



Legislation Text

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Report regarding an ordinance amending Title 8, Chapter 8.50 and Title 20, Chapter 20.420 and adding Title 6, Chapter 6.47 of the South San Francisco Municipal Code pertaining to the sale of tobacco, flavored tobacco, and electronic smoking devices. (*Christina Fernandez, Assistant to the City Manager*)

RECOMMENDATION

It is recommended City Council introduce an ordinance amending Title 8, Chapter 8.50 and Title 20, Chapter 20.420 and adding Title 6, Chapter 6.47 of the South San Francisco Municipal Code pertaining to the sale of tobacco, flavored tobacco, and electronic smoking devices, and waive further reading.

BACKGROUND/DISCUSSION

According to the California Department of Public Health, 80% of young people who used tobacco started with a flavored tobacco product. A majority of youth report flavoring as a leading reason for using tobacco products. This includes 82% of e-cigarette users, 79% of hookah users, 74% of cigar users, and 69% of smokeless users. Flavors such as watermelon, cherry, chocolate, mint, and gummy bear appeal to kids and teens. Flavorings mask the taste of tobacco making it more palatable for youth to begin tobacco use. Flavored tobacco products also use the same flavoring chemicals as Jolly Rancher, Kool-Aid, and Life Savers. Certain minority groups also disproportionately use flavored tobacco products, including menthol cigarettes. In one survey, 82.6% of African American cigarette smokers reported smoking menthol cigarettes in the month prior.

Flavored E-Cigarettes

Most commonly used among youth, e-cigarettes deliver flavorings, nicotine and other additives via an inhaled aerosol. E-cigarettes entered the marketplace in 2007, and since 2014 have been the most commonly used tobacco product among youth. E-cigarette use among U.S. middle and high school students has increased 900% between 2011 and 2015. During the past year, e-cigarette use has increased 78% among high school students. In 2018, more than 3.6 million U.S. youth, including 1 in 5 high school students and 1 in 20 middle school students currently use e-cigarettes. The chemical Diacetyl is found in 75% of flavored e-liquids and is linked to “popcorn lung” which causes irreversible lung damage.

State and Federal Guidance and Regulations

The U.S. Surgeon General warns that flavored tobacco products help new users establish habits that lead to long-term addiction. Flavors like menthol in tobacco products make it more difficult for users to quit. All nicotine products are addictive and increase the risk of developing serious health problems including cancer, heart disease, and emphysema.

In 2009, the Federal Government passed the Family Smoking Prevention and Tobacco Control Act that banned the manufacture of flavored cigarettes. Menthol cigarettes were exempt from this ban. The ban also does not restrict non-cigarette tobacco products such as smokeless tobacco.

The Food and Drug Administration announced a new plan to protect youth by preventing access to flavored tobacco and banning menthol in cigarettes. The proposed plan would ban menthol cigarettes finding that

menthol cigarettes are easier to smoke and harder to quit. It is also the choice combustible cigarette for youth and underserved communities. Recently, at the direction of President Trump, Health and Human Services Secretary Alex Azar announced that newly proposed enforcement policies may require e-cigarette companies to take their products off of the market.

At the state level, Governor Newsom pledged \$20 million for a public awareness campaign about the dangers of vaping nicotine and cannabis products. Further, the state will step up efforts to prohibit the sale of illicit products and is exploring additional warning signs at retailers and in advertisements.

The California Department of Tax and Fee Administration is directed to study changing how e-cigarettes are taxed as they typically face lower charges than traditional cigarettes. The state may also implement a “track and trace” program, which tracks the amount of vaping product distributors are giving retailers against the tax it is collecting. The track and trace program indicates if retailers make money from illicit or untaxed products.

South San Francisco Tobacco-Related Ordinances

In 2008, the City enacted South San Francisco Municipal Code (SSFMC) Section 6.46.010 “Authorization of enforcement by San Mateo County personnel” which adopts by reference San Mateo County Ordinance Code Chapter 4.98 “Tobacco Retailer Permit.”

San Mateo County Ordinance Chapter 4.98 requires all retailers to obtain and maintain a valid tobacco retailer’s permit from San Mateo County for each location where tobacco products are sold. Further, Chapter 4.98 authorizes the County’s Environmental Health Division to hold hearings, suspend permits, and issue administrative fines in enforcing the governing of tobacco retailer permits. The adoption of SSFMC Section 6.46.010 is significant as it serves as the mechanism for enforcement should the City Council decide to adopt a Flavored Tobacco Ban. For a list of local tobacco-related ordinances in jurisdictions across California, please see Attachment 1.

In 2012, the City enacted SSFMC Chapter 20.420 “Prohibition on new significant tobacco retailers,” which prohibits a business whose principal or core is selling tobacco products and/or paraphernalia from operating in the City. Significant tobacco retailers are defined as any tobacco retailer with 20 percent or more of floor area and display area devoted to the sale or exchange of tobacco products, tobacco paraphernalia, or both; or 50 percent or more of completed sales transactions include tobacco products or paraphernalia.

The City Council discussed limiting youth access to flavored tobacco and e-cigarettes at two Special City Council meetings on April 9, 2019 and July 22, 2019. In April, Council directed staff to explore the prohibition of flavored tobacco and e-cigarettes citywide at all businesses with the exception of adult only retailers. Adult only retailers allow those 21 and over on their premises. Minors may only enter an adult only establishment if accompanied by a parent.

Proposed Ordinance

Given Council direction at both study sessions in April and July, staff recommends the following Municipal Code amendments be adopted by Council with the purpose of limiting youth access to flavored tobacco and e-cigarettes.

Title 8, Chapter 8.50 Use of Electronic Smoking Devices - Restricted

Amendments to Chapter 8.50 of the South San Francisco Municipal Code revises the definition of Electronic Smoking Device to be consistent with Section 20.420.002 which prohibits Significant Tobacco Retailers. The

amendment also specifies the exclusion of medical inhalers prescribed by a licensed doctor. Another modification deletes the definition of “Retail Tobacco Stores” so as to avoid confusion with the definition of “significant tobacco retailer” under the Zoning Code. Further, one other proposed change would clarify that smoking is permitted in hookah bars and smoking lounges as defined in the City’s Zoning Code, and deletes the reference to “Retail Tobacco Stores” as the latter would not be permitted within the City based on the prohibition against significant tobacco retailers.

The changes made to Chapter 8.50 are for internal consistency purposes only, and the regulations under that chapter remain unchanged.

Title 6, Chapter 6.47 - Sales of Flavored Tobacco Products, Pharmacy Sales of Tobacco Products, and Sales of Electronic Smoking Devices Prohibited.

The addition of Title 6, Chapter 6.47 of the Municipal Code is modeled after Chapter 4.9 of the San Mateo County Code. This proposed chapter would specifically regulate flavored tobacco product and e-cigarettes. The proposed chapter defines flavored tobacco and outlines the prohibition of sales of flavored tobacco products, electronic smoking devices, and tobacco products by a pharmacy. Chapter 6.47 only pertains to flavored tobacco and e-cigarettes; traditional combustible tobacco remains under the purview of Chapter 6.46.

Chapter 6.47 prohibits the sale of flavored tobacco and e-cigarettes by any retailer with the exception of “adult only retailers”. Adult only retailers are defined as “any retailer or business that allow entry only by adults (aged 21 and older) onto the entire premises of the business or retailer, or that require minors to be accompanied by a parent, guardian, or another adult in order to enter the entire premises of the business or the retailer.” This definition specifically does not include any retailer or business that only prohibits minors from entering certain sections, divisions, or a part of the premises that are marked or otherwise restricted as “adult only”. Likewise, Chapter 6.47 would prohibit the sale of tobacco products by a pharmacy and existing tobacco retailer permits may not be renewed by a pharmacy that may have previously obtained such permits.

In addition, Chapter 6.47 defines flavored tobacco as containing a “characterizing flavor” which is distinguishable taste or aroma, or both. These flavors include but are not limited to, fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, menthol, mint, wintergreen, herb or spice. Staff notes that as currently drafted, this inclusion of mint, menthol, and wintergreen under Chapter 6.47 is broader than the scope of federal regulations, since federal law prohibits the manufacture of flavored cigarettes, but excludes menthol cigarettes from the prohibitions.

Chapter 6.47 further exempts pre-existing significant tobacco retailers (lawfully existing prior to the ban on significant tobacco retailers was enacted by the City) and hookah bars/smoking lounges from the prohibition of flavored tobacco and e-cigarettes if they qualify as an adult-only retailer. Hookah bars and smoking lounges are defined by Chapter 20.620 of the Zoning Code that serve flavored tobacco or other products for on-site smoking.

The proposed Chapter 6.47 further permits County personnel to enforce the requirements of that chapter, and also reserves authority for the City to enforce any violations thereto.

Zoning Code- Title 20, Chapter 20.420 Significant Tobacco Retailers Prohibited

The definition of “tobacco products” has been amended to include flavored tobacco and electronic cigarette

devices. This revision brings vape shops and flavored tobacco retailers within the definition of “significant tobacco retailers.” Unless exempted under Chapter 6.47, significant tobacco retailers are not a permitted use and prohibited in all zones citywide. The proposed revisions to Chapter 20.420 would have the effect of prohibiting vape shops but provides the ability for the City to exempt the two existing vape shops.

The Planning Commission held a duly noticed public hearing on September 5, 2019, to consider the proposed revisions to the Zoning Code. Staff presented the revision of Chapter 20.420 of the Municipal Code to include vape shops in the definition of significant tobacco retailers, with an exemption for the two existing significant tobacco retailers.

Planning Commission comments included the following concerns:

- A philosophical concern of restricting an adult’s ability to make their own decisions about tobacco use
- The need for clear, concise definitions for “flavored tobacco”
- Questions regarding staff’s research on the use of CBD oil in e-cigarettes

The Planning Commission voted (5 yes, 1 abstention, 1 recusal) to recommend that the City Council adopt the amendments to Chapter 20.420 of the Municipal Code.

Enforcement

As discussed previously, the proposed ordinance amendments would still permit the City of South San Francisco to enforce all provisions in the Municipal Code or Zoning Code with any enforcement remedies available by law and/or the City’s Municipal Code. Remedies include civil enforcement through a restraining order, a preliminary or permanent injunction or by any other means authorized by law. Additionally, the County of San Mateo’s Health System Chief, or his or her designee, may enforce the provisions outlined in Chapter 6.47.

The County of San Mateo enforces its ordinance by relying on the Health System Chief to enforce Chapter 4.99 by suspending a tobacco retailer’s permit and/or imposing administrative fines following enumerated procedures and amounts. Administrative fines range from \$100 for the first violation and range up to \$500 for a third and subsequent violations. Each day that tobacco products are offered for sale without a permit constitutes a separate violation.

Public Outreach

Business Town Hall Meetings

The City Manager’s office in coordination with the Economic and Community Development Department hosted a series of four Business Town Hall meetings on June 17, 2019, June 24, 2019, June 27, 2019 and June 28, 2019. Two meetings were held in the morning and two in the evening.

The City advertised the town hall meetings through mailers sent to every business license holder citywide. Approximately 6,000 mailers were sent via U.S. Postal Mail to every business license address. In addition, the non-profit organization Gatepath personally handed out mailers to every business along Grand Avenue and Linden Avenue.

Further, the City advertised the business town hall meetings on social media platforms including the City’s

Facebook page, the Economic and Community Development Facebook page, NextDoor and the City's Website Calendar of Events. The Economic and Community Development department and the City Manager's office also provided e-blasts to their distribution lists. Lastly, the city also called businesses along Grand Avenue to inform them of the business town hall meeting dates. Representatives from the hotel, restaurant, tobacco retail, and grocer industries participated in the Business Town Hall meetings. However, despite the above named outreach efforts, fewer than 20 businesses cumulatively participated.

A significant tobacco retailer attended a Business Town Hall meeting and were supportive of the direction provided by Council at its April 9, 2019 study session. At this study session, the City Council directed staff to study prohibiting the sale of flavored tobacco and e-cigarettes at all retailers citywide with the exception of adult only establishments. Adult only establishments only allow those 21 and over to enter their premises unless they are with a parent.

JUUL Labs, Inc.

JUUL Labs, Inc. has provided the City with a plan to implement additional, targeted youth prevention measures to restrict youth access. (JUUL's letter to City Council dated July 3, 2019 - *Attachment 2*)

Some of those measures include:

- Deployment of automated point-of-sale (POS) systems that restrict sales to verified adults 21+ and limit the amount of product that can be purchased
- Targeted secret shopper program that ensures compliance with age verification and bulk purchasing requirements
- Partnerships with track-and-trace programs for JUUL products to identify where products are being obtained by youth

JUUL piloted its track and trace program in a U.S. metropolitan area in addition to providing targeted education and information campaigns. JUUL has offered to work with the City to create awareness about the track and trace program in order to assess where youth are accessing JUUL products. JUUL sent additional comments regarding Council direction provided at July 22, 2019 study session. (JUUL letter to City Council dated August 30, 2019 - *Attachment 3*) Comments provided propose the following alternative policies to restrict youth access.

- Require all tobacco retailers to adopt electronic scanning technology to verify the purchaser's age (21+) and ID validity before completing a transaction involving a tobacco product, including vapor products; or
- Permit the sale of traditional flavored tobacco products, including traditional flavored vapor products, in any retail outlet that sells combustible cigarettes; *and* restrict non-traditional flavor tobacco products, including non-traditional flavored vapor products, to retail outlets that have been enhanced access restrictions that have been shown to prevent youth access.

FISCAL IMPACT

There is no known fiscal impact.

RELATIONSHIP TO STRATEGIC PLAN

Regulating the sale of flavored tobacco and e-cigarettes meet the city's strategic goal of providing a high quality of life for our residents.

CONCLUSION

It is recommended City Council introduce an ordinance amending Title 8, Chapter 8.50 and Title 20, Chapter 20.420 and adding Title 6, Chapter 6.47 of the South San Francisco Municipal Code pertaining to the sale of tobacco, flavored tobacco, and electronic smoking devices, and waive further reading.

Attachments:

1. Matrix of Local Tobacco-Related Ordinances
2. JUUL's letter to Council - July 3, 2019
3. JUUL's letter to Council - August 30, 2019
4. Flavored Tobacco & E-Cigarette PowerPoint Presentation