ORDINANCE NO. 20-0007

AN ORDINANCE OF THE CITY OF MANHATTAN BEACH AMENDING MANHATTAN BEACH MUNICIPAL CODE CHAPTER 4.118 TO PROHIBIT THE SALE OF ALL TOBACCO PRODUCTS AND ELECTRONIC SMOKING DEVICES, AND MAKING A FINDING OF EXEMPTION UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

RECITALS

A. The City of Manhattan Beach is committed to protecting the public health and welfare.

B. Cigarettes cause millions of premature, preventable deaths.

C. Tobacco use causes death and disease and continues to be an urgent public health threat, as evidenced by the fact that 480,000 people die prematurely in the United States from smoking-related diseases every year, making tobacco use the leading cause of preventable death. In the United States, smoking is responsible for about one in every five deaths, more deaths each year than human immunodeficiency virus (HIV), illegal drug use, alcohol use, motor vehicle injuries, microbial agents, and toxic agents combined.

D. Tobacco use leads to more than $300 billion in health care and lost worker productivity costs each year.

E. On November 5, 2019, the City Council adopted Urgency Ordinance No. 19-0016-U to prohibit the sale of vape products, electronic smoking devices, and tobacco products that impart a characterizing flavor. Nothing in this Ordinance shall be construed to remove, delay or affect that prohibition.

NOW THEREFORE, THE MANHATTAN BEACH CITY COUNCIL DOES ORDAIN AS FOLLOWS:

SECTION 1. The City Council hereby amends Manhattan Beach Municipal Code Chapter 4.118 to read as follows:

"Chapter 4.118 – PROHIBITION OF THE RETAIL SALE OF TOBACCO PRODUCTS AND ELECTRONIC SMOKING DEVICES

4.118.010 - Definitions.

For the purposes of this chapter, the following definitions shall apply:

"Electronic smoking device" means (1) an electronic or battery-operated device that can deliver an inhalable dose of nicotine to the user or (2) any product intended or sold for use with such a device. "Electronic smoking device" includes any product meeting this definition, regardless of whether it is manufactured,

distributed, marketed or sold as an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, electronic hookah, electronic vape, vaping device, vaporizer, or any other product name or descriptor. "Electronic smoking device" also includes any liquid or substance containing nicotine, whether sold separately or sold in combination with any device that could be used to deliver an inhalable dose of nicotine to a person.

"Retailer" means any person who sells, exchanges, or offers to sell or exchange, for any form of consideration, tobacco products or electronic smoking devices. "Retailing" shall mean the doing of any of these things.

"Tobacco product" means any product containing, made, or derived from tobacco or nicotine, whether natural or synthetic, including but not limited to cigarettes, cigars, pipe tobacco, hookah tobacco, snuff, chewing tobacco, dipping tobacco, snus, bidis, or any other preparation of tobacco that is manufactured, sold, offered for sale, or otherwise distributed with the expectation that the product or matter will be introduced into the human body. "Tobacco product" does not include any cessation product specifically approved by the United States Food and Drug Administration for use in treating nicotine or tobacco dependence.

4.118.020 - Prohibitions.

It shall be unlawful for any person to sell a tobacco product or electronic smoking device in the City.

4.118.030 - Enforcement.

A. Any violation of this chapter is hereby declared to be a public nuisance.

B. Causing, permitting, aiding, abetting, or concealing a violation of any provision of this chapter shall also constitute a violation of this chapter.

C. Violations of this chapter may be remedied by a civil action brought by the City, including, but not limited to, administrative or judicial nuisance abatement proceedings, civil code enforcement proceedings, and suits for injunctive relief. For the purposes of the civil remedies provided in this chapter, each day on which a tobacco product or electronic smoking device is offered for sale in violation of this chapter, and each individual retail tobacco product or electronic smoking device that is distributed, sold, or offered for sale in violation of this chapter, shall constitute a separate violation of this chapter.

D. The City Prosecutor shall have discretion to prosecute violations of this chapter as infractions or misdemeanors.

E. The remedies provided by this chapter are cumulative and in addition to any other remedies available at law or in equity."

SECTION 2. CEQA FINDING. This Ordinance is exempt from the environmental review requirements of the California Environmental Quality Act ("CEQA") pursuant to Section 15061(b)(3) of Title 14 of the California Code of

Regulations because it can be seen with certainty that there is no possibility that the activity in question (prohibiting the retail sale of tobacco) may have a significant effect on the environment.

SECTION 3. IMPLEMENTATION AND ENFORCEMENT. The City shall not enforce this Ordinance, except the prohibition on the sale of vape products, electronic smoking devices, and tobacco products that impart a characterizing flavor, until January 1, 2021.

SECTION 4. HARDSHIP EXEMPTION.

A. An application for a hardship exemption to be excluded from this Ordinance or extend the time to comply with this Ordinance may be filed pursuant to this section.

B. Any retailer that wishes to sell tobacco products on or after January 1, 2021, may apply for one hardship exemption. A retailer must submit a complete application for a hardship exemption at any time between September 1, 2020, and October 31, 2020. Such application shall be made in writing on a form prescribed by the Director of Finance and shall be accompanied by the filing fee established by resolution of the City Council. The retailer shall bear the burden of proof in establishing, by a preponderance of the evidence, that the application of this Ordinance No. 20-0007, amending Manhattan Beach Municipal Code Chapter 4.118, to the retailer's business is unreasonable, and will cause significant hardship to the retailer by not allowing the retailer to recover his or her investment backed expectations. The retailer applying for the exemption shall furthermore be required, in order to meet its burden of proof, to submit the documents set forth in this section.

C. A complete application for a hardship exemption shall include the following:

1. The retailer's name and street address of business;

2. The address to which notice is to be mailed, at the retailer's option, a telephone number and email address;

3. The retailer's signature;

4. A declaration, under penalty of perjury, that all the information in the application is true and correct;

5. The term of the requested extension;

6. Documentation relevant to the information requested in subsection D of this section; and

7. The required filing fee.

D. In determining whether to grant a hardship exemption to the retailer, and in determining the appropriate length of time that the retailer will be authorized to continue retailing, the City Council may consider, among other factors:

1. The percentage of the retail sales over the last three years that have been derived from tobacco products;

2. The amount of investment in the business;

3. The present actual and depreciated value of any business improvements dedicated to the retail sale of tobacco products;

4. The applicable Internal Revenue Service depreciation schedule or functional non-confidential equivalent;

5. The remaining useful life of the business improvements that are dedicated to the sale of tobacco products;

6. The remaining lease term of the business, if any;

7. The ability of the retailer to sell other products;

8. The opportunity for relocation of the business and the cost of relocation; and

9. A business plan demonstrating how long the business will need to sell tobacco products to recoup any investment backed expectations, and a plan for phasing out the sale of those products.

E. The hardship exemption hearing shall be conducted by the City Council. Written notice of the time and place of the hearing shall be given at least 10 calendar days prior to the date of the hearing to the retailer by the City either by causing a copy of such notice to be delivered to the retailer personally or by mailing a copy thereof, postage prepaid, addressed to the retailer at the address shown on the hardship exemption application.

F. Within 45 days after a completed application is filed, the City Council shall open the hearing on the hardship exemption. The City Council shall receive and consider evidence presented by the retailer, and shall determine whether to grant or deny the hardship exemption, and if granting the hardship exemption, the length of time that the retailer will be permitted to operate. The Council has the discretion to provide a hardship exemption for an unlimited period. The City Council shall make written findings in support of the decision. The decision of the City Council shall be final and conclusive.

G. A retailer may continue to sell tobacco products while a hardship exemption application is pending before the City Council.

SECTION 6. SEVERABILITY. If any part of this Ordinance or its application is deemed invalid by a court of competent jurisdiction, the City Council intends that

such invalidity will not affect the effectiveness of the remaining provisions or their application and, to this end, the provisions of this Ordinance are severable.

SECTION 7. CERTIFICATION. The City Clerk shall certify to the passage and adoption of this Ordinance and shall cause this Ordinance to be published within 15 days after its passage, in accordance with Section 36933 of the Government Code.

ADOPTED on February 18, 2020.

AYES: Napolitano, Stern, Montgomery and Mayor Hersman.
NOES: Hadley.
ABSENT: None.
ABSTAIN: None.

NANCY HERSMAN
Mayor

ATTEST:

LIZA TAMURA
City Clerk