

INTRODUCED BY COUNCILMEMBER \_\_\_\_\_

City Attorney

**OAKLAND CITY COUNCIL****ORDINANCE No. 12868 C.M.S.**

**AN ORDINANCE AMENDING THE OAKLAND PLANNING CODE TO:**  
**(1) AMEND CHAPTER 17.09 "DEFINITIONS" TO DEFINE TOBACCO ORIENTED ACTIVITIES AS THOSE THAT SELL ANY AMOUNT OF TOBACCO OR TOBACCO RELATED PRODUCTS WITH THE EXCEPTION OF STORES OVER 10,000 SQUARE FEET OR THOSE ASSOCIATED WITH A GASOLINE SERVICE STATION; AND (2) AMEND CHAPTER 17.134 "CONDITIONAL USE PERMIT PROCEDURES" TO REQUIRE A MAJOR CONDITIONAL USE PERMIT FOR ESTABLISHING A NEW TOBACCO ORIENTED ACTIVITY**

**WHEREAS**, more than 440,000 people die in the United States from tobacco-related diseases every year, making it the nation's leading cause of preventable death; and

**WHEREAS**, the World Health Organization (WHO) estimates that by 2030, tobacco will account for 10 million deaths per year, making it the greatest cause of death worldwide; and

**WHEREAS**, the California Legislature has recognized the danger of tobacco use and has made reducing youth access to tobacco products a high priority, as evidenced by the fact that:

- The Legislature has declared that smoking is the single most significant source of preventable disease and premature death in California (Cal. Health & Safety Code § 118950); and
- 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
- State law requires that tobacco retailers check the identification of tobacco purchasers who reasonably appear to be under 18 years of age (Cal. 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
- State law prohibits the sale of tobacco products and paraphernalia through self-services displays except in adult-only establishments (Cal. Bus. & Prof. Code § 22962); and
- State law prohibits the sale of "bidis" (hand-rolled filter-less cigarettes imported primarily from India and Southeast Asian countries) except in adult-only establishments (Cal. Pen. Code § 308.1); and
- 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**, 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 local governments to regulate business activity in order to discourage violations of law; and

**WHEREAS**, despite the state’s efforts to limit youth access to tobacco, minors are still able to access cigarettes, as evidenced by the fact that:

- Nearly half of all youth smokers nationwide buy the cigarettes they smoke, either directly from retailers or vending machines, or by giving money to others to purchase the cigarettes for them; and
- Minors consume 924 million packs of cigarettes each year nationwide, yielding the tobacco industry \$480 million in profits from underage smokers; and
- Most adults who have ever tried smoking have tried their first cigarette under the age of 18, and are on average under the age of 16; and

**WHEREAS**, research demonstrates that local tobacco retail ordinances dramatically reduce youth access to cigarettes, as evidenced by the following:

- A study of several states found that youth sales of tobacco moved from a baseline of 70% of retailers selling to minors before the adoption of the ordinance to less than 5% in the year and a half after enactment; and
- A study of the effect of licensing and enforcement methods used in the Philadelphia area revealed a decrease in sales to minors from 85% in 1994 to 43% in 1998; and
- A study of several Minnesota cities found that an increased licensing fee in conjunction with strict enforcement of youth access laws led to a decrease from 39.8% to 4.9% in the number of youth able to purchase tobacco; and

**WHEREAS**, the City has a substantial interest in promoting compliance with federal, state, and local laws intended to regulate tobacco sales and use; in discouraging the illegal purchase of tobacco products by minors; in promoting compliance with laws prohibiting sales of cigarettes and tobacco products to minors; and finally, and most importantly, in protecting children from being lured into illegal activity through the misconduct of adults;

**WHEREAS**, the City Council finds and determines that the adoption of this ordinance is exempt from CEQA under Sections 15061(b)(3), 15301, 15303 and 15183 of the CEQA Guidelines; now, therefore

**THE COUNCIL OF THE CITY OF OAKLAND DOES ORDAIN AS FOLLOWS:**

**Section 1.** The City Council finds and determines the forgoing recitals to be true and correct and hereby makes them a part of this Ordinance.

**Section 2.** Chapter 17.09 and Chapter 17.134 of the Oakland Planning Code are hereby amended as detailed in **Exhibit A**, attached hereto and hereby incorporated herein by reference.

**Section 3.** Prior to adopting this Ordinance, the City Council independently finds and determines that this action complies with CEQA because the proposed amendments are exempt under Sections 15061(b)(3) as the proposed amendments will not cause a physical change to the environment. The amendments are also exempt under Sections 15301 and 15303 because they deal with existing structures and/or establishment of new small structures. . As a separate and independent basis, this Ordinance is consistent with CEQA Guidelines section 15183. The Environmental Review Officer is directed to cause to be filed a Notice of Determination with the appropriate agencies.

**Section 4.** This ordinance shall be effective upon its adoption if it receives at least six affirmative votes; otherwise, it shall be effective upon the seventh day after final adoption.

**Section 5.** Nothing in this Ordinance shall be interpreted or applied so as to create any requirement, power, or duty in conflict with any federal or state law.

**Section 6.** If any section, subsection, sentence, clause or phrase of this Ordinance is held to be invalid or unconstitutional, the offending portion shall be severed and shall not affect the validity of the remaining portions which shall remain in full effect.

**Section 7.** That the record before this Council relating to this Ordinance includes, without limitation, the following:

1. the application, including all accompanying maps and papers;
2. all relevant plans and maps;
3. all final staff reports, decision letters and other documentation and information produced by or on behalf of the City;
4. all oral and written evidence received by the City staff, Planning Commission and City Council before and during the public hearings on the application;
5. all matters of common knowledge and all official enactments and acts of the City, such as (a) the General Plan and the General Plan Conformity Guidelines; (b) Oakland Municipal Code, including, without limitation, the Oakland real estate regulations, Oakland Fire Code; (c) Oakland Planning Code; (d) other applicable City policies and regulations; and, (e) all applicable state and federal laws, rules and regulations.

**Section 8.** That the custodians and locations of the documents or other materials which constitute the record of proceedings upon which the City Council's decision is based are respectively: (a) Community & Economic Development Agency, Planning & Zoning Division, 250 Frank H. Ogawa Plaza, Suite 3315, Oakland, CA.; and (b) Office of the City Clerk, 1 Frank H. Ogawa Plaza, 1<sup>st</sup> floor, Oakland, CA.

IN COUNCIL, OAKLAND, CALIFORNIA, APR 15 2008

**PASSED BY THE FOLLOWING VOTE:**

AYES- BROOKS, BRUNNER, CHANG, ~~KERNIGHAN~~, NADEL, QUAN, REID, and PRESIDENT DE LA FUENTE - 7

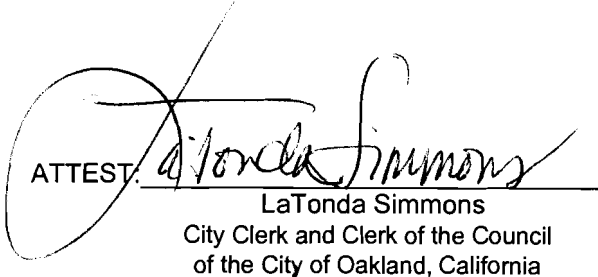
NOES- 0

ABSENT- 0

ABSTENTION- 0

Excused- Kernighan- 1

ATTEST.

  
LaTonda Simmons  
City Clerk and Clerk of the Council  
of the City of Oakland, California

Introduction Date: APR 1 2008

DATE OF ATTESTATION:

4-21-08

## EXHIBIT A

Section 17.09 of the Planning Code defines tobacco related activities as follows:

*“Tobacco oriented activities” are defined as activities devoting any floor area or display area to or deriving any gross sales receipts from, the sale or exchange of tobacco-related products with the exception of (a) stores with over 10,000 square feet of total sales area, provided the floor area devoted to tobacco sales does not exceed 20% of the overall store area or display area or 75% of gross sales receipts from, the sale or exchange of tobacco-related products, or (b) activities selling tobacco related products in conjunction with Automotive Servicing Commercial Activities as defined in Section 17.10.470 (Gasoline Stations), provided the floor area devoted to tobacco sales does not exceed 20% of the overall store area or display area or 75% of gross sales receipts from, the sale or exchange of tobacco-related products.*

Section 17.134.020 of the Planning Code defines major and minor conditional use permits as follows:

*17.134.020 Definition of major and minor conditional use permits.*

*A. Major Conditional Use Permit. A major conditional use permit is one that involves any of the following:*

*1. Thresholds. Any project that meets any of the following size thresholds:*

*a. The actual project site (including only portions of the lot actually affected by the project) exceeds one acre;*

*b. Nonresidential projects involving twenty-five thousand (25,000) square feet or more of floor area, except in the R-80, R-90, C-51, C-55, S-2, or S-15 zones;*

*c. Residential projects requiring a conditional use permit for density resulting in a total number of dwelling units as follows:*

*i. Two or more dwelling units in the R-35 zone, except in the case of a Secondary Unit,*

*ii. Three or more dwelling units in the R-36 or R-40 zone,*

*iii. Seven or more dwelling units in the R-50 zone.*

*d. Residential projects requiring a conditional use permit to exceed the basic or permitted density resulting in seven or more dwelling units in the R-60, R-70, R-80, or R-90 zone.*

*e. Large Scale Developments. Any development which is located in the R-80, R-90, C-51, C-55, S-2, or S-15 zone and results in more than one hundred thousand (100,000) square feet of new floor area, or a new building, or portion thereof, of more than one hundred twenty (120) feet in height.*

*2. Uses. Any project that involves any of the following activity or facility types except where the proposal involves only accessory parking, the resumption of a discontinued nonconforming activity, or an addition to an existing activity which does not increase the existing floor area by more than twenty (20) percent:*

*a. Activities:*

*i. Residential Care Residential,*

*ii. Service Enriched Housing Residential,*

*iii. Transitional Housing Residential,*

*iv. Emergency Shelter Residential,*

- v. *Extensive Impact Civic,*
  - vi. *Convenience Market Commercial,*
  - vii. *Fast-food Restaurant Commercial,*
  - viii. *Alcoholic Beverage Sales Commercial or sale of alcoholic beverages at any full-service restaurant in a location described by Section 17.102.210 (B),*
  - ix. *Heavy Manufacturing,*
  - x. *Small Scale Transfer and Storage Hazardous Waste Management,*
  - xi. *Industrial Transfer/Storage Hazardous Waste Management,*
  - xii. *Mining and Quarrying Extractive;*
  - xiii. *Tobacco Oriented Activities*
  - b. *Facilities:*
    - i. *Drive-Through,*
    - ii. *Advertising Sign, except when the facility meets the requirements of Section 17.11.090.*
    - iii. *Special Health Care Civic Activities.*
3. *Special Situations. Any project that involves any of the following situations:*
- a. *Any project that requires development of an Environmental Impact Report;*
  - b. *Any Commercial or Manufacturing Activity, or portion thereof, which is located in any residential zone and occupies more than one thousand five hundred (1,500) square feet of floor area, except where the proposal involves only the resumption of a nonconforming activity;*
  - c. *Off-Street Parking Facilities in the C-40, C-51, C-52 and S-2 zones serving fifty (50) or more vehicles;*
  - d. *Transient Habitation Commercial Activities in the C-40 and C-45 zones;*
  - e. *Monopole Telecommunication Facilities in, or within three hundred (300) feet of the boundary of, any residential zone;*
  - f. *Any project in the OS zone listed as requiring a major conditional use permit in Chapter 17.11;*
  - g. *Any electroplating activity as defined in Section 17.09.040 subject to the provisions of Section 17.102.340;*
  - h. *Any conditional use permit application referred by the Director of City Planning to the City Planning Commission for decision pursuant to Section 17.134.040(B)(1);*
  - i. *Any Telecommunications Facility in or within one hundred (100) feet of the boundary of any residential zone;*
  - j. *Any Telecommunications Facility whose antennas and equipment are not fully concealed from view within three hundred (300) feet of the boundary of residential zones R-1 through R-60 inclusive.*
- B. Minor Conditional Use Permit. A minor conditional use permit is a conditional use permit which does not involve any of the purposes listed in subsection A of this section. (Ord. 12776 § 3, Exh. A (part), 2006; Ord. 12768 § 3 (part), 2006; Ord. 12501 § 80, 2003; Ord. 12450 § 19, 2002; Ord. 12350 § 3 (part), 2001; Ord. 12272 § 4 (part), 2000; Ord. 12237 § 4, 2000; Ord. 12234 § 4, 2000; Ord. 12224 § 7, 2000; Ord. 12205 § 4 (part), 2000; Ord. 12199 § 9 (part), 2000; Ord. 12138 § 4 (part), 1999; Ord. 12078 § 5 (part), 1998; Ord. 12072 § 12, 1998; Ord. 12016 § 2 (part), 1997; Ord. 11904 § 5.91, 1996; Ord. 11892 § 21, 1996; Ord. 11539 § 2, 1993; prior planning code § 9201)*