

ORDINANCE NO. 682

AN ORDINANCE OF THE CITY OF FOSTER CITY TO AMEND SECTIONS 8.11.010, 8.11.020 AND 8.11.030 OF CHAPTER 8.11, "REGULATION OF THE SALE OF FLAVORED TOBACCO PRODUCTS AND ELECTRONIC CIGARETTES" WITHIN TITLE 8, "HEALTH AND SAFETY" OF THE FOSTER CITY MUNICIPAL CODE TO REPEAL CERTAIN PROVISIONS RELATING TO RESTAURANTS THAT SELL HOOKAH AND SHISHA TOBACCO PRODUCTS

CITY OF FOSTER CITY

WHEREAS, on August 28, 2020, SB 793 (Health and Safety Code section 104559.5) was signed into law and prohibited a tobacco retailer, or any of the tobacco retailer's agents or employees, from selling, offering for sale, or possessing with the intent to sell or offer for sale, a flavored tobacco product or a tobacco product flavor enhancer; and

WHEREAS, Health and Safety Code section 104559.5(c), (d) and (e) (b) has several exemptions, including the sale of "Shisha tobacco product[s]" and the sale of certain specialty cigars and loose-leaf tobacco; and

WHEREAS, Health and Safety Code section 104559.5(g) specifically preempts a local standard that imposed less restrictive standards on the access to tobacco products but did not preempt any local standards that imposed more restrictive standards; and

WHEREAS, on November 7, 2022, the City Council adopted Ordinance No. 653 to add a new Chapter 8.11 within Title 8 to regulate the sale of flavored tobacco products and electronic cigarettes; and

WHEREAS, Ordinance No. 653 substantively mirrored the requirements of SB 793 except that Ordinance No. 653 included in subdivision (E) of section 8.11.020 language which specified that restaurants that have 50% of the outdoor seating area designated as smoking areas and sell hookah products for use with a hookah pipe as an approved use as of the effective date of the ordinance would not be subject to the prohibition for the sale of flavored tobacco by tobacco retailers in subdivision (A) of section 8.11.020 of the Foster City Municipal Code; and

WHEREAS, Ordinance No. 653 also included section 8.11.060 that provides that nothing in Chapter 8.11 should be interpreted or applied to create any requirement, power, or duty that is preempted by state law; and

WHEREAS, although Ordinance No. 653 could not be enforced to the extent that the City's regulations were preempted by State law given the language in section 8.11.060, the City Council now desires to amend Chapter 8.11 to repeal subdivision (E) in section 8.11.020 to remove the provision relating to restaurants and other conforming

amendments to revise the provisions of Chapter 8.11 to be more consistent with Health and Safety Code section 104559.5.

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

Section 1. Recitals. The foregoing recitals are true and correct and incorporated herein as findings which are the basis for the amendment.

Section 2. Amendment. Sections 8.11.010, 8.11.020 and 8.11.030 of Chapter 8.11, "Regulation of the Sale of Flavored Tobacco Products and Electronic Cigarettes" within Title 8, "Health and Safety" of the Foster City Municipal Code is hereby amended to read as follows:

"8.11.010 Definitions.

The following words and phrases, whenever used in this chapter, shall be construed as defined in this section:

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

"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.

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

"Electronic cigarette" has the meaning set forth in Section 30121 of the California Revenue and Taxation Code, as may be amended from time to time.

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

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

"Hookah" means a type of water pipe, 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 retailer” means a tobacco retailer that is engaged in the retail sale of shisha tobacco products, hookah, and hookah smoking accessories at a retail location.

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

“Loose leaf tobacco” consists of cut or shredded pipe tobacco, usually sold in pouches, excluding any tobacco product which, because of its appearance, type, packaging, or labeling, is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes, including roll-your-own cigarettes.

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

“Person” means any individual, partnership, cooperative association, private corporation, or any other legal entity.

“Premium cigar” means any cigar that is handmade, is not mass-produced by use of mechanization, has a wrapper that is made entirely from whole tobacco leaf, and has a wholesale price of no less than twelve dollars. A premium cigar does not have a filter, tip, or nontobacco mouthpiece and is capped by hand.

“Retail location” means both of the following:

1. A building from which tobacco products are sold at retail.
2. A vending machine.

“Sale” includes any transfer of title or possession for a consideration, exchange or barter, in any manner or by any means whatever.

“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, water pipe 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.

“Tobacco product” means a tobacco product as defined in Section 104495(a)(8) of the California Health and Safety Code, as that provision may be amended from time to time.

“Tobacco product flavor enhancer” means a product designed, manufactured, produced, marketed, or sold to produce a characterizing flavor when added to a tobacco product.

“Tobacco retailer” means a person who engages in the sale of tobacco products directly to the public from a retail location. “Tobacco retailer” includes a person who operates vending machines from which tobacco products are sold in the city of Foster City.

8.11.020 Sale of flavored tobacco products prohibited.

A. A tobacco retailer, or any of the tobacco retailer's agents or employees, shall not sell, offer for sale, or possess with the intent to sell or offer for sale, a flavored tobacco product or a tobacco product flavor enhancer within the geographic boundaries of Foster City.

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

C. Subsection A of this section does not apply to the sale of flavored shisha tobacco products by a hookah tobacco retailer if all of the following conditions are met:

1. The hookah tobacco retailer has a valid license to sell tobacco products issued pursuant to Chapter 2 (commencing with Section 22971.7) of Division 8.6 of the Business and Professions Code.
2. The hookah tobacco retailer does not permit any person under twenty-one years of age to be present or enter the premises at any time.
3. The hookah tobacco retailer shall operate in accordance with all relevant state and local laws relating to the sale of tobacco products.
4. If consumption of tobacco products is allowed on the premises of the hookah tobacco retailer, the hookah tobacco retailer shall operate in accordance with all state and local laws relating to the consumption of tobacco products on the premises of a tobacco retailer, including, but not limited to, Section 6404.5 of the Labor Code.

D. Subsection A of this section does not apply to sales of premium cigars sold in cigar lounges where tobacco products are purchased and consumed only on the premises of a cigar lounge.

8.11.030 Sale of electronic cigarettes prohibited.

A. A tobacco retailer, or any of the tobacco retailer's agents or employees, shall not sell, offer for sale or possess with the intent to sell or offer for sale electronic cigarettes within the geographic boundaries of Foster City."

Section 3. Severability.

If any section, subsection, sentence, clause or phrase of this Ordinance is for any reason held to be invalid, such decision shall not affect the validity of the remaining portions of

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

Section 4. Environmental Determination.

The Ordinance is not a project within the meaning of Section 15378 of CEQA Guidelines because it has no potential for resulting in either a direct or a reasonably foreseeable indirect physical change in the environment, either directly or ultimately. In the event that this Ordinance is found to be a project under CEQA, it is subject to the CEQA exemption contained in CEQA Guidelines section 15061(b)(3) because it can be seen with certainty to have no possibility of having a significant effect on the environment.

Section 5. Publication.

This Ordinance shall be published in accordance with the law.

Section 6. Effective Date.

This Ordinance shall take effect 30 days from the date of adoption.

Section 7. Posting.

Within fifteen (15) days after the adoption of this Ordinance, the City Clerk shall have it posted in three (3) public places designated by the City Council.

This Ordinance was introduced and read on the 16th day of September, and passed and adopted on the 7th day of October, by the following vote:

AYES: Councilmembers Froomin, Hindi, Jimenez, Kiesel, and Mayor Sullivan

NOES: None

ABSENT: None

ABSTAIN: None

Signed by:

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PATRICK SULLIVAN, MAYOR

ATTEST:

DocuSigned by:

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PRISCILLA SCHAUS, CITY CLERK

CERTIFICATE OF POSTING

I, Priscilla Schaus, hereby certify as follows:

That I am, and at all time herein mentioned, was the duly acting and qualified City Clerk of the **City of Foster City**, Foster City, San Mateo County, California.

I further certify to the proper posting of:

Ordinance No. 682, "An Ordinance of the City of Foster City to Amend Sections 8.11.010, 8.11.020 and 8.11.030 of Chapter 8.11, "Regulation of the Sale of Flavored Tobacco Products and Electronic Cigarettes" Within Title 8, "Health and Safety" of the Foster City Municipal Code to Repeal Certain Provisions Relating to Restaurants That Sell Hookah and Shisha Tobacco Products"

in the following three public places of the **City of Foster City**, Foster City, San Mateo County, California:

1. Metro Center
927 E. Hillsdale Boulevard
2. Council Chambers
620 Foster City Boulevard
3. Foster City Public Library
1000 E. Hillsdale Boulevard

Executed at the **City of Foster City**, Foster City, San Mateo County, California this 10th day of October 2024.

DocuSigned by:

Priscilla Schaus

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Priscilla Schaus, City Clerk