

New York Model Ordinance for Tobacco Retail Licensing

Section 1: Findings

The **[Common Council]** of **[City]** hereby finds and declares that:

Tobacco use is the foremost preventable cause of premature death in the United States, causing over 400,000 deaths in the United States each year;¹

More than XXX high school age youth and XXX adults in **[City]** currently smoke, and smoking kills approximately XXX adults in **[City]** each year;

Tobacco companies sell products that are addictive and inherently dangerous, causing cancer, heart disease, and other serious illnesses;² **[City]** has a substantial interest in reducing the number of individuals of all ages who use cigarettes and other tobacco products, and a particular interest in protecting adolescents from tobacco dependence and the illnesses and premature death associated with tobacco use;³

An overwhelming majority of Americans who use tobacco products begin using such products while they are adolescents and become addicted to those products before reaching the age of 18;⁴

[City] has a substantial and important interest in reducing the illegal sale of tobacco products to minors;⁵

Although it is unlawful to sell tobacco products to minors, 5.9% of New York retailers surveyed do sell to minors [New York State Department of Health, 2010 Youth Access Tobacco Enforcement Program

Consider Who Will Adopt the Law

In addition to cities, counties and county boards of health may possess the legal authority to create a licensing system for tobacco retailers.

County boards of health can adopt such a rule by adding it to the county's sanitary code. However, this model would have to be adapted somewhat for that purpose. Please contact the Center for Public Health and Tobacco Policy to discuss this option further.

¹ Ctrs. for Disease Control & Prevention, *Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses—United States, 2000–2004*. 57-45 MORBIDITY AND MORTALITY WEEKLY REPORT 1221, 1226–8 (2008).

² U.S. DEP'T OF HEALTH AND HUMAN SERVS., PREVENTING TOBACCO USE AMONG YOUTH AND YOUNG ADULTS, A REPORT OF THE SURGEON GENERAL 3 (2012), available at <http://www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/full-report.pdf>; U.S. DEP'T OF HEALTH AND HUMAN SERVS., CDC, THE HEALTH CONSEQUENCES OF SMOKING, A REPORT OF THE SURGEON GENERAL 8 (2004), available at http://www.cdc.gov/tobacco/data_statistics/sgr/2004/pdfs/executivesummary.pdf.

³ Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 555 (2001); see also Cf. Ian McLaughlin, Tobacco Control Legal Consortium, *License to Kill?: Tobacco Retailer Licensing as an Effective Enforcement Tool* 1 (2010), available at <http://publichealthlawcenter.org/sites/default/files/resources/tclc-syn-retailer-2010.pdf>.

⁴ US Dep't of Health and Human Servs., *supra* note 2 at 134, 165.

⁵ McLaughlin et al., *supra* note 3 at 1.

Annual Report];⁶ and 20% of underage smokers in New York report that they usually purchase their cigarettes from a retail store [New York Youth Tobacco Survey 2008].⁷

Research has found that higher tobacco retail outlet density is significantly associated with higher rates of youth smoking initiation and experimentation;⁸

Restricting the number and the location of tobacco retailers in the City is necessary to protect the public health, safety, and welfare of our youth;⁹

A local licensing system for tobacco retailers is necessary and appropriate to protect the public health, safety, and welfare of our residents;

A local licensing system for tobacco retailers will help ensure that retailers comply with the Adolescent Tobacco Use Prevention Act, other tobacco control laws, and the business standards of the [City];¹⁰

Studies have found a higher prevalence of current smoking at schools with more tobacco outlets within walking distance, and researchers suggest that limiting the proximity of tobacco outlets to schools may be an effective strategy to reduce youth smoking rates;¹¹

Add Localized Findings

Communities can add more localized facts into the findings and can add other findings compelling to the community. It is also important to introduce supporting materials into the record during common council hearings. Those materials can be referenced in the findings.

Examples of Localized Findings

The number of tobacco retail outlets near schools, surveys of students about the ease of purchasing tobacco products, and data on youth use of tobacco products

⁶ N.Y. State Dep't of Health, Youth Access Tobacco Enforcement Program Annual Report: October 1, 2009 – September 30, 2010, 12, Appendix 1B (2010), available at

http://www.health.ny.gov/prevention/tobacco_control/docs/tobacco_enforcement_annual_report_2009-2010.pdf.

⁷ N.Y. STATE DEP'T OF HEALTH, NEW YORK STATE YOUTH TOBACCO SURVEY: 2008, 17 (Table 11) (2008), available at http://www.health.ny.gov/prevention/tobacco_control/docs/2008_ny_yts_nyc.pdf.

⁸ William J. McCarthy et al., *Density of Tobacco Retailers Near Schools: Effects on Tobacco Use Among Students*, 99 AM. J. PUB. HEALTH 2006, 2011-12, 2014 (2009). ("Our results confirm the plausibility of the notion that zoning restrictions can help reduce tobacco use initiation by students attending secondary schools."); Scott P. Novak et al., *Retail Tobacco Outlet Density and Youth Cigarette Smoking: A Propensity-Modeling Approach*, 96 AM. J. PUB. HEALTH 670, 673-74 (2006); Lisa Henriksen et al., *Is adolescent smoking related to the density and proximity of tobacco outlets and retail cigarette advertising near schools?*, 47 PREV. MED. 210(2008).

⁹ INST. OF MED., ENDING THE TOBACCO PROBLEM: BLUEPRINT FOR THE NATION 304-307 (2007), available at http://books.nap.edu/openbook.php?record_id=11795 ("Recommendation 32: State governments should develop and, if feasible, implement and evaluate legal mechanisms for restructuring retail tobacco sales and restricting the number of tobacco outlets."); N.Y. PUB. HEALTH LAW § 308 (2013), (local boards of health have the authority to pass regulations "necessary and proper for the preservation of life and health").

¹⁰ N.Y. PUB. HEALTH LAW §§ 1399-aa - 1399-mm (2013).

¹¹ Lisa Henriksen et al., *supra* note 8 at 213; Brett Loomis et al., *The density of tobacco retailers and its association with attitudes toward smoking, exposure to point-of-sale tobacco advertising, cigarette purchasing, and smoking among New York youth*, 55(5) Prev. Med. 468, 468 (2012) ("High outlet density may promote youth smoking by providing easy access to tobacco, because students, who often have limited transportation options, do not have to travel as far to reach a store that sells tobacco. With more outlets to choose from, youth may find it easier to locate one that will sell to them illegally.").



Licensing laws in other communities have been effective in reducing the number of illegal tobacco sales to minors;¹²

The sale of tobacco products is incompatible with the mission of pharmacies because tobacco product sales are detrimental to the public health;¹³

The American Pharmacists Association and the Pharmacists Society of the State of New York have called for the adoption of state and local prohibitions of tobacco sales in pharmacies;¹⁴ and

It is the intent of the [City] to implement effective measures through this Chapter to reduce the number of tobacco retail outlets, regulate the location of tobacco retail outlets, stop the sale of tobacco products to youth, prevent the sale or distribution of contraband tobacco products, and facilitate the enforcement of tax laws and other applicable laws relating to tobacco products.

Section 2: Definitions

As used in this Chapter, the following terms shall have the meanings indicated:

ADULT-ONLY ESTABLISHMENT means a facility where the operator ensures or has a reasonable basis to believe (such as by checking the identification of any person appearing to be under the age of 25) that no person under the Legal Age is permitted entrance.

APPLICANT means an individual, partnership, limited liability company, corporation, or other business entity seeking a Tobacco Retail License.

DEPARTMENT means the [Department of XXX].

LEGAL AGE means the minimum age at which individuals are permitted to legally purchase tobacco products.

NEW TOBACCO RETAIL LICENSE means any Tobacco Retail License that is not a Renewed Tobacco Retail License.

PERSON means any natural person, company, corporation, firm, partnership, business, organization, or other legal entity.

Department

This will be the entity responsible for implementing and enforcing the law. Depending on the city, this could be the Health Department, the Department of Permit and Inspection Services, the Department of Code Enforcement, or another similar department. It should be either a health-oriented department, if possible, or another department that already issues licenses and conducts inspections.

¹² The Center for Tobacco Policy & Organizing, American Lung Association in California, *Tobacco Retailer Licensing Is Effective* (September 2013) available at <http://center4tobaccopolicy.org/wp-content/uploads/2013/09/Tobacco-Retailer-Licensing-is-Effective-September-2013.pdf> (study of 33 California communities with strong licensing ordinances shows the dramatic impact these regulations can have on tobacco sales to minors with some communities showing an 80% reduction in sales to minors).

¹³ See K. Suchanek Hudmon et al., *Tobacco Sales in Pharmacies: Time to Quit*, 15 TOBACCO CONTROL 35, 37 (2006); See U.S. DEP'T OF HEALTH AND HUMAN SERVS., *supra* note 2 at 545.

¹⁴ See AM. PHARMACISTS ASS'N, 2010 ACTIONS OF THE APHA HOUSE OF DELEGATES, WASHINGTON, DC, MARCH 12-15, 2010, 2 (2010); PHARMACISTS SOCIETY OF THE STATE OF NEW YORK, INC., RESOLUTION #4—06-25-09 (June 25, 2009) (on file with author).



PHARMACY means a registered pharmacy as defined in Section 6802 of New York Education Law.

RENEWED TOBACCO RETAIL LICENSE means a Tobacco Retail License issued to an Applicant for the same location at which the Applicant possessed a valid Tobacco Retail License during the previous year.

SCHOOL means a public or private kindergarten, elementary, middle, junior high, or high school.

TOBACCO PRODUCT means any manufactured product containing tobacco or nicotine, including but not limited to cigarettes, cigars, pipe tobacco, snuff, chewing tobacco, dipping tobacco, bidis, snus, dissolvable tobacco products, and electronic cigarette cartridges. However, "Tobacco Product" does not include any product that has been approved by the U.S. Food and Drug Administration, pursuant to its authority over drugs and devices, for sale as a tobacco use cessation product or for other medical purposes and is being marketed and sold solely for that approved purpose.

TOBACCO RETAIL LICENSE means a license issued by the Department to a Person to engage in the retail sale of Tobacco Products in **[City]**.

Tobacco Products

A license is required for the sale of any tobacco products, including smokeless tobacco, cigars, and mini-cigars. A license is not required for the sale of FDA-approved cessation aids.

Section 3: Tobacco Retail License

(A) Starting **[EnforcementDate]**, no Person shall sell, offer for sale, or permit the sale of Tobacco Products to consumers in **[City]**, without a valid Tobacco Retail License issued by the Department. A Tobacco Retail License is not required for a wholesale dealer who sells Tobacco Products to retail dealers for the purpose of resale only and does not sell any Tobacco Products directly to consumers.

(B) All Tobacco Retail Licenses issued pursuant to this section are nontransferable and non-assignable and are valid only for the Applicant and the specific address indicated on the Tobacco Retail License. A separate Tobacco Retail License is required for each address at which Tobacco Products are sold or offered for sale. Any change in business ownership or business address requires a new Tobacco Retail License.

(C) All Tobacco Retail Licenses issued pursuant to this section are valid for no more than one year and expire on the **[Day of Month (of EnforcementDate)]** following the effective date of the Tobacco Retail License. As set forth in Section 9, a Tobacco Retail License may be revoked by the Department prior to its expiration date for cause.

(D) Applications for a New or Renewed Tobacco Retail License shall be submitted to the Department in writing upon a form provided by the Department. The Department may require such forms to be signed and verified by the Applicant or an authorized agent thereof.

Enforcement Date

This is the date on which all retailers will need to have a valid license. The licenses will expire one year from that date. The Enforcement Date should be set so that it provides the Department with enough time to implement the law and review applications.

One Year License

For example, if the Enforcement Date is July 1, 2014, then licenses will expire on the following 1st of July ("day of month").



(E) Applications for a new or renewed Tobacco Retail License shall be accompanied by the fee set forth in Section 7.

(F) The issuance of any Tobacco Retail License pursuant to this Chapter is done in **[City's]** discretion and shall not confer upon licensee any property rights in the continued possession of such a license.

Section 4: Issuance of Licenses

(A) Upon the receipt of a completed application for a New or Renewed Tobacco Retail License and the fee required by Section 7, the Department shall inspect the location at which tobacco sales are to be permitted. The Department may also ask the Applicant to provide additional information that is reasonably related to the determination of whether a license may issue.

(B) The Department may refuse to issue a Tobacco Retail License to an Applicant if it finds that one or more of the following bases for denial exists:

- (1) The information presented in the application is incomplete, inaccurate, false, or misleading;
- (2) The fee for the application has not been paid as required;
- (3) The Applicant does not possess a valid certificate of registration as a tobacco retail dealer from the New York State Department of Taxation and Finance;
- (4) The application seeks a New Tobacco Retail License at a location for which this Chapter prohibits the issuance of a New Tobacco Retail License;
- (5) The total number of applications exceeds the number permitted by Section 5 of this Chapter;
- (6) The Applicant has previously had a Tobacco Retail License issued under this Chapter revoked;
- (7) A Tobacco Retail License issued under this Chapter for the same address or location has previously been revoked;
- (8) The Applicant has been found by a court of law or administrative body to have violated any federal, state, or local laws pertaining to (a) trafficking in contraband Tobacco Products or illegal drugs, (b) the payment or collection of taxes on Tobacco Products, (c) the display of Tobacco Products or of health warnings pertaining to Tobacco Products, or (d) the sale of Tobacco Products;
- (9) The Applicant has not paid to **[City]** outstanding fees, fines, penalties, or other charges owed to the **[City]**; or
- (10) The Department determines, in accordance with written criteria established to further the purposes of this Chapter, that the Applicant is otherwise not fit to hold a Tobacco Retail License.

Inspections

The cost of inspections can be paid for by the permit fee (see Section 7).

Previous Revocation

Paragraph 4(B)(7) is intended to prevent repeat violators from re-registering for a license under a different name. Note that the department may grant a license, if it finds that there is no connection between the new applicant and the previous owner.

Other Reasons for Denial

Other criteria under Paragraph 4(B)(10) could, for example, include other criminal convictions (e.g., fraud) or a belief that the applicant is a straw man for an ineligible applicant (person is applying on behalf of someone who would not qualify).



Section 5: Limitation on Number of Licenses Issued

(A) For the first year subsequent to the effective date of this Chapter, a Tobacco Retail License shall only be issued to an Applicant for the same location at which the Applicant possessed a valid certificate of registration as a tobacco retail dealer from the New York State Department of Taxation and Finance 180 days prior to the effective date of this Chapter.

(B) With the exception of the first year subsequent to effective date of this Chapter, the total number of New and Renewed Tobacco Retail Licenses issued by the Department in a given year (measured from **EnforcementDate** to **EnforcementDate**) shall not exceed the number of Tobacco Retail Licenses that were issued during the previous year.

(C) Starting on [**EnforcementDate + 1 year**], the Department shall issue only one New Tobacco Retail License for every two Tobacco Retail Licenses that were revoked during the previous year or for which no renewal application was submitted.

(D) Whenever the number of valid applications for New Tobacco Retail Licenses exceeds the maximum number of such new licenses that may be issued pursuant to this section, the Department shall grant such licenses using the following priorities:

(1) Tobacco Retail Licenses shall be granted, first, to any Applicant that held a valid Tobacco Retail License in the prior year for an establishment within [**XX feet**] of the nearest point of the property line of a School and who is not seeking to renew that license. If there are more valid applications from such sellers for new licenses than the number of available new licenses, the licenses shall be granted to those Applicants by lottery;

(2) Tobacco Retail Licenses shall be granted, second, to any person who will sell Tobacco Products at an Adult-Only Facility. If there are more valid applications from such sellers for new licenses than the number of available new licenses, the licenses shall be granted to those Applicants by lottery; and

(3) Any remaining available New Tobacco Retail Licenses shall be granted to Applicants by lottery.

First Year

Under Paragraph 5(A), during the first year of this law no local licenses will be issued to any retailer who did not previously hold a New York State tobacco retail permit.

Subsequent Years

For each successive year, only one new license will be granted for each two that are revoked or not renewed, so the total number of Tobacco Retail Licenses will gradually decline. The year is “measured from Enforcement Date to Enforcement Date,” meaning, for example, July 1st to Jun 30th of the licensing cycle.

Preferences

Paragraph 5(D)(1) allows retailers who stop selling tobacco products near schools to be put first in line for a tobacco retail license at a different location.



Section 6: Certain Locations

- (A) No Tobacco Retail License shall be issued to any seller of tobacco products that is not in a fixed, permanent location.
- (B) No Tobacco Retail License shall be issued for any establishment that has or operates a Pharmacy within it.
- (C) With the exception of the first year subsequent to effective date of this Chapter, no New Tobacco Retail License shall be issued to any establishment within **[XX feet]** of the nearest point of the property line of a School.

Section 7: Required Fee

- (A) Each application for a New or Renewed Tobacco Retail License shall be accompanied by a fee of **[\$[FeeAmt]**.
- (B) Starting two years after the effective date of this Chapter, the Department may, on an annual basis, modify the fee required pursuant to Section 7(A). The fee shall be calculated so as to recover the cost of administration and enforcement of this Chapter, including, for example, issuing a 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 regulatory program authorized by this Chapter. All fees and interest upon proceeds of fees shall be used exclusively to fund the program. Fees are nonrefundable except as may be required by law.

Section 8: Required License Display

- (A) Any Tobacco Retail License issued pursuant to this chapter shall be displayed prominently at the location where the Tobacco Products are sold so that it is readily visible to customers.
- (B) Selling, offering for sale, or permitting the sale of any Tobacco Product without a valid Tobacco Retail License displayed in accordance with Section 8(A) constitutes a violation of this Chapter.

Section 9: Revocation of Licenses

- (A) The Department may suspend or revoke a Tobacco Retail License issued pursuant to this Chapter for violations of the terms and conditions of this Chapter or for violation of any federal, state, or local law or regulation pertaining to (a) trafficking in contraband Tobacco Products or illegal drugs,

Pharmacies

This model ordinance prohibits pharmacies from selling tobacco products. Speak with the Center for Public Health and Tobacco Policy if you would like to discuss phasing in this prohibition.

Distance from Schools

This distance will be tailored to your community. Please work with the Center for Public Health and Tobacco Policy and the NY Bureau of Tobacco Control to determine a recommended distance before using this model ordinance as an educational tool in your outreach.

Retailers near Schools

Paragraph 6(C) allows current retailers near schools to continue selling tobacco products, but prohibits new retailers from locating near schools.



(b) the payment or collection of taxes on Tobacco Products, (c) the display of Tobacco Products or of health warnings pertaining to Tobacco Products, or (d) the sale of Tobacco Products.

(B) The Department may revoke a Tobacco Retail License if the Department finds that one or more of the bases for denial of a license under Section 4 existed at the time application was made or at any time before the license issued.

Section 10: Violations and Enforcement

(A) The Department or its authorized designee(s) shall enforce the provisions of this chapter. The Department may conduct periodic inspections in order to ensure compliance with this Chapter.

(B) In addition to the penalties provided for in Section 9, any Person found to be in violation of this Chapter shall be liable for civil penalty of not more than \$250 for the first violation, not more than \$500 for the second violation within a two-year period, and not more than \$1000 for the third and each subsequent violation within a two-year period. Each day on which a violation occurs shall be considered a separate and distinct violation.

Section 11: Rules and Regulations

The Department may issue and amend rules, regulations, standards, guidelines, or conditions to implement and enforce this Chapter.

Section 12: Severability

The provisions of this Chapter are declared to be severable, and if any section of this Chapter is held to be invalid, such invalidity shall not affect the other provisions of this Chapter that can be given effect without the invalidated provision.

Section 13: Effective Date

The effective date of this ordinance shall be thirty (30) days from the date of its enactment.

License Revocation

The Department can create its own procedural rules (or use existing ones) to implement this section.

Revocation could be integrated with City's current public health or licensing rules/procedures.

The Center for Public Health and Tobacco Policy can work with communities to ensure that our model does not conflict with existing licensing requirements in the city.

Penalties

Penalties could be tailored to reflect other similar local laws. The penalties section would have to be modified before inclusion in a county sanitary code. (Fines under a county sanitary code cannot exceed \$500.)

