



# CITY COUNCIL AGENDA STATEMENT



February 25, 2020

File ID: 20-0021

## **TITLE**

ORDINANCE OF THE CITY OF CHULA VISTA AMENDING CHULA VISTA MUNICIPAL CODE CHAPTER 5.56 (TOBACCO RETAILER) TO PROHIBIT THE SALE OF FLAVORED TOBACCO PRODUCTS AND ELECTRONIC SMOKING DEVICES LACKING A REQUIRED FOOD AND DRUG ADMINISTRATION MARKETING ORDER (FIRST READING)

## **RECOMMENDED ACTION**

Council hear the report, consider the ordinance and provide staff with direction.

## **SUMMARY**

The City of Chula Vista adopted the Healthy Chula Vista Action Plan in January 2016 inclusive of strategies to prevent chronic diseases. An ordinance amending Chula Vista Municipal Code Chapter 5.56 (Tobacco Retailer) to incorporate additional regulations on tobacco products that address youth access and emerging public health risks, as recommended by the Healthy Chula Vista Advisory Commission, is being presented for Council consideration.

## **ENVIRONMENTAL REVIEW**

The activity is not a "Project" as defined under Section 15378 of the California Environmental Quality Act State Guidelines; therefore, pursuant to State Guidelines Section 15060(c)(3) no environmental review is required.

## **BOARD/COMMISSION/COMMITTEE RECOMMENDATION**

The Healthy Chula Vista Advisory Commission provided an advisory recommendation that the City Council adopt the ordinance at a special meeting on February 3, 2020 by a vote of 4-0. All Chula Vista licensed tobacco retailers were notified of the meeting and eleven speakers provided input into the agenda item.

## **DISCUSSION**

On January 5, 2016, the first Healthy Chula Vista Action Plan was adopted, providing a set of strategies to review, create, and evaluate policies and programs within the City and to develop community partnerships to promote wellness within our community. A key component of the plan included measures to prevent chronic diseases within our community. As the overseeing body of the Action Plan, the Healthy Chula Vista Advisory Commission has proposed amendments to the Chula Vista Municipal Code (CVMC) to address emerging public health issues surrounding youth access to e-cigarette products.

On December 19, 2017, the City Council approved amendments to CVMC Chapter 8.22 (Regulation of Smoking in Public Places and Places of Employment) to: add e-cigarettes, including devices used for vaping, to the definition of “smoking”; prohibit smoking on any portion of City owned property (inclusive of all parks, libraries, City buildings, and associated parking lots); and restrict smoking to designated areas in Affordable Housing Projects to align with U.S. Department of Housing and Urban Development guidelines. On March 16, 2018, the City Council also adopted CVMC Chapter 5.56 (Tobacco Retailer), establishing a tobacco retailers license program to regulate tobacco businesses and prevent the selling of tobacco and tobacco paraphernalia to individuals (under the age of 21).

#### Public Health Risks Associated with Smoking

Over 480,000 deaths are attributed annually to smoking related diseases in the United States. In the South Bay of San Diego, 20.5% of deaths are attributable to smoking related diseases. While we have known the dangers of smoking combustible cigarettes and other tobacco products for decades, a new form of tobacco products emerged in the U.S. in 2006 through e-cigarettes and became popular over the past three to five years.

In June 2019 multiple reports of sudden, and severe lung illness associated with vaping began to be noticed by physicians across the United States. These illnesses have been classified as E-cigarette, or Vaping, Product Use Associated Lung Injuries (EVALI) or Vaping-Associated Pulmonary Injury (VAPI). As of January 21, 2020, the U.S. Centers for Disease Controls and Prevention (CDC) has reported 2,711 hospitalized EVALI cases or deaths, with 60 confirmed deaths<sup>1</sup>.

Currently the CDC research has closely related the additive Vitamin E acetate to EVALI, however there are many different substances and product sources that are being investigated, and there may be more than one cause. While CDC guidance continues to evolve, they indicate that youth and young adults should never use e-cigarette or vaping products<sup>1</sup>.

Due to the public health risks surrounding e-cigarettes, many jurisdictions across the country have become more aware of who was using vaping devices in their communities. While advocates for vaping indicate that e-cigarettes have helped many people stop smoking combustible cigarettes, the U.S. Surgeon General indicated in the January 2020 Smoking Cessation report that there is presently inadequate evidence to conclude that e-cigarettes, in general, increase smoking cessation<sup>2</sup>. To date, no e-cigarette product in the U.S. has been approved as a cessation device.

The most alarming discovery in the 2020 report was the increased number of youths using e-cigarette products:

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<sup>1</sup> CDC Smoking & Tobacco Use, “Outbreak of Lung Injury Associated with the Use of E-Cigarette, or Vaping, Products”, [https://www.cdc.gov/tobacco/basic\\_information/e-cigarettes/severe-lung-disease.html?s\\_cid=osh-stu-home-spotlight-006](https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html?s_cid=osh-stu-home-spotlight-006)

<sup>2</sup> U.S. Department of Health & Human Services, “Smoking Cessation: A Report of the Surgeon General”, January 2020, <https://www.hhs.gov/sites/default/files/2020-cessation-sgr-full-report.pdf>

- Nearly one-third of high schoolers report using tobacco products, of which 27.5% reported using e-cigarettes within the past 30 days<sup>3</sup>;
- 99% of smokers started before the age of 26; and
- At the current rate of smoking among youth, 5.6 million of today's Americans younger than 18 will die early from a smoking-related illness<sup>4</sup>.

Within San Diego County, several jurisdictions have recently adopted policies or are considering taking actions to prohibit flavored products and/or e-cigarette products, including the County of San Diego and the City of Imperial Beach. Amendments have been proposed by the Healthy Chula Vista Advisory Commission to reduce youth tobacco use and reduce public health risks associated with vaping by placing prohibitions on the sale of flavored tobacco products and electronic smoking devices, as described below.

### Flavored Tobacco Products

While the federal government recognized the dangers of flavored cigarettes in 2009, banning them through the Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act), the law did not restrict menthol cigarettes and it does not restrict flavored non-cigarette tobacco products, such as smokeless tobacco<sup>4</sup>. Since 2009, the “vaping” industry has flourished across the United States, introducing many new non-cigarette flavored products.

Flavored tobacco products are considered “starter” products that help establish long-term tobacco use and that are proven to be particularly appealing to youth. These products also pose significant barriers to achieving health equity since tobacco companies have targeted youth, communities of color, low-income populations, and members of LGBTQ+ communities with marketing efforts and these groups are significantly more likely to use flavored tobacco products<sup>5</sup>.

According to the 2019 National Youth Tobacco Survey 67.8% of high school students report using flavored vaping products like fruit, mint and candy flavors<sup>6</sup>.

### E-Cigarette Products

On Aug. 8, 2016, all e-cigarettes and other Electronic Nicotine Delivery Systems (ENDS), such as e-liquids products, became subject to the U.S. Food and Drug Administration (FDA) premarket approval requirements, meaning that they must receive authorization to be legally marketed<sup>7</sup>. To date, only one ENDS products has been authorized by the FDA and therefore all others are subject to enforcement, at any time.

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<sup>3</sup> CDC Smoking & Tobacco Use, “Fast Facts”,

[https://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/fast\\_facts/index.htm#diseases](https://www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/index.htm#diseases)

<sup>4</sup> “Family Smoking Prevention and Tobacco Control Act - An Overview”, <https://www.fda.gov/tobacco-products/rules-regulations-and-guidance/family-smoking-prevention-and-tobacco-control-act-overview>

<sup>5</sup> California Medical Association, “Flavored and Mentholated Tobacco Products: Enticing a New Generation of Users”, May 2016, <https://www.cdph.ca.gov/Programs/CCDPHP/DCDIC/CTCB/CDPH%20Document%20Library/Policy/FlavoredTobaccoAndMenthol/FlavoredAndMentholatedTobaccoProductsCMAWhitePaperAndExecSummaryMay2016.pdf>

<sup>6</sup> U.S. Department of Health & Human Services, 2019 Preliminary Data - National Youth Tobacco Survey (NYTS)

<sup>7</sup> Federal Register – The Daily Journal of the United States Government, May 10, 2016, <https://www.federalregister.gov/documents/2016/05/10/2016-10685/deeming-tobacco-products-to-be-subject-to-the-federal-food-drug-and-cosmetic-act-as-amended-by-the>

On June 11, 2019, the FDA released its final guidance on applications of ENDS products for premarket approval. The FDA will review the tobacco products components, ingredients, additives, constituents and health risks, as well as how the product is manufactured, packaged and labeled to limit risk to overall public health of nicotine and tobacco-related disease and death<sup>8&9</sup>. The FDA further identified limiting access and target marketing to youth as a driver in this recent guidance.

On January 2, 2020, the FDA issued a guidance policy to manufacturers of ENDS, to prioritize enforcement resources against those that: market flavored products; have failed to take (or are failing to take) adequate measures to prevent minors' access; and target to minors or whose marketing is likely to promote use of ENDS by minors<sup>10</sup>.

#### Chula Vista Actions to Prevent Youth Access

In addition to the ordinance updates that have been made in the past few years to establish a tobacco retailers license and make City facilities smoke/vape free, the Police Department has received two rounds of funding through Tobacco Grant Programs. The first round of funding was granted to assist in providing additional services aimed at the education, compliance and enforcement of tobacco-related issues within the community. To date, the Chula Vista Police Department has spent over 200 staff hours educating the community on the harmful effects of vaping, enforcing tobacco-related violations through undercover operations and conducting compliance checks at retail establishments. The second round of funding will support an additional School Resource Officer with the hopes of bringing much needed education directly into the schools, directly to our youth. Partnerships with the school district, retailers and ongoing education are critical to ensure our community is aware of the potential dangers of tobacco use.

The Healthy Chula Vista Advisory Commission has recommended amendments to CVMC Chapter 5.56 to place a prohibition on the sale of all flavored tobacco products and e-cigarette products that do not have FDA premarket approval, within the City of Chula Vista. While these amendments have been proposed by the Commission based on best practices identified to limit youth access and use of tobacco products, jurisdictions throughout the country have taken different approaches to address this issue. If approved, the ordinance would take effect September 1, 2020.

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<sup>8</sup> "FDA finalizes guidance for premarket tobacco product applications for electronic nicotine delivery systems as part of commitment to continuing a strong oversight of e-cigarettes", FDA News Release, June 11, 2019, <https://www.fda.gov/news-events/press-announcements/fda-finalizes-guidance-premarket-tobacco-product-applications-electronic-nicotine-delivery-systems>

<sup>9</sup> "Premarket Tobacco Product Applications for Electronic Nicotine Delivery Systems (ENDS) - *Guidance for Industry*", June 2019, <https://www.fda.gov/regulatory-information/search-fda-guidance-documents/premarket-tobacco-product-applications-electronic-nicotine-delivery-systems-ends>

<sup>10</sup> "FDA Finalizes Enforcement Policy on Unauthorized Flavored Cartridge-Based E-Cigarettes That Appeal to Children, Including Fruit and Mint", HHS News Release, January 2, 2020, <https://www.hhs.gov/about/news/2020/01/02/fda-finalizes-enforcement-policy-unauthorized-flavored-cartridge-based-e-cigarettes.html>

### **DECISION-MAKER CONFLICT**

Staff has reviewed the decision contemplated by this action and has determined that it is not site-specific and consequently, the real property holdings of the City Council members do not create a disqualifying real property-related financial conflict of interest under the Political Reform Act (Cal. Gov't Code § 87100, et seq.).

Staff is not independently aware, and has not been informed by any City Council member, of any other fact that may constitute a basis for a decision-maker conflict of interest in this matter.

### **CURRENT-YEAR FISCAL IMPACT**

All costs associated with the preparation of this staff report are covered under the Development Services budget.

### **ONGOING FISCAL IMPACT**

Staff time associated with the enforcement of the tobacco retailing prohibitions are budgeted under that Police Department.

### **ATTACHMENTS**

1. Proposed Ordinance Amendments.

*Staff Contact: Stacey Kurz, Senior Project Coordinator, Development Services Department*