

MICHAEL N. FEUER
CITY ATTORNEY

REPORT NO. R 1 3 - 0 3 0 4
OCT 23 2013

REPORT RE:

DRAFT ORDINANCE AMENDING ARTICLES 6.9 AND 7 OF THE LOS ANGELES MUNICIPAL CODE TO ADD PRODUCTS CONTAINING BIOLOGICALLY ACTIVE AMOUNTS OF NICOTINE TO THE DEFINITION OF TOBACCO PRODUCTS AND TO MAKE OTHER CHANGES TO THE TOBACCO RETAILERS PERMIT AND TO THE SELF-SERVICE DISPLAY OF TOBACCO PRODUCTS REGULATIONS

The Honorable City Council
of the City of Los Angeles
Room 395, City Hall
200 North Spring Street
Los Angeles, CA 90012

Honorable Members:

This Office has prepared and now transmits for your consideration, the attached draft ordinance, approved as to form and legality. The draft ordinance amends Article 6.9 (Tobacco Retailer's Permit) and Article 7 (Self-Service Display of Tobacco Products) of the Los Angeles Municipal Code (LAMC) to include products containing biologically active amounts of nicotine in the definition of tobacco products and to make other changes.

A City of Los Angeles Tobacco Retailer's Permit is required in order for a retailer to sell tobacco products. This requirement is found in Article 6.9, the Tobacco Retailer's Permit Ordinance. Recently, there has been a significant increase in emergent tobacco products that have entered the marketplace that are not covered under the current definition of tobacco provided in Article 6.9. These emergent tobacco products include electronic smoking devices (electronic cigarettes), hookah pens and orally ingested products commonly referred to as dissolvables. Dissolvables can be sold in many forms including lollipops, films and lozenges. Many emergent tobacco products are available in flavors which make them attractive to children, such as strawberry, bubble

gum, chocolate and cotton candy. Emergent tobacco products are marketed on the Internet, in television commercials, in magazine advertisements and with celebrity endorsements. Some emergent tobacco products, like electronic cigarettes, are also made to look like fun gadgets or everyday items such as pens or USB memory sticks. The flavorings, the product designs, the advertising and the marketing of emergent tobacco products all contribute to their attractiveness to youth.

It should be noted that candy flavorings and fruit flavorings are known to entice children and are banned in traditional cigarettes. However, products such as electronic cigarettes that contain these flavorings can be easily purchased at retail stores. Although State law makes it illegal to sell an electronic cigarette to a minor, there are no regulations that cover who can lawfully sell these products or where they can lawfully be sold.

The draft ordinance addresses the concerns poised by emergent tobacco products by modernizing the LAMC's definition of a tobacco product to include all emergent tobacco products that contain biologically active amounts of nicotine. The ordinance will require that all retailers of tobacco products that contain biologically active amounts of nicotine to obtain a City of Los Angeles Tobacco Retailer's Permit. This will make the permit requirements equally applicable to retailers of traditional cigarettes and emergent tobacco products such as electronic cigarettes. All sales will have to be from a fixed location. Street sales and mobile vending of emergent tobacco products will be prohibited just as they are for traditional cigarettes. This draft ordinance will eliminate unregulated street sales or any type of mobile vending such as from ice cream trucks or food carts. Prohibiting mobile vending decreases accessibility to minors and protects children.

The draft ordinance applies the new definition of tobacco products to LAMC Section 47.14, the Self-Service Display of Tobacco Products. Currently, the self-service display of traditional cigarettes is illegal. All cigarette sales in the City of Los Angeles must be vendor-assisted so that the vendor can verify that the purchaser is of legal age. The more expansive definition of tobacco products will apply the ban on self-service display to emergent tobacco products so that children cannot readily access these new nicotine products or evade the requirement of showing proper age identification.

Reducing our youth's accessibility to emergent tobacco products is critical. The latest findings from the National Youth Tobacco Survey published by the Centers for Disease Control and Prevention demonstrate that the percentage of middle and high school students who have used electronic cigarettes has more than doubled, from 4.7% to 10.0% between 2011 and 2012.¹ Nicotine is a highly addictive neurotoxin. Teens that start using these new nicotine products may suffer a lifelong addiction to nicotine.

¹ Centers for Disease Control and Prevention. Press Release: "Morbidity and Mortality Weekly Report: Notes from the Field: Electronic Cigarette Use among Middle and High School Students – United States, 2011-2013.

Some of these products, such as electronic cigarettes, are likely to be a gateway to traditional cigarettes.

The draft ordinance also modernizes the tobacco permit application process to conform with technological advances that allow permits to be processed over the Internet. The draft ordinance also modifies the administrative violation process that is triggered when retailers illegally sell tobacco products to minors.

Council Rule 38 Referral

A copy of the draft ordinance was sent, pursuant to Council Rule 38, to the Office of Finance asking that it make any comments that it might have directly to the City Council when you consider this matter.

If you have questions regarding this matter, please contact Deputy City Attorney Celina Porras at (213) 978-7953. She or another member of this Office will be present when you consider this matter to answer any questions you may have.

Very truly yours,

MICHAEL N. FEUER, City Attorney

By



DAVID MICHAELSON
Chief Assistant City Attorney

DM:CP:ac
Transmittal

ORDINANCE NO. _____

An ordinance amending Articles 6.9 and 7 of the Los Angeles Municipal Code to add products containing biologically active amounts of nicotine to the definition of tobacco products and to make other changes to the Tobacco Retailers Permit and to the Self-Service Display of Tobacco Products regulations.

**THE PEOPLE OF THE CITY OF LOS ANGELES
DO ORDAIN AS FOLLOWS:**

Section 1. Article 6.9 of the Los Angeles Municipal Code is amended in its entirety to read as follows:

**ARTICLE 6.9
TOBACCO RETAILERS PERMIT**

SEC. 46.90. DEFINITIONS.

(a) **“Proprietor”** shall mean a person with ownership or managerial interest in the business. An ownership interest shall be deemed to exist when a person has ten percent or greater interest in the stock, assets, or income of a business. 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 the business.

(b) **“Tobacco paraphernalia”** shall mean 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.

(c) **“Tobacco product”** shall mean any substance containing tobacco leaf, including but not limited to cigarettes, cigars, pipe tobacco, snuff, chewing tobacco, dipping tobacco, bidis or beedies, hookah tobacco or any other preparation of tobacco. **“Tobacco product”** shall also include 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. **“Tobacco product”** does not include any cessation product specifically approved by the United States Food and Drug Administration for use in treating nicotine or tobacco dependence.

(d) **“Tobacco retailer”** shall mean any person or proprietor who sells, offers for sale, or exchanges or offers to exchange for any form of consideration, tobacco, tobacco products or tobacco paraphernalia. **“Tobacco retailing”** shall mean engaging in any of the above. These definitions are without regard to the quantity of tobacco, tobacco products, or tobacco paraphernalia sold, offered for sale, exchanged, or offered for exchange.

(e) “**Arm’s length transaction**” shall mean 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 article is not an arm’s length transaction.

SEC. 46.91. TOBACCO RETAILER’S PERMIT REQUIRED.

(a) It shall be a misdemeanor for any person or proprietor, within the City of Los Angeles, to act as a tobacco retailer at a location for which a valid Tobacco Retailer's Permit has not been issued pursuant to this article. A separate Tobacco Retailer's Permit is required for each location at which tobacco retailing is to occur. No permit shall be issued to authorize tobacco retailing at any place other than a fixed location. Tobacco retailing from any non-permanent location, including from vehicles, is prohibited. No permit shall be issued for residences, newsstands, or locations where engaging in tobacco retailing is prohibited by federal, state, or local law.

(b) A person or proprietor without a valid Tobacco Retailer’s Permit, including a person or proprietor whose permit has been suspended, shall keep all tobacco products and tobacco paraphernalia out of public view. The public display of tobacco products or tobacco paraphernalia in violation of this provision shall constitute tobacco retailing without a permit.

(c) Each day that a person or proprietor sells or offers for sale tobacco, tobacco products or tobacco paraphernalia without a valid Tobacco Retailer’s Permit shall constitute a separate violation.

SEC. 46.92. APPLICATION PROCEDURE.

(a) Application for a Tobacco Retailer’s Permit shall be submitted to the Office of Finance by any proprietor of a business seeking the permit. Each applicant shall be responsible for reviewing the conditions of conducting retail tobacco sales within the City of Los Angeles and shall agree to abide by these conditions by signing the application under penalty of perjury. All applications shall be submitted on a form supplied by the City and shall contain the following information:

(1) The business name, address and telephone number of the location for which the Tobacco Retailer’s Permit is sought.

(2) The name, mailing address and telephone number of the proprietor or person authorized to receive communications and notices required by or authorized by this article. If such information is not supplied, each proprietor shall be understood to consent to the provision of notice at the business address of the location for which the Tobacco Retailer’s Permit is sought.

(3) Such other information as the City Attorney deems necessary for enforcement of this ordinance.

(b) A Tobacco Retailer's Permit must be obtained prior to the sale of any tobacco product. A new Tobacco Retailer's Permit must be obtained upon change of ownership or upon change of form of ownership prior to the sale of any tobacco product or tobacco paraphernalia, including but not limited to a sole proprietor becoming a corporation.

SEC. 46.93. ISSUANCE OF PERMIT.

(a) The permit shall state the following on its face:

- (1) Legal owner,
- (2) Doing Business As (D.B.A.),
- (3) Los Angeles Municipal Code section regulating Tobacco Retailer's Permits,
- (4) Business and mailing addresses,
- (5) Date permit was issued and permit expiration date,
- (6) Account number.

(b) Upon the receipt of an application for a Tobacco Retailer's Permit and fee payment, the Office of Finance shall issue a permit, unless the City Attorney demonstrates one of the following bases for denial:

- (1) The application is incomplete or inaccurate; or
- (2) the application seeks authorization for tobacco retailing at a location for which a suspension is in effect pursuant to Section 46.98; or
- (3) the application seeks authorization for tobacco retailing that is unlawful pursuant to any section of this article or any federal, state or local law.

(c) **City Attorney's Responsibilities.** It shall be the responsibility of the City Attorney or his/her designee to enforce all provisions set forth in this article, which includes but is not limited to the following:

- (1) Investigate and prosecute tobacco retailers who fail to obtain and/or maintain a Tobacco Retailer's Permit.

(2) Conduct any and all audits that may be necessary in the investigation of tobacco retailers.

(d) **Office of Finance Responsibilities.** It shall be the duty of the Office of Finance to administer and process the Tobacco Retailer's Permit application; mail renewal notices to permittees; and deposit funds collected for each Tobacco Retailer's Permit into the General Fund.

SEC. 46.94. DISPLAY OF PERMIT.

Any Tobacco Retailer's Permit issued pursuant to this article shall be prominently displayed in public view at the location for which it is issued.

SEC. 46.95. FEES FOR PERMIT.

(a) A fee shall be charged for a Tobacco Retailer's Permit. The permit fee will be recalculated annually and approved by the City Council. The permit fee shall be calculated so as not to exceed the amount necessary to recover the cost of both the administration and enforcement of the Tobacco Retailer's Permit Program, including the costs of issuing the permits, renewing the permits, administering the retailer permit program, retailer education, retailer inspection and compliance checks, documentation of violations, prosecution of violators, adjudications, and convictions. The permit fee for calendar year 2008 shall be \$208. The permit fee for calendar year 2009 and thereafter shall be \$300 until such fee is recalculated and the revised fee is approved by the City Council. All fees are non-refundable, except as required by law, and shall be used exclusively to reimburse the costs incurred for the program. Fees shall not be prorated. All fee collected shall be deposited into the General Fund.

(b) A \$5.00 charge shall be imposed for the issuance of a duplicate permit upon the permittee or an authorized representative stating, in a properly executed affidavit of loss, that the original permit has been lost or destroyed. This charge shall be deposited into the General Fund.

SEC. 46.96. RENEWAL OF PERMIT; DELINQUENCY.

A Tobacco Retailer's Permit is invalid unless the required fee has been paid in full and the term of the permit has not yet expired. The term of the permit shall be one year, and the permit shall be deemed expired on December 31st of the year for which the permit was issued. Renewal statements shall be due and payable November 1st of each year and shall be delinquent by January 1st of the next year. Delinquent renewals shall be charged an additional sum equal to 25 percent of the required permit fee. Such additional sum shall become a part of the fee required by the Office of Finance.

SEC. 46.97. PERMITS NOT TRANSFERABLE.

A Tobacco Retailer's Permit is non-transferable. If a new person or proprietor acquires a business engaged in tobacco retailing, that person or proprietor must apply for a new permit before engaging in the sale of tobacco products or tobacco paraphernalia.

SEC. 46.98. ADMINISTRATIVE VIOLATIONS.

(a) **Cumulative to Other Violations.** The violations set forth in this section are cumulative to, and in addition to, any other violations of federal, state or local law and shall be punished as specified in Section 46.99.

(b) **Failure to Comply With Federal, State or Local Law.**
An administrative violation shall be found when the City Attorney is in receipt of an official record of any court or governmental agency that demonstrates that a tobacco retailer, or any of the tobacco retailer's agents or employees, has violated any federal, state, or local law applicable to tobacco products, tobacco paraphernalia, or tobacco retailing. An official record of any court or governmental agency includes but is not limited to an abstract from The State of California Department of Public Health that a tobacco retailer has paid a civil monetary penalty imposed for violating The Stop Tobacco Access to Kids Enforcement Act (Business and Professions Code Division 8.5), or a certified court docket reflecting the entry of a plea of guilty or "no contest" in a criminal case involving the sale of tobacco products, tobacco paraphernalia or tobacco retailing.

SEC. 46.99. ADMINISTRATIVE PENALTIES.

(a) Any tobacco retailer determined by the City Attorney or his/her designee to have violated Section 46.98 shall be subject to the penalties of this section. The City Attorney or his/her designee shall notify the tobacco retailer that there has been an initial determination of violation under the provisions of this ordinance, and shall specify the violation and the penalty imposed, including the effective date of the suspension, if any. The notice shall further state that the tobacco retailer may, within 15 calendar days of receipt of the notice, submit to the City Attorney any written or documentary evidence to contest the initial determination of violation. After receiving and considering the evidence that is provided, the City Attorney or his/her designee shall prepare a final written decision with findings, and shall serve this final determination upon the tobacco retailer. Upon written request, the tobacco retailer shall have the right to receive copies of any records upon which the final determination is based. This final determination shall be served within 30 calendar days of the initial determination.

(b) Administrative penalties shall be imposed as follows:

(1) for the first violation in any five-year period, the tobacco retailer shall receive a letter of reprimand from the City Attorney;

(2) for the second violation in any five-year period, the Tobacco Retailer's Permit shall be suspended for 30 calendar days;

(3) for a third violation in any five-year period, the Tobacco Retailer's Permit shall be suspended for 90 calendar days;

(4) for a fourth or subsequent violation in any five-year period, the Tobacco Retailer's Permit shall be suspended for 12 months.

(c) Notwithstanding any other provision of this article, prior violations at a location shall continue to be counted against a location and permit suspension periods shall continue to apply to a location unless:

(1) the location has been fully transferred to a new proprietor with no financial relationship to the former proprietor; and

(2) the new proprietor provides the City Attorney with clear and convincing evidence that the new proprietor have acquired or is acquiring the location in an arm's length transaction.

SEC. 46.100. RIGHT TO ADMINISTRATIVE REVIEW AND PROCEDURES.

(a) The tobacco retailer shall have the right to an administrative review of the final determination of the City Attorney. The administrative review shall be conducted by the Police Permit Review Panel as authorized by Section 102.13.01 of the Los Angeles Municipal Code. To obtain an administrative review of the City Attorney's final determination, the tobacco retailer must notify the City Attorney, in writing, within 15 calendar days of its receipt of the City Attorney's final determination. The timely filing of a request for an administrative review shall hold in abeyance any permit suspension until the administrative review is heard and decided.

(b) **Notice of Review.** If a review is requested pursuant to Section 46.100(a) the City Attorney shall provide written notice, within 45 calendar days of its receipt of the request, to the tobacco retailer of the date, time, and place of the review.

(c) **Review Procedure.** The administrative review hearing shall be recorded by a certified court reporter. During the hearing, no evidence or testimony shall be presented to the Police Permit Review Panel. The purpose of the Panel's review is to ascertain whether the final determination of the City Attorney was supported by the administrative record. A decision shall be rendered by the Police Permit Review Panel at the conclusion of the hearing. Notice of the decision shall be mailed to the tobacco retailer who requested the review.

(d) **Finality of The Police Permit Review Panel's Decision.** The decision of the Police Permit Review Panel shall be the final decision of the City.

SEC. 46.101. SEVERABILITY.

If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this Ordinance is for any reason held to be invalid or unenforceable, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases of this Ordinance or the rules adopted hereby. The City Council of the City of Los Angeles hereby declares that it would have adopted independently each section, subsection, subdivision, paragraph, sentence, clause or phrase hereof, irrespective of the fact that any one or more other sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases hereof be declared invalid or unenforceable.

Sec. 2. Section 47.14 of Article 7 of the Los Angeles Municipal Code is amended in its entirety to read as follows:

SEC. 47.14. SELF-SERVICE DISPLAY OF TOBACCO PRODUCTS.

(a) **Definitions.** For the purposes of this section, the following definitions shall apply:

1. **“Person”** shall mean any natural person, partnership, cooperative association, domestic or foreign corporation, receiver, trustee, assignee, or any other legal entity.

2. **“Tobacco product”** shall mean any substance containing tobacco leaf, including but not limited to cigarettes, cigars, pipe tobacco, snuff, chewing tobacco, dipping tobacco, bidis or beedies, hookah tobacco or any other preparation of tobacco. **“Tobacco product”** shall also include 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. **“Tobacco product”** does not include any cessation product specifically approved by the United States Food and Drug Administration for use in treating nicotine or tobacco dependence.

3. **“Tobacco retailer”** shall mean any person who sells, offers for sale, or does or offers to exchange for any form of consideration, tobacco, tobacco products or tobacco paraphernalia. **“Tobacco retailing”** shall mean engaging in any of the above. These definitions are without regard to the quantity of tobacco, tobacco products, or tobacco paraphernalia sold, offered for sale, exchanged, or offered for exchange.

4. **“Vendor-assisted sale”** shall mean a sale requiring a direct, face-to-face exchange between the tobacco retailer and the customer, in which the tobacco retailer or the tobacco retailer’s employee has access to the tobacco

product, and assists the customer by supplying the product. The customer does not take possession of the product until it is purchased.

5. **“Self-service display”** shall mean the open display of tobacco products to which the public has access without the intervention or assistance of a store employee, including but not limited to a rack, shelf, or counter-top display.

6. **“Cigar lounge”** shall mean a private smokers’ lounge of an enclosed area in or attached to a retail or wholesale tobacco shop that is dedicated to the use of tobacco products.

7. **“Tobacco shop”** shall mean a business establishment whose main or principal purpose is the sale of tobacco products, including but not limited to, cigars, pipe tobacco, and smoking accessories.

(b) **Prohibition.** No person or tobacco retailer shall sell, permit to be sold, or offer for sale any tobacco product by means of a self-service display, or by any means other than vendor-assisted sales. This prohibition shall not apply to tobacco shops or cigar lounges.

Sec. 3. The City Clerk shall certify to the passage of this ordinance and have it published in accordance with Council policy, either in a daily newspaper circulated in the City of Los Angeles or by posting for ten days in three public places in the City of Los Angeles: one copy on the bulletin board located at the Main Street entrance to the Los Angeles City Hall; one copy on the bulletin board located at the Main Street entrance to the Los Angeles City Hall East; and one copy on the bulletin board located at the Temple Street entrance to the Los Angeles County Hall of Records.

I hereby certify that this ordinance was passed by the Council of the City of Los Angeles, at its meeting of _____.

HOLLY L. WOLCOTT, Interim City Clerk


By _____
Deputy

Approved _____

Mayor

Approved as to Form and Legality

MICHAEL N. FEUER, City Attorney

By 
CELINA Z. PORRAS
Deputy City Attorney

Date 10/23/13

File No. _____