

ORDINANCE NO. 2018-

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF SANTA CRUZ AMENDING CHAPTERS 6.06 "TOBACCO MERCHANDISING REGULATION" AND 6.07 "TOBACCO RETAILER LICENSES" OF THE CITY OF SANTA CRUZ MUNICIPAL CODE TO RESTRICT THE SALE OF FLAVORED TOBACCO PRODUCTS

THE CITY COUNCIL OF THE CITY OF SANTA CRUZ does hereby find, determine and declare as follows:

WHEREAS, tobacco use remains the leading cause of preventable death in the United States, killing more than 480, 000 people each year. It causes or contributes to many forms of cancer, as well as heart disease and respiratory diseases, among other health disorders. Tobacco use remains a public health crisis of the first order, in terms of the human suffering and loss of life it causes. the financial costs it imposes on society, and the burdens it places on our health care system; and

WHEREAS, flavored tobacco products are commonly sold by California tobacco retailers. For example: 97.4% of stores that sell cigarettes sell menthol cigarettes; 94.5% of stores that sell little cigars sell them in flavored varieties; 84.2% of stores that sell electronic smoking devices sell flavored varieties; and 83.8% of stores that sell chew or snus sell flavored varieties;

WHEREAS, each day, approximately 2,500 children in the United States try their first cigarette; and another 8,400 children under 18 years of age become new regular, daily smokers. 81% of youth who have ever used a tobacco product report that the first tobacco product they used was flavored. Flavored tobacco products promote youth initiation of tobacco use and help young occasional smokers to become daily smokers by reducing or masking the natural harshness and taste of tobacco smoke and thereby increasing the appeal of tobacco products. As tobacco companies well know, menthol, in particular, cools and numbs the throat to reduce throat irritation and make the smoke feel smoother, making menthol cigarettes an appealing option for youth who are initiating tobacco use. Tobacco companies have used flavorings such as mint and wintergreen in smokeless tobacco products as part of a "graduation strategy" to encourage new users to start with tobacco products with lower levels of nicotine and progress to products with higher levels of nicotine. It is therefore unsurprising that young people are much more likely to use menthol-, candy- and fruit-flavored tobacco products, including not just cigarettes but also cigars, cigarillos, and hookah tobacco, than adults. Data from the National Youth Tobacco Survey indicate that more than two-fifths of U.S. middle school and high school smokers report using flavored little cigars or flavored cigarettes. Further, the Centers for Disease Control and Prevention has reported a more than 800% increase in electronic cigarette use among middle school and high school students between 2011 and 2015. Nicotine solutions, which are consumed via electronic smoking devices such as electronic cigarettes, are sold in thousands of flavors that appeal to youth, such as cotton candy and bubble gum; and

WHEREAS, much as young people disproportionately use flavored tobacco products including menthol cigarettes, the same can be said of certain minority groups. In one survey, the percentage of people who smoke cigarettes that reported smoking menthol cigarettes in the prior month included, most dramatically, 82.6% of Blacks or African-Americans who smoke cigarettes.

The statistics for other groups were: 53.2% of Native Hawaiians or other Pacific Islanders who smoke cigarettes; 36.9% of individuals with multiracial backgrounds who smoke cigarettes; 32.3% of Hispanics or Latinos who smoke cigarettes; 31.2% of Asians who smoke cigarettes; 24.8% of American Indians or Alaska Natives who smoke cigarettes; and 23.8% of Whites or Caucasians who smoke cigarettes. People who identify as LGBT and young adults with mental health conditions also struggle with disproportionately high rates of menthol cigarette use. The disproportionate use of menthol cigarettes among targeted groups, especially the extremely high use among African-Americans, is troubling because of the long-term adverse health impacts on those groups; and

WHEREAS, between 2004 and 2014, overall smoking prevalence decreased, but use of menthol cigarettes increased among both young adults (ages 18-25) and other adults (ages 26+). These statistics are consistent with the finding that smoking menthol cigarettes reduces the likelihood of successfully quitting smoking. Scientific modeling has projected that a national ban on menthol cigarettes could save between 300,000 and 600,000 lives by 2050.

NOW, THEREFORE, BE IT ORDAINED by the City Council of the City of Santa Cruz as follows:

SECTION 1. Chapter 6.06 “Tobacco Merchandising Regulation” of Title 6 “Health and Sanitation” of the City of Santa Cruz Municipal Code is hereby amended to read as follows:

#### **“Chapter 6.06**

### **TOBACCO MERCHANDISING REGULATION**

#### **6.06.010 PURPOSE.**

The purpose of this chapter is to promote the welfare of youth by discouraging the commercial exploitation of potential underage tobacco users and by discouraging actions that promote the unlawful sale of tobacco products to youth as well as the unlawful purchase or possession of tobacco products by youth, the sale and/or distribution of e-cigarettes to youth and the possession of e-cigarettes by youth.

#### **6.06.020 DEFINITIONS.**

A. “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, e-cigarette, or tobacco paraphernalia, or any byproduct produced by the tobacco product, e-cigarette, or tobacco paraphernalia, including, but not limited to, tastes or aromas relating to menthol, mint, wintergreen, fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb, or spice; provided, however, that a tobacco product, e-cigarette, or tobacco paraphernalia shall not be determined to have a characterizing flavor solely because of the use of additives or flavorings or the provision of ingredient information.

B. “E-cigarette” means any electronically or battery-operated device, often shaped like a cigarette, containing a nicotine-based liquid, sometimes flavored, that is vaporized and inhaled, and which is used to simulate the experience of smoking tobacco or other combustible substances.

C. “Flavored tobacco product” means any tobacco product, e-cigarette, or tobacco paraphernalia that imparts a characterizing flavor.

D. "Labeling" means written, printed, or graphic matter upon any tobacco product, e-cigarette, or tobacco paraphernalia, or any of its packaging, or accompanying such tobacco product, e-cigarette, or tobacco paraphernalia.

E. "Manufacturer" means any person, including any repacker or relabeler, who manufactures, fabricates, assembles, processes, or labels a tobacco product, e-cigarette, or tobacco paraphernalia; or imports a finished tobacco product, e-cigarette, or tobacco paraphernalia for sale or distribution into the United States.

F. "Packaging" means a pack, box, carton, or container of any kind or, if no other container, any wrapping (including cellophane) in which a tobacco product, e-cigarette, or tobacco paraphernalia is sold or offered for sale to a consumer.

G. "Person" means any individual, firm, partnership, cooperative association, private corporation, personal representative, receiver, trustee, assignee, or other legal entity.

H. "Retail tobacco store" means a retail store where at least fifty percent of the annual gross receipts are from the sale of tobacco products and smoking accessories and in which the sale of other products is merely incidental, and meets all of the following requirements:

1. Does not permit any person under 21 years of age to be present or enter the premises at any time, unless accompanied by the person's parent or legal guardian, as defined in Section 6903 of the Family Code; and

2. Does not sell alcoholic beverages or food for consumption on the premises.

I. "Self-service display" means an open display of tobacco products which is accessible without the intervention of a vendor, including, but not limited to, a rack, shelf, or counter-top display.

J. "School" means a building or group of buildings and associated grounds used for educational and/or classroom purposes operated by the Santa Cruz City School District (SCCSD) and/or other public or private educational institutions offering a general course of study at primary, secondary or high school levels (grades K through 12) which is equivalent to the courses of study at such levels offered by the SCCSD, as specified by City Council Resolution from time to time. Pre-school, vocational or trade programs shall be considered schools only when incidental to the primary use as a school as defined herein. Excluded from this definition are buildings operated by public or private education institutions in which the total student enrollment is less than 25 students and private residences at which students participate in home-based or independent study programs.

K. "Tobacco product" means:

1. Any product containing, made, or derived from tobacco or nicotine that is intended for human consumption, whether smoked, 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; and

2. Any electronic device that delivers nicotine or other substances to the person inhaling from the device, including, but not limited to, an electronic cigarette, electronic cigar, electronic pipe, or electronic hookah.

3. Notwithstanding any provision of subsections (1) and (2) to the contrary, “tobacco product” includes any component, part, or accessory intended or reasonably expected to be used with a tobacco product, whether or not sold separately. “Tobacco product” does not include drugs, devices, or combination products authorized for sale by the United States Food and Drug Administration, as those terms are defined in the Federal Food, Drug and Cosmetic Act.

L. “Vendor-assisted sale” means a purchase requiring a direct, face-to-face exchange between the vendor and the customer, in which the vendor does not transfer possession of the product to the customer until the purchase is completed.

M. “Youth” means any person or persons under 21 years of age.

#### **6.06.030 RESTRICTIONS ON TOBACCO MERCHANDISING.**

A. It shall be unlawful to sell, permit to be sold, or offer for sale any tobacco or e-cigarette product by means of self-service merchandising or by any means other than a vendor-assisted sale. This prohibition shall not apply to a retail tobacco store, or a vending machine authorized by Chapter 6.05 of this code.

B. It shall be unlawful to sell or otherwise distribute e-cigarettes to youth.

C. It shall be unlawful for youth to possess or smoke/inhale e-cigarettes.

D. Except in accordance with Subsection E, below, effective on \_\_\_\_\_, 201\_, it shall be a violation of this chapter for any tobacco retailer or any of the tobacco retailer’s agents or employees to sell or offer for sale, or to possess with intent to sell or offer for sale, any flavored tobacco product.

1. There shall be a rebuttable presumption that a tobacco retailer in possession of four or more flavored tobacco products, including but not limited to individual flavored tobacco products, packages of flavored tobacco products, or any combination thereof, possesses such flavored tobacco products with intent to sell or offer for sale.

2. There shall be a rebuttable presumption that a tobacco product is a flavored tobacco product if a tobacco retailer, manufacturer, or any employee or agent of a tobacco retailer or manufacturer has:

a. made a public statement or claim that the tobacco product imparts a characterizing flavor;

b. used text and/or images on the tobacco product’s labeling or packaging to explicitly or implicitly indicate that the tobacco product imparts a characterizing flavor; or

- c. taken action directed to consumers that would be reasonably expected to cause consumers to believe the tobacco product imparts a characterizing flavor.

E. A retail tobacco store, as defined in Subsection H of Section 6.06.020, operating as of January 1, 2018, is exempt from Subsection D for a period of one year from the date set forth in Subsection D, above, provided that all of the following requirements are met:

1. Within sixty (60) days of the effective date of this ordinance, the Tobacco Retailer submits to the City Manager written notice that it seeks temporary exemption from subsection (D) and documentation that demonstrates:

- a. the Tobacco Retailer was lawfully operating as of the date this ordinance was adopted;
- b. fifty percent (50%) or more of gross sales receipts are derived from Tobacco Products, Tobacco Paraphernalia, or both, or fifty percent (50%) or more of completed sales transactions include Tobacco Products, Tobacco Paraphernalia, or both; and
- c. The submission shall include all information and documentation the City Manager may request to determine the Tobacco Retailer's qualifications for this exemption; and

2. The City Manager determines the Tobacco Retailer meets the qualifications set forth in Subsection E.1; and

3. The Retail Tobacco Store submits all information and documentation requested by the City Manager to determine continued qualification for this exemption. This exemption to subsection E shall not apply if the City Manager determines that the Tobacco Retailer no longer meets the qualifications set forth in subsection E.1.

4. The City Manager shall offer the Tobacco Retailer an opportunity for an oral or paper hearing and render a written decision on the record of that hearing. That decision shall be final as to the City and subject to judicial review pursuant to Code of Civil Procedure section 1094.5.

#### **6.06.040 ENFORCEMENT – PENALTIES – CIVIL ACTIONS.**

A. Causing, permitting, aiding, abetting, or concealing a violation of any provision of the ordinance codified in this chapter shall constitute a violation. After notification, it shall be a separate offense for each day such violation shall continue.

B. Violations of this chapter shall be prosecuted as infractions and shall not be punishable by imprisonment. Every violation determined to be an infraction is punishable by:

- 1. A fine not exceeding one hundred dollars for a first violation;

2. A fine not exceeding two hundred dollars for a second violation of the same provision within one year;

3. A fine not exceeding five hundred dollars for a third and each additional violation of the same provision within one year.

C. The ordinance codified in this chapter may be administered and enforced by city staff in accordance with Title 4 of this code.

D. Violations of this chapter are hereby declared to be public nuisances.

E. In addition to other remedies provided by this chapter, any violation of this chapter may be enforced by a civil action brought by the city attorney, including but not limited to administrative or judicial nuisance abatement proceedings, civil enforcement proceedings, and suits for injunctive relief. The remedies provided by this chapter are cumulative and in addition to any other remedies available at law or in equity.”

**SECTION 2.** Chapter 6.07 “Tobacco Retailer Licenses” of Title 6 “Health and Sanitation” of the City of Santa Cruz Municipal Code is hereby amended at Sections 6.07.010 “Definitions,” 6.07.020 “Tobacco Retailer Licenses – Violations” and 6.07.090 “Suspension or Revocation of License by Chief of Police” to read as follows:

**“6.07.010 DEFINITIONS.**

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

(a) “Chief of police” shall refer to the city of Santa Cruz chief of police or the person designated by the chief of police.

(b) “Drug paraphernalia” shall have the definitions set forth in California Health and Safety Code Section 11014.5, as that section may be amended from time to time.

(c) “E-cigarette” means any electronically or battery-operated device, often shaped like a cigarette, containing a nicotine-based liquid, sometimes flavored, that is vaporized and inhaled, and which is used to simulate the experience of smoking tobacco or other combustible substances.

(d) “Person” shall mean any natural person, partnership, cooperative association, corporation, personal representative, receiver, trustee, assignee, or any other legal entity.

(e) “Proprietor” shall mean 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 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.

(f) “Tobacco paraphernalia” shall mean cigarette papers or wrappers, pipes, holders of smoking materials of all types, cigarette rolling machines, and any other item designed for the smoking, preparation, storing, or consumption of tobacco products.

(g) “Tobacco product” shall mean as set forth in Section 6.06.020.

(h) “Tobacco retailer” shall mean any person or business which sells, offers for sale, or does or offers to exchange for any form of consideration, tobacco, tobacco products, tobacco paraphernalia or e-cigarettes, or who distributes free or low-cost samples of tobacco products, tobacco paraphernalia or e-cigarettes. “Tobacco retailing” shall mean the doing of any of these things. This definition is without regard to the quantity of tobacco, tobacco products, tobacco paraphernalia or e-cigarettes sold, offered for sale, exchanged, or offered for exchange.

#### **6.07.020 TOBACCO RETAILER LICENSE – VIOLATIONS.**

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(a) It shall be unlawful for any person to act as a tobacco retailer, or to display or advertise the sale of tobacco products, tobacco paraphernalia or e-cigarettes, without obtaining and maintaining a valid tobacco retailer’s license pursuant to this chapter for each location at which that activity is to occur.

(b) Tobacco retailing by persons on foot or from vehicles is prohibited.

(c) Each tobacco retailer license shall be prominently displayed in a publicly visible location at the licensed location.

(d) In the course of tobacco retailing or in the operation of a business or maintenance of a location for which a tobacco retailer’s license has been issued, it shall be a violation of this chapter for a licensee, or any of the licensee’s agents or employees, to violate any local, state or federal law applicable to tobacco products, tobacco paraphernalia, tobacco retailing, narcotics or e-cigarettes.

(e) Tobacco retailing in violation of Section 6.06.030 is prohibited.

#### **6.07.090 SUSPENSION OR REVOCATION OF LICENSE BY CHIEF OF POLICE.**

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(a) In addition to any other remedy authorized by law, a tobacco retailer’s license may be suspended and eventually revoked if the chief of police finds pursuant to this chapter 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 designated in Section 6.07.020, or Section 6.06.030. During any period of license suspension, the retailer must remove all tobacco products from public view.

(b) Time Period of Suspension of License.

(1) Upon the first time that the chief of police makes a finding as set forth in subsection (a), the tobacco retailer’s license shall be suspended for up to sixty days.

(2) Upon the second time that the chief of police makes a finding as set forth in subsection (a) within sixty months of the first determination, the tobacco retailer’s license shall be suspended for one hundred twenty days.

(3) Upon the third time that the chief of police makes a finding as set forth in subsection (a) within sixty months of the prior determination, the tobacco retailer's license shall be suspended for one hundred eighty days.

(4) Upon the fourth and each subsequent time that the chief of police makes a finding as set forth in subsection (a) within sixty months of the prior determination, the tobacco retailer's license shall be revoked, and no new license may be issued for the location until five years have passed from the date of revocation.

(c) **Revocation of License Issued in Error.** A tobacco retailer's license shall be revoked if the chief of police finds, after written notice and opportunity to be heard, that one or more of the bases for denial of a license under Section 6.07.050 existed at the time the application was made or at any time before the license was issued. The decision by the chief of police shall be final. The revocation shall be without prejudice to the filing of a new application for license."

**SECTION 3. NO CONFLICT WITH FEDERAL OR STATE LAW.** Nothing in this Ordinance shall be interpreted or applied so as to create any requirement, power, or duty that is preempted by federal or state law.

**SECTION 4. SEVERABILITY.** If any section, subsection, subdivision, paragraph, sentence, clause, or phrase of this Ordinance, or its application to any person or circumstance, is for any reason held to be invalid or unenforceable, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining sections, subsections, subdivisions, paragraphs, sentences, clauses, or phrases of this Ordinance, or its application to any other person or circumstance. The City Council of the City of Santa Cruz hereby declares that it would have adopted each section, subsection, subdivision, paragraph, sentence, clause, or phrase hereof, irrespective of the fact that any one or more other sections, subsections, subdivisions, paragraphs, sentences, clauses, or phrases hereof be declared invalid or unenforceable.

**SECTION 5. EFFECTIVE DATE.** This ordinance shall take effect and be in force thirty (30) days after final adoption.

PASSED FOR PUBLICATION this 13<sup>th</sup> day of November, 2018, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

APPROVED: \_\_\_\_\_  
Mayor

ATTEST: \_\_\_\_\_  
City Clerk Administrator



PASSED FOR FINAL ADOPTION this \_\_\_ day of \_\_\_\_\_, 2018, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

APPROVED: \_\_\_\_\_  
Mayor

ATTEST: \_\_\_\_\_  
City Clerk Administrator

This is to certify that the above  
and foregoing document is the  
original of Ordinance No. 2018-  
and that it has been published or  
posted in accordance with the  
Charter of the City of Santa Cruz.

\_\_\_\_\_  
City Clerk