

Law and Legislation Committee Report

915 I Street, 1st Floor

Sacramento, CA 95814

www.cityofsacramento.org

File ID: 2019-00424

March 19, 2019

Discussion Item 04

Title: Alternate Ordinance Revisions to Chapter 5.138 of Sacramento City Code Relating to Tobacco Retailers

Location: Citywide

Recommendation: Provide direction alternate ordinance language to amend Sacramento City Code Chapter 5.138 relating to tobacco retailers.

Contact: Jose Mendez, Code Enforcement Manager, (916) 808-5947, Community Development Department

Presenter: Jose Mendez, Code Enforcement Manager, (916) 808-5947, Community Development Department

Attachments:

- 1-Description/Analysis
- 2-Staff Recommendation - Ordinance (Redline)
- 3-Staff Recommendation - Ordinance (Clean)
- 4-Alternate Recommendation - Ordinance (With Tobacco Coalition Amendments)

Description/Analysis

Issue Detail: On July 24, 2018, the Law and Legislation Committee directed staff to prepare an ordinance that: 1) updates Chapter 5.138; 2) adopts a distance requirement between new tobacco retailers; and 3) adopts a prohibition of flavored tobacco products.

The use of tobacco has been a health and safety issue addressed by the City over the past several years. In 2003, the Sacramento County Department of Health and Human Services Tobacco Education Program found that 24.4 percent of tobacco retailers sampled in the City of Sacramento unlawfully sold tobacco products to minors. In 2004, the City adopted Sacramento City Code Chapter 5.138 to regulate tobacco retailers by requiring yearly non-transferrable licenses and conducting regular business compliance inspections, under-age sales sting operations, and license suspension and revocation proceedings. The program is designed to promote compliance with federal, state and local laws regulating tobacco sales and discourage the illegal sale and distribution of tobacco to minors. In 2009, the Family Smoking Prevention and Tobacco Control Act was enacted and prohibits candy and fruit flavored cigarettes, however, a recent study by the California Department of Public Health estimates that 82 percent of tobacco retailers in California sold flavored non-cigarette tobacco products. Over 90 percent of tobacco retailers sell menthol cigarettes, and 8 out of 10 tobacco retailers near schools sold flavored non-cigarette tobacco products.

There are more than 15,000 tobacco flavors on the market, many of which have names that are enticing to youth including “Gummy Bear” “Bubblegum” and “Unicorn Pop!” Mentholated and flavored products have been shown to be “starter” products for youth who begin using tobacco. These products are proven to help establish tobacco habits that can lead to long-term addiction. Flavored tobacco has significant public health implications for youth and people of color because of targeted industry marketing strategies and product manipulation.

In 2016, state law was changed to raise the legal age to buy tobacco products from 18 to 21, tighten restrictions on e-cigarettes and expand the definition of smoke-free workplaces. Unlike cigarette use that has steadily declined among youth, the prevalence of the use of non-cigarette tobacco products has remained statistically unchanged, and in some cases, increased among youth. From 2013 to 2015, an estimated 15 percent of ninth and eleventh grade students in California reported using electronic smoking devices. Nine and three-tenths percent of high school students in California reported buying their own electronic cigarettes from a store.

The density and proximity of tobacco retailers influence smoking behaviors, including the number of cigarettes smoked per day. Adults who smoke have a harder time quitting when density is higher. There are currently 386 tobacco retailers operating within the City of

Sacramento. Currently, 79 percent of tobacco retailers are located within 1,000 feet of other retailers. Twenty-six percent of retailers are located within 1,000 feet of a public or private school (K - 12). Policies to reduce tobacco retailer density have been shown to be effective and may reduce or eliminate inequities in the location and distribution of tobacco retailers.

Staff met with representatives of the Sacramento County Tobacco Control Coalition and representatives of the Saving Our Legacy Project. Both organizations shared concerns with:

- Flavored tobacco products and the apparent advertisement to persons under 21 years of age;
- The absence of a distance requirement between tobacco retailers; and
- E-cigarettes and the availability of these products to youth.

At the request of the Law and Legislation Committee, staff met with stakeholders representing the tobacco industry on February 8, 2019. The intent of the meeting was to gather solutions that would help reduce access of tobacco by persons under the age of 21 in lieu of the proposed amendments. Staff met with representatives from JUUL (the electronic cigarette manufacturer), the American Petroleum and Convenience Store Association, and the California Fuels and Convenience Alliance. A copy of the industry's proposed revised ordinance is attached. In summary, the group proposed that the City adopt five alternatives in lieu of the proposed amendments:

1. Require tobacco retailers to utilize Age Verification Technology (AVT) that can scan identification.
2. Regulate packaging of flavored tobacco products that is "knowingly attractive to minors," prohibit the use of cartoon-like characters, symbols and celebrity images.
3. Require child-resistant caps and tamper evident packaging on all electronic cigarettes.
4. Regulate density of tobacco retailers by requiring a Conditional Use Permit from the Planning Department for new tobacco retailers.
5. Impose monetary penalties in lieu of suspension periods after a tobacco retailer is found to have sold tobacco to a person under the age of 21. The proposed penalties would be as follows:
 - a. For violations of the ordinance, other than sales to persons under the age of 21, the penalties are now as follows:
 - i. First violation within a 5-year period: \$1,000.
 - ii. Second violation within a 5-year period: \$2,500.
 - iii. Third violation within a 5-year period: \$5,000.
 - iv. Fourth violation with a 5-year period: Revocation of the license.
 - b. For violations of the ordinance involving sales to persons under the age of 21, the penalties are now as follows:

- i. The first violation within a 5-year period: \$2,500.
 - ii. The second violation within a 5-year period: \$5,000 and a 30-day suspension of the license.
 - iii. The third violation within a 5-year period: Revocation of the license.
- c. These violation time periods would be extended from 3 years to 5 years, which creates a much longer statutory window for the City to accumulate violations against the licensees which could lead to a license revocation.

Policy Considerations: The City of Sacramento's 2035 General Plan encourages a healthy lifestyle for Sacramento residents to improve overall public health. The Public Health and Safety Goal 5.1 states that a goal of the General Plan is to: "Improve the provision of human services and promote public health and safety."

Economic Impacts: None

Environmental Considerations: None

Sustainability: None

Commission/Committee Action: On October 23, 2018, staff recommended that the Law and Legislation Committee pass amendments to Chapter 5.138 of the Sacramento City Code relating to Tobacco Retailers. The Law and Legislation Committee forwarded a recommendation to the City Council to adopt the revisions.

Rationale for Recommendation: The proposed ordinance is consistent with General Plan policies to promote a safe and healthy lifestyle for residents of the City of Sacramento.

Financial Considerations: The Tobacco Retailers Licensing program recovers costs through the collection of program fees. For FY 2018/19, the revenue budget for the program is approximately \$148,869.

Local Business Enterprise (LBE): Not applicable.

ORDINANCE NO. 2019-xxx

Adopted by the Sacramento City Council

xxxxx, 2019

**AN ORDINANCE AMENDING VARIOUS SECTIONS OF CHAPTER
5.138 OF THE SACRAMENTO CITY CODE, RELATING TO
TOBACCO RETAILERS**

BE IT ENACTED BY THE COUNCIL OF THE CITY OF SACRAMENTO:

SECTION 1.

Section 5.138.010 of the Sacramento City Code is amended to read as follows:

5.138.010 Legislative findings.

- A. State law prohibits the sale or furnishing of cigarettes, tobacco products and smoking paraphernalia to ~~minors, as well as the purchase, receipt, or possession of tobacco products by minors (Penal Code persons under 21 years of age except active duty military personnel who are 18 years of age or older (California Penal Code § 308).~~
- B. State law requires that tobacco retailers check the identification of tobacco purchasers who reasonably appear to be under ~~eighteen (18)~~21 years of age (California Business & Professions Code § 22956) and provides procedures for using persons under ~~eighteen (18)~~21 years of age to conduct onsite compliance checks of tobacco retailers (California Business & Professions Code § 22952).
- C. State law requires that tobacco retailers post a conspicuous notice at each point of sale stating that selling tobacco products to anyone under ~~eighteen (18)~~21 years of age is illegal (California Business & Professions Code § 22952, California Penal Code § 308).
- D. State law prohibits the sale or display of cigarettes through a self-service display and prohibits public access to cigarettes without the assistance of a clerk (California Business & Professions Code § 22962).
- E. State law prohibits the sale of “bidis” (~~a type of hand-rolled filterless cigarettes imported primarily from India and Southeast Asian countries~~cigarette) except at those businesses that prohibit the presence of minors. ~~(California Penal Code § 308.1).~~
- F. State law prohibits the manufacture, distribution, or sale of cigarettes in packages of less than ~~twenty (20)~~ and prohibits the manufacture, distribution, or sale of “roll-your-own” tobacco in packages containing less than six-tenths of an ounce of tobacco (California Penal Code § 308.3).
- G. State law prohibits public school students from smoking or using tobacco products while on campus, while attending school-sponsored activities, or while under

the supervision or control of school district employees (California Education Code § 48901(a)).

H. Sacramento City Code Section 5.140.040 prohibits the sale or distribution of tobacco products from vending machines.

I. From 2013 to 2015, an estimated 15% of Health and Human Services Tobacco Education Program found that twenty-seven and four tenths (27.4) percent eleventh grade students in California reported using electronic smoking devices.

J. Over 9% of high school students in California reported buying their own electronic cigarette from a store.

K. In 2016, an estimated 82% of tobacco retailers sampled in the city of Sacramento unlawfully in California sold flavored non-cigarette tobacco products to minors, over 90% of tobacco retailers sold menthol cigarettes, and 80% tobacco retailers near schools sold flavored non-cigarette tobacco products.

J. Eighty eight (88) percent

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

M. Between 2004 and 2014, use of non-menthol cigarettes decreased among all populations, but overall use of menthol cigarettes increased among young adults who have ever smoked tried their first (18 to 25 years of age) and adults (over 26 years of age).

N. Unlike cigarette use that has steadily declined among youth, the age prevalence of eighteen (18), and the average age at which smokers try their first use of non-cigarette tobacco products has remained statistically unchanged and, in some cases, increased among youth.

O. Flavored tobacco has significant public health implications for youth and people of color as a result of targeted industry marketing strategies and product manipulation.

P. The density and proximity of tobacco retailers influence smoking behaviors, including the number of cigarettes smoked per day.

Q. Adults who smoke have a harder time quitting when density of tobacco retailers is fourteen and a half (14½) high.

R. Policies to reduce tobacco retailer density have been shown to be effective and may reduce or eliminate inequities in the location and distribution of tobacco retailers.

S. Neither federal nor California state laws restrict the sale of menthol cigarettes or flavored non-cigarette tobacco products, electronic smoking devices, or the solutions used in these devices.

T. The city of Sacramento has a substantial interest in promoting compliance with federal, state, and local laws intended to regulate tobacco sales and use; in discouraging

the illegal purchase of tobacco products by ~~minors~~persons under 21 years of age; in promoting compliance with laws prohibiting sales of cigarettes and tobacco products to ~~minors~~persons under 21 years of age; and in protecting ~~children~~youth and underserved populations from ~~being lured into illegal activity through the misconduct~~harms of ~~adult~~tobacco use.

~~L.~~—U. California courts in Cohen v. Board of Supervisors, (1985) 40 Cal.-3d 277 (1985), and, Bravo Vending v. City of Rancho Mirage, (1993) 16 Cal.-App.-4th 383 (1993), and Prime Gas v. City of Sacramento (2010) 184 Cal.App.4th 697, have affirmed the power of local jurisdictions to regulate business activity in order to discourage violations of law.

~~M.~~—V. State law authorizes local tobacco retailer licensing laws to provide for the suspension or revocation of the local tobacco retailer license for any violation of a state tobacco control law (California Business & Professions Code § 22971.3).

~~N.~~—W. 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 to adults. It will, however, allow the city to regulate the operation of lawful businesses to discourage violations of federal, state, and local tobacco-related laws.

SECTION 2.

Section 5.138.030 of the Sacramento City Code is amended to read as follows:

5.138.030 Definitions.

As used in this chapter, the following words and phrases shall have the meaning given them in this ~~Section~~section, unless the context clearly requires otherwise:

~~“City” means the city of Sacramento.~~

“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 under any compulsion to participate in the transaction. A sale between relatives, related companies or partners, or a sale for the primary purpose of avoiding the effect of the violations of this chapter that occurred at the location, is presumed not to be an “arm’s length transaction.”

“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 produced by the tobacco product, including, but not limited to, tastes or aromas relating to menthol, mint, wintergreen, fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcohol beverage, herb, or spice.

~~“City manager” means the city manager of the city of Sacramento or his or her designee.~~

“Flavored tobacco product” means any tobacco product that imparts a characterizing flavor.

"Itinerant tobacco retailing" means engaging in tobacco retailing at other than a fixed location.

"License" means a tobacco retailer license issued by the city pursuant to this chapter.

"Licensee" means any proprietor holding a license issued by the city pursuant to this chapter.

~~"Person" means any individual, firm, partnership, joint venture, limited liability company, association, social club, fraternal organization, corporation, estate, trust, business trust, receiver, trustee, syndicate, or any other group or combination acting as a unit.~~

"Proprietor" 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 ~~ten (10) percent~~ 10 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 has, or can have, sole or shared control over the day-to-day operations of a business.

"Tobacco product" means ~~any substance~~:

1. A product containing, made, or derived from tobacco leaf 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, pipe tobacco, snuff, little cigars, chewing tobacco, dipping pipe tobacco, or snuff;
2. An electronic device that delivers nicotine or other vaporized liquids to the person inhaling from the device, including, but not limited to, an electronic cigarette, cigar, pipe, or hookah; and
3. Any component, part, or accessory of a tobacco, bidis or any other preparation of product, whether or not sold separately.
4. "Tobacco product" does not include a 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 the product is marketed and sold solely for such an approved purpose.

~~"Tobacco paraphernalia" means cigarette papers or wrappers, pipes, holders of smoking materials of all types, cigarette rolling machines and any other any item designed or used marketed for the smoking consumption, use, or ingestion preparation of a tobacco products product.~~

"Tobacco retailer" means any person who sells, offers for sale, exchanges, or offers to exchange for any form of consideration, tobacco, tobacco products, or tobacco paraphernalia without regard to the quantity sold, offered for sale, exchanged, or offered for exchange.

"Tobacco retailing" means selling, offering for sale, exchanging, or offering to exchange for any form of consideration, tobacco, tobacco products, or tobacco paraphernalia without regard to the quantity sold, offered for sale, exchanged, or offered for exchange.

SECTION 3.

Section 5.138.040 of the Sacramento City Code is amended to read as follows:

5.138.040 Requirement for tobacco retailer license.

A. ____ It shall be unlawful for any person to act as a tobacco retailer without ~~first obtaining a~~ valid license for each location at which tobacco retailing is to occur. No license will be issued to authorize tobacco retailing at other than a fixed location. No license will be issued for itinerant tobacco retailing or tobacco retailing from vehicles.

~~B. _____~~ B. No license shall issue, and no existing license shall be renewed, to authorize tobacco retailing within 1,000 feet of a tobacco retailer already licensed pursuant to this chapter as measured by a straight line from the nearest point of the property line of the parcel on which the applicant's business is located to the nearest point of the property line of the parcel on which an existing licensee's business is located.

C. ____ Nothing in this chapter shall be construed to grant any person obtaining a license any status or right other than the right to act as a tobacco retailer at the location in the city identified on the face of the license, subject to compliance with all other applicable laws, regulations, and ordinances. Nothing in this chapter shall be construed to render inapplicable, ~~supercede~~ supersede, or apply in lieu of any other provision of applicable law, including, without limitation, any condition or limitation on indoor smoking made applicable to business establishments by California Labor Code ~~Section~~ section 6404.5.

SECTION 4.

Section 5.138.060 of the Sacramento City Code is amended to read as follows:

5.138.060 Issuance and renewal of license.

A. Upon the receipt of an application for a license and the applicable license fee, the city manager shall issue a license unless:

1. The application is incomplete or inaccurate;
2. The application seeks authorization for tobacco retailing at an address that appears on a license that is suspended, has been revoked, or is subject to suspension or revocation proceedings for violation of any of the provisions of this chapter; provided, however, this subparagraph shall not constitute a basis for denial of a license if either or both of the following apply:

a. The applicant provides the city with documentation demonstrating that the applicant has acquired or is acquiring the premises or business in an arm's length transaction. ~~For the purposes of this subparagraph, an "arm's length transaction" is defined as 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 under any compulsion to participate in the transaction. A sale between relatives, related companies or partners, or a sale for the primary purpose of avoiding the effect of the~~

~~violations of this chapter that occurred at the location, is presumed not to be an “arm’s length transaction”;~~

b. It has been more than five years since the most recent license for that location was revoked;

3. The application seeks authorization for tobacco retailing that is unlawful pursuant to this code, or that is unlawful pursuant to any other local, state, or federal law; or,

4. The city manager has information that the applicant or his or her agents or employees has violated any local, state or federal tobacco control law at the location for which the license or renewal of the license is sought within the preceding ~~thirty (30)-~~ day period.

B. A license ~~shall be~~ valid for one year and must be renewed not later than ~~thirty (30)~~ days prior to the expiration of the license, but no earlier than ~~sixty (60)~~ days prior to the expiration of the license. Unless revoked on an earlier date, all licenses ~~shall~~ expire one year after the date of issuance. A license may be renewed for additional one-year ~~periods of one year~~ by submitting an application to the city manager and payment of the applicable license fee; provided, however, a license that is suspended, has been revoked, or is subject to suspension or revocation proceedings shall not be renewed. The application and license fee shall be submitted at least ~~thirty (30)~~ days, but not more than ~~sixty (60)~~ days, prior to the expiration of the current valid license. The applicant shall follow all of the procedures and provide all of the information required by Section ~~section~~ 5.138.050. The city manager shall process the application according to the provisions of this section.

~~C. ——— Where~~ C. Notwithstanding section 5.138.040B, a tobacco retailer operating lawfully on the date this subsection C is effective that would otherwise be eligible for a tobacco retailer license for the location for which a license is sought may receive or renew a license for that location so long as all of the following conditions are met:

1. The license is timely obtained and is renewed without lapse or permanent revocation (as opposed to temporary suspension);

2. The tobacco retailer is not closed for business or has not ceased tobacco retailing for more than 60 consecutive days;

3. The tobacco retailer does not substantially change the business premises or business operation for the purpose of increasing the sale or display of tobacco products; and

4. The tobacco retailer retains the right to operate under all other applicable laws.

D. When the city manager does not approve a license or renewal of a license, the city manager shall notify the applicant of the specific grounds for the denial in writing. The notice of denial shall be served personally or by mail not later than five calendar days after the date of the denial. If by mail, the notice shall be placed in a sealed envelope, with postage paid, addressed to the applicant at the address as it appears on the application. The giving of notice shall be deemed complete at the time of deposit of

the notice in the United States mail without extension of time for any reason. In lieu of mailing, the notice may be served personally by delivering to the person to be served and service shall be deemed complete at the time of such delivery. Personal service to a corporation may be made by delivery of the notice to any person designated in the California Code of Civil Procedure to be served for the corporation with summons and complaint in a civil action.

SECTION 5.

Section 5.138.100 of the Sacramento City Code is amended to read as follows:

5.138.100 License violation.

~~It shall be A.~~ It is a violation of a license for a licensee or his or her agents or employees to sell or offer for sale any flavored tobacco product. There is a rebuttable presumption that a tobacco product is a flavored tobacco product if a manufacturer or its agents or employees has made a public statement or claim that the tobacco product has or produces a characterizing flavor, including, but not limited to, text, color, or images on the product's labeling or packaging that are used to expressly or impliedly communicate that a tobacco product has a characterizing flavor.

B. It is a violation of a license for a licensee or his or her agents or employees to violate any local, state, or federal tobacco-related law.

SECTION 6.

Section 5.138.110 of the Sacramento City Code is amended to read as follows:

5.138.110 Suspension or revocation of license.

A. In addition to any other remedy authorized by law, a license shall be suspended or revoked as provided in this section, if the city manager finds that the licensee or his or her agents or employees has or have violated any of the provisions of this chapter; provided, however, violations by a licensee at one location may not be accumulated against other locations of that same licensee, nor may violations accumulated against a prior licensee at a licensed location be accumulated against a new licensee at the same licensed location.

1. Upon a finding by the city manager of a first license violation within any five-year period, the license shall be suspended for ~~thirty (30)~~ days.

2. Upon a finding by the city manager of a second license violation within any five-year period, the license shall be suspended for ~~ninety (90)~~ days.

3. Upon a finding by the city manager of a third license violation within any five-year period, the license shall be ~~suspended for one year~~revoked.

~~4. Upon a finding by the city manager of a fourth license violation within any five year period, the license shall be revoked.~~

B. Notwithstanding ~~Section~~section 5.138.~~110(A),110A~~, a license shall be revoked if the city manager finds that either one or both of the following conditions exist:

1. One or more of the bases for denial of a license under ~~Section~~section 5.138.~~060(A),060A~~ existed at the time application was made or at ~~anytime~~any time before the license issued.

2. The information contained in the license application, including supplemental information, if any, is found to be false in any material respect.

C. In the event the city manager suspends or revokes a license, written notice of the suspension or revocation shall be served upon the licensee within five days of the suspension or revocation in the manner prescribed in ~~Section~~section 5.138.~~060(C),060D~~. The notice shall contain:

1. A brief statement of the specific grounds for such suspension or revocation;

2. A statement that the licensee may appeal the suspension or revocation by submitting an appeal, in writing, in accordance with the provisions of ~~Section~~section 5.138.120, to the city manager, within ~~ten (10)~~ calendar days of the date of service of the notice; and

3. A statement that the failure to appeal the notice of suspension or revocation will constitute a waiver of all right to an administrative appeal hearing, and the suspension or revocation will be final.

D. A licensee for whom a license suspension is in effect, or whose license has been revoked, must cease all tobacco retailing and remove all tobacco products and tobacco paraphernalia from public view at the address that appears on the suspended or revoked license.

SECTION 7.

Section 5.138.120 of the Sacramento City Code is amended to read as follows:

5.138.120 Denial, suspension and revocation—Appeals.

A. Any applicant or licensee aggrieved by the decision of the city manager in denying, suspending, or revoking a license, may appeal the decision by submitting a written appeal to the city manager within ~~ten (10)~~ calendar days from the date of service of the notice of denial, suspension, or revocation. The appeal must be accompanied by an appeal fee set by resolution of the city council. The written appeal shall contain:

1. A brief statement in ordinary and concise language of the specific action protested, together with any material facts claimed to support the contentions of the appellant;

2. A brief statement in ordinary and concise language of the relief sought, and the reasons why it is claimed the protested action should be reversed or otherwise set aside;

3. The signatures of all parties named as appellants and their official mailing addresses; and
 4. The verification (by declaration under penalty of perjury) of at least one appellant as to the truth of the matters stated in the appeal.
- B. The appeal hearing shall be conducted by a hearing examiner appointed pursuant to Sectionsection 8.04.070 of this code.
 - C. Upon receipt of any appeal filed pursuant to this Sectionsection, the city manager shall transmit ~~said~~the appeal to the secretary of the hearing examiner who shall calendar it for hearing as follows:
 1. If the appeal is received by the city manager not later than ~~fifteen (15)~~ days prior to the next regular appeal hearing, it shall be calendared for hearing at said meeting.
 2. If the appeal is received by the city manager on a date less than ~~fifteen (15)~~ days prior to the next appeal hearing, it shall be calendared for the next subsequent appeal hearing.
 - D. Written notice of the time and place of the hearing shall be given at least ~~ten (10)~~ calendar days prior to the date of the hearing to each appellant by the secretary of the hearing examiner either by causing a copy of such notice to be delivered to the appellant personally or by mailing a copy thereof, postage prepaid, addressed to the appellant at the address shown on the appeal.
 - E. Failure of any person to file a timely appeal in accordance with the provisions of this section shall constitute an irrevocable waiver of the right to an ~~administrative hearing and a final adjudication of the notice and order, or any portion thereof.~~administrative hearing and a final adjudication of the notice and order, or any portion of the notice and order.
 - F. Only those matters or issues specifically raised by the appellant in the appeal notice shall be considered in the hearing of the appeal.
 - G. Any suspension or revocation of a license shall be stayed during the pendency of an appeal which is properly and timely filed pursuant to this section.

SECTION 8.

Section 5.138.140 of the Sacramento City Code is amended to read as follows:

5.138.140 Conduct of hearing.

- A. Hearings need not be conducted according to the technical rules relating to evidence and witnesses. California Government Code Sectionsection 11513, subsections~~subdivisions~~ (a), (b) and (c) ~~as presently written or hereinafter amended~~, shall apply to hearings under this chapter.
- B. Oral evidence shall be taken only upon oath or affirmation.
- C. Irrelevant and unduly repetitious evidence shall be excluded.
- D. Each party shall have these rights, among others:

1. To call and examine witnesses on any matter relevant to the issues of the hearing;
 2. To introduce documentary and physical evidence;
 3. To cross-examine opposing witnesses on any matter relevant to the issues of the hearing;
 4. To impeach any witness regardless of which party first called the witness to testify;
 5. To rebut the evidence presented against the party; and
 6. To represent himself, herself, or itself or to be represented by anyone of his, her, or its choice who is lawfully permitted to do so.
- E. In reaching a decision, official notice may be taken, either before or after submission of the case for decision, of any fact that may be judicially noticed by the courts of this state or that may appear in any of the official records of the city or any of its departments.

SECTION 9.

Section 5.138.150 of the Sacramento City Code is amended to read as follows:

5.138.150 Form and contents of decision—Finality of decision.

- A. If it is shown, by a preponderance of the evidence, that one or more bases exist to deny, suspend, or revoke the license, the hearing examiner shall affirm the city manager’s decision to deny, suspend, or revoke the license. The decision of the hearing examiner shall be in writing and shall contain findings of fact and a determination of the issues presented.
- B. The decision shall inform the appellant that the decision is a final decision and that the time for judicial review is governed by California Code of Civil Procedure ~~Section~~section 1094.6. Copies of the decision shall be delivered to the parties personally or sent by certified mail to the address shown on the appeal. The decision shall be final when signed by the hearing examiner and served as provided in this section.

SECTION 10.

Section 5.138.160 of the Sacramento City Code is amended to read as follows:

5.138.160 Enforcement.

- A. In addition to any other remedy, any person violating any provision of this chapter shall be guilty of a misdemeanor for each day such violation continues.
- B. Any violation of this chapter may be remedied by a civil action brought by the city attorney. The city may recover reasonable ~~attorneys~~attorneys’ fees and costs of suit in any civil action brought by the city attorney to remedy any violation of this chapter.

C. Any person violating the provisions of this chapter shall also be liable for civil penalties of not less ~~than two hundred fifty dollars (\$250.00)~~ or more than ~~twenty-five thousand dollars (\$25,000.00)~~ for each day the violation continues.

D. Violations of this chapter are hereby declared to be public nuisances subject to abatement by the city.

E. In addition to criminal sanctions, civil penalties as provided in this section, and other remedies set forth in this chapter, administrative penalties may be imposed pursuant to ~~Chapter~~chapter 1.28 against any person violating any provision of this chapter. Imposition, enforcement, collection and administrative review of administrative penalties imposed shall be conducted pursuant to ~~Chapter~~chapter 1.28.

SECTION 11.

The effective date of this ordinance is October 1, 2019.

Adopted by the Sacramento City Council

xxxxx, 2019

AN ORDINANCE AMENDING VARIOUS SECTIONS OF CHAPTER
5.138 OF THE SACRAMENTO CITY CODE, RELATING TO
TOBACCO RETAILERS

BE IT ENACTED BY THE COUNCIL OF THE CITY OF SACRAMENTO:

SECTION 1.

Section 5.138.010 of the Sacramento City Code is amended to read as follows:

5.138.010 Legislative findings.

- A. State law prohibits the sale or furnishing of cigarettes, tobacco products and smoking paraphernalia to persons under 21 years of age except active duty military personnel who are 18 years of age or older (California Penal Code § 308).
- B. State law requires that tobacco retailers check the identification of tobacco purchasers who reasonably appear to be under 21 years of age (California Business & Professions Code § 22956) and provides procedures for using persons under 21 years of age to conduct onsite compliance checks of tobacco retailers (California Business & Professions Code § 22952).
- C. State law requires that tobacco retailers post a conspicuous notice at each point of sale stating that selling tobacco products to anyone under 21 years of age is illegal (California Business & Professions Code § 22952, California Penal Code § 308).
- D. State law prohibits the sale or display of cigarettes through a self-service display and prohibits public access to cigarettes without the assistance of a clerk (California Business & Professions Code § 22962).
- E. State law prohibits the sale of "bidis" (a type of hand-rolled filterless cigarette) except at those businesses that prohibit the presence of minors (California Penal Code § 308.1).
- F. State law 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 six-tenths of an ounce of tobacco (California Penal Code § 308.3).
- G. State law prohibits public school students from smoking or using tobacco products while on campus, while attending school-sponsored activities, or while under the supervision or control of school district employees (California Education Code § 48901(a)).

- H. Sacramento City Code section 5.140.040 prohibits the sale or distribution of tobacco products from vending machines.
- I. From 2013 to 2015, an estimated 15% of ninth and eleventh grade students in California reported using electronic smoking devices.
- J. Over 9% of high school students in California reported buying their own electronic cigarette from a store.
- K. 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 80% tobacco retailers near schools sold flavored non-cigarette tobacco products.
- L. Mentholated and flavored products have been shown to be “starter” products for youth who begin using tobacco and these products help establish tobacco habits that can lead to long-term addiction.
- M. Between 2004 and 2014, use of non-menthol cigarettes decreased among all populations, but overall use of menthol cigarettes increased among young adults (18 to 25 years of age) and adults (over 26 years of age).
- N. Unlike cigarette use that has steadily declined among youth, the prevalence of the use of non-cigarette tobacco products has remained statistically unchanged and, in some cases, increased among youth.
- O. Flavored tobacco has significant public health implications for youth and people of color as a result of targeted industry marketing strategies and product manipulation.
- P. The density and proximity of tobacco retailers influence smoking behaviors, including the number of cigarettes smoked per day.
- Q. Adults who smoke have a harder time quitting when density of tobacco retailers is high.
- R. Policies to reduce tobacco retailer density have been shown to be effective and may reduce or eliminate inequities in the location and distribution of tobacco retailers.
- S. Neither federal nor California state laws restrict the sale of menthol cigarettes or flavored non-cigarette tobacco products, electronic smoking devices, or the solutions used in these devices.
- T. The city has a substantial interest in promoting compliance with federal, state, and local laws intended to regulate tobacco sales and use; in discouraging the illegal purchase of tobacco products by persons under 21 years of age; in promoting compliance with laws prohibiting sales of cigarettes and tobacco products to persons under 21 years of age; and in protecting youth and underserved populations from the harms of tobacco use.
- U. California courts in 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, have affirmed the power of local jurisdictions to regulate business activity in order to discourage violations of law.

V. State law authorizes local tobacco retailer licensing laws to provide for the suspension or revocation of the local tobacco retailer license for any violation of a state tobacco control law (California Business & Professions Code § 22971.3).

W. 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 to adults. It will, however, allow the city to regulate the operation of lawful businesses to discourage violations of federal, state, and local tobacco-related laws.

SECTION 2.

Section 5.138.030 of the Sacramento City Code is amended to read as follows:

5.138.030 Definitions.

As used in this chapter, the following words and phrases shall have the meaning given them in this section, unless the context clearly requires otherwise:

“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 under any compulsion to participate in the transaction. A sale between relatives, related companies or partners, or a sale for the primary purpose of avoiding the effect of the violations of this chapter that occurred at the location, is presumed not to be an “arm’s length transaction.”

“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 produced by the tobacco product, including, but not limited to, tastes or aromas relating to menthol, mint, wintergreen, fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcohol beverage, herb, or spice.

“City manager” means the city manager of the city or his or her designee.

“Flavored tobacco product” means any tobacco product that imparts a characterizing flavor.

“Itinerant tobacco retailing” means engaging in tobacco retailing at other than a fixed location.

“License” means a tobacco retailer license issued by the city pursuant to this chapter.

“Licensee” means any proprietor holding a license issued by the city pursuant to this chapter.

“Proprietor” 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 10% 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 has, or can have, sole or shared control over the day-to-day operations of a business.

“Tobacco product” means:

1. A 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, or snuff;
2. An electronic device that delivers nicotine or other vaporized liquids to the person inhaling from the device, including, but not limited to, an electronic cigarette, cigar, pipe, or hookah; and
3. Any component, part, or accessory of a tobacco product, whether or not sold separately.
4. "Tobacco product" does not include a 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 the product is marketed and sold solely for such an approved purpose.

"Tobacco paraphernalia" means any item designed or marketed for the consumption, use, or preparation of a tobacco product.

"Tobacco retailer" means any person who sells, offers for sale, exchanges, or offers to exchange for any form of consideration, tobacco, tobacco products, or tobacco paraphernalia without regard to the quantity sold, offered for sale, exchanged, or offered for exchange.

"Tobacco retailing" means selling, offering for sale, exchanging, or offering to exchange for any form of consideration, tobacco, tobacco products, or tobacco paraphernalia without regard to the quantity sold, offered for sale, exchanged, or offered for exchange.

SECTION 3.

Section 5.138.040 of the Sacramento City Code is amended to read as follows:

5.138.040 Requirement for tobacco retailer license.

A. It shall be unlawful for any person to act as a tobacco retailer without a valid license for each location at which tobacco retailing is to occur. No license will be issued to authorize tobacco retailing at other than a fixed location. No license will be issued for itinerant tobacco retailing or tobacco retailing from vehicles.

B. No license shall issue, and no existing license shall be renewed, to authorize tobacco retailing within 1,000 feet of a tobacco retailer already licensed pursuant to this chapter as measured by a straight line from the nearest point of the property line of the parcel on which the applicant's business is located to the nearest point of the property line of the parcel on which an existing licensee's business is located.

C. Nothing in this chapter shall be construed to grant any person obtaining a license any status or right other than the right to act as a tobacco retailer at the location in the city identified on the face of the license, subject to compliance with all other applicable laws, regulations, and ordinances. Nothing in this chapter shall be construed to render

inapplicable, supersede, or apply in lieu of any other provision of applicable law, including, without limitation, any condition or limitation on indoor smoking made applicable to business establishments by California Labor Code section 6404.5.

SECTION 4.

Section 5.138.060 of the Sacramento City Code is amended to read as follows:

5.138.060 Issuance and renewal of license.

A. Upon the receipt of an application for a license and the applicable license fee, the city manager shall issue a license unless:

1. The application is incomplete or inaccurate;
2. The application seeks authorization for tobacco retailing at an address that appears on a license that is suspended, has been revoked, or is subject to suspension or revocation proceedings for violation of any of the provisions of this chapter; provided, however, this subparagraph shall not constitute a basis for denial of a license if either or both of the following apply:

a. The applicant provides the city with documentation demonstrating that the applicant has acquired or is acquiring the premises or business in an arm's length transaction;

b. It has been more than five years since the most recent license for that location was revoked;

3. The application seeks authorization for tobacco retailing that is unlawful pursuant to this code, or that is unlawful pursuant to any other local, state, or federal law; or

4. The city manager has information that the applicant or his or her agents or employees has violated any local, state or federal tobacco control law at the location for which the license or renewal of the license is sought within the preceding 30-day period.

B. A license is valid for one year and must be renewed not later than 30 days prior to the expiration of the license, but no earlier than 60 days prior to the expiration of the license. Unless revoked on an earlier date, all licenses expire one year after the date of issuance. A license may be renewed for additional one-year periods by submitting an application to the city manager and payment of the applicable license fee; provided, however, a license that is suspended, has been revoked, or is subject to suspension or revocation proceedings shall not be renewed. The application and license fee shall be submitted at least 30 days, but not more than 60 days, prior to the expiration of the current valid license. The applicant shall follow all of the procedures and provide all of the information required by section 5.138.050. The city manager shall process the application according to the provisions of this section.

C. Notwithstanding section 5.138.040B, a tobacco retailer operating lawfully on the date this subsection C is effective that would otherwise be eligible for a tobacco retailer

license for the location for which a license is sought may receive or renew a license for that location so long as all of the following conditions are met:

1. The license is timely obtained and is renewed without lapse or permanent revocation (as opposed to temporary suspension);
2. The tobacco retailer is not closed for business or has not ceased tobacco retailing for more than 60 consecutive days;
3. The tobacco retailer does not substantially change the business premises or business operation for the purpose of increasing the sale or display of tobacco products; and
4. The tobacco retailer retains the right to operate under all other applicable laws.

D. When the city manager does not approve a license or renewal of a license, the city manager shall notify the applicant of the specific grounds for the denial in writing. The notice of denial shall be served personally or by mail not later than five calendar days after the date of the denial. If by mail, the notice shall be placed in a sealed envelope, with postage paid, addressed to the applicant at the address as it appears on the application. The giving of notice shall be deemed complete at the time of deposit of the notice in the United States mail without extension of time for any reason. In lieu of mailing, the notice may be served personally by delivering to the person to be served and service shall be deemed complete at the time of such delivery. Personal service to a corporation may be made by delivery of the notice to any person designated in the California Code of Civil Procedure to be served for the corporation with summons and complaint in a civil action.

SECTION 5.

Section 5.138.100 of the Sacramento City Code is amended to read as follows:

5.138.100 License violation.

A. It is a violation of a license for a licensee or his or her agents or employees to sell or offer for sale any flavored tobacco product. There is a rebuttable presumption that a tobacco product is a flavored tobacco product if a manufacturer or its agents or employees has made a public statement or claim that the tobacco product has or produces a characterizing flavor, including, but not limited to, text, color, or images on the product's labeling or packaging that are used to expressly or impliedly communicate that a tobacco product has a characterizing flavor.

B. It is a violation of a license for a licensee or his or her agents or employees to violate any local, state, or federal tobacco-related law.

SECTION 6.

Section 5.138.110 of the Sacramento City Code is amended to read as follows:

5.138.110 Suspension or revocation of license.

A. In addition to any other remedy authorized by law, a license shall be suspended or revoked as provided in this section, if the city manager finds that the licensee or his or her agents or employees has or have violated any of the provisions of this chapter; provided, however, violations by a licensee at one location may not be accumulated against other locations of that same licensee, nor may violations accumulated against a prior licensee at a licensed location be accumulated against a new licensee at the same licensed location.

1. Upon a finding by the city manager of a first license violation within any five-year period, the license shall be suspended for 30 days.

2. Upon a finding by the city manager of a second license violation within any five-year period, the license shall be suspended for 90 days.

3. Upon a finding by the city manager of a third license violation within any five-year period, the license shall be revoked.

B. Notwithstanding section 5.138.110A, a license shall be revoked if the city manager finds that either one or both of the following conditions exist:

1. One or more of the bases for denial of a license under section 5.138.060A existed at the time application was made or at any time before the license issued.

2. The information contained in the license application, including supplemental information, if any, is found to be false in any material respect.

C. In the event the city manager suspends or revokes a license, written notice of the suspension or revocation shall be served upon the licensee within five days of the suspension or revocation in the manner prescribed in section 5.138.060D. The notice shall contain:

1. A brief statement of the specific grounds for such suspension or revocation;

2. A statement that the licensee may appeal the suspension or revocation by submitting an appeal, in writing, in accordance with the provisions of section 5.138.120, to the city manager, within 10 calendar days of the date of service of the notice; and

3. A statement that the failure to appeal the notice of suspension or revocation will constitute a waiver of all right to an administrative appeal hearing, and the suspension or revocation will be final.

D. A licensee for whom a license suspension is in effect, or whose license has been revoked, must cease all tobacco retailing and remove all tobacco products and tobacco paraphernalia from public view at the address that appears on the suspended or revoked license.

SECTION 7.

Section 5.138.120 of the Sacramento City Code is amended to read as follows:

5.138.120 Denial, suspension and revocation—Appeals.

- A. Any applicant or licensee aggrieved by the decision of the city manager in denying, suspending, or revoking a license, may appeal the decision by submitting a written appeal to the city manager within 10 calendar days from the date of service of the notice of denial, suspension, or revocation. The appeal must be accompanied by an appeal fee set by resolution of the city council. The written appeal shall contain:
1. A brief statement in ordinary and concise language of the specific action protested, together with any material facts claimed to support the contentions of the appellant;
 2. A brief statement in ordinary and concise language of the relief sought, and the reasons why it is claimed the protested action should be reversed or otherwise set aside;
 3. The signatures of all parties named as appellants and their official mailing addresses; and
 4. The verification (by declaration under penalty of perjury) of at least one appellant as to the truth of the matters stated in the appeal.
- B. The appeal hearing shall be conducted by a hearing examiner appointed pursuant to section 8.04.070.
- C. Upon receipt of any appeal filed pursuant to this section, the city manager shall transmit the appeal to the secretary of the hearing examiner who shall calendar it for hearing as follows:
1. If the appeal is received by the city manager not later than 15 days prior to the next regular appeal hearing, it shall be calendared for hearing at said meeting.
 2. If the appeal is received by the city manager on a date less than 15 days prior to the next appeal hearing, it shall be calendared for the next subsequent appeal hearing.
- D. Written notice of the time and place of the hearing shall be given at least 10 calendar days prior to the date of the hearing to each appellant by the secretary of the hearing examiner either by causing a copy of such notice to be delivered to the appellant personally or by mailing a copy thereof, postage prepaid, addressed to the appellant at the address shown on the appeal.
- E. Failure of any person to file a timely appeal in accordance with the provisions of this section shall constitute an irrevocable waiver of the right to an administrative hearing and a final adjudication of the notice and order, or any portion of the notice and order.
- F. Only those matters or issues specifically raised by the appellant in the appeal notice shall be considered in the hearing of the appeal.
- G. Any suspension or revocation of a license shall be stayed during the pendency of an appeal which is properly and timely filed pursuant to this section.

SECTION 8.

Section 5.138.140 of the Sacramento City Code is amended to read as follows:

5.138.140 Conduct of hearing.

- A. Hearings need not be conducted according to the technical rules relating to evidence and witnesses. California Government Code section 11513, subdivisions (a), (b) and (c), shall apply to hearings under this chapter.
- B. Oral evidence shall be taken only upon oath or affirmation.
- C. Irrelevant and unduly repetitious evidence shall be excluded.
- D. Each party shall have these rights, among others:
 - 1. To call and examine witnesses on any matter relevant to the issues of the hearing;
 - 2. To introduce documentary and physical evidence;
 - 3. To cross-examine opposing witnesses on any matter relevant to the issues of the hearing;
 - 4. To impeach any witness regardless of which party first called the witness to testify;
 - 5. To rebut the evidence presented against the party; and
 - 6. To represent himself, herself, or itself or to be represented by anyone of his, her, or its choice who is lawfully permitted to do so.
- E. In reaching a decision, official notice may be taken, either before or after submission of the case for decision, of any fact that may be judicially noticed by the courts of this state or that may appear in any of the official records of the city or any of its departments.

SECTION 9.

Section 5.138.150 of the Sacramento City Code is amended to read as follows:

5.138.150 Form and contents of decision—Finality of decision.

- A. If it is shown, by a preponderance of the evidence, that one or more bases exist to deny, suspend, or revoke the license, the hearing examiner shall affirm the city manager's decision to deny, suspend, or revoke the license. The decision of the hearing examiner shall be in writing and shall contain findings of fact and a determination of the issues presented.
- B. The decision shall inform the appellant that the decision is a final decision and that the time for judicial review is governed by California Code of Civil Procedure section 1094.6. Copies of the decision shall be delivered to the parties personally or sent by certified mail to the address shown on the appeal. The decision shall be final when signed by the hearing examiner and served as provided in this section.

SECTION 10.

Section 5.138.160 of the Sacramento City Code is amended to read as follows:

5.138.160 Enforcement.

- A. In addition to any other remedy, any person violating any provision of this chapter shall be guilty of a misdemeanor for each day such violation continues.
- B. Any violation of this chapter may be remedied by a civil action brought by the city attorney. The city may recover reasonable attorneys' fees and costs of suit in any civil action brought by the city attorney to remedy any violation of this chapter.
- C. Any person violating the provisions of this chapter shall also be liable for civil penalties of not less \$250 or more than \$25,000 for each day the violation continues.
- D. Violations of this chapter are hereby declared to be public nuisances subject to abatement by the city.
- E. In addition to criminal sanctions, civil penalties as provided in this section, and other remedies set forth in this chapter, administrative penalties may be imposed pursuant to chapter 1.28 against any person violating any provision of this chapter. Imposition, enforcement, collection and administrative review of administrative penalties imposed shall be conducted pursuant to chapter 1.28.

SECTION 11.

The effective date of this ordinance is October 1, 2019.

ORDINANCE NO. 2018-xxx (With Coalition Amendments)

Adopted by the Sacramento City Council

xxxxx, 2018

AN ORDINANCE AMENDING VARIOUS SECTIONS OF CHAPTER 5.138 OF THE SACRAMENTO CITY CODE, RELATING TO TOBACCO RETAILERS

SECTION 1.

Section 5.138.010 of the Sacramento City Code is amended to read as follows:

5.138.010 Legislative findings.

- A. State law prohibits the sale or furnishing of cigarettes, tobacco products and smoking paraphernalia to persons under 21 years of age except active duty military personnel who are 18 years of age or older (California Penal Code § 308).
- B. State law requires that tobacco retailers check the identification of tobacco purchasers who reasonably appear to be under 21 years of age (California Business & Professions Code § 22956) and provides procedures for using persons under 21 years of age to conduct onsite compliance checks of tobacco retailers (California Business & Professions Code § 22952).
- C. State law requires that tobacco retailers post a conspicuous notice at each point of sale stating that selling tobacco products to anyone under 21 years of age is illegal (California Business & Professions Code § 22952, California Penal Code § 308).
- D. State law prohibits the sale or display of cigarettes through a self-service display and prohibits public access to cigarettes without the assistance of a clerk (California Business & Professions Code § 22962).
- E. State law prohibits the sale of “bidis” (a type of hand-rolled filterless cigarette) except at those businesses that prohibit the presence of minors (California Penal Code § 308.1).
- F. State law 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 six-tenths of an ounce of tobacco (California Penal Code § 308.3).
- G. State law prohibits public school students from smoking or using tobacco products while on campus, while attending school-sponsored activities, or while under the supervision or control of school district employees (California Education Code § 48901(a)).
- H. Sacramento City Code section 5.140.040 prohibits the sale or distribution of tobacco products from vending machines.
- I. From 2013 to 2015, an estimated 15% of ninth and eleventh grade students in California reported using electronic smoking devices.
- J. Over 9% of high school students in California reported buying their own electronic cigarette from a store.

- K. 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 80% tobacco retailers near schools sold flavored non-cigarette tobacco products.
- L. Mentholated and flavored products have been shown to be “starter” products for youth who begin using tobacco and these products help establish tobacco habits that can lead to long-term addiction.
- M. Between 2004 and 2014, use of non-menthol cigarettes decreased among all populations, but overall use of menthol cigarettes increased among young adults (18 to 25 years of age) and adults (over 26 years of age).
- N. Unlike cigarette use that has steadily declined among youth, the prevalence of the use of non-cigarette tobacco products has remained statistically unchanged and, in some cases, increased among youth.
- O. Flavored tobacco has significant public health implications for youth and people of color as a result of targeted industry marketing strategies and product manipulation.
- P. The density and proximity of tobacco retailers influence smoking behaviors, including the number of cigarettes smoked per day.
- Q. Adults who smoke have a harder time quitting when density of tobacco retailers is high.
- R. Policies to reduce tobacco retailer density have been shown to be effective and may reduce or eliminate inequities in the location and distribution of tobacco retailers.
- S. Neither federal nor California state laws restrict the sale of menthol cigarettes or flavored non-cigarette tobacco products, electronic smoking devices, or the solutions used in these devices.
- T. The city has a substantial interest in promoting compliance with federal, state, and local laws intended to regulate tobacco sales and use; in discouraging the illegal purchase of tobacco products by persons under 21 years of age; in promoting compliance with laws prohibiting sales of cigarettes and tobacco products to persons under 21 years of age; and in protecting youth and underserved populations from the harms of tobacco use.
- U. California courts in *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, have affirmed the power of local jurisdictions to regulate business activity in order to discourage violations of law.
- V. State law authorizes local tobacco retailer licensing laws to provide for the suspension or revocation of the local tobacco retailer license for any violation of a state tobacco control law (California Business & Professions Code § 22971.3).
- W. 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 to adults. It will, however, allow the city to regulate the operation of lawful businesses to discourage violations of federal, state, and local tobacco-related laws.

SECTION 2.

Section 5.138.030 of the Sacramento City Code is amended to read as follows:

5.138.030 Definitions.

As used in this chapter, the following words and phrases shall have the meaning given them in this section, unless the context clearly requires otherwise:

“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 under any compulsion to participate in the transaction. A sale between relatives, related companies or partners, or a sale for the primary purpose of avoiding the effect of the violations of this chapter that occurred at the location, is presumed not to be an “arm’s length transaction.”

“Age Verification Technology” means any device or software that can verify the identity and date of birth of the consumer for each retail transaction.

~~“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 produced by the tobacco product, including, but not limited to, tastes or aromas relating to menthol, mint, wintergreen, fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcohol beverage, herb, or spice.~~

“City manager” means the city manager of the city or his or her designee.

~~“Flavored tobacco product” means any tobacco product that imparts a characterizing flavor.~~

“E-liquid” means a substance that:

(1) contains nicotine;

(2) is intended to be vaporized and inhaled using a vapor product; and

(3) is a legal substance under the laws of this State and the laws of the United States;

E-liquid does not include cannabis or CBD as defined under the laws of this State and the laws of the United States.

“Flavoring” means a food grade additive or synthetic flavoring substance that is used to add flavor and that is not prohibited by the federal Food and Drug Administration as an additive in e-liquids.

“Knowingly Attractive to Minors” means:

(1) A cartoon-like fictional character that mimics characters primarily aimed at entertaining minors;

(2) Imitates or mimics trademarks or trade dress of products that are or have been primarily marketed towards minors;

(3) A symbol or celebrity image that is primarily used to market products to minors; or

(4) An image of individuals appearing 27 years of age or younger

“Packaging or Container” means any receptacle that contains e-liquid or a vapor product.

“School” means any public or private school providing instruction in kindergarten or grades 1 to 12, inclusive, but does not include any private school in which education is primarily conducted in private homes.

“Vapor product” means a powered vaporizer that converts e-liquid to a vapor intended for inhalation.

“Youth-oriented facility” means any establishment that caters to or provides services primarily intended for minors; that is patronized predominantly by minors; or where the people who regularly congregate or assemble are predominantly minors.

“Itinerant tobacco retailing” means engaging in tobacco retailing at other than a fixed location.

“License” means a tobacco retailer license issued by the city pursuant to this chapter.

“Licensee” means any proprietor holding a license issued by the city pursuant to this chapter.

“Proprietor” 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 10% 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 has, or can have, sole or shared control over the day-to-day operations of a business.

“Tobacco product” means:

1. A 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, or snuff;
2. An electronic device that delivers nicotine or other vaporized liquids to the person inhaling from the device, including, but not limited to, an electronic cigarette, cigar, pipe, or hookah; and
3. Any component, part, or accessory of a tobacco product, whether or not sold separately.
4. “Tobacco product” does not include a 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 the product is marketed and sold solely for such an approved purpose.

“Tobacco paraphernalia” means any item designed or marketed for the consumption, use, or preparation of a tobacco product.

“Tobacco retailer” means any person who sells, offers for sale, exchanges, or offers to exchange for any form of consideration, tobacco, tobacco products, or tobacco paraphernalia without regard to the quantity sold, offered for sale, exchanged, or offered for exchange.

“Tobacco retailing” means selling, offering for sale, exchanging, or offering to exchange for any form of consideration, tobacco, tobacco products, or tobacco paraphernalia without regard to the quantity sold, offered for sale, exchanged, or offered for exchange.

SECTION 3.

Section 5.138.040 of the Sacramento City Code is amended to read as follows:

5.138.040 Requirement for tobacco retailer license.

A. It shall be unlawful for any person to act as a tobacco retailer without a valid license for each location at which tobacco retailing is to occur. No license will be issued to authorize tobacco retailing at other than a fixed location. No license will be issued for itinerant tobacco retailing or tobacco retailing from vehicles.

~~B. No license shall issue, and no existing license shall be renewed, to authorize tobacco retailing within 1,000 feet of a tobacco retailer already licensed pursuant to this chapter as measured by a straight line from the nearest point of the property line of the parcel on which the applicant's business is located to the nearest point of the property line of the parcel on which an existing licensee's business is located.~~

B. As of July 1, 2019, any new tobacco retail licensee, pursuant to Section 5.138.040 of the Sacramento City Code, shall obtain a Conditional Use Permit from the Planning and Design Commission

C. The city shall not issue any new tobacco retail license or authorize the transfer of any current tobacco retail license, pursuant to Section 5.138.040 of the Sacramento City Code, within 600 feet of a school, park, or other youth-oriented facility. This subsection (C) shall not apply to any tobacco retail license issued prior to the effective date of this ordinance.

~~D.~~ Nothing in this chapter shall be construed to grant any person obtaining a license any status or right other than the right to act as a tobacco retailer at the location in the city identified on the face of the license, subject to compliance with all other applicable laws, regulations, and ordinances. Nothing in this chapter shall be construed to render inapplicable, supersede, or apply in lieu of any other provision of applicable law, including, without limitation, any condition or limitation on indoor smoking made applicable to business establishments by California Labor Code section 6404.5

SECTION 4.

Section 5.138.060 of the Sacramento City Code is amended to read as follows:

5.138.060 Issuance and renewal of license.

A. Upon the receipt of an application for a license and the applicable license fee, the city manager shall issue a license unless:

1. The application is incomplete or inaccurate;
2. The application seeks authorization for tobacco retailing at an address that appears on a license that is suspended, has been revoked, or is subject to suspension or revocation proceedings for violation of any of the provisions of this chapter; provided, however, this subparagraph shall not constitute a basis for denial of a license if either or both of the following apply:
 - a. The applicant provides the city with documentation demonstrating that the applicant has acquired or is acquiring the premises or business in an arm's length transaction;

b. It has been more than five years since the most recent license for that location was revoked;

3. The application seeks authorization for tobacco retailing that is unlawful pursuant to this code, or that is unlawful pursuant to any other local, state, or federal law; or

4. The city manager has information that the applicant or his or her agents or employees has violated any local, state or federal tobacco control law at the location for which the license or renewal of the license is sought within the preceding 30-day period.

B. A license is valid for one year and must be renewed not later than 30 days prior to the expiration of the license, but no earlier than 60 days prior to the expiration of the license. Unless revoked on an earlier date, all licenses expire one year after the date of issuance. A license may be renewed for additional one-year periods by submitting an application to the city manager and payment of the applicable license fee; provided, however, a license that is suspended, has been revoked, or is subject to suspension or revocation proceedings shall not be renewed. The application and license fee shall be submitted at least 30 days, but not more than 60 days, prior to the expiration of the current valid license. The applicant shall follow all of the procedures and provide all of the information required by section 5.138.050. The city manager shall process the application according to the provisions of this section.

C. Notwithstanding section 5.138.040B, a tobacco retailer operating lawfully on the date this subsection C is effective that would otherwise be eligible for a tobacco retailer license for the location for which a license is sought may receive or renew a license for that location so long as all of the following conditions are met:

1. The license is timely obtained and is renewed without lapse or permanent revocation (as opposed to temporary suspension);

2. The tobacco retailer is not closed for business or has not ceased tobacco retailing for more than 60 consecutive days;

3. The tobacco retailer does not substantially change the business premises or business operation for the purpose of increasing the sale or display of tobacco products; and

4. The tobacco retailer retains the right to operate under all other applicable laws.

D. When the city manager does not approve a license or renewal of a license, the city manager shall notify the applicant of the specific grounds for the denial in writing. The notice of denial shall be served personally or by mail not later than five calendar days after the date of the denial. If by mail, the notice shall be placed in a sealed envelope, with postage paid, addressed to the applicant at the address as it appears on the application. The giving of notice shall be deemed complete at the time of deposit of the notice in the United States mail without extension of time for any reason. In lieu of mailing, the notice may be served personally by delivering to the person to be served and service shall be deemed complete at the time of such delivery. Personal service to a corporation may be made by delivery of the notice to any person designated in the California Code of Civil Procedure to be served for the corporation with summons

and complaint in a civil action.

SECTION 5.

Section 5.138.100 of the Sacramento City Code is amended to read as follows:

5.138.100 License violation.

~~A. It is a violation of a license for a licensee or his or her agents or employees to sell or offer for sale any flavored tobacco product. There is a rebuttable presumption that a tobacco product is a flavored tobacco product if a manufacturer or its agents or employees has made a public statement or claim that the tobacco product has or produces a characterizing flavor, including, but not limited to, text, color, or images on the product's labeling or packaging that are used to expressly or impliedly communicate that a tobacco product has a characterizing flavor.~~

A. A tobacco product for sale by a licensee licensed under this Section shall meet the following requirements:

1. A tobacco product shall not be "knowingly attractive to minors", as defined in Sections 5.138.030.

2. An e-liquid container must use a child-resistant cap that has the child resistant effectiveness set forth in the federal poison prevention packaging standards, 16 CFR 1700.15(b)(1).

3. An e-liquid container must use a tamper evident package. The tamper evident package feature must be designed to and remain intact when handled in a reasonable manner during the manufacture, distribution, and retail display of the e-liquid container.

4. The label on an e-liquid container must meet the nicotine addictiveness warning statement requirements set forth in 21 CFR 1143.3.

5. Retailers shall display signage indicating that states "unaccompanied minors are not allowed on the premises", "products are not for sale to minors", and "underage sales prohibited".

6. All retailers selling e-liquids shall display e-liquids behind a counter or in an enclosed display that is not accessible without the assistance of a sales representative.

B. It is a violation of a license for a licensee or his or her agents or employees to violate any local, state, or federal tobacco-related law.

SECTION 6.

Section 5.138.110 of the Sacramento City Code is amended to read as follows:

5.138.110 Suspension or revocation of license.

A. In addition to any other remedy authorized by law, a license shall be suspended or revoked as provided in this section, if the city manager finds that the licensee or his or her agents or employees has or have violated any of the provisions of this chapter; provided, however, violations by a licensee at one location may not be accumulated against other locations of that

same licensee, nor may violations accumulated against a prior licensee at a licensed location be accumulated against a new licensee at the same licensed location.

1. Upon a finding by the city manager of a first license violation within any five-year period, the licensee **shall be a penalty of \$250 \$1,000** ~~shall be suspended for 30 days.~~
2. Upon a finding by the city manager of a second license violation within any five- year period, the licensee **shall be a penalty of \$500 \$2,500** ~~shall be suspended for 90 days.~~
3. Upon a finding by the city manager of a third license violation within any five- year period, the licensee **shall be a penalty of \$1,000 \$5,000** ~~shall be suspended for one year.~~
4. Upon a finding by the city manager of a fourth license violation within any five- year period, the license shall be revoked.

B. A license shall be penalized, suspended or revoked as provided in this section, if the city manager finds that the licensee or his or her agents or employees sells, gives, or in any way furnishes to another person who is under 21 years of age, any tobacco product or tobacco paraphernalia according to the following schedule:

1. A \$250 \$2,500 penalty for the first violation at the same location within a three five-year period.

2. A \$2,500 \$5,000 penalty and a 30-day license suspension for the 2nd violation at the same location within a three five-year period.

3. Revocation of the license for a third violation at the same location within a three five-year period.

B. C. Notwithstanding section 5.138.110A, a license shall be revoked if the city manager finds that either one or both of the following conditions exist:

1. One or more of the bases for denial of a license under section 5.138.060A existed at the time application was made or at any time before the license issued.
2. The information contained in the license application, including supplemental information, if any, is found to be false in any material respect.

C. D. In the event the city manager suspends or revokes a license, written notice of the suspension or revocation shall be served upon the licensee within five days of the suspension or revocation in the manner prescribed in section 5.138.060D. The notice shall contain:

1. A brief statement of the specific grounds for such suspension or revocation;
2. A statement that the licensee may appeal the suspension or revocation by submitting an appeal, in writing, in accordance with the provisions of section 5.138.120, to the city manager, within 10 calendar days of the date of service of the notice; and

3. A statement that the failure to appeal the notice of suspension or revocation will constitute a waiver of all right to an administrative appeal hearing, and the suspension or revocation will be final.

D. E. A licensee for whom a license suspension is in effect, or whose license has been revoked, must cease all tobacco retailing and remove all tobacco products and tobacco paraphernalia from public view at the address that appears on the suspended or revoked license.

SECTION 7.

Section 5.138.120 of the Sacramento City Code is amended to read as follows:

5.138.120 Denial, suspension and revocation—Appeals.

A. Any applicant or licensee aggrieved by the decision of the city manager in denying, suspending, or revoking a license, may appeal the decision by submitting a written appeal to the city manager within 10 calendar days from the date of service of the notice of denial, suspension, or revocation. The appeal must be accompanied by an appeal fee set by resolution of the city council. The written appeal shall contain:

1. A brief statement in ordinary and concise language of the specific action protested, together with any material facts claimed to support the contentions of the appellant;
2. A brief statement in ordinary and concise language of the relief sought, and the reasons why it is claimed the protested action should be reversed or otherwise set aside;
3. The signatures of all parties named as appellants and their official mailing addresses; and
4. The verification (by declaration under penalty of perjury) of at least one appellant as to the truth of the matters stated in the appeal.

B. The appeal hearing shall be conducted by a hearing examiner appointed pursuant to section 8.04.070.

C. Upon receipt of any appeal filed pursuant to this section, the city manager shall transmit the appeal to the secretary of the hearing examiner who shall calendar it for hearing as follows:

1. If the appeal is received by the city manager not later than 15 days prior to the next regular appeal hearing, it shall be calendared for hearing at said meeting.
2. If the appeal is received by the city manager on a date less than 15 days prior to the next appeal hearing, it shall be calendared for the next subsequent appeal hearing.

D. Written notice of the time and place of the hearing shall be given at least 10 calendar days prior to the date of the hearing to each appellant by the secretary of the hearing examiner either by causing a copy of such notice to be delivered to the appellant personally or by mailing a copy thereof, postage prepaid, addressed to the appellant at the address shown on the appeal.

E. Failure of any person to file a timely appeal in accordance with the provisions of this section shall constitute an irrevocable waiver of the right to an administrative hearing and a final adjudication of the notice and order, or any portion of the notice and order.

F. Only those matters or issues specifically raised by the appellant in the appeal notice shall be considered in the hearing of the appeal.

G. Any suspension or revocation of a license shall be stayed during the pendency of an appeal which is properly and timely filed pursuant to this section.

SECTION 8.

Section 5.138.140 of the Sacramento City Code is amended to read as follows:

5.138.140 Conduct of hearing.

A. Hearings need not be conducted according to the technical rules relating to evidence and witnesses. California Government Code section 11513, subdivisions (a), (b) and (c), shall apply to hearings under this chapter.

B. Oral evidence shall be taken only upon oath or affirmation.

C. Irrelevant and unduly repetitious evidence shall be excluded.

D. Each party shall have these rights, among others:

1. To call and examine witnesses on any matter relevant to the issues of the hearing;
2. To introduce documentary and physical evidence;
3. To cross-examine opposing witnesses on any matter relevant to the issues of the hearing;
4. To impeach any witness regardless of which party first called the witness to testify;
5. To rebut the evidence presented against the party; and
6. To represent himself, herself, or itself or to be represented by anyone of his, her, or its choice who is lawfully permitted to do so.

E. In reaching a decision, official notice may be taken, either before or after submission of the case for decision, of any fact that may be judicially noticed by the courts of this state or that may appear in any of the official records of the city or any of its departments.

SECTION 9.

Section 5.138.150 of the Sacramento City Code is amended to read as follows:

5.138.150 Form and contents of decision—Finality of decision.

A. If it is shown, by a preponderance of the evidence, that one or more bases exist to deny, suspend, or revoke the license, the hearing examiner shall affirm the city manager's decision to deny, suspend, or revoke the license. The decision of the hearing examiner shall be in writing and shall contain findings of fact and a determination of the issues presented.

B. The decision shall inform the appellant that the decision is a final decision and that the time for judicial review is governed by California Code of Civil Procedure section 1094.6. Copies of the decision shall be delivered to the parties personally or sent by

certified mail to the address shown on the appeal. The decision shall be final when signed by the hearing examiner and served as provided in this section.

SECTION 10.

Section 5.138.160 of the Sacramento City Code is amended to read as follows:

5.138.160 Enforcement.

- A. In addition to any other remedy, any person violating any provision of this chapter shall be guilty of a misdemeanor for each day such violation continues.
- B. Any violation of this chapter may be remedied by a civil action brought by the city attorney. The city may recover reasonable attorneys' fees and costs of suit in any civil action brought by the city attorney to remedy any violation of this chapter.
- C. Any person violating the provisions of this chapter shall also be liable for civil penalties of not less \$250 or more than \$25,000 for each day the violation continues.
- D. Violations of this chapter are hereby declared to be public nuisances subject to abatement by the city.
- E. In addition to criminal sanctions, civil penalties as provided in this section, and other remedies set forth in this chapter, administrative penalties may be imposed pursuant to chapter 1.28 against any person violating any provision of this chapter. Imposition, enforcement, collection and administrative review of administrative penalties imposed shall be conducted pursuant to chapter 1.28.

SECTION 11.

The effective date of this ordinance is January 1, 2019.

Add Section 12 – Requirement for ID Verification

5.138.040 Requirement for tobacco retailer license.

A. It shall be unlawful for any person to act as a tobacco retailer without first obtaining a license for each location at which tobacco retailing is to occur. No license will be issued to authorize tobacco retailing at other than a fixed location. No license will be issued for itinerant tobacco retailing or tobacco retailing from vehicles.

B. Every tobacco retail licensee shall obtain and use Age Verification Technology, as defined in Section 5.138.030, for each tobacco product purchase at his or her licensed location. Failure to adhere to this requirement shall constitute a violation pursuant to Section 5.138.110.

~~B.~~ **C.** Nothing in this chapter shall be construed to grant any person obtaining a license any status or right other than the right to act as a tobacco retailer at the location in the city identified on the face of the license, subject to compliance with all other applicable laws,

regulations, and ordinances. Nothing in this chapter shall be construed to render inapplicable, supercede, or apply in lieu of any other provision of applicable law, including, without limitation, any condition or limitation on indoor smoking made applicable to business establishments by [Labor Code](#) Section 6404.5. (Ord. 2004-013 § 1)