

Chapter 4-35 TOBACCO RETAILERS
4-35-100 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:

“Administrator” means the Chief of Police or designee for the City of San Leandro.

“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 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.

“Coupon” means anything that can be exchanged for or used to acquire an electronic cigarette, electronic cigarette paraphernalia, electronic cigarette or tobacco product, such as a printed piece of paper, voucher, ticket, rebate, rebate offer, check, credit, token, code, password, or anything labeled “coupon” or “coupon offer.”

“Department” means the City of San Leandro Finance Department.

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

“Drug paraphernalia” shall have the definition set forth in California Health and Safety Code Section 11014.5, as that section may be amended from time to time.

“Electronic cigarette” means “a device that can provide an inhalable dose of nicotine by delivering a vaporized solution” as defined in California Health and Safety Code Section 119405(b), as that section may be amended from time to time, or any device designed to vaporize a liquid solution that releases flavored vapor.

“Electronic cigarette paraphernalia” means any device designed to provide an inhalable dose of nicotine or a flavored liquid solution through vaporization, nicotine-based or flavored solution-based cartridges for use with electronic cigarettes, and any other item designed for the vaporization, preparation, storing, or consumption of electronic cigarette products.

“Electronic cigarette product” means any substance containing nicotine or a flavored liquid solution for vaporization, including 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 cessation product specifically approved by the United States Food and Drug Administration for use in treating nicotine or tobacco dependence.

“Flavored tobacco product” means any tobacco product (other than cigarettes as defined by the U.S. Food and Drug Administration) that contains a constituent that imparts a characterizing flavor. This includes cigars, little cigars, pipe tobacco, hookah tobacco, snuff, chewing tobacco, dipping tobacco, bidis, blunts, and electronic cigarettes or electronic smoking devices containing nicotine.

(a) For purposes of this definition, “constituent” means any ingredient, substance, chemical, or compound, other than tobacco, water, or reconstituted tobacco sheet, which is added by the manufacturer to a tobacco product during the processing, manufacture, or packing of the tobacco product.

(b) Further, a tobacco product is presumed to be a flavored tobacco product if a manufacturer or any of the manufacturer's agents or employees has:

(1) 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 explicitly or implicitly to communicate information about the flavor, taste, or aroma of a tobacco product; or

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

"License" means a tobacco retailer's license as defined below.

"Licensee" means a tobacco retailer with a tobacco retailer's license.

"Nominal cost" means the cost of any item that is transferred from one person to another for less than the total of: (1) twenty-five percent of the full retail value of the item exclusive of taxes and fees; plus (2) all taxes and fees previously paid and all taxes and fees still due on the item at the time of transfer.

"Nonsale distribution" means to give, within the jurisdictional limits of the City, a tobacco product or coupon at no cost or at nominal cost to a person who is not a tobacco seller.

"Person" means any natural person, partnership, cooperative association, corporation, personal representative, receiver, trustee, assignee, or any other legal entity.

"Proprietor" means 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 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 place" means any place within the City, public or private, that is open to the general public regardless of any fee or age requirement, including, for example, bars, restaurants, clubs, stores, stadiums, parks, playgrounds, taxis, and buses.

"Retailer" means tobacco retailer as defined herein.

"Self-service display" means the open display or storage of electronic cigarettes, electronic cigarette products, electronic cigarette paraphernalia, tobacco products or tobacco paraphernalia in a manner that is physically accessible in any way to the general public without the assistance of the retailer or employee of the retailer and a direct person-to-person transfer between the purchaser and the retailer or employee of the retailer. A vending machine is a form of self-service display.

"Tobacco" means leaves of the tobacco plant dried and prepared for smoking or ingestion.

"Tobacco paraphernalia" means cigarette papers or wrappers, pipes, holders of smoking materials of all types, cigarette rolling machines, and any other item designed for the smoking, preparation, storing, or consumption of tobacco products.

"Tobacco product" means tobacco and any substance containing tobacco, including, but not limited to, cigarettes, cigars, cigarillos, pipe tobacco, hookah tobacco, snuff, chewing tobacco, dipping tobacco, snus, bidis, or any other preparation of tobacco; and 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 cessation product specifically approved by the United States Food and Drug Administration for use in treating nicotine or tobacco dependence.

“Tobacco retailer” means any person who sells, offers for sale, or does or offers to exchange for any form of consideration, electronic cigarettes, electronic cigarette products, electronic cigarette paraphernalia, 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 electronic cigarettes, electronic cigarette products, electronic cigarette paraphernalia, tobacco products or tobacco paraphernalia sold, offered for sale, exchanged, or offered for exchange.

“Tobacco retailer’s license” means the license issued pursuant to Section 4-35-300 that authorizes electronic-cigarette or tobacco retailing at a certain location and by a certain tobacco retailer.

4-35-150 REQUIREMENTS AND PROHIBITIONS.

(a) Tobacco Retailer’s License Required. It is unlawful for any person to act as a tobacco retailer in the City 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 nuisance as a matter of law.

(b) 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 is issued, it shall be a violation of this Chapter for a licensee, or any of the licensee’s agents or employees, to violate any local, State, or Federal law applicable to electronic cigarettes, electronic cigarette products, electronic cigarette paraphernalia, tobacco products, tobacco paraphernalia, or tobacco retailing.

(c) Display of License. Each tobacco retailer’s license shall be prominently displayed in a publicly visible location at the licensed location.

(d) Positive Identification Required. No person engaged in tobacco retailing shall sell or transfer an electronic cigarette, electronic cigarette product, electronic cigarette paraphernalia, tobacco product or tobacco paraphernalia to another person who appears to be under the age of twenty-seven 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 electronic cigarette, electronic cigarette product, electronic cigarette paraphernalia, tobacco product or tobacco paraphernalia.

(e) Minimum Age for Persons Selling Tobacco. No person who is younger than the minimum age established by State law for the purchase or possession of electronic cigarette products or tobacco products shall engage in tobacco retailing.

(f) Self-Service Displays Prohibited. Tobacco retailing by means of a self-service display is prohibited.

(g) False and Misleading Advertising Prohibited. A tobacco retailer or proprietor without a valid tobacco retailer’s license, including, for example, a person whose license has been revoked:

(1) Shall keep all electronic cigarettes, electronic cigarette products, electronic cigarette paraphernalia, tobacco products and tobacco paraphernalia out of public view. The public display of electronic cigarettes, electronic cigarette products, electronic cigarette paraphernalia, tobacco products or tobacco paraphernalia in violation of this provision shall constitute tobacco retailing without a license; and

(2) Shall not display any advertisement relating to electronic cigarettes, electronic cigarette products, electronic cigarette paraphernalia, 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.

(h) Signage Violations. It is a violation of this Chapter for any licensee to violate any local, State, or Federal law regulating exterior, storefront, window, or door signage.

(i) Drug Paraphernalia. It is a violation of this Chapter for any licensee or any of the licensee's agents or employees, to violate any local, State, or Federal law regulating controlled substances or drug paraphernalia.

(j) Nonsale Distribution of Tobacco Products Prohibited.

(1) No tobacco retailer nor any agent or employee of a tobacco retailer shall engage in the nonsale distribution of any electronic cigarette, electronic cigarette paraphernalia, electronic cigarette product, tobacco product or coupon in any public place.

(2) No person, motivated by an economic or a business purpose, shall knowingly permit the nonsale distribution of any electronic cigarette, electronic cigarette paraphernalia, electronic cigarette product, tobacco product or coupon: (a) anywhere in any public place under the legal or de facto control of the person; or (b) through any agent or employee of the person. This provision shall not apply to coupons incidentally distributed in connection with a printed or electronic publication, such as, for example, magazines, newspapers, and websites, so long as that person's distribution of a publication containing coupons is not primarily motivated by an economic or a business purpose to distribute coupons.

(k) Minimum Pack Size for Cigars.

(1) Notwithstanding any other provision of this Chapter, no tobacco retailer shall sell, offer for sale, or exchange for any form of consideration:

(i) Any single cigar, whether or not packaged for individual sale;

(ii) Any number of cigars fewer than the number contained in the manufacturer's original consumer packaging designed for retail sale to a consumer; or

(iii) Any package of cigars containing fewer than fifteen cigars.

(2) This subsection does not apply to the sale or offer for sale of a single cigar for which the retail price exceeds either five dollars or the dollar amount adopted by resolution of the City Council and adjusted from time to time, whichever is higher. The public shall be given notice of any such resolution in the manner notice is given of ordinances of the City.

(3) This subsection shall apply to cigars, cigarillos and any other cigar product regardless of the terminology used for the product.

(l) Flavored Tobacco Products Prohibited. No tobacco retailer, nor any of the retailer's agents or employees, shall sell or offer for sale, or possess with intent to sell or offer for sale, any flavored tobacco product.

4-35-200 LIMITS ON ELIGIBILITY FOR A TOBACCO RETAILER'S LICENSE.

(a) No license shall be issued to authorize tobacco retailing at other than a fixed location.

(b) No license shall be issued to authorize tobacco retailing at a location where electronic cigarettes, electronic cigarette paraphernalia, electronic cigarette products or tobacco products are prohibited from being distributed pursuant to the Zoning Code of the City of San Leandro.

(c) No license shall be issued to a location or a tobacco retailer where prohibited pursuant to Section 4-35-600.

4-35-250 APPLICATION PROCEDURE.

(a) Application for a tobacco retailer's license shall be submitted in the name of each proprietor proposing to conduct tobacco retailing and shall be signed by each proprietor or an authorized agent thereof. 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 4-35-600(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 the following information:

- (1) The name, address, and telephone number of each proprietor of the business seeking a license;
- (2) The business name, address, and telephone number of the single fixed location for which a license is sought;
- (3) 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 subsection (a)(2) of this section;
- (4) 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;
- (5) Whether or not any proprietor or any agent of the proprietor 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 five years;
- (6) A statement signed by each proprietor that no drug paraphernalia is or will be sold at the location for which the license is sought;
- (7) 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) A licensed tobacco retailer shall inform the Department in writing of any change in the information submitted on an application for a tobacco retailer's license within ten business days of a change.

(c) All information specified in an application pursuant to this section shall be subject to disclosure under the California Public Records Act (California Government Code Section 6250 et seq.) or any other applicable law, subject to the laws' exemptions.

4-35-300 ISSUANCE OF LICENSE.

Upon the receipt of a complete application for a tobacco retailer's license and the license fee required by this Chapter, the Administrator 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 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's licenses. However, this subsection 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 or location for which this Chapter prohibits a license to be issued, including the provisions of Section 4-35-600;

(d) The application seeks authorization for tobacco retailing that is prohibited pursuant to this Chapter (e.g., mobile vending), that is unlawful pursuant to this Code or that is unlawful pursuant to any other law;

(e) The location for which a tobacco retailer's license is sought lacks a valid state tobacco retailer's license by the California Board of Equalization.

4-35-350 LICENSE RENEWAL AND EXPIRATION.

(a) Term and Renewal of License. A tobacco retailer's license is invalid if the appropriate fee has not been timely paid in full or if the term of the license has expired. The term of a tobacco retailer's license is one year. Each tobacco retailer shall apply for the renewal of his or her tobacco retailer's license and submit the license fee no later than thirty days prior to expiration of the term.

(b) Expiration of License. A tobacco retailer's license that is not timely renewed shall expire at the end of its term. To renew a license not timely renewed pursuant to subsection (a) of this section, the proprietor must:

(1) Submit the license fee and application renewal form; and

(2) Submit a signed affidavit affirming that the proprietor:

(i) Has not sold and will not sell any electronic cigarette, electronic cigarette product, electronic cigarette paraphernalia, 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 4-35-600(a) of this Chapter, before seeking renewal of the license.

4-35-400 LICENSES NONTRANSFERABLE.

(a) A tobacco retailer's license may not be transferred from one person to another or from one location to another. A new tobacco retailer's license is required whenever a tobacco retailing location has a change in proprietor(s).

(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 provides the City with clear and convincing evidence that the new proprietor has acquired or is acquiring the location in an arm's length transaction.

4-35-450 LICENSE CONVEYS A LIMITED, CONDITIONAL PRIVILEGE.

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 limited conditional privilege 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, supersede, or apply in lieu of, any other provision of applicable law, including but not limited to, any provision of this Code, 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's license does not make the retailer a "retail or wholesale tobacco shop" for the purposes of California Labor Code Section 6404.5.

4-35-500 FEE FOR LICENSE.

The fee to issue or to renew a tobacco retailer's license shall be established from time to time by resolution of the City Council and shall be included within the City's Master Fee Schedule. 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 this Chapter, 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 and interest upon proceeds of fees shall be used exclusively to fund the program. Fees are nonrefundable except as may be required by law.

4-35-550 COMPLIANCE MONITORING.

(a) Compliance with this Chapter shall be monitored by the Police Department. The City may designate any number of additional persons to monitor compliance with this Chapter.

(b) Compliance checks shall be conducted so as to allow the Police Department to determine, at a minimum, if the tobacco retailer is conducting business in a manner that complies with laws regulating youth access to electronic cigarettes, electronic cigarette paraphernalia, electronic cigarette products or tobacco products. When the Police Department deems appropriate, the compliance checks shall determine compliance with other laws applicable to tobacco retailing.

(c) The City shall not enforce any law establishing a minimum age for electronic cigarette, electronic cigarette paraphernalia, electronic cigarette product or tobacco product purchases or possession against a person who otherwise might be in violation of such law because of the person's age (hereinafter "youth decoy") if the potential violation occurs when:

(1) The youth decoy is participating in a compliance check supervised by a peace officer or a code enforcement official of the City;

(2) The youth decoy is acting as an agent of a person designated by the City to monitor compliance with this Chapter; or

(3) The youth decoy is participating in a compliance check funded in part, either directly or indirectly through subcontracting, by the Alameda County Public Health Department or the California Department of Health Services.

4-35-600 VIOLATIONS AND REVOCATION OF LICENSE.

(a) Violations. If the Administrator has reasonable cause to believe a violation of this Chapter exists, or if any court of competent jurisdiction determines the same, the Administrator may issue a notice of violation and begin the revocation process as follows:

(1) First Violation. After a first violation of this Chapter at a location within any sixty-month period, the Administrator shall:

(i) Issue a written warning to the licensee, which includes: the facts supporting the finding of a violation, the penalties for further violations of this Chapter, and provides thirty days within which the licensee may cure the violation and advise employees of applicable regulations or contact the Administrator to challenge the finding of a violation.

(ii) If the licensee contacts the Administrator to challenge the finding of a violation, the Administrator shall provide written notice of a hearing, not less than five business days after the notice, at which the tobacco retailer may show cause, at a time and place specified in the notice, why a violation does not exist. Should the tobacco retailer fail to present evidence at such hearing establishing, in the reasonable determination of the Administrator, that a violation does not exist, the Administrator shall provide written notice to the tobacco retailer that the notice of violation is upheld.

(2) Second Violation. After a second violation of this Chapter at a location within any sixty-month period, the license shall be revoked and no new license shall be issued for the location or the tobacco retailer until thirty days have passed from the date of revocation.

(3) Third Violation. After a third violation of this Chapter at a location within any sixty-month period, the license shall be revoked and no new license shall be issued for the location or the tobacco retailer until ninety days have passed from the date of revocation.

(4) Fourth Violation and Additional Violations. After four or more violations of this Chapter at a location within any sixty-month period, the license shall be revoked and no new license may issue for the location or tobacco retailer until five years have passed from the date of revocation.

(b) Revocation Procedures. If a license is subject to revocation, the Administrator shall provide written notice of revocation along with the reasons for revocation, facts suggesting violation, the penalties for violation, and ability to appeal pursuant to subsection (c) of this section. Within five days of the mailing of notice of revocation, the tobacco retailer shall cease the operation of the business for which the license was issued.

(c) Appeal of Revocation. A decision of the Administrator to revoke a license is appealable to the City Manager and must be filed with the City Clerk within ten days of mailing of the Administrator's notice of revocation. If such an appeal is made, it shall stay enforcement of the appealed action. An appeal to the City Manager is not available for a revocation made pursuant to subsection (d) of this section. The date, time, and place of appeal hearings shall be provided in writing to the tobacco retailer with at least ten days' notice and copies of hearing rules. If the tobacco retailer fails to present evidence establishing that tobacco retailer is entitled to retain the license, the City Manager shall uphold the revocation and give written notice to the tobacco retailer. Within five days of the mailing of the notice of upheld revocation, the tobacco retailer shall cease operation of the business for which the license was issued.

(d) Revocation of License Wrongly Issued. A tobacco retailer's license shall be revoked if the Administrator finds, after the licensee is afforded notice and an opportunity to be heard, that one or more of the bases for denial of a license under Section 4-35-300 existed at the time application was made or at any time before the license issued. The decision by the Administrator shall be the final decision of the City. Such a revocation shall be without prejudice to the filing of a new license application.

(a) Criminal Prosecution. Each incident of violation of this Chapter is an infraction subject to a one hundred dollar fine or otherwise punishable pursuant to Section 1-12-200(c) of this Code. Other violations of this Chapter may, in the discretion of the City Prosecutor, be prosecuted as infractions or misdemeanors when the interests of justice so require. Enforcement of this Chapter shall be the responsibility of the Police Chief or designee. In addition, any peace officer or code enforcement official also may enforce this Chapter.

(b) Civil Enforcement by the City.

(1) Fines. Violations of this Chapter are subject to a civil action brought by the City of San Leandro, punishable by a civil fine not less than two hundred fifty dollars and not exceeding one thousand dollars per violation.

(2) Injunctions, Nuisance Abatement, and Code Enforcement. 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 or criminal code enforcement proceedings, and suits for injunctive relief. Where the City pursues a civil action to remedy a violation of this Chapter, the prevailing party shall be entitled to recover attorneys' fees and costs if the City elects, at the beginning of that action, to seek recovery of its own attorneys' fees and costs pursuant to California Government Code Section 38773.5 as that section may be amended from time to time.

(c) General Provisions.

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

(2) Violations. Causing, permitting, aiding, abetting, or concealing a violation of any provision of this Chapter shall also constitute a violation of this Chapter. A violation exists for each day on which an electronic cigarette, electronic cigarette product, electronic cigarette paraphernalia, tobacco product or tobacco paraphernalia is offered for sale in violation of this Chapter. A violation also exists for each individual retail electronic cigarette, electronic cigarette product or tobacco product and each individual retail item of electronic cigarette paraphernalia tobacco paraphernalia that is distributed, sold, or offered for sale in violation of this Chapter.

(3) Nuisances. Violations of this Chapter are hereby declared to be public nuisances.

(4) No Testimony for Persons Under Eighteen. Whenever evidence of a violation of this Chapter is obtained in any part through the participation of a person under the age of eighteen 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.