

**FIRST AMENDED AND RESTATED AGREEMENT BETWEEN
THE COUNTY OF SANTA CLARA
AND CITY OF CUPERTINO FOR
A TOBACCO RETAIL PERMIT PROGRAM**

This First Amended and Restated Agreement (“Agreement”) is entered into by and between the County of Santa Clara (“County”) and City of Cupertino (“City”) relating to administration and enforcement of a tobacco retail permit program in the City of Cupertino. County and City may be referred to in this Agreement individually as a “Party” and collectively as “Parties.”

Background / Purpose

In 2010, the County added Chapter XXIII to Division A18 of its Ordinance Code (“Chapter XXIII”), thereby establishing a permit requirement for retailers of tobacco products in the unincorporated areas of the County of Santa Clara. The County has since expanded the scope of Chapter XXIII and modified provisions therein. The City has adopted City Code Chapter 5.50 to mirror the provisions of Chapter XXIII in their entirety, effective July 1, 2020, and intends to continue updating City Code Chapter 5.50 to maintain consistency with Chapter XXIII. The City and County intend for the County to administer and enforce the City’s tobacco retail permit program (as described in City Code Chapter 5.50) within the City, except as otherwise provided in this Agreement. The County intends to cite violators of the City’s Municipal Code Chapter 5.50 pursuant to this Agreement. Terms used in this Agreement, such as, but not limited to, “tobacco products” and “retailer,” shall be interpreted in accordance with Chapter XXIII and City Code Chapter 5.50.

Agreement

The Parties agree as follows:

1. Designation

The City hereby designates the County of Santa Clara’s Department of Environmental Health and any agency or person designated by the Director of the Department of Environmental Health to enforce or administer the City Ordinance. They shall act as the “Department”, as defined in section 5.50.020(b) of the City Ordinance.

2. Scope of Work

Each Party shall perform the work as described in Exhibit A, attached hereto and incorporated herein by this reference.

3. Legislative Consistency

The County’s administration and enforcement under this Agreement is contingent upon the City’s adoption and maintenance of a City Ordinance that is the same as the County Ordinance in all material respects.

- 3.1 Within 90 days of the County’s adoption of any material amendment to the County Ordinance, the City’s governing body shall consider and vote upon

an amendment to the City Ordinance that is the same as the County's amendment in all material respects. If the City does not adopt such an amendment within 90 days of the County's amendment to the County Ordinance, the County may, in its sole discretion, immediately terminate this Agreement by sending written notice to the City.

- 3.2 If the City wishes to amend the City Ordinance other than to conform to the County's prior amendment of the County Ordinance as set forth in Paragraph 3.1 above, the City shall provide the County with the full text of the proposed amendment 120 days prior to adoption of such an amendment. If the City adopts an amendment to the City Ordinance other than to conform in all material respects to the County's prior amendment of the County Ordinance, the County may, in its sole discretion, immediately terminate this Agreement by sending written notice to the City.
- 3.3 The County shall have no responsibility for administering or enforcing any provisions of the City Ordinance that are in addition to or otherwise materially different from the County Ordinance.

4. Relationship of Parties / Independent Contractors

Each Party shall perform all work described herein as an independent contractor and not as an officer, agent, servant or employee of the other Party. None of the provisions of this Agreement are intended to create, nor shall be deemed or construed to create, any relationship between the Parties other than that of independent parties contracting with each other for purpose of effecting the provisions of this Agreement. The Parties are not, and shall not be construed to be in a relationship of joint venture, partnership or employer-employee. Neither Party has the authority to make any statements, representations or commitments of any kind on behalf of the other Party, or to use the name of the other Party in any publications or advertisements, except with the written consent of the other Party or as is explicitly provided herein. Each Party shall be solely responsible for the acts and omissions of its officers, agents, employees, contractors, and subcontractors, if any.

5. Term of Agreement

This Agreement is effective from the date that this Agreement is executed by all Parties, until terminated in accordance with this Agreement.

6. Payment

The City shall adopt, by reference, the County's fee schedule for annual tobacco retail permits and tobacco retail permit applications. All annual permit fees and application fees for the tobacco retail permit program shall be collected and retained by the County.

The County shall advise City of the initial permit fee and application fee necessary to cover County's anticipated costs under this Agreement. Thereafter, the County shall

provide notice to the City and tobacco retail permit holders in the City of any increases or decreases in the cost of the County's work under this Agreement and any need to revise permit fees and/or application fees accordingly.

7. Termination

Except as provided in paragraphs 3.1 and 3.2 above, which allow for immediate termination in the specified circumstances, either Party may terminate this Agreement for any reason upon ninety (90) days' written notice. Upon service of a termination notice, the Parties shall use their best efforts to develop a mutually-agreeable plan for transition of the County's responsibilities to the City. Upon termination of this Agreement, the City will be responsible for replacing the County-issued permits.

8. Indemnification and Insurance

In lieu of and notwithstanding the pro rata risk allocation, which might otherwise be imposed between the Parties pursuant to Government Code Section 895.6, the Parties agree that all losses or liabilities incurred by Party shall not be shared pro rata but, instead, County and City agree that, pursuant to Government Code Section 895.4, each of the Parties hereto shall fully indemnify and hold each of the other Parties, their officers, board members, employees, and agents, harmless from any claim, expense or cost, damage or liability imposed for injury (as defined in Government Code Section 810.8) occurring by reason of the negligent acts or omissions or willful misconduct of the indemnifying party, its officers, employees or agents, under or in connection with or arising out of any work, authority or jurisdiction delegated to such party under this Agreement. No party, nor any officer, board member or agent thereof shall be responsible for any damage or liability occurring by reason of the negligent acts or omissions or willful misconduct of the other Parties hereto, their officers, board members, employees, or agents, under or in connection with or arising out of any work authority or jurisdiction delegated to such other Parties under this Agreement.

Without limiting the indemnification both Parties shall maintain or cause to be maintained the following insurance coverage: (1) a policy of commercial general liability with limits of liability not less than one million dollars (\$1,000,000) per occurrence and two million dollars (\$2,000,000) annual aggregate; (ii) a policy of workers' compensation providing statutory coverage; (iii) a policy of professional or public officials errors and omissions liability with limits of liability not less than one million dollars (\$1,000,000) per occurrence/aggregate; and (iv) such other insurance or self-insurance as shall be necessary to insure it against any claim or claims for damages arising under the Agreement. Each Party's insurance afforded by the commercial general liability policy shall be endorsed to provide coverage to the other Party as an additional insured. A Certificate of Insurance certifying that coverage as required herein has been obtained to the other Party. The requirements of this section may be satisfied by the provision of similar coverage through a self-insurance program.

9. Compliance with All Laws, Rules, Regulations, Policies and Procedures

The Parties shall comply with all applicable federal, state and local laws, rules, regulations, policies and procedures.

10. Monitoring / Records

10.1 Monitoring

Each Party shall permit the other Party to monitor its performance of this Agreement. To the extent permitted by law, such monitoring may include, but not be limited to, audits and review of records related to this Agreement. Upon request, a Party shall provide the other Party with access to facilities, financial and employee records that are related to the purpose of the Agreement, except where prohibited by federal, state or local laws, regulations or rules. Monitoring shall be permitted at any time during normal business hours upon no less than 10 business days advance notice and may occur up to one year following termination of the Agreement.

Each Party shall designate a project director/coordinator responsible for overseeing that Party's performance of this Agreement. Each Party shall notify the other Party in writing of the designation of the project director/coordinator and of any change thereto.

10.2 California Public Records Act

The Parties are public agencies subject to the disclosure requirements of the California Public Records Act ("CPRA"). In the event of a CPRA request for information related to this Agreement, each Party will use its best efforts to notify the other Party before such disclosure.

11. Representations and Warranties

11.1 Conflict of Interest

Each Party shall comply, and require its subcontractors to comply, with all applicable (i) requirements governing avoidance of impermissible client conflicts; and (ii) federal, state and local conflict of interest laws and regulations including, without limitation, California Government Code section 1090 et. seq., the California Political Reform Act (California Government Code section 87100 et. seq.) and the regulations of the Fair Political Practices Commission concerning disclosure and disqualification (2 California Code of Regulations section 18700 et. seq.). Failure to do so constitutes a material breach of this Agreement and is grounds for immediate termination of this Agreement by either Party.

11.2 Authority

Each individual executing this Agreement on behalf of a Party represents that he or she is duly authorized to execute and deliver this Agreement on that Party's behalf.

12. Assignment, Delegation, Subcontracting

Neither Party may assign any of its rights, delegate any of its duties or subcontract any portion of its work or business under this Agreement without the prior written consent of the other Party, which such other Party may withhold in its sole and absolute discretion. No assignment, delegation or subcontracting will release a Party from any of its obligations or alter any of its obligations to be performed under the Agreement.

13. Governing Law, Jurisdiction and Venue

This Agreement shall be construed and its performance enforced under California law. In the event that suit shall be brought by either Party to this Agreement, the Parties agree that venue shall be exclusively vested in the state courts of the County of Santa Clara or, if federal jurisdiction is appropriate, exclusively in the United States District Court for the Northern District of California, in San Jose, California.

14. Waiver

No delay or failure to require performance of any provision of this Agreement shall constitute a waiver of that provision as to that or any other instance. Any waiver granted by a Party must be in writing, and shall apply to the specific instance expressly stated.

15. Notice

Any notice required to be given by either Party, or which either Party may wish to give, shall be in writing and served either by personal delivery or sent by certified or registered mail, postage prepaid, addressed as follows:

If to COUNTY:

County of Santa Clara Public Health Department
Sara H. Cody, MD, Health Officer and Public Health
Director
976 Lenzen Avenue
San Jose, CA 95126

If to City:

City of Cupertino
Office of the City Manager
Pamela Wu, City Manager
10300 Torre Avenue
Cupertino, CA 95014

With a copy to:

Count of Santa Clara Public Health Department
Contracts and Compliance Unit
976 Lenzen Avenue, Second Floor
San Jose, CA 95126

Notice shall be deemed effective on the date personally delivered or, if mailed, three (3) days after deposit in the mail. Either Party may designate a different person and/or address for the receipt of notices by sending written notice to the other Party.

16. Third Party Beneficiaries

This Agreement does not and is not intended to confer any rights or remedies upon any person or entity other than the Parties.

17. Entire Agreement

This document represents the entire Agreement between the Parties with respect to the subject matter hereof. All prior negotiations and written and/or oral Agreements between the Parties with respect to the subject matter of this Agreement are merged into this Agreement.

18. Amendments

This Agreement may only be amended by a written instrument signed by the Parties.

19. Survival

The rights and duties under the following provisions shall survive the termination or expiration of this Agreement: Section 8 – Indemnification and Insurance; Section 10 – Monitoring/ Records; Section 11 – Conflicts of Interest; and Section 13 – Governing Law, Jurisdiction, and Venue, and in any instrument, certificate, exhibit, or other writing attached hereto and incorporated herein.

20. Severability

If any term, covenant, condition or provision of this Agreement, or the application thereof to any person or circumstance, shall to any extent be held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of the terms, covenants, conditions and provisions of this Agreement, or the application thereof to any person or circumstance, shall remain in full force and effect and shall in no way be affected, impaired or invalidated thereby.

21. Contract Execution

Unless otherwise prohibited by law or City or County policy, the Parties agree that an electronic copy of a signed contract, or an electronically signed contract, has the same force and legal effect as a contract executed with an original ink signature. The term “electronic copy of a signed contract” refers to a transmission by facsimile, electronic mail, or other electronic means of a copy of an original signed contract in a portable document format. The term “electronically signed contract” means a contract that is executed by applying an electronic signature using technology approved by the Parties.

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22. Counterparts

This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the dates written below.

Signed:

County of Santa Clara:

City of Cupertino

_____	_____	_____	_____
Gene Clark	Date	Pamela Wu	Date
Chief Procurement Officer		Cupertino City Manager	

Approved as to Form and Legality:

Attest:

_____	_____	_____	_____
Jenny Lam	Date	Kirsten Squarcia	Date
Deputy County Counsel		Cupertino City Clerk	

Approved:

Approved as to Form:

_____	_____	_____	_____
Sara H. Cody, MD	Date	Christopher Jensen	Date
Health Officer and Public Health Director		Cupertino City Attorney	

Approved:

_____	_____
Tina Cordero	Date
CSCHS Chief Fiscal Officer	

Exhibits to this Agreement:

Exhibit A: Scope of Work

EXHIBIT A

COUNTY OF SANTA CLARA AND CITY OF CUPERTINO TOBACCO RETAIL PERMIT PROGRAM – DESCRIPTION OF ROLES BY AGENCY

County of Santa Clara

Department of Environmental Health

1. Provide permit applications to all new retailers selling tobacco products in the City of Cupertino and issue permits to eligible applicants.
2. Ensure all existing tobacco retail permits that meet and maintain eligibility requirements are renewed on an annual basis.
3. Maintain database tracking system for all permitted tobacco retailers.
4. Provide list of permitted tobacco retailers to Public Health Department and City of Cupertino on an annual basis or more frequently as requested.
5. Collect required permit fees.
6. Meet with all related personnel to: (1) coordinate enforcement strategy; and (2) develop/maintain policy and procedure for enforcement.
7. Conduct at least one annual inspection of tobacco retailers to ensure compliance with local, state, and federal laws (except sales to underage individuals).
8. Meet with all related personnel as necessary to: (1) coordinate post compliance check strategy; and (2) next steps for violations.
9. Conduct follow up inspections, including for complaints received by the public, if necessary, for ensuring compliance with the tobacco retail permit ordinance. Provide and promote a clear process for the public to file and track complaints for potential violations of the tobacco retail permit ordinance.
10. Respond to requests for information from Cupertino tobacco retailers and the public regarding requirements under the tobacco retail permit ordinance.
11. Keep records of inspection outcomes for each tobacco retailer and provide annual inspection report summaries to a single point of contact at the Public Health Department.
12. Take enforcement action, as appropriate, to address violations.
13. Notify the City of Cupertino when Notice of Violations (NOVs) are issued as a result of violations of the ordinance.
14. Issue NOVs per Ordinance and ensure the tobacco retailer corrects violations and executes all required corrections identified in the NOV.
15. Coordinate with the Office of County Hearing Officer as appropriate on hearings, including to supply information on violations where an appeal is requested.

Public Health Department

1. Provide initial list of tobacco retailers to Department of Environmental Health to send out permit applications.
2. Obtain lists from California Department of Tax and Fee Administration and monitor for any new retailers.
3. Provide on-going technical assistance to Department of Environmental Health on ordinance requirements. This may include trainings for inspectors, research on flavored and emerging products, and development of educational materials for tobacco retailers.
4. Map any new retailers to ensure they meet eligibility requirements related to distance from schools, distance from existing tobacco retailers, and that under the ordinance the retailer meets all other eligibility requirements.

5. If a business seeking a tobacco retail permit is deemed ineligible by the County due to ordinance requirements, including attaching any relevant documentation supporting the basis for business ineligibility (e.g. maps of business location; documentation of pharmacy license status; copies of 3 or more NOV's issued in a 60-month period).
6. Proactively engage the business community so that they are aware of the TRL ordinance (e.g., effective date, requirements, fines/penalties) as appropriate.
7. Coordinate with the Office of County Hearing Officer and County Counsel as appropriate on appeals hearings.
8. Provide an annual update to appropriate Cupertino staff on enforcement and compliance activities and outcomes for the program.

County Sheriff's Office

1. Conduct undercover decoy operations at tobacco retailers to ensure compliance with sales of tobacco products to underage individuals laws. Prior to performing operations, notify Department of Environmental Health of planned operation dates.
2. Issue citations for any violations of tobacco sales to underage individuals laws (e.g. PC § 308(a), Cupertino Municipal Code Chapter 5.50, CA Business and Professions Code § 22958).
3. Immediately notify the Department of Environmental Health on outcomes of enforcement operations within 3-5 days of the performed operation. Provide copies of all documentation associated with the violation: a copy of the citation, written reports/records, or any additional evidence of violation (e.g. receipts, photo copies of the product) to the Department of Environmental Health.
4. Coordinate with the Office of County Hearing Officer and County Counsel as appropriate on appeals hearings.

City of Cupertino

City Manager's Office

1. Publish information on the City of Cupertino's website on the TRP ordinance, for example: where tobacco retailers can get more information on the requirements for selling tobacco in Cupertino, and how the public can file a complaint or request more information about the TRP ordinance.
2. Act as a resource to other cities that may be interested in a similar partnership with the County.
3. Update ordinance as needed in collaboration with City Attorney and the County Departments.