

ORDINANCE NO. ____

AN ORDINANCE OF THE CITY OF PLEASANT HILL AMENDING
CHAPTER 9.45 (“TOBACCO PRODUCTS AND ELECTRONIC SMOKING DEVICES”)
OF THE PLEASANT HILL MUNICIPAL CODE TO PROHIBIT THE SALE OF FLAVORED
TOBACCO PRODUCTS 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;¹ and

WHEREAS e-cigarette use among youth in the United States has skyrocketed to what the U.S. Surgeon General and the U.S. Food and Drug Administration (“FDA”) have called “epidemic” levels; and

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

WHEREAS, the U.S. Surgeon General has reported a more than a 900% increase in the use of electronic smoking devices among middle school and high school students between 2011 and 2015;² and

WHEREAS, federal data shows that e-cigarette use among middle and high school students more than doubled from 2017 to 2019, with five million youths reportedly having used e-cigarettes in 2019; and

WHEREAS, state data shows that one in eight California high school students currently use tobacco products, with the most used product among all students being electronic smoking devices and flavored tobacco products; and

WHEREAS, electronic smoking devices often mimic conventional tobacco products in shape, size, and color, with the user exhaling a smoke-like vapor similar in appearance to the exhaled smoke from cigarettes and other conventional tobacco products; 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 FDA 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;³ and

¹ U.S. Department of Health and Human Services. “The Health Consequences of Smoking—50 Years of Progress. A Report of the Surgeon General” (2014). https://www.ncbi.nlm.nih.gov/books/NBK179276/pdf/Bookshelf_NBK179276.pdf

² Office of the Surgeon General. “Surgeon General’s Advisory on E-cigarette Use Among Youth” (2018). <https://e-cigarettes.surgeongeneral.gov/documents/surgeon-generals-advisory-on-e-cigarette-use-among-youth-2018.pdf>

³ *Id.*

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, the smoking of tobacco and the use of electronic cigarettes are forms of air pollution and are a danger to public health as well as a material public nuisance; 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, the federal Family Smoking Prevention Tobacco Control Act, enacted in 2009, prohibited candy and fruit-flavored cigarettes, largely because these flavored products were marketed to youth and young adults, and younger smokers were more likely to have tried these products than older smokers; and

WHEREAS, the California Legislature has recognized the danger of tobacco use and has made reducing youth access to tobacco products a high priority; 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, State law prohibits the sale or distribution of free or nominal-cost cigarettes or smokeless tobacco products (or coupons, coupon offers, or rebate offers for such products) on public grounds or on private grounds that are open to the public (Cal. Health & Safety Code, § 118950); and

WHEREAS, most recently in August 2020, the California Legislature passed and Governor Newsom signed into law Senate Bill 793 (SB 793), a broad legislation prohibiting the sale of most flavored tobacco products (codified at Cal. Health & Safety Code, § 104559.5); and

WHEREAS, Section 104559.5(g) also specifically allows adoption of a local ordinance that imposes greater restrictions on the access to tobacco products than the restrictions imposed by state law, and provides that a stricter local ordinance shall govern in the case of any inconsistency between the local ordinance and state law; and

WHEREAS, while SB 793 has been placed on the November 8, 2022 ballot through a qualifying referendum, municipalities continue to retain the authority to adopt local ordinances restricting the sale of flavored tobacco and/or electronic cigarettes; and

WHEREAS, federal law also expressly grants state and local governments the right to enact measures that are more restrictive than those in the federal law;⁴ and

WHEREAS, despite local, state, and federal efforts to limit youth access to tobacco, flavored tobacco products and electronic smoking devices, minors are still able to access these products; and

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 Pleasant Hill; 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%.⁵ Convenience stores have a violation rate of 25.3%, while small markets have a rate of 24.8%;⁶ and

WHEREAS, the accessibility of these products in retailers such as vape shops, pharmacies, and convenience stores, and lower costs of some of the products relative to conventional cigarettes made possible by social media promotion from retailers and coupons, discounts, and other promotional materials make these products more easily available to youth; and

WHEREAS, the California Constitution, Article XI, Section 7, provides cities and counties with the authority to enact ordinances to protect the health, safety, welfare, and morals of their citizens; and

WHEREAS, the City of Pleasant Hill has a substantial interest in promoting compliance with federal, state, and local laws prohibiting the sale or furnishing tobacco products and electronic cigarette products by minors; in promoting compliance with laws prohibiting sales of cigarettes and tobacco products to minors; and in protecting children from being lured into illegal activity through adult misconduct; and

WHEREAS, in 2019, Contra Costa County adopted Ordinance No. 2019-34 prohibiting, in unincorporated county areas, the sale of (1) any e-liquid or electronic smoking device that is required to obtain, but has not yet obtained, a premarket review order from the FDA pursuant to the federal Family Smoking Prevention and Tobacco Control Act, and (2) any flavored tobacco product or menthol cigarette; and

WHEREAS, in January 2020, the Governing Board of the Mt. Diablo Unified School District adopted Resolution No. 19/20-32 opposing the use and sale of e-cigarettes and electronic vaping devices, agreeing to adopt district policies and take other actions to prohibit such devices, and urging cities within the school district to prohibit the sale, manufacture, and distribution of

⁴ 21 U.S.C. § 387p(a)(1) (2009).

⁵ California Department of Public Health, California Tobacco Control Program. “California Tobacco Facts and Figures 2019” (2019).

⁶ *Id.*

flavored tobacco products and electronic vaping devices due to the harmful impacts on public health including on both youth and adult smokers; 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, based upon the recitals above, the City Council finds that the proposed amendments to Pleasant Hill Municipal Code Chapter 9.45 (“Tobacco Products and Electronic Smoking Devices”) are necessary for the protection of the public health, safety, and welfare.

NOW, THEREFORE, the City Council of the City of Pleasant Hill does ordain as follows:

Section 1. Section 9.45.030 (“Definitions”) of Article I (“Regulation of Smoking”) of Chapter 9.45 of the Pleasant Hill Municipal Code is amended by revising the definition of “electronic smoking device” as shown in underline/strike-through as follows:

Electronic smoking device means any electronic and/or battery-operated device or delivery system, the use of which may resemble traditional smoking and that can be used to deliver to a person in aerosolized or vaporized form, nicotine, tetrahydrocannabinol, or any other cannabinoid, including but not limited to an electronic cigarette, electronic cigar, electronic pipe, electronic hookah, or vape pen. an inhaled dose of nicotine or other substances, including any component, part, or accessory of such a device, whether or not sold separately. The term *Electronic smoking device* includes any component, part, or accessory of such a device, including but not limited to a cartridge, that is used during the operation of the device. such device, whether manufactured, distributed, marketed, or sold as an electronic cigarette, an e-cigarette, an electronic cigar, an electronic cigarillo, an electronic pipe, an electronic hookah, or any other product name or descriptor. The term does not include any inhaler prescribed by a licensed doctor.

Section 2. Section 9.45.030 (“Definitions”) of Article I (“Regulation of Smoking”) of Chapter 9.45 of the Pleasant Hill Municipal Code is amended by revising the definition of “smoking” as shown in underline/strike-through as follows:

Smoking means engaging in an act that generates smoke, such as, for example: inhaling, exhaling, burning, igniting, operating, or carrying any lighted, heated, or ignited cigar, cigarette, cigarillo, pipe, hookah, electronic smoking device, or any plant product intended for human inhalation. the carrying, holding or operating of a lighted or heated pipe, cigar, cigarette, electronic smoking device, or any other kind of smoking or vaporizing equipment. Smoking also means the lighting, operating, emitting, or exhaling of the smoke, fumes or vapor of a pipe, cigar, cigarette, electronic smoking device, or other kind of smoking or vaporizing equipment.

Section 3. Section 9.45.030 (“Definitions”) of Article I (“Regulation of Smoking”) of Chapter 9.45 of the Pleasant Hill Municipal Code is amended by revising the definition of “tobacco product” as shown in underline/strike-through as follows:

Tobacco product means:

1. Any product containing, made, or derived from tobacco or nicotine that is intended for human consumption, whether smoked, heated, chewed, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means, including, but not limited to, cigarettes, cigars, little cigars, chewing tobacco, pipe tobacco, and snuff; and.
2. ~~Notwithstanding any provision of subsection (1) of this definition to the contrary, tobacco product includes any component, part, or accessory of a tobacco product, whether or not sold separately. Tobacco product 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. Any electronic smoking device that contains nicotine or can be used to deliver nicotine in aerosolized or vaporized form.~~
3. Any component, part, or accessory of a tobacco product, whether or not it is sold separately.
4. Tobacco product 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 the product is marketed and sold solely for that approved purpose.

Section 4. Section 9.45.030 (“Definitions”) of Article I (“Regulation of Smoking”) of Chapter 9.45 of the Pleasant Hill Municipal Code is amended by deleting the definition of “electronic smoking device retailer” as shown in strike-through as follows:

~~*Electronic smoking device retailer* means any person who sells, offers for sale, or does or offers to exchange for any form of consideration electronic smoking devices and/or electronic smoking device paraphernalia. *Electronic smoking device retailing* shall mean the doing of any of these things. This definition is without regard to the quantity of electronic smoking devices and/or electronic smoking device paraphernalia sold, offered for sale, exchanged, or offered for exchange.~~

Section 5. Section 9.45.030 (“Definitions”) of Article I (“Regulation of Smoking”) of Chapter 9.45 of the Pleasant Hill Municipal Code is amended to include the following definitions, but shall remain otherwise unchanged:

Adult means an individual twenty-one years of age or older.

Adult only business means any retailer or business that allows 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. *Adult only business* does not include any retailer or business that only prohibits minors from entering certain sections, divisions, or a part of the premises that is 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.

Characterizing flavor means a distinguishable taste or aroma imparted by a tobacco product or any byproduct produced by the tobacco product that is perceivable by an ordinary consumer by either the sense of taste or smell, other than the taste or aroma of tobacco. *Characterizing flavor* includes, but is not limited to, a taste or aroma relating to a fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, menthol, mint, wintergreen, herb, or spice.

Cigar means any roll of tobacco other than a cigarette wrapped entirely or in part in tobacco or any substance containing tobacco and weighing more than three pounds per thousand.

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.

Consumer means a person who purchases a tobacco product for consumption and not for sale to another.

E-liquid means any substance that is intended to be consumed in aerosolized or vaporized form using an electronic smoking device, regardless of the nicotine content of the substance.

Flavored tobacco product means any tobacco product that contains a constituent that imparts a characterizing flavor. Menthol cigarettes are included in the definition of a flavored tobacco product for the purposes of this chapter. A tobacco product whose labeling or packaging contains text or an image indicating that the product imparts a characterizing flavor is presumed to be a flavored tobacco product.

Hookah means a type of waterpipe, used to smoke shisha or other tobacco products, with a long flexible tube for drawing aerosol through water. Components of a *hookah* may include heads, stems, bowls, and hoses.

Hookah tobacco business means a tobacco retailer, a smoking lounge or bar that is engaged in the retail sale of shisha tobacco products, hookah, and hookah smoking accessories, or the serving of those products and accessories for onsite smoking.

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

Little cigar means any roll of tobacco other than a cigarette 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, any tobacco product known or labeled as “small cigar” or “little cigar.”

Menthol cigarettes means cigarettes as defined by federal law that have a characterizing flavor of menthol, mint, or wintergreen, including cigarettes advertised, labeled, or described by the manufacturer as possessing a menthol characterizing flavor.

Package or *packaging* means a pack, box, carton, or container of any kind, or any wrapping, in which a tobacco product is sold or offered for sale to a consumer.

Person means any individual, firm, partnership, cooperative association, private corporation, personal representative, receiver, trustee, assignee, or other legal entity.

Shisha tobacco product means a tobacco product smoked or intended to be smoked in a hookah. *Shisha tobacco product* includes, and may be referred to as, hookah tobacco, waterpipe tobacco, maassel, narghile, and argileh. *Shisha tobacco product* does not include any electronic devices, such as an electronic hookah, electronic cigarette, or electronic tobacco product.

Smoke means the gases, particles, or vapors released into the air as a result of combustion, electrical ignition or vaporization, when the apparent or usual purpose of the combustion, electrical ignition or vaporization is human inhalation of the byproducts, except when the combusting or vaporizing material contains no tobacco, marijuana, or nicotine and the purpose of inhalation is solely olfactory, such as, for example, smoke from incense. *Smoke* includes, but is not limited to, tobacco and marijuana smoke and gases, particles, e-liquids, and vapors from electronic smoking devices as defined in this chapter. Any vapor produced during vaporization of marijuana for medical purposes in a multi-unit residence is not included within this definition.

Section 6. Subsection B of Section 9.45.050 (“Smoking prohibition”) of Article I (“Regulation of Smoking”) of Chapter 9.45 of the Pleasant Hill Municipal Code is amended as shown in strike-through as follows:

B. Places of employment. In addition to the prohibitions on the use of tobacco in places of employment set forth in California Labor Code section 6404.5, within the city of Pleasant Hill, no employer shall knowingly or intentionally permit, and no person shall engage in, the use of any electronic smoking device in an enclosed space at a place of employment. *Enclosed space* includes lobbies, lounges, waiting areas, elevators, stairwells, and restrooms that are a structural part of the building. For purposes of this subsection B and in order to determine compliance with the requirements of California Labor Code section 6404.5:

~~*Place of employment* does not include an electronic smoking device retailer, provided there is no smoking of any tobacco product in other than an enclosed area in or attached to any electronic smoking device retailer and the enclosed area shares no common air space, ventilation, air conditioning or heating system with the remainder of said retailer.~~

Place of employment does not include an enclosed area in or attached to any tobacco retailer, provided the enclosed area shares no common air space, ventilation, air conditioning or heating system with the remainder of said retailer.

Section 7. Section 9.45.100 (“Vending machines”) of the Pleasant Hill Municipal Code is hereby repealed and reserved. The deleted text is shown in strikeout below:

9.45.100 Reserved. ~~Vending machines.~~

~~Neither cigarette nor electronic smoking device or electronic smoking device paraphernalia vending machines may be installed, utilized or operated on or within any premises in the city.~~

Section 8. Section 9.45.110 (“Distribution of free samples and coupons”) of Article I (“Regulation of Smoking”) of Chapter 9.45 of the Pleasant Hill Municipal Code is hereby amended as shown in strike-through as follows:

No person, firm, association or corporation in the business of selling ~~or otherwise distributing cigarettes, electronic smoking devices or electronic smoking device paraphernalia or other tobacco products~~ for commercial purposes, or agent or employee thereof, shall in the course of such business distribute, or direct, authorize, or permit any agent or employee to distribute, any of the following on or in a public street, sidewalk, park, playground or building: (A) any ~~cigarette or other tobacco or smoking product, including any smokeless tobacco product, electronic smoking device or electronic smoking device paraphernalia;~~ or (B) coupons, certificates, or other written material which may be redeemed for tobacco products ~~or electronic smoking devices or electronic smoking device paraphernalia~~ without charge.

Section 9. Section 9.45.120 (“Out-of-package sales”) of Article I (“Regulation of Smoking”) of Chapter 9.45 of the Pleasant Hill Municipal Code is hereby amended as shown in underline/strike-through as follows:

No person shall sell or offer for sale any ~~cigarettes, electronic smoking devices or electronic smoking device paraphernalia, or smokeless tobacco~~ product not in the original packaging provided by the manufacturer.

Section 10. Article II (“Restricting the Advertising and Promotion of Tobacco Products, Electronic Smoking Devices and Electronic Smoking Device Paraphernalia to Minors”) of Chapter 9.45 of the Pleasant Hill Municipal Code is amended as shown in underline/strike-through as follows:

Article II. Restricting the Advertising and Promotion of Tobacco Products, ~~Electronic Smoking Devices and Electronic Smoking Device Paraphernalia~~ to Minors

9.45.200 Purpose.

The purpose of this article is to promote the welfare of minors by discouraging the commercial exploitation of potential underage tobacco ~~and electronic smoking device~~ users and by discouraging actions that promote the unlawful sale of tobacco products, ~~electronic smoking devices and electronic smoking device paraphernalia~~ to minors, as well as the unlawful purchase or possession of tobacco products, ~~electronic smoking devices and electronic smoking device paraphernalia~~ by minors.

9.45.210 Definitions.

This article incorporates the definitions set forth in PHMC § 9.45.030. In addition, as used in this article:

Advertising display sign means a sign, billboard, signboard, poster, placard, freestanding sign, pennant, banner, graphic display, mural, or similar device that is used to advertise or promote a product. It includes a sign which is temporary or permanent, placed on or affixed to the ground, sidewalk, a pole or post, fence, or a building, or displayed in the window or door of a commercial establishment.

Chief of police means the city chief of police or his or her designee.

Mobile billboard means an advertising display sign which is placed on or affixed to a vehicle if the vehicle is parked within a public right-of-way or on private property and is used primarily to advertise a product. (See Prohibited signs, PHMC § 18.60.060.)

Offering for sale means that tobacco products, ~~electronic smoking devices or electronic smoking device paraphernalia~~ are actually sold and/or displayed in the retail establishment.

Promotion means a display of any logo, brand name, character, graphic, artwork, colors, scenes, or designs that are a recognized image of a particular product brand that calls the public's attention to the product brand.

Publicly visible location means an outdoor location that is visible from any street, sidewalk, or other public thoroughfare, or a location inside a commercial establishment that is in or adjacent to a window or doorway and is visible from any street, sidewalk, or other public thoroughfare. To be considered publicly visible, an inside location must be within one foot of a window or doorway.

Self-service display means the open display or storage of tobacco products or tobacco paraphernalia 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.

9.45.220 Administration.

This article shall be administered by the chief of police. The chief may develop guidelines to ensure implementation of this article.

9.45.230 Restrictions on the advertising of tobacco products, ~~electronic smoking devices and electronic smoking device paraphernalia~~ – Exceptions.

A. Restriction. No person shall place or maintain, or cause or allow to be placed or maintained, any advertising or promotion of tobacco products, ~~electronic smoking devices or electronic smoking device paraphernalia~~ on an advertising display sign in a publicly visible location within 1,600 feet of the perimeter of: a public or private elementary, middle or secondary school; or a public playground or playground area in a public park (e.g., a public park with equipment such as swings and seesaws, baseball diamonds or basketball courts).

B. Exceptions. Subsection A of this section does not apply to advertising or promotion for tobacco products, ~~electronic smoking devices or electronic smoking device paraphernalia~~ which are:

1. Located inside a commercial establishment, unless the advertising display sign or promotion is attached to, affixed to, leaning against, or otherwise in contact with any window or door in such a manner that it is visible from a street, sidewalk or other public thoroughfare;
2. On vehicles, other than mobile billboards;
3. On any sign located inside or immediately outside a commercial establishment if the sign provides notice that the establishment sells tobacco products, ~~electronic smoking devices or electronic smoking device paraphernalia~~, so long as the sign does not promote any brand of tobacco product, ~~electronic smoking device or electronic smoking device paraphernalia~~; or
4. On tobacco product, ~~electronic smoking device or electronic smoking device paraphernalia~~ packaging.

9.45.240 Sale and distribution of promotional items related to tobacco products or ~~electronic smoking devices~~ prohibited.

A. No manufacturer, distributor, or retailer of tobacco products, ~~electronic smoking devices or electronic smoking device paraphernalia~~ may market, license, distribute, sell, or cause to be marketed, licensed, distributed or sold any item or service to a minor which bears the brand name (alone or in conjunction with any other word), logo, symbol, motto, selling message, recognizable color or pattern of colors, or any other indicia or product identification identical with, or similar to, or identifiable with, those used for any brand of tobacco product, ~~electronic smoking device or electronic smoking device paraphernalia~~.

B. No person in the business of selling or otherwise distributing tobacco products, ~~electronic smoking devices or electronic smoking device paraphernalia~~ for commercial purposes shall, in the course of such business, distribute, or direct, authorize or permit any agent or employee to distribute, any of the following on a public street or sidewalk, in a public park or playground, or on any other public ground or in a public building: (1) a ~~cigarette or other tobacco product, electronic smoking device or electronic smoking device paraphernalia~~; or (2) a coupon, certificate, or other written material which may be redeemed for tobacco products, ~~electronic smoking devices and/or electronic smoking device paraphernalia~~ without charge.

9.45.250 Self-service displays prohibited.

It is unlawful for a person to sell, permit to be sold, offer for sale, or display for sale any ~~packaged tobacco product, electronic smoking device or electronic smoking device paraphernalia~~ by means of a self-service display, rack, counter top or shelf that allows a self-service customer access to a ~~packaged tobacco product, electronic smoking device or electronic smoking device paraphernalia~~. All ~~packaged tobacco products, electronic smoking devices and electronic smoking device paraphernalia~~ shall be offered for sale exclusively by means of seller assistance. ~~Packaged~~ ~~†~~Tobacco products, ~~electronic smoking devices and electronic smoking device paraphernalia~~ shall be located exclusively in a locked case, located behind counters out of reach from customers, or in a similar location that is inaccessible to customers, requiring seller assistance for the customer to obtain access to the products.

9.45.260 Violations.

A. Chief of police review. A private citizen or a city officer or employee may submit a written complaint to the chief of police concerning any advertising or promotion prohibited by this article. The chief will review and, if determined to be appropriate, act upon the complaint in a timely manner. The chief may serve written notice requiring correction of any violation of this article upon the person responsible for the business or for the advertising display sign or promotion or self-service display prohibited by this article. Any notice issued shall specify a date by which the violation must be corrected. The notice shall be served by (1) personal service or by (2) certified and first class mail.

B. Correction. The person responsible shall correct the violation within the time specified in the notice.

C. Each display and each day a separate offense. Each separate display of advertising or promotion prohibited by this article is considered a separate violation. Each day a violation continues is considered a separate violation.

D. Each business location a separate entity. For purposes of determining liability, each individual franchise or business entity is deemed a separate entity.

9.45.270 Additional remedies – Disclaimers.

A. Intent as to additional legal restrictions and remedies. Nothing in this article is intended to alter the obligations or restrictions that apply to any person under any other law governing signs, billboards, advertising or any other matter covered by this article. The remedies set forth in this article are not exclusive. If any action prohibited by this article is also unlawful under any other law, the penalties and remedies under other laws may be pursued in addition to those provided in this chapter.

B. Disclaimers. By prohibiting the advertising or promotion of the products regulated herein in outdoor or publicly visible locations, prohibiting the distribution of certain promotional items and self-service displays of enumerated products, the city is only promoting the general welfare. It is not assuming, nor is it imposing upon its officers and employees, an obligation for breach of which it is liable in money damages to any person who claims that such breach proximately caused injury.

Section 11. Section 9.45.300 (“Retailer license requirement – Generally”) of Article III (“Retail Licenses”) of Chapter 9.45 of the Pleasant Hill Municipal Code is amended as shown in strike-through as follows:

A. License required. It is unlawful for a person or retailer who, within the last 12 months, has been determined to be in violation of a provision of this chapter, or applicable state or federal law governing the sale and distribution of any tobacco product, electronic smoking device or electronic smoking device paraphernalia, to sell or offer for sale any tobacco product, ~~electronic smoking device or electronic smoking device paraphernalia~~ within the city without first obtaining and maintaining a retailer’s license from the city.

It is unlawful for any retailer who is required to have a retailer’s license pursuant to this article to sell or offer for sale any tobacco products, ~~electronic smoking devices or electronic smoking device paraphernalia~~ if the license has been suspended under PHMC § 9.45.360.

A retailer’s license shall be obtained from the chief of police.

B. Term of license – Obligation to maintain. A license is valid for three years, and a person or retailer subject to this license requirement must maintain the license during the three-year period. If there are no further violations of any laws regulating the sale or distribution of tobacco products, ~~electronic smoking devices or electronic smoking device paraphernalia~~ in that three-year period, a retailer’s license will no longer be required.

Section 12. Section 9.45.310 (“Retailer license – Application procedure”) of Article III (“Retail Licenses”) of Chapter 9.45 of the Pleasant Hill Municipal Code is amended as shown in strike-through as follows:

An application for a retailer’s license shall be submitted in the name of the person or retailer who, following a finding of violation as specified in PHMC § 9.45.300, proposes to conduct retail tobacco, ~~electronic smoking device or electronic smoking device paraphernalia~~ sales on the business premises. The application shall be signed by the person or retailer or its authorized agent.

The application shall be submitted on a form provided by the city and shall contain the following information:

- A. The name, address, and telephone number of the applicant;
- B. The business name, address, and telephone number where the tobacco product, ~~electronic smoking device or electronic smoking device paraphernalia~~ is to be sold; and
- C. Such other information as the chief of police determines is reasonably necessary for implementation of this article.

Section 13. Section 9.45.340 (“Retailer license – Display”) of Article III (“Retail Licenses”) of Chapter 9.45 of the Pleasant Hill Municipal Code is amended as shown in strike-through as follows:

The license must be prominently displayed at the location where tobacco products, ~~electronic smoking devices or electronic smoking device paraphernalia~~ retail sales are conducted.

Section 14. Section 9.45.360 (“Retailer license – Suspension”) of Article III (“Retail Licenses”) of Chapter 9.45 of the Pleasant Hill Municipal Code is amended as shown in strike-through as follows:

A. Suspension of license. In order to discourage violations of law, a retailer’s license may be suspended if the chief of police finds that the licensee or his or her employee has violated any law regulating the sale or distribution of tobacco products, electronic smoking devices or electronic smoking paraphernalia. (See PHMC § 9.45.300.A.) The chief may suspend the license only after giving the licensee notice and a reasonable opportunity to be heard on the matter. The chief shall put his or her findings in writing.

B. Time period of suspension.

1. The first time that the chief finds a violation occurred, the license to sell tobacco products, ~~electronic smoking devices and/or electronic smoking device paraphernalia~~ may be suspended for up to 60 days.

2. After the second time that the chief finds a violation occurred within a 12-month period, the license to sell tobacco products, ~~electronic smoking devices and/or electronic smoking device paraphernalia~~ may be suspended for up to 120 days.

3. After the third and each subsequent time that the chief finds a violation occurred within a 12-month period, the license to sell tobacco products, ~~electronic smoking devices or electronic smoking device paraphernalia~~ may be suspended for up to one year.

C. Appeal of suspension. A decision of the chief to suspend a retailer’s license may be appealed to the city manager or his or her designee.

Section 15. Article IV entitled “Sales of Flavored Tobacco Products and Sales of Electronic Smoking Devices Prohibited” is hereby added to Chapter 9.45 of the Pleasant Hill Municipal Code to read as follows:

“Article IV. Sales of Flavored Tobacco Products and Sales of Electronic Smoking Devices Prohibited

9.45.400 Sale or offer for sale of flavored tobacco products prohibited.

A. No person or tobacco retailer shall sell, or offer to sell, 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.

C. 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:

1. 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; or
2. Taken action directed to consumers that would be reasonably expected to cause consumers to believe the tobacco product imparts a characterizing flavor.

9.45.410 Sale or offer for sale of electronic smoking devices and electronic smoking device paraphernalia prohibited.

No person or tobacco retailer shall sell, or offer to sell, any electronic smoking device or electronic smoking device paraphernalia.

9.45.420 Exemption.

Notwithstanding any other provision of this article, hookah tobacco businesses with valid retailer’s licenses issued pursuant to this chapter shall be exempt from the requirements of this chapter provided that such businesses qualify as an adult only business and operate in accordance with all relevant state and local laws relating to the sale of tobacco products and tobacco paraphernalia.

9.45.430 Public nuisance.

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

9.45.440 No conflict with federal or state law.

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

9.45.450 Enforcement.

The city may enforce this article by any means authorized in PHMC Chapter 1.25, including an administrative citation under PHMC Chapter 1.35.”

Section 16. If any section, subsection, sentence, clause, or phrase of this Ordinance is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of the Ordinance. The City Council hereby declares that it would have passed this Ordinance and each section, subsection, sentence, clause, and phrase thereof, irrespective of the fact that anyone or more sections, subsections, sentences, clauses, or phrases be declared invalid or unconstitutional.

Section 17. Any provision of the Pleasant Hill Municipal Code or appendices thereto inconsistent with the provisions of this Ordinance, to the extent of such inconsistencies and no further, is hereby repealed or modified to the extent necessary to implement the provisions of this Ordinance.

Section 18. The City Council finds that adoption of this Ordinance is exempt from the California Environmental Quality Act (“CEQA”) because its provisions will not result in a direct or reasonably foreseeable indirect physical change in the environment (CEQA Guidelines Section 15060(c)(2)), and it can be seen with certainty that there is no possibility that the ordinance will have a significant impact on the environment (CEQA Guidelines Section 15061(b)(3)).

Section 19. This Ordinance shall be effective 30 days following its adoption by the City Council. However, until (*five months after the effective date*) the City will not enforce those portions of the Ordinance prohibiting the sale of flavored tobacco products or electronic smoking devices.

Section 20. Within fifteen days after the passage of this Ordinance, the City Clerk shall cause it or a summary of it to be posted in the three places designated by resolution of the City Council.

The foregoing Ordinance was introduced at a regular meeting of the City Council of the City of Pleasant Hill on the ___th day of _____ 2021.

ADOPTED and ordered posted at a meeting of the City Council of the City of Pleasant Hill, held on the _____ day of _____, 2022, by the following vote:

AYES:
NOES:
ABSENT:

ABSTAIN:

ATTEST:

MICHAEL G. HARRIS, OD, Mayor

DANIELLE K. HABR, City Clerk