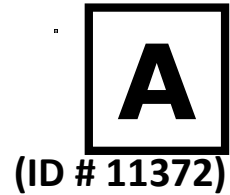




# City of Palo Alto

## City Council Staff Report



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**Report Type: Consent Calendar**

**Meeting Date: 6/8/2020**

**Summary Title: Adoption of Tobacco Retail Permit Ordinance**

**Title: Adoption of Amendments to the City of Palo Alto Tobacco Retailer Permit Ordinance (PAMC Chapter 4.64) to Further Restrict Electronic Cigarette Products and Flavored Tobacco Products**

**From: City Manager**

**Lead Department: Public Works**

### **Recommendation**

Per Council direction at the May 18, 2020 Council meeting, staff recommends that Council adopt revisions to Chapter 4.64 of the Palo Alto Municipal Code (Attachment A) to mirror the Santa Clara County Department of Health Tobacco Permit Ordinance, which will further restrict sales of flavored tobacco and electronic cigarette products.

### **Background**

At the December 9, 2019 Council meeting, Council directed staff to adopt an ordinance prohibiting the sale and distribution of all electronic cigarettes and flavored tobacco products, in alignment with the County of Santa Clara's recent approach, with as few exemptions as possible ([Colleagues' Memo From Council Members Cormack, Fine, and Tanaka Regarding Anti-Vaping Measures](#), December 9, 2019). Following a stakeholder engagement process with affected businesses, staff returned with a proposed ordinance, which mirrored the Santa Clara County ordinance, but which proposed an exemption for adult-only stores (those which serve customers only age 21 and older) because of the severe financial impact and potential closure of five retailers in Palo Alto ([Staff Report #11005](#), May 4, 2020). The proposed ordinance was at first scheduled as a Consent Item but was rescheduled as an Action Item for Council discussion at the May 18 Council meeting. Subsequently, a staff memo and additional ordinance adjustments reflecting public feedback received after May 4 were presented for Council consideration ([Memo to Staff Report #11332](#)).

At the May 18, 2020 meeting, Council reviewed the proposed ordinance and directed staff to return with ordinance revisions that mirror the Santa Clara County ordinance requirements. The attached proposed ordinance (Attachment A) mirrors the Santa Clara County ordinance requirements.

### **Stakeholder Engagement**

Stakeholder engagement to affected businesses was conducted and is discussed in [Staff Report #11005](#). In addition, staff attended several public meetings and met with community members to hear concerns about youth vaping. A summary of stakeholder input is summarized in [Memo to Staff Report #11332 \(Attachment A–Summary of Major Public Comments About Palo Alto’s Proposed Tobacco Retail Permit Ordinance\)](#).

### **Environmental Review**

This proposed ordinance would not be subject to environmental review under the California Environmental Quality Act (CEQA) because it does not cause a direct physical change in the environment or a reasonably foreseeable indirect change in the physical environment.

### **Attachments:**

- Attachment A - Ordinance Amending Chapter 4.64 of the Municipal Code to Adopt the County's Tobacco Retailer Permit Ordinance

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Ordinance No. \_\_\_\_\_

Ordinance of the Council of the City of Palo Alto Amending Chapter 4.64  
(Permits for Retailers of Tobacco Products) Of Title 4 (Business Licenses and  
Regulations).

The Council of the City of Palo Alto ORDAINS as follows:

SECTION 1. Findings and Declarations. The City Council finds and declares as follows:

- A. Electronic cigarettes, also known as e-cigarettes, e-vaporizers, or electronic nicotine delivery systems, are battery-operated devices that people use to inhale an aerosol that typically contains nicotine. In addition to nicotine, the aerosol from e-cigarettes may include up to 31 other components, including formaldehyde, acetaldehyde, glycidol, acrolein, acetol, and diacetyl. Several of these compounds are likely carcinogens, and acrolein is a powerful irritant.<sup>1</sup> These products can resemble traditional tobacco cigarettes (cig-a-likes), cigars, or pipes, or even everyday items like pens or USB memory sticks.<sup>2</sup> The pervasive use of these and other related Electronic Cigarette Products has given rise to a massive and multi-faceted public health crisis.
- B. The Surgeon General has declared the use of e-cigarettes among youth an “epidemic.” There is an extensive and rapidly growing body of evidence supporting that characterization. For instance:
  - i. E-cigarette companies use marketing strategies to target youth. In 2014, 18 million (7 out of 10) middle and high school students were exposed to e-cigarette ads.<sup>3</sup>
  - ii. E-cigarettes are marketed in a variety of flavors that appeal to youth, including gummy bear, birthday cake, cotton candy, and fruit punch.
  - iii. While youth use of combustible cigarettes has decreased dramatically, e-cigarette use—or “vaping”—among middle and high school students increased

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

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

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

by 78 percent between 2017 and 2018, with over 4 million kids currently using e-cigarettes in 2018.<sup>4</sup>

- iv. The proportion of current e-cigarette users in high school who reported use on 20 days or more in the past 30-day period increased from 20 percent in 2017 to 27.7 percent in 2018.<sup>5</sup>
  - v. In 2019, the national prevalence of e-cigarette use during the previous 30 days was more than 1 in 4 students in the 12th grade, more than 1 in 5 in the 10th grade, and more than 1 in 11 in the 8th grade.<sup>6</sup>
  - vi. Use of e-cigarettes among undergraduate college students increased from 4.9 percent to 10.1 percent between 2017 and 2018.<sup>7</sup>
  - vii. There was a 46.2 percent increase in current e-cigarette use between 2017 and 2018 among young adults.<sup>8</sup>
  - viii. Adolescents obtain e-cigarettes from a variety of sources. The most common sources are: purchasing from a store or online (31.1 percent); buying from another person (16.3 percent); and giving someone money to purchase for them (15.0 percent).<sup>9</sup>
- C. Nearly 1 in 3 Santa Clara County teens—31.6 percent—report that they have used an e-cigarette at least once. Most teens obtained their e-cigarettes from “social sources,”

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

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

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

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

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

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

while around 45 percent reported purchasing their own e-cigarettes (with over a quarter of this group saying they buy them directly from a local store).<sup>10</sup>

- D. E-cigarettes have severe adverse health effects for both youth and adults.
- i. According to the Surgeon General, “[m]ost e-cigarettes contain nicotine—the addictive drug in regular cigarettes, cigars, and other tobacco products. Nicotine exposure during adolescence can harm the developing brain—which continues to develop until about age 25. Nicotine exposure during adolescence can impact learning, memory, and attention. Using nicotine in adolescence can also increase risk for future addiction to other drugs. In addition to nicotine, the aerosol that users inhale and exhale from e-cigarettes can potentially expose both themselves and bystanders to other harmful substances, including heavy metals, volatile organic compounds, and ultrafine particles that can be inhaled deeply into the lungs.”<sup>11</sup>
  - ii. E-cigarette use can also play a role in adolescent social maladjustment, including poor learning and academic performance, increased aggressive and impulsive behavior, poor sleep quality, attention deficits, impaired memory, cognition, and increased depression and suicidal ideation.<sup>12</sup>
  - iii. Daily e-cigarette use is associated with increased risk of irreversible cardiovascular and lung disease through the inhalation of harmful chemicals.<sup>13</sup>
  - iv. Secondhand emissions from e-cigarettes are also dangerous because they contain “nicotine; ultrafine particles; flavorings such as diacetyl, a chemical linked to serious lung disease; volatile organic compounds such as benzene, which is found in car exhaust; and heavy metals, such as nickel, tin, and lead.”<sup>14</sup>

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

<sup>11</sup> Surgeon General’s Advisory on E-cigarette Use Among Youth (2008). <https://e-cigarettes.surgeongeneral.gov/documents/surgeon-generals-advisory-on-e-cigarette-use-among-youth-2018.pdf>.

<sup>12</sup> Tobore TO. On the potential harmful effects of E-Cigarettes (EC) on the developing brain: The relationship between vaping-induced oxidative stress and adolescent/young adults social maladjustment. *J Adolesc.* 2019; 76:202-209. doi:10.1016/j.adolescence.2019.09.004.

<sup>13</sup> American Lung Association. The Impact of E-Cigarettes on the Lung (2011). <https://www.lung.org/stop-smoking/smoking-facts/impact-of-e-cigarettes-on-lung.html>; Bein K, Leikauf GD. Acrolein - a pulmonary hazard. *Mol Nutr Food Res* 55(9):1342-60. doi: 10.1002/mnfr.201100279.

<sup>14</sup> American Lung Association. The Impact of E-Cigarettes on the Lung (2011). <https://www.lung.org/stop-smoking/smoking-facts/impact-of-e-cigarettes-on-lung.html>.

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- v. E-cigarette use is dangerous for pregnant women and is a fetal risk factor. It is associated with an increased risk of smallness-for-gestational-age.<sup>15</sup>
- E. In addition to these negative long-term health effects, e-cigarette use is now associated with a wave of dangerous, life-threatening illnesses.
  - i. As of October 15, 2019, 1,479 cases of acute lung injury associated with the use of e-cigarette or vaping products in 49 states, the District of Columbia, and 1 U.S. territory have been reported to the Centers for Disease Control and Prevention (CDC). Thirty-three deaths have been confirmed in 24 states.<sup>16</sup>
  - ii. Since the CDC's August 30, 2019 Official Health Advisory,<sup>17</sup> there have been two reported cases of lung injury associated with e-cigarettes in Santa Clara County. One of these cases was in an adolescent, and both individuals required hospitalization.
- F. Other risks and injuries are attributable to the proliferation of e-cigarettes:
  - i. E-cigarettes present a poison risk for children. From 2013 to 2017, an estimated 4,745 e-liquid poisoning cases among children under age five were treated in U.S. hospital emergency departments.<sup>18</sup>
  - ii. E-cigarettes present a risk of burns and other injuries, usually from malfunctioning batteries. From 2015 to 2017, there were an estimated 2,035 e-cigarette explosion and burn injuries reported in U.S. hospital emergency rooms.<sup>19</sup>

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<sup>15</sup> Cardenas V, Cen R, Clemens M, et al. Use of Electronic Nicotine Delivery Systems (ENDS) by pregnant women I: Risk of small-for-gestational-age birth. *Tob Induc Dis*. 2019;17(May). doi:10.18332/tid/106089

<sup>16</sup> Centers for Disease Control and Prevention. Outbreak of Lung Injury Associated with E-cigarette Use, or Vaping. October (2019). [https://www.cdc.gov/tobacco/basic\\_information/e-cigarettes/severe-lung-disease.html](https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html).

<sup>17</sup> Centers for Disease Control and Prevention Official Health Advisory. Severe Pulmonary Disease Associated with Using E-Cigarette Products (Aug. 30, 2019). <https://emergency.cdc.gov/han/han00421.asp>.

<sup>18</sup> Chang JT, Wang B, Chang CM, Ambrose BK. National estimates of poisoning events related to liquid nicotine in young children treated in US hospital emergency departments, 2013–2017. *Inj Epidemiol*. 2019;6(1):10. doi:10.1186/s40621-019-0188-9.

<sup>19</sup> Rossheim ME, Livingston MD, Soule EK, Zeraye HA, Thombs DL. Electronic cigarette explosion and burn injuries, US Emergency Departments 2015-2017. *Tob Control*. 2019;28(4):472-474. doi:10.1136/tobaccocontrol-2018-054518.

- G. While the e-cigarette industry claims that its products help people quit smoking combustible cigarettes, the evidence shows that e-cigarette use is actually associated with *increased* risk of cigarette initiation, particularly among low-risk youths.<sup>20</sup>
- i. Use of e-cigarettes was most common among smokers, and dual users had the highest prevalence of respiratory symptoms. On a population level, this indicates that the present use of e-cigarettes does not adequately serve as a smoking cessation tool.<sup>21</sup>
  - ii. E-cigarettes are not commonly used as a quit tool among college students, but rather as a secondary source of nicotine, most commonly in current smokers.<sup>22</sup>
  - iii. Of adults and young adults over 18 who use e-cigarettes, around 63 percent typically use non-tobacco flavored e-cigarettes, while over a third typically use tobacco-flavored or unflavored e-cigarettes.<sup>23</sup>
- H. Open e-cigarette systems are customizable by consumers and often allow for potential “unorthodox” use of the product. These modifications include altering mechanical components and replacing liquid cartridges with dangerous off-market or illegal substances.<sup>24</sup> Customization is one of the most popular social media topics for e-cigarettes.<sup>25</sup>

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<sup>20</sup> Berry KM, Fetterman JL, Benjamin EJ, et al. Association of Electronic Cigarette Use With Subsequent Initiation of Tobacco Cigarettes in US Youths. *JAMA Netw Open*. Published online February 01, 2019;2(2):e187794. doi:10.1001/jamanetworkopen.2018.7794.

<sup>21</sup> Hedman L, Backman H, Stridsman C, et al. Association of Electronic Cigarette Use With Smoking Habits, Demographic Factors, and Respiratory Symptoms. *JAMA Netw Open*. 2018;1(3):e180789. doi:10.1001/jamanetworkopen.2018.0789.

<sup>22</sup> Martinasek MP, Bowersock A, Wheldon CW. Patterns, Perception and Behavior of Electronic Nicotine Delivery Systems Use and Multiple Product Use Among Young Adults. *Respir Care*. 2018;63(7):913-919. doi:10.4187/respcare.06001.

<sup>23</sup> Landry RL, Groom AL, Vu T-HT, et al. The role of flavors in vaping initiation and satisfaction among U.S. adults. *Addict Behav*. 2019;99:106077. doi:10.1016/j.addbeh.2019.106077.

<sup>24</sup> Guy MC, Helt J, Palafox S, et al. Orthodox and Unorthodox Uses of Electronic Cigarettes: A Surveillance of YouTube Video Content. *Nicotine Tob Res*. 2019;21(10):1378-1384. doi:10.1093/ntr/nty132.

<sup>25</sup> Lee A, Hart J, Sears C, Walker K, Siu A, Smith C. A picture is worth a thousand words: Electronic cigarette content on Instagram and Pinterest. *Tob Prev Cessat*. 2017;3(July). doi:10.18332/tpc/74709.

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SECTION 2. Chapter 4.64 (Permits for Retailers of Tobacco Products) of Title 4 (Business Licenses and Regulations) is hereby amended and restated as follows:

**CHAPTER 4.64.  
PERMITS FOR RETAILERS OF TOBACCO PRODUCTS**

**4.64.010. Intent.**

This Chapter is adopted to:

- (1) Ensure compliance with the business standards and practices of the County;
- (2) Encourage responsible retailing of Tobacco Products;
- (3) Discourage violations of laws related to Tobacco Products, especially those that prohibit or discourage the Sale or Distribution of Tobacco Products to individuals under 21;
- (4) Respond to a new wave of addiction to Electronic Cigarette Products;
- (5) Reduce vulnerability to unexplained illnesses associated with Electronic Cigarette Products; and
- (6) Protect the public health and welfare.

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

**4.64.020. Definitions.**

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

- (a) *Arm's Length Transaction* means a Sale in good faith and for valuable consideration that reflects the fair market value in the open market between two or more informed and willing parties, neither of which is under any compulsion to participate in the transaction. A Sale between relatives, related companies or partners, or a Sale for which a significant purpose is avoiding the effect of the violations of this Chapter is not an Arm's Length Transaction.
- (b) *Department* means any department of the City of Palo Alto or County of Santa Clara designated by the City Manager to enforce or administer this Chapter, including the County of Santa Clara's Department of Environmental Health and any agency or Person designated by the Director of the Department of Environmental Health to enforce or administer the provisions of this Chapter.



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

- (j) *Tobacco Product* means (unless specifically noted elsewhere) any product subject to Subchapter IX (21 U.S.C. § 387 et seq. (“Subchapter IX”)) of the Federal Food, Drug, and Cosmetic Act. (See 21 U.S.C. § 387a(b) (products subject to Subchapter IX); 21 C.F.R. §§ 1100.1-1100.3 (tobacco products subject to Subchapter IX).) Products subject to Subchapter IX include, but are not limited to, cigarettes, cigarette tobacco, roll-your-own tobacco, smokeless tobacco, cigars, pipe tobacco, waterpipe tobacco, and Electronic Cigarette Products. Products that are not subject to Subchapter IX include accessories of Tobacco Products, such as, but not limited to, ashtrays, spittoons, and conventional matches and lighters that solely provide an external heat source to initiate but not maintain combustion of a Tobacco Product.

**4.64.030. Requirements and prohibitions.**

- (a) *Permit required.* It shall be unlawful for any Person to act as a Retailer without first obtaining and maintaining a Permit pursuant to this Chapter for each location at which Retailing occurs.
- (b) *Lawful business operation.* It shall be a violation of this Chapter for any Retailer to violate any local, state, or federal law applicable to Tobacco Products or the Retailing of such Tobacco Products.
- (c) *Display of Permit.* Each Permit shall be prominently displayed in a publicly visible place at the location identified in the Permit.
- (d) *Notice of minimum age for purchase of Tobacco Products.* Retailers shall post conspicuously, at each point of purchase, a notice stating that selling Tobacco Products to anyone under 21 years of age is illegal and subject to penalties. Such notice shall be subject to the approval of the Public Health Department.
- (e) *Positive identification required.* No Retailer shall Sell or Distribute a Tobacco Product to another individual who appears to be under 30 years of age without first examining the individual’s identification to confirm that the individual is at least the minimum age required under state law to purchase and possess the Tobacco Product.
- (f) *Minimum age for individuals selling Tobacco Products.* No individual who is younger than the minimum age established by State law for the purchase or possession of Tobacco Products shall engage in Retailing.
- (g) *False and misleading advertising prohibited.* A Retailer without a Permit:
  - (1) Shall keep all Tobacco Products out of public view.
  - (2) Shall not display any advertisement relating to Tobacco Products that promotes the Sale or Distribution of such products from the Retailer’s location or that

could lead a reasonable consumer to believe that Tobacco Products can be obtained at that location.

- (h) *Limitation on storefront advertising.* No more than 15 percent of the square footage of the windows and clear doors of a physical storefront used for Retailing Tobacco Products shall bear advertising or signs of any sort, and all advertising and signage shall be placed and maintained in a manner that ensures that law enforcement personnel have a clear and unobstructed view of the interior of the premises, including the area in which the cash registers are maintained, from the exterior public sidewalk or entrance to the premises. However, this latter requirement of this subsection (h) shall not apply to an establishment where there are no windows or clear doors, or where existing windows are located only at a height that precludes a view of the interior of the premises by an individual standing outside the premises.
- (i) *Flavored Tobacco Products.*
  - (1) Except as permitted in paragraph (3) of this subsection (i), no Retailer shall Sell a Tobacco Product containing, as a constituent or additive, an artificial or natural flavor or aroma (other than tobacco) or an herb or spice, including but not limited to strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, mint, menthol, or coffee, that is a characterizing flavor or aroma of the Tobacco Product, smoke, or vapor produced by the Tobacco Product.
  - (2) A Tobacco Product shall be subject to a rebuttable presumption that the product is prohibited by paragraph (1) of this subsection if:
    - (i) The product's manufacturer or any other Person associated with the manufacture or Sale of Tobacco Products makes or disseminates public statements or claims to the effect that the product has or produces a characterizing flavor or aroma, other than tobacco; or
    - (ii) The product's label, labeling, or packaging includes a statement or claim—including any text and/or images used to communicate information—that the product has or produces a characterizing flavor or aroma, other than tobacco.
  - (3) Except as provided in Paragraph (4) of this subsection (i), Paragraph (1) of this subsection (i) shall not apply to any Retailer that meets all the following criteria:
    - (i) Primarily sells Tobacco Products;
    - (ii) Generates more than 60 percent of its gross revenues annually from the Sale of Tobacco Products;

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- (iii) Does not permit any individual under 21 years of age to be present or enter the premises at any time, unless accompanied by the individual's parent or legal guardian, as defined in Section 6903 of the Family Code;
  - (iv) Does not Sell alcoholic beverages or food for consumption on the premises; and
  - (v) Posts a sign outside the retail location that clearly, sufficiently, and conspicuously informs the public that individuals under 21 years of age are prohibited from entering the premises.
- (4) No Retailer that is issued a new Permit after July 22, 2020 shall Sell or Distribute flavored Tobacco Products under paragraph (3) of this subsection (i) after Permit issuance. No Retailer that receives a Permit renewal after July 22, 2020 shall Sell or Distribute flavored Tobacco Products under paragraph (3) of this subsection (i) after Permit renewal. Regardless of the date of Permit issuance or renewal, no Retailer shall Sell or Distribute flavored Tobacco Products after July 22, 2020.
- (j) *Vending machines prohibited.* No Tobacco Product shall be Sold or Distributed to the public from a vending machine or appliance, or any other coin or token operated mechanical device designed or used for vending purposes, including, but not limited to, machines or devices that use remote control locking mechanisms.
- (k) *Prohibition on Sale or Distribution of Tobacco Products to individuals under 21.* No Retailer shall Sell or Distribute any Tobacco Product to any individual who is under 21 years of age.
- (l) *Prohibition on Sale or Distribution of Electronic Cigarette Products.* No Retailer that is issued a new Permit after July 22, 2020 shall Sell or Distribute Electronic Cigarette Products after Permit issuance. No Retailer that receives a Permit renewal after July 22, 2020 shall Sell or Distribute Electronic Cigarette Products after Permit renewal. Regardless of the date of Permit issuance or renewal, no Retailer shall Sell or Distribute Electronic Cigarette Products after July 22, 2020.

**4.64.040. Eligibility requirements for a Permit.**

- (a) No Permit may be issued to authorize Retailing at or from other than a fixed location. For example, Retailing by Persons on foot or from vehicles is prohibited.
- (b) No Permit may be issued to authorize Retailing at a temporary or recurring temporary event. For example, Retailing at flea markets and farmers' markets is prohibited.

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- (c) No Permit may be issued to authorize Retailing at any location where the profession of pharmacy is practiced by a pharmacist licensed by the State in accordance with the Business and Professions Code and where prescription drugs are offered for Sale.
- (d) No Permit may be issued to authorize Retailing at any location within 1,000 feet of a School, as measured by a straight line between any point along the property line of any parcel on which a School is located and any point along the perimeter of the Permit applicant's proposed business location; provided, however, that the prohibition contained in this subsection (d) shall not apply to the following:
  - (1) Any Retailer of Tobacco Products (as such term was defined in the predecessor Ordinance No. 5418) operating lawfully on June 30, 2018 provided that the Retailer obtains a permit prior to July 1, 2020 pursuant to sections 4.64.050 and 4.64.060, and timely renews its permit pursuant to section 4.64.070(b);
  - (2) Any Retailer of electronic smoking devices (as such term was defined in the predecessor Ordinance No. 5418) operating lawfully on June 30, 2018 provided that the Retailer obtains a permit prior to July 1, 2020 pursuant to sections 4.64.050 and 4.64.060, and timely renews its permit pursuant to section 4.64.070(b); however, any such Retailer is subject to the prohibition on the Sale and Distribution of Electronic Cigarette Products established in Section 4.64.030(l); and
  - (3) Any lawfully operating Retailer of Tobacco Products that would otherwise become ineligible to receive or renew a Permit due to the creation or relocation of a School.
- (e) No Permit may be issued to authorize Retailing at a location which is within 500 feet of a location occupied by another Retailer, as measured by a straight line between any point along the perimeter of an existing Retailer's business location and any point along the perimeter of the Permit applicant's proposed business location; provided, however, that the prohibition contained in this subsection (e) shall not apply to:
  - (1) Any Retailer of Tobacco Products (as such term was defined in the predecessor Ordinance No. 5418) operating lawfully on June 30, 2018 provided that the Retailer obtains a permit prior to July 1, 2020 pursuant to sections 4.64.050 and 4.64.060, and timely renews its permit pursuant to section 4.64.070(b); and
  - (2) Any Retailer of electronic smoking devices (as such term was defined in the predecessor Ordinance No. 5418) operating lawfully on June 30, 2018 provided that the Retailer obtains a permit prior to July 1, 2020 pursuant to sections 4.64.050 and 4.64.060, and timely renews its permit pursuant to section 4.64.070(b); however, any such Retailer is subject to the prohibition on the Sale

and Distribution of Electronic Cigarette Products established in Section 4.64.030(l).

- (f) Any exemption granted to a Retailer pursuant to subsections (d) and (e) shall cease to apply upon the earlier of the following to occur:
  - (1) The Retailer fails to timely renew the Permit pursuant to Section 4.64.070(b) of this Chapter.
  - (2) A new Person obtains Ownership in the business.

**4.64.050. Application procedure.**

- (a) It is the responsibility of each Retailer to be informed of all laws applicable to Retailing, including those laws affecting the issuance of a Permit. No Retailer may rely on the issuance of a Permit as a determination by the City or County of Santa Clara that the Retailer has complied with all laws applicable to Retailing. A Permit issued contrary to this Chapter, contrary to any other law, or on the basis of false or misleading information supplied by a Retailer shall be revoked pursuant to Section 4.64.060 of this Chapter.
- (b) All Permit applications shall be submitted on a form supplied by the Department.
- (c) A permitted Retailer shall inform the Department in writing of any change in the information submitted on an application for a Permit within 14 calendar days of a change.
- (d) All information specified in an application pursuant to this section shall be subject to disclosure under the California Public Records Act (Government Code Section 6250 et seq.) or any other applicable law, subject to the laws' exemptions.

**4.64.060. Permit issuance, denial, and revocation.**

- (a) Upon the receipt of a complete application for a Permit, the application fee, and the annual Permit fee, the Department shall issue a Permit unless substantial evidence demonstrates that one or more of the following bases for denial exists:
  - (1) The information presented in the application is inaccurate or false.
  - (2) The application seeks authorization for Retailing at a location for which this Chapter prohibits issuance of a Permit.
  - (3) The application seeks authorization for Retailing by a Person to whom this Chapter prohibits issuance of a Permit.

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

**4.64.070. Permit term, renewal, and expiration.**

- (a) *Term of Permit.* The term of a Permit is one year. A Permit is invalid upon expiration.
- (b) *Renewal of Permit.* The Department shall renew a Permit upon timely payment of the annual Permit fee provided that the Retailer is in compliance with this Chapter, as amended. The Department may, in its discretion, agree to renew any expired Permit within the three-month period following expiration if the Retailer pays the annual Permit fee and applicable late charges. For every calendar month, or fraction thereof, that a Retailer fails to renew an expired Permit, a late charge equal to 20 percent of the annual Permit fee shall be assessed. A Permit renewed within three calendar months of expiration shall be treated as if timely renewed.
- (c) *Issuance of Permit after revocation or expiration of Permit.* To apply for a new Permit more than three calendar months after expiration of a Permit or following revocation of a Permit that was wrongly issued, a Retailer must submit a complete application for a Permit, along with the application fee and annual Permit fee. The Department shall issue a Permit pursuant to the requirements of Section 4.64.060 of this Chapter.

**4.64.080. Permits nontransferable.**

- (a) A Permit may not be transferred from one Person to another or from one location to another. Whenever a new Person obtains Ownership in a business for which a Permit has been issued, a new Permit shall be required, but any exemption granted pursuant to Section 4.64.040 of this Chapter shall cease to apply.
- (b) Notwithstanding any other provision of this Chapter, prior violations of this Chapter at a location shall continue to be counted against a location and Permit ineligibility and suspension periods shall continue to apply to a location unless:
  - (1) One hundred percent of the interest in the stock, assets, or income of the business, other than a security interest for the repayment of debt, has been transferred to one or more new owners; and

- (2) The City is provided with clear and convincing evidence, including an affidavit, that the business has been acquired in an Arm's Length Transaction.

**4.64.090. Permit conveys a limited, conditional privilege.**

Nothing in this Chapter shall be construed to grant any Person obtaining and maintaining a Permit any status or right other than the limited, conditional privilege to act as a Retailer at the location in the City identified on the face of the Permit. All Permits are issued subject to the City's right to amend this Chapter, and Retailers shall comply with all provisions of this Chapter, as amended.

**4.64.100. Fees.**

The Department shall not issue or renew a Permit prior to full payment of any applicable fees. The City shall, from time to time, establish by resolution or ordinance the fees to issue or to renew a Permit. The fees shall be calculated so as to recover the cost of administration and enforcement of this Chapter, including, for example, issuing a Permit, administering the Permit program, Retailer education, Retailer inspection and compliance checks, documentation of violations, and prosecution of violators, but shall not exceed the cost of the regulatory program authorized by this Chapter. All fees and interest earned from such fees shall be used exclusively to fund administration and enforcement of this Chapter.

**4.64.110. 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 Manager may designate any number of additional individuals to monitor and facilitate compliance with this Chapter.
- (b) The Department or other individuals designated to enforce the provisions of this Chapter shall check each Retailer at least once per 12-month period to determine if the Retailer is complying with all laws applicable to Retailing, other than those laws regulating underage access to Tobacco Products. Nothing in this paragraph shall create a right of action in any Retailer or other Person against the City, the County of Santa Clara, or its agents.

**4.64.120. Prevention of underage Sales.**

- (a) The Department or other departments or individuals designated to enforce the provisions of this Chapter shall, in conjunction with the Police Department, check each Retailer at least twice per 12-month period to determine whether the Retailer is conducting business in a manner that complies with laws regulating youth access to Tobacco Products. Nothing in this paragraph shall create a right of action in any Retailer or other Person against the City, the County of Santa Clara, or its agents.



- (b) The City shall not enforce any law establishing a minimum age for Tobacco Product purchases against an individual who otherwise might be in violation of such law because of the individual's age ("Youth Decoy") if the potential violation occurs when:
  - (1) The Youth Decoy is participating in a compliance check supervised by a peace officer or a code enforcement official of the City or County of Santa Clara;
  - (2) The Youth Decoy is acting as an agent of a Department or individual designated by the City or County of Santa Clara to monitor compliance with this Chapter; or
  - (3) The Youth Decoy is participating in a compliance check funded in part, either directly or indirectly through subcontracting, by the City, the County of Santa Clara, or the California Department of Public Health.

**4.64.130. Penalties for a violation by a Retailer with a Permit.**

- (a) *Administrative fine.* In addition to any other penalty authorized by law, an administrative fine shall be imposed and a Permit shall be suspended if any court of competent jurisdiction determines, or the Department finds based on a preponderance of the evidence that the Retailer, or any of the Retailer's agents or employees, has violated any of the requirements, conditions, or prohibitions of this Chapter, has pled guilty, "no contest" or its equivalent to such a violation, or has admitted to a such a violation.
- (b) *Amount of fine.* The amount of the administrative fine for each such violation shall be as follows:
  - (1) A fine not to exceed \$100.00 for a first violation within a 12-month period;
  - (2) A fine not to exceed \$200.00 for a second violation within a 12-month period; and
  - (3) A fine not to exceed \$500.00 for each additional violation within a 12-month period.
- (c) *Time period for Permit suspension.* The period of the suspension shall be as follows:
  - (1) For a first violation of this Chapter at a location within any 60-month period, the Permit shall be suspended for up to 30 calendar days.
  - (2) For a second violation of this Chapter at a location within any 60-month period, the Permit shall be suspended for up to 90 calendar days.

- (3) For each additional violation of this Chapter at a location within any 60-month period, the Permit shall be suspended for up to one year.
- (d) *Waiver of penalties for first violation.* The Department may waive any penalties for a Retailer's first violation of any requirement, condition, or prohibition of this Chapter, other than a violation of a law regulating youth access to Tobacco Products, if the Retailer admits the violation in writing and agrees to forego a hearing on the allegations. Regardless of the Department's waiver of penalties for a first violation, the violation will be considered in determining the penalties for any future violation.
- (e) *Corrections period.* The Department shall have discretion to allow a Retailer a period of time to correct any violation of any requirement, condition, or prohibition of this Chapter, other than a violation of a law regulating youth access to Tobacco Products. If the Department exercises its discretion to provide a corrections period, and a Retailer's violation is corrected within the time allowed for correction, no penalty shall be imposed under this section.
- (f) *Written notice of penalties.* Whenever a fine is issued and/or a Permit is suspended based on a violation of this Chapter, the Department shall provide the Retailer written notice of the violation and the fine and suspension, including when the suspension shall take effect.

**4.64.140. Penalties for Retailing without a Permit.**

- (a) *Administrative fine.* In addition to any other penalty authorized by law, an administrative fine and an ineligibility period for application or issuance of a Permit shall be imposed if a court of competent jurisdiction determines, or the Department finds based on a preponderance of evidence, that any Person has engaged in Retailing at a location without a valid Permit, either directly or through the Person's agents or employees, has pled guilty, "no contest" or its equivalent to such a violation, or has admitted to such a violation.
- (b) *Amount of fine.* The amount of the administrative fine for each such violation shall be as follows:
  - (1) A fine not to exceed \$100.00 for a first violation within a 12-month period;
  - (2) A fine not to exceed \$200.00 for a second violation within a 12-month period; and
  - (3) A fine not to exceed \$500.00 for each additional violation within a 12-month period.

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- (c) *Time period for Permit ineligibility.* The ineligibility period shall be as follows:
- (1) For a first violation of this section at a location within any 60-month period, no new Permit may be issued for the Person or the location (unless Ownership of the business at the location has been transferred in an Arm's Length Transaction) until 30 calendar days have passed from the date of the violation.
  - (2) For a second violation of this section at a location within any 60-month period, no new Permit may be issued for the Person or the location (unless Ownership of the business at the location has been transferred in an Arm's Length Transaction) until 90 calendar days have passed from the date of the violation.
  - (3) For each additional violation of this section at a location within any 60-month period, no new Permit may be issued for the Person or the location (unless Ownership of the business at the location has been transferred in an Arm's Length Transaction) until one year has passed from the date of the violation.
- (d) *Waiver of penalties for first violation.* The Department may waive any penalties for a Retailer's first violation of this section, unless the violation also involves a violation of a law regulating youth access to Tobacco Products, if the Retailer admits the violation in writing and agrees to forego a hearing on the allegations. Regardless of the Department's waiver of penalties for a first violation, the violation will be considered in determining the penalties for any future violation.
- (e) *Written notice of penalties.* Whenever a fine is issued and/or a Permit is suspended pursuant to this section, the Department shall provide the Retailer written notice of the fine and suspension, including when the suspension shall take effect.
- (f) *Appeals.* Any penalties imposed under this section may be appealed pursuant to Section 4.64.150 of this Chapter. A timely appeal shall stay enforcement of the appealed penalties while the appeal is ongoing.

**4.64.150. Appeals.**

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

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- (2) Any evidence the Retailer wants the Hearing Officer to consider;
  - (3) An advance deposit of the amount of any fine challenged; and
  - (4) The address of the Retailer and, if available, an email address that can be used for contact and correspondence by the Office of the County Hearing Officer and the Department. The Retailer may request service of notice by mail.
- (c) The hearing request form shall be deemed filed on the date received by the Office of the County Hearing Officer. A timely appeal shall stay enforcement of the appealed penalties while the appeal is ongoing.
- (d) After receiving a timely hearing request form, the Office of the County Hearing Officer shall notify the Department as soon as practicable and then shall schedule an administrative hearing. The Office of the County Hearing Officer shall provide the Retailer and the Department at least ten calendar days' written notice of the date, time, and place of the administrative hearing and the name of the Hearing Officer who will conduct the hearing. The notice shall be given to the Retailer either by email, if requested, or by first class mail, postage prepaid.
- (e) Between the time the Retailer requests the administrative hearing and the time of the Hearing Officer's decision, the Retailer, the Department, and each of their representatives shall not engage in *ex parte* communications with the Office of the County Hearing Officer or the Hearing Officer regarding the matters at issue in the hearing.
- (f) The hearing shall be conducted by the Hearing Officer on the date, time, and place specified in the notice to the Retailer. A Retailer's failure to appear at the hearing shall constitute an abandonment of the hearing request and a failure to exhaust administrative remedies as a precedent to judicially challenge the existence of the violation and the imposition of the fine and suspension.
- (g) At the hearing, the Retailer and the Department shall have the opportunity to present evidence, including witnesses, relevant to the Hearing Officer's determination of the matter. Neither the provisions of the Administrative Procedure Act (Government Code Section 11500 et seq.) nor the formal rules of evidence in civil or criminal judicial proceedings shall apply to such hearing. The Hearing Officer may admit any evidence, including witnesses, relevant to the determination of the matter, except as otherwise provided in Section 4.64.160(c).
- (h) The written notice of penalties and any other reports prepared by or for the Department concerning the violation shall be admissible and accepted by the Hearing Officer as prima facie evidence of the violation and the facts stated in those documents.

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

**4.64.160. Enforcement.**

- (a) Any violation of this Chapter is hereby declared to be a public nuisance.
- (b) Causing, permitting, aiding, abetting, or concealing a violation of any provision of this Chapter shall also constitute a violation of this Chapter.
- (c) Whenever evidence of a violation of this Chapter is obtained in any part through the participation of an individual under the age of 21 years old, such an individual shall not be required over his or her objection to appear or give testimony in any civil or administrative process brought to enforce this Chapter and the alleged violation shall be adjudicated based upon the sufficiency and persuasiveness of the evidence presented.
- (d) Violations of this Chapter may be remedied by a civil action brought by the City Attorney or Santa Clara County Counsel, including, but not limited to, administrative or judicial nuisance abatement proceedings, civil code enforcement proceedings, and suits for injunctive relief. For the purposes of the civil remedies provided in this Chapter, each day on which a Tobacco Product is offered for Sale in violation of this Chapter, and each

individual retail Tobacco Product that is Sold or Distributed in violation of this Chapter, shall constitute a separate violation of this Chapter.

- (e) Any Person found guilty of violating any provision of this Chapter shall be deemed guilty of an infraction, punishable as provided by California Government Code § 25132.
- (f) The remedies provided by this Chapter are cumulative and in addition to any other remedies available at law or in equity.

**4.64.170. No conflict with federal or state law.**

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

SECTION 3. If any section, subsection, clause or phrase of this Ordinance is for any reason held to be invalid, such decision shall not affect the validity of the remaining portion or sections of the Ordinance. The Council hereby declares that it should have adopted the Ordinance and each section, subsection, sentence, clause or phrase thereof irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases be declared invalid.

SECTION 4. The Council finds that this project is exempt from the provisions of the California Environmental Quality Act (“CEQA”), pursuant to Section 15061 of the CEQA Guidelines, because it can be seen with certainty that there is no possibility that the ordinance will have a significant effect on the environment.

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SECTION 5. This ordinance shall be effective on the thirty-first day after the date of its adoption.

INTRODUCED:

PASSED:

AYES:

NOES:

ABSENT:

ABSTENTIONS:

ATTEST:

\_\_\_\_\_  
City Clerk

\_\_\_\_\_  
Mayor

APPROVED AS TO FORM:

APPROVED:

\_\_\_\_\_  
Deputy City Attorney

\_\_\_\_\_  
City Manager

\_\_\_\_\_  
Director of Public Works

\_\_\_\_\_  
Chief of Police

\_\_\_\_\_  
Director of Administrative Services