



Legislation Text

File #: 19-433, **Version:** 1

Ordinance amending Title 8, Chapter 8.50 and Title 20, Chapter 20.420, and adding Title 6, Chapter 6.47, of the South San Francisco Municipal Code pertaining to sale of tobacco, flavored tobacco, and electronic smoking devices

WHEREAS, the U.S. Center for Disease Control and Prevention estimates that approximately 480,000 people die each year in the United States due to smoking, and more than 16 million people are living with disease caused by smoking; and

WHEREAS, studies have shown that electronic smoking devices contain high levels of toxic chemicals; and

WHEREAS, the Surgeon General has reported a more than an 900% increase in the use of electronic smoking devices among middle school and high school students between 2011 and 2015; and

WHEREAS, the liquid nicotine solutions consumed in electronic smoking devices are marketed in a variety of flavors that appeal to youth including cotton candy, bubble gum, and fruit; and

WHEREAS, the U.S. Food and Drug Administration and the U.S. Surgeon General have stated that flavored tobacco products in electronic smoking devices help establish smoking habits in youth that can lead to long-term addiction; and

WHEREAS, traditional tobacco products including cigarettes, cigarillos, and chewing tobacco are also sold in flavors (such as menthol and wintergreen) that appeal to young people, with data from the National Youth Tobacco survey indicating that over two-fifths of U.S. middle school and high school smokers report using flavored cigarillos or flavored cigarettes; and

WHEREAS, a local prohibition against the sale of flavored tobacco products and against the sale of all electronic smoking devices is an effective means to reduce the availability of these products to youth, thereby protecting the public health by discouraging tobacco initiation and continued use; and

WHEREAS, State law contains various tobacco control laws including: the prohibition against the sale or furnishing of tobacco products and smoking paraphernalia to minors (Cal. Pen. Code, § 308); the sale or furnishing of electronic smoking devices to minors (Cal. Health & Safety Code, § 119405); and the sale of loose or single cigarettes; and

WHEREAS, State law requires tobacco retailers check the identification of tobacco purchasers who appear to be under 21 years of age (Cal. Bus. & Prof. Code, § 22956); and

WHEREAS, flavored tobacco products, including liquid solutions for electronic smoking devices and traditional flavored products, are commonly sold to young people by California retailers. For example, statewide, California retailers violate the federal prohibition against underage tobacco sales at a rate of 19.1%. Convenience stores have a violation rate of 25.3%, while small markets have a rate of 24.8%.

WHEREAS, the failure of retailers to comply with tobacco control laws and other smoking laws, particularly laws prohibiting sale to minors, presents an imminent threat to the public health, safety, and welfare of the residents of South San Francisco; and

WHEREAS, the City seeks to ensure compliance with state laws relating to tobacco retailing and discourage violations of tobacco-related laws, particularly those that prohibit the sale or distribution of smoking and tobacco products to minors; and

WHEREAS, in 2008 the City added Chapter 6.46 “Tobacco Retailer Permit” which adopted by reference and made effective Chapter 4.98 “Tobacco Retailer Permit” of Title 4 of the San Mateo County Code to establish a local licensing system for tobacco retailers and authorize enforcement by San Mateo County personnel as an effective means to ensure that retailers comply with existing tobacco and smoking control laws in order to protect the public health, safety, and welfare; and

WHEREAS, in 2012 the City added Chapter 20.420 “Prohibition on New Significant Tobacco Retailers” to preclude the opening, establishment, and/or operation of new significant tobacco retailers in the City; and

WHEREAS, in 2018 the County of San Mateo adopted Chapter 4.99 of Title 4 of the San Mateo County Code, entitled “Sales of Flavored Tobacco Products and Pharmacy Sales of Tobacco Products Prohibited”, prohibiting the sale of flavored tobacco products; and

WHEREAS, the City desires to add Chapter 6.47 “Sales of Flavored Tobacco Products, Pharmacy Sales of Tobacco Products, and Sales of Electronic Smoking Devices Prohibited”, which will be modeled after Chapter 4.99 of the San Mateo County Code, to prohibit the sale of flavored tobacco products by any person, tobacco retailer, or pharmacy, as well as authorize enforcement by San Mateo County personnel; and

WHEREAS, the City also desires to amend Chapter 20.420 to prohibit the sale of flavored tobacco products and all electronic smoking devices; and

WHEREAS, the City further desires to amend Chapter 8.50 to provide internally consistent definitions for electronic smoking devices and regulations of permitted locations for smoking activities;

WHEREAS, the Planning Commission of the City of South San Francisco held a duly noticed public hearing on September 5, 2019 to solicit public comment and consider the proposed entitlements and environmental effects of the project, take public testimony, and make a recommendation that the City Council adopt the amendments to Chapter 20.420; and

WHEREAS, based upon the recitals above, the City Council finds that the proposed amendments are necessary for the protection of the public health, safety, and welfare; and

WHEREAS, based on all of the information presented at the September 25, 2019 City Council meeting, both written and oral, including without limitation the public comment, staff reports, minutes, and other relevant materials (hereafter the “Record”), the City Council finds that this ordinance is not subject to the California Environmental Quality Act (“CEQA”) pursuant to Section 15060(c)(2) of the CEQA Guidelines because the activity will not result in a direct or reasonably foreseeable indirect physical change in the environment, and Section 15060(c)(3) of the CEQA Guidelines because the activity is not a “project” as defined in Section 15378

of the CEQA Guidelines, because it has no potential for resulting in physical change to the environment, directly or indirectly.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF SOUTH SAN FRANCISCO, DOES HEREBY ORDAIN AS FOLLOWS:

SECTION 1. Findings The City Council of South San Francisco, finds that all Recitals are true and correct and are incorporated herein by reference.

SECTION 2. Amendments to Title 8

Title 8, Chapter 8.50 of the South San Francisco Municipal Code is hereby amended with additions in double-underline and deletions in ~~striketrough~~. Sections and subsections that are not amended by this Ordinance are not included below, and shall remain in full force and effect.

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Section 8.50.020 Definitions

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~~“Retail tobacco store” means a retail store utilized primarily for the sale of tobacco products and tobacco accessories and in which the sale of other products is merely incidental.~~

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Section 8.50.040 Smoking permitted.

(a) Unless otherwise affirmatively protected by state or federal law, smoking is permitted in the following places within the city:

(1) Hookah bars/Smoking lounges ~~Retail Tobacco Stores~~. Smoking is permitted in hookah bars/smoking lounges ~~retail tobacco stores~~ as defined by Chapter 20.620 of this Code.

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Section 8.50.090 Use of electronic smoking devices-Restricted.

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(b) Definition- Electronic Smoking Device. “Electronic smoking device” means any electronic ~~or battery-operated~~ device or product ~~that can be used by a person to simulate smoking through inhalation of vapor or aerosol from the 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. This term includes every variation and type of such ~~products or~~ electronic smoking devices whether they are

manufactured, distributed, marketed, or sold as an electronic cigarette, an electronic cigar, an electronic cigarillo, an electronic pipe, an electronic hookah, a vapor pen, or any other product name or descriptor. This term does 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 such product is marketed and sold solely for such an approved purpose, such as any medical inhaler prescribed by a licensed doctor. ~~The term does not include any medical inhaler prescribed by a licensed doctor or a product that has been approved by the United States Food and Drug Administration for sale as a tobacco cessation product and is being marketed and sold solely for the approved purpose.~~

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SECTION 3. Amendment to Title 6

Title 6, Chapter 6.47 is hereby added to the South San Francisco Municipal Code to read as follows. Sections and subsections that are not amended by this Ordinance are not included below, and shall remain in full force and effect.

Chapter 6.47

Sales of Flavored Tobacco Products, Pharmacy Sales of Tobacco Products, and Sales of Electronic Smoking Devices Prohibited

Section 6.47.010	Definitions
Section 6.47.020	Sale or offer for sale of flavored tobacco products prohibited
Section 6.47.030	Sale or offer for sale of electronic smoking devices prohibited
Section 6.47.040	Sale or offer for sale of tobacco products by a pharmacy prohibited
Section 6.47.050	Exemptions
Section 6.47.060	Public nuisance
Section 6.47.070	No conflict with federal or state law
Section 6.47.080	Authorization of enforcement by San Mateo County personnel
Section 6.47.090	Violation and Enforcement
Section 6.47.100	Severability

Section 6.47.010 Definitions

For the purposes of this chapter, the following definitions shall govern unless the context clearly requires otherwise:

- (a) “Adult” means, for the purposes of this chapter, an individual over the age of twenty-one (21) or older.
- (b) “Adult-only retailer” means any retailer or businesses that allow entry only by adults onto the entire premises of the business or retailer, or that require minors to be accompanied by a parent, guardian, or another adult in order to enter the entire premises of the business or the retailer. The definition of an “adult-only retailer” does not include any retailer or business that only prohibits minor from entering certain sections, divisions, or a part of the premises that are marked or otherwise restricted as adult-only and allows minors to otherwise enter the remainder of its premises unaccompanied by a parent, guardian or another adult.

(c) "Characterizing flavor" means a distinguishable taste or aroma or both, other than the taste or aroma of tobacco, imparted by a tobacco product or any byproduct produced by the tobacco product. Characterizing flavors include, but are not limited to, tastes or aroma relating to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, menthol, mint, wintergreen, herb, or spice. A tobacco product shall not be determined to have a characterizing flavor solely because of the use of additives or flavorings or the provision of ingredient information. Rather, it is the presence of a distinguishable taste or aroma, or both, as described in the first sentence of this definition, that constitutes a characterizing flavor.

(d) "Constituent" means any ingredient, substance, chemical, or compound, other than tobacco, water, or reconstituted tobacco sheet that is added by the manufacturer to a tobacco product during the processing, manufacture, or packing of the tobacco product.

(e) "Distinguishable" means perceivable by either the sense of smell or taste.

(f) "Flavored tobacco product" means any tobacco product that contains a constituent that imparts a characterizing flavor.

(g) "Labeling" means written, printed, pictorial, or graphic matter upon any tobacco product or any of its packaging.

(h) "Minor" means, for the purposes of this chapter, an individual under the age of twenty-one (21).

(i) "Packaging" means a pack, box, carton, or container of any kind or, if no other container, any wrapping (including cellophane) in which a tobacco product is sold, or offered for sale, to a consumer.

(j) "Pharmacy" means any retail establishment in which 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 pharmaceuticals are offered for sale, regardless of whether the retail establishment sells other retail goods in addition to prescription pharmaceuticals.

(k) "Tobacco product" is defined as set forth in section 20.420.002 of this Code.

(l) "Tobacco retailer" means any store, stand, booth, concession or any other enterprise that engages in the retail sale of tobacco products or tobacco paraphernalia as defined in section 20.420.002 of this Code, including but not limited to stores that engage in the retail sale of food items.

Section 6.47.020 Sale or offer for sale of flavored tobacco products prohibited.

(a) Except for adult-only retailers as defined in this Chapter, no person or tobacco retailer as defined in this Chapter shall sell, or offer to sell, any flavored tobacco product.

(b) There shall be a rebuttable presumption that a tobacco product is a flavored tobacco product if a manufacturer or any of the manufacturer's agents or employees, in the course of their agency or employment, has made a statement or claim directed to consumers or to the public that the tobacco product has or produces a characterizing flavor including, but not limited to, text, color, and/or images on the product's labeling or packaging that are used to explicitly or implicitly communicate that the tobacco product has a characterizing flavor.

Section 6.47.030 Sale or offer for sale of electronic smoking devices prohibited;

Except for adult-only retailers as defined in this Chapter, no person or tobacco retailer as defined under this Chapter shall sell, or offer to sell, any electronic smoking device as defined in Section 8.50.090 of this Code.

Section 6.47.040 Sale or offer for sale of tobacco products by a pharmacy prohibited.

- (a) Notwithstanding any provisions of this Chapter, no pharmacy or pharmacy employee or agent shall sell or offer for sale any tobacco product.
- (b) No new tobacco retailer permit may be issued to a pharmacy under Chapter 6.46 of this Code.
- (c) No existing tobacco retailer permit issued under Chapter 6.46 of this Code may be renewed by a pharmacy.

Section 6.47.050 Exemptions

Notwithstanding any other provision of this section, the following retailers and businesses shall be exempt from the requirements of this chapter provided that such retailers and businesses qualify as an adult-only retailer as defined in this Chapter:

- (a) Significant tobacco retailers as defined in Chapter 20.420 of this Code that were lawfully established prior to the effective date of Ordinance No. 1455 prohibiting significant tobacco retailers.
- (b) Hookah bars/Smoking lounges as defined by Chapter 20.620 of this code that serve flavored tobacco or other products for on-site smoking.

Section 6.47.060 Public nuisance.

Any violation of this ordinance is hereby declared a public nuisance.

Section 6.47.070 No conflict with federal or state law.

Nothing in this chapter shall be interpreted or applied so as to create any requirement, power, or duty that is preempted by federal or state law.

Section 6.47.080 Authorization of enforcement by San Mateo County personnel

The City Manager, or his or her designee may enforce the provisions of this Chapter. Additionally, the County's Health System Chief, or his or her designee, may enforce the provisions of this Chapter.

Section 6.47.090 Violation and Enforcement

Notwithstanding authorization of enforcement by San Mateo County personnel in this chapter, the violation of, or noncompliance with, any of the requirements of this chapter or applicable provisions of this code, shall be subject to any administrative, civil, or criminal enforcement remedies available under the law and/or the City's Municipal Code. In addition, the City may enforce the violation of this chapter by means of civil enforcement through a restraining order, a preliminary or permanent injunction or by any other means authorized by the law.

Section 6.47.100 Severability

If any provision, section, subsection, sentence, clause, phrase, or word of this Chapter 6.47, or any application thereof to any person or circumstance, is held to be invalid or unconstitutional by a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions or applications of the chapter. The Board of Supervisors hereby declares that it would have passed this chapter, and each provision, section, subsection, sentence, clause, phrase, and word not declared invalid or unconstitutional without regard to whether any other portion of this chapter or application thereof would be subsequently declared invalid or unconstitutional.

SECTION 4. Amendment to Title 20

Title 20, Chapter 20.420 of the South San Francisco Municipal Code is hereby amended with additions in double-underline and deletions in ~~striketrough~~. Sections and subsections that are not amended by this Ordinance are not included below, and shall remain in full force and effect.

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20.420.002 Definitions

The words and phrases included in this section shall have the following meanings, unless it is clearly apparent from the context that another meaning is intended:

“Significant tobacco retailer” means any tobacco retailer whose principal or core business is selling tobacco products, tobacco paraphernalia, or both, as evidenced by any of the following: 20 percent or more of floor area and display area is devoted to the sale or exchange of tobacco products, tobacco paraphernalia, or both; 67 percent or more of gross sales receipts are derived from the sale or exchange of tobacco products, tobacco paraphernalia, or both; or 50 percent or more of completed sales transactions include a tobacco product or tobacco paraphernalia.

“Tobacco paraphernalia” means cigarette papers or wrappers, pipes, holders of smoking materials of all types, cigarette rolling machines, any electronic cigarette and any other item designed for the smoking or ingestion of tobacco products.

“Tobacco products” mean (1) any substances containing any tobacco leaf, including, but not limited to, cigarettes, cigars, bidis, pipe tobacco, snuff, chewing tobacco, flavored tobacco as defined under Chapter 6.47 of this Code, and smokeless tobacco-; and (2) 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. Notwithstanding the foregoing, “tobacco product” includes any component, part, or accessory intended or reasonably expected to be used with a tobacco product, whether or not sold separately. “Tobacco product” does not, however, 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 such product is marketed and sold solely for such an approved purpose.

20.420.003 Significant Tobacco Retailers Prohibited

A. Unless otherwise exempted under Chapter 6.47 of this Code, significant tobacco retailers are not a permitted use and are prohibited in all zones throughout the City. No permit or any other applicable license or entitlement for use, nor any business license, shall be approved or issued for the establishment, maintenance or operation of a significant tobacco retailer within the City.

B. The establishment, maintenance or operation of a significant tobacco retailer within the City is declared to be a public nuisance and may be abated by the City either pursuant to the South San Francisco Municipal Code or any other available legal remedies, including, but not limited to, declaratory relief and civil injunctions.

20.420.004 Violation and Enforcement

The establishment, maintenance or operation of a significant tobacco retailer in violation of, or in noncompliance with, any of the requirements of this chapter or applicable provisions of the Zoning Code or South San Francisco Municipal Code, shall be subject to any enforcement remedies available under the law and/or the City's Municipal Code. In addition, the City may enforce the violation of this chapter by means of civil enforcement through a restraining order, a preliminary or permanent injunction or by any other means authorized by the law.

SECTION 5. Severability

If any provision of this ordinance or the application thereof to any person or circumstance is held invalid, the remainder of the ordinance and the application of such provision to other persons or circumstances shall not be affected thereby.

SECTION 6. Publication and Effective Date

Pursuant to the provisions of Government Code Section 36933, a summary of this Ordinance shall be prepared by the City Attorney. At least five (5) days prior to the Council meeting at which this Ordinance is scheduled to be adopted, the City Clerk shall (1) publish the Summary, and (2) post in the City Clerk's Office a certified copy of this Ordinance. Within fifteen (15) days after the adoption of this Ordinance, the City Clerk shall (1) publish the summary, and (2) post in the City Clerk's Office a certified copy of the full text of this Ordinance along with the names of those City Council members voting for and against this Ordinance or otherwise voting.

This Ordinance shall become effective thirty (30) days from and after its adoption.

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