



City of Palo Alto

City Council Staff Report

(ID # 8348)

Report Type: Consent Calendar

Meeting Date: 9/18/2017

Summary Title: Approval of an Ordinance Establishing a Permitting Program for Tobacco Retailers

Title: Adoption of an Ordinance Establishing a Permitting Program for Tobacco Retailers to be Administered by Santa Clara County (PW)

From: City Manager

Lead Department: Public Works

Recommendation

Staff recommends that Council approve a Palo Alto ordinance (Attachment A) establishing a permitting program for tobacco retailers to be administered by Santa Clara County.

Background

Council approved an agreement with Santa Clara County (County) in December 2016 ([CMR #7371](#)) in which the County agreed to administer a permit program in Palo Alto for retailers selling tobacco products, including e-cigarettes. More than 100 cities and counties in California have similar permit programs that prohibit tobacco sales to underage persons and other related ordinance requirements. County staff is motivated to run this program, but must have the Palo Alto ordinance be essentially the same as the County ordinance (which governs unincorporated areas) to avoid confusion.

Discussion

The proposed Palo Alto ordinance would:

1. Effective July 1, 2018, require:
 - a. all tobacco retailers to have a Tobacco Retail Permit;
 - b. after initial permits are issued, prohibit the transfer of the permit when a business changes hands to the new owner (new owners must obtain a new permit and permits will not be re-issued to new owners)

if stores are within 1,000 feet of a school, or 500 feet of an existing tobacco retailer).

c. prohibit pharmacies from selling tobacco products;

2. Effective January 1, 2019, other requirements would go into effect including:

a. discontinued sales of flavored tobacco products;

b. limits on storefront advertising of tobacco products.

A key provision is the state-wide smoking age requirement of 21. This is the only permit provision for which an annual sting-type inspection will be conducted by Palo Alto Police Department. The other provisions of the Palo Alto ordinance and permits will be inspected by the County. If formal enforcement action is needed for any provision, Palo Alto would take that action.

Of all the new provisions, the one generating the most comments is the change of ownership provision. Some small businesses believe the monetary value of their businesses will be significantly reduced if a buyer cannot sell tobacco products.

This ordinance will also repeal the City's existing regulations on tobacco vending machines and replace them with the County's ban on tobacco vending machines.

Resource Impact

The County will administer the permit program and the collection of fees to cover costs and take the lead on general outreach efforts. Public Works and Palo Alto Police Department can accommodate the small additional costs related to enforcement.

Policy Implications

The proposed Ordinance is consistent with existing Policies and Palo Alto's "Healthy City" goal.

Environmental Review

The ordinance does not constitute a Project under CEQA.

Attachments:

- Attachment A: Ordinance of the Council of the City of Palo Alto Repealing Section 9.14.080 and Adding Chapter 4.64 to Regulate the Sale of Tobacco Products

- Attachment B: Staff Report 7371 - Approval of an Agreement With the County of Santa Clara With Respect to a Tobacco Retailer Permit Program

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Ordinance No. _____

Ordinance of the Council of the City of Palo Alto Repealing Section 9.14.080 (Location of Tobacco Vending Machines) and Adding Chapter 4.64 to Title 4 (Business Licenses and Regulations) to Regulate the Sale of Tobacco Products

The Council of the City of Palo Alto does ORDAIN as follows:

SECTION 1. Findings and Recitals. The Council of the City of Palo Alto finds and declares as follows:

A. The California Legislature has recognized smoking as “the single most important source of preventable disease and premature death in California.” (Health and Safety Code section 118950(a)(1)).

B. In 2016, the State of California raised the minimum age to purchase or consume tobacco products (including through electronic vaporizing devices) from 18 to 21.

C. Researchers at Stanford University School of Medicine have found that teens’ exposure to tobacco advertising at retail outlets substantially increases the odds they will start smoking.

D. The County of Santa Clara reported that, in Palo Alto, the percentage of stores found to be selling tobacco to minors rose from 5.5% in 2013 to 15.3% in 2014 (4 of 26 stores in 2014).

E. The State of California’s Cigarette and Tobacco Products Licensing Act of 2003 allows local licensing laws for tobacco sales. (Business and Professions Code section 22971.3).

F. The County of Santa Clara has adopted a tobacco retail permit program in order to encourage responsible retailing of tobacco products and to deter the sale and distribution of tobacco products to persons under 21. (County of Santa Clara Ordinance Code, Title A, Division A18 (§ A18-367 et seq.)).

G. On December 5, 2016, the City Council approved an agreement with the County of Santa Clara to administer a tobacco retail permit system in the City, pending the passage of a retail permit ordinance.

H. The City desires to protect the public health, safety, and welfare by discouraging the sale and distribution of tobacco products to persons under 21.

I. In order to protect the public health, safety, and welfare, the City Council desires to amend Palo Alto Municipal Code, Title 4 to add a new chapter 4.64 to regulate the sale of tobacco products.

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SECTION 2. Title 4 (Business Licenses and Regulations) is hereby amended to add new Chapter 4.64 to read as follows:

Chapter 4.64 Permits for retailers of tobacco products.

4.64.010 Intent.

(a) This Chapter is adopted to:

- (1) Ensure compliance with the business standards and practices of the City;
- (2) Encourage responsible retailing of tobacco products;
- (3) Discourage violations of laws related to tobacco products, especially those that prohibit or discourage the sale or distribution of tobacco products to persons under 21; and
- (4) Protect the public health and welfare.

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

4.64.020 Definitions.

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

- (a) "Arm's length transaction" means a sale in good faith and for valuable consideration that reflects the fair market value in the open market between two or more informed and willing parties, neither of which is under any compulsion to participate in the transaction. A sale between relatives, related companies or partners, or a sale for which a significant purpose is avoiding the effect of the violations of this Chapter is not an arm's length transaction.
- (b) "Designee" means the agency selected or designated by the City to enforce and/or administer the provisions of this Chapter.
- (c) "Ownership" means possession of a ten percent or greater interest in the stock, assets, or income of a business, other than a security interest for the repayment of debt.
- (d) "School" means a public or private elementary, middle, junior high or high school.
- (e) "Tobacco product" means:
 - (1) Any product subject to: 21 U.S.C. § 387 *et seq.* ("Subchapter IX") of the Federal Food, Drug, and Cosmetic Act (See 21 U.S.C. § 387a(b)) ("products subject to Subchapter IX"); or 21 C.F.R. §§ 1100.1- 1100.3 ("tobacco products subject to Subchapter IX"). Products subject to Subchapter IX include, but are not limited to, cigarettes, cigarette tobacco, roll-your-own tobacco, smokeless tobacco, cigars, pipe tobacco, waterpipe tobacco, and electronic nicotine delivery systems (such as, but not limited to, electronic cigarettes, electronic cigars, electronic hookahs, vape pens, personal vaporizers, and electronic pipes). Products subject to Subchapter IX also include components or parts of tobacco products, such as, but not limited to, liquids that are for use in an electronic nicotine delivery system and that contain tobacco or nicotine or are derived from tobacco or nicotine ("e-liquids"), vials that contain e-liquids, and atomizers. Products that are not subject to Subchapter IX include accessories of tobacco products, such as, but not limited to, ashtrays, spittoons, and conventional matches and lighters that solely provide an external heat source to initiate but not maintain combustion of a tobacco product.

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(2) Any product for use in an electronic nicotine delivery system, whether or not it contains tobacco or nicotine or is derived from tobacco or nicotine.

- (f) "Retailer" means any person who sells, exchanges, or offers to sell or exchange, for any form of consideration, tobacco products. "Retailing" shall mean the doing of any of these things. This definition is without regard to the quantity of tobacco products sold, exchanged, or offered for sale or exchange.

4.64.030 Requirements and prohibitions.

- (a) Permit required. It shall be unlawful for any person to act as a retailer of tobacco products in the City without first obtaining and maintaining a valid retailer permit pursuant to this Chapter for each location at which that activity is to occur. Tobacco product retailing without a valid tobacco retailer permit is a nuisance as a matter of law.
- (b) Lawful business operation. It shall be a violation of this Chapter for any retailer to violate any local, state, or federal law applicable to tobacco products or the retailing of such products.
- (c) Display of permit. Each current retailer permit shall be prominently displayed in a publicly visible place at the permitted location.
- (d) Notice of minimum age for purchase of tobacco products. Retailers shall post conspicuously, at each point of purchase, a notice stating that selling tobacco products to anyone under 21 years of age is illegal and subject to penalties. Such notice shall be subject to the approval of the City or its Designee.
- (e) Positive identification required. No retailer shall sell or transfer a tobacco product to another person who appears to be under 30 years of age without first examining the customer's identification to confirm that the customer is at least the minimum age required under state law to purchase and possess the tobacco product.
- (f) False and misleading advertising prohibited. A retailer either without a valid retailer permit or with a suspended retailer permit:
- (1) Shall keep all tobacco products out of public view.
 - (2) Shall not display any advertisement relating to tobacco products that promotes the sale or distribution of such products from the retailer's location or that could lead a reasonable consumer to believe that tobacco products can be obtained at that location.
- (g) Limitation on storefront advertising. No more than 15 percent of the square footage of the windows and clear doors of an establishment used for retailing shall bear advertising or signs of any sort, and all advertising and signage shall be placed and maintained in a manner that ensures that law enforcement personnel have a clear and unobstructed view of the interior of the premises, including the area in which the cash registers are maintained, from the exterior public sidewalk or entrance to the premises. However, this latter requirement shall not apply to an establishment where there are no windows, or where existing windows are located at a height that precludes a view of the interior of the premises by a person standing outside the premises.
- (h) Flavored tobacco products.
- (1) Except as permitted in paragraph (3) of this subsection (h), no retailer shall sell a tobacco product containing, as a constituent or additive, an artificial or natural flavor or aroma (other than tobacco) or an herb or spice, including strawberry, grape, orange,

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clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, or coffee, that is a characterizing flavor or aroma of the tobacco product, smoke or vapor produced by the tobacco product.

- (2) A tobacco product shall be subject to a rebuttable presumption that the product is prohibited by paragraph (1) of this subsection (h) if:
 - (A) The product's manufacturer or any other person associated with the manufacture or sale of tobacco products makes or disseminates public statements or claims to the effect that the product has or produces a characterizing flavor or aroma, other than tobacco; or
 - (B) The product's label, labeling, or packaging includes a statement or claim—including any text and/or images used to communicate information—that the product has or produces a characterizing flavor or aroma other than tobacco.
- (3) Paragraph (1) of this subsection (h) shall not apply to any retailer that meets all of the following criteria:
 - (A) Primarily sells tobacco products;
 - (B) Generates more than 60 percent of its gross revenues annually from the sale of tobacco products;
 - (C) Does not permit any person under 21 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 Family Code;
 - (D) Does not sell alcoholic beverages or food for consumption on the premises; and
 - (E) Posts a sign outside the retail location that clearly, sufficiently, and conspicuously informs the public that persons under 21 years of age are prohibited from entering the premises.
- (i) Vending machines prohibited. No tobacco product shall be sold, offered for sale, or distributed to the public from a vending machine or appliance, or any other coin or token operated mechanical device designed or used for vending purposes, including, but not limited to, machines or devices that use remote control locking mechanisms.
- (j) Prohibition on sale or distribution of tobacco products to persons under 21 years. No retailer shall sell, offer for sale, or distribute any tobacco product to any individual who is under 21 years of age.

4.64.040 Eligibility requirements for a permit.

- (a) No retailer permit may be issued to authorize retailing at other than a fixed location. For example, retailing by persons on foot or from vehicles is prohibited.
- (b) No retailer permit may be issued to authorize retailing at a temporary or recurring temporary event. For example, retailing at flea markets and farmers' markets is prohibited.
- (c) No retailer permit may be issued to authorize retailing at any location where 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 drugs are offered for sale.
- (d) No retailer permit may be issued to authorize retailing at any location within 1,000 feet of a school, as measured by a straight line between any point along the property line of any parcel on which a school is located and any point along the perimeter of the applicant's

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proposed business location; provided, however, that the prohibition contained in this subsection (d) shall not apply to the following:

- (1) Any retailer of tobacco products operating lawfully on the date immediately prior to this Chapter becoming effective; and
 - (2) Any lawfully operating retailer of tobacco products that would otherwise become ineligible to receive or renew a retailer permit due to the creation or relocation of a school.
- (e) No retailer permit may be issued to authorize retailing at a location which is within 500 feet of a location occupied by another retailer, as measured by a straight line between any point along the perimeter of an existing retailer's business location and any point along the perimeter of the applicant's proposed business location, provided, however, that the prohibition contained in this subsection (e) shall not apply to existing retailers of tobacco products operating lawfully on the date immediately prior to this Chapter becoming effective.
- (f) Any exemption granted to a retailer pursuant to this Chapter shall cease to apply upon the earlier of the following to occur:
- (1) The retailer fails to timely renew the retailer permit pursuant to this Chapter.
 - (2) A new person obtains ownership in the business.

4.64.050 Application procedure.

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

4.64.060 Issuance of permit.

- (a) Upon the receipt of a complete application for a retailer permit, the application fee, and the annual permit fee, the City or its Designee shall issue a retailer permit unless substantial evidence demonstrates that one or more of the following bases for denial exists:
 - (1) The information presented in the application is inaccurate or false.
 - (2) The application seeks authorization for retailing at a location for which this Chapter prohibits issuance of a retailer permit.

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- (3) The application seeks authorization for retailing by a person to whom this Chapter prohibits issuance of a retailer permit.
- (4) The application seeks authorization for retailing that is prohibited pursuant to this Chapter (e.g., mobile vending) or that is unlawful pursuant to any other law.
- (b) A retailer permit shall be revoked if the City or its Designee finds that one or more of the bases for denial of a retailer permit under this Chapter existed at the time application was made or at any time before the retailer permit issued. Such a revocation shall be without prejudice to the filing of a new permit application.
- (c) A decision to deny issuance of a retailer permit or to revoke a retailer permit that has been wrongly issued may be appealed pursuant to this Chapter.

4.64.070 Permit term, renewal, and expiration.

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

4.64.080 Permits nontransferable.

- (a) A retailer permit may not be transferred from one person to another or from one location to another. Whenever a new person obtains ownership in a business for which a retailer permit has been issued, a new retailer permit shall be required, but any exemption granted pursuant to Section 4.64.040(d) or (e) shall cease to apply.
- (b) Notwithstanding any other provision of this Chapter, prior violations of this Chapter at a location shall continue to be counted against a location and permit ineligibility and suspension periods shall continue to apply to a location unless:
 - (1) One hundred percent of the interest in the stock, assets, or income of the business, other than a security interest for the repayment of debt, has been transferred to one or more new owners; and
 - (2) The City or its Designee is provided with clear and convincing evidence, including an affidavit, that the business has been acquired in an arm's length transaction.

4.64.090 Permit conveys a limited, conditional privilege.

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Nothing in this Chapter shall be construed to grant any person obtaining and maintaining a retailer permit any status or right other than the limited, conditional privilege to act as a retailer at the location in the City identified on the face of the permit.

4.64.100 Fees.

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

4.64.110 Compliance monitoring.

- (a) Compliance with this Chapter shall be monitored by the City or its Designee. In addition, any peace officer may enforce the penal provisions of this Chapter. The City Manager may designate any number of additional persons to monitor and facilitate compliance with this Chapter.
- (b) The City or its Designee shall check each retailer at least once per 12-month period to determine if the retailer is complying with all laws applicable to retailing, other than those laws regulating underage access to tobacco products. Nothing in this paragraph shall create a right of action in any retailer or other person against the City or its agents.

4.64.120 Prevention of underage sales.

- (a) The City or its Designee shall check each retailer to determine whether the retailer is conducting business in a manner that complies with laws regulating youth access to tobacco products. Nothing in this paragraph shall create a right of action in any retailer or other person against the City or its agents.
- (b) The City or its Designee shall not enforce any law establishing a minimum age for tobacco product purchases against a person who otherwise might be in violation of such law because of the person's age ("Youth Decoy") if the potential violation occurs when:
 - (1) The Youth Decoy is participating in a compliance check supervised by a peace officer or a code enforcement official of the City or its Designee;
 - (2) The Youth Decoy is acting as an agent of a person designated by the City or its Designee to monitor compliance with this Chapter; or
 - (3) The Youth Decoy is participating in a compliance check funded in part, either directly or indirectly through subcontracting, by the City, or the California Department of Public Health.

4.64.130 Penalties for a violation by a retailer with a permit.

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- (a) In addition to any other penalty authorized by law, an administrative fine shall be imposed and a retailer permit shall be suspended if any court of competent jurisdiction determines, or the City or its Designee finds based on a preponderance of the evidence, after the retailer is afforded notice and an opportunity to be heard, that the retailer, or any of the retailer's agents or employees, has violated any of the requirements, conditions, or prohibitions of this Chapter, has pled guilty, "no contest" or its equivalent to such a violation, or has admitted to such a violation.
- (b) Amount of fine. Each such violation shall be subject to an administrative fine as follows:
 - (1) A fine not to exceed \$100.00 for a first violation within a 12-month period;
 - (2) A fine not to exceed \$200.00 for a second violation within a 12-month period; and
 - (3) A fine not to exceed \$500.00 for each additional violation within a 12-month period.
- (c) Time period for permit suspension.
 - (1) For a first violation of this Chapter at a location within any 24-month period, the retailer permit shall be suspended for up to 30 calendar days.
 - (2) For a second violation of this Chapter at a location within any 24-month period, the retailer permit shall be suspended for up to 90 calendar days.
 - (3) For each additional violation of this Chapter at a location within any 24-month period, the retailer permit shall be suspended for up to one year.
- (d) Waiver of penalties for first violation. The City or its Designee may waive any penalties for a retailer's first violation of any requirement, condition or prohibition of this Chapter, other than a violation of a law regulating youth access to tobacco products, if the retailer admits the violation in writing and agrees to forego a hearing on the allegations. Regardless of the City's or its Designee's waiver of penalties for a first violation, the violation will be considered in determining the penalties for any future violation.
- (e) Corrections period. The City or its Designee shall have discretion to allow a retailer a period of time to correct any violation of any requirement, condition or prohibition of this Chapter, other than a violation of a law regulating youth access to tobacco products. If a retailer's violation is corrected within the time allowed for correction, no penalty shall be imposed under this Chapter.
- (f) Appeals. Any penalties imposed under this Chapter may be appealed pursuant to Section 4.64.150 of this Chapter.

4.64.140 Penalties for retailing without a permit.

- (a) Administrative fine. In addition to any other penalty authorized by law, an administrative fine and an ineligibility period for application or issuance of a retailer permit shall be imposed if a court of competent jurisdiction determines, or the City or its Designee finds based on a preponderance of evidence, after notice and an opportunity to be heard, that any person has engaged in retailing at a location without a valid retailer permit, either directly or through the person's agents or employees, has pled guilty, "no contest" or its equivalent to such a violation, or has admitted to such a violation.
- (b) Amount of fine. Each such violation shall be subject to an administrative fine as follows:
 - (1) A fine not to exceed \$100.00 for a first violation within a 12-month period;
 - (2) A fine not to exceed \$200.00 for a second violation within a 12-month period; and

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- (3) A fine not to exceed \$500.00 for each additional violation within a 12-month period.
- (c) Time period for permit ineligibility.
 - (1) For a first violation of this Chapter at a location within any 24-month period, no new retailer permit may be issued for the person or the location (unless ownership of the business at the location has been transferred in an arm's length transaction) until 30 calendar days have passed from the date of the violation.
 - (2) For a second violation of this Chapter at a location within any 24-month period, no new retailer permit may be issued for the person or the location (unless ownership of the business at the location has been transferred in an arm's length transaction) until 90 calendar days have passed from the date of the violation.
 - (3) For each additional violation of this Chapter at a location within any 24-month period, no new retailer permit may be issued for the person or the location (unless ownership of the business at the location has been transferred in an arm's length transaction) until one year has passed from the date of the violation.
- (d) Waiver of penalties for first violation. The City or its Designee may waive any penalties for a retailer's first violation of this Chapter, unless the violation also involves a violation of a law regulating youth access to tobacco products, if the retailer admits the violation in writing and agrees to forego a hearing on the allegations. Regardless of the City's or its Designee's waiver of penalties for a first violation, the violation will be considered in determining the penalties for any future violation.
- (e) Appeals. Any penalties imposed under this Chapter may be appealed pursuant to this Section.

4.64.150 Appeals.

- (a) A decision to deny issuance of a retailer permit, to revoke a retailer permit that has been wrongly issued, or to impose penalties for a violation of this Chapter can be appealed to a hearing officer, subject to the following requirements and procedures. The hearing officer shall be the City Manager or its Designee.
- (b) All appeals must be in writing, state the grounds asserted for relief and the relief sought, and be filed with the City or its Designee within ten calendar days of receipt of notice of the appealed action. If such an appeal is made, it shall stay enforcement of the appealed action.
- (c) No later than 15 calendar days after receipt of the appeal, the hearing officer shall set an appeal hearing at the earliest practicable time and shall give notice of the hearing to the parties at least ten calendar days before the date of the hearing.
- (d) Neither the provisions of the Administration Procedure Act (Government Code Section 11500 et seq.) nor the formal rules of evidence in civil or criminal judicial proceedings shall apply to such hearing. At the hearing, the hearing officer may admit any evidence, including witnesses, relevant to the determination of the matter, except as otherwise provided in Section 4.64.160(c) of this Chapter. A record of the hearing shall be made by any means, including electronic recording, so long as a reasonably accurate and complete written transcription of the proceedings can be made.
- (e) The hearing officer may continue the hearing from time to time, in his or her sole discretion, to allow for orderly completion of the hearing.

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- (f) After the conclusion of the hearing, the hearing officer shall issue a written decision, which shall be supported by substantial evidence. Notice of the written decision, including findings of facts, conclusions of law, and notification of the time period in which judicial review may be sought pursuant to Code of Civil Procedure Section 1094.6, shall be served upon all parties no later than 20 calendar days following the date on which the hearing closed. Any decision rendered by the hearing officer shall be a final administrative decision.

4.64.160 Enforcement.

- (a) Any violation of this Chapter is hereby declared to be a public nuisance.
- (b) Causing, permitting, aiding, abetting, or concealing a violation of any provision of this Chapter shall also constitute a violation of this Chapter.
- (c) Whenever evidence of a violation of this Chapter is obtained in any part through the participation of a person under the age of 18 years old, such a person shall not be required over his or her objection to appear or give testimony in any civil or administrative process brought to enforce this Chapter and the alleged violation shall be adjudicated based upon the sufficiency and persuasiveness of the evidence presented.
- (d) Violations of this Chapter may be remedied by a civil action brought by the City, including, but not limited to, administrative or judicial nuisance abatement proceedings, civil code enforcement proceedings, and suits for injunctive relief. For the purposes of the civil remedies provided in this Chapter, each day on which a tobacco product is offered for sale in violation of this Chapter, and each individual retail tobacco product that is distributed, sold, or offered for sale in violation of this Chapter, shall constitute a separate violation of this Chapter.
- (e) Any person found guilty of violating any provision of this Chapter shall be deemed guilty of an infraction, punishable as provided by California Government Code § 25132.
- (f) The remedies provided by this Chapter are cumulative and in addition to any other remedies available at law or in equity.

SECTION 4. Section 9.14.080 (Location of tobacco vending machines) of Chapter 9.14 (Smoking and Tobacco Regulations) is hereby repealed effective January 1, 2019.

SECTION 5. Severability. If any provision, clause, sentence or paragraph of this ordinance, or the application to any person or circumstances, shall be held invalid, such invalidity shall not affect the other provisions of this ordinance which can be given effect without the invalid provision or application and, to this end, the provisions of this ordinance are hereby declared to be severable.

SECTION 6. CEQA. The City Council finds and determines that this Ordinance is not a “project” within the meaning of section 15378 of the California Environmental Quality Act (CEQA) Guidelines because it has no potential for resulting in physical change in the environment, either directly or ultimately. In the event that this Ordinance is found to be a project under CEQA, it is subject to the CEQA exemption contained in CEQA Guidelines section 15061(b)(3) because it can be seen with certainty to have no possibility of a significant effect on the environment.

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SECTION 7. Effective Date. This ordinance shall be effective on the thirty-first date after the date of its adoption except for the following sections:

- (a) Sections 4.64.030(a) through (e) inclusive, section 4.64.110, section 4.64.120, section 4.64.130, section 4.64.140, section 4.64.150, and section 4.64.160 shall be effective July 1, 2018.
- (b) Sections 4.64.030(f) through (j) inclusive shall be effective January 1, 2019.
- (c) The repeal of Section 9.14.080 shall be effective as noted in Section 4 of this ordinance.

INTRODUCED:

PASSED:

AYES:

NOES:

ABSTENTIONS:

ABSENT:

ATTEST:

APPROVED:

City Clerk

Mayor

APPROVED AS TO FORM:

City Manager

Deputy City Attorney



City of Palo Alto City Council Staff Report

(ID # 7371)

Report Type: Action Items

Meeting Date: 12/5/2016

Summary Title: Approval of Ordinance and Agreement with the County of Santa Clara on Tobacco Retailer Permits

Title: Approval of an Agreement With the County of Santa Clara With Respect to a Tobacco Retailer Permit Program; and Discussion and Potential Adoption of an Ordinance Amending Chapter 9.14 to Restrict Smoking in Multi Family Housing

From: City Manager

Lead Department: Public Works

Recommendation

The Policy and Services Committee recommends that Council:

1. Approve an agreement with the County of Santa Clara (Attachment A) relating to the administration and enforcement of a Tobacco Retail Permit Program in the City of Palo Alto;
2. Direct staff to draft an ordinance amending Chapter 9.14 (Smoking and Tobacco Regulations) of the Palo Alto Municipal Code to establish a Tobacco Retail Permit Program; and
3. Discuss and potentially adopt on first reading the attached ordinance amending Chapter 9.14 (Smoking and Tobacco Regulations) of the Palo Alto Municipal Code to ban smoking in units in multi-unit residences and common areas, and make other minor amendments to smoking restrictions (remove bingo games as places and workplaces exempt from the City's prohibition against smoking in enclosed places) (Attachment C).

Background

On February 9, 2016, the Policy and Services Committee directed staff to continue discussions with the County of Santa Clara on regulatory mechanisms related to retail sale of tobacco, and report to Council with an ordinance substantially similar to the County's Ordinance. In addition, the Policy and Services Committee approved the draft multi-family smoking ordinance with minor changes for discussion with Council; and deleting bingo games as places exempt from the City's prohibition against smoking in enclosed places (see Attachment D for Policy and Services Action Minutes and Staff Report).

Discussion

Tobacco Retail Permit Ordinance and Agreement

Staff from the County of Santa Clara and the City of Palo Alto met twice since February 2016 to develop an agreement for the County to administer and enforce a new tobacco retail permit program in the City of Palo Alto. Presently the County only enforces the County's tobacco retail permit program in unincorporated areas of the County, but is hoping to establish similar administration and enforcement partnerships with other cities in the County. Under the Agreement, staff from the County's Department of Public Health and Environmental Health would handle permitting of retailers, collect permit application and annual permit fees (currently \$340 and \$425, respectively), review permit applications for new retailers to determine compliance, provide education to retailers on ordinance requirements, conduct inspections for compliance with the ordinance, and handle most enforcement tasks. The City of Palo Alto's responsibility would be to conduct annual undercover operations to verify retailers are not conducting underage sales and to issue citations for such sales. The City and County would share information on any enforcement and provide annual summaries of retailers and compliance and alert the County to any new planning applications for tobacco retailers. The agreement outlining the roles and responsibilities is contained in Attachment A.

Under the Agreement, the City of Palo Alto must adopt a local ordinance that contains the same regulatory provisions as the County's tobacco retailer permit ordinance and any future County amendments to its retail tobacco permit ordinance. The County's current retail tobacco permit ordinance is attached as Attachment B. The County is scheduled in December 2016 to update its ordinance to better align its provisions with changes in state law, align definitions with

federal definitions, include a ban of menthol flavored tobacco, and expand the definition of flavored e-cigarettes. The anticipated operable date of the County's December 2016 amendments to its Ordinance is July 1, 2017.

In February 2017, staff will return to Council with a draft local ordinance that will contain the County's regulatory provisions, including the December amendments. The anticipated operable date of the City's Tobacco Retail Permit ordinance is July 1, 2017.

Smoking Ban in Units in Multi-Unit Residences and Common Areas

Staff made changes requested by the Policy and Services Committee and completed a final draft of the multi-unit residence smoking ban, including the one-year implementation time-frame for outreach and education (Attachment C). The effective date of the ordinance is January 1, 2018. Due to staffing shortages, staffing capacity and competing projects and assignments for all departments involved (Police, Planning, Public Works, City Manager's Office), staff is not in a position to dedicate resources for enforcement of the ordinance. Nonetheless, the City would:

- 1) Require Landlords to give written notice to tenants and buyers and sellers of units in multi-unit residences of the City's prohibition effective January 1, 2018, against smoking in units in multi-unit residences and commons areas; and
- 2) Require, effective January 1, 2018, Landlords to include the smoking prohibition as a term in a lease or other rental agreement entered into or continued.

While there would not be an active enforcement program, Committee members noted that adopting the Ordinance would help to create a social norm for Palo Alto. Several Bay Area cities have done this, and believe that it has been successful. Council may decide that this approach is desirable. There remains a concern, however, that Palo Alto residents may expect outreach and enforcement, for which there are no available resources.

Removal of Exemption of Bingo Games from Smoking Ban in Enclosed Places

As directed by the Policy and Services Committee, Staff made changes to the Palo Alto Municipal Code Section 9.14.070 to remove the exemption of bingo games from the places and workplaces exempt from the City's prohibition of smoking in enclosed places.

Policy Implications

The adoption of the proposed ordinance would further Comprehensive Plan policies: N-5: Clean, Healthful Air for Palo Alto and N-6: An Environment Free of the Damaging Effects of Biological and Chemical Hazardous Materials.

In addition, this effort is consistent with Council's adopted four priorities that will "receive particular, unusual and significant attention during the year," including "Healthy City, Healthy Community."

Resource Impact

The tobacco retail permit agreement and subsequent ordinance establishing the program would have a minor impact on the City staff and financial resources and can be absorbed with existing budgets.

The multi-unit residence smoking ban ordinance could have moderate or significant impact on City staff and financial resources due to potential resident requests for enforcement, complaints and inquiries. The City has no budgeted resources to perform outreach, education or to respond to complaints and inquiries.

Environmental Review

Provisions of this ordinance do not constitute a project under the Environmental Quality Act because it can be seen with certainty that no significant negative environmental impact will occur as a result of the amended ordinance.

Attachments:

- A: Agreement for Palo Alto Tobacco Retail Permit Program (PDF)
- B: Permits For Retailers Of Tobacco Products (PDF)
- C: Ordinance re: Smoking Restrictions for Multi-Family Housing (PDF)

**AGREEMENT BETWEEN
THE COUNTY OF SANTA CLARA
AND CITY OF PALO ALTO FOR
A TOBACCO RETAIL PERMIT PROGRAM**

This Agreement is entered into by and between the County of Santa Clara (“County”) and City of Palo Alto (“City”) relating to administration and enforcement of a tobacco retail permit program in the City of Palo Alto. County and City may be referred to in this Agreement individually as a “Party” and collectively as “Parties.”

Background / Purpose

In 2010, the County added Chapter XXIII to Division A18 of its Ordinance Code, thereby establishing a permit requirement for retailers of tobacco products in the unincorporated areas of the County of Santa Clara. The County has since expanded the scope of Chapter XXIII and modified provisions therein. The City now wishes to adopt one or more ordinance(s) to mirror the provisions of Chapter XXIII in their entirety. The City and County intend for the County to administer and enforce the City’s tobacco retail permit program within the City, except as otherwise provided in this Agreement. The County intends to cite violators of the City’s Ordinance Code pursuant to this Agreement.

Agreement

The Parties agree as follows:

1. Scope of Work

Each Party shall perform the work as described in Exhibit A, attached hereto and incorporated herein by this reference; provided, however, that the County shall have no responsibility for administering or enforcing any provisions of the City’s tobacco retailer permit ordinance that are in addition to or otherwise different from the County’s provisions.

2. Relationship of Parties / Independent Contractors

Each Party shall perform all work described herein as an independent contractor and not as an officer, agent, servant or employee of the other Party. None of the provisions of this Agreement are intended to create, nor shall be deemed or construed to create, any relationship between the Parties other than that of independent parties contracting with each other for purpose of effecting the provisions of this Agreement. The Parties are not, and will not be construed to be in a relationship of joint venture, partnership or employer-employee. Neither Party has the authority to make any statements, representations or commitments of any kind on behalf of the other Party, or to use the name of the other Party in any publications or advertisements, except with the written consent of the other Party or as is explicitly provided herein. Each Party will be solely responsible for the

acts and omissions of its officers, agents, employees, contractors, and subcontractors, if any.

3. Term of Agreement

This Agreement is effective from the date that this Agreement is executed, until terminated in accordance with this Agreement.

4. Payment

The City shall adopt, by reference, the County's fee schedule for annual tobacco retail permits and tobacco retail permit applications. All annual permit fees and application fees for the tobacco retail permit program shall be collected and retained by the County.

The County shall advise City of the initial permit fee and application fee necessary to cover County's anticipated costs under this Agreement. Thereafter, the County shall provide notice to the City and tobacco retail permit holders in the City of any increases or decreases in the cost of the County's work under this Agreement and any need to revise permit fees and/or application fees accordingly.

5. Termination

Either Party may terminate this Agreement for any reason upon ninety (90) days' written notice. Upon service of a termination notice, the Parties shall use their best efforts to develop a mutually-agreeable plan for transition of the County's responsibilities to the City. Upon termination of this Agreement, the City will be responsible for replacing the County-issued permits.

6. Indemnification and Insurance

City shall indemnify and hold harmless County, its officers, agents and employees for 50 percent of the amount of any claim, liability, loss, injury or damage arising out of, or in connection with, performance of this Agreement by County and/or its agents, employees or subcontractors, excepting only loss, injury or damage caused by the negligence or willful misconduct of personnel employed by County. County shall defend the City, its officers, agents and employees against any claim, liability, loss, injury or damage arising out of, or in connection with, performance of this Agreement by County and/or its agents, employees or subcontractors.

City shall immediately notify County upon learning of any potential or asserted claim, liability, loss, injury or damage for which the City may be obligated to indemnify or hold the County harmless pursuant to any provision of this Agreement. County shall immediately notify City upon learning of any potential or asserted claim, liability, loss, injury or damage for which the City may be obligated to indemnify or hold the County harmless pursuant to any provision of this Agreement.

Without limiting the indemnification, City shall maintain or cause to be maintained the following insurance coverage: (1) a policy of commercial general liability with limits of liability not less than one million dollars (\$1,000,000) per occurrence and two million dollars (\$2,000,000) annual aggregate; (ii) a policy of workers' compensation providing statutory coverage; (iii) a policy of professional errors and omissions liability with limits of liability not less than one million dollars (\$1,000,000) per occurrence/aggregate; and (iv) such other insurance or self-insurance as shall be necessary to insure it against any claim or claims for damages arising under the Agreement. Insurance afforded by the commercial general liability policy shall be endorsed to provide coverage to the County as an additional insured. A Certificate of Insurance certifying that coverage as required herein has been obtained shall be provided to the County. The requirements of this section may be satisfied by the provision of similar coverage through a self-insurance program.

7. Compliance with All Laws, Rules, Regulations, Policies and Procedures

The Parties shall comply with all applicable federal, state and local laws, rules, regulations, policies and procedures.

8. Monitoring / Records

8.1 Monitoring

Each Party shall permit the other Party to monitor its performance of this Agreement. To the extent permitted by law, such monitoring may include, but not be limited to, audits and review of records related to this Agreement. Upon request, a Party shall provide the other Party with access to facilities, financial and employee records that are related to the purpose of the Agreement, except where prohibited by federal, state or local laws, regulations or rules. Monitoring shall be permitted at any time during normal business hours upon no less than 10 business days advance notice and may occur up to one year following termination of the Agreement.

Each Party shall designate a project director/coordinator responsible for overseeing that Party's performance of this Agreement. Each Party shall notify the other Party in writing of the designation of the project director/coordinator and of any change thereto.

8.2 California Public Records Act

The Parties are public agencies subject to the disclosure requirements of the California Public Records Act ("CPRA"). In the event of a CPRA request for information related to this Agreement, each Party will use its best efforts to notify the other Party before such disclosure.

9. Representations and Warranties

9.1 Conflict of Interest

Each Party shall comply, and require its subcontractors to comply, with all applicable (i) requirements governing avoidance of impermissible client conflicts; and (ii) federal, state and local conflict of interest laws and regulations including, without limitation, California Government Code section 1090 et. seq., the California Political Reform Act (California Government Code section 87100 et. seq.) and the regulations of the Fair Political Practices Commission concerning disclosure and disqualification (2 California Code of Regulations section 18700 et. seq.). Failure to do so constitutes a material breach of this Agreement and is grounds for immediate termination of this Agreement by either Party.

9.2 Authority

Each individual executing this Agreement on behalf of a Party represents that he or she is duly authorized to execute and deliver this Agreement on that Party's behalf.

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10. Assignment, Delegation, Subcontracting

Neither Party may assign any of its rights, delegate any of its duties or subcontract any portion of its work or business under this Agreement without the prior written consent of the other Party, which such other Party may withhold in its sole and absolute discretion. No assignment, delegation or subcontracting will release a Party from any of its obligations or alter any of its obligations to be performed under the Agreement.

11. Governing Law, Jurisdiction and Venue

This Agreement shall be construed and its performance enforced under California law. In the event that suit shall be brought by either Party to this Agreement, the Parties agree that venue shall be exclusively vested in the state courts of the County of Santa Clara or, if federal jurisdiction is appropriate, exclusively in the United States District Court for the Northern District of California, in San Jose, California.

12. Waiver

No delay or failure to require performance of any provision of this Agreement shall constitute a waiver of that provision as to that or any other instance. Any waiver granted by a Party must be in writing, and shall apply to the specific instance expressly stated.

13. Notice

Any notice required to be given by either Party, or which either Party may wish to give, shall be in writing and served either by personal delivery or sent by certified or registered

mail, postage prepaid, addressed as follows:

If to COUNTY:

County of Santa Clara
Public Health Department
Sara H. Cody, MD
Health Officer and Public Health Director
976 Lenzen Avenue
San Jose, CA 95126

If to CITY:

City of Palo Alto
Mike Sartor
Director of Public Work
250 Hamilton Ave., 6th Fl.
Palo Alto, CA 94301

Notice shall be deemed effective on the date personally delivered or, if mailed, three (3) days after deposit in the mail. Either Party may designate a different person and/or address for the receipt of notices by sending written notice to the other Party.

14. Third Party Beneficiaries

This Agreement does not and is not intended to confer any rights or remedies upon any person or entity other than the Parties.

15. Entire Agreement

This document represents the entire Agreement between the Parties with respect to the subject matter hereof. All prior negotiations and written and/or oral Agreements between the Parties with respect to the subject matter of this Agreement are merged into this Agreement.

16. Amendments

This Agreement may only be amended by a written instrument signed by the Parties.

17. Survival

The rights and duties under the following provisions shall survive the termination or expiration of this Agreement: Section 6 – Indemnification and Insurance; Section 8 – Monitoring/ Records; Section 9 – Representation and Warranties; and Section ~~1147~~ – Governing Law/Venue, and in any instrument, certificate, exhibit, or other writing attached hereto and incorporated herein.

18. Severability

If any term, covenant, condition or provision of this Agreement, or the application thereof to any person or circumstance, shall to any extent be held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of the terms, covenants, conditions and provisions of this Agreement, or the application thereof to any person or

circumstance, shall remain in full force and effect and shall in no way be affected, impaired or invalidated thereby.

19. Contract Execution

Unless otherwise prohibited by law or County policy, the Parties agree that an electronic copy of a signed contract, or an electronically signed contract, has the same force and legal effect as a contract executed with an original ink signature. The term "electronic copy of a signed contract" refers to a transmission by facsimile, electronic mail, or other electronic means of a copy of an original signed contract in a portable document format. The term "electronically signed contract" means a contract that is executed by applying an electronic signature using technology approved by the County.

20. Counterparts

This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument.

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IN WITNESS WHEREOF, the parties have executed this Agreement as of the dates written below.

Signed:

County of Santa Clara:

City of Palo Alto

Dave Cortese, President
Board of Supervisors

Date

Date

Attest:

Megan Doyle
Clerk of the Board of Supervisors

Date

Approved:

Sara H. Cody, MD
Health Officer and Public Health
Director

Date

Approved as to Form and Legality:

_____ Jenny S. Lam Deputy County Counsel	_____ Date
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Approved:

_____ John Cookinham SCVHHS Chief Financial Officer	_____ Date
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Exhibits to this Agreement:

Exhibit A: Scope of Work

Exhibit A

County-City of Palo Alto Tobacco Retail Permit Partnership

Description of Roles by Agency

County of Santa Clara

Department of Environmental Health

1. Send out permit applications to all existing retailers selling tobacco products and/or electronic smoking devices in the City of Palo Alto and issue permits as necessary
2. Maintain database tracking system for all permitted tobacco retailers
3. Provide list of permitted tobacco retailers to Public Health Department and City of Palo Alto on an annual basis or more frequently as requested
4. Collect required permit fees
5. Conduct at least one annual inspection of tobacco retailers to ensure compliance with local, state, and federal laws (except sales to minors)
6. Conduct follow up inspections if necessary
7. Keep records of inspection outcomes for each tobacco retailer and provide annual inspection report summaries to a single point of contact at the Public Health Department and the City of Palo Alto
8. Take appropriate enforcement action if a violation is not corrected
9. Coordinate with City of Palo Alto Police Department when violations of sales to minors occur in order to take the appropriate enforcement action (may include fines and suspension of permit)
10. Conduct administrative hearings if retailer appeals violation; Director of Environmental Health or his/her designee serves as the Administrative Hearing Officer

Public Health Department

1. Provide initial list of tobacco retail facilities to DEH
2. Obtain monthly list from Board of Equalization to establish current list of tobacco retailers and map for any new retailers
3. Map any new retailers to ensure meet requirements related to distance from schools, distance from existing tobacco retailers – provide timely comments to City of Palo Alto Planning Department for new tobacco retailers whose plans have been routed.
4. Proactively engage the business community so that they are aware of the TRL ordinance (e.g., effective date, requirements, fines/penalties)
5. Respond to requests for information from Palo Alto tobacco retailers and the public regarding requirements under the Tobacco Retail Permit ordinance
6. Meet with all related personnel to: (1) coordinate enforcement strategy; and (2) develop/maintain policy and procedure for enforcement
7. Meet with all related personnel as necessary to: (1) coordinate post-compliance check strategy; and (2) next steps for violators
8. Conduct outreach to impacted Palo Alto stakeholders (retailers, the public) if the County proposes any amendments to their current ordinance and engage with Palo Alto Public Works staff prior to outreach to notify them of any proposed changes;

City of Palo Alto

Police Department

1. Conduct undercover decoy operations with tobacco retailers once a year
2. Issue citations for violations of PC 308(a)
3. Immediately notify the County (Department of Environmental Health and Public Health) on outcomes of enforcement operations, particularly when violations of PC 308(a) occur
4. Provide any requested documentation or evidence as part of the Administrative Hearing should a retailer appeal a violation

Public Works Department

1. Provide annual enforcement report summaries to a single point of contact at the Public Health Department and Department of Environmental Health
2. Act as a resource to other cities that may be interested in a similar partnership with the County
3. Update ordinance as needed in collaboration with Attorneys office

Planning Department

1. Route plans for any new tobacco or e-cigarette retailers to a designated contact at the County Public Health Department to obtain input.

CHAPTER XXIII. - PERMITS FOR RETAILERS OF TOBACCO PRODUCTS⁽²²⁾*Footnotes:**--- (22) ---*

Editor's note— Ord. No. NS-300.903, adopted Oct. 18, 2016, amended Ch. XXIII in its entirety to read as herein set out. Former Ch. XXIII, pertained to permits for retailers of tobacco products and electronic smoking devices, and derived from Ord. No. NS-300.873, adopted June 24, 2014; and Ord. No. NS-300.883, adopted June 23, 2015.

Sec. A18-367. - Intent.

This chapter is adopted to:

- (1) Ensure compliance with the business standards and practices of the County;
- (2) Encourage responsible retailing of tobacco products;
- (3) Discourage violations of laws related to tobacco products, especially those that prohibit or discourage the sale or distribution of tobacco products to persons under 21; and
- (4) Protect the public health and welfare.

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

(Ord. No. NS-300.903, § 1, 10-18-16)

Sec. A18-368. - Definitions.

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

- (a) *Arm's length transaction* means a sale in good faith and for valuable consideration that reflects the fair market value in the open market between two or more informed and willing parties, neither of which is under any compulsion to participate in the transaction. A sale between relatives, related companies or partners, or a sale for which a significant purpose is avoiding the effect of the violations of this chapter is not an arm's length transaction.
- (b) *Department* means the County's Department of Environmental Health and any agency or person designated by the director of the Department of Environmental Health to enforce or administer the provisions of this chapter.
- (c) *Ownership* means possession of a ten-percent or greater interest in the stock, assets, or income of a business, other than a security interest for the repayment of debt.
- (d) *School* means a public or private elementary, middle, junior high or high school.

- (e) *Tobacco product* means (unless specifically noted elsewhere):
- (1) Any product subject to Subchapter IX (21 U.S.C. § 387 et seq. ("Subchapter IX")) of the Federal Food, Drug, and Cosmetic Act. (See 21 U.S.C. § 387a(b) (products subject to Subchapter IX); 21 C.F.R. §§ 1100.1-1100.3 (tobacco products subject to Subchapter IX).) Products subject to Subchapter IX include, but are not limited to, cigarettes, cigarette tobacco, roll-your-own tobacco, smokeless tobacco, cigars, pipe tobacco, waterpipe tobacco, and electronic nicotine delivery systems (such as, but not limited to, electronic cigarettes, electronic cigars, electronic hookahs, vape pens, personal vaporizers, and electronic pipes). Products subject to Subchapter IX also include components or parts of tobacco products, such as, but not limited to, liquids that are for use in an electronic nicotine delivery system and that contain tobacco or nicotine or are derived from tobacco or nicotine ("e-liquids"), vials that contain e-liquids, and atomizers. Products that are not subject to Subchapter IX include accessories of tobacco products, such as, but not limited to, ashtrays, spittoons, and conventional matches and lighters that solely provide an external heat source to initiate but not maintain combustion of a tobacco product.
 - (2) Any product for use in an electronic nicotine delivery system, whether or not it contains tobacco or nicotine or is derived from tobacco or nicotine.
- (f) *Retailer* means any person who sells, exchanges, or offers to sell or exchange tobacco products for any form of consideration. "Retailing" shall mean the doing of any of these things. This definition is without regard to the quantity of tobacco products sold, exchanged, or offered for sale or exchange.

(NS-300.903, § 1, 10-18-16)

Sec. A18-369. - Requirements and prohibitions.

- (a) *Permit required.* It shall be unlawful for any person to act as a retailer of tobacco products in an unincorporated area of the County without first obtaining and maintaining a valid retailer permit pursuant to this chapter for each location at which that activity is to occur.
- (b) *Lawful business operation.* It shall be a violation of this chapter for any retailer to violate any local, state, or federal law applicable to tobacco products or the retailing of such products.
- (c) *Display of permit.* Each retailer permit shall be prominently displayed in a publicly visible place at the permitted location.
- (d)

Notice of minimum age for purchase of tobacco products. Retailers shall post conspicuously, at each point of purchase, a notice stating that selling tobacco products to anyone under 21 years of age is illegal and subject to penalties. Such notice shall be subject to the approval of the Public Health Department.

- (e) *Positive identification required.* No retailer shall sell or transfer a tobacco product to another person who appears to be under 30 years of age without first examining the customer's identification to confirm that the customer is at least the minimum age required under state law to purchase and possess the tobacco product.
- (f) *Minimum age for persons selling tobacco products.* No person who is younger than the minimum age established by state law for the purchase or possession of tobacco products shall engage in retailing.
- (g) *False and misleading advertising prohibited.* A retailer either without a valid retailer permit or with a suspended retailer permit:
 - (1) Shall keep all tobacco products out of public view.
 - (2) Shall not display any advertisement relating to tobacco products that promotes the sale or distribution of such products from the retailer's location or that could lead a reasonable consumer to believe that tobacco products can be obtained at that location.
- (h) *Limitation on storefront advertising.* No more than 15 percent of the square footage of the windows and clear doors of an establishment used for retailing shall bear advertising or signs of any sort, and all advertising and signage shall be placed and maintained in a manner that ensures that law enforcement personnel have a clear and unobstructed view of the interior of the premises, including the area in which the cash registers are maintained, from the exterior public sidewalk or entrance to the premises. However, this latter requirement shall not apply to an establishment where there are no windows, or where existing windows are located at a height that precludes a view of the interior of the premises by a person standing outside the premises.
- (i) *Flavored tobacco products.*
 - (1) Except as permitted in paragraph (3) of this subsection (i), no retailer shall sell a tobacco product containing, as a constituent or additive, an artificial or natural flavor or aroma (other than tobacco) or an herb or spice, including strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, or coffee, that is a characterizing flavor or aroma of the tobacco product, smoke or vapor produced by the tobacco product.
 - (2) A tobacco product shall be subject to a rebuttable presumption that the product is

prohibited by paragraph (1) of this subsection if:

- (i) The product's manufacturer or any other person associated with the manufacture or sale of tobacco products makes or disseminates public statements or claims to the effect that the product has or produces a characterizing flavor or aroma, other than tobacco; or
 - (ii) The product's label, labeling, or packaging includes a statement or claim—including any text and/or images used to communicate information—that the product has or produces a characterizing flavor or aroma, other than tobacco.
- (3) Paragraph (1) of this subsection (i) shall not apply to any retailer that meets all of the following criteria:
- (i) Primarily sells tobacco products;
 - (ii) Generates more than 60 percent of its gross revenues annually from the sale of tobacco products;
 - (iii) Does not permit any person under 21 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 Family Code;
 - (iv) Does not sell alcoholic beverages or food for consumption on the premises; and
 - (v) Posts a sign outside the retail location that clearly, sufficiently, and conspicuously informs the public that persons under 21 years of age are prohibited from entering the premises.
- (j) *Vending machines prohibited.* No tobacco product shall be sold, offered for sale, or distributed to the public from a vending machine or appliance, or any other coin or token operated mechanical device designed or used for vending purposes, including, but not limited to, machines or devices that use remote control locking mechanisms.
- (k) *Prohibition on sale or distribution of tobacco products to individuals under 21.* No retailer shall sell, offer for sale, or distribute any tobacco product to any individual who is under 21 years of age.

(Ord. No. NS-300.903, § 1, 10-18-16)

Sec. A18-370. - Eligibility requirements for a permit.

- (a) No retailer permit may be issued to authorize retailing at other than a fixed location. For example, retailing by persons on foot or from vehicles is prohibited.
- (b) No retailer permit may be issued to authorize retailing at a temporary or recurring

temporary event. For example, retailing at flea markets and farmers' markets is prohibited.

- (c) No retailer permit may be issued to authorize retailing at any location where 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 drugs are offered for sale.
- (d) No retailer permit may be issued to authorize retailing at any location within 1,000 feet of a school, as measured by a straight line between any point along the property line of any parcel on which a school is located and any point along the perimeter of the applicant's proposed business location; provided, however, that the prohibition contained in this subsection (d) shall not apply to the following:
 - (1) Any retailer of tobacco products (as such term was defined in this chapter of the Ordinance Code on January 22, 2011) operating lawfully on January 21, 2011;
 - (2) Any retailer of electronic smoking devices (as such term was defined in this chapter of the Ordinance Code on August 23, 2014) operating lawfully on August 22, 2014; and
 - (3) Any lawfully operating retailer of tobacco products that would otherwise become ineligible to receive or renew a retailer permit due to the creation or relocation of a school.
- (e) No retailer permit may be issued to authorize retailing at a location which is within 500 feet of a location occupied by another retailer, as measured by a straight line between any point along the perimeter of an existing retailer's business location and any point along the perimeter of the applicant's proposed business location; provided, however, that the prohibition contained in this subsection (e) shall not apply to:
 - (1) Any retailer of tobacco products (as such term was defined in this chapter of the Ordinance Code on January 22, 2011) operating lawfully on January 21, 2011; and
 - (2) Any retailer of electronic smoking devices (as such term was defined in this chapter of the Ordinance Code on August 23, 2014) operating lawfully on August 22, 2014.
- (f) Any exemption granted to a retailer pursuant to this section shall cease to apply upon the earlier of the following to occur:
 - (1) The retailer fails to timely renew the retailer permit pursuant to Section A18-373(b) of this chapter.
 - (2) A new person obtains ownership in the business.

(Ord. No. NS-300.903, § 1, 10-18-16)

Sec. A18-371. - Application procedure.

- (a) It is the responsibility of each retailer to be informed of all laws applicable to retailing, including those laws affecting the issuance of a retailer permit. No retailer may rely on the issuance of a retailer permit as a determination by the County that the retailer has complied with all laws applicable to retailing. A retailer permit issued contrary to this chapter, contrary to any other law, or on the basis of false or misleading information supplied by a retailer shall be revoked pursuant to Section A18-372 of this chapter.
- (b) All retailer permit applications shall be submitted on a form supplied by the Department.
- (c) A permitted retailer shall inform the Department in writing of any change in the information submitted on an application for a retailer permit within 14 calendar days of a change.
- (d) All information specified in an application pursuant to this section shall be subject to disclosure under the California Public Records Act (Government Code Section 6250 et seq.) or any other applicable law, subject to the laws' exemptions.

(Ord. No. NS-300.903, § 1, 10-18-16)

Sec. A18-372. - Issuance of permit.

- (a) Upon the receipt of a complete application for a retailer permit, the application fee, and the annual permit fee, the department shall issue a retailer permit unless substantial evidence demonstrates that one or more of the following bases for denial exists:
 - (1) The information presented in the application is inaccurate or false.
 - (2) The application seeks authorization for retailing at a location for which this chapter prohibits issuance of a retailer permit.
 - (3) The application seeks authorization for retailing by a person to whom this chapter prohibits issuance of a retailer permit.
 - (4) The application seeks authorization for retailing that is prohibited pursuant to this chapter (e.g., mobile vending) or that is unlawful pursuant to any other law.
- (b) A retailer permit shall be revoked if the Department finds that one or more of the bases for denial of a retailer permit under this section existed at the time application was made or at any time before the retailer permit issued. Such a revocation shall be without prejudice to the filing of a new permit application.
- (c) A decision to deny issuance of a retailer permit or to revoke a retailer permit that has been wrongly issued may be appealed pursuant to Section A18-381 of this chapter.

(Ord. No. NS-300.903, § 1, 10-18-16)

Sec. A18-373. - Permit term, renewal, and expiration.

- (a) *Term of permit.* The term of a retailer permit is one year. A retailer permit is invalid upon expiration.
- (b) *Renewal of permit.* The Department shall renew a valid retailer permit upon timely payment of the annual permit fee. The Department may, in its discretion, agree to renew any expired retailer permit within the three-month period following expiration if the retailer pays the annual permit fee and applicable late charges. For every calendar month, or fraction thereof, that a retailer fails to renew an expired retailer permit, a late charge equal to 20 percent of the annual permit fee shall be assessed. A retailer permit renewed within three calendar months of expiration shall be treated as if timely renewed.
- (c) *Issuance of permit after revocation or expiration of permit.* To apply for a new retailer permit more than three calendar months after expiration of a retailer permit or following revocation of a retailer permit that was wrongly issued, a retailer must submit a complete application for a retailer permit, along with the application fee and annual permit fee. The Department shall issue a retailer permit pursuant to the requirements of Section A18-372 of this chapter.

(Ord. No. NS-300.903, § 1, 10-18-16)

Sec. A18-374. - Permits nontransferable.

- (a) A retailer permit may not be transferred from one person to another or from one location to another. Whenever a new person obtains ownership in a business for which a retailer permit has been issued, a new retailer permit shall be required, but any exemption granted pursuant to Section A18-370 of this chapter shall cease to apply.
- (b) Notwithstanding any other provision of this chapter, prior violations of this chapter at a location shall continue to be counted against a location and permit ineligibility and suspension periods shall continue to apply to a location unless:
 - (1) One hundred percent of the interest in the stock, assets, or income of the business, other than a security interest for the repayment of debt, has been transferred to one or more new owners; and
 - (2) The County is provided with clear and convincing evidence, including an affidavit, that the business has been acquired in an arm's length transaction.

(Ord. No. NS-300.903, § 1, 10-18-16)

Sec. A18-375. - Permit conveys a limited, conditional privilege.

Nothing in this chapter shall be construed to grant any person obtaining and maintaining a retailer permit any status or right other than the limited, conditional privilege to act as a retailer at the location in the County identified on the face of the permit.

(Ord. No. NS-300.903, § 1, 10-18-16)

Sec. A18-376. - Fees.

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

(Ord. No. NS-300.903, § 1, 10-18-16)

Sec. A18-377. - Compliance monitoring.

- (a) Compliance with this chapter shall be monitored by the Department. In addition, any peace officer may enforce the penal provisions of this chapter. The County Executive may designate any number of additional persons to monitor and facilitate compliance with this chapter.
- (b) The Department or other person designated to enforce the provisions of this chapter shall check each retailer at least once per 12-month period to determine if the retailer is complying with all laws applicable to retailing, other than those laws regulating underage access to tobacco products. Nothing in this paragraph shall create a right of action in any retailer or other person against the County or its agents.

(Ord. No. NS-300.903, § 1, 10-18-16)

Sec. A18-378. - Prevention of underage sales.

- (a)

The Public Health Department or other persons designated to enforce the provisions of this chapter shall, in conjunction with the Sheriff's Office, check each retailer at least twice per 12-month period to determine whether the retailer is conducting business in a manner that complies with laws regulating youth access to tobacco products. Nothing in this paragraph shall create a right of action in any retailer or other person against the County or its agents.

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

(Ord. No. NS-300.903, § 1, 10-18-16)

Sec. A18-379. - Penalties for a violation by a retailer with a permit.

- (a) *Administrative fine.* In addition to any other penalty authorized by law, an administrative fine shall be imposed and a retailer permit shall be suspended if any court of competent jurisdiction determines, or the Department finds based on a preponderance of the evidence, after the retailer is afforded notice and an opportunity to be heard, that the retailer, or any of the retailer's agents or employees, has violated any of the requirements, conditions, or prohibitions of this chapter, has pled guilty, "no contest" or its equivalent to such a violation, or has admitted to a such a violation.
- (b) *Amount of fine.* Each such violation shall be subject to an administrative fine as follows:
- (1) A fine not to exceed \$100.00 for a first violation within a 12-month period;
 - (2) A fine not to exceed \$200.00 for a second violation within a 12-month period; and
 - (3) A fine not to exceed \$500.00 for each additional violation within a 12-month period.
- (c) *Time period for permit suspension.*
- (1) For a first violation of this chapter at a location within any 24-month period, the retailer permit shall be suspended for up to 30 calendar days.
 - (2) For a second violation of this chapter at a location within any 24-month period, the

retailer permit shall be suspended for up to 90 calendar days.

- (3) For each additional violation of this chapter at a location within any 24-month period, the retailer permit shall be suspended for up to one year.
- (d) *Waiver of penalties for first violation.* The Department may waive any penalties for a retailer's first violation of any requirement, condition or prohibition of this chapter, other than a violation of a law regulating youth access to tobacco products, if the retailer admits the violation in writing and agrees to forego a hearing on the allegations. Regardless of the Department's waiver of penalties for a first violation, the violation will be considered in determining the penalties for any future violation.
- (e) *Corrections period.* The Department shall have discretion to allow a retailer a period of time to correct any violation of any requirement, condition or prohibition of this chapter, other than a violation of a law regulating youth access to tobacco products. If a retailer's violation is corrected within the time allowed for correction, no penalty shall be imposed under this section.
- (f) *Appeals.* Any penalties imposed under this section may be appealed pursuant to Section A18-381 of this chapter.

(Ord. No. NS-300.903, § 1, 10-18-16)

Sec. A18-380. - Penalties for retailing without a permit.

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

- For a first violation of this section at a location within any 24-month period, no new retailer permit may be issued for the person or the location (unless ownership of the business at the location has been transferred in an arm's length transaction) until 30 calendar days have passed from the date of the violation.
- (2) For a second violation of this section at a location within any 24-month period, no new retailer permit may be issued for the person or the location (unless ownership of the business at the location has been transferred in an arm's length transaction) until 90 calendar days have passed from the date of the violation.
- (3) For each additional violation of this section at a location within any 24-month period, no new retailer permit may be issued for the person or the location (unless ownership of the business at the location has been transferred in an arm's length transaction) until one year has passed from the date of the violation.
- (d) *Waiver of penalties for first violation.* The Department may waive any penalties for a retailer's first violation of this section, unless the violation also involves a violation of a law regulating youth access to tobacco products, if the retailer admits the violation in writing and agrees to forego a hearing on the allegations. Regardless of the Department's waiver of penalties for a first violation, the violation will be considered in determining the penalties for any future violation.
- (e) *Appeals.* Any penalties imposed under this section may be appealed pursuant to Section A18-381 of this chapter.
- (Ord. No. NS-300.903, § 1, 10-18-16)

Sec. A18-381. - Appeals.

- (a) A decision to deny issuance of a retailer permit, to revoke a retailer permit that has been wrongly issued, or to impose penalties for a violation of this chapter can be appealed to a hearing officer, subject to the following requirements and procedures. The hearing officer shall be the director of the Department, his or her designee, or another individual selected by the County.
- (b) All appeals must be in writing, state the grounds asserted for relief and the relief sought, and be filed with the director of the Department or his or her designee within ten calendar days of receipt of notice of the appealed action. If such an appeal is made, it shall stay enforcement of the appealed action.
- (c)

No later than 15 calendar days after receipt of the appeal, the hearing officer shall set an appeal hearing at the earliest practicable time and shall give notice of the hearing to the parties at least ten calendar days before the date of the hearing.

- (d) Neither the provisions of the Administration Procedure Act (Government Code Section 11500 et seq.) nor the formal rules of evidence in civil or criminal judicial proceedings shall apply to such hearing. At the hearing, the hearing officer may admit any evidence, including witnesses, relevant to the determination of the matter, except as otherwise provided in Section A18-382 (c) of this chapter. A record of the hearing shall be made by any means, including electronic recording, so long as a reasonably accurate and complete written transcription of the proceedings can be made.
- (e) The hearing officer may continue the hearing from time to time, in his or her sole discretion, to allow for orderly completion of the hearing.
- (f) After the conclusion of the hearing, the hearing officer shall issue a written decision, which shall be supported by substantial evidence. Notice of the written decision, including findings of facts, conclusions of law, and notification of the time period in which judicial review may be sought pursuant to Code of Civil Procedure Section 1094.6, shall be served upon all parties no later than 20 calendar days following the date on which the hearing closed. Any decision rendered by the hearing officer shall be a final administrative decision.

(Ord. No. NS-300.903, § 1, 10-18-16)

Sec. A18-382. - Enforcement.

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

violation of this chapter, and each individual retail tobacco product that is distributed, sold, or offered for sale in violation of this chapter, shall constitute a separate violation of this chapter.

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

(Ord. No. NS-300.903, § 1, 10-18-16)

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Ordinance No. _____
Ordinance of the Council of the City of Palo Alto Amending
Chapter 9.14 (Smoking and Tobacco Regulations) of the Palo Alto
Municipal Code to Establish New Smoking Restrictions for Multi-
Family Housing

The Council of the City of Palo Alto does ORDAIN as follows:

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

(a) That the adoption of this Ordinance is necessary to protect the public health, safety and welfare for the reasons set forth in section 9.14.005. The purposes of this Ordinance are to ban smoking in multi-unit housing in order to reduce the risks of second hand smoke and vapor, reduce litter, and enhance enjoyment of these areas.

SECTION 2. Chapter 9.14 of the Palo Alto Municipal Code is hereby amended to read as follows:

Palo Alto Municipal Code Chapter 9.14: Smoking and Tobacco Regulations

9.14.005 Purpose.

The purpose of this Chapter is to:

(a) Protect the public health, safety and general welfare by prohibiting smoking and use of electronic smoking devices in multi-unit housing, public parks, public places, service locations, city pool cars, child day care facilities, and unenclosed eating establishments.

(b) Ensure a cleaner and more hygienic environment within the city, reduce litter, and protect the City's natural resources, including creeks and streams.

(c) Enhance the welfare of residents, workers, and visitors by reducing exposure to second hand smoke, which studies confirm can cause negative health effects in non-smokers.

(d) Balance the needs of persons who smoke with the needs of nonsmokers, including children and youth, to be free from the discomforts and health threats created by exposure to second-hand smoke and vapor.

9.14.010 Definitions.

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

(a) "Adjacent Unenclosed Property" means any Unenclosed Area of property, publicly or privately owned, that abuts a Multi-Unit Residence

(ab) "Bar" means an area which is devoted to serving alcoholic beverages and in which serving food is only incidental to the consumption of such beverages. "Bar" shall include

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bar areas within eating establishments which are devoted to serving alcoholic beverages and in which serving food is only incidental to the consumption of such beverages.

(~~bc~~) "City car" means any truck, van or automobile owned by the city and operated by a city employee.

~~(d)(e)~~ "Commercial Area" means an area, including all publicly owned sidewalks, alleys, parking areas, public places, outdoor dining areas, service areas, etc. within areas zoned in the City's Comprehensive Plan as regional/community commercial (including Downtown, California Avenue Business District, Town and Country, and Stanford Shopping Center) and Neighborhood Commercial.

(e) "Common Area" means every Enclosed Area and every Unenclosed Area of a Multi-Unit Residence that residents of more than one Unit are entitled to enter or use, including, without limitation, halls, pathways, lobbies, courtyards, elevators, stairs, community rooms, playgrounds, gym facilities, swimming pools, parking garages, parking lots, grassy or landscaped areas, restrooms, laundry rooms, cooking areas, and eating areas.

(~~ef~~) "Eating establishment" means a coffee shop, cafeteria, short-order café, luncheonette, sandwich shop, soda fountain, restaurant, or other establishment serving food to members of the public.

(~~eg~~) "Electronic smoking device" means an electronic and/or battery-operated device that can deliver an inhalable dose of nicotine to the user. "Electronic smoking device" includes any product meeting this definition, regardless of whether it is manufactured, distributed, marketed or sold as an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, electronic hookah, electronic vape, vaporizer or any other product name or descriptor.

(~~fh~~) "Employee" means any person who is employed by any employer in consideration for direct or indirect monetary wages or profit.

(~~gi~~) "Employee eating place" means any place serving as an employee cafeteria, lunchrooms, lounge, or like place.

(~~hi~~) "Employer" means any person who employs the services of an individual person or persons.

(~~ik~~) "Enclosed" means either closed in by a roof and four walls with appropriate openings for ingress and egress or not open to the sky due to a cover or shelter consisting of a tarpaulin, tent structure or other impermeable or semi-permeable materials or fabric.

(l) "Enclosed Area" means an area in which outside air cannot circulate freely to all parts of the area, and includes an area that has:

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(1) any type of overhead cover, whether or not that cover includes vents or other openings and at least three (3) walls or other physical boundaries of any height, whether or not those boundaries include vents or other openings; or

(2) four (4) walls or other vertical boundaries that exceed six (6) feet in height, whether or not those boundaries include vents or other openings.

(m) "Landlord" means any Person or agent of a Person who owns, manages, or is otherwise legally responsible for a Unit in a Multi-Unit Residence that is leased to a residential tenant, except that "Landlord" does not include a tenant who sublets a Unit (e.g., a sublessor).

(jn) "Motion picture theater" means any theater engaged in the business of exhibiting motion pictures.

(o) "Multi-Unit Residence" means property containing two (2) or more Units, including, but not limited to, apartment buildings, condominium complexes, senior and assisted living facilities, and long-term health care facilities. Multi-Unit Residences do not include the following:

(1) a hotel or motel that meets the requirements of California Civil Code section 1940, subdivision (b)(2);

(2) a mobile home park;

(3) a single-family home; and

(4) a single-family home with a detached or attached in-law or second unit

(p) "Nonsmoking Area" means any Enclosed Area or Unenclosed Area in which Smoking is prohibited by (1) this chapter or other law; (2) binding agreement relating to the ownership, occupancy, or use of real property; or (3) designation of a Person with legal control over the area.

(kq) "Public Event" means events open to the general public, including but not limited to a farmers' market, parade, craft fair, festival, or any other such event.

(r) "Public places" means enclosed areas within publicly and privately owned buildings, structures, facilities, or complexes that are open to, used by, or accessible to the general public. Public places include, but are not limited to, stores, banks, eating establishments, bars, hotels, motels, depots and transit terminals, theaters and auditoriums, enclosed sports arenas, convention centers, museums, galleries, polling places, hospitals and other health care facilities of any kind (including clinics, dental, chiropractic, or physical therapy facilities), automotive service centers, general business offices, nonprofit entity offices and libraries. Public places further include, but are not limited to, hallways, restrooms, stairways, escalators, elevators, lobbies, reception areas, waiting rooms, indoor service lines, checkout stations, counters and other pay stations, classrooms, meeting or conference rooms, lecture rooms, buses, or other enclosed places that are open to, used by, or accessible to the general public.

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(~~ms~~) "Service locations" means those enclosed or unenclosed areas open to, used by, or accessible to the general public that are listed below:

- (1) Bus, train and taxi shelters;
- (2) Service waiting areas including, but not limited to, ticket or service lines, public transportation waiting areas, and public telephones;
- (3) Areas within twenty-five feet of the entrance or exit to an enclosed public place, where smoking is prohibited;
- (4) Areas in dedicated parks or other publicly accessible areas that are within twenty-five feet of bleachers, backstops, or play structures.

(~~nt~~) "Smoking" means ~~the combustion of any cigar, cigarette, tobacco or any similar article inhaling, exhaling, burning, or carrying any lighted, heated, or ignited cigar, cigarette, cigarillo, pipe, hookah, Eelectronic Ssmoking Ddevice, or any plant product intended for human inhalation.~~

(~~eu~~) "Tobacco product" means any substance containing tobacco leaf, including but not limited to cigarettes, cigars, smoking tobacco, and smokeless tobacco.

(~~pv~~) "Tobacco store" means a retail store utilized primarily for the sale of tobacco products and accessories and in which the sale of other products is incidental.

(~~qw~~) "Tobacco vending machine" means any electronic or mechanical device or appliance the operation of which depends upon the insertion of money, whether coin or paper bill, or other thing representative of value, which dispenses or releases a tobacco product and/or tobacco accessories.

(x) "Unenclosed Area" means any area that is not an Enclosed Area.

(y) "Unit" means a personal dwelling space, even where lacking cooking facilities or private plumbing facilities, and includes any associated exclusive-use Enclosed Area or Unenclosed Area, such as, for example, a private balcony, porch, deck, or patio. "Unit" includes, without limitation, an apartment; a condominium; a townhouse; a room in a senior facility; a room in a long-term health care facility, assisted living facility, or hospital; a room in a hotel or motel; a dormitory room; a room in a single room occupancy facility; a room in a homeless shelter; a mobile home; a camper vehicle or tent; a single-family home; and an in-law or second unit.

(~~fz~~) "Vapor" means aerosol produced from use of an electronic smoking device.

(~~saa~~) "Workplace" means any enclosed area of a structure or portion thereof used as a place of employment as well as unenclosed workplaces, such as outdoor construction sites.

9.14.020 Smoking prohibited - Enclosed Places.

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Smoking and the use of electronic smoking devices is prohibited in the Enclosed Areas of the following places within the City of Palo Alto, except in places subject to prohibition on smoking contained in Labor Code section 6404.5, in which case that law applies

- (1) Workplaces;
- (2) Public places;
- (3) Units within Multi-Unit residences; and
- (4) Common Areas of Multi-Unit residences.

The effective date of the smoking prohibition provided in subdivisions (3) and (4) of this Section is January 1, 2018.

Any places exempted by the California smoke free workplace law (Labor Code Section 6404.5(d)) are not exempt under this chapter. Smoking is prohibited by this chapter in all places exempted by that State law, except as provided in 9.14.070.

9.14.025 Smoking prohibited - Unenclosed Areas.

(a) Smoking and the use of electronic smoking devices in all unenclosed areas defined as Service Locations shall be prohibited, including a buffer zone within 25 feet from any doorway, window, opening, crack, or vent into an Enclosed Area in which Smoking is prohibited, except while the Person Smoking is actively passing on the way to another destination and provided Smoke does not enter any Enclosed Area in which Smoking is prohibited.

(b) Smoking and the use of electronic smoking devices is prohibited in unenclosed eating establishments and bars.

9.14.030 Smoking prohibited - City cars.

Smoking and the use of electronic smoking devices is prohibited in all city cars.

9.14.035 Smoking Prohibited - Public Parks and Public Events.

Smoking and the use of electronic smoking devices is prohibited in all parks, including at public events.

9.14.040 Smoking prohibited - Child day care facilities.

Smoking is prohibited in a private residence which is licensed as a child day care facility within the meaning of Health and Safety Code Section 1596.750 and Section 1596.795 and amendments.

9.14.045 Smoking prohibited – Commercial Areas and Public Events.

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Smoking and the use of electronic smoking devices is prohibited in commercial areas, except places where smoking is already prohibited by state or federal law, in which case those laws apply. This prohibition includes public events held on public streets. A shopping center or commercial areas may establish a designated smoking area that is at least 25 feet away from any openings and includes receptacles to control litter.

9.14.050 Smoking Prohibited - Outdoor Common Areas of all Multi Unit Residences.

Smoking and the use of electronic smoking devices is prohibited in Outdoor Common Areas of all Multi-Unit Residences, provided, however, that a Person with legal control over a Common Area may designate a portion of the Unenclosed Area of the Common Area as a designated Smoking area if the area meets the following criteria:

- (1) Must be an Unenclosed Area;
- (2) Must be at least twenty-five (25) feet from Unenclosed Areas primarily used by children and Unenclosed Areas with improvements that facilitate physical activity including, for example, playgrounds, tennis courts, swimming pools, and school campuses;
- (3) Must be at least twenty-five (25) feet in any direction from any operable doorway, window, opening or other vent into an Enclosed Area that is located at the Multi-Unit Residence and is a Nonsmoking area;
- (4) Shall have a clearly marked perimeter;
- (5) Shall have a receptacle for cigarette butts that is emptied and maintained, and
- (6) Shall be identified by conspicuous signs.

9.14.055 Smoking Prohibited - Nonsmoking Buffer Zones.

Smoking and the use of electronic smoking devices is prohibited in Adjacent Unenclosed Property within twenty-five (25) feet in any direction of any doorway, window, opening, or other vent into an Enclosed Area of a Multi-Unit Residence.

9.14.060 Required and Implied Lease Terms for all New and Existing Units in Multi-Unit Residences.

- (a) Every lease or other rental agreement for the occupancy of a Unit in a Multi-Unit Residence, entered into, renewed, or continued month-to-month, effective January 1, 2018 shall include the following:
 - (1) A clause stating that Smoking is prohibited in the Unit, including exclusive-use areas such as balconies, porches, or patios.
 - (2) A clause providing that it is a material breach of the lease or agreement for the tenant, or any other Person subject to the control of the tenant or present by invitation or permission of the tenant, to (i) Smoke in any Common Area of the property other than a designated Smoking area; (ii) Smoke in the Unit, or (iii) violate any law regulating Smoking anywhere on the property.

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- (3) A clause providing that it is a material breach of the agreement for tenant or any other Person subject to the control of the tenant to violate any law regulating Smoking while anywhere on the property. Such a clause might state, "It is a material breach of this agreement for tenant or any other person subject to the control of the tenant or present by invitation or permission of the tenant to violate any law regulating smoking while anywhere on the property."
- (4) A clear description of all areas on the property and in the buffer zone where Smoking is allowed or prohibited.
- (5) A clause expressly conveying third-party beneficiary status to all occupants of the Multi-Unit Residence as to the Smoking provisions of the lease or other rental agreement. Such a clause shall provide that any tenant of the Multi-Unit Residence may sue another tenant/owner to enforce the Smoking provisions of the agreement but that no tenant shall have the right to evict another tenant for a breach of the Smoking provisions of the agreement.
- (b) Whether or not a Landlord complies with subsections (a) above, the clauses required by those subsections shall be implied and incorporated by law into every agreement to which subsection (a) applies and shall become effective as of the earliest possible date on which the Landlord could have made the insertions pursuant to subsections (a).
- (c) This chapter shall not create additional liability for a Landlord to any Person for a tenant's breach of any Smoking provision in a lease or other rental agreement for the occupancy of a Unit in a Multi-Unit Residence if the Landlord has fully complied with this Section.
- (d) Failure to enforce any Smoking provision required by this chapter shall not affect the right to enforce such provision in the future, nor shall a waiver of any breach constitute a waiver of any subsequent breach or a waiver of the provision itself.

9.14.065 Other Requirements And Prohibitions.

- (a) Every Landlord shall deliver the following, on or before July 1, 2017, to each Unit of a Multi-Unit Residence:

 - (1) a written notice of the new requirements prohibiting smoking in units and common areas as stated in 9.14. 020
 - (b) As of July 1, 2017, every seller of a Unit in a Multi-Unit Residence shall provide prospective buyers with written notice clearly stating that:

 - (i) Smoking is prohibited in Units, including any associated exclusive-use Enclosed Area or Unenclosed Area, such as, for example, a private balcony, porch, deck, or patio, as of January 1, 2018; and

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(ii) Smoking is prohibited in all Common Areas, except for specifically designated Smoking areas, as of January 1, 2018.

(d) Clear and unambiguous “No Smoking” signs shall be posted in sufficient numbers and locations in Common Areas where Smoking is prohibited by this chapter or other law. Such signs shall be maintained by the Person or Persons with legal control over the Common Areas. The absence of signs shall not be a defense to a violation of any provision of this chapter.

~~9.14.060 Reserved.*~~

~~* Editor's Note: Former Section 9.14.060, Regulation of Smoking in the Workplace, previously codified herein and containing portions of Ordinance Nos. 4056 and 4164 was repealed in its entirety by Ordinance No. 4294.~~

9.14.070 Exemptions.

The following places and workplaces are exempt from Section 9.14.020:

(a) Smoking at theatrical production sites is not prohibited by this subsection if the theater general manager certifies that smoking is an essential part of the story and the use of a fake, prop, or special effect cannot reasonably convey the idea of smoking in an effective way to a reasonable member of the anticipated audience. This exception will not apply if minors are performers within the production.

~~(b) Bingo games, consistent with prohibition on smoking contained in Labor Code section 6404.5 and licensed pursuant to the Palo Alto Municipal Code, which do not permit access by minors under eighteen years of age~~

~~(c)~~ (b) A fully enclosed room in a hotel, motel, other transient lodging establishment similar to a hotel, motel, or public convention center which is being used entirely for a private function and which is not open to the general public, except while food or beverage functions are taking place, including setup, service, and cleanup activities, or when the room is being used for exhibit purposes, sixty-five percent of the guest rooms in a hotel, motel, or similar transient lodging establishment;

~~(d)~~ (c) Tobacco stores with private smokers' lounges meeting the requirements of the applicable portions of subdivision (d)(4) of Labor Code Section 6404.5.

9.14.80 Location of tobacco vending machines.

(a) No person shall locate, install, keep or maintain a tobacco vending machine except in a place which under state law is not lawfully accessible to minors.

(b) This section shall become effective ninety days after its enactment. Any tobacco vending machine not in conformance with this section upon its effective date shall be removed.

9.14.090 Display of tobacco products for sale.

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No person shall display or offer tobacco products for sale except in an area, or from within an enclosure, which physically precludes the removal of the tobacco products without the assistance of the person authorizing such display or offer, or an employee of such person.

(Ord. 4056 § 4 (part), 1991)

9.14.100 Posting of signs required.

With the exception of service locations, wherever this ordinance prohibits smoking and the use of electronic smoking devices, conspicuous signs shall be posted. Signs of similar size containing the international "no smoking" symbol consisting of a pictorial representation of a burning cigarette and electronic smoking device enclosed in a red circle with a red bar across it may be used in addition to or in lieu of any signs required hereunder. Such signs shall be placed by the owner, operator, manager, or other persons having control of such room, building, or other place where smoking and the use of electronic smoking devices is prohibited. Signs placed at each entrance of buildings in which smoking is totally prohibited shall be sufficient. The absence of signs shall not be a defense to a violation of any provision of this chapter.

9.14.110 Enforcement.

Pursuant to Section 6 of Article IV of the Palo Alto City Charter, the city manager is hereby granted authority to enforce the provisions of this chapter and Labor Code Section 6404.5.

9.14.120 Public nuisance.

Any violation of this chapter is a public nuisance and may be abated in accordance with Chapter 9.56 of the Palo Alto Municipal Code and/or Code of Civil Procedure Section 731.

9.14.130 Violations.

Violation of any provision of this chapter shall be punishable as provided in this code. Violations shall be punishable by the following:

- (1) An administrative citation and a fine not exceeding \$250 for the first violation;
- (2) An infraction and a fine not exceeding \$300 for the second violation
- (3) An infraction or a misdemeanor and a fine not exceeding \$500 for each additional violation within one year

SECTION 3. Severability. If any provision, clause, sentence or paragraph of this ordinance, or the application to any person or circumstances, shall be held invalid, such invalidity shall not affect the other provisions of this Ordinance which can be given effect without the invalid provision or application and, to this end, the provisions of this Ordinance are hereby declared to be severable.

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

NOT YET APPROVED

INTRODUCED:

PASSED:

AYES:

NOES:

ABSENT:

ABSTENTIONS:

ATTEST:

City Clerk

Mayor

APPROVED AS TO FORM:

APPROVED:

Principal City Attorney

City Manager

Director of Public Works