

**LEMON GROVE CITY COUNCIL  
AGENDA ITEM SUMMARY**

**Item No.** \_\_\_\_\_

**Mtg. Date** August 7, 2018

**Dept.** City Manager's Office

**Item Title:** Tobacco Retailer Licensing Program Update

**Staff Contact:** Miranda Evans, Management Analyst

**Recommendation:**

Staff recommends that the City Council:

- 1) Discuss the draft Tobacco Retailer Licensing Program provisions and draft ordinance, and
- 2) Advise staff regarding the provisions.

**Item Summary:**

At the May 9, 2017 City Council Goal Setting Workshop, the City Council identified the implementation of a Tobacco Retailer Licensing Program as one of their top priorities in addressing public safety and improving quality of life for Lemon Grove residents. In accordance with this directive, staff has begun the process of researching and creating a Tobacco Retailer Licensing Program for the City. Staff's report (**Attachment A**) includes background information on state and local Tobacco Retail Licensing Programs, tobacco use information, an overview of regulations from San Diego County jurisdictions, program provisions, a proposed timeline, implementation plan and program cost. **Attachment B** includes proposed Ordinance text.

Feedback from the City Council on the draft program provisions, timeline and implementation is requested for staff to move forward.

**Fiscal Impact:**

The Tobacco Retailer Licensing Program will include a fee structure that will cover the cost of license administration and yearly compliance checks by the San Diego County Sheriff's Department. The City was recently awarded \$46,071.00 in grant funding from the California Department of Justice for program administration and enforcement costs for 2018 – 2020.

**Environmental Review:**

Not subject to review

Negative Declaration

Exempt

Mitigated Negative Declaration

**Public Information:**

None

Newsletter article

Tribal Government Consultation Request

Notice published in local newspaper

Notice to property owners within 500 ft.

**Attachments:**

A. Staff Report

B. Draft Ordinance



# Attachment A

## LEMON GROVE CITY COUNCIL STAFF REPORT

Item No. \_\_\_\_\_

Mtg. Date | August 7, 2018

Item Title: | **Tobacco Retailer Licensing Program Update** |

Staff Contact: | Miranda Evans, Management Analyst

### Background:

At the May 9, 2017 City Council Goal Setting Workshop, the City Council identified the implementation of a Tobacco Retailer Licensing Program as one of their top priorities in addressing public safety and improving quality of life for Lemon Grove residents. In accordance with this directive, staff has begun the process of researching and creating a Tobacco Retailer Licensing (TRL) Program for the City. Feedback from the City Council on the draft program provisions, timeline and implementation is requested for staff to move forward and return to the City Council at a later date with a draft ordinance for introduction consideration.

As of January 1, 2017, all tobacco retailers are required to apply for a retail license with the state of California for a fee of \$265. The fee must be paid and the license renewed on an annual basis. All retailers selling tobacco products (**Attachment B**), including those selling e-cigarettes only, must participate in the licensing program. Prior to this legislation, the state's licensing requirements only applied to retailers selling traditional tobacco and required a one-time \$100 fee. The state's tobacco retail licensing program is primarily intended to target and fund the enforcement of cigarette tax evasion and black market sales. The state's program does not fund enforcement of minimum age to purchase and does not include any provisions to further regulate tobacco sales.

Although the state requires a license to sell tobacco products, the state licensing law is not designed to reduce illegal sales to minors by retailers. To meet that need, over 120 California cities and counties have adopted local TRL programs in addition to the State's licensing requirement. This special license is issued by a city or county to a business selling tobacco products and is aimed at ensuring that licensees are aware of certain eligibility requirements and performance standards.

At the March 6, 2018 City Council meeting, staff presented an overview of Tobacco Retailer Licensing proposed provisions. Staff is returning with a draft of the Ordinance for the City Council to discuss and give comments to staff prior to the scheduled public outreach.

### Discussion:

In the United States, over 480,000 people die from tobacco-related diseases every year<sup>1</sup>, making tobacco use the nation's leading cause of preventable death. Cigarettes and other tobacco product sales are very lucrative and are usually the top items sold in convenience stores. According to data from the National Association of Convenience Stores, the average convenience store nationwide generated over \$600,000 in sales from cigarettes alone, accounting for roughly 36% of all sales in those stores in 2016. While cigarette sales continue to decrease, the use of other tobacco products (especially e-cigarettes) is steadily increasing among youth due to product innovation and the shift from combustible tobacco products to other forms of tobacco.

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<sup>1</sup> United States Department of Health and Human Services Surgeon General 2015 Report.

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## Tobacco Troubles

E-cigarette use among U.S. youth and young adults is now a major public health concern. E-cigarette use has increased considerably in recent years, growing an astounding 900% among high school students from 2011 to 2015. These products are now the most commonly used form of tobacco among youth in the United States, surpassing conventional tobacco products, such as cigarettes, cigars, chewing tobacco, and hookahs.<sup>2</sup> It is notable that hookah lounges are prohibited in the City.

Local data from the California Healthy Kids Survey of 7<sup>th</sup> graders in Lemon Grove School District<sup>3</sup> revealed that 5% of seventh graders tried electronic smoking devices. Although there are no high school districts in Lemon Grove, available data indicates that among East County 11<sup>th</sup> grade students, 4% smoked cigarettes in the past 30 days and 11% used e-cigarettes in the past 30 days. 60% of these students believe cigarettes are “fairly easy/very easy to obtain.” According to the Centers for Disease Control, nearly 9 out of 10 smokers started smoking and began their tobacco addiction by age 18.

At this time, Lemon Grove has approximately 31 tobacco retailers<sup>4</sup> from a variety of retail uses including, but not limited to, convenience stores and gas stations, grocery stores, smoke shops and liquor stores. The City has a high concentration of tobacco sales establishments within the Broadway commercial corridor, but a low concentration in the remaining areas of the City. While the California statewide average for sales to youth is 10.3%, Lemon Grove’s sales rates have historically been significantly higher.

According to Youth Tobacco Purchase Surveys conducted by Community Action Service & Advocacy (CASA), survey findings revealed that in 2014, 39% of tobacco retailers in Lemon Grove sold tobacco products illegally to youth, including e-cigarettes. In 2015, 41% made illegal sales using the same survey protocol. These results were despite retailer education visits to each store conducted one to two weeks prior to each of these surveys.

As of June 9, 2016, individuals must now be at least 21 years old to purchase any tobacco products, including e-cigarettes. The only exception to this rule is for active duty military personnel who may purchase such products if they are 18 years old and have military identification. Following adoption of Tobacco21, a young adult tobacco purchase survey was conducted in Lemon Grove during April 2017. Also prior to that survey, retailer education materials were hand-delivered to all stores in the City. Even so, 31% of stores still sold tobacco products, both cigarettes and e-cigarettes, illegally to youth surveyors under 21 years of age.

## San Diego County Jurisdiction Regulations

In San Diego County, the following five cities currently have TRL ordinances in place: El Cajon (2004), San Diego (2007), San Marcos (2016), Solana Beach (2009) and Vista (2005). Of the five cities, El Cajon, San Marcos and Vista are considered by tobacco control organizations to be the most effective due to their regular compliance checks. Compliance checks must review the following: existing tobacco laws regulating underage sales, compliance with identification and signage requirements in accordance with the STAKE Act and prohibiting sales of drug paraphernalia (as defined by state law). An overview of the program details for each San Diego

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<sup>2</sup> *E-Cigarette Use Among Youth and Young Adults*. 2016. Vivek H. Murthy, M.D., M.B.A. U.S. Surgeon General.

<sup>3</sup> 2014-2015 California Healthy Kids Survey data

<sup>4</sup> 31 tobacco retailers equates to 1.2 retailers per 1,000 population which is the highest ratio among the five San Diego County cities with a TRL ordinance.

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County jurisdiction with an adopted ordinance are outlined in the matrix on the following page. Additional program details will also be included in Staff's subsequent report.

## Overview of San Diego County Tobacco Retailer Licensing Programs

Jurisdiction	Year Approved	Municipal Code Section	Annual License Cost	Enforcement Agency	Number of Retailers	Retailers per 1,000 Population
City of El Cajon	June 2004	ECMC 8.33	\$675	Code Enforcement Officers (2) and CASA	114	1.1
City of San Diego	November 2007	SDMC 3.3.45	\$132*	San Diego Police Department	1,144	.9
City of San Marcos	July 2016	SMMC 8.65	\$189.50	San Diego Sheriff's Department	55	.6
City of Solana Beach	July 2009	SBMC 6.17	\$110	City Code Compliance Officer	7	.5
City of Vista	May 2005	VMC 3.56	\$250	San Diego County Sheriff's Department	72	.7

\* includes \$56 application fee in addition to the \$132 license fee

### Program Provisions

20 years of research throughout California reveals that effective TRL Programs have annual fees adequate to support all program costs and require annual compliance checks. In addition, some ordinances include additional retailer incentives for those with exemplary performance during annual compliance checks. Violations, documented illegal sales to minors, result in fines and penalties such as mandated periods of license suspension, up to and including the revocation of their license to sell tobacco products.

Staff recommends the City Council pursue an effective, research-based TRL ordinance with the addition of incentives for retailers with exemplary performance. Such an ordinance offers retailers who comply with licensing requirements and pass compliance checks discounts on their annual TRL license fee. For example, fee reductions may result from compliance with the following items: no tobacco violations on the previous year's compliance check, no tobacco advertising on store windows or doors, electronic age verification at the point of sale, compliance with state-required age of sale signage at each point of sale and employee tobacco retailing education programs. Under this model, penalties for violations may include fines in lieu of license suspensions that are much more costly to the business, but with revocations for multi-year repeat offenders. Should a license be suspended or revoked, the ordinance will set forth an appeal process to allow for an impartial review.

# Attachment A

This approach is modeled after the City of Vista's ordinance that has been in place for over a decade. This model, later adopted by San Marcos in 2016, was created to lower youth smoking rates, reduce youth access to tobacco, educate the community on the issues of illegal tobacco sales to youth and help create a safer and healthier environment. Prior to the adoption of Vista's ordinance, the youth sales rate was 39%. This figure decreased significantly to 1.9% following the adoption of their ordinance<sup>5</sup>.

## Proposed Timeline and Implementation Plan

Staff has updated the timeline below from what was originally presented to Council in Spring 2018.

- March – April 2018: Using feedback obtained from the March 6, 2018 City Council meeting, staff will draft the TRL ordinance.
- March 20, 2018: Staff will return to the City Council with the grant project proposal and application for Proposition 56 grant funding. The grant submittal deadline is March 23, 2018.
- August 2018: Staff will return to present a draft of the ordinance to the City Council.
- August - October 2018: Staff will begin the public outreach plan to educate the community and tobacco stakeholders.
- September – October 2018: Two community meetings are planned to allow a constructive venue for the public to ask questions, share concerns and provide input regarding the proposed TRL program. Meeting times will be staggered with one meeting in the morning and one during the evening to accommodate different schedules.
- September – October 2018: Letters will be sent out to all Lemon Grove tobacco industry stakeholders including local tobacco business owners and managers (approximately 31 retailers) to invite them to a separate industry specific meeting. They will also be invited to attend the two community meetings.
- October 2018: Staff will present a summary of the community outreach results and will introduce the ordinance to the City Council.
- November 2018: Staff will present the ordinance to City Council for its second reading.
- December 2018: TRL Program implementation can begin with the business license renewal process. Tobacco Retail Licenses will be required in addition to the required City Business License.

## The Tobacco Retailer Licensing Draft Ordinance

The language of the attached Draft Ordinance (**Attachment B**) adds the requirement for a Tobacco Retail License to the Lemon Grove Municipal Code. The proposed ordinance is based in large part on the successful program in the Cities of Vista and San Marcos.

This ordinance requires all sellers of tobacco and smoking products to obtain a City license annually using a process that is similar to the regular business license process. It requires businesses selling tobacco products to obtain an annual TRL by December 31, 2019 for the 2020 calendar year. Licenses would need to be renewed each year. The core of the program is the annual compliance check conducted by the San Diego Sheriff's Department with retailer

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<sup>5</sup> September 2013 data from the Cater for Tobacco Policy & Organizing

# Attachment A

education and assistance from CASA. Checks from the San Diego Sheriff's Department will review the following:

- Existing tobacco laws regulating underage sales
- Compliance with the STAKE Act (identification and signage requirements)
- Prohibiting sales of drug paraphernalia.

### *Penalties for violations:*

If during the annual compliance checks any retailer is found to be in violation of this ordinance, the penalties are as follows:

- 1st violation within 5 years results in a warning and a requirement to train employees within 60 days.
- 2nd violation within 5 years is a suspension of up to 30 days.
- 3rd violation within 5 years is up to a 90-day suspension.
- 4th violation within 5 years is a suspension of up to 12 months.
- 5th violation within 5 years may result in the revocation of the license.

Should a license be suspended or revoked, the proposed ordinance sets forth an appeal process for the retailer that allows for a review by an impartial hearing officer. Any violation(s) found during the annual compliance check will automatically result in the rescinding of any discounts, and the full license fee will be charged.

### *Drug paraphernalia sales prohibited as a license condition:*

Stores that sell drug paraphernalia sometimes sell tobacco products, and those retailers often claim that the paraphernalia is for the use of tobacco in order to get around state law that prohibits its sale. This ordinance requires that the retailer comply with all state laws relating to drug paraphernalia as a condition of the license. As a result, if a compliance check reveals that retailer is selling items constituting drug paraphernalia (as defined by state law), the retailer is violating the local license, which can then be suspended or revoked. Drug control organizations believe this addition to a tobacco retailer license can be a very effective tool to fight substance abuse in communities.

### *Fiscal impact and building in fees:*

As with the other five San Diego County jurisdictions with a TRL Program, Lemon Grove's program will be created with a self-sustaining license fee that will completely cover the cost of the program administration and enforcement costs incurred by the San Diego County Sheriff's Department Lemon Grove Substation. Staff anticipates TRL costs to be similar to the City of San Marcos and the City of Vista, ranging between \$189.50 - \$250, and will return with a fee estimate that will cover the administration of the license and enforcement through yearly compliance checks. The goal is to provide a discount that incentivizes compliance, but still allows the City to cover all of the direct costs paid to the Sheriff's Department for inspections. It is essential that the fee structure stay within the confines of Proposition 26 which mandates that the City cannot recover more revenue than the cost of implementing the program.

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## *Proposition 56 grant funding award:*

In November 2016, California voters approved Proposition 56 which increased the excise tax for tobacco products sold in the State. Thirty million dollars of the projected annual revenue is to be distributed annually to local law enforcement agencies through a grant program to support enforcement of certain state and local tobacco laws. In January 2018, staff became aware of this opportunity and identified it as an implementation measure for the proposed TRL Program. In accordance with the State Budget Act and Proposition 56, the grant program guidelines require that only local law enforcement agencies within the State of California are eligible to receive funds. As such, only local agencies with enforcement authority for tobacco-related state laws may apply. However, City staff prepared and submitted a joint-award application with the Sheriff's Department and was successful in the application.

The City was awarded a total of \$46,071.00 to fund the administration and enforcement of the TRL Program. This funding is provided through June 2020 and is a crucial component of the start-up costs of the program. The core components of the program in its infancy are 1) start-up of the program including public outreach, program implementation including form creation, interagency-coordination with the Sheriff's Department and CASA and 2) enforcement costs from yearly compliance checks performed by law enforcement.

As a part of the grant award, CASA will develop and produce an implementation case study for small jurisdictions. The case study will provide background of the jurisdiction and problem statement utilizing the data derived from multiple youth/young adult purchase surveys. It will also discuss strategies for small jurisdictions to identify constituents, allies and opponents as well as tactics to educate the community and build organizational support. The Case Study will also address various policy considerations for other small jurisdictions interested in pursuing a Tobacco Retailer Licensing Ordinance. The Case Study will also include pre-and post-ordinance data documenting the reductions in illegal sales to people under age 21 years old.

## *License fee and discounts for compliance:*

Under California law, the cost of the license may not exceed the cost to issue the license, carry out annual inspections, or any other associated costs. The City estimates that the cost of inspections, processing the license, and other administrative costs will be approximately \$250 per license. As a result, the fee for 2019 will also be approximately \$250. This fee will be reviewed in 2020 to make sure that it continues to match the salaries and administrative processing costs, as well as the time spent per license. Upon introduction of the Ordinance, staff will include an accompanying resolution which states that the fee will be adjusted up or down in accordance with state law.

Starting the second year of the license, eligible retailers will receive a reduction in their annual fee if no violations are found during the annual compliance check. Additionally, fee reductions will be available if the retailer has a magnetic strip reader to verify age, conducts regular staff training and/or has no tobacco advertising on store windows or doors. No discounts will be available the first year, but will be available the following year after the retailer has been through at least one compliance check.

The proposed amount for each discount beginning in year two of the program will be \$20 (about 8% percent of the 2019 proposed license cost). The goal is to provide a discount that incentivizes compliance, but still allows the city to cover all of the direct costs paid to the Sheriff's Department for inspections. Due to the nature of the grant funding, the license fee and discount for good-actors will need to be revisited after the award cycle ends in June 2020. This proposed fee structure allows for more time spent on set-up and enforcement in 2019 and 2020. Staff recommends that after the grant completion that the CASA case study is reviewed and fees are

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revisited to assess if the program is sustainable without grant funding. Staff will also look for additional grant funding opportunities.

## **Public Information:**

A public outreach plan will be implemented during the public information phase of this project. Public outreach will include the following communication methods through various platforms and will occur as outlined in the proposed project timeline.

- Update of information and project announcement on the City's website homepage and tobacco retailer information subpage,
- News release and social media information campaign on Facebook, Instagram and Twitter,
- East County Californian notice,
- Individual letters sent to each Lemon Grove tobacco retailer, and
- Coordination with the San Diego County Sheriff's Lemon Grove Substation.

In addition to sharing information through the above mentioned methods, three community meetings are planned as detailed in the proposed project timeline. ]

## **Conclusion:**

[Staff recommends that the City Council discuss the draft Tobacco Retailer Licensing Program provisions and draft Ordinance and advise staff.. ]



# Attachment B

## DRAFT – FOR DISCUSSION PURPOSES ONLY

### ORDINANCE NO.

#### **AN ORDINANCE OF THE CITY OF LEMON GROVE CITY COUNCIL AMENDING CHAPTER ADDING CHAPTER \*\*\* (TOBACCO RETAIL LICENSE) TO THE LEMON GROVE MUNICIPAL CODE TO ESTABLISH A TOBACCO RETAIL LICENSE AND PROHIBIT THE SALE OF TOBACCO PRODUCTS TO MINORS**

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**WHEREAS**, California Penal Code Section 308 prohibits the sale or furnishing of cigarettes, tobacco products and smoking paraphernalia to minors, as well as the purchase, receipt, or possession of tobacco products by minors; and

**WHEREAS**, California Business & Professions Code Section 22956 requires that tobacco retailers check the identification of tobacco purchasers who reasonably appear to be under 21 years of age; and

**WHEREAS**, California Business & 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 minors is illegal; and

**WHEREAS**, California Business & Profession Code Section 22962 prohibits the sale or display of cigarettes though a self-service display and prohibits public access to cigarettes without the assistance of a clerk; and

**WHEREAS**, California Penal Code Section 308.1 prohibits the sale of "bidis" (hand-rolled filterless cigarettes) except at those businesses that prohibit the presence of minors; and

**WHEREAS**, California Penal Code Section 308.3 prohibits the manufacture, distribution, or sale of cigarettes in packages of less than 20 and prohibits the manufacture, distribution, or sale of "roll-your-own" tobacco in packages containing less than 0.60 ounces of tobacco; and

**WHEREAS**, California Business & 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; and

**WHEREAS**, a 2015 Center for Disease Control and Prevention report states that middle and high school students' use of electronic cigarettes have tripled from 2013 to 2014; and

**WHEREAS**, the same report states that 9 out of 10 cigarette smokers had their first cigarette before the age of 18; and

**WHEREAS**, according to 2017 data from Youth Tobacco Purchase Surveys conducted by Community Action Service & Advocacy (CASA), 31 percent of Lemon Grove's tobacco retailers sold tobacco products illegally to youth surveyors under 21 years of age; and

**WHEREAS**, the City of Lemon Grove has a substantial interest in promoting compliance with federal, state and local laws intended to regulate tobacco sales and use to youth; and

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

## Attachment B

**WHEREAS**, state law prohibits sales of “drug paraphernalia” however many retailers sell items that are commonly known to be “drug paraphernalia” including water pipes and personal vaporizers used to smoke illicit drugs, claiming the items are for tobacco or e-liquid use; and

**WHEREAS**, Lemon Grove intends to require compliance with state drug paraphernalia laws as a condition of obtaining and maintaining the local tobacco retail license; and

**WHEREAS**, Senate Bill 7, Chapter 8 of the 2015-2016 second special session of the State Legislature changed the age for which individuals can purchase tobacco products; and

**WHEREAS**, the City desires to add Chapter \*\*\* to the Lemon Grove Municipal Code to create a Tobacco Retail License; and

**NOW, THEREFORE**, the addition of Chapter \*\*\* TOBACCO RETAIL LICENSE, establishing tobacco retailer license regulations, is hereby added to the City of Lemon Grove Municipal Code to read as shown in Exhibit A.

# Attachment B

## EXHIBIT A

### TEXT OF PROPOSED REGULATIONS

#### NOTE:

- Text proposed to be added is displayed in underlined type.
- Text proposed to be deleted is displayed in strikeout type.

The City of Lemon Grove Municipal Code to add Chapter \*\*\* to read as follows:

### CHAPTER \*\*\* TOBACCO RETAIL LICENSE

#### SECTIONS:

Purpose

Definitions

Requirement for Tobacco Retail License

Applications Procedure

Issuance and Renewal of License

Display of License

License Fee

Licenses Nontransferable

License Violation - Compliance Monitoring

Suspension or Revocation of License

Denial, Suspension and Revocation - Appeals

Hearings - Generally

Conduct of Hearing

Form and Contents of Decision of Hearing Officer - Appeal to City Manager – Finality of Decision

Enforcement

Severability

# Attachment B

## Purpose

The purpose of this chapter is to encourage responsible tobacco retailing and discourage violations of tobacco related laws that prohibit the sale or distribution of tobacco products, including all smoking materials as defined in section 8.65.020, to minors and tobacco related laws that prohibit the display of tobacco products within reach of the public, 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 penalty provided therefore.

## Definitions

When used in this chapter, the following definitions shall have the meanings given by this section, whether or not these words or phrases are capitalized:

“Drug Paraphernalia” shall have the meaning set forth in Health & Safety Code section 11014.5, as that section may be amended from time to time.

“Electronic Smoking Device” means an electronic and/or battery operated device, the use of which may resemble smoking, which can be used to deliver an inhaled dose of nicotine or other substances by delivering a vaporized solution. Electronic smoking device includes any such device, whether manufactured, distributed marketed or sold as an electronic cigarette, an e-cigarette, an electronic cigar, electronic cigarillo, an electronic pipe, an electronic hookah, or any product name or descriptor, including any component, part or accessory of such a device, whether or not sold separately.

“Electronic Smoking Device Paraphernalia” means cartridges, cartomizers, e-liquid, smoke juices, tips, atomizers, electronic smoking device batteries, electronic smoking chargers and any other item specifically designed for the preparations, charging or use of electronic devices.

“Hearing Officer” means the impartial hearing officer designated to serve in this capacity. “Itinerant Tobacco Retailing” means engaging in tobacco retailing at other than a fixed location. “License” means a Tobacco Retail License issued by the City pursuant to this Chapter.

“Licensee” means a Person to whom a License has been issued.

“Person” means any individual, firm, partnership, joint venture, limited liability company, association, social club, fraternal organization, corporation, estate, trust, business trust, receiver, trustee, syndicate, or any other group or combination acting as a unit.

“Proprietor” means 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 has, or can have, sole or shared control over the day- to-day operations of a business.

“Smoking Materials” means Tobacco Products, Electronic Smoking Device, Electronic Smoking Device Paraphernalia, and any other product containing tobacco or nicotine that releases gases, particles or vapors into the air as a result of combustion, electrical ignition or vaporization, when the apparent or usual purpose is human inhalation of the byproducts.

## Attachment B

"Tobacco Product" means: (1) any product containing, made, or derived from tobacco or nicotine that is intended for human consumption, whether smoked, heated, chewed, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means, including, but not limited to cigarettes, cigars, little cigars, chewing tobacco, pipe tobacco, snuff; and (2) any Electronic Smoking Device. (3) Notwithstanding any provision of subsections (1) and (2) to the contrary, "tobacco product" includes any component, part, or accessory of a tobacco product, whether or not sold separately. "Tobacco product" does not include any product that has been approved by the United States Food and Drug Administration for sale as a tobacco cessation product or for other therapeutic purposes where such product is marketed and sold solely for such an approved purpose.

"Tobacco Paraphernalia" includes 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.

"Tobacco Retailer" means any person who sells, offers for sale, exchanges, or offers to exchange for any form of consideration, tobacco, tobacco products, or tobacco paraphernalia without regard to the quantity sold, offered for sale, exchanged, or offered for exchange.

"Tobacco Retailing" shall mean selling, offering for sale, exchanging, or offering to exchange for any form of consideration, tobacco, tobacco products, or tobacco paraphernalia without regard to the quantity sold, offered for sale, exchanged, or offered for exchange.

### Requirement for Tobacco Retail License

A. It shall be unlawful for any person to act as a Tobacco Retailer in the City without first obtaining and maintaining a valid Tobacco Retail License pursuant to this Municipal Code Chapter for each location at which Tobacco Retailing is to occur. No Tobacco Retail License will be issued to an authorized Tobacco Retailing at other than a fixed location. No License will be issued for itinerant Tobacco Retailing or Tobacco Retailing from vehicles.

B. Nothing in this Chapter shall be construed to grant any person obtaining a Tobacco Retail License any status or right other than the right to act as a Tobacco Retailer at the location in the City identified on the face of the License, subject to compliance with all other applicable laws, regulations, and ordinances. Nothing in this Chapter shall be construed to render inapplicable, supersede, or apply in lieu of any other provision of applicable law, including, without limitation, any condition or limitation on indoor smoking made applicable to business establishments by Labor Code Section 6404.5.

C. No person who is younger than the minimum age established by California law for the purchase or possession of Tobacco Products shall engage in Tobacco Retailing.

### Applications Procedure

A. Application for a Tobacco Retail License shall be submitted to the City in the name of each Proprietor proposing to conduct Tobacco Retailing and shall be 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.

B. All applications shall be submitted on a form supplied by the City and shall contain the following information:

## Attachment B

1. The name, address, and telephone number of each Proprietor.
2. The business name, address and telephone number of the fixed location for which a Tobacco Retail License is sought.
3. The name and mailing address authorized by each applicant to receive all License-related communications and notices (the "authorized address"). Failure to supply an authorized address shall be understood to consent to the provision of notice at the business address specified in paragraph 2, above.
4. Whether or not any applicant 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.
5. Such other information as the City Manager deems necessary for the administration or enforcement of this Chapter.
6. Any and all additional requirements contained in a Tobacco Retail License application pursuant to this Municipal Code Section 5.04.030.

### Issuance and Renewal License

A. Upon the receipt of an application for a Tobacco Retail License and the payment of a Tobacco

Retail License fee, the City shall issue a License unless:

1. The application is incomplete or inaccurate.
2. The application seeks authorization for tobacco retailing at an address that appears on a license that is suspended, has been revoked, or is subject to suspension or revocation proceedings for violation of any of the provisions of this chapter. Notwithstanding the foregoing, this subparagraph shall not constitute a basis for denial of a license if either or both of the following apply:
  - a) The applicant provides the City with documentation demonstrating that the applicant has acquired or is acquiring the premises or business in an arm's length transaction. For the purposes of this subparagraph, an "arm's length transaction" is defined as 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, or a sale for the primary purpose of avoiding the effect of the violations of this chapter that occurred at the location, is presumed not to be an "arm's length transaction."
  - b) It has been more than three years since the most recent License for that location was revoked.
3. The application seeks authorization for Tobacco Retailing by a Proprietor for which or whom a suspension is in effect or by a Proprietor which or who has had a license revoked, pursuant to this chapter.

## Attachment B

4. The application seeks an authorization for Tobacco Retailing that is unlawful pursuant to this Chapter, or that is unlawful pursuant to any other local, state, or federal law.

5. The City has information that the applicant or his or her agents or employees have violated any local, state, or federal tobacco control law at the location for which the License or renewal of the License is sought within the preceding 30 day period.

6. The City has information that the applicant or his or her agent or employee has violated any local, State or Federal tobacco control law, including this Chapter, within the preceding (12) months.

7. The issuance of a Tobacco Retail License would be in conflict with any other City ordinance.

B. Beginning from the effective date of this Chapter, all Tobacco Retailers have until December 31, 2018 to obtain a License. An application to renew such License shall be made no later than 30 days prior, but no earlier than 60 days prior to the expiration of the License. The City has no obligation to issue notification of impending expiration of any License. The applicant shall follow all of the procedures and provide all of the information required by Section 8.65.040 above. The City shall process the application according to the provisions of this section. A License may be renewed annually by submitting a Tobacco Retail License application to the City along with payment of a Tobacco Retail Licensing fee; provided, however, a Tobacco Retail License that is suspended, has been revoked, or is subject to suspension or revocation proceedings shall not be renewed.

C. If the information required in the License application pursuant to any subsection of Chapter 8.65 changes, a new Tobacco Retail 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. If the business is sold, the new owner must apply for a License for that location before acting as a Tobacco Retailer.

D. A Tobacco Retail License that is not timely renewed pursuant to this chapter shall be automatically suspended by operation of law. If not renewed, a license shall be automatically revoked six months after the renewal date. Additionally, civil, criminal and/or administrative citations may be issued during this interim period for failure to maintain the appropriate License. To reinstate the paid status of a License that has been suspended due to the failure to timely pay the renewal fee, the Tobacco Retailer must:

1. Submit the License renewal fee plus a reinstatement fee of ten percent of the License renewal fee; and

2. Submit a signed affidavit affirming that he or she has not sold any Tobacco Product or Tobacco Paraphernalia during the period the license was suspended for failure to pay the License renewal fee.

### Display of License

Each license shall be prominently displayed in a publicly visible location at the licensed premises. Failure to properly display the license will result in the issuance of a citation.

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## License Fees

The fee for issuance or renewal of a Tobacco Retail License shall be established by resolution of the City Council and shall be in addition to the City's business license fee and any other license or permit fee imposed by this code upon the applicant. The Tobacco Retail License fee shall be paid to the City at the time the license application is submitted. The fee shall be calculated so as to recover the cost of administration and enforcement of this Chapter, including, for example, issuing a License, administering the License program, Tobacco Retailer education, Tobacco 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 Chapter. All fees and interest upon proceeds of fees shall be used exclusively to fund the program. Fees are nonrefundable except as may be required by law.

## Licenses Nontransferable & Convey a Limited, Conditional Privilege

A Tobacco Retail License is nontransferable and subject to the provisions of this Municipal Code Section. Nothing in this Chapter shall be construed to grant any person obtaining and maintaining a Tobacco Retailer License any status or right other than the limited conditional privilege to act as a Tobacco Retailer at the location within the City's jurisdictional boundaries identified on the face of the License, subject to compliance with the terms and conditions of this Chapter.

## License Violation – Compliance Monitoring

A. It shall be a violation of a Tobacco Retail License for a Tobacco Retail Licensee or his or her agents or employees to violate any local, state or federal tobacco-related law.

B. It shall be a violation of this Chapter for any Tobacco Retail Licensee or any of the Licensee's agents or employees to violate any local, state, or federal law regulating controlled substances or Drug Paraphernalia including, but not limited to, California Health and Safety Code section 11364.7, as that section may be amended from time to time.

C. In addition to the provisions of this Municipal Code, compliance with this Chapter shall be monitored by the San Diego Sheriff's Department. Any peace officer or Municipal Code compliance official also may enforce this Chapter. The San Diego Sheriff's Department shall check compliance of each Tobacco Retailer at least one time per twelve (12) month period and shall conduct additional compliance checks as warranted. The compliance checks shall be conducted to determine, at a minimum, if the Tobacco Retailer is complying with tobacco laws regulating underage sales. The San Diego Sheriff's Department shall use youth decoys and comply with protocols for the compliance checks developed in consultation with the San Diego County Department of Health and Human Services and the San Diego District Attorney. When appropriate, the compliance checks shall determine compliance with other tobacco-related laws.

D. 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 a person's age (hereinafter "youth decoy") if the potential violation occurs when:

1. The youth decoy is participating in a compliance check supervised by a peace officer;  
or

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2. The youth decoy is participating in a compliance check funded in part by the San Diego County Department of Health and Human Services or funded in part, either directly or indirectly through sub-contracting, by the California Department of Health Services.

3. The youth decoy has a letter of permission for such compliance check activity from the District Attorney's Office.

### Suspension or Revocation of License

A. In addition to any other penalty authorized by law, and including the provisions of this Municipal Code, a Tobacco Retail License may be suspended or revoked if the City finds, after notice to the Tobacco Retail Licensee and opportunity to be heard, that the Tobacco Retail Licensee or his or her agents or employees has or have violated any of the provisions of this Chapter; provided, however, violations by a Licensee at one location may not be accumulated against other locations of that same Tobacco Retail Licensee, nor may violations accumulated against a prior tobacco retail licensee at a licensed location be accumulated against a new tobacco retail licensee at the same licensed location.

1. Upon a finding by the City of a first License violation within any five-year period, the City shall:

- a) Issue a written warning to the Licensee.
- b) Advise the Licensee of the penalties for further violations of this Chapter.
- c) Require the Licensee to provide documentation to the City that all employees engaged in the Retail Sale of tobacco have received training in a City approved program within sixty (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 five year period, the License may be suspended up to thirty (30) days.

3. Upon the finding by the City of a third License violation within any five year period, the license may be suspended for up to ninety (90) days.

4. Upon the finding by the City of a fourth License violation within any five year period, the License may be suspended for up to one (1) year.

5. Upon a finding by the City of a fifth License violation within any five year period, the License may be revoked.

B. A Tobacco Retail License shall be revoked if the City finds, after notice and opportunity to be heard, that any one of the conditions listed below exist. The revocation shall be without prejudice to the filing of a new application for a Tobacco Retail License.

1. One or more of the bases for denial of a Tobacco Retail License under Section 8.65.050 existed at the time the Tobacco Retail License application was made or at any time before the Tobacco Retail License was issued.

2. The application is incomplete for failure to provide the information required by Section 8.65.040.

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3. The information contained in the application, including supplemental information, if any, is found to be false in any material respect.

4. The application seeks authorization for Tobacco Retailing that is unlawful pursuant to this Code, or that is unlawful pursuant to any other local, state, or federal law.

C. In the event the City suspends or revokes a Tobacco Retail License, written notice of the suspension or revocation shall be served upon the Tobacco Retail Licensee within five (5) days of the suspension or revocation in a manner prescribed in Section 8.65.040. The notice shall contain:

1. A brief statement of the specific grounds for such suspension or revocation;

2. A statement that the Tobacco Retail Licensee may appeal the suspension or revocation by submitting an appeal, in writing, in accordance with the provisions of Section 8.65.110, to the City, within ten (10) calendar days of the date of the service of the notice; and

3. A statement that the failure to appeal the notice of suspension or revocation will constitute a waiver of all rights to an administrative appeal hearing, and the suspension or revocation will be final.

### Denial, Suspension and Revocation - Appeals

A. Any Tobacco Retail License applicant or licensee aggrieved by the decision of the City in denying, suspending, or revoking a Tobacco Retail License, may appeal the decision, by submitting a written appeal to the City Clerk within ten (10) calendar days from the date of service of the notice of denial, suspension, or revocation. The written appeal shall contain:

1. A brief statement in ordinary and concise language of the specific action protested, together with any material facts claimed to support the contentions of the appellant;

2. A brief statement in ordinary and concise language of the relief sought, and the reasons why it is claimed the protested action should be reversed or otherwise set aside;

3. The signatures of all parties named as appellants and their official mailing addresses; and

4. The verification (by declaration under penalty of perjury) of at least one appellant as to the truth of the matters stated in the appeal.

B. The appeal hearing shall be conducted by a hearing officer.

C. Upon receipt of any appeal filed pursuant to this section, the City Clerk shall transmit said appeal to the hearing officer who shall calendar it for a hearing. The hearing officer shall give the parties at least fifteen (15) calendar days written notice of the time and place of the hearing either by causing a copy of such notice to be delivered to the appellant personally or by mailing a copy thereof, postage prepaid, addressed to the appellant at the address shown on the appeal. Upon good cause, the hearing officer may grant one extension for the date of the hearing not to exceed fifteen (15) days from the original date set for the hearing.

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D. Only those matters or issues specifically raised by the appellant in the notice of appeal shall be considered in the hearing of the appeal.

E. Failure of any person to file a timely appeal in accordance with the provisions of this section shall constitute an irrevocable waiver of the right to an administrative hearing and a final adjudication of the notice and order, or any portion thereof.

F. Following the hearing on the appeal by the hearing officer, the decision of the hearing officer may be appealed to the City Manager or his or her designee. A decision of the City Manager or his or her designee shall be the final decision of the City.

G. During a period of License suspension, the Tobacco Retail Licensee must remove from public view all Tobacco Products and Tobacco Paraphernalia at the address that appears on the suspended or revoked Tobacco Retail License.

## Hearings – Generally

A. At the time set for hearing, the hearing officer shall proceed to hear the testimony of material witnesses, the appellant, and other competent persons, including members of the public, respecting those matters or issues specifically listed by the appellant in the notice of appeal.

B. The proceedings at the hearing shall be electronically recorded. Either party may provide a certified shorthand reporter to maintain a record of the proceedings at the party's own expense.

C. The hearing officer may, upon the request of the appellant or upon the request of the City, grant continuances from time to time for good cause shown, or upon his or her own motion.

## Conduct of Hearing

A. Hearings need not be conducted in accordance to the technical rules relating to evidence and witnesses. Government Code section 11513, subsections (a), (b) and (c), or as such section may be amended from time to time, shall apply to hearings under this Chapter.

B. Oral evidence shall be taken only upon oath or affirmation.

C. Irrelevant and unduly repetitious evidence shall be excluded.

D. Each party shall have these rights, among others:

1. To call and examine witnesses on any matter relevant to the issues of the hearing.
2. To introduce documentary and physical evidence.
3. To cross-examine opposing witnesses on any matter relevant to the issues of the hearing.
4. To impeach any witness regardless of which party first called the witness to testify.
5. To rebut evidence presented against the party.

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6. To represent himself, herself, or itself, or to be represented by anyone of his, her, or its choice who is lawfully permitted do so.

E. In reaching a decision, official notice may be taken, either before or after submission of the case for decision, of any fact that may be judicially noticed by the courts of this state or that may appear in any of the official records of the City of any of its departments.

### Form and Contents of Decision of Hearing Officer - Appeal to City Manager - Finality of Decision

A. If it is shown, by a preponderance of the evidence, that one or more bases exist to deny, suspend, or revoke the Tobacco Retail License, the hearing officer shall affirm the City's decision to deny, suspend, or revoke the Tobacco Retail License. The decision of the hearing officer shall be in writing and shall contain findings of fact and a determination of the issues presented.

B. The decision of the hearing officer shall inform the appellant that the decision may be appealed to the City Manager by filing a written appeal with the hearing officer within ten days of receipt of the decision of the hearing officer. The written appeal shall be forwarded to the City Manager upon receipt.

C. Within fifteen (15) days of receipt of the written appeal, the City Manager shall review the record of the hearing and issue a written decision to grant or deny the appeal. A decision of the City Manager shall be final. The City Manager shall provide appellant with a copy of his or her decision and that the time for judicial review is governed by California Code of Civil Procedure section 1094.6, or as such section may be amended from time to time. Copies of the decision shall be delivered to the parties personally or sent by certified mail to the address shown on the appeal. The decision shall be final when signed by City Manager and served as provided in this section.

### Enforcement

A. In addition to any other remedy, any person violating any provision of this chapter shall be guilty of a misdemeanor for each day a violation continues.

B. Any violation of this chapter may be remedied by a civil action brought by the City Attorney. The City may recover attorneys' fees and costs of suit, including witness fees, in any civil action brought by the City Attorney to remedy any violation of this chapter.

C. Violations of this chapter are hereby declared to be public nuisances subject to abatement by the City.

D. In addition to criminal sanctions and other remedies set forth in this chapter, civil and administrative penalties may be imposed pursuant to Chapter 1.24 of this Municipal Code against any person violating any provision of this chapter. Imposition, enforcement, collection and administrative review of administrative penalties imposed shall be conducted pursuant to this Municipal Code Chapter 1.24.

### Severability

If any section, subsection, subdivision, paragraph, sentence, clause, or phrase in this chapter or any part thereof is for any reason held to be unconstitutional or invalid or ineffective by any court

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of competent jurisdiction, that decision shall not affect the validity or effectiveness of the remaining portions of this chapter or any part thereof. The City Council hereby declares that it would have passed each section, subsection, subdivision, paragraph, sentence, clause, or phrase thereof irrespective of the fact that any one or more subsections, subdivisions, paragraphs, sentences, clauses, or phrases be declared unconstitutional, or invalid, or ineffective.

The City Clerk shall certify to the passage of this Ordinance and cause the same to be published in accordance with the provisions of state law in a newspaper of general circulation designated for legal notices publication in the City of Lemon Grove.