CITY COUNCIL OF THE CITY OF OXNARD
ORDINANCE NO. 2973

ORDINANCE OF THE CITY OF OXNARD, CALIFORNIA, AMENDING CHAPTER 11 ARTICLE XIV OF THE CITY CODE CONCERNING TOBACCO RETAILER PERMITS

WHEREAS, the California Legislature recognizes the danger of tobacco use and has made reducing youth access to tobacco products a high priority; and

WHEREAS, State law explicitly permits cities and counties to enact local tobacco retail licensing ordinances and allows for the suspension or revocation of a local license for a violation of any state tobacco control law (Cal. Bus. & Prof. Code § 22971.3); and

WHEREAS, flavorings in tobacco products make them more appealing to young people, masking the harshness of cigarette smoke and nicotine; and

WHEREAS, over 80 percent of young people who use tobacco products report starting with a flavored product; and

WHEREAS, a California Healthy Kids Survey 2017-18 for Oxnard Union High School District found that 11 % of 9th graders, 9% of 11th graders and 22% of Non-Traditional school students have used an e-cigarette in the past 30 days; and

WHEREAS, on November 20, 2019, the American Medical Association called for a total ban of non-Food and Drug Administration approved vaping products; and

WHEREAS, the failure of tobacco retailers to comply with all tobacco control laws, particularly laws prohibiting the sale of tobacco products to minors, presents an imminent threat to the public health, safety, and welfare of the residents of the City of Oxnard.

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

Part 1. City Code Amendment. Article XIV to Chapter 11 of the Oxnard City Code is hereby amended to read as follows:

"**ARTICLE XIV. TOBACCO RETAILERS**

For the purposes of this article, the following words shall have the following meanings:

SEC. 11-370. DEFINITIONS.

(A) ARM'S LENGTH TRANSACTION - A sale in good faith and for valuable consideration that reflects the fair market value in the open market between two 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 the article is not an arm's length transaction.

(B) CIGAR – Any roll of tobacco other than cigarettes wrapped entirely or in part in tobacco or any substance containing tobacco and weighing more than three pounds per thousand.

(C) CIGARETTE – (1) any roll of tobacco wrapped in paper or in any substance not containing tobacco; and (2) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described herein.

(D) COLLECTOR - The city treasurer or designee.

(E) ELECTRONIC SMOKING DEVICE – Any device that may be used to deliver any aerosolized or vaporized substance to the person inhaling from the device, including, but not limited to, an e-cigarette, e-cigar, e-pipe, vape pen, or e-hookah. Electronic smoking device includes any component, part, or accessory of the device, and also includes any substance that may be aerosolized or vaporized by such device, whether or not the substance contains nicotine. Electronic smoking device does not include drugs, devices, or combination products authorized for sale by the U.S. Food and Drug Administration, as those terms are defined in the Federal Food, Drug, and Cosmetic Act.

(F) FLAVORED TOBACCO PRODUCT - Any tobacco product that contains a taste or smell, other than the taste or smell of tobacco, that is distinguishable by an ordinary consumer either prior to, or during the consumption of, a tobacco product, including, but not limited to, any taste or smell relating to fruit, menthol, mint, wintergreen, chocolate, cocoa, vanilla, honey, or any candy, dessert, alcoholic beverage, herb, or spice. A public statement or claim, whether express or implied, made or disseminated by the manufacturer of a tobacco product, or by any person authorized or permitted by the manufacturer to make or disseminate public statements concerning such products, that a product has or produces a taste or smell other than a taste or smell of tobacco will constitute presumptive evidence that the product is a flavored product.

(G) LITTLE CIGAR – Any roll of tobacco other than cigarettes wrapped entirely or in part in tobacco or any substance containing tobacco and weighing no more than three pounds per thousand. Little cigar includes, but is not limited to, tobacco products known or labeled as small cigar, little cigar, or cigarillo.

(H) PERSON -Any natural person, partnership, cooperative association, corporation, personal representative, receiver, trustee, assignee, or any other legal entity.

(I) PROPRIETOR- A person with an ownership or managerial interest in a business. An ownership interest shall be deemed to exist when a person has a ten percent (10%) or greater interest in the stock, assets, or income of a business other than the sole interest of security for debt. A managerial interest shall be deemed to exist when a person can or does have or share ultimate control over the day-to-day operations of a business.

(J) SALE or SELL – means any transfer, exchange, barter, gift, offer for sale, or distribution for a commercial purpose, in any manner or by any means whatsoever.

(K) SELF-SERVICE DISPLAY -The open display or storage of tobacco products in a manner that is physically accessible in any way to the general public without the assistance of the retailer or employee of the retailer and a direct person-to-person transfer between the purchaser and the retailer or employee of the retailer. A vending machine is a form of self-service-display.

(L) TOBACCO PRODUCT- means:

(1) any product containing, made of, or derived from tobacco or nicotine that is intended for human consumption or is likely to be consumed, whether inhaled, absorbed, or ingested by any other means, including but not limited to, a cigarette, a cigar, pipe tobacco, chewing tobacco, snuff, or snus;

(2) any electronic smoking device as defined in this article and any substances that may be aerosolized or vaporized by such device, whether or not the substance contains nicotine; or

(3) any component, part, or accessory of 1) or 2), whether or not any of these contains tobacco or nicotine, including but not limited to filters, rolling papers, blunt or hemp wraps, hookahs, and pipes.

"Tobacco product" does not include drugs, devices, or combination products authorized for sale by the U.S. Food and Drug Administration, as those terms are defined in the Federal Food, Drug, and Cosmetic Act.

(M) TOBACCO RETAILER - Any person who sells, offers for sale, exchanges or offers to exchange for any form of consideration tobacco products.

(N) TOBACCO RETAILING - Selling, offering for sale, or exchanging or offering to exchange for any form of consideration tobacco products without regard to the quantity of tobacco products sold, offered for sale, exchanged, or offered for exchange.

SEC. 11-371. TOBACCO RETAILER PERMIT REQUIRED; COMPLIANCE WITH OTHER LAWS.

(A) TOBACCO RETAILER'S PERMIT REQUIRED. No person shall act as a tobacco retailer without first obtaining and maintaining a valid tobacco retailer's permit pursuant to this article for each location at which such activity is to occur.

(B) DISPLAY OF PERMITS. Each tobacco retailer permit shall be posted in a conspicuous public location at the place of business for which the permit has been issued.

(C) LAWFUL BUSINESS OPERATION. A business tax certificate shall be obtained pursuant to section 11-4 of this code before any permit is issued pursuant to this section. The issuance of a permit shall not eliminate compliance with any other requirements, including the requirement for another permit, certificate or clearance, imposed by any other local, State, or federal rule, regulation, or law.

SEC. 11-372. TERM; FEES.

(A) A tobacco retailer permit shall be valid for 12 months from the date of issuance or as indicated on the permit and shall specify the location where tobacco retailing may be held.

(B) Fees for such permits shall be established by resolution of the city council.

SEC. 11-373. RESTRICTIONS.

(A) POSITIVE IDENTIFICATION REQUIRED. No person engaged in tobacco retailing shall sell or transfer a tobacco product or tobacco paraphernalia to another person who appears to be under the age of 27 years without first examining the identification of the recipient to confirm that the recipient is at least the minimum age under state law to purchase and possess the tobacco product or tobacco paraphernalia.

(B) MINIMUM CLERK AGE. No person who is younger than the minimum age established by state law for the purchase or possession of tobacco products shall engage in tobacco retailing.

(C) SELF SERVICE DISPLAYS PROHIBITED. Tobacco retailing by means of a self-service display is prohibited.

(D) DISPLAY OF TOBACCO PRODUCTS WITHOUT A PERMIT. A tobacco retailer or proprietor without a valid tobacco retailer permit, including, a person whose license has been suspended or revoked, shall keep all tobacco products out of public view. Advertisements relating to tobacco products or tobacco paraphernalia that promote the sale or distribution of such products from the tobacco retailer's location or that could lead a reasonable consumer to believe that such products can be obtained at that location shall not be displayed.

(E) ON-SITE SALES. All sales of tobacco products shall be conducted in-person at the permitted location. It shall be a violation of this article for any tobacco retailer or any of the tobacco retailer's agents or employees to deliver tobacco products or to knowingly or recklessly sell tobacco products to any person that intends to deliver the tobacco product. For purposes of this subsection, "deliver" means the commercial transfer of tobacco products to a person at a location not permitted pursuant to this article.

SEC. 11-374. SALE OF FLAVORED TOBACCO PRODUCTS PROHIBITED.

(A) It shall be unlawful for any retailer to sell or offer for sale any flavored tobacco product.

(B) There shall be a rebuttable presumption that a tobacco retailer in possession of four or more flavored tobacco products, including, but not limited to, individual flavored tobacco products, packages of flavored tobacco products, or any combination thereof, possesses such flavored tobacco products with intent to Sell or offer for Sale.

SEC. 11-375. TOBACCO PRODUCT PRICING AND PACKAGING.

(A) PACKAGING AND LABELING. No tobacco retailer shall sell any tobacco product to any person unless such product: (1) is sold in the original manufacturer's packaging intended for sale; and (2) conforms to all applicable federal labeling requirements.

(B) DISPLAY OF PRICE. The price of each tobacco product offered for sale shall be clearly and conspicuously displayed to indicate the price of the product.

(C) PROHIBITION OF TOBACCO COUPONS AND DISCOUNTS. No tobacco retailer shall:

(1) Honor or redeem, or offer to honor or redeem, a coupon to allow a person to purchase a tobacco product for less than the full retail price;

(2) Sell any tobacco product to a person through a multiple-package discount or otherwise provide any such product to a consumer for less than the full retail price in consideration for the purchase of any tobacco product or any other item; or

(3) Provide any free or discounted item to a person in consideration for the purchase of any tobacco product.

(D) MINIMUM PACKAGE SIZE FOR LITTLE CIGARS AND CIGARS. No tobacco retailer shall sell to a person:

(1) Any little cigar unless it is sold in a package of at least 20 little cigars, or any cigar unless it is sold in a package of at least six cigars; or

(2) The restriction in subsection D(1) shall not be a cigar that has a price of at least [$5] per cigar, including all applicable taxes and fees.

SEC. 11-376. PERMIT APPLICATION PROCEDURES.

(A) An application for a tobacco retailer permit shall be submitted on a form supplied by the collector, signed by each proprietor or an authorized agent thereof, and shall contain the following information:

(1) The name, title, address, and telephone number of each proprietor of the business seeking a permit.

(2) The business name, address, and telephone number of the single fixed location for which a permit is sought.

(3) A single name and mailing address authorized by each proprietor to receive all communications and notices required by, authorized by, or convenient to the enforcement of this article.

(4) Proof that the location for which a tobacco retailer permit is sought has been issued a valid state tobacco retailer's license by the California Board of Equalization, if applicable.

(5) The dates and locations of any admitted violations of this article or of any tobacco permit requirement by any proprietor or any agent of the proprietor and the dates and locations of any violations of this article or of any tobacco pelmit requirement found to have been committed by any proprietor or any agent of the proprietor within the previous five years.

(6) Whether or not any proprietor or any agent of the proprietor has admitted violating, or has been found to have violated, this article, and if so, the dates and locations of all such violations within the previous five years.

(7) Such other information as the collector deems necessary for the administration or enforcement of this article as specified on the application form required by this section.

(B) A permitted tobacco retailer shall inform the collector in writing of any change in the information submitted on an application for a tobacco retailer permit within 10 business days of such change.

(C) All information specified in an application pursuant to this section shall be subject to disclosure under the California Public Records Act (Cal. Govt. Code section 6250 et seq.) or any other applicable law.

SEC. 11-377. ISSUANCE OF A PERMIT.

Upon receipt of a completed application for a tobacco retailer permit and the applicable permit fee, the collector shall issue a permit, after receiving input from appropriate city departments, unless substantial evidence demonstrates that one or more of the following bases for denial exists:

(A) The information presented in the application is inaccurate or false.

(B) The application seeks authorization for tobacco retailing at a location for which this article prohibits issuance of tobacco retailer permits.

(C) The application seeks authorization for tobacco retailing for a proprietor to whom this article prohibits a permit to be issued.

(D) The application seeks authorization for tobacco retailing that is prohibited pursuant to this article, that is unlawful pursuant to this code, or that is unlawful pursuant to any other law.

SEC. 11-378. PERMIT RENEWAL AND EXPIRATION.

(A) A tobacco retailer's permit is invalid if the appropriate fee has not been timely paid in full or if the term of the permit has expired. The term of a tobacco retailer permit is 12 months. An application for the renewal of a tobacco retailer permit shall be submitted to the collector, along with the permit renewal fee as established by resolution of the city council, no later than 30 days prior to the expiration of the permit.

(B) A tobacco retailer permit that is not timely renewed shall expire at the end of its term. To renew a permit not timely renewed pursuant to subsection (A) of this section, the proprietor(s) must provide the following:

(1) An application for a new tobacco retailer permit along with the new application permit fee as established by resolution of the city council; and

(2) A signed affidavit affirming that the tobacco retailer:

(i) has not sold and will not sell any tobacco product after the permit expiration date and before a new permit is issued; or

(ii) has waited the appropriate ineligibility period established for tobacco retailing without a permit, as set forth in section 11-382 of this code, before seeking a new permit.

SEC. 11-379. PERMITS NON TRANSFERABLE.

(A) A tobacco retailer permit may not be transferred from one person to another or from one location to another.

(B) A new tobacco retailer permit is required when a tobacco retailing location has a change in ownership.

(C) Notwithstanding any other provision of this article, prior violations at a location shall continue to be counted against a location and permit ineligibility periods shall continue to apply to a location unless:

(1) The location has been fully transferred to a new owner or fully transferred to entirely new owners; and

(2) The new owner or owners provide the collector with clear and convincing evidence that the new owner or owners have acquired or are acquiring the location in an arm's length transaction.

SEC. 11-380. FEE FOR PERMIT.

The fee to issue or to renew a tobacco retailer's permit shall be established from time to time by resolution of the City Council. The fee shall be calculated so as to recover the cost of administration and enforcement of this article, including, for example, issuing a permit,

administering the permitting program, retailer education, retailer inspection and compliance checks, documentation of violations, and prosecution of violators, but shall not exceed the cost of the regulatory program authorized by this article. All fees and interest upon proceeds of fees shall be used exclusively to fund the program. Fees are nonrefundable except as may be required by law.

SEC. 11-381. MODIFICATION, SUSPENSION, OR REVOCATION OF PERMIT.

(A) In addition to any other penalty authorized by law, a tobacco retailer permit may be suspended revoked by the collector, after notice and an opportunity to be heard as set forth in chapter 1, article V of this code, for failure of the permittee, or any of the permittee's agents or employees, to comply with applicable local, state, or federal rules, regulations, or laws concerning tobacco retailing, based on matters occurring after the permit is issued or on matters not considered at the time of issuance of the permit that would have authorized denial of the permit or the imposition of conditions on the permit.

(B) Any person, including a city officer or employee, may file with the collector a written request for revocation, suspension, or modification of a tobacco retailer permit, stating facts showing that the permittee, or any of the permittee's agents or employees, failed to comply with applicable rules, laws, regulations, or permit conditions.

(C) If the request is filed by a city officer or employee on behalf of a city department, the request shall be accompanied by a written report, stating wherein the permittee, or any of the permittee's agents or employees, has not complied with applicable rules, laws, regulations, or permit conditions and recommending that the tobacco retailer permit be revoked, suspended, or in what respect the permit should be modified.

(D) Based on the preponderance of the evidence, if the collector finds the tobacco retailer or any of the tobacco retailer's employees or agents has violated any of the requirements, conditions, or prohibitions of this article, the collector may take the following actions:

(i) Upon a finding by the collector of a first violation of this article at a location within any [five-year] period, the permit may be suspended for up to [30] days.

(ii) Upon a finding by the collector of a second violation of this article at a location within any [five-year] period, the license may be suspended for up to [90] days.

(iii) Upon a finding by the collector of a third violation of this article at a location within any [five-year] period, the license may be suspended for up to [one] year.

(iv) Upon a finding by the Department of four or more violations of this article at a location within any [five-year] period, the license may be revoked.

SEC. 11-382. TOBACCO RETAILING WITHOUT A PERMIT.

(A) In addition to any other penalty authorized by law, if a court of competent jurisdiction determines, or the collector finds based on a preponderance of evidence, after notice and an opportunity to be heard as set forth in chapter 1, article V of this code, that any person has engaged in tobacco retailing at a location without a valid tobacco retailer permit, either directly or through the person's agents or employees, the person shall be ineligible to apply for, or to be issued, a tobacco retailing permit as follows:

(1) After a first violation of this section at a location within any five year period, no new permit may issue for the person or the location, unless ownership of the business at the location has been transferred in an arm's length transaction, until 30 days have passed from the date of the violation.

(2) After a second violation of this section at a location within any five year period, no new permit may issue for the person or the location, unless ownership of the business at the location has been transferred in an arm's length transaction, until 90 days have passed from the date of violation.

(3) After a third or subsequent violation of this section at a location within any five year period, no new permit may issue for the person 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 violation.

(B) Tobacco products offered for sale or exchange in violation of this section are subject to seizure by the collector or any peace officer and shall be forfeited after the permittee and any other owner of the tobacco products seized is given reasonable notice and an opportunity to demonstrate, as set forth in article V of chapter 1 of this code, that the tobacco products were not offered for sale or exchange in violation of this article. Forfeited tobacco products and shall be destroyed after all internal appeals have been exhausted and the time in which to seek judicial review pursuant to California Code of Civil Procedure section 1094.6 or other applicable law has expired without the filing of a lawsuit, or if such a suit is final, after judgment in that suit becomes final.

(C) For the purposes of the civil remedies provided in this article:

(1) Each day on which a tobacco product is offered for sale in violation of this article shall constitute a separate violation of this article; and

(2) Each individual retail tobacco product and each individual retail item that is distributed, sold, or offered for sale in violation of this article shall constitute a separate violation of this article.

SEC.11-383. ENFORCEMENT.

(A) The remedies provided by this article are cumulative and in addition to any other remedies available at law or in equity.

(B) Whenever evidence of a violation of this article is obtained in any part through the participation of a person under the age of eighteen (18) years old, such a person shall not be required to appear or give testimony in any civil or administrative process brought to enforce this article and the alleged violation shall be adjudicated based upon the sufficiency and persuasiveness of the evidence presented.

(C) Violations of this article are hereby declared to be public nuisances.

(D) In addition to other remedies provided by this article or by other law, any violation of this article may be remedied by a civil action brought by the City Attorney, including, but not limited to, administrative or judicial nuisance abatement proceedings, civil or criminal code enforcement proceedings, and suits for injunctive relief.

SEC.11-384. SEVERABILITY

If any section or provision of this ordinance is held invalid, such invalidity will not affect other sections or provisions that can be given force and effect without the invalidated section or provision. "

Part 2. Severability. If any section, subsection, sentence, clause, phrase, part or portion of this Ordinance is for any reason held to be invalid or unconstitutional by any court of competent jurisdiction, such decision will not affect the validity of the remaining portions of this Ordinance. The City Council declares that it would have adopted this Ordinance and each section, subsection, sentence, clause, phrase, part or portion thereof, irrespective of the fact that any one of more section, subsections, sentences, clauses, phrases, parts or portions be declared invalid or unconstitutional.

Part 3. The City Council determines and finds that this ordinance is exempt from the California Environmental Quality Act under section 15061(b)(3) because the activity is covered by the general rule that CEQA applies only to projects 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.

Part 4. Pursuant to Cal. Gov. Code Section 36933(c)(1), the City Attorney was designated to prepare, and the City Clerk published, a summary of this ordinance, and a certified copy of the ordinance was posted in the Office of the City Clerk a minimum of five days before the City Council's adoption of the ordinance.

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Part 5. Within fifteen days after passage, the City Clerk shall cause this ordinance to be published one time in a newspaper of general circulation, published and circulated in the City. Ordinance No. 2973 was first read on December 3, 2019, and finally adopted on December 17, 2019, to become effective thirty days thereafter.

AYES: Councilmembers Basua, Flynn, Lopez, MacDonald, Madrigal, Perello and Ramirez.

NOES: None.

ABSENT: None.

ABSTAIN: None.

Tim Flynn 12/17/19
Tim Flynn, Mayor

ATTEST:

Michelle Ascencion, City Clerk

APPROVED AS TO FORM:

12/12/19
Stephen M. Fischer, City Attorney