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ORDINANCE NO. 5192

AN URGENCY ORDINANCE ADOPTING AN INTERIM MORATORIUM ON NEW TOBACCO RETAILER APPLICATIONS FOR ALL PURPOSES WITHIN THE UNINCORPORATED AREAS OF THE COUNTY OF EL DORADO PENDING THE STUDY AND DEVELOPMENT OF REASONABLE REGULATIONS

WHEREAS, the County has seen a proliferation of tobacco retailer businesses within the unincorporated areas, with 52 new licenses issued since 2020 for a total of 143 tobacco retailers established in El Dorado County as of December 11, 2023; and

WHEREAS, the County is concerned about this recent proliferation (a 36% increase) of tobacco retailer businesses and the harmful effects of tobacco on County residents and especially youth; and

WHEREAS, the Board of Supervisors has a substantial interest in protecting County residents, particularly youth and underserved populations from the harms of tobacco use; and

WHEREAS, tobacco use is the number one cause of preventable death in California and continues to be an urgent public health issue, as evidenced by the following: 40,000 California adults die from their own smoking annually¹; more than 25% of all adult cancer deaths in California are attributable to smoking²; smoking costs California \$15.44 billion in annual health care expenses, \$3.85 billion in Medicaid costs caused

¹ Centers for Disease Control and Prevention. Best Practices for Comprehensive Tobacco Control Programs — 2014. 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. Available at:

https://www.cdc.gov/tobacco/stateandcommunity/best_practices/pdfs/2014/comprehensive.pdf.

² Lortet-Tieulent J, Goding Sauer A, Siegel RL, et al. State-Level Cancer Mortality Attributable to Cigarette Smoking in the United States. JAMA Intern Med. 2016;176(12):1792-1798. doi:10.1001/jamainternmed.2016.6530.

by smoking, and \$28.1 billion in smoking-caused productivity losses³; tobacco use can cause disease in nearly all of the organs of the body and is responsible for 87% of lung cancer deaths, 32% of coronary heart disease deaths, and 79% of all cases of chronic obstructive pulmonary disease in the United States⁴; and

Whereas, 5.6 million of today's Americans who are younger than 18 years of age are projected to die prematurely from a smoking-related illness.⁵

WHEREAS, research indicates that the density and proximity of tobacco retailers increase smoking behaviors, including number of cigarettes smoked per day, particularly in neighborhoods experiencing poverty⁶; and

WHEREAS, the density of tobacco retailers near adolescents' homes has been associated with increased youth smoking rates⁷ and initiation of noncigarette tobacco product use⁸; and

WHEREAS, adults who smoke are likely to have a harder time quitting when residential proximity to tobacco retailers is closer⁹ and density is higher¹⁰; and

WHEREAS, The 2023 National Youth Tobacco Survey (NYTS) was recently released and identified a concerning trend that has emerged among middle school students with a significant rise in the use of any tobacco product reaching 6.6% in 2023, up from 4.5%

³ Campaign for Tobacco-Free Kids. The Toll of Tobacco in California.

<https://www.tobaccofreekids.org/problem/toll-us/california>. Reviewed December 18, 2023.

⁴ 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. Available at: https://www.ncbi.nlm.nih.gov/books/NBK179276/pdf/Bookshelf_NBK179276.pdf.

⁵ https://www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/diseases-and-death.html

⁶ E.g. Chuang YC, Cubbin C, Ahn D, Winkleby MA. Effects of neighborhood socioeconomic status and convenience store concentration on individual level smoking. *J Epidemiol Community Health*. 2005;59(7):568-573. doi: 10.1136/jech.2004.029041.

⁷ Finan LJ, Lipperman-Kreda S, Abadi M, et al. Tobacco Outlet Density and Adolescents' Cigarette Smoking: A Meta-Analysis. *Tob Control*. 2019;28(1):27-33. doi: 10.1136/tobaccocontrol-2017-054065.

⁸ Abdel Magid HS, Halpern-Felsher B, Ling PM, et al. Tobacco Retail Density and Initiation of Alternative Tobacco Product Use Among Teens. *J Adolesc Health*. 2020;66(4):423-430. doi: 10.1016/j.jadohealth.2019.09.004.

⁹ Reitzel LR, Cromley EK, Li Y, et al. The effect of tobacco outlet density and proximity on smoking cessation. *Am J Public Health*. 2011;101(2):315-320. doi: 10.2105/AJPH.2010.191676.

¹⁰ E.g. Cantrell J, Anesetti-Rothermel A, Pearson JL, Xiao H, Vallone D, Kirchner TR. The impact of the tobacco retail outlet environment on adult cessation and differences by neighborhood poverty. *Addiction*. 2015;110(1):152-161. doi: 10.1111/add.12718.

in 2022. That is an increase of over 46%¹¹; and

WHEREAS, in 2023, 10.0% of middle and high school students (2.80 million) reported current (i.e., past 30-day) use of any tobacco product¹²; and

WHEREAS, given the number of middle and high school students that use tobacco products, sustained efforts to prevent initiation of tobacco product use among young persons and strategies to help young tobacco users quit are critical to reducing youth tobacco product use; and

WHEREAS, policies to reduce tobacco retailer density have been shown to be effective and can reduce or eliminate inequities in the location and distribution of tobacco retailers¹³; and

WHEREAS, the County has no specific regulations for tobacco retailers that would protect minors, such as distance requirements from schools and/or youth-oriented areas; and

WHEREAS, on December 5, 2023, the Board of Supervisors provided staff direction to draft an urgency ordinance to allow staff the opportunity to study various options to regulate tobacco retail businesses; and

WHEREAS, Government Code section 25131 expressly authorizes the Board of Supervisors to adopt an urgency ordinance immediately upon the introduction and Government Code section 25123 makes such an urgency ordinance effective immediately.

NOW, THEREFORE, THE BOARD OF SUPERVISORS OF THE COUNTY OF EL DORADO DOES ORDAIN AS FOLLOWS:

Section 1. Purpose and Authority.

The purpose of this Interim Urgency Ordinance (“Ordinance”) is to establish a temporary moratorium in the unincorporated areas of the County on the approval of any new Tobacco Retailer applications for all purposes, while County staff determines the impact of unregulated local Tobacco Retailer licensing, zoning, and density; and develops reasonable regulations to mitigate those impacts. This Ordinance is adopted pursuant to California Constitution Article XI, Section 7, and Government Code Section

¹¹ Tobacco Product Use Among U.S. Middle and High School Students — National Youth Tobacco Survey, 2023 (cdc.gov)

¹² Id.

¹³ *E.g.* Ribisl KM, Luke DA, Bohannon DL, Sorg AA, Moreland-Russell S. Reducing Disparities in Tobacco Retailer Density by Banning Tobacco Product Sales Near Schools. *Nicotine Tob Res.* 2017;19(2):239-244. doi: 10.1093/ntr/ntw185.

65800 *et seq.*, particularly Section 65858 and other applicable law.

Section 2. Findings and Declarations.

The Board of Supervisors of the County of El Dorado makes the following findings in support of the immediate adoption and application of this interim urgency moratorium:

- A. Under Article XI, Section 7 of the California Constitution, the County may adopt and enforce ordinances and regulations not in conflict with general laws to protect and promote the public health, safety, and welfare of its citizens.
- B. Under Government Code Section 25123, the County may enact an ordinance for the immediate preservation of the public peace, health, or safety, which contains a declaration of facts constituting the urgency, and that ordinance will be effective immediately.
- C. Under Government Code Section 65858, the County may as an urgency measure adopt an interim ordinance prohibiting land uses that may be in conflict with contemplated land use regulations that the County is studying or considering or intends to study within a reasonable time.
- D. The *Smoking Prevention and Tobacco Control Act of 2009* (21 USC §387p) does not preempt state or local law to regulate the “sale, distribution, possession, exposure to, [or] access to” tobacco products.
- E. The County has seen a proliferation of new tobacco retailers and is concerned for the health and safety of residents and visitors to the County.
- F. The County has no specific regulations for tobacco retailers that would protect youth, such as distance requirements from schools, youth-oriented areas, or other tobacco retailers.
- G. The County of El Dorado has a compelling interest in protecting the public health, safety, and welfare of its residents and businesses, and to improve health outcomes, and encourage patterns of development that promote a healthy community by creating regulations to reduce the availability of tobacco products and tobacco advertising near youth-orientated areas and other tobacco retailers, in order to ensure the effective implementation of the County of El Dorado’s land use objectives and policies, a temporary prohibition (moratorium) on the establishment or approval of new Tobacco Retailers is necessary.
- H. There is no feasible alternative to enactment of this Ordinance that will

satisfactorily mitigate or avoid the previously identified impacts to the public health, safety, and welfare with a less burdensome or restrictive effect.

- I. This Ordinance complies with State law and imposes reasonable regulations that the Board of Supervisors concludes are necessary to protect the public safety, health and welfare of residents and business within the County.

Section 3. Declaration of Urgency

Based on the recitals and findings set forth in Section 2, the Board finds and declares that there is a current and immediate threat to the public health, safety, and welfare arising from the absence of reasonable regulations in the County Code governing the zoning and density of Tobacco Retailers in the unincorporated areas of the County. The Board determines that this urgency ordinance is needed to preserve the public health, safety, and welfare by providing the County with additional time to prepare the studies and reports required to consider the comprehensive regulation of Tobacco Retailer licensing, zoning and density, for all purposes in the unincorporated areas of the County.

Section 4. Moratorium

A temporary moratorium in the unincorporated area of the County on the approval of any new Tobacco Retailer applications is hereby established.

For purposes of this Ordinance:

- A. **“Person”** means any natural person, partnership, cooperative association, corporation, personal representative, receiver, trustee, assignee, or any other legal entity.
- B. **“Sale” or “Sell”** means any transfer, exchange, barter, gift, offer for sale, or distribution for a commercial purpose, in any manner or by any means whatsoever.
- C. **Tobacco Product** means:
 1. Any product containing, made of, or derived from tobacco or nicotine that is intended for human consumption or is likely to be consumed, whether inhaled, absorbed, or ingested by any other means, including but not limited to, a cigarette, a cigar, pipe tobacco, chewing tobacco, snuff, or snus;
 2. any electronic smoking device and any substances that may be aerosolized or vaporized by such device, whether or not the substance contains nicotine; or

3. any component, part, or accessory of (1) or (2) whether or not any of these contains tobacco or nicotine, including but not limited to filters, rolling papers, blunt or hemp wraps, hookahs, mouthpieces, and pipes.

“Tobacco Product” does not include drugs, devices, or combination products authorized for sale by the United States Food and Drug Administration, as those terms are defined in the Federal Food, Drug and Cosmetic Act.

- D. **“Tobacco Retailer”** means any Person who Sells, offers for Sale, or does or offers to exchange for any form of consideration Tobacco Products. “Tobacco Retailing” shall mean the doing of any of these things. This definition is without regard to the quantity of Tobacco Products sold, offered for Sale, exchanged, or offered for exchange.

During the term of this Ordinance, including any extensions hereto:

- A. The County, and any other County official or employee, shall not issue any County permit, registration, or approval of any type to a Tobacco Retailer within the unincorporated areas of the County.
- B. This section is cumulative to all other remedies now or hereafter available to abate or otherwise regulate or prevent public nuisances or to enforce the provisions of the County Code of Ordinances.
- C. To the fullest extent permitted by law, any actions taken under the provisions of this Ordinance by any public officer or employee of the County of El Dorado itself shall not become a personal liability of that person or a liability of the County.
- D. As authorized by Government Code section 25132 and except as otherwise provided by state statute, any person or entity violating any provision of this Ordinance shall be guilty of a misdemeanor.
- E. This Ordinance shall not apply to an application determined to be complete and in compliance with California Government Code section 65943 prior to the effective date of this Ordinance.

Section 5. Adoption of this Ordinance is Not a Project under the California Environmental Quality Act (CEQA).

This Ordinance is not a “project” within the meaning of Public Resources Code Section 21065 and CEQA Guidelines Section 15378 because the temporary moratorium on approval of new Tobacco Retailer applications does not have the potential of resulting

in a direct physical change to the environment or reasonably foreseeable indirect physical change in the environment. Even if the adoption of the moratorium were a project, it would be categorically exempt from CEQA under CEQA Guidelines Section 15308 because the moratorium is adopted in order for the County to adopt a regulatory process for the protection of the environment and there are no unusual circumstances under CEQA Guidelines Section 15300.2, and under the “common sense” exemption in CEQA Guidelines Section 15061(b)(3) because there is no possibility that adoption of this temporary moratorium would have a significant effect on the environment.

Section 6: Severability.

If any section, subsection, sentence, clause, phrase or portion of this Ordinance is for any reason held invalid or unconstitutional by a decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Ordinance. The Board of Supervisors 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 7. Conflicting Laws.

For the term of this Ordinance, as set forth in Section 8 below, the provisions of this Ordinance shall govern. The provisions of this Ordinance shall prevail in the event that they are in conflict between the provisions of this Ordinance and the provisions of any provision of the County Code of Ordinances or any other County ordinance, resolution, or policy.

Section 8. Effective Date and Term.

This urgency Ordinance shall take full force and effect immediately upon adoption by a vote of at least four-fifths of the Board of Supervisors. In accordance with Government Code Section 65858, this Ordinance shall be in full force and effect for a period of forty-five (45) days, unless extended by the Board of Supervisors as provided in Government Code Section 65858.

PASSED AND ADOPTED by the Board of Supervisors of the County of El Dorado at a regular meeting of said Board, held on the 30th day of January 2024, by the following vote of said Board:

ATTEST

Kim Dawson

Clerk of the Board of Supervisors

Ayes: Thomas, Hidahl, Turnboo, Parlin, Laine

By: *Kyra Schaufuly*
Deputy Clerk

Noes: None

Absent: None

Wendy Thomas
Wendy Thomas
Chair, Board of Supervisors

APPROVED AS TO FORM
DAVID LIVINGSTON
COUNTY COUNSEL

By: *[Signature]* (JBB)

Title: Deputy County Counsel