

ORDINANCE NO. 5200

AN ORDINANCE OF THE COUNTY OF MONTEREY, STATE OF CALIFORNIA, ADDING CHAPTER 7.80 TO THE MONTEREY COUNTY CODE RELATING TO THE LICENSING OF TOBACCO RETAILERS

County Counsel Summary

This ordinance adds Chapter 7.80 to the Monterey County Code to establish licensing requirements for tobacco retailing within the unincorporated area of Monterey County. The ordinance requires tobacco retailers to obtain a license to engage in tobacco retailing at locations in the unincorporated areas of Monterey County. Selling tobacco products to minors or using false information in a license application are violations of Chapter 7.80 and may lead to suspension or revocation of the license. Penalties under Chapter 7.80 are graduated, depending on the number of violations. This ordinance provides that the denial of an application for a license, the suspension or revocation of a license, or the imposition of a penalty for tobacco retailing without a license are subject to administrative review. Retailers may pay a stipulated fine in lieu of a hearing.

The Board of Supervisors of the County of Monterey ordains as follows:

SECTION 1: Chapter 7.80 is added to the Monterey County Code to read as follows:

Chapter 7.80 - Tobacco Retailer License

Sections:

- 7.80.010 - Purpose and application.
- 7.80.020 - Definitions.
- 7.80.030 - Mandatory License.
- 7.80.040 - Issuance of License.
- 7.80.050 - Applications for License.
- 7.80.060 - Issuance of License.
- 7.80.070 - License renewal and expiration.
- 7.80.080 - License nontransferable.
- 7.80.090 - Inspections, investigations and enforcement.
- 7.80.100 - Suspension or revocation of License.
- 7.80.110 - Penalties for Tobacco Retailing without a License.
- 7.80.120 – Health Officer decision.
- 7.80.130 - Appeal procedures.
- 7.80.140 - Other Penalties.
- 7.80.150 - Stipulated fine in lieu of hearing.
- 7.80.160 - Implementation.
- 7.80.170 - Severability.

7.80.010 - Purpose and application.

A. In promoting the health, safety, and general welfare of its residents, the County of Monterey has a substantial interest in encouraging compliance with Federal, State, and local laws regulating tobacco sales and use.

B. State law permits local governments to enact ordinances regarding the local licensing of retailers of tobacco and allows for the suspension or revocation of a local license for a violation of any State tobacco control law.

C. This Chapter is adopted to: (1) ensure compliance with business standards and practices of the County; (2) to encourage responsible retailing of tobacco; and (3) to discourage violations of tobacco-related laws, but not to expand or reduce the degree to which the acts regulated by Federal or State law are criminally proscribed or otherwise regulated.

7.80.020 - Definitions.

For the purpose of this Chapter, the following words and terms shall have the following meaning:

- A. "Department" means the Monterey County Health Department.
- B. "Drug Paraphernalia" shall have the definitions set forth in California Health and Safety Code Section 11014.5, as that Section may be amended from time to time.
- C. "Health Officer" means the Health Officer of the County of Monterey or his or her designee.
- D. "License" means a Tobacco Retailer License issued by the County pursuant to this Chapter.
- E. "Licensee" means any Proprietor holding a License issued by the County pursuant to this Chapter.
- F. "License Fee" means the charge established by resolution of the Board of Supervisors of the County of Monterey, calculated to recover the reasonable regulatory costs of issuing and administering Licenses, retailer education, performing investigations, inspections, and the administrative enforcement and adjudication thereof.
- G. "Person" means any natural person, partnership, cooperative association, corporation, personal representative, receiver, trustee, assignee, or any other legal entity.
- H. "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 (10) percent 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.

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

J. "Tobacco Product" means any substance containing tobacco leaf--including but not limited to cigarettes, cigars, pipe tobacco, hookah tobacco, snuff, chewing tobacco, dipping tobacco, bidis, or any other preparation of tobacco--and any product or formulation of matter containing biologically active amounts of nicotine that is product or matter will be introduced into the human body, but does not include any product specifically approved by the United States Food and Drug Administration for use in treating nicotine or Tobacco Product dependence.

K. "Tobacco Retailer" means any Person who engages in Tobacco Retailing.

L. "Tobacco Retailing" means selling, offering for sale, exchanging, or offering to exchange for any form of consideration, tobacco, Tobacco Products, or Tobacco Paraphernalia without regard to the quantity sold, offered for sale, exchanged, or offered for exchange.

7.80.030 - Mandatory License.

A. Any Person who is or intends to become a Tobacco Retailer shall obtain pursuant to this Chapter a License for each fixed location at which Tobacco Retailing is to occur.

B. Any Person who is a Tobacco Retailer as of the effective date of the ordinance enacting this Chapter shall obtain a License within ninety (90) days of the effective date of the ordinance that enacted this Chapter.

C. Any Person who intends to act as a Tobacco Retailer shall obtain a License prior to acting as a Tobacco Retailer.

D. Each License shall be prominently displayed in a publicly visible location at the licensed location.

E. Nothing in this Chapter shall be construed to grant any Licensee any status or right other than to act as a Tobacco Retailer at the location identified on the face of the License, subject to compliance with all other applicable laws, regulations, or ordinances.

F. Nothing in this Chapter shall be construed to render inapplicable, supersede, or apply in lieu of any other provision of applicable law.

7.80.040 - Issuance of License.

A. No License shall be issued to authorize Tobacco Retailing at other than a fixed business location. It is unlawful for any Person to engage in Tobacco Retailing at non-fixed

locations. For example, Tobacco Retailing by Persons on foot and Tobacco Retailing from vehicles are prohibited.

B. No License shall be issued to authorize Tobacco Retailing at a temporary or recurring temporary event. For example, Tobacco Retailing at flea markets and farmers' markets is prohibited.

C. No License shall be issued to authorize Tobacco Retailing at any location for which a License suspension is in effect or during a period of ineligibility following a revocation pursuant to Section 7.80.100.

D. In the course of Tobacco Retailing or in the operation of the business or maintenance of the location for which a License issued, it shall be a violation of this Chapter for a Licensee, or any of the Licensee's agents or employees, to violate any local, State, or Federal law applicable to Tobacco Products, Tobacco Paraphernalia, or Tobacco Retailing.

E. No Person engaged in Tobacco Retailing shall sell or transfer a Tobacco Product or Tobacco Paraphernalia to another Person who appears to be under the age of twenty-seven (27) years without first examining the identification of the recipient to confirm that the recipient is at least the minimum age under State law to purchase and possess the Tobacco Product or Tobacco Paraphernalia.

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

7.80.050 - Applications for License.

All applications for a License shall be submitted to the Department in the name of each Proprietor proposing to conduct Tobacco Retailing and signed by each prospective Proprietor or an authorized agent. Each License application must be accompanied by the required License Fee, which is set by resolution of the Board of Supervisors. A Proprietor proposing to conduct Tobacco Retailing at more than one location shall submit a separate application for each location. Every application shall contain the following information:

- A. The name, address, and telephone number of each prospective Proprietor;
- B. The business name, address, and telephone number of the fixed location for which the License is sought;
- C. Whether or not each prospective Proprietor has previously been issued a License pursuant to this Chapter that is, or was at any time, suspended or revoked and, if so, the date of the suspension or revocation;
- D. Proof that the location for which a License is sought has been issued a valid State Cigarette and Tobacco Products Retail License by the State of California Board of Equalization pursuant to the California Cigarette and Tobacco Products Licensing Act of 2003 (Cal. Bus. &

Prof. Code, §§ 22970 et seq.);

E. A statement signed by each prospective Proprietor that no Drug Paraphernalia is or will be sold at the location for which the License is sought;

F. A statement signed by each prospective Proprietor that the Proprietor is informed of the laws affecting Licenses; and

G. Such other information as the County deems necessary for the administration of this Chapter.

7.80.060 - Issuance of a License.

A. Upon the receipt of a complete application for a License and the License Fee required by this Chapter, the Health Officer shall issue a License unless one (1) or more of the following grounds exists:

1. The application is incomplete or inaccurate;
2. The application seeks authorization for Tobacco Retailing at a location for which a suspension is in effect pursuant to this Chapter, for which a License has been revoked pursuant to this Chapter, or for which this Chapter otherwise prohibits issuance of Licenses;
3. The application seeks authorization for Tobacco Retailing for a prospective Proprietor for whom a suspension is in effect pursuant to this Chapter for the subject location or another location, whose License has been revoked pursuant to this Chapter for the subject location or another location, or to whom this Chapter otherwise prohibits a License to be issued;
4. The Department has information that the prospective Proprietor or his or her agent or employee has violated any local, State or Federal tobacco control law, including this Chapter, within the preceding twelve (12) months; or
5. The application seeks authorization for Tobacco Retailing that is prohibited pursuant to this Chapter, that is otherwise unlawful pursuant to this Code, or that is unlawful pursuant to any other local, State, or Federal law.

B. Any denial of an application for a License shall be in writing, setting forth the reasons for the denial and notifying the applicant for a License that the decision to deny an application for a License shall become final unless the applicant seeks an appeal pursuant to Section 7.80.130 within fourteen (14) calendar days of the date of service of the Health Officer's decision. Service of the decision shall be provided in accordance with the service requirements set forth in Subsection A of Section 7.80.120.

C. All information required to be submitted pursuant to Section 7.80.050 in order to apply for a License shall be updated whenever the information changes. A Tobacco Retailer shall provide the Department with any updates within ten (10) business days of a change.

7.80.070 - License renewal and expiration.

A. A License is invalid unless the appropriate License Fee has been paid in full and the term of the License has not expired. The term of a License is one (1) year beginning each fiscal year on July 1st and ending on June 30th of the following year. Each Tobacco Retailer shall apply for the renewal of his or her License and submit the License Fee no later than thirty (30) calendar days prior to expiration of the term.

B. A License that is not timely renewed shall expire at the end of its term. To reinstate a License that has expired, or to renew a License not timely renewed pursuant to Subsection A of this Section, the Proprietor must:

1. Submit the License Fee; and
2. Submit a signed affidavit affirming that the Proprietor:
 - a. Has not sold and will not sell any Tobacco Product or Tobacco Paraphernalia after the License expiration date and before the License is renewed; or
 - b. Has waited the appropriate ineligibility period established for Tobacco Retailing without a License, as set forth in Section 7.80.110, before seeking renewal of the License.

7.80.080 - License nontransferable.

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

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

1. The location has been fully transferred to an entirely new Proprietor or fully transferred to entirely new Proprietors; and
2. The new Proprietor(s) provides the Department with clear and convincing evidence that the new Proprietor(s) has acquired or is acquiring the location in an arm's length transaction. As used in this Section, the term "arm's length transaction" shall mean a sale in good faith and for valuable consideration that reflects the fair market value in the open market between two informed and willing parties, neither of which is under any compulsion to participate in the transaction. A sale between relatives, related companies or partners, or a sale for which a significant purpose is avoiding the effect of the violations of this Chapter is not an arm's length transaction.

7.80.090 - Inspections, investigations and enforcement.

A. Compliance with this Chapter shall be monitored by the Department or any law enforcement officer. Employees of the Department or a law enforcement officer may conduct compliance checks, including but not limited to youth decoy operations. Any law enforcement officer may enforce the penal provisions of this Chapter. Compliance checks may be unannounced.

B. The County shall not enforce any tobacco-related minimum age law against a person who otherwise might be in violation of such law because of the person's age (hereinafter "youth decoy") if the potential violation occurs when:

1. The youth decoy is participating in a compliance check supervised by an employee of the Department or a law enforcement officer;

2. The youth decoy is acting as an agent of a person designated by the County to monitor compliance with this Chapter;

3. The youth decoy is participating in a compliance check funded in part, either directly or indirectly through subcontracting, by the Department; or

4. The youth decoy has an immunity letter from the District Attorney's Office.

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.

7.80.100 - Suspension or revocation of License.

A. In addition to any other remedy authorized by law, after notice and opportunity to be heard pursuant to Section 7.80.120 of this Chapter, a License may be suspended or revoked as provided in this Section if the Health Officer finds by a preponderance of the evidence that the Licensee, or any of the Licensee's agents or employees, has:

1. Violated any of the requirements, conditions prohibitions of this Chapter; or

2. Pleaded guilty, "no contest" or its equivalent, or admitted to any of the following:

a. The original or renewal application contained incorrect, false, or misleading information;

b. One or more of the grounds for denial listed in Section 7.80.060 existed before the License was issued; or

c. A Licensee is convicted of a misdemeanor or felony violation of any Federal, State, or local tobacco retailing law or regulation, including any provision of this Chapter.

B. During any period of suspension or revocation, the Licensee shall remove all Tobacco Products and Tobacco Paraphernalia from public view. Failure to do so may be considered a subsequent violation.

C. When the Health Officer finds a violation as set forth in Subsection A of this Section, the License shall be suspended or revoked as follows:

1. Upon a finding by the Health Officer of a first License violation, the License shall be suspended for sixty (60) days;

2. Upon a finding by the Health Officer of a second License violation within any sixty (60) month period, the License shall be suspended for one hundred and twenty (120) days;

3. Upon a finding by the Health Officer of a third License violation in any sixty (60) month period, the License shall be suspended for one hundred and eighty (180) days; and

4. Upon a finding by the Health Officer of a fourth License violation within any sixty (60) month period, the License shall be revoked and no new License shall issue for the location until five (5) years has passed from the date of revocation.

D. Violation by a Licensee at one location shall not be construed as a violation at another location of the same Licensee, nor shall violations by a prior Licensee at the same location be accumulated against a subsequent Licensee at the same location.

E. A License shall be revoked if the Health Officer finds that one or more of the grounds for denial of an application for a License pursuant to Section 7.80.060 existed at the time the application was made or at any time before the License was issued.

7.80.110 - Penalties for Tobacco Retailing without a License.

A. In addition to any other penalty authorized by law, if a court of competent jurisdiction determines, or the Health Officer finds after notice and opportunity to be heard pursuant to Section 7.80.120 of this Chapter, that any Person has engaged in Tobacco Retailing at a location without a valid License, either directly or through the Person's agents or employees, the Person shall be ineligible to apply for, or to be issued, a License as follows:

1. After a first violation of this Section at a location, no new License may issue for the Person or the location (unless ownership of the business at the location has been transferred in an arm's length transaction), until sixty (60) days have passed from the date of the violation.

2. After a second violation of this Section at a location within any sixty (60) month period, no new License may issue for the Person or the location (unless ownership of the business at the location has been transferred in an arm's length transaction), until one hundred

and eighty (180) days have passed from the date of the violation.

3. After a third or subsequent violation of this Section at a location within any sixty (60) month period, no new License may issue for the Person or the location (unless ownership of the business at the location has been transferred in an arm's length transaction), until five (5) years have passed from the date of the violation.

B. Any imposition of a penalty pursuant to this Section shall be in writing, setting forth the reasons for the imposition of a penalty and notifying the Person subject to the penalty that the decision to impose the penalty shall become final unless the Person seeks an appeal pursuant to Section 7.80.130 within fourteen (14) calendar days of the date of service of the Health Officer's decision. Service of the decision shall be provided in accordance with the service requirements set forth in Subsection A of Section 7.80.120.

7.80.120 – Health Officer decision.

A. Upon determining the existence of any of the grounds pursuant to this Chapter for the suspension or revocation of a License, or the imposition of a penalty for Tobacco Retailing without a License, the Health Officer shall issue a notice of intended decision to the applicant for a License, the Licensee, or the Person against whom the penalty for Tobacco Retailing without a License is directed. The notice shall be provided by personal service or by first class mail, postage prepaid, and shall include a copy of the affidavit or certificate of mailing.

B. The notice of intended decision shall state all the grounds upon which the revocation, suspension, or imposition of penalty is based.

C. The notice of intended decision shall specify the effective date of the action.

D. The notice of intended decision shall state that the Health Officer shall give the applicant for a License, the Licensee, or the Person against whom the penalty for Tobacco Retailing without a License is directed an opportunity to request a hearing thereon. The hearing shall be an informal hearing before the Health Officer. Following the hearing, or within a reasonable time if no hearing is requested, the Health Officer shall issue a decision and serve the decision in accordance with the service requirements set forth in Subsection A of this Section.

E. The decision of the Health Officer shall be in writing, setting forth the reasons for the decision, and shall advise the applicant for a License, the Licensee, or the Person against whom the penalty for Tobacco Retailing without a License is directed that the decision to suspend or revoke the License, or to impose the penalty for Tobacco Retailing without a License shall become final unless the applicant for a License, the Licensee, or the Person against whom the penalty for Tobacco Retailing without a License is directed seeks an appeal pursuant to Section 7.80.130.

7.80.130 - Appeal procedures.

With regard to any denial of an application for a License pursuant to Section 7.80.060 or any

decision issued by the Health Officer pursuant to Section 7.80.120, the following rules apply:

A. A decision of the Health Officer to deny an application for a License, to suspend or revoke a License, or to impose a penalty for Tobacco Retailing without a License can be appealed to a hearing officer, subject to the following requirements and procedures. A Person served with a decision issued pursuant to Subsection B of Section 7.80.060 or Subsection D of Section 7.80.120 may seek an appeal by filing with the Health Officer a written request for hearing within fourteen (14) calendar days of service of the decision. Failure to timely file a written request for hearing shall be deemed a waiver of the right to challenge the decision of the Health Officer and a failure to exhaust administrative remedies. The hearing officers shall be individuals selected by the County who may hear the appeals, issue subpoenas, receive evidence to administer oaths, rule on questions of law and the admissibility of evidence, prepare a record of the proceedings, and issue orders with regard to an appeal.

B. The hearing officer shall schedule a hearing.

1. Written notice of the time, date and location of a hearing before the hearing officer shall be given by personal service or by first class mail, postage prepaid, including a copy of the affidavit or certificate of mailing, to the appellant.

2. Hearing Procedures.

a. Requirements for Taking Testimony. In any proceeding before a hearing officer, oral testimony offered as evidence shall be taken only on oath or affirmation, and the hearing officer, his/her clerk, or other designee shall have the power to administer oaths and affirmations and to certify to official acts. Oaths of witnesses may be given individually or en masse. Witnesses shall be asked to raise their right hands and to swear or affirm that the testimony they shall give will be the truth, the whole truth, and nothing but the truth.

b. Continuances. The hearing officer may continue the hearing as determined appropriate by the hearing officer.

c. Administrative Interpretations. In conducting the hearing, the hearing officer shall consider the previously established interpretation of an ordinance provision by the Department charged with its enforcement unless that interpretation is shown to be clearly erroneous or unauthorized.

d. Hearing Officer Decisions. Within thirty (30) calendar days after the close of the hearing, the hearing officer shall issue a written decision, including a statement of the basis for the decision. The hearing officer's written decision shall constitute the final administrative decision of the County.

e. In the event a civil action is initiated to obtain enforcement of the decision of the hearing officer, and judgment is entered to enforce the decision, the Person against whom the order of enforcement has been entered shall be liable to pay the County's total costs of enforcement, including reasonable attorney's fees.

C. The appellant's failure to appear at the hearing on appeal shall constitute an abandonment of the review request and a failure to exhaust administrative remedies.

7.80.140 - Other Penalties.

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

A. Violations of this Chapter may, in the discretion of the District Attorney, be prosecuted as infractions or misdemeanors.

B. Causing, permitting, aiding, abetting, or concealing a violation of any provision of this Chapter shall constitute a violation.

C. Violations of this Chapter are hereby declared to be public nuisances.

7.80.150 - Stipulated fine in lieu of hearing.

For a first or second alleged violation of this Chapter within any sixty (60) month period, the Health Officer may allow a Tobacco Retailer alleged to have violated this Chapter to stipulate in writing to the penalties provided in this Section in lieu of the penalties that would otherwise apply pursuant to this Chapter and to forego any right the Tobacco Retailer may have to a hearing pursuant to Section 7.80.130. Notice of any stipulation shall be provided to the Sheriff's Office, and no hearing shall be held. Stipulations shall not be confidential, shall be in writing, and shall contain the following terms plus any other noncriminal provisions established by the Health Officer in the interests of justice:

A. After a first alleged violation of the Chapter at a location:

1. An agreement by the Tobacco Retailer to stop acting as a Tobacco Retailer for one (1) day;

2. An administrative penalty of One Thousand and no/100ths (\$1,000.00) Dollars;

3. An admission by the Tobacco Retailer that the first alleged violation of the Chapter at the location occurred; and

4. An agreement that the first alleged violation of the Chapter at the location shall be considered in determining the penalty for any future violation.

B. After a second alleged violation of the Chapter at a location within any sixty (60) month period:

1. An agreement by the Tobacco Retailer to stop acting as a Tobacco Retailer for ten (10) days;

2. An administrative penalty of Five Thousand and no/100ths (\$5,000.00) Dollars;
3. An admission by the Tobacco Retailer that the second alleged violation of the Chapter at the location occurred; and
4. An agreement by the Tobacco Retailer that the second alleged violation of the Chapter at the location will be considered in determining the penalty for any future violations.

7.80.160 - Implementation.

The Department shall begin implementing the provisions of this Chapter effective July 1, 2012.

7.80.170 - Severability.

If any provision of this Chapter or the application thereof to any Person or circumstance is held invalid, the remainder of this Chapter or the application of such provision to other Persons or circumstances shall not be affected thereby.

SECTION 2. This ordinance shall become effective on the thirty-first day following its adoption.

PASSED AND ADOPTED on this 15th day of May, 2012, by the following vote:

AYES: Supervisors Armenta, Calcagno, Salinas, Parker, and Potter
 NOES: None
 ABSENT: None
 ABSTAIN:None

/s/ Dave Potter
 Dave Potter, Chair
 Monterey County Board of Supervisors

A T T E S T:

GAIL T. BORKOWSKI
 Clerk of the Board of Supervisors

By: /s/ Gail T. Borkowski
 Clerk

<p>APPROVED AS TO FORM</p> <p><u>/s/ Wendy S. Strimling</u> WENDY S. STRIMLING Senior Deputy County Counsel</p>
