



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Chris Burton

SUBJECT: SEE BELOW

DATE: September 15, 2021

Approved

Date

9/16/2021

SUPPLEMENTAL

SUBJECT: AMENDMENT TO CHAPTER 6.87, TOBACCO RETAIL LICENSE OF TITLE 6, BUSINESS LICENSES AND REGULATIONS, OF THE SAN JOSE MUNICIPAL CODE IN ALIGNMENT WITH CITY COUNCIL POLICY PRIORITY #12: FLAVORED TOBACCO AND E-CIGARETTES, ITEMS 1, 2 AND 3/ PROTECTING OUR YOUTH FROM THE E-CIGARETTE EPIDEMIC

REASON FOR SUPPLEMENTAL

On June 9, 2021, the Rules and Open Government Committee directed staff to conduct further outreach to impacted retailers and stakeholders and gather further information regarding tobacco restrictions instituted by neighboring jurisdictions. The Council Priority #12 Flavored Tobacco and E-Cigarettes was deferred from the June 15, 2021 Council Meeting to September 2021 to allow staff ample time to conduct further outreach and gather the requested information.

ANALYSIS

Public and Stakeholder Outreach and Engagement

Tobacco Retail License Program Businesses

Staff had previously conducted an online retailer survey and held a webinar for tobacco retailers, the results of which are outlined in the original memorandum dated June 1, 2021.

Per the direction given at the June 9, 2021 Rules and Open Government Committee, staff held two additional webinars for tobacco retailers. The webinars were held on July 29, 2021, and on August 12, 2021, including an overview of the proposed ordinance amendment and an open forum for retailers to express their concerns. A total of 41 retailers and various representatives

of tobacco retailers attended the July 29, 2021 webinar, and a total of 29 attendees participated in the August 12, 2021 webinar. The following is a summary of the primary concerns and feedback expressed by the participants:

- The City should hold off on new regulations until the results of Senate Bill SB-793 that will be voted on during the November 2022 General Election.
- Banning flavored products will create an unregulated “black market”.
- Banning flavored products will force customers to go to other jurisdictions where flavored products are not banned.
- Existing customers will simply buy flavored products online.
- There should be financial assistance for retailers to supplement the loss of income a flavored ban will cause and to help small businesses financially fulfill their lease requirements.
- San José is not providing financial assistance to tobacco retailers who have already been heavily impacted by the COVID-19 pandemic.
- Small businesses will be the most impacted by a flavored ban.
- Many of these impacted small businesses are minority or immigrant-owned and family businesses.
- San José will lose tax revenue due to loss of sales as well as from the potential of some businesses having to close.
- The focus should be on prevention, education, and enforcement of existing laws instead of implementing a flavored product ban.

Staff also conducted an additional online survey for tobacco retailers that ran from July 23, 2021 through August 27, 2021. The survey was available in three languages (English, Spanish, and Vietnamese) and received a total of 10 responses (eight responded to the English survey and two responded to the Vietnamese survey). Of the respondents surveyed:

- 60% stated they own a tobacco retailer business or a property that has a tobacco retail business on it;
- 50% stated that between 11%-25% of their total retail sales are flavored tobacco products;
- 50% stated they would continue to sell tobacco if the ordinance is approved to prohibit the sale of flavored tobacco products;
- 70% stated that it is difficult or somewhat difficult for youth under the age of 21 to buy flavored tobacco products in San José;
- 40% stated they support prohibiting the sale of flavored tobacco in San José, and 40% stated they oppose prohibiting the sale of flavored tobacco in San José; and
- 70% stated all tobacco retailers should be required to purchase a license to sell tobacco, even if they do not admit minors.

Code Enforcement Website

Staff updated the Code Enforcement Tobacco Retail License webpage on July 26, 2021 to include links to the upcoming webinars, online survey, draft ordinance, the original City Council memorandum dated June 1, 2021, and a Frequently Asked Questions page. The webpage provided a form for retailers to provide an email address so they could be informed of news and information regarding the proposed ordinance amendment. Currently, the most recent version of the draft ordinance is posted on the website.

Outreach Letters and Mailings

An outreach letter containing information regarding the webinar, survey, and updated webpage was attached to the annual Tobacco Retailer License renewal invoices on July 23, 2021. A total of 601 invoices with attached letters were mailed to program retailers and an additional 88 outreach letters were mailed to exempt and unregistered retailers. A separate notice regarding the webinars was mailed on August 3, 2021 to 695 retailers. A total of 31 letters were returned from the July mailing and 65 letters were returned from the August mailing.

Tobacco-Free Organizations

On August 12, 2021, staff met with the Tobacco-Free Coalition of Santa Clara County to discuss the proposed ordinance amendments and hear comments, concerns, and feedback. The following is a summary of the primary concerns and feedback expressed by the participants:

- Remove exemptions for flavored hookah, premium cigars, and loose-leaf tobacco, and ensure no exemption is added for menthol;
- Exempting hookah will result in an increase of adult-only stores;
- Support for the inclusion of menthol as a flavored product as it has been aggressively marketed to communities of color and youth, and menthol cigarettes make it easy for people to start smoking and harder for them to quit;
- Remove language that allows Tobacco Retail Licenses to be transferred to new owners upon sales of business;
- Clarify that in fact, SB-39 puts safeguards in place to ensure youth cannot buy tobacco online and requires the identification of a person over 21 be scanned upon delivery;
- Smoking and e-cigarettes are considered risk factors for COVID-19;
- A flavor ban prioritizes public health over profits;
- The ordinance should clearly specify that it is not a violation for an individual to be in possession of a banned product if not engaged in tobacco retailing.

Research and Benchmarking

Staff previously conducted research and benchmarking of various jurisdictions throughout the Bay Area and State including Oakland, San Diego, Sunnyvale, Cupertino, Los Gatos, Saratoga, Los Altos, Fremont, Gilroy, and Santa Clara and San Mateo Counties (see Attachment).

The City of Santa Clara is currently exploring an ordinance to prohibit the sale of flavored e-cigarettes, e-liquids, flavored cigars, little cigars, flavored hookah, and menthol cigarettes, and requiring that new tobacco retailers are located a minimum of 1,000 feet from schools and 500 feet from existing tobacco retailers.

Recent State Legislation

California Senate Bill No. 793 (SB-793), approved by the Governor on August 28, 2020, banned flavored tobacco products including menthol flavors but exempted pipe tobacco, hookah, and premium cigars, with an effective date of January 1, 2021. On August 31, 2020, a proposed referendum was submitted to the Attorney General of California. On January 22, 2021, the referendum qualified for the ballot and the implementation of SB-793 was suspended pending the outcome of the referendum vote which was expected to be held during the Fall 2021 Special Election. The referendum vote is now expected to be held during the November 2022 General Election. Regardless of the outcome of the referendum, a local jurisdiction can still implement their own tobacco policies and regulations.

Implementation and Enforcement Strategy

Since this item was deferred from the originally scheduled June 29, 2021 City Council meeting to the September 28, 2021 Council meeting, the originally proposed implementation and enforcement strategy timeline has been updated (see Table A).

Table A: Proposed Ordinance Implementation and Enforcement Strategy

Timeline	Activity	Progress
June-July 2021	<ul style="list-style-type: none"> Update the multilingual Tobacco Retail License brochure and create a frequently asked questions (FAQ) document to educate tobacco retailers. Update Code Enforcement Division website to include updated collateral and new program information 	<ul style="list-style-type: none"> In progress Completed
June- August November 2021	<ul style="list-style-type: none"> Begin Tobacco Retail License Program annual license renewal process. Conduct outreach to all retailers to educate of new requirements and regulations. Enroll any identified new businesses into the TRL program for annual renewal and licensing including a site visit and inspection. 	<ul style="list-style-type: none"> Completed Completed Pending
September November 2021	<ul style="list-style-type: none"> 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 	<ul style="list-style-type: none"> Pending
Ongoing	<ul style="list-style-type: none"> Continue to carry out inspections and enforcement of the Tobacco Retail License Program in accordance with program performance measures and the SJMC. 	<ul style="list-style-type: none"> Ongoing

CONCLUSION

Per direction given at the June 9, 2021 Rules and Open Government Committee, staff held two additional webinars for retailers, hosted an additional survey in English, Spanish, and Vietnamese, updated the Code Enforcement Tobacco Retail License webpage, and gathered further information regarding tobacco restrictions instituted by neighboring jurisdictions. Information gathered from this additional outreach and information did not change staff's recommendation to adopt an ordinance amending Chapter 6.87, Title 6 of the San José Municipal Code to prohibit the sale of flavored tobacco products, including flavored e-cigarettes, limit any further overconcentration of tobacco retailers by prohibiting new tobacco retailers within 1,000

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feet of a youth-sensitive receptor and within 500 feet of an existing tobacco retailer, and remove all licensing exemptions. Following ordinance adoption, existing retailers will be provided a grace period to deplete their remaining stock of newly banned products. The ordinance will also be in alignment with current State and Federal legislation and would implement and complete the goals of City Council Policy Priority #12.

/s/

CHRIS BURTON, Director

Planning, Building and Code Enforcement

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

Attachment: Tobacco Regulations Comparison

Tobacco Regulations Comparison

Municipality	Regulations	TRL Permits Issued	Distance from school? If so How far?	Distance from Othe Tobacco Retailers? Ban	Other notable restrictions	Fines	Permit Transferable?	Zoning Code?	Exemptions	Hookah exemption?	Business impacts - flavor ban
County of Santa Clara	Adopted revised Ordinance 11/19/2019. No flavored or e-cigarettes at any store. Retailers with existing permits can continue to sell until 7/1/2020.	13	1,000 ft	500 ft	Includes menthol. School distance & distance from other tobacco retailer does not apply when operating legally pre 2011&14 for electronic	Yes, for not having permit 1st - \$100, 2nd - \$200, 3rd - \$500. Suspension of permit	No	No	No	No	No county stores closed as a result of the retail policy, even the one adult store we have - Stuff N Puff - is still operating. There have been stores that have decided to stop selling tobacco (based on a variety of reasons) but continue to operate their businesses selling their other products. No stores were cited for continuing to sell flavors. Only 1 or 2 stores had flavored products when we first went out to inspect, it was only one or two products, and the stores corrected the action right away (it was a corrective action, and then DEH inspectors went back out to make sure they were still compliant).
Los Gatos	Adopted 11/19/2019 Code has distance requirements No flavored or e-cigarettes at any store. Retailers with existing permits can continue to sell until 7/1/2020. No stores impacted (was preventative measure)	17	1,000 ft	500 ft	retailers exempt from schools and other retailers if in operation pre 1-1-18. loose status if 1 - fails to timely renew the permit and 2. A new person obtains ownership in the business. Ordinance is very similar to SC. Includes County Includes Menthol	Yes, for not having permit 1st - \$100, 2nd - \$200, 3rd - \$500. Suspension of permit	No	No	designated smoking clubs, privated residences, etc	No	*After two full calendar years of implementation, Los Gatos had 29 retailers, today it has 17 (41% drop off). One adult store (The Los Gatos Cigar Club) "closed" but it moved its location from Los Gatos to San Jose. TRL is enforced by County
Cupertino	Adopted 2/18/2020. No flavored or e-cigarettes at any store. Retailers with existing permits can continue to sell until 7/1/2020.	19	1,000 ft	500 ft	includes menthol. Operating next to school exempt prior to July 1, 2020, if fails to renew they no longer qualify. 500 ft of retailer no longer qualifies if they fail to timely renew and a new person has ownership	Yes, for not having permit 1st - \$100, 2nd - \$200, 3rd - \$500. Suspension of permit	No	No	No	No	*Prior to policy adoption (November 2019), Cupertino had 26 tobacco retailers and today has 17 retailers (35% drop off). The initial attrition is contributed to chain stores such as Walgreens/Safeway/etc. no longer being able to sell tobacco due to the pharmacy component of their business. Other owners also decided to not move forward with applying for a license and opting to discontinue tobacco sales. No tobacco only shops. The TRL is enforced by the County
Saratoga	Flavored tobacco products prohibited. No flavored tobacco product shall be sold, offered for sale, or possessed with intent to sell or offer for sale. Electronic smoking products prohibited. Beginning January 1, 2021 no electronic smoking products shall be sold, offered for sale, or possessed with intent to sell or offer for sale.	4	1,000 ft	500 ft	Conditional Use permit required for operation. Must be 1,000 feet away from a City park. If an existence prior to October 16, 2009, no use permit required.	Yes and suspension of permit	No	CUP - needed	no	no	
Los Altos	Similar to County but exempts adult only stores - only one in city	No Response	1,000 ft	500 ft	Includes menthol.	Yes and suspension of permit	No	No	Yes (see Los Altos)	Yes (see Los Altos)	
Sunnyvale	flavored tobacco ban at all retailers	60	N/A	N/A	includes menthol	Yes and suspension of permit	N/A	No	No	Yes (see Sunnyvale)	Sunnyvale law takes effect on June 10 and the city will not begin enforcement until September 2021
San Mateo County	Ban on flavored tobacco. Prohibits sale of tobacco from pharmacies and can not renew ban of flavored tobacco which includes menthol	320 includes all cities and SFO	N/A	N/A	includes menthol	Yes, for not having permit 1st - \$100, 2nd - \$200, 3rd - \$500. Suspension of permit	No	No	Yes (C of San Mateo)	No	
Fremont	Flavored tobacco ban	128	N/A	N/A	menthol included	Yes and suspension of permit	No	Yes	Yes	No	
City of Gilroy	No ban on flavored tobacco	57	1,000 ft	N/A	school location is exempt if in location prior to ordinance being written. If business is sold and stays in same location it can continue as long as they renew permit	Yes and suspension of permit	No	No	No	No	
City of Oakland	Ban on sale of flavored tobacco. Pharmacies. No license may issue, and no existing license may be renewed, to authorize tobacco retailing in a pharmacy. bans menthol flavored tobacco products	No response	N/A	N/A	bans menthol	Yes and suspension of permit	No		Yes (see Oakland)	No	
City of San Diego	Police department regulates and requires a tobacco retail permit. No ban on flavored tobacco.	793	N/A	N/A	ordinance looks like it has not been updated since 2014	can suspend and revoke	No	No	Yes (see San Diego)	No	
City and County of SF	Bans flavors including menthol, electronic cigarettes banned that lack approval of FDA	635	500 ft	500 ft	Cap on supervisor district at 45 permits	Suspension of TRL	No	Cap	Exception for existing smoking/ cigar bar	No	2010 banned smoking indoors which included hookah. There are hookah stores still operating illegally but they are hard to catch. 2018 enacted flavor ban. 2020 banned ecigs & vapes, only had about 10 straight vape stores that closed down. Most stores changed business models.
City of Berkeley	Flavored tobacco products prohibited throughout city, e cigarettes only prohibited 600 ft within schools	No Response	600 ft	N/A	No TRLs to pharmacies (includes existing and new). includes menthol. Cigars at a price that is less than \$7.00 per cigar, including all applicable taxes and fees, must sell packages of cigars of 6 or more	Yes and suspension of permit	No	No	No	No	

Leaf Blower Ordinance Comparison

Municipality	Regulations	TRL Permits Issued	Distance from school? If so How far?	Distance from Othe Tobacco Retailers? Ban	Other notable restrictions	Fines	Permit Transferable?	Zoning Code?	Exemptions	Hookah exemption?	Business impacts - flavor ban
Palo Alto	Selling flavored tobacco products, including menthol cigarettes, flavored cigars, flavored electronic cigarettes, or e-liquids	22	1,000 ft	500 ft	If you are located within 1,000 feet from a school or 500 feet from another tobacco retailer you can continue selling tobacco products if you were lawfully selling tobacco products as of 6/30/18	Yes and suspension of permit	No		Yes - adult only stores	No	*After two full calendar years of implementation, Palo Alto went from 29 to 22 retailers (24% reduction) Palo Alto currently has 5 adult only stores in business. It's a small sample size, but Palo Alto's 5 adult only stores are still in business after two years. one hookah bar closed. One historic newsstand/smoke shop (Mac's) is struggling and will probably close. Partly due to COVID and partly due to the tobacco law. Another smoke shop — Raw — is still open but Julie said they were selling prohibited products during at least one compliance check
Morgan Hill	Ban on flavors, and electronic cigarettes	No Response	N/A	N/A		Suspension of TRL	No	No	No	No	includes an exemption for flavored cigars and pipe tobacco. This exemption was specifically added at the request of a local smoke shop whose owner is ver
Mountain View	None	N/A	N/A	N/A	No TRL Required	N/A	N/A	N/A	N/A	N/A	
City of Santa Clara	None	N/A	N/A	N/A	In process of implementing a flavor ban	N/A	N/A	N/A	N/A	N/A	
Campbell	TRL Required	39			No flavor ban	Suspension of TRL					
<p>*Please note that these figures are based on the # of permits issued. Each year, I get a list of stores that did not re-apply for a permit and I visit them to confirm whether they have either forgotten to renew, opt to no longer sell tobacco, or close. Most businesses actually opt to discontinue tobacco sales. Within these three cities, inspections did reveal that some stores were still selling flavored tobacco or vaping products. However, many of these products were kept on the shelves in error (for example – the flavor “sweet”) and the inspecting officer was able to educate and correct the problem right on the spot. Only one retailer out of a total of 57 actually required a 2nd follow up visit for a re-inspection. Other common violations included: not displaying State and Local Permits & Window Signage Issues.</p>											