

ORDINANCE NO. 28-2004

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF ELK GROVE
ADDING CHAPTER 4.62 TO THE ELK GROVE MUNICIPAL CODE
REQUIRING THE LICENSING OF TOBACCO RETAILERS
AND ADDING CHAPTER 1.11 TO THE ELK GROVE MUNICIPAL CODE
CONCERNING ADMINISTRATIVE HEARINGS**

The City Council of the City of Elk Grove does ordain as follows:

SECTION 1. PURPOSE AND AUTHORITY.

The purpose of this ordinance is to create a licensing requirement for tobacco retailers and a program for its enforcement in order to discourage violations of federal, state, and local tobacco-related laws. This ordinance is enacted under the authority of California Business and Professions Code section 22971.3 and pursuant to the authority granted cities by Article XI, Section 7 of the California Constitution.

SECTION 2. TOBACCO RETAIL LICENSING.

Chapter 4.62 is added to the Elk Grove Municipal Code, to read as follows:

Chapter 4.62

TOBACCO RETAILERS

Section(s):

- 4.62.010 Legislative Findings
- 4.62.020 Purpose
- 4.62.030 Definitions
- 4.62.040 Requirement for Tobacco Retailers License
- 4.62.050 Application Procedure
- 4.62.060 Issuance and Renewal of License
- 4.62.070 Display of License
- 4.62.080 License Fee
- 4.62.090 License Nontransferable
- 4.62.100 License Violation
- 4.62.110 Suspension or Revocation of License
- 4.62.120 Denial, Suspension, and Revocation – Appeals
- 4.62.130 Enforcement

4.62.010 Legislative Findings.

The City Council of the City of Elk Grove finds and determines that:

A. 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 (Penal Code § 308).

B. State law requires that tobacco retailers check the identification of tobacco purchasers who reasonably appear to be under 18 years of age (Business & Professions Code § 22956) and provide procedures for using persons under 18 years of age to conduct onsite compliance checks of tobacco retailers (Business & Professions Code § 22952).

C. 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 (Business & Professions Code § 22952, Penal Code § 308).

D. 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 (Business & Professions Code § 22962).

E. State law prohibits the sale of "bidis" (hand-rolled filterless cigarettes imported primarily from India and Southeast Asian countries) except at those businesses that prohibit the presence of minors. (Penal Code § 308.1).

F. State law prohibits the manufacture, distribution, or sale of cigarettes in packages of less than 20 and prohibits the manufacture, distribution, or sale of "roll-your-own" tobacco in packages containing less than 0.60 ounces of tobacco (Penal Code § 308.3).

G. State law prohibits public school students from smoking or using tobacco products while on campus, while attending school-sponsored activities, or while under the supervision or control of school district employees (Education Code § 48901(a)).

H. Elk Grove Municipal Code Section 6.86.070 prohibits the sale or distribution of tobacco products from vending machines.

I. In May of 2004, the Sacramento County Department of Health and Human Services Tobacco Education Program found that 17.0% of tobacco retailers sampled in the City of Elk Grove unlawfully sold tobacco products to minors, clerks in several types of outlets, including supermarket, convenience mart/gas stations, drug stores, and small markets, sold tobacco to minors and less than 45% of the stores surveyed displayed the STAKE Act signs required by State Law.

J. Eighty-eight percent of adults who have ever smoked tried their first cigarette by the age of 18, and the average age at which smokers try their first cigarette is 14½.

K. The City of Elk Grove has a substantial interest in promoting compliance with federal, state, and local laws intended to regulate tobacco sales and use; in discouraging the illegal purchase of tobacco products by minors; in promoting

compliance with laws prohibiting sales of cigarettes and tobacco products to minors; and in protecting children from being lured into illegal activity through the misconduct of adults.

L. California courts in *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 local jurisdictions to regulate business activity in order to discourage violations of law.

M. State law authorizes local tobacco retailer licensing laws to provide for the suspension or revocation of the local tobacco retailer license for any violation of a state tobacco control law (Business & Professions Code § 22971.3).

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

4.62.020 Purpose.

The purpose of this Chapter is to encourage responsible tobacco retailing and to discourage violations of tobacco-related laws, especially those that prohibit or discourage the sale or distribution of tobacco products to minors, but not to expand or reduce the degree to which the acts regulated by federal or state law are criminally proscribed or to alter the penalty provided for violations.

4.62.030 Definitions.

As used in this Chapter, the following words and phrases shall have the meaning given them in this Section, unless the context clearly requires otherwise:

- A. "City" means the City of Elk Grove.
- B. "City Manager" means the City Manager of the City of Elk Grove or his or her designee.
- C. "Itinerant tobacco retailing" means engaging in tobacco retailing at other than a fixed location.
- D. "License" means a tobacco retailer license issued by the City pursuant to this Chapter.
- E. "Licensee" means any proprietor holding a license issued by the City pursuant to this Chapter.
- F. "Person" means any individual, firm, partnership, joint venture, limited liability company, association, social club, fraternal organization, corporation, estate, trust,

business trust, receiver, trustee, syndicate, or any other group or combination acting as a unit.

G. "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 has, or can have, sole or shared control over the day-to-day operations of a business.

H. "Tobacco product" means any substance containing tobacco leaf, including but not limited to cigarettes, cigars, pipe tobacco, snuff, chewing tobacco, dipping tobacco, bidis, or any other preparation of tobacco.

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

J. "Tobacco retailer" means any person who sells, offers for sale, exchanges, or offers to exchange for any form of consideration, tobacco, tobacco products, or tobacco paraphernalia without regard to the quantity sold, offered for sale, exchanged, or offered for exchange.

K. "Tobacco retailing" shall mean selling, offering for sale, exchanging, or offering to exchange for any form of consideration, tobacco, tobacco products, or tobacco paraphernalia without regard to the quantity sold, offered for sale, exchanged, or offered for exchange.

4.62.040 Requirement for Tobacco Retailers License.

A. It shall be unlawful for any person to act as a tobacco retailer without first obtaining a license for each location at which tobacco retailing is to occur. No license will be issued to authorize tobacco retailing at other than a fixed location. No license will be issued for itinerant tobacco retailing or tobacco retailing from vehicles.

B. Nothing in this Chapter shall be construed to grant any person obtaining a 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, subject to compliance with all other applicable laws, regulations, 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 Labor Code section 6404.5.

4.62.050 Application Procedure.

All applications for a license shall be submitted to the City Manager in the name of each proprietor proposing to conduct tobacco retailing and shall be signed by each

proprietor or an authorized agent thereof. A proprietor proposing to conduct tobacco retailing at more than one location shall submit a separate application for each location. Every application shall be submitted on a form supplied by the City Manager and shall contain the following information:

- A. The name, address, and telephone number of each proprietor.
- B. The business name, address, and telephone number of the fixed location for which a license is sought.
- C. 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.
- D. Such other information as the City Manager deems necessary for the administration or enforcement of this Chapter.

4.62.060 Issuance and Renewal of License.

A. Upon the receipt of an application for a license and the applicable license fee, the City Manager shall issue a license unless:

- 1. The application is incomplete or inaccurate;
- 2. The application seeks authorization for tobacco retailing at an address that appears on a license that is suspended, has been revoked, or is subject to suspension or revocation proceedings for violation of any of the provisions of this Chapter; provided, however, this subparagraph shall not constitute a basis for denial of a license if either or both of the following apply:
 - a. The applicant provides the City with documentation demonstrating that the applicant has acquired or is acquiring the premises or business in an arm's length transaction. For the purposes of this subparagraph, 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";
 - b. It has been more than five (5) years since the most recent license for that location was revoked;
- 3. The application seeks authorization for tobacco retailing that is unlawful pursuant to this Code, or that is unlawful pursuant to any other local, state, or federal law; or,

4. The City Manager has information that the applicant or his or her agents or employees has violated any local, state or federal tobacco control law at the location for which the license or renewal of the license is sought within the preceding thirty-day (30) period.

B. A license shall be valid for one year and must be renewed not later than thirty (30) days prior to the expiration of the license, but no earlier than sixty (60) days prior to the expiration of the license. Unless revoked on an earlier date, all licenses shall expire one year after the date of issuance. A license may be renewed for additional periods of one year by submitting an application to the City Manager and payment of the applicable license fee; provided, however, a license that is suspended, has been revoked, or is subject to suspension or revocation proceedings shall not be renewed. The application and license fee shall be submitted at least thirty (30) days, but not more than sixty (60) days, prior to the expiration of the current valid license. The applicant shall follow all of the procedures and provide all of the information required Section 4.62.050. The City Manager shall process the application according to the provisions of this Section.

C. Where the City Manager does not approve a license or renewal of a license, the City Manager shall notify the applicant of the specific grounds for the denial in writing. The notice of denial shall be served personally or by mail not later than five (5) calendar days after the date of the denial. If by mail, the notice shall be placed in a sealed envelope, with postage paid, addressed to the applicant at the address as it appears on the application. The giving of notice shall be deemed complete at the time of deposit of the notice in the United States mail without extension of time for any reason. In lieu of mailing, the notice may be served personally by delivering to the person to be served and service shall be deemed complete at the time of such delivery. Personal service to a corporation may be made by delivery of the notice to any person designated in the Code of Civil Procedure to be served for the corporation with summons and complaint in a civil action.

4.62.070 Display of License.

Each license shall be prominently displayed in a publicly visible location at the licensed premises.

4.62.080 License Fee.

The fee for issuance or renewal of a license shall be established by resolution of the City Council and shall be in addition to the City's business operation tax and any other license or permit fee imposed by this Code upon the applicant. The license fee shall be paid to the City at the time the license application is submitted.

4.62.090 License Nontransferable.

A license is nontransferable. If a licensee changes business location, that licensee must obtain a new license prior to acting as a tobacco retailer at the new location. If a

business licensed to conduct tobacco retailing is sold, the new owner must obtain a license for that location before acting as a tobacco retailer.

4.62.100 License Violation.

It shall be a violation of a license for a licensee or his or her agents or employees to violate any local, state, or federal tobacco-related law.

4.62.110 Suspension or Revocation of License.

A. In addition to any other remedy authorized by law, a license shall be suspended or revoked as provided in this Section, if the City Manager finds that the licensee or his or her agents or employees has or have violated any of the provisions of this Chapter; provided, however, violations by a licensee at one location may not be accumulated against other locations of that same licensee, nor may violations accumulated against a prior licensee at a licensed location be accumulated against a new licensee at the same licensed location.

1. Upon a finding by the City Manager of a first license violation within any five-year (5) period, the license shall be suspended for thirty (30) days.

2. Upon a finding by the City Manager of a second license violation within any five-year (5) period, the license shall be suspended for ninety (90) days.

3. Upon a finding by the City Manager of a third license violation within any five-year (5) period, the license shall be suspended for one (1) year.

4. Upon a finding by the City Manager of a fourth license violation within any five-year (5) period, the license shall be revoked.

B. Notwithstanding Section 4.62.110(A), a license shall be revoked if the City Manager finds that either one or both of the following conditions exist:

1. One or more of the bases for denial of a license under Section 4.62.060(A) existed at the time application was made or at anytime before the license issued.

2. The information contained in the license application, including supplemental information, if any, is found to be false in any material respect.

C. In the event the City Manager suspends or revokes a license, written notice of the suspension or revocation shall be served upon the licensee within five (5) days of the suspension or revocation in the manner prescribed in Section 4.62.060(C). The notice shall contain:

1. A brief statement of the specific grounds for such suspension or revocation;

2. A statement that the licensee may appeal the suspension or revocation by submitting an appeal, in writing, in accordance with the provisions of Section 4.62.120, to the City Manager, within ten (10) calendar days of the date of service of the notice; and,

3. A statement that the failure to appeal the notice of suspension or revocation will constitute a waiver of all right to an administrative appeal hearing, and the suspension or revocation will be final.

D. A licensee for whom a license suspension is in effect must remove all tobacco products and tobacco paraphernalia from public view at the address that appears on the suspended license.

4.62.120 Denial, Suspension, and Revocation – Appeals.

A. Any applicant or licensee aggrieved by the decision of the City Manager in denying, suspending, or revoking a license, may appeal the decision by submitting a written appeal to the City Manager within ten (10) calendar days from the date of service of the notice of denial, suspension, or revocation. The written appeal shall contain:

1. A brief statement in ordinary and concise language of the specific action protested, together with any material facts claimed to support the contentions of the appellant;

2. A brief statement in ordinary and concise language of the relief sought, and the reasons why it is claimed the protested action should be reversed or otherwise set aside;

3. The signatures of all parties named as appellants and their official mailing addresses; and,

4. The verification (by declaration under penalty of perjury) of at least one appellant as to the truth of the matters stated in the appeal.

B. The appeal hearing shall be conducted in accordance with Chapter 1.11 of the Municipal Code.

C. Any suspension or revocation of a license shall be stayed during the pendency of an appeal that is properly and timely filed pursuant to this Section.

4.62.130 Enforcement.

A. In addition to any other remedy, any person violating any provision of this Chapter shall be guilty of a misdemeanor for each day such violation continues.

B. Any violation of this Chapter may be remedied by a civil action brought by the City Attorney. The City may recover reasonable attorneys' fees and costs of suit in any civil action brought by the City Attorney to remedy any violation of this Chapter.

C. Any person violating the provisions of this Chapter shall also be liable for civil penalties of not less than two hundred fifty dollars (\$250.00) or more than twenty-five thousand dollars (\$25,000.00) for each day the violation continues.

D. Violations of this Chapter are hereby declared to be public nuisances subject to abatement by the City.

E. In addition to criminal sanctions, civil penalties as provided in this Section, and other remedies set forth in this Chapter, administrative penalties of up to \$5,000 for each violation of this Chapter may be imposed against any person violating any provision of this Chapter pursuant to the procedures specified in Section 16.18.205f of the Municipal Code or pursuant to any generally applicable provisions of the Municipal Code concerning administrative fines and penalties.

SECTION 3. ADMINISTRATIVE HEARING PROCEDURES.

Chapter 1.11 is added to the Elk Grove Municipal Code, to read as follows:

Chapter 1.11

ADMINISTRATIVE HEARINGS

Section(s):

1.11.010. Administrative Hearing Procedures

1.11.010. Administrative Hearing Procedures

The City Manager shall promulgate rules and procedures as necessary for the use of administrative hearing officers and the procedures governing administrative hearings for all hearings conducted under the Elk Grove Municipal Code.

SECTION 4. MANDATORY DUTY OF CARE.

This ordinance is not intended to and shall not be construed or given effect in a manner that imposes upon the City or any officer or employee thereof a mandatory duty of care towards persons and property within or without the City, so as to provide a basis of civil liability for damages, except as otherwise imposed by law.

SECTION 5. SEVERABILITY.

If any section, subsection, subdivision, paragraph, sentence, clause, or phrase in this Chapter or any part thereof is for any reason held to be unconstitutional or invalid or ineffective by any court of competent jurisdiction, that decision shall not affect the validity or effectiveness of the remaining portions of this Chapter or any part thereof. The City Council hereby declares that it would have passed each section, subsection, subdivision, paragraph, sentence, clause, or phrase thereof irrespective of the fact that any one or more subsections, subdivisions, paragraphs, sentences, clauses, or phrases be declared unconstitutional, or invalid, or ineffective.

SECTION 6. EFFECTIVE DATE AND PUBLICATION

This Ordinance shall take effect thirty (30) days after its adoption. In lieu of publication of the full text of the ordinance within 15 days after its passage, a summary of the ordinance may be published at least five days prior to and fifteen (15) days after adoption by the City Council and a certified copy shall be posted in the office of the City Clerk, pursuant to Government Code section 36933(c)(1).


PASSED AND ADOPTED by the City Council of the City of Elk Grove this 20th day of October 2004.


SOPHIA SCHERMAN, MAYOR of the
CITY OF ELK GROVE

ATTEST:


PEGGY E. JACKSON, CITY CLERK

APPROVED AS TO FORM:


ANTHONY B. MANZANETTI,
CITY ATTORNEY

Effective Date: November 19, 2004

AYES: Scherman, Soares, Briggs
NOES: None
ABSTAIN: None
ABSENT: Cooper
RECUSAL: Leary