

ORDINANCE NUMBER O- 19674 (NEW SERIES)

DATE OF FINAL PASSAGE NOV 15 2007

AN ORDINANCE AMENDING CHAPTER 3, ARTICLE 3, OF THE SAN DIEGO MUNICIPAL CODE BY ADDING DIVISION 45, SECTIONS 33.4501 TO 33.4519, TITLED "PERMITS FOR TOBACCO PRODUCTS SALES," RELATING TO REQUIREMENTS FOR A POLICE PERMIT FOR TOBACCO RETAILERS

WHEREAS, according to the National Institutes of Health, minors face social, psychological, and educational challenges, exposing them to various risk factors for drug abuse, including the underage use of legal drugs like tobacco; and

WHEREAS, minors who use tobacco products face profound consequences, including illness, cancer, addiction, increased drug use, poor school performance, and a host of other similar maladies; and

WHEREAS, according to the American Cancer Society, nearly all first use of tobacco products by minors occurs before high school graduation, and if such use is curtailed, then minors are likely to not use tobacco at all; and

WHEREAS, state law (Penal Code section 308) 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 to minors; and

WHEREAS, state law requires tobacco retailers to check the identification of tobacco purchasers who reasonably appear to be under 18 years of age (Business and Professions Code

section 22956) and provides procedures for onsite sting inspections of tobacco retailers using persons under 18 years of age (Business and Professions Code section 22952); and

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

WHEREAS, a 2004 purchase survey by the American Lung Association of San Diego and Imperial Counties showed that 43.6 percent of 264 stores surveyed in the City of San Diego sell cigarettes to minors; and

WHEREAS, the City Council of the City of San Diego has a substantial interest in promoting compliance with state law prohibiting the sale of cigarettes and tobacco products to minors; promoting compliance with federal, state, and local laws intended to discourage the purchase of tobacco products by minors; and in protecting children from being lured into illegal activity through the misconduct of adults; and

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

WHEREAS, state law (Health and Safety Code section 11364.7) authorizes revocation of a business license if a person possesses with intent to furnish drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to inject, ingest, inhale, or otherwise introduce into the human body a controlled substance; and

WHEREAS, State Assembly Bill 71, chaptered on October 12, 2003, (Business and Professions Code section 22971.3) creates a state licensing program for the sale of tobacco

products and authorizes local governments to adopt their own ordinances to provide for the suspension or revocation of a local license for any violation of a state tobacco control law;

WHEREAS, the City Council of the City of San Diego finds and declares that the purpose of the ordinance is:

- (1) To regulate tobacco retail businesses by requiring police permits; and
- (2) To discourage violations of law which prohibit or discourage the sale or distribution of tobacco products to minors; and
- (3) To protect the health, welfare, and safety of minors; NOW, THEREFORE,

BE IT ORDAINED, by the Council of the City of San Diego, as follows:

Section 1. That Chapter 3, Article 3, of the San Diego Municipal Code be and is hereby amended by adding Division 45, Sections 33.4501 through 33.4519, titled "Permits for Tobacco Products Sales," to read as follows:

§33.4501 Purpose and Intent

It is the purpose and intent of this Division to provide for local regulation of tobacco retail businesses by requiring police permits. The intent is to discourage violations of law prohibiting the sale or distribution of tobacco products to minors to protect their health, welfare, and safety. It is also the intent that all costs associated with the administration and enforcement of this Division be borne by tobacco retailer applicants and permittees. It is further the intent that recoveries hereunder shall be used to pay the costs of administering and enforcing this Division.

§33.4502 Definitions

Except as otherwise provided, for purposes of this Division:

“*Person*” has the same meaning as used in Section 11.0210.

“*Police permit*” has the same meaning as used in Municipal Code section 33.0201.

“*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*, excluding lighters.

“*Tobacco products*” means any substance containing tobacco leaf, including, but not limited to, cigarettes, pipe tobacco, snuff, chewing tobacco, dipping tobacco, or any other preparation of tobacco.

“*Tobacco retailer*” means any *person* who owns or operates, in whole or in part, a business for profit or not for profit who engages in *tobacco retailing*.

“*Tobacco retailing*” means selling, offering for sale, or offering to exchange for any form of consideration, tobacco, *tobacco products* or *tobacco paraphernalia*.

§ 33.4503 Police Permit Required for Tobacco Retailer

- (a) It is unlawful for any *person* to operate as a *tobacco retailer* without a *police permit*.
- (b) It is unlawful for any *person* to engage in *tobacco retailing* unless the owner or operator has been issued a *police permit* to operate as a *tobacco retailer* at that location.

- (c) A *tobacco retailer* shall obtain a separate *police permit* for each fixed location from which he or she engages in *tobacco retailing*.
- (d) No *police permit* shall be issued for any *person* operating as a *tobacco retailer* at any location other than a fixed location.
- (e) This section does not apply to sales or exchanges not made to the public.

§33.4504 Enforcement Authority

The *Chief of Police* shall administer and enforce this Division. The *Chief of Police* shall be responsible for accepting applications for a *police permit* to operate as a *tobacco retailer*, and for issuing the permit. The *Chief of Police* shall be responsible for determining the fitness of applicants for a *police permit* to operate as a *tobacco retailer*, investigating any violations of this Division, and for taking administrative action against any *police permit* issued under this Division.

§33.4505 Tobacco Retailer Permit Application Contents

- (a) Each applicant for a *police permit* to operate as a *tobacco retailer* shall furnish the following information to the *Chief of Police*:
 - (1) The full true name and any other names ever used by the applicant.
 - (2) The current residential address and telephone number of the applicant.
 - (3) The address of the proposed *tobacco retailer* business location.

- (4) Each residential address of the applicant for the five years immediately preceding the date of the application, and the inclusive dates of each address.
- (5) All fictitious business names ever used by applicant and the respective addresses of those businesses.
- (6) Written proof that the applicant is at least eighteen years of age.
- (7) A valid social security number.
- (8) Applicant's height, weight, and color of eyes and hair.
- (9) Photographs of the applicant as specified by the *Chief of Police*.
- (10) Applicant's business, occupation, and employment history for the five years immediately preceding the date of application, including addresses and dates of employment.
- (11) Whether the applicant has ever had any *license* or *permit* issued by any agency or board, or any city, county, state or federal agency suspended or revoked, or has had any professional or vocational *license* or *permit* suspended or revoked within five years immediately preceding the application, and the reason for the suspension or revocation.
- (12) All criminal *convictions*, including those dismissed pursuant to Penal Code section 1203.4, except traffic

infractions, and a statement of the dates and places of such *convictions*.

- (13) The name and address of the current owner and lessor of the real property upon which the proposed *tobacco retailing* business is to be conducted, and a copy of the lease or rental agreement.
 - (14) Copies of all business tax certificates.
 - (15) Information regarding *licenses* required under the “Cigarette and Tobacco Products Licensing Act of 2003,” found in Business and Professions Code sections 22970, et seq., including, but not limited to, copies of applications for *licenses*, *licenses* issued, and any documentation regarding the reasons for the denial of such *license*.
 - (16) Such other identification and information, including fingerprints, as may be required in order to discover the truth of the matters herein specified as required to be set forth in the application.
- (b) In addition to the information required by Municipal Code section 33.4505(a), an applicant for a *tobacco retailing permit* shall furnish the following information to the *Chief of Police*:
- (1) If the applicant is a corporation, the name of the corporation exactly as shown in its Articles of Incorporation or Charter, together with the state and date of

incorporation, and names and residential addresses of each of its current officers and directors, and of each stockholder holding more than 25 percent of the stock of the corporation;

- (2) If the applicant is a partnership, the name and residential address of each of the partners, including limited partners;
- (3) If the applicant is a limited partnership, a copy of the limited partnership's certificate of limited partnership as filed with the County Clerk;
- (4) If one or more of the limited partners is a corporation, the applicant shall provide the information about that partner required by Municipal Code section 33.4505(b)(1);
- (5) If the applicant is a corporation or partnership, the name of the responsible managing officer.

- (c) An applicant for a *police permit* to operate as a *tobacco retailer* shall submit a signed declaration certifying that he or she has not been convicted of or faced administrative action based on violations of the offenses listed in Municipal Code section 33.4510.

§33.4506 Corporate Officers and Partners Deemed Applicants

Each corporate officer or partner of a *tobacco retailing* business is deemed an applicant and each shall provide the information required in Municipal Code section 33.4505.

§33.4507 Designation of Responsible Managing Officer, Signature on Applications

An applicant that is a corporation or partnership shall designate one of its officers or general partners to act as its responsible managing officer. The responsible managing officer may complete and sign all applications on behalf of the corporate officers and partners.

§33.4508 Proof of State Licenses, Permits, and Certifications Required Before Issuance of Tobacco Retailer Permit

In addition to the requirements of Municipal Code section 33.4505, any *person* desiring a *police permit* to operate as a *tobacco retailer* shall furnish to the *Chief of Police* copies of all state *licenses, permits, and certifications* related to the sale of *tobacco products* and alcoholic beverages at the fixed location of the proposed *tobacco retailing* business.

§33.4509 Investigation Prior to Issuance of Tobacco Retailer Permit

- (a) The *Chief of Police*, or other designated official, shall make an investigation as may be deemed sufficient as stated in Municipal Code section 33.0301 to determine an applicant's fitness to operate as a *tobacco retailer*. The *Chief of Police* shall have authority to grant or deny a *police permit*, and to determine whether to take administrative action against a *police permit* under this Division.
- (b) An investigation for a permit to operate as a *tobacco retailer* shall be conducted as prescribed in Municipal Code sections 33.0302, 33.0303(a), 33.0304, 33.0306, 33.0307, 33.0308, 33.0309, 33.0310, 33.0311, 33.0312, and 33.0313.

§33.4510 Grounds for Denial of Tobacco Retailer Permit

In addition to the grounds for denial stated in Municipal Code section 33.0305(a)-(f), an application for a *police permit* to operate as a *tobacco retailer* shall be denied for any of the following reasons: The applicant has within five years immediately preceding the date of the filing of the application been *convicted* of, suffered any civil penalty, or faced administrative action against any type of *license* for violations of any tobacco control law, including, but not limited to, the following offenses: Penal Code section 308, Business and Professions Code sections 22950, et seq. (“Stop Tobacco Access to Kids Enforcement Act” or the “STAKE Act”), Business and Professions Code sections 22970, et seq. (“Cigarette and Tobacco Products Licensing Act of 2003”), or a charge of violating a lesser-included or lesser-related offense including, but not limited to, Penal Code section 415, in satisfaction of, or as a substitute for, an original charge of any of the offenses listed in this section.

§33.4511 Right to Appeal Denial of Tobacco Retailer Permit

Any applicant denied a permit to operate as a *tobacco retailer* shall be afforded an appeal as prescribed in Municipal Code sections 33.0501, 33.0502, 33.0503, 33.0504, 33.0505, and 33.0508.

§33.4512 Permit Fees

- (a) All costs associated with administration and enforcement of this Division including, but not limited to, investigating *permit* applications, processing *permit* applications, inspecting, regulating, and enforcing this Division, and providing for appeals,

shall be borne by applicants and *permittees*. The Mayor shall assess a fee for a *police permit* to operate as a *tobacco retailer* according to the schedule set in the City Clerk's Composite Rate Book. Fees will be reviewed annually.

- (b) A *permit* issued under this Division shall be valid for a period of one year from the date of issuance or from the date of renewal.

§33.4513 Tobacco Retailer Operating Requirements

- (a) A *tobacco retailer* shall keep and post his or her *police permit*, issued under this Division, in the manner prescribed in Municipal Code sections 33.0105(a) and (c). This subsection is regulatory only.
- (b) *Tobacco retailers* shall not allow, at any location for which they have a *police permit* to operate as a *tobacco retailer*, a violation of any tobacco control law including, but not limited to, the offenses listed in Municipal Code section 33.4510. *Tobacco retailers* shall be responsible for the acts of others who violate tobacco control laws at any location for which the *tobacco retailer* possesses a *police permit* to operate as a *tobacco retailer*. This subsection is regulatory only.
- (c) A *tobacco retailer* shall display in a conspicuous and prominent location near *tobacco products*, information, in a manner established by the *Chief of Police*, on how to report violations of

tobacco control laws including, but not limited to, reporting sales of *tobacco products* to minors, to the *Chief of Police*.

- (d) Clerks who transact *tobacco products* sales in *tobacco retailer* establishments shall themselves be the minimum legal age to purchase *tobacco products* (currently 18 years of age). This subsection is regulatory only.
- (e) *Tobacco retailers* shall check the age of purchasers of *tobacco products* who reasonably appear to be under the age of 27. This subsection is regulatory only.

§33.4514 Penalties and Regulatory Action

- (a) All penalties and regulatory action related to a *police permit* issued to operate as a *tobacco retailer* shall be conducted as prescribed in Municipal Code sections 33.0401 to 33.0406.
- (b) If a *police permit* issued under this Division is suspended or revoked, all *tobacco products* and tobacco paraphernalia shall be removed from public view for the duration of the suspension or revocation.

§33.4515 Additional Penalties

Pursuant to Health and Safety Code section 11364.7, a business license shall be revoked if a *person* possesses with intent to furnish drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to inject, ingest, inhale, or otherwise introduce into the human body a controlled substance.

§33.4516 Tobacco Retailer Permit Not Transferable

A *police permit* issued under this Division is not transferable.

§33.4517 Grandfather Clause

Notwithstanding Section 33.4510, *convictions* for offenses listed in Section 33.4510 shall not be used to deny an application for a *police permit* under this Division if the date of the *conviction* was prior to the passage of this Division.

§33.4518 Operative Date, Requirement for Police Permit

For a new business, a *police permit* to operate as a *tobacco retailer* must be obtained upon the issuance of a business tax certificate. For an existing business, a *police permit* to operate as a *tobacco retailer* must be obtained upon renewal of the tax certificate. During the first year in which this ordinance is in effect, any existing business whose tax certificate renewal has not yet become due may operate as a *tobacco retailer* on condition that a currently valid state tobacco license is in effect for each location where *tobacco products* are sold.

§33.4519 Reporting

The *Chief of Police* shall, on a yearly basis or as requested by the Public Safety and Neighborhood Services Committee, report to the Public Safety and Neighborhood Services Committee the following information:

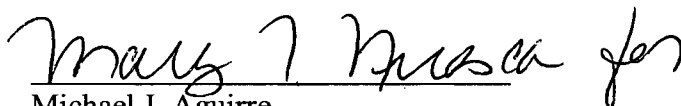
- (a) A summary of activity related to the administration and enforcement of this Division, including:
 - (1) Number of violations,

- (2) Number and amount of fines,
 - (3) Number and type of penalties,
 - (4) How the fine revenues are being used, and
 - (5) Detailing the program budget; and
- (b) An accounting of all funds received and used for the administration and enforcement of this Division; and
- (c) The estimated rate of illegal sales of *tobacco products* to minors within the City of San Diego.

Section 2. That a full reading of this ordinance is dispensed with prior to passage, a written copy having been available to the City Council and the public prior to the day of its passage.

Section 3. This ordinance shall take effect and be in force on the thirtieth day from and after its final passage.

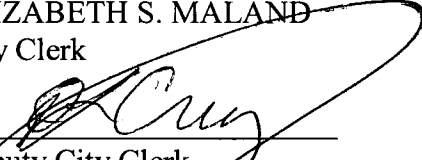
APPROVED: MICHAEL J. AGUIRRE, City Attorney

By 
Michael J. Aguirre
City Attorney

LLP
10/03/07
Or.Dept:Police
O-2008-34

I hereby certify that the foregoing Ordinance was passed by the Council of the City of San Diego, at this meeting of ~~OCT 30 2007~~.

ELIZABETH S. MALAND
City Clerk

By 
Deputy City Clerk

Approved: 11-15-07
(date)


JERRY SANDERS, Mayor

Vetoed: _____
(date)

JERRY SANDERS, Mayor