

ORDINANCE 2015-_____

**AN ORDINANCE OF THE BOARD OF SUPERVISORS OF PIMA COUNTY, ARIZONA,
RELATING TO THE REGULATION OF TOBACCO RETAIL SALES; AMENDING THE
PIMA COUNTY CODE BY ADDING A NEW CHAPTER 8.52**

DRAFT

The Board of Supervisors of Pima County, Arizona finds that:

1. The Board of Supervisors of Pima County, Arizona, has authority under A.R.S. §§ 11-251(17) and 36-186 et seq to adopt provisions necessary to preserve the health of the county, and provide for the expenses thereof.
2. It is in the public interest to protect minors from the health risks associated with tobacco use by licensing tobacco retailers and regulating their locations in order to discourage illegal sales to minors of cigarettes and other tobacco products and paraphernalia.

BE IT ORDAINED BY THE BOARD OF SUPERVISORS OF PIMA COUNTY, ARIZONA:

SECTION 1. The Pima County Code is amended by adding a new Chapter 8.52, to read as follows:

**Chapter 8.52
TOBACCO RETAILERS**

8.52.010 Definitions

1. "Arm's Length Transaction" means a sale between two or more informed and willing parties for valuable consideration that reflects the subject property's fair market value. A sale between relatives, related companies or partners, or a sale for which a significant purpose is avoiding the effect of the violations of this chapter, is not an Arm's Length Transaction.
2. "Department" means the Pima County Health Department and its Consumer Health and Food Safety Division, including any agency or person designated by the director of the Department to enforce or administer the provisions of this chapter.
3. "Owner" means a person or entity having a ten percent or greater interest in the stock, assets or income of a Tobacco Retailer, other than a security interest for the repayment of debt.
4. "School" means a public, charter, or private elementary, middle, junior high or high school.
5. "Tobacco Point of Sale Area" means the specific physical location within a Tobacco Retail Establishment where Tobacco Products are sold or exchanged.

6. "Tobacco Product" means any product containing tobacco or nicotine intended for human consumption, including liquid nicotine solution. The term "Tobacco Product" does not include any nicotine replacement therapy product approved by the United States Food and Drug Administration for use in treating nicotine or tobacco dependency, such as nicotine gum, transdermal nicotine patches, and nicotine lozenge products.
7. "Tobacco Retail Establishment" means a single location with a fixed, permanent structure with its own physical address where Tobacco Retailing takes place.
8. "Tobacco Retail License" means a license issued by the Department authorizing a Tobacco Retailer to operate a Tobacco Retail Establishment in Pima County, Arizona.
9. "Tobacco Retailer" means a person or entity that engages in Tobacco Retailing.
10. "Tobacco Retailing" means selling, exchanging, or offering to sell or exchange, Tobacco Products of any quantity directly to consumers.

8.52.020 Conditions of Licensure

(A) *License Required.* It is unlawful to engage in Tobacco Retailing in any location within Pima County, Arizona without a valid Tobacco Retail License issued by the Department. Any Tobacco Retailer that sells, exchanges, or offers to sell or exchange Tobacco Products of any quantity directly to consumers must obtain a Tobacco Retail License or cease all Tobacco Retailing by January 1, 2017.

(B) *License Non-Transferable.* A Tobacco Retail License issued under this chapter is non-transferable and non-assignable, and is valid only for the named Tobacco Retailer for a single Tobacco Retail Establishment at the address indicated on the license.

(C) *Duration of License.* A Tobacco Retail License is valid for one year unless suspended or revoked. A Tobacco Retailer is not entitled to any refund of the fee for a license that is suspended or revoked.

(D) *Status, Rights or Privileges.* Nothing in this chapter grants any Tobacco Retailer any right in the continued possession of a Tobacco Retail License other than the limited, conditional privilege to engage in Tobacco Retailing at the Tobacco Retail Establishment identified on the license.

(E) *Adherence to Tobacco Laws.* It is a violation of this chapter for any Tobacco Retailer to violate any local, state or federal law applicable to Tobacco Products, Tobacco Paraphernalia, or Tobacco Retailing.

(F) *Public Display of License.* When engaging in Tobacco Retailing, a Tobacco Retailer must display its license in a conspicuous manner visible from outside the Tobacco Retail Establishment's main public entrance.

(G) *Persons Authorized to Engage in Tobacco Retailing.* No person younger than eighteen years old may engage in Tobacco Retailing.

(H) *Accessibility of Tobacco Products.* All Tobacco Products at any Tobacco Retail Establishment to which persons under eighteen years old are permitted entry must be maintained:

- (1) behind a counter in an area accessible only to employees of the Tobacco Retailer: or
- (2) in a locked container accessible only to employees of the Tobacco Retailer: or
- (3) otherwise out of physical reach of any consumer and only accessible to employees of the Tobacco Retailer.

8.52.030 Eligibility for License

(A) Any Tobacco Retailer with a valid tax identification number is eligible to apply for a Tobacco Retail License from the Department. Only Tobacco Retail Establishments are eligible for licensure; Tobacco Retailing by any other means such as on foot or by vehicle is prohibited.

(B) No Tobacco Retail License will be issued:

- (1) for single, temporary, or recurring events including, but not limited to, fairs, flea markets, conventions, conferences, fundraisers, or farmers' markets;
 - (2) for any Tobacco Retail Establishment that has not previously been issued a license to engage in Tobacco Retailing at its current physical address, where the applicant is barred from applying for a Tobacco Retail License pursuant to section 8.52.070(A)(1)(d) or owes a fine for any violation of this chapter; or
 - (3) for any Tobacco Retail Establishment located within 1,000 feet of a school, as measured by the shortest distance from any public entrance of the proposed location for Tobacco Retailing to the parcel boundary of the school. This prohibition does not apply to:
 - (a) a Tobacco Retail Establishment operating lawfully and continuously that is already located within 1,000 feet of a school on January 1, 2017; or
 - (b) a Tobacco Retail Establishment with a valid Tobacco Retail License that is otherwise ineligible for a Tobacco Retail License due to the creation or relocation of a school to within 1,000 feet; or
 - (c) a Tobacco Retailer that acquires through an Arm's Length Transaction a Tobacco Retail Establishment that is located within 1,000 feet of a school and has a valid Tobacco Retail License, and applies to obtain a Tobacco Retailer License within thirty days of the from the date of the transaction.
- Exemptions

(d) Any exemption granted under (a) through (c) above ceases to apply to any Tobacco Retail Establishment that fails to maintain a current license for thirty days or more. .

8.52.040 Application for and Issuance of License

(A) It is the responsibility of each Tobacco Retailer to be informed of all laws applicable to Tobacco Retailing, including those laws affecting the issuance of a Tobacco Retail License. The issuance of a Tobacco Retail License is not a determination by Pima County, Arizona or the Department that the Tobacco Retailer has complied with any laws applicable to Tobacco Retailing.

(B) An application for a Tobacco Retail License shall be submitted in writing to the Department on a form supplied by the Department's Consumer Health and Food Safety Office. The Department may require the application form to be signed and verified by the Tobacco Retailer applying for licensure or by an authorized agent. The Tobacco Retailer must identify and list all of its Owners on the application.

(C) A Tobacco Retailer must notify the Department of a change in any of the information submitted on its application for a Tobacco Retail License in writing within fifteen days of the change.

(D) The Department will issue a Tobacco Retail License for the Tobacco Retail Establishment within ten business days of receipt of a complete application and the payment of the application fee, unless the information presented in the application is incomplete, inaccurate, false ,or misleading or the application seeks authorization for Tobacco Retailing for a location or applicant that is prohibited by this chapter or any other law.

(E) The Department will revoke any Tobacco Retail License that it finds was wrongly issued. Such a revocation is without prejudice to the filing of a new license application.

8.52.050 Required Fee

(A) Each application for a Tobacco Retail License must be accompanied by an annual fee of \$300. The fee is nonrefundable except as required by law.

(B) The Department will calculate the fee to allow for the recovery of the cost of administration, implementation, and enforcement of this chapter, including costs associated with issuing licenses, administering the license program, educating retailers, conducting retailer inspection, re-inspection and compliance checks, documenting violations and prosecuting violators. The Department may modify the fee on an annual basis when warranted by changes in such costs. All fees shall be deposited in a special

permanent, nonlapsing and nonreverting fund to be used to fund administration, implementation, enforcement, and education under this chapter.

8.52.060 Inspections for Compliance

The Department shall conduct compliance checks to certify Tobacco Retailers are complying with all laws applicable to Tobacco Retailing, all provisions of this chapter, and any other law relating to Tobacco Products, Tobacco Paraphernalia, or Tobacco Retailing. The Department or any peace officer may issue citations and enforce the penalty provisions for violations of this chapter to the extent authorized by law. Nothing in this paragraph shall create a right of action in any Tobacco Retailer or other person against the Department or its agents.

8.52.070 Penalties

(A) Committing a violation while in possession of a valid Tobacco Retail License

If any court of competent jurisdiction determines, or the Department finds, that a Tobacco Retailer, or any of its agents or employees, has violated a local, state, or federal law regulating tobacco sales or does not comply with this chapter, the following penalties apply, in addition to any other penalties imposed by a court of competent jurisdiction or the Department:

- (1) Tobacco Retail License suspension and revocation.
 - (a) For a first violation at a Tobacco Retail Establishment, the Department will issue the Tobacco Retailer with a written notice of violation requiring a representative of that retailer to attend and complete a mandatory education course
 - (b) For a second violation at a Tobacco Retail Establishment within one year of a first violation at that establishment, the Tobacco Retailer shall have its Tobacco Retail License for that establishment suspended for thirty days.
 - (c) For a third violation at a Tobacco Retail Establishment within one year commencing from the completion date of the previous penalty, the Tobacco Retailer shall have its Tobacco Retail License for that establishment revoked and neither the Tobacco Retailer nor any of its Owners will be eligible to apply for a Tobacco Retail License for that establishment for one year.
 - (d) For a fourth violation within one year commencing from the completion date of the previous penalty, the Tobacco Retailer shall have its Tobacco Retail License revoked and neither the Tobacco Retailer nor any of its Owners will be eligible to apply for a Tobacco Retail License for that establishment for three years..

- (2) Conditions of suspension/revocation.
 - (a) During any period that a Tobacco Retail License is expired, suspended, or revoked, a Tobacco Retailer must:
 - (i) Remove all Tobacco Products from the relevant Tobacco Retail

Establishment's retail area;

(ii) Remove the Tobacco Retail License from public view;

(iii) Display signage, provided by the Department, in a conspicuous manner visible to the general public and within a 5 foot radius of any tobacco product point of sale area, indicating that the Tobacco Retailer does not possess a current license to sell tobacco products. If multiple tobacco product point of sale areas exist in a single Tobacco Retail Establishment, such signage must be displayed in each area.

(iv) Remove all tobacco advertising that is not permanently affixed to the Tobacco Retail Establishment's structure.

(B) Committing a violation while not in possession of a valid Tobacco Retail

License: If any court of competent jurisdiction determines, or the Department finds, that any Tobacco Retailer or any of its Owners has violated a local, state, or federal law regulating tobacco sales or does not comply with the requirements, conditions, or prohibitions established in this chapter, it will be subject to the following penalties:

(1) Amount of Fine. Each violation shall subject the Tobacco Retailer to an administrative fine as follows:

(a) For a first violation \$2,500;

(b) For a second violation within one year of a first violation, \$5,000.00;

(c) For each additional violation within one year of any second or subsequent violation, \$7,500.

(2) Time period for license ineligibility.

(a) After a first violation, no Tobacco Retail License may be issued for that Tobacco Retail Establishment for thirty days

(b) After a second violation within one year of a first violation, no Tobacco Retail License may be issued for that Tobacco Retail Establishment for ninety days ,.

(c) After any additional violation within one year of a prior violation, no Tobacco Retail License may be issued for that Tobacco Retail Establishment until a one-year period has passed from the date of the most recent violation.

(d) The periods of ineligibility in subsections (a) to (c) above apply to any Tobacco Retail Establishment located at the physical address where the violation occurred, unless ownership of the establishment has been transferred in an Arm's Length Transaction.

(C) *Counting of Violations for a Tobacco Retailer.*

(1) Prior violations at the same Tobacco Retail Establishment are counted against a Tobacco Retailer until one year after the completion date of any previously imposed penalty.

(2) If multiple violations of this chapter or any other local, state or federal law applicable to Tobacco Products, Tobacco Paraphernalia, or Tobacco Retailing

have been identified during a single inspection, infractions will be counted as a single violation with respect to penalties imposed under this chapter.

- (D) *Aiding or Abetting*. Causing, permitting, aiding, abetting, or concealing a violation of this Chapter constitutes a separate violation and is subject to the following administrative fines:
- (a) For a first violation \$2,500;
 - (b) For a second violation within one year of a first violation, \$5,000;
 - (c) For each additional violation within one year of any second or subsequent violation, \$7,500.
- (E) *Applicability of Other Laws*. The remedies provided by this chapter are cumulative and in addition to any other remedies available at law or in equity. Nothing in this chapter prohibits the prosecution of criminal offenses under any applicable law. The Department may enforce this chapter in a civil action, including administrative or judicial proceedings, civil code enforcement proceedings, and suits for injunctive relief.

8.52.080 Right to Hearing and Appeal

- (A) *Notice*. The Department shall issue a citation, either in person or by mail, to any Tobacco Retailer:
- a. whom it reasonably believes has violated this chapter; or
 - b. who has been issued a citation under A.R.S. 13-3622 for furnishing tobacco to a minor; or
 - c. whom it reasonably believes has violated any other applicable local, state, or federal law regulating tobacco sales.

The citation shall set forth the alleged violation, and notify the Tobacco Retailer of his or her right to a hearing on the matter pursuant to subsection (B) below and how to request such a hearing.

(B) *Hearings*. A Tobacco Retailer may request a hearing no later than fifteen days after receipt of a citation. The Department shall set the hearing. Written notice of the hearing date, time and location shall be delivered to the Tobacco Retailer at least fifteen calendar days before the hearing. The formal rules of evidence in civil or criminal judicial proceedings do not apply to such hearings. At the hearing, the hearing officer may admit any relevant evidence, including testimony of witnesses. The Department shall make a record of the hearing and make a copy available to the Tobacco Retailer in the event of an appeal.

(C) *Hearing Officer*. The director of the Department shall designate a county official or another impartial person to conduct the hearing and issue a decision.

(D) *Minors Not Required to Testify.* If evidence of a violation of this chapter is obtained in any part through the participation of a person under eighteen years old, such a person shall not be required over his or her objection to appear or give testimony in any proceeding brought to enforce this chapter.

(E) *Decision.* The hearing officer shall issue a written decision and mail a copy to all parties within thirty days of the hearing. The decision shall include findings of fact, conclusions of law, any penalty imposed under this chapter, and notification of the time for appeal. The decision of the hearing officer shall be a final administrative decision.

(F) *Costs.* If the hearing officer finds the Tobacco Retailer to be responsible for a violation, the Tobacco Retailer shall be liable for the actual expenses of the hearing.

(G) *Appeal.* The decision of the hearing officer may be reviewed by the superior court in accordance with Title 12, Chapter 7, Article 6 of the Arizona Revised Statutes. Filing an appeal shall stay enforcement of the appealed decision.

8.52.100 Severability

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

SECTION 3. This Ordinance is effective 30 days after the date of its adoption, with the exception of the penalty section 8.52.070 which takes effect January 1, 2017.