

# Case Studies

on the Implementation and Enforcement  
of Local Tobacco Retailer Licensing  
Ordinances in California



This publication was developed by Ellen Feighery, a researcher with the Public Health Institute, and Samantha Graff, a staff attorney with the Technical Assistance Legal Center (TALC).

The authors wish to thank the lead agency staff in the four communities profiled in this publication for taking the time to share their stories. The authors also thank TALC staff for their vision and input throughout the process of developing of this report.

This publication is provided for general information only and is not offered or intended as legal advice. Readers should seek the advice of an attorney when confronted with legal issues, and attorneys should perform an independent evaluation of the issues raised in these materials.

This material was made possible by funds received from the California Department of Health Services, under contract #04-35336.

June 2006

*Illustrations by Janet Cleland*

## TABLE OF CONTENTS

Introduction .....	3
Chapter 1: An Overview of Laws Enforced via Local Licensing Ordinances .....	5
Chapter 2: Background on the Four Communities .....	7
Chapter 3: Essential Preconditions for Active and Effective Enforcement .....	8
Chapter 4: One-Step vs. Two-Step Enforcement Process .....	9
Chapter 5: Administration of Tobacco Licenses .....	10
Chapter 6: Monitoring Tobacco Retailers .....	12
Chapter 7: The Penalty Phase .....	14
Conclusion .....	19
Appendix A: Comparing the Four Communities’ Licensing Programs .....	20
Appendix B: Resources .....	21



## INTRODUCTION

---

Although the state of California requires a license to sell tobacco products, the state licensing law is not designed to address public health concerns, such as youth access to tobacco products. Communities across California have attempted to fill the void by adopting local tobacco retailer licensing ordinances.

Approximately 50 cities and counties in California currently have local ordinances, most of which (a) require retailers to obtain a license to sell tobacco products and (b) impose a suspension or revocation of the license when a retailer violates state or local laws related to the sale, distribution, or use of tobacco. But when it comes to implementing and enforcing the ordinances, the licensing programs that have emerged look remarkably different from one another.

To help understand the variety of local approaches to tobacco retailer licensing, the Technical Assistance Legal Center (TALC) studied four communities that are enforcing their local tobacco retailer licensing ordinances: Contra Costa County, Santa Barbara County, the City of Willits, and the City of Los Angeles. TALC chose these communities because they were among the first in California to suspend the tobacco licenses of retail outlets that violated sales-to-youth or other tobacco control laws.

The purpose of TALC's study was to examine the differences among the four licensing programs, analyze why they evolved differently, and explore the significance of the differences given that they all were reaching the ultimate goal of holding retailers accountable for violations of tobacco sales laws. Note that TALC focused its research on implementation and enforcement—not on the process of organizing the community around the passage of the ordinance.

This report summarizes the key elements of the four licensing programs as they were described in interviews with lead agency staff in the four communities. A major conclusion of the report is that there is no one “right way” to implement and enforce a local tobacco retailer licensing program. Each of the four communities tailored its licensing program to its unique political climate and the particular capabilities and resources of its local agencies.

This report is designed for advocates in communities that have recently adopted or are in the process of adopting tobacco retailer licensing ordinances.

**Chapter 1** provides basic information about tobacco control laws that are enforced through local licensing ordinances.

**Chapter 2** provides brief descriptions of the four communities featured in the report.

**Chapter 3** highlights two major preconditions that lay the groundwork for active and effective enforcement: a committed lead agency and early planning for enforcement.

**Chapter 4** describes a key decision that affects many aspects of enforcement in the four communities, namely whether sales-to-youth violations are prosecuted in court before license-related penalties are imposed on retailers.

**Chapter 5** compares how the four communities administer their licensing programs.

**Chapter 6** compares how the four communities monitor retailers for violations of tobacco control laws.

**Chapter 7** compares how the four communities penalize retailers who are found to be out of compliance with the law.

Two appendices at the end of this publication offer additional resources for readers:

**Appendix A** provides a chart comparing the four communities' licensing programs.

**Appendix B** provides contact information for staff in the four communities and sources of assistance on legal issues related to licensing, support for campaign organizing around licensing, and access to lists of local retailers.

## CHAPTER 1

### An Overview of Laws Enforced via Local Licensing Ordinances

In most cases, a local tobacco retailer licensing ordinance requires retailers to obtain a license to sell tobacco products and provides for the suspension or revocation of the license if a retailer violates state or local laws related to the sale, distribution, or use of tobacco.

A licensing ordinance functions as an umbrella under which violations of various tobacco control laws may be enforced. In a community with a licensing ordinance, if a retailer violates a state or local tobacco control law, the retailer also has violated the tobacco license.

For example, a retailer who sells a pack of cigarettes to a minor is in violation of the state law banning tobacco sales to youth and in violation of the license requiring the retailer to comply with all tobacco control laws. Even though two violations are involved, a city or county generally does not need to prosecute the tobacco control law violation in court before imposing license-related penalties, including suspension or revocation of the license. Instead, the city or county need only provide an opportunity for the retailer to object to the license-related penalty in a government hearing, also known as an “administrative” hearing because it is usually provided by an administrative agency within the government. (For a general explanation of administrative hearing procedures, see page 14 of TALC’s Administrative Enforcement Roadmap, available in the enforcement category of publications at <http://talc.phi.org>.) Therefore, licensing ordinances offer local officials a streamlined system for imposing strong penalties on retailers who are out of compliance with any existing law that applies to tobacco sales.

Two general categories of tobacco control laws may be enforced through licensing ordinances: (1) state laws prohibiting sales to minors; and (2) state and local laws regulating various aspects of the retail environment, such as laws banning self-service displays of tobacco products and laws requiring the posting of tobacco retail licenses and “STAKE Act” signs. These laws are referred to as “point of sale” laws for the remainder of the report.



Although a tobacco retailer license can be used to enforce different types of tobacco control laws, the chief purpose of local tobacco retailer licensing ordinances is to give local officials an effective way to enforce state laws prohibiting sales to minors. California has two separate laws that forbid the sale of tobacco products to minors. Each of these laws has major drawbacks from a local enforcement perspective:

- Penal Code section 308(a) (or “PC 308”) is a state law prohibiting the sale of tobacco to minors. PC 308 can be enforced by local law enforcement officials, but it is a relatively weak law. The law mandates that violators must “know or have grounds to know” that the buyer is a minor in order to run afoul of the law. This makes it difficult to prosecute store owners if their employees sell to youth, so clerks—not store owners—are more likely to be cited for violations. Also, in the event that a store owner is held accountable for the violation, the law’s penalties would entail a mere slap on the wrist. Violators are subject either to a criminal misdemeanor action or to a civil penalty schedule of \$200

for the first offense, \$500 for the second offense, and \$1,000 for the third offense. Many district attorneys are unwilling to pursue misdemeanor actions for PC 308 violations because they do not believe that the offense warrants the expenditure of resources, including the full-scale jury trial to which misdemeanor defendants are entitled. Therefore, many communities are left with the relatively light civil penalty schedule.

- California Business and Professions Code section 22958 (the “STAKE Act”) is a somewhat stronger state law prohibiting the sale of tobacco to minors. The law does not mandate that retailers know the buyer is a minor in order to constitute a violation; it requires prosecution of the owner rather than the clerk; and it has a higher civil penalty schedule. At this time, however, the STAKE Act can be enforced only by the Food and Drug Branch of the California Department of Health Services, which has limited state funding to devote to enforcing tobacco control laws.

The great advantage of a local licensing ordinance is that it empowers *local* law enforcement officials to impose a *meaningful* penalty on owners of stores that sell tobacco to minors.



## CHAPTER 2

### Background on the Four Communities

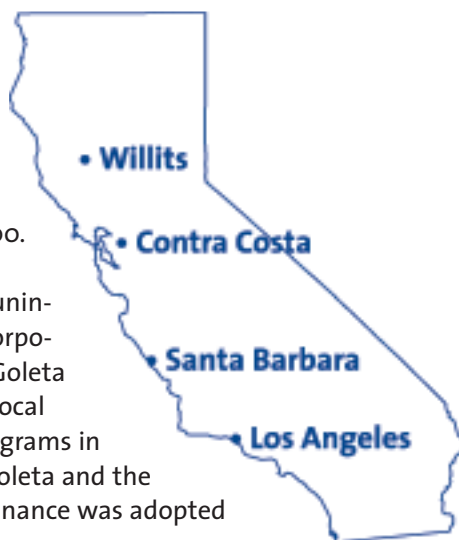
TALC chose to focus on four particular communities because they have been actively enforcing their local tobacco retailer licensing ordinances for several years, and they have succeeded in securing strong penalties against retailers who violate tobacco control laws. The four communities also represent a diverse sample of California jurisdictions in terms of their size, location, and demographics.

**Contra Costa**, one of the nine counties in the San Francisco Bay Area, is the ninth most populous county in California. Its population numbered approximately 980,000 in 2002. Contra Costa is comprised of urban and rural communities. The county has 19 incorporated cities and the unincorporated area. This report studies the ordinance that applies to the unincorporated areas, in which there are 125 tobacco retailers. Contra Costa actually has had two versions of a tobacco retailer licensing ordinance. In 1998, the county adopted a compromise ordinance that required tobacco retailers to obtain a license to sell tobacco only after they were found to be in violation of a local or state tobacco control law. Efforts to revise and strengthen the licensing ordinance were later championed by a county supervisor who wanted to leave an anti-tobacco legacy as she was preparing to step down from the board of supervisors. The county's current ordinance was adopted in 2003, and the annual licensing fee was set at \$25. One year later, with the loss of a state enforcement grant, the fee was raised to \$160.

**Santa Barbara** is a southern coastal county with a population of 400,000. There are nine jurisdictions in the county including eight cities and the unincorporated area. This report focuses on the City of Goleta and the unincorporated area of the county. The City of Goleta was part of the unincorporated area until it became an incorporated city in January 2002. When Goleta split from the county, it adopted all of the county's laws, including the local tobacco retailer licensing ordinance. The county treats the licensing programs in Goleta and the unincorporated area as one and the same. The City of Goleta and the unincorporated area are home to 96 tobacco retailers. The county's ordinance was adopted in 2001, and the annual licensing fee was set at \$30.

**Willits** is a small rural city located in Mendocino County about 125 miles north of San Francisco. One of four incorporated cities in the county, Willits has a population of about 5,100 and 13 tobacco retailers. The city's licensing ordinance was adopted in 2003, and the annual licensing fee was set at \$15.

**Los Angeles** is the largest city in California—and the second largest in the nation—with an estimated population of just under 4 million people. The city has identified approximately 5,000 tobacco retailers within its borders, but law enforcement officials suspect that there are an additional 1,500 to 3,000 retailers in the city—composed in large part of nontraditional retailers such as doughnut shops, video stores, and cafes. The city's licensing ordinance was adopted in 2000, and it did not provide for an annual licensing fee. In September 2005, the city adopted an amendment to the ordinance that set an initial fee of \$208 with future annual fees to be set by the city council. The increased fee will allow for an expansion of the program with additional staffing and a significant increase in the number of compliance checks.



## CHAPTER 3

### Essential Preconditions for Active and Effective Enforcement

Staff from the four communities identified two major preconditions that lay the groundwork for active and effective enforcement: a committed lead agency and early planning for enforcement.

#### Committed lead agencies

In all four communities, committed staff members from a single government agency (hereinafter referred to as the “lead agency”) have been essential to the successful implementation and enforcement of the local licensing ordinance. The health departments in Contra Costa, Santa Barbara, and Willits, and the city attorney’s office in Los Angeles, all allocated significant staff time and resources to every stage of the organizing, drafting, and implementation process.

Dedicated staff members from the lead agencies galvanized support from local advocates and organized the movement to get the licensing ordinance passed. They educated key opinion leaders and cultivated relationships with individuals in other agencies that would serve administrative and enforcement functions in the licensing program. They worked with their local attorneys to draft the strongest ordinance that they thought could be adopted. And once the licensing ordinance was passed, they tenaciously coaxed and oiled all parts of the machine to keep it running as smoothly as possible.

#### Early planning for implementation and enforcement

In the campaign stage, the lead agency in each community worked hard to figure out who would be responsible for administering and enforcing the ordinance and to get the relevant departments and individuals on board. All recognized that planning for enforcement begins when the ordinance is being drafted—not after it is passed—and continues with deliberate efforts to engage key players in designing and implementing various aspects of a licensing program.



Charlotte Dickson, who until recently served as policy coordinator for Contra Costa County’s Tobacco Prevention Project, credits an attorney from the county counsel’s office for advising the health department to communicate with key players in all of the agencies that would be involved in administering and enforcing the licensing ordinance. These early conversations would ensure that everyone would understand and prepare for their respective roles.

“I can’t overemphasize the importance of county counsel helping to write the ordinance so it was ready to roll as soon as it was passed,” Dickson stresses. “He didn’t want new responsibilities dumped on people out of the blue, so we worked out many of the intricacies of enforcement upfront with the agencies that would be involved.”

Dawn Dunn, project director of the Santa Barbara County Public Health Department’s Tobacco Prevention Settlement Program, echoes the importance of this step. “The campaign phase sets the tone for the implementation phase,” she says. “Relationships within and among agencies must be fostered and maintained from the beginning.”

## CHAPTER 4

### One-Step vs. Two-Step Enforcement Process

A key decision that shapes many aspects of enforcement in the four communities is whether to prosecute violations in court before imposing license-related penalties on retailers. Even though local licensing ordinances generally allow for a one-step process, three of the four communities—Contra Costa, Santa Barbara, and Los Angeles—decided to implement a two-step enforcement process that applies mainly to sales-to-youth violations. First, the offending clerk or retailer is prosecuted in court for selling tobacco to a minor. Second, once the court determines (usually, through a settlement or plea) that the clerk or retailer was guilty of the sale, the process of determining the licensing penalty begins. (See Chapter 7 for more information on this stage of the process.)

In Contra Costa and Santa Barbara, the two-step enforcement process is not required by the ordinance but instead comes by way of historic practice. Before licensing ordinances were passed in these counties, each had a dedicated source of money (from a state enforcement grant and the Master Settlement Agreement, respectively) to devote to PC 308 enforcement. Because the legal standard makes it hard to obtain a PC 308 conviction against a store *owner*, the two counties were limited in the past to the prosecution of clerks. Since the licensing ordinance was passed in these counties, it has been used as a supplement to the existing enforcement program. The counties still prosecute *clerks* in court for violating PC 308, but they then use the PC 308 conviction against a clerk as proof of a violation for the licensing penalty process against store *owners*.

The lead agencies in these counties point to several advantages of the two-step process. They are comfortable leaving the task of proving PC 308 violations to traditional law enforcement agencies whose everyday job entails proving violations. Moreover, once a court has determined that a violation occurred, the administrative licensing hearing is simpler because the hearing need only address the question of whether the clerk who violated the tobacco control law worked for the store owner who holds the license to sell tobacco products. Also, staff interviewed in Contra Costa and Santa Barbara believe that a decision made at an administrative licensing hearing is less likely to result in an appeal if there is an underlying state court judgment regarding the violation.

The two-step enforcement process is required by the Los Angeles ordinance to accommodate the lead agency's decision to contract with the state Food and Drug Branch (FDB) to monitor retailers for violation of sales-to-youth and other tobacco laws. The Los Angeles police department has a policy against the use of youth decoys, so the FDB was a good alternative enforcement agency. As the agency with sole responsibility for enforcing the STAKE Act, the FDB has experience in, and working protocols for, monitoring tobacco retailers using youth decoys. Since the FDB had a complete monitoring and prosecution system already in place, it made sense for the FDB to maintain its practice of marshalling a violation through to a court judgment before handing over evidence of the violation to the city attorney's office for use in the licensing penalty process.

Willits is the only one of the four communities to use a one-step enforcement process, which allows the community to impose license-related penalties for sales to youth violations without going first to court. Guadalupe Chavez, project director of the Mendocino County Department of Public Health's Tobacco Control Program, explains that for Willits, "our goal is to keep the whole thing as simple as possible."



## CHAPTER 5

### Administration of Tobacco Licenses

---

All of the communities confronted three major questions regarding the administration of the four local tobacco retailer licensing programs: How would it be funded? Who would be responsible for issuing the licenses? And how would all of the stores in the community selling tobacco be identified?

#### Setting the licensing fee

All four communities launched their licensing programs with nominal or no annual license fees. The ordinances of Contra Costa, Santa Barbara, and Willits provide that the local governing body (i.e., board of supervisors or city council) shall establish the annual license fee, and the governing bodies set the fees at \$25, \$30, and \$15, respectively—just enough to cover the processing of the license itself. Initially, the Los Angeles ordinance did not provide for any fee, but the ordinance was amended in 2005 to institute a \$208 fee, adjustable annually by the city council.



These four communities were able to implement effective enforcement programs because they had access to supplemental sources of funding. Contra Costa started out with a state enforcement grant. When that ended, the board of supervisors raised the licensing fee to \$160 (enough to cover the cost of administering the license and monitoring compliance with point-of-sale laws), and the public health director committed health department funds to cover the cost of conducting youth sting operations. To date, Santa Barbara has been able to draw from a dedicated stream of Master Settlement Agreement money for tobacco control law enforcement. The Mendocino county health department covers the costs of monitoring retailers in Willits, and the city absorbs the hearing costs, which are fairly low since Willits has so few retailers.

Los Angeles used the funds from a litigation settlement to launch its licensing program. Then, for two years, the program was funded by the city's general fund. In September 2005, the city attorney's office had convinced the city council of the value of the licensing program and was able to push through a fee that would support its continuation. The lead agencies keep close track of the actual cost of enforcement so they can use the information to advocate for higher fees or to justify the allocation of resources from other sources.

Staff members from all four lead agencies stress that in the absence of another guaranteed source of funding, it is very important to charge a license fee that is large enough to cover a full-fledged enforcement program. However, they acknowledge that in the early days of licensing, many boards of supervisors and city councils were reluctant to “burden” retailers with high fees and that a nominal fee made their licensing ordinances more palatable to their elected officials. (More recently, several California communities have been able to pass licensing ordinances with fees high enough to fund their enforcement programs.)

Contra Costa is the only one of the four communities to charge violators a fee for the hearing and subsequent re-inspection. The board of supervisors wanted violators to bear the cost of hearings and re-inspections, so it established a \$348 suspension hearing fee and \$110 reinspection fee.

## Choosing and working with the license administrator

In each of the four communities, administration of the tobacco license program is housed in the agency that issues local licenses or permits, such as business licenses or police and fire permits. Three of the communities have a separate tobacco license, but Contra Costa integrated the tobacco license application into the annual business and alcohol license application and created a sticker that could be affixed to the business license in lieu of a separate tobacco license.

Since tobacco licenses are administered in a similar fashion to other types of licenses and permits, it made sense to piggyback on administrative systems that were already in place. Dawn Dunn of Santa Barbara lists additional reasons for assigning administration to the county treasurer/tax collector: “Not only does the treasurer already issue all of the licenses in our county, but you are likely to pay attention when you get a letter from the treasurer,” she says. “Also, giving the treasurer the money that comes with administering the license was a good political move. By doing so, we got the support of the county administrator.”



Even though the lead agencies are not responsible for administering licenses, they are very involved in this part of the licensing process. Each lead agency took the initiative in preparing packets to inform retailers about the licensing program, and in developing a system for sharing information with the administering agency about the addition or loss of retailers, as well as license suspensions and revocations. Staff members from the lead agencies reported that it takes a lot of work to maintain clear and regular channels of communication with the administering agencies but that it is critically important to do so.

## Identifying retailers

The licensing ordinance in each community requires tobacco retailers to identify themselves by applying for a license to sell tobacco. However, many tobacco retailers either dishonestly or negligently fail to identify themselves as such. It is a challenge for the lead agencies in these communities to find stores flying under the radar—especially nontraditional retailers such as doughnut shops and outlets that have changed ownership.

In Contra Costa and Santa Barbara, the health departments have managed to develop fairly complete lists of tobacco retailers. They began compiling these lists when they started monitoring illegal tobacco sales to youth in the 1990s and refined their lists over the years as staff members and advocates noticed and reported new locations selling tobacco.

Because of its size, Los Angeles has had a harder time building and maintaining a comprehensive list. The city attorney’s office started out by blanketing all retailers with a particular “standard industry code” (SIC code) with an informational mailer, but SIC codes are not designed around specific products sold (e.g., tobacco), so this tactic resulted in irate calls from stores that did not sell tobacco products complaining about wasted taxpayer money. (In fact, the money used for the mailing resulted from a litigation settlement, not taxes.) When the state tobacco retailer licensing law took effect in 2004, the California Board of Equalization (BOE) began to keep its own list of tobacco retailers, and the city attorney’s office began to build a relationship with the BOE. The BOE now shares its data with Los Angeles and other jurisdictions with local licensing ordinances. (Refer to Appendix B for information about how to obtain tobacco retailer lists from the BOE.) Los Angeles is currently in the process of further expanding its tobacco retailer lists, because its new license fee funds investigators to detect retailers selling tobacco without a license.

## CHAPTER 6

### Monitoring Tobacco Retailers

A major component of the licensing program in the four communities involves monitoring retailers for tobacco control law violations. All four communities had to decide which agency would be responsible, how many retailers to check, and how often to visit them.

#### Choosing the monitoring agency

None of the four ordinances specifies the agency that will be responsible for monitoring tobacco retailers. The lead agency in each community selected the monitoring agency/ies based on a range of variables unique to the community.

In Contra Costa and Santa Barbara, the county sheriff enforces sales-to-youth laws, and the health department enforces self-service display and other point-of-sale laws. These counties split the enforcement function mainly because they use a two-step enforcement process and the sheriff is better equipped than the health department to lead youth sting operations and take violators to court.



In order to get buy-in from the sheriffs' departments, the lead agencies in Contra Costa and Santa Barbara had to find sources of funding and conduct concerted outreach because tobacco control traditionally is not a law enforcement priority.

In Contra Costa, the public health director enters into an annual contract with the sheriff so that the health department pays the sheriff to conduct PC 308 inspections. The sheriff uses the money to contract with a retired deputy sheriff, whose sole responsibility is PC 308 enforcement. "The deputy sheriff is great and committed," says Charlotte Dickson of Contra Costa. "He follows through on everything—the paperwork and the communication with us." However, the sheriff's office has not incorporated this function into regular operations. The contract is renewed annually and is highly dependent on an individual staff member at the sheriff's office. In Santa Barbara, the sheriff rotates the assignment of this function among personnel in the department, so the lead agency has had challenges maintaining open lines of communication about enforcement. However, relations between the lead agency and the sheriff have improved over time.

The health departments in Contra Costa and Santa Barbara monitor tobacco retailers for compliance with a range of laws relating to the point of sale, including laws banning self-service displays, bidis, and single cigarettes, and laws requiring the posting of STAKE Act signs and the county license. The Contra Costa health department is considering whether to ask the environmental health department to assume this enforcement function since its inspectors already go out to the same stores.

Health department staff from both counties express some ambivalence about their enforcement roles. "The other day I said, 'I am an enforcement officer of the health department!'" says Dickson. "That surprised me. . . . I approach it from a social work and health education perspective. Our role is to help these retailers come into compliance."

Dawn Dunn of Santa Barbara shares that approach, given her primary training as a health educator. "Enforcement is our last resort," she says. "We have tried every other method. Nothing but serious sanctions will change retailer behavior." Now that she's played the

role for some time, she reflects, “it’s not that bad. I’m just enforcing the law. My purpose is to reduce illegal sales. I’m on the same page as the retailers because they say they want the same thing.”

In Los Angeles, the city contracts with the state Food and Drug Branch (FDB) to be the sole agency responsible for monitoring tobacco retailers for sales-to-youth and other tobacco control law violations. The FDB is expensive (Los Angeles pays about \$450 per sting) and can be bureaucratic. However, the city attorney’s office is pleased with this choice because the FDB has the experience and capacity to conduct operations across a city the size of Los Angeles.

The Mendocino county health department assumes all monitoring responsibilities in Willits, a decision made for several reasons. The health department has been conducting retailer compliance surveys for approximately ten years, so it has experience monitoring tobacco control laws; it has established close ties with a network of youth decoys; and it has a strong commitment to enforcing tobacco control laws. Since Willits is a small community with only 13 tobacco retailers, the health department can afford to devote staff time to enforcing the tobacco retailer licensing ordinance. Finally, Willits has not implemented a two-step enforcement process, so there is no need to get the local police involved.

### **Determining which stores to visit and how often to visit them**

In all four jurisdictions, the amount of money available for enforcement dictates the number of stores visited by the monitoring agency/ies and the frequency of the visits. The three smaller communities are able to check almost every store at least once per year, while Los Angeles has to resort to sampling a subset of its approximately 5,000 tobacco retailers.

The deputy sheriff in Contra Costa conducts 100 stings per year. He inspects some tobacco retailers more than once and others not at all, working with the health department to prioritize which sites to visit. The decision is based on the type of establishment (country clubs, bars, and restaurants are generally excluded), the density and location of retail districts (including stores that youth can access easily), and the locations of known violators. The health department in Contra Costa visits every tobacco retailer at least once per year and goes back to about half—mainly those who have violated a point-of-sale-related law—for a second visit in the same year.



In Santa Barbara, the sheriff attempts to inspect all retailers once annually. When there are insufficient resources to do this, the health department selects a random sample of stores for the sheriff to visit but always includes stores with previous violations. The health department in Santa Barbara has been visiting tobacco retailers approximately once every other year to check for compliance with point-of-sale laws but hopes to conduct at least two visits per year in the future. In Willits, the health department checks all 13 retailers twice a year.

In Los Angeles, the FDB has visited between 300 and 500 tobacco retailers per year. Initially, the list of retailers to visit was made up of a random sample of all known tobacco retailers within city borders. As the FDB built a data set that pointed to high sales rates in certain council districts, it worked with the city attorney’s office to begin concentrating on those districts. Currently, the FDB focuses on certain types of stores within high-sales districts: retailers within 1,000 feet of schools, nontraditional vendors such as doughnut shops, and areas with historic sales-to-youth problems.

## CHAPTER 7

### The Penalty Phase

Once the monitoring agency has discovered a tobacco control law violation, the penalty phase begins. Each of the four communities designed a penalty process based on the terms of its ordinance and other local factors.

#### One- vs. two-step prosecution in practice

As noted earlier, Contra Costa, Santa Barbara, and Los Angeles all use a two-step prosecution process where most license violations are prosecuted in court before license-related penalties are imposed.



In Contra Costa, if the sheriff finds that a retailer sold tobacco to minors in violation of PC 308, the sheriff prosecutes the clerk in traffic court. After the clerk is convicted, the sheriff reports the misdemeanor conviction to the health department. As the ordinance mandates, every conviction triggers an administrative licensing hearing to determine what penalty the retailer should face. Other tobacco sale violations (such as the sale of bidis or single cigarettes) or point-of-sale violations (such as self-service displays) are not prosecuted in court; they are brought directly to an administrative licensing hearing only after a retailer is discovered to be out of compliance by the health department, receives a notice to comply, and is still out of compliance on a follow-up visit. Contra Costa is the only one of the four communities that has suspended licenses on the basis of self-service display violations.

In Santa Barbara, after the sheriff finds that a store has sold tobacco to a minor, the district attorney prosecutes the PC 308 violation in court. The northern and southern divisions of the district attorney's office take different approaches to PC 308 prosecution because they have different kinds of legal expertise: the north favors civil actions against store owners, while the south prefers criminal misdemeanor actions against store clerks. The civil cases generally settle with an admission that an illegal sale took place, and the criminal cases often result in a "no contest" plea (i.e., a plea in a non-felony criminal case that has the same effect as a guilty plea except that it cannot be used against the defendant as an admission of guilt in a related civil case).

The health department tracks the cases that go to court, and once a court case is resolved, the health officer begins the license-related penalty process. For a first violation, the health department sends the retailer a warning letter. For a second violation in two years, the health department sends a notice of a 30-day suspension and notifies the retailer that he or she may appeal the suspension in an administrative hearing.

The health department in Santa Barbara has not conducted administrative licensing hearings for other tobacco sale or point-of-sale violations. "The intent of the licensing ordinance is to get at sales to minors," explains Dawn Dunn. "We included all violations because that creates a wide net. If someone is extremely recalcitrant on a self-service display or other tobacco related law, we will cite them and the license related sanctions would be triggered." Self-service display problems, she says, are "usually solved by a talk-to and a fix-it."

In Los Angeles, the state Food and Drug Branch (FDB) prosecutes all sales-to-youth violations under the STAKE Act in court. Once the FDB obtains a final judgment, it reports the



outcome to the city attorney's office. The retailer's first offense results in a warning letter, and the second offense in five years results in a 30-day suspension appealable via an administrative procedure.

Nora Manzanilla, administrative coordinator for the Tobacco Enforcement Project of the Los Angeles City Attorney's Office, says that this process generally works well. One downside is that the whole process—from the illegal sale to the suspension of the license—can take up to two years. Since business ownership turnover is very high, it can be hard to keep track of violators. And many retailers take advantage of the length of the process to transfer the business owner name to a husband, aunt, or nephew. In Los Angeles, other tobacco sale and point-of-sale violations have not resulted in suspensions because violators tend to come into compliance after receiving a warning letter.

Willits is unique among the four communities in that it does not prosecute sales-to-youth violations before initiating the licensing penalty process. In Willits, upon the first violation, retailers can choose to conduct a training on sales-to-youth laws to avoid suspension. The second violation in three years triggers a suspension. The city manager mails the suspension notice and informs the retailer that he or she may appeal the suspension in an administrative hearing. Like Santa Barbara, Willits has used administrative licensing hearings to penalize only sales-to-youth violations and not other tobacco sale or point-of-sale violations.

### Penalty for the first violation

Contra Costa is the only one of the four communities to suspend licenses on the first violation. Santa Barbara and Los Angeles issue warning letters, and Willits gives retailers 30 days to submit proof that they have trained their clerks on sales-to-youth laws.

Staff members from the lead agencies in Contra Costa, Santa Barbara, and Los Angeles all believe that a warning letter is an ineffectual penalty. "We guessed that a warning letter would allow for the fact that anyone can make a mistake once," reflects Dawn Dunn of Santa Barbara. "But sales rates remained relatively steady from the time the ordinance took effect in 2001 to 2005." One explanation for this, she says, is that the impact of licensing is likely only after real punitive sanctions are implemented. "If I could revise the ordinance, I'd drop the warning letter."

Nora Manzanilla echoes this opinion. "A suspension on the first violation would certainly serve as a stronger deterrent than a warning letter," she says, "especially since we don't visit every store once, much less twice."

The Medocino county health department is satisfied with the training provision in the Willits ordinance. With only 13 tobacco retailers in the city, the health department can easily collect proof that a training took place and can quickly identify repeat violators. Moreover, the training provision lessens the bureaucratic burden associated with the hearing process.



### Look-back period

The length of the look-back period (that is, the time period that the ordinance "looks back" to count repeat violations) ranges from two years in Contra Costa and Santa Barbara to three years in Willits to five years in Los Angeles.

The lead agencies in every community except Los Angeles are satisfied with the workability of their look-back periods. The longer look-back period in Los Angeles poses a challenge because the city attorney's office has to keep track of thousands of retailers with very high business turnover rates. However, the five-year period is essential because of the large number of retailers. "We devote a huge number of hours, calls, and letters working to unveil sham ownership changes," says Nora Manzanilla. "When they have different last names, it takes a lot of sleuthing to find the actual legal owner of the business."

### The hearing agency

Like administration and monitoring, the function of holding license suspension hearings rests in different agencies in different communities. Each ordinance specifies who is responsible for holding hearings. In Contra Costa and Santa Barbara, hearings are held by the health department, and the role of the hearing officer is played by the public health director and health officer, respectively. The city attorney serves as the hearing officer in Los Angeles, while the city grievance committee presides over hearings in Willits.

The lead agencies in Contra Costa, Santa Barbara, and Los Angeles decided to place the hearing function in their own domain because they had the greatest stake in seeing enforcement through. In Willits, it seemed less important to keep the hearing function in-house because Willits is a very small community where key players in all of the involved agencies are in constant touch with one another. So the lead agency in Willits decided to tap into an existing administrative hearing system that was working smoothly in other contexts.

### The hearing process

There is significant variation in the way license suspension hearings play out in the four communities. This variation derives in part from the four ordinances, which direct Contra Costa, Santa Barbara, and Willits to provide in-person hearings and Los Angeles to provide a written hearing. In addition, the hearing models vary based on the size of the community, on how local legal counsel interpret the laws regarding the degree of formality required, and on whether (and if so, how) sales-to-youth violations are prosecuted in court.



In Contra Costa, everyone who receives a notice of suspension has to appear for an administrative licensing hearing in person. The public health director in Contra Costa holds a hearing in his office, attended by the health department investigator, the retailer, and (for sales-to-youth violations) the deputy sheriff. "Scale matters," notes Charlotte Dickson. "This is a small community, so we have the capacity to hold an in-person hearing for everyone. The hearing is really about giving people a chance to tell their side of the story—like, 'Hey, my clerk had a personal tragedy and he was distracted,' or 'I didn't know about the self-service display law.'"

The hearings in Santa Barbara are much more formal, especially when the sales-to-youth violation was prosecuted in court as a criminal misdemeanor and resulted in a "no-contest" plea. Since "no-contest" is not a technical admission of guilt, the county counsel has determined that the health officer must preside over a judicial-like proceeding in which the health department investigator proves that a violation occurred. The hearing is recorded and requires the presence of one attorney from the county counsel's office to represent the health officer, another attorney from the county counsel's office to represent

the tobacco program staff, the sheriff who witnessed the violation, and the retailer, who may or may not bring along an attorney. In light of the time- and resource-intensive nature of this hearing model, the key players developed a strategy for averting the need for a hearing altogether. The health officer now orders the parties to hold a settlement conference in advance of the hearing, and retailers generally agree to an admission of guilt and a suspension that is less than the time period required by the ordinance.

Willits has a similar approach to Santa Barbara. Since Willits does not prosecute sales-to-youth violations in court but instead takes retailers straight to an administrative licensing hearing, the hearing is the place where the violation is proved for the first and only time. So the hearing looks similar to a court hearing, with the city attorney and witnesses in attendance. However, most violations do not end up in a hearing because the city attorney is willing to negotiate beforehand for a suspension period that is less than the time period set forth in the ordinance.

Los Angeles is distinctive because retailers who want to protest a suspension must do so in writing rather than in person. They may submit written evidence to the city attorney's office in support of their objections. "We are a huge city," explains Nora Manzanilla. "There was no way the city attorney's office was going to take on the enormous task of holding an in-person hearing for every violator." This is another benefit of contracting with the state Food and Drug Branch to prosecute store owners under the STAKE Act, she notes. "Once the FDB gets a judgment against the store owner, we have all the evidence we need to suspend that license." Retailers are entitled to an in-person appeal only if they lose their written hearing.

### Discretionary vs. mandatory penalties

The suspension schedule in Contra Costa's ordinance is discretionary, meaning there is room for the hearing officer to exercise discretion in determining the number days of the suspension. The other three ordinances have suspension schedules that are mandatory—that is, a first or repeat violation automatically triggers a suspension for a fixed number of days. The three ordinances with mandatory suspension schedules range from 21 to 30 days for a first-time suspension, which some staff members from the lead agencies believe is too harsh.



The Contra Costa public health director has used the discretion afforded to him by the ordinance to strike what he believes is a fair penalty. He has the prerogative to suspend a license for up to 30 days upon the first offense, but as of June 2005, he had never issued a first-time suspension for more than one week. "He believes that a seven-day suspension is enough to bring retailers into compliance," says Charlotte Dickson. "The decline in sales rates since our ordinance was passed—from 37 percent to 7 percent—has proven this to be true."

The Santa Barbara health department sees advantages and disadvantages to the mandatory suspension schedule. On the upside, it saves the health officer from being accused of unequal treatment. On the downside, it forces the health officer to impose what he considers to be an unduly burdensome 30-day penalty for the first suspension. The health department found a way to build some flexibility into the otherwise mandatory suspension schedule by holding settlement conferences before administrative licensing hearings. In these settlement conferences, retailers have an opportunity to admit their wrongdoing and obtain a suspension period that is shorter than that required by the ordinance.

Although the suspension schedule in the Willits ordinance does not appear to leave room for discretion, the grievance committee has given it a loose interpretation in order to get around the problem of having to impose first-time suspensions of 21 days. For the few retailers who decline to settle and instead go to an administrative licensing hearing, the grievance committee has issued ten-day suspensions. “Ten days is enough punishment in the eyes of the committee,” says Guadalupe Chavez. “Our goal is to keep the burden low on everyone—retailers and city staff alike—while promoting compliance.”

Staff members from the Los Angeles city attorney’s office are in favor of abiding strictly by their mandatory suspension schedule. “We absolutely can’t allow for one retailer to get seven days and another 17 days,” says Nora Manzanilla. “I am always able to tell retailers that all violators get the same penalty no matter what.”

### **Appeals process**

In Santa Barbara and Willits, the outcome of an administrative licensing hearing is a “final administrative decision,” which means that if the losing party wants to appeal, it must do so in state court. So far, no one in those communities has filed an appeal.

In Contra Costa, the public health director’s decision can be appealed to the board of supervisors, which makes a final administrative decision. As of June 2005, only one retailer had appealed a suspension. “He was a 7-11 franchise owner worried about his chances to advance in the corporate hierarchy, so he was willing to go out on a limb,” Charlotte Dickson recalls. “He tried, but he lost.”

The Los Angeles ordinance provides that appeals go to the police permit review panel, but no retailer has taken a suspension decision that far.

## CONCLUSION

---

Each of the four communities highlighted in this report has succeeded in crafting and sustaining a process for enforcing its tobacco retailer licensing ordinance. The absence of a strong state licensing law has resulted in great variation among local licensing programs. Each community studied in this report has built a successful enforcement program around its unique political climate and the particular capabilities and resources of its local agencies. Based on this review, there appears to be no one “right way” to design and run a local tobacco retailer licensing program. For this reason, the case studies do not provide a blueprint of “best practices” for a successful enforcement program.

The case studies do offer some insight, however, into the nature of the lead agencies and their decision-making processes in communities that manage to implement aggressive enforcement of local tobacco retailer licensing ordinances. The lead agencies in all four communities have an unwavering commitment to a strong licensing program, even in the face of struggles and setbacks. They are deeply familiar with their communities, which allows them to assess and manage facilitators and barriers to their goal. And they have worked to cultivate relationships with key players at critical junctures from passage to enforcement of their ordinances. Ultimately, these agencies did what they needed to do to get a strong licensing program up and running in order to reduce tobacco use among youth in their communities.

The local tobacco retailer licensing movement continues to grow in the absence of a state tobacco retailer licensing law that could bring a comprehensive and uniform approach to the problem of illegal tobacco sales to minors. Communities that followed the early adopters of tobacco retail licensing laws have passed or are in the process of passing new licensing ordinances that include provisions designed to avoid some of the challenges identified by their predecessors.

Resources are readily available to local communities embarking on this effort who want assistance with organizing around licensing, drafting licensing ordinance language, or implementing and enforcing licensing ordinances. These resources are listed in Appendix B.



## APPENDIX A:

### Comparing the Four Communities' Licensing Ordinances

	Contra Costa County	Santa Barbara County and the City of Goleta	City of Willits	City of Los Angeles
<b>Number of retailers</b>	125	96	13	5,000
<b>One vs. two-step enforcement process<sup>1</sup></b>	Two-step	Two-step	One-step	Two-step
<b>Fee as of 6/06</b>	\$160 license fee \$348 hearing fee \$110 reinspection fee	\$30	\$15	\$208
<b>Issuing agency</b>	Tax collector	Treasurer-tax collector	City business license clerk	Office of finance
<b>Monitoring agency</b>	Sales-to-youth laws: sheriff Point-of-sale laws: health department	Sales-to-youth laws: sheriff Point-of-sale laws: health department	Health department	California Food and Drug Branch
<b>Hearing officer/body</b>	Public health director	Health officer	City grievance committee	City attorney
<b>Type of initial hearing</b>	In person	In person	In person	In writing
<b>Look-back period<sup>2</sup></b>	Two years	Two years	Three years	Five years
<b>Discretionary vs. mandatory penalties<sup>3</sup></b>	Discretionary	Mandatory	Mandatory	Mandatory
<b>Penalty schedule for license violators</b>	1 <sup>st</sup> violation: up to 30 days suspension 2 <sup>nd</sup> violation in 2 years: up to 90 days suspension 3 <sup>rd</sup> violation or more in 2 years: up to 1 year suspension	1 <sup>st</sup> violation: letter of warning 2 <sup>nd</sup> violation in 2 years: 30-day suspension 3 <sup>rd</sup> violation 2 years: 90-day suspension 4 <sup>th</sup> violation in 2 years: 12-month suspension	1 <sup>st</sup> violation: 14 days or proof of retailer compliance training 2 <sup>nd</sup> violation in 3 years: 21-day suspension 3 <sup>rd</sup> violation in 3 years: 30-day suspension 4 <sup>th</sup> violation in 3 years: revocation with no option to reapply	1 <sup>st</sup> violation: letter of reprimand 2 <sup>nd</sup> violation in 5 years: 30-day suspension 3 <sup>rd</sup> violation in 5 years: 90-day suspension 4 <sup>th</sup> violation in 5 years: 12-month suspension

<sup>1</sup> In a two-step enforcement process, the community prosecutes sales-to-youth violations in court before imposing license-related penalties on retailers. In a one-step enforcement process, the community imposes license-related penalties for sales-to-youth violations without going first to court.

<sup>2</sup> Refers to the time period that the ordinance "looks back" to count repeat violations against a particular retailer.

<sup>3</sup> A discretionary penalty leaves the hearing officer room to exercise discretion in determining the number of days of a suspension. In a mandatory penalty schedule, a first or repeat violation automatically triggers a suspension for a fixed number of days.

## APPENDIX B:

### Resources

#### COMMUNITY CONTACTS

##### Contra Costa County

Denice A. Dennis, MPH  
Tobacco Prevention Project Manager  
Contra Costa Health Services  
597 Center Avenue  
Martinez, CA 94553  
(925) 313-6825 (tel)  
[ddennis@hsd.cccounty.ca.us](mailto:ddennis@hsd.cccounty.ca.us)

##### Santa Barbara County

Dawn M. Dunn, MPH  
Project Director, Tobacco  
Prevention Settlement Program  
Santa Barbara County Public  
Health Department  
300 San Antonio Road  
Santa Barbara, CA 93110  
(805) 681-5407 (ph)  
[dawn.dunn@sbcphd.org](mailto:dawn.dunn@sbcphd.org)

##### Willits

Guadalupe Chavez  
Project Director, Tobacco Control Project  
Mendocino County Department  
of Public Health  
1120 Dora Street  
Ukiah, CA 95482  
(707) 472-2695 (ph)  
[chavezg@co.mendocino.ca.us](mailto:chavezg@co.mendocino.ca.us)

##### City of Los Angeles

Nora Manzanilla  
Administrative Coordinator,  
Tobacco Enforcement Program  
Los Angeles Office of the City Attorney  
200 N. Main Street, 500 City Hall East  
Los Angeles, CA 90012  
(213) 978-7742 (tel)  
[nmanzan@atty.lacity.org](mailto:nmanzan@atty.lacity.org)

#### Technical Assistance Legal Center (TALC)

TALC is funded by the California Department of Health Services to provide legal technical assistance to local tobacco control projects. TALC's Model California Ordinance Requiring a Tobacco Retailer License is available on TALC's website (<http://talc.ph.org>), and TALC attorneys are available to provide legal technical assistance on customizing the ordinance to meet specific community needs. For further information, e-mail **TALC at [talc@phi.org](mailto:talc@phi.org)** or call (510) 444-8252.

#### Center for Tobacco Policy and Organizing

The Center is funded by the California Department of Health Services to provide technical assistance on policy campaigns to local tobacco control projects. The Center's staff is available to help develop a campaign plan around licensing and to provide ongoing technical assistance as the campaign rolls out. For further information, visit the Center's website ([www.californialung.org/thecenter](http://www.californialung.org/thecenter)) or call (916) 442-4299.

#### California Board of Equalization (BOE)

The BOE maintains a list of tobacco retailers for the purpose of enforcing the state licensing law. The BOE is required by law to provide a free list of licensed local tobacco retailers to a local agency who will use the list for enforcement activities. If the list is requested for non-enforcement activities, such as merchant education or research, the BOE will provide a fee quote before creating the list. Requests must be made in writing and include the requester's name, professional title, agency they work for, an explanation of why the list is being requested, and the name of the locale, city or county. The BOE will provide a CD with a spreadsheet of the account number, name (and/or business name) and address of the retailers in the area. Questions or requests should be directed to Rebecca Vega Olivas at [rolivas@boe.ca.gov](mailto:rolivas@boe.ca.gov) or 916-327-7209.



Technical Assistance Legal Center (TALC)  
(510) 444-8252 • (510) 444-8253 (fax)  
talc@phi.org • <http://talc.phi.org>