

RESOLUTION NO. 14-028**A RESOLUTION OF THE PLANNING COMMISSION OF THE CITY OF MILPITAS APPROVING VAPE ONE RETAIL CONDITIONAL USE PERMIT NO. UP14-0003 TO ALLOW AN ELETRONIC SMOKING DEVICE RETAIL ESTABLISHMENT IN AN EXISTING COMMERCIAL TENANT SPACE LOCATED AT 794 BARBER LANE**

WHEREAS, in May 1996, the City approved a General Plan Amendment changing the land use for the property located 794 Barber Lane from industrial park to commercial. Subsequently, in February 1997, the City approved an approximate 40,000 square foot retail center (Ulferts Center). Since that time there have been various use permits for restaurants and telecommunication facilities and S-Zone Amendments for various external building and site modifications.

WHEREAS, on March 18, 2014, the City Council held a public hearing to consider introducing Ordinance No. 38.813 defining electronic smoking device and head/smoke/tobacco shops and other related amendments for inclusion in the Zoning Ordinance and to consider introducing Ordinance No. 277.6 to amend the Smoking Ordinance to regulate the use of electronic smoking devices.

WHEREAS, on April 1, 2014, the City Council waived the second readings, adopted Ordinance No. 38.813 defining electronic smoking device and head/smoke/tobacco shops and adopted Ordinance No. 227.6 to regulate the use of electronic smoking devices. The proposed retail sales of electronic smoking devices and the similar products are within the category defined in the Ordinance No. 38.813 and, therefore, the proposed retail establishment requires a Conditional Use Permit to allow sales of electronic smoking devices and the similar products per Ordinance No. 227.6.

WHEREAS, on March 17, 2014, Tommy (Yung Tai) Lu representing Vape One Incorporated submitted an application pursuant to Section 57 of the Milpitas Zoning Ordinance for a Conditional Use Permit. The request is to allow Vape One Incorporated in an existing commercial tenant space for retail sale of electronic smoking devices and similar products and no on-site consumption of electronic smoking device products. Per Table XI-10-5.02-1 and Ordinance No. 227.6 of the Milpitas Zoning Ordinance, the proposed retail sale of electronic smoking devices and similar products requires Planning Commission's approval through a Conditional Use Permit.

WHEREAS, the Planning Division completed an environmental assessment for the project in accordance with the California Environmental Quality Act (CEQA), and recommends that the Planning Commission determine this project is categorically exempt from further CEQA review under Section 15301 of the CEQA Guidelines, Existing Facilities. A new partition wall will be constructed to separate the existing tenant space from the other tenant space. A new restroom will also be provided for the proposed retail use. However, the construction will be within the existing building footprint. The building structure is existing and there are no exterior alteration proposed.

WHEREAS, on June 25, 2014, the Planning Commission held a duly noticed public hearing on the subject application, and considered evidence presented by City staff, the applicant, and other interested parties.

NOW THEREFORE, the Planning Commission of the City of Milpitas hereby finds, determines and resolves as follows:

Section 1: The Planning Commission has duly considered the full record before it, which may include but is not limited to such things as the City staff report, testimony by staff and the public, and other materials and evidence submitted or provided to the Planning Commission. Furthermore, the recitals set forth above are found to be true and correct and are incorporated herein by reference.

Section 2: The project is categorically exempt from further CEQA review under Section 15301 of the CEQA Guidelines, Existing Facilities. A new partition wall will be constructed to separate the project site from the other tenant space. A new restroom will also be provided for the proposed retail use. However, the construction will be within the existing building footprint and there is no exterior alteration proposed.

Section 3: Conditional Use Permit (Section XI-10-57.04(F)) - The Planning Commission makes the following findings based on the evidence in the public record in support of Conditional Use Permit No. UP14-0003:

- a. *The proposed use, at the proposed location will not be detrimental or injurious to property or improvements in the vicinity nor to the public health, safety, and general welfare.*

The project is consistent with this finding because the project is in the existing commercial building and is permitted under the Zoning Ordinance with a Conditional Use Permit. The proposed retail business selling electronic smoking devices and similar products provides retail options for the patrons. The proposal increases economic opportunity, and as conditioned, will not be detrimental to property or improvements in the vicinity nor to the public health, safety, and general welfare because the building exists and the retail sales will be conducted within the building. No consumption of the products will be made in the premises. As discussed in detail in the staff report, the site meets all development standards and parking requirements.

- b) *The proposed use is consistent with the Milpitas General Plan, specifically Policy Policy 2.a-I-3 and Policy 2.a-I-5:*

The project is consistent with this finding because the General Plan specifically contains the following policies:

- Policy 2.a-I-3 Encourage economic pursuits which will strengthen and promote development through stability and balance.

- Policy 2.a-I-5 Maintain policies that promote a strong economy which provides economic opportunities for all Milpitas residents within existing environmental, social fiscal and land use constraints.

The proposed retail sales of electronic smoking devices and the similar products will encourage economic pursuits by operating a sales business in an existing unoccupied commercial building with Conditional Use Permit approval. The proposal will provide economic opportunities to the Milpitas residents and around the region by providing different retail options.

c) *The proposed use is consistent with the Milpitas Zoning Ordinance:*

The project is consistent with this finding because the commercial shopping center was constructed in 1997 in conformance with the Milpitas Zoning Ordinance in terms of land use and development standards with no proposed exterior modifications under this application. The interior improvements will be within the existing building footprint and will not have impact on development standards.

In terms of the land use, the project is consistent with General Commercial Zoning District in that head/smoke/tobacco stores are conditionally permitted uses with a Conditional Use Permit approval by the Planning Commission.

Although state law currently prohibits the sale or furnishing of cigarettes, tobacco products, and smoking paraphernalia (including electronic smoking devices) to minors and requires tobacco retailers to check the identification of tobacco purchasers who reasonably appear to be under 18 years of age, the number of youths having access to tobacco and electronic smoking products is a concern and potential issue with this type of retail establishment. As such, staff recommends the following conditions of approval:

- Prohibit the sale or transfer of electronic smoking devices products and electronic smoking devices paraphernalia to anyone under the age of 18. The operator shall obtain age detection devices that will confirm the purchaser is the minimum age under state law to purchase and possess electronic smoking devices or paraphernalia.
- Prohibit a person who is younger than the minimum age of 18 from working at the site.
- Prohibit all self-service displays of electronic smoking devices products.
- All products and related paraphernalia shall be stored or kept out public view and shall maintain a minimum distance of 5-feet from any storefront window.
- Prohibit on-site consumption of electronic smoking devices and other similar products.

Additionally, any window advertisement shall be regulated by Milpitas Sign Ordinance. Per Milpitas Municipal Code XI-10-24.04-1 (Window Signs), window displays shall not cover more than 25% of the contiguous window area. As conditioned above, the project will not be detrimental or injurious to property, improvements, or the public health, safety, and general welfare and ensure the propose use will add to the vitality of the shopping center.

Section 4: The Planning Commission of the City of Milpitas hereby adopts **Resolution No. 14-028 approving Vape One Retail Conditional Use Permit No. UP14-0003 based on**

the above Findings and subject to the Conditions of Approval attached hereto as Exhibit 1 incorporated herein.

PASSED AND ADOPTED at a regular meeting of the Planning Commission of the City of Milpitas on June 25, 2014.

Chair

TO WIT:

I HEREBY CERTIFY that the following resolution was duly adopted at a regular meeting of the Planning Commission of the City of Milpitas on June 25, 2014, and carried by the following roll call vote:

COMMISSIONER	AYES	NOES	ABSENT	ABSTAIN
Lawrence Ciardella				
John Luk				
Rajeev Madnawat				
Sudhir Mandal				
Demetress Morris				
Gurdev Sandhu				
Garry Barbadillo				
Hon Lien (alternate)				

EXHIBIT 1

CONDITIONS OF APPROVAL
Vape One Retail Conditional Use Permit No. 14-0003

General Conditions

1. General Compliance. The applicant and owner, including all successors in interest (collectively “Permittee”) shall comply with each and every condition set forth in this Permit. This Vape One Retail Conditional Use Permit No. UP14-0003 (“Permit”) shall have no force or effect and no building permit shall be issued unless and until all things required by the below-enumerated precedent conditions have been performed or caused to be performed.
2. Effective Date. Unless there is a timely appeal filed in accordance with the Milpitas Zoning Code, the date of approval of this Permit is the date on which the decision-making body approved this Permit.
3. Acceptance of Permit. Should Permittee fail to file a timely appeal within twelve (12) calendar days of the date of approval of this Permit, inaction by Permittee shall be deemed to constitute each of the following:
 - a. Acceptance of this Permit by Permittee; and
 - b. Agreement by the Permittee to be bound by, comply with, and to do all things required of or by Permittee pursuant to all of the terms, obligations, and conditions of this Permit.
4. Permit Expiration. Pursuant to Section XI-10-64-06 of the Milpitas Zoning Code, this Permit shall become null and void if the activity permitted by this Permit is not commenced within two (2) years from the date of approval, or for a project submitted with a tentative map, within the time limits of the approved tentative map. Pursuant to Section XI-10-64.06(B) of the Milpitas Zoning Code, an activity permitted by this Permit shall be deemed to have commenced when the project:
 - a. Completes a foundation associated with the project; or
 - b. Dedicates any land or easement as required from the zoning action; or
 - c. Complies with all legal requirements necessary to commence the use, or obtains an occupancy permit, whichever is sooner.
5. Time Extension. Pursuant to Section XI-10-64.07 of the Milpitas Zoning Code, unless otherwise provided by State law, Permittee shall have the right to request a one-time extension of the Permit if the request is made in writing to the Planning Division prior to the expiration date of the approval. **(P)**
6. Project Job Account. If Permittee’s project job account is at any time delinquent or below the required deposit amount, City will not continue to review or process the application until Permittee’s private job account is paid in full and the required deposit has been made.

Additionally, prior to the issuance of any building permit or occupancy permit, as applicable, Permittee shall pay in full the project account balance and establish a remaining balance of at least twenty-five percent (25%) of the required initial deposit.

7. Notice. Pursuant to California Government Code Section 66020, any protest filed in court relating to the imposition of fees, dedication, reservations, or other exactions to be imposed on the development project shall be filed within ninety (90) days after the date of the adoption of this Resolution. This provision serves as notice from the local agency to the Permittee that the ninety (90) day period in which the applicant may file a protest has begun under California Government Code Section 66020(d)(1).
8. Cost and Approval. Permittee shall fully complete and satisfy each and every condition set forth in this Resolution and any other condition applicable to the project to the sole satisfaction of the City. Additionally, Permittee shall be solely responsible and liable for the cost to satisfy each and every condition.
9. Conditions. Each and every condition set forth in this Exhibit shall apply to the project and continue to apply to the project so long as the Permittee is operating the project under the permits and approvals in this Resolution.
10. Compliance with Laws. The construction, use, and all related activity authorized under this Permit shall comply with all applicable local, state, and federal laws, rules, regulations, guidelines, requirements, and policies. **(CA/P)**
11. Previous Approvals. Permittee shall abide and continue to comply with all previous City approvals, permits, or requirements relating to the subject property, unless explicitly superseded or revised by this Permit.
12. Indemnification. To the fullest extent permitted by law, Permittee shall indemnify, defend with counsel of the City's choosing, and hold harmless City, its City Council, its boards and commissions, officials, officers, employees, and agents from and against any and all claims, demands, obligations, damages, actions, causes of action, suits, losses, judgments, fines, penalties, liabilities, costs and expenses (including without limitation, attorney's fees, disbursements and court costs) of every kind and nature whatsoever which may arise from or in any manner relate (directly or indirectly) to (i) City's approval of the project, including but not limited to, the approval of the discretionary permits, maps under the Subdivision Map Act, and/or the City's related determinations or actions under the California Environmental Quality Act, and (ii) Permittee's construction, operation, use, or related activity under this Permit. This indemnification shall include, but not be limited to, damages awarded against the City, if any, costs of suit, attorneys' fees, and other expenses incurred in connection with such claim, action, causes of action, suit or proceeding whether incurred by applicant, City, and/or the parties initiating or bringing such proceeding. Permittee shall indemnify the City for all of City's costs, attorneys' fees, and damages which City incurs in enforcing the indemnification provisions set forth in this condition. Permittee shall pay to the City upon demand or, as applicable, to counsel of City's choosing, any amount owed pursuant to the indemnification requirements prescribed in this condition.

13. Revocation, Suspension, Modification. This Permit may be suspended, revoked, or modified in accordance with Section XI-10-63.06 of the Milpitas Zoning Code.
14. Severability. If any term, provision, or condition of this Permit is held to be illegal or unenforceable by the Court, such term, provision, or condition shall be severed and shall be inoperative, and the remainder of this Permit shall remain operative, binding, and fully enforceable.
15. Permittee shall develop the approved project in conformance with the approved plans approved by the Planning Commission on June 25, 2014, in accordance with these Conditions of Approval.

Any deviation from the approved site plan, elevations, materials, colors, landscape plan, or other approved submittal shall require that, prior to the issuance of building permits, the Permittee shall submit modified plans and any other applicable materials as required by the City for review and obtain the approval of the Planning Director or Designee. If the Planning Director or designee determines that the deviation is significant, the owner or designee shall be required to apply for review and obtain approval of the Planning Commission or City Council, as applicable, in accordance with the Milpitas Zoning Code. **(P)**

16. Permittee shall fully pay all applicable fees and charges at the time they are due to City based on the rate schedule in effect at the time the fees or charges are due and payable to City. **(P)**

Project Specific Conditions

17. The business hours are limited to Monday through Thursday from 11 am to 7 pm, Friday and Saturday from 11 am to 8 pm, and Sunday from 11 am to 7 pm. **(P)**
18. The business is retail only. There will be no food or drink served on the premises. Customers shall not be allowed to sample the products. No consumption or use of the products shall be authorized in any manner onsite. **(P)**
19. The project shall be subject to a twelve (12) month permit review by the Planning Commission in a fully noticed public hearing after issuance of Certificate of Occupancy. Permittee shall bear the costs of all materials and fees associated with the hearing. The Planning Commission may add any additional condition(s) to address any impact from the use authorized in this Permit. **(P)**
20. Prohibit the sale or transfer of any electronic smoking devices products and electronic smoking device paraphernalia to anyone under the age of 18. Permittee shall at all times obtain age detection devices that will confirm the purchaser is the minimum age of 18. **(P)**
21. Prohibit a person who is younger than the minimum age of 18 from working at the subject property. **(P)**

22. Prohibit all self-service displays of any electronic smoking device products. **(P)**
23. Any window advertisement shall be regulated by the Milpitas Sign Ordinance. Per Milpitas Municipal Code XI-10-24.04-1 (Window Signs), window displays shall not cover more than 25% of the contiguous window area. **(P)**

Building & Safety Department Conditions

24. The applicable existing Building codes shall be 2013 CBC, CMC, CEC, CPC, Green Building Code, California Energy Code and 2014 Milpitas Municipal Code. Building permit applications submitted after January 1, 2014 shall comply with newly adopted 2013 Family of Codes and 2014 Milpitas Municipal Code. **(B)**
25. Permittee shall obtain a Business License and Certificate of Occupancy prior to commencement of any business activities or operation. **(B)**
26. Engineer or architect licensed in the State of California shall prepare all required plans necessary for building permit. Structural design calculations and plans shall be wet signed and stamped prior to obtaining a building permit. **(B)**
27. Access to restroom through storage room shall comply with City Policy BDP-BLG30: "Restrooms located inside stockrooms in retail stores are permitted provided that the path of travel from the stockroom entrance door to the restroom door shall be striped with minimum of 36 inches clear width and the maneuvering clearance in front of the two doors as required in CBC section 11B-404.2.4. The words "KEEP CLEAR" shall be painted on the striped path". **(B)**
28. Accessible parking for the people with disabilities shall be provided as per 2013 CBC, section 11B-208.1. **(B)**
29. Accessible parking spaces shall be dispersed and located closest to the accessible entrances as per 2013 CBC sec.11B-208.3.1. **(B)**
30. One in every six accessible parking spaces, but not less than one parking space, shall be van accessible as per 2013 CBC sec.11B-208.2.4. **(B)**
31. Curb ramps shall have detectable warnings extending 36 inches in the direction of travel as per 2013 CBC sec.11B-406.5.12 and sec.11B-705.1.2.2. **(B)**
32. All primary entrances and required exit doors shall be accessible to people with disabilities as per 2013 CBC, sec. 11B-206.4.1. **(B)**
33. Tactile exit signs shall be provided where exit signs as per 2013 CBC sec.1011.1 and provided as per 2013 CBC sec.1011.3. **(B)**

34. Sanitary facilities shall be fully accessible to people with disabilities as per 2013 CBC, sec. 11B-213.1. **(B)**
35. Provide maneuvering clearances at doors as per 2013 CBC, Sec. 11B-404.2.4. **(B)**
36. At least one accessible counter for each counter type shall be provided for the public and in general employee area. The minimum length for the counter must be 36 inches long and not more 34 inches high per 2013 CBC, Sec. 11B-904.4. **(B)**
37. Provide minimum aisle width per 2013 CBC section 11B-403.5.1 exception 4. Every aisle shall be 36 inches wide if serving one side and minimum of 44 inches wide if serving both sides. **(B)**
38. Each tenant shall be provided with separate electrical branch circuits disconnect system as per City Policy BDP-EL02. **(B)**

Fire Department Conditions

39. Premises Identification. New and existing building shall have approved address numbers, building numbers or approved building identification placed in a position that is legible and visible from the street fronting the property. These numbers shall contrast with their background. Address numbers shall be Arabic numerals or alphabet letters and shall be consistent with Milpitas standardize addressing guidelines. **(F)**
40. Portable fire extinguishers shall be selected, installed, and maintained in accordance with California Fire Code. **(F)**
41. Key Box. The Fire Code Official is authorized to require a key box to be installed in an approved location if necessary for life saving or fire-fighting purpose. When required, the Knox box location shall be at 6 feet above finished floor, or fire access walkway or road. **(F)**
42. No approval is granted for the use, storage, sales or handling of hazardous materials. **(F)**
43. Egress doors shall be readily openable from the egress side without the use of a key or special knowledge or effort. **(F)**
44. The Milpitas Fire department shall approve new installation and/or modifications to existing fire protection, alarm, or monitoring system(s). A separate submittal is required to the Milpitas Fire Department for review and approval prior to the commencement of any construction work. **(F)**

Engineering Department Land Development Section Conditions

45. This approval is based on the plans submitted by Permittee to the City showing no utility connections will be required within the City's property or right-of-way (right of way/easement). **(E)**

- 46. The improvement is limited to existing building footprint with no improvement in existing landscaping, parking lot, or otherwise. **(E)**
- 47. The property is in Flood Zone X (flood insurance not required). This is for information only. **(E)**

Police Department Conditions

- 48. Lighting should be sufficient to provide adequate illumination and to make clearly visible of the presence of any person during hours of darkness in front of the business and in the parking lot. **(PD)**
- 49. Prior to building permit final, the applicant shall install closed circuit video surveillance cameras within the business and video recordings shall be maintained for no less than one-month or 30 days. The resolution of the surveillance cameras shall be 720p or better. Surveillance recordings shall be made available at any time to the Police Department upon request. **Surveillance equipment shall be operable at all times, except for maintenance service by a qualified professional surveillance equipment technician for no more than two (2) days at any given time and no more than six (6) days within any 365 day period. (PD)**
- 50. Install signage clearly displaying the maximum occupancy of the establishment. **(PD)**
- 51. Install signage clearly displaying that California Law prohibits the sale of electronic cigarettes to persons under age of 18 years old. **(PD)**

- (P) = Planning
- (B) = Building
- (E) = Engineering
- (F) = Fire Prevention
- (CA) = City Attorney
- (PD) = Police Department