

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. 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 special meeting of the Cupertino City Council on April 3, 2024 and **ENACTED** at a regular meeting of the Cupertino City Council on April 16, 2024 by the following vote:

Members of the City Council

AYES:

NOES:

ABSENT:

ABSTAIN:

<p>SIGNED:</p> _____ Shelia Mohan, Mayor City of Cupertino	 _____ Date
<p>ATTEST:</p> _____ Kirsten Squarcia, City Clerk	 _____ Date
<p>APPROVED AS TO FORM:</p> _____ 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 Intent.

A. This Chapter is adopted to:

1. Ensure compliance with the business standards and practices of the City;
2. Encourage responsible retailing of Tobacco Products;
3. Prevent violations of laws related to Tobacco Products, especially those that prohibit or discourage the sale or distribution of Tobacco Products and Electronic Cigarette Products to individuals 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 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, 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 purpose is avoiding the effect of the violations of this Chapter is not an arm's length transaction.
- B. "Department" means 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 provisions of this 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. § 387(a). As used in this 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. "Hearing Officer" means the hearing officer appointed by the Department in accordance with County of Santa Clara Ordinance Code ("County Ordinance Code") section A38-2.
- F. "Impound" means the legal control exercised by the Department over the use, sale, disposal, or removal of any Tobacco Products.
- G. "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.
- H. "Permit" means a valid permit issued by the Department to a person to act as a retailer.
- I. "Retailer" means any person who sells, exchanges, offers to sell or exchange, or distributes Tobacco Products for any form of consideration, whether or not they possess a current Permit. "Retailing" shall mean the doing of any of these actions. This definition is without regard to the quantity of Tobacco Products sold, exchanged, distributed, or offered for sale or exchange.
- J. "School" means a public or private elementary, middle, junior high, or high school.
- K. "Sale and sold" includes any sale, exchange, barter, or offer for sale.
- L. "Tobacco Product" means (unless specifically noted elsewhere) any product subject to Subchapter IX (21 U.S.C. § 387 et seq. ("Subchapter IX")) of the Federal Food, Drug, and Cosmetic Act (See 21 U.S.C. § 387a(b) (products subject to Subchapter IX); 21 C.F.R. §§ 1100.1- 1100.3 (tobacco products 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. 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 without first obtaining and maintaining a Permit pursuant to this Chapter for each location at which Retailing occurs.
- B. Lawful business operation. It shall be a violation of this Chapter for any retailer to violate any local, state, or federal law applicable to tobacco products or the retailing of such Tobacco Products.
- C. Display of Permit. Each 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 Department.
- E. Positive identification required. No retailer shall sell or distribute a Tobacco Product to another individual without first examining the individual's identification to confirm that the individual 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 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 an individual 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 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 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 individuals under twenty-one. No Retailer shall Sell 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, whether or not issued a Permit, shall Sell or Distribute Electronic Cigarette Products.

5.50.040. Eligibility requirements for a Permit.

- A. No 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 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 Permit may be issued to authorize Retailing at any location where the profession of pharmacy is practiced by a pharmacist licensed by the State in accordance with the Business and Professions Code and where prescription drugs are offered for sale.
- D. No 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 Permit applicant's proposed business location; provided, however, that the prohibition contained in this paragraph shall not apply to the following:
 - 1. Any Retailer of tobacco products (as such term was defined in Ordinance No. 20-2197) operating lawfully on the date immediately before this Chapter becoming effective provided that the Retailer obtained a Permit before July 1, 2020 pursuant to sections 5.50.050 and 5.50.060, and timely renews its permit pursuant to 5.50.070(B);
 - 2. Any Retailer of electronic smoking devices (as such term was defined in Ordinance No. 20-2197) operating lawfully on the date immediately before this Chapter becoming effective provided that the Retailer obtained a Permit before July 1, 2020 pursuant to sections 5.50.050 and 5.50.060, and timely renews its permit pursuant to 5.50.070(B); however, any such Retailer is subject to the prohibition on the Sale and Distribution of Electronic Cigarette Products established in Section 5.50.030; and

3. Any lawfully operating Retailer of Tobacco Products that would otherwise become ineligible to receive or renew a Permit due to the creation or relocation of a school.
- E. No 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 Permit applicant's proposed business location; provided, however, that the prohibition contained in this paragraph shall not apply to:
1. Any Retailer of tobacco products (as such term was defined in Ordinance No. 20-2197) operating lawfully on the date immediately before this Chapter becoming effective provided that the Retailer obtained a Permit before 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 Retailer of electronic smoking devices (as such term was defined in Ordinance No. 20-2197) operating lawfully on the date immediately before this Chapter becoming effective provided that the Retailer obtained a Permit before July 1, 2020 pursuant to sections 5.50.050 and 5.50.060, and timely renewed its Permit pursuant to 5.50.070(B); however, any such Retailer is subject to the prohibition on the Sale and Distribution of Electronic Cigarette Products established in Section 5.50.030.
- 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 Permit pursuant to this Chapter.
 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 Permit. No Retailer may rely on the issuance of a Permit as a determination by the City or the County of Santa Clara that the Retailer has complied with all laws applicable to Retailing. A Permit issued contrary to this Chapter, 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.

- B. All Permit applications shall be submitted on a form supplied by the Department.
- C. A permitted retailer shall inform the Department in writing of any change in the information submitted on an application for a Permit within fourteen calendar days of a change.
- D. All information included in an application pursuant to this Chapter shall be subject to disclosure under the California Public Records Act (Government Code Section 6250 et seq.) or any other applicable law, subject to the laws' exemptions.

5.50.060 Permit issuance, denial, and revocation.

- A. Upon the receipt of a complete application for a Permit, the application fee, and the annual Permit fee, the Department shall issue a 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 prohibits issuance of a Permit.
 - 3. The application seeks authorization for Retailing by a Person to whom this Chapter prohibits issuance of a 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 (e.g., mobile vending, Electronic Cigarette Products) or that is unlawful pursuant to any other law.
 - 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 Permit shall be revoked if the Department finds that one or more of the bases for denial of a Permit under this Chapter existed at the time application was made or at any time before the Permit was issued. Such a revocation shall be without prejudice to the filing of a new Permit application.
- C. A Permit shall be permanently revoked if the Retailer has committed violations as specified in Section 5.50.130.

5.50.070 Permit term, conditions, renewal, and expiration.

- A. Term of Permit. The term of a Permit is one year. A 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 this Chapter and expressly consent to inspection of all areas 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 Department to impound any product not authorized to be sold by this Chapter and cooperate with any Departmental 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 5.50.130.
- C. Renewal of Permit. The Department shall renew a Permit upon timely payment of the annual Permit fee provided that the Retailer complies with this Chapter, as amended. The Department may, in its discretion, agree to renew any expired 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 Permit, a late charge equal to twenty percent of the annual Permit fee shall be assessed. A Permit renewed within three calendar months of expiration shall be treated as if timely renewed.
- D. Issuance of Permit after revocation or expiration of Permit. To apply for a new Permit more than three calendar months after expiration of a Permit or following revocation of a Permit that was wrongly issued, a Retailer must submit a complete application for a Permit, along with the application fee and annual Permit fee. The Department shall issue a retailer permit pursuant to the requirements of this Chapter.

5.50.080 Permits nontransferable.

- A. A 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

Permit has been issued, a new Permit shall be required, but any exemption granted pursuant to Section 5.50.040 shall cease to apply.

- B. Notwithstanding any other provision of this Chapter, prior violations of this Chapter at a location shall continue to apply to 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. The Department 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 shall be construed to grant any person obtaining and maintaining a 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 City's right to amend this Chapter, and Retailers shall comply with all provisions of this Chapter, as amended.

5.50.100 Fees.

The Department shall not issue or renew a Permit before full payment of any applicable fees. The County Board of Supervisors shall, from time to time, establish by resolution or ordinance the fees to issue or to renew a Permit. The fees shall be calculated so as to recover the cost of administration of this Chapter, including, for example, issuing a Permit, administering the Permit program, conducting Retailer education, routine Retailer inspection and compliance, but shall not exceed the cost of the regulatory program authorized by this Chapter. All fees and interest earned from such fees shall be used exclusively to fund administration and enforcement of this Chapter.

5.50.110 Compliance monitoring.

- A. Compliance with this Chapter shall be monitored by the Department. In addition, any peace officer may enforce the penal provisions of this Chapter. The Department may designate any number of additional individuals to monitor and facilitate compliance with this Chapter.

- B. The Department or other individuals designated to enforce the provisions of this Chapter shall 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 City, the County of Santa Clara, or its agents.
- C. 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 attorneys' fees in any administrative or civil matter in which the Department prevails pursuant to Division A1 of the County Ordinance Code or any other provision of law.

5.50.120 Prevention of underage sales.

- A. The Department or other departments or individuals designated to enforce the provisions of this Chapter shall monitor each Retailer at least twice per twelve-month period 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 City, the County of Santa Clara, or its agents.
- B. The Department or other departments or individuals designated to enforce the provisions of this Chapter shall not enforce any law establishing a minimum age for Tobacco Product purchases against an individual who otherwise might be in violation of such law because of the individual'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 City or its designee;
 - 2. The Youth Decoy is acting as an agent of a department or individual designated by the City or the County of Santa Clara to monitor compliance with this Chapter; or
 - 3. The Youth Decoy is participating in a compliance check funded in part, either directly or indirectly through subcontracting, by the City, the County of Santa Clara, or the California Department of Public Health.

5.50.130 Penalties for a violation by a Retailer with a Permit.

- A. Administrative Fine. In addition to any other penalty authorized by law, a Retailer shall pay a fine if the Retailer or any of the Retailer's agents or employees, violates any of the requirements, conditions, or prohibitions of this Chapter.

The amount of the administrative fine for each violation of this Chapter shall be as follows:

1. A fine not to exceed \$1,000 for each violation identified during the first instance in which the Retailer has committed a violation or violations;
 2. A fine not to exceed \$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
 3. A fine not to exceed \$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.
- B. Permit suspension. In addition to any other penalty authorized by law, the Department may suspend a permit if the Department demonstrates that the Retailer or any of the Retailer's agents or employees has violated any of the requirements, conditions, or prohibitions of this Chapter. The period of the suspension shall be as follows:
1. A suspension not to exceed 30 calendar days for an initial violation.
 2. 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. When a Permit is suspended based on a violation of this Chapter, the Department 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 Department to ensure proper notice to the general public and to patrons of the physical location used for Retailing Tobacco Products.
 - (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 Department or upon written notification from the Department.
- C. Permanent Permit revocation. In addition to any other penalty authorized by law, the Department shall permanently revoke a Permit if a retailer commits a violation or violations during three instances within a 60-month period.
- D. Waiver or reduction of fines and penalties for first violation. The Department may, in its sole discretion, waive or reduce any fines and penalties for a Retailer's first violation of this Chapter if the Retailer admits the violation in writing and agrees to forego a hearing on the allegations. Regardless of the Department's waiver of penalties for a first violation, the violation will be considered in determining the fines and suspension periods or revocation for any future violation. This paragraph shall not apply to any violation involving a law regulating youth access to Tobacco Products.
- E. Corrections period. The Department shall have discretion to allow a Retailer a period of time to correct any violation of any requirement, condition, or prohibition of this Chapter, other than a violation of a law regulating youth access to Tobacco Products. If the Department 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.
- F. Written notice of penalties. Whenever a fine is issued and/or a Permit is suspended or revoked based on a violation of this Chapter, the Department 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.
- G. Appeals. Any penalties imposed under this section may be appealed pursuant to Section 5.50.150 of this Chapter.
- H. A timely appeal shall stay enforcement of the appealed penalties until the final administrative decision of the Department is issued.

5.50.140 Penalties for retailing without a Permit.

- A. Administrative fine. In addition to any other penalty authorized by law, a Retailer shall pay a fine if the Department demonstrates that the Retailer has engaged in Retailing at a location without a valid Permit, either directly or through the Retailer's agents or employees. The amount of the administrative fine for each violation of this Chapter shall be as follows:
1. A fine not to exceed \$2,500 for each violation identified during the first instance in which the Retailer has committed a violation or violations without a valid Permit;
 2. A fine not to exceed \$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
 3. A fine not to exceed \$10,000 for each violation identified during a subsequent instance after the Retailer has twice committed a previous violation or violations within a 60-month period without a valid Permit.
- B. Time period for Permit ineligibility. The ineligibility period shall be as follows:
1. For an initial violation of this Chapter 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 Arm's Length Transaction) until 30 calendar days have passed from the date of the violation.
 2. 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 Arm's Length Transaction) until one year has passed from the date of the second violation.
 3. If a Retailer commits a violation or violations during three instances within a 60-month period without a valid Permit, the Retailer and the location (unless Ownership of the business at the location has been transferred in an Arm's Length Transaction) shall be permanently ineligible for a Permit.
- C. Waiver or reduction of fines and penalties for first violation. The Department may, in its sole discretion, waive or reduce any fines and penalties for a Retailer's first violation of this Chapter if the Retailer admits the violation in writing and agrees to forego a hearing on the allegations. Regardless of the Department's

waiver of fines or penalties for a first violation, the violation will be considered in determining the 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.

- D. Written notice of penalties. Whenever a fine is issued and/or a Permit is suspended pursuant to this section, the Department shall provide the Retailer written notice of the fine and suspension, including when the suspension shall take effect.
- E. Appeals. Any penalties imposed under this Chapter may be appealed pursuant to Section 5.50.150 of this Chapter. A timely appeal shall stay enforcement of the appealed penalties until the final administrative decision of the County is issued.

5.50.150 Appeals.

- A. Any Retailer served with a written notice of violation may request an administrative hearing to appeal the existence of the violation, the amount of the fine, the length of a suspension, a revocation of a Permit, the sustained impoundment of Tobacco Products, and/or seizure of Tobacco Products by returning a completed hearing request form to the Office of the County Hearing Officer 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:
 - 1. A statement indicating the reason the Retailer contests the written notice of penalties, including a factual and/or legal basis for the appeal in sufficient detail to put the Department on notice of the nature of the appeal and the objections and arguments raised by the Retailer;
 - 2. Any evidence the Retailer wants the Hearing Officer to consider;
 - 3. Payment of the \$250 filing fee.
 - 4. An advance deposit of the amount of any fine challenged if less than \$1,000.00, and otherwise \$1,000.00;
 - 5. The address of the Retailer and, if available, an email address that can be used for contact and correspondence by the Office of the County Hearing Officer and the Department. The Retailer may request service of notice by mail; and

6. Notwithstanding the above requirements, a Retailer may seek a waiver or reduction in the filing fee and/or deposit requirement by submitting a sworn affidavit and supporting documents or materials demonstrating the Retailer's financial inability to pay the filing fee and/or advance deposit.
- C. The hearing request form shall be deemed filed on the date received by the Office of the County Hearing Officer. A timely appeal shall stay enforcement of the appealed penalties while the appeal is ongoing.
- D. After receiving a timely hearing request form, the Office of the County Hearing Officer shall notify the Department as soon as practicable and then shall schedule an administrative hearing. The Office of the County Hearing Officer shall provide the Retailer and the Department 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.
- E. Between the time the Retailer requests the administrative hearing and the time of the Hearing Officer's decision, the Retailer, the Department, and each of their representatives shall not engage in ex parte communications with the Hearing Officer regarding the matters at issue in the hearing.
- F. 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.
- G. At the hearing, the Retailer and the Department 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).
- H. The written notice of penalties and any other reports prepared by or for the Department 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 the Hearing Officer's sole discretion, to allow for its orderly completion

of the hearing. After receiving the evidence submitted at the hearing, the Hearing Officer may further continue the hearing and request additional information from either the Department or the Retailer.

- I. 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.
 2. Include a statement of the reasons for the decision.
 3. Be issued within twenty calendar days of the close of the hearing.
 4. Be served on both the Retailer and the Department. The decision shall be given to the Retailer either by email, if requested, or by first class mail, postage prepaid.
- J. Based on the Hearing Officer's decision, the Office of the County Hearing Officer shall promptly refund to the Retailer any amount of the advance fine deposit the Department is not entitled to and shall provide the remainder to the Department.
- K. The Hearing Officer's written decision shall constitute the final administrative decision of the Department.

5.50.160 Enforcement.

- A. Any violation of this Chapter is hereby declared to be a public nuisance.
- B. Causing, permitting, aiding, abetting, or concealing a violation of any provision of this Chapter shall also constitute a violation of this Chapter.
- C. Whenever evidence of a violation of this Chapter is obtained in any part through the participation of an individual under the age of twenty-one years old, such an individual shall not be required over their objection to appear or give testimony in any civil or administrative process brought to enforce this Chapter and the alleged violation shall be adjudicated based upon the sufficiency and persuasiveness of the evidence presented.
- D. Violations of this Chapter may be remedied by a legal action brought by the County of Santa Clara Office of the County Counsel pursuant to Division A1 of the Ordinance Code of the County of Santa Clara. For the purposes of the civil remedies provided in this Chapter, each day on which a product is offered for

Sale in violation of this Chapter, and each individual retail product that is Sold or Distributed in violation of this Chapter, shall constitute a separate violation of this Chapter.

E. Impoundment.

1. Based upon inspection findings or other evidence, the Department may impound Tobacco Products that are suspected of being or found to be offered for Sale or Distribution in violation of this Chapter. The Department may affix a label to the product that shall be removed only by the Department following final written determination by the Department 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 Department may be appealed pursuant to the procedures set forth in Section 5.50.150.
3. Within 30 days of final determination whether impounded products are authorized for sale under this Chapter, the Department shall release the impounded materials or order that unauthorized, impounded product shall be destroyed and properly disposed of at the cost of the Retailer.

F. Seizure. Tobacco Products offered for sale in violation of this Chapter are subject to seizure by the Department 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 Chapter. The decision by the Department may be appealed pursuant to the procedures set forth in Section 5.50.150. Forfeited Tobacco Products shall be destroyed and properly disposed of at the cost of the Retailer after all internal appeals have been exhausted and after the time in which to seek judicial review pursuant to Section 5.50.150 of this Chapter has expired.

G. All Retailers are responsible for the actions of their employees relating to compliance with this Chapter. The Sale, offer to sell, or furnishing of any Tobacco Products by an employee shall be considered an act of the Retailer.

H. The remedies provided by this Chapter are cumulative and in addition to any other remedies available at law or in equity.

5.50.170 Interpretation.

- A. Nothing in this Chapter 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.
- B. Nothing in this Chapter 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.