

As Amended
November 26, 2012

ORDINANCE NO. 8533

AN ORDINANCE ENACTING A NEW CHAPTER 15 OF TITLE IX OF THE PUEBLO MUNICIPAL CODE RELATING TO LICENSING OF NON-CIGARETTE TOBACCO RETAILERS AND PROVIDING FEES AND PENALTIES FOR VIOLATION THEREOF, AND AMENDING CHAPTER 1 OF TITLE XI TO BE CONSISTENT THEREWITH

WHEREAS, the City of Pueblo recognizes the dangers associated with youth access to tobacco products; and

WHEREAS, a local licensing system for retailers who sell non-cigarette tobacco products is appropriate to protect the health, safety and welfare of young people in Pueblo; and

WHEREAS, the requirement for a tobacco retailer license to sell non-cigarette tobacco products will not unduly burden legitimate business activities of retailers who sell non-cigarette tobacco products to adults. NOW THEREFORE,

BE IT ORDAINED BY THE CITY COUNCIL OF PUEBLO, that: (brackets indicate matter being deleted, underscoring indicates new matter being added)

SECTION 1.

Chapter 15 of Title IX of the Pueblo Municipal Code is hereby enacted and adopted to read as follows:

CHAPTER 15

Licensing of Non-Cigarette Tobacco Retailers

Sec. 9-15-1. Incorporation of general licensing provisions.

The provisions of Chapter 1, Title IX, Pueblo Municipal Code, shall apply to this Chapter except where they are specifically modified by the provisions of this Chapter.

Sec. 9-15-2. Definitions.

The following definitions shall apply throughout this Chapter:

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

a. any roll of tobacco wrapped in paper or in any substance not containing tobacco;

b. 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

c. 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)(a) above.

d. 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.

(2) City License Officer or License Officer means the City Clerk.

(3) Department means the City of Pueblo Police Department, and any agency or person designated by the City Manager or Chief of Police to enforce or administer the provisions of this Chapter.

(4) Licensee means the owner or holder of a non-cigarette tobacco product retailer license.

(5) License refers to the non-cigarette tobacco product retailer license.

(6) Minor means any natural person who is under eighteen (18) years of age.

(7) Non-cigarette tobacco product includes (1) any product, other than a cigarette, that contains tobacco or nicotine or 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 electronic device that can be used to deliver nicotine or tobacco to the person using the device, including but not limited to an electronic cigarette, cigar, cigarillo or pipe. The term "non-cigarette 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(s) is being marketed and sold solely for such an approved purpose.

(8) Non-cigarette tobacco product retail location or retail location means any premises where non-cigarette tobacco products are sold or distributed to a consumer including, but not limited to, hookah bar, lounge or café, any grounds occupied by a retailer, any store, stand, outlet, vehicle, cart, location, vending machine or structure where non-cigarette tobacco products are sold.

(9) Non-Cigarette Tobacco Product Retailer means any person who sells, offers for sale, or does or offers to exchange for any form of consideration, a non-cigarette tobacco product.

(10) Non-Cigarette Tobacco Product Retailing means the selling, offering for sale, or exchanging for any form of consideration a non-cigarette tobacco product.

(11) Self-Service Display means the open display or storage of non-cigarette tobacco products 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.

(12) Vending machine shall mean any mechanical, electrical, or electronic self-service device which, upon insertion of money, tokens, or any other form of payment, dispenses product.

Sec. 9-15-3. Time.

In calculating any period of time prescribed or allowed under this Chapter, the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, even if it is a Saturday, Sunday or a legal holiday, unless the prescribed time period is ten (10) days or less.

Sec. 9-15-4. License requirements and prohibitions.

(a) Non-cigarette tobacco product retailer license required.

(1) It shall be unlawful and a Class 1 municipal offense for any person to act as a non-cigarette tobacco product retailer in the City of Pueblo unless he or she has obtained a non-cigarette tobacco retail license and maintains the same in full force and effect pursuant to this Chapter for each location where non-cigarette tobacco product retailing occurs.

(2) No license may be issued to authorize non-cigarette tobacco product retailing anywhere other than at a fixed location that is designated in the License application and approved by the Licensing Officer. Non-cigarette tobacco product retailing by persons on foot or from vehicles is prohibited.

(3) Non-cigarette tobacco retailing without a valid non-cigarette tobacco product retailer license is a nuisance as a matter of law.

(b) Display of License.

Each non-cigarette tobacco product retailer license shall be prominently displayed in a publicly visible location at the licensed non-cigarette tobacco product retail location.

(c) Other Prohibitions.

(1) A non-cigarette tobacco product retail location may only have one active license at one time. Every license is separate and distinct and specific to a designated location. The license cannot be assigned, delegated, sold, inherited or otherwise transferred between persons or transferred to a different location, except as provided in this Chapter. No licensee shall exercise the privileges of any other license or delegate the privileges of its own license.

(2) A person or entity may not apply for a license for a non-cigarette tobacco product retail for a one year period after a license has been revoked.

(3) No license shall be issued to any person under eighteen (18) years of age.

Sec. 9-15-5. Conditions of the non-cigarette tobacco product retail license.

The following conditions shall apply to the licensee:

(1) Minimum age for persons handling non-cigarette tobacco products.

No person younger than eighteen (18) years of age while employed at a non-cigarette tobacco product retail location shall sell, stock, retrieve, or otherwise handle non-cigarette tobacco products.

(2) Prohibition of self-service displays.

Licensees shall stock and display all non-cigarette tobacco products in a manner so as to make all such products inaccessible to customers without the assistance of a retail clerk, thereby requiring a direct face-to-face exchange of the non-cigarette tobacco product from an employee of the business to the customer.

(3) Requirements of positive identification.

No person engaged in non-cigarette tobacco product retailing shall sell or transfer a non-cigarette tobacco product to another person who appears to be under the age of thirty (30) years without first examining the identification of the recipient to confirm that the recipient is at least eighteen (18) years of age.

Sec. 9-15-6. Application procedure.

(a) An application for a License shall be submitted and signed by an individual authorized by the person or entity making application for the License. It is the responsibility of each applicant and/or Licensee to be informed regarding all laws applicable to tobacco retailing, including those laws affecting the issuance of said license. No applicant and/or Licensee may rely on the issuance of a license as a determination by the City that the proprietor has complied with all applicable tobacco retailing laws.

(b) All applications shall be submitted on a form supplied by the Licensing Officer.

(c) A licensed Non-Cigarette Tobacco Product Retailer shall inform the Licensing Officer in writing of any change in the information submitted on an application for a license within thirty (30) business days of a change.

(d) All License applications shall be accompanied by the payment in full of all fees as required in this Chapter.

Sec. 9-15-7. Issuance of a non-cigarette tobacco product license.

Upon the receipt of a completed application for a non-cigarette tobacco product retailer license as required by this Chapter, the Licensing Officer shall sign and issue a license within thirty (30) days which period may be extended by the Licensing Officer for good cause unless substantial evidence demonstrates 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 authorization for a license at a location where this Chapter 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 applicant seeks authorization for a license and the applicant's current license is suspended or revoked;

(5) The applicant is not qualified to hold the requested License under the provisions of this Chapter; or

(6) The applicant and/or retail location is not in compliance with all City, state or federal laws;

(7) The applicant is indebted to, or obligated in any manner to the City for unpaid taxes, liens or other monies; or

(8) The payment of the licensing fee in the full amount chargeable for such license does not accompany such license application.

Sec. 9-15-8. Denial of non-cigarette tobacco product license.

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

(b) An applicant has the right to appeal the Licensing Officer's denial of an application to a "Hearing Officer" that shall be appointed by the City Manager. Such an appeal shall be initiated by filing a written request with the Licensing Officer within twenty (20) days of the date of the notice of denial of the issuance of a License.

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

(d) The appeal, including any right to further appeals, shall be conducted and controlled by the provisions of Chapter 7 of Title I of the Pueblo Municipal Code. The standard of proof at such appeal shall be a preponderance of the evidence and the burden of proof shall be upon the applicant.

Sec. 9-15-9. License term, renewal and expiration.

(a) Term.

All licenses issued under this Code shall be for the period of one (1) year or a fraction thereof and shall expire on the last day of December of each calendar year unless otherwise specifically provided.

(b) Renewal of license.

A Licensee shall apply for the renewal of the License and submit the renewal license fee no later than thirty (30) days prior to expiration of the existing term. The Licensing Officer shall renew the License prior to the end of the term, provided that the renewal application and fee were timely submitted and the Licensing Officer is not aware of any fact that would have prevented issuance of the original license or issuance of the renewal.

(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. There shall be no sale of any non-cigarette tobacco products after the License expiration date, and before the new License is issued.

Sec. 9-15-10. License non-transferable.

(a) A license shall not be transferred from one person to another or from one location to another.

(b) 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. 9-15-11. Fee for license.

The annual fee for original issuance and renewal of a Non-Cigarette Tobacco Product Retailer license shall be one hundred dollars (\$100). The fee to issue or to renew a license may be changed 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 license, administering the license program, retailer education and training, retailer inspection, compliance checks, documentation of violations, and prosecution of violators, but shall not exceed the cost of the regulatory program authorized by this Chapter. Fees are nonrefundable except as may be required by law.

Sec. 9-15-12. Compliance monitoring.

(a) Compliance monitoring of this Chapter shall be by the Department, as the Department deems appropriate.

(b) The Department shall have discretion to consider previous compliance check history of a Licensee in determining how frequently to conduct compliance checks of the Licensee with respect to individual Licensees.

(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) Compliance checks shall be conducted as the Department deems appropriate so as to allow the Department to determine, at a minimum, if the non-cigarette tobacco product retailer is conducting business in a manner that complies with laws regulating access to non-cigarette tobacco products. When the Department deems appropriate, the compliance checks shall determine compliance with other laws applicable to non-cigarette tobacco products.

(e) 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 "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 Department; or

(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 Pueblo City-County Health Department or the Colorado Department of Health and Environment.

Sec. 9-15-13. 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 Licensee's officers, agents, or employees of any of the provisions of this Chapter, or any laws of the United States, the State of Colorado or ordinances of the City of Pueblo relating to the sale or furnishing of tobacco or cigarettes to minors, or the storage or display of cigarettes or tobacco products.

(2) Violations of any conditions imposed by the Licensing Officer or Hearing Officer in connection with the issuance or renewal of a 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 right to possession of the licensed premises.

(5) Fraud, misrepresentation, or a false statement of material fact contained in the original or renewal license application;

(b) The City Manager shall appoint a Hearing Officer to hear all actions relating to the suspension or revocation of Licenses pursuant to this Chapter. The Hearing Officer shall have the authority to suspend, revoke, or impose remedial sanctions for violations.

(c) The Licensing Officer shall commence suspension or revocation proceedings by petitioning the Hearings Officer to issue an order to the Licensee to show cause why the Licensee's license(s) should not be suspended or revoked. The Hearing Officer 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 Hearing Officer.

(d) Notice of the order to show cause order and hearing date shall be mailed to Licensee by regular mail, postage prepaid, at the address shown on the License no later than thirty (30) days prior to the hearing date. Notice is deemed to have been properly given upon mailing.

(e) The notice to show cause hearing and any subsequent right to appeal shall be conducted and controlled by the provisions of Chapter 7 of Title I of the Pueblo Municipal Code. The standard of proof at such hearings shall be a preponderance of the evidence and the burden of proof shall be upon the Licensing Officer and/or Department.

(f) In determining whether a License should be suspended or revoked, and in determining whether to impose conditions in the event of a suspension, the Hearing Officer 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; and
- (6) Previous sanctions, if any, imposed on the Licensee.

Sec. 9-15-14. Penalties and fines.

(a) Licensees: penalties and fines.

In addition to any other penalty authorized by law, and if the Hearing Officer determines based on a preponderance of the evidence, that the licensee, or any of the licensee's agents or employees, has violated any of the requirements, conditions, or prohibitions of this Chapter, or has pleaded guilty, "no contest" or its equivalent, or admitted to a violation of any law relating to the sale of tobacco to minors including but not limited to C.R.S. sections 18-13-121 and 24-35-503, the Hearing Officer may consider the following non-binding guidelines in determining the sanctions to be imposed upon a Licensee as follows:

(1) One violation within one year: a civil penalty of one hundred dollars (\$100).

(2) Two violations within one year: a civil penalty of two hundred dollars (\$200) and suspension of the License for seven (7) days.

(3) Three violations within one year: a civil penalty of three hundred dollars (\$300) and a minimum twenty (20) days suspension of the License.

(4) Four violations within one year: a civil penalty of five hundred dollars (\$500) and revocation of license.

The actual sanction imposed upon a Licensee for any violation may vary from the above-stated guidelines when warranted by the specific facts and circumstances of the case.

(b) After the effective date of this ordinance, it shall be unlawful and a Class 1 municipal offense for any non-cigarette tobacco product retailer to sell a non-cigarette product without a license as mandated under this Chapter, or with a suspended or revoked license. In addition, the Hearing Officer may impose civil penalties of up to \$500 for each separate non-cigarette tobacco product sold during the period of non-compliance with this Chapter.

Sec. 9-15-15. Enforcement.

(a) The remedies provided by this Chapter are cumulative and in addition to any other remedies available at law or in equity. In addition to other remedies provided by this Chapter or by other law, any violation of this Chapter may be remedied by a civil action brought by the City Attorney, including but not limited to nuisance abatement proceedings and injunctive relief.

(b) Causing, permitting, aiding, abetting, or concealing a violation of any provision of this Chapter shall cause the offender to be subject to the penalty provisions of Chapter 1 of Title XI of this Code.

Sec. 9-15-16. Compliance with C.R.S. Section 39-22-623.

This Chapter is not nor shall not be construed in any way as imposing a fee, license, or tax as a condition for engaging in the business of selling cigarettes or imposing a tax on cigarettes. The non-cigarette tobacco product retailer license in no way applies to the sale of cigarettes. If any part of this Chapter is found to impose a fee, license, or tax as a condition for engaging in the business of selling cigarettes, then that part shall be deemed void.

Sec. 9-15-17. No Rights in License.

Every license issued under this Chapter confers only a limited and conditional privilege subject to the requirements, conditions, limitations and qualifications of this Chapter. The license does not confer a property right of any kind. The license and privilege created by the license may be further regulated, limited or completely extinguished at the discretion of City Council or the electorate of the City, as provided in this Chapter, without any compensation to the licensee. Nothing contained in this Chapter grants to any licensee any vested right to continue operating under the provisions of this Chapter as they existed at the time the license was approved or issued, and every license shall be subject to any ordinance or prohibition adopted after the license was approved or issued.

Sec. 9-15-18. Effective Date.

This Chapter shall become effective on March 1, 2013 and enforceable on and after that date. This date shall be the Effective Date. Any non-cigarette tobacco product retailer without a license after the effective date will be in violation of this Chapter.

SECTION 2.

Subsection (f) of Section 11-1-209, Chapter 1, Title XI of the Pueblo Municipal Code, as amended, is hereby amended to read as follows:

Sec. 11-1-209. Sale, possession and use of tobacco products.

. . .

(f) 【Notwithstanding any provision of this Section, it shall not be unlawful for any minor employed by any retail or wholesale commercial enterprise to handle tobacco products in connection with such minor's assigned job duties for such enterprise.】 **No person younger than eighteen (18) years of age while employed at any retail or wholesale commercial enterprise shall sell, stock, retrieve, or otherwise handle tobacco products in connection with such minor's assigned job duties or otherwise.**

. . .


SECTION 3.

This Ordinance shall become effective upon final passage and approval.

INTRODUCED: November 12, 2012

BY: Sandy Daff
COUNCIL PERSON

ATTEST: 
City Clerk

APPROVED: 
PRESIDENT OF CITY COUNCIL

PASSED AND APPROVED: November 26, 2012