

ORDINANCE NO. ____ C.S.

AN ORDINANCE OF THE COUNCIL OF THE CITY OF MONTEREY

AMEND CHAPTER 19, ARTICLE 5 OF THE MONTEREY CITY CODE (TOBACCO RETAILER LICENSE) TO PROHIBIT THE SALE OF ALL FLAVORED TOBACCO PRODUCTS AND TO PROHIBIT SINGLE USE ELECTRONIC SMOKING PRODUCTS, EXEMPTING FLAVORED SHISHA TOBACCO PRODUCTS SOLD AT 220 OLIVIER STREET, MONTEREY, FOR ON-SITE USE

THE COUNCIL OF THE CITY OF MONTEREY DOES ORDAIN, as follows:

SECTION 1:

WHEREAS, state law prohibits the sale or furnishing of cigarettes, tobacco products, and smoking paraphernalia to minors, as well as the purchase, receipt, or possession of tobacco products by minors (Cal. Pen. Code § 308);

WHEREAS, state law explicitly permits cities and counties to enact local tobacco retail permitting ordinances and allows for the suspension or revocation of a local permit for a violation of any state tobacco control law (Cal. Bus. & Prof. Code § 22971.3);

WHEREAS, in 2014 the Monterey City Council enacted Monterey City Code section 19-105 et seq. to establish a permitting system for tobacco retailers to ensure that retailers comply with tobacco control laws and business standards of the City to protect the public health, safety, and welfare of the residents of the City. Prohibiting the sale of flavored tobacco products also furthers these goals and objectives;

WHEREAS, prohibiting tobacco retailers from selling flavored tobacco products will not unduly burden legitimate business activities of retailers who sell cigarettes or other tobacco products to adults. It will, however, allow the City to regulate the operation of lawful business to discourage violations of local laws by selling flavored tobacco products;

WHEREAS, the City has a substantial interest in promoting compliance with federal, state, and local laws intended to regulate flavored tobacco product sales and use; in discouraging the illegal purchase of flavored tobacco products by minors; in promoting compliance with laws prohibiting sales of e-cigarettes and flavored tobacco products to minors; and finally, and most importantly, in protecting children from being lured into illegal activity through the misconduct of adults;

WHEREAS, Senate Bill 793, approved by the Governor in August 2020, prohibits a tobacco retailer from selling flavored tobacco products. A referendum challenging this law qualified for the November 8, 2022 ballot. Therefore, the new state law is suspended until the outcome of the vote on the referendum. If the referendum is not successful, Health & Safety Code section 104559.5(g) provides that the state law does not preempt or otherwise prohibit the adoption of local standards that impose greater restrictions on the access to tobacco products than the restrictions imposed by the state. To the extent that there is an inconsistency between the state law and local standards, the greater restriction on the access to tobacco products in the local

standard shall prevail;

WHEREAS, in a ruling issued on March 18, 2022, the Ninth Circuit Court of Appeals in R.J. Reynolds Tobacco Company et al v. County of Los Angeles, et al (9th Cir. 2022) 29 F.4th 542 held that the Family Smoking Prevention and Tobacco Control Act, codified at 21 USC §387 et seq., did not preempt a city from banning the sale of some or all tobacco products;

WHEREAS, more than 5.2 million young people in the United States reported vape use in 2019, including 27.5% of high school students and 10.5% of middle school students (CDC);

WHEREAS, 24% of high school students have reported trying vape products in California from 2019-2020 (California Student Tobacco Survey);

WHEREAS, 27.3% of high school students in the Monterey County area have tried or currently use vape products as of 2020 (California Student Tobacco Survey);

WHEREAS, disposable e-cigarette use, which are designed for one time-use, has increased 1000% among high school students in the United States between 2019 and 2020 (FDA);

WHEREAS, e-cigarette waste introduces plastic, nicotine salts, heavy metals, lead, mercury, and flammable lithium-ion batteries into waterways, soil, and to wildlife (CDC);

WHEREAS, a garbology study performed in 12 San Francisco high schools from 2018 to 2019 to investigate e-cigarette, combustible cigarette, and cannabis product waste revealed that 99% of identifiable e-cigarette waste was from flavored pods other than tobacco flavor and 42% of all identifiable combustible cigarette waste was menthol flavored. In the same study, menthol flavored waste accounted for 60% in low-income schools, 38% in middle-income schools, and 28% in high-income schools of all identifiable combustible cigarette waste (CDC);

WHEREAS, adolescents obtain e-cigarettes from a variety of sources, including purchasing from a store or online (31%), buying from another person (16%), and giving a person of legal age money to purchase for them (15%) (AJHP Pepper et al);

WHEREAS, it is the intent of this ordinance to exempt from its application the use of real property located at 220 Olivier Street, Monterey, as a location where flavored shisha tobacco products may be purchased and used on-site. This location has sold flavored shisha tobacco products for use at its on-site hookah lounge continuously since approximately 2007. Should this use discontinue for 90 days, it is the intent of this ordinance that the sale of flavored shisha tobacco products will be prohibited throughout the city;

WHEREAS, the City of Monterey determined that the proposed action is not a project as defined by the California Environmental Quality Act (CEQA)(CCR, Title 14, Chapter 3 ("CEQA Guidelines), Article 20, Section 15378). In addition, CEQA Guidelines Section 15061 includes the general rule that CEQA applies only to activities which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA. Because the proposed action and this matter have no potential to cause any effect on the environment, or because it falls within a category of activities excluded as projects pursuant to CEQA Guidelines section 15378, this matter is not a project. Because the matter does not cause a direct or any reasonably foreseeable indirect physical change on or in the environment, this matter

is not a project. Any subsequent discretionary projects resulting from this action will be assessed for CEQA applicability.

NOW THEREFORE, the Monterey City Council declares as follows:

SECTION 2: The foregoing recitals are true and correct and are incorporated herein by reference.

SECTION 3. Monterey City Code, Article 5, Chapter 19, Section 19-105, subsection (c) is hereby amended to read as follows:

“c. This article is adopted to: (1) ensure compliance with business standards and practices of the City; (2) to encourage responsible retailing of tobacco; (3) to limit the sale of tobacco products to those with the taste or aroma of tobacco, or no taste or aroma at all; and (4) to discourage violations of tobacco-related laws, but not to expand or reduce the degree to which the acts regulated by federal or state law are criminally proscribed or otherwise regulated.”

SECTION 4: Monterey City Code, Chapter 19, Article 5, Section 19-106 is hereby re-lettered sequentially by inserting the following new definitions in alphabetical order into the existing text:

“a. “Characterizing flavor” means a taste or aroma, other than the taste or aroma of tobacco, imparted either prior to or during consumption of a tobacco product or any byproduct produced by the tobacco product, including but not limited to tastes or aromas related to menthol, mint, wintergreen, fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb, or spice. Characterizing flavor includes flavor in any form, mixed with or otherwise added to any tobacco product or nicotine delivery device, including electronic smoking devices.

d. “Electronic smoking device” means:

(1) Any electronic device or delivery system that can be used to deliver an inhaled dose of nicotine, flavorings, chemicals, or other substances in aerosolized or vaporized form for human consumption, including but not limited to an electronic cigarette, cigar, pipe, vape pen, or 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, whether sold separately or sold in combination with any such device or delivery system that could be used to deliver tobacco products, nicotine, or other substances in aerosolized or vaporized form.

(4) Any product for use in such an electronic device or delivery system whether it contains nicotine or tobacco or is derived from nicotine or tobacco.

e. “E-Liquid” means the liquid that is converted into an aerosol by an e-cigarette or vaping product. It is typically a mixture of water, food grade flavoring, and a choice of nicotine levels, cannabis (THC, CBD), propylene glycol (PG) or vegetable glycerin (VG).

f. “Flavored tobacco product” means any tobacco product, as defined in this Article, which imparts a characterizing flavor.

g. “Hookah” means a type of waterpipe, used to smoke shisha or other tobacco products, with a long flexible tube for drawing aerosol through water. Components of a hookah may

include heads, stems, bowls, and hoses.

j. "Shisha tobacco product" means a tobacco product smoked or intended to be smoked in a hookah. "Shisha tobacco product" includes, and may be referred to as, hookah tobacco, waterpipe tobacco, maassel, narghile, and argileh.

k. "Single-use electronic smoking product" means an electronic smoking device that is not refillable or rechargeable and is typically discarded once its contents have been used."

SECTION 5: Monterey City Code, Chapter 19, Section 19-106 (i) is hereby amended to read as follows:

"i. "Tobacco product" means:

- (1) Any substance containing, made, or derived from tobacco or nicotine, whether natural or synthetic, that is intended for human consumption, whether smoked, heated, chewed, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means, including but not limited to cigarettes, cigars, little cigars, pipe tobacco, hookah tobacco, shisha, waterpipe tobacco, maassel, narghile, argileh, smokeless tobacco (e.g., snuff, snus, chewing tobacco, dipping tobacco) bidis, heated tobacco, or any other preparation of tobacco; or
- (2) Any electronic smoking device that delivers nicotine or other substances, whether natural or synthetic, to the person inhaling from the device, including but not limited to an electronic cigarette, electronic cigar, electronic pipe, or vaping device. An electronic smoking device does not include an electronic hookah.
- (3) 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.
- (4) "Tobacco product" does not include drugs, devices, or combination products authorized for sale by the United States Food and Drug Administration, as those terms are defined in the Federal Drug and Cosmetic Act, as may be amended."

SECTION 6: Monterey City Code, Chapter 19, Section 19-113 through 19-120 are hereby renumbered as Section 19-114 through 19-121.

SECTION 7: Monterey City Code, Chapter 19, Section 19-113 is hereby added to read as follows:

"19-113. Violations.

- a. It shall be a violation of this Article for a tobacco retailer, or its agents or employees, to violate any federal state or local tobacco law or regulation, including any provision of this Article.
- b. Causing, permitting, aiding, abetting, or concealing a violation of any provision of this Article shall constitute a violation.
- c. Failure to prominently display the Tobacco Retail License in a publicly visible location at the licensed premises shall constitute a violation.
- d. The failure of the tobacco retailer, or its agents or employees, to allow any peace officer, or other authorized government official to conduct unscheduled inspections of the premises of the business for the purpose of ensuring compliance with any federal, state, or local tobacco law or regulations, including any provision of this Article, at any time the business is open for business shall constitute a violation.
- e. After 180 days of the effective date of this ordinance, it shall be a violation of this Article for a tobacco retailer, or its agents or employees to sell, or offer for sale, or possess

with the intent to sell or offer for sale, any flavored tobacco product intended to impart, or imparting a characterizing flavor in any form, to any tobacco product.

- (1) Subsection (e) does not apply to flavored shisha tobacco products sold at 220 Olivier Street, Monterey for on-site use, unless the retail sale of flavored shisha tobacco at this location is discontinued for a period of 90 consecutive days or more, at which time the sales of flavored shisha tobacco will be prohibited.
- f. After 180 days of the effective date of this ordinance, it shall be a violation of this Article for a tobacco retailer, or its agents or employees, to sell, or offer for sale, or possess with the intent to sell or offer for sale, any single use electronic smoking device.
- g. A tobacco retailer’s possession of four or more flavored tobacco products creates a rebuttable presumption the retailer possesses such flavored tobacco products with intent to sell or offer for sale.
- h. The following actions of a tobacco retailer, its employees or agents, creates a rebuttable presumption that a tobacco product is flavored:
 - (1) public statements or claims that the tobacco product imparts a characterizing flavor;
 - (2) text and/or images on the product’s labeling or packaging to explicitly or implicitly indicate the tobacco product imparts a characterizing flavor; or
 - (3) other actions directed to consumers that would reasonably cause consumers to believe the tobacco or electronic cigarette product imparts a characterizing flavor.

SECTION 8: All ordinances and parts of ordinances in conflict herewith are hereby repealed.

SECTION 9: This ordinance shall be in full force and effect thirty (30) days from and after its final passage and adoption.

SECTION 10. Nothing in this Article shall be interpreted or applied to create any power or duty in conflict with any federal or state law. If any provision of this Article or the application thereof to any person or circumstance is held invalid, the remainder of this Article or the application of such provision to other persons or circumstances shall not be affected thereby.

PASSED AND ADOPTED BY THE COUNCIL OF THE CITY OF MONTEREY this _____ day of _____, 202_, by the following vote:

AYES:	COUNCILMEMBERS:
NOES:	COUNCILMEMBERS:
ABSENT:	COUNCILMEMBERS:
ABSTAIN:	COUNCILMEMBERS:

APPROVED:

ATTEST:

Mayor of said City

City Clerk thereof