



Memorandum

TO: NEIGHBORHOOD SERVICES AND
EDUCATION COMMITTEE

FROM: Christopher Burton

**SUBJECT: FLAVORED TOBACCO BAN AND
NITROUS OXIDE WORK PLAN
STATUS REPORT**

DATE: September 25, 2023

Approved

Date

10/5/23

RECOMMENDATION

Accept the status report of the Flavored Tobacco Ordinance and the proposed Nitrous Oxide Ordinance work plan.

BACKGROUND

Flavored Tobacco Ordinance

On September 28, 2021, the City Council approved an ordinance amending Chapter 6.87, Tobacco Retail License, of Title 6, Business Licenses and Regulations, of the San José Municipal Code to prohibit the sale of flavored tobacco and e-cigarettes (or other flavored tobacco products), prevent further overconcentration of tobacco retail businesses, and reduce youth access to tobacco products. The City Council also directed City staff to:

1. Include language in the ordinance clarifying that enforcement will be aimed at tobacco retailers.
2. Direct Code Enforcement to continue to perform a minimum of one annual compliance check for each tobacco retailer per year.
3. Direct the Administration to search and apply for grants at the Federal, State, or County levels of government and any private or philanthropic organizations that might allow for a more robust enforcement program, including funding for decoy enforcement programs.
4. Direct staff to return to the Neighborhood Services and Education Committee within 12 months after full implementation analyzing the ordinance's effects on tobacco retail licenses throughout San José with a special focus on tobacco retail licenses that are within 1,000 feet of a youth-sensitive receptor.
5. Direct staff to propose amendments to the fine schedule to increase the penalty for violations of this ordinance.
6. Direct staff to report back to the City Council through an information memorandum or informal presentation regarding efforts to cross-train inspectors to enable a single inspector to provide multiple inspections (e.g., alcohol, tobacco, and code) for a

single business, and thereby improve the efficiency of code operations. Fees should be accordingly adjusted to reflect partial cost recovery proportionate to the cost of inspection of each subject.

Nitrous Oxide Ordinance

On February 16, 2022, Council Member Davis submitted a memorandum to the Rules and Open Government Committee dated January 1, 2022, recommending the Committee:

1. Direct the City Attorney to draft an ordinance banning the sale of nitrous oxide products in vape and smoke shops.
 - a. Direct staff to define “vape and smoke shops” and identify nitrous oxide products that will be banned at these retailers.
 - b. Direct staff to create a timeline for vape and smoke shops to cease nitrous oxide product sales.
 - c. Work with the San José Police Department and Code Enforcement to create a work plan to audit nitrous oxide product sales at vape and smoke shops.
 - d. Direct staff to explore fines and/or retail license suspension for vape and smoke shops that continue the sale of nitrous oxide after the ordinance goes into effect.
2. Require retailers who sell nitrous oxide products to display substance abuse resources.
3. Add this issue to our city’s legislative priorities list to advocate for state legislation that prioritizes banning nitrous oxide product sales at vape and smoke shops.

The Rules and Open Government Committee approved Council Member Davis’s recommendation in accordance with the Early Consideration Form provided by staff. Staff proposed to begin the ordinance work within six to nine months after other priority work items already in progress were completed. The Early Consideration Form outlined the following anticipated steps to enact the proposed Nitrous Oxide Ordinance:

1. Evaluate the existing Tobacco Retail License (TRL) and research-related nitrous oxide ordinances in other jurisdictions to draft proposed ordinance language and new fines.
2. Evaluate the impact of absorbing audits of nitrous oxide product sales at vape and smoke shops on staffing and resources of Code Enforcement and the Police Department.
3. Conduct outreach regarding the proposed ordinance amendments to affected business owners and other stakeholders as appropriate,
4. Design a plan for implementation including a grace period for retailers to cease nitrous oxide sales.
5. Collaborate with the Police Department, as needed, to respond to any subsequent calls for service for assistance in the citation or documentation of illegal nitrous oxide sales. As always, these responses will be subject to the availability of officers at the time of the call for service.
6. Explore potential requirements for retailers to display substance abuse resources at business locations in coordination and partnership with the County and the City Attorney’s Office.

7. Ensure the Office of Administration, Policy, and Intergovernmental Relations will add this issue to the City’s legislative program list to advocate for State legislation banning the sale of these products.

This memorandum provides a status report on the Flavored Tobacco Ordinance 12 months after implementation as directed by Council, a status update on Council direction approved with the Flavored Tobacco Ordinance, and the proposed Nitrous Oxide Ordinance work plan.

ANALYSIS

Flavored Tobacco Ordinance- Implementation and Enforcement Strategy

Following the adoption of the Flavored Tobacco Ordinance in 2021, the Code Enforcement Division began executing the Flavored Tobacco Ordinance Implementation and Enforcement Strategy. As part of this strategy, staff updated the Code Enforcement Division website, the multilingual Tobacco Retail License (TRL) Program brochure, and the TRL frequently asked questions with the new ordinance information to help educate existing and new retailers. Staff completed the annual TRL renewal process in July 2022 and conducted outreach to businesses on the new regulations as part of the annual inspections. In November 2021, the Santa Clara County Public Health Department awarded Code Enforcement a \$60,000 grant dispersed over three years, from November 2021 through June 2024, to conduct tobacco enforcement operations, specifically decoy operations using students under the age of 21 to attempt to purchase tobacco products from licensed retailers. Following a grace period to allow retailers to offload remaining flavored tobacco products, staff began enforcement in July 2022.

Implementation and Enforcement Strategy items not completed include working in partnership with the Santa Clara County Public Health Department and other organizations to develop resources for smoking cessation programs and assistance. Staff anticipates completing this remaining strategy item by June 2024. Efforts that remain ongoing include identifying new businesses required to enroll in the program and conducting a minimum of one annual inspection. As part of our annual renewal process, the City’s TRL list is reconciled with the list of businesses permitted by the State to sell tobacco to ensure we are capturing any businesses that may be required to obtain a TRL or would be unpermitted and require enforcement. Another component of our standard process is conducting a minimum of one annual inspection each year to ensure the businesses are operating in compliance with the TRL regulations. The status of each of the Implementation and Enforcement Strategy items is also provided in Table A below.

Activity	Status
Update the Code Enforcement Division website to include new program information	Completed
Conduct outreach to all retailers to educate of new requirements and regulations.	Completed
Pending State grant funding for enforcement, establish a decoy program, in partnership with the Santa Clara County Public Health Department, to conduct decoy operations to enforce tobacco sales to minors laws	Completed
Complete the Tobacco Retail License Program annual license renewal process.	Completed

Update the multilingual Tobacco Retail License brochure and frequently asked questions (FAQ) document to educate tobacco retailers.	Completed
Enroll any identified new businesses into the TRL program for annual renewal and licensing including a site visit and inspection.	Ongoing
Continue to carry out inspections and enforcement of the Tobacco Retail License Program in accordance with program performance measures and the SJMC.	Ongoing
Work in partnership with Santa Clara County Public Health Department and other organizations to develop resources for smoking cessation programs and assistance.	Target- June 2024

Tobacco Retail Licenses Data

At the start of Fiscal Year 2022-2023, the TRL program had 615 active TRL businesses. By the end of the fiscal year, 587 businesses remained in the program, a reduction of 28 businesses selling tobacco products. Currently, there are 583 businesses in the TRL Program. During the fiscal year, staff received 27 new license applications and approved 25, rejecting two. This is a 42% reduction in new applications from the prior fiscal year in which 63 applications were received. The reduction in license applications was primarily due to prospective retailers being informed they would not qualify for the license under the new distance requirements and thus did not apply. Other licenses were cancelled due to the businesses being sold to new owners, or because the business chose to stop selling tobacco products.

Businesses and Proximity to Youth-Sensitive Receptors

Since ordinance adoption, the proximity of retailers to youth-sensitive receptors such as schools, parks, libraries, and community centers has declined. The data at ordinance adoption in 2021 showed that of the 613 retailers, 199 were located within 500 feet of a youth-sensitive receptor, 421 were located within 1,000 feet of a youth-sensitive receptor, and 140 were located within 500 feet of another retailer. Today’s data shows that of the 583 current retailers, 180 are located within 500 feet of a youth-sensitive receptor, 389 are located within 1,000 feet of a youth-sensitive receptor, and 134 are located within 500 feet of another retailer. This indicates that there has been a 5% reduction in total TRL businesses, a 10% reduction in businesses located within 500 feet of a youth-sensitive use, an 8% reduction in businesses located within 1000 feet of a youth-sensitive use, and a 4% reduction in businesses located near one another since the ordinance’s inception. (See Table B- Proximity of Tobacco Retail License Businesses to Sensitive Receptors (as of 9/20/23))

	2021	2023	#/% change
Total locations	613	583	-30/5%
Within 500-foot Sensitive Receptor Buffer	199	180	-19/10%
Within 1000-foot Sensitive Receptor Buffer	421	389	-32/8%

Within 500-foot of another TRL	140 grouped events	134 grouped events	-6/4%
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Inspections and Enforcement

Enforcement of the ordinance was conducted through annual inspections, responding to complaints, and decoy operations. During the Fiscal Year 2022-2023, staff completed 78% of the annual required inspections (or 457 of 587). The scope of the annual inspection includes not only checking for compliance with Tobacco Retail License regulations but also inspecting the premises for blight, building, sign ordinance, or other municipal code violations. While most of the businesses were operating in compliance, staff did find several minor violations during annual inspections that resulted in Warnings and were quickly remedied. Staff also responded to 20 complaints for concerns such as selling tobacco to minors, businesses being located near a youth-sensitive receptor, not having a TRL, and smoking inside the premises. Of the 20 complaints, seven resulted in citations, four resulted in Warnings, and six remain open and still under investigation.

Decoy operations were also a critical component of enforcement. In November 2021, staff was awarded grant funding by the County of Santa Clara Public Health Department (PHD) to support tobacco enforcement efforts. Staff coordinated with the PHD and PHD partner Breathe California to hire underage decoys to assist the City in conducting decoy operations to enforce upon businesses selling illegally to minors. Staff conducted a total of 93 decoy operations between July 2022 and February 2023. Of the 93 decoy operations, 18 businesses failed the operation and were cited. In total 20 citations were issued, four for selling flavored tobacco products to a minor and 16 for selling tobacco products to a minor. To date, 87 of the decoy operation cases have been closed and six remain open for further follow-up. The current citation amount for selling flavored tobacco products is \$500 and \$2,500 for selling to a minor. As part of the decoy operations, it was determined that several businesses had repeat violations for selling tobacco to a minor or selling flavored tobacco products. Code Enforcement and the City Attorney’s Office are working through the municipal code process to potentially revoke the Tobacco Retail License for businesses with repeat offenses. Unfortunately, decoy operations are currently on hold due to a lack of available decoys. Students enrolled previously as decoys have either resigned from the program or have taken other decoy assignments with law enforcement. Staff is coordinating with Breathe California to secure new decoys so that successful decoy operations can resume.

Challenges

While analysis remains ongoing, staff has uncovered several challenges since implementing the Flavored Tobacco Ordinance. One of the greatest challenges has been new products entering the market that appear to circumvent the ordinance. With each new product, staff must evaluate and assess the product to determine if it meets the criteria as an allowed or banned product and provide feedback to retailers. Another challenge staff has encountered is flavored tobacco products being stored under counters out of view or in an inaccessible area such as a back stock room. To access product that is not in plain sight or visible to the public, staff must request

access to inspect, and businesses in some instances have not been transparent or cooperative. Staff is also unable to search through cabinets, boxes, etc. which may store prohibited products. Staff has also identified the need to update the Zoning Ordinance and TRL Ordinance to ensure alignment between the Zoning and TRL codes and clarify TRL regulations. Staff has determined that the Zoning Ordinance should be updated to include TRL business location restrictions in the “Allowed Use Tables” to align the Zoning Ordinance with TRL regulations for distance requirements and ensure these requirements are properly communicated to Planning Division customers. Staff has also identified potential updates to the TRL Ordinance to clarify or add regulations regarding regulating tobacco distributors, clarifying shisha product exemptions, regulating the storage of flavored tobacco products, and requiring 21 and over signage at Hookah Lounges. Lastly, as noted above the current fine amount for selling flavored tobacco products is \$500. Staff has received feedback from retailers that the \$500 penalty is the mere cost of doing business. Thus, an increased fine amount for this violation may be a more effective deterrent in fostering compliance. Staff intends to continue to analyze the above challenges and bring proposed new fine amounts before Council in June 2024 and ordinance amendments as appropriate for Council Consideration in Fiscal Year 2024-2025.

City Council Direction

As part of the approval of the Flavored Tobacco Ordinance on September 28, 2021, the City Council directed staff to complete several items in addition to the Flavored Tobacco Ordinance Implementation and Enforcement Strategy. The status of each Council directive is provided in *Table C- Flavored Tobacco Ordinance Council Direction*. As noted in the Table, staff has completed several items including adding language to the ordinance clarifying enforcement would be aimed at Tobacco Retailers and pursuing grant opportunities to support enforcement efforts. One Council-directed item that remains ongoing is performing a minimum of one annual inspection per year for each Tobacco Retail Business. While the target each year is to complete 100% of all required annual TRL inspections, in the Fiscal Year 2022-2023 staff completed 78% of TRL annual inspections. The 130 overdue annual inspections were primarily due to staff resource availability and competing priorities such as complaint response, re-inspections, and decoy operations. Staff is working to ensure the remaining 130 TRL businesses receive the required annual inspection in the first quarter of this fiscal year. Also in progress is the directive to propose amendments to the fine schedule to increase the penalty for violations of the ordinance. While it does appear that increasing the minimum fine for the sale of flavored tobacco products may be beneficial in promoting compliance, additional analysis is still needed. Staff anticipates bringing a proposal to amend the fine schedule for the TRL Ordinance in June 2024. Lastly, staff has not yet completed the work to cross-train inspectors to perform joint Tobacco Retail License and Off Sale Alcohol program inspections. With a vacancy rate of 28% in Fiscal Year 2022-2023, staff was unable to make this transition. However, now that the vacancy rate has greatly declined, the staff is able to move forward with this work. Per Code Enforcement's current work plan, staff intends to provide an Information Memorandum to the City Council on the implementation of this direction in October 2024.

<i>Table C- Flavored Tobacco Ordinance Council Direction</i>		
	Council Direction	Status
1	Include language in the ordinance clarifying enforcement will be aimed at tobacco retailers.	Completed
2	Direct Code Enforcement to continue to perform a minimum of one annual compliance check per year.	Ongoing <i>The annual target is to complete 100% of all required annual inspections. In FY22-23 Staff completed 87% of the annual inspections.</i>
3	Direct the Administration to search and apply for grants at the Federal, State, or County levels of government and any private or philanthropic organizations that might allow for a more robust enforcement program, including funding for decoy enforcement programs.	Completed <i>Staff secured a 3-year Grant from the Department of Justice administered by the County of Santa Clara to fund decoy programs. Staff completed 92 decoys in FY22-23.</i>
5	Direct staff to propose amendments to the fine schedule to increase the penalty for violations of this ordinance.	Not Completed <i>Target Date of Completion- June 2024 Pending Further Analysis</i>
6	Direct staff to report back to the City Council through an information memorandum regarding efforts to cross-train inspectors to enable a single inspector to provide multiple inspections (e.g., alcohol, tobacco, and code) for a single business, thereby improving the efficiency of code operations. Fees should be accordingly adjusted to reflect partial cost recovery proportionate to the cost of inspection of each subject.	Not Completed <i>Target Date of Completion – October 2024 Pending Implementation</i>

Nitrous Oxide Proposed Work Plan

As noted in the background of this memorandum, the Rules and Open Government Committee approved Council Member Davis’s memo and staff’s Early Consideration Form on February 16, 2022, to direct City staff to, in summary, draft an ordinance banning the sale of nitrous oxide products in vape and smoke shops, require retailers who sell nitrous oxide products to display substance abuse resources, and add this issue to our city’s legislative priorities list to advocate for state legislation that prioritizes banning nitrous oxide product sales at vape and smoke shops. As indicated in the staff’s Early Consideration Form response, staff would move forward with this work once priority items in progress had been completed and staffing levels had improved. Having reached these milestones, the staff is proposing the following work plan to complete the development of the proposed ordinance.

<i>Nitrous Oxide Proposed Work Plan (9 months)</i>		
Objective	Tasks	Target Timeline
Research, Benchmarking, and Analysis	<ul style="list-style-type: none"> - Research related nitrous oxide ordinances in other jurisdictions to draft proposed ordinance language and new fines. - Evaluate Existing Tobacco Retail License Ordinance (TRL) 	Jan/Feb 2024
Internal Coordination/ Enforcement Plan Development	<ul style="list-style-type: none"> - Design a plan for implementation. - Collaborate with the San Jose Police Department on enforcement strategies/support/assistance of illegal nitrous oxide sales. - Evaluate the impact on staffing and resources of enforcement/audits of nitrous oxide product sales at vape and smoke shops. - Explore potential requirements for retailers to display substance abuse resources at business locations in coordination and partnership with the County and the City Attorney’s Office. - Coordinate with the Office of Administration, Policy, and Intergovernmental Relations to add the issue to the City’s legislative program list to advocate for State legislation banning the sale of these products. 	March/April 2024
Draft Ordinance	<ul style="list-style-type: none"> - Coordinate with the City Attorney to draft an ordinance. - Bring forward any related budget proposals to support enforcement. 	May 2024
Outreach	Conduct outreach regarding the proposed ordinance amendments to affected business owners and other stakeholders as appropriate.	June/July 2024
Final Ordinance Adoption	Bring final ordinance for Council consideration	Aug/September 2024
Implementation	Begin implementation and enforcement of Ordinance (allows approximately 2 to 3-month grace period to come into compliance prior to enforcement)	January 2025

As noted in the Early Consideration Form, several Departments will be required to participate in the development, implementation, and enforcement of this ordinance. An examination of Code Enforcement and San José Police Department resources is needed to support the implementation and enforcement of a Nitrous Oxide Ordinance and will be a key part of this work plan.

October 12, 2023

Subject: Flavored Tobacco Ban and Nitrous Oxide Work Plan Status Report

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COORDINATION

This memorandum has been coordinated with the City Attorney's Office and the San José Police Department.

/s/

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For questions, please contact Rachel Roberts, Deputy Director, at rachel.roberts@sanjoseca.gov .