



City of San Leandro

Meeting Date: October 16, 2017

Staff Report

File Number: 17-603

Agenda Section: ACTION ITEMS

Agenda Number: 10.A.

TO: City Council

FROM: Chris Zapata
City Manager

BY:

FINANCE REVIEW: Not Applicable

TITLE: Staff Report for an Ordinance of the City of San Leandro adding Chapter 4.36 "Tobacco Retailers" to the San Leandro Municipal Code to require the licensure of Tobacco Retailers and to regulate the sale of cigars, cigarillos and electronic cigarettes

RECOMMENDATIONS

Staff recommends that the City Council adopt the attached Ordinance adding Chapter 4.36 "Tobacco Retailers" to the San Leandro Municipal Code to require the licensure of Tobacco Retailers and to regulate the sale of cigars, cigarillos and electronic cigarettes

BACKGROUND AND SUMMARY

State and federal law currently establish restrictions and regulations on tobacco and electronic cigarette retailing. These restrictions and regulations include, but are not limited to:

- Prohibiting the sale or furnishing of cigarettes (including electronic cigarettes), tobacco products, and smoking paraphernalia to anyone under the age of 21;
- Requiring that retailers post conspicuous notices stating that selling tobacco products to anyone under 21 years of age is illegal;
- Prohibiting the sale of tobacco products and paraphernalia through self-service displays with limited exceptions;
- Prohibiting the sale of "bidis" (filterless cigarettes wrapped in temburni or tendu leaf) except in adult-only establishments;
- Prohibiting the manufacture, distribution, or sale of cigarettes in packages of less than 20 and prohibiting the manufacture, distribution, or sale of "roll-your-own" tobacco in packages containing less than 0.60 ounces of tobacco; and
- Prohibiting the sale of flavored cigarettes (except for menthol).

Despite state and federal regulations, studies show that underage individuals are still able to gain

access to tobacco and electronic cigarette products. Additionally, while regulations exist regarding the flavor and package size of cigarettes, similar regulations do not exist regarding the flavor and package size of electronic cigarettes and cigars.

State and federal law generally provide local jurisdictions with authority to enact retail licensing ordinances and other regulations that are more restrictive than existing state and federal regulations. As a result, more than one hundred and forty-eight cities and counties throughout California have adopted a tobacco retailer licensing ordinance in an effort to prevent underage tobacco use.

The City Council began considering an ordinance establishing regulations for tobacco retailing in 2015. Since then, the City Attorney's Office prepared and presented draft tobacco retailers licensing ordinances to the City Council Rules Committee on: May 25, 2016; November 28, 2016; and April 24, 2017. The City Council considered the draft tobacco retailers licensing ordinance on June 5, 2017 and referred the draft ordinance to the City Council Rules Committee for further consideration. The City Council Rules Committee considered the draft ordinance on June 26, 2017.

First Reading and Introduction of Tobacco Retailers Ordinance:

On October 2, 2017, the City Council considered the draft ordinance, made some minor amendments, and voted 4-3 to waive first reading and introduce the ordinance. A summary of the key provisions of the tobacco retailers licensing ordinance, including the proposed revisions are below:

Applicability and Prohibitions:

The ordinance applies to all tobacco retailers within the City, which includes any person who sells electronic cigarettes, electronic cigarette products, electronic cigarette paraphernalia, tobacco products, or tobacco paraphernalia. Prohibited activities include:

- The sale of tobacco or electronic cigarette products without a valid tobacco retailers license;
- Tobacco retailing via a self-service display;
- Tobacco retailing by an individual that is younger than 18;
- The non-sale distribution of tobacco and electronic cigarette products in a public place;
- The sale of cigars in a package at less than \$7 per five cigars, except for the sale of single cigars in excess of \$5;
- The sale of flavored cigars; and
- The sale of flavored electronic cigarette products, whether such products contain nicotine or not.

Licensing Provisions and Enforcement:

The ordinance requires that all tobacco retailers obtain a tobacco retailers license from the City. A tobacco retailers license requires the payment of an annual fee in order to fund costs of administration and enforcement of the ordinance. The fees obtained from tobacco retailers will

fund a compliance monitoring program operated by the Police Department. If violations are discovered, tobacco retailers are subject to the below penalties:

1. First Violation: Written warning and thirty days to cure the violation.
2. Second Violation: Licensee fined two thousand five hundred dollars (\$2,500)
3. Third Violation: License suspended for 20 days.
4. Fourth Violation: License revoked and license cannot be issued to retailer or the retail location for three years.

In addition to administrative penalties, the ordinance permits criminal and civil enforcement by the City.

First Reading and Revisions from the October 2, 2017 City Council Meeting:

The City Council voted 4-3 to conduct a first reading and introduce the ordinance with the following changes:

1. Revise the timeframe for calculating violations from violations occurring during a sixty-month (5 years) period to violations occurring during a thirty-six-month (3 years) period.
2. Revise and clarify the minimum pack size and price requirement for cigars to reflect that cigars, including all cigar products, cannot be sold in a package of less than \$7 per five Cigars, including all applicable taxes and fees, except for single cigars sold for more than \$5.

Effective Date:

The draft ordinance provides that it shall not become operative until March 1, 2018.



City of San Leandro

Meeting Date: October 16, 2017

Ordinance

File Number: 17-559

Agenda Section: ACTION ITEMS

Agenda Number:

TO: City Council

FROM: Chris Zapata
City Manager

BY:

FINANCE REVIEW: Not Applicable

TITLE: ORDINANCE of the City of San Leandro Adding Chapter 4.36 "Tobacco Retailers" to the San Leandro Municipal Code to Require the Licensure of Tobacco Retailers and to Regulate the Sale of Cigars, Cigarillos and Electronic Cigarettes

WHEREAS, the California Constitution, Article XI, Section 7, provides cities and counties with the authority to enact ordinances to protect the health, safety, welfare, and morals of their citizens; and

WHEREAS, California courts have affirmed the power of a city to regulate business activity in order to discourage violations of law in such cases as Cohen v. Board of Supervisors (1985) 40 Cal.3d 277, Bravo Vending v. City of Rancho Mirage (1993) 16 Cal.App.4th 383, and Prime Gas v. City of Sacramento (2010) 184 Cal.App.4th 697; and

WHEREAS, local zoning controls allow local governments to regulate the operation of lawful businesses to avoid circumstances that facilitate violations of state, federal, and local laws; and

WHEREAS, based in part on the information contained in this section, the City Council finds that the failure of tobacco retailers to comply with all tobacco control laws, particularly laws prohibiting the sale of tobacco products to minors, presents an imminent threat to the public health, safety, and welfare of the residents of the City San Leandro; and

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

WHEREAS, the California Legislature has recognized the danger of tobacco use and has made reducing youth access to tobacco products a high priority, as evidenced by the following:

- The Legislature has declared that smoking is the single most important source of

preventable disease and premature death in California; that keeping children from beginning to use tobacco products in any form shall be among the highest priorities in disease prevention for the State of California;

- State law prohibits the sale or furnishing of cigarettes, tobacco products, and smoking paraphernalia to anyone under the age of 21; requires that tobacco retailers check the identification of tobacco purchasers who reasonably appear to be under 21 years of age; requires that retailers of tobacco products post conspicuous notices stating that selling tobacco products to anyone under 21 years of age is illegal; prohibits the sale of tobacco products and paraphernalia through self-service displays with limited exceptions; prohibits the sale of “bidis” (filterless cigarettes wrapped in temburni or tendu leaf) except in adult-only establishments; prohibits the manufacture, distribution, or sale of cigarettes in packages of less than 20 and prohibits the manufacture, distribution, or sale of “roll-your-own” tobacco in packages containing less than 0.60 ounces of tobacco; and

WHEREAS, state law requires all tobacco retailers to be licensed by the Board of Equalization primarily to curb the illegal sale and distribution of cigarettes due to tax evasion and counterfeiting; 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; and

WHEREAS, despite local, state, and federal efforts to limit youth access to tobacco, minors are still able to access tobacco products, as evidenced by the following: in 2009, 10.9% of all students in grades 9-12, including 6.7% of female students and 15% of male students were current cigar users; in 2009, 3.9% of all students in grades 6-8 were current cigar users; and

WHEREAS, research demonstrates that local tobacco retail ordinances dramatically reduce youth access to cigarettes, as evidenced by the following:

- A review of thirty three California communities with strong tobacco retailer licensing ordinances shows that the youth sales rate declined in nearly each community;
- A study of the effect of licensing and enforcement methods used in the Philadelphia area revealed a decrease in sales to minors from 85% in 1994 to 43% in 1998;
- A study of several Minnesota cities found that an increased licensing fee in conjunction with strict enforcement of youth access laws led to a decrease from 38.8% to 4.9% in the number of youth able to purchase tobacco; and

WHEREAS, over one hundred and forty-eight cities and counties in California have passed tobacco retailer licensing ordinances in an effort to stop minors from smoking; and

WHEREAS, while state law prohibits possession of certain forms of “drug paraphernalia,” and prohibits all sales of “drug paraphernalia,” many retailers continue to sell items that are commonly known to be “drug paraphernalia,” and claim that such items are intended to be used for tobacco; and

WHEREAS, the federal Family Smoking Prevention and Tobacco Control Act, enacted in 2009, prohibited candy and fruit-flavored cigarettes, largely because these flavored products were marketed to youth and young adults, and younger smokers were more likely to have tried these products than older smokers; and although the manufacture and distribution of flavored cigarettes (excluding menthol) is banned by federal law, neither federal nor California laws restrict sales of flavored non-cigarette tobacco products, such as cigars, cigarillos, smokeless tobacco, hookah tobacco, and electronic smoking devices and the nicotine solutions used in these devices; and

WHEREAS, flavored non-cigarette tobacco products have become increasingly common and are available in a variety of flavors that appeal to children and young adults, including apple, cherry, chocolate, grape, peach, strawberry, and vanilla; and

WHEREAS, the U.S. Surgeon General has stated that flavored tobacco products are considered to be “starter” products that help establish smoking habits that can lead to long-term addiction; and

WHEREAS, data from the National Youth Tobacco Survey indicate that approximately two-fifths of U.S. middle and high school smokers report using flavored little cigars or flavored cigarettes; and

WHEREAS, tobacco companies have used flavorings such as mint and wintergreen in smokeless tobacco products as part of a “graduation strategy” to encourage new users to start with products with lower levels of nicotine and progress to products with higher levels of nicotine; and

WHEREAS, the U.S. Center for Disease Control and Prevention has reported current electronic cigarette use (use on at least 1 day in the past 30 days) among high school students increased from 4.5 percent in 2013 to 13.4 percent in 2014, rising from approximately 660,000 to 2 million students. Among middle school students, current e-cigarette use more than tripled from 1.1 percent in 2013 to 3.9 percent in 2014—an increase from approximately 120,000 to 450,000 students; and

WHEREAS, nicotine solutions, which are consumed via electronic smoking devices such as electronic cigarettes, are sold in dozens of flavors that appeal to youth, such as coffee and fruit; and

WHEREAS, electronic cigarette companies have targeted minors with fruit-flavored products; and

WHEREAS, while it is unlawful to sell or furnish an electronic cigarette to minors, minors are still able to obtain access to electronic cigarette products. A national survey revealed that between 2011 and 2012, middle school students who reported ever using e-cigarettes increased from 1.4% to 2.7% and current use of e-cigarettes increased from 0.6% to 1.1%. The same survey found that high school students who reported ever using e-cigarettes increased from 4.7% to 10.0% while current use increased from 1.5% to 2.8%; and

WHEREAS, the safety and efficacy of electronic cigarettes is still unknown and electronic cigarettes deliver an unknown mix of potentially carcinogenic and toxic compounds as evidenced by the following: a) nicotine content labeling was not accurate with some manufacturers; b) nicotine related impurities in cartridges and refills vary by electronic cigarette manufacturer; and c) the concentrations of some metal and silicate particles in electronic cigarette aerosol were higher than or equal to the levels contained in conventional cigarette smoke; and

WHEREAS, it is unknown if e-cigarettes may lead minors to try other tobacco products; and

WHEREAS, the City Council finds that the reports referenced herein are relevant to the problems addressed by the City of San Leandro in enacting this ordinance to preserve and safeguard public health, safety and welfare by protecting against the negative secondary effects and adverse impacts of tobacco use and electronic cigarette use among youth; and

WHEREAS, the federal Family Smoking Prevention and Tobacco Control Act (the “FDA law”) completely bans free distribution of all tobacco products except smokeless tobacco, which can still be distributed in “qualified adult-only facilities”; and

WHEREAS, the FDA does not prohibit the free distribution of coupons or nominally priced tobacco products; and

WHEREAS, California state law prohibits the sale or distribution of free or nominal-cost cigarettes or smokeless tobacco products (or coupons, coupon offers, or rebate offers for such products) on public grounds or on private grounds that are open to the public; and

WHEREAS, California state law specifically allows adoption of a local ordinance related to the distribution of free or nominal-cost tobacco products that is “more restrictive” provides that a stricter local ordinance shall govern in the case of any inconsistency between the local ordinance and state law; and

WHEREAS, the FDA law also expressly grants state and local governments the right to enact measures that are more restrictive than those in the federal law; and

WHEREAS, the City of San Leandro has a substantial interest in promoting compliance with federal, state, and local laws prohibiting the sale or furnishing of tobacco products and electronic cigarette products to minors; in discouraging the illegal purchase of tobacco and electronic cigarette products by minors; in promoting compliance with laws prohibiting sales of cigarettes and tobacco products to minors; and in protecting children from being lured into illegal activity through adult misconduct; 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 San Leandro, to protect the health, safety, and welfare of residents; and

WHEREAS, a requirement for a tobacco retailer license will not unduly burden legitimate

business activities of retailers who sell or distribute cigarettes or other tobacco products or electronic cigarettes to adults. It will, however, allow the City to regulate the operation of lawful businesses to discourage violations of federal, state, and local tobacco and electronic cigarette-related laws; and

WHEREAS, it is the intent of the City Council, in enacting this ordinance, to ensure compliance with the business standards and practices of the City of San Leandro 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 minors, but not to expand or reduce the degree to which the acts regulated by federal or state law are criminally proscribed or to alter the penalties provided therein; and

WHEREAS, the amendments to the Municipal Code propose to add Chapter 4.36 as shown in Exhibit A, which exhibit is attached and incorporated herein by reference.

Now, therefore, the City Council of the City of San Leandro does ordain as follows:

SECTION I. **Recitals.** The above recitals are true and correct and made a part of this ordinance.

SECTION II. CEQA. Approval of the amendments is exempt from further environmental review under the general rule in California Environmental Quality Act (CEQA) Guidelines Section 15061(b)(3) that CEQA only applies to projects that have the potential for causing a significant effect on the environment. As a series of text amendments and additions, it can be seen with certainty that there is no possibility that the ordinance will have a significant effect on the environment.

SECTION III. Approval. The City Council hereby approves the amendments to the Municipal Code, more particularly, adding Chapter 4.36, as shown in attached Exhibit A, which is incorporated herein by reference and available for review in the City Clerk's office during normal business hours.

SECTION IV. Severability. If any provision of this ordinance or the application thereof to any person or circumstance is held invalid, the remainder of the ordinance, including the application of such part or provision to other persons or circumstances shall not be affected thereby and shall continue in full force and effect. To this end, provisions of this ordinance are severable. The City Council hereby declares that it would have passed each section, subsection, subdivision, paragraph, sentence, clause, or phrase hereof irrespective of the fact that any one or more sections, subsections, subdivisions, paragraphs, sentences, clauses, or phrases be held unconstitutional, invalid, or unenforceable.

SECTION V. Publication and effective date. This Ordinance shall take effect thirty (30) days after adoption. The City Clerk of the City of San Leandro shall cause the Ordinance to be published in accordance with section 36933 of the Government Code of the State of California.

IN THE CITY COUNCIL FOR THE CITY OF SAN LEANDRO

**AN ORDINANCE OF THE CITY OF SAN LEANDRO ADDING CHAPTER 4.36
“TOBACCO RETAILERS” TO THE SAN LEANDRO MUNICIPAL CODE TO
REQUIRE THE LICENSURE OF TOBACCO RETAILERS AND TO REGULATE THE
SALE OF CIGARS, CIGARILLOS AND ELECTRONIC CIGARETTES**

WHEREAS, the California Constitution, Article XI, Section 7, provides cities and counties with the authority to enact ordinances to protect the health, safety, welfare, and morals of their citizens; and

WHEREAS, California courts have affirmed the power of a city to regulate business activity in order to discourage violations of law in such cases as Cohen v. Board of Supervisors (1985) 40 Cal.3d 277, Bravo Vending v. City of Rancho Mirage (1993) 16 Cal.App.4th 383, and Prime Gas v. City of Sacramento (2010) 184 Cal.App.4th 697; and

WHEREAS, local zoning controls allow local governments to regulate the operation of lawful businesses to avoid circumstances which facilitate violations of state, federal, and local laws; and

WHEREAS, based in part on the information contained in this section, the City Council finds that the failure of tobacco retailers to comply with all tobacco control laws, particularly laws prohibiting the sale of tobacco products to minors, presents an imminent threat to the public health, safety, and welfare of the residents of the City San Leandro; and

WHEREAS, approximately 480,000 people die in the United States from tobacco-related diseases every year, making it the nation’s leading cause of preventable death;¹ and

WHEREAS, the California Legislature has recognized the danger of tobacco use and has made reducing youth access to tobacco products a high priority, as evidenced by the following:

- The Legislature has declared that smoking is the single most important source of preventable disease and premature death in California; that keeping children from beginning to use tobacco products in any form shall be among the highest priorities in disease prevention for the State of California;²
- State law prohibits the sale or furnishing of cigarettes, tobacco products, and smoking paraphernalia to anyone under the age of 21;³ requires that tobacco retailers check the identification of tobacco purchasers who reasonably appear to be under 21 years of age;⁴ requires that retailers of tobacco products post conspicuous notices stating that selling

¹ U.S. Department of Health and Human Services. 2014. *The Health Consequences of Smoking — 50 Years of Progress. A Report of the Surgeon General*, www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf.

² Cal. Health & Safety Code § 118950.

³ Cal. Pen. Code § 308.

⁴ Cal. Bus. & Prof. Code § 22956.

tobacco products to anyone under 21 years of age is illegal;⁵ prohibits the sale of tobacco products and paraphernalia through self-service displays with limited exceptions;⁶ prohibits the sale of “bidis” (filterless cigarettes wrapped in temburni or tendu leaf) except in adult-only establishments;⁷ prohibits the manufacture, distribution, or sale of cigarettes in packages of less than 20 and prohibits the manufacture, distribution, or sale of “roll-your-own” tobacco in packages containing less than 0.60 ounces of tobacco;⁸ and

WHEREAS, state law requires all tobacco retailers to be licensed by the Board of Equalization primarily to curb the illegal sale and distribution of cigarettes due to tax evasion and counterfeiting;⁹ 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;¹⁰ and

WHEREAS, despite local, state, and federal efforts to limit youth access to tobacco, minors are still able to access tobacco products, as evidenced by the following: in 2009, 10.9% of all students in grades 9-12, including 6.7% of female students and 15% of male students were current cigar users;¹¹ in 2009, 3.9% of all students in grades 6-8 were current cigar users;¹² and

WHEREAS, research demonstrates that local tobacco retail ordinances dramatically reduce youth access to cigarettes, as evidenced by the following:

- A review of thirty three California communities with strong tobacco retailer licensing ordinances shows that the youth sales rate declined in nearly each community;¹³
- A study of the effect of licensing and enforcement methods used in the Philadelphia area revealed a decrease in sales to minors from 85% in 1994 to 43% in 1998;¹⁴
- A study of several Minnesota cities found that an increased licensing fee in conjunction with strict enforcement of youth access laws led to a decrease from 38.8% to 4.9% in the number of youth able to purchase tobacco;¹⁵ and

⁵ Cal. Bus. & Prof. Code § 22952.

⁶ Cal. Bus. & Prof. Code §§ 22960, 22962.

⁷ Cal. Pen. Code § 308.1.

⁸ Cal. Pen. Code § 308.3.

⁹ Cal. Bus. & Prof. Code §§ 22970.1, 22972.

¹⁰ Cal. Bus. & Prof. Code § 22971.3

¹¹ National Center for Chronic Disease Prevention and Health Promotion (US) Office on Smoking and Health. Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General. Atlanta (GA): Centers for Disease Control and Prevention (US); 2012. 3, The Epidemiology of Tobacco Use Among Young People in the United States and Worldwide. Available from: <http://www.ncbi.nlm.nih.gov/books/NBK99243/>.

¹² *Id.*

¹³ American Lung Association in California, Center for Tobacco Policy & Organizing. 2013. *Tobacco Retail Licensing is Effective*, <http://center4tobaccopolicy.org/wp-content/uploads/2016/10/Tobacco-Retailer-Licensing-is-Effective-September-2013.pdf>.

¹⁴ Ma GX, Shive S and Tracy M. “The Effects of Licensing and Inspection Enforcement to Reduce Tobacco Sales to Minors in Greater Philadelphia, 1994-1998.” *Addictive Behaviors*, 26(5): 677-87, 2001. Abstract available at: www.ncbi.nlm.nih.gov/entrez/query.fcgi?cmd=Retrieve&db=PubMed&list_uids=11676378&dopt=Abstract.

WHEREAS, over one hundred and forty-eight cities and counties in California have passed tobacco retailer licensing ordinances in an effort to stop minors from smoking;¹⁶ and

WHEREAS, while state law prohibits possession of certain forms of “drug paraphernalia,” and prohibits all sales of “drug paraphernalia,” many retailers continue to sell items that are commonly known to be “drug paraphernalia,” and claim that such items are intended to be used for tobacco; and

WHEREAS, the federal Family Smoking Prevention and Tobacco Control Act, enacted in 2009, prohibited candy and fruit-flavored cigarettes,¹⁷ largely because these flavored products were marketed to youth and young adults,¹⁸ and younger smokers were more likely to have tried these products than older smokers;¹⁹ and although the manufacture and distribution of flavored cigarettes (excluding menthol) is banned by federal law,²⁰ neither federal nor California laws restrict sales of flavored non-cigarette tobacco products, such as cigars, cigarillos, smokeless tobacco, hookah tobacco, and electronic smoking devices and the nicotine solutions used in these devices; and

WHEREAS, flavored non-cigarette tobacco products have become increasingly common and are available in a variety of flavors that appeal to children and young adults,²¹ including apple, cherry, chocolate, grape, peach, strawberry, and vanilla; and

WHEREAS, the U.S. Surgeon General has stated that flavored tobacco products are considered to be “starter” products that help establish smoking habits that can lead to long-term addiction;²² and

¹⁵ Forster JL et al. “The Effects of Community Policies to Reduce Youth Access to Tobacco.” *American Journal of Public Health*, 88(8): 1193-1197, 1998. Available at: www.ajph.org/cgi/reprint/88/8/1193.

¹⁶ American Nonsmokers’ Rights Foundation. 2012. *California Municipalities with Laws Restricting Youth Access to Tobacco*, <http://changelabsolutions.org/publications/anrf-list>.

¹⁷ 21 U.S.C. § 387g.

¹⁸ U.S. Department of Health and Human Services. 2012. *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General*. Atlanta: U.S. National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, p. 537, www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/full-report.pdf.

¹⁹ *Id.*

²⁰ 21 U.S.C. § 387g.

²¹ U.S. Department of Health and Human Services. 2012. *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General*. Atlanta: U.S. National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, p. 164, 205, www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/full-report.pdf; Morris DS and Fiala SC. 2013. “Flavoured, Non-cigarette Tobacco for Sale in the USA: An Inventory Analysis of Internet Retailers.” *Tobacco Control*. [Electronic publication ahead of print], <http://tobaccocontrol.bmj.com/content/early/2013/08/08/tobaccocontrol-2013-051059.full>.

²² U.S. Department of Health and Human Services. 2012. *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General*. Atlanta: U.S. National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, p. 539, www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/full-report.pdf.

WHEREAS, data from the National Youth Tobacco Survey indicate that approximately two-fifths of U.S. middle and high school smokers report using flavored little cigars or flavored cigarettes;²³ and

WHEREAS, tobacco companies have used flavorings such as mint and wintergreen in smokeless tobacco products as part of a “graduation strategy” to encourage new users to start with products with lower levels of nicotine and progress to products with higher levels of nicotine;²⁴ and

WHEREAS, the U.S. Centers for Disease Control and Prevention has reported current electronic cigarette use (use on at least 1 day in the past 30 days) among high school students increased from 4.5 percent in 2013 to 13.4 percent in 2014, rising from approximately 660,000 to 2 million students. Among middle school students, current e-cigarette use more than tripled from 1.1 percent in 2013 to 3.9 percent in 2014—an increase from approximately 120,000 to 450,000 students;²⁵ and

WHEREAS, nicotine solutions, which are consumed via electronic smoking devices such as electronic cigarettes, are sold in dozens of flavors that appeal to youth, such as coffee and fruit;²⁶ and

WHEREAS, electronic cigarette companies have targeted minors with fruit-flavored products;²⁷ and

WHEREAS, while it is unlawful to sell or furnish an electronic cigarette to minors,²⁸ minors are still able to obtain access to electronic cigarette products. A national survey revealed that between 2011 and 2012, middle school students who reported ever using e-cigarettes

²³ King BA, Tynan MA, Dube SR, et al. 2013. “Flavored-Little-Cigar and Flavored-Cigarette Use Among U.S. Middle and High School Students.” *Journal of Adolescent Health*. [Article in press], www.jahonline.org/article/S1054-139X%2813%2900415-1/abstract.

²⁴ U.S. Department of Health and Human Services. 2012. *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General*. Atlanta: U.S. National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, p. 539, www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/full-report.pdf.

²⁵ Centers for Disease Control & Prevention. April 17, 2015. “Tobacco Use Among Middle and High School Students — United States, 2011–2014,” *Morbidity and Mortality Weekly Report (MMWR)* 64(14):381-385 http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6414a3.htm?s_cid=mm6414a3_w

²⁶ U.S. Department of Health and Human Services. 2012. *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General*. Atlanta: U.S. National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, p. 549, www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/full-report.pdf.

²⁷ Press Release, State of California Department of Justice, Office of the Attorney General, Brown Announces Electronic Cigarette Maker's Agreement to Stop Deceptive Marketing and Sales to Minors (Aug. 3, 2010), oag.ca.gov/news/press-releases/brown-announces-electronic-cigarette-makers-agreement-stop-deceptive-marketing.

²⁸ Cal. Penal Code § 308.

increased from 1.4% to 2.7% and current use of e-cigarettes increased from 0.6% to 1.1%.²⁹ The same survey found that high school students who reported ever using e-cigarettes increased from 4.7% to 10.0% while current use increased from 1.5% to 2.8%;³⁰ and

WHEREAS, the safety and efficacy of electronic cigarettes is still unknown and electronic cigarettes deliver an unknown mix of potentially carcinogenic and toxic compounds as evidenced by the following: a) nicotine content labeling was not accurate with some manufacturers;³¹ b) nicotine related impurities contents in cartridges and refills vary by electronic cigarette manufacturer;³² and c) the concentrations of some metal and silicate particles in electronic cigarette aerosol were higher than or equal to the levels contained in conventional cigarette smoke;³³ and

WHEREAS, it is unknown if e-cigarettes may lead minors to try other tobacco products; and

WHEREAS, the City Council finds that the reports referenced herein are relevant to the problems addressed by the City of San Leandro in enacting this ordinance to preserve and safeguard public health, safety and welfare by protecting against the negative secondary effects and adverse impacts of tobacco use and electronic cigarette use among youth; and

WHEREAS, the federal Family Smoking Prevention and Tobacco Control Act (the “FDA law”) completely bans free distribution of all tobacco products except smokeless tobacco, which can still be distributed in “qualified adult-only facilities”;³⁴ and

WHEREAS, the FDA law does not prohibit the free distribution of coupons or nominally priced tobacco products; and

WHEREAS, California state law prohibits the sale or distribution of free or nominal-cost cigarettes or smokeless tobacco products (or coupons, coupon offers, or rebate offers for such products) on public grounds or on private grounds that are open to the public;³⁵ and

WHEREAS, California state law specifically allows adoption of a local ordinance related to the distribution of free or nominal-cost tobacco products that is “more restrictive”

²⁹ Centers for Disease Control and Prevention. Electronic Cigarette Use Among Middle and High School Students—United States, 2011-2012. *Morbidity and Mortality Weekly Report*. September 6, 2013 (survey results are available at http://www.cdc.gov/tobacco/data_statistics/surveys/nyts.)

³⁰ *Id.*

³¹ Trehy ML, Ye W, et al. “Analysis of Electronic Cigarette Cartridges, Refill Solutions, and Smoke for Nicotine and Nicotine Related Impurities.” *Journal of Liquid Chromatography & Related Technologies*, 34:1442–1458, 2011.

³² *Id.*

³³ Williams M, Villarreal A, Bozhilov K, Lin S, Talbot P (2013) Metal and Silicate Particles Including Nanoparticles Are Present in Electronic Cigarette Cartomizer Fluid and Aerosol. *PLoS ONE* 8(3): e57987. doi:10.1371/journal.pone.0057987.

³⁴ 21 U.S.C. § 387a-1.

³⁵ Cal. Health & Safety Code § 118950.

provides that a stricter local ordinance shall govern in the case of any inconsistency between the local ordinance and state law;³⁶ and

WHEREAS, the FDA law also expressly grants state and local governments the right to enact measures that are more restrictive than those in the federal law;³⁷ and

WHEREAS, the City of San Leandro has a substantial interest in promoting compliance with federal, state, and local laws prohibiting the sale or furnishing of tobacco products and electronic cigarette products to minors; in discouraging the illegal purchase of tobacco and electronic cigarette products by minors; in promoting compliance with laws prohibiting sales of cigarettes and tobacco products to minors; and in protecting children from being lured into illegal activity through adult misconduct; 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 San Leandro, to protect the health, safety, and welfare of our residents; and

WHEREAS, a requirement for a tobacco retailer license will not unduly burden legitimate business activities of retailers who sell or distribute cigarettes or other tobacco products or electronic cigarettes to adults. It will, however, allow the City to regulate the operation of lawful businesses to discourage violations of federal, state, and local tobacco and electronic cigarette-related laws; and

WHEREAS, it is the intent of the City Council, in enacting this ordinance, to ensure compliance with the business standards and practices of the City of San Leandro 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 minors, but not to expand or reduce the degree to which the acts regulated by federal or state law are criminally proscribed or to alter the penalties provided therein; and

WHEREAS, the amendments to the Municipal Code propose to add Chapter 4.36 as shown in Exhibit A, which exhibit is attached and incorporated herein by reference.

Now, therefore, the City Council of the City of San Leandro does ordain as follows:

SECTION I. Recitals. The above recitals are true and correct and made a part of this ordinance.

SECTION II. CEQA. Approval of the amendments is exempt from further environmental review under the general rule in California Environmental Quality Act (CEQA) Guidelines Section 15061(b)(3) that CEQA only applies to projects that have the potential for causing a significant effect on the environment. As a series of text amendments and additions, it can be

³⁶ *Id.*

³⁷ 21 U.S.C. § 387p(a)(1).

seen with certainty that there is no possibility that the ordinance will have a significant effect on the environment.

SECTION III. Approval. The City Council hereby approves the amendments to the Municipal Code, more particularly, adding Chapter 4.36, as shown in attached Exhibit A, which is incorporated herein by reference and available for review in the City Clerk's office during normal business hours.

SECTION IV. Severability. If any provision of this ordinance or the application thereof to any person or circumstance is held invalid, the remainder of the ordinance, including the application of such part or provision to other persons or circumstances shall not be affected thereby and shall continue in full force and effect. To this end, provisions of this ordinance are severable. The City Council hereby declares that it would have passed each section, subsection, subdivision, paragraph, sentence, clause, or phrase hereof irrespective of the fact that any one or more sections, subsections, subdivisions, paragraphs, sentences, clauses, or phrases be held unconstitutional, invalid, or unenforceable.

SECTION V. Publication and effective date. This Ordinance shall take effect thirty (30) days after adoption. The City Clerk of the City of San Leandro shall cause the Ordinance to be published in accordance with section 36933 of the Government Code of the State of California.

2815301.1

EXHIBIT A

Chapter 4-36 TOBACCO RETAILERS 4-36-100 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:

“Administrator” means the Chief of Police or designee for the City of San Leandro.

“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.

“Characterizing flavor” means a distinguishable taste or aroma, other than the taste or aroma of tobacco, imparted by a tobacco product or any byproduct produced by the tobacco product, including, but not limited to, tastes or aromas relating to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, menthol, mint, wintergreen, herb, or spice.

“Coupon” means anything that can be exchanged for or used to acquire an electronic cigarette, electronic cigarette paraphernalia, electronic cigarette or tobacco product, such as a printed piece of paper, voucher, ticket, rebate, rebate offer, check, credit, token, code, password, or anything labeled “coupon” or “coupon offer.”

“Department” means the City of San Leandro Finance Department.

“Distinguishable” means perceivable by an ordinary consumer by either the sense of smell or taste.

“Drug paraphernalia” shall have the definition set forth in California Health and Safety Code Section 11014.5, as that section may be amended from time to time.

“Electronic cigarette” means “a device that can provide an inhalable dose of nicotine by delivering a vaporized solution” as defined in California Health and Safety Code Section 119405(b), as that section may be amended from time to time, or any device designed to vaporize a liquid solution that releases flavored vapor.

“Electronic cigarette paraphernalia” means any device designed to provide an inhalable dose of nicotine or a flavored liquid solution through vaporization, nicotine-based or flavored solution-based cartridges for use with electronic cigarettes, and any other item designed for the vaporization, preparation, storing, or consumption of electronic cigarette products.

“Electronic cigarette product” means any substance containing nicotine or a flavored liquid solution for vaporization, including any product or formulation of matter containing biologically active amounts of nicotine that is manufactured, sold, offered for sale, or otherwise distributed with the expectation that the product or matter will be introduced into the human body, but does not include any cessation product specifically approved by the United States Food and Drug Administration for use in treating nicotine or tobacco dependence.

“Flavored tobacco product” means any tobacco product (other than cigarettes as defined by the U.S. Food and Drug Administration) that contains a constituent that imparts a characterizing flavor. This includes cigars, little cigars, pipe tobacco, hookah tobacco, snuff, chewing tobacco, dipping tobacco, bidis, blunts, and electronic cigarettes or electronic smoking devices.

(a) For purposes of this definition, “constituent” means any ingredient, substance, chemical, or compound, other than tobacco, water, or reconstituted tobacco sheet, which is

added by the manufacturer to a tobacco product during the processing, manufacture, or packing of the tobacco product.

(b) Further, a tobacco product is presumed to be a flavored tobacco product if a manufacturer or any of the manufacturer's agents or employees has:

(1) Made a public statement or claim that the tobacco product has or produces a characterizing flavor, including, but not limited to, text and/or images on the product's labeling or packaging that are used explicitly or implicitly to communicate information about the flavor, taste, or aroma of a tobacco product; or

(2) Taken actions directed to consumers that would be reasonably expected to result in consumers believing that the tobacco product imparts a characterizing flavor.

“License” means a tobacco retailer’s license as defined below.

“Licensee” means a tobacco retailer with a tobacco retailer’s license.

“Nominal cost” means the cost of any item that is transferred from one person to another for less than the total of: (1) twenty-five percent of the full retail value of the item exclusive of taxes and fees; plus (2) all taxes and fees previously paid and all taxes and fees still due on the item at the time of transfer.

“Nonsale distribution” means to give, within the jurisdictional limits of the City, a tobacco product or coupon at no cost or at nominal cost to a person who is not a tobacco seller.

“Person” means any natural person, partnership, cooperative association, corporation, personal representative, receiver, trustee, assignee, or any other legal entity.

“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 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.

“Public place” means any place within the City, public or private, that is open to the general public regardless of any fee or age requirement, including, for example, bars, restaurants, clubs, stores, stadiums, parks, playgrounds, taxis, and buses.

“Retailer” means tobacco retailer as defined herein.

“Self-service display” means the open display or storage of electronic cigarettes, electronic cigarette products, electronic cigarette paraphernalia, 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.

“Tobacco” means leaves of the tobacco plant dried and prepared for smoking or ingestion.

“Tobacco paraphernalia” means cigarette papers or wrappers, pipes, holders of smoking materials of all types, cigarette rolling machines, and any other item designed for the smoking, preparation, storing, or consumption of tobacco products.

“Tobacco product” means tobacco and any substance containing tobacco, including, but not limited to, cigarettes, cigars, cigarillos, pipe tobacco, hookah tobacco, snuff, chewing tobacco, dipping tobacco, snus, bidis, or any other preparation of tobacco; any electronic cigarette product; and any product or formulation of matter containing biologically active amounts of nicotine that is manufactured, sold, offered for sale, or otherwise distributed with the expectation that the product or matter will be introduced into the human body, but does not

include any cessation product specifically approved by the United States Food and Drug Administration for use in treating nicotine or tobacco dependence.

“Tobacco retailer” means any person who sells, offers for sale, or does or offers to exchange for any form of consideration, electronic cigarettes, electronic cigarette products, electronic cigarette paraphernalia, 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 electronic cigarettes, electronic cigarette products, electronic cigarette paraphernalia, tobacco products or tobacco paraphernalia sold, offered for sale, exchanged, or offered for exchange.

“Tobacco retailer’s license” means the license issued pursuant to Section 4-36-300 that authorizes electronic-cigarette or tobacco retailing at a certain location and by a certain tobacco retailer.

4-36-150 REQUIREMENTS AND PROHIBITIONS.

(a) Tobacco Retailer’s License Required. It is 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 Chapter for each location at which that activity is to occur. Tobacco retailing without a valid tobacco retailer’s license is a nuisance as a matter of law.

(b) Lawful Business Operation. In the course of tobacco retailing or in the operation of the business or maintenance of the location for which a license is 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 electronic cigarettes, electronic cigarette products, electronic cigarette paraphernalia, tobacco products, tobacco paraphernalia, or tobacco retailing.

(c) Display of License. Each tobacco retailer’s license shall be prominently displayed in a publicly visible location at the licensed location.

(d) Positive Identification Required. No person engaged in tobacco retailing shall sell or transfer an electronic cigarette, electronic cigarette product, electronic cigarette paraphernalia, tobacco product or tobacco paraphernalia to another person who appears to be under the age of twenty-seven years without first examining the identification of the recipient to confirm that the recipient is at least the minimum age under State law to purchase and possess the electronic cigarette, electronic cigarette product, electronic cigarette paraphernalia, tobacco product or tobacco paraphernalia.

(e) Minimum Age for Persons Selling Tobacco. No person who is younger than 18 years of age shall engage in tobacco retailing.

(f) Self-Service Displays Prohibited. Tobacco retailing by means of a self-service display is prohibited.

(g) False and Misleading Advertising Prohibited. A tobacco retailer or proprietor without a valid tobacco retailer’s license, including, for example, a person whose license has been revoked:

(1) Shall keep all electronic cigarettes, electronic cigarette products, electronic cigarette paraphernalia, tobacco products and tobacco paraphernalia out of public view. The public display of electronic cigarettes, electronic cigarette products, electronic cigarette paraphernalia, tobacco products or tobacco paraphernalia in violation of this provision shall constitute tobacco retailing without a license; and

(2) Shall not display any advertisement relating to electronic cigarettes, electronic cigarette products, electronic cigarette paraphernalia, tobacco products or tobacco paraphernalia

that promotes the sale or distribution of such products from the tobacco retailer's location or that could lead a reasonable consumer to believe that such products can be obtained at that location.

(h) Signage Violations. It is a violation of this Chapter for any licensee to violate any local, State, or Federal law regulating exterior, storefront, window, or door signage.

(i) Drug Paraphernalia. It is a violation of this Chapter for any licensee or any of the licensee's agents or employees, to violate any local, State, or Federal law regulating controlled substances or drug paraphernalia.

(j) Nonsale Distribution of Tobacco Products Prohibited.

(1) No tobacco retailer nor any agent or employee of a tobacco retailer shall engage in the nonsale distribution of any electronic cigarette, electronic cigarette paraphernalia, electronic cigarette product, tobacco product or coupon in any public place.

(2) No person, motivated by an economic or a business purpose, shall knowingly permit the nonsale distribution of any electronic cigarette, electronic cigarette paraphernalia, electronic cigarette product, tobacco product or coupon: (a) anywhere in any public place under the legal or de facto control of the person; or (b) through any agent or employee of the person. This provision shall not apply to coupons incidentally distributed in connection with a printed or electronic publication, such as, for example, magazines, newspapers, and websites, so long as that person's distribution of a publication containing coupons is not primarily motivated by an economic or a business purpose to distribute coupons.

(k) Minimum Pack Size for Cigars.

(1) Notwithstanding any other provision of this Chapter, no tobacco retailer shall sell, offer for sale, or exchange for any form of consideration:

(i) Any single cigar, whether or not packaged for individual sale;

(ii) Any number of cigars fewer than the number contained in the manufacturer's original consumer packaging designed for retail sale to a consumer; or

(iii) Any package of cigars containing fewer than five cigars and for less than seven dollars per package, including all taxes and fees.

(2) This subsection does not apply to the sale or offer for sale of a single cigar for which the retail price exceeds either five dollars or the dollar amount adopted by resolution of the City Council and adjusted from time to time, whichever is higher. The public shall be given notice of any such resolution in the manner notice is given of ordinances of the City.

(3) This subsection shall apply to cigars, cigarillos and any other cigar product regardless of the terminology used for the product.

(l) Flavored Tobacco Products Prohibited. No tobacco retailer, nor any of the retailer's agents or employees, shall sell or offer for sale, or possess with intent to sell or offer for sale, any flavored tobacco product.

4-36-200 LIMITS ON ELIGIBILITY FOR A TOBACCO RETAILER'S LICENSE.

(a) No license shall be issued to authorize tobacco retailing at other than a fixed location.

(b) No license shall be issued to authorize tobacco retailing at a location where electronic cigarettes, electronic cigarette paraphernalia, electronic cigarette products or tobacco products are prohibited from being distributed pursuant to the Zoning Code of the City of San Leandro.

(c) No license shall be issued to a location or a tobacco retailer where prohibited pursuant to Section 4-36-600.

4-36-250 APPLICATION PROCEDURE.

(a) Application for a tobacco retailer's license shall be submitted in the name of each proprietor proposing to conduct tobacco retailing and shall be signed by each proprietor or an authorized agent thereof. 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 Chapter, contrary to any other law, or on the basis of false or misleading information supplied by a proprietor shall be revoked pursuant to Section 4-36-600(d) of this Chapter. 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.

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 Chapter. If an authorized address is not supplied, each proprietor shall be understood to consent to the provision of notice at the business address specified in subsection (a)(2) of this section;
- (4) Proof that the location for which a tobacco retailer's license is sought has been issued a valid state tobacco retailer's license by the California Board of Equalization;
- (5) Whether or not any proprietor or any agent of the proprietor has admitted violating, or has been found to have violated, this Chapter and, if so, the dates and locations of all such violations within the previous five years;
- (6) A statement signed by each proprietor that no drug paraphernalia is or will be sold at the location for which the license is sought;
- (7) Such other information as the Department deems necessary for the administration or enforcement of this Chapter as specified on the application form required by this section.

(b) A licensed tobacco retailer shall inform the Department in writing of any change in the information submitted on an application for a tobacco retailer's license within ten business days of a change.

(c) All information specified in an application pursuant to this section shall be subject to disclosure under the California Public Records Act (California Government Code Section 6250 et seq.) or any other applicable law, subject to the laws' exemptions.

4-36-300 ISSUANCE OF LICENSE.

Upon the receipt of a complete application for a tobacco retailer's license and the license fee required by this Chapter, the Administrator shall issue a license unless substantial evidence demonstrates that one or more of the following bases for denial exists:

- (a) The information presented in the application is inaccurate or false. Intentionally supplying inaccurate or false information shall be a violation of this Chapter;
- (b) The application seeks authorization for tobacco retailing at a location for which this Chapter prohibits issuance of tobacco retailer's licenses. However, this subsection shall not constitute a basis for denial of a license if the applicant provides the City with documentation demonstrating by clear and convincing evidence that the applicant has acquired or is acquiring the location or business in an arm's length transaction;
- (c) The application seeks authorization for tobacco retailing for a proprietor or location for which this Chapter prohibits a license to be issued, including the provisions of Section 4-36-600;
- (d) The application seeks authorization for tobacco retailing that is prohibited pursuant to this Chapter (e.g., mobile vending), that is unlawful pursuant to this Code or that is unlawful pursuant to any other law;
- (e) The location for which a tobacco retailer's license is sought lacks a valid state tobacco retailer's license by the California Board of Equalization.

4-36-350 LICENSE RENEWAL AND EXPIRATION.

(a) Term and Renewal of License. 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's license is one year. Each tobacco retailer shall apply for the renewal of his or her tobacco retailer's license and submit the license fee no later than thirty days prior to expiration of the term.

(b) Expiration of License. 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) of this section, the proprietor must:

- (1) Submit the license fee and application renewal form; and
- (2) Submit a signed affidavit affirming that the proprietor:
 - (i) Has not sold and will not sell any electronic cigarette, electronic cigarette product, electronic cigarette paraphernalia, tobacco product or tobacco paraphernalia after the license expiration date and before the license is renewed; or
 - (ii) Has waited the appropriate ineligibility period established for tobacco retailing without a license, as set forth in Section 4-36-600(a) of this Chapter, before seeking renewal of the license.

4-36-400 LICENSES NONTRANSFERABLE.

(a) 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 proprietor(s).

(b) 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 fully transferred to a new proprietor or fully transferred to entirely new proprietors; and
- (2) The new proprietor provides the City with clear and convincing evidence that the new proprietor has acquired or is acquiring the location in an arm's length transaction.

4-36-450 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 City identified on the face of the license. For example, nothing in this Chapter 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, 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.

4-36-500 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 and shall be included within the City's Master Fee Schedule. The fee shall be calculated so as to recover the cost of administration and enforcement of this Chapter, including, for example, issuing a license, administering this Chapter, 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.

4-36-550 COMPLIANCE MONITORING.

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

(b) Compliance checks shall be conducted so as to allow the Police Department to determine, at a minimum, if the tobacco retailer is conducting business in a manner that complies with laws regulating youth access to electronic cigarettes, electronic cigarette paraphernalia, electronic cigarette products or tobacco products. When the Police Department deems appropriate, the compliance checks shall determine compliance with other laws applicable to tobacco retailing.

(c) The City shall not enforce any law establishing a minimum age for electronic cigarette, electronic cigarette paraphernalia, electronic cigarette product or tobacco product purchases or possession against a person who otherwise might be in violation of such law because of the person's age (hereinafter "youth decoy") if the potential violation occurs when:

- (1) The youth decoy is participating in a compliance check supervised by a peace officer or a code enforcement official of the City;
- (2) The youth decoy is acting as an agent of a person designated by the City to monitor compliance with this Chapter; or
- (3) The youth decoy is participating in a compliance check funded in part, either directly or indirectly through subcontracting, by the Alameda County Public Health Department or the California Department of Health Services.

4-36-600 VIOLATIONS AND REVOCATION OF LICENSE.

(a) Violations. If the Administrator has reasonable cause to believe a violation of this Chapter exists, or if any court of competent jurisdiction determines the same, the Administrator may issue a notice of violation and begin the revocation process as follows:

(1) First Violation. After a first violation of this Chapter at a location within any sixty-month period, the Administrator shall:

(i) Issue a written warning to the licensee, which includes: the facts supporting the finding of a violation, the penalties for further violations of this Chapter, and provides thirty days within which the licensee may cure the violation and advise employees of applicable regulations or contact the Administrator to challenge the finding of a violation.

(ii) If the licensee contacts the Administrator to challenge the finding of a violation, the Administrator shall provide written notice of a hearing, not less than five business days after the notice, at which the tobacco retailer may show cause, at a time and place specified in the notice, why a violation does not exist. Should the tobacco retailer fail to present evidence at such hearing establishing, in the reasonable determination of the Administrator, that a violation does not exist, the Administrator shall provide written notice to the tobacco retailer that the notice of violation is upheld.

(2) Second Violation. After a second violation of this Chapter at a location within any sixty-month period, the licensee shall be fined two thousand five hundred dollars (\$2,500).

(3) Third Violation. After a third violation of this Chapter at a location within any sixty-month period, the license shall be suspended for twenty (20) days.

(4) Fourth Violation and Additional Violations. After four or more violations of this Chapter at a location within any sixty-month period, the license shall be revoked and no new license may issue for the location or tobacco retailer until three years have passed from the date of revocation.

(b) Revocation and Suspension Procedures. If a license is subject to revocation or suspension, the Administrator shall provide written notice of revocation or suspension along with the reasons for revocation or suspension, facts suggesting violation, the penalties for violation, and ability to appeal pursuant to subsection (c) of this section. Within five days of the mailing of notice of revocation or suspension, the tobacco retailer shall cease the operation of the business for which the license was issued.

(c) Appeal of Revocation or Suspension. A decision of the Administrator to revoke or suspend a license is appealable to the City Manager and must be filed with the City Clerk within ten days of mailing of the Administrator's notice of revocation or suspension. If such an appeal is made, it shall stay enforcement of the appealed action. An appeal to the City Manager is not available for a revocation made pursuant to subsection (d) of this section. The date, time, and place of appeal hearings shall be provided in writing to the tobacco retailer with at least ten days' notice and copies of hearing rules. If the tobacco retailer fails to present evidence establishing that tobacco retailer is entitled to retain the license or should not be subject to suspension, the City Manager shall uphold the revocation or suspension and give written notice to the tobacco retailer. Within five days of the mailing of the notice of upheld revocation or suspension, the tobacco retailer shall cease operation of the business for which the license was issued.

(d) Revocation of License Wrongly Issued. A tobacco retailer's license shall be revoked if the Administrator 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 4-36-300 existed at the

time application was made or at any time before the license issued. The decision by the Administrator shall be the final decision of the City. Such a revocation shall be without prejudice to the filing of a new license application.

4-36-650 ENFORCEMENT.

(a) Criminal Prosecution. Each incident of violation of this Chapter is an infraction subject to a one hundred dollar fine or otherwise punishable pursuant to Section 1-12-200(c) of this Code. Other violations of this Chapter may, in the discretion of the City Prosecutor, be prosecuted as infractions or misdemeanors when the interests of justice so require. Enforcement of this Chapter shall be the responsibility of the Police Chief or designee. In addition, any peace officer or code enforcement official also may enforce this Chapter.

(b) Civil Enforcement by the City.

(1) Fines. Violations of this Chapter are subject to a civil action brought by the City of San Leandro, punishable by a civil fine not less than two hundred fifty dollars and not exceeding one thousand dollars per violation.

(2) Injunctions, Nuisance Abatement, and Code Enforcement. In addition to other remedies provided by this Chapter or by other law, any violation of this Chapter may be remedied by a civil action brought by the City Attorney including, for example, administrative or judicial nuisance abatement proceedings, civil or criminal code enforcement proceedings, and suits for injunctive relief. Where the City pursues a civil action to remedy a violation of this Chapter, the prevailing party shall be entitled to recover attorneys' fees and costs if the City elects, at the beginning of that action, to seek recovery of its own attorneys' fees and costs pursuant to California Government Code Section 38773.5 as that section may be amended from time to time.

(c) General Provisions.

(1) Cumulative Remedies. The remedies provided by this Chapter are cumulative and in addition to any other remedies available at law or in equity.

(2) Violations. Causing, permitting, aiding, abetting, or concealing a violation of any provision of this Chapter shall also constitute a violation of this Chapter. A violation exists for each day on which an electronic cigarette, electronic cigarette product, electronic cigarette paraphernalia, tobacco product or tobacco paraphernalia is offered for sale in violation of this Chapter. A violation also exists for each individual retail electronic cigarette, electronic cigarette product or tobacco product and each individual retail item of electronic cigarette paraphernalia tobacco paraphernalia that is distributed, sold, or offered for sale in violation of this Chapter.

(3) Nuisances. Violations of this Chapter are hereby declared to be public nuisances.

(4) No Testimony for Persons Under Eighteen. Whenever evidence of a violation of this Chapter is obtained in any part through the participation of a person under the age of eighteen years old, such a person shall not be required to appear or give testimony in any civil or administrative process brought to enforce this Chapter and the alleged violation shall be adjudicated based upon the sufficiency and persuasiveness of the evidence presented.

4-36-700 OPERATIVE DATE OF CHAPTER.

This chapter shall be operative on March 1, 2018.

EXHIBIT A

Chapter 4-36 TOBACCO RETAILERS 4-36-100 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:

“Administrator” means the Chief of Police or designee for the City of San Leandro.

“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.

“Characterizing flavor” means a distinguishable taste or aroma, other than the taste or aroma of tobacco, imparted by a tobacco product or any byproduct produced by the tobacco product, including, but not limited to, tastes or aromas relating to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, menthol, mint, wintergreen, herb, or spice.

“Coupon” means anything that can be exchanged for or used to acquire an electronic cigarette, electronic cigarette paraphernalia, electronic cigarette or tobacco product, such as a printed piece of paper, voucher, ticket, rebate, rebate offer, check, credit, token, code, password, or anything labeled “coupon” or “coupon offer.”

“Department” means the City of San Leandro Finance Department. **

“Distinguishable” means perceivable by an ordinary consumer by either the sense of smell or taste.

“Drug paraphernalia” shall have the definition set forth in California Health and Safety Code Section 11014.5, as that section may be amended from time to time.

“Electronic cigarette” means “a device that can provide an inhalable dose of nicotine by delivering a vaporized solution” as defined in California Health and Safety Code Section 119405(b), as that section may be amended from time to time, or any device designed to vaporize a liquid solution that releases flavored vapor.

“Electronic cigarette paraphernalia” means any device designed to provide an inhalable dose of nicotine or a flavored liquid solution through vaporization, nicotine-based or flavored solution-based cartridges for use with electronic cigarettes, and any other item designed for the vaporization, preparation, storing, or consumption of electronic cigarette products.

“Electronic cigarette product” means any substance containing nicotine or a flavored liquid solution for vaporization, including any product or formulation of matter containing biologically active amounts of nicotine that is manufactured, sold, offered for sale, or otherwise distributed with the expectation that the product or matter will be introduced into the human body, but does not include any cessation product specifically approved by the United States Food and Drug Administration for use in treating nicotine or tobacco dependence.

“Flavored tobacco product” means any tobacco product (other than cigarettes as defined by the U.S. Food and Drug Administration) that contains a constituent that imparts a characterizing flavor. This includes cigars, little cigars, pipe tobacco, hookah tobacco, snuff, chewing tobacco, dipping tobacco, bidis, blunts, and electronic cigarettes or electronic smoking devices.

(a) For purposes of this definition, “constituent” means any ingredient, substance, chemical, or compound, other than tobacco, water, or reconstituted tobacco sheet, which is

added by the manufacturer to a tobacco product during the processing, manufacture, or packing of the tobacco product.

(b) Further, a tobacco product is presumed to be a flavored tobacco product if a manufacturer or any of the manufacturer's agents or employees has:

(1) Made a public statement or claim that the tobacco product has or produces a characterizing flavor, including, but not limited to, text and/or images on the product's labeling or packaging that are used explicitly or implicitly to communicate information about the flavor, taste, or aroma of a tobacco product; or

(2) Taken actions directed to consumers that would be reasonably expected to result in consumers believing that the tobacco product imparts a characterizing flavor.

“License” means a tobacco retailer’s license as defined below.

“Licensee” means a tobacco retailer with a tobacco retailer’s license.

“Nominal cost” means the cost of any item that is transferred from one person to another for less than the total of: (1) twenty-five percent of the full retail value of the item exclusive of taxes and fees; plus (2) all taxes and fees previously paid and all taxes and fees still due on the item at the time of transfer.

“Nonsale distribution” means to give, within the jurisdictional limits of the City, a tobacco product or coupon at no cost or at nominal cost to a person who is not a tobacco seller.

“Person” means any natural person, partnership, cooperative association, corporation, personal representative, receiver, trustee, assignee, or any other legal entity.

“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 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.

“Public place” means any place within the City, public or private, that is open to the general public regardless of any fee or age requirement, including, for example, bars, restaurants, clubs, stores, stadiums, parks, playgrounds, taxis, and buses.

“Retailer” means tobacco retailer as defined herein.

“Self-service display” means the open display or storage of electronic cigarettes, electronic cigarette products, electronic cigarette paraphernalia, 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.

“Tobacco” means leaves of the tobacco plant dried and prepared for smoking or ingestion.

“Tobacco paraphernalia” means cigarette papers or wrappers, pipes, holders of smoking materials of all types, cigarette rolling machines, and any other item designed for the smoking, preparation, storing, or consumption of tobacco products.

“Tobacco product” means tobacco and any substance containing tobacco, including, but not limited to, cigarettes, cigars, cigarillos, pipe tobacco, hookah tobacco, snuff, chewing tobacco, dipping tobacco, snus, bidis, or any other preparation of tobacco; any electronic cigarette product; and any product or formulation of matter containing biologically active amounts of nicotine that is manufactured, sold, offered for sale, or otherwise distributed with the expectation that the product or matter will be introduced into the human body, but does not

include any cessation product specifically approved by the United States Food and Drug Administration for use in treating nicotine or tobacco dependence.

“Tobacco retailer” means any person who sells, offers for sale, or does or offers to exchange for any form of consideration, electronic cigarettes, electronic cigarette products, electronic cigarette paraphernalia, 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 electronic cigarettes, electronic cigarette products, electronic cigarette paraphernalia, tobacco products or tobacco paraphernalia sold, offered for sale, exchanged, or offered for exchange.

“Tobacco retailer’s license” means the license issued pursuant to Section 4-36-300 that authorizes electronic-cigarette or tobacco retailing at a certain location and by a certain tobacco retailer.

4-36-150 REQUIREMENTS AND PROHIBITIONS.

(a) Tobacco Retailer’s License Required. It is 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 Chapter for each location at which that activity is to occur. Tobacco retailing without a valid tobacco retailer’s license is a nuisance as a matter of law.

(b) Lawful Business Operation. In the course of tobacco retailing or in the operation of the business or maintenance of the location for which a license is 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 electronic cigarettes, electronic cigarette products, electronic cigarette paraphernalia, tobacco products, tobacco paraphernalia, or tobacco retailing.

(c) Display of License. Each tobacco retailer’s license shall be prominently displayed in a publicly visible location at the licensed location.

(d) Positive Identification Required. No person engaged in tobacco retailing shall sell or transfer an electronic cigarette, electronic cigarette product, electronic cigarette paraphernalia, tobacco product or tobacco paraphernalia to another person who appears to be under the age of twenty-seven years without first examining the identification of the recipient to confirm that the recipient is at least the minimum age under State law to purchase and possess the electronic cigarette, electronic cigarette product, electronic cigarette paraphernalia, tobacco product or tobacco paraphernalia.

(e) Minimum Age for Persons Selling Tobacco. No person who is younger than 18 years of age shall engage in tobacco retailing.

(f) Self-Service Displays Prohibited. Tobacco retailing by means of a self-service display is prohibited.

(g) False and Misleading Advertising Prohibited. A tobacco retailer or proprietor without a valid tobacco retailer’s license, including, for example, a person whose license has been revoked:

(1) Shall keep all electronic cigarettes, electronic cigarette products, electronic cigarette paraphernalia, tobacco products and tobacco paraphernalia out of public view. The public display of electronic cigarettes, electronic cigarette products, electronic cigarette paraphernalia, tobacco products or tobacco paraphernalia in violation of this provision shall constitute tobacco retailing without a license; and

(2) Shall not display any advertisement relating to electronic cigarettes, electronic cigarette products, electronic cigarette paraphernalia, tobacco products or tobacco paraphernalia

that promotes the sale or distribution of such products from the tobacco retailer's location or that could lead a reasonable consumer to believe that such products can be obtained at that location.

(h) Signage Violations. It is a violation of this Chapter for any licensee to violate any local, State, or Federal law regulating exterior, storefront, window, or door signage.

(i) Drug Paraphernalia. It is a violation of this Chapter for any licensee or any of the licensee's agents or employees, to violate any local, State, or Federal law regulating controlled substances or drug paraphernalia.

(j) Nonsale Distribution of Tobacco Products Prohibited.

(1) No tobacco retailer nor any agent or employee of a tobacco retailer shall engage in the nonsale distribution of any electronic cigarette, electronic cigarette paraphernalia, electronic cigarette product, tobacco product or coupon in any public place.

(2) No person, motivated by an economic or a business purpose, shall knowingly permit the nonsale distribution of any electronic cigarette, electronic cigarette paraphernalia, electronic cigarette product, tobacco product or coupon: (a) anywhere in any public place under the legal or de facto control of the person; or (b) through any agent or employee of the person. This provision shall not apply to coupons incidentally distributed in connection with a printed or electronic publication, such as, for example, magazines, newspapers, and websites, so long as that person's distribution of a publication containing coupons is not primarily motivated by an economic or a business purpose to distribute coupons.

(k) Minimum Pack Size for Cigars.

(1) Notwithstanding any other provision of this Chapter, no tobacco retailer shall sell, offer for sale, or exchange for any form of consideration:

(i) Any single cigar, whether or not packaged for individual sale;

(ii) Any number of cigars fewer than the number contained in the manufacturer's original consumer packaging designed for retail sale to a consumer; or

(iii) Any package of cigars at a price that is less than \$7.00 per five Cigars, including all applicable taxes and fees.

(2) This subsection does not apply to the sale or offer for sale of a single cigar for which the retail price exceeds either five dollars or the dollar amount adopted by resolution of the City Council and adjusted from time to time, whichever is higher. The public shall be given notice of any such resolution in the manner notice is given of ordinances of the City.

(3) This subsection shall apply to cigars, cigarillos and any other cigar product regardless of the terminology used for the product.

(l) Flavored Tobacco Products Prohibited. No tobacco retailer, nor any of the retailer's agents or employees, shall sell or offer for sale, or possess with intent to sell or offer for sale, any flavored tobacco product.

4-36-200 LIMITS ON ELIGIBILITY FOR A TOBACCO RETAILER'S LICENSE.

(a) No license shall be issued to authorize tobacco retailing at other than a fixed location.

(b) No license shall be issued to authorize tobacco retailing at a location where electronic cigarettes, electronic cigarette paraphernalia, electronic cigarette products or tobacco products are prohibited from being distributed pursuant to the Zoning Code of the City of San Leandro.

(c) No license shall be issued to a location or a tobacco retailer where prohibited pursuant to Section 4-36-600.

4-36-250 APPLICATION PROCEDURE.

(a) Application for a tobacco retailer's license shall be submitted in the name of each proprietor proposing to conduct tobacco retailing and shall be signed by each proprietor or an authorized agent thereof. 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 Chapter, contrary to any other law, or on the basis of false or misleading information supplied by a proprietor shall be revoked pursuant to Section 4-36-600(d) of this Chapter. 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.

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 Chapter. If an authorized address is not supplied, each proprietor shall be understood to consent to the provision of notice at the business address specified in subsection (a)(2) of this section;

(4) Proof that the location for which a tobacco retailer's license is sought has been issued a valid state tobacco retailer's license by the California Board of Equalization;

(5) Whether or not any proprietor or any agent of the proprietor has admitted violating, or has been found to have violated, this Chapter and, if so, the dates and locations of all such violations within the previous five years;

(6) A statement signed by each proprietor that no drug paraphernalia is or will be sold at the location for which the license is sought;

(7) Such other information as the Department deems necessary for the administration or enforcement of this Chapter as specified on the application form required by this section.

(b) A licensed tobacco retailer shall inform the Department in writing of any change in the information submitted on an application for a tobacco retailer's license within ten business days of a change.

(c) All information specified in an application pursuant to this section shall be subject to disclosure under the California Public Records Act (California Government Code Section 6250 et seq.) or any other applicable law, subject to the laws' exemptions.

4-36-300 ISSUANCE OF LICENSE.

Upon the receipt of a complete application for a tobacco retailer's license and the license fee required by this Chapter, the Administrator shall issue a license unless substantial evidence demonstrates that one or more of the following bases for denial exists:

- (a) The information presented in the application is inaccurate or false. Intentionally supplying inaccurate or false information shall be a violation of this Chapter;
- (b) The application seeks authorization for tobacco retailing at a location for which this Chapter prohibits issuance of tobacco retailer's licenses. However, this subsection shall not constitute a basis for denial of a license if the applicant provides the City with documentation demonstrating by clear and convincing evidence that the applicant has acquired or is acquiring the location or business in an arm's length transaction;
- (c) The application seeks authorization for tobacco retailing for a proprietor or location for which this Chapter prohibits a license to be issued, including the provisions of Section 4-36-600;
- (d) The application seeks authorization for tobacco retailing that is prohibited pursuant to this Chapter (e.g., mobile vending), that is unlawful pursuant to this Code or that is unlawful pursuant to any other law;
- (e) The location for which a tobacco retailer's license is sought lacks a valid state tobacco retailer's license by the California Board of Equalization.

4-36-350 LICENSE RENEWAL AND EXPIRATION.

(a) Term and Renewal of License. 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's license is one year. Each tobacco retailer shall apply for the renewal of his or her tobacco retailer's license and submit the license fee no later than thirty days prior to expiration of the term.

(b) Expiration of License. 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) of this section, the proprietor must:

- (1) Submit the license fee and application renewal form; and
- (2) Submit a signed affidavit affirming that the proprietor:
 - (i) Has not sold and will not sell any electronic cigarette, electronic cigarette product, electronic cigarette paraphernalia, tobacco product or tobacco paraphernalia after the license expiration date and before the license is renewed; or
 - (ii) Has waited the appropriate ineligibility period established for tobacco retailing without a license, as set forth in Section 4-36-600(a) of this Chapter, before seeking renewal of the license.

4-36-400 LICENSES NONTRANSFERABLE.

(a) 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 proprietor(s).

(b) 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 fully transferred to a new proprietor or fully transferred to entirely new proprietors; and
- (2) The new proprietor provides the City with clear and convincing evidence that the new proprietor has acquired or is acquiring the location in an arm's length transaction.

4-36-450 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 City identified on the face of the license. For example, nothing in this Chapter 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, 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.

4-36-500 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 and shall be included within the City's Master Fee Schedule. The fee shall be calculated so as to recover the cost of administration and enforcement of this Chapter, including, for example, issuing a license, administering this Chapter, 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.

4-36-550 COMPLIANCE MONITORING.

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

(b) Compliance checks shall be conducted so as to allow the Police Department to determine, at a minimum, if the tobacco retailer is conducting business in a manner that complies with laws regulating youth access to electronic cigarettes, electronic cigarette paraphernalia, electronic cigarette products or tobacco products. When the Police Department deems appropriate, the compliance checks shall determine compliance with other laws applicable to tobacco retailing.

(c) The City shall not enforce any law establishing a minimum age for electronic cigarette, electronic cigarette paraphernalia, electronic cigarette product or tobacco product purchases or possession against a person who otherwise might be in violation of such law because of the person's age (hereinafter "youth decoy") if the potential violation occurs when:

- (1) The youth decoy is participating in a compliance check supervised by a peace officer or a code enforcement official of the City;
- (2) The youth decoy is acting as an agent of a person designated by the City to monitor compliance with this Chapter; or
- (3) The youth decoy is participating in a compliance check funded in part, either directly or indirectly through subcontracting, by the Alameda County Public Health Department or the California Department of Health Services.

4-36-600 VIOLATIONS AND REVOCATION OF LICENSE.

(a) Violations. If the Administrator has reasonable cause to believe a violation of this Chapter exists, or if any court of competent jurisdiction determines the same, the Administrator may issue a notice of violation and begin the revocation process as follows:

(1) First Violation. After a first violation of this Chapter at a location within any thirty-six-month period, the Administrator shall:

(i) Issue a written warning to the licensee, which includes: the facts supporting the finding of a violation, the penalties for further violations of this Chapter, and provides thirty days within which the licensee may cure the violation and advise employees of applicable regulations or contact the Administrator to challenge the finding of a violation.

(ii) If the licensee contacts the Administrator to challenge the finding of a violation, the Administrator shall provide written notice of a hearing, not less than five business days after the notice, at which the tobacco retailer may show cause, at a time and place specified in the notice, why a violation does not exist. Should the tobacco retailer fail to present evidence at such hearing establishing, in the reasonable determination of the Administrator, that a violation does not exist, the Administrator shall provide written notice to the tobacco retailer that the notice of violation is upheld.

(2) Second Violation. After a second violation of this Chapter at a location within any thirty-six-month period, the licensee shall be fined two thousand five hundred dollars (\$2,500).

(3) Third Violation. After a third violation of this Chapter at a location within any thirty-six-month period, the license shall be suspended for twenty (20) days.

(4) Fourth Violation and Additional Violations. After four or more violations of this Chapter at a location within any thirty-six-month period, the license shall be revoked and no new license may issue for the location or tobacco retailer until three years have passed from the date of revocation.

(b) Revocation and Suspension Procedures. If a license is subject to revocation or suspension, the Administrator shall provide written notice of revocation or suspension along with the reasons for revocation or suspension, facts suggesting violation, the penalties for violation, and ability to appeal pursuant to subsection (c) of this section. Within five days of the mailing of notice of revocation or suspension, the tobacco retailer shall cease the operation of the business for which the license was issued.

(c) Appeal of Revocation or Suspension. A decision of the Administrator to revoke or suspend a license is appealable to the City Manager and must be filed with the City Clerk within ten days of mailing of the Administrator's notice of revocation or suspension. If such an appeal is made, it shall stay enforcement of the appealed action. An appeal to the City Manager is not available for a revocation made pursuant to subsection (d) of this section. The date, time, and place of appeal hearings shall be provided in writing to the tobacco retailer with at least ten days' notice. If the tobacco retailer fails to present evidence establishing that tobacco retailer is entitled to retain the license or should not be subject to suspension, the City Manager shall uphold the revocation or suspension and give written notice to the tobacco retailer. Within five days of the mailing of the notice of upheld revocation or suspension, the tobacco retailer shall cease operation of the business for which the license was issued.

(d) Revocation of License Wrongly Issued. A tobacco retailer's license shall be revoked if the Administrator 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 4-36-300 existed at the

time application was made or at any time before the license issued. The decision by the Administrator shall be the final decision of the City. Such a revocation shall be without prejudice to the filing of a new license application.

4-36-650 ENFORCEMENT.

(a) Criminal Prosecution. Each incident of violation of this Chapter is an infraction subject to a one hundred dollar fine or otherwise punishable pursuant to Section 1-12-200(c) of this Code. Other violations of this Chapter may, in the discretion of the City Prosecutor, be prosecuted as infractions or misdemeanors when the interests of justice so require. Enforcement of this Chapter shall be the responsibility of the Police Chief or designee. In addition, any peace officer or code enforcement official also may enforce this Chapter.

(b) Civil Enforcement by the City.

(1) Fines. Violations of this Chapter are subject to a civil action brought by the City of San Leandro, punishable by a civil fine not less than two hundred fifty dollars and not exceeding one thousand dollars per violation.

(2) Injunctions, Nuisance Abatement, and Code Enforcement. In addition to other remedies provided by this Chapter or by other law, any violation of this Chapter may be remedied by a civil action brought by the City Attorney including, for example, administrative or judicial nuisance abatement proceedings, civil or criminal code enforcement proceedings, and suits for injunctive relief. Where the City pursues a civil action to remedy a violation of this Chapter, the prevailing party shall be entitled to recover attorneys' fees and costs if the City elects, at the beginning of that action, to seek recovery of its own attorneys' fees and costs pursuant to California Government Code Section 38773.5 as that section may be amended from time to time.

(c) General Provisions.

(1) Cumulative Remedies. The remedies provided by this Chapter are cumulative and in addition to any other remedies available at law or in equity.

(2) Violations. Causing, permitting, aiding, abetting, or concealing a violation of any provision of this Chapter shall also constitute a violation of this Chapter. A violation exists for each day on which an electronic cigarette, electronic cigarette product, electronic cigarette paraphernalia, tobacco product or tobacco paraphernalia is offered for sale in violation of this Chapter. A violation also exists for each individual retail electronic cigarette, electronic cigarette product or tobacco product and each individual retail item of electronic cigarette paraphernalia tobacco paraphernalia that is distributed, sold, or offered for sale in violation of this Chapter.

(3) Nuisances. Violations of this Chapter are hereby declared to be public nuisances.

(4) No Testimony for Persons Under Eighteen. Whenever evidence of a violation of this Chapter is obtained in any part through the participation of a person under the age of eighteen years old, such a person shall not be required to appear or give testimony in any civil or administrative process brought to enforce this Chapter and the alleged violation shall be adjudicated based upon the sufficiency and persuasiveness of the evidence presented.

4-36-700 OPERATIVE DATE OF CHAPTER.

This chapter shall be operative on March 1, 2018.

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