

ORDINANCE NO. _____

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF CUPERTINO
AMENDING CHAPTER 5.50 OF TITLE 5 (BUSINESS LICENSES AND
REGULATIONS) TO REGULATE THE SALE OF TOBACCO PRODUCTS**

The City Council of the City of Cupertino finds that:

1. Electronic cigarettes, also known as e-cigarettes, e-vaporizers, or electronic nicotine delivery systems, are battery-operated devices that people use to inhale an aerosol that typically contains nicotine. In addition to nicotine, the aerosol from e-cigarettes may include up to 31 other components, including formaldehyde, acetaldehyde, glycidol, acrolein, acetol, and diacetyl. Several of these compounds are likely carcinogens, and acrolein is a powerful irritant. (*See 2016 Surgeon General's Report: E-Cigarette Use Among Youth and Young Adults*, Centers for Disease Control and Prevention (2016), https://www.cdc.gov/tobacco/data_statistics/sgr/e-cigarettes/index.htm). These products can resemble traditional tobacco cigarettes (cig-a-likes), cigars, or pipes, or even everyday items like pens or USB memory sticks. (*See Vaping Devices (Electronic Cigarettes)*, National Institute for Drug Abuse (2020), <https://www.drugabuse.gov/publications/drugfacts/vaping-devices-electronic-cigarettes>). The pervasive use of these and other related electronic cigarette products has given rise to a massive and multifaceted public health crisis. In addition, the Surgeon General has declared the use of e-cigarettes among youth an “epidemic.” Nearly 1 in 3 Santa Clara County teens—31.6 percent—report that they have used an e-cigarette at least once. (*See Zhu S-H, et al., Tobacco use among high school students in Santa Clara County: Findings from the 2017-18 California Student Tobacco Survey*, Center for Research and Intervention in Tobacco Control (2019)).
2. The City Council of the City of Cupertino held a duly noticed public hearing on February 4th, 2020, and after considering all testimony and written materials provided in connection with that hearing introduced this ordinance and waived the reading thereof.

**NOW, THEREFORE, THE CITY COUNCIL OF THE OF CITY OF CUPERTINO
DOES ORDAIN AS FOLLOWS:**

SECTION 1. Adoption.

The Cupertino Municipal Code is hereby amended as set forth in Attachment A.

SECTION 2: Severability and Continuity.

The City Council declares that each section, sub-section, paragraph, sub-paragraph, sentence, clause and phrase of this ordinance is severable and independent of every other section, sub-section, paragraph, sub-paragraph, sentence, clause and phrase of this ordinance. If any section, sub-section, paragraph, sub-paragraph, sentence, clause or phrase of this ordinance is held invalid, or its application to any person or circumstance, be determined by a court of competent jurisdiction to be unlawful, unenforceable or otherwise void, the City Council declares that it would have adopted the remaining provisions of this ordinance irrespective of such portion, and further declares its express intent that the remaining portions of this ordinance should remain in effect after the invalid portion has been eliminated.

SECTION 3: California Environmental Quality Act.

This Ordinance is not a project under the requirements of the California Quality Act of 1970, together with related State CEQA Guidelines (collectively, "CEQA") because it has no potential for resulting in physical change in the environment. In the event that this Ordinance is found to be a project under CEQA, it is subject to the CEQA exemption contained in CEQA Guidelines section 15061(b)(3) because it can be seen with certainty to have no possibility that the action approved may have a significant effect on the environment. CEQA applies only to actions which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA. In this circumstance, the amendments to the City Code would have no or only a de minimis effect on the environment. The foregoing determination is made by the City Council in its independent judgment.

SECTION 4: Effective Date.

This Ordinance shall take effect thirty days after adoption as provided by Government Code Section 36937.

SECTION 5: Publication.

The City Clerk shall give notice of adoption of this Ordinance as required by law. Pursuant to Government Code Section 36933, a summary of this Ordinance may be prepared by the City Clerk and published in lieu of publication of the entire text. The City Clerk shall post in the office of the City Clerk a certified copy of the full text of the Ordinance listing the names of the City Council members voting for and against the ordinance.

INTRODUCED at a regular meeting of the Cupertino City Council on September 19, 2023 and **ENACTED** at a regular meeting of the Cupertino City Council on October 17, 2023 by the following vote:

Members of the City Council

AYES:

NOES:

ABSENT:

ABSTAIN:

SIGNED: _____ Hung Wei, Mayor City of Cupertino	_____ Date
ATTEST: _____ Kirsten Squarcia, City Clerk	_____ Date
APPROVED AS TO FORM: _____ Christopher D. Jensen, City Attorney	_____ Date

**Attachment A – An Ordinance of the City Council of the City of Cupertino
Amending Chapter 5.50 of Title 5 (Business Licenses and Regulations) to Regulate
the Sale of Tobacco Products**

The sections of the Cupertino Municipal Code set forth below are amended or adopted as follows:

*Text added to existing provisions is shown in bold double-underlined text (**example**) and text to be deleted is shown in strikethrough (~~example~~). Text in existing provisions is not amended or readopted by this Ordinance. Text in italics is explanatory and is not an amendment to the Code.*

Where the explanatory text indicates that a new section is being added to the City Code, the new section is shown in plain text.

This ordinance amends several portions of the Municipal Code. For ease of review, the amendments advancing the primary objective are presented first followed by conforming amendments. There is a separate heading in bold italics for each portion of the Code being amended. Each portion is shown beginning on a separate page.

1. Chapter 5.50 of Title 5 is amended as follows:

5.50.010 ~~Section Intent~~Purpose.

A. This ~~chapter~~Chapter is adopted to:

1. Ensure compliance with the business standards and practices of the eCity;
2. Encourage responsible retailing of tobacco products;
3. Discourage violations of laws related to tobacco products, especially those that prohibit or discourage the sale or distribution of tobacco products to persons under twenty-one;
4. Respond to a new wave of addiction to electronic cigarette products;
5. Reduce vulnerability to unexplained illnesses associated with electronic cigarette products; and

6. Protect the public health and welfare.

B. This ~~chapter~~Chapter does not expand or reduce the degree to which the acts regulated by federal or state law are criminally proscribed or alter the penalties provided by such laws.

5.50.020 Definitions.

For the purposes of this ~~chapter~~Chapter, the following definitions shall apply:

- A. "Arm's length transaction" means a sale in good faith and for valuable consideration that reflects the fair market value in the open market between two or more informed and willing parties, neither of which is under any compulsion to participate in the transaction. A sale between relatives, related companies or partners, or a sale for which a significant purpose is avoiding the effect of the violations of this ~~chapter~~Chapter is not an arm's length transaction.
- B. "Designee" means the agency or public entity selected or designated by the ~~e~~City to enforce and/or administer the provisions of this ~~chapter~~Chapter.
- C. "Distribute or Distribution" means the transfer, by any person other than a common carrier, of a tobacco product to another person for sale or personal consumption.
- D. "Electronic cigarette products" means any of the following products:
 - 1. Any device or delivery system that can be used to deliver nicotine in aerosolized or vaporized form, including, but not limited to, an e-cigarette, e-cigar, e-pipe, vape pen, or e-hookah.
 - 2. Any component, part, or accessory of such a device or delivery system that is used during its operation.

3. Any flavored or unflavored liquid or substance containing nicotine, whether sold separately or sold in combination with any device or delivery system that could be used to deliver nicotine in aerosolized or vaporized form.
4. Any product for use in an electronic nicotine device or delivery system whether or not it contains nicotine or tobacco or is derived from nicotine or tobacco.
5. Electronic cigarette products shall not include any battery, battery charger, carrying case, or other accessory not used in the operation of the device if sold separately. Electronic cigarette products shall 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 that product is marketed and sold solely for such approved use. See 21 U.S.C. § 387a. As used in this ~~subsection~~paragraph, nicotine does not include any food products as that term is defined pursuant to Section 6359 of the California Revenue and Taxation Code.

E. "Impound" means the legal control exercised by the City over the use, sale, disposal, or removal of any Tobacco Products.

E.F. "Ownership" means possession of a ten percent or greater interest in the stock, assets, or income of a business, other than a security interest for the repayment of debt. Notwithstanding any other definition in this code, an owner means a person who possesses ownership.

F.G. "Permit" means a valid permit issued by the Ceity or its designee to a person to act as a retailer.

G.H. "Retailer" means any person who sells, exchanges, or offers to sell or exchange, for any form of consideration, ~~tobacco products~~whether or not they possess a current permit. "Retailing" shall mean the doing of any of these things. This definition is without regard to the quantity of tobacco products sold, exchanged, distributed, or offered for sale or exchange.

H.I. "School" means a public or private elementary, middle, junior high, or high school.

I.J. "Tobacco product" means:

1. Any product subject to: 21 U.S.C. § 387 et seq. ("~~Subchapter~~chapter IX") of the Federal Food, Drug, and Cosmetic Act (See 21 U.S.C. § 387a(b)) ("products subject to [~~Subchapter~~chapter IX]"); or 21 C.F.R. §§ 1100.1- 1100.3 ("~~[tobacco products] are subject to Subchapter IX~~") and electronic cigarette products. Products subject to Subchapter IX include, but are not limited to, cigarettes, cigarette tobacco, roll-your-own tobacco, smokeless tobacco, cigars, pipe tobacco, and waterpipe tobacco, ~~and electronic cigarette products.~~ Products that are not subject to Subchapter IX include accessories of tobacco products, such as, but not limited to, ashtrays, spittoons, and conventional matches and lighters that solely provide an external heat source to initiate but not maintain combustion of a tobacco product.

5.50.030. Requirements and prohibitions.

- A. Permit required. It shall be unlawful for any person to act as a retailer of tobacco products in the city without first obtaining and maintaining a valid retailer permit pursuant to this ~~chapter~~Chapter for each location at which retailing occurs. Tobacco product retailing without a valid tobacco retailer permit is a nuisance as a matter of law.

- B. Lawful business operation. It shall be a violation of this ~~chapter~~ Chapter for any retailer to violate any local, state, or federal law applicable to tobacco products or the retailing of such products.
- C. Display of permit. Each current retailer permit shall be prominently displayed in a publicly visible place at the location identified in the permit.
- D. Notice of minimum age for purchase of tobacco products. Retailers shall post conspicuously, at each point of purchase, a notice stating that selling tobacco products to anyone under twenty-one years of age is illegal and subject to penalties. Such notice shall be subject to the approval of the city or its designee.
- E. Positive identification required. No retailer shall sell or distribute a tobacco product to another person ~~who appears to be under thirty years of age~~ without first examining the customer's identification to confirm that the customer is at least the minimum age required under state law to purchase and possess the tobacco product.
- F. Minimum age for individuals selling tobacco products. No individual who is younger than the minimum age established by state law for the purchase or possession of tobacco products shall engage in retailing.
- G. False and misleading advertising prohibited. A retailer without a permit:
1. Shall keep all tobacco products out of public view.
 2. Shall not display any advertisement relating to tobacco products that promotes the sale or distribution of such products from the retailer's location or that could lead a reasonable consumer to believe that tobacco products can be obtained at that location.

H. Limitation on storefront advertising. No more than fifteen percent of the square footage of the windows and clear doors of a physical storefront used for retailing tobacco products shall bear advertising or signs of any sort, and all advertising and signage shall be placed and maintained in a manner that ensures that law enforcement personnel have a clear and unobstructed view of the interior of the premises, including the area in which the cash registers are maintained, from the exterior public sidewalk or entrance to the premises. However, this latter requirement of this ~~subsection (H) paragraph~~ shall not apply to an establishment where there are no windows or clear doors, or where existing windows are located only at a height that precludes a view of the interior of the premises by a person standing outside the premises.

I. Flavored tobacco products.

1. No retailer shall sell a tobacco product containing, as a constituent or additive, an artificial or natural flavor or aroma (other than tobacco) or an herb or spice, including but not limited to strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, mint, menthol, or coffee, that is a characterizing flavor or aroma of the tobacco product, smoke or vapor produced by the tobacco product.
2. A tobacco product shall be subject to a rebuttable presumption that the product is prohibited by subparagraph (1) of this subsection (I) paragraph if:
 - a. The product's manufacturer or any other person associated with the manufacture or sale of tobacco products makes or disseminates public statements or claims to the effect that the product has or produces a characterizing flavor or aroma, other than tobacco; or

b. The product's label, labeling, or packaging includes a statement or claim— including any text and/or images used to communicate information— that the product has or produces a characterizing flavor or aroma other than tobacco.

J. Vending machines prohibited. No tobacco product shall be sold, offered for sale, or distributed to the public from a vending machine or appliance, or any other coin or token operated mechanical device designed or used for vending purposes, including, but not limited to, machines or devices that use remote control locking mechanisms.

K. Prohibition on sale or distribution of tobacco products to persons under twenty-one years. No retailer shall sell, offer for sale, or distribute any tobacco product to any individual who is under twenty-one years of age.

L. Prohibition on sale or distribution of electronic cigarette products. No person in the County/City, whether or not issued a Permit, shall sell or distribute electronic cigarette products. ~~No retailer shall sell or distribute electronic cigarette products.~~

5.50.040. Eligibility requirements for a permit.

A. No retailer permit may be issued to authorize retailing at or from other than a fixed location. For example, retailing by persons on foot or from vehicles is prohibited.

B. No retailer permit may be issued to authorize retailing at a temporary or recurring temporary event. For example, retailing at flea markets and farmers' markets is prohibited.

C. No retailer permit may be issued to authorize retailing at any location where the profession of pharmacy is practiced by a pharmacist licensed by the State of

California in accordance with the Business and Professions Code and where prescription drugs are offered for sale.

D. No retailer permit may be issued to authorize retailing at any location within one thousand feet of a school, as measured by a straight line between any point along the property line of any parcel on which a school is located and any point along the perimeter of the applicant's proposed business location; provided, however, that the prohibition contained in this ~~subsection (D)~~ paragraph shall not apply to the following:

1. Any retailer of tobacco products operating lawfully on the date immediately prior to this ~~e~~Chapter becoming effective provided that the retailer obtains a permit prior to July 1, 2020 pursuant to sections 5.50.050 and 5.50.060, and timely renews its permit pursuant to 5.50.070(B); and
2. Any lawfully operating retailer of tobacco products that would otherwise become ineligible to receive or renew a retailer permit due to the creation or relocation of a school.

E. No retailer permit may be issued to authorize retailing at a location which is within five hundred feet of a location occupied by another retailer, as measured by a straight line between any point along the perimeter of an existing retailer's business location and any point along the perimeter of the applicant's proposed business location, provided, however, that the prohibition contained in this ~~subsection (E)~~ paragraph shall not apply to existing retailers of tobacco products operating lawfully on the date immediately prior to this ~~chapter~~ Chapter becoming effective provided that the retailers obtain a permit prior to July 1, 2020 pursuant to sections 5.50.050 and 5.50.060, and timely renew their permits pursuant to 5.50.070(B).

F. Any exemption granted to a retailer pursuant to this Chapter shall cease to apply upon the earlier of the following to occur:

—1. The retailer fails to timely renew the retailer permit pursuant to this eChapter.

~~1.~~—2. A new person obtains ownership in the business.

5.50.050 Application procedure.

- A. It is the responsibility of each retailer to be informed of all laws applicable to retailing, including those laws affecting the issuance of a retailer permit. No retailer may rely on the issuance of a retailer permit as a determination by the eCity that the retailer has complied with all laws applicable to retailing. A retailer permit issued contrary to this eChapter, contrary to any other law, or on the basis of false or misleading information supplied by a retailer shall be revoked pursuant to this ~~chapter~~Chapter.
- B. All retailer permit applications shall be submitted on a form supplied by the eCity or its designee to implement this eChapter.
- C. A permitted retailer shall inform the eCity or its designee in writing of any change in the information submitted on an application for a retailer permit within fourteen calendar days of a change.
- ~~E.~~—D. All information specified in an application pursuant to this eChapter shall be subject to disclosure under the California Public Records Act (Government Code Section 6250 et seq.) or any other applicable law, subject to any exemptions.

5.50.060 Permit issuance, denial, and revocation.

A. Upon the receipt of a complete application for a retailer permit, the application fee, and the annual permit fee, the Ccity or its designee shall issue a retailer permit unless substantial evidence demonstrates that one or more of the following bases for denial exists:

1. The information presented in the application is inaccurate or false.
2. The application seeks authorization for retailing at a location for which this ~~chapter~~ Chapter prohibits issuance of a retailer permit.
3. The application seeks authorization for retailing by a person to whom this ~~chapter~~ Chapter prohibits issuance of a retailer permit.
4. The application seeks authorization for a retailer whose permit has previously been revoked or who has otherwise violated any provision of this Chapter within the last 60 months.
5. The application seeks authorization for retailing that is prohibited pursuant to this ~~chapter~~ Chapter (e.g., mobile vending) or that is unlawful pursuant to any other law.
- 4.6. The application seeks authorization for Retailing by a Retailer who has failed to pay any fees, penalties, or reinspection fees required by this Chapter.

B. -A retailer permit shall be revoked if the eCcity or its designee finds that one or more of the bases for denial of a retailer permit under this ~~chapter~~ Chapter existed at the time application was made or at any time before the retailer permit issued. Such a revocation shall be without prejudice to the filing of a new permit application.

~~B.C.~~ A violation of this Chapter may result in ~~permit shall be permanently~~ suspension or permanent ~~revoked~~ revocation of ~~if the retailer has committed~~ violation as ~~Specified in a permit pursuant to Section B11-588 (c)~~ 5.50.130.

5.50.070 Permit term, conditions, renewal, and expiration.

A. Term of permit. The term of a retailer permit is one year. A retailer permit is invalid upon expiration.

B. Conditions of permit. As conditions of permit issuance and retention, retailer shall:

1. Allow compliance inspections as described in ~~Section B11-586~~ this Chapter and expressly consent to inspection of all area and records of retailer's business required to effectuate the purpose of this Chapter, including unlocking and allowing access to any area of retailer's business requested by any individual authorized to monitor and facilitate compliance with this Chapter.
2. Comply with any order of the city to impound any product not authorized to be sold by this Chapter and cooperate with any city seizure of any product, subject to appeal of those actions.
3. Failure to comply with these permit conditions may result in permit suspension or revocation as described in ~~Section B11-588~~ 5.120.

~~B.C.~~ Renewal of permit. The ~~e~~City or its designee shall renew a valid retailer permit upon timely payment of the annual permit fee provided that the retailer ~~is in compliance~~ complies with this ~~e~~Chapter, as amended. The ~~e~~City or its designee may, in its discretion, agree to renew any expired retailer permit within the three-month period following expiration if the retailer pays the annual permit fee and applicable late charges. For every calendar month, or fraction thereof, that a

retailer fails to renew an expired retailer permit, a late charge equal to twenty percent of the annual permit fee shall be assessed. A retailer permit renewed within three calendar months of expiration shall be treated as if timely renewed.

~~B.~~ D. Issuance of permit after revocation or expiration of permit. To apply for a new retailer permit more than three calendar months after expiration of a retailer permit or following revocation of a retailer permit that was wrongly issued, a retailer must submit a complete application for a retailer permit, along with the application fee and annual permit fee. The €City or its designee shall issue a retailer permit pursuant to the requirements of this €Chapter.

5.50.080 Permits nontransferable.

- A. A retailer permit may not be transferred from one person to another or from one location to another. Whenever a new person obtains ownership in a business for which a retailer permit has been issued, a new retailer permit shall be required, but any exemption granted pursuant to Section 5.50.040(D) or (E) shall cease to apply.
- B. Notwithstanding any other provision of this €Chapter, prior violations of this €Chapter at a location shall continue to be counted against a location and permit ineligibility and suspension periods shall continue to apply to a location unless:
 - 1. One hundred percent of the interest in the stock, assets, or income of the business, other than a security interest for the repayment of debt, has been transferred to one or more new owners; and

2.—2. The eCity or its designee is provided with clear and convincing evidence, including an affidavit, that the business has been acquired in an arm's length transaction.

5.50.090 Permit conveys a limited, conditional privilege.

—Nothing in this ~~chapter~~ Chapter shall be construed to grant any person obtaining and maintaining a retailer permit any status or right other than the limited, conditional privilege to act as a retailer at the location in the city identified on the face of the permit. All permits are issued subject to the eCity's right to amend this chapter, and retailers shall comply with all provisions of this eChapter, as amended.

5.50.100 Fees.

—The eCity or its designee shall not issue or renew a retailer permit ~~prior to~~ before full payment of any applicable fees. The eCity shall, from time to time, establish by resolution or ordinance the fees to issue or to renew a retailer permit. The fees shall be calculated so as to recover the cost of administration ~~and enforcement~~ of this eChapter, including, for example, issuing a permit, administering the permit program, conducting retailer education, routine performing retailer inspection and compliance ~~checks,~~ documenting violations, and prosecuting violators, but shall not exceed the cost of the regulatory program authorized by this eChapter. All fees and interest earned from such fees shall be used exclusively to fund administration and enforcement of this eChapter.

5.50.110 Compliance monitoring.

A. Compliance with this eChapter shall be monitored by the eCity or its designee. In addition, any peace officer may enforce the penal provisions of this eChapter. The

City Manager may designate any number of additional persons to monitor and facilitate compliance with this eChapter.

—The eCity or its designee shall ~~check~~ monitor each retailer at least once per twelve-month period to determine if the retailer is complying with all laws applicable to retailing, other than those laws regulating underage access to tobacco products. Nothing in this paragraph shall create a right of action in any retailer or other person against the eCity or its agents.

B. ~~Any retailer found to be in violation of this Chapter shall pay all costs related to enforcement to ensure retailer's compliance with this chapter, including but not limited to fees for reinspection to determine compliance after a violation, enforcement costs, litigation costs, and attorney's fees in any administrative or civil matter in which the County prevails pursuant to Division A1 of this Code~~

5.50.120 Prevention of underage sales.

A. The eCity or its designee shall ~~check~~ monitor each retailer to determine whether the retailer is conducting business in a manner that complies with laws regulating youth access to tobacco products. Nothing in this paragraph shall create a right of action in any retailer or other person against the eCity or its agents.

B. The eCity or its designee shall not enforce any law establishing a minimum age for tobacco product purchases against a person who otherwise might be in violation of such law because of the person's age (~~“(“youth decoy”)~~) if the potential violation occurs when:

1. The youth decoy is participating in a compliance check supervised by a peace officer or a code enforcement official of the Ccity or its designee;

2. The youth decoy is acting as an agent of a person designated by the Ceity or its designee to monitor compliance with this eChapter; or
- ~~2.~~3. The youth decoy is participating in a compliance check funded in part, either directly or indirectly through subcontracting, by the Ceity, or the California Department of Public Health.

5.50.130 ~~Penalties for a violations by a retailer with a permit~~Permit suspension or revocation.

~~A. In addition to any other penalty authorized by law, an administrative fine shall be imposed and a retailer permit shall be suspended if any court of competent jurisdiction determines, or the city or its designee finds based on a preponderance of the evidence, a retailer shall pay a fine if the retailer or that the retailer, or any of the retailer's agents or employees, has violated any of the requirements, conditions, or prohibitions of this chapter, has pled guilty, "no-contest" or its equivalent to such a violation, or has admitted to such a violation.~~

~~Amount of fine. Each such violation of this chapter shall be subject to an administrative fine as follows:~~

- ~~0. A fine not to exceed one hundred dollars (\$100.00) for a first violation; A fine not to exceed one thousand dollars (\$1,000) for each violation identified during the first instance in which the retailer has committed a violation or violations;~~
- ~~0. A fine not to exceed two hundred dollars (\$200.00) for a second violation within a twelve-month period; A fine not to exceed two thousand five hundred dollars (\$2,500) for each violation identified during a subsequent~~

instance if the retailer has committed a previous violation or violations within a 60-month period; and

- ~~0.~~ A fine not to exceed five hundred dollars (\$500.00) for each additional violation within a twelve-month period. A Fine not to exceed five thousand dollars (\$5,000) for each violation identified during a subsequent instance after the retailer twice committed a previous violation or violations within a 60-month period.

F.A. Time period for pPermit suspension. In addition to any other penalty authorized by law, the City may suspend a permit if the City demonstrates that the retailer or any of the retailer's agents or employees has violated any of the requirements, conditions, or prohibitions of this eChapter. The period of the suspension shall be as follows:

- ~~1.~~ For a first violation of this chapter at a location within any sixty-month period, the retailer permit shall be suspended for up to thirty calendar days. A suspension not to exceed 30 calendar days for an initial violation.
- ~~2.~~ For a second violation of this chapter at a location within any sixty-month period, the retailer permit shall be suspended for up to ninety calendar days. A suspension not to exceed 180 calendar days if a retailer commits a violation or violations during two instances within a 60-month period.
- ~~3.~~ For each additional violation of this chapter at a location within any sixty-month period, the retailer permit shall be suspended for up to one year. When a Permit Mis suspended based on a violation of this chapter, the City shall post a placard at the physical location used for retailing tobacco products to notify the general public of the suspension. The placard shall be:

(A) Posted in the front window of the storefront used for retailing tobacco products within five feet of the front door; or

(B) Posted in a display case mounted on the outside front wall of the physical location used for retailing tobacco products within five feet of the front door; or

(C) Posted in a location approved by the Director to ensure proper notice to the general public and to patrons of the physical location used for retailing tobacco products.

(A)(D) Once attached to a building or structure, a placard is not to be removed, altered, or covered until done so by an authorized representative of the City or upon written notification from the City.

B. Permanent permit revocation. In addition to any other penalty authorized by law, the City shall permanently revoke a permit if a retailer commits a violation or violations during three instances within a 60-month period.

G.C. Waiver or reduction of fines and of penalties for first violation. The City or its designee may, in its sole discretion, may waive or reduce any fines and penalties for a retailer's first violation of any requirement, condition or prohibition of this chaptersection, other than a violation of a law regulating youth access to tobacco products, if the retailer admits the violation in writing and agrees to forego a hearing on the allegations. Regardless of the City's or its designee's waiver of penalties for a first violation, the violation will be considered in determining the fines and suspension periods or revocation penalties for any future violation. This subsection paragraph shall not apply to any violation involving a law regulating youth access to tobacco products.

~~H.D.~~ Corrections period. The ~~e~~City or its designee shall have discretion to allow a retailer a period of time to correct any violation of any requirement, condition or prohibition of this ~~C~~hapter, other than a violation of a law regulating youth access to tobacco products. If the ~~C~~eity or its designee exercises its discretion to provide a corrections period and a retailer's violation is corrected within the time allowed for correction, no penalty shall be imposed under this ~~chapter~~Chapter.

E. Written notice of penalties. Whenever ~~a fine~~ an administrative citation is issued and/or a permit is ~~suspended~~ or revoked based on a violation of this ~~chapter~~Chapter, the ~~e~~City or its designee shall provide the retailer written notice of the violation and the ~~fine and suspension~~ or revocation, including when the ~~suspension~~ or revocation shall take effect.

F. Appeals. The suspension or revocation of a permit may be appealed in the same manner as the appeal of an administrative citation pursuant to Section 1.10.090.

~~Any penalties imposed under this section may be appealed pursuant to Section B11-590 of this chapter.~~

~~H.~~ G. A timely appeal shall stay enforcement of the appealed penalties until the final administrative decision of the ~~C~~City is issued.

~~5.50.140 Penalties for retailing without a permit.~~

~~Administrative fine. In addition to any other penalty authorized by law, an administrative fine and an ineligibility period for application or issuance of a retailer permit retailer shall pay a fine shall be imposed if a court of competent jurisdiction determines, or the ~~C~~City or its designee finds based on a preponderance of evidence, demonstrates that any ~~the person~~ retailer has engaged in retailing at a location without a~~

valid retailer permit, either directly or through the person retailer's agents or employees, has pled guilty, "no contest" or its equivalent to such a violation, or has admitted to such a violation of this Chapter shall be as follows:

~~— Amount of fine. Each such violation shall be subject to an administrative fine as follows:~~

~~0. A fine not to exceed one hundred dollars (\$100.00) for a first violation; A fine not to exceed two thousand five hundred dollars (\$2,500) for each violation identified during the first instance in which the retailer has committed a violation or violations without a valid permit;~~

~~0. A fine not to exceed two hundred dollars (\$200.00) for a second violation within a twelve-month period A fine not to exceed five thousand dollars (\$5,000) for each violation identified during a subsequent instance if the retailer has committed a previous violation or violations within a 60-month period without a valid permit; and~~

~~0. A fine not to exceed five hundred dollars (\$500.00) for each additional violation within a twelve-month period. A fine not to exceed ten thousand dollars (\$10,000) for each violation identified during a subsequent instance after the retailer twice committed a previous violation or violations within a 60-month period without a valid permit.~~

~~— Time period for permit ineligibility. The ineligibility period shall be as follows:~~

~~0. For a first an initial violation of this chapter without a valid permit, at a location within any sixty-month period, no new retailer permit may be issued ffor the retailer person or the location (unless ownership of the business at the~~

location has been transferred in an arm's length transaction) until thirty calendar days have passed from the date of the violation.

~~0. For a second violation of this chapter at a location within any sixty month period, no new retailer permit may be issued for the person or the location (unless ownership of the business at the location has been transferred in an arm's length transaction) until ninety calendar days have passed from the date of the violation. If a retailer commits a violation or violations during two instances within a 60 month period without a valid permit, no new permit may be issued to the retailer or the location (unless Ownership of the business at the location has been transferred in an arms' length transaction) until one year has passed from the date of the second violation.~~

~~0. For each additional violation of this chapter at a location If a retailer commits a violation or violations during three instances within any sixty month period without a valid permit, no new retailer permit may be issued for the person or ~~the~~the retailer and the location (unless ownership of the business at the location has been transferred in an arm's length transaction) until one year has passed from the date of the violationsshall be permanently ineligible for a permit.~~

~~— Waiver of reduction of fines and penalties for first violation. The city or its designee may, in its sole discretion, may waive or reduce any fines and penalties for a retailer's first violation of this Cchapter, unless the violation also involves a violation of a law regulating youth access to tobacco products, if the retailer admits the violation in writing and agrees to forego a hearing on the allegations. Regardless of the Ccity's or its designee's waiver of penalties for a first violation, the violation will be considered in determining the penalties for any future~~

~~violation fines and suspension periods or revocation for any future violation. This subsection shall not apply to any violation involving a law regulating youth access to tobacco products.~~

~~—Written notice of penalties. Whenever a fine is issued and/or a permit is suspended pursuant to this section, the City or its designee shall provide the retailer written notice of the fine and suspension, including when the suspension shall take effect.~~

~~A. Appeals. Any penalties imposed under this chapter may be appealed pursuant to this section. A timely appeal shall stay enforcement of the appealed penalties while until the appeal is ongoing final administrative decision of the County is issued.~~

~~4.49.149 Appeals.~~

~~B. Any retailer served with a written notice of penalties violation may request an administrative hearing to appeal the existence of the violation, the amount of the fine, and/or the length of the suspension, a revocation of a permit, the sustained impounded of tobacco products, and/or seizure of tobacco products by returning a completed hearing request form to the city or its designee within 10 days from the date of the written notice of penalties.~~

~~B. The retailer shall include the following in or with the hearing request form:~~

~~0. A statement indicating the reason the retailer contests the written notice of penalties;~~

~~0. Any evidence the retailer wants the hearing officer to consider;~~

- ~~1. An advance deposit of the amount of any fine challenged; and~~
- ~~1. The address of the retailer and, if available, an email address that can be used for contact and correspondence by the Ccity or its designee. The retailer may request service of notice by mail.~~
 - ~~A. The hearing request form shall be deemed filed on the date received by the agency designated by the cCity. A timely appeal shall stay enforcement of the appealed penalties while the appeal is ongoing.~~
 - ~~A. After receiving a timely hearing request form, the Ccity or its designee shall schedule an administrative hearing. The Ccity or its designee shall provide the retailer at least ten calendar days' written notice of the date, time, and place of the administrative hearing and the name of the hearing officer who will conduct the hearing. The notice shall be given to the retailer either by email, if requested, or by first class mail, postage prepaid.~~
 - ~~A. Between the time the retailer requests the administrative hearing and the time of the hearing officer's decision, the retailer, and each of their representatives shall not engage in ex parte communications with the hearing officer regarding the matters at issue in the hearing.~~
 - ~~A. The hearing shall be conducted by the hearing officer on the date, time, and place specified in the notice to the retailer. A retailer's failure to appear at the hearing shall constitute an abandonment of the hearing request and a failure to exhaust administrative remedies as a precedent to judicially challenge the existence of the violation and the imposition of the fine and suspension.~~
 - ~~A. At the hearing, the retailer and the Ccity or its designee shall have the opportunity to present evidence, including witnesses, relevant to the hearing~~

~~officer's determination of the matter. Neither the provisions of the Administration Procedure Act (Government Code Section 11500 et seq.) nor the formal rules of evidence in civil or criminal judicial proceedings shall apply to such hearing. The hearing officer may admit any evidence, including witnesses, relevant to the determination of the matter, except as otherwise provided in Section 5.50.160(C).~~

- ~~A. The written notice of penalties and any other reports prepared by or for the City or its designee concerning the violation shall be admissible and accepted by the hearing officer as prima facie evidence of the violation and the facts stated in those documents. The hearing officer may continue the hearing from time to time, in his or her sole discretion, to allow for its orderly completion.~~

- ~~A. After receiving the evidence submitted at the hearing, the hearing officer may further continue the hearing and request additional information from either the city, its designee, or the retailer.~~

- ~~A. After considering the evidence and testimony submitted, the hearing officer shall issue a written decision regarding the matters properly raised in the request for administrative hearing. The hearing officer's decision shall:
 - ~~1. Be based on a preponderance of the evidence.~~

 - ~~1. Include a statement of the reasons for the decision.~~

 - ~~1. Be issued within twenty calendar days of the close of the hearing.~~

 - ~~1. Be served on both the retailer and the city or its designee. The decision shall be given to the retailer either by email, if requested, or by first class mail, postage prepaid.~~~~

~~B. Based on the hearing officer's decision, the City or its designee shall promptly refund to the retailer any amount of the advance fine deposit the city or its designee is not entitled to.~~

~~B. The hearing officer's written decision shall constitute the final administrative decision of the City.~~

5.50.1460 Enforcement.

A. Any violation of this Chapter is subject to administrative citation pursuant to Chapter 1.10.

~~A.B.~~ Any violation of this chapter Chapter is hereby declared to be a public nuisance.

~~B.C.~~ Causing, permitting, aiding, abetting, or concealing a violation of any provision of this Chapter shall also constitute a violation of this chapter Chapter.

~~C.D.~~ Whenever evidence of a violation of this Chapter is obtained in any part through the participation of a person under the age of eighteen years old, such a person shall not be required over his or her objection to appear or give testimony in any civil or administrative process brought to enforce this chapter Chapter and the alleged violation shall be adjudicated based upon the sufficiency and persuasiveness of the evidence presented.

E. Violations of this chapter Chapter may be remedied by a legal civil civil action brought by the City, including, but not limited pursuant to, administrative or judicial nuisance abatement proceedings, civil code enforcement proceedings, and suits for injunctive relief. Division A1 of this Code.

~~D.F.~~ For the purposes of the civil and administrative remedies provided in this ~~chapter~~Chapter, each day on which a ~~tobacco~~ product is offered for sale in violation of this Chapter, and each individual ~~retail tobacco~~ product that is distributed, sold, or offered for sale in violation of this Chapter, shall constitute a separate violation of this Chapter.

~~E. Impoundment.~~ Any person found guilty of violating any provision of this chapter shall be deemed guilty of an infraction, punishable as provided by California Government Code § 36900.

G.

1. Based upon inspection findings or other evidence, the City may impound tobacco products that are suspected of being or found to be offered for sale or distribution in violation of this Cchapter. The City may affix a label to the product that shall be removed only by the City following final written determination by the City as described below.

2. No impounded tobacco products shall be used, removed, disposed, or offered for sale unless the impoundment has been released. The decision by the City may be appealed pursuant to the procedures set forth in Section B11-590.

3. Within 30 -days of final determination whether impounded products are authorized for sale under this eChapter, the City shall release the impounded materials or order that unauthorized, impounded product shall be destroyed and properly disposed of at the cost of the retailer. The decision by the City may be appealed pursuant to the procedures set forth in Section 1.10.090.

H. Seizure. Tobacco products offered for sale in violation of this Cchapter are subject to seizure by the City and shall be forfeited after the retailer of the tobacco

products seized is given reasonable notice and an opportunity to demonstrate that the tobacco products were not offered for sale in violation of this eChapter. The decision by the City may be appealed pursuant to the procedures set forth in Section B11-590Section 1.10.090. Forfeited tobacco products shall be destroyed and properly disposed at the cost of the retailer after all internaladministrative appeals have been exhausted and after the time in which to seek judicial review pursuant to Section B11-590 of this Chapter has expired.

I. All retailers are responsible for the actions of their employees relating to compliance with this eChapter. The sale, offer to sale, or furnishing of any tobacco products by an employee shall be considered an act of the retailer.

J. Any retailer found to bin in violation of this Chapter shall pay all costs related to enforcement to ensure retailer's compliance with this Chapter, including but not limited to fees for reinspection to determine compliance after a violation, enforcement costs, litigation costs, and attorneys' fees in any administrative or civil matter in which the City prevails.

F.K. The remedies provided by this eChapter are cumulative and in addition to any other remedies available at law or in equity.

5.50.1570 ~~No conflict with federal or state law~~Interpretation.

A. Nothing in this eChapter shall be interpreted or applied so as to create any requirement, power, or duty that is preempted by, or in conflict with, federal or state law, rules, or regulations.

A.B. Nothing in this eChapter shall be construed to penalize the purchase, use, or possession of a tobacco product by any person not engaged in the retailing of such products.