



CITY COUNCIL AGENDA REPORT

August 4, 2020
Community Development
Police Department
Economic Development Department

**TITLE: SECOND READING AND ADOPTION OF ORDINANCE NO. 2209
AMENDING MUNICIPAL CODE CHAPTER 9.32 TO ADOPT TOBACCO
RETAILER PERMITTING REQUIREMENTS**

The foregoing Ordinance was introduced at a regular meeting of the City Council of the City of Pleasanton on June 16, 2020 by the following vote:

- Ayes: Councilmembers Pentin, Narum, Mayor Thorne
- Noes: Councilmembers Brown, Testa
- Absent: None
- Abstain: None

ORDINANCE NO. 2209

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF PLEASANTON
AMENDING MUNICIPAL CODE CHAPTER 9.32 TO ADOPT TOBACCO RETAILER
PERMITTING REQUIREMENTS**

WHEREAS, the California Department of Public Health Tobacco Control Program reports in its Young Adult Tobacco Purchase Survey 2019 that underage decoys were able to purchase the following tobacco products from retail locations at this frequency: e-cigarettes and e-liquids = 16.9%; cigarettes = 17.5%; cigars, little cigars/cigarillos, or wraps = 33.3%; at these store types: pharmacies = 3.5%; supermarkets 8.9%; vape shops = 13.4%; gas stations = 14.5%; liquor stores = 15%; convenience stores = 15.5%; tobacco stores/smoke shops = 30.6%; and restaurant/café/donut shop = 43.2%; and

WHEREAS, communities which have adopted tobacco retailer permitting or licensing requirements have data that demonstrates that tobacco retailers and tobacco stores subject to such permitting better comply with requirements to sell only to persons 21 and older and with local tobacco restrictions; and

WHEREAS, it is in the community's public health and safety interest to reduce underage use of tobacco products, in particular by enforcing federal, state and local tobacco sales restrictions.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF PLEASANTON DOES HEREBY ORDAIN AS FOLLOWS:

Section 1. Finds that the amendment to the Municipal Code has no possibility to have a significant effect on the environment per Title 14 California Code of Regulations §15061(b)(3) as it only subjects tobacco retailers and tobacco stores to obtain a regulatory permit and be subject to an inspection requirement.

Section 2. Finds that this amendment to the Municipal Code conforms with the following provisions of the General Plan's Public Facilities and Community Programs Element regarding Human Services:

- Goal 9: Promote a healthy community and a strong community support system.
- Program 24.1: Support the Youth Commission in its study of youth needs in Pleasanton.

Section 3. Amends Municipal Code Chapter 9.32 Tobacco Restrictions to add Article V as set forth in the attached Exhibit A.

Section 4. A summary of this ordinance shall be published once within fifteen (15) days after its adoption in "The Valley Times", a newspaper of general circulation published in the City of Pleasanton, and the complete ordinance shall be posted for fifteen (15) days in the City Clerk's office within fifteen (15) days after its adoption.

Section 5. This ordinance shall be effective thirty (30) days after its passage and adoption; but the tobacco retailer permitting requirement shall not be enforced until January 1, 2021.

The foregoing Ordinance was introduced at a regular meeting of the City Council of the City of Pleasanton on June 16, 2020 by the following vote:

Ayes: Councilmembers Pentin, Narum, Mayor Thorne
Noes: Councilmembers Brown, Testa
Absent: None

Jerry Thorne, Mayor

ATTEST:

Karen Diaz, City Clerk

APPROVED AS TO FORM:

Daniel G. Sodergren, City Attorney

Exhibit A

Amend Chapter 9.32 **TOBACCO RESTRICTIONS** by adding Article V as follows:

Article V. Tobacco Retailer Permitting and other Regulations

- 9.32.070 Tobacco retailer and tobacco store requirements and prohibitions**
- 9.32.080 Application Process**
- 9.32.090 Issuance of Tobacco Retailer Permit: Standards**
- 9.32.100 Tobacco Retailer Permit Renewal and Expiration**
- 9.32.110 Fees for Tobacco Retailer Permit**
- 9.32.120 Tobacco Retailer Permit Nontransferable**
- 9.32.130 Compliance Monitoring**
- 9.32.140 Violation**
- 9.32.150 Tobacco Retailing Without a Valid Permit**
- 9.32.160 Suspension or Revocation of Tobacco Retailer Permit**
- 9.32.170 Notices**
- 9.32.180 Hearing and Appeal**
- 9.32.190 Enforcement**
- 9.32.200 Sale of Tobacco Products from or self-service displays**
- 9.32.210 Severability**

9.32.070 Tobacco retailer and tobacco store requirements and prohibitions.

- A. Tobacco Retailer Permit Required. It is unlawful for any person to act as a tobacco retailer or a tobacco store in the city without first obtaining and maintaining a valid tobacco retailer permit under this chapter for each location at which the sale of tobacco products or tobacco paraphernalia on a retail basis is to occur. The sale of tobacco products or tobacco paraphernalia on a retail basis without a valid permit constitutes a nuisance as a matter of law.
- B. Lawful Business Operation. It is a violation of this chapter for any person to violate any local, state or federal law applicable to tobacco retailing.
- C. Display of Tobacco Retailer Permit. Each tobacco retailer and tobacco store must prominently display its tobacco retailer permit in a publicly visible area at the permitted location.
- D. Positive Identification Required. No tobacco retailer or tobacco store may sell a tobacco product or tobacco paraphernalia to a person who is under the age of thirty (30) years without first examining the identification of the consumer to confirm that the consumer is at least the minimum age for sale of tobacco products as established by state and federal law.
- E. On-Site Sales. All sales of tobacco products and tobacco paraphernalia to consumers must be conducted in-person at the permitted location. It is a violation of this chapter for any tobacco retailer, tobacco store or any agents or employees to: deliver tobacco products or tobacco paraphernalia or to knowingly or recklessly sell a tobacco product or tobacco paraphernalia to any person that intends to deliver such tobacco products or tobacco paraphernalia to a consumer in the city; and to sell a tobacco product or tobacco paraphernalia at a non-fixed location, including, but not limited to, tobacco retailing by persons on foot or from vehicles.

- F. False and Misleading Advertising Prohibited. A tobacco retailer or tobacco store without a valid permit, including, for example, a person whose permit has been suspended or revoked:
1. Must keep all tobacco products and tobacco paraphernalia out of public view. The public display of tobacco products and tobacco paraphernalia in violation of this provision constitutes tobacco retailing without a permit in violation of Section 9.32.150; and
 2. Must not display any advertisement related to tobacco products and tobacco paraphernalia that promotes the sale of such products from the tobacco retailer or tobacco store's location or that could lead a reasonable consumer to believe that such products can be obtained at that location.
- G. Limited, Conditional Privilege. Nothing in this chapter shall be construed to grant any person obtaining and maintaining a permit any status or right other than the limited conditional privilege to act as a tobacco retailer or tobacco store at the location in the city identified on the face of the permit.

Section 9.32.080. Application Procedure.

- A. Application for a tobacco retailer permit must be submitted in the name of each person proposing to conduct sales of tobacco products or tobacco paraphernalia and each person or an authorized agent thereof shall furnish to the business license division a sworn statement setting forth the information in this section.
- B. It is the responsibility of each person to be informed of all laws applicable to tobacco retailing.
- C. No person may rely on the issuance of a permit as a determination by the city that the person is in compliance with all laws related to its operation. A permit issued contrary to this chapter or any other law, or on the basis of false or misleading information supplied by an applicant, shall be revoked under Section 9.32.160 of this chapter. Nothing in this chapter shall be construed to vest in any person obtaining and maintaining a permit any status or right to act as a tobacco retailer or tobacco store in contravention of any provision of law.
- D. All applications must be submitted on a form supplied by the business license division and must contain the following information:
1. The name, address, and telephone number of each proprietor of the business seeking a permit;
 2. The business name, address, and telephone number of the single fixed location for which a permit is sought;
 3. An address for receipt of legal notice;
 4. Proof that the location for which a permit is sought conforms with applicable zoning;
 5. Proof that the location for which a permit is sought has been issued a valid California Cigarette and Tobacco Products Retailer's Permit for the sale of tobacco products, if the tobacco retailer or tobacco store sells products that require such permit;
 6. 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 (5) years; and

7. Such other information as the business license division deems appropriate for the administration or enforcement of this chapter.
- E. A permitted tobacco retailer or tobacco store must inform the business license division in writing of any change in the information submitted on an application for a permit within ten (10) business days of a change.

Section 9.32.090. Issuance of Tobacco Retailer Permit: Standards. After receipt of a complete application for a tobacco retailer permit and the permit fee required by this chapter, the business license division, after consultation with the community development department, shall issue a permit within thirty (30) days unless substantial evidence demonstrates that one or more of the following bases for denial exists:

- A. The application is incomplete or inaccurate;
- B. The application seeks authorization for tobacco retailing by a person or at a location for which a suspension or revocation is in effect under Section 9.32.160 of this chapter;
- C. The application seeks authorization for tobacco retailing for a person to whom this chapter prohibits a permit to be issued; or
- D. The application seeks authorization for tobacco retailing at a location that is in violation of applicable city zoning under Chapter 18 of this Code, or is in violation of any other local, state, or federal law.

Section 9.32.100 Tobacco Retailer Permit Renewal and Expiration.

- A. Renewal of Tobacco Retailer Permit. A tobacco retailer permit is invalid if the permit fee has not been timely paid in full or if the permit term has expired. The term of a permit is one (1) year from January 1st to December 31st of each calendar year. Each tobacco retailer and tobacco store must apply for the renewal of their permit and submit the permit fee as required by the business license division.
- B. Expiration of Tobacco Retailer Permit. A permit that is not timely renewed shall expire at the end of its term. To renew a permit not timely renewed under Subsection A., above, the renewal applicant must:
 1. Submit the permit fee and renewal application form; and
 2. Submit a signed affidavit affirming the proprietor has not sold and will not sell any tobacco product or tobacco paraphernalia after the permit expiration date and before the permit is renewed.
- C. If the proprietor has engaged in tobacco retailing during a period in which its permit is invalid, a permit may only be re-issued to eligible applicants following the applicable periods set forth in Section 9.32.150.

9.32.110 Fees for Tobacco Retailer Permit. The fee is \$550.00 to issue, or \$450.00 to renew, a tobacco retailer permit. The fee shall be adjusted July 1st of each year beginning in 2022 based on Consumer Price Index for all urban users for all items for the San Francisco-Oakland-Hayward statistical area as reported by the U.S. Bureau of Labor Statistics or successor index. Adjustments made on percent change based on the annual average with base of June 2020 in \$5.00 increments.

9.32.120 Tobacco Retailer Permit Nontransferable.

- A. A tobacco retailer permit may not be transferred from one person to another or from one location to another. A new permit is required if a tobacco retailing location has a change in proprietor, or a person issued a permit changes a business location for tobacco retailing.
- B. Notwithstanding any other provision of this chapter, prior violations at a location shall continue to be counted against a location and permit ineligibility periods shall continue to apply to a location unless:
 - 1. The location has been transferred to new proprietor in an arm's length transaction; 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.

9.32.130 Compliance Monitoring. Compliance with this chapter shall be monitored by the community development department. In addition, any peace officer may enforce the provisions of this chapter. The city manager may designate additional persons to monitor compliance with this chapter.

A minimum of two compliance visits to each tobacco retailer permit location shall occur each year.

Nothing in this section creates a right of action in any permittee or other person against the city or its agents.

Any and all investigating officials of the city shall have the right to enter a tobacco retailer or tobacco store's business location from time to time during regular business hours to make reasonable inspections, including review of financial records to determine the percentage of gross receipts related to the sale of tobacco products and tobacco paraphernalia, to observe and enforce compliance with state or federal laws, provisions of this chapter, and provisions of the municipal code.

9.32.140 Violation.

- A. It is a violation of this chapter to do any of the following:
 - 1. Conduct tobacco retailing without a permit;
 - 2. Conduct tobacco retailing at a location that is not permitted;
 - 3. Conduct tobacco retailing at a location that is not fixed;
 - 4. Conduct tobacco retailing that involves the delivery of tobacco products or tobacco paraphernalia from a fixed location in the city to a customer at a different location in the city;
 - 5. Fail to fulfill the permittee obligations set forth in Section 9.32.070;
 - 6. Sell or offer for sale, give or furnish at no cost or nominal cost, or to possess with intent to sell or offer for sale, any flavored tobacco product prohibited by Section 9.32.030;
 - 7. Sell or offer for sale, give or furnish at no cost or nominal cost, or to possess with intent to sell or offer for sale, any electronic smoking device and related paraphernalia device prohibited by Section 9.32.050;

8. Sell or offer for sale tobacco products which do not meet the minimum package sizes and prices in Section 9.32.065;
 9. Honor coupons or provide discounts to allow a consumer to purchase a tobacco product for less than full retail price as set forth in Section 9.32.065.C;
 10. Violate any local, state or federal law applicable to tobacco products, tobacco paraphernalia or tobacco retailing;
- B. Causing, permitting, aiding, abetting or concealing a violation of any provision of this chapter shall also constitute a violation of this chapter;
 - C. Each sale in violation of this chapter shall be regarded as a new and separate offense. Each day any violation of this chapter continues shall be regarded as a new and separate offense. The remedies provided in this chapter shall be cumulative and exclusive.
 - D. Violations of this chapter are hereby declared to be public nuisances.
 - E. No monetary fines under the municipal code are to be assessed on employees of the permittee for such employee's violations of this chapter. Violations of this chapter are subject to tobacco retailer permit suspension or revocation as provided in Section 9.32.160.

9.32.150 Tobacco Retailing Without a Valid Permit. In addition to any other penalty authorized by law, if the city finds or a court of competent jurisdiction determines, after notice and an opportunity to be heard, that any person has engaged in tobacco retailing at a location without a valid tobacco retailer permit, either directly or through the person's agents or employees, the person shall be ineligible to receive a permit as follows:

- A. Upon a first violation of this section at a location within any five (5) year period, no new permit 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 thirty (30) days have passed from the date of the violation.
- B. Upon a second violation of this section at a location within any five (5) year period, no new permit 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 one (1) year has passed from the date of the violation.
- C. Upon a third or subsequent violation of this section at a location within any five (5) year period, no new permit 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).

9.32.160 Suspension or Revocation of Tobacco Retailer Permit.

- A. Suspension or Revocation of Tobacco Retailer Permit for Violation. In addition to any other penalty authorized by law, a tobacco retailer permit shall be suspended or revoked if the city finds or a court of competent jurisdiction determines, after the permittee is afforded notice and an opportunity to be heard, that the permittee, or any of the permittee's agents or employees, has violated any provision of this chapter.
 1. Upon a finding of a first violation of this chapter at a location within any five (5) year period, the permit shall be suspended for thirty (30) days.

2. Upon a finding of a second violation of this chapter at a location within any five (5) year period, the permit shall be suspended for one (1) year.
 3. Upon a finding of three (3) or more violations of this chapter at a location within any five (5) year period, the permit shall be revoked.
- B. Revocation of Tobacco Retailer Permit Wrongly Issued. A permit shall be revoked if the community development department finds, after the permittee is afforded notice and an opportunity to be heard, that one or more of the bases for denial of a permit under Section 9.32.090 existed at any time before the permit issued. Such a revocation shall be without prejudice to the filing of a new permit application.

9.32.170 Notices.

- A. Whenever the business license division or community development department denies an application for a permit or permit renewal, the community development department shall issue a written notice of denial sent by either regular mail to the applicant's address for notice listed on the permit application, or by personal delivery. The notice must include:
1. The reason for denial;
 2. A statement that the applicant may request a hearing on the denial of a permit by submitting a hearing request, in writing, to the city clerk within ten (10) calendar days of the date of the notice; and
 3. A statement that the failure to request a hearing on the notice of denial will constitute a waiver of all hearing and appeal rights, and the denial of the permit will be final.
- B. Whenever the city determines that a person has violated any provision of this chapter, the community development department shall send a written notice of the violation to the person by personal service or regular mail to the person's address for notice listed on the permit application, if the person is a permit holder, otherwise to the location at which the violation occurred. The notice of violation may be combined with the notice of suspension or revocation below.
- C. Whenever the community development department determines that grounds for suspension or revocation exist, it shall send a written notice of the suspension or revocation to the permit holder by personal service or by regular mail with proof of service, to the permit holder's address listed for notice in the permit application. The notice must include:
1. A statement that the permit holder's permit is being suspended or revoked under this chapter;
 2. The code section(s) violated, or applicable state or federal law violated, and a brief description of the violation(s);
 3. The address or other description of the location where the violation(s) occurred;
 4. The date of the applicable violation(s);
 5. The time period of the suspension or revocation;
 6. A statement that the permit holder may request a hearing on the suspension or revocation by submitting a hearing request, in writing, to the city clerk within ten (10) calendar days of the date of the notice;

7. A statement that the failure to request a hearing on the notice of suspension or revocation will constitute a waiver of all hearing and appeal rights, and the suspension or revocation will be final.
- D. Service of notice shall be deemed complete at the time of personal service or the time the notice is deposited in the mail. Failure of any person to receive notice shall not affect the validity of any proceedings hereunder.

9.32.180 Hearing and Appeal.

- A. Request for Hearing. Any recipient of a notice of: denial of an application for a permit; denial of a renewal of a permit; or violation of this chapter described in Section 9.32.170 (a "notice") may contest the determination described in the notice by completing a request for hearing form and returning it to the city clerk within ten (10) days from the date of the notice. The request for hearing shall include a statement of the specific action protested, together with any facts claimed to support the protest, as well as a statement of relief sought. If such a timely request for hearing is made, it shall stay enforcement of the contested notice. If the request for hearing is found not timely or incomplete by the city clerk, the city clerk shall provide a written response to the requestor rejecting the hearing request.
- B. The person requesting the hearing shall be notified of the time and place set for the hearing at least ten (10) days prior to the date of the hearing. Written notice of the time and place for the hearing shall be provided in person or by mailing a copy thereof, postage prepaid, to the mailing address provided in the request for hearing form. Service shall be deemed to be complete at the time notice is personally served or deposited in the mail. The failure of any person to receive notice of hearing shall not affect the validity of any proceedings under this chapter.
- C. If the community development department submits an additional written report concerning the notice to the hearing officer for consideration at the hearing, then a copy of this report also shall be served on the person requesting the hearing at least five (5) days prior to the date of the hearing.
- D. The failure of any person to file a request for hearing in accordance with this section shall constitute waiver of that person's rights to administrative determination of the merits of the notice and any penalties assessed.
- F. Hearing officer. The city manager shall designate the hearing officer.
- G. Hearing procedure.
 1. A hearing before the hearing officer shall be set for a date that is not less than ten (10) business days and not more than thirty (30) calendar days from the date that the request for hearing is filed in accordance with the provisions of this chapter, unless otherwise agreed to by the community development department and person requesting the hearing.
 2. The hearing need not be conducted according to the technical rules relating to evidence and witnesses. Oral evidence shall be taken only upon oath or affirmation. The community development department and the person requesting the hearing shall have the right to call witnesses, introduce documentary and physical evidence.
 3. The failure of the person requesting the hearing to appear at the hearing shall constitute a forfeiture of the hearing and a failure to exhaust administrative remedies.

4. The notice and any additional report or information submitted by the community development department shall constitute prima facie evidence of the respective facts contained in those documents and records.
5. The hearing officer may continue the hearing and request additional information from the community development department or the person requesting the hearing prior to issuing a written decision.

H. Hearing officer's decision.

1. After considering all of the testimony and evidence submitted at the hearing, the hearing officer shall issue a written decision to uphold or cancel the action described in the notice and shall list in the decision the reasons for that decision.
2. If the hearing officer determines that the action described in the notice should be upheld, the hearing officer set forth a written decision including the applicable penalty as set forth in Section 9.32.160.
3. The person requesting the hearing shall be served with a copy of the hearing officer's written decision. The decision shall include a statement that: person requesting the hearing may request an appeal of the hearing officer's decision by submitting an appeal request, in writing, to the city clerk within ten (10) calendar days of the date of the hearing officer's decision; failure to request an appeal will constitute a waiver of all appeal rights, and the decision of the hearing officer will be final.
4. The employment, performance evaluation, compensation and benefits of the hearing officer shall not be directly or indirectly conditioned upon the amount of fines or penalties upheld by the hearing officer.

I. Appeal to City Manager.

After receipt of the hearing officer's written decision, the person requesting the hearing may appeal by sending a written appeal request to the city clerk within ten (10) days from the date of the hearing officer's decision. The appeal request should include facts that may justify rescinding the hearing officer's decision. If such an appeal request is timely made, it shall stay enforcement of the appealed hearing officer's decision. The city clerk will forward the appeal request and supporting documents concerning the original notice and request for hearing to the city manager. The city manager will review all information and determine if the hearing officer's decision will stand. The city manager, at his or her discretion, may hold a public hearing on the matter and accept oral and written testimony. The person requesting the hearing will be notified in writing of the city manager's decision concerning the appeal within thirty (30) days after sending the written appeal request. The decision of the city manager shall be final.

J. Judicial Review.

Judicial review of the city manager's decision and any penalties imposed under this chapter shall be taken under Cal. Government Code §53069.4(b) and commenced within twenty (20) days of the date of service of the decision.

9.32.190 Enforcement.

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

- B. The community development director, hearing officer, or city manager shall suspend or revoke a permit for a violation of this chapter as set forth in Section 9.32.160.
1. A violation of this chapter may be documented by an administrative citation issued by a police officer or community services officer of the police department, or a code enforcement officer of the community development department. A copy of the administrative citation may be provided to the person violating this chapter, and another copy provided to the community development department for it to commence enforcement as provided in this Section 9.32.190.

9.32.200 Sale of Tobacco Products from or self-service displays. Tobacco stores may have self-service displays of tobacco products only when in compliance with the Stop Tobacco Access to Kids Enforcement Act (STAKE) in Cal. Business and Professions Code §§22950-22963, and other applicable federal and state laws.

9.32.210 Severability. If any section or portion of this chapter is found to be invalid by a court of competent jurisdiction, such finding shall not affect the validity of the remainder of the chapter, which shall continue in full force and effect.

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