

ORDINANCE NO. 15-0020

AN ORDINANCE OF THE CITY OF MANHATTAN BEACH
ADDING CHAPTER 4.118 (PERMITS FOR RETAILERS OF
TOBACCO PRODUCTS AND/OR ELECTRONIC SMOKING
DEVICES) OF TITLE 4 OF THE MANHATTAN BEACH
MUNICIPAL CODE

THE MANHATTAN BEACH CITY COUNCIL HEREBY ORDAINS AS FOLLOWS:

SECTION 1. The City Council hereby finds, determines and declares that:

SECTION 2. Title 4 (Public Welfare, Morals and Conduct) is hereby amended to add a new Chapter 4.118, Permits for Retailers of Tobacco Products and/or Electronic Smoking Devices, as follows:

**“Chapter 4.118
PERMITS FOR RETAILERS OF TOBACCO PRODUCTS AND/OR ELECTRONIC
SMOKING DEVICES**

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4.118.010 Intent.

This Chapter is adopted to:

1. Ensure compliance with the business standards and practices of the City;
2. Encourage responsible retailing of tobacco products and electronic smoking devices;
3. Discourage violations of laws related to tobacco products and electronic smoking devices, especially those that prohibit or discourage the sale or distribution of tobacco products and electronic smoking devices to minors; and
4. Protect the public health and welfare.

This Chapter does not expand or reduce the degree to which the acts regulated by federal or state law are criminally proscribed or alter the penalties provided by such laws.

4.118.020 Definitions.

For the purposes of this Chapter, the following definitions shall apply:

“Arm’s length transaction” means a sale in good faith and for valuable consideration that reflects the fair market value in the open market between two or more informed and willing parties, neither of which is under any compulsion to participate in the transaction. A sale between relatives, related companies or partners, or a sale for which a significant purpose is avoiding the effect of the violations of this Chapter is not an arm’s length transaction.

“Electronic smoking device” means (1) an electronic and/or battery-operated device that can deliver an inhalable dose of nicotine to the user or (2) any product intended or sold for use with such a device. “Electronic smoking device” includes any product meeting this definition, regardless of whether it is manufactured, distributed, marketed or sold as an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, electronic hookah, electronic vape, vaporizer or any other product name or descriptor.

“Ownership” means possession of a ten-percent or greater interest in the stock, assets, or income of a business, other than a security interest for the repayment of debt.

“School” means a public or private elementary, middle, junior high or high school.

“Tobacco product” means any product containing tobacco leaf, including but not limited to cigarettes, cigars, pipe tobacco, hookah tobacco, snuff, chewing tobacco, dipping tobacco, snus, bidis, or any other preparation of tobacco that is manufactured, sold, offered for sale, or otherwise distributed with the expectation that the product or matter will be introduced into the human body. Tobacco product does not include any

cessation product specifically approved by the United States Food and Drug Administration for use in treating nicotine or tobacco dependence.

“Retailer” means any person who sells, exchanges, or offers to sell or exchange, for any form of consideration, tobacco products and/or electronic smoking devices. “Retailing” shall mean the doing of any of these things. This definition is without regard to the quantity of tobacco products or electronic smoking devices sold, exchanged, or offered for sale or exchange.

4.118.030 Requirements and Prohibitions.

A. Permit required. It shall be unlawful for any person to act as a retailer of tobacco products and/or electronic smoking devices in the City without first obtaining and maintaining a valid retailer permit pursuant to this Chapter for each location at which that activity is to occur.

B. Lawful business operation. It shall be a violation of this Chapter for any retailer to violate any local, state, or federal law applicable to tobacco products, electronic smoking devices, or the retailing of such products.

C. Display of permit. Each retailer permit shall be prominently displayed in a publicly visible place at the permitted location.

D. Notice of minimum age for purchase of electronic smoking devices. Retailers shall post conspicuously, at each point of purchase, a notice stating that selling electronic smoking devices to anyone under 18 years of age is illegal and subject to penalties. Such notice shall be subject to the approval of the City.

E. Positive identification required. No retailer shall sell or transfer a tobacco product or electronic smoking device to another person who appears to be under 30 years of age without first examining the customer’s identification to confirm that the customer is at least the minimum age under state law to purchase and possess the tobacco product.

F. Minimum age for persons selling tobacco or electronic smoking devices. No person who is younger than the minimum age established by state law for the purchase or possession of tobacco products or electronic smoking devices shall engage in retailing.

G. False and misleading advertising prohibited. A retailer either without a valid retailer permit or with a suspended retailer permit:

1. Shall keep all tobacco products and electronic smoking devices out of public view.

2. Shall not display any advertisement relating to tobacco products or electronic smoking devices that promotes the sale or distribution of such products from the retailer’s location or that could lead a reasonable consumer to believe that tobacco products or electronic smoking devices can be obtained at that location.

H. Flavored Tobacco Products. No retailer shall sell a tobacco product, or any product used in an electronic smoking device, containing, as a constituent or additive, an artificial or natural flavor or an herb or spice, including but not limited to strawberry, grape, orange, clove, cinnamon, mint, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, or coffee, that is a characterizing flavor of the tobacco product or smoke produced by the tobacco product. The prohibition in the preceding sentence shall not apply to a retailer that permits only patrons 18 years of age or older to enter the location where the tobacco product is sold.

I. Vending Machines Prohibited. No tobacco product or electronic smoking device shall be sold, offered for sale, or distributed to the public from a vending machine or appliance, or any other coin or token operated mechanical device designed or used for vending purposes, including but not limited to, machines or devices that use remote control locking mechanisms.

J. Self-service display prohibited.

1. Except as permitted in paragraph (2), no electronic smoking device shall be sold, offered for sale, or openly displayed for sale in a manner that is accessible to the general public without the assistance of the retailer or an employee of the retailer.

2. Paragraph (1) shall not apply to the display of electronic smoking devices by a retailer that:

a. Primarily sells tobacco products and/or electronic smoking devices;

b. Generates more than 60 percent of its gross revenues annually from the sale of tobacco products, tobacco paraphernalia, or electronic smoking devices;

c. Does not permit any person under 18 years of age to be present or enter the premises at any time;

d. Does not sell alcoholic beverages or food for consumption on the premises; and

e. Posts a sign outside the retail location that clearly, sufficiently and conspicuously informs the public that persons under 18 years of age are prohibited from entering the premises.

4.118.040 Eligibility Requirements for a Permit.

A. No retailer permit may be issued to authorize retailing at other than a fixed location. For example, retailing by persons on foot or from vehicles is prohibited.

B. No retailer permit may be issued to authorize retailing at a temporary or recurring temporary event. For example, retailing at flea markets and farmers' markets is prohibited.

C. No retailer permit may be issued to authorize retailing at any location within 1,000 feet of a school, as measured by the shortest distance traveled from any entrance of the proposed location for retailing to the parcel boundary of the school, provided, however, that the prohibition contained in this subsection "C" shall not apply to any lawfully operating retailer of tobacco products and/or electronic smoking devices that would otherwise become ineligible to receive or renew a retailer permit due to the creation or relocation of a school.

D. No retailer permit may be issued to authorize retailing at a location which is within 500 feet of a location occupied by another retailer, as measured by the shortest distance traveled from any entrance of the proposed location to any entrance of the existing location, provided, however, that the prohibition contained in this subsection "D" shall not apply to existing retailers of tobacco products and/or electronic smoking devices operating lawfully on the date immediately prior to this Chapter becoming effective.

E. Any exemption granted to a retailer pursuant to this section shall cease to apply upon the earlier of the following to occur:

1. The retailer fails to timely renew the retailer permit pursuant to Section 4.118.070.B of this Chapter; or
2. A new person obtains ownership in the business.

4.118.050 Application Procedure.

A. It is the responsibility of each retailer to be informed of all laws applicable to retailing, including those laws affecting the issuance of a retailer permit. No retailer may rely on the issuance of a retailer permit as a determination by the City that the retailer has complied with all laws applicable to retailing. A retailer permit issued contrary to this Chapter, contrary to any other law, or on the basis of false or misleading information supplied by a retailer shall be revoked pursuant to Section 4.118.060 of this Chapter.

B. All retailer permit applications shall be submitted on a form supplied by the City.

C. A permitted retailer shall inform the City in writing of any change in the information submitted on an application for a retailer permit within 14 calendar days of a change.

D. All information specified in an application pursuant to this section shall be subject to disclosure under the California Public Records Act (Government Code Section 6250 et seq.) or any other applicable law, subject to the laws' exemptions.

4.118.060 Issuance of Permit.

A. Upon the receipt of a complete application for a retailer permit, the application fee, and the annual permit fee, the City shall issue a retailer permit unless

substantial evidence demonstrates that one or more of the following bases for denial exists:

1. The information presented in the application is inaccurate or false;
2. The application seeks authorization for retailing at a location for which this Chapter prohibits issuance of a retailer permit;
3. The application seeks authorization for retailing by a person to whom this Chapter prohibits issuance of a retailer permit; or
4. The application seeks authorization for retailing that is prohibited pursuant to this Chapter (e.g., mobile vending) or that is unlawful pursuant to any other law.

B. A retailer permit shall be revoked if the City finds that one or more of the bases for denial of a retailer permit under this section existed at the time application was made or at any time before the retailer permit issued. Such a revocation shall be without prejudice to the filing of a new permit application.

C. A decision to deny issuance of a retailer permit, or to revoke a retailer permit that has been wrongly issued, can be appealed to a hearing officer, subject to the following requirements and procedures. The hearing officer shall be designated by the City Manager.

1. All appeals must be in writing, state the grounds asserted for relief and the relief sought, and filed with the City Manager or his or her designee within ten calendar days of receipt of notice of the appealed action. If such an appeal is made, it shall stay enforcement of the appealed action.

2. After the conclusion of the hearing, the hearing officer shall issue a written decision. Any decision rendered by the hearing officer shall be a final administrative decision.

4.118.070 Permit Term, Renewal, and Expiration.

A. Term of Permit. The term of a retailer permit is one year. A retailer permit is invalid upon expiration.

B. Renewal of Permit. The City shall renew a valid retailer permit upon timely payment of the annual permit fee. The City may, in its discretion, agree to renew any expired retailer permit within the three-month period following expiration if the retailer pays the annual permit fee and applicable late charges. For every calendar month, or fraction thereof, that a retailer fails to renew an expired retailer permit, a late charge equal to 20 percent of the annual permit fee shall be assessed. A retailer permit renewed within three calendar months of expiration shall be treated as if timely renewed.

C. Issuance of Permit after Revocation or Expiration of Permit. To apply for a new retailer permit more than three calendar months after expiration of a retailer permit

or following revocation of a retailer permit that was wrongly issued, a retailer must submit a complete application for a retailer permit, along with the application fee and annual permit fee. The City shall issue a retailer permit pursuant to the requirements of Section 4.118.060 of this Chapter.

4.118.080 Permits Nontransferable.

A. A retailer permit may not be transferred from one person to another or from one location to another. Whenever a new person obtains ownership in a business for which a retailer permit has been issued, a new retailer permit shall be required, and any exemption granted pursuant to Section 4.118.040 of this Chapter shall cease to apply.

B. Notwithstanding any other provision of this Chapter, prior violations of this Chapter at a location shall continue to be counted against a location and permit ineligibility and suspension periods shall continue to apply to a location unless:

1. One hundred percent of the interest in the stock, assets, or income of the business, other than a security interest for the repayment of debt, has been transferred to one or more new owners; and

2. The City is provided with clear and convincing evidence, including an affidavit, that the business has been acquired in an arm's length transaction.

4.118.090 Permit Conveys a Limited, Conditional Privilege.

Nothing in this Chapter shall be construed to grant any person obtaining and maintaining a retailer permit any status or right other than the limited, conditional privilege to act as a retailer at the location in the City identified on the face of the permit.

4.118.100 Fees.

The City shall not issue or renew a retailer permit prior to full payment of any applicable fees. The City Council shall, from time to time, establish by resolution the fees to issue or to renew a retailer permit. The fees shall be calculated so as to recover the cost of administration and enforcement of this Chapter, including, for example, issuing a permit, administering the permit program, retailer education, retailer inspection and compliance checks, documentation of violations, and prosecution of violators, but shall not exceed the cost of the regulatory program authorized by this Chapter. All fees and interest earned from such fees shall be used exclusively to fund administration and enforcement of this Chapter.

4.118.110 Compliance Monitoring.

The City shall check each retailer at least once per 12-month period to determine if the retailer is complying with all laws applicable to retailing, other than those laws regulating youth access to tobacco products or electronic smoking devices. Nothing in this paragraph shall create a right of action in any retailer or other person against the City or its agents.

4.118.120 Prevention of Sales to Youth.

A. The City shall check each retailer at least twice per 12-month period to determine whether the retailer is conducting business in a manner that complies with laws regulating youth access to tobacco products or electronic smoking devices. Nothing in this paragraph shall create a right of action in any retailer or other person against the City or its agents.

B. The City shall not enforce any law establishing a minimum age for tobacco product or electronic smoking device purchases or possession against a person who otherwise might be in violation of such law because of the person's age ("Youth Decoy") if the potential violation occurs when:

1. The Youth Decoy is participating in a compliance check supervised by a peace officer or a code enforcement official of the City;

2. The Youth Decoy is acting as an agent of a person designated by the City to monitor compliance with this Chapter; or

3. The Youth Decoy is participating in a compliance check funded in part, either directly or indirectly through subcontracting, by the City or the California Department of Public Health.

4.118.130 Enforcement.

A. Any violation of this Chapter is hereby declared to be a public nuisance.

B. Causing, permitting, aiding, abetting, or concealing a violation of any provision of this Chapter shall also constitute a violation of this Chapter.

C. Violations of this Chapter may be remedied by a civil action brought by the City, including, but not limited to, administrative or judicial nuisance abatement proceedings, civil code enforcement proceedings, and suits for injunctive relief. For the purposes of the civil remedies provided in this Chapter, each day on which a tobacco product or electronic smoking device is offered for sale in violation of this Chapter, and each individual retail tobacco product or electronic smoking device that is distributed, sold, or offered for sale in violation of this Chapter, shall constitute a separate violation of this Chapter.

D. The City Prosecutor shall have discretion to prosecute violations of this Chapter as infractions or misdemeanors.

E. The remedies provided by this Chapter are cumulative and in addition to any other remedies available at law or in equity."

SECTION 3. If any sentence, clause, or phrase of this ordinance is for any reason held to be unconstitutional or otherwise invalid, such decision shall not affect the validity of the remaining provisions of this ordinance. The City Council hereby declares that it would have passed this ordinance and each sentence, clause or phrase thereof

irrespective of the fact that any one or more sentence, clauses or phrases be declared unconstitutional or otherwise invalid.

SECTION 4. The City Clerk shall certify to the passage and adoption of this Ordinance and shall cause this Ordinance to be published within 15 days after its passage, in accordance with Section 36933 of the Government Code.

SECTION 5. This Ordinance shall go into effect and be in full force and effect at 12:01 a.m. on the 31st day after its passage.

PASSED, APPROVED AND ADOPTED this ____ day of _____, 2015.

AYES:

NOES:

ABSENT:

ABSTAIN:

MARK BURTON
Mayor

ATTEST:

LIZA TAMURA
City Clerk

APPROVED AS TO FORM:

QUINN M. BARROW
City Attorney