

ORDINANCE NO. 2014-_____

AN ORDINANCE AMENDING CHAPTERS 3.56, 3.60 AND 6.72 OF THE ALAMEDA COUNTY
GENERAL ORDINANCE CODE TO INCLUDE ELECTRONIC SMOKING DEVICES
(ELECTRONIC CIGARETTES) IN TOBACCO SAMPLING, TOBACCO RETAIL, AND
SMOKING RESTRICTIONS

WHEREAS, the County of Alameda has a substantial interest in protecting the health and welfare of its residents from the health hazards associated with tobacco and nicotine ingestion and addiction; and

WHEREAS, the County of Alameda has a substantial interest in protecting the public health and welfare by prohibiting smoking in public places, and in protecting the rights of non-smokers to breathe smoke-free air; and

WHEREAS, electronic smoking devices, commonly known as “electronic cigarettes,” “e-cigarettes,” “e-cigars,” “e-cigarillos,” “e-pipes,” “e-hookahs,” “electronic nicotine delivery systems,” etc., are battery operated devices designed to deliver nicotine, flavor, and/or other substances through a vapor inhaled by the user;¹ and

WHEREAS, the U.S. Surgeon General has declared that nicotine is as addictive as cocaine or heroin;² and

WHEREAS, use of electronic smoking devices has increased significantly in recent years, as evidenced by the fact that:

- Between 2011 and 2012 the percentage of all youth in grades 6 to 12 who had tried electronic smoking devices doubled;³
- 6.8% of all youth between 6th and 12th grade report trying electronic smoking devices;⁴
- 10% of high school students have tried electronic smoking devices;⁵
- 9.3% of youth who have used electronic smoking devices have never smoked conventional cigarettes;⁶
- Between 2010 and 2011, rates of both awareness and use of unregulated electronic smoking devices by adults also increased significantly;⁷ and

¹ U.S. Food and Drug Administration. (2001). *Electronic Cigarettes*. Retrieved on September 22, 2013 from <http://www.fda.gov/newsevents/publichealthfocus/ucm172906.htm>.

² *The Health Consequences of Smoking: Nicotine Addiction*, U.S. Surgeon General (May 1988), <http://profiles.nlm.nih.gov/ps/access/NNBBZD.pdf>.

³ Corey, C., Johnson, S., Apelberg, B., et al. (2013). “Notes from the Field: Electronic Cigarette Use Among Middle and High School Students - United States, 2011- 2012.” *Morbidity and Mortality Weekly Report (MMWR)*. 62(35):729–730. Available at: <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6235a6.htm>.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

WHEREAS, existing studies on electronic smoking devices' vapor emissions and cartridge contents have found a number of dangerous substances including:

- Chemicals known to the State of California to cause cancer⁸ such as formaldehyde, acetaldehyde, lead, nickel, and chromium;^{9, 10}
- PM_{2.5}, acrolein, tin, toluene, and aluminum,^{11, 12, 13, 14} which are associated with a range of negative health effects such as skin, eye, and respiratory irritation,^{15, 16, 17, 18} neurological effects,¹⁹ damage to reproductive systems,²⁰ and even premature death from heart attacks and stroke;²¹

⁷ King, B., Alam S., Promoff, G., et al. (2013). "Awareness and Ever Use of Electronic Cigarettes Among U.S. Adults, 2010-2011." *Nicotine and Tobacco Research*, doi: 10.1093/ntr/ntt013, 2013.

⁸ State of California Environmental Protection Agency, Office of Environmental Health Hazard Assessment, Safe Drinking Water and Toxic Enforcement Act of 1986. (2013) Chemicals known to the State of California to cause cancer or reproductive toxicity. Available at: http://oehha.ca.gov/prop65/prop65_list/files/P65single091313.pdf

⁹ *Id.*

¹⁰ Goniewicz M, Knysak J, Gawron M, et al. (2013). Levels of selected carcinogens and toxicants in vapour from electronic cigarettes. *Tob. Control*. 2013;1:1–8. Available at: <http://www.ncbi.nlm.nih.gov/pubmed/23467656>. Accessed August 2, 2013.

¹¹ German Cancer Research Center. (2013). "Electronic Cigarettes - An Overview" *Red Series Tobacco Prevention and Control*. Available at: www.dkfz.de/de/tabakkontrolle/download/Publikationen/RoteReihe/Band_19_e-cigarettes_an_overview.pdf

¹² Goniewicz M, Knysak J, Gawron M, et al., *supra* note 10.

¹³ Williams, M., Villarreal, A., Bozhilov, K., Lin, S., & Talbot, P. (2013). Metal and silicate particles including nanoparticles are present in electronic cigarette cartomizer fluid and aerosol. *PloS one*, 8(3), e57987. doi:10.1371/journal.pone.0057987

¹⁴ Schober W, Szendrei K, Matzen W, et al. (2013). Use of electronic cigarettes (e-cigarettes) impairs indoor air quality and increases FeNO levels of e-cigarette consumers. *Int. J. Hyg. Environ. Health*. Available at: <http://dx.doi.org/10.1016/j.ijheh.2013.11.003>

¹⁵ Agency for Toxic Substances and Disease Registry (ATSDR). (2008). Toxic Substances Portal – Aluminum. Available at <http://www.atsdr.cdc.gov/phs/phs.asp?id=1076&tid=34>

¹⁶ Agency for Toxic Substances and Disease Registry (ATSDR). (2005). Toxic Substances Portal – Tin. Available at <http://www.atsdr.cdc.gov/phs/phs.asp?id=541&tid=98>

¹⁷ United States Environmental Protection Agency. (N.d.) EPA Schools Monitoring Initiative Fact Sheet. <http://www.epa.gov/air/sat/pdfs/acroleinupdate.pdf>

¹⁸ Agency for Toxic Substances and Disease Registry (ATSDR). (2007). Toxic Substances Portal – Acrolein. Available at <http://www.atsdr.cdc.gov/PHS/PHS.asp?id=554&tid=102>

¹⁹ State of California Environmental Protection Agency Office of Environmental Health Hazard Assessment. (n.d.). Chronic Toxicity Summary: Toluene. CAS Registry Number: 108-88-3. Available at: http://oehha.ca.gov/air/chronic_rels/pdf/108883.pdf

²⁰ *Id.*

²¹ Environmental Protection Agency. (2012). Particle Pollution and Health. Available at: <http://www.epa.gov/pm/2012/fshealth.pdf>

- Inconsistent labeling of nicotine levels in electronic smoking device products;²² and
- In one instance, diethylene glycol, an ingredient used in antifreeze and toxic to humans;²³ and

WHEREAS, more than one study has concluded that exposure to vapor from electronic smoking devices may cause passive or secondhand vaping;^{24, 25, 26} and

WHEREAS, some cartridges used by electronic smoking devices can be re-filled with liquid nicotine solution, creating the potential for exposure to dangerous concentrations of nicotine;²⁷ and

WHEREAS, clinical studies about the safety and efficacy of these products have not been submitted to the FDA²⁸ for the over 400 brands of electronic smoking devices that are on the market²⁹ and for this reason, consumers currently have no way of knowing:³⁰

- Whether electronic smoking devices are safe;
- What types or concentrations of potentially harmful chemicals the products contain; and
- What dose of nicotine the products deliver; and

WHEREAS, the World Health Organization has strongly advised consumers against the use of electronic smoking devices until they are “deemed safe and effective and of acceptable quality by a competent national regulatory body”;³¹ and

WHEREAS, the World Medical Association has determined that electronic smoking devices “are not comparable to scientifically-proven methods of smoking cessation” and that

²² Department of Health and Human Services Food and Drug Administration. (2009). “FDA Evaluation of E-Cigarettes.” Available at www.fda.gov/downloads/drugs/ScienceResearch/UCM173250.pdf

²³ *Id.*

²⁴ *Id.*

²⁵ Schripp, T., Markewitz, D., Uhde, E., & Salthammer, T. (2013). Does e-cigarette consumption cause passive vaping? *Indoor Air*. 23(1), 25–31. Doi:10.1111/j.1600-0668.2012.00792.x

²⁶ Schober W, Szendrei K, Matzen W, et al., *supra* note 14.

²⁷ Yamin C, Bitton A, and Bates D. (2010). “E-Cigarettes: A Rapidly Growing Internet Phenomenon.” *Annals of Internal Medicine*, 153:607-609.

²⁸ U.S. Food and Drug Administration. (2009) FDA Warns Of Health Risk Posed By E-Cigarettes. Available at:

www.fda.gov/downloads/forconsumers/consumerupdates/UCM173430.pdf

²⁹ Chen, L. (2013). “FDA Summary of Adverse Events on Electronic Cigarettes.” *Nicotine & Tobacco Research: Official Journal of the Society for Research on Nicotine and Tobacco*. 15(2): 615–6. Doi:10.1093/ntr/nts145.

³⁰ U.S. Food and Drug Administration, *supra* note 28.

³¹ World Health Organization. (2013). Questions and Answers on Electronic Cigarettes or Electronic Nicotine Delivery Systems (ENDS). Available at:

www.who.int/tobacco/communications/statements/electronic_cigarettes/en/

“neither their value as therapeutic aids for smoking cessation nor their safety as cigarette replacements is established”;³² and

WHEREAS, the State of California’s Tobacco Education and Research Oversight Committee (TEROC) “opposes the use of e-cigarettes in all areas where other tobacco products are banned”;³³ and

WHEREAS, a study published in the Journal of Environmental and Public Health suggests that electronic smoking devices “may have the capacity to ‘re-normalize’ tobacco use in a demographic that has had significant de-normalization of tobacco use previously”;³⁴ and

WHEREAS, electronic smoking devices often mimic conventional tobacco products in shape, size, and color,³⁵ with the user exhaling a smoke-like vapor similar in appearance to the exhaled smoke from cigarettes and other conventional tobacco products;³⁶ and

WHEREAS, the use of electronic smoking devices in smoke-free locations threatens to undermine compliance with smoking regulations and reverse the progress that has been made in establishing a social norm that smoking is not permitted in public places and places of employment;³⁷ and

WHEREAS, over 71 jurisdictions within California require retailers to obtain a license to sell electronic smoking devices³⁸ and at least 62 local jurisdictions in California prohibit the use of electronic smoking devices in specific locations;³⁹ and

³² World Medical Association. (2012). *Statement on Electronic Cigarettes and Other Electronic Nicotine Delivery Systems*. Available at: [www.wma.net/en/30publications/10policies/e19/index.html.pdf?print-media-type&footer-right=\[page\]/\[toPage\]](http://www.wma.net/en/30publications/10policies/e19/index.html.pdf?print-media-type&footer-right=[page]/[toPage])

³³ State of California Tobacco Education and Research Oversight Committee. (2013). Position on Electronic Cigarettes (e-cigarettes). Available at: http://www.cdph.ca.gov/services/boards/teroc/Documents/Positions/TEROC%20Official%20Position%20of%20E-Cigs_June%202013_final.pdf

³⁴ McMillen R, Maduka J and Winickoff J. (2011). “Use of Emerging Tobacco Products in the United States.” *Journal of Environmental and Public Health*. Doi:10.1155/2012/989474.

³⁵ Legacy Foundation. (2012). Tobacco Fact Sheet: Electronic Cigarettes (E-Cigarettes). Available at: www.legacyforhealth.org/PDFPublications/ECIGARETTE_0909_temp.pdf

³⁶ Kuschner WG, Reddy S, Mehrotra N, et al. (2011). “Electronic Cigarettes and Thirdhand Smoke: Two Emerging Health Care Challenges for the Primary Care Provider.” *International Journal of General Medicine*. 4: 115–120. Available at: www.ncbi.nlm.nih.gov/pmc/articles/PMC3068875/

³⁷ American Cancer Society Cancer Action Network, American Heart Association, Campaign for Tobacco Free Kids, American Lung Association. (2011). *Policy Guidance Document Regarding E-Cigarettes*. Available at: <http://www.acscan.org/content/wp-content/uploads/2013/06/Policy-Guidance-on-E-Cigarettes-.pdf>.

³⁸ American Lung Association in California, the Center for Tobacco Policy and Organizing. (2013). Tobacco Retailer Licensing and Electronic Cigarettes. Available at: <http://center4tobaccopolicy.org/wp-content/uploads/2014/05/E-cigarettes-in-TRL-May-2014.pdf>

WHEREAS, in accordance with similar health concerns, the state of California implemented Health and Safety Code section 119405, which prohibits the sale of electronic cigarettes to minors in order to protect their welfare and to reduce the chances of nicotine addiction in youth; and

WHEREAS, it is the purpose and intent of the Board of Supervisors, in enacting this Ordinance, to amend current County of Alameda tobacco product and smoking regulation ordinances to include electronic smoking devices, thus improving the health, safety, and welfare of its constituents by continuing to prevent the harmful effects of nicotine and tobacco products;

NOW THEREFORE, the Board of Supervisors of the County of Alameda ordains as follows:

SECTION I

Chapter 3.56 of the Alameda County General Ordinance Code is amended to read:

Chapter 3.56 PROHIBITION ON THE DISTRIBUTION OF TOBACCO PRODUCT SAMPLES

3.56.010 Findings and declaration.

The board of supervisors of Alameda County hereby finds and declares that:

- A. Substantial scientific evidence supports the casual relationship between tobacco smoking and deadly diseases such as cancer, chronic bronchitis, heart disease and emphysema. The Surgeon General of the United States has determined that smoking is the leading cause of preventable death in this country;
- B. The chewing of tobacco is hazardous to one's health;
- C. Minors currently have ready access to tobacco products as a result of noncompliance with existing laws that prohibit the furnishing of tobacco products to minors and the marketing practice of distributing free tobacco product samples;
- D. Urban neighborhoods are prime marketing targets for cigarette and other tobacco product "giveaways" by tobacco companies. This promotional strategy is apparently designed to increase sales by encouraging smoking and the ongoing consumption of tobacco products;
- E. The marketing practice of tobacco product giveaways is commonly pursued through the use of multimedia equipped vans and promotion

³⁹ American Lung Association in California, the Center for Tobacco Policy and Organizing. (2013). Local Policies on the use of Electronic Cigarettes. Available at: <http://center4tobaccopolicy.org/wp-content/uploads/2014/05/Local-Policies-on-Use-of-E-Cigs-May-2014.pdf>

- teams which distribute tobacco product samples at shopping areas, public parks and other areas where contact with the general public is frequent;
- F. The free distribution of cigarettes: encourages people to begin smoking and thereby leads to a form of addiction; discourages those who already smoke from quitting; and tempts former smokers to resume smoking;
 - G. Encouraging smoking and discouraging smokers from quitting smoking endangers the public health by leading more people to form or renew habits that cause illness and death;
 - H. Tobacco product giveaways promote unsightly litter, thereby increasing the costs to the public in cleaning the streets, and also causes pedestrian and vehicular traffic congestion;
 - I. Educators, health workers, parents, church leaders and business owners have complained about this marketing practice which targets low income urban neighborhoods;
 - J. Ad hoc protests have been only marginally effective in discouraging the giveaways, the sole consequence of which is that the distributors relocate to a different neighborhood;
 - K. Repeated efforts by county officials to seek discontinuance of this distribution practice have been rebuked by tobacco industry agents;
 - L. In order to minimize the use of tobacco products by minors it is necessary that an ordinance be adopted which restricts access to tobacco product samples by minors, in the interest of promoting their health, safety and welfare;
 - M. It is in the interests of the health, safety, and welfare of minors and the people of Alameda County to include electronic smoking devices within these tobacco product regulations.

3.56.020 Declaration of policy.

It is declared to be in the public interest and in the interest of the residents of the unincorporated areas of Alameda County to prohibit tobacco product sample promotions and giveaways.

3.56.030 Definitions.

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

"Distribute" means to give, sell, deliver, dispense, issue, or cause or hire any person to give, sell, deliver, dispense, issue or offer to give, sell, deliver, dispense or issue, as part of an advertising plan or program.

"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," shall mean an individual, firm, partnership, joint venture, unincorporated association, corporation, estate, trust, trustee, or any other group or combination of the above acting as a unit;

"Sample" means a distribution to a member or members of the general public at no cost or at nominal cost for the purpose, in whole or in part, of promoting a tobacco product;

~~"Tobacco product" means: any substance containing tobacco leaf, including but not limited to cigarettes, cigars, smoking tobacco, and smokeless tobacco.~~

(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.

(c) 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.

3.56.040 Tobacco product sampling prohibited.

No person shall knowingly distribute or furnish without charge, or cause to be furnished without charge to the general public, cigarettes, electronic smoking devices, or other tobacco products, or coupons for cigarettes, electronic smoking devices, or other tobacco products, at any event open to the public, or in any public place, including but not limited to any right-of-way, mall or shopping center, park, playground, and any property owned by the city, any school district, or any park district, within the unincorporated areas of the County of Alameda, or any property owned by the County of Alameda, except in retail tobacco product stores.

3.56.050 Violation—Penalty.

- A. A violation of any of the provisions of this chapter may be redressed by civil action and may further be charged by the District Attorney as a misdemeanor. The penalty for conviction shall be a fine or imprisonment or both not to exceed the limits set forth in California Penal Code Section 19.
- B. Each person shall be guilty of a separate offense for each and every day during any portion of which any violation of this chapter is committed, continued or permitted by such person and shall be punishable accordingly.

SECTION II

Chapter 3.60 of the Alameda County General Ordinance Code is amended to read:

Chapter 3.60 TOBACCO VENDING MACHINES RETAIL RESTRICTIONS ON TOBACCO PRODUCTS

3.60.010 Findings and declaration.

The board of supervisors of Alameda County hereby finds and declares that:

- A. Substantial scientific evidence supports the causal relationship between tobacco smoking and deadly diseases such as cancer, chronic bronchitis, heart disease and emphysema. The Surgeon General of the United States has determined that smoking is the leading cause of preventable death in this country;
- B. The chewing of tobacco is hazardous to one's health;
- C. Minors currently have ready access to tobacco products as a result of noncompliance with existing state and federal laws that prohibit the furnishing of tobacco products to minors, prohibit self-service tobacco product displays, require age identification, and restrict the widespread availability of tobacco product vending machines;
- D. In order to minimize the use of tobacco products by minors it is necessary that an ordinance be adopted which prohibits self-service tobacco product displays, requires age identification for tobacco product purchases, and restricts access to tobacco product vending machines by minors, in the interest of promoting their health, safety and welfare;
- E. It is in the interests of the health, safety, and welfare of minors and the people of Alameda County to include electronic smoking devices within these tobacco product regulations.

3.60.020 Declaration of policy.

It is hereby declared to be in the public interest and in the interest of all the residents of Alameda County to prohibit self-service displays, require age identification, and prohibit the distribution through vending machines, of for tobacco products including

electronic smoking devices through vending machines in any place within the unincorporated areas of the county which is open to minors.

3.60.030 Definitions.

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

"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 an individual, firm, partnership, joint venture, unincorporated association, corporation, estate, trust, trustee, or any other group or combination of the above acting as a unit.

"Self-service display" means the open display or storage of tobacco products, tobacco accessories, or electronic smoking devices in a manner that is physically accessible in any way to the general public without the assistance of a retailer or employee of a retailer and a direct person-to-person transfer between a retailer or employee of a retailer and any other Person. A vending machine is a form of self-service display.

"Tobacco accessories" means cigarette papers or wrapper, pipes, holders of smoking materials of all types, cigarette rolling machines, and any other item designed primarily for the smoking or ingestion or chewing of tobacco products.

~~"Tobacco product" means: any substance containing tobacco leaf, including but not limited to cigarettes, cigars, smoking tobacco, and smokeless tobacco.~~

(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.

(c) 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~~-vending machine" means any electronic or mechanical device or appliance the operation of which depends upon the insertion of money, whether in coin or paper bill, or other thing representative of value, which dispenses or releases a product.

3.60.040 Prohibition on the sale of tobacco products through vending machines in the unincorporated areas of Alameda County.

No cigarette, electronic smoking device, or other tobacco product may be sold, offered for sale, or distributed by or from a vending machine or other appliance, or any other device designed or used for vending purposes. Any ~~tobacco~~-such vending machine in use on the effective date of the ordinance codified in this section shall be removed within thirty (30) days after the effective date of the ordinance or any ordinance amendment codified in this section.

3.60.050 Age Identification Required.

All persons engaging in the retail sale of tobacco products shall check the identification of tobacco product purchasers, to establish the age of the purchaser, if the purchaser reasonably appears to be under 27 years of age.

3.60.060 Self-Service Displays Prohibited.

Self-service displays for tobacco products and tobacco accessories are prohibited.

3.60.05070 Violations—Penalty.

- A. Any person violating Section 3.60.040 this chapter shall be deemed guilty of an infraction unless such violation is described as a misdemeanor by specific provisions of this chapter.
- B. Any person convicted of an infraction under the provisions of this chapter shall be punishable upon a first conviction by a fine of not more than one hundred dollars (\$100.00), and for a second conviction within a period of one year by a fine of not more than two hundred dollars (\$200.00), and for a third or any subsequent conviction within a one year period by a fine of not more than five hundred dollars (\$500.00).

Any violations beyond the third conviction within a one year period may be charged by the District Attorney as a misdemeanor and the penalty for conviction shall be subject to a fine or imprisonment or both not to exceed the limits set forth in California Penal Code Section 19.

- C. Each person shall be guilty of a separate offense for each and every day during any portion of which any violation of any provision of this chapter is committed, continued or permitted by such person and shall be punishable accordingly.
- D. Any ~~tobacco~~-vending machine or self-service display placed or used in violation of this chapter which is not removed or converted to a permissible use shall be deemed a public nuisance, and may be abated as such in a civil action or by other appropriate legal proceeding.

SECTION III

Chapter 6.72 of the Alameda County General Ordinance Code is amended to read:

Chapter 6.72 SMOKING

6.72.010 Findings and declaration.

The Alameda County board of supervisors does find that:

A. Tobacco Product Findings

Numerous studies have found that tobacco smoke is a major contributor to indoor air pollution, and that breathing secondhand tobacco smoke is a cause of disease, including lung cancer, in nonsmokers. At special risk are children, elderly people, individuals with cardiovascular disease and individuals with impaired respiratory function, including asthmatics and those with obstructive airway disease; and

Health hazards induced by exposure to environmental tobacco smoke (ETS) include lung and other forms of cancer, respiratory infection, decreased respiratory function, including broncho-constriction and broncho-spasm, and premature death from heart disease.

In 1989, the health care costs and lost productivity resulting from smoking-related disease and death amounted to three hundred seventy million dollars (\$370,000,000.00) in Alameda County and represent a heavy and avoidable financial drain on our community.

Section 6404.5 of the California Labor Code regulates smoking in California workplaces, and requires local governments to initiate enforcement of this law.

The U.S. Surgeon General and the U.S. Department of Health and Human Services have found that a majority of those Americans who die of tobacco-caused diseases became addicted to nicotine in tobacco products as adolescents before the age of legal consent.

The U.S. Surgeon General has declared that nicotine is as addictive as cocaine or heroin; no other addictive product or drug, or cancer-causing product or drug is sold through vending machines.

The free distribution of cigarettes and other tobacco products encourages people to begin smoking and using tobacco products, and tempts those who had quit to begin smoking again. Minors currently have ready access to tobacco products as a result of noncompliance with existing laws that prohibit the furnishing of tobacco products to minors and the marketing practice of distributing free tobacco product samples and the widespread availability of tobacco vending machines.

According to recent studies, exposure to secondhand smoke is the third leading cause of preventable death in the United States, killing over fifty-three thousand (53,000) non-smokers each year, including three thousand (3,000) deaths from lung cancer.

B. Electronic Smoking Device Findings

The County of Alameda has a substantial interest in protecting the health and welfare of its residents from the health hazards associated with nicotine ingestion and addiction.

The County of Alameda has a substantial interest in protecting the public health and welfare by prohibiting smoking in public places, and in protecting the rights of non-smokers to breathe smoke-free air.

Electronic smoking devices, commonly known as “electronic cigarettes,” “e-cigarettes,” “e-cigars,” “e-cigarillos,” “e-pipes,” “e-hookahs,” “electronic nicotine delivery systems,” etc., are battery operated devices designed to deliver nicotine, flavor, and/or other substances through a vapor inhaled by the user.

The U.S. Surgeon General has declared that nicotine is as addictive as cocaine or heroin.

Use of electronic smoking devices has increased significantly in recent years, as evidenced by the fact that:

- Between 2011 and 2012 the percentage of all youth in grades 6 to 12 who had tried electronic smoking devices doubled;
- 6.8% of all youth between 6th and 12th grade report trying electronic smoking devices;
- 10% of high school students have tried electronic smoking devices;
- 9.3% of youth who have used electronic smoking devices have never smoked conventional cigarettes;
- Between 2010 and 2011, rates of both awareness and use of unregulated electronic smoking devices by adults also increased significantly.

Existing studies on electronic smoking devices' vapor emissions and cartridge contents have found a number of dangerous substances including:

- Chemicals known to the State of California to cause cancer such as formaldehyde, acetaldehyde, lead, nickel, and chromium;
- PM_{2.5}, acrolein, tin, toluene, and aluminum, which are associated with a range of negative health effects such as skin, eye, and respiratory irritation, neurological effects, damage to reproductive systems, and even premature death from heart attacks and stroke;
- Inconsistent labeling of nicotine levels in electronic smoking device products; and
- In one instance, diethylene glycol, an ingredient used in antifreeze and toxic to humans.

More than one study has concluded that exposure to vapor from electronic smoking devices may cause passive or secondhand vaping.

Some cartridges used by electronic smoking devices can be re-filled with liquid nicotine solution, creating the potential for exposure to dangerous concentrations of nicotine.

Clinical studies about the safety and efficacy of these products have not been submitted to the FDA for the over 400 brands of electronic smoking devices that are on the market and for this reason, consumers currently have no way of knowing:

- Whether electronic smoking devices are safe;
- What types or concentrations of potentially harmful chemicals the products contain; and
- What dose of nicotine the products deliver.

The World Health Organization has strongly advised consumers against the use of electronic smoking devices until they are “deemed safe and effective and of acceptable quality by a competent national regulatory body”.

The World Medical Association has determined that electronic smoking devices “are not comparable to scientifically-proven methods of smoking cessation” and that “neither their value as therapeutic aids for smoking cessation nor their safety as cigarette replacements is established”.

The State of California's Tobacco Education and Research Oversight Committee (TEROC) “opposes the use of e-cigarettes in all areas where other tobacco products are banned”.

A study published in the Journal of Environmental and Public Health suggests that electronic smoking devices “may have the capacity to ‘re-normalize’ tobacco use in a demographic that has had significant de-normalization of tobacco use previously”.

Electronic smoking devices often mimic conventional tobacco products in shape, size, and color, with the user exhaling a smoke-like vapor similar in appearance to the exhaled smoke from cigarettes and other conventional tobacco products.

The use of electronic smoking devices in smoke-free locations threatens to undermine compliance with smoking regulations and reverse the progress that has been made in establishing a social norm that smoking is not permitted in public places and places of employment.

Over 71 jurisdictions within California require retailers to obtain a license to sell electronic smoking devices and at least 62 local jurisdictions in California prohibit the use of electronic smoking devices in specific locations.

In accordance with similar health concerns, the state of California implemented Health and Safety Code section 119405, which prohibits the sale of electronic cigarettes to minors in order to protect their welfare and to reduce the chances of nicotine addiction in youth.

C. Declaration

Accordingly, the Alameda County board of supervisors finds and declares that the purposes of this chapter are: (A) to protect the public health and welfare by prohibiting smoking in public places and places of employment not under the jurisdiction of state law; (B) to enforce the state law prohibiting smoking in the workplace; (C) to guarantee the rights of nonsmokers to breathe smoke-free air, and to recognize that the need to breathe smoke-free air shall have priority over the desire to smoke; (D) to reduce addiction to nicotine and tobacco products by minors; and (E) to generally promote the health, safety, and welfare of all people in the county of Alameda against the health hazards and harmful effects of the use of tobacco products including electronic smoking devices.

6.72.020 Definitions.

The following words and phrases, whenever used in this chapter, shall be construed as defined in this section:

"Bar" means an area that is devoted to the serving of alcoholic beverages for consumption by guests on the premises and in which any food served is incidental. "Bar" does not include the dining areas of a restaurant, regardless of whether alcoholic beverages are served therein.

"Business" means any sole proprietorship, partnership, joint venture, corporation, or other business entity formed for profit-making purposes, including retail establishments where goods or services are sold as well as corporations and other entities where legal, medical, dental, engineering, architectural, or other professional services are delivered.

"Business vehicle" means automobile, truck or van, owned, leased or otherwise controlled by an employer, which is available, by advance request, reservation or otherwise, for the use, in the course of employment, of any employee or employees.

"Distribute" means to give, sell, deliver, dispense, issue, or cause or hire any person to give, sell, deliver, dispense, issue or offer to give, sell, deliver, dispense or issue, as part of an advertising plan or program.

"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.

"Employee" means any person who is employed by an employer in consideration for direct or indirect monetary wages or profit, and any person who volunteers his or her services for a nonprofit entity, and shall have the same meaning as the term "employee" as defined in Sections 3350 through 3352.94, inclusive, of the California Labor Code.

"Employer" means every person or public service corporation which has any natural person in service, and shall have the same meaning as the term "employer" in Section 3300 and Section 3301 of the California Labor Code.

"Enclosed area" means all space between a floor and ceiling that is enclosed on all sides by solid walls or windows (exclusive of door or passageways) which extend from the floor to the ceiling, including all space therein screened by partitions which do not extend to the ceiling or are not solid, "office landscaping" or similar structures.

"Gaming club" means any establishment where legal gambling, as defined in Section 19802(a) of the Business and Professions Code, is conducted, or bingo facility, as defined in Section 326.5 of the Penal Code, that restricts access to minors under eighteen (18) years of age.

"Place of employment" means any enclosed area under the control of a public or private employer in which employees normally meet or work during the course of

employment, including, but not limited to, work areas, employee lounges and restrooms, conference and classrooms, employee cafeterias and hallways. A private residence is not a "place of employment" unless it is used as a child care or health care facility.

"Public place" means any enclosed area to which the public is invited or in which the public is permitted, including, but not limited to, laundromats, public transportation facilities, reception areas, indoor shopping malls, theaters and waiting rooms.

"Reasonable distance" means a distance of at least twenty (20) feet to insure that occupants of a building and those entering or exiting the building are not exposed to secondhand smoke created by smokers outside of the building. The determination of the health officer or appropriate designee shall be final in any disputes relating to reasonable distance beyond twenty (20) feet for smoking outside of buildings regulated by this chapter.

"Restaurant" means any indoor and outdoor coffee shop, cafeteria, sandwich stand, private and public school cafeteria, and any other eating establishment which gives or offers for sale food to the public, guests, or employees, as well as kitchens in which food is prepared on the premises for serving elsewhere, including catering facilities, except that the term "restaurant" shall not include a cocktail lounge or tavern if said cocktail lounge or tavern is a "bar" as defined in this section.

"Retail tobacco store" means a retail store utilized primarily for the sale of tobacco products and accessories and in which the sale of other products is merely incidental.

"Sample" means a distribution to a member or members of the general public at no cost or at nominal cost for the purpose, in whole or in part, of promoting a tobacco product or electronic smoking device.

"Seller" shall mean any natural person, company, corporation, firm, partnership, organization, or other legal entity, who sells, dispenses, distributes or issues tobacco products or electronic smoking devices for commercial purposes.

"Service area" means any area designated to be or regularly used by one or more persons to receive or wait to receive a service, to enter a public place, or to make a transaction, whether or not such service includes the exchange of money, including but not limited to, ATMs, bank teller windows, telephones, ticket lines, bus stops, waiting rooms, restrooms, and taxi stands.

"Service line" means any line at which one or more persons are waiting for or receiving service of any kind, whether or not such service involves the exchange of money.

"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, inhaling, exhaling, burning or carrying any lighted cigar, cigarette, weed, plant, or other combustible substance in any manner or in any form.

"Sports arena" means sports pavilions, gymnasiums, health spas, boxing arenas, swimming pools, roller and ice rinks, bowling centers and other similar places where members of the general public assemble either to engage in physical exercise, participate in athletic competition, or witness sports events.

"Tobacco accessories" means cigarette papers or wrappers, pipes, holders of smoking materials of all types, cigarette rolling machines, and any other item designed primarily for the smoking or ingestion or chewing of tobacco products.

~~"Tobacco product" means: any substance containing tobacco leaf, including but not limited to cigarettes, cigars, smoking tobacco, and smokeless tobacco.~~

(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.

(c) 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.

"Vending machine" means any electronic or mechanical device or appliance, the operation of which depends upon insertion of money, whether in coin or in paper bill, or other thing representative of value, which dispenses or releases a product. ~~tobacco products, and/or tobacco accessories.~~

6.72.030 Prohibition of smoking in county facilities.

All enclosed facilities owned by the county of Alameda shall be subject to the provisions of this chapter. Smoking is prohibited in all enclosed facilities which the county of Alameda owns and/or operates, including, but not limited to, work areas,

employee lounges, conference rooms, employee cafeterias, private enclosed spaces and offices, and vehicles.

6.72.040 Sale prohibited.

The sale of tobacco products by any means, including vending machines, in facilities in which the county conducts its business is prohibited.

6.72.050 Prohibition of smoking in public places.

- A. Smoking shall be prohibited in all enclosed public places within the unincorporated areas of Alameda County, including, but not limited to, the following places:
1. All facilities owned or operated by the county of Alameda;
 2. Elevators;
 3. Buses, taxicabs, and other means of public transit under the authority of Alameda County, and ticket, boarding and waiting areas of public transit depots, including bus stops;
 4. Outdoor areas near any entrance or exit to any facility in which smoking is prohibited. Smokers must maintain a "reasonable distance" of at least twenty (20) feet from all such entrances, exits, windows, ventilation systems or any other means and to ensure that those indoors and those entering or leaving the building are not involuntarily exposed to secondhand tobacco smoke;
 5. All service areas and lines, indoor and outdoor;
 6. All areas available to and customarily used by the general public in all businesses and nonprofit entities patronized by the public, including but not limited to laundromats, indoor and outdoor dining areas of restaurants, hotels and motels, waiting rooms, hallways;
 7. Public areas of aquariums, galleries, libraries, museums, and other exhibits open to the public;
 8. Any facility used for exhibiting any motion picture, stage drama, musical recital or other similar performance, except when smoking is part of a stage production;
 9. Sports arenas and convention halls;
 10. Every room, chamber, place of meeting or public assembly, including school buildings under the control of any board, council, commission, committee, including joint committees, or agencies of the county or any political subdivision of the state to the extent such a place is subject to the jurisdiction of the county;
 11. Lobbies, hallways, and other common areas in apartment buildings, condominiums, mobilehome parks, retirement facilities, nursing homes, and other multiple-unit residential facilities;
 12. Restrooms, lobbies, hallways, and other common areas in multiple-unit commercial facilities;

13. Polling places;
14. Any other enclosed place open to the general public not regulated under the smoking restrictions in Section 6404.5 of the California Labor Code.

B. Notwithstanding any other provision of this section, any owner, operator, manager or other person who controls any establishment or facility may declare that entire establishment or facility as a nonsmoking establishment.

6.72.060 Prohibition of smoking in places of employment.

- A. It shall be the responsibility of employers to comply with smoking restrictions enumerated in Section 6404.5 of the California Labor Code and to provide a smoke-free workplace for all employees.
- B. Within ninety (90) days of the effective date of the ordinance codified in this chapter, each employer otherwise exempt from the smoke restrictions in Section 6404.5 of the California Labor Code having an enclosed place of employment located within the unincorporated areas of Alameda County shall adopt, implement, make known and maintain a written smoking policy which shall contain the following requirements: Smoking shall be prohibited in all enclosed facilities within a place of employment without exception. This includes common work areas, auditoriums, classrooms, conference and meeting rooms, private offices, elevators, hallways, medical facilities, cafeterias, employee lounges, stairs, restrooms, vehicles and all other enclosed facilities.
- C. The smoking policy shall be communicated to employees within three weeks of its adoption.
- D. All employers shall supply a written copy of the smoking policy upon request to any existing or prospective employee.

6.72.070 Reasonable distance.

Smoking shall occur at a reasonable distance of at least twenty (20) feet outside any enclosed area where smoking is prohibited to ensure that smoke does not enter the area through entrances, windows, ventilation systems or any other means to ensure that those indoors and those entering or leaving the building are not involuntarily exposed to secondhand ~~tobacco~~-smoke.

6.72.080 Where smoking not regulated.

- A. Notwithstanding any other provision of this chapter to the contrary, the following areas shall not be subject to the smoking restrictions of this chapter:
 1. Private residences, unless used as a child care or health care facility;
 2. Retail tobacco product stores that deal exclusively in the sale of tobacco products and accessories, ~~and smoking paraphernalia~~ unless minors are allowed access. If minor access is allowed, then smoking shall be prohibited;
 3. Twenty-five (25) percent of hotel and motel rooms rented to guests, provided that each hotel and motel designates not less than seventy-five

(75) percent of their guest rooms as nonsmoking rooms and removes ashtrays and matches from these rooms;

~~4. Bars and gaming clubs as defined by Section 6.72.020 of this chapter until January 1, 1998, the date by which the standards board or Environmental Protection Agency must adopt standards prescribed for reducing employee exposure to ETS in order to permit continuance of the exemption for bars and taverns and gaming clubs as stated in Section 6404.5 of the California Labor Code as amended on February 23, 1996.~~

- B. Notwithstanding any other provision of this section, any owner, operator, manager or other person who controls any establishment or facility may declare that entire establishment or facility as a nonsmoking establishment.

6.72.090 Posting of signs.

- A. "No Smoking" signs or "Smoke Free" signs, with letters of no less than one inch in height, or the international "No Smoking" symbol (consisting of a pictorial representation of a burning cigarette enclosed by a red circle with a red bar across it) shall be clearly, sufficiently and conspicuously posted in or at the entrance of every building or other place where smoking is prohibited by this chapter, by owner, operator, manager or other person having control of such building or other place. The "No Smoking" signs shall include a citation of the ordinance number, and the telephone number to report violations. For purposes of this chapter, the general services agency shall be responsible for the posting of signs in regulated facilities in the county of Alameda.
- B. Every public place and workplace covered under this chapter shall have posted at every entrance a conspicuous sign clearly stating that smoking is prohibited. The "No Smoking" signs shall follow the regulation listed in subsection A of this section.
- C. All ashtrays and other smoking paraphernalia shall be removed from any area where smoking is prohibited including outdoor areas such as doorways where smoking is prohibited by this chapter by the owner, operator, manager or other person having control of such area.
- D. The owner, operator, manager or other person having control of any establishment that continues to allow smoking as permitted in this chapter shall conspicuously post in, at every entrance of their business adjacent to any warning sign required under the California Safe Drinking Water and Toxic Enforcement Act of 1986 (Prop. 65), a "Smoking Permitted" sign.

6.72.100 Enforcement.

- A. This chapter, and those provisions of state law which provide for complete one hundred (100) percent smoking prohibition in enclosed places of employment under Section 6404.5 of the California Labor Code, shall be enforced by the county health officer or appropriate designee.
- B. Notice of the provisions set forth in this chapter shall be given to all applicants for a business license in the unincorporated areas of Alameda County.

- C. Any citizen who desires to register a complaint under this chapter may initiate enforcement with the County Department of Health or appropriate designee.
- D. The health department shall require, while an establishment is undergoing otherwise mandated inspections, a "self-certification" from the owner, manager, operator, or other person having control of such establishment that all requirements of this chapter have been complied with. Citations shall be issued by the Alameda County sheriff's department at the direction of the health officer.
- E. Any owner, manager, operator or employee of any establishment regulated by this chapter may inform persons violating this chapter of the appropriate provisions thereof.
- F. The department of health shall file a complaint with the California Division of Occupational Safety and Health, Department of Industrial Relations against any employer who has been found guilty of a third violation within twelve (12) months of the smoking restrictions in Section 6404.5 of the California Labor Code.
- G. Notwithstanding any other provision of this chapter, a private citizen may bring legal action to enforce this chapter.

6.72.110 Violations and penalties.

- A. It is unlawful for any person who owns, manages, operates or otherwise controls the use of any premises subject to regulation under this chapter to fail to comply with any of its provisions.
- B. It is unlawful for any person to smoke in any area where smoking is prohibited by the provisions of this chapter.
- C. Any person who violates any provision of this chapter shall be guilty of a misdemeanor, punishable by:
 1. A fine of five hundred dollars (\$500.00) for a first violation;
 2. A fine of one thousand dollars (\$1,000.00) for a subsequent violation.

6.72.120 Nonretaliation.

No person or employer shall discharge, refuse to hire or in any manner retaliate against any employee or applicant for employment because such employee or applicant exercises any right to a smoke-free environment afforded in this chapter.

6.72.130 Other applicable laws.

This chapter shall not be interpreted or construed to permit smoking where it is otherwise restricted by other applicable laws or regulations.

6.72.140 Severability.

If any provision, clause, sentence or paragraph of this chapter or the application thereof to any person or circumstances shall be held invalid, such invalidity shall not affect the other provisions of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are declared severable.

6.72.150 Public education.

The health officer or appropriate designee shall engage in a continuing program to explain and clarify the purposes and requirements of this chapter to citizens affected by it, and to guide owners, operators and managers in their compliance with it. Such program may include publication of a brochure for affected businesses and individuals explaining the provisions of this chapter.

SECTION IV

- 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 _____, 2014, 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

By: _____

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

By: _____
Farand C. Kan
Deputy County Counsel