

ORDINANCE NO. 2024-

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF LA MESA ADDING
CHAPTER 6.07 TO THE LA MESA MUNICIPAL CODE REQUIRING THE
LICENSING OF TOBACCO RETAILERS

WHEREAS, California Penal Code Section 308 prohibits the sale or giving of tobacco products to persons under 21 years of age, as well as the purchase, receipt or possession of tobacco products by persons under 21 years of age; and

WHEREAS, California Business and Professions Code Section 22956 requires that tobacco retailers check the identification of tobacco purchasers, to establish the age of the purchaser, if the purchaser reasonably appears to be under 21 years of age;

WHEREAS, California Business and Professions Code Section 22952 and California Penal Code Section 308 require that tobacco retailers post a conspicuous notice at each point of sale stating that selling tobacco products to anyone under 21 years of age is illegal;

WHEREAS, California Business and Profession Code Section 22962 prohibits the sale or display of any tobacco product or paraphernalia, including electronic smoking devices though a self-service display or vending machine and prohibits public access to cigarettes without the assistance of a clerk;

WHEREAS, California Health and Safety Code section 104559.5 prohibits the sale of flavored tobacco products including flavored e-cigarettes and menthol cigarettes in retail stores in California;

WHEREAS, California Business and Professions Code Section 22971.3 authorizes local authorities to adopt tobacco retailer licensing laws to provide for the suspension and revocation of the local tobacco retailer license for any violation of a state tobacco control law;

WHEREAS, studies have shown that local tobacco retail licensing programs coupled with a strong enforcement program substantially reduces youth access to tobacco; and

NOW, THEREFORE, BE IT AND IT IS HEREBY ORDAINED by the City Council of the City of La Mesa, California as follows:

SECTION 1: The City Council finds and determines that the foregoing recitals are true and correct and hereby adopts such recitals as findings.

SECTION 2: The City Council desires to add a new Chapter 6.07 entitled "Tobacco Retail License", to the La Mesa Municipal Code as follows:

"Chapter 6.07

TOBACCO RETAIL LICENSE

6.07.010 Definitions.

The following words and phrases, whenever used in this chapter, shall have the meanings defined in this section:

A. **Authorized address** means the name and mailing address authorized by each proprietor to receive all license-related communications and notices.

B. **Electronic vapor device** means any device with a heating element, a battery or an electronic circuit that provides nicotine or other vaporized liquids to the user in a manner that simulates smoking tobacco products, shisha, herbs or any other product that produces smoke.

C. **Electronic vapor inhalation substance products** means cartridges, cartomizers, e-liquid, smoke juice, tanks, tips, atomizers, vaporizers, electronic smoking device batteries, electronic smoking device chargers and any other item specifically designed for the preparation, charging, or use of electronic vapor devices.

D. **Electronic vapor device retailers** means any establishment that sells electronic cigarettes or any products used in conjunction with electronic cigarettes, including, but not limited to, kits, e-liquids and 'juice'.

E. **Hookah** means a pipe commonly, but not always, made of glass, used for vaporizing and smoking tobacco, flavored tobacco, non-flavored tobacco, shisha, dried fruits or other substances in which vapor or smoke is passed through a water basin before inhalation.

F. **Proprietor** means a legal owner, operator or agent acting on behalf of the same or equivalent similar interest as qualified in this subsection. Legal ownership status 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. Operator or agent status shall be deemed to exist when a person can or does have, or can or does share ultimate control over the day-to-day operations of a business.

G. **Tobacco product** means: (1) any substance containing tobacco leaf, including, but not limited to, cigarettes, cigars, pipe tobacco, dipping tobacco, or any other preparation of tobacco; (2) 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 lungs or mouth; (3) any electronic vapor device, electronic vapor inhalation substance and hookahs; and (4) any plant, weed or plant product that is manufactured, sold, offered for sale or otherwise distributed with the expectation that the product or matter will be introduced into the human lungs or mouth in smoke or vapor form, using any tobacco paraphernalia, but does not include any product specifically approved by the Federal Food and Drug Administration for use in treating nicotine or tobacco product dependence.

H. **Tobacco paraphernalia** means cigarette papers or wrappers, pipes, holders of smoking materials of all types, cigarette rolling machines and any other item designed for the smoking or ingestion of tobacco products, hookahs, electronic vapor devices and electronic vapor inhalation substances.

I. **Tobacco retailer** means any person or proprietor who personally or through an agent, employee, contractor or other intermediary sells, offers for sale or does or offers to exchange for any form of consideration, tobacco, tobacco products or tobacco paraphernalia, hookahs, electronic vapor devices and electronic vapor inhalation substances. 'Tobacco retailing' shall mean the doing of any of these things. This definition is without regard to the quantity of tobacco, tobacco products or tobacco paraphernalia sold, offered for sale, exchanged or offered for exchange.

6.07.020 Requirement for tobacco retailer license.

A. It shall be unlawful for any person to act as a tobacco retailer without first obtaining and maintaining a valid tobacco retailer's license pursuant to this chapter for each location at which that activity is to occur.

B. A license may only issue to authorize tobacco retailing at a specified fixed address legally zoned for commercial activities at the location. For example, tobacco retailing by persons on foot and tobacco retailing from vehicles shall be prohibited.

C. The license fee established pursuant to Section 6.07.060 confers paid status upon a license for a term of one year. Each tobacco retailer shall apply for the renewal of his or her tobacco retailer's license no later than thirty days prior to expiration of the payment term.

D. Nothing in this chapter shall grant any person obtaining and maintaining a tobacco retailer's license any status or right other than the right to act as a tobacco retailer at the location in the City specified in the license. For example, nothing in this chapter shall render inapplicable, supersede or apply in lieu of any other provision of applicable law, including, without limitation, any condition or limitation on smoking in enclosed places of employment made applicable to business establishments by California [Labor Code](#) Section 6404.5.

6.07.030 Application procedure.

Application for a tobacco retailer's license shall be submitted in the name of each proprietor proposing to conduct retail tobacco sales and signed by each proprietor or an authorized agent thereof. A proprietor proposing to conduct tobacco retailing at more than one location shall submit a separate application for each location. It is the responsibility of each proprietor to be informed of the laws affecting the issuance of a tobacco retailer's license. All applications shall be submitted on a form supplied by the City and shall contain the following information:

A. The name, address and telephone number of each proprietor.

B. The business name, address and telephone number of the single fixed location for which a tobacco retailer's license is sought.

C. The authorized address for each proprietor. If an authorized address is not supplied, each proprietor shall be understood to consent to the provision of notice at the business address specified in subsection B above.

D. Whether any proprietor has previously been issued a license pursuant to this chapter that is, or was at any time, suspended or revoked and, if so, the dates of the suspension period or the date of revocation.

E. Such other information as the City Manager deems necessary for the administration or enforcement of this chapter.

6.07.040 Issuance of license.

Upon the receipt of an application for a tobacco retailer's license and the license fee, the City shall issue a license unless reasonable evidence in the record demonstrates one of the following basis for denial:

- A. The application is incomplete or inaccurate; or
- B. The application seeks authorization for tobacco retailing by a proprietor for which or whom a suspension is in effect pursuant to this chapter; or
- C. The application seeks authorization for tobacco retailing by a proprietor for which or whom a suspension is in effect pursuant to this chapter; or at a location which has had a license revoked pursuant to this chapter provided; however, this subsection shall not constitute a basis for denial of a license if the applicant provides the City with documentation demonstrating by clear and convincing evidence that the applicant: (1) was not a proprietor at the time that: (a) a violation of this chapter occurred, or (b) an appeal of a citation for a violation of this chapter was pending; and (2) has acquired or is acquiring the premises or business in an arm's length transaction. For the purposes of this subsection, an "arm's length transaction" is defined as a third-party 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 under any compulsion to participate in the transaction. A sale between relatives, related companies or partners, proprietors or a sale for the primary purpose of avoiding the effect of the violation of this chapter that occurred at the location, shall not constitute an 'arm's length transaction'; or
- D. The application seeks authorization for tobacco retailing that is prohibited pursuant to the La Mesa Municipal Code (e.g., mobile vending) or that is unlawful pursuant to any other local, state or federal law.

6.07.050 Other requirements and prohibitions.

- A. Display of License. Each license shall be prominently displayed in a publicly visible location at the licensed premises.
- B. Positive Identification Required. No person shall engage in tobacco retailing without first examining the identification of each purchaser and confirming that the proposed sale is to a purchaser who is at least the minimum age pursuant to state law for being sold the tobacco product or tobacco paraphernalia.
- D. Minimum Age for Persons Selling Tobacco. No person shall engage in tobacco retailing if the person is younger than the minimum age pursuant to state law for being sold or for possessing any tobacco product.

6.07.060 Fees for license.

- A. The fee to issue or to renew a tobacco retailer's license shall be established by resolution of the City Council pursuant to applicable law.

6.07.070 Licenses nontransferable.

A tobacco retailer's license is nontransferable except between existing proprietors holding a license at the same location. If the information required in the license application pursuant to this chapter changes, a new tobacco retailer's license is required before the business may continue to act as a tobacco retailer. For example, if a proprietor to whom a license has been issued changes business location, that proprietor must apply for a new license prior to acting as a tobacco retailer at the new location. Also, if the business is sold, the new owner must apply for a license for that location before acting as a tobacco retailer.

6.07.080 License violation and compliance monitoring.

A. Violation of Tobacco-Related Laws. It shall be unlawful for a tobacco retailer or his or her agent or employee to violate any local, state or federal tobacco-related law.

B. License Compliance Monitoring.

1. Compliance checks shall be conducted by any peace officer, code enforcement official, or contractor designated by the City.

2. The City, in partnership with an outside Contractor, shall check the compliance of each tobacco retailer. The compliance checks shall be conducted to determine, at a minimum, if the tobacco retailer is complying with tobacco laws regulating underage sales. The designated department, or the police department, in assisting the City in performing compliance checks, shall use underage decoys and comply with the City's protocols for the compliance checks developed in consultation with the San Diego County Department of Health and Human Services, the San Diego County District Attorney, and the City Attorney's Office. When appropriate, the compliance checks shall determine compliance with other tobacco-related laws.

3. The City shall not enforce any tobacco-related minimum-age law against a person who otherwise might be in violation of such law because of the person's age (the "underage decoy") if the potential violation occurs when:

a. The underage decoy is participating in a compliance check supervised by a peace officer, code enforcement official, or contractor designated by the City; or

b. The underage decoy is participating in a compliance check funded in part by the San Diego County Department of Health and Human Services, funded in part, either directly or indirectly through sub-contracting, by the California Department of Health Services, or funded in part directly by fees or fines collected from tobacco retailers under this chapter.

6.07.90 Penalties for violation.

A. In addition to any other penalty authorized by law, a tobacco retail license may be suspended or revoked if the City finds, after notice to the tobacco retailer and opportunity to be heard, that the tobacco retailer or his or her agents or employees has or have violated any of the provisions of this chapter or any applicable City, state or federal law; provided; however, violations by the tobacco retailer at one location may not be accumulated against other locations of that same tobacco retailer, nor may violations accumulated against a prior tobacco retailer at a licensed location be accumulated against a new tobacco retailer at the same licensed location.

1. Upon a finding by the City of a first license violation within any thirty-six-month period, the City shall:

a. Require the tobacco retailer to pay an administrative fine in the amount of \$1,000 (one thousand dollars). The City may conduct additional compliance checks within the 12 months (twelve month) of the first violation;

b. Advise the tobacco retailer of the penalties for further violations of the ordinance; and

c. Require the tobacco retailer to provide documentation to the City that all employees engaged in the retail sales of tobacco have received training in a City approved program within 60 days after the warning, or such other time as shall be set by the City.

2. Upon a finding by the City of a second license violation within any thirty-six-month period, the license shall be suspended for 60 days. The City may conduct additional compliance checks within the 12 months (twelve month) of the second violation;

3. Upon the finding by the City of a third license violation within any three-year period, the license shall be suspended for one year (365 days). The City may conduct additional compliance checks within the 12 months (twelve month) of the second violation;

4. Upon a finding by the City of a fourth license violation within any within any thirty-six-month period, the license shall be permanently revoked.

B. Suspension of License for Failure to Pay Renewal Fee. A tobacco retailer's license that is not timely renewed pursuant to Section 6.07.020(D) shall automatically be suspended by operation of law. If not renewed, a license shall be automatically revoked two years after the renewal date. To reinstate the paid status of a license that has been suspended due to the failure to timely pay the renewal fee, the proprietor must:

1. Submit the renewal fee plus a reinstatement fee of ten percent (10%) of the renewal fee; and

2. Submit a signed affidavit affirming that the proprietor has not sold any tobacco product or tobacco paraphernalia during the period the license was suspended for failure to pay the renewal fee.

C. Revocation of License Issued in Error. A tobacco retailer's license shall be revoked if the City finds, after notice and opportunity to be heard, that one or more of the basis for denial of a license under Section 6.07.40 of this chapter existed at the time application was made or at any time before the license issued. The revocation shall be without prejudice to the filing of a new application for a license.

D. Appeal of Suspension or Revocation. A decision to revoke or suspend a license may be appealed by a proprietor or a tobacco retailer by means of an administrative hearing before an independent fact finder pursuant to applicable law. The appeal may also include a challenge to any fine accompanying the suspension or revocation. Any appeal must be filed with the City Clerk within ten (10) calendar days of mailing of the City's decision and be accompanied by the full amount of any applicable fine as provided in chapters 1.07 and 1.09. An appeal shall stay all proceedings in furtherance of the appealed action.

E. Appeal of Fine. Any appeal of a fine not involving a suspension or revocation must be conducted pursuant to chapters 1.07 and 1.09.

F. An administrative hearing to appeal a decision of the City to issue a fine and revoke or suspend a license held pursuant to subdivision (A) paragraphs (2) through (4) of this section, and subdivision (D) of this section is civil in nature and therefore the burden of proof required is a preponderance of the evidence. In such an appeal the administrative hearing officer shall only determine whether the violations of this chapter occurred in the time periods set forth in subdivision (A), paragraphs (2), (3) or (4), or subdivision (D) of this section. The administrative hearing officer shall not consider the appropriateness of the amount of the fine or whether the length of suspension of a license, or revocation of the license, creates a financial hardship on the tobacco retailer; nor shall the administrative hearing officer grant the applicant any stay of execution or delay of enforcement of a suspension or revocation sustained following the hearing.

G. The rules of evidence in an administrative hearing to appeal a decision of the City to revoke or suspend a license held pursuant to Section 6.07.090 (A) or (D) shall be in accordance with California [Government Code](#) Sections 11513 and 11514 as those sections are amended from time to time. Except as provided in this subdivision (F), the provisions of administrative adjudication for the State of California (Chapter 5 of Part 1 of Division 3 of Title 2 of the California [Government Code](#)) shall not apply to any administrative hearing under this chapter.

6.07.100 Administrative fine.

A. Grounds for Fine. In addition to any other remedies available at law or in equity, if the City finds, based on substantial evidence, that any unlicensed person, including a person named on a revoked or suspended license, has engaged in tobacco retailing in violation of Section 6.07.20 of this chapter, the City shall impose an administrative fine on that person pursuant to Section 6.07.110 (C) of this chapter.

B. Appeal to Superior Court of Limited Jurisdiction. Notwithstanding the provisions of Section 1094.5 or 1094.6 of the [Code of Civil Procedure](#), and in accordance with Chapter 1.03 of the La Mesa Municipal Code, within twenty (20) days after mailing or personal service of the hearing officer's decision and findings, any person subject to a fine may seek review of the hearing officer's decision and findings by the superior court of limited jurisdiction. A copy of the notice of appeal to the superior court shall be timely served in person or by first-class mail upon the City by the contestant. The appeal shall be heard de novo, except that the contents of the City's file in the case shall be received in evidence. A copy of the records of the City of the notices of the violation and of the hearing officer's decision and findings shall be admitted into evidence as prima facie evidence of the facts stated therein.

C. Failure to Pay Fine. If no timely notice of appeal to the superior court is filed, or the City is not timely served with a copy of a notice of appeal, the hearing officer's decision and findings shall be deemed confirmed and the fine shall be collected pursuant to Section 1.07.160 of the La Mesa Municipal Code.

6.07.110 Enforcement.

In addition to other remedies provided by this chapter or any applicable City, state, or federal 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. The City may recover reasonable attorney fees and costs of suit in any civil action brought by the City Attorney to remedy any violation of this chapter.

SECTION 3. This Ordinance shall be effective 30 days after its adoption and operative commencing 90 days hence pursuant to Section 4 of this Ordinance. The City Clerk shall certify to the adoption of this Ordinance. The City Clerk is hereby authorized to use summary publication procedures pursuant to Government Code Section 36933 utilizing a newspaper of general circulation published in the City of La Mesa.

SECTION 4. This Ordinance shall be effective pursuant to Section 3; however, for notice and educational purposes related to its content, implementation and enforcement, it shall become operative 90 days subsequent to its effective date.

INTRODUCED AND READ at a Regular meeting of the City Council of the City of La Mesa, California, held the 12th day of December 2023, and thereafter PASSED AND ADOPTED at a Regular meeting of said City Council held the 9th day of January 2024, by the following vote, to wit:

AYES:

NOES:

ABSENT:

APPROVED:

MARK ARAPOSTATHIS, Mayor

ATTEST:

MEGAN WIEGELMAN, CMC, City Clerk

CERTIFICATE OF CITY CLERK

I, MEGAN WIEGELMAN, City Clerk of the City of La Mesa, California, do hereby certify the foregoing to be a true and correct copy of Ordinance No. 2024-__, duly passed and adopted by the City Council of said City on the date and by the vote therein recited and that the same has been duly published according to law.

MEGAN WIEGELMAN, CMC, City Clerk

(SEAL OF CITY)