

CITY OF ALAMEDA ORDINANCE NO. \_\_\_\_\_

New Series

AMENDING THE ALAMEDA MUNICIPAL CODE BY ADDING ARTICLE XVII (TOBACCO RETAILERS) TO CHAPTER VI (BUSINESSES, OCCUPATIONS AND INDUSTRIES) TO REQUIRE LICENSING OF TOBACCO RETAILERS IN THE CITY AND PROHIBIT THE SALE OF FLAVORED TOBACCO PRODUCTS

The City Council of the City of Alameda does ordain as follows:

**SECTION I. FINDINGS.** The City Council of the City of Alameda hereby finds and declares as follows:

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

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

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

- 40,000 California adults die from their own smoking annually;
- More than 25% of all adult cancer deaths in California are attributable to smoking;
- Smoking costs California \$13.29 billion in annual health care expenses, \$3.58 billion in Medicaid costs caused by smoking, and \$10.35 billion in smoking-caused productivity losses;
- Tobacco use can cause disease in nearly all of the organs of the body and is responsible for 87% of lung cancer deaths, 32% of coronary heart disease deaths, and 79% of all cases of chronic obstructive pulmonary disease in the United States; and

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

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

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

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

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

- Tobacco companies target young adults ages 18 to 24 to increase their frequency of tobacco use and encourage their transition to habitual users;
- Tobacco industry documents state that if "a man has never smoked by the age of 18, the odds are three-to-one he never will. By age 24, the odds are twenty-to-one";
- The tobacco industry spends an estimated \$620 million annually to market tobacco products to California residents; and

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

- 9.3% of high school students in California reported buying their own electronic cigarette from a store;

- 7.6% of California tobacco retailers unlawfully sold tobacco products to minors in 2015; 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 Council to regulate the operation of lawful businesses to discourage violations of federal, state, and local tobacco control and youth tobacco access laws, as evidenced by the following:

- Cigarettes are the number one product sold in U.S. convenience stores, and in 2012, they generated an average of \$622,248 in sales per store;
- A study found that odds of daily smoking were reduced by 2% for each 1% increase in merchant compliance with youth tobacco sales laws;
- Studies found increased retailer compliance and reduced tobacco sales to youth following implementation and active enforcement of youth tobacco sales laws paired with penalties for violations;
- A review of 33 California communities with strong tobacco retailer licensing ordinances found that youth sales rates declined in 32 of these communities after the ordinances were enacted, with an average decrease of 28% in the youth sales rate; 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, neither federal nor California state laws restrict the sale of menthol cigarettes or flavored non-cigarette tobacco products, such as cigars, cigarillos, smokeless tobacco, hookah tobacco, electronic smoking devices, and the solutions used in these devices; and

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

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

WHEREAS, flavored tobacco has significant public health implications for youth and people of color as a result of targeted industry marketing strategies and product manipulation; and

WHEREAS, scientific reviews by the FDA and the Tobacco Products Scientific Advisory Committee (“TPSAC”) found marketing of menthol cigarettes likely increases the prevalence of smoking among the entire population, but especially among youth,

African Americans, and possibly Hispanic and Latino individuals; and that menthol cigarettes are associated with increased initiation and progression to regular cigarette smoking, increased dependence on cigarettes, and reduced success in smoking cessation, especially among African American menthol smokers; and

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

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

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

WHEREAS, unlike cigarette use that has steadily declined among youth, the prevalence of the use of non-cigarette tobacco products has remained statistically unchanged and in some cases actually increased among youth; and

WHEREAS, the availability of inexpensive tobacco products leads to increased tobacco use as evidenced by more than 100 academic studies that conclusively show that when tobacco products are made more expensive, fewer people use tobacco, fewer initiate tobacco use, and more people quit tobacco use; and

WHEREAS, although federal and state law ban the sale of individual cigarettes, neither federal nor California state laws restrict the sale of individual little cigars and cigars; and

WHEREAS, many retailers sell little cigars and cigars individually, making them more affordable and appealing to youth. For example:

- 87.4% of California tobacco retailers sell a popular brand of youth-friendly cigars for less than \$1.00;
- From 1995 to 2008, annual sales of cigarillos increased by 255%, and sales of little cigars increased by 316%; and

WHEREAS, a 10% increase in cigar prices has been associated with decreased cigar sales and may significantly reduce cigar use among youth; and

WHEREAS, neither federal nor California state laws set a minimum price for tobacco products; and

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

WHEREAS, pharmacies sell cigarettes cheaper than other stores; and

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

WHEREAS, the density and proximity of tobacco retailers influence smoking behaviors, including number of cigarettes smoked per day; and

WHEREAS, the density of tobacco retailers near schools has been associated with increased youth smoking rates; and

WHEREAS, adults who smoke have a harder time quitting when residential proximity to tobacco retailers is smaller and density is higher; and

WHEREAS, tobacco retailers are more prevalent in underserved communities, especially in neighborhoods with a higher proportion of African American or Hispanic residents; and

WHEREAS, disparities in tobacco retailer location and density differ between rural and urban settings, with higher density in urban locations and variations for Hispanics in rural communities as well as intra-urban differences by income; and

WHEREAS, policies to reduce tobacco retailer density have been shown to be effective and may reduce or eliminate inequities in the location and distribution of tobacco retailers; and

WHEREAS, six out of 10 tobacco retailers in California sold cigar products using cannabis-related flavor descriptors and these retailers were more prevalent in school neighborhoods with lower median income; and

WHEREAS, both youth and adult tobacco users are more likely to also use cannabis; and

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

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

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

WHEREAS, state law explicitly permits cities and counties to enact local tobacco retail licensing ordinances, and allows for the suspension or revocation of a local license for a violation of any state tobacco control law (Cal. Bus. & Prof. Code § 22971.3); and

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

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

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

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

NOW THEREFORE, it is the intent of the City Council, in enacting this ordinance, to ensure compliance with the business standards and practices of the City and to encourage responsible tobacco retailing and to discourage violations of tobacco-related laws, especially those which prohibit or discourage the sale or distribution of tobacco and nicotine products to youth, 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 penalties provided therein.

**SECTION II.** Article XVII (Tobacco Retailers) of the Alameda Municipal Code is hereby added to Chapter VI to read as follows:

**6-60.10. DEFINITIONS.**

The following words and phrases, whenever used in this Article 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 in the open market between two informed and willing parties, neither of which is under any compulsion to participate in the transaction. A sale for which a significant purpose is avoiding the effect of the violations of this Article is not an Arm's Length Transaction.
- B. "Characterizing Flavor" means a taste or aroma, other than the taste or aroma of tobacco, imparted prior to or during consumption of a Tobacco Product or any byproduct produced by the Tobacco Product including, but not limited to, tastes or aroma relating to menthol, mint, wintergreen, fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb or spice; provided, however, that a Tobacco Product shall not be determined to have a Characterizing Flavor solely because of the use of additives or flavorings or the provision of ingredient information.
- C. "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 three pounds per thousand.
- D. "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 that, 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 as described herein.
- E. "City" means the City of Alameda.
- F. "Consumer" means a Person who purchases a Tobacco Product for consumption and not for Sale to another.
- G. "Coupon" means anything that can be exchanged or used to acquire a Tobacco Product for less than the full retail price, whether in paper, digital or other form.
- H. "Department" means the City's Community Development Department and any other City department or Person designated by the Department to enforce or administer the provisions of this Article.

- I. "Drug Paraphernalia" means the same as that term is defined in California Health and Safety Code, section 11364.5, as amended from time to time.
- J. "Flavored Tobacco Product" means any Tobacco Product that contains a constituent that imparts a Characterizing Flavor. For purposes of this definition "constituent" means any ingredient, substance, chemical or compound, other than tobacco, water or reconstituted tobacco sheet that is added by the manufacturer to the Tobacco Product during the processing, manufacturing or packing of the Tobacco Product.
- 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.
- L. "Labeling" means any written, printed or graphic material upon any Tobacco Product or any of its packaging, or accompanying such Tobacco Product.
- M. "Little Cigar" means any roll of tobacco other than a Cigarette wrapped entirely in part in tobacco or any substance containing tobacco and weighing no more than three pounds per thousand, including, but not limited to, Tobacco Products known or labeled as small cigar, little cigar or cigarillo.
- N. "Manufacturer" means any Person, including a repacker or relabeler, who manufactures, fabricates, assembles, processes or labels a Tobacco Product or who imports a finished Tobacco Product for sale or distribution into the United States.
- O. "Package of Cigarettes" means a pack of 20 Cigarettes in a manufacturer's original Consumer packaging designed for individual retail sale to a Consumer.
- P. "Packaging" means any 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.
- Q. "Person" means any natural person, partnership, cooperative association, corporation, personal representative, receiver, trustee, assignee, or any other legal entity.
- R. "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 ten percent (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.



- S. "Public Nuisance" means the same as defined in California Civil Code, section 3480, as amended from time to time.
- T. "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.
- U. "Self-Service Display" means the open display or storage of Tobacco Products or Tobacco Paraphernalia in a manner that is physically accessible in any way to the general public without the assistance of the retailer or employee of the retailer and a direct person-to-person transfer between the purchaser and the retailer or employee of the retailer. A vending machine is a form of Self-Service Display.
- V. "Smoking" means inhaling, exhaling, burning or carrying any lighted, heated or ignited Tobacco Product.
- W. "Tobacco Paraphernalia" means any item designed or marketed for the consumption, use or preparation of Tobacco Products,
- X. "Tobacco Product" means:
1. any product containing, made, or derived from tobacco or nicotine that is intended for human consumption, whether smoked, heated, chewed, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means, including, but not limited to Cigarettes, Cigars, Little Cigars, chewing tobacco, pipe tobacco, snuff; and
  2. any electronic smoking device that delivers nicotine or other substances to the Person inhaling from the device including, but not limited to, an electronic cigarette, electronic cigar, electronic pipe or electronic hookah.
  3. Notwithstanding any provision of paragraphs 1 and 2 of this subsection X 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 drugs, devices, or combination products authorized for sale by the United States Food and Drug Administration, as those terms are defined in the Federal Food, Drug and Cosmetic Act, including cessation products specifically approved by the United States Food and Drug Administration for use in treating nicotine or tobacco dependence.
- Y. "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.

- Z. “Youth Populated Area” means a parcel in the City that is used or occupied by a private or public kindergarten, elementary, middle or high school.

#### **6-60.20. TOBACCO RETAILER LICENSE REQUIRED.**

- A. It shall be unlawful for any Person to act as a Tobacco Retailer in the City without first obtaining and maintaining a valid Tobacco Retailer’s license pursuant to this Article for each location at which that activity is to occur. Tobacco Retailing without a valid Tobacco Retailer’s license is a Public Nuisance. This Article applies to all existing and future Tobacco Retailers in the City.
- B. 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 Article for a licensee, or any of the licensee’s agents or employees, to violate any local, state, or federal law applicable to Tobacco Products, Tobacco Paraphernalia, or Tobacco Retailing.
- C. Each Tobacco Retailer license shall be prominently displayed in a publicly visible location at the licensed location.
- D. No Person engaged in Tobacco Retailing shall Sell a Tobacco Product or Tobacco Paraphernalia to another Person who appears to be under the age of 27 years without first examining the identification of the recipient to confirm that the recipient is at least the minimum age for sale of Tobacco Products as established by State law.
- E. No Person who is younger than 18 years old shall engage in Tobacco Retailing.
- F. Tobacco Retailing by means of a Self-Service Display is prohibited.
- G. A Tobacco Retailer without a valid Tobacco Retailer license or a Proprietor without a valid Tobacco Retailer license, including, for example, a Person whose license has been suspended or revoked:
  - 1. Shall keep all Tobacco Products and Tobacco Paraphernalia out of public view. The public display of Tobacco Products or Tobacco Paraphernalia in violation of this provision shall constitute Tobacco Retailing without a license under Section 6-60.140; and
  - 2. Shall not display any advertisement relating to Tobacco Products or Tobacco Paraphernalia that promotes the sale or distribution of such Products or Paraphernalia from the Tobacco Retailer’s location or that could lead a reasonable Consumer to believe that such Products or Paraphernalia can be obtained at that location.

H. Nothing in this Article shall be construed to grant any Person obtaining and maintaining a Tobacco Retailer's license any status or right other than the right to act as a Tobacco Retailer at the location in the City identified on the face of the license. Nothing in this Article shall be construed to render inapplicable, supersede or apply in lieu of, any other provision of applicable law including, but not limited to, any provision of the zoning ordinance including the conditional use permit requirements, or any condition or limitation on smoking in an enclosed place of employment pursuant to Labor Code, section 5405.5 or Section 24-11.1 et seq. of this Code or smoking prohibitions in housing under Section 24-12.1 et seq. of this Code.

#### **6-60.30. LIMITS ON ELIGIBILITY FOR A TOBACCO RETAILER LICENSE.**

- A. No license may issue, and no license may be renewed, to authorize Tobacco Retailing at other than a fixed location. For example, Tobacco Retailing by Persons on foot or from vehicles is prohibited.
- B. No license may issue to authorize Tobacco Retailing at any location where Drug Paraphernalia is sold, offered for sale or displayed for sale.
- C. A license may issue to authorize Tobacco Retailing to any Person who, on the date this Article is adopted, is operating lawfully and holds a State license to Sell Tobacco Products even if the Person would otherwise be ineligible under this Article for a Tobacco Retailer license for the location for which the license is sought. A Tobacco Retailer to whom a license under this Article has been issued may renew the license for that location so long as all of the following conditions are met:
  - 1. The license is timely obtained and is renewed without lapse or permanent revocation;
  - 2. The Tobacco Retailer is not closed for business or otherwise suspends Tobacco Retailing for more than 60 consecutive days; and
  - 3. The Tobacco Retailer retains the right to operate under all other applicable laws.
- D. As to any Person who, on the date this Article is adopted, did not hold a State license to sell Tobacco Products, no license may issue to authorize Tobacco Retailing (i) in a Pharmacy (as defined in subsection F of this Section 6-60.30), (ii) within 300 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 front entrance of the Tobacco Retailer's business location) or (iii) within 500 feet of another Tobacco Retailer location already licensed under this Article as measured by a straight line from the nearest point of the property line of

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

- E. As to any Person who, on the date this Article is adopted, holds a State license to sell Tobacco Products and who, thereafter, obtains a Tobacco Retailer license as provided in this Article, no license for that location may be issued to a different Person or Proprietor, regardless if ownership of the business at the location is transferred in an Arm's Length Transaction, if the location is within 300 feet of a Youth Populated Area (as measured in subsection D of this section 6-60.30) unless such license is issued to such different Person or Proprietor within three years from the date this Article is adopted.
- F. Notwithstanding subsection C of this Section 6-60.30:

No license shall be issued under this Article to authorize Tobacco Retailing in a Pharmacy. For purposes of this subsection, "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 prescriptive pharmaceuticals are offered for sale, regardless of whether the retail establishment sells other retail goods in addition to prescription pharmaceuticals.

- G. The total number of Tobacco Retailer licenses within the City shall be limited to one for each 2500, or fraction thereof, inhabitants of the City. For purposes of this subsection, the number of inhabitants shall be determined by the most current published total available from the U.S. Census Bureau or the California State Department of Finance, whichever has been most recently updated, as of the date the license application is filed. This subsection G shall not apply to any Tobacco Retailer who obtains and maintains a license under subsections C or E of this section 6-60.30. No new license may be issued to authorize Tobacco Retailing if the number of Tobacco Retailer licenses issued equals or exceeds the total number of authorized pursuant to this subsection G..

**6-60.40. POSTING OF FULL RETAIL PRICE; DISCOUNTS PROHIBITED; MINIMUM PACKAGING AND PRICING**

- A. A Tobacco Retailer shall prominently display the full retail price of all Tobacco Products offered for Sale at the point of display or at the point of sale.
- B. Notwithstanding any other provision of this Article, no Tobacco Retailer shall:
  - 1. Honor or redeem, or offer to honor or redeem, a Coupon to allow a Consumer to purchase Tobacco Products for less than the full retail price.
  - 2. Sell, or offer for Sale, any Tobacco Products to a Consumer through a multi-package discount or otherwise provide any Tobacco Products to a Consumer

for less than full retail price in exchange for the purchase of any other Tobacco Products or any other item by the Consumer.

3. Provide any free or discounted item to a Consumer in consideration for the purchase of Tobacco Products at full retail price.
4. Sell, or offer for Sale, Tobacco Products to a Consumer for less than full retail price; provided, however, that this paragraph 4 does not prohibit a Tobacco Retailer from changing the full retail price or informing Consumers that the full retail price has changed.
5. Sell, or offer for Sale, any Little Cigar unless it is sold in a Package of at least five Little Cigars.
6. Sell, or offer for Sale, any Cigar unless it is sold in a package of at least five Cigars, provided, however, that this paragraph 6 shall not apply to a Cigar that has a retail price of at least five dollars, including all applicable taxes.
7. Sell, or offer for Sale, Cigarettes at a price that is less than seven dollars per package of Cigarettes, including all applicable taxes.
8. Sell, or offer for Sale, Cigars at a price less than five dollars per Cigar, including all applicable taxes.

C. The minimum price established by paragraphs 6 through 9 of subsection B of this Section 6-60.40 shall be adjusted annually by the annual average of the percentage change in the Consumer Price Index, all Urban Consumers for all items for the San Francisco-Oakland-San Jose statistical area as reported by the U.S. Bureau of Labor Statistics or successor to that index.

#### **6-60.50. APPLICATION PROCEDURE.**

- A. 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.
- B. It is the responsibility of each Proprietor to be informed regarding all laws applicable to Tobacco Retailing, including those laws affecting the issuance of a Tobacco Retailer's license. No Proprietor may rely on the issuance of a license as a determination by the City that the Proprietor has complied with all laws applicable to Tobacco Retailing. A license issued contrary to this Article, contrary to any other law, or on the basis of false or misleading information supplied by a Proprietor shall be revoked pursuant to Section 6-60.130 C of this Article. Nothing in this Article 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.

- C. All applications shall be submitted on a form supplied by the Department and shall contain the following information:
1. The name, address, and telephone number of each Proprietor of the business seeking a license.
  2. The business name, address, and telephone number of the single fixed location for which a license is sought.
  3. A single name and mailing address authorized by each Proprietor to receive all communications and notices (the "Authorized Address") required by, authorized by, or convenient to the enforcement of this Article. 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 paragraph 2 of this subsection C.
  4. Proof that the location for which a Tobacco Retailer's license is sought has been issued a valid state license for the sale of Tobacco Products, if the Tobacco Retailer sells products that require such license.
  5. Whether or not any Proprietor or any agent of the Proprietor has admitted violating, or has been found to have violated, this Article and, if so, the dates and locations of all such violations within the previous five years.
  6. All information required to be submitted in order to apply for a Tobacco Retailer's license shall be updated with the Department whenever the information changes within 10 business days of a change.
  7. A copy of the conditional use permit for which the Tobacco Retailer's license is sought if such permit is applicable and, if not, an explanation why no permit is required.
  8. A statement signed by each Proprietor that no Drug Paraphernalia is or will be sold, or offered for Sale, at the location for which a license is sought.
  9. Such other information as the Department deems necessary for the administration or enforcement of this Article as specified on the application form required by this section 6-60.50.
- D. All information specified in an application pursuant to this Section 6-60.50 shall be subject to disclosure under the California Public Records Act (California Government Code section 6250 *et seq.*) or any other applicable law including the City's Sunshine Ordinance, subject to the laws' exemptions.

#### **6-60.60. ISSUANCE OR DENIAL OF LICENSE.**

- A. Upon the Department's receipt of a complete application for a Tobacco Retailer's license or the renewal thereof, and the license fee required by this Article, the Department 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 Article;
  2. The application seeks authorization for Tobacco Retailing at a location for which this Article prohibits issuance of Tobacco Retailer license.
  3. The application seeks authorization for Tobacco Retailing for a Proprietor to whom this Article prohibits a license to be issued; and/or.
  4. The application seeks authorization for Tobacco Retailing that is prohibited pursuant to this Article (e.g., mobile vending), that is unlawful pursuant to this Code, including without limitation the zoning ordinance, building code, and business license tax ordinance, or that is unlawful pursuant to any other law.
- B. The Department's denial of the application shall be in writing, citing the reasons for such denial and shall be appealable to the City Manager as set forth in the appeal provisions in Section 6-60.130 B.

#### **6-60.70. LICENSE RENEWAL AND EXPIRATION.**

- A. 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. All prior year's fines and fees must be paid in full for a license to be renewed unless the Department provides otherwise. The term of a Tobacco Retailer license is twelve months, running from July 1 to June 30 of the following year. Each Tobacco Retailer shall annually apply for the renewal of the Tobacco Retailer's license and submit the license fee no later than 30 days prior to expiration of the term.
- B. A Tobacco Retailer's license that is not timely renewed shall expire at the end of its term. To renew a license not timely renewed pursuant to subsection A, the Proprietor must:
1. Submit the license fee and application renewal form; and
  2. Submit a signed affidavit affirming that the Proprietor:
    - (a) has not sold and will not Sell any Tobacco Product or Tobacco Paraphernalia after the license expiration date and before the license is renewed; or
    - (b) has waited the period of time required by Section 6-60.130 A of this Article for Tobacco Retailing without a valid license before seeking renewal of the license.
- C. If the Department denies the renewal of a Tobacco Retailer's license, the Tobacco Retailer may appeal the decision as provided in Section 6-60.130 B.

**6-60.80. LICENSES NONTRANSFERABLE.**

- A. A Tobacco Retailer's license may not be transferred from one Person or Proprietor to a different Person or from one location to another. Such Person must apply for a Tobacco Retailer's License as provided in this Article.
- B. Notwithstanding any other provision of this Article, prior violations at a location shall continue to be counted against a location and license ineligibility periods shall continue to apply to a location.

**6-60.90 LICENSE CONVEYS A LIMITED, CONDITIONAL PRIVILEGE.**

Nothing in this Article shall be construed to grant any Person obtaining and maintaining a Tobacco Retailer's license any status or right other than the limited conditional privilege to act as a Tobacco Retailer at the location in the City identified on the face of the license. For example, nothing in this Article shall be construed to render inapplicable, supersede, or apply in lieu of, any other provision of applicable law, including but not limited to, any provision of this Code including without limitation the zoning ordinance, building codes, and business license tax ordinance, or any condition or limitation on smoking in an enclosed place of employment pursuant to California Labor Code section 6404.5. For example, obtaining a Tobacco Retailer's license does not make the retailer a "retail or wholesale tobacco shop" for the purposes of California Labor Code section 6404.5.

**6-60.100 FEE FOR LICENSE.**

The fee to issue or to renew a Tobacco Retailer's license shall be established from time to time by resolution of the City Council. The fee shall be calculated so as to recover the cost of administration and enforcement of this Article, including, for example, issuing a license, administering the license program, retailer education, retailer inspection and compliance checks, documentation of violations, and prosecution of violators, but shall not exceed the cost of the regulatory program authorized by this Article. 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.

**6-60.110. SALE OF FLAVORED TOBACCO PRODUCTS PROHIBITED**

- A. It shall be a violation of this Article for any Tobacco Retailer or any of the Tobacco Retailer's agents or employees to Sell or offer for Sale, or to possess with intent to Sell or offer for Sale, any Flavored Tobacco Product.
- B. There shall be a rebuttable presumption that a Tobacco Retailer in possession of four or more Flavored Tobacco Products, including but not limited to individual Flavored Tobacco Products, packages of Flavored Tobacco Products, or any



combination thereof, possesses such Flavored Tobacco Products with intent to Sell or offer for Sale.

- C. There shall be a rebuttable presumption that a Tobacco Product is a Flavored Tobacco Product if a Tobacco Retailer, Manufacturer, or any employee or agent of a Tobacco Retailer or Manufacturer:
1. makes or disseminates a public statement or claim to the effect that the Tobacco Product imparts a Characterizing Flavor;
  2. uses text and/or images on the Tobacco Product's Labeling or Packaging that explicitly or implicitly indicate that the Tobacco Product imparts a Characterizing Flavor;
  3. uses text or images on the Tobacco Product's Labeling or Packaging that uses descriptive terms such as "sweet" or "spicy" that refer to or imply a Characterizing Flavor; or
  4. has taken action directed to Consumers that would be reasonably expected to cause Consumers to believe the Tobacco Product imparts a Characterizing Flavor.

#### **6-60.120. COMPLIANCE MONITORING.**

- . The Department shall inspect each Tobacco Retailer for compliance with this Article. In addition, any peace officer may enforce the provisions of this Article. The City may designate any number of additional Persons to monitor compliance with this Article. Nothing in this section shall create a right of action in any licensee or other Person against the City or its agents.

#### **6-60.130. SUSPENSION OR REVOCATION OF LICENSE**

- A. In addition to any other penalty authorized by law (including this Article), the Department shall suspend or revoke a Tobacco Retailer's license if a court of competent jurisdiction determines, or the Department finds based on the preponderance of evidence, after the licensee is afforded notice and opportunity to be heard, that the licensee, or any of the licensee's employees or agents, has violated any of the requirements, conditions or prohibitions of this Article or has pleaded guilty, "no contest" or its equivalent, or admitted to a violation of any law designated in this Article.
1. Upon the Department's finding of a first violation of this Article at a location within any five year period, the Tobacco Retailer licensee shall pay a fine of \$1500.
  2. Upon the Department's finding of a second violation of this Article at a location with any five year period, the license shall be suspended for 15 days. In lieu

of a 15 day suspension of a license, the Department may allow a Tobacco Retailer to pay a fine as provided in paragraph 5 of this subsection A.

3. Upon the Department's finding of a third violation of this Article at a location within any five year period, the license shall be suspended for 30 days, In lieu of a 30 day suspension, the Department may allow a Tobacco Retailer to pay a fine as provided in paragraph 5 of this subsection A..
  4. Upon the Department's finding of four or more violations of this Article at a location with any five year period, the license shall be revoked.
  5. The Tobacco Retailer must provide to the Department substantial evidence of its sales of its Tobacco Products over the 30 day period prior to the date of the violation. The Department shall determine the fine by calculating the average daily sales of the Tobacco Products and multiplying that number by 15 (if the second violation) or 30 (if a third violation).
- B. A decision of the Department to deny, suspend or revoke a license, or to impose a fine, is appealable to the City Manager and any appeal must be filed in writing with the City Clerk within ten days of mailing of the Department's decision. If such an appeal is timely made, it shall stay enforcement of the suspension or revocation, or the payment of the fine. The City Manager may conduct the hearing, assign a City Department head to conduct the hearing or assign the hearing to an outside hearing officer. In any matter so assigned, the person to whom the matter has been assigned shall report within 30 days after the conclusion of hearing his or her findings and recommendations to the City Manager. Within 60 days of the City Manager's receipt of the findings and recommendations, the City Manager shall confirm, adopt, modify or set aside the findings and with or without notice enter his or her findings and decision. If a license is suspended or revoked, or the renewal of a license denied, any certificate issued in connection with the granting of such license shall be immediately surrendered by the licensee to the City Manager. Review of the City Manager's decision shall be only through a judicial action under Code of Civil Procedure, Section 1094.5 and within the time frame for filing such action as provided in Code of Civil Procedure, section 1094.6. An appeal to City Manager is not available for a revocation made pursuant to subsection C below.
- C. A Tobacco Retailer's license shall be revoked if the Department finds, after the licensee is afforded notice and an opportunity to be heard, that one or more of the bases for denial of a license under Section 6-60.60 existed at the time application was made or at any time before the license issued. The decision by the Department shall be the final decision of the City. Such a revocation shall be without prejudice to the filing of a new license application.

#### **6-60.140. TOBACCO RETAILING WITHOUT A VALID LICENSE.**

- A. In addition to any other penalty authorized by law, if the Department finds or a court of competent jurisdiction determines, 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 within any 60 month period, no license may issue to the Person or for the location until 30 days have passed from the date of the violation.
  2. After a second violation of this section at a location within any 60 month period, no license may issue to the Person or for the location until 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 60 month period, no license may issue to the Person or for the location until one year has passed from the date of the violation.
- B. Tobacco Products and Tobacco Paraphernalia offered for Sale or exchange in violation of this section are subject to seizure by the Department or any peace officer and shall be forfeited after the licensee and any other owner of the Tobacco Products and Tobacco Paraphernalia seized is given reasonable notice and an opportunity to demonstrate that the Tobacco Products and Tobacco Paraphernalia were not offered for Sale or exchange in violation of this Article. The decision by the Department may be appealed pursuant to the procedures set forth in Section 6-60.130 B. Forfeited Tobacco Products and Tobacco Paraphernalia shall be destroyed after all internal appeals have been exhausted and the time in which to seek judicial review pursuant to California Code of Civil Procedure section 1094.6 or other applicable law has expired without the filing of a lawsuit or, if such a suit is filed, after judgment in that suit becomes final.
- C. For the purposes of the civil remedies provided in this Article:
1. each day on which a Tobacco Product, Tobacco Paraphernalia or Drug Paraphernalia is offered for Sale in violation of this Article shall constitute a separate violation of this Article; or
  2. each individual retail Tobacco Product and each individual retail item of Tobacco Paraphernalia or Drug Paraphernalia that is distributed, sold, or offered for Sale in violation of this Article shall constitute a separate violation of this Article.

#### **6-60.150. PENALTIES AND ENFORCEMENT.**

- A. The penalty and enforcement provisions of Articles 1-5 and 1.7 of Chapter 1 of this Code are incorporated herein by reference.
- B. Any violation is a Public Nuisance. In addition to the penalties provided in this section, any use or condition caused or permitted to exist in violation of any of the provisions of this Article shall be and is declared to be a Public Nuisance and may be summarily abated as such by the City.
- C. Whenever evidence of a violation of this Article is obtained in any part through the participation of a Person under the age of eighteen (18) years old, such a Person shall not be required to appear or give testimony in any civil or administrative process brought to enforce this Article and the alleged violation shall be adjudicated based upon the sufficiency and persuasiveness of the evidence presented.

#### **6-60.160. OUTREACH AND EDUCATION.**

The Department, in conjunction with the Alameda County Health Department and community organizations, shall develop and conduct a Tobacco Retailer outreach and education program designed to inform Tobacco Retailers about the requirements of this Article. Any written materials and training developed pursuant to this section shall be offered in multiple languages in addition to English. Nothing in this section shall create a right of action in any licensee or other Person against the City or its employees and agents.

#### **6-60.170 AUTHORITY TO ADOPT REGULATIONS TO IMPLEMENT THIS ARTICLE**

The Department shall have the power to adopt regulations not inconsistent with this Article for the purpose of carrying out the provisions of this Article. A copy of such regulations shall be on file with the Department and available for public inspection.

#### **SECTION III. CEQA**

Adoption of this Ordinance is not a project within the meaning of Section 15378 of the CEQA Guidelines in that it (a) is an ordinance of general policy and procedure and does not constitute a project within the meaning of CEQA and (b) has no potential for resulting in either a direct or a reasonably foreseeable indirect physical change in the environment.

**SECTION IV. 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 Alameda 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 V. EFFECTIVE DATE.** This Ordinance shall be effective from and after the expiration of 30 days from the date of its final passage.

**SECTION VI. ENFORCEMENT DATE.** Notwithstanding the effective date of this Ordinance, it will not be enforced until July 1, 2019.

\_\_\_\_\_  
Presiding Officer of the City Council

Attest:

\_\_\_\_\_  
Lara Weisiger, City

\* \* \* \* \*

I, the undersigned, hereby certify that the foregoing ordinance was duly and regularly adopted and passed by the Council of the City of Alameda in a regular meeting assembled on the \_\_\_\_ day of \_\_\_\_\_, 2018, by the following vote to wit:

AYES:

NOES:

ABSENT:

ABSENTIONS:

IN WITNESS, WHEREOF, I have hereunto set my hand and affixed the official seal of said City this \_\_\_\_ day of \_\_\_\_\_, 2018.

\_\_\_\_\_  
Lara Weisiger, City Clerk  
City of Alameda

APPROVED AS TO FORM:

\_\_\_\_\_  
Janet C. Kern, City Attorney  
City of Alameda