

ORDINANCE NO. 3663 C.S.

AN ORDINANCE OF THE COUNCIL OF THE CITY OF MONTEREY

**AMEND THE FLAVORED TOBACCO ORDINANCE (CHAPTER 19, ARTICLE 5 OF THE
MONTEREY CITY CODE)**

THE COUNCIL OF THE CITY OF MONTEREY DOES ORDAIN, as follows:

SECTION 1:

WHEREAS, state law prohibits the sale or furnishing of cigarettes, tobacco products, and smoking paraphernalia to minors, as well as the purchase, receipt, or possession of tobacco products by minors (Cal. Pen. Code § 308);

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

WHEREAS, in 2014 the Monterey City Council enacted Monterey City Code section 19-105 et seq. to establish a permitting system for tobacco retailers to ensure that retailers comply with tobacco control laws and business standards of the City to protect the public health, safety, and welfare of the residents of the City;

WHEREAS, in 2022 the Monterey City Council prohibited the sale of all flavored tobacco products and single use electronic smoking products, exempting flavored shisha tobacco products sold at 220 Olivier Street, Monterey, for onsite use;

WHEREAS, Senate Bill 793, approved by the Governor in August 2020, prohibits a tobacco retailer from selling flavored tobacco products. Proposition 31, the Flavored Tobacco Products Referendum, was on the November 8, 2022 ballot. The ballot measure was approved by the voters, thus upholding the legislation. Therefore, SB 793 became effective in December 2022 pursuant to California Constitution, article 2, section 10;

WHEREAS, Health & Safety Code section 104559.5(g) provides that the state law does not preempt or otherwise prohibit the adoption of local standards that impose greater restrictions on the access to tobacco products than the restrictions imposed by the state. To the extent that there is an inconsistency between the state law and local standards, the greater restriction on the access to tobacco products in the local standard shall prevail;

WHEREAS, in a ruling issued on March 18, 2022, the Ninth Circuit Court of Appeals in R.J. Reynolds Tobacco Company et al v. County of Los Angeles, et al (9th Cir. 2022) 29 F.4th 542 held that the Family Smoking Prevention and Tobacco Control Act, codified at 21 USC §387 et seq., did not preempt a city from banning the sale of some or all tobacco products;

WHEREAS, it is the intent of this ordinance to continue to exempt from its application the use of real property located at 220 Olivier Street, Monterey, as a location where flavored shisha tobacco products may be purchased and used on-site, so long as the retailer complies with

conditions for the sale of flavored shisha tobacco products by a hookah tobacco retailer set out under subsection (c) of California Health and Safety Code 104559.5, and this ordinance. This location has sold flavored shisha tobacco products for use at its on-site hookah lounge continuously since approximately 2007. Should this use discontinue for 90 days, it is the intent of this ordinance that the sale of flavored shisha tobacco products will be prohibited throughout the city;

WHEREAS, the City of Monterey determined that the proposed action is not a project as defined by the California Environmental Quality Act (CEQA)(CCR, Title 14, Chapter 3 ("CEQA Guidelines), Article 20, Section 15378). In addition, CEQA Guidelines Section 15061 includes the general rule that CEQA applies only to activities 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. Because the proposed action and this matter have no potential to cause any effect on the environment, or because it falls within a category of activities excluded as projects pursuant to CEQA Guidelines section 15378, this matter is not a project. Because the matter does not cause a direct or any reasonably foreseeable indirect physical change on or in the environment, this matter is not a project. Any subsequent discretionary projects resulting from this action will be assessed for CEQA applicability.

NOW THEREFORE, the Monterey City Council declares as follows:

SECTION 2. Monterey City Code, Chapter 19, Section 106 is amended to read as follows:

"For purposes of this article, the terms and definitions in Section 104559.5 of the California Health and Safety Code are incorporated herein, to the extent they are not inconsistent with the below-listed definitions:

- a. "Department" refers to any City department designated by the City Manager to administer and/or enforce the provisions of this article or, if so designated by the City Manager, the Monterey County Department of Health or other County department.
- b. "Drug paraphernalia" shall have the definitions set forth in California Health and Safety Code section 11014.5 as that section may be amended from time to time.
- c. "License" means a tobacco retailer license issued by the City pursuant to this Article.
- d. "Licensee" means any proprietor holding a license issued by the City pursuant to this Article
- e. "License fee" means the charge established by resolution of the City Council, calculated to recover the reasonable regulatory costs of issuing and administering licenses, retailer education, performing investigations, inspections, and the administrative enforcement and adjudication thereof.
- f. "Person" means any natural person, partnership, cooperative association, corporation, personal representative, receiver, trustee, assignee, or any other legal entity.
- g. "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.
- h. "Single-use electronic smoking product" means an electronic smoking device that is not refillable or rechargeable and is typically discarded once its contents have been used. It

includes without limitation:

1. Any electronic device or delivery system that can be used to deliver an inhaled dose of nicotine, flavorings, chemicals, or other substances in aerosolized or vaporized form for human consumption, including but not limited to an electronic cigarette, cigar, pipe, vape pen, or 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, whether sold separately or sold in combination with any such device or delivery system that could be used to deliver tobacco products, nicotine, or other substances in aerosolized or vaporized form.
 4. Any product for use in such an electronic device or delivery system whether it contains nicotine or tobacco or is derived from nicotine or tobacco.”
- i. “Tobacco paraphernalia” means cigarette papers or wrappers, pipes, holders of smoking materials of all types, cigarette rolling machines, and any other item designed or used for the smoking or ingestion of tobacco products.
 - j. “Tobacco retailer” means any person who engages in tobacco retailing.
 - k. “Tobacco retailing” means selling, offering for sale, exchanging, or offering to exchange for any form of consideration tobacco, tobacco products, or tobacco paraphernalia without regard to the quantity sold, offered for sale, exchanged, or offered for exchange.”

SECTION 3. Monterey City Code, Chapter 19, Section 19-113 is hereby amended to read as follows:

“Sec. 19-113. Violations.

- a. It shall be a violation of this Article for a tobacco retailer, or its agents or employees, to violate any federal, state, or local tobacco law or regulation.
- b. It shall be a violation of this Article to sell flavored tobacco products or tobacco product flavor enhancers in violation of the California Health and Safety Code and, as a greater restriction, such prohibition in this Article does not exempt, but instead expressly applies to premium cigars, shisha tobacco products, or loose-leaf tobacco.
 - i. This subsection does not apply to flavored shisha tobacco products sold at 220 Olivier Street, Monterey for on-site use, so long as the retailer complies with conditions for the sale of flavored shisha tobacco products by a hookah tobacco retailer set out under subsection (c) of California Health and Safety Code Section 104559.5, and so long as the retail sale for on-site use of flavored shisha tobacco at this location is not discontinued for a period of 90 consecutive days or more.
- c. Causing, permitting, aiding, abetting, or concealing a violation of any provision of this Article shall constitute a violation.
- d. Failure to prominently display the Tobacco Retail License in a publicly visible location at the licensed premises shall constitute a violation.
- e. The failure of the tobacco retailer, or its agents or employees, to allow any peace officer, or other authorized government official to conduct unscheduled inspections of the premises of the business for the purpose of ensuring compliance with any federal, state, or local tobacco law or regulations, including any provision of this Article, at any time the business is open for business shall constitute a violation.
- f. It shall be a violation of this Article for a tobacco retailer, or its agents or employees, to sell, or offer for sale, or possess with the intent to sell or offer for sale, any single-use electronic smoking product.

- g. A tobacco retailer’s possession of four or more flavored tobacco products creates a rebuttable presumption the retailer possesses such flavored tobacco products with intent to sell or offer for sale.
- h. The following actions of a tobacco retailer, its employees or agents, creates a rebuttable presumption that a tobacco product is flavored:
 - (1) public statements or claims that the tobacco product imparts a characterizing flavor;
 - (2) text and/or images on the product’s labeling or packaging to explicitly or implicitly indicate the tobacco product imparts a characterizing flavor; or
 - (3) other actions directed to consumers that would reasonably cause consumers to believe the tobacco or electronic cigarette product imparts a characterizing flavor. “

SECTION 4: All ordinances and parts of ordinances in conflict herewith are hereby repealed.

SECTION 5: This ordinance shall be in full force and effect thirty (30) days from and after its final passage and adoption.

SECTION 6. Nothing in this Article shall be interpreted or applied to create any power or duty in conflict with any federal or state law. If any provision of this Article or the application thereof to any person or circumstance is held invalid, the remainder of this Article or the application of such provision to other persons or circumstances shall not be affected thereby.

PASSED AND ADOPTED BY THE COUNCIL OF THE CITY OF MONTEREY this 16th day of May 2023, by the following vote:

AYES:	5	COUNCILMEMBERS:	Barber, Garcia, Haffa, Smith, Williamson
NOES:	0	COUNCILMEMBERS:	None
ABSENT:	0	COUNCILMEMBERS:	None
ABSTAIN:	0	COUNCILMEMBERS:	None


APPROVED:

ATTEST:

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 Mayor of said City

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 City Clerk thereof