

ORDINANCE NO. _____

ORDINANCE OF THE CITY OF CHULA VISTA AMENDING
CHULA VISTA MUNICIPAL CODE CHAPTER 5.56
(TOBACCO RETAILER) TO PROHIBIT THE SALE OF
FLAVORED TOBACCO PRODUCTS AND ELECTRONIC
SMOKING DEVICES LACKING A REQUIRED FOOD AND
DRUG ADMINISTRATION MARKETING ORDER

WHEREAS, jurisdictions are becoming increasingly aware that cities play a critical role in supporting the health and well-being of their communities and, thus, the City of Chula Vista adopted the Healthy Chula Vista Action Plan on January 5, 2016; and

WHEREAS, the City recognizes that policy to limit exposure and access to smoking, especially in our youth, is important to prevent increasing the number of smokers in our community and to reduce the risk of chronic diseases; and

WHEREAS, in 2018, the City adopted various restrictions related to smoking prohibitions and tobacco sales through Ordinance 3413 (updating Chula Vista Municipal Code Chapter 8.22 (Regulation of Smoking in Public Places, Affordable Housing Projects and Places of Employment) and Ordinance 3417 (adding Chula Vista Municipal Code Chapter 5.56 (Tobacco Retailer) (“CVMC 5.56”)); and

WHEREAS, over 480,000 smoking related deaths are reported in the United States each year; and

WHEREAS, 99% of smokers report starting tobacco use before the age of 26; and

WHEREAS, in 2019, about one in every ten middle schoolers and more than one in every four high schoolers reported using electronic cigarettes in the past 30 days; and

WHEREAS, the federal Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act), enacted in 2009, prohibited candy- and fruit-flavored cigarettes, largely because these flavored products were marketed to youth and young adults, and younger smokers were more likely than older smokers to have tried these products; and

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

WHEREAS, flavored products have been shown to be “starter” products for youth who begin using tobacco and that these products help establish tobacco habits that can lead to long-term addiction; and

WHEREAS, The United States Food and Drug Administration (“FDA”) has required that all e-cigarette products file an application for pre-market approval in part to ensure they are not marketing and targeting products to youth; and

WHEREAS, in order to further limit the exposure of youth to starter products such as flavored tobacco products and prevent youth from lifelong tobacco habits and associated chronic diseases in the city, amendments have been proposed to CVMC 5.56.

NOW, THEREFORE, BE IT RESOLVED by the Healthy Chula Vista Advisory Commission, that it recommends that City Council adopt amendments to CVMC 5.56 to restrict the sale of flavored tobacco products and prohibit sales of electronic smoking products that do not have FDA Pre-Market Approval.

NOW THEREFORE the City Council of the City of Chula Vista does ordain as follows:

Section I.

- A. Chapter 5.56, section 5.56.010 of the Chula Vista Municipal Code is amended to read as follows:

5.56.010 Definitions.

The following words and phrases, whenever used in this chapter, shall have the meanings defined in this section unless the context clearly requires otherwise:

- 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 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. “Applicant” means the Person applying for a permit pursuant to this chapter.
- C. “Chief of Police” means the Chief of Police of the City of Chula Vista, or his/her designee.
- D. “City” means the City of Chula Vista.
- E. “City Attorney” means the City Attorney for the City of Chula Vista, or his/her designee.
- F. “Crime of Moral Turpitude” means a crime involving a readiness to do evil, an act of moral depravity of any kind that has a tendency in reason to shake one’s confidence in their honesty, deceit, or fraud.
- G. “Drug Paraphernalia” has the meaning set forth in California Health and Safety Code Section [11014.5](#), as that section may be amended from time to time.
- H. “Electronic Smoking Device” means an electronic device that can be used to deliver an inhaled dose of nicotine, or other substances, including any component, part, or accessory of such a device, whether or not sold separately. “Electronic Smoking Device” includes any such device, whether

manufactured, distributed, marketed, or sold as an electronic cigarette, an electronic cigar, an electronic cigarillo, an electronic pipe, an electronic hookah, or any other product name or descriptor. “Electronic Smoking Device” also includes cartridges, cartomizers, e-liquid, smoke juice, tips, atomizers, Electronic Smoking Device batteries, Electronic Smoking Device charges, and any other item specifically designed for the preparation, charging, or use of Electronic Smoking Devices.

I. “Flavored Tobacco Product” means any Tobacco Product that contains a taste or smell, other than the taste or smell of tobacco, that is distinguishable by a consumer either prior to, or during the consumption of, a tobacco product, including, but not limited to, any taste or smell relating to fruit, menthol, mint, wintergreen, chocolate, cocoa, vanilla, honey, or any candy, dessert, alcoholic beverage, herb, or spice.

I. “Owner” means a Person with an ownership or managerial interest in a business. An ownership interest shall be deemed to exist when a Person has a 20 percent or greater interest in the stock, assets, or income of a business other than the sole interest of security for debt. A managerial interest shall be deemed to exist when a Person can or does have or share ultimate control over the day-to-day operations of a business.

J. “Person” means any natural person, partnership, cooperative association, corporation, personal representative, receiver, trustee, assignee, or any other legal entity.

K. “Police Department” means the Chula Vista Police Department, and any agency or Person designated by the Department to enforce or administer the provisions of this chapter.

L. “Self-Service Display” means the open display or storage of Tobacco Products or Tobacco Paraphernalia in a manner that is physically accessible in any way to the general public without the assistance of the retailer or employee of the retailer and a direct person-to-person transfer between the purchaser and the retailer or employee of the retailer. A vending machine is a form of Self-Service Display.

M. “Tobacco Paraphernalia” means any item designed for the consumption, use, or preparation of a Tobacco Product.

N. “Tobacco Product” means:

1. Any product containing, made, or derived from tobacco or nicotine that is intended for human consumption, whether smoked, heated, chewed, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means, including, but not limited to, cigarettes, cigars, little cigars, chewing tobacco, pipe tobacco, snuff; and

2. Any Electronic Smoking Device.

3. Notwithstanding any provision of subsections [\(N\)\(1\)](#) and [\(N\)\(2\)](#) of this section to the contrary, “tobacco product” includes any component, part, or accessory of a tobacco product, whether or not sold separately. “Tobacco product” does not include any product that has been approved by the United States Food and Drug Administration for sale as a tobacco cessation product or for other therapeutic purposes where such product is marketed and sold solely for such an approved purpose.

O. “Tobacco Retailer” means any Person who sells, offers for sale, or does or offers to exchange for any form of consideration tobacco, Tobacco Products or Tobacco Paraphernalia. “Tobacco Retailing” shall mean the doing of any of these things. This definition is without regard to the quantity of Tobacco Products or Tobacco Paraphernalia sold, offered for sale, exchanged, or offered for exchange. Tobacco Retailer does not include persons licensed by the City to conduct commercial cannabis activity in accordance with Chapter [5.19](#) CVMC. (Ord. 3417 § 1, 2018).

[Section 5.56.020 through 5.56.090 remain unchanged.]

B. Chapter 5.56, section 5.56.095 of the Chula Vista Municipal Code is added to read as follows:

5.56.095 Sale of Certain Items Prohibited.

A. *Sale of Flavored Tobacco Products Prohibited.* Beginning September 1, 2020, it shall be a violation of this chapter for any Person to sell or offer for sale, or to possess with intent to sell or offer for sale, any Flavored Tobacco Product.

1. There shall be a permissive inference that a Tobacco Retailer in possession of four or more Flavored Tobacco Products, including but not limited to individual Flavored Tobacco Products, packages of Flavored Tobacco Products, or any combination thereof, possesses such Flavored Tobacco Products with intent to sell or offer for sale.

2. There shall be a permissive inference that a Tobacco Product is a Flavored Tobacco Product if:

a. a public statement or claim is made or disseminated by the manufacturer of a Tobacco Product, or by any person authorized or permitted by the manufacturer to make or disseminate public statement concerning such tobacco product, that such Tobacco Product has or produces a taste or smell other than tobacco; or

b. text and/or images on the Tobacco Product’s Labeling or Packaging explicitly or implicitly indicates that the Tobacco Product is a Flavored Tobacco Product.

B. *Sale or Distribution of Electronic Smoking Devices Lacking Food and Drug Administration Marketing Order Prohibited.* Beginning September 1, 2020, it shall be a violation of this chapter for any Person to sell or offer for sale, or to possess with intent to sell or offer for sale, in the City any Electronic Smoking Device that requires and does not have a Food and Drug Administration Marketing Order under 21 U.S.C. § 387j.

[Section 5.56.100 through 5.56.130 remain unchanged.]

Section II. Severability

If any portion of this Ordinance, or its application to any person or circumstance, is for any reason held to be invalid, unenforceable or unconstitutional, by a court of competent jurisdiction, that portion shall be deemed severable, and such invalidity, unenforceability or unconstitutionality shall not affect the validity or enforceability of the remaining portions of the Ordinance, or its application to any other person or circumstance. The City Council of the City of Chula Vista hereby declares that it would have adopted each section, sentence, clause or phrase of this

Ordinance, irrespective of the fact that any one or more other sections, sentences, clauses or phrases of the Ordinance be declared invalid, unenforceable or unconstitutional.

Section III. Construction

The City Council of the City of Chula Vista intends this Ordinance to supplement, not to duplicate or contradict, applicable state and federal law and this Ordinance shall be construed in light of that intent.

Section IV. Effective Date

The prohibitions in this amendment to the Ordinance shall take effect and be in force September 1, 2020.

Section V. Publication

The City Clerk shall certify to the passage and adoption of this Ordinance and shall cause the same to be published or posted according to law.

Presented by

Approved as to form by

Kelly G. Broughton, FASLA
Director of Development Services

Glen R. Googins
City Attorney