

DRAFT 9/23/2020 AA

ORDINANCE NO. _____

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY
OF SUNNYVALE TO AMEND CHAPTER 9.28
(REGULATION OF SMOKING) OF TITLE 9 (PUBLIC
PEACE, SAFETY OR WELFARE) OF THE SUNNYVALE
MUNICIPAL CODE TO PROHIBIT THE SALE OF
FLAVORED TOBACCO PRODUCTS**

WHEREAS, the City of Sunnyvale desires to amend certain sections of the Sunnyvale Municipal Code Chapter 9.28 relating to regulation of smoking and flavored tobacco products to protect public health, safety, and welfare by discouraging the sale and distribution of flavored tobacco products; and

WHEREAS, in 2009, the federal Food and Drug Administration (FDA) banned all flavored cigarette products (with the exception of menthol); and

WHEREAS, following the FDA ban, tobacco use by youth decreased by 6% and decreased the likelihood of becoming a cigarette smoker by 17%; and

WHEREAS, federal law does not restrict the sale of menthol cigarettes or flavored non-cigarette tobacco products, such as cigarillos or electronic smoking devices, and the solutions used in these devices; and

WHEREAS, on August 28, 2020, the state of California adopted SB 793, codified at California Health and Safety Code section 104559.5 and taking effect on January 1, 2021, which will prohibit the sale of most flavored tobacco products and which specifically provides that a municipality may adopt a more strict local ordinance; and

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

WHEREAS, tobacco use remains the number one most preventable cause of death and disease in the United States, causing one in eight deaths in Santa Clara County every year; and

WHEREAS, evidence and studies show that youth believe flavored tobacco products are safer and less addictive than non-flavored varieties; and

WHEREAS, 82.3% of Santa Clara County teens currently using tobacco reported using a flavored tobacco product; and

WHEREAS, 80% of Santa Clara County teens reported starting tobacco use with a flavored tobacco product; and

WHEREAS, in 2016, an estimated 82% of tobacco retailers in California sold flavored

non-cigarette tobacco products, over 90% of tobacco retailers sold menthol cigarettes, and 8 of 10 tobacco retailers near schools sold flavored, non-cigarette tobacco products; and

WHEREAS, in 2019, the City Council approved Study Issue 19-01, titled Ban the Sale of Flavored Tobacco Products, of which a main goal is to prohibit the sale of flavored tobacco products, and includes a study of implementation strategies and enforcement options.

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

SECTION 1. Chapter 9.28 AMENDED. Chapter 9.28 (Regulation of Smoking) of Title 9 (Public Health, Safety or Welfare) of the Sunnyvale Municipal Code is hereby amended to read as follows:

9.28. Regulation of Smoking and Flavored Tobacco Products.

SECTION 2. Section 9.28.010 AMENDED. Section 9.28.010 of Chapter 9.28 (Regulation of Smoking) of Title 9 (Public Health, Safety, or Welfare) of the Sunnyvale Municipal Code is hereby amended to read as follows:

9.28.010. Purpose.

The city council of the city of Sunnyvale does hereby find that tobacco smoke is detrimental to the health, welfare and comfort of the general public and that the health, safety and general welfare of the residents of, persons employed in, and persons who frequent this city would be furthered by the prohibition and regulation of smoking in enclosed places or defined places, including places of employment and multi-unit residences. The city council also finds that smoking is the number one most preventable cause of death and disease and that the use of flavored tobacco products, particularly use among youth, has increased in recent years. The purpose of this chapter is to ensure a healthier environment within the city, improve public safety by reducing litter from smoking waste and the risk of fire from smoking, and 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, and 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. This chapter also seeks to prevent access to flavored tobacco products, which studies show are a gateway to establishing tobacco habits with long-term addictive consequences.

SECTION 3. Section 9.28.020 AMENDED. Section 9.28.020 of Chapter 9.28 (Regulation of Smoking) of Title 9 (Public Health, Safety or Welfare) of the Sunnyvale Municipal Code is hereby amended to read as follows:

9.28.020. Definitions

(a)-(b) [Text unchanged]

(c) “Characterizing flavor” means a taste or aroma, other than the taste

or aroma of tobacco, imparted either prior to or during consumption of a tobacco product or any byproduct of the tobacco product, including but not limited to menthol, mint, wintergreen, fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb or spice, provided however that a tobacco product shall not be determined to have a characterizing flavor solely because of the use of additives, flavorings, or the provision of ingredient information.

(~~de~~)-(j*i*) [Text Unchanged; Renumbered]

(k) “Flavored tobacco product” means any tobacco product that imparts a characterizing flavor. A manufacturer’s public statement or claim of characterizing flavor, texts or images on labeling or packing that explicitly or implicitly implies characterizing flavor, or actions by a manufacturer directed to consumers that would cause consumers to believe the tobacco product imparts a characterizing flavor shall raise a rebuttable presumption that the tobacco product is a flavored tobacco product.

(l*j*)-(q~~o~~) [Text Unchanged; Renumbered]

~~(p) “Retail or wholesale tobacco store” means a store utilized primarily for the sale of tobacco products and/or electronic smoking devices, associated paraphernalia and accessories, and in which the sale of other products is merely incidental.~~

(r) “Sale” or “sell” means any transfer, exchange, barter, gift, offer for sale, or distribution for a commercial purpose, in any manner or by any means whatsoever. Possession of four or more flavored tobacco products by a tobacco retailer, including individual or packages of such products, or any combination thereof, shall raise a rebuttable presumption of possession with intent to sell flavored tobacco products.

(~~sq~~) [Text Unchanged; Renumbered]

(~~tf~~) “Smoke” means the gases, particles, or vapors released into the air as a result of combustion, electrical ignition, or vaporization, when the apparent or usual purpose of the combustion, electrical ignition, or vaporization is human inhalation of the byproducts, except when the combusting or vaporizing material contains no tobacco or nicotine and the purpose of inhalation is solely olfactory such as, for example, from incense. The term “smoke” includes, but is not limited to tobacco smoke, vapors from an electronic smoking device~~—vapors~~, and marijuana smoke.

(~~us~~) “Smoking” means inhaling, exhaling, burning, or carrying any lighted, heated, or ignited cigar, cigarette, cigarillo, pipe, hookah, electronic smoking device, or any plant product intended ~~to~~for human inhalation.

(vt) “Tobacco product” means any product containing, made from, 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, cigarillos, chewing tobacco, pipe tobacco, and snuff; and any electronic smoking device. “Tobacco product” also includes any component, part, or accessory intended or reasonably expected to be used with a tobacco product, whether or not sold separately. “Tobacco product” does not include drugs, devices, or combination products authorized for sale by the United States Food and Drug Administration as defined in Sections 321 and 353(g) of Title 21 of the United States Code, relating to the Federal Food, Drug and Cosmetic Act.

(w) “Tobacco retailer” means any person who sells or offers for sale tobacco products and associated paraphernalia, without regard to the quantity of tobacco products sold or offered for sale.

(x)-(z) [Text Unchanged; Renumbered]

SECTION 4. Section 9.28.070 AMENDED. Section 9.28.070 (Violations) of Chapter 9.28 (Regulation of Smoking) of Title 9 (Public Health, Safety or Welfare) of the Sunnyvale Municipal Code is hereby added to read as follows:

9.28.070 Violations.

- (a) It is unlawful for any person to smoke in a place within the city where smoking is prohibited.
- (b) No employer or other person with responsibility for management or control of a place where smoking is prohibit shall knowingly and intentionally allow smoking in violation of this chapter, or fail to post signs required by this chapter.
- (c) No person shall dispose of used smoking or tobacco product waste within the boundaries of an area in which smoking is prohibited, including within any reasonable distance required by this chapter.
- (d) No person, employer, or nonprofit entity shall intimidate, threaten any reprisal, effect any reprisal, or in any manner discriminate against another person who seeks to attain compliance with this chapter.
- (e) It is unlawful for any tobacco retailer, its agents, employees, or assigns to sell or offer for sale, or possess with intent to sell or offer to sell any flavored tobacco product.

(fe)-(gf) [Text Unchanged; Renumbered]

SECTION 5. Section 9.28.075 ADDED. Section 9.28.075 (Relationship to Other Requirements) of Chapter 9.28 (Regulation of Smoking) of Title 9 (Public Health, Safety or Welfare) of the Sunnyvale Municipal Code is hereby added to read as follows:

9.28.075 Relationship to Other Requirements.

This chapter provides for regulation of smoking and sale of tobacco products and shall not be construed to preempt or otherwise limit or affect the applicability of any other law, regulation, requirement, policy or standard, or to alter the penalties provided by such laws, or regulate conduct where such regulation has been preempted by the United States or the State of California.

SECTION 6. CEQA - EXEMPTION. The City Council finds, pursuant to Title 14 of the California Code of Regulations, Section 15061(b)(3), that this ordinance is exempt from the requirements of the California Environmental Quality Act (CEQA) in that it is not a Project which has the potential for causing a significant effect on the environment.

SECTION 7. CONSTITUTIONALITY; SEVERABILITY. If any section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be invalid, such decision or decisions shall not affect the validity of the remaining portions of this ordinance. The City Council hereby declares that it would have passed this ordinance, and each section, subsection, sentence, clause and phrase thereof irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases be declared invalid.

SECTION 8. EFFECTIVE DATE. This ordinance shall be in full force and effect six (6) months from and after the date of its adoption.

SECTION 9. POSTING AND PUBLICATION. The City Clerk is directed to cause copies of this ordinance to be posted in three (3) prominent places in the City of Sunnyvale and to cause publication once in The Sun, the official publication of legal notices of the City of Sunnyvale, of a notice setting forth the date of adoption, the title of this ordinance, and a list of places where copies of this ordinance are posted, within fifteen (15) days after adoption of this ordinance.

Introduced at a regular meeting of the City Council held on _____, and adopted as an ordinance of the City of Sunnyvale at a regular meeting of the City Council held on _____, by the following vote:

AYES:

NOES:

ABSTAIN:

ABSENT:

RECUSAL:

ATTEST:

APPROVED:

City Clerk
Date of Attestation: _____

Mayor

(SEAL)

APPROVED AS TO FORM:

City Attorney