

Chapter 8.90

TOBACCO RETAIL LICENSING

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8.90.010 Title. This Chapter shall be known as the Tobacco Retail Licensing Ordinance. This Chapter shall be applicable in the unincorporated territory of the County of Tuolumne, which shall be referred to herein as "County."

8.90.020 Purpose. The purpose of this chapter is to enact a tobacco retail licensing system in order to enforce laws relating to the sale of commercial tobacco products. Requiring tobacco retailers to obtain a tobacco retailer license will allow the Board of Supervisors to regulate the operation of lawful businesses to discourage violations of federal, state, and local tobacco control and youth tobacco access laws.

8.90.030 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:

- 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.
- B. "Cigar" means any roll of tobacco other than a cigarette wrapped entirely or in part in tobacco or any substance containing

tobacco and weighing more than 4.5 pounds per thousand.

- C. "Cigarette" means: (1) any roll of tobacco wrapped in paper or in any substance not containing tobacco; and (2) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described herein.
- D. "Compliance checks" means systems the division uses to investigate and ensure that tobacco retailers are following and complying with the requirements of this chapter. Compliance checks may involve the use of persons between the ages of 18 and 20 who purchase or attempt to purchase tobacco products. Compliance checks may also be conducted by the County 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. "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.
- F. "Division" means Tuolumne County Environmental Health Division and any agency or person designated by the Division to enforce or administer the provisions of this chapter.
- G. "Electronic smoking device" means any device that may be used to deliver any aerosolized or vaporized substance to the person inhaling from the device, including, but not limited to, an e cigarette, e-cigar, e-pipe, vape pen, or e-hookah. Electronic smoking device includes any component, part, or accessory of the device, and also includes any substance that may be aerosolized or vaporized by such device, whether or not the substance contains nicotine. Electronic smoking device does not include drugs, devices, or combination products authorized for sale by the U.S. Food and Drug Administration, as those terms are defined in the Federal Food, Drug, and Cosmetic Act.
- H. "Flavored Tobacco Product" means any tobacco product that contains a taste or smell, other than the taste or smell of tobacco, that is distinguishable by an ordinary consumer either prior to, or during the consumption of, a tobacco product, including, but not limited to, any taste or smell relating to fruit, menthol, mint, wintergreen, chocolate, cocoa, vanilla, honey, molasses, or any candy, dessert, alcoholic beverage, herb, or spice.
- I. "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 4.5 pounds per thousand. "Little Cigar" includes, but is not limited to, tobacco products known or labeled as small cigar, little cigar, or cigarillo.
- 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. "Moveable place of business" means any form of business that is operated out of a kiosk, truck, van, automobile or other type of vehicle or transportable shelter and not a fixed address store front or other permanent type of structure authorized for sales transactions.
- 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 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 ultimate control over the day-to-day operations of a business.
- 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. "Smoking" means inhaling, exhaling, burning, or carrying any lighted or heated cigar, cigarette, or pipe, or any other lighted or heated product containing, made, or derived from nicotine, tobacco, marijuana, or other plant, whether natural or synthetic, that is intended for inhalation. "Smoking" includes using an electronic smoking device.
- P. "Tobacco Product" means: 1. any product containing, made of, or derived from tobacco or nicotine that is intended for human consumption or is likely to be consumed, whether inhaled, absorbed, or ingested by any other means, including but not limited to, a cigarette, a cigar, pipe tobacco, chewing tobacco, snuff, or snus; 2. Any electronic smoking device and any substances that may be aerosolized or vaporized by such device, whether or not the substance contains nicotine; or 3. any component, part, or accessory of 1. or 2., whether or not any of these contains tobacco or nicotine, including but not limited to filters, rolling papers, blunt or hemp wraps, hookahs, mouthpieces, and pipes. "Tobacco product" does not mean

drugs, devices, or combination products authorized for sale by the U.S. Food and Drug Administration, as those terms are defined in the Federal Food, Drug, and Cosmetic Act.

Q. "Tobacco Retailer" means any person who sells, offers for sale, or exchanges or offers to exchange for any form of consideration, tobacco products. This definition is without regard to the quantity of tobacco products sold, offered for sale, exchanged, or offered for exchange.

R. "Tobacco Retailing" means engaging in the activities of a tobacco retailer.

8.90.040 General requirements and prohibitions.

- A. It shall be unlawful for any person to engage in tobacco retailing in the County without first obtaining and maintaining a valid tobacco retailer's license for each location at which tobacco retailing is to occur. Tobacco retailing without a valid tobacco retailer's license is a nuisance as a matter of law.
- B. 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 the sale of tobacco products.
- C. No person engaged in tobacco retailing shall sell a tobacco product to a person under 21 years of age.
- D. Each tobacco retailer license shall be prominently displayed in a publicly visible location at the licensed location.
- E. No person engaged in tobacco retailing shall sell a tobacco product to another person without first verifying by means of government-issued photographic identification that the recipient is at least 21 years of age.
- F. All sales of tobacco products shall be conducted in-person in 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 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 County.

G. All tobacco retailers 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 tobacco retailer.

8.90.050 Sale of flavored tobacco products prohibited.

- A. It shall be unlawful for any tobacco retailer to sell any flavored tobacco product.
- B. 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 a taste or smell other than tobacco shall constitute presumptive evidence that the tobacco product is a flavored tobacco product.

8.90.060 Limits on eligibility for a tobacco retailer license Tobacco retail licenses shall not be issued to any tobacco retailer that is not operating in a fixed location. No tobacco retail license will be issued to a moveable place of business.

8.90.070 Application procedure.

- A. An 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. All applications shall be submitted on a form supplied by the Division.
- B. A license issued contrary to this chapter, contrary to any other law, or on the basis of false or misleading information shall be revoked pursuant to Section 8.90.080 of this chapter.
- C. Applicant submissions 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 location for which a license is sought.
 - 3. The name and mailing address authorized by each proprietor to receive all communications and notices required by,

authorized by, or convenient to the enforcement of this chapter.

4. Proof that the location for which a tobacco retailer's license is sought has been issued all necessary state licenses for the sale of tobacco products.
 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 governing the sale of tobacco products and, if so, the dates and locations of all such violations within the previous five years.
 6. A signed affidavit affirming that the proprietor has not sold and will not sell any tobacco product without a license required by this chapter.
 7. Such other information as the Division deems necessary for the administration or enforcement of this chapter as specified on the application form required by this section.
- D. A licensed tobacco retailer shall inform the Division 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.

8.90.080 License issuance or denial.

- A. Upon the receipt of a complete and adequate application for a tobacco retailer's license and the license fee required by this chapter, the Division may approve or deny the application for a license, or it may delay action for a reasonable period of time to complete any investigation of the application or the applicant deemed necessary.
- B. The Division may deny an application for a tobacco retailer's license based on any of the following:
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 for which this chapter prohibits a license to be issued;
 3. The application seeks authorization for tobacco retailing for a proprietor to whom this chapter prohibits a license to be issued; or

4. The application seeks authorization for tobacco retailing in a manner that is prohibited pursuant to this chapter, that is unlawful pursuant to any other chapter of this Code, or that is unlawful pursuant to any other local, state, or federal law governing the sale of tobacco products.
5. The applicant seeks authorization for tobacco retailing for a proprietor or other person for whom, or at a location for which, a license revocation is in effect pursuant to this Chapter.

C. The Division may revoke a tobacco retailer's license if the Division finds, subsequent to issuing the license, that one or more of the bases for denial of a license under Section 8.90.080(B) existed at the time application was made or at any time before the license issued. No new license shall issue for a period of not less than thirty (30) days from the date of revocation. This revocation is subject to appeal under Section 8.90.090.

8.90.090 Appeal of denial of application.

- A. If the Environmental Health Director denies an application for or revokes a license pursuant to Section 8.90.080, the applicant may appeal the denial or revocation by filing a written request with the Environmental Health Director within fifteen (15) calendar days of the date of decision.
- B. A request for appeal shall include a detailed written explanation as to the grounds for appeal of the denial or revocation. Any appeal shall be limited to such written grounds.
- C. The Board of Supervisors shall hear any appeal of a denial or revocation under Section 8.90.080. The Board is authorized to:
1. Conduct hearings;
 2. Issue subpoenas;
 3. Receive evidence;
 4. Administer oaths;
 5. Rule on questions of law and the admissibility of evidence; and
 6. Prepare a records of the proceedings.
- D. Hearing Procedure:
1. An appeal request shall be deemed filed upon receipt of a written appeal request by the

- Environmental Health Director and the payment of any hearing fee, which may be established by resolution of the Board of Supervisors, within the specified time frame. Any hearing fee shall not exceed the reasonable cost to the County of a hearing.
2. The hearing before the Board shall be set for a date that is not less than fifteen (15) days from the date of hearing request. The owner and/or responsible person requesting the hearing shall be notified of the time and place set for the hearing at least fifteen (15) days prior to the date of the hearing.
 3. The Board shall only consider evidence that is relevant to the hearing matter.
 4. The owner or responsible person shall be given the opportunity to testify and present witnesses and evidence at the requested hearing.
 5. The failure of the owner, responsible person, or an authorized representative, to appear at any properly noticed hearing shall constitute a failure to exhaust administrative remedies. Failure to appear at the hearing shall not affect the proceedings, the hearing will proceed, and all matters will be resolved without the participation of the person s provided notice of the hearing.
 6. Failure to raise any issue at the hearing will be considered a waiver of that issue, and the County will contend it cannot be raised in any judicial review or enforcement proceeding or action.
 7. Any documents submitted by the County shall constitute prima facie evidence of the respective facts contained in those documents.
 8. At least ten (10) days prior to the date of the hearing, the person requesting the hearing, shall be provided with copies of the license denial or revocation, reports and other documents submitted or relied upon by the County. No other discovery is permitted. Formal rules of evidence shall not apply.
 9. Except as provided herein, Government Code section 11513 shall apply to the hearing and the term "respondent" shall refer to the applicant and/or other party appearing in response to the notice of hearing. Official notice shall be taken of any fact which appears in any of the official records of the County or any of its departments, and of any fact in the same manner as is judicial notice pursuant to Evidence Code sections 451, 452, 453, 454, 455 and 456. The Board may question witnesses.
 10. The Board may continue the hearing and request additional information from the County or the person requesting the hearing prior to issuing a written decision.
 11. The County shall establish the grounds for denial or revocation, as provided by Section 8.90.080, by a preponderance of the evidence.
 12. The oral proceedings at all hearings shall be reported electronically by a tape recorder provided by the County, and under the control of the Board. Any party may provide a certified shorthand reporter to maintain a record of the proceedings at the party's own expense.
- E. After considering all of the testimony and evidence submitted at the hearing, the Hearing Board shall determine whether the County has established the grounds for denial or revocation. If the Hearing Board finds that the County has met the burden of proof, the appeal shall be denied; if the Hearing Board finds that the County has not shown by a preponderance of evidence that grounds exist to deny the application for or revoke the license pursuant to Section 8.90.080, the Board shall make written findings stating the factual and legal basis for its decision and shall direct the Division to issue a license to the applicant.
 - F. The decision of the Board shall be the final administrative order and decision.

To seek further relief, an applicant may file an appeal in superior court as set forth in California Code of Civil Procedure sections 1094.5 and 1094.6.

8.90.100 License renewal and expiration. A tobacco retailer's license is invalid if the appropriate fee has not been timely paid in full or if the term of the license has expired. The term of a tobacco retailer license is one (1) year. Each tobacco retailer shall apply for the renewal of their tobacco retailer's license and submit the license fee no later than thirty (30) days prior to expiration of the current license. A retailer that fails to timely submit a renewal application and fee is ineligible for license renewal and must submit a new application pursuant to Section 8.90.070. A retailer whose license is subject to a suspension pursuant to Section 8.90.150 is ineligible for license renewal and must submit a new application pursuant to Section 8.90.070 once the suspension period has concluded.

8.90.110 License not transferrable. A tobacco retailer's license may not be transferred from one person to another or from one location to another. A new tobacco retailer's license is required whenever a tobacco retailing location has a change in proprietors or location.

8.90.120 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 County identified on the face of the permit. 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. Nothing in this chapter shall be construed to render inapplicable, supersede, or apply in lieu of, any other provision of applicable law.

8.90.130 Fee for license. Each license shall require the payment of a nonrefundable fee as set forth in Chapter 3.40 of the Tuolumne County Ordinance Code. The fee shall be calculated so as to recover the cost of administration and enforcement of this chapter, including, but not limited to, 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.

8.90.140 Compliance monitoring.

- A. Compliance with this chapter shall be monitored by the Division. In addition, the County may designate additional persons to monitor compliance with this chapter. All licensed premises must be open to inspection by county staff or designated persons during regular business hours.
- B. Each tobacco retailer shall be subject to inspection by the Environmental Health Division at least one (1) time per 12-month period to ensure compliance with this chapter.
- C. The County will conduct at least one (1) compliance check per 24-month period that involves the participation of persons between the ages of 18 and 20 to enter licensed premises to attempt to purchase tobacco products.
- D. Nothing in this Chapter shall be construed as imposing on the County any duty to enforce the provisions of this Chapter, and the County shall not be held liable for failure to enforce this Chapter. Nothing in this section shall create a right of action in any licensee or other person against the County or its agents.

8.90.150 Enforcement.

- A. This Chapter shall be enforced as provided for in Chapter 1.10 of this Code. Violations of the Chapter are considered violations impacting health and safety. The provisions of this Chapter shall be enforced by the Environmental Health Division.
- B. In addition to the civil penalties authorized by Chapter 1.10 of the Code, a Notice and Order issued pursuant to Chapter 1.10 of this Code shall specify that a tobacco retailer's license shall be revoked:
 - 1. After a first violation of this Chapter at a location within any twelve (12) month period while owned by the same person, no new license may issue for that location until not less than ten (10) days have passed from the first Notice and Order.

2. After a second violation of this Chapter at a location within a twelve (12) month period while owned by the same person, no new license may issue for that location until not less than ninety (90) days have passed from the second Notice and Order.
 3. After a third violation of this Chapter at a location within a twelve (12) month period while owned by the same person, no new license may issue for that location until not less than one (1) year has passed from the third Notice and Order.
 4. After four or more violations of this Chapter at a location within a twelve (12) month period while owned by the same person, no new license may issue for that location until less than five (5) years have passed from the date of revocation.
- C. Each day on which a tobacco product is distributed, sold, or offered for sale in violation of this Chapter shall constitute a separate violation of this Chapter and each individual tobacco product that is distributed, sold, or offered for sale in violation of this Chapter shall constitute a separate violation of this Chapter.
 - D. Violations of this Chapter are hereby declared to be public nuisances.
 - E. Notwithstanding any other provision of this Chapter, prior violations at a location shall continue to be counted against a location and license ineligibility periods shall continue to apply to a location unless: 1. The location has been transferred to new proprietor(s) in an arm's length transaction; and 2. The new proprietor(s) provide the County with evidence that the new proprietor(s) have acquired the location in an arm's length transaction.

8.90.160 Exceptions.

- A. Nothing in this chapter prevents the provision of tobacco products to any person as part of an indigenous practice or a lawfully recognized religious or spiritual ceremony or practice.
- B. 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.

8.90.170 Public records. All information provided to the Division by a licensee or license applicant pursuant to this chapter shall be subject to disclosure under the California Public Records Act (California Government Code section 7920.000 et seq.) or any other applicable law.