

**ORDINANCE NO. 871-C.S.**

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF PACIFICA ADDING CHAPTER 32, "SALE OR DISTRIBUTION OF ELECTRONIC CIGARETTES" AND CHAPTER 33, "SALES OF FLAVORED TOBACCO PRODUCTS AND PHARMACY SALES OF TOBACCO PRODUCTS PROHIBITED" AND AMENDING SECTION 5-31.03, "LIMITS ON TOBACCO RETAILER LICENSES" WITHIN CHAPTER 31 OF TITLE 5 "PUBLIC WELFARE, MORALS, AND CONDUCT" OF THE PACIFICA MUNICIPAL CODE TO BAN THE SALE AND DISTRIBUTION OF FLAVORED TOBACCO PRODUCTS, THE SALE AND DISTRIBUTION OF ELECTRONIC CIGARETTES AND TO PROHIBIT THE SALE OF TOBACCO PRODUCTS AT PHARMACIES IN THE CITY OF PACIFICA**

**WHEREAS**, tobacco use remains the leading cause of preventable death in the United States, killing more than 480,000 people each year.<sup>1</sup> It causes or contributes to many forms of cancer, as well as heart and respiratory diseases, among other health disorders. Tobacco use remains a public health crisis of the first order, in terms of the human suffering and loss of life it causes, the financial costs it imposes on society and the burdens it places on our health care system; and

**WHEREAS**, according to the Federal Food and Drug Administration ("FDA"), nearly 80% of youth ages 12-17 and nearly 75% of young adults ages 18-25 who were currently tobacco users in 2014 reported that the first tobacco product they ever used was flavored;<sup>2</sup> and

**WHEREAS**, each day, about 2,500 children in the United States try their first cigarette; and another 400 children under 18 years of age become new regular, daily smokers. 81% of youth who have ever used a tobacco product report that the first tobacco product they used was flavored.<sup>3</sup> Flavored tobacco products promote youth initiation of tobacco use and help young occasional smokers to become daily smokers by reducing or masking the natural harshness and taste of tobacco smoke and thereby increasing the appeal of tobacco products. As tobacco companies well know, menthol, in particular, cools and numbs the throat to reduce throat irritation and make the smoke feel smoother, making menthol cigarettes an appealing option for youth who are initiating tobacco use. Tobacco companies have used flavorings such as mint and wintergreen in smokeless tobacco products as part of a "graduation strategy" to encourage new users to start with tobacco products with lower levels of nicotine and progress to products with higher levels of nicotine. It is therefore unsurprising that young people are much more likely to use menthol-, candy- and fruit-flavored tobacco products than adults, including not just cigarettes but also cigars and cigarillos. Data from the National Youth Tobacco Survey indicate that more than two-fifths of U.S. middle school and high school smokers report using flavored little cigars or flavored cigarettes. Further the

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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: 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, 2014.

<sup>2</sup> Villanti, A. C., Johnson, A. L., Ambrose, B. K., Cummings, K. M., Stanton, C. A., Rose, S. W., ... Hyland, A. (2017). Flavored Tobacco Product Use in Youth and Adults: Findings From the First Wave of the PATH Study (2013-2014). American Journal of Preventive Medicine.

<sup>3</sup> Ibid.

Centers for Disease Control and Prevention has reported a more than 800% increase in electronic cigarette use among middle school and high school students between 2011 and 2015. Nicotine solutions, which are consumed via electronic smoking devices such as electronic cigarettes are sold in thousands of flavors that appeal to youth, such as cotton candy and bubble gum; and

**WHEREAS**, According to Tobacco Free Kids, a non-profit organization that works to reduce youth access to tobacco and reduce tobacco related deaths:

- Tobacco industry documents show that the tobacco companies have a long history of developing and marketing flavored tobacco products as “starter” products that attract kids.
- Flavors improve the taste and reduce the harshness of tobacco products, making them more appealing and easier for beginners to try the product and ultimately become addicted.
- Menthol cools and numbs the throat, reducing the harshness of cigarette smoke, thereby making menthol cigarettes more appealing to youth who are initiating tobacco use.
- According to the Federal Food and Drug Administration’s (FDA) Tobacco Product Scientific Advisory Committee (TPSAC), menthol cigarettes increase the number of children who experiment with cigarettes and the number of children who become regular smokers, increasing overall youth smoking.
- Flavors can create the false impression that a tobacco product is less harmful than it really is; and

**WHEREAS**, Tobacco-Free Kids conducted a 2019 survey of middle and high school students and determined the following based on those survey results:

- 81% of youth who have ever used tobacco products initiated with a flavored product.
- 72.3% of youth tobacco users have used a flavored tobacco product in the month preceding the survey.
- At least two-thirds of youth tobacco users report using tobacco products “because they come in flavors I like”; and

**WHEREAS**, research also shows that use of menthol cigarettes has perpetuated disparities among other groups. According to the 2018 National Survey of Drug Use and Health (NSDUH): 85% of African American smokers, 50% of Hispanic smokers and 47% of Asian American smokers use menthol cigarettes, compared to 29% of White smokers; 51% of lesbian/gay and 46% of bisexual smokers use menthol cigarettes, compared to 39% of heterosexual smokers; 45% of smokers with severe psychological distress use menthol cigarettes compared to 39% of smokers with no past month serious psychological distress; 47% of smokers living in poverty use menthol cigarettes, compared to 36% of smokers with an income exceeding twice the Federal Poverty Threshold; and 60% of pregnant smokers use menthol cigarettes<sup>4</sup>; and

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<sup>4</sup> Delnevo, CD, et al., “Banning Menthol Cigarettes: A Social Justice Issue Long Overdue,” *Nicotine & Tobacco Research*, 22(10): 1673-1675, 2020.

**WHEREAS**, 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 dangerous to smoke; and

**WHEREAS**, the Tobacco and Education Research Oversight Committee for California, as well as the American Pharmacists Association, the California Pharmacists Association, and the California Medical Association have called for the adoption of state and local prohibitions of tobacco sales in drug stores and pharmacies; and

**WHEREAS**, electronic smoking device (or electronic cigarette (E-cigarette), vape, vape pen, e-hookah, etc.) usage by youth has been rising. Usage by high school students increased 78% between 2017-2018 with 1 in 5 high school students currently using and 1 in 20 middle school students currently using the products.<sup>5</sup> The devices were available in the U.S. marketplace in the mid-2000s<sup>6</sup> and by 2014, the products were the most commonly used tobacco product among middle school and high school students;<sup>7</sup> and

**WHEREAS**, The Centers for Disease Control and Prevention also has reported a more than 800% increase in E-cigarette use among middle school and high school students between 2011 and 2015; and

**WHEREAS**, according to a 2021 FDA survey, more than 2 million U.S. youth currently use E-cigarettes (11.3% of high school students and 2.8% of middle school students).<sup>8</sup> Among those youth, about 2 in 5 of them use E-cigarettes frequently while about 1 in 4 use E-cigarettes daily. These survey results show high rates of frequent and daily use which suggests many teens have a strong dependence on nicotine. Of those youth that indicated E-cigarette use in survey, nearly 85% of them used flavored E-cigarettes; and

**WHEREAS**, in 2016, it was estimated that 20.5 million (4 in 5) middle and high school students in the U.S. were exposed to advertisements for E-cigarettes from at least one source. This was a significant increase compared to 2014 and 2015 data. Furthermore, almost 17.7 million (7 in 10) youths were exposed to advertisements for E-cigarettes in retail stores in 2016, while about 2 in 5 had exposure on the Internet or on television, and almost 1 in 4 had exposure through magazines and newspapers. E-cigarette advertising has an association with e-cigarette use among youths. The advertising themes and strategies used are similar to traditional cigarette advertising tactics that have been found to appeal to youths;<sup>9</sup> and

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<sup>5</sup> Cullen KA, Ambrose BK, Gentzke AS, Apelberg BJ, Jamal A, King BA. Notes from the Field: Use of Electronic Cigarettes and Any Tobacco Product Among Middle and High School Students – United States, 2011-2018.

<sup>6</sup> US Department of Health and Human Services. E-cigarette use among youth and young adults: a report of the Surgeon General. Atlanta, GA: US Department of Health and Human Services, CDC, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health; 2016.

<sup>7</sup> Arrazola RA, Singh T, Corey CG, et al. Tobacco use among middle and high school students—United States, 2011–2014.

<sup>8</sup> FDA and Centers for Disease Control and Prevention (CDC) released findings from the 2021 National Youth Tobacco Survey (NYTS)

<sup>9</sup> Marynak K, Gentzke A, Wang TW, Neff L, King BA. Exposure to Electronic Cigarette Advertising Among Middle and High School Students – United States, 2014-2016. MMWR Morb Mortal Wkly Rep 2018.

**WHEREAS**, a 2018 National Academy of Sciences, Engineering, and Medicine report found moderate evidence that e-cigarette use increases the frequency and intensity of smoking cigarettes in the future.<sup>10</sup> According to a report by the Surgeon General, any use of E-cigarettes among young people is not safe even if the young people do not move on to future cigarette smoking;<sup>11</sup> and

**WHEREAS**, on January 13, 2020 and September 27, 2021 staff presented to City Council reports on the consideration of development of an ordinance prohibiting the sales of flavored tobacco products and E-cigarettes; and

**WHEREAS**, with the delay and potential repeal of SB793, City Council listed as one of 17 priorities adopted on April 17, 2021 to “Present an ordinance to City Council for consideration regulating the sale of flavored tobacco in Pacifica”; and

**WHEREAS**, a local prohibition against the sale and distribution of all electronic smoking devices and flavored tobacco is an effective means to reduce the availability of these products to youth, thereby protecting the public health and safety by discouraging tobacco initiation and continued use.

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

**Section 1. Recitals.** The City Council of the City of Pacifica does hereby find the above referenced recitals are true and correct and material to the adoption of this Ordinance.

**Section 2. Added.** Chapter 5.32, “Sale and Distribution of Electronic Cigarettes” is hereby added to Title 5, “Public Welfare, Morals, and Conduct” of the Pacifica Municipal Code as follows:

“Sec. 5-32.01 – Definitions

For the purposes of this chapter, the following definitions shall govern unless the context clearly requires otherwise:

- a) "Distribute" or "Distribution" means the transfer by any Person other than a common carrier, at any point from the place of manufacture or thereafter to a Person who sells or offers to sell the electronic cigarette or other electronic smoking device.
- b) "Electronic Cigarette" has the meaning set forth in Section 30121 of the California Revenue and Taxation Code, as may be amended from time to time.

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<sup>10</sup> Moritz, T. (2019, March 18). Vaping: It’s All Smoke and Mirrors.

<sup>11</sup> US Department of Health and Human Services. E-cigarette use among youth and young adults: a report of the Surgeon General. Atlanta, GA: US Department of Health and Human Services, CDC, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health; 2016.

- c) "Person" means any individual, partnership, cooperative association, private corporation, or any other legal entity.
- d) "Tobacco Retailer" is defined as set forth in subsection (i) of Section 5-31.01 of this Code.
- e) "Tobacco Retailer License" "shall mean a Tobacco Retailer that has been issued a License pursuant to Section 5-31.02 of this Code.
- f) "Sell", "Sale" or "to Sell" mean any transaction where, for any consideration, ownership is transferred from one (1) Person or entity to another including, but not limited to any transfer of title or possession for consideration, exchange or barter, in any manner or by any means

Sec. 5-32.02 – Sale or Distribution of Electronic Cigarettes Prohibited.

- a) No Person, Tobacco Retailer, or other legal entity shall Sell or offer for Sale nor Distribute any Electronic Cigarette to a Person within the geographic boundaries of the City.
- b) For Tobacco Retailers that have a valid Tobacco Retailer License, the provisions of Section 5-32.02(a) shall take effect upon expiration of the Tobacco Retailer License in effect as of the effective date of this Ordinance.

Sec. 5-32.03 – Enforcement.

- a) The remedies provided by this chapter are cumulative and in addition to any other remedies available at law or in equity.
- b) Violations of this chapter are subject to a civil action brought by the City Attorney, punishable by a civil fine payable to the city not less than One Hundred (\$100) Dollars and not exceeding One Thousand and no/100ths (\$1,000.00) Dollars per violation.
- c) Violations of this chapter may, in the discretion of the City Attorney, be prosecuted as infractions or misdemeanors.
- d) Causing, permitting, aiding, abetting, or concealing a violation of any provision of this chapter shall also constitute a violation of this chapter.
- e) 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 City Attorney, including, for example, administrative or judicial nuisance abatement proceedings, civil or criminal code enforcement proceedings, and suits for injunctive relief.

Sec. 5-32.04 – Public Nuisance.

Any violation of this chapter is hereby declared a public nuisance.”

**Section 3. Added.** Chapter 5.33, “Sales of Flavored Tobacco Products and Pharmacy Sales of Tobacco Products Prohibited” is hereby added to Title 5, “Public Welfare, Morals, and Conduct” of the Pacifica Municipal Code as follows:

“Sec. 5-33.01 – Definitions

For the purposes of this chapter, the following definitions shall govern unless the context clearly requires otherwise:

- a) “Adult” shall mean any individual 21 years of age or older.
- b) “Adult-only retailer” shall mean any retailer or businesses that allows entry only by adults onto the entire premises of the business or retailer, or that require minors to be accompanied by a parent, guardian, or another adult in order to enter the entire premises of the business or the retailer. The definition of an “adult-only retailer” does not include any retailer or business that only prohibits minors from entering certain sections, divisions, or a part of the premises that are marked or otherwise restricted as adult only and allows minors to otherwise enter the remainder of its premises unaccompanied by a parent, guardian or another adult.
- c) "Characterizing flavor" shall mean a distinguishable taste or aroma or both, other than the taste or aroma of tobacco, imparted by a tobacco product or any byproduct produced by the tobacco product. Characterizing flavors include, but are not limited to, tastes or aroma relating to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, menthol, mint, wintergreen, herb, or spice. 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. Rather, it is the presence of a distinguishable taste or aroma, or both, as described in the first sentence of this definition that constitutes a characterizing flavor.
- d) "Constituent" shall mean any ingredient, substance, chemical, or compound, other than tobacco, water, or reconstituted tobacco sheet that is added by the manufacturer to a tobacco product during the processing, manufacture, or packing of the tobacco product.
- e) "Distinguishable" shall mean perceivable by either the sense of smell or taste.
- f) "Distribute" or "Distribution" means the transfer by any Person other than a common carrier, at any point from the place of manufacture or thereafter to a Person who sells or offers to sell the electronic cigarette

or other electronic smoking device.

- g) "Flavored tobacco product" shall mean any tobacco product that contains a constituent that imparts a characterizing flavor.
- h) "Hookah Pipe" shall mean a type of water pipe used to smoke flavored tobacco products, with a long flexible tube for drawing aerosol through water.
- i) "Hookah Products" shall mean any component of a hookah pipe including, but not limited to, heads, stems, bowls, vases and hoses.
- j) "Labeling" shall mean written, printed, pictorial, or graphic matter upon any tobacco product or any of its packaging.
- k) "Packaging" shall mean 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, or offered for sale, to a consumer.
- l) "Person" means any individual, partnership, cooperative association, private corporation, or any other legal entity.
- m) "Pharmacy" shall mean 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.
- n) "Sell", "Sale" or "to Sell" shall mean any transaction where, for any consideration, ownership is transferred from one (1) Person or entity to another including, but not limited to any transfer of title or possession for consideration, exchange or barter, in any manner or by any means.
- o) "Tobacco Product" shall have the same definition as set forth in subsection (h) of Section 5-31.01 of this Code.
- p) "Tobacco Retailer" shall have the same definition as set forth in subsection (i) of Section 5-31.01 of this Code.
- q) "Tobacco Retailer License" shall mean a Tobacco Retailer that has been issued a License pursuant to Section 5-31.02 of this Code.

Sec. 5-33.02 – Sale or Offer for Sale of Flavored Tobacco Products Prohibited.

- a) No Person, Tobacco Retailer, or other legal entity shall Sell, or offer for Sale nor Distribute, any Flavored Tobacco Product, except as provided

in Section 5-33.02(c).

- b) There shall be a rebuttable presumption that a Tobacco Product is a Flavored Tobacco Product if a manufacturer or any of the manufacturer's agents or employees, in the course of their agency or employment, has made a statement or claim directed to consumers or to the public that the Tobacco Product has or produces a Characterizing Flavor including, but not limited to, text, color, and/or images on the product's Labeling or Packaging that are used to explicitly or implicitly communicate that the Tobacco Product has a Characterizing Flavor.
- c) Tobacco Retailers that are Adult-Only Retailers that sell Flavored Tobacco Products for use with a Hookah Pipe or Hookah Products shall be exempt from the requirements of section 5-33.02(a).
- d) For Tobacco Retailers that have a valid Tobacco Retailer License, the provisions of Section 5-33.02(a) shall take effect upon expiration of the Tobacco Retailer License in effect as of the effective date of this Ordinance.

Sec. 5-33.03 – Sale or Offer for Sale of Tobacco Products by a Pharmacy Prohibited.

- a) No Pharmacy or Pharmacy employee or agent shall sell or offer for sale any Tobacco Product.
- b) No new Tobacco Retailer License may be issued to a Pharmacy after the effective date of this Ordinance.
- c) No Tobacco Retailer License may be renewed by a Pharmacy after the effective date of this Ordinance.
- d) The provisions of Section 5-33.03(a) shall take effect upon the expiration of the Pharmacy's Tobacco Retailer License in effect as of the effective date of this Ordinance.

Sec. 5-33.04 – Enforcement.

- a) The remedies provided by this chapter are cumulative and in addition to any other remedies available at law or in equity.
- b) Violations of this chapter are subject to a civil action brought by the City Attorney, punishable by a civil fine payable to the City not less than One Hundred (\$100) Dollars and not exceeding One Thousand and no/100ths (\$1,000.00) Dollars per violation.
- c) Violations of this chapter may, in the discretion of the City Attorney, be prosecuted as infractions or misdemeanors.

- d) Causing, permitting, aiding, abetting, or concealing a violation of any provision of this chapter shall also constitute a violation of this chapter.
- e) 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 City Attorney, including, for example, administrative or judicial nuisance abatement proceedings, civil or criminal code enforcement proceedings, and suits for injunctive relief.

Sec. 5-33.05 – Public Nuisance.

Any violation of this ordinance is hereby declared a public nuisance.

Sec. 5-33.06 – No Conflict with Federal or State Law.

Nothing in this chapter shall be interpreted or applied so as to create any requirement, power, or duty that is preempted by federal or state law.”

**Section 4. Amended.** Section 5-31.03, “Limits on tobacco retailer licenses” of Chapter 31 “Tobacco Retailing” within Title 5, “Public Welfare, Morals, and Conduct” of the Pacifica Municipal Code is hereby amended by repealing and replacing Section 5-31.03 in its entirety to read as follows:

“Sec. 5-31.03. - Limits on tobacco retailer licenses.

- a) No license may issue 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 license may issue to authorize tobacco retailing at any location that is licensed under State law to serve alcoholic beverages for consumption on the premises (e.g., an "on-sale" license issued by the California Department of Alcoholic Beverage Control) and no license may issue to authorize tobacco retailing at any location offering food or alcoholic beverages for sale for consumption by guests or patrons on the premises. For example, tobacco retailing in bars and restaurants is prohibited. Restaurants that allow on-site consumption of alcoholic beverages that were brought to the premises by patrons shall also not be entitled to a license to engage in tobacco retailing.
- c) No license may issue to authorize tobacco retailing at a Pharmacy, as that term is defined in Section 5-33.01 of this Code.”

**Section 5. Severability.** If any section, subsection, sentence, clause or phrase of this Ordinance is for any reason held to be invalid, such decision shall not affect the validity of the remaining portions of this Ordinance. The City Council hereby declares that it should have adopted the Ordinance and each section, subsection, sentence, clause or phrase thereof, irrespective of the fact that any one or more sections, subsections, sentence, clauses or phrases be declared unconstitutional.

**Section 6. Publication.** The City Clerk is hereby ordered and directed to certify to the passage of this Ordinance by the City Council of the City of Pacifica, California, and cause the same to be published in accordance with State Law.

**Section 7. Effective Date.** This Ordinance shall be in full force and effect thirty (30) days after its adoption and shall be published and posted as required by law.

**PASSED AND ADOPTED** at a regular meeting of the City Council of the City of Pacifica, California, held on the 28th day of February 2022, by the following vote:

**AYES**, Councilmembers: Beckmeyer, Bier, Bigstyck, O'Neill, Vaterlaus.

**NOES**, Councilmembers: n/a

**ABSENT**, Councilmembers: n/a

**ABSTAIN**, Councilmembers: n/a

**CITY OF PACIFICA**

  
Mary Bier (Mar 8, 2022 07:15 PST)

Mary Bier, Mayor

ATTEST:

  
\_\_\_\_\_  
Sarah Coffey, City Clerk

APPROVED AS TO FORM:

  
\_\_\_\_\_  
Michelle Kenyon, City Attorney

# For Signature: OrdinanceNo871-CS\_ProhibitFlavoredTobaccoSale

Final Audit Report

2022-03-08

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