

ORDINANCE NO. _____

AN ORDINANCE OF THE BOARD OF SUPERVISORS OF THE COUNTY OF SANTA BARBARA AMENDING AND ADOPTING CHAPTER 37A OF THE COUNTY CODE OF THE COUNTY OF SANTA BARBARA, ENTITLED LICENSURE OF TOBACCO RETAILERS

The Board of Supervisors of the County of Santa Barbara finds and declares that:

- (a) 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 (Penal Code § 308);
- (b) State law requires tobacco retailers to check the identification of tobacco purchasers who reasonably appear to be under 18 years of age (Business & Professions Code § 22956) and provides procedures for onsite sting inspections of tobacco retailers using persons under 18 years of age (Business & Professions Code § 22952);
- (c) State law prohibits the sale of tobacco products and paraphernalia through self-services displays with limited exceptions for tobacco stores (Cal. Bus. & Prof. Code § 22960, 22962);
- (d) The results of the 2009 California Youth Tobacco Purchase Survey, shows that 8.6%¹ of retailers surveyed sold tobacco product to minors; though the most recent local youth purchase survey (2010) showed youth buy rates of 17%²;
- (e) 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 County to regulate business activity in order to discourage violations of state law;
- (f) State law explicitly permits cities and counties to enact local tobacco retail licensing ordinances, and allows for the suspension or revocation of a local license for a violation of any state tobacco control law (Cal. Bus. & Prof. Code § 22971.3);
- (g) More than 75% of all current smokers in 2001 began smoking before the age of 18³;
- (h) A recent study found that 33% of tobacco underage sales took place within 1,000 feet of schools⁴;
- (i) Ninety-six cities and counties in California have passed tobacco retailer licensing ordinances in an effort to stop minors from smoking⁵; and

¹ California Department of Public Health, California Tobacco Control Program. *Youth Tobacco Purchase Survey, 1995-2009*, July 2009. Available at: <http://www.cdph.ca.gov/Documents/PH09-85-Tobacco-Sales-to-Minors-2009-Chart.pdf>

² Dunn, D. & Long, T. *Santa Barbara County Tobacco Retail Licensing Policies: Looking to the Future, Tobacco Retail Licensing, Final Evaluation Report, 2007-2010 Santa Barbara County*, June 2010.

³ Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, Office of Applied Studies. *2003 National Survey on Drug Use and Health: Results*. 2003. Available at: www.oas.samhsa.gov/nhsda/2k3nsduh/2k3Results.htm#ch5

⁴ Lipton, Robert, et.al., *The Spatial Distribution of Underage Tobacco Sales in Los Angeles*. Substance Use and Misuse, 2008. Available at: <http://www.informaworld.com/smpp/content~db=all~content=a901982166>

⁵ Americans for Non-Smokers' Rights. *List of Communities with Licensing and Self-Service Ordinance Services*, July 2010. Available at: http://www.phlpnet.org/system/files/ANRF_List_of_Communities_with_Licensing_and_Self-Service_Display_Ordinances_PDF_Updated_7_10.pdf

(j) 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 County to regulate the operation of lawful businesses to discourage violations of federal, state, and local tobacco-related laws.

Therefore, the Board of Supervisors of the County of Santa Barbara amends and adopts Chapter 37A of the County Code of the County of Santa Barbara and ordains as follows:

SECTION ONE

Chapter 37A of the Santa Barbara County Code is amended, adopted and ordained as follows:

Sec. 37A-1. Purpose.

It is the intent of the board of supervisors, in enacting this Chapter, to discourage violations of laws which prohibit or discourage sale or distribution of Tobacco Products and Tobacco Paraphernalia to minors, but not to expand or reduce the degree to which the acts regulated by state or federal law are criminally proscribed.

Sec. 37A-2. Definitions.

The following words and phrases, whenever used in this chapter, shall have the meanings defined in this section unless the context clearly requires otherwise:

- (a) "Arm's Length Transaction" means a sale in good faith and for valuable consideration that reflects the fair market value in the open market between two informed and willing parties, neither of which is under any compulsion to participate in the transaction. A sale between relatives, related companies or partners, or a sale for which a significant purpose is avoiding the effect of a violation of this Chapter, is not an "Arm's Length Transaction".
- (b) "Health Officer" shall mean the county health officer or the duly authorized designee of the county health officer.
- (c) "Licensing Agent" shall mean the Santa Barbara County Treasurer-Tax Collector.
- (d) "Person" shall mean any natural person, partnership, cooperative association, private corporation, personal representative, receiver, trustee, assignee, or any other legal entity.
- (e) "School" shall mean any public or private kindergarten, elementary, middle, junior high or high school.
- (f) "Tobacco Paraphernalia" shall mean cigarette papers or wrappers, pipes, holders of smoking materials of all types, cigarette rolling machines, and any other item designed for smoking, preparation, storing or consumption of Tobacco Products.
- (g) "Tobacco Product" shall mean any substance containing tobacco leaf, including but not limited to cigarettes, cigars, pipe tobacco, hookah tobacco, snuff, chewing tobacco, dipping tobacco, snus, bidis or any other preparation of tobacco, and 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 cessation product specifically approved by the United States Food and Drug Administration for use in treating nicotine or tobacco dependence.

- (h) "Tobacco Retailer" shall mean 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.
- (i) "Tobacco Retailer License" or "License" shall mean a business license that permits the retail sale of Tobacco Products and/or Tobacco Paraphernalia.

Sec. 37A-3. Requirement for Tobacco Retailer License.

It is unlawful for any person to act as a Tobacco Retailer without first obtaining and maintaining a valid Tobacco Retailer License pursuant to this chapter for each location at which that activity is to occur. Tobacco Retailer Licenses are valid for one year. An application to renew a Tobacco Retailer License should be submitted prior to the expiration of the License.

Sec. 37A-4. Application Procedure.

- (a) An application for a Tobacco Retailer License, plus one copy shall be submitted to the Licensing Agent in the name of the person proposing to conduct Tobacco Retailing and shall be signed by such person or an authorized agent thereof. All applications shall be submitted on a form supplied by the Licensing Agent and shall contain the following information:
 - (1) The name, address, and telephone number of the applicant;
 - (2) The business name, address, and telephone number of each location for which a License is sought.
 - (3) Such other information as the Licensing Agent deems necessary for enforcement of this Chapter.
- (b) Once an application has been submitted to the Licensing Agent, it will be promptly forwarded to the Public Health Department for review. The Public Health Department shall, within twenty-one business days of their receipt of the application, recommend whether or not the Licensing Agent should issue the Tobacco Retailer License.

Sec. 37A-5. Issuance of Tobacco Retailer License.

- (a) Within thirty days of the Licensing Agent's receipt of an application for a Tobacco Retailer License, the Licensing Agent shall issue a License, unless it has been determined by the Public Health Department that the issuance of the License should be denied, based on the following criteria:
 - (1) The application is incomplete or inaccurate; or
 - (2) The application seeks authorization for Tobacco Retailing by a person or at a location for which a suspension is in effect pursuant to section 37A-15 of this Chapter; or
 - (3) The application seeks authorization for Tobacco Retailing in an area that is in violation of Sec. 37A-10 or County zoning pursuant to Chapter 35 of this Code.
- (b) A denial of a Tobacco Retailer License may be appealed pursuant to section 37A-15.
- (c) The Licensing Agent shall keep a permanent record of all Tobacco Retailer Licenses issued, but may destroy such records as provided by law with the approval of the Board of Supervisors.

Sec. 37A-6. Display of Tobacco Retailer License.

Each licensee shall prominently display the Tobacco Retailer License at each location where Tobacco Retailing occurs.

Sec. 37A-7. Fees for Tobacco Retailer License.

- (a) The initial fee or renewal fee for a Tobacco Retailer License shall be \$435 and shall be paid to the Licensing Agent when a Tobacco Retailer License application is submitted. The fee shall be allocated between the Licensing Agent and the Public Health Department: \$30 will be apportioned to the Licensing Agent for processing the licenses and the balance will be apportioned to the Public Health Department for administration and enforcement of this Chapter.
- (b) Renewal. Renewal fees are due the first business day after the date of expiration of a Tobacco Retailer License. A Tobacco Retailer will be allowed a thirty day grace period to pay the renewal fee. If the renewal fee has not been paid by the end of the grace period, a penalty of fifty percent of the renewal fee shall be added to the renewal fee. If the renewal fee and any applicable late penalty are not paid within ninety days after the date of expiration of a Tobacco Retailer License, then the Licensing Agent shall automatically revoke the License. Thereafter, if the Licensee desires to resume Tobacco Retailing, a new License application must be submitted to the Licensing Agent in accordance with Sec. 37A-4, along with the License fee and late penalty.

Sec. 37A-8. Tobacco Retailer Licenses are Nontransferable.

- (a) A Tobacco Retailer License is nontransferable. If a Person to whom a Tobacco Retailer License has been issued, changes the business location or sells the business, then that Person must obtain a new License prior to acting as a Tobacco Retailer at the new location, or the buyer of the business must obtain a license in the buyer's name before acting as a Tobacco Retailer.
- (b) Prior violations at a location shall continue to be counted against a location and License revocation periods shall continue to apply to a location unless:
 - (1) the location is being or has been fully transferred to a new owner; and
 - (2) the new owner(s) provide the Licensing Agent with clear and convincing evidence that the new owner(s) is acquiring or has acquired the location in an Arm's Length Transaction.

Sec. 37A-9. Tobacco Retailers must operate at a Fixed Location.

No Tobacco Retailer License may be issued to authorize Tobacco Retailing at other than a fixed location. For example, Tobacco Retailing by Persons on foot or from vehicles is prohibited.

Sec. 37A-10 Prohibition of Tobacco Retailing within One-Thousand Feet of a School.

- (a) No Tobacco Retailer License may be issued to authorize Tobacco Retailing within one-thousand feet of a School, except as provided in subsection (b).
- (b) Exception. A Tobacco Retailer operating with a valid Tobacco Retailer License at a location within one-thousand feet of a School, on the operative date of this ordinance, may continue to operate under their existing Tobacco Retailer License and under any Tobacco Retailer License that is timely renewed for that location.
- (c) All distances shall be measured in a straight line from the nearest point on the parcel boundary of an existing or proposed Tobacco Retailer to the nearest point on the parcel boundary of the nearest School.

Sec. 37A-11. Positive Identification Requirements for Sale of Tobacco Products and Tobacco Paraphernalia.

No Person engaged in Tobacco Retailing shall sell or transfer a Tobacco Product or Tobacco Paraphernalia to another Person who appears to be under the age of twenty-seven, without first examining the identification of the recipient to confirm that the recipient is at least the minimum age under state law to purchase and possess Tobacco Products or Tobacco Paraphernalia.

Sec. 37A-12. Minimum Age for Persons Selling Tobacco Products and Tobacco Paraphernalia.

No Person who is younger than the minimum age established by state law for the purchase or possession of Tobacco Products or Tobacco Paraphernalia shall engage in Tobacco Retailing.

Sec. 37A-13. False and Misleading Advertising Prohibited.

A Tobacco Retailer without a valid Tobacco Retailer License, including for example, a Tobacco Retailer License that has been suspended or revoked, shall not display any advertisement promoting the sale or distribution of Tobacco Products or Tobacco Paraphernalia at the Tobacco Retailer's location and shall keep all such products out of public view.

Sec. 37A-14. Compliance Monitoring.

- (a) Compliance with this Chapter shall be primarily enforced by the Santa Barbara County Sheriff, in conjunction with the Public Health Department. However, any peace officer may enforce the penal provisions of this Chapter.
- (b) The Sheriff will check the compliance of each Tobacco Retailer one to three times per twelve month period. However, the Sheriff may check the compliance of a Tobacco Retailer more or less often, depending on a Tobacco Retailer's compliance history. Nothing in this paragraph shall create a right of action for any Tobacco Retailer or other person, against the County or its agents.

Sec. 37A-15. Revocation or Suspension of Tobacco Retailer License; and Appeals.

- (a) Grounds for Revocation or Suspension.
 - (1) A Tobacco Retailer License shall be revoked if the Public Health Department finds that one or more of the basis for denial of a License under section 37A-5 of this Chapter exists. The revocation shall be without prejudice to the filing of a new application for a License following correction of the conditions that required revocation of the License.
 - (2) A Tobacco Retailer License shall be suspended under this section, if the Public Health Department finds that the licensee or his or her agent or employee has violated any federal, state or local law governing the sale, distribution, advertisement or display of tobacco, Tobacco Products or Tobacco Paraphernalia, including but not limited to: Penal Code Section 308a, or Business and Professions Code Sections 22950 et seq. (Stop Tobacco Access to Kids Enforcement Act "STAKE Act") or Sections 37-7 and 37-8 of this Code, or Business and Professions Code 25612.5(c)(7).
 - (3) The Public Health Department shall give notice of revocation or suspension to a licensee by personal service or by certified mail return receipt requested, addressed to where the License was issued. The notice of revocation or suspension shall be effective when notice is personally served, or when the certified mail return receipt is returned to the Public Health Department. If the licensee fails to file a timely appeal of the suspension or revocation pursuant to this Section, the notice of suspension or revocation shall be final, subject only to judicial review.

- (b) Suspension of Tobacco Retailer License. If the Public Health Department finds that there are grounds for suspension of a Tobacco Retailer License, the following sanctions shall be imposed:
 - (1) Upon a first finding by the Public Health Department of a violation of this chapter by a licensee or by any agent or employee of a licensee within any five year period, the License shall be suspended for thirty days.
 - (2) Upon the second finding by the Public Health Department of a violation of this chapter by a licensee or by any agent or employee of a licensee within any five year period, the License shall be suspended for ninety days.
 - (3) Upon the third or subsequent finding by the Public Health Department of a violation of this chapter by a licensee or by any agent or employee of a licensee within any five year period, the License shall be suspended for twelve months. However, if the licensee is operating within one-thousand feet of a school pursuant to Sec. 37A-10 of this Chapter, upon the third finding by the Public Health Department of a violation by a licensee or by any agent or employee of a licensee within any five year period, then the Tobacco Retailer License shall be permanently revoked.
- (c) Appeal of Denial, Revocation and/or Suspension. The decision of the Licensing Agent to deny the issuance of a Tobacco Retailer License or the decision of the Public Health Department to revoke or suspend a License can be appealed to the Health Officer or his designee. All appeals must be in writing and filed with the Health Officer, Santa Barbara County Public Health Department, 300 North San Antonio Road, Santa Barbara, CA 93110-1316 within ten days of receipt of notice of denial, or within ten days of the effective date of the notice of revocation or suspension of a Tobacco Retailer License. The Health Officer shall set an appeal hearing at the earliest practicable time and shall give written notice of the hearing to the parties at least ten days before the date of the hearing. At the hearing any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. Within a reasonable time after the conclusion of the hearing, the Health Officer shall make a written decision. An appeal shall stay all proceedings until the appeal is resolved. Any decision rendered by the Health Officer shall be a final administrative decision.
- (d) Settlement in Lieu of Appeal Hearing. For a first or second alleged violation of this Chapter within any five year period, the Health Officer or his designee may engage in settlement negotiations and may enter into a settlement agreement with a Tobacco Retailer alleged to have violated this Chapter, provided that a timely appeal has been filed. Settlements shall not be confidential.
 - (1) After a first alleged violation, any settlement must contain the following minimum terms:
 - (A) Suspension of the Tobacco Retailer License for at least fifteen days;
 - (B) A settlement payment to the Public Health Department of at least one-thousand dollars; and
 - (C) An admission by the licensee that the violation occurred and a stipulation that the violation will be counted when considering what penalty will be assessed for any future violations.
 - (2) After a second alleged violation, any settlement must contain the following minimum terms:
 - (A) Suspension of the Tobacco Retailer License for at least forty-five days;
 - (B) A settlement payment to the Public Health Department of at least five-thousand dollars; and
 - (C) An admission by the licensee that the violation occurred and a stipulation that the violation will be counted when considering what penalty will be assessed for any future violations.

Sec. 37A-16. Penalties--Enforcement.

- (a) Any violation of the provisions of this Chapter by any person is a misdemeanor and is punishable as provided in Chapter 1, Sec.1-7 of this Code.
- (b) Violations of this ordinance are hereby declared to be public nuisances.
- (c) In addition to other remedies provided by this chapter or by other law, any violation of this Ordinance may be remedied by a civil action brought by the County Counsel, including but not limited to administrative or judicial nuisance abatement proceedings, Civil Code enforcement proceedings, and suits for injunctive relief. The remedies provided by this chapter are cumulative and in addition to any other remedies available at law or in equity.

Sec. 37A-17. Severability.

If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this ordinance 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 the rules adopted hereby. The Board of Supervisors of the County of Santa Barbara 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.

Sec. 37A-18. Grace Period.

Any retailer who is selling tobacco products as of the effective date of this Ordinance, shall obtain a Tobacco Retailer License within sixty days of the effective date of this ordinance.

SECTION TWO

This ordinance shall take effect and be in force thirty (30) days from the date of its passage; and before the expiration of fifteen (15) days after its passage it, or a summary of it, shall be published once, in the Santa Barbara News Press, the Santa Maria Times and the Lompoc Record, which are newspapers of general circulation, published in the County of Santa Barbara.

PASSED, APPROVED AND ADOPTED this day of , 2010, by the following vote:

AYES:

NOES:

ABSTAIN:

ABSENT:

Chair, Board of Supervisors

ATTEST:
MICHAEL F. BROWN
CLERK OF THE BOARD

By: _____
Deputy

APPROVED AS TO FORM:
DENNIS MARSHALL
COUNTY COUNSEL

APPROVED AS TO ACCOUNTING FORM:
ROBERT W GEIS, CPA
AUDITOR-CONTROLLER

By: _____
Deputy County Counsel

By: _____
Deputy

APPROVED
TAKASHI WADA, MD, MPH
DIRECTOR/HEALTH OFFICER
PUBLIC HEALTH DEPARTMENT

By: _____
Director

APPROVED
BERNICE JAMES
TREASURER-TAX COLLECTOR

APPROVED
BILL BROWN
SHERIFF

By: _____

By: _____