

ORDINANCE NO. 2016-1428

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF SAN MARCOS, CALIFORNIA, AMENDING CHAPTER 5.04 (UNIFORM LICENSING PROCEDURES), ADDING CHAPTER 5.55 (TOBACCO RETAIL LICENSE) AND AMENDING CHAPTER 10.10 (YOUTH ACCESS TO SMOKING MATERIALS) OF THE SAN MARCOS MUNICIPAL CODE TO ESTABLISH A TOBACCO RETAIL LICENSE AND PROHIBIT THE SALE OF TOBACCO PRODUCTS TO MINORS

WHEREAS, California Penal Code Section 308 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; and

WHEREAS, California Business & Professions Code Section 22956 requires that tobacco retailers check the identification of tobacco purchasers who reasonably appear to be under 21 years of age; and

WHEREAS, California Business & Professions Code Section 22952 and California Penal Code Section 308 require that tobacco retailers post a conspicuous notice at each point of sale stating that selling tobacco products to minors is illegal; and

WHEREAS, California Business & Profession Code Section 22962 prohibits the sale or display of cigarettes though a self-service display and prohibits public access to cigarettes without the assistance of a clerk; and

WHEREAS, California Penal Code Section 308.1 prohibits the sale of "bidis" (hand-rolled filterless cigarettes) except at those businesses that prohibit the presence of minors; and

WHEREAS, California Penal Code Section 308.3 prohibits the manufacture, distribution, or sale of cigarettes in packages of less than 20 and prohibits the manufacture, distribution, or sale of "roll- your-own" tobacco in packages containing less than 0. 60 ounces of tobacco; and

WHEREAS, Chapter 10.10 of the San Marcos Municipal Code regulates access to and use of tobacco products by minors; and

WHEREAS, California Business & Professions Code Section 22971.3 authorizes local authorities to adopt tobacco retailer licensing laws to provide for the suspension and revocation of the local tobacco retailer license for any violation of a state tobacco control law; and

WHEREAS, a 2015 Center for Disease Control and Prevention report states that middle and high school students' use of electronic cigarettes have tripled from 2013 to 2014; and

WHEREAS, the same report states that 9 out of 10 cigarette smokers had their first cigarette before the age of 18; and

WHEREAS, the City of San Marcos has a substantial interest in promoting compliance with federal, state and local laws intended to regulate tobacco sales and use to youth; and

WHEREAS, studies have shown that local tobacco retail licensing programs coupled with a strong enforcement program substantially reduces youth access to tobacco; and

WHEREAS, state law prohibits sales of “drug paraphernalia” however many retailers sell items that are commonly known to be “drug paraphernalia” including water pipes and personal vaporizers used to smoke illicit drugs, claiming the items are for tobacco or e-liquid use; and

WHEREAS, San Marcos intends to require compliance with state drug paraphernalia laws as a condition of obtaining and maintaining the local tobacco retail license; and

WHEREAS, Senate Bill 7, Chapter 8 of the 2015-2016 second special session of the State Legislature changed the age for which individuals can purchase tobacco products; and

WHEREAS, the City desires to amend Chapter 5.04 of the San Marcos Municipal Code to add a Tobacco Retail License to its Uniform Licensing Procedures; and to add Chapter 5.55 to create a Tobacco Retail License; and to amend Chapter 10.10 to ensure consistency with state law; and

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

Section 1. The foregoing recitals are true and correct.

Section 2. Chapter 5.04 of the San Marcos Municipal Code is hereby amended to read as shown in blacklined underlined additions as follows:

Chapter 5.04
UNIFORM LICENSING PROCEDURES

5.04.010 License –Required. It is unlawful for any person, firm, or corporation to engage in, conduct, manage or carry on any of the following businesses, practices, professions, or occupations within the City without first having obtained a license therefore in accordance with the uniform licensing procedure:

(p) Tobacco retail

Section 3. Chapter 5.55 of the San Marcos Municipal Code is hereby added in its entirety as follows:

CHAPTER 5.55

TOBACCO RETAIL LICENSE

SECTIONS:

- 5.55.010 Purpose**
- 5.55.020 Definitions**
- 5.55.030 Requirement for Tobacco Retail License**
- 5.55.040 Applications Procedure**
- 5.55.050 Issuance and Renewal of License**
- 5.55.060 Display of License**
- 5.55.070 License Fee**
- 5.55.080 Licenses Nontransferable**
- 5.55.090 License Violation - Compliance Monitoring**
- 5.55.100 Suspension or Revocation of License**
- 5.55.110 Denial, Suspension and Revocation - Appeals**
- 5.55.120 Hearings - Generally**
- 5.55.130 Conduct of Hearing**
- 5.55.140 Form and Contents of Decision of Hearing Officer - Appeal to City Manager - Finality of Decision**
- 5.55.150 Enforcement**
- 5.55.160 Severability**

5.55.010 Purpose

The purpose of this chapter is to encourage responsible tobacco retailing and discourage violations of tobacco related laws that prohibit the sale or distribution of tobacco products, including all smoking materials as defined in section 5.55.020, to minors and tobacco related laws that prohibit the display of tobacco products within reach of the public, but not to expand or reduce the degree to which the acts regulated by federal or state law are criminally proscribed or to alter the penalty provided therefore.

5.55.020 Definitions

When used in this chapter, the following definitions shall have the meanings given by this section, whether or not these words or phrases are capitalized:

“Drug Paraphernalia” shall have the meaning set forth in Health & Safety Code section 11014.5, as that section may be amended from time to time.

“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 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.

"Hearing Officer" means the impartial hearing officer designated to serve in this capacity.

"Itinerant Tobacco Retailing" means engaging in tobacco retailing at other than a fixed location.

"License" means a Tobacco Retail License issued by the City pursuant to this Chapter and this Municipal Code section 5.04.010.

"Licensee" means a Person to whom a License has been issued.

"Person" means any individual, firm, partnership, joint venture, limited liability company, association, social club, fraternal organization, corporation, estate, trust, business trust, receiver, trustee, syndicate, or any other group or combination acting as a unit.

"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 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 has, or can have, sole or shared control over the day- to-day operations of a business.

"Smoking Materials" means Tobacco Products, 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.

"Tobacco Product" means: (1) any product containing, made, or derived from tobacco or nicotine that is intended for human consumption, whether smoked, heated, chewed, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means, including, but not limited to cigarettes, cigars, little cigars, chewing tobacco, pipe tobacco, snuff; and (2) any Electronic Smoking Device. (3) Notwithstanding any provision of subsections (1) and (2) to the contrary, "tobacco product" includes any component, part, or accessory of a tobacco product, whether or not sold separately. "Tobacco product" does 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 such product is marketed and sold solely for such an approved purpose.

"Tobacco Paraphernalia" includes cigarette papers or wrappers, pipes, holders of smoking materials of all types, cigarette rolling machines, and any other item designed for the smoking or ingestion of tobacco products.

"Tobacco Retailer" means any person who sells, offers for sale, exchanges, or offers 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.

"Tobacco Retailing" shall mean 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.

5.55.030 Requirement for Tobacco Retail License

- A. It shall be unlawful for any person to act as a Tobacco Retailer in the City without first obtaining and maintaining a valid Tobacco Retail License pursuant to this Municipal Code Chapter 5.04.010 for each location at which Tobacco Retailing is to occur. No Tobacco Retail License will

be issued to an authorized Tobacco Retailing at other than a fixed location. No License will be issued for itinerant Tobacco Retailing or Tobacco Retailing from vehicles.

- B. Nothing in this Chapter shall be construed to grant any person obtaining a Tobacco Retail License any status or right other than the right to act as a Tobacco Retailer at the location in the City identified on the face of the License, subject to compliance with all other applicable laws, regulations, and ordinances. Nothing in this Chapter shall be construed to render inapplicable, supersede, or apply in lieu of any other provision of applicable law, including, without limitation, any condition or limitation on indoor smoking made applicable to business establishments by Labor Code Section 6404.5.
- C. No person who is younger than the minimum age established by California law for the purchase or possession of Tobacco Products shall engage in Tobacco Retailing.

5.55.040 Applications Procedure

- A. Application for a Tobacco Retail License shall be submitted to the City in the name of each Proprietor proposing to conduct Tobacco Retailing and shall be signed by each Proprietor or an authorized agent thereof. A Proprietor proposing to conduct Tobacco Retailing at more than one location shall submit a separate application for each location.
- B. All applications shall be submitted on a form supplied by the City and shall contain the following information:
 - 1. The name, address, and telephone number of each Proprietor.
 - 2. The business name, address and telephone number of the fixed location for which a Tobacco Retail License is sought.
 - 3. The name and mailing address authorized by each applicant to receive all License-related communications and notices (the "authorized address"). Failure to supply an authorized address shall be understood to consent to the provision of notice at the business address specified in paragraph 2, above.
 - 4. Whether or not any applicant has previously been issued a License pursuant to this Chapter that is or was at any time suspended or revoked and, if so, the dates of the suspension period or the date of revocation.
 - 5. Such other information as the City Manager deems necessary for the administration or enforcement of this Chapter.
 - 6. Any and all additional requirements contained in a Tobacco Retail License application pursuant to this Municipal Code Section 5.04.030.

5.55.050 Issuance and Renewal License

- A. Upon the receipt of an application for a Tobacco Retail License and the payment of a Tobacco Retail License fee, the City shall issue a License unless:
 - 1. The application is incomplete or inaccurate.
 - 2. The application seeks authorization for tobacco retailing at an address that appears on a license that is suspended, has been revoked, or is subject to suspension or revocation proceedings for violation of any of the provisions of this chapter. Notwithstanding the

foregoing, this subparagraph shall not constitute a basis for denial of a license if either or both of the following apply:

- a) The applicant provides the City with documentation demonstrating that the applicant has acquired or is acquiring the premises or business in an arm's length transaction. For the purposes of this subparagraph, an "arm's length transaction" is defined as 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 under any compulsion to participate in the transaction. A sale between relatives, related companies or partners, or a sale for the primary purpose of avoiding the effect of the violations of this chapter that occurred at the location, is presumed not to be an "arm's length transaction."
 - b) It has been more than three years since the most recent License for that location was revoked.
3. The application seeks authorization for Tobacco Retailing by a Proprietor for which or whom a suspension is in effect or by a Proprietor which or who has had a license revoked, pursuant to this chapter.
 4. The application seeks an authorization for Tobacco Retailing that is unlawful pursuant to this Chapter, or that is unlawful pursuant to any other local, state, or federal law.
 5. The City has information that the applicant or his or her agents or employees have violated any local, state, or federal tobacco control law at the location for which the License or renewal of the License is sought within the preceding 30 day period.
 6. The City has information that the applicant or his or her agent or employee has violated any local, State or Federal tobacco control law, including this Chapter, within the preceding (12) months.
 7. The issuance of a Tobacco Retail License would be in conflict with any other City ordinance.
- B. Beginning from the effective date of this Chapter, all Tobacco Retailers have until December 31, 2016 to obtain a License. Any License issued prior to December 31, 2016, shall remain effective until December 31, 2017. An application to renew such License shall be made no later than 30 days prior, but no earlier than 60 days prior to the expiration of the License. The City has no obligation to issue notification of impending expiration of any License. The applicant shall follow all of the procedures and provide all of the information required by Section 5.55.040 above. The City shall process the application according to the provisions of this section. A License may be renewed annually by submitting a Tobacco Retail License application to the City along with payment of a Tobacco Retail Licensing fee; provided, however, a Tobacco Retail License that is suspended, has been revoked, or is subject to suspension or revocation proceedings shall not be renewed.
- C. If the information required in the License application pursuant to any subsection of Chapter 5.55 changes, a new Tobacco Retail License is required before the business may continue to act as a Tobacco Retailer. For example, if a Proprietor to whom a License has been issued changes business location, that Proprietor must apply for a new License prior to acting as a Tobacco Retailer at the new location. If the business is sold, the new owner must apply for a License for that location before acting as a Tobacco Retailer.
- D. A Tobacco Retail License that is not timely renewed pursuant to this chapter shall be automatically suspended by operation of law. If not renewed, a license shall be automatically revoked six months after the renewal date. Additionally, civil, criminal and/or administrative

citations may be issued during this interim period for failure to maintain the appropriate License. To reinstate the paid status of a License that has been suspended due to the failure to timely pay the renewal fee, the Tobacco Retailer must:

1. Submit the License renewal fee plus a reinstatement fee of ten percent of the License renewal fee; and
2. Submit a signed affidavit affirming that he or she has not sold any Tobacco Product or Tobacco Paraphernalia during the period the license was suspended for failure to pay the License renewal fee.

5.55.060 Display of License

Each license shall be prominently displayed in a publicly visible location at the licensed premises. Failure to properly display the license will result in the issuance of a citation.

5.55.070 License Fees

The fee for issuance or renewal of a Tobacco Retail License shall be established by resolution of the City Council and shall be in addition to the City's business license fee and any other license or permit fee imposed by this code upon the applicant. The Tobacco Retail License fee shall be paid to the City at the time the license application is submitted. The fee shall be calculated so as to recover the cost of administration and enforcement of this Chapter, including, for example, issuing a License, administering the License program, Tobacco Retailer education, Tobacco Retailer inspection and compliance checks, documentation of violations, and prosecution of violators, but shall not exceed the cost of the regulatory program authorized by this Chapter. All fees and interest upon proceeds of fees shall be used exclusively to fund the program. Fees are nonrefundable except as may be required by law.

5.55.080 Licenses Nontransferable & Convey a Limited, Conditional Privilege

A Tobacco Retail License is nontransferable and subject to the provisions of this Municipal Code Section 5.04.040. Nothing in this Chapter shall be construed to grant any person obtaining and maintaining a Tobacco Retailer License any status or right other than the limited conditional privilege to act as a Tobacco Retailer at the location within the City's jurisdictional boundaries identified on the face of the License, subject to compliance with the terms and conditions of this Chapter.

5.55.090 License Violation – Compliance Monitoring

- A. It shall be a violation of a Tobacco Retail License for a Tobacco Retail Licensee or his or her agents or employees to violate any local, state or federal tobacco-related law.
- B. It shall be a violation of this Chapter for any Tobacco Retail Licensee or any of the Licensee's agents or employees to violate any local, state, or federal law regulating controlled substances or Drug Paraphernalia including, but not limited to, California Health and Safety Code section 11364.7, as that section may be amended from time to time.

- C. In addition to the provisions of Section 5.04.080 of this Municipal Code, compliance with this Chapter shall be monitored by the San Diego Sheriff's Department. Any peace officer or Municipal Code compliance official also may enforce this Chapter. The San Diego Sheriff's Department shall check compliance of each Tobacco Retailer at least one time per twelve (12) month period and shall conduct additional compliance checks as warranted. The compliance checks shall be conducted to determine, at a minimum, if the Tobacco Retailer is complying with tobacco laws regulating underage sales. The San Diego Sheriff's Department shall use youth decoys and comply with protocols for the compliance checks developed in consultation with the San Diego County Department of Health and Human Services and the San Diego District Attorney. When appropriate, the compliance checks shall determine compliance with other tobacco-related laws.
- D. The City shall not enforce any tobacco related minimum age law against a person who otherwise might be in violation of such law because of a person's age (hereinafter "youth decoy") if the potential violation occurs when:
 - 1. The youth decoy is participating in a compliance check supervised by a peace officer or a Code compliance official; or
 - 2. The youth decoy is participating in a compliance check funded in part by the San Diego County Department of Health and Human Services or funded in part, either directly or indirectly through sub-contracting, by the California Department of Health Services.
 - 3. The youth decoy has a letter of permission for such compliance check activity from the District Attorney's Office.

5.55.100 Suspension or Revocation of License

- A. In addition to any other penalty authorized by law, and including the provisions of this Municipal Code Section 5.04.100, a Tobacco Retail License may be suspended or revoked if the City finds, after notice to the Tobacco Retail Licensee and opportunity to be heard, that the Tobacco Retail Licensee or his or her agents or employees has or have violated any of the provisions of this Chapter; provided, however, violations by a Licensee at one location may not be accumulated against other locations of that same Tobacco Retail Licensee, nor may violations accumulated against a prior tobacco retail licensee at a licensed location be accumulated against a new tobacco retail licensee at the same licensed location.
 - 1. Upon a finding by the City of a first License violation within any three-year period, the City shall:
 - a) Issue a written warning to the Licensee.
 - b) Advise the Licensee of the penalties for further violations of this Chapter.
 - c) Require the Licensee to provide documentation to the City that all employees engaged in the Retail Sale of tobacco have received training in a City approved program within sixty (60) days after the warning, or such other time as shall be set by the City.
 - 2. Upon a finding by the City of a second License violation within any three year period, the License may be suspended up to thirty (30) days.
 - 3. Upon the finding by the City of a third License violation within any three year period, the license may be suspended for up to ninety (90) days.

4. Upon the finding by the City of a fourth License violation within any three year period, the License may be suspended for up to one (1) year.
 5. Upon a finding by the City of a fifth License violation within any three year period, the License may be revoked.
- B. A Tobacco Retail License shall be revoked if the City finds, after notice and opportunity to be heard, that any one of the conditions listed below exist. The revocation shall be without prejudice to the filing of a new application for a Tobacco Retail License.
1. One or more of the bases for denial of a Tobacco Retail License under Section 5.55.050 existed at the time the Tobacco Retail License application was made or at any time before the Tobacco Retail License was issued.
 2. The application is incomplete for failure to provide the information required by Section 5.55.040.
 3. The information contained in the application, including supplemental information, if any, is found to be false in any material respect.
 4. The application seeks authorization for Tobacco Retailing that is unlawful pursuant to this Code, or that is unlawful pursuant to any other local, state, or federal law.
- C. In the event the City suspends or revokes a Tobacco Retail License, written notice of the suspension or revocation shall be served upon the Tobacco Retail Licensee within five (5) days of the suspension or revocation in a manner prescribed in Section 5.55.040. The notice shall contain:
1. A brief statement of the specific grounds for such suspension or revocation;
 2. A statement that the Tobacco Retail Licensee may appeal the suspension or revocation by submitting an appeal, in writing, in accordance with the provisions of Section 5.55.110, to the City, within ten (10) calendar days of the date of the service of the notice; and
 3. A statement that the failure to appeal the notice of suspension or revocation will constitute a waiver of all rights to an administrative appeal hearing, and the suspension or revocation will be final.

5.55.110 Denial, Suspension and Revocation - Appeals

- A. Notwithstanding any provisions in this Municipal Code Sections 5.04.110; 5.04.130; 5.04.140 and 5.04.150, any Tobacco Retail License applicant or licensee aggrieved by the decision of the City in denying, suspending, or revoking a Tobacco Retail License, may appeal the decision, by submitting a written appeal to the City Clerk within ten (10) calendar days from the date of service of the notice of denial, suspension, or revocation. The written appeal shall contain:
1. A brief statement in ordinary and concise language of the specific action protested, together with any material facts claimed to support the contentions of the appellant;
 2. A brief statement in ordinary and concise language of the relief sought, and the reasons why it is claimed the protested action should be reversed or otherwise set aside;
 3. The signatures of all parties named as appellants and their official mailing addresses; and
 4. The verification (by declaration under penalty of perjury) of at least one appellant as to the truth of the matters stated in the appeal.
- B. The appeal hearing shall be conducted by a hearing officer.

- C. Upon receipt of any appeal filed pursuant to this section, the City Clerk shall transmit said appeal to the hearing officer who shall calendar it for a hearing. The hearing officer shall give the parties at least fifteen (15) calendar days written notice of the time and place of the hearing either by causing a copy of such notice to be delivered to the appellant personally or by mailing a copy thereof, postage prepaid, addressed to the appellant at the address shown on the appeal. Upon good cause, the hearing officer may grant one extension for the date of the hearing not to exceed fifteen (15) days from the original date set for the hearing.
- D. Only those matters or issues specifically raised by the appellant in the notice of appeal shall be considered in the hearing of the appeal.
- E. Failure of any person to file a timely appeal in accordance with the provisions of this section shall constitute an irrevocable waiver of the right to an administrative hearing and a final adjudication of the notice and order, or any portion thereof.
- F. Following the hearing on the appeal by the hearing officer, the decision of the hearing officer may be appealed to the City Manager or his or her designee. A decision of the City Manager or his or her designee shall be the final decision of the City.
- G. During a period of License suspension, the Tobacco Retail Licensee must remove from public view all Tobacco Products and Tobacco Paraphernalia at the address that appears on the suspended or revoked Tobacco Retail License.

5.55.120 Hearings – Generally

- A. At the time set for hearing, the hearing officer shall proceed to hear the testimony of material witnesses, the appellant, and other competent persons, including members of the public, respecting those matters or issues specifically listed by the appellant in the notice of appeal.
- B. The proceedings at the hearing shall be electronically recorded. Either party may provide a certified shorthand reporter to maintain a record of the proceedings at the party's own expense.
- C. The hearing officer may, upon the request of the appellant or upon the request of the City, grant continuances from time to time for good cause shown, or upon his or her own motion.

5.55.130 Conduct of Hearing

- A. Hearings need not be conducted in accordance to the technical rules relating to evidence and witnesses. Government Code section 11513, subsections (a), (b) and (c), or as such section may be amended from time to time, shall apply to hearings under this Chapter.
- B. Oral evidence shall be taken only upon oath or affirmation.
- C. Irrelevant and unduly repetitious evidence shall be excluded.
- D. Each party shall have these rights, among others:
 - 1. To call and examine witnesses on any matter relevant to the issues of the hearing.
 - 2. To introduce documentary and physical evidence.

3. To cross-examine opposing witnesses on any matter relevant to the issues of the hearing.
 4. To impeach any witness regardless of which party first called the witness to testify.
 5. To rebut evidence presented against the party.
 6. To represent himself, herself, or itself, or to be represented by anyone of his, her, or its choice who is lawfully permitted to do so.
- E. In reaching a decision, official notice may be taken, either before or after submission of the case for decision, of any fact that may be judicially noticed by the courts of this state or that may appear in any of the official records of the City or any of its departments.

5.55.140 Form and Contents of Decision of Hearing Officer - Appeal to City Manager - Finality of Decision

- A. If it is shown, by a preponderance of the evidence, that one or more bases exist to deny, suspend, or revoke the Tobacco Retail License, the hearing officer shall affirm the City's decision to deny, suspend, or revoke the Tobacco Retail License. The decision of the hearing officer shall be in writing and shall contain findings of fact and a determination of the issues presented.
- B. The decision of the hearing officer shall inform the appellant that the decision may be appealed to the City Manager by filing a written appeal with the hearing officer within ten days of receipt of the decision of the hearing officer. The written appeal shall be forwarded to the City Manager upon receipt.
- C. Within fifteen (15) days of receipt of the written appeal, the City Manager shall review the record of the hearing and issue a written decision to grant or deny the appeal. A decision of the City Manager shall be final. The City Manager shall provide appellant with a copy of his or her decision and that the time for judicial review is governed by California Code of Civil Procedure section 1094.6, or as such section may be amended from time to time. Copies of the decision shall be delivered to the parties personally or sent by certified mail to the address shown on the appeal. The decision shall be final when signed by City Manager and served as provided in this section.

5.55.150 Enforcement

- A. In addition to any other remedy, any person violating any provision of this chapter shall be guilty of a misdemeanor for each day a violation continues.
- B. Any violation of this chapter may be remedied by a civil action brought by the City Attorney. The City may recover attorneys' fees and costs of suit, including witness fees, in any civil action brought by the City Attorney to remedy any violation of this chapter.
- C. Violations of this chapter are hereby declared to be public nuisances subject to abatement by the City.
- D. In addition to criminal sanctions and other remedies set forth in this chapter, civil and administrative penalties may be imposed pursuant to Section 1.14.30 of this Municipal Code against any person violating any provision of this chapter. Imposition, enforcement, collection

and administrative review of administrative penalties imposed shall be conducted pursuant to this Municipal Code Chapter 1.14.

5.55.160 Severability

If any section, subsection, subdivision, paragraph, sentence, clause, or phrase in this chapter or any part thereof is for any reason held to be unconstitutional or invalid or ineffective by any court of competent jurisdiction, that decision shall not affect the validity or effectiveness of the remaining portions of this chapter or any part thereof. The City Council hereby declares that it would have passed each section, subsection, subdivision, paragraph, sentence, clause, or phrase thereof irrespective of the fact that any one or more subsections, subdivisions, paragraphs, sentences, clauses, or phrases be declared unconstitutional, or invalid, or ineffective.

Section 4. Chapter 10.10 of the San Marcos Municipal Code is hereby amended to read as shown in blacklined underlined additions and strikeouts as follows:

**CHAPTER 10.10
YOUTH ACCESS TO SMOKING MATERIALS**

10.10.010 Definitions

(i) *Minor* means any individual who ~~is less than eighteen (18) years old~~ is prohibited by state law and this Municipal Code from purchasing tobacco products.

(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.~~ means: (1) any product containing, made, or derived from tobacco or nicotine that is intended for human consumption, whether smoked, heated, chewed, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means, including, but not limited to cigarettes, cigars, little cigars, chewing tobacco, pipe tobacco, snuff; and (2) any Electronic Smoking Device. (3) Notwithstanding any provision of subsections (1) and (2) to the contrary, "tobacco product" includes any component, part, or accessory of a tobacco product, whether or not sold separately. "Tobacco product" does 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 such product is marketed and sold solely for such an approved purpose.

(n) "Smoking Materials" means Tobacco Products, 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.~~

(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.~~ (Ord. No. 2014 1404, 11/10/2014) means any person who sells, offers for sale, exchanges, or offers 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.

10.10.020 Prohibitions

(a) No person or business shall engage in the sale of tobacco products without first posting a plainly visible sign at the point of purchase of tobacco products which has wording and sizing as required by California Business and Professions Code Section 22952 and California Code of Regulations Title 17 Section 6902, as those sections may be amended from time to time. ~~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. ~~(Ord. No. 2014-1404, 11/10/2014)~~

(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. ~~(Ord. No. 2014-1404, 11/10/2014)~~

10.10.040 Exceptions to Location of Smoking Materials and Advertising Inside Retail Establishments. ~~(Ord. No. 2014-1404, 11/10/2014)~~

(a) Section 10.10.030 does not apply to commercial establishments where access to the premises by persons under ~~eighteen (18)~~ twenty-one (21) 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)**

Section 5. 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 6. 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, or the title thereof, as a summary as required by state law.

Section 7. 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 12th day of July, 2016; and

PASSED, APPROVED AND ADOPTED at a regular meeting of the City Council of the City of San Marcos held on the _____ day of _____, 2016 by the following roll call vote:

AYES: COUNCILMEMBERS:

NOES: COUNCILMEMBERS:

ABSENT: COUNCILMEMBERS:

APPROVED:

James M. Desmond, Mayor
City of San Marcos

ATTEST:

APPROVED AS TO FORM:

Phillip Scollick, City Clerk
City of San Marcos

Helen Holmes Peak, City Attorney
City of San Marcos