

Smoke Free Marin Coalition
Model Language for Zoning Restrictions on
Significant Tobacco Retailers
Draft – April 28, 2003

Note: The language of a Conditional Use Permit ordinance varies widely from town to town, and is usually just a small insertion in the existing zoning code. Therefore this suggested "model ordinance" is presented in the form of suggested language to be modified as required by each city or town attorney.

This model is incomplete; it needs (1) findings and (2) an introductory paragraph explaining what it is, some background: County, Novato, San Rafael adopted ordinances, and discussion of the amortization issue.

Attachments: SR and county ordinances. Amortization memo from TALC.

Definitions:

“Shopping Mall” means an enclosed group of commercial establishments, planned, owned or managed as a unit, with covered, common-gathering areas and off-street parking provided on the site.

“Tobacco Product” means 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.

“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.

“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.

“Tobacco Retailer, Significant” means a retail establishment that devotes 20% or more of its sales or display area to, or derives 75% or more of its gross sales receipts from, the sale of tobacco products and/or tobacco paraphernalia.

Regulations:

A Significant Tobacco Retailer shall not be located within 1,000 feet from: schools (public and private elementary, junior high, and high schools), public parks, public libraries,

arcades, youth/teen centers, community/recreation centers, licensed daycare centers for children, shopping malls, and houses of worship with organized youth programs, as measured from the property lines of each parcel.

A Significant Tobacco Retailer shall not be located within 500 feet from the property line of a parcel zoned to be residential.

Amortizationⁱ of Existing Significant Tobacco Retailers:

A Significant Tobacco Retailer otherwise prohibited by the land use restrictions on Significant Tobacco Retailers imposed pursuant to this Article may continue acting as a Significant Tobacco Retailer for one year past the date the ordinance adopting this Article was introduced if:

1. The Significant Tobacco Retailer was in existence on the date the ordinance adopting this Article was introduced;
2. The Significant Tobacco Retailer otherwise complies with all requirements of tobacco retailing that are set forth in this Article, in other local laws, in state laws, and in federal laws; and
3. The Significant Tobacco Retailer does not change location or expand the Tobacco Retailing part of the business.

A Significant Tobacco Retailer may petition to continue acting as a Significant Tobacco Retailer for up to one additional year on the grounds of financial hardship if, by the forty-fifth day after the effective date of the ordinance adopting this Article, the retailer submits a signed declaration setting forth all facts that establish a financial hardship, what additional time is requested, and all supporting documentation to the [Planning Department]. The [Planning Department] shall give the retailer notice and an opportunity to be heard regarding the merits of the petition. The [Planning Department] shall conduct a public hearing and determine whether, and on what conditions, the extension of time ought to be granted. The decision of the [Planning Department] shall be the final decision of the City of [Name].

ⁱ NOTE FROM TALC: The appropriate amortization period is a factual question to be determined by the city passing the ordinance. The initial period should be calculated to include a reasonable period for most retailers, and the hardship period should be calculated to be reasonable as to all other retailers. The ordinance “findings” should include statements validating the period established (e.g., “For most existing Significant Tobacco Retailers, operating for an additional year in an area prohibited by this ordinance will mitigate the consequences of requiring the retailer to close, for example, by permitting the retailer to earn an additional year’s profit and by permitting the retailer time to sell down merchandise, time to secure a favorable lease in a non-prohibited location or conform the use of the land, and time to benefit economically by operating in a location in which new competitors may not locate.”) What should be considered when adopting amortization? According to a California Supreme Court decision involving amortization in the context of billboards, “[t]he central issue in cases involving the termination of

nonconforming uses is the reasonableness of the amortization period allowed. The burden is on the [person challenging the ordinance] to establish the unreasonableness of the amortization period with regard to each structure declared to be nonconforming.” *Tahoe Regional Planning Agency v. King*, 233 Cal.App.3d 1365, 1396 (1991). In setting the amortization period the following factors are typically considered: (a) the amount of investment or original cost of setting up the business; (b) the present actual or depreciated value of the business; (c) the deductions to the value of the business made for tax purposes; (d) the salvage value of the business; (e) the remaining useful life of the business; and (f) the term and cost of the lease, if any. *Metromedia, Inc. v. City of San Diego*, 26 Cal. 3d 848, 884 (1980), *rev’d* 453 U.S. 490 (1981) (reversed on other grounds).