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ORDINANCE NO. 2019-04

**AN ORDINANCE OF THE ALBANY CITY COUNCIL AMENDING CHAPTER 5 OF
THE ALBANY MUNICIPAL CODE, SECTION 5-24, TOBACCO RETAILER LICENSE
TO PROHIBIT THE SALE OF FLAVORED TOBACCO PRODUCTS**

WHEREAS, tobacco use remains a leading cause of preventable death in the United States, and tobacco use can cause or contribute to many forms of cancer, as well as heart disease and respiratory diseases, among other health disorders; and

WHEREAS, the federal Family Smoking Prevention and Tobacco Control Act (FSPTCA), 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 although the manufacture and distribution of flavored cigarettes (excluding menthol) is banned by federal law, neither federal nor California laws restrict sales of flavored non-cigarette tobacco products, such as cigars, cigarillos, smokeless tobacco, hookah tobacco, and electronic smoking devices and the nicotine solutions used in these devices; and

WHEREAS, flavored non-cigarette tobacco products have become increasingly common and are available in a variety of flavors that appeal to children and young adults, including apple, cherry, chocolate, grape, peach, strawberry, and vanilla; and

WHEREAS, the U.S. Food and Drug Administration and the U.S. Surgeon General have stated that flavored tobacco products are considered to be “starter” products that help establish smoking habits that can lead to long-term addiction; and

1 **WHEREAS**, data from the National Youth Tobacco Survey indicate that more than two
2 fifths of U.S. middle and high school smokers report using flavored little cigars or flavored
3 cigarettes; and
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5
6 **WHEREAS**, tobacco companies have used flavorings such as mint and wintergreen in
7 smokeless tobacco products as part of a “graduation strategy” to encourage new users to start
8 with products with lower levels of nicotine and progress to products with higher levels of
9 nicotine; and
10

11 **WHEREAS**, the City Council held a public hearing on September 4, 2018 to consider
12 introduction of an ordinance prohibiting the sale of flavored tobacco products within the City of
13 Albany; and

14 **WHEREAS**, at the public hearing the City Council received testimony about possible
15 impacts on local retailers and decided to gather more information about the topic before
16 proceeding further; and

17 **WHEREAS**, at its meeting on December 3, 2018, the City Council conducted a study
18 session on the proposed ordinance and received detailed testimony from experts on the negative
19 public health impacts of flavored tobacco products; and

20 **WHEREAS**, among other things the expert testimony demonstrated the following:
21 Youth are more attracted to flavored tobacco products than adults, and advertising of these
22 products is targeted toward younger age groups; Flavored tobacco products are a gateway to
23 smoking cigarettes; Adults likely purchase these products for underage youth, even if retail
24 businesses do not sell them directly to underage youth; When vaping, users inhale large doses of
25 nicotine, as well as flavorings which can cause respiratory illnesses; Flavorings may be safe for
26 oral consumption, but not safe for inhalation; although flavored tobacco products may potentially
27 help some adults who are addicted to smoking transition to less harmful sources of nicotine, it is
28

1 also possible that they will continue using both regular cigarettes and electronic cigarettes;
2 African-Americans are particularly vulnerable to suffering adverse health effects from flavored
3 tobacco products; Protecting underage youth from becoming addicted to nicotine is an overriding
4 public health priority; and

6 **WHEREAS**, in public statements issued on September 12, 2018 and March 13, 2019, the
7 United States Food and Drug Administration described recent dramatic increases in e-cigarette
8 use among middle and high school students as an epidemic which runs the risk of addicting an
9 entire generation of our youth to nicotine; and

11 **WHEREAS**, after duly considering all the information presented at the September 4,
12 2018 public hearing, the December 3, 2018 study session, and the April 1, 2019 public hearing,
13 the City Council has determined that it is in the public interest to prohibit the sale of flavored
14 tobacco products within the City of Albany to help minimize the availability of these products to
15 our youth.

17 **NOW, THEREFORE, THE ALBANY CITY COUNCIL ORDAINS AS**
18 **FOLLOWS:**

19 **SECTION 1: CHAPTER 5 OF THE ALBANY MUNICIPAL CODE, SECTION**
20 **5-24 TITLED "TOBACCO RETAILER LICENSE" IS HEREBY AMENDED AS**

21 **FOLLOWS:**

22
23 **5-24 TOBACCO RETAILER LICENSE.**

24 **5-24.1 Definitions.**

25 As used in this subsection.

26 *Characterizing Flavor* shall mean a taste or aroma, other than the taste or aroma of
27 tobacco, imparted by a tobacco product or any byproduct produced by the tobacco product,
28 including, but not limited to, tastes or aromas relating to any fruit, chocolate, vanilla, honey,
candy, cocoa, dessert, alcoholic beverage, menthol, mint, wintergreen, herb, or spice, provided,

1 however, that a tobacco product shall not be determined to have a characterizing flavor solely
2 because of the use of additives or flavorings or the provision of ingredient information.

3 *Department* shall mean the City of Albany Police Department or other City Department
4 designated by the City Manager as responsible for administering and enforcing this Ordinance.

5 *Flavored Tobacco Product* shall mean any tobacco product that imparts a characterizing
6 flavor. This includes cigars, little cigars, pipe tobacco, hookah tobacco, snuff, chewing tobacco,
7 dipping tobacco, bidis, blunts, and electronic cigarettes or electronic smoking devices containing
8 nicotine.

9 *Labeling* shall mean written, printed, or graphic matter upon any tobacco product or any
10 of its packaging, or accompanying such tobacco product.

11 *Manufacturer* shall mean any person, including any repacker or relabeler, who
12 manufactures, fabricates, assembles, processes, or labels a tobacco product, or imports a finished
tobacco product for sale or distribution into the United States.

13 *Package or packaging* shall mean a pack, box, carton, or container of any kind or, if no
14 other container, any wrapping (including cellophane) in which a tobacco product is sold or
offered for sale to a consumer.

15 *Proprietor* shall mean a person with an ownership or managerial interest in a business.
16 An ownership interest shall be deemed to exist when a person has a ten (10%) percent or greater
17 interest in the stock, assets, or income of a business other than the sole interest of security for
18 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.

19 *Self-service display* shall mean the open display or storage of tobacco product or tobacco
20 paraphernalia in a manner that is physically accessible in any way to the general public without
21 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.

22 *Tobacco paraphernalia* shall Any item designed or marketed for the consumption, use or
23 preparation of tobacco products.

24 *Tobacco product* shall mean: (1) any product containing, made, or derived from tobacco
25 or nicotine that is intended for human consumption, whether smoked, heated, chewed, absorbed,
26 dissolved, inhaled, snorted, sniffed, or ingested by any other means, including, but not limited to,
27 cigarettes, cigars, little cigars, chewing tobacco, pipe tobacco, or snuff; and (2) any electronic
28 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. (3) Notwithstanding any provision of subsections (1) and (2) to the contrary, "Tobacco
Product" includes any component, part, or accessory intended or reasonably expected to be used
with a Tobacco Product, whether or not sold separately. "Tobacco Product" does not include

1 drugs, devices, or combination products authorized for sale by the United States Food and Drug
2 Administration, as those terms are defined in the Federal Food, Drug and Cosmetic Act.

3 *Tobacco retailer* shall mean any person who sells, offers for sale, or does or offers to
4 exchange for any form of consideration, tobacco, tobacco products, or tobacco paraphernalia, or
5 who distributes free or low cost samples of tobacco products or tobacco paraphernalia. "Tobacco
6 retailing" shall mean the doing of any of these things. This definition is without regard to the
7 quantity of tobacco, tobacco products, or tobacco paraphernalia sold, offered for sale, exchanged,
8 or offered for exchange.

(Ord. #09-02, §2)

8 **5-24.2 Tobacco Retailer License Required.**

9 a. It shall be unlawful for any person to act as a tobacco retailer without first
10 obtaining and maintaining a valid tobacco retailer's license pursuant to this section for each
11 location at which that activity is to occur. tobacco retailing without a valid tobacco retailer's
12 license is a public nuisance.

13 b. No license may be issued to authorize tobacco retailing at other than a fixed
14 location. For example, tobacco retailing by persons on foot or from vehicles is prohibited.

15 c. The issuance of a tobacco retailer license does not exempt any business that is
16 subject to the Smoking Pollution Control provisions within the Albany Municipal Code, Section
17 17-1.

18 d. A tobacco retailer or proprietor without a valid tobacco retailer license, including,
19 for example, a person whose license has been revoked:

20 1. Shall keep all tobacco products and tobacco paraphernalia out of public
21 view. The public display of tobacco products or tobacco paraphernalia in violation of this
22 provision shall constitute tobacco retailing without a license under subsection 5-24.10

23 2. Shall not display any advertisement relating to tobacco products or
24 tobacco paraphernalia that promotes the sale or distribution of such products from the
25 tobacco retailer's location or that could lead a reasonable consumer to believe that such
26 products can be obtained at that location.

(Ord. #09-02, §2)

27 **5-24.3 Application Procedure.**

28 Application for a tobacco retailer's license shall be submitted in the name of each
proprietor proposing to conduct retail tobacco sales and shall be signed by each proprietor or an
authorized agent thereof. All applications shall be submitted on a form supplied by the Albany
Police Department and shall contain the following information:

a. The name, address, and telephone number of each proprietor.

1 b. The business name, address, and telephone number of the single fixed location for
2 which a license is sought.

3 c. Such other information as the Department deems necessary for the administration
4 or enforcement of this section.
5 (Ord. #09-02, §2)

6
7 **5-24.4 Issuance and Renewal of License.**

8 a. Within thirty (30) days of the Department's receipt of an application for a tobacco
9 retailer's license and the license fee required by this section, the Department shall issue a license
10 unless substantial evidence demonstrates that one (1) or more of the following bases for denial
11 exists:

12 1. The information presented in the application is incomplete, inaccurate, or
13 false.

14 2. The application seeks authorization for tobacco retailing by a proprietor or
15 at a location for which a revocation is in effect pursuant to subsection 5-24.10 of this
16 section.

17 3. The application seeks authorization for tobacco retailing that is unlawful
18 pursuant to this Code, or that is unlawful pursuant to any other local, State or Federal
19 law.

20 b. A license shall be valid for one (1) calendar year and must be renewed prior to the
21 expiration of the payment term.
22 (Ord. #09-02, §2)

23 **5-24.5 License Nontransferable.**

24 A tobacco retailer's license is nontransferable. In the event a person to whom license has
25 been issued changes business location or sells the business referenced in that person's license,
26 that person must apply for a new license prior to acting as a tobacco retailer at the new location.
27 The transferee of the licensee must apply for a license in the transferee's name before acting as a
28 tobacco retailer. Any license issued pursuant to this section shall expire on the date the previous
license for the business or person would have expired. (Ord. #09-02, §2)

5-24.6 Fees for License.

 The fee to issue or to renew a tobacco retailer's license shall be established by resolution
of the City Council. The fee shall reflect the actual cost of processing the license, including
inspection of the tobacco retailer's business premises and implementation and enforcement of the
licensing program. (Ord. #09-02, §2)

1 **5-24.7 Display of License.**

2 Each tobacco retailer license shall be prominently displayed in a publicly visible location
3 at the licensed location. (Ord. #09-02, §2)

4 **5-24.8 Other Requirements and Prohibitions.**

5
6 a. *Positive Identification Required.* No person engaged in tobacco retailing shall sell
7 or transfer a tobacco product or tobacco paraphernalia to another person who appears to be under
8 the age of twenty-seven (27) years without first examining the identification of the recipient to
9 confirm that the recipient is at least the minimum age under State law to purchase and possess
the tobacco product or tobacco paraphernalia.

10 b. *Minimum Age for Persons Selling Tobacco.* No person who is younger than the
11 minimum age established by State law for the purchase or possession of tobacco products shall
engage in tobacco retailing.

12 c. *Self-service Displays Prohibited.* No tobacco retailer shall display tobacco
13 products or tobacco paraphernalia by means of a self-service display or engage in tobacco
14 retailing by means of a self-service display.

15 d. *Lawful Business Operation.* In the course of tobacco retailing or in the operation
16 of the business or maintenance of the location for which a license has been issued, it shall be a
violation of this section for a licensee, or any of the licensee's agents or employees, to:

17 1. Violate any local, State, or Federal law applicable to tobacco products,
18 tobacco paraphernalia, or tobacco retailing.

19 2. Violate any local, State, or Federal law regulating exterior, storefront,
20 window or door signage.
(Ord. #09-02, §2)

21 e. *Flavored Tobacco Product Sales Prohibited.* No tobacco retailer, nor any of the
22 retailer's agents or employees, shall sell or offer for sale, or possess with intent to sell or offer for
sale, any flavored tobacco product.

23 f. *Presumptions for Flavored Tobacco Products.* There shall be a rebuttable
24 presumption that a tobacco product is a flavored tobacco product if a tobacco retailer,
25 manufacturer, or any employee or agent of a tobacco retailer or manufacturer has: (1) made a
26 public statement or claim that the tobacco product imparts a characterizing flavor; (2) used text
27 and/or images on the tobacco product's labeling or packaging to explicitly or implicitly indicate
that the tobacco product imparts a characterizing flavor; or (3) taken action directed to
consumers that would be reasonably expected to cause consumers to believe the tobacco product
imparts a characterizing flavor.

1 g. *Packaging and Labeling.* No tobacco retailer shall sell any tobacco product to
2 any consumer unless such product: (1) is sold in the original manufacturer's packaging intended
3 for sale to consumers; and (2) conforms to all applicable federal labeling requirements.
4

5 **5-24.9 Revocation of License.**
6

7 a. *Revocation of License for Violation.* In addition to any other penalty authorized
8 by law, a tobacco retailer's license shall be revoked if the Department finds or any court of
9 competent jurisdiction determines, after the licensee is afforded notice and an opportunity to be
10 heard, that the licensee, or any of the licensee's agents or employees, has violated any of the
11 requirements, conditions, or prohibitions of this section or, in a different legal proceeding, has
pleaded guilty, "no contest" or its equivalent, or admitted to a violation of any law designated in
subsection 5-24.8 above.

12 b. *New License after Revocation.*

13 1. After revocation for a first violation of this section at a location within any
14 sixty-month (60) period, no new license may issue for the location until thirty (30) days
have passed from the date of revocation.

15 2. After revocation for a second violation of this section at a location within
16 any sixty-month (60) period, no new license may issue for the location until ninety (90)
17 days have passed from the date of revocation. If the violation occurs within twelve (12)
18 months of the first violation the tobacco retailer shall be subject to an administrative fine
of two hundred fifty (\$250.00) dollars.

19 3. After revocation for a third violation of this chapter at a location within
20 any sixty-month (60) period, no new license may issue for the location until one year has
21 passed from the date of revocation. If the violation occurs within twelve (12) months of
the second violation the tobacco retailer shall be subject to an administrative fine of five
hundred (\$500.00) dollars.

22 4. After revocation for four (4) or more violations of this section at a location
23 within any sixty-month (60) period, no new license may issue for the location until five
24 (5) years have passed from the date of revocation. In addition, the tobacco retailer shall
be subject to an administrative fine of one thousand (\$1,000.00) dollars.

25 c. *Appeal of Revocation.* A decision of the Department to revoke a license is
26 appealable to the City Manager and must be filed with the City Clerk within ten (10) days of
27 mailing of the Department's decision. If such an appeal is made, it shall stay enforcement of the
28 appealed action. An appeal to the City Administrator is not available for a revocation made
pursuant to paragraph d. below.

1 d. *Revocation of License Issued in Error.* A tobacco retailer's license shall be
2 revoked if the Department finds, after the licensee is afforded reasonable notice and an
3 opportunity to be heard, that one (1) or more of the bases for denial of a license under subsection
4 5-24.4 existed at the time application was made or at any time before the license issued. The
5 decision by the Department shall be the final decision of the City. The revocation shall be
6 without prejudice to the filing of a new license application.
7 (Ord. #09-02, §2)

8 **5-24.10 Tobacco Retailing Without a License.**

9 In addition to any other penalty authorized by law, if the Department finds, based on
10 substantial record evidence, that any person has engaged in tobacco retailing at a location
11 without a valid tobacco retailer's license, either directly or through the person's agents or
employees, the person shall be ineligible to apply for or be issued a tobacco retailing license for
that location as follows:

12 a. After a first violation of this section at a location within any sixty (60) month
13 period, no new license may issue for the person at the location until thirty (30) days have passed
from the date of the violation.

14 b. After a second violation of this section at a location within any sixty (60) month
15 period, no new license may issue for the person at the location until ninety (90) days have passed
from the date of the violation.

16 c. After of a third or subsequent violation of this section at a location within any
17 sixty (60) month period, no new license may issue for the person at the location until five (5)
years have passed from the date of the violation.

18 (Ord. #09-02, §2)

19 **5-24.11 Enforcement.**

20 a. Causing, permitting, aiding, abetting, or concealing a violation of any provision of
21 this section shall constitute a violation.

22 b. In addition to the administrative enforcement procedures provided by this section,
23 violations of this section may, in the discretion of the City Attorney, be prosecuted as infractions,
pursuant to Albany Municipal Code.

24 c. Violations of this section are hereby declared to be public nuisances.

25 d. In addition to other remedies provided by this section or by other law, any
26 violation of this section may be remedied by a civil action brought by the City Attorney,
27 including but not limited to administrative or judicial nuisance abatement proceedings, civil or
28 criminal code enforcement proceedings, and suits for injunctive relief. The remedies provided by
this section are cumulative and in addition to any other remedies available at law or in equity.

1 e. An action for injunction may be brought in a court of competent jurisdiction by
2 any aggrieved person, or any person or entity that will fairly and adequately represent the
3 interests of the class protected by this section.

(Ord. #09-02, §2)

4 **SECTION 2: CONSTRUCTION AND SEVERABILITY.**

5
6 It is the intent of the City Council of the City of Albany to supplement applicable State
7 and Federal law and not to duplicate or contradict such law, and this Ordinance shall be
8 construed consistently with that intention. If any provision of this Ordinance, or its applicability
9 to any person or circumstance, is for any reason held to be invalid or unenforceable, such
10 invalidity or unenforceability shall not affect the validity or enforceability of the remainder of
11 this Ordinance, or its applicability to any person or circumstance. The City Council of the City
12 of Albany hereby declares that it would have adopted each provision of this Ordinance,
13 irrespective of the fact that any one or more provisions might be declared invalid or
14 unenforceable.

15 **SECTION 3: PUBLICATION AND EFFECTIVE DATE.**

16 This ordinance shall be posted at three public places within the City of Albany and shall
17 become effective six months after the date of its posting. The City Council finds and determines
18 that six months is a sufficient amount of time for tobacco retailers to sell their existing
19 inventories of flavored tobacco products and come into compliance with this Ordinance.

20 **PASSED AND ADOPTED** by the City Council of the City of Albany at its meeting on
21 the 15th day of April, 2019, by the following vote:

22 AYES: *Council Members Barnes, McQuaid, Pitch and Mayor Nason*

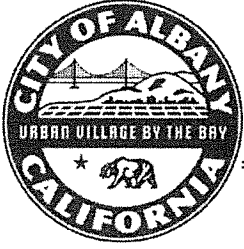
23 NOES: *none*

24 ABSENT: *Council Member Maass*

25 ABSTAIN: *none*

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ROCHELLE NASON, MAYOR



City of Albany

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ORDINANCE NO. 2019-04

PASSED AND APPROVED BY THE COUNCIL OF THE CITY OF ALBANY,
the 15th day of April, 2019 by the following votes:

AYES: Council Members Barnes, McQuaid, Pilch, Mayor Nason

NOES: none

ABSTAINED: none

ABSENT: Council Member Maass

WITNESS MY HAND AND THE SEAL OF THE CITY OF ALBANY, this
16th day of April, 2019.

Eileen Harrington
DEPUTY CITY CLERK