

ORDINANCE NO. _____

**AN ORDINANCE AMENDING CHAPTER 4
OF THE SARATOGA CITY CODE, TOBACCO RETAILER LICENSE**

THE CITY COUNCIL OF THE CITY OF SARATOGA HEREBY ORDAINS AS
FOLLOWS:

Findings

1. The City of Saratoga wishes to amend the provisions of the City Code concerning Tobacco Retailer License regulations to prohibit the sale of electronic smoking products to discourage underage tobacco use.
2. The Journal of American Medical Association reported in a November 5, 2019 article titled ["e-Cigarette Use Among Youth in the United States, 2019"](#) that since 2014 electronic smoking devices have been the most commonly used tobacco product among young people and approximately 4 million high school students in the United States identified as current electronic smoking product users, meaning that they had used an electronic smoking device within the past 30 days.
3. The 2018 National Youth Tobacco Survey showed notable increases in youth use of electronic smoking devices. There was a rise of more than 75% in the number of high school-age children that reported using e-cigarettes in the last 30 days when compared to 2018. The use of e-cigarettes among students in middle school increased by almost 50%.
4. The [County of Santa Clara Public Health Department reported in August 2019](#) that roughly 1 in 3 Santa Clara County teens stated that they have tried electronic smoking products and more than 13% of teens are current electronic smoking product users, meaning that they had used an electronic smoking device within the past 30 days. Furthermore, more than 2 in 5 teens reported that they were able to purchase their own electronic smoking devices.
5. Nicotine exposure in adolescence can negatively impact learning, memory, and attention. It can also increase anxiety, mood swings, and irritability. For the purposes of this ordinance, nicotine does not include any food products as that term is defined pursuant to Section 6359 of the California Revenue and Taxation Code.
6. The City Council of the City of Saratoga held a duly noticed public hearing on September 2, 2020, and after considering all testimony and written materials provided in connection with that hearing introduced this ordinance and waived the reading thereof.

Therefore, the City Council hereby ordains as follows:

Section 1. Adoption.

The Saratoga City Code is amended as set forth in Attachment 1. Text to be added is indicated in bold double-underlined font (e.g., **bold double-underlined**) and text to be deleted is indicated in strikeout font (e.g., ~~strikeout~~). Text in standard font is readopted by this ordinance. Text in italics (e.g., *italics*) is descriptive only and is not part of the amendments to the City Code.

Section 2. Severance Clause.

The City Council declares that each section, sub-section, paragraph, sub-paragraph, sentence, clause and phrase of this ordinance is severable and independent of every other section, sub-section, paragraph, sub-paragraph, sentence, clause and phrase of this ordinance. If any section, sub-section, paragraph, sub-paragraph, sentence, clause or phrase of this ordinance is held invalid, the City Council declares that it would have adopted the remaining provisions of this ordinance irrespective of the portion held invalid, and further declares its express intent that the remaining portions of this ordinance should remain in effect after the invalid portion has been eliminated.

Section 3. California Environmental Quality Act

The proposed amendments and additions to the City Code are Categorical Exempt from the California Environmental Quality Act (CEQA) pursuant to CEQA Guideline section 15061(b)(3). CEQA applies only to projects which have the potential of causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA. In this circumstance the amendments to the existing City Code would have a de minimis impact on the environment.

Section 4. Publication.

A summary of this ordinance shall be published in a newspaper of general circulation of the City of Saratoga within fifteen days after its adoption.

Following a duly noticed public hearing the foregoing ordinance was introduced at the regular meeting of the City Council of the City of Saratoga held on the 2nd day of September 2020, and was adopted by the following vote on September 16, 2020.

COUNCIL MEMBERS:

AYES:

NAYS:

ABSENT:

ABSTAIN:

SIGNED:

Howard A. Miller
MAYOR, CITY OF SARATOGA, CALIFORNIA

ATTEST:

Debbie Bretschneider, CMC
CITY CLERK

DATE: _____

APPROVED AS TO FORM:

Richard Taylor
CITY ATTORNEY

DATE: _____

ATTACHMENT 1 – AMENDMENTS TO ARTICLE 4-20 OF THE CITY CODE

Article 4-90 - TOBACCO RETAILER LICENSE

4-90.010 - Purpose.

This Article is intended to set forth a local licensing process for tobacco retailers to ensure compliance with City business standards and practices; encourage responsible retailing of tobacco products ~~and electronic smoking devices~~; discourage violations of laws related to tobacco products ~~and electronic smoking devices~~, especially those laws that prohibit or discourage sale or distribution of tobacco products ~~or electronic smoking devices~~ to minors; **prohibit sales of electronic smoking products**, and, protect the public health, safety, and welfare. This Article 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.

4-90.020 - Definitions.

- (a) **Electronic smoking device product** means ~~an electronic and/or battery-operated device, the use of which may resemble smoking, which can be used to deliver an inhaled dose of vapors including nicotine or other substances. "Electronic smoking device" includes any such device, whether it is manufactured, distributed, marketed, or sold as an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, electronic hookah, electronic vape, vaporizer or any other product name or description. "Electronic smoking device" does not include any product specifically approved by the United States Food and Drug Administration for the use in the mitigation, treatment, or prevention of disease.~~ **any of the following products:**
- (1) Any device or delivery system that can be used to deliver nicotine or other chemicals in aerosolized or vaporized form, including but not limited to an e-cigarette, e-cigar, e-pipe, e-hookah, vape pen, electronic vape, vaporizer, or any other product name or description.**
 - (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 or other chemicals, whether sold separately or sold in combination with any device or delivery system that could be used to delivery nicotine or other chemicals in aerosolized or vaporized form.**
 - (4) Any product for use in an electronic smoking device or delivery system whether or not it contains nicotine or tobacco or is derived from nicotine or tobacco.**
 - (5) Electronic smoking products shall not include:**
 - (i) any battery, battery charger, carrying case, or other accessory not used in the operation of the device if sold separately; or**
 - (ii) 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.**
- b) **Flavored tobacco product** means any tobacco product that imparts a taste or aroma, other than the taste or aroma of tobacco or menthol, imparted either prior to or during consumption of a tobacco product or any byproduct produced by the tobacco product, including, but not limited to, tastes or aromas relating to mint, wintergreen, fruit,

chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb, or spice; provided, however, that a tobacco product shall not be determined to be flavored tobacco solely because of the use of additives or flavorings or the provision of ingredient information.

- (c) **Paraphernalia** means cigarette papers or wrappers, pipes, holders of smoking materials of all types, rolling machines, and any other item designed for smoking or for ingestion of tobacco products. **Until January 1, 2021 paraphernalia includes electronic smoking products.**
- (d) **Person** means any natural person, partnership, cooperative association, private corporation, personal representative, receiver, trustee, assignee, or any other legal entity.
- (e) **Retailer** means any person who sells, exchanges, or offers to sell or exchange, for any form of consideration, tobacco products **or**, ~~paraphernalia, or electronic smoking devices~~. "Retailing" shall mean the doing of any of these things whether exclusively or in conjunction with any other use. The definition of a retailer is without regard to the quantity of tobacco products **or**, ~~paraphernalia, or electronic smoking devices~~ sold, exchanged, or offered for sale or exchange.
- (f) **Self-service display** means the open display or storage of tobacco products **or**, ~~paraphernalia, or electronic smoking devices~~ in a manner that is physically accessible in any way to the direct general public without the assistance of the retailer or employee of the retailer and a direct person-to-person transfer between the purchaser and the retailer or employee of the retailer.
- (g) **Tobacco product** means any substance containing tobacco leaf, including but not limited to cigarettes, cigars, pipe tobacco, hookah tobacco, snuff, chewing tobacco, dipping tobacco, snus, bidis, or any other preparation of tobacco (such as flavored tobacco); and any product or formulation of product 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 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.**
- (h) **Tobacco retailer license** is a license issued pursuant to this Article.

4-90.030 - License required.

It shall be unlawful for any person to act as a retailer in the City of Saratoga without first obtaining and maintaining a valid tobacco retailer license pursuant to this Article for each location at which the activity is to occur.

4-90.040 - Regulations and prohibitions.

- (a) **Lawful business operation.** It shall be a violation of this Article for any retailer to violate any local, state, or federal law applicable to tobacco products, electronic smoking devices, or the retailing of such products.
- (b) **Location.** Retailing activities shall be conducted at a fixed location and within an enclosed area of a commercial premises accessible to the general public during the hours of business operation. No tobacco retailers established after September 16, 2016, shall be granted a tobacco retailer license for a location which is: within five hundred feet of a site occupied by another tobacco retailer; within one thousand feet of a site occupied by a

public or private elementary, middle, or high school; or within one thousand feet of a site occupied by a City park. All distances shall be measured in a straight line from the point on the parcel boundary of the proposed tobacco retailer location nearest to the subject use (i.e. existing tobacco retailer, school, or park) to the nearest point on the parcel boundary of the subject use. Notwithstanding the foregoing, a tobacco retailer license may be issued for use of a location for which a tobacco retailer license was in effect prior to September 16, 2016 and may be renewed thereafter unless it expires due to non-renewal or is revoked in accordance with section 4-90.070 of this Code.

- (c) **Pharmacies.** No retailer permit may be issued to authorize retailing activities at any location where the profession of pharmacy is practiced by a pharmacist licensed by the State of California in accordance with the Business and Professions Code and where prescription drugs are offered for sale regardless of whether other retail goods in addition to prescription pharmaceuticals are offered for sale.
- (d) **Display of license.** Each tobacco retailer license shall be prominently displayed in a publicly visible place at the licensed location.
- (e) **License nontransferable.** A tobacco retailer license may not be transferred from one person to another or from one location to another. Whenever a new person obtains 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) for which a tobacco retailer license has been issued, a new license shall be required.
- (f) **False and misleading advertising prohibited.** A retailer either without a valid tobacco retailer license or with a suspended license shall not display any tobacco products or; paraphernalia, ~~or electronic smoking devices~~ nor display any advertisement 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 or; paraphernalia, ~~or electronic smoking devices~~ can be obtained at that location.
- (g) **Minimum age for purchase.** No retailer shall sell, give, or otherwise transfer tobacco product or; paraphernalia, ~~or electronic smoking devices~~ to a person under the minimum age for purchase as set by State law.
- (h) **Positive identification required.** No retailer shall sell, give, or otherwise transfer tobacco product or; paraphernalia, ~~or electronic smoking devices~~ to another person who appears to be under thirty years of age without first examining the customer's identification to confirm that the customer is at least the minimum age for purchase as set by State law.
- (i) **Minimum age for engaging in tobacco sales.** No retailer may allow a person under the minimum age for purchase as set by State law of tobacco products to sell, give, or otherwise transfer to customers tobacco product or; paraphernalia, ~~or electronic smoking devices~~.
- (j) **Limitation on storefront advertising.** Storefront advertising shall comply with Article 15-30 of this Code 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 establishment. However, this shall not apply to an establishment where there are no windows or where existing windows are located at a height that preclude view of the interior of the premises by a person standing outside the premises.

- (k) **Vending machines prohibited.** No tobacco product ~~or~~, paraphernalia, ~~or electronic smoking device~~ shall be sold, offered for sale, or distributed to the public from a vending machine or appliance, or any other coin- or token-operated mechanical device designed or used for vending purposes, including, but not limited to, machines or devices that use remote control locking mechanisms.
- (l) **Self-service displays prohibited.** No tobacco product ~~or~~, paraphernalia, ~~or electronic smoking device~~ shall be sold, offered for sale, or distributed to the public from a self-service display.
- (m) **Flavored tobacco products prohibited.** No flavored tobacco product shall be sold, offered for sale, or possessed with intent to sell or offer for sale.
- (n) **Electronic smoking products prohibited. Beginning January 1, 2021 no electronic smoking products shall be sold, offered for sale, or possessed with intent to sell or offer for sale.**
- (~~no~~) **Limited, conditional privilege.** Nothing in this Article shall be construed to grant any person obtaining and maintaining a tobacco retailer license any status or right other than the limited, conditional privilege to act as a retailer at the location in the City identified on the face of the license.

4-90.070 - Enforcement.

- (a) Any peace officer may enforce the penal provisions of this Article. The City Manager may designate any number of additional persons to monitor compliance with this Article.
- (b) The City shall not enforce any law establishing a minimum age for tobacco product, paraphernalia, or electronic smoking **product device** purchases against a person who otherwise might be in violation of such law because of the person's age if the violation occurs when:
 - (1) The purchaser (hereinafter referred to as "youth decoy") is participating in a compliance check supervised by a peace officer or designated official of the City;
 - (2) The youth decoy is acting as an agent of a person designated by the City to monitor compliance with this Article; or
 - (3) The youth decoy is participating in a compliance check funded in part, either directly or independently through subcontracting, by the County or the State of California.
- (c) Any violation of this Article is hereby declared to be a public nuisance.
- (d) Causing, permitting, aiding, abetting, or concealing a violation of any provision of this Article shall also constitute a violation of this Article.
- (e) For purpose of this Article, each day on which a tobacco product, paraphernalia, ~~or electronic smoking device~~, **flavored tobacco product, or electronic smoking product** is offered for sale in violation of this Article constitutes a separate violation.
- (f) Violations of this Article shall be subject to issuance of administrative citations pursuant to Article 3-30 and suspended from holding or receiving a tobacco retailer license as follows:
 - (1) **First citation within twenty-four months.** For up to sixty calendar days from the date of the administrative citation issuance, no tobacco retailer license shall be issued and any existing license shall be suspended.
 - (2) **Second or subsequent citations within twenty-four months.** For up to twenty-four months from the date of the administrative citation issuance, no tobacco retailer license shall be issued and any existing license shall be revoked.

- (g) Notwithstanding any other provisions of this Article, prior violations of this Article at a location shall continue to be counted against a location and license 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 security interest for the repayment of debt, has been transferred to one or more new owners; and
 - (2) The City is provided clear and convincing evidence that the transfer was pursuant to an arm's length transaction in good faith 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 to avoid the effect of the violations of this Article is not an arm's length transaction.

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