

Attachment No. PC 2

Amendments to Title 5 (Business Licenses and Regulations), proposed redlined code changes

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Chapter 5.55 Tobacco Retailer Businesses

5.55.005 Findings and Purpose.

The City Council finds and declares as follows:

- A. It is the purpose and intent of this Chapter to encourage responsible tobacco retailing and to discourage violations of tobacco-related laws, especially those that prohibit or discourage the sale or distribution of tobacco products to minors, but not to expand or reduce the degree to which the acts regulated by federal, or state law are criminally proscribed or to alter the penalty provided for violations.
- B. The restrictions and requirements contained in this Chapter reduce the burdens on the Police Department and permit the deployment of the police personnel such that more serious crimes may be prevented.

5.55.010 Definitions.

“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 under any compulsion to participate in the transaction. A sale between relatives, related companies or partners, or a sale for the primary purpose of avoiding the effect of violations of this Chapter that occurred at the location, is presumed not to be an arm’s length transaction.

“Cigar Lounge” shall have the same meaning as defined in Chapter 20.70.020 (Definitions of Specialized Terms and Phrases.).

“Drug paraphernalia” means any instrument, device, or material used, designed for use, or intended for use in ingesting, inhaling, or preparing cannabis, hashish, hashish oil, cocaine, or other controlled substances, as defined in California Health and Safety Code Sections 11014.5, 11364.5, and 11364.7, as those sections may be amended from time to time.

“E-liquid” means any substance that is intended to be consumed in aerosolized or vaporized form using an electronic smoking device, regardless of the nicotine content or other substance.

“Electronic smoking device” means an electronic and/or battery-operated device, the use of which may resemble smoking, which can be used to deliver an inhaled dose of nicotine or other substance in aerosolized or vaporized form to a person, as well as any component, part, or accessory for the device that is used during its preparation, consumption, or operation. Includes, but is not limited to, electronic cigarettes, electronic cigars, electronic cigarillos, electronic pipes, vape pen, electronic hookahs, cartridges, cartomizers, e-liquid, smoke juice, tanks, vaporizers, tips, atomizers, device batteries, device charges, or any component, part, or accessory of such a device as contained in state law. Does not include any product specifically approved by the United States Food and Drug Administration for sale as a tobacco cessation product or for other therapeutic purposes.

“Flavored tobacco product” shall have the same meaning as defined in Chapter 6.30.010 (Definitions).

“Grocery store” shall have the same meaning as defined in Chapter 20.70.020 (Definitions of Specialized Terms and Phrases.).

“Nitrous oxide” shall have the same meaning as defined in Chapter 6.30.010 (Definitions).

“Permittee” means any proprietor who holds a valid tobacco retailer’s permit issued pursuant to this Chapter.

“Premium cigar” shall have the same meaning as defined in Chapter 6.30.010 (Definitions).

“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 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 has, or shares, control over the day-to-day operations of a business.

“Smoking” means the act of inhaling, exhaling, burning, or carrying any lighted or heated device or substance, including tobacco, as defined in California Business and Professions Code Section 22950.5(c), as that section may be amended from time to time.

“Smoking lounge (land use)” shall have the same meaning as defined in Chapter 20.70.020 (Definitions of Specialized Terms and Phrases.).

“Tobacco paraphernalia” means cigarette papers or wrappers, blunt wraps as defined in California Penal Code Section 308, pipes, holders of smoking materials of all types, cigarette rolling machines, or any other instruments or items designed or marketed for the consumption, preparation, storing, use, smoking or ingestion of tobacco products, as those sections may be amended from time to time.

“Tobacco product” shall have the same meaning as defined in Chapter 6.30.010 (Definitions).

“Tobacco product flavor enhancer” has the meaning set forth in Health and Safety Code Section 104559.5(a)(18), as may be amended from time to time.

“Tobacco retailer business” shall have the same meaning as defined in Chapter 20.70.020 (Definitions of Specialized Terms and Phrases.).

“Tobacco retailer’s permit” means the certificate issued by the Chief of Police, which allows a facility to sell tobacco, tobacco products, and tobacco paraphernalia. The issuance of this permit does not indicate or imply that the facility is in compliance with all state and city regulations related to its operation; and may be suspended or revoked by the department.

5.55.15 Requirements of Operation.

- A. Tobacco Retailer’s Permit Requirement. Except as provided in subsection (E) of this section, no person shall engage in tobacco retailing within the City without first obtaining and maintaining a valid tobacco retailer’s permit for each specific location.
- B. Zoning and Land Use Restrictions.
 - 1. Permits shall not be issued for locations that violate Title 20 (Planning and Zoning) or Title 21 (Local Coastal Program Implementation Plan) of this Code and shall only be located in zoning districts where retails sales are a permitted use.
- C. Prohibited Business Types.
 - 1. Tobacco Retailer’s Permits shall not be issued or renewed for any premises licensed by the state to serve alcohol for on-site consumption, or restaurants and businesses offering food for on-site consumption.

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- D. Location Requirements. Tobacco Retailer Businesses shall comply with the following minimum separation requirements:
1. One thousand (1,000) feet from another permitted tobacco retailer business;
 2. Five hundred (500) feet from a public or private school, park or playground, civic center, cultural site, or religious institution; or
 3. Five hundred (500) feet from the boundary of any residential zoning district or residential use.
- E. Nonconforming Use Exception. A tobacco retailer business lawfully operating as of the effective date of this Chapter may continue operating under the following conditions:
1. The tobacco retailer's permit is obtained and renewed without lapse or permanent revocation.
 2. A tobacco retailer's permit application is filed within 60 days of the effective date of this Chapter.
 3. The tobacco retail business shall not be closed or suspended for more than 60 consecutive days.
 4. No substantial change to the premises or operations occurs, including:
 - a. A transfer in ownership unless it is a bona fide arm's length transaction;
 - b. A change made primarily to evade enforcement or penalties.
 5. The tobacco retailer business has no recorded violations and remains in full compliance with all applicable laws.
 6. If the City finds the operation has substantially changed, the tobacco retailer business bears the burden of proving otherwise by a preponderance of the evidence.
 7. Expiration of Legal Nonconforming Use. Permits issued under this section shall be treated as legal nonconforming uses under Chapter 20.38.050 (Nonconforming Uses and Structures) of the NBMC and subject to its provisions and limitations.
- F. Permit is Conditional. A tobacco retailer permit grants only a limited and conditional privilege to operate at the location listed on the permit. It does not confer any vested right and does not supersede any other applicable law, including:
1. The City's zoning, building, or business license requirements;
 2. Labor Code section 6404.5 regarding smoking in enclosed workplaces.

5.55.020 Application for Tobacco Retailer Permit.

- A. Application Procedure.

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1. Applications must be submitted on forms provided by the City and include a non-refundable annual fee as set by City Council resolution.
 2. Each application shall include, at minimum, the following:
 - a. Full legal name, date of birth, government-issued identification number, mailing address, phone number, and email for each proprietor;
 - b. Business name, address, phone number, and hours of operation;
 - c. Disclosure of any prior permit suspensions or revocations under this Chapter, including dates and reasons;
 - d. Proof of a valid state tobacco retailer license from the California Department of Tax and Fee Administration;
 - e. Any other information deemed necessary by the Chief of Police for the administration or enforcement purposes;
 - f. A signed certification by each proprietor under penalty of perjury affirming the accuracy of the information provided and compliance with this Chapter.
- B. Change of Information. Permittee shall notify the City in writing of any changes to submitted application information within 10 calendar days. A fee as set by City Council resolution may be imposed for processing such changes.
- C. Non-Transferability. Tobacco retailer permits are non-transferable between persons, proprietors, or locations. Any attempted transfer shall be null and void. A new permit application is required for any change in ownership or location, subject to all applicable conditions.
- D. Effect of Prior Violations at Location. Permit ineligibility due to prior violations at a location shall continue to apply unless:
1. The business has been transferred to a new proprietor or proprietors in a bona fide arm's length transaction; and
 2. The new proprietor submits clear and convincing evidence of such transfer to the City's satisfaction.

5.55.025 Tobacco Retailer Permit Issuance and Renewal.

- A. Tobacco Retailer's Permit Review and Issuance. The Chief of Police reviews each completed Tobacco Retailer's Permit application and may conduct an investigation to determine compliance with this Chapter and applicable laws. A tobacco retailer's permit may be issued or renewed unless the Chief of Police determines that one or more of the following conditions exist:
1. The application is materially incomplete or contains inaccurate, false, fraudulent, or misleading information;

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2. The applicant seeks authorization for tobacco retailing that is prohibited, unlawful or violates this Chapter or other applicable City, County, state, or federal law or regulation;
 3. The applicant has not resolved outstanding fines, penalties, fees, or taxes owed to the City in connection with tobacco retailing activities or other applicable laws;
 4. The location is currently subject to an active suspension or revocation proceeding, unless:
 - a. The applicant has acquired the business or premises through a good-faith, arm's length transaction and provides satisfactory documentation; or
 - b. At least five years have passed since the date of revocation.

B. Tobacco Retailer Permit Term and Renewal.

1. A permit is valid for one year from the date of issuance and must be renewed annually to continue operation as a tobacco retailer business.
2. To maintain continuity, renewal applications should be submitted at least 30 days before expiration.
3. Any permit not renewed by its expiration date automatically expires at midnight, with no grace period or temporary permit issued thereafter. Once a permit expires, all tobacco retailing must cease. A new application is required, subject to all applicable conditions.
4. If a permit has expired during a suspension or revocation period, the permittee may reapply after the enforcement action has concluded, subject to all applicable conditions of this Chapter.

5.55.030 Prohibitions and Requirements.

- A. Compliance with Laws. Tobacco retailer businesses shall operate in accordance with all applicable local, state, and federal laws, including, but not limited to, zoning, building, fire, public health, safety, general welfare and tobacco control regulations.
- B. Fixed Location Required. Tobacco retailing must occur from a fixed, permanent location. Retailing from vehicles, temporary structures, or mobile operations (e.g., carts, pop-up booths) is prohibited.
- C. Prohibited Products and Activities. The following items shall not be sold, distributed, displayed, furnished, administered, exchanged, given away, or possessed with the intent to sell or offered for sale by any tobacco retailer business:
 1. Drug paraphernalia;
 2. Nitrous oxide or any device used to dispense it as defined by state law and the NBMC;
 3. Cannabis, cannabis products, cannabis accessories, or edible cannabis products as defined in state or federal law;

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4. Controlled substances, including marijuana where applicable, as governed by California Health and Safety Code Sections 11351, 11352, 11359, 11360, 11366, 11378, and 11379 as may be amended from time to time.
 5. Flavored tobacco products and tobacco product flavor enhancer, as prohibited under state or federal law;
 6. Electronic smoking devices and related paraphernalia and accessories, unless preempted or otherwise limited by state or federal law at that time;
 7. Imitation tobacco products, including, but not limited to, candy cigarettes and bubble gum cigars;
 8. Edible tobacco look-alike products, including, but not limited to, snacks packaged or marketed to resemble tobacco products;
 9. Disguised vape or electronic smoking devices, including, but not limited to, those made to look like USB drives, pens, markers, phone cases, watches, lipstick, remote keys or other non-tobacco items.
 10. Unlawful weapon sales, including, but not limited to, violations of California Penal Code Sections 17235 (switchblade knives over two inches), 20410 (ballistic knives), 21810 (brass knuckles) as may be amended from time to time, and any other applicable local, state or federal laws.
- D. Self-Service Displays. Self-service displays of tobacco products are prohibited as established by state law. All tobacco sales must be conducted by a tobacco retailer business directly assisting the customer. Vending machines shall be prohibited.
- E. Minimum Age and Identification.
1. No person under the minimum legal age determined by the stricter of state or federal law for purchasing or possessing tobacco products may engage in, or assist with tobacco retailing.
 2. A tobacco retailer business must request and check a valid, government-issued photo identification of any person who appears under 30 years of age, to ensure the customer meets the minimum age to purchase and possess tobacco products as required by the stricter of state or federal law.
- F. Packaging, Labeling, and Pricing.
1. Tobacco products must be sold in the original manufacturer's packaging, compliant with all federal and state labeling and child-resistant packaging laws.
 2. Prices must be clearly displayed on the product or nearby shelf or signage.
- G. Display of Licenses and Permits. The City-issued tobacco retailer's permit, business license, and all applicable state or federal licenses must be visibly posted within five feet of the point-of-sale register.

H. Premises Regulations.

1. The tobacco retailer business must maintain a clearly designated front entrance for customers. All non-emergency public access must occur through this entrance.
2. Front entrance doors must remain unlocked during regular business hours, unless temporarily secured for safety or emergency response.
3. No business shall engage in tobacco retailing between the hours of 12:00 a.m. and 6:00 a.m. of the same day.

I. Signage Compliance. Tobacco retailer businesses must comply with all signage requirements in Title 20 of the NBMC and all applicable state and federal laws related to tobacco warnings, age restrictions, and advertising. In addition to the aforementioned signage compliance, retailers must also adhere to the following:

1. Limitation on Storefront Advertising. No more than twenty (20) percent of the total transparent area of the windows and clear doors of a physical storefront used for Tobacco Retailing may bear advertising or signage of any kind. All advertising and signage shall be placed and maintained in a manner that ensures law enforcement personnel have a clear and unobstructed view of the interior of the Premises, including the area where the cash registers are located, from the exterior public sidewalk or entrance.

J. Special Events and Temporary Retailing Prohibited. Tobacco retailing at special events, outdoor markets, street fairs, or temporary setups is not permitted under this Chapter.

5.55.035 Compliance Monitoring and Right of Entry.

The City may enter any permitted tobacco retailer business location during business hours for the purpose of making reasonable inspections to observe and enforce compliance with provisions of this Chapter and any other applicable regulations, laws, and statutes. to inspect for compliance with this Chapter and applicable laws. Inspections may be routine, unannounced, complaint-based, or involve youth decoy operations. Refusal to allow entry or impeding or delaying an inspection may constitute a violation of this Chapter.

5.55.040 Violations - Suspension or Revocation.

A. Grounds for Enforcement. In addition to any other penalties and remedies provided by law or this Code, a tobacco retailer's permit may be subject to suspension, or revocation if the permittee or their agents or employees:

- a. Violate any provision of this Code or Chapter;
- b. Are found liable in court or administrative proceedings for violating federal, or state, laws and regulations governing tobacco products; or
- c. Admit to or plead guilty or no contest to such violations.

B. Conditions During Suspension or Revocation. During a suspension or revocation period:

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- a. All tobacco products and related items must be removed from customer view and/or stored in a secured, non-public area.
 - b. A City-issued notice must be posted at all public entrances and points of sale, stating the reason and duration of the enforcement action.
 - C. Notwithstanding any other portion of this section, any violation of subsections (C) and (E) of Section 5.55.030 shall be considered an egregious violation of this Chapter and a public nuisance that is imminently dangerous to life, health, safety, or adjacent property, such that it requires immediate correction or elimination. Such a violation shall subject the tobacco retailer business to immediate suspension of the tobacco retailer's permit. A permittee or applicant may request administrative review of immediate suspensions pursuant to 5.55.045(B).

5.55.045 Suspension, Revocation, Denial and Appeal.

- A. Notice of Action. Except as provided in Section 5.55.040(C), before denying, suspending, or revoking a tobacco retailer's permit or following the seizure of items prohibited under this Chapter, the Chief of Police shall issue written notice to the permittee or applicant. The notice shall include:
 - 1. The proposed enforcement action;
 - 2. A brief summary of the reason(s) and applicable code section(s); and
 - 3. Instructions for requesting an administrative review.
- B. Right to Request Review. A permittee or applicant may request administrative review by submitting a written request to the Chief of Police within 10 calendar days of the notice. The request must include any applicable appeal fee as set by City Council.
- C. Scheduling the Review. Upon receiving a timely request, the City shall schedule an administrative review. The review shall be conducted within a reasonable time, and notice shall be provided to the appellant at least 10 calendar days in advance.
- D. Hearing Process.
 - 1. The hearing shall be conducted by a hearing officer.
 - 2. Both parties may present evidence, provide written statements or oral testimony, and be represented by legal counsel.
 - 3. Formal rules of evidence do not apply, but relevant and reliable evidence will be considered.
 - 4. Hearings may be continued for good cause.
- E. Burden of Proof. The City bears the burden of proving the violation by a preponderance of the evidence.

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- F. Failure to Participate. If the appellant fails to appear or otherwise participate in the hearing, the appeal will be deemed withdrawn and considered a waiver of the right to exhaust administrative remedies.
 - G. Final Decision. The hearing officer shall issue a written decision within a reasonable time following the hearing. The decision shall include findings and be final upon issuance. Judicial review is available under California Code of Civil Procedure Sections 1094.5 and 1094.6.
 - H. Permit Ineligibility Following Revocation. If a permit is revoked, no new or renewal permit shall be issued for the same business location for up to five years, unless the City determines that substantial changes in ownership or operations justify reconsideration.

5.55.45 Enforcement.

- A. The remedies provided in this Chapter are in addition to any other remedies available under local, state, or federal law. Nothing in this Chapter limits the City's authority to pursue any available legal remedy, including, but not limited to, nuisance abatement, permit or business license suspension or revocation, or enforcement under Chapter 20.68 of the Newport Beach Municipal Code.
- B. Seizures may be appealed through the procedures set forth in this Chapter. If not appealed or if upheld after review, seized items shall be destroyed in accordance with Police Department policy and applicable law.
- C. Evidence of Violations. If a violation is partially based on the involvement of a person under the age of 18 years old, that individual is not required to appear or testify in any civil or administrative enforcement process brought to enforce this Chapter. The alleged violation will be adjudicated based upon the sufficiency and persuasiveness of the evidence presented.

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