

**TOWN OF GYPSUM, COLORADO
ORDINANCE NO. 10
SERIES 2019**

**AN ORDINANCE OF TOWN OF GYPSUM, COLORADO AMENDING TITLE 5,
BUSINESS TAXES, LICENSES AND REGULATIONS, OF THE GYPSUM MUNICIPAL
CODE WITH THE ADDITION OF CHAPTER 5.07 REGARDING A TOBACCO
PRODUCT RETAIL LICENSE**

WHEREAS, Article XX of the Colorado Constitution grants to home rule municipalities “every power theretofore possessed by the legislature to authorize municipalities to function in local and municipal affairs;” and

WHEREAS, the Town of Gypsum, (Town) is a home rule municipal corporation and politic duly organized and existing under Article XX of the Colorado Constitution and the Town’s Home Rule Charter effective October 21, 1982; and

WHEREAS, the requirement for a Tobacco Retail License will not unduly burden legal business activities of retailers who sell tobacco to adults; and

WHEREAS, the Centers for Disease Control and Prevention has reported that smoking is the leading cause of preventable death, and that thousands of young people under age 18 start smoking every day¹; and

WHEREAS, the Town finds that licensing requirements for tobacco product retailers, and the related sale of tobacco product regulations related to cigarettes, tobacco products and nicotine products are appropriate and necessary to protect the health, safety, and welfare of the public.

**NOW THEREFORE, BE IT ORDAINED BY THE TOWN OF GYPSUM,
COLORADO that:**

1. Adoption of Chapter 5.07 of the Gypsum Municipal Code. A new Chapter 5.07 of the Gypsum Municipal Code, as more particularly set forth on Exhibit A, as attached hereto and incorporated herein by this reference, is hereby enacted and adopted in its entirety and by this reference ordained.

2. Public Hearing. A public hearing on this Ordinance shall be held on the 8th day of October, 2019, at 7:00 p.m. at the Town of Gypsum Town Hall, 50 Lundgren Boulevard, Gypsum, Colorado.

3. Effective Date. This Ordinance shall become effective as a permanent Ordinance five (5) days after publication, following final adoption after a public hearing held on the 22nd day of October, 2019, at 7:00 p.m., at the Gypsum Town Hall, 50 Lundgren Blvd., Gypsum, Colorado.

¹ https://www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/index.htm

EXHIBIT A
CHAPTER 5.07 OF THE GYPSUM MUNICIPAL CODE

Chapter 5.07 - TOBACCO PRODUCT RETAIL LICENSE

5.07.010 - Purpose and Intent.

A. The purpose of this ordinance is to establish a process for licensing sellers of tobacco products within in the Town of Gypsum to ensure compliance with the business standards and practices of the Town, to encourage the responsible sale of tobacco products, to discourage violations of laws that prohibit or discourage the sale or distribution of tobacco products to young people, to reduce the likelihood that youth will become tobacco product users by prohibiting the sale of tobacco products to persons under twenty-one (21) years of age, but not 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 to protect the health, safety and welfare of the residents of Gypsum.

5.07.020 - Defined Terms.

As used in this Chapter, the following terms shall have the following meanings:

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 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 a violation of this Chapter is not an Arm’s Length Transaction.

B. **“Cigarette”** means any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains:

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

C. **“Cigar”** means any roll of tobacco other than a Cigarette wrapped entirely or in part in tobacco or any other substance containing tobacco. For purposes herein, cigar includes, but is not limited to tobacco products known or labeled as a “cigar,” “cigarillo” or “little cigar.”

D. **“Consumer”** means a person who purchases Tobacco Products not for Sale to another.

E. **“Electronic Smoking Device”** means any product containing or delivering nicotine intended for human consumption that can be used by an individual to simulate smoking in the delivery of nicotine or any other substance, even if marketed as nicotine-free, through inhalation from the product. Electronic smoking device includes any refill, cartridge or component part of a product, whether or not marketed or sold separately. Electronic smoking device does not include any product that has been approved or certified by the United States Food and Drug Administration for sale as a tobacco cessation product or for other medically approved or certified purposes.

F. **“License”** means a license issued by the Town to operate as a Tobacco Product Retailer.

G. **“Licensee”** means the holder of an unexpired License.

H. **“License Officer”** means the Town Clerk for administration of the License, i.e. issuance, renewal and collection of License Fees.

I. **“License Fee”** means the annual fee for a Tobacco Product Retail License.

J. **“Licensed Premises”** means the retail location within the Town for which a Tobacco Product Retail License is issued.

K. **“Little Cigar”** means any roll of Tobacco other than a Cigarette wrapped entirely or in part in Tobacco and weighing no more than three pounds per thousand. “Little Cigar” includes, but is not limited to, any product known or labeled as “small cigar” “cigarillo” or “little cigar.”

L. **“Minimum Legal Sales Age”** means twenty-one (21) years of age or older.

M. **“Person”** means any natural person, partnership, cooperative association, corporation, limited liability company, personal representative, receiver, trustee, assignee or other legal entity.

N. **“Sale” or “Sell”** means any transfer, exchange, barter, gift, offer for sale, or distribution for a commercial purpose, in any manner or by any means whatsoever.

O. **“Self-Service Display”** means the open display or storage of Tobacco Products in a manner that is physically accessible in any way to the general public without the assistance of

the Licensee or an employee of the Licensee and a direct person-to-person transfer between the purchaser and the Licensee or employee of the Licensee. A vending machine is a form of self-service display.

P. *“Tobacco Paraphernalia”* means any item designed for the consumption, use, or preparation of a Tobacco Product.

Q. *“Tobacco Product”* means:

- (1) any product which contains, is made or derived from tobacco or used to deliver nicotine, synthetic nicotine or other substances intended for human consumption, whether heated, chewed, absorbed, dissolved, inhaled, snorted, sniffed or ingested by any other means, including, but not limited to Cigarettes, Cigars, Little Cigars, chewing tobacco, pipe tobacco, snuff, bidis, snus, nicotine product, mints, hand gels; and
- (2) an Electronic Smoking Device; and
- (3) notwithstanding any provision of subsections (1) and (2) above to the contrary, “Tobacco Product” includes any component, part, accessory or associated Tobacco Paraphernalia of a Tobacco Product whether or not sold separately.
- (4) The term “Tobacco Product” does not include:
 - (i) any product that contains marijuana; and
 - (ii) any product made from or derived from tobacco and approved by the Food and Drug Administration (FDA) for use in connection with cessation of smoking.

R. *“Tobacco Product Retailer”* means any Person who engages in the sale of Tobacco Products directly to the public from any store, stand, booth, concession, outlet, vehicle, cart, vending machine, structure or any grounds or any other enterprise that Sells, offers for Sale, or does or offers to exchange for any form of consideration Tobacco Products. “Tobacco Product Retailing” shall mean the doing of any of these things. This definition is without regard to the quantity of Tobacco Products sold, offered for sale, exchanged, or offered for exchange.

5.07.030 - Applicability.

A. The License Officer shall receive and process applications for Licenses pursuant to the requirements herein.

B. No person shall have any entitlement or vested right in a License under these regulations.

5.07.040 - Requirements and Prohibitions.

A. License Required. A separate License is required for each retail location within the Town where Tobacco Products are sold.

B. Display of License. Each Tobacco Product Retail License shall be prominently displayed at the Licensed Premises in a publicly visible location.

C. Minimum Legal Sales Age. Tobacco Products shall not be sold or offered for sale to any person under twenty-one (21) years of age.

D. Minimum Legal Sales Age Signage Requirements. Signage is required to be prominent displayed at all entrances to a Licensed Premises indicating that Tobacco Products shall not be sold to any person under twenty-one (21) years of age.

E. Self-Service Displays Prohibited. The sale of Tobacco by means of a Self-Service Display is prohibited.

F. Packaging and Labeling. Tobacco Products may not be sold to any Consumer unless such product:

- (1) is sold in the original Manufacturer's Packaging intended for Sale to Consumers; and
- (2) conforms to all applicable federal Labeling requirements.

G. Positive Identification Required. No Licensee shall sell or transfer any Tobacco Product to an individual who appears to be under the age of thirty (30) years without first examining the government-issued photographic identification of the recipient to confirm that the recipient is at least the Minimum Legal Sales Age.

H. False and Misleading Advertising Prohibited. A Tobacco Product Retailer without a valid License, including a Tobacco Product Retailer whose License has been suspended or revoked shall not engage in any of the following, which shall be constitute Tobacco Product Retailing without a License:

- (1) The display of any Tobacco Product in public view; and
- (2) Any advertising, including but not limited to displays, that promotes the sale or distribution of any Tobacco Product that could lead a reasonable Consumer to believe that such products can be obtained from the Tobacco Product Retailer.

5.07.050 - Limits on License Eligibility.

A. Fixed Location. The application must include a fixed location for Tobacco Product Retailing. Licenses will not be granted at a location other than a fixed location. Mobile sales of Tobacco Products is prohibited within the Town.

B. Under-Age Applicant. The applicant must be at least as old as the Minimum Legal Sales Age.

5.07.060 - License Application.

A. An application for a License shall be submitted in the names of either all owners of the business or all individuals proposing to conduct Tobacco Product Retailing and shall be signed by the same or an authorized agent thereof.

- (1) It is the responsibility of each applicant to be informed regarding all laws applicable to Tobacco Product Retailing, including those laws affecting the issuance of a License.
- (2) No applicant may rely on the issuance of a License as a determination by the Town that the applicant has complied with all laws applicable to Tobacco Product Retailing.
- (3) A License issued contrary to this Chapter, contrary to any other law, or on the basis of false or misleading information supplied by an applicant shall be automatically revoked.
- (4) Nothing in this Chapter shall be construed to vest in any person obtaining and maintaining a License any status or right to act as a Tobacco Product Retailer in contravention of any provision of law.

B. All applications shall be submitted on a form supplied by the License Officer and shall contain the following information:

- (1) The name, address, and telephone number of each applicant seeking a License; and
- (2) The business name, address, and telephone number of the single fixed location where a License is sought; and
- (3) A name and mailing address authorized by each applicant authorized to receive all communications and notices (the "authorized address") required by, authorized by, or convenient to the enforcement of this Chapter. If an authorized address is not supplied, each applicant shall be understood to consent to the provision of notice at the business address specified in subsection (2) above; and

- (4) A copy of a driver's license or other government-issued identification verifying that all applicants meet the Minimum Legal Sales Age requirement.

C. A Tobacco Product Retailer shall inform the Town in writing of any change in the information submitted on the application within ten (10) business days of a change.

5.07.070 – License Fees.

A. The License Fee for applications submitted through December 31, 2019 shall be fifty dollars (\$50) for new applications, and twenty five dollars (\$25) for renewals.

B. Beginning in 2020, the License Fees shall be reviewed at least annually and, if necessary, adjusted by the Town Manager to reflect the direct and indirect costs incurred by the Town in connection with the adoption, administration and enforcement of this Chapter.

C. License Fees are due at the time of initial application and each annual renewal and are nonrefundable. A License is not valid until the License Fee has been paid.

5.07.080 - Issuance of a License.

A. Upon the receipt of a completed application and the payment of the License Fee pursuant to this Chapter, the License Officer shall issue a License unless substantial evidence demonstrates that one (1) or more of the following bases for denial exists:

- (1) The information presented in the application is inaccurate or false. Intentionally supplying inaccurate or false information shall be a violation of this Chapter.
- (2) The application seeks authorization for a License at a location where this Chapter prohibits issuance of Tobacco Product Retail License, and/or the zoning of the property prohibits this type of use.
- (3) The application seeks authorization for a License for an applicant for whom this Chapter prohibits a License to be issued.
- (4) The application seeks authorization for Tobacco Product Retailing that is prohibited pursuant to this Chapter, that is unlawful pursuant to these regulations, or that is unlawful pursuant to any other law.

5.07.090 - License Term, Renewal and Expiration.

A. **Term.** The term of a License is up to one (1) year. All Licenses shall expire on December 31 of each year. Initial and renewed licenses shall be issued on January 1 of each year.

B. Renewals. A Tobacco Product Retailer shall apply for the renewal of the License and submit the applicable License Fee no later than thirty (30) days prior to expiration of the term. An application for the renewal of a License shall require the disclosure of such information required by section 5.07.060 and any information concerning the conduct and operation of the Tobacco Retail Establishment during the preceding licensing period as is reasonably necessary for determining the applicants' eligibility for a renewal License.

C. Expiration of License.

- (1) A License that is not been timely renewed shall expire at the end of its term.
- (2) To renew a License that has expired, the applicant must submit the License Fee, application renewal form, and a signed affidavit affirming that the applicant has not sold and will not sell any Tobacco Products after the License expiration date and before the License is renewed.
- (3) An applicant who failed to renew a License and engaged in Tobacco Product Retailing without a valid License after the expiration of the License will be issued a renewal License only after waiting a period of time that is equivalent to the period of time during which the Licensee engaged in Tobacco Product Retailing. If such time period cannot be determined, a new License will be issued only after waiting the equivalent period of time between the expiration of the previous License and the date the applicant submitted a complete application for renewal.

5.07.100 - Duplicate Licenses.

A. A duplicate License, valid for the remainder of the term of the License, shall be issued by the License Officer to replace any License previously issued, which has been lost, stolen, defaced, or destroyed without any willful conduct on the part of the Licensee, upon the paying to the License Officer of a duplicate license fee in the amount of twenty dollars (\$20.00).

5.07.110 - License Non-Transferrable.

A. A Tobacco Product Retail License shall not be transferred from one (1) person to another or from one (1) location to another. A new License is required whenever a Tobacco Product Retail location has a change in owner(s) in an Arm's Length Transaction. Notwithstanding any other provision of this Chapter, prior violations at a Licensed Premises shall continue to be counted against the location and License ineligibility periods shall continue to apply to the location unless:

- (1) the location has been transferred to new business owner in an Arm's Length Transaction; and

- (2) the new owner(s) provide the Town with clear and convincing evidence that the new owner(s) has acquired or is acquiring the location in an Arm's Length Transaction.

5.07.120 - License Conveys a Limited, Conditional Privilege.

A. Nothing in this Chapter shall be construed to grant any person obtaining or maintaining a License any status or right other than the limited conditional privilege to act as a Tobacco Product Retailer at the Licensed Premises. Nothing in this Chapter shall be construed to render inapplicable, supersede, or apply in lieu of, any other provision of applicable law, including but not limited to, any provision of this Ordinance.

5.07.130 - Denial of License.

A. The License Officer shall approve or deny in writing an application for a License within thirty (30) days of denial and information outlining the appeals process shall be mailed to the applicant's address as specified in the application.

5.07.140 - Inspections.

A. The License Officer, Town officials charged with enforcing the Municipal Code, and police officers may conduct inspections and examine businesses to enforce compliance with this Chapter. Such persons may enter premises during normal business hours, with or without a search warrant, to conduct inspections.

5.07.150 - Compliance orders.

A. If the License Officer determines, in his/her sole discretion, that a business violated the Municipal Code or any law, including the failure to obtain all relevant licenses required by the State of Colorado, the License Officer or designee shall serve the affected person with a written compliance order apprising the person affected of his specific violations and ordering him to comply. Service may either be by personal service or a copy of the compliance order may be posted in a conspicuous manner on the premises and mailed first class U.S. certified mail to the Licensee or business owner at the address as provided in section 5.07.060(B)(3). The compliance order shall require compliance within thirty (30) days of the date of the personal service or the posting and mailing of the order.

5.07.160 - Compliance Monitoring.

A. The Town shall not enforce any law establishing a Minimum Legal Sales Age for Tobacco Product purchases or for possession of Tobacco pursuant to C.R.S. § 25-14-301 against a person who otherwise might be in violation of such law because of the person's age if the

potential violation occurs when the person was acting at the direction of the Town or the Eagle County Sheriff's Office for the purposes of monitoring compliance with this Chapter.

B. Whenever evidence of a violation of this Chapter is obtained in any part through the participation of an individual under the Minimum Legal Sales Age to purchase Tobacco Products, such individual shall not be required to appear or give testimony in any civil or administrative process brought to enforce this Chapter and the alleged violation shall be adjudicated based upon the sufficiency and persuasiveness of the evidence presented.

5.07.170 - Penalties, Suspension and Revocation of License.

A. Grounds for revocation or suspension. Upon receipt of a verified written complaint of any violation of the provisions of this Chapter or failure of a Licensee to comply with a compliance order issued pursuant to section 5.07.150, the License Officer shall have the power to suspend or revoke any License if the License Officer finds, in his/her sole discretion, that the Licensee has committed any of the following acts or omissions:

- (1) Failed to comply with any requirements of this Chapter.
- (2) Willfully and/or deliberately disregarded any provision of this Chapter or relevant sections of the Municipal Code.
- (3) Misrepresented a material fact, or committed fraud or deceit in order to obtain a License.
- (4) Engaged in any willful, fraudulent act by which another is injured.
- (5) Carelessly or negligently failed to provide reasonable safety measures or failed to follow all required practices for the protection of employees and the public health, morals or welfare.
- (6) Failed or refused to obtain a License prior to operating a Tobacco Retail Establishment for which a License is required by this Chapter.
- (7) Failed to obtain, or had suspended or revoked, a business license by the Town.
- (8) Failed to obtain all relevant licenses required by the State of Colorado.
- (9) Failed to comply with any zoning requirements of the Town.
- (10) Violated any laws or regulations applicable to such business.

B. Emergency suspension. The License Officer may make an emergency suspension of any License should the actions of the Licensee or business involved pose an immediate, serious and imminent threat to the health, safety and welfare of the residents of the

Town of Gypsum. Such emergency suspension shall not continue longer than 60 days without a hearing before the License Officer.

C. Length of suspension or revocation. The License Officer, in his/her sole discretion, may suspend a License for up to six (6) months and may revoke a License for up to one (1) year during which period the Licensee may not operate any business in the Town that engages in Tobacco Products Retailing. In determining the length of suspension or revocation, the License Officer shall take into consideration the severity of the Licensee's violation of this Chapter, the Licensee's past performance, any attempt by the Licensee to remedy the violation(s), and any verified written complaints received against the business or applicant.

D. Reapplication. At the end of the period of revocation or suspension, any applicant whose License has been suspended or revoked may reapply for a new License. Such License will only be granted if the applicant has served the full suspension or revocation term and sufficiently shows, to the satisfaction of the License Officer, that the violations of this Chapter or other reason(s) for suspension or revocation of the license have been remedied.

5.07.180 – License hearing.

A. Upon written request to the License Officer within thirty (30) days of any decision by the License Officer, including but not limited to compliance orders or the denial, suspension, or revocation of a License, the License Officer shall hold a hearing and issue a written decision. Notice of such hearing, to be held within thirty (30) days of receipt of the hearing request, shall be given to the affected person. Upon written application or on his/her own motion, the License Officer shall have the authority, in a proper case, to extend the time for compliance, to grant a new hearing date, and to change, modify or rescind any recommendation or order.

5.07.190 - Appeals.

A. Any person aggrieved by any decision of the License Officer after a license hearing, including but not limited to a Licensee, shall have the right to appeal to the Town Council upon filing with the Town Clerk a written appeal and request for hearing within thirty (30) days following issuance of a written hearing decision by the License Officer. Such appeal shall set out a copy of the order or decision appealed from and shall include a statement of the facts in support of the appeal. A copy of the appeal shall be forwarded to the License Officer.

5.07.200 - Appeals hearing.

A. The Town Council shall hold a hearing on any appeal of a decision of the License Officer at its next regularly scheduled meeting scheduled at least seven (7) days after filing the appeal and shall give notice to the appellant of the time and place of such hearing, and shall also notify the License Officer who may appear and defend such order. After hearing evidence from

the applicant and the License Officer, the Town Council may issue a verbal decision and shall issue written findings which shall be final and conclusive.

5.07.210 Tobacco Retailing Without a License.

A. In addition to any other penalty authorized by law, if a court of competent jurisdiction determines, or the Town finds based on a preponderance of evidence, after notice and an opportunity for a hearing before the License Officer, that any person has engaged in Tobacco Product Retailing without a valid License, either directly or through the person's agents or employees, the person shall be ineligible to apply for, or to be issued, a License as follows:

- (1) After a first violation of this Chapter, no new License may be issued at the location where the violation occurred, until thirty (30) days have passed from the date of the violation, unless ownership of the business at the location has been transferred in an Arm's Length Transaction.
- (2) After a second violation of this Chapter, no new License may be issued at the location until ninety (90) days have passed from the date of the violation, unless ownership of the business at the location has been transferred in an Arm's Length Transaction.
- (3) After a third or subsequent violation of this Chapter, no new License may be issued at the location until one (1) year has passed from the date of the violation, unless ownership of the business at the location has been transferred in an Arm's Length Transaction.

5.07.220 – Fines.

A. A person who violates the requirements of this Chapter may be fined the maximum amount for violations of the Municipal Code pursuant to section 2.01.090(6). Separate violations will be deemed to have occurred for each day that a Tobacco Product is offered for sale in violation of this Chapter and for each Tobacco Product distributed, sold, or offered for sale in violation of this Chapter.

5.07.230 - Additional Remedies.

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

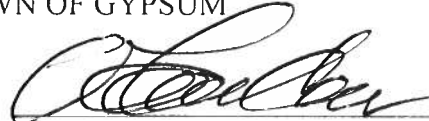
B. In addition to other remedies provided by this Chapter or by other law, any violation of this Chapter may be remedied by a civil action brought by the Town, including, for example, administrative or judicial nuisance abatement proceedings, civil or criminal code enforcement proceedings, and suits for injunctive relief.

4. Severability. If any portion of this Ordinance, or the International Codes amended hereby, is found to be void or ineffective, it shall be deemed severed from this Ordinance and the remaining provisions shall remain valid and in full force and effect.

INTRODUCED, READ AND ORDERED PUBLISHED BY THE TOWN COUNCIL OF THE TOWN OF GYPSUM, COLORADO, UPON A MOTION DULY MADE, SECONDED AND PASSED AT ITS REGULAR MEETING HELD AT THE TOWN OF GYPSUM ON THE 8TH DAY OF OCTOBER, 2019.

TOWN OF GYPSUM

By:



Stephen M. Carver, Mayor

Attest:


Danette Schlegel, Town Clerk

INTRODUCED ON SECOND READING, READ, CONSIDERED AT A PUBLIC HEARING AND FINALLY ADOPTED, PASSED AND APPROVED WITH AMENDMENTS, IF ANY, AND ORDERED POSTED AND PUBLISHED, BY THE TOWN COUNCIL OF THE TOWN OF GYPSUM, COLORADO, UPON A MOTION DULY MADE AND PASSED AT ITS MEETING HELD ON THE 22ND DAY OF OCTOBER, 2019, BY A VOTE OF 5 IN FAVOR AND 0 AGAINST.

TOWN OF GYPSUM.

By: _____


Stephen M. Carver, Mayor

Attest:


Danette Schlegel, Town Clerk

(S E A L)