



# City of Sunnyvale

## Agenda Item-No Attachments (PDF)

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### REPORT TO COUNCIL

#### **SUBJECT**

Introduce an Ordinance to Amend Chapter 9.28 (Regulation of Smoking) of Title 9 (Public Peace, Safety or Welfare) of the Sunnyvale Municipal Code to Prohibit the Sale of Flavored Tobacco Products (Study Issue)

#### **REPORT IN BRIEF**

In March 2019, the City Council directed staff to study a prohibition on the sale of flavored tobacco products (Attachment 1), including e-cigarettes, cigars, hookah tobacco, e-liquids, and smokeless tobacco (Study Issue DPS 19-01).

Staff was previously scheduled to present this Report to Council on March 31, 2020; however, it was postponed until October 27, 2020 due to COVID-19. Since then, on August 28, 2020, California passed a law prohibiting the sale of most flavored tobacco products (SB 793). The law is scheduled to take effect on January 1, 2021. However, despite a near complete ban on such products, the new State law explicitly provides that local governments may pass stricter local ordinances.

The state law largely prohibits the sale of flavored tobacco products with three primary exemptions:

1. hookah and shisha products if sold by a licensed tobacco retailer and where entry is limited to those aged 21 and over;
2. premium cigars that are handmade with a tobacco leaf wrapper, with a wholesale price of no less than \$12 as well as premium cigars sold in a cigar lounge and consumed on the premises; and
3. loose leaf tobacco, such as for use in pipes, and which is usually sold in pouches (except for tobacco used for roll-your-own cigarettes).

The Santa Clara County Public Health Department (PHD) recommends that local municipalities who wish to prohibit flavored tobacco in their jurisdictions proceed with adoption of a local ordinance to address the exemptions provided under state law and because of a recently filed referendum to SB 793. If the referendum qualifies for the ballot, the state law will be suspended until it is voted on in November 2022.

The purpose of this report is to summarize the key findings and policy options associated with the study and introduce amendments to the City's existing smoking ordinance (Sunnyvale Municipal Code Chapter 9.28).

#### **BACKGROUND**

In 2016, the City of Sunnyvale updated its smoking laws to protect the community from the harmful effects of secondhand smoke by prohibiting smoking in outdoor dining areas; within 25 feet of building entryways; in service areas; at public events; within 25 feet of public transit stops; and in all

units, common areas, and within 25 feet of doors and windows of multi-family residences.

The PHD has provided funding to cities to support tobacco prevention strategies known to have the highest impact on reducing tobacco-related disparities and inequities. As part of this funding, the City of Sunnyvale received a \$67,205 grant from the PHD to explore tobacco prevention policies that have been shown to reduce youth access and exposure to tobacco products, such as a ban on flavored tobacco products.

## **EXISTING POLICY**

### **General Plan**

Chapter 4, Community Character, Policy CC-1.6 Maintain City neighborhoods as safe, healthy places to live.

Chapter 6, Safety and Noise, Policy SN-4-2 Provide for assessment of changing community needs and expectations.

Chapter 6, Safety and Noise, Goal SN-1 Acceptable Levels of Risk for Natural and Human-Caused Hazards. Ensure that natural and human-caused hazards are recognized and considered in decisions affecting the community and that land uses reflect acceptable levels of risk based on identified hazards and occupancy.

## **ENVIRONMENTAL REVIEW**

The action being considered is exempt from the California Environmental Quality Act ("CEQA") pursuant to CEQA Guidelines section 15061 (b) (3) as the activity is covered by the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA.

## **DISCUSSION**

Tobacco use remains the number one preventable cause of death and disease in California, causing nearly 40,000 deaths in California every year. In Santa Clara County, one in eight deaths annually is attributed to smoking-related illness or diseases, such as cancer, heart disease, and respiratory diseases. More than one in ten youth in the County currently use tobacco products, including electronic smoking devices, and nearly one in three Santa Clara County teens report that they have used an e-cigarette at least once.

Santa Clara County's Healthy Cities Program seeks to address these tobacco-related health concerns by promoting policies and practices to provide tobacco-free and smoke-free communities. Currently, Sunnyvale has adopted 7 out of 12 recommended tobacco prevention strategies in the Healthy Cities Program - 2019 Dashboard (Attachment 2). Although the City prohibits smoking in multi-family housing and many outdoor areas, it does not prohibit the sale of flavored tobacco products. The American Lung Association provides an evaluation of local tobacco control policies through an annual State of Tobacco Control Report. Sunnyvale currently has an overall "B" grade on this report, including an "F" grade in the category of reducing sales of tobacco products (Attachment 3).

After conducting research on best practices to reduce youth access to tobacco products and seeking

public input, staff has drafted an Ordinance to prohibit the sale of flavored tobacco products in the City (Attachment 4). Such a prohibition would apply to flavored e-cigarettes, e-liquids, flavored cigars, cigarillos, flavored hookah, and menthol cigarettes and address gaps left by SB 793. E-liquids are nicotine solutions that are used with e-cigarettes. These liquid solutions are available in thousands of flavors that are attractive to youth, such as gummy bear and cotton candy.

As of August 2020, 54 communities in California have passed similar laws to restrict the sale of flavored tobacco products. Most of the recently adopted laws include a complete prohibition on the sale of flavored tobacco products, including menthol cigarettes. In October 2020, the City surveyed other Santa Clara County jurisdictions regarding local flavored tobacco ordinances. In Santa Clara County, the cities of Cupertino, Los Altos, Los Gatos, Morgan Hill, Palo Alto, Saratoga, and Santa Clara County prohibit the sale of flavored tobacco products with few exemptions (Attachment 5). The City of Saratoga exempts menthol cigarettes and the City of Morgan Hill exempts flavored loose-leaf tobacco products (smokeless), otherwise known as chewing tobacco. The following municipalities restrict the sale of all vaping products: Cupertino, Los Altos, Los Gatos, Morgan Hill, Palo Alto, Saratoga, and Santa Clara County.

Although federal law prohibits the sale of candy and fruit-flavored cigarettes, this law does not prohibit the sale of menthol cigarettes or flavored, non-cigarette tobacco products, such as cigars, cigarillos, smokeless tobacco, hookah tobacco, electronic smoking devices, and the e-liquid used in these devices.

The Study found that flavored tobacco products are considered “starter” products for youth who begin to use tobacco, establishing tobacco habits that can lead to long-term addiction. Studies and research indicate that youth believe that flavored products are safer and less addictive than non-flavored varieties. In Santa Clara County, 82.3% of teens currently using tobacco reported using a flavored product and 80% of youth who have ever used tobacco started with a flavored product. Nationally, e-cigarette use more than doubled among high school students (from 11.7% to 27.5%) and tripled among middle school students (from 3.3% to 10.5%) from 2017 to 2019.

In Santa Clara County, 93% of tobacco retailers sell menthol cigarettes and nearly 80% of tobacco retailers (including those near schools) sell flavored, non-cigarette tobacco products. Almost half of Santa Clara County teens (45.4%) reported purchasing their own e-cigarettes, with over a quarter of this group saying they buy them directly from a local store.

## **Public Input**

Earlier this year, staff conducted extensive outreach to obtain feedback from residents and businesses about the proposed ban on flavored tobacco products which included three in-person public outreach meetings in February 2020 and a community survey.

The outreach meetings and survey were advertised through the Department of Public Safety’s social medial platforms including Twitter, Facebook, Nixle, and Nextdoor. They were also promoted through the Office of the City Manager, Communications Division, posted on the City’s homepage, and placed on the events calendar. All 61 tobacco retailers in Sunnyvale, licensed by the State of California, were sent a letter notifying them of the outreach meeting for tobacco retailers and encouraging them to complete the survey.

Outreach Meetings were held at the Sunnyvale Community Center as follows:

Community Meetings - Public Input

Wednesday, February 12 from 2:00 p.m. to 3:00 p.m.

Thursday, February 13 from 6:00 p.m. to 7:00 p.m.

Community Meeting - Tobacco Retailers

Thursday, February 13 from 10:00 a.m. to 11:00 a.m.

At the February 12 community meeting there were five attendees, four from one tobacco shop on S. Murphy Ave. and one person from Breathe California, a non-profit that works “to reduce the impact of lung disease through prevention, education, advocacy and patient services.” At the meeting, the representatives from the tobacco shop expressed concern that their shop would go out of business if a ban on flavored tobacco is approved by Council. One community member, Mayor Klein, attended the February 13 community meeting held at 6:00 p.m.

At the February 13 community meeting for tobacco retailers, there were eight attendees representing all three tobacco shops in Sunnyvale and three tobacco retailers, such as gas station and liquor store owners. Several attendees expressed concerns about the loss of business if a ban on flavored tobacco is passed (Attachment 6). Many stated that they have, or would, complete the survey and would attend this City Council meeting. One attendee said that he did not receive the letter that was sent to the tobacco retailers. Instead, he was contacted by a representative of R.J Reynolds Tobacco Company who told him about the outreach meeting and survey.

The community outreach survey opened on February 3 and closed on February 24. A total of 700 responses were received (Attachment 7). The support for banning flavored tobacco dropped dramatically, from 91% in favor to 43.7%, after the tobacco retailers were provided with notice of the survey through a letter from the City. At least one tobacco shop, requested their social media followers to fill out the survey and oppose the ban. (Attachment 8). Staff received emails from tobacco retailers opposing the ban and provided alternatives to a ban on flavored tobacco (Attachment 9).

The Sunnyvale School District and the Fremont Union High School District have passed resolutions supporting a ban on flavored tobacco products (Attachments 10 and 11 respectively).

**Implementation and Enforcement**

If Council adopts the proposed ordinance, and the referendum to SB 793 does not qualify for the ballot, the statewide ban on flavored tobacco products would become effective January 1, 2021. However, because the City’s ordinance proposes a six month grace period, the ban on flavored hookah and shisha products, premium cigars, and loose leaf tobacco would become effective six months after adoption. If Council adopts the proposed ordinance, and the referendum to SB 793 qualifies for the ballot, the new state law would be stayed and our local ordinance would not be stayed. The City’s ban on the sale of all flavored tobacco products would become effective six months after adoption. This grace period would allow the City to educate retailers about the prohibition and allow retailers to sell down their existing inventory of flavored tobacco products. As of the ordinance’s effective date, retailers would no longer be able to sell flavored tobacco products in Sunnyvale.

The proposed Ordinance prohibits the sale of flavored tobacco products as a stand-alone requirement on tobacco retailers. However, the Council could ask staff to study the adoption of a local tobacco retailer license (TRL) requirement as a mechanism to enforce the law.

Nearly all California communities that restrict the sale of flavored tobacco products do so as a condition of a local TRL. Although the State of California requires a license to sell tobacco products, more than 150 cities and counties also require a local TRL. A local TRL is generally adopted to:

- Create more comprehensive restrictions than State law on the sale or marketing of tobacco products in the retail environment;
- Allow for meaningful penalties for violation of tobacco control laws, such as license suspension; and
- Help fund local enforcement of tobacco control laws through the local licensing fee.

Sunnyvale does not currently require a TRL. Although it is possible to adopt a prohibition on the sale of flavored tobacco products without a local TRL, the City would not have a dedicated source of funding to monitor compliance with the flavored tobacco restrictions. Currently, all but two of the 54 California communities that restrict the sale of flavored tobacco products also require a TRL.

Staff have identified three primary options for implementation and enforcement of a prohibition on the sale of flavored tobacco products:

1. Adopt the prohibition on the sale of flavored tobacco products as a stand-alone requirement for retailers. Staff from the Department of Public Safety (i.e., code enforcement), would conduct enforcement to ensure that tobacco retailers are in compliance. Existing code provides a violation of Chapter 9.28 may be punishable by an administrative citation or an infraction, or addressed by civil action initiated by the City Attorney against businesses out of compliance.
2. Require retailers to obtain a local license to sell tobacco products from the City of Sunnyvale. The sale of flavored tobacco products would be prohibited and would be a violation of the license. A retailer's license could be suspended for license violations.
3. Require retailers to obtain a local license to sell tobacco products in a program administered by the Santa Clara County Department of Environmental Health. Santa Clara County is willing to partner with the City of Sunnyvale to administer, implement, and monitor its tobacco retailer licensing law if the City adopts a TRL that mirrors the County's requirements below. To cover the costs of the program, the County typically collects a \$425 annual licensing fee paid by tobacco retailers. To participate, Sunnyvale's TRL ordinance must include the following:
  - a. Require retailers to obtain and annually renew a tobacco retailer license.
  - b. Require retailers to post a notice saying that the sale of tobacco products to anyone under 21 years of age is illegal and subject to penalties.
  - c. Require retailers to check the identification for any purchaser who appears to be under 30 years of age.
  - d. Prohibit the sale of tobacco products from a vending machine.
  - e. Prohibit retailers from covering more than 15% of windows and clear doors with any type of ads or signs.
  - f. Prohibit the sale of flavored tobacco products, including menthol cigarettes.

- g. Prohibit the sale of all electronic smoking devices and vaping products.
- h. Prohibit new tobacco retailers from locating within 1,000 feet of a school (existing retailers within this radius may continue to sell tobacco products provided they are operating lawfully, submit a timely annual TRL renewal, and do not transfer ownership).
- i. Prohibit new tobacco retailers from locating within 500 feet of another tobacco retailer (existing retailers in these locations may continue to sell tobacco products provided they are operating lawfully, submit a timely annual TRL renewal, and do not transfer ownership).
- j. Prohibit the sale of tobacco products from pharmacies.
- k. Prohibit mobile tobacco retailing or tobacco retailing at a temporary event.

### **FISCAL IMPACT**

If the City Council adopts a prohibition on the sale of flavored tobacco products as a stand-alone requirement for retailers, staff from the Department of Public Safety would conduct enforcement, which would be absorbed in the existing operating budget.

If Council directs staff to return with an amendatory ordinance, after conducting community outreach with stakeholders, to implement a TRL administered by the City, the fiscal impact would be studied and presented for Council's consideration at that time. If Council directs staff to return with an amendatory ordinance, after conducting community outreach with stakeholders, to implement a more comprehensive TRL administered by the Santa Clara County Department of Environmental Health, the County would implement and enforce the City's program at no cost to the City. The County would recover costs through charging each tobacco retailer in Sunnyvale an annual fee.

### **PUBLIC CONTACT**

Public contact was made by posting the Council agenda on the City's official-notice bulletin board outside City Hall, Sunnyvale Public Library and Department of Public Safety. In addition, the agenda and report are available at the Office of the City Clerk and on the City's website.

### **ALTERNATIVES**

1. Introduce an Ordinance to amend Sunnyvale Municipal Code Chapter 9.28 to prohibit the sale of flavored tobacco products.
2. Direct staff to return with an amended ordinance, after conducting community outreach with stakeholders, to implement a Tobacco Retailer License administered by the City, prohibiting the sale of flavored tobacco products.
3. Direct staff to return with an amended ordinance, after conducting community outreach with stakeholders, to implement a Tobacco Retailer License administered by the Santa Clara County Department of Environmental Health, prohibiting the sale of flavored tobacco products, electronic smoking devices and vaping products, sales of tobacco products from pharmacies, and all other requirements listed in this Report to Council.
4. Do not introduce an Ordinance to Amend Sunnyvale Municipal Code Chapter 9.28 to prohibit the sale of flavored tobacco products.

### **STAFF RECOMMENDATION**

Alternative 1: Introduce an Ordinance to amend the Sunnyvale Municipal Code Chapter 9.28 to prohibit the sale of flavored tobacco products.

The City has the opportunity to help prevent youth from using tobacco by prohibiting the sale of

flavored tobacco products and reducing the availability of tobacco in the City. These policies would demonstrate the City's commitment to protecting the health of its residents and would improve the City's performance on the County's Healthy Cities Initiative and the American Lung Association's State of Tobacco Control grades.

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Reviewed by: Teri Silva, Assistant City Manager

Approved by: Kent Steffens, City Manager

### **ATTACHMENTS**

1. Study Issue DPS 19-01 Tobacco
2. Healthy Cities Program - 2019 Dashboard
3. American Lung Association - 2020 Report
4. Draft Ordinance
5. Tobacco-Free Communities in Santa Clara County
6. Tobacco Retailers Outreach Meeting Feedback
7. Flavored Tobacco Community Survey Results
8. Tobacco Retailer Advertising Survey
9. Emails from Tobacco Retailers
10. Sunnyvale School District Letter and Resolution
11. Fremont Union High School District Letter and Resolution