

## **ORDINANCE NO. 1544**

### **AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF SAN CARLOS AMENDING SAN CARLOS MUNICIPAL CODE, TITLE 8 – HEALTH AND SAFETY; CONSISTING OF ADDING A NEW CHAPTER 8.02 TO THE SAN CARLOS MUNICIPAL CODE TO PROHIBIT THE SALE OF FLAVORED TOBACCO PRODUCTS IN THE CITY LIMITS AND TOBACCO PRODUCTS IN PHARMACIES, AND MODIFICATIONS TO CHAPTER 8.06 TO ADD THE DEFINITION OF “TOBACCO PRODUCTS”.**

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The City Council of the City of San Carlos hereby ordains as follows:

#### **SECTION 1. Findings.**

- a) Tobacco use remains the leading cause of preventable death in the United States, killing more than 480,000 people each year. 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. The financial cost of tobacco use in San Mateo County alone amounts to over \$575 million in direct health care expenses over the 5-year period from 2006-2010.
- b) Flavored tobacco products are commonly sold by California tobacco retailers. For example, 97.4% of stores that sell cigarettes sell menthol cigarettes; 94.5% of stores that sell little cigars sell them in flavored varieties; 84.2% of stores that sell electronic smoking devices sell flavored varieties; and 83.8% of stores that sell chew or snuff sell flavored varieties.
- c) 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. 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, cigarillos, and hookah tobacco. 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 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.

- d) Certain minority groups also disproportionately use flavored tobacco products, including menthol cigarettes. In one survey, the percentage of people who smoke cigarettes that reported smoking menthol cigarettes in the prior month included, most dramatically 82.6% of Blacks or African-Americans who smoke cigarettes. The statistics for other groups were: 53.2% of Native Hawaiians or Other Pacific Islanders who smoke cigarettes; 36.9% of individuals with multiracial backgrounds who smoke cigarettes; 32.3% of Hispanics or Latinos who smoke cigarettes; 31.2% of Asians who smoke cigarettes; 24.8% of American Indians or Alaska Natives who smoke cigarettes; and 23.8% of Whites or Caucasians who smoke cigarettes. People who identify as LGBT and young adults with mental health conditions also struggle with disproportionately high rates of menthol cigarette use. The disproportionate use of menthol cigarettes among targeted groups, especially the extremely high use among African-Americans, is troubling because of the long-term adverse health impacts on those populations.
- e) Between 2004 and 2014 overall smoking prevalence decreased, but use of menthol cigarettes increased among both young adults (ages 18-25) and other adults (ages 26+). These statistics are consistent with the finding that smoking menthol cigarettes reduces the likelihood of successfully quitting smoking. Scientific modeling has projected that a national ban on menthol 17 cigarettes could save between 300, 000 and 600, 000 lives by 2050.
- f) 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.
- g) 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.
- h) A Shape San Carlos online town hall forum was open for 5.5 weeks. The survey was advertised on the City website, across social media and Nextdoor and forwarded to the Shape San Carlos subscriber list. Results show that: 0% of respondents use flavored tobacco products, and 82.1% support a ban on the sale of flavored tobacco. 84.6% of responses support a ban on the sale of tobacco products near schools. Participants also shared their concerns about the sale of flavored tobacco products in San Carlos.

**SECTION 2.** A new Chapter 8.02 is hereby added to Title 8 of the San Carlos Municipal Code to be numbered and entitled and to read in its entirety as follows:

**CHAPTER 8.02 SALES OF FLAVORED TOBACCO PRODUCTS AND PHARMACY  
SALES OF TOBACCO PRODUCTS PROHIBITED**

**8.02.010 Application of Chapter.**

The provisions of this Chapter shall apply within City of San Carlos.

### **8.02.020 Definitions.**

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

- (a) "Characterizing Flavor" means 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.
- (b) "Constituent" means 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.
- (c) "Distinguishable" means perceivable by either the sense of smell or taste.
- (d) "Flavored Tobacco Product" means any Tobacco Product that contains a constituent that imparts a Characterizing Flavor.
- (e) "Labeling" means written, printed, pictorial, or graphic matter upon any Tobacco Product or any of its Packaging.
- (f) "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, or offered for sale, to a consumer.
- (g) "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.
- (h) "Tobacco Product" is defined as set forth in section 8.06.030 of chapter 8.06 of this Ordinance Code.
- (i) "Tobacco Retailer" means any store, stand, booth, concession or any other enterprise that engages in the retail sale of Tobacco Products, including but not limited to stores that engage in the retail sale of food items.

### **8.02.030 Sale or Offer for Sale of Flavored Tobacco Products Prohibited.**

- (a) The sale or offer for sale, by any person or Tobacco Retailer of any Flavored Tobacco Product is prohibited and no person or Tobacco Retailer shall sell, or offer for sale, any Flavored Tobacco Product.
- (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.

**8.02.040 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 permit may be issued to a Pharmacy under Chapter 4.98 of this Ordinance Code.
- (c) No existing tobacco retailer permit issued under Chapter 4.98 of this Ordinance Code may be renewed by a Pharmacy.

**8.02.050 Enforcement.**

- (a) The City Manager, or his or her designee, may enforce this chapter.
- (b) Violations of this chapter may be criminally prosecuted as infraction(s) or misdemeanor(s) at the discretion of the city attorney as the interests of justice require.
- (c) This section shall not be interpreted to limit the applicable civil or administrative remedies available under law.
- (d) The City Manager, or his or her designee, may adopt administrative rules, regulations, or guidelines for the implementation and enforcement of this chapter.

**8.02.060 Public Nuisance.**

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

**8.02.070 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.

### **8.02.080 Severability.**

If any provision, section, subsection, sentence, clause, phrase, or word of this Chapter 8.02, or any application thereof to any person or circumstance, is held to be invalid or unconstitutional by a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions or applications of the chapter. The Board of Supervisors hereby declares that it would have passed this chapter, and each provision, section, subsection, sentence, clause, phrase, and word not declared invalid or unconstitutional without regard to whether any other portion of this chapter or application thereof would be subsequently declared invalid or unconstitutional.

**SECTION 3.** Section 8.06.030 of Chapter 8.06 of Municipal Code shall be amended to read as follows:

### **8.06.030 Definitions.**

As used in this chapter, those terms identified in this section shall, unless the context indicates otherwise, be ascribed the meaning contained in this section.

“Bar” means an enclosed area which is devoted to the serving of alcoholic beverages for consumption on the premises, and in which the serving of food, if any, is incidental to the consumption of such beverages.

“Business” means any sole proprietorship, partnership, joint venture, corporation or other entity formed for either charitable or profit-making purposes, including without limitation by reason of enumeration, manufacturing concerns, retail or commercial establishment where goods or services are sold, and professional corporations or other entities where legal, medical, dental, engineering, architecture, financial or other professional services are delivered.

“Enclosed” means closed in by a roof and four or more connected floor-to-ceiling walls with appropriate openings for ingress and egress.

“Public building” means a public building owned or operated by the City of San Carlos.

“Public place” means any enclosed area to which the public is invited or in which the public is permitted or invited, where goods or services are sold, including, but not limited to, retail establishments, restaurants (all available seating), retail food markets, enclosed shopping malls, places of employment, professional corporations or other entities where legal, medical, dental, engineering, architectural, financial or other professional services are delivered, educational facilities, health facilities, bingo parlors, public transportation facilities, reception areas, libraries and museums, retail food production and marketing establishments, restrooms, service lines, elevators, escalators, hallways, lobbies, reception areas, stairways, theaters, sports arenas, automobile dealerships, barber or beauty shops, cleaners, laundromats, polling places, and places of public assembly.

“Restaurant” means any eating establishment, organization, club, boardinghouse or guesthouse where the primary function is the serving of food and which gives or offers for sale food to the

public, guests, patrons, or employees as well as kitchens in which food is prepared on the premises for serving elsewhere, including catering functions.

“Retail tobacco store” means a retail store primarily used for the sale of tobacco products and accessories.

“Smoking” means inhaling, exhaling, burning or carrying any lighted cigarette, cigar, pipe, weed, plant or other combustible substance in any manner or in any form.

“Tobacco,” “tobacco or smoking product,” or “tobacco or nicotine product” means:

- (1) 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, and snuff;
- (2) 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.
- (3) Notwithstanding any provision of subsections (1) and (2) 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 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 such product is marketed and sold solely for such an approved purpose.

**SECTION 4. Severability.** If any section, subsection, sentence, clause, phrase or portion of this Ordinance is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Ordinance. The City Council of the City of San Carlos hereby declares that it would have adopted this Ordinance and such section, subsection, sentence, clause, phrase or portion may be declared invalid or unconstitutional.

**SECTION 5. Effective Date.** Pursuant to Section 36937 of the Government Code of the State of California, this ordinance shall take effect and be in full force and effect thirty (30) days after its final passage.

**SECTION 6. Publication.** The City Clerk shall cause this ordinance to be published and posted in accordance with the requirements of Section 36933 of the Government Code of the State of California.

Introduced the 25<sup>th</sup> day of March, 2019. Passed and adopted as an Ordinance of the City Council of the City of San Carlos at a regular meeting thereof held on the 8<sup>th</sup> day of April, 2019 by the following vote:

**AYES, COUNCILMEMBERS:** COLLINS, MCDOWELL, PARMER-LOHAN, RAK, OLBERT

**NOES, COUNCILMEMBERS:** NONE

**ABSENT, COUNCILMEMBERS:** NONE

  
**CITY CLERK** of the City of San Carlos

APPROVED:  
  
**MAYOR** of the City of San Carlos