

IN THE CITY COUNCIL FOR THE CITY OF SAN LEANDRO

**AN ORDINANCE OF THE CITY OF SAN LEANDRO ADDING CHAPTER 4.36
“TOBACCO RETAILERS” TO THE SAN LEANDRO MUNICIPAL CODE TO
REQUIRE THE LICENSURE OF TOBACCO RETAILERS AND TO REGULATE THE
SALE OF CIGARS, CIGARILLOS AND ELECTRONIC CIGARETTES**

WHEREAS, the California Constitution, Article XI, Section 7, provides cities and counties with the authority to enact ordinances to protect the health, safety, welfare, and morals of their citizens; and

WHEREAS, California courts have affirmed the power of a city to regulate business activity in order to discourage violations of law in such cases as Cohen v. Board of Supervisors (1985) 40 Cal.3d 277, Bravo Vending v. City of Rancho Mirage (1993) 16 Cal.App.4th 383, and Prime Gas v. City of Sacramento (2010) 184 Cal.App.4th 697; and

WHEREAS, local zoning controls allow local governments to regulate the operation of lawful businesses to avoid circumstances which facilitate violations of state, federal, and local laws; and

WHEREAS, based in part on the information contained in this section, the City Council finds that the failure of tobacco retailers to comply with all tobacco control laws, particularly laws prohibiting the sale of tobacco products to minors, presents an imminent threat to the public health, safety, and welfare of the residents of the City San Leandro; and

WHEREAS, approximately 480,000 people die in the United States from tobacco-related diseases every year, making it the nation’s leading cause of preventable death;¹ and

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

- The Legislature has declared that smoking is the single most important source of preventable disease and premature death in California; that keeping children from beginning to use tobacco products in any form shall be among the highest priorities in disease prevention for the State of California;²
- State law prohibits the sale or furnishing of cigarettes, tobacco products, and smoking paraphernalia to anyone under the age of 21;³ requires that tobacco retailers check the identification of tobacco purchasers who reasonably appear to be under 21 years of age;⁴ requires that retailers of tobacco products post conspicuous notices stating that selling

¹ U.S. Department of Health and Human Services. 2014. *The Health Consequences of Smoking — 50 Years of Progress. A Report of the Surgeon General*, www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf.

² Cal. Health & Safety Code § 118950.

³ Cal. Pen. Code § 308.

⁴ Cal. Bus. & Prof. Code § 22956.

tobacco products to anyone under 21 years of age is illegal;⁵ prohibits the sale of tobacco products and paraphernalia through self-service displays with limited exceptions;⁶ prohibits the sale of “bidis” (filterless cigarettes wrapped in temburni or tendu leaf) except in adult-only establishments;⁷ prohibits the manufacture, distribution, or sale of cigarettes in packages of less than 20 and prohibits the manufacture, distribution, or sale of “roll-your-own” tobacco in packages containing less than 0.60 ounces of tobacco;⁸ and

WHEREAS, state law requires all tobacco retailers to be licensed by the Board of Equalization primarily to curb the illegal sale and distribution of cigarettes due to tax evasion and counterfeiting;⁹ and

WHEREAS, state law explicitly permits cities and counties to enact local tobacco retail licensing ordinances, and allows for the suspension or revocation of a local license for a violation of any state tobacco control law;¹⁰ and

WHEREAS, despite local, state, and federal efforts to limit youth access to tobacco, minors are still able to access tobacco products, as evidenced by the following: in 2009, 10.9% of all students in grades 9-12, including 6.7% of female students and 15% of male students were current cigar users;¹¹ in 2009, 3.9% of all students in grades 6-8 were current cigar users;¹² and

WHEREAS, research demonstrates that local tobacco retail ordinances dramatically reduce youth access to cigarettes, as evidenced by the following:

- A review of thirty three California communities with strong tobacco retailer licensing ordinances shows that the youth sales rate declined in nearly each community;¹³
- A study of the effect of licensing and enforcement methods used in the Philadelphia area revealed a decrease in sales to minors from 85% in 1994 to 43% in 1998;¹⁴
- A study of several Minnesota cities found that an increased licensing fee in conjunction with strict enforcement of youth access laws led to a decrease from 38.8% to 4.9% in the number of youth able to purchase tobacco;¹⁵ and

⁵ Cal. Bus. & Prof. Code § 22952.

⁶ Cal. Bus. & Prof. Code §§ 22960, 22962.

⁷ Cal. Pen. Code § 308.1.

⁸ Cal. Pen. Code § 308.3.

⁹ Cal. Bus. & Prof. Code §§ 22970.1, 22972.

¹⁰ Cal. Bus. & Prof. Code § 22971.3

¹¹ National Center for Chronic Disease Prevention and Health Promotion (US) Office on Smoking and Health. Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General. Atlanta (GA): Centers for Disease Control and Prevention (US); 2012. 3, The Epidemiology of Tobacco Use Among Young People in the United States and Worldwide. Available from: <http://www.ncbi.nlm.nih.gov/books/NBK99243/>.

¹² *Id.*

¹³ American Lung Association in California, Center for Tobacco Policy & Organizing. 2013. *Tobacco Retail Licensing is Effective*, <http://center4tobaccopolicy.org/wp-content/uploads/2016/10/Tobacco-Retailer-Licensing-is-Effective-September-2013.pdf>.

¹⁴ Ma GX, Shive S and Tracy M. “The Effects of Licensing and Inspection Enforcement to Reduce Tobacco Sales to Minors in Greater Philadelphia, 1994-1998.” *Addictive Behaviors*, 26(5): 677-87, 2001. Abstract available at: www.ncbi.nlm.nih.gov/entrez/query.fcgi?cmd=Retrieve&db=PubMed&list_uids=11676378&dopt=Abstract.

WHEREAS, over one hundred and forty-eight cities and counties in California have passed tobacco retailer licensing ordinances in an effort to stop minors from smoking;¹⁶ and

WHEREAS, while state law prohibits possession of certain forms of “drug paraphernalia,” and prohibits all sales of “drug paraphernalia,” many retailers continue to sell items that are commonly known to be “drug paraphernalia,” and claim that such items are intended to be used for tobacco; and

WHEREAS, the federal Family Smoking Prevention and Tobacco Control Act, enacted in 2009, prohibited candy and fruit-flavored cigarettes,¹⁷ largely because these flavored products were marketed to youth and young adults,¹⁸ and younger smokers were more likely to have tried these products than older smokers;¹⁹ and although the manufacture and distribution of flavored cigarettes (excluding menthol) is banned by federal law,²⁰ neither federal nor California laws restrict sales of flavored non-cigarette tobacco products, such as cigars, cigarillos, smokeless tobacco, hookah tobacco, and electronic smoking devices and the nicotine solutions used in these devices; and

WHEREAS, flavored non-cigarette tobacco products have become increasingly common and are available in a variety of flavors that appeal to children and young adults,²¹ including apple, cherry, chocolate, grape, peach, strawberry, and vanilla; and

WHEREAS, the U.S. Surgeon General has stated that flavored tobacco products are considered to be “starter” products that help establish smoking habits that can lead to long-term addiction;²² and

¹⁵ Forster JL et al. “The Effects of Community Policies to Reduce Youth Access to Tobacco.” *American Journal of Public Health*, 88(8): 1193-1197, 1998. Available at: www.ajph.org/cgi/reprint/88/8/1193.

¹⁶ American Nonsmokers’ Rights Foundation. 2012. *California Municipalities with Laws Restricting Youth Access to Tobacco*, <http://changelabsolutions.org/publications/anrf-list>.

¹⁷ 21 U.S.C. § 387g.

¹⁸ U.S. Department of Health and Human Services. 2012. *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General*. Atlanta: U.S. National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, p. 537, www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/full-report.pdf.

¹⁹ *Id.*

²⁰ 21 U.S.C. § 387g.

²¹ U.S. Department of Health and Human Services. 2012. *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General*. Atlanta: U.S. National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, p. 164, 205, www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/full-report.pdf; Morris DS and Fiala SC. 2013. “Flavoured, Non-cigarette Tobacco for Sale in the USA: An Inventory Analysis of Internet Retailers.” *Tobacco Control*. [Electronic publication ahead of print], <http://tobaccocontrol.bmj.com/content/early/2013/08/08/tobaccocontrol-2013-051059.full>.

²² U.S. Department of Health and Human Services. 2012. *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General*. Atlanta: U.S. National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, p. 539, www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/full-report.pdf.

WHEREAS, data from the National Youth Tobacco Survey indicate that approximately two-fifths of U.S. middle and high school smokers report using flavored little cigars or flavored cigarettes;²³ and

WHEREAS, tobacco companies have used flavorings such as mint and wintergreen in smokeless tobacco products as part of a “graduation strategy” to encourage new users to start with products with lower levels of nicotine and progress to products with higher levels of nicotine;²⁴ and

WHEREAS, the U.S. Centers for Disease Control and Prevention has reported current electronic cigarette use (use on at least 1 day in the past 30 days) among high school students increased from 4.5 percent in 2013 to 13.4 percent in 2014, rising from approximately 660,000 to 2 million students. Among middle school students, current e-cigarette use more than tripled from 1.1 percent in 2013 to 3.9 percent in 2014—an increase from approximately 120,000 to 450,000 students;²⁵ and

WHEREAS, nicotine solutions, which are consumed via electronic smoking devices such as electronic cigarettes, are sold in dozens of flavors that appeal to youth, such as coffee and fruit;²⁶ and

WHEREAS, electronic cigarette companies have targeted minors with fruit-flavored products;²⁷ and

WHEREAS, while it is unlawful to sell or furnish an electronic cigarette to minors,²⁸ minors are still able to obtain access to electronic cigarette products. A national survey revealed that between 2011 and 2012, middle school students who reported ever using e-cigarettes

²³ King BA, Tynan MA, Dube SR, et al. 2013. “Flavored-Little-Cigar and Flavored-Cigarette Use Among U.S. Middle and High School Students.” *Journal of Adolescent Health*. [Article in press], www.jahonline.org/article/S1054-139X%2813%2900415-1/abstract.

²⁴ U.S. Department of Health and Human Services. 2012. *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General*. Atlanta: U.S. National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, p. 539, www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/full-report.pdf.

²⁵ Centers for Disease Control & Prevention. April 17, 2015. “Tobacco Use Among Middle and High School Students — United States, 2011–2014,” *Morbidity and Mortality Weekly Report (MMWR)* 64(14):381-385 http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6414a3.htm?s_cid=mm6414a3_w

²⁶ U.S. Department of Health and Human Services. 2012. *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General*. Atlanta: U.S. National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, p. 549, www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/full-report.pdf.

²⁷ Press Release, State of California Department of Justice, Office of the Attorney General, Brown Announces Electronic Cigarette Maker's Agreement to Stop Deceptive Marketing and Sales to Minors (Aug. 3, 2010), oag.ca.gov/news/press-releases/brown-announces-electronic-cigarette-makers-agreement-stop-deceptive-marketing.

²⁸ Cal. Penal Code § 308.

increased from 1.4% to 2.7% and current use of e-cigarettes increased from 0.6% to 1.1%.²⁹ The same survey found that high school students who reported ever using e-cigarettes increased from 4.7% to 10.0% while current use increased from 1.5% to 2.8%;³⁰ and

WHEREAS, the safety and efficacy of electronic cigarettes is still unknown and electronic cigarettes deliver an unknown mix of potentially carcinogenic and toxic compounds as evidenced by the following: a) nicotine content labeling was not accurate with some manufacturers;³¹ b) nicotine related impurities contents in cartridges and refills vary by electronic cigarette manufacturer;³² and c) the concentrations of some metal and silicate particles in electronic cigarette aerosol were higher than or equal to the levels contained in conventional cigarette smoke;³³ and

WHEREAS, it is unknown if e-cigarettes may lead minors to try other tobacco products; and

WHEREAS, the City Council finds that the reports referenced herein are relevant to the problems addressed by the City of San Leandro in enacting this ordinance to preserve and safeguard public health, safety and welfare by protecting against the negative secondary effects and adverse impacts of tobacco use and electronic cigarette use among youth; and

WHEREAS, the federal Family Smoking Prevention and Tobacco Control Act (the “FDA law”) completely bans free distribution of all tobacco products except smokeless tobacco, which can still be distributed in “qualified adult-only facilities”;³⁴ and

WHEREAS, the FDA law does not prohibit the free distribution of coupons or nominally priced tobacco products; and

WHEREAS, California state law prohibits the sale or distribution of free or nominal-cost cigarettes or smokeless tobacco products (or coupons, coupon offers, or rebate offers for such products) on public grounds or on private grounds that are open to the public;³⁵ and

WHEREAS, California state law specifically allows adoption of a local ordinance related to the distribution of free or nominal-cost tobacco products that is “more restrictive”

²⁹ Centers for Disease Control and Prevention. Electronic Cigarette Use Among Middle and High School Students—United States, 2011-2012. *Morbidity and Mortality Weekly Report*. September 6, 2013 (survey results are available at http://www.cdc.gov/tobacco/data_statistics/surveys/nyts.)

³⁰ *Id.*

³¹ Trehy ML, Ye W, et al. “Analysis of Electronic Cigarette Cartridges, Refill Solutions, and Smoke for Nicotine and Nicotine Related Impurities.” *Journal of Liquid Chromatography & Related Technologies*, 34:1442–1458, 2011.

³² *Id.*

³³ Williams M, Villarreal A, Bozhilov K, Lin S, Talbot P (2013) Metal and Silicate Particles Including Nanoparticles Are Present in Electronic Cigarette Cartomizer Fluid and Aerosol. *PLoS ONE* 8(3): e57987. doi:10.1371/journal.pone.0057987.

³⁴ 21 U.S.C. § 387a-1.

³⁵ Cal. Health & Safety Code § 118950.

provides that a stricter local ordinance shall govern in the case of any inconsistency between the local ordinance and state law;³⁶ and

WHEREAS, the FDA law also expressly grants state and local governments the right to enact measures that are more restrictive than those in the federal law;³⁷ and

WHEREAS, the City of San Leandro has a substantial interest in promoting compliance with federal, state, and local laws prohibiting the sale or furnishing of tobacco products and electronic cigarette products to minors; in discouraging the illegal purchase of tobacco and electronic cigarette products by minors; in promoting compliance with laws prohibiting sales of cigarettes and tobacco products to minors; and in protecting children from being lured into illegal activity through adult misconduct; and

WHEREAS, the City Council finds that a local licensing system for tobacco retailers is appropriate to ensure that retailers comply with tobacco control laws and business standards of the City of San Leandro, to protect the health, safety, and welfare of our residents; and

WHEREAS, a requirement for a tobacco retailer license will not unduly burden legitimate business activities of retailers who sell or distribute cigarettes or other tobacco products or electronic cigarettes to adults. It will, however, allow the City to regulate the operation of lawful businesses to discourage violations of federal, state, and local tobacco and electronic cigarette-related laws; and

WHEREAS, it is the intent of the City Council, in enacting this ordinance, to ensure compliance with the business standards and practices of the City of San Leandro and to encourage responsible tobacco retailing and to discourage violations of tobacco-related laws, especially those which prohibit or discourage the sale or distribution of tobacco and nicotine products to minors, but not to expand or reduce the degree to which the acts regulated by federal or state law are criminally proscribed or to alter the penalties provided therein; and

WHEREAS, the amendments to the Municipal Code propose to add Chapter 4.36 as shown in Exhibit A, which exhibit is attached and incorporated herein by reference.

Now, therefore, the City Council of the City of San Leandro does ordain as follows:

SECTION I. Recitals. The above recitals are true and correct and made a part of this ordinance.

SECTION II. CEQA. Approval of the amendments is exempt from further environmental review under the general rule in California Environmental Quality Act (CEQA) Guidelines Section 15061(b)(3) that CEQA only applies to projects that have the potential for causing a significant effect on the environment. As a series of text amendments and additions, it can be

³⁶ *Id.*

³⁷ 21 U.S.C. § 387p(a)(1).

seen with certainty that there is no possibility that the ordinance will have a significant effect on the environment.

SECTION III. Approval. The City Council hereby approves the amendments to the Municipal Code, more particularly, adding Chapter 4.36, as shown in attached Exhibit A, which is incorporated herein by reference and available for review in the City Clerk's office during normal business hours.

SECTION IV. Severability. If any provision of this ordinance or the application thereof to any person or circumstance is held invalid, the remainder of the ordinance, including the application of such part or provision to other persons or circumstances shall not be affected thereby and shall continue in full force and effect. To this end, provisions of this ordinance are severable. The City Council hereby declares that it would have passed each section, subsection, subdivision, paragraph, sentence, clause, or phrase hereof irrespective of the fact that any one or more sections, subsections, subdivisions, paragraphs, sentences, clauses, or phrases be held unconstitutional, invalid, or unenforceable.

SECTION V. Publication and effective date. This Ordinance shall take effect thirty (30) days after adoption. The City Clerk of the City of San Leandro shall cause the Ordinance to be published in accordance with section 36933 of the Government Code of the State of California.

2815301.1