

DRAFT

ORDINANCE NO.

**AN URGENCY ORDINANCE OF THE CITY OF SAN JOSE
AMENDING TITLE 6 OF THE SAN JOSE 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 REPEALING SECTION
1.13.170 OF CHAPTER 1.13 OF TITLE 1 OF THE SAN
JOSE MUNICIPAL CODE RELATING TO LIMITS ON
PROPERTY OWNER RESPONSIBILITY FOR PUBLIC
NUISANCE**

WHEREAS, the City of San José (“City”) is authorized by the California Constitution, Article XI, Section 7 to make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws; and

WHEREAS, nitrous oxide is an odorless, colorless chemical that can be inhaled for legitimate purposes associated with medical or dental procedures in a clinical setting, and is legitimately used for industrial purposes and as a propellant for food products; and

WHEREAS, nitrous oxide is also misused and abused, in part, because it is easy to purchase from retail vendors and it is relatively inexpensive; and

WHEREAS, the City finds that recreational use of nitrous oxide has been identified by medical authorities as a serious and growing public health threat, particularly among youth, and that misuse of this substance can cause long-term physical injuries including asphyxiation, paralysis, neurological damage, and even death; and

WHEREAS, studies show that the abuse of nitrous oxide has increased nationwide in recent years, a trend accelerated since the COVID-19 pandemic, and that this increase has been especially pronounced among teenagers and young adults; and

WHEREAS, while state law prohibits the sale of nitrous oxide for recreational use, nitrous oxide remains readily available in smoke shops, which routinely and knowingly sell the product without the safeguards required by law, thereby undermining the effectiveness of state regulation and implicitly condoning recreational misuse; and

WHEREAS, the widespread commercial availability of nitrous oxide in smoke shops and other retail stores within the City both enables abuse and contributes to related harms, including dangerous driving, littering, and other negative impacts on public health, safety, and the environment; and

WHEREAS, the City does not currently regulate the retail sale of nitrous oxide, and finds that in the absence of such regulation, sales by vendors create a significant risk of misuse and abuse by individuals who purchase the product for recreational purposes; and

WHEREAS, the City desires to regulate the sale of nitrous oxide to close this loophole, reduce the availability of nitrous oxide for recreational use, and to preserve and protect the health, safety, and welfare of the residents of the City; and

WHEREAS, pursuant to Section 605 of the City Charter, this urgency ordinance must be “adopted as and declared by the Council to be an urgency measure necessary for the immediate preservation of the public peace, health or safety, containing a statement of the facts constituting such urgency,” and

WHEREAS, pursuant to the provisions and requirements of the California Environmental Quality Act of 1970, together with related State CEQA Guidelines and Title 21 of the San José Municipal Code (collectively, "CEQA"), the Director of Planning, Building and Code Enforcement has determined that the provisions of this Ordinance do not constitute a project, under File No. PP17-008 (General Procedure and Policy Making resulting in no changes to the physical environment); and

WHEREAS, the Council of the City of San José is the decision-making body for this Ordinance; and

WHEREAS, this Council has reviewed and considered the "not a project" determination under CEQA prior to taking any approval actions on this Ordinance;

NOW THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF SAN JOSE:

SECTION 1. A new Chapter is added to Title 6 of the San José Municipal Code, to be numbered, entitled and to read as follows:

CHAPTER 6.89
NITROUS OXIDE

Part 1
Purpose

6.89.010 Purpose

This Chapter is enacted pursuant to the City's police powers to protect the public health, safety, and welfare, consistent with state and federal law. The purpose of this Chapter is

to safeguard the community from the dangers associated with the recreational misuse of nitrous oxide, a substance that poses serious health risks when used as an intoxicant. By prohibiting the retail sale of nitrous oxide in smoke shops and similar establishments, the City seeks to reduce opportunities for abuse, reinforce state restrictions, and promote the overall well-being of the City's residents.

Part 2

Definitions

6.89.201 Definitions and Construction

The definitions set forth in this Part shall govern the application and interpretation of this Chapter.

6.89.202 Device

“Device” means any cartridge, compressed gas cylinder, apparatus, container, balloon, attachment, nozzle, or other object used to contain, dispense or administer nitrous oxide.

6.89.203 Nitrous Oxide

“Nitrous oxide” means the colorless, nonflammable gas sometimes identified as N₂O, which is sometimes used in aerosols and as an anesthetic, which, when inhaled, produces loss of sensibility to pain, oftentimes preceded by exhilaration and laughter. It is used often as an anesthetic in dentistry. Nitrous oxide is often commonly called or referred to as “laughing gas,” “NOX,” “galaxy gas,” “whippits,” among others.

6.89.204 Person

“Person” shall have the definition given in Section 1.04.020 of this Code.

6.89.205 Wholesale Capacity

“Wholesale capacity” means the sale of or distribution of nitrous oxide or a device to dispense nitrous oxide to a person that will use nitrous oxide or the device in service or products for resale. Examples include, but are not limited to, commercial sale of dentistry supplies to dentists or dentistry offices, commercial sale of devices for the use in food production or in a commercial kitchen, and/or commercial sale of nitrous oxide for the purpose of producing food products for commercial sale (e.g., whipped cream canisters).

Part 3

Prohibition on Sale or Distribution

6.89.301 Prohibition on Sale or Distribution of Nitrous Oxide

- A. Except as otherwise explicitly authorized by law or allowed under this Chapter, it shall be unlawful for any person to attempt to sell, offer, distribute, or otherwise provide to any person nitrous oxide, a device to dispense or administer nitrous oxide, or any device that contains any quantity of nitrous oxide.
- B. It shall be unlawful for any property owner, landlord, lessor, or person in control of real property to knowingly permit the sale, offer for sale, or distribution of nitrous oxide in violation of this Chapter on any premises owned, leased, or controlled by that person. Any such property owner, landlord, lessor, or person in control of real property shall be jointly and severally liable with the business operator for violations of this Chapter occurring on the premises.

Part 4
Exceptions

6.89.401 Exceptions to Prohibition

The prohibitions in this chapter shall not apply to the following:

- A. A pharmacist, pharmacist intern, or pharmacy as defined by California Business and Professions Code Sections 4030, 4036, and 4037, as may be amended, who dispenses the device in the course of their duties as a pharmacist or pharmacist intern, or wholesalers licensed by the Board of Pharmacy or manufacturers classified under the North American Industry Classification System pursuant to California Penal Code Section 381e, as may be amended, who dispense the device in the course of their duties.
- B. A health care professional licensed in California who possesses and dispenses nitrous oxide in the course of medical or dental treatment.
- C. Any person who is under the influence of nitrous oxide or any material containing nitrous oxide duly received pursuant to exception A or B above.
- D. Any person who sells, attempts to sell, offers, or distributes nitrous oxide in a wholesale capacity. This exemption only applies if the wholesaler does not know or have reason to know that the recipient intends to use the nitrous oxide or device in violation of Section 6.89.301.
- E. Any person who possesses or distributes nitrous oxide under an express exemption pursuant to California Penal Code Sections 381b-e.

6.89.402 Documentation Requirements

Any sales or distribution of nitrous oxide contemplated under this Chapter shall comply with all documentation requirements set forth in California Penal Code Section 381e.

Part 5

Public Nuisance

6.89.501 Public Nuisance

Any violation of this Chapter is hereby declared a public nuisance, subject to all applicable civil, administrative, and criminal remedies and penalties according to the provisions and procedures contained in this Code and state law, including, but not limited to, an action for abatement or injunctive relief. All remedies provided herein shall be cumulative and not exclusive.

Part 6

Violations and Penalties

6.89.601 Violations and Penalties

A. Any violation of this Chapter shall be a misdemeanor and, upon conviction thereof, punishable by county jail or by a fine of \$1,000, or both. Every day such violation continues shall constitute a separate offense.

B. A violation of this Chapter is grounds for revocation of a Tobacco Retailer License in accordance with Section 6.87.455 of Chapter 6.87 of this Code.

C. A violation of this Chapter is grounds for revocation of a Notice of Completed Registration under Section 6.88.350 of Chapter 6.88 of this Code, if applicable.

D. This Chapter shall not be interpreted to limit the applicable civil or administrative remedies available under law. All available enforcement procedures and remedies remain applicable including, but not limited to, administrative fines set forth in Chapter 1.15 of this Code or other applicable law.

SECTION 2. Section 1.13.170 of Chapter 1.13 of Title 1 of the San José Municipal Code is hereby repealed.

1.13.170 Limit On Property Owner Responsibility

~~The owner of a subject property upon which the board has found that a public nuisance has occurred or recurred shall not be responsible for the payment of administrative penalties or administrative costs, or interest accrued on those amounts, imposed by the board solely upon an occupant or other person who is not the property owner.~~

SECTION 3. The City Council hereby finds that there is a current and immediate threat to the public health, safety and/or welfare and a need for immediate preservation of the public peace, health, or safety that warrants this urgency measure. The facts constituting the urgency are as follows: The City Council finds that medical authorities have linked the recreational use of nitrous oxide to serious health problems which can cause physical illness, mental illness, injury, and/or even death, and whereas the sale and distribution of nitrous oxide can be harmful to the public, health, safety and welfare. Eliminating the possession, sales, and distribution of nitrous oxide in the City will reduce the number of persons in possession and use of nitrous oxide as an intoxicating drug and will promote public health, safety, and welfare.

SECTION 4. This Ordinance is declared by the City Council to be an urgency measure necessary for the immediate preservation of the public peace, health or safety. The facts constituting such urgency are all of those certain facts set forth in Section 3 of this Ordinance.

SECTION 5. This Ordinance shall become effective immediately upon its adoption pursuant to Section 605 of the Charter of the City of San José and shall remain effective until the effective date of any superseding ordinance.

ADOPTED this _____ day of _____, 2025, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

MATT MAHAN
Mayor

ATTEST:

TONI J. TABER, MMC
City Clerk