

ORDINANCE NO. ____

AN ORDINANCE OF THE CITY OF HERMOSA BEACH
ADDING CHAPTER 5.78 TO THE HERMOSA BEACH
MUNICIPAL CODE (TOBACCO RETAILERS) REQUIRING
LICENSURE OF TOBACCO RETAILERS AND LIMITING
SALE OF ELECTRONIC SMOKING DEVICES AND
FLAVORED TOBACCO PRODUCTS TO REDUCE THE
ILLEGAL SALE OF TOBACCO TO YOUTH AND
AMENDING SECTION 1.10.040 TO MAKE VIOLATIONS OF
CHAPTER 5.78 SUBJECT TO ADMINISTRATIVE PENALTY
PROCEDURES

The City Council of the City of Hermosa Beach does hereby ordain as follows:

Section 1. A new Chapter 5.78, entitled “Tobacco Retailers” and containing Sections 5.78.010 through 5.78.150, is added to Title 5 of the Hermosa Beach Municipal Code (the “Code”) to read as follows:

Chapter 5.78

TOBACCO RETAILERS

Sections:

5.78.010 Title

5.78.020 Purpose

5.78.030 Definitions

5.78.040 Tobacco Retailer license required

5.78.050 Limits on eligibility and location

5.78.060 License application procedure

5.78.070 Issuance of Tobacco Retailer license

5.78.080 Term and renewal

5.78.090 License nontransferable

5.78.100 Operating requirements and prohibitions

5.78.110 Compliance monitoring and enforcement

5.78.120 Violations

5.78.130 Tobacco Retailing Without a Valid License

5.78.140 New license after revocation

5.78.150 Implementing rules and regulations

5.78.010 Title.

This Chapter shall be known as the “Tobacco Retailer Ordinance” of the City of Hermosa Beach.

5.78.020 Purpose.

In enacting this Chapter, it is the intent of the City Council to encourage responsible Tobacco Retailing and to discourage violations of tobacco-related laws, especially those involving the sale or distribution of tobacco and nicotine products to youth.

5.78.030 Definitions.

The following words and phrases, whenever used in this Chapter, shall have the meanings defined in this section unless the context clearly requires otherwise:

“Arm’s Length Transaction” means a Sale in good faith and for valuable consideration that reflects the fair market value in the open market between two informed and willing parties, neither of which is under any compulsion to participate in the transaction. A Sale between relatives, related companies or partners, or a Sale for which a significant purpose is avoiding the effect of the violations of this Chapter is not an Arm’s Length Transaction.

“Consumer” means a person who purchases a Tobacco Product for consumption and not for Sale to another.

“Electronic Smoking Device” means an electronic device that can be used to deliver an inhaled dose of nicotine, or other substances, including any component, part, or accessory of such device, whether or not sold separately. This definition includes any such device, whether manufactured, distributed, marketed or sold as an electronic cigarette, an electronic cigar, an electronic cigarillo, an electronic pipe, an electronic hookah, or any other product name or descriptor, including any component, part or accessory of such device, whether or not sold separately. “Electronic Smoking Device” does not include any product specifically approved by the United States Food and Drug Administration for use in the mitigation, treatment, or prevention of disease, where such product is marketed and sold solely for such an approved purpose.

“Enforcement Official” means any member of the Hermosa Beach Code Enforcement Department, the Hermosa Beach Police Department, the Alcohol Beverage Control Department, and the Los Angeles County Sheriff’s Department, or their designees.

“Flavored Tobacco Product” means a Tobacco Product containing an additive with an artificial or natural flavor or an herb or spice, including but not limited to a characterizing flavor such as strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, or coffee. A public statement or claim made or disseminated by the manufacturer of a Tobacco Product, or by any person authorized or permitted by the manufacturer to make or disseminate public statements concerning such Tobacco Product, that such Tobacco Product has or produces such a characterizing flavor shall constitute presumptive evidence that the Tobacco Product is a Flavored Tobacco Product.

“Little Cigar” means any roll of tobacco other than a cigarette wrapped entirely or in part in tobacco or any substance containing tobacco and weighing no more than three

pounds per thousand. "Little Cigar" includes, but is not limited to, any Tobacco Product known or labeled as "small cigar" or "little cigar."

"Package" means a pack, box, carton, or container of any kind or, if no other container, any wrapping (including cellophane) in which a Tobacco Product is sold or offered for Sale to a Consumer.

"Person" means any individual, partnership, co-partnership, firm, association, joint stock company, corporation, or combination of the above in whatever form or character.

"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.

"Sale" means any transfer, exchange, barter, gift, offer for sale, or distribution for a commercial purpose, in any manner or by any means whatsoever.

"Self-Service Display" means the open display or storage of Tobacco Products 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 retailer's agent or employee. A vending machine is a form of Self-Service Display.

"Smoking" means the combustion, electrical ignition or vaporization and/or inhaling, exhaling, burning or carrying any lighted, heated or ignited cigar, cigarette, cigarillo, pipe, hookah, Electronic Smoking Device, or any plant product intended for human inhalation that facilitates the release of gases, particles, or vapors into the air.

"Tobacco Paraphernalia" means any item designed for the consumption, use, or preparation of Tobacco Products.

"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, snus; and

(2) Any Electronic Smoking Device, with or without nicotine.

(3) Notwithstanding any provision of subsections (1), (2) and (3) to the contrary, "Tobacco Product" includes any component, part, or accessory of a Tobacco Product, whether or not sold separately. "Tobacco Product" does not include any product that has been approved by the United States Food and Drug

Administration for Sale as a tobacco cessation product or for other therapeutic purposes where such product is marketed and sold solely for such an approved purpose.

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

5.78.040 Tobacco Retailer license required.

It shall be unlawful for any Person to engage in Tobacco Retailing in the City without first obtaining and maintaining a valid Tobacco Retailer license pursuant to the provisions of this Chapter for each location at which that activity is to occur.

5.78.050 Limits on eligibility and location.

A. No license may be issued under this Chapter to authorize Tobacco Retailing at other than a fixed location, such as on foot or from vehicles.

B. No license may be issued under this Chapter to authorize Tobacco Retailing at a temporary or recurring temporary event, such as farmers’ markets, special events, or mobile carts.

C. No license may be issued under this Chapter to authorize Tobacco Retailing at any location that violates any provision of the Hermosa Beach zoning ordinance.

D. Pharmacies. No license may be issued to authorize Tobacco Retailing in a Pharmacy.

E. Schools and Youth-Populated Areas. Tobacco Retailing is prohibited near schools and areas with youth populations as follows:

- (1) No license may issue to authorize Tobacco Retailing within 500 feet of a Youth-Populated Area as measured by a straight line from the nearest point of the property line of the parcel on which the Youth-Populated Area is located to the nearest point of the property line of the parcel on which the applicant’s business is located.

For the purposes of this subsection, a “Youth-Populated Area” means a parcel in the City that is occupied by:

- (i) a private or public kindergarten, elementary, middle, junior high, or high school;
- (ii) a library open to the public;

- (iii) a playground or sandbox area open to the public, as defined by California Health & Safety Code § 104495;
- (iv) a youth center, defined as a facility where children, ages 6 to 17, inclusive, come together for programs and activities.

F. Premises Furnishing Alcohol and/or Food for On-Site Consumption. No license may issue to authorize Tobacco Retailing at any location that is (i) licensed under state law to serve alcoholic beverages for consumption on the premises (e.g., an “on-Sale” license issued by the California Department of Alcoholic Beverage Control); or (ii) offering food for Sale for consumption on the premises.

G. Notwithstanding the foregoing, a Tobacco Retailer operating lawfully on the effective date of this ordinance that otherwise would be eligible for a Tobacco Retailer license for the location for which a license is sought may receive or renew a license for that location so long as: (i) the license is timely obtained and is renewed without lapse or permanent revocation (as opposed to temporary suspension); (ii) the Tobacco Retailer is not closed for business or otherwise suspends Tobacco Retailing for more than sixty (60) consecutive days; (iii) the Tobacco Retailer does not substantially change the business premises or business operation; and (iv) the Tobacco Retailer retains the right to operate under other applicable laws, including without limitation the zoning ordinance, building codes and business license tax ordinance.

5.78.060 License application procedure.

A. Any Person seeking a license pursuant to this Chapter shall submit a completed application, on a City-approved form, to the Finance Department.

B. The application for a license under this Chapter shall be submitted in the name of each and every business owner proposing to conduct retail tobacco Sales for each location at which retail tobacco Sales are being proposed and shall be signed by each business owner or an authorized agent thereof.

C. Said application shall contain the following information:

1. The name, address, and telephone number of each business owner 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 of an agent authorized by each business owner to receive all communications and notices required by, authorized by, or convenient to the enforcement of this Chapter. If an authorized agent is not supplied, each business owner 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 license is sought has been issued a valid state Tobacco Retailer's license by the California Department of Tax and Fee Administration if required for the business.
5. Whether any business owner or any agent of the business owner was previously issued a license pursuant to this Chapter which was at any time suspended or revoked, and, if so, the dates of the suspension period or the date of the revocation.
6. Whether any business owner or any agent of the business owner has been determined to have violated any provision of this Chapter or any State or Federal tobacco-related law, and, if so, the dates of all such violations within the preceding five (5) years.
7. Such other information as the Finance Department deems necessary for the administration or enforcement of this Chapter as specified on the application form required by this Chapter.

D. The City Council may establish by resolution the amount of an application fee for the Tobacco Retailer license in an amount not to exceed the City's reasonable cost of providing the services required by this Chapter, in which case the City shall accept no application unless accompanied by payment of such fee.

E. An applicant or agent thereof shall inform the Finance Department in writing of any change in the information submitted on an application for a Tobacco Retailer registration within ten (10) business days of a change.

5.78.070 Issuance of Tobacco Retailer license.

A. Upon the receipt of a completed application for a Tobacco Retailer license and the corresponding application fee, if any, the Finance Department, with consultation of Community Development Department for location requirements, shall issue a license unless substantial evidence demonstrates that one or more of the following bases for denial exists:

1. The information presented in the application is inaccurate or false. Intentionally supplying inaccurate or false information shall be a violation of this Chapter.
2. The application seeks authorization for Tobacco Retailing at a location prohibited by Section 5.78.050 of this Chapter.
3. The applicant has had a license issued pursuant to this Chapter revoked within the preceding twelve (12) months.
4. The application seeks authorization for Tobacco Retailing that is otherwise prohibited pursuant to this Chapter, that is unlawful pursuant to this Code

(including without limitation the Hermosa Beach zoning ordinance and business license regulations), or that is unlawful pursuant to any other law.

5. The applicant is indebted to the City for any unpaid fee or fine.

B. Any applicant aggrieved by a decision denying a license pursuant to this Chapter may contest the decision by appealing the decision to the City Council by filing with the City Manager a written notice of appeal within ten (10) business days of the date of receipt of the license denial. Upon receipt of a timely, written request for an appeal, the City Clerk shall set a hearing to occur within forty-five (45) days before the Council or its designated hearing officer and shall provide written notice of same by first class mail to the appellant. The City Council shall sustain or overrule with conditions, the denial or intended revocation upon written findings within thirty (30) days of the conclusion of the hearing.

5.78.080 Term and renewal.

A. A Tobacco Retailer license issued pursuant to this Chapter shall be valid for one (1) year after the date of issuance, unless it is revoked earlier in accordance with the provisions of this Chapter. The expiration date of each Tobacco Retailer license shall be shown on the license itself and each Tobacco Retailer license shall expire at midnight on the expiration date.

B. Each Tobacco Retailer who seeks to renew a license issued pursuant to this Chapter shall submit a renewal application on a City-approved form and tender any applicable fees to the Finance Department no later than thirty (30) calendar days prior to the expiration of the license. Any license issued pursuant to this Chapter that is not timely renewed shall expire and become null and void at the end of its term.

C. An application to renew a license issued pursuant to this Chapter may be denied by the Finance Department upon the grounds set forth in Section 5.78.070 of this Chapter.

5.78.090 License nontransferable.

A. No Person shall operate under a name, or conduct business under a designation not specified on the license.

B. A license issued pursuant to this Chapter may not be transferred from one Person to another or from one location to another. A change in business owner, business name, or location shall render the license null and void, and shall require a new license to be obtained in accordance with the provisions of this Chapter.

5.78.100 Operating requirements.

The following operating requirements shall be deemed conditions of any Tobacco Retailer license issued pursuant to the provisions of this Chapter, and failure to comply with any such requirement shall be grounds for suspension, revocation, and/or the imposition of administrative fines in accordance with Section 5.78.120 of this Chapter.

A. Posting of license. Each license issued pursuant to this Chapter shall be prominently displayed in a publicly visible location at the permitted location.

B. Retail Sales to Persons under twenty one prohibited. No Person engaged in Tobacco Retailing shall sell or offer to sell, give or offer to give, or transfer or offer to transfer any Tobacco Product to any Person who is under the legal age under state law to purchase and possess Tobacco Products, which is age twenty-one (or eighteen if active military).

C. Positive identification required. No Tobacco Retailer shall sell or transfer a Tobacco Product to any Person who appears to be under the age of thirty (30) years old without first examining the identification of that Person to confirm that Person is at least the minimum age under state law to purchase and possess the product. The Tobacco Retailer or agent thereof shall refuse the Sale or transfer of any Tobacco Product to any Person who appears to be under the age of thirty (30) years old, who fails to present valid, legal photo identification prior to the Sale or transfer.

D. Minimum age for Persons selling tobacco. No Person who is younger than twenty-one shall engage in Tobacco Retailing.

E. Self-Service Displays prohibited. Tobacco Retailing by means of a self-service display is prohibited.

F. Electronic Smoking Device. No retailer shall sell an Electronic Smoking Device or any product used in an Electronic Smoking Device. The prohibition in the preceding sentence shall not apply to a retailer that permits only patrons 21 years of age or older, or active duty military personnel who are eighteen (18) years of age or older, to enter the location where the Tobacco Product is sold.

G. Flavored Tobacco Products. No retailer shall sell Flavored Tobacco Products. The prohibition in the preceding sentence shall not apply to a retailer that permits only patrons twenty-one (21) years of age or older, or active duty military personnel who are eighteen (18) years of age or older, to enter the location where the tobacco product is sold.

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. Minimum Package Size for Little Cigars. No Tobacco Retailer shall Sell to a Consumer any Little Cigar unless it is sold in a Package of at least twenty Little Cigars.

J. False and misleading advertising prohibited. A Tobacco Retailer who does not have a valid license pursuant to this Chapter or whose license has been suspended or revoked shall not display any item or advertisement relating to Tobacco Products that promotes

the Sale or distribution of such products from the premises or that could lead a reasonable Consumer to believe that tobacco products can be obtained at that location. Such display or advertisement in violation of this provision shall constitute Tobacco Retailing without a valid license.

5.78.110 Compliance monitoring and enforcement.

A. Compliance checks shall be conducted so as to allow Enforcement Officials to determine, at a minimum, if a Tobacco Retailer is complying with laws regulating youth access to tobacco. The Chief of Police may also conduct compliance checks to determine compliance with other laws applicable to Tobacco Retailing.

B. During business hours, Enforcement Officials shall have the right to enter any place of business for which a license is required by this Chapter for the purpose of making reasonable inspections to observe and enforce compliance with the provisions of this Chapter and any other applicable regulations, laws, and statutes.

C. The Hermosa Beach Police Department (or designee thereof) may promulgate and adopt policies, procedures and/or guidelines for the participation of Persons under the minimum legal age for tobacco purchases in compliance checks pursuant to this Chapter ("Youth Decoys").

D. Enforcement Officials shall inspect each Tobacco Retailer at least one (1) time per every twelve (12) month period. Nothing in this paragraph shall create a right of action in any licensee or other Person against the City or its agents.

5.78.120 Violations.

A. Administrative fine. In addition to any other penalty authorized by law, violations of this Chapter are subject to the administrative citations and penalties provisions in Title 1, Chapter 1.10 of this Code.

B. Suspension or revocation.

1. In addition to any other penalty authorized by law, a Tobacco Retailer's license shall be suspended or revoked if the City finds based on a preponderance of the evidence, after the licensee is afforded notice and an opportunity to be heard, if it is determined that any of the following has occurred:

- a. The licensee or his/her agent or employee has violated any provision of this Chapter;
- b. The licensee or his/her agent or employee has continued to operate as a Tobacco Retailer after a license issued pursuant to this Chapter has been suspended; or
- c. The retailer violates any provision of this Chapter twice within any thirty-

six (36) month period.

2. Notwithstanding the foregoing, a license may be revoked if it is determined that one or more grounds for denial of a license under Section 5.78.070 of this Chapter existed at the time the application was made or at any time before the license was issued. No administrative fine shall accompany a revocation of a wrongly issued license.
3. Any applicant aggrieved by a decision revoking or suspending a license pursuant to this Chapter may contest the decision in the same manner as a challenge of an administrative citation, pursuant to the procedure set forth in Section 5.78.070(B).

5.78.130 Tobacco Retailing Without a Valid License.

In addition to any other penalty authorized by law, if the City based on a preponderance of 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'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, no new license may be issued 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 thirty-six (36) month 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 violation.
3. After of a third or subsequent violation of this section at a location within any thirty-six (36) month period, no new license may be issued for the Person or the location (unless ownership of the business at the location has been transferred in an Arm's Length Transaction), until three (3) years have passed from the date of the violation.

5.78.140 New license after revocation.

Notwithstanding any other provision of this Chapter, no Tobacco Retailer's license shall be issued to a Tobacco Retailer (or business owner thereof) whose license has previously been revoked pursuant to this Chapter for a period of twelve (12) months from the date of the prior revocation, unless ownership of the business at the location has been transferred in an Arm's Length Transaction.

5.78.150 Implementing rules and regulations.

The City Manager is hereby authorized to make and promulgate any rules and regulations necessary to implement the requirements of this Chapter. The rules and regulations shall be in addition to the requirements set forth in this Chapter. In the event of a conflict between a provision set forth in this Chapter and a rule or regulation promulgated by the City Manager pursuant to this section, the more stringent or restrictive requirement or condition shall apply.

Section 2. Administrative Citations and Penalties. Section 1.10.040 of Chapter 1.10 of Title 1 the HBMC is hereby amended to add subparagraph (A)(19) to read as follows:

“19. Chapter 5.78: Tobacco Retailer License”

Section 3. 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 of the City of Hermosa Beach 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 5. Effective Date. This ordinance shall take effect thirty days after its passage and adoption pursuant to California Government Code section 36937.

Section 6. Certification. The City Clerk is directed to certify the passage and adoption of this Ordinance; cause it to be entered into the City of Hermosa Beach’s book of original ordinances; make a note of the passage and adoption in the records of this meeting; and, within fifteen days after the passage and adoption of this Ordinance, cause it to be published or posted in accordance with California law.

PASSED, APPROVED and ADOPTED this ____ day of _____ 2018.

VOTE: AYES:
 NOES:
 ABSTAIN:
 ABSENT:

MAYOR of the City of Hermosa Beach, California

ATTEST:

APPROVED AS TO FORM:

City Clerk

City Attorney