

CHAPTER 5.50 TOBACCO RETAIL LICENSING

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5.50.010. Purpose.

The purpose of this chapter is to encourage responsible tobacco retailing and to discourage violations of tobacco related laws, especially those that prohibit or discourage the sale or distribution of tobacco products to minors. It is not the purpose of this ordinance to expand or reduce the degree to which the activities regulated by federal or state law are criminally proscribed or to alter the penalties provided for violations of federal or state tobacco-related laws.

5.50.020. Definitions.

The following words and phrases, whenever used in this chapter, shall have the meanings defined in this section unless the context clearly requires otherwise:

A. "Arm's length transaction" means a sale in good faith and for valuable consideration that reflects the fair market value in the open market between two informed and willing parties, neither of which is under any compulsion to participate in the transaction. A sale between relatives, related companies or partners, or a sale for the primary purpose of avoiding the effect of the violations of this chapter is presumed not to be an "arm's length transaction."

B. "Characterizing flavor" means a taste or aroma, other than the taste or aroma of tobacco, imparted either prior to or during consumption of a tobacco product or any byproduct produced by a tobacco product, including, but not limited to, tastes or aromas relating to menthol, mint, wintergreen, fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb, or spice.

C. "Department" means the Livermore Police Department and any other department, division, or person designated by the City to enforce or administer the provisions of this chapter.

D. "Electronic smoking device" means any device or delivery system that can be used to deliver nicotine in aerosolized or vaporized form to a person, as well as any component, part, or accessory for the device that is used during its operation. "Electronic smoking device" includes electronic cigarettes as defined in section 30121 of the California Revenue and Taxation Code, and any other device manufactured, distributed, marketed, or sold as an electronic cigar, an electronic cigarillo, an electronic pipe, an electronic hookah, or any other product name or descriptor, that can be used to deliver nicotine in aerosolized or vaporized form to a person. "Electronic smoking device" does not include any product that has been approved by the United States Food and Drug Administration for sale as a tobacco cessation product or for other therapeutic purposes where that product is marketed and sold solely for such approved use.

E. "Electronic smoking device fluid" means any liquid or substance that can be used by an electronic smoking device.

F. "Flavored tobacco product" means any tobacco product that imparts a characterizing flavor.

G. "License" means a tobacco retailer license issued by the City pursuant to this chapter.

H. "Licensee" means any proprietor that was issued a license by the City for tobacco retailing pursuant to this chapter.

I. "New FDA approved tobacco product" means a new tobacco product as defined in 21 U.S.C. § 387j(a)(1) of the Family Smoking Prevention and Tobacco Control Act of 2009 when that product requires premarket review by the United States Food and Drug

Administration and that product has obtained a premarket review order under 21 U.S.C. § 387j(c)(1)(A)(i), as those statutes may be amended from time to time.

J. “Proprietor” means a person with an ownership or managerial interest in a tobacco retailing business. An ownership interest shall be deemed to exist when a person has a 10% or greater interest in stock, assets, or income of a business other than the sole interest of security for debt. A managerial interest shall be deemed to exist when a person has, or can have, sole or shared control over the day-to-day operations of a business.

K. “Tobacco paraphernalia” means any item designed or marketed for the consumption, use, or preparation of a tobacco product.

L. “Tobacco product” means: Any product containing, made from, or derived from tobacco or nicotine that is intended for human consumption, whether smoked, heated, chewed, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means, including, but not limited to cigarettes, cigars, little cigars, chewing tobacco, pipe tobacco, snuff; Any electronic smoking device; Any electronic smoking device fluid; and, any component, part, or accessory of a tobacco product, whether or not sold separately. “Tobacco product” does not include any product that has been approved by the United States Food and Drug Administration for sale as a tobacco cessation product or for other therapeutic purposes where that product is marketed and sold solely for such approved use. Examples of the products approved by the United States Food and Drug Administration for the cessation of smoking include skin patches, lozenges, gum, and prescription medications. Also, “Tobacco product” does not include any 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, provided the drug, device, or combination products is not otherwise prohibited by this chapter as a flavored tobacco product.

M. “Tobacco retailer” means any person who sells, offers for sale, exchanges, or offers to exchange any tobacco, tobacco product, or tobacco paraphernalia for consideration, without regard to the quantity sold, offered for sale, exchanged, or offered to exchange.

N. “Tobacco retailing” means the conduct of selling, offering for sale, exchanging, or offering to exchange any tobacco, tobacco product, or tobacco paraphernalia for any form of consideration, without regard to the quantity sold, offered for sale, exchanged, or offered to exchange.

O. “Youth-Populated-Area” means a parcel in the city that is occupied by a: private or public kindergarten, elementary, middle, junior high, or high school; library open to the public; playground open to the public; youth center, defined as a facility where children, ages 6 to 17, inclusive, come together for programs and activities; recreation facility open to the public, defined as an area, place, structure, or other facility that is used either permanently or

temporarily for community recreation, even though it may be used for other purposes, which includes, but is not limited to, a gymnasium, playing court, playing field, and swimming pool; or licensed commercial child-care or preschool facility.

5.50.030. License required

- A. No person shall be a tobacco retailer, or conduct tobacco retailing, in the city without a valid license.
- B. No person shall conduct tobacco retailing at a location in the city without a valid license for that specific location.
- C. The term of each license is one year, unless the license is revoked.
- D. Nothing in this chapter shall be construed to grant any person obtaining a license any status or right other than to conduct tobacco retailing at the location in the city identified on the face of the license, subject to compliance with all other applicable laws, regulations, and ordinances. Nothing in this chapter shall be construed to render inapplicable, supersede, or apply in lieu of any other provision of applicable law, including, without limitation, any condition or limitation on indoor smoking made applicable to business establishments by California Labor Code section 6404.5.

5.50.040 Ineligible to receive a license.

In addition to any other penalty authorized by law, if a court of competent jurisdiction determines, or the Department finds and determines after hearing pursuant to LMC 5.50.110.C, that any person has engaged in tobacco retailing without a valid license, either directly or through the person's agents or employees, or that a licensee violated this chapter, then that person or licensee shall be ineligible to apply for, or to be issued, a license as follows:

- A. After a first violation of this chapter at a location within any five-year (5) period, no license may be issued to the person, licensee, or for the location (unless ownership of the business at the location has been transferred in an arm's length transaction), until thirty (30) days have passed from the date of the violation.
- B. After a second violation of this chapter at a location within any five-year (5) period, no license may be issued to the person, licensee, or for the location (unless ownership of the business at the location has been transferred in an arm's length transaction), until ninety (90) days have passed from the date of the violation.
- C. After of a third or subsequent violation of this chapter at a location within any five-year (5) period, no license may be issued to the person, licensee, or the location (unless

ownership of the business at the location has been transferred in an arm's length transaction), until five (5) years have passed from the date of the violation.

5.50.050. Locations.

A. Licenses shall only be issued for tobacco retailing at fixed locations.

B. Licenses shall not be issued for itinerant tobacco retailing, tobacco retailing from vehicles or carts, or for tobacco retailing that involves the delivery of tobacco products or tobacco paraphernalia from a fixed location in the city to a customer at a different location in the city.

C. Except as provided in subsection D below, no license shall be issued, and no existing license may be renewed, for tobacco retailing within one thousand (1,000) feet of a youth-populated-area. The distance between a youth-populated-area and a tobacco retailing location shall be measured by a straight line from the nearest point of the property line for the parcel where the youth-populated-area is located to the nearest point of the property line for the parcel where the tobacco retailing location is located or proposed to be located.

D. The prohibition in subsection C above does not apply to following legal nonconforming tobacco retailing:

1. Any proprietor that on the date this ordinance is adopted is lawfully conducting tobacco retailing at a location that would be prohibited by this chapter from receiving a license due to its proximity to a youth-populated-area, and which proprietor and location are otherwise eligible to receive a license, will be considered legal non-conforming general retail land use subject to the provisions in Livermore Development Code Chapter 9.16 *Nonconforming Provisions*, for the purposes of the license application, issuance, and renewal provisions in this chapter, but the proprietor must obtain a license and otherwise comply with the requirements this chapter for tobacco retailing; and,

2. Any licensee with a license for a location that would be prohibited from receiving a license due to its proximity to a youth-populated-area that was created after the license was issued, and which licensee and location are otherwise eligible to receive a license, will be considered legal non-conforming retail land land use subject to provisions in Livermore Development Code Chapter 9.16 *Nonconforming Provisions*, for the purposes of the license application, issuance, and renewal provisions of this chapter.

5.50.060 Application and renewal procedure; Fees.

A. All applications for a license, and to renew a license, shall be submitted to the Department in the name of each proprietor proposing to conduct tobacco retailing and shall be signed by each proprietor or an authorized agent thereof. A separate application must be

submitted for each location where tobacco retailing will occur. Each application shall be submitted on a form supplied by the Department and must contain the following information:

1. The name, address, email address, and telephone number of each proprietor for the tobacco retailing business;
2. The business name, address, and telephone number for the fixed location for the tobacco retailing business;
3. The name, address, email address, and telephone number for the primary person authorized by each proprietor to receive all communications and notices required by, authorized by, or convenient to the enforcement of this chapter;
4. Proof that each proprietor has been issued a valid state license for the sale of tobacco products;
5. Whether or not a proprietor applying for the license was previously issued a license pursuant to this chapter that is, or was at any time, suspended or revoked, and if so, the dates of the suspension period or the date of revocation;
6. Whether or not any proprietor has been cited a violation of this chapter, and if so, the dates of the citation;
7. Whether or not any proprietor has been cited for a violation of any local, state, or federal tobacco-related law, and if so, the name of the agency that issued the citations and the dates the citation was issued; and
8. Such other information as the department deems necessary for the administration or enforcement of this chapter as specified on the application form required by this section.

B. The fee for issuance or renewal of a license shall be established by resolution of the City Council and shall be in addition to the City's business operation tax and any other license or permit fee imposed by this code upon the applicant.

1. The license fee shall be paid to the City at the time the license application is submitted.
2. The fee shall be calculated so as to recover the cost of administration and enforcement of this chapter, including, for example, issuing a license, administering the license program, retailer education, retailer inspection and compliance checks, documentation of violations, and prosecution of violators, but shall not exceed the cost of the regulatory program authorized by this chapter.

3. License fees are nonrefundable except as may be required by law.

C. A licensee may renew a license as follows:

1. A proprietor may renew an unexpired license that has not been revoked.

To renew the license, the proprietor need only submit the applicable license fee to the City no more than sixty (60) days and no less than thirty (30) days before the expiration of the license to be renewed.

2. A proprietor may renew an expired license that has been expired for less than six (6) months by submitting:

(a) A license fee and application renewal form that provides all the information required to apply for a license; and,

(b) A declaration under the penalty of perjury that the proprietor did not conduct tobacco retailing after the licensed expired, and that the proprietor will not conduct tobacco retailing until a new license is issued.

3. A proprietor may not renew a license that has been expired more than six (6) months prior to the renewal, or revoked, and must instead must submit a new application.

D. All information specified in an application pursuant to this section shall be subject to disclosure under the California Public Records Act.

5.50.070 Issuance or denial.

A. Upon the receipt of a complete license application and the license fee required by this chapter, the Department shall review the application and issue a license unless substantial evidence demonstrates that one or more of the following bases for denial exists:

1. The information presented in the application is inaccurate or false;

2. The application seeks a license for a tobacco retailing activity that is not authorized by this chapter, or is prohibited by this chapter or other law;

3. The application seeks a license for more than one location;

4. The application seeks a license for a proprietor that requires, but has not received, a valid state license for the sale of tobacco products;

5. The application seeks a license for a location that requires, but has not received, a valid state license for the sale of tobacco products;

6. The application seeks a license for a location that is within one thousand (1,000) feet of a youth-populated-area and the location does not qualify for a legal non-conforming use exception set forth in this chapter;

7. The application seeks a license for a proprietor that this chapter provides is ineligible to receive a license; or

8. The application seeks a license for a location where a license was revoked less than five (5) years prior the application.

B. Nothing in this chapter shall be construed to vest in any person obtaining and maintaining a license any status or right to act as a tobacco retailer in contravention of any provision of law.

5.50.080. Licenses are not transferable.

A license is nontransferable. If a licensee changes business location, that licensee must obtain a new license prior to conducting tobacco retailing at the new location. If a business licensed to conduct tobacco retailing is transferred to a new proprietor, the new proprietor must obtain a license before conducting tobacco retailing at that location.

5.50.090 Licensee obligations.

A. It is the responsibility of each proprietor to be informed regarding all laws applicable to tobacco retailing, including those laws affecting the issuance of a license. No proprietor may rely on the issuance of a license as a determination by the City that the proprietor has complied with all laws applicable to tobacco retailing.

B. Each license shall be prominently displayed in an area that is visible to the public at the licensed location.

C. Each licensee shall inform the Department in writing of any change in the information submitted in an application for an issued license within ten (10) calendar days of a change.

D. No licensee shall sell a tobacco product or tobacco paraphernalia to another person who is under the age of twenty-seven (27) years without first examining the person's identification to confirm that the person is at least the minimum age for sale of tobacco products as established by state law.

E. Licensee, and the agents and employees of the licensee, shall not violate any federal or state tobacco-related laws regarding the sale of tobacco or tobacco products to underage persons.

5.50.100. Sale of flavored tobacco, electronic smoking devices, and fluid prohibited.

A. The sale, offer for sale, exchange, or offer to exchange of any flavored tobacco product is prohibited.

1. There is a rebuttable presumption that a tobacco product is a flavored tobacco product if the product manufacturer, tobacco retailer, or any of their respective agents or employees, has made a public statement or claim that the tobacco product has or produces a characterizing flavor, including, but not limited to, text, color, or images on the product's labeling or packaging that are used to expressly or impliedly communicate that a tobacco product has a characterizing flavor.

2. There shall be a rebuttable presumption that anyone in possession of four or more flavored tobacco products as part of a commercial enterprise, including, but not limited to, individual flavored tobacco products, packages of flavored tobacco products, or any combination thereof, possesses such flavored tobacco products with intent to sell, offer for sale, exchange, or offer to exchange.

B. The sale, offer for sale, exchange, or offer to exchange of any electronic smoking device is prohibited, except where the electronic smoking device is a new FDA approved tobacco product.

C. The sale, offer for sale, exchange, or offer to exchange of any electronic smoking device fluid is prohibited, except where the electronic smoking device fluid is an FDA approved tobacco product that is not otherwise prohibited by this chapter as a flavored tobacco product.

5.50.110 Compliance monitoring.

A. Compliance with this chapter shall be monitored by the Department. In addition, any peace officer may enforce the penal provisions of this chapter. The City may designate additional persons to monitor compliance with this chapter.

B. The Department shall inspect each tobacco retailer at least one (1) time during every twelve (12) month period.

C. The Department may conduct a hearing to determine whether a licensee, or an agent or employee of the licensee, has violated any of the requirements, conditions, or prohibitions of this chapter or has pleaded guilty, no contest or its equivalent, or admitted to a violation of this chapter or any federal or state tobacco-related laws. The Department shall provide notice of the date, time, and location of the hearing to the primary person authorized by each proprietor to receive all communications and notices required by, authorized by, or convenient to the enforcement of this chapter. The hearing may not be conducted less than 14

days after the notice for the hearing is issued. The hearing need not be conducted according to the technical rules relating to evidence and witnesses, but shall comply with the provisions in Government Code section 11512 (a), (b), and (c). Oral evidence shall be taken only upon oath or affirmation, and irrelevant and unduly repetitious evidence shall be excluded. The Department and the licensee have the right to: call and examine witnesses on any matter relevant to the issues of the hearing; introduce documentary and physical evidence; cross-examine opposing witnesses or any matter relevant to the issues of the hearing; to impeach any witness regardless of which party called the witness to testify; to rebut evidence; to take notice of any fact that may be judicially noticed, whether that notice is taken before or after the hearing; and to represent himself or herself, or to be represented by anyone of his or her choice who is lawfully permitted to do so. The Department shall mail written findings and its determination after hearing to the primary person authorized by each proprietor to receive all communications and notices required by, authorized by, or convenient to the enforcement of this chapter.

D. Nothing in this chapter creates a right of action in any licensee or other person against the City or its agents or its employees.

5.50.120 Violation.

- A. It is a violation of this ordinance to do any of the following:
1. Conduct tobacco retailing without a license;
 2. Conduct tobacco retailing at a location that is not licensed;
 3. Conduct tobacco retailing at a location that is not fixed;
 4. Conduct tobacco retailing that involves the delivery of tobacco products or tobacco paraphernalia from a fixed location in the City to a customer at a different location in the City;
 5. Fail to fulfill the licensee obligations set forth in LMC 5.50.090;
 6. Sell, offer for sale, exchange, or offer to exchange any electronic smoking device prohibited by LMC 5.50.100.B in the City;
 7. Sell, offer for sale, exchange, or offer to exchange any electronic smoking device fluid in the City;
 8. Sell, offer for sale, exchange, or offer to exchange any flavored tobacco in the City; and, to

9. Violate any local, state, or federal law applicable to tobacco products, tobacco paraphernalia, or tobacco retailing.

B. Causing, permitting, aiding, abetting, or concealing a violation of any provision of this chapter shall also constitute a violation of this chapter.

C. Each sale in violation of this chapter shall be regarded as a new and separate offense. Each day any violation of this chapter continues shall be regarded as a new and separate offense. The remedies provided in this chapter shall be cumulative and exclusive.

D. Violations of this chapter are hereby declared to be public nuisances.

E. This ordinance is not intended and nothing in this chapter shall be interpreted to penalize the purchase, use, possession, or attempted purchase, use, or possession of tobacco products, tobacco paraphernalia, electronic smoking devices, or electronic smoking device fluid by persons under twenty-one years of age; provided, however, persons under twenty-one years of age remain subject to generally applicable laws regulating such conduct without respect to the person's age.

5.50.130. Penalties.

A. The remedies provided by this chapter are cumulative and in addition to any other remedies available at law or in equity.

B. Whenever evidence of a violation of this chapter is obtained in any part through the participation of a person under the age of twenty-one (21) years old, such person shall not be required to appear or give testimony in any civil or administrative process brought to enforce this chapter and the alleged violation shall be adjudicated based upon the sufficiency and persuasiveness of the evidence presented.

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

D. Violations of this chapter may, in the discretion of the prosecuting District Attorney or City Attorney, be prosecuted as infractions or misdemeanors when the interests of justice so require.

E. 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, for example, administrative or judicial nuisance abatement proceedings, civil code enforcement proceedings, and suits for injunctive relief.

5.50.140. Suspension or revocation of license.

A. A license issued contrary to this chapter, contrary to any other law, or on the basis of false or misleading information supplied by a proprietor shall be revoked.

B. In addition to any other remedy authorized by law, a license shall be suspended or revoked if any court of competent jurisdiction determines, or the Department finds and determines after hearing pursuant to LMC 5.50.110.C, that the licensee, or any agent or employee of the licensee, violated any of the requirements, conditions, or prohibitions of this chapter or has pleaded guilty, no contest or its equivalent, or admitted to a violation of this chapter or any federal or state tobacco-related laws.

1. Upon a finding by the Department of a first violation of this chapter at a location within any five-year (5) period, the license shall be suspended for thirty (30) days.

2. Upon a finding by the Department of a second violation of this chapter at a location within any five-year (5) period, the license shall be suspended for one (1) year.

3. Upon a finding by the Department of three or more violations of this chapter at a location within any five-year (5) period, the license shall be revoked.

C. When a license is suspended, the licensee and all employees and agents must immediately cease all tobacco retailing and remove all tobacco products from public view from the licensed location, during the term of the suspension.

D. When a license is revoked, the licensee and all employees and agents must immediately cease all tobacco retailing and remove all tobacco products from public view from the licensed location, and no tobacco retailing may occur at that location unless and until a new license is issued pursuant to this chapter.

E. Violations at a location shall continue to be counted against a location and license ineligibility periods shall continue to apply to a location unless:

1. The tobacco retailing business at the location has been transferred to new proprietor(s) in an arm's length transaction; and

2. The new proprietor(s) obtain a license to conduct tobacco retailing at that location.

F. A decision of the Department to suspend a license is appealable to the City Manager and any appeal must be filed in writing with the City Clerk within ten days of mailing of the Department's decision. If such an appeal is timely made, it shall stay enforcement of the appealed action. The decision on the appeal by the City Manager shall be the final decision of the City.

G. A decision of the Department to revoke is a final decision of the City, and there is not appeal to the City Manager.

5.50.150. Summary suspension and revocation of license.

As a possible alternative to the hearing for the suspension of a license following a first or second alleged violation of this chapter within any five year period, the licensee alleged to have violated this chapter may request the Department exercise its prosecutorial discretion to allow the licensee to agree to the penalties provided in this section in lieu of the penalties that would otherwise apply under this chapter and to forego a hearing on the allegations. Notice of any agreement shall be provided to the Department and no hearing shall be held. Agreements shall not be confidential and shall contain the following terms as well as any other non-criminal provisions established by the City in the interests of justice:

A. After a first alleged violation of this chapter at a location:

1. Cease all tobacco retailing and remove all tobacco products from public view from the licensed location for one (1) day,
2. Payment of an administrative penalty of one thousand dollars (\$1,000),
and
3. Admission that the violation occurred and an acknowledgment that the violation will be considered in determining the fine or penalty for any future violation.

B. After a second alleged violation of this chapter at a location within any five year period:

1. Cease all tobacco retailing and remove all tobacco products from public view from the licensed location for ten (10) days,
2. Payment of an administrative penalty of at least five thousand dollars (\$5,000), and
3. Admission that the violation occurred and an acknowledgment that the violation will be considered in determining the fine or penalty for any future violations.

5.50.160. Other laws.

This chapter does not intend and shall not be interpreted to regulate any conduct where the regulation of such conduct has been preempted by the United States or the State of California.