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Introduced by councilmember LARRY REID

REVISED PURSUANT TO CITY COUNCIL DIRECTION AT MARCH 18, 2008 MEETING

APPROVED AS TO FORM AND LEGALITY

City Attorney

Ordinance No. _____C.M.S.

ORDINANCE REQUIRING THE LICENSURE OF TOBACCO RETAILERS AND CODIFYING SAID REQUIREMENTS AT OAKLAND MUNICIPAL CODE CHAPTER 5.91 AND ADOPTING A TOBACCO LICENSING APPLICATION FEE OF $50.00 AND A TOBACCO LICENSING FEE OF $1,500.00 ANNUALLY TO COVER ADMINISTRATION, INSPECTION, COMPLIANCE AND SIMILAR COSTS

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, state law requires all tobacco retailers to be licensed by the Board of Equalization in order to curb the illegal sale and distribution of cigarettes which deprive the state yearly of hundreds of millions of tax dollars that fund local and state programs such as health services, antismoking campaigns, cancer research, and education programs (Cal. Bus. & Prof. Code §§ 22970.1, 22972); and

WHEREAS, 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); 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 implementation of tobacco-licensing requirements is supported by most Californians, as evidenced by the following:

- 73% of California adults think tobacco retailers should be licensed;
- 65% of California's key opinion leaders surveyed support implementation of tobacco-licensing requirements; and
- Over 90% of enforcement agencies surveyed in 2000 rated license suspension or revocation after repeated violations as an effective strategy to reduce youth access to tobacco;

WHEREAS, seventy-one cities and counties in California have passed tobacco retailer licensing ordinances in an effort to stop minors from smoking, and

WHEREAS, 615 communities in the United States require a license to sell tobacco products and provide penalties such as suspension or revocation of the license for illegal conduct (e.g., selling tobacco to minors); and

WHEREAS, California retailers continue to sell tobacco to underage consumers, evidenced by the following:

- 14% of all tobacco retailers unlawfully sold to minors in 2004;
- 31.5 % of non-traditional tobacco retailers such as deli, meat, and produce markets sold to minors in 2004; and

- Teens surveyed in 2002 say they bought their cigarettes at: gas stations (58%), liquor stores (45%), and supermarkets and small grocery stores (25%).

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 to regulate the operation of lawful businesses to discourage violations of federal, state, and local tobacco-related laws; 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, and 15303 of the CEQA Guidelines;

NOW, THEREFORE, The City Council of the City of Oakland does ordain as follows:

SECTION 1. The City Council finds and determines the foregoing recitals to be true and correct and hereby makes them part of this Ordinance.

SECTION 2. Chapter 5.91 is hereby added to Title 5, Building Taxes, Permits and Regulations, of the Oakland Municipal Code, as follows:

Chapter 5.91. LICENSURE OF TOBACCO RETAILERS

5.91.010. DEFINITIONS. The following definitions apply to this Chapter:

"Arm's Length Transaction" as used in this Chapter shall mean 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 the violations of this Chapter is not an Arm's Length Transaction.

"City Administrator" as used in this Chapter shall mean the City Administrator for the City of Oakland; further provided, that the use of the title of any officer or to any office shall refer to such officer or office of the City of Oakland.

"Department" as used in this Chapter shall mean the Oakland Police Department.

"Drug Paraphernalia" as used in this Chapter shall have the same definition set forth under California Health and Safety Code section 11364.5, as amended from time to time.

"Person" as used in this Chapter shall mean any natural person, partnership, cooperative association, corporation, limited liability company, personal representative, receiver, trustee, assignee, or any other legal entity.

"Proprietor" as used in this Chapter shall mean 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 share ultimate control over the day-to-day operations of a business.

"Public Nuisance" as used in this Chapter shall have the same definition as set forth under California Civil Code Section 3490, as amended from time to time.

"Self-Service Display" as used in this Chapter shall mean the open display of Tobacco Products or Tobacco Paraphernalia in a manner that is accessible to the general public without the assistance of the retailer or employee of the retailer. A Vending Machine is a form of Self-Service Display.

"Smoking" as used in this Chapter shall mean possessing a lighted Tobacco Product, lighted Tobacco Paraphernalia, or any other lighted weed or plant (including a lighted pipe, cigar, hookah pipe, or cigarette of any kind), the lighting of a Tobacco Product,

Tobacco Paraphernalia, or any other weed or plant (including a pipe, cigar, hookah pipe, or cigarette of any kind).

"Tobacco Paraphernalia" as used in this Chapter shall mean cigarette papers or wrappers, pipes, holders of smoking materials of all types, cigarette rolling machines, and any other item designed for the smoking, preparation, storing, or consumption of Tobacco Products.

"Tobacco Product" as used in this Chapter shall mean: (1) any substance containing tobacco leaf, including but not limited to cigarettes, cigars, pipe tobacco, hookah 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 United States Food and Drug Administration for use in treating nicotine or tobacco product dependence.

"Tobacco Retailer" as used in this Chapter 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. This definition is without regard to the quantity of tobacco, Tobacco Products, or Tobacco Paraphernalia sold, offered for sale, exchanged, or offered for exchange.

"Vending Machine" as used in this Chapter shall mean a machine, appliance, or other mechanical device operated by currency, token, debit card, credit card, or any other form of payment that is designed or used for vending purposes, including, but not limited to, machines or devices that use remote control locking mechanisms.

Sec. 5.91.020. TOBACCO RETAILER LICENSE REQUIRED.

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 Chapter for each location at which that activity is to occur. Tobacco Retailing without a valid Tobacco Retailer's license is a Public Nuisance, as defined in the Oakland Municipal Code. This Chapter applies to all existing and future Tobacco Retailers in the City. The City Administrator shall have power to adopt rules of procedure and regulations not inconsistent with the provisions of this Chapter for the purpose of carrying out the provisions of this Chapter; and a copy of such rules of procedure and regulations shall be on file and available for public examination at the Department.

B. A Tobacco Retailer or Proprietor without a valid Tobacco Retailer license, including without limitation a Person whose license has been suspended or revoked:

(1) Shall keep all Tobacco Products and Tobacco Paraphernalia out of public view. The public display of Tobacco Products or Tobacco Paraphernalia in violation of this provision shall constitute Tobacco Retailing without a license under Section 5.91.120.

(2) Shall not display any advertisement relating to Tobacco Products or Tobacco Paraphernalia that promotes the sale or distribution of such products from the Tobacco Retailer's location or that could lead a reasonable consumer to believe that such products can be obtained at that location.

C. Nothing in this 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 identified on the face of the license. For example, nothing in this Chapter shall be construed to render inapplicable, supercede, or apply in lieu of, any other provision of applicable law, including but not limited to, any provision of this Code, the Oakland Planning Code, including the conditional use permit, if applicable, or any condition or limitation on smoking in an enclosed place of employment pursuant to California Labor Code section 6404.5. For example, obtaining a Tobacco Re-

tailer license does not make the retailer a "retail or wholesale tobacco shop" for the purposes of California Labor Code section 6404.5.

Sec. 5.91.030. LIMITS ON TOBACCO RETAILER LICENSES.

A. No license may issue to authorize Tobacco Retailing at other than a fixed location. For example, Tobacco Retailing by Persons on foot or from vehicles is prohibited.

B. No license may issue to authorize Tobacco Retailing at any location where Drug Paraphernalia is sold, offered for sale, or displayed for sale.

Sec. 5.91.040. 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, and shall include the license application fee set forth under Section 5.91.080.

It is the responsibility of each Proprietor to be informed regarding all laws applicable to Tobacco Retailing, including those laws affecting the issuance of a Tobacco Retailer's license. No Proprietor may rely on the issuance of a license as a determination by the City that the Proprietor has complied with all laws applicable to Tobacco Retailing. A license issued contrary to this Chapter, contrary to any other law, or on the basis of false or misleading information supplied by a Proprietor shall be revoked pursuant to Section 5.91.110(D) of this Chapter. Nothing in this Chapter shall be construed to vest in any Person obtaining and maintaining a Tobacco Retailer's license any status or right to act as a Tobacco Retailer in contravention of any provision of law.

All applications shall be submitted on a form supplied by the Department and shall contain, at a minimum, the following information:

A. The name, address, telephone number, driver's license or similar identification, including date of birth, of each Proprietor of the business that is seeking a license.

B. The business name, address, telephone number and business hours of the single fixed location for which a license is sought.

C. If the single fixed location is leased, a copy of the lease and the name of the owner of single fixed location.

D. A single name and mailing address authorized by each Proprietor to receive all communications and notices (the "Authorized Address") required by, authorized by, or convenient to the enforcement of this Chapter. 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 (B) above.

E. Proof that the location for which a Tobacco Retailer's license is sought has been issued a valid state tobacco retailer's license by the California Board of Equalization.

F. Whether or not any Proprietor or prior Proprietor, to the best of applicant's knowledge, has admitted violating, or has been found to have violated, this Chapter or whose proprietorship has admitted violating, or has been found to have violated, this Chapter, and, if so, the dates and locations of all such violations within the previous six years.

G. All criminal violations and any prior violations under this Chapter of each Proprietor or prior Proprietor, to the best of applicant's knowledge.

H. Such other information as the Department deems necessary for the administration or enforcement of this Chapter.

I. All information required to be submitted in order to apply for a Tobacco Retailer's license shall be updated with the Department whenever the information changes. A Tobacco Retailer shall provide the Department with any updates within ten (10) business days of a change.

J. A copy of the Major Conditional Use Permit, if applicable (or an explanation as to why such permit is not required).

K. A statement signed by each Proprietor that no Drug Paraphernalia is or will be sold at the business seeking the license.

Sec. 5.91.050. ISSUANCE OF LICENSE.

Upon the receipt of an application for a Tobacco Retailer's license and the license fee required by this Chapter, the Department shall issue a license unless substantial evidence demonstrates that one or more of the following bases for denial exists:

A. The information presented in the application is incomplete, inaccurate, or false. Intentionally supplying inaccurate or false information shall be a violation of this Chapter.

B. The application seeks authorization for Tobacco Retailing at a location for which this Chapter prohibits issuance of Tobacco Retailer licenses. However, this subparagraph shall not constitute a basis for denial of a license if the applicant provides the City with documentation demonstrating by clear and convincing evidence that the applicant has acquired or is acquiring the location or business in an Arm's Length Transaction.

C. The application seeks authorization for Tobacco Retailing for a Proprietor to whom this Chapter prohibits a license to be issued.

D. The application seeks authorization for Tobacco Retailing that is prohibited pursuant to this Chapter (e.g., mobile vending), that is unlawful pursuant to any provision of this Code, or that is unlawful pursuant to any other law.

E. The Department, or the investigating official acting thereon, determines, in its reasonable discretion, that the applicant is not a fit and proper person, either for financial, moral, or other reasons, to conduct or maintain the business, establishment, place, or other thing, to which the application pertains; that the applicant has not complied with the provisions of this code which pertain directly to the maintenance or conduct of the busi-

ness, establishment, place, or other thing in question or for the violation of any law appertaining thereto; or for any other reason hereinafter in this Chapter more specifically set forth. In granting or denying the license, the Department, shall consider the character of the applicant with respect to morality, honesty and integrity, and all pertinent acts which may concern the health, safety, and general welfare of the public.

F. A denial of a license application shall be in writing, citing the reasons for such denial and shall be appealable to the City Administrator per the appeal provisions set forth in Section 5.91.110 of this Chapter.

Sec. 5.91.060. LICENSE RENEWAL AND EXPIRATION.

A. RENEWAL OF LICENSE. A Tobacco Retailer license is invalid unless the appropriate fee has been paid in full and the term of the license has not expired. The term of a Tobacco Retailer license is one year. Each Tobacco Retailer shall apply for the renewal of his or her Tobacco Retailer's license and submit the license fee no later than thirty (30) days prior to expiration of the license term.

B. EXPIRATION OF LICENSE. A Tobacco Retailer's license that is not timely renewed shall expire at the end of its term. To reinstate a license that has expired, or to renew a license not timely renewed pursuant to subparagraph (A), the Proprietor must:

(1) Submit the license fee plus a reinstatement fee of ten percent (10%) of the license fee.

(2) Submit a signed affidavit affirming that the Proprietor:

(i) has not sold and will not sell any Tobacco Product or Tobacco Paraphernalia after the license expiration date and before the license is renewed; or

(ii) has waited the appropriate ineligibility period established for Tobacco Retailing without a license, as set forth in Section 5.91.120(A) of this Chapter, before

seeking renewal of the license.

Sec. 5.91.070. LICENSES NONTRANSFERABLE.

A. A Tobacco Retailer's license may not be transferred from one Person to another or from one location to another. Whenever a Tobacco Retailing location has a change in Proprietors a new Tobacco Retailer's license is required.

B. Notwithstanding any other provision of this Chapter, prior violations at a location shall continue to be counted against a location and license ineligibility periods shall continue to apply to a location unless:

(1) the location has been fully transferred to a new Proprietor or fully transferred to entirely new Proprietors; and

(2) the new Proprietor(s) provide the City with clear and convincing evidence that the new Proprietor(s) have acquired or is acquiring the location in an Arm's Length Transaction.

Sec. 5.91.080. FEES FOR LICENSE.

A. AMOUNT OF FEES. *The application fee shall be $50.00 and the licensing and re*newal fee shall be $1500.00, or as the application, licensing and renewal fees may be amended in the City's master fee schedule. The fees 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 regulatory program authorized by this Chapter. All fees shall be used exclusively to fund the program, and shall be separately accounted for. Fees are nonrefundable except as may be required by law.

B. FEES DUE AND PAYABLE. The application fee is due and payable at the time the application is submitted to the City. All licensing and renewal fees shall be due and payable to the City as determined by the Department. The amount of fees shall be deemed a debt to the City. An action may be commenced in the name of the City in any court of competent jurisdiction for the amount of any delinquent fees. An action to collect the fee must be commenced within three years of the date the fee becomes due. An action to collect the penalty for nonpayment of the fee must be commenced within three years of the date the penalty accrues.

C. FEES ASSESSED AGAINST THE BUSINESS PROPERTY. The amount of fee, penalty and interest imposed under the provisions of this Chapter may be assessed against the business property on which the fee is imposed in those instances where the Proprietor of the business and the business property are one and the same. If the fees are not paid when due, such fee, penalty and interest shall constitute an assessment against *such business property and shall be a lien on the property for the amount thereof, which* lien shall continue until the amount thereof including all penalties and interest are paid, or until it is discharged of record.

D. TOBACCO RETAILERS SUBJECT TO DEEMED APPROVED ALCOHOLIC BEVERAGE SALE REGULATIONS. Any Tobacco Retailer subject to annual inspection fees for alcoholic beverage retail establishments as set forth in the master fee schedule shall not pay licensing and renewal fees under this Chapter. Such Tobacco Retailer, however, shall apply for a Tobacco Retailer's license and pay the application fee set forth under paragraph (a) of this Section.

Sec. 5.91.090. OTHER REQUIREMENTS AND PROHIBITIONS.

A. LAWFUL BUSINESS OPERATION. In the course of Tobacco Retailing or in the operation of the business or maintenance of the location for which a license issued, it shall be a violation of this Chapter for a licensee, or any of the licensee's agents or employees, to:

(1) Violate any local, state, or federal law applicable to Tobacco Products, Tobacco Paraphernalia, Tobacco Retailing, Smoking, including without limitation Oakland Municipal Code Chapter 8.30.

(2) Violate any local, state, or federal law regulating exterior, storefront, window, or door signage.

(3) Violate any local, state or federal law regulating the sale, offer for sale, or display for sale, of any Drug Paraphernalia.

(4) Operate in any manner that adversely affects the health, safety or welfare of persons residing or working in the surrounding area, or in any manner that constitutes a Public Nuisance.

B. DISPLAY OF LICENSE. *Each Tobacco Retailer license shall be prominently displayed* in a publicly visible location at the licensed location.

C. POSITIVE IDENTIFICATION REQUIRED. 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 (27) years 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 the Tobacco Product or Tobacco Paraphernalia.

D. MINIMUM AGE FOR PERSONS SELLING TOBACCO. No Person who is younger than the minimum age established by state law for the purchase or possession of Tobacco Products shall engage in Tobacco Retailing.

E. SELF-SERVICE DISPLAYS PROHIBITED. No Tobacco Retailer shall display Tobacco Products or Tobacco Paraphernalia by means of a Self-Service Display or engage in Tobacco Retailing by means of a Self-Service Display.

Sec. 5.91.100. COMPLIANCE MONITORING.

A. Compliance with this Chapter shall be monitored by the Department. Any peace officer may enforce the penal provisions of this Chapter.

B. Nothing in this Chapter shall create a right of action in any Tobacco Retailer licensee or other Person against the City or its agents.

C. Compliance checks shall determine, at a minimum, if the Tobacco Retailer is conducting business in a manner that complies with tobacco laws regulating youth access to tobacco. When appropriate, the compliance checks shall determine compliance with other laws applicable to Tobacco Retailing.

Sec. 5.91.110. DENIAL OR REVOCATION OF LICENSE.

A. *DENIAL OR REVOCATION OF LICENSE. In addition to any other penalty authorized by law or this Chapter,* a Proprietor's application shall be denied by the Department or a Tobacco Retailer's license shall be revoked by the City Administrator as in his or her discretion may seem just, for any reason for which a granting of such license might be lawfully denied, or for any other reason hereinafter in this Chapter specifically provided including, but not limited to, any violation of law designated in Section 5.91.090(A) of this Chapter. An appeal of a denial or a revocation of a license under this Chapter shall be made only upon a hearing held before the City Administrator after ten (10) days written notice by U.S. mail to such Proprietor applying for the license or Tobacco Retailer's license holder, as applicable, stating generally the grounds of complaint against him or her and stating the time and place where such hearing will be held. In the event of revocation of the license, any certificate issued in connection with the granting of such license shall, by the holder thereof, be forthwith surrendered to the City Administrator.

B. HEARINGS ON REVOCATION OF LICENSE OR APPEAL OF DENIAL. Any investigation, inquiry or hearing which the City Administrator has power to undertake or to hold may be undertaken or held by such member of the City Administrator's staff as he or she may designate and to whom the matter is assigned. The person to whom a matter is as-

signed shall be deemed a "Hearing Officer." In any matter so assigned the Hearing Officer conducting the investigation, inquiry or hearing shall report within thirty (30) days after the conclusion of the investigation, inquiry or hearing his or her findings and recommendations to the City Administrator.

(1) Within sixty (60) days after the filing of the findings and recommendations of the Hearing Officer, the City Administrator shall confirm, adopt, modify or set aside the findings of the Hearing Officer and with or without notice enter his or her order, findings, decision or award based upon the record in the case.

(2) In such hearings, investigations, and inquiries by the City Administrator or a Hearing Officer, he or she shall not be bound in the conduct thereof by the common law or statutory rules of evidence and procedure but inquiry shall be made in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the public parties and carry out justly the spirit and provisions of this Chapter.

(3) No informality in any proceeding or the manner of taking testimony shall invalidate any other decision, award or rule made as specified in this Chapter. No order, decision, award or rule shall be invalidated because of the admission into the record and the use as any proof of any fact in dispute or any evidence not admissible under the common law or statutory rules of evidence and procedure.

C. APPEALS TO CITY COUNCIL. Any Proprietor excepting to any denial of a Tobacco Retailer license, or any Tobacco Retailer license holder excepting to any revocation of such license held by him or her pursuant to the provisions of this Chapter, may appeal in writing to the City Council by filing with the City Clerk a written notice of such appeal setting forth the specific grounds thereof. Such notice must be filed within fourteen (14) days after notice of such action appealed from is posted in the United States mail. Upon receipt of such notice of appeal the Council shall set the time for consideration thereof. The City Clerk shall cause notice thereof to be given (A) to the appellant and (B) to the adverse party or parties, or to the attorney, spokesman, or representative of such party or parties, not less than five days prior to such hearing. At such hearing the appellant shall show

cause on the grounds specified in the notice of appeal why the action excepted to should not be approved. Such hearing may, by the Council, be continued over from time to time and its findings on the appeal shall be final and conclusive in the matter.

D. REVOCATION OF LICENSE ISSUED IN ERROR. A Tobacco Retailer's license shall be revoked if the Department or City Administrator finds, after the licensee is afforded reasonable notice and an opportunity to be heard, that one or more of the bases for denial of a license under Section 5.91.050 of this Chapter existed at the time application was made or at any time before the license issued. The decision by the Department or the City Administrator shall be the final decision of the City. The revocation shall be without prejudice to the filing of a new license application.

E. NEW LICENSE AFTER REVOCATION.

(1) After revocation for a first violation of this Chapter at a location within any sixty-month (60) period, no new license may issue for the location until ten (10) days have passed from the date of revocation.

(2) After revocation for a second violation of this Chapter at a location within any sixty-month (60) period, no new license may issue for the location until thirty (30) days have passed from the date of revocation.

(3) After revocation for a third violation of Chapter at a location within any sixty-month (60) period, no new license may issue for the location until ninety (90) days have passed from the date of revocation.

(4) After revocation for four or more violations of this Chapter at a location within any sixty-month (60) period, no new license may issue for the location until five (5) years have passed from the date of revocation.

Sec. 5.91.120. TOBACCO RETAILING WITHOUT A LICENSE.

(a) In addition to any other penalty authorized by law, if the Department finds or any court of competent jurisdiction determines, after notice and an opportunity to be heard, that any Person has engaged in Tobacco Retailing at a location without a valid Tobacco Retailer's license, either directly or through the Person's agents or employees, the Person shall be ineligible to apply for or be issued a Tobacco Retailing license for that location as follows:

(1) After a first violation of this section at a location within any sixty-month (60) period, no new license may issue for the Person at the location until thirty (30) days have passed from the date of the violation.

(2) After a second violation of this section at a location within any sixty-month (60) period, no new license may issue for the Person at the location until ninety (90) days have passed from the date of the violation.

(3) After of a third or subsequent violation of this section at a location within any sixty-month (60) period, no new license may issue for the Person at the location until five (5) years have passed from the date of the violation.

(b) Tobacco Products and Tobacco Paraphernalia offered for sale or exchange in violation of this Chapter are subject to seizure by the Department or any peace officer and shall be forfeited after the licensee and any other owner of the Tobacco Products or Tobacco Paraphernalia is given reasonable notice and an opportunity to demonstrate that the products were not offered for sale or exchange in violation of this Chapter. The decision by the Department may be appealed pursuant to the procedures set forth in Section 5.91.110(C). Forfeited Tobacco Products and Tobacco Paraphernalia shall be destroyed by the Department.

(c) For the purposes of the civil remedies provided in this Chapter:

(1) each day on which a Tobacco Product, Tobacco Paraphernalia, or Drug Paraphernalia is offered for sale in violation of this Chapter; or

(2) each individual retail Tobacco Product, and each individual retail item of Tobacco Paraphernalia or Drug Paraphernalia that is distributed, sold, or offered for sale in violation of this Chapter;

whichever is greater, shall constitute a separate violation of this Chapter.

Sec. 5.91.130. SETTLEMENT IN LIEU OF HEARING.

For a first or second alleged violation of this Chapter within any sixty-month (60) period, the City Administrator or authorized designee may engage in settlement negotiations and may enter into a settlement agreement with a Tobacco Retailer alleged to have violated this Chapter without approval from the City Council. Notice of any settlement shall be provided to the Department and no hearing shall be held. The Tobacco Retailers' license shall be suspended until adoption of this settlement agreement. After the settlement agreement has been adopted, the license shall continue under the same terms prior to the settlement, unless otherwise stated. Settlements shall not be confidential and shall contain the following minimum terms:

(a) After a first alleged violation of this Chapter at a location within any sixty-month (60) period:

(1) an agreement to stop acting as a Tobacco Retailer for at least one (1) day;

(2) a settlement payment to the City of at least one thousand dollars ($1,000); and

(3) an admission that the violation occurred and a stipulation that the violation will be counted when considering what penalty will be assessed for any future violations.

(b) After a second alleged violation of this Chapter at a location within any sixty-month (60) period:

(1) an agreement to stop acting as a Tobacco Retailer for at least ten (10) days;

(2) a settlement payment to the City of at least five thousand dollars ($5,000); and

(3) an admission 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. 5.91.140. ENFORCEMENT.

All officials, departments, and employees of the City vested with the authority to issue permits, certificates, or licenses shall adhere to, and require conformance with, this Tobacco Retail Licensing Ordinance.

A. Violations and penalties.

(1) Infractions. Any person who violates, causes, or permits another person to violate any provision of this Ordinance is guilty of an infraction unless otherwise provided.

(2) Separate Offenses for Each Day. Any violator shall be guilty of a separate offense for each and every day during any portion of which any violation of any provision of this Ordinance is committed, continued, permitted, or caused by such violator and shall be punishable accordingly.

(3) Any Violation a Public Nuisance. In addition to the penalties provided in this section, any use or condition caused or permitted to exist in violation of any of the provisions of this Chapter shall be and is declared to be a Public Nuisance and may be summarily abated as such by the City.

(4) Injunction as Additional Remedy. Any violation of any provision of this Ordinance shall be and is declared to be contrary to the public interest and shall, at the discretion of the City, create a cause of action for injunctive relief.

(5) Penalties. Any person convicted of an infraction under the provisions of this section shall be punishable by a fine to the maximum permitted under Oakland Municipal Code 1.28. Any violation beyond the second conviction within a one-year period may be charged by the

District Attorney as a misdemeanor, and the penalty for conviction shall be punishable by a fine or imprisonment to the maximum permitted under Oakland Municipal Code 1.28.

(6) Liability for Expenses. In addition to the punishment provided by law, a violator is liable for such costs, expenses, and disbursements paid or incurred by the City or any of its contractors in correction, abatement, and prosecution of the violation. Reinspection fees to ascertain compliance with previously noticed or cited violations shall be charged against the owner of the Tobacco Retailer's License. Fees shall be in the amount described in Section 5.91.060(B)(1) for charged reinspections. The inspection official shall give the owner or other responsible party of such affected premises a written notice showing the itemized cost of such chargeable service and requesting payment thereof.

B. Enforcement. The City designates the Department to enforce the provisions of this Ordinance. The City Administrator shall have power to adopt rules of procedure and regulations not inconsistent with the provisions of this Chapter for the purpose of carrying out the provisions of this Chapter; and a copy of such rules of procedure and regulations shall be on file and available for public examination at the Department.

C. Inspection and right of entry. The Department, or their duly authorized representatives, may enter on any site or into any structure for the purpose of investigation, provided they shall do so in a reasonable manner, whenever they have cause to suspect a violation of any provision of this Ordinance. An owner or occupant or agent thereof who refuses to permit such entry and investigation shall be guilty of infringing upon the violations and penalties as outlined in Section 5.91.140(A) and subject to related penalties thereof.

D. Remedies are Cumulative. The remedies provided by this Chapter are cumulative and in addition to any other remedies available at law or in equity.

E. Youth Decoy Participation. Whenever evidence of a violation of this Chapter is obtained in any part through the participation of a Person under the age of eighteen (18) years old, such a Person shall not be required to appear or give testimony in any civil or administrative process brought to enforce this Chapter and the alleged violation shall be adjudicated based upon the sufficiency and persuasiveness of the evidence presented.

Section 3. SEVERABILITY. If any article, section, subsection sentence, clause or phrase of this ordinance or exhibit is held to be invalid or unconstitutional, the offending portion shall be severed and shall not affect the validity of remaining portions which shall remain in full force and effect.

Section 4. EFFECTIVE DATE. This Ordinance shall become effective ninety (90) days after final adoption of this Ordinance by the City Council of Oakland.

Section 5. AUTHORITY. This Ordinance is enacted pursuant to the City of Oakland's general police powers, Section 106 of the City Charter of the City of Oakland and Article XI of the California Constitution.

IN COUNCIL, OAKLAND, CALIFORNIA, (DATE),_____ 2008

Passed By The Following Vote:

AYES- BROOKS, BRUNNER, CHANG, KERNIGHAN, NADEL, QUAN, REID AND PRESIDENT DE LA FUENTE

NOES-

ABSENT-

ABSTENTION-

DATE OF ATTESTATION: _____

ATTEST:_____
LATONDA SIMMONS

CITY CLERK AND CLERK OF THE COUNCIL OF
THE CITY OF OAKLAND, CALIFORNIA

FILED
OFFICE OF THE CITY CLERK
OAKLAND

08 MAR 20 PM 4:01

REVISED PURSUANT TO CITY COUNCIL
DIRECTION AT MARCH 18, 2008 MEETING

APPROVED AS TO FORM AND LEGALITY

City Attorney

Introduced by councilmember LARRY REID

Ordinance No. _____C.M.S.

ORDINANCE REQUIRING THE LICENSURE OF TOBACCO RETAILERS AND CODIFYING SAID REQUIREMENTS AT OAKLAND MUNICIPAL CODE CHAPTER 5.91 AND ADOPTING A TOBACCO LICENSING APPLICATION FEE OF $50.00 AND A TOBACCO LICENSING FEE OF $1,500.00 ANNUALLY TO COVER ADMINISTRATION, INSPECTION, COMPLIANCE AND SIMILAR COSTS

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, state law requires all tobacco retailers to be licensed by the Board of Equalization in order to curb the illegal sale and distribution of cigarettes which deprive the state yearly of hundreds of millions of tax dollars that fund local and state programs such as health services, antismoking campaigns, cancer research, and education programs (Cal. Bus. & Prof. Code §§ 22970.1, 22972); and

WHEREAS, 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); 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 implementation of tobacco-licensing requirements is supported by most Californians, as evidenced by the following:

- 73% of California adults think tobacco retailers should be licensed;
- 65% of California's key opinion leaders surveyed support implementation of tobacco-licensing requirements; and
- Over 90% of enforcement agencies surveyed in 2000 rated license suspension or revocation after repeated violations as an effective strategy to reduce youth access to tobacco;

WHEREAS, seventy-one cities and counties in California have passed tobacco retailer licensing ordinances in an effort to stop minors from smoking, and

WHEREAS, 615 communities in the United States require a license to sell tobacco products and provide penalties such as suspension or revocation of the license for illegal conduct (e.g., selling tobacco to minors); and

WHEREAS, California retailers continue to sell tobacco to underage consumers, evidenced by the following:

- 14% of all tobacco retailers unlawfully sold to minors in 2004;
- 31.5 % of non-traditional tobacco retailers such as deli, meat, and produce markets sold to minors in 2004; and

- Teens surveyed in 2002 say they bought their cigarettes at: gas stations (58%), liquor stores (45%), and supermarkets and small grocery stores (25%).

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 to regulate the operation of lawful businesses to discourage violations of federal, state, and local tobacco-related laws; 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, and 15303 of the CEQA Guidelines;

NOW, THEREFORE, The City Council of the City of Oakland does ordain as follows:

SECTION 1. The City Council finds and determines the foregoing recitals to be true and correct and hereby makes them part of this Ordinance.

SECTION 2. Chapter 5.91 is hereby added to Title 5, Building Taxes, Permits and Regulations, of the Oakland Municipal Code, as follows:

Chapter 5.91. LICENSURE OF TOBACCO RETAILERS

5.91.010. DEFINITIONS. The following definitions apply to this Chapter:

"Arm's Length Transaction" as used in this Chapter shall mean 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 the violations of this Chapter is not an Arm's Length Transaction.

"City Administrator" as used in this Chapter shall mean the City Administrator for the City of Oakland; further provided, that the use of the title of any officer or to any office shall refer to such officer or office of the City of Oakland.

"Department" as used in this Chapter shall mean the Oakland Police Department.

"Drug Paraphernalia" as used in this Chapter shall have the same definition set forth under California Health and Safety Code section 11364.5, as amended from time to time.

"Person" as used in this Chapter shall mean any natural person, partnership, cooperative association, corporation, limited liability company, personal representative, receiver, trustee, assignee, or any other legal entity.

"Proprietor" as used in this Chapter shall mean 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 share ultimate control over the day-to-day operations of a business.

"Public Nuisance" as used in this Chapter shall have the same definition as set forth under California Civil Code Section 3490, as amended from time to time.

"Self-Service Display" as used in this Chapter shall mean the open display of Tobacco Products or Tobacco Paraphernalia in a manner that is accessible to the general public without the assistance of the retailer or employee of the retailer. A Vending Machine is a form of Self-Service Display.

"Smoking" as used in this Chapter shall mean possessing a lighted Tobacco Product, lighted Tobacco Paraphernalia, or any other lighted weed or plant (including a lighted pipe, cigar, hookah pipe, or cigarette of any kind), the lighting of a Tobacco Product,

Tobacco Paraphernalia, or any other weed or plant (including a pipe, cigar, hookah pipe, or cigarette of any kind).

"Tobacco Paraphernalia" as used in this Chapter shall mean cigarette papers or wrappers, pipes, holders of smoking materials of all types, cigarette rolling machines, and any other item designed for the smoking, preparation, storing, or consumption of Tobacco Products.

"Tobacco Product" as used in this Chapter shall mean: (1) any substance containing tobacco leaf, including but not limited to cigarettes, cigars, pipe tobacco, hookah 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 United States Food and Drug Administration for use in treating nicotine or tobacco product dependence.

"Tobacco Retailer" as used in this Chapter 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. This definition is without regard to the quantity of tobacco, Tobacco Products, or Tobacco Paraphernalia sold, offered for sale, exchanged, or offered for exchange.

"Vending Machine" as used in this Chapter shall mean a machine, appliance, or other mechanical device operated by currency, token, debit card, credit card, or any other form of payment that is designed or used for vending purposes, including, but not limited to, machines or devices that use remote control locking mechanisms.

Sec. 5.91.020. TOBACCO RETAILER LICENSE REQUIRED.

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 Chapter for each location at which that activity is to occur. Tobacco Retailing without a valid Tobacco Retailer's license is a Public Nuisance, as defined in the Oakland Municipal Code. This Chapter applies to all existing and future Tobacco Retailers in the City. The City Administrator shall have power to adopt rules of procedure and regulations not inconsistent with the provisions of this Chapter for the purpose of carrying out the provisions of this Chapter; and a copy of such rules of procedure and regulations shall be on file and available for public examination at the Department.

B. A Tobacco Retailer or Proprietor without a valid Tobacco Retailer license, including without limitation a Person whose license has been suspended or revoked:

(1) Shall keep all Tobacco Products and Tobacco Paraphernalia out of public view. The public display of Tobacco Products or Tobacco Paraphernalia in violation of this provision shall constitute Tobacco Retailing without a license under Section 5.91.120.

(2) Shall not display any advertisement relating to Tobacco Products or Tobacco Paraphernalia that promotes the sale or distribution of such products from the Tobacco Retailer's location or that could lead a reasonable consumer to believe that such products can be obtained at that location.

C. Nothing in this 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 identified on the face of the license. For example, nothing in this Chapter shall be construed to render inapplicable, supercede, or apply in lieu of, any other provision of applicable law, including but not limited to, any provision of this Code, the Oakland Planning Code, including the conditional use permit, if applicable, or any condition or limitation on smoking in an enclosed place of employment pursuant to California Labor Code section 6404.5. For example, obtaining a Tobacco Re-

tailer license does not make the retailer a "retail or wholesale tobacco shop" for the purposes of California Labor Code section 6404.5.

Sec. 5.91.030. LIMITS ON TOBACCO RETAILER LICENSES.

A. No license may issue to authorize Tobacco Retailing at other than a fixed location. For example, Tobacco Retailing by Persons on foot or from vehicles is prohibited.

B. No license may issue to authorize Tobacco Retailing at any location where Drug Paraphernalia is sold, offered for sale, or displayed for sale.

Sec. 5.91.040. 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, and shall include the license application fee set forth under Section 5.91.080.

It is the responsibility of each Proprietor to be informed regarding all laws applicable to Tobacco Retailing, including those laws affecting the issuance of a Tobacco Retailer's license. No Proprietor may rely on the issuance of a license as a determination by the City that the Proprietor has complied with all laws applicable to Tobacco Retailing. A license issued contrary to this Chapter, contrary to any other law, or on the basis of false or misleading information supplied by a Proprietor shall be revoked pursuant to Section 5.91.110(D) of this Chapter. Nothing in this Chapter shall be construed to vest in any Person obtaining and maintaining a Tobacco Retailer's license any status or right to act as a Tobacco Retailer in contravention of any provision of law.

All applications shall be submitted on a form supplied by the Department and shall contain, at a minimum, the following information:

A. The name, address, telephone number, driver's license or similar identification, including date of birth, of each Proprietor of the business that is seeking a license.

B. The business name, address, telephone number and business hours of the single fixed location for which a license is sought.

C. If the single fixed location is leased, a copy of the lease and the name of the owner of single fixed location.

D. A single name and mailing address authorized by each Proprietor to receive all communications and notices (the "Authorized Address") required by, authorized by, or convenient to the enforcement of this Chapter. 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 (B) above.

E. Proof that the location for which a Tobacco Retailer's license is sought has been issued a valid state tobacco retailer's license by the California Board of Equalization.

F. Whether or not any Proprietor or prior Proprietor, to the best of applicant's knowledge, has admitted violating, or has been found to have violated, this Chapter or whose proprietorship has admitted violating, or has been found to have violated, this Chapter, and, if so, the dates and locations of all such violations within the previous six years.

G. All criminal violations and any prior violations under this Chapter of each Proprietor or prior Proprietor, to the best of applicant's knowledge.

H. Such other information as the Department deems necessary for the administration or enforcement of this Chapter.

I. All information required to be submitted in order to apply for a Tobacco Retailer's license shall be updated with the Department whenever the information changes. A Tobacco Retailer shall provide the Department with any updates within ten (10) business days of a change.

J. A copy of the Major Conditional Use Permit, if applicable (or an explanation as to why such permit is not required).

K. A statement signed by each Proprietor that no Drug Paraphernalia is or will be sold at the business seeking the license.

Sec. 5.91.050. ISSUANCE OF LICENSE.

Upon the receipt of an application for a Tobacco Retailer's license and the license fee required by this Chapter, the Department shall issue a license unless substantial evidence demonstrates that one or more of the following bases for denial exists:

A. The information presented in the application is incomplete, inaccurate, or false. Intentionally supplying inaccurate or false information shall be a violation of this Chapter.

B. The application seeks authorization for Tobacco Retailing at a location for which this Chapter prohibits issuance of Tobacco Retailer licenses. However, this subparagraph shall not constitute a basis for denial of a license if the applicant provides the City with documentation demonstrating by clear and convincing evidence that the applicant has acquired or is acquiring the location or business in an Arm's Length Transaction.

C. The application seeks authorization for Tobacco Retailing for a Proprietor to whom this Chapter prohibits a license to be issued.

D. The application seeks authorization for Tobacco Retailing that is prohibited pursuant to this Chapter (e.g., mobile vending), that is unlawful pursuant to any provision of this Code, or that is unlawful pursuant to any other law.

E. The Department, or the investigating official acting thereon, determines, in its reasonable discretion, that the applicant is not a fit and proper person, either for financial, moral, or other reasons, to conduct or maintain the business, establishment, place, or other thing, to which the application pertains; that the applicant has not complied with the provisions of this code which pertain directly to the maintenance or conduct of the busi-

ness, establishment, place, or other thing in question or for the violation of any law appertaining thereto; or for any other reason hereinafter in this Chapter more specifically set forth. In granting or denying the license, the Department, shall consider the character of the applicant with respect to morality, honesty and integrity, and all pertinent acts which may concern the health, safety, and general welfare of the public.

F. A denial of a license application shall be in writing, citing the reasons for such denial and shall be appealable to the City Administrator per the appeal provisions set forth in Section 5.91.110 of this Chapter.

Sec. 5.91.060. LICENSE RENEWAL AND EXPIRATION.

A. RENEWAL OF LICENSE. A Tobacco Retailer license is invalid unless the appropriate fee has been paid in full and the term of the license has not expired. The term of a Tobacco Retailer license is one year. Each Tobacco Retailer shall apply for the renewal of his or her Tobacco Retailer's license and submit the license fee no later than thirty (30) days prior to expiration of the license term.

B. EXPIRATION OF LICENSE. A Tobacco Retailer's license that is not timely renewed shall expire at the end of its term. To reinstate a license that has expired, or to renew a license not timely renewed pursuant to subparagraph (A), the Proprietor must:

(1) Submit the license fee plus a reinstatement fee of ten percent (10%) of the license fee.

(2) Submit a signed affidavit affirming that the Proprietor:

(i) has not sold and will not sell any Tobacco Product or Tobacco Paraphernalia after the license expiration date and before the license is renewed; or

(ii) has waited the appropriate ineligibility period established for Tobacco Retailing without a license, as set forth in Section 5.91.120(A) of this Chapter, before

seeking renewal of the license.

Sec. 5.91.070. LICENSES NONTRANSFERABLE.

A. A Tobacco Retailer's license may not be transferred from one Person to another or from one location to another. Whenever a Tobacco Retailing location has a change in Proprietors a new Tobacco Retailer's license is required.

B. Notwithstanding any other provision of this Chapter, prior violations at a location shall continue to be counted against a location and license ineligibility periods shall continue to apply to a location unless:

(1) the location has been fully transferred to a new Proprietor or fully transferred to entirely new Proprietors; and

(2) the new Proprietor(s) provide the City with clear and convincing evidence that the new Proprietor(s) have acquired or is acquiring the location in an Arm's Length Transaction.

Sec. 5.91.080. FEES FOR LICENSE.

A. AMOUNT OF FEES. The application fee shall be $50.00 and the licensing and renewal fee shall be $1500.00, or as the application, licensing and renewal fees may be amended in the City's master fee schedule. The fees 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 regulatory program authorized by this Chapter. All fees shall be used exclusively to fund the program, and shall be separately accounted for. Fees are nonrefundable except as may be required by law.

B. FEES DUE AND PAYABLE. The application fee is due and payable at the time the application is submitted to the City. All licensing and renewal fees shall be due and payable to the City as determined by the Department. The amount of fees shall be deemed a debt to the City. An action may be commenced in the name of the City in any court of competent jurisdiction for the amount of any delinquent fees. An action to collect the fee must be commenced within three years of the date the fee becomes due. An action to collect the penalty for nonpayment of the fee must be commenced within three years of the date the penalty accrues.

C. FEES ASSESSED AGAINST THE BUSINESS PROPERTY. The amount of fee, penalty and interest imposed under the provisions of this Chapter may be assessed against the business property on which the fee is imposed in those instances where the Proprietor of the business and the business property are one and the same. If the fees are not paid when due, such fee, penalty and interest shall constitute an assessment against such business property and shall be a lien on the property for the amount thereof, which lien shall continue until the amount thereof including all penalties and interest are paid, or until it is discharged of record.

D. TOBACCO RETAILERS SUBJECT TO DEEMED APPROVED ALCOHOLIC BEVERAGE SALE REGULATIONS. Any Tobacco Retailer subject to annual inspection fees for alcoholic beverage retail establishments as set forth in the master fee schedule shall not pay licensing and renewal fees under this Chapter. Such Tobacco Retailer, however, shall apply for a Tobacco Retailer's license and pay the application fee set forth *under paragraph (a) of this Section.*

Sec. 5.91.090. OTHER REQUIREMENTS AND PROHIBITIONS.

A. LAWFUL BUSINESS OPERATION. In the course of Tobacco Retailing or in the operation of the business or maintenance of the location for which a license issued, it shall be a violation of this Chapter for a licensee, or any of the licensee's agents or employees, to:

(1) Violate any local, state, or federal law applicable to Tobacco Products, Tobacco Paraphernalia, Tobacco Retailing, Smoking, including without limitation Oakland Municipal Code Chapter 8.30.

(2) Violate any local, state, or federal law regulating exterior, storefront, window, or door signage.

(3) Violate any local, state or federal law regulating the sale, offer for sale, or display for sale, of any Drug Paraphernalia.

(4) Operate in any manner that adversely affects the health, safety or welfare of persons residing or working in the surrounding area, or in any manner that constitutes a Public Nuisance.

B. DISPLAY OF LICENSE. Each Tobacco Retailer license shall be prominently displayed in a publicly visible location at the licensed location.

C. POSITIVE IDENTIFICATION REQUIRED. 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 (27) years 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 the Tobacco Product or Tobacco Paraphernalia.

D. MINIMUM AGE FOR PERSONS SELLING TOBACCO. No Person who is younger than the minimum age established by state law for the purchase or possession of Tobacco Products shall engage in Tobacco Retailing.

E. SELF-SERVICE DISPLAYS PROHIBITED. No Tobacco Retailer shall display Tobacco Products or Tobacco Paraphernalia by means of a Self-Service Display or engage in Tobacco Retailing by means of a Self-Service Display.

Sec. 5.91.100. COMPLIANCE MONITORING.

A. Compliance with this Chapter shall be monitored by the Department. Any peace officer may enforce the penal provisions of this Chapter.

B. Nothing in this Chapter shall create a right of action in any Tobacco Retailer licensee or other Person against the City or its agents.

C. Compliance checks shall determine, at a minimum, if the Tobacco Retailer is conducting business in a manner that complies with tobacco laws regulating youth access to tobacco. When appropriate, the compliance checks shall determine compliance with other laws applicable to Tobacco Retailing.

Sec. 5.91.110. DENIAL OR REVOCATION OF LICENSE.

A. DENIAL OR REVOCATION OF LICENSE. In addition to any other penalty authorized by law or this Chapter, a Proprietor's application shall be denied by the Department or a Tobacco Retailer's license shall be revoked by the City Administrator as in his or her discretion may seem just, for any reason for which a granting of such license might be lawfully denied, or for any other reason hereinafter in this Chapter specifically provided including, but not limited to, any violation of law designated in Section 5.91.090(A) of this Chapter. An appeal of a denial or a revocation of a license under this Chapter shall be made only upon a hearing held before the City Administrator after ten (10) days written notice by U.S. mail to such Proprietor applying for the license or Tobacco Retailer's license holder, as applicable, stating generally the grounds of complaint against him or her and stating the time and place where such hearing will be held. In the event of revocation of the license, any certificate issued in connection with the granting of such license shall, by the holder thereof, be forthwith surrendered to the City Administrator.

B. HEARINGS ON REVOCATION OF LICENSE OR APPEAL OF DENIAL. Any investigation, inquiry or hearing which the City Administrator has power to undertake or to hold may be undertaken or held by such member of the City Administrator's staff as he or she may designate and to whom the matter is assigned. The person to whom a matter is as-

signed shall be deemed a "Hearing Officer." In any matter so assigned the Hearing Officer conducting the investigation, inquiry or hearing shall report within thirty (30) days after the conclusion of the investigation, inquiry or hearing his or her findings and recommendations to the City Administrator.

(1) Within sixty (60) days after the filing of the findings and recommendations of the Hearing Officer, the City Administrator shall confirm, adopt, modify or set aside the findings of the Hearing Officer and with or without notice enter his or her order, findings, decision or award based upon the record in the case.

(2) In such hearings, investigations, and inquiries by the City Administrator or a Hearing Officer, he or she shall not be bound in the conduct thereof by the common law or statutory rules of evidence and procedure but inquiry shall be made in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the public parties and carry out justly the spirit and provisions of this Chapter.

(3) No informality in any proceeding or the manner of taking testimony shall invalidate any other decision, award or rule made as specified in this Chapter. No order, decision, award or rule shall be invalidated because of the admission into the record and the use as any proof of any fact in dispute or any evidence not admissible under the common law or statutory rules of evidence and procedure.

C. APPEALS TO CITY COUNCIL. Any Proprietor excepting to any denial of a Tobacco Retailer license, or any Tobacco Retailer license holder excepting to any revocation of such license held by him or her pursuant to the provisions of this Chapter, may appeal in writing to the City Council by filing with the City Clerk a written notice of such appeal setting forth the specific grounds thereof. Such notice must be filed within fourteen (14) days after notice of such action appealed from is posted in the United States mail. Upon receipt of such notice of appeal the Council shall set the time for consideration thereof. The City Clerk shall cause notice thereof to be given (A) to the appellant and (B) to the adverse party or parties, or to the attorney, spokesman, or representative of such party or parties, not less than five days prior to such hearing. At such hearing the appellant shall show

cause on the grounds specified in the notice of appeal why the action excepted to should not be approved. Such hearing may, by the Council, be continued over from time to time and its findings on the appeal shall be final and conclusive in the matter.

D. REVOCATION OF LICENSE ISSUED IN ERROR. A Tobacco Retailer's license shall be revoked if the Department or City Administrator finds, after the licensee is afforded reasonable notice and an opportunity to be heard, that one or more of the bases for denial of a license under Section 5.91.050 of this Chapter existed at the time application was made or at any time before the license issued. The decision by the Department or the City Administrator shall be the final decision of the City. The revocation shall be without prejudice to the filing of a new license application.

E. NEW LICENSE AFTER REVOCATION.

(1) After revocation for a first violation of this Chapter at a location within any sixty-month (60) period, no new license may issue for the location until ten (10) days have passed from the date of revocation.

(2) After revocation for a second violation of this Chapter at a location within any sixty-month (60) period, no new license may issue for the location until thirty (30) days have passed from the date of revocation.

(3) After revocation for a third violation of Chapter at a location within any sixty-month (60) period, no new license may issue for the location until ninety (90) days have passed from the date of revocation.

(4) After revocation for four or more violations of this Chapter at a location within any sixty-month (60) period, no new license may issue for the location until five (5) years have passed from the date of revocation.

Sec. 5.91.120. TOBACCO RETAILING WITHOUT A LICENSE.

(a) In addition to any other penalty authorized by law, if the Department finds or any court of competent jurisdiction determines, after notice and an opportunity to be heard, that any Person has engaged in Tobacco Retailing at a location without a valid Tobacco Retailer's license, either directly or through the Person's agents or employees, the Person shall be ineligible to apply for or be issued a Tobacco Retailing license for that location as follows:

(1) After a first violation of this section at a location within any sixty-month (60) period, no new license may issue for the Person at the location until thirty (30) days have passed from the date of the violation.

(2) After a second violation of this section at a location within any sixty-month (60) period, no new license may issue for the Person at the location until ninety (90) days have passed from the date of the violation.

(3) After of a third or subsequent violation of this section at a location within any sixty-month (60) period, no new license may issue for the Person at the location until five (5) years have passed from the date of the violation.

(b) Tobacco Products and Tobacco Paraphernalia offered for sale or exchange in violation of this Chapter are subject to seizure by the Department or any peace officer and shall be forfeited after the licensee and any other owner of the Tobacco Products or Tobacco Paraphernalia is given reasonable notice and an opportunity to demonstrate that *the products were not offered for sale or exchange in violation of this Chapter. The* decision by the Department may be appealed pursuant to the procedures set forth in Section 5.91.110(C). Forfeited Tobacco Products and Tobacco Paraphernalia shall be destroyed by the Department.

(c) For the purposes of the civil remedies provided in this Chapter:

(1) each day on which a Tobacco Product, Tobacco Paraphernalia, or Drug Paraphernalia is offered for sale in violation of this Chapter; or

(2) each individual retail Tobacco Product, and each individual retail item of Tobacco Paraphernalia or Drug Paraphernalia that is distributed, sold, or offered for sale in violation of this Chapter;

whichever is greater, shall constitute a separate violation of this Chapter.

Sec. 5.91.130. SETTLEMENT IN LIEU OF HEARING.

For a first or second alleged violation of this Chapter within any sixty-month (60) period, the City Administrator or authorized designee may engage in settlement negotiations and may enter into a settlement agreement with a Tobacco Retailer alleged to have violated this Chapter without approval from the City Council. Notice of any settlement shall be provided to the Department and no hearing shall be held. The Tobacco Retailers' license shall be suspended until adoption of this settlement agreement. After the settlement agreement has been adopted, the license shall continue under the same terms prior to the settlement, unless otherwise stated. Settlements shall not be confidential and shall contain the following minimum terms:

(a) After a first alleged violation of this Chapter at a location within any sixty-month (60) period:

(1) an agreement to stop acting as a Tobacco Retailer for at least one (1) day;

(2) a settlement payment to the City of at least one thousand dollars ($1,000); and

(3) an admission that the violation occurred and a stipulation that the violation will be counted when considering what penalty will be assessed for any future violations.

(b) After a second alleged violation of this Chapter at a location within any sixty-month (60) period:

(1) an agreement to stop acting as a Tobacco Retailer for at least ten (10) days;

(2) a settlement payment to the City of at least five thousand dollars ($5,000); and

(3) an admission 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. 5.91.140. ENFORCEMENT.

All officials, departments, and employees of the City vested with the authority to issue permits, certificates, or licenses shall adhere to, and require conformance with, this Tobacco Retail Licensing Ordinance.

A. Violations and penalties.

(1) Infractions. Any person who violates, causes, or permits another person to violate any provision of this Ordinance is guilty of an infraction unless otherwise provided.

(2) Separate Offenses for Each Day. Any violator shall be guilty of a separate offense for each and every day during any portion of which any violation of any provision of this Ordinance is committed, continued, permitted, or caused by such violator and shall be punishable accordingly.

(3) Any Violation a Public Nuisance. In addition to the penalties provided in this section, any use or condition caused or permitted to exist in violation of any of the provisions of this Chapter shall be and is declared to be a Public Nuisance and may be summarily abated as such by the City.

(4) Injunction as Additional Remedy. Any violation of any provision of this Ordinance shall be and is declared to be contrary to the public interest and shall, at the discretion of the City, create a cause of action for injunctive relief.

(5) Penalties. Any person convicted of an infraction under the provisions of this section shall be punishable by a fine to the maximum permitted under Oakland Municipal Code 1.28. Any violation beyond the second conviction within a one-year period may be charged by the

District Attorney as a misdemeanor, and the penalty for conviction shall be punishable by a fine or imprisonment to the maximum permitted under Oakland Municipal Code 1.28.

(6) Liability for Expenses. In addition to the punishment provided by law, a violator is liable for such costs, expenses, and disbursements paid or incurred by the City or any of its contractors in correction, abatement, and prosecution of the violation. Reinspection fees to ascertain compliance with previously noticed or cited violations shall be charged against the owner of the Tobacco Retailer's License. Fees shall be in the amount described in Section 5.91.060(B)(1) for charged reinspections. The inspection official shall give the owner or other responsible party of such affected premises a written notice showing the itemized cost of such chargeable service and requesting payment thereof.

B. Enforcement. The City designates the Department to enforce the provisions of this Ordinance. The City Administrator shall have power to adopt rules of procedure and regulations not inconsistent with the provisions of this Chapter for the purpose of carrying out the provisions of this Chapter; and a copy of such rules of procedure and regulations shall be on file and available for public examination at the Department.

C. Inspection and right of entry. The Department, or their duly authorized representatives, may enter on any site or into any structure for the purpose of investigation, provided they shall do so in a reasonable manner, whenever they have cause to suspect a violation of any provision of this Ordinance. An owner or occupant or agent thereof who refuses to permit such entry and investigation shall be guilty of infringing upon the violations and penalties as outlined in Section 5.91.140(A) and subject to related penalties thereof.

D. Remedies are Cumulative. The remedies provided by this Chapter are cumulative and in addition to any other remedies available at law or in equity.

E. Youth Decoy Participation. Whenever evidence of a violation of this Chapter is obtained in any part through the participation of a Person under the age of eighteen (18) years old, such a Person shall not be required to appear or give testimony in any civil or administrative process brought to enforce this Chapter and the alleged violation shall be adjudicated based upon the sufficiency and persuasiveness of the evidence presented.

Section 3. SEVERABILITY. If any article, section, subsection sentence, clause or phrase of this ordinance or exhibit is held to be invalid or unconstitutional, the offending portion shall be severed and shall not affect the validity of remaining portions which shall remain in full force and effect.

Section 4. EFFECTIVE DATE. This Ordinance shall become effective ninety (90) days after final adoption of this Ordinance by the City Council of Oakland.

Section 5. AUTHORITY. This Ordinance is enacted pursuant to the City of Oakland's general police powers, Section 106 of the City Charter of the City of Oakland and Article XI of the California Constitution.

IN COUNCIL, OAKLAND, CALIFORNIA, (DATE),_____ 2008

Passed By The Following Vote:

AYES- BROOKS, BRUNNER, CHANG, KERNIGHAN, NADEL, QUAN, REID AND PRESIDENT DE LA FUENTE

NOES-

ABSENT-

ABSTENTION-

DATE OF ATTESTATION: _____

ATTEST:_____
LATONDA SIMMONS

CITY CLERK AND CLERK OF THE COUNCIL OF THE CITY OF OAKLAND, CALIFORNIA