

ORDINANCE NO. 2199, NEW SERIES

AN ORDINANCE OF THE CITY OF MORGAN HILL AMENDING CHAPTER 5.64 (TOBACCO RETAILER'S LICENSE) OF THE MUNICIPAL CODE OF THE CITY OF MORGAN HILL TO CLARIFY WHEN TOBACCO RETAILER'S LICENSE RENEWALS EXPIRE, TO ASSESS A PENALTY FOR LATE RENEWALS AND CLEAN UP LANGUAGE FROM THE ORDINANCE

WHEREAS, Article XI, Section 7 of the California Constitution provides that the City may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws; and

WHEREAS, California Government Code Section 36901 authorizes the City to impose fines, penalties, and forfeitures for violations of ordinances; and

WHEREAS, the City Council desires to clarify when Tobacco Retailer's Licenses expire, to assess a penalty for late renewals, and to clean up language from the original Ordinance.

NOW THEREFORE, IN CONSIDERATION OF THE FOREGOING, THE CITY COUNCIL OF THE CITY OF MORGAN HILL DOES HEREBY ORDAIN AND ENACT AS FOLLOWS:

Section 1. Chapter 5.04 is hereby amended to read as follows:

Chapter 5.64 - TOBACCO RETAILER'S LICENSE

5.64.010 - Purpose.

This chapter is intended to set forth a local license process for tobacco retailers to ensure that retailers comply with tobacco control laws and city business standards to protect the public health, safety and welfare, 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 products to minors. This chapter is not intended 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.

5.64.020 - Definitions.

A. The following words and phrases, whenever used in this chapter, shall be construed as defined in this section:

1. "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.

2. "City" means the City of Morgan Hill and each of its officers and employees designated to enforce or administer the provisions of this chapter.

3. "Licensee" means a tobacco retailer or their authorized representative and/or employee with a valid tobacco retailer's license.

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

5. "Proprietor" means a person with an ownership or managerial interest in a business. An ownership interest shall be deemed to exist when a person has a ten percent (10%) or greater interest in the stock, assets, or income of a business other than the sole interest of security for debt. A managerial interest shall be deemed to exist when a person can or does have or share ultimate control over the day-to-day operations of a business.

6. "Self-service display" means the open display or storage of tobacco products or tobacco paraphernalia in a manner that is physically accessible in any way to the general public without the assistance of the retailer or employee of the retailer and a direct person-to-person transfer between the purchaser and the retailer or employee of the retailer. A vending machine is a form of self-service display.

7. "Smoking" means possessing a lighted tobacco product, lighted tobacco paraphernalia, or any other lighted weed or plant (including a lighted pipe, cigar, hookah pipe, or cigarette of any kind) and means the lighting of a tobacco product, tobacco paraphernalia, or any other weed or plant (including a pipe, cigar, hookah pipe, or cigarette of any kind).

8. "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.

9. "Tobacco product" means any substance containing tobacco leaf, including, but not limited to, cigarettes, cigars, pipe tobacco, hookah tobacco, snuff, chewing tobacco, dipping tobacco, snus, bidis, or any other preparation of tobacco; 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.

10. "Tobacco retailer" means any person who sells, offers for sale, or does or offers to exchange for any form of consideration, tobacco, tobacco products, or tobacco paraphernalia, and "tobacco retailing" shall mean the doing of any of these activities. This definition is without regard to the quantity of tobacco, tobacco products, or tobacco paraphernalia sold, offered for sale, exchanged, or offered for exchange.

B. Any reference in this chapter to a specific state or federal statute or municipal code provision shall be construed to mean that state or federal statute or municipal code provision as may be amended from time to time.

5.64.030 - Tobacco retailer's 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's license pursuant to this chapter for each location at which that activity is to occur. 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.

5.64.040 - Operating regulations and prohibitions.

Every person engaged in tobacco retailing activities shall comply with each and every provision set forth below:

A. Location. Tobacco retailing activities shall be conducted at a fixed location and within the enclosed area of the tenant space completely accessible to the general public during the hours of business operation.

B. Display of license. Each tobacco retailer's license shall be prominently displayed in a publicly visible location at the licensed location.

C. Minimum age for persons selling tobacco. No person who is younger than the minimum age established by state law for the purchase or possession of tobacco products shall engage in tobacco retailing.

D. Minimum age for the purchase of tobacco. No person engaged in tobacco retailing shall sell or transfer tobacco product or tobacco paraphernalia to a person whose legal age is under minimum age established by state law for the purchase or possession of tobacco products.

E. Positive identification required. Persons engaged in tobacco retailing may not 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 under state law to purchase and possess a tobacco product or tobacco paraphernalia.

F. Compliance with the City of Morgan Hill's Smoking Pollution Control Regulations. Persons engaged in tobacco retailing shall ensure that the tobacco retailing activities comport with Morgan Hill Municipal Code Chapter 8.44, Title 8, titled "Smoking Pollution Control".

G. Self-service displays prohibited. Tobacco retailing by means of a self-service display is prohibited.

H. License nontransferable. 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 the proprietor(s) of a tobacco retailing location change.

I. Lawful business operation. In the course of tobacco retailing or in the operation of the business or maintenance of the premises for which a tobacco retailer's license is issued, it shall be a violation of this chapter for any tobacco retailer or any tobacco retailer's agent or employee to violate any federal, state, or local law applicable to tobacco products, tobacco paraphernalia, or tobacco retailing.

5.64.050 - Application procedure; unlawfully providing false information.

A. It shall be unlawful for any person to supply inaccurate or false information on a tobacco retailer's license application.

B. All applications shall be submitted on a form supplied by the City of Morgan Hill Finance Department, shall be accompanied by payment in full of the license fee, 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 subparagraph (2) above;
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. Such other information as the city deems necessary for the administration or enforcement of this chapter as specified on the application form required by this section;
7. Any person applying for a tobacco retailer's license pursuant to this chapter agrees to fully indemnify, defend and hold harmless the city, its officers, employees and agents for all claims, losses, or liabilities that arise out of the issuance or use of the tobacco products or tobacco paraphernalia; and

8. The application shall be signed by each proprietor or an authorized agent thereof.

C. A licensed tobacco retailer shall inform the city 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.

D. 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.

5.64.060 - 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 city shall issue a tobacco retailer's license, except as otherwise provided in this chapter. A tobacco retailer's license shall not be issued if substantial evidence demonstrates to city that one or more of the following 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 a tobacco retailer license has been denied pursuant to this chapter. However, this subparagraph 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, and is not associated with the previous applicant in any way;

C. The application seeks authorization for tobacco retailing for a proprietor to whom this chapter prohibits a license to be issued; or

D. The application seeks authorization for tobacco retailing that is prohibited pursuant to this chapter, that is unlawful pursuant to the Morgan Hill Municipal Code, or that is unlawful pursuant to any other law.

5.64.070 - License renewal and expiration.

A. Each tobacco retailer's license issued pursuant to this chapter shall expire on June 30th of each year, subject to suspension or revocation as provided in this chapter.

B. Renewal of license. Each tobacco retailer shall renew their tobacco retailer's license and submit the license fee prior to July 1st of each year. A tobacco retailer's license is invalid if the term of the license has expired and the license was not timely renewed and the appropriate fee was not paid.

C. Expiration of license. A tobacco retailer's license not timely renewed shall expire on June 30th of each year. To renew a license not timely renewed pursuant to subparagraph (A), the proprietor must:

1. Submit the license fee and application renewal form; and,
2. Submit a signed affidavit affirming that the proprietor has not sold and will not sell any tobacco product or tobacco paraphernalia after the license expiration date and before the license is renewed.

5.64.080 - Fee for license.

- A. Each tobacco retailer who applies for or holds a tobacco retailer's license shall pay all associated fees in the amounts established by the city council. Fees are nonrefundable except as may be required by law.
- B. The fee to issue or renew a tobacco retailer's license shall be established from time to time by the city council.
- C. No tobacco retailer's licensee shall be issued or renewed prior to the full payment of any applicable fees.
- D. Licenses renewed after July 31st of each year shall be assessed a ten percent (10%) penalty and licenses renewed after August 31st of each year shall be assessed an additional fifteen percent (15%) penalty.

5.64.090 - License conveys a limited, conditional privilege.

- A. 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.
- B. 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 license does not make the retailer a "retail or wholesale tobacco shop" for the purposes of California Labor Code Section 6404.5.

5.64.100 - Compliance monitoring.

- A. The Morgan Hill Police Department and Finance Department shall have primary responsibility for monitoring compliance with this chapter. Any peace officer may enforce the penal provisions of this chapter. The city may designate any number of additional persons to monitor compliance with this chapter.

B. Inspections may be conducted so as to allow the city to determine, at a minimum, if a tobacco retailer is conducting business in a manner that complies with laws regulating youth access to tobacco products and paraphernalia.

C. The city shall not enforce any law establishing a minimum age for tobacco purchasers or possession against a purchaser of tobacco that otherwise might be in violation of such law because of the person's age if the potential violation occurs when:

1. The purchaser (hereinafter referred to as "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 Santa Clara County Department of Health or the California Department of Health Services.

5.64.110 - Tobacco retailing without a license.

A. In addition to any other penalty authorized by law, if a court or hearing officer of competent jurisdiction determines that any person has engaged in tobacco retailing at a location without a valid tobacco retailer's license, either directly or through the person's agents or employees, the person shall be ineligible to apply for, or to be issued, a tobacco retailing license as follows:

1. After a second violation of retailing without a license at a location within any sixty (60) month period, no tobacco retailer license shall be issued for the person or the location (unless ownership of the business at the location has been transferred in an arm's length transaction), until one (1) calendar year has passed from the date of the second violation;
2. After a third or subsequent violation of this section at a location within any sixty (60) month period, no new license may issue for the person or the location (unless ownership of the business at the location has been transferred in an arm's length transaction), until five (5) calendar years have passed from the date of the most recent violation.

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(s); and
2. The new proprietor(s) provide the city with clear and convincing evidence that the new proprietor(s) have acquired or is acquiring the location in an arm's length transaction, and are not associated with the prior proprietor(s) in any way.

5.64.120 - False and misleading advertising prohibited.

It shall be unlawful for a tobacco retailer without a valid tobacco retailer license or whose license has been revoked to:

- A. Keep tobacco products and tobacco paraphernalia within public view.
- B. 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.

5.64.130 - Penalties and enforcement.

- A. The remedies provided by this chapter are cumulative and in addition to any other remedies available at law or in equity.
- B. Whenever evidence of a violation of this chapter is obtained, in any part, through the participation of a person under the age of eighteen (18) years old, such a person shall not be required to appear or give testimony in any civil or administrative process brought to enforce this chapter and the alleged violation shall be adjudicated based upon the sufficiency and persuasiveness of the evidence presented.
- C. Violations of this chapter are subject to a civil action brought by the city attorney, punishable by a civil fine payable to the city not less than two hundred fifty dollars (\$250.00) and not exceeding one thousand dollars (\$1000.00) per violation.
- D. Any person who violates Section 5.64.040(D) is guilty of a misdemeanor. The city attorney, at his or her discretion, may prosecute a violation as an infraction pursuant to Chapter 1.24 of the Morgan Hill Municipal Code.
- E. Causing, permitting, aiding, abetting, or concealing a violation of any provision of this chapter shall also constitute a violation of this chapter.
- F. Violations of this chapter are hereby declared to be public nuisances pursuant to Morgan Hill Municipal Code. Any nuisance may be abated as provided in Chapter 1.18 of the Morgan Hill Municipal Code.
- G. Each day that a violation of this chapter exists constitutes a new and separate offense.

5.64.140 - Suspension or revocation of a tobacco retailer's license, or forfeiture of seized tobacco and tobacco paraphernalia.

- A. In addition to any other penalty authorized by law, the city may suspend or revoke a tobacco retailer's license on the grounds set forth in this section after the licensee has been afforded notice and an opportunity to be heard, consistent with the hearing procedures set forth in Morgan Hill Municipal Code Sections 1.19.060 through 1.19.100, inclusive. If, after the passage of

fifteen (15) calendar days from the mailing or personal delivery of the notice, the licensee has not requested a hearing, the suspension, revocation, or forfeiture shall become final. Any suspended or revoked tobacco retailer's license shall be surrendered to the city and all operations covered by such license shall cease once the suspension or revocation becomes final.

1. A tobacco retailer's license may be suspended or revoked on one or more of the following grounds:

a. A tobacco retailer's license was issued contrary to this chapter, contrary to any other law, or on the basis of false or misleading information;

b. One or more of the bases for denial of a license pursuant to this chapter existed at the time application was made or at any time before the license issued; and/or

c. A court or hearing officer of competent jurisdiction has determined that a licensee has violated a provision of this chapter.

B. For violations of Section 5.64.040(D), the city shall have the additional authority:

1. Upon a finding by the city of a first violation of Section 5.64.040(D) at a location within a sixty (60) month period, the license shall be subject to suspension for thirty (30) days.

2. Upon a finding by the city of a second violation of Section 5.64.040(D) at a location within a sixty (60) month period, the license shall be subject to suspension for ninety (90) days.

3. Upon a finding by the city of a third violation of Section 5.64.040(D) at a location within a sixty (60) month period, the license shall be subject to suspension for one (1) year.

4. Upon a finding by the city of a fourth violation of Section 5.64.040(D) at a location within a sixty (60) month period, the license shall be subject to revocation.

C. Tobacco products and tobacco paraphernalia offered for sale or exchange in violation of this chapter are subject to seizure by the city or any peace officer and shall be forfeited after the person, the person's agents or employees, or any other owner of the tobacco products and tobacco paraphernalia seized is given reasonable notice and an opportunity, consistent with the hearing procedures set forth in Morgan Hill Municipal Code Sections 1.19.060 through 1.19.100, inclusive, to demonstrate that the tobacco products and tobacco paraphernalia were not offered for sale or exchange in violation of this chapter. The decision by the city is final and is subject to judicial review pursuant to Morgan Hill Municipal Code Section 1.19.125. Forfeited tobacco products and tobacco paraphernalia may be destroyed after all internal appeals have been exhausted and the time in which to seek judicial review pursuant to California Code of Civil Procedure Section 1094.6 or other applicable law has expired without the filing of a lawsuit or, if such a suit is filed, after judgment in that suit becomes final.

5.64.150 - Appeal.

A. Pursuant to the provisions of Chapter 1.20 of the Morgan Hill Municipal Code, the licensee can appeal a decision of the city to suspend and/or revoke a tobacco retailer's license. Compliance with the procedures set forth in Section 5.64.140 shall be deemed to fulfill the procedural requirement of Section 1.20.020.

5.64.160 - New license after revocation.

A. After first revocation at a location within any sixty (60) month period, no new license may issued for the location until one (1) calendar year has passed from the date of revocation.

B. After second or more revocations at a location within any sixty (60) month period, no new license may issued for the location until five (5) calendar years days have passed from the date of the most recent revocation.

5.64.170 - Nondiscrimination.

No person shall discharge, refuse to hire, or in any manner discriminate against any employee or applicant for employment because such employee or applicant exercises any rights afforded by this chapter.

Section 2. **Severability.** Should any provision of this Ordinance be deemed unconstitutional or unenforceable by a court of competent jurisdiction, such provision shall be severed from the Ordinance, and such severance shall not affect the remainder of the Ordinance.

Section 3. **Effective Date; Posting.** This Ordinance shall take effect on June 17, 2016. The City Clerk is hereby directed to publish this Ordinance pursuant to Government Code Section 36933.

Section 4. **Exempt from CEQA.** The City Council determines and finds that this Ordinance is exempt from the California Environmental Quality Act under section 15061(b)(3) because the activity is covered by the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA.

THE FOREGOING ORDINANCE WAS INTRODUCED AT A REGULAR MEETING OF THE CITY COUNCIL HELD ON THE 4TH DAY OF MAY 2016 AND WAS FINALLY ADOPTED AT A REGULAR MEETING OF THE CITY COUNCIL HELD ON THE 18TH DAY OF MAY 2016 AND SAID ORDINANCE WAS DULY PASSED AND ADOPTED IN ACCORDANCE WITH LAW BY THE FOLLOWING VOTE:

AYES: COUNCIL MEMBERS:

NOES: COUNCIL MEMBERS:

ABSTAIN: COUNCIL MEMBERS:
ABSENT: COUNCIL MEMBERS:

APPROVED:

STEVE TATE, MAYOR

ATTEST:

DATE:

IRMA TORREZ, City Clerk

Effective Date: June 17, 2016

∞ **CERTIFICATE OF THE CITY CLERK** ∞

I, IRMA TORREZ, CITY CLERK OF THE CITY OF MORGAN HILL, CALIFORNIA, do hereby certify that the foregoing is a true and correct copy of Ordinance No. 2199, New Series, adopted by the City Council of the City of Morgan Hill, California at their regular meeting held on the 18th day of May 2016.

WITNESS MY HAND AND THE SEAL OF THE CITY OF MORGAN HILL.

DATE: _____

IRMA TORREZ, City Clerk