



CITY OF SALINAS COUNCIL STAFF REPORT

DATE: JANUARY 21, 2020

DEPARTMENT: SALINAS CITY COUNCIL

FROM: CHRISTOPHER A. CALLIHAN, CITY ATTORNEY

TITLE: AN ORDINANCE RESTRICTING THE SALE OF ELECTRONIC CIGARETTE PRODUCTS AND FLAVORED TOBACCO PRODUCTS

RECOMMENDATION MOTION:

A motion to adopt an ordinance amending Article XI of Chapter 16 of the Salinas Municipal Code to restrict the sale of electronic cigarette products and flavored tobacco products.

RECOMMENDATION:

It is recommended that the City Council adopt the proposed ordinance.

EXECUTIVE SUMMARY:

The city of Salinas recently joined the Blue Zones Project, a community-wide well-being improvement initiative supported by the Salinas Valley Memorial Healthcare System, Montage Health, and Taylor Farms. The Blue Zones Project encourages changes in the community that lead to healthier options with a goal of lowered healthcare costs, improved productivity, and a higher quality of life.¹

As a part of the City's participation in the Blue Zones Project, the Mayor and Council member De La Rosa, working with Kendra Howell, Sr. Policy Lead for the Blue Zones Project Monterey County and Government Affairs Manager for the Salinas Valley Memorial Healthcare System, requested that an ordinance be prepared to restrict the sale and electronic cigarettes and flavored tobacco products in Salinas. Citing the negative health consequences and the increasing rates of tobacco use among youth as a result of electronic cigarettes and flavored tobacco, as well as the

¹ montereyocounty.bluezonesproject.com

City's commitment to the Blue Zones Project and its desired outcomes, the proposed ordinance restricts the sale of both electronic cigarette products and flavored tobacco products in Salinas.

DISCUSSION:

Electronic Cigarettes (e-cigarettes)

Vapes, vaporizers, vape pens, hookah pens, electronic cigarettes (e-cigarettes or e-cigs) and e-pipes are some of the many terms used to describe electronic nicotine delivery systems (ENDS). These items are collectively and generally referred to in this Report as e-cigarettes. These products use an "e-liquid" that may contain nicotine, as well as varying compositions of flavorings and other ingredients. The liquid is heated to create an aerosol that the user inhales. e-cigarettes may be manufactured to look like conventional cigarettes, cigars, or pipes. Some resemble pens or USB flash drives. Larger devices may resemble cell phones and bear no little or no resemblance to cigarettes.

According to the 2019 National Youth Tobacco Survey of the United States Food and Drug Administration (FDA), e-cigarettes have become the top choice among youth with over 5 million currently (within the past 30 days) using e-cigarettes, compared to over 3.6 million in 2018. Nearly 1 million youth reported using e-cigarettes daily, with about 1.6 million youth using the product frequently (on 20 or more days per month). Between 2011 and 2019, e-cigarette use among high school students rose 27.5% and among middle school students rose 10.5%, while cigarette use among high school students decreased by 5.8% and among middle school students by 2.3% over that same time period.² The use of e-cigarettes, particularly those with high levels of nicotine, place youth at risk for developing nicotine addiction. Nicotine exposure during adolescence could harm brain development. Additionally, youth who use e-cigarettes are more likely to start smoking cigarettes. Further, e-cigarette aerosol may expose users to other harmful substances such as heavy metals, volatile organic compounds, and ultrafine particle that could harm the lungs.³

The FDA is required by the Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act) to regulate the manufacture, distribution, and marketing of tobacco products. Among the FDA's responsibilities under the Tobacco Control Act is to premarket review all "new tobacco products." New tobacco products are defined in Section 910a of the Tobacco Control Act as "any tobacco product (including those products in test markets) that was not commercially marketed in the United States as of February 15, 2007." Almost all e-cigarettes that are sold today entered the

² Youth Tobacco Use: Results from the National Youth Tobacco Survey. United States Food and Drug Administration. <https://www.fda.gov/tobacco-products/youth-and-tobacco/youth-tobacco-use-results-national-youth-tobacco-survey>

³ Id.

market after 2007 and are thereby subject to premarket review by the FDA, though they have not been reviewed by the FDA to determine if they are appropriate for public health.⁴ The FDA has, in fact, stated that it “has not banned any class of tobacco products, including e-cigarettes [and they] expect that many products will remain on the market while manufacturers apply for authorization to market their products.”⁵

In California, individuals must be at least 21 years of age to buy tobacco products (including vaping devices).⁶ E-cigarettes are covered under California’s smokefree laws, meaning like traditional tobacco products, e-cigarettes are prohibited in many spaces including workplaces, restaurants, bars, and movie theaters.

The proposed ordinance prohibits the sale of e-cigarettes within the city of Salinas. The prohibition includes the use of e-cigarettes for smoking marijuana. Among the illnesses reported from the use of e-cigarettes, neither the CDC nor the FDA have found a device, product, or substance that is linked to all cases.⁷ However, a paper published by the New England Journal of Medicine suggest that many sick individuals vaped THC, a compound in marijuana, before developing an illness, either instead of or in addition to nicotine.⁸ CDC and public-health officials confirmed this finding.⁹ Some of the health concerns stem from the presence of an additive—vitamin E acetate—an unauthorized additive in some marijuana vaping pods. The FDA does not regulate THC vaping products because marijuana is illegal under federal law. California, however, regulates marijuana and restricts sales from licensed dispensaries to only tested, regulated products. There may be a concern that patients in need of medical cannabis who e-cigarettes as their preferred means of ingesting medical cannabis as the proposed ordinance would restrict all sales of e-cigarettes. The proposed ordinance regulates the sale of e-cigarettes and not the possession of e-cigarettes and regulates tobacco products not cannabis products, so the City Council could exempt licensed and permitted dispensaries from the restrictions, however, as the premises for the proposed ordinance

⁴ “To date, no ENDS products have been authorized by the FDA—meaning that all ENDS products currently on the market are considered illegally marketed and are subject to enforcement, at any time, in the FDA’s discretion.” Enforcement Priorities for Electronic Nicotine Delivery Systems (ENDS) and Other Deemed Products on the Market Without Premarket Authorization. January 2020. <https://www.fda.gov/media/133880/download>

⁵ Commonly Asked Questions: About the Center for Tobacco Products. <https://www.fda.gov/tobacco-products/about-center-tobacco-products-ctp/commonly-asked-questions-about-center-tobacco-products#4>

⁶ Stop Tobacco Access to Kids Enforcement (STAKE) Act. California Business and Professions Code section 22950, et seq.

⁷ Is Vaping Marijuana Safe? Death and Lung Disease Linked to E-Cigs Call that Into Question. Ducharme, Jamie. Time Magazine September 6, 2019. <https://time.com/5670147/vaping-marijuana-lung-disease/>

⁸ Vaping-Induced Lung Injury. Christiani, David. C., M.D., M.P.H. The New England Journal of Medicine, September 6, 2019. DOI: 10.1056/NEJMe1912032 <https://www.nejm.org/doi/full/10.1056/NEJMe1912032>

⁹ Ducharme, Jamie.

include the health risks associated with e-cigarettes and the attractiveness of e-cigarettes to youth, the City Council should be mindful of creating exceptions to the restrictions.

Flavored Tobacco

The FDA has established enforcement priorities for some flavored tobacco products which do not have FDA premarket authorization.¹⁰ The FDA's action is limited and is focused on mint-, fruit-, and dessert-flavored e-cigarette cartridges popular with teenagers, but allows menthol and tobacco flavors to remain on the market. Flavored nicotine used in open tank systems can continue to be sold, however. Specifically, the FDA has indicated that it intends to prioritize enforcement against the following groups of products: any flavored, cartridge-based ENDS product (other than tobacco- or menthol-flavored ENDS product; all other ENDS products for which the manufacturer has failed to take (or is failing to take) adequate measures to prevent minors' access; and any ENDS product that is targeted to minors or likely to promise use of ENDS by minors.¹¹

State legislation has been proposed (Senate Bill 793) to prohibit flavored products not covered by a recent federal ban, including menthol flavored cartridges and refillable, tank-based vaping systems that can be filled with flavored chemicals. SB 793 would also outlaw flavors for traditional combustible cigarettes and cigars, as well as chewing tobacco and hookah pipes. Given that the State Legislature will not act on this proposed legislation in the near term, the proposed ordinance includes a prohibition on the sale of flavored tobacco and tobacco products.

The proposed ordinance prohibits the sale of all flavored tobacco and flavored tobacco products within the city of Salinas, regardless of the delivery system.

The proposed ordinance also contains various, minor amendments intended to modernize existing provisions of this Article of the Municipal Code.

Minors in Possession of Tobacco and Tobacco Products

Current State law criminalizes the act of selling or giving tobacco or tobacco products to minors, not minors' possession of it. This means that persons under 21 years of age cannot be fined, jailed, or otherwise punished for having tobacco or tobacco products (including e-cigarettes), unless they violate another law such as smoking in a movie theater. Council member Davis has requested the City Council consider an ordinance to criminalize minors' possession of tobacco or tobacco

¹⁰ Enforcement Priorities for Electronic Nicotine Delivery Systems (ENDS) and Other Deemed Products on the Market Without Premarket Authorization. January 2020. <https://www.fda.gov/media/133880/download>

¹¹ Id.

products. That issue is beyond the scope of this proposed ordinance. The City Attorney will research the legality of such an ordinance and will report back to the City Council on that issue.

CEQA CONSIDERATION:

The adoption of this proposed ordinance is not a project pursuant to CEQA Guidelines Section 15378(b)(2) which provides that a project does not include general policy and procedure making. The adoption of this proposed ordinance is also not a project pursuant to CEQA Guidelines Section 15378(b)(5) which provides that a project does not include organizational and administrative action of government which will not result in direct or indirect physical changes in the environment.

In the alternative, if the adoption of this proposed ordinance is considered a project, it is subject to exemption. It can be seen with certainty that there is no possibility that the adoption of this ordinance may have a significant effect on the environment and therefore the adoption of this ordinance is exempt from environmental review under the California Environmental Quality Act (CEQA) because CEQA applies only to projects which have the potential for causing a significant effect on the environment [CEQA Guidelines Section 15061(b)(3)].

STRATEGIC PLAN INITIATIVE:

The adoption of the proposed ordinance is consistent with the City Council's goal of promoting a high Quality of Life and promoting a Safe, Livable Community.

FISCAL AND SUSTAINABILITY IMPACT:

The City Council's adoption of the proposed ordinance is not expected to have an impact on the City's General Fund, or the Measure E or Measure G Funds.

DEPARTMENTAL COORDINATION

The City Attorney's Office did not coordinate with other City departments in the preparation of the proposed ordinance; however, the City Attorney's Office coordinated the presentation of this proposed ordinance with the Blue Zones Project and with the County of Monterey. The City Attorney's Office contacted the Salinas Union High District regarding the proposed ordinance.

ATTACHMENTS:

Ordinance