

ORDINANCE NO. NS- 300.903

**AN ORDINANCE OF THE BOARD OF SUPERVISORS
OF THE COUNTY OF SANTA CLARA
AMENDING CHAPTER XXIII OF DIVISION A18 OF THE SANTA CLARA
COUNTY ORDINANCE CODE RELATING TO PERMITS FOR RETAILERS
OF TOBACCO PRODUCTS AND ELECTRONIC SMOKING DEVICES**

Summary

This Ordinance revises the definition of "tobacco product" in Chapter XXIII of Division A18 of the Ordinance Code, amends the prohibition on sales of flavored tobacco products, and revises the method for measuring tobacco retailer density.

**THE BOARD OF SUPERVISORS OF THE COUNTY OF SANTA CLARA
ORDAINS AS FOLLOWS:**

SECTION 1. Chapter XXIII of Division A18 of the Ordinance Code of the County of Santa Clara is hereby amended to be titled and to read as follows:

CHAPTER XXIII. - PERMITS FOR RETAILERS OF TOBACCO PRODUCTS

Sec. A18-367. - Intent.

This chapter is adopted to:

- (1) Ensure compliance with the business standards and practices of the County;
- (2) Encourage responsible retailing of tobacco products;
- (3) Discourage violations of laws related to tobacco products, especially those that prohibit or discourage the sale or distribution of tobacco products to persons under 21; and
- (4) Protect the public health and welfare.

This chapter does not expand or reduce the degree to which the acts regulated by federal or state law are criminally proscribed or alter the penalties provided by such laws.

Sec. A18-367. - Definitions.

For the purposes of this chapter, the following definitions shall apply:

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- (a) *Arm's length transaction* means a sale in good faith and for valuable consideration that reflects the fair market value in the open market between two or more informed and willing parties, 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.
- (b) *Department* means the County's Department of Environmental Health and any agency or person designated by the director of the Department of Environmental Health to enforce or administer the provisions of this chapter.
- (c) *Ownership* means possession of a ten-percent or greater interest in the stock, assets, or income of a business, other than a security interest for the repayment of debt.
- (d) *School* means a public or private elementary, middle, junior high or high school.
- (e) *Tobacco product* means (unless specifically noted elsewhere):
 - (1) Any product subject to Subchapter IX (21 U.S.C. § 387 et seq. ("Subchapter IX")) of the Federal Food, Drug, and Cosmetic Act. (See 21 U.S.C. § 387a(b) (products subject to Subchapter IX); 21 C.F.R. §§ 1100.1-1100.3 (tobacco products subject to Subchapter IX).) Products subject to Subchapter IX include, but are not limited to, cigarettes, cigarette tobacco, roll-your-own tobacco, smokeless tobacco, cigars, pipe tobacco, waterpipe tobacco, and electronic nicotine delivery systems (such as, but not limited to, electronic cigarettes, electronic cigars, electronic hookahs, vape pens, personal vaporizers, and electronic pipes). Products subject to Subchapter IX also include components or parts of tobacco products, such as, but not limited to, liquids that are for use in an electronic nicotine delivery system and that contain tobacco or nicotine or are derived from tobacco or nicotine ("e-liquids"), vials that contain e-liquids, and atomizers. Products that are not subject to Subchapter IX include accessories of tobacco products, such as, but not limited to, ashtrays, spittoons, and conventional matches and lighters that solely provide an external heat source to initiate but not maintain combustion of a tobacco product.
 - (2) Any product for use in an electronic nicotine delivery system, whether or not it contains tobacco or nicotine or is derived from tobacco or nicotine.
- (f) *Retailer* means any person who sells, exchanges, or offers to sell or exchange tobacco products for any form of consideration. "Retailing" shall mean the doing of any of these things. This definition is without regard to the quantity of tobacco products sold, exchanged, or offered for sale or exchange.

Sec. A18-369. - Requirements and prohibitions.

- (a) *Permit required.* It shall be unlawful for any person to act as a retailer of tobacco products in an unincorporated area of the County without first obtaining and maintaining a valid retailer permit pursuant to this chapter for each location at which that activity is to occur.
- (b) *Lawful business operation.* It shall be a violation of this chapter for any retailer to violate any local, state, or federal law applicable to tobacco products or the retailing of such products.
- (c) *Display of permit.* Each retailer permit shall be prominently displayed in a publicly visible place at the permitted location.
- (d) *Notice of minimum age for purchase of tobacco products.* Retailers shall post conspicuously, at each point of purchase, a notice stating that selling tobacco products to anyone under 21 years of age is illegal and subject to penalties. Such notice shall be subject to the approval of the Public Health Department.
- (e) *Positive identification required.* No retailer shall sell or transfer a tobacco product to another person who appears to be under 30 years of age without first examining the customer's identification to confirm that the customer is at least the minimum age required under state law to purchase and possess the tobacco product.
- (f) *Minimum age for persons selling tobacco products.* No person who is younger than the minimum age established by state law for the purchase or possession of tobacco products shall engage in retailing.
- (g) *False and misleading advertising prohibited.* A retailer either without a valid retailer permit or with a suspended retailer permit:
 - (1) Shall keep all tobacco products out of public view.
 - (2) Shall not display any advertisement relating to tobacco products that promotes the sale or distribution of such products from the retailer's location or that could lead a reasonable consumer to believe that tobacco products can be obtained at that location.
- (h) *Limitation on storefront advertising.* No more than 15 percent of the square footage of the windows and clear doors of an establishment used for retailing shall bear advertising or signs of any sort, and all advertising and signage shall be placed and maintained in a manner that ensures that law enforcement personnel have a clear and unobstructed view of the interior of the premises, including the area in which the cash registers are maintained, from the exterior public sidewalk or entrance to the premises. However, this latter requirement shall not apply to an establishment where there are no windows, or where existing windows are located at a height that precludes a view of the interior of the premises by a person standing outside the premises.
- (i) *Flavored tobacco products.*
 - (1) Except as permitted in paragraph (3) of this subsection (i), no retailer shall sell a tobacco product containing, as a constituent or additive, an artificial

or natural flavor or aroma (other than tobacco) or an herb or spice, including strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, or coffee, that is a characterizing flavor or aroma of the tobacco product, smoke or vapor produced by the tobacco product.

- (2) A tobacco product shall be subject to a rebuttable presumption that the product is prohibited by paragraph (1) of this subsection if:
 - (i) The product's manufacturer or any other person associated with the manufacture or sale of tobacco products makes or disseminates public statements or claims to the effect that the product has or produces a characterizing flavor or aroma, other than tobacco; or
 - (ii) The product's label, labeling, or packaging includes a statement or claim—including any text and/or images used to communicate information—that the product has or produces a characterizing flavor or aroma, other than tobacco.
- (3) Paragraph (1) of this subsection (i) shall not apply to any retailer that meets all of the following criteria:
 - (i) Primarily sells tobacco products;
 - (ii) Generates more than 60 percent of its gross revenues annually from the sale of tobacco products;
 - (iii) 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;
 - (iv) Does not sell alcoholic beverages or food for consumption on the premises; and
 - (v) Posts a sign outside the retail location that clearly, sufficiently, and conspicuously informs the public that persons under 21 years of age are prohibited from entering the premises.
- (j) *Vending machines prohibited.* No tobacco product shall be sold, offered for sale, or distributed to the public from a vending machine or appliance, or any other coin or token operated mechanical device designed or used for vending purposes, including, but not limited to, machines or devices that use remote control locking mechanisms.
- (k) *Prohibition on sale or distribution of tobacco products to individuals under 21.* No retailer shall sell, offer for sale, or distribute any tobacco product to any individual who is under 21 years of age.

Sec. A18-370. - Eligibility requirements for a permit.

- (a) No retailer permit may be issued to authorize retailing at other than a fixed location. For example, retailing by persons on foot or from vehicles is prohibited.
- (b) No retailer permit may be issued to authorize retailing at a temporary or recurring temporary event. For example, retailing at flea markets and farmers' markets is prohibited.
- (c) No retailer permit may be issued to authorize retailing at any location where the profession of pharmacy is practiced by a pharmacist licensed by the State of California in accordance with the Business and Professions Code and where prescription drugs are offered for sale.
- (d) No retailer permit may be issued to authorize retailing at any location within 1,000 feet of a school, as measured by a straight line between any point along the property line of any parcel on which a school is located and any point along the perimeter of the applicant's proposed business location; provided, however, that the prohibition contained in this subsection (d) shall not apply to the following:
 - (1) Any retailer of tobacco products (as such term was defined in this chapter of the Ordinance Code on January 22, 2011) operating lawfully on January 21, 2011;
 - (2) Any retailer of electronic smoking devices (as such term was defined in this chapter of the Ordinance Code on August 23, 2014) operating lawfully on August 22, 2014; and
 - (3) Any lawfully operating retailer of tobacco products that would otherwise become ineligible to receive or renew a retailer permit due to the creation or relocation of a school.
- (e) No retailer permit may be issued to authorize retailing at a location which is within 500 feet of a location occupied by another retailer, as measured by a straight line between any point along the perimeter of an existing retailer's business location and any point along the perimeter of the applicant's proposed business location; provided, however, that the prohibition contained in this subsection (e) shall not apply to:
 - (1) Any retailer of tobacco products (as such term was defined in this chapter of the Ordinance Code on January 22, 2011) operating lawfully on January 21, 2011; and
 - (2) Any retailer of electronic smoking devices (as such term was defined in this chapter of the Ordinance Code on August 23, 2014) operating lawfully on August 22, 2014.
- (f) Any exemption granted to a retailer pursuant to this section shall cease to apply upon the earlier of the following to occur:
 - (1) The retailer fails to timely renew the retailer permit pursuant to Section A18-373(b) of this chapter.
 - (2) A new person obtains ownership in the business.

Sec. A18-371. - Application procedure.

- (a) It is the responsibility of each retailer to be informed of all laws applicable to retailing, including those laws affecting the issuance of a retailer permit. No retailer may rely on the issuance of a retailer permit as a determination by the County that the retailer has complied with all laws applicable to retailing. A retailer permit issued contrary to this chapter, contrary to any other law, or on the basis of false or misleading information supplied by a retailer shall be revoked pursuant to Section A18-372 of this chapter.
- (b) All retailer permit applications shall be submitted on a form supplied by the Department.
- (c) A permitted retailer shall inform the Department in writing of any change in the information submitted on an application for a retailer permit within 14 calendar days of a change.
- (d) All information specified in an application pursuant to this section shall be subject to disclosure under the California Public Records Act (Government Code Section 6250 et seq.) or any other applicable law, subject to the laws' exemptions.

Sec. A18-372. - Issuance of permit.

- (a) Upon the receipt of a complete application for a retailer permit, the application fee, and the annual permit fee, the department shall issue a retailer permit unless substantial evidence demonstrates that one or more of the following bases for denial exists:
 - (1) The information presented in the application is inaccurate or false.
 - (2) The application seeks authorization for retailing at a location for which this chapter prohibits issuance of a retailer permit.
 - (3) The application seeks authorization for retailing by a person to whom this chapter prohibits issuance of a retailer permit.
 - (4) The application seeks authorization for retailing that is prohibited pursuant to this chapter (e.g., mobile vending) or that is unlawful pursuant to any other law.
- (b) A retailer permit shall be revoked if the Department finds that one or more of the bases for denial of a retailer permit under this section existed at the time application was made or at any time before the retailer permit issued. Such a revocation shall be without prejudice to the filing of a new permit application.
- (c) A decision to deny issuance of a retailer permit or to revoke a retailer permit that has been wrongly issued may be appealed pursuant to Section A18-381 of this chapter.

Sec. A18-373. - Permit term, renewal, and expiration.

- (a) *Term of permit.* The term of a retailer permit is one year. A retailer permit is invalid upon expiration.
- (b) *Renewal of permit.* The Department shall renew a valid retailer permit upon timely payment of the annual permit fee. The Department may, in its discretion, agree to renew any expired retailer permit within the three-month period following expiration if the retailer pays the annual permit fee and applicable late charges. For every calendar month, or fraction thereof, that a retailer fails to renew an expired retailer permit, a late charge equal to 20 percent of the annual permit fee shall be assessed. A retailer permit renewed within three calendar months of expiration shall be treated as if timely renewed.
- (c) *Issuance of permit after revocation or expiration of permit.* To apply for a new retailer permit more than three calendar months after expiration of a retailer permit or following revocation of a retailer permit that was wrongly issued, a retailer must submit a complete application for a retailer permit, along with the application fee and annual permit fee. The Department shall issue a retailer permit pursuant to the requirements of Section A18-372 of this chapter.

Sec. A18-374. - Permits nontransferable.

- (a) A retailer permit may not be transferred from one person to another or from one location to another. Whenever a new person obtains ownership in a business for which a retailer permit has been issued, a new retailer permit shall be required, but any exemption granted pursuant to Section A18-370 of this chapter shall cease to apply.
- (b) Notwithstanding any other provision of this chapter, prior violations of this chapter at a location shall continue to be counted against a location and permit ineligibility and suspension periods shall continue to apply to a location unless:
 - (1) One hundred percent of the interest in the stock, assets, or income of the business, other than a security interest for the repayment of debt, has been transferred to one or more new owners; and
 - (2) The County is provided with clear and convincing evidence, including an affidavit, that the business has been acquired in an arm's length transaction.

Sec. A18-375. - Permit conveys a limited, conditional privilege.

Nothing in this chapter shall be construed to grant any person obtaining and maintaining a retailer permit any status or right other than the limited, conditional privilege to act as a retailer at the location in the County identified on the face of the permit.

Sec. A18-376. - Fees.

The Department shall not issue or renew a retailer permit prior to full payment of any applicable fees. The Board of Supervisors shall, from time to time, establish by resolution the fees to issue or to renew a retailer permit. The fees 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 earned from such fees shall be used exclusively to fund administration and enforcement of this chapter.

Sec. A18-377. - Compliance monitoring.

- (a) Compliance with this chapter shall be monitored by the Department. In addition, any peace officer may enforce the penal provisions of this chapter. The County Executive may designate any number of additional persons to monitor and facilitate compliance with this chapter.
- (b) The Department or other person designated to enforce the provisions of this chapter shall check each retailer at least once per 12-month period to determine if the retailer is complying with all laws applicable to retailing, other than those laws regulating underage access to tobacco products. Nothing in this paragraph shall create a right of action in any retailer or other person against the County or its agents.

Sec. A18-378. - Prevention of underage sales.

- (a) The Public Health Department or other persons designated to enforce the provisions of this chapter shall, in conjunction with the Sheriff's Office, check each retailer at least twice per 12-month period to determine whether the retailer is conducting business in a manner that complies with laws regulating youth access to tobacco products. Nothing in this paragraph shall create a right of action in any retailer or other person against the County or its agents.
- (b) The County shall not enforce any law establishing a minimum age for tobacco product purchases against a person who otherwise might be in violation of such law because of the person's age ("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 County;
 - (2) The Youth Decoy is acting as an agent of a person designated by the County 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 County or the California Department of Public Health.

Sec. A18-379. - Penalties for a violation by a retailer with a permit.

- (a) *Administrative fine.* In addition to any other penalty authorized by law, an administrative fine shall be imposed and a retailer permit shall be suspended if any court of competent jurisdiction determines, or the Department finds based on a preponderance of the evidence, after the retailer is afforded notice and an opportunity to be heard, that the retailer, or any of the retailer's agents or employees, has violated any of the requirements, conditions, or prohibitions of this chapter, has pled guilty, "no contest" or its equivalent to such a violation, or has admitted to a such a violation.
- (b) *Amount of fine.* Each such violation shall be subject to an administrative fine as follows:
- (1) A fine not to exceed \$100.00 for a first violation within a 12-month period;
 - (2) A fine not to exceed \$200.00 for a second violation within a 12-month period; and
 - (3) A fine not to exceed \$500.00 for each additional violation within a 12-month period.
- (c) *Time period for permit suspension.*
- (1) For a first violation of this chapter at a location within any 24-month period, the retailer permit shall be suspended for up to 30 calendar days.
 - (2) For a second violation of this chapter at a location within any 24-month period, the retailer permit shall be suspended for up to 90 calendar days.
 - (3) For each additional violation of this chapter at a location within any 24-month period, the retailer permit shall be suspended for up to one year.
- (d) *Waiver of penalties for first violation.* The Department may waive any penalties for a retailer's first violation of any requirement, condition or prohibition of this chapter, other than a violation of a law regulating youth access to tobacco products, if the retailer admits the violation in writing and agrees to forego a hearing on the allegations. Regardless of the Department's waiver of penalties for a first violation, the violation will be considered in determining the penalties for any future violation.
- (e) *Corrections period.* The Department shall have discretion to allow a retailer a period of time to correct any violation of any requirement, condition or prohibition of this chapter, other than a violation of a law regulating youth access to tobacco products. If a retailer's violation is corrected within the time allowed for correction, no penalty shall be imposed under this section.

- (f) *Appeals.* Any penalties imposed under this section may be appealed pursuant to Section A18-381 of this chapter.

Sec. A18-380. - Penalties for retailing without a permit.

- (a) *Administrative fine.* In addition to any other penalty authorized by law, an administrative fine and an ineligibility period for application or issuance of a retailer permit shall be imposed 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 retailing at a location without a valid retailer permit, either directly or through the person's agents or employees, has pled guilty, "no contest" or its equivalent to such a violation, or has admitted to such a violation.
- (b) *Amount of fine.* Each such violation shall be subject to an administrative fine as follows:
- (1) A fine not to exceed \$100.00 for a first violation within a 12-month period;
 - (2) A fine not to exceed \$200.00 for a second violation within a 12-month period; and
 - (3) A fine not to exceed \$500.00 for each additional violation within a 12-month period.
- (c) *Time period for permit ineligibility.*
- (1) For a first violation of this section at a location within any 24-month period, no new retailer 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 calendar days have passed from the date of the violation.
 - (2) For a second violation of this section at a location within any 24-month period, no new retailer 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 calendar days have passed from the date of the violation.
 - (3) For each additional violation of this section at a location within any 24-month period, no new retailer 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 one year has passed from the date of the violation.
- (d) *Waiver of penalties for first violation.* The Department may waive any penalties for a retailer's first violation of this section, unless the violation also involves a violation of a law regulating youth access to tobacco products, if the retailer admits the violation in writing and agrees to forego a hearing on the allegations.

Regardless of the Department's waiver of penalties for a first violation, the violation will be considered in determining the penalties for any future violation.

- (e) *Appeals.* Any penalties imposed under this section may be appealed pursuant to Section A18-381 of this chapter.

Sec. A18-381. - Appeals.

- (a) A decision to deny issuance of a retailer permit, to revoke a retailer permit that has been wrongly issued, or to impose penalties for a violation of this chapter can be appealed to a hearing officer, subject to the following requirements and procedures. The hearing officer shall be the director of the Department, his or her designee, or another individual selected by the County.
- (b) All appeals must be in writing, state the grounds asserted for relief and the relief sought, and be filed with the director of the Department or his or her designee within ten calendar days of receipt of notice of the appealed action. If such an appeal is made, it shall stay enforcement of the appealed action.
- (c) No later than 15 calendar days after receipt of the appeal, the hearing officer shall set an appeal hearing at the earliest practicable time and shall give notice of the hearing to the parties at least ten calendar days before the date of the hearing.
- (d) Neither the provisions of the Administration Procedure Act (Government Code Section 11500 et seq.) nor the formal rules of evidence in civil or criminal judicial proceedings shall apply to such hearing. At the hearing, the hearing officer may admit any evidence, including witnesses, relevant to the determination of the matter, except as otherwise provided in Section A18-382(c) of this chapter. A record of the hearing shall be made by any means, including electronic recording, so long as a reasonably accurate and complete written transcription of the proceedings can be made.
- (e) The hearing officer may continue the hearing from time to time, in his or her sole discretion, to allow for orderly completion of the hearing.
- (f) After the conclusion of the hearing, the hearing officer shall issue a written decision, which shall be supported by substantial evidence. Notice of the written decision, including findings of facts, conclusions of law, and notification of the time period in which judicial review may be sought pursuant to Code of Civil Procedure Section 1094.6, shall be served upon all parties no later than 20 calendar days following the date on which the hearing closed. Any decision rendered by the hearing officer shall be a final administrative decision.

Sec. A18-382. - Enforcement.

- (a) Any violation of this chapter is hereby declared to be a public nuisance.

- (b) Causing, permitting, aiding, abetting, or concealing a violation of any provision of this chapter shall also constitute a violation of this chapter.
- (c) Whenever evidence of a violation of this chapter is obtained in any part through the participation of a person under the age of 21 years old, such a person shall not be required over his or her objection 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.
- (d) Violations of this chapter may be remedied by a civil action brought by the County, including, but not limited to, administrative or judicial nuisance abatement proceedings, civil code enforcement proceedings, and suits for injunctive relief. For the purposes of the civil remedies provided in this chapter, each day on which a tobacco product is offered for sale in violation of this chapter, and each individual retail tobacco product that is distributed, sold, or offered for sale in violation of this chapter, shall constitute a separate violation of this chapter.
- (e) Any person found guilty of violating any provision of this chapter shall be deemed guilty of an infraction, punishable as provided by California Government Code § 25132.
- (f) The remedies provided by this chapter are cumulative and in addition to any other remedies available at law or in equity.

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SECTION 2. This ordinance shall become operable on July 1, 2017.

PASSED AND ADOPTED by the Board of Supervisors of the County of Santa Clara, State of California, on OCT 18 2016, by the following vote:

AYES: **CHAVEZ, CORTESE, SIMITIAN, WASSERMAN, YEAGER**

NOES: **NONE**


ABSENT: **NONE**

ABSTAIN: **NONE**

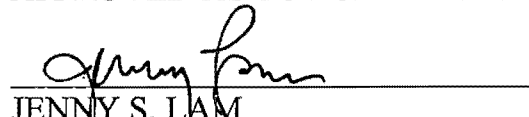


DAVE CORTESE, President
Board of Supervisors

ATTEST:


MEGAN DOYLE
Clerk of the Board of Supervisors

APPROVED AS TO FORM AND LEGALITY:


JENNY S. LAM
Deputy County Counsel

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