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**VIA EMAIL ONLY**

City of Fresno  
City Council  
2600 Fresno Street  
Fresno, CA 93721  
[REDACTED]  
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Re: ID 25-132: Comments on Text Amendment Application No. P23-03410  
Submitted on Behalf of the California Smoke Shops Association

Dear Councilmembers:

We have been retained by the California Smoke Shops Association ("CSSA") regarding Text Amendment Application No. P23-03410<sup>1</sup> and related Environmental Finding for Environmental Assessment No. P23-03410, which will amend Sections 15-2761 and 15-6802 of the Citywide Development Code relating to Tobacco and Vapor Sales, Smoke Shops, and Definitions (the "Proposed Amendment"). The Planning Commission recommended approval of the Proposed Amendment with modifications at a public hearing on February 19, 2025 at 6:00 p.m. (ID 25-160.) The Proposed Amendment is now set to be considered by Fresno City Council on February 27, 2025 at 9:15 a.m. (ID 25-132.)

We submit these comments on behalf of the CSSA and its members. As outlined below, we urge you to reject the Proposed Amendment.

**The Retroactive Application of the Proposed Amendment Would Lead to the Closure of Numerous Properly Licensed Smoke Shops and Impose Disparate Obligations on Those Remaining**

As you are aware, the Proposed Amendment will require new and existing smoke shops to obtain a Conditional Use Permit ("CUP") to continue operating their businesses. While we do not question the power of the City to enact ordinances that proactively alter the General Plan, the retroactive application of the Proposed Amendment exceeds the City's police and regulatory powers. Simply put, the City's proposed retroactive application of CEQA as a weapon would violate the rights of existing small business owners in the City.

An analysis of the practical impact of the retroactive application of the Proposed Ordinance demonstrates the problem. First, the Proposed Amendment would limit the number of available CUPs to seven smoke shops in each City Council District for a

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<sup>1</sup> In some contexts, the Proposed Amendment is also identified as Text Amendment Application No. P24-02419.

total of 49 smoke shops City-wide. Assuming (1) the accuracy of the City's PowerPoint Presentation, there are 82 licensed and permitted smoke shops currently operate in the City of Fresno, rather than the higher number indicated by other sources,<sup>2</sup> and (2) the City issues all 49 CUPs to existing smoke shops, then the Proposed Amendment would force 33 existing, properly licensed and permitted smoke shops to permanently shutter their doors. The casualties of this undirected and arbitrary exercise of City power would result in 33 business owners deprived of their investment-backed expectations in their existing business, their employees, and the families of both.

In addition, the Proposed Amendment imposes additional duties and requirements on smoke shops alone (as compared to others among the significantly greater number of purveyors of tobacco products) that bear no reasonable relation to the use of property for which the CUP is required, including landscaping, lighting, litter and graffiti management, as well as vending machine prohibitions, and requirements for video surveillance, signage, window glazing, loitering, and training. In each of these cases, the Proposed Amendment directly targets CSSA members while ignoring other businesses that sell tobacco products. Including, in the case of convenience stores, liquor stores and grocery stores, those that sell tobacco products and alcohol.

Supporters of the Proposed Amendment claim it is an exercise of the City's police power intended to eliminate unlicensed smoke shops, address other alleged unlawful activities and/or violations by some smoke shops, and other alleged activities purportedly attributed to third persons near smoke shops. But in so doing, the Proposed Amendment ignores other similarly situated businesses with similar potential problems. The Proposed Amendment would impose requirements, restrictions, and harsh penalties on smoke shops, but not other business that sell similar products (including alcohol) and attract similar customers, including but not limited to convenience stores, liquor stores, gas stations, and grocery stores. Additionally, the Proposed Amendment conveniently ignores cannabis dispensaries entirely, thereby (perhaps intentionally) giving those dispensaries an unfair economic advantage through drastically reduced competition. Indeed, the City acknowledges at least 472 licensed tobacco retailers who are expressly excluded from compliance under the Proposed

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<sup>2</sup> It certainly is less than clear whether the City actually knows the number of shops. However, City Attorney Andrew Janz indicated there have been over 100 raids on smoke shops in Fresno. Other estimates place the number of smoke shops in the City at 89, 119, 140, or more than 400. (See, e.g., Morris, Ben, *Ordinance limiting Fresno smoke shops heads to city council* (Feb. 20, 2025), YourCentralValley, <https://www.yourcentralvalley.com/news/local-news/ordinance-limiting-fresno-smoke-shops-heads-to-city-council/> [89 smoke shops]; Smith, Edward, *How Many Smoke Shops Is Too Many? Fresno Plan Would Allow Only 49* (Nov. 12, 2024), GVWire, <https://gvwire.com/2025/01/16/planning-commission-says-fresno-smoke-shop-plan-hurts-good-biz-owners-arias-says-pc-is-out-of-touch/> [400 smoke shops]; Hok, Soreath, *'Slippery slope' or needed regulation? Fresno eyes new rules for smoke shops* (Oct. 13, 2023), KVPR, <https://www.kvpr.org/local-news/2023-10-13/slippy-slope-or-needed-regulation-fresno-eyes-new-rules-for-smoke-shops> [119 smoke shops] (visited Feb. 25, 2025).)

Amendment. Though given the disparity with the City's other estimates, this number is likely even higher.

Given the impact of the Proposed Amendment, it is not surprising that its enactment and enforcement would violate one or more rights guaranteed in the United States and California Constitutions.

**Retroactive Application of the Proposed Amendment Would Deprive Numerous Smoke Shop Owners of their Rights without Due Process and in Violation of the Business Owners' Equal Protection Rights**

The Proposed Amendment implicates each licensed smoke shop owner's rights under the Fourteenth Amendment and the California Constitution. The Fourteenth Amendment of the United States Constitution prohibits States from depriving any person of life, liberty, or property without due process of law or from denying any person within its jurisdiction the equal protection of the laws. Likewise, the California Constitution prohibits the denial of equal protection. The concept of equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment.

Here, the Proposed Amendment treats similarly situated businesses and business properties differently. The Proposed Amendment deprives shop owners of their businesses without any individualized process at all. It does not seek to separate "bad actors" from "good actors" through any type of process. It does not afford a hearing. It simply eliminates businesses. Moreover, it does so by limiting the number of smoke shops per City Council District, without regard to how many legitimate shops are in each District.

Under the equal protection clause of the U.S. Constitution and California Constitution, if a law, ordinance, or regulation affects two or more similarly situated groups in unequal manners, such legislation must be rationally related to the realistically conceivable, legitimate legislative purpose. But instead of regulating the sale of tobacco for all businesses located within the City of Fresno, the Proposed Amendment arbitrarily targets smoke shops, which are only a small subset of the businesses that sell tobacco products. Owners of grocery stores, convenience stores, gas stations, liquor stores, and cannabis dispensaries are free to continue selling tobacco and tobacco paraphernalia without obtaining a CUP or complying with the conditions imposed for the issuance of a CUP. Smoke shops are singled out and precluded from continuing their business without first obtaining a CUP. Notably, there are not enough permits for all currently licensed and permitted smoke shops to secure approvals, resulting in forced closure of numerous smoke shops currently existing in the City of Fresno. Since the City of Fresno provides no rational basis for treating smoke shops differently from grocery stores, convenience stores, gas stations, liquor stores, cannabis dispensaries, and others who sell tobacco products, the Proposed Amendment violates the due process and equal protection clauses of the United States and California Constitutions.

**Retroactive Application of the Proposed Amendment Would Exact a Regulatory Taking of Numerous Smoke Shops Triggering Millions of Dollars in Compensation to the Affected Owners**

If the Proposed Amendment is not invalidated for violating the Fourteenth Amendment, it most certainly will implicate the Takings Clause of the United States Constitution. As discussed above, under the most optimistic estimate the Proposed Amendment would target and close 33—at minimum, and likely more—properly licensed, permitted, and operating smoke shops, depriving their owners (and employees) of the investment-backed expectations in their properly permitted and licensed businesses.

Under the Fifth Amendment, a regulatory taking is an unreasonable exercise of a public entity's police power that eliminates or diminishes the value of property or interferes with a person's investment-backed expectations without just compensation. If passed, the Proposed Amendment would invariably force numerous smoke shop businesses in the City to permanently close their doors because there simply are not enough CUPs available. As to those that remain open, the Proposed Amendment imposes various unreasonable operational requirements, including landscaping, lighting, litter and graffiti, vending machines, video surveillance, signage, window glazing, loitering, and training.

Put simply, the Proposed Amendment interferes with the investment-backed expectations of legally licensed and permitted smoke shops that currently comply with and satisfy State and local laws and regulations. Indeed, many law-abiding, licensed smoke shop owners will be forced to suspend operations indefinitely regardless of compliance with the broad requirements and restrictions in the Proposed Amendment. Certainly collectively, and in many cases, individually, these restrictions constitute a regulatory taking by depriving smoke shop business owners of their ability to continue operating their businesses. ***Such a taking requires the City of Fresno to pay each and every smoke shop owner just compensation.*** This just compensation would likely cost Fresno taxpayers tens of millions of dollars—if not hundreds of millions of dollars. In addition, the City will suffer millions of dollars in lost tax revenue per year from shuttered businesses and simultaneously experience significant increases in local unemployment from the displacement of hundreds of terminated employees following the amortization period in the Proposed Amendment.

Although the State (and by extension the City) does have an interest in regulating the tobacco industry, such interest is already achieved under current State laws and regulations. The Proposed Amendment does not achieve that interest; rather, it impermissibly favors a subset of tobacco retailers at the expense of others by impeding competition. The Proposed Amendment is therefore not reasonably necessary to effect that interest and serves only as an unjust taking.

**Retroactive Application of the Proposed Amendment Improperly Weaponizes CEQA Against Independent Business Owners Rather than Use it Properly as a Development Tool**


The primary purpose of CEQA is to inform decision makers and the public about the *potential*, significant effect of *proposed* projects, attempt to mitigate those impacts, reduce impacts and disclose the basis of approvals of projects. As the highlighted language makes clear, each of these goals is *prospective*. CEQA is intended to judge the future impacts of a project prior to the decision maker approving the project. The Proposed Amendment departs from these goals entirely. In so doing, it turns CEQA into a blunt instrument retroactively aimed at uses already approved under the General Plan and operating consistently with the plan. But CEQA is not a weapon against disapproved activities. It is properly used as tool to control potential development and mitigate environmental impacts.

Moreover, the proposed use of a CUP is improper. A CUP regulates land, not individuals. Conditions on approval must reasonably relate to the use of property for which the conditional use permit is requested. The Proposed Amendment is aimed at individual smoke shop owners – its goal it to put them out of business – rather than the land on which they run their businesses.

Finally, smoke shop owners have a vested right to continue using their property in conformance with existing rules and regulations. “The law recognizes a vested right to continue a use which existed at the time zoning regulations changed and the use thereafter became a nonconforming use.” If the Proposed Amendment is adopted, business owners’ existing, conforming uses will suddenly become “nonconforming” uses. Rather than using the permitting process to allow for business owners to continue their operations as previously conforming uses, the CUP requirements here are instead being weaponized to declare past conforming uses as nonconforming uses, which is an improper exercise of police power by the City.

We appreciate the opportunity to submit these comments and appreciate your consideration.

Very truly yours,

  
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