

BEFORE THE CITY COUNCIL OF THE CITY OF ORINDA

In the Matter of:  
An Ordinance Banning the Sale of  
Flavored Tobacco and Vaping Products

Ordinance 22-01

WHEREAS, the U.S. Center for Disease Control and Prevention ("CDC") estimates that approximately 480,000 people die each year in the United States ("U.S.") due to smoking, and that cigarette smoking is the leading cause of preventable death in the U.S.;<sup>1</sup> and

WHEREAS, flavored tobacco products can appeal to youths and young adults and influence tobacco initiation and continued use; and

WHEREAS, conventional tobacco products including cigars and hookah are also sold in flavors (such as menthol and wintergreen) that appeal to young people, with data from the National Youth Tobacco Survey ("NYTS") indicating that nearly two thirds of U.S. middle school and high school smokers reported using flavored tobacco products in 2018, including menthol cigarettes, flavored cigars, flavored bidis, flavored smokeless tobacco, flavored tobacco in pipes, and flavored hookah;<sup>2</sup> and

WHEREAS, the use of vaping products is difficult to monitor due to their varied design, appearance, and names, including, but not limited to: "e-cigarettes," "c-cigs," "cigalikes," "e-hookahs," "mods," "vape pens," "vapes," and "tank systems"; and

WHEREAS, the use of vaping products among U.S. youth has increased considerably due to youth-appealing flavors and product innovations, growing 900 percent among high school students from 2011 to 2015;<sup>3</sup> and

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<sup>1</sup> U.S. Department of Health and Human Services. *The Health Consequences of Smoking—50 Years of Progress. A Report of the Surgeon General*, Atlanta, GA: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, p. iii, 11 (2014), [https://www.ncbi.nlm.nih.gov/books/NBK179276/pdf/Bookshelf\\_NBK179276.pdf](https://www.ncbi.nlm.nih.gov/books/NBK179276/pdf/Bookshelf_NBK179276.pdf).

<sup>2</sup> Cullen, et al. "Flavored Tobacco Product Use Among Middle and High School Students – United States, 2014-2018." *MMWR Morb Mortal Wkly Rep* (2019); 68:839–844, <http://dx.doi.org/10.15585/mmwr.mm6839a2>.

<sup>3</sup> U.S. Department of Health and Human Services. *E-Cigarette Use Among Youth and Young Adults. A Report of the Surgeon General*, Atlanta, GA: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, p. vii (2016). [https://www.cdc.gov/tobacco/data\\_statistics/sgr/e-cigarettes/pdfs/2016\\_sgr\\_entire\\_report\\_508.pdf](https://www.cdc.gov/tobacco/data_statistics/sgr/e-cigarettes/pdfs/2016_sgr_entire_report_508.pdf).

WHEREAS, in the 2020 NYTS, approximately one in five high school students and one in 20 middle school students reported using vaping products, with more than eight in ten youths using flavored vaping products;<sup>4</sup> and

WHEREAS, in the 2019-2020 California Student Tobacco Survey, 28.6 percent of California high school students reported ever using any tobacco product, and that vapes were the most commonly used tobacco product across gender, race/ethnicity, and grade;<sup>5</sup> and

WHEREAS, vaping products are marketed in a variety of flavors that appeal to youth, including: candy, chocolate, cocktails, desserts, fruit, menthol, mint, and other sweets; and

WHEREAS, the smoking of tobacco and the use of vaping products are forms of air pollution and are a danger to public health as well as a material public nuisance; and

WHEREAS, a local prohibition against the sale of flavored tobacco and vaping products is an effective means to reduce the availability of these products to youth, thereby protecting the public health by discouraging tobacco initiation and continued use; and

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

WHEREAS, the California Legislature has recognized the danger of tobacco use and has made reducing youth access to tobacco products a high priority, with various tobacco control laws including: the prohibition against the sale or furnishing of tobacco products and smoking paraphernalia to minors (Cal. Pen. Code, § 308); the sale or furnishing of vaping products to minors (Cal. Health & Safety Code, § 119405); and the sale of loose or single cigarettes; and

WHEREAS, State law requires tobacco retailers check the identification of tobacco purchasers who appear to be under 21 years of age (Cal. Bus. & Prof. Code, § 22956); and

WHEREAS, in August 2020, the California Legislature passed and Governor Newsom signed into law Senate Bill 793 ("SB 793"), a broad legislation prohibiting the sale of most flavored tobacco products (codified at Cal. Health & Safety Code, §104559.5); and

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<sup>4</sup> Wang, et. al. *E-cigarette Use Among Middle and High School Students — United States* (2020), MMWR Morb Mortal Wkly Rep 2020;69:1310–1312. DOI: <http://dx.doi.org/10.15585/mmwr.mm6937e1>.

<sup>5</sup> Zhu, et al., *Results of the Statewide 2019 -20 California Student Tobacco Survey*, San Diego, California: Center for Research and Intervention in Tobacco Control (CRITC), University of California San Diego (2021), [https://www.cdph.ca.gov/Programs/CCDCPHP/DCDIC/CTCB/CDPH%20Document%20Library/ResearchandEvaluation/FactsandFigures/2019-20CSTSBiennialReport\\_7-27-2021.pdf](https://www.cdph.ca.gov/Programs/CCDCPHP/DCDIC/CTCB/CDPH%20Document%20Library/ResearchandEvaluation/FactsandFigures/2019-20CSTSBiennialReport_7-27-2021.pdf).

WHEREAS, Section 104559.5(g) also specifically allows adoption of a local ordinance that imposes greater restrictions on the access to tobacco products than the restrictions imposed by state law, and provides that a stricter local ordinance shall govern in the case of any inconsistency between the local ordinance and state law; and

WHEREAS, while SB 793 has been placed on the November 8, 2022 ballot through a qualifying referendum, municipalities continue to retain the authority to adopt local ordinances restricting the sale of flavored tobacco and/or vaping products; and

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

WHEREAS, despite local, state, and federal efforts to limit youth access to tobacco, flavored tobacco and vaping products, minors are still able to access these products; and

WHEREAS, the failure of retailers to comply with tobacco control laws and other smoking laws, particularly laws prohibiting sale to minors, presents an imminent threat to the public health, safety, and welfare of the residents of Orinda; and

WHEREAS, flavored tobacco and vaping products are commonly sold to young people by California retailers. For example, in 2019, California retailers violated the federal prohibition against underage tobacco sales at an average rate of 17.9 percent; in particular, tobacco stores and smoke shops had a violation rate of 30.6 percent while vape shops had a rate of 13.4 percent;<sup>6</sup> and

WHEREAS, the accessibility of these products in retailers such as gas stations, deli markets, and discount stores, and low cost in comparison to conventional cigarettes, coupons, discounts, and other promotional materials make these products more easily available to youth; and

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

WHEREAS, the City of Orinda ("City") has a substantial interest in promoting compliance with federal, state, and local laws prohibiting the sale or furnishing of tobacco products and vaping products by minors; in promoting compliance with laws prohibiting sales of cigarettes and tobacco products to minors; and in protecting children from being lured into illegal activity through adult misconduct; and

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<sup>6</sup> California Tobacco Control Branch, California Department of Public Health, "Young Adult Tobacco Purchase Survey Results - Tobacco Sales to Young Adults Under 21 Years, 2019" (Aug. 28, 2019), [https://www.cdph.ca.gov/Programs/CCDCPHP/DCDIC/CTCB/CDPH%20Document%20Library/ResearchandEvaluation/FactsandFigures/YATPSforCDPHCTCPWebsite\\_9-26-2019.pdf](https://www.cdph.ca.gov/Programs/CCDCPHP/DCDIC/CTCB/CDPH%20Document%20Library/ResearchandEvaluation/FactsandFigures/YATPSforCDPHCTCPWebsite_9-26-2019.pdf).

WHEREAS, the City seeks to ensure compliance with state laws relating to tobacco retailing and discourage violations of tobacco-related laws, particularly those that prohibit the sale or distribution of smoking and tobacco products to minors; and

WHEREAS, based upon the recitals above, the City Council finds that the proposed amendments are necessary for the protection of the public health, safety, and welfare.

NOW THEREFORE, the City Council of the City of Orinda DOES ORDAIN as follows:

**SECTION 1.** The City Council of the City of Orinda hereby amends Chapter 9.28 (Restrictions on the Advertising, Access and Promotion of Tobacco Products to Minors) to Title 9 of the Orinda Municipal Code (Public Peace, Morals and Welfare). The full text of Chapter 9.28 is contained in Attachment A to this ordinance, with additions in underline and deletions in strikethrough.

**SECTION 2.** Purpose and intent. The purpose of this ordinance is to the ban the sale of flavored tobacco and vaping products in Orinda.

**SECTION 3.** If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this ordinance is for any reason held to be invalid, such a decision shall not affect the validity of the remaining portions of this ordinance. The City Council hereby declares that it would have passed each section, subsection, subdivision, paragraph, sentence, clause or phrase of this ordinance irrespective of the invalidity of any section, subsection, subdivision, paragraph, sentence, clause or phrase.

**SECTION 4.** This ordinance is consistent with the Orinda General Plan.

**SECTION 5.** This ordinance is exempt from California Environmental Quality Act ("CEQA") review under CEQA Guidelines Section 15061(b)(3), the common sense exemption. This exemption applies to projects that will have no significant effect on the environment. Adopting and implementing an ordinance banning the sale of flavored tobacco and vaping products would not adversely affect the environment.

**SECTION 6.** This ordinance becomes effective 30 days after adoption.


**SECTION 7.** The City Clerk shall either (a) have this ordinance published once within fifteen (15) days after adoption in a newspaper of general circulation, or (b) have a summary of this ordinance published twice in a newspaper of general circulation, once five (5) days before its adoption and again within fifteen (15) days after adoption.

The foregoing ordinance was introduced at a regular meeting of the City Council of the City of Orinda held on May 3, 2022 and was adopted and ordered published at a regular meeting held on May 17, 2022 by the following vote:

AYES:	COUNCILMEMBERS: Fay, Kosla, Miller, Worth
NOES:	COUNCILMEMBERS: None
ABSENT:	COUNCILMEMBERS: Gee
ABSTAIN:	COUNCILMEMBERS: None

  
Dennis Fay, Mayor

ATTEST:

  
Sheri Marie Smith, City Clerk

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## Attachment A

### Chapter 9.28 – RESTRICTIONS ON THE ADVERTISING, ACCESS AND PROMOTION OF TOBACCO PRODUCTS TO PROTECT MINORS

#### 9.28.010 Purpose.

The purpose of this chapter is to promote the welfare of minors by discouraging the commercial exploitation of potential underage tobacco users, the unlawful sale of tobacco products to minors and the unlawful purchase or possession of tobacco products by minors.

#### 9.28.020 Definitions.

In this chapter:

"Adult" means any person or persons over the minimum age at which it is legal to purchase or possess (whichever minimum age is older) tobacco products. A driver's license or other government-issued identification shall be deemed to be sufficient proof of adulthood.

"Adult-only facility" means a facility or restricted area (whether open-air or enclosed) where the operator ensures or has a reasonable basis to believe (such as by checking identification as required under state law, or by checking the identification of any person appearing to be under the age of twenty-seven (27)) that no underage person is present. A facility or restricted area need not be permanently restricted to adults in order to constitute an adult-only facility, provided that the operator ensures or has a reasonable basis to believe that no underage person is present during the event or time period in question.

"Characterizing flavor" means a distinguishable taste or aroma imparted by a tobacco product or any byproduct produced by the tobacco product that is perceivable by an ordinary consumer by either the sense of taste or smell, other than the taste or aroma of tobacco. A "characterizing flavor" includes, but is not limited to, a taste or aroma relating to a fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, menthol, mint, wintergreen, herb, or spice.

"Cigarette" means any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains: (1) any roll of tobacco wrapped in paper or in any substance not containing tobacco; or (2) tobacco, in any form, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette; or (3) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in clause (1) of this definition. The term "cigarette" includes "roll-your-own" (i.e., any tobacco which, because of its appearance, type, packaging, or labeling is suitable for



use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes).

"City Manager" means the City Manager or his/her designee.

"Flavored tobacco product" means any tobacco product that contains a constituent that imparts a characterizing flavor. Menthol cigarettes are included in the definition of a flavored tobacco product for the purposes of this chapter. A tobacco product whose labeling or packaging contains text or an image indicating that the product imparts a characterizing flavor is presumed to be a flavored tobacco product.

"Menthol cigarettes" means cigarettes as defined by federal law that have a characterizing flavor of menthol, mint, or wintergreen, including cigarettes advertised, labeled, or described by the manufacturer as possessing a menthol characterizing flavor.

"Nonsale distribution" means to give tobacco products to the general public at no cost, or at nominal cost, or to give coupons, coupon offers, or rebate offers for tobacco products or cigarettes to the general public at no cost or at nominal cost. Distribution to an adult of tobacco products, coupons, coupon offers, gift certificates, gift cards, or other similar offers, or rebate offers in connection with the sale of another item, including tobacco products, cigarette lighters, magazines, or newspapers shall not constitute nonsale distribution.

"Offering for sale" refers to tobacco products that are sold or displayed in a retail establishment.

"Smokeless tobacco product" means any finely cut, ground, powdered, or leaf tobacco that is intended to be placed in the oral cavity as defined in the Comprehensive Smokeless Tobacco Health Education Act, 15 U.S.C. § 4401 et seq.

"Tobacco product" means cigarettes, ~~and~~ smokeless tobacco products, any vaping device that contains nicotine or can be used to deliver nicotine in aerosolized or vaporized form; 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, little cigars, chewing tobacco, pipe tobacco, and snuff; or any component, part, or accessory of a tobacco product, whether or not it is sold separately.

"Underage" means younger than the minimum age at which it is legal to purchase or possess (whichever minimum age is older) tobacco products.

"Vaping product" means any device or delivery system that can be used to deliver nicotine to a person in aerosolized or vaporized form, including but not limited to, an electronic cigarette, electronic cigar, electronic pipe, electronic hookah, or vape pen. This definition of "vaping product" includes any component, part, or accessory, including but not limited to a cartridge, that is used during the operation of the device or delivery system.

#### **9.28.030 Administration.**

This chapter shall be administered by the City Manager. The City Manager may issue guidelines to ensure implementation of this chapter.

#### **9.28.040 Restrictions on the advertising of tobacco products.**

No person shall place or maintain any advertising or promotion of tobacco products in violation of the provisions of Chapter 17.18 ("Signs") of the Orinda Municipal Code.

#### **9.28.050 Nonsale distribution of tobacco products prohibited.**

No person in the business of selling or distributing tobacco products for commercial purpose shall, in the course of business, distribute, authorize or permit an agent or employee to engage in Nonsale distribution within the City of Orinda.

#### **9.28.060 Self-service displays prohibited.**

- A. It is unlawful for a person to sell, offer for sale, or display for sale any tobacco product by means of a self-service display, rack, counter top or shelf that allows a self-service customer access to a tobacco product.
- B. Every tobacco product shall be offered for sale exclusively by means of seller assistance. Every tobacco product shall be located exclusively in a locked case, located behind a counter out of reach from customers, or in a similar location that is inaccessible to customers and requires seller assistance for the customer to obtain access to the tobacco product.
- C. Exceptions. Subsections A and B of this section do not apply to vending machines located in an adult-only facility.

#### **9.28.065 Sale or offer for sale of flavored tobacco and vaping products prohibited.**

It is unlawful for a person or retailer to sell, or offer to sell, any flavored tobacco or vaping product.

#### **9.28.070 License requirement generally.**

- A. License Required. It is unlawful for a person or retailer who, within the last twelve (12) months, has been found to be in violation of this chapter or applicable state or federal law governing the sale and distribution of tobacco, to sell or offer for sale any tobacco product within the city without first obtaining and maintaining a tobacco retailer's license from the city.
- B. It is unlawful for a person or retailer who is required to have a tobacco retailer's license to sell or offer a tobacco product for sale if the license has been suspended pursuant to Section 9.28.080.



#### **9.28.080 License application and suspension procedure.**

- A. The City Manager shall issue each tobacco retailer's license.
- B. An application for a tobacco retailer's license shall be submitted in the name of the person or retailer, who, following a finding of a violation of this chapter or applicable state or federal law governing the sale and distribution of tobacco, proposes to conduct retail tobacco sales. The application shall be signed by the person or retailer or its authorized agent. The application shall be submitted on a form provided by the city and shall contain the following information:
  - 1. The name, address, and telephone number of the applicant;
  - 2. The business name, address and telephone number where tobacco is to be sold; and
  - 3. Such other information as the City Manager determines is reasonably necessary for implementation of this chapter.
- C. Failure to Pay Fine. Any outstanding fines must be paid before the city issues a tobacco retailer's license under this section.
- D. Upon receipt of a completed application for a tobacco retailer's license, including payment of the license fee and any outstanding fines, the City Manager shall issue a license.
- E. The fee for a tobacco retailer's license shall be established from time to time by the City Council and shall reflect the actual cost of processing the license, including the cost of any inspection of the tobacco retailer's business premises and implementation costs for the licensing program.
- F. The license must be prominently displayed at the location where tobacco retail sales are conducted.
- G. The Tobacco Retailer's License is Nontransferable. If there is a change in location, a new tobacco retail license will be issued for the new address upon receipt of an application. The new license shall retain the same expiration date as the previous license.
- H. Suspension of License. To discourage violations of law, a tobacco retailer's license may be suspended if the City Manager finds that the licensee or an employee or other agent has violated the provisions of this chapter or any state or federal law governing the sale or distribution of tobacco. The City Manager may suspend the license only after giving the licensee notice and a reasonable opportunity to be heard on the matter. The City Manager shall put the findings regarding the violation in writing.
  - 1. The first time that the City Manager finds a violation has occurred, the license may be suspended for up to sixty (60) days.

2. After the second time within a twelve-month period that the City Manager finds a violation has occurred, the license may be suspended for up to one hundred twenty (120) days.
  3. After the third and each subsequent time within a twelve-month period that the City Manager finds a violation has occurred, the license may be suspended for up to one (1) year.
  4. *Appeal of suspension.* A decision of the City Manager to suspend a tobacco retailer's license may be appealed to the City Council.
- I. A License is Valid for Three (3) Years. If there is no further violation of a law regulating the sale or distribution of tobacco during that three-year period, a tobacco retailer's license is no longer required.

#### **9.28.090 Violations.**

- A. *City Manager review.* A private citizen or a city officer or employee may submit a written complaint to the City Manager reporting violations of this chapter.
- B. If the City Manager finds a violation of this chapter, the City Manager shall serve written notice requiring correction of the violation upon the person responsible. The notice shall specify a date by which the violation must be corrected. The notice shall be served by: (1) personal service; or (2) certified first class mail. The person responsible shall correct the violation within the time specified in the notice.
- C. *Imposition of fine.* The City Manager may impose an administrative fine, as permitted under Government Code Section 53069.4, upon finding a violation of this chapter. A fine may be imposed only after the City Manager gives notice and an opportunity to be heard.
- D. *Fine amount.* The fine amounts are as set from time to time City Council resolution.
- E. *Fine procedures.*
  1. *Notice.* Notice of the fine shall be served by certified first class mail. The notice shall contain notice of the right to request a hearing before the City Council contesting the imposition of the fine. The hearing must be requested within ten (10) days of the date of the notice of the fine.
  2. *Judicial review.* A person contesting the decision of the City Council may seek judicial review under Government Code section 53069.4(b).
- F. *Separate violations.*
  1. Each day that an advertisement or promotion of tobacco products is placed or maintained in violation of the provisions of Chapter 17.18 ("Signs") of the Orinda Municipal Code is a separate violation.
  2. Each instance of nonsale distribution in violation of this chapter is a separate violation.
  3. Each day that the self-service provisions of this chapter are violated is a separate violation.

4. Each day that the flavored tobacco and/or vaping products provisions of this chapter are violated is a separate violation.
5. Each day that a tobacco product is offered for sale without a license by a person or retailer required to have a license is a separate violation. Each day that a tobacco product is offered for sale by a person or retailer with a suspended license is a separate violation.
- ~~65~~. For the purposes of determining liability, each location at which a violation of this chapter occurs is considered a separate entity.

#### **9.28.100 Additional remedies—Disclaimers.**

- A. *Intent as to additional legal restrictions and remedies.* This chapter is not intended to alter the obligations or restrictions that apply to a person under any other law governing matters covered by this chapter. The remedies set forth in this chapter are not exclusive. If an action prohibited by this chapter is also unlawful under another law, the penalties and remedies under other laws may be pursued in addition to those provided in this chapter.
- B. *Disclaimers.* In regulating tobacco products, the city is promoting the general welfare. It is not assuming, nor is it imposing upon its officers and employees, a mandatory duty or obligation. Nothing in this chapter shall render the city liable to any person who claims that the city's action or inaction caused injury.

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