

ORDINANCE NO. 2020-29R

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF ESCONDIDO, CALIFORNIA, TO AMEND ESCONDIDO MUNICIPAL CODE CHAPTER 16, ARTICLE 3, BUSINESSES LICENSED FOR REVENUE AND REGULATION, BY ADDING DIVISION 6, TOBACCO RETAILER LICENSE

WHEREAS, California Penal Code Section 308 prohibits the sale or furnishing of cigarettes, tobacco products and smoking paraphernalia to minors, as well as the purchase, receipt, or possession of tobacco products by minors; and

WHEREAS, California Business and Professions Code Section 22956 requires that tobacco retailers check the identification of tobacco purchasers who reasonably appear to be under 21 years of age; and

WHEREAS, Chapter 22A, Smoking Regulations, of the Escondido Municipal Code regulates access to and use of tobacco products; and

WHEREAS, California Business and Professions Code Section 22971.3 authorizes local authorities to adopt tobacco retailer licensing laws to provide for the suspension and revocation of the local tobacco retailer license for any violation of a state tobacco control law; and

WHEREAS, the City of Escondido ("City") has a substantial interest in promoting compliance with federal, state and local laws intended to regulate tobacco sales and use to youth; and

WHEREAS, studies have shown that local tobacco retailer licensing programs coupled with a strong enforcement program substantially reduces youth access to tobacco; and

WHEREAS, the City intends to require compliance with state drug paraphernalia

laws as a condition of obtaining and maintaining the local tobacco retail license; and

WHEREAS, the City seeks to align tobacco retailer license expiration dates with the business license expiration date to allow efficient renewal processing; and

WHEREAS, the City will not charge a fee for any tobacco retailer licenses issued before July 1, 2021; and such no fee licenses will expire with the expiration of the associated business license beginning on July 1, 2021; and

WHEREAS, to ensure adequate time to implement tobacco retailer licensing procedures, this Ordinance shall be effective on July 1, 2021.

NOW, THEREFORE, IT IS HEREBY RESOLVED and the City Council of the City of Escondido DOES HEREBY ORDAIN as follows:

SECTION 1. The foregoing recitals are true and correct.

SECTION 2. That Escondido Municipal Code, Chapter 16, Licenses and Business Regulation Generally, Article 3, Businesses Licensed for Revenue and Regulation, is amended by adding Division 6, Tobacco Retailer License, as described in Exhibit "A" and incorporated herein.

SECTION 3. SEPARABILITY. If any section, subsection sentence, clause, phrase or portion of this Ordinance is held invalid or unconstitutional for any reason by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions.

SECTION 4. That as of the effective date of this Ordinance, July 1, 2021, all ordinances or parts of ordinances in conflict herewith are hereby repealed.

SECTION 5. That the City Clerk is hereby directed to certify to the passage of this Ordinance and to cause the same or a summary to be published one time within 15

days of its passage in a newspaper of general circulation, printed and published in the County and circulated in the City of Escondido.

PASSED, ADOPTED AND APPROVED by the City Council of the City of Escondido at a regular meeting thereof this 18th day of November, 2020 by the following vote to wit:

AYES : Councilmembers: DIAZ, MARTINEZ, MORASCO, MCNAMARA

NOES : Councilmembers: NONE

VACANT : Councilmembers: DISTRICT 2

APPROVED:

DocuSigned by:
Paul McNamara
CAACE20782954D3...
PAUL MCNAMARA, Mayor of the
City of Escondido, California

ATTEST:

DocuSigned by:
Zack Beck
A58535D0BDC1430...
ZACK BECK, City Clerk of the
City of Escondido, California

STATE OF CALIFORNIA)
COUNTY OF SAN DIEGO : ss.
CITY OF ESCONDIDO)

I, Zack Beck, City Clerk of the City of Escondido, hereby certify that the foregoing ORDINANCE NO. 2020-29R passed at a regular meeting of the City Council of the City of Escondido held on the 18th day of November, 2020, after having been read at the regular meeting of said City Council held on the 28th day of October, 2020.

DocuSigned by:
Zack Beck
A58535D0BDC1430...
ZACK BECK, City Clerk of the
City of Escondido, California

ORDINANCE NO. 2020-29R

Chapter 16
LICENSES AND BUSINESS REGULATIONS GENERALLY
ARTICLE 3
BUSINESSES LICENSED FOR REVENUE AND REGULATION
DIVISION 6
TOBACCO RETAILER LICENSE

Sec. 16-201. Tobacco Retailer License Required.

It shall be unlawful for any person to act as a tobacco retailer in the city without a valid tobacco retailer license issued pursuant to this division.

Sec. 16-202. Definitions.

For the purpose of this division, the following words and phrases shall have the meanings ascribed to them in this section:

- (a) *Advertising* display means a sign, signboard, billboard, poster, banner or other communication displayed at a business establishment, and used to call attention or promote products. It does not include printed material on the container of a product offered for sale at a retail establishment.
- (b) *Applicant* means the person applying for a license for a business to conduct tobacco retail sales pursuant to this division.
- (c) *Hearing Officer* means the city employee designated by the city manager to serve as described in the division.
- (d) *Licensee* means any proprietor holding a tobacco retailer license issued by the city pursuant to the provisions of this article.
- (e) *Owner* means any of the following individuals:
 - (1) The sole practitioner of a sole proprietorship operating a business establishment.
 - (2) Any person who is a member of an entity operating a business establishment.
 - (3) Any person identified as an owner on the tobacco product retailer license application.

(f) *Person* shall mean any individual, firm, association, business, trust, organization, corporation, partnership, company, or any other entity recognized by law as the subject of rights or duties.

(g) *Self-service display* means the open display or storage of tobacco products or tobacco paraphernalia in a manner that is physically accessible to the general public without the assistance of the retailer or their agent. A vending machine is a form of self-service display.

(h) *Tobacco paraphernalia* means any item designed for the consumption, use, or preparation of a tobacco product.

(i) *Tobacco product* shall have the meaning as defined in California Business & Professions Code section 22950.5 including electronic devices used to deliver nicotine or other vaporized liquids to a person inhaling from the device.

(j) *Tobacco retailer* means any person who sells, offers for sale, or offers to exchange for any form of consideration tobacco products or tobacco paraphernalia.

Sec. 16-203. Application Process.

(a) An applicant shall submit a separate application for each physical location seeking to sell or offer to exchange for any form of consideration any tobacco product or tobacco paraphernalia. The owner, or an authorized representative, shall sign the application.

(b) All applications shall be submitted on a form supplied by the city and shall contain the following information:

(1) The name, address, and telephone number of each owner.

(2) The business name, mailing address, retail location (if different), telephone number and email address.

(3) Whether or not any applicant, an owner, or the business has previously been issued a license pursuant to this division that is or was at any time suspended or revoked and, if so, the dates of the suspension period or the date of revocation.

(4) Notice that owners are strictly liable for the actions of their employees and agents when engaged in tobacco retailing.

(5) Such other information as the city manager deems necessary for the administration or enforcement of this division.

(c) If the owner is a legal entity other than a natural person, the owner shall authorize, in writing, at least one of its officers or partners to act as its behalf.

(d) Upon receipt of the completed application, the police chief or designee shall have up to thirty (30) days to complete a background investigation.

Sec. 16-204. License Issuance.

(a) A tobacco product retailer license shall be issued by the city to any tobacco retailer meeting the following:

(1) The operation, as proposed by the applicant, would comply with all applicable laws and all requirements listed in this division.

(2) The applicant has provided all information, assurances, or documentation required by this division, has not failed to reveal any fact material to qualification, and has not supplied information that is not true or misleading as to a material fact pertaining to the qualification criteria.

(3) Payment of a tobacco retailer license fee as authorized by the city council.

(4) Successful completion of a background check indicating no administrative, civil or criminal violations of any law regulating tobacco use or sales including any conviction obtained following the reduction of a tobacco specific charge including but not limited to California Penal Code section 415. Investigators shall use a preponderance of the evidence standard to assess whether a violation of any tobacco related law occurred.

(b) Notwithstanding subsection (a), the city shall not issue a tobacco retailer license if the owner has a suspended, or revoked license or if ongoing proceedings may result in a suspended or revoked license, or if the tobacco retailer had any violations of law related to tobacco product or tobacco paraphernalia sales to a person under twenty-one years of age within twelve months of the application.

(c) The city shall provide notice to the applicant of the decision to approve or deny the application for a tobacco retailer license. If the city denies an application, the city shall provide notice stating the reasons for denial, the effective date of the decision, and the right to appeal the decision.

Sec. 16-205. License Renewal and Expiration.

(a) Effective July 1, 2021, a tobacco retailer license renewal shall align with the renewal date for the business' city business license.

(b) A tobacco retail license that is not timely renewed pursuant to this division shall be automatically suspended by operation of law. Automatic reinstatement shall occur upon payment of the license fee so long as no violations of this division have occurred during the suspension period.

(c) A tobacco product retailer license shall automatically renew upon payment of the annual license fee, unless the city has grounds to deny license renewal.

(d) The City has the authority to deny license renewal license for any of the following reasons:

(1) Any of the grounds for suspension or revocation exist.

(2) The license is suspended or revoked at the time of the application.

(3) The tobacco product retailer has not been in regular and continuous operation in the four months prior to the renewal application.

(4) The tobacco product retailer fails to or is unable to renew any required state licenses.

(5) The tobacco product retailer has failed to pay the renewal fee established pursuant this division prior to the date on which the license is to be automatically renewed.

(6) The tobacco product retailer fails to ensure that all city records generated pursuant to this division are accurate and up to date prior to the automatic renewal.

(e) The chief of police is authorized to make all decisions concerning the issuance of a renewal license. In making the decision, the chief of police is authorized to impose additional conditions on a renewal license if it is determined to be necessary to ensure compliance with state or local laws and regulations or to preserve the public health, safety or welfare. Any appeals shall in accordance with the procedure included in this division.

Sec. 16-206. License Nontransferable.

A tobacco product retailer license is nontransferable.

Sec. 16-207. License Fee.

The fee to issue or to renew a tobacco product retailer license shall be established from time to time by resolution of the city council. The fee shall be calculated to recover the cost of administration and enforcement of this division. Fees are nonrefundable except as may be required by law.

Sec. 16-208. Tobacco Product Retailer Operating Requirements and Prohibitions.

(a) Compliance with All Laws Required. In the course of tobacco product retailing or in the operation of the tobacco product retailing establishment for which a license is issued, it shall be a violation of this division 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 product retailing.

(b) Fixed Location Required. No person shall engage in tobacco product retailing at other than a fixed location. A separate tobacco retail license is required at each business location.

(c) Display of License. Each tobacco product retailer license shall be prominently displayed in a publicly visible location at the tobacco retailing 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 21 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 tobacco product or tobacco paraphernalia.

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

(f) Location of Tobacco Product Advertising Displays. Tobacco product retailers shall be prohibited from placing or maintaining, or causing to be placed or maintained, any advertising display containing tobacco products below four feet from the floor. This prohibition shall not apply to commercial establishments where access to the premises by persons under twenty-one (21) years of age is prohibited by law.

(g) Drug Paraphernalia. It shall be a violation of this division 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, except that conduct authorized pursuant to state law shall not be a violation of this division.

(h) Change in Information. A tobacco retailer shall immediately inform the City in writing of any change in the information submitted on an application for a tobacco retailer license within ten (10) days of a change. Any change in ownership shall require a new application.

Sec. 16-209. Suspension or Revocation of License.

(a) Suspension or Revocation of License for Violation. In addition to any other penalty authorized by law, a tobacco product retailer license may be suspended or revoked if any court of competent jurisdiction determines, or the chief of police finds, based on a preponderance of the evidence that the licensee, or any of the licensee's agents, officers, partners, representatives, managers, or employees, has violated any of the requirements, conditions, or prohibitions of this division, or has pleaded guilty, "no contest" or its equivalent, or admitted to a violation of any law in any way associated with tobacco retail sales.

(1) Upon a finding by the chief of police of a first violation of this division, the licensee may receive a warning by the department.

(2) Upon a finding by the chief of police of a second violation of this division, within any 60-month period, the license may be suspended for 90 days.

(3) Upon a finding by the chief of police of a third violation of this division, within any 60-month period, the license may be suspended for one year.

(4) Upon a finding by the chief of police of a fourth violation of this division, within any 60-month period, the license shall be revoked.

(b) Notwithstanding subsection (a)(1), the chief of police need not issue a warning when multiple violations occur within a thirty (30) day period or for any unauthorized tobacco product or tobacco paraphernalia sales.

(c) Any appeal shall be made in accordance with the procedures included in this division.

(d) If a license issued under this division is suspended or revoked, all tobacco products and tobacco paraphernalia at the suspended or revoked tobacco product retailer's location shall be removed from public view for the duration of the suspension or revocation. The tobacco product retailer additionally shall not display any advertisement relating to tobacco products or tobacco paraphernalia that promotes the sale or distribution of such products from the tobacco product retailer's location.

Sec. 16-212. Enforcement.

(a) In addition to any other remedy, any person violating any provision of this division shall be guilty of a misdemeanor for each day a violation continues.

(b) Any violation of this division may be remedied by a civil action brought by the city attorney. The city may recover reasonable attorney fees and costs of suit in any civil action brought by the city attorney to remedy any violation of this chapter.

(c) Violations of this division are hereby declared to be public nuisances subject to abatement by the city.

(d) In addition to criminal sanctions and other remedies set forth in this division, administrative penalties may be imposed pursuant to Chapter 1A of this code against any person violating any provision of this division.

(e) Tobacco product retailing without a valid license – ineligibility for license. In addition to any other penalty authorized by law, if the chief of police finds based on a preponderance of evidence, after notice and an opportunity to be heard, that any person has engaged in tobacco product retailing at a location without a valid tobacco product retailer license, either directly or through the person's agents or employees, the person

shall be ineligible to apply for, or to be issued, a tobacco product retailer license for up to sixty (60) months.

(f) The remedies specified in this section are cumulative and in addition to any other remedies available under state or local law for a violation of this code.

Sec. 16-213. Denial, Suspension and Revocation – Appeals.

(a) A tobacco retailer license applicant or licensee aggrieved by the decision of the city in denying, suspending, or revoking a tobacco retailer license may appeal the decision by submitting a written appeal to the city clerk within ten (10) calendar days from the date of service of the notice of denial, suspension, or revocation. Service is complete upon mailing a notice by the chief of police. The written appeal shall contain:

(1) A brief statement in ordinary and concise language of the specific action protested, together with any material facts claimed to support the contentions of the appellant;

(2) A brief statement in ordinary and concise language of the relief sought, and the reasons why it is claimed the protested action should be reversed or otherwise set aside;

(3) The signatures of all parties named as appellants and their official mailing addresses; and

(4) The verification (by declaration under penalty of perjury) of at least one appellant as to the truth of the matters stated in the appeal.

(b) The appeal hearing shall be conducted by a hearing officer.

(c) Upon receipt of any appeal filed pursuant to this section, the city clerk shall transmit said appeal to the hearing officer who shall calendar it for a hearing. The hearing officer shall give the parties at least fifteen (15) calendar days written notice of the time and place of the hearing either by causing a copy of such notice to be delivered to the appellant personally or by mailing a copy thereof, postage prepaid, addressed to the appellant at the address shown on the appeal. Upon good cause, the hearing officer may grant one extension for the date of the hearing not to exceed fifteen (15) days from the original date set for the hearing.

(d) Only those matters or issues specifically raised by the appellant in the notice of appeal shall be considered in the hearing of the appeal.

(e) Failure of any person to file a timely appeal in accordance with the provisions of this section shall constitute an irrevocable waiver of the right to an administrative hearing and a final adjudication of the notice and order, or any portion thereof.

(f) Following the hearing on the appeal by the hearing officer, the decision of the hearing officer may be appealed to the city manager or his or her designee. A decision of the city manager or his or her designee shall be the final decision of the city.

(g) During a period of license suspension or revocation appeal, the tobacco retailer licensee shall remove from public view all tobacco products and tobacco paraphernalia at the tobacco retail location.

Sec. 16-214. Hearings – Generally.

(a) At the time set for hearing, the hearing officer shall proceed to hear the testimony of material witnesses, the appellant, and other competent persons, including members of the public, respecting those matters or issues specifically listed by the appellant in the notice of appeal.

(b) The proceedings at the hearing shall be recorded. Either party may provide a certified shorthand reporter to maintain a record of the proceedings at the party's own expense.

(c) The hearing officer may, upon the request of the appellant or upon the request of the city, grant continuances from time to time for good cause shown, or upon his or her own motion.

Sec. 16-215. Conduct of Hearing.

(a) Hearings need not be conducted in accordance to the technical rules relating to evidence and witnesses. California Government Code section 11513, subsections (a), (b) and (c), or as such section may be amended from time to time, shall apply to hearings under this division.

(b) Oral evidence shall be taken only upon oath or affirmation.

(c) Irrelevant and unduly repetitious evidence shall be excluded.

(d) Each party shall have these rights, among others:

(1) To call and examine witnesses on any matter relevant to the issues of the hearing.

(2) To introduce documentary and physical evidence.

(3) To cross-examine opposing witnesses on any matter relevant to the issues of the hearing.

(4) To impeach any witness regardless of which party first called the witness to testify.

- (5) To rebut evidence presented against the party.

Sec. 16-216. Form and Contents of Decision of Hearing Officer - Appeal to City Manager - Finality of Decision.

(a) If it is shown, by a preponderance of the evidence, that one or more bases exist to deny, suspend, or revoke the tobacco retailer license, the hearing officer shall affirm the city's decision to deny, suspend, or revoke the tobacco retailer license. The decision of the hearing officer shall be in writing and shall contain findings of fact and a determination of the issues presented.

(b) The decision of the hearing officer shall inform the appellant that the decision may be appealed to the city manager by filing a written appeal with the hearing officer within ten days of receipt of the decision of the hearing officer. The written appeal shall be forwarded to the city manager upon receipt.

(c) Within fifteen (15) days of receipt of the written appeal, the city manager shall review the record of the hearing and issue a written decision to grant or deny the appeal. A decision of the city manager shall be final. The city manager shall provide appellant with a copy of his or her decision and that the time for judicial review is governed by California Code of Civil Procedure section 1094.6, or as such section may be amended from time to time. Copies of the decision shall be delivered to the parties personally or sent by certified mail to the address shown on the appeal. The decision shall be final when signed by city manager and served as provided in this division.