

O-2019-1

AN ORDINANCE

ADDING A NEW CHAPTER 5.06 TO THE LAKEWOOD MUNICIPAL CODE
CONCERNING THE LICENSING OF RETAILERS THAT SELL NONCIGARETTE
TOBACCO PRODUCTS

WHEREAS, the City Council of the City of Lakewood recognizes the dangers associated with youth access to tobacco products;

WHEREAS, the City Council believes a local licensing system for retailers that sell non-cigarette tobacco products is appropriate to protect the health, safety and welfare of young people in Lakewood; and

WHEREAS, the imposition of a requirement for a tobacco retailer license to sell non-cigarette tobacco products will not unduly burden legitimate business activities of retailers who sell non-cigarette tobacco products to adults.

WHEREAS, approval of this ordinance on first reading is intended only to confirm that the City Council desires to comply with the Lakewood Municipal Code by setting a public hearing to provide City staff and the public an opportunity to present evidence and testimony regarding the proposal; and

WHEREAS, approval of this ordinance on first reading does not constitute a representation that the City Council, or any member of the City Council, supports, approves, rejects or denies the proposal.

NOW, THEREFORE, BE IT ORDAINED by the City Council of the City of Lakewood:

SECTION 1. A new Chapter 5.06 is hereby added to Title 5 of the Lakewood Municipal Code (Business Licenses and Regulations) to read in full as follows:

Chapter 5.06

NONCIGARETTE TOBACCO RETAILER LICENSING

5.06.010 Legislative Intent

It is the intent of the City Council of the City of Lakewood ("City") in enacting this chapter to prohibit sales of non-cigarette tobacco products to youth, to encourage responsible tobacco retailing, and to reduce the impact of tobacco product use by young people in Lakewood, pursuant to C.R.S. Section 18-13-121.

5.06.020 Definitions

The following words and phrases, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise:

"Application" means an application for a license issued pursuant to this chapter.

“Cigarette” means any tobacco or nicotine product intended to be burned or heated and smoked. The term includes loose tobacco or nicotine products that may be smoked through use of a non-electronic pipe or is “roll-your-own,” i.e., any tobacco that, because of its appearance, type, packaging or labeling, is suitable for use and likely to be offered to or purchased by consumers as tobacco for making cigarettes.

“City Manager” means the City Manager of the City of Lakewood and any agency or person designated by him/her to enforce or administer the provisions of this Chapter.

“License” refers to the non-cigarette tobacco product retailer license.

“Licensee means” the owner or holder of a non-cigarette tobacco product retailer license and shall include the employees, agents and officers thereof, as appropriate.

“Licensed premises” means any area of the premises where non-cigarette tobacco products are authorized to be sold or distributed to a consumer including, but not limited to, the grounds occupied by a retailer and any store, stand, outlet, location or structure where non-cigarette tobacco products are sold, as designated in the approved license application.

“LPD” means the City of Lakewood Police Department.

“Non-cigarette tobacco product” means and includes any product, other than a cigarette, that contains tobacco or nicotine or is made or derived from tobacco and is intended or expected to be ingested, smoked, inhaled, placed in oral or nasal cavities, or applied to the skin of an individual, including hookah or shishah, as well as electronic devices that can be used to deliver nicotine or tobacco to the person using the device, including, but not limited to, an electronic cigarette, cigar, cigarillo or pipe. The term “non-cigarette tobacco product” does not include any product specifically approved by the United States Food and Drug Administration for use in reducing, treating or eliminating nicotine or tobacco dependence, or for other medical purposes, when such product(s) is being marketed and sold solely for such an approved purpose.

“Non-cigarette tobacco product retailer” means any person who sells, offers for sale, or does or offers to exchange for any form of consideration, a non-cigarette tobacco product.

“Non-cigarette tobacco product retailing” means the selling, offering for sale, or exchanging for any form of consideration a non-cigarette tobacco product.

“Person” means an individual or entity.

“School” means any public or private daycare, elementary school, middle school or high school.

“Self-service display” means any display or storage of non-cigarette tobacco products for purchase, whereby a customer may reach or procure such products prior to age verification by a licensee.

5.06.030 License Required

A. Non-cigarette tobacco product retailer license required.

1. It is unlawful for any person to act as a non-cigarette tobacco product retailer in the City of Lakewood without first obtaining and maintaining a valid license pursuant to this Chapter for each location where non-cigarette tobacco product retailing occurs.

2. No license shall be issued to authorize non-cigarette tobacco product retailing anywhere other than at the fixed location designated in the license application and approved license. Non-cigarette tobacco product retailing from vehicles is prohibited.

3. Except as provided in this subparagraph, no license shall be issued to authorize non-cigarette product retailing within 500 feet of a school, as measured by a straight line from the nearest point of the property line of the site of the school to the nearest point of the property line of the site of the business premises proposed for licensure. Notwithstanding the foregoing, a non-cigarette tobacco product retailer holding a valid license on the effective date of this chapter shall be exempt from the 500-foot prohibition set forth in this subsection.

4. A licensed premises shall have only one active license at any one time.

5. Non-cigarette tobacco retailing without a valid license is a nuisance as a matter of law.

B. Display of license. Each license shall be prominently displayed in a publicly visible location at the licensed premises.

C. Limitations.

1. No person shall apply for a new license for a one-year period after a license held by such person has been revoked.

2. No license shall be issued to any natural person under 18 years of age.

5.06.040 Regulations

A. Positive Identification Required. No licensee shall sell or transfer a non-cigarette tobacco product without first examining the identification of the recipient to confirm the recipient is at least the minimum age under state and local law to purchase and possess the non-cigarette tobacco product.

B. Minimum age for persons handling non-cigarette tobacco products. Licensees shall not allow, permit or require any person younger than the age of 18 years to sell, stock, retrieve or otherwise handle non-cigarette tobacco products.

C. Self-service displays prohibited. No licensee shall provide or permit a self-service display in areas or on premises under the licensee's ownership or control. This prohibition

does not apply to Tobacco businesses and Tobacco bars with age restrictions as defined by Chapter 9.38 of the Lakewood Municipal Code.

5.06.050 Application Procedure

- A. Applications shall be submitted and signed by an individual authorized by the person making application.
- B. All applications shall be submitted on a form supplied by the City Clerk.
- C. All applications shall be accompanied by payment in full of all fees required in this chapter.
- D. Applicants and licensees shall inform the City Clerk in writing of any change in the information submitted on an application within 30 calendar days of a change.

5.06-060 License Issuance; Denial

A. Upon the receipt of a completed application and all required fees, the City Clerk shall issue a license within 30 days, which period may be extended by the City Clerk for good cause, unless credible evidence indicates that one or more of the following bases for denial exists:

- 1. The information presented in the application is incomplete, inaccurate or false.
- 2. The applicant seeks a license for a location prohibited under this chapter;
- 3. The applicant seeks a license for a location not appropriately zoned for the use;
- 4. The proposed location for the license is not otherwise in compliance with all city, state or federal laws that pertain to the proposed use; or
- 5. The applicant is not qualified under this chapter to hold a license.

B. If the City Clerk denies issuance of a license, the City Clerk shall notify the applicant in writing by regular mail, postage prepaid, to the address shown in the application. The notice of denial shall include the grounds for the denial. Notice is deemed to have been properly given upon mailing.

5.06.070 Appeal of License Denial

A. An applicant has the right to appeal the City Clerk's denial of a license to a hearing officer designated by the City Manager. Such appeal shall be initiated by submitting a to the City Clerk, within 20 days of the date of the notice of denial, written request for a hearing.

B. Failure to timely appeal a denial is a waiver of the applicant's right to contest the denial.

5.06.080 License Term; Renewal; Expiration

A. Term. A license shall be valid for a term of one year. A license is invalid if the appropriate fee has not been timely paid in full or if the term of the license has expired.

B. Renewal. A licensee shall apply for the renewal of a license and submit the renewal license fee no later than 30 days prior to expiration of the existing term. The City Clerk shall renew the license prior to the end of the term, provided that the renewal application and fee were timely submitted and the City Clerk is not aware of any fact that would have prevented issuance of the original license.

C. Expiration. A license not timely renewed shall expire at the end of its term. The failure to timely renew a license requires submission of a new application. The licensee is prohibited from selling any non-cigarette tobacco products after a license has expired, and before a new license is issued.

5.06.090 License Transfer

A. A license may be transferred from one person to another so long as the transferee qualifies as a non-cigarette tobacco product retailer and is operating in the same location as the prior licensee.

B. When a license is transferred, the transferee must apply for a license transfer using the process provided in this Chapter 5.06. Any applicable exemption pursuant to section 5.06.030(a)(3) shall continue to apply in case of new ownership and transfer of license.

C. When a license has been issued to a spouse, or to general or limited partners, the death of a spouse or partner shall not require the surviving spouse or partner to obtain a new license for the remainder of the term of that license. All rights and privileges granted under the original license shall continue in full force and effect as to such survivors for the balance of the license term.

05.06.100 License Fee

A. The fee to issue or to renew a license shall be established from time to time by resolution of the City Council.

B. The fee shall be calculated so as to recover the cost of administration and enforcement of this chapter, including, but not limited to, issuing a license, administering the license program, licensee education and training, licensee inspections, compliance checks, documentation of violations, and prosecution of violators, but shall not exceed the estimated cost of the regulatory program authorized by this chapter. Fees are nonrefundable except as may be required by law.

C. Fees shall be assessed and collected on new applications and license renewals. Fees may also be assessed for any re-inspection of licensees found in violation of the provisions of this chapter.

05.06.110 Compliance Monitoring

A. LPD and the City Clerk shall monitor compliance under this chapter, as the Clerk and LPD deem appropriate. The City Clerk shall also conduct licensee inspections on an annual basis.

B. Additional compliance checks shall be conducted as LPD deems appropriate so as to allow LPD to determine, at a minimum, whether the non-cigarette tobacco product retailer is conducting business in a manner that complies with laws regulating access to non-cigarette tobacco products. When LPD deems appropriate, the compliance checks may determine compliance with other laws applicable to non-cigarette tobacco products. LPD shall have the discretion to consider the previous compliance check history of a licensee in determining how frequently to conduct compliance checks with respect to individual licensees.

C. Nothing in this paragraph shall create a right of action in any licensee or other person against the City or its agents and officers.

D. LPD shall not enforce any law establishing a minimum age for tobacco purchases or possession against a person who otherwise might be in violation of such law because of the person's age if the potential violation occurs when:

1. The person is participating in a compliance check supervised by a police agent or a City code enforcement official; or
2. The person is acting as an agent of a person designated by the City to monitor compliance with this Chapter.

5.06.120 Suspension or Revocation

A. The following constitute grounds for suspension or revocation of a license:

1. A violation by a licensee, or its officers, agents or employees, of any provision of this chapter, or any state or local laws, relating to the sale or furnishing of tobacco or cigarettes to minors, or the storage or display of cigarettes or tobacco products, including, without limitation, C.R.S. 18-13-121 or C.R.S. 44-7-103;
2. Violation of any condition or sanction imposed by the City Clerk or hearing officer in connection with the issuance or renewal of a license;
3. Failure to pay state or local taxes related to the operation of the business associated with the license;
4. Loss of right to possession to the licensed premises;
5. Fraud, misrepresentation or a false statement of material fact contained in the original, or any renewal, application.

B. The City Manager shall appoint a hearing officer to hear all actions relating to the suspension or revocation of licenses pursuant to this chapter. The hearing officer is authorized to impose remedial sanctions for violations.

C. The City shall commence suspension or revocation proceedings by petitioning the hearing officer to issue an order to the licensee to show cause why the license(s) should not be suspended or revoked. The hearing officer shall issue an order to show cause if

the petition demonstrates that probable cause exists to determine one or more grounds exist pursuant to subsection A to suspend or revoke the license. The order to show cause shall set the matter for a public hearing before the hearing officer.

D. The City Clerk shall give notice of the public hearing no later than 30 days prior to the hearing by mailing the same in writing to the licensee at the address contained in the license. At the hearing, the licensee shall have the opportunity to be heard, to present evidence and witnesses, and to cross examine witnesses presented by the City. The hearing officer is authorized to administer oaths and issue subpoenas to require the presence of persons and the production of papers, books and records necessary to the determination of any hearing the hearing officer is authorized to conduct. The standard of proof at such hearings shall be a preponderance of the evidence. The burden of proof shall be upon the City.

E. In determining whether a license should be suspended or revoked, and in determining whether to impose conditions and/or sanctions in the event of a suspension, the hearing officer shall consider the following factors:

1. The nature and circumstances of the violation;
2. Corrective action, if any, taken by the licensee;
3. Prior violations, if any, by the licensee;
4. The likelihood of recurrence of the violation;
5. Whether the violation was willful;
6. Previous sanctions, if any, imposed on the licensee.

F. The hearing officer shall consider the following non-binding guidelines in determining whether to suspend or revoke a license and, in the case of a suspension, the length of the suspension. The purpose of these guidelines is to provide consistent treatment of violations of this chapter. The actual sanction imposed upon a licensee for any violation may vary from the guidelines when warranted by the specific facts and circumstances of the case. The decision of the hearing officer with respect to the suspension or revocation shall constitute a final administrative action by the City.

1. For a first offense within a three-year period: license suspension for seven days.
2. For a second offense within a three-year period: license suspension for 30 days.
3. For a third or subsequent offense within a three-year period: license revocation.

5.06.130 Enforcement

A. The remedies provided by this chapter are cumulative and in addition to any other remedies available at law or in equity.

B. Causing, permitting, aiding, abetting or concealing a violation of any provision of this chapter is unlawful and shall cause the offender to be subject to the general penalty provisions of the Lakewood Municipal Code.

C. 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.

5.06.140 – Compliance with C.R.S. Section 39-22-623

This chapter is not and shall not be construed in any way as imposing a fee, license or tax as a condition for engaging in the business of selling cigarettes or imposing a tax on cigarettes. The non-cigarette tobacco product retailer license in no way applies to the sale of cigarettes. If any part of this chapter is found to impose a fee, license or tax as a condition for engaging in the business of selling cigarettes, then that part shall be deemed void.

I hereby attest and certify that the within and foregoing ordinance was introduced and read on first reading at a regular meeting of the Lakewood City Council on the 14th day of January, 2019; published by title in the Denver Post and in full on the City of Lakewood's website, www.lakewood.org, on the 17th day of January, 2019; set for public hearing on the 28th day of January, 2019, read, finally passed and adopted by the City Council on the 28th day of January, 2019 and, signed and approved by the Mayor on the 29th day of January, 2019.



Adam Paul, Mayor

ATTEST:

Margy Greer, City Clerk

APPROVED AS TO FORM:

Timothy P. Cox, City Attorney