




TOWN OF FAIRFAX

STAFF REPORT

December 6, 2017

TO: Mayor and Town Council

FROM: Garrett Toy, Town Manager 

SUBJECT: Second reading by title only and adoption of an Ordinance of the Town Council of the Town of Fairfax Amending Chapter 8.44 of the Fairfax Municipal Code, Title 8, Entitled "Clean Indoor and Outdoor Air and Health Protection - Smoking Regulations" to Prohibit Smoking in Unenclosed Service Areas, Raise the Age to Purchase Tobacco Products and Require the Licensure of Tobacco Retailers to Ensure Compliance with Tobacco Control Laws which would improve air quality and health in town; CEQA Categorical Exemption, CEQA Guidelines Sections 15060(c)(2), 15060(c)(3)

RECOMMENDATION

Waive second reading and read by title only and adopt an Ordinance of the Town Council of the Town of Fairfax Amending Chapter 8.44 of the Fairfax Municipal Code, Title 8, Entitled "Clean Indoor and Outdoor Air and Health Protection - Smoking Regulations" to Prohibit Smoking In Unenclosed Service Areas, Raise the Age to Purchase Tobacco Products and Require the Licensure of Tobacco Retailers to Ensure Compliance With Tobacco Control Laws.

DISCUSSION

At its November 1st meeting, the Town Council introduced the attached ordinance, which will make the Town Code consistent with recent changes to State law and create a better smoke-free environment for residents through several amendments which:

1. Prohibit smoking in unenclosed (outdoor) service areas;
2. Add a Town tobacco retailer licensing requirement for local retailers
3. Ban the sampling of tobacco products;
4. Ban pharmacies from selling tobacco products;
5. Prohibit flavored tobacco products except for tobacco or menthol;
6. Establish a minimum pack size for cigars.

Prior to introducing the ordinance, the Council added language to paragraphs D and K (2) under Section 8.44.210 *Requirements and Prohibitions*, to clarify the exception of active duty military personnel aged 18 years or older with a US Armed Forces identification card.

If adopted tonight, the ordinance would go into effect in 30 days. However, Article II entitled "Tobacco Retailers Licensing Law" will not be enforced by the Town until January 1, 2019.

FISCAL IMPACT

N/A

ATTACHMENT

Ordinance

AGENDA ITEM # 25

ORDINANCE NO. _____

**AN ORDINANCE OF THE TOWN COUNCIL OF THE TOWN OF FAIRFAX
AMENDING CHAPTER 8.44 OF THE FAIRFAX MUNICIPAL CODE, TITLE 8, ENTITLED
“CLEAN INDOOR AND OUTDOOR AIR AND HEALTH PROTECTION - SMOKING
REGULATIONS” TO PROHIBIT SMOKING IN UNENCLOSED SERVICE AREAS, RAISE
THE AGE TO PURCHASE TOBACCO PRODUCTS AND REQUIRE THE LICENSURE OF
TOBACCO RETAILERS TO ENSURE COMPLIANCE WITH TOBACCO CONTROL LAWS**

The Town Council of the Town of Fairfax hereby finds that:

WHEREAS, the Town desires to amend its local smoking regulations to reflect the Tobacco 21 Law, which amended California Penal Code Section 308 to prohibit sale of tobacco and tobacco products, including electronic smoking devices, to minors under the age of 21, except for active duty military personnel aged 18 years or older; and

WHEREAS, the Town desires to clarify that marijuana smoking is prohibited anywhere tobacco smoking is prohibited, consistent with the Adult Use of Marijuana Act of 2016; and

WHEREAS, the Town desires to amend its local smoking regulations to ban smoking in outdoor service areas, to ban sampling of tobacco products, to ban pharmacies from selling tobacco products, to specify a minimum pack size for cigars, and to prohibit the sale of tobacco flavored products, excluding menthol tobacco products; and

WHEREAS, the County of Marin, Health and Human Services Department has reported that the failure of tobacco retailers to comply with all tobacco control laws can be addressed through the licensing of tobacco retailers; and

WHEREAS, state law explicitly permits cities and counties to enact local tobacco retail licensing ordinances, and allows for the suspension or revocation of a local license for a violation of any state tobacco control law (Cal. Bus. & Prof. Code §22971.3); and

WHEREAS, it is the intent of the Town Council, 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 and nicotine products, including electronic smoking devices, to minors, but not 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; and

WHEREAS, the Town Council finds that a local licensing system for tobacco retailers is appropriate to ensure that retailers comply with tobacco control laws and business standards of the Town, in order to protect the health, safety, and welfare of our residents.

NOW, THEREFORE, THE TOWN COUNCIL OF THE TOWN OF FAIRFAX DOES
ORDAIN AS FOLLOWS:

Section 1. The above recitals are true and correct and are hereby incorporated into this Ordinance.

Section 2. Article I Designated. Sections 8.44.010 through and including Section 8.44.170 are hereby designated as Article I, entitled "Smoking Regulations" of Chapter 8.44 of the Fairfax Municipal Code.

Section 3. Finding Smoking Marijuana/Cannabis to be Prohibited. A new finding, subdivision (V) is hereby added to Section 8.44.010 of the Fairfax Municipal Code as follows:

"(V) California Health & Safety Code Section 11362.3 provides that no person may smoke marijuana/cannabis or marijuana/cannabis products in a location where smoking tobacco is prohibited. Therefore the smoking regulations herein are intended to apply equally to smoking of cannabis and cannabis products to the fullest extent permitted by law."

Section 4. Definitions Amended. The following definitions of "arm's length transaction," "cigar," "department," "pharmacy," "proprietor," and "tobacco retailer" shall be added, the definition of "minor" shall be amended, and the definitions of "retail electronic smoking device store" and "retail tobacco store" shall be repealed from, Fairfax Municipal Code, Article I, Section 8.44.020 "DEFINITIONS" as set forth in underline/strikeout below:

"**ARM'S LENGTH TRANSACTION.** 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."

"**CIGAR** means:

1. Any roll of tobacco wrapped entirely or in part in tobacco or in any substance containing tobacco; or
2. Any paper or wrapper that contains tobacco and is designed for smoking or ingestion of tobacco products.
3. For the purposes of this subsection, "cigar" includes, but is not limited to, tobacco products known or labeled as "cigar," "cigarillo," "tiparillo," "little cigar," "blunt wrap," or "cigar wrap." "

"**DEPARTMENT.** The town manager, and any agency or person designated by the town manager to enforce or administer the provisions of this chapter."

"**PHARMACY.** A retail establishment in which the profession of pharmacy by a pharmacist licensed by the State of California in accordance with the Business and Professions Code is

practiced and where prescriptions are offered for sale. A pharmacy may also offer other retail goods in addition to prescription pharmaceuticals.”

“**PROPRIETOR.** 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 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 shares ultimate control over the day-to-day operations of a business.”

“**TOBACCO RETAILER OR RETAILER.** Any person who sells, offers for sale, or does or offers to exchange for any form of consideration, tobacco, tobacco products, tobacco paraphernalia, electronic smoking devices or electronic smoking device paraphernalia. "Tobacco retailing" shall mean the doing of any of these things. This definition is without regard to the quantity of tobacco products, tobacco paraphernalia, electronic smoking devices or electronic smoking device paraphernalia sold, offered for sale, exchanged, or offered for exchange.”

“**MINOR.** Any individual who is less than 18 years old. Any individual who is less than 21 years old, except active duty military personnel who are 18 years of age or older. An identification card issued by the United States Armed Forces shall be used as proof of age for this purpose.”

~~**RETAIL ELECTRONIC SMOKING DEVICE STORE.** A retail store which sells, offers for sale, or does or offers to exchange for any form of consideration, Electronic Smoking Devices or Electronic Smoking Device Paraphernalia. This definition is without regard to the quantity of the Electronic Smoking Devices or Electronic Smoking Device Paraphernalia sold, offered for sale, exchanged, or offered for exchange.~~

~~**RETAIL TOBACCO STORE.** A retail store in which the primary merchandise for sale consists of tobacco products and accessories, and in which the sale of other products is merely incidental, and which does not provide any entertainment, or any food or beverage for consumption on the premises.~~

All other provisions and definitions contained in Section 8.44.020 of the Fairfax Municipal Code shall remain in full force and effect.

Section 5. Smoking in Unenclosed Service Areas Prohibited. Subdivision (B)(5) is hereby added to Section 8.44.070 of Fairfax Municipal Code, which is amended and restated in full as follows:

“§ 8.44.070 PROHIBITION OF SMOKING IN CERTAIN UNENCLOSED PUBLIC PLACES.

(A) Except as otherwise expressly authorized by state or federal law, smoking shall be prohibited in any place where food and/or drink is offered for sale, including outdoor dining areas of restaurants and farmers markets, except unenclosed areas of a stand-alone bar.

(B) Smoking is prohibited within:

(1) A reasonable distance from any entrance, opening or exit of any enclosed area within which smoking is prohibited, except while passing on the way to another destination. Entrances to outdoor decks or patios at bars are excluded from this prohibition;

(2) Parks, including, but not limited to Contratti Field, Fairfax Park and Peri Park Playground;

(3) Public events including but not limited to, sports events, festivals, entertainment, speaking performances, ceremonies, pageants, parades, fairs and farmer's markets; and

(4) Places of employment; and

(5) Unenclosed (outdoor) service areas.

(C) No person shall place, cause to be placed, or permit to be placed any ashtray, or tobacco ash collector or receptacle in any area designated a non-smoking area by this chapter.

(D) No person shall dispose of smoking waste or tobacco product waste within the boundaries of an area in which smoking is prohibited, including inside the perimeter of any reasonable distance requirement."

Section 6. Posting of Signs Amended. Subdivision (C) of Section 8.44.100 of Fairfax Municipal Code is hereby repealed. Subdivisions (A) and (B) of Section 8.44.100 shall remain in full force and effect.

Section 7. Section 8.44.110 Repealed and Reserved. Fairfax Municipal Code, Section 8.44.110 entitled "Regulating the Sale of Tobacco Products and Electronic Smoking Devices" is hereby repealed, and Section 8.44.110 shall be reserved.

Section 8. Article II Added. Article II entitled "Tobacco Retailers Licensing Law" is hereby added to Chapter 8.44 of the Fairfax Municipal Code, Title 8, as contained in the attached Exhibit A of this ordinance.

Section 9. Compliance with California Environmental Quality Act. The Town Council finds that this ordinance is not subject to the California Environmental Quality Act (CEQA) pursuant to Sections 15060(c)(2) (the activity will not result in a direct or reasonably foreseeable indirect physical change in the environment) and 15060(c)(3) (the activity is not a project as defined in Section 15378) of the CEQA Guidelines, California Code of Regulations, Title 14, Chapter 3, because it has no potential for resulting in physical change to the environment, directly or indirectly.

Section 10. Effective Date and Posting. This Ordinance shall be effective 30 days following its adoption by the Town Council. Copies of this Ordinance shall, within fifteen days after its passage and adoption, be posted in three public places in the Town of Fairfax, to wit: 1. Bulletin Board, Town Hall Offices; 2. Bulletin Board, Fairfax Post Office; and 3. Bulletin Board, Fairfax Women's Club.

The foregoing Ordinance was introduced at a regular meeting of the Town Council on the 1st day of November 2017, and duly adopted at the next regular meeting of the Town Council on the ___ day of _____, 2017, by the following vote, to wit:

AYES:
NOES:
ABSENT:
ABSTAIN:

MAYOR

ATTEST:

Michele Gardner, Town Clerk

Exhibit A attached

ORDINANCE NO. _____

EXHIBIT A

Adding Article II entitled "Tobacco Retailers Licensing Ordinance" to Fairfax Municipal Code, Title 8, Chapter 8.44 ("Clean Indoor and Outdoor Air and Health Protection - Smoking Regulations")

Article II: Tobacco Retailers Licensing Ordinance

8.44.200 *Title*. This article shall be known as Fairfax's "Tobacco Retailers Licensing Ordinance."

8.44.210 *Requirements and Prohibitions*.

- A. Tobacco Retailer's License Required. It shall be unlawful for any person to act as a tobacco retailer in the Town without first obtaining and maintaining a valid tobacco retailer's license pursuant to this article for each location at which that activity is to occur. Tobacco retailing without a valid tobacco retailer's license is a nuisance as a matter of law.
- B. Lawful Business Operation. In the course of tobacco retailing or in the operation of the business or maintenance of the location for which a license is issued, it shall be a violation of this section for a licensee, or any of the licensee's agents or employees, to violate any local, state, or federal law applicable to tobacco products or paraphernalia, electronic smoking devices or paraphernalia or tobacco retailing.
- C. Display of License. Each tobacco retailer license shall be prominently displayed in a publicly visible location at the licensed location.
- D. Positive Identification Required. No person engaged in tobacco retailing shall sell or transfer a tobacco product, electronic smoking device or electronic smoking device paraphernalia to another person who appears to be under the age of 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 the tobacco product, tobacco paraphernalia, electronic smoking device or electronic smoking device paraphernalia (i.e., 21 years old, or active duty military personnel who are 18 years of age or older with a US Armed Forces identification card).
- E. Minimum Age for Persons Selling Tobacco. No person who is younger than the age of 18 shall engage in tobacco retailing.
- F. Self-Service Displays Prohibited. Tobacco retailing by means of a self-service display or self-service merchandizing, or by any means other than vendor-assisted sales, is prohibited. No tobacco retailer shall locate, install, keep, maintain or use, or permit the location, installation, keeping, maintenance or use on his, her or its premises any electronic smoking device vending machine or tobacco vending machine for the purpose of selling or distributing any electronic smoking device or any tobacco product.

- G. False and Misleading Advertising Prohibited. A tobacco retailer without a valid tobacco retailer license or a proprietor without a valid tobacco retailer license, including, for example, a person whose license has been suspended or revoked:
1. Shall keep all tobacco products out of public view. The public display of tobacco products in violation of this provision shall constitute tobacco retailing without a license under section 8.44.300; and
 2. Shall not display any advertisement relating to tobacco products 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.
- H. Flavored Tobacco Products. No tobacco retailer shall sell a tobacco product containing, as a constituent or additive, an artificial or natural flavor (other than tobacco or menthol) or an herb or spice, including strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, or coffee, that is a characterizing flavor of the tobacco product or smoke produced by the tobacco product unless:
1. The tobacco product consists of a package of cigars containing at least five cigars or more; or
 2. The tobacco product consists of a single cigar for which the retail price exceeds five dollars (\$5.00); or
 3. The tobacco product consists of pipe tobacco; or
 4. The tobacco product consists of a package of chewing tobacco or snuff containing at least five units or more.
- I. Minimum Pack Size for Cigars. Notwithstanding any other provision of this section, it shall be a violation of this subsection for any licensee or any of the licensee's agents or employees to sell, offer for sale, or exchange for any form of consideration:
1. Any single cigar, whether or not packaged for individual sale;
 2. Any number of cigars fewer than the number contained in the manufacturer's original consumer packaging designed for retail sale to a consumer; or
 3. Any package of cigars containing fewer than five cigars.
- This subsection I. does not apply to the sale or offer for sale of a single cigar for which the retail price exceeds five dollars (\$5.00).
- J. Pharmacies Cannot Sell Tobacco Products. No license may be issued to authorize tobacco retailing in a pharmacy.
- K. Signage Requirements.
1. A tobacco retailer shall post plainly visible signs at the point of purchase of tobacco products which comply with the signage requirements of Cal. Bus. and Prof. Code § 22952, as amended from time to time.
 2. A tobacco retailer shall post signs at each entrance to any premises on which any tobacco product is offered for sale, plainly visible from outside the premises, which state "Warning: The fine for buying tobacco products or electronic cigarettes for

anyone under 21 is \$200-\$1,000, with the exception of active duty military personnel aged 18 years or older with a US Armed Forces identification card in letters at least one-half inch tall, and which cite Cal. Penal Code § 308(a). These signs shall be updated to conform to any subsequent state or federal requirements and/or amendments to Cal. Penal Code § 308(a).

- L. Sampling and distribution of sampling packages of tobacco products, tobacco paraphernalia, electronic smoking devices, and electronic smoking device paraphernalia is not permitted.

8.44.220 *Application Procedure.*

- A. Application for a tobacco retailer's license shall be submitted in the name of each proprietor proposing to conduct or conducting retail tobacco sales, and shall be signed by each proprietor or an authorized agent thereof.
 - 1. It is the responsibility of each proprietor to be informed regarding all laws applicable to tobacco retailing, including those laws affecting the issuance of a tobacco retailer's license. No proprietor may rely on the issuance of a license as a determination by the Town that the proprietor has complied with all laws applicable to tobacco retailing. A license issued contrary to this section, contrary to any other law, or on the basis of false or misleading information supplied by a proprietor shall be revoked pursuant to section 8.44.290. Nothing in this article 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.
 - 2. All applications shall be submitted on a form supplied by the department and shall contain the following information:
 - a. The name, address, and telephone number of each proprietor of the business seeking a license.
 - b. The business name, address, and telephone number of the single fixed location for which a license is sought.
 - c. A single name and mailing address authorized by each proprietor to receive all communications and notices (the "authorized person and address") required by, authorized by, or convenient to the enforcement of this section. If an authorized person and address is not supplied, each proprietor shall be understood to consent to the provision of notice at the business address specified in subparagraph b. above.
 - d. 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.
 - e. Such other information as the department deems necessary for the administration or enforcement of this article as specified on the application form required by this section.

- B. A licensed tobacco retailer shall inform the department in writing of any change in the information submitted on an application for a tobacco retailer's license within ten business days of any change.
- C. Tobacco retailers in existence on the effective date enforcement date specified in section 8.44.310 shall apply for a license within 90 days after said enforcement date.

8.44.230 *Issuance of License.*

- A. Grounds for Denial. Upon the receipt of a complete application for a tobacco retailer's license and the license fee required by this section, the department shall issue a license unless substantial evidence demonstrates that one or more of the following grounds for denial exists:
 - 1. The information presented in the application is inaccurate or false. Intentionally supplying inaccurate or false information shall be a violation of this section.
 - 2. The application seeks authorization for tobacco retailing at a location which is not eligible for the issuance of a tobacco retailer license. However, this subparagraph shall not constitute a basis for denial of a license if the applicant provides the Town 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.
 - 3. The application seeks authorization for tobacco retailing for a proprietor to whom this article prohibits a license to be issued.
 - 4. The application seeks authorization for tobacco retailing at a location that is unlawful pursuant to any other provision this Code, including without limitation, zoning ordinance and building code, or that is unlawful pursuant to any other law.
- B. Appeal of Denial. Except as provided in Section 8.44.290, subsection C, a decision of the department to deny a license is appealable to the Town Council and any such appeal must be filed in writing with the Town Clerk within 15 days of the department's denial of the issuance of the license and the applicable appeal fee must be paid.

8.44.240 *License Renewal and Expiration.*

- A. Renewal of License. A tobacco retailer's license is invalid if the appropriate license fee has not been timely paid in full or if the term of the license has expired. The term of a tobacco retailer license is one calendar year. Each tobacco retailer shall apply for the renewal of his or her tobacco retailer's license and submit the license fee no later than November 30 of each year.
- B. Expiration of License. A tobacco retailer's license that is not timely renewed shall expire on December 31 of each year. To renew a license not timely renewed pursuant to subparagraph A., above, the proprietor must:
 - 1. Submit the license fee and the 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.

8.44.250 *Transfer Restrictions.*

- A. A tobacco retailer's license may not be transferred from one location to another.
- B. A new tobacco retailer's license is required whenever a tobacco retailing location has a change in proprietor(s).
- C. Notwithstanding any other provision of this article, 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 the new proprietor(s) provide the department with clear and convincing evidence that the new proprietor(s) have acquired or are acquiring the location in an arm's length transaction.

8.44.260 *License Conveys a Limited, Conditional Privilege.*

Nothing in this article 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 Town identified on the face of the license. For example, nothing in this article 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 including, without limitation, the zoning ordinance and building codes, 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's license does not make the retailer a "retail or wholesale tobacco shop" for the purposes of California Labor Code Section 6404.5.

8.44.270 *Fee for License.*

The fee to issue or to renew a tobacco retailer's license shall be established from time to time by resolution of the Town Council. The fee shall be calculated so as to recover the cost of administration and enforcement of this article, including, for example, issuing a license, administering the license program, retailer education, retailer inspection and compliance checks, documentation of violations, and prosecution of violators, but shall not exceed the cost of the regulatory program authorized by this article. Fees are nonrefundable except as may be required by law.

8.44.280 *Compliance Monitoring.*

- A. Compliance with this article shall be monitored by the department. In addition, any peace officer may enforce the penal provisions of this article. The department may designate any number of additional persons to monitor compliance with this article.

- B. The department will work with Marin County Tobacco Program to inspect each tobacco retailer at least one time per 12-month period. Nothing in this paragraph shall create a right of action in any licensee or other person against the Town or its agents.
- C. The department shall not enforce any law establishing a minimum age for tobacco purchases or possession against a minor person who otherwise might be in violation of such law because of the person's age (hereinafter "youth decoy") if the potential violation occurs when:
 - 1. The youth decoy is participating in an inspection supervised by a peace officer, code enforcement official, or the person designated by the Town to monitor compliance with this article;
 - 2. The youth decoy is acting as an agent of a person designated by the Town to monitor compliance with this article; or
 - 3. The youth decoy is participating in an inspection funded in part, either directly or indirectly through subcontracting, by the County of Marin Department of Health and Human Services or the California Department of Health Services.

8.44.290 *Suspension or Revocation of License.*

- A. Suspension or Revocation of License for Violation. In addition to any other penalty authorized by law, a tobacco retailer's license shall be suspended or revoked if any court of competent jurisdiction determines, or the department finds based on a preponderance of the evidence, after the licensee is afforded notice and an opportunity to be heard, that the licensee, or any of the licensee's agents or employees, has violated any of the requirements, conditions, or prohibitions of this article or has pleaded guilty, "no contest" or its equivalent, or admitted to a violation of any law designated in section 8.44.210 above.
 - 1. Upon a finding by the department of a first violation of this article at a location within any 60-month period, the license shall be suspended for 30 days.
 - 2. Upon a finding by the department of a second violation of this article at a location within any 60-month period, the license shall be suspended for 90 days.
 - 3. Upon a finding by the department of a third violation of this article at a location within any 60-month period, the license shall be suspended for one year.
 - 4. Upon a finding by the department of four or more violations of this article at a location within any 60-month period, the license shall be revoked and thereafter the licensee shall be ineligible to apply for a new license for five years.
- B. Appeal of Suspension or Revocation. A decision of the department to suspend or revoke a license is appealable to the Town Council and any appeal must be filed in writing with the Town Clerk within 15 days of mailing of the department's decision and the applicable appeal fee must be paid. If such an appeal is timely made, it shall stay enforcement of the appealed action. An appeal to the Town Council is not available for a revocation made pursuant to subsection C. below.

- C. **Revocation of License Wrongly Issued.** A tobacco retailer's license shall be revoked if the department finds, after the licensee is afforded notice and an opportunity to be heard, that one or more of the grounds for denial of a license under section 8.44.230 existed at the time application was made or at any time before the license issued. The decision by the department shall be the final decision of the Town. Such a revocation shall be without prejudice to the filing of a new license application.
- D. **Judicial Action to Challenge.** Any final administrative action to suspend or revoke a tobacco retailer's license under this article shall be subject to judicial review pursuant to California Government Code Section 53069.4, which, among other things, requires such a judicial challenge to be brought within 20 days of service of the final decision.

8.44.300 Tobacco Retailing Without a Valid License.

- A. In addition to any other penalty authorized by law, if a court of competent jurisdiction determines, or the Town Council finds based on a preponderance of evidence, after notice and an opportunity to be heard, that any person has engaged in tobacco retailing at a location without a valid tobacco retailer's license or has engaged in any prohibited activity set forth in Section 8.44.210, either directly or through the person's agents or employees, the person shall be ineligible to apply for, or to be issued, a tobacco retailer's license as follows:
 - 1. After a first violation of this article at a location within any 60-month period, no new license may issue for the location (unless ownership of the business at the location has been transferred in an arm's length transaction), until 30 days have passed from the date of the violation.
 - 2. After a second violation of this article at a location within any 60-month period, no new license may issue for the location (unless ownership of the business at the location has been transferred in an arm's length transaction), until 90 days have passed from the date of the violation.
 - 3. After a third or subsequent violation of this article at a location within any 60-month period, no new license may issue for the location (unless ownership of the business at the location has been transferred in an arm's length transaction), until 60 months have passed from the date of the violation.

8.44.310 Enforcement.

- A. This article shall not be enforced by the Town until January 1, 2019.
- B. Tobacco products, tobacco paraphernalia, electronic smoking devices or electronic smoking device paraphernalia offered for sale or exchange in violation of this article are subject to seizure by the department or any peace officer and shall be forfeited after the licensee and any other owner of such items seized is given reasonable notice and an opportunity to demonstrate that the items were not offered for sale or exchange in violation of this article. The decision by the department may be appealed pursuant to the procedures set forth in section 8.44.290, subsection B. Forfeited items shall 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.

- C. For the purposes of the civil remedies provided in this article, each of the following constitutes a separate violation:
1. Each day on which a tobacco product, tobacco paraphernalia, electronic smoking device or electronic smoking device paraphernalia is offered for sale in violation of this article; or
 2. Each individual retail tobacco product, retail item of tobacco paraphernalia, retail electronic smoking device or retail item of electronic smoking device paraphernalia that is distributed, sold, or offered for sale in violation of this article.

8.44.320 *Additional Remedies.*

- A. The remedies provided by this article are cumulative and in addition to any other remedies available at law or in equity.
- B. Whenever evidence of a violation of this article is obtained in any part through the participation of a person under the age of 21 years old, such a person shall not be required to appear or give testimony in any civil or administrative process brought to enforce this article and the alleged violation shall be adjudicated based upon the sufficiency and persuasiveness of the evidence presented.
- C. Violations of this article are subject to a civil action brought by the Town Attorney, punishable by a civil fine not less than two hundred fifty dollars (\$250.00) and not exceeding one thousand dollars (\$1,000.00) per violation.
- D. Violations of this article, in the discretion of the Town Attorney, may be prosecuted as infractions or misdemeanors when the interests of justice so require.
- E. Causing, permitting, aiding, abetting, or concealing a violation of any provision of this article shall also constitute a violation of this article.
- F. Violations of this article are hereby declared to be public nuisances.
- G. In addition to other remedies provided by this article or by other law, any violation of this article may be remedied by a civil action brought by the Town Attorney, including, for example, administrative or judicial nuisance abatement proceedings, civil or criminal code enforcement proceedings, and suits for injunctive relief.