

BEFORE THE CITY COUNCIL OF THE CITY OF LAFAYETTE

IN THE MATTER OF:

An Ordinance (i) Repealing LMC Chapter 5-5)
"RESTRICTIONS ON THE ADVERTISING,)
ACCESS AND PROMOTION OF)
TOBACCO PRODUCTS TO MINORS," (ii)) Ordinance No. 675
Repealing certain sections of Chapter 5-3)
"SMOKING," and (iii) Adding a new Chapter)
5-9, entitled "TOBACCO RETAILER LICENSING)
AND RESTRICTIONS ON SALES OF TOBACCO)
AND FLAVORED TOBACCO PRODUCTS")

WHEREAS, the city council finds that a local licensing system for tobacco retailers is appropriate to ensure that retailers comply with tobacco control laws and business standards of the city council, to protect the health, safety, and welfare of our residents;

WHEREAS, approximately 480,000 people die in the United States from smoking-related diseases and exposure to secondhand smoke every year, making tobacco use the nation's leading cause of preventable death;¹

WHEREAS, the World Health Organization (WHO) estimates that tobacco kills roughly 6 million people and causes over half a trillion dollars in economic damage each year;²

WHEREAS, 5.6 million of today's Americans who are younger than 18 are projected to die prematurely from a smoking-related illness;¹

WHEREAS, tobacco use is the number one cause of preventable death in California³ and continues to be an urgent public health issue, as evidenced by the following:

- 40,000 California adults die from their own smoking annually;
- More than 25% of all adult cancer deaths in California are attributable to smoking;⁴
- Smoking costs California \$13.29 billion in annual health care expenses, \$3.58 billion in Medicaid costs caused by smoking, and \$10.35 billion in smoking-caused productivity losses;⁵

- Tobacco use can cause disease in nearly all of the organs of the body and is responsible for 87% of lung cancer deaths, 32% of coronary heart disease deaths, and 79% of all cases of chronic obstructive pulmonary disease in the United States;¹

WHEREAS, tobacco use among priority populations in California contributes to health disparities and creates significant barriers to health equity, as evidenced by the following:

- African American (20%), Asian (15.6%), Hispanic (15.0%), and American Indian/Alaska Native (36.2%) males all report a higher smoking prevalence than White, Non-Hispanic males (14.8%);⁶
- More than half (53.8%) of low socioeconomic status American Indian/Alaska Native Californians smoke, the highest smoking prevalence among all populations;⁶
- From 2002 to 2012, smoking prevalence increased among African American youth;⁶
- Californians with the highest levels of educational attainment and annual household income have the lowest smoking prevalence;⁶
- Those who identify as bisexual, compared with heterosexual, gay/lesbian/homosexual, not sexual, celibate, or other, smoke at rates disproportional to their population in California;⁶
- Those who reported experiencing psychological distress over the past year smoke at rates disproportional to their population in California;⁶

WHEREAS, despite the state's efforts to limit youth access to tobacco, youth are still able to access tobacco products, as evidenced by the following:

- In California, over 67% of current and former adult smokers started by the age of 18 and almost 100% start by age 26;⁶
- In California, from 2013 to 2015, approximately 15% of 9th and 11th grade students report using electronic smoking devices;⁶
- Unless smoking rates decline, an estimated 5% of all California youth who are alive today will die prematurely from smoking-related diseases;^{5,7}
- In 2017, 22.8% of high school students in California had tried cigarette smoking;^{8,9}

WHEREAS, the tobacco industry encourages youth and young adult tobacco initiation through predatory targeting,¹⁰ as evidenced by the following:

- Tobacco companies target young adults ages 18 to 24 to increase their frequency of tobacco use and encourage their transition to habitual users;¹¹

- Tobacco industry documents state that if “a man has never smoked by the age of 18, the odds are three-to-one he never will. By age 24, the odds are twenty-to-one”;¹²
- The tobacco industry spends an estimated \$620 million annually to market tobacco products to California residents;⁵

WHEREAS, California retailers continue to sell tobacco to underage consumers, evidenced by the following:

- 9.3% of high school students in California reported buying their own electronic cigarette from a store;^{8,9}
- 7.6% of California tobacco retailers unlawfully sold tobacco products to minors in 2015;⁶

WHEREAS, requiring tobacco retailers to obtain a tobacco retailer license will not unduly burden legitimate business activities of retailers who sell tobacco products to adults but will, however, allow the city council to regulate the operation of lawful businesses to discourage violations of federal, state, and local tobacco control and youth tobacco access laws, as evidenced by the following:

- Cigarettes are the number one product sold in U.S. convenience stores, and in 2012, they generated an average of \$622,248 in sales per store;¹³
- A study found that odds of daily smoking were reduced by 2% for each 1% increase in merchant compliance with youth tobacco sales laws;^{14,15}
- Studies found increased retailer compliance and reduced tobacco sales to youth following implementation and active enforcement of youth tobacco sales laws paired with penalties for violations;^{16,17}
- A review of 33 California communities with strong tobacco retailer licensing ordinances found that youth sales rates declined in 32 of these communities after the ordinances were enacted, with an average decrease of 28% in the youth sales rate;¹⁸

WHEREAS, the federal Family Smoking Prevention and Tobacco Control Act (“Tobacco Control Act”), enacted in 2009, prohibited candy- and fruit-flavored cigarettes,¹⁹ largely because these flavored products are marketed to youth and young adults,^{14,20,21} and younger smokers were more likely than older smokers to have tried these products;¹⁴

WHEREAS, neither federal nor California state laws restrict the sale of menthol cigarettes or flavored non-cigarette tobacco products, such as cigars, cigarillos, smokeless tobacco, hookah tobacco, electronic smoking devices, and the solutions used in these devices;

WHEREAS, in 2016, an estimated 82% of tobacco retailers in California sold flavored non-cigarette tobacco products, over 90% of tobacco retailers sold menthol cigarettes, and 8 out of 10 tobacco retailers near schools sold flavored non-cigarette tobacco products;²²

WHEREAS, mentholated and flavored products have been shown to be “starter” products for youth who begin using tobacco^{14,23,24} and that these products help establish tobacco habits that can lead to long-term addiction;^{14,25}

WHEREAS, between 2004 and 2014, use of non-menthol cigarettes decreased among all populations, but overall use of menthol cigarettes increased among young adults (ages 18 to 25) and adults (ages 26+);²⁶

WHEREAS, flavored tobacco has significant public health implications for youth and people of color as a result of targeted industry marketing strategies and product manipulation;^{10,14,27,28}

WHEREAS, a review of advertising, promotions, and pack prices near California high schools found that “for each 10 percentage point increase in the proportion of Black students, the proportion of menthol advertising increased by 5.9% ... the odds of a Newport [a leading brand of mentholated cigarettes] promotion were 50% higher ... and the cost of Newport was 12 cents lower.” There was no such association found for non-mentholated cigarettes;²⁹

WHEREAS, scientific reviews by the FDA and the Tobacco Products Scientific Advisory Committee (“TPSAC”) found marketing of menthol cigarettes likely increases the prevalence of smoking among the entire population, but especially among youth, African Americans,³⁰ and possibly Hispanic and Latino individuals;³¹ and that menthol cigarettes are associated with increased initiation and progression to regular cigarette smoking, increased dependence on cigarettes, and reduced success in smoking cessation, especially among African American menthol smokers;³⁰

WHEREAS, as a result of the FDA ban on all flavored cigarette products (except menthol), tobacco use by youth decreased by 6% and the likelihood of a youth becoming a cigarette smoker post flavor ban fell by 17%;³²

WHEREAS, an evaluation of New York City’s law, which prohibits the sale of all flavored tobacco, excluding menthol, found that as a result of the law, youth had 37% lower odds of ever trying flavored tobacco products and 28% lower odds of ever using any type of tobacco;³³

WHEREAS, the health effects of non-cigarette tobacco products such as cigars, cigarillos, smokeless tobacco, and shisha are substantial as demonstrated by research that shows that non-cigarette tobacco products have addictive levels of nicotine, harmful toxins, and dangerous carcinogens;³⁴⁻⁴¹

WHEREAS, unlike cigarette use that has steadily declined among youth, the prevalence of the use of non-cigarette tobacco products has remained statistically unchanged and, in some cases, increased among youth;^{14,42-46}

WHEREAS, by selling tobacco products, pharmacies reinforce positive social perceptions of smoking, convey tacit approval of tobacco use, and send a message that it is not so dangerous to smoke;^{47,48}

WHEREAS, pharmacies sell cigarettes cheaper than other stores;⁴⁹

WHEREAS, tobacco-free pharmacy sales policies decrease the availability of tobacco products by reducing tobacco retailer density by up to three times compared with communities that do not have such policies,⁵⁰ and immediately after the nationwide CVS policy change to not sell tobacco products, cigarette purchases declined and smokers who had previously purchased their cigarettes exclusively at CVS were up to twice as likely to stop buying cigarettes entirely;⁵¹

WHEREAS, strict enforcement of policies prohibiting retail sales of cigarettes to youth, sales of cigarettes via vending machines, and other means through which youth gain access to tobacco in the commercial settings can limit their opportunities to obtain these products;^{14,52}

WHEREAS, strong policy enforcement and monitoring of retailer compliance with tobacco control policies (e.g., requiring identification checks) is necessary to achieve reductions in youth tobacco sales;⁵³

WHEREAS, the National Academy of Medicine recommends imposing penalties on business owners to provide sufficient incentives to comply with the law, and business owners with an economic incentive to avoid violations are more likely to establish company-wide policies and incorporate instruction on tobacco laws into employee training;⁵⁴

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);

WHEREAS, California courts have affirmed the power of the city council to regulate business activity to discourage violations of law. See, e.g., *Cohen v. Board of Supervisors*, 40 Cal. 3d 277 (1985); *Bravo Vending v. City of Rancho Mirage*, 16 Cal. App. 4th 383 (1993); *Prime Gas, Inc. v. City of Sacramento*, 184 Cal. App. 4th 697 (2010);

WHEREAS, over 130 cities and counties in California have passed tobacco retailer licensing ordinances in an effort to stop youth from using tobacco;⁵⁵

WHEREAS, the California Healthy Kids Survey 2017-18 for Acalanes Union High School found that 50% of 11th Graders found it very easy to have access to cigarettes and e-cigarettes, that 25% of 11th graders have used an e-cigarette in the past 30 days and that 7% have used it 20 or more days in past 30 days; and

WHEREAS, the City has a substantial government interest in promoting compliance with federal, state, and local laws intended to regulate tobacco sales and use, in particular, those laws prohibiting sales of cigarettes and tobacco products to youth; and

WHEREAS, the City has a substantial interest in discouraging the sale of, and access to, tobacco products, especially e-cigarettes and flavored tobacco products, to youth; and

WHEREAS, the city council finds that a local licensing system for tobacco retailers is appropriate to ensure that retailers comply with tobacco control laws and business standards of the Lafayette in order to protect the health, safety, and welfare of our residents.

THE CITY COUNCIL OF THE CITY OF LAFAYETTE DOES HEREBY ORDAIN AS FOLLOWS:

Section 1. Amendments. Chapter 5-9 entitled “Tobacco Retailer Licensing and Restrictions on Sales of Tobacco and Flavored Tobacco Products” is hereby added to Title 5 of the Lafayette Municipal Code to read as follows:

“Chapter 5-9 –TOBACCO RETAILER LICENSING AND RESTRICTIONS ON SALES OF TOBACCO AND FLAVORED TOBACCO PRODUCTS

5-901 – Definitions.

In this chapter, unless the context otherwise requires, the following definitions shall apply:

- (a) “Arm’s length transaction” means a sale in good faith and for valuable consideration that reflects the fair market value 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.

- (b) "Characterizing flavor" means a taste or aroma, other than the taste or aroma of tobacco, imparted either prior to or during consumption of a tobacco product or any byproduct produced by the tobacco product, including, but not limited to, tastes or aromas relating to menthol, mint, wintergreen, fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb, or spice; provided, however, that a tobacco product shall not be determined to have a characterizing flavor solely because of the use of additives or the provision of ingredient information.
- (c) "Consumer" means a person who purchases a tobacco product for consumption and not for sale to another.
- (d) "Coupon" means any voucher, rebate, card, paper, note, form, statement, ticket, image, or other issue, whether in paper, digital, or other form, used for commercial purposes to obtain an article, product, service, or accommodation without charge or at a discounted price.
- (e) "Department" means the agency or department designated by the city manager to enforce or administer the provisions of this chapter.
- (f) "Flavored tobacco product" means any tobacco product that imparts a characterizing flavor.
- (g) "Full retail price" means the price listed for a tobacco product on its packaging or on any related shelving, advertising, or display where the tobacco product is sold or offered for sale, plus all applicable taxes and fees if such taxes and fees are not included in the listed price.
- (h) "Labeling" means written, printed, or graphic matter upon any tobacco product or any of its packaging, or accompanying such tobacco product.
- (i) "Manager" means a person with a managerial interest in a business. 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.

- (j) "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.
- (k) "Package" or "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.
- (l) "Person" means any natural person, partnership, cooperative association, corporation, personal representative, receiver, trustee, assignee, or any other legal entity.
- (m) "Proprietor" means a person with an ownership 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.
- (n) "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.
- (o) "Self-service display" means the open display or storage of 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.
- (p) "Tobacco paraphernalia" means any item designed or marketed for the consumption, use, or preparation of tobacco products.
- (q) "Tobacco product" means:
 - (1) 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

- (2) any electronic device that delivers nicotine or other substances to the person inhaling from the device, including, but not limited to, an electronic cigarette, electronic cigar, electronic pipe, or electronic hookah.
 - (3) Notwithstanding any provision of subsections (1) and (2) to the contrary, “tobacco product” includes any component, part, or accessory intended or reasonably expected to be used with a tobacco product, whether or not sold separately. “Tobacco Product” does not include drugs, devices, or combination products authorized for sale by the United States Food and Drug Administration, as those terms are defined in the Federal Food, Drug and Cosmetic Act.
- (r) “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 products or tobacco paraphernalia sold, offered for sale, exchanged, or offered for exchange.

5-902 – General Requirements and Prohibitions.

- (a) TOBACCO RETAILER’S LICENSE REQUIRED. It shall be 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 tobacco retailing is to occur. Tobacco retailing without a valid tobacco retailer’s license is a public 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 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 tobacco products, tobacco paraphernalia, or tobacco retailing.
- (c) DISPLAY OF LICENSE. Each tobacco retailer 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 a tobacco product or tobacco paraphernalia to another person who is 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 for sale of tobacco products as established by state law.

- (e) SELF-SERVICE DISPLAYS PROHIBITED. Tobacco retailing by means of a self-service display is prohibited.
- (f) PACKAGING AND LABELING. No tobacco retailer shall sell any tobacco product to any consumer unless such product: (1) is sold in the original manufacturer's packaging intended for sale to consumers; and (2) conforms to all applicable federal labeling requirements.
- (g) ON-SITE SALES. All sales of tobacco products and tobacco paraphernalia to consumers shall be conducted in-person at the licensed location. It shall be a violation of this chapter for any tobacco retailer or any of the tobacco retailer's agents or employees to deliver tobacco products or tobacco paraphernalia or to knowingly or recklessly sell tobacco products or tobacco paraphernalia to any person that intends to deliver the tobacco product or tobacco paraphernalia to a consumer in the city. For purposes of this subsection, "deliver" means the commercial transfer of tobacco products or tobacco paraphernalia to a consumer at a location not licensed pursuant to this chapter.
- (h) FALSE AND MISLEADING ADVERTISING PROHIBITED. A tobacco retailer without a valid tobacco retailer license or a proprietor without a valid tobacco retailer license, including, for example, 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 5-913; and
 - (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.
- (i) FREE SAMPLES PROHIBITED. No tobacco retailer shall distribute any free tobacco product or tobacco paraphernalia to a consumer.

- (j) DISPLAY OF PRICE. The price of each tobacco product offered for sale shall be clearly and conspicuously displayed to indicate the price of the product.
- (k) PROHIBITION OF TOBACCO COUPONS AND DISCOUNTS. No tobacco retailer shall:
 - (1) honor or redeem, or offer to honor or redeem, a coupon to allow a consumer to purchase a tobacco product for less than the full retail price;
 - (2) sell any tobacco product to a consumer through a multiple-package discount or otherwise provide any such product to a consumer for less than the full retail price in consideration for the purchase of any tobacco product or any other item;
or
 - (3) provide any free or discounted item to a consumer in consideration for the purchase of any tobacco product.

5-903 – Sale of Flavored Tobacco Products Prohibited.

- (a) 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.
- (b) There shall be a rebuttable presumption that a tobacco retailer in possession of four or more flavored tobacco products, including, but not limited to, individual flavored tobacco products, packages of flavored tobacco products, or any combination thereof, possesses such flavored tobacco products with intent to sell or offer for sale.
- (c) There shall be a rebuttable presumption that a tobacco product is a flavored tobacco product if a tobacco retailer, manufacturer, or any employee or agent of a tobacco retailer or manufacturer has:
 - (1) made a public statement or claim that the tobacco product imparts a characterizing flavor;
 - (2) used text and/or images on the tobacco product’s labeling or packaging to explicitly or implicitly indicate that the tobacco product imparts a characterizing flavor; or

- (3) taken action directed to consumers that would be reasonably expected to cause consumers to believe the tobacco product imparts a characterizing flavor.
- (d) A tobacco retailer lawfully operating as of the date this chapter is adopted may apply for an exemption from subsection (a) for an additional period of up to one hundred eighty (180) days from the Compliance Period (as defined by Section 5-917), provided that all of the following requirements are met:
 - (1) Within thirty (30) days of the effective date of this chapter, the tobacco retailer submits to the city manager, or his or her designee, written notice that it seeks temporary exemption from subsection (a) and documentation that demonstrates: (i) the tobacco retailer was lawfully operating as of the date this chapter was adopted; (ii) sixty percent (60%) or more of gross sales receipts are derived from flavored tobacco products, tobacco paraphernalia, or both; and (iii) the amortization period afforded by the ninety (90) day Compliance Period provided under Section 5-917 is insufficient to allow the tobacco retailer to sell, return to the distributor or wholesaler, or otherwise obtain the benefit of, property which has no lawful use by virtue of the ordinance adopting this section. The submission shall include all information and documentation the city manager or his or her designee may request to determine the tobacco retailer's qualifications for this exemption.
 - (2) The city manager or his or her designee determines in writing that the tobacco retailer meets the qualifications set forth in subsection (d)(1).
 - (3) The decision of the city manager or his or her designee shall be final as to the city and subject to judicial review pursuant to Code of Civil Procedure Section 1094.5.

5-904 – Limits on Eligibility for A Tobacco Retailer License.

- (a) **MOBILE VENDING.** No license may issue to authorize tobacco retailing at other than a fixed location, including, but not limited to, tobacco retailing by persons on foot or from vehicles.
- (b) **PHARMACIES.** No license may issue, and no existing license may be renewed, to authorize tobacco retailing in a pharmacy. For the purposes of this chapter, "pharmacy" means any retail establishment in which the profession of pharmacy is practiced by a pharmacist licensed by the State of California in accordance with the

Business and Professions Code and where prescription pharmaceuticals are offered for sale, and includes a retail establishment that sells other retail goods in addition to prescription pharmaceuticals as well as a retail establishment in which the pharmacy located within a larger, connected retail establishment.

(c) POPULATION AND DENSITY. The issuing of tobacco retailer licenses is limited as follows:

- (1) The total number of tobacco retailer licenses within the city shall be limited to the lesser of eleven (11), or one for each 2,500, or fraction thereof, inhabitants of the city. An existing tobacco retailer operating lawfully within the city on the date this chapter is adopted shall be given priority in licensing if such tobacco retailer submits proof within the Compliance Period (as defined by Section 5-917) demonstrating that it has been operating lawfully as of the date this chapter is adopted, is eligible for a license and will comply with this chapter, and is in possession of all required state and local licenses or permits.
 - (2) For the purposes of this subsection, the total population of the city shall be determined by the most current published total available from the U.S. Census Bureau or the California State Department of Finance, whichever has been more recently updated, as of the date the license application is filed.
 - (3) No new license may be issued to authorize tobacco retailing if the number of tobacco retailer licenses already issued equals or exceeds the total number authorized pursuant to subsection (c)(1).
- (d) If the actual number of existing tobacco retailers operating lawfully within the city on the date this chapter is adopted exceeds the limit in subsection (c)(1), then a tobacco retailer operating lawfully within the city on the date this chapter is adopted that is eligible for a tobacco retailer license for the location for which a license is sought may receive or renew a license for that location. For so long as the number of licensed retailers approved pursuant to this section exceeds the limit specified in subsection (c)(1), then the following conditions apply to all licensed tobacco retailers:
- (1) Failure to timely submit the license application or a license renewal shall cause the retailer to be ineligible for a license or license renewal.

- (2) If the tobacco retailer closes the business, or otherwise voluntarily suspends tobacco retailing, for more than sixty (60) consecutive days, then the tobacco retailer shall be deemed to have voluntarily surrendered the license. Surrendered licenses may not be renewed.
- (3) Without limiting Section 5-908, any sale of the tobacco retailer's business in an arm's length transaction shall be deemed a voluntary surrender of the license. Surrendered licenses may not be renewed.

5-905 – Application Procedure.

- (a) The 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.

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 5-912(c) 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 subparagraph (2) above.

- (4) Proof that the location for which a tobacco retailer's license is sought has been issued a valid state license for the sale of tobacco products, if the tobacco retailer sells products that require such license.
 - (5) Whether or not any proprietor or any agent of the proprietor has admitted violating, or has been found to have violated, this chapter or any other local, state, or federal law applicable to tobacco products, tobacco paraphernalia, or tobacco retailing, and, if so, the dates and locations of all such violations within the previous five years.
 - (6) 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 (10) business days of a change.

5-906 – 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 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 inaccurate or false. Intentionally supplying inaccurate or false information shall be a violation of this chapter;
- (b) The application seeks authorization for tobacco retailing for a proprietor to whom this chapter prohibits a license to be issued; and/or

- (c) The application seeks authorization for tobacco retailing that is prohibited pursuant to this chapter, that is unlawful pursuant to this code, or that is unlawful pursuant to any other law.

5-907 – License Term, Renewal and Expiration.

- (a) TERM. The term of a tobacco retailer license is one year.
- (b) RENEWAL OF LICENSE. Each tobacco retailer shall apply for the renewal of their tobacco retailer’s license by filing out the license renewal application form and submit the license fee no later than thirty (30) days prior to expiration of the term. Applications for renewal made less than 30 days before the expiration date shall not stay the expiration date of the license.
- (c) 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), the proprietor must:
 - a. submit the license fee and application renewal form; and
 - b. 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 period of time required by Section 5-912 or Section 5-913(d) of this chapter before seeking renewal of the license (if applicable).

5-908 – Licenses Nontransferable.

A tobacco retailer’s license may not be transferred from one person to another or from one location to another.

5-909 – 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 permit. 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:

- (a) any provision of this code; and/or
- (b) any condition or limitation on smoking in an enclosed place of employment pursuant to California Labor Code Section 6404.5. 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.

5-910 – 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. The fee shall be calculated so as to recover the cost of administration and enforcement of this chapter, including, for example, issuing a license, administering the license program, retailer education, retailer inspection and compliance checks, documentation of violations, and prosecution of violators, but shall not exceed the cost of the regulatory program authorized by this chapter. 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.

5-911 – Compliance Monitoring.

- (a) Compliance with this chapter shall be monitored by the department. In addition, any peace officer may enforce the provisions of California Penal Code and the STAKE Act (California Business and Professions Code, §22950 et seq.) related to tobacco control as provided by state law. The city may designate additional persons to monitor compliance with this chapter.
- (b) The department shall inspect each tobacco retailer at least one time per twelve (12) month period. A tobacco retailer found to have violated any provision of this chapter may be re-inspected in the sole discretion of the department within three (3) months of the violation. Should any such re-inspection be performed, the cost of any re-inspection shall be billed to the proprietor, and the proprietor shall be obligated to pay, a re-inspection fee in an amount established by resolution of the city council. Nothing in

this paragraph shall create an obligation on the part of the city or the department to conduct inspections or re-inspections, nor shall this section create a right of action in any licensee or other person against the city or its agents.

- (c) The city council does not intend and nothing in this chapter shall be interpreted to penalize the purchase, use, possession, or attempted purchase, use, or possession of tobacco products or tobacco paraphernalia by persons under twenty-one years of age; provided, however, that persons under twenty-one years of age remain subject to generally applicable laws regulating such conduct without respect to the person's age.

5-912 – Suspension or Revocation of License.

- (a) The department may suspend or revoke a tobacco retailer's license if any of the conditions identified in this Section exist. On determining that grounds for license suspension or revocation exist, the department shall serve the licensee with written notice of the proposed suspension or revocation. The notice shall state the ground or grounds upon which the decision is based, the effective date of the notice, the right of the licensee to appeal the decision to the City Manager. The notice is effective fifteen (15) calendar days from the date of service of the notice. If an appeal is timely and properly filed, then the effective date of the notice is stayed.
- (b) A licensee is subject to suspension or revocation of the tobacco retailer's license for any of the following causes arising from the acts or omissions of the licensee, or its employees, agents, managers or proprietors:
 - (1) The licensee has made a false, misleading or fraudulent statement or omission of facts in the application for a license, or in any report or record required to be filed with the City.
 - (2) A violation of any provision of this chapter, or any other provision of the Municipal Code.
 - (3) A violation of any local, state or federal law applicable to tobacco products, tobacco paraphernalia, or tobacco retailing.
- (c) Upon finding that one or more of the conditions in subsection (b) exist then a tobacco retailer's license may be suspended or revoked as follows:

- (1) Upon a finding by the department of a first violation of this chapter at a location within any five-year (5) period, the license shall be suspended for thirty (30) days.
 - (2) Upon a finding by the department of a second violation of this chapter at a location within any five-year (5) period, the license shall be suspended for ninety (90) days.
 - (3) Upon a finding by the department of a third violation of this chapter at a location within any five-year (5) period, the license shall be suspended for the remainder of the license term, up to one (1) year. No license renewal may be approved for a period of one (1) year from the date of suspension.
 - (4) Upon a finding by the department of four or more violations of this chapter at a location within any five-year (5) period, the license shall be revoked. Upon revocation, no new license may be issued to the proprietor for a period of five years from the date of revocation.
- (d) **REVOCAION OF LICENSE WRONGLY ISSUED.** A tobacco retailer's license shall be revoked if the department finds that one or more of the bases for denial of a license under Section 5-906 existed at the time application was made or at any time before the license issued.
- (e) Prior violations at a location shall continue to be counted against a location for purposes of subsection (c), and for purposes of license ineligibility periods pursuant to Section 5-913, unless:
- (1) the location has been transferred to new proprietor(s) in an arm's length transaction; and
 - (2) the new proprietor(s) provide the city with clear and convincing evidence that the new proprietor(s) have acquired or are acquiring the location in an arm's length transaction.

5-913 – Tobacco Retailing Without A Valid License.

- (a) **IMPOSITION OF FINE—AMOUNTS.** If the department finds a person or retailer is selling or offering tobacco products for sale without a valid tobacco retailer's license (or with

an expired or suspended license), that person or retailer is subject to an administrative fine, as permitted under Government Code Section 53069.4.

The fine amount is:

- (1) Up to a maximum \$100.00 for a first violation;
- (2) Up to a maximum \$200.00 for a second violation within one year;
- (3) Up to a maximum \$500.00 for the third and subsequent violations within one year.

Each day that a tobacco product is offered for sale without a license by a person or retailer required to have a license is a separate violation.

- (b) FINE PROCEDURES. Notice of the fine shall be served on the person or retailer who is the owner of the establishment. The notice shall contain a description of the violation, the amount of the fine and the date by which the fine is due, as well notice of the right to request an appeal hearing before the city manager in accordance with Section 5-914 contesting the imposition of the fine or requesting a hardship waiver. The hearing must be requested within fifteen days of the date of the notice of the fine.
- (c) FAILURE TO PAY FINE. An outstanding fine must be paid before the city may issue the tobacco retailer's license.
- (d) In addition to any fines and any other penalty authorized by law, if a court of competent jurisdiction determines, or the department finds 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 to be issued, a tobacco retailer's license as follows:
 - (1) After a first violation of this section at a location within any five-year (5) period, no new license may issue for the person or the location (unless ownership of the business at the location has been transferred in an arm's length transaction), until thirty (30) days have passed from the date of the violation.
 - (2) After a second violation of this section at a location within any five-year (5) period, no new license may issue for the person or the location (unless

ownership of the business at the location has been transferred in an arm's length transaction), until ninety (90) days have passed from the date of the second violation.

- (3) After a third violation of this section at a location within any five-year (5) period, no new license may issue for the person or the location (unless ownership of the business at the location has been transferred in an arm's length transaction), until one (1) year has passed from the date of the third violation.
- (4) After of a fourth or subsequent violation of this section at a location within any five-year (5) period, no new license may issue for the person or the location (unless ownership of the business at the location has been transferred in an arm's length transaction), until five (5) years have passed from the date of the fourth or subsequent violation.

5-914 – Appeals

- (a) A licensee may appeal a decision of the department within fifteen (15) calendar days of the date of service of the decision by filing a written appeal with the City Clerk. The notice of appeal shall be in writing and signed by the person making the appeal, or his or her legal representative, and shall contain the following:
 - (1) The name, address, telephone number of the appellant.
 - (2) A true and correct copy of the notice of the decision issued by the department for which the appellant is appealing.
 - (3) A specific statement of the reasons and grounds for making the appeal in sufficient detail to enable the City Manager to understand the nature of the controversy, the basis of the appeal, and the relief requested.
 - (4) All documents or other evidence pertinent to the appeal that the appellant requests the City Manager to consider at the hearing.
- (b) At the time of filing the appellant shall pay the designated appeal fee, established by resolution of the City Council from time to time.

- (c) Failure of the City Clerk to receive a timely and proper appeal, or the requisite fee, constitutes a waiver of the right to appeal the decision of the department and a failure to exhaust all administrative remedies. In this event, the department's decision is final and binding.
- (d) In the event a notice of appeal is timely filed, the decision being appealed shall not be effective until a final order has been rendered and issued by the City Manager. If a notice of appeal is not timely filed, in the event of a decision of nonrenewal, the permit expires at the conclusion of the term of the license and in the event of a suspension or revocation, the suspension of revocation is effective upon the expiration of the period for filing a written notice of appeal.
- (e) Upon receipt of a timely notice of appeal, the City Clerk shall set the matter for a hearing before the City Manager, who shall hear the matter de novo. The department bears the burden of proof to establish the grounds for denial, nonrenewal, suspension or revocation by a preponderance of the evidence. The issuance of the department's decision constitutes prima facie evidence of grounds for the denial, nonrenewal, suspension, or revocation.
- (f) The appeal shall be held within a reasonable time after the filing of the notice of appeal, but in no event later than ninety (90) calendar days from the date of such filing. The City Clerk shall notify the appellant in writing of the date, time and location of the hearing at least ten (10) calendar days prior to the date of the hearing.
- (g) At the hearing the appellant may present witnesses and evidence relevant to the decision appealed. Appeal hearings are informal, and the formal rules of evidence and discovery applicable in a court of law shall not apply to the hearing. However, rules of privilege shall be applicable to the extent they are permitted by law, and irrelevant, collateral and repetitious evidence may be excluded.
- (h) After the conclusion of the appeal hearing, the City Manager shall determine if any ground exists for the denial, nonrenewal, suspension, or revocation of the tobacco retailer's license. If the City Manager determines that no grounds supporting the department's decision exist, the department's notice of decision shall be deemed cancelled. If the City Manager determines that grounds supporting the department's decision exist, the City Manager shall issue a written final order upholding the department's decision. The decision of the City Manager shall be final. The decision shall contain the following statement: "The decision of the City Manager is final and

binding. Judicial review of this decision is subject to the time limits set forth in California Code of Civil Procedure section 1094.6.” The final order shall be served by first-class mail on the appellant.

5-915 - Service

All notices or decisions required to be served by this chapter will be served by either:

(a) Certified mail. Certified mail will be addressed to the tobacco retailer at the address shown on the license application. Service is deemed complete upon the deposit of the notice or decision, postage pre-paid, in the United States mail. Simultaneously, the same notice or decision may be sent by regular mail. If a notice or decision sent by certified mail is returned unsigned, then service is deemed effective pursuant to regular mail on the date mailed.

(b) Personal service. Personal service is deemed complete on the date the notice or decision is personally served.

The failure of a person to receive a properly addressed service shall not affect the validity of the proceedings.

5-916 – Additional Remedies.

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

(b) For the purposes of this chapter:

(1) Each day on which a tobacco product or tobacco paraphernalia is offered for sale in violation of this chapter shall constitute a separate violation of this chapter; and

(2) Each individual retail tobacco product and each individual retail item of tobacco paraphernalia that is distributed, sold, or offered for sale in violation of this chapter shall constitute a separate violation of this chapter.

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

- (c) Whenever evidence of a violation of this chapter is obtained in any part through the participation of a person under the age of twenty-one (21) years old, such 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.
- (d) Violations of this chapter, in the discretion of the City Attorney, may be prosecuted as infractions or misdemeanors when the interests of justice so require.
- (e) Violations of this chapter are hereby declared to be public nuisances.
- (f) In addition to other remedies provided by this chapter, by this code, or by other law, any violation of this chapter may be remedied by, without limitation, administrative citation and penalties or a civil action brought by the city attorney, including, for example, administrative or judicial nuisance abatement proceedings, civil code enforcement proceedings, and suits for injunctive relief.

5-917 – Compliance Period. A Tobacco Retailer that is open for business and operating in the city on the date the ordinance enacting this chapter is adopted shall have ninety (90) days from the effective date of the ordinance comply with this Chapter 5-9 (the “Compliance Period”).

5-918 – Rules and Regulations.

The city manager shall have the power and authority to promulgate rules, regulations, and requirements consistent with the provisions of this chapter and other law.”

Section 2. Amendment. Section 5-303 (“Definitions”) of the Lafayette Municipal Code is hereby amended and restated to read in its entirety as shown in underline/strike-through as follows:

5-303 - Definitions.

In this chapter unless context otherwise requires:

- (a) "Area open to the public" means any area available to and customarily used by the general public.

- (b) "Bar" means an area which is devoted to the serving of alcoholic beverages and in which the service of food is only incidental to the consumption of such beverages (Department of Alcoholic Beverage Control Type 61, 42 or 48 licenses). That area of a restaurant which is devoted to the serving of alcoholic beverages and in which the service of food is only incidental to the consumption of such beverages is also considered a bar. An area in which food service is only incidental may not exceed 40 percent of a restaurant's total seating capacity.
- (c) "Designated smoking area" means an area meeting the requirements of Section 5-309 of this chapter where smoking is permitted, as designated by the landlord.
- (d) ~~Reserved. "Distribute" means to give, sell, deliver, dispense, issue, or cause or hire any person to give, sell, deliver, dispense, issue or offer to give, sell, deliver, dispense or issue.~~
- (e) "Employee" means a person who is employed by an employer in consideration for direct or indirect monetary wages or profit.
- (f) "Employer" means and includes a person, municipal corporation or public entity, who employs the services of one or more persons to conduct business within the establishment.
- (g) "Enclosed area" means an area closed in by a roof and walls with appropriate openings for ingress and egress.
- (h) "Existing" means a qualifying use lawfully established and existing as of the effective date of this section and continuing at the same location without interruption.
- (i) "General public" means shoppers, customers, patrons, patients, students, clients and other similar invitees of a commercial enterprise or nonprofit entity.
- (j) "Landlord" includes the owner, manager or person with legal control of a commercial building or multifamily residence.
- (k) "Multifamily residence" means residential property containing three or more residential units with one or more shared walls, floors or ceilings, including for example, rental complexes, residential cooperatives, condominium complexes, senior residences, assisting living complexes and skilled nursing facilities.

- (l) "Multifamily residence common area" means an indoor or outdoor common area of a multifamily residence accessible to and usable by more than one residence, including but not limited to a hall, lobby, laundry room, outdoor eating area, play area or swimming pool. Smoking is permitted in designated smoking areas that comply with the requirements of Section 5-309 of this chapter.

- (m) "Outdoor dining area" means any unenclosed area available to or customarily used by the general public, which is designed, established or regularly used for consuming food or drink.

- (n) "Place of employment" means any enclosed area under the control of a public or private employer which employees normally frequent during the course of employment, including but not limited to, work areas, employee lounges, conference rooms and employee cafeterias, except for those places specified in Section 5-308. A private residence is not a place of employment unless it is used as a child care or health care facility.

- (o) "Public events" means indoor and outdoor occurrences where people are seated or congregate in close proximity including, but not limited to, parades, fairs, farmers markets, concerts and ceremonies.

- (p) "Smoking" means the carrying or holding of a lighted pipe, cigar or cigarette of any kind, or any other lighted smoking equipment or the lighting or emitting or exhaling the smoke of a pipe, cigar or cigarette of any kind. Smoking does not include the use of an electronic cigarette or similar unlighted device.

- (q) "Sports arena" means sports pavilion, gymnasium, health spa, boxing arena, swimming pool, roller and ice rink, bowling center, hall, and other similar place where members of the public assemble to engage in physical exercise, participate in athletic competition, or witness sports events.

- (r) "Unenclosed area" means any area that is not an enclosed area.

- (s) "Unit" means a unit in a multifamily residence that is issued a certificate of occupancy on or after 60 days after the ordinance from which this chapter is derived takes effect and a unit in a multifamily residence that is leased or rented to a new tenant on or after 60 days after the ordinance from which this chapter is derived takes effect. Unit includes

all interior and exterior areas under the possession or control of the tenant, including any balconies, patios, porches or fenced outdoor space.

Section 3. Repeal. Section 5-311 (“Vending Machines”) of the Lafayette Municipal Code is hereby repealed and reserved. The deleted text is shown in strikeout below:

5-311 - Reserved.

Section 4. Repeal. Section 5-312 (“Distribution of free samples and coupons”) of the Lafayette Municipal Code is hereby repealed and reserved. The deleted text is shown in strikeout below:

5-312 - Reserved.

Section 5. Repeal. Section 5-313 (“Out of package sales”) of the Lafayette Municipal Code is hereby repealed and reserved. The deleted text is shown in strikeout below:

5-313 -Reserved.

Section 6. Repeal. Chapter 5-5 entitled “Restrictions on the Advertising, Access and Promotion of Tobacco Products to Minors,” of the Lafayette Municipal Code is hereby repealed in its entirety and reserved. The deleted text is shown in strikeout below:

Section 7. Construction. It is the intent of the City Council to supplement applicable state and federal law and not to duplicate or contradict such law and this ordinance shall be construed consistently with that intention. Nothing in this ordinance shall be interpreted to regulate any conduct where the regulation of such conduct has been preempted by the United States or the State of California.

Section 8. Effective Date. This ordinance becomes effective thirty (30) days after its adoption.

Section 9. CEQA. The city council finds that adoption of this ordinance is not a “project,” as defined in the California Environmental Quality Act because it does not have a potential for resulting in either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment and concerns general business licensing of tobacco retailers where such retail uses are already permitted.

Section 10. Severability. If any section, subsection, subdivision, paragraph, sentence, clause, or phrase of this Ordinance, or its application to any person or circumstance, is for any reason held to be invalid or unenforceable, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining sections, subsections, subdivisions, paragraphs, sentences, clauses, or phrases of this Ordinance, or its application to any other person or circumstance. The City Council hereby declares that it would have adopted each section, subsection, subdivision, paragraph, sentence, clause, or phrase hereof, irrespective of the fact that any one or more other sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases hereof be declared invalid or unenforceable.

Section 11. Publication. The City Clerk shall either (a) have this ordinance published in a newspaper of general circulation once within fifteen (15) days after its adoption, or (b) have a summary of this ordinance published twice in a newspaper of general circulation, once five (5) days before its adoption and again within fifteen (15) days after adoption, including the names of the council members who voted for and against its passage.

The foregoing Ordinance was introduced at a meeting of the City Council of the City of Lafayette held on May 17, 2019 and adopted and ordered published at a meeting of the City Council held on May 28, 2019 by the following vote:

AYES: **Anderson, Candell, Bliss, Burks and Gerringer**
NOES: **None**
ABSTAIN: **None**
ABSENT: **None**

ATTEST:



Joanne Robbins, City Clerk

APPROVED:



Mike Anderson, Mayor

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