



## CITY OF SAN JOSÉ, CALIFORNIA

Office of the City Clerk  
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City Clerk

STATE OF CALIFORNIA)  
COUNTY OF SANTA CLARA)  
CITY OF SAN JOSE)

I, Toni J. Taber, City Clerk & Ex-Officio Clerk of the Council of and for the City of San Jose, in said County of Santa Clara, and State of California, do hereby certify that "**Ordinance No. 30675**", the original copy of which is attached hereto, was passed for publication of title on the **28<sup>th</sup> day of September, 2021**, was published in accordance with the provisions of the Charter of the City of San Jose, and was given final reading and adopted on the **19<sup>th</sup> day of October 2021**, by the following vote:

AYES: ARENAS, CARRASCO, COHEN, DAVIS, ESPARZA, FOLEY, JONES,  
JIMENEZ, MAHAN, PERALEZ, LICCARDO.

NOES: NONE.

ABSENT: NONE.

DISQUALIFIED: NONE.

VACANT: NONE.

Said Ordinance is effective as of the **5<sup>th</sup> day of November, 2021**.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the corporate seal of the City of San Jose, this **28<sup>th</sup> Day of September, 2021**.

(SEAL)

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TONI J. TABER, CMC  
CITY CLERK & EX-OFFICIO  
CLERK OF THE CITY COUNCIL

/YJ

**ORDINANCE NO. 30675**

**AN ORDINANCE OF THE CITY OF SAN JOSE AMENDING, DELETING, AND ADDING VARIOUS SECTIONS OF CHAPTER 6.87 OF TITLE 6 OF THE SAN JOSE MUNICIPAL CODE TO REGULATE TOBACCO RETAIL LICENSES**

**WHEREAS**, electronic cigarettes, also known as e-cigarettes, e-vaporizers, or electronic nicotine delivery systems, are battery-operated devices that people use to inhale an aerosol that typically contains nicotine. In addition to the nicotine, the aerosol from e-cigarettes may include up to 31 other components, including formaldehyde, acetaldehyde, glycidol, acrolein, acetol and diacetyl. Several of these compounds are likely carcinogens; and

**WHEREAS**, e-cigarettes are marketed in a variety of flavors that appeal to youth; and

**WHEREAS**, the U.S. Surgeon General declared the use of e-cigarettes among U.S. youth and young adults as “epidemic”; and

**WHEREAS**, the City Council wishes to amend the Tobacco Retail License to address this major public health concern by regulating the sale of tobacco products, including a prohibition on the sale of flavored tobacco products in order to protect the public health and welfare; and

**WHEREAS**, pursuant to the provisions and requirements of the California Environmental Quality Act of 1970, together with related State CEQA Guidelines and Title 21 of the San José Municipal Code (collectively, "CEQA"), the Director of Planning, Building and Code Enforcement has determined that the provisions of this Ordinance do not constitute a project, under File No. PP147-008 (General Procedure and Policy Making resulting in no changes to the physical environment); and

**WHEREAS**, the City Council of the City of San José is the decision-making body for this Ordinance; and

**WHEREAS**, this Council has reviewed and considered the "not a project" determination under CEQA prior to taking any approval actions on this Ordinance;

**NOW, THEREFORE**, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF SAN JOSE:

**SECTION 1.** Section 6.87.010 of Chapter 6.87 of Title 6 of the San José Municipal Code is amended to read as follows:

**6.87.010 Purpose of Chapter**

The failure of Tobacco Retailers to comply with all tobacco control laws, particularly the sale of Tobacco Products, including flavored tobacco and Electronic Cigarette Products to minors, presents an imminent threat to the public health, safety and welfare. A local licensing program for Tobacco Retailers is intended to ensure that Tobacco Retailers comply with tobacco control laws and business standards of the City and to protect the health, safety and welfare of those persons who reside in, work in and visit this City. State law explicitly permits cities 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. A requirement for a Tobacco Retailer license will not unduly burden legitimate business activities of retailers who sell or distribute Tobacco Products to adults but will allow the City to regulate the operation of lawful businesses to discourage violations of federal, state and local tobacco-related laws. 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, including flavored tobacco and Electronic Cigarette Products, by minors; in promoting compliance with laws prohibiting sales of Tobacco Products to minors; and in

protecting children from being lured into illegal activity through the misconduct of adults. This Chapter is adopted to encourage responsible Tobacco Retailing and to discourage violation of tobacco-related laws, especially those that prohibit or discourage the sale or distribution of Tobacco Products and Electronic Cigarette Products to minors. This chapter does not expand or reduce the degree to which the acts regulated by federal or state law are criminally proscribed or alter the penalties provided by such laws. Nothing in this Chapter shall be construed to penalize the purchase, use or possession of a tobacco product by any person not engaged in the retail of tobacco.

**SECTION 2.** A new Section is added to Chapter 6.87 of Title 6 of the San José Municipal Code, to be numbered, entitled, and to read as follows:

**6.87.025 Arm's Length Transaction**

"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 (2) or more informed and willing parties, neither of which is under any compulsion to participate in the transaction. A sale between relatives, related companies or partners, or a sale for which a significant purpose is avoiding the effect of violations of this Chapter is not an Arm's Length Transaction.

**SECTION 3.** A new Section is added to Chapter 6.87 of Title 6 of the San José Municipal Code, to be numbered, entitled, and to read as follows:

**6.87.055 Electronic Cigarette Products**

"Electronic Cigarette Products" means any of the following products:

1. Any device or delivery system that can be used to deliver nicotine in aerosolized or vaporized form, including, but not limited to, an e-cigarette, e-cigar, e-pipe, vape pen, or e-hookah.
2. Any component, part, or accessory of such a device or delivery system that is used during its operation.
3. Any flavored or unflavored liquid or substance containing nicotine, whether sold separately or sold in combination with any device or delivery system that could be used to deliver nicotine in aerosolized or vaporized form.
4. Any product for use in an electronic nicotine device or delivery system whether or not it contains nicotine or tobacco or is derived from nicotine or tobacco.
5. Electronic Cigarette Products shall not include any battery, battery charger, carrying case, or other accessory not used in the operation of the device if sold separately. Electronic Cigarette Products shall not include any product that has been approved by the United States Food and Drug Administration for sale as a tobacco cessation product or for other therapeutic purposes where that product is marketed and sold solely for such approved use. See 21 U.S.C. § 387(a). As used in this subsection, nicotine does not include any food products as that term is defined pursuant to Section 6359 of the California Revenue and Taxation Code.

**SECTION 4.** A new Section is added to Chapter 6.87 of Title 6 of the San José Municipal Code, to be numbered, entitled, and to read as follows:

**6.87.056 Hookah**

“Hookah” means a waterpipe, used to smoke shisha or other Tobacco Products, with a long flexible tube for drawing aerosol through water. Components of a hookah may include heads, stems, bowls, and hoses.

**SECTION 5.** A new Section is added to Chapter 6.87 of Title 6 of the San José Municipal Code, to be numbered, entitled, and to read as follows:

**6.87.065 Loose Leaf Tobacco**

“Loose leaf tobacco” consists of cut or shredded pipe tobacco, usually sold in pouches, excluding any Tobacco Product, 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, including roll-your-own cigarettes.

**SECTION 6.** A new Section is added to Chapter 6.87 of Title 6 of the San José Municipal Code, to be numbered, entitled, and to read as follows:

**6.87.083 Premium Cigar**

“Premium cigar” means any cigar that is handmade, is not mass produced by the use of mechanization, has a wrapper that is made entirely from whole tobacco leaf, and has a wholesale price of no less than twelve dollars (\$12). A premium cigar does not have filter, tip, or nontobacco mouthpiece and is capped by hand.

**SECTION 7.** A new Section is added to Chapter 6.87 of Title 6 of the San José Municipal Code, to be numbered, entitled, and to read as follows:

**6.87.085 Sale and Sold**

“Sale” and “sold” include any sale, exchange, barter or offer for sale.

**SECTION 8.** A new Section is added to Chapter 6.87 of Title 6 of the San José Municipal Code, to be numbered, entitled, and to read as follows:

**6.87.087 School**

“School” means a public or private preschool, elementary, middle, or secondary school.

**SECTION 9.** A new Section is added to Chapter 6.87 of Title 6 of the San José Municipal Code, to be numbered, entitled, and to read as follows:

**6.87.095 Shisha Tobacco Product**

“Shisha Tobacco Product” means a Tobacco Product smoked or intended to be smoked in a hookah. “Shisha Tobacco Product” includes, and may be referred to as, hookah tobacco, waterpipe tobacco, maassel, narghile, and argileh. “Shisha Tobacco Product” does not include any electronic devices, such as an electronic hookah, electronic cigarette, or electronic Tobacco Product.

**SECTION 10.** Section 6.87.100 of Chapter 6.87 of Title 6 of the San José Municipal Code is hereby repealed.

**SECTION 11.** Section 6.87.110 of Chapter 6.87 of Title 6 of the San José Municipal Code is hereby repealed.

**SECTION 12.** Section 6.87.120 of Chapter 6.87 of Title 6 of the San José Municipal Code is amended to read as follows:

### **6.87.120 Tobacco Product**

"Tobacco Product" means (unless specifically noted elsewhere) any product subject to Subchapter IX (21 U.S.C. § 387 et seq. ("Subchapter IX")) of the Federal Food, Drug, and Cosmetic Act. (See 21 U.S.C. § 387a(b) (products subject to Subchapter IX); 21 C.F.R. §§ 1100.1—1100.3 (tobacco products subject to Subchapter IX).) Products subject to Subchapter IX include, but are not limited to, cigarettes, cigarette tobacco, roll-your-own tobacco, smokeless tobacco, cigars, pipe tobacco, waterpipe tobacco, and Electronic Cigarette Products. Products that are not subject to Subchapter IX include accessories of Tobacco Products, such as, but not limited to, ashtrays, spittoons, and conventional matches and lighters that solely provide an external heat source to initiate but not maintain combustion of a Tobacco Product.

**SECTION 13.** Section 6.87.210 of Chapter 6.87 of Title 6 of the San José Municipal Code is hereby repealed.

**SECTION 14.** Section 6.87.300 of Chapter 6.87 of Title 6 of the San José Municipal Code is amended to read as follows:

### **6.87.300 Operating Regulations and Conditions**

- A. The provisions of this Part shall constitute terms and conditions applicable to each Tobacco Retail License issued by the Director.
  
- B. The provisions of this Part shall also constitute operating regulations that are applicable to each holder of a Tobacco Retail License issued pursuant to this Chapter.



- C. It shall be unlawful for any Tobacco Retailer licensed under this Chapter, required to be licensed under this Chapter, whether or not such Tobacco Retailer is actually so licensed under this Chapter, to violate any of the provisions of this Chapter.
  
- D. The provisions of this Chapter are intended to provide a minimum level of public health, safety and welfare protection at businesses engaging in Tobacco Retailing. Nothing in this Chapter is intended nor shall prevent the City from imposing more stringent, site-specific operating requirements and conditions through other applicable permitting and approval processes, including, without limitation, environmental or land use approvals or permits. In the event of a conflict between an operating regulation set forth in this Chapter and a requirement or condition contained in any other applicable permit or approval, the more stringent or restrictive requirement or condition shall apply.
  
- E. Except as permitted in paragraph 2 of this subsection E, no Tobacco Retailer shall sell a Tobacco Product containing, as a constituent or additive, an artificial or natural flavor or aroma (other than tobacco) or an herb or spice, including but not limited to strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, mint, menthol, or coffee, that is a characterizing flavor or aroma of the Tobacco Product, smoke, or vapor produced by the Tobacco Product after the close of business on June 30, 2022.
  - 1. A Tobacco Product shall be subject to a rebuttable presumption that the product is prohibited by the above paragraph if:
    - a. The product's manufacturer or any other person associated with the manufacture or sale of Tobacco Products makes or disseminates public statements or claims to the effect that the product has or produces a characterizing flavor or aroma, other than tobacco; or



3. No License may be issued to authorize Tobacco Retailing at any location within one thousand (1,000) feet of a school, a community or recreation center, a park, or a library (collectively “sensitive uses”), as measured in a straight line from the parcel boundary of these sensitive uses to the boundary lines of the parcel of the License applicant's proposed business location; provided, however, that the prohibition contained in this paragraph 3 shall not apply to the following:
  - a. Any Tobacco Retailer operating lawfully on the day before the effective date of this ordinance;
  - b. Any lawfully operating Tobacco Retailer that would otherwise become ineligible to receive a new license due to the creation or relocation of a school.
  
4. No license may be issued to authorize Tobacco Retailing at a location which is within five hundred (500) feet of a location occupied by another Tobacco Retailer, as measured in a straight line between the boundary lines of the parcel of an existing Tobacco Retailer’s business location and to the boundary lines of the parcel of the License applicant's proposed business location; provided, however, that the prohibition contained in this paragraph 4 shall not apply to any Tobacco Retailer operating lawfully on the day before the effective date of this ordinance;
  
5. Any exemption granted to a Tobacco Retailer pursuant to paragraphs 3 and 4 shall cease to apply if a Tobacco Retailer fails to timely renew the License pursuant to Section 6.87.460 of this Chapter.

However, any exemption granted to a Tobacco Retailer pursuant to paragraphs 3 and 4 shall also apply to the sale to another individual, through an Arm’s Length Transaction, of a tobacco retail business

operating lawfully on the effective date of the ordinance codified in this article. The new owner of such business is required to apply for and obtain a new Tobacco Retailer's license.

**SECTION 15.** Section 6.87.370 of Chapter 6.87 of Title 6 of the San José Municipal Code is amended to read as follows:

**6.87.370 Limits on Eligibility and Location**

- A. No Tobacco Retail License under this Chapter may be issued to authorize Tobacco Retailing at other than a fixed location. For example, Tobacco Retailing by persons on foot or from vehicles is prohibited.
- B. No Tobacco Retail License under this Chapter may be issued to authorize Tobacco Retailing at a temporary or recurring temporary event. For example, Tobacco Retailing at flea markets and farmers' markets is prohibited.
- C. No License may be issued to authorize Tobacco Retailing at any location within one thousand (1,000) feet of a school, a community or recreation center, a park, or a library (collectively "sensitive uses"), as measured in a straight line from the parcel boundary of these sensitive uses to the boundary lines of the parcel of the License applicant's proposed business location, subject to the exemptions provided in Section 6.87.300.E.3 and 4 above.
- D. No License may be issued to authorize Tobacco Retailing at a location which is within five hundred (500) feet of a location occupied by another Tobacco Retailer, as measured in a straight line between the boundary lines of the parcel of an existing Tobacco Retailer's business location and the boundary lines of the parcel of the License applicant's proposed business location, subject to the exemptions provided in Section 6.87.300.E.3 and 4 above.

**SECTION 16.** Section 6.87.440 of Chapter 6.87 of Title 6 of the San José Municipal Code is amended to read as follows:

**6.87.440 License Application**

- A. Applications for a new Tobacco Retail License shall contain or be accompanied by the following:
1. If the Tobacco Retailer is:
    - a. An individual, the individual shall state his or her legal name and any aliases and shall submit satisfactory proof that he or she is twenty-one (21) years of age;
    - b. A partnership, the partnership shall state its complete name, and the names of all partners, whether the partnership is general or limited, and a copy of the partnership agreement, if any;
    - c. A closely held corporation, the name of the corporation shall be set forth exactly as shown in its articles of incorporation, together with the state and date of incorporation and the names and residence addresses of each of its current officers and directors and of each stockholder, and the name and address of the registered corporate agent for service of process;
    - d. A corporation, other than a closely held corporation, the name of the corporation shall be set forth exactly as shown in its articles of incorporation, together with the state and date of incorporation, evidence that the corporation is in good standing and authorized to

do business in the state of California, the names and capacity of all officers, directors and principal owners, and the name and address of the registered corporate agent for service of process;

- e. A limited liability company, the company shall state its complete name, the date of filing of the articles of organization and operating agreement, and the names of all managers and members;
2. The legal name under which the business engaging in Tobacco Retailing is or will be conducted;
  3. The physical address and all telephone numbers of the business engaging in Tobacco Retailing;
  4. Proof of the Tobacco Retailer's right to possess the Premises where the Tobacco Retailing is to occur and proof that engaging in Tobacco Retailing from the Premises does not violate the terms of any contract or lease regarding the Premises;
  5. The following personal information concerning the Tobacco Retailer, if an individual; and concerning each stockholder, each officer and each director, if the Tobacco Retailer is a closely held corporation; and concerning each partner, including limited partners, having an ownership interest in the business of more than ten percent (10%), if the Tobacco Retailer is a partnership:
    - a. Complete legal name, and any aliases;
    - b. Date of birth;

- c. Current residence address (post office boxes will not be deemed to satisfy this requirement);
  - d. If the person has resided at the current residence address for less than three (3) years, the previous addresses immediately prior to the present address for the last three (3) years;
  - e. A copy of a valid government issued photo identification card or valid government issued driver's license;
  - f. The business history experience, including but not limited to, whether or not the person previously operating in this City or anywhere in the United States under any permit or license issued to a business engaging in Tobacco Retailing, has had such a permit or license denied, revoked or suspended and the reasons therefor, and the business activities or occupations subsequent to such action of denial, suspension or revocation;
6. A signed indemnification agreement as required by Section 6.87.405;
  7. Proof of payment of any applicable business tax for the business engaging in Tobacco Retailing which is due to the City pursuant to Chapter 4.76 of the Code;
  8. A copy of all current and valid permits, licenses or other authorization(s) required by the City or any other federal, state or local agency for the Premises and for the operation of the business engaging in Tobacco Retailing, including but not limited to any and all permits, licenses and authorization(s) required by the California Department of Alcoholic Beverage Control, the California Board of Equalization, County

Department of Health, the City's Department of Planning, Building and Code Enforcement, and the Fire Marshal;

9. The name, telephone number and address of the person authorized to accept service of process on behalf of the business engaging in Tobacco Retailing and all of the business owners;
  10. Authorization for the Director to seek other information the Director considers necessary for a complete investigation and to conduct an investigation into the truth of the statements set forth in the application;
  11. A dated statement agreeing and certifying under penalty of perjury the following:
    - a. That the information provided in the application is true and correct.
    - b. That for purposes of this Chapter all persons signing and required to sign the application shall be deemed the Tobacco Retailer applying for the Tobacco Retail License and shall be deemed the Licensee under the Tobacco Retail License as a result of the submission of the application.
    - c. That all persons signing and required to sign the application are and shall be bound by the terms of any Tobacco Retail License issued as a result of the submission of the application and shall be liable for any violation of said license.
- B. The application shall be signed by the Tobacco Retailer as follows:
1. For an individual, the application shall be signed by that individual.



2. For a partnership, the application shall be signed by each of the partners.
  3. For a limited liability company that has elected to be managed by its members, the application shall be signed by each member or by an officer authorized by the articles of organization or the operating agreement to bind the company. In the case of a limited liability company that has elected to be managed by a manager or managers, the application shall be signed by the manager or managers or by an officer authorized by the articles of organization or the operating agreement to bind the company.
  4. For a corporation, the application shall be signed by two (2) officers of the corporation, one (1) from each of the following categories:
    - a. The chairperson of the board, the president, or a vice president.
    - b. The secretary, assistant secretary, chief financial officer, or assistant treasurer.
- C. An application shall not be deemed complete until all the information required in Subsections A. and B. has been provided to the Director and the required fees and any applicable business tax required pursuant to Chapter 4.76 of the Code have been paid.

**SECTION 17.** Section 6.87.455 of Chapter 6.87 of Title 6 of the San José Municipal Code is amended to read as follows:

**6.87.455 Denial, Suspension or Revocation**

An application for a Tobacco Retail License or a request for an exemption may be denied, and a Tobacco Retail License issued or an exemption granted pursuant to this Chapter may be suspended or revoked by the Director upon any of the following grounds:

- A. The Tobacco Retailer has knowingly made a false statement of fact or omitted a fact required to be revealed in an application for the Tobacco Retail License or a request for an exemption, or in any amendment or report or other information required to be made thereunder;
- B. The Premises in which the Tobacco Retailing will occur is in violation of any building, zoning, health, safety, fire, police or other provision of this Code or of federal, state or local law which substantially affects the public health, safety or welfare;
- C. The Tobacco Retailer has violated the terms and conditions of the Licensee's Tobacco Retail License or other requirements of this Chapter within the past five (5) years;
- D. The Tobacco Retailer has owned or leased a Premises that has been the subject of an administrative, civil or criminal nuisance abatement action and court judgment or administrative determination finding the Premises to be a nuisance within the past five (5) years;
- E. Failure to pay any disturbance response fee imposed pursuant to Section 6.02.310;
- F. Failure to pay any reinspection fee authorized by Section 6.87.320B.;

- G. A prior application for a license or permit to operate a business engaged in Tobacco Retailing in the City or anywhere in the United States has been denied by the City or any federal, state, or local agency on one or more of the grounds provided in this section within five (5) years prior to the date of the current application;
- H. A permit or license issued by the City or any federal, state or local agency to operate or manage a business engaged in Tobacco Retailing anywhere in the United States has been revoked or suspended within the past five (5) years;
- I. The Tobacco Retailer has conducted the business engaging in Tobacco Retailing in a manner that creates or results in a public nuisance, as defined in Section 1.13.050 of this Code or Sections 3479 and 3480 of the California Civil Code, on or within one hundred fifty (150) feet of the Premises;
- J. If the Tobacco Retailer is a corporation, the corporation is not in good standing in the state of California or is not authorized to do business in the state of California;
- K. Engaging in Tobacco Retailing, or allowing or offering Tobacco Products for sale at the Premises for which the Tobacco Retail License is sought or was issued or granted is prohibited under the terms of any contract or lease for that Premises;

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PASSED FOR PUBLICATION of title this 28<sup>TH</sup> day of September, 2021, by the following vote:

AYES: ARENAS, CARRASCO, COHEN, DAVIS, ESPARZA,  
FOLEY, JONES, JIMENEZ, MAHAN, PERALEZ,  
LICCARDO.

NOES: NONE.

ABSENT: NONE.

DISQUALIFIED: NONE.



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SAM LICCARDO  
Mayor

ATTEST:



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TONI J. TABER, CMC  
City Clerk