

ORDINANCE NO. 2012 - _____

**ORDINANCE OF THE MARIN COUNTY BOARD OF SUPERVISORS
REQUIRING THE LICENSING OF TOBACCO RETAILERS AND
REGULATING YOUTH ACCESS TO TOBACCO PRODUCTS AT
DRUGSTORES AND RETAIL FOOD DISTRIBUTORS**

THE BOARD OF SUPERVISORS OF THE COUNTY OF MARIN HEREBY ORDAINS AS
FOLLOWS:

SECTION I. Chapter 5.70 of the Marin County Code is hereby added to read as
follows:

CHAPTER 5.70

REQUIREMENT OF LICENSE FOR ALL TOBACCO RETAILERS

Sections:

5.70.010	Legislative Purpose
5.70.020	Legislative Findings
5.70.030	Title
5.70.040	Definitions
5.70.050	License Requirements for Tobacco Retailers
5.70.051	Application, Issuance and Renewal Procedure
5.70.052	Issuance, Display and Transfer of License
5.70.053	License Fee
5.70.054	Business License
5.70.055	Enforcement
5.70.056	License Revocation
5.70.057	License Suspension
5.70.058	Violation/Administrative Fines
5.70.059	Hearings on the Imposition of Administrative Fines; Appeal
5.70.060	Enforcement of State Law
5.70.065	Service of Notices or Decisions
5.70.070	Severability
5.70.080	Effective Date

5.70.010 Legislative Purpose

The purposes of this Chapter are:

- (a) to protect the public health, safety and general welfare as it relates to regulating the sale of tobacco products through licensing of responsible retailers;
- (b) It is the intent of the Board of Supervisors, in enacting this ordinance, to ensure compliance with the business standards and practices of the County and to encourage responsible tobacco retailing and to discourage violations of tobacco-related laws, especially those which prohibit or discourage the sale or distribution of tobacco and nicotine products to minors, but not to expand or reduce the degree to which the acts regulated by federal or state law are criminally proscribed or to alter the penalties provided therein; and
- (c) to offset the costs associated with providing county personnel to inspect retail businesses that do not comply with the purposes of this Chapter.

5.70.020 Legislative Findings

The Board of Supervisors finds and declares as follows:

- (a) Based in part on the information contained in this section, the Board of Supervisors finds that the failure of tobacco retailers to comply with all tobacco control laws, particularly laws prohibiting the sale of tobacco products to minors, presents an imminent threat to the public health, safety, and welfare of the residents of the County; and
- (b) The Board of Supervisors finds that a local licensing system for tobacco retailers is appropriate to ensure that retailers comply with tobacco control laws and business standards of the County to protect the health, safety, and welfare of our residents; and
- (c) Approximately 438,000 people die in the United States from tobacco-related diseases every year, making it the nation's leading cause of preventable death;¹ and

¹ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Morbidity and Mortality Weekly Report: Annual Smoking - Attributable Mortality, Years of Potential Life Lost, and Productivity Losses - United States 1997-2001*. 2005, 54(25): p. 625-628. Available at:

(d) The World Health Organization (WHO) estimates that by 2030, tobacco will account for 8.3 million deaths per year, killing 50% more people in 2015 than HIV/AIDS, and will be responsible for 10% of all deaths worldwide;² and

(e) 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 important source of preventable disease and premature death in California (Cal. Health & Safety Code § 118950);
- 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);
- 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 minors to conduct onsite compliance checks of tobacco retailers (Cal. Bus. & Prof. Code § 22952);
- State law prohibits the sale of tobacco products and paraphernalia through self-services displays with limited exceptions for tobacco stores (Cal. Bus. & Prof. Code § 22960, 22962);
- 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

(f) State law requires all tobacco retailers to be licensed by the Board of Equalization primarily to curb the illegal sale and distribution of cigarettes due to tax evasion and counterfeiting (Cal. Bus. & Prof. Code §§ 22970.1, 22972); and

www.cdc.gov/mmwr/preview/mmwrhtml/mm5425a1.htm.

² World Health Organization. *World Health Statistics 2007, Part 1: Ten Statistical Highlights in Global Public Health*. 2007, p. 12. Available at: www.who.int/whosis/whostat2007_10highlights.pdf.

(g) 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

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

(i) Despite the state's efforts to limit youth access to tobacco, minors are still able to access cigarettes, as evidenced by the fact that:

- Each day, nearly 4,000 children under 18 years of age smoke their first cigarette, and almost 1,500 children under 18 years of age begin smoking daily;³
- More than 75% of all current smokers in 2001 began smoking before the age of 18;⁴
- Among middle school students who were current cigarette users in 2004, 70.6% were not asked to show proof of age when they purchased or attempted to purchase cigarettes from a store, and 66.4% were not refused purchase because of their age;⁵
- In 2002, children under eighteen smoked approximately 540 million packs of cigarettes, generating nearly \$1.2 billion in tobacco industry revenue⁶; and

(j) Research demonstrates that local tobacco retail ordinances dramatically reduce youth access to cigarettes, as evidenced by the following:

- A review of thirteen California communities with strong tobacco retailer licensing ordinances shows that the youth sales

³ Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, Office of Applied Studies. *Results from the 2004 National Survey on Drug Use and Health: National Findings*. 2005. Available at: <http://oas.samhsa.gov/NSDUH/2k4nsduh/2k4Results/2k4Results.pdf>.

⁴ Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, Office of Applied Studies. *2003 National Survey on Drug Use and Health: Results*. 2003. Available at: www.oas.samhsa.gov/nhsda/2k3nsduh/2k3Results.htm#ch5.

⁵ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Morbidity and Mortality Weekly Report: Tobacco Use, Access & Exposure to Tobacco Among Middle & High School Students, U.S., 2004*. 2005, 54: p. 297-301. Available at: www.cdc.gov/mmwr/preview/mmwrhtml/mm5412a1.htm.

⁶ Heaton C, Farrelly MC, Weitzkamp D, et al. "Youth Smoking Prevention and Tobacco Industry Revenue." *Tobacco Control*, 15: 103-106, 2006. Available at: <http://tobaccocontrol.bmj.com/cgi/content/full/15/2/103>.

rate declined in twelve of the thirteen communities, with an average decrease of 68% in the youth sales rate;⁷

- 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;⁸
- 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 sales of tobacco to minors;⁹ and

(k) The implementation of tobacco retailer licensing requirements is supported by most Californians, as evidenced by the following:

- Statewide, over 80% of California adults think tobacco retailers should be licensed;¹⁰
- Similarly, in rural areas in California, 78% of adults think tobacco retailers should be licensed, and 91% agree that a store owner who repeatedly sells cigarettes to minors should no longer have the right to sell cigarettes;¹¹
- 65% of California's key opinion leaders surveyed support implementation of tobacco-licensing requirements;¹²
- 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;¹³ and

⁷ American Lung Association of California, Center for Tobacco Policy and Organizing. *Tobacco Retail Licensing is Effective*. 2007. Available at: www.center4tobaccopolicy.org/files/files/5377_Tobacco%20Retailer%20Licensing%20is%20Effective%20October%202007.pdf.

⁸ Ma GX, Shive S and Tracy M. "The Effects of Licensing and Inspection Enforcement to Reduce Tobacco Sales to Minors in Greater Philadelphia, 1994-1998." *Addictive Behaviors*, 26(5): 677-87, 2001. Abstract available at: www.ncbi.nlm.nih.gov/entrez/query.fcgi?cmd=Retrieve&db=PubMed&list_uids=11676378&dopt=Abstract.

⁹ Forster JL et al. "The Effects of Community Policies to Reduce Youth Access to Tobacco." *American Journal of Public Health*, 88(8): 1193-1197, 1998. Available at: www.ajph.org/cgi/reprint/88/8/1193.

¹⁰ California Department of Health Services, Tobacco Control Section. *California Tobacco Control Update*. 2004. Available at: <http://dhs.ca.gov/tobacco/documents/pubs/2004TCSupdate.pdf>.

¹¹ American Lung Association of California, Center for Tobacco Policy and Organizing. *Survey of California Rural and Small Town Voters About Local Tobacco Retail Licensing Ordinances*. 2008. Available at: www.center4tobaccopolicy.org/files/files/Rural_Poll_Summary_of_Findings_Final_5-21-08.pdf.

¹² California Department of Health Services, Tobacco Control Section. *Final Report, Independent Evaluation of the California Tobacco Control Prevention & Education Program: Waves 1, 2, and 3 (1996-2000)*. 2003. Available at: www.dhs.ca.gov/tobacco/documents/pubs/WavesComplete.pdf.

¹³ *Id.*

(l) Ninety-four cities and counties in California have passed tobacco retailer licensing ordinances in an effort to stop minors from smoking;¹⁴ and

(m) California retailers continue to sell tobacco to underage consumers, evidenced by the following:

- Nearly 11% of all tobacco retailers unlawfully sold to minors in 2007;¹⁵
- Non-traditional tobacco retailers such as deli, meat, and donut shops sold to minors in 2007 at a much higher rate than the statewide average, as high as 16%;¹⁶
- Teens surveyed in 2002 say they bought their cigarettes at: gas stations (58%), liquor stores (45%), and supermarkets and small grocery stores (29% combined);¹⁷ and

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

(o) The County of Marin 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.

5.70.030

Title: This Chapter shall be known as the “Licensing of Tobacco Retailers.”

¹⁴ American Nonsmokers' Rights Foundation. *California Municipalities With Ordinances Restricting Youth Access To Tobacco*. 2008. Available at: http://talc.phlaw.org/pdf_files/0021.pdf.

¹⁵ California Department of Health Services, Tobacco Control Section. *Youth Purchase Survey, 2007: Percent of Retailers Selling Tobacco to Youth by Store Type*. 2007 (graph on file with TALC).

¹⁶ *Id.*

¹⁷ California Department of Health Services, Tobacco Control Section. *Final Report, Tobacco Control Successes in California: A Focus on Young People, Results from the California Tobacco Surveys, 1990-2002*. 2003, p. 11-12. Available at: www.dhs.ca.gov/tobacco/documents/eval/2003CTSReport.pdf.

5.70.040 Definitions

For purposes of this chapter, the following words and phrases have the following meanings unless the context clearly requires otherwise:

(a) "Department" means Department of Health and Human Services of Marin County and any agency or Person designated by the Department to enforce or administer the provisions of this chapter.

(b) "Director" means the Director of the Marin County Department of Health and Human Services or his/her designee.

(c) "Licensee" means a tobacco retailer who has been issued a tobacco retailer's license in accordance with Section 5.70.050.

(d) "Person" means any natural person, partnership, cooperative association, corporation, personal representative, receiver, trustee, assignee, or any other legal entity.

(e) "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 share ultimate control over the day-to-day operations of a business.

(f) "Tobacco Product" means any substance containing tobacco leaf, including but not limited to cigarettes, cigars, pipe tobacco, hookah tobacco, snuff, chewing tobacco, dipping tobacco, snus, bidis, or any other preparation of tobacco; and any product or formulation of matter containing biologically active amounts of nicotine that is manufactured, sold, offered for sale, or otherwise distributed with the expectation that the product or matter will be introduced into the human body, but does not include any cessation product specifically approved by the United States Food and Drug Administration for use in treating nicotine or tobacco dependence.

(g) "Tobacco Retailer" means any Person who sells, offers for sale, or does or offers to exchange for any form of consideration, tobacco, Tobacco Products or Tobacco Paraphernalia in the unincorporated area of the county. "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.

5.70.050 License Requirements for Tobacco Retailers

It is unlawful for any retailer, individual, or entity to sell or offer for sale any tobacco products in the unincorporated area of the county without first obtaining and maintaining a valid tobacco retailer's license from the County of Marin for each location where these sales are conducted. No tobacco retailer's license will be issued that authorizes tobacco retailing at any location other than a fixed location. Tobacco retailing by persons on foot and tobacco retailing from vehicles are prohibited.

5.70.051 Application, Issuance and Renewal Procedure.

(a) Application. An application for a tobacco retailer's license shall be submitted to the Director of the Marin County Department of Health and Human Services in the name of the retailer, individual, or entity proposing to conduct retail tobacco sales on the business premises. The application shall be signed by the retailer, individual or entity or agent with written authority to act for same. All applications shall be submitted on a form available from the Department and shall contain the following information:

- (1) The name, address, and telephone number of the applicant;
- (2) The business name, address, and telephone number of each establishment where tobacco is to be sold.

(b) Issuance and Renewal. All tobacco retailer's licenses will be issued and due for renewal effective July 1st and will expire on the subsequent June 30th. Licensees must apply for renewal before the tobacco retailer's license expires. Applicants for renewal must follow the application procedures set forth in subdivision (a).

(c) A licensed Tobacco Retailer shall inform the Department in writing of any change in the information submitted on an application for a Tobacco Retailer's license within ten (10) business days of a change.

(d) All information specified in an application pursuant to this section shall be subject to disclosure under the California Public Records Act (California Government Code section 6250 *et seq.*) or any other applicable law, subject to the laws' exemptions.

5.70.052 Issuance, Display, and Transfer of License

(a) Upon receipt of a completed application for a tobacco retailer's license, including payment of a fee pursuant to Section 5.70.053, the Department will issue a tobacco retailer's license, unless any of the following grounds for denial

exist:

- (1) The application is incomplete or inaccurate;
- (2) The application seeks authorization for tobacco retailing by a person or location for which a suspension is in effect under Section 5.70.057;
- (3) The application seeks authorization for tobacco retailing that is an unlawful use of land, building or structure contrary to any provision of the Marin County Code; or
- (4) Failure to pay an outstanding fine pursuant to this Code.

(b) Each licensee must prominently display the tobacco retailer's license at the location where tobacco retail sales are conducted.

(c) The tobacco retailer's license is nontransferable. If there is a change in location, a new tobacco retailer's license will be issued for the new address upon receipt of an application for change of location. The new tobacco retailer's license will retain the same expiration date as the previous one.

5.70.053 License fee

(a) The fee to issue or to renew a Tobacco Retailer's license shall be **\$25.00** and shall be adjusted from time to time by Resolution of the Board of Supervisors. The fee shall be calculated so as to recover the cost of administration and enforcement of this chapter, including, for example, issuing a 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 and interest upon proceeds of fees shall be used exclusively to fund the program. Fees are nonrefundable except as may be required by law.

5.70.054 Business license

If a tobacco retailer's license is denied, revoked, or suspended pursuant to this chapter, the holder of a valid business license issued pursuant to Section 5.54 of this Code may nevertheless carry on all lawful aspects of his or her business, other than the sale or offering for sale of tobacco products, unless otherwise prohibited.

5.70.055 Enforcement

(a) Enforcement of this Chapter shall be the responsibility of the Marin County Department of Health and Human Services. Additionally, any person may report violations of this Section to the Department. Specifically, the Department may rely upon reports from any law enforcement officer or persons acting on behalf of the Department as to violations of this Chapter.

(b) The county may seek compliance with this chapter by any remedy allowed under this Code, including, but not limited to, revocation (Section 5.70.056), suspension (Section 5.70.057), civil fines (Section 5.70.058) and any other remedy allowed by law. Such remedies may be sought independent of one another or may be sought in addition to one another.

5.70.056 License revocation

(a) Grounds for Revocation. A tobacco retailer's license may be revoked on any of the following grounds:

- (1) One or more of the grounds for denial of a tobacco retailer's license under Section 5.70.052 existed either when a license application was made or before the tobacco retailer's license was issued;
- (2) The tobacco retailer's license fee is unpaid;
- (3) The tobacco retailer's license has been transferred in violation of Section 5.70.052(c); or
- (4) Two or more suspensions within a twelve (12) month period.

(b) Notice of Revocation Hearing. If any grounds for revocation exist, the director may issue a notice of revocation hearing. A notice of revocation hearing will be served to a tobacco retailer as specified in Section 5.70.065 and will include all of the following information:

- (1) The address or a definite description of the location where the tobacco retailer's license is issued;
- (2) The grounds for revocation;
- (3) The date of the revocation hearing before the Director or his/her designee. The notice of revocation hearing will set the hearing date no sooner than twenty days and no later than forty-five days following the date the notice of revocation hearing is served.

(c) Revocation Hearing. A tobacco retailer's license may be revoked by the Director or his/her designee after a tobacco retailer's license revocation hearing. At the hearing, the licensee will be given the opportunity to testify and to present evidence concerning the grounds set forth in the notice of revocation hearing. After considering the testimony and evidence submitted at the hearing, the Director or his/her designee will issue a written decision to revoke or not revoke the license and will list in the decision the reason or reasons for that decision. The written decision will be served as specified in Section 5.70.065. A revocation is without prejudice to the filing of a new application for a tobacco retailer's license.

(d) Revocation Appeal. The decision of the Director or his/her designee to revoke a tobacco retailer's license is appealable to a Hearing Officer. The

Hearing Officer shall be the County Administrative Officer (CAO) or his/her designee. The matter will be heard at a noticed public hearing. The Appeal shall be filed no later than 20 days following the mailing of the Director's decision or the date of personal service.

(e) Final Order. The tobacco retailer's license revocation becomes a final administrative order at one of the following times:

- (1) On the date of the revocation hearing, if a tobacco retailer fails to appear at a scheduled revocation hearing;
- (2) On the date when the time for an appeal has expired without a written appeal on record;
- (3) On the date of the appeal hearing, if a tobacco retailer fails to appear at a scheduled appeal hearing before the Hearing Officer;
- (4) On the date of the decision by the Hearing Officer, if a tobacco retailer appears at a scheduled appeal hearing before the Hearing Officer and the decision is adverse to the tobacco retailer.

5.70.057 License suspension

(a) Grounds for Suspension. A tobacco retailer's license may be suspended for any violation of this Chapter, or any state or federal tobacco-related laws.

(b) Notice of Suspension Hearing. If any grounds for suspension exist, the Director or his/her designee may issue a notice of suspension hearing. The notice of suspension hearing will be served to a tobacco retailer as specified in Section 5.70.065 and will include all of the following information:

- (1) The date of the violation;
- (2) The address or other description of the location where the violation occurred;
- (3) The code section(s) violated, or applicable state or federal law violated, and a description of the violation;
- (4) The time period of the tobacco retailer's license suspension;
- (5) The date of the suspension hearing before the Director or his/her designee. The notice of suspension hearing will set the hearing date no sooner than twenty days and no later than forty-five days following the date the notice of suspension hearing is served.

(c) Suspension Hearing. A tobacco retailer's license may be suspended by the Director or his/her designee after a tobacco retailer's license suspension hearing. At the hearing, the licensee will be given the opportunity to testify and to present evidence concerning the grounds set forth in the notice of suspension hearing. After considering the testimony and evidence submitted at the hearing, the Director or his/her designee will issue a written decision to suspend or not

suspend the tobacco retailer's license. The Director or his/her designee will list in the decision the reason or reasons for the decision and will list the time period of the tobacco retailer's license suspension, if applicable. The written decision will be served as specified in Section 5.70.065.

(d) Time Period of License Suspension.

- (1) A tobacco retailer's license suspension may be up to thirty days for a first violation;
- (2) A tobacco retailer's license suspension may be up to ninety days for a second violation occurring within twenty-four months of the first violation;
- (3) A tobacco retailer's license suspension may be up to one year for each subsequent violation occurring within twenty-four months of the most recent prior determination.

(e) Suspension Appeal. The decision of the Director or his/her designee to suspend a tobacco retailer's license is appealable to a Hearing Officer. The Hearing Officer shall be the County Administrative Officer (CAO) or his/her designee. The matter will be heard at a noticed public hearing. The Appeal shall be filed no later than 20 days following the date of mailing of the Director's decision or the date of personal service.

(f) Final Order. The tobacco retailer's license suspension becomes a final administrative order at one of the following times:

- (1) On the date of the suspension hearing, if a tobacco retailer fails to appear at a scheduled suspension hearing;
- (2) On the date when the time for an appeal has expired without a written appeal on record;
- (3) On the date of the appeal hearing, if a tobacco retailer fails to appear at a scheduled appeal hearing before the Hearing Officer;
- (4) On the date of the decision by the Hearing Officer, if a tobacco retailer appears at a scheduled appeal hearing before the Hearing Officer and the decision is adverse to the tobacco retailer.

5.70.058 Violation/Administrative Fines

(a) Violations of this Chapter are subject to an administrative citation issued by the Department, punishable by an administrative fine not less than five hundred dollars (\$500) per violation. It is the specific intention of the Board of Supervisors that the administrative fine may be assessed by the Director for violations even where the Department seeks revocation and/or suspension of a tobacco retailer's license. Each day that tobacco products are offered for sale by a tobacco retailer without a tobacco retailer's license is a separate violation. Thus, this administrative fine may be assessed at \$500 per violation and may be assessed

\$500 for each day as a separate violation. All fines and interest upon proceeds of fines shall be used exclusively to fund the tobacco education program.

(b) The remedies provided by this Chapter are cumulative and are in addition to any other remedies available at law or in equity.

(c) 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.

5.70.059 Hearings on the Imposition of Civil Fines; Appeal

(a) Administrative Hearing

Any person subject to an Administrative Fine pursuant to Section 5.70.058, et seq. shall have the right to request an administrative hearing within 45 days of the issuance of a citation for an administrative violation of this Ordinance [Sections 5.75.058] pursuant to the authority granted to the Board of Supervisors by Government Code Section 53069.4, et seq. To request such a hearing, the person requesting the hearing shall notify the Director of the Department of Health and Human Services in writing within 45 days of the issuance of the citation.

The Marin County Department of Health and Human Services shall refer any request for a hearing under Section 5.70.058, et seq. to a Hearing Officer. The Hearing Officer shall be the County Administrative Officer (CAO) or his/her designee. The Hearing Officer shall conduct a hearing on the matter within 90 days of the request for the hearing unless one of the parties requests a continuance for good cause. The Hearing Officer shall render a decision within 30 days of the conclusion of the hearing. Either party may appeal the decision of the Hearing Officer pursuant to the requirements set forth below in subsection (b).

(b) Appeal from Decision of the Hearing Officer

The person upon whom an Administrative Fine is imposed pursuant to Section 5.70.058 may appeal the decision of the Hearing Officer. The Department of Health and Human Services (H&HS) may also appeal the decision of the Officer. No appeal can lie unless the party filing the appeal has first properly requested and obtained a hearing

under Section 5.75.059(a) or, in the case of H&HS, participated in a hearing under Section 5.75.059(a).

The Appeal must be filed within 20 days after service of the final decision issued by the Hearing Officer pursuant to California Government Code Section 53069.4, subdivision (b). The procedures outlined in Government Code 53069.4 shall apply.

5.70.060 Enforcement of State Law

If a clerk or employee sells a tobacco product to a minor, the retailer shall immediately notify the appropriate local law enforcement agency of the violation of Penal Code Section 308 for enforcement under that statute.

5.70.065 Service of Notices or Decision

All notices or decisions required to be served by this Chapter will be served either by the method specified in subsection (a) or by the method specified in subsection (b). The failure of a person to receive a properly addressed service shall not affect the validity of the proceedings.

(a) Certified mail. Certified mail will be addressed to the tobacco retailer at the address shown on the license application. Service is deemed complete upon the deposit of the notice or decision, postage pre-paid, in the United States mail. Simultaneously, the same notice or decision may be sent by regular mail. If a notice or decision sent by certified mail is returned unsigned, then service is deemed effective pursuant to regular mail on the date mailed.

(b) Personal service. Personal service is deemed complete on the date the notice or decision is personally served.

5.70.070 Severability

If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this Chapter, or its application to any person or circumstance, is for any reason held to be invalid or unenforceable, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases of this Chapter, or its application to any other person or circumstance. The Board of Supervisors of the County of Marin hereby declares that it would have adopted each section, subsection, subdivision, paragraph, sentence, clause or phrase hereof, irrespective of the fact that any one or more other sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases hereof be declared invalid or unenforceable.

5.70.080 Effective Date

This Chapter shall be and is hereby declared to be in full force and effect as of thirty (30) days from and after the date of its passage and a Summary shall be published once before the expiration of fifteen (15) days after its passage, with the names of the supervisors voting for and against the same, in the MARIN INDEPENDENT JOURNAL, a newspaper of general circulation published in the County of Marin.

SECTION II. Chapter 5.75 of the Marin County Code is hereby added to read as follows:

CHAPTER 5.75

**REGULATING YOUTH ACCESS TO TOBACCO PRODUCTS AT
DRUGSTORES AND RETAIL FOOD DISTRIBUTORS**

Sections:

5.75.010	Legislative Purpose
5.75.020	Legislative Findings
5.75.030	Title
5.75.040	Definitions
5.75.050	Regulations Regarding Youth Access to Tobacco Products at Drugstores and Retail Food Distributors
5.75.051	Enforcement
5.75.052	Violations/Administrative Fines
5.75.055	Hearings on the Imposition of Administrative Fines; Appeal
5.75.060	Administrative Fine – Debt to County; Enforcement
5.75.070	Severability and Preemption
5.75.080	Effective Date

5.75.010 Legislative Purpose

The purposes of this Ordinance are:

- (a) to protect the public health, safety and general welfare as it relates to children;
- (b) to promote the reduction of underage smoking by imposing youth access regulations on retail businesses that store and/or package tobacco products in a manner that increases the risk that children will commence smoking;

- (c) to facilitate the enforcement of laws prohibiting the sale of tobacco products to minors; and
- (d) to offset the costs associated with providing county personnel to inspect retail businesses that do not comply with the purposes of this Ordinance.

5.75.020 Legislative Findings

The Board of Supervisors finds as follows:

- (a) The County of Marin, pursuant to the police powers delegated to it by the California Constitution, has the authority to enact laws which promote the public health, safety and general welfare of its residents;
- (b) Smoking related illnesses are responsible for approximately one in five deaths in the United States and are one of the leading sources of preventable death worldwide¹⁸ and in the County of Marin, the three leading causes of death in 2000 were Coronary Heart Disease, Cancer and Cerebrovascular Disease, all of which can be caused by or exacerbated by tobacco use;¹⁹
- (c) In addition to its health impact, tobacco related death and disease has an economic impact. In 1999, the economic costs of smoking in California were estimated to be \$475 per resident or \$3,331 per smoker, for a total of nearly \$15.8 billion in smoking-related costs (1999 dollars).²⁰ Those same costs in 2008 dollars would be \$614 per resident or \$4,310 per smoker for a total of nearly \$20.4 billion dollars;²¹
- (d) It is inappropriate for pharmacies and drugstores as health care providers to also sell tobacco products and thus contribute to tobacco-related disease. Selling the cure (smoking cessation products) and the cause (tobacco products) are a fundamental contradiction;
- (e) As of January 2003, 75% of independent pharmacies, 70% of small chain pharmacies and 100% of Target retail stores

¹⁸ Mokdad AH, Marks JS, Stroup DF, Gerberding JL. Actual causes of death in the United States, 2000. JAMA 2004; 291:1238-45. [PubMed]

¹⁹ Marin County Health and Human Services, Department of Epidemiology, Leading Causes of death; 2000. <http://www.co.marin.ca.us/depts/HH/main/epi/pdf/leadingcausedeathcharts.pdf>

²⁰ Max W, Rice DP, Zhang X, Sung H-Y, Miller L. The Cost of Smoking in California, 1999. Sacramento, CA: California Department of Health Services, 2002.

²¹ 2008 dollar figures calculated based on the Consumer Price Index from 1999 compared to 2008. A 1999 dollar is worth 29% more than a 2008 dollar. <http://minneapolisfed.org/research/data/us/calc/>

do not sell tobacco products. However, almost all large grocery stores, large chain pharmacies and discount/warehouse retailers excluding Target and Costco (Novato store) continue to sell tobacco products;^{22 23}

- (f) The California Department of Health Services funded several studies, which support the merits of tobacco-free pharmacy policies. The results show that of the independently-owned tobacco-free pharmacies in California, 96.8%²⁴ of California consumers indicate that they would continue to patronize their pharmacy or drugstore as often or more often if it stopped selling tobacco products; 72.3% of California consumers are not in favor of tobacco products being sold in drugstores, and 49.7%²⁵ “disagree” or “strongly disagree” that tobacco products should be sold through drugstores; and overall, 80.6% of chain drugstore pharmacists “disagree” or “strongly disagree” that it is appropriate for pharmacies and drugstores to carry tobacco products;
- (g) Tobacco-free and or cigarette-free pharmacy policies are endorsed by the American Medical Association, the American Public Health Association and the American Pharmaceutical Association and legislation banning the sale of tobacco in pharmacies has been adopted by the United Kingdom, France, Canada, and other countries;
- (h) Pharmacies and drugstores, which are tobacco vendors often cite loss of revenue as their primary reason to continue tobacco sales. However, a study funded by the California Department of Health Services shows that of the independently-owned pharmacies that have gone tobacco-free, 88%²⁶ reported that they had experienced either no loss or an increase in business since removing tobacco from their shelves. Pharmacies and drugstores with fears of potential restructuring costs associated with ending tobacco sales can consider taking these steps which helped

²² Tobacco Education and Research Oversight Committee for California. Confronting a Relentless Adversary: A Plan for Success Toward a Tobacco-Free California 2006-2008; March 2006.

²³ How Californians Really Feel about Tobacco in Pharmacies. October 2000. Fact sheet developed by Prescription for Change a project of the California Medical Association Foundation funded by the California Department of Health Services, Tobacco Control Section, Grant No. 00-90381

²⁴ Robinson G. California Adult Consumer Survey Pharmacies and Drugstores Selling Tobacco Products - Phase II: Executive Summary, 1997-2000; California State University Fullerton, Social Science Research Center; California Medical Association Foundation, Pharmacy Partnership Project. California State University Fullerton, Social Science Research Center; California Medical Association Foundation, 2000.

²⁵ Robinson G. California Adult Consumer Survey. *ibid.*

²⁶ Prescription for Change Fact Sheet. *op. cit.*

pharmacies and drugstores in Newfoundland, Canada ease the impact of the transition to becoming tobacco-free:

1. Ensure tobacco products are displayed in only a single section of the store.
2. Eliminate all advertisements including display material for tobacco products.
3. Display advertisements warning of the detrimental health affects of tobacco use (that comply with federal law) or the benefits of tobacco use cessation.
4. Encourage pharmacists to actively provide clients who smoke with tobacco cessation information, and display signage advertising the availability of the information.
5. Limit tobacco sales to a single checkout station.
6. Remove tobacco products from public view.
7. End sale of tobacco products and replace with additional smoking cessation products or products with high demand in the local economy;

(i) Through the sale of tobacco products, pharmacies, drug stores and retail food outlets including grocery stores, big box stores, convenience stores, liquor stores and gas stations, convey tacit approval of the purchase and use of tobacco products. This approval sends a mixed message to consumers who generally patronize grocery stores, convenience stores, liquor stores, gas stations, pharmacies and drug stores;

(j) The display of cigarette packages functions much like cigarette advertising in the minds of children, increasing their perception that cigarettes are easy to obtain and facilitating their recall of brand names. This study suggests that the presence of cigarette displays at the point-of-sale, even in the absence of cigarette advertising, has adverse effects on students' perceptions about ease of access to cigarettes and brand recall, both factors that increase the risk of taking up smoking. Furthermore, the study suggests that cigarette advertising has similar effects, and may also weaken students' firm intentions not to smoke in the future, a measure that also strongly predicts smoking commencement. These findings make a case for eliminating cigarette advertising at the point-of-sale, and also for placing

- cigarettes out of sight in the retail environment. [According to Wakefield et al. (2006)];²⁷
- (k) Cigarette companies spend more of their marketing dollars in stores than in any other venue. In 2005, they spent 88% of a total of \$13.1 billion to advertise and promote product sales in stores. The results indicate increasing use of stores to market and promote cigarette sales [E C Feighery 2008];²⁸
 - (l) Point of Purchase (POP) advertising exposes and potentially affects everyone: The young who grow up seeing tobacco as a benign cultural commonplace in the market on a par with milk and bread and come to underestimate its risks; the adult smoker who is reminded and cued to smoke now and more often; the occasional smoker who is cued to consume more; the would-be quitter whose intentions to quit are undermined; and the ex-smoker tempted to relapse and resume smoking. Regulation of both the amount (size) and character (brand imagery) of POP advertising is, therefore, a legitimate and important component of the tobacco control strategy, with substantial potential for advancing public health, particularly in jurisdictions where it is the predominant mode of sale promotion [Richard W. Pollay 2007];²⁹
 - (m) Promotions foster positive attitudes, beliefs and expectations regarding tobacco use. In turn, these positive reactions foster intentions to use and increase the likelihood of initiation. Greater exposure to promotion leads to higher risk. This is seen in diverse cultures and persists when other risk factors, such as socioeconomic status or parental and peer smoking, are controlled. Causality is the only plausible scientific explanation for the observed data. The evidence satisfies the Hill criteria, indicating that exposure to tobacco promotion causes children to initiate tobacco use [Joseph R. DiFranza, M.D. et al. 2006];³⁰
 - (n) Studies show that tobacco product ads and displays increase tobacco sales anywhere from 12% to 28%. These tobacco displays are also an effective marketing tool to children and youth. Voluntary bans of tobacco displays by

²⁷ Wakefield M, Germain D, Durkin S, Henriksen L. An experimental study of effects on schoolchildren of exposure to point-of-sale cigarette advertising and pack displays. *Health Education Research* 2006; 21(3):338-347.

²⁸ Feighery E C. An examination of Trends in Amount and Type of Cigarette Advertising and Sales Promotions in California Stores, 2002-2005. Public Health Institute, United States <http://lib.bioinfo.pl/pmid:18303088>

²⁹ Pollay, R. 2007. More Than Meets the Eye: On the Importance of Retail Cigarette Merchandising. *Tobacco Control* 16, 270-274

³⁰ DiFranzi, J. The Extent to Which Tobacco Marketing and Tobacco Use in Films Contribute to Children's Use of Tobacco. *Pediatrics and Adolescent Medicine*, Vol. 160 No. 12, December 2006

retailers will help prevent young people from starting to smoke and reduce their exposure to tobacco products.

5.75.030 Title

This Chapter shall be known as the "Youth Access Ordinance."

5.75.040 Definitions

For the purpose of this chapter, the following definitions shall apply:

(a) "Drugstore" means a retail or wholesale business that sells over the counter and prescription pharmaceutical products, may sell other food products as well and includes Pharmacies.

(b) "Juvenile" means any person less than eighteen (18) years of age.

(c) "Liquor Store" means any liquor retailer for which the principal or core business is selling wine, beer and/or distilled spirits (e.g., vodka, gin, bourbon, scotch, rum) as evidenced by any of the following: twenty percent (20%) or more of floor area or display area is devoted to wine, beer or distilled spirits; sixty-seven percent (67%) or more of gross sales receipts are derived from wine, beer and/or distilled spirits; or fifty percent (50%) or more of completed sales transactions include wine, beer or distilled spirits.

(d) "Opaque container" means a container that does not allow a person to see the contents inside the container.

(e) "Retail Food Distributor" means any store that sells food products including but not limited to grocery stores, big box stores, convenience stores or gas stations.

(e) "Significant Tobacco Retailer" means any Tobacco Retailer for which the principal or core business is selling Tobacco Products, Tobacco Paraphernalia, or both, as evidenced by any of the following: twenty percent (20%) or more of floor area or display area is devoted to Tobacco products, Tobacco Paraphernalia, or both; sixty-seven percent (67%) or more of gross sales receipts are derived from Tobacco Products, Tobacco Paraphernalia, or both; or fifty percent (50%) or more of completed sales transactions include Tobacco Products or Tobacco Paraphernalia.

(f) "Tobacco Product" means any substance containing tobacco leaf, including but not limited to cigarettes, cigars, pipe tobacco, hookah tobacco, snuff, chewing tobacco, dipping tobacco, snus, bidis, or any other preparation of tobacco; and any product or formulation of matter containing

biologically active amounts of nicotine that is manufactured, sold, offered for sale, or otherwise distributed with the expectation that the product or matter will be introduced into the human body, but does not include any cessation product specifically approved by the United States Food and Drug Administration for use in treating nicotine or tobacco dependence.

5.75.050 Regulations on Youth Access to Tobacco Products at Drugstores and Retail Food Distributors

- (a) Every drugstore and retail food distributor shall store tobacco products in a non-public storeroom or other non-public area of the drugstore or retail food distributor so that the **actual tobacco products** are not visible to juveniles. Should the drugstore or retail food distributor not have a separate storeroom that is not visible to the public or already have a separate area of the store where tobacco products are stored, the tobacco product shall be stored in opaque container(s) so that the actual tobacco products are not visible to juveniles.

(1) Exceptions:

(aa) Should a drugstore or retail food distributor have five (5) employees or fewer on duty during store hours, then it shall have the automatic option of storing tobacco products in opaque containers within the public area of the store as described in subsection (a) above.

(bb) Should storage of tobacco products in the storeroom or non-public area of the drugstore or retail food distributor be a hardship not otherwise addressed in subsection (aa), then the drugstore or retail food distributor may apply to the Director of Health and Human Services of Marin County for a hardship so that the drugstore or retail food distributor may store tobacco products in opaque containers. Applications are available through the Office of the Director of Marin County Department of Health and Human Services.

- (2) This section **shall not affect** the ability of a tobacco provider to promote its products and has no impact on the advertising or labeling of tobacco products. Consequently, a drugstore and/or retail food distributor has the ability to list the tobacco products anywhere in the store or where stored in an opaque container, on the outside of the opaque container, provide photographs of tobacco products anywhere in the store or on the outside of the opaque container and/or provide empty packages of tobacco products anywhere in the store or on the outside of the opaque

container so that the consumer of such products has the ability to see what products are available for purchase and the tobacco provider can promote its products. Such listing, photographs and/or empty packages may be done in any format within the drugstore and/or retail food distributor's place of business and/or on the outside of the opaque container. This section shall not affect other forms of advertising or display of the types of tobacco products available.

Placement within Store: Where tobacco products are stored in an opaque container (i.e., no warehouse or non-public storage area), it is preferred but not required that every drugstore and retail food distributor **place** the opaque container in an area of their establishment that is, to the extent possible, away from products normally purchased by juveniles or by parents with juvenile children.

(3) Tobacco products shall be **packaged and priced** at the storage point, that is, at the storeroom or other non-public area or at the opaque container location, in non-transparent material before scanning or charging the customer for the product.

(aa) For example, the clerk may package the product in a simple brown paper bag that is non-transparent so long as the pricing is on the outside of the bag. The intent here is that juveniles are not easily able to observe transactions involving tobacco products.

(b) Exemptions

The following establishments as defined in Section 5.75.040 are exempted from the requirements of this Chapter: (1) A significant tobacco retailer; and (2) Liquor stores.

5.75.051 Enforcement

(a) Notice of this Chapter will be provided to all drugstores and retail food distributors. However, lack of notice shall be no defense to a violation of this Chapter.

(b) Enforcement of this Chapter shall be the responsibility of the Director of the Marin County Department of Health and Human Services, or his/her designee.

5.75.052 Violations/Administrative Fines

- (a) Any person, employee, manager, or operator of any establishment subject to this Chapter who violates any provision of this chapter shall subject the **business owner** to an administrative fine under the following fine scheme:
- (1) An administrative fine not exceeding one hundred dollars (\$100) and/or ten hours of community service, for the first violation of this chapter.
 - (2) An administrative fine, not exceeding two hundred dollars (\$200) and/or twenty hours of community service, for a second violation of this chapter. It shall constitute a second violation of this chapter if a first violation is not corrected within 24 hours of notice of the first violation.
 - (3) An administrative fine, not exceeding five hundred dollars (\$500) and/or fifty hours of community service, for a third violation of this chapter. It shall constitute a third violation of this chapter if a second violation is not corrected within 24 hours of notice of the second violation.
 - (4) Should there be a continuous violation, that is, a failure to correct the violation, then the violator shall be subject to an administrative fine of five hundred dollars (\$500) a day following the third violation of this chapter.
 - (5) All proceeds of fines under this section shall be used exclusively to fund the County's tobacco education program.

5.75.055 Hearings on the Imposition of Administrative Fine; Appeals

a. Administrative Hearing

Any person subject to an Administrative Fine pursuant to Section 5.75.050, et seq. shall have the right to request an administrative hearing within 45 days of the issuance of a citation for a civil violation of this Ordinance [Sections 5.75.050 and 5.75.052] pursuant to the authority granted to the Board of Supervisors by Government Code Section 53069.4, et seq. To request such a hearing, the person requesting the hearing shall notify the Director of the Marin County Department of Health and Human Services (H&HS) in writing within 45 days of the issuance of the citation.

The Director of the Marin County Department of H&HS or his/her designee shall refer any request for a hearing under Section 5.75.050, et seq. to a Hearing Officer. The Hearing Officer shall be the County Administrative Officer (CAO) or his/her designee. The Hearing Officer shall conduct a hearing on the matter within 90 days of the request for the hearing unless one of the parties requests a continuance for good cause. The Hearing Officer shall render a decision within 30 days of the conclusion of the hearing. Either party may appeal the decision of the Hearing Officer pursuant to the requirements set forth below in subsection (b).

(b) Appeal from Decision of the Hearing Officer

The person upon whom an Administrative Fine is imposed pursuant to Section 5.75.052 may appeal the decision of the Hearing Officer. H&HS may also appeal the decision of the Hearing Officer. No appeal can lie unless the party filing the appeal has first properly requested and obtained a hearing under Section 5.75.055(a).

The Appeal must be filed within 20 days after service of the final decision issued by the Hearing Officer pursuant to California Government Code Section 53069.4, subdivision (b). The procedures outlined in Government Code 53069.4 shall apply.

5.75.060 Administrative Fine – Debt to County; Enforcement

The amount of an Administrative Fine shall be deemed a debt owed to H&HS by the person found in violation of Section 5.75.050 and therefore liable for a fine under Section 5.75.052. Any person owing such fine and/or fees shall be liable in an action brought in the name of H&HS for recovery of such fine and/or fees. These recovery costs may include reasonable attorney fees incurred in the action if H&HS prevails, as H&HS reserves the right to seek to recover reasonable attorney fees, on a case by case basis. In those cases in which the H&HS seeks to recover reasonable attorney fees, the other party may likewise do so.

5.75.070 Severability and Preemption

If any provision of this section or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect any other provision or application, and to this end the provisions of this section are severable. The administrative fines imposed by this

Ordinance do not preclude other potential civil actions or criminal prosecution under any other provision of law.

5.75.080 Effective Date

This Chapter shall be and is hereby declared to be in full force and effect as of thirty (30) days from and after the date of its passage and a Summary shall be published once before the expiration of fifteen (15) days after its passage, with the names of the supervisors voting for and against the same, in the MARIN INDEPENDENT JOURNAL, a newspaper of general circulation published in the County of Marin.

PASSED AND ADOPTED at a regular meeting of the Board of Supervisors of the County of Marin, held on the ___th day of _____, 2012, by the following vote:

AYES:

NOES:

ABSENT:

PRESIDENT OF THE BOARD OF SUPERVISORS

ATTEST

Clerk