

ORDINANCE NO. _____(N.S.)

AN ORDINANCE ADDING PROVISIONS TO TITLE 3, DIVISION 2 OF THE SAN DIEGO COUNTY REGULATORY CODE REGARDING SMOKING RELATED PROHIBITIONS IN THE UNINCORPORATED AREA OF THE COUNTY

The Board of Supervisors of the County of San Diego ordains as follows:

Section 1. Title 3, Division 2 of the San Diego County Code is amended to add Chapter 8.7 as follows:

SEC. 32.871. FINDINGS AND INTENT.

- (a) Smoking is the leading cause of preventable death in the United States and California. Smoking kills more than 480,000 Americans each year, including secondhand smoke that kills approximately 41,000 Americans who do not smoke.
- (b) The United States Surgeon General concluded in 2006 that there is no safe level of exposure to secondhand smoke.
- (c) The California Air Resources Board placed secondhand smoke in the same category as the most toxic automotive and industrial air pollutants by categorizing it as a toxic air contaminant for which there is no safe level of exposure.
- (d) The California Environmental Protection Agency included secondhand smoke on the Proposition 65 list of chemicals known to the State of California to cause cancer, birth defects, and other reproductive harm.
- (e) Secondhand smoke is responsible for as many as 7,300 deaths from lung cancer and 34,000 deaths from heart disease among adult nonsmokers each year in the United States. Secondhand smoke is particularly hazardous to individuals with cardiovascular disease, and individuals with impaired respiratory function, including those with asthma or obstructive airway disease.
- (f) Exposure to secondhand smoke can occur at significant levels outdoors, and secondhand exposure can reach levels attained indoors depending on direction and amount of wind, and number and proximity of smokers.
- (g) Californians working in the service and hospitality industry have much greater exposure to secondhand smoke when there is an outdoor dining area at their workplace because State law does not regulate smoking in outdoor dining areas to the same extent as indoor dining areas.
- (h) Aerosols created by electronic smoking devices contain varying concentrations of particles and chemicals; some studies found particle sizes and nicotine concentrations similar to, or even exceeding, conventional cigarette smoke.
- (i) For the reasons stated above, smoking in and around public outdoor dining areas is a public nuisance.
- (j) It is the intent of the Board to provide for the public health, safety, and welfare, by reducing secondhand smoke exposure in public outdoor dining areas.

SEC. 32.872. DEFINITIONS.

- (a) “Outdoor dining area” means any portion of a permitted food facility that contains areas designated, established, or regularly used for consuming food or drink outdoors, in a covered area, or otherwise outside the confines of the interior premises.
- (b) “Shisha” means a flavored smoking product that is traditionally mixed with molasses, honey, fruit pulp, or dried fruits and is sold for use in a water pipe known as a hookah.
- (c) “Smoking” has the meaning set forth in section 22950.5 of the California Business and Professions Code.

SEC. 32.873. SMOKING PROHIBITED IN AND AROUND OUTDOOR DINING AREAS.

- (a) Smoking is prohibited in all outdoor dining areas, and within 25 feet from the perimeter of such areas, in the unincorporated area of the County.
- (b) Smoking is prohibited within 40 feet from a permitted food facility that is a mobile food or temporary food facility, including a food truck or food cart, in the unincorporated area of the County.
- (c) The owner, operator, manager, or other person in control of an area subject to this section shall install signage notifying employees, patrons, and visitors of the prohibition on smoking. The signage required in this section shall include the text “No Smoking” in letters not less than one inch in height displayed against a contrasting background. Signs of similar size containing the international “no smoking” symbol consisting of a pictorial representation of a burning cigarette and an electronic cigarette enclosed in a red circle with a red bar across it, may be used in addition to, or in lieu of, the required text signs. The signage shall be clearly and conspicuously posted at congregating points in, and at entrance points to, areas subject to this section.
- (d) The owner, operator, manager, or other person in control of an area subject to this section who witnesses smoking in violation of this section shall immediately inform any person in violation to cease smoking.
- (e) No ashtrays shall be placed, installed, or retained in an area where smoking is prohibited by this section.
- (f) This section shall not apply to a facility or location whose business operation, as its principal use, is devoted to the on-premises smoking of shisha, including, but not limited to, establishments known variously as hookah bars, hookah lounges, hookah parlors, or hookah cafes.

SEC. 32.874. VIOLATIONS.

Any person who violates the provisions of this chapter shall be subject to an infraction as set forth in section 11.116 of this code in conjunction with or in addition to any other remedy set forth in section 11.121 of this code or allowed by law. The County’s Chief Administrative Officer may designate one or more County officers to enforce and administer any remedy authorized by this code.

Section 2. Title 3, Division 2 of the San Diego County Code is amended to add Chapter 8.8 as follows:

CHAPTER 8.8. SALE OR DISTRIBUTION OF FLAVORED SMOKING PRODUCTS.

SEC. 32.881. FINDINGS AND INTENT.

- (a) Smoking is the leading cause of preventable death in the United States and California. Smoking kills more than 480,000 Americans each year, including secondhand smoke that kills approximately 41,000 who do not smoke. Three-fifths of lifelong smokers die from smoking-related diseases, including many forms of cancer, heart disease, respiratory diseases, among other health disorders.
- (b) The National Survey on Drug Use and Health in 2017 found that four-fifths of people who smoke become daily smokers before turning twenty-one. Developing adolescent brains are especially vulnerable to the effects of nicotine.
- (c) The findings of the 2019 National Youth Tobacco Survey, released by the Centers for Disease Control and Prevention and Food and Drug Administration, showed that more than 5 million U.S. middle and high school students reported current e-cigarette use, an increase of more than 1.5 million students from the 2018 findings. The survey also found that 27.5 percent of high school students reported current e-cigarette use, a percentage that has increased dramatically since 2018.
- (d) The 2019 National Youth Tobacco Survey also found that, among current exclusive e-cigarette users, approximately 72 percent of high school students and 60 percent of middle school students used flavored e-cigarettes. Flavors, such as fruit, menthol, mint, candy, or dessert, hide the harshness of nicotine, making initiation of nicotine use easier among youth. Menthol and mint flavors are particularly important to prohibit; menthol flavoring makes it easier to start smoking and harder to quit. The marketing of menthol cigarettes has disproportionately targeted African-American communities for decades.
- (e) Youth get access to tobacco products through stores, the Internet, and social sources such as friends or classmates. Eliminating youth access requires action on all three fronts. State and federal action is needed, but curbing retail sales is often addressed by local government. The 2018 Young Adult Tobacco Purchase Survey showed that tobacco and vape shops made sales to underage decoys 49.8 percent of the time, twice the rate of any other category of retailer.
- (f) For the reasons stated above, the sale or distribution of flavored smoking products is a public nuisance.
- (g) It is the intent of the Board to provide for the public health, safety, and welfare, by prohibiting the sale or distribution of flavored smoking products in the unincorporated area of the County.

SEC. 32.882. DEFINITIONS.

For the purposes of this chapter:

- (a) “Distribution” means to give smoking products to the general public at no cost, or at nominal cost, or to give coupons, coupon offers, gift certificates, gift cards, or other

similar offers, or rebate offers for smoking products to the general public at no cost or at nominal cost.

- (b) “Flavored Smoking Product” is a product containing, made, or derived from tobacco or nicotine that is intended for smoking, and that emits a taste or smell, other than the taste or smell of tobacco, including, but not limited to, any taste or smell relating to fruit, menthol, mint, wintergreen, chocolate, cocoa, vanilla, honey, candy, dessert, alcoholic beverage, herb, or spice.
- (c) “Shisha” means a flavored smoking product that is traditionally mixed with molasses, honey, fruit pulp, or dried fruits and is sold for use in a water pipe known as a hookah.
- (d) “Smoking” has the meaning set forth in section 22950.5 of the California Business and Professions Code.

SEC. 32.883. PROHIBITION ON SALE OR DISTRIBUTION OF FLAVORED SMOKING PRODUCTS.

- (a) The sale or distribution of all flavored smoking products is prohibited in the unincorporated area of the County.
- (b) This section shall not apply to the sale or distribution of shisha for use in a hookah.
- (c) This section shall not apply to a product that has been approved by the Food and Drug Administration for sale as a tobacco cessation product or for other therapeutic purposes, where the product is marketed and sold solely for such an approved purpose.

SEC. 32.884. VIOLATIONS.

- (a) Any person who violates the provisions of this chapter shall be subject to an infraction as set forth in section 11.116 of this code in conjunction with or in addition to any other remedy set forth in section 11.121 of this code or allowed by law.
- (b) The County’s Chief Administrative Officer may designate one or more County officers to enforce and administer any remedy authorized by this code.

Section 3. Title 3, Division 2 of the San Diego County Code is amended to add Chapter 8.9 as follows:

CHAPTER 8.9. TEMPORARY PROHIBITION ON THE SALE OR DISTRIBUTION OF ELECTRONIC SMOKING DEVICES.

SEC. 32.891. FINDINGS AND INTENT.

- (a) Electronic smoking devices are battery-operated devices that heat “e-liquid” solutions of chemicals, turning them into an aerosol that is inhaled in a manner similar to smoking a cigarette. There is a tremendous variety of e-liquids on the market. They often have varying compositions of flavorings, propylene glycol, vegetable glycerin, and other ingredients. Most have nicotine. Electronic smoking devices are also increasingly used to deliver tetrahydrocannabinol (THC) or cannabidiol (CBD).
- (b) Currently, the electronic smoking market is largely unregulated. In 2009, Congress passed the Family Smoking Prevention and Tobacco Control Act, which extended the

federal Food and Drug Administration's (FDA) authority to regulate tobacco products, including requiring that all new tobacco products receive FDA premarket clearance to be sold in the United States. However, FDA granted electronic tobacco products a grace period and extended it. Currently, manufacturers are required to submit Premarket Tobacco Product Applications to FDA by May 12, 2020.

- (c) E-cigarettes are not approved by FDA as an aid to quit smoking. Studies indicate no evidence of definitive long-term efficacy of e-cigarettes as a cessation aid and many people become 'dual users' instead of completely quitting combustible cigarettes. E-cigarette manufacturers could request approval to market their products as a "modified risk tobacco product" or a cessation aid. Without this FDA approval manufacturers may not make safety or health claims for their products.
- (d) The long-term health consequences of electronic smoking devices are unclear, but evidence is mounting that there are serious risks. Research suggests vegetable glycerin and propylene glycol, which produce the aerosol cloud, are toxic to cells in lungs. Research also indicates that the metals in heating coils enter the aerosol that is pulled into the lungs. A review of the research on vaping by the National Academies of Sciences, Engineering, and Medicine concluded that there was "conclusive evidence that in addition to nicotine, most e-cigarette products contain and emit numerous potentially toxic substances." This review noted the presence of known carcinogens, like formaldehyde and acrolein, but expressed the most concern about the unknown effects of flavorings.
- (e) A longitudinal study, published in the *American Journal of Preventive Medicine*, in December 2019, revealed statistically significant associations between former e-cigarette use and current e-cigarette use with having incident respiratory disease.
- (f) The findings of the 2019 National Youth Tobacco Survey, released by the Centers for Disease Control and Prevention (CDC) and FDA, showed that more than 5 million U.S. middle and high school students reported current e-cigarette (use within the last 30 days), an increase of more than 1.5 million students from the 2018 findings. The survey also found that 27.5 percent of high school students reported current e-cigarette use, a percentage that has increased dramatically since 2018.
- (g) Electronic smoking devices have been implicated in an acute public health crisis that began in the summer of 2019. E-cigarette, or vaping, product use associated lung injury (EVALI), formerly known as vaping-associated pulmonary injury (VAPI), has led to hospitalizations and deaths nationwide, including in California. There have been 41 confirmed or probable EVALI cases in San Diego County as of December 18, 2019 (most recent data as of docket date). In response, the California Department of Public Health has urged the public to immediately cease using electronic smoking devices, regardless of whether they include THC, CBD, or nicotine. Investigations to date on the cause of the outbreak have identified vitamin E acetate, an additive in some e-cigarette, or vaping, products containing THC, as closely associated with EVALI. There may be other contributing causes of EVALI, and it is notable that some individuals with EVALI did not report using THC-containing products. Regardless of the specific ingredients ultimately pinpointed as contributing to this outbreak, EVALI is indicative of the uncertainties and potential harms of widespread recreational electronic smoking device use in a minimally regulated market.
- (h) For the reasons stated above, the sale or distribution of electronic smoking devices is a

public nuisance.

- (i) It is the intent of the Board to provide for the public health, safety and welfare, by temporarily prohibiting the sale or distribution of electronic smoking devices in the unincorporated area of the County.

SEC. 32.892. DEFINITIONS.

For the purposes of this chapter:

- (a) "Distribution" means to give smoking products to the general public at no cost, or at nominal cost, or to give coupons, coupon offers, gift certificates, gift cards, or other similar offers, or rebate offers for smoking products to the general public at no cost or at nominal cost.
- (b) "Electronic smoking device" is defined as an electronic and/or battery-operated device, which can be used to deliver an inhaled dose of nicotine or other substances whether manufactured, distributed, marketed, or sold as an electronic cigarette, an electronic cigar, an electronic cigarillo, an electronic pipe, or any other product name or descriptor. For the purposes of this chapter, "electronic smoking device" does not include any product that the Food and Drug Administration has either granted premarket approval, or approved for use as a tobacco cessation product or for other therapeutic purposes where the product is marketed and sold solely for such an approved purpose.
- (c) "E-cigarette, or vaping, product use associated lung injury outbreak" or "EVALI outbreak" is an outbreak of a severe and sometimes fatal illness that was identified in the summer of 2019 and is the subject of an ongoing investigation by the Centers for Disease Control and Prevention.

SEC. 32.893. TEMPORARY PROHIBITION.

- (a) The sale or distribution of an electronic smoking device is prohibited within the unincorporated area of the County for one year from the effective date of the ordinance codified in this chapter.
- (b) This section shall not apply to electronic smoking devices that, at the conclusion of the ongoing investigation by the CDC, are not identified as a causal factor in the e-cigarette, or vaping, product use associated lung injury outbreak. The health officer shall issue a public notice at the termination of the CDC's investigation regarding whether this condition has been met.

SEC. 32.894. VIOLATIONS.

Any person who violates the provisions of this chapter shall be subject to an infraction as set forth in section 11.116 of this code in conjunction with or in addition to any other remedy set forth in section 11.121 of this code or allowed by law. The County's Chief Administrative Officer may designate one or more County officers to enforce and administer any remedy authorized by this code.

SEC. 32.895. SUNSET.

This chapter shall remain in effect for one year from the effective date of the ordinance codified in this chapter and shall terminate thereafter.

Section 4. Effective Date. This ordinance shall take effect thirty (30) days after its adoption. Within fifteen (15) days after the date of adoption of this ordinance, a summary shall be published once with the name of those members voting for and against the same in a newspaper of general circulation published in San Diego County.

Section 5. Operative Date. This ordinance shall become operative on July 1, 2020.

APPROVED AS TO FORM AND LEGALITY
COUNTY COUNSEL

By: Kyle Sand, Senior Deputy County Counsel