

ORDINANCE NO. 3788-C.S.

AN URGENCY ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MODESTO MAKING FINDINGS AND EXTENDING THE TEMPORARY MORATORIUM ON THE ESTABLISHMENT OF NEW AND RELOCATION OR PHYSICAL EXPANSION OF EXISTING TOBACCO RETAILER BUSINESSES, ALSO KNOWN AS SMOKE SHOPS, WITHIN THE CITY OF MODESTO FOR A PERIOD OF TEN (10) MONTHS AND FIFTEEN (15) DAYS, TO BECOME EFFECTIVE IMMEDIATELY

WHEREAS, the City of Modesto (the “City”) is a municipal corporation duly organized as a Charter City under the constitution and laws of the State of California; and

WHEREAS, the City Council has broad discretion pursuant to Article II, Sections 200 and 201 of the City Charter; California Constitution Article XI, Section 5; and the general law of the state, including, but not limited to, the California Planning and Zoning Law (Gov. Code section 65000 et seq.), to legislate for public purposes and for the general welfare, including, but not limited to, matters of public health and safety; and

WHEREAS, the City protects the public health, safety, and welfare of the community through numerous avenues, including by establishing and enforcing zoning, licensing, and health and safety regulations on specified commercial activities; and

WHEREAS, Government Code section 65858, subdivision (a) provides that the legislative body of a city may, to protect the public safety, health, and welfare, adopt as an urgency measure an interim ordinance prohibiting any uses that may be in conflict with a contemplated general plan, specific plan, or zoning proposal the City Council is considering or studying or intends to study; and

WHEREAS, on October 8, 2024, the City Council of the City of Modesto adopted Urgency Ordinance No.3785-C.S., imposing a forty-five (45) day moratorium on the establishment of new and the relocation or physical expansion of existing massage establishments; and

WHEREAS, Urgency Ordinance No. 3785-C.S. will, unless extended, expire by its own terms on November 22, 2024; and

WHEREAS, Government Code section 65858, subdivision (a) authorizes the extension of an urgency ordinance, for ten (10) months and fifteen (15) days after a noticed public hearing, to prohibit uses of land which may conflict with a contemplated general plan, specific plan, or zoning proposal which the legislative body, planning commission or the planning department is considering, studying, or intends to study within a reasonable period of time; and

WHEREAS, the City has seen a proliferation of tobacco retailer businesses, also known as smoke shops, within the City; and

WHEREAS, there are currently 41 tobacco retailer businesses/smoke shops who have an active business license in the City of Modesto. Staff and the Police Department are currently assessing whether there are additional establishments operating without a business license in the City; and

WHEREAS, the City is concerned about this recent proliferation of tobacco retailer businesses, locations of tobacco retailer businesses, the harmful effects of tobacco and other products sold at these establishments containing industrial hemp on the health, safety, and welfare of City residents and especially youth; and

WHEREAS, tobacco retailer businesses continue to be a source of unlawful activities in the City, which, if not curtailed, present an immediate threat to the public health, safety, and welfare; and

WHEREAS, tobacco retailer businesses can be a target for theft and vandalism, as well as may be affiliated with the sale of illegal cannabis products and drug paraphernalia that encourage illegal activity; and

WHEREAS, within the last year, the Modesto Police Department conducted inspections at various tobacco retailers throughout the City, resulting in the seizure of marijuana/cannabis-infused items, illicit drugs, flavored tobacco products, and illegal gambling machines. These inspections also resulted in the arrest of several individuals involved in these illegal activities; and

WHEREAS, following the City Council’s adoption of the forty-five (45) day moratorium, the Modesto Police Department conducted further inspections of City tobacco retailers. These inspections resulted in seizures of marijuana/cannabis-infused items, illicit drugs, and flavored tobacco products, including multiple tobacco retailers who had previously had items seized by the Police Department; and

WHEREAS, during these inspections, Modesto Police Department visited 43 tobacco retailers, and all 43 retailers were found to have illegal flavored tobacco products for sale; and

WHEREAS, on September 23, 2024, the California Department of Public Health (“CDPH”) promulgated emergency regulations related to industrial hemp and the threat to public health, safety, and welfare, particularly to minors; and

WHEREAS, the CDPH regulations come after California Governor Gavin Newsom directed the CDPH to draft emergency regulations, citing the increasing amounts of safety concerns from the adverse health effects of intoxicating hemp food and beverage products; and

WHEREAS, the emergency regulations aim to combat hemp products containing tetrahydrocannabinol (“THC”) that skirt the age and sale restrictions that have been placed on recreational marijuana sold through licensed and regulated dispensaries; and

WHEREAS, hemp products have been found to be sold in tobacco retailer businesses, or smoke shops, with marketing aimed toward children featuring colorful packaging designs and sweet candy flavors; and

WHEREAS, as currently defined under state law, “industrial hemp” is permitted to contain a delta-9 THC concentration of no more than 0.3 percent on a dry weight basis; however, the emergency regulations prohibit industrial hemp final form food and beverage products, specifically, from containing any detectable level of THC; and

WHEREAS, the emergency regulations expand on the number of psychoactive cannabinoids that will need to be undetectable in industrial hemp final food form products, including edibles such as gummies, other candies and drinks as well as restricting the serving sizes such products contain to five servings or less and limiting sales of the products to consumers who are at least 21 years of age; and

WHEREAS, aside from new regulations related to hemp, many state laws have been adopted, which acknowledge the public health impacts of tobacco, especially flavored tobacco products, and specifically its effect on minors. For example, state law prohibits public school students from smoking or using tobacco products while on campus, while attending school-sponsored activities, or while under the supervision or control of school district employees. State law also prohibits smoking in playgrounds. State law also prohibits smoking within twenty (20) feet of the main entrances and exits of public buildings; and

WHEREAS, on November 8, 2022, California voters upheld the state law (“SB 793”) prohibiting a tobacco retailer, or any of the tobacco retailer’s agents or employees, from selling, offering for sale, or possessing with the intent to sell or offer for sale, most flavored tobacco products including flavored e-cigarettes and menthol cigarettes, as well as tobacco product flavor enhancers in retail locations; and

WHEREAS, on October 7, 2023, Governor Newsom signed into law AB 935, strengthening the enforcement of the flavored tobacco retail law and broadening the definition of retail location; and

WHEREAS, cities still retain the authority to draft and enforce local flavored tobacco bans for products; and

WHEREAS, Government Code section 36937 authorizes the City Council to adopt an urgency ordinance for the immediate preservation of the public peace, health, or safety; and

WHEREAS, Government Code section 65858 provides that to protect against any current and immediate threats to public health, safety, or welfare, the City Council may adopt, as an urgency measure, an interim ordinance prohibiting any uses that may be in conflict with a contemplated general plan, specific plan, or zoning proposal that the City plans to study; and

WHEREAS, the initial forty-five (45) day moratorium period established by Ordinance 3785-C.S. was insufficient to complete a study and adoption of new or amended regulations. City staff continues to develop updated regulations impacting tobacco retailers; and

WHEREAS, for all the reasons set forth above, the City has determined that a ten (10) month and fifteen (15) day extension of the moratorium on the establishment of new and the relocation or physical expansion of existing tobacco retailer businesses within the City is necessary. This moratorium shall continue in effect pending completion of the City’s study of the potential impacts of tobacco retailer businesses, also known as smoke shops, and its potential adoption of amendments to the Modesto Municipal Code and other appropriate regulations for the protection of the public health, safety, and welfare; and

WHEREAS, the City has complied with Government Code section 65858(d), which requires the City’s legislative body to issue a written report describing the measures taken to alleviate the conditions which led to the adoption of Ordinance 3785-C.S. ten (10) days prior to the expiration of the interim ordinance.

NOW, THEREFORE, the City Council of the City of Modesto hereby ordains as follows:

SECTION 1. Recitals.

The above recitals are true and correct and are hereby adopted as the City Council’s findings.

SECTION 2. Purpose and Authority.

In the interest of protecting the health, safety, and welfare of the residents in the City of Modesto, it is the purpose and intent of this Ordinance to place a temporary moratorium on the issuance of any new permit, license, or other entitlement for any tobacco retailer business, also known as smoke shop, in the City of Modesto. This includes any new permit, license, or other entitlement for the relocation or physical expansion of existing business falling under the definition of a tobacco retailer as defined under this Ordinance. The City Council has the authority to adopt this Ordinance pursuant to California Government Code section 65858 as an urgency measure prohibiting any use that may be in conflict with a contemplated general plan, specific plan, or zoning proposal that the City is considering or studying.

SECTION 3. Findings.

The City Council hereby finds and determines that Tobacco Retailer Businesses and Smoke Shops constitute an immediate threat to the public health, safety, and welfare. The approval of additional entitlements for Tobacco Retailer Businesses and approval of the relocation or physical expansion of existing Tobacco Retailer Businesses under the City’s current regulations will further threaten the public health, safety, and welfare. The adoption of this Urgency Ordinance is therefore necessary for the immediate protection of public health, safety, and

welfare. The above recitals are incorporated herein by reference as true and correct and as the Council's findings.

SECTION 4. Definitions.

- A. "Person" shall mean any individual natural person, 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.

- B. "Tobacco Paraphernalia" means any device, product, equipment, or material of any kind that is intended or designed for use for smoking, inhaling, or ingesting tobacco or cannabis, notwithstanding that the device, product, equipment, or material may also be used for smoking, inhaling, or ingesting any controlled substance. Tobacco paraphernalia includes, but is not limited to, all of the following: (i) metal, ivory, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured bowls; (ii) water pipes; (iii) bong; (iv) chillums; (v) ice pipes or chillers; (vi) cigarette papers or wrappers; (vii) cigarette rolling machines; (viii) blunt wraps, as defined in Section 308 of the Penal Code; (ix) hookahs and similar devices constructed with a receptacle or container in which water or some other liquid may be placed into which smoke passes and is cooled in the process of being inhaled or ingested; and (x) any electronic device that delivers nicotine or other vaporized liquids to the person inhaling from the device, including, but not limited to, an electronic cigarette, cigar, pipe, or hookah. Tobacco Paraphernalia shall include any component, part, or accessory of the foregoing, whether or not sold separately.

- C. "Tobacco Product" means 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, e-cigarettes (with or without flavoring), cigars, little cigars, chewing tobacco, pipe tobacco, or snuff, or vaping accessories. Tobacco Product shall include any component, part, or accessory of the foregoing, whether or not sold separately. Tobacco Product does not include a 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 the product is marketed and solely for such an approved purpose.

- D. "Tobacco Retailer Business" or "Smoke Shop" shall mean a retailer or wholesale business or any person that: (1) sells, offers for sale, or offers to exchange for any form of consideration, tobacco, hemp products, Tobacco Products, or Tobacco Paraphernalia; and (2) has fifteen percent (15%) or more of the square feet in the establishment used for the sale or display of tobacco, hemp products, Tobacco Products, or Tobacco Paraphernalia.

SECTION 5. Moratorium Imposed.

- A. Scope. In accordance with the authority granted the City of Modesto under Article XI, Section 7 of the California Constitution and California Government Code section 65858, from and after the effective date of this Ordinance, no license, permit, or other entitlement for use, including, but not limited to, the issuance of a business license, building permit, conditional use permit, or other land use approval, shall be approved or issued by the City for the establishment, relocation or physical expansion of a Tobacco Retailer Business. Additionally, the establishment, relocation, or physical expansion of the Tobacco Retailer Business is hereby expressly prohibited in all areas and zoning districts of the City.
- B. Exceptions. This Ordinance shall not prohibit the renewal of a business license for an existing Tobacco Retailer Business, provided that the renewal seeks to maintain the business without physical expansion and in its current location, and the Tobacco Retailer Business is operating in a manner, and housed within a building, which complies with all City, State, Federal, or otherwise applicable, codes, rules, regulations, or laws.

SECTION 6. Violation.

Except as otherwise permitted under this Ordinance, the establishment, relocation, or physical expansion of a Tobacco Retailer Business within the limits of the City is declared to be a public nuisance. Violations of this Ordinance may be enforced by any applicable laws or ordinances, including, but not limited to, injunctions or administrative or criminal penalties under the Modesto Municipal Code.

SECTION 7. Term of Ordinance.

This Ordinance is an extension of the moratorium established by Ordinance 3785-C.S. pursuant to Government Code section 65858. It shall be in effect from the date of adoption of this Urgency Ordinance for a period of ten (10) months and fifteen (15) days unless it is extended pursuant to California Government Code section 65858 or other applicable law, as approved by the City Council.

SECTION 8. Environmental Review / California Environmental Quality Act (CEQA).

This Ordinance is intended to preserve the status quo, and it will not cause a direct physical change in the environment, nor a reasonably foreseeable indirect physical change in the environment. The enactment of this Ordinance, therefore, does not constitute the approval of a project under the California Environmental Quality Act (“CEQA”), and it is exempt from CEQA.

SECTION 9. Severability.

If any provision of this Ordinance or the application thereof to any person or circumstance is held to be invalid, such invalidity shall not affect other provisions or applications of the

Ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this Ordinance are severable. This City Council hereby declares that it would have adopted this Ordinance irrespective of the invalidity of any particular portion thereof and intends that the invalid portions be severed, and the balance of the Ordinance be enforced.

SECTION 10. Effective Date and Publication.

This Ordinance, passed by at least a four-fifths vote of the City Council, is declared to be an interim Urgency Ordinance for preserving the public health, safety, and welfare and shall take effect and be enforced immediately upon adoption pursuant to Government Code section 36937.

PASSED and ADOPTED this 12th day of November 2024 by the following vote:

AYES: Alvarez, Bavaro, Escutia-Braaton, Ricci, Williams, Wright, Mayor Zwahlen

NOES: None

ABSENT: None

APPROVED: _____
SUE ZWAHLEN, Mayor

ATTEST: _____
DIANE NAYARES-PEREZ, City Clerk

(SEAL)

APPROVED AS TO FORM:

BY: _____
JOSE M. SANCHEZ, City Attorney

FINAL ADOPTION CLAUSE

The foregoing ordinance, having been published as required by the Charter of the City of Modesto, and coming on for final consideration at the regular meeting of the Council of the City of Modesto held on the 12th day of November, 2024, Wright moved its final adoption, which motion being duly seconded by Councilmember Escutia-Braaton, was upon roll call carried and the ordinance adopted by the following vote:

AYES: Councilmembers: Alvarez, Bavaro, Escutia-Braaton, Ricci, Williams, Wright, Mayor Zwahlen
NOES: Councilmembers: None
ABSENT: Councilmembers: None

APPROVED: _____
SUE ZWAHLEN, Mayor

ATTEST: _____
DIANE NAYARES-PEREZ, City Clerk