



DATE: January 29, 2019

TO: Mayor and City Council

FROM: Development Services Director

SUBJECT: Work Session to Consider a Moratorium on Certain Businesses Including Massage Parlors, Alcohol-only Establishments, Tobacco or Vaping Retail, Check Cashing, and Fast Food

RECOMMENDATION

That the City Council reviews and provides direction related to a proposed moratorium on certain businesses.

SUMMARY

In December 2018, the Council directed staff to consider a moratorium on various businesses including massage parlors, tobacco and vaping retail establishments, check cashing businesses, fast food restaurants, and alcohol establishments based on concerns that the City was experiencing an over concentration of such uses and the potential impacts those uses have on the long-term vision for the City. Based on the background information, staff does not recommend such a moratorium for massage, tobacco, check cashing, and fast food restaurants as staff believes the existing regulatory framework can address any potential impacts these uses may cause. With respect to alcohol establishments, staff is requesting additional clarification from Council as to next steps if such a moratorium is recommended.

BACKGROUND

In December 2018, following the consideration of a proposed alcohol-only establishment in Downtown Hayward and concerns regarding an over-concentration of other uses city-wide, the City Council directed staff to consider a moratorium on various businesses including massage parlors, tobacco and vaping retail establishments, check cashing businesses, and fast food restaurants in addition to alcohol-only establishments.

Massage Establishments

The original Massage Permit Ordinance was adopted by the City in 1977 and later amended in 1978. Since that time, the Ordinance was replaced in 2006 and updated in 2015 with a more robust and stringent set of regulations that improved the ability of the City to deal with massage establishments that function as fronts for illicit sexual activity, minimize

opportunities for prostitution and human trafficking, and establishing operational and licensing protocols to ensure the preservation of public health, safety and welfare. The current Massage Permit Ordinance¹ mandates that all massage businesses and massage technicians be required to obtain a Massage Permit and be subject to a rigorous background and permitting process, which is managed by the Hayward Police Department (HPD).

Massage Permits are not required for some persons, such as physicians, chiropractors, physical therapists, acupuncturists, athletic trainers, or barbers/beauticians, who are duly licensed to practice their respective professions in the State. However, the Ordinance does make the permittee of a massage establishment responsible for all prohibited or required conduct and acts committed on the permittee's premises whether or not the permittee is personally involved or the prohibited or required conduct is committed by a direct employee, contract employee, or customer. Permittees are subject to random inspections and verification from HPD and are required to renew their licenses every two years. Additionally, licenses cannot be sold, transferred, or assigned to any other person and any new owner of a massage therapy establishment must submit a new application for a massage establishment permit in accordance with this Ordinance and is subject to the same background and screening requirements.

Prior to Ordinance adoption in 2006, HPD met with several massage establishment permittees and massage technicians to discuss the pending amendments to the Ordinance. At the time, there was significant support from those in the legitimate massage business to strengthen the requirements and regulations of the trade. Since adoption in 2006, there has been a decline in the number of land use applications related to massage establishments and staff believes that the additional background checks and screening requirements of potential applicants has deterred many of the illegitimate operators from Hayward.

Currently, the City has 18 known massage establishments operating within City limits. Of those 18 businesses, 15 have obtained and maintain current massage operating licenses from the City, which are valid through 2019-2020. The remaining three businesses have either no record with the City and/or do not hold licenses to legally operate. A map of the licensed massage establishments in the City are included as Attachment II.

Per Section 6-10.23 of the HMC², the Police Department can, during any hour in which a massage establishment is open for business, make an administrative inspection of each massage establishment for the purpose of determining compliance with this Article. If the establishment is found to be in violation, the City has the ability to take administrative, civil and/or criminal actions against the establishment, including revocation of the license and closure of the business. Since 2016, there has not been a revocation of any legally licensed massage establishment in the City. While there has been a record of illegitimate activities in the past related to massage parlors and massage technicians, the majority of the calls for

¹https://library.municode.com/ca/hayward/codes/municipal_code?nodeId=HAYWARD_MUNICIPAL_CODE_C_H6BUPRTR_ART10MAPEOR

²https://library.municode.com/ca/hayward/codes/municipal_code?nodeId=HAYWARD_MUNICIPAL_CODE_C_H6BUPRTR_ART10MAPEOR_S6-10.23IN

service that HPD currently receives are tied to illegal brothels and prostitution activities within multi-family residential apartments, and not from the legally permitted massage operators.

Massage parlors and similar massage activities are not permitted by right in any land use district in the City. In several commercially zoned districts, a massage parlor is allowed with the issuance of an Administrative Use Permit when the proposed massage use is ancillary to another established primary use, such as a beauty salon. Otherwise, massage parlors, as a principal use, require the issuance of a Conditional Use Permit by the Planning Commission and the issuance of a Massage Permit by the Hayward Police Department.

Tobacco Establishments

The regulations governing tobacco establishments were most recently updated in 2014 when the City Council adopted Resolution 14-093 and Ordinance 14-16 related to tobacco retailers, requiring a Conditional Use Permit for such facilities, limiting the location for any new tobacco retail establishments to areas of the City zoned General Commercial (CG), and established a Tobacco Retailers License (TRL) for all new and existing tobacco retailers. In addition to the requirements for a CUP and the TRL, tobacco retailers shall not be located within 500 feet of schools, parks, and other sensitive receptors. The combination of permitting requirements and the separation requirements described have significantly reduced the ability for any new businesses of this type to open.

According to the City's business license records, there are 113 tobacco retail establishments located in Hayward (Attachment III) that vary from gas stations to convenience markets to large format stores to tobacco only establishments. Of the total number of tobacco retail establishments, 85% of those were already existing in Hayward prior to the adoption of the new regulations in 2014.

Check Cashing and Payday Loan

Pay day lenders and check cashing businesses engage in the business of cashing checks, warrants, money orders, or similar short-term unsecured promissory notes for a fee. State law requires pay day lenders and check cashing businesses to register with the state, submit reports to the state and allows the state to issue penalties. The law also limits the fee (interest) charged by the lenders and check cashers. The check casher law does not apply to state and federally chartered banks, savings associations, credit unions and industrial loan companies, and retail establishments that cash checks or provide money orders for a minimum flat fee not exceeding \$2.

Pursuant to Hayward Municipal Code Section 10-1.3510, Uses and Activities Defined:

Check Cashing Store is defined as "an establishment primarily engaged in the cashing of checks for customers who usually do not have a checking account at a bank or other financial institution. Is commonly found in areas with easy access and high visibility."

A Payday Loan Facility is defined as "an establishment primarily engaged in the business of advancing funds to customers in situations where the customer uses his or

her entitlement to a future paycheck from some other source as collateral for the loan, and for which the customer pays a fee (percentage or otherwise) for the advancement.”

Under the City’s current regulations, Check Cashing Stores and Payday Loan Facilities are subject to Conditional Use Permit (CUP) approval in the Neighborhood Commercial District, Neighborhood Commercial – Residential District, General Commercial District, Office Commercial District and the Central Business District. In Downtown, Check Cashing Stores are permitted subject to CUP approval in the Central City-Commercial District and Central City-Plaza District (on the ground floor only); and subject to Administrative Use Permit (AUP) approval in the Central City-Residential District. Payday Loan Facilities are not permitted in Downtown zoning districts.

According to the City’s business license records, there are five check cashing businesses located in Hayward and no licensed Payday Loan Facilities. The businesses are dispersed throughout the City and are generally located in multi-tenant commercial buildings or in shopping centers along major arterials (Attachment IV). In addition, large-scale retail establishments such as Food Max, Chavez Market and Saudagar Cash and Carry offer check cashing as an incidental service. Check cashing businesses can also provide a valuable service to segments of the population that may not be able to establish a traditional bank account for a variety of reasons.

Fast Food Restaurants/Drive-Thru Establishments

The Hayward 2040 General Plan includes Goal 3 (Access to Healthy Foods) as part of the Community Health and Quality of Life Element. The primary intention of this goal is to expand year-round access to affordable, fresh, and healthy foods throughout the City. The General Plan states and includes the following policies:

HQL-3.1: Access to Healthy Foods The City shall strive to ensure that all residents are within walking distance of sources of fresh and healthy foods (e.g., grocery stores, healthy corner stores, farmers’ markets, and community gardens).

HQL-3.2: New Healthy Food Venues The City shall support and consider incentives to encourage the development of new retail venues that sell local, fresh produce, including farmers’ markets, community-supported agriculture programs, and grocery stores, especially in underserved areas and near schools.

HQL-3.8: Restrict Unhealthy Food Options The City shall discourage new liquor stores and fast food restaurants near schools and in areas with an existing high concentration of such stores.

Most fast food restaurants in the city, such as McDonalds, Burger King, Taco Bell, etc., are generally affiliated with having a drive-thru component. While restaurants, including fast food restaurants are typically a permitted use in most commercial zoning districts, when that fast food restaurant includes a drive-thru component, then the permit requirement changes and either an Administrative or Conditional Use Permit is required as shown in the Table 1 below.

Table 1. Permit Requirements for Drive-thru Establishments by Zoning District

ZONING DISTRICT	ENTITLEMENT PROCESS
Commercial Neighborhood (CN)	Conditional Use Permit (CUP)
General Commercial (CG)	Conditional Use Permit (CUP)
Central Business (CB)	Conditional Use Permit (CUP)
Commercial Limited (CL)	Conditional Use Permit (CUP)
Central-City Commercial (CC-C)	Conditional Use Permit (CUP)
Industrial District (I)	Administrative Use Permit (AUP)
South Hayward BART and Mission Boulevard Form-Based Codes (Specific Transect Zones)	Conditional Use Permit (CUP)

Currently, the Hayward Municipal Code includes minimum design and performance standards for drive-thru restaurants and coffee/espresso shops which prohibits the establishment of any drive-thru restaurant or drive-thru coffee/espresso shop within half-mile radius of another establishment as measured from the building walls of existing or proposed buildings. However, the City Council approved a Zoning Text Amendment and adopted Ordinance No. 18-11 which amended the land use prohibition to allow the establishment of these land uses, if certain additional findings can be made related to location.

The adopted text amendment maintained the existing half-mile prohibition, but incorporated flexibility by including additional special required findings within the performance standards that shall be justified in addition to those of the AUP or CUP to allow for an application to be filed with the Planning Division. The required findings to grant flexibility include the following:

- i. The drive-in or drive-thru restaurants (and coffee/espresso shops) are located within one-half mile from the Interstate 880 (Nimitz Freeway) or State Route 92 (Jackson Freeway) rights-of-way as measured by the existing roadway network;
- ii. The location of the drive-in or drive-thru restaurants (and coffee/espresso shops) will not have a substantial adverse effect on vehicular (including bicycle), pedestrian circulation and safety, or transit accessibility;
- iii. The drive-in or drive-thru restaurants (and coffee/espresso shops) will not conflict with City adopted goals and policies including, but not limited to, the General Plan and Bicycle Master Plan; and
- iv. The site is suitable and adequate for the proposed use because the drive-in or drive-thru restaurant (and coffee/espresso shops) lanes and service windows will be located

at least seventy-five (75) feet away from residential uses and residentially zoned properties.

Staff analysis completed for the recent text amendment determined that based on existing zoning districts coupled with the flexibility granted by the adopted text amendment, the potential new opportunity sites for drive-in and drive-thru restaurants and coffee/espresso shops would be limited to the following areas: Southland Mall area, portions of "A" Street to and from the I-880, West Winton Avenue and Amador Street (adjacent to County buildings), commercial properties adjacent to the SR-92 entrance at West Jackson and Santa Clara Street, and areas of the Industrial zoning district along the SR-92 and I-880 (Attachment V).

Within the City, there are 23 existing drive-thru restaurants (Attachment VI) which include, but are not limited to: McDonalds, Burger King, Jack in the Box, Taco Bell, and Kentucky Fried Chicken. Since the adoption of Ordinance No. 18-11, the Planning Commission has approved a drive-thru Starbucks at the Eden Shores Retail Center and City staff is still currently processing a Conditional Use Permit application for another new Starbucks cafe at the intersection of Mission Boulevard and Tennyson Road.

Alcohol Establishments

In 2013, new Alcoholic Beverage Outlet regulations were adopted into the City's Zoning Ordinance with the purpose of providing for the orderly integration of alcohol related uses in a manner that will protect public safety and encourage business growth. The Ordinance recognized that the "proliferation of establishments selling alcoholic beverages within the City of Hayward presents problems that affect residents, businesses, property owners, visitors, and workers in Hayward." However, the ordinance also understood that regulations that promote responsible alcohol consumption can contribute to economic vitality, particularly in the downtown area.

The Alcoholic Beverage Outlet regulations require most alcohol establishments to obtain a Conditional Use Permit (CUP), with a few exceptions including:

- (a) retail stores having 10,000 square feet or more of floor area and which devote not more than five percent of such floor area to the sale, display, and storage of alcoholic beverages;
- (b) full-service restaurants as defined in the ordinance; or
- (c) special event functions such as neighborhood or community festivals, provided all of the following criteria are met:
 - (1) The person, group, business, or organization sponsoring the event secures all applicable permits from the City of Hayward;
 - (2) The person, group, business, or organization sponsoring the event obtains a temporary on-sale ABC license for each of the dates the event will be held; and

(3) The duration of the event does not exceed three consecutive days or five days in any single calendar year, such as the Russell City Blues Festival and the summer street parties sponsored by the Chamber of Commerce.

In addition, all alcoholic beverage sales establishments shall abide by all of the following performance standards:

- (1) the establishment does not result in adverse effects to the health, peace or safety of persons residing, visiting, or working in the surrounding area; and
- (2) the establishment does not result in jeopardizing or endangering the public health or safety of persons residing, visiting, or working in the surrounding area; and
- (3) the establishment does not result in repeated nuisance activities within the premises or in close proximity of the premises, including but not limited to disturbance of the peace, illegal drug activity, public drunkenness, drinking in public, harassment of passersby, gambling, prostitution, sale of stolen goods, public urination, theft, assaults, batteries, acts of vandalism, excessive littering, loitering, graffiti, illegal parking, excessive loud noises, especially in the late night or early morning hours, traffic violations, curfew violations, lewd conduct, or police detentions and arrests; and
- (4) the establishment does not result in violations to any applicable provision of any other city, state, or federal regulation, ordinance or statute; and
- (5) the establishment's upkeep and operating characteristics are compatible with and do not adversely affect the livability or appropriate development of abutting properties and the surrounding neighborhood; and
- (6) the establishment's employees, except those employees with no customer contact, attend and successfully complete a training class on Responsible Beverage Service within ninety (90) days of being employed (exempting employees at retail stores having 10,000 square feet or more of floor area and which devote not more than five (5) percent of such floor area to the sale, display, and storage of alcoholic beverages); and
- (7) the establishment complies with all of ABC's Retail Operating Standards; and
- (8) the establishment does not sell alcoholic beverages to minors.

The regulations also further refine certain exempt uses including full-service restaurants which are defined as sit-down establishments that are regularly used and kept open for the primary purpose of serving meals to guests for compensation. These establishments shall have suitable kitchen facilities connected therewith, containing conveniences for cooking an assortment of foods that may be required for such meals, and that may include an incidental bar, cocktail lounge, or other area designated primarily for the service of alcohol on the premises, which operates as part of the restaurant and is subservient to the primary function of the establishment, and which maintains a minimum of 60 percent of its gross receipts from the sale of meals. For purposes of these regulations, a full-service restaurant does not include fast food restaurants.

In addition, full-service restaurants must also comply with additional performance standards including:

(1) A full-service restaurant shall serve meals to guests at all times the establishment is open for business. An establishment shall not be considered a full-service restaurant if it serves alcohol without meal service being provided;

(2) Any bar/lounge area cannot remain open when the dining area is closed. However, the dining area may be open while the bar/lounge area is closed;

(3) A full-service restaurant may offer live or recorded music until midnight without a cabaret license or permit, provided the music is within the parameters established by the City's Noise Ordinance. Dancing or other form of live entertainment besides music is not allowed unless a conditional use permit and a cabaret license or permit is obtained, in accordance with Chapter 6, Article 2 of this code. The right to have live or recorded music in a full-service restaurant may be revoked or suspended if violations of the requirements in this section or performance standards occur, in accordance with the procedures outlined in the regulations; and

(4) A full-service restaurant may offer reduced price alcoholic beverages served on the premises between the hours of 4:00 p.m. and 9:00 p.m., provided that such beverages are offered in conjunction with reduced price appetizers and reduced price non-alcoholic beverages. The right to have reduced price alcoholic beverages in a full-service restaurant may be revoked or suspended if violations of the requirements in this section or performance standards contained occur, in accordance with the procedures outlined in the regulations.

Based on data received by the Department of Alcoholic Beverage Control (ABC), there are numerous on- and off-sale alcohol outlet establishments within City limits as summarized in Table 2 below:

Table 2. Most Common On- and Off-Sale Retail Establishment Licenses in Hayward

Quantity	License Type	License Description
31	20	(Package Store) Authorizes the sale of beer and wine for consumption off the premises where sold. Minors are allowed on the premises.
49	21	(Package Store) Authorizes the sale of beer, wine, and distilled spirits for consumption off the premises where sold. Minors are allowed on the premises.
4	40	(Bar, Tavern) Authorizes the sale of beer for consumption on or off the premises where sold. No wine or distilled spirits may be on the premises. Full meals are not required; however, sandwiches or snacks must be available. Minors are allowed on the premises.
79	41	(Restaurant) Authorizes the sale of beer and wine for consumption on or off the premises where sold. Distilled spirits may not be on the premises (except brandy, rum, or liqueurs for use solely for cooking purposes). Must operate and maintain the licensed premises as a bona fide eating place. Must maintain suitable kitchen facilities and must make actual and substantial sales of meals for consumption on the premises. Minors are allowed on the premises.
2	42	(Bar, Tavern) Authorizes the sale of beer and wine for consumption on or off the premises where sold. No distilled spirits may be on the premises. Minors are not allowed to enter and remain (see Section 25663.5 for exception, musicians). Food service is not required.
29	47	(Restaurant) Authorizes the sale of beer, wine, and distilled spirits for consumption on the licensed premises. Authorizes the sale of beer and wine for consumption off the licensed premises. Must operate and maintain the licensed premises as a bona fide eating place. Must maintain suitable kitchen facilities and must make actual and substantial sales of meals for consumption on the premises. Minors are allowed on the premises.
10	48	(Bar, Night Club) Authorizes the sale of beer, wine and distilled spirits for consumption on the premises where sold. Authorizes the sale of beer and wine for consumption off the premises where sold. Minors are not allowed to enter and remain (see Section 25663.5 for exception, musicians). Food service is not required.

DISCUSSION

Pursuant to California Government Code Section 65858, in order to protect the public health, safety, or welfare, the Council may adopt an Interim Urgency Ordinance establishing a temporary moratorium on issuance of any City approvals, permits, or other entitlements for specific uses in the city that may be in conflict with a contemplated general plan, specific plan, or zoning proposal that the legislative body is considering or studying within a reasonable

time. In order to impose the moratorium, the City Council must make specific legislative findings that there is a current and immediate threat to the public health, safety, or welfare and the issuance of city approvals for specific uses would result in that threat to public health, safety, or welfare.

Based on the background information provided on the various uses and as shown in summary table (Attachment VII), all of the uses are not permitted or require either an Administrative or Conditional Use Permit. These are discretionary permits that are either decided at the staff level or by the Planning Commission at a noticed public hearing and require very specific findings be made related to not impacting the health, safety and general welfare of the community. Of course, decisions on these permits may be appealed to the next level or called-up by a Councilmember.

Given the limited number of some of these uses within the city (massage and check cashing) and strict regulations and location criteria for other uses (tobacco and fast food/drive-thru establishments), staff would not recommend instituting a moratorium on such uses. Staff believes the regulatory framework in place, including the requirements for discretionary permits, is sufficient to address and minimize the proliferation of these uses within the City. Additionally, with respect to check cashing establishments, these facilities provide access to financial services in low-income communities and to those who might not be able to establish a traditional bank account, so to not allow them might be considered discriminatory. However, if Council wishes to pursue a predatory lending practices policy, staff could research that.

With respect to alcohol establishments, staff heard feedback from Council regarding concerns, primarily over stand-alone alcohol establishments such as liquor stores and bars, and how they may or may not be aligned with the vision for the City and specifically downtown. Staff also heard from Council the desire to modify definitions and/or performance standards such as the 60% food sales receipts requirement for full-service restaurants. Should Council direct staff to return with an Urgency Ordinance establishing a moratorium on alcohol establishments, staff would request clarification on the following areas:

- (1) Clarify what types of alcohol establishments would be subject to the moratorium
- (2) Clarify the location of the moratorium (Downtown or City-wide)

Alternatively, should there not be the necessary support for establishing a moratorium, the Council may direct staff to work on an update to the Alcohol Beverage Outlet regulations, which would not preclude applicants from submitting and staff processing any such applications between now and when the new regulations are considered and adopted by Council.

STRATEGIC INITIATIVES

This agenda item supports the Complete Communities Strategic Initiative. The purpose of the Complete Communities Strategic Initiative is to create and support structured services and amenities to provide inclusive and equitable access for all with the goal of becoming a

thriving and promising place to live, work and play. This item supports the following goal and objective:

Goal 3: Develop a Regulatory Toolkit for Policy Makers.

Objective 3: Update, streamline, and modernize zoning codes.

The purpose of a moratorium, should that be the direction of Council, would be to update the regulatory guidelines governing the use(s) and update them accordingly to be more aligned with the goals and objectives of the City Council.

ECONOMIC IMPACT

There is no economic impact anticipated from this work session; however, if the Council direction is to establish a moratorium on certain land uses, then there are potential short-term economic impacts resulting in fewer businesses being established within the City. As the requested regulations are updated, however, there may be positive economic impacts that result from those regulatory changes.

FISCAL IMPACT

The establishment of a moratorium was not anticipated in the Development Services budget nor on its list of priority projects. As such, there is not an identified funding source to cover the costs associated with research, analysis, and regulation updates depending on direction from Council.

Staff anticipates that additional resources for contract services will be needed to accomplish tasks as described above should Council direct staff to do so. To meet this need if the Council decides to proceed with the moratorium or changes to any of the current regulations, staff would request an augmentation of \$75,000 for contract (planning) services during the FY 2019 mid-year budget process.

PUBLIC OUTREACH

On January 18, 2019, a Notice of Public Hearing for the City Council work session was published in the Daily Review newspaper and sent to all stakeholders and businesses engaged in the land uses described in this report.

NEXT STEPS

Based on the feedback and direction from the Council and assuming a 4/5 vote (6 affirmative votes) of the Council to establish a moratorium based on the necessary findings, staff will return with an Ordinance establishing a proposed moratorium at a future meeting. Staff can either return on February 5, 2019 or February 19, 2019. If the moratorium is introduced without the prior publication notice, which would be the case if staff returns on February 5, the initial term is 45 days followed by two possible extensions, a 10-month, 15-day extension, followed by a

one-year extension. If the published notice is provided before the adoption of the moratorium on February 19, 2019, the initial term is 45 days followed by a 22-month 15-day extension.

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Approved by:

A handwritten signature in black ink, appearing to read 'K. McAdoo', written in a cursive style.

Kelly McAdoo, City Manager