



Office of the City Manager

REVISED AGENDA MATERIAL

Meeting Date: April 7, 2015

Item Number: 8

Item Description: Amendment to BMC Chapter 9.80 - Tobacco Retailers

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

“Good of the City” Analysis: *The analysis below must demonstrate how accepting this supplement/revision is for the “good of the City” and outweighs the lack of time for citizen review or evaluation by the Council.*

Staff discovered an inconsistency in the Ordinance effective date which the attached revision seeks to remedy. The effective date of the proposed ordinance had been listed as January 1, 2016. However, the Ordinance requires retailers to apply for a “grace period” license extension by October 30, 2015 (two months prior to the effective date). The proposed revision, included below, is in the good of the City as it remedies the timing inconsistency, avoiding confusion as to the timing of the application process. The change does not, in effect, impact the dates on which tobacco retailers will need to comply with the ordinance, as licenses run on a calendar year basis. The “buffer zone” restrictions and requirements and restrictions related to selling e-cigarettes will still be effective January 1, 2016.

Revision:

Section 7. ~~This Ordinance shall take effect January 1, 2016.~~ 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.

Consideration of supplemental or revised agenda material is subject to approval by a two-thirds roll call vote of the City Council. (BMC 2.06.070)

ORDINANCE NO. -N.S.

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 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

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.

school students;⁵

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 80% 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

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.

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.

which the acts regulated by federal or state law are criminally proscribed or to alter the penalty provided therefore.

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 9.80.035 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 5. 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 6. 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 7. 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 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.

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;¹⁰
2. The density of tobacco retailers, particularly in neighborhoods surrounding schools, has been associated with increased youth smoking rates;¹¹
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;¹²
4. A California study found that the density of tobacco retailers near schools was positively associated with the prevalence of students reporting experimental smoking;¹³
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

¹⁰ 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.

¹¹ 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.

¹² 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.

¹³ 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.

school students;¹⁴

7. 6.8% of all youth between 6th and 12th grade report trying electronic smoking devices, according to an MMWR report;¹⁵ 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.¹⁶

9. Approximately 80% 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.¹⁷

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 21.¹⁸

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

¹⁴ 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.

¹⁵ 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.

¹⁶ 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.

¹⁷ 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.

¹⁸ 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.

which the acts regulated by federal or state law are criminally proscribed or to alter the penalty provided therefore.

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 9.80.035 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 5. 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 6. That Berkeley Municipal Code Section 9.80.095 is hereby added to read as follows:

9.80.959.80.96 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 7. 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 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