

AN ORDINANCE ADDING CHAPTER 3.58 TO TITLE 3 OF THE ALAMEDA COUNTY ORDINANCE CODE TO LICENSE AND REGULATE TOBACCO RETAILERS IN THE UNINCORPORATED AREAS OF THE COUNTY OF ALAMEDA; AND REPEALING CHAPTERS 3.57 AND 3.60 OF TITLE 3 OF THE ALAMEDA COUNTY ORDINANCE CODE

IT IS HEREBY ORDAINED BY THE BOARD OF SUPERVISORS OF THE COUNTY OF ALAMEDA THAT THE ALAMEDA COUNTY ORDINANCE CODE IS AMENDED AS FOLLOWS:

SECTION I

Chapter 3.58 is added to Title 3 of the General Code of the County of Alameda, to read as follows:

Section 3.58.005. Findings and Declaration

The Board of Supervisors of the County of Alameda finds and declares that:

- A. A local licensing system for tobacco retailers is necessary to ensure retailers comply with tobacco control laws, and business standards of the Board of Supervisors, to protect the health, safety, and welfare of our residents.
- B. Approximately 480,000 people die in the United States from smoking-related diseases and exposure to secondhand smoke every year, making tobacco use the nation's leading cause of preventable death.
- C. The World Health Organization (WHO) estimates tobacco kills roughly 6 million people and causes over half a trillion dollars in economic damage each year.
- D. 5.6 million of today's Americans who are younger than 18 are projected to die prematurely from a smoking-related illness.
- E. Tobacco use is the number one cause of preventable death in California and continues to be an urgent public health issue, as evidenced by the following:
 - 1. 40,000 California adults die from their own smoking annually.
 - 2. More than 25% of all adult cancer deaths in California are attributable to smoking.
 - 3. Smoking costs California \$13.29 billion in annual health care expenses, \$3.58 billion in Medicaid costs caused by smoking, and \$10.35 billion in smoking-caused productivity losses.
 - 4. Tobacco use can cause disease in nearly all of the organs of the body and is responsible for 87% of lung cancer deaths, 32% of coronary heart disease deaths, and 79% of all cases of chronic obstructive pulmonary disease in the United States.
- F. Tobacco use among certain populations in California contributes to health disparities and creates significant barriers to health equity, as evidenced by the following:
 - 1. African American (20%), Asian (15.6%), Hispanic (15.0%), and American Indian/Alaska Native (36.2%) males all report a higher smoking prevalence than White, Non-Hispanic males (14.8%).

2. From 2002 to 2012, smoking prevalence increased among African American youth.
 3. Californians with the highest levels of educational attainment and annual household income have the lowest smoking prevalence.
 4. Those who identify as bisexual, compared with heterosexual, gay/lesbian/homosexual, not sexual, celibate, or other, smoke at rates disproportional to their population in California.
 5. Those who reported experiencing psychological distress over the past year smoke at rates disproportional to their population in California.
- G. Despite the state's efforts to limit youth access to tobacco, youth are still able to access tobacco products, as evidenced by the following:
1. In California, over 67% of current and former adult smokers started by the age of 18 and almost 100% start by age 26.
 2. 2017-2018 California Healthy Kids Survey results show that 58% of Castro Valley Unified School District 11th graders and 57% of San Lorenzo 11th graders believe it is very or fairly easy to obtain e-cigarettes.
 3. Unless smoking rates decline, an estimated 5% of all California youth who are alive today will die prematurely from smoking-related diseases.
- H. The tobacco industry encourages youth and young adult tobacco initiation through predatory targeting, as evidenced by the following:
1. Tobacco companies target young adults ages 18 to 24 to increase their frequency of tobacco use and encourage their transition to habitual users.
 2. The majority of smokers begin tobacco use before age 18. Tobacco industry documents state that if "a man has never smoked by the age of 18, the odds are three-to-one he never will. By age 24, the odds are twenty-to-one."
 3. The tobacco industry spends an estimated \$620 million annually to market tobacco products to California residents.
- I. Tobacco retailers continue to sell tobacco to underage consumers, as evidenced by the following:
1. 69% of high school students in all of Alameda County who purchased electronic cigarettes reported buying them from the store themselves or from someone else; only 6.5% purchased online (2017-2018 California Student Tobacco Survey for Alameda County).
 2. 12.5% of businesses surveyed in the unincorporated areas of Alameda County unlawfully sold a tobacco product to a minor decoy in 2018.
 3. A 2019 statewide survey shows that nearly 50% of tobacco stores and vape shops failed to check ID when underage decoys attempted to purchase vape products.
- J. Requiring tobacco retailers to obtain a Tobacco Retailer License will not unduly burden legitimate business activities of retailers who sell tobacco products to adults but will, however, allow the Board of Supervisors to regulate the operation of lawful businesses to discourage violations of federal, state, and local tobacco control and youth tobacco access laws, as evidenced by the following:

1. Over 130 cities and counties in California have passed tobacco retailer licensing ordinances in an effort to stop youth from using tobacco.
 2. A review of 41 California communities with strong tobacco retailer licensing ordinances found that youth sales rates declined in 40 of these communities after the ordinances were enacted, with an average decrease of 26% in the youth sales rate.
 3. Strong policy enforcement and monitoring of retailer compliance with tobacco control policies (e.g., requiring identification checks) is necessary to achieve reductions in youth tobacco sales.
 4. The National Academy of Medicine recommends imposing penalties on business owners to provide sufficient incentives to comply with the law, and business owners with an economic incentive to avoid violations are more likely to establish company-wide policies and incorporate instruction on tobacco laws into employee training.
 5. State law explicitly permits cities and counties to enact local tobacco retail licensing ordinances and allows for the suspension or revocation of a local license for a violation of any state tobacco control law (Cal. Bus. & Prof. Code § 22971.3).
- K. Flavored Tobacco Products are increasingly popular among youth and young adults:
1. Flavors such as grape, menthol, cotton candy, and gummy bear mask the harsh taste of tobacco and are highly appealing to youth.
 2. Youth cite flavors as a major reason for tobacco use with over 80% of youth e-cigarette users reporting that they used the product “because they come in flavors I like.”
 3. 2019 data from the National Youth Tobacco Survey show that fruit (65.9%) and menthol or mint (63.9%) are the most popular flavors among high school users of e-cigarettes.
 4. The federal Family Smoking Prevention and Tobacco Control Act (“Tobacco Control Act”), enacted in 2009, prohibited candy- and fruit-flavored cigarettes, largely because these flavored products are marketed to youth and young adults, and younger smokers were more likely than older smokers to have tried these products.
 5. Scientific reviews by the FDA and the Tobacco Products Scientific Advisory Committee (“TPSAC”) found marketing of menthol cigarettes likely increases the prevalence of smoking among the entire population, but especially among youth, African Americans, and possibly Hispanic and Latino individuals; and that menthol cigarettes are associated with increased initiation and progression to regular cigarette smoking, increased dependence on cigarettes, and reduced success in smoking cessation, especially among African American menthol smokers.
 6. Menthol cigarettes are starter products for youth, especially among middle school smokers. While 37% of all smokers smoke menthol cigarettes, 50% of 12 to 17 year-old smokers smoke menthol cigarettes.
 7. National data show that four out of five youth tobacco users ages 12-17 initiated with a flavored product, and 80% used a flavored tobacco product in the past month.
 8. In 2017-2018, 87.6% of current youth tobacco users in all of Alameda County reported using a flavored tobacco product.

9. In a 2019 observation survey of tobacco retailers within the unincorporated areas of Alameda County (n=72), 99% of stores sold flavored tobacco products including fruit, candy, alcohol, and mint/menthol flavors, and 97% of stores surveyed sold menthol cigarettes.
 10. An evaluation of New York City's law, which prohibits the sale of all flavored tobacco, excluding menthol, found that as a result of the law, youth had 37% lower odds of ever trying flavored tobacco products and 28% lower odds of ever using any type of tobacco.
- L. Unlike cigarette use that has steadily declined among youth, the U.S. has seen a surge in teen e-cigarettes use; over the past three years, youth e-cigarette use has increased 135% - one in four U.S. high school students has used e-cigarettes.
1. Adolescents are more likely than adults to use flavored e-cigarettes.
 2. In 2017-2018, over 1 in 4 (28%) San Lorenzo Unified School District 11th graders and over 1 in 5 (21%) Castro Valley Unified School District 11th graders have used e-cigarettes.
 3. Electronic cigarettes are not harmless water vapor. Mounting research shows that electronic cigarettes are neither safe nor harmless: e-cigarette aerosol contains many of the same toxic chemicals found in cigarettes such as nicotine, formaldehyde and lead, which are known to cause cancer, birth defects and other health problems. The U.S. Surgeon General and CDC highlight that youth e-cigarette use can pose harm to respiratory health and brain development.
 4. In 2017-2018, 44% of San Lorenzo Unified School District 11th graders and 42% Castro Valley Unified School District 11th graders perceived little to no harm in using e-cigarettes compared to smoking cigarettes.
 5. For every adult who quits smoking using e-cigarettes, 80 youth initiate daily tobacco use through e-cigarettes.
 6. Electronic smoking devices are defined by California law as tobacco products. No electronic smoking device is currently approved by the FDA as a smoking cessation product.
 7. In a 2019 observation survey of tobacco retailers within the unincorporated areas of Alameda County (n=72), 50% of stores surveyed sold flavored electronic smoking devices.
- M. Small packages and inexpensive or discounted tobacco products increase access for price sensitive consumers:
1. Evidence suggests that cigarettes are cheaper in neighborhoods with lower household incomes; Newport menthol cigarettes cost less in areas with higher proportions of African Americans, and these communities are targeted with price discounts and coupons.
 2. The availability of inexpensive tobacco products leads to increased tobacco use as evidenced by more than 100 academic studies that conclusively show that when tobacco products are made more expensive, fewer people use tobacco, fewer initiate tobacco use, and more people quit tobacco use.
 3. Price-discounted sales account for a substantial proportion of overall tobacco product sales.
 4. Youth are particularly sensitive to changes in tobacco prices.

5. Many retailers sell little cigars and cigars individually and in minimally priced packages, making them more affordable and appealing to youth. For example:
 - a. 87.4% of California tobacco retailers sell a popular brand of youth-friendly cigars for less than \$1.00.
 - b. In a 2019 observation survey of tobacco retailers within the unincorporated areas of Alameda County (n=72), 83% of stores surveyed that sold little cigars and cigarillos sold them in pack sizes as small as 1 or 2 for prices less than \$2.00 (before taxes), often as little as \$0.99 per pack of six cigarillos. The lowest price for a single flavored cigarillo was \$0.49.
 - c. From 1995 to 2008, annual sales of cigarillos increased by 255%, and sales of Little Cigars increased by 316%.
- N. The density and proximity of tobacco retailers influence smoking behaviors, including number of cigarettes smoked per day.
1. Tobacco retailers are more prevalent in underserved communities, especially in neighborhoods with a higher proportion of African American or Hispanic residents.
 2. In the unincorporated areas of Alameda County, up to 71% of occupied housing units are within walking distance (0.5 mile) to tobacco retailers.
 3. The density of tobacco retailers near schools has been associated with increased youth smoking rates.
 4. In the unincorporated areas of Alameda County, up to 61% of tobacco retailers are close to a school.
 5. 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.
- O. Pharmacists are perceived by many as among the most trusted of health care professionals. By selling tobacco products, pharmacies reinforce positive social perceptions of smoking, convey tacit approval of tobacco use, and send a message that it is not so dangerous to smoke. Children and young people are particularly influenced by cues suggesting that smoking is acceptable.
1. The American Pharmacists Association, the California Pharmacists Association, and the California Medical Association have called for state and local laws prohibiting tobacco sales in drugstores and pharmacies because they believe that doing so supports the public health and social welfare of the communities in which they practice.
 2. Tobacco-free pharmacy sales policies decrease the availability of tobacco products by reducing tobacco retailer density by up to three times compared with communities that do not have such policies.
 3. Nearly 90 percent of California's tobacco-free independent pharmacies have reported either no change or an increase in business since they stopped selling tobacco products.
- P. The Board of Supervisors has a substantial interest in protecting youth and underserved populations from the harms of tobacco use.

Section 3.58.010. Purpose and Intent

It is the purpose and intent of the Board of Supervisors, in enacting this Chapter, to ensure compliance with the business standards and practices of the County, to encourage responsible Tobacco Retailing and to discourage violations of tobacco-related laws, especially those which prohibit or discourage the Sale of Tobacco Products to youth, but not to expand or reduce the degree to which the acts regulated by federal or state law are criminally proscribed or to alter the penalties provided in federal or state law.

Section 3.58.020. Definitions

The following words and phrases, whenever used in this Chapter, shall be construed as hereafter set forth, unless it is apparent from the context that they have a different meaning:

“Arm’s Length Transaction” means a sale in good faith and for valuable consideration that reflects the fair market value between two informed and willing parties, neither of which is under any compulsion to participate in the transaction. A sale between relatives, related companies or partners, or a sale for which a significant purpose is avoiding the effect of the violations of this Chapter is not an Arm’s Length Transaction.

“Board of Zoning Adjustments” means the applicable County of Alameda board of zoning adjustments as set forth in the Alameda County Administrative Code, Chapter 2.40 of Title 2.

“Cigar” means any roll of tobacco other than a Cigarette wrapped entirely or in part in tobacco or any substance containing tobacco and weighing more than three pounds per thousand.

“Cigarette” means: (1) any roll of tobacco wrapped in paper or in any substance not containing tobacco; and (2) 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 herein.

“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, alcoholic beverage, herb, or spice; provided, however, that a Tobacco Product shall not be determined to have a Characterizing Flavor solely because of the use of additives or flavorings or the provision of ingredient information.

“Consumer” means a Person who purchases or intends to purchase a Tobacco Product or Tobacco Paraphernalia for consumption or use and not for Sale to another.

“Coupon” means any voucher, rebate, card, paper, note, form, statement, ticket, image, or other issue, whether in paper, digital, or other form, used for commercial purposes to obtain an article, product, service, or accommodation without charge or at a discounted price.

“Deliver” means to commercially transfer Tobacco Products or Tobacco Paraphernalia to a Consumer at a location not licensed under this Chapter.

“Department” means the Community Development Agency of the County of Alameda and its authorized representatives, designees, or agents.

“Flavored Tobacco Product” means any Tobacco Product that imparts a Characterizing Flavor.

“Full Retail Price” means the price listed for a Tobacco Product on its Packaging or on any related shelving, advertising, or display where the Tobacco Product is Sold, plus all applicable taxes and fees if such taxes and fees are not included in the listed price.

“Labeling” means written, printed, or graphic matter upon any Tobacco Product or any of its Packaging, or accompanying such Tobacco Product.

“Little Cigar” means any roll of tobacco other than a Cigarette wrapped entirely or in part in tobacco or any substance containing tobacco and weighing no more than three pounds per thousand. “Little Cigar” includes, but is not limited to, Tobacco Products known or labeled as small cigar, little cigar, or cigarillo.

“Manufacturer” means any Person, including any repacker or relabeler, who manufactures, fabricates, assembles, processes, or labels a Tobacco Product; or imports a finished Tobacco Product for Sale into the United States.

“Notice Address” means the name and mailing address authorized by each Proprietor to receive License-related communications and notices.

“Package” or “Packaging” means a pack, box, carton, or container of any kind or, if no other container, any wrapping (including cellophane) in which a Tobacco Product is Sold to a Consumer.

“Person” means any natural person, partnership, cooperative association, corporation, personal representative, receiver, trustee, assignee, or any other legal entity.

“Pharmacy” means any retail establishment in which the profession of pharmacy is practiced by a pharmacist licensed by the State of California in accordance with the Business and Professions Code and where prescription pharmaceuticals are offered for Sale, regardless of whether the retail establishment Sells other retail goods in addition to prescription pharmaceuticals.

“Proprietor” means a Person with an ownership interest in a business. An ownership interest shall be deemed to exist when a Person has a ten percent (10%) or greater interest in the stock, assets, or income of a business other than the sole interest of security for debt.

“Sale” or “Sell” or “Sold” means any transfer, exchange, barter, gift, sale, distribution for a commercial purpose, or offer of any of the foregoing, in any manner or by any means whatsoever.

“Self-Service Display” means the display or storage of Tobacco Products or Tobacco Paraphernalia in a manner that is physically accessible in any way to the general public without (a) the assistance of the retailer or employee of the retailer and (b) a direct person-to-person transfer between the purchaser and the retailer or employee of the retailer. A vending machine is a form of Self-Service Display.

“Tobacco Paraphernalia” means any item designed or marketed for the consumption, use, or preparation of Tobacco Products.

“Tobacco Product” means:

- A. any 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, snuff, and blunt wraps; and
- B. any electronic device that delivers nicotine or other substances to the Person inhaling from the device, including, but not limited to, an electronic cigarette, electronic cigar, electronic pipe, or electronic hookah.
- C. Notwithstanding any provision of subsections (A) and (B) to the contrary, "Tobacco Product" includes any component, part, or accessory intended or reasonably expected to be used with a Tobacco Product, whether or not Sold separately. "Tobacco Product" does not include drugs, devices, or combination products authorized for Sale by the United States Food and Drug Administration, as those terms are defined in the Federal Food, Drug and Cosmetic Act.

"Tobacco Retailer" means any Person who Sells Tobacco Products or Tobacco Paraphernalia. "Tobacco Retailing" means the doing of any of these things. This definition is without regard to the quantity of Tobacco Products or Tobacco Paraphernalia Sold.

"Tobacco Retailer License" or "License" means the certificate issued by the Department, which allows a location to Sell Tobacco Products and Tobacco Paraphernalia.

"Youth-Populated Area" means any parcel in the county that is occupied by a school for pre-K to 12th grade students, licensed child or day care facility, public park or playground, or public recreation center.

Section 3.58.030. Requirements and Prohibitions

- A. Tobacco Retailer License Required. It is unlawful for any Person to act as a Tobacco Retailer in the unincorporated areas of the county without first obtaining and maintaining a valid Tobacco Retailer License under this Chapter for each location at which Tobacco Retailing is to occur. Tobacco Retailing without a valid License constitutes a nuisance as a matter of law.
- B. Lawful Business Operation. It is a violation of this Chapter for any Person to violate any local, state, or federal law applicable to Tobacco Retailing.
- C. Display of Tobacco Retailer License. Each Tobacco Retailer must prominently display the License in a publicly-visible area at the licensed location.
- D. Positive Identification Required. No Tobacco Retailer may Sell a Tobacco Product or Tobacco Paraphernalia to a Person who is under the age of twenty-seven (27) years without first examining the identification of the Consumer to confirm that the Consumer is at least the minimum age for Sale of Tobacco Products as established by state law.
- E. Self-Service Displays Prohibited. No Tobacco Retailer may Sell A Tobacco Product or Tobacco Paraphernalia by means of a Self-Service Display.

- F. On-Site Sales. All Sales of Tobacco Products and Tobacco Paraphernalia to Consumers must be conducted in-person at the licensed location. It is a violation of this Chapter for any Tobacco Retailer or any of the Tobacco Retailer's agents or employees to Deliver Tobacco Products or Tobacco Paraphernalia or to knowingly or recklessly Sell a Tobacco Product or Tobacco Paraphernalia to any Person that intends to Deliver such Tobacco Product or Tobacco Paraphernalia to a Consumer in the unincorporated areas of the county.
- G. False and Misleading Advertising Prohibited. A Tobacco Retailer without a valid License, including, for example, a Person whose License has been suspended or revoked:
1. Must keep all Tobacco Products and Tobacco Paraphernalia out of public view. The public display of Tobacco Products or Tobacco Paraphernalia in violation of this provision constitutes Tobacco Retailing without a License in violation of section 3.58.130; and
 2. Must not display any advertisement relating to Tobacco Products or Tobacco Paraphernalia that promotes the Sale of such products from the Tobacco Retailer's location or that could lead a reasonable Consumer to believe that such products can be obtained at that location.
- H. Limited, Conditional Privilege. Nothing in this Chapter shall be construed to grant any Person obtaining and maintaining a License any status or right other than the limited conditional privilege to act as a Tobacco Retailer at the location in the unincorporated areas of the county identified on the face of the License.

Section 3.58.040. Sale of Flavored Tobacco Products Prohibited

- A. No Tobacco Retailer or any of the Tobacco Retailer's agents or employees may Sell or possess with intent to Sell any Flavored Tobacco Product.
- B. There shall be a rebuttable presumption that a Tobacco Product is a Flavored Tobacco Product if a Tobacco Retailer, Manufacturer, or any employee or agent of a Tobacco Retailer or Manufacturer has:
1. Made a public statement or claim that the Tobacco Product imparts a Characterizing Flavor;
 2. Used text and/or images on the Tobacco Product Labeling or Packaging to explicitly or implicitly indicate the Tobacco Product imparts a Characterizing Flavor, including, but not limited to, use of descriptive terms such as "sweet" or "spicy" that imply a Characterizing Flavor;
 3. Taken action directed to Consumers that would be reasonably expected to cause Consumers to believe the Tobacco Product imparts a Characterizing Flavor.
- C. There shall be a rebuttable presumption that a Tobacco Product is a Flavored Tobacco Product if the Tobacco Product Labeling or Packaging explicitly or implicitly indicates the Tobacco Product imparts a Characterizing Flavor, including, but not limited to, use of descriptive terms such as "sweet" or "spicy" that imply a Characterizing Flavor.

Section 3.58.050. Tobacco Product Pricing and Packaging

- A. Packaging and Labeling. No Tobacco Retailer may Sell any Tobacco Product to any Consumer unless such product: (1) is sold in the original Manufacturer's Packaging intended for Sale to Consumers; and (2) conforms to all applicable federal Labeling requirements.
- B. Display of Price. The price of each Tobacco Product offered for Sale must be clearly and conspicuously displayed to indicate the price of the product.
- C. Prohibition of Tobacco Product Coupons and Discounts. No Tobacco Retailer may:
 - 1. Honor or redeem, or offer to honor or redeem, a Coupon to allow a Consumer to purchase a Tobacco Product for less than the Full Retail Price;
 - 2. Sell any Tobacco Product to a Consumer through a multiple-Package discount or otherwise provide any such product to a Consumer for less than the Full Retail Price in consideration for the purchase of any Tobacco Product or any other item; or
 - 3. Provide any free or discounted item to a Consumer in consideration for the purchase of any Tobacco Product.
- D. Minimum Package Size for Little Cigars. No Tobacco Retailer may Sell to a Consumer any Little Cigar unless it is sold in a Package of at least twenty (20) Little Cigars.
- E. Minimum Prices for Cigarettes, Little Cigars, and Cigars. No Tobacco Retailer may Sell to a Consumer:
 - 1. Cigarettes at a price that is less than \$8.00 per Package of 20 Cigarettes, including all applicable taxes and fees;
 - 2. Little Cigars at a price that is less than \$8.00 per Package of Little Cigars, including all applicable taxes and fees; or
 - 3. Cigars at a price that is less than \$8.00 per Cigar, including all applicable taxes and fees.
 - 4. The minimum prices established in this section shall be adjusted April 1 of each year beginning 2021 (percent change in the annual average, not seasonally adjusted) in proportion with the Consumer Price Index: all urban consumers for all items for the San Francisco-Oakland-Hayward statistical area as reported by the United States Bureau of Labor Statistics or any successor to that index. The Department shall provide notice of the April 1 adjustment by publicly posting the adjusted minimum prices on the County website by the preceding March 1.

Section 3.58.060. Limits On Eligibility for a Tobacco Retailer License

- A. Mobile Vending. No Tobacco Retailer License may issue to authorize Tobacco Retailing at a non-fixed location, including, but not limited to, Tobacco Retailing by Persons on foot or from vehicles.

- B. Pharmacies. No License may issue to authorize Tobacco Retailing in a Pharmacy.
- C. Proximity to Youth-Populated Areas. No License may issue, and no existing license may be renewed, to authorize Tobacco Retailing within one thousand (1,000) feet of a Youth-Populated Area as measured by a straight line from the nearest point of the property line of any parcel on which the Youth-Populated Area is located to the nearest point of the property line of any parcel on which the applicant's business is located.
- D. Proximity to Other Tobacco Retailers. No License may issue, and no existing license may be renewed, to authorize Tobacco Retailing within five hundred (500) feet of a Tobacco Retailer location already licensed under this Chapter as measured by a straight line from the nearest point of the property line of any parcel on which the applicant's business is located to the nearest point of the property line of any parcel on which an existing licensee's business is located.
- E. Population and Density. The issuance of Licenses is limited as follows:
1. The total number of Licenses issued by the Department must be limited to one for each 2,500 inhabitants of the unincorporated areas of the county.
 2. For the purposes of this subsection, the total population of the unincorporated areas of the county shall be determined by the most current published total available from the U.S. Census Bureau or the California State Department of Finance, whichever has been more recently updated, as of the date the License application is filed.
 3. No new License may be issued to authorize Tobacco Retailing if the number of Licenses already issued equals or exceeds the total number authorized under subsection (E)(1).
- F. Notwithstanding subsections (C), (D), and (E), a Tobacco Retailer operating lawfully on the date this ordinance is adopted that would otherwise be eligible for a 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 otherwise suspends Tobacco Retailing for more than sixty (60) consecutive days;
 3. The Tobacco Retailer retains the right to operate under all other applicable laws; and
 4. The Tobacco Retailer does not substantially change the business premises or business operation. A substantial change to the business operation includes, but is not limited to, the transfer of a location:
 - a. To a new Proprietor in an Arm's Length Transaction; or
 - b. For which a significant purpose is avoiding the effect of violations of this Chapter.

5. If the County determines that a Tobacco Retailer has substantially changed their business premises or operation and the Tobacco Retailer disputes this determination, the Tobacco Retailer bears the burden of proving by a preponderance of evidence that such change(s) do not constitute a substantial change.

Section 3.58.070. Application Procedure

- A. Application for a Tobacco Retailer License must be submitted in the name of each Person proposing to conduct Sales of Tobacco Products or Tobacco Paraphernalia and must be signed by each Person or an authorized agent thereof.
- B. It is the responsibility of each Person to be informed of all laws applicable to Tobacco Retailing.
- C. No Person may rely on the issuance of a License as a determination by the County that the Person is in compliance with all laws related to its operation. A License issued contrary to this Chapter or any other law, or on the basis of false or misleading information supplied by an applicant shall be revoked under section 3.58.140 of this Chapter. Nothing in this Chapter shall be construed to vest in any Person obtaining and maintaining a License any status or right to act as a Tobacco Retailer in contravention of any provision of law.
- D. All applications must be submitted on a form supplied by the Department and must contain the following information:
 1. The name, address, and telephone number of each Proprietor of the business seeking a license;
 2. The business name, address, and telephone number of the single fixed location for which a License is sought;
 3. The Notice Address;
 4. Proof that the location for which a License is sought conforms with applicable zoning;
 5. Proof that the location for which a License is sought has been issued a valid state license for the Sale of Tobacco Products, if the Tobacco Retailer Sells products that require such license;
 6. Whether or not any Proprietor or any agent of the Proprietor has admitted violating, or has been found to have violated, this Chapter and, if so, the dates and locations of all such violations within the previous five (5) years; and
 7. Such other information as the Department deems appropriate for the administration or enforcement of this Chapter.
- E. A licensed Tobacco Retailer must inform the Department in writing of any change in the information submitted on an application for a License within ten (10) business days of a change.

Section 3.58.080. Issuance of Tobacco Retailer License; Standards

- A. After receipt of a complete application for a Tobacco Retailer License and the License fee required by this Chapter, the Department shall issue a License within thirty (30) days unless substantial evidence demonstrates that one or more of the following bases for denial exists:
1. The application is incomplete or inaccurate;
 2. The application seeks authorization for Tobacco Retailing by a Person or at a location for which a suspension or revocation is in effect under section 3.58.140 of this Chapter;
 3. The application seeks authorization for Tobacco Retailing for a Person to whom this Chapter prohibits a License to be issued; or
 4. The application seeks authorization for Tobacco Retailing at a location that is in violation of applicable County zoning under Chapter 17 of this Code, or is in violation of any other local, state, or federal law.

Section 3.58.090. Tobacco Retailer License Renewal and Expiration

- A. Renewal of Tobacco Retailer License. A Tobacco Retailer License is invalid if the License fee has not been timely paid in full or if the License term has expired. The term of a License is one (1) year. Each Tobacco Retailer must apply for the renewal of their License and submit the License fee no later than thirty (30) days prior to expiration of the term.
- B. Expiration of Tobacco Retailer License. A License that is not timely renewed shall expire at the end of its term. To renew a License not timely renewed under subsection (A), the renewal applicant must:
1. Submit the License fee and renewal application form; and
 2. Submit a signed affidavit affirming the Proprietor has not Sold and will not Sell any Tobacco Product or Tobacco Paraphernalia after the License expiration date and before the License is renewed.
- C. If the Proprietor has engaged in Tobacco Retailing during a period in which its License is invalid, a License may only be re-issued to eligible applicants following the applicable periods set forth in section 3.58.130(A) of this Chapter.

Section 3.58.100. Fees for Tobacco Retailer License

- A. The fee to issue or to renew a Tobacco Retailer License shall be established from time to time by resolution of the Board of Supervisors. The fee shall be calculated so as to recover the cost of administration and enforcement of this Chapter, including, for example, issuing Licenses, administering the Tobacco Retailer License program, Tobacco Retailer education, Tobacco Retailer inspection and compliance checks, documentation of violations, and prosecution of violators, but shall not exceed the cost of the regulatory program authorized by this Chapter. The manner in which the License fees allocated to a

payor must bear a fair and reasonable relationship to the payor's burdens on, and benefits received from, the administration and enforcement activities of this Chapter.

Section 3.58.110. Tobacco Retailer License Nontransferable

- A. A Tobacco Retailer License may not be transferred from one Person to another or from one location to another. A new License is required if a Tobacco Retailing location has a change in Proprietor, or a Person issued a License changes a business location for Tobacco Retailing.
- B. Notwithstanding any other provision of this Chapter, prior violations at a location shall continue to be counted against a location and license ineligibility periods shall continue to apply to a location unless:
 - 1. The location has been transferred to new Proprietor in an Arm's Length Transaction; and
 - 2. The new Proprietor provides the County with clear and convincing evidence that the new Proprietor has acquired or is acquiring the location in an Arm's Length Transaction.

Section 3.58.120. Compliance Monitoring

- A. Compliance with this Chapter shall be monitored by the Department. In addition, any peace officer may enforce the provisions of this Chapter. The County may designate additional Persons to monitor compliance with this Chapter. Nothing in this section creates a right of action in any licensee or other Person against the County or its agents.

Section 3.58.130. Tobacco Retailing Without a Valid License

- A. In addition to any other penalty authorized by law, if the County finds or a court of competent jurisdiction determines, after notice and an opportunity to be heard, that any Person has engaged in Tobacco Retailing at a location without a valid Tobacco Retailer License, either directly or through the Person's agents or employees, the Person shall be ineligible to receive a License as follows:
 - 1. Upon a first violation of this section at a location within any five (5) year period, no new License may issue for the Person or the location (unless ownership of the business at the location has been transferred in an Arm's Length Transaction), until thirty (30) days have passed from the date of the violation.
 - 2. Upon a second violation of this section at a location within any five (5) year period, no new License may issue for the Person or the location (unless ownership of the business at the location has been transferred in an Arm's Length Transaction), until ninety (90) days have passed from the date of the violation.
 - 3. Upon a third or subsequent violation of this section at a location within any five (5) year period, no new License may issue for the Person or the location (unless ownership of the business at the location has been transferred in an Arm's Length Transaction), until one (1) year has passed from the date of the violation.

4. Upon a finding of four or more violations of this section at a location within any five (5) year period, no new License may issue for the Person or the location unless ownership of the business at the location has been transferred in an Arm's Length Transaction.

Section 3.58.140. Suspension or Revocation of Tobacco Retailer License

- A. Suspension or Revocation of Tobacco Retailer License for Violation. In addition to any other penalty authorized by law, a Tobacco Retailer License shall be suspended or revoked if the Department finds or a court of competent jurisdiction determines, after the licensee is afforded notice and an opportunity to be heard, that the licensee, or any of the licensee's agents or employees, has violated any provision of this Chapter.
 1. Upon a finding of a first violation of this Chapter at a location within any five (5) year period, the License shall be suspended for thirty (30) days.
 2. Upon a finding of a second violation of this Chapter at a location within any five (5) year period, the License shall be suspended for ninety (90) days.
 3. Upon a finding of a third violation of this Chapter at a location within any five (5) year period, the License shall be suspended for one (1) year.
 4. Upon a finding of four or more violations of this Chapter at a location within any five (5) year period, the License shall be revoked.
- B. Revocation of Tobacco Retailer License Wrongly Issued. A License shall be revoked if the Department finds, after the licensee is afforded notice and an opportunity to be heard, that one or more of the bases for denial of a License under section 3.58.080 existed at any time before the license issued. Such a revocation shall be without prejudice to the filing of a new license application.

Section 3.58.145. Notices

- A. Whenever the Department denies an application for a License or License renewal, the Department shall issue a written notice of denial served by personal service or regular mail to the applicant's Notice Address. The notice must include:
 1. The reason for denial;
 2. A statement that the applicant may request a hearing on the denial of a License by submitting a hearing request, in writing, in accordance with the provisions of Section 3.58.150, to the Department, within ten (10) calendar days of the date of the notice; and
 3. A statement that the failure to request a hearing on the notice of denial will constitute a waiver of all hearing and appeal rights, and the denial of the License will be final.
- B. Whenever the Department determines a Person has violated any provision of this Chapter, it shall send a written notice of the violation to the Person by personal service or regular mail to the Person's Notice Address, if the Person is a License holder, otherwise to the

location at which the violation occurred. The enforcement officer designated by the Department may impose administrative penalties under Section 3.58.180(B). The notice of violation may be combined with the notice of suspension or revocation below.

- C. Whenever the Department determines that grounds for suspension or revocation exist, it shall send a written notice of the suspension or revocation to the License holder by personal service or by prepaid certified mail, return receipt requested, to the License holder's Notice Address. The notice must include:
1. A statement that the license holder's License is being suspended or revoked under this Chapter;
 2. The Code section(s) violated, or applicable state or federal law violated, and a brief description of the violation(s);
 3. The address or other description of the location where the violation(s) occurred;
 4. The date of the applicable violation(s);
 5. The time period of the suspension or revocation;
 6. A statement that the License holder may request a hearing on the suspension or revocation by submitting a hearing request, in writing, in accordance with the provisions of Section 3.58.150, to the Department, within ten (10) calendar days of the date of the notice;
 7. A statement that the failure to request a hearing on the notice of suspension or revocation will constitute a waiver of all hearing and appeal rights, and the suspension or revocation will be final; and
 8. Signature of the enforcement officer designated by the Department.
- D. Service of notice shall be deemed complete at the time of personal service or the time the notice is deposited in the mail. Failure of any Person to receive notice shall not affect the validity of any proceedings hereunder.

Section 3.58.150. Hearings Before the Board of Zoning Adjustments

- A. Any Person aggrieved by the decision of the Department in issuing a notice of violation, or denying, suspending, or revoking a Tobacco Retailer License, may request a hearing on the decision by submitting a written request for hearing to the Department within ten (10) calendar days from the date of the notice of violation, or notice of denial, suspension, or revocation. The written request for hearing must 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 protestor;
 2. A brief statement in ordinary and concise language of the relief sought, and the reason why it is claimed the protested action should be reversed or otherwise set aside;

3. The signatures of all parties named as protestors and their official mailing address for purposes of this section; and
 4. The verification (by declaration under penalty of perjury) of at least one protestor as to the truth of the matters stated in the request for hearing.
- B. Any timely written request for hearing will be reviewed and, if found by the Department to be complete, a date, time, and place shall be set for a hearing before the Board of Zoning Adjustments. Written notice of the time and place for the hearing shall be provided in person or by mailing a copy thereof, postage prepaid, to the official mailing address provided to the Department under this section at least seven (7) calendar days before the day set for hearing. Service shall be deemed to be complete at the time notice is personally served or deposited in the mail. If the request for hearing is found not timely or incomplete by the Department, the Department shall provide a written response to the requestor rejecting the hearing request.
- C. The failure of any Person to receive notice of hearing shall not affect the validity of any proceedings under this Chapter.
- D. The failure of any Person to file a request for hearing in accordance with this section shall constitute waiver of that Person's rights to administrative determination of the merits of the notice of violation, or notice of denial, suspension, or revocation and the amount of any penalties assessed.
- E. The Board of Zoning Adjustments shall be designated for hearings under this Chapter. The Board of Zoning Adjustments shall conduct an orderly, fair hearing and adhere to the following procedures:
1. A valid notice of violation, or notice of denial, suspension, or revocation shall be prima facie evidence of the cause for the violation, or denial, suspension, or revocation of the License;
 2. The Person responsible for the violation, or the denial, suspension, or revocation of the License, or any other interested Person may present testimony or evidence concerning the cause for violation, or the denial, suspension, or revocation; and
 3. Hearings need not be conducted according to the California Code of Evidence.
- F. The Board of Zoning Adjustments shall make findings based on the record of the hearing and make a written decision based on the findings. The decision shall be issued by the Department following the hearing and served by regular mail on all parties. The decision shall be served with a notice of the Person's rights to appeal to the Board of Supervisors under section 3.58.160.

Section 3.58.160. Appeal to Board of Supervisors

- A. A Person may appeal to the Board of Supervisors the Board of Zoning Adjustments' findings and decision by filing an appeal with the clerk of the Board of Supervisors within ten (10) calendar days from the date of service of the Board of Zoning Adjustments' decision. The appeal must contain:

1. Specific identification of the subject Tobacco Retailer establishment;
 2. The names and addresses of all appellants;
 3. A statement of appellant's legal interest in the subject establishment;
 4. A statement in ordinary and concise language of the specific portions of the Board of Zoning Adjustments' findings and decision protested and the grounds for appeal, together with all material facts in support thereof;
 5. The date and signatures of all appellants; and
 6. 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 Board of Supervisors shall set a date to hear the appeal which date shall be neither less than seven (7) calendar days nor more than forty-five (45) calendar days from the date the appeal was filed. The Board of Supervisors shall give each appellant written notice of the time and place of hearing at least five (5) calendar days prior to the date of the hearing, either by causing a copy of notice to be delivered to the appellant personally or by mailing a copy thereof, postage prepaid, addressed to the appellant(s) at the address(es) shown on the appeal. Continuances of the hearing from time to time may be granted by the Board of Supervisors on request of the appellant for good cause shown, or on the Board of Supervisors' own motion.
- C. Upon the conclusion of the hearing, the Board of Supervisors shall make findings and determine whether the decision of the Board of Zoning Adjustments should be affirmed or denied, or whether some other remedy is appropriate. The Board of Supervisors shall adopt a resolution setting forth its findings and ordering that the Board of Zoning Adjustments' decision be affirmed, denied, or ordering some other remedy if appropriate. The decision of the Board of Supervisors is final.

Section 3.58.170. Judicial Review

- A. Judicial review of the Board of Supervisors' decision and any penalties imposed under this Chapter shall be taken under Government Code section 53069.4 and commenced within twenty (20) days of the date of service of the decision.

Section 3.58.180. Enforcement

- A. The remedies provided by this Chapter are cumulative and in addition to any other remedies available at law or in equity.
- B. The enforcement officer designated by the Department, Board of Zoning Adjustments, or Board of Supervisors may impose administrative penalties as follows:
1. For a first violation of this Chapter within any five (5) year period, two hundred fifty dollars (\$250.00);
 2. For a second violation of this Chapter within any five (5) year period, five hundred dollars (\$500.00); and

3. For a third or subsequent violation of this Chapter within any five (5) year period, one thousand dollars (\$1,000.00).
- C. Violations of this Chapter are subject to a civil action brought by the District Attorney or the County Counsel, punishable by a civil fine not less than two hundred fifty dollars (\$250) and not exceeding one thousand dollars (\$1,000) per violation.
 - D. Violations of this Chapter may, in the discretion of the District Attorney, be prosecuted as infractions or misdemeanors when the interests of justice so require.
 - E. Tobacco Products and Tobacco Paraphernalia offered for Sale in violation of this Chapter are subject to seizure by the County or any peace officer and shall be forfeited after the licensee and any other owner of the Tobacco Products and Tobacco Paraphernalia seized is given reasonable notice and an opportunity to demonstrate that the Tobacco Products and Tobacco Paraphernalia were not offered for Sale in violation of this Chapter.
 - F. For the purposes of the civil remedies provided in this Chapter, each day on which a Tobacco Product or Tobacco Paraphernalia is offered for Sale in violation of this Chapter shall constitute a separate violation of this Chapter.
 - G. Causing, permitting, aiding, abetting, or concealing a violation of any provision of this Chapter shall also constitute a violation of this Chapter.
 - H. Violations of this Chapter are hereby declared to be public nuisances and may be enforced under the procedure in Chapter 6.65 of this Code.
 - I. In addition to other remedies provided by this Chapter or by other law, any violation of this Chapter may be remedied by a civil action brought by the County, including, for example, administrative or judicial nuisance abatement proceedings, civil or criminal Code enforcement proceedings, and suits for injunctive relief.
 - J. Whenever evidence of a violation of this Chapter is obtained in any part through the participation of a Person under the age of twenty-one (21) years old, such Person shall not be required to appear or give testimony in any civil or administrative process brought to enforce this Chapter and the alleged violation shall be adjudicated based on the sufficiency and persuasiveness of the evidence presented.

Section 3.58.190. Authority to Adopt Regulations to Implement this Chapter

- A. The Department may adopt rules and regulations which are necessary or appropriate to implement, administer, and enforce the provisions of this Chapter.

Section 3.58.200. Tobacco Retailer License Fund

- A. The "Tobacco Retailer License Fund" ("Fund") is hereby created as a special revenue fund. All proceeds for the Tobacco Retailer License program received under this Chapter, including fees and any penalties, and interest earned on such proceeds, shall be deposited into the Fund for distribution under this section. All proceeds from penalties, fines, and violations relating to this Chapter and the Tobacco Retailer License program shall also be deposited into the Fund for distribution under this section.

- B. Monies in the Fund shall be used exclusively to pay for the administration and enforcement of this Chapter. If this Chapter or the use of the Fund is legally challenged, monies in the Fund may be used to reimburse the County and the Department for their costs of legal defense, including attorneys' fees and other expenses.

Section 3.58.210. Exception for Cannabis Retail or Delivery Operators and Combined Cannabis Operations

- A. The requirements and prohibitions of this Chapter shall not apply to Cannabis Retail or Delivery Operators holding a permit under Chapter 6.108 or Combined Cannabis Operations holding a permit under Chapter 6.109.

Section 3.58.220. Severability

If any section, subsection, subdivision, paragraph, sentence, clause, or phrase of this ordinance, or its application to any person or circumstance, is for any reason held to be invalid or unenforceable, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining sections, subsections, subdivisions, paragraphs, sentences, clauses, or phrases of this ordinance, or its application to any other person or circumstance. The Board of Supervisors hereby declares that it would have adopted each section, subsection, subdivision, paragraph, sentence, clause, or phrase hereof, irrespective of the fact that any one or more other sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases hereof be declared invalid or unenforceable.

SECTION II

Chapter 3.57 of the Alameda County General Ordinance Code is hereby repealed in its entirety.

Chapter 3.60 of the Alameda County General Ordinance Code is hereby repealed in its entirety.

SECTION III

- A. This ordinance shall take effect and be in force ninety (90) days from and after the date of passage; provided, however, that section 3.58.040 shall not be enforced until one hundred eighty (180) days from and after the date of passage.
- B. Before the expiration of fifteen (15) days after its passage, it shall be published once with the names of the members voting for and against the same in the Inter-City Express, a newspaper published in the County of Alameda.

Adopted by the Board of Supervisors of the County of Alameda, State of California, on 14th
January, 2020, by the following called vote:

AYES: Supervisors Carson, Chan, Haggerty & President Valle

NOES: None

EXCUSED: None

ABSTAINED: Supervisor Miley



Richard Valle
President of the Board of Supervisors
County of Alameda, State of California

ATTEST:
Clerk of the Board of Supervisors
County of Alameda

By: RBailey, Deputy

APPROVED AS TO FORM:
DONNA R. ZIEGLER, COUNTY COUNSEL
County of Alameda

By: [Signature]
Raymond Leung, Deputy County Counsel