

## **CHAPTER 8.10 TOBACCO and INHALENT DELIVERY SYSTEMS RETAIL LICENSING AND SALES**

8.10.010	Purpose
8.10.011	Definitions
8.10.012	License Required
	Fee for License
	Issuance of Privilege and Not a Right
	Grounds for Denial
	License Renewal and Expiration
	License Nontransferable
8.10.013	Prohibitions
8.10.014	Policy and Procedures
8.10.015	Enforcement and Monitoring
8.10.016	Penalties, License Suspension & Revocation
8.10.017	Appeals and Hearing
8.10.018	Severability

### **8.10.010 Purpose.**

The purpose of licensing Tobacco Retailers is to promote compliance with federal, state and local laws relating to the retail sale of Tobacco Products and inhalant delivery systems and to discourage violations of tobacco-related laws, particularly those that relate to underage persons. Clackamas County has determined that it is necessary to regulate Tobacco Retailers to assure activities necessary for the preservation of health and the prevention of disease in Clackamas County.

It is the intent of Public Health to provide education and assistance to Tobacco Retailers to help them comply with the ordinance and to enforce penalties in accordance with the ordinance. Public Health will work with Tobacco Retailers to remedy violations found during inspections.

### **8.10.011 Definitions.**

A. "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, none 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.

B. "Board" means the Clackamas County Board of Health.

C. "Inhalant Delivery System" means any device or component of a device meeting the definition of "inhalant delivery system" in ORS 431A.175.

D. "Mobile Vending Unit" means any motorized vehicle designed to be portable and not permanently attached to the ground from which tobacco products and inhalant delivery systems are peddled, vended, sold, or given away.

A. "Person" means any natural person, business, partnership, cooperative association, employer, corporation, personal representative, receiver, trustee, assignee, or any other legal entity, including a government agency.

B. "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 (10%) or greater interest in the stock, assets, or income of a business other than the sole interest of security for debt. A managerial interest shall be deemed to exist when a Person can, does have, or shares ultimate control over the day-to-day operations of a business.

C. "Public Health" means the Clackamas County Public Health Division of the Health, Housing and Human Services Department.

D. "Retail Sale" means any transfer, conditional or otherwise, of title or possession of Tobacco Products or inhalant delivery systems to a consumer of such products to a consumer of such products.

E. "Smoking" means inhaling, exhaling, burning or carrying any lighted or heated cigar, cigarette, pipe, weed, plant, or other tobacco like product or substance in any manner or in any form. "Smoking" also includes the use of an Inhalant Delivery System, which creates an aerosol, in any manner or in any form.

F. "Tobacco Paraphernalia" means any item designed for the consumption, use, or preparation of any Tobacco Products.

G. "Tobacco Product" means:

1. Any substance containing, made or derived from tobacco that is intended for human consumption by any means including but not limited to cigarettes, bidis, cigars, cheroots, stogies, periques, granulated, plug cut, crimp cut, ready rubbed and other smoking tobacco, snuff, snuff flour, shisha, hookah tobacco, cavendish, plug and twist tobacco, fine-cut and other chewing tobaccos, shorts, refuse scraps, clippings, cuttings and sweepings of tobacco and other forms of tobacco, prepared in a manner that makes the tobacco suitable for chewing or smoking in a pipe or otherwise, or for both chewing and smoking; and

2. Electronic cigarettes or any inhalant delivery systems containing or delivering nicotine; and-

3. Vape juice or e-liquids defined as any aerosol or liquid solution that vaporizes when heated to make a smoke-like vapor and that contains nicotine or any nicotine containing product, in any amount or concentration, including tobacco plant extract, tobacco dust,

or synthetic nicotine in any amount, concentration or strength, in any form including but not limited to bottled, pre-filled cartridges, or as part of a kit.

4. This definition excludes any product that has been approved by the United States Food and Drug Administration for sale as a tobacco cessation product or for any other therapeutic purpose, if the product is marketed and sold solely for such an approved purpose.

H. "Tobacco Retailer" means any person or entity that owns a business that sells, offers for retail sale, exchanges or offers to exchange, Tobacco Products, including inhalant delivery systems as defined in ORS 431A.175, or that distributes free or low cost samples of Tobacco Products. This definition is without regard to the quantity of Tobacco Products sold, offered for retail sale, exchanged, offered for exchange, or distributed.

#### **8.10.012 License Required.**

- A. A Tobacco Retail license is required for each address at which Tobacco Products, tobacco paraphernalia, or Inhalant Delivery Systems are available from a Tobacco Retailer.
- B. Each applicant for a Tobacco Retail license must meet all requirements of this ordinance and all rules adopted pursuant to this ordinance, and all federal, state, and local laws relating to the retail sale of Tobacco Products, Tobacco Paraphernalia, or Inhalant Delivery Systems.
- C. Application for a Tobacco Retail license issued under this subchapter shall be made on forms provided by Public Health.
- D. A Tobacco Retail license fee shall be submitted with the license application.
- E. To obtain a Tobacco Retail license, each applicant must meet all requirements of this subchapter, the Rules adopted pursuant to this subchapter, and federal, state, and local laws relating to the retail sale of tobacco products.
- F. Each Tobacco Retail license shall expire one calendar year from the date of issuance.
- G. A licensed Tobacco Retailer shall inform Public Health in writing of any change in the information submitted on an application for a Tobacco Retailer license within ten (10) business days of any such change.
- H. The Tobacco Retail license shall be displayed in a prominent and conspicuous place in plain view of the general public at the location licensed.

- I. All information specified in an application pursuant to this section is subject to disclosure under the Oregon Public Records Act or other applicable law, subject to the laws' exemptions.

**See Attached Majority and Minority Reports  
on Location-Based Restrictions**

~~J. Limits on Eligibility for a Tobacco Retailer License.~~

~~1) WITHIN 1,000 FEET OF ESTABLISHMENTS SERVING CHILDREN. No license will be issued to a Tobacco Retailer located "within 1,000 feet of any school, child care center, and other establishments that serve children" as follows:~~

~~(a) Except as provided in subsection (ii), no Tobacco Retailer license will be issued within one thousand (1,000) feet of a Youth-Populated Area as measured by a straight line from the nearest point of the property line of the parcel on which the Youth-Populated Area is located to the nearest point of the property line of the parcel on which the applicant's business is located. For the purposes of this subsection, a "Youth-Populated Area" means a parcel in Clackamas County that is occupied by:~~

~~(i) a private or public kindergarten, elementary, middle, junior high, or high school; library open to the public;~~

~~(ii) a playground open to the public;~~

~~(iii) a youth center, defined as a facility where children, ages 6 to 17, inclusive, come together for programs and activities;~~

~~(iv) a recreation facility open to the public, defined as an area, place, structure, or other facility that is used either permanently or temporarily for community recreation, even though it may be used for other purposes. "Recreation facility" includes, but is not limited to, a gymnasium, playing court, playing field, and swimming pool;~~

~~(v) an arcade open to the public;~~

~~(vi) a park open to the public or to all the residents of a private community;~~

~~(vii) a licensed child-care facility or preschool;~~

~~(b) A Tobacco Retailer in operation as of \_\_\_\_\_ is exempt from the requirements of section (a) above.~~

K. Fee for License.

1. A license fee shall be submitted with an application for a new license or the renewal of a license. The fee shall be established from time to time by resolution of the Clackamas County Board of Commissioners and shall be

calculated so as to recover the costs of administration and enforcement of this ordinance including, but not limited to, issuing a license, administering the Tobacco Retailer license program, providing Tobacco Retailer education, conducting Tobacco Retailer inspections and compliance checks, documenting violations, and prosecuting alleged violators. All fees are nonrefundable except as required by law. The fee established shall not exceed the costs of the administration and enforcement of this ordinance. All fees and interest upon proceeds of fees shall be used exclusively to fund the costs of the administration and enforcement of this ordinance. Fees will not be prorated.

K. Issuance of Privilege and Not a Right.

Nothing in this ordinance grants any Person obtaining and maintaining a Tobacco Retailer's license any status or right other than the limited conditional privilege to act as a Tobacco Retailer at the location identified on the face of the license. Nothing in this Ordinance renders inapplicable, supersedes, or applies in lieu of any other provision of applicable law, including but not limited to, any provision of this Ordinance, or any condition or limitation on smoking in an enclosed place of employment under ORS 433.847 and OAR 333-015-0068 or other federal or local ordinances. Obtaining a Tobacco Retailer's license does not make the Tobacco Retailer a certified smoke shop under ORS 433.847 and OAR 333-015-0068.

L. Grounds for License Denial.

Upon receipt of a completed application for a Tobacco Retailer license and the license fee required by this ordinance, Public Health shall issue a license unless substantial evidence demonstrates that one or more of the following bases for denial exists:

1. The information presented in the application is inaccurate, misleading, or false. Intentionally supplying inaccurate, misleading, or false information shall be a violation of this ordinance;
2. The application seeks authorization for a Tobacco Retailer license at a location for which this ordinance prohibits issuance of a Tobacco Retailer license. This subparagraph shall not constitute a basis for denial of a license if the applicant provides Clackamas County with clear and convincing evidence that the applicant has acquired, or is acquiring, the location or business in an Arm's Length Transaction from a Tobacco Retailer that is exempt from all applicable location prohibitions in this ordinance;

3. The application seeks a Tobacco Retailer license for a Proprietor to whom this ordinance prohibits a license to be issued; or
4. The application seeks a Tobacco Retailer license for activities that are prohibited by law or municipal Ordinance including, without limitation, a zoning ordinance, building code, or business license, or that is unlawful pursuant to any other local, state, or federal law.

M. License Renewal and Expiration.

1. A Tobacco Retailer license is invalid if the appropriate fee has not been timely paid in full or if the term of the license has expired. Each Tobacco Retailer shall apply for the renewal of the license and submit the license fee no later than thirty (30) days prior to expiration of the one-year license term.
2. A Tobacco Retailer license that is not timely renewed will expire at the end of its one-year term. To renew a license not timely renewed as described herein, the Tobacco Retailer must:
  - a. Submit the license fee and application renewal form; and
  - b. Submit a signed and notarized affidavit affirming that the Tobacco Retailer:
    - 1) Has not sold and will not sell any Tobacco Product, Tobacco Paraphernalia, or Inhalant Delivery System after the license expiration date and before the license is renewed; or
    - 2) Has waited the period of time required by Section 10 of this ordinance, for the violation of Tobacco Retailing without a valid license, before seeking renewal of the license.

N. License Nontransferable.

1. Tobacco Retail license may not be transferred from one Tobacco Retailer to another or from one location to another.
2. Prior violation of this subchapter at a location will continue to be counted against a location, and license ineligibility and suspension periods will continue to apply to a location, unless 100 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. The new owner must provide Public Health with clear and convincing evidence, including a sworn affidavit or declaration, that the business has been acquired in an Arm's Length Transaction.

3. Prior violation of this subchapter may be considered in subsequent enforcement actions and applications for additional Tobacco Retail licenses.

#### **8.10.013 Prohibitions.**

A. It is a violation of this subchapter for a Tobacco Retailer to make ~~available~~ Tobacco Products, Tobacco Paraphernalia, or Inhalant Delivery Systems available to a consumer:

(1) Without a Tobacco Retail License.

(2) From a motor vehicle or mobile vending unit.

(3) Outside original packaging containing health warnings satisfying the requirements of federal law.

(4) To a person who appears to be under the age of 27 years, per federal law, without first examining the recipient's identification to confirm that the recipient is at least 21 years old, the minimum age under state law to purchase and possess Tobacco Products.

(5) To distribute, sell or allow to be sold an inhalant delivery system if the system is not labeled and packaged in compliance with Oregon law and federal rules regulating inhalant delivery systems.

(6) To locate any Tobacco Products, Tobacco Paraphernalia, or Inhalant Delivery Systems in any location in a retail store or other establishment where such products are accessible by a customer without the assistance of a Tobacco Retailer or an employee or agent of the Tobacco Retailer. This prohibition does not apply to a Person in a licensed establishment that is permanently and entirely off-limits to Persons under the age of twenty-one (21) and that prohibits Persons under twenty-one (21) from entering the establishment at any time.

B. It is a violation of this subchapter to fail to post a notice that it is unlawful to sell tobacco products or inhalant delivery systems to persons under 21 years of age. This notice must be clearly visible to the seller and the purchaser of tobacco products or inhalant delivery systems.

C. It is a violation of this subchapter to fail to comply with license terms, the Rules adopted pursuant to this subchapter, and federal, state, and local laws relating to the retail sale of tobacco products and inhalant delivery systems.

D. A Tobacco Retailer or any other Person without a valid Tobacco Retailer license, including, but not limited to, a Person whose license has been suspended,

revoked, or not renewed shall keep all Tobacco Products, Tobacco Paraphernalia, and Inhalant Delivery Systems out of public view, and shall not display any indoor outdoor advertisement or otherwise publish or distribute any advertisement relating to a Tobacco Product, Tobacco Paraphernalia, or Inhalant Delivery System that promotes the sale or distribution of such products from the Tobacco Retailer location or that could lead a reasonable consumer to believe that such products can be obtained at that location. The public display of any Tobacco Product, Tobacco Paraphernalia, or Inhalant Delivery System in violation of this provision shall constitute Tobacco Retailing without a license.

- E. It is a violation of this ordinance to fail to comply with license provisions or rules adopted pursuant to this ordinance and federal, state, and local laws relating to Tobacco and Inhalant Delivery System Retailing.

#### **8.10.014 Policy and Procedures.**

- A. The Board delegates the authority to develop Rules to implement this subchapter to Public Health with review by a Rules Advisory Committee. The powers, duties, membership, terms of office of members, provisions as to meetings and conduct of business of and by the Committee will be in accordance with its adopted bylaws.

Public Health will adopt Rules to address license application, inspections, data collection and educational information, as well as any other matters necessary to implement this subchapter.

- B. The Local Board of Health Rules will approve the Rules by resolution upon recommendation by the Rules Advisory Committee.
- C. As part of program administration, Public Health shall provide educational resources to licensed Tobacco Retailers to support compliance with the license requirements. Upon request, Public Health will provide educational materials in the preferred language of a Tobacco Retailer. In addition, Public Health, in its discretion, may offer Tobacco Retailers [including managers or other employees] annual, free, culturally responsive training on federal, state, and local laws to support clerks, managers, and owners in meeting applicable legal requirements. Public Health shall update its educational resources when federal, state, or local laws are enacted or changed, and provide the updated resources to Tobacco Retailers in a timely manner.

#### **8.10.015 Enforcement and Monitoring.**

- A. The Public Health Director, or designee, shall enforce the provisions of this



Ordinance and the Rules adopted pursuant to this subchapter. In addition, any peace officer may enforce the penal provisions of this Ordinance.

- A. The Public Health Director, or designee, shall have the authority to inspect and investigate potential violations of this subchapter in accordance with the Rules.
- B. The provisions of this subchapter will not be deemed to restrict the right of the County to inspect any property pursuant to any applicable federal, state, or local law or regulation.
- D. Public Health will endeavor to inspect each Tobacco Retailer at least one time per twelve-month period. Nothing in this paragraph creates a right of action in any licensee or other Person against the County, Public Health or its agents.
- E. The Public Health Director or designee may issue civil penalties, impose restrictions, and deny, suspend, or revoke a Tobacco Retail license based upon a finding that a Tobacco Retailer is in violation of this subchapter, the Rules adopted pursuant to this subchapter, and federal, state, or local laws relating to the retail sale of Tobacco Products and Inhalant Delivery Systems.

#### **8.10.016 Penalties, License Suspension and Revocation**

- A. The Board shall set license fees and civil penalties under this subchapter by Board resolution.
- B. Any Tobacco Retailer found in violation of this subchapter may be subject to a civil penalty not to exceed \$1000 per day.
- C. For the purposes of the civil remedies provided in this ordinance the following constitute separate violations:
  - (a) Each day on which a Tobacco Product, Tobacco Paraphernalia or an Inhalant Delivery System is offered for sale in violation of this ordinance; or
  - (b) Each instance in which an individual retail Tobacco Product, item of Tobacco Paraphernalia or Inhalant Delivery System distributed, sold, or offered for sale in violation of this ordinance.
- D. Suspension or revocation of license for violation.
  - 1. In addition to any other penalty authorized by law, a Tobacco Retailer's license will be suspended or revoked if any court of competent jurisdiction determines, or the Division finds based on a preponderance of the evidence, after the licensee is afforded notice and an opportunity to be heard, that the

licensee, or any of the licensee's agents or employees, has violated any of the requirements, conditions, or prohibitions of this ordinance or state or federal tobacco law or has pleaded guilty, "no contest" or its equivalent, or admitted to a violation of any law designated in this ordinance.

(a) Upon a finding by Public Health Department of a first violation of this ordinance at a location within any sixty-month period, a fine and mandatory training will be imposed ~~the license will be suspended for thirty days~~.

(b) Upon a finding by Public Health of a second violation of this ordinance at a location within any sixty-month period, a fine will be imposed and the license will be ~~suspended for ninety~~ suspended for thirty days.

(c) Upon a finding by Public Health of a third violation of this ordinance at a location within any sixty-month period, a fine will be imposed and the license will be suspended for ~~one year~~ ninety days.

(d) Upon a finding by Public Health of four or more violations of this ordinance at a location within any sixty-month (60) period, a fine will be imposed and the license will be revoked for two years.

## 2. Revocation of license wrongly issued.

A Tobacco Retailer's license will be revoked if Public Health finds, after the licensee is afforded notice and an opportunity to be heard, that one or more of the bases for denial of a license under this ordinance existed at the time application was made or at any time before the license issued. The decision by Public Health will be the final decision of the County. Such a revocation will be without prejudice to the filing of a new license application.

## 3. Tobacco Retailing without a valid license.

In addition to any other penalty authorized by law, if Public Health or a court finds based on a preponderance of evidence, after notice and an opportunity to be heard, that any Person has engaged in Tobacco Retailing at a location without a valid Tobacco Retailer's license, either directly or through the Person's agents or employees, the Person will be ineligible to apply for, or to be issued, a Tobacco Retailer's license as follows:

(a) After a first violation of this section at a location within any sixty-month period, no new license will be issued for the Person or the location (unless ownership of the business at the location has been transferred in an Arm's Length Transaction), until thirty days have passed from the date of the violation.

(b) After a second violation of this section at a location within any sixty-month period, no new license will be issued for the Person or the location (unless ownership of the business at the location has been transferred in an Arm's Length Transaction), until ninety days have passed from the date of the violation.

(c) After of a third or subsequent violation of this section at a location within any sixty-month period, no new license will be issued for the Person or the location (unless ownership of the business at the location has been transferred in an Arm's Length Transaction), until five years have passed from the date of the violation.

#### **E. Penalties and Additional Remedies.**

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

(2) Causing, permitting, aiding, abetting, or concealing a violation of any provision of this ordinance is a violation subject to penalties.

(3) Violations of this ordinance are hereby declared to be public nuisances.

(4) In addition to other remedies provided by this ordinance or by other law, any violation of this ordinance may be remedied by a civil action including, for example, through administrative or judicial nuisance abatement proceedings, civil or criminal code enforcement proceedings, and suits for injunctive relief.

#### **8.10.017 Appeals and Hearing.**

Any person receiving a written notice of violation of this subchapter may request a hearing in accordance with the Rules adopted to implement this subchapter.

#### **8.10.018 Severability**

The provisions of this Ordinance are severable. If a court determines that a word, phrase, clause, sentence, paragraph, subsection, section, or other provision is invalid or that the application of any part of the provision to any person or circumstance is invalid, the remaining provisions and the application of those provisions to other persons or circumstances is not affected by that decision.

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