

CITY OF EDGEWATER
ORDINANCE NO. 2016 - 20
SERIES OF 2016

AN ORDINANCE AMENDING CHAPTER 6 OF THE EDGEWATER MUNICIPAL CODE, CONCERNING BUSINESS LICENSES AND REGULATIONS, BY THE ADDITION OF A NEW ARTICLE 14, CONCERNING THE ESTABLISHMENT OF A REQUIREMENT FOR THE LICENSING OF TOBACCO PRODUCT RETAILERS, AND REQUIREMENTS CONCERNING THE SALE OF TOBACCO PRODUCTS BY SUCH RETAILERS, WHICH REQUIREMENTS ARE NECESSARY TO SAFEGUARD THE HEALTH OF INDIVIDUALS WHO ARE NOT OF LEGAL AGE TO PURCHASE TOBACCO PRODUCTS.

WHEREAS, the City Council of the City of Edgewater finds that the use of tobacco products by minors presents grave health risks to minors, including but not limited to nicotine addiction; and

WHEREAS, the City of Edgewater has a substantial interest in promoting compliance with state and local laws intended to regulate tobacco sales and use, discouraging the illegal sales of tobacco and nicotine products to minors, and promoting compliance with laws prohibiting the sale of tobacco products to minors; and

WHEREAS, the City Council finds that there is a financial incentive to tobacco product retailers to sell tobacco products to minors, which incentive too often results in the unlawful sale of tobacco products to minors; and

WHEREAS, the City Council finds that the establishment herein of licensing requirements for tobacco product retailers, and the related substantive limitations on the sale of tobacco products to minors, will protect the health, safety, and welfare of the public by encouraging responsible tobacco product retailing and reducing the sales of tobacco products to minors in Edgewater.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF EDGEWATER, COLORADO, THAT:

Section 1. Chapter 6 of the Edgewater Municipal Code, titled "Business Licenses and Regulations," is hereby amended by the addition of a new Article 14, to read in its entirety as follows:

ARTICLE 14

TOBACCO PRODUCT RETAILER LICENSE AND REGULATIONS

Sec. 6-14-10. Legislative intent.

It is the intent of the City Council of Edgewater in enacting this Article to prohibit sales of tobacco products to youth, to encourage responsible tobacco product retailing and to reduce the impact of tobacco product use by young people in Edgewater.

Sec. 6-14-20. Application of licensure provisions of this Article.

Effective February 1, 2017, it shall be unlawful for any person to be a tobacco product retailer without a valid license issued pursuant to this Article.

Sec. 6-14-30. Definitions.

When not inconsistent with the content, words used in the present tense include the future, words in the singular number include the plural number, words in the plural number include the singular number, and the masculine includes the feminine. For purposes of this Article, the following words, terms and phrases shall have the following meanings unless the context clearly indicates otherwise:

Cigarette means any product that contains tobacco or nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains:

- (1) any roll of tobacco wrapped in paper or in any substance not containing tobacco; or
- (2) tobacco in any form that is functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging or labeling, is likely to be offered to, or purchased by consumers as a cigarette; or
- (3) any roll of tobacco wrapped in any substance containing tobacco that, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (1) above.

The term includes all "roll-your-own," i.e., any tobacco that, because of its appearance, type, packaging, or labeling, is suitable for use and likely to be offered to, or purchased by consumers as tobacco for making cigarettes.

Department means the City of Edgewater Police Department, and any agency or person designated by the department to enforce the provisions of this Article.

“Electronic Smoking Device” means an electronic device that, when activated, emits a vapor, aerosol, fume or smoke that may be inhaled or absorbed by the user, including, but not limited to, an e---cigarette, e---cigar, e---pipe, vape pen, or e---hookah. Electronic smoking device includes any component, part, or accessory of such a device, whether or not sold separately, and includes any substance, with or without nicotine, intended to be aerosolized, vaporized or produces a fume or smoke during the use of the device intended for human consumption.

License means the tobacco product retailer license.

License Administrator means the Edgewater City Clerk.

Licensee means the owner or holder of a tobacco product retailer license and shall include the employees, agents and officers thereof as appropriate.

Licensed Premises means any area of the premises where tobacco products are authorized to be sold or distributed to a consumer including, but not limited to, the grounds occupied by a retailer and any store, outlet, location, vending machine or structure where tobacco products are sold, as designated in the approved License application.

Retail Tobacco Business means a person engaged primarily in the sale, manufacture, or promotion of tobacco, tobacco products, electronic smoking devices or accessories, either at wholesale or retail, and in which the sale, manufacture or promotion of other products is less than 25% of gross sales receipts. For purposes of enforcement of this Article, a retail tobacco business shall also include a person engaged primarily in the sale or manufacture of hookah or shisha products and related smoking products, including but not limited to, any plant, or other organic matter packaged for smoking or held out as a smoking product, or any person engaged in the promotion of hookah or shisha smoking, sometimes referred to as a hookah bar, lounge or café.

Self-Service Display means the open display or storage of tobacco products, electronic smoking devices, or tobacco paraphernalia in a manner that is physically accessible in any way to the general public without the assistance of the retailer or employee of the retailer and a direct, person-to-person transfer between the purchaser and the retailer or employee of the retailer. A vending machine is a form of self-service display.

Tobacco Product means and includes cigarettes, electronic smoking devices and:

(1) any other product that contains tobacco, nicotine, or synthetic nicotine products is made or derived from tobacco that is intended or expected to be ingested, smoked, inhaled, placed in oral or nasal cavities, or applied to the skin of an individual; or

(2) any device that can be used to deliver tobacco or nicotine to the person inhaling from the device, including an electronic cigarette, cigar, cigarillo, or pipe.

The term "Tobacco Product" does not include any product specifically approved by the United States Food and Drug Administration for use in reducing, treating or eliminating nicotine or tobacco dependence, or for other medical purposes, when such product is being marketed solely for such an approved purpose.

Tobacco Product Retailer means any person who sells, offers for sale, or exchanges or offers to exchange for any form of consideration, a tobacco product, electronic smoking device or tobacco paraphernalia.

Tobacco Product Retailing means the selling, offering for sale, exchanging or offering for exchange for any form of consideration, a tobacco product or electronic smoking device.

Tobacco Paraphernalia means any item designed for the consumption, use or preparation of a tobacco product or for the use of an electronic smoking device.

Sec. 6-14-40. License required.

(a) *Tobacco product retailer license required.*

(1) It shall be unlawful for any person to engage in tobacco product retailing in the City of Edgewater without a valid license issued pursuant to this Article for each location where tobacco product retailing occurs.

(2) No license may be issued to authorize tobacco product retailing anywhere other than at a fixed location that is designated in the license application and approved license. Tobacco product retailing from vehicles is prohibited.

(3) A licensed premise may only have one active license at one time.

(b) *Display of License.* Each license shall be prominently displayed in a publicly visible location at the licensed premises.

(c) *Period of revocation.* A person may not apply for a new license for a one year period after a license held by such person has been revoked.

(d) *Minimum age of licensee.* No License shall be issued to any natural person under eighteen (18) years of age.

Sec. 6-14-50. Limitations on tobacco product retailing.

- (a) *Requirements of positive identification.* No licensee shall sell or transfer a tobacco product without first examining the identification of the recipient to confirm that the recipient is at least eighteen (18) years of age.
- (b) *Minimum age for persons selling tobacco products.* Licensees shall not allow, permit or require any person who is younger than the age of 18 years to sell, a tobacco product during the course of operation of the business.
- (c) *No unaccompanied minors permitted in retail tobacco businesses.* Licensee shall not allow or permit a person who is younger than age 18 years to be admitted or remain upon the licensed premises of a retail tobacco business, unless such person is accompanied by his or her parent or guardian. The licensee of a retail tobacco business shall post and keep at all times visible to the public in a conspicuous place on the licensed premises, a sign to be provided by the City Clerk's office which shall read as follows:

WARNING: It is a violation of the Edgewater Municipal Code for any person under eighteen (18) years of age to be on the premises of this business unless accompanied by their parent or guardian.
- (d) *Self-service display prohibited.* Except at a location where minors are prohibited from entry, it is unlawful for a licensee to engage in tobacco product retailing by means of a self-service display.

Sec. 6-14-60. Application procedure.

- (a) An application for a license shall be submitted and signed by an individual authorized by the person making application for the license.
- (b) An application for a license for an operation for which there is a reasonable expectation that it will meet the definition of a retail tobacco business shall so indicate in the application. For any license that is granted pursuant to an application indicating that a retail tobacco business is anticipated on the licensed premises, there shall be a rebuttal presumption that in fact the business is a retail tobacco business.
- (c) All license applications shall be submitted on a form supplied by the License Administrator.
- (d) All license applications shall be accompanied by the payment in full of an application fee in the amount set forth in the fee schedule adopted by the City Council from time to time.

- (e) Applicants and licensees shall inform the Licensing Administrator in writing of any change to the information submitted on an application for a license within thirty (30) calendar days of a change, including, without limitation, a change that indicates that the licensee is operating as a retail tobacco business.

Sec. 6-14-70. Issuance of license

(a) Upon the receipt of a completed application for a license and all required fees, the License Administrator shall issue a license within thirty (30) days, which period may be extended by the License Administrator for good cause, unless credible evidence indicates that one or more of the following bases for denial exists:

- (1) The information presented in the application is incomplete, inaccurate or false;
- (2) The applicant seeks a license for a location where this Article prohibits the issuance of a license;
- (3) The applicant seeks a license for a location that is not appropriately zoned for the use;
- (4) The proposed location for the requested license is not otherwise in compliance with applicable City law;
- (5) The applicant is not qualified to hold the requested license under the provisions of this Article.

(b) If the License Administrator denies the application for issuance of the license, the License Administrator shall notify the applicant in writing by regular mail, postage prepaid, to the address shown in the application. The notice shall include the grounds for denial. Notice is deemed to have been properly given upon mailing.

Sec. 6-14-80. Appeal of License Administrator's decision.

(a) An applicant has the right to appeal the Licensing Administrator's denial of an application to the City Council. Such appeal shall be initiated by filing a written request with the Licensing Administrator within twenty (20) days of the date of the notice of denial of the issuance of a license.

(b) The applicant's failure to timely appeal the decision of the Licensing Administrator is a waiver the applicant's right to contest the denial of the issuance of the license.

(c) The appeal to the City Council shall be conducted as a de novo hearing by the City Council.

Sec. 6-14-90. License term, renewal and transfer.

- (a) *Term.* A license shall be valid for a term of one (1) year from the date of its issuance.
- (b) *Renewal of License.* A licensee shall apply for the renewal of the license and submit the renewal license fee, as set forth in the fee schedule adopted by the City Council from time to time, no later than thirty (30) days prior to expiration of the existing license term. The License Administrator shall renew the license prior to the end of the term, provided that the renewal application and fee were timely submitted and the License Administrator is not aware of facts that would have prevented issuance of the original license.
- (c) *Expiration of License.* A license that is not timely renewed shall expire at the end of its term. The failure to timely obtain a renewal of a license requires submission of a new application.
- (e) A license shall not be transferred from one person to another or from one location to another.
- (f) When a license has been issued to a husband and wife, or to general or limited partners, the death of a spouse or partner shall not require the surviving spouse or partner to obtain a new license for the remainder of the term of that license. All rights and privileges granted under the original license shall continue in full force and effect as to such survivors for the balance of the term of the license.

Sec. 6-14-100. Compliance monitoring.

- (a) Compliance monitoring of this Article shall be by the Department, as the Department deems appropriate, to allow the Department to determine if a tobacco product retailer is conducting business in a manner that complies with this Article.
- (b) The Department shall have the discretion to consider the previous compliance check history of a licensee in determining how frequently to conduct compliance checks of a licensee.
- (c) Nothing in this section shall create a right of action in any licensee or other person against the City, the Department or their agents and officers.
- (d) The Department shall not enforce any law establishing a minimum age for tobacco purchases or possession against a person who otherwise might be in violation of such law because of the person's age (hereinafter "minor operative") if the potential violation occurs when:

- (1) The minor operative is participating in a compliance check supervised by a peace officer or a code enforcement official of the Department; or
- (2) The minor operative is acting as an agent of a person designated by the City to monitor compliance with this Article; or
- (3) The minor operative is participating in a compliance check funded in part, either directly or indirectly through subcontracting, by the State of Colorado or Jefferson County Department of Health and Environment or the Colorado Department of Health and Environment

(e) The results of Department compliance monitoring activities shall be provided by the Department to the City Clerk and the City Clerk shall maintain a database of such activities on a license by license basis.

Sec. 6-14-110. Suspension or revocation of license.

(a) The following shall be grounds for suspension or revocation of the licensee's license:

- (1) A violation by a licensee or a licensee's officers, agents, or employees of any of the provisions of this Article or any laws of the State of Colorado or ordinances of the City of Edgewater relating to the sale or furnishing of tobacco or cigarettes or tobacco products to minors, or the storage or display of cigarettes or tobacco products, including, without limitation, C.R.S. 18-13-121, C.R.S. 24-35-503, and Section 10-7-60 of the Edgewater Municipal Code;
- (2) Violations of any conditions imposed by the License Administrator or City Council in connection with the issuance or renewal of the license;
- (3) Failure to pay state or local taxes that are related to the operation of the business associated with the license;
- (4) Loss of the right to possession of the licensed premises; or
- (5) Fraud, misrepresentation or a false statement of material fact contained in the original or renewal license application.

(b) The City Council shall hear and determine all actions relating to the suspension or revocation of licenses pursuant to this Article. The City Council shall have the authority to impose remedial sanctions for violations.

(c) The Department shall commence suspension or revocation proceedings by petitioning the City Council to issue an order to the licensee to show cause why the licensee's license should not be suspended or revoked. The City Council shall issue such an order to show cause if the petition demonstrates that

probable cause exists to determine that one or more grounds exist pursuant to subsection (a) to suspend or revoke the licensee's license. The order to show cause shall set the matter for a public hearing before the City Council.

(d) The City Clerk shall give notice of the public hearing no later than thirty (30) days prior to the hearing by mailing the same in writing to the licensee at the address contained in the licensee's license. At the hearing, the licensee shall have the opportunity to be heard, to present evidence and witnesses, and to cross-examine witnesses presented by the Department. The City Council shall have the power to administer oaths and issue subpoenas to require the presence of persons and the production of papers, books, and records necessary to the determination of any hearing that the City Council is authorized to conduct. The standard of proof at such hearings shall be a preponderance of the evidence. The burden of proof shall be upon the Department.

(e) In determining whether a license should be suspended or revoked, and in determining whether to impose conditions in the event of a suspension, the City Council shall consider the following factors:

- (1) The nature and circumstances of the violation;
- (2) Corrective action, if any, taken by the licensee;
- (3) Prior violations, if any, by the licensee;
- (4) The likelihood of recurrence of the violation;
- (5) Whether the violation was willful;
- (6) Previous sanctions, if any, imposed on the licensee.

(f) The City Council shall consider the following non-binding guidelines in determining whether to suspend or revoke a license and, in the case of a suspension, the length of the suspension. The purpose of these guidelines is to provide generally consistent treatment of violators of this Article. The actual sanction imposed upon a licensee for any violation may vary from the guidelines when warranted by the specific facts and circumstances of the case. The decision of the City Council with respect to the suspension or revocation of a license shall constitute a final administrative action by the City of Edgewater, subject to judicial review.

- (1) For a first offense within a one-year period, suspension for seven days.
- (2) For a second offense within a one-year period, suspension for 30 days.
- (3) For a third or subsequent offense within a one-year period, revocation of the license.

(g) Upon request of a licensee, the City Council may allow for the payment of a fine in lieu of the suspension of a license for all or part of the suspension period. Upon the receipt of such a request, the City Council may, in its sole discretion, stay the proposed suspension and cause any investigation to be

made that it deems desirable and may, in its sole discretion, grant the request if it is satisfied that:

(1) The public welfare and morals would not be impaired by permitting the licensee to operate during the period set for suspension and that the payment of the fine will achieve the desired disciplinary purposes; and

(2) The books and records of the licensee are kept in such a manner that the loss of sales of tobacco products that the licensee would have suffered had the suspension gone into effect can be determined with reasonable accuracy.

(3) The fine amount shall be the equivalent of twenty percent (20%) of the licensee's estimated gross revenues from sales of tobacco products during the period of the proposed suspension; except that the fine shall be not less than two hundred dollars nor more than five thousand dollars.

(h) Payment of any fine pursuant to the provisions of subsection (g) above shall be in the form of cash or in the form of a certified check or cashier's check made payable to the City of Edgewater.

(i) Upon payment of the fine pursuant to subsection (h) above, the City Council shall enter its further order permanently staying the imposition of the suspension and shall cause such moneys to be paid into the general fund of the City.

Sec. 16-14-120. Enforcement.

(a) The remedies provided by this Article are cumulative and in addition to any other remedies available at law or in equity.

(b) Causing, permitting, aiding, abetting, or concealing a violation of any provision of this Article is unlawful and shall cause the offender to be subject to the general penalty provisions of the Edgewater Municipal Code.

(c) Violations of this Article are hereby declared to be public nuisances.

(d) In addition to other remedies provided by this Chapter or by other law, any violation of this Article 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.

Section 2. Severability. If any section, paragraph, sentence, clause, or phrase of this ordinance is held to be unconstitutional or invalid for any reason, such decision shall not affect the validity or constitutionality of the remaining portions of this ordinance. The City Council hereby declares that it would have adopted this ordinance and each part or parts hereof irrespective of the fact that any one part or parts be declared unconstitutional or invalid.

Section 3. Safety Clause. The City Council hereby finds, determines, and declares that this ordinance is promulgated under the general police power of the City, that it is promulgated for the health, safety, and welfare of the public, that this ordinance is necessary for the preservation of health and safety and for the protection of public convenience and welfare, and that this ordinance bears a rational relation to the proper legislative object sought to be attained.

Section 4. Effective Date. This ordinance shall become effective in accordance with the Home Rule Charter of the City of Edgewater.

INTRODUCED, READ, PASSED ON FIRST READING AND ORDERED PUBLISHED this 3rd day of November, 2016.

/s/ Kris Teegardin, Mayor

ATTEST:

/s/ Pam Anderson, City Clerk

PASSED AND ADOPTED ON SECOND READING AND ORDERED PUBLISHED this 17th day of November, 2016.

/s/ Kris Teegardin, Mayor

ATTEST:

/s/ Pam Anderson, City Clerk

APPROVED AS TO FORM:

/s/ Thad Renaud, City Attorney