



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Christopher Burton

SUBJECT: See Below

DATE: October 6, 2025

Approved

Date:

10/10/2025

COUNCIL DISTRICT: Citywide

SUBJECT: Amendment to the San José Municipal Code to Prohibit the Sale and Distribution of Nitrous Oxide

RECOMMENDATION

Adopt an urgency ordinance:

- (a) Amending Title 6 of the San José Municipal Code to add a new Chapter 6.89 prohibiting the sale and distribution of nitrous oxide by smoke shops and other similar retail establishments marketing products for recreational use; and
- (b) Repealing Section 1.13.170 of Title 1 of the San José Municipal Code relating to limits on property owner responsibility for public nuisance.

SUMMARY AND OUTCOME

Approval of the urgency ordinance adding Chapter 6.89 to Title 6 (Business Licenses and Regulations) will carry out the Rules and Open Government Committee's direction on February 16, 2022¹ and close a loophole in existing state law by prohibiting the sale of nitrous oxide in smoke shops and other similar retail establishments. This action will reduce opportunities for recreational misuse, particularly by youth, align with medical and public health guidance, and safeguard the health, safety, and welfare of San José residents.

Approval of the repeal of Section 1.13.170 of Title 1 (Limit on property owner responsibility) will further strengthen enforcement by enabling the City to hold negligent property owners accountable when their tenants create public nuisances on their properties.

¹ <https://sanjose.legistar.com/View.ashx?M=A&ID=930970&GUID=A312835E-1802-454B-978E-33FA2F83E104>

BACKGROUND

Over the past several years, nitrous oxide (whippets) has emerged as a significant and largely unaddressed public health concern across the United States. Once considered a relatively obscure issue, recreational abuse of nitrous oxide has increased at alarming rates, particularly among teenagers and young adults. This trend accelerated during the COVID-19 pandemic,² with the *Journal of Clinical Pharmacology* describing nitrous oxide abuse as a global youth public health threat.³

Despite its legitimate uses in medical, dental, industrial, and culinary contexts, nitrous oxide is frequently diverted for recreational use due to its low cost and easy accessibility. California law prohibits sales for recreational purposes and imposes certain documentation and disclosure requirements on vendors. In practice, however, these safeguards have proven ineffective. Nitrous oxide is commonly available in smoke shops and other retail establishments that market recreational products, where it is sold with little regard for state requirements or the health risks posed by inhalation. The presence of nitrous oxide in these venues implicitly condones its misuse and normalizes the perception of nitrous oxide as a recreational drug.

Medical authorities have documented the serious health risks associated with recreational use of nitrous oxide, including asphyxiation, paralysis, permanent neurological damage, and even death. These dangers have prompted physicians, youth advocates, and conservationists to call on local governments to reassess nitrous oxide regulations. In San José, the issue is compounded by the environmental blight of discarded canisters littering neighborhoods and parks.

To address these risks, staff recommends City Council approval of an ordinance amending Title 6 of the San José Municipal Code to add a new Chapter 6.89, "Nitrous Oxide". The proposed Chapter would:

- Prohibit the retail sale, offer for sale, or distribution of nitrous oxide or nitrous oxide dispensing devices in smoke shops and similar retail establishments.
- Establish property owner liability for knowingly permitting such sales on their premises, with landlords and operators held jointly and severally liable.
- Provide limited exceptions for medical, dental, industrial, and culinary wholesale uses consistent with state law.

² Kaar et al. Up: The rise of nitrous oxide abuse. An international study of contemporary nitrous oxide use. *Journal of Psychopharmacology*, 30(4), 395-401.

³ Chien, W.H., Huang, M.C., & Chen, L.Y. (2020) Psychiatric and other medical manifestations of nitrous oxide abuse: Implications from case series. *Journal of Clinical Pharmacology*, 40(1), 80-83.

- Declare violations of the Chapter to be a public nuisance, subject to civil, administrative, and, where appropriate, criminal enforcement remedies.
- Make violations grounds for revocation of a Tobacco Retailer License or other City-issued registrations.

The ordinance also includes an urgency clause, allowing it to take effect immediately upon adoption to preserve public peace, health, and safety.

In conjunction with adoption of Chapter 6.89, staff recommends amending Title 1 of the San José Municipal Code to repeal Section 1.13.170, which creates a carve-out shielding property owners from liability for nuisance activity at their properties. The current provision conflicts with other provisions in Title 1, 6, 17, and 20 that holds property owners accountable for illegal acts. Its repeal will simplify the San José Municipal Code and ensure consistency, including the currently proposed Chapter 6.89.

Together, these amendments will close a critical regulatory gap, align City law with public health guidance, and reduce the accessibility and misuse of nitrous oxide in San José.

ANALYSIS

The City Attorney's Office, City Manager's Office, and City departments coordinated extensively on the above City Council directions. After significant research, evaluation, and coordination, it was jointly determined that the ordinance recommended and described herein best respond to City Council's direction.

Amend Title 6 to Add Chapter 6.89 – Nitrous Oxide

Prohibiting nitrous oxide sales in smoke shops will:

- Eliminate one of the primary retail sources for recreational misuse of nitrous oxide;
- Reinforce existing state law by removing the appearance that recreational use is permissible;
- Support the City's broader public health efforts, including its prior action banning flavored tobacco; and
- Provide a civil enforcement mechanism through suspension or revocation of tobacco retailer licenses, rather than criminal penalties, consistent with judicial precedent for substances with both legal and illegal uses.

Repeal of Section 1.13.170 of Title 1

San José Municipal Code Section 1.13.170 expressly exempts property owners from liability for administrative penalties when those penalties are imposed solely upon an occupant or other non-owner. However, this protection directly conflicts with provisions such as San José Municipal Code Chapter 17.02 (General Provisions – Abatement of Nuisance on Private Property), which imposes liability on property owners for nuisance conditions regardless of contracts with tenants or third parties. Additionally, Chapters 1.14 and 1.15 (Administrative Remedies and Citations), as well as nuisance-related provisions in Titles 6, 17, and 20, adopt a broader framework of joint or owner-specific liability, contradicting the shield provided in Section 1.13.170.

The repeal of San José Municipal Code Section 1.13.170 will increase accountability on property owners for public nuisance on their properties, and harmonize local law with the new Chapter 6.89.

Implementation and Enforcement Strategy

Upon adoption of the urgency ordinance, the Code Enforcement Division in the Planning, Building, and Code Enforcement Department will issue notification letters to all Tobacco Retail License holders and known smoke shop businesses, informing them of the new regulations.

During inspections, if a business is found to be engaged in the unlawful sale or possession of nitrous oxide whippets, the following actions will be taken.

- Licensed Tobacco Retailers: A Notice of Intended Decision to suspend or revoke the Tobacco Retail License will be issued. The case will also be referred to the City Attorney's Office for issuance of a Cease and Desist Order.
- Unlicensed or Unauthorized Businesses: Code Enforcement will issue a Compliance Order requiring the immediate cessation of whippet sales and possession. This will be followed by a Cease and Desist Order from the City Attorney's Office.

If a business continues to unlawfully sell or possess nitrous oxide whippets after receiving these notices, Code Enforcement will coordinate with the City Attorney's Office to pursue additional legal action. In cases where staff or public safety is a concern, Code Enforcement will coordinate with the Police Department to conduct investigations and take appropriate enforcement action.

EVALUATION AND FOLLOW-UP

Following adoption of the ordinance, Code Enforcement will coordinate with the City Attorney's Office and Police Department to carry out the Implementation and Enforcement Strategy described above. Code Enforcement will provide an update on enforcement of the ordinance through the Code Enforcement Annual Report to the Neighborhood Services and Education Committee in April 2026.

COST SUMMARY/IMPLICATIONS

The proposed ordinance is not anticipated to have significant fiscal impacts. Enforcement would occur through the existing tobacco retail license program and general code enforcement processes, including civil penalties and potential suspension or revocation of tobacco retailer licenses for noncompliant businesses.

COORDINATION

This memorandum has been coordinated with the City Attorney's Office and the City Manager's Budget Office.

PUBLIC OUTREACH

This memorandum will be posted on the City's Council Agenda website for the November 4, 2025 City Council meeting.

CEQA

Not a Project, File No. PP17-008, General Procedure and Policy Making resulting in no changes to the physical environment.

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PUBLIC SUBSIDY REPORTING

This item does not include a public subsidy as defined in section 53083 or 53083.1 of the California Government Code or the City's Open Government Resolution.

/s/

Chris Burton

Director, Planning, Building, and Code
Enforcement Department

For questions, please contact Rachel Roberts, Deputy Director, Planning, Building, and Code Enforcement Department, at rachel.roberts@sanJoseca.gov.