

ORDINANCE 2018-006

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF SAN PABLO AMENDING CHAPTER 5.06 OF THE SAN PABLO MUNICIPAL CODE RELATING TO THE CITY WIDE PROHIBITION OF THE SALES OF FLAVORED TOBACCO INCLUDING MENTHOL AND E-CIGARETTES; ESTABLISHING A MINIMUM PACK SIZE FOR CIGARS, CIGARILLOS AND LITTLE CIGARS; AND ESTABLISHING A MINIMUM PRICE FOR CIGARS

The City Council of the City of San Pablo does ordain as follows:

Section 1. The City Council makes the following findings, pursuant to Section 5.06 of the San Pablo Municipal Code:

- A. This ordinance was initiated by City of San Pablo staff in response to the City Council's adopted policy or program under the FY 2018-21 Council Priority Workplan to "reduce promotion of unhealthy tobacco products to youth, such as prohibiting the sale of flavored tobacco products, and the number of stores that seek these products near San Pablo schools."
- B. A duly noticed meeting was held by the City Council on November 5, 2018, to consider this amendment to the Title 5, Licensure of Tobacco Products, of the Municipal Code of the City of San Pablo with all licensed tobacco retailers receiving notice of the proposed ordinance.
- C. As further described in the City Council staff report accompanying this Ordinance, the Ordinance is consistent with the City of San Pablo General Plan, and meets the intent of the following policies in that reducing access to tobacco products addresses the need to protect the public health of the youth of San Pablo:

Policy HEA – G-4: Promote health equity in San Pablo, including equal access to health facilities, goods, services, and economic and educational opportunities, helping to ensure wellbeing for resident of all ages, abilities, and incomes.

Policy HEA – I-23: Collaborate with Contra Costa Health Services to monitor and maintain data related to San Pablo health outcomes and risk factors, and to use these data to inform new County and City programs to serve the San Pablo community.

Policy HEA –I-37: Continue community policing and relationship building programs, include educational and mentoring initiatives with schools.

- D. As further described in the City Council staff report accompanying this Ordinance, data from the State Board of Equalization shows that San Pablo has between 30 and 50 tobacco retailers, and 28 tobacco retailers are within 1000 feet of a public school. The Health Element within the General Plan focuses on the relationship between community health and wellness outcomes and the built, natural, and social environments. Preventing San Pablo youth from being exposed and having

access to tobacco products will reinforce the purpose of the City's Health Element, and work to benefit the lives of the youth of San Pablo by preventing access to tobacco.

- E. Public health journals and the U.S. Department of Health and Human Services have found that mentholated and flavored products have been shown to be "starter" products for youth who begin using tobacco and that these products mask the harsh taste of tobacco and help establish tobacco habits that can lead to long-term addiction, with 70% of middle school and high school students who currently use tobacco, reporting their use of flavored products that taste like menthol, alcohol, candy, fruit, chocolate, or other sweets. Data from the National Youth Tobacco Survey indicate that more than two-fifths of U.S. middle school and high school smokers report using flavored little cigars or flavored cigarettes. The Centers for Disease Control and Prevention has reported a more than 800% increase in electronic cigarette use among middle school and high school students between 2011 and 2015.

Nicotine solutions, which are consumed via electronic smoking devices such as electronic cigarettes, are sold in dozens of flavors that appeal to youth, such as cotton candy and bubble gum. The California Attorney General has stated that electronic cigarette companies have targeted minors with fruit-flavored products.

A Substance Abuse and Mental Health Services Administration report on the use of menthol cigarettes in 2009 found that people ages 12 and older from communities of color are more likely to smoke mentholated cigarettes, as evidenced by the following percentages of people who smoke cigarettes reported smoking mentholated cigarettes in the prior month:

- 82.6% of Black or African American individuals;
- 53.2% of Native Hawaiians or Other Pacific Islanders;
- 36.9% of individuals with multiracial backgrounds;
- 32.3% of Hispanic or Latino individuals;
- 31.2% of Asian individuals;
- 24.8% of American Indians or Alaska Natives; and
- 23.8% of White or Caucasian individuals; and

Scientific reviews by the Tobacco Products Scientific Advisory Committee (TPSAC) and the FDA found marketing of menthol cigarettes likely increases the prevalence of smoking among the entire population, and especially among youth, African Americans, and possibly Hispanic and Latino individuals. As a multi-cultural community, San Pablo is particularly concerned with these statistics.

An evaluation of New York City's law, which prohibits the sale of all flavored tobacco, excluding menthol, found that as a result of the law, youth had 37% lower odds of ever trying flavored tobacco products and 28% lower odds of ever using any type of tobacco.

- F. According to an American Journal of Health article in 2011 and other scientific journals, between 1995 and 2008, sales of little cigars increased by 316%. Between 2008 and 2015, sales of flavored cigars increased by nearly 50% and in 2015, made up more than half of all cigar sales. A 2013–2014 survey by the American Academy of Pediatrics, American Cancer Society Cancer Action Network, American Heart Association, American Stroke Association and American Lung Association found that “80.8 percent of 12-17 year olds who had ever used a tobacco product initiated tobacco use with a flavored product.” In 2014, nearly two-thirds of U.S. middle school and high school cigar smokers reported using flavored cigars, and more than 1.5 million students reported using a flavored e-cigarette within the past 30 days. Additionally, while federal law prohibits the sale of most flavored cigarettes and individual cigarettes, these types of sales are not prohibited for other tobacco products. Thus, many retailers currently sell flavored cigars, little cigars, and cigarillos individually, making them more affordable to youth.

According to the United States Surgeon General, the link between the price of tobacco products and consumption is well established, especially among youth. When tobacco products cost more, fewer people use tobacco because fewer start and more quit. In fact, it is estimated that a 20% price increase on a pack of cigarettes reduces demand by 10.4%, decreases the prevalence of adult tobacco use by 3.6%, and decreases initiation of tobacco use among young people by 8.6%. There is also sufficient evidence that increases in the price of non-cigarette tobacco products reduces consumption for those products and that unequal price increases across products can lead to substitution from one product to another.

Though generally similar to cigarette smoke, cigar smoke contains higher levels of harmful constituents including tobacco-specific nitrosamines (TSNAs), NNK, Carbon monoxide (CO), Ammonia, and Tar.

Secondhand cigar smoke contains dangerous compounds and chemicals that pose significant health problems to cigar smokers and non-smokers. Cigar smoke contains higher concentrations of toxic and carcinogenic compounds than cigarette smoke.

- G. The Ordinance is consistent with federal law and California Business and Professions Code sections 22950 – 22964, and 22971.7 - 22974:

The proposed ordinance, to prohibit the sale of flavored tobacco products citywide (including menthol and e-cigarettes) in order to reduce the promotion of unhealthy tobacco products to youth, is consistent with the language in Sections 22950-22964 of the state Business and Professions Code regarding the limitation of tobacco products or electronic smoking devices to persons under the age of 21 years. Additionally, the proposed citywide prohibition of flavored tobacco products (including menthol and e-cigarettes) is consistent with the language in Sections 22971.1 – 22991 regarding the licensing of tobacco products. The City seeks to ensure compliance with State laws relating to tobacco retailing and discourage

violations of tobacco-related laws, particularly those that prohibit the sale or distribution of smoking and tobacco products to minors.

The federal Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act, 21 USC section 387(g)(a)(1)(A)), enacted in 2009, prohibited candy- and fruit-flavored cigarettes, largely because these flavored products were marketed to youth and young adults, and younger smokers were more likely than older smokers to have tried these products, as documented in public health journals and the U.S. Department of Health and Human Services reports.

- H. Pursuant to the California Environmental Quality Act, the proposed ordinance is categorically exempt based on Section 15321, Enforcement Actions by Regulatory Agencies. Class 21 consists of: (a) Actions by regulatory agencies to enforce or revoke a lease, permit, license, certificate, or other entitlement for use issued, adopted, or prescribed by the regulatory agency or enforcement of a law, general rule, standard, or objective, administered or adopted by the regulatory agency. Additionally, Section 15268(b)(2), Ministerial Projects, also applies, as the issuance of a business license is seen as a ministerial act by a City.
- I. The proposed ordinance prohibits the citywide sale of flavored tobacco products (including menthol and e-cigarettes) and regulates the pack size of cigars, little cigars and cigarillos in order to reduce the promotion of unhealthy tobacco products to youth. The City still retains its ability to issue business licenses for existing smoke shops within San Pablo. A local licensing system for tobacco retailers is an effective means to ensure that retailers comply with existing tobacco and smoking control laws in order to protect the public health, safety, and welfare.

Section 2. Section 5.06.010, “Definitions,” of Chapter 5.06, “Licensure of Tobacco Retailers,” of the San Pablo Municipal Code is amended **to add** the following definitions:

“Electronic Smoking device” means an electronic device which can be used to deliver an inhaled dose of flavored tobacco, nicotine or other substance, including any component, part or accessory of such a device, whether or not sold separately.” “Electronic Smoking Device” includes any such device, whether manufactured, distributed, marketed, or sold as an electronic cigarette, an electronic cigar, an electronic cigarillo, an electronic pipe, an electronic hookah, or any other product name or descriptor.

Flavored Tobacco Product means any tobacco product that imparts a taste or aroma, other than the taste or aroma of tobacco, imparted either prior to or during consumption of a tobacco product or any byproduct produced by the tobacco product, including, but not limited to, tastes or aromas relating to menthol, mint, wintergreen, fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb, or spice (“characterizing flavor”). There shall be a rebuttable presumption that a tobacco product is a flavored tobacco product if a tobacco retailer, manufacturer, or any employee or agent of a tobacco retailer or manufacturer has:

- (1) made a public statement or claim that the tobacco product imparts a characterizing flavor;
- (2) used text and/or images on the tobacco product's labeling or packaging to explicitly or implicitly indicate that the tobacco product imparts a characterizing flavor; or
- (3) taken action directed to consumers that would be reasonably expected to cause consumers to believe the tobacco product imparts a characterizing flavor.

[Except as set forth below, all other provisions of this section remain the same]

Section 3. Section 5.06.010, "Definitions," of Chapter 5.06, "Licensure of Tobacco Retailers," of the San Pablo Municipal Code is amended **to amend** the following definitions:

"Department" means the Community and Economic Development Department of the City of San Pablo as to the issuance of tobacco retailer license and that department or other enforcing department pursuant to Section 5.06.080.

"Tobacco product" means any substance containing, made, or derived from tobacco or nicotine that is intended for human consumption, whether smoked, heated, chewed, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means, including but not limited to cigarettes, cigars, little cigars, pipe tobacco, snuff, chewing tobacco, dipping tobacco, bidis, flavored tobacco or any other preparation of tobacco.

"Tobacco retailer" means any person who sells, offers for sale, or does or offers to exchange for any form of consideration, tobacco, tobacco products, flavored tobacco products, including menthol tobacco, tobacco paraphernalia or electronic smoking device. "Tobacco retailing" means the doing of any of these things. This definition is without regard to the quantity of tobacco, tobacco products, or tobacco paraphernalia sold, offered for sale, exchanged, or offered for exchange. Tobacco retailer includes any of the tobacco retailer's agents or employees.

[Except as set forth above, all other provisions of this section remain the same]

Section 4. Section 5.06.020, Requirement for tobacco retailer license, of the San Pablo Municipal Code is amended **to add** the following language:

5.06.020, Requirement for tobacco retailer license; flavored tobacco sale restrictions.

...

D. Sale of flavored tobacco products prohibited. No tobacco retailer shall sell any flavored tobacco product.

E. Minimum pack size. The following shall be the minimum pack size for the sale of cigars, cigarillos, and little cigars:

1. Cigars – a minimum pack of six (6);
2. Cigarillos – a minimum pack of twenty-five (25); and
3. Little cigars – a minimum pack of twenty (20).

F. Minimum Cost per cigar: \$10.00.

[all other provisions of this section remain the same]

Section 5. Severability. If any sections, subsections, sentences, clauses, phrases or portions of this ordinance are for any reason held invalid or unconstitutional, such decision shall not affect the validity of the remaining portions of this ordinance. The City Council hereby declares that it would have passed this and each section, subsection, phrase or clause of this ordinance whether or not any one or more sections, subsections, phrases or clauses may be declared invalid or unconstitutional on their face or as applied.

Section 6. Effective Date. This ordinance shall become effective ninety (90) days following its adoption. This additional period of time before enforcement provides a sufficient amortization period to allow a lawfully operating tobacco retailer to sell, return to the distributor or wholesaler, or otherwise obtain the benefit of, property that can no longer be sold within the City of San Pablo by virtue of this ordinance.

Section 8. Publication. The City Clerk’s Office shall publish and post the ordinance in accordance with California Government Code section 36933.

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First read at a regular meeting of the City Council of the City of San Pablo on November 5, 2018, and finally passed and adopted at a regular meeting of said City Council held on December 17, 2018 by the following vote:

AYES:	COUNCILMEMBERS:	Valdez, Pabon-Alvarado & Xavier
NOES:	COUNCILMEMBERS:	Kinney
ABSENT:	COUNCILMEMBERS:	Cruz
ABSTAIN:	COUNCILMEMBERS:	None

ATTEST:

APPROVED:

/s/ Patricia Ponce
Patricia Ponce, City Clerk

/s/ Rich Kinney
Rich Kinney, Mayor