



DATE: March 3, 2020

TO: Council Economic Development Committee

FROM: Development Services Director

SUBJECT: Review and Discussion of Tobacco Retail License Ordinance as it Pertains to the Accessibility of Tobacco and Vaping Products to Youth

RECOMMENDATION

That the Council Economic Development Committee (CEDC) review and provide feedback as to the Council referral memorandum request for discussion to enact stronger restrictions on tobacco retailers of the access of tobacco and vaping products to youth in Hayward.

SUMMARY

On September 24, 2019, the Council approved a referral memorandum to review the City's Tobacco Retail License (TRL) ordinance and regulations and address concerns regarding the accessibility of tobacco and vaping products to youth. The points of discussion expressed included the following:

- Restrictions on the sale of tobacco and vaping products
- Restrictions on the sale of small or inexpensive tobacco and vaping products.
- Further regulation on the location of tobacco and vaping product sales (as it relates to youth sensitive areas).
- Additional monitoring of tobacco and vaping retailers to reduce sales to minors.
- Other changes to help reduce the teen use of tobacco and vaping products.

Code Enforcement staff is currently reviewing the newly released U.S. Food and Drug Administration policy on the enforcement of unauthorized flavored cartridge-based e-cigarettes provided, and the City's TRL ordinance. Staff will present potential policy options and solicit feedback from the CEDC.

DISCUSSION

Hayward's TRL ordinance prohibits the sale of flavored tobacco products, single cigars with a retail price of less than \$5, and cigar or wrappers packages fewer than five. The ordinance allowed all legal establishments that sold flavored tobacco products prior to the adoption of

the ordinance in 2014 to be deemed legal non-conforming uses. In addition, the ordinance prohibits smoking lounges or hookah bars or lounges. The legal non-conforming businesses previously in place in 2014 are no longer operating.

On January 2, 2020 the FDA, in response to evidence of increased youth use of Electronic Nicotine Delivery Systems (ENDS) issued a formal guidance document for enforcement priorities on ENDS products. Specifically, the FDA prioritized enforcement against tobacco products on the market including: (1) flavored, cartridge-based ENDS products (except for tobacco- or menthol-flavored products); (2) All other ENDS products for which the manufacturer has failed to take (or is failing to take) adequate measures to prevent minors' access; and (3) Any ENDS products targeted to, or whose marketing is likely to promote use by, minors. In addition, the FDA intends to prioritize enforcement of any ENDS product that is offered for sale in the United States after May 12, 2020.

There are currently 114 active tobacco retail establishments in Hayward. According to the California Community Health Assessment Tool, approximately 13 tobacco establishments in Hayward are within 500 feet of schools, while 37 are within 1,000 feet. The monitoring of tobacco sales to youth is conducted by the Hayward Police Department (HPD). HPD has increased the number of yearly compliance inspections for selling to minors to an average of four or more decoy operations per year. During the last calendar year 2019, approximately 449 inspections were conducted by HPD, during which 57 administrative citations were issued for selling to minors.

In addition, Code Enforcement conducts complaint inspections and at least one annual inspection to verify compliance with local, state, and federal requirements for the sale of tobacco products. In 2019, Code Enforcement issued 25 violation notices resulting in fees and penalties of the 114 establishments. The current ordinance does not restrict the number of inspections, which can be increased or decreased based on the compliance rate and available resources.

Code Enforcement staff feels that after additional data review and analysis, the City's TRL ordinance can be further strengthened by:

1. Eliminating the legal non-conforming status through a phase-out period of 6 to 12 months to allow time for the establishments affected to comply.
2. Increasing the current minimum distance of tobacco retail locations of 500 feet from schools to 1,000 feet for all new TRL establishments, with a phase-out of any legal non-conforming business through change of ownership. This may require further evaluations as staff is uncertain of any potential impact to the community.
3. Adding a section of the ordinance to address enforcement of all vaping products, including but not limited to nicotine and other substances, and the accessibility of vaping products to adults as a cessation product to correlate with state and federal changes.

4. Adding/revising language in the ordinance to correlate with any state and federal requirements adopted since the implementation of the City's tobacco ordinance in 2014.
5. Revising the definitions section to provide clarity on the types of products. Clarifying property and business owners' liability and responsibilities for non-compliance that includes employees and agents, etc., and areas that require clarity for property enforcement.
6. Further evaluating the City's ability to establish a minimum floor price for market products that fluctuate to coincide with state regulations and compare them with other jurisdictions for a standard.
7. Reviewing all tobacco fees to verify cost recovery of current compliance inspections and the administration of the TRL program.

NEXT STEPS

Upon review and comments by CEDC on the above policy options, staff will proceed to draft a revised Tobacco Retail License ordinance to further restrict the access of tobacco flavored products and vaping products to the youth in Hayward. Tasks will include: (1) conducting research analysis of federal, state, and local regulations; (2) surveying the legal tobacco establishments that continue to sell flavored tobacco and vaping products; and (3) hosting a public outreach workshop in collaboration with HPD and other divisions for feedback from businesses and the community.

Prepared by: Maggie Flores, Senior Code Enforcement Inspector

Recommended by: Laura Simpson, Director of Development Services
Paul Nguyen, Economic Development Manager

Approved By:



Kelly McAdoo, City Manager