



SUBJECT

Proposed Text Amendment to Chapter 10, Article 1 (Zoning Ordinance), Sections 10-1.2780 through 2797 (Tobacco Retail Sales Establishments) of the Hayward Municipal Code related to the retail sales of tobacco and tobacco related products, including electronic smoking devices.

RECOMMENDATION

That the Planning Commission review and recommend approval to the City Council adoption of proposed Text Amendments to Chapter 10, Article 1 of the Hayward Municipal Code, Sections 10-1.2780 through 10-1.2797, related to the Tobacco Retail Sales Establishments Ordinance (Attachment III) per the attached findings for approval.

SUMMARY

The City recognizes that attention and response to maintaining regulations beneficial and current to the health and safety needs of our community and youth are an important part of our responsibility as members serving the interest of the public.

In response to the City Council direction and concerns pertaining to the negative health consequences of tobacco, the increased use of flavored tobacco and E-cigarettes and vapor products among youth in Hayward, staff is recommending the several Text Amendments to the Tobacco Retail Sales Establishment Ordinance to include specific regulations related to the use of flavored tobacco and E-cigarettes, including the use of electronic smoking devices use and vaping products. The proposed Text Amendments to the Ordinance establish improved regulatory standards to mitigate the increase use of flavored tobacco products, E-cigarettes and vapor products among Hayward youth, general accessibility to tobacco products, and includes clarifying language consistent with county, state and federal regulatory agencies to ensure uniform education and compliance related to tobacco and electronic smoking products.

BACKGROUND

On July 1, 2014, the City of Hayward adopted Chapter 10, Article 1 of the Hayward Municipal Code, Sections 10-1.2780 through 10-1.2797, Tobacco Retail Sales Establishments Ordinance. This ordinance established reasonable and uniform regulations to prevent the proximity of tobacco retail sales to youth within sensitive receptors areas and a means by which to regulate and monitor retail sales of tobacco to protect youth in our community.

In 2014, there were 144 tobacco retail establishments in Hayward, including four vapor lounges. To date, there are 119 active tobacco retail establishments and no active vapor lounges. According to the California Community Health Assessment Tool of the Stanford

Prevention Research Center, there are approximately 13 tobacco establishments in Hayward that are within 500 feet of schools, while 37 are within 1,000 feet. In addition, according to data from the Alameda County Community Assessment Planning and Evaluation map, approximately 35% of the City's tobacco retailers are located within 500 feet to youth sensitive receptors (i.e. schools, parks and playgrounds, etc.) while an additional 37% percent are within 1,000 feet.

During calendar year 2019, the Hayward Police Department issued approximately 57 administrative citations to local tobacco retailers selling to minors. During this same time period, there were 25 regulatory violation notices issued to local tobacco retailers in violation of local and state tobacco retail laws and standards.

On September 24, 2019, the Council approved a referral memorandum to review the City's Tobacco Retail License (TRL) ordinance and regulations to address concerns regarding the accessibility of tobacco and the availability of alternative vapor and electronic smoking products to youth. The points of discussion from Council included restrictions or further regulations on: (1) the sale of tobacco and vaping products, flavored tobacco products, small or inexpensive tobacco; (2) location of tobacco retailers as it relates to youth sensitive areas; and (3) any other changes that will help reduce teen use of tobacco and vaping products in Hayward.

On December 2019, a Tobacco Policy meeting with members of the Coalition for Health Against Tobacco, the Alameda County of Public Health Department, and staff from the City Manager's Office and Development Services was held. Among the discussion, substantial regional and national data regarding the growing trend of tobacco use by youth and the health consequences, in addition to the "best practices" measures adopted by the State and local agencies were presented and discussed in an effort to align local enforcement of flavored tobacco and electronic smoking devices in Alameda County and eliminate the accessibility of tobacco products to youth and address the related health issues.

On January 2, 2020, in response to evidence of increased youth use of Electronic Nicotine Delivery Systems (ENDS), the Food and Drug Administration (FDA) issued a formal guidance document for enforcement priorities on ENDS products. Specifically, the FDA prioritized enforcement against tobacco products on the market that included: (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 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.

As a result, staff have been in discussion with the County of Alameda Public Health Department and City divisions in identifying various positive and effective regulations to manage this crisis given our available resources.

Public Outreach: On February 14, 2020, in response to the Council referral memorandum related to Tobacco Retail Establishments, staff presented a report for public input to the Chamber of Commerce Government Relations Committee (GRC) to identify any local business concerns and receive public input. Overall, the GRC and its attendees expressed support for the establishment of strengthened regulations and standards.

On March 2, 2020, staff presented a report to the Community Economic Development Committee (CEDC) and the general public to request direction on drafting revisions to the Tobacco Retail Sales Establishment Ordinance. Public speakers included many students and staff from the Hayward Unified School District as well as staff from the Alameda County Department of Public Health in support of additional regulations for the health and safety of the youth, as well as measures necessary to reduce the accessibility of tobacco and electronic smoking devices to youth. Members of CEDC (the Mayor and two City Council members) expressed deep concern about identifying measures to deal more effectively with this growing issue and the negative impacts it has and will continue to have in our community, specifically our youth. As a result, staff have been in discussion with the County of Alameda Public Health Department and City divisions in identifying various positive and effective regulations to manage this crisis given our available resources.

A legal ad and public hearing notice of the proposed Amendments was published on May 15, 2020. The Notice included a link to the draft document on the City's website. On May 18, 2020, a Code Enforcement notification was mailed to the all 119 active tobacco retailers businesses with information on the scheduled Planning Commission Public Hearing Meeting of May 28, 2020 as it relates to the text amendment to the Tobacco Retail Sales Establishment Ordinance, HMC Section 10-1.2780. To date, no additional comments have been received as of the date of finalization of this report.

Staff received the following public comments, emails and letters in support of stronger regulations to help protect our youth in our communities. Areas of concerns expressed by the public included: the sale of flavored tobacco products and electronic smoking devices, the sales of tobacco near child-sensitive areas, and raising the tobacco minimum price and package size requirements. Copies of the letters and emails are included in Attachment IV.

- December 12, 2019 - Tobacco Policy Meeting between City staff and representatives from the following tobacco control advocacy groups: Alameda County Public Health, Eden Youth and Family Center, ChangeLab Solutions, and Bay Area Community Resources/API-CHAT
- February 26, 2020 – Letter from the Alameda County Tobacco Control Coalition, Alameda County Department of Public Health, Co-Chairs Scott Gerbert and Rosalyn Moya
- February 27, 2020 - Email from Flavors Addict Kids-Livermore Co-Founders Jannell Gladen, Paula Campbell, Kristie Wang
- March 2, 2020 – Public comments at the Community Economic Development Commission Meeting from:
 - Alameda County Department of Public Health, Alameda County Tobacco Control Coalition members and staff: Paul Cummings, Program Director; Rosalyn Moya, Co-Chair; and Anna Lee, Policy Coordinator
 - Eden Youth and Family Center members and staff: Karen Halfon, Executive Director; Jennifer Duncan, Substance Abuse Prevention Program Director; Maria

- Fernandez Sotomayor, Program Operations Assistant; Aleli Nortado, Advisory Council Member; Savannah Quan, Volunteer and Chabot College Student
- African-American Tobacco Control Leadership Council Co-Chair Dr. Phillip Gardiner
 - American Heart Association, Blythe Young
 - Tennyson High School students Pilar Cortes-Vega and Paula Anne Carreon
 - Mt. Eden High School student Jessica Fuentes
- February 29, 2020 – Letter from the African American Tobacco Control Leadership Council, Co-Chairs Dr. Phillip Gardiner and Carol McCruider
 - March 17, 2020 – Letter from the Breathe California, Chief Executive Officer Margo Sidener
 - April 16, 2020 – Letter from The Community Health Education Institute, Executive Director Pauline Bondonno
 - May 11, 2020 - Email from the Bay Area Community Resources, Asian Pacific Islander Project Manager Rosalyn Moya

Code Enforcement staff has received no comments or letters in opposition since the date of this report.

DISCUSSION

According to recent information published by the Centers for Disease Control and Prevention (CDC), Tobacco product use among U.S. youth is rapidly increasing. More than 1 in 4 high school students and about 1 in 14 middle school students, were found to have used tobacco in 2018. This notable increase from previous 2017 data compiled by CDC was identified to have been driven predominately by an increase in E-cigarette use. E-cigarette use increased from 11.7% to 20.8% among high school students, and from 3.3% to 4.9% among middle school students from 2017 to 2018. No significant change was found in the use of other tobacco products, including traditional cigarettes during this time.

Information from the California Department of Public Health 2018 survey of California youth identified a similar increase in E-cigarette and vaping, 27%, from 2016 to 2018. Additionally, data from the California Department of Education 2018-2019 survey of the Hayward Unified School District revealed a significant number of 7th, 9th and 11th graders (8%, 11% and 13%, respectively) are currently using electronic cigarettes/vapor products, validating staff and community concerns of trending tobacco use activity by the youth. As detailed below, the proposed Amendments would help the City establish improved regulatory standards to mitigate the increase use of flavored tobacco products, E-cigarettes and vapor products among Hayward youth, general accessibility to tobacco products, and includes clarifying language consistent with county, state and federal regulatory agencies to ensure uniform education and compliance related to tobacco and electronic smoking products.

Overview of Proposed Amendments: As adopted, the specific purpose of the regulations is "to provide for the orderly integration of tobacco-related uses in a manner that will prevent the sale of tobacco products and electronic smoking devices to youth by establishing reasonable and uniform regulations to prevent the close proximity of tobacco retail sales uses to youth and sensitive receptors, while permitting the location of tobacco retail sales in certain areas." As proposed, the Tobacco Retail Sales Regulations will be codified at Section 10-1.2780 et seq. of the Zoning Ordinance. There are five areas of concern which are the primary focus of the proposed text Amendments to the Ordinance:

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

These points of concern are addressed through the suggested text amendments to the ordinance in the following sections to provide a best practices approach to strengthening tobacco laws to protect our youth and limit accessibility to tobacco products in line with the State, County, and surrounding jurisdictions. The Amendments are summarized below:

Findings and Purpose - SEC. 10-1.2780 – Findings and Purpose - The section previously identified as "Purpose" has been updated to include findings related to council and public concerns regarding the negative effects that tobacco and related products have on the health of the City's youth and community. Recommended changes to this section also provide clarification of the purpose of the Ordinance and a level of regulatory protection sufficient to mitigate the dangers these substances present to Hayward residents.

Definitions - SEC. 10-1.2782- Definitions - On January 2, 2020 the U.S. Food and Drug Administration (FDA), in response to evidence of increased youth use of Electronic cigarettes or what the FDA identified as Electronic Nicotine Delivery Systems (ENDS), issued a formal guidance document for enforcement priorities on ENDS products. As a result, staff have included amendments in the definition section to ensure consistency with County, State and Federal terminology related to newly emerging tobacco, vapor, and electronic smoking devices or substance distribution products.

Operational Standards - SEC. 10-1.2783 – Requirements and Operational Standards for Tobacco Retail Sales Establishments - Text amendments and re-organization of established standards were proposed throughout the requirements and operational standards section to provide additional clarity as well as to align regulatory requirements consistent with best practices from the California Tobacco Control Program, the Alameda County Department of Public Health, and other surrounding jurisdictions. The more notable changes to this section were done to ensure alignment with Council's request to create additional standards to mitigate rising trends in secondary school use of tobacco and vaping products.

The primary amendments to this Section include:

1. Changes in the minimum floor price and packaging of tobacco products to align

- with County and neighboring jurisdictions best practices for consistency in the enforcement and accessibility of products to youth.
2. The removal of the legal-nonconforming status of tobacco retailers that currently sell flavored or other unpermitted tobacco products currently banned throughout the City.
 3. Consolidation of all regulations pertaining to banned substances or products to ensure clarity in product offering restrictions to the public.
 4. Implementation of a six (6) month-grace period for all legal retailers to cease sales and remove all un-permitted or unlawful products, which includes all:
 - (i) Flavored tobacco products and any related flavored tobacco paraphernalia.
 - (ii) Electronic smoking devices and electronic nicotine delivery systems; and
 - (iii) Vaping products and vaping paraphernalia; including devices, parts and components.
 5. Additional text amendments for language clarity, including details in the descriptions of the products being regulated.

Large Format Retailers - SEC. 10-1.2784 – Large Format Tobacco Retailers - Language was added under Item “c.” of this Section to effectively prohibit the sales of tobacco products and tobacco paraphernalia sales in large format stores that primarily promote community health, such as pharmacies and drugstores, consistent with County and local jurisdictions best practices.

Conditional Use Permits - SEC. 10-1.2786 - Conditional Use Permit for new Tobacco Retail Sales Establishments - To limit accessibility of tobacco products to youth and sensitive receptors, staff proposed an increase to the minimum distance of tobacco retailers to residential zones and any sensitive receptors from 500 feet to 1,000 feet, which is also consistent with the County of Alameda best practices standards.

POLICY CONTEXT AND CODE COMPLIANCE

Hayward 2040 General Plan. The City’s General Plan includes several goals and policies in the Health and Quality of Life section that support the proposed text Amendments related to the public health, safety and welfare, including the following:

- *HQL Goal 1:* Improving health and well-being of all Hayward residents;
- *HQL Policy 1.1:* Health in all Policies;
- *HQL Goal 3:* Collaboration for Improved Health;
- *HQL Policy 3-2:* Access to Healthy Foods;
- *HQL Goal 4:* Health Care Access and Disease Prevention;
- *HQL Goal Policy 4-3:* Prohibiting Cigarette Sales near Schools;
- *HQL Goal 7:* Protect residents from harmful effects of pollution, toxic substances and environmental contaminants; and
- *HQL Policy 7-5:* Proximity to Pollution Sources.

Pursuant to HMC Section 10-1.3425(a), the Planning Commission shall hold a public hearing on all map and text amendments and may recommend approval of or deny a text amendment, to the City Council based on the following findings:

1. Substantial proof exists that the proposed change will promote the public health, safety, convenience, and general welfare of the residents of Hayward.
2. The proposed change is in conformance with all applicable, officially adopted policies and plans.
3. Streets and public facilities existing or proposed are adequate to serve all uses permitted when the property is reclassified. And,
4. All uses permitted when property is reclassified will be compatible with present and potential future uses, and, further, a beneficial effect will be achieved which is not obtainable under existing regulations.

Staff has included more detailed findings to support the Amendments in Attachment II and a comprehensive list of all the Amendments being proposed is included as Attachment III.

STAFF ANALYSIS

It is staff's determination that the proposed Text will promote public health by the elimination of youth access to flavored tobacco products and electronic smoking devices currently existing in neighborhoods throughout the community. The text amendments will support responsibility and accountability of tobacco retailing in Hayward in alignment with the County, State and Federal regulatory standards for effective local tobacco education and enforcement of flavored tobacco and electronic smoking products in Hayward.

ENVIRONMENTAL REVIEW

Pursuant to the California Environmental Quality Act of 1970, Public Resources Code §21000, et seq., as amended and implementing State CEQA Guidelines, Title 14, Chapter 3 of the California Code of Regulations (collectively, "CEQA"), the proposed Amendments do not constitute a "project" within the meaning of Public Resources Code Section 21065, and CEQA Guidelines Sections 15061(b)(3) and 15378 because there is no potential that it will result in a direct or reasonably foreseeable indirect physical change in the environment and because it has no potential for either a direct physical change to the environment, or a reasonably foreseeable indirect physical change in the environment.

NEXT STEPS

Staff will incorporate input from the Planning Commission and forward the Commission's recommendations to the City Council for a Public Hearing scheduled in late June 2020. If adopted, the proposed Amendments will go into effect next Fiscal Year 2020-2021. Staff will contact all existing establishments by serving a notice of the adoption of the regulations and the procedures and the time frame in which they must obtain compliance with all new adopted regulations and standards.

Prepared by: Maggie Flores, Senior Code Enforcement Inspector

Approved by:



Sara Buizer, Planning Manager



Laura Simpson, Director of Development Services