

OAKLAND CITY COUNCIL

ORDINANCE NO. _____ C.M.S.

INTRODUCED BY COUNCIL MEMBERS LARRY REID, SHENG THAO, DAN KALB,
AND LOREN TAYLOR

ORDINANCE CHANGING LOCAL RULES FOR THE SALE OF TOBACCO PRODUCTS BY: (A) AMENDING OAKLAND MUNICIPAL CODE CHAPTER 5.91 TO: (1) ELIMINATE THE “TOBACCO STORE” EXCEPTION TO THE CITY’S GENERAL PROHIBITION ON THE SALE OF FLAVORED TOBACCO PRODUCTS; (2) PROHIBIT PHARMACIES FROM SELLING TOBACCO PRODUCTS; (3) IMPOSE A MINIMUM PRICE AND PACKAGE SIZE FOR CIGARS AND CIGARETTES; (4) REQUIRE THE ON-SITE PURCHASE OF TOBACCO PRODUCTS; (5) CHANGE DEFINITIONS OF TERMS; (6) MAKE ADMINISTRATIVE CHANGES FOR THE LICENSURE OF TOBACCO RETAILERS; AND (B) REPEALING OAKLAND MUNICIPAL CODE CHAPTER 8.34, WHICH PROHIBITS TOBACCO PRODUCT VENDING MACHINES IN AREAS ACCESSIBLE TO PEOPLE UNDER TWENTY ONE (21) YEARS OF AGE

WHEREAS, approximately 480,000 people die in the United States from smoking-related diseases and exposure to secondhand smoke every year, making tobacco use the nation’s leading cause of preventable death. Tobacco use is also the number one cause of preventable death in California; and

WHEREAS, tobacco use among priority populations in California contributes to health disparities and creates significant barriers to health equity; and

WHEREAS, despite efforts to limit youth access to tobacco, youth are still able to access tobacco products; and

WHEREAS, the National Youth Tobacco Survey showed that e-cigarette use increased 78 percent among high school youth and 48 percent among middle school youth across the country from 2017 to 2018; and

WHEREAS, in 2018, more than 3.6 million U.S. youth used e-cigarettes. E-cigarette use by high school students increased even further in 2019 with more than 5 million youth, including more than 1 in 4 high school students and 1 in 10 middle school student, currently using e-cigarettes; and

WHEREAS, unless smoking rates decline, an estimated 5% of all California youth who are alive today will die prematurely from smoking-related diseases; and

WHEREAS, in the Oakland Unified School District, 22% of 11th graders reported having used electronic cigarettes (2017-2018). Additionally, 47% of 11th graders believe that it is either very or fairly easy to obtain e-cigarettes or vaping devices; and

WHEREAS, unlike cigarette use that has steadily declined among youth, the U.S. has seen a surge in teen e-cigarette use. Over the past three years, youth e-cigarette use has increased 135%; and

WHEREAS, electronic cigarettes are not harmless water vapor. Mounting research shows that electronic cigarettes are neither safe nor harmless: e-cigarette aerosol contains many of the same toxic chemicals found in cigarettes such as nicotine, formaldehyde, and lead, which are known to cause cancer, birth defects, and other health problems; and

WHEREAS, the U.S. Surgeon General and Center for Disease Control take the position that youth e-cigarette use can pose harm to respiratory health and brain development; and

WHEREAS, for every adult who quits smoking using e-cigarettes, 80 youth initiate tobacco use with e-cigarettes; and

WHEREAS, California law defines electronic smoking devices as tobacco products; and

WHEREAS, the Federal Drug Administration (FDA) has not approved any electronic smoking device as a smoking cessation product; and

WHEREAS, flavored tobacco products, including menthol cigarettes and flavored e-cigarettes, continue to cause substantial public health harms and impede efforts to advance health equity; and

WHEREAS, scientific reviews by the FDA and the Tobacco Products Scientific Advisory Committee (“TPSAC”) found that: (1) marketing of menthol cigarettes likely increases the prevalence of smoking among the entire population, but especially among youth, African-Americans, and possibly Hispanic and Latino individuals; (2) that menthol cigarettes are associated with increased initiation and progression to regular cigarette smoking, increased dependence on cigarettes; and (3) reduced success in smoking cessation, especially among African-American menthol smokers; and

WHEREAS, a review of advertising, promotions, and pack prices near California high schools found that “for each 10 percentage point increase in the proportion of Black students, the proportion of menthol advertising increased by 5.9% ... the odds of a Newport [a leading brand of mentholated cigarettes] promotion were 50% higher ... and the cost of Newport was 12 cents lower.” There was no such association found for non-mentholated cigarettes; and

WHEREAS, as of 2017, sales of menthol cigarettes made up 35% of all cigarette sales in the U.S.—the highest proportion since major tobacco companies were required to report those data; and

WHEREAS, youth smokers are more likely to use menthol cigarettes than any other age group, with over half (53.9%) of youth smokers ages 12-17 using menthol cigarettes, compared to less than one-third of smokers ages 35 and older. Moreover, more than half (51.8%) of young adult smokers (18-34) initiated with menthol cigarettes; and

WHEREAS, in 2018, nearly two-thirds of U.S. middle school and high school students who used tobacco reported using flavored tobacco products, including more than 2.3 million students who reported using a flavored e-cigarette within the past 30 days. Preliminary results from the 2019 National Youth Tobacco Survey show that of the more than a quarter (27.5%) of high school students who use e-cigarettes, nearly two-thirds use fruit and menthol or mint-flavored e-cigarettes (65.9% and 63.9%, respectively); and

WHEREAS, the tobacco store exemption to Oakland’s general prohibition on the sale of flavored tobacco products has resulted in implementation and enforcement challenges, reducing the law’s efficacy as evidenced by the following anecdotal data:

- Some tobacco retailers have changed their business model to qualify for the exemption such as: (1) shifting their product make-up by increasing their volume of tobacco products for sale and decreasing stocks of non-tobacco products; (2) investing large sums of money to build in-store adult-only structures, or rooms with separate entrances, which they aim to operate independently of the primary store; and (3) dividing their existing properties, and products, into two stores to allow for the sale of flavored tobacco products in one; and
- All of the retailers are established and not new; and
- Although retailers must sign an affidavit stating that their store meets all adult-only tobacco store requirements, it is difficult for enforcement staff to determine and validate the percent of a store’s annual revenue based on the financial records provided; and
- Many retailers have stated that the tobacco store exemption creates an unfair business practice in which certain stores can sell flavored tobacco while others

cannot. These retailers would prefer a so-called “even playing field” created by citywide restrictions on the sale of all flavored tobacco products; and

- Although only 2 to 5 adult-only tobacco stores existed in Oakland prior to the effective date of the current flavor restrictions, 56 adult-only tobacco stores now operate in the city, primarily in low-income areas of the city. As a result, menthol cigarettes and other flavored tobacco products are still readily available and prevalent, particularly in certain low-income areas of the city that are already among the communities most heavily targeted by the tobacco industry; and
- 2017 and 2018 California tobacco purchase surveys both found that tobacco and vape shops had the highest rate of underage sales compared with other types of tobacco retailers. Nearly half (49.8%) of tobacco and vape shops did not check ID for underage decoys when they attempted to purchase vape products and 44.7% of tobacco and vape shops actually sold vape products to underage decoys; and

WHEREAS, eliminating the exemption allowing adult-only tobacco stores to sell flavored tobacco products will streamline implementation and enforcement, promote public health, and advance health equity; and

WHEREAS, a study modeling the effects of a nationwide menthol sales ban found that the policy would save more than 600,000 lives, including nearly a quarter million Black lives; and

WHEREAS, an evaluation of New York City’s flavored tobacco law found that it lowered the odds of youth ever trying flavored tobacco products and ever using *any* type of tobacco by 37% and 28%, respectively; and

WHEREAS, a study evaluating a sales ban on menthol tobacco products in Ontario, Canada found a substantially greater number of people who used mentholated products attempted or successfully quit smoking following the ban compared with people who used non-mentholated tobacco products; and

WHEREAS, federal and state law ban the sale of individual cigarettes but neither federal nor state law restrict the sale of individual little cigars and cigars or set a minimum price for tobacco products; and

WHEREAS, in Oakland, the cheapest pack of cigarettes (pack of 20) sells for \$8.00 on average. Although, a pack of cigarettes can be purchased for as little as \$4.69.

WHEREAS, many retailers sell little cigars and cigars individually and in minimally priced packages, making them more affordable and appealing to youth and price-sensitive consumers. For example, data shows the following:

- 87.4% of California tobacco retailers sell a popular brand of youth-friendly cigars for less than \$1.00; and

- From 1995 to 2008, annual cigarillo sales increased by 255%, and little cigar sales increased by 316%; and
- In Oakland, 99% of tobacco retailers sell little cigars in packs of 5 or less for less than \$2 after taxes. A single little cigar sells for as little as \$0.49; and

WHEREAS, tobacco companies spend considerably to decrease the price of their products in order to counter state and local tobacco control efforts, appeal to price-sensitive consumers, and increase demand for tobacco products; and

WHEREAS, tobacco companies spent the majority of their marketing budgets on price discounts, accounting for nearly \$8 billion of \$8.7 billion advertising and promotional expenditures in 2016; and

WHEREAS, the tobacco industry's price discounting strategies, such as coupons and multiple-package discounts, are popular among consumers, with more than half of adults using some price minimization strategy. In California, individuals who use price minimization strategies save an average \$1.04 per pack (or 18.6% off the total); and

WHEREAS, price-discounted sales account for a substantial proportion of overall tobacco product sales; and

WHEREAS, evidence suggests that cigarettes are cheaper in neighborhoods with lower household incomes, Newport menthol cigarettes cost less in areas with higher proportions of African-Americans, and underserved communities are targeted with price discounts and coupons; and

WHEREAS, the availability of inexpensive tobacco products leads to increased tobacco use as evidenced by more than 100 academic studies that conclusively show that when tobacco products are made more expensive, fewer people use tobacco, fewer initiate tobacco use, and more people quit tobacco use; and

WHEREAS, research has consistently shown that increases in cigarettes prices will result in less smoking across various sociodemographic populations. A 20% price increase would reduce demand for cigarettes by approximately 10.4%, the prevalence of adult tobacco use by 3.6%, and initiation of tobacco use by young people by 8.6%; and

WHEREAS, youth are particularly responsive to changes in tobacco prices, and evidence suggests that tobacco companies deliberately target youth with price reductions; and

WHEREAS, unequal price increases across different types of tobacco products leads to substitution from one product to another; and

WHEREAS, a 10% increase in cigar prices has been associated with decreased cigar sales and may significantly reduce cigar use among youth; and

WHEREAS, in a recent a study to estimate the potential effects of a tobacco minimum floor price law in Oakland on youth and adult use of cigarettes and little cigars, showed the following data:

- Setting a minimum price floor would increase average prices; and
- A minimum floor price on cigarettes and little cigars or cigarillos of \$8.00 or higher is expected to decrease tobacco use prevalence and the number of tobacco users; and
- Greater reductions are expected in the number of smokers under 18 years old (especially at higher floor prices) and smokers in low-income households; and
- Greater reductions are expected in the number of users of little cigars or cigarillos who are male, 18 years and older, and from low-income households; and

WHEREAS, minimum price markups and related laws in other states can be effective at increasing the price of tobacco products but they remain vulnerable to price manipulation by the tobacco industry unless accompanied by minimum floor prices and restrictions on the redemption of coupons and discounts; and

WHEREAS, studies have estimated that if price discounts were prohibited across the United States, the number of people who smoke would decrease by more than 13%; and

WHEREAS, a \$10 federal minimum floor price for cigarettes could reduce the number of packs sold in the United States by 5.7 billion per year and prompt 10 million smokers to quit; and

WHEREAS, state-level minimum floor price laws designed to raise the average price of cigarette packs by \$2.00 could decrease cigarette consumption by 15.9% and reduce income-based smoking disparities more than a comparable excise tax increase; and

WHEREAS, pharmacists are perceived by many as among the most trusted health care professionals. 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 so dangerous to smoke. Children and young people are particularly influenced by cues suggesting that smoking is acceptable; and

WHEREAS, the American Pharmacists Association, the California Pharmacists Association, and the California Medical Association have called for state and local laws prohibiting tobacco sales in drug stores and pharmacies because they believe that doing so supports the public health and social welfare of the communities in which they practice; and

WHEREAS, tobacco-free pharmacy sales policies decrease the availability of tobacco products by reducing tobacco retailer density by up to three times compared with communities without such policies; and

WHEREAS, nearly 90 percent of California’s tobacco-free independent pharmacies have reported either no change or an increase in business since they stopped selling tobacco products. Many independent pharmacies do not sell tobacco products; and

WHEREAS, immediately after the nationwide CVS policy change to not sell tobacco products, cigarette purchases declined and smokers who had previously purchased their cigarettes exclusively at CVS were up to twice as likely to stop buying cigarettes entirely; and

WHEREAS, the California Legislature (Legislature) has recognized the danger of tobacco use and has made reducing youth access to tobacco products a high priority, as evidenced by the following:

- The Legislature has declared that smoking is the single most significant source of preventable disease and premature death in California (Cal. Health & Safety Code § 118950); and
- 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); and
- State law requires that tobacco retailers check the identification of tobacco purchasers who reasonably appear to be under 21 years of age (Cal. Bus. & Prof. Code § 22956) and provides procedures for using persons under 21 years of age to conduct onsite compliance checks of tobacco retailers (Cal. Bus. & Prof. Code § 22952); and
- State law prohibits the sale of tobacco products and paraphernalia through self-services displays except in adult-only establishments (Cal. Bus. & Prof. Code § 22962); and
- State law prohibits the sale of “bidis” (hand-rolled filter-less cigarettes imported primarily from India and Southeast Asian countries) except in adult-only establishments (Cal. Pen. Code § 308.1); and
- State law prohibits the manufacture, distribution, or sale of cigarettes in packages of less than 20 and prohibits the manufacture, distribution, or sale of “roll-your-own” tobacco in packages containing less than 0.60 ounces of tobacco (Cal. Pen. Code § 308.3); and

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

WHEREAS, California courts in such cases as *Cohen v. Board of Supervisors*, 40 Cal. 3d 277 (1985), and *Bravo Vending v. City of Rancho Mirage*, 16 Cal. App. 4th 383 (1993), have affirmed the power of local governments to regulate business activity in order to discourage violations of law; and

WHEREAS, the Federal Family Smoking Prevention and Tobacco Control Act (FSPTCA), enacted in 2009, prohibited candy and fruit-flavored cigarettes, largely because these flavored products were marketed to youth and young adults¹; and

WHEREAS, the FSPTCA expressly authorizes state and local governments to regulate the sales, distribution, possession, access, advertising, and use of tobacco products²; and

WHEREAS, federal courts in such cases as *Independents Gas & Service Stations Associations, Inc. v. City of Chicago*, 112 F.Supp.3d 749, (2015), *National Assn. of Tobacco Outlets, Inc. v. City of Providence, R.I.*, 731 F.3d 71 (2013), and *U.S. Smokeless Tobacco Mfg. Co. LLC*, 708 F.3d. 428 (2013), have affirmed the power of local governments to regulate the sales of tobacco products, including flavored tobacco products; and

WHEREAS, although the manufacture and distribution of flavored cigarettes (excluding menthol) is banned by federal law, neither federal nor California laws restrict sales of flavored non-cigarette tobacco products, such as cigars, cigarillos, smokeless tobacco, hookah tobacco, and electronic smoking devices and the nicotine solutions used in these devices; and

WHEREAS, flavored non-cigarette tobacco products have become increasingly common and are available in a variety of flavors that appeal to children and young adults, including apple, cherry, chocolate, grape, peach, strawberry, and vanilla; and

WHEREAS, the U.S. Food and Drug Administration and the U.S. Surgeon General have stated that flavored tobacco products are considered to be “starter” products that help establish smoking habits that can lead to long-term addiction; and

WHEREAS, in December of 2010, the Oakland City Council unanimously passed resolution number 83113 CMS, declaring the City of Oakland’s support of Food and Drug Administration (FDA) regulation of menthol in cigarettes and flavoring in other tobacco products; and

¹ Family Smoking Prevention and Tobacco Control Act, in Public Law No. 111-31, 123 Stat. 1776 (codified, in relevant part, at 15 U.S.C.A. 1334-34 and 21 U.S.C.A. 301 et seq.) 2009

² 21 U.S.C.A 387p;

WHEREAS, data from the National Youth Tobacco Survey indicates that more than two-fifths of U.S. middle and high school age smokers report using flavored “little” cigars or flavored cigarettes³; and

WHEREAS, in a survey of 300 stores in Alameda County, 87% sold candy, mint and liquor flavored tobacco products and were located within 1,000 feet of a school⁴; and

WHEREAS, among the nearly 300 stores surveyed in Alameda County, 85% sell the most popular brand of cigarillos for under one dollar and cheaper cigarillos are more widely available in low-income neighborhoods⁵; and

WHEREAS, research shows that 81% of youth tobacco users ages 12-17 initiated with a flavored product, and 80% used a flavored tobacco product in the past month⁶; and

WHEREAS, despite efforts to prohibit tobacco sales to minors, a 2014 survey reported that 70% of middle and high school tobacco users tried at least one flavored tobacco product⁷; and

WHEREAS, over three-fifths (63%) of middle and high school cigar users smoked a flavored cigar in the past 30 days⁸; and

WHEREAS, a government study found that 81% of kids who have ever used tobacco products started with a flavored product, including 81% who have ever tried e-cigarettes and 65 percent who have ever tried cigars⁹; and

WHEREAS, youth cite flavors as a major reason for their current use of non-cigarette tobacco products, with 81.5% of youth e-cigarette users and 73.8% of youth cigar users saying they used the product “because they come in flavors I like¹⁰.”; and

³ King BA, Tynan MA, Dube SR, et al. 2013. “Flavored-Little-Cigar and Flavored-Cigarette Use Among U.S. Middle and High School Students.” *Journal of Adolescent Health*. [Article in press], www.jahonline.org/article/S1054-139X%2813%2900415-1/abstract

⁴ Healthy Stores for a Healthy Community Survey, 2013

⁵ Ibid.

⁶ Ambrose, BK, et al., “Flavored Tobacco Product Use Among US Youth Aged 12-17 years, 2-13-2014,” *Journal of the American Medical Association*, published online October 26, 2015

⁷ National Youth Tobacco Survey, 2014

⁸ Corey, CG, et al., “Flavored Tobacco Product Use Among Middle and High School Students – United States, 2014,” *Morbidity and Mortality Weekly Report*, 64 (38): 1066-1070, 2015

⁹ Campaign for Tobacco-Free Kids, “The Flavor Trap: How Tobacco Companies are Luring Kids with Candy Flavored E-Cigarettes and Cigars”, 2017
http://www.tobaccofreekids.org/microsites/flavortrap/full_report.pdf

WHEREAS, Menthol is considered the tobacco industry’s “starter” ingredient and¹¹ menthol’s anesthetizing effect makes the smoke “smooth” and easier to inhale while masking the harshness of tobacco, making menthol cigarettes especially popular among young and beginner smokers¹²; and

WHEREAS, menthol in cigarettes has an anesthetic effect on the throat, bronchi and lungs, allowing smokers to inhale deeper and for harmful particles to settle deeper inside the lungs and his inhalation pattern may cause greater harm to the smoker¹³; and

WHEREAS, menthol decreases the metabolism of nicotine and increases the amount of the addictive substance in the blood, making menthol cigarettes even more dangerous and difficult to quit¹⁴; and

WHEREAS, quitting menthol cigarettes is particularly difficult, because menthol smokers have to get over the dependency on nicotine as well as positive associations with menthol itself such as the minty taste, cooling sensation and sensory excitation¹⁵; and

WHEREAS, 54% of current smokers in high school and 48.4% of current smokers in middle school smoke menthols¹⁶; and

WHEREAS, nearly all African-American teen smokers, 95%, smoke menthol cigarettes¹⁷; and

¹⁰ Ibid.

¹¹ Gardiner, P and Clark P.I. (2010) “Menthol Cigarettes: Moving Toward a Broader Definition of Harm” *Nicotine & Tobacco Research*, 12 (Suppl. 2), S85-S93

¹² Kreslake, JM, Ferris Wayne, G, Alpert, HR, Koh, HK, & Connoly, G.N. (2008) “Tobacco Industry Control of Menthol in Cigarettes and Targeting of Adolescents and Young Adults” *American Journal of Public Health*, 98(9): 1685-1692

¹³ Kreslake, JM and Yerger, VB (2010). “Coming Out about Smoking: A Report from the National LGBTQ Young Adult Tobacco Project. Washington D.C.

¹⁴ Benowitz, NL, Herrera B, and Jacob III, P (2004) “Mentholated Cigarette Smoking Inhibits Nicotine Metabolism”. *Journal of Pharmacology and Experimental Therapeutics*, 310(3), 1208-1215

¹⁵ Gardiner, P and Clark P.I. (2010) “Menthol Cigarettes: Moving Toward a Broader Definition of Harm” *Nicotine & Tobacco Research*, 12 (Suppl. 2), S85-S93

¹⁶ Centers for Disease Control and Prevention. 2015. “Flavored Tobacco Product Use Among Middle and High School Students – United States, 2014.” *Morbidity and Mortality Weekly Report* 64(38): 1066-1070. https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6438a2.htm?s_cid=mm6438a2_w

¹⁷ Giovino G, Villanti A, Mowery P, Sevilimedu V, Niaura R, Vallone D, Abrams D. Differential trends in cigarette smoking in the USA: is menthol slowing progress? *Tobacco Control*. 2015 Jan;24(1):28-37

WHEREAS, although the use of cigarettes is declining in the United States, sales of menthol cigarettes have steadily increased in recent years, especially among young people and new smokers¹⁸; and

WHEREAS, mentholated cigarettes were originally developed and promoted to women and since then the tobacco industry has used a unique combination of advertising, packaging, pricing and distribution channels to catch the interest of particular groups, such as youth and young adults, women, African-Americans and other specific priority or ethnic population¹⁹; and

WHEREAS, tobacco retailers in low income, urban communities having high mentholated cigarette brands, provide higher discount rates on mentholated cigarette brands, including between \$1.00 and \$1.50 off per pack or *buy 1 get 1 free* promotions, while more affluent neighborhoods see discounts on menthols of only about \$0.50 off per pack or *buy 2 get 1 free* offers²⁰; and

WHEREAS, historically, African-Americans have been exposed to hundreds of tobacco ads and the tobacco industry has places proportionately more menthol cigarette ads in African-American magazines than in mainstream magazines²¹; and

WHEREAS, the Food and Drug Administration (FDA) has the ability to prohibit menthol as an ingredient in cigarettes and other tobacco products and the Tobacco Products Scientific Advisory Committee (TPSAC) has been established and charged with developing a report assessing the impact of the use of menthol in cigarettes on public health and proposing recommendations to the FDA on whether menthol should be banned or not; and

WHEREAS, the TPSAC report and recommendations were submitted to the FDA on March 18, 2011 and the report found that the availability of menthol cigarettes has an adverse impact on public health in the United States and recommended removal of menthol cigarettes from the marketplace; and

WHEREAS, the National African American Tobacco Control Leadership Council with signed support from over 30 national leaders and organizations called on the national government to take action on removing menthol from the U.S. market²²; and

¹⁸ SAMHSA (Substance Abuse and Mental Health Services Administration). 2013. Results from the 2012 National Survey on Drug Use.

¹⁹ National Cancer Institute. "The Role of the Media in Promoting and Reducing Tobacco Use". Tobacco Control Monograph No. 19. Bethesda, MD: U.S. Department of Health and Human Services, National Institutes of Health, National Cancer Institute. NIH Pub. No. 07-6242, June 2008.

²⁰ Gardiner, P and Clark P.I. (2010) "Menthol Cigarettes: Moving Toward a Broader Definition of Harm" Nicotine & Tobacco Research, 12 (Suppl. 2), S85-S93

²¹ American Heart Association. "Tobacco Industry's Targeting of Youth, Minorities and Women" <http://www.americanheart.org/presenter.jhtml?identifier=11226>

WHEREAS, “little cigars” look nearly identical to cigarettes and can have up to four times as much nicotine as a cigarette; and

WHEREAS, the U.S. surgeon general has stated unequivocally that increasing the price of tobacco products will decrease the prevalence of tobacco use, particularly among adolescents and young adults; and

WHEREAS, all types of tobacco products are sold locally including but not limited to: cigarettes, cigars, little cigars/cigarillos, smokeless tobacco, electronic cigarettes, vape pens, e-liquids, hookah, vape tanks/mods, vape atomizer, vaporizers and e-hookah²³; and

WHEREAS, in July 2017 the Oakland City Council, via Ordinance No. 13452 C.M.S., amending Oakland Municipal Code chapter 5.91 to: (1) prohibit the sale of flavored tobacco products; (2) require the posting of the full retail price of tobacco products; (3) prohibit the redemption of tobacco discounts and coupons; and (4) make administrative changes for the licensure of tobacco retailers; and

WHEREAS, for the reasons stated above and, in the report, accompanying this legislation, the Oakland City Council seeks to make changes to the local rules regulating tobacco product sales by (A) amending Oakland Municipal Code Chapter 5.91 to: (1) eliminate the “tobacco store” exception to the City’s general prohibition on the sale of flavored tobacco products; (2) prohibit pharmacies from selling tobacco products; (3) impose a minimum price and package size for cigars and cigarettes; (4) require the on-site purchase of tobacco products; (5) change definitions of terms; (6) make administrative changes for the licensure of tobacco retailers; and (B) repealing Oakland Municipal Code Chapter 8.34, which prohibits tobacco product vending machines in areas accessible to people under twenty one (21) years of age; and

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

SECTION 1. The City Council finds and determines the foregoing recitals to be true and correct and hereby makes them part of this Ordinance.

SECTION 2. Oakland Municipal Code Chapter 5.91, Licensure of Tobacco Retailers, is hereby amended to add, delete, or modify sections as set forth below (chapter and

²² The African American Tobacco Control Leadership Council (August 10, 2016). Letter to President Obama. <http://www.savingblacklives.org/letter-to-president-obama/>

²³ <https://www.cdph.ca.gov/programs/tobacco/Documents/Tobacco21Law/What> is a tobacco product in CA 5-31-16 .pdf

section numbers and titles are indicated in **bold type**; additions are indicated by underscoring and deletions are indicated by strike-through type; portions of the regulations not cited or not shown in underscoring or strike-through type are not changed).

SECTION 3.

Chapter 5.91 - LICENSURE OF TOBACCO RETAILERS

5.91.010 - Definitions.

The following definitions apply to this chapter:

"Arm's Length Transaction" as used in this chapter shall mean a sale in good faith and for valuable consideration that reflects the fair market value in the open market between two informed and willing parties, neither of which is under any compulsion to participate in the transaction. A sale between relatives, related companies or partners, or a sale for which a significant purpose is avoiding the effect of the violations of this chapter is not an arm's length transaction.

"Characterizing Flavor" means a ~~distinguishable~~ taste or aroma, other than the taste or aroma of tobacco, imparted by a tobacco product or any byproduct produced by the tobacco product, including, but not limited to, tastes or aromas relating to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, menthol, mint, wintergreen, herb, or spice; provided, however, that 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.

"Cigar" means any roll of tobacco other than a cigarette wrapped entirely or in part in tobacco or in any substance containing tobacco and weighing more than three pounds per thousand.~~For purposes of this Chapter, "cigar" includes, but is not limited to, tobacco products known or labeled as "cigar," "cigarillo," "tiparillo," or "little cigar."~~

"Cigarette" means: (1) any roll of tobacco wrapped in paper or in any substance not containing tobacco and (2) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described herein.

"City Administrator" as used in this chapter shall mean the City Administrator for the City of Oakland; further provided, that the use of the title of any officer or to any office shall refer to such officer or office of the City of Oakland.

"Consumer" means a person who purchases a package of cigarettes or other tobacco product for consumption and not for sale to another.

"Coupon" means anything that can be exchanged or used to acquire a cigarette or other tobacco product for less than the full retail price, whether in paper, digital or other form.

"Department" as used in this chapter shall mean the Oakland Police Department.

~~"Distinguishable" means perceivable by an ordinary consumer by either the sense of smell or taste.~~

"Drug Paraphernalia" as used in this chapter shall have the same definition set forth under California Health and Safety Code section 11364.5, as amended from time to time.

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

"Flavored Tobacco Product" means any tobacco product ~~which contains an ingredient~~ that imparts a characterizing flavor.

"Full Retail Price" means the price listed for a package of cigarettes or other tobacco product on its packaging or on any related shelving, advertising, or display where the package of cigarettes or tobacco product is sold or offered for sale.

~~"Ingredient" means any 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.~~
"Labeling" means written, printed, or graphic matter upon any tobacco product or any of its packaging, or accompanying such tobacco product.

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

"Manufacturer" means any person, including any repacker or relabeler, who manufactures, fabricates, assembles, processes, or labels a tobacco product; or imports a finished tobacco product for sale or distribution into the United States.

"Package of Cigarettes" means a pack of twenty (20) cigarettes in a manufacturer's original consumer packaging designed for individual retail sale to a consumer.

"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.

"Person" as used in this chapter shall mean any natural person, partnership, cooperative association, corporation, limited liability company, personal representative, receiver, trustee, assignee, or any other legal entity.

"Proprietor" as used in this chapter shall mean a person with an ownership or managerial interest in a business. An ownership interest shall be deemed to exist when a person has a ten (10) percent or greater interest in the stock, assets, or income of a business other than the sole interest of security for debt. A managerial interest shall be deemed to exist when a person can or does have or share ultimate control over the day-to-day operations of a business.

"Public Nuisance" as used in this chapter shall have the same definition as set forth under California Civil Code Section 3480, as amended from time to time.

"Sale" or "Sell" means any transfer, exchange, barter, gift, offer for sale, or distribution for a commercial purpose, in any manner or by any means whatsoever.

"Self-Service Display" as used in this chapter shall mean the open display of tobacco products or tobacco paraphernalia in a manner that is accessible to the general public without the assistance of the retailer or employee of the retailer. A vending machine is a form of self-service display.

"Smoking" as used in this Chapter means inhaling, exhaling, burning, or carrying any lighted, heated, or ignited cigar, cigarette, cigarillo, pipe, hookah, electronic smoking device, or any plant product intended for human inhalation.

"Tobacco Paraphernalia" as used in this Chapter shall mean cigarette papers and any other item designed or marketed for the smoking, preparation, storing, or consumption of tobacco products, including but not limited to wrappers, pipes, holders of smoking materials of all types, and cigarette rolling machines.

"Tobacco Product" as used in this Chapter means:

- a. Any product containing, made, or derived from tobacco or nicotine that is intended for human consumption, whether smoked, heated, chewed, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means, including, but not limited to cigarettes, cigars, little cigars, chewing tobacco, pipe tobacco, snuff; and
- b. Any electronic smoking device.
- c. Notwithstanding any provision of subsections a. and b. to the contrary, "tobacco product" includes any component, part, or accessory intended or reasonably expected to be used with a tobacco product, whether or not

~~sold separately. "Tobacco product" does not include drugs, devices, or combination products authorized for sale any product that has been approved by the United States Food and Drug Administration, as those terms are defined in the Federal Food, Drug and Cosmetic Act for sale as a tobacco cessation product or for other therapeutic purposes where such product is marketed and sold solely for such an approved purpose.~~

"Tobacco Retailer" means any person who sells, offers for sale, or does or offers to exchange for any form of consideration, tobacco, tobacco products or tobacco paraphernalia. This definition is without regard to the quantity of tobacco products or tobacco paraphernalia sold, offered for sale, exchanged, or offered for exchange.

"Tobacco Retailing" means the act of selling, offering for sale, or exchanging or offering to exchange for any form of consideration, tobacco, tobacco products or tobacco paraphernalia.

~~"Tobacco Store" has the same meaning as provide in California Business and Professions Code Section 22962, which defines the term as a retail business that meets all of the following requirements:~~

- ~~a. Primarily sells tobacco products;~~
- ~~b. Generates more than sixty (60) percent of its gross revenues annually from the sale of tobacco products and tobacco paraphernalia;~~
- ~~c. Does not permit any person under eighteen (18) years of age to be present or enter the premises at any time, unless accompanied by the person's parent or legal guardian, as defined in Section 6903 of the California Family Code; and~~
- ~~d. Does not sell alcoholic beverages or food for consumption on the premises.—"Vending Machine" as used in this Chapter shall mean a machine, appliance, or other mechanical device operated by currency, token, debit card, credit card, or any other form of payment that is designed or used for vending purposes, including, but not limited to, machines or devices that use remote control locking mechanisms.~~

5.91.020 - Tobacco retailer license required.

- A. It shall be unlawful for any person to act as a tobacco retailer without first obtaining and maintaining a valid tobacco retailer's license pursuant to this chapter for each location at which that activity is to occur. Tobacco retailing without a valid tobacco retailer's license is a public nuisance, as defined in the Oakland Municipal Code. This chapter applies to all existing and future tobacco retailers in the city. The City Administrator shall have power to adopt rules of procedure and regulations not inconsistent with the provisions of this chapter for the purpose of carrying out the provisions of this chapter; and a copy of such

rules of procedure and regulations shall be on file and available for public examination at the Department.

- B. A tobacco retailer or proprietor without a valid tobacco retailer license, including without limitation a person whose license has been suspended or revoked:
 - 1. Shall keep all tobacco products and tobacco paraphernalia out of public view. The public display of tobacco products or tobacco paraphernalia in violation of this provision shall constitute tobacco retailing without a license under Section 5.91.130.
 - 2. Shall not display any advertisement relating to tobacco products or tobacco paraphernalia that promotes the sale or distribution of such products from the tobacco retailer's location or that could lead a reasonable consumer to believe that such products can be obtained at that location.
- C. Nothing in this chapter shall be construed to grant any person obtaining and maintaining a tobacco retailer's license any status or right other than the right to act as a tobacco retailer at the location in the city identified on the face of the license. For example, nothing in this chapter shall be construed to render inapplicable, supersede, or apply in lieu of, any other provision of applicable law, including but not limited to, any provision of this Code, the Oakland Planning Code, including the conditional use permit, if applicable, or any condition or limitation on smoking in an enclosed place of employment pursuant to California Labor Code section 6404.5. For example, obtaining a tobacco retailer license does not make the retailer a "retail or wholesale tobacco shop" for the purposes of California Labor Code section 6404.5.

5.91.030 - Limits on tobacco retailer licenses.

- A. Fixed Location Requirement. No license may issue to authorize tobacco retailing at other than a fixed location. For example, tobacco retailing by persons on foot or from vehicles is prohibited.
- B. No Drug Paraphernalia. No license may issue to authorize tobacco retailing at any location where drug paraphernalia is sold, offered for sale, or displayed for sale.
- C. No Sale of Flavored Tobacco Products.
 - 1. It shall be a violation of this Chapter for any tobacco retailer or any of the tobacco retailer's agents or employees to sell or offer for sale, or to possess with intent to sell or offer for sale, any flavored tobacco product.
 - 2. There is a rebuttable presumption that a tobacco product is a flavored tobacco product if a tobacco retailer,

manufacturer, or any employee or agent of a tobacco retailer or manufacturer has:

- a. Made a public statement or claim that the tobacco product has or produces a characterizing flavor, including, but not limited to, text and/or images on the product's labeling or packaging that are used to explicitly or implicitly communicate information about the flavor, taste, or aroma of a tobacco product.
 - b. Taken actions directed to consumers that would be reasonably expected to result in consumers believing that the tobacco product imparts a characterizing flavor.
- ~~3. Exemption for "tobacco stores." This Section does not apply to the sale or offer for sale of flavored tobacco products by a "tobacco store" D. Pharmacies. No license may issue, and no existing license may be renewed, to authorize tobacco retailing in a pharmacy. For the purposes of this subsection, "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.~~

5.91.040 - Posting full retail price; discounts prohibited; minimum price; minimum pack size.

- A. A tobacco retailer shall prominently display the full retail price of all cigarettes and other tobacco products offered for sale, at the point of display or at the point of sale.
- B. Notwithstanding any other provision of this chapter, no tobacco retailer shall:
 1. Honor or redeem, or offer to honor or redeem, a coupon to allow a consumer to purchase tobacco products for less than the full retail price.
 2. Sell, or offer for sale, any tobacco products to a consumer through a multi-package discount or otherwise provide any tobacco products to a consumer for less than the full retail price in exchange for the purchase of any other tobacco products, or any other item by the consumer.
 3. Provide any free or discounted item to a consumer in consideration for the purchase of tobacco products at full retail price.
 4. Sell, or offer for sale, a tobacco product to a consumer for less than full retail price; provided, however, that this subsection 4. does not prohibit a tobacco retailer from changing the full retail price or informing consumers that the full retail price has changed.

C. No tobacco retailer shall sell to a consumer any of the following:

1. A little cigar unless it is sold in a package of at least twenty little cigars;
2. Cigarettes at a price that is less than \$8.00 per package of 20 cigarettes, including all applicable taxes and fees;
3. Little cigars at a price that is less than \$8.00 per package of little cigars, including all applicable taxes and fees; or
4. Cigars at a price that is less than \$8.00 for a single cigar or package of cigars, including all applicable taxes and fees.

D. The minimum prices established in this section 5.91.040 shall be adjusted annually (percent change in the annual average, not seasonally adjusted) by the department in proportion with the Consumer Price Index: all urban consumers for all items for the San Francisco–Oakland– Hayward statistical area as reported by the United States Bureau of Labor Statistics or any successor to that index.

5.91.050 - Application procedure.

Application for a tobacco retailer's license shall be submitted in the name of each proprietor proposing to conduct retail tobacco sales and shall be signed by each proprietor or an authorized agent thereof, and shall include the license application fee set forth under Section 5.91.090.

It is the responsibility of each proprietor to be informed regarding all laws applicable to tobacco retailing, including those laws affecting the issuance of a tobacco retailer's license. No proprietor may rely on the issuance of a license as a determination by the city that the proprietor has complied with all laws applicable to tobacco retailing. A license issued contrary to this chapter, contrary to any other law, or on the basis of false or misleading information supplied by a proprietor shall be revoked pursuant to Section 5.91.120 D. of this chapter. Nothing in this chapter shall be construed to vest in any person obtaining and maintaining a tobacco retailer's license any status or right to act as a tobacco retailer in contravention of any provision of law.

All applications shall be submitted on a form supplied by the Department and shall contain, at a minimum, the following information:

- A. The name, address, telephone number, driver's license or similar identification, including date of birth, of each proprietor of the business that is seeking a license.
- B. The business name, address, telephone number and business hours of the single fixed location for which a license is sought.
- C. If the single fixed location is leased, a copy of the lease and the name of the owner of the single fixed location.

- D. A single name and mailing address authorized by each proprietor to receive all communications and notices (the "authorized address") required by, authorized by, or convenient to the enforcement of this chapter. If an authorized address is not supplied, each proprietor shall be understood to consent to the provision of notice at the business address specified in subsection (B) above.
- E. Proof that the location for which a tobacco retailer's license is sought has been issued a valid state tobacco retailer's license by the California ~~Board of Equalization~~ Department of Tax and Fee Administration.
- F. Whether or not any proprietor or prior proprietor, to the best of applicant's knowledge, has admitted violating, or has been found to have violated, this chapter or whose proprietorship has admitted violating, or has been found to have violated, this chapter, and, if so, the dates and locations of all such violations within the previous six years.
- G. All criminal violations and any prior violations under this chapter of each proprietor or prior proprietor, to the best of applicant's knowledge.
- H. Such other information as the Department deems necessary for the administration or enforcement of this chapter.
- I. All information required to be submitted in order to apply for a tobacco retailer's license shall be updated with the Department whenever the information changes. A tobacco retailer shall provide the Department with any updates within ten (10) business days of a change.
- J. A copy of the major conditional use permit, if applicable (or an explanation as to why such permit is not required).
- K. A statement signed by each proprietor that no drug paraphernalia is or will be sold at the business seeking the license.

5.91.060 - Issuance of license.

Upon the receipt of an application for a tobacco retailer's license and the license fee required by this chapter, the Department shall issue a license unless substantial evidence demonstrates that one or more of the following bases for denial exists:

- A. The information presented in the application is incomplete, inaccurate, or false. Intentionally supplying inaccurate or false information shall be a violation of this chapter.
- B. The application seeks authorization for tobacco retailing at a location for which this chapter prohibits issuance of tobacco retailer licenses. However, this paragraph shall not constitute a basis for denial of a license if the applicant provides the city with documentation demonstrating by clear and convincing

evidence that the applicant has acquired or is acquiring the location or business in an arm's length transaction.

- C. The application seeks authorization for tobacco retailing for a proprietor to whom this chapter prohibits a license to be issued.
- D. The application seeks authorization for tobacco retailing that is prohibited pursuant to this chapter (e.g., mobile vending), that is unlawful pursuant to any provision of this Code, or that is unlawful pursuant to any other law.
- E. The Department, or the investigating official acting thereon, determines, in its reasonable discretion, that the applicant is not a fit and proper person, either for financial, moral, or other reasons, to conduct or maintain the business, establishment, place, or other thing, to which the application pertains; that the applicant has not complied with the provisions of this code which pertain directly to the maintenance or conduct of the business, establishment, place, or other thing in question or for the violation of any law appertaining thereto; or for any other reason herein-after in this chapter more specifically set forth. In granting or denying the license, the Department shall consider the character of the applicant with respect to morality, honesty and integrity, and all pertinent acts which may concern the health, safety, and general welfare of the public.
- F. A denial of a license application shall be in writing, citing the reasons for such denial and shall be appealable to the City Administrator per the appeal provisions set forth in Section 5.91.120 of this chapter.

5.91.070 - License renewal and expiration.

- A. **Renewal of License.** A tobacco retailer license is invalid unless the appropriate fee has been paid in full and the term of the license has not expired. All prior year's fines and fees must be paid in full for license renewal unless otherwise agreed upon by the city and licensee. The term of a tobacco retailer license is one (1) calendar year running from January 1—December 31. Each tobacco retailer shall annually apply for the renewal of his or her tobacco retailer's license and submit the license fee no later than thirty (30) days prior to expiration of the license term.
- B. **Expiration of License.** A tobacco retailer's license that is not timely renewed shall expire at the end of its term. To reinstate a license that has expired, or to renew a license not timely renewed pursuant to subsection (A), the proprietor must:
 - 1. Submit the license fee plus a reinstatement fee of ten percent (10%) of the license fee.
 - 2. Submit a signed affidavit affirming that the proprietor:

- (i) has not sold and will not sell any tobacco product or tobacco paraphernalia after the license expiration date and before the license is renewed; or
- (ii) has waited the appropriate ineligibility period established for tobacco retailing without a license, as set forth in Section 5.91.150 A. of this chapter, before seeking renewal of the license.

5.91.080 - Licenses are not transferable.

- A. A tobacco retailer's license may not be transferred from one person to another or from one (1) location to another. Whenever a tobacco retailing location has a change in proprietors a new tobacco retailer's license is required and will be subject to the application and licensing requirements as provided in Sections 5.91.020 and 5.91.050.
- B. Notwithstanding any other provision of this chapter, prior violations at a location shall continue to be counted against a location and license ineligibility periods shall continue to apply to a location unless:
 - 1. The location has been fully transferred to a new proprietor or fully transferred to entirely new proprietors; and
 - 2. The new proprietor(s) provide the city with clear and convincing evidence that the new proprietor(s) have acquired or is acquiring the location in an arm's length transaction.

5.91.090 - Fees for license.

- A. Amount of Fees. The application fee shall be fifty dollars (\$50.00) and the licensing and renewal fee shall be one thousand five hundred dollars (\$1,500.00), or the application, licensing and renewal fees may be provided by amendments to the city's master fee schedule. The fees shall be calculated so as to recover the total cost of both license administration and license enforcement, including, for example, issuing the license, administering the license program, retailer education, retailer inspection and compliance checks, documentation of violations, and prosecution of violators, but shall not exceed the cost of the regulatory program authorized by this Chapter. All fees shall be used exclusively to fund the program, and shall be separately accounted for. Fees are nonrefundable except as may be required by law.
- B. Fees Due and Payable. The application fee is due and payable at the time the application is submitted to the city. All licensing and renewal fees shall be due and payable to the city as determined by the Department. The amount of fees shall be deemed a debt to the city. An action may be commenced in the name of the city in any court of competent jurisdiction for the amount of any delinquent fees. An action to collect the fee must be commenced within three (3) years of the date the fee becomes due. An action to collect the penalty for nonpayment of

the fee must be commenced within three (3) years of the date the penalty accrues. The city is entitled to recover its attorney's fees and costs pertaining to any action to delinquent fees plus interest at the rate specified by law if the city is the prevailing party.

- C. Fees Assessed Against the Business Property. The amount of fee, penalty and interest imposed under the provisions of this Chapter may be assessed against the business property on which the fee is imposed in those instances where the proprietor of the business and the business property are one (1) and the same. If the fees are not paid when due, such fee, penalty and interest shall constitute an assessment against such business property and shall be a lien on the property for the amount thereof, which lien shall continue until the amount thereof including all penalties and interest are paid, or until it is discharged of record.
- D. Tobacco Retailers Subject to Deemed Approved Alcoholic Beverage Sale Regulations. Any tobacco retailer subject to annual inspection fees for alcoholic beverage retail establishments as set forth in the master fee schedule shall not pay licensing and renewal fees under this Chapter. Such tobacco retailer, however, shall apply for a tobacco retailer's license and pay the application fee set forth under paragraph A. of this Section. Further, if during the course of the calendar year a tobacco retailing location has a change in proprietors, the new tobacco license is subject to the application and licensee fee as required in Section 5.91.090 A. as tobacco licenses are not transferable pursuant to Section 5.91.080.

5.91.100 - Other requirements and prohibitions.

- A. Lawful Business Operation. In the course of tobacco retailing or in the operation of the business or maintenance of the location for which a license issued, it shall be a violation of this chapter for a licensee, or any of the licensee's agents or employees, to:
 - 1. Violate any local, state, or federal law applicable to tobacco products, tobacco paraphernalia, tobacco retailing, or smoking, including without limitation Oakland Municipal Code Chapter 8.30.
 - 2. Violate any local, state, or federal law regulating exterior, storefront, window, or door signage.
 - 3. Violate any local, state or federal law regulating the sale, offer for sale, or display for sale, of any drug paraphernalia.
 - 4. Operate in any manner that adversely affects the health, safety or welfare of persons residing or working in the surrounding area, or in any manner that constitutes a public nuisance.
 - 5. Violates any local or state law regulating the sale of cannabis including but not limited to Business and Professions Code Section 26054 (which

provides that nonmedical cannabis licensees shall not also be licensed as a retailer of tobacco products).

- B. Display of License. Each tobacco retailer license shall be prominently displayed in a publicly visible location at the licensed location.
- C. Positive Identification Required. No person engaged in tobacco retailing shall sell or transfer a tobacco product or tobacco paraphernalia to another person who ~~appears to be~~ is under the age of ~~thirty (30) twenty-seven (27)~~ years without first examining the identification of the recipient to confirm that the recipient is at least the minimum age for sale of under state law to purchase and possess the tobacco products or tobacco paraphernalia as established by the more restrictive of federal, state, or local law. (currently set at age of twenty one (21) years, except in the case of active duty military personnel at least eighteen (18) years of age and in possession of military identification).
- D. Minimum Age for Persons Selling Tobacco. No person who is younger than eighteen (18) years of age shall engage in tobacco retailing.
- E. Self-Service Displays Prohibited. No tobacco retailer shall display tobacco products or tobacco paraphernalia by means of a self-service display or engage in tobacco retailing by means of a self-service display.
- F. On-site Sales. All sales of tobacco products and tobacco paraphernalia to consumers shall be conducted in-person at the licensed location. It shall be a violation of this chapter for any tobacco retailer or any of the tobacco retailer's agents or employees to deliver tobacco products or tobacco paraphernalia or to knowingly or recklessly sell tobacco products or tobacco paraphernalia to any person that intends to deliver the tobacco product or tobacco paraphernalia to a consumer in the city. For the purposes of this subsection, "deliver" means the commercial transfer of tobacco products or tobacco paraphernalia to a consumer at a location not licensed pursuant to this chapter.

5.91.110 - Compliance monitoring.

- A. Compliance with this Chapter shall be monitored by the Department and/or by such other city agency, department, or division as may be designated by the City Administrator. Any peace officer may enforce the penal provisions of this Chapter.
- B. Nothing in this chapter shall create a right of action in any tobacco retailer licensee or other person against the city or its agents.
- C. Compliance checks shall determine, at a minimum, if the tobacco retailer is conducting business in a manner that complies with tobacco laws regulating youth access to tobacco. When appropriate, the compliance checks shall determine compliance with other laws applicable to tobacco retailing.

D. The Department shall conduct compliance checks for each tobacco retailer at least once per twelve (12) month period and shall conduct a follow-up compliance check of a non-compliant tobacco retailer within three (3) months of any violation of this chapter. All compliance checks shall be subject to the Department having adequate staffing capacity to conduct the compliance checks. The results of all compliance checks shall be published by the Department at least annually and made available to the public upon request.

5.91.120 - Denial or revocation of license.

- A. Denial or Revocation of License. In addition to any other penalty authorized by law or this Chapter, a proprietor's application shall be denied by the Department or a tobacco retailer's license shall be revoked by the city administrator as in his or her discretion may seem just, for any reason for which a granting of such license might be lawfully denied, or for any other reason hereinafter in this chapter specifically provided including, but not limited to, any violation of law designated in Section 5.91.100 A. of this Chapter. An appeal of a denial or a revocation of a license under this chapter shall be made only upon a hearing held before the City Administrator after ten (10) days written notice by U.S. mail to such proprietor applying for the license or tobacco retailer's license holder, as applicable, stating generally the grounds of complaint against him or her and stating the time and place where such hearing will be held. In the event of revocation of the license, any certificate issued in connection with the granting of such license shall, by the holder thereof, be forthwith surrendered to the City Administrator.
- B. Hearings on Revocation of License or Appeal of Denial. Any investigation, inquiry or hearing which the City Administrator has power to undertake or to hold may be undertaken or held by such member of the City Administrator's staff as he or she may designate and to whom the matter is assigned. The person to whom a matter is assigned shall be deemed a "Hearing Officer." In any matter so assigned the Hearing Officer conducting the investigation, inquiry or hearing shall report, within thirty (30) days after the conclusion of the investigation, inquiry or hearing his or her findings and recommendations to the City Administrator.
1. Within sixty (60) days after the filing of the findings and recommendations of the Hearing Officer, the City Administrator shall confirm, adopt, modify or set aside the findings of the Hearing Officer and with or without notice enter his or her order, findings, decision or award based upon the record in the case.
 2. In such hearings, investigations, and inquiries by the City Administrator or a Hearing Officer, he or she shall not be bound in the conduct thereof by the common law or statutory rules of evidence and procedure but inquiry shall be made in the manner, through oral testimony and records, which is

best calculated to ascertain the substantial rights of the public parties and carry out justly the spirit and provisions of this chapter.

3. No informality in any proceeding or the manner of taking testimony shall invalidate any other decision, award or rule made as specified in this chapter. No order, decision, award or rule shall be invalidated because of the admission into the record and the use as any proof of any fact in dispute or any evidence not admissible under the common law or statutory rules of evidence and procedure.
- C. Appeals to Superior Court. Any proprietor excepting to any denial of a tobacco retailer license, or any tobacco retailer license holder excepting to any revocation of such license held by him or her pursuant to the provisions of this Chapter, may appeal in writing to the Alameda Superior Court as provided below.
1. Hearing Officer's Decision Final. The Hearing Officer's decision pursuant to Section 5.91.120 B. is final. Parties cannot appeal the decision of a Hearing Officer to the City Council. In every final decision reached under this Section, notice of such final decision shall only be given directly to the respondent and such notice shall explain that California Code of Civil Procedure Section 1094.6 governs the time period for which judicial review of any such final decision must be sought. Final notice to the respondent shall conclude with the following statement:

The city has reached a final decision in the administrative matter pending before the city. If you choose to seek judicial review of the city's final decision in this matter, such action shall be initiated under California Code of Civil Procedure Section 1094.5 and time limits for filing such an action as are set by California Code of Civil Procedure 1094.6.
 2. Superior Court Review. A party may seek judicial review of a final decision of the Hearing Officer by filing a petition for writ of administrative writ of mandate pursuant to California Civil Code Section 1094.5 within the time frames for filing such actions as provided in California Civil Code Section 1094.6.
- D. Revocation of License Issued in Error. A tobacco retailer's license shall be revoked if the Department or City Administrator finds, after the licensee is afforded reasonable notice and an opportunity to be heard, that one or more of the bases for denial of a license under Section 5.91.060 of this chapter existed at the time application was made or at any time before the license issued. The decision by the Department or the City Administrator shall be the final decision of the city. The revocation shall be without prejudice to the filing of a new license application.
- E. New License After Revocation.

1. After revocation for a first violation of this chapter at a location within any sixty (60) month period, no new license may issue for the location until ~~ten~~thirty (30) days have passed from the date of revocation.
2. After revocation for a second violation of this chapter at a location within any sixty (60) month period, no new license may issue for the location until ninety (90) days have passed from the date of revocation.
3. After revocation for a third violation of this chapter at a location within any sixty (60) month period, no new license may issue for the location until ~~ninetyone~~ (90) ~~days~~year has~~ve~~ passed from the date of revocation.
4. After revocation for four or more violations of this chapter at a location within any sixty (60) month period, no new license may issue for the location until five (5) years have passed from the date of revocation.

5.91.130 - Tobacco retailing without a license.

- A. In addition to any other penalty authorized by law, if the Department finds or any court of competent jurisdiction determines, after notice and an opportunity to be heard, that any person has engaged in tobacco retailing at a location without a valid tobacco retailer's license, either directly or through the person's agents or employees, the person shall be ineligible to apply for or be issued a tobacco retailing license for that location as follows:
 1. After a first violation of this section at a location within any sixty (60) month period, no new license may issue for the person at the location until thirty (30) days have passed from the date of the violation.
 2. After a second violation of this section at a location within any sixty (60) month period, no new license may issue for the person at the location until ninety (90) days have passed from the date of the violation.
 3. After of a third or subsequent violation of this section at a location within any sixty (60) month period, no new license may issue for the person at the location until five (5) years have passed from the date of the violation.
- B. Tobacco products and tobacco paraphernalia offered for sale or exchange in violation of this chapter are subject to seizure by the Department or any peace officer and shall be forfeited after the licensee and any other owner of the tobacco products or tobacco paraphernalia is given reasonable notice and an opportunity to demonstrate that the products were not offered for sale or exchange in violation of this chapter. The decision by the Department may be appealed pursuant to the procedures set forth in Section 5.91.120 C. Forfeited tobacco products and tobacco paraphernalia shall be destroyed by the Department.
- C. For the purposes of the civil remedies provided in this chapter:

1. Each day on which a tobacco product, tobacco paraphernalia, or drug paraphernalia is offered for sale in violation of this chapter or
2. Each individual retail tobacco product, and each individual retail item of tobacco paraphernalia or drug paraphernalia that is distributed, sold, or offered for sale in violation of this chapter, whichever is greater, shall constitute a separate violation of this chapter.

5.91.140 - Settlement in lieu of hearing.

For a first or second alleged violation of this chapter within any sixty (60) month period, the City Administrator or authorized designee may engage in settlement negotiations and may enter into a settlement agreement with a tobacco retailer alleged to have violated this chapter without approval from the City Council. Notice of any settlement shall be provided to the Department and no hearing shall be held. The tobacco retailer's license shall be suspended until adoption of this settlement agreement. After the settlement agreement has been adopted, the license shall continue under the same terms prior to the settlement, unless otherwise stated. Settlements shall not be confidential and shall contain the following minimum terms:

- A. After a first alleged violation of this chapter at a location within any sixty (60) month period:
 1. An agreement to stop acting as a tobacco retailer for at least fifteen (15) ~~one~~ days;
 2. A settlement payment to the city of at least one thousand dollars (\$1,000.00); and
 3. An admission that the violation occurred and a stipulation that the violation will be counted when considering what penalty will be assessed for any future violations.
- B. After a second alleged violation of this chapter at a location within any sixty (60) month period:
 1. An agreement to stop acting as a tobacco retailer for at least 45 ~~ten (10)~~ days;
 2. A settlement payment to the city of at least five thousand dollars (\$5,000.00); and
 3. An admission that the violation occurred and a stipulation that the violation will be counted when considering what penalty will be assessed for any future violations.

5.91.150 - Enforcement.

All officials, departments, and employees of the city vested with the authority to issue permits, certificates, or licenses shall adhere to, and require conformance with, this Tobacco Retail Licensing Ordinance.

A. Violations and Penalties.

1. Infractions. Any person who violates, causes, or permits another person to violate any provision of this chapter is guilty of an infraction unless otherwise provided.
2. Separate offenses for each day. Any violator shall be guilty of a separate offense for each and every day during any portion of which any violation of any provision of this chapter is committed, continued, permitted, or caused by such violator and shall be punishable accordingly.
3. Any violation a public nuisance. In addition to the penalties provided in this section, any use or condition caused or permitted to exist in violation of any of the provisions of this chapter shall be and is declared to be a public nuisance and may be summarily abated as such by the city.
4. Injunction as additional remedy. Any violation of any provision of this chapter shall be and is declared to be contrary to the public interest and shall, at the discretion of the city, create a cause of action for injunctive relief.
5. Penalties. Any person convicted of an infraction under the provisions of this section shall be punishable by a fine in the amount specified in Section 5.91.150.G of this chapter ~~to the maximum permitted under Oakland Municipal Code Chapter 1.28~~. Any violation beyond the second conviction within a one-year period may be charged by the District Attorney as a misdemeanor, and the penalty for conviction shall be punishable by a fine in the amount specified by Section 5.91.150.G of this chapter or imprisonment to the maximum permitted under Oakland Municipal Code Chapter 1.28.
6. Liability for expenses. In addition to the punishment provided by law, a violator is liable for such costs, expenses, and disbursements paid or incurred by the city or any of its contractors in correction, abatement, and prosecution of the violation. Reinspection fees to ascertain compliance with previously noticed or cited violations shall be charged against the owner of the tobacco retailer's license. Fees shall be in the amount described in Section 5.91.070 B.1. for charged reinspections. The inspection official shall give the owner or other responsible party of such affected premises a written notice showing the itemized cost of such chargeable service and requesting payment thereof.

In any administrative, civil, or special proceeding to abate a public nuisance pursuant to this chapter, the city may, at the initiation of the

proceeding, seek an award of attorney's fees. If the city seeks an award of attorney's fees, the award shall be made to the prevailing party. Provided however, that no award may be made to a prevailing party that exceeds the amount of reasonable attorney's fees incurred by the city in the action or proceeding.

- B. Enforcement. The city designates the Department to enforce the provisions of this chapter. The City Administrator shall have power to adopt rules of procedure and regulations not inconsistent with the provisions of this chapter for the purpose of carrying out the provisions of this chapter; and a copy of such rules of procedure and regulations shall be on file and available for public examination at the Department.
- C. Inspection and Right of Entry. The Department, or their duly authorized representatives, may enter on any site or into any structure for the purpose of investigation, provided they shall do so in a reasonable manner, whenever they have cause to suspect a violation of any provision of this chapter. An owner or occupant or agent thereof who refuses to permit such entry and investigation shall be guilty of infringing upon the violations and penalties as out- lined in Section 5.91.150 A. and subject to related penalties thereof.
- D. Remedies are Cumulative. The remedies provided by this chapter are cumulative and in addition to any other remedies available at law or in equity.
- E. Youth Decoy Participation. Whenever evidence of a violation of this chapter is obtained in any part through the participation of a person under the age of ~~eighteen~~eighteen~~twenty-one~~ (21~~48~~) years old, such a person shall not be required to appear or give testimony in any civil or administrative process brought to enforce this chapter and the alleged violation shall be adjudicated based upon the sufficiency and persuasiveness of the evidence presented.
- F. No Youth Penalties. The City does not intend and nothing in this chapter shall be interpreted to penalize the purchase, use, possession, or attempted purchase, use, or possession of tobacco products or tobacco paraphernalia by persons under twenty-one (21) years old; provided, however, that persons under twenty-one (21) years old remain subject to generally applicable laws regulating such conduct without respect to the person's age.
- G. Notwithstanding any provision of this chapter:
 - 1. The proprietor(s) of a tobacco retailer shall be subject to a \$1,000 fine if the proprietor(s) violates this chapter; a person is fined for violating this chapter while acting as an agent or employee of the proprietor(s); or a person violates any local, state, or federal law applicable to tobacco retailing while acting as an agent or employee of the proprietor(s). The City shall not

reduce a fine imposed on the proprietor(s) of a tobacco retailer pursuant to this chapter to an amount less than \$500.

2. A person other than a proprietor who violates this chapter is subject to a fine of \$50.
3. The City shall not initiate criminal proceedings against any person other than the proprietor(s) of a tobacco retailer for any alleged violation of this chapter.

SECTION 4. Oakland Municipal Code Chapter 8.34, Tobacco Product Vending Machines, is deleted in its entirety as indicated by strike-through type as provided below.

~~8.34.010 – Title.~~

~~This chapter shall be known as the ordinance to prohibit tobacco product vending machines in areas accessible to persons under twenty one (21) years of age.~~

~~8.34.020 – Findings.~~

~~The City Council of the city finds that:~~

- ~~A. The adverse effects of smoking are well established by studies conducted in the health and medical fields; and~~
- ~~B. The smoke emitted by tobacco products contains over four thousand (4,000) chemicals, many of which are known carcinogens, mutagens, irritants and toxins; and~~
- ~~C. The Surgeon General has identified the smoking of tobacco products as the single most preventable cause of death in our society, accounting for an estimated three hundred ninety thousand (390,000) premature deaths per year in the United States alone; and~~
- ~~D. The smoking of cigarettes and other related products is highly addictive, so that the chances are only one out of twenty (20) that a smoker attempting to quit smoking will succeed; and~~
- ~~E. Minors are generally not informed of the adverse effects of smoking or are led through advertisements and commercial promotions to believe that cigarette smoking will enhance their image or lifestyle; and~~
- ~~F. Tobacco product vending machines provide minors unregulated access to smoking products, increasing the risk of early exposure to smoking which may result in a life-long addiction to tobacco products; and~~
- ~~G. In order to minimize the use of tobacco products by minors it is necessary that an ordinance be adopted which restricts access to tobacco vending machines by minors, in the interest of promoting their health, safety and welfare.~~

~~8.34.030 – Definitions.~~

~~The following words and phrases, whenever used in this Chapter, shall be construed as defined in this section:~~

~~"Person" means an individual, firm, partnership, joint venture, unincorporated association, corporation, estate, trust, trustee, or any other group or combination of the above acting as a unit.~~

~~"Six-month owner" means a person who purchased a tobacco product vending machine with an approved electronic security device fewer than six months prior to the effective date of this Chapter for the purpose of using the machines to sell or distribute tobacco products exclusively within the city of Oakland and who on the effective date of this Chapter was using the vending machines in an area accessible to minors and who has not, or will not have, recovered his or her investment therein by the date on which discontinuance of use is required pursuant to Section 8.34.040B.~~

~~"Tobacco accessories" means cigarette papers or wrappers, pipes, cigarette rolling machines, and any other item designed primarily for the smoking or ingestion of tobacco products.~~

~~"Tobacco product" means any substance containing tobacco leaf, including but not limited to cigarettes, cigars, pipe tobacco, snuff, chewing tobacco, and dipping tobacco.~~

~~"Tobacco product vending machine" means any mechanical or electrical device requiring the insertion of coins or paper bills, or other thing representative of value, to dispense or release a tobacco product and/or tobacco accessories.~~

~~8.34.040 - Prohibition of tobacco product vending machines.~~

~~A. No person shall place, maintain, use, or permit the placement, maintenance, or use, of any tobacco product vending machine ("machine") on his or her premises for the purpose of selling or distributing any tobacco products or tobacco accessories when persons under twenty one (21) years of age have access to the premises.~~

~~B. All machines in use on premises accessible to minors shall be removed within ninety (90) days after the effective date of the ordinance codified in this Chapter except a machine owned by a person who has purchased the machine within six months prior to the effective date of the ordinance codified in this Chapter, and who has applied for and received a use extension based on financial hardship, as described in subsection C of this section.~~

~~C. A use extension shall be granted to an owner of a machine who has purchased such a machine within six months prior to the effective date of this Chapter, upon a showing of financial hardship, determined if all the following are present:~~

- ~~1. That the tobacco product vending machine had been in use in the city in an area accessible to minors on the effective date of this Chapter;~~

- ~~2. That the tobacco product vending machine owner ("owner") had owned the machine for less than six months prior to the effective date of this Chapter;~~
- ~~3. That the owner will not have recovered his or her investment in the machine before the date of required discontinuance; and~~
- ~~4. That the investment not recovered at the date of required discontinuance will exceed ten percent of the actual cost of the machine; and~~
- ~~5. That the machine will be located so as to allow for constant supervision by the owner or a responsible employee.~~

~~The length of the use extension shall be determined by the City Manager or his or her designee, provided that the use extension shall in no event exceed one year from the date of installation of the machine. The owner shall bear the burden of proof on each issue, and the decision of the City Manager or his or her designee shall be final. The City Manager's power to grant a use extension shall expire six months after the effective date of this Chapter.~~

~~8.34.050 - Exemption.~~

- ~~A. A tobacco product vending machine equipped with an approved electronic security device which notifies an adult proprietor, employee, or other adult individual in custody and control of the tobacco vending machine of an impending vending machine transaction, and which requires said proprietor or employees or individual to unlock the vending machine security device before the transaction can be consummated, is exempt from the provisions of Section 8.34.040, provided that the vending machine cannot be accessed without deactivating the security device. The security device shall be on at all times, except when a transaction is made, and must only be turned off for a specific transaction.~~
- ~~B. For the exemption in this section to apply, approval, in the form of a permit, of the electronic security device must be obtained from the City Manager or his or her designee.~~
- ~~C. The fee for such permit is to be established pursuant to the Master Fee Schedule.~~

~~8.34.060 - Enforcement and penalties.~~

- ~~A. Any person who violates or refuses to comply with the provisions of this Chapter shall be guilty of an infraction.~~
- ~~B. Each day such violation is committed or permitted to continue shall constitute a separate offense.~~
- ~~C. Any person convicted of an infraction under the provisions of this Chapter shall be punished upon a first conviction by a fine of not more than one hundred~~

~~dollars (\$100.00) and, for a second conviction within a period of one year, by a fine of not more than two hundred dollars (\$200.00) and, for a third or any subsequent conviction within a one-year period, by a fine of not more than five hundred dollars (\$500.00). Any violation beyond the third conviction within a one-year period may be charged by the City Attorney or the District Attorney as a misdemeanor and the penalty for conviction of the same shall be punishable by a fine of not more than one thousand dollars (\$1,000.00) or by imprisonment in the county jail for a period of not more than six months or by both.~~

~~D. The City Manager or his or her designee shall enforce this Chapter against violations by any of the following actions:~~

- ~~1. Receiving and investigating complaints related to the violation of this Chapter;~~
- ~~2. Serving notice requiring the correction of any violation of this Chapter;~~
- ~~3. Calling upon the City Attorney to maintain an action for injunction to enforce the provisions of this Chapter and to cause the correction of any such violation through all appropriate equitable and legal means.~~

8.34.070 – Severability.

~~This chapter shall be enforced to the full extent of the authority of the city. If any section, subsection, paragraph, sentence or word of this Chapter is deemed to be invalid or beyond the authority of the city, either on its face or as applied, the invalidity of such provision shall not affect the other sections, subsections, paragraphs, sentences or words of this Chapter, and the applications thereof; and to that end the section, subsections, paragraphs, sentences and words of this Chapter shall be deemed severable.~~

SECTION 5. General Provisions.

- A. If any section, subsection, sentence, clause or phrase of this Ordinance is for any reason held to be invalid or unconstitutional by decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of the Chapter. The City Council hereby declares that it would have passed this Ordinance and each section, subsection, clause or phrase thereof irrespective of the fact that one or more other sections, subsections, clauses or phrases may be declared invalid or unconstitutional.
- B. No Conflict with State or Federal Law. Nothing in this ordinance shall be Interpreted or applied so as to create any requirement, power, or duty in conflict with any federal or state law.

C. Undertaking for the General Welfare. In adopting and implementing this ordinance, the City of Oakland is assuming an undertaking only to promote the general welfare. It is not assuming, nor is it imposing in its officers and employees, and obligation for breach of which it is liable in money damages to any person who claims that such breach proximately caused injury.

SECTION 6. California Environmental Quality Act

This ordinance is exempt from the California Environmental Quality Act (CEQA) under CEQA Guidelines Sections 15060(c)(2) (no direct or reasonably foreseeable indirect physical change in the environment), and 15061 (b)(3) (no environmental impact).

SECTION 7. Effective Date.

This ordinance shall become effective ninety days after the date of final adoption by the City Council.

IN COUNCIL, OAKLAND, CALIFORNIA,

PASSED BY THE FOLLOWING VOTE:

AYES - FORTUNATO BAS, GALLO, GIBSON MCELHANEY, KALB, REID, TAYLOR, THAO AND PRESIDENT KAPLAN

NOES –

ABSENT –

ABSTENTION –

ATTEST: _____
LATONDA SIMMONS
City Clerk and Clerk of the Council of the City of
Oakland, California

Date of Attestation: _____

