



February 10, 2020

The Honorable Board of Supervisors  
County Administration Building  
1221 Oak Street  
Oakland, CA 94612

**SUBJECT: ADOPT AN ORDINANCE TO PROHIBIT THE SALE OF ELECTRONIC SMOKING DEVICES IN THE UNINCORPORATED AREAS OF ALAMEDA COUNTY BY ADDING CHAPTER 3.59 TO TITLE 3 OF THE ALAMEDA COUNTY ORDINANCE CODE**

Dear Board Members:

**RECOMMENDATION**

Adopt an ordinance adding Chapter 3.59 to Title 3 of the Alameda County Ordinance Code to prohibit the sale of electronic smoking devices in the unincorporated areas of Alameda County.

**DISCUSSION/SUMMARY**

Despite progress in reducing smoking, tobacco use is still the leading cause of preventable death in the United States. Tobacco kills more than 480,000 people in this country annually. Electronic cigarettes (also known as e-cigarettes) are the most commonly used tobacco product among youth in the United States (U.S.). Unlike traditional cigarette use that has steadily declined among youth, the U.S. has seen a surge in teen e-cigarette use; in 2018, the U.S. Surgeon General issued an advisory on e-cigarette use among youth, declaring the growing problem an epidemic.

According to the U.S. Centers for Disease Control and Prevention (CDC), "The rise in e-cigarette use during 2017-2018 is likely because of the recent popularity of e-cigarettes shaped like a USB flash drive; these products can be used discreetly, have a high nicotine content, and come in flavors that appeal to youths." In the U.S., adolescents are more likely than adults to use e-cigarettes. For every one (1) adult smoker who switches to e-cigarettes, eighty (80) youth initiate daily tobacco use through e-cigarettes.

As stated by the U.S. Surgeon General, "Most e-cigarettes contain nicotine – the addictive drug in regular cigarettes, cigars, and other tobacco products. Nicotine exposure during adolescence can harm the developing brain – which continues to develop until about age 25. Nicotine exposure during adolescence can impact learning, memory, and attention." The Surgeon General concluded that, "The use of products containing nicotine poses dangers to youth, pregnant women, and fetuses. The use of products containing nicotine in any form among youth, including in e-cigarettes, is unsafe."

Among high school students in all of Alameda County who purchased electronic cigarettes, 69% reported buying them from the store themselves or from someone else; only 6.5% purchased online (2017-2018 California Student Tobacco Survey for Alameda County).

The proposed ordinance before your Board today would prohibit the sale of electronic smoking devices at tobacco retailers in the unincorporated areas of the County. It would impose this requirement on tobacco retailers in addition to the requirements set forth in the tobacco retailer licensing ordinance (Chapter 3.58) – first reading passed by your Board on December 17, 2019 (Agenda Item #91.1), and second reading and adoption of the ordinance on January 14, 2020 (Agenda Item #60). The adopted tobacco retailer licensing ordinance requires all tobacco retailers in unincorporated Alameda County to obtain an annual tobacco retailer license, and in addition: prohibits the sale of flavored tobacco products; creates pricing and packaging requirements for the sale of tobacco products; establishes tobacco retailing density requirements; and prohibits pharmacies from obtaining a tobacco retail license. A violation of the ordinance prohibiting the sale of electronic smoking devices (Chapter 3.59) is also a violation of the tobacco retailer licensing ordinance (Chapter 3.58), and therefore would be subject to the same penalty structure. During any five-year (or 60-month) period, penalties escalate with each subsequent violation as follows: (1) 30-day license suspension; (2) 90-day license suspension; (3) One-year license suspension; and (4) license revocation. License suspensions and revocations refer only to the sale of tobacco products.

The request to bring forward an ordinance to restrict the sale of electronic smoking devices came from your Board's Transportation & Planning Committee on November 4, 2019. The proposal to prohibit the sale of electronic smoking devices was presented at the Castro Valley Municipal Advisory Council (MAC) meeting on November 18, 2019. The Castro Valley MAC voted 5-2 to recommend against restricting the sale of electronic smoking devices. The proposed ordinance was presented to the Fairview MAC on February 4, 2020; the Fairview MAC voted 4-0 to request that the Board of Supervisors take no action on the proposed ordinance on February 25, 2020, and to allow for further input by community members and concerned stakeholders, citing insufficient noticing and a lack of specificity in the title of the agenda item. The Proposed ordinance was presented to the Eden MAC on February 11, 2020; the Eden MAC voted 6-0 in favor of prohibiting the sale of electronic smoking devices. On February 19, 2020, the proposed ordinance was presented to the Sunol Citizen's Advisory Council (SCAC); the SCAC voted 4-0 in favor of prohibiting the sale of electronic smoking devices.

In Alameda County, the cities of Livermore and Dublin have prohibited the sale of electronic smoking devices, with other jurisdictions in the County considering similar policy action. Statewide, at least seventeen (17) additional jurisdictions have prohibited the sale of electronic smoking devices in some form including: Contra Costa County, San Mateo County, San Diego County, Santa Clara County, and the City and County of San Francisco; and the Cities of Arroyo Grande, Benicia, Beverly Hills, Carpinteria, East Palo Alto, Los Gatos, Manhattan Beach, Menlo Park, Richmond, South San Francisco, Watsonville, and West Hollywood.

### **FINANCING**

Any costs to administer programs related to the ordinance prohibiting the sale of electronic smoking devices will be supported by Tobacco Retail Licensing fees. There are no additional projected costs to adopt this ordinance and there will be no increase to net County cost.

### **VISION 2026 GOAL**

Restricting the sale of electronic smoking device products to reduce youth access meets the 10X goal pathway of **Healthcare for All** in support of our shared visions of a **Healthy Environment, Thriving & Resilient Populations** and **Safe & Livable Communities**.

The Honorable Board of Supervisors  
February 10, 2020  
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Sincerely,

DocuSigned by:  
  
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Colleen Chawla, Director  
Health Care Services Agency

DocuSigned by:  
  
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Chris Bazar, Director  
Community Development Agency

ORDINANCE NO. 2020 - \_\_\_\_\_

**AN ORDINANCE ADDING CHAPTER 3.59 TO TITLE 3 OF THE ALAMEDA COUNTY  
ORDINANCE CODE TO PROHIBIT THE SALE OF ELECTRONIC SMOKING DEVICES IN  
THE UNINCORPORATED AREAS OF THE COUNTY OF ALAMEDA**

IT IS HEREBY ORDAINED BY THE BOARD OF SUPERVISORS OF THE COUNTY OF  
ALAMEDA THAT THE ALAMEDA COUNTY ORDINANCE CODE IS AMENDED AS FOLLOWS:

**SECTION I**

Chapter 3.59 is added to Title 3 of the General Code of the County of Alameda, to read as follows:

**Chapter 3.59 – Prohibition on the Sale of Electronic Smoking Devices**

**Section 3.59.005. Findings and Declaration**

The Board of Supervisors of the County of Alameda finds and declares that:

- A. Despite progress in reducing smoking, tobacco use is still the leading cause of preventable death in the United States. Tobacco kills more than 480,000 people in this country annually – more than AIDS, alcohol, car accidents, illegal drugs, murders, and suicides combined.
- B. The World Health Organization (WHO) estimates tobacco kills roughly 6 million people and causes over half a trillion dollars in economic damage each year.
- C. 5.6 million of today’s Americans who are younger than 18 are projected to die prematurely from a smoking-related illness.
- D. Electronic cigarettes (also known as e-cigarettes) are the most commonly used tobacco product among youth in the United States:
  1. Unlike traditional cigarette use that has steadily declined among youth, the U.S. has seen a surge in teen e-cigarettes use; in 2018, the Surgeon General issued an advisory on e-cigarette use among youth, declaring the growing problem an epidemic.
  2. According to the 2019 National Youth Tobacco Survey, 5.3 million youth are current e-cigarette users in 2019 - an increase of over 3 million students since 2017.
  3. Among U.S. high school students, e-cigarette use increased by 135 percent from 2017 to 2019, increasing from 11.7% to 27.5%; one in four U.S. high school students reported using e-cigarettes. Among middle school students, e-cigarette use more than tripled from 2017 to 2019, increasing from 3.3% to 10.5%.
  4. In 2017 – 2018, over 1 in 4 (28%) San Lorenzo Unified School District 11th graders and over 1 in 5 (21%) Castro Valley Unified School District 11th graders reported using e-cigarettes.
  5. According to the U.S. Centers for Disease Control and Prevention (CDC), “The rise in e-cigarette use during 2017-2018 is likely because of the recent popularity of e-

cigarettes shaped like a USB flash drive . . . these products can be used discreetly, have a high nicotine content, and come in flavors that appeal to youths.”

6. In the U.S., adolescents are more likely than adults to use e-cigarettes. For every 1 adult smoker who switches to e-cigarettes, 80 youth initiate daily tobacco use through e-cigarettes.
- E. The widespread use of e-cigarettes by youth has significant public health consequences:
1. Mounting research shows that e-cigarettes are neither safe nor harmless: e-cigarette aerosol contains many of the same toxic chemicals found in cigarettes such as nicotine, formaldehyde and lead, which are known to cause cancer, birth defects and other health problems. The U.S. Surgeon General and CDC highlight that youth e-cigarette use can pose harm to respiratory health and brain development.
  2. As stated by the U.S. Surgeon General, "Most e-cigarettes contain nicotine – the addictive drug in regular cigarettes, cigars, and other tobacco products. Nicotine exposure during adolescence can harm the developing brain - which continues to develop until about age 25. Nicotine exposure during adolescence can impact learning, memory, and attention. Using nicotine in adolescence can also increase risk for future addiction to other drugs. In addition to nicotine, the aerosol that users inhale and exhale from e-cigarettes can potentially expose both themselves and bystanders to other harmful substances, including heavy metals, volatile organic compounds, and ultrafine particles that can be inhaled deeply into the lungs."
  3. The U.S. Surgeon General concluded: "The use of products containing nicotine poses dangers to youth, pregnant women, and fetuses. The use of products containing nicotine in any form among youth, including in e-cigarettes, is unsafe."
  4. Evidence from several longitudinal studies suggests that e-cigarette use is strongly associated with the use of other tobacco products among youth and young adults, including conventional cigarettes. The National Academies of Sciences, Engineering, and Medicine concluded in its 2018 report: "There is substantial evidence that e-cigarette use increases risk of ever using combustible tobacco cigarettes among youth and young adults."
  5. The 2018 National Academies of Sciences, Engineering, and Medicine report concluded that "among youth and young adult e-cigarette users who ever used combustible tobacco cigarettes, there is moderate evidence that e-cigarette use increases the frequency and intensity of subsequent combustible tobacco cigarette smoking."
  6. In addition, there is a growing body of research concluding that there are significant health risks associated with e-cigarette use. For example, daily e-cigarette use is associated with increased odds of a heart attack. The American Lung Association has warned that the inhalation of harmful chemicals through vaping may cause irreversible lung damage and lung disease.
  7. A December 2019 University of California San Francisco study found that people who smoke e-cigarettes face a significant risk of developing severe, chronic lung illnesses – such as asthma, bronchitis and emphysema – that have long been associated with smoking combustible cigarettes. The study showed that people who use e-cigarettes in addition to smoking traditional tobacco triple their risk of chronic lung disease.

8. The California Department of Public Health issued a Health Advisory on November 5, 2019, informing the public about the imminent public health risks posed by vaping any product, including the use of e-cigarettes.
  9. CDC continues to warn that any tobacco product use, including e-cigarettes, is unsafe, especially for youth, pregnant, and breastfeeding women.
- F. Among high school students in all of Alameda County who purchased e-cigarettes, 69% reported buying them from the store themselves or from someone else; only 6.5% purchased online (2017-2018 California Student Tobacco Survey for Alameda County).
  - G. An April 2018 national survey of over 1,000 12- to 17-year-olds found that nearly three quarters (74%) of youth who used a particular brand of flavor pods in the past 30 days reported that they obtained the device at a physical retail location; over half (52%) reported that they received the product from a social source, such as a friend or family member, while only 6% reported that they received the product through an online transaction.
  - H. In 2018, the U.S. Food and Drug Administration (FDA) Center for Tobacco Products issued more than 1,300 warning letters and fines to tobacco retailers who illegally sold e-cigarette products to minors, including major national retail chains, tobacco specialty stores and online retailers.
  - I. E-cigarettes are readily accessible in the unincorporated areas of Alameda County. In a 2019 observation survey of tobacco retailers within the unincorporated areas of Alameda County (n=72), 50% of stores surveyed sold flavored electronic smoking devices.
  - J. Marketing of e-cigarettes contributes to youth appeal:
    1. The California Attorney General has stated that e-cigarette companies have targeted youth with their products.
    2. E-cigarette companies have effectively used marketing strategies, including celebrity endorsements, slick magazine advertisements, social media campaigns, paid influencers, and music sponsorships, to reach youth and young adults. A 2016 study found that 78.2% of middle and high school students – 20.5 million youth – had been exposed to e-cigarette advertisements from at least one source, an increase from 68.9% only two years before, in 2014.
    3. In 2019, the FDA warned a leading e-cigarette company for marketing unauthorized modified risk tobacco products, including claims to children and youth that e-cigarettes are safer than traditional cigarettes.
    4. In 2017-2018, 44% of San Lorenzo Unified School District 11th graders and 42% Castro Valley Unified School District 11th graders perceived little to no harm in using e-cigarettes compared to smoking cigarettes.
  - K. California law defines tobacco products to include electronic smoking devices. No electronic smoking device is currently approved by the FDA as a smoking cessation product.
  - L. To protect the public, especially youth, against the health risks created by tobacco products, Congress enacted the Family Smoking Prevention and Tobacco Control Act ("Tobacco Control Act") in 2009. The Tobacco Control Act authorized the FDA to set national standards governing the manufacture of tobacco products, to limit levels of

harmful components in tobacco products and to require manufacturers to disclose information and research relating to the products' health effects.

- M. A central requirement of the Tobacco Control Act is premarket review of all new tobacco products. Specifically, every "new tobacco product" – defined to include any tobacco product not on the market in the U.S. as of February 15, 2007 – must be authorized by the FDA for sale in the United States before it may enter the marketplace. A new tobacco product may not be marketed until the FDA has found that the product is: (1) appropriate for the protection of the public health upon review of a premarket tobacco application; (2) substantially equivalent to a grandfathered product; or (3) exempt from substantial equivalence requirements.
- N. In determining whether the marketing of a tobacco product is appropriate for the protection of the public health, the FDA must consider the risks and benefits of the product to the population as a whole, including users and nonusers of the product, and taking into account the increased or decreased likelihood that existing users of tobacco products will stop using tobacco products and the increased or decreased likelihood that those who do not use tobacco products will start using them. Where there is a lack of showing that permitting the sale of a tobacco product would be appropriate for the protection of the public health, the Tobacco Control Act requires that the FDA deny an application for premarket review.
- O. Virtually all e-cigarettes that are sold today entered the market after 2007, but have not been reviewed by the FDA to determine if they are appropriate for the public health. In May 2017, the FDA issued Guidance that, as a matter of the FDA's enforcement discretion, purports to give e-cigarette manufacturers until August 8, 2022 to submit their application for premarket review of e-cigarettes that were on the market as of August 8, 2016. The Guidance further purports, as a matter of the FDA's enforcement discretion, to allow unapproved products to stay on the market indefinitely, until such time as the FDA complies with its statutory duty to conduct a premarket review to determine whether a new tobacco product poses a risk to public health. In March 2019, the FDA issued Draft Guidance in which it considered moving the premarket application deadline up by one year for certain flavored e-cigarette products. It is not known when, if ever, this narrow adjustment will become final or will take effect.
- P. The FDA has exercised its discretion to not initiate enforcement action for e-cigarettes that remain in the marketplace. Nevertheless, the Tobacco Control Act clearly requires every "new tobacco product" – defined to include any tobacco product not on the market in the U.S. as of February 15, 2007 – to be authorized by the FDA for sale in the United States before it may enter the marketplace. Therefore, given the enforcement void at the federal level and the major public health crisis stemming from the use of electronic smoking devices, particularly among youth, the County of Alameda deems it necessary and appropriate to adopt this Ordinance to protect the health, safety, and welfare of its residents.

#### Section 3.59.010. Purpose and Intent

It is the purpose and intent of the Board of Supervisors, in enacting this Chapter, to impose a Tobacco Retailing restriction by prohibiting the sale of Electronic Smoking Devices to protect the health, safety, and general welfare of residents within the unincorporated areas of the County of Alameda.



Section 3.59.020. Definitions

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

“Cannabis Delivery Operator” has the meaning set forth in Chapter 6.108.

“Cannabis Retail Operator” has the meaning set forth in Chapter 6.108.

“Combined Cannabis Operation” has the meaning set forth in Chapter 6.109.

“Consumer” means a Person who purchases or intends to purchase a Tobacco Product or Tobacco Paraphernalia for consumption or use and not for Sale to another.

“Department” means the Community Development Agency of the County of Alameda and its authorized representatives, designees, or agents.

“Electronic Smoking Device” means:

- A. Any electronic device that delivers nicotine or other substances to the Person inhaling from the device, including, but not limited to, an electronic cigarette, electronic cigar, electronic pipe, or electronic hookah.
- B. “Electronic Smoking Device” includes any component, part, or accessory intended or reasonably expected to be used with an Electronic Smoking Device, whether or not Sold separately.
- C. Notwithstanding any provision of subsections (A) and (B) to the contrary, “Electronic Smoking Device” does not include drugs, devices, or combination products authorized for sale by the United States Food and Drug Administration, as those terms are defined in the federal Food, Drug and Cosmetic Act.”

“Person” means any natural person, partnership, cooperative association, corporation, personal representative, receiver, trustee, assignee, or any other legal entity.

“Sale” or “Sell” or “Sold” means any transfer, exchange, barter, gift, sale, distribution for a commercial purpose, or offer of any of the foregoing, in any manner or by any means whatsoever.

“Tobacco Retailing” has the meaning set forth in Chapter 3.58.

Section 3.59.030. Sale of Electronic Smoking Device Prohibited

No Person may Sell or possess with intent to Sell any Electronic Smoking Device within the unincorporated areas of the County.

Section 3.59.040. Exception to Prohibition

The prohibition in Section 3.59.030 shall not apply to Electronic Smoking Devices Sold by a Cannabis Retail or Delivery Operator holding a permit under Chapter 6.108 or Combined Cannabis Operation holding a permit under Chapter 6.109.



Section 3.59.050. Enforcement

- A. A violation of this Chapter shall be deemed a violation of Section 3.58.030(B) of this Code, and administration and enforcement shall be undertaken following the procedures in Chapter 3.58 for violation of Section 3.58.030(B).

Section 3.59.060. Authority to Adopt Regulations to Implement this Chapter

- A. The Department may adopt rules and regulations which are necessary or appropriate to implement, administer, and enforce the provisions of this Chapter.

Section 3.59.070. Severability

- A. If any section, subsection, subdivision, paragraph, sentence, clause, or phrase of this ordinance, or its application to any person or circumstance, is for any reason held to be invalid or unenforceable, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining sections, subsections, subdivisions, paragraphs, sentences, clauses, or phrases of this ordinance, or its application to any other person or circumstance. The Board of Supervisors hereby declares that it would have adopted each section, subsection, subdivision, paragraph, sentence, clause, or phrase hereof, irrespective of the fact that any one or more other sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases hereof be declared invalid or unenforceable.

**SECTION II**

- A. This ordinance shall take effect and be in force ninety (90) days from and after the date of passage; provided, however, that section 3.59.030 shall not be enforced until one hundred eighty (180) days from and after the date of passage.
- B. Before the expiration of fifteen (15) days after its passage, it shall be published once with the names of the members voting for and against the same in the Inter-City Express, a newspaper published in the County of Alameda.

Adopted by the Board of Supervisors of the County of Alameda, State of California, on \_\_\_\_\_, 2020, by the following called vote:

AYES:

NOES:

EXCUSED:

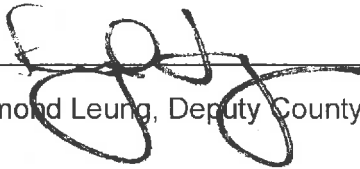
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Richard Valle  
President of the Board of Supervisors  
County of Alameda, State of California

ATTEST:  
Clerk of the Board of Supervisors  
County of Alameda

By: \_\_\_\_\_

APPROVED AS TO FORM:  
DONNA R. ZIEGLER, COUNTY COUNSEL  
County of Alameda

By:  \_\_\_\_\_  
Raymond Leung, Deputy County Counsel