



STAFF REPORT

City Council

Meeting Date:

12/10/2019

Staff Report Number:

19-270-CC

Regular Business:

**First Reading and introduction of ordinance
No. 1064 banning sale of flavored tobacco and
e-cigarette devices**

Recommendation

Staff recommends the City Council waive first reading and introduce for adoption ordinance No. 1064 banning sale of flavored tobacco products and e-cigarette devices (Attachment A.)

Policy Issues

The state Legislature introduced but did not pass legislation banning flavored tobacco products and e-cigarettes this session. In the absence of a statewide ban, individual cities can determine the appropriate level of regulation for their community.

Background

Health impacts of smoking

Tobacco use remains the leading cause of preventable death in the United States. It causes and contributes to many forms of cancer, as well as heart and respiratory diseases among other health disorders. The financial cost of tobacco uses in San Mateo County alone amounted to over \$575 million in direct health care expense over the five year period from 2006-2010.

Flavored tobacco products are commonly sold by California tobacco retailers and promote youth initiation of tobacco use. The flavored products 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.

In December 2018, the surgeon general declared the use of e-cigarettes among youth an “epidemic.” According to data from the Centers for Disease Control and Prevention and the Food and Drug Administration’s national youth tobacco survey, the percentage of high school-age children reporting past 30-day use of e-cigarettes rose by more than 75 percent between 2017 and 2018. Use among middle school-age children also increased nearly 50 percent.

Menlo Park’s current smoking regulations

City and state laws currently regulate the sale and use of tobacco products in Menlo Park in several ways. California prohibits the sale of tobacco products to anyone under the age of 21, requires that retailers check photo IDs of purchasers, requires that online retailers obtain and verify photo IDs and requires that tobacco products be stored behind the counter or in lockboxes. In addition to these state rules, Menlo Park requires

brick and mortar retailers to obtain retail sales permits from the County¹ and prohibits smoking in most public places, businesses, restaurants, places of employment and multiunit residential building common areas.² Most recently, Menlo Park also banned cannabis smoking in designated locations and prohibited commercial cannabis operations in the City.³

Flavored tobacco bans

Data shows that youth use flavored tobacco products at a higher rate than other populations. In order to minimize the number of children who start to smoke and become addicted to tobacco, the U.S. Food and Drug Administration implemented a ban on flavored cigarettes in 2009, but it did not include a ban on menthol flavored cigarettes or other flavored tobacco products (such as JUUL pods.) As a result, many local jurisdictions have begun to take the lead in banning flavored tobacco products, including menthol cigarettes.

In June 2018, the City and County of San Francisco became the first local agency to prohibit the sale of e-cigarettes that have not undergone premarket review by federal regulators. The ordinance recently survived a referendum largely funded by JUUL, the largest e-cigarette manufacturer.

On June 19, 2018, the San Mateo Board of Supervisors passed an ordinance prohibiting the sale of flavored tobacco products and prohibiting pharmacies from selling any tobacco product. On November 19, 2019, the Board of Supervisors expanded that ban to e-cigarettes and other vaping devices. (Attachment B.) On November 19, 2019, the Santa Clara County Board of Supervisors adopted a flavored tobacco and e-cigarette ban ordinance. (Attachment C.)

Pending legislation and recent developments

Last session, the Senate introduced two bills that would ban the sale of flavored tobacco and related e-cigarette products statewide. This legislation however did not pass.

In addition, following the recent reporting of vaping deaths, the leading manufacturer of e-cigarettes, JUUL, announced it would be voluntarily suspended sale of their non-tobacco, non-menthol-based flavors (Mango, Creme, Fruit and Cucumber) in the United States, pending Food and Drug Administration review. JUUL is still, however, selling menthol (mint) flavor.

The federal government announced it was taking action to ban vaping devices, but recently has changed course.

Analysis

On November 5, 2019, the City Council conducted a study session on flavored tobacco and e-cigarette regulation. The City Council indicated it would be supportive of a local ban modeled after San Mateo County. In addition, the City Council requested the city attorney to return with further modifications including:

- Prohibiting vaping in areas where smoking is currently prohibited.
- Expanding ban to menthol and mint-flavored tobacco products
- Prohibiting pharmacies from selling tobacco products and e-cigarettes.

In accordance with the feedback received at the study session, the attached ordinance (Attachment A) uses

¹ See Menlo Park Municipal Code Chapter 5.26. The County Health Department administers this provision of the Code.

² See Menlo Park Municipal Code Chapter 7.30.

³ See Menlo Park Municipal Code Chapter 7.31.

the adopted San Mateo County ordinance as a model and incorporates the modifications requested by City Council. In addition, the ordinance uses the Santa Clara County definition of e-cigarette, rather than the San Mateo County's definition. The Santa Clara County's ordinance clearly prohibits the sale of just the e-cigarette device, whereas the San Mateo County ordinance appears to only ban e-cigarette devices if they are sold in conjunction with a flavored tobacco product. Also, the proposed ordinance requires tobacco retailers to conspicuously post a notice that selling tobacco products to anyone under 21 years of age is illegal and subject to penalties. Finally, the ordinance authorizes both local and County officials to enforce. Staff is exploring more robust enforcement options, such as contracting with another agency for routine compliance monitoring.

Impact on City Resources

In preliminary discussions with the County, the tobacco prevention program associated with the County's health department, expressed a willingness to assist in outreach and education on implementing a proposed flavored tobacco and e-cigarette ban. There would be local resources needed to enforce the ordinance.

Environmental Review

This action is not a project within the meaning of the California Environmental Quality Act (CEQA) Guidelines §§ 15378 and 15061(b)(3) as it will not result in any direct or indirect physical change in the environment. Any subsequent use of the property would be subject to environmental review.

Public Notice

Public notification was achieved by posting the agenda, with the agenda items being listed, at least 72 hours prior to the meeting.

Attachments

- A. Ordinance No. 1064
- B. San Mateo e-cigarette ban ordinance
- C. Santa Clara County flavored tobacco and e-cigarette ban
- D. Hyperlink – November 5, 2019 City Council staff report 19-238 flavored tobacco and e-cigarette ban:
menlopark.org/DocumentCenter/View/23337/SS2-20191105-Re-flavored-tobacco-and-e-cigarette-ban-CC

Report prepared by:

Cara Silver, Assistant City Attorney

ORDINANCE NO. 1064

**ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MENLO PARK
AMENDING CHAPTER 5.26 [TOBACCO RETAIL LICENSES] OF TITLE 5
[BUSINESS LICENSES AND REGULATIONS] AND CHAPTER 7.30 [SMOKING
REGULATED OR PROHIBITED] OF TITLE 7 [HEALTH AND SANITATION] OF
THE MENLO PARK MUNICIPAL CODE**

The City Council of the City of Menlo Park does hereby ordain as follows:

SECTION 1. FINDINGS AND DETERMINATIONS.

A. Research has found health risks associated with using electronic smoking devices. One study found that both e-cigarettes and traditional cigarettes are independently associated with increased risk of heart attack.¹

B. The American Lung Association has stated that there is risk for irreversible lung damage and disease as a result of vaping.²

C. The 2018 Monitoring the Future Survey found that over 60% of 10th grade students said it was easy to get vaping devices and e-liquids.³

D. The 2018 National Youth Tobacco Survey discovered that almost 15% of middle and high school e-cigarette users (younger than 18) reported that they got the devices from a vape shop in the past month, 8.4% from a gas station or convenience store, and 6.5% from the Internet.⁴

E. In June 2009, the Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act) was signed into law to give the U.S. Food & Drug Administration (FDA) authority to regulate the manufacture, distribution, and marketing of tobacco products. The Tobacco Control Act was enacted in order to protect the public and create a healthier future for all Americans. Tobacco companies are required to provide the FDA with detailed information about their products' ingredients. Additionally, among other authorities, the Tobacco Control Act allows the FDA to implement standards for tobacco products to protect public health. For example, the FDA can regulate nicotine and ingredient levels in tobacco products.⁵

F. The California Student Tobacco Survey found that in San Mateo County, the current e-cigarette use prevalence among high school students was 20.8% - much higher than the state prevalence of 10.9%. Additional findings showed 86.4% of teens currently using tobacco reported using a flavored product: use of flavored products was widespread

¹ 5 Jun 2019 <https://doi.org/10.1161/JAHA.119.012317> Journal of the American Heart Association. 2019; Volume 8, No. 12.

² Moritz, T. (2019, March 18). Vaping: It's All Smoke and Mirrors. Retrieved from <https://www.lung.org/about-us/blog/2019/03/vaping-smoke-and-mirrors.html>

³ University of Michigan, 2018 Monitoring the Future Study, Trends in Availability – Tables 15-17. See <http://monitoringthefuture.org/data/18data/18drtbl15.pdf> and <http://monitoringthefuture.org/data/18data/18drtbl16.pdf>

⁴ FDA, "Modifications to Compliance Policy for Certain Deemed Products: Guidance for Industry, Draft Guidance," March 13, 2019, <https://www.fda.gov/media/121384/download>

⁵ FDA. (2018, January 17). Family Smoking Prevention and Tobacco Control Act – An Overview. Retrieved from <https://www.fda.gov/tobacco-products/rules-regulations-and-guidance/family-smoking-prevention-and-tobacco-control-act-overview>

across all tobacco products and all demographic categories. And more than 2 in 5 teens – 42.4% -- reported purchasing their own e-cigarettes, with more than 30% of this group saying they buy them directly from a local store. Among those who purchased e-cigarettes in a local store, 54.5% purchased them at a vape shop⁶

G. Flavored tobacco products have fueled youth tobacco use. Flavors improve the taste and mask the harshness of tobacco products, making it easier for kids to try the product and ultimately become addicted. There is conclusive evidence that flavors – of which there are over 15,000 available -- play a key role in youth initiation and continued use of tobacco products. In fact, over 80 percent of kids who have used tobacco started with a flavored product.^{7,8}

H. U.S. Surgeon General Vivek H. Murthy, M.D., M.B.A. stated that “Most e-cigarettes contain nicotine, which can cause addiction and can harm the developing adolescent brain. Compared with older adults, the brain of youth and young adults is more vulnerable to the negative consequences of nicotine exposure. The effects include addiction, priming for use of other addictive substances, reduced impulse control, deficits in attention and cognition, and mood disorders.”⁹

I. In 2016, it was estimated that 20.5 million (4 in 5) middle and high school students in the U.S. were exposed to advertisements for e-cigarettes from at least one source. This was a significant increase compared to 2014 and 2015 data. Furthermore, almost 17.7 million (7 in 10) youths were exposed to advertisements for e-cigarettes in retail stores in 2016, while about 2 in 5 had exposure on the Internet or on television, and almost 1 in 4 had exposure through magazines and newspapers. E-cigarette advertising has an association with e-cigarette use among youths. The advertising themes and strategies used are similar to traditional cigarette advertising tactics that have been found to appeal to youths.¹⁰

J. Newly released data from the 2019 National Youth Tobacco Survey (NYTS) shows that e-cigarette use among high school students more than doubled from 2017 to 2019, to 27.5 percent of students, or more than 1 in 4 high schoolers.¹¹

⁶ Results of the Statewide 2017-18 California Student Tobacco Survey, Zhu S-H, Zhuang YL, Braden K, Cole A, Gamst A, Wolfson T, Lee J, Ruiz CG, Cummins SE (2019). <https://www.cdph.ca.gov/Programs/CCDPHP/DCDIC/CTCB/CDPH%20Document%20Library/ResearchandEvaluation/Reports/2017-18CaliforniaStudentTobaccoSurveyBiennialReport.pdf>

⁷ Ambrose, BK, et al., “Flavored Tobacco Product Use Among US Youth Aged 12-17 Years, 2013-2014,” Journal of the American Medical Association, published online October 26, 2015.

⁸ Written Testimony of Matthew L. Myers President Campaign for Tobacco-Free Kids Before the House of Representatives Committee on Energy and Commerce Subcommittee on Health Hearing on “Legislation to Reverse the Youth Tobacco Epidemic” October 16, 2019. <https://docs.house.gov/meetings/IF/IF14/20191016/110091/HHRG-116-IF14-Wstate-MyersM-20191016.pdf>

⁹ US Department of Health and Human Services. E-cigarette use among youth and young adults: a report of the Surgeon General. Atlanta, GA: US Department of Health and Human Services, CDC, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health; 2016. https://e-cigarettes.surgeongeneral.gov/documents/2016_SGR_Full_Report_non-508.pdfpdf icon

¹⁰ Marynak K, Gentzke A, Wang TW, Neff L, King BA. Exposure to Electronic Cigarette Advertising Among Middle and High School Students – United States, 2014-2016. MMWR Morb Mortal Wkly Rep 2018;67:294-299. DOI: <http://dx.doi.org/10.15585/mmwr.mm6710a3>

¹¹ FDA, “Trump Administration Combating Epidemic of Youth E-Cigarette Use with Plan to Clear Market of Unauthorized, NonTobacco-Flavored E-Cigarette Products,” September 11, 2019, <https://www.fda.gov/news-events/press-announcements/trump-administration-combating-epidemic-youth-e-cigarette-use-plan-clear-market-unauthorized-non>. Current use defined as any use in the past month.

K. Altogether, 5 million middle and high school students used e-cigarettes in 2019 – an increase of nearly 3 million users in two years.¹²

L. Another national study showed that e-cigarette use among 8th, 10th and 12th graders has more than doubled in the past two years¹³

M. Electronic smoking device (or “e-cigarette, vape, vape pen, e-hookah, etc.”) usage by youth has been rising. Usage by high school students increased 78% between 2017-2018 with 1 in 5 high school students currently using and 1 in 20 middle school students currently using the products.¹⁴ The devices were available in the U.S. marketplace in the mid-2000s¹⁵ and in 2014, the products were the most commonly used tobacco product among middle and high school students.¹⁶

SECTION 2. REPEAL OF SECTION. Section 5.26.010 [Requirement for a permit] of Title 5 [Business Licenses and Regulations] of the Menlo Park Municipal Code is hereby repealed as follows. Underlined text indicates an addition and ~~strikethrough~~ text indicates a deletion.

~~5.26.010 Requirement for a permit.~~

~~It shall be unlawful for any retailer, individual, or entity to sell or offer for sale any tobacco products without first obtaining and maintaining a valid tobacco retailer's permit from the Environmental Health Division of the San Mateo County Department of Health ("Environmental Health Division") for each location where such sales are conducted. Permits are valid for one year and shall be renewed annually.~~

SECTION 3. AMENDMENT OF CODE. Chapter 5.26 [Tobacco Retail Licenses] of Title 5 [Business Licenses and Regulations] of the Menlo Park Municipal Code is hereby amended as follows. Underlined text indicates an addition and ~~strikethrough~~ text indicates a deletion.

5.26.010 Definitions.

For the purposes of this chapter, the following definitions shall govern unless the context clearly requires otherwise:

¹² Edney, A., et al., “Vaping Furor Intensifies as Trump Vows Tough U.S. Scrutiny”, Bloomberg, September 11, 2019, <https://www.bloomberg.com/news/articles/2019-09-11/trump-to-hold-meeting-on-vaping-after-reports-of-u-s-illness>.

¹³ Miech, R, et al., “Trends in Adolescent Vaping, 2017-2019,” New England Journal of Medicine, published online September 18, 2019.

¹⁴ Cullen KA, Ambrose BK, Gentzke AS, Apelberg BJ, Jamal A, King BA. *Notes from the Field: Use of Electronic Cigarettes and Any Tobacco Product Among Middle and High School Students – United States, 2011-2018.* MMWR Morb Mortal Wkly Rep 2018;67:1276-1277. DOI: <http://dx.doi.org/10.15585/mmwr.mm6745a5>

¹⁵ US Department of Health and Human Services. E-cigarette use among youth and young adults: a report of the Surgeon General. Atlanta, GA: US Department of Health and Human Services, CDC, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health; 2016. https://e-cigarettes.surgeongeneral.gov/documents/2016_SGR_Full_Report_non-508.pdfpdf icon

¹⁶ Arrazola RA, Singh T, Corey CG, et al. Tobacco use among middle and high school students—United States, 2011–2014. MMWR Morb Mortal Wkly Rep 2015;64:381–5. [PubMedexternal icon](#)

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

(b) "Constituent" means any ingredient, substance, chemical, or compound, other than tobacco, water, or reconstituted tobacco sheet that is added by the manufacturer to a tobacco product during the processing, manufacture, or packing of the tobacco product.

(c) "Distinguishable" means perceivable by either the sense of smell or taste.

(d) "Electronic cigarette" means any of the following products:

(1) Any device or delivery system that can be used to deliver nicotine in aerosolized or vaporized form, including, but not limited to, an e-cigarette, e-cigar, e-pipe, vape pen, or e-hookah.

(2) Any component, part, or accessory of such a device or delivery system that is used during its operation.

(3) Any flavored or unflavored liquid or substance containing nicotine, whether Sold separately or Sold in combination with any device or delivery system that could be used to deliver nicotine in aerosolized or vaporized form.

(4) Any product for use in an electronic nicotine device or delivery system whether or not it contains nicotine or tobacco or is derived from nicotine or tobacco.

(5) Electronic Cigarette Products shall not include any battery, battery charger, carrying case, or other accessory not used in the operation of the device if Sold separately. Electronic Cigarette Products shall not include any product that has been approved by the United States Food and Drug Administration for Sale as a tobacco cessation product or for other therapeutic purposes where that product is marketed and Sold solely for such approved use. See 21 U.S.C. § 387(a). As used in this subsection, nicotine does not include any food products as that term is defined pursuant to Section 6359 of the California Revenue and Taxation Code.

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

(f) "Person" means any individual, partnership, cooperative association, private corporation, or any other legal entity.

(g) "Pharmacy" means any retail establishment in which 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 pharmaceuticals are offered for sale, regardless of whether the retail establishment sells other retail goods in addition to prescription pharmaceuticals.

(h) "Sell", "Sale" or "to Sell" means any transaction where, for any consideration, ownership is transferred from one Person or entity to another including, but not limited to any transfer of title or possession for consideration, exchange or barter, in any manner or by any means.

(i) "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, and snuff;

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 any product that has been approved by the United States Food and Drug Administration for sale as a tobacco cessation product or for other therapeutic purposes where such product is marketed and sold solely for such an approved purpose.

(j) "Tobacco retailer" or "retailer" means any store, stand, booth, concession or other enterprise that engages in the retail sale or exchange of tobacco products or electronic cigarettes.

5.26.011 Requirements and prohibitions.

(a) Permit required. It shall be unlawful for any retailer, individual, or entity to sell or offer for sale any tobacco products without first obtaining and maintaining a valid tobacco retailer's permit from the Environmental Health Division of the San Mateo County Department of Health ("Environmental Health Division") for each location where such sales are conducted. Permits are valid for one year and the retailer shall renew annually. (Ord. 967 § 2 (part), 2010).

(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 tobacco products.

(c) 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 Environmental Health Division.

(d) Prohibition on sale of flavored tobacco products.

(1) The sale or offer for sale, by any person or tobacco retailer of any flavored tobacco product is prohibited and no person or tobacco retailer shall sell, or offer for sale, any flavored tobacco product.

(2) There shall be a rebuttable presumption that a tobacco product is a flavored tobacco product if a manufacturer or any of the manufacturer's agents or employees, in the course of their agency or employment, has made a statement or claim directed to consumers or to the

public that the tobacco product has or produces a characterizing flavor including, but not limited to, text, color, and/or images on the product's labeling or packaging that are used to explicitly or implicitly communicate that the tobacco product has a characterizing flavor.

(e) Prohibition on sale of electronic cigarettes. No tobacco retailer or other person shall sell any electronic cigarette to a person.

(f) Prohibition on sale of tobacco products at pharmacy. No pharmacy or pharmacy employee or agent shall sell or offer for sale any tobacco product. No new tobacco retailer permit may be issued to a pharmacy under this Chapter. No existing tobacco retailer permit issued under this Chapter 4.98 may be renewed by a pharmacy.

(g) Prohibition on sale of tobacco products to individuals under 21. No retailer shall sell any tobacco product to any individual who is under 21 years of age.

(h) Vending machines prohibited. No tobacco product shall be sold to the public from a vending machine or appliance; or any other coin, token, credit card or debit card operated mechanical device designed or used for vending purposes, including, but not limited to, machines or devices that use remote control locking mechanisms.

5.26.020 Application, issuance and renewal procedure.

(a) Application for a tobacco retailer's permit shall be submitted in the name of the entity or person proposing to conduct retail tobacco sales and shall be signed by such person or an authorized agent thereof. All applications shall be submitted on a form supplied by the Environmental Health Division and contain the following information:

- (1) The name, address, and telephone number of the applicant;
 - (2) The business name, address, and telephone number of each location where tobacco is retailed; and
 - (3) Such other information as the director of the Environmental Health Division ("director") or his or her designee determines is necessary for implementation of this chapter.
- (b) Applicants for renewal must follow the application procedures set forth in subsection (a) of this section. Renewal of a tobacco retailer's permit shall be denied if the application is for a person or location for which a suspension is in effect. (Ord. 967 § 2 (part), 2010).

5.26.030 Display of permit.

Upon receipt of an application for a tobacco retailer's permit, the director or his or her designee shall issue a permit which must be prominently displayed at each location where tobacco retail sales are conducted. (Ord. 967 § 2 (part), 2010).

5.26.040 Fees for permit.

The fee for a tobacco retailer's permit shall reflect the County of San Mateo's costs of processing the permit and regulating compliance with this chapter and shall be contained in Section 5.64.070 of the San Mateo County Ordinance Code. (Ord. 967 § 2 (part), 2010).

5.26.050 Permit is nontransferable.

Tobacco retailer's permits are nontransferable as between entities, retailers, individuals, locations or otherwise. (Ord. 967 § 2 (part), 2010).

5.26.060 Enforcement of applicable law.

If an agent or employee of the tobacco retailer violates any provisions of this chapter or any federal or state tobacco-related law, the tobacco retailer shall immediately report the violation to the Environmental Health Division. (Ord. 967 § 2 (part), 2010).

5.26.070 Suspension of permit.

(a) Grounds for Suspension. A tobacco retailer's permit may be suspended, as set forth below in subsection (b) of this section, by the director or his or her designee upon a finding, after notice and opportunity to be heard, that either of the following occurred:

- (1) After the permit was issued it was determined that the application for the permit is incomplete or inaccurate.
- (2) The permittee or his or her agent has violated any provision of this chapter or any federal or state tobacco-related law.

(b) Time Period of Suspension of Permit.

- (1) The first time that the director or his or her designee makes the finding that a violation of either subsection (a)(1) or (2) of this section has occurred, the permit to sell tobacco products shall be suspended for up to thirty days.
- (2) The second time that the director or his or her designee makes the finding set forth in subsection (a)(1) or (2) of this section within twenty-four months of the first determination, the permit to sell tobacco products shall be suspended for no less than thirty days and up to ninety days.
- (3) The third and each subsequent time that the director or his or her designee makes the finding set forth in subsection (a)(1) or (2) of this section within twenty-four months of a prior determination, the permit to sell tobacco products shall be suspended for no less than ninety days and up to one year.

(c) Effective Date of Suspension.

- (1) If the director or his or her designee makes oral findings and issues an order of suspension at the hearing, the suspension will be effective ten days from the date of the hearing, unless a timely appeal is filed in accordance with subsection (d) of this section.
- (2) If the director or his or her designee makes written findings and issues an order of suspension by certified mail after the hearing, the suspension will be effective fifteen days from the date appearing on the notice of that finding and order of suspension, unless a timely appeal is filed in accordance with subsection (d) of this section.

(d) Appeal of Suspension.

(1) The decision of the director or his or her designee is appealable to the San Mateo County Licensing Board.

(2) An appeal must be in writing, be addressed to the director and be hand-delivered to the offices of the Environmental Health Division.

(3) An appeal must be received by the Environmental Health Division before the effective date of suspension provided by subsections (c)(1) or (2) of this section in order to be considered.

(4) The filing of a timely appeal will stay a suspension pending a decision on the appeal by the San Mateo County Licensing Board.

(5) The decision of the San Mateo County Licensing Board shall be a final administrative order, with no further administrative right of appeal. (Ord. 967 § 2 (part), 2010).

5.26.080 Administrative fine.

(a) Grounds for Fine. A fine may be imposed upon findings made by the director or his or her designee, the City Manager or designee or a code enforcement officer, that any retailer, individual, or entity who is an owner of a retail establishment:

(1) Does not have a valid tobacco retailer's permit; and

(2) Offers for sale any tobacco, flavored tobacco, electronic cigarette, cigarette, or cigarette papers, or any other preparation of tobacco, or any other instrument or paraphernalia that is designed for the smoking or ingestion of tobacco or products prepared from tobacco.

(b) Amount of Fine. Upon findings made under subsection (a) of this section, the retailer, individual, or entity who is an owner of a retail establishment shall be subject to an administrative fine as follows:

(1) A fine not exceeding one hundred dollars for a first violation.

(2) A fine not exceeding two hundred dollars for a second violation.

(3) A fine not exceeding five hundred dollars for the third and subsequent violations.

(4) Each day that tobacco products, flavored tobacco or electronic cigarettes are offered for sale without a permit shall constitute a separate violation. A finding of "offering for sale" will be made if these tobacco products are actually sold and/or displayed in the retail establishment.

(c) Fine Procedures. Notice of the fine shall be served on the retailer, individual, or entity who is owner of the establishment by certified mail. The notice shall contain an advisement of the right to request a hearing before the director or his or her designee contesting the imposition of the fine. Said hearing must be requested within ten days of the date appearing on the notice of

the fine. The decision of the director shall be a final administrative order, with no administrative right of appeal.

(d) Failure to Pay Fine. If said fine is not paid within thirty days from the date appearing on the notice of the fine or of the notice of determination of the director or her or his designee after the hearing, the fine shall be referred to a collection agency within or external to the County of San Mateo. In addition, any outstanding fines must be paid prior to the issuance of any permit by the San Mateo County Environmental Health Division of the Department of Health. (Ord. 967 § 2 (part), 2010).

5.26.090 Authorization of enforcement by San Mateo County personnel.

The County of San Mateo, its officers, employees and agents are hereby authorized to enforce this chapter on behalf of the city, within the jurisdiction areas of the city. Such enforcement authority includes, but is not limited to, the collection of fees and fines, expending such revenue in the enforcement of the tobacco retailer requirements, holding hearings, suspending permits and issuing administrative fines.

SECTION 4. AMENDMENT OF CODE. Chapter 7.30 [Smoking Regulated or Prohibited] of Title 7 [Health and Sanitation] of the Menlo Park Municipal Code is hereby amended as follows. Underlined text indicates an addition and ~~strikethrough~~ text indicates a deletion.

7.30.010 Definitions

...

(18) "Secondhand smoke" means the tobacco smoke created by burning or carrying of any lighted pipe, cigar, or cigarette of any kind, and the smoke exhaled by an individual who engages in smoking. Secondhand aerosol emitted from electronic cigarettes as defined in Section 5.26.010(d) shall be considered secondhand smoke for purposes of this chapter.

...

(20) "Smoking" or "smoke" means possessing a lighted tobacco product, or any other lighted weed or plant (including, but not limited to, a lighted pipe, lighted hookah pipe, lighted cigar, or lighted cigarette of any kind), or the lighting of a tobacco product, or any other weed or plant (including, but not limited to, a pipe, a hookah pipe, cigar, or cigarette of any kind) or use or operation of an electronic cigarette as defined in Section 5.26.010(d).

(21) "Tobacco product" means any substance containing tobacco leaf, including, but not limited to, cigarettes, cigars, electronic cigarettes as defined in Section 5.26.010(d), pipe tobacco, hookah tobacco, snuff, chewing tobacco, dipping tobacco, or any other preparation of tobacco; and any product or formulation of matter containing biologically active amounts of nicotine that is manufactured, sold, offered for sale, or otherwise distributed with the expectation that the product or matter will be introduced into the human body, but does not include any cessation product specifically approved by the United States Food and Drug Administration for use in treating nicotine or tobacco dependence.

SECTION 5. SEVERABILITY. If any section of this ordinance, or part hereof, is held by a court of competent jurisdiction in a final judicial action to be void, voidable or unenforceable, such

section, or part hereof, shall be deemed severable from the remaining sections of this ordinance and shall in no way affect the validity of the remaining sections hereof.

SECTION 6. CALIFORNIA ENVIRONMENTAL QUALITY ACT DETERMINATION. The City Council hereby finds that this ordinance is not subject to the provisions of the California Environmental Quality Act ("CEQA") under Sections 15378 and 15061(b)(3) of the of the CEQA Guidelines. The ordinance is a clean up ordinance and has no potential for resulting in physical change to the environment either directly or indirectly.

SECTION 7. EFFECTIVE DATE AND PUBLISHING. This ordinance shall take effect 30 days after adoption. The City Clerk shall cause publication of the ordinance within 15 days after passage in a newspaper of general circulation published and circulated in the city or, if none, the posted in at least three public places in the city. Within 15 days after the adoption of the ordinance amendment, a summary of the amendment shall be published with the names of the council members voting for and against the amendment.

INTRODUCED on the tenth day of December, 2019.

PASSED AND ADOPTED as an ordinance of the City of Menlo Park at a regular meeting of said Council on the tenth day of December, 2019 by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

APPROVED:

Mayor

ATTEST:

Judi Herren, City Clerk

ORDINANCE NO. .**BOARD OF SUPERVISORS, COUNTY OF SAN MATEO, STATE OF CALIFORNIA**

* * * * *

AN ORDINANCE ADDING A NEW CHAPTER 4.95 TO TITLE 4 OF THE SAN MATEO COUNTY ORDINANCE CODE TO PROHIBIT THE SALE OR DISTRIBUTION OF ELECTRONIC CIGARETTES

The Board of Supervisors of the County of San Mateo, State of California, **ORDAINS** as follows:

SECTION 1. Findings.

The Board of Supervisors finds and determines that:

- (a) Electronic smoking device (or “e-cigarette, vape, vape pen, e-hookah, etc.”) usage by youth has been rising. Usage by high school students increased 78% between 2017-2018 with 1 in 5 high school students currently using and 1 in 20 middle school students currently using the products.¹ The devices were available in the U.S. marketplace in the mid-2000s² and, by 2014, the products were the most commonly used tobacco product among middle and high school students.³
- (b) According to the Centers for Disease Control and Prevention (“CDC”), the number of middle and high school students who reported being current users of tobacco products increased 36%—from 3.6 million to 4.9 million students—between 2017 and 2018. This dramatic increase, which has erased past progress in reducing youth tobacco use, is directly attributable to a nationwide surge in e-cigarette use by adolescents. There were 1.5 million more youth e-cigarette users in 2018 than 2017, and those who were using e-cigarettes were using them more often. Frequent use of e-cigarettes increased from 20 percent in 2017 to 28 percent in 2018 among current high school e-cigarette users.
- (c) In 2016, it was estimated that 20.5 million (4 in 5) middle and high school students in the U.S. were exposed to advertisements for e-cigarettes from

¹ Cullen KA, Ambrose BK, Gentzke AS, Apelberg BJ, Jamal A, King BA. Notes from the Field: Use of Electronic Cigarettes and Any Tobacco Product Among Middle and High School Students – United States, 2011-2018. MMWR Morb Mortal Wkly Rep 2018;67:1276-1277. DOI: <http://dx.doi.org/10.15585/mmwr.mm6745a5>

² US Department of Health and Human Services. E-cigarette use among youth and young adults: a report of the Surgeon General. Atlanta, GA: US Department of Health and Human Services, CDC, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health; 2016.

https://ecigarettes.surgeongeneral.gov/documents/2016_SGR_Full_Report_non-508.pdfpdf icon

³ Arrazola RA, Singh T, Corey CG, et al. Tobacco use among middle and high school students—United States, 2011–2014. MMWR Morb Mortal Wkly Rep 2015;64:381–5. PubMedexternal icon

at least one source. This was a significant increase compared to 2014 and 2015 data. Furthermore, almost 17.7 million (7 in 10) youths were exposed to advertisements for e-cigarettes in retail stores in 2016, while about 2 in 5 had exposure on the Internet or on television, and almost 1 in 4 had exposure through magazines and newspapers. E-cigarette advertising has an association with e-cigarette use among youths. The advertising themes and strategies used are similar to traditional cigarette advertising tactics that have been found to appeal to youths.⁴

- (d) The 2018 Monitoring the Future Survey found that over 60% of 10th grade students said it was easy to get vaping devices and e-liquids.⁵ The 2018 National Youth Tobacco Survey discovered that almost 15% of middle and high school e-cigarette users (younger than 18) reported that they got the devices from a vape shop in the past month, 8.4% from a gas station or convenience store, and 6.5% from the Internet.⁶
- (e) U.S. Surgeon General Vivek H. Murthy, M.D., M.B.A. stated that “Most e-cigarettes contain nicotine, which can cause addiction and can harm the developing adolescent brain. Compared with older adults, the brain of youth and young adults is more vulnerable to the negative consequences of nicotine exposure. The effects include addiction, priming for use of other addictive substances, reduced impulse control, deficits in attention and cognition, and mood disorders.”⁷
- (f) A 2018 National Academy of Sciences, Engineering, and Medicine report found moderate evidence that e-cigarette use increases the frequency and intensity of smoking cigarettes in the future.⁸ According to a report by the Surgeon General, any use of e-cigarettes among young people is not safe, even if the young people do not move on to future cigarette smoking.⁹
- (g) According to the American Heart Association, research has found health risks associated with using electronic smoking devices. One study found that both e-cigarettes and traditional cigarettes are independently

⁴ Marynak K, Gentzke A, Wang TW, Neff L, King BA. Exposure to Electronic Cigarette Advertising Among Middle and High School Students – United States, 2014–2016. *MMWR Morb Mortal Wkly Rep* 2018;67:294–299. DOI: <http://dx.doi.org/10.15585/mmwr.mm6710a3>

⁵ University of Michigan, 2018 Monitoring the Future Study, Trends in Availability – Tables 15–17. See <http://monitoringthefuture.org/data/18data/18drtbl15.pdf> and <http://monitoringthefuture.org/data/18data/18drtbl16.pdf>.

⁶ FDA, “Modifications to Compliance Policy for Certain Deemed Products: Guidance for Industry, Draft Guidance,” March 13, 2019, <https://www.fda.gov/media/121384/download>

⁷ US Department of Health and Human Services. E-cigarette use among youth and young adults: a report of the Surgeon General. Atlanta, GA: US Department of Health and Human Services, CDC, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health; 2016. https://e-cigarettes.surgeongeneral.gov/documents/2016_SGR_Full_Report_non-508.pdfpdf icon

⁸ Moritz, T. (2019, March 18). Vaping: It’s All Smoke and Mirrors. Retrieved from <https://www.lung.org/about-us/blog/2019/03/vaping-smoke-and-mirrors.html>

⁹ US Department of Health and Human Services. E-cigarette use among youth and young adults: a report of the Surgeon General. Atlanta, GA: US Department of Health and Human Services, CDC, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health; 2016. https://e-cigarettes.surgeongeneral.gov/documents/2016_SGR_Full_Report_non-508.pdfpdf icon

associated with increased risk of heart attack.¹⁰ The American Lung Association has reported that there is risk for irreversible lung damage and disease as a result of vaping.¹¹

- (h) The County of San Mateo (the “County”) issues permits to tobacco retailers. (Chapter 4.98). In 2018, in order to reduce flavored tobacco product availability, the County adopted Ordinance No. 04799, prohibiting the sale of flavored tobacco products and pharmacy sales of all tobacco products.
- (i) In spite of these efforts, San Mateo County youth still have access to tobacco products and are using the products. According to the 2018 California Student Tobacco Survey, for Region 20 (San Francisco, San Mateo counties), the current e-cigarette use prevalence among high school students in 2017-2018 was 20.8%. This prevalence is much higher than the state-wide prevalence of 10.9%.¹²
- (j) In June 2009, the Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act) was signed into law to give the U.S. Food & Drug Administration (FDA) authority to regulate the manufacture, distribution, and marketing of tobacco products. The Tobacco Control Act was enacted in order to protect the public and create a healthier future for all Americans.¹³
- (k) A central requirement of the Tobacco Control Act is premarket review of all new tobacco products. Specifically, every “new tobacco product”—defined to include any tobacco product not on the market in the United States as of February 15, 2007—must be authorized by the FDA for sale in the United States before it may enter the marketplace. A new tobacco product may not be marketed until the FDA has found that the product is: (1) appropriate for the protection of the public health upon review of a premarket tobacco application; (2) substantially equivalent to a grandfathered product; or (3) exempt from substantial equivalence requirements.
- (l) In determining whether the marketing of a tobacco product is appropriate for the protection of the public health, the FDA must consider the risks and benefits of the product to the population as a whole, including users and nonusers of the product, and taking into account the increased or decreased likelihood that existing users of tobacco products will stop using tobacco products and the increased or decreased likelihood that those who do not use tobacco products will start using them. Where there is a lack of

¹⁰ 5 Jun 2019 <https://doi.org/10.1161/JAHA.119.012317> Journal of the American Heart Association. 2019;8:e012317

¹¹ Moritz, T. (2019, March 18). Vaping: It’s All Smoke and Mirrors. Retrieved from <https://www.lung.org/about-us/blog/2019/03/vaping-smoke-and-mirrors.html>

¹² Zhu S-H, Zhuang YL, Braden K, Cole A, Gamst A, Wolfson T, Lee J, Ruiz CG, Cummins SE (2019). Results of the Statewide 2017-18 California Student Tobacco Survey. San Diego, California: Center for Research and Intervention in Tobacco Control (CRITC), University of California, San Diego.

¹³ FDA. (2018, January 17). Family Smoking Prevention and Tobacco Control Act – An Overview. Retrieved from <https://www.fda.gov/tobacco-products/rules-regulations-and-guidance/family-smoking-prevention-and-tobacco-control-act-overview>

showing that permitting the sale of a tobacco product would be appropriate for the protection of the public health, the Tobacco Control Act requires that the FDA deny an application for premarket review.

- (m) Virtually all electronic cigarettes that are sold today entered the market after 2007, but have not been reviewed by the FDA to determine if they are appropriate for the public health. In 2017, the FDA issued Guidance that purports to give electronic cigarette manufacturers until August 8, 2022 to submit their application for premarket review. The Guidance further purports to allow unapproved products to stay on the market indefinitely, until such time as the FDA complies with its statutory duty to conduct a premarket review to determine whether a new tobacco product poses a risk to public health. In 2019, the FDA issued draft guidance in which it considered moving the premarket application deadline up by one year for certain flavored e-cigarette products.¹⁴ In July of 2019, a U.S. District Court issued an order requiring manufacturers to submit a premarket review application by May 12, 2020 for deemed tobacco products, which includes e-cigarettes, that were on the market as of August 8, 2016. However, that order has been appealed and a stay requested. Thus, the deadlines for applications for premarket review, and timelines for any premarket review orders, are in flux and uncertain.
- (n) By the time e-cigarette manufacturers will be required to submit their premarket review applications, e-cigarettes will have been on the market for approximately fifteen years without any FDA analysis of their safety and alleged benefit. If current trends continue, six million more youth in the United States will begin using e-cigarettes between now and then. Until such time as the FDA fulfills its statutory duty to conduct premarket reviews of new tobacco products, a generation of young people will become addicted to tobacco, resulting in an entirely preventable increase in the burdens and tragedies associated with tobacco use. The County of San Mateo is not content to continue to wait before addressing, for its residents, what appears from the evidence to be a major public health crisis that is going unattended by federal or state regulation.

SECTION 2. New Chapter 4.95 Added.

A new Chapter 4.95 is added to the San Mateo County Ordinance Code, to be numbered and entitled and to read as follows:

Chapter 4.95. Sale or Distribution of Electronic Cigarettes.

¹⁴ FDA. (2019, June). Premarket Tobacco Product Applications for Electronic Nicotine Delivery Systems – Guidance for Industry. Retrieved from <https://www.fda.gov/media/127853/download>

4.95.010. Application of Chapter.

The provisions of this Chapter shall apply within the unincorporated area of San Mateo County, except that this ordinance shall not apply to the duty –free retail stores at San Francisco International Airport.

4.95. 020. Definitions.

For the purposes of this Chapter, the following definitions shall govern unless the context clearly requires otherwise:

- (a) “Distribute” or “Distribution” means the transfer .by any Person other than a common carrier, at any point from the place of manufacture or thereafter to a Person who sells the electronic cigarette or other electronic smoking device.
- (b) “Electronic Cigarette” has the meaning set forth in Section 30121 of the California Revenue and Taxation Code, as may be amended from time to time.
- (c) “Person” means any individual, partnership, cooperative association, private corporation, or any other legal entity.
- (d) “Tobacco Retailer” means any store, stand, booth, concession or other enterprise that engages in the retail sale or exchange of tobacco products (as defined in subsection (h) of section 4.96.030 of this Code), electronic cigarettes, or electronic smoking devices.
- (e) “Sell”, “Sale” or “to Sell” mean any transaction where, for any consideration, ownership is transferred from one Person or entity to another including, but not limited to any transfer of title or possession for consideration, exchange or barter, in any manner or by any means.

4.95.030. Sale or Distribution of Electronic Cigarettes Prohibited.

No Person, Tobacco Retailer or other legal entity shall sell or distribute any Electronic Cigarette to a Person in unincorporated San Mateo County.

4.95.040 Enforcement.

- (a) The Health System Chief, or his or her designee, may enforce this Chapter by suspension of a tobacco retailer’s permit and/or imposition of administrative fines following the procedures and amounts set forth in Sections 4.98.150 and 4.98.160 of Chapter 4.98 of this Ordinance Code.

- (b) Violations of this Chapter may be criminally prosecuted as infraction(s) or misdemeanor(s) at the discretion of the prosecuting attorney as the interests of justice require.
- (c) This section shall not be interpreted to limit the applicable civil or administrative remedies available under law.
- (d) The Health System Chief may adopt administrative rules, regulations, or guidelines for the implementation and enforcement of this Chapter.

4.95.050 – Public Nuisance.

Any violation of this ordinance is hereby declared a public nuisance.

SECTION 3. No Conflict With State or Federal Law.

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

SECTION 4. Severability.

If any section, subsection, sentence, clause, phrase, or word of this ordinance, or any application thereof to any person or circumstance, is held to be invalid or unconstitutional by a decision of a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions or applications of the ordinance. The Board of Supervisors hereby declares that it would have passed this ordinance and each and every section, subsection, sentence, clause, phrase, and word not declared invalid or unconstitutional without regard to whether any other portion of this Chapter or application thereof would be subsequently declared invalid or unconstitutional.

SECTION 5. Effective and Operative Dates.

This ordinance shall become effective 30 days after enactment, and shall become operative and enforceable six months after the effective date.

* * * * *

ORDINANCE NO. NS-517.93

**AN ORDINANCE OF THE BOARD OF SUPERVISORS OF THE COUNTY OF
SANTA CLARA REPEALING CHAPTER XXIII OF DIVISION A18, AND
ADDING CHAPTER XXII, PERMITS FOR RETAILERS OF TOBACCO
PRODUCTS, OF DIVISION B11 OF THE COUNTY OF SANTA CLARA
ORDINANCE CODE RELATING TO PROHIBITIONS AND LIMITATIONS ON
THE SALE AND DISTRIBUTION OF ELECTRONIC CIGARETTE PRODUCTS
AND OTHER TOBACCO PRODUCTS**

Summary

This Ordinance repeals Chapter XXIII of Division A18 of the Ordinance Code, and adds Chapter XXII of Division B11 of the Ordinance Code prohibiting the sale and distribution of all electronic cigarette products, eliminating the exemption allowing certain retailers to sell flavored tobacco products, and modifying other provisions of the prior ordinance relating to permits for retailers of tobacco products.

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

- A. Electronic cigarettes, also known as e-cigarettes, e-vaporizers, or electronic nicotine delivery systems, are battery-operated devices that people use to inhale an aerosol that typically contains nicotine. In addition to nicotine, the aerosol from e-cigarettes may include up to 31 other components, including formaldehyde, acetaldehyde, glycidol, acrolein, acetol, and diacetyl. Several of these compounds are likely carcinogens, and acrolein is a powerful irritant.¹ These products can resemble traditional tobacco cigarettes (cig-a-likes), cigars, or pipes, or even everyday items like pens or USB memory sticks.² The pervasive use of these and other related Electronic Cigarette Products has given rise to a massive and multi-faceted public health crisis.

¹ Centers for Disease Control and Prevention. Cigarette Use Among Youth and Young Adults: A Report of the Surgeon General (2016). https://www.cdc.gov/tobacco/data_statistics/sgr/e-cigarettes/index.htm.

² National Institute on Drug Abuse. Electronic Cigarettes (E-cigarettes) (2019). <https://www.drugabuse.gov/publications/drugfacts/electronic-cigarettes-e-cigarettes>; Breland A, Soule E, Lopez A, Ramôa C, El-Hellani A, Eissenberg T. Electronic cigarettes: what are they and what do they do? *Ann N Y Acad Sci.* 2017;1394(1):5-30. doi:10.1111/nyas.12977.

- B. The Surgeon General has declared the use of e-cigarettes among youth an “epidemic.” There is an extensive and rapidly growing body of evidence supporting that characterization. For instance:
- i. E-cigarette companies use marketing strategies to target youth. In 2014, 18 million (7 out of 10) middle and high school students were exposed to e-cigarette ads.³
 - ii. E-cigarettes are marketed in a variety of flavors that appeal to youth, including gummy bear, birthday cake, cotton candy, and fruit punch.
 - iii. While youth use of combustible cigarettes has decreased dramatically, e-cigarette use—or “vaping”—among middle and high school students increased by 78 percent between 2017 and 2018, with over 4 million kids currently using e-cigarettes in 2018.⁴
 - iv. The proportion of current e-cigarette users in high school who reported use on 20 days or more in the past 30-day period increased from 20 percent in 2017 to 27.7 percent in 2018.⁵
 - v. In 2019, the national prevalence of e-cigarette use during the previous 30 days was more than 1 in 4 students in the 12th grade, more than 1 in 5 in the 10th grade, and more than 1 in 11 in the 8th grade.⁶
 - vi. Use of e-cigarettes among undergraduate college students increased from 4.9 percent to 10.1 percent between 2017 and 2018.⁷

³ Centers for Disease Control and Prevention. E-cigarette Ads and Youth (2017). <https://www.cdc.gov/vitalsigns/ecigarette-ads/index.html>.

⁴ Cullen KA, Ambrose BK, Gentzke AS, Apelberg BJ, Jamal A, King BA. Use of Electronic Cigarettes and Any Tobacco Product Among Middle and High School Students—United States, 2011–2018. *MMWR Morb Mortal Wkly Rep.* 2018;67(45):1276–1277. doi:10.15585/mmwr.mm6745a5.

⁵ Cullen KA, Ambrose BK, Gentzke AS, Apelberg BJ, Jamal A, King BA. Use of Electronic Cigarettes and Any Tobacco Product Among Middle and High School Students—United States, 2011–2018. *MMWR Morb Mortal Wkly Rep.* 2018;67(45):1276–1277. doi:10.15585/mmwr.mm6745a5.

⁶ Miech R, Johnston L, O’Malley PM, Bachman JG, Patrick ME. Trends in Adolescent Vaping, 2017–2019. *N Engl J Med.* September 2019;NEJMc1910739. doi:10.1056/NEJMc1910739.

⁷ *Compare American College Health Association-National College Health Assessment II: Undergraduate Student Reference Group Executive Summary Spring 2018.* Silver Spring, MD: American College Health Association with American College Health Association-National College Health Assessment II: Reference Group Undergraduate Executive Summary Spring 2017. Hanover, MD: American College Health Association.

- vii. There was a 46.2 percent increase in current e-cigarette use between 2017 and 2018 among young adults.⁸
 - viii. Adolescents obtain e-cigarettes from a variety of sources. The most common sources are: purchasing from a store or online (31.1 percent); buying from another person (16.3 percent); and giving someone money to purchase for them (15.0 percent).⁹
- C. Nearly 1 in 3 Santa Clara County teens—31.6 percent—report that they have used an e-cigarette at least once. Most teens obtained their e-cigarettes from “social sources,” while around 45 percent reported purchasing their own e-cigarettes (with over a quarter of this group saying they buy them directly from a local store).¹⁰
- i. In 2019, the number of violations for sales to minors at tobacco retailers in the unincorporated county increased to 12 violations (out of 44 undercover enforcement checks), up from only 1 violation (out of 34 undercover enforcement checks) in 2018. This included one violation at an adult-only tobacco store in the unincorporated county.¹¹
- D. E-cigarettes have severe adverse health effects for both youth and adults.
- i. According to the Surgeon General, “[m]ost e-cigarettes contain nicotine—the addictive drug in regular cigarettes, cigars, and other tobacco products. Nicotine exposure during adolescence can harm the developing brain—which continues to develop until about age 25. Nicotine exposure during adolescence can impact learning, memory, and attention. Using nicotine in adolescence can also increase risk for future addiction to other drugs. In addition to nicotine, the aerosol that users inhale and exhale from e-cigarettes can potentially expose both themselves and bystanders to other

⁸ Dai H, Leventhal AM. Prevalence of e-Cigarette Use Among Adults in the United States, 2014-2018. *JAMA*. September 2019. doi:10.1001/jama.2019.15331.

⁹ Pepper JK, Coats EM, Nonnemaker JM, Loomis BR. How Do Adolescents Get Their E-Cigarettes and Other Electronic Vaping Devices? *Am J Health Promot*. 2019;33(3):420-429. doi:10.1177/0890117118790366.

¹⁰ Zhu S-H, Lee J, Zhuang YL, Branden K, Cole A, Wolfson T, Gamst A (2019). Tobacco use among high school students in Santa Clara County: Findings from the 2017-18 California Student Tobacco Survey. San Diego, California: Center for Research and Intervention in Tobacco Control (CRITC), University of California, San Diego.

¹¹ Santa Clara County Public Health Department, 2019 Tobacco Law Enforcement Survey.

harmful substances, including heavy metals, volatile organic compounds, and ultrafine particles that can be inhaled deeply into the lungs.”¹²

- ii. E-cigarette use can also play a role in adolescent social maladjustment, including poor learning and academic performance, increased aggressive and impulsive behavior, poor sleep quality, attention deficits, impaired memory, cognition, and increased depression and suicidal ideation.¹³
- iii. Daily e-cigarette use is associated with increased risk of irreversible cardiovascular and lung disease through the inhalation of harmful chemicals.¹⁴
- iv. Secondhand emissions from e-cigarettes are also dangerous because they contain “nicotine; ultrafine particles; flavorings such as diacetyl, a chemical linked to serious lung disease; volatile organic compounds such as benzene, which is found in car exhaust; and heavy metals, such as nickel, tin, and lead.”¹⁵
- v. E-cigarette use is dangerous for pregnant women and is a fetal risk factor. It is associated with an increased risk of smallness-for-gestational-age.¹⁶

E. In addition to these negative long-term health effects, e-cigarette use is now associated with a wave of dangerous, life-threatening illnesses.

- i. As of October 15, 2019, 1,479 cases of acute lung injury associated with the use of e-cigarette or vaping products in 49 states, the District of Columbia, and 1 U.S. territory have been reported to the Centers for

¹² Surgeon General’s Advisory on E-cigarette Use Among Youth (2008). <https://e-cigarettes.surgeongeneral.gov/documents/surgeon-generals-advisory-on-e-cigarette-use-among-youth-2018.pdf>.

¹³ Tobore TO. On the potential harmful effects of E-Cigarettes (EC) on the developing brain: The relationship between vaping-induced oxidative stress and adolescent/young adults social maladjustment. *J Adolesc.* 2019; 76:202-209. doi:10.1016/j.adolescence.2019.09.004.

¹⁴ American Lung Association. The Impact of E-Cigarettes on the Lung (2011). <https://www.lung.org/stop-smoking/smoking-facts/impact-of-e-cigarettes-on-lung.html>; Bein K, Leikauf GD. Acrolein - a pulmonary hazard. *Mol Nutr Food Res* 55(9):1342-60. doi: 10.1002/mnfr.201100279.

¹⁵ American Lung Association. The Impact of E-Cigarettes on the Lung (2011). <https://www.lung.org/stop-smoking/smoking-facts/impact-of-e-cigarettes-on-lung.html>.

¹⁶ Cardenas V, Cen R, Clemens M, et al. Use of Electronic Nicotine Delivery Systems (ENDS) by pregnant women I: Risk of small-for-gestational-age birth. *Tob Induc Dis.* 2019;17(May). doi:10.18332/tid/106089

Disease Control and Prevention (CDC). Thirty-three deaths have been confirmed in 24 states.¹⁷

- ii. Since the CDC's August 30, 2019 Official Health Advisory,¹⁸ there have been two reported cases of lung injury associated with e-cigarettes in Santa Clara County. One of these cases was in an adolescent, and both individuals required hospitalization.

F. Other risks and injuries are attributable to the proliferation of e-cigarettes:

- i. E-cigarettes present a poison risk for children. From 2013 to 2017, an estimated 4,745 e-liquid poisoning cases among children under age five were treated in U.S. hospital emergency departments.¹⁹
- ii. E-cigarettes present a risk of burns and other injuries, usually from malfunctioning batteries. From 2015 to 2017, there were an estimated 2,035 e-cigarette explosion and burn injuries reported in U.S. hospital emergency rooms.²⁰

G. While the e-cigarette industry claims that its products help people quit smoking combustible cigarettes, the evidence shows that e-cigarette use is actually associated with *increased* risk of cigarette initiation, particularly among low-risk youths.²¹

- i. Use of e-cigarettes was most common among smokers, and dual users had the highest prevalence of respiratory symptoms. On a population level, this

¹⁷ Centers for Disease Control and Prevention. Outbreak of Lung Injury Associated with E-cigarette Use, or Vaping. October (2019). https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html.

¹⁸ Centers for Disease Control and Prevention Official Health Advisory. Severe Pulmonary Disease Associated with Using E-Cigarette Products (Aug. 30, 2019). <https://emergency.cdc.gov/han/han00421.asp>.

¹⁹ Chang JT, Wang B, Chang CM, Ambrose BK. National estimates of poisoning events related to liquid nicotine in young children treated in US hospital emergency departments, 2013–2017. *Inj Epidemiol*. 2019;6(1):10. doi:10.1186/s40621-019-0188-9.

²⁰ Rossheim ME, Livingston MD, Soule EK, Zeraye HA, Thombs DL. Electronic cigarette explosion and burn injuries, US Emergency Departments 2015-2017. *Tob Control*. 2019;28(4):472-474. doi:10.1136/tobaccocontrol-2018-054518.

²¹ Berry KM, Fetterman JL, Benjamin EJ, et al. Association of Electronic Cigarette Use With Subsequent Initiation of Tobacco Cigarettes in US Youths. *JAMA Netw Open*. Published online February 01, 2019;2(2):e187794. doi:10.1001/jamanetworkopen.2018.7794.

indicates that the present use of e-cigarettes does not adequately serve as a smoking cessation tool.²²

- ii. E-cigarettes are not commonly used as a quit tool among college students, but rather as a secondary source of nicotine, most commonly in current smokers.²³
 - iii. Of adults and young adults over 18 who use e-cigarettes, around 63 percent typically use non-tobacco flavored e-cigarettes, while over a third typically use tobacco-flavored or unflavored e-cigarettes.²⁴
- H. Open e-cigarette systems are customizable by consumers and often allow for potential “unorthodox” use of the product. These modifications include altering mechanical components and replacing liquid cartridges with dangerous off-market or illegal substances.²⁵ Customization is one of the most popular social media topics for e-cigarettes.²⁶

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 repealed in its entirety.

SECTION 2. Chapter XXII of Division B11 of the Ordinance Code of the County of Santa Clara is hereby added, as follows:

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²² Hedman L, Backman H, Stridsman C, et al. Association of Electronic Cigarette Use With Smoking Habits, Demographic Factors, and Respiratory Symptoms. *JAMA Netw Open*. 2018;1(3):e180789. doi:10.1001/jamanetworkopen.2018.0789.

²³ Martinasek MP, Bowersock A, Wheldon CW. Patterns, Perception and Behavior of Electronic Nicotine Delivery Systems Use and Multiple Product Use Among Young Adults. *Respir Care*. 2018;63(7):913-919. doi:10.4187/respcare.06001.

²⁴ Landry RL, Groom AL, Vu T-HT, et al. The role of flavors in vaping initiation and satisfaction among U.S. adults. *Addict Behav*. 2019;99:106077. doi:10.1016/j.addbeh.2019.106077.

²⁵ Guy MC, Helt J, Palafox S, et al. Orthodox and Unorthodox Uses of Electronic Cigarettes: A Surveillance of YouTube Video Content. *Nicotine Tob Res*. 2019;21(10):1378-1384. doi:10.1093/ntr/nty132.

²⁶ Lee A, Hart J, Sears C, Walker K, Siu A, Smith C. A picture is worth a thousand words: Electronic cigarette content on Instagram and Pinterest. *Tob Prev Cessat*. 2017;3(July). doi:10.18332/tpc/74709.

CHAPTER XXII. PERMITS FOR RETAILERS OF TOBACCO PRODUCTS

Sec. B11-576. 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 individuals under 21;
- (4) Respond to a new wave of addiction to Electronic Cigarette Products;
- (5) Reduce vulnerability to unexplained illnesses associated with Electronic Cigarette Products; and
- (6) 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. B11-577. Definitions.

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

- (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) *Distribute* or *Distribution* means the transfer, by any Person other than a common carrier, of a Tobacco Product to another Person for Sale or personal consumption.
- (d) *Electronic Cigarette Products* means any of the following products:
 - (1) Any device or delivery system that can be used to deliver nicotine in aerosolized or vaporized form, including, but not limited to, an e-cigarette, e-cigar, e-pipe, vape pen, or e-hookah.
 - (2) Any component, part, or accessory of such a device or delivery system that is used during its operation.
 - (3) Any flavored or unflavored liquid or substance containing nicotine, whether Sold separately or Sold in combination with any device or delivery system that could be used to deliver nicotine in aerosolized or vaporized form.
 - (4) Any product for use in an electronic nicotine device or delivery system whether or not it contains nicotine or tobacco or is derived from nicotine or tobacco.
 - (5) Electronic Cigarette Products shall not include any battery, battery charger, carrying case, or other accessory not used in the operation of the device if Sold separately. Electronic Cigarette Products shall not include any product that has been approved by the United States Food and Drug Administration for Sale as a tobacco cessation product or for other therapeutic purposes where that product is marketed and Sold solely for such approved use. *See* 21 U.S.C. § 387(a). As used in this subsection, nicotine does not include any food products as that term is defined pursuant to Section 6359 of the California Revenue and Taxation Code.
- (e) *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. Notwithstanding any other definition in this Code, an *Owner* means a Person who possesses Ownership.
- (f) *Permit* means a valid permit issued by the Department to a Person to act as a Retailer.
- (g) *Retailer* means any Person who Sells or Distributes Tobacco Products for any form of consideration. *Retailing* shall mean the doing of any of these actions. This definition is without regard to the quantity of Tobacco Products Sold or Distributed.

- (h) *School* means a public or private elementary, middle, junior high, or high school.
- (i) *Tobacco Product* means (unless specifically noted elsewhere) 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 Cigarette Products. 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.

Sec. B11-578. Requirements and prohibitions.

- (a) *Permit required.* It shall be unlawful for any Person to act as a Retailer in an unincorporated area of the County without first obtaining and maintaining a Permit pursuant to this Chapter for each location at which Retailing occurs.
- (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 Tobacco Products.
- (c) *Display of Permit.* Each Permit shall be prominently displayed in a publicly visible place at the location identified in the Permit.
- (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 Distribute a Tobacco Product to another individual who appears to be under 30 years of age without first examining the individual’s identification to confirm that the individual is at least the minimum age required under state law to purchase and possess the Tobacco Product.
- (f) *Minimum age for individuals selling Tobacco Products.* No individual 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 without a 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 a physical storefront used for Retailing Tobacco Products 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 of this subsection (h) shall not apply to an establishment where there are no windows or clear doors, or where existing windows are located only at a height that precludes a view of the interior of the premises by an individual 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 but not limited to strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, mint, menthol, 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) Except as provided in Paragraph (4) of this subsection (i), Paragraph (1) of this subsection (i) shall not apply to any Retailer that meets all 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 individual under 21 years of age to be present or enter the premises at any time, unless accompanied by the individual'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 individuals under 21 years of age are prohibited from entering the premises.
- (4) No Retailer that is issued a new Permit after December 19, 2019 shall Sell or Distribute flavored Tobacco Products under paragraph (3) of this subsection (i) after Permit issuance. No Retailer that receives a Permit renewal after December 19, 2019 shall Sell or Distribute flavored Tobacco Products under paragraph (3) of this subsection (i) after Permit renewal. Regardless of the date of Permit issuance or renewal, no Retailer shall Sell or Distribute flavored Tobacco Products after June 30, 2020.
- (j) *Vending machines prohibited.* No Tobacco Product shall be Sold 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 or Distribute any Tobacco Product to any individual who is under 21 years of age.

- (l) *Prohibition on Sale or Distribution of Electronic Cigarette Products.* No Retailer that is issued a new Permit after December 19, 2019 shall Sell or Distribute Electronic Cigarette Products after Permit issuance. No Retailer that receives a Permit renewal after December 19, 2019 shall Sell or Distribute Electronic Cigarette Products after Permit renewal. Regardless of the date of Permit issuance or renewal, no Retailer shall Sell or Distribute Electronic Cigarette Products after June 30, 2020.

Sec. B11-579. Eligibility requirements for a Permit.

- (a) No Permit may be issued to authorize Retailing at or from other than a fixed location. For example, Retailing by Persons on foot or from vehicles is prohibited.
- (b) No 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 Permit may be issued to authorize Retailing at any location where the profession of pharmacy is practiced by a pharmacist licensed by the State in accordance with the Business and Professions Code and where prescription drugs are offered for Sale.
- (d) No 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 Permit 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 the predecessor Ordinance on January 22, 2011) operating lawfully on January 21, 2011;
 - (2) Any Retailer of electronic smoking devices (as such term was defined in the predecessor Ordinance on August 23, 2014) operating lawfully on August 22, 2014; however, any such Retailer is subject to the prohibition on the Sale and Distribution of Electronic Cigarette Products established in B11-578(l); and
 - (3) Any lawfully operating Retailer of Tobacco Products that would otherwise become ineligible to receive or renew a Permit due to the creation or relocation of a School.

- (e) No 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 Permit 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 the predecessor Ordinance on January 22, 2011) operating lawfully on January 21, 2011; and
 - (2) Any Retailer of electronic smoking devices (as such term was defined in the predecessor Ordinance on August 23, 2014) operating lawfully on August 22, 2014; however, any such Retailer is subject to the prohibition on the Sale and Distribution of Electronic Cigarette Products established in B11-578(l).
- (f) Any exemption granted to a Retailer pursuant to subsections (d) and (e) shall cease to apply upon the earlier of the following to occur:
 - (1) The Retailer fails to timely renew the Permit pursuant to Section B11-582(b) of this Chapter.
 - (2) A new Person obtains Ownership in the business.

Sec. B11-580. 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 Permit. No Retailer may rely on the issuance of a Permit as a determination by the County that the Retailer has complied with all laws applicable to Retailing. A 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 B11-581 of this Chapter.
- (b) All 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 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. B11-581. Permit issuance, denial, and revocation.

- (a) Upon the receipt of a complete application for a Permit, the application fee, and the annual Permit fee, the Department shall issue a 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 Permit.
 - (3) The application seeks authorization for Retailing by a Person to whom this Chapter prohibits issuance of a Permit.
 - (4) The application seeks authorization for Retailing that is prohibited pursuant to this Chapter (e.g., mobile vending, Electronic Cigarette Products) or that is unlawful pursuant to any other law.
- (b) A Permit shall be revoked if the Department finds that one or more of the bases for denial of a Permit under this section existed at the time application was made or at any time before the Permit issued. Such a revocation shall be without prejudice to the filing of a new Permit application.

Sec. B11-582. Permit term, renewal, and expiration.

- (a) *Term of Permit.* The term of a Permit is one year. A Permit is invalid upon expiration.
- (b) *Renewal of Permit.* The Department shall renew a Permit upon timely payment of the annual Permit fee provided that the Retailer is in compliance with this Chapter, as amended. The Department may, in its discretion, agree to renew any expired 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 Permit, a late charge equal to 20 percent of the annual Permit fee shall be assessed. A 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 Permit more than three calendar months after expiration of a Permit or following revocation of a Permit that was wrongly issued, a Retailer must submit a complete application for a Permit, along with the application fee and annual Permit fee. The Department shall issue a Permit pursuant to the requirements of Section B11-581 of this Chapter.

Sec. B11-583. Permits nontransferable.

- (a) A 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 Permit has been issued, a new Permit shall be required, but any exemption granted pursuant to Section B11-579 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. B11-584. Permit conveys a limited, conditional privilege.

Nothing in this Chapter shall be construed to grant any Person obtaining and maintaining a 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. All Permits are issued subject to the County's right to amend this Chapter, and Retailers shall comply with all provisions of this Chapter, as amended.

Sec. B11-585. Fees.

The Department shall not issue or renew a 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 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. B11-586. 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 individuals to monitor and facilitate compliance with this Chapter.
- (b) The Department or other individuals 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. B11-587. Prevention of underage Sales.

- (a) The Public Health Department, Department of Environmental Health, or other departments or individuals 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 an individual who otherwise might be in violation of such law because of the individual'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 Department or individual 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. B11-588. 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 Permit shall be suspended if any court of competent jurisdiction determines, or the Department finds based on a preponderance of the evidence 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.* The amount of the administrative fine for each such violation shall be 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.* The period of the suspension shall be as follows:
 - (1) For a first violation of this Chapter at a location within any 60-month period, the Permit shall be suspended for up to 30 calendar days.
 - (2) For a second violation of this Chapter at a location within any 60-month period, the Permit shall be suspended for up to 90 calendar days.
 - (3) For each additional violation of this Chapter at a location within any 60-month period, the 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 the Department exercises its discretion to provide a corrections period, and a Retailer's violation is corrected within the time allowed for correction, no penalty shall be imposed under this section.
- (f) *Written notice of penalties.* Whenever a fine is issued and/or a Permit is suspended based on a violation of this Chapter, the Department shall provide the Retailer written notice of the violation and the fine and suspension, including when the suspension shall take effect.

Sec. B11-589. 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 Permit shall be imposed if a court of competent jurisdiction determines, or the Department finds based on a preponderance of evidence, that any Person has engaged in Retailing at a location without a valid 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.* The amount of the administrative fine for each such violation shall be 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.* The ineligibility period shall be as follows:
 - (1) For a first violation of this section at a location within any 60-month period, no new Permit may be issued for the Person or the location (unless Ownership of the business at the location has been transferred in an Arm's Length Transaction) until 30 calendar days have passed from the date of the violation.

- (2) For a second violation of this section at a location within any 60-month period, no new Permit may be issued for the Person or the location (unless Ownership of the business at the location has been transferred in an Arm's Length Transaction) until 90 calendar days have passed from the date of the violation.
- (3) For each additional violation of this section at a location within any 60-month period, no new Permit may be issued for the Person or the location (unless Ownership of the business at the location has been transferred in an Arm's Length Transaction) until 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) *Written notice of penalties.* Whenever a fine is issued and/or a Permit is suspended pursuant to this section, the Department shall provide the Retailer written notice of the fine and suspension, including when the suspension shall take effect.
- (f) *Appeals.* Any penalties imposed under this section may be appealed pursuant to Section B11-590 of this Chapter. A timely appeal shall stay enforcement of the appealed penalties while the appeal is ongoing.

Sec. B11-590. Appeals.

- (a) Any Retailer served with a written notice of penalties may request an administrative hearing to appeal the existence of the violation, the amount of the fine, and/or the length of the suspension by returning a completed hearing request form to the Office of the County Hearing Officer within 10 days from the date of the written notice of penalties.
- (b) The Retailer shall include the following in or with the hearing request form:
 - (1) A statement indicating the reason the Retailer contests the written notice of penalties;
 - (2) Any evidence the Retailer wants the Hearing Officer to consider;

- (3) An advance deposit of the amount of any fine challenged; and
 - (4) The address of the Retailer and, if available, an email address that can be used for contact and correspondence by the Office of the County Hearing Officer and the Department. The Retailer may request service of notice by mail.
- (c) The hearing request form shall be deemed filed on the date received by the Office of the County Hearing Officer. A timely appeal shall stay enforcement of the appealed penalties while the appeal is ongoing.
 - (d) After receiving a timely hearing request form, the Office of the County Hearing Officer shall notify the Department as soon as practicable and then shall schedule an administrative hearing. The Office of the County Hearing Officer shall provide the Retailer and the Department at least ten calendar days' written notice of the date, time, and place of the administrative hearing and the name of the Hearing Officer who will conduct the hearing. The notice shall be given to the Retailer either by email, if requested, or by first class mail, postage prepaid.
 - (e) Between the time the Retailer requests the administrative hearing and the time of the Hearing Officer's decision, the Retailer, the Department, and each of their representatives shall not engage in *ex parte* communications with the Office of the County Hearing Officer or the Hearing Officer regarding the matters at issue in the hearing.
 - (f) The hearing shall be conducted by the Hearing Officer on the date, time, and place specified in the notice to the Retailer. A Retailer's failure to appear at the hearing shall constitute an abandonment of the hearing request and a failure to exhaust administrative remedies as a precedent to judicially challenge the existence of the violation and the imposition of the fine and suspension.
 - (g) At the hearing, the Retailer and the Department shall have the opportunity to present evidence, including witnesses, relevant to the Hearing Officer's determination of the matter. Neither the provisions of the Administrative 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. The Hearing Officer may admit any evidence, including witnesses, relevant to the determination of the matter, except as otherwise provided in section B11-591(c).
 - (h) The written notice of penalties and any other reports prepared by or for the Department concerning the violation shall be admissible and accepted by the

Hearing Officer as prima facie evidence of the violation and the facts stated in those documents.

- (i) The Hearing Officer may continue the hearing from time to time, in his or her sole discretion, to allow for its orderly completion. After receiving the evidence submitted at the hearing, the Hearing Officer may further continue the hearing and request additional information from either the Department or the Retailer.
- (j) After considering the evidence and testimony submitted the Hearing Officer shall issue a written decision regarding the matters properly raised in the request for administrative hearing. The Hearing Officer's decision shall:
 - (1) Be based on a preponderance of the evidence.
 - (2) Include a statement of the reasons for the decision.
 - (3) Be issued within 20 calendar days of the close of the hearing.
 - (4) Be served on both the Retailer and the Department. The decision shall be given to the Retailer either by email, if requested, or by first class mail, postage prepaid.
- (k) Based on the Hearing Officer's decision, the Office of the County Hearing Officer shall promptly refund to the Retailer any amount of the advance fine deposit the Department is not entitled to and shall provide the remainder to the Department.
- (l) The Hearing Officer's written decision shall constitute the final administrative decision of the County.

Sec. B11-591. 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 an individual under the age of 21 years old, such an individual 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 Counsel, 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 Sold or Distributed 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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Sec. B11-592. No conflict with federal or state law.

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

PASSED AND ADOPTED by the Board of Supervisors of the County of Santa Clara, State of California, on November 19, 2019, by the following vote:

AYES: CHAVEZ, CORTESE, ELLENBERG
SIMITIAN, WASSERMAN

NOES: NONE

ABSENT: NONE

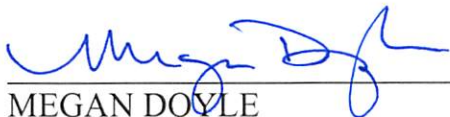
ABSTAIN: NONE



S. JOSEPH SIMITIAN, President
Board of Supervisors

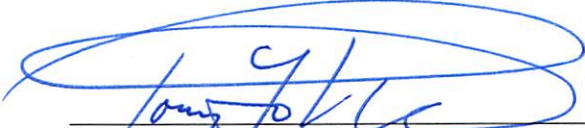
Signed and certified that a copy of this document has been delivered by electronic or other means to the President, Board of Supervisors.

ATTEST:



MEGAN DOYLE
Clerk of the Board of Supervisors

APPROVED AS TO FORM AND LEGALITY:



TONY LOPRESTI
Deputy County Counsel

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