

**ITEM 3 ATTACHMENT 1
ORDINANCE NO. 2020-383**

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF CALABASAS, CALIFORNIA AMENDING CHAPTER 5.18 OF THE CALABASAS MUNICIPAL CODE TO PROHIBIT THE SALE AND DISTRIBUTION OF ELECTRONIC CIGARETTES WITHIN THE CITY OF CALABASAS.

WHEREAS, The State Planning and Zoning Law (Government Code Sections 65000, et seq.) broadly empowers the City to plan for and regulate the use of land in order to provide for orderly development, the public health safety and welfare, and a balancing of property rights and the desires of the community and how its citizens envisions their city; and

WHEREAS, based upon its grave concerns about use of tobacco products, the City Council of the City of Calabasas has previously adopted Calabasas Municipal Code Chapter 5.18 – Tobacco Retailer Registration Ordinance and Chapter 17.12.225 –Tobacco Retailing; and

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

WHEREAS, nationwide, electronic cigarette use has increased at alarming rates since the first products became available about 10 years ago, and while there have been many successful efforts to reduce underage tobacco use, the growing availability of e-cigarettes has reversed those positive trends; and

WHEREAS, approximately 480,000 people die in the United States from tobacco-related diseases every year, making it the nation’s leading cause of preventable death; and WHEREAS, 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 which authorized the U.S. Food and Drug Administration (“FDA”) to set national standards governing the manufacture of tobacco products, to limit levels of harmful components in tobacco products and to require manufactures to disclose information and research relating to the products’ health effects; and

WHEREAS, a central requirement of the Tobacco Control Act is premarket review of all new tobacco products not on the market in the United States 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; and

WHEREAS, The FDA's premarket review process is intended to determine if a tobacco product is appropriate for the protection of the public health "with respect to the risks and benefits to the population as a whole, including users and nonusers of the tobacco product, and taking into account- (A) the increased or decreased likelihood that existing users of tobacco products will stop using such products; and (B) the increased or decreased likelihood that those who do not use tobacco products will start using such products"; and

WHEREAS, virtually all electronics cigarettes that are sold today are considered "new tobacco products" under the Tobacco Control Act, but unfortunately, they have not obtained a premarket review order and the FDA has not taken appropriate action to enforce the requirements of the Tobacco Control Act; and

WHEREAS, in 2017, the FDA issued Guidance that purports to give electronic cigarettes manufacturers until August 8, 2022 to submit their application for premarket review. The Guidance further purports 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-cigarettes products. It is not known when, if ever, this narrow adjustment will become final or will take effect; and

WHEREAS, over 40 local jurisdictions have restricted the sale of electronic cigarettes; and

WHEREAS, pursuant to the City of Calabasas's police power, as granted under Article XI, section 7 of the California Constitution, the City Council of the City has the authority to enact and enforce ordinances and regulations for public health, safety and welfare; and

WHEREAS, pursuant to its police powers, the City has authority to regulate the sale of tobacco products in the City; and

WHEREAS, in order to protect public health, safety, and welfare, the City Council desires to adopt an ordinance that, subject to certain exceptions, will prohibit the sale of all electronic cigarettes and vaping devices.

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

SECTION 1. Recitals.

The City Council finds that all the facts, findings, and conclusions set forth above in this Ordinance are true and correct. The adoption of this Ordinance is therefore necessary for the immediate protection of the public safety, health and welfare.

SECTION 2. The City Council hereby amends Calabasas Municipal Code Chapter 5.18.020 "Definitions" to read as follows, with additions denoted by underlined text:

The following words and phrases, whenever used in this chapter, shall have the meanings defined in this section unless the context clearly requires otherwise:

"Arm's length transaction" means a sale in good faith and for valuable consideration that reflects the fair market value in the open market between two 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 this chapter is not an arm's length transaction.

"Department" means community development department, and any other agency or person tasked by the city manager of the city with enforcement of this chapter.

"Director" and community development director, mean the community development director of the city and any other person tasked by the city manager of the city with enforcement of this chapter.

"Electronic cigarette" means any of the following products:

(1) Any device or delivery system that can be used to deliver nicotine or flavored tobacco products in aerosolized or vaporized form, including, but not limited to, an e-cigarette, e-cigar, e-pipe, vape pen, or e-hookah.

(2) Any component, part, or accessory of such a device or delivery system that is used during its operation.

(3) Any flavored or unflavored liquid or substance containing nicotine, whether sold separately or sold in combination with any device or delivery system that could be used to deliver nicotine in aerosolized or vaporized form.

(4) Any product for use in an electronic nicotine device or delivery system whether or not it contains nicotine or tobacco or is derived from nicotine or tobacco.

(5) Electronic Cigarette Products shall not include any battery, battery charger, carrying case, or other accessory not used in the operation of the device if sold separately. Electronic Cigarette Products shall not include any product that has been approved by the United States Food and Drug Administration for sale as a tobacco cessation product or for other therapeutic purposes where that product is marketed and sold solely for such approved use. As used in this subsection, nicotine does not include any food products as that term is defined pursuant to Section 6359 of the California Revenue and Taxation Code.

"Flavored tobacco product" means any tobacco product that contains a constituent that imparts a characterizing flavor

"Proprietor" means 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 (10) percent 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.

"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.

"Smoking" means possessing a lighted tobacco product, lighted tobacco paraphernalia, or any other lighted weed or plant (including a lighted pipe, cigar, hookah pipe, or cigarette of any kind) and means the lighting of a tobacco product, tobacco paraphernalia, or any other weed or plant (including a pipe, cigar, hookah pipe, or cigarette of any kind).

"Tobacco paraphernalia" means cigarette papers or wrappers, pipes, holders of smoking materials of all types, cigarette rolling machines, and any other item designed for the smoking, preparation, storing, or consumption of tobacco products.

"Tobacco product" means any substance containing tobacco leaf, including but not limited to cigarettes, cigars, pipe tobacco, hookah tobacco, snuff, chewing tobacco, dipping tobacco, snus, bidis, or any other preparation of tobacco; 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; and any product or formulation of matter containing biologically active amounts of nicotine that is manufactured, sold, offered for sale, or otherwise distributed with the expectation that the product or matter will be introduced into the human body, but does not include any cessation product specifically approved by the United States Food and Drug Administration for use in treating nicotine or tobacco dependence.

"Tobacco retailer" means any person who sells, offers for sale, or does or offers to exchange for any form of consideration, tobacco, tobacco products or tobacco paraphernalia. "Tobacco retailing" shall mean the doing of any of these things. This definition is without regard to the quantity of tobacco, tobacco products, or tobacco paraphernalia sold, offered for sale, exchanged, or offered for exchange.

SECTION 3. Calabasas Municipal Code Chapter 5.18.030 "Requirements and prohibitions" is to read as follows, with additions denoted by underlined text

- A. Tobacco Retailer Registration Required. It shall be unlawful for any person to act as a tobacco retailer in the city without first obtaining and maintaining a valid tobacco retailer's registration pursuant to this chapter for each location at which that activity is to occur.
- B. Lawful Business Operation. In the course of tobacco retailing or in the operation of the business or maintenance of the location for which a registration issued, it shall be a violation of this chapter for a registered tobacco retailer, or any of the registered tobacco retailer's agents or employees, to violate any local, state, or federal law applicable to tobacco products, tobacco paraphernalia, or tobacco retailing.
- C. Display of Registration. Each tobacco retailer registration shall be prominently displayed in a publicly visible location at the registered location.
- D. 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 twenty-seven (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.
- E. Minimum Age for Persons Selling Tobacco. 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.

- F. Self-Service Displays Prohibited. Tobacco retailing by means of a self-service display is prohibited.
- G. False and Misleading Advertising Prohibited. A tobacco retailer or proprietor without a valid tobacco retailer registration, including, for example, a person whose registration has been revoked:
1. Shall keep all tobacco products and tobacco paraphernalia out of public view. The public display of tobacco products or tobacco paraphernalia in violation of this provision shall constitute tobacco retailing without a registration under Section 5.18.120; and
 2. Shall not display any advertisement relating to tobacco products or tobacco paraphernalia that promotes 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.
- H. Sales of Electronic Cigarette Products Prohibited. No tobacco retailer shall sell or distribute any electronic cigarette product in retail establishments located within the City of Calabasas, including any non-flavored, mint, menthol, or flavored electronic cigarette product.

Section 4. Effective Date.

These amendments to the Tobacco Retailer Registration Ordinance shall take effect 180 days after the adoption of this ordinance.

SECTION 5. CEQA Findings.

The City Council hereby finds and determines that it can be seen with certainty that this Ordinance prohibiting the sale of electronic cigarette products in retail establishments is categorically exempt under the California Environmental Quality Act ("CEQA"). Accordingly, under the provisions of § 15061(b)(2) and §§ 15307 – 15308 of Division 6 of Title 14 of the California Code of Regulations, the CEQA Guidelines, the adoption of this Ordinance is not subject to review under the requirements of CEQA.

SECTION 6. Inconsistencies.

Any provision of the City's Municipal Code or appendices thereto that are inconsistent with the provisions of this Ordinance, to the extent of such inconsistencies and no further, is hereby modified to the extent necessary to effect the provisions of this Ordinance.

SECTION 8. Severability.

If any section, subsection, sentence, clause, phrase, or portion 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 this Ordinance. The City Council of the City of Calabasas hereby declares that it would have adopted this Ordinance and each section, subsection, sentence, clause, phrase or portion thereof irrespective of the fact that any one or more sections, subsections, sentences, clauses, phrases, or portions be declared invalid or unconstitutional.

SECTION 9. Certification:

The City Clerk shall certify to the passage and adoption of this Ordinance and shall cause the same to be published or posted according to law.

PASSED, APPROVED AND ADOPTED this 27th day of May 2020.

Alicia Weintraub, Mayor

ATTEST:

Maricela Hernandez, City Clerk
Master Municipal Clerk
California Professional Municipal Clerk

Scott H. Howard
Colantuono, Highsmith & Whatley, PC
City Attorney