

ORDINANCE NO. 2016-XXXX

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF SAN MARCOS,
CALIFORNIA, AMENDING SECTION 10.10 OF THE SAN MARCOS MUNICIPAL
CODE RELATING TO YOUTH ACCESS TO TOBACCO

WHEREAS, electronic cigarettes, commonly known as e-cigarettes, are battery operate devices designed to deliver nicotine, flavors and other substances through vapor inhaled by the user; and

WHEREAS, e-cigarette use has increased significantly in recent years, including a doubling of use among middle and high school youth during the 2011-2012; and

WHEREAS, many e-cigarettes products appear to be manufactured to appeal to young people by using bright colors for the devices and having candy-like flavorings; and

WHEREAS, access to and use of tobacco products by minors are currently regulated by the San Marcos Municipal Code and the City Council desires to extend those regulation to electronic smoking devices and paraphernalia; and

WHEREAS, the City Council of the City of San Marcos desires to promote a smoke-free environment for the youth in the City.

NOW, THEREFORE, the City Council of the City of San Marcos, in accordance with the freedom accorded to charter cities generally, and by the Charter of the City of San Marcos, specifically does ordain as follows:

Section 1: 10.10 of the San Marcos Municipal Code is hereby amended as follows:

CHAPTER 10.10

YOUTH ACCESS TO SMOKING MATERIALS

SECTIONS:

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| 10.10.010 | Definitions |
| 10.10.020 | Prohibitions |
| 10.10.030 | Location of Smoking Materials and Advertising Inside Retail Establishments |
| 10.10.040 | Exceptions to Location of Smoking Materials and Advertising Inside Retail Establishments |

10.10.050	Non-Retaliation
10.10.060	Conflicts With Other Applicable Laws
10.10.070	Violation-Enforcement and Penalties

10.10.010 Definitions.

- (a) *Advertising* means printed matter that calls the public's attention to things for sale.
- (b) *Advertising display* means a sign, sign-board, poster, or banner that is temporarily or permanently affixed to the ground, sidewalk, a pole or post, or a building, or is displayed in the windows of a commercial establishment, and that is used to advertise or promote products.
- (c) *Arcade* is any establishment within the City of San Marcos (other than a pool hall, billiard hall or card room) open to the public with six or more games of skill or amusement installed on the premises.
- (d) *Business* means any sole proprietorship, joint venture, corporation or other business entity formed for profit making purposes, including retail establishments where goods or services are sold, as well as professional corporations and other entities where legal, medicinal, dental, engineering, architectural or other professional services are delivered.
- (e) *City* shall mean the City of San Marcos.
- (f) *Electronic Smoking Device* means an electronic and/or battery operated device, the use of which may resemble smoking, which can be used to deliver an inhaled dose of nicotine or other substances by delivering a vaporized solution. Electronic smoking device includes any such device, whether manufactured, distributed marketed or sold as an electronic cigarette, an e-cigarette, an electronic cigar, electronic cigarillo, an electronic pipe, an electronic hookah, or any product name or descriptor, including any component, part or accessory of such a device, whether or not sold separately. Electronic smoking device does not include any inhaler or other product specifically approved by the United State Food and Drug Administration for therapeutic purposes or for use in the mitigation, treatment or prevention of disease, where such product is marketed and sold solely for such an approved purpose.

(g) *Electronic Smoking Device Paraphernalia* means cartridges, cartomizers, e-liquid, smoke juices, tips, atomizers, electronic smoking device batteries, electronic smoking chargers and any other item specifically designed for the preparations, charging or use of electronic devices.

(h) *Employee* means any person who is employed by an employer in consideration for direct or indirect wages or profit, and any person who volunteers his or her services for a non-profit entity.

(i) *Minor* means any individual who is less than eighteen (18) years old

(j) *Non-profit entity* means any corporation, unincorporated association or other entity created for charitable, philanthropic, educational-character building, political, social or other similar purpose, the net proceeds from the operations of which are committed to the promotion of the objectives or purposes of the entity and not to private gain. A public agency is not a *non-profit entity* within the meaning of this section.

(k) *Person* shall mean any individual, partnership, cooperative association, private corporation, personal representative, receiver, trustee, assignee, or any other legal entity.

(l) *Playground* means any outdoor premises or grounds owned or operated by the City, a public or private school, child care center, youth or recreational center, that contains any play or athletic equipment used or intended to be used by minors.

(m) *Self-service merchandising* means open display of smoking materials and point-of-sale smoking materials -related promotional products that the public has access to without the intervention of an employee.

(n) *Smoking Materials* means tobacco products, an electronic smoking device, electronic smoking device paraphernalia, and any other product containing tobacco or nicotine that releases gases, particles or vapors into the air as a result of combustion, electrical ignition or vaporization, when the apparent or usual purpose is human inhalation of the byproducts, except when the purpose of inhalation is solely olfactory.

(o) *Tobacco product* means any tobacco cigarette, cigar, pipe tobacco, smokeless tobacco, snuff or any other form of tobacco which may be utilized for smoking, chewing, inhaling or other manner of ingestion.

(p) *Tobacco retailer* shall mean any person or governmental entity that operates a store, stand, booth, concession, or other place at which sales of smoking materials are made to purchasers for consumption or use.

(q) *Tobacco vending machine* means any electronic or mechanical device or appliance the operation of which depends upon the insertion of money, whether in coin or paper currency, or other things representative of value, which dispenses or releases a smoking materials.

(r) *Vendor-assisted* means only a store employee has access to the smoking materials and assists the customer by supplying the product. The customer does not take possession of the product until it is purchased.

10.10.020 Prohibitions.

(a) No person or business shall engage in the sale of smoking materials without first posting a plainly visible sign at the point of purchase of smoking materials which has wording similar to: "THE SALE OF SMOKING MATERIALS TO PERSONS UNDER 18 YEARS OF AGE IS PROHIBITED BY LAW AND SUBJECT TO PENALTIES. PHOTO IDENTIFICATION IS REQUIRED OF PURCHASERS APPEARING TO BE 21 AND YOUNGER." The letters of the sign shall be at least one quarter inch (1/4") high.

(b) No person, business, tobacco retailer, or owner, manager or operator of any establishment subject to this ordinance shall sell, offer to sell, or permit to be sold any smoking materials to an individual without requesting and examining identification of customers appearing to be twenty-one (21) and younger for the purpose of establishing the purchaser's age as eighteen (18) years or greater, unless the seller has some other reasonable basis for determining the buyer's age.

(c) No person, business, tobacco retailer or other establishment shall sell or offer for sale cigarettes or other tobacco or smoking products not in the original packaging provided by the manufacturer and with all required health warnings.

(d) It shall be unlawful for any person, business or tobacco retailer to sell, permit to be sold, offer for sale or display for sale any smoking materials by means of self-service merchandising or by any means other than vendor-assisted sales as defined in Section 10.10.010(o), above. **(Ord. No. 2004-1219, 1/27/04)**

(e) No person, business or tobacco retailer shall locate, install, keep, maintain or use, or permit the location, installation, keeping, maintenance or use on his, her or its premises any tobacco vending machine for the purpose of selling or distributing any smoking materials except as allowed hereinafter. Operating and maintaining a vending machine for dispensing cigarettes or other smoking materials shall be allowed and such machines or machine may be located in any business premises from which minor persons are excluded by law.

(f) It shall be unlawful for any person, business, or tobacco retailer to distribute “free sample” smoking materials, except in enclosed areas where minors are not permitted. A “free sample” does not include any form of smoking materials that is provided in connection with: 1) the vendor-assisted purchase, exchange or redemption for proof of purchase of any smoking materials after age verification is performed as set forth in Section 10.10.020(b), above, including, but not limited to, a free offer in connection with the purchase of smoking materials, such as a “two-for-one” offer; or (d) the conducting of consumer testing or evaluation of smoking materials with persons after age verification is performed as set forth in Section 10.10.020(b), above. **(Ord. No. 2004-1219, 1/27/04)**

10.10.030 Location of Smoking Materials and Advertising Inside Retail Establishments.

It shall be unlawful for any person, business, or tobacco retailer to place or maintain, or cause to be placed or maintained, any display containing smoking materials. **(Ord. No. 2004-1219, 1/27/04)**

10.10.040 Exceptions to Location of Smoking Materials and Advertising Inside Retail Establishments.

(a) Section 10.10.030 does not apply to commercial establishments where access to the premises by persons under eighteen (18) years of age is prohibited by law.

(b) Section 10.10.030(a) does not apply to displays in any establishments that are located behind a counter and not accessible to patrons unless vendor-assisted, or are located in other restricted areas that are not accessible to patrons unless vendor-assisted. **(Ord. No. 2004-1219, 1/27/04)**

10.10.050 Non-Retaliation.

(a) No person or employee shall discharge, refuse to hire or in any manner retaliate against any employee or applicant for employment because such employee or applicant agrees to abide by the provision of this article.

(b) No person shall intimidate or threaten any reprisal or effect any reprisal for the purpose of retaliating against another person because such other person seeks to attain compliance with provisions of this article.

10.10.060 Conflicts With Other Applicable Laws.

This article shall not be interpreted or construed to permit tobacco vending machines and distribution of smoking materials samples where they are otherwise restricted by other applicable laws. Nor shall this article be construed as cause for breach of any pre-existing private contract, or cause for interference with regulations imposed by state or federal law or related to interstate commerce.

10.10.070 Violation-Enforcement and Penalties.

(a) Any person, business or tobacco retailer who violates any provision of this article shall upon conviction thereof, be guilty of a misdemeanor offense, punishable as provided in Section 1.12.020 of this code.

(b) The owner, operator or manager of any public place or place of employment within the purview of this article shall comply herewith. Such owner, operator or manager shall post or cause to be posted all signage required by this article.

(c) It shall be the responsibility of employers to disseminate information concerning the provisions of this article to employees. **(Ord. No. 99-1066, 7/13/99)**

Section 2. If any section, sentence, clause or phrase of this Ordinance is determined to be invalid, illegal or unconstitutional by a decision or order of any court or agency of competent jurisdiction, then such decision or order will not affect the validity and enforceability of the remaining portions of this Ordinance. The City Council declares that it would have passed and adopted the Ordinance, and each section, sentence, clause or phrase thereof, regardless of the fact that any one or more sections, subsections, sentences, clauses, or phrases be declared invalid or unconstitutional.

Section 3. This Ordinance shall be effective thirty (30) days following its adoption. Within fifteen (15) days following its adoption, the City Clerk shall publish this Ordinance of the title thereof, as a summary as required by state law.

Section 4. The City Clerk shall certify to the passage of this Ordinance and cause the same to be published in accordance with the provisions of State Law in a newspaper of general circulation designated for legal notices publication in the City of San Marcos.

INTRODUCED at a regular meeting of the City Council of the City of San Marcos held on the 28th day of October 2014; and

PASSED, APPROVED AND ADOPTED at a regular meeting of the City Council of the City of San Marcos, California, this 28th day of June 2016, by the following roll call vote:

AYES: COUNCILMEMBERS:
NOES: COUNCILMEMBERS:
ABSENT: COUNCILMEMBERS:

APPROVED:

James M. Desmond, Mayor
City of San Marcos

ATTEST:

Phillip Scollick, City Clerk
City of San Marcos

APPROVED AS TO FORM:

Helen Holmes Peak, City Attorney
City of San Marcos