



DATE: July 7, 2020

TO: Mayor and City Council

FROM: Development Services Director

SUBJECT: Zoning Text Amendment for Tobacco Retail Sales Establishments: Introduction of an Ordinance and Adoption of a Resolution for a Zoning Text Amendment to Chapter 10, Article 1, Section 10-1.2780, Tobacco Retail Sales Establishments, of the Hayward Municipal Code Relating to Tobacco Retail Sales Establishments

RECOMMENDATION

That Council adopts an ordinance (Attachment II) and a resolution (Attachment III) for the proposed Zoning Text Amendment to Chapter 10, Article 1 of the Hayward Municipal Code, Sections 10-1.2780 through 10-1.2797, Tobacco Retail Sales Establishments, to establish new and updated regulations relating to the sale of flavored tobacco products, electronic smoking devices, and vaping products.

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 to serve the interests of the public.

In response to City Council direction from a September 2019 Council Referral Memo and concerns pertaining to the negative health consequences of tobacco and the increased use of flavored tobacco, electronic smoking devices (“E-cigarettes”) and vapor products among youth in Hayward, staff is recommending a Zoning Text Amendment to the Tobacco Retail Sales Establishment Ordinance that includes improved regulatory standards to mitigate the increase use of flavored tobacco products, E-cigarettes, and vapor products among Hayward youth, and the general accessibility of tobacco products. The proposed text amendments include stronger regulations in line 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

Ordinance¹. This ordinance established reasonable and uniform regulations to prevent the proximity of tobacco retail sales to youth within sensitive receptor areas and a means by which to regulate and monitor retail sales of tobacco to protect youth in our community.

In 2014, 144 tobacco retail establishments in Hayward were identified, including four vapor lounges. To date, there are 119 active tobacco retail establishments and zero 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. Furthermore, an evaluation of City data shows there are 48 existing tobacco retailers located within the 500-foot buffer zone to youth sensitive areas (i.e. schools and parks), and 36 retailers are located within a 1,000-foot buffer zone to youth sensitive areas, for a total of 84 tobacco retailers within the 1,000-foot buffer zone.

For Fiscal Years 2014-2015 through 2019-2020, the Hayward Police Department conducted approximately 539 inspections and issued 78 administrative citations to local tobacco retailers for selling to minors. Of the 78 that sold tobacco products to minors, 17 retailers sold a vape product to a minor, while 61 retailers sold a traditional tobacco product. In addition, of the 78 retailers, 18 retailers were repeat offenders. During the same period, the Code Enforcement Division conducted approximately 339 inspections and issued approximately 100 regulatory violation notices to tobacco retailers who were in violation of local and State tobacco retail laws and standards, i.e. sale of single cigarettes, minimum size package requirement, not renewing their tobacco license, etc.

On September 24, 2019, the Council approved a referral memorandum², submitted by Councilmembers Mendall, Márquez, and Zermeño, 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 adding or enhancing 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) 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 Public Health Department, and the City was held. Among the discussion points, substantial regional and national data regarding the growing trend of tobacco use by youth and the health consequences were presented together with "best practice" measures adopted by the State and local agencies 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 to address the related health issues.

¹ Hayward Municipal Code Section 10-1.2780, Tobacco Retail Sales Establishments Ordinance: https://library.municode.com/ca/hayward/codes/municipal_code?nodeId=HAYWARD_MUNICIPAL_CODE_CH10PLZOSU_ART1ZOOR_S10-1.2780TORESAES

² City Council Memorandum Referral (RPT 19-344), September 24, 2019: <https://hayward.legistar.com/View.ashx?M=F&ID=7723961&GUID=6EA8754E-EE71-4E2E-98C7-8271095BF23A>

On January 2, 2020, in response to evidence of increased youth use of Electronic Nicotine Delivery Systems (ENDS), the U.S. Food and Drug Administration (FDA) issued a formal guidance document³ 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 as of September 9, 2020.

According to information published by the Centers for Disease Control and Prevention (CDC)⁴, tobacco product use among U.S. youth is rapidly increasing. More than 1 in 4 high school students and about 1 in 10 middle school students, were found to have used tobacco in 2019. This notable increase from previous 2017 data⁵ 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 27.5% among high school students, and from 3.3% to 10.5% among middle school students from 2017 to 2019. A slight downward, 1-3%, change was found in the use of other tobacco products, including traditional cigarettes during this time for middle and high school students.

Information from the California Department of Public Health 2018 Survey of California Youth⁶ 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 for Hayward Unified School District⁷ 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.

Based on the data obtained identifying the increased health crisis and the trends in the use of flavored tobacco products and the accessibility by youth, staff reviewed several ordinances, including the County of Alameda and the cities of Fremont, Oakland, and San Leandro, as well as supportive language from Change Lab Solutions (tobacco policy expert), to craft text amendments suited for Hayward.

In addition, staff has 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.

³ FDA Enforcement Priorities for Electronic Nicotine Delivery Systems (ENDS) and Other Deemed Products on the Market Without Premarket Authorization: <https://www.fda.gov/media/133880/download>

⁴Centers for Disease Control and Prevention, Youth and Tobacco Use, Estimates: https://www.cdc.gov/tobacco/data_statistics/fact_sheets/youth_data/tobacco_use/index.htm#current-estimates

⁵2019 National Youth Tobacco Survey Fact Sheet: <https://www.fda.gov/media/132299/download>

⁶California Department of Public Health, Tobacco Control Program, California Tobacco Facts and Figures 2019:: <https://www.cdph.ca.gov/Programs/CCDPHP/DCDIC/CTCB/CDPH%20Document%20Library/ResearchandEvaluation/FactsandFigures/CAtoTobaccoFactsandFigures2019.pdf>

⁷ California Department of Education 2018-2019 Survey, Hayward Unified School District, Middle and Secondary Students Survey Table: https://public.tableau.com/shared/NK9FK6YPT?:toolbar=n&:display_count=y&:origin=viz_share_link&:embed=y

Council Economic Development Committee CEDC: On March 2, 2020⁸, staff presented a report to the CEDC and the general public to request direction on drafting revisions to the Tobacco Retail Sales Establishment Ordinance. Public speakers included students and staff from the Hayward Unified School District as well as staff from the Alameda County Public Health Department in support of additional regulations for the health and safety of 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 concerns about identifying measures to deal more effectively with this growing issue and the negative impacts to our youth and community. Staff received consensus to bring forward a Text Amendment of the Ordinance to the City Council.

Planning Commission Public Hearing: On May 28, 2020⁹, the Planning Commission held a public hearing to review staff's recommendations of the proposed revisions to the Tobacco Retail Sales Establishment Ordinance. Public speakers included several tobacco retail owners from the Hayward business community and from the general public against the proposed amendments, as well as many students and staff from the Hayward Unified School District, Alameda County Public Health Department, Alameda County Tobacco Control Coalition, and other local agencies in support of the proposed amendments.

The Planning Commission voted 6-0 (one absent) to recommend approval of the proposed amendments to the Tobacco Retail Sales Establishment Ordinance with the recommendation for staff to attach a matrix, "Planning Commission Comments and Recommendations for City Council" (Attachment IV), that includes a general evaluation and response by staff for consideration by the City Council as possible alternatives to the proposed ordinance changes.

DISCUSSION

As adopted in 2014, 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 updated Tobacco Retail Sales Establishment regulations will be codified in Section 10-1.2780 et seq. of the Zoning Ordinance.

The areas of consideration provided to staff by Council are the primary focal points of the proposed text amendments to the Tobacco Retail Sales Establishment Ordinance, which include: additional restrictions on the sale of tobacco and vaping products, flavored tobacco products, and small or inexpensive tobacco; the location of tobacco retailers as it relates to youth sensitive areas; additional monitoring of tobacco use and vaping products; and changes that will help reduce teen use of tobacco and vaping products in Hayward.

Staff recommends the proposed Text Amendment to Chapter 10, Article 1, Section 10-1.2780,

⁸ Council Economic Development Committee, March 2, 2020, Meeting, Item RPT 20-026:

<https://hayward.legistar.com/MeetingDetail.aspx?ID=752550&GUID=FFB56822-5B3E-4AAF-9E20-76A40801051&Options=info&Search=>

⁹ Planning Commission Meeting, Public Hearing #PH 20-023, Item with Attachments:

<https://hayward.legistar.com/LegislationDetail.aspx?ID=4544481&GUID=C662AF9E-5966-40D6-BE89-BDA9F990018&Options=&Search=>

Tobacco Retail Sales Establishment Ordinance included in Attachment II, with deletions shown in ~~striketrough~~ and new text shown in underlined text. The most significant changes from the existing regulations are included in the following sections of the Ordinance.

SEC. 10-1.2780 - Findings and Purpose - This 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.

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 has 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.

SEC. 10-1.2783 - Requirements and Operational Standards for Tobacco Retail Sales Establishments - Text amendments and re-organization of established standards where proposed throughout this section will provide additional clarity as well as 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 address areas for consideration provided by the Council and include stronger standards to help mitigate the rising trends in the use of tobacco and vaping products in secondary schools.

The main text amendments to this Section include:

1. Changes in the minimum floor price to \$8, and packaging size of tobacco products (i.e. 20 cigarettes per package size) consistent with County and neighboring jurisdictions for enforcement.
2. The removal of the legal-nonconforming status of tobacco retailers that sell flavored or other unpermitted tobacco products currently banned throughout the City.
3. Consolidation of all regulations pertaining to banned substances and 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, including:
 - (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 and details in the descriptions of

the products being regulated

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 the intent of the County and other local jurisdictions regulations.

SEC. 10-1.2786 - Conditional Use Permit for new Tobacco Retail Sales Establishments – To further 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. The Planning Commission voted (6-0) on the proposed land use change to increase the minimum distance from youth sensitive receptors to 1,000 feet.

Planning Commission Recommendations. Per the Planning Commission’s recommendation, staff created a matrix, “Planning Commission Comments and Recommendations for City Council” (Attachment IV) of comments provided by the Planning Commission and staff’s evaluation and action for review by the City Council. The comments included:

- Imposing community service for violators.
- Limiting the ban of flavored tobacco products to adult-only locations.
- Regulating tobacco retailers like cannabis dispensaries.
- Enforcing the buffer zones.
- Exploring other options prior to a full ban across all tobacco retailers.
- Including actions to mitigate the impact to the community, i.e. cessation assistance resources, etc.
- Not including vaping products in the proposed ban of flavored tobacco products.

Staff reviewed these items and provided responses and proposed actions in Attachment IV. No additional changes to the proposed text amendments are recommended by staff, with the exception of additional language related to the ban on vaping products for greater clarity.

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.

ECONOMIC IMPACT

The adoption of the proposed tobacco retail sales regulation amendments will provide stronger enforcement authority for establishments that sell or continue to sell to minors, while providing the ability to keep new tobacco retail establishments away from youth sensitive receptors through the increase of the buffer zone from 500 feet to 1,000 feet.

Positive impacts on sensitive receptors and neighborhoods are expected with the increased distance from these locations by limiting accessibility of tobacco products to minors.

However, existing retail stores that rely on a large percent of their total sales of flavored tobacco and vaping products may be discouraged from locating in Hayward, which may result in a decrease in sales tax revenue from tobacco sales for the City.

According to the National Association of Convenience Stores (NACS)¹⁰, sales of tobacco products (cigarettes and other tobacco products in general) represent approximately 36% of in-store sales at U.S. convenience stores, including gas stations. Staff was not able to locate a collection of specific sales data for Hayward by tobacco product to determine the potential economic impact to existing tobacco retailers, as most tobacco retailers in Hayward sell other consumer products in addition to tobacco products.

Although not known, it could be reasonable to assume that a portion of the 36% in potential tobacco sales revenue for convenience stores and gas stations in Hayward will be reduced by the implementation of the proposed text amendments. The increase on the minimum floor prices and minimum package sizes of non-flavored tobacco products proposed could also potentially offset a portion of the loss in sales revenue resulting from the proposed full ban of flavored tobacco products and vaping products.

FISCAL IMPACT

Staff has identified no additional fiscal impact at this time and anticipate any cost recovery for enforcement will be accomplished under the currently existing Tobacco Retailer License Inspection Program, jointly operated by the Code Enforcement Division and the Police Department. Staff will continue to monitor the program for impacts and report to Council for further direction if required. The existing annual Tobacco Retail Sales License fee for tobacco retailers is \$400. In addition, the City has adopted tobacco offense penalties (\$1,500, \$3,000, and \$5,000) for violations of the Tobacco Retail Sales Establishment Ordinance, including violations of local, State, and Federal regulations relating to the sales of tobacco products, in accordance with the Master Fee Schedule.

STRATEGIC ROADMAP

This agenda item supports the Strategic Priority of Support Quality of Life Initiative. Specifically, this item relates to the implementation of the following project:

Project 11: Implement a vaping ban

¹⁰ National Association of Convenience Stores (NACS) weblink:
<https://www.convenience.org/Advocacy/Issues/Tobacco/FDARegulationofTobacco>

SUSTAINABILITY FEATURES

The proposed project involves the amendment of the Tobacco Retail Sales Establishment regulations, which will not result in a direct impact on the environment. However, with the implementation of these regulations, it will reduce the exposure of direct and secondhand smoke to individuals and youth within the City, which will result in healthier people within the community. In the midst of the COVID-19 global pandemic, an acute respiratory syndrome, health experts have found new evidence that using vaping and electronic devices increases the risk of contracting the virus and makes individuals susceptible to greater lung injury from any illness. Minimizing exposure to direct and secondhand smoke from all forms of nicotine vapors and similar devices promotes the health of individuals in Hayward.

PUBLIC CONTACT

On February 14, 2020, staff presented a report for public input to the Chamber of Commerce Government Relations Council (GRC) to identify any local business concerns and receive public input. Overall, the GRC and its attendees expressed support for the establishment of strengthened standards.

Staff has worked closely with subject matter experts from the Alameda County Public Health Department and Change Lab Solutions (tobacco policy expert) in reviewing adopted local regulations and best practice measures to develop the proposed text amendments in line with the intent of these locally adopted standards for local consistency in the enforcement, while still maintaining them suited within the City's standards and enforcement practices.

On May 15, 2020, a legal ad was posted in the Daily Review newspaper of the proposed Ordinance. The ad provided information on the date the full draft document would be available on the City's website.

On May 18, 2020, a Code Enforcement notification was mailed to all existing tobacco retailers (119) that included an overview of the proposed Text Amendment to the Tobacco Retail Sales Establishment Ordinance, HMC Section 10-1.2780, and information on the scheduled Planning Commission Public Hearing Meeting of May 28, 2020.

Staff received numerous letters and other communications¹¹ from the public and community advocacy groups prior to the Planning Commission meeting in support of stronger regulations pertaining to the sale of flavored tobacco products and electronic smoking devices, the sale of tobacco near child-sensitive areas, raising the tobacco minimum price and package size requirements, and prohibiting the sale of tobacco products in pharmacies. Staff also received communication via email and phone from retailers and consumers opposing the ban of flavored tobacco and vaping products.

On June 23, 2020, Code Enforcement staff mailed an informational notification to all existing tobacco retailers that included an overview of the proposed Text Amendment changes, the scheduled upcoming City Council public hearing pertaining to the introduction of the Text

¹¹ Public Comment Correspondence prior to Planning Commission Meeting of May 28,2020; Attachment IV Comments Received: <https://hayward.legistar.com/LegislationDetail.aspx?ID=4544481&GUID=C662AF9E-5966-40D6-BE89-BDA9F990018&Options=&Search=>

Amendment to the Tobacco Retail Sales Establishment Ordinance, and information pertaining to comments received to date from tobacco retailers and tobacco consumers in opposition of stronger regulations.

As of the date of this report, staff received additional letters and other communications (Attachment V) from the public and community groups in support of stronger regulations to restrict access of flavored tobacco and vaping products to the youth in our community. As of the date of this report was generated, no additional communication was received opposing the proposed Text Amendment to the Tobacco Retail Sales Establishment Ordinance.

On June 26, 2020, a legal ad was posted in the Daily Review newspaper of the proposed Ordinance. The ad provided information on date the full draft document would be available on the City's website.

NEXT STEPS

If approved, the text amendments to Tobacco Retail Sales Establishment Ordinance will be reviewed by the City Council for a second reading for adoption and will become effective in Fiscal Year 2020-2021, 30 days after adoption. Code Enforcement, in collaboration with the Police Department, will complete an implementation plan for notification and enforcement to all existing establishments that will include: (1) the new adopted regulations; (2) timeframe to comply with the new regulations; (3) a list of examples of types of products prohibited for sale and inspection checklist; (4) the City's inspection and enforcement procedures; (5) appeal process to contest a violation; and (6) information of available resources for the community and the tobacco retailers to assist in the transition of the new regulations. Additionally, all program information will be updated and made available on the City's website.

Prepared by: Maggie Flores, Senior Code Enforcement Inspector

Recommended by: Laura Simpson, Director of Development Services

Approved by:



Kelly McAdoo, City Manager