasis has been placed on civil fines rather than criminal prosecution and the civil fines have been increased significantly.
- Ordinary citizens are granted the power to privately enforce the licensing ordinance in small claims court.

**AN ORDINANCE OF THE [CITY / COUNTY] OF [____]
REQUIRING THE LICENSURE OF TOBACCO RETAILERS
AND AMENDING THE [____] MUNICIPAL CODE**

The [City Council of the City / Board of Supervisors of the County] of [____] does ordain as follows:

|| **COMMENT:** This is introductory boilerplate language that should be adapted to the conventional form used in the jurisdiction. ||

SECTION I. FINDINGS. The [City Council of the City / Board of Supervisors of the County] of [____] hereby finds and declares as follows:²

WHEREAS, more than 440,000 people die in the United States from tobacco-related diseases every year, making it the nation’s leading cause of preventable death;³ and

WHEREAS, the World Health Organization (WHO) estimates that by 2030, tobacco will account for 10 million deaths per year, making it the greatest cause of death worldwide;⁴ and

WHEREAS, the California Legislature has recognized the danger of tobacco use and has made reducing youth access to tobacco products a high priority, as evidenced by the fact that:

- The Legislature has declared that smoking is the single most important source of preventable disease and premature death in California (Cal. Health & Safety Code § 118950); and
- State law prohibits the sale or furnishing of cigarettes, tobacco products, and smoking paraphernalia to minors, as well as the purchase, receipt, or possession of tobacco products by minors (Cal. Pen. Code § 308); and
- State law requires that tobacco retailers check the identification of tobacco purchasers who reasonably appear to be under 18 years of age (Cal. Bus. & Prof. Code § 22956) and provides procedures for using persons under 18 years of age to conduct onsite compliance checks of tobacco retailers (Cal. Bus. & Prof. Code § 22952); and
- State law prohibits the sale of tobacco products and paraphernalia through self-services displays except in adult-only establishments (Cal. Bus. & Prof. Code § 22962); and
- State law prohibits the sale of “bidis” (hand-rolled filter-less cigarettes imported primarily from India and Southeast Asian countries) except in adult-only establishments (Cal. Pen. Code § 308.1); and

² Each of the authorities identified in this model ordinance can be obtained from the Technical Assistance Legal Center at the address, phone, and e-mail address indicated on the first page of this model ordinance.

³ U.S. Dep’t of Health and Human Servs., Centers for Disease Control and Prevention, Annual Smoking - Attributable Mortality, Years of Potential Life Lost, and Economic Costs - United States 1995-1999 Morbidity and Mortality Weekly Report at 51(14):300-303 (2002), available at <<http://www.cdc.gov/mmwr/PDF/wk/mm5114.pdf>>. (last accessed March 23, 2005).

⁴ U.S. Dep’t of Health and Human Servs., Centers for Disease Control and Prevention, Reducing Tobacco Use: A Report of the Surgeon General at 437 (2001), available at <http://www.cdc.gov/tobacco/sgr/sgr_2000/chapter8.pdf>. (last accessed March 23, 2005).

- State law prohibits the manufacture, distribution, or sale of cigarettes in packages of less than 20 and prohibits the manufacture, distribution, or sale of “roll-your-own” tobacco in packages containing less than 0.60 ounces of tobacco (Cal. Pen. Code § 308.3); and

WHEREAS, state law requires all tobacco retailers to be licensed by the Board of Equalization in order to curb the illegal sale and distribution of cigarettes which deprive the state yearly of hundreds of millions of tax dollars that fund local and state programs such as health services, anti-smoking campaigns, cancer research, and education programs (Cal. Bus. & Prof. Code §§ 22970.1, 22972); and

WHEREAS, state law explicitly permits cities and counties to enact local tobacco retail licensing ordinances, and allows for the suspension or revocation of a local license for a violation of any state tobacco control law (Cal. Bus. & Prof. Code § 22971.3); and

WHEREAS, 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 the [City / County] to regulate business activity in order to discourage violations of law; and

[WHEREAS,] [note any local ordinances regulating the sale of tobacco products, such as a complete ban on self-service tobacco displays, a ban on cigarette vending machines, or a conditional use permit or other land use restriction on tobacco sales] [; and]

WHEREAS, despite the state’s efforts to limit youth access to tobacco, minors are still able to access cigarettes, as evidenced by the fact that:

- Nearly half of all youth smokers nationwide buy the cigarettes they smoke, either directly from retailers or vending machines, or by giving money to others to purchase the cigarettes for them;⁵ and
- Minors consume 924 million packs of cigarettes each year nationwide, yielding the tobacco industry \$480 million in profits from underage smokers;⁶ and
- Most adults who have ever tried smoking have tried their first cigarette under the age of 18,⁷ and are on average under the age of 16;⁸

⁵ From the American Lung Association, fact sheet, available at: <http://www.lungusa.org/site/apps/s/content.asp?c=dvLUK900E&b=34706&ct=66968> (last accessed March 25, 2005).

⁶ Joseph R. DiFranza, M.D. & John J. Librett, M.P.H., *State and Federal Revenues from Tobacco Consumed by Minors*, 89 Am. J. Pub. Health 1106 (1999).

⁷ U.S. Surgeon General, U.S. Dep’t of Health & Human Servs., *Preventing Tobacco Use Among Young People: A Report of the Surgeon General 2* (1995) (noting that almost all first use of tobacco occurs by the time people graduate from high school), available at http://profiles.nlm.nih.gov/NN/B/CL/Q/_/nnbclq.pdf (last accessed March 11, 2005) (noting that 88% of adults who have ever smoked tried their first cigarette by the age of 18).

⁸ Substance Abuse & Mental Health Servs. Agency, U.S. Dep’t of Health & Human Servs., *Tobacco Use in America: Findings from the 1999 NHSDA*, available at <http://www.oas.samhsa.gov/NHSDA/tobacco/highlights.htm> (last accessed March 11, 2005) (noting the average age at which smokers try their first cigarette is 15.4).

WHEREAS, research demonstrates that local tobacco retail ordinances dramatically reduce youth access to cigarettes, as evidenced by the following:

- A study of several states found that youth sales of tobacco moved from a baseline of 70% of retailers selling to minors before the adoption of the ordinance to less than 5% in the year and a half after enactment;⁹ and
- A study of the effect of licensing and enforcement methods used in the Philadelphia area revealed a decrease in sales to minors from 85% in 1994 to 43% in 1998;¹⁰ and
- A study of several Minnesota cities found that an increased licensing fee in conjunction with strict enforcement of youth access laws led to a decrease from 39.8% to 4.9% in the number of youth able to purchase tobacco;¹¹ and

WHEREAS, the implementation of tobacco-licensing requirements is supported by most Californians, as evidenced by the following:

- 73% of California adults think tobacco retailers should be licensed;¹²
- 65% of California's key opinion leaders surveyed support implementation of tobacco-licensing requirements;¹³ and
- Over 90% of enforcement agencies surveyed in 2000 rated license suspension or revocation after repeated violations as an effective strategy to reduce youth access to tobacco;¹⁴

WHEREAS, fifty-one cities and counties in California have passed tobacco retailer licensing ordinances in an effort to stop minors from smoking,¹⁵ and

⁹ Leonard A. Jason et al., *Active Enforcement of Cigarette Control Laws in the Prevention of Cigarette Sales to Minors*, 266 J. Am. Med. Ass'n 3159 (1991).

¹⁰ G.X. Ma, S. Shive, M. Tracy, *The Effects of Licensing and Inspection Enforcement to Reduce Tobacco Sales to Minors in Greater Philadelphia, 1994-1998*, 26(5):677-87. 2001 Sep.-Oct., PMID: 11676378, abstract available at http://www.ncbi.nlm.nih.gov/entrez/query.fcgi?cmd=Retrieve&db=PubMed&list_uids=11676378&dopt=Abstract (last accessed March 11, 2005).

¹¹ Jean L. Forster et al., *The Effects of Community Policies to Reduce Youth Access to Tobacco*, 88 Am. J. Pub. Health 1193, 1197 (1998).

¹² Gilpin EA, Emery SL, Farkas AJ, Distefan JM, White MM, Pierce JP, *The California Tobacco Control Program: A Decade of Progress, Results from the California Tobacco Survey, 1990-1999*, 9-15, University of California, San Diego (2001), available at http://ssdc.ucsd.edu/ssdc/pdf/1999_Final_Report.pdf (last accessed April 8, 2005).

¹³ Tobacco Control Section, Cal. Dep't of Health Servs., *Independent Evaluation of the California Tobacco Control Prevention & Education Program: Waves 1, 2, and 3 (1996-2000)*, 110 (April 2003), available at <http://www.dhs.ca.gov/tobacco/documents/WavesComplete.pdf> (last accessed March 11, 2005).

¹⁴ Tobacco Control Section, Cal. Dep't of Health Servs., *Independent Evaluation of the California Tobacco Control Prevention & Education Program: Waves 1, 2, and 3 (1996-2000)*, 110 (April 2003), available at <http://www.dhs.ca.gov/tobacco/documents/WavesComplete.pdf> (last accessed March 11, 2005).

¹⁵ American Nonsmokers' Rights Foundation, *California Municipalities With Ordinances Restricting Youth Access To Tobacco* (April 17, 2006), available at http://tal.cphlaw.org/pdf_files/0021.pdf (last accessed May 19, 2006).

WHEREAS, 615 communities in the United States require a license to sell tobacco products and provide penalties such as suspension or revocation of the license for illegal conduct (e.g., selling tobacco to minors);¹⁶ and

WHEREAS, California retailers continue to sell tobacco to underage consumers, evidenced by the following:

- 14% of all tobacco retailers unlawfully sold to minors in 2004;¹⁷
- 31.5 % of non-traditional tobacco retailers such as deli, meat, and produce markets sold to minors in 2004;¹⁸
- Teens surveyed in 2002 say they bought their cigarettes at: gas stations (58%), liquor stores (45%), and supermarkets and small grocery stores (25%);¹⁹
- [insert local sales rate to minors, if available] [; and]

WHEREAS, a requirement for a tobacco retailer license will not unduly burden legitimate business activities of retailers who sell or distribute cigarettes or other tobacco products to adults. It will, however, allow the [City / County] to regulate the operation of lawful businesses to discourage violations of federal, state, and local tobacco-related laws; and

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

NOW THEREFORE, it is the intent of the [City Council / Board of Supervisors], in enacting this ordinance, to encourage responsible tobacco retailing and to discourage violations of tobacco-related laws, especially those which prohibit or discourage the sale or distribution of tobacco and nicotine products to minors, but not to expand or reduce the degree to which the acts regulated by federal or state law are criminally proscribed or to alter the penalties provided therein.

COMMENT: These findings lay out the policy rationale for the ordinance and specifically demonstrate why local licensing laws are not preempted by California's youth access law, California Penal Code

¹⁶ Phone conversation with Maggie Hopkins, American Nonsmokers' Rights Foundation (ANRF), (3/28/2005), *U.S. Communities with Local Tobacco Control Ordinances: Cumulative Totals from the ANR Foundation Local Tobacco Control Ordinance Database* (database last updated on March 28, 2005) (on file with ANRF).

¹⁷ Tobacco Control Section, Cal. Dep't Health Servs., *Tobacco Control Update*, 15, available at <http://www.dhs.ca.gov/tobacco/documents/2004TCSupdate.pdf> (last accessed April 8, 2005); see also Tobacco Control Section, Cal. Dep't Health Servs., *Youth Purchase Survey, 2004: Percent of retailers selling tobacco to youth by store type* (2004) (graph on file with TALC).

¹⁸ Tobacco Control Section, Cal. Dep't Health Servs., *Youth Purchase Survey, 2004: Percent of retailers selling tobacco to youth by store type* (2004) (graph on file with TALC).

¹⁹ Tobacco Control Section, Cal. Dep't Health Servs., *Tobacco Control Successes in California: A Focus on Young People, Results from the California Tobacco Surveys, 1990-2002*, 11-12, available at <http://www.dhs.ca.gov/tobacco/documents/2003CTSreport.pdf> (last accessed April 8, 2005).

section 308(a) (“PC 308”). PC 308(e) preempts local laws that are “inconsistent” with the state law that prohibits tobacco sales to minors and provides civil and criminal penalties. However, by regulating businesses in order to discourage violations of federal or state law but not increasing the penalties established by such laws, the city or county is staying within the safe harbor created by the *Cohen* and *Bravo Vending* cases.

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 *Cohen* and *Bravo Vending* 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).

SECTION II. [Article / Section] of the [____] Municipal Code is hereby amended to read as follows:

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

(a) “Arm’s Length Transaction” means a sale in good faith and for valuable consideration that reflects the fair market value in the open market between two informed and willing parties, neither of which is under any compulsion to participate in the transaction. A sale between relatives, related companies or partners, or a sale for which a significant purpose is avoiding the effect of the violations of this [article / chapter] is not an Arm’s Length Transaction.

(b) “Department” means [____].

COMMENT: This term is used in the ordinance to refer to the city or county agency charged with issuing licenses and possibly enforcing the ordinance. In some areas, more than one agency may be involved in administering and/or enforcing the ordinance.

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

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

(d) “Proprietor” means a Person with an ownership or managerial interest in a business. An ownership interest shall be deemed to exist when a Person has a ten percent (10%) or greater interest in the stock, assets, or income of a business other than the sole interest of security for debt. A managerial interest shall be deemed to exist when a Person can or does have or share ultimate control over the day-to-day operations of a business.

COMMENT: This term is defined to help prevent sham ownership changes made for the significant purpose of evading the license penalty provisions.

(e) “Self-Service Display” means the open display of Tobacco Products or Tobacco Paraphernalia in a manner that is accessible to the general public without the assistance of the retailer or employee of the retailer. A Vending Machine is a form of Self-Service Display.

COMMENT: This definition tracks the language used in the state self-service display ban of cigarettes and certain other tobacco products: Business and Professions Code section 22962.

(f) “Significant Tobacco Retailer” means any Tobacco Retailer whose principal or core business is selling Tobacco Products, Tobacco Paraphernalia, or both, as evidenced by any of the following: [twenty percent (20%)] or more of floor area and display area is devoted to the sale or exchange of Tobacco products, Tobacco Paraphernalia, or both; [sixty-seven percent (67%)] or more of gross sales receipts are derived from the sale or exchange of Tobacco Products, Tobacco Paraphernalia, or both; or [fifty percent (50%)] or more of completed sales transactions include a Tobacco Product or Tobacco Paraphernalia.

COMMENT: This definition is only necessary if the city or county wishes to ban new “tobacco” shops (including “head shops,” which sell paraphernalia such as “water tobacco pipes.”). Existing tobacco shops will be “grandfathered” by this ordinance and allowed to continue.

The percentages and even the categories used to define a “Significant Tobacco Retailer” can be changed to fit the policy objectives of a community.

(g) “Smoking” means possessing a lighted Tobacco Product, lighted Tobacco Paraphernalia, or any other lighted weed or plant (including a lighted pipe, cigar, hookah pipe, or cigarette of any kind), the lighting of a Tobacco Product, Tobacco Paraphernalia, or any other weed or plant (including a pipe, cigar, hookah pipe, or cigarette of any kind).

(h) “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, preparation, storing, or consumption of Tobacco Products.

COMMENT: This definition draws on the language of Penal Code section 308(a). Whether to regulate sales of Tobacco Paraphernalia in addition to sales of Tobacco Products is a question of local policy. If only tobacco sales are to be regulated, this definition and the words “Tobacco Paraphernalia” used throughout this model should be omitted.

(i) “Tobacco Product” means: (1) any substance containing tobacco leaf, including but not limited to cigarettes, cigars, pipe tobacco, hookah tobacco, snuff, chewing tobacco, dipping tobacco, bidis, or any other preparation of tobacco; and (2) any product or formulation of matter containing biologically active amounts of nicotine that is manufactured, sold, of-

ferred for sale, or otherwise distributed with the expectation that the product or matter will be introduced into the human body, but does not include any product specifically approved by the United States Food and Drug Administration for use in treating nicotine or tobacco product dependence.

COMMENT: This definition is written broadly to include nontraditional tobacco and nicotine products such as nicotine water and nicotine lollipops, but without interfering with the FDA's mission of approving products intended to benefit public health, such as nicotine patches and other nicotine cessation products.

(j) “Tobacco Retailer” means any Person who sells, offers for sale, or does or offers to exchange for any form of consideration, tobacco, Tobacco Products, or Tobacco Paraphernalia, or who distributes free or low cost samples of Tobacco Products or Tobacco Paraphernalia. “Tobacco Retailing” shall mean the doing of any of these things. This definition is without regard to the quantity of tobacco, Tobacco Products, or Tobacco Paraphernalia sold, offered for sale, exchanged, or offered for exchange.

COMMENT: These definitions reach only persons who sell Tobacco Products, exchange them for something of value, or distribute samples of Tobacco Products or Tobacco Paraphernalia. As written, the definition includes the distribution of free samples, such as at tobacco company-sponsored “bar nights.” The distribution of other products affiliated with a tobacco company or product, such as t-shirts or coasters, is not included and should not be, due to significant First Amendment issues that might arise.

(k) “Vending Machine” means a machine, appliance, or other mechanical device operated by currency, token, debit card, credit card, or any other form of payment that is designed or used for vending purposes, including, but not limited to, machines or devices that use remote control locking mechanisms.

COMMENT: This definition tracks the language used in the state law banning most vending machines—Business and Professions Code section 22960—except that it includes all currency, not just coins, and adds machines operated by debit or credit cards.

Sec. [____ (*2)]. TOBACCO RETAILER LICENSE REQUIRED.

(a) It shall be unlawful for any Person to act as a Tobacco Retailer without first obtaining and maintaining a valid Tobacco Retailer’s license pursuant to this [article / chapter] for each location at which that activity is to occur. Tobacco Retailing without a valid Tobacco Retailer’s license is a public nuisance.

COMMENT: This is the primary operative section of the ordinance. It requires a license for each retail location. So, for example, a supermarket chain would need a tobacco retailer license for each store.

Note that because this ordinance will most often be adopted as an amendment to an existing business license ordinance, it uses the

term “license.” A city or county could, of course, choose to label the requirement a “permit,” as the two terms are generally interchangeable. The term used should be consistent with other provisions of the city or county code to which this ordinance is added.

(b) A Tobacco Retailer or Proprietor without a valid Tobacco Retailer license, including, for example, a person whose license has been revoked:

(1) Shall keep all Tobacco Products and Tobacco Paraphernalia out of public view. The public display of Tobacco Products or Tobacco Paraphernalia in violation of this provision shall constitute Tobacco Retailing without a license under Section [____(*12)].

COMMENT: This provision vastly simplifies enforcement as it makes the mere display of Tobacco Products or Tobacco Paraphernalia evidence of sales and does not require enforcement officials to witness an actual sale.

(2) Shall not display any advertisement relating to Tobacco Products or Tobacco Paraphernalia that promotes the sale or distribution of such products from the Tobacco Retailer’s location or that could lead a reasonable consumer to believe that such products can be obtained at that location.

COMMENT: This subsection provides that a retailer who can not legally sell tobacco products or paraphernalia may not display or advertise such products. To do so would be misleading to consumers (see Business & Professions Code section 17500) and could invite illegal sales. False commercial speech is not protected by the First Amendment.

(c) Nothing in this [article / chapter] shall be construed to grant any Person obtaining and maintaining a Tobacco Retailer’s license any status or right other than the right to act as a Tobacco Retailer at the location in the [City / County] identified on the face of the permit. For example, nothing in this [article / chapter] shall be construed to render inapplicable, supercede, or apply in lieu of, any other provision of applicable law, including but not limited to, any provision of this Code [including without limitation the [e.g., zoning ordinance, building codes, and business license tax ordinance]], or any condition or limitation on smoking in an enclosed place of employment pursuant to California Labor Code section 6404.5. For example, obtaining a Tobacco Retailer license does not make the retailer a “retail or wholesale tobacco shop” for the purposes of California Labor Code section 6404.5.

COMMENT: Subsection (c) makes explicit the fact that granting a Tobacco Retailer license does not affect a Tobacco Retailer’s status under other local, state, or federal law. For example, obtaining a local license does not transform a business into a “retail or wholesale tobacco shop” in which smoking is allowed pursuant to California Labor Code 6404.5(d)(4). The reference to zoning, building, and business tax licensing ordinances is intended to allow each community to enforce all of its local regulations and to not allow a Tobacco Retailer to claim that he or she reasonably believed that a

Tobacco Retailer license was all that was needed to do business in a given location. Tailor the list as appropriate.

Sec. [____ (*3)]. LIMITS ON TOBACCO RETAILER LICENSES.

(a) No license may issue to authorize Tobacco Retailing at other than a fixed location. For example, Tobacco Retailing by Persons on foot or from vehicles is prohibited.

(b) No license may issue to authorize Tobacco Retailing by a Significant Tobacco Retailer, provided however that a Significant Tobacco Retailer operating legally on the date that the ordinance enacting this [article / chapter] was first introduced and that would otherwise be entitled to receive a license may receive a license and may continue to operate so long as (1) the license is renewed continually without lapse; (2) the Significant Tobacco Retailer is not closed for business for more than sixty (60) consecutive days; (3) the Significant Tobacco Retailer does not substantially change the business premises or business operation; and (4) the Significant Tobacco Retailer’s maintains the right to operate under the terms of other applicable laws [including without limitation the [e.g., zoning ordinance, building codes, and business license tax ordinance]].

COMMENT: This provision bans all new Significant Tobacco Retailers from locating within the jurisdiction but permits those that currently exist to continue operation. If this option is not desired, this provision and the definition for “Significant Tobacco Retailer” should be deleted.

This provision would be invoked when a Significant Tobacco Retailer attempts to obtain or renew a license. For a renewal, if any of the four conditions are violated, the renewal will be denied.

(c) No license may issue to authorize Tobacco Retailing at any location that is licensed under state law to serve alcoholic beverages for consumption on the premises (e.g., an “on-sale” license issued by the California Department of Alcoholic Beverage Control) and no license may issue to authorize Tobacco Retailing at any location offering food for sale for consumption by guests on the premises. For example, Tobacco Retailing in bars and restaurants is prohibited.

COMMENT: In part, this provision provides that tobacco product samples and tobacco paraphernalia can not be distributed as part of tobacco industry “bar nights” because bars can not be issued a tobacco retailer license.

[(d) [____] (The City or County may wish to add other desired limits.)]

Sec. [____ (*4)]. APPLICATION PROCEDURE. Application for a Tobacco Retailer’s license shall be submitted in the name of each Proprietor proposing to conduct retail tobacco sales and shall be signed by each Proprietor or an authorized agent thereof.

It is the responsibility of each Proprietor to be informed regarding all laws applicable to Tobacco Retailing, including those laws affecting the issuance of a Tobacco Retailer’s license. No

Proprietor may rely on the issuance of a license as a determination by the [City / County] that the Proprietor has complied with all laws applicable to Tobacco Retailing. A license issued contrary to this [article / chapter], contrary to any other law, or on the basis of false or misleading information supplied by a Proprietor shall be revoked pursuant to Section [____(*11)(d)] of this [article / chapter]. Nothing in this [article / chapter] shall be construed to vest in any Person obtaining and maintaining a Tobacco Retailer’s license any status or right to act as a Tobacco Retailer in contravention of any provision of law.

All applications shall be submitted on a form supplied by the Department and shall contain the following information:

(a) The name, address, and telephone number of each Proprietor of the business that is seeking a license.

(b) The business name, address, and telephone number of the single fixed location for which a license is sought.

(c) A single name and mailing address authorized by each Proprietor to receive all communications and notices (the “Authorized Address”) required by, authorized by, or convenient to the enforcement of this [article / chapter]. If an Authorized Address is not supplied, each Proprietor shall be understood to consent to the provision of notice at the business address specified in subparagraph (b) above.

(d) Proof that the location for which a Tobacco Retailer’s license is sought has been issued a valid state tobacco retailer’s license by the California Board of Equalization.

(e) Whether or not any Proprietor has admitted violating, or has been found to have violated, this [article / chapter] or whose proprietorship has admitted violating, or has been found to have violated, this [article / chapter], and, if so, the dates and locations of all such violations within the previous six years.

COMMENT: This is an important provision because it requires a tobacco retailer to disclose past violations which will make it easier for staff to determine if the application requires closer scrutiny. If the retailer does not disclose past violations and a license is issued, the license can be revoked as soon as the past violations are discovered pursuant to Section [____(*11)(d)] below.

(f) Such other information as the Department deems necessary for the administration or enforcement of this [article / chapter].

COMMENT: This requirement authorizes administrative and enforcement staff to establish application forms that require various types of information to aid effective operation and enforcement of the ordinance. For example, it may be useful to include in the application a statement, perhaps made under penalty of perjury, that the applicant has familiarized himself or herself with the legal requirements applicable to tobacco retailing. It would, of course, be helpful to pro-

vide written information about those requirements to those who apply for a license.

(g) All information required to be submitted in order to apply for a Tobacco Retailer's license shall be updated with the Department whenever the information changes. A Tobacco Retailer shall provide the Department with any updates within [ten (10)] business days of a change.

(h) The information specified in subparagraphs (b) and (c) shall be available to the public for all currently licensed Tobacco Retailers. Upon request, the Department shall provide a compilation of this information to any Person within a reasonable time and subject to a fee approximating the actual cost of compiling and presenting the information.

Sec. [____ (*5)]. ISSUANCE OF LICENSE. Upon the receipt of an application for a Tobacco Retailer's license and the license fee required by this [article / chapter], the Department shall issue a license unless substantial evidence demonstrates that one or more of the following bases for denial exists:

(a) The information presented in the application is incomplete, inaccurate, or false. Intentionally supplying inaccurate or false information shall be a violation of this [article / chapter].

(b) The application seeks authorization for Tobacco Retailing at a location for which this [article / chapter] prohibits issuance of Tobacco Retailer licenses. However, this subparagraph shall not constitute a basis for denial of a license if the applicant provides the [City / County] with documentation demonstrating by clear and convincing evidence that the applicant has acquired or is acquiring the location or business in an Arm's Length Transaction.

(c) The application seeks authorization for Tobacco Retailing for a Proprietor to whom this [article / chapter] prohibits a license to be issued.

(d) The application seeks authorization for Tobacco Retailing that is prohibited pursuant to this [article / chapter] (e.g., mobile vending), that is unlawful pursuant to this Code [including without limitation the [e.g., zoning ordinance, building codes, and business license tax ordinance]], or that is unlawful pursuant to any other law.

COMMENT: Although a license technically should not be issued if prohibited elsewhere in the city or county code, it is valuable to make note of what other tobacco ordinances staff should take into consideration under section *5(d). For example, if the code contains a zoning or conditional use permit ordinance affecting tobacco retailers, the licensing ordinance should refer to it directly to assist staff in implementing the ordinance. It is also helpful to cite building codes (to ensure the structure has been permitted) and any business license tax, to ensure that these taxes are also paid.

This section makes issuance of licenses a mandatory, ministerial duty of staff unless substantial evidence can be shown supporting one of the four justifications for denial of the ordinance. "Substantial

evidence” referred to in section *5 is oral or written evidence within the City’s or County’s records that is sufficiently reliable and persuasive that a court will accept it. The usual test is that it must be the kind of evidence upon which responsible people rely in making important business, personal, and other decisions. The technical rules of evidence used for court proceedings do not apply.

Providing evidence of the bases for denial under *5(b) and (c) should be simple and can take the form of a memo from Department staff or from staff members who maintain the records of revocations. Proving that an application is incomplete also will be simple. Proving that an application contains false information will be more difficult and greater attention to the quality of evidence (i.e., its persuasiveness and reliability) is therefore appropriate. If oral evidence is to be relied upon, such as citizen complaints, it should be reduced to writing, as by a staff memo to the file.

Sec. [____ (*6)]. LICENSE RENEWAL AND EXPIRATION.

(a) RENEWAL OF LICENSE. A Tobacco Retailer license is invalid unless the appropriate fee has been paid in full and the term of the license has not expired. The term of a Tobacco Retailer license is [one year]. Each Tobacco Retailer shall apply for the renewal of his or her Tobacco Retailer’s license and submit the license fee no later than [thirty (30)] days prior to expiration of the term.

COMMENT: The payment term of licenses is a matter for local policy. If this ordinance is adopted as an amendment to a local business license ordinance, many administrative details, such as the term of licenses, may be covered by the existing license ordinance.

(b) EXPIRATION OF LICENSE. A Tobacco Retailer’s license that is not timely renewed shall expire at the end of its term. To reinstate a license that has expired, or to renew a license not timely renewed pursuant to subparagraph (a), the Proprietor must:

(1) Submit the license fee plus a reinstatement fee of [ten percent (10%)] of the license fee.

(2) Submit a signed affidavit affirming that the Proprietor:

(i) has not sold and will not sell any Tobacco Product or Tobacco Paraphernalia after the license expiration date and before the license is renewed; or

(ii) has waited the appropriate ineligibility period established for Tobacco Retailing without a license, as set forth in Section [____(*12)(a)] of this [article / chapter], before seeking renewal of the license.

Sec. [____ (*7)]. LICENSES NONTRANSFERABLE.

(a) A Tobacco Retailer’s license may not be transferred from one Person to another or from one location to another. Whenever a Tobacco Retailing location has a change in Proprietors a new Tobacco Retailer’s license is required.

COMMENT: This provision requires a new license for any change in ownership. For example, if a Proprietor to whom a license has been issued changes business location, that Proprietor must apply for a new license prior to acting as a Tobacco Retailer at the new location. Or, if the business is sold or otherwise transferred to a new owner, the new owner must apply for a license for that location before acting as a Tobacco Retailer.

(b) Notwithstanding any other provision of this [article / chapter], prior violations at a location shall continue to be counted against a location and license ineligibility periods shall continue to apply to a location unless:

(1) the location has been fully transferred to a new Proprietor or fully transferred to entirely new Proprietors; and

(2) the new Proprietor(s) provide the [City / County] with clear and convincing evidence that the new Proprietor(s) have acquired or is acquiring the location in an Arm's Length Transaction.

COMMENT: This provision prevents sham transfers of ownership from defeating the effect of past violations. For example, if a retailer who is found in violation of the licensing law subsequently transfers ownership to his brother, and if the brother also then violates the ordinance, it would be counted as the second violation, not the first.

Sec. [____ (*8)]. FEES FOR LICENSE. The fee to issue or to renew a Tobacco Retailer's license shall be established by resolution of the [City Council / Board of Supervisors]. The fee shall be calculated so as to recover the total cost of both license administration and license enforcement, including, for example, issuing the license, administering the license program, retailer education, retailer inspection and compliance checks, documentation of violations, and prosecution of violators, but shall not exceed the cost of the regulatory program authorized by this [article / chapter]. All fees shall be used exclusively to fund the program. Fees are nonrefundable except as may be required by law.

COMMENT: It is lawful to impose a fee on applicants in an amount sufficient to offset the cost of the entire tobacco retailer enforcement program of the locality under such cases as *Sinclair Paint Co. v. Board of Equalization*, 15 Cal. 4th 866 (1997).

The license fee can incorporate the cost of enforcing *all* tobacco laws related to a Tobacco Retailer because a violation of any tobacco-related law is a basis for revocation of a license. For example, if the enforcing agency is the police department, a new police officer could be hired for tobacco retailer enforcement activities and a percentage of the cost of the hire could be included in the fee so long as the same percentage of the officer's efforts are used to monitor and enforce license-related tobacco laws.

Government Code section 66018 governs the establishment of regulatory fees. Other Government Code notice and hearing requirements will apply if the ordinance is included in a zoning ordinance. Other local requirements established by charter or ordi-

nance may apply as well. The Government Code requires a noticed public hearing. This ordinance provides that fees are established by resolution both because the Government Code permits the use of a resolution rather than an ordinance and because many cities and counties adopt an annual master fee-setting resolution that can be amended to include this fee.

One approach to setting the fee is to estimate the cost of administration and enforcement of the licensing program. For example, estimate the number of stores in the city or county and how much time it will take a government employee to review applications and issue licenses. The fraction of that employee's time can then be used to calculate the annual cost of license administration, based on the cost of that employee's salary, benefits, and his or her share of administrative overhead such as rent, insurance, legal advice, etc. As for enforcement costs, calculate, for example, how many yearly inspections are necessary (ideally one to four per retailer) and how much staff time each inspection demands. It is important to document these calculations for two reasons: to provide support for the fee amount; and, to refute a potential legal challenge claiming the fee exceeds the cost of administration and enforcement. A spreadsheet developed to help calculate the actual costs for a particular community is available from TALC's website: <http://talc.phil.org>.

Note that the city or county can avoid having to calculate staff time by mandating that a set amount of time, e.g., 15 hours a week, shall be spent on license enforcement activity (including enforcing the tobacco laws that give rise to a license violation). New staff could be hired to meet this mandate and the cost can be incorporated into the license fee.

Sec. [____ (*9)]. OTHER REQUIREMENTS AND PROHIBITIONS.

(a) **LAWFUL BUSINESS OPERATION.** In the course of Tobacco Retailing or in the operation of the business or maintenance of the location for which a license issued, it shall be a violation of this [article / chapter] for a licensee, or any of the licensee's agents or employees, to:

- (1) Violate any local, state, or federal law applicable to Tobacco Products, Tobacco Paraphernalia, or Tobacco Retailing.

COMMENT: This provision makes licensing an effective tool for comprehensively enforcing tobacco control laws. A city or county can use the license revocation provisions to encourage compliance with all tobacco-related laws, even laws that the city or county might not otherwise have authority to enforce, such as the Stop Tobacco Access to Kids Enforcement Act ("STAKE Act," Business and Professions Code section 22958). This provision also gives a city or county additional enforcement options: either enforcing the underlying tobacco law—such as the prohibition on selling tobacco to minors (Penal Code section 308)—and/or discouraging illegal behavior by revoking a license. Losing the right to sell tobacco will likely be a bigger financial deterrent than an occasional fine imposed under other laws.

(2) Violate any local, state, or federal law regulating exterior, storefront, window, or door signage.

COMMENT: This provision makes abiding by applicable sign laws a condition of maintaining a Tobacco Retailer license. For example, if a retailer violates the state law setting a maximum percentage of window space that can be covered by signs at retail alcohol outlets (Business and Professions Code section 25612.5(c)(7)), the retailer's license could be revoked. Because a large percentage of signs at a tobacco retailer are likely to be tobacco-related, sign laws can have a large, albeit indirect, impact on tobacco advertising.

[(3) [____] (The city or county may wish to add other laws that, if violated, will constitute basis to revoke the license.)]

COMMENT: A novel provision would be to link a tobacco retailer's license to illegal sales of other *non-tobacco* age-restricted products such as alcohol. For example, if a tobacco retailer is found to have illegally sold alcohol to a minor, the retailer's Tobacco Retailer license could be revoked. The rationale for such a provision is that if a retailer is illegally selling non-tobacco products to youth, then the retailer may not be trusted to abide by the law prohibiting tobacco sales to youth. Doing so will require an additional paragraph in this subsection.

(b) **DISPLAY OF LICENSE.** Each Tobacco Retailer license shall be prominently displayed in a publicly visible location at the licensed location.

(c) **POSITIVE IDENTIFICATION REQUIRED.** No Person engaged in Tobacco Retailing shall sell or transfer a Tobacco Product or Tobacco Paraphernalia to another Person who appears to be under the age of [twenty-seven (27)] years without first examining the identification of the recipient to confirm that the recipient is at least the minimum age under state law to purchase and possess the Tobacco Product or Tobacco Paraphernalia.

COMMENT: This provision eliminates the excuse that a purchaser arguably looked to be 18 years old. Perhaps more importantly, it allows compliance checks to be conducted with persons who are 18 or 19 years old, which eliminates the need to seek immunity from the district attorney for youth who act as decoys in operations testing a retailer's compliance with youth access laws. It also allows non-law enforcement agencies, such as a local health department, to conduct decoy operations with young adults and to revoke the licenses of those retailers who violate this provision by failing to check identification of the purchaser before selling a tobacco product or tobacco paraphernalia. Eliminating the need to use the police or sheriff's department in compliance checks can be a significant cost savings.

(d) **MINIMUM AGE FOR PERSONS SELLING TOBACCO.** No Person who is younger than the minimum age established by state law for the purchase or possession of Tobacco Products shall engage in Tobacco Retailing.

COMMENT: This provision deliberately omits stating a specific age such as “18” so that the law will not need to be amended if state law changes the legal age for using tobacco.

(e) **SELF-SERVICE DISPLAYS PROHIBITED.** No Tobacco Retailer shall display Tobacco Products or Tobacco Paraphernalia by means of a Self-Service Display or engage in Tobacco Retailing by means of a Self-Service Display.

COMMENT: This provision goes beyond state law because the definition of Tobacco Product in this ordinance is broader than state law.

(f) **SMOKING PROHIBITED.** Smoking shall be prohibited inside the location of a Tobacco Retailer and in all outdoor areas that are within [twenty (20) feet] of any door, window, or other opening into the Tobacco Retailer except in such places in which Smoking is already prohibited by state or federal law, in which case the state or federal law applies in lieu of this paragraph (f). A Tobacco Retailer shall not permit Smoking in violation of this paragraph and shall post conspicuous “no smoking” signs at all entrances to the licensed location and in all outdoor portions of the licensed location in which smoking is prohibited.

COMMENT: This provision eliminates the exception in the state workplace smoking law for “retail or wholesale tobacco shops.” Labor Code section 6404.5(d)(4). It also bans smoking in all outdoor locations that are near openings into the tobacco retailer such as doorways.

[(g) [____] (The City or County may wish to add other desired requirements that, if violated, will constitute a violation of the license.)]

COMMENT: This is a convenient method of enacting additional tobacco control measures without having to pass separate ordinances. Note, however, that any measure added to this section can only be enforced as a license violation. There will not be a separate penalty provisions for violating the underlying measure unless this section or another section of the Code expressly so provides.

Sec. [____ (*10)]. COMPLIANCE MONITORING.

(a) Compliance with this [article / chapter] shall be monitored by [enforcement agency]. Any peace officer may enforce the penal provisions of this [article / chapter].

COMMENT: It is important to designate who will monitor license compliance or, in other words, who will enforce the license. Unless an enforcing authority is explicitly named, the license may not be enforced at all. Multiple agencies should be given authority to enforce the license, but it is probably a good idea to provide a primary enforcement agency to discourage conflicts and situations in which each agency defers to the other and neither enforces the ordinance.

(b) The [enforcement agency] shall [(*see note on counties below)] check the compli-

ance of each Tobacco Retailer at least [three (3)] times per twelve (12) month period. The [enforcement agency] may check the compliance of Tobacco Retailers previously found to be in compliance a fewer number of times so that the [enforcement agency] may check the compliance of Tobacco Retailers previously found in violation of the licensing law a greater number of times. Nothing in this paragraph shall create a right of action in any licensee or other Person against the [City / County] or its agents.

COMMENT: It is a good idea to provide a minimum number of compliance checks to ensure that at least some level of enforcement will take place. One to four checks per year may be appropriate depending on the number of Tobacco Retailers in a community and the level of funding established through the license fee. Communities with a large number of retailers may wish to check compliance of a subset of retailers that are selected either randomly or based on past violations and complaints.

*Note that counties cannot directly mandate that the county sheriff conduct compliance checks. However, a county can provide dedicated funding to the sheriff that can be used only to conduct compliance checks. If this is desired, replace the first sentence in subsection (b) with:

The [enforcement agency] shall be funded to check the compliance of each Tobacco Retailer at least [three (3)] times per twelve (12) month period.

Alternatively, the county could contract for enforcement and compliance checks. Cities, on the other hand, can directly mandate that a certain city law enforcement agency conduct compliance checks.

The last sentence of this provision protects a city or county from a lawsuit claiming that the city or county is violating the licensing ordinance if the number of compliance checks conducted falls below the number mandated.

(c) Compliance checks shall determine, at a minimum, if the Tobacco Retailer is conducting business in a manner that complies with tobacco laws regulating youth access to tobacco. When appropriate, the compliance checks shall determine compliance with other laws applicable to Tobacco Retailing.

COMMENT: Reducing the sale of Tobacco Products to minors is the primary reason to license tobacco retailers, so it makes sense to focus on youth access laws first (e.g., Penal Code section 308(a), self-service display bans, sale of bidis). Other laws, such as signage requirements, may be checked when time and resources permit.

(d) The [City / County] shall not enforce any law establishing a minimum age for tobacco purchases or possession against a Person who otherwise might be in violation of such law because of the Person's age (hereinafter "Youth Decoy") if the potential violation occurs when:

(1) the Youth Decoy is participating in a compliance check supervised by a peace of-

ficer or a code enforcement official of the [City / County]; or

(2) the Youth Decoy is participating in a compliance check funded in part, either directly or indirectly through subcontracting, by the [name of city health department / name of county health department] or the California Department of Health Services.

COMMENT: This provision is intended to permit youth to participate in compliance checks without first obtaining a letter of immunity from the city or county. However, this provision does not provide protection from prosecution by agencies other than the city or county adopting this ordinance. A letter of immunity from the local district attorney is still recommended.

Sec. [____ (*11)]. REVOCATION OF LICENSE.

(a) REVOCATION OF LICENSE FOR VIOLATION. In addition to any other penalty authorized by law, a Tobacco Retailer's license shall be revoked if the Department finds or any court of competent jurisdiction determines, after the licensee is afforded notice and an opportunity to be heard, that the licensee, or any of the licensee's agents or employees, has violated any of the requirements, conditions, or prohibitions of this [article / chapter] or, in a different legal proceeding, has pleaded guilty, "no contest" or its equivalent, or admitted to a violation of any law designated in Section [____(*9)(a)] above.

COMMENT: Many local license laws "suspend" a license for a certain period of time, such as 30 days, for a violation and only revoke a license after repeated violations. This model ordinance instead uses revocation exclusively but permits a retailer to acquire a new license after a set period of time depending upon the number of past violations. Used in this way, revocation accomplishes the same goal as suspension but adds these benefits:

1. The burden is put on the retailer to seek to sell tobacco again. Retailers who have little interest in selling may simply choose to stop and not reapply. With suspension, a retailer "automatically" re-acquires the privilege of selling tobacco.
2. Because the retailer must reapply for a license, a new licensing fee must be paid and the retailer is re-educated regarding the requirements of the license by reading and completing the application.
3. Technical, but legally significant, difficulties arise if a license is allowed to "expire" before a final administrative decision regarding a suspension is made (e.g., a court may question how a license can be suspended if that license no longer exists).
4. Enforcement is more clear-cut: a retailer either has a license or the retailer does not. With suspension, a retailer could also have a suspended license which raises the question of how to treat additional violations during a suspension period.

A plea of "no contest" or "nolo contendere" is usually used by a defendant to prevent having a "guilty" plea used against him in a subsequent civil suit. This provision puts a Tobacco Retailer on notice that even a "no contest" plea can still be used to establish a licensing violation and will result in the revocation of the retailer's tobacco retailer license. Precedent exists in California state law for

considering a “no contest” plea in relation to a license. *See, e.g.*, Business and Professions Code section 5063. Note that a “no contest” plea can only be used to revoke a license, but not to impose any other enforcement provisions provided in the ordinance. If imposing additional enforcement provisions is desired (e.g., imposing a civil fine), the City or County will need to prove that the underlying violation occurred and not rely on the “no contest” plea as conclusive evidence of a violation.

(b) NEW LICENSE AFTER REVOCATION.

(1) After revocation for a first violation of this [article / chapter] at a location within any [sixty-month (60)] period, no new license may issue for the location until [ten (10) days] have passed from the date of revocation.

(2) After revocation for a second violation of this [article / chapter] at a location within any [sixty-month (60)] period, no new license may issue for the location until [thirty (30)] days have passed from the date of revocation.

(3) After revocation for a third violation of this [article / chapter] at a location within any [sixty-month (60)] period, no new license may issue for the location until [ninety (90)] days have passed from the date of revocation.

(4) After revocation for four or more violations of this [article / chapter] at a location within any [sixty-month (60)] period, no new license may issue for the location until [five (5) years] have passed from the date of revocation.

COMMENT: This is the primary provision designating the length of time a Tobacco Retailer is ineligible to sell tobacco products once the retailer’s license is revoked pursuant to subsection (a). Stronger or more lenient penalties may be provided as a matter of local policy. For example, some local ordinances permit first time offenders to “settle” their way out of a first revocation by instead paying a fine (\$1,000, for example).

By providing mandatory penalties, this model does not provide any discretion to enforcement staff. This lack of discretion makes for a simple ordinance and standardized, even-handed enforcement. If discretion with respect to penalties is desired, the ordinance must state the standard by which that discretion is to be exercised (e.g., financial hardship, history of compliance, etc.). Note, too, that these penalty provisions do not prevent the use of other legal tools, such as criminal prosecution under Penal Code section 308, enforcement of the Stop Tobacco Access to Kids Enforcement Act (“STAKE Act,” Business and Professions Code sections 22950-22962), or the several judicial remedies discussed below.

Note that if a Tobacco Retail outlet is sold in an Arm’s Length Transaction then the violations will no longer be counted against the location under the new owner’s license pursuant to Section *7(b).

(c) APPEAL OF REVOCATION. A decision of the Department to revoke a license is appealable to [the name of appellate agency, panel, or person (e.g., police permit board, board of supervisors, city manager, or director of the health department)] and must be filed with [the name of the agency, panel, or person to receive the notice] within ten days of mailing of the Department's decision. If such an appeal is made, it shall stay enforcement of the appealed action. An appeal to [the name of appellate agency, panel, or person] is not available for a revocation made pursuant to subsection (d) below.

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. Local governments would do well to trigger the 90-day statute of limitations for legal challenges by complying with the notice requirements of Code of Civil Procedure 1094.6(f) in making and giving notice of determinations under this ordinance.

(d) REVOCATION OF LICENSE ISSUED IN ERROR. A Tobacco Retailer's license shall be revoked if the Department finds, after the licensee is afforded reasonable notice and an opportunity to be heard, that one or more of the bases for denial of a license under Section [____ (*5)] existed at the time application was made or at any time before the license issued. The decision by the Department shall be the final decision of the [City / County]. The revocation shall be without prejudice to the filing of a new license application.

COMMENT: This provision allows the city or county to revoke a license that should not have been granted. For example, if information provided in an application turns out to have been incorrect, the license can be revoked. Another example is if a zoning ordinance prohibits Tobacco Retailing in certain locations, but staff issues a license by mistake, the license can be revoked.

Sec. [____ (*12)]. TOBACCO RETAILING WITHOUT A LICENSE.

(a) In addition to any other penalty authorized by law, if the Department finds or any court of competent jurisdiction determines, after notice and an opportunity to be heard, that any Person has engaged in Tobacco Retailing at a location without a valid Tobacco Retailer's license, either directly or through the Person's agents or employees, the Person shall be ineligible to apply for or be issued a Tobacco Retailing license for that location as follows:

(1) After a first violation of this [article / chapter] at a location within any [sixty-month (60)] period, no new license may issue for the Person at the location until [thirty (30)] days have passed from the date of the violation.

(2) After a second violation of this [article / chapter] at a location within any [sixty-month (60)] period, no new license may issue for the Person at the location until [ninety (90)] days have passed from the date of the violation.

(3) After of a third or subsequent violation of this [article / chapter] at a location within any [sixty-month (60)] period, no new license may issue for the Person at the location until [five (5)] years have passed from the date of the violation.

COMMENT: This provision prohibits a Person who sells Tobacco or Tobacco Paraphernalia without a license from obtaining a license for a set amount of time or from transferring the business to another person to sell tobacco at the same location for that time. It does not apply to a wholly new business at the same site and cannot do so without violating the property rights of a landlord or of an innocent person who buys a site from which illegal tobacco sales previously occurred. The penalty period for selling without a license is greater than the penalty period associated with violating an existing license (see Section [____(*11)(b)] because ignoring the law completely by selling without a license is deemed a greater offense. This ineligibility period is in addition to any other penalty the City or County might pursue, such as the fines set forth in Section *14.

Note that if a Tobacco Retail outlet is sold in an Arm's Length Transaction then the violations will no longer be counted against the location under the new owner's license pursuant to Section *7(b).

(b) Tobacco Products and Tobacco Paraphernalia offered for sale or exchange in violation of this [article / chapter] are subject to seizure by the Department or any peace officer and shall be forfeited after the licensee and any other owner of the Tobacco Products and Tobacco Paraphernalia seized is given reasonable notice and an opportunity to demonstrate that the Tobacco Products and Tobacco Paraphernalia were not offered for sale or exchange in violation of this [article / chapter]. The decision by the Department may be appealed pursuant to the procedures set forth in Section [____(*11)(c)]. Forfeited Tobacco Products and Tobacco Paraphernalia shall be destroyed.

COMMENT: Seizing and destroying illegally offered products requires additional procedures beyond the normal hearing for license revocation. In part, this is because of the possibility that the true owner of products seized is not the licensee. For example, cigarettes could be sold on a consignment basis. Such owners must be provided due process before their property is destroyed. An independent administrative hearing regarding the forfeiture of any seized products is recommended.

(c) For the purposes of the civil remedies provided in this [article / chapter]:

(1) each day on which a Tobacco Product or Tobacco Paraphernalia is offered for sale in violation of this [article / chapter]; or

(2) each individual retail Tobacco Product and each individual retail item of Tobacco Paraphernalia that is distributed, sold, or offered for sale in violation of this [article / chapter];

whichever is greater, shall constitute a separate violation of this [article / chapter].

Sec. [____ (*13)]. SETTLEMENT IN LIEU OF HEARING. For a [first or second] alleged violation of this [article / chapter] within any [sixty-month (60)] period, the [City Attorney / County Counsel] may engage in settlement negotiations and may enter into a settlement agreement with a Tobacco Retailer alleged to have violated this [article / chapter] without approval from the [City Council / Board of Supervisors]. Notice of any settlement shall be provided to the Department and no hearing shall be held. Settlements shall not be confidential and shall contain the following minimum terms:

(a) After a first alleged violation of this [article / chapter] at a location within any [sixty-month (60)] period:

- (1) an agreement to stop acting as a Tobacco Retailer for at least [one (1) day];
- (2) a settlement payment to the [City / County] of at least [one thousand dollars (\$1,000)]; and
- (3) an admission that the violation occurred and a stipulation that the violation will be counted when considering what penalty will be assessed for any future violations.

(b) After a second alleged violation of this [article / chapter] at a location within any [sixty-month (60)] period:

- (1) an agreement to stop acting as a Tobacco Retailer for at least [ten (10) days];
- (2) a settlement payment to the [City / County] of at least [five thousand dollars (\$,5000)]; and
- (3) an admission that the violation occurred and a stipulation that the violation will be counted when considering what penalty will be assessed for any future violations.

COMMENT: This provision provides some flexibility in what is otherwise a mandatory penalty system. Settlements can be much less resource-intensive than even an administrative hearing and can take into account the unique circumstances of a particular violation. Also, settlements can result in changes at a retail location that could not otherwise be obtained, such as a settlement term limiting the amount of tobacco advertising that a retailer displays.

Minimum settlement terms are provided to ensure that settlements do not undercut the purpose of providing meaningful deterrents. The minimum terms can be changed to suit a particular community.

Sec. [____ (*14)]. ENFORCEMENT.

(a) The remedies provided by this [article / chapter] are cumulative and in addition to any other remedies available at law or in equity.

COMMENT: The following section is designed to offer a variety of options to the drafter and to the enforcing agency. 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, although

multiple remedies might be used against a particularly egregious violator over time.

(b) Whenever evidence of a violation of this [article / chapter] is obtained in any part through the participation of a Person under the age of eighteen (18) years old, such a Person shall not be required to appear or give testimony in any civil or administrative process brought to enforce this [article / chapter] and the alleged violation shall be adjudicated based upon the sufficiency and persuasiveness of the evidence presented.

COMMENT: This provision is designed to eliminate any legal right a defendant might otherwise have to compel a youth decoy testify or be deposed. If criminal remedies are pursued, constitutional rights of criminal defendants to confront witnesses against them might require a youth decoy to testify.

(c) Violations of this [article / chapter] are subject to a civil action brought by the [City Prosecutor / District Attorney] or the [City Attorney / County Counsel], punishable by a civil fine not less than [two hundred fifty dollars (\$250)] and not exceeding [one thousand dollars (\$1,000)] per violation.

COMMENT: This provision provides civil fines for violating the licensing ordinance. It requires that the city or county file a traditional civil suit. The fine amounts can be adjusted but cannot exceed \$1,000 per violation. Government Code section 36901.

(d) Violations of this [article / chapter] may, in the discretion of the [City Prosecutor / District Attorney], be prosecuted as infractions or misdemeanors.

COMMENT: Sometimes called a “wobbler,” this provision affords the prosecuting attorney discretion on whether to pursue a violation as an infraction or a misdemeanor. Alternatively, violations can be set as *either* an infraction or a misdemeanor in all circumstances. Fines and other criminal penalties are established by the Penal Code and are typically reflected in the general punishments provision of a local code.

(e) Causing, permitting, aiding, abetting, or concealing a violation of any provision of this [article / chapter] shall also constitute a violation of this [article / chapter].

COMMENT: This is standard language that is typically included in a city or county code and may be omitted if duplicative of existing code provisions.

(f) Violations of this [article / chapter] 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. Such a declaration also facilitates injunctive relief (where a court orders that a defendant do certain things or refrain from doing certain things, such as selling tobacco to minors).

(g) In addition to other remedies provided by this [article / chapter] or by other law, any violation of this [article / chapter] may be remedied by a civil action brought by the [City Attorney / County Counsel], including, for example, administrative or judicial nuisance abatement proceedings, civil or criminal code enforcement proceedings, and suits for injunctive relief.

COMMENT: It is 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 permanent 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. 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 38773.7 (authorizing treble damages) 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.

(h) Any Person, including the [City of [____] and the County of [____] / County of [____]], acting for the interests of itself, its members, or the general public (hereinafter “the Private Enforcer”) may bring a civil action to enforce this [article / chapter].

(1) Upon proof of a violation, a court shall award to the Private Enforcer the following:

COMMENT: This is a powerful provision that allows members of the public to complement traditional government enforcement by suing alleged violators in small claims court.

This provision allows any person (known as a “Private Enforcer”) to sue a violator if the Private Enforcer has been personally harmed or if the Private Enforcer wants to act as a “private attorney general” by holding the violator accountable on behalf of the general public. Note that public agencies can be a “Private Enforcer” as the term is defined. Therefore, public agencies also can use this subsection to enforce the licensing law if desired.

For further explanation of the rationale and potential impact of this provision, please see TALC’s memorandum entitled “The Benefits of Adding a Private Right of Action Provision to Local Tobacco Control Ordinances” available from TALC at (510) 444-8252, by e-mail at talcc@phi.org, or from our website at <http://talcc.phi.org>.

(i) Damages in the amount of either:

(a) upon proof, actual damages; or

(b) with insufficient or no proof of the amount of damages, \$[500] for each violation of this [article / chapter] (hereinafter “Statutory Damages”). Unless otherwise specified in this [article / chapter], each day of a continuing violation shall constitute a separate violation. Notwithstanding any other provision of this [article / chapter], no Private Enforcer suing on behalf of the general public shall recover Statutory Damages based upon a violation of this [article / chapter] if a previous claim brought on behalf of the general public for Statutory Damages and based upon the same violation has been adjudicated, whether or not the Private Enforcer was a party to that adjudication.

COMMENT: This provision allows for the collection of damages even if it is difficult or impossible to prove the actual amount of damages that resulted from the given violation. Statutory damages can add up to a substantial sum because each day of a continuing violation counts as a separate violation. However, if an action is brought in small claims court, the total amount of damages sought must fall below \$7,500. So, when considering the amount at which to set statutory damages in a given ordinance, it is worth considering whether a typical case brought under the ordinance will involve a claim for less than \$7,500. Note that this provision protects a retailer from being sued multiple times on behalf of the general public for the same violation.

(ii) Exemplary damages, where it is proven by clear and convincing evidence that the defendant is guilty of oppression, fraud, malice, or a conscious disregard for the public health.

COMMENT: Exemplary damages are also known as *punitive damages*. They are designed to punish and deter a defendant in a tort case who has acted in an outrageous manner.

(2) The Private Enforcer may also bring a civil action to enforce this [article / chapter] by way of a conditional judgment or an injunction.

COMMENT: In order to get an injunction, a plaintiff would have to sue in the unlimited jurisdiction division of the superior court and not the small claims division. While lawyers are not permitted to appear in small claims court (except when representing themselves), a case in the unlimited jurisdiction division typically requires legal counsel. However, a plaintiff could seek a conditional judgment in small claims court. Note that the difference between an injunction and a conditional judgment is that with the former, the defendant is directly ordered to do something (or to refrain from doing something). With a conditional judgment, however, the defendant is given a choice between fulfilling certain conditions (e.g., ceasing the illegal conduct) or suffering a different judgment (e.g., paying monetary damages). (See 1 *Consumer Law Sourcebook for Small Claims Court Judicial Officers* (California Department of Consumer Affairs 1996) §§ 12.32-12.34.) A conditional judgment could serve as an alternative to damages, or it could be in addition to damages. For example, a small claims court could order some monetary damages

along with a conditional judgment giving the defendant a choice between ceasing the violations or paying even more money.

(3) Notwithstanding any legal or equitable bar against a Private Enforcer seeking relief on its own behalf, a Private Enforcer may bring an action to enforce this [article / chapter] solely on behalf of the general public. When a Private Enforcer brings an action solely on behalf of the general public, nothing about such an action shall act to preclude or bar the Private Enforcer from bringing a subsequent action based upon the same facts but seeking relief on the Private Enforcer's own behalf.

COMMENT: This is an important clause, so exercise care when considering whether to modify or eliminate it. This clause accomplishes two distinct goals:

First, the clause permits a Private Enforcer with a special relationship to a particular defendant to sue the defendant even though the Private Enforcer might otherwise be prohibited from doing so. Attorneys often refer to such prohibitions as *legal and equitable bars*. For example, an employee may be required to arbitrate—not litigate—any employment dispute, such as a dispute involving smoking inside a Tobacco Retailer. Under this clause, such an employee may be required to arbitrate any *personal* claims (e.g., damages for personal injury from secondhand smoke) but can nevertheless sue the Tobacco Retailer in court as a representative member of the general public. In such a circumstance, the Private Enforcer could only make the claims that *every* member of the general public could make (e.g., sue for Statutory Damages on behalf of the general public for the Tobacco Retailer's violation of the licensing ordinance).

Second, the clause permits a Private Enforcer who first sues *solely* on behalf of the general public to sue the same defendant later on any personal claims (although such personal claims might still be subject to legal or equitable bars as described above). Normally, repetitive suits based upon essentially the same facts and circumstances are prohibited. Attorneys often use the terms *res judicata*, *issue preclusion*, and *collateral estoppel* for such prohibitions. Under this clause, however, the parent of a child injured by illegally sold cigarettes can first sue the retailer solely on behalf of the general public, receiving the Statutory Damages amount for each violation. The parent still can sue the retailer later for personal injury to the child (e.g., medical bills for a child's asthma aggravated by smoking).

This clause is not intended to modify well-established legal rules concerning when a plaintiff may bring personal claims. Rather, it simply reflects the reasoning that when a Private Enforcer brings a claim *solely* on behalf of the general public, the plaintiff is acting as a private attorney general; thus, the existence of personal claims is irrelevant and such claims are unaffected.

(4) Nothing in this [article / chapter] shall prohibit the Private Enforcer from bringing an action in small claims court to enforce this [article / chapter], so long as the amount in demand and the type of relief sought are within the jurisdictional requirements of small claims court as set forth in California Code of Civil Procedure section 116.220.

COMMENT: This clause is legally superfluous, but it serves to flag for plaintiffs and courts that small claims court would be an appropriate forum for resolving disputes under this provision.

SECTION III. SEVERABILITY. If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this Ordinance, or its application to any person or circumstance, 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 its application to any other person or circumstance. 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. Often this “boilerplate” is found at the end of an ordinance but its location is irrelevant.