

CHAPTER 25
ARTICLE XXVIII - TOBACCO RETAILER PERMIT

SECTION:

25.255: Title

25.256: Purpose

25.257: Definitions

25.258: Requirements and prohibitions.

25.259: Limits On Eligibility for a Tobacco Retailer Permit

25.260: Tobacco Retailer Permit Application Procedure

25.261: Issuance of Tobacco Retailer Permit

25.262: Term and Renewal

25.263: Permits Nontransferable

25.264: Fee for Permit

25.265: Compliance Monitoring

25.266: Suspension and Revocation of Tobacco Retailer Permit; Imposition of Administrative Fine

25.267: Appeal of Director's Determination

25.268: New Permit After Revocation

25.269: Tobacco Retailing Without a Permit

25.270. Violations

25.271: No Conflict with Federal or State Law

25.272: Severability

§ 25.255 Title

This article may be referred to as the TOBACCO RETAILER PERMIT ORDINANCE of the city of Red Bluff.

§ 25.256: Purpose

In enacting this article, it is the intent of the city council to encourage responsible tobacco retailing and to discourage violations of tobacco-related laws, especially those that discourage the sale or distribution of tobacco and nicotine products to minors. There is no intent, however, to expand or reduce the degree to which the acts regulated by federal or state law are criminally proscribed or to alter the penalties provided therein.

§ 25.257 Definitions

The following words and phrases, whenever used in this chapter, shall have the meanings defined in this section unless the context clearly requires otherwise:

"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 2 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.

"Characterizing flavor" means a taste or aroma, other than the taste or aroma of tobacco, imparted either prior to or during consumption of a tobacco product or any byproduct produced by the tobacco product, including, but not limited to, tastes or aromas relating to menthol, mint, wintergreen, fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcohol beverage, herb, or spice. A tobacco product shall not be determined to have a characterizing flavor solely because of the use of additives or flavorings or the provision of ingredient information. Rather, it is the presence of a distinguishable taste or aroma, or both, as described in the first sentence of this definition, that constitutes a characterizing flavor.

"Flavored tobacco product" means any tobacco product that contains a constituent that imparts a characterizing flavor.

"Person" means any natural person, partnership, cooperative association, corporation, personal representative, receiver, trustee, assignee, or any other legal entity.

"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 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 or does have or share ultimate control over the day-to-day operations of a business.

"Self-service display" means the open display or storage of tobacco products 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.

"Smoking." Refer to Section 9.04.170 for the definition.

"Tobacco paraphernalia" means cigarette papers or wrappers, pipes, holders of smoking materials of all types, cigarette rolling machines, vaporizers and any other item designed for the smoking, preparation, storing, or consumption of tobacco products. For the purpose of this chapter, electronic cigarette supplies are considered tobacco paraphernalia.

"Tobacco product" means any substance 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; and any product or formulation of matter containing biologically active amounts of nicotine that is manufactured, sold, offered for sale, or otherwise distributed with the expectation that the product or matter will be introduced into the human body, but does not

include any cessation product specifically approved by the United States Food and Drug Administration for use in treating nicotine or tobacco dependence. For the purpose of this chapter, electronic cigarettes are considered a tobacco product. For the purposes of this title, tobacco products exclude products with a characterizing flavor.

"Tobacco retailer" means any person who sells, offers for sale, or exchanges for any form of consideration, tobacco, tobacco products or tobacco paraphernalia. "Tobacco retailing" shall mean the doing of any of these things. This definition is without regard to the quantity of tobacco, tobacco products, or tobacco paraphernalia sold, offered for sale, exchanged, or offered for exchange.

§ 25.258. Requirements and prohibitions

- A. Tobacco Retailer Permit Required. It is unlawful for any person to act as a tobacco retailer in the City of Red Bluff without first obtaining and maintaining a valid tobacco retailer's permit pursuant to this chapter for each location at which that activity is to occur. Tobacco retailing without a valid tobacco retailer's permit is a nuisance as a matter of law.
- B. Lawful Business Operation. In the course of tobacco retailing or in the operation of the business or maintenance of the location for which a Permit is issued, it shall be a violation of this chapter for a permit, or any of the permittee's agents or employees, to violate any local, state, or federal law applicable to tobacco products, tobacco paraphernalia, or tobacco retailing.
- C. Display of Permit. Each tobacco retailer permit shall be prominently displayed in a publicly visible location at the permitted location.
- D. Positive Identification Required. No person engaged in tobacco retailing shall sell or transfer a tobacco product or tobacco paraphernalia to another person who appears to be under the age of 30 years without first examining the identification of the recipient to confirm that the recipient is at least the minimum age under state law to purchase and possess the tobacco product or tobacco paraphernalia.
- E. Minimum Age for Persons Selling Tobacco. No person who is younger than the minimum age established by state law for the purchase or possession of tobacco products shall engage in tobacco retailing.
- F. Self-Service Displays Prohibited. Tobacco retailing by means of a self-service display is prohibited.
- G. False and Misleading Advertising Prohibited. A tobacco retailer or proprietor without a valid tobacco retailer permit, including, for example, a person whose permit has been revoked, shall not display any advertisement relating to tobacco products or tobacco paraphernalia that promote the sale or distribution of such products from the tobacco retailer's location or that could lead a reasonable consumer to believe that such products can be obtained at that location.
- H. Compliance With State Mandated Sign Requirements: Tobacco retailers shall post and maintain all signage required by the California Labor Code, California Business And Professions Code, California Penal Code, and any other applicable federal, state, or local law.

§ 25.259. Limits on eligibility for a tobacco retailer permit

No permit may authorize tobacco retailing at any location other than a fixed location. For example, tobacco retailing by persons on foot or from vehicles is prohibited.

§ 25.260. Tobacco Retailer Permit Application Procedure

Application for a tobacco retailer's permit shall be submitted in the name of each proprietor proposing to conduct retail tobacco sales and shall be signed by each proprietor or an authorized agent thereof.

It is the responsibility of each proprietor to be informed regarding all laws applicable to tobacco retailing, including those laws affecting the issuance of a tobacco retailer's permit. No proprietor may rely on the issuance of a Permit as a determination by the City of Red Bluff that the proprietor has complied with all laws applicable to tobacco retailing. A permit or Permit issued contrary to this chapter, contrary to any other law, or on the basis of false or misleading information supplied by a proprietor shall be revoked. All applications shall be submitted on a form supplied by the City of Red Bluff. A permitted tobacco retailer shall inform the department in writing of any change in the information submitted on an application for a tobacco retailer's Permit within 10 business days of a change.

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

§ 25.261. Issuance Of Tobacco Retailer Permit

Upon the receipt of a complete application for a tobacco retailer's Permit and the Permit fee required by this chapter, the city shall issue a Permit unless substantial evidence demonstrates that one or more of the following bases for denial exists:

- A. The information presented in the application is inaccurate or false. Intentionally supplying inaccurate or false information shall be a violation of this chapter.
- B. The application seeks authorization for tobacco retailing for a proprietor to whom this chapter prohibits the issuance of a Permit.
- C. The application seeks authorization for tobacco retailing that is prohibited pursuant to this chapter (e.g., mobile vending), that is unlawful pursuant to this Code (e.g., zoning code, building code, and business license tax ordinance), or that is unlawful pursuant to any other law.

§ 25.262. Term and Renewal

Renewal of Permit. A tobacco retailer's Permit is invalid if the appropriate fee has not been timely paid in full or if the term of the Permit has expired. The term of a tobacco retailer Permit is one year. Each tobacco retailer shall apply for the renewal of his or her tobacco

retailer's Permit and submit the Permit fee no later than 30 days prior to the expiration of the term.

Expiration of Permit. A tobacco retailer's Permit that is not timely renewed shall expire at the end of its term. To renew a Permit not timely renewed pursuant to subsection A of this section, the proprietor must:

Submit the Permit fee and application renewal form; and

Submit a signed affidavit affirming that the proprietor has not sold and will not sell any tobacco product or tobacco paraphernalia after the Permit expiration date and before the Permit is renewed.

§ 25.263. Permits nontransferable

A tobacco retailer's Permit may not be transferred from one person to another or from one location to another. A new tobacco retailer's Permit is required whenever a tobacco retail location changes proprietor(s).

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

The location has been fully transferred to a new proprietor or fully transferred to entirely new proprietors; and

The new proprietor(s) provide the city with clear and convincing evidence that the new proprietor(s) have acquired or are acquiring the location in an arm's length transaction.

§ 25.264. Fee for Permit

The fee to issue or to renew a tobacco retailer's permit shall be established from time to time by resolution of the city council. The fee 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 upon proceeds of fees shall be used exclusively to fund the program. Fees are nonrefundable except as may be required by law.

§ 25.265. Compliance monitoring

Compliance checks shall be conducted to enable the city to determine, at a minimum, whether the tobacco retailer is complying with laws regulating youth access to tobacco. When the department deems appropriate, the compliance checks shall determine compliance with other laws applicable to tobacco retailing.

§25.266. Suspension And Revocation of Tobacco Retailer Permit; Imposition Of Administrative Fine

- A. Suspension Or Revocation; Administrative Fine: In addition to any other penalty authorized by law, a tobacco retailer permit shall be suspended or revoked and an administrative fine shall be assessed against the tobacco retailer in accordance with the procedures set forth in this section if it is determined that the permittee or his or her agent or employee has violated any of the conditions of the permit imposed pursuant to this article or any other local, state or federal law pertaining to the sale of tobacco products or tobacco paraphernalia to persons under **twenty-one (21)** years of age.
1. First Violation: Upon a determination by the department of a first permit violation within a sixty (60) month period, the permit shall be suspended for a period of thirty (30) calendar days and an administrative fine in the amount of five hundred dollars (\$500.00) (or as otherwise set by resolution of the city council) shall be assessed against the tobacco retailer. The administrative fine shall be due and payable in full at the time that the suspension becomes effective.
 2. Second Violation: Upon a determination by the department of a second permit violation within a sixty (60) month period, the permit shall be suspended for a period of ninety (90) calendar days and an administrative fine in the amount of one thousand dollars (\$1,000.00) (or as otherwise set by resolution of the city council) shall be assessed against the tobacco retailer. The administrative fine shall be due and payable in full at the time that the suspension becomes effective.
 3. Third Violation: Upon a determination by the department of a third permit violation within a sixty (60) month period, the permit shall be revoked, and an administrative fine in the amount of two thousand five hundred dollars (\$2,500.00) (or as otherwise set by resolution of the city council) shall be assessed against the tobacco retailer. The administrative fine shall be due and payable in full at the time that the revocation becomes effective.
- B. Revocation Of Permit Wrongly Issued: A tobacco retailer permit shall be revoked if the department determines that one or more of the bases for denial of a permit under subsection 5-2D-6A of this article existed at the time the application was made or at any time before the permit was issued. No administrative fine shall accompany the revocation of a permit that was wrongly issued.
- C. Order Of Suspension/Revocation: Upon a determination by the department that the permittee or his or her agent or employee has violated any of the conditions of the permit imposed pursuant to this article, or any other local, state or federal law pertaining to the sale of tobacco products or tobacco paraphernalia to persons under the age of eighteen (18) years, the department shall serve a written order of suspension/revocation of tobacco retailer permit (hereinafter, "order of suspension/revocation") upon either: 1) the authorized agent either via personal service or via first class mail, postage prepaid to the address provided on the tobacco retailer permit application, or 2) if an authorized agent was not listed on the tobacco retailer permit application, to the permittee via personal service or via first class mail, postage prepaid to the business address.
1. The order of suspension/revocation shall provide, at a minimum, the following information:
 - a. The name of the permittee and tobacco retailer permit number;

- b. A brief statement of the specific ground(s) for the suspension or revocation;
- c. If applicable, the term of the suspension;
- d. If applicable, the amount of any administrative fine being assessed;
- e. If applicable, the dates and terms of any prior suspensions and administrative fines within the preceding sixty (60) months;
- f. The effective date of the suspension or revocation and the due date of the administrative fine;
- g. If applicable, the date on which a permittee may apply for a new tobacco retailer permit after revocation;
- h. The time frame and manner in which the permittee may contest the order of suspension/revocation as set forth in subsection D1 of this section;
- i. A statement that the failure of the permittee to contest the order of suspension/revocation will constitute a waiver of the permittee's right to administratively challenge the order of suspension/revocation, and the order of suspension/revocation shall be deemed a final and binding administrative decision; and
- j. If applicable and in the possession of the department, copies of the following documents:
 - (1) Permittee's application for a tobacco retailer permit;
 - (2) Permittee's tobacco retailer permit;
 - (3) Permittee's tobacco retailer's Permit (as issued by the state board of equalization); and
 - (4) Any law enforcement report, memorandum, and/or photograph submitted by the sheriff's department or other law enforcement agency relied upon by the department in support of the suspension or revocation. These documents shall be redacted as required or permitted by law.

- 2. Service of the order of suspension/revocation shall be deemed to have been completed on the date on which the order of suspension/revocation is either personally delivered to the authorized agent or permittee or the date on which the order of suspension/revocation is deposited with the United States Postal Service.
- 3. Failure of an authorized agent or permittee to receive a properly addressed order of suspension/revocation shall not invalidate any of the proceedings pursuant to this article.

D. Contest Of Order Of Suspension/Revocation:

- 1. Any permittee whose permit has been suspended or revoked pursuant to the provisions of this article may contest the order of suspension/revocation by filing with the department a written request to contest the order of suspension/revocation (including the imposition of the corresponding administrative fine) within ten (10) calendar days of the order of suspension/revocation. The

written request must include, at a minimum, the following:

- a. The name of the permittee, the address of the business property, and the tobacco retailer permit number that is subject to the order of suspension/revocation;
 - b. The date on which the order of suspension/revocation was issued;
 - c. 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 permittee;
 - d. A brief statement in ordinary and concise language of the relief sought, and the reasons why it is claimed the order of suspension/revocation should be reversed or otherwise set aside;
 - e. The signature of all proprietors who are contesting the order of suspension/revocation under penalty of perjury as to the contents of the request for appeal.
2. Notwithstanding title 1, chapter 4, "Administrative Citations", of this code or any other provision of this code, an administrative fine assessed against a tobacco retailer in conjunction with an order of suspension/revocation, the assessment of the administrative fine shall only be challenged as set forth in this section.
 3. Upon receipt of such written request for a hearing, the department shall give not less than five (5) business days' written notice to the permittee to show cause at a time and place fixed in the notice why the tobacco retailer permit should not be suspended or revoked (as the case may be). The written notice of hearing shall be served upon the permittee in the same manner as the order of suspension/revocation.
 4. Any order of suspension/revocation and any assessment of a corresponding administrative fine shall be stayed pending a director's determination upon the timely filing of a request for a hearing.

E. Administrative Review Hearing:

1. The director shall conduct the administrative review hearing at the designated time and place. The hearing is to be conducted informally, and formal rules of evidence do not apply. If a youth decoy participated in the underlying investigation, the youth decoy shall not be required to appear or to give testimony. At the hearing, the permittee shall have the burden of showing cause why the tobacco retailer permit should not be suspended or revoked, and the permittee shall be given an opportunity to present any evidence (testimonial, documentary, or otherwise) as it pertains to whether a ground for suspension or revocation exists. In determining whether a ground for suspension or revocation exists, the director shall not consider any evidence pertaining to "preventative measures" or "subsequent remedial measures" (e.g., employee training, the termination of employment of the agent/employee that committed the underlying violation, etc.).
2. Within thirty (30) calendar days of the conclusion of the administrative review hearing, the director shall serve the permittee with written notice of its determination

as to whether the tobacco retailer permit shall be suspended or revoked (and the corresponding administrative fine shall be assessed). The written determination shall be served upon the permittee in the same manner as the order of suspension/revocation. If the director determines that the tobacco retailer permit shall be suspended or revoked, the written determination shall contain all of the information required pursuant to subsection C1 of this section. A written determination that the tobacco retailer permit shall be suspended or revoked shall also contain the time frame and manner in which the permittee may contest the director's determination as set forth in this article, and, a statement that the failure of the permittee to contest the director's determination will constitute a waiver of the permittee's right to administratively challenge the director's determination, and the director's determination to suspend or revoke the tobacco retailer permit shall be deemed a final and binding administrative decision.

§ 25.267 Appeal of Directors' determination

- A. Request For Appeal: Any permittee who has been aggrieved by a director's determination to affirm an order of suspension/revocation and to suspend or revoke a tobacco retailer permit (and impose the corresponding administrative fine) may appeal the director's determination by submitting a written request for appeal to the city clerk within ten (10) calendar days of the director's written determination. The written request for appeal shall contain, at a minimum, the following:
 - 1. The name of the permittee, the address of the business property, and the tobacco retailer permit number that is subject to the director's determination to suspend or revoke;
 - 2. The date on which the director's determination was issued;
 - 3. A statement as to all grounds for appeal in ordinary and concise language, together with any material facts claimed to support the contentions of the permittee (as only the matters and issues raised in the written request will be considered on appeal);
 - 4. A brief statement in ordinary and concise language of the relief sought, and the reasons why it is claimed the director's determination should be reversed or otherwise set aside;
 - 5. The signature of all proprietors who are contesting the director's determination under penalty of perjury as to the contents of the request for appeal.
- B. Staying Of Suspension/Revocation: A director's determination to suspend or revoke a tobacco retailer permit (and to pay the corresponding administrative fine) shall be stayed pending a determination of the city manager (or designee thereof) upon the timely filing of a written request for appeal.
- C. Notice Of Appeal Hearing: Upon receipt of such written request for appeal, the city clerk shall give not less than five (5) business days' written notice to the permittee of the date and time of the appeal hearing. Service of the notice of appeal hearing shall be in the same manner as the order of suspension/revocation.
- D. Appeal Hearing: At the time and place set for the appeal hearing, the city manager (or

designee thereof) shall proceed to hear testimony and to receive evidence from the city, the permittee, and other competent persons respecting those matters or issues on appeal. Only those matters or issues specifically raised by the permittee in the written request for appeal shall be considered in the hearing of the appeal. The formal rules of evidence do not apply to this proceeding. If a youth decoy participated in the underlying investigation, the youth decoy shall not be required to appear or to give testimony. At the hearing, the permittee shall be given an opportunity to present any evidence (testimonial, documentary, or otherwise) as it pertains to whether a ground for suspension or revocation exists. In determining whether a ground for suspension or revocation exists, the director shall not consider any evidence pertaining to "preventative measures" or "subsequent remedial measures" (e.g., employee training, the termination of employment of the agent/employee that committed the underlying violation, etc.).

- E. **Decision On Appeal:** If it is shown at the appeal hearing by a preponderance of the evidence that one or more bases exist to suspend or revoke the tobacco retailer permit, the city manager (or designee thereof) shall affirm the director's determination to suspend or revoke the permit and to impose the corresponding administrative fine. The city manager shall cause to be served upon the permittee a written notice of decision that shall contain the city manager's determination as to whether the tobacco retailer permit shall be suspended or revoked, the corresponding administrative fine assessed, and the findings of fact supporting the determination. The written notice of decision shall further inform the appellant that the decision is a final decision and that the time for judicial review for the suspension or revocation is governed by California Code Of Civil Procedure section 1094.6 et seq., and that the time for judicial review for the imposition of the administrative fine is governed by Government Code section 53069.4(b). The notice of decision shall be served upon the appellant in the same manner as the order of suspension/revocation. A decision to affirm the director's determination to suspend or revoke a tobacco retailer permit shall become effective, and the permit shall be suspended or revoked, immediately upon service of the written notice of decision. The corresponding administrative fine shall be immediately due upon service of the written notice of decision.

§ 25.268 New permit after revocation

- A. Notwithstanding any other provision of this article, no tobacco retailer's permit shall be issued to a tobacco retailer (or proprietor thereof) whose permit has previously been revoked pursuant to subsections of this article for a period of twelve (12) months from the date of the prior revocation.
- B. Notwithstanding any other provision of this article, no tobacco retailer's permit shall be issued for any location where a tobacco retailer permit has previously been revoked pursuant to subsections of this article for a period of twelve (12) months from the date of the prior revocation, unless ownership of the business at the location has been transferred in an arm's length transaction.
- C. The revocation of a tobacco retailer's permit pursuant to subsections of this article shall be without prejudice to the filing of a new tobacco retailer permit application. Any such new application shall be reviewed in accordance with this article.

§ 25.269. Tobacco retailing without a permit

In addition to any other penalty authorized by law, if a court of competent jurisdiction determines, or the department 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 Permit, either directly or through the person's agents or employees, the person shall be ineligible to apply for, or to be issued, a tobacco retailing Permit as follows:

After a first violation of this section, no new Permit may 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 30 days have passed from the date of the violation.

After a second violation of this section, no new Permit may 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 90 days have passed from the date of the violation.

After a third or subsequent violation of this section at a location, no new Permit may 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 5 years have passed from the date of the violation.

§ 25.270. Violations

- A. In addition to any other remedy, any person who causes, permits, aids, abets, suffers, or conceals a violation of any provision of this article, or who fails to comply with any obligation or requirement of this article, is guilty of a misdemeanor punishable in accordance with title 1, chapter 2 of this code.
- B. Each violation of this article is hereby declared to be a public nuisance.
- C. The remedies provided by this article are cumulative and in addition to any other remedies available at law or in equity.
- D. In addition to other remedies provided by this article or by other law, any violation of this article may be remedied by administrative or civil action, including, but not limited to, civil injunction or other abatement action.

§ 25.271. No conflict with federal or state law

Nothing in this chapter shall be interpreted or applied so as to create any requirement, power, or duty that is preempted by federal or state law.

§ 25.272. Severability

If any provision, section, subsection, sentence, clause, phrase, or word of this Chapter 5.28, or any application thereof to any person or circumstance, is held to be invalid or

unconstitutional by a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions or applications of the chapter. The city council hereby declares that it would have passed this chapter, and each provision, section, subsection, sentence, clause, phrase, and word not declared invalid or unconstitutional without regard to whether any other portion of this chapter or application thereof would be subsequently declared invalid or unconstitutional.