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Approved as to Form and Legality

  
City Attorney's Office

AS AMENDED BY CITY COUNCIL ON JULY 18, 2017

## OAKLAND CITY COUNCIL

Ordinance No. \_\_\_\_\_ C.M.S.

INTRODUCED BY VICE MAYOR ANNIE CAMPBELL WASHINGTON AND  
COUNCIL PRESIDENT LARRY REID

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**ORDINANCE AMENDING OAKLAND MUNICIPAL CODE CHAPTER 5.91 TO:  
(1) PROHIBIT THE SALE OF FLAVORED TOBACCO PRODUCTS; (2)  
REQUIRE THE POSTING OF THE FULL RETAIL PRICE OF TOBACCO  
PRODUCTS; (3) PROHIBIT THE REDEMPTION OF TOBACCO DISCOUNTS  
AND COUPONS; AND (4) MAKE ADMINISTRATIVE CHANGES FOR THE  
LICENSURE OF TOBACCO RETAILERS**

**WHEREAS**, cigarette smoking is the leading preventable cause of death in the United States<sup>1</sup>; and

**WHEREAS**, cigarette smoking causes more than 480,000 deaths each year in the United States which is nearly one in five deaths<sup>2</sup>; and

**WHEREAS**, smokers are more likely than nonsmokers to develop heart disease, and lung cancer or suffer a stroke; and

**WHEREAS**, cigarette smoking is the leading preventable cause of death in the United States; and

**WHEREAS**, strategies to reduce use of tobacco and initiation of tobacco smoking by youth and adolescents are especially important given that nearly 90 percent of adult smokers begin smoking by the age of 18<sup>3</sup>; and

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<sup>1</sup> U.S. Department of Health and Human Services. The. Atlanta: 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  
[https://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/health\\_effects/effects\\_cig\\_smoking/](https://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/effects_cig_smoking/)

<sup>2</sup> U.S. Department of Health and Human Services. The Health Consequences of Smoking – 50 Years of Progress: A Report of the Surgeon General ([http://www.cdc.gov/tobacco/data\\_statistics/sgr/50th-anniversary/index.htm](http://www.cdc.gov/tobacco/data_statistics/sgr/50th-anniversary/index.htm)). Atlanta: 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 [accessed 2015 Oct 5].

<sup>3</sup> Centers for Disease Control and Prevention. 2012. "Current Tobacco Use Among Middle and High School Students – United States, 2011." *Morbidity and Mortality Weekly Report* 61: 581–604.  
[www.cdc.gov/mmwr/pdf/wk/mm6131.pdf](http://www.cdc.gov/mmwr/pdf/wk/mm6131.pdf)

**WHEREAS**, the California Legislature has recognized the danger of tobacco use and has made reducing youth access to tobacco products a high priority, as evidenced by the fact that:

- The Legislature has declared that smoking is the single most significant source of preventable disease and premature death in California (Cal. Health & Safety Code § 118950); and
- State law prohibits the sale or furnishing of cigarettes, tobacco products, and smoking paraphernalia to minors, as well as the purchase, receipt, or possession of tobacco products by minors (Cal. Pen. Code § 308); and
- State law requires that tobacco retailers check the identification of tobacco purchasers who reasonably appear to be under 21 years of age (Cal. Bus. & Prof. Code § 22956) and provides procedures for using persons under 21 years of age to conduct onsite compliance checks of tobacco retailers (Cal. Bus. & Prof. Code § 22952); and
- State law prohibits the sale of tobacco products and paraphernalia through self-services displays except in adult-only establishments (Cal. Bus. & Prof. Code § 22962); and
- State law prohibits the sale of “bidis” (hand-rolled filter-less cigarettes imported primarily from India and Southeast Asian countries) except in adult-only establishments (Cal. Pen. Code § 308.1); and
- State law prohibits the manufacture, distribution, or sale of cigarettes in packages of less than 20 and prohibits the manufacture, distribution, or sale of “roll-your-own” tobacco in packages containing less than 0.60 ounces of tobacco (Cal. Pen. Code § 308.3); and

**WHEREAS**, state law explicitly permits cities and counties to enact local tobacco retail licensing ordinances, and allows for the suspension or revocation of a local license for a violation of any state tobacco control law (Cal. Bus. & Prof. Code § 22971.3); and

**WHEREAS**, California courts in such cases as *Cohen v. Board of Supervisors*, 40 Cal. 3d 277 (1985), and *Bravo Vending v. City of Rancho Mirage*, 16 Cal. App. 4th 383 (1993), have affirmed the power of local governments to regulate business activity in order to discourage violations of law; and

**WHEREAS**, amongst Oakland Unified School District (OUSD) students, 78% of 11th grade tobacco smokers reported starting between ages 11-17<sup>4</sup>; and

**WHEREAS**, “E-cigarette” use tripled nationwide among high school youth from 2013 (4%) to 2014 (13%)<sup>5</sup> and reached 27% among OUSD 11th graders<sup>6</sup>; and

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<sup>4</sup> Oakland Unified School District. “California Healthy Kids Survey”, 2013-14: Main Report. San Francisco: Wested Health & Human Development Program for the California Department of Education.

<sup>5</sup> Centers for Disease Control and Prevention. April 17, 2015. “Tobacco Use Among Middle And High School Students — United States, 2011–2014,” *Morbidity And Mortality Weekly Report (MMWR)* 64(14):381-385 [Http://www.Cdc.Gov/Mmwr/Preview/Mmwrhtml/Mm6414a3.Htm?S\\_Cid=Mm6414a3\\_W](http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6414a3.htm?S_Cid=Mm6414a3_W).

<sup>6</sup> Oakland Unified School District. “California Healthy Kids Survey”, 2015-16: Main Report pages 44/76. San Francisco: Wested Health & Human Development Program for the California Department of Education.

**WHEREAS**, according to the California Healthy Kids Survey 2015-2016, 22% of 7<sup>th</sup> graders, 36% of 9<sup>th</sup> graders, and 52% of 11<sup>th</sup> graders at OUSD believe that it is “very easy” or “fairly easy” to obtain cigarettes<sup>7</sup>; and

**WHEREAS**, according to 2014 California Health Interview Survey results, 19% of Oakland youth ages 1-17 have been diagnosed with asthma, compared to California’s statewide rate of 15%. Among Oakland adults (18+ years old), 16% have been diagnosed with asthma, compared to 14% statewide<sup>8</sup>; and

**WHEREAS**, the Federal Family Smoking Prevention and Tobacco Control Act (FSPTCA), enacted in 2009, prohibited candy and fruit-flavored cigarettes, largely because these flavored products were marketed to youth and young adults<sup>9</sup>; and

**WHEREAS**, the FSPTCA expressly authorizes state and local governments to regulate the sales, distribution, possession, access, advertising, and use of tobacco products<sup>10</sup>; and

**WHEREAS**, federal courts in such cases as *Independents Gas & Service Stations Associations, Inc. v. City of Chicago*, 112 F.Supp.3d 749, (2015), *National Ass’n of Tobacco Outlets, Inc. v. City of Providence, R.I.*, 731 F.3d 71 (2013), and *U.S. Smokeless Tobacco Mfg. Co. LLC*, 708 F.3d. 428 (2013), have affirmed the power of local governments to regulate the sales of tobacco products, including flavored tobacco products; and

**WHEREAS**, although the manufacture and distribution of flavored cigarettes (excluding menthol) is banned by federal law, neither federal nor California laws restrict sales of flavored non-cigarette tobacco products, such as cigars, cigarillos, smokeless tobacco, hookah tobacco, and electronic smoking devices and the nicotine solutions used in these devices; and

**WHEREAS**, flavored non-cigarette tobacco products have become increasingly common and are available in a variety of flavors that appeal to children and young adults, including apple, cherry, chocolate, grape, peach, strawberry, and vanilla; and

**WHEREAS**, the U.S. Food and Drug Administration and the U.S. Surgeon General have stated that flavored tobacco products are considered to be “starter” products that help establish smoking habits that can lead to long-term addiction; and

**WHEREAS**, in December of 2010, the Oakland City Council unanimously passed resolution number 83113 CMS, declaring the City of Oakland’s support of Food and Drug

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<sup>7</sup> Ibid

<sup>8</sup> “California Health Interview Survey”. Ask CHIS Neighborhood Edition – Local Level Health Data. Los Angeles, CA: UCLA Center for Health Policy Research, 2014.

<sup>9</sup> Family Smoking Prevention and Tobacco Control Act, in Public Law No. 111-31, 123 Stat. 1776 (codified, in relevant part, at 15 U.S.C.A. 1334-34 and 21 U.S.C.A. 301 et seq.) 2009

<sup>10</sup> 21 U.S.C.A 387p;

Administration (FDA) regulation of menthol in cigarettes and flavoring in other tobacco products; and

**WHEREAS**, data from the National Youth Tobacco Survey indicates that more than two-fifths of U.S. middle and high school age smokers report using flavored “little” cigars or flavored cigarettes<sup>11</sup>; and

**WHEREAS**, in a survey of 300 stores in Alameda County, 87% sold candy, mint and liquor flavored tobacco products and were located within 1,000 feet of a school<sup>12</sup>; and

**WHEREAS**, among the nearly 300 stores surveyed in Alameda County, 85% sell the most popular brand of cigarillos for under one dollar and cheaper cigarillos are more widely available in low-income neighborhoods<sup>13</sup>; and

**WHEREAS**, research shows that 81% of youth tobacco users ages 12-17 initiated with a flavored product, and 80% used a flavored tobacco product in the past month<sup>14</sup>; and

**WHEREAS**, despite efforts to prohibit tobacco sales to minors, a 2014 survey reported that 70% of middle and high school tobacco users tried at least one flavored tobacco product<sup>15</sup>; and

**WHEREAS**, over three-fifths (63%) of middle and high school cigar users smoked a flavored cigar in the past 30 days<sup>16</sup>; and

**WHEREAS**, a government study found that 81% of kids who have ever used tobacco products started with a flavored product, including 81% who have ever tried e-cigarettes and 65 percent who have ever tried cigars<sup>17</sup>; and

**WHEREAS**, youth cite flavors as a major reason for their current use of non-cigarette tobacco products, with 81.5% of youth e-cigarette users and 73.8% of youth cigar users saying they used the product “because they come in flavors I like<sup>18</sup>.”; and

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<sup>11</sup> King BA, Tynan MA, Dube SR, et al. 2013. “Flavored-Little-Cigar and Flavored-Cigarette Use Among U.S. Middle and High School Students.” *Journal of Adolescent Health*. [Article in press], [www.jahonline.org/article/S1054-139X%2813%2900415-1/abstract](http://www.jahonline.org/article/S1054-139X%2813%2900415-1/abstract)

<sup>12</sup> Healthy Stores for a Healthy Community Survey, 2013

<sup>13</sup> Ibid.

<sup>14</sup> Ambrose, BK, et al., “Flavored Tobacco Product Use Among US Youth Aged 12-17 years, 2-13-2014,” *Journal of the American Medical Association*, published online October 26, 2015

<sup>15</sup> National Youth Tobacco Survey, 2014

<sup>16</sup> Corey, CG, et al., “Flavored Tobacco Product Use Among Middle and High School Students – United States, 2014,” *Morbidity and Mortality Weekly Report*, 64 (38): 1066-1070, 2015

<sup>17</sup> Campaign for Tobacco-Free Kids, “The Flavor Trap: How Tobacco Companies are Luring Kids with Candy Flavored E-Cigarettes and Cigars”, 2017  
[http://www.tobaccofreekids.org/microsites/flavortrap/full\\_report.pdf](http://www.tobaccofreekids.org/microsites/flavortrap/full_report.pdf)

<sup>18</sup> Ibid.

**WHEREAS**, Menthol is considered the tobacco industry's "starter" ingredient and menthol's anesthetizing effect makes the smoke "smooth" and easier to inhale while masking the harshness of tobacco, making menthol cigarettes especially popular among young and beginner smokers<sup>20</sup>; and

**WHEREAS**, Menthol in cigarettes has an anesthetic effect on the throat, bronchi and lungs, allowing smokers to inhale deeper and for harmful particles to settle deeper inside the lungs and his inhalation pattern may cause greater harm to the smoker<sup>21</sup>; and

**WHEREAS**, Menthol decreases the metabolism of nicotine and increases the amount of the addictive substance in the blood, making menthol cigarettes even more dangerous and difficult to quit<sup>22</sup>; and

**WHEREAS**, quitting menthol cigarettes is particularly difficult, because menthol smokers have to get over the dependency on nicotine as well as positive associations with menthol itself such as the minty taste, cooling sensation and sensory excitation<sup>23</sup>; and

**WHEREAS**, 54% of current smokers in high school and 48.4% of current smokers in middle school smoke menthols<sup>24</sup>; and

**WHEREAS**, nearly all African-American teen smokers, 95%, smoke menthol cigarettes<sup>25</sup>; and

**WHEREAS**, although the use of cigarettes is declining in the United States, sales of menthol cigarettes have steadily increased in recent years, especially among young people and new smokers<sup>26</sup>; and

**WHEREAS**, mentholated cigarettes were originally developed and promoted to women and since then the tobacco industry has used a unique combination of advertising, packaging, pricing and distribution channels to catch the interest of particular groups, such

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<sup>19</sup> Gardiner, P and Clark P.I. (2010) "Menthol Cigarettes: Moving Toward a Broader Definition of Harm" *Nicotine & Tobacco Research*, 12 (Suppl. 2), S85-S93

<sup>20</sup> Kreslake, JM, Ferris Wayne, G, Alpert, HR, Koh, HK, & Connolly, G.N. (2008) "Tobacco Industry Control of Menthol in Cigarettes and Targeting of Adolescents and Young Adults" *American Journal of Public Health*, 98(9): 1685-1692

<sup>21</sup> Kreslake, JM and Yeger, VB (2010). "Coming Out about Smoking: A Report from the National LGBTQ Young Adult Tobacco Project. Washington D.C.

<sup>22</sup> Benowitz, NL, Herrera B, and Jacob III, P (2004) "Mentholated Cigarette Smoking Inhibits Nicotine Metabolism". *Journal of Pharmacology and Experimental Therapeutics*, 310(3), 1208-1215

<sup>23</sup> Gardiner, P and Clark P.I. (2010) "Menthol Cigarettes: Moving Toward a Broader Definition of Harm" *Nicotine & Tobacco Research*, 12 (Suppl. 2), S85-S93

<sup>24</sup> Centers for Disease Control and Prevention. 2015. "Flavored Tobacco Product Use Among Middle and High School Students – United States, 2014." *Morbidity and Mortality Weekly Report* 64(38): 1066-1070. [https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6438a2.htm?s\\_cid=mm6438a2\\_w](https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6438a2.htm?s_cid=mm6438a2_w)

<sup>25</sup> Giovino G, Villanti A, Mowery P, Sevilimedu V, Niaura R, Vallone D, Abrams D. Differential trends in cigarette smoking in the USA: is menthol slowing progress? *Tobacco Control*. 2015 Jan;24(1):28-37

<sup>26</sup> SAMHSA (Substance Abuse and Mental Health Services Administration). 2013. Results from the 2012 National Survey on Drug Use.

as youth and young adults, women, African-Americans and other specific priority or ethnic population<sup>27</sup>; and

**WHEREAS**, Tobacco retailers in low income, urban communities having high mentholated cigarette brands, provide higher discount rates on mentholated cigarette brands, including between \$1.00 and \$1.50 off per pack or *buy 1 get 1 free* promotions, while more affluent neighborhoods see discounts on menthols of only about \$0.50 off per pack or *buy 2 get 1 free* offers<sup>28</sup>; and

**WHEREAS**, historically, African-Americans have been exposed to hundreds of tobacco ads and the tobacco industry has places proportionately more menthol cigarette ads in African-American magazines than in mainstream magazines<sup>29</sup>; and

**WHEREAS**, the Food and Drug Administration (FDA) has the ability to prohibit menthol as an ingredient in cigarettes and other tobacco products and the Tobacco Products Scientific Advisory Committee (TPSAC) has been established and charged with developing a report assessing the impact of the use of menthol in cigarettes on public health and proposing recommendations to the FDA on whether menthol should be banned or not; and

**WHEREAS**, the TPSAC report and recommendations were submitted to the FDA on March 18, 2011 and the report found that the availability of menthol cigarettes has an adverse impact on public health in the United States and recommended removal of menthol cigarettes from the marketplace; and

**WHEREAS**, the National African American Tobacco Control Leadership Council with signed support from over 30 national leaders and organizations called on the national government to take action on removing menthol from the U.S. market<sup>30</sup>; and

**WHEREAS**, “little cigars” look nearly identical to cigarettes and can have up to four times as much nicotine as a cigarette; and

**WHEREAS**, the U.S. surgeon general has stated unequivocally that increasing the price of tobacco products will decrease the prevalence of tobacco use, particularly among adolescents and young adults; and

**WHEREAS**, all types of tobacco products are sold locally including but not limited to: cigarettes, cigars, little cigars/cigarillos, smokeless tobacco, electronic cigarettes, vape pens, e-liquids, hookah, vape tanks/mods, vape atomizer, vaporizers and e-hookah.<sup>31</sup>

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<sup>27</sup> National Cancer Institute. “The Role of the Media in Promoting and Reducing Tobacco Use”. Tobacco Control Monograph No. 19. Bethesda, MD: U.S. Department of Health and Human Services, National Institutes of Health, National Cancer Institute. NIH Pub. No. 07-6242, June 2008.

<sup>28</sup> Gardiner, P and Clark P.I. (2010) “Menthol Cigarettes: Moving Toward a Broader Definition of Harm” Nicotine & Tobacco Research, 12 (Suppl. 2), S85-S93

<sup>29</sup> American Heart Association. “Tobacco Industry’s Targeting of Youth, Minorities and Women” <http://www.americanheart.org/presenter.jhtml?identifier=11226>

<sup>30</sup> The African American Tobacco Control Leadership Council (August 10, 2016). Letter to President Obama. <http://www.savingblacklives.org/letter-to-president-obama/>

**NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF OAKLAND DOES ORDAIN AS FOLLOWS:**

**SECTION 1.** The City Council finds and determines the foregoing recitals to be true and correct and hereby makes them part of this Ordinance.

**SECTION 2.** Oakland Municipal Code Chapter 5.91, Licensure of Tobacco Retailers, is hereby amended to add, delete, or modify sections as set forth below (chapter and section numbers and titles are indicated in **bold type**; additions are indicated by underscoring and deletions are indicated by strike-through type; portions of the regulations not cited or not shown in underscoring or strike-through type are not changed).

**SECTION 3.** This Ordinance shall be referred to as the "Oakland Children Smoking Prevention Ordinance".

**Chapter 5.91. LICENSURE OF TOBACCO RETAILERS**

**5.91.010. DEFINITIONS.** The following definitions apply to this Chapter:

"Arm's Length Transaction" as used in this Chapter shall mean 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 which a significant purpose is avoiding the effect of the violations of this Chapter is not an Arm's Length Transaction.

"Characterizing Flavor" means a distinguishable taste or aroma, other than the taste or aroma of tobacco, imparted by a Tobacco Product or any byproduct produced by the Tobacco Product, including, but not limited to, tastes or aromas relating to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, menthol, mint, wintergreen, herb, or spice; provided, however, that a tobacco product shall not be determined to have a Characterizing Flavor solely because of the use of additives or flavorings or the provision of ingredient information.

"Cigar" means any roll of tobacco other than a cigarette wrapped entirely or in part in tobacco or in any substance containing tobacco. For purposes of this Chapter, "Cigar" includes, but is not limited to, tobacco products known or labeled as "cigar," "cigarillo," "tiparillo," or "little cigar."

"Cigarette" means: (1) any roll of tobacco wrapped in paper or in any substance not containing tobacco and (2) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or

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<sup>31</sup>[https://www.cdph.ca.gov/programs/tobacco/Documents/Tobacco21Law/What is a tobacco product in CA 5-31-16 .pdf](https://www.cdph.ca.gov/programs/tobacco/Documents/Tobacco21Law/What%20is%20a%20tobacco%20product%20in%20CA%205-31-16.pdf)

its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described herein.

“City Administrator” as used in this Chapter shall mean the City Administrator for the City of Oakland; further provided, that the use of the title of any officer or to any office shall refer to such officer or office of the City of Oakland.

“Consumer” means a person who purchases a package of cigarettes or other tobacco product for consumption and not for sale to another.

“Coupon” means anything that can be exchanged or used to acquire a cigarette or other tobacco product for less than the full retail price, whether in paper, digital or other form.

“Department” as used in this Chapter shall mean the Oakland Police Department.

“Distinguishable” means perceivable by an ordinary consumer by either the sense of smell or taste.

“Drug Paraphernalia” as used in this Chapter shall have the same definition set forth under California Health and Safety Code section 11364.5, as amended from time to time.

“Electronic Smoking Device” means an electronic device that can be used to deliver an inhaled dose of nicotine, or other substances, including any component, part, or accessory of such a device, whether or not sold separately. “Electronic Smoking Device” includes any such device, whether manufactured, distributed, marketed, or sold as an electronic cigarette, an electronic cigar, an electronic cigarillo, an electronic pipe, an electronic hookah, or any other product name or descriptor.

“Flavored Tobacco Product” means any tobacco product which contains an ingredient that imparts a characterizing flavor.

“Full Retail Price” means the price listed for a package of cigarettes or other tobacco product on its packaging or on any related shelving, advertising, or display where the package of cigarettes or tobacco product is sold or offered for sale.

“Ingredient” means any substance, chemical, or compound, other than tobacco, water, or reconstituted tobacco sheet that is added by the manufacturer to a Tobacco Product during the processing, manufacture, or packing of the tobacco product.

“Labeling” means written, printed, or graphic matter upon any tobacco product or any of its Packaging, or accompanying such tobacco product.

“Manufacturer” means any person, including any repacker or relabeler, who manufactures, fabricates, assembles, processes, or labels a tobacco product; or imports a finished tobacco product for sale or distribution into the United States.



“Package of Cigarettes” means a pack of twenty (20) cigarettes in a manufacturer’s original consumer packaging designed for individual retail sale to a consumer.

“Packaging” means a pack, box, carton, or container of any kind or, if no other container, any wrapping (including cellophane) in which a tobacco product is sold or offered for sale to a consumer.

“Person” as used in this Chapter shall mean any natural person, partnership, cooperative association, corporation, limited liability company, personal representative, receiver, trustee, assignee, or any other legal entity.

“Proprietor” as used in this Chapter shall mean a Person with an ownership or managerial interest in a business. An ownership interest shall be deemed to exist when a Person has a ten percent (10%) or greater interest in the 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 can or does have or share ultimate control over the day-to-day operations of a business.

“Public Nuisance” as used in this Chapter shall have the same definition as set forth under California Civil Code Section 348090, as amended from time to time.

“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.

“Self-Service Display” as used in this Chapter shall mean the open display of Tobacco Products or Tobacco Paraphernalia in a manner that is accessible to the general public without the assistance of the retailer or employee of the retailer. A Vending Machine is a form of Self-Service Display.

~~“Smoking” as used in this Chapter shall mean possessing a lighted Tobacco Product, lighted Tobacco Paraphernalia, or any other lighted weed or plant (including a lighted pipe, cigar, hookah pipe, or cigarette of any kind), the lighting of a Tobacco Product, Tobacco Paraphernalia, or any other weed or plant (including a pipe, cigar, hookah pipe, or cigarette of any kind).~~

“Smoking” as used in this Chapter means inhaling, exhaling, burning, or carrying any lighted, heated, or ignited cigar, cigarette, cigarillo, pipe, hookah, Electronic Smoking Device, or any plant product intended for human inhalation.

“Tobacco Paraphernalia” as used in this Chapter shall mean cigarette papers and any other item designed for the smoking, preparation, storing, or consumption of Tobacco Products, including but not limited to wrappers, pipes, holders of smoking materials of all types and, cigarette rolling machines and any other item designed for the smoking, preparation, storing, or consumption of Tobacco Products.

“Tobacco Product” as used in this Chapter shall mean: (1) any substance containing tobacco leaf, including but not limited to cigarettes, cigars, pipe tobacco,

~~hookah tobacco, snuff, chewing tobacco, dipping tobacco, bidis, or any other preparation of tobacco; and (2) any product or formulation of matter containing biologically active amounts of nicotine that is manufactured, sold, offered for sale, or otherwise distributed with the expectation that the product or matter will be introduced into the human body, but does not include any product specifically approved by the United States Food and Drug Administration for use in treating nicotine or tobacco product dependence.~~

“Tobacco Product” as used in this Chapter means:

- a. Any product containing, made, 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; and
- b. Any Electronic Smoking Device.
- c. Notwithstanding any provision of subsections a. and b. to the contrary, “tobacco product” includes 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 such product is marketed and sold solely for such an approved purpose.

~~“Tobacco Retailer” means any person who sells, offers for sale, or does or offers to exchange for any form of consideration, tobacco, tobacco products or tobacco paraphernalia. “Tobacco Retailing” shall mean the doing of any of these things. This definition is without regard to the quantity of ~~€Tobacco p~~Products or ~~€Tobacco p~~Paraphernalia sold, offered for sale, exchanged, or offered for exchange.~~

“Tobacco Retailing” means the act of selling, offering for sale, or exchanging or offering to exchange for any form of consideration, tobacco, tobacco products or tobacco paraphernalia.

“Tobacco store” has the same meaning as provide in California Business and Professions Code Section 22962, which defines the term as a retail business that meets all of the following requirements:

- a. Primarily sells tobacco products;
- b. Generates more than 60 percent of its gross revenues annually from the sale of tobacco products and tobacco paraphernalia;
- c. Does not permit any person under 18 years of age to be present or enter the premises at any time, unless accompanied by the person's parent or legal guardian, as defined in Section 6903 of the California Family Code; and
- d. Does not sell alcoholic beverages or food for consumption on the premises.

~~“Vending Machine” as used in this Chapter shall mean a machine, appliance, or other mechanical device operated by currency, token, debit card, credit card, or any~~

other form of payment that is designed or used for vending purposes, including, but not limited to, machines or devices that use remote control locking mechanisms.

**Sec. 5.91.020. TOBACCO RETAILER LICENSE REQUIRED.**

- A. It shall be unlawful for any Person to act as a Tobacco Retailer without first obtaining and maintaining a valid Tobacco Retailer's license pursuant to this Chapter for each location at which that activity is to occur. Tobacco retailing without a valid Tobacco Retailer's license is a Public Nuisance, as defined in the Oakland Municipal Code. This Chapter applies to all existing and future Tobacco Retailers in the City. The City Administrator shall have power to adopt rules of procedure and regulations not inconsistent with the provisions of this Chapter for the purpose of carrying out the provisions of this Chapter; and a copy of such rules of procedure and regulations shall be on file and available for public examination at the Department.
- B. A Tobacco Retailer or Proprietor without a valid Tobacco Retailer license, including without limitation a Person whose license has been suspended or revoked:
  - 1. Shall keep all Tobacco Products and Tobacco Paraphernalia out of public view. The public display of Tobacco Products or Tobacco Paraphernalia in violation of this provision shall constitute Tobacco Retailing without a license under Section 5.91.130120.
  - 2. Shall not display any advertisement relating to Tobacco Products or Tobacco Paraphernalia that promotes the sale or distribution of such products from the Tobacco Retailer's location or that could lead a reasonable consumer to believe that such products can be obtained at that location.
- C. Nothing in this Chapter shall be construed to grant any Person obtaining and maintaining a Tobacco Retailer's license any status or right other than the right to act as a Tobacco Retailer at the location in the City identified on the face of the license. For example, nothing in this Chapter shall be construed to render inapplicable, supercede, or apply in lieu of, any other provision of applicable law, including but not limited to, any provision of this Code, the Oakland Planning Code, including the conditional use permit, if applicable, or any condition or limitation on smoking in an enclosed place of employment pursuant to California Labor Code section 6404.5. For example, obtaining a Tobacco Retailer license does not make the retailer a "retail or wholesale tobacco shop" for the purposes of California Labor Code section 6404.5.

**Sec. 5.91.030. LIMITS ON TOBACCO RETAILER LICENSES.**

- A. Fixed location Requirement. No license may issue to authorize Tobacco Retailing at other than a fixed location. For example, Tobacco Retailing by Persons on foot or from vehicles is prohibited.

B. No Drug Paraphernalia. No license may issue to authorize Tobacco Retailing at any location where Drug Paraphernalia is sold, offered for sale, or displayed for sale.

C. No Sale of Flavored Tobacco Products

1. It shall be a violation of this Chapter for any tobacco retailer or any of the tobacco retailer's agents or employees to sell or offer for sale, or to possess with intent to sell or offer for sale, any flavored tobacco product.

2. A tobacco product is presumed to be a flavored tobacco product if a Tobacco Retailer, Manufacturer, or any employee or agent of a Tobacco Retailer or Manufacturer has:

a. Made a public statement or claim that the tobacco product has or produces a characterizing flavor, including, but not limited to, text and/or images on the product's labeling or packaging that are used to explicitly or implicitly communicate information about the flavor, taste, or aroma of a tobacco product.

b. Taken actions directed to consumers that would be reasonably expected to result in consumers believing that the tobacco product imparts a characterizing flavor.

3. Exemption for "Tobacco Stores".

This section does not apply to the sale or offer for sale of Flavored Tobacco Products by a "Tobacco Store".

**Sec. 5.91.040. Posting Full Retail Price; Discounts Prohibited**

A. A Tobacco Retailer shall prominently display the full retail price of all cigarettes and other tobacco products offered for sale, at the point of display or at the point of sale.

B. Notwithstanding any other provision of this chapter, no Tobacco Retailer shall:

1. Honor or redeem, or offer to honor or redeem, a coupon to allow a consumer to purchase Tobacco Products for less than the full retail price.

2. Sell, or offer for sale, any Tobacco Products to a consumer through a multi-package discount or otherwise provide any Tobacco Products to a consumer for less than the full retail price in exchange for the purchase of any other Tobacco products, or any other item by the consumer.

3. Provide any free or discounted item to a consumer in consideration for the purchase of Tobacco Products at full retail price.

4. Sell, or offer for sale, a Tobacco Products to a consumer for less than full retail price; provided, however, that this subsection iv. does not prohibit a Tobacco Retailer from changing the Full Retail Price or informing Consumers that the Full Retail Price has changed.

**Sec. 5.91.0450. APPLICATION PROCEDURE.**

Application for a Tobacco Retailer's license shall be submitted in the name of each Proprietor proposing to conduct retail tobacco sales and shall be signed by each Proprietor or an authorized agent thereof, and shall include the license application fee set forth under Section 5.91.080090.

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 Tobacco Retailer's 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. 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 pursuant to Section 5.91.1420.D of this Chapter. Nothing in this Chapter shall be construed to vest in any Person obtaining and maintaining a Tobacco Retailer's license any status or right to act as a Tobacco Retailer in contravention of any provision of law.

All applications shall be submitted on a form supplied by the Department and shall contain, at a minimum, the following information:

- A. The name, address, telephone number, driver's license or similar identification, including date of birth, of each Proprietor of the business that is seeking a license.
- B. The business name, address, telephone number and business hours of the single fixed location for which a license is sought.
- C. If the single fixed location is leased, a copy of the lease and the name of the owner of single fixed location.
- D. A single name and mailing address authorized by each Proprietor to receive all communications and notices (the "Authorized Address") required by, authorized by, or convenient to the enforcement of this Chapter. If an Authorized Address is not supplied, each Proprietor shall be understood to consent to the provision of notice at the business address specified in subparagraph B. above.
- E. Proof that the location for which a Tobacco Retailer's license is sought has been issued a valid state tobacco retailer's license by the California Board of Equalization.
- F. Whether or not any Proprietor or prior Proprietor, to the best of applicant's

knowledge, has admitted violating, or has been found to have violated, this Chapter or whose proprietorship has admitted violating, or has been found to have violated, this Chapter, and, if so, the dates and locations of all such violations within the previous six years.

- G. All criminal violations and any prior violations under this Chapter of each Proprietor or prior Proprietor, to the best of applicant's knowledge.
- H. Such other information as the Department deems necessary for the administration or enforcement of this Chapter.
- I. All information required to be submitted in order to apply for a Tobacco Retailer's license shall be updated with the Department whenever the information changes. A Tobacco Retailer shall provide the Department with any updates within ten (10) business days of a change.
- J. A copy of the Major Conditional Use Permit, if applicable (or an explanation as to why such permit is not required).
- K. A statement signed by each Proprietor that no Drug Paraphernalia is or will be sold at the business seeking the license.

**Sec. 5.91.0560. ISSUANCE OF LICENSE.**

Upon the receipt of an application for a Tobacco Retailer's license and the license fee required by this Chapter, the Department shall issue a license unless substantial evidence demonstrates that one or more of the following bases for denial exists:

- A. The information presented in the application is incomplete, inaccurate, or false. Intentionally supplying inaccurate or false information shall be a violation of this Chapter.
- B. The application seeks authorization for Tobacco Retailing at a location for which this Chapter prohibits issuance of Tobacco Retailer licenses. However, this subparagraph shall not constitute a basis for denial of a license if the applicant provides the City with documentation demonstrating by clear and convincing evidence that the applicant has acquired or is acquiring the location or business in an Arm's Length Transaction.
- C. The application seeks authorization for Tobacco Retailing for a Proprietor to whom this Chapter prohibits a license to be issued.
- D. The application seeks authorization for Tobacco Retailing that is prohibited pursuant to this Chapter (e.g., mobile vending), that is unlawful pursuant to any provision of this Code, or that is unlawful pursuant to any other law.

- E. The Department, or the investigating official acting thereon, determines, in its reasonable discretion, that the applicant is not a fit and proper person, either for financial, moral, or other reasons, to conduct or maintain the business, establishment, place, or other thing, to which the application pertains; that the applicant has not complied with the provisions of this code which pertain directly to the maintenance or conduct of the business, establishment, place, or other thing in question or for the violation of any law appertaining thereto; or for any other reason hereinafter in this Chapter more specifically set forth. In granting or denying the license, the Department, shall consider the character of the applicant with respect to morality, honesty and integrity, and all pertinent acts which may concern the health, safety, and general welfare of the public.
- F. A denial of a license application shall be in writing, citing the reasons for such denial and shall be appealable to the City Administrator per the appeal provisions set forth in Section 5.91.1420 of this Chapter.

**Sec. 5.91.0670. LICENSE RENEWAL AND EXPIRATION.**

- A. RENEWAL OF LICENSE. A Tobacco Retailer license is invalid unless the appropriate fee has been paid in full and the term of the license has not expired. All prior year's fines and fees must be paid in full for license renewal unless otherwise agreed upon by the City and licensee. The term of a Tobacco Retailer license is one calendar year running from January 1-December 31. Each Tobacco Retailer shall annually apply for the renewal of his or her Tobacco Retailer's license and submit the license fee no later than thirty (30) days prior to expiration of the license term.
- B. EXPIRATION OF LICENSE. A Tobacco Retailer's license that is not timely renewed shall expire at the end of its term. To reinstate a license that has expired, or to renew a license not timely renewed pursuant to subparagraph (A), the Proprietor must:
  - 1. Submit the license fee plus a reinstatement fee of ten percent (10%) of the license fee.
  - 2. Submit a signed affidavit affirming that the Proprietor:
    - (i) has not sold and will not sell any Tobacco Product or Tobacco Paraphernalia after the license expiration date and before the license is renewed; or
    - (ii) has waited the appropriate ineligibility period established for Tobacco Retailing without a license, as set forth in Section 5.91.1250.A of this Chapter, before seeking renewal of the license.

**Sec. 5.91.0780. LICENSES ARE NOT NON TRANSFERABLE.**

- A. A Tobacco Retailer's license may not be transferred from one Person to another or from one location to another. Whenever a Tobacco Retailing location has a change in Proprietors a new Tobacco Retailer's license is required and will be subject to the application and licensing requirements as provided in Sections 5.91.020 and 5.91.050 .
- B. Notwithstanding any other provision of this Chapter, prior 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 location has been fully transferred to a new Proprietor or fully transferred to entirely new Proprietors; and
  - 2. The new Proprietor(s) provide the City with clear and convincing evidence that the new Proprietor(s) have acquired or is acquiring the location in an Arm's Length Transaction.

**Sec. 5.91.0890. FEES FOR LICENSE.**

- A. AMOUNT OF FEES. The application fee shall be \$50.00 and the licensing and renewal fee shall be \$1500.00, or as the application, licensing and renewal fees may be provided by amendments to be amended in the City's master fee schedule. The fees shall be calculated so as to recover the total cost of both license administration and license enforcement, including, for example, issuing the 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. All fees shall be used exclusively to fund the program, and shall be separately accounted for. Fees are nonrefundable except as may be required by law.
- B. FEES DUE AND PAYABLE. The application fee is due and payable at the time the application is submitted to the City. All licensing and renewal fees shall be due and payable to the City as determined by the Department. The amount of fees shall be deemed a debt to the City. An action may be commenced in the name of the City in any court of competent jurisdiction for the amount of any delinquent fees. An action to collect the fee must be commenced within three years of the date the fee becomes due. An action to collect the penalty for nonpayment of the fee must be commenced within three years of the date the penalty accrues. The City is entitled to recover its attorney's fees and costs pertaining to any action to delinquent fees plus interest at the rate specified by law if the City is the prevailing party.
- C. FEES ASSESSED AGAINST THE BUSINESS PROPERTY. The amount of fee, penalty and interest imposed under the provisions of this Chapter may be assessed against the business property on which the fee is imposed in those instances where the Proprietor of the business and the business property are one and the same. If the fees are not paid when due, such fee,



penalty and interest shall constitute an assessment against such business property and shall be a lien on the property for the amount thereof, which lien shall continue until the amount thereof including all penalties and interest are paid, or until it is discharged of record.

- D. TOBACCO RETAILERS SUBJECT TO DEEMED APPROVED ALCOHOLIC BEVERAGE SALE REGULATIONS. Any Tobacco Retailer subject to annual inspection fees for alcoholic beverage retail establishments as set forth in the master fee schedule shall not pay licensing and renewal fees under this Chapter. Such Tobacco Retailer, however, shall apply for a Tobacco Retailer's license and pay the application fee set forth under paragraph (a)A. of this Section. Further, if during the course of the calendar year a Tobacco Retailing location has a change in Proprietors, the new Tobacco License is subject to the application and licensee fee as required in Section 5.91.090.A as Tobacco Licenses are not transferable pursuant to Section 5.91.080.

**Sec. 5.91.09100. OTHER REQUIREMENTS AND PROHIBITIONS.**

- A. **LAWFUL BUSINESS OPERATION.** In the course of Tobacco Retailing or in the operation of the business or maintenance of the location for which a license issued, it shall be a violation of this Chapter for a licensee, or any of the licensee's agents or employees, to:
1. Violate any local, state, or federal law applicable to Tobacco Products, Tobacco Paraphernalia, Tobacco Retailing, Smoking, including without limitation Oakland Municipal Code Chapter 8.30.
  2. Violate any local, state, or federal law regulating exterior, storefront, window, or door signage.
  3. Violate any local, state or federal law regulating the sale, offer for sale, or display for sale, of any Drug Paraphernalia.
  4. Operate in any manner that adversely affects the health, safety or welfare of persons residing or working in the surrounding area, or in any manner that constitutes a Public Nuisance.
  5. Violates any local or state law regulating the sale of cannabis including but not limited to Business and Professions Code section 26054 (which provides nonmedical cannabis licensees shall not also be licensed as a retailer of tobacco products).
- B. **DISPLAY OF LICENSE.** Each Tobacco Retailer license shall be prominently displayed in a publicly visible location at the licensed location.
- C. **POSITIVE IDENTIFICATION REQUIRED.** No Person engaged in Tobacco Retailing shall sell or transfer a Tobacco Product or Tobacco Paraphernalia to another Person who appears to be under the age of twenty-seven (27)

years without first examining the identification of the recipient to confirm that the recipient is at least the minimum age under state law to purchase and possess the Tobacco Product or Tobacco Paraphernalia (currently set at age of twenty-one (21) years, except in the case of active duty military personnel at least eighteen (18) years of age and in possession of military identification).

- D. **MINIMUM AGE FOR PERSONS SELLING TOBACCO.** No Person who is younger than eighteen (18) years of age ~~the minimum age established by state law for the purchase or possession of Tobacco Products shall engage in Tobacco Retailing. (currently set at age twenty-one (21) years, except in cases of active duty military personnel at least eighteen (18) years of age and in possession of military identification).~~
- E. **SELF-SERVICE DISPLAYS PROHIBITED.** No Tobacco Retailer shall display Tobacco Products or Tobacco Paraphernalia by means of a Self-Service Display or engage in Tobacco Retailing by means of a Self-Service Display.

**Sec. 5.91.1100. COMPLIANCE MONITORING.**

- A. Compliance with this Chapter shall be monitored by the Department and/or by such other City agency, department, or division as may be designated by the City Administrator. Any peace officer may enforce the penal provisions of this Chapter.
- B. Nothing in this Chapter shall create a right of action in any Tobacco Retailer licensee or other Person against the City or its agents.
- C. Compliance checks shall determine, at a minimum, if the Tobacco Retailer is conducting business in a manner that complies with tobacco laws regulating youth access to tobacco. When appropriate, the compliance checks shall determine compliance with other laws applicable to Tobacco Retailing.

**Sec. 5.91.1240. DENIAL OR REVOCATION OF LICENSE.**

- A. **DENIAL OR REVOCATION OF LICENSE.** In addition to any other penalty authorized by law or this Chapter, a Proprietor's application shall be denied by the Department or a Tobacco Retailer's license shall be revoked by the City Administrator as in his or her discretion may seem just, for any reason for which a granting of such license might be lawfully denied, or for any other reason hereinafter in this Chapter specifically provided including, but not limited to, any violation of law designated in Section 5.91.09100(A) of this Chapter. An appeal of a denial or a revocation of a license under this Chapter shall be made only upon a hearing held before the City Administrator after ten (10) days written notice by U.S. mail to such Proprietor applying for the license or Tobacco Retailer's license holder, as applicable, stating generally the grounds of complaint against him or her and

stating the time and place where such hearing will be held. In the event of revocation of the license, any certificate issued in connection with the granting of such license shall, by the holder thereof, be forthwith surrendered to the City Administrator.

**B. HEARINGS ON REVOCATION OF LICENSE OR APPEAL OF DENIAL.**

Any investigation, inquiry or hearing which the City Administrator has power to undertake or to hold may be undertaken or held by such member of the City Administrator's staff as he or she may designate and to whom the matter is assigned. The person to whom a matter is assigned shall be deemed a "Hearing Officer." In any matter so assigned the Hearing Officer conducting the investigation, inquiry or hearing shall report within thirty (30) days after the conclusion of the investigation, inquiry or hearing his or her findings and recommendations to the City Administrator.

1. Within sixty (60) days after the filing of the findings and recommendations of the Hearing Officer, the City Administrator shall confirm, adopt, modify or set aside the findings of the Hearing Officer and with or without notice enter his or her order, findings, decision or award based upon the record in the case.
2. In such hearings, investigations, and inquiries by the City Administrator or a Hearing Officer, he or she shall not be bound in the conduct thereof by the common law or statutory rules of evidence and procedure but inquiry shall be made in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the public parties and carry out justly the spirit and provisions of this Chapter.
3. No informality in any proceeding or the manner of taking testimony shall invalidate any other decision, award or rule made as specified in this Chapter. No order, decision, award or rule shall be invalidated because of the admission into the record and the use as any proof of any fact in dispute or any evidence not admissible under the common law or statutory rules of evidence and procedure.

**C. APPEALS TO SUPERIOR COURT. CITY COUNCIL.** Any Proprietor excepting to any denial of a Tobacco Retailer license, or any Tobacco Retailer license holder excepting to any revocation of such license held by him or her pursuant to the provisions of this Chapter, may appeal in writing to the Alameda Superior Court as provided below. ~~the City Council by filing with the City Clerk a written notice of such appeal setting forth the specific grounds thereof. Such notice must be filed within fourteen (14) days after notice of such action appealed from is posted in the United States mail. Upon receipt of such notice of appeal the Council shall set the time for consideration thereof. The City Clerk shall cause notice thereof to be given (A) to the appellant and (B) to the adverse party or parties, or to the attorney, spokesman, or representative of such party or parties, not less than five days prior to such hearing. At such hearing the appellant shall show cause on the~~

~~grounds specified in the notice of appeal why the action excepted to should not be approved. Such hearing may, by the Council, be continued over from time to time and its findings on the appeal shall be final and conclusive in the matter.~~

1. Hearing Officer's Decision Final. The Hearing Officer's decision pursuant to Section 5.91.120.B is final. Parties cannot appeal the decision of a Hearing Officer to the City Council. In every final decision reached under this Section, notice of such final decision shall only be given directly to the respondent and such notice shall explain that California Code of Civil Procedure Section 1094.6 governs the time period for which judicial review of any such final decision must be sought. Final notice to the respondent shall conclude with the following statement:

THE CITY HAS REACHED A FINAL DECISION IN THE ADMINISTRATIVE MATTER PENDING BEFORE THE CITY. IF YOU CHOOSE TO SEEK JUDICIAL REVIEW OF THE CITY'S FINAL DECISION IN THIS MATTER, SUCH ACTION SHALL BE INITIATED UNDER CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 1094.5 AND TIME LIMITS FOR FILING SUCH AN ACTION AS ARE SET BY CALIFORNIA CODE OF CIVIL PROCEDURE 1094.6.

2. Superior Court Review. A party may seek judicial review of a final decision of the Hearing officer by filing a petition for writ of administrative writ of mandate pursuant to California Civil Code Section 1094.5 within the time frames for filing such actions as provided in California Civil Code Section 1094.6.

D. REVOCATION OF LICENSE ISSUED IN ERROR. A Tobacco Retailer's license shall be revoked if the Department or City Administrator finds, after the licensee is afforded reasonable notice and an opportunity to be heard, that one or more of the bases for denial of a license under Section 5.91.0560 of this Chapter existed at the time application was made or at any time before the license issued. The decision by the Department or the City Administrator shall be the final decision of the City. The revocation shall be without prejudice to the filing of a new license application.

E. NEW LICENSE AFTER REVOCATION.

1. After revocation for a first violation of this Chapter at a location within any sixty-month (60) period, no new license may issue for the location until ten (10) days have passed from the date of revocation.
2. After revocation for a second violation of this Chapter at a location within any sixty-month (60) period, no new license may issue for the location until thirty (30) days have passed from the date of revocation.

3. After revocation for a third violation of Chapter at a location within any sixty-month (60) period, no new license may issue for the location until ninety (90) days have passed from the date of revocation.
4. After revocation for four or more violations of this Chapter at a location within any sixty-month (60) period, no new license may issue for the location until five (5) years have passed from the date of revocation.

**Sec. 5.91.1320. TOBACCO RETAILING WITHOUT A LICENSE.**

- A. In addition to any other penalty authorized by law, if the Department finds or any court of competent jurisdiction determines, after notice and an opportunity to be heard, that any Person has engaged in Tobacco Retailing at a location without a valid Tobacco Retailer's license, either directly or through the Person's agents or employees, the Person shall be ineligible to apply for or be issued a Tobacco Retailing license for that location as follows:
  1. After a first violation of this section at a location within any sixty-month (60) period, no new license may issue for the Person at the location until thirty (30) days have passed from the date of the violation.
  2. After a second violation of this section at a location within any sixty-month (60) period, no new license may issue for the Person at the location until ninety (90) days have passed from the date of the violation.
  3. After of a third or subsequent violation of this section at a location within any sixty-month (60) period, no new license may issue for the Person at the location until five (5) years have passed from the date of the violation.
- B. Tobacco Products and Tobacco Paraphernalia offered for sale or exchange in violation of this Chapter are subject to seizure by the Department or any peace officer and shall be forfeited after the licensee and any other owner of the Tobacco Products or Tobacco Paraphernalia is given reasonable notice and an opportunity to demonstrate that the products were not offered for sale or exchange in violation of this Chapter. The decision by the Department may be appealed pursuant to the procedures set forth in Section 5.91.1420.C. Forfeited Tobacco Products and Tobacco Paraphernalia shall be destroyed by the Department.
- C. For the purposes of the civil remedies provided in this Chapter:
  1. each day on which a Tobacco Product, Tobacco Paraphernalia, or Drug Paraphernalia is offered for sale in violation of this Chapter; or
  2. each individual retail Tobacco Product, and each individual retail item of Tobacco Paraphernalia or Drug Paraphernalia that is distributed, sold, or

offered for sale in violation of this Chapter; whichever is greater, shall constitute a separate violation of this Chapter.

**Sec. 5.91.1340. SETTLEMENT IN LIEU OF HEARING.**

For a first or second alleged violation of this Chapter within any sixty-month (60) period, the City Administrator or authorized designee may engage in settlement negotiations and may enter into a settlement agreement with a Tobacco Retailer alleged to have violated this Chapter without approval from the City Council. Notice of any settlement shall be provided to the Department and no hearing shall be held. The Tobacco Retailers' license shall be suspended until adoption of this settlement agreement. After the settlement agreement has been adopted, the license shall continue under the same terms prior to the settlement, unless otherwise stated. Settlements shall not be confidential and shall contain the following minimum terms:

- A. After a first alleged violation of this Chapter at a location within any sixty-month (60) period:
  - 1. an agreement to stop acting as a Tobacco Retailer for at least one (1) day;
  - 2. a settlement payment to the City of at least one thousand dollars (\$1,000); and
  - 3. an admission that the violation occurred and a stipulation that the violation will be counted when considering what penalty will be assessed for any future violations.
  
- B. After a second alleged violation of this Chapter at a location within any sixty-month (60) period:
  - 1. an agreement to stop acting as a Tobacco Retailer for at least ten (10) days;
  - 2. a settlement payment to the City of at least five thousand dollars (\$5,000); and
  - 3. an admission that the violation occurred and a stipulation that the violation will be counted when considering what penalty will be assessed for any future violations.

**Sec. 5.91.1540. ENFORCEMENT.**

All officials, departments, and employees of the City vested with the authority to issue permits, certificates, or licenses shall adhere to, and require conformance with, this Tobacco Retail Licensing Ordinance.

- A. Violations and penalties.
  - 1. Infractions. Any person who violates, causes, or permits another person to violate any provision of this Ordinance is guilty of an infraction unless otherwise provided.

2. Separate Offenses for Each Day. Any violator shall be guilty of a separate offense for each and every day during any portion of which any violation of any provision of this Ordinance is committed, continued, permitted, or caused by such violator and shall be punishable accordingly.
  3. Any Violation a Public Nuisance. In addition to the penalties provided in this section, any use or condition caused or permitted to exist in violation of any of the provisions of this Chapter shall be and is declared to be a Public Nuisance and may be summarily abated as such by the City.
  4. Injunction as Additional Remedy. Any violation of any provision of this Ordinance shall be and is declared to be contrary to the public interest and shall, at the discretion of the City, create a cause of action for injunctive relief.
  5. Penalties. Any person convicted of an infraction under the provisions of this section shall be punishable by a fine to the maximum permitted under Oakland Municipal Code 1.28. Any violation beyond the second conviction within a one-year period may be charged by the District Attorney as a misdemeanor, and the penalty for conviction shall be punishable by a fine or imprisonment to the maximum permitted under Oakland Municipal Code 1.28.
  6. Liability for Expenses. In addition to the punishment provided by law, a violator is liable for such costs, expenses, and disbursements paid or incurred by the City or any of its contractors in correction, abatement, and prosecution of the violation. Reinspection fees to ascertain compliance with previously noticed or cited violations shall be charged against the owner of the Tobacco Retailer's License. Fees shall be in the amount described in Section 5.91.0670(B)(1) for charged reinspections. The inspection official shall give the owner or other responsible party of such affected premises a written notice showing the itemized cost of such chargeable service and requesting payment thereof. In any administrative, civil, or special proceeding to abate a public nuisance pursuant to this chapter, the City may, at the initiation of the proceeding, seek an award of attorney's fees. If the City seeks an award of attorney's fees, the award shall be made to the prevailing party. Provided however, that no award may be made to a prevailing party that exceeds the amount of reasonable attorney's fees incurred by the City in the action or proceeding.
- B. Enforcement. The City designates the Department to enforce the provisions of this Ordinance. The City Administrator shall have power to adopt rules of procedure and regulations not inconsistent with the provisions of this Chapter for the purpose of carrying out the provisions of this Chapter; and a

copy of such rules of procedure and regulations shall be on file and available for public examination at the Department.

- C. Inspection and right of entry. The Department, or their duly authorized representatives, may enter on any site or into any structure for the purpose of investigation, provided they shall do so in a reasonable manner, whenever they have cause to suspect a violation of any provision of this Ordinance. An owner or occupant or agent thereof who refuses to permit such entry and investigation shall be guilty of infringing upon the violations and penalties as outlined in Section 5.91.1450.A and subject to related penalties thereof.
- D. Remedies are Cumulative. The remedies provided by this Chapter are cumulative and in addition to any other remedies available at law or in equity.
- E. Youth Decoy Participation. Whenever evidence of a violation of this Chapter is obtained in any part through the participation of a Person under the age of eighteen (18) years old, such a 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.

### **SECTION 3. Outreach and Education.**

- A. The Alameda County Public Health Department in conjunction with the Oakland Police Department and community organizations shall develop and conduct a retailer outreach and education program designed to inform Tobacco Retailers about the requirements of this Ordinance and the link between Cigarettes, Tobacco Products, and chronic disease. Any written materials and trainings developed pursuant to this subsection shall be offered in multiple languages in addition to English. Nothing in this section shall create a right of action in any licensee or other Person against the City or its agents.

### **SECTION 4. General Provisions.**

- A. Severability. If any section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be invalid or unconstitutional by decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of the Chapter. The City Council hereby declares that it would have passed this Ordinance and each section, subsection, clause or phrase thereof irrespective of the fact that one or more other sections, subsections, clauses or phrases may be declared invalid or unconstitutional.



- B. No Conflict with State or Federal Law. Nothing in this ordinance shall be interpreted or applied so as to create any requirement, power, or duty in conflict with any federal or state law.
  
- C. Undertaking for the General Welfare. In adopting and implementing this ordinance, the City of Oakland is assuming an undertaking only to promote the general welfare. It is not assuming, nor is it imposing in its officers and employees, and obligation for breach of which it is liable in money damages to any person who claims that such breach proximately caused injury.

**Section 5.** EFFECTIVE DATE. After final adoption by the City Council, this Ordinance shall become effective six months after final adoption of this Ordinance by the City Council of Oakland July 1, 2018.

**Section 6.** AUTHORITY. This Ordinance is enacted pursuant to the City of Oakland's general police powers, Section 106 of the City Charter of the City of Oakland and Article XI of the California Constitution.

IN COUNCIL, OAKLAND, CALIFORNIA,

PASSED BY THE FOLLOWING VOTE:

AYES - BROOKS, CAMPBELL WASHINGTON, GALLO, GUILLÉN, KALB, KAPLAN, GIBSON MCELHANEY, AND PRESIDENT REID

NOES -

ABSENT -

ABSTENTION -

ATTEST: \_\_\_\_\_  
LATONDA SIMMONS  
City Clerk and Clerk of the Council of the  
City of Oakland, California