

ORDINANCE NO. 10699 (N.S.)

AN ORDINANCE ADDING AND REPEALING PROVISIONS IN THE SAN DIEGO COUNTY CODE REGARDING THE SALE OF TOBACCO PRODUCTS IN THE UNINCORPORATED AREA OF SAN DIEGO COUNTY

The Board of Supervisors of the County of San Diego ordains as follows:

Section 1. Section 21.101 of the San Diego County Code is amended as follows:

SEC. 21.101. LICENSES, PERMITS AND REGISTRATION REQUIRED.

This chapter establishes a Uniform Licensing Procedure and only applies to the activities that require licenses, permits or registration under sections 21.102, 21.103, and 21.103.5 unless this code provides that this chapter or any portion of this chapter regulates other activities. For purposes of this chapter “license” means a license, permit or registration and “licensee” means a licensee, permittee, or registrant. No person other than an applicant for a license shall have any right to challenge a decision to grant, deny, suspend, or revoke a license. It shall be unlawful for any person to engage in any activity listed in sections 21.102, 21.103, and 21.103.5 within the unincorporated area of the County of San Diego:

- (a) Without first having obtained a license from the appropriate Issuing Officer as described below;
- (b) After a license required by this chapter has expired or been suspended or revoked;
- (c) Contrary to terms of the license issued pursuant to this chapter.

Section 2. Section 21.103.5 of the San Diego County Code is added as follows:

SEC 21.103.5. LICENSE REQUIRED FROM THE HEALTH OFFICER.

Tobacco Retailing is an activity for which the Health Officer is the Issuing Officer.

Section 3. Title 2, Division 1 of the San Diego County Code is amended to add Chapter 26 as follows:

CHAPTER 26. TOBACCO RETAILING.

SEC. 21.2601. FINDINGS AND INTENT.

- (a) Smoking is the leading cause of preventable death in the United States and California. Smoking kills more than 480,000 Americans each year, including secondhand smoke that kills approximately 41,000 Americans who do not smoke. Three-fifths of lifelong smokers die from smoking-related diseases, including many forms of cancer, heart disease, respiratory diseases, and other health disorders.
- (b) The National Survey on Drug Use and Health in 2017 found that four-fifths of people who smoke become daily smokers before turning 21. The developing adolescent brain is especially vulnerable to the effects of nicotine.
- (c) Although dropping from its 2019 peak, the 2020 National Youth Tobacco Survey, released by the Centers for Disease Control and Prevention and Food and Drug Administration, showed that 3.6 million American middle and high school students reported current e-cigarette use, with now 19.6 percent of high school students reporting using e-cigarettes within the past thirty days.

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- (d) Flavored tobacco products, such as fruit, menthol, mint, candy, or dessert, hide the harshness of nicotine, making initiation of nicotine use easier among youth.
- (e) California retailers continue to sell tobacco to underage consumers. The latest available data, reported in 2017, evidenced that 9.3 percent of high school students in California buy their own electronic cigarettes from a store, and 17.9 percent of California tobacco retailers unlawfully sold tobacco products to minors in 2019. In February 2020, a young adult tobacco purchase survey was conducted in the unincorporated area of the County and 20 percent of retailers sold tobacco products to underage youth.
- (f) Studies demonstrate that retailer compliance with and active enforcement of minimum age laws reduces youth uptake of tobacco. Review of 42 California communities with strong tobacco retailer licensing ordinances by September 2018 found that an average of 34 percent of retailers sold to minors before the tobacco retail license programs were in place, but that the rate of illegal sales dropped to 9 percent after such license programs were implemented.
- (g) Tobacco consumers, especially youth, are sensitive to prices. Higher prices discourage experimentation and initiation, encourage attempts to quit and reduce consumption among those who are unable to quit. In 2014, the Surgeon General concluded that the ideal minimum price for a pack of cigarettes to curb youth use, based on global evidence, was at least ten dollars. The tobacco industry uses wide-ranging price discounting strategies, such as coupons and multiple-package discounts, to encourage continued consumption of their products.
- (h) While the 2009 federal Family Smoking Prevention and Tobacco Control Act requires cigarettes be sold in packages of at least twenty, neither federal nor California law establishes a minimum pack size for the sale of individual cigars and little cigars, which have increased in relative popularity since the 2009 federal minimum pack size for cigarettes. Many retailers sell cigars and little cigars individually or in packs of two or three, making them cheaper and more appealing to youth. An analysis of nationwide sales showed that a 10 percent increase in cigar prices was associated with decreased sales by over 25 percent.
- (i) Neither federal nor California law set a minimum price for tobacco products at retail outlets. Minimum price markups and related laws in other states have been shown to be effective at increasing the price of cigarettes but may remain vulnerable to price manipulation by the tobacco industry without attention to coupons and discounts. A single pod for certain electronic smoking devices and its competitors often contain roughly as much nicotine as a pack of cigarettes.
- (j) By selling tobacco products, pharmacies reinforce positive social perceptions of smoking, convey tacit approval of tobacco use and implicitly downplay the dangers of smoking. Since 2010, the American Pharmacist Association has supported policies to discontinue tobacco sales at pharmacies.
- (k) Smokeless tobacco products can cause numerous diseases, especially of the mouth, throat, and pancreas.
- (l) Youth gain access to tobacco products through stores, the Internet, and social sources (e.g., friends, classmates). Eliminating youth access requires action on all three fronts. State and federal action is needed, but local jurisdictions can prohibit delivery sales.
- (m) Higher density and proximity of tobacco retailers influence smoking behaviors, including the number of cigarettes smoked per day. Adults who smoke have a harder time quitting when residential proximity to tobacco retailers is closer and density is higher.

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- (n) Congress has expressed that it is “the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.”
- (o) For the reasons stated above, sales of tobacco products to people below the age of legal purchase is a public nuisance.
- (p) It is the intent of the Board to provide for the public health, safety, and welfare, by reducing illegal sales to people below the age of legal purchase.

SEC. 21.2602. DEFINITIONS.

For the purposes of this chapter:

- (a) “Cigar” means any roll of tobacco (other than a cigarette) that is wrapped entirely or in part in tobacco or any substance containing tobacco and weighing more than three pounds per thousand.
- (b) “Cigarette” means: (1) any roll of tobacco wrapped in paper or in any substance not containing tobacco; and (2) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler or its packaging and labeling, is likely to be offered to or purchased by, consumers as a cigarette described herein.
- (c) “Coupon” means any voucher, rebate, card, paper, note, form, statement, ticket, image or other issue, whether in paper, digital or other form, used for commercial purposes to obtain an article, product, service or accommodation without charge or at a discounted price.
- (d) “Delivery sale” means the commercial transfer of tobacco products to a consumer at a location not licensed pursuant to this chapter.
- (e) “Distribution” means to give tobacco products or tobacco promotional items to the general public at no cost, or at nominal cost, or to give coupons, coupon offers, gift certificates, gift cards or other similar offers, or rebate offers for tobacco products to the general public at no cost or at nominal cost.
- (f) “Electronic smoking device” is defined as an electronic and/or battery-operated device, which can be used to deliver an inhaled dose of nicotine or other substances whether manufactured, distributed, marketed or sold as an electronic cigarette, an electronic cigar, an electronic cigarillo, an electronic hookah, an electronic pipe or any other product name or descriptor. For the purposes of this chapter, “electronic smoking device” does not include any product that the Food and Drug Administration has approved for use as a tobacco cessation product or for other therapeutic purposes where the product is marketed and sold solely for such an approved purpose.
- (g) “Electronic smoking device starter kit” is defined as a combined package of an electronic smoking device and materials consumed during the use of the device.
- (h) “Flavored shisha tobacco product” means any shisha tobacco product that contains a taste or smell, other than the taste or smell of tobacco, that is distinguishable by an ordinary consumer either prior to or during the consumption of the product, including, but not limited to, any taste or smell relating to chocolate, cocoa, menthol, mint, wintergreen, vanilla, honey, fruit or any candy, dessert, alcoholic beverage, herb or spice.
- (i) “Flavored tobacco product” means any tobacco product that contains a taste or smell, other than the taste or smell of tobacco, that is distinguishable by an ordinary consumer

either prior to or during the consumption of the product, including, but not limited to, any taste or smell relating to chocolate, cocoa, menthol, mint, wintergreen, vanilla, honey, fruit or any candy, dessert, alcoholic beverage, herb or spice.

- (j) "Full retail price" means the price listed for a tobacco product on its packaging or on any related shelving, advertising or display where the tobacco product is sold or offered for sale, plus all applicable taxes and fees if such taxes and fees are not included in the listed price.
- (k) "Gift" means to give or share a tobacco product for a noncommercial purpose.
- (l) "Hookah" means a type of waterpipe, used to smoke shisha or other tobacco products, with a long flexible tube for drawing aerosol through water. Components of a hookah may include heads, stems, bowls, and hoses.
- (m) "Hookah tobacco retailer" means a tobacco retailer that is engaged in the retail sale of shisha tobacco products, hookah, and hookah smoking accessories.
- (n) "Labeling" means written, printed, pictorial, or graphic matter upon a tobacco product or any of its packaging.
- (o) "Little cigar" means any roll of tobacco (other than a cigarette) that is wrapped entirely or in part in tobacco or any substance containing tobacco and weighing no more than three pounds per thousand. "Little cigar" includes, but is not limited to, tobacco products known or labeled as small cigar, little cigar, or cigarillo.
- (p) "Loose leaf tobacco" consists of cut or shredded pipe tobacco, usually sold in pouches, excluding any tobacco product which, because of its appearance, type, packaging, or labeling, is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes, including roll-your-own cigarettes.
- (q) "Manufacturer" means any person, including any repacker or relabeler, who manufactures, fabricates, assembles, processes, or labels a tobacco product; or imports a finished tobacco product for sale or distribution into the United States.
- (r) "Packaging" means a pack, box, carton, or container of any kind, or, if no other container, any wrapping, including cellophane, in which a tobacco product is sold or offered for sale to a consumer.
- (s) "Pharmacy" means any retail establishment as defined in section 4037 of the California Business and Professions Code.
- (t) "Premium cigar" means any cigar that is handmade, is not mass produced by use of mechanization, has a wrapper that is made entirely from whole tobacco leaf, and has a wholesale price of no less than \$12.00. A premium cigar does not have a filter, tip, or nontobacco mouthpiece and is capped by hand.
- (u) "Private smokers' lounge" has the meaning set forth in section 6404.5 of the California Labor Code.
- (v) "Retail location" means a building from which tobacco products are sold at retail.
- (w) "Retail or wholesale tobacco shop" has the meaning set forth in section 6404.5 of the California Labor Code.
- (x) "Sale" or "Sell" means any transfer of, exchange of, barter with or offer for the sale of a tobacco product, in any manner or by any means whatsoever.
- (y) "Self-service display" means the open display or storage of tobacco products in a manner that is physically accessible in any way to the general public without the assistance of the retailer or employee of the retailer and a direct face-to-face transfer between the purchaser and the retailer or employee of the retailer. A vending machine is a form of self-service display.

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- (z) "Shisha tobacco product" means a tobacco product smoked or intended to be smoked in a hookah. "Shisha tobacco product" includes, and may be referred to as, hookah tobacco, waterpipe tobacco, maassel, narghile, and argileh. "Shisha tobacco product" does not include any electronic devices, such as an electronic hookah, electronic cigarette, or electronic tobacco product.
- (aa) "Smoking" has the meaning set forth in section 22950.5 of the California Business and Professions Code.
- (bb) "Tobacco product" means a tobacco product as defined in paragraph (8) of subdivision (a) of Health and Safety Code section 104495, as that provision may be amended from time to time.
- (cc) "Tobacco product flavor enhancer" means a product designed, manufactured, produced, marketed, or sold to produce a flavor when used with a tobacco product.
- (dd) "Tobacco retailer" means a person who engages in the sale of tobacco products to consumers.
- (ee) "Tobacco Retailing" shall mean engaging in the activities of a tobacco retailer. This definition is without regard to the quantity of tobacco products sold, offered for sale, exchanged, or offered for exchange.

SEC. 21.2603. GENERAL REQUIREMENTS AND PROHIBITIONS.

- (a) TOBACCO RETAILER'S LICENSE REQUIRED. Tobacco retailing requires a license for which the Health Officer, or designee, is the Issuing Officer.
- (b) APPLICATION OF UNIFORM LICENSING PROCEDURE. Except where inconsistent with this chapter, the Uniform Licensing Procedure set forth in Title 2, Division 1, Chapter 1 of the code shall apply.
- (c) LAWFUL BUSINESS OPERATION. In the course of tobacco retailing or in the operation of the business or maintenance of the location for which a license issued, it shall be a violation of this chapter for a licensee, or any of the licensee's agents or employees, to violate any local, State or federal law applicable to tobacco products, tobacco retailing, or on-premises tobacco use.
- (d) DISPLAY OF LICENSE. Each tobacco retailer licensee shall display its license pursuant to section 21.111 of the code at the fixed location for which the license was granted.
- (e) MINIMUM LEGAL AGE OF SALE AND GIFT. No tobacco retailer shall sell or gift a tobacco product to a person under the age of legal age of purchase for tobacco products.
- (f) POSITIVE IDENTIFICATION REQUIRED. No person engaged in tobacco retailing shall sell a tobacco product to another person who is under the age of 30 years without first examining the identification of the recipient to confirm that the recipient is at least the minimum age for sale of tobacco products. For a retail or wholesale tobacco shop, or accompanying private smoker's lounge, such age verification shall be required for entry.
- (g) SELF-SERVICE DISPLAYS PROHIBITED. Tobacco retailing by means of a self-service display is prohibited.
- (h) ONSITE SALES. All sales of tobacco products shall be conducted in-person at the licensed location. Each location requires a separate license. It shall be a violation of this chapter for any tobacco retailer or any of the tobacco retailer's agents or employees to make a delivery sale of tobacco products or to knowingly or recklessly sell or provide tobacco products to any person that intends to make a delivery sale of the tobacco product to a consumer in the unincorporated area of the County.

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- (i) **MINIMUM CLERK AGE.** No tobacco retailer may permit an employee under 18 years of age to handle or sell tobacco products unless under the continuous supervision of a person 21 years of age or older.

SEC. 21.2604. SALE OF FLAVORED TOBACCO PRODUCTS PROHIBITED.

- (a) A tobacco retailer, or any of the tobacco retailer's agents or employees, shall not sell, offer for sale, or possess with the intent to sell or offer for sale, a flavored tobacco product or a tobacco product flavor enhancer.
- (b) There is a rebuttable presumption that a tobacco product is a flavored tobacco product if a manufacturer or any of the manufacturer's agents or employees, in the course of their agency or employment, has made a statement or claim directed to consumers or to the public that the tobacco product has or produces a flavor other than tobacco, including, but not limited to, text, color, images, or all, on the product's labeling or packaging that are used to explicitly or implicitly communicate that the tobacco product has or produces a flavor other than tobacco.
- (c) This section shall not apply to the sale of flavored shisha tobacco products by a hookah tobacco retailer if all of the following conditions are met:
 - (1) The hookah tobacco retailer has a valid license to sell tobacco products issued pursuant to Chapter 2 (commencing with section 22971.7) of Division 8.6 of the California Business and Professions Code.
 - (2) The hookah tobacco retailer does not permit any person under 21 years of age to be present or enter the premises at any time.
 - (3) The hookah tobacco retailer shall operate in accordance with all relevant state and local laws relating to the sale of tobacco products.
 - (4) If consumption of tobacco products is allowed on the premises of the hookah tobacco retailer, the hookah tobacco retailer shall operate in accordance with all state and local laws relating to the consumption of tobacco products on the premises of a tobacco retailer, including, but not limited to, section 6404.5 of the Labor Code.
- (d) This section shall not apply to loose leaf tobacco or premium cigars.

SEC. 21.2605. TOBACCO PRODUCT PRICING AND PACKAGING.

- (a) **PACKAGING AND LABELING.** No tobacco retailer shall sell any tobacco product to any consumer unless such product: (1) is sold in the original manufacturer's packaging intended for sale to consumers; (2) conforms to all applicable federal labeling requirements; and (3) conforms to all applicable child-resistant packaging requirements.
- (b) **DISPLAY OF PRICE.** The price of each tobacco product offered for sale shall be clearly and conspicuously displayed to indicate the price of the product.
- (c) **PROHIBITION OF TOBACCO COUPON REDEMPTION AND DISCOUNTS.** No tobacco retailer shall:
 - (1) Honor or redeem, or offer to honor or redeem, a coupon to allow a consumer to purchase a tobacco product for less than the full retail price.
 - (2) Sell any tobacco product to a consumer through a multiple-package discount, including cartons, or otherwise provide any such product to a consumer for less than the full retail price in consideration for the purchase of any tobacco product or any other item.
 - (3) Provide any free or discounted item to a consumer in consideration for the purchase

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- of any tobacco product.
- (4) Distribute promotional items or coupons for tobacco products.
- (d) **MINIMUM PACKAGE SIZE FOR CIGARS AND LITTLE CIGARS.** No tobacco retailer shall sell:
 - (1) Any cigar unless it is sold in a package of at least six cigars. This subsection shall not apply to a cigar that has a price of at least \$10.00 per cigar, including all applicable taxes and fees.
 - (2) Any little cigar unless it is sold in a package of at least twenty little cigars.
- (e) **MINIMUM PRICES FOR CIGARETTES, CIGARS, LITTLE CIGARS AND ELECTRONIC SMOKING DEVICES.** No tobacco retailer shall sell:
 - (1) Cigarettes at a price that is less than \$10.00 per package of 20 cigarettes, including all applicable taxes and fees.
 - (2) Cigars in a package at a price that is less than \$5.00 per cigar, including all applicable taxes and fees.
 - (3) Little cigars at a price that is less than \$10.00 per package of 20 little cigars, including all applicable taxes and fees.
 - (4) Electronic smoking devices at a price of less than \$20.00 per device, including all applicable taxes and fees.
 - (5) Child-resistant container of material to be consumed in the use of an electronic smoking device at a price of less than \$10.00 per unit, including all applicable taxes and fees. This price is applicable to any type of child-resistant liquid container packaging and applies per unit even if sold together. For example, a package of two liquid-containing cartridges must sell for \$20.00 or more, including all applicable taxes and fees.
 - (6) Electronic smoking device starter kits at a price of less than \$30.00 per kit, including all applicable taxes and fees.

SEC. 21.2606. LIMITS ON ELIGIBILITY FOR A TOBACCO RETAILER LICENSE.

- (a) **PHARMACIES.** No license may be issued to authorize tobacco retailing at a location with an onsite pharmacy.
- (b) **DENSITY.** The issuing of tobacco retailer licenses is limited as follows:
 - (1) After January 1, 2022, no new license may be issued to authorize tobacco retailing if the number of tobacco retailer licenses already issued equals or exceeds 330.
 - (2) After January 1, 2022, no new license may be issued within 500 feet of a tobacco retailer location already licensed pursuant to this chapter as measured by a straight line from the nearest point of the property line of the parcel on which the applicant's business is located to the nearest point of the property line of the applicant's parcel.
- (c) **MINIMUM AGE TO BE ISSUED A LICENSE.** No license may be issued to anyone under the minimum legal sales age to purchase tobacco.
- (d) **TRANSFER TO IMMEDIATE FAMILY MEMBER.** A tobacco retailer may transfer their license to their parent, child, spouse, or domestic partner for tobacco retailing at the same retail location. The transferee must be eligible to hold a tobacco retailer license.

SEC. 21.2607. COMPLIANCE MONITORING.

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- (a) Compliance with this chapter shall be monitored and may be enforced by the Issuing Officer, persons designated by the Issuing Officer, or any other person authorized by law.
- (b) The Issuing Officer, or designee, will both inspect each tobacco retailer and conduct a youth decoy operation at least once per 12-month period, and additionally as warranted. Nothing in this paragraph shall create a right of action for any tobacco retailer, or any other person against the Issuing Officer, the County, or its agents.

SEC. 21.2608. ADMINISTRATIVE PROCEDURES AND CIVIL PENALTIES.

- (a) **LICENSE MAY BE SUSPENDED OR REVOKED.** In addition to any other remedy authorized by law, a tobacco retailer's license may be suspended or revoked pursuant section 21.112 of the code as follows:
 - (1) Upon a finding by the Issuing Officer of a first violation of this chapter at a location, the license may be suspended for 30 days.
 - (2) Upon a finding by the Issuing Officer of a second violation of this chapter at a location within any five-year period, the license may be suspended for 60 days.
 - (3) Upon a finding by the Issuing Officer of a third violation of this chapter at a location within any five-year period, the license may be suspended for 90 days.
 - (4) Upon a finding by the Issuing Officer of a fourth violation of this chapter at a location within any five-year period, the license may be revoked.
- (b) The Issuing Officer may pursue any additional remedy for violation of this chapter including, but not limited to, administrative civil penalties pursuant to Title 1, Division 8, Chapter 2 of the code.
- (c) Any violation of this chapter may also be deemed a public nuisance and may be enforced by any remedy available for abatement of public nuisances.

SEC. 21.2609. EXCEPTIONS.

- (a) Nothing in this chapter shall be construed to prohibit the provision of tobacco products to any person as part of a noncommercial Native American practice or a lawfully recognized religious or spiritual ceremony or practice.
- (b) Nothing in this chapter shall be construed to penalize the purchase, use or possession of a tobacco product by any person under the legal age to purchase tobacco.

SEC. 21.2610 FEE FOR LICENSE.

- (a) The fee to issue or to renew a Tobacco Retailer's license shall be established from time to time by the Board of Supervisors. The fee shall be calculated so as to recover the cost of administration and enforcement of this Chapter, including, for example, issuing a license, administering the license program, retailer education, retailer inspection and compliance checks, documentation of violations, and prosecution of violators, but shall not exceed the cost of the regulatory program authorized by this section. All fees and interest upon proceeds of fees shall be used exclusively to fund the program. Fees are nonrefundable except as may be required by law.

Section 4. Repeal Chapter 8.6 of the San Diego County Code as of July 1, 2021.

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Section 5. Repeal Chapter 8.8 of the San Diego County Code on July 1, 2021.

Section 6. Effective Date. This ordinance shall take effect thirty (30) days after its adoption. Within fifteen (15) days after the date of adoption of this ordinance, a summary shall be published once with the name of those members voting for and against the same in a newspaper of general circulation published in San Diego County.


Section 7. Operative Date. This ordinance shall become operative on July 1, 2021.

APPROVED AS TO FORM AND LEGALITY

COUNTY COUNSEL

By: Kyle Sand

PASSED, APPROVED, AND ADOPTED by the Board of Supervisors of the County of San Diego this 08th day of December 2020.

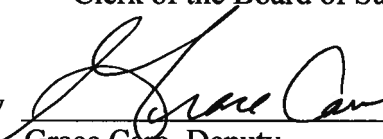


GREG COX
Chairman, Board of Supervisors
County of San Diego, State of California

The above Ordinance was adopted by the following vote:

AYES: Cox, Jacob, Fletcher, Desmond
NOES: Gaspar

ATTEST my hand and the seal of the Board of Supervisors this 08th day of December 2020.

ANDREW POTTER
Clerk of the Board of Supervisors
By 
Grace Caro, Deputy



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