



November 12, 2019

Via Electronic Mail and Hand Delivery

Contra Costa County Board of Supervisors
County Administration Building
651 Pine Street, Room 107
Martinez, CA 94553

John Gioia, District 1, John_Gioia@bos.cccounty.us
Candace Andersen, District 2, supervisorandersen@bos.cccounty.us
Diane Burgis Supervisor, District 3, supervisor_burgis@bos.cccounty.us
Karen Mitchoff, District 4, supervisormitchoff@bos.cccounty.us
Federal D. Glover, District 5, district5@bos.cccounty.us
Jami Napier, Chief Assistant Clerk of the Board, clerkoftheboard@cob.cccounty.us

RE: LETTER IN OPPOSITION TO CONTRA COSTA COUNTY ACTION ON VAPING, AGENDA ITEM D3.

Dear Contra Costa County Board of Supervisors:

This letter is submitted to the Contra Costa County Board of Supervisors (“Board”) in opposition to the Board’s consideration of Ordinance No. 2019-34, which would, in part, prohibit the sale or delivery of tobacco and cannabis vaping products. The following information and recommendations are provided to further educate Board members and encourage informed and fact-based decision-making in addressing this complex and timely issue.

Eden Enterprises, Inc. (“Eden”) is a vertically integrated cannabis company with operations along the supply chain, including Garden of Eden (“GOE”), a Medical and Adult Use Cannabis Storefront Retailer in unincorporated Alameda County. GOE sells high quality cannabis vape products in its store. Eden also owns and operates Eden Infusions, LLC, a manufacturer of regulated and tested cannabis vape products. Along with operating GOE and Eden Infusions, Eden has secured additional retail license in Alameda County and a Storefront Retail, Cultivation, Manufacturing and Distribution in Union City.

We urge the County to **continue this agenda item.** The Board and the public should take the time necessary to be fully informed regarding vape-related illnesses including the new information released by the Centers for Disease Control and Prevention (“CDC”) and the State legislature’s forthcoming regulation.

I. Background on Contra Costa County Supervisors' Concerns Regarding Vaping Products.

On September 10, 2019, Contra Costa County ("County") Supervisor Mitchoff directed staff to prepare an ordinance banning the sale of all vaping products. A sole staff report was presented to the Family and Human Services Committee on October 07, 2019, County staff made no other outreach efforts to engage and solicit community feedback. Supervisor Mitchoff during the September 10th meeting insisted the Ordinance should move forward as quickly as possible; however, this action has led to the Board missing a critical step of receiving information and feedback from stakeholders, particularly the cannabis industry. The County, with an ongoing commercial cannabis process, has a devoted department with subscribers and email notifications, including sending an email regarding this hearing four days before the hearing. However, an email notification was not sent for the October Committee meeting.

The staff report for the proposed Ordinance cites to a CDC advisory that recommends all users to refrain from vaping, no matter the substance or source and states that "vaping nicotine or cannabis is dangerous and potentially deadly for any user." This statement without context in this manner is misleading; especially, in light of the recent findings from the CDC linking vaping-related lung illnesses to a specific substance that is uncommon in the legal industry. The staff report also states that "[t]here is growing evidence of harms associated with youth cannabis use." The report inappropriately conflates the issue of youth vaping with the legal adult use cannabis market. These issues are discussed in further detail below.

While we support a County-wide ban on non-cannabis derived flavoring and additives in all vaping products, it is important for the County to be wary of conflating concerns over youth vaping, unregulated untested vaping products, and the legal and highly regulated and tested cannabis vaping products, such as the products manufactured and sold by Eden.

II. Legal Cannabis Vaping Products Are a Separate and Distinct Category from Unregulated and Untested Illicit Market Vaping Products.

Vaping-related lung illnesses from vapes that include THC have been traced directly to unregulated and unsafe vapes that result from prohibition and lack of enforcement against the illicit market. At a hearing before the House Appropriations Labor, Health and Human Services, Education, and Related Agencies Subcommittee,¹ CDC Principal Deputy Director Anne Schuchat has specifically stated that the CDC has not found any evidence linking vaping-related lung illness to the legal cannabis market. In fact, no licensed California brands or products have been implicated in any vaping-related lung illnesses.

A clear distinction between health concerns over illicit market vaping products and legally manufactured and tested cannabis vape products that are sold to adults over the age of 21. This issue has been further conflated in the media with tobacco use and vaping use among minors.

¹ See <https://appropriations.house.gov/events/hearings/e-cigarettes-an-emerging-threat-to-public-health>.

Tobacco use by minors is a major and escalating concern, especially nicotine vape products that contain artificial flavoring ingredients and additives designed with flavors such as bubble gum, cherry, etc. to entice underage users. Unfortunately, unlike cannabis, the flavored nicotine and tobacco products are loosely regulated and widely available. More problematic is the limited standardization of nicotine vape ingredients and, as a result, difficulty in determining how the varied ingredients and combinations can affect the younger demographic in particular.

Conversely, compliant cannabis vape products are produced by State-licensed manufacturers under strict regulations and testing standards. These licensed products are **not** accessible to minors through legal channels. State-licensed manufacturers have sold tens of millions of lab-tested cannabis cartridges to licensed retailers since the adult use of cannabis was legalized in January 2018, with no linkage to vape-related lung illnesses. All of California's regulated cannabis products, including vapes, are rigorously tested for:

- Microbial contaminants;
- Residual solvents;
- Mycotoxins;
- Heavy metals; and
- Chemical residues including:
 - Pesticides;
 - Fungicides;
 - Plant growth regulators.²

All manufactured products must be associated with a passing Certificate of Analysis ("COA") from the licensed third-party Testing Laboratory to ensure impartiality *prior* to being eligible for sale in at a licensed retailer. These testing protocols are above and beyond the testing required for any other manufactured product sold in the State. Unregulated products sold on the illicit market follow no such testing standards.

Providing access to legal vape products is crucial. Vaping can serve as a better option for those adult use consumers who do not desire or cannot use combustible cannabis such as flower and need or prefer a more rapid onset than an edible can provide. For example, elderly or disabled consumers / patients who consume cannabis wand have less dexterity for rolling flower may prefer to use vapes to ingest their cannabis. Preventing access to these consumers will severely limit their ability to obtain safe and trustworthy products from a licensed and regulated facility. Consequently, these consumers may then be forced to purchase their cannabis vape on the illicit market, subjecting themselves to potential health risks.

² Bureau of Cannabis Control Regulations Section 5711 – 5725.

III. Centers for Disease Control and Prevention Has Identified Vitamin E Acetate as a Potential Source of Vaping-Related Illnesses.

The CDC recently released new information regarding a potential source of vaping-related illnesses –Vitamin E acetate, which is used as an additive in vaping products.³ The CDC states that Vitamin E acetate usually does not cause harm when ingested as a vitamin supplement or applied to the skin. However, research suggests when Vitamin E acetate is inhaled, it may interfere with normal lung functioning. Vitamin E acetate is used as an additive and a thickening agent in vaping liquids. The use of Vitamin E acetate in vapes is not a common practice in the legal industry and is easily testable. Eden does not and has never used Vitamin E acetate or any other additive or non-cannabis derived flavoring in its vape products. Through METRC, the State’s mandatory track and trace program, if a product were discovered to have Vitamin E acetate, a recall could be conducted to remove the affected product from the regulated market.

Addressing the illicit market is a critical component of any plan to address vape-related public health concerns. The CDC’s latest research demonstrates that this is an opportunity for targeted and fact-based regulation and action, rather than blanket prohibitions.

IV. Enforcement Against the Illicit Market Must be Included as a Critical Component of any Program that Addresses Vaping Concerns.

Enforcement against the illicit market must be a high priority for the County. There are over 3,000 illicit storefront dispensaries currently operating in California, including in Contra Costa County. These illicit shops sell unregulated and potentially dangerous vaping products that put consumers and the legal cannabis market at risk.

Over a dozen illegal shops in the County can easily be found on Weedmaps, a website that allows its users to find local cannabis dispensaries. Weedmaps notoriously does not prohibit unlicensed dispensaries from advertising on their platform. The lack of education to the consumer in combination with a flawed source of information a significant risk of customers purchasing unregulated and untested products remain. **Almost half** of the dispensaries seen listed on Weedmaps throughout the County are not currently licensed by the State.⁴

We urge the County to take action on these kinds of flagrant and unlawful activities within its borders. If access to heavily utilized vape products is cut off, there will be a direct link to the proliferation of the black market potentially resulting in increased incidents of vaping lung illness.

³ Centers for Disease Control and Prevention, https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html.

⁴ See Weedmaps website, <https://bit.ly/2qFg4y4>.

V. **The County Should Follow the Lead of Other Local Jurisdictions who have Taken a Precise and Targeted Approach to Addressing the Issue with Bans on Flavored Tobacco and Nicotine Vapes.**

Several jurisdictions have enacted bans relating primarily to flavoring in tobacco products and nicotine vapes, such as:

a. *City and County of San Francisco*

In June 2019, the San Francisco Board of Supervisors approved a ban on the sale and distribution of e-cigarettes, or nicotine vapes, that have not received approval from the Food and Drug Administration (“FDA”), as well as all flavored tobacco products and e-cigarettes that have not received approval from the FDA. In November 2019, Proposition C, which would have reversed this ban, was defeated with 80% voting against the measure. The ban does not include cannabis products. The ordinance reads in part:

“(a) No Person shall Sell or Distribute any Flavored Tobacco Product to a Person in San Francisco. There shall be a rebuttable presumption that a Tobacco Product, other than a Cigarette, 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....(b) The sale or distribution by an Establishment of an Electronic Cigarette is prohibited where the Electronic Cigarette: (a) Is a New Tobacco Product, (b) Requires premarket review under U.S. C. § 387j, as may be amended from time to time; and (c) Does not have a premarket review order under 21 U.S.C. § 387j(c)(1)(A)(i), as may be amended from time to time.”

b. *Los Angeles County*

In October 2019, Los Angeles County approved a ban on all flavored tobacco products, including vapes. The ban does not include cannabis products. The ordinance reads in part:

“After 180 days of the effective date of the Ordinance codified in this Chapter, it shall be a violation of this Chapter for a tobacco retailer/licensee or its agent(s) or employee(s) to sell or offer for sale, or to possess with the intent to sell or offer for sale, any flavored tobacco product or any component, part, or accessory intended to impart, or imparting a characterizing flavor in any form, to any tobacco product or nicotine delivery device, including electronic smoking devices.”

c. *City of Richmond*

In September 2019, the City of Richmond approved a ban on flavored tobacco products and any e-cigarette that meets certain criteria, effectively banning all nicotine vapes. The ban does not include cannabis products. The ordinance reads in part:

“It shall be a violation of this chapter for any tobacco retailer or any of the tobacco retailer's agents or employees to sell, offer for sale, or to possess with intent to sell or offer for sale, any flavored tobacco product.... The sale by a Tobacco Retailer of an Electronic Cigarette is prohibited where the Electronic Cigarette: A. is a New Tobacco Product; B. requires premarket review under 21 U.S.C. § 387j, as may be amended from time to time; and C. does not have a premarket review order under 21 U.S.C. § 387j(c)(1)(A)(i), as may be amended from time to time.”

d. City of Livermore

In June 2019, the City of Livermore approved a ban on flavored tobacco and e-cigarettes. The ban does not include cannabis products. The ordinance reads in part:

“The sale, offer for sale, exchange, or offer to exchange of any flavored tobacco product is prohibited... The sale, offer for sale, exchange, or offer to exchange of any electronic smoking device is prohibited, except where the electronic smoking device is a new FDA approved tobacco product... The sale, offer for sale, exchange, or offer to exchange of any electronic smoking device fluid is prohibited, except where the electronic smoking device fluid is an FDA approved tobacco product that is not otherwise prohibited by this chapter as a flavored tobacco product.”

All City and County Ordinances are attached to this letter as **Attachments**. Other jurisdictions are considering or actively pursuing bans. For example, San Jose City Council Members have expressed interest in banning the sale of e-cigarettes and flavored tobacco products that have not received approval from the Food and Drug Administration. Furthermore, states like Oregon, Michigan, New York, Rhode Island and others have enacted varied state bans. The California legislature recently held a public hearing on vaping and received testimony from medical experts, cannabis industry regulators, and the public on health concerns around vaping. Some of the legislators commented that they are interested in pursuing legislation that would address the issue through a ban similar to other states, likely with a focus on non-cannabis derived flavoring and additives like Vitamin E acetate.

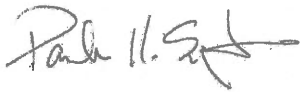
It is important to note that in none of the above examples did a locality include a blanket prohibition of all vaping products. The jurisdictions relied on targeted regulation addressing the major public concerns – tobacco use and vaping among minors and illicit market proliferation. These jurisdictions had the understanding that banning all vaping products including cannabis would have been misguided and reactionary ultimately generating unintended consequences.

VI. Recommendation and Request for a Continuation of Agenda Item D3.

Over 60% of residents in the County voted in favor of adult use legalization through Prop 64 in 2016. The County has unequivocally acknowledged there is a need for cannabis regulation by implementing measures to regulate the establishment of commercial cannabis businesses in the County, including the retail sale and delivery of cannabis and cannabis products such as vapes. The Ordinance before the Board, for a blanket ban on vaping and aerosol products, is a huge step backwards and lacking the level of consideration and discussion required. In taking abrupt and uninformed action, the County will be depriving its residents of accessing several important methods of ingestion, in both delivery and in the local cannabis businesses that residents have been expecting to operate within the County.

While Eden supports the County's evaluation of a ban on non-cannabis derived flavoring and additives in all vape products, including cannabis vapes, we recommend that the County **continue this agenda item** until such time that the CDC provides additional information on its ongoing investigation and the State legislature has had an opportunity to develop its plan of action for further regulation. We also urge the County to direct funds towards enforcement against the illicit cannabis market including illegal dispensaries.

Respectfully Submitted,



Pamela N. Epstein Esq. LLM
General Counsel and Chief Regulatory and Licensing Officer
Eden Enterprises, Inc.

1 [Health Code - Restricting the Sale, Manufacture, and Distribution of Tobacco Products,
2 Including Electronic Cigarettes]

3 **Ordinance amending the Health Code to prohibit the sale by tobacco retail**
4 **establishments of electronic cigarettes that require, but have not received, an order**
5 **from the Food and Drug Administration (FDA) approving their marketing; and**
6 **prohibiting the sale and distribution to any person in San Francisco of flavored**
7 **tobacco products and electronic cigarettes that require, but have not received, an FDA**
8 **order approving their marketing.**

9 NOTE: **Unchanged Code text and uncodified text** are in plain Arial font.
10 **Additions to Codes** are in *single-underline italics Times New Roman font*.
11 **Deletions to Codes** are in ~~*italics Times New Roman font*~~.
12 **Board amendment additions** are in Arial font.
13 **Board amendment deletions** are in ~~Arial font~~.
14 **Asterisks (* * * *)** indicate the omission of unchanged Code
15 subsections or parts of tables.

16 Be it ordained by the People of the City and County of San Francisco:

17 Section 1. Findings.

18 (a) Despite progress in reducing smoking, tobacco use is still the leading cause of
19 preventable death in the United States. Tobacco kills more than 480,000 people in this
20 country annually – more than AIDS, alcohol, car accidents, illegal drugs, murders, and
21 suicides combined. And beyond this large, impersonal statistic, are countless human beings,
22 whose lives are forever devastated by the irreparable loss of a loved one caused by tobacco
23 use, and the inevitable rupture of family that follows such a loss. And that is to say nothing of
24 the huge financial costs tobacco use places on our health care system, and the constraints on
25 productivity it imposes on our economic system.

1 (b) Electronic cigarettes (or “e-cigarettes”) entered the marketplace around 2007, and
2 since 2014, they have been the most commonly used tobacco product among youth in the
3 United States. The dramatic surge in youth e-cigarette use (“vaping”) is no accident. E-
4 cigarettes are frequently marketed in a variety of flavors with obvious appeal to youth, such as
5 gummy bear, cotton candy, and fruit punch. As of 2017, researchers had identified more than
6 15,500 unique e-cigarette flavors available online. In addition, e-cigarette companies have
7 effectively used marketing strategies, including celebrity endorsements, slick magazine
8 advertisements, social media campaigns, paid influencers, and music sponsorships, to reach
9 youth and young adults. A 2016 study found that 78.2% of middle and high school students—
10 20.5 million youth—had been exposed to e-cigarette advertisements from at least one source,
11 an increase from 68.9% only two years before, in 2014.

12 (c) According to the Centers for Disease Control and Prevention (“CDC”), the number
13 of middle and high school students who reported being current users of tobacco products
14 increased 36%—from 3.6 million to 4.9 million students—between 2017 and 2018. This
15 dramatic increase, which has erased past progress in reducing youth tobacco use, is directly
16 attributable to a nationwide surge in e-cigarette use by adolescents. There were 1.5 million
17 more youth e-cigarette users in 2018 than 2017, and those who were using e-cigarettes were
18 using them more often. Frequent use of e-cigarettes increased from 20 percent in 2017 to 28
19 percent in 2018 among current high school e-cigarette users.

20 (d) The widespread use of e-cigarettes by youth has significant public health
21 consequences. As stated by the Surgeon General, “Most e-cigarettes contain nicotine – the
22 addictive drug in regular cigarettes, cigars, and other tobacco products. Nicotine exposure
23 during adolescence can harm the developing brain – which continues to develop until about
24 age 25. Nicotine exposure during adolescence can impact learning, memory, and attention.
25 Using nicotine in adolescence can also increase risk for future addiction to other drugs. In

1 addition to nicotine, the aerosol that users inhale and exhale from e-cigarettes can potentially
2 expose both themselves and bystanders to other harmful substances, including heavy metals,
3 volatile organic compounds, and ultrafine particles that can be inhaled deeply into the lungs.”

4 (e) And while there is some evidence that the use of e-cigarettes by adults may
5 support smoking cessation under certain circumstances, a 2018 National Academy of
6 Sciences, Engineering, and Medicine report concluded that there was moderate evidence that
7 e-cigarette use in fact *increases* the frequency and intensity of cigarette smoking in the future.

8 (f) In addition, there is a growing body of research concluding that there are significant
9 health risks associated with electronic cigarette use. For example, daily e-cigarette use is
10 associated with increased odds of a heart attack. And the American Lung Association has
11 warned that the inhalation of harmful chemicals through vaping may cause irreversible lung
12 damage and lung disease.

13 (g) To reduce the burden of tobacco use, the City and County of San Francisco (the
14 “City”) licenses tobacco retail establishments. (Health Code Article 19H). In 2017, to address
15 the appeal of flavored tobacco products to youth, the City enacted Ordinance No. 140-17,
16 prohibiting tobacco retail establishments from selling flavored tobacco products. As a result of
17 the referendum process, the ordinance was placed before the voters, who approved the
18 ordinance in June 2018 (Proposition E) by a majority of 68.39%.

19 (h) Notwithstanding these efforts, San Francisco’s youth still access and use tobacco
20 products. According to the most recent Youth Risk Behavior Survey for which local data are
21 available, in 2017, 16.7% of San Francisco’s high school students had tried smoking, 25%
22 had used an electronic cigarette (or “vaped”), and 7.1% reported current e-cigarette use,
23 which is defined as use on at least one day in the past 30 days.

24 (i) Among San Francisco high school students who reported currently using electronic
25 cigarettes, 13.6% reported that they usually purchased their electronic cigarette products in a

1 store. The remaining 86.4% reported that they obtained them from places other than the
2 City's licensed tobacco retail establishments, including friends, other social sources, and
3 internet e-cigarette vendors.

4 (j) To protect the public, especially youth, against the health risks created by tobacco
5 products, Congress enacted the Family Smoking Prevention and Tobacco Control Act
6 ("Tobacco Control Act") in 2009. Among other things, the Tobacco Control Act authorized the
7 U.S. Food and Drug Administration ("FDA") to set national standards governing the
8 manufacture of tobacco products, to limit levels of harmful components in tobacco products
9 and to require manufacturers to disclose information and research relating to the products'
10 health effects.

11 (k) A central requirement of the Tobacco Control Act is premarket review of all new
12 tobacco products. Specifically, every "new tobacco product"—defined to include any tobacco
13 product not on the market in the United States as of February 15, 2007—must be authorized
14 by the FDA for sale in the United States before it may enter the marketplace. A new tobacco
15 product may not be marketed until the FDA has found that the product is: (1) appropriate for
16 the protection of the public health upon review of a premarket tobacco application; (2)
17 substantially equivalent to a grandfathered product; or (3) exempt from substantial
18 equivalence requirements.

19 (l) In determining whether the marketing of a tobacco product is appropriate for the
20 protection of the public health, the FDA must consider the risks and benefits of the product to
21 the population as a whole, including users and nonusers of the product, and taking into
22 account the increased or decreased likelihood that existing users of tobacco products will stop
23 using tobacco products and the increased or decreased likelihood that those who do not use
24 tobacco products will start using them. Where there is a lack of showing that permitting the
25

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

3 (m) Virtually all electronic cigarettes that are sold today entered the market after 2007,
4 but have not been reviewed by the FDA to determine if they are appropriate for the public
5 health. In 2017, the FDA issued Guidance that purports to give electronic cigarette
6 manufacturers until August 8, 2022 to submit their application for premarket review. The
7 Guidance further purports to allow unapproved products to stay on the market indefinitely,
8 until such time as the FDA complies with its statutory duty to conduct a premarket review to
9 determine whether a new tobacco product poses a risk to public health. In March 2019, the
10 FDA issued draft guidance in which it considered moving the premarket application deadline
11 up by one year for certain flavored e-cigarette products. It is not known when, if ever, this
12 narrow adjustment will become final or will take effect.

13 (n) By the time e-cigarette manufacturers will be required to submit their premarket
14 review applications, e-cigarettes will have been on the market for fifteen years without any
15 FDA analysis of their safety and alleged benefit. If current trends continue, six million more
16 youth in the United States will begin using e-cigarettes between now and then. Until such
17 time as the FDA fulfills its statutory duty to conduct premarket reviews of new tobacco
18 products, a generation of young people will become addicted to tobacco, resulting in an
19 entirely preventable increase in the burdens and tragedies associated with tobacco use. San
20 Francisco is not content to wait until then before addressing, for its residents, what appears
21 from the evidence to be a major public health crisis that is going unattended.

22
23 Section 2. The Health Code is amended by adding new Article 19R, consisting of
24 Sections 19R.1 through 19R.5, to read as follows:
25

1 **ARTICLE 19R: PROHIBITING THE SALE OF ELECTRONIC CIGARETTES LACKING FOOD**
2 **AND DRUG ADMINISTRATION PREMARKET APPROVAL**

3 **SEC. 19R.1. DEFINITIONS.**

4 For purposes of this Article 19R, the following terms have the following meanings:

5 "Director" has the meaning set forth in Health Code Section 19H.2.

6 "Electronic Cigarette" has the meaning set forth in Section 30121 of the California Revenue
7 and Taxation Code, as may be amended from time to time.

8 "Establishment" has the meaning set forth in Health Code Section 19H.2.

9 "New Tobacco Product" has the meaning set forth in 21 U.S.C. § 387j(a)(1), as may be
10 amended from time to time.

11
12 **SEC. 19R.2. SALE OR DISTRIBUTION OF ELECTRONIC CIGARETTES LACKING**
13 **FOOD AND DRUG ADMINISTRATION PREMARKET ORDER OF APPROVAL PROHIBITED.**

14 The sale or distribution by an Establishment of an Electronic Cigarette is prohibited where the
15 Electronic Cigarette:

16 (a) Is a New Tobacco Product;

17 (b) Requires premarket review under 21 U.S.C. § 387j, as may be amended from time to time;
18 and

19 (c) Does not have a premarket review order under 21 U.S.C. § 387j(c)(1)(A)(i), as may be
20 amended from time to time.

21
22 **SEC. 19R.3. ADMINISTRATIVE REGULATIONS.**

23 The Director may adopt rules, regulations, or guidelines for the implementation and
24 enforcement of this Article 19R.

1 **SEC. 19R.4. ENFORCEMENT.**

2 *The Director may enforce Section 19R.2 under Articles 19 et seq. of the Health Code, including*
3 *but not limited to Article 19H.*

4
5 **SEC. 19R.5. NO CONFLICT WITH FEDERAL OR STATE LAW.**

6 *Nothing in this Article 19R shall be interpreted or applied so as to create any requirement,*
7 *power, or duty that is preempted by federal or state law.*

8
9 Section 3. Article 19H of the Health Code is amended by adding new Section 19H.14-
10 3, to read as follows:

11
12 **SEC. 19H.14-3. CONDUCT VIOLATING HEALTH CODE ARTICLE 19R**
13 **(PROHIBITING THE SALE OR DISTRIBUTION OF ELECTRONIC CIGARETTES LACKING**
14 **FOOD AND DRUG ADMINISTRATION PREMARKET ORDER OF APPROVAL).**

15 *(a) Upon a decision by the Director that the Permittee or the Permittee's agent or employee*
16 *has engaged in any conduct that violates Health Code Section 19R.2 (Sale or Distribution of Electronic*
17 *Cigarettes Lacking Food and Drug Administration Premarket Order of Approval Prohibited), the*
18 *Director may suspend a Tobacco Sales permit as set forth in Section 19H.19.*

19 *(b) The Director shall commence enforcement under this Section 19H.14-3 by serving either a*
20 *notice of correction under Section 19H.21 or a notice of initial determination under Section 19H.22.*

21
22 Section 4. The Health Code is hereby amended by adding new Article 19S, consisting
23 of Sections 19S.1 through 19S.6, to read as follows:

1 ARTICLE 19S. PROHIBITING THE SALE AND DISTRIBUTION OF TOBACCO PRODUCTS

2 IN SAN FRANCISCO

3 SEC. 19S.1. DEFINITIONS.

4 For purposes of this Article 19S, the following terms have the following meanings:

5 "Characterizing Flavor" has the meaning set forth in Health Code Section 19Q.2.

6 "Cigarette" has the meaning set forth in Health Code Section 19Q.2.

7 "City" means the City and County of San Francisco.

8 "Constituent" has the meaning set forth in Health Code Section 19Q.2.

9 "Director" means the Director of Health, or the Director's designee.

10 "Distinguishable" has the meaning set forth in Health Code Section 19Q.2.

11 "Distribute" or "Distribution" means the transfer, by any Person other than a common carrier,
12 of a Tobacco Product at any point from the place of Manufacture or thereafter to the Person who sells
13 the Tobacco Product to an individual for personal consumption.

14 "Electronic Cigarette" has the meaning set forth in Section 30121 of the California Revenue
15 and Taxation Code, as may be amended from time to time.

16 "Flavored Tobacco Product" has the meaning set forth in Health Code Section 19Q.2.

17 "Labeling" has the meaning set forth in Health Code Section 19Q.2.

18 "New Tobacco Product" has the meaning set forth in 21 U.S.C. § 387j(a)(1), as may be
19 amended from time to time.

20 "Packaging" has the meaning set forth in Health Code Section 19Q.2.

21 "Person" has the meaning set forth in Health Code Section 19H.2.

22 "Sell," "Sale," and "to Sell" mean any transaction where, for any consideration, ownership of
23 a Tobacco Product is transferred from one Person to another, including but not limited to any transfer
24 of title or possession for consideration, exchange, or barter, in any manner or by any means.

25 "Tobacco Product" has the meaning set forth in Health Code Section 19H.2.

1
2 **SEC. 19S.2. PROHIBITION ON SALE OR DISTRIBUTION OF TOBACCO PRODUCTS.**

3 (a) No Person shall Sell or Distribute any Flavored Tobacco Product to a Person in San
4 Francisco. There shall be a rebuttable presumption that a Tobacco Product, other than a Cigarette, is
5 a Flavored Tobacco Product if a manufacturer or any of the manufacturer's agents or employees, in
6 the course of their agency or employment, has made a statement or claim directed to consumers or to
7 the public that the Tobacco Product has or produces a Characterizing Flavor, including, but not
8 limited to, text, color, and/or images on the product's Labeling or Packaging that are used to explicitly
9 or implicitly communicate that the Tobacco Product has a Characterizing Flavor.

10 (b) No Person shall Sell or Distribute an Electronic Cigarette to a Person in San Francisco
11 where the Electronic Cigarette:

12 (1) Is a New Tobacco Product;

13 (2) Requires premarket review under 21 U.S.C. § 387j, as may be amended from time
14 to time; and

15 (3) Does not have a premarket review order under 21 U.S.C. § 387j(c)(1)(A)(i), as may
16 be amended from time to time.

17
18 **SEC. 19S.3. ADMINISTRATIVE REGULATIONS.**

19 The Director may adopt rules, regulations, or guidelines for the implementation of this Article
20 19S.

21
22 **SEC. 19S.4. ENFORCEMENT.**

23 (a) Violations of this Article 19S or of any rule or regulation issued under this Article shall be
24 punishable by administrative fines imposed pursuant to administrative citations. Administrative Code
25 Chapter 100 "Procedures Governing the Imposition of Administrative Fines," as amended from time to

1 time, shall govern the issuance and enforcement of administrative citations, and collection and review
2 of administrative fines, to enforce this Article and any rule or regulation adopted pursuant to this
3 Article.

4 (b) The City Attorney may at any time institute civil proceedings for injunctive and monetary
5 relief including civil penalties, against any Person for violations of this Article 19S, without regard to
6 whether the Director has assessed or collected administrative penalties.

7 (c) At any time, the Director may refer a case to the City Attorney's Office for civil
8 enforcement, but a referral is not required for the City Attorney to bring a civil action under subsection
9 (b).

10 (d) Any Person that violates any provision of this Article 19S shall be subject to injunctive
11 relief and a civil penalty in an amount not to exceed \$1,000 for each violation, which penalty shall be
12 assessed and recovered in a civil action brought in the name of the people of the City and County of
13 San Francisco by the City Attorney in any court of competent jurisdiction. In assessing the amount of
14 the civil penalty, the court shall consider any one or more of the relevant circumstances presented by
15 any of the parties to the case, including but not limited to, the following: the nature and seriousness of
16 the misconduct giving rise to the violation, the number of violations, the persistence of the misconduct,
17 the length of time over which the misconduct occurred, the willfulness of the misconduct, and the
18 defendant's assets, liabilities, and net worth.

19 (e) The City may recover reasonable attorneys' fees and costs for civil actions brought
20 pursuant to this Section 19S.4.

21 (f) Remedies under this Section 19S.4 are non-exclusive and cumulative to all other remedies
22 available at law or equity.

23
24 **SEC. 19S.5. NO CONFLICT WITH FEDERAL OR STATE LAW.**
25

1 Nothing in this Article 19S shall be interpreted or applied so as to create any requirement,
2 power, or duty that is preempted by federal or state law.

3
4 **SEC. 19S.6. SEVERABILITY.**

5 If any section, subsection, sentence, clause, phrase, or word of this Article 19S, or any
6 application thereof to any person or circumstance, is held to be invalid or unconstitutional by a
7 decision of a court of competent jurisdiction, such decision shall not affect the validity of the remaining
8 portions or applications of the Article. The Board of Supervisors hereby declares that it would have
9 passed this ordinance and each and every section, subsection, sentence, clause, phrase, and word not
10 declared invalid or unconstitutional without regard to whether any other portion of this Article or
11 application thereof would be subsequently declared invalid or unconstitutional.

12
13 Section 5. Effective and Operative Dates.

14 (a) This ordinance shall become effective 30 days after enactment. Enactment occurs
15 when the Mayor signs the ordinance, the Mayor returns the ordinance unsigned or does not
16 sign the ordinance within ten days of receiving it, or the Board of Supervisors overrides the
17 Mayor's veto of the ordinance.

18 (b) This ordinance shall become operative six months after the effective date.


19
20 Section 6. Severability. If any section, subsection, sentence, clause, phrase, or word of
21 this ordinance, or any application thereof to any person or circumstance, is held to be invalid
22 or unconstitutional by a decision of a court of competent jurisdiction, such decision shall not
23 affect the validity of the remaining portions or applications of the ordinance. The Board of
24 Supervisors declares that it would have passed this ordinance and each and every section,
25 subsection, sentence, clause, phrase, and word not declared invalid or unconstitutional

1 without regard to whether any other portion of this ordinance or application thereof would be
2 subsequently declared invalid or unconstitutional.

3
4 Section 7. Undertaking for the General Welfare. In enacting and implementing this
5 ordinance, the City is assuming an undertaking only to promote the general welfare. It is not
6 assuming, nor is it imposing on its officers and employees, an obligation for breach of which it
7 is liable in money damages to any person who claims that such breach proximately caused
8 injury.

9
10 APPROVED AS TO FORM:
11 DENNIS J. HERRERA, City Attorney

12 By:


13 ANNE PEARSON
Deputy City Attorney

14 n:\legana\as2019\1900441\01345951.docx



City and County of San Francisco
Tails
Ordinance

City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4689

File Number: 190312

Date Passed: June 25, 2019

Ordinance amending the Health Code to prohibit the sale by tobacco retail establishments of electronic cigarettes that require, but have not received, an order from the Food and Drug Administration (FDA) approving their marketing; and prohibiting the sale and distribution to any person in San Francisco of flavored tobacco products and electronic cigarettes that require, but have not received, an FDA order approving their marketing.

June 07, 2019 Public Safety and Neighborhood Services Committee - RECOMMENDED

June 18, 2019 Board of Supervisors - PASSED ON FIRST READING

Ayes: 11 - Brown, Fewer, Haney, Mandelman, Mar, Peskin, Ronen, Safai, Stefani, Walton and Yee

June 25, 2019 Board of Supervisors - FINALLY PASSED

Ayes: 10 - Brown, Haney, Mandelman, Mar, Peskin, Ronen, Safai, Stefani, Walton and Yee

Absent: 1 - Fewer

File No. 190312

I hereby certify that the foregoing Ordinance was FINALLY PASSED on 6/25/2019 by the Board of Supervisors of the City and County of San Francisco.

fr Angela Calvillo
Clerk of the Board

London N. Breed
Mayor

6/25/19

Date Approved

REVISED

ANALYSIS

This Ordinance constitutes the Los Angeles County Tobacco Ordinance which establishes the implementation, administration, and enforcement of business licensing requirements for Tobacco Shops in Title 7 – Business Licenses, and amends Title 11 – Health and Safety – to update terminology and Tobacco Retail License requirements, including prohibiting the sale of flavored tobacco products. This Ordinance also adds fees for the reasonable regulatory costs for issuing the business license and enforcing the Ordinance.

MARY C. WICKHAM
County Counsel

By



JUDY W. WHITEHURST
Senior Assistant County Counsel
Executive Office

JWW:EDI:ld

Requested: 02/04/2019

Revised: 9/26/2019

ORDINANCE NO. 2019-0049

An Ordinance amending and adding various sections to Title 7 – Business Licenses, and Title 11 – Health and Safety, of the Los Angeles County Code, relating to the regulation of tobacco shops and tobacco retailers.

The Board of Supervisors of the County of Los Angeles ordains as follows:

SECTION 1. Section 7.04.325 is hereby added to read as follows:

7.04.325 Violation – Fines.

Subject to the requirements of Chapter 1.25 of this County Code, the Tax Collector may impose administrative fines on persons violating any provision of this Title or any federal, State, or local law or regulation incorporated into this Title, in an amount determined by the Tax Collector. The imposition of any such fine shall in no way limit the Tax Collector's ability or authority to impose other requirements of this Chapter or seek other remedies against violators.

SECTION 2. Section 7.14.010 is hereby amended to read as follows:

7.14.010 Fee sSchedule.

The license fees required to be paid to perform, carry on, conduct, or engage in any businesses, occupations or activities set forth in this Title 7, the license eOrdinance codified in this ~~t~~Title, are as stated in this eChapter.

<u>ANNUAL FEES</u>		
	First Year	Annual Renewal
...		
THEATER (motion picture and live, other than adult)	1,829.00	246.00
<u>TOBACCO SHOP</u>	<u>778.00</u>	<u>142.00</u>
TOW TRUCK	168.00	131.00
...		
WEED ERADICATOR	237.00	129.00
<u>TWO YEAR FEES</u>		
	<u>Initial Application Fee for First Two Years</u>	<u>Two Year Renewal Fee</u>
<u>TOBACCO SHOP</u>	<u>778.00</u>	<u>142.00</u>

- SECTION 3.** Chapter 7.83 is hereby added to read as follows:
- Chapter 7.83 Tobacco Shops.**
- 7.83.010 Purpose and Intent.**
- 7.83.020 Definitions.**
- 7.83.030 Tobacco Shop – Business License Required.**
- 7.83.040 Operating Requirements.**
- 7.83.050 Consumption of Food or Beverages Prohibited.**
- 7.83.060 Use of Tobacco Products Prohibited.**
- 7.83.070 Smokers' Lounges.**
- 7.83.080 Loitering Prohibited.**
- 7.83.090 Compliance with Other Requirements.**
- 7.83.100 Conflict with Other Law, Severability, Saving Clause.**
- 7.83.010 Purpose and Intent.**

In promoting the health, safety, and general welfare of its residents, the County of Los Angeles has a substantial interest in encouraging compliance with federal, State, and local laws regulating tobacco sales and use; discouraging the purchase and use of tobacco products by anyone under the age of 21; increasing compliance with laws prohibiting the sale of tobacco products to anyone under the age of 21; and protecting children from being lured into nicotine and tobacco use through the illegal sale of products, including vaping products. It is the intent of the Ordinance codified in this Title, together with the additions and amendments to Title 11, to enforce responsible Tobacco Shop business and public health-related practices which prevent

the sale or distribution of tobacco products to anyone under the age of 21. This Ordinance does not expand or reduce the degree to which the acts regulated by federal or State law are criminally proscribed or otherwise regulated.

7.83.020 Definitions.

For the purpose of this Chapter, the words and terms listed below shall have the following meanings:

A. "Cigarette" is any roll of tobacco wrapped in paper or in any substance not containing tobacco, or any roll of tobacco wrapped in any substance containing tobacco, which is likely to be offered, or purchased as a cigarette, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling.

B. "Electronic smoking device" is an electronic device which can be used to deliver an inhaled dose of nicotine or other substances, including any component, part, or accessory of such a device, whether manufactured, distributed, marketed, or sold as an electronic cigarette, electronic cigar or cigarillo, electronic pipe, electronic hookah, vaping device, or any other product name or descriptor.

C. "Little cigar" is any roll of tobacco other than a cigarette wrapped entirely or in part in tobacco or any substance containing tobacco and weighing no more than three pounds per thousand units. "Little cigar" includes, but is not limited to, tobacco products known or labeled as small cigar, little cigar or cigarillo.

D. "Loitering" means delaying or lingering without an apparently proper purpose for being on the property.

E. "Smokers' lounge" has the same meaning as defined by the California Labor Code Section 6404.5 (e) (2) (A) and (B).

F. "Tobacco paraphernalia" is any cigarette papers or wrappers, pipes, holders of smoking materials of all types, cigarette rolling machines, characterizing flavors in any form, mixed with or otherwise added to any tobacco product or nicotine delivery device, including electronic smoking devices, and any other item designed or used for the smoking or ingestion of tobacco products.

G. "Tobacco product" means the following:

1. Any product containing, made, or derived from tobacco or nicotine, whether natural or synthetic, 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; or

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

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.

4. "Tobacco product" does not include drugs, devices or combination products authorized for sale by the United States Food and Drug Administration, as those terms are defined in the Federal Drug and Cosmetic Act.

H. "Tobacco Shop" is any retail business devoted exclusively or predominantly to the sale of tobacco, tobacco products, and tobacco paraphernalia, including but not limited to cigarettes, cigars, pipe tobacco, electronic cigarettes, vaping devices, and any components, parts, or accessories.

7.83.030 Tobacco Shop – Business License Required.

A. A business license is required for a Tobacco Shop, or a Tobacco Shop and Smokers' Lounge, pursuant to Title 7 Division 1 Chapter 7.04 of this Code.

B. Notwithstanding Section 7.04.020 of this Code, any currently operating Tobacco Shop in the unincorporated areas of the County must, within ~~90~~180 days of the effective date of the Ordinance codified in this Chapter, apply for a business license for each location pursuant to Division 1 of this Chapter.

C. As of the effective date of this Ordinance, any retailer establishing a new Tobacco Shop must apply for and obtain a business license, in accordance with Section 7.04.020 of this Code.

D. The Tobacco Shop business license may be issued to authorize sales of tobacco products from a fixed location only. Tobacco retailing on foot or from vehicles, carts, or any other non-fixed location, is prohibited.

E. To operate as a Tobacco Shop in the unincorporated areas of the County, the business must possess a valid business license, and a valid Tobacco Retail License

issued pursuant to Title 11 of this Code, in addition to any other required or applicable licenses, permits, or certifications. Revocation or suspension of the Tobacco Retail License, for any period, automatically revokes or suspends the Business License for the same period.

F. Each day that a person or proprietor of a Tobacco Shop sells or offers for sale, tobacco, tobacco products, or tobacco paraphernalia in the unincorporated areas of Los Angeles County without a valid County of Los Angeles business license constitutes a separate violation of this Ordinance.

7.83.040 Operating Requirements.

The operation and maintenance of a Tobacco Shop must conform to every provision of this Chapter.

A. A recognizable and readable sign clearly identifying the Tobacco Shop shall be posted at the building entrance of the Tobacco Shop. Signage must meet the requirements of this Code.

B. Exterior facing advertisements of tobacco products may not occupy an area larger than 14 square feet. Such advertisements may not be placed next to any other outward facing advertisement so as to create a single mosaic type advertisement larger than 14 square feet. It is a violation of this Chapter to violate any local, State, or federal law regulating exterior storefront window or door advertising.

C. No one under the age of 21, unless United States Military with valid identification of active service, is allowed in or on the premises of a Tobacco Shop. A sign stating, "No one under the age of 21 unless United States Military with valid

identification of active service is allowed on these premises" shall be posted at the entrance of the Tobacco Shop.

D. Any sale of tobacco, tobacco products or tobacco paraphernalia to any person under the age of 21 is prohibited. Active United States Military with valid identification may purchase tobacco, tobacco products, or tobacco paraphernalia at age 18, in accordance with State law.

E. All areas of the entire exterior grounds of the Tobacco Shop, including the parking lot, require sufficient exterior lighting, so that all such areas are clearly visible during business hours.

F. All cash registers and credit/debit card point of sale equipment must produce a receipt with a receipt number generated automatically and recorded with each transaction. After the collection of funds, the cashier shall offer a copy of the receipt to the customer. Prior to leaving the cash register or work area for any reason, the cashier will lock the cash drawer and remove the key, keeping it in their possession. All cash registers and point of sale equipment must produce end of day report totals for verification of the cash and cash equivalents collected and deposited into a bank account.

7.83.050 Consumption of Food or Beverages Prohibited.

A. Consuming food or beverages, including alcohol, by patrons, or providing food or beverages, including alcohol, to patrons for consumption on the premises of a Tobacco Shop is prohibited.

B. A permanent sign or signs in a place clearly visible to patrons of the Tobacco Shop stating, "No consumption of food, beverages, or alcohol is allowed on these premises" is required pursuant to requirements of this Code.

7.83.060 Use of Tobacco Products Prohibited.

A. Tobacco, tobacco products, and tobacco paraphernalia may not be used inside the Tobacco Shop premises, except as permitted in a Smokers' Lounge pursuant to Section 7.83.070 of this Chapter.

B. A permanent sign or signs posted at the building entrance and in a place clearly visible to patrons inside the Tobacco Shop stating, "No use of tobacco, tobacco products, or tobacco paraphernalia is allowed on these premises" is required, except for in a Smokers' Lounge. The permanent signs must meet any additional requirements of this Code.

7.83.070 Smokers' Lounges.

A. A separate business license is not required for operation of a Smokers' Lounge.

B. Smoking, use of tobacco, tobacco products, or tobacco paraphernalia is permitted only in a Smokers' Lounge.

C. Consuming food or beverages, including alcohol, by patrons, or providing food or beverages, including alcohol, to patrons for consumption on the premises of a Smokers' Lounge is prohibited.

D. A permanent sign or signs posted in a place clearly visible to patrons of the Smokers' Lounge stating, "Consuming food or beverages, including alcohol, by

patrons, or providing food or beverages, including alcohol, to patrons, is prohibited in the Smokers' Lounge" is required. The permanent signs must meet any additional requirements of this Code.

E. No one under the age of 21, unless the patron has an active United States Military identification card and is at least 18 years old, is allowed in or on the premises of a Smokers' Lounge.

F. Smokers' Lounges shall post a permanent sign or signs at the entrance to the building or structure and in a place clearly visible to patrons inside the Tobacco Shop stating, "Smoking is prohibited except in designated areas." The permanent signs must meet any additional requirements of this Code.

7.83.080 Loitering Prohibited.

A. Loitering in or around the Tobacco Shop is prohibited. Tobacco Shops must ensure the absence of loitering.

B. A permanent sign or signs posted at the entrance to the building or structure and in a place clearly visible to patrons on the exterior areas the Tobacco Shop stating, "No loitering is allowed" is required. The permanent signs must meet any additional requirements of this Code.

7.83.090 Compliance with Other Requirements.

The Tobacco Shop must comply with all applicable federal and State law, and all requirements of this Code. Failure to comply with any provision of this Code constitutes a violation of the Code and may serve as grounds for denial of an Application, issuance

of a fine, revocation or suspension of a business license, or modification of a business license, pursuant to Title 7 Division 1, or legal action.

7.83.100 Conflict with Other Law, Severability, Saving Clause.

Nothing in this Chapter shall be interpreted or applied so as to create any power or duty in conflict with any federal or State law. If any provision of this Chapter or the application thereof to any person or circumstance is held invalid, the remainder of the Chapter, or the application of such provision to other persons or circumstances shall not be affected thereby.

SECTION 4. Section 11.35.010 is hereby amended to read as follows:

11.35.010 Purpose and aApplication.

In promoting the health, safety, and general welfare of its residents, the County of Los Angeles has a substantial interest in encouraging compliance with federal, ~~s~~State, and local laws regulating tobacco sales and use; ~~in~~discouraging the purchase and use of tobacco products by ~~minors~~anyone under the age of 21; ~~in~~increasing compliance with laws prohibiting the sale of tobacco products to ~~minors~~anyone under the age of 21; and ~~in~~protecting children from being lured into nicotine and tobacco use through the illegal activity through the misconduct of adults~~sale of products, including vaping products~~. It is the intent of the ~~e~~Ordinance codified in this Title, together with the additions to Title 7, to encourage responsible tobacco retailing and to discourage violations of tobacco-related laws, especially those that prohibit the sale or distribution of tobacco products to ~~minors~~anyone under the age of 21.~~;~~ but This Ordinance does not ~~to~~expand or reduce the degree to which the acts regulated by federal or ~~s~~State law

are criminally proscribed or otherwise regulated.

SECTION 5. Section 11.35.020 is hereby amended to read as follows:

11.35.020 Definitions.

For the purpose of this eChapter, the following words and terms listed below shall have the following meanings:

A. "Accessory" means equipment, products, or materials that are used, intended for use, or designed for use in smoking, vaping, ingesting, inhaling, or otherwise introducing tobacco or tobacco products into the human body and can be an object or device that is not essential in itself but adds to the beauty, convenience, or effectiveness of something else.

AB. "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 informed and willing parties, when neither is under any compulsion to participate in the transaction. A sale between relatives, related companies or partners, or a sale for the primary purpose of avoiding the effect of the violations of this eChapter that occurred at the location, is presumed not to be an arm's length transaction.

C. "Characterizing flavor" means a taste or aroma, other than the taste or aroma of tobacco, imparted either prior to or during consumption of a tobacco product or any byproduct produced by the tobacco product, including, but not limited to, tastes or aromas relating to menthol, mint, wintergreen, fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb, or spice. Characterizing flavor includes flavor

in any form, mixed with or otherwise added to any tobacco product or nicotine delivery device, including electronic smoking devices.

D. "Cigarette" is any roll of tobacco wrapped in paper or in any substance not containing tobacco, or any roll of tobacco wrapped in any substance containing tobacco which is likely to be offered to, or purchased as a cigarette, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling.

E. "Cigarillo" means any roll of tobacco other than a cigarette wrapped entirely or in part in tobacco or any substance containing tobacco and weighing no more than three pounds per thousand units. "Cigarillo" includes, but is not limited to, tobacco products known or labeled as small cigar or little cigar.

F. "Component" means any item intended or reasonably expected to be used with or for the human consumption of a tobacco product.

BG. "Department" means the Los Angeles County Department of Public Health.

GH. "Director" means the eDirector of the Los Angeles County Department of Public Health or his/her-designee.

I. "Electronic Smoking Device" means an electronic device, including but not limited to an electronic cigarette, electronic cigar or cigarillo, electronic pipe, electronic hookah, vaping device, or any other product name or descriptor, which can be used to deliver an inhaled dose of nicotine or other substances, including any component, part, or accessory of such a device, whether manufactured, distributed, marketed, or sold as such.

J. "Flavored Tobacco Product" means any tobacco product, as defined in this Chapter, which imparts a characterizing flavor.

~~D. "Itinerant tobacco retailing" means engaging in tobacco sale or distribution at other than a fixed location.~~

EK. "License" means a Tobacco Retailer License issued by the County pursuant to this Section.

FL. "Licensee" means any proprietor holding a license issued by the County pursuant to this Chapter.

M. "Little Cigar" means any roll of tobacco other than a cigarette wrapped entirely or in part in tobacco or any substance containing tobacco and weighing no more than three pounds per thousand units. "Little Cigar" includes, but is not limited to, tobacco products known or labeled as small cigar or cigarillo.

N. "Package" or "Packaging" means a pack, box, carton, or container of any kind or, if no other container, any wrapping (including cellophane) in which a tobacco product is sold or offered for sale.

O. "Part" means a piece or segment of something, which combined with other pieces makes up the whole.

GP. "Person" means any individual, entity, firm, partnership, joint venture, limited liability company, association, social or professional club, fraternal organization, corporation, estate, trust, business trust, receiver, trustee, syndicate, or other group or combination of the above acting as a single unit.

Q. "Pharmacy" means any retail establishment, including any location with an on-site pharmacy, 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.

HR. "Proprietor" means a person with an ownership interest in a business. An ownership interest shall be deemed to exist when a person has a ten percent or greater interest in the stock, assets, or income of a business other than the sole interest of security for debt.

S. "Self-service Display" means the open display or storage of tobacco products or tobacco paraphernalia in a manner that is physically accessible in any way to the 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. A vending machine is a form of self-service display.

~~IT. "Tobacco product" means any substance containing tobacco leaf, including but not limited to cigarettes, cigars, pipe tobacco, snuff, chewing tobacco, dipping tobacco, bidis, or any other preparation which includes any tobacco product.~~
"Tobacco Paraphernalia" means cigarette papers or wrappers, pipes, holders of smoking materials of all types, cigarette rolling machines, characterizing flavors in any form, mixed with or otherwise added to any tobacco product or nicotine delivery device.

including electronic smoking devices, and any other item designed or used for the smoking or ingestion of tobacco products.

~~JU. "Tobacco paraphernalia" means cigarette papers or wrappers, pipes, holders of smoking materials of all types, cigarette rolling machines, and any other item designed or used for the smoking or ingestion of tobacco products. "Tobacco Product" means any substance containing tobacco leaf, including but not limited to cigarettes, cigars, pipe tobacco, snuff, chewing tobacco, dipping tobacco, bidis, or any other preparation which includes any tobacco product.~~ the following:

1. Any product containing, made, or derived from tobacco or nicotine whether natural or synthetic, 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; or

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

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.

4. "Tobacco Product" does not include drugs, devices, or combination products authorized for sale by the United States Food and Drug Administration, as those terms are defined in the Federal Food, Drug and Cosmetic Act.

KV. "Tobacco rRetailer" means any person who sells, offers for sale or distribution, exchanges, or offers to exchange for any form of consideration, tobacco, tobacco products, or tobacco paraphernalia without regard to the quantity sold, distributed, exchanged, or offered for exchange.

LW. "Tobacco rRetailing" means selling, offering for sale, exchanging, or offering to exchange for any form of consideration, tobacco, tobacco products, or tobacco paraphernalia without regard to the quantity sold, offered for sale, exchanged, or offered for exchange.

SECTION 6. Section 11.35.030 is hereby amended to read as follows:

11.35.030 **Mandatory tTobacco rRetail lLicense.**

A. Any person intending to act as a tobacco retailer, who does not currently hold a Tobacco Retail License, shall, within ~~ninety~~⁹⁰180 days of the effective date of the eOrdinance codified in this eChapter, obtain a tTobacco rRetailing lLicense for each location at which tobacco retailing is to occur. ~~No license may be issued to authorize tobacco retailing at other than a fixed location. Itinerant tobacco retailing is prohibited.~~

B. Nothing in this eChapter shall be construed to grant any licensee any status or right other than to act as a tobacco retailer at the location identified on the face of the Tobacco Retail lLicense, subject to compliance with all other applicable laws,

regulations, or ordinances. Nothing in this ~~e~~Chapter shall be construed to render inapplicable, supersede, or apply in lieu of any other provision of applicable law.

SECTION 7. Section 11.35.040 is hereby amended to read as follows:

11.35.040 **Application ~~p~~Procedure for ~~t~~Tobacco ~~r~~Retail ~~l~~License.**

All applications for a Tobacco Retail lLicense shall be submitted in the name of each proprietor proposing to conduct tobacco retailing and signed by each prospective proprietor or an authorized agent. Each Tobacco Retail lLicense application must be accompanied by the required Tobacco Retail lLicense fee pursuant to ~~s~~Section 8.04.720 of this ~~e~~Code. A proprietor proposing to conduct tobacco retailing at more than one location shall submit a separate application for each location. Every application shall contain the following information:

- A. The name, address, and telephone number of each proprietor.
- B. The business name, address, and telephone number of the fixed location for which the Tobacco Retail lLicense is sought.
- C. Whether ~~or not~~ any proprietor has previously been issued a Tobacco Retail lLicense pursuant to this ~~e~~Chapter that is, or was at any time, suspended or revoked and, if so, the date of the suspension or revocation.
- D. Proof that the location for which a ~~t~~Tobacco ~~r~~Retailing ~~l~~License is sought has been issued a valid ~~s~~State tobacco retailer's license by the California ~~Board of Equalization~~Department of Tax and Fee Administration, in addition to any other required or applicable licenses, permits, or certifications.

E. A signed affirmation by each proprietor ~~that each proprietor is of being~~ informed of, ~~and agreeing to abide by,~~ the laws affecting tobacco retailing licenses.

F. Such other information as the eCounty deems necessary for the administration of this eChapter.

Any application that is denied is subject to an administrative review, at the request of the applicant, which shall be held pursuant to the provisions of Section 11.35.110 of this Chapter.

SECTION 8. Section 11.35.050 is hereby amended to read as follows:

11.35.050 Issuance and ~~r~~Renewal of Tobacco Retail lLicense.

A. Upon receipt of an application for a new Tobacco Retail License and applicable fee, as set forth in sSection 8.04.720, the applicant(s) shall be issued a Tobacco Retail lLicense unless:

1. The application is incomplete, ~~or inaccurate, false, or misleading;~~
2. The dDepartment has information that the applicant, or ~~his/her~~ the applicant's agent(s) or employee(s), ~~has violated any local, s~~State, or federal tobacco control law ~~at the location for which the license or renewal license is sought~~ within the preceding ~~sixty (60)~~ 180 days; or
3. The application seeks authorization for tobacco retailing at an address where a previous Tobacco Retail lLicense has been suspended, revoked, or is subject to suspension or revocation proceedings for any violation of any of the provisions of this eChapter. However, this shall not constitute a basis for denial of a Tobacco Retail lLicense if either or both of the following apply:

a. The applicant provides documentation which clearly demonstrates that the applicant has acquired or is in the process of acquiring the premises or business in an arm's length transaction; or

b. It has been more than five years since the most recent Tobacco Retail License for that location was revoked.

B. ~~Renewal of Tobacco Retailing License.~~ A Tobacco Retail License shall be valid for one year and must be renewed between ~~thirty~~30 and ~~sixty~~60 days prior to the expiration of the Tobacco Retail License. A Tobacco Retail License may be renewed for additional one year periods by submission of a renewal application and the applicable fee. Any Tobacco Retail License that is suspended, has been revoked within the previous five years, or is subject to suspension or revocation proceedings shall not be renewed until suspension or revocation proceedings are complete and the suspension or revocation period, if any, is over.

SECTION 9. Section 11.35.055 is hereby added to read as follows:

11.35.055 Business License Required.

A. In addition to the Tobacco Retail License, any Tobacco Shop in an unincorporated area of the County, devoted exclusively or predominantly to the sale of tobacco, tobacco products, and tobacco paraphernalia, must have a valid business license as required by Title 7 of this Code.

B. Tobacco Shops currently holding a valid Tobacco Retail License as of the effective date of the Ordinance codified in this Chapter must apply for a business

license as required by Title 7 of this Code and may legally operate while such application is in active process.

C. Any retailer establishing a new Tobacco Shop after the effective date of this Ordinance must apply for and obtain a business license as required by Title 7 of this Code and a Tobacco Retail License, as required by this Chapter, before it may legally operate.

D. If the business license is revoked or suspended for any period of time, the Tobacco Retail License shall be automatically revoked or suspended for the same period.

SECTION 10. Section 11.35.060 is hereby amended to read as follows:

11.35.060 Tobacco Retail License nNontransferable.

A ~~t~~Tobacco ~~r~~Retailing ~~l~~License is nontransferable. If a licensee changes business location, that licensee must obtain a new Tobacco Retail ~~l~~License prior to acting as a tobacco retailer at the new location. If a business licensed to ~~conduct tobacco retailing~~ as a tobacco retailer is sold or transferred, the new proprietor must obtain a Tobacco Retail ~~l~~License for that location before acting as a tobacco retailer.

SECTION 11. Section 11.35.070 is hereby amended to read as follows:

11.35.070 License ~~v~~Violations.

A. It shall be a violation of this ~~e~~Chapter for a tobacco retailer/licensee, or ~~his/hers~~its agent(s) or employee(s), to violate any federal, ~~e~~State, or local tobacco law or regulation, including any provision of this ~~e~~Chapter.

B. Causing, permitting, aiding, abetting, or concealing a violation of any

provision of this eChapter shall constitute a violation.

C. Failure to prominently display the tTobacco rRetailing lLicense in a publicly visible location at the licensed premises shall constitute a violation.

D. The failure of the tobacco retailer/licensee, or the applicant's agent(s) or employee(s) to allow any peace officer, the dDirector, or any authorized eCounty official to conduct unscheduled inspections of the premises of the business for the purpose of ensuring compliance with any federal, sState, or local tobacco law or regulation, including any provision of this eChapter, at any time the business is open for business shall constitute a violation.

E. After 180 days of the effective date of the Ordinance codified in this Chapter, it shall be a violation of this Chapter for a tobacco retailer/licensee or its agent(s) or employee(s) to sell or offer for sale, or to possess with the intent to sell or offer for sale, any flavored tobacco product or any component, part, or accessory intended to impart, or imparting a characterizing flavor in any form, to any tobacco product or nicotine delivery device, including electronic smoking devices.

F. No tobacco retailer/licensee or its agent(s) or employee(s) may sell or offer for sale any little cigar or cigarillo unless it is sold in a package of at least 20 little cigars or cigarillos. Little cigars or cigarillos may not be sold individually or in packages of less than 20 units.

G. Tobacco retailing by means of a self-service display is prohibited pursuant to State law.

H. A Tobacco Retail License may be issued to authorize tobacco retailing at a fixed location only. Tobacco retailing on foot or from vehicles, carts, or any other non-fixed location, is prohibited and shall be considered a violation of this Chapter.

I. No Tobacco Retail License may issue and no existing Tobacco Retail License may be renewed, to authorize tobacco retailing in a pharmacy, including any location with an on-site pharmacy.

J. Each tobacco retailer/licensee and its agent(s) or employee(s) must be over the age of 21 in order to sell tobacco and/or tobacco products.

SECTION 12. Section 11.35.080 is hereby amended to read as follows:

11.35.080 Compliance eChecks.

A. Compliance with this eChapter shall be monitored by the eDepartment of Public Health ("Department") or any law enforcement officer. Any law enforcement officer may conduct compliance checks, including but not limited to youth decoy operations, and enforce the penal provisions of this eChapter.

B. The eDepartment shall check the compliance of each tobacco retailer a minimum of one time per ~~twelve~~12 month period. Compliance checks may be unannounced.

SECTION 13. Section 11.35.090 is hereby amended to read as follows:

11.35.090 Administrative fFines.

Subject to the requirements of Chapter 1.25 of this eCounty eCode, the eDirector may impose administrative fines on persons violating any provision of this eChapter or any federal, sState, or local law or regulation incorporated into this eChapter. The

dDirector may impose a fine upon such violators in an amount determined by the dDirector. The imposition of any such fine shall in no way limit the dDirector's ability or authority to impose other requirements of this eChapter or seek other remedies against violators:

SECTION 14. Section 11.35.100 is hereby amended to read as follows:

11.35.100 **Suspension or ~~r~~Revocation of Tobacco Retail ~~!~~License.**

A. In addition to any other remedy authorized by law, a Tobacco Retail ~~!~~License may be suspended or revoked as provided in this sSection if it is discovered that any of the following occurred:

1. The licensee, or the licensee's agent(s) or employee(s), has violated any provision of this eChapter. Violation by a licensee at one location shall not be construed as a violation at another location of the same licensee, nor shall violations by a prior licensee at the same location be accumulated against a subsequent licensee at the same location;
2. The original or renewal application contained ~~incorrect~~incomplete, inaccurate, false, or misleading information;
3. One or more of the bases for denial listed in sSection 11.35.050 existed before the Tobacco Retail ~~!~~License was issued; or
4. A licensee is convicted of a misdemeanor or felony violation of any federal, sState, or local tobacco law or regulation, including any provision of this ~~chapter~~Code.

B. During any period of suspension or revocation, the licensee shall remove all tobacco products and tobacco paraphernalia from public-view, including from displays and behind counter storage areas, whether or not visible to the public. All tobacco products and tobacco paraphernalia must be placed in a room that is separate from the area where point of sale transactions occur, or removed from the tobacco retail location entirely. Failure to do so may be considered a subsequent violation.

C. During any period of suspension or revocation, the tobacco retailer/licensee shall conspicuously post, at each point of sale register and near the entrance door of the tobacco retail location, a notice of a Tobacco Retail License suspension provided by the Department of Public Health. The notice shall include the suspension or revocation period, reason for suspension or revocation, tobacco retailer/licensee and location information, and Department of Public Health contact information to report violations.

GD. When the dDirector finds a violation as set forth in section 41.35.100(A) this Chapter, the Tobacco Retail lLicense may be suspended or revoked as follows:

1. Upon finding by the dDirector of a first Tobacco Retail lLicense violation within any five-year period, the Tobacco Retail lLicense may be suspended for up to ~~thirty~~30 days;

2. Upon a finding by the dDirector of a second Tobacco Retail lLicense violation within any five-year period, the Tobacco Retail lLicense may be suspended for up to ~~ninety~~90 days;

3. Upon a finding by the ~~d~~Director of a third Tobacco Retail License violation in any five-year period, the Tobacco Retail License may be suspended for up to ~~one hundred and twenty~~120 days; and

4. Upon a finding by the ~~d~~Director of a fourth Tobacco Retail License violation within a five year period, the Tobacco Retail License shall be revoked.

SECTION 15. Section 11.35.110 is hereby amended to read as follows:

11.35.110 Suspension or ~~r~~Revocation ~~p~~Procedure.

A. Before a Tobacco Retail License is suspended or revoked, the ~~d~~Director shall provide written notice to the licensee. Said notice shall include the following:

1. A statement that the proprietor's ~~t~~Tobacco ~~r~~Retailing License is being suspended or revoked pursuant to this ~~e~~Chapter;
2. The ~~e~~Code ~~s~~Section violated by licensee or licensee's agents or employees;
3. A description of the violation that occurred;
4. The address of the business where the violation occurred; and
5. The procedure for requesting an administrative review.

B. A licensee served with a notice of suspension or revocation may request an administrative review to contest the suspension or revocation. The request must be made in writing and filed with the ~~d~~Director within ~~ten~~10 calendar days of service of the notice of suspension or revocation. Failure to timely request an administrative review shall be deemed a waiver of the right to request such a review and a failure to exhaust administrative remedies.

C. After receiving a timely administrative review request, the dDirector shall schedule an administrative review within ~~twenty~~20 calendar days of receipt of the written request and designate a reviewing officer. The dDirector may, ~~in their discretion,~~ appoint as a reviewing officer, any dDepartment or other eCounty employee with expertise in public health who is not directly involved in inspection or enforcement of tobacco retailing establishments.

D. The proprietor shall be given written notice of the date, time, and location of the administrative review and the name of the reviewing officer who will conduct the administrative review at least ~~ten~~10 calendar days in advance of the review.

E. The reviewing officer, in their discretion, may grant a reasonable continuance upon the written request and showing of good cause. ~~In no event shall the continuance be longer than thirty calendar days from the originally scheduled review date.~~

F. At the administrative review, the dDepartment has the burden of providing by a preponderance of the evidence that the alleged violation occurred.

G. The failure to appear at the administrative review shall constitute an abandonment of the review request and a failure to exhaust administrative remedies.

H. Within ~~ten~~10 calendar days after the close of the administrative review, the reviewing officer shall issue a written decision on the suspension or revocation of the Tobacco Retail ILicense, including a statement of the basis for the decision. The reviewing officer's written decision shall constitute the final administrative decision of the eCounty.

I. If the Director revokes a Tobacco Retailing License, no new Tobacco Retail License may be issued for five years after that revocation.

SECTION 16. Section 11.35.120 is hereby amended to read as follows:

11.35.120 Violation—Other Penalties.

A. In addition to any other penalties and remedies provided by law, including the provisions of this Chapter, any violation of the provisions of this Chapter may be charged as a misdemeanor pursuant to Chapter 1.24 of this Code, or, in the discretion of the prosecutor, as an infraction. Any person who violates any provision of this Chapter is subject to a suit for civil action, including but not limited to, an injunction, as well as prosecution for any criminal violation.

B. In addition to any other penalty under this Chapter, a person found to have engaged in tobacco retailing without a valid Tobacco Retailing License shall be ineligible to apply for or be issued a Tobacco Retailing License as follows:

1. ~~After a first person is caught in violation for a person within any five year period of this Section,~~ no new Tobacco Retail License may be issued for the person as a proprietor until ~~thirty~~30 days have passed from the date of last ~~the~~ violation; and

~~2. After a second violation for a person within any five year period, no new Tobacco Retail License may be issued for the person as a proprietor until ninety (90) days have passed from the date of last violation;~~

~~3. After three (3) or more violations for a person within any five year period, no new Tobacco Retail License may be issued for the person as a proprietor until five (5) years have passed from the date of last violation;~~

~~24. Each day that a person engages in tobacco retailing without a valid Tobacco Retailing License shall constitute a separate violation; and,~~

~~5C. Any person found by the Director to be ineligible to be issued a Tobacco Retail License pursuant to this Section may request an administrative review within ~~ten~~10 days of notice of the violation. The request must be made to the Director in writing. Any administrative review shall be held pursuant to the provisions of Section 11.35.110 of this Chapter.~~

~~6D. Violations of this Chapter are hereby declared to be public nuisances pursuant to this Code.~~

SECTION 17. Section 11.35.130 is hereby amended to read as follows:

11.35.130 Conflict with Other Law, Severability, Saving Clause.

Nothing in this Chapter shall be interpreted or applied so as to create any power or duty in conflict with any federal or State law. If any provision of this Chapter or the application thereof to any person or circumstance is held invalid, the remainder of this Chapter or the application of such provision to other persons or circumstances shall not be affected thereby.

[CH783EICC]

SECTION 18 This ordinance shall be published in The Daily Commerce a newspaper printed and published in the County of Los Angeles.



Janice Hahn
Chair

ATTEST:

Celia Zavala

Celia Zavala
Executive Officer -
Clerk of the Board of Supervisors
County of Los Angeles

I hereby certify that at its meeting of October 1, 2019 the foregoing ordinance was adopted by the Board of Supervisors of said County of Los Angeles by the following vote, to wit:

Ayes

Noes

Supervisors Hilda Solis
Mark Ridley-Thomas
Sheila Kuehl
Janice Hahn

Supervisors None
Absent
Supervisor Kathryn Barger

Effective Date: October 31, 2019

Operative Date: _____

Celia Zavala

Celia Zavala
Executive Officer -
Clerk of the Board of Supervisors
County of Los Angeles

I hereby certify that pursuant to Section 25103 of the Government Code, delivery of this document has been made

CELIA ZAVALA
Executive Officer
Clerk of the Board of Supervisors

By [Signature]
Deputy



APPROVED AS TO FORM:
MARY C. WICKHAM
County Counsel

By [Signature]
Lester J. Tolnai
Chief Deputy County Counsel

ORDINANCE NO. XX-XX N.S.

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF RICHMOND
AMENDING CHAPTER 7.106 OF THE RICHMOND MUNICIPAL CODE
ENTITLED TOBACCO RETAILER LICENSE TO PROHIBIT THE SALE OF
ELECTRONIC CIGARETTES**

The Council of the City of Richmond hereby finds and declares as follows:

WHEREAS, on July 17, 2018 the City Council adopted an ordinance (No. 20-18 N.S.) amending Richmond Municipal Code Chapter 7.106 by banning the sale of menthol and other flavored tobacco products, establishing a minimum pack size for little cigars and cigars, and imposing location requirements on new tobacco retailers; and

WHEREAS, the regulations adopted in Ordinance No. 20-18 N.S. took effect on April 17, 2019, and were initiated following a presentation to the City Council from the Youth Tobacco Advocacy & Policy Project, highlighting the negative health impacts that tobacco products have on youth; and

WHEREAS, the City's current regulations prohibit the sale of all electronic cigarette products which have a taste or aroma other than the taste or aroma of tobacco; and

WHEREAS, electronic smoking devices often mimic conventional tobacco products in shape, size, and color, with the user exhaling a smoke-like vapor similar in appearance to the exhaled smoke from cigarettes and other conventional tobacco products; and

WHEREAS, nationwide, electronic cigarette use has increased at alarming rates since the first products became available about 10 years ago, and while there have been many successful efforts to reduce underage tobacco use, the growing availability of e-cigarettes has reversed those positive trends; and

WHEREAS, approximately 480,000 people die in the United States from tobacco-related diseases every year, making it the nation's leading cause of preventable death; and

WHEREAS, to protect the public, especially youth, against the health risks created by tobacco products, Congress enacted the Family Smoking Prevention and Tobacco Control Act ("Tobacco Control Act") in 2009 which authorized the U.S. Food and Drug Administration ("FDA") to set national standards governing the manufacture of tobacco products, to limit levels of harmful components in tobacco products and to require manufactures to disclose information and research relating to the products' health effects; and

WHEREAS, a central requirement of the Tobacco Control Act is premarket review of all new tobacco products 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; and

WHEREAS, The FDA’s premarket review process is intended to determine if a tobacco product is appropriate for the protection of the public health “with respect to the risks and benefits to the population as a whole, including users and nonusers of the tobacco product, and taking into account- (A) the increased or decreased likelihood that existing users of tobacco products will stop using such products; and (B) the increased or decreased likelihood that those who do not use tobacco products will start using such products”¹; and

WHEREAS, virtually all electronics cigarettes that are sold today are considered “new tobacco products” under the Tobacco Control Act, but unfortunately they have not obtained a premarket review order and the FDA has not taken appropriate action to enforce the requirements of the Tobacco Control Act; and

WHEREAS, in 2017, the FDA issued Guidance that purports to give electronic cigarettes manufactures 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 March 2019, the FDA issued draft guidance in which it considered moving the premarket application deadline up by one year for certain flavored e-cigarettes products. It is not known when, if ever, this narrow adjustment will become final or will take effect; and

WHEREAS, the project is exempt from the California Environmental Quality Act (CEQA) because it is covered by the general rule that CEQA applies only to projects which have the potential for causing a significant adverse effect on the environment.

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Richmond does ordain as follows:

SECTION I.

Chapter 7.106.030 entitled “Requirements and Prohibitions” of the City of Richmond Municipal Code is hereby amended to read as follows:

7.106.030 Requirements and Prohibitions.

A. Tobacco Retailer License Required.

It shall be unlawful for any person to act as a tobacco retailer in the City without first obtaining and maintaining a valid tobacco retailer license for each location at which that activity

¹ 21 U.S.C. § 387j: Application for Review of Certain Tobacco Products

is to occur. Tobacco retailing without a valid tobacco retailer's license is a nuisance as a matter of law.

B. Lawful Business Operation.

In the course of tobacco retailing or in the operation of the business or maintenance of the location for which a license is issued, it shall be a violation of this chapter for a licensee, or any of the licensee's agents or employees, to violate any local, state or federal law applicable to tobacco products, tobacco paraphernalia, or tobacco retailing.

C. Display of License.

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

D. Positive Identification Required.

No person engaged in tobacco retailing shall sell or transfer a tobacco product or tobacco paraphernalia to another person who appears to be under the age of twenty-seven (27) years without first examining the identification of the recipient to confirm that the recipient is at least the minimum age for sale of tobacco products as established by state law.

E. Minimum Age for Persons Selling Tobacco.

No person who is younger than 18 years of age shall engage in tobacco retailing.

F. False and Misleading Advertising Prohibited.

A tobacco retailer without a valid tobacco retailer license, or a proprietor without a valid tobacco retailer license including, for example, a person whose license has been revoked:

(1) Shall keep all tobacco products and tobacco paraphernalia out of public view. The public display of tobacco products or tobacco paraphernalia in violation of this provision shall constitute tobacco retailing without a license under Section 7.106.090.

(2) Shall not display any advertisement relating to tobacco products or tobacco paraphernalia that promotes the sale or distribution of such products from the tobacco retailer's location or that could lead a reasonable consumer to believe that such products can be obtained at that location.

G. Drug Paraphernalia.

It shall be a violation of this chapter for any licensee or any of the licensee's agents or employees, to violate any local, state, or federal law regulating controlled substances or drug paraphernalia, such as, California Health and Safety Code Section 11364.7.

H. Sale of Tobacco Products by Self-Service Display Prohibited.

It is unlawful for any person to display tobacco products or tobacco paraphernalia by means of a self-service display or to engage in tobacco retailing by means of a self-service display.

I. Minimum Pack Size for Little Cigars and Cigars.

No tobacco retailer shall sell or offer for sale, or possess with intent to sell or offer for sale:

1. Any single little cigar or cigar, whether or not packaged for individual sale;
2. Any number of little cigars or cigars fewer than the number contained in the manufacturer's original packaging intended for sale to a consumer;
3. Any package of little cigars or cigars containing fewer than twenty (20) little cigars or cigars.
4. This subsection does not apply to the sale or offer for sale of a single cigar for which the retail price (exclusive of all applicable taxes and fees) exceeds \$5.00. This minimum retail amount may be adjusted from time to time by a resolution of the City Council.

J. Sale of Flavored Tobacco Products Prohibited.

(a) It shall be a violation of this chapter for any tobacco retailer or any of the tobacco retailer's agents or employees to sell, offer for sale, or to possess with intent to sell or offer for sale, any flavored tobacco product.

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

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

- (1) made a public statement or claim that the tobacco product imparts a Characterizing Flavor;
- (2) used text and/or images on the Tobacco Product's Labeling or Packaging to explicitly or implicitly indicate that the Tobacco Product imparts a Characterizing Flavor; or
- (3) taken action directed to Consumers that would be reasonably expected to cause Consumers to believe the Tobacco Product imparts a Characterizing Flavor.

K. Sale of electronic cigarettes prohibited.

(1) The sale by a Tobacco Retailer of an Electronic Cigarette is prohibited where the Electronic Cigarette:

- A. is a New Tobacco Product;
- B. requires premarket review under 21 U.S.C. § 387j, as may be amended from time to time; and
- C. does not have a premarket review order under 21 U.S.C. § 387j(c)(1)(A)(i), as may be amended from time to time.

(2) For the purposes of subsection (k)(1), Electronic Cigarette shall have the definition set forth in the California Revenue and Taxation Code Section 30121, as may be amended from time to time.

(3) For the purposes of subsection (k)(1), New Tobacco Product has the meaning set forth in 21 U.S.C. § 387j(a)(1), as may be amended from time to time.

SECTION II. Severability.

If any section, subsection, sentence, clause, or phrase of this Ordinance is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of the ordinance. The City Council hereby declares that it would have passed this Ordinance and each section, subsection, sentence, clause, and phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses, or phrases be declared invalid or unconstitutional.

SECTION III. Effective Date.

This Ordinance shall be effective 114 days after passage and adoption.

First introduced at a regular meeting of the City Council of the City of Richmond held on _____ and finally passed and adopted at a regular meeting held on _____ by the following vote:

AYES:

NOES:

ABSTENTIONS:

ABSENT:

Clerk of the City of Richmond
(SEAL)

Approved:

Mayor

Approved as to form:

City Attorney

IN THE CITY COUNCIL OF THE CITY OF LIVERMORE, CALIFORNIA
AN ORDINANCE REGULATING TOBACCO PRODUCT SALES, REQUIRING
THE LICENSURE OF TOBACCO RETAILERS, AND AMENDING THE
LIVERMORE MUNICIPAL CODE TO ADD A NEW CHAPTER 5.50,
TOBACCO RETAIL LICENSING

The City of Livermore has a substantial interest in promoting compliance with federal, state, and local laws intended to regulate tobacco sales; in discouraging the illegal purchase of tobacco products by persons under 21 years of age; in promoting compliance with laws prohibiting sales of cigarettes and tobacco products to persons under 21 years of age; and in protecting youth and underserved populations from the harms of tobacco.

State law expressly authorizes cities to enact local tobacco retail licensing ordinances, and allows for the suspension or revocation of a local license for a violation of any state tobacco control law. (California Business. & Professions Code § 22971.3.)

State law prohibits the sale or furnishing of cigarettes, tobacco products, and smoking paraphernalia to persons under 21 years of age except active duty military personnel who are 18 years of age or older (California Penal Code § 308).

Groups including ChangeLab Solutions, Flavors Hook Kids Livermore, the Asian Pacific Islander Coalition for Health Against Tobacco, and the American Lung Association have produced information summarizing and citing studies and data gathered and analyzed by the Centers for Disease Control and Prevention, California Department of Public Health, Alameda County Public Health Department, Stanford Prevention Research Center, GreenInfo Network, and numerous other governmental, academic, and private agencies that show:

- Between 2004 and 2014, use of non-menthol cigarettes decreased among all populations, but overall use of menthol cigarettes increased among young adults (18 to 25 years of age) and adults (over 26 years of age);
- From 2013 to 2015, an estimated 15% of 9th and 11th grade students in California reported using electronic smoking devices;
- In 2015, 7.6% of California tobacco retailers unlawfully sold tobacco products to minors;
- In 2016, an estimated 82% of tobacco retailers in California sold flavored non-cigarette tobacco products, over 90% of tobacco retailers sold menthol cigarettes,

ORDINANCE NO. 2088

and 80% of tobacco retailers near schools sold flavored non-cigarette tobacco products;

- Unlike cigarette use that has steadily declined among youth, the prevalence of the use of non-cigarette tobacco products has remained statistically unchanged and, in some cases, increased among youth;
- Flavored tobacco has significant public health implications for youth and people of color as a result of targeted industry marketing strategies and product manipulation;
- Mentholated and flavored products have been shown to be “starter” products for youth who begin using tobacco and these products help establish tobacco habits that can lead to long-term addiction;
- Over 9% of high school students in California reported buying their own electronic cigarette from a store;
- The tobacco industry encourages youth and young adult tobacco initiation through predatory targeting, as evidenced by the following:
 - Tobacco companies target young adults ages 18 to 24 to increase their frequency of tobacco use and encourage their transition to habitual users;
 - Tobacco industry documents state that if “a man has never smoked by the age of 18, the odds are three-to-one he never will. By age 24, the odds are twenty-to-one”;
 - The tobacco industry spends an estimated \$620 million annually to market tobacco products to California residents;
- Approximately 480,000 people die in the United States from smoking-related diseases and exposure to secondhand smoke every year, making tobacco use the nation’s leading cause of preventable death;
- 5.6 million of today’s Americans who are younger than 18 years of age are projected to die prematurely from a smoking-related illness;
- As a result of the U.S. Food and Drug Administration’s ban on all flavored cigarette products (except menthol), tobacco use by youth decreased by 6% and the likelihood of a youth becoming a cigarette smoker post flavor ban fell by 17%; and,

- **Despite the state's efforts to limit youth access to tobacco, youth are still able to access tobacco products, as evidenced by the following:**
 - **Over 67% of current and former adult smokers in California started by the age of 18 and almost 100% started by the age of 26;**
 - **From 2013 to 2015, approximately 15% of 9th and 11th grade students in California reported using electronic smoking devices;**
 - **In 2017, 22.8% of high school students in California had tried cigarette smoking.**

Those groups also produced information and data that shows requiring tobacco retailers to obtain a tobacco retailer license will not unduly burden legitimate business activities of retailers who sell tobacco products to adults, but will allow the City to regulate the operation of lawful businesses to discourage violations of federal, state, and local tobacco control and youth tobacco access laws, as evidenced by the following:

- **Cigarettes are the number one product sold in convenience stores in the United States, and in 2012, they generated an average of \$622,248 in sales per store;**
- **A study found the odds of daily smoking were reduced by 2% for each 1% increase in merchant compliance with youth tobacco sales laws;**
- **Studies found increased retailer compliance and reduced tobacco sales to youth following implementation and active enforcement of youth tobacco sales laws paired with penalties for violations; and,**
- **A review of 33 California communities with strong tobacco retailer licensing ordinances found that youth sales rates declined in 32 of these communities after the ordinances were enacted, with an average decrease of 28% in the youth sales rate.**

The State of California has enacted numerous tobacco related laws that include, but are not limited to, laws that:

- **Require tobacco retailers check the identification of tobacco purchasers who reasonably appear to be under 21 years of age (California Business & Professions Code § 22956), and provide procedures for using persons under 21 years of age to conduct onsite compliance checks of tobacco retailers (California Business & Professions Code § 22952);**

- Require that tobacco retailers post a conspicuous notice at each point of sale stating that selling tobacco products to anyone under 21 years of age is illegal (California Business & Professions Code § 22952, California Penal Code § 308);
- Prohibit the sale or display of cigarettes through a self-service display and prohibits public access to cigarettes without the assistance of a clerk (California Business & Professions Code § 22962);
- Prohibit public school students from smoking or using tobacco products while on campus, while attending school-sponsored activities, or while under the supervision or control of school district employees (California Education Code § 48901(a));
- Prohibit smoking within twenty five (25) feet of a playground or a tot lot sand box area, and prohibits the use of any tobacco product within two hundred and fifty (250) feet of a youth sports event (California Health & Safety Code § 104495); and,
- Authorize local tobacco retailer licensing laws to provide for the suspension or revocation of the local tobacco retailer license for any violation of a state tobacco control law (California Business & Professions Code § 22971.3).

The federal government has enacted numerous tobacco related laws that include, but are not limited to, the Family Smoking Prevention and Tobacco Control Act ("Tobacco Control Act"), enacted in 2009. The Tobacco Control Act prohibited candy and fruit-flavored cigarettes largely because these flavored products are marketed to youth and young adults, and younger smokers were more likely than older smokers to have tried these products. Among other things, the Tobacco Control Act authorized the U.S. Food and Drug Administration ("FDA") to set national standards governing the manufacture of tobacco products, to limit levels of harmful components in tobacco products, and to require manufacturers to disclose information and research relating to the products' health effects. 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. 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 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. The City and County of San Francisco reports that nearly all vaping devices 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. That 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 March 2019, the FDA issued draft guidance in which it considered moving the premarket application deadline up by one year for certain flavored electronic cigarette products. It is not known when, if ever, this narrow adjustment will become final or will take effect.

Neither federal nor California state laws restrict the sale of menthol cigarettes or flavored non-cigarette tobacco products, electronic smoking devices, or the solutions used in these devices.

The City of Livermore previously adopted Municipal Code Chapter 8.10, *Smoking Pollution Control*, to protect public health by prohibiting smoking in places of employment and certain public spaces. Section 8.10.100 in that ordinance prohibits the sale or distribution of tobacco products from vending machines.

Over 130 cities and counties in California have passed tobacco retailer licensing ordinances in an effort to stop youth from using tobacco.

On June 18, 2019, the City and County of San Francisco introduced an ordinance to prohibit the sale of electronic cigarettes lacking FDA premarket approval.

California courts have affirmed the power of local jurisdictions to regulate business activity in order to discourage violations of law in several cases, including but not limited to, *Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, *Bravo Vending v. City of Rancho Mirage* (1993) 16 Cal.App.4th 383, and *Prime Gas v. City of Sacramento* (2010) 184 Cal.App.4th 697.

////
////

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF LIVERMORE DOES ORDAIN AS FOLLOWS:

Section 1. Findings. The City Council finds that:

A. A local licensing system for tobacco retailers is appropriate to ensure that retailers comply with tobacco control laws and business standards of the City Council, to protect the health, safety, and welfare of our residents;

B. A requirement for a tobacco retailer license will not unduly burden legitimate business activities of retailers who sell or distribute cigarettes or other tobacco products to adults. It will, however, allow the City to regulate the operation of lawful businesses to discourage violations of federal, state, and local tobacco-related laws;

C. The City Council has a substantial interest in protecting youth and underserved populations from the harms of tobacco use; and

D. A local licensing system for tobacco retailers is appropriate to ensure that retailers comply with tobacco control laws and business standards of the City of Livermore in order to protect the health, safety, and welfare of our residents.

Section 2. Amendment. Chapter 5.50, *Tobacco Retail Licensing*, of the Livermore Municipal Code is hereby adopted and added to the Livermore Municipal Code as set forth in Exhibit A attached hereto.

Section 3. Environmental. The passage of this ordinance is not a project according to the definition in the California Environmental Quality Act and, therefore, is not subject to the provisions requiring environmental review.

Section 4. Severability. If any part of this ordinance is declared invalid by a court, such invalidity shall not affect any of the remaining parts.

Section 5. Publication. This ordinance shall be published once in a newspaper of general circulation of the City of Livermore within fifteen days after its adoption.

Section 6. Effective date. This ordinance shall take effect 30 days after its adoption.

The foregoing ordinance was introduced at the meeting of the City Council of the City of Livermore held on June 24, 2019, by the following vote:

AYES: Council Members Coomber, Munro, Woerner, Vice Mayor Carling,
Mayor Marchand
NOES: None
ABSENT: None
ABSTAIN: None

ORDINANCE NO. 2088

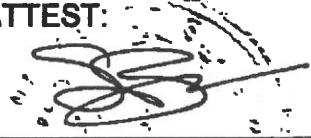
The ordinance was adopted at the regular meeting of the City Council held on July 8, 2019, by the following vote:

AYES: Council Members Coomber, Munro, Woerner, Vice Mayor Carling,
Mayor Marchand
NOES: None
ABSENT: None
ABSTAIN: None




Mayor, City of Livermore

ATTEST:



Sarah Bunting
City Clerk
Date: July 9, 2019

APPROVED AS TO FORM:



Jason Alcala
City Attorney

Exhibit A – Municipal Code Chapter 5.50, Tobacco Retail Licensing

ORDINANCE NO. 2088

EXHIBIT A

CHAPTER 5.50 TOBACCO RETAIL LICENSING

- 5.50.010 Purpose.**
- 5.50.020 Definitions.**
- 5.50.030 License required.**
- 5.50.040 Ineligible to receive license.**
- 5.50.050 Locations.**
- 5.50.060 Application and renewal procedure; Fees.**
- 5.50.070 Issuance or denial.**
- 5.50.080 Licenses are not transferable.**
- 5.50.090 Licensee obligations.**
- 5.50.100 Sale of flavored tobacco, electronic smoking devices, and fluid prohibited.**
- 5.50.110 Compliance monitoring.**
- 5.50.120 Violation.**
- 5.50.130 Penalties.**
- 5.50.140 Suspension or revocation of license.**
- 5.50.150 Summary suspension and revocation of license.**
- 5.50.160 Other laws.**

5.50.010. Purpose.

The purpose of this chapter is to encourage responsible tobacco retailing and to discourage violations of tobacco related laws, especially those that prohibit or discourage the sale or distribution of tobacco products to minors. It is not the purpose of this ordinance to expand or reduce the degree to which the activities regulated by federal or state law are criminally proscribed or to alter the penalties provided for violations of federal or state tobacco-related laws.

5.50.020. Definitions.

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

EXHIBIT A

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 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 the primary purpose of avoiding the effect of the violations of this chapter is presumed not to be an "arm's length transaction."

B. "Characterizing flavor" means a taste or aroma, other than the taste or aroma of tobacco, imparted either prior to or during consumption of a tobacco product or any byproduct produced by a tobacco product, including, but not limited to, tastes or aromas relating to menthol, mint, wintergreen, fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb, or spice.

C. "Department" means the Livermore Police Department and any other department, division, or person designated by the City to enforce or administer the provisions of this chapter.

D. "Electronic smoking device" means any device or delivery system that can be used to deliver nicotine in aerosolized or vaporized form to a person, as well as any component, part, or accessory for the device that is used during its operation. "Electronic smoking device" includes electronic cigarettes as defined in section 30121 of the California Revenue and Taxation Code, and any other device manufactured, distributed, marketed, or sold as an electronic cigar, an electronic cigarillo, an electronic pipe, an electronic hookah, or any other product name or descriptor, that can be used to deliver nicotine in aerosolized or vaporized form to a person. "Electronic smoking device" 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.

E. "Electronic smoking device fluid" means any liquid or substance that can be used by an electronic smoking device.

F. "Flavored tobacco product" means any tobacco product that imparts a characterizing flavor.

G. "License" means a tobacco retailer license issued by the City pursuant to this chapter.

H. "Licensee" means any proprietor that was issued a license by the City for tobacco retailing pursuant to this chapter.

I. "New FDA approved tobacco product" means a new tobacco product as defined in 21 U.S.C. § 387j(a)(1) of the Family Smoking Prevention and Tobacco Control Act of 2009 when that product requires premarket review by the United States Food and Drug

EXHIBIT A

Administration and that product has obtained a premarket review order under 21 U.S.C. § 387j(c)(1)(A)(i), as those statutes may be amended from time to time.

J. "Proprietor" means a person with an ownership or managerial interest in a tobacco retailing business. An ownership interest shall be deemed to exist when a person has a 10% or greater interest in stock, assets, or income of a business other than the sole interest of security for debt. A managerial interest shall be deemed to exist when a person has, or can have, sole or shared control over the day-to-day operations of a business.

K. "Tobacco paraphernalia" means any item designed or marketed for the consumption, use, or preparation of a tobacco product.

L. "Tobacco product" means: Any product containing, made from, or derived from tobacco or nicotine that is intended for human consumption, whether smoked, heated, chewed, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means, including, but not limited to cigarettes, cigars, little cigars, chewing tobacco, pipe tobacco, snuff; Any electronic smoking device; Any electronic smoking device fluid; and, any component, part, or accessory of 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 that product is marketed and sold solely for such approved use. Examples of the products approved by the United States Food and Drug Administration for the cessation of smoking include skin patches, lozenges, gum, and prescription medications. Also, "Tobacco product" does not include any drugs, devices, or combination products authorized for sale by the United States Food and Drug Administration, as those terms are defined in the Federal Food, Drug and Cosmetic Act, provided the drug, device, or combination products is not otherwise prohibited by this chapter as a flavored tobacco product.

M. "Tobacco retailer" means any person who sells, offers for sale, exchanges, or offers to exchange any tobacco, tobacco product, or tobacco paraphernalia for consideration, without regard to the quantity sold, offered for sale, exchanged, or offered to exchange.

N. "Tobacco retailing" means the conduct of selling, offering for sale, exchanging, or offering to exchange any tobacco, tobacco product, or tobacco paraphernalia for any form of consideration, without regard to the quantity sold, offered for sale, exchanged, or offered to exchange.

O. "Youth-Populated-Area" means a parcel in the city that is occupied by a: private or public kindergarten, elementary, middle, junior high, or high school; library open to the public; playground open to the public; youth center, defined as a facility where children, ages 6 to 17, inclusive, come together for programs and activities; recreation facility open to the public, defined as an area, place, structure, or other facility that is used either permanently or

EXHIBIT A

temporarily for community recreation, even though it may be used for other purposes, which includes, but is not limited to, a gymnasium, playing court, playing field, and swimming pool; or licensed commercial child-care or preschool facility.

5.50.030. License required

A. No person shall be a tobacco retailer, or conduct tobacco retailing, in the city without a valid license.

B. No person shall conduct tobacco retailing at a location in the city without a valid license for that specific location.

C. The term of each license is one year, unless the license is revoked.

D. Nothing in this chapter shall be construed to grant any person obtaining a license any status or right other than to conduct tobacco retailing at the location in the city identified on the face of the license, subject to compliance with all other applicable laws, regulations, and ordinances. Nothing in this chapter shall be construed to render inapplicable, supersede, or apply in lieu of any other provision of applicable law, including, without limitation, any condition or limitation on indoor smoking made applicable to business establishments by California Labor Code section 6404.5.

5.50.040 Ineligible to receive a license.

In addition to any other penalty authorized by law, if a court of competent jurisdiction determines, or the Department finds and determines after hearing pursuant to LMC 5.50.110.C, that any person has engaged in tobacco retailing without a valid license, either directly or through the person's agents or employees, or that a licensee violated this chapter, then that person or licensee shall be ineligible to apply for, or to be issued, a license as follows:

A. After a first violation of this chapter at a location within any five-year (5) period, no license may be issued to the person, licensee, or for the location (unless ownership of the business at the location has been transferred in an arm's length transaction), until thirty (30) days have passed from the date of the violation.

B. After a second violation of this chapter at a location within any five-year (5) period, no license may be issued to the person, licensee, or for the location (unless ownership of the business at the location has been transferred in an arm's length transaction), until ninety (90) days have passed from the date of the violation.

C. After of a third or subsequent violation of this chapter at a location within any five-year (5) period, no license may be issued to the person, licensee, or the location (unless

EXHIBIT A

ownership of the business at the location has been transferred in an arm's length transaction), until five (5) years have passed from the date of the violation.

5.50.050. Locations.

- A. Licenses shall only be issued for tobacco retailing at fixed locations.
- B. Licenses shall not be issued for itinerant tobacco retailing, tobacco retailing from vehicles or carts, or for tobacco retailing that involves the delivery of tobacco products or tobacco paraphernalia from a fixed location in the city to a customer at a different location in the city.
- C. Except as provided in subsection D below, no license shall be issued, and no existing license may be renewed, for tobacco retailing within one thousand (1,000) feet of a youth-populated-area. The distance between a youth-populated-area and a tobacco retailing location shall be measured by a straight line from the nearest point of the property line for the parcel where the youth-populated-area is located to the nearest point of the property line for the parcel where the tobacco retailing location is located or proposed to be located.
- D. The prohibition in subsection C above does not apply to following legal nonconforming tobacco retailing:
 1. Any proprietor that on the date this ordinance is adopted is lawfully conducting tobacco retailing at a location that would be prohibited by this chapter from receiving a license due to its proximity to a youth-populated-area, and which proprietor and location are otherwise eligible to receive a license, will be considered legal non-conforming general retail land use subject to the provisions in Livermore Development Code Chapter 9.16 *Nonconforming Provisions*, for the purposes of the license application, issuance, and renewal provisions in this chapter, but the proprietor must obtain a license and otherwise comply with the requirements this chapter for tobacco retailing; and,
 2. Any licensee with a license for a location that would be prohibited from receiving a license due to its proximity to a youth-populated-area that was created after the license was issued, and which licensee and location are otherwise eligible to receive a license, will be considered legal non-conforming retail land land use subject to provisions in Livermore Development Code Chapter 9.16 *Nonconforming Provisions*, for the purposes of the license application, issuance, and renewal provisions of this chapter.

5.50.060 Application and renewal procedure; Fees.

- A. All applications for a license, and to renew a license, shall be submitted to the Department in the name of each proprietor proposing to conduct tobacco retailing and shall be signed by each proprietor or an authorized agent thereof. A separate application must be

EXHIBIT A

submitted for each location where tobacco retailing will occur. Each application shall be submitted on a form supplied by the Department and must contain the following information:

1. The name, address, email address, and telephone number of each proprietor for the tobacco retailing business;
2. The business name, address, and telephone number for the fixed location for the tobacco retailing business;
3. The name, address, email address, and telephone number for the primary person authorized by each proprietor to receive all communications and notices required by, authorized by, or convenient to the enforcement of this chapter;
4. Proof that each proprietor has been issued a valid state license for the sale of tobacco products;
5. Whether or not a proprietor applying for the license was previously issued a license pursuant to this chapter that is, or was at any time, suspended or revoked, and if so, the dates of the suspension period or the date of revocation;
6. Whether or not any proprietor has been cited a violation of this chapter, and if so, the dates of the citation;
7. Whether or not any proprietor has been cited for a violation of any local, state, or federal tobacco-related law, and if so, the name of the agency that issued the citations and the dates the citation was issued; and
8. Such other information as the department deems necessary for the administration or enforcement of this chapter as specified on the application form required by this section.

B. The fee for issuance or renewal of a license shall be established by resolution of the City Council and shall be in addition to the City's business operation tax and any other license or permit fee imposed by this code upon the applicant.

1. The license fee shall be paid to the City at the time the license application is submitted.
2. The fee shall be calculated so as to recover the cost of administration and enforcement of this chapter, including, for example, issuing a license, administering the license 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.

EXHIBIT A

3. License fees are nonrefundable except as may be required by law.

C. A licensee may renew a license as follows:

1. A proprietor may renew an unexpired license that has not been revoked. To renew the license, the proprietor need only submit the applicable license fee to the City no more than sixty (60) days and no less than thirty (30) days before the expiration of the license to be renewed.

2. A proprietor may renew an expired license that has been expired for less than six (6) months by submitting:

(a) A license fee and application renewal form that provides all the information required to apply for a license; and,

(b) A declaration under the penalty of perjury that the proprietor did not conduct tobacco retailing after the licensed expired, and that the proprietor will not conduct tobacco retailing until a new license is issued.

3. A proprietor may not renew a license that has been expired more than six (6) months prior to the renewal, or revoked, and must instead must submit a new application.

D. All information specified in an application pursuant to this section shall be subject to disclosure under the California Public Records Act.

5.50.070 Issuance or denial.

A. Upon the receipt of a complete license application and the license fee required by this chapter, the Department shall review the application and issue a license 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 a license for a tobacco retailing activity that is not authorized by this chapter, or is prohibited by this chapter or other law;

3. The application seeks a license for more than one location;

4. The application seeks a license for a proprietor that requires, but has not received, a valid state license for the sale of tobacco products;

5. The application seeks a license for a location that requires, but has not received, a valid state license for the sale of tobacco products;

EXHIBIT A

6. The application seeks a license for a location that is within one thousand (1,000) feet of a youth-populated-area and the location does not qualify for a legal non-conforming use exception set forth in this chapter;

7. The application seeks a license for a proprietor that this chapter provides is ineligible to receive a license; or

8. The application seeks a license for a location where a license was revoked less than five (5) years prior the application.

B. Nothing in this chapter shall be construed to vest in any person obtaining and maintaining a license any status or right to act as a tobacco retailer in contravention of any provision of law.

5.50.080. Licenses are not transferable.

A license is nontransferable. If a licensee changes business location, that licensee must obtain a new license prior to conducting tobacco retailing at the new location. If a business licensed to conduct tobacco retailing is transferred to a new proprietor, the new proprietor must obtain a license before conducting tobacco retailing at that location.

5.50.090 Licensee obligations.

A. It is the responsibility of each proprietor to be informed regarding all laws applicable to tobacco retailing, including those laws affecting the issuance of a license. No proprietor may rely on the issuance of a license as a determination by the City that the proprietor has complied with all laws applicable to tobacco retailing.

B. Each license shall be prominently displayed in an area that is visible to the public at the licensed location.

C. Each licensee shall inform the Department in writing of any change in the information submitted in an application for an issued license within ten (10) calendar days of a change.

D. No licensee shall sell a tobacco product or tobacco paraphernalia to another person who is under the age of twenty-seven (27) years without first examining the person's identification to confirm that the person is at least the minimum age for sale of tobacco products as established by state law.

E. Licensee, and the agents and employees of the licensee, shall not violate any federal or state tobacco-related laws regarding the sale of tobacco or tobacco products to underage persons.

EXHIBIT A

5.50.100. Sale of flavored tobacco, electronic smoking devices, and fluid prohibited.

A. The sale, offer for sale, exchange, or offer to exchange of any flavored tobacco product is prohibited.

1. There is a rebuttable presumption that a tobacco product is a flavored tobacco product if the product manufacturer, tobacco retailer, or any of their respective agents or employees, has made a public statement or claim that the tobacco product has or produces a characterizing flavor, including, but not limited to, text, color, or images on the product's labeling or packaging that are used to expressly or impliedly communicate that a tobacco product has a characterizing flavor.

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

B. The sale, offer for sale, exchange, or offer to exchange of any electronic smoking device is prohibited, except where the electronic smoking device is a new FDA approved tobacco product.

C. The sale, offer for sale, exchange, or offer to exchange of any electronic smoking device fluid is prohibited, except where the electronic smoking device fluid is an FDA approved tobacco product that is not otherwise prohibited by this chapter as a flavored tobacco product.

5.50.110 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 City may designate additional persons to monitor compliance with this chapter.

B. The Department shall inspect each tobacco retailer at least one (1) time during every twelve (12) month period.

C. The Department may conduct a hearing to determine whether a licensee, or an agent or employee of the licensee, has violated any of the requirements, conditions, or prohibitions of this chapter or has pleaded guilty, no contest or its equivalent, or admitted to a violation of this chapter or any federal or state tobacco-related laws. The Department shall provide notice of the date, time, and location of the hearing to the primary person authorized by each proprietor to receive all communications and notices required by, authorized by, or convenient to the enforcement of this chapter. The hearing may not be conducted less than 14

EXHIBIT A

days after the notice for the hearing is issued. The hearing need not be conducted according to the technical rules relating to evidence and witnesses, but shall comply with the provisions in Government Code section 11512 (a), (b), and (c). Oral evidence shall be taken only upon oath or affirmation, and irrelevant and unduly repetitious evidence shall be excluded. The Department and the licensee have the right to: call and examine witnesses on any matter relevant to the issues of the hearing; introduce documentary and physical evidence; cross-examine opposing witnesses or any matter relevant to the issues of the hearing; to impeach any witness regardless of which party called the witness to testify; to rebut evidence; to take notice of any fact that may be judicially noticed, whether that notice is taken before or after the hearing; and to represent himself or herself, or to be represented by anyone of his or her choice who is lawfully permitted to do so. The Department shall mail written findings and its determination after hearing to the primary person authorized by each proprietor to receive all communications and notices required by, authorized by, or convenient to the enforcement of this chapter.

D. Nothing in this chapter creates a right of action in any licensee or other person against the City or its agents or its employees.

5.50.120 Violation.

- A. It is a violation of this ordinance to do any of the following:
1. Conduct tobacco retailing without a license;
 2. Conduct tobacco retailing at a location that is not licensed;
 3. Conduct tobacco retailing at a location that is not fixed;
 4. Conduct tobacco retailing that involves the delivery of tobacco products or tobacco paraphernalia from a fixed location in the City to a customer at a different location in the City;
 5. Fail to fulfill the licensee obligations set forth in LMC 5.50.090;
 6. Sell, offer for sale, exchange, or offer to exchange any electronic smoking device prohibited by LMC 5.50.100.B in the City;
 7. Sell, offer for sale, exchange, or offer to exchange any electronic smoking device fluid in the City;
 8. Sell, offer for sale, exchange, or offer to exchange any flavored tobacco in the City; and, to

EXHIBIT A

9. Violate any local, state, or federal law applicable to tobacco products, tobacco paraphernalia, or tobacco retailing.

B. Causing, permitting, aiding, abetting, or concealing a violation of any provision of this chapter shall also constitute a violation of this chapter.

C. Each sale in violation of this chapter shall be regarded as a new and separate offense. Each day any violation of this chapter continues shall be regarded as a new and separate offense. The remedies provided in this chapter shall be cumulative and exclusive.

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

E. This ordinance is not intended and nothing in this chapter shall be interpreted to penalize the purchase, use, possession, or attempted purchase, use, or possession of tobacco products, tobacco paraphernalia, electronic smoking devices, or electronic smoking device fluid by persons under twenty-one years of age; provided, however, persons under twenty-one years of age remain subject to generally applicable laws regulating such conduct without respect to the person's age.

5.50.130. Penalties.

A. The remedies provided by this chapter are cumulative and in addition to any other remedies available at law or in equity.

B. Whenever evidence of a violation of this chapter is obtained in any part through the participation of a person under the age of twenty-one (21) years old, such person shall not be required 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.

C. Violations of this chapter are subject to a civil action brought by the District Attorney or the City Attorney, punishable by a civil fine not less than two hundred fifty dollars (\$250) and not exceeding one thousand dollars (\$1,000) per violation.

D. Violations of this chapter may, in the discretion of the prosecuting District Attorney or City Attorney, be prosecuted as infractions or misdemeanors when the interests of justice so require.

E. In addition to other remedies provided by this chapter or by other law, any violation of this chapter may be remedied by a civil action brought by the City Attorney, including, for example, administrative or judicial nuisance abatement proceedings, civil code enforcement proceedings, and suits for injunctive relief.

EXHIBIT A

5.50.140. Suspension or revocation of license.

A. A license issued contrary to this chapter, contrary to any other law, or on the basis of false or misleading information supplied by a proprietor shall be revoked.

B. In addition to any other remedy authorized by law, a license shall be suspended or revoked if any court of competent jurisdiction determines, or the Department finds and determines after hearing pursuant to LMC 5.50.110.C, that the licensee, or any agent or employee of the licensee, violated any of the requirements, conditions, or prohibitions of this chapter or has pleaded guilty, no contest or its equivalent, or admitted to a violation of this chapter or any federal or state tobacco-related laws.

1. Upon a finding by the Department of a first violation of this chapter at a location within any five-year (5) period, the license shall be suspended for thirty (30) days.

2. Upon a finding by the Department of a second violation of this chapter at a location within any five-year (5) period, the license shall be suspended for one (1) year.

3. Upon a finding by the Department of three or more violations of this chapter at a location within any five-year (5) period, the license shall be revoked.

C. When a license is suspended, the licensee and all employees and agents must immediately cease all tobacco retailing and remove all tobacco products from public view from the licensed location, during the term of the suspension.

D. When a license is revoked, the licensee and all employees and agents must immediately cease all tobacco retailing and remove all tobacco products from public view from the licensed location, and no tobacco retailing may occur at that location unless and until a new license is issued pursuant to this chapter.

E. Violations at a location shall continue to be counted against a location and license ineligibility periods shall continue to apply to a location unless:

1. The tobacco retailing business at the location has been transferred to new proprietor(s) in an arm's length transaction; and

2. The new proprietor(s) obtain a license to conduct tobacco retailing at that location.

F. A decision of the Department to suspend a license is appealable to the City Manager and any appeal must be filed in writing with the City Clerk within ten days of mailing of the Department's decision. If such an appeal is timely made, it shall stay enforcement of the appealed action. The decision on the appeal by the City Manager shall be the final decision of the City.

EXHIBIT A

G. A decision of the Department to revoke is a final decision of the City, and there is not appeal to the City Manager.

5.50.150. Summary suspension and revocation of license.

As a possible alternative to the hearing for the suspension of a license following a first or second alleged violation of this chapter within any five year period, the licensee alleged to have violated this chapter may request the Department exercise its prosecutorial discretion to allow the licensee to agree to the penalties provided in this section in lieu of the penalties that would otherwise apply under this chapter and to forego a hearing on the allegations. Notice of any agreement shall be provided to the Department and no hearing shall be held. Agreements shall not be confidential and shall contain the following terms as well as any other non-criminal provisions established by the City in the interests of justice:

A. After a first alleged violation of this chapter at a location:

1. Cease all tobacco retailing and remove all tobacco products from public view from the licensed location for one (1) day,
2. Payment of an administrative penalty of one thousand dollars (\$1,000),
and
3. Admission that the violation occurred and an acknowledgment that the violation will be considered in determining the fine or penalty for any future violation.

B. After a second alleged violation of this chapter at a location within any five year period:

1. Cease all tobacco retailing and remove all tobacco products from public view from the licensed location for ten (10) days,
2. Payment of an administrative penalty of at least five thousand dollars (\$5,000), and
3. Admission that the violation occurred and an acknowledgment that the violation will be considered in determining the fine or penalty for any future violations.

5.50.160. Other laws.

This chapter does not intend and shall not be interpreted to regulate any conduct where the regulation of such conduct has been preempted by the United States or the State of California.

C.45

TO: BOARD OF SUPERVISORS
FROM: Phil Batchelor
County Administrator



CONTRA COSTA COUNTY

DATE: January 27, 1998

SUBJECT: Minicucci Associates Contract for Study of Neighborhood Change

SPECIFIC REQUEST(S) OR RECOMMENDATION(S) & BACKGROUND AND JUSTIFICATION

RECOMMENDATION(S):

APPROVE and AUTHORIZE the County Administrator, or designee, to execute a contract with Minicucci Associates with a payment limit of \$72,500 to conduct an evaluation of Neighborhood Change for the period from January 1, 1998 through December 31, 1998.

BACKGROUND/REASON(S) FOR RECOMMENDATION(S):

The Study of Neighborhood Change will seek to determine if the quality of life in three low income neighborhoods improved between 1990 and the year 2000. The study will examine specific core indicators of improvement, such as increased employment, family stabilization, neighborhood safety and school attendance. It will also look at qualitative measures; i. e., observed changes connected to a variety of program activities implemented through neighborhood service integration, mutual assistance and self help and other neighborhood programs. The objective of this study is to better understand the elements that lead to positive changes within neighborhoods and to improve the ability of public agencies and foundations to use their resources in a cost effective manner.

Contra Costa County is acting as the fiscal agent for this study. The Zellerbach Family Fund has selected Minicucci Associates to perform the evaluation.

CONTINUED ON ATTACHMENT: YES SIGNATURE: 

RECOMMENDATION OF COUNTY ADMINISTRATOR RECOMMENDATION OF BOARD COMMITTEE
 APPROVE OTHER

SIGNATURE(S):

ACTION OF BOARD ON 1-27-1998 APPROVED AS RECOMMENDED OTHER

VOTE OF SUPERVISORS

UNANIMOUS (ABSENT _____)
AYES: _____ NOES: _____
ABSENT: _____ ABSTAIN: _____

I HEREBY CERTIFY THAT THIS IS A TRUE AND CORRECT COPY OF AN ACTION TAKEN AND ENTERED ON MINUTES OF THE BOARD OF SUPERVISORS ON THE DATE SHOWN.

Contact: Sara Hoffman, 335-1090

ATTESTED January 27, 1998
PHIL BATCHELOR, CLERK OF
THE BOARD OF SUPERVISORS
AND COUNTY ADMINISTRATOR

BY Shirley Canlan DEPUTY

cc: CAO

C.46

TO: BOARD OF SUPERVISORS
FROM: PHIL BATCHELOR, COUNTY ADMINISTRATOR

DATE:

SUBJECT: APPROVING AND AUTHORIZING THE ISSUANCE OF A CHANGE ORDER TO THE CONTRACT FOR BID PACKAGE NO. 3-CONSTRUCTION OF NEW HOSPITAL, 2500 ALHAMBRA AVENUE, MARTINEZ (WH580B)

SPECIFIC REQUEST(S) OR RECOMMENDATION(S) & BACKGROUND AND JUSTIFICATION

I. RECOMMENDATION

APPROVE the issuance of Change Order No. 168 to the Contract dated February 7, 1995 issued to Centex Golden Construction Co. for the Construction of a New Hospital at 2500 Alhambra Avenue, Martinez, and AUTHORIZE the County Administrator or his designee to execute the Change Order.

II. FINANCIAL IMPACT

Change Order No. 168 totals \$120,862.00. Funds in the capital account established for the project are sufficient to cover the amount encumbered by this contract, from bond proceeds specified to the project. Bond financing for the total project cost was secured in May, 1992 in accordance with the Board of Supervisors' direction.

CONTINUED ON ATTACHMENT: X YES SIGNATURE: [Signature]
 RECOMMENDATION OF COUNTY ADMINISTRATOR RECOMMENDATION OF BOARD COMMITTEE
 APPROVE OTHER

SIGNATURE(S): _____

ACTION OF BOARD ON 1-27-1998 APPROVED AS RECOMMENDED OTHER

VOTE OF SUPERVISORS
 UNANIMOUS (ABSENT _____)
AYES: _____ NOES: _____
ABSENT: _____ ABSTAIN: _____

I HEREBY CERTIFY THAT THIS IS A TRUE AND CORRECT COPY OF AN ACTION TAKEN AND ENTERED ON THE MINUTES OF THE BOARD OF SUPERVISORS ON THE DATE SHOWN.

ATTESTED January 27, 1998
PHIL BATCHELOR, CLERK OF THE BOARD OF SUPERVISORS AND COUNTY ADMINISTRATOR

CONTACT: D. Bell, CAO
CC: Auditor/Controller
GSD (Accounting)
O'Brien-Kreitzberg (via CAO)
Contractor (Via CAO)

BY Shirley Casella , DEPUTY

Board Order to Approve
Issuance of a Change Order for
Merrithew Memorial Hospital Replacement Project
Bid Package No. 3

III. REASONS FOR RECOMMENDATIONS

Change Order No. 168 will provide for the following:

Proposed Change Order No. 680 – Door 1207 and 2013 changes \$27,853.00

The patient recovery area has a pair of single acting entrance doors. Code mandates that dual egress (bi-parting) doors be provided to allow emergency egress in or out of the area. In addition, to increase security, the Owner has requested that electronic changes be implemented at the double door into material management.

Proposed Change Order No. 750 – Added retaining wall and fencing behind existing wards \$49,296.00

At the rear of the hospital, changes were incorporated into the retaining wall and surrounding site work to accommodate a revised entry to the future clinical lab.

Proposed Change Order No. 510 – Revised film processor infrastructure \$ 43,713.00

Under previous directives, changes were made to the film processors and the silver recovery process. The above change order directed additional architectural, mechanical and electrical revisions. Revisions included sleeve patching, door revisions, and duct/drain deletions and rerouting.