

ORDINANCE NO. _____

Ordinance Of The City Council Of The City Of Emeryville Adding Chapter 42, ("Tobacco Retailer License Requirements"), To Title 5 Of The Emeryville Municipal Code; And Authorizing The City Manager To Take Actions Related To Implementation And Enforcement: CEQA Determination: Exempt Pursuant To Guideline Sections 15378 And 15061(b)(3)

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 council, to protect the health, safety, and welfare of our residents; and

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; and

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

WHEREAS, tobacco use is the number one cause of preventable death in California and continues to be an urgent public health issue; and

WHEREAS, despite the state's efforts to limit youth access to tobacco, youth are still able to access tobacco products in California; and

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 to regulate the operation of lawful businesses to discourage violations of federal, state, and local tobacco control and youth tobacco access laws; and

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

WHEREAS, in 2018, more than 86% of tobacco retailers in California sold flavored non-cigarette tobacco products, over 91% of tobacco retailers sold menthol cigarettes, and, as of 2016, 8 out of 10 tobacco retailers near schools sold flavored non-cigarette tobacco products; and

WHEREAS, in 2017-2018, 87.6% of current youth tobacco users in Alameda County reported using a flavored tobacco product; flavored tobacco product use was high across all genders, races/ethnicities, and grades; and

WHEREAS, in 2020, California passed SB 793, which amended the California Health and Safety Code section 104559.5 to prohibit the sale of most types of flavored tobacco products, including flavored electronic cigarettes, menthol cigarettes, non-premium flavored cigars, as well as flavored tobacco enhancers; and

Ordinance No. _____
Tobacco Retailer License Requirements
City Council Meeting | May 7, 2024
Page 2 of 16

WHEREAS, California Health and Safety Code section 104559.5 allows local jurisdictions to adopt more restrictive flavored tobacco sales regulations than state law, and does not preempt or otherwise prohibit the adoption of a local standard that imposes greater restrictions on access to flavored tobacco products; and

WHEREAS, California Business & Professions Code section 22971.3 explicitly permits cities and counties to enact local tobacco retail licensing ordinances, and the suspension or revocation of a local license for a violation of any state tobacco control law; and

WHEREAS, the City of Emeryville has a substantial interest in protecting youth and underserved populations from the harms of tobacco use; and

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF EMERYVILLE DOES HEREBY ORDAIN AS FOLLOWS:

SECTION ONE. PURPOSE AND FINDINGS

The above recitals being true and correct and incorporated by reference, the purpose of this Ordinance is to improve public health, safety, and quality of life by enacting licensing requirements for tobacco retailers.

SECTION TWO. ADDING TITLE 5, CHAPTER 42, "TOBACCO RETAILER LICENSE REQUIREMENTS" TO THE EMERYVILLE MUNICIPAL CODE

Chapter 42, "Tobacco Retailer Licensing Requirements," of the Emeryville Municipal Code is hereby added as follows:

5-42.01 – Purpose and Intent.

The failure of Tobacco Retailers to comply with all tobacco control laws, particularly the sale of Tobacco Products, including flavored tobacco and electronic cigarette products to minors, presents an imminent threat to the public health, safety and welfare. A local licensing program for Tobacco Retailers is intended to ensure that Tobacco Retailers comply with tobacco control laws and business standards of the City and to protect the health, safety and welfare of those persons who reside in, work in and visit this City. State law explicitly permits cities 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. A requirement for a Tobacco Retailer license will not unduly burden legitimate business activities of retailers who sell or distribute Tobacco Products to adults but will allow the City to regulate the operation of lawful businesses to discourage violations of federal, state and local tobacco-related laws. The City has a substantial interest in promoting compliance with federal, state and local laws intended to regulate

Ordinance No. _____
Tobacco Retailer License Requirements
City Council Meeting | May 7, 2024
Page 3 of 16

tobacco sales and use; in discouraging the illegal purchase of Tobacco Products, including flavored tobacco and electronic cigarette products, by minors; in promoting compliance with laws prohibiting sales of Tobacco Products to minors; and in protecting children from being lured into illegal activity through the misconduct of adults. This Chapter is adopted to encourage responsible Tobacco Retailing and to discourage violation of tobacco-related laws, especially those that prohibit or discourage the sale or distribution of Tobacco Products and electronic cigarette products to minors. This Chapter does not expand or reduce the degree to which the acts regulated by federal or state law are criminally proscribed or alter the penalties provided by such laws. Nothing in this Chapter shall be construed to penalize the purchase, use or possession of a Tobacco Product by any person not engaged in the retail of tobacco.

5-42.02 - Definitions.

For the purposes of this chapter, unless otherwise apparent from the context, certain words and phrases used in this chapter are defined as follows:

- (a) "Arm's Length Transaction" means a sale in good faith and for valuable consideration that reflects the fair market value in the open market between two (2) 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 violations of this Chapter is not an Arm's Length Transaction.
- (b) "Cigar" as defined in Section 5-29.02 of Chapter 29 of Title 5 ("Smoking Pollution Control") of the Emeryville Municipal Code.
- (c) "Cigarette" as defined in Section 5-29.02 of Chapter 29 of Title 5 ("Smoking Pollution Control") of the Emeryville Municipal Code.
- (d) "Compliance Check" means systems that the Department uses to investigate and ensure that Tobacco Retailers are following and complying with the requirements of this Chapter. A "Compliance Check" shall involve the use of persons between the ages of 18 and 20 who purchase or attempt to purchase Tobacco Products. A Compliance Check may also be conducted by the Department or other units of government for educational, research, and training purposes or for investigating or enforcing federal, state, or local laws and regulations relating to tobacco products.
- (e) "Consumer" means a person who purchases a Tobacco Product for consumption and not for sale to another.
- (f) "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

Ordinance No. _____
Tobacco Retailer License Requirements
City Council Meeting | May 7, 2024
Page 4 of 16

purposes to obtain an article, product, service, or accommodation without charge or at a discounted price.

(g) “Delivery Sale” means the sale of any Tobacco Product to any person for personal consumption and not for resale when the sale is conducted by any means other than an in-person, over-the-counter sales transaction in a tobacco retail establishment. Delivery sale includes the sale of any Tobacco Product when the sale is conducted by telephone, other voice transmission, mail, the internet, or app-based service. Delivery sale includes delivery by licensees or third parties by any means, including curbside pick-up.

(h) “Department” means the City of Emeryville Police Department or other City department designated by the City Manager as responsible for administering and enforcing this Section.

(i) “Electronic Smoking Device” as defined in Section 5-29.02 of Chapter 29 of Title 5 (“Smoking Pollution Control”) of the Emeryville Municipal Code.

(j) “Flavored Tobacco Product” means any Tobacco Product that:

- (1) Imparts a taste or odor distinguishable by an ordinary consumer, other than the taste or odor of tobacco, either prior to or during the consumption of such Tobacco Product, including but not limited to, tastes or odors relating to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, mint, wintergreen, menthol, herb, or spice; or
- (2) Imparts a heating, cooling, or numbing sensation distinguishable by an ordinary consumer during the consumption of such tobacco product; or
- (3) Is prohibited under Cal Health & Safety Code section 104559.5(b)(2)

(k) “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.

(l) “Labeling” means written, printed, or graphic matter upon any Tobacco Product or any of its packaging, or accompanying such Tobacco Product.

(m) “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.

(n) “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.

Ordinance No. _____
Tobacco Retailer License Requirements
City Council Meeting | May 7, 2024
Page 5 of 16

(o) “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, regardless of whether the retail establishment sells other retail goods in addition to prescription pharmaceuticals.

(p) “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 can or does have or share ultimate control over the day-to-day operations of a business.

(q) “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.

(r) “Self-service Display” means the open display or storage of Tobacco Product 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.

(s) “Tobacco Paraphernalia” means any item designed or marketed for the consumption, use or preparation of Tobacco Products.

(t) “Tobacco Product” as defined in Section 5-29.02 of Chapter 29 of Title 5 (“Smoking Pollution Control”) of the Emeryville Municipal Code. Tobacco Product includes Flavored Tobacco Products.

(u) “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, or who distributes free or low-cost samples of 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, Tobacco Products, or Tobacco Paraphernalia sold, offered for sale, exchanged, or offered for exchange.

(v) “Youth-Oriented Facility” means a location or parcel in the City that is occupied by:

- (1) A private or public kindergarten, elementary, middle, junior high, or high school;
- (2) A library open to the public;
- (3) A playground open to the public;
- (4) A youth center, defined as a facility where children, ages 6 to 17, inclusive,

Ordinance No. _____
Tobacco Retailer License Requirements
City Council Meeting | May 7, 2024
Page 6 of 16

come together for programs and activities;

- (5) A recreation facility open to the public, defined as an area, place, structure, or other facility that is used either permanently or temporarily for community recreation, even though it may be used for other purposes;
- (6) A park open to the public or to all the residents of a private community; or
- (7) A licensed child-care facility or preschool other than a small-family day care home or a large-family day care home as defined in California Health & Safety Code section 1596.78.

5-42.03 – Tobacco Retailer License Required.

(a) It shall be unlawful for any person to act as a Tobacco Retailer without first obtaining and maintaining a valid Tobacco Retailer license pursuant to this Section for each location at which that activity is to occur. Tobacco retailing without a valid Tobacco Retailer license is a public nuisance.

(b) No license may be issued to authorize tobacco retailing at other than a fixed location. For example, tobacco retailing by persons on foot or from vehicles is prohibited.

(c) The issuance of a Tobacco Retailer license does not exempt any business that is subject to the Smoking Pollution Control ordinance pursuant to Chapter 29 of Title 5 of the Emeryville Municipal Code.

(d) A Tobacco Retailer or Proprietor without a valid Tobacco Retailer license, including, for example, a person whose license has been 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 5-42.13.
- (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.

5-42.04 – Application Procedure.

Application for a Tobacco Retailer license shall be submitted in the name of each Proprietor proposing to conduct retail tobacco sales and shall be signed by each

Ordinance No. _____
Tobacco Retailer License Requirements
City Council Meeting | May 7, 2024
Page 7 of 16

Proprietor or an authorized agent thereof. All applications shall be submitted on a form supplied by the Emeryville Police Department and shall contain the following information:

- (a) The name, address, and telephone number of each Proprietor.
- (b) The business name, address, and telephone number of the single fixed location for which a license is sought.
- (c) 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 (b) of this Section;
- (d) Proof that the location for which a Tobacco Retailer license is sought has been issued a valid state Tobacco Retailer license has been issued by the California Department of Tax and Fee Administration.
- (e) Proof that the location for which a Tobacco Retail license is sought has been issued a Major Use Permit by the Emeryville Planning Commission, if such a permit is required by the City, pursuant to Emeryville Municipal Code sections 9-2.701 and 9-3.202.
- (f) Such other information as the Department deems necessary for the administration or enforcement of this Section.

5-42.05 – Issuance and Renewal of License.

- (a) Within 30 days of the Department's receipt of an application for a Tobacco Retailer license and the license fee required by this Section, the Department shall issue a license unless a preponderance of the evidence demonstrates that one or more of the following reasons for denial exists:
 - (1) The information presented in the application is incomplete, inaccurate, or false.
 - (2) The application seeks authorization for tobacco retailing by a Proprietor or at a location for which a revocation is in effect pursuant to Section 5-42.11.
 - (3) The application seeks authorization for tobacco retailing that is unlawful pursuant to this Code, or that is unlawful pursuant to any other local, state or federal law.

Ordinance No. _____
Tobacco Retailer License Requirements
City Council Meeting | May 7, 2024
Page 8 of 16

- (b) A license shall be valid for one year after the date of issuance and must be renewed prior to the expiration of the term.

5-42.06 – License Nontransferable.

A Tobacco Retailer license is nontransferable. In the event a person to whom a license has been issued changes business location or sells the business referenced in that person's license, that person must apply for a new license prior to acting as a Tobacco Retailer at the new location. The transferee of the licensee must apply for a license in the transferee's name before acting as a Tobacco Retailer. Any license issued pursuant to this Section shall expire on the date the previous license for the business or person would have expired.

5-42.07 – Fees for License.

The fee to issue or to renew a Tobacco Retailer license shall be established in the Master Fee Schedule adopted by resolution of the City Council. The fee shall reflect the actual cost of processing the license, including inspection of the Tobacco Retailer's business premises and implementation and enforcement of the licensing program.

5-42.08 – Display of License.

Each Tobacco Retailer license shall be prominently displayed in a publicly visible location at the licensed location.

5-42.09 – Limits on Eligibility for a Tobacco Retailer License.

- (a) Pharmacies. No license may be issued, and no existing license may be renewed, to authorize tobacco retailing in a pharmacy.
- (b) Proximity to Youth-Oriented Facilities. No license may issue, and no existing license may be renewed, with an exception of subsection (d) in this Section, to authorize tobacco retailing within 1,000 feet of a Youth-Oriented Facility as measured by a straight line from the nearest point of the property line of the parcel on which the Youth-Oriented Facility is located to the nearest point of the property line of the parcel on which the applicant's business is located.
- (c) Proximity to other Tobacco Retailers. No license may issue, and no existing license may be renewed, with an exception of subsection (d) in this Section, to authorize tobacco retailing within 500 feet of a Tobacco Retailer location already licensed pursuant to this Chapter as measured by a straight line from the nearest point of the property line of the

Ordinance No. _____
Tobacco Retailer License Requirements
City Council Meeting | May 7, 2024
Page 9 of 16

parcel on which the applicant's business is located to the nearest point of the property line of the parcel on which an existing licensee's business is located.

(d) Existing Tobacco Retailers. A Tobacco Retailer selling Tobacco Products operating lawfully on the date this ordinance is operative, may receive or renew a license so long as all of the following conditions are met:

- (1) The license is timely obtained and is renewed without lapse or revocation;
- (2) The Tobacco Retailer is not closed for business or otherwise suspends tobacco retailing for more than sixty (60) consecutive days;
- (3) The Tobacco Retailer does not substantially change the business premises or business operation. A substantial change to the business operation includes, but is not limited to, the transfer of a location to a new Proprietor(s); and
- (4) The Tobacco Retailer retains the right to operate under other applicable laws.

(e) Change of business dispute. If the City determines that a Tobacco Retailer has substantially changed their business premises or operation and the Tobacco Retailer disputes this determination, the Tobacco Retailer bears the burden of proving by a preponderance of the evidence that such change(s) do not constitute a substantial change.

5-42.10 – Other Requirements and Prohibitions.

(a) Positive identification required. No person engaged in tobacco retailing shall sell a Tobacco Product or Tobacco Paraphernalia to another person without first verifying, by means of government-used photographic identification that the recipient is at least 21 years of age.

(b) 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 Tobacco Products shall engage in tobacco retailing.

(c) On-site sales. The delivery sale of Tobacco Products is prohibited in the City. All sales of Tobacco Products must be conducted in person in a licensed location. It shall be a violation of the Emeryville Municipal Code for any person to engage in the delivery sale of Tobacco Products or to knowingly or recklessly sell or provide Tobacco Products to any person that intends to engage in the delivery sale of the Tobacco Product in the City.

Ordinance No. _____
Tobacco Retailer License Requirements
City Council Meeting | May 7, 2024
Page 10 of 16

(d) Self-service Displays prohibited. No Tobacco Retailer shall display Tobacco Products or Tobacco Paraphernalia by means of a Self-service Display or engage in tobacco retailing by means of a Self-service Display.

(e) 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 has been issued, it shall be a violation of this Chapter for a licensee, or any of the licensee's agents or employees, to:

- (1) Violate any local, state, or federal law applicable to Tobacco Products, Tobacco Paraphernalia, or tobacco retailing.
- (2) Violate any local, state, or federal law regulating exterior, storefront, window or door signage.
- (3) Refuse to cooperate with any Compliance Check conducted by the Department.

(f) Flavored Tobacco Product sales 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.

(g) Sale of Electronic Smoking Devices prohibited. No person may sell or possess with the intent to sell any Electronic Smoking Device within the City.

(h) 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.

(i) 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.

(j) 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

Ordinance No. _____
Tobacco Retailer License Requirements
City Council Meeting | May 7, 2024
Page 11 of 16

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.

(k) Minimum package size for Cigars. No retailer shall sell any Cigar unless it is sold in a package of at least 20 Cigars, provided, however, that this subsection does not apply to a Cigar that has a price of at least \$10 per Cigar, including all applicable fees and taxes.

(l) Minimum prices for Cigarettes and Cigars.

- (1) No Tobacco Retailer shall sell to a consumer:

- (a) Cigarettes at a price that is less than \$10 per package of 20 Cigarettes, including all applicable fees and taxes;
- (b) Cigars at a price that is less than \$10 per package of 20 Cigars, including all applicable fees and taxes.

- (2) The minimum prices established in this Section shall be adjusted annually (percent change in the annual average, not seasonally adjusted) in proportion with the Consumer Price Index, all urban consumers for all items for the San Francisco-Oakland-Hayward statistical area as reported by the United States Bureau of Labor Statistics or any successor to that Index.

5-42.11 – Compliance Monitoring.

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

(b) The Department shall conduct at least one Compliance Check every 12-month period. A Compliance Check must also involve verification that the Tobacco Retailer is in compliance with all other requirements of this Chapter.

(c) If the Department determines that a Tobacco Retailer has not complied with the requirements of this Chapter following a Compliance Check, a follow-up Compliance Check shall be conducted within ninety (90) days. The cost for the follow-up Compliance Check shall be paid by the Tobacco Retailer within thirty (30) days after the Department has sent an invoice to the Tobacco Retailer requesting payment.

Ordinance No. _____
Tobacco Retailer License Requirements
City Council Meeting | May 7, 2024
Page 12 of 16

5-42.12 – Suspension and Revocation of License Penalties.

(a) The following penalties apply if a Tobacco Retailer is notified by the Department that their license is being suspended or revoked for a violation of applicable requirements set forth in this Chapter:

- (1) Upon a finding of a first violation of this Chapter at a location within any sixty-month period, the license shall be suspended for 30 days and subject to an administrative fine of \$100.
- (2) Upon a finding of a second violation of this Chapter at a location within any sixty-month period, the license shall be suspended for 90 days. If the violation occurs within 5 years of the first violation, the Tobacco Retailer shall be subject to an administrative fine of \$200.
- (3) Upon a finding of a third violation of this Chapter at a location within any sixty-month period, the license shall be suspended for 1 year. If the violation occurs within 5 years of the second violation, the Tobacco Retailer shall be subject to an administrative fine of \$500.
- (4) Upon a finding of four or more violations of this Section at a location within any sixty-month period, no new license may be issued for the location until five years have passed from the date of revocation.

(b) Revocation of License Issued in Error. A Tobacco Retailer license shall be revoked if the Department finds, after the licensee is afforded reasonable notice and an opportunity to be heard, that one or more of the bases for denial of a license under Section 5-42.05 existed at the time application was made or at any time before the license issued. Notice and appeal of the revocation shall be conducted in accordance with this Chapter. The revocation shall be without prejudice to the filing of a new license application.

5-42.13 – Review of Applications – Appeal of Denial and Suspension.

(a) Within fifteen (15) days after the Department serves notification of denial or suspension, an applicant may appeal the denial by notifying the City Clerk in writing of the appeal, the reasons for the appeal, and paying any applicable fees.

(b) The City Clerk shall set a hearing on the appeal and shall fix a date and time certain, within thirty (30) days after the receipt of the applicant's appeal, unless the City and the applicant agree to a longer time, to consider the appeal. The City Clerk shall provide notice of the date, time and place of hearing, at least seven (7) days prior to the date of the hearing.

Ordinance No. _____
Tobacco Retailer License Requirements
City Council Meeting | May 7, 2024
Page 13 of 16

(c) The City Manager shall appoint a Hearing Officer to hear the appeal and determine the order of procedure, and rule on all objections to admissibility of evidence. The applicant and the Department shall each have the right to submit documents, call and examine witnesses, cross-examine witnesses and argue their respective positions. The proceeding shall be informal, and the strict rules of evidence shall not apply, and all evidence shall be admissible which is of the kind that reasonably prudent persons rely upon in making decisions.

(d) The Hearing Officer shall issue a written decision within fifteen (15) days after the close of the hearing. The decision of the Hearing Officer shall be final.

5-42.14 – Tobacco Retailing Without a License.

In addition to any other penalty authorized by law, if the Department finds, or if a court of competent jurisdiction determines, based on a preponderance of the evidence after notice and an opportunity to be heard, that any person has engaged in tobacco retailing at a location without a valid Tobacco Retailer 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 license for that location as follows:

(a) After a first violation of this Section at a location within any sixty-month period, no new license may be issued for the person at the location until 30 days have passed from the date of the violation.

(b) After a second violation of this Section at a location within any sixty-month period, no new license may be issued for the person at the location until 90 days have passed from the date of the violation.

(c) After a third or subsequent violation of this Section at a location within any sixty-month period, no new license may be issued for the person at the location until five years have passed from the date of the violation.

(d) Upon a finding of four or more violations of this Section at a location within any five-year 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.

5-42.15 – Enforcement and Penalties.

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

Ordinance No. _____
Tobacco Retailer License Requirements
City Council Meeting | May 7, 2024
Page 14 of 16

(b) Violations of this Chapter are subject to administrative citation under Chapter 7 of Title I. Each day of engaging in any of the prohibited activities shall constitute a separate violation.

(c) Violations of this Section are hereby declared to be public nuisances.

(d) In addition to other remedies provided by this Section or by other law, any violation of this Section may be remedied by a civil action brought by the City Attorney, including, but not limited to, administrative or judicial nuisance abatement proceedings, civil or criminal code enforcement proceedings, and suits for injunctive relief. The remedies provided by this Section are cumulative and in addition to any other remedies available at law or in equity. Where the City pursues a civil action to remedy a violation of this Chapter, the prevailing party shall be entitled to recovery of attorney's fees if the City elects, at the beginning of that action, to seek recovery of its own attorneys' fees pursuant to Government Code section 38773.5 as currently drafted or as amended.

(e) An action for injunction may be brought in a court of competent jurisdiction by any aggrieved person, or any person or entity that will fairly and adequately represent the interests of the class protected by this Section.

(f) For the purposes of the civil remedies provided in this Chapter:

- (1) Each day on which a Tobacco Product is distributed, sold, offered for sale, or held with the intent to sell in violation of this Chapter will constitute a separate violation of this Chapter; and
- (2) Each individual Tobacco Product that is distributed, sold, offered for sale, or held with the intent to sell in violation of this Chapter will constitute a separate violation of this Chapter.

(g) All licensees are responsible for the actions of their employees relating to the sale, offer to sell, and furnishing of Tobacco Products at the retail location. The sale of any Tobacco Product by an employee shall be considered an act of the licensee.

5-42.16 – Exception.

Nothing in this Chapter shall be construed to penalize the purchase, use, or possession of a Tobacco Product by any person not engaged in tobacco retailing.

SECTION THREE. SEVERABILITY

The City Council of the City of Emeryville declares that each section, sub-section, paragraph, sub-paragraph, sentence, clause and phrase of this ordinance

Ordinance No. _____
Tobacco Retailer License Requirements
City Council Meeting | May 7, 2024
Page 15 of 16

is severable and independent of every other section, sub-section, paragraph, sub-paragraph, sentence, clause and phrase of this ordinance. If any section, sub-section, paragraph, sub-paragraph, sentence, clause or phrase of this ordinance is held invalid, the City declares that it would have adopted the remaining provisions of this ordinance irrespective of the portion held invalid, and further declares its express intent that the remaining portions of this ordinance should remain in effect after the invalid portion has been eliminated.

SECTION FOUR. CALIFORNIA ENVIRONMENTAL QUALITY ACT DETERMINATION

This ordinance is exempt from the California Environmental Quality Act pursuant to CEQA Guidelines section 15378 because it is not a “project” because it has no potential for resulting in a direct or indirect physical change in the environment; it is merely an administrative action setting forth a regulatory licensing program and involves no authorization of any construction or other activities that could impact the environment. Further, this ordinance is exempt pursuant to CEQA Guidelines section 15061(b)(3) because it can be seen with certainty that there is no possibility that the ordinance will have a significant effect on the environment. Again, the ordinance does not authorize construction or other activities that could impact the environment.

SECTION FIVE. EFFECTIVE AND OPERATIVE DATE

This Ordinance shall be effective 30 days following its final passage and operative 90 days following its final passage. The City Clerk is directed to cause copies of this Ordinance to be posted or published as required by Government Code section 36933.

SECTION SIX. CODIFICATION

Section Two of this Ordinance shall be codified in the Emeryville Municipal Code. Sections One, Three, Four, Five, and Six shall NOT be so codified.

Ordinance No. _____
Tobacco Retailer License Requirements
City Council Meeting | May 7, 2024
Page 16 of 16

This Ordinance was **INTRODUCED AND FIRST READ** by the City Council of the City of Emeryville at a regular meeting held Tuesday, April 16, 2024, and **PASSED AND ADOPTED** by the City Council of the City of Emeryville at a regular meeting held Tuesday, May 7, 2024, by the following vote:

AYES: _____
NOES: _____
ABSTAIN: _____
ABSENT: _____

ATTEST:

CITY CLERK

MAYOR

APPROVED AS TO FORM:

DocuSigned by:
John Kennedy
2C994D02BB55467...

CITY ATTORNEY