

ORDINANCE NO. 20-2197

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF CUPERTINO  
REPEALING AND REPLACING CHAPTER 5.50 OF TITLE 5 (BUSINESS LICENSES  
AND REGULATIONS) TO REGULATE THE SALE OF TOBACCO PRODUCTS

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The City Council of the City of Cupertino finds that:

1. Electronic cigarettes, also known as e-cigarettes, e-vaporizers, or electronic nicotine delivery systems, are battery-operated devices that people use to inhale an aerosol that typically contains nicotine. In addition to nicotine, the aerosol from e-cigarettes may include up to 31 other components, including formaldehyde, acetaldehyde, glycidol, acrolein, acetol, and diacetyl. Several of these compounds are likely carcinogens, and acrolein is a powerful irritant. (See *2016 Surgeon General's Report: E-Cigarette Use Among Youth and Young Adults*, Centers for Disease Control and Prevention (2016), [https://www.cdc.gov/tobacco/data\\_statistics/sgr/e-cigarettes/index.htm](https://www.cdc.gov/tobacco/data_statistics/sgr/e-cigarettes/index.htm)). These products can resemble traditional tobacco cigarettes (cig-a-likes), cigars, or pipes, or even everyday items like pens or USB memory sticks. (See *Vaping Devices (Electronic Cigarettes)*, National Institute for Drug Abuse (2020), <https://www.drugabuse.gov/publications/drugfacts/vaping-devices-electronic-cigarettes>). The pervasive use of these and other related electronic cigarette products has given rise to a massive and multifaceted public health crisis. In addition, the Surgeon General has declared the use of e-cigarettes among youth an "epidemic." Nearly 1 in 3 Santa Clara County teens—31.6 percent—report that they have used an e-cigarette at least once. (See Zhu S-H, et al., *Tobacco use among high school students in Santa Clara County: Findings from the 2017-18 California Student Tobacco Survey*, Center for Research and Intervention in Tobacco Control (2019)).
2. The City Council of the City of Cupertino held a duly noticed public hearing on February 4<sup>th</sup>, 2020, and after considering all testimony and written materials provided in connection with that hearing introduced this ordinance and waived the reading thereof.

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

**SECTION 1. Adoption.**

The Cupertino Municipal Code is hereby amended as set forth in Attachment A.

**SECTION 2: Severability and Continuity.**

The City Council declares that each section, sub-section, paragraph, sub-paragraph, sentence, clause and phrase of this ordinance is severable and independent of every other section, sub-section, paragraph, sub-paragraph, sentence, clause and phrase of this ordinance. If any section, sub-section, paragraph, sub-paragraph, sentence, clause or phrase of this ordinance is held invalid, or its application to any person or circumstance, be determined by a court of competent jurisdiction to be unlawful, unenforceable or otherwise void, the City Council declares that it would have adopted the remaining provisions of this ordinance irrespective of such portion, and further declares its express intent that the remaining portions of this ordinance should remain in effect after the invalid portion has been eliminated. To the extent the provisions of this Ordinance are substantially the same as previous provisions of the Cupertino Municipal Code (that are not expressly repealed and replaced), these provisions shall be construed as continuations of those provisions and not as an amendment to or readoption of the earlier provisions.

**SECTION 3: California Environmental Quality Act.**

This Ordinance is not a project under the requirements of the California Quality Act of 1970, together with related State CEQA Guidelines (collectively, "CEQA") because it has no potential for resulting in physical change in the environment. 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 that the action approved may have a significant effect on the environment. CEQA applies only to actions which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA. In this circumstance, the amendments to the City Code would have no or only a de minimis effect on the environment. The foregoing determination is made by the City Council in its independent judgment.

**SECTION 4: Effective Date.**

This Ordinance shall take effect thirty days after adoption as provided by Government Code Section 36937. However, the Ordinance's requirements shall not become operative

as to tobacco retailers until July 1, 2020, which means that the City, or its designee, will not begin to enforce the provisions and penalties under the Ordinance until July 1, 2020.

**SECTION 5: Publication.**

The City Clerk shall give notice of adoption of this Ordinance as required by law. Pursuant to Government Code Section 36933, a summary of this Ordinance may be prepared by the City Clerk and published in lieu of publication of the entire text. The City Clerk shall post in the office of the City Clerk a certified copy of the full text of the Ordinance listing the names of the City Council members voting for and against the ordinance.

**INTRODUCED** at a regular meeting of the Cupertino City Council on February 4, 2020 and **ENACTED** at a regular meeting of the Cupertino City Council on February 18, 2020 by the following vote:

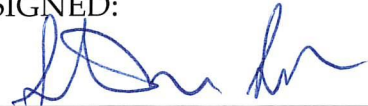
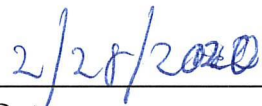

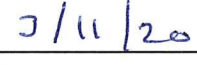
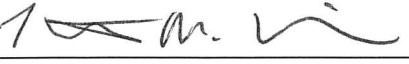
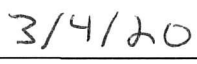
Vote    Members of the City Council

AYES:        Scharf, Paul, Chao, Sinks, Willey

NOES:        None

ABSENT:     None

ABSTAIN:    None

SIGNED:  _____ Steven Scharf, Mayor City of Cupertino	 _____ Date
ATTEST:  _____ Kirsten Squarcia, City Clerk	 _____ Date
APPROVED AS TO FORM:  _____ Heather Minner, City Attorney	 _____ Date

Attachment A – An Ordinance of the City Council of the City of Cupertino Repealing and Replacing Chapter 5.50 of Title 5 (Business Licenses and Regulations) to Regulate the Sale of Tobacco Products

*The sections of the Cupertino Municipal Code set forth below are amended or adopted as follows:*

*Text added to existing provisions is shown in bold double-underlined text (**example**) and text to be deleted is shown in strikethrough (~~example~~). Text in existing provisions is not amended or readopted by this Ordinance. Text in italics is explanatory and is not an amendment to the Code.*

*Where the explanatory text indicates that a new section is being added to the City Code, the new section is shown in plain text.*

*This ordinance amends several portions of the Municipal Code. For ease of review, the amendments advancing the primary objective are presented first followed by conforming amendments. There is a separate heading in bold italics for each portion of the Code being amended. Each portion is shown beginning on a separate page.*

**1. Chapter 5.50 of Title 5 is repealed and replaced as follows:**

5.50.010 Section 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 twenty-one;
4. Respond to a new wave of addiction to electronic cigarette products;
5. Reduce vulnerability to unexplained illnesses associated with electronic cigarette products; and

6. 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.

5.50.020 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 or public entity selected or designated by the city to enforce and/or administer the provisions of this chapter.
- C. "Distribute or Distribution" means the transfer, by any person other than a common carrier, of a tobacco product to another person for sale or personal consumption.
- D. "Electronic cigarette products" means any of the following products:
1. Any device or delivery system that can be used to deliver nicotine in aerosolized or vaporized form, including, but not limited to, an e-cigarette, e-cigar, e-pipe, vape pen, or e-hookah.
  2. Any component, part, or accessory of such a device or delivery system that is used during its operation.

3. Any flavored or unflavored liquid or substance containing nicotine, whether sold separately or sold in combination with any device or delivery system that could be used to deliver nicotine in aerosolized or vaporized form.
  4. Any product for use in an electronic nicotine device or delivery system whether or not it contains nicotine or tobacco or is derived from nicotine or tobacco.
  5. Electronic cigarette products shall not include any battery, battery charger, carrying case, or other accessory not used in the operation of the device if sold separately. Electronic cigarette products shall 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 that product is marketed and sold solely for such approved use. See 21 U.S.C. § 387a. As used in this subsection, nicotine does not include any food products as that term is defined pursuant to Section 6359 of the California Revenue and Taxation Code.
- E. "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. Notwithstanding any other definition in this code, an owner means a person who possesses ownership.
- F. "Permit" means a valid permit issued by the city or its designee to a person to act as a retailer.
- G. "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, distributed, or offered for sale or exchange.

H. "School" means a public or private elementary, middle, junior high, or high school.

I. "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] are 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 cigarette products. 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.

5.50.030. 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 retailing occurs. 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 location identified in the permit.
- 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 twenty-one 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 distribute a tobacco product to another person who appears to be under thirty 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 individuals selling tobacco products. No individual 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 without a 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 fifteen percent of the square footage of the windows and clear doors of a physical storefront used for retailing tobacco products 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 of this subsection (H) shall not apply to an establishment where there are no windows or clear doors, or where existing windows are located only 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. 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 but not limited to strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, mint, menthol, 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 (I) 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.

- 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 persons under twenty-one years. No retailer shall sell, offer for sale, or distribute any tobacco product to any individual who is under twenty-one years of age.
- L. Prohibition on sale or distribution of electronic cigarette products. No retailer shall sell or distribute electronic cigarette products.

5.50.040. Eligibility requirements for a permit.

- A. No retailer permit may be issued to authorize retailing at or from 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 one thousand 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 operating lawfully on the date immediately prior to this chapter becoming effective provided that the retailer obtains a permit prior to July 1, 2020 pursuant to sections 5.50.050 and 5.50.060, and timely renews its permit pursuant to 5.50.070(B); 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 five hundred 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 provided that the retailers obtain a permit prior to July 1, 2020 pursuant to sections 5.50.050 and 5.50.060, and timely renew their permits pursuant to 5.50.070(B).

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.

5.50.050 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 fourteen 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.

5.50.060 Permit issuance, denial, and revocation.

- 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.
  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.

5.50.070 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 provided that the retailer is in compliance with this chapter, as amended. 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 twenty

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.

5.50.080 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 5.50.040(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.

5.50.090 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 city identified on the face of the permit. All permits are issued subject to the city's right to amend this chapter, and retailers shall comply with all provisions of this chapter, as amended.

5.50.100 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 or ordinance 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.

5.50.110 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 twelve-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.

5.50.120 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.

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

- 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, 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 one hundred dollars (\$100.00) for a first violation;
2. A fine not to exceed two hundred dollars (\$200.00) for a second violation within a twelve-month period; and
3. A fine not to exceed five hundred dollars (\$500.00) for each additional violation within a twelve-month period.

C. Time period for permit suspension. The period of the suspension shall be as follows:

1. For a first violation of this chapter at a location within any sixty-month period, the retailer permit shall be suspended for up to thirty calendar days.
2. For a second violation of this chapter at a location within any sixty-month period, the retailer permit shall be suspended for up to ninety calendar days.
3. For each additional violation of this chapter at a location within any sixty-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 the city or its designee exercises its discretion to provide a corrections period and a retailer's violation is corrected within the time allowed for correction, no penalty shall be imposed under this chapter.
- F. Written notice of penalties. Whenever a fine is issued and/or a permit is suspended based on a violation of this chapter, the city or its designee shall provide the retailer written notice of the violation and the fine and suspension, including when the suspension shall take effect.

5.50.140 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, 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 one hundred dollars (\$100.00) for a first violation;
2. A fine not to exceed two hundred dollars (\$200.00) for a second violation within a twelve-month period; and
3. A fine not to exceed five hundred dollars (\$500.00) for each additional violation within a twelve-month period.

C. Time period for permit ineligibility. The ineligibility period shall be as follows:

1. For a first violation of this chapter at a location within any sixty-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 thirty calendar days have passed from the date of the violation.
2. For a second violation of this chapter at a location within any sixty-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 ninety calendar days have passed from the date of the violation.
3. For each additional violation of this chapter at a location within any sixty-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. Written notice of penalties. Whenever a fine is issued and/or a permit is suspended pursuant to this section, the city or its designee shall provide the retailer written notice of the fine and suspension, including when the suspension shall take effect.
- F. Appeals. Any penalties imposed under this chapter may be appealed pursuant to this section. A timely appeal shall stay enforcement of the appealed penalties while the appeal is ongoing.

#### 5.50.150 Appeals.

- A. Any retailer served with a written notice of penalties may request an administrative hearing to appeal the existence of the violation, the amount of the fine, and/or the length of the suspension by returning a completed hearing request form to the city or its designee within 10 days from the date of the written notice of penalties.
- B. The retailer shall include the following in or with the hearing request form:
  - 1. A statement indicating the reason the retailer contests the written notice of penalties;
  - 2. Any evidence the retailer wants the hearing officer to consider;
  - 3. An advance deposit of the amount of any fine challenged; and

4. The address of the retailer and, if available, an email address that can be used for contact and correspondence by the city or its designee. The retailer may request service of notice by mail.
- C. The hearing request form shall be deemed filed on the date received by the agency designated by the city. A timely appeal shall stay enforcement of the appealed penalties while the appeal is ongoing.
- D. After receiving a timely hearing request form, the city or its designee shall schedule an administrative hearing. The city or its designee shall provide the retailer at least ten calendar days' written notice of the date, time, and place of the administrative hearing and the name of the hearing officer who will conduct the hearing. The notice shall be given to the retailer either by email, if requested, or by first class mail, postage prepaid.
- E. Between the time the retailer requests the administrative hearing and the time of the hearing officer's decision, the retailer, and each of their representatives shall not engage in ex parte communications with the hearing officer regarding the matters at issue in the hearing.
- F. The hearing shall be conducted by the hearing officer on the date, time, and place specified in the notice to the retailer. A retailer's failure to appear at the hearing shall constitute an abandonment of the hearing request and a failure to exhaust administrative remedies as a precedent to judicially challenge the existence of the violation and the imposition of the fine and suspension.
- G. At the hearing, the retailer and the city or its designee shall have the opportunity to present evidence, including witnesses, relevant to the hearing officer's determination of the matter. 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. The hearing officer may admit any evidence, including witnesses, relevant to the determination of the matter, except as otherwise provided in Section 5.50.160(C).

- H. The written notice of penalties and any other reports prepared by or for the city or its designee concerning the violation shall be admissible and accepted by the hearing officer as prima facie evidence of the violation and the facts stated in those documents. The hearing officer may continue the hearing from time to time, in his or her sole discretion, to allow for its orderly completion.
- I. After receiving the evidence submitted at the hearing, the hearing officer may further continue the hearing and request additional information from either the city, its designee, or the retailer.
- J. After considering the evidence and testimony submitted, the hearing officer shall issue a written decision regarding the matters properly raised in the request for administrative hearing. The hearing officer's decision shall:
  - 1. Be based on a preponderance of the evidence.
  - 2. Include a statement of the reasons for the decision.
  - 3. Be issued within twenty calendar days of the close of the hearing.
  - 4. Be served on both the retailer and the city or its designee. The decision shall be given to the retailer either by email, if requested, or by first class mail, postage prepaid.

- K. Based on the hearing officer's decision, the city or its designee shall promptly refund to the retailer any amount of the advance fine deposit the city or its designee is not entitled to.
- L. The hearing officer's written decision shall constitute the final administrative decision of the city.

5.50.160 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 eighteen 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 § 36900.
  
- F. The remedies provided by this chapter are cumulative and in addition to any other remedies available at law or in equity.

5.50.170 No conflict with federal or state law.

Nothing in this Chapter shall be interpreted or applied so as to create any requirement, power, or duty that is preempted by, or in conflict with, federal or state law, rules, or regulations.



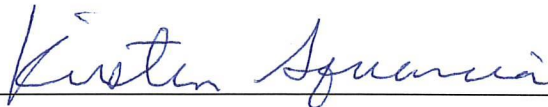
STATE OF CALIFORNIA )

COUNTY OF SANTA CLARA )

CITY OF CUPERTINO )

I, KIRSTEN SQUARCIA, City Clerk and ex-officio Clerk of the City Council of the City of Cupertino, California, do hereby certify the attached to be a true and correct copy of Ordinance No. 20-2197, which was enacted on February 18, 2020, and that it has been published or posted pursuant to law (G.C. 40806).

IN WITNESS WHEREOF, I have hereunto set my hand and seal  
this 11<sup>TH</sup> day of ~~February~~ March 2020.



KIRSTEN SQUARCIA, City Clerk and Ex-officio Clerk  
of the City Council of the City of Cupertino, California