

El Cajon Tobacco Retailer Licensing Ordinance

Summary: The City of El Cajon's recently enacted tobacco realer licensing ordinance contains some of the most innovative and strongest language to yet appear in California. The city's new law incorporates much of the progressive language that is under development by TALC for inclusion in the forthcoming major revision of TALC's model licensing ordinance. Key policy choices contained in El Cajon's tobacco licensing law include:

- Banning mobile vending
- Prohibiting tobacco sales in bars and restaurants
- Mandating ID checks for anyone appearing under the age of 27
- Requiring that clerks selling tobacco be 18 years of age or older
- Assessing a licensing fee calculated to include the full cost of administration and enforcement
- Mandating that every retailer be inspected for compliance an average of three times per year
- Granting youth decoys automatic immunity
- Requiring that tobacco retailers with a suspended or revoked license remove all tobacco products from public view
- Requiring that tobacco retailers with a suspended or revoked license remove all tobacco advertisements from public view
- Providing for attorney-free private enforcement by advocates in small claims court

ORDINANCE NO. _____

AN ORDINANCE OF THE CITY OF EL CAJON, CALIFORNIA
ADDING CHAPTER 8.33 TO THE EL CAJON MUNICIPAL CODE
REGARDING THE LICENSURE OF TOBACCO RETAILERS.

The City Council of the of the City of El Cajon does ordain as follows:

SECTION 1. FINDINGS. The City Council of the of El Cajon hereby finds and declares as follows:

WHEREAS, 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

WHEREAS, state law requires that tobacco retailers check the identification of tobacco purchasers who reasonably appear to be under 18 years of age (Bus. & Prof. Code § 22956) and provides procedures for using persons under 18 years of age to conduct on-site compliance checks of tobacco retailers (Cal. Bus. & Prof. Code § 22952); and

WHEREAS, state law requires that tobacco retailers post a conspicuous notice at each point of sale stating that selling tobacco products to anyone under 18 years of age is illegal (Cal. Bus. & Prof. Code § 22952, Cal. Pen. Code § 308); and

WHEREAS, state law prohibits the sale or display of cigarettes through a self-service display and prohibits public access to cigarettes without the assistance of a clerk (Cal. Bus. & Prof. Code § 22962); and

WHEREAS, state law prohibits the sale of “bidis” (hand-rolled filterless cigarettes imported primarily from India and Southeast Asian countries) except in adult-only establishments (Cal. Pen. Code § 308.1); and

WHEREAS, 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 prohibits public school students from smoking or using tobacco products while on campus, while attending school-sponsored activities, or while under the supervision or control of school district employees (Cal. Educ. Code § 48901(a)); and

WHEREAS, the City of El Cajon, through Chapter 8.32 of the El Cajon Municipal Code, prohibits smoking tobacco products in certain locations, buildings and parks, in the City of El Cajon, and further prohibits the use of vending machines for the sale of cigarettes, tobacco products, cigarette paper or wrappers; and

WHEREAS, despite these restrictions, minors continue to obtain cigarettes and other tobacco products at alarming rates. 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; and

WHEREAS, in a 2001 California youth-buying survey, 17.1% of retailers surveyed unlawfully sold tobacco product to minors; and

WHEREAS, a local study of retailers unlawfully selling tobacco products to minors reveals that as many as thirty-eight percent (38%) of the retailers in El Cajon, selling tobacco products, have been found to sale tobacco products to minors; and

WHEREAS, 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; and

WHEREAS, the City 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

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 the City to regulate business activity in order to discourage violations of law; 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 to regulate the operation of lawful businesses to discourage violations of federal, state, and local tobacco-related laws; and

WHEREAS, 65% of California's key opinion leaders surveyed support implementation of tobacco-licensing requirements.

NOW THEREFORE, it is the intent of the City Council, 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 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 penalty provided therefore.

SECTION 2. SEVERABILITY. If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this Ordinance, or its application to any person or circum-

stance, 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 of the City of El Cajon 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.

SECTION 3. Chapter 8.33 of the El Cajon Municipal Code is hereby added to read as follows:

8.33.010. 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 the Finance Department.

(b) "Person" shall have the definition set forth in section 1.04.020 of the El Cajon Municipal Code.

(c) "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 can or does share, ultimate control over the day-to-day operations of a business.

(d) "Tobacco Product" means: (1) any substance containing tobacco leaf, including but not limited to cigarettes, cigars, pipe 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, offered 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 Federal Food and Drug Administration for use in treating nicotine or tobacco product dependence.

(e) "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.

(f) "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; "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.

8.33.020. Requirement For Tobacco Retailer License.

(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 chapter for each location at which that activity is to occur.

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

(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.

(d) The license fee established pursuant to section 8.33.060 confers paid status upon a license for a term of one year. Each Tobacco Retailer shall apply for the renewal of his or her Tobacco Retailer's license no later than thirty (30) days prior to expiration of the payment term.

(e) Nothing in this 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 identified on the face of the license. For example, nothing in this chapter shall be construed to render inapplicable, supercede, or apply in lieu of any other provision of applicable law, including, without limitation, any condition or limitation on smoking in enclosed places of employment made applicable to business establishments by California Labor Code section 6404.5.

8.33.030. 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 of the laws affecting the issuance of a Tobacco Retailer's license. A license that is issued in error or on the basis of false or misleading information supplied by a Proprietor may be revoked pursuant to section 8.33.090(c) of this chapter. All applications shall be submitted on a form supplied by the Department and shall contain the following information:

1. The name, address, and telephone number of each Proprietor.
2. The business name, address, and telephone number of the single fixed location for which a Tobacco Retailer's license is sought.

3. The name and mailing address authorized by each Proprietor to receive all license-related communications and notices (the “Authorized Address”). 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 2 above.

4. Whether or not any Proprietor has previously been issued a license pursuant to this chapter that is, or was at any time, suspended or revoked and, if so, the dates of the suspension period or the date of revocation.

5. Such other information as the Department deems necessary for the administration or enforcement of this ordinance.

8.33.040. Issuance Of License.

Upon the receipt of an application for a Tobacco Retailer’s license and the license fee, the Department shall issue a license unless substantial record evidence demonstrates one of the following bases for denial:

(a) the application is incomplete or inaccurate; or

(b) the application seeks authorization for Tobacco Retailing by a Proprietor for which or whom a suspension is in effect pursuant to section 8.33.090 of this chapter; or by a Proprietor which or who has had a license revoked pursuant to Section 8.33.090(a)(4) of this chapter; or

(c) the application seeks authorization for Tobacco Retailing at a location for which a suspension is in effect pursuant to section 8.33.090 of this chapter; or at a location which has had a license revoked pursuant to section 8.33.090(a)(4) of this chapter provided, however, this subparagraph shall not constitute a basis for denial of a license if the applicant provides the City with documentation demonstrating by clear and convincing evidence that the applicant has acquired or is acquiring the premises or business in an arm’s length transaction. For the purposes of this subparagraph, an “arm’s length transaction” is defined as 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 under any compulsion to participate in the transaction. A sale between relatives, related companies or partners, or a sale for the primary purpose of avoiding the effect of the violations of this chapter that occurred at the location, is presumed not to be an “arm’s length transaction”;

(d) the application seeks authorization for Tobacco Retailing that is prohibited pursuant to Section 8.33.020 of this chapter (e.g., mobile vending), that is unlawful pursuant to Title 17 of this Code (i.e., the zoning ordinance), or that is unlawful pursuant to any other local, state, or federal law.

8.33.050. Other Requirements And Prohibitions.

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

(b) POSITIVE IDENTIFICATION REQUIRED. No Person shall engage in Tobacco Retailing without first examining the identification of the purchaser, if the purchaser reasonably appears under the age of twenty-seven (27) years old, and confirming that the proposed sale is to a purchaser who is at least the minimum age in state law for being sold the Tobacco Product or Tobacco Paraphernalia.

(c) MINIMUM AGE FOR PERSONS SELLING TOBACCO. No Person shall engage in Tobacco Retailing if the Person is younger than the minimum age in state law for being sold or for possessing any Tobacco Product.

8.33.060. Fees For License.

The fee to issue or to renew a Tobacco Retailer's license shall be established by resolution of the City Council. 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 total program. All fees shall be used to fund the program. Fees are nonrefundable except as may be required by law.

8.33.070. Licenses Nontransferable.

A Tobacco Retailer's license is nontransferable. If the information required in the license application pursuant to section 8.33.030, items 1, 2, or 3, changes, a new Tobacco Retailer's license is required before the business may continue to act as a Tobacco Retailer. 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, the new owner must apply for a license for that location before acting as a Tobacco Retailer.

8.33.080. License Violation and Compliance Monitoring.

(a) VIOLATION OF TOBACCO-RELATED LAWS. It shall be a violation of a Tobacco Retailer's license for a licensee or his or her agent or employee to violate any local, state, or federal tobacco-related law.

(b) LICENSE COMPLIANCE MONITORING.

(1) Compliance with this chapter shall be monitored by the Department. Any peace officer or code enforcement official also may enforce this chapter.

(2) The Department shall check the compliance of each Tobacco Retailer at least two (2) times per twelve (12) month period and shall conduct additional compliance checks as warranted within that period so that the total number of com-

pliance checks equals no less than an average of three (3) checks per Tobacco Retailer during each calendar year. The compliance checks shall be conducted to determine, at a minimum, if the Tobacco Retailer is complying with tobacco laws regulating underage sales. The Department, or the Police Department, in assisting the Department in performing compliance checks, shall use youth decoys and comply with protocols for the compliance checks developed in consultation with the San Diego County Department of Health and Human Services and the San Diego County District Attorney. When appropriate, the compliance checks shall determine compliance with other tobacco-related laws.

(3) The City shall not enforce any tobacco-related minimum-age law 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:

(i) the youth decoy is participating in a compliance check supervised by a peace officer or a code enforcement official; or

(ii) the youth decoy is participating in a compliance check funded in part by the San Diego County Department of Health and Human Services or funded in part, either directly or indirectly through sub-contracting, by the California Department of Health Services.

8.33.090. Suspension Or Revocation Of License.

(a) **SUSPENSION OR REVOCATION OF LICENSE FOR VIOLATION.** In addition to any other penalty authorized by law, a Tobacco Retailer's license shall be suspended or revoked if the Department finds, after notice to the licensee and opportunity to be heard, that the licensee or his or her agents or employees has or have violated the requirements or prohibitions of this chapter including the conditions of the license imposed pursuant to Section 8.33.080 above.

(1) Upon a finding by the Department of a first license violation within any sixty-month (60) period, the license shall be suspended for thirty (30) days unless, at the election of the Tobacco Retailer, the Tobacco Retailer pays an administrative fine in accordance with chapter 1.14 of this Code. The payment of a fine in lieu of suspension does not expunge the violation and the violation will be counted for the purposes of a future finding that a second or subsequent violation has occurred.

(2) Upon a finding by the Department of a second license violation within any sixty-month (60) period, the license shall be suspended for ninety (90) days and (if the violation occurs within twelve (12) months of the first violation) the Tobacco Retailer may be fined an administrative fine for a second violation in accordance with chapter 1.14 of this Code.

(3) Upon a finding by the Department of a third license violation within any sixty-month (60) period, the license shall be suspended for one (1) year and (if the violation occurs within twelve (12) months of the first violation) the Tobacco Retailer

may be fined an administrative fine for a third violation in accordance with chapter 1.14 of this Code.

(4) Upon a finding by the Department of a fourth license violation within any sixty-month (60) period, the license shall be revoked, if the violation occurs within twelve (12) months of the first violation the Tobacco Retailer may be fined an administrative fine for a third violation in accordance with chapter 1,14 of this Code, and the Proprietor or Proprietors who had been issued the license shall never again be issued a Tobacco Retailer's license pursuant to this chapter.

(5) A Tobacco Retailer with a suspended or revoked license:

(i) shall remove all Tobacco Products and Tobacco Paraphernalia from public view; and

(ii) shall not display any advertisement relating to Tobacco Products or Tobacco Paraphernalia that promotes the sale or distribution of such products at the Tobacco Retailer location or that would lead a reasonable consumer to believe that such products can be obtained at the Tobacco Retailer location, including any use of the terms, "tobacco," or "smoke shop," or similar references in the name of the business operated by the Tobacco Retailer;

(iii) except that for a first or second suspension within any sixty-month (60) period, instead of complying with subsections (i) and (ii) above, the Tobacco Retailer may elect to post a clear and legible sign at each point of sale and at every public entrance stating in seventy two (72) point type or larger: "TOBACCO PRODUCTS NOT FOR SALE because this store has violated a public health law regulating tobacco" and such signs must be present and remain free of obstructions for the entire duration of the suspension period.

(b) **SUSPENSION OF LICENSE FOR FAILURE TO PAY RENEWAL FEE.** A Tobacco Retailer's license that is not timely renewed pursuant to section 8.33.020(d) shall automatically be suspended by operation of law. If not renewed, a license shall be automatically revoked two (2) years after the renewal date. To reinstate the paid status of a license that has been suspended due to the failure to timely pay the renewal fee, the proprietor must:

(1) submit the renewal fee plus a reinstatement fee of ten percent (10%) of the renewal fee; and

(2) submit a signed affidavit affirming that the Proprietor has not sold any Tobacco Product or Tobacco Paraphernalia during the period the license was suspended for failure to pay the renewal fee.

(c) **REVOCAION OF LICENSE ISSUED IN ERROR.** A Tobacco Retailer's license shall be revoked if the Department finds, after notice and opportunity to be heard, that one or more of the bases for denial of a license under section 8.33.040 existed at the

time application was made or at anytime before the license issued. The revocation shall be without prejudice to the filing of a new application for a license.

(d) **APPEAL OF SUSPENSION OR REVOCATION.** A decision of the Department to revoke or suspend a license may be appealed by a Proprietor or a Tobacco Retailer to the City Council in accordance with chapter 1.36 of this Code. Any appeal must be filed with the City Clerk within ten (10) days of mailing of the Department's decision. An appeal shall stay all proceedings in furtherance of the appealed action. A suspension or revocation pursuant to section 8.33.090(b) is not subject to appeal.

8.33.100. Administrative Fine.

(a) **GROUND FOR FINE.** In addition to any other remedies available at law or in equity, if the Department finds, based on substantial evidence, that any unlicensed Person, including a Person named on a revoked or suspended license, has engaged in Tobacco Retailing in violation of section 8.33.020 of this chapter, the Department shall impose an administrative fine on that Person pursuant to chapter 1.14 of this Code.

(b) **APPEAL TO SUPERIOR COURT OF LIMITED JURISDICTION.** Notwithstanding the provisions of section 1094.5 or section 1094.6 of the Code of Civil Procedure, and in accordance with section 1.14.150 of this Code, within twenty (20) days after mailing or personal service of the hearing officer's decision and findings, any Person subject to a fine may seek review of the hearing officer's decision and findings by the superior court of limited jurisdiction. A copy of the notice of appeal to the superior court shall be timely served in person or by first-class mail upon the Department by the contestant. The appeal shall be heard de novo, except that the contents of the Department's file in the case shall be received in evidence. A copy of the records of the Department of the notices of the violation and of the hearing officer's decision and findings shall be admitted into evidence as prima facie evidence of the facts stated therein.

(c) **FAILURE TO PAY FINE.** If no timely notice of appeal to the superior court is filed, or the Department is not timely served with a copy of a notice of appeal, the hearing officer's decision and findings shall be deemed confirmed and the fine shall be collected pursuant to section 1.14.130 of this Code.

8.33.110. Enforcement.

The remedies provided by this chapter are cumulative and in addition to any other remedies available at law or in equity.

(a) Causing, permitting, aiding, abetting, or concealing a violation of any provision of this chapter shall constitute a violation.

(b) Violations of this chapter may, in the discretion of the City Attorney, be prosecuted as infractions or misdemeanors in accordance with section 1.24.010 of this Code.

(c) Any Person violating this chapter is subject to a civil action brought by the City Attorney, punishable by:

1. a fine not less than one hundred dollars (\$100) for a first violation in any twelve-month (12) period; or
2. a fine not less than two hundred dollars (\$200) for a second violation in any twelve-month (12) period; or
3. a fine not less than five hundred dollars (\$500) for a third or subsequent violation in any twelve-month (12) period.

(d) Violations of this chapter are hereby declared to be public nuisances.

(e) Violations of this chapter are hereby declared to be unfair business practices and are presumed to at least nominally damage each and every resident of the community in which the business operates.

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

(g) Any Person acting for the interests of itself, its members, or the general public may bring an action for injunctive relief to prevent future such violations or to recover such actual damages as he or she may prove.

8.33.120. Private Enforcement.

(a) Any Person acting for the interests of itself, its members, or the general public (hereinafter “the Private Enforcer”) may bring a civil action to enforce this chapter. Upon proof of a violation, a court shall award the following:

1. Damages in the amount of either:
 - (i) upon proof, actual damages; or
 - (ii) with insufficient or no proof of damages, \$ 500 for each violation of this chapter (hereinafter “Statutory Damages”). Unless otherwise specified in this chapter, each day of a continuing violation shall constitute a separate violation. Notwithstanding any other provision of this chapter, no Private Enforcer suing on behalf of the general public shall recover Statutory Damages based upon a violation of this 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.
2. Restitution of the gains obtained in violation of this chapter.

3. 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.

(b) The Private Enforcer may also bring a civil action to enforce this chapter by way of a conditional judgment or an injunction. Upon proof of a violation, a court shall issue a conditional judgment or an injunction.

(c) 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 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 its own behalf.

(d) Nothing in this chapter shall prohibit the Private Enforcer from bringing a civil action in small claims court to enforce this 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.

SECTION 4: This ordinance shall become effective thirty days following its passage and adoption.

Licensing Model Ordinance final draft-El Cajon
5/25/04
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