

Office of the City Manager

ACTION CALENDAR
November 19, 2002

To: Honorable Mayor and
Members of the City Council

From: Weldon Rucker, City Manager

Subject: Tobacco Retail Licensure
CF# 205-01

RECOMMENDATION

1. Conduct a public hearing and upon conclusion, adopt a Resolution establishing fees for the administration, monitoring, and enforcement of a program to license retailers selling tobacco in Berkeley; and authorizing the implementation of the program and appropriation of funding for related expenses.
2. Adopt first reading of an Ordinance adding Chapter 9.80 to Berkeley Municipal Code Title 9, Business Licenses and Regulations, requiring the licensure of tobacco retailers in the City of Berkeley.

SUMMARY

Smoking-related diseases remain the largest cause of preventable death in this country, killing more than 440,000 Americans every year. California's highest priority in disease prevention is keeping children and young adults from beginning to use tobacco. Educational programs, media campaigns, clean indoor and outdoor air policies, land use restrictions and tobacco control enforcement have all contributed to a decrease in youth smoking in Berkeley and throughout California. Nevertheless, teens have easy access to tobacco. During August and September 2002, 44 Berkeley tobacco retailers were visited in a youth purchase survey conducted by the Berkeley Police Department and the Tobacco Prevention Program. Seventeen of the 44 merchants (38%) sold tobacco to a minor.

The licensing of retailers selling tobacco allows local communities to hold the owner of a retail outlet accountable for the unlawful sale of tobacco to minors. In communities that have adopted

licensing, it has offered a viable mechanism to provide sanctions and monitoring of tobacco retail owners who repeatedly sell tobacco to minors.

It is recommended that Council adopt the proposed Ordinance for Berkeley, as it will be an effective tool for making retailers responsible for the privilege of selling tobacco. The proposed Ordinance (ATTACHMENT A) would require all retailers of tobacco to obtain a license, and pay a \$283 annual fee to cover expenses for licensure administration, monitoring and enforcement. The possibility of suspension or revocation of the license would only apply to retailers who repeatedly sell to minors, or violate other state or local tobacco control laws.

FINANCIAL IMPACTS OF RECOMMENDATION

Fees from the retail license to sell tobacco would be used to cover the costs of administration, implementation and enforcement. It is expected that approximately \$45,328 will be generated and expended annually, as detailed in ATTACHMENT B. The fees and costs will be re-evaluated in two to three years to determine whether retailer fees can be adjusted if compliance with tobacco control laws increases.

The Department of Finance has determined that their annual costs for administering the license will be approximately \$35 per tobacco retailer. A .10FTE Office Assistant II would be needed to support this activity. The Department of Health and Human Services, Environmental Health Division has determined that their annual costs for implementing retailer inspections, enforcement oversight, monitoring and other functions as described in ATTACHMENT B would be approximately \$248 per tobacco retailer. A .5FTE Registered Environmental Health Specialist would be needed to carry out these functions. Space is currently available to accommodate this position, which would be recruited. The total fee to be assessed to each Berkeley retailer selling tobacco will be \$283 per year. The fees will be deposited into a revenue code to be established.

Costs associated with the initial implementation of this program, for tobacco education of merchants, and for the coordination and training for the Youth Tobacco Purchase Surveys are estimated to be approximately \$10,000 per year. These costs will be covered with the annual allocation to the Tobacco Prevention Program from the California Department of Health Services.

CURRENT SITUATION AND ITS EFFECTS

No other consumer product has such a devastating impact on the health of a community as tobacco. According to the American Cancer Society, tobacco use causes nearly one in every five deaths in the United States. More than 440,000 people die every year from smoking-related diseases, and smoking remains the largest cause of preventable death in this country, eventually killing one of every two people who continue to smoke. 88% of adults, who have ever smoked, tried their first cigarette by the age of 18, and the average age at which smokers try their first

cigarette is 14½¹. As a result, the California State Legislature has determined that the State's highest priority in disease prevention shall be keeping children and young adults from beginning to use tobacco. Data collected by the Department of Health and Human Services during 2000 and 2001 revealed that heart disease, cancer and stroke account for 60% of all Berkeley deaths. Tobacco use is a causative and/or contributing factor to all three of these diseases.

Youth Tobacco Access

In California, 18.4% of the adult population² and 10.7% of teenagers³ currently smoke. In a survey conducted in the Berkeley schools in 2000, 13.1% of tenth graders at Berkeley High School and 22.2% of tenth graders at Berkeley Alternative High School, where the vast majority of students are African-American, reported smoking within the last 30 days.

Although it is unlawful to sell tobacco products to minors¹, 38% of Berkeley's tobacco retailers sold to minors in a summer, 2002 undercover youth purchase survey conducted by the Berkeley Police Department in collaboration with the Tobacco Prevention Program. This is nearly twice the California rate of tobacco sales to minors (19.3%)⁴. In Spring 2000, 36% of Berkeley tobacco retailers sold tobacco to minors. In 1999 undercover surveys conducted by the California Department of Health Services, Food and Drug Branch, 73% of Berkeley's tobacco merchants sold to minors.

In spite of a comprehensive merchant education campaign, many merchants are still not asking young tobacco customers for identification. During the summer of 2001, merchant education visits were conducted in every Berkeley retail tobacco store. Informational materials and signs were distributed, and managers were educated about training clerks to ask for identification and about their responsibility for posting signs, etc. Nevertheless, the results of the 2002 survey show that only half of the stores asked the youth for identification. None of the stores that asked for identification sold tobacco, while 77% of the stores that **did not** ask for identification sold tobacco to minors.

BACKGROUND

On May 30, 2001, the City of Berkeley Planning Commission requested that the City Council adopt stronger regulations for all businesses that sell tobacco and/or tobacco related products in order to reduce youth access to tobacco. On November 13, 2001, Council approved a recommendation directing staff to research and report back within six months with a progress report on options to address issues relating to youth and tobacco including licensure of tobacco retailers. The proposal to pass this Ordinance in Berkeley was delayed while the outcome of

¹ United States Department of Health & Human Services, et. al, Preventing Tobacco Use Among Young People: A Report of the Surgeon General, 67 (1994)

² California Department of Health Services, Tobacco Control Section, Youth Smoking Trends in California (Oct. 1999)

³ Cal. Dep't. Health Services, Tobacco Control Section, Adult Smoking Trends in California (Oct. 1999)

⁴ Youth Purchase Survey, 2002, Department of Health Services, Tobacco Control Section (2002)

Senate Bill 1700 was determined during the 2001-2002 California legislative session. The bill did not pass and would not have met Council's goal of decreasing access of tobacco to youth.

The Department of Health and Human Services took the lead and convened an ad-hoc interdepartmental working group consisting of representatives from the Planning Department, Environmental Health Division, Office of the City Attorney, City Manager's Budget Unit and Department of Finance. The Tobacco Retail Licensure Working Group has determined that requiring Berkeley tobacco retailers to obtain a license is the most effective measure Berkeley can take at this time to reduce youth access to tobacco, and to increase retailer compliance with federal, state and local tobacco control laws.

Tobacco Retail Licensure

The proposed Ordinance would: 1) require that all merchants intending to sell tobacco in Berkeley pay an annual fee covering expenses for the administration, implementation, monitoring, and enforcement of the tobacco retail licensure program; 2) establish conditions for selling tobacco to encourage compliance with federal, state and local tobacco control laws including, but not limited to, refusing to sell tobacco to minors (PC 308(a)) and requiring vendor assistance for tobacco sales (BMC 13.62); and 3) require that merchants who violate tobacco control laws attend a hearing and risk having their tobacco license suspended or revoked, with escalating penalties for each subsequent violation.

The Department of Finance has agreed to issue licenses and collect fees for the approximately 130 tobacco retailers in fixed locations and approximately 30 mobile vendors. ATTACHMENT C describes the protocol for what tobacco retailers must do to obtain and maintain a license, and it also describes the role of each City department.

The Tobacco Prevention Program would take responsibility for initial and on-going merchant education, preparing certificates, coordinating youth purchase surveys with the Berkeley Police Department, and assisting in tracking and monitoring of violations.

The Environmental Health Division would take responsibility for monitoring and enforcement of the licensure program, and has agreed to:

1. Inspect for posting of license/permit during regularly scheduled inspections, approximately three times per year;
2. Maintain a database of the tobacco retailers and violation history;
3. Investigate stores after a suspension or revocation to confirm that tobacco is not stored in public areas;
4. Re-inspect stores, if problems occur;
5. Issue re-inspection fee charges and/or citations;
6. Hold administrative hearings if retailer is at risk of license suspension or revocation; and
7. Follow-up with any aspect of implementation.

The possibility of suspension or revocation of the license only applies to retailers who repeatedly sell to minors, or violate other state or local tobacco control laws. The Berkeley Police

Department, working in collaboration with the Tobacco Prevention Program, would perform undercover PC 308(a) youth purchase surveys.

Responses from the Community Health Commission and the Community

On April 11, 2002, the Community Health Commission approved a motion supporting tobacco retail licensure in Berkeley, including a progressive fee structure based on tobacco revenues. Unfortunately, there is currently no mechanism for tracking tobacco sales or determining tobacco revenues. This would require instituting a new system of reporting and monitoring tobacco sales, increasing costs for the City of Berkeley.

An analysis of the types of stores that have sold tobacco to minors in Berkeley during the 2002 youth purchase survey shows that the Community Health Commission suggestions would harm the best compliers with the law. The large chain markets and drugstores have never sold to youth either during the most recent survey or in the past three surveys. Small independent operators sold 48% of the times they were surveyed. Gas stations sold 43% of the times they were surveyed. The greatest offender of sales to minors was from the small doughnut, ice cream, candy and card stores at a rate of 66%.

All Berkeley tobacco retailers, various community groups, the Office of Economic Development, Chamber of Commerce, all merchants associations and others were sent two separate invitations (ATTACHMENT D) to attend community meetings on April 22, 2002 and May 25, 2002. The licensing proposals were discussed, and merchants provided comments and feedback on the proposal. ATTACHMENT E summarizes the comments, concerns and ideas voiced at the community meetings.

RATIONALE FOR RECOMMENDATION

Licensing allows local communities to hold the owner of a retail outlet accountable for the unlawful sale of tobacco to minors. In addition to sales to minors laws, a local retailer license law allows communities to hold retailers responsible for other state and local tobacco control laws that reduce youth access to tobacco such as self-service display restrictions, selling tobacco paraphernalia near schools, selling bidis in a store open to minors, and selling loose cigarettes.

In communities that have adopted licensing, it has offered a viable mechanism to provide sanctions and monitoring of tobacco retail owners who repeatedly sell tobacco to minors. Currently there are 23 states and over 25 California communities including Santa Barbara, Los Angeles, Contra Costa County and several cities in Marin County, which have tobacco retailer licensing laws. In Alameda County, both Albany and Hayward are currently considering licensing measures.

Reducing youth access to tobacco and tobacco use is a primary goal for improving public health outcomes in Berkeley. Establishing a requirement that Berkeley tobacco merchants obtain a license to sell tobacco will provide an additional tool for helping them comply with federal, state and local tobacco control laws. Working in concert with media campaigns, educational

programs and other laws this measure will reduce youth access to tobacco and ultimately reduce youth smoking rates and long-term adult disease rates.

ALTERNATIVE ACTIONS CONSIDERED

Several options for reducing youth access to tobacco have been considered and implemented in recent years. Several Berkeley ordinances, educational programs and other efforts currently in place are designed to reduce youth access to tobacco and youth tobacco use prevalence. These include:

- Merchant education program to encourage compliance with federal, state and local tobacco control laws;
- Self-service tobacco display ordinance (BMC 13.62) to require vendor assistance with each tobacco sale and prohibit tobacco vending machines;
- Youth purchase surveys to test merchant compliance with PC 308(a);
- Conditional Use Permits to prohibit new smoke shops from locating near schools and parks;
- Media campaigns to reduce 'social sources' of youth access to tobacco, such as friends and family sources;
- Educational programs to decrease youth demand for tobacco, held in the community, at private schools and with 4th through 12 graders in the Berkeley Unified School District;
- Supporting a school policy to divert students who are found in possession of tobacco on school grounds from suspension into tobacco awareness programs;
- Cessation programs for youth and adults; and
- Countering pro-tobacco influences through media campaigns, community fairs, pledges, petitions and other activities, etc.

CONTACT PERSONS

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ATTACHMENT A –PROPOSED RESOLUTION AND ORDINANCE

ATTACHMENT B - PROJECTED TOBACCO LICENSURE COSTS

ATTACHMENT C - TOBACCO RETAIL LICENSURE PROTOCOL

ATTACHMENT D - COMMUNITY MEETING NOTICES

ATTACHMENT E – SUMMARY OF COMMUNITY MEETINGS

Approved by:



Fred Medrano, Director

Department of Health and Human Services

ATTACHMENT A

RESOLUTION NO. -N.S.

ESTABLISHING FEES FOR THE ADMINISTRATION, MONITORING, AND ENFORCEMENT OF A PROGRAM TO LICENSE RETAILERS SELLING TOBACCO IN BERKELEY; AND AUTHORIZING THE IMPLEMENTATION OF THE PROGRAM AND APPROPRIATION OF FUNDING FOR RELATED EXPENSES

WHEREAS, minors continue to obtain cigarettes and other tobacco products at alarming rates, despite state and local laws restricting youth access to tobacco; and

WHEREAS, in a 2001 California youth-buying survey, 19.3% of retailers surveyed unlawfully sold tobacco products to minors;¹ and

WHEREAS, in 2002 the Berkeley Police Department found that 38% of Berkeley tobacco merchants sold tobacco to minors;² and

WHEREAS, a requirement for a tobacco retailer license will not unduly burden legitimate business activities of retailers who sell or distribute cigarettes or other tobacco products to adults. It will, however, allow the City to regulate the operation of lawful businesses to discourage violations of federal, state, and local tobacco-related laws; and

WHEREAS, the City of Berkeley 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.

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Berkeley, as follows:

The fee of \$283 is hereby established as an annual fee for each tobacco retailer in Berkeley, whether from a fixed location or a mobile vehicle/structure, for the costs associated with the administration, monitoring, and enforcement of a program to license retailers selling tobacco in Berkeley. Further, Environmental Health reinspection fees will be charged, as necessary and authorized by existing Council Resolution.

BE IT FURTHER RESOLVED, that the City Manager is authorized to implement the program and appropriate funding for related expenditures.

¹ Cal. Dept. Health Servs., Tobacco Control Section, *Youth Tobacco Purchase Survey 2002*.

² Results of the Berkeley Police Department, youth purchase survey, available from the City of Berkeley Tobacco Prevention Program.

ATTACHMENT A

ORDINANCE NO. –N.S.

ADDING CHAPTER 9.80 TO BERKELEY MUNICIPAL CODE TITLE 9, BUSINESS LICENSES AND REGULATIONS, REQUIRING THE LICENSURE OF TOBACCO RETAILERS IN THE CITY OF BERKELEY.¹

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. **Findings:** That Council finds and determines that:

A. State law prohibits the sale or furnishing of cigarettes, tobacco products and smoking paraphernalia to minors, as well as the purchase, receipt, or possession of tobacco products by minors (Pen. Code § 308).

B. State law provides procedures for using persons under 18 years of age to conduct on-site compliance checks of tobacco retailers and requires that tobacco retailers check the identification of tobacco purchasers who reasonably appear to be under 18 years of age (Bus. & Prof. Code §§ 22952, 22956).

C. State law requires that tobacco retailers post a conspicuous notice at each point of sale stating that selling tobacco products to anyone under 18 years of age is illegal (Bus. & Prof. Code § 22952, Pen. Code § 308).

D. State law prohibits the sale or display of cigarettes through a self-service display and prohibits public access to cigarettes without the assistance of a clerk but permits the sale of tobacco products from certain vending machines (Bus. & Prof. Code § 22962).

E. Berkeley Municipal Code Chapter 13.62 also prohibits the sale or display of cigarettes through a self-service display in other than adult-only tobacco retail establishments and prohibits public access to cigarettes without the assistance of a clerk while banning the sale of cigarettes and tobacco products from vending machines altogether, and further prohibits free sampling of tobacco.

F. State law prohibits the sale of “bidis” (hand-rolled filterless cigarettes imported primarily from India and some Southeast Asian countries) except in adult-only establishments (Pen. Code § 308.1).

G. State law prohibits the manufacture, distribution, or sale of cigarettes in packages of less than 20 cigarettes and prohibits the manufacture, distribution, or sale of “roll-your-own” tobacco in packages containing less than 0.60 ounces of tobacco (Pen. Code § 308.3).

II. State law prohibits public school students from smoking or using tobacco products

¹ For health and safety issues of tobacco smoking, see Ch. 12.68, Ch. 12.70 and Ch. 13.62

while on campus, while attending school-sponsored activities, or while under the supervision or control of school district employees (Educ. Code § 48901(a)).

I. Despite these restrictions, minors continue to obtain cigarettes and other tobacco products at alarming rates. Each year, an estimated 924 million packs of cigarettes are consumed by minors 12 to 17 years of age, yielding the tobacco industry \$480 million in profits from underage smokers.²

J. In a 2001 California youth-buying survey, 17.1% of retailers surveyed unlawfully sold tobacco products to minors.³

K. In 1999 the California Department of Health Services, Food and Drug Branch found that 73% of Berkeley tobacco merchants sold tobacco to minors (STAKE Act).⁴

L. In 2000 the Berkeley Police Department found that 35% of Berkeley tobacco merchants sold tobacco to minors.⁵

M. Berkeley Municipal Code §§ 23E.36.030, 23E.40.030, 23E.44.030, 23E.48.030, 23E.52.030, 23E.56.030, 23E.60.030, 23E.64.030 and 23E.68.030 prohibits tobacco retail stores to locate within 1,400 feet of schools and parks.

N. Eighty-eight percent of adults who have ever smoked tried their first cigarette by the age of 18 and the average age at which smokers try their first cigarette is 14½.⁶

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

P. 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.

Q. The City of Berkeley 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

² Joseph R. DiFranza, M.D. & John J. Librett, M.P.H., *State and Federal Revenues from Tobacco Consumed by Minors*, 89 Am. J. Pub. Health 1106 (1999).

³ Cal. Dept. Health Servs., Tobacco Control Section, *Youth Tobacco Purchase Survey 2001* (forthcoming 2002) (upon release, survey results are expected to be available the California Department of Health Services web site). Note that the youth sales rate cited above is a statewide average.

⁴ Survey results of the 1999 California Department of Health Services, STAKE Act youth purchase survey.

⁵ Results of the Berkeley Police Department, youth purchase survey, available from the City of Berkeley Tobacco Prevention Program.

⁶ U.S. Dep't of Health & Human Servs. et al., *Preventing Tobacco Use Among Young People: A Report of the Surgeon General* 67 (1994).

tobacco products to minors; and finally, and most importantly, in protecting children from being lured into illegal activity through the misconduct of adults.

Section 2. That Chapter 9.80, to license tobacco retailers, is hereby added to Title 9 of the Berkeley Municipal Code, to read as follows:

9.80.010 Purpose: The purpose of this chapter is to discourage violations of tobacco-related laws that prohibit or discourage the sale or distribution of tobacco products to minors and that prohibit the display of tobacco products within reach of the public, but not to expand or reduce the degree to which the acts regulated by federal or state law are criminally proscribed or to alter the penalty provided therefore.

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 permit, subject to compliance with all other applicable laws and ordinances. Nothing in this chapter shall be construed to render inapplicable, supercede, or apply in lieu of any other provision of applicable law, including, without limitation, any condition or limitation on indoor smoking made applicable to business establishments by California Labor Code section 6404.5.

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

A. "Proprietor" means a Person with an ownership or managerial interest in a business. An ownership interest shall be deemed to exist when a Person has a ten percent (10%) or greater interest in the stock, assets or income of a business other than the sole interest of security for debt. A managerial interest shall be deemed to exist when a Person can or does have, or can or does share, ultimate control over the day-to-day operations of a business.

B. "Tobacco Product" means any substance containing tobacco leaf, including but not limited to cigarettes, cigars, pipe tobacco, snuff, chewing tobacco, dipping tobacco, bidis, or any other instrument or paraphernalia which is designed for the smoking or ingestion of tobacco or products prepared from tobacco.

C. "Tobacco Paraphernalia" includes cigarette papers or wrappers, pipes, holders of smoking materials of all types, cigarette rolling machines, and any other item designed for the smoking or ingestion of Tobacco Products.

D. "Tobacco Retailer" means any person or business that operates a store, stand, booth concession or other place at which the sales of tobacco products are made to purchasers for personal consumption or use.

9.80.030 Requirement for Tobacco Retail Licensure

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.

B. It shall be a violation of a Tobacco Retailer's license for a licensee or his or her agent or employee to violate any local, state, or federal tobacco-related law.

9.80.040 Application Procedure:

A. 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.

B. It is the responsibility of each Proprietor to be informed of the laws affecting the issuance of a Tobacco Retailer's license.

C. A license that is issued in error or on the basis of false or misleading information supplied by a Proprietor may be revoked pursuant to Section 9.80.090(B). All applications shall be submitted on a form supplied by the City and shall contain the following information:

1. The name, address, and telephone number of each Proprietor.
2. The business name, address, and telephone number of the fixed location for which a Tobacco Retailer's license is sought.
3. The name and mailing address authorized by each applicant to receive all license-related communications and notices (the "Authorized Address"). Failure to supply an Authorized Address shall be understood to consent to the provision of notice at the business address specified in paragraph 2, above.
4. Whether or not any applicant has previously been issued a license pursuant to this chapter that is or was at any time suspended or revoked and, if so, the dates of the suspension period or the date of revocation.
5. Such other information as the City deems necessary for the administration or enforcement of this ordinance.

9.80.050 Issuance and Renewal of License:

A. Upon the receipt of an application for a Tobacco Retailer's license and the license fee, the City shall issue a license unless:

1. The application is incomplete or inaccurate; or
2. The application seeks authorization for Tobacco Retailing by a Proprietor for which or whom a suspension is in effect or by a Proprietor which or who has had a license revoked, pursu-

ant to Section 9.80.090; or

3. The application seeks authorization for Tobacco Retailing that is unlawful pursuant to this Code, or that is unlawful pursuant to any other local, state, or federal law.

4. The City has information that the Proprietor or his or her agent or employee has violated any local, state or federal tobacco control law within the preceding thirty (30) day period.

B. A License shall be valid for one year and must be renewed no later than thirty (30) days prior to the expiration of the payment term.

C. If the information required in the license application pursuant to Section 9.80.040(C), items 1, 2, or 3, changes, a new Tobacco Retailer's license is required before the business may continue to act as a Tobacco Retailer. For example, if a Proprietor to whom a license has been issued changes business location, that Proprietor must apply for a new license prior to acting as a Tobacco Retailer at the new location. If the business is sold, the new owner must apply for a license for that location before acting as a Tobacco Retailer.

9.80.060 Display of License: Each license shall be prominently displayed in a publicly visible location at the licensed premises.

9.80.070 License and Reinspection Fees: The City Council may by resolution establish fees for the administration of this chapter.

9.74.080 Licenses Nontransferable: A Tobacco Retailer's license is nontransferable and is valid only for the person and location of license issued, unless it is suspended or revoked for cause, for the period indicated.

9.74.090 Suspension or Revocation of License:

A. In addition to any other penalty authorized by law, a Tobacco Retailer's license may be suspended or revoked if the City finds, after notice to the licensee and opportunity to be heard, that the licensee or his or her agents or employees has violated the conditions of the license imposed pursuant to Section 9.80.030 above.

(1) Upon a finding by the City of a first license violation within any five-year period, the license shall be suspended for thirty (30) days.

(2) Upon a finding by the City of a second license violation within any five-year period, the license shall be suspended for ninety (90) days.

(3) Upon a finding by the City of a third license violation within any five-year period, the license shall be suspended for one (1) year.

(4) Upon a finding by the City of a fourth license violation within any five-year period,

the license shall be revoked.

B. A Tobacco Retailer's license may be canceled if the City finds, after notice and opportunity to be heard, that one of the following conditions exist. The revocation shall be without prejudice to the filing of a new application for a license.

(1) The application is incomplete for failure to provide the information required by Section 9.80.040.

(2) The information contained in the application, including supplemental information, if any, is found to be false in any material respect.

(3) The application seeks authorization for a license that is unlawful as specified in Section 9.80.050(A)(3).

C. A decision of the City to revoke or suspend a license is appealable to a Hearing Officer and must be filed with the Hearing Officer at least ten working days prior to the commencement date of the license suspension or revocation. An appeal shall stay all proceedings in furtherance of the appealed action. Following appeal, the decision of the Hearing Officer may be appealed to the City Manager or his or her designee. A decision of the City Manager or his or her designee shall be the final decision of the City.

D. During a period of license suspension the Tobacco Retailer must remove from public view all tobacco products.

9.80.100 Enforcement: The remedies provided by this chapter are cumulative and in addition to any other remedies available at law or in equity.

A. A violation of this Chapter is a misdemeanor punishable as set forth in Chapter 1.20 of this code, but may be charged, in the discretion of the prosecutor, as an infraction.

B. Violations of this ordinance are hereby declared to be public nuisances.

C. In addition to other remedies provided by this chapter or by other law, any violation of this ordinance may be remedied by a civil action brought by the City Attorney.

D. The City may recover reasonable attorneys fees and costs of suit in any civil action brought by the City Attorney to remedy any violation of this ordinance.

E. Any Person acting for the interests of itself, its members, or the general public may bring an action for injunctive relief to prevent future violations or to recover such actual damages as he or she may prove.

Section 3. Severability

In the event any court of competent jurisdiction holds any provision of this Ordinance invalid

or unenforceable, such holding shall not invalidate or render unenforceable any other provisions hereof.

Section 4. **Posting**

Copies of this ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of Old City Hall, 2134 Martin Luther King, Jr. Way. Within fifteen (15) days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.

ATTACHMENT B

**PROJECTED
ENVIRONMENTAL HEALTH AND FINANCE DEPARTMENT
TOBACCO RETAIL LICENSURE COSTS**

Environmental Health Division, HHS			Inspections	Hours
Total Projected Facility Inspections Per Year				
160 x 3	Routine Inspections	=	480	140
160 x 20%	Reinspections	=	32	18
160 x 20%	Complaint Response	=	32	25
160 x 10%	B.M.C. Chapter 12.70 Violations	=	<u>16</u>	<u>19</u>
			560	202
Total Projected Enforcement Hearings/Revocations			Enforcement Hearings/Revocations	Hours
160 x 5%	Selling Bidis	=	8	12
160 x 35%	Selling to Minors	=	56	90
160 x 25%	Self-Serve Display	=	40	70
160 x 5%	Paraphernalia	=	8	12
160 x 5%	B.M.C. Chapter 12.70 Violations and other local, State and Federal tobacco control laws	=	<u>8</u>	<u>14</u>
			120	198
Total Inspections and Hours		=	680	400
Cost of Program	400 hours x \$104/ hour ¹	=		\$41,600
Reinspection Revenue	18 hours x \$104/hour	=		-(\$1,872)
Sub-Total				\$39,728
.5 FTE Registered Environmental Health Specialist		=	\$30,051	
Fringes @ 30.0%		=	<u>\$9,015</u>	
			\$39,066	
0.5 FTE Registered Environmental Health Specialist.		=		\$39,066
Non-Personnel		=		<u>\$ 662</u>
				\$39,728

¹ Environmental Health hourly rate as set by Council Resolution # 61, 573 - N.S.

ATTACHMENT B

**PROJECTED
ENVIRONMENTAL HEALTH AND FINANCE DEPARTMENT
TOBACCO RETAIL LICENSURE COSTS**

<u>Indirect Inspection Hours</u>	<u>Hours</u>
Staff Meetings	45
Data Management	60
Travel	60
Office Specialist Support	80
Training	60
Telephone complaints/ follow-up and requests for service	62
Education (newsletter, etc.)	20
Notices and Reports	75
<u>Non Inspection Hours</u>	
Sick	48
Vacation	60
Holidays	70
<u>Direct Inspection Hours (see previous page)</u>	400
<u>Total Registered Environmental Health Specialist Hours (0.5FTE)</u>	1040

Finance Department Functions	Hours for Office Specialist II	Annual Costs
Establish and Maintain system to manage data	3 hours/month	\$850. (includes fringe benefits)
Track and Monitor current and new tobacco retailers	5 hours/month	\$1,500. (includes fringe benefits)
Administration, notices, billings, communication with retailers and Environmental Health Division	9 hours/month	2,650. (includes fringe benefits)
Materials, postage, miscellaneous		\$600.
TOTAL		\$5,600

ATTACHMENT B

PROJECTED ENVIRONMENTAL HEALTH AND FINANCE DEPARTMENT TOBACCO RETAIL LICENSURE COSTS

Environmental Health Division, HHS Dept. Costs= \$39,728/year

Finance Department Costs= \$5,600/year

Total Costs= \$ 45, 328/year

Currently, there are 130 fixed tobacco retailers and approximately 30 mobile vendors=160 retailers

Recommended Tobacco Retailer fee = \$283/year x 160= \$45, 328/year

It is recommended that costs and fees should be re-evaluated in two to three years to determine whether retailer fees can be adjusted.

**ATTACHMENT C
BERKELEY TOBACCO RETAILER LICENSE
PROTOCOL**

1. Obtaining a Berkeley Tobacco Retailer's License

On an annual basis, the list of current Berkeley tobacco retailers (BTR) will be sent to the Finance Department from the Health and Human Services Department, Environmental Health Division (EHD). Finance will send each BTR a bill for their annual tobacco retailer license at the time that they are billed for a food permit. The BTR License will cover the administration, implementation and the license enforcement. Based on a calculation of costs for the Environmental Health Division to administer, implement, monitor, track and enforce these licensure provisions, a fee of approximately \$248 per year will be assessed to each tobacco retailer. Based upon a calculation of the costs for the Finance Department to administer the license, mail renewals and collect fees, a fee of approximately \$35 per year will be assessed to each tobacco retailer. The total fee assessed to each Berkeley retailer selling tobacco will be \$283 per year.

- A. New language has been incorporated into the business license application asking if the applicant sells tobacco products. The Finance Department will bill tobacco retailers.
- B. Upon receiving license fee, a tobacco retail license certificate is sent to the retailer by the Finance Department, along with a copy of their requirements as a Berkeley tobacco retailer. The HHS Department, Tobacco Prevention Program will assist with list preparation.
- C. Each Tobacco Retailer shall apply for the renewal of his or her Tobacco Retailer's license no later than thirty (30) days prior to expiration of the payment term.

1. Posting Tobacco Retailer's License

Each BTR must post a current tobacco retailer's license in public view on site. The EHD will conduct approximately three (3) inspections each year with follow-up inspections as needed, to confirm that these requirements are being met.

3. Violation

If any BTR violates any federal, state or local tobacco control law, they will be subject to all fines or penalties associated with the violation. The enforcing department will send a copy of the violation to the EHD. Examples of the laws and the enforcing departments are:

- i. PC308(a) (sales to minors) – BPD
- ii. STAKE Act (sales to minors) – California Department of Health Services, Food and Drug Branch
- iii. PC 308.1 (sales of bidis in stores where minors are allowed) –BPD
- iv. PC308.3 (sales of “loosies & kiddie packs”) – BPD
- v. BMC13.62 (self-services displays) – EHD
- vi. BMC 12.70 (Smoking Pollution Control Ordinance) – EHD
- vii. BMC Zoning Ordinance Sub-Title 23E (no new smoke shops with tobacco paraphernalia near schools and parks)– Planning Department

The EHD may make a re-inspection with necessary fee, serve a notice within 5 days of the violation, or send a certified letter within 10 days of the violation requesting that the owner/manger of the business appear at a hearing for violation of BTR License. The HHS Dept., Tobacco Prevention Program will assist with tracking of violations.

4. Hearing for Violation of BTR License

The business owner or manager, EHD and possibly the BPD will present the case to the EHD-Hearing Officer to consider BTR License suspension or revocation as a consequence of violating a tobacco control law and therefore the conditions of the BTR License.

5. Suspension or Revocation of BTR License

In addition to any other penalty authorized by law, the BTR License may be suspended or revoked if the BTR Licensee violates any tobacco control law, with the following consequences. All retailers who have a suspended license must remove all tobacco products from public view:

- (1) In the case of a **first license violation** within any sixty-month (60) period, the license shall be suspended for thirty (30) days.
- (2) In the case of a **second license violation** within any sixty-month (60) period, the license shall be suspended for ninety (90) days.
- (3) In the case of a **third license violation** within any sixty-month (60) period, the license shall be suspended for one (1) year.
- (4) In the case of a **fourth license violation** within any sixty-month (60) period, the license shall be revoked.

6. Re-inspection and Fee

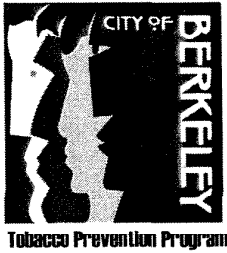
If the EHD must make a separate inspection to insure that there are no violations, the owner or manager will be charged a re-inspection fee. The EHD will send information to the Finance Department, which will bill the business owner.

7. Selling Tobacco without a BTR License

If a business or person sells tobacco without a license (either because they failed to get one or because they had their BTR License suspended or revoked), they will be subject to administrative fines as established by resolution of the City Council and administered by the City Manager. The EHD will send information to Finance Department, which will bill business owner.

8. Appeal Process

A decision of the City to revoke or suspend a license is appealable to a Hearing Officer and must be filed with the Hearing Officer at least ten working days prior to the commencement date of the license suspension or revocation. An appeal shall stay all proceedings in furtherance of the appealed action. Following appeal, the decision of the Hearing Officer may be appealed to the City Manager or his or her designee. A decision of the City Manager or his or her designee shall be the final decision of the City.



ATTACHMENT D

**SAMPLE NOTICE OF COMMUNITY MEETINGS
ON
PROPOSAL FOR TOBACCO RETAIL LICENSURE:**

**HELD MONDAY, APRIL 22, 2002 AT 2180 MILVIA
and
SATURDAY, MAY 25, 2002
3PM – 4PM**

**NORTH BERKELEY SENIOR CENTER
1901 MARTIN LUTHER KING JR. WAY, AT HEARST ST., BERKELEY**

THE CITY COUNCIL OF THE CITY OF BERKELEY HAS DIRECTED THAT THE CITY MANAGER PREPARE A PROPOSAL TO LICENSE ALL TOBACCO MERCHANTS IN BERKELEY.

The proposal would require each tobacco merchant intending to sell tobacco in Berkeley to pay an annual fee for a license. If merchants were found to be in violation of tobacco control laws, such as selling to a minor, they would risk license suspension. If there were more than three tobacco control violations within five years, they would risk license revocation.

IN PREPARATION FOR SUBMITTING THESE REGULATIONS TO THE CITY COUNCIL ON JUNE 25, 2002, THE CITY STAFF WOULD LIKE TO MEET WITH ALL PERSONS INTERESTED IN AND AFFECTED BY SUCH REGULATIONS TO SEEK THEIR COMMENTS AND SUGGESTIONS REGARDING THIS PLAN.

PLEASE COME TO THE COMMUNITY MEETING TO SHARE YOUR COMMENTS AND SUGGESTIONS REGARDING THIS PROPOSAL.

For further information, please contact Marcia Brown-Machen at 981-5330.

ATTACHMENT E

SUMMARY OF COMMUNITY MEETINGS HELD ON April 22, 2002 and May 25, 2002 TO DISCUSS TOBACCO RETAIL LICENSURE IN BERKELEY

All Berkeley tobacco retailers, various community groups, the Office of Economic Development, Chamber of Commerce, all merchants associations and others were sent two separate invitations (ATTACHMENT C) to attend community meetings on April 22, 2002 and Saturday, May 25, 2002. The licensing proposals were discussed, and merchants provided comments and feedback on the proposal.

On Monday April 22nd, there were only four merchants who attended the community meeting from more than 130 merchants who were sent notices 10-12 days before the meeting. There were no other representatives from the business community, but several Tobacco Prevention Coalition and licensure committee members attended. On Saturday, May 25th, eleven merchants and two community members attended.

During both meetings the tobacco retailers objected to the possible licensure scheme, since they said they were following the law and asking for IDs and felt that they were paying for the violations committed by other merchants. It turned out that the most vocal objector had actually sold tobacco to minors during two Berkeley Police Department youth purchase surveys and during two surveys conducted by the State.

Generally, the fee was thought to be too high and they didn't want to pass the extra expense on to their customers. One merchant estimated that another 5 cents per pack would cover the added expense. Several merchants thought we should be paying for the licensure costs by taking part of the fine that is collected by the State, when they cite for violations.

They admitted that if there were a licensing ordinance, they would be more likely to ID people and to come to merchant education sessions to hear about the law knowing that their ability to sell tobacco may be in jeopardy. There were concerns about all the regulations the city puts on them, the costs of permits and all the harassment from their customers.

Several recommendations included collecting fines as a method of paying for a program. It was explained to merchants that this would be an on-going proactive program with up-front costs that encourages and enables merchant compliance with the laws, rather than relying on merchant non-compliance for funding. It is recommended that costs and fees be evaluated in 3-5 years to determine whether retailer fees can be reduced if compliance with tobacco control laws increases.

Several recommendations about merchant education will be taken into consideration for possible implementation in the near future. A listing of comments and ideas as voiced by merchants are listed below and grouped into like categories.

Comments/ Concerns:

Some workers are afraid to ask for ID, especially late at night because young people come in who are cussing, aggressive, and hostile. To ask for ID makes it worse. This causes a lot of **stress for merchants**. They know what some young people are capable of and **businesses are easy targets**. "I deal with **kids, homeless, drunks**, and I know their problems, but we can't deal with them smoking cigarettes and drinking alcohol. There are reasons why they smoke and drink. People making an honest living still pay for all their costs."

"There's no way you're going to stop kids from smoking and drinking. I think all your efforts will not work. You're just punishing us. You have parents, schools, churches etc. who should keep control of their children. I care about the kids, too. We are not killers. You look to the community, the **family to take action** on this. The only way people kick these things is by responsibility and to say, 'I'm going to quit'."

"How do we know the cost will not go up every year?"

"We would have to pass on the cost of the licensure fee by **charging 5 cents more per pack**".

The **Tobacco Industry** should publish ingredients of cigarettes. When you allow someone to have the ability to sell a carcinogenic product, the industry is the criminal. They should stop allowing tobacco at all.

"It's all about generating more money. Smuggling created a loss of revenue for the state of CA. They can get cigarettes at only \$15 per carton on the Internet. Also, in the City of Berkeley, fewer people are smoking than before. Because of the price, and campaign against cigarettes, we **don't make any money off of cigarettes anymore**."

"We pay for a business license and sales tax, so if we also pay for a tobacco retail license, we will be paying a **double tax**. The government is trying to find the short cut and we are the small guys. Sometimes Berkeley feels **over regulated**. Not many services and lots of taxes. The merchants are in a less safe position than the City and it's day-to-day survival. Every regulation has to be managed by us and you have to make more adjustments. Other regulations will come our way that have nothing to do with tobacco."

We've been here a long time and **providing a customer service**. Instead of charging merchants for this, should charge the people who are not abiding by the rules. There is nothing left for us. City of Berkeley is doing a good job: we have no advertisements outside of the store. The Mayor sent me a letter saying "good job reducing sales to minors" and now I'm here trying to defend myself from getting a fee.

"Whenever a new law comes down, we don't listen. Education does nothing, because we merchants are the ones in the middle. We'll have to **shut down our businesses while there's a meeting**. How can we get merchant education when I'm trying to make a sale?"

“We make a mistake, **we all make mistakes**, so we should be able to correct our mistakes and go on. It hurts me if another merchant get shut down. It doesn’t make sense that owners are responsible when a clerk sells tobacco to minors.”

“During the stings, it was the **small stores that were selling to minors** more. That’s because we are in the neighborhoods, inside the community where people are more likely to go for a pack of cigarettes. The number of stores that’s selling tobacco to minors seems to be going down.”

“It’s very **easy for minors to get tobacco** and alcohol licensure won’t solve the problem. It will increase the price of tobacco. It will keep retailers from opening shops in Berkeley.”

“We merchants are doing our best. We **always ID people who look young**. How are you punishing the children?”

“This is too much for us to pay, there is no assurance that the city will use this money to enforce the law. I survive off money from tobacco sales. It’s not fair only retailers pay the fines, why doesn’t the city and police work with us. Your survey data is two years old. Take a new survey. **If we lose our license we will lose our consistent customers and go bankrupt.**”

New Ideas:

Merchants thought we should be paying for the licensure costs by taking part of the **fine that is collected by the State**, when they cite for violations.

The merchants feel **more education is required**, since some merchants could not make this meeting, other merchants feel we should have more meetings or at least one on a Saturday to reach all merchants who sell tobacco and provide merchant education. (Staff agreed to and did hold the following meeting on a Saturday afternoon)

Other merchants stated since many merchants don’t speak English, they wouldn’t come to meetings or learn much at a meeting. Merchants suggested we have other merchants who speak the same language educate the non-English speaking merchants. Merchants also stated that they need three weeks notice before the next meeting to make arrangements to attend. They suggested we have a **tobacco retailer newsletter that goes out four to five times a year, translated into Arabic**.

Merchants would like us to educate them on how to deal with the hostility of people who want tobacco. **How to cope with anxiety, stress and ways to enforce this**.

Merchants feel we should **link the fee to something else like sales tax**.

Another suggestion was for the state and county to do a lot of **undercover buy stings** and raise money to pay for licensure.

“Every **employee should sign a City of Berkeley pledge** promising that they will not sell tobacco to minors. Then if the clerk sells tobacco, they would be responsible or paying any fines.”

“The license should be **paid by the tobacco industry.**”

“Who ever violates the law should get **finer and jail time.**”

“**Provide a waiver for merchants who have excellent records.**”

“ City should **alert all warehouses not to sell tobacco to merchants who violate** the law.”

“**Increase the fines** for violations of PC 308a from \$200.”

“The best way to stop kids from smoking is **to raise the price of cigarettes** to \$10.00 per pack”

“**Site minors who are smoking on the street**, this will raise thousands of dollars. Make **bounty** for the public: every time you see a teen smoking bust them and get \$100.00.”

“**State request for increase in tobacco tax should be used for licensure program.**”