



TOWN OF FAIRFAX

STAFF REPORT

November 3, 2021

TO: Mayor and Town Council

FROM: Michele Gardner, Town Clerk/Assistant to the Town Manager

SUBJECT: Read by title only and adopt an Ordinance of the Town Council of the Town of Fairfax Amending Chapter 8.44 of Title 8 of the Fairfax Municipal Code, entitled “Clean Indoor and Outdoor Air and Health Protection - Smoking Regulations” to Address Smoking in Multi-Unit Residences; CEQA Exempt Under CEQA Guidelines Sections 15060(c)(2) and 15060(c)(3)

RECOMMENDATION

Waive second reading, read by title only and adopt “An Ordinance of the Town Council of the Town of Fairfax amending Chapter 8.44 of Title 8 of the Fairfax Municipal Code, entitled ‘Clean Indoor and Outdoor Air and Health Protection - Smoking Regulations’ to Address Smoking in Multi-Unit Residences.”

DISCUSSION

Councilmember Coler requested that this ordinance be brought to the Council for consideration.

The proposed ordinance was introduced at the October 20th Town Council meeting. Tonight is the second reading and adoption. If adopted, it would amend Chapter 8.44 to require 100 percent of units in multi-unit residences to be smoke-free by January 1, 2023 and make clarifying changes to related provisions. (Currently, existing code requires a minimum of 75 percent of units in a multi-unit residence to be permanently designated as non-smoking, including the exclusive use areas of the units such as private balconies, porches, decks, or patios.)

The Town worked with Mr. Bob Curry from the Marin County Department of Health and Human Services on the ordinance.

FISCAL IMPACT

N/a

ATTACHMENT

Ordinance

ORDINANCE NO. ____

AN ORDINANCE OF THE TOWN COUNCIL OF THE TOWN OF FAIRFAX AMENDING CHAPTER 8.44 (CLEAN INDOOR AND OUTDOOR AIR AND HEALTH PROTECTION - SMOKING REGULATIONS) OF TITLE 8 (HEALTH AND SAFETY) OF THE FAIRFAX MUNICIPAL CODE TO ADDRESS SMOKING IN MULTI-UNIT RESIDENCES

The Town Council of the Town of Fairfax hereby finds that:

WHEREAS, secondhand smoke, including secondhand cannabis smoke, has repeatedly been identified as a health hazard and exposure to secondhand smoke causes death and disease; and

WHEREAS, the U.S. Surgeon General has concluded that eliminating smoking in indoor spaces is the only way to fully protect nonsmokers from secondhand smoke exposure, and that separating smokers from nonsmokers, cleaning the air, and ventilating buildings cannot completely prevent secondhand smoke exposure; and

WHEREAS, in 2016, the United States Department of Housing and Urban Development issued a final rule requiring all public housing agencies to adopt smoke-free policies to protect residents from secondhand smoke exposure effective February 2017; and

WHEREAS, California law allows local governments to adopt ordinances that require residential rental agreements to prohibit smoking tobacco products within rental units (Civil Code § 1947.5); and

WHEREAS, California law declares that anything which is injurious to health or obstructs the free use of property so as to interfere with the comfortable enjoyment of life or property, is a nuisance; and

WHEREAS, pursuant to Section 7 of Article XI of the California Constitution, a city may “make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws;” and

WHEREAS, in order to protect the public health, the Town desires to amend Chapter 8.44 of the Fairfax Municipal Code to address smoking in multi-unit residences and make clarifying changes to related provisions.

NOW, THEREFORE, THE TOWN COUNCIL OF THE TOWN OF FAIRFAX DOES ORDAIN AS FOLLOWS:

Section 1. The above recitals are true and correct and are hereby incorporated into this Ordinance.

Section 2. Chapter 8.44 (Clean Indoor and Outdoor Air and Health Protection - Smoking Regulations) of Title 8 (Health and Safety) the Fairfax Municipal Code is hereby amended in its entirety to read as follows (additions shown in underline, deletions shown in strikeout):

“CHAPTER 8.44: CLEAN INDOOR AND OUTDOOR AIR AND HEALTH PROTECTION - SMOKING REGULATIONS

Section

Article I: Smoking Regulations

- 8.44.010 Findings and purpose
- 8.44.020 Definitions
- 8.44.030 Smoke generally
- 8.44.040 Application of chapter to town-owned facilities
- 8.44.050 Prohibition of smoking in certain enclosed places
- 8.44.060 Smoking restrictions in new and existing units of multi-unit residences
- 8.44.070 Prohibition of smoking in certain unenclosed public places
- 8.44.080 Smoking optional areas
- 8.44.090 Duty of person, employer, business or nonprofit entity
- 8.44.100 Posting of signs
- 8.44.110 [Reserved]
- 8.44.120 Enforcement
- 8.44.130 Violations and penalties
- 8.44.140 Non-retaliation
- 8.44.150 Public education
- 8.44.160 Governmental agency cooperation
- 8.44.170 Other applicable laws

Article II: Tobacco Retailers Licensing Ordinance

- 8.44.200 Title
- 8.44.210 Requirements and prohibitions
- 8.44.220 Application procedure
- 8.44.230 Issuance of license
- 8.44.240 License renewal and expiration
- 8.44.250 Transfer restrictions
- 8.44.260 License conveys a limited, conditional privilege
- 8.44.270 Fee for license
- 8.44.280 Compliance monitoring
- 8.44.290 Suspension or revocation of license
- 8.44.300 Tobacco retailing without a valid license
- 8.44.310 Enforcement
- 8.44.320 Additional remedies

ARTICLE I: SMOKING REGULATIONS

§ 8.44.010 FINDINGS AND PURPOSE.

The Town Council does find that:

(A) Tobacco use causes death and disease and continues to be an urgent public health challenge, as evidenced by the following:

(1) Tobacco-related illness is the leading cause of preventable death in the United States, accounting for about 443,000 deaths each year; and scientific studies have concluded that tobacco use can cause chronic lung disease, coronary heart disease, and stroke, in addition to cancer of the lungs, larynx, esophagus, and mouth; and

(2) Some of the most common types of cancers including stomach, liver, uterine cervix, and kidney are related to tobacco use; and

(B) Secondhand smoke has been repeatedly identified as a health hazard, as evidenced by the following:

(1) The U.S. Surgeon General concluded that there is no risk-free level of exposure to secondhand smoke; and

(2) The California Air Resources Board placed secondhand smoke in the same category as the most toxic automotive and industrial air pollutants by categorizing it as a toxic air contaminant for which there is no safe level of exposure; and

(3) The California Environmental Protection Agency included secondhand smoke on the Proposition 65 list of chemicals known to the State of California to cause cancer, birth defects, and other reproductive harm; and

(C) Exposure to secondhand smoke causes death and disease, as evidenced by the following:

(1) Secondhand smoke is responsible for as many as 73,000 deaths among nonsmokers each year in the United States; and

(2) Exposure to secondhand smoke increases the risk of coronary heart disease by approximately 30 percent; and

(3) Secondhand smoke exposure causes lower respiratory tract infections, such as pneumonia and bronchitis in as many as 300,000 children in the United States under the age of 18 months each year; and exacerbates childhood asthma; and

(D) The U.S. Food and Drug Administration conducted laboratory analysis of electronic cigarette samples and found they contained carcinogens and toxic chemicals to which users and bystanders could potentially be exposed; and

(E) Tobacco use and exposure to secondhand smoke impose great social and economic costs, as evidenced by the following:

(1) The total annual economic burden of smoking in the United States is \$193,000,000,000; and

(2) From 2001 through 2004, the average annual health care expenditures attributable to smoking were approximately \$96,000,000,000; and

(3) The medical and other costs to nonsmokers due to exposure to secondhand smoke were estimated at over \$10,000,000,000 per year in the United States in 2005; and

(4) The total annual cost of smoking in California was estimated at \$475 per resident or \$3,331 per smoker per year, for a total of nearly \$15,800,000,000 in smoking-related costs in 1999 alone; and

(5) California's Tobacco Control Program saved the state and its residents \$86,000,000,000 in health care expenditures between the year of its inception, 1989, and 2004, with savings growing yearly; and

(F) Exposure to secondhand smoke anywhere has negative health impacts, and exposure to secondhand smoke does occur at significant levels outdoors, as evidenced by the following:

(1) Levels of secondhand smoke exposure outdoors can reach levels attained indoors depending on direction and amount of wind and number and proximity of smokers; and

(2) Irritation from secondhand smoke begins at levels as low as four micrograms per cubic meter, and in some outdoor situations this level can be found as far away as 13 feet from the burning cigarette; and

(3) To be completely free from exposure to secondhand smoke in outdoor places, a person may have to move nearly 25 feet away from the source of the smoke, about the width of a two-lane road; and

(G) Thirdhand smoke harms indoor air quality and is a recognized public health concern, as evidenced by the following:

(1) Thirdhand smoke is residual tobacco smoke contamination after a cigarette has been extinguished and takes the form of particulate matter that is deposited in a layer onto every indoor surface; in loose household dust; and as volatile organic compounds that “off gas” into the air over days, weeks and months; and

(2) Desorption of thirdhand smoke from indoor surfaces to air is recognized as a source of tobacco exposure;

(3) A majority of adults in the United States agreed with the statement that breathing in air in a room today where people smoked yesterday can harm the health of children; and

(H) Thirdhand smoke exposure has negative health impacts, as evidenced by the following:

(1) Tobacco smoke constituents, even at low levels, have been proved toxic; and

(2) Residual nicotine from tobacco smoke absorbed to indoor surfaces reacts with ambient nitrous acid, a common indoor air pollutant, to form carcinogenic tobacco-specific nitrosamines; and

(3) High levels of nicotine on indoor surfaces represents a health hazard through dermal exposure, dust inhalation, and ingestion; and

(I) Smoking is the primary cause of fire-related injuries and deaths in the home, as evidenced by the following:

(1) Cigarettes, cigars, pipes and other smoking materials are the leading cause of fire deaths in the United States, causing an estimated 142,900 smoking-related fires, 780 deaths, 1,600 injuries, and \$606,000,000 in direct property damage in 2006; and

(2) One in four fatalities from home fires caused by smoking is NOT the smoker whose cigarette started the fire, and 25 percent of those deaths were of neighbors or friends of the smoker; and

(3) Smoking in a residence where long-term oxygen therapy takes place is very dangerous as oxygen is a fire accelerant, and 27 percent of fatalities due to smoking during long-term oxygen therapy occurred in multifamily dwellings; and

(4) The United States Fire Administration recommends that people smoke outdoors; and

(J) Nonsmokers who live in multi-unit dwellings can be exposed to neighbors' secondhand smoke, as evidenced by the following:

(1) Secondhand smoke can seep under doorways and through wall cracks; and persons living in apartments near smokers can be exposed to elevated pollution levels for 24 hours a day, and at times, the particulate matter exposure can exceed the U.S. Environmental Protection Agency's 24-Hour Health Based Standard; and

(2) The Surgeon General has concluded that eliminating smoking in indoor spaces is the only way to fully protect nonsmokers from secondhand smoke exposure and that separating smokers from nonsmokers, cleaning the air, and ventilating buildings cannot completely prevent secondhand smoke exposure; and

(3) The U.S. Department of Health and Human Services and the World Health Organization (WHO) have found that there is no risk-free level of secondhand smoke, and even brief exposure can cause immediate harm. Establishing a 100% smoke free environment is the only effective way to fully protect those who do not smoke from secondhand smoke.

(K) Most Californians do not smoke and a majority favors limitations on smoking in multi-unit residences, as evidenced by the following:

(1) Sixty-nine percent of Californians surveyed favor limiting smoking in outdoor common areas of apartment buildings and 78 percent support laws that create nonsmoking units; and

(2) Sixty-two percent of California renters feel that there is a need for laws to limit smoking in apartments; and

(L) A local ordinance that authorizes residential rental agreements to include a prohibition on smoking of tobacco products within rental units is expressly permitted by California law; and

(M) Creating smoke free areas helps protect the health of the 86.7 percent of Californians who are nonsmokers; and

(N) State law prohibits smoking within 25 feet of playgrounds and tot lots and expressly authorizes local communities to enact additional restrictions; and state law prohibits smoking within 20 feet of entryways and operable windows of government buildings; and

(O) Cigarette butts are a major and persistent source of litter, as evidenced by the following:

(1) It is estimated that over 2,000,000,000 billion cigarette butts are discarded every day worldwide, and that Americans alone discard more than 175,000,000 pounds of cigarette butts every year; and

(2) Cigarette butts are often cast onto sidewalks and streets, and frequently end up in storm drains that flow into streams, rivers, bays, lagoons and ultimately the ocean; and

(3) Cigarette filters, made of plastic cellulose acetate, take approximately 15 years to decompose; and

(P) There is no Constitutional right to smoke.

(Q) Electronic smoking devices, or "e-cigarettes," have become increasingly popular in recent years, as evidenced by the following:

(1) Between 2011 and 2012 the percentage of all youth in grades six to 12 who had tried electronic smoking devices doubled;

(2) Six point eight percent (6.8%) of all youth between sixth and twelfth grade report trying electronic smoking devices;

(3) Ten percent (10%) of high school students have tried electronic smoking devices;

(4) Nine point three percent (9.3%) of youth who have used electronic smoking devices have never smoked conventional cigarettes;

(5) Between 2010 and 2011, rates of both awareness and use of unregulated electronic smoking devices by adults also increased significantly;

(6) Findings from the 2014 National Youth Tobacco Survey show that current e-cigarette use (use on at least one day in the past 30 days) among high school students increased from 4.5% in 2013 to 13.4% in 2014, rising from approximately 660,000 to 2,000,000 students; and

(7) Among middle school students, current e-cigarette use more than tripled from 1.1% in 2013 to 3.9% in 2014, an increase from approximately 120,000 to 450,000 students.

(R) The State of California's Tobacco Education and Research Oversight Committee (TEROC) "opposes the use of e- cigarettes in all areas where other tobacco products are banned."

(S) A study published in the *Journal of Environmental and Public Health* suggests that electronic smoking devices "may have the capacity to 're-normalize' tobacco use in a demographic that has had significant denormalization of tobacco use previously."

(T) Electronic smoking devices often mimic conventional tobacco products in shape, size, and color, with the user exhaling a smoke-like vapor similar in appearance to the exhaled smoke from cigarettes and other conventional tobacco products.

(U) The use of electronic smoking devices in smoke free locations threatens to undermine compliance with smoking regulations and reverse the progress that has been made in establishing a social norm that smoking is not permitted in public places and places of employment.

(V) Cal. Health & Safety Code § 11362.3 provides that no person may smoke marijuana/ cannabis or marijuana/cannabis products in a location where smoking tobacco is prohibited. Therefore the smoking

regulations herein are intended to apply equally to smoking of cannabis and cannabis products to the fullest extent permitted by law.

(W) Flavored tobacco products promote youth initiation of tobacco use and cause young occasional smokers to become daily smokers by reducing or masking the natural harshness and taste of tobacco smoke and thereby increasing the appeal of tobacco products.

§ 8.44.020 DEFINITIONS.

For the purpose of this chapter, the following definitions shall apply unless the context clearly indicates or requires a different meaning.

ARM'S LENGTH TRANSACTION. A 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 of which is under any compulsion to participate in the transaction. A sale between relatives, related companies or partners, or a sale for which a significant purpose is avoiding the effect of the violations of this article is not an arm's length transaction.

BAR. An area which is devoted to the serving of alcoholic beverages for consumption by patrons on the premises and in which the serving of food is only incidental to the consumption of the beverages. Although a restaurant may contain a **BAR**, the term **BAR** shall not include the restaurant dining area.

BUSINESS. Any sole proprietorship, joint venture, corporation, or other business entity formed for profit-making purposes.

CIGAR.

- (1) Any roll of tobacco wrapped entirely or in part in tobacco or in any substance containing tobacco; or
- (2) Any paper or wrapper that contains tobacco and is designed for smoking or ingestion of tobacco products.
- (3) For the purposes of this subsection, **CIGAR** includes, but is not limited to, tobacco products known or labeled as "cigar," "cigarillo," "tiparillo," "little cigar," "blunt wrap," or "cigar wrap."

CHARACTERIZING FLAVOR. 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 aromas relating to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, menthol, mint, wintergreen, herb, or spice.

CONSTITUENT. 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.

DEPARTMENT. The Town Manager, and any agency or person designated by the Town Manager to enforce or administer the provisions of this chapter.

DISTINGUISHABLE. Perceivable by either the sense of smell or taste.

ELECTRONIC SMOKING DEVICE. An electronic or battery-operated device that delivers vapors for inhalation. This term shall include every variation and type of such devices, whether they are manufactured, distributed, marketed, or sold as an electronic cigarette, an electronic cigar, an electronic cigarillo, an electronic pipe, an electronic hookah, or any other product name or descriptor.

ELECTRONIC SMOKING DEVICE PARAPHERNALIA. Any cartridges, cartomizers, e-liquid, smoke juice, tips, atomizers, electronic smoking device batteries, electronic smoking device chargers, and any other item specifically designed for the preparation, charging, or use of electronic smoking devices.

ELECTRONIC SMOKING DEVICE VENDING MACHINE. Any machine, appliance, or other mechanical device that carries Electronic Smoking Devices or Electronic Smoking Device Paraphernalia that is operated by currency, token, debit card, credit card, or any other form of payment that is designed or used for vending purposes, including, but not limited to, machines or devices that use remote control locking mechanisms.

EMPLOYEE. Any person who is employed by any employer in consideration for direct or indirect monetary wages or profit, and any person who volunteers his or her services for a non-profit entity.

EMPLOYER. Any person, partnership, corporation, including a municipal corporation or non-profit entity, which employs the services of one or more individual persons or utilizes volunteers.

ENCLOSED AREA. All space between a floor and ceiling which is enclosed on all sides by solid walls or windows (exclusive of door or passageways) which extend from the floor to the ceiling, including all space therein screened by portions which do not extend to the ceiling or are not solid, such as “office landscaping” or similar structures.

FLAVORED TOBACCO PRODUCT. Any tobacco product that contains a constituent that imparts a characterizing flavor.

LABELING. Written, printed, pictorial, or graphic matter upon any tobacco product or any of its packaging.

LANDLORD. Any person who owns real property leased as residential property, any person who lets residential property, or any person who manages such property, except that **LANDLORD** does not include sublessors.

LEASE. A written or oral agreement between a landlord and tenant conveying possession of a unit. **LEASE** includes both agreements set for a fixed period of time as well as month-to-month or week-to-week rental agreements.

MINOR. Any individual who is less than 21 years old, except active-duty military personnel who are 18 years of age or older. An identification card issued by the United States Armed Forces shall be used as proof of age for this purpose.

MULTI-UNIT RESIDENCE. A building or portion thereof that contains two or more units except the following specifically excluded types of housing:

(1) A single-family home;

(2) A mobile home park;

(3) A campground;

(4) A marina or port;

(5) A single-family home with an attached in-law or second unit when permitted pursuant to Cal. Gov't Code §§ 65852.1, 65852.150, 65852.2 or an ordinance of the town adopted pursuant to those sections.

MULTI-UNIT COMMON AREA. Every enclosed area or unenclosed area of a multi-unit residence, multi-unit commercial facilities, senior citizen residences and nursing homes accessible to and usable by residents of different small units and/or members of the public, including but not limited to halls and paths, courtyards, lobbies, laundry rooms, common areas, outdoor eating areas, play areas and swimming pools.

NEW UNIT. A unit that is issued a certificate of occupancy after the effective date of this Ordinance and also means a unit that is let for residential use for the first time after the effective date of this Ordinance.

NON-PROFIT ENTITY. Any corporation, unincorporated association or other entity created for charitable, religious, philanthropic, educational, character-building, political, social, or other similar purposes, 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 chapter.

NO SMOKING SIGN. A sign containing the words “No Smoking” or the international “No Smoking” symbol (consisting of a pictorial representation of a burning cigarette in a red circle or red heart with a red bar across it).

OPENINGS. **OPENINGS** shall include main entrances, exits, operable windows and ventilation intake systems.

PACKAGING. 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. Any natural person, partnership, cooperative association, private corporation, personal representative, receiver, trustee, assignee, or any other legal entity.

PHARMACY. A retail establishment in which the profession of pharmacy by a pharmacist licensed by the State of California in accordance with the Business and Professions Code is practiced and where prescriptions are offered for sale. A pharmacy may also offer other retail goods in addition to prescription pharmaceuticals.

PLACE OF EMPLOYMENT. Any area under the legal or actual control of an employer or sole proprietor that an employee, contractor or member of the public to enter during the normal course of operations, but regardless of

hours of operation, including, but not limited to, indoor and outdoor work areas, construction sites, vehicles used in employment or for business purposes, taxis, employee lounges and restrooms, conference and banquet rooms, classrooms, bingo and gaming facilities, long-term health facilities, warehouses, and private residences used as child/elder care or health care facilities subject to licensing requirements.

PROPRIETOR. A person with an ownership or managerial interest in a business. An ownership interest shall be deemed to exist when a person has a 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 shares ultimate control over the day-to-day operations of a business.

PUBLIC PLACE. Any place, public or private, open to members of the general public regardless of any fee or age requirement, including but not limited to, bars, restaurants, clubs, stores, stadiums, parks, playgrounds, taxis, buses, bus shelters, public transportation facilities, hotels and motels, fairs, farmers' markets, and theaters. **PUBLIC PLACE** does not include the area within private vehicles that are in or on public places.

REASONABLE DISTANCE. A distance of at least 20 feet.

RECREATION AREA. Any area, public or private, open to the general public for recreational purposes, regardless of any fee requirement, including, but not limited to public gardens, children's play areas, sporting facilities, stadiums, and playgrounds.

SELF-SERVICE MERCHANDISING. The open display of tobacco products or tobacco paraphernalia in a manner that is accessible to the general public without the assistance of the retailer or employee of the retailer. This includes point-of-sale tobacco promotional products (such as tobacco industry tee shirts, caps, key chains, give-aways), to which the public has access without the assistance of an employee. A vending machine is a form of self- service display.

SERVICE AREA. Area at which one or more persons are waiting for a transaction, entry, or service of any kind, whether or not such service involves the exchange of money, including, but not limited to ATMs, bank teller windows, telephones, ticket lines, bus stops, and cab stands.

SMOKE. The gases and particles released into the air by combustion, electrical ignition, or vaporization, including from an Electronic Smoking Device, when the apparent or usual purpose of the combustion, electrical ignition or vaporization is human inhalation of the resulting gases, particles, or vapors combustion products, such as, for example, tobacco smoke, and marijuana (cannabis) smoke, except when the purpose of inhalation is solely olfactory, such as, for example, smoke from incense.

SMOKING. Engaging in an act that generates Smoke, such as, for example, possessing a lighted cigar, a lighted cigarette of any kind, a lighted pipe, or a lighted hookah pipe; or lighting a pipe, a hookah pipe, a cigar, or a cigarette of any kind, or operating an electronic smoking device.

SPORTS ARENA. Enclosed or unenclosed sports pavilions, gymnasiums, health spas, swimming pools, roller and ice rinks, bowling alleys and other similar places where members of the general public assemble either to engage in physical exercise, participate in athletic competition or witness sports events.

TOBACCO PARAPHERNALIA. Cigarette papers or wrappers, pipes, holders of smoking materials of all types, cigarette rolling machines, and any other item designed for the smoking, preparation, storing, or consumption of tobacco products.

TOBACCO PRODUCT.

(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, pipe tobacco, hookah tobacco, snuff, chewing tobacco, dipping tobacco, or any other preparation of tobacco; or

(2) Any device or component, part, or accessory that delivers nicotine alone or combined with other substances to the person using the device including but not limited to cigarettes, electronic smoking devices or paraphernalia, cigars, or pipes, whether or not the device or component is 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 RETAILER or RETAILER. Any person who sells, offers for sale, or does or offers to exchange for any form of consideration, tobacco, tobacco products, tobacco paraphernalia, electronic smoking devices or electronic smoking device paraphernalia. **TOBACCO RETAILING** shall mean the doing of any of these things.

This definition is without regard to the quantity of tobacco products, tobacco paraphernalia, electronic smoking devices or electronic smoking device paraphernalia sold, offered for sale, exchanged, or offered for exchange.

TOBACCO VENDING MACHINE. Any machine, appliance, or other mechanical device that carries tobacco products or tobacco paraphernalia operated by currency, token, debit card, credit card, or any other form of payment that is designed or used for vending purposes, including, but not limited to, machines or devices that use remote control locking mechanisms.

TOWN. The Town of Fairfax.

UNENCLOSED AREA. Any area that is not an enclosed area.

UNIT. A dwelling space consisting of essentially complete independent living facilities for one or more persons, including, for example, permanent provisions for living and sleeping, and any private outdoor spaces like balconies and patios. **UNIT** includes an apartment; a room in a long-term health care facility, senior citizen housing, assisted living facility, or hospital; a room in a single room occupancy (“SRO”) facility; a room in a homeless shelter; a single-family home; an in-law or second unit; and single room occupancy hotel rooms, as defined in Cal. Health and Safety Code § 50519(b)(1), even where lacking private cooking facilities or private plumbing facilities. **UNIT** does not include lodging in a hotel or motel that meets the requirements set forth in Cal. Civil Code § 1940(b)(2).

VENDOR-ASSISTED. Only a store employee has access to the tobacco product and assists the customer by supplying the product. The customer does not take possession of the product until it is purchased.

§ 8.44.030 SMOKE GENERALLY.

For all purposes within the town, the Town Council declares that nonconsensual exposure to smoke is a nuisance, and the uninvited presence of smoke on property is a nuisance and a trespass.

§ 8.44.040 APPLICATION OF CHAPTER TO TOWN-OWNED FACILITIES.

All town-owned vehicles, including buses and other means of public transit under the authority of the town, and all enclosed areas of facilities owned and controlled by the town, including jails, and any board, council, commission, and agency of the town shall be subject to the provisions of this chapter.

§ 8.44.050 PROHIBITION OF SMOKING IN CERTAIN ENCLOSED PLACES.

(A) Except as otherwise provided, smoking shall be prohibited in the enclosed areas of the following places within the Town of Fairfax and except in such places in which smoking is already prohibited by state or federal law in which case the state or federal law applies:

- (1) Places of employment;
- (2) Buses, taxicabs, and other means of public transit under the authority of the town and ticket, boarding, and waiting areas of public transit depots;
- (3) Public places;
- (4) Service areas;
- (5) Any facility which is primarily used for exhibiting motion pictures, stage productions, lectures, musical recitals, or other similar performances, except for smoking which is part of such production;
- (6) Sports arenas and convention halls; and

(B) No person shall place, cause to be placed, or permit to be placed any ashtray, or tobacco ash collector or receptacle in any enclosed area designated as non-smoking.

(C) No person shall dispose of smoking waste or tobacco product waste within the boundaries of an area in which smoking is prohibited, including inside the perimeter of any reasonable distance requirement.

§ 8.44.060 SMOKING RESTRICTIONS IN NEW AND EXISTING UNITS OF MULTI-UNIT RESIDENCES.

(A) All new units of a multi-unit residence are hereby designated nonsmoking units including any associated exclusive-use enclosed areas or unenclosed areas, such as, for example, a private balcony, porch, deck, or patio.

(B) All units of a multi-unit residence that are not new units, are hereby designated nonsmoking units, including any associated exclusive-use enclosed areas or unenclosed areas, such as, for example, a private balcony, porch deck, or patio as of January 1, 2023.

(C) *Required and implied lease terms for all new and existing units of multi-unit residences.*

- (1) Every lease or other rental agreement for the occupancy of a unit in a multi-unit residence, including, for example, new units and existing units, entered into, renewed, or continued month-to-month after the effective date of this Ordinance shall include the provisions set forth in subsection (2) below on the earliest possible date when such an amendment is allowable by law when providing the minimum legal notice.
- (2) Every lease or other rental agreement for the occupancy of a unit in a multi-unit residence, including, for example, new units and existing units, entered into, renewed, or continued month-to-month after the effective date of this Ordinance shall be amended or prepared to include the following provisions:
 - (a) For new and existing units:
 1. *New units.* A clause providing that as of January 1, 2023, it is a material breach of the agreement to allow or engage in smoking in the unit. Such a clause might state, "It is a material breach of this agreement for tenant or any other person subject to the control of the tenant or present by invitation or permission of the tenant to engage in smoking in the unit."
 2. *Existing units.* A clause providing that as of January 1, 2023, it is a material breach of the agreement to allow or engage in smoking in the unit. Such a clause might state, "It is a material breach of this agreement for tenant or any other person subject to the control of the tenant or present by invitation or permission of the tenant to engage in smoking in the unit as of January 1, 2023."
 - (b) A clause providing that it is a material breach of the agreement. for tenant or any other person subject to the control of the tenant or present by invitation or permission of the tenant to engage in smoking in any common area of the property other than a designated smoking area. Such a clause might state, "It is a material breach of this agreement for tenant or any other person subject to the control of the tenant or present by invitation or permission of the tenant to engage in smoking in any common area of the property, except in an outdoor designated smoking area, if one exists."
 - (c) A clause providing that it is a material breach of the agreement for tenant or any other person subject to the control of the tenant or present by invitation or permission of the tenant to violate any law regulating smoking while anywhere on the property. Such a clause might state, "It is a material breach of this agreement for tenant or any other person subject to the control of the tenant or present by invitation or permission of the tenant to violate any law regulating smoking while anywhere on the property."
 - (d) A clause expressly conveying third-party beneficiary status to all occupants of the multi-unit residence as to the smoking provisions of the agreement. Such a clause might state, "Other occupants of the property are express third-party beneficiaries of those provisions in this agreement that concern smoking. As such, other occupants of the property may seek to enforce such provisions by any lawful means, including by bringing a civil action in a court of law."
- (3) Whether or not a landlord complies with subsections (1) and (2) above, the clauses required by those subsections shall be implied and incorporated by law into every agreement to which subsections (1) or (2) apply and shall become effective as of the earliest possible date on which the landlord could have made the insertions pursuant to subsections (1) or (2).
- (4) A tenant who breaches the smoking regulations of a lease or knowingly allows another person to do so shall be liable to:
 - (a) The landlord; and
 - (b) Any lawful occupant of the multi-unit residence who is exposed to smoke or who suffers damages as a result of that breach.
- (5) This chapter shall not create additional liability in a landlord to any person for a tenant's breach of any

smoking provision in a lease or other rental agreement for the occupancy of a unit in a multi-unit residence if the landlord has fully complied with this section.

- (6) Failure to enforce any smoking regulation of a lease or agreement on one or more occasions shall not constitute a waiver of the lease or agreement provisions required by this chapter and shall not prevent future enforcement of any such smoking regulation on another occasion.

(D) *Prohibitions and duties generally.*

- (1) No person shall smoke or knowingly permit smoking in an area of the premises under his or her legal or de facto control in which smoking is prohibited by a lease or agreement term, by this chapter, the Town Code, or any other state or federal law, provided, however, that this prohibition does not apply to a person who is already compelled to act under state or federal law.
- (2) No person shall knowingly or intentionally permit the presence or placement of ash receptacles, such as, for example, ash trays or ash cans, within an area under the legal or de facto control of the person and in which smoking is prohibited by law, including, without limitation, within a reasonable distance required by this chapter from any area in which smoking is prohibited. Notwithstanding the foregoing, the presence of ash receptacles in violation of this subsection shall not be a defense to a charge of smoking in violation of any provision of this chapter.
- (3) Smoking is prohibited in all multi-unit common areas, provided, however, that a person with legal control over a common area may designate a portion of the unenclosed area of the multi-unit common area as a designated smoking area if the area meets all of the following criteria:
 - (a) The area must be located a reasonable distance from any unit or enclosed area where smoking is prohibited by this section or other law; by binding agreement relating to the ownership, occupancy, or use of real property; or by designation of a person with legal control over the property. In the case of a nonsmoking area created by agreement or designation, this provision does not apply unless the person designating the smoking area has actual knowledge of, or has been given notice of, the agreement or designation. A person with legal control over a designated smoking area may be obliged to modify, relocate, or eliminate that as laws change, as binding agreements are created, and as nonsmoking areas on neighboring property are established;
 - (b) The area must not include, and must be a reasonable distance from, unenclosed areas primarily used by children and unenclosed areas with improvements that facilitate physical activity including, for example, playgrounds, tennis courts, swimming pools, school campuses, and sandboxes;
 - (c) The area must be no more than 10 percent of the total unenclosed area of the premises for which it is designated;
 - (d) The area must have a clearly marked perimeter;
 - (e) The area must be identified by conspicuous signs;
 - (f) The area must be completely within an unenclosed area; and
 - (g) The area must not overlap with any enclosed or unenclosed area in which smoking is otherwise prohibited by this chapter or other provisions of this Code, state law, or federal law.
- (4) "No Smoking" signs, with letters of no less than one inch in height or the international "No Smoking" symbol (consisting of a pictorial representation of a burning cigarette enclosed in a red circle crossed by a red bar) shall be clearly and conspicuously posted and maintained by the landlord in every place on the premises in which smoking is prohibited by this chapter or by the landlord, except that signs are not required inside units. Signs must be sufficient to make areas where smoking is prohibited obvious to a reasonable person. The absence of signs shall not be a defense to a violation of any provision of this chapter.

§ 8.44.070 PROHIBITION OF SMOKING IN CERTAIN UNENCLOSED PUBLIC PLACES.

(A) Except as otherwise expressly authorized by state or federal law, smoking shall be prohibited in any place where food and/or drink is offered for sale, including outdoor dining areas of restaurants and farmers markets, except unenclosed areas of a stand-alone bar.

(B) Smoking is prohibited within:

(1) A reasonable distance from any entrance, opening or exit of any enclosed area within which smoking is prohibited, except while passing on the way to another destination. Entrances to outdoor decks or patios at bars are excluded from this prohibition;

(2) Parks, including, but not limited to Contratti Field, Bolinas Park and Peri Park Playground;

(3) Public events including but not limited to, sports events, festivals, entertainment, speaking performances, ceremonies, pageants, parades, fairs, and farmer's markets; and

(4) Places of employment; and

(5) Unenclosed (outdoor) service areas.

(C) No person shall place, cause to be placed, or permit to be placed any ashtray, or tobacco ash collector or receptacle in any area designated a non-smoking area by this chapter.

(D) No person shall dispose of smoking waste, cannabis waste, or tobacco product waste within the boundaries of an area in which smoking is prohibited, including inside the perimeter of any reasonable distance requirement.

§ 8.44.080 SMOKING OPTIONAL AREAS.

(A) Except as otherwise prohibited by state or federal law, the smoking restrictions of this chapter shall not apply to private single-family residences, except when used as a child care or health care facility.

(B) Nothing in this chapter shall be construed to prevent any owner, operator, manager, or other person who controls any establishment or facility from declaring and enforcing a nonsmoking policy in the entire establishment or facility or from posting signs as described by § 8.44.100.

§ 8.44.090 DUTY OF PERSON, EMPLOYER, BUSINESS OR NONPROFIT ENTITY.

(A) No person, employer, business, or nonprofit entity shall knowingly permit smoking in an area which is under the legal or de facto control of the person, employer, business, or nonprofit entity and in which smoking is prohibited by law.

(B) No person, employer, business, or nonprofit entity shall knowingly or intentionally permit the presence or placement of ash receptacles, such as, for example, ashtrays or ash cans, within an area which is under the legal or actual control of the person, employer, business, or nonprofit entity and in which smoking is prohibited by law, including, without limitation, within a reasonable distance required by this chapter from any area in which smoking is prohibited. Notwithstanding the foregoing, the presence of ash receptacles in violation of this subsection shall not be a defense to a charge of smoking in violation of any provision of this chapter.

§ 8.44.100 POSTING OF SIGNS.

(A) The person, employer, business, or non-profit entity with legal or actual control of a building subject to this chapter shall clearly and conspicuously post "No Smoking" signs at the entrances of every building, as well as at every other place where smoking is prohibited under this chapter.

(B) "No Smoking" signs shall be clearly and conspicuously posted at every entrance to any building or other place where smoking is prohibited under this chapter.

§ 8.44.110 [RESERVED.]

§ 8.44.120 ENFORCEMENT.

(A) Notice of these regulations shall be given to all applicants for a business license or renewal thereof; provided, however, lack of such notice shall be no defense to a violation of this chapter.

(B) Enforcement of this chapter may be brought through the administrative citation process as outlined in Chapter 1.10 of the Fairfax Town Code. Before a civil penalty is levied, the person charged with the violation

shall be given a written warning by the town staff of the proposed action, including the nature of the violation and the amount of the proposed penalty.

- (C) Notwithstanding any other provision of this chapter, a private citizen may bring legal action to enforce this chapter.
- (D) Any violation of this chapter is hereby declared to be a nuisance.

§ 8.44.130 VIOLATIONS AND PENALTIES.

- (A) Each instance of smoking in violation of this chapter shall constitute a separate and continuing violation.
- (B) Violations of this chapter are subject to a civil action brought by the Town of Fairfax, punishable by a civil fine not less than one hundred dollars (\$100) and not exceeding five hundred dollars (\$500) per violation.

§ 8.44.140 NON-RETALIATION.

No person or employer shall discharge, refuse to hire or in any manner retaliate against any employee or applicant for employment because the employee or applicant exercises any right to a smoke-free environment afforded by this chapter.

§ 8.44.150 PUBLIC EDUCATION.

The Town Manager or his or her designee will engage in a continuing educational program to explain and clarify the purposes and requirements of this chapter, as well as a guide to owners, operators and managers with compliance; provided, however, lack of such education shall be no defense to a violation of this chapter.

§ 8.44.160 GOVERNMENTAL AGENCY COOPERATION.

The Town Manager or his or her designee may annually request other governmental and educational agencies having facilities within the town to establish local operating procedures in cooperation and compliance with this chapter. This includes urging all federal, state, county, and school district agencies to update their existing smoking control regulations to be consistent with current health findings regarding environmental tobacco smoke.

§ 8.44.170 OTHER APPLICABLE LAWS.

It is the intent of the Town Council of the Town of Fairfax to supplement applicable state and federal law and not to duplicate or contradict such law and this chapter shall be construed consistently with that intention. This chapter shall not be interpreted or construed to permit smoking where it is otherwise restricted by other applicable laws.

ARTICLE II: TOBACCO RETAILERS LICENSING ORDINANCE

§ 8.44.200 TITLE.

This article shall be known as Fairfax's "Tobacco Retailers Licensing Ordinance."

§ 8.44.210 REQUIREMENTS AND PROHIBITIONS.

- (A) *Tobacco retailer's license required.* It shall be unlawful for any person to act as a tobacco retailer in the town without first obtaining and maintaining a valid tobacco retailer's license pursuant to this article for each location at which that activity is to occur. Tobacco retailing without a valid tobacco retailer's license is a nuisance as a matter of law.
- (B) *Lawful business operation.* In the course of tobacco retailing or in the operation of the business or maintenance of the location for which a license is issued, it shall be a violation of this section for a licensee, or any of the licensee's agents or employees, to violate any local, state, or federal law applicable to tobacco products or paraphernalia, electronic smoking devices or paraphernalia or tobacco retailing.

(C) *Display of license.* Each tobacco retailer license shall be prominently displayed in a publicly visible location at the licensed location.

(D) *Positive identification required.* No person engaged in tobacco retailing shall sell or transfer a tobacco product, electronic smoking device or electronic smoking device paraphernalia to another person who appears to be under the age of 27 years without first examining the identification of the recipient to confirm that the recipient is at least the minimum age under state law to purchase and possess the tobacco product, tobacco paraphernalia, electronic smoking device or electronic smoking device paraphernalia (i.e., 21 years old, or active duty military personnel who are 18 years of age or older with a US Armed Forces identification card).

(E) *Minimum age for persons selling tobacco.* No person who is younger than the age of 18 shall engage in tobacco retailing.

(F) *Self-service displays prohibited.* Tobacco retailing by means of a self-service display or self-service merchandizing, or by any means other than vendor-assisted sales, is prohibited. No 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 electronic smoking device vending machine or tobacco vending machine for the purpose of selling or distributing any electronic smoking device or any tobacco product.

(G) *False and misleading advertising prohibited.* A tobacco retailer without a valid tobacco retailer license or a proprietor without a valid tobacco retailer license, including, for example, a person whose license has been suspended or revoked:

(1) Shall keep all tobacco products out of public view. The public display of tobacco products in violation of this provision shall constitute tobacco retailing without a license under § 8.44.300; and

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

(H) *Flavored tobacco products.*

(1) The sale or distribution by a tobacco retailer of any flavored tobacco product is prohibited.

(2) There shall be 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, and/or images on the product's labeling or packaging that are used to explicitly or implicitly communicate that the tobacco product has a characterizing flavor.

(3) The Town Manager, or his or her designee, may adopt rules, regulations, or guidelines for the implementation and enforcement of this § 8.44.210(H).

(I) *Minimum pack size for cigars.* Notwithstanding any other provision of this section, it shall be a violation of this subsection for any licensee or any of the licensee's agents or employees to sell, offer for sale, or exchange for any form of consideration:

(1) Any single cigar, whether or not packaged for individual sale;

(2) Any number of cigars fewer than the number contained in the manufacturer's original consumer packaging designed for retail sale to a consumer; or

(3) Any package of cigars containing fewer than five cigars.

This subsection (I) does not apply to the sale or offer for sale of a single cigar for which the retail price exceeds \$5.

(J) *Pharmacies cannot sell tobacco products.* No license may be issued to authorize tobacco retailing in a pharmacy.

(K) *Signage requirements.*

(1) A tobacco retailer shall post plainly visible signs at the point of purchase of tobacco products which comply with the signage requirements of Cal. Bus. and Prof. Code § 22952, as amended from time to time.

(2) A tobacco retailer shall post signs at each entrance to any premises on which any tobacco product is offered for sale, plainly visible from outside the premises, which state "Warning: The fine for buying tobacco

products or electronic cigarettes for anyone under 21 is \$200-\$1,000, with the exception of active duty military personnel aged 18 years or older with a US Armed Forces identification card" in letters at least one-half inch tall, and which cite Cal. Penal Code § 308(a). These signs shall be updated to conform to any subsequent state or federal requirements and/or amendments to Cal. Penal Code § 308(a).

(L) Sampling and distribution of sampling packages of tobacco products, tobacco paraphernalia, electronic smoking devices, and electronic smoking device paraphernalia is not permitted.

§ 8.44.220 APPLICATION PROCEDURE.

(A) Application for a tobacco retailer's license shall be submitted in the name of each proprietor proposing to conduct or conducting retail tobacco sales and shall be signed by each proprietor or an authorized agent thereof.

(1) It is the responsibility of each proprietor to be informed regarding all laws applicable to tobacco retailing, including those laws affecting the issuance of a tobacco retailer's license. No proprietor may rely on the issuance of a license as a determination by the Town that the proprietor has complied with all laws applicable to tobacco retailing. A license issued contrary to this section, contrary to any other law, or on the basis of false or misleading information supplied by a proprietor shall be revoked pursuant to § 8.44.290. Nothing in this article shall be construed to vest in any person obtaining and maintaining a tobacco retailer's license any status or right to act as a tobacco retailer in contravention of any provision of law.

(2) All applications shall be submitted on a form supplied by the department and shall contain the following information:

(a) The name, address, and telephone number of each proprietor of the business seeking a license.

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

(c) A single name and mailing address authorized by each proprietor to receive all communications and notices (the "authorized person and address") required by, authorized by, or convenient to the enforcement of this section. If an authorized person and address is not supplied, each proprietor shall be understood to consent to the provision of notice at the business address specified in subparagraph (b) above.

(d) Proof that the location for which a tobacco retailer's license is sought has been issued a valid state tobacco retailer's license by the California Board of Equalization.

(e) Such other information as the department deems necessary for the administration or enforcement of this article as specified on the application form required by this section.

(B) A licensed tobacco retailer shall inform the department in writing of any change in the information submitted on an application for a tobacco retailer's license within ten business days of any change.

(C) Tobacco retailers in existence on the effective date enforcement date specified in §8.44.310 shall apply for a license within 90 days after said enforcement date.

§ 8.44.230 ISSUANCE OF LICENSE.

(A) *Grounds for denial.* Upon the receipt of a complete application for a tobacco retailer's license and the license fee required by this section, the department shall issue a license unless substantial evidence demonstrates that one or more of the following grounds for denial exists:

(1) The information presented in the application is inaccurate or false. Intentionally supplying inaccurate or false information shall be a violation of this section.

(2) The application seeks authorization for tobacco retailing at a location which is not eligible for the issuance of a tobacco retailer license. However, this subparagraph shall not constitute a basis for denial of a license if the applicant provides the town with documentation demonstrating by clear and convincing evidence that the applicant has acquired or is acquiring the location or business in an arm's length transaction.

(3) The application seeks authorization for tobacco retailing for a proprietor to whom this article prohibits a license to be issued.

(4) The application seeks authorization for tobacco retailing at a location that is unlawful pursuant to any other provision of this Code, including without limitation, zoning ordinance and building code, or that is unlawful pursuant to any other law.

(B) *Appeal of denial.* Except as provided in § 8.44.290(C), a decision of the department to deny a license is appealable to the Town Council and any such appeal must be filed in writing with the Town Clerk within 15 days of the department's denial of the issuance of the license and the applicable appeal fee must be paid.

§ 8.44.240 LICENSE RENEWAL AND EXPIRATION.

(A) *Renewal of license.* A tobacco retailer's license is invalid if the appropriate license fee has not been timely paid in full or if the term of the license has expired. The term of a tobacco retailer license is one calendar year. Each tobacco retailer shall apply for the renewal of his or her tobacco retailer's license and submit the license fee no later than November 30 of each year.

(B) *Expiration of license.* A tobacco retailer's license that is not timely renewed shall expire on December 31 of each year. To renew a license not timely renewed pursuant to subparagraph (A), above, the proprietor must:

- (1) Submit the license fee and the renewal form; and
- (2) Submit a signed affidavit affirming that the proprietor has not sold and will not sell any tobacco product or tobacco paraphernalia after the license expiration date and before the license is renewed.

§ 8.44.250 TRANSFER RESTRICTIONS.

- (A) A tobacco retailer's license may not be transferred from one location to another.
- (B) A new tobacco retailer's license is required whenever a tobacco retailing location has a change in proprietor(s).
- (C) Notwithstanding any other provision of this article, prior violations at a location shall continue to be counted against a location and license ineligibility periods shall continue to apply to a location unless the new proprietor(s) provide the department with clear and convincing evidence that the new proprietor(s) have acquired or are acquiring the location in an arm's length transaction.

§ 8.44.260 LICENSE CONVEYS A LIMITED, CONDITIONAL PRIVILEGE.

Nothing in this article shall be construed to grant any person obtaining and maintaining a tobacco retailer's license any status or right other than the limited conditional privilege to act as a tobacco retailer at the location in the town identified on the face of the license. For example, nothing in this article shall be construed to render inapplicable, supersede, or apply in lieu of, any other provision of applicable law, including but not limited to, any provision of this Code including, without limitation, the zoning ordinance and building codes, or any condition or limitation on smoking in an enclosed place of employment pursuant to Cal. Labor Code § 6404.5. For example, obtaining a tobacco retailer's license does not make the retailer a "retail or wholesale tobacco shop" for the purposes of Cal. Labor Code § 6404.5.

§ 8.44.270 FEE FOR LICENSE.

The fee to issue or to renew a tobacco retailer's license shall be established from time to time by resolution of the Town Council. The fee shall be calculated so as to recover the cost of administration and enforcement of this article, including, for example, issuing a license, administering the license program, retailer education, 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 article. Fees are nonrefundable except as may be required by law.

§ 8.44.280 COMPLIANCE MONITORING.

(A) Compliance with this article shall be monitored by the department. In addition, any peace officer may enforce the penal provisions of this article. The department may designate any number of additional persons to monitor compliance with this article.

(B) The department will work with Marin County Tobacco Program to inspect each tobacco retailer at least one time per 12-month period. Nothing in this paragraph shall create a right of action in any licensee or other person against the Town or its agents.

(C) The department shall not enforce any law establishing a minimum age for tobacco purchases or possession against a minor person who otherwise might be in violation of such law because of the person's age (hereinafter "youth decoy") if the potential violation occurs when:

- (1) The youth decoy is participating in an inspection supervised by a peace officer, code enforcement

official, or the person designated by the town to monitor compliance with this article;

(2) The youth decoy is acting as an agent of a person designated by the town to monitor compliance with this article; or

(3) The youth decoy is participating in an inspection funded in part, either directly or indirectly through subcontracting, by the County of Marin Department of Health and Human Services or the California Department of Health Services.

§ 8.44.290 SUSPENSION OR REVOCATION OF LICENSE.

(A) *Suspension or revocation of license for violation.* In addition to any other penalty authorized by law, a tobacco retailer's license shall be suspended or revoked if any court of competent jurisdiction determines, or the department finds based on a preponderance of the evidence, after the licensee is afforded notice and an opportunity to be heard, that the licensee, or any of the licensee's agents or employees, has violated any of the requirements, conditions, or prohibitions of this article or has pleaded guilty, "no contest" or its equivalent, or admitted to a violation of any law designated in § 8.44.210 above.

(1) Upon a finding by the department of a first violation of this article at a location within any 60-month period, the license shall be suspended for 30 days.

(2) Upon a finding by the department of a second violation of this article at a location within any 60-month period, the license shall be suspended for 90 days.

(3) Upon a finding by the department of a third violation of this article at a location within any 60-month period, the license shall be suspended for one year.

(4) Upon a finding by the department of four or more violations of this article at a location within any 60-month period, the license shall be revoked and thereafter the licensee shall be ineligible to apply for a new license for five years.

(B) *Appeal of suspension or revocation.* A decision of the department to suspend or revoke a license is appealable to the Town Council and any appeal must be filed in writing with the Town Clerk within 15 days of mailing of the department's decision and the applicable appeal fee must be paid. If such an appeal is timely made, it shall stay enforcement of the appealed action. An appeal to the Town Council is not available for a revocation made pursuant to subsection (C) below.

(C) *Revocation of license wrongly issued.* A tobacco retailer's license shall be revoked if the department finds, after the

licensee is afforded notice and an opportunity to be heard, that one or more of the grounds for denial of a license under §

8.44.230 existed at the time application was made or at any time before the license issued. The decision by the department shall be the final decision of the town. Such a revocation shall be without prejudice to the filing of a new license application.

(D) *Judicial action to challenge.* Any final administrative action to suspend or revoke a tobacco retailer's license under this article shall be subject to judicial review pursuant to Cal. Gov't Code § 53069.4, which, among other things, requires such a judicial challenge to be brought within 20 days of service of the final decision.

§ 8.44.300 TOBACCO RETAILING WITHOUT A VALID LICENSE.

(A) In addition to any other penalty authorized by law, if a court of competent jurisdiction determines, or the Town Council finds based on a preponderance of evidence, after notice and an opportunity to be heard, that any person has engaged in tobacco retailing at a location without a valid tobacco retailer's license or has engaged in any prohibited activity set forth in § 8.44.210, either directly or through the person's agents or employees, the person shall be ineligible to apply for, or to be issued, a tobacco retailer's license as follows:

(1) After a first violation of this article at a location within any 60-month period, no new license may issue for the location (unless ownership of the business at the location has been transferred in an arm's length transaction), until 30 days have passed from the date of the violation.

(2) After a second violation of this article at a location within any 60-month period, no new license may issue for the location (unless ownership of the business at the location has been transferred in an arm's length transaction), until 90 days have passed from the date of the violation.

(3) After a third or subsequent violation of this article at a location within any 60-month period, no new

license may issue for the location (unless ownership of the business at the location has been transferred in an arm's length transaction), until 60 months have passed from the date of the violation.

§ 8.44.310 ENFORCEMENT.

(A) This article shall not be enforced by the town until January 1, 2019.

(B) Tobacco products, tobacco paraphernalia, electronic smoking devices or electronic smoking device paraphernalia offered for sale or exchange in violation of this article are subject to seizure by the department or any peace officer and shall be forfeited after the licensee and any other owner of such items seized is given reasonable notice and an opportunity to demonstrate that the items were not offered for sale or exchange in violation of this article. The decision by the department may be appealed pursuant to the procedures set forth in § 8.44.290(B). Forfeited items shall be destroyed after all internal appeals have been exhausted and the time in which to seek judicial review pursuant to Cal. Code of Civil Procedure § 1094.6 or other applicable law has expired without the filing of a lawsuit or, if such a suit is filed, after judgment in that suit becomes final.

(C) For the purposes of the civil remedies provided in this article, each of the following constitutes a separate violation:

(1) Each day on which a tobacco product, tobacco paraphernalia, electronic smoking device or electronic smoking device paraphernalia is offered for sale in violation of this article; or

(2) Each individual retail tobacco product, retail item of tobacco paraphernalia, retail electronic smoking device or retail item of electronic smoking device paraphernalia that is distributed, sold, or offered for sale in violation of this article.

§ 8.44.320 ADDITIONAL REMEDIES.

(A) The remedies provided by this article are cumulative and in addition to any other remedies available at law or in equity.

(B) Whenever evidence of a violation of this article is obtained in any part through the participation of a person under the age of 21 years old, such a person shall not be required to appear or give testimony in any civil or administrative process brought to enforce this article and the alleged violation shall be adjudicated based upon the sufficiency and persuasiveness of the evidence presented.

(C) Violations of this article are subject to a civil action brought by the Town Attorney, punishable by a civil fine not less than \$250 and not exceeding \$1,000 per violation.

(D) Violations of this article, in the discretion of the Town Attorney, may be prosecuted as infractions or misdemeanors when the interests of justice so require.

(E) Causing, permitting, aiding, abetting, or concealing a violation of any provision of this article shall also constitute a violation of this article.

(F) Violations of this article are hereby declared to be public nuisances.

(G) In addition to other remedies provided by this article or by other law, any violation of this article may be remedied by a civil action brought by the Town Attorney, including, for example, administrative or judicial nuisance abatement proceedings, civil or criminal code enforcement proceedings, and suits for injunctive relief."

Section 3. Compliance with California Environmental Quality Act. The Town Council finds that this ordinance is not subject to the California Environmental Quality Act (CEQA) pursuant to Sections 15060(c)(2) (the activity will not result in a direct or reasonably foreseeable indirect physical change in the environment) and 15060(c)(3) (the activity is not a project as defined in Section 15378) of the CEQA Guidelines, California Code of Regulations, Title 14, Chapter 3, because it has no potential for resulting in physical change to the environment, directly or indirectly.

Section 4. Severability. If any section, subsection, subdivision, paragraph, sentence, clause, or phrase in this ordinance or any part thereof is for any reason held to be unconstitutional or invalid or ineffective by any court of competent jurisdiction, such decision shall not affect the validity or effectiveness of the remaining portions of this Ordinance or any

part thereof. The Town 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 (1) or more subsections, subdivisions, paragraphs, sentences, clauses, or phrases be declared unconstitutional, or invalid, or ineffective.

Section 5. Effective Date and Posting. This Ordinance shall be effective thirty (30) days after the date of its passage and adoption. As set forth in Section 8.44.060, the prohibition on smoking in existing units of multi-unit residences shall not become operative until January 1, 2023. Copies of this Ordinance shall, within fifteen days after its passage and adoption, be posted in three public places in the Town of Fairfax, to wit: 1. Bulletin Board, Town Hall Offices; 2. Bulletin Board, Fairfax Post Office; and 3. Bulletin Board, Fairfax Women’s Club.

The foregoing Ordinance was introduced at a regular meeting of the Town Council on the 20th day of October 2021, and duly adopted at the next regular meeting of the Town Council on the 3rd day of November 2021, by the following vote, to wit:

AYES:
NOES:
ABSENT:
ABSTAIN:

BRUCE ACKERMAN, Mayor

ATTEST:

Michele Gardner, Town Clerk