Meeting Date: 02/14/12

ACTION	TYPE OF ITEM
☐ Approved Recommendation	■ Info/Consent
☐ Ord. No(s). _____	☐ Report
☐ Res. No(s). _____	☐ Public Hearing (Info/consent)
☐ Other _____	☐ Other _____

Prepared By: Grace Magistrale Hoffman GMH Agenda Item No. I-4

Reviewed By: City Manager City Attorney Finance Other *(Specify)*

DATE: February 6, 2012

TO: City Council

FROM: Grace Magistrale Hoffman, Deputy City Manager, City Manager's Office

SUBJECT: **Ordinance Establishing Tobacco Retailer Permits**

RECOMMENDATION

That City Council approve the first reading by title only and subsequent adoption of an ordinance establishing a local licensing system for tobacco retailers.

DISCUSSION

In order to reduce illegal sales of tobacco products to minors, many cities and counties in California have adopted local tobacco retailer licensing ordinances. A proposed ordinance for the City has been developed as a result of a multi-departmental team consisting of the Police Department, the City Attorney's Office, Licensing Division, and the City Manager's Office.

The proposed ordinance includes the following major components:

- All tobacco product retailers must obtain a non-transferrable license.
- Retailers will pay an annual licensing fee that covers program costs, including administration.
- Coordinates tobacco regulations so that a violation of any existing local, state or federal tobacco regulation violates the license.
- Provides a financial deterrent through fines and penalties including the suspension and revocation of the license.

To date, over 100 communities throughout the State have passed tobacco retailer licensing laws. A local licensing system for tobacco retailers is recommended to ensure that retailers comply with tobacco control laws and reduce youth access to tobacco products. Despite efforts to limit youth access to tobacco, minors are still able to access cigarettes, as evidenced by the following statewide statistics:

- Each day, more than 3,500 children under 18 years of age smoke their first cigarette, and each day approximately 1,000 children under 18 years of age begin to smoke daily.
- Ninety percent of all adult smokers begin while in their teens, or earlier, and two-thirds become regular, daily smokers before they reach the age of 19.
- 20.1 percent of high school students are current smokers by the time they leave high school.
- Experts maintain that smoking during youth is associated with an increased likelihood of using illegal drugs.

Surveys show that rates of illegal tobacco sales to minors have decreased in California communities which have passed strong retailer licensing ordinances.

City staff has worked closely with the Ventura County Public Health Tobacco Education Program to develop the proposed ordinance. In addition, City staff met with the Oxnard Chamber of Commerce Business Advocacy Committee on January 9, 2012, to present and discuss the proposed ordinance. The full board of the Chamber of Commerce took action on January 26, 2012, to support the local tobacco retailers licensing ordinance. (Although there was some concern about "smoke-free zones" expressed by the Business Advocacy Committee, this is not a component of the proposed ordinance.)

FINANCIAL IMPACT

The proposed tobacco retailer permit fees are based on a cost recovery basis. The proposed cost for the original application fee is $69, and the annual renewal fee is $51. There are approximately 190 tobacco retailers in the City of Oxnard.

Attachment #1 - Ordinance Establishing Tobacco Retailer Permits

ORDINANCE OF THE CITY OF OXNARD

ORDINANCE NO. __

ORDINANCE OF THE CITY COUNCIL OF THE CITY OF OXNARD ADDING ARTICLE XIV TO CHAPTER 11 OF THE OXNARD CITY CODE CONCERNING TOBACCO RETAILER PERMITS

The City Council of the City of Oxnard makes the following findings:

1. 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 City of Oxnard.

2. A local licensing system for tobacco retailers is appropriate to ensure that retailers comply with tobacco control laws and business standards of the City of Oxnard to protect the health, safety, and welfare of our residents.

3. 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 following facts:

- 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).

- 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).

- 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).

4. 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).

5. 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).

6. Despite the state's efforts to limit youth access to tobacco, minors are still able to access cigarettes, as evidenced by the following facts:

- Each day, more than 3,500 children under 18 years of age smoke their first cigarette, and each day approximately 1,000 children under 18 years of age begin to smoke daily.

- Ninety percent of all adult smokers begin while in their teens, or earlier, and two-thirds become regular, daily smokers before they reach the age of 19.

- 20.1% of high school students are current smokers by the time they leave high school.

- Smoking during youth is associated with an increased likelihood of using illegal drugs.

7. Approximately 78 cities and counties in California have passed tobacco retailer licensing ordinances in an effort to stop minors from smoking.

8. Surveys show that rates of illegal tobacco sales to minors have decreased in California communities which have passed strong retailer licensing ordinances.

9. In the City of Oxnard, tobacco retailers continue to sell tobacco to underage consumers, as evidenced by the following facts:

- From July 2009 to April 2010 the Ventura County Public Health Tobacco Education Program partnered with the Oxnard Revival Center to conduct Youth Purchase Surveys in the City of Oxnard to gather data on compliance rates.

- Of the 146 tobacco retailers surveyed, 38 sold tobacco products to youths, resulting in a 26% sales rate.

- In 71% of the attempts, the youths were not asked their age, and in 24%, they were not asked for identification.

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

11. The City of Oxnard 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 in protecting children from being lured into illegal activity through the misconduct of adults.

NOW THEREFORE, because it is the intent of the City Council of the City of Oxnard, in enacting this ordinance, to ensure compliance with the business standards and practices of the City of Oxnard 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, the City Council of the City of Oxnard does ordain as follows:

Part 1. Article XIV is hereby added to Chapter 11 of the Oxnard City Code to read as follows:

"ARTICLE XIV. TOBACCO RETAILERS

SEC. 11-370. DEFINITIONS.

For the purposes of this article, the following words shall have the following meanings:

(A) ARM'S LENGTH TRANSACTION – 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 the article is not an Arm's Length Transaction.

(B) COLLECTOR – The city treasurer or designee.

(C) PERSON – Any natural person, partnership, cooperative association, corporation, personal representative, receiver, trustee, assignee, or any other legal entity.

(D) PROPRIETOR – 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.

(E) SELF-SERVICE DISPLAY – The open display or storage of tobacco products or tobacco paraphernalia in a manner that is physically accessible in any way to the general public without the assistance of the retailer or employee of the retailer and a direct person-to-person transfer between the purchaser and the retailer or employee of the retailer. A vending machine is a form of self-service-display.

(F) SMOKING – Possessing a lighted tobacco product, lighted tobacco paraphernalia, or any other lighted weed or plant (including a lighted pipe, cigar, hookah pipe, or cigarette of any kind) and the lighting of a tobacco product, tobacco paraphernalia, or any other weed or plant (including a pipe, cigar, hookah pipe, or cigarette of any kind).

(G) TOBACCO PARAPHERNALIA – Cigarette papers or wrappers, pipes, holders of smoking materials of all types, cigarette rolling machines, and any other item designed for the smoking, preparation, storing, or consumption of tobacco products.

(H) TOBACCO PRODUCT – Any substance containing tobacco leaf, including but not limited to cigarettes, e-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.

(I) TOBACCO RETAILER – Any person who sells, offers for sale, or does or offers to exchange for any form of consideration, tobacco, tobacco products, or tobacco paraphernalia.

(J) TOBACCO RETAILING – Selling, offering for sale, or exchanging or offering to exchange for any form of consideration, tobacco, tobacco products, or tobacco paraphernalia without regard to the quantity of tobacco, tobacco products, or tobacco paraphernalia sold, offered for sale, exchanged, or offered for exchange.

SEC. 11-371. TOBACCO RETAILER PERMIT REQUIRED; COMPLIANCE WITH OTHER LAWS.

(A) No person shall act as a tobacco retailer without first obtaining and maintaining a valid tobacco retailer's permit pursuant to this article for each location at which such activity is to occur.

(B) Each tobacco retailer permit shall be posted in a conspicuous public location at the place of business for which the permit has been issued.

(C) A business tax certificate shall be obtained pursuant to section 11-4 of this code before any permit is issued pursuant to this section. The issuance of a permit shall not eliminate compliance with any other requirements, including the requirement for another permit, certificate or clearance, imposed by any other local, state, or federal rule, regulation, or law.

SEC. 11-372. TERM; FEES.

(A) A tobacco retailer permit shall be valid for 12 months from the date of issuance or as indicated on the permit and shall specify the location where tobacco retailing may be held.

(B) Fees for such permits shall be established by resolution of the city council.

SEC. 11-373. RESTRICTIONS.

(A) 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.

(B) 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.

(C) Tobacco retailing by means of a self-service display is prohibited.

(D) A tobacco retailer or proprietor without a valid tobacco retailer permit shall comply with the following requirements:

(1) All tobacco products and tobacco paraphernalia shall be kept out of public view.

(2) Advertisements relating to tobacco products or tobacco paraphernalia that promote the sale or distribution of such products from the tobacco retailer's location or that could lead a reasonable consumer to believe that such products can be obtained at that location shall not be displayed.

(E) Tobacco retailing at other than a fixed location is prohibited.

SEC. 11-374. PERMIT APPLICATION PROCEDURES.

(A) An application for a tobacco retailer permit shall be submitted on a form supplied by the collector, signed by each proprietor or an authorized agent thereof, and shall contain the following information:

(1) The name, title, address, and telephone number of each proprietor of the business seeking a permit.

(2) The business name, address, and telephone number of the single fixed location for which a permit is sought.

(3) A single name and mailing address authorized by each proprietor to receive all communications and notices required by, authorized by, or convenient to the enforcement of this article.

(4) Proof that the location for which a tobacco retailer permit is sought has been issued a valid state tobacco retailer's license by the California Board of Equalization, if applicable.

(5) The dates and locations of any admitted violations of this article or of any tobacco permit requirement by any proprietor or any agent of the proprietor and the dates and locations of any violations of this article or of any tobacco permit requirement found to have been committed by any proprietor or any agent of the proprietor within the previous five years.

(6) Such other information as the collector deems necessary for the administration or enforcement of this article as specified on the application form required by this section.

(B) A permitted tobacco retailer shall inform the collector in writing of any change in the information submitted on an application for a tobacco retailer permit within 10 business days of such change.

SEC. 11-375. ISSUANCE OF PERMIT.

Upon receipt of a completed application for a tobacco retailer permit and the applicable permit fee, the collector shall issue a permit, after receiving input from appropriate city departments, unless substantial evidence demonstrates that one or more of the following bases for denial exists:

(A) The information presented in the application is inaccurate or false.

(B) The application seeks authorization for tobacco retailing at a location for which this article prohibits issuance of tobacco retailer permits. This subsection shall not constitute a basis for denial of a permit if the applicant provides to the collector

documentation demonstrating by clear and convincing evidence that the applicant has acquired or is acquiring the location or business in an arm's length transaction.

(C) The application seeks authorization for tobacco retailing for a proprietor to whom this article prohibits a permit to be issued.

(D) The application sees authorization for tobacco retailing that is prohibited pursuant to this article, that is unlawful pursuant to this code, or that is unlawful pursuant to any other law.

SEC. 11-376. PERMIT RENEWAL.

(A) An application for the renewal of a tobacco retailer permit shall be submitted to the collector, along with the permit renewal fee as established by resolution of the city council, no later than 30 days prior to the expiration of the permit.

(B) A tobacco retailer permit that is not timely renewed shall expire at the end of its term. To renew a permit not timely renewed pursuant to subsection (A) of this section, the proprietor(s) must provide the following:

(1) An application for a new tobacco retailer permit along with the new application permit fee as established by resolution of the city council; and

(2) A signed affidavit affirming that the proprietor has not sold and will not sell any tobacco product or tobacco paraphernalia after the permit expiration date and before a new permit is issued or has waited the appropriate ineligibility period established for tobacco retailing without a permit, as set forth in section 11-379 of this code, before seeking a new permit.

SEC. 11-377. PERMITS NONTRANSFERABLE.

(A) A tobacco retailer permit may not be transferred from one person to another or from one location to another.

(B) A new tobacco retailer permit is required when a tobacco retailing location has a change in proprietor.

(C) Notwithstanding any other provision of this article, prior violations at a location shall continue to be counted against a location and permit ineligibility periods shall continue to apply to a location unless:

(1) The location has been fully transferred to a new proprietor or fully transferred to entirely new proprietors; and

(2) The new proprietor or proprietors provide the collector with clear and convincing evidence that the new proprietor or proprietors have acquired or are acquiring the location in an arm's length transaction.

SEC. 11-378. MODIFICATION, SUSPENSION, OR REVOCATION OF PERMIT.

(A) In addition to any other penalty authorized by law, a tobacco retailer permit may be modified, suspended, or revoked by the collector, after notice and an opportunity to be heard as set forth in article V of chapter 1 of this code, for failure of the permittee, or any of the permittee's agents or employees, to comply with applicable local, state, or federal rules, regulations, or laws concerning tobacco retailing, based on matters occurring after the permit is issued or on matters not considered at the time of issuance of the permit that would have authorized denial of the permit or the imposition of conditions on the permit.

(B) Any person, including a city officer or employee, may file with the collector a written request for revocation, suspension, or modification of a tobacco retailer permit, stating facts showing that the permittee, or any of the permittee's agents or employees, failed to comply with applicable rules, laws, regulations, or permit conditions.

(C) If the request is filed by a city officer or employee on behalf of a city department, the request shall be accompanied by a written report, stating wherein the permittee, or any of the permittee's agents or employees, has not complied with applicable rules, laws, regulations, or permit conditions and recommending that the tobacco retailer permit be revoked, suspended, or in what respect the permit should be modified.

(D) After revocation, no new permit may issue for the same location until the following time:

(1) Thirty (30) days from the date of revocation for a first violation at a location within any five year period.

(2) Sixty (60) days from the date of revocation for a second violation at a location within any five year period.

(3) Ninety (90) days from the date of revocation for a third violation at a location within any five year period.

(4) One (1) year from the date of revocation for a fourth or any subsequent violation at a location within any five year period.

(E) A tobacco retailer permit shall be revoked if the collector finds, after the permittee is afforded notice and an opportunity to be heard as set forth in article V of chapter 1 of this code, that one or more of the bases for denial of a permit under section

11-375 of this code existed at the time application was made or at any time before the permit issued. The decision by the collector shall be final.

SEC. 11-379. TOBACCO RETAILING WITHOUT A PERMIT.

(A) In addition to any other penalty authorized by law, if a court of competent jurisdiction determines, or the collector finds based on a preponderance of evidence, after notice and an opportunity to be heard as set forth in article V of chapter 1 of this code, that any person has engaged in tobacco retailing at a location without a valid tobacco retailer permit, either directly or through the person's agents or employees, the person shall be ineligible to apply for, or to be issued, a tobacco retailing permit as follows:

(1) After a first violation of this section at a location within any five year period, no new permit 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 30 days have passed from the date of the violation.

(2) After a second violation of this section at a location within any five year period, no new permit 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 90 days have passed from the date of violation.

(3) After a third or subsequent violation of this section at a location within any five year period, no new permit 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 year has passed from the date of the violation.

(B) Tobacco products and/or tobacco paraphernalia offered for sale or exchange in violation of this section are subject to seizure by the collector or any peace officer and shall be forfeited after the permittee and any other owner of the tobacco products and/or tobacco paraphernalia seized is given reasonable notice and an opportunity to demonstrate, as set forth in article V of chapter 1 of this code, that the tobacco products and/or tobacco paraphernalia were not offered for sale or exchange in violation of this article. Forfeited tobacco products and/or tobacco paraphernalia shall be destroyed after all internal appeals have been exhausted and the time in which to seek judicial review pursuant to California Code of Civil Procedure section 1094.6 or other applicable law has expired without the filing of a lawsuit, or if such a suit is final, after judgment in that suit becomes final.

SEC. 11-380. ENFORCEMENT.

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

(B) Whenever evidence of a violation of this article 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 article and the alleged violation shall be adjudicated based upon the sufficiency and persuasiveness of the evidence presented.

(C) Violations of this article are hereby declared to be public nuisances.

(D) In addition to other remedies provided by this article or by other law, any violation of this article may be remedied by a civil action brought by the City Attorney, including, but not limited to, administrative or judicial nuisance abatement proceedings, civil or criminal code enforcement proceedings, and suits for injunctive relief."

Part 2. Within 15 days after passage, the City Clerk shall cause this ordinance to be published one time in a newspaper of general circulation within the city. Ordinance No. ____ was first read on _____, 20__ and finally adopted on _____, 20__ to become effective thirty days thereafter.

AYES:

NOES:

ABSENT:

_____
Dr. Thomas E. Holden, Mayor

ATTEST:

_____
Daniel Martinez, City Clerk

APPROVED AS TO FORM:

for
_____
Alan Holmberg, City Attorney
2.8.12