

ALAMEDA COUNTY
HEALTH CARE SERVICES

AGENCY
ALEX BRISCOE, Director



AGENDA December 8, 2015

ADMINISTRATION & INDIGENT HEALTH

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November 23, 2015

The Honorable Board of Supervisors
County Administration Building
1221 Oak Street
Oakland, CA 94612

Dear Board Members:

**SUBJECT: ADOPT ORDINANCE TO LICENSE AND REGULATE TOBACCO
RETAILERS IN THE UNINCORPORATED AREAS OF ALAMEDA
COUNTY BY ADDING CHAPTER 3.58 TO TITLE 3 OF THE ALAMEDA
COUNTY ORDINANCE CODE**

RECOMMENDATION:

Adopt 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 Alameda County.

SUMMARY:

The proposed ordinance requires all tobacco retailers and retailers selling e-cigarette devices obtain an annual tobacco retailer license. The licensing program would be administered by Public Health, enforced by the Sheriff's Department, and would hold store owners accountable for following California tobacco laws as well as any additional local standards. California law holds clerks accountable for illegal sales of tobacco to minors with a fine of \$100 per violation. This program would hold both clerks and store owners accountable for compliance to California and local law.

In addition to penalizing sales of tobacco to minors, this proposed ordinance includes additional standards regarding sale of cigarillos or little cigars, which would need to be sold in packages of 5 or more cigars with an exemption for cigars costing more than \$5 per single cigar. This proposed ordinance also includes additional standards regarding the sale of e-cigarettes. All retailers selling e-cigarettes would be required to obtain a local Tobacco Retailer License, and e-cigarettes would need to be displayed behind the counter. Current California law already bans the sale of these products to persons under age 18.

Fines, Penalties and Suspensions during any 60-month period are as follows:

- 1st violation - warning
- 2nd violation - \$750 or 30 day suspension
- 3rd violation - \$1500 or 60 day suspension
- 4th violation - 90 day suspension
- 5th violation - 1 year suspension

DISCUSSION:

The Public Health Department supports adoption of Tobacco Retailer Licensing ordinance. In Alameda County, six cities (Albany, Berkeley, Dublin, Hayward, Oakland, Union City) have adopted Tobacco Retailer Licensing ordinances that hold retailers accountable for following all applicable tobacco laws. Fees in these cities range from \$250 to \$1,500. Additionally, both Hayward and Union City restrict the sale of cigarillos to packages of 5 or more.

Although the sale of flavored and individual cigarettes is banned by federal law, neither federal nor California law restrict the sale of flavored cigar products or the sale of individual cigar products.¹ The California Healthy Kids Survey 2009-2011 reports that 13% of 7th graders, 32% of 9th graders, and 45% of 11th graders responded that it was “very easy” for them to obtain tobacco products in Alameda County.² Six counties that have a tobacco retail licensing ordinance in California record a 21.15% average drop in youth purchases of tobacco products.³

BACKGROUND:

This proposed ordinance was presented at Castro Valley Municipal Advisory Committee on Unincorporated Services Committee on March 25, 2015, San Lorenzo Village Homes Association on April 16, 2015; Cherryland Community Association on April 14, 2015; Sunol Municipal Advisory Committee on June 17, 2015; and the Castro Valley Municipal Advisory Committee on May 19, 2014. The San Lorenzo Village Homes Association voted 3-1 to support the ordinance. The Sunol CAC voted 3-0 to support the ordinance. The Castro Valley Municipal Advisory Committee voted 6-0-1 to make the following recommendations: 1) Delete section G in its entirety, related to cigar pack size; 2) The Tobacco Retailer’s License Fee (TRL) should be decreased to \$200, with the balance of any costs incurred be funded by the Tobacco Master Settlement Funds (TMSF); 3) Align the definition of “smoke” and “smoking” in the new draft ordinance with previous definitions, that it is not so broadly defined; 4) Add an educational component to the TRL, via detailed materials with licensing fee renewals for the first year, with the intent of increasing education in future years; 5) Add an exclusion for electronic smoking devices that do not contain carcinogens or nicotine.

¹ 21 C.F.R. § 1140.14(d).

² Alameda California Healthy Kids Survey, 2009-11: Main Report San Francisco: WestEd Health and Human Development Program for the California Department of Education.

³ Local Tobacco Policies in the Retail Environment: The Center for Tobacco Policy & Organizing | American Lung Association in California © 2013. California Department of Public Health. Funded under contract #09-11173.

FINANCING:

Projected cost of the program is \$81,000 or \$700 per tobacco retailer in the unincorporated area per year. The proposal is to fund the project through retailer fees at \$350 per retailer and \$40,500 funded from a portion of the tobacco control specific allocation from Tobacco Master Settlement Funds.

Very truly yours,



Alex Briscoe, Director
Health Care Services Agency

REVISED

ORDINANCE NO. 2015-_____

**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 ALAMEDA COUNTY**

IT IS HEREBY ORDAINED BY THE BOARD OF SUPERVISORS OF THE COUNTY
OF ALAMEDA THAT:

SECTION I

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

Section 3.58.005. Findings and Declaration

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

- A. The California Legislature has recognized the danger of Tobacco use and has made reducing youth access to Tobacco Products a high priority, as evidenced by the following:
- The Legislature has declared that Smoking is the single most important source of preventable disease and premature death in California; that the earlier a child begins to use Tobacco Products, the less likely it is that the child will be able to quit; and that keeping children from beginning to use Tobacco Products in any form and encouraging all Persons to quit Tobacco use shall be among the highest priorities in disease prevention for the State of California (Cal. Health & Safety Code § 118950);
 - State law prohibits the sale or furnishing of cigarettes, Tobacco Products, and Smoking Paraphernalia to minors, as well as the purchase, receipt, or possession of Tobacco Products by minors (Cal. Pen. Code § 308);
 - State law requires that Tobacco Retailers check the identification of Tobacco purchasers who reasonably appear to be under 18 years of age (Cal. Bus. & Prof. Code § 22956);
 - State law requires that Retailers of Tobacco Products post conspicuous notices stating that selling Tobacco Products to anyone under 18 years of age is illegal, and provides procedures for using minors to conduct onsite

compliance checks of Tobacco Retailers (Cal. Bus. & Prof. Code § 22952);

- State law prohibits the sale of Tobacco Products and Paraphernalia through self-service displays with limited exceptions for Tobacco stores (Cal. Bus. & Prof. Code §§ 22960, 22962);
- State law prohibits the sale of "bidis" (filterless cigarettes wrapped in temburni or tendu leaf) except in adult-only establishments (Cal. Pen. Code § 308.1);
- State law prohibits the manufacture, distribution, or sale of cigarettes in packages of less than 20 and prohibits the manufacture, distribution, or sale of "roll-your-own" Tobacco in packages containing less than 0.60 ounces of Tobacco (Cal. Pen. Code § 308.3); and
- State law requires all Tobacco Retailers that sell cigarettes, cigars, smoking tobacco, chewing tobacco, snuff, and other products containing at least 50% tobacco, but not Electronic Smoking Devices, to be Licensed by the California Board of Equalization to curb the unlawful distribution and untaxed sale of such products (Cal. Bus. & Prof. Code §§ 22970.1, 22972);

B. The Board of Supervisors of the County of Alameda previously found that minors have ready access to Tobacco Products as a result of noncompliance with existing laws and banned the sale of Tobacco Products through vending machines in the unincorporated areas of Alameda County in order to minimize the use of Tobacco Products by minors (Alameda County Code of Ordinances, chapter 3.60);

C. Despite local, state, and federal efforts to limit youth access to Tobacco, minors are still able to access Tobacco Products including Cigars, as evidenced by the following:

- In 2009, a national study found that 10.9% of all students in grades 9-12, including 6.7% of female students and 15% of male students were current Cigar users; and
- In 2009, the same national study found that 3.9% of all students in grades 6-8, including 3.2% of female students and 4.6% of male students were current Cigar users;

D. A local licensing system, with local enforcement, for Tobacco Retailers is appropriate to ensure that Retailers comply with Tobacco control laws and business standards of the county, to protect the health, safety, and welfare of our

residents;

- E. State law explicitly permits cities and counties to enact local Tobacco Retailer Licensing ordinances, and allows for the suspension or revocation of a local License for a violation of any state Tobacco control law (Bus. & Prof. Code § 22971.3);
- F. California courts have affirmed the power of the county to regulate business activity in order to discourage violations of law in such cases as Cohen v. Board of Supervisors (1985) 40 Cal.3d 277, Bravo Vending v. City of Rancho Mirage (1993) 16 Cal.App.4th 383, and Prime Gas v. City of Sacramento (2010) 184 Cal.App.4th 697;
- G. The county has enacted local ordinances regulating the use and sale of Tobacco Products, including a ban on the distribution of Tobacco samples (General Code chapter 3.56) a ban on vending machine sales of Tobacco (General Code chapter 3.60), and a ban on Smoking in county facilities, public places and places of employment (General Code chapter 6.72);
- H. Research demonstrates that local Tobacco Retailer Licensing ordinances dramatically reduce youth access to cigarettes;
- I. The county 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 by minors; in promoting compliance with laws prohibiting sales of cigarettes and Tobacco Products to minors; and finally, and most importantly, in protecting children from being lured into illegal activity through the misconduct of adults;
- J. The failure of Tobacco Retailers to comply with all Tobacco control laws, particularly laws prohibiting the sale of Tobacco Products to minors, presents an imminent threat to the public health, safety, and welfare of the residents of the county;
- K. A requirement for a Tobacco Retailer License will not unduly burden legitimate business activities of Retailers who sell or distribute cigarettes or other Tobacco Products to adults; it will, however, allow the county to regulate the operation of lawful businesses to discourage violations of federal, state, and local Tobacco-related laws;
- L. The Tobacco Retailer License fees imposed under this Ordinance will be for the

reasonable regulatory costs to the county for issuing licenses and permits, performing investigations, inspections, and audits, and the administrative enforcement and adjudication thereof;

- M. The amount of the Tobacco Retailer License fees and any fines assessed under this Ordinance will be no more than necessary to cover the reasonable costs of the administration and enforcement of this Ordinance;
- N. The manner in which the Tobacco Retailer License fees and any fines assessed under this Ordinance are allocated to a payor will bear a fair and reasonable relationship to the payor's burdens on, and benefits received from, the administration and enforcement activities of this Ordinance;
- O. While state law prohibits possession of certain forms of "Drug Paraphernalia," and prohibits all sales of "Drug Paraphernalia," many Retailers continue to sell items that are commonly known to be "Drug Paraphernalia," and claim that such items are intended to be used for Tobacco;
- P. State law prohibits the sale or furnishing of electronic cigarettes to minors (Cal. Health & Safety Code § 119405);
- Q. Cigarettes are subject to minimum pack sizes and certain taxes that do not apply to cigars under federal or California law;
- R. Higher prices caused by minimum pack sizes for cigarettes and higher tax rates have acted as a significant deterrent against purchases of Tobacco Products by minors and young adults; and
- S. The price of a pack of cigarettes can be more than ten times the price of a single cigar, and lower priced cigars are attractive to youth looking for a less expensive Tobacco alternative to cigarettes.

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 or distribution of Tobacco Products to minors, 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 therein.

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 in the open market 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 County of Alameda Administrative Code, Chapter 2.40.

“Cigar” means any roll of Tobacco wrapped entirely or in part in Tobacco or in any substance containing Tobacco, and all of the component parts of the Cigar (including but not limited to Tobacco, filters, or wrapping). For purposes of this chapter, **“Cigar”** includes, but is not limited to, Tobacco Products labeled or commonly known as “cigar,” “cigarillo,” “tiparillo,” “little cigar,” “blunt,” “cigar wrap,” or “blunt wrap.”

“Drug Paraphernalia” shall have the definition set forth in California Health & Safety Code section 11014.5, as that section may be amended from time to time.

“Electronic Smoking Device” means any product containing or delivering nicotine or any other substance intended for human consumption that can be used by a person to simulate smoking through inhalation of vapor or aerosol from the product. “Electronic Smoking Device” includes any such device and parts thereof, whether manufactured, distributed, marketed, or sold as an electronic cigarette, an electronic cigar, an electronic cigarillo, an electronic pipe, an electronic hookah, or any other product name or descriptor. “Electronic Smoking Device” includes cartridges, cartomizers, e-liquid, smoke juice, tips, atomizers, electronic smoking device batteries, electronic smoking device chargers, and any other item specifically designed for the preparation, charging, or use of electronic smoking devices. “Electronic Smoking Device” does not include any product specifically approved by the United States Food and Drug Administration for use in the mitigation, treatment, or prevention of disease.

“Person” means any individual, firm, partnership, joint venture, unincorporated association, corporation, estate, trust, trustee, or any other group or combination of the foregoing acting as a unit or a legal entity.

"Public Health Department" means the Public Health Department of the County of Alameda and its authorized representatives, designees or agents.

"Smoke" means the gases, particles, or vapors released into the air as a result of combustion, electrical ignition or vaporization, when the apparent or usual purpose of the combustion, electrical ignition or vaporization is human inhalation of the byproducts, except when the combusting or vaporizing material contains no tobacco or nicotine and the purpose of inhalation is solely olfactory, such as, for example, smoke from incense. The term "Smoke" includes, but is not limited to, tobacco smoke, Electronic Smoking Device vapors, and marijuana smoke.

"Smoking" means engaging in an act that generates Smoke, such as, for example: possessing a lighted pipe, a lighted hookah pipe, a lighted cigar, an operating Electronic Smoking Device, or a lighted cigarette of any kind; or lighting or igniting a pipe, a hookah pipe, a cigar, or a cigarette of any kind.

"Tobacco Paraphernalia" includes, but is not limited to, cigarette papers or wrappers, pipes, holders of Smoking materials of all types, cigarette rolling machines, and any other item designed for the Smoking, preparation, storing, consumption, or ingestion 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
- (b) Any Electronic Smoking Device.

Notwithstanding any provision of subsections (a) and (b) to the contrary, "Tobacco Product" includes any component, part, or accessory of 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.

"Tobacco Retailer" means any Person who sells, offers for sale, exchanges, or offers to exchange, for any form of compensation, any of the following items: Tobacco, Tobacco Products, Tobacco Paraphernalia, or Electronic Smoking Devices. "Tobacco Retailing" shall mean the doing of any of these things. This definition is without regard to the quantity of Tobacco, Tobacco Products, Tobacco Paraphernalia, or Electronic

Smoking Devices sold, offered for sale, exchanged, or offered for exchange.

“Tobacco Retailer License” or “License” means the certificate issued by the Public Health Department, which allows a facility to sell Tobacco, Tobacco Products, Tobacco Paraphernalia, or Electronic Smoking Devices. The issuance of this License does not indicate or imply that the facility is in compliance with all state and county regulations related to its operation; and may be suspended or revoked by the Public Health Department.

Section 3.58.030. Requirements and Prohibitions

- A. Tobacco Retailer License Required. It shall be unlawful for any Person to act as a Tobacco Retailer in the unincorporated area of the county without first obtaining and maintaining a valid Tobacco Retailer License pursuant to this chapter for each location at which that activity is to occur. Tobacco Retailing without a valid Tobacco Retailer License shall constitute a public nuisance.
- B. Lawful Business Operation. In the course of Tobacco Retailing or in the operation of the business or maintenance of the location for which a Tobacco Retailer License is issued, it shall be a violation of this chapter for the License holder, or any of the License holder's agents or employees, to violate any local, state, or federal law applicable to Tobacco Products, Tobacco Paraphernalia, Electronic Smoking Devices, or Tobacco Retailing.
- C. Display of License. Each Tobacco Retailer License shall be prominently displayed in a publicly visible location at the licensed location.
- D. Limited, Conditional Privilege. Nothing in this chapter shall be construed to grant any Person obtaining and maintaining a Tobacco Retailer License any status or right other than the right to act as a Tobacco Retailer at the location in the unincorporated area of the county identified on the face of the License. No License may be issued to authorize Tobacco Retailing at other than a fixed location; Tobacco Retailing by Persons on foot or from vehicles is prohibited.
- E. Drug Paraphernalia. It shall be a violation of this chapter for the holder of any License, or the License holder's agents or employees, to violate any local, state, or federal law regulating controlled substances or Drug Paraphernalia, such as, for example, California Health and Safety Code section 11364.7, except that a violation of federal law relating to the use of medical marijuana shall not be a violation of this chapter if the conduct at issue is authorized pursuant to California Health and Safety Code sections 11362.7, *et seq.*

F. Violation of Age-Verification Laws. No License holder may violate any local, state, or federal law that requires a seller to verify that a purchaser of any product sold by the License holder be a specified age or older. For example, and without limitation, a Tobacco Retailer who illegally sells alcohol to a Person below the minimum age under state law to purchase alcohol has violated the Tobacco Retailer License.

G. Minimum Pack Size For Cigars.

Notwithstanding any other provision of this chapter, no Tobacco Retailer located within the unincorporated area of Alameda County shall sell, offer for sale, or exchange for any form of consideration:

- (1) any single Cigar, whether or not packaged for individual sale;
- (2) any number of Cigars fewer than the number contained in the manufacturer's original consumer packaging designed for Retail sale to a consumer; or
- (3) any package of Cigars containing fewer than five (5) Cigars.

This section does not apply to the sale or offer for sale of a single Cigar for which the Retail price meets or exceeds either \$5.00 or the dollar amount adopted by resolution of the Board of Supervisors and adjusted from time to time, whichever is higher. The public shall be given notice of any such resolution in the manner notice is given of ordinances of the County.

H. Term of License. Licenses are valid for one (1) year from the date of issue and each Tobacco Retailer shall apply for the renewal of his or her Tobacco Retailer License at least forty-five (45) calendar days prior to its expiration using the procedure in Section 3.58.040.

Section 3.58.040. Application Procedure

- A. An application for a Tobacco Retailer License shall be submitted to the Public Health Department in the name of the Person proposing to conduct Retail Tobacco sales and shall be signed by such Person or his or her authorized agent. It is the responsibility of each applicant to be informed of the laws affecting the issuance of a Tobacco Retailer License.
- B. All applications shall be submitted on a form supplied by the Public Health Department and shall contain the following information:

- (1) The name, address, and telephone number of the applicant;
- (2) The business name, address, and telephone number of the single fixed location for which a Tobacco Retailer License is sought;
- (3) The name and mailing address authorized by the applicant to receive permit-related communications and notices (the "notice address");
- (4) Proof that the location for which a Tobacco Retailer License is sought has been issued a valid state Tobacco Retailer License by the California Board of Equalization; a Tobacco Retailer who sells only Electronic Smoking Devices, and who does not sell Tobacco Products as defined in paragraph (a) of "Tobacco Products" in this chapter and in California Business & Professions Code section 22791 shall present proof that only Electronic Smoking Devices will be sold at that location in lieu of proof of issuance of a valid state Tobacco Retailer License;
- (5) Proof that the location for which a Tobacco Retailer License is sought conforms with applicable zoning;
- (6) A statement signed by each applicant that at the location for which the License is sought, no products are or will be sold consisting of a) Drug Paraphernalia; or b) single Cigars in violation of the minimum pack size restriction set forth in section 3.58.030(G); and
- (7) Such other information as the Public Health Department deems necessary for the administration or enforcement of this chapter.

C. The applicant shall inform the Public Health Department in writing of any change in the information submitted on an application within ten (10) business days of the change.

Section 3.58.050. Issuance of License; Standards

A. Within thirty (30) days of the Public Health Department's receipt of an application for a Tobacco Retailer License, the Public Health Department shall issue a License unless it has determined, based on substantial evidence, that one or more of the following bases for denial exists:

- (1) The application is incomplete or inaccurate; or
- (2) The application seeks authorization for Tobacco Retailing by a Person or at a location for which a suspension or revocation is in effect pursuant to section 3.58.100 or 3.58.110 of this chapter; or
- (3) The application seeks authorization for Tobacco Retailing at a location that is in violation of applicable county zoning pursuant to chapter 17 of this Code, or is in violation of any other local, state, or federal law; or

- (4) The application seeks authorization for Tobacco Retailing by a Person to whom this chapter prohibits a License to be issued.
- B. When an application for a Tobacco Retail License is denied, the Public Health Department shall issue a written notice of denial. The notice of denial shall set forth the reason for denial and notify the applicant that a hearing on the denial of a License may be requested pursuant to section 3.58.130 of this chapter. The notice of denial shall be served by regular mail to the notice address designated on the application.

Section 3.58.060. Fees for License

- A. A Tobacco Retailer License is invalid unless the appropriate fee has been paid in full as required. The fee to issue or renew a Tobacco Retailer License shall be established by resolution of the board of supervisors and shall be calculated so as to recover the cost of administration and enforcement of this chapter, including the cost of processing the License application, administering the License program, Tobacco Retailer inspection and compliance checks, documentation of violations, and prosecution of violators. The fee for a Tobacco Retailer License shall be paid to the Public Health Department and shall be used to fund the program.
- B. The Tobacco Retailer License fees imposed under this Ordinance shall be for the reasonable regulatory costs to the county for issuing licenses and permits, performing investigations, inspections, and audits, and the administrative enforcement and adjudication thereof. The amount of the Tobacco Retailer License fees and any fines assessed under this chapter shall be no more than necessary to cover the reasonable costs of the administration and enforcement of this chapter. The manner in which the Tobacco Retailer License fees and any fines assessed under this chapter are allocated to a payor shall 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 3.58.070. License Nontransferable

- A. A Tobacco Retailer License may not be transferred from one Person to another or from one location to another.
- B. In the event a Person to whom a License has been issued changes business locations, that Person must apply for a new License prior to acting as a Tobacco Retailer at the new location.

- C. Any License issued pursuant to this section shall expire on the date the previous License for the business or Person would have otherwise expired.
- D. Notwithstanding any other provision of this chapter, prior violations of this chapter at a location shall continue to be counted against that location and the License ineligibility periods in section 3.58.110 shall continue to apply to that location unless the location has been fully transferred to a different Person in an Arm's Length Transaction.

Section 3.58.080. Compliance Monitoring

The Public Health Department shall check the compliance of each Tobacco Retailer as necessary to carry out the purpose and intent of this chapter. Compliance checks shall determine, at a minimum, compliance with the requirements of this chapter and specifically if the Tobacco Retailer is conducting business in a manner that complies with Tobacco laws regulating youth access to Tobacco.

Section 3.58.090. Grounds for Modification, Suspension or Revocation of Licenses

- A. In addition to any other penalty authorized by law, a Tobacco Retailer License may be modified, suspended or revoked if the Public Health Department finds that the Person holding the License, including his or her agents or employees, has violated any of the requirements, conditions, or prohibitions of this chapter.
- B. A Tobacco Retailer License may also be revoked if the Public Health Department finds that it issued the License in error. A revocation based on the issuance of the License in error shall be without prejudice to the filing of a new application for a License.

Section 3.58.100. Tobacco Retailing Without a Valid License

- A. In addition to any other penalty authorized by law, if the county or any court of competent jurisdiction finds, 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 agents or employees, the Person shall be ineligible to apply for or be issued a License for that location as follows:
 - (1) After a first violation at a location within any five-year period, no new License may issue for the Person at the location until sixty (60) days have passed from the date of the finding of violation.

- (2) After a second violation at a location within any five-year period, no new License may issue for the Person at the location until one hundred and eighty days (180) have passed from the date of the finding of violation.
- (3) After a third or subsequent violation at a location within any five-year period, no new License may issue for the Person at the location until five (5) years have passed from the date of the finding of violation.

For purposes of this section, a Tobacco Retailer License obtained upon proof that the Tobacco Retailer shall only sell Electronic Smoking Devices at the licensed location is not a valid Tobacco Retailer License for the sale of Tobacco Products other than Electronic Smoking Devices.

- B. Tobacco Products, Tobacco Paraphernalia, and Electronic Smoking Devices offered for sale or exchange in violation of this chapter are subject to seizure by the Public Health Department and shall be forfeited after the License holder is given reasonable notice and an opportunity to demonstrate that the Products were not offered for sale or exchange in violation of this chapter.
- C. For the purposes of the civil remedies provided in this chapter each day on which Tobacco Products, Tobacco Paraphernalia, or Electronic Smoking Devices are offered for sale in violation of this chapter shall constitute a separate violation of this chapter.
- D. When a Person is found to have engaged in Tobacco Retailing without a valid License, the Public Health Department shall issue a written notice of violation in accordance with section 3.58.120. The notice of violation shall be served by regular mail to the location where the violation occurred. Persons found to have engaged in Tobacco Retailing without a valid Tobacco Retailer License may request a hearing on this finding in accordance with section 3.58.130.

Section 3.58.110. Suspension or Revocation of License

- A. In addition to any other remedy authorized by law, a License shall be suspended or revoked as provided in this section, if the Public Health Department finds that the License holder has, or his or her agents or employees have, violated any of the provisions of this chapter; provided, however, that violations by a License holder at one location may not be accumulated against other locations of that same License holder, nor may violations accumulated against a prior License holder at a Licensed location be accumulated against a new License holder at

the same Licensed location. When the Public Health Department finds a violation, the License may be suspended or revoked as follows:

- (1) Upon a finding of a first License violation within any five-year period, the License holder shall receive a warning;
 - (2) Upon a finding of a second License violation within any five-year period, the License shall be suspended for thirty (30) days;
 - (3) Upon a finding of a third License violation within any five-year period, the License shall be suspended for sixty (60) days;
 - (4) Upon a finding of a fourth License violation within any five-year period, the License shall be suspended for ninety (90) days;
 - (5) Upon a finding of a fifth License violation within any five-year period, the License shall be suspended for one (1) year;
 - (6) Upon a finding of a sixth License violation within any five-year period, the License shall be revoked, and no new license may be issued for the location until five (5) years have passed from the date of revocation.
- B. Notwithstanding any other provisions of this chapter, a License shall be revoked if the Public Health Department finds that one or more of the bases for denial of a License under Section 3.58.050 existed at the time application was made or at any time before the License was issued.
- C. A License holder for whom a License suspension or revocation is in effect must remove all Tobacco Products, Tobacco Paraphernalia, and Electronic Smoking Devices from the address that appears on the suspended License. Failure to do so will be considered a subsequent violation.

Section 3.58.120. Notice of Violation

- A. Whenever the Public Health Department determines that grounds for a suspension or revocation exist, it shall send a written notice of violation to the License holder by personal service or by prepaid certified mail, return receipt requested, to the notice address provided on the License application pursuant to section 3.58.040B(3). The notice of violation shall include:
- (1) a statement that the License holder's Tobacco Retail License is being suspended or revoked pursuant to this chapter;
 - (2) the date of the violation;
 - (3) the address or other description of the location where the violation occurred;
 - (4) the code section(s) violated, or applicable state or federal law violated,

- and a brief description of the violation;
- (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 3.58.130, to the Public Health Department, within ten (10) calendar days of the date of service of the notice;
- (7) notice of the License holder's right to request a stipulated fine in lieu of suspension for second and third violations under section 3.58.170 of this chapter;
- (8) 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
- (9) signature of the enforcement officer and the officer's badge number, where applicable.

B. Service of the 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 3.58.130. Hearing on Denial, Suspension or Revocation

A. Any applicant or License holder aggrieved by the decision of the Public Health Department in denying, suspending, or revoking a License, may request a hearing on the decision by submitting a written request for hearing to the Public Health Department within ten (10) calendar days from the date of service of the notice of denial, suspension, or revocation. The written request for hearing shall 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 reasons why it is claimed the protested action should be reversed or otherwise set aside;
- (3) If a fine in lieu of suspension under section 3.58.170 of this chapter is requested, payment of the total fine;
- (4) The signatures of all parties named as protestors and their official mailing addresses; and
- (5) 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. The written request for hearing will be reviewed and, if found 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 will be served by first class mail or Personal service at least ten (10) days prior to the date of the hearing to the party appealing the notice of denial or violation. Service by first class mail, postage prepaid shall be effective on the date of mailing.
- C. The failure of any Person to receive notice of the hearing shall not affect the validity of any proceedings under this chapter.
- D. Failure of any Person to file a request for hearing in accordance with the provisions of this section shall constitute waiver of that Person's rights to administrative determination of the merits of the notice of denial or violation 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 accept evidence as follows:
 - (1) A valid notice of denial or violation shall be prima facie evidence of the cause for denial or the violation;
 - (2) All testimony shall be by declaration under penalty of perjury; and
 - (3) The Person responsible for the denial or violation, or any other interested Person may present testimony or evidence concerning the cause for denial or violation.
- 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 served by first class 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 3.58.140.
- G. The Public Health Department may establish appropriate administrative rules for implementing this chapter, conducting hearings, and rendering decisions pursuant to this section.

3.58.140. Appeal to Board of Supervisors

- A. A Person may appeal to the Alameda County 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) days from the date of service of the Board of Zoning Adjustments' decision. The appeal shall contain:

- (1) A 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 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 the place of the 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's 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 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 3.58.150. Judicial Review

Judicial review of the board of supervisors' decision and any penalties imposed under this chapter shall be taken pursuant to Government Code section 53069.4 and commenced within twenty (20) days of the date of service of the decision.

Section 3.58.160. 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 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.
- C. Any violation of this chapter is hereby declared to be a misdemeanor. Violations of this chapter may, in the discretion of the district attorney, be prosecuted as infractions or misdemeanors.
- D. Violations of this chapter are hereby declared to be public nuisances and may be enforced pursuant to the procedure in chapter 6.65 of this Code.
- 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 county code enforcement officer, including, for example, administrative or judicial nuisance abatement proceedings, civil or criminal code enforcement proceedings, and suits for injunctive relief.

Section 3.58.170. Fine In Lieu of Suspension

- A. For a second or third alleged violation of this chapter within any five-year period, the Public Health Department may allow a Tobacco Retailer alleged to have violated this chapter to stipulate to the penalties provided in this section in lieu of the suspension that would otherwise apply under this chapter.
- B. A fine in lieu of suspension shall contain the following terms plus any other non-criminal provisions agreed to by the Public Health Department and the License holder:

- (1) After a second alleged violation of this chapter at a location:

- (a) an administrative penalty of seven hundred fifty dollars (\$750) shall be paid by the Tobacco Retailer; and
 - (b) the alleged violation shall be considered to have occurred, for the purposes of determining the penalty for any future violation.
- (2) After a third alleged violation of this chapter at a location:
 - (a) an administrative penalty of one thousand five hundred dollars (\$1,500) shall be paid by the Tobacco Retailer; and
 - (b) the alleged violation shall be considered to have occurred, for the purposes of determining the penalty for any future violation.
- C. A Tobacco Retailer who stipulates to a fine in lieu of suspension and pays the resulting administrative penalty may request a hearing and protest the fine and the alleged violation in accordance with section 3.58.130.

Section 3.58.180. Tobacco Retailer License Fund

- A. The "Tobacco Retailer License Fund" ("Fund") is hereby created as a special revenue fund. All proceeds from Tobacco Retailer License fees, including any penalties and interest earned on such proceeds, shall be deposited into the Fund for distribution pursuant to this Section. All proceeds from penalties, fines, and violations relating to this chapter and the Tobacco Retailer License shall also be deposited into the Fund for distribution pursuant to this Section.
- B. Moneys in the Tobacco Retailer License Fund shall be used exclusively to pay for the administration and enforcement of this chapter and the Tobacco Retailer License. If this chapter or the use of the Fund is legally challenged, moneys in the Fund may be used to reimburse the County and the Public Health Department for their costs of legal defense, including attorneys' fees and other expenses.

3.58.190. Severability

- A. If any provision of this chapter is held by any court or by any Federal or State agency of competent jurisdiction, to be invalid as conflicting with any Federal or State law, rule or regulation now or hereafter in effect, or is held by such court or agency to be modified in any way in order to conform to the requirements of any such law, rule or regulation, such provision shall be considered a separate, distinct, and independent part of this ordinance, and such holding shall not affect the validity and enforceability of all other provisions hereof. In the event that such law, rule or regulation is subsequently repealed, rescinded, amended or

otherwise changed, so that the provision thereof which had previously been held invalid or modified is no longer in conflict with such law, rule or regulation, said provision shall thereupon return to full force and effect and shall thereafter be binding.

- B. If any section, subsection, phrase, clause, sentence, or word in this ordinance shall for any reason be held invalid or unconstitutional by a court of competent jurisdiction, it shall not nullify the remainder of this ordinance but shall be confined to the article, section, subsection, subdivision, clause, sentence or word so held invalid or unconstitutional.

SECTION II

- A. This ordinance shall take effect and be in force ninety (90) 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 _____, 2015, by the following called vote:

AYES:

NOES;

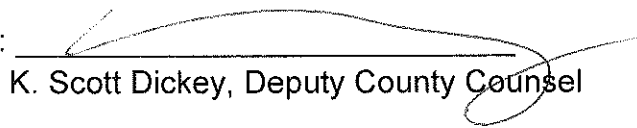
EXCUSED:

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

ATTEST:
Clerk of the Board of Supervisors
County of Alameda

By: _____

Approved as to form:
DONNA R. ZIEGLER, County Counsel
County of Alameda

By: 
K. Scott Dickey, Deputy County Counsel



Board of Supervisors

Nathan A. Miley
Supervisor, District 4

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Oakland, CA 94612
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Eden Area District Office
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Pleasanton, CA 94566
925-803-7959

district4@acgov.org

January 12, 2016

The Honorable Board of Supervisors
County Administration Building
1221 Oak Street, Suite 536
Oakland, CA 94612

Re: Oppose staff recommendation of Agenda Item #17 - Adding Chapter 3.58 to Title 3 of the Alameda County Ordinance Code to license and regulate tobacco retailers in the unincorporated areas of Alameda County; and Agenda Item #18 - The Alameda County Ordinance Code to include Electronic Smoking Devices in tobacco sampling, tobacco retail, and smoking restrictions

Dear Board Members:

I oppose the staff's recommendation of Item #17 and Item #18 on the Tuesday, January 12, 2016 Board of Supervisors meeting agenda. I support regulating electronic cigarettes similar to tobacco products, but I believe that they should not be defined as a tobacco product. Please refer to the points/testimony by Dr. Michael Siegel for the reasons why electronic cigarettes should not be classified and regulated as a tobacco product. Additionally, you can watch Dr. Siegel's presentation for more information at <https://youyube.be/h4ujAdupT1Y>.

Instead, I recommend the staff to develop an ordinance that would regulate electronic cigarettes as an entity of vaping products.

Sincerely,

A handwritten signature in black ink, appearing to read "Nate Miley", is written over a horizontal line. The signature is fluid and cursive.

Nate Miley

cc: BOS, CAO, CBS

Testimony of Michael Siegel, MD, MPH

Before the Alameda County Board of Supervisors

January 5, 2016

RE: Item 25 – An Ordinance to License and Regulate Tobacco Retailers

RE: Item 26 – Electronic Smoking Devices in Tobacco Sampling, Tobacco Retail, and Smoking Restrictions Ordinance

Dear President Haggerty and Supervisors Valle, Chan, Miley, and Carson,

Thank you for the opportunity to comment upon Items 25 and 26 on today's agenda, which would regulate electronic cigarettes as tobacco products under the Alameda County Ordinance Code.

I am a Professor in the Department of Community Health Sciences at the Boston University School of Public Health and have conducted research in the area of tobacco control for the past 30 years. I have been a strong advocate for 100% smoke-free bar and restaurant laws. From 1991-1993, I had the pleasure of working with the Alameda County Health Care Services Agency, the American Lung Association, and the American Heart Association to promote smoke-free ordinances in many cities in Alameda County. During my time in the Bay Area, I was fortunate to be trained by my two heroes in the tobacco control movement: Dr. Stan Glantz at UCSF and Serena Chen of the American Lung Association, who I view as the #1 tobacco control advocate in the country. I was also fortunate to have worked closely with then Councilman Miley, who championed Oakland's smoke-free restaurant law. I have conducted extensive research on secondhand smoke, smoking policies, and electronic cigarettes and have published 130 peer-reviewed articles in the scientific literature, most pertaining to tobacco.

My main objective today is to clarify a number of misconceptions about electronic cigarettes. When I first heard about these products back in 2007, I assumed that this was just another tobacco industry ploy to deceive the public into thinking that this was a safer type of cigarette. The industry has a history of promoting novel products as safer when subsequent research reveals that they are no safer and that it is little more than a Big Tobacco hoax. But after conducting research on electronic cigarettes, interviewing smokers using these products, and reviewing the scientific literature, I realized that electronic cigarettes were something different.

First of all, these products were not developed by the tobacco companies. They were developed and introduced to the U.S. market by independent, small businesses that had nothing to do with Big Tobacco and whose value propositions were to make smoking obsolete. It was only in 2012 that the tobacco companies started marketing these products. But even now, of the more than 450 brands of electronic cigarettes on the market in the U.S., only 3 are produced by tobacco companies.

Second, this was not a hoax. The research clearly shows that electronic cigarettes are much safer than conventional cigarettes. Numerous studies have shown that smokers who switch to electronic cigarettes experience a dramatic improvement in their respiratory health, both subjectively and objectively. They not only report an improvement in their breathing, but spirometry testing demonstrates improved lung function. Electronic cigarettes eliminate almost all of the more than 10,000 chemicals and 60 human carcinogens that are present in tobacco smoke. They do not produce acute cardiovascular effects. They do not affect lung function as measured by spirometry. Their cytotoxicity is much lower than that of tobacco smoke.

Third, these products really work for smoking cessation. There are literally thousands of former smokers who were able to quit smoking only because of the availability of electronic cigarettes. Many of these smokers had tried to quit unsuccessfully with traditional methods such as the nicotine patch or other drugs, but succeeded in quitting only when electronic cigarettes became available. In particular, vape shops have played a significant role in enhancing smoking cessation. Unlike traditional nicotine replacement therapy, vape shops provide social support to smokers trying to quit. The availability of multiple vaping product types and flavors creates a type of "hobby-like" activity which cannot be matched by any other smoking cessation method. Research has demonstrated that smokers who use vape shop products are particularly successful in quitting smoking. But even cig-a-likes, which look like regular cigarettes, have been shown in a clinical trial to be just as effective as the FDA-approved nicotine patch for smoking cessation.

Fourth, despite the widespread hysteria being spread in the media about electronic cigarettes serving as a gateway to youth smoking, the actual evidence demonstrates just the opposite. While the use of electronic cigarettes among youth skyrocketed over the past four years, the rate of youth smoking has plummeted to its lowest level in history. Rather than addicting youth and then propelling them on to become smokers, electronic cigarettes are actually diverting youth away from the use of tobacco cigarettes. Of course, this does not mean that e-cigarette use should be promoted among youth; however, it does demonstrate that the public health benefits of electronic cigarettes among adults are not being outweighed by adverse effects among youth.

Finally, the most important thing that makes electronic cigarettes different, and which truly makes them a game changer, is that they are **not tobacco products**. Specifically, electronic cigarettes do not contain tobacco. The e-liquids do not contain tobacco. The only reason they have been referred to as tobacco products is that under federal law, these products cannot be regulated as drugs. Thus, they are being regulated under the federal Tobacco Act. But it is critical to understand that there is no tobacco whatsoever in electronic cigarettes or other vaping products. To call them tobacco products is not only wrong, but it deceives the public into believing that they contain tobacco, which distorts the public's understanding of the relative safety of real tobacco cigarettes compared to electronic cigarettes.

No one disputes the fact that electronic cigarettes should be regulated, especially in terms of requiring licenses for e-cigarette sellers, preventing the distribution of free samples, banning the sale of e-cigarettes through vending machines, restricting self-service displays, and requiring identification for purchase to keep these products out the hands of minors. However, I believe it is critical that electronic cigarettes be regulated not as tobacco products, but as a separate entity of vaping products.

Classifying and regulating electronic cigarettes as tobacco products is causing considerable public health harm. By confusing the public into thinking that these products contain tobacco and are simply another method of smoking, the public has been deceived into thinking that electronic cigarettes are just as hazardous as smoking. This is undermining decades of public education about the severe hazards of smoking. Surveys have shown that over the past four years, the public's appreciation of the hazards of smoking has **decreased**, because many people falsely believe that smoking is only as bad as using a vaping product. The unique hazards associated with the use of **tobacco** have been obscured.

I urge you to amend both of the proposed ordinances so that they define electronic cigarettes not as tobacco products, but as a separate entity of non-tobacco-containing vaping products. Every single one of the objectives of this legislation can be accomplished just as effectively if electronic cigarettes are regulated as separate entities from tobacco products. In fact, defining these products separately could lead to more effective public health protection because additional requirements to ensure the safety of electronic cigarettes could then be applied to this category of products, something that cannot be done for cigarettes due to federal preemption.

Finally, there is one aspect of the proposed ordinance that I believe deserves further consideration: namely, the ban on vaping in all the same places where smoking is prohibited. When I testified before the Oakland City Council and the Alameda County Board of Supervisors in 1993, urging these bodies to adopt 100% smoke-free restaurant laws, opponents questioned

whether the government was justified in interfering with the autonomy of business owners. I was able to provide definitive scientific evidence demonstrating that secondhand smoke is a substantial health hazard for restaurant workers. In fact, I produced for Alameda County's health department an 80-page report which documented the increased risk of disease for restaurant workers due to their high exposure to secondhand smoke.

However, there is currently no evidence that "secondhand vaping" has any significant adverse health effects. In fact, there is no study which documents that under actual conditions, the use of vaping products in public places results in significant exposure of bystanders to toxic chemicals or that it impairs their health in any way.

Absent this evidence, I question why the proposed ordinance places a seeming priority on banning vaping even in outdoor areas, while it does nothing to address the far more significant problem of the very real health effects that are occurring due to the County allowing smoking in multi-unit dwellings. As you know, Chapter 6.72.050(A)(11) of the Alameda County Ordinance Code (that's on page 18 of Attachment #26) allows smoking in multi-unit housing. There is strong evidence that tobacco smoke exposure for nonsmokers in units adjacent to those in which smoking occurs places residents at significant health risk. I question whether it makes sense to focus on banning vaping, even in outdoor areas, when there is no evidence of any substantial public health hazard, when the County still allows smoking in multi-unit housing in the face of incontrovertible evidence that nonsmokers are suffering significant health effects. The evidence is so strong that recently, my home city of Boston strengthened its smoking ban to include multi-unit public housing. It is not clear to me how the Board of Supervisors can justify the interference with the autonomy of private businesses in the absence of evidence that "secondhand vaping" is actually causing adverse health effects.

Thank you for the opportunity to share this perspective with you today. I applaud you for your continuing efforts to lead the nation in protecting your residents from the known hazards of tobacco products and from the potential risks for youth who are using vaping products which do not contain tobacco, but which often contain nicotine and therefore should not be used by minors.

Michael Siegel, MD, MPH
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