



Office of the City Manager

ACTION CALENDAR

May 12, 2015

To: Honorable Mayor and Members of the City Council

From:  Christine Daniel, City Manager

Submitted by: Jane Micallef, Director, Health, Housing & Community Services
Department

Subject: Amendment to BMC Chapter 9.80 – Tobacco Retailers

RECOMMENDATION

Adopt first reading of an Ordinance amending Berkeley Municipal Code Sections 9.80.010, 9.80.020 and 9.80.035, and adding Sections 9.80.037 and 9.80.095 as follows:

1. Require a Tobacco Retail License (TRL) to sell Electronic Nicotine Delivery Systems (ENDS);
2. Prohibit sale of all tobacco products within a 1,000 foot buffer zone around schools and public parks, with a grace period of one to two years to minimize economic hardship; and
3. Define violation of Chapter 9.80 as a public nuisance.

SUMMARY

Since 2010, Council has taken multiple actions to protect Berkeley youth from the negative impacts of tobacco by adopting ordinances prohibiting smoking in multi-unit housing and prohibiting the use of ENDS in all places smoking is prohibited. To further protect youth, the recommendations in this report serve to create a tobacco free buffer zone around schools and parks by prohibiting the issuance of TRLs within the buffer zone. This will restrict the sale of conventional tobacco products and ENDS in areas frequented by youth. This recommendation has received strong support from the Community Health Commission. The California Department of Public Health recently issued a Health Advisory detailing the many adverse effects of electronic cigarettes and the public health risks posed by the marketing, sale and use of ENDS especially to children and teens.

FISCAL IMPACTS OF RECOMMENDATION

Retailers who currently sell ENDS, but do not also sell conventional tobacco products, will be newly required to obtain TRLs. The number of such retailers is unknown, but is expected to be small and therefore any revenue generated would be minimal.

Revenue generated for the City from TRLs will be impacted. Each TRL generates \$498 of annual revenue. Preliminary information suggests that revenue will decrease due to loss of TRLs issued to retailers within 1,000 feet of schools and public parks if all TRLs in the buffer zone are prohibited. Approximately 75% of licensed tobacco retailers in Berkeley operate within 1,000 feet of a school or public park. Currently the City has 84 active TRLs (excluding pharmacies). Elimination of 75% of these would result in annual revenue reduction of approximately \$31,374.

Reduction in retail sales of tobacco products near schools and parks will result in reduction of local sales tax revenue of unknown amount.

Outreach and education costs related to implementing these ordinance amendments can be funded through ongoing State and county tobacco grants in the Public Health Division (PHD). Staff time for enforcement can be incorporated into the existing work of the Environmental Health Division.

CURRENT SITUATION AND ITS EFFECTS

Since 2010, Council has taken multiple actions to protect Berkeley youth from the negative impacts of tobacco by adopting ordinances prohibiting smoking in multi-unit housing and prohibiting the use of ENDS in all places where smoking is prohibited. Council has also provided direction to the City Manager to further protect youth by considering measures that restrict tobacco sales, particularly the sale of flavored tobacco, in areas frequented by youth and that regulate the sale of ENDS (See Attachments 3-5).

The proposed amendments and additions to the City's tobacco retail ordinance are responsive to Council's directions. Section 9.80.020 is amended to include definitions of "Electronic nicotine delivery system," "School," and "Public park" and to expand and clarify the definition of "Tobacco product" to include ENDS as well as both traditional tobacco products (i.e. cigarettes, cigars, etc.) and "Tobacco paraphernalia." Section 9.80.035 is amended to prohibit the issuance or renewal of TRLs to all tobacco product retailers within 1,000 feet of any school or public park (Attachment 9). The ordinance includes a grace period provision to reduce economic hardship for specified types of retailers, many of which are small businesses, by allowing them to apply for a one-time license or license renewal to sell down existing inventory of these products. The ordinance also provides a limited subgroup of retailers that meet specific criteria an additional one time TRL (not to exceed December 31, 2017). This additional grace period allows businesses primarily engaged in the sale of tobacco products (such as smoke shops and vaping shops) with long-term leases additional time to sell current inventory, adjust their business plans or relocate their businesses.

Section 9.80.037 is added to exempt medical cannabis dispensaries from the requirement for a TRL for the sale of non-tobacco/nicotine containing tobacco paraphernalia (such as papers/rolling machines) or electronic paraphernalia (such as refillable e-cigarettes) to dispensary members. Section 9.80.095 is added to define

violation of Chapter 9.80, including the sale of tobacco products within 1000 feet of schools and public parks in violation of the ordinance, as a public nuisance.

At the regularly scheduled meeting of the Community Health Commission (CHC) on February 26, 2015, the Commission took the following action:

1. M/S/C (Rosales/Stein) We wholeheartedly support Council’s direction to strengthen youth tobacco prevention. Therefore we strongly support, in its totality, the staff recommendation to amend BMC sections 9.80.020 and 9.80.035 and to add sections 9.80.037 and 9.80.095 as to be brought to Council on April 7, 2015.

Ayes: Commissioners Chen, Franklin, Namkung, Nathan, Rosales, Shaw, Soichet, Speich, Stein, Thornton. A. Wong, and M. Wong

Noes: None

Abstain: None

Absent from vote: Commissioner Lee

Excused: Commissioner Kwanele

Motion passed.

BACKGROUND

Tobacco sales near schools and targeting of youth

According to the Surgeon General of the United States, approximately 90% of adult smokers started by age 18 and almost no one begins smoking after age 21.¹ The United States Food and Drug Administration (FDA) has declared smoking to be “fundamentally a pediatric disease².” In a 2013 survey conducted by City of Berkeley Public Health Division staff, individually packaged tobacco products like “Swisher Sweets” could be purchased for under \$1 in over 90% of tobacco retailers. This same study revealed that over 86% of candy, mint and liquor flavored non-cigarette tobacco products in Berkeley are sold within 1,000 feet of K-12 schools. A June 2014 public opinion poll conducted by City of Berkeley Public Health Division staff in Berkeley demonstrated strong support (81%) for banning sales of tobacco products near schools.³

¹ U.S. Department of Health and Human Services. The Health Consequences of Smoking—50 Years of Progress: A Report of the Surgeon General. Atlanta, GA: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2014.

² Hilts, Philip J. “FDA Head Calls Smoking a Pediatric Disease.” The New York Times 9 Mar. 1995.

³ In-person poll of Berkeley community members (did not include merchants), n=125 total respondents

Adolescents frequently visit tobacco outlets near schools and are routinely exposed to tobacco advertising.^{4, 5} Stores within 1,000 feet of schools contain more cigarette advertising than do those farther away.^{6, 7}

Additionally, a University of Michigan national survey of substance use by students in 8th, 10th and 12th grade found that more teens use e-cigarettes than traditional tobacco cigarettes or any other tobacco product—the first time a U.S. national study shows that teen use of e-cigarettes surpasses use of tobacco cigarettes. The 2014 survey asked more than 40,000 students in about 400 secondary schools whether they had used an e-cigarette or a tobacco cigarette in the past 30 days. More than twice as many 8th- and 10th-graders reported using e-cigarettes as reported using tobacco cigarettes. Specifically, 9 percent of 8th-graders, 16 percent of 10th graders, and 17 percent of 12th-graders reported e-cigarette use.⁸

Retail licensing for electronic smoking devices

E-cigarettes pose health risks to both their users and those exposed to their use. These risks are related to several characteristics of e-cigarettes:

- “Gateway” to conventional tobacco products
- Unregulated status
- Content of e-cigarette vapor
- Nicotine addiction
- Re-normalizing of smoking behavior.

These health risks are described in detail in the State Health Officer’s Report on E-Cigarettes and the State Health Advisory of January 28, 2015 (Attachments 6 & 7). Most significantly, public use of e-cigarettes threatens to re-normalize smoking behavior and thus to undo decades of public health success in decreasing smoking rates across the country and in the Berkeley community.

On October 21, 2014 Council adopted an ordinance restricting the use of electronic smoking devices in the same manner as conventional cigarette-smoking is restricted. Regulating retail sales of e-cigarettes similarly recognizes that the health risks posed by

⁴ Feighery, E.C., Henriksen, L., Wang, Y., Schleicher, N.C., Fortmann, S.P. An evaluation of four measures of adolescents' exposure to cigarette marketing in stores. *Nicotine & Tobacco Research*. 8, 751–759, 2006.

⁵ Henriksen, L., Feighery, E.C., Schleicher, N.C., Haladjian, H.H., Fortmann, S.P., Reaching youth at the point of sale: cigarette marketing is more prevalent in stores where adolescents shop frequently. *Tobacco Control* 13, 315–318, 2004.

⁶ Pucci, L.G., Joseph Jr., H.M., Siegel, M., Outdoor tobacco advertising in six Boston neighborhoods: evaluating youth exposure. *American Journal of Preventive Medicine*. 15, 155–159, 1998.

⁷ Rogers, T., Feighery, E.C., Tenca, E., Butler, J., Weiner, L. Community mobilization to reduce point-of-purchase advertising of tobacco products. *Health Education Quarterly*. 22, 427–442, 1995.

⁸ Johnston, L. D., O'Malley, P. M., Miech, R.A., Bachman, J. G., & Schulenberg, J. E.. Monitoring the Future national results on adolescent drug use: Overview of key findings, 2014. Ann Arbor, Mich.: Institute for Social Research, the University of Michigan. 2015.

electronic products are such that they warrant the same level of regulation as conventional tobacco products.

ENVIRONMENTAL SUSTAINABILITY

By restricting tobacco sales near schools and parks, this recommendation will potentially reduce tobacco waste. Tobacco waste is toxic and makes up 34 percent of the total litter collected in California. It is a significant component of storm drain debris and contributes to stormwater pollution that negatively impacts water quality and wildlife in the San Francisco Bay.

RATIONALE FOR RECOMMENDATION

All tobacco products pose health risks to school-age youth. Therefore, staff recommends that Council prohibit the licensing of retail sales of all tobacco products, including electronic products, near schools and parks. While there is no formula to determine an appropriate buffer to reduce youth access and exposure to tobacco products, tobacco retail density around schools has been shown to have a significant impact on the prevalence of youth experimental tobacco use, contributing to higher prevalence of youth smoking in neighborhoods with high tobacco retail density.⁹ In the aforementioned 2013 survey conducted by City of Berkeley Public Health Division staff, it was revealed that over 86% of candy, mint and liquor flavored non-cigarette tobacco products in Berkeley are sold within 1,000 feet of K-12 schools. (Attachment 8)

E-cigarettes and related products are aggressively marketed to youth and are gateway products to nicotine use and addiction. The recommendation to require TRLs for ENDS is consistent with the recently adopted BMC amendments to regulate electronic smoking devices in the same way as conventional tobacco products, and similarly strengthens protections for youth.

ALTERNATIVE ACTIONS CONSIDERED

The referral from Councilmembers Moore and Anderson (Attachment 4) proposed the consideration of a school buffer zone only for all flavored tobacco products (including menthol)¹⁰. However, differential licensing and enforcement for flavored, menthol, and non-flavored tobacco products was deemed prohibitively complex and likely to impede effective implementation. Public Health does not differentiate between flavored and non-flavored tobacco products, as use of tobacco products of all types is harmful.

Staff considered and rejected a school buffer zone of 500 feet (Attachment 4) because it would not adequately reduce tobacco use by youth. Five hundred feet is approximately one to two blocks, and would present only a minor barrier to the tobacco retail

⁹ Henriksen, L, Feighery, E., Schleicher, N., Cowling, D., Kline, R., Fortmann, S. Is adolescent smoking related to the density and proximity of tobacco outlets and retail cigarette advertising near schools? Preventative Medicine 47 210-214, 2008.

¹⁰ Flavored tobacco products are a subset of all tobacco products – both conventional and electronic – and include cigarettes, e-cigarettes, and other tobacco products. These products are marketed heavily to youth.

environment that is within easy walking distance of schools and parks. One thousand feet is approximately three to four blocks and presents a more significant barrier.

Councilmembers Arreguin and Moore's referral (Attachment 5) to the Planning Commission was to consider revising the zoning ordinance to expand the buffer zone around schools and public parks in which all new uses involving tobacco sales would be prohibited. (Currently, only new "smoke shops" are prohibited within 1,400 feet of schools and parks.) Staff recommends instead that the Council amend the BMC ordinance regarding TRLs, because TRLs are renewed annually and apply to both current license holders and new businesses. This approach allows for broader and more rapid implementation of the buffer zone and obviates the necessity for any amendment to the Zoning Ordinance.

Staff considered and rejected a buffer zone around churches, day care centers, etc. (Attachment 3). Such establishments are more transient in nature and would not significantly increase or decrease the impact of the current buffer zone proposal. Enforcement around these establishments was deemed prohibitively complex and likely to impede effective implementation.

Staff also considered banning the sales of tobacco products altogether. Staff determined that the proposed approach best achieves a balance of focusing on restrictions most immediately beneficial to youth while reducing the financial burden on local businesses and the financial impact on the City. Elimination of 100% of current TRLs would result in annual revenue reduction of approximately \$41,832 and reduction of local sales tax revenue of unknown amount.

CONTACT PERSON

Janet Berreman, Health Officer, 981-5301

Attachments:

1. Ordinance (clean copy)
2. Ordinance (track changes)
3. 2010-07-13 Referral to City Manager and Community Health Commission Tobacco Free School Zones
4. 2014-02-25 Strengthen Youth Tobacco Prevention
5. 2014-09-09 referral to Planning Commission Tobacco
6. CDPH State Health Officer's Report on E-cigarettes
7. CDPH Health Advisory on E-Cigarettes
8. California Healthy Stores Healthy Community Survey Report – City of Berkeley
9. Buffer zone map

ORDINANCE NO. -N.S.

AMENDING BERKELEY MUNICIPAL CODE SECTIONS 9.80.010, 9.80.020, 9.80.030, AND 9.80.035 AND ADDING SECTIONS 9.80.037 and 9.80.095 TO DEFINE TOBACCO PRODUCTS TO INCLUDE ELECTRONIC NICOTINE DELIVERY SYSTEMS, TO PROHIBIT SALES OF TOBACCO PRODUCTS WITHIN 1000 FEET OF SCHOOLS AND PUBLIC PARKS, AND TO DECLARE VIOLATION OF CHAPTER 9.80 TO BE A PUBLIC NUISANCE

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

Section 1. Legislative findings:

A. The City Council hereby finds that:

1. Children are particularly influenced by cues suggesting that smoking is acceptable;¹
2. The density of tobacco retailers, particularly in neighborhoods surrounding schools, has been associated with increased youth smoking rates;²
3. A study of California high school students found that the prevalence of smoking was higher at schools in neighborhoods with five or more tobacco outlets than at schools in neighborhoods without tobacco outlets;³
4. A California study found that the density of tobacco retailers near schools was positively associated with the prevalence of students reporting experimental smoking;⁴
5. Electronic smoking devices and other unapproved nicotine delivery products have a high appeal to youth due to their high tech design and availability in child friendly flavors like cotton candy, bubble gum, chocolate chip cookie dough and cookies and cream milkshake;
6. A CDC study showed that in 2011 4.7% of all high school students had tried e-cigarettes and that in 2012 that percentage more than doubled to 10.0% of all high school students;⁵

¹ DiFranza JR, Wellman RJ, Sargent JD, et al. 2006. "Tobacco Promotion and the Initiation of Tobacco Use: Assessing the Evidence for Causality." *Pediatrics* 6: e1237-e1248.

² Henriksen L, Feighery EC, Schleicher NC, et al. 2008. "Is Adolescent Smoking Related to Density and Proximity of Tobacco Outlets and Retail Cigarette Advertising Near Schools?" *Preventive Medicine* 47: 210-214.

³ Henriksen L, Feighery EC, Schleicher NC, et al. 2008. "Is Adolescent Smoking Related to Density and Proximity of Tobacco Outlets and Retail Cigarette Advertising Near Schools?" *Preventive Medicine* 47: 210-214.

⁴ McCarthy WJ, Mistry R, Lu Y, et al. 2009. "Density of Tobacco Retailers Near Schools: Effects on Tobacco Use Among Students." *American Journal of Public Health*, 99(11): 2006-2013.

⁵ Centers for Disease Control. "E-cigarette use more than doubles among U.S. middle and high school students from 2011-2012." CDC Press Release, September 2013.

7. 6.8% of all youth between 6th and 12th grade report trying electronic smoking devices, according to an MMWR report;⁶ and

8. A University of Michigan national survey of substance use by among students in 8th, 10th and 12th grade found that more teens use e-cigarettes than traditional, tobacco cigarettes or any other tobacco product—the first time a U.S. national study shows that teen use of e-cigarettes surpasses use of tobacco cigarettes. Specifically, 9 percent of 8th-graders, 16 percent of 10th graders, and 17 percent of 12th-graders reported e-cigarette use.⁷

9. Approximately 75% of licensed tobacco retailers in Berkeley operate within 1000 feet of a school. Block lengths vary, but 500 feet is approximately 1-2 blocks and 1000 feet is approximately 3-4 blocks.

10. Overall, studies suggest that youth who may have otherwise never smoked cigarettes are now getting hooked on nicotine due to e-cigarettes, and that adolescents who use e-cigarettes are more likely to progress from experimenting with cigarettes to becoming established smokers.⁸

11. According to the Surgeon General of the United States, approximately 90% of adult smokers started by age 18 and almost no one begins smoking after age 21.⁹

Section 2. That Berkeley Municipal Code Section 9.80.010 is hereby amended to read as follows:

9.80.010 Purpose.

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

⁶ Corey, C., Johnson, S., Apelberg, B., et al. (2013). "Notes from the Field: Electronic Cigarette Use Among Middle and High School Students - United States, 2011- 2012." *Morbidity and Mortality Weekly Report (MMWR)*. 62(35):729–730.

⁷ Johnston, L. D., O'Malley, P. M., Miech, R.A., Bachman, J. G., & Schulenberg, J. E.. Monitoring the Future national results on adolescent drug use: Overview of key findings, 2014. Ann Arbor, Mich.: Institute for Social Research, the University of Michigan, scheduled for publication January 2015.

⁸ California Department of Public Health. *Electronic Cigarettes: A Summary of the Public Health Risks and Recommendations for Health Care Professionals Health Advisory*. January 28, 2015.

⁹ U.S. Department of Health and Human Services. *The Health Consequences of Smoking—50 Years of Progress: A Report of the Surgeon General*. Atlanta, GA: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2014.

Nothing in this chapter shall be construed to grant any person obtaining and maintaining a tobacco retailer's license any status or right other than the right to act as a tobacco retailer at the location in the City identified on the face of the permit, subject to compliance with all other applicable laws and ordinances. Nothing in this chapter shall be construed to render inapplicable, supercede, or apply in lieu of any other provision of applicable law, including, without limitation, any condition or limitation on indoor smoking made applicable to business establishments by California Labor Code Section 6404.5.

Section 3. That Berkeley Municipal Code Section 9.80.020 is hereby amended to read as follows:

9.80.020 Definitions.

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

A. "Electronic nicotine delivery system" means any electronic and/or battery-operated device, the use of which may resemble smoking, which can be used to deliver an inhaled dose of nicotine or other substances, including but not limited to electronic cigarettes, electronic cigars, electronic cigarillos, electronic pipes, electronic hookahs, or any other product name or descriptor, and inclusive of any items specifically designed for the preparation, charging, or use of any such electronic and/or battery-operated device, including but not limited to e-liquid, smoke juice, cartridges, cartomizers, atomizers, and tips.

B. "Pharmacy" means any retail establishment in which the profession of pharmacy is practiced by a pharmacist licensed by the State of California in accordance with the Business and Professions Code and where prescription pharmaceuticals are offered for sale, regardless of whether the retail establishment sells other retail goods in addition to prescription pharmaceuticals.

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 (10%) or greater interest in the stock, assets or income of a business other than the sole interest of security for debt. A managerial interest shall be deemed to exist when a person can or does have, or can or does share, ultimate control over the day-to-day operations of a business.

D. "Public park" means any public property within the boundaries of the City of Berkeley used as a playground, park, community garden or open space, as specified by City Council Resolution from time to time.

E. "School" means a building or group of buildings and associated grounds used for educational and/or classroom purposes operated by the Berkeley Unified School District (BUSD) and/or other public or private educational institutions offering a general course of study at primary, secondary or high school levels (grades K through 12) which is

equivalent to the courses of study at such levels offered by the BUSD, as specified by City Council Resolution from time to time. Pre-school, vocational or trade programs shall be considered schools only when incidental to the primary use as a school as defined herein. Excluded from this definition are buildings operated by public or private education institutions in which the total student enrollment is less than 25 students and private residences at which students participate in home-based or independent study programs.

F. "Tobacco paraphernalia" means items or instruments designed for the consumption, or preparation for consumption, of any substance containing tobacco leaf or derived from tobacco, including but not limited to cigarette papers or wrappers, pipes, and cigarette rolling machines.

G. "Tobacco product" means any of the following: (1) any substance containing, made of, or derived from tobacco or nicotine including but not limited to cigarettes, cigars, cigarillos, pipe tobacco, snuff, chewing tobacco, dipping tobacco, bidis, or shisha; (2) any electronic nicotine delivery system, or (3) any tobacco paraphernalia. "Tobacco product" does not include any cessation product specifically approved by the United States Food and Drug Administration for use in treating nicotine or tobacco dependence.

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

Section 4. That Berkeley Municipal Code Section 9.80.030 is hereby amended to read as follows:

9.80.030 Requirement for tobacco retail licensure.

A. It shall be unlawful for any person to act as a tobacco retailer without first obtaining and maintaining a valid tobacco retailer's license pursuant to this chapter, for each location at which that activity is to occur.

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

C. Any person who as of March 1, 2015 was lawfully selling electronic nicotine delivery systems and was not otherwise required to have a tobacco retailer's license shall be exempt from the requirements of subdivision A of this Section until January 1, 2016.

Section 5. That Berkeley Municipal Code Section 9.80.035 is hereby amended to read as follows:

9.80.035 Limits on eligibility for a tobacco retailer license.

A. No new tobacco retailer license may be issued to a pharmacy.

B. No existing tobacco retailer license may be renewed by a pharmacy.

C. No new tobacco retailer license may be issued to authorize the sale of tobacco products within one thousand (1000) feet of any school or public park as measured by a straight line from the nearest point of the property line of the parcel on which the school or public park is located to the nearest point of the property line of the parcel on which the business is located.

D. No existing tobacco retailer license may be renewed to authorize the sale of tobacco products within one thousand (1000) feet of any school or public park as measured by a straight line from the nearest point of the property line of the parcel on which the school or public park is located to the nearest point of the property line of the parcel on which the business is located.

E. A tobacco retailer lawfully operating prior to March 1, 2015 that is ineligible to apply for or renew a tobacco retailer's license due to the proximity to a school or public park as specified in subdivisions C or D may apply, no later than close of business October 30, 2015, for a one-time license or license renewal not to exceed one year in duration (through December 31, 2016), if:

(1) the tobacco retailer falls into one of the following categories of businesses as defined in Sub-Title 23F: gasoline/automobile fuel station, smoke shop, alcoholic beverage sales, food products stores, gift/novelty shop, retail products store - Stationery, Cards and Paper Goods, and retail products store – variety; or

(2) the tobacco retailer does not fall into one of the business categories in subdivision E.1 above, but can establish that the sale of tobacco products accounts for more than 25% of its calendar year 2014 gross receipts.

F. A lawfully operating tobacco retailer that received a license or license renewal under subdivision E, and makes an adequate showing as determined by the City Manager or his or her designee that a license renewal is reasonably necessary based on the criteria listed below, may apply, no later than close of business October 31, 2016, for a license renewal for an additional one-year period (not to exceed December 31, 2017), if:

(1) the business meets the definition of a smoke shop in Sub-Title 23F or was engaged primarily in the sale of electronic nicotine delivery systems prior to March 1, 2015; and

(2) the proprietor is subject to a written long-term lease entered into prior to March 1, 2015, with a term running to December 31, 2017 or beyond with no right to early termination.

G. A map identifying the areas falling within 1000 feet of schools and public parks shall be adopted by the City Council by resolution, and may be amended from time to time.

Section 6. That Berkeley Municipal Code Section 9.80.037 is hereby added to read as follows:

9.80.037 Medical cannabis dispensary.

Sale by a dispensary to its members of tobacco paraphernalia or electronic paraphernalia does not require a tobacco retailer license. "Electronic paraphernalia" for purposes of this section only means an electronic and/or battery-operated device, the use of which may resemble smoking, which does not contain tobacco or nicotine and can be used to deliver an inhaled dose of medical cannabis, including but not limited to any device manufactured, distributed, marketed, or sold as an electronic cigarette, an electronic cigar, an electronic cigarillo, an electronic pipe, an electronic hookah, or any other product name or descriptor.

Section 7. That Berkeley Municipal Code Section 9.80.095 is hereby added to read as follows:

9.80.95 Public Nuisance.

A. Any tobacco retailer violating this Chapter is a public nuisance, subject to abatement under BMC Chapter 1.24 and 1.26.

B. Any tobacco retailer selling any tobacco product within 1000 feet of a school or public park is a public nuisance. Such tobacco product sales shall be terminated over a reasonable period, as set forth in Section 9.80.035, subdivisions E and F.

Section 8. Posting.

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

ORDINANCE NO. -N.S.

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

Section 1. Legislative findings:

A. The City Council hereby finds that:

1. Children are particularly influenced by cues suggesting that smoking is acceptable;¹
2. The density of tobacco retailers, particularly in neighborhoods surrounding schools, has been associated with increased youth smoking rates;²
3. A study of California high school students found that the prevalence of smoking was higher at schools in neighborhoods with five or more tobacco outlets than at schools in neighborhoods without tobacco outlets;³
4. A California study found that the density of tobacco retailers near schools was positively associated with the prevalence of students reporting experimental smoking;⁴
5. Electronic smoking devices and other unapproved nicotine delivery products have a high appeal to youth due to their high tech design and availability in child friendly flavors like cotton candy, bubble gum, chocolate chip cookie dough and cookies and cream milkshake;
6. A CDC study showed that in 2011 4.7% of all high school students had tried e-cigarettes and that in 2012 that percentage more than doubled to 10.0% of all high school students;⁵

¹ DiFranza JR, Wellman RJ, Sargent JD, et al. 2006. "Tobacco Promotion and the Initiation of Tobacco Use: Assessing the Evidence for Causality." *Pediatrics* 6: e1237-e1248.

² Henriksen L, Feighery EC, Schleicher NC, et al. 2008. "Is Adolescent Smoking Related to Density and Proximity of Tobacco Outlets and Retail Cigarette Advertising Near Schools?" *Preventive Medicine* 47: 210-214.

³ Henriksen L, Feighery EC, Schleicher NC, et al. 2008. "Is Adolescent Smoking Related to Density and Proximity of Tobacco Outlets and Retail Cigarette Advertising Near Schools?" *Preventive Medicine* 47: 210-214.

⁴ McCarthy WJ, Mistry R, Lu Y, et al. 2009. "Density of Tobacco Retailers Near Schools: Effects on Tobacco Use Among Students." *American Journal of Public Health*, 99(11): 2006-2013.

⁵ Centers for Disease Control. "E-cigarette use more than doubles among U.S. middle and high school students from 2011-2012." CDC Press Release, September 2013.

7. 6.8% of all youth between 6th and 12th grade report trying electronic smoking devices, according to an MMWR report;⁶ and

8. A University of Michigan national survey of substance use by among students in 8th, 10th and 12th grade found that more teens use e-cigarettes than traditional, tobacco cigarettes or any other tobacco product—the first time a U.S. national study shows that teen use of e-cigarettes surpasses use of tobacco cigarettes. Specifically, 9 percent of 8th-graders, 16 percent of 10th graders, and 17 percent of 12th-graders reported e-cigarette use.⁷

9. Approximately 75% of licensed tobacco retailers in Berkeley operate within 1000 feet of a school. Block lengths vary, but 500 feet is approximately 1-2 blocks and 1000 feet is approximately 3-4 blocks.

10. Overall, studies suggest that youth who may have otherwise never smoked cigarettes are now getting hooked on nicotine due to e-cigarettes, and that adolescents who use e-cigarettes are more likely to progress from experimenting with cigarettes to becoming established smokers.⁸

11. According to the Surgeon General of the United States, approximately 90% of adult smokers started by age 18 and almost no one begins smoking after age 21.⁹

Section 2. That Berkeley Municipal Code Section 9.80.010 is hereby amended to read as follows:

9.80.010 Purpose.

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

⁶ Corey, C., Johnson, S., Apelberg, B., et al. (2013). "Notes from the Field: Electronic Cigarette Use Among Middle and High School Students - United States, 2011- 2012." *Morbidity and Mortality Weekly Report (MMWR)*. 62(35):729–730.

⁷ Johnston, L. D., O'Malley, P. M., Miech, R.A., Bachman, J. G., & Schulenberg, J. E.. Monitoring the Future national results on adolescent drug use: Overview of key findings, 2014. Ann Arbor, Mich.: Institute for Social Research, the University of Michigan, scheduled for publication January 2015.

⁸ California Department of Public Health. *Electronic Cigarettes: A Summary of the Public Health Risks and Recommendations for Health Care Professionals Health Advisory*. January 28, 2015.

⁹ U.S. Department of Health and Human Services. *The Health Consequences of Smoking—50 Years of Progress: A Report of the Surgeon General*. Atlanta, GA: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2014.

Nothing in this chapter shall be construed to grant any person obtaining and maintaining a tobacco retailer's license any status or right other than the right to act as a tobacco retailer at the location in the City identified on the face of the permit, subject to compliance with all other applicable laws and ordinances. Nothing in this chapter shall be construed to render inapplicable, supercede, or apply in lieu of any other provision of applicable law, including, without limitation, any condition or limitation on indoor smoking made applicable to business establishments by California Labor Code Section 6404.5.

Section 3. That Berkeley Municipal Code Section 9.80.020 is hereby amended to read as follows:

9.80.020 Definitions.

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

A. "Electronic nicotine delivery system" means any electronic and/or battery-operated device, the use of which may resemble smoking, which can be used to deliver an inhaled dose of nicotine or other substances, including but not limited to electronic cigarettes, electronic cigars, electronic cigarillos, electronic pipes, electronic hookahs, or any other product name or descriptor, and inclusive of any items specifically designed for the preparation, charging, or use of any such electronic and/or battery-operated device, including but not limited to e-liquid, smoke juice, cartridges, cartomizers, atomizers, and tips.

EB. "Pharmacy" means any retail establishment in which the profession of pharmacy is practiced by a pharmacist licensed by the State of California in accordance with the Business and Professions Code and where prescription pharmaceuticals are offered for sale, regardless of whether the retail establishment sells other retail goods in addition to prescription pharmaceuticals.

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

D. "Public park" means any public property within the boundaries of the City of Berkeley used as a playground, park, community garden or open space, as specified by City Council Resolution from time to time.

E. "School" means a building or group of buildings and associated grounds used for educational and/or classroom purposes operated by the Berkeley Unified School District (BUSD) and/or other public or private educational institutions offering a general course

of study at primary, secondary or high school levels (grades K through 12) which is equivalent to the courses of study at such levels offered by the BUSD, as specified by City Council Resolution from time to time. Pre-school, vocational or trade programs shall be considered schools only when incidental to the primary use as a school as defined herein. Excluded from this definition are buildings operated by public or private education institutions in which the total student enrollment is less than 25 students and private residences at which students participate in home-based or independent study programs.

FG. "Tobacco paraphernalia" means items or instruments designed for the consumption, or preparation for consumption, of any substance containing tobacco leaf or derived from tobacco, including but not limited to cigarette papers or wrappers, pipes, holders of smoking materials of all types, and cigarette rolling machines, and any other item designed for the smoking or ingestion of tobacco products.

BG. "Tobacco product" means any of the following: (1) any substance containing, made of, or derived from tobacco or nicotine leaf, including but not limited to cigarettes, cigars, cigarillos, pipe tobacco, snuff, chewing tobacco, dipping tobacco, bidis, or shisha; (2) any electronic nicotine delivery system, or (3) any tobacco paraphernalia. or any other instrument or paraphernalia which is designed for the smoking or ingestion of tobacco or products prepared from tobacco. "Tobacco product" does not include any cessation product specifically approved by the United States Food and Drug Administration for use in treating nicotine or tobacco dependence.

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

Section 4. That Berkeley Municipal Code Section 9.80.030 is hereby amended to read as follows:

9.80.030 Requirement for tobacco retail licensure.

A. It shall be unlawful for any person to act as a tobacco retailer without first obtaining and maintaining a valid tobacco retailer's license pursuant to this chapter, for each location at which that activity is to occur.

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

C. Any person who as of March 1, 2015 was lawfully selling electronic nicotine delivery systems and was not otherwise required to have a tobacco retailer's license shall be exempt from the requirements of subdivision A of this Section until January 1, 2016.

Section 5. That Berkeley Municipal Code Section 9.80.035 is hereby amended to read as follows:

9.80.035 Limits on eligibility for a tobacco retailer license.

A. No new tobacco retailer license may be issued to a pharmacy.

B. No existing tobacco retailer license may be renewed by a pharmacy.

C. No new tobacco retailer license may be issued to authorize the sale of tobacco products within one thousand (1000) feet of any school or public park as measured by a straight line from the nearest point of the property line of the parcel on which the school or public park is located to the nearest point of the property line of the parcel on which the business is located.

D. No existing tobacco retailer license may be renewed to authorize the sale of tobacco products within one thousand (1000) feet of any school or public park as measured by a straight line from the nearest point of the property line of the parcel on which the school or public park is located to the nearest point of the property line of the parcel on which the business is located.

E. A tobacco retailer lawfully operating prior to March 1, 2015 that is ineligible to apply for or renew a tobacco retailer's license due to the proximity to a school or public park as specified in subdivisions C or D may apply, no later than close of business October 30, 2015, for a one-time license or license renewal not to exceed one year in duration (through December 31, 2016), if:

(1) the tobacco retailer falls into one of the following categories of businesses as defined in Sub-Title 23F: gasoline/automobile fuel station, smoke shop, alcoholic beverage sales, food products stores, gift/novelty shop, retail products store - Stationery, Cards and Paper Goods, and retail products store – variety; or

(2) the tobacco retailer does not fall into one of the business categories in subdivision E.1 above, but can establish that the sale of tobacco products accounts for more than 25% of its calendar year 2014 gross receipts.

F. A lawfully operating tobacco retailer that received a license or license renewal under subdivision E, and makes an adequate showing as determined by the City Manager or his or her designee that a license renewal is reasonably necessary based on the criteria listed below, may apply, no later than close of business October 31, 2016, for a license renewal for an additional one-year period (not to exceed December 31, 2017), if:

(1) the business meets the definition of a smoke shop in Sub-Title 23F or was engaged primarily in the sale of electronic nicotine delivery systems prior to March 1, 2015; and

(2) the proprietor is subject to a written long-term lease entered into prior to March 1, 2015, with a term running to December 31, 2017 or beyond with no right to early termination.

G. A map identifying the areas falling within 1000 feet of schools and public parks shall be adopted by the City Council by resolution, and may be amended from time to time.

Section 6. That Berkeley Municipal Code Section 9.80.037 is hereby added to read as follows:

9.80.037 Medical cannabis dispensary.

Sale by a dispensary to its members of tobacco paraphernalia or electronic paraphernalia does not require a tobacco retailer license. "Electronic paraphernalia" for purposes of this section only means an electronic and/or battery-operated device, the use of which may resemble smoking, which does not contain tobacco or nicotine and can be used to deliver an inhaled dose of medical cannabis, including but not limited to any device manufactured, distributed, marketed, or sold as an electronic cigarette, an electronic cigar, an electronic cigarillo, an electronic pipe, an electronic hookah, or any other product name or descriptor.

Section 7. That Berkeley Municipal Code Section 9.80.095 is hereby added to read as follows:

9.80.95 Public Nuisance.

A. Any tobacco retailer violating this Chapter is a public nuisance, subject to abatement under BMC Chapter 1.24 and 1.26.

B. Any tobacco retailer selling any tobacco product within 1000 feet of a school or public park is a public nuisance. Such tobacco product sales shall be terminated over a reasonable period, as set forth in Section 9.80.035, subdivisions E and F.

Section 8. Posting.

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