

Legislation Text

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DATE OF MEETING: 11/05/18

SUBJECT:

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 CITYWIDE 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 OF \$10 PER CIGAR

CITY MANAGER RECOMMENDATION

Waive first reading; introduce Ordinance

COMPLIANCE STATEMENTS

FY 2018-2021 Council Priority Workplan Compliance Statement

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 is an adopted policy or program under the FY 2018-21 Council Priority Workplan, effective November 1, 2017, and as adopted by the City Council by Resolution 2018-024 on February 20, 2018.

CEQA Compliance Statement

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.

BACKGROUND

The issue of regulating the sale of flavored tobacco citywide began in early 2018, when at its February 20, 2018 regular meeting, the San Pablo City Council adopted Resolution 2018-024 which added the following policy to the FY 2018-2021 Council Priority Workplan:

POLICY AREA: SERVICES FOR FAMILIES, SENIORS AND YOUTH

Add: Policy 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.

At its March 19, 2018 meeting, the City Council heard a presentation by the Bay Area Community Resources (BACR) that provided an overview of the health and safety dangers of flavored tobacco products being sold to youth at retail establishments in close proximity to San Pablo schools. Several

speakers also addressed the Council endorsing a ban on the sale of flavored tobacco within the City of San Pablo. One speaker spoke against this issue. One advocacy group, the American Petroleum and Convenience Store Association (APCA), submitted a letter discussing the financial impact to a local gas station in El Sobrante with the passage of a flavored tobacco ban in unincorporated Contra Costa County. This advocacy group suggested working with local retailers prior to the introduction of any flavored tobacco ban in San Pablo.

At this March 19, 2018 meeting, the City Council unanimously authorized and directed staff to explore further policies to protect local youth from unhealthy flavored tobacco products such as prohibiting the sale of flavored tobacco products and the number of stores that seek these products near San Pablo Schools.

According to the State Board of Equalization, San Pablo has between 30 and 50 tobacco retailers, and 28 tobacco retailers are within 1000 feet of a public school (see Attachment A). 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 flavored tobacco.

Staff from the Planning Division of the Community and Economic Development Department ("Planning staff") researched the issue of how other local municipalities -San Francisco, Oakland, Berkeley, Richmond, Hayward, El Cerrito, Sonoma, and the County of Contra Costa - are addressing the sale of flavored tobacco. Additionally, City staff met with different stakeholders, as well as the San Pablo Police Department, to understand the concerns on this issue. All of the municipalities listed above have prohibitions on the sales of flavored tobacco, with several establishing location specific regulations addressing the sale of flavored tobacco adjacent to schools (the cities of Berkeley, Hayward, and Richmond). The County of Contra Costa also limits the number of tobacco retailer's license to a maximum of 90 within unincorporated Contra Costa County. Planning staff brought its research on the issue of restricting the sale flavored tobacco in San Pablo to the Public Safety Council Standing Committee on July 31, 2018. The Standing Committee endorsed the option to consider a citywide ban and directed staff to bring this to the City Council for further input and discussion.

Planning staff provided three approaches for consideration to prohibit the sale of flavored tobacco within the City of San Pablo at an August 6, 2018 City Council meeting:

1. Prohibit the sale of flavored tobacco city-wide;

Every retailer - whether classified as a smoke shop or not -- would be prohibited from selling any flavored tobacco citywide.

2. Prohibit the sale of flavored tobacco within 600 feet of any school, licensed day care, public park or playground; and

This approach would prohibit any retailer within 600 feet from any school, licensed day care, public park, or playground from selling flavored tobacco products. The Zoning Ordinance, Section 17.62.180, prohibits smoke shops from locating within 600 feet from any other smoke

shop, or any school, licensed day care center, public park or playground, senior citizen facility, or licensed alcohol or drug treatment facility. The new amendment would include every retailer not classified as a smoke shop, as well.

3. Prohibit the sale of flavored tobacco throughout the City, except at legal smoke shops.

With the amendment of the Marijuana Ordinance in September 2017, the Smoke Shop Ordinance was also amended to limit the number of smoke shops in the city to six (6) per Section 17.62.180 of the City of San Pablo Municipal Code ("Municipal Code"). The City only allows smoke shops in commercial areas and not within six hundred (600) feet of any school, licensed day care center, public park or playground, senior center facility, or licensed alcohol or drug treatment facility.

Smoke Shops are defined as: A use classification that consists of any establishment that either devotes twenty percent or more of sales floor area or product display area to, or derives twenty percent or more of gross sales receipts from, the sale or exchange of tobacco or marijuana paraphernalia and/or tobacco or marijuana products as defined in Division VI, Glossary, and Section [17.62.130](#)

[<http://www.codepublishing.com/CA/SanPablo/html/SanPablo17/SanPablo1762.html>](http://www.codepublishing.com/CA/SanPablo/html/SanPablo17/SanPablo1762.html).

The City Council directed staff to pursue option #1, the prohibition of the sale of flavored tobacco citywide, at the August 6, 2018 City Council meeting (see Attachment B). The City Council also directed staff to bring back an ordinance to prohibit menthol flavored tobacco and e-cigarette cartridges for flavored and menthol tobacco products, as well as to establish a minimum pack size for cigars, cigarillos, and little cigars in the citywide ban of these products (see Attachment A). Prohibiting the sale of flavored tobacco within the City of San Pablo is accomplished by amending Title 5, Business Taxes, Licenses and Regulations, of the Municipal Code. The proposed ordinance also establishes a minimum pack size for cigars (a minimum pack of six (6), or a minimum cost of \$10 per cigar), cigarillos (a minimum pack of twenty-five (25)), and little cigars (a minimum pack of twenty (20)). The proposed Ordinance language that would regulate the citywide ban of flavored tobacco, including menthol and flavored e-cigarette cartridges, and establishing a minimum pack size for cigars (as well as a minimum sales price of \$10 per cigar), cigarillos, and little cigars is attached to this report.

Public Health Data on Flavored Tobacco Products

Public health journals and the U.S. Department of Health and Human Services included in the information from Change Lab Solutions ([<https://www.changelabsolutions.org/tobacco-control>](https://www.changelabsolutions.org/tobacco-control)) 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 US 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. Minimum Pack Size for Cigars, Cigarillos and Little Cigars and Minimum Cigar Cost

Information compiled by Change Lab Solutions (

<https://www.changelabsolutions.org/tobacco-control>) indicates that 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 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. Moreover, a 2013-2014 survey found higher rates of flavored cigar use among underserved populations, including cigar smokers with lower income, with less education and those who were lesbian, gay or bisexual.

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.

Federal law requires that cigarettes be sold in packages containing at least 20 cigarettes, but there are no minimum package size requirements for other tobacco products. This is especially concerning given the rising popularity of little cigars and cigars. From 1995 to 2008, annual sales of cigarillos increased by 255%, and sales of little cigars increased by 316%. 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.

Requiring little cigars and cigars to be sold in packs of a certain size raises the *overall* cost to purchase these products, even if the price *per* little cigar or cigar does not change. Increasing the amount of tobacco products purchased in a single transaction may seem counterintuitive, but raising the cost barrier is expected to improve public health and protect price-sensitive youth. However, minimum package size requirements are most effective when paired with minimum price policies.

Sales of little cigars and cigarillos have steadily increased even as large cigar and cigarette consumption has decreased. Little cigar sales increased by 240 percent and cigarillo sales by 150 percent between 1997 and 2007. Two factors contributing to this rise in popularity are that these products are sold individually and are available in a variety of flavors, which makes them more affordable and more appealing to youth.

In a 2010 Maryland study, over 79 percent of underage high school students who used tobacco reported using a product other than cigarettes, and nearly three-quarters of these students reported smoking cigars. Over 75 percent of underage high school cigar smokers reported smoking flavored cigars while only two percent of adult cigar smokers currently smoked flavored cigars.

Cigarillos are often sold one at a time for under 70 cents each, less than the price of a candy bar. This makes them much more attainable for youth and other price-sensitive groups.

In November 2011, the city of Huntington Park in Los Angeles County became the first city in California to adopt a policy prohibiting the sale of any kind of single cigar and requiring all cigars to be sold in their original packaging.

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.

For the reasons discussed above, the City of San Pablo finds there are studies, facts, and data, as well as significant long-term public health issues, to support establishing a minimum pack size for cigars cigarillos and little cigars. In addition, since the Council's discussion of this item in August, staff has also learned that minimum costs for cigars can also make them less accessible to youth and reduce youth tobacco use. Therefore, although not previously discussed by Council, staff is recommending that the City Council approve the proposed ordinance with a minimum price for cigars of \$10.

Staff has attached background information, a Model California Ordinance published by Change Lab Solutions (see Attachment C), that has relevant information and data that was included in the City's Ordinance. This background information discusses regulations for flavored tobacco, and provides a neutral analysis of the health, equity and policy issues related to the use and sale of menthol and other flavored tobacco products.

Collaboration between the Police and Community and Economic Development Departments, and Next Steps

Staff from the Community and Economic Development and Police Departments continue to work collaboratively on this issue. Assuming that the ordinance passes, the Police Department will work with the existing businesses to educate these businesses about the City's ban on the sales of flavored tobacco products. The educational campaign will occur within the first three (3) months after the adoption of the ordinance amendment. After this three-month period, the City will formally enforce the ban on the sales of flavored tobacco products, including menthol and flavored e-cigarette cartridges and the minimum pack size for the sale of cigars, cigarillos, and little cigars.

FISCAL IMPACT

The California Department of Justice awarded the City of San Pablo \$612,056 in grant funding to participate in the Tobacco Enforcement Grant Program to combat minors' use of tobacco products. The City Council accepted the grant funding on July 2, 2018, pursuant to Resolution 2018-098. The grant monies will fund the salary and benefits to staff one (1) full-time Police Officer and one (1) full-time Police Services Technician (PST) for FY 18/19 and FY 19/20. These positions will be committed to developing and delivering on the goals of the program which include: widespread community outreach, education classes for our youth and families through the elementary and middle schools, collaboration and training with business owners, and enforcement operations. There is currently no identified funding for the additional positions after FY 2019/20. However, it is the intent of the Police Department to seek funding sources for these additional FTEs in subsequent years through additional grant opportunities.

Additionally, it is anticipated that there will be some reduction in sales tax revenue to the City of San Pablo with the citywide prohibition of flavored tobacco, including menthol and e-cigarettes and establishing a minimum pack size for cigars, cigarillos, and little cigars.

ATTACHMENTS

- A - Map of Tobacco Retailers within 1,000 of schools within the City of San Pablo
- B - August 6, 2018 City Council Meeting Minutes
- C - Model California Ordinance: Restricting the Sale of Menthol Cigarette and Other Flavored Tobacco Products, <https://ChangeLabSolutions.org/publications/flavored-tobacco>
- D - Public Notice