

ORDINANCE NO. 11-09 N.S

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF RICHMOND
ADDING CHAPTER 9.58 TO THE RICHMOND MUNICIPAL CODE REGULATING
CIGARETTE AND TOBACCO PRODUCT SAMPLING**

SECTION I Findings.

The City Council of the City of Richmond hereby finds and declares as follows:

WHEREAS, California state law prohibits the sale or distribution of free or nominal-cost cigarettes or smokeless tobacco products (or coupons, coupon offers, or rebate offers for such products) on public grounds or on private grounds that are open to the public; and

WHEREAS, this state law does *not* apply to:

- locations where minors are prohibited by law (such as bars); and
- public grounds leased for a private function where minors are denied access to the private function by a peace officer or licensed security guard; and
- private property open to the general public where minors are denied access to a separate sampling area and the sampling area is enclosed so minors cannot see inside; and
- product samples, coupons, or rebate offers in connection with the sale of another item, including tobacco products, lighters, magazines, or newspapers; and

WHEREAS, this state law specifically allows adoption of a local ordinance that is “more restrictive” than the state law and provides that a stricter local ordinance shall govern in the case of any inconsistency between the local ordinance and state law; and

WHEREAS, tobacco use is an addictive, unhealthy, and harmful habit with significant social and economic costs, as evidenced by the following:

- more than 440,000 people die in the United States from tobacco-related diseases every year, making it the nation’s leading cause of preventable death; and
- secondhand smoke is responsible for an estimated 38,000 deaths among non-smokers each year in the United States, which includes 3,000 lung cancer deaths and 35,000 deaths due to heart disease; and
- tobacco use costs more than \$75 billion per year in medical expenditures nationally, and another \$92 billion per year resulting from lost productivity; and
- medical care costs in the United States just for *nonsmokers* suffering from diseases caused by secondhand smoke totaled \$2.6 billion in 2004, and costs for medical care and economic losses combined are estimated at \$6 billion per year; and

- scientific studies have concluded that cigarette smoking can cause chronic lung disease, coronary heart disease, and stroke, in addition to cancer of the lungs, larynx, esophagus, mouth, and bladder; and
- smokeless tobacco products and cigars are known to cause lung, larynx, esophageal, and oral cancer; and
- a smokeless tobacco user's risk of developing oral cancer is several times greater than a non-user's risk, and the risk of developing cancer of the cheek or gums is 50 times greater; and
- smoking a single cigarette makes nicotine addiction more likely to occur several years after the initial use; and

WHEREAS, combining tobacco products with alcohol consumption increases the likelihood of developing oral cancer, and has been shown to dramatically increase the addictive power of nicotine among younger smokers; and

WHEREAS, tobacco use is particularly prevalent among young adults and young adulthood is a time when many people begin to smoke, as evidenced by the following:

- a California survey identified young adults (aged 18-24 years) as having the highest smoking prevalence of any age group, at 18% in the year 2005; and
- a 2002 study reported that 70% of college students smoke socially, noting that it is possible that social smoking may transition into regular smoking behavior; and
- the college years (ages 18-24) are a time of transition in smoking behavior, during which many college students begin to experiment with a range of tobacco products and a significant portion of occasional smokers make the transition to habitual smoking; and
- college students are subject to unique stress levels due to a variety of factors, including peer pressure, close living quarters, and living away from home for the first time, making them likely to begin smoking at college in response to stress; and

WHEREAS, the tobacco companies distribute free samples for the purpose of luring young adult tobacco users, as evidenced by the following:

- 18-24 year olds have been specifically targeted by tobacco industry marketing as the youngest group of legal smokers; and
- after the 1998 Master Settlement Agreement (MSA) with the states, tobacco companies increased marketing aimed at college students by sponsoring events at college bars and providing free samples to college students as well as distributing free samples at promotional events at fraternities; and

- a 2001 study showed that the tobacco industry sponsored social events at 99% of the college campuses surveyed; and
- that same study showed that among students who were not smokers at age 19, those who had attended tobacco industry promotional events were twice as likely to become smokers; and
- according to the 2002 California Tobacco Survey, 36.5% of adults age 18-29 reported seeing tobacco company logos on giveaway items at bars, while 15.4% reported seeing tobacco company representatives distributing free tobacco samples; and
- tobacco promotional events encourage tobacco use among college students by linking the enjoyable aspects of a bar environment with a tobacco brand name; and
- tobacco company documents demonstrate that bar promotions are highly effective at increasing sales due in part to resulting brand switching, smoking uptake, or relapsed quitting; and
- past research has shown that sampling in bar environments has the ability to significantly increase awareness, trial, and purchase of tobacco products by young adults; and
- the vast majority of free samples distributed by tobacco companies are used, whether by the recipient or a friend or family member of the recipient; and
- young adults are significantly more likely to be willing to use tobacco promotional items than adults over 25 years old; and

WHEREAS, the young adult population is especially vulnerable to tobacco sample distribution, as evidenced by the following:

- tobacco companies sponsored 416 promotional events in California in 2003, 332 of which were held at bars; and
- tobacco companies sponsored 40 fraternity events in California in 2003; and
- studies indicate that belonging to a fraternity or sorority increases a college students chance of smoking by 30% for male students and by 50% for female students; and
- During at least 44 tobacco industry-sponsored events in California during 2003, product distribution violated state law and/or the terms of the Master Settlement Agreement; and
- despite the MSA's prohibition on marketing to underage youth, half of all age groups in a 2002 study reported seeing cigarette advertisements at special events, concerts, bars, or clubs; and
- five percent of the 12-17 year olds in the same 2002 study reported having been present

at a bar, nightclub, or concert where free samples of cigarettes were available and one in five of the youth present at these events were actually *offered* free cigarettes; and

- of the youth that were exposed to free tobacco samples in the same study, 45% were exposed at concerts for popular groups, which have no age restrictions; and

WHEREAS, it is the intent of the City Council, in enacting this ordinance, to provide for the public health, safety, and welfare by discouraging the inherently dangerous behavior of cigarette and tobacco use, especially by children and current non-users; by prohibiting the distribution of free and low cost tobacco products in order to limit the ability of tobacco companies to make their addictive, unhealthy, and harmful products freely available to adults and particularly young adults; and by reducing the potential for children to wrongly associate smoking and tobacco with a healthy lifestyle;

NOW THEREFORE, the City Council of the City of Richmond do ordain as follows:

SECTION 2

Chapter 9.58 entitled “**Cigarette and Tobacco Product Sampling**” of the Richmond Municipal Code is hereby added to read as follows:

Chapter 9.58

Sections:

- 9.58.010** **Definitions.**
- 9.58.020** **Prohibition of Nonsale Distribution of Cigarettes and Tobacco Products.**
- 9.58.030** **Enforcement.**
- 9.58.040** **Community Enforcement.**
- 9.58.010** **Definitions.**

For the purposes of this Chapter, the following definitions shall govern unless the context clearly requires otherwise:

(a) “Cigarette” means: (1) any roll of tobacco wrapped in paper or in any substance not containing tobacco; and (2) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subsection (a)(1) above.

(b) “Coupon” means anything that can be exchanged for or used to acquire a Cigarette or Tobacco Product, such as a printed piece of paper, voucher, ticket, rebate, rebate offer, check, credit, token, code, password, or anything labeled “coupon” or “coupon offer.”

(c) “Nominal Cost” means the cost of any item that is transferred from one person to another for less than the total of: (1) twenty-five percent (25%) of the full retail value of the item exclusive of taxes and fees; plus (2) all taxes and fees previously paid and all still due on the

item at the time of transfer.

(d) “Nonsale Distribution” means to give, within the jurisdictional limits of the City, a Cigarette, Tobacco Product, or Coupon at no cost or at Nominal Cost to a person who is not a Tobacco Seller.

(e) “Tobacco Product” means: (1) any substance containing tobacco leaf, including but not limited to cigars, pipe tobacco, hookah tobacco, snuff, chewing tobacco, dipping tobacco, bidis, snus, or any other preparation of tobacco other than a Cigarette; and (2) any product or formulation of matter containing biologically active amounts of nicotine that is manufactured, sold, offered for sale, or otherwise distributed with the expectation that the product or matter will be introduced into the human body other than: (i) a Cigarette; or (ii) any product specifically approved by the United States Food and Drug Administration for use in treating nicotine or tobacco product dependence.

(f) “Tobacco Seller” means any person who is in the business of selling or distributing Cigarettes or Tobacco Products.

9.58.020 Prohibition of Nonsale Distribution of Cigarettes and Tobacco Products.

(a) No Tobacco Seller nor any agent or employee of a Tobacco Seller shall engage in the Nonsale Distribution of any Cigarette, Tobacco Product, or Coupon in any public place.

(b) No person, motivated by profit or a business purpose, shall knowingly permit the Nonsale Distribution of any Cigarette, Tobacco Product, or Coupon: (1) anywhere in any public place under the legal or de facto control of the Person; or (2) through any agent or employee of the Person. This provision shall not apply to Coupons incidentally distributed in connection with a printed or electronic publication, such as, for example, magazines, newspapers, and websites, so long as the distribution by the Person is not primarily motivated by a desire to distribute a Coupon.

9.58.030 Enforcement.

(a) The remedies provided by this Chapter are cumulative and in addition to any other remedies available at law or in equity.

(b) Each violation of this Chapter constitutes a misdemeanor punishable as provided in section 1.04.100 of this Code or may, in the discretion of the City Attorney, be prosecuted as an infraction if the interests of justice so require.

(c) Enforcement of this chapter shall be the responsibility of the City Manager or his or her designee. In addition, any peace officer or code enforcement official also may enforce this chapter.

(d) Violations of this Chapter are subject to a civil action brought by the City of Richmond, punishable by a civil fine not less than two hundred fifty dollars (\$250) and not exceeding one thousand dollars (\$1,000) per violation.

(e) Any violation of this Chapter is hereby declared to be a nuisance.

(g) In addition to other remedies provided by this chapter or by other law, any violation of this chapter may be remedied by a civil action brought by the City Attorney, including, but not limited to, administrative or judicial nuisance abatement proceedings, civil or criminal code enforcement proceedings, and suits for injunctive relief.

(h) Any person acting in the interests of: (1) himself, herself, or itself; (2) its members; or (3) the general public may bring a civil action to enjoin a violation of this chapter.

9.58.040. Community Enforcement.

(a) Any Person acting for the interests of itself, its members, or the general public (hereinafter a “Community Enforcer”), including the City of Richmond, may bring a civil action to enforce this Chapter. Upon proof of a violation, a court shall award the following:

(1) Damages in the amount of either:

(i) upon proof, actual damages; or

(ii) with insufficient or no proof of damages, \$500 for each violation of this Chapter (hereinafter “Statutory Damages”). Unless otherwise specified in this Chapter, each day of a continuing violation shall constitute a separate violation. Notwithstanding any other provision of this Chapter, no Community Enforcer suing on behalf of the general public shall recover Statutory Damages based upon a violation of this Chapter if a previous claim brought on behalf of the general public for Statutory Damages and based upon the same violation has been adjudicated, whether or not the Community Enforcer was a party to that adjudication.

(2) Restitution of the gains obtained in violation of this chapter.

(3) Exemplary damages, where it is proven by clear and convincing evidence that the defendant is guilty of oppression, fraud, malice, or a conscious disregard for the public health.

SECTION 3

If any section, subsection, sentence, clause, or phrase of this Ordinance is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of the ordinance. The City Council hereby declares that it would have passed this Ordinance and each section, subsection,

sentence, clause, and phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses, or phrases be declared invalid or unconstitutional.

SECTION 4

This Ordinance shall be effective 30 days after passage and adoption.

First introduced at a regular meeting of the City Council of the City of Richmond held on **May 19, 2009**, and finally passed and adopted at a regular meeting held on **June 2, 2009**, by the following vote:

AYES: Councilmembers Bates, Butt, Ritterman, Rogers, Vice Mayor Lopez, and Mayor McLaughlin

NOES: None.

ABSTENTIONS: None.

ABSENT: None.

CLERK OF THE CITY OF RICHMOND

(SEAL)

Approved:

Mayor

Approved as to form:

City Attorney

State of California }
County of Contra Costa : ss.
City of Richmond }

I certify that the foregoing is a true copy of Ordinance No. 11-09, finally passed and adopted by the Council of the City of Richmond at a meeting held on June 2, 2009.