



# **San Diego Model Ordinance Requiring a Tobacco Retailer License (with Annotations)**

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Technical Assistance Legal Center  
505 14<sup>th</sup> Street, Suite 810  
Oakland, CA 94612  
Phone: (510) 444-8252  
Fax: (510) 444-8253  
<http://talc.phi.org>  
[talc@phi.org](mailto:talc@phi.org)

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**AN ORDINANCE OF THE [ CITY / COUNTY ] OF [ \_\_\_\_ ]  
REGARDING 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:<sup>1</sup>

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 onsite 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

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<sup>1</sup> Each of the authorities identified in this model ordinance can be obtained from the Technical Assistant Legal Center at the address, phone, and e-mail address indicated on the first page of this model ordinance.

[ WHEREAS, ] [ discuss any local ordinances regulating the sale of tobacco products, such as a complete self-service display ban, a ban on cigarette vending machines, or a conditional use permit or other land use restriction on tobacco sales ] [ ; 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;<sup>2</sup> and

WHEREAS, in a 2001 California youth-buying survey, 17.1% of retailers surveyed unlawfully sold tobacco product to minors;<sup>3</sup> and

WHEREAS, in a 2004 San Diego County youth-buying survey, 33.4% of retailers surveyed unlawfully sold 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 14;<sup>4</sup> 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

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 / County ] 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 / County ] to regulate the operation of lawful businesses to discourage violations of federal, state, and local tobacco-related laws; and

<sup>2</sup> DiFranza & Librett, *supra*, at 1106 n.2.

<sup>3</sup> Cal. Dep't Health Servs., Tobacco Control Section, *Youth Tobacco Purchase Survey 2001* (forthcoming 2002) (upon release, survey results are expected to be available at <http://www.dhs.ca.gov/tobacco/html/pressreleases.htm>). Note that the youth sales rate cited above is a statewide average. Youth sales rates for a particular city or county may be significantly higher. Check with your local tobacco prevention project, usually located in the county Health Department, to see if local figures are available.

<sup>4</sup> U.S. Dep't of Health & Human Servs. et al., *Preventing Tobacco Use Among Young People: A Report of the Surgeon General* 67 (1994).

WHEREAS, 65% of California's key opinion leaders surveyed support implementation of tobacco-licensing requirements.<sup>5</sup>

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 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.

COMMENT: These findings lay out the policy rationale for the ordinance. California Penal Code section 308(e) preempts local laws that are "inconsistent" with the state law that prohibits tobacco sales to minors and provides civil and criminal penalties. 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. 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. It is placed here to simplify updating cross-references should the City or County wish to customize this model by adding or deleting sections.

<sup>5</sup> Cal. Dep't of Health Servs., Tobacco Control Section, *Independent Evaluation of the California Tobacco Control Prevention & Education Program: Wave 2 Data, 1998, Wave 1 & Wave 2 Data Comparisons 1996-1998* (2001), available at <http://www.dhs.ca.gov/tobacco/documents/Wave2IEreport.pdf> (last updated April 24, 2001).

**SECTION III.** [ 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, shall have the meanings defined in this section unless the context clearly requires otherwise:

(a) "Department" means [ \_\_\_\_ ].

|| **COMMENT:** This term is used in the ordinance to refer to the 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.

(b) "Person" means any natural person, partnership, cooperative association, private 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.

(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.

|| **COMMENT:** This term is defined in attempt to prevent sham ownership changes made for the sole purpose of evading the license penalty provisions.

(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.

|| **COMMENT:** This definition is based upon a common definition used in many tobacco control laws but also includes non-tobacco nicotine products such as nicotine water and nicotine lollipops.

(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.

|| 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, both this definition and the words "Tobacco Paraphernalia" as used in the operative sections below, should be omitted.

(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.

|| COMMENT: These definitions only reach persons who sell Tobacco Products or exchange them for something of value. Tobacco-related products, such as t-shirts and the like, are not included.

**Sec. [ \_\_\_\_ (\*2) ]. 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 [ article / 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 [ \_\_\_\_ (\*6) ] 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.

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

|| rely on those provisions to avoid unintended inconsistencies that can complicate enforcement of the ordinance.

(e) 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 license. 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, 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.

|| 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).

Sec. [ \_\_\_\_ (\*3) ]. **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 [ \_\_\_\_ (\*9)(c) ] of this [ article / 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 [ article / 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.

COMMENT: Again, if the ordinance is included in a comprehensive licensing ordinance, this section might be omitted. The fourth requirement is intended to allow the administrative agency to identify applicants who have previously had licenses suspended or revoked. The fifth 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 provide information about those requirements to those who apply.

Sec. [ \_\_\_\_ (\*4) ]. **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) ] of this [ article / chapter ]; or by a Proprietor which or who has had a license revoked pursuant to Section [ \_\_\_\_ (\*9)(a)(4) ] of this [ article / chapter ]; or

(c) the application seeks authorization for Tobacco Retailing at a location for which a suspension is in effect pursuant to Section [ \_\_\_\_ (\*8) ] of this [ article / chapter ]; or at a location which has had a license revoked pursuant to Section [ \_\_\_\_ (\*9)(a)(4) ] of this [ article / chapter ] provided, 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 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 [ article / 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 [ \_\_\_\_ (\*2) ] of this [ chapter / article (e.g., mobile vending) ], that is unlawful pursuant to this Code [ [ chapter / article ] [ \_\_\_\_ ] (e.g., the zoning code) ], or that is unlawful pursuant to any other local, state, or federal law.

COMMENT: Although a license technically should not be issued if prohibited elsewhere in the City or County code, it is valu-

able to make note of what other tobacco ordinances staff should take into consideration. 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.

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

It is lawful to establish a discretionary license system, where licenses are issued only after some form of hearing (which could be a "paper" hearing conducted by mail) and individually tailored conditions of approval are imposed. However, given the likely volume of such licenses in most communities, this ordinance takes a less ambitious approach and will require less staff time and money to implement.

Providing record evidence of the bases for denial under subsections (b) and (c) should be simple and can take the form of a memo from planning staff or from staff members who maintain the records of suspensions and 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, it should be reduced to writing, as by a staff memo to the file that reports the oral complaint of a resident.

**Sec. [ \_\_\_\_ (\*5) ]. 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.

**Sec. [ \_\_\_\_ (\*6) ]. 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 total program. All fees shall be used to fund the program. Fees are nonrefundable except as may be required by law.

**COMMENT:** California Government Code sections 66016–66018.5 govern the establishment of fees; other local requirements established by charter or ordinance, 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.

It is lawful to impose a fee on applicants in an amount sufficient to offset the cost of the entire tobacco 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 because a violation of any tobacco-related law is a basis for revocation or suspension of a license. For example, if the enforcing agency is the police department, a new officer could be hired and the cost of hire included in the fee so long as the efforts of a full-time officer (or the equivalent number of staff hours) are used to monitor and enforce tobacco laws in connection with monitoring compliance with the license.

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, 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. Please contact TALC for an example of a fee calculation performed by the county of Santa Barbara prior to passage of that county's licensing ordinance.

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. [ \_\_\_\_ (\*7) ]. **LICENSES NONTRANSFERABLE.** A Tobacco Retailer's license is nontransferable. If the information required in the license application pursuant to Section [ \_\_\_\_ (\*3) ], 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.

Sec. [ \_\_\_\_ (\*8) ]. **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.

COMMENT: This provision makes licensing an effective tool for comprehensively enforcing tobacco control laws. A city or county can use the suspension/revocation provisions of a license 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," Bus. & Prof. Code § 22958). This provision also gives a city or county additional enforcement options: enforcing an underlying tobacco law, such as not selling tobacco to minors (Penal Code 308); and/or discouraging illegal behavior by suspending or revoking a license. Losing the right to sell tobacco will likely be a bigger financial deterrent than an occasional fine imposed under other laws.

(b) **LICENSE COMPLIANCE MONITORING.**

(1) Compliance with this [ chapter / article ] shall be monitored by [ enforcement agency ]. Any peace officer or code enforcement official also may enforce this [ chapter / article ].

(2) The [ enforcement agency ] shall check the compliance of each Tobacco Retailer at least [ ] times per twelve (12) month period and shall conduct additional compliance checks as warranted within that period so that the total number of compliance checks equals no less than an average of [ ] checks per Tobacco Retailer. The compliance checks shall be conducted to determine, at a minimum, if the Tobacco Retailer is complying with tobacco laws regulating underage sales. The [ enforcement agency ] 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 District Attorney. When appropriate, the compliance checks shall determine compliance with other tobacco-related laws.

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 set forth, the license may not be enforced at all. Multiple agencies may be given authority to enforce the license, but it is probably a good idea to provide some clear division of authority between them to discourage conflicts and situations in which each agency defers to the other and neither enforces the ordinance.

It is also a good idea to recommend 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.

(3) The [ City / County ] 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.

**Sec. [ \_\_\_\_ (\*9) ]. 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 [ article / chapter ] including the conditions of the license imposed pursuant to Section [ \_\_\_\_ (\*8) ] 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 a penalty of [ two thousand five hundred dollars (\$2500) ]. The payment of a penalty 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.

(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.

(4) Upon a finding by the Department of a fourth license violation within any sixty-month (60) period, the license shall be revoked 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 / article ].

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

This model ordinance does not impose fines upon Tobacco Retailers for license violations related to state tobacco laws in order to avoid potential preemption by state law. Penal Code section 308(a) prohibits the sale of tobacco to minors and establishes criminal and civil penalties for violation. Penal Code section 308(e) prohibits local governments from passing ordinances "inconsistent" with this law. Therefore, local governments may not be able to increase the fines for illegal sale of tobacco to minors but they may provide for suspension of a retailer's license to encourage compliance with Penal Code section 308.

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. One formula might be: "the license shall be suspended for up to 90 days, depending on the willfulness of the violations and the need to deter further violations." 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," Bus. & Prof. Code § 22950-22962), or the administrative and judicial remedies discussed below.

This ordinance provides a broad range of enforcement devices, ranging from suspension and revocation of licenses to fines, criminal law suits, civil law suits, etc. It is unlikely that every remedy would be used in a single case, although multiple remedies might be used against a particularly egregious violator over time. If more than one penalty is to be imposed, attention should be given to the possibility of a violation of the double jeopardy clauses of the state and federal constitu-

tions, which forbid multiple criminal sanctions for a single misdeed. That doctrine does not, however, prevent both civil and criminal remedies for a single misdeed. Thus someone convicted of violating Penal Code section 308 could also face the civil penalty of license suspension or revocation.

(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;

(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 Sec. [ \_\_\_\_ (\*2)(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.

**COMMENT:** This provision closes loopholes that can occur if a license is not renewed during the course of a license violation investigation or suspension period.

(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 [ \_\_\_\_ (\*4) ] 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.

**COMMENT:** This provision allows the City or County to revoke a license that should not have been granted but it is not a punitive revocation like subsection (a) above. 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 issue a license by mistake, the license can be revoked.

(d) APPEAL OF SUSPENSION OR REVOCATION. A decision of the Department to revoke or suspend a license is appealable to the [ \_\_\_\_ ] and must be filed with the [ \_\_\_\_ ] within ten 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 [ \_\_\_\_(\*9)(b) ] is not subject to appeal.

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

**Sec. [ \_\_\_\_ (\*10) ]. ADMINISTRATIVE FINE.**

(a) GROUNDS 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 [ \_\_\_\_(\*2) ] of this [ article / chapter ], the Department shall fine that Person as follows:

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

Each day that such a Person engages in Tobacco Retailing shall constitute a separate violation.

**COMMENT:** This provision provides a mandatory remedy against a Tobacco Retailer who sells Tobacco Products without a license or with a suspended license. Selling without a license or with a suspended license may be the most serious violation of the ordinance, as it undermines the entire licensing scheme. It may be possible to pursue these violators through criminal prosecution under the criminal penalty section set out below in Section (\*11). Again, if the retailer is selling Tobacco Products to a *minor*, the City or County may still choose to rely on other tools, such as criminal prosecution under Penal Code section 308, enforcement of the Stop Tobacco Access to Kids Enforcement Act ("STAKE Act," Bus. & Prof. Code § 22950-22962). Higher or lower fines may be provided as a matter of local policy, although fines cannot be so high as to be confiscatory or to violate the Eighth Amendment prohibition on "excessive fines and forfeitures." Note that if in Section (\*11)(b), the City or County chooses to allow the prosecution of violations as infractions, the fines imposed in this section can not be greater than the maximum fine for an infraction. Cal. Gov. Code § 53069.4. This model incorporates the current maximum limits. See Cal. Gov. Code § 25132. The last sentence of this section commonly appears in City and County codes and may be unnecessary.

(b) NOTICE OF VIOLATION. A notice of violation and of intent to impose a fine shall be personally served on, or sent by certified mail to, the Person or Persons subject to the fine. The notice shall state the basis of the Department's determinations and include an advisement of the right to request a hearing to contest the fine. Any request for a hearing must be in writing and must be received by the Department within ten (10) calendar days of personal service of the notice on the Person or Persons subject to a fine or within fifteen (15) calendar days if the Person or Persons subject to a fine are served by mail.

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

(d) NOTICE OF HEARING. If a hearing is requested pursuant to subsection (b) of this section, the Department shall provide written notice, within forty-five (45) calendar days of its receipt of the hearing request, to the Person or Persons subject to a fine of the date, time, and place of the hearing in the manner specified above for a notice of violation.

(e) HEARING DECISION. The hearing officer shall render a written decision and findings within twenty (20) working days of the hearing. Copies of the decision and findings shall be provided to the Person or Persons subject to a fine in the manner specified above for a notice of violation.

(f) FINALITY OF THE HEARING OFFICER'S DECISION. The decision of the hearing officer shall be the final decision of the [ City / County ].

(g) APPEAL TO SUPERIOR COURT OF LIMITED JURISDICTION. Notwithstanding the provisions of section 1094.5 or section 1094.6 of the Code of Civil Procedure, within twenty (20) days after personal service of the hearing officer's decision and findings, or within twenty-five (25) days if served by mail, 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.

COMMENT: As discussed below, cities and counties have the power to impose fines administratively only if the ordinance expressly provides for effective judicial review. As an alternative to subsection (g), a City or County may choose to simply authorize a writ of administrative mandamus under Code of Civil Procedure sections 1094.5 and 1094.6. The language provided in subsection (g) is intended to shorten the time in which to seek judicial review and to specify other procedural details and is substantially similar to Gov't Code Section 63069.4(b)(1).

(h) 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 subsection (c) of this Section.

COMMENT: Cities and counties have the power to impose fines administratively in addition to civil actions for injunction or nuisance abatement and criminal prosecutions for violations of the Code. To do so, however, it is necessary to satisfy the requirements of *McHugh v. Santa Monica Rent Control Board*, 49 Cal. 3d 348 (1989), which the procedures spelled out in this section are designed to do. This language of this section is substantially similar to the provisions of Gov't Code Sections 53069.4(c) and (d).

Sec. [ \_\_\_\_ (\*11) ]. ENFORCEMENT. 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. Additional comment regarding considerations about the choice of remedy appears above with respect to administrative fines.

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

**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.

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

(c) Any Person violating this [ article / chapter ] is subject to a civil action brought by the [ City Prosecutor / District Attorney ] or the [ City Attorney / County Counsel ], punishable by:

1. a fine not less than one hundred dollars (\$100) and not exceeding five hundred dollars (\$500) for a first violation in any twelve-month (12) period; or
2. a fine not less than five hundred dollars (\$500) and not exceeding one thousand dollars (\$1,000) for a second violation in any twelve-month (12) period; or
3. a fine not less than one thousand dollars (\$1,000) and not exceeding three thousand dollars (\$3,000) for a third or subsequent violation in any twelve-month (12) period.

**COMMENT:** The amount of the fines may be adjusted. This model presents two choices: (1) enforcement under the code section for an infraction (like a parking ticket); and (2) enforcement under the code section for a misdemeanor (like vandalism). Other possibilities exist. For instance, the ordinance could be enforced under the code section for the City's or County's "wobbler" ordinance, which gives the prosecutor discretion whether to charge a particular violation as an infraction or a misdemeanor. Or it could be enforced using a sliding scale that provides for infraction enforcement in most cases, with misdemeanor enforcement against repeat violators. Fines and other criminal penalties are established by the Penal Code and are typically reflected in the general punishments provision of a local code. Note that if violations are defined as infractions, the fines imposed under Section (\*10)(a) cannot exceed the relatively low penalties authorized by the Penal Code for infractions. Accordingly, it may be

preferable to define these violations as misdemeanors and rely on a "wobbler" ordinance to authorize prosecution as an infraction in appropriate cases.

(d) 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. In addition, together with the provision for injunctive relief below, this provision authorizes a civil public nuisance action as an enforcement device.

(e) Violations of this [ article / 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.

COMMENT: This express statement serves to emphasize the fact that a violation of this ordinance can be enforced using Business & Professions Code section 17200.

(f) 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 38773.5 (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.

(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.

COMMENT: In addition to the remedies provided above, local governments may wish to provide for enforcement by private parties. If so, the right of private action must be expressly provided. Note that injunctions are issued only by the Superior Court of unlimited jurisdiction and, practically speaking, require an attorney. The language in this section providing who may bring an action tracks the language of California Business & Professions code section 17200 and is intended to allow almost anyone to act as a private enforcement officer.

Sec. [ \_\_\_\_ (\*12) ]. PRIVATE ENFORCEMENT.

COMMENT: For further explication of the rationale behind 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 or by e-mail at talc@phi.org or from our website at <http://talc.phi.org>.

(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 [ article / 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 [ article / 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.

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 \$5,000. 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 \$5,000. Note that this provision protects a retailer from being sued multiple times on behalf of the general public for the same violation.

(2) Restitution of the gains obtained in violation of this [ article / chapter ].

COMMENT: This provision can prevent a person operating illegally from keeping the profits of the illegal acts. Restitution is a remedy that entails "making good," in that it forces the defendant to give the plaintiff an equivalent value for any loss, damage, or injury. (See 1 Witkin, *Summary 9th Contracts* § 91 (1990).)

(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.

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.

(b) The Private Enforcer may also bring a civil action to enforce this [ article / 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.

COMMENT: In order to get an injunction, a plaintiff would have to sue in another division of superior court and not the small claims division. 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 latter, the defendant is not directly ordered to do something (or to refrain from doing something). Rather, 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 restitution, or it could be in addition to damages or restitution. 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.

(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 [ 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 its 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 in the workplace. 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 employer 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 employer's violation of a workplace smoking law).

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, an employee subjected to smoking in the workplace can first sue her employer solely on behalf of the general public, receiving the Statutory Damages amount for each violation. If the employee is made ill by the secondhand smoke, she can sue the employer later for personal injury.

This clause is not intended to modify well established legal rules concerning when a plaintiff may bring personal claims. Rather, it simply incorporates the logical line of 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.

(d) Nothing in this [ article / chapter ] shall prohibit the Private Enforcer from bringing a civil 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.