STAFF REPORT
CITY OF SOLANA BEACH

TO: Honorable Mayor and City Councilmembers
FROM: David Ott, City Manager
MEETING DATE: July 8, 2009
ORIGINATING DEPT: Dept. of Public Safety/City Attorney’s Office
SUBJECT: Adopt (2nd Reading) Ordinance 403 - Related to Smoking and Tobacco, Tobacco Retailer Licensing, and Public Property and Places

BACKGROUND:
On June 24, 2009, the City Council introduced Ordinance 403, which would amend Chapter 6.16 of Title 6 of the Municipal Code to provide for the prohibition of smoking in outdoor dining areas, bars, playgrounds and tot lots, and farmer’s markets as well as to update the chapter and reduce accessibility of tobacco products to minors. It would also add Chapter 6.17 to Title 6 of the Municipal Code to provide for the licensure of tobacco retailers in Solana Beach for regulatory purposes and amend Chapter 11.12. of Title 11 of the to ban smoking within the boundaries of the Coastal Rail Trail.

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. The World Health Organization 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.

Smoking of tobacco or any other weed or plant is a positive danger to health and a cause of material annoyance, inconvenience, discomfort, and a health hazard to those who are present in confined places. Secondhand smoke is harmful to persons with certain respiratory conditions, and has also been determined to cause cancer to nonsmokers exposed to secondhand smoke on a frequent basis.

Every day approximately 3,600 children between 12 and 17 years of age smoke their first cigarette, and an estimated 1,100 of them will become regular smokers. Research has shown that smoking cigarettes during childhood and adolescence leads to significant health problems among young people including an increase in the number and severity of respiratory illnesses, decreased physical fitness, and potential

CITY COUNCIL ACTION:

AGENDA ITEM
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retardation in the rate of lung growth and the level of maximum lung function. Moreover, tobacco use is associated with alcohol and illicit drug use and acts as a "gateway drug."

Tobacco use poses a serious threat to the health and safety of young people. Reducing youth access to tobacco products is important to the health, safety and welfare of the citizens of the City. Tobacco retailers have failed to comply with all tobacco control laws, particularly those prohibiting the sale of tobacco products to minors.

State enforcement of tobacco control laws and the tobacco industry’s merchant education and signage programs have proven to be ineffective in curtailing tobacco sales to minors. However, strong local tobacco retailer licensing ordinances that are consistently and regularly enforced have resulted in dramatic reductions in the rate of illegal tobacco sales to minors. Because these ordinances are regulatory, their enforcement and other costs are funded by means of an annual fee that completely covers a city’s or county’s expenses in administering and enforcing the ordinance at the local level.

Further, while Solana Beach has ordinances regulating smoking in the City in order to protect the public from the effects of secondhand smoke, the City’s primary ordinance, Chapter 6.16 SBMC, was passed in 1992, prior to the California Legislature’s enactment in 1994 of California Labor Code ("LC") Section 6404.5, banning smoking in all places of employment, with certain specified, permissive, exceptions. Thus, certain sections of Chapter 6.16 were superceded by LC Section 6404.5, and this ordinance would amend and update Chapter 6.16 to reflect the presence of state labor law prohibitions. However, because local laws are superceded, but not preempted by state law, certain provisions protecting employees from secondhand smoke in the workplace have been retained in the event that state law should be repealed or modified. Additionally, state law invites local regulation of smoking in areas other than in places of employment, including unenclosed areas.

At the request of Council Members Joe Kellejian and David Roberts, Staff researched the issues and reviewed ordinances in other communities aimed at prohibiting smoking in outdoor dining areas and farmer's markets, establishing a tobacco retailer licensing ordinance, and banning smoking on or near the Coastal Rail Trail. The purpose of this report is to bring such an ordinance back to the City Council for consideration.

**DISCUSSION:**

At the June 24th City Council meeting, the City Council made the following changes to the proposed ordinance prior to the introduction: prohibiting smoking at street fairs and within 20 feet of all building entryways. The ordinance was introduced and first read with those additions. Ordinance 403 is now being presented for final adoption.

To assure a cleaner and more hygienic environment for the City, its residents, and visitors, as well as to strike a reasonable balance between the needs of persons who smoke and the needs of nonsmokers, including children and persons with respiratory
conditions, and to curtail access to tobacco products by minors, the City Council is being presented with a draft ordinance that updates its current ordinance to reflect state law and clarifies current bans on smoking in certain public areas, as well as proposes a ban on smoking in outdoor dining areas, bars, farmer's markets, and playgrounds and tot lots, whether or not those areas are enclosed; and on or near the Coastal Rail Trail. The aim of these prohibitions is to reduce the public's exposure to the deleterious effects of secondhand smoke, even in certain outdoor areas.

Further, this draft ordinance provides for a tobacco retailer licensing and enforcement process. Youth purchase surveys of several California communities have shown a marked decline in the rate of illegal sales of tobacco products in the wake of the enactment of strong tobacco retailer licensing ordinances, with an average decrease of 68% in the youth sales rate. This tobacco retailer licensing program is based primarily on that of the City of El Cajon but draws on similar ordinances from other cities as well. El Cajon's ordinance is the first of the so-called "strong" tobacco licensure ordinances in San Diego County, and has withstood challenges, including due process challenges, in the San Diego Superior Court. The anticipated result of enacting such program will be a significant decrease in the rate of illegal tobacco sales to minors and an increase in awareness by retailers of their obligations to train their employees to prevent such sales.

This ordinance also includes provisions that cigarettes be sold by means of vendor-assisted sales only, and bans cigarette vending machines. These provisions are also intended to decrease the accessibility of tobacco products to minors.

In addition to health considerations and accessibility to minors, another negative by-product of smoking tobacco products is the litter problem caused by irresponsible disposal of cigarette butts. At the request of various council members, City staff are researching the issues and will address them through a separate ordinance at a future date.

CEQA COMPLIANCE STATEMENT:
Not a project as defined by CEQA.

FISCAL IMPACT:
Should the City Council decide to adopt the tobacco retailer licensing ordinance, the proposed amount for the licensed fee will be studied and a recommendation will brought back to the City Council at a future date for approval.

WORKPLAN: N/A

OPTIONS:
- Adopt staff recommendation.
- Provide direction.
DEPARTMENT RECOMMENDATION:
Staff recommends that the City Council

1. Adopt Ordinance 403 amending Chapter 6.16 of Title 6 of the SBMC to provide for the prohibition of smoking in outdoor dining areas, bars, playgrounds and tot lots, and farmer's markets as well as to update the chapter and reduce accessibility of tobacco products to minors; adding Chapter 6.17 to Title 6 of the SBMC to provide for the licensure of tobacco retailers in Solana Beach for regulatory purposes; and amending Chapter 11.12. of Title 11 of the SBMC to ban smoking within the boundaries of the Coastal Rail Trail.

CITY MANAGER'S RECOMMENDATION:
Approve Department Recommendation

David Ott, City Manager

Attachments:
1. Ordinance 403
ORDINANCE 403


WHEREAS, approximately 440,000 people die in the United States from tobacco-related diseases every year, making it the nation's leading cause of preventable illness; and

WHEREAS, the United States Environmental Protection Agency (EPA) has found secondhand smoke to be a risk to public health, and has classified secondhand smoke as a group A carcinogen, the most dangerous class of carcinogen; and

WHEREAS, secondhand smoke exposure causes as many as 300,000 children in the United States to suffer from lower respiratory tract infections, such as pneumonia and bronchitis, exacerbates childhood asthma, and increases the risk of acute, chronic, middle ear infection in children; and

WHEREAS, 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 (California Penal Code § 308); and

WHEREAS, state law requires that tobacco retailers check the identification of tobacco purchasers who reasonably appear to be under 18 years of age (California Business and Professions. Code § 22956) and provides procedures for using persons under 18 years of age to conduct onsite compliance checks of tobacco retailers (California Business and Professions Code § 22952); and

WHEREAS, state law requires that tobacco retailers post a conspicuous notice at each point of sale stating that selling tobacco products to anyone under 18 years of age is illegal (California Business and Professions Code § 22952, California Penal Code § 308); and

WHEREAS, state law prohibits the sale or display of cigarettes through a self-service display and prohibits public access to cigarettes without the assistance of a clerk (California Business and Professions Code § 22962); and

WHEREAS, the City of Solana Beach, through Chapter 6.16 of the Solana Beach Municipal Code, prohibits smoking tobacco products in certain locations in the City of Solana Beach, and further prohibits the use of vending machines for the sale of cigarettes; and
WHEREAS, despite these restrictions, minors continue to obtain cigarettes and other tobacco products at alarming rates. Every day approximately 3,600 children between 12 and 17 years of age smoke their first cigarette, and an estimated 1,100 of them will become regular smokers. Half of them will ultimately die from their habit.

WHEREAS, in 2004, after enacting a tobacco licensure ordinance aimed primarily at reducing illegal sales of tobacco products to minors, El Cajon, saw the rate of illegal sales to minors drop from 40% in 2004 to 10% in 2007. After adopting its ordinance in 2002, Berkeley saw a drop in illegal sales from 38% to 4.2%. Coachella adopted an ordinance in 2007 and saw a drop in illegal sales from 69% to 11%. Elk Grove adopted an ordinance in 2004 and the rate of illegal sales dropped from 17% to 0%. In 2003, San Luis Obispo enacted an ordinance and the rate of illegal sales also dropped from 17% to 0%; and

WHEREAS, the city has a substantial interest in promoting compliance with federal, state, and local laws intended to regulate tobacco sales and use; in discouraging the illegal purchase of tobacco products by minors; in promoting compliance with laws prohibiting sales of cigarettes and tobacco products to minors; and finally, and most importantly, in protecting children from being lured into illegal activity through the misconduct of adults; and

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

WHEREAS, state law authorizes the regulation of tobacco retailers by means of implementation of local licensing laws that provide for the suspension or revocation of the retailer's local license for any violation of a local, state, or federal tobacco control law. (California Business and Professions Code § 22971.3); and

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

WHEREAS, for the health, safety, and welfare of the public, the City Council desires to further restrict access to tobacco by minors and minimize the public's exposure to second-hand smoke.

NOW THEREFORE, THE CITY COUNCIL OF THE CITY OF SOLANA BEACH DOES ORDAIN AS FOLLOWS:

Section 1. Section 6.16.010 of the Solana Beach Municipal Code is hereby amended to read as follows:

6.16.010 Definitions.
A. “Area open to the public” means any area available to and customarily used by the general public.

B. “Bar” means an enclosed or unenclosed establishment in which alcoholic beverages are served, and includes that area of a dining area which is devoted to the serving of alcoholic beverages and in which the service of food may be only incidental to the consumption of such beverages. C. Dining area” means any enclosed or unenclosed seating at any restaurant, dinner house, coffee shop, cafeteria, luncheonette, soda fountain, fast food service and other establishment where cooked or otherwise prepared food is sold to the general public for consumption on the premises.

D. “Distribute” means to give, sell, deliver, issue or cause or hire any person to give, sell, deliver, dispense, issue or offer to give, sell, deliver, dispense or issue.

E. “Employee” means any person who is employed by any employer in consideration for direct or indirect monetary wages or other compensation.

F. “Employer” means any person, partnership, corporation, including municipal corporation or public entities, who employs the services of two or more persons or two or more people conducting business within the establishment.

G. “Enclosed” means closed in by a roof and walls with appropriate openings for ingress and egress.

H. “General public” means shoppers, customers, patrons, patients, students, clients and other similar invitees of a commercial enterprise or nonprofit entity.

I. “Place of employment” means any enclosed area under the control of a public or private employer which employees normally frequent during the course of employment, including but not limited to, work areas, employee lounges, conference rooms, and employee cafeterias. A private residence is not a place of employment unless it is used as a child care, day care, health care or other similar facility.

J. "Playground" means any park or recreational area specifically designed to be used by children that has play equipment installed, or any similar facility located on public or private school grounds, or on city property.

K. "Self-service merchandising" means open display of tobacco products and point-of-sale tobacco-related promotional products to which the public has access without the intervention of any employee;

L. “Smoking” means the carrying or holding of a lighted pipe, cigar or cigarette of any kind, or any other lighted smoking equipment or the lighting or emitting or exhaling the smoke of a pipe, cigar or cigarette of any kind.

M. "Sports arena" means sports pavilions, gymnasiums, health spas, boxing arenas, swimming pools, roller and ice rinks, bowling centers, halls and other similar places where members of the public assemble to engage in physical exercise, participate in athletic competition, or witness sports events.

N. “Street Fair” means a gathering of people to display, sell, or trade produce or other goods, usually held on the main street of a neighborhood or in some other designated public place, such as in a park or parking lot, in which the main component is booths or stands used to sell goods, including food, or convey information. A street fair may also include carnival rides, parades, live music and/or dances.

O. "Unenclosed area" means any area which is not an enclosed area.

P. “Vending machine" means an electronic or mechanical device or appliance the operation of which depends upon the insertion of money, whether in coin or paper bill, or
other thing representative of value, which dispenses or releases a tobacco product and/or tobacco accessories;
Q. "Vendor-assisted" means only a store employee has access to the tobacco product and assists the customer by supplying the product. The customer does not take possession of the product until it is purchased.

Section 2. Section 6.16.020 of the Solana Beach Municipal Code is hereby amended to read as follows:

6.16.020 City-owned facilities and vehicles.
Smoking is prohibited in all buildings and vehicles, including cabs of motortrucks or truck tractors or other enclosed areas occupied by city employees, owned or leased by the city, or otherwise operated by the city.

Section 3. Section 6.16.030 of the Solana Beach Municipal Code is hereby amended to read as follows:

6.16.030 Smoking Prohibited.
Smoking is prohibited in the following places within the city of Solana Beach and city-owned facilities:

A. Within 20 feet of all entry ways and all enclosed areas available to and customarily used by the general public and all businesses patronized by the public, including but not limited to, retail stores, the common areas, including lobbies, of hotels and motels, pharmacies, banks, shopping malls, and other offices;
B. All enclosed or unenclosed dining areas and bars. The owner, manager or operator of the restaurant shall post signs as prescribed by SBMC 6.16.060 and remove all ashtrays from tables;
C. Elevators and public restrooms, indoor services lines, buses, taxicabs and other means of public transit under the authority of public entities, and in ticket, boarding and waiting areas of public transit depots;
D. In public area of museums and galleries;
E. Theaters, auditoriums, concert facilities and halls which are used for motion pictures, stage dramas and musical performances, ballets or other exhibitions, both indoor and outdoor, except when smoking is part of any such production;
F. Enclosed or unenclosed retail food marketing establishments, including grocery stores, farmer's markets, and supermarkets;
G. Public schools and other public facilities under the control of another public agency, which are available to and customarily used by the general public, to the extent that the same are subject to the jurisdiction of the city;
H. Sports arenas, both indoor and outdoor, and convention halls;
I. Private residences when used as child care, day care, health care, or other similar facilities.
J. Board and care facilities, except that long-term health care facilities, as defined in Section 1418 of the California Health and Safety Code, may provide patient smoking areas;
K. In, and within twenty feet of, any tot lot, any playground, and any recreational area. A tot lot is defined as any area located in a city park or city playground, or in a privately
owned playground open to the public, where playground equipment, intended for use by children, is located. Playground equipment includes but is not limited to swings, slides, sandboxes and climbing apparatus;
L. Street Fairs.

Notwithstanding any other provisions of this section, any owner, operator, manager, employer, or other person who controls any establishment described in this section may declare that entire establishment as a nonsmoking establishment.

Section 4. Section 6.16.040 of the Solana Beach Municipal Code is hereby repealed.

Section 5. Section 6.16.050 of the Solana Beach Municipal Code is hereby amended to read as follows:

6.16.050 Optional smoking areas.
Notwithstanding any other provisions of this chapter to the contrary, the following areas shall not be subject to the smoking restrictions of this chapter:
A. A private residence, including one which may serve as a place of employment, except for private residences licensed as family day care homes, during the hours of operation as family day care homes and in those areas where children are present.
B. In up to 25 percent of hotel and motel rooms rented to guests; provided, however, that each hotel and motel designates not less than 75 percent of their guest rooms as nonsmoking rooms and removes ashtrays from these rooms. Smoking rooms shall be segregated from nonsmoking on separate floors, wings, or portions of either; smoking and nonsmoking rooms shall not be interspersed. Nothing in this chapter shall require a hotel or motel to provide smoking rooms and the owner or operator of a hotel or motel may choose to prohibit smoking throughout the property;
C. In any unenclosed area other than those specifically provided for in this chapter or in Section 11.12.020(EE) of the SBMC;
D. Retail stores that deal exclusively in the sale of tobacco and smoking paraphernalia.

Section 6. Section 6.16.055 of the Solana Beach Municipal Code is hereby repealed.

Section 7. Section 6.16.070 of the Solana Beach Municipal Code is hereby amended to read as follows:

6.16.070 Vending machines.
No cigarette or other tobacco product, cigarette paper or wrapper may be sold, offered for sale, or distributed by or from a tobacco vending machine or other appliance, or any other device designed or used for vending purposes.

Section 8. Section 6.16.080 of the Solana Beach Municipal Code is hereby amended to read as follows:

6.16.080 Distribution of free samples and coupons for tobacco products and method of sales of tobacco products.
A. No person, firm, association or corporation in the business of selling or otherwise distributing cigarettes or other tobacco or smoking products for commercial purposes shall, in the course of such business, distribute, or direct, authorize or permit any agent or employee to distribute: (1) any cigarette or other tobacco or smoking product, including any smokeless tobacco product; or (2) coupons, certificates or other written material which may be redeemed for tobacco products without charge to any person on any public street or sidewalk or in any public park or playground or on any other public ground or in any public building.

B. No agent or employee of any person, firm, association or corporation in the business of selling or otherwise distributing cigarettes or tobacco or smoking products for commercial purposes shall, in the course of such business, distribute: (1) any cigarette or other tobacco or smoking product, including any smokeless tobacco product; or (2) coupons, certificates or other written material which may be redeemed for tobacco products without charge to any person on any public street or sidewalk or in any public park or playground or on any other public ground or in any public building.

C. For purposes of this section, “public ground” and “public building” mean and include sports arenas as defined in SBMC 6.16.010(), and for any entertainment facility whether enclosed or not for which a charge is made for admission, whether publicly or privately owned.

D. It shall be unlawful for any person, business, or tobacco retailer to sell, permit to be sold, offer for sale, or display for sale any tobacco product by means of self-service merchandising or by means other than vendor-assisted sales.

Section 10. Section 6.16.080 of the Solana Beach Municipal Code is hereby amended to read as follows:

6.16.120 Nonretaliation.
No person shall intimidate, threaten or effect any retaliation against an individual seeking enforcement of this chapter. Violation of this section is a misdemeanor punishable according to Chapter 1.16 SBMC.

Section 11. Chapter 6.17 is hereby added to the Solana Beach Municipal Code to read:

"Chapter 6.17
LICENSURE OF TOBACCO RETAILERS"

Sections:
6.17.010. Definitions.
6.17.040. Issuance Of License.
6.17.050. Other Requirements And Prohibitions.
6.17.060. Fees For License.
6.17.080. License Violation and Compliance Monitoring.
6.17.090. Suspension Or Revocation Of License.
6.17.010. Definitions.

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

A. "Department" means the community development department. (or...)
B. "Person" shall have the definition set forth in section 1.04.010 of the Solana Beach Municipal Code.
C. "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 or greater interest in the stock, assets, or income of a business other than the sole interest of security for debt. A managerial interest shall be deemed to exist when a person can or does have, or can or does share, ultimate control over the day-to-day operations of a business.
D. "Tobacco product" means: (1) any substance containing tobacco leaf, including but not limited to cigarettes, cigars, pipe tobacco, dipping tobacco, bidis, or any other preparation of tobacco; and (2) any product or formulation of matter containing biologically active amounts of nicotine that is manufactured, sold, offered for sale or otherwise distributed with the expectation that the product or matter will be introduced into the human body but does not include any product specifically approved by the Federal Food and Drug Administration for use in treating nicotine or tobacco product dependence.
E. "Tobacco paraphernalia" means cigarette papers or wrappers, pipes, holders of smoking materials of all types, cigarette rolling machines, and any other item designed for the smoking or ingestion of tobacco products.
F. "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. "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.


A. It shall be unlawful for any person to act as a tobacco retailer without first obtaining and maintaining a valid tobacco retailer's license pursuant to this chapter for each location at which that activity is to occur.
B. No license may issue to authorize tobacco retailing at any location. For example, tobacco retailing by persons on foot and tobacco retailing from vehicles are prohibited.
C. No license may issue to authorize tobacco retailing at any location that is licensed under state law to serve alcoholic beverages for consumption on the premises (e.g., an "on-sale" license issued by the California Department of Alcoholic Beverage Control) and no license may issue to authorize tobacco retailing at any location offering food for sale for consumption by guests on the premises. For example, tobacco retailing in bars and restaurants is prohibited.
D. The license fee established pursuant to section 6.17.060 confers paid status upon a license for a term of one year. Each tobacco retailer shall apply for the renewal of his or her tobacco retailer’s license no later than thirty days prior to expiration of the payment term.

E. Nothing in this chapter shall be construed to grant any person obtaining and maintaining a tobacco retailer’s license any status or right other than the right to act as a tobacco retailer at the location in the city identified on the face of the license. For example, nothing in this chapter shall be construed to render inapplicable, supercede, or apply in lieu of any other provision of applicable law, including, without limitation, any condition or limitation on smoking in enclosed places of employment made applicable to business establishments by California Labor Code section 6404.5.


A. Application for tobacco retailer’s license shall be submitted in the name of each proprietor proposing to conduct retail tobacco sales and shall be signed by each proprietor or an authorized agent thereof. It is the responsibility of each proprietor to be informed of the laws affecting the issuance of a tobacco retailer’s license. A license that is issued in error or on the basis of false or misleading information supplied by a proprietor may be revoked pursuant to section 6.17.090(C) of this chapter. All applications shall be submitted on a form supplied by the department and shall contain the following information:

1. The name, address, and telephone number of each proprietor.
2. The business name, address, and telephone number of the single fixed location for which a tobacco retailer’s license is sought.
3. The name and mailing address authorized by each proprietor to receive all license-related communications and notices (the “authorized address”). If an authorized address is not supplied, each proprietor shall be understood to consent to the provision of notice at the business address specified in subsection 2 above.
4. Whether or not any 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 dates of the suspension period or the date of revocation.
5. Such other information as the department deems necessary for the administration or enforcement of this ordinance codified in this chapter.

6.17.040. Issuance Of License.

Upon the receipt of an application for a tobacco retailer’s license and the license fee, the department shall issue a license unless substantial record evidence demonstrates one of the following bases for denial:

A. The application is incomplete or inaccurate; or
B. The application seeks authorization for tobacco retailing by a proprietor for which or whom a suspension is in effect pursuant to section 6.17.090 of this chapter; or
C. The application seeks authorization for tobacco retailing by a proprietor for which or whom a suspension is in effect pursuant to section 6.17.090 of this chapter; or at a location which has had a license revoked pursuant to section 6.17.090(A)(4) of this chapter provided, however, this subsection shall not constitute a basis for denial of a license if the applicant provides the city with documentation demonstrating by clear and convincing evidence that the applicant has acquired or is acquiring the premises or
business in an arm’s length transaction. For the purposes of this subsection, an “arm’s length transaction” is defined as 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 under any compulsion to participate in the transaction. A sale between relatives, related companies or partners, or a sale for the primary purpose of avoiding the effect of the violations of this chapter that occurred at the location, is presumed not to be an “arm’s length transaction”;

D. The application seeks authorization for tobacco retailing that is prohibited pursuant to Section 6.17.020 of this chapter (e.g., mobile vending), or that is unlawful pursuant to any other local, state, or federal law.

6.17.050. Other Requirements And Prohibitions.
A. Display of License. Each license shall be prominently displayed in a publicly visible location at the licensed premises.
B. Positive Identification Required. No Person shall engage in tobacco retailing without first examining the identification of the purchaser, if the purchaser reasonably appears under the age of twenty-seven years old, and confirming that the proposed sale is to a purchaser who is at least the minimum age in state law for being sold the tobacco product or tobacco paraphernalia.
C. Minimum Age for Persons Selling tobacco. No person shall engage in tobacco retailing if the person is younger than the minimum age in state law for being sold or for possessing any tobacco product.

6.17.060. Fees For License.
The fee to issue or to renew a tobacco retailer’s license shall be established by resolution of the city council. The fee shall be calculated so as to recover the total cost of both license administration and license enforcement, including, for example, issuing the license, administering the license program, retailer education, retailer inspection and compliance checks, documentation of violations, and prosecution of violators, but shall not exceed the cost of the total program. All fees shall be used to fund the program. Fees are nonrefundable except as may be required by law.

A tobacco retailer’s license is nontransferable. If the information required in the license application pursuant to section 6.17.030, subsections (A)(1),(2), or (3) changes, a new tobacco retailer’s license is required before the business may continue to act as a tobacco retailer. For example, if a proprietor to whom a license has been issued changes business location, that proprietor must apply for a new license prior to acting as a tobacco retailer at the new location. Or if the business is sold, the new owner must apply for a license for that location before acting as a tobacco retailer.

6.17.080. License Violation and Compliance Monitoring.
A. Violation of Tobacco-Related Laws. It shall be a violation of a tobacco retailer's license for a licensee or his or her agent or employee to violate any local, state, or federal tobacco-related law.

B. License Compliance Monitoring.
   1. Compliance with this chapter shall be monitored by the department. Any peace officer or code enforcement official also may enforce this chapter.
   2. The department shall check the compliance of each tobacco retailer at least one time per twelve-month period and shall conduct additional compliance checks within that period as warranted. The compliance checks shall be conducted to determine, at a minimum, if the tobacco retailer is complying with tobacco laws regulating underage sales. The department, or the police department, in assisting the department in performing compliance checks, shall use youth decoys and comply with protocols for the compliance checks developed in consultation with the San Diego County Department of Health and Human Services and the San Diego County District Attorney. When appropriate, the compliance checks shall determine compliance with other tobacco-related laws.
   3. The city 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:
      a. The youth decoy is participating in a compliance check supervised by a peace officer or a code enforcement official; or
      b. The youth decoy is participating in a compliance check funded in part by the San Diego County Department of Health and Human Services or funded in part, either directly or indirectly through sub-contracting, by the California Department of Health Services.

6.17.090. Suspension Or Revocation Of License.
A. Suspension or Revocation of License for Violation. In addition to any other penalty authorized by law, a tobacco retailer's license shall be suspended or revoked if the department finds, after notice to the licensee and opportunity to be heard, that the licensee or his or her agents or employees has or have violated the requirements or prohibitions of this chapter including the conditions of the license imposed pursuant to Section 6.17.080 of this chapter.
   1. Upon a finding by the department of a first license violation within any sixty-month period, the license shall be suspended for thirty days unless, at the election of the tobacco retailer, the tobacco retailer pays an administrative fine in accordance with Section 6.17.110(C) of this chapter. The payment of a fine in lieu of suspension does not expunge the violation and the violation will be counted for the purposes of a future finding that a second or subsequent violation has occurred.
   2. Upon a finding by the department of a second license violation within any sixty-month period, the license shall be suspended for ninety days and (if the violation occurs within twelve months of the first violation) the tobacco retailer shall be fined an administrative fine for a second violation in accordance with Section 6.17.110(C) of this chapter.
   3. Upon a finding by the department of a third license violation within any sixty-month period, the license shall be suspended for one year and (if the violation
occurs within twelve months of the first violation) the tobacco retailer shall be fined an administrative fine for a third violation in accordance with Section 6.17.110(C) of this chapter.

4. Upon a finding by the department of a fourth license violation within any sixty-month period, the license shall be revoked, if the violation occurs within twelve months of the first violation the tobacco retailer shall be fined an administrative fine for a fourth violation in accordance with Section 6.17.110(C) of this code, and the proprietor or proprietors who had been issued the license shall never again be issued a tobacco retailer's license pursuant to this chapter.

5. A tobacco retailer with a suspended or revoked license:
   a. Shall remove all tobacco products and tobacco paraphernalia from public view; and
   b. Shall not display any advertisement relating to tobacco products or tobacco paraphernalia that promotes the sale or distribution of such products at the tobacco retailer location or that would lead a reasonable consumer to believe that such products can be obtained at the tobacco retailer location, including any use of the terms, “tobacco,” or “smoke shop,” or similar references in the name of the business operated by the tobacco retailer;
   c. Except that for a first or second suspension within any sixty-month period, instead of complying with subsections a and b of this section, the tobacco retailer may elect to post a clear and legible sign at each point of sale and at every public entrance stating in seventy-two point type or larger: “TOBACCO PRODUCTS NOT FOR SALE because this store has violated a public health law regulating tobacco” and such signs must be present and remain free of obstructions for the entire duration of the suspension period.

B. Suspension of License for Failure to Pay Renewal Fee. A tobacco retailer's license that is not timely renewed pursuant to Section 6.17.020(D) shall automatically be suspended by operation of law. If not renewed, a license shall be automatically revoked two years after the renewal date. To reinstate the paid status of a license that has been suspended due to the failure to timely pay the renewal fee, the proprietor must:
   1. Submit the renewal fee plus a reinstatement fee of ten percent of the renewal fee; and
   2. Submit a signed affidavit affirming that the proprietor has not sold any tobacco product or tobacco paraphernalia during the period the license was suspended for failure to pay the renewal fee.

C. Revocation of License Issued in Error. A tobacco retailer's license shall be revoked if the department finds, after notice and opportunity to be heard, that one or more of the bases for denial of a license under Section 6.17.040 of this chapter existed at the time application was made or at any time before the license issued. The revocation shall be without prejudice to the filing of a new application for a license.

D. Appeal of Suspension or Revocation. A decision of the department to revoke or suspend a license may be appealed by a proprietor or a tobacco retailer by means of an administrative hearing before an independent fact finder, including, but not limited to, an administrative law judge from the state Office of Administrative Hearings. Any appeal must be filed with the city clerk within ten calendar days of mailing of the department's decision.
and be accompanied by the full amount of any applicable fine as provided in Section 1.18.070 of this code. An appeal shall stay all proceedings in furtherance of the appealed action. A suspension or revocation pursuant to Section 6.17.090(B) of this chapter is not subject to appeal.

E. An administrative hearing to appeal a decision of the department to revoke or suspend a license held pursuant to Section 6.17.100(B) is civil in nature and therefore the burden of proof required is a preponderance of the evidence.

F. The rules of evidence in an administrative hearing to appeal a decision of the department to revoke or suspend a license held pursuant to Section 6.17.100(B) shall be in accordance with California Government Code Sections 11513 and 11514 as those sections are amended from time to time.

6.17.100. Administrative Fine.

A. Grounds for Fine. In addition to any other remedies available at law or in equity, if the department finds, based on substantial evidence, that any unlicensed person, including a person named on a revoked or suspended license, has engaged in tobacco retailing in violation of Section 6.17.020 of this chapter, the department shall impose an administrative fine on that person pursuant to Section 6.17.110(C) of this code.

B. Appeal to Superior Court of Limited Jurisdiction. Notwithstanding the provisions of Section 1094.5 or Section 1094.6 of the Code of Civil Procedure, and in accordance with Section 1.18.120 of this code, within twenty days after mailing or personal service of the hearing officer's decision and findings, any person subject to a fine may seek review of the hearing officer's decision and findings by the superior court of limited jurisdiction. A copy of the notice of appeal to the superior court shall be timely served in person or by first-class mail upon the department by the contestant. The appeal shall be heard de novo, except that the contents of the department's file in the case shall be received in evidence. A copy of the records of the department of the notices of the violation and of the hearing officer's decision and findings shall be admitted into evidence as prima facie evidence of the facts stated therein.

C. Failure to Pay Fine. If no timely notice of appeal to the superior court is filed, or the department is not timely served with a copy of a notice of appeal, the hearing officer's decision and findings shall be deemed confirmed and the fine shall be collected pursuant to section 1.18.110 of this Code.

6.17.110. Enforcement.

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

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

B. Violations of this chapter shall constitute an infraction except that, notwithstanding any provision of this subdivision, any violation may, in the discretion of the city attorney, be charged and prosecuted as a misdemeanor in accordance with section 1.16.110 of this code.

C. Any person violating this chapter is subject to a civil action brought by the city attorney, punishable by a fine of one thousand dollars for each violation. Any continuing violation shall constitute a separate offense for each day of the violation.
D. Violations of this chapter are hereby declared to be public nuisances.
E. Violations of this chapter are hereby declared to be unfair business practices and are presumed to at least nominally damage each and every resident of the community in which the business operates.
F. In addition to other remedies provided by this chapter or by other law, any violation of this chapter may be remedied by a civil action brought by the city attorney including, for example, administrative or judicial nuisance abatement proceedings, civil or criminal code enforcement proceedings, and suits for injunctive relief.
G. Any person acting for the interests of itself, its members, or the general public may bring an action for injunctive relief to prevent future such violations or to recover such actual damages as he or she may prove.

Section 6.17.120 Severability
The provisions of this chapter are declared to be severable and if any provision, sentence, clause, section or part of this chapter is held illegal, invalid, unconstitutional or inapplicable to any person or circumstances, such illegality, invalidity or unconstitutionality or inapplicability shall not affect or impair any of the remaining provisions, sentences, clauses, sections or parts of this chapter or their application to persons and circumstances."

Section 12. Section 11.12.200 of the Solana Beach Municipal Code is hereby amended to read as follows:

11.12.010 Definitions.
For the purposes of this article, the following terms shall have the meanings established by this section.
A. “Beaches” means and includes any public beach or beach which is open to the public or any bluff top open to the public, public trail, access way or public parking lot, immediately adjacent to a beach.
B. “Parks” means and includes all dedicated parks, parks established by adverse uses, planted areas open to the general public, parks on publicly leased or licensed property, planted parkways, triangles and traffic circles maintained by the city, except parkway strips between curb and sidewalk, or behind curb, along the several streets and highways of the city.
C. "Coastal Rail Trail" or "CRT" means the concrete and decomposed granite paths, lighting, landscaping and hardscape features such as seat/sediment walls, drinking fountains bus stops and viewing areas that runs north/south in the City of Solana Beach beginning at the city's south boundary (north curb face of Via de la Valle) and ending approximately 1.7 miles north just north of Ocean Street. The west boundary of the CRT is the east curb face of Highway 101 and the east boundary is the railroad fence.

Section 13. Section 11.12.020, subsection EE of the Solana Beach Municipal Code is hereby amended to read as follows:

11.12.020 Unlawful acts on beaches or parks.
It is unlawful for any person to do any of the following acts in or upon any park or beach within the city:
EE. No person shall smoke within the boundaries of any public beach, or park, or the Coastal Rail Trail.

Section 14. The provisions of this ordinance are declared to be severable and if any provision, sentence, clause, section or part of this ordinance is held illegal, invalid, unconstitutional or inapplicable to any person or circumstances, such illegality, invalidity or unconstitutionality or inapplicability shall not affect or impair any of the remaining provisions, sentences, clauses, sections or parts of this ordinance or their application to persons and circumstances.

EFFECTIVE DATE: This Ordinance shall be effective thirty (30) days after its adoption. Within fifteen (15) days after its adoption, the City Clerk of the City of Solana Beach shall cause this Ordinance to be published pursuant to the provisions of Government Code §36933.

INTRODUCED AND FIRST READ at a regular meeting of the City Council of the City of Solana Beach, California, on the 24th day of June 2009; and

THEREAFTER ADOPTED at a regular meeting of the City Council of the City of Solana Beach, California, on the 8th day of July, 2009, by the following vote:

AYES: Councilmembers –
NOES: Councilmembers –
ABSTAIN: Councilmembers –
ABSENT: Councilmembers –

MIKE NICHOLS, Mayor

APPROVED AS TO FORM: ATTEST:

JOHANNA N. CANLAS, City Attorney ANGELA IVEY, City Clerk