

ORDINANCE NO. 14-19 N.S.

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF RICHMOND
AMENDING CHAPTER 7.106 OF THE RICHMOND MUNICIPAL CODE
ENTITLED TOBACCO RETAILER LICENSE TO PROHIBIT THE SALE OF
ELECTRONIC CIGARETTES**

The Council of the City of Richmond hereby finds and declares as follows:

WHEREAS, on July 17, 2018 the City Council adopted an ordinance (No. 20-18 N.S.) amending Richmond Municipal Code Chapter 7.106 by banning the sale of menthol and other flavored tobacco products, establishing a minimum pack size for little cigars and cigars, and imposing location requirements on new tobacco retailers; and

WHEREAS, the regulations adopted in Ordinance No. 20-18 N.S. took effect on April 17, 2019, and were initiated following a presentation to the City Council from the Youth Tobacco Advocacy & Policy Project, highlighting the negative health impacts that tobacco products have on youth; and

WHEREAS, the City's current regulations prohibit the sale of all electronic cigarette products which have a taste or aroma other than the taste or aroma of tobacco; and

WHEREAS, electronic smoking devices often mimic conventional tobacco products in shape, size, and color, with the user exhaling a smoke-like vapor similar in appearance to the exhaled smoke from cigarettes and other conventional tobacco products; and

WHEREAS, nationwide, electronic cigarette use has increased at alarming rates since the first products became available about 10 years ago, and while there have been many successful efforts to reduce underage tobacco use, the growing availability of e-cigarettes has reversed those positive trends; 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, to protect the public, especially youth, against the health risks created by tobacco products, Congress enacted the Family Smoking Prevention and Tobacco Control Act ("Tobacco Control Act") in 2009 which authorized the U.S. Food and Drug Administration ("FDA") to set national standards governing the manufacture of tobacco products, to limit levels of harmful components in tobacco products and to require manufactures to disclose information and research relating to the products' health effects; and

WHEREAS, a central requirement of the Tobacco Control Act is premarket review of all new tobacco products not on the market in the United States as of February 15, 2007—must be authorized by the FDA for sale in the United States before it may enter the marketplace. A new tobacco product may not be marketed until the FDA has found that the product is: (1) appropriate for the protection of the public health upon review of a premarket tobacco application; (2) substantially equivalent to a grandfathered product; or (3) exempt from substantial equivalence requirements; and

WHEREAS, The FDA's premarket review process is intended to determine if a tobacco product is appropriate for the protection of the public health "with respect to the risks and benefits to the population as a whole, including users and nonusers of the tobacco product, and taking into account- (A) the increased or decreased likelihood that existing users of tobacco products will stop using such products; and (B) the increased or decreased likelihood that those who do not use tobacco products will start using such products"¹; and

¹ 21 U.S.C. § 387j: Application for Review of Certain Tobacco Products

WHEREAS, virtually all electronics cigarettes that are sold today are considered “new tobacco products” under the Tobacco Control Act, but unfortunately they have not obtained a premarket review order and the FDA has not taken appropriate action to enforce the requirements of the Tobacco Control Act; and

WHEREAS, in 2017, the FDA issued Guidance that purports to give electronic cigarettes manufactures until August 8, 2022 to submit their application for premarket review. The Guidance further purports to allow unapproved products to stay on the market indefinitely, until such time as the FDA complies with its statutory duty to conduct a premarket review to determine whether a new tobacco product poses a risk to public health. In March 2019, the FDA issued draft guidance in which it considered moving the premarket application deadline up by one year for certain flavored e-cigarettes products. It is not known when, if ever, this narrow adjustment will become final or will take effect; and

WHEREAS, the project is exempt from the California Environmental Quality Act (CEQA) because it is covered by the general rule that CEQA applies only to projects which have the potential for causing a significant adverse effect on the environment.

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Richmond does ordain as follows:

SECTION I.

Chapter 7.106.030 entitled “Requirements and Prohibitions” of the City of Richmond Municipal Code is hereby amended to read as follows:

7.106.030 Requirements and Prohibitions.

A. Tobacco Retailer License Required.

It shall be unlawful for any person to act as a tobacco retailer in the City without first obtaining and maintaining a valid tobacco retailer license 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 tobacco products, tobacco paraphernalia, or tobacco retailing.

C. Display of License.

Each tobacco retailer 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 a tobacco product or tobacco paraphernalia to another person who appears to be under the age of twenty-seven (27) years without first examining the identification of the recipient to confirm that the recipient is at least the minimum age for sale of tobacco products as established by state law.

E. Minimum Age for Persons Selling Tobacco.

No person who is younger than 18 years of age shall engage in tobacco retailing.

F. False and Misleading Advertising Prohibited.

A tobacco retailer without a valid tobacco retailer license, or a proprietor without a valid tobacco retailer license including, for example, a person whose license has been revoked:

(1) Shall keep all tobacco products and tobacco paraphernalia out of public view. The public display of tobacco products or tobacco paraphernalia in violation of this provision shall constitute tobacco retailing without a license under Section 7.106.090.

(2) Shall not display any advertisement relating to tobacco products or tobacco paraphernalia that promotes the sale or distribution of such products from the tobacco retailer's location or that could lead a reasonable consumer to believe that such products can be obtained at that location.

G. Drug Paraphernalia.

It shall be 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, such as, California Health and Safety Code Section 11364.7.

H. Sale of Tobacco Products by Self-Service Display Prohibited.

It is unlawful for any person to display tobacco products or tobacco paraphernalia by means of a self-service display or to engage in tobacco retailing by means of a self-service display.

I. Minimum Pack Size for Little Cigars and Cigars.

No tobacco retailer shall sell or offer for sale, or possess with intent to sell or offer for sale:

1. Any single little cigar or cigar, whether or not packaged for individual sale;
2. Any number of little cigars or cigars fewer than the number contained in the manufacturer's original packaging intended for sale to a consumer;
3. Any package of little cigars or cigars containing fewer than twenty (20) little cigars or cigars.
4. This subsection does not apply to the sale or offer for sale of a single cigar for which the retail price (exclusive of all applicable taxes and fees) exceeds \$5.00. This minimum retail amount may be adjusted from time to time by a resolution of the City Council.

J. Sale of Flavored Tobacco Products Prohibited.

(a) It shall be a violation of this chapter for any tobacco retailer or any of the tobacco retailer's agents or employees to sell, offer for sale, or to possess with intent to sell or offer for sale, any flavored tobacco product.

(b) There shall be a rebuttable presumption that a tobacco retailer in possession of four or more flavored tobacco products, including but not limited to individual flavored tobacco products, packages of flavored tobacco products, or any combination thereof, possesses such flavored tobacco products with intent to sell or offer for sale.

(c) There shall be a rebuttable presumption that a tobacco product is a flavored tobacco product if a tobacco retailer, manufacturer, or any employee or agent of a tobacco retailer or manufacturer has:

- (1) made a public statement or claim that the tobacco product imparts a Characterizing Flavor;
- (2) used text and/or images on the Tobacco Product's Labeling or Packaging to explicitly or implicitly indicate that the Tobacco Product imparts a Characterizing Flavor; or
- (3) taken action directed to Consumers that would be reasonably expected to cause Consumers to believe the Tobacco Product imparts a Characterizing Flavor.

K. Sale of electronic cigarettes prohibited.

(1) The sale by a Tobacco Retailer of an Electronic Cigarette is prohibited where the Electronic Cigarette:

- A. is a New Tobacco Product;
- B. requires premarket review under 21 U.S.C. § 387j, as may be amended from time to time; and
- C. does not have a premarket review order under 21 U.S.C. § 387j(c)(1)(A)(i), as may be amended from time to time.

(2) For the purposes of subsection (k)(1), Electronic Cigarette shall have the definition set forth in the California Revenue and Taxation Code Section 30121, as may be amended from time to time.

(3) For the purposes of subsection (k)(1), New Tobacco Product has the meaning set forth in 21 U.S.C. § 387j(a)(1), as may be amended from time to time.

SECTION II. Severability.

If any section, subsection, sentence, clause, or phrase of this Ordinance is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of the ordinance. The City Council hereby declares that it would have passed this Ordinance and each section, subsection, sentence, clause, and phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses, or phrases be declared invalid or unconstitutional.

SECTION III. Effective Date.

This Ordinance shall be effective 114 days after passage and adoption.

First introduced at a regular meeting of the City Council of the City of Richmond held July 23, 2019, and finally passed and adopted at a regular meeting held September 10, 2019, by the following vote:

AYES: Councilmembers Bates, Johnson III, Martinez, Myrick, Willis,
Vice Mayor Choi, and Mayor Butt.

NOES: None.

ABSTENTIONS: None.

ABSENT: None.

PAMELA CHRISTIAN
CLERK OF THE CITY OF RICHMOND
(SEAL)

Approved:
TOM BUTT
Mayor

Approved as to form:
BRUCE GOODMILLER
City Attorney

State of California }
County of Contra Costa : ss.
City of Richmond }

I certify that the foregoing is a true copy of **Ordinance No. 14-19 N.S.** passed and adopted by the City Council of the City of Richmond at a regular meeting held on September 10, 2019.



Pamela Christian, City Clerk of the City of Richmond