

Not Yet Approved

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. The City of Palo Alto and the County of Santa Clara have a partnership to regulate tobacco retailers and the sale of tobacco products in the City of Palo Alto. The City adopts the County's relevant ordinance and the County enforces the City's ordinance.
- B. The County adopted County Ordinance NS-517.96 in 2022 to amend its tobacco retailing ordinance. The City intends to make the same changes to its own ordinance through adoption of this ordinance.
- C. This Ordinance amends Palo Alto Municipal Code Chapter 4.64 (Permits for Retailers of Tobacco Products) to authorize denial of a permit to a Retailer whose permit was previously revoked; impose conditions on permits to facilitate enforcement; increase fines for violations; provide for impound and seizure of noncompliant products; require posting of public notice during any suspension; and clarify the existing prohibition on the sale of electronic cigarette products.

SECTION 2. The following sections of Chapter 4.64 (Permits for Retailers of Tobacco Products) of Title 4 (Business Licenses and Regulations) are hereby amended as follows (new text underlined, deleted text in ~~striketrough~~):

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

4.64.010 Intent.

(a) This ~~e~~Chapter is adopted to:

- (1) Ensure compliance with the business standards and practices of the ~~county~~City;
- (2) Encourage responsible retailing of ~~t~~Tobacco ~~p~~Products;
- (3) Discourage violations of laws related to ~~t~~Tobacco ~~p~~Products, especially those that prohibit or discourage the sale or distribution of ~~t~~Tobacco ~~p~~Products and eElectronic
eCigarette pProducts to individuals under twenty-one;
- (4) Respond to a new wave of addiction to ~~e~~Electronic ~~e~~Cigarette ~~p~~Products;

(5) Reduce vulnerability to unexplained illnesses associated with ~~e~~Electronic ~~e~~Cigarette ~~p~~Products; and

(6) Protect the public health and welfare.

(b) This ~~e~~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 ~~e~~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 ~~e~~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 ~~e~~Chapter.

(c) "Distribute or distribution" means the transfer, by any person other than a common carrier, of a ~~t~~Tobacco ~~p~~Product to another person for sale or personal consumption.

(d) "Electronic ~~e~~Cigarette ~~p~~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 ~~e~~Cigarette ~~p~~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 ~~e~~Cigarette ~~p~~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 ~~s~~Subsection, nicotine does not include any food products as that term is defined pursuant to ~~Section 6359 of the~~ California Revenue and Taxation Code section 6359.

(e) Hearing Officer shall mean the hearing officer appointed by the Department in accordance with County of Santa Clara Ordinance Code ("County Ordinance Code") section A38-4.

(fe) "Impound" means the legal control exercised by the Department over the use, sale, disposal, or removal of any Tobacco Products.

~~(efg)~~ "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.

~~(fgh)~~ "Permit" means a valid permit issued by the Department to a person to act as a retailer.

~~(ghi)~~ "Retailer" means any person who sells or distributes ~~t~~Tobacco ~~p~~Products for any form of consideration, whether or not they possess a current Permit. Retailing shall mean the doing of any of these actions. This definition is without regard to the quantity of ~~t~~Tobacco ~~p~~Products sold or distributed.

~~(hij)~~ "School" means a public or private elementary, middle, junior high, or high school.

~~(ik)~~ "Sale and sold" includes any sale, exchange, barter or offer for sale.

~~(jl)~~ "Tobacco ~~p~~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) and Electronic Cigarette Products.) Products subject to Subchapter IX include, but are not limited to, cigarettes, cigarette tobacco, roll-your-own tobacco, smokeless tobacco, cigars, pipe tobacco, and 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 ~~p~~Permit pursuant to this ~~e~~Chapter for each location at which ~~r~~Retailing occurs.

(b) Lawful business operation. It shall be a violation of this ~~e~~Chapter for any retailer to violate any local, state, or federal law applicable to tobacco products or the retailing of such ~~t~~Tobacco ~~p~~Products.

(c) Display of ~~p~~Permit. Each ~~p~~Permit shall be prominently displayed in a publicly visible place at the location identified in the ~~p~~Permit.

(d) Notice of minimum age for purchase of ~~t~~Tobacco ~~p~~Products. Retailers shall post conspicuously, at each point of purchase, a notice stating that selling ~~t~~Tobacco ~~p~~Products to anyone under twenty-one years of age is illegal and subject to penalties. Such notice shall be subject to the approval of the ~~public health d~~Department.

(e) Positive identification required. No retailer shall sell or distribute a ~~t~~Tobacco ~~p~~Product to another individual ~~who appears to be under thirty years of age~~ without first examining the individual's identification to confirm that the individual is at least the minimum age required under ~~s~~State law to purchase and possess the ~~t~~Tobacco ~~p~~Product.

(f) Minimum age for individuals selling ~~t~~Tobacco ~~p~~Products. No individual who is younger than the minimum age established by state law for the purchase or possession of ~~t~~Tobacco ~~p~~Products shall engage in retailing.

(g) False and misleading advertising prohibited. A retailer without a ~~p~~Permit:

(1) Shall keep all ~~t~~Tobacco ~~p~~Products out of public view.

(2) Shall not display any advertisement relating to ~~t~~Tobacco ~~p~~Products that promotes the ~~s~~Sale or ~~d~~Distribution of such products from the ~~r~~Retailer's location or that could lead a reasonable consumer to believe that ~~t~~Tobacco ~~p~~Products can be obtained at that location.

(h) Limitation on storefront advertising. No more than fifteen percent of the square footage of the windows and clear doors of a physical storefront used for ~~r~~Retailing ~~t~~Tobacco ~~p~~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 ~~T~~Tobacco ~~p~~Products.

(1) ~~Except as permitted in paragraph (3) of this subsection (i), no~~ ~~No~~ ~~R~~etailer shall sell a ~~T~~Tobacco ~~p~~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 ~~T~~Tobacco ~~p~~Product, smoke, or vapor produced by the ~~T~~Tobacco ~~p~~Product.

(2) A ~~T~~Tobacco ~~p~~Product shall be subject to a rebuttable presumption that the product is prohibited by paragraph (1) of this subsection if:

(i~~A~~) The product's manufacturer or any other person associated with the manufacture or sale of ~~T~~Tobacco ~~p~~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

(i~~B~~) 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 sixty percent of its gross revenues annually from the sale of tobacco products;~~

~~—(iii) Does not permit any individual under twenty-one 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 twenty-one years of age are prohibited from entering the premises.~~

~~—(4) No retailer that is issued a new permit after September 2, 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 September 2, 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 September 2, 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 twenty-one. No ~~€~~Retailer shall sell or distribute any ~~€~~Tobacco ~~€~~Product to any individual who is under twenty-one years of age.

(l) Prohibition on ~~€~~Sale or ~~€~~Distribution of ~~€~~Electronic ~~€~~Cigarette ~~€~~Products. ~~No person, whether or not issued a permit, shall Sell or Distribute Electronic Cigarette Products. No retailer that is issued a new permit after September 2, 2020 shall sell or distribute electronic cigarette products after permit issuance. No retailer that receives a permit renewal after September 2, 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 September 2, 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.

(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 obtained ~~€~~a ~~€~~Permit prior to July 1, 2020 pursuant to Sections 4.64.050 and 4.64.060, and timely renewed ~~€~~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 obtained ~~€~~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 ~~e~~Electronic ~~c~~Cigarette ~~p~~Products established in Section 4.64.030(l); and

(3) Any lawfully operating ~~r~~Retailer of ~~t~~Tobacco ~~p~~Products that would otherwise become ineligible to receive or renew a ~~p~~Permit due to the creation or relocation of a school.

(e) No ~~p~~Permit may be issued to authorize ~~r~~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 ~~p~~Permit applicant's proposed business location; provided, however, that the prohibition contained in this subsection (e) shall not apply to:

(1) Any ~~r~~Retailer of ~~t~~Tobacco ~~p~~Products (as such term was defined in the predecessor Ordinance No. 5418) operating lawfully on June 30, 2018 provided that the ~~r~~Retailer ~~obtained~~s a ~~p~~Permit prior to July 1, 2020 pursuant to Sections 4.64.050 and 4.64.060, and timely renews its ~~p~~Permit pursuant to Section 4.64.070(b); and

(2) Any ~~r~~Retailer~~s~~ 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 ~~obtained~~s a permit prior to July 1, 2020 pursuant to Sections 4.64.050 and 4.64.060, and timely ~~renewed~~s its permit pursuant to Section 4.64.070(b); however, any such ~~r~~Retailer is subject to the prohibition on the ~~s~~Sale and ~~d~~Distribution of ~~e~~Electronic ~~c~~Cigarette ~~p~~Products established in Section 4.64.030(l).

(f) Any exemption granted to a ~~r~~Retailer pursuant to subsections (d) and (e) shall cease to apply upon the earlier of the following to occur:

(1) The ~~r~~Retailer fails to timely renew the ~~p~~Permit pursuant to Section 4.64.070(b).

(2) A new person obtains ownership in the business.

4.64.050 Application procedure.

(a) It is the responsibility of each ~~r~~Retailer to be informed of all laws applicable to ~~R~~Retailing, including those laws affecting the issuance of a ~~p~~Permit. No ~~r~~Retailer may rely on the issuance of a ~~p~~Permit as a determination by the ~~C~~City or County of Santa Clara that the ~~r~~Retailer has complied with all laws applicable to ~~r~~Retailing. A ~~p~~Permit issued contrary to this ~~c~~Chapter, contrary to any other law, or on the basis of false or misleading information supplied by a ~~r~~Retailer shall be revoked pursuant to Section 4.64.060.

(b) All ~~p~~Permit applications shall be submitted on a form supplied by the ~~d~~Department.

(c) A permitted retailer shall inform the ~~d~~Department in writing of any change in the information submitted on an application for a permit within fourteen 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 ~~p~~Permit, the application fee, and the annual ~~p~~Permit fee, the ~~d~~Department shall issue a ~~p~~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 ~~r~~Retailing at a location for which this ~~c~~Chapter prohibits issuance of a ~~p~~Permit.

(3) The application seeks authorization for ~~r~~Retailing by a person to whom this ~~c~~Chapter prohibits issuance of a ~~p~~Permit.

(4) The application seeks authorization for a Retailer whose Permit has previously been revoked or who has otherwise violated any provision of this Chapter within the last 60 months.

~~(45)~~ The application seeks authorization for ~~r~~Retailing that is prohibited pursuant to this ~~c~~Chapter (e.g., mobile vending, ~~e~~Electronic ~~C~~eigarette ~~p~~Products) or that is unlawful pursuant to any other law.

(6) The application seeks authorization for Retailing by a Retailer who has failed to pay any fees, penalties, or reinspection fees required by this Chapter.

(b) A permit shall be revoked if the ~~d~~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 was issued. Such a revocation shall be without prejudice to the filing of a new ~~p~~Permit application.

(c) A permit shall be permanently revoked if the Retailer has committed violations as specified in section 4.64.130.

4.64.070 Permit term, conditions, renewal, and expiration.

(a) Term of ~~p~~Permit. The term of a permit is one year. A ~~p~~Permit is invalid upon expiration.

(b) Conditions of pPermit. As conditions of pPermit issuance and retention, rRetailer shall:

(1) Allow compliance inspections as described in Section 4.64.110 and expressly consent to inspection of all areas and records of a Retailer's business required to effectuate the purpose of this Chapter, including unlocking and allowing access to any area of Retailer's business requested by any individual authorized to monitor and facilitate compliance with this Chapter.

(2) Comply with any order of the Department to impound any product not authorized to be sold by this Chapter and cooperate with any Departmental seizure of any product, subject to appeal of those actions.

(3) Failure to comply with these Permit conditions may result in Permit suspension or revocation as described in Section 4.64.130.

(bc) Renewal of pPermit. The dDepartment shall renew a pPermit upon timely payment of the annual pPermit fee provided that the rRetailer is in compliance complies with this eChapter, as amended. The dDepartment may, in its discretion, agree to renew any expired pPermit within the three-month period following expiration if the rRetailer pays the annual pPermit fee and applicable late charges. For every calendar month, or fraction thereof, that a rRetailer fails to renew an expired pPermit, a late charge equal to twenty percent of the annual pPermit fee shall be assessed. A pPermit renewed within three calendar months of expiration shall be treated as if timely renewed.

(ed) Issuance of pPermit after revocation or expiration of permit. To apply for a new pPermit more than three calendar months after expiration of a pPermit or following revocation of a pPermit that was wrongly issued, a rRetailer must submit a complete application for a pPermit, along with the application fee and annual pPermit fee. The dDepartment shall issue a permit pursuant to the requirements of Section 4.64.060.

4.64.080 Permits nontransferable.

(a) A pPermit 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 pPermit has been issued, a new pPermit shall be required, but any exemption granted pursuant to Section 4.64.040 shall cease to apply.

(b) Notwithstanding any other provision of this eChapter, prior violations of this eChapter at a location shall continue to be counted against a location and ppermit 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~~ Department is provided with clear and convincing evidence, including an affidavit, that the business has been acquired in an ~~a~~ Arm's ~~length~~ Transaction.

4.64.090 Permit conveys a limited, conditional privilege.

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

4.64.100 Fees.

The ~~d~~ Department shall not issue or renew a ~~p~~ Permit ~~prior to~~ before full payment of any applicable fees. The ~~city~~ County Board of Supervisors shall, from time to time, establish by resolution ~~or ordinance~~ the fees to issue or to renew a ~~p~~ Permit. The fees shall be calculated so as to recover the cost of administration ~~and enforcement~~ of this ~~e~~ Chapter, including, for example, issuing a ~~p~~ Permit, administering the ~~p~~ Permit program, ~~r~~ Retailer education, and routine r 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 ~~e~~ Chapter. All fees and interest earned from such fees shall be used exclusively to fund administration and enforcement of this ~~e~~ Chapter.

4.64.110 Compliance monitoring.

(a) Compliance with this ~~e~~ Chapter shall be monitored by the ~~d~~ Department. In addition, any peace officer may enforce the penal provisions of this ~~e~~ Chapter. The ~~city manager~~ Department may designate any number of additional individuals to monitor and facilitate compliance with this ~~e~~ Chapter.

(b) The ~~d~~ Department or other individuals designated to enforce the provisions of this ~~e~~ Chapter shall ~~check~~ monitor each ~~r~~ Retailer at least once per twelve-month period to determine if the ~~r~~ Retailer is complying with all laws applicable to retailing, other than those laws regulating underage access to ~~t~~ Tobacco ~~p~~ Products. Nothing in this paragraph shall create a right of action in any ~~r~~ Retailer or other person against the ~~e~~ City, the County of Santa Clara, or its agents.

(c) Any Retailer found to be in violation of this Chapter shall pay all costs related to enforcement to ensure retailer's compliance with this Chapter, including but not limited to, fees for reinspection to determine compliance after a violation, enforcement costs, litigation costs, and attorneys' fees in any administrative or civil matter in which the Department prevails pursuant to Division A1 of the County Ordinance Code or any other provision of law.

4.64.120 Prevention of underage sales.

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

(b) The ~~city~~ Department or other departments or individuals designated to enforce the provisions of this Chapter shall not enforce any law establishing a minimum age for ~~t~~Tobacco ~~p~~Product purchases against an individual who otherwise might be in violation of such law because of the individual's age ("~~y~~Youth ~~d~~Decoy") if the potential violation occurs when:

(1) The ~~y~~Youth ~~d~~Decoy is participating in a compliance check supervised by a peace officer or a code enforcement official of the ~~e~~City ~~or County of Santa Clara~~;

(2) The ~~y~~Youth ~~d~~Decoy is acting as an agent of a ~~d~~Department or individual designated by the ~~e~~City or County of Santa Clara to monitor compliance with this ~~e~~Chapter; or

(3) The ~~y~~Youth ~~d~~Decoy is participating in a compliance check funded in part, either directly or indirectly through subcontracting, by the ~~e~~City, the County of Santa Clara, or the California Department of Public Health.

4.64.130 Penalties for a violation by a ~~r~~Retailer with a ~~p~~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 a~~ ~~r~~Retailer shall pay a fine if the Retailer, or any of the ~~r~~Retailer's agents or employees, has violated violates any of the requirements, conditions, or prohibitions of this ~~e~~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 of this Chapter shall be as follows:

(1) ~~A fine not to exceed one hundred dollars (\$100.00) for a first violation within a twelve-month period;~~ A fine not to exceed \$1,000 for each violation identified during the first instance in which the Retailer has committed a violation or violations;

(2) ~~A fine not to exceed two hundred dollars (\$200.00) for a second violation within a twelve-month period;~~ A fine not to exceed \$2,500 for each violation identified during a subsequent instance if the Retailer has committed a previous violation or violations within a 60-month period; and

~~(3) A fine not to exceed five hundred dollars (\$500.00) for each additional violation within a twelve-month period.~~ A fine not to exceed \$5,000 for each violation identified during a subsequent instance after the Retailer twice committed a previous violation or violations within a 60-month period.

~~(c) Time period for permit.~~ Permit suspension. In addition to any other penalty authorized by law, the Department may suspend a permit if the Department demonstrates that the Retailer or any of the Retailer's agents or employees has violated any of the requirements, conditions, or prohibitions of this Chapter. The period of the suspension shall be as follows:

~~(1) For a first violation of this chapter at a location within any sixty-month period, the permit shall be suspended for up to thirty calendar days.~~ A suspension not to exceed 30 calendar days for an initial violation.

~~(2) For a second violation of this chapter at a location within any sixty-month period, the permit shall be suspended for up to ninety calendar days.~~ A suspension not to exceed 180 calendar days if a Retailer commits a violation or violations during two instances within a 60-month period.

~~(3) For each additional violation of this chapter at a location within any sixty-month period, the permit shall be suspended for up to one year.~~ When a permit is suspended based on a violation of this Chapter, the Department shall post a placard at the physical location used for Retailing Tobacco Products to notify the general public of the suspension. The placard shall be:

(A) Posted in the front window of the storefront used for Retailing Tobacco Products within five feet of the front door; or

(B) Posted in a display case mounted on the outside front wall of the physical location used for Retailing Tobacco Products within five feet of the front door; or

(C) Posted in a location approved by the Department to ensure proper notice to the general public and to patrons of the physical location used for Retailing Tobacco Products.

(D) Once attached to a building or structure, a placard is not to be removed, altered, or covered until done so by an authorized representative of the Department or upon written notification from the Department.

(c) Permanent Permit revocation. In addition to any other penalty authorized by law, the Department shall permanently revoke a Permit if a retailer commits a violation or violations during three instances within a 60-month period.

(d) Waiver or reduction of fines and penalties for first violation. The Department may, in its sole discretion, waive or reduce any fines and penalties for a Retailer's first violation of any

~~requirement, condition, or prohibition of this chaptersection, 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 ~~dDepartment's~~ waiver of penalties for a first violation, the violation will be considered in determining the finest and suspension periods or revocation penalties for any future violation. This subsection shall not apply to any violation involving a law regulating youth access to Tobacco Products.

(e) Corrections period. The ~~dDepartment~~ 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 pProducts~~. If the ~~dDepartment~~ 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 ~~pPermit~~ is suspended or revoked based on a violation of this ~~€Chapter~~, the ~~dDepartment~~ shall provide the ~~¶Retailer~~ written notice of the violation and the fine and suspension or revocation, including when the suspension or revocation shall take effect.

(g) Appeals. Any penalties imposed under this section may be appealed pursuant to Section 4.64.150 of this Chapter.

(h) A timely appeal shall stay enforcement of the appealed penalties until the final administrative decision of the Department is issued.

4.64.140 Penalties for retailing without a ~~pPermit~~.

(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 a ¶Retailer shall be imposed pay a fine if a court of competent jurisdiction determines, or the dDepartment finds based on a preponderance of evidence demonstrates, that any the person ¶Retailer has engaged in retailing at a location without a valid pPermit, either directly or through the person's Retailer's agents or employees, has pled guilty, "no contest" or its equivalent to such a The amount of the administrative fine for each violation, or has admitted to such a violation of this Chapter shall be as follows:~~

~~(b) Amount of fine. The amount of the administrative fine for each such violation shall be as follows:~~

(1) A fine not to exceed one hundred dollars (\$100.00) for a first violation within a twelve-month period; A fine not to exceed \$2,500 for each violation identified during the first instance in which the Retailer has committed a violation or for violations without a valid Permit;

~~(2) A fine not to exceed two hundred dollars (\$200.00) for a second violation within a twelve-month period; and~~ A fine not to exceed \$5,000 for each violation identified during a subsequent instance if the Retailer has committed a previous violation or violations within a 60-month period without a valid Permit; and

~~(3) A fine not to exceed five hundred dollars (\$500.00) for each additional violation within a twelve-month period. A fine not to exceed \$10,000 for each violation identified during a subsequent instance after the Retailer has twice committed a previous violation or violations within a 60-month period without a valid Permit.~~

(~~e~~b) Time period for ~~p~~Permit ineligibility. The ineligibility period shall be as follows:

(1) ~~For a first an initial violation of this section at a location within any sixty-month period Chapter without a valid Permit, no new pPermit may be issued for to the person Retailer or the location (unless ownership of the business at the location has been transferred in an aArm's lLength tTransaction) until thirty calendar days have passed from the date of the violation.~~

(2) ~~For a second violation of this section at a location within any sixty-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 ninety calendar days have passed from the date of the violation. If a Retailer commits a violation or violations during two instances within a 60-month period without a valid Permit, no new Permit may be issued to the Retailer or the location (unless ownership of the business at the location has been transferred in an Arms Length tTransaction) until one year has passed from the date of the second violation.~~

(3) ~~For each additional violation of this section at a location If a Retailer commits a violation or violations during three instances within any sixty60-month period without a valid Permit, no new permit may be issued for the person or the Retailer and the location (unless ownership of the business at the location has been transferred in an aArm's lLength tTransaction) shall be permanently ineligible for a Permit. until one year has passed from the date of the violation.~~

(~~d~~c) ~~Waiver of for reduction of fines and penalties for first violation. The dDepartment may, in its sole discretion, waive or reduce any fines and 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 rRetailer admits the violation in writing and agrees to forego a hearing on the allegations. Regardless of the dDepartment's waiver of fines or penalties for a first violation, the violation will be considered in determining the penalties for any future violation fines and suspension periods or revocation for any future violation. This subsection shall not apply to any violation involving a law regulating youth access to Tobacco Products.~~

(ed) Written notice of penalties. Whenever a fine is issued and/or a ~~p~~Permit is suspended pursuant to this section, the ~~d~~Department shall provide the ~~r~~Retailer written notice of the fine and suspension, including when the suspension shall take effect.

(fe) Appeals. Any penalties imposed under this section may be appealed pursuant to Section 4.64.150. ~~A timely appeal shall stay enforcement of the appealed penalties while the appeal is ongoing.~~

4.64.150 Appeals.

(a) Any ~~r~~Retailer served with a written notice of ~~penalties-violation~~ may request an administrative hearing to appeal the existence of the violation, the amount of the fine, ~~and/or~~ the length of ~~the a~~ suspension, a revocation of a Permit, the sustained impoundment of Tobacco Products, and/or seizure of Tobacco Products by returning a completed hearing request form to the Office of the County Hearing Officer within ten days from the date of the written notice of penalties.

(b) The ~~r~~Retailer shall include the following in or with the hearing request form:

(1) A statement indicating the reason the ~~r~~Retailer contests the written notice of penalties;

(2) Any evidence the ~~r~~Retailer wants the ~~h~~Hearing ~~o~~Officer to consider;

(3) An advance deposit of the amount of any fine challenged; and

(4) The address of the ~~r~~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 ~~r~~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 Hearing Officer shall notify the ~~d~~Department as soon as practicable and then shall schedule an administrative hearing. The Office of the County Hearing Officer shall provide the ~~r~~Retailer and the ~~d~~Department at least ten calendar days' written notice of the date, time, and place of the administrative hearing and the name of the ~~h~~Hearing ~~o~~Officer who will conduct the hearing. The notice shall be given to the ~~r~~Retailer either by email, if requested, or by first class mail, postage prepaid.

(e) Between the time the ~~r~~Retailer requests the administrative hearing and the time of the ~~h~~Hearing ~~o~~Officer's decision, the ~~r~~Retailer, the ~~d~~Department, and each of their representatives

shall not engage in ex parte communications with the Office of the County Hearing Officer or the ~~H~~Hearing ~~O~~Officer regarding the matters at issue in the hearing.

(f) The hearing shall be conducted by the ~~H~~Hearing ~~O~~Officer on the date, time, and place specified in the notice to the ~~R~~Retailer. A ~~R~~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 ~~R~~Retailer and the ~~d~~Department shall have the opportunity to present evidence, including witnesses, relevant to the ~~H~~Hearing ~~O~~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 ~~H~~Hearing ~~O~~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 ~~d~~Department concerning the violation shall be admissible and accepted by the ~~H~~Hearing ~~O~~Officer as prima facie evidence of the violation and the facts stated in those documents.

(i) The ~~H~~Hearing ~~O~~Officer may continue the hearing from time to time, in ~~his or her~~the Hearing Officer's sole discretion, to allow for its orderly completion of the hearing. After receiving the evidence submitted at the hearing, the ~~H~~Hearing ~~O~~Officer may further continue the hearing and request additional information from either the ~~d~~Department or the ~~R~~Retailer.

(j) After considering the evidence and testimony submitted the ~~H~~Hearing ~~O~~Officer shall issue a written decision regarding the matters properly raised in the request for administrative hearing. The ~~H~~Hearing ~~O~~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 twenty calendar days of the close of the hearing.

(4) Be served on both the ~~R~~Retailer and the ~~d~~Department. The decision shall be given to the ~~R~~Retailer either by email, if requested, or by first class mail, postage prepaid.

(k) Based on the ~~H~~Hearing ~~O~~Officer's decision, the Office of the County Hearing Officer shall promptly refund to the ~~R~~Retailer any amount of the advance fine deposit the ~~d~~Department is not entitled to and shall provide the remainder to the ~~d~~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 twenty-one years old, such an individual shall not be required over ~~his or her~~ their 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 legal~~ action brought by the ~~city attorney or County of Santa Clara Office of the County Counsel pursuant to dDivision A1 of the Ordinance Code of the County of Santa Clara, including, but not limited to, administrative or judicial nuisance abatement proceedings, civil code enforcement proceedings, and suits for injunctive relief pursuant to XXXXX of this Code~~. For the purposes of the civil remedies provided in this chapter, each day on which a ~~tobacco~~ product is offered for ~~s~~Sale in violation of this ~~€~~Chapter, and each individual retail ~~tobacco~~ product that is ~~s~~Sold or ~~d~~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.~~

(e) Impoundment.

(1) Based upon inspection findings or other evidence, the Department may impound Tobacco Products that are suspected of being or found to be offered for sSale or Distribution in violation of this Chapter. The Department may affix a label to the product that shall be removed only by the Department following final written determination by the Department as described below.

(2) No impounded Tobacco Products shall be used, removed, disposed, or offered for Sale unless the impoundment has been released. The decision by the Department may be appealed pursuant to the procedures set forth in Section 4.64.150.

(3) Within 30 days of final determination whether the impounded products are authorized for sale under this Chapter, the Department shall release the impounded materials or order that unauthorized, impounded product shall be destroyed and properly disposed of at the cost of the Retailer.

(f) Seizure. Tobacco Products offered for sale in violation of this Chapter are subject to seizure by the Department and shall be forfeited after the Retailer of the Tobacco Products

seized is given reasonable notice and an opportunity to demonstrate that the Tobacco Products were not offered for sale in violation of this Chapter. The decision by the Department may be appealed pursuant to the procedures set forth in Section 4.64.150. Forfeited Tobacco Products shall be destroyed and properly disposed of at the cost of the Retailer after all internal appeals have been exhausted and after the time in which to seek judicial review pursuant to Section 4.64.150 of this Chapter has expired.

(g) All Retailers are responsible for the actions of their employees relating to compliance with this Chapter. The sale, offer to sell, or furnishing of any Tobacco Products by an employee shall be considered an act of the Retailer.

(h) 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~~**No conflict with federal or state law**~~
Interpretation.

(a) 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.

(b) Nothing in this Chapter shall be construed to penalize the purchase, use, or possession of a Tobacco Product by any person not engaged in the retailing of such products.

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 31 days after adoption.

INTRODUCED:

PASSED:

AYES:

NOES:

ABSENT:

ABSTENTIONS:

ATTEST:

City Clerk

Mayor

APPROVED AS TO FORM:

APPROVED:

Assistant City Attorney

City Manager

Director of Public Works

Chief of Police

Director of Administrative Services