

## **ORDINANCE NO. .**

### **BOARD OF SUPERVISORS, COUNTY OF SAN MATEO, STATE OF CALIFORNIA**

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#### **ORDINANCE ADDING CHAPTER 4.99 TO TITLE 4 OF THE SAN MATEO COUNTY ORDINANCE CODE TO PROHIBIT SALE OR OFFER FOR SALE OF FLAVORED TOBACCO PRODUCTS AND PROHIBIT PHARMACIES FROM SELLING OR OFFERING FOR SALE ANY TOBACCO PRODUCTS, AND AMENDING SECTION 4.96.030 OF CHAPTER 4.96 TO CLARIFY DEFINITION OF "TOBACCO PRODUCTS"**

The Board of Supervisors of the County of San Mateo, State of California,

**ORDAINS** as follows:

#### **SECTION 1. FINDINGS.**

- a) Tobacco use remains the leading cause of preventable death in the United States, killing more than 480,000 people each year. It causes or contributes to many forms of cancer, as well as heart and respiratory diseases, among other health disorders. Tobacco use remains a public health crisis of the first order, in terms of the human suffering and loss of life it causes, the financial costs it imposes on society and the burdens it places on our health care system. The financial cost of tobacco use in San Mateo County alone amounts to over \$575 million in direct health care expenses over the 5-year period from 2006-2010.
- b) Flavored tobacco products are commonly sold by California tobacco retailers. For example, 97.4% of stores that sell cigarettes sell menthol cigarettes; 94.5% of stores that sell little cigars sell them in flavored varieties; 84.2% of stores that sell electronic smoking devices sell flavored varieties; and 83.8% of stores that sell chew or snus sell flavored varieties. 76% of tobacco retailers located within 1,000 feet of schools in San Mateo County sell flavored tobacco products other than menthol cigarettes, and nearly all of them sell menthol cigarettes.
- c) Each day, about 2,500 children in the United States try their first cigarette; and another 400 children under 18 years of age become new regular, daily smokers. 81% of youth who have ever used a tobacco product report that the first tobacco product they used was flavored. Flavored tobacco products promote youth initiation of tobacco use and help young occasional smokers to become daily smokers by reducing or masking the natural harshness and taste of tobacco smoke and thereby increasing the appeal of tobacco products. As tobacco companies well know, menthol, in particular, cools and numbs the throat to reduce throat irritation and make the smoke feel smoother, making menthol cigarettes an appealing option for youth who are initiating tobacco use. Tobacco

companies have used flavorings such as mint and wintergreen in smokeless tobacco products as part of a "graduation strategy" to encourage new users to start with tobacco products with lower levels of nicotine and progress to products with higher levels of nicotine. It is therefore unsurprising that young people are much more likely to use menthol-, candy- and fruit-flavored tobacco products than adults, including not just cigarettes but also cigars, cigarillos, and hookah tobacco. Data from the National Youth Tobacco Survey indicate that more than two-fifths of U.S. middle school and high school smokers report using flavored little cigars or flavored cigarettes. Further the Centers for Disease Control and Prevention has reported a more than 800% increase in electronic cigarette use among middle school and high school students between 2011 and 2015. Nicotine solutions, which are consumed via electronic smoking devices such as electronic cigarettes are sold in thousands of flavors that appeal to youth, such as cotton candy and bubble gum.

- d) Certain minority groups also disproportionately use flavored tobacco products, including menthol cigarettes. In one survey, the percentage of people who smoke cigarettes that reported smoking menthol cigarettes in the prior month included, most dramatically 82.6% of Blacks or African-Americans who smoke cigarettes. The statistics for other groups were: 53.2% of Native Hawaiians or Other Pacific Islanders who smoke cigarettes; 36.9% of individuals with multiracial backgrounds who smoke cigarettes; 32.3% of Hispanics or Latinos who smoke cigarettes; 31.2% of Asians who smoke cigarettes; 24.8% of American Indians or Alaska Natives who smoke cigarettes; and 23.8% of Whites or Caucasians who smoke cigarettes. People who identify as LGBT and young adults with mental health conditions also struggle with disproportionately high rates of menthol cigarette use. The disproportionate use of menthol cigarettes among targeted groups, especially the extremely high use among African-Americans, is troubling because of the long-term adverse health impacts on those populations.
- e) Between 2004 and 2014 overall smoking prevalence decreased, but use of menthol cigarettes increased among both young adults (ages 18-25) and other adults (ages 26+). These statistics are consistent with the finding that smoking menthol cigarettes reduces the likelihood of successfully quitting smoking. Scientific modeling has projected that a national ban on menthol 17 cigarettes could save between 300, 000 and 600, 000 lives by 2050.
- f) By selling tobacco products, pharmacies reinforce positive social perceptions of smoking, convey tacit approval of tobacco use, and send a message that it is not dangerous to smoke.
- g) The Tobacco and Education Research Oversight Committee for California, as well as the American Pharmacists Association, the California Pharmacists Association, and the California Medical Association have called for the adoption of state and local prohibitions of tobacco sales in drug stores and pharmacies.

**SECTION 2.** A new Chapter 4.99 is hereby added to Title 4 of the San Mateo County Ordinance Code to be numbered and entitled and to read in its entirety as follows:

**CHAPTER 4.99 SALES OF FLAVORED TOBACCO PRODUCTS PROHIBITED**

**4.99.010-Application of Chapter.**

The provisions of this chapter shall apply within the unincorporated area of San Mateo County.

**4.99.020-Definitions.**

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

- (a) "Characterizing Flavor" means a distinguishable taste or aroma or both, other than the taste or aroma of tobacco, imparted by a Tobacco Product or any byproduct produced by the Tobacco Product. Characterizing Flavors include, but are not limited to, tastes or aroma relating to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, menthol, mint, wintergreen, herb, or spice. A Tobacco Product shall not be determined to have a Characterizing Flavor solely because of the use of additives or flavorings or the provision of ingredient information. Rather, it is the presence of a distinguishable taste or aroma or both, as described in the first sentence of this definition that constitutes a Characterizing Flavor.
- (b) "Constituent" means any ingredient, substance, chemical, or compound, other than tobacco, water, or reconstituted tobacco sheet that is added by the manufacturer to a Tobacco Product during the processing, manufacture, or packing of the Tobacco Product.
- (c) "Distinguishable" means perceivable by either the sense of smell or taste.
- (d) "Flavored Tobacco Product" means any Tobacco Product that contains a constituent that impacts a Characterizing Flavor.
- (e) "Labeling" means written, printed, pictorial, or graphic matter upon any Tobacco Product or any of its Packaging.
- (f) "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 to a consumer.

- (g) "Pharmacy" means any retail establishment in which the profession of pharmacy is practiced by a pharmacist licensed by the State of California in accordance with the Business and Professions Code and where prescription pharmaceuticals are offered for sale, regardless of whether the retail establishment sells other retail goods in addition to prescription pharmaceuticals.
- (h) "Tobacco Product" is defined as set forth in subsection (h) of section 4.96.030 of chapter 4.96 of this Ordinance Code.
- (i) "Tobacco Retailer" means any store, stand, booth, concession or any other enterprise that engages in the retail sale of Tobacco Products, including but not limited to stores that engage in the retail sale of food items.

#### **4.99.030- Sale or Offer for Sale of Flavored Tobacco Products Prohibited.**

- (a) The sale or offer for sale, by any person or Tobacco Retailer of any Flavored Tobacco Product is prohibited and no person or Tobacco Retailer shall sell, or offer for sale, any Flavored Tobacco Product.
- (b) There shall be a rebuttable presumption that a Tobacco Product is a Flavored Tobacco Product if a Manufacturer or any of the Manufacturer's agents or employees, in the course of their agency or employment, has made a statement or claim directed to consumers or to the public that the Tobacco Product has or produces a Characterizing Flavor including, but not limited to, text, color, and/or images on the product's Labeling or Packaging that are used to explicitly or implicitly communicate that the Tobacco Product has a Characterizing Flavor.

#### **4.99.040- Sale or Offer for Sale of Tobacco Products by a Pharmacy Prohibited.**

- (a) No Pharmacy or Pharmacy employee or agent shall sell or offer for sale any Tobacco Product.
- (b) No new tobacco retailer permit may be issued to a Pharmacy under Chapter 4.98 of this Ordinance Code.
- (c) No existing tobacco retailer permit issued under Chapter 4.98 of this Ordinance Code may be renewed by a Pharmacy.

#### **4.99.050-Enforcement.**

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

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

#### **4.99.060-Public Nuisance.**

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

#### **4.99.070-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 federal or state law.

#### **4.99.080-Severability.**

If any provision, section, subsection, sentence, clause, phrase, or word of this Chapter 4.99, or any application thereof to any person or circumstance, is held to be invalid or unconstitutional by a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions or applications of the chapter. The Board of Supervisors hereby declares that it would have passed this chapter, and each provision, section, subsection, sentence, clause, phrase, and word not declared invalid or unconstitutional without regard to whether any other portion of this chapter or application thereof would be subsequently declared invalid or unconstitutional.

**SECTION 3.** Subsection (h) of Section 4.96.030 of Chapter 4.96 of this Ordinance Code shall be amended to read as follows:

(h) "Tobacco," "tobacco or smoking product," or "tobacco or nicotine product" means any substance containing tobacco leaf, including but not limited to cigarettes, cigars, pipe tobacco, hookah tobacco, snuff, chewing tobacco, dipping tobacco, or any other preparation of tobacco which can be used for smoking, chewing, inhalation or other means of ingestion; and any electronic cigarette or other electronic device, and any accessory or component used with such device to smoke or generate smoke; and any product or formulation of matter containing biologically active amounts of nicotine that is manufactured, sold, offered for sale, or otherwise distributed with the expectation that the product or matter will be introduced into the human body, but does not include any cessation product specifically approved by the United States Food and Drug

Administration for use in treating nicotine or tobacco dependence.

**SECTION 4.** This ordinance is exempt from the requirements of the California Environmental Quality Act (CEQA) pursuant to the CEQA Guidelines, as it is not a “project” as it has no potential to result in a direct or reasonably foreseeable indirect physical change to the environment. (14 Cal. Code Regs. § 15378(a)). Further, there is no possibility that the ordinance or its implementation would have a significant effect on the environment. (14 Cal. Code Regs. § 15061(b)(3)). The ordinance is also categorically exempt because it is an action taken by a regulatory agency to assume the maintenance, restoration, enhancement or protection of the environment. (14 Cal. Code Regs. § 15308). The Director of Community Development shall cause a Notice of Exemption to be filed as authorized by CEQA and the CEQA guidelines.

**SECTION 5.** This Ordinance shall be in effect thirty (30) days after adoption. However, its provisions shall not become enforceable until July 1, 2018.

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