



Memorandum

TO: NEIGHBORHOOD SERVICES
AND EDUCATION COMMITTEE

FROM: Rosalynn Hughey

SUBJECT: SEE BELOW

DATE: November 23, 2020

Approved

Date

12/03/20

**SUBJECT: CITY COUNCIL POLICY PRIORITY #12: FLAVORED TOBACCO AND
E-CIGARETTES / PROTECTING OUR YOUTH FROM THE E-
CIGARETTE EPIDEMIC STATUS REPORT**

RECOMMENDATION

Accept the status report on the City Council Policy Priority #12: Flavored Tobacco and E-Cigarettes, Items 1, 2, and 3 / Protecting our Youth from the E-Cigarette Epidemic.

OUTCOME

The Neighborhood Services and Education Committee will be informed about the status of City Council Policy Priority #12: Flavored Tobacco and E-Cigarettes, Items 1, 2, and 3 / Protecting our Youth from the E-Cigarette Epidemic (Council Policy Priority #12) including work plan scope, actions completed, and next steps. Staff will receive feedback from the Committee on the work plan, progress, and report.

BACKGROUND

Rules and Open Government Committee

On September 18, 2019, Councilmember Carrasco brought forward a memorandum¹ to the Rules and Open Government Committee, dated September 11, 2019, recommending that staff:

1. Develop an ordinance prohibiting the sale by tobacco retail establishments of electronic cigarettes that require, but have not received, an order from the Food and Drug Administration (FDA) approving their marketing; and prohibiting the sale and

¹ <https://sanjose.legistar.com/View.ashx?M=F&ID=7703318&GUID=B4E21BAB-1E85-40C0-9299-55DD3B135836>

- distribution to any person in San Jose of flavored tobacco products and electronic cigarettes that require, but have not received, an FDA order approving their marketing.
2. Explore policies that could limit any further overconcentration of tobacco businesses by either:
 - a. Limiting the sale of tobacco products near schools and other youth-sensitive areas; or
 - b. Limiting the sale of tobacco products near existing businesses that sell tobacco products.
 3. Remove the tobacco retail license exemption from the San Jose Municipal Code 6.87.210 for eighteen and over tobacco retailers.
 4. Support state and federal legislation to prohibit the sale of e-cigarettes and flavored tobacco products.

On September 25, 2019, the Rules and Open Government Committee approved the recommendation that the above items 1, 2, and 3 be referred to the Council Priority Setting session for FY 2020-2021. The item was added as a “yellow-lit item” to the preliminary list of FY 2020-2021 City Council Policy Priorities.

On February 25, 2020, the City Council held its 2020-2021 Council Policy Priority Setting Session. In addition to Councilmember Carrasco’s yellow-lit preliminary FY 2020-2021 City Council Priority Proposal, Councilmember Foley put forward a policy proposal entitled “Protecting Our Youth from the E-Cigarette Epidemic” which included the following action items:

1. Partner with state and federal agencies to implement effective ways of confirming a consumer’s age during online purchases of e-cigarettes.
2. Explore amending the City’s zoning code and tobacco licensing process to stop manufacturers of e-cigarette products from selling to retail stores within a half-mile of middle and high schools.
3. Explore amending the City’s zoning code and tobacco licensing process to stop retailers from selling flavored products within a mile of elementary, middle, and high schools.

After two rounds of voting by Council, the proposals, which had been combined into a single item, received 6 votes, and was added to the Council Policy Priority List for FY 2020-2021. The priority item was ranked as City Council Policy Priority #12: Flavored Tobacco and E-Cigarettes, Items 1, 2, and 3 / Protecting Our Youth from the E-Cigarette Epidemic (COMBINED).

Santa Clara County Public Health Department Funding

On January 31, 2020, the Code Enforcement Division applied for funding from the Santa Clara County Public Health Department (PHD) Tobacco-Free Healthy Cities Project, Tobacco-Free Communities Program to amend the existing tobacco retail license ordinance to prohibit the sale of flavored tobacco products and add distance requirements for tobacco retail businesses located near schools and other tobacco retailers.

On February 13, 2020, the City received notification of an award of \$120,270 in funding from PHD to support the implementation of proposed strategies that promote tobacco-free communities in alignment with the PHD's Healthy Cities Program. The funding was awarded for a term beginning from contract execution on October 1, 2020 through June 30, 2021 and will reimburse the cost of staff resources expended to carry out the Council Priority #12 work plan through the end of the 2020-2021 fiscal year. The funding provided by the PHD was the result of California Proposition 56, the California Healthcare, Research, and Prevention Tobacco Act of 2016, which increased the tax on cigarettes and other tobacco products by two dollars.

State Legislation

Since 2016, various State legislation has been enacted to further restrict the sale and use of tobacco products. On May 4, 2016, California Senate Bill No. 7 was approved by the Governor which increased the minimum sale age from 18 to 21 taking effect on June 9, 2016. More recently, California Senate Bill No. 793, which was approved by the Governor on August 28, 2020, banned flavored tobacco products including menthol flavors but exempted pipe tobacco, hookah, and premium cigars. This bill will take effect on January 1, 2021.

ANALYSIS

In October 2020, staff began implementing the Council Policy Priority#12 Flavored Tobacco and E-Cigarettes work plan including key components such as research and benchmarking of various city and county jurisdictions flavored tobacco and e-cigarette ordinances, data collection and analysis of existing and potential tobacco retail and e-cigarette businesses, development of a stakeholder outreach strategy, and an ordinance implementation plan (see Attachment A).

Research and Benchmarking

Staff conducted research and benchmarking of various jurisdictions throughout the Bay Area and State to gather information on existing regulations and enforcement banning or restricting the sale of flavored tobacco products and e-cigarettes including Oakland, San Diego, Sunnyvale, Cupertino, Los Gatos, Saratoga, Los Altos, Fremont, Gilroy, and Santa Clara and San Mateo Counties.

Staff found that between November 2019 and July 2020, several jurisdictions within Santa Clara County, including the County, have adopted tobacco retail ordinances to prohibit the sale of tobacco within a certain distance of a school and have placed restrictions on the proximity of tobacco retail businesses to one another. Santa Clara County, Los Gatos, Cupertino, and Gilroy have all implemented a ban on the sale of tobacco products within 1,000 feet of a school and 500 feet from other tobacco product retailers. These jurisdictions have also included exemptions or provisions in the ordinances for businesses operating prior to adoption of the ordinance such as:

- Legal non-conforming status for businesses selling tobacco prior to the ordinance;

- Criteria to revoke legal non-conforming status such as failure to renew their permit in a timely manner or a change in ownership; and
- A six-month grace period for businesses required to close.

Data Collection, Mapping, and Preliminary Analysis

Staff also began preliminary data collection and analysis to determine the number of existing businesses potentially affected by the proposed ordinance changes; the proximity of existing businesses to schools and other youth-related sensitive receptors such as parks, community centers, and libraries; proximity of existing businesses to one another; and the number of new businesses that would be subject to the proposed provisions. Staff utilized an online mapping tool (developed by the [Stanford Prevention Research Center](#) and [GreenInfo Network](#) with funding from Tobacco Related Disease Research Program (TRDRP) and the [California Tobacco Control Program](#))² to estimate how many existing businesses fell within 500 feet of a school or within the proposed 1,000 feet distance from schools.

The Stanford Prevention Research Center online mapping tool showed that 657 tobacco retailers are currently operating in the City of San Jose compared to the 607 retailers currently enrolled in the City of San Jose Tobacco Retail License Program. Of the 657 businesses currently operating within the City limits, 68 or 10.4% of the retailers are identified as being located within 500 feet of a school, and 188 or 28.6% of the retailers are within 1,000 feet of a school (see Attachment B). Staff anticipates the discrepancy in number of retailers is due to either businesses being exempt under the current Municipal Code regulations or possibly new businesses that have not yet registered in the Tobacco Retail License Program. The number of licensed retailers can change throughout the year as businesses cease or begin selling tobacco products. Code Enforcement's roster of eligible businesses is evaluated annually prior to the annual license renewal process conducted in July and is cross referenced with Santa Clara County and State licensed tobacco business records.

Draft Ordinance Amendment

In September 2020, Staff began drafting amendments to Title 6.87, Tobacco Retail License, of the San Jose Municipal Code to align the current ordinance with State regulations and City Council Policy Priority #12 direction. The draft proposed ordinance amendments include but are not limited to:

- Prohibiting the sale of flavored tobacco and e-cigarettes and other products including menthol flavored products
- Setting proximity limits for new tobacco retailers to schools and other youth-related sensitive receptors, such as parks, community centers, and libraries and other existing tobacco retailers
- Increasing the minimum sale age from 18 to 21

² <https://cthat.org/>

- Removing license exemptions
- Aligning City of San Jose Municipal Code with State and Federal Regulations
- Defining legal non-conforming requirements as appropriate
- Providing a defined grace period for affected retailers to deplete current stock of prohibited products

Estimated outcomes of the proposed draft ordinance amendments include:

- 18 Smoke/Vape type businesses currently in the Tobacco Retail License Program would be required to cease selling vape products
- 44 Tobacco Retail License exempt businesses would be required to register into the Program
- 12 Vape only type businesses would be required to close per SB 793 as of January 1, 2021
- Up to 188 Tobacco Retail License businesses could potentially be impacted due to proximity to schools

Staff will continue to conduct research, collect data, and undertake mapping other analyses to ensure a complete understanding of the implications and potential outcomes of the proposed provisions on existing and future businesses and youth-related sensitive receptors prior to conducting stakeholder outreach and proposing final recommendations of ordinance amendments.

CONCLUSION

Staff has made progress in advancing the work plan for City Council Priority #12 with some limitations due to impacts of COVID-19. Staff will finalize the work plan items, including research, data and analysis, and stakeholder outreach in spring 2021. Staff will continue to coordinate with the City Attorney's Office and PHD to develop proposed ordinance amendments for consideration by the City Council by June 2021. Staff will also assess and develop budget and fee proposals as appropriate for additional resources needed to support the Tobacco Retail License Program as part of the annual budget process for Fiscal Year 2021-2022.

EVALUATION AND FOLLOW-UP

This status report provides an overview of the progress to date of the Council Policy Priority #12 including work plan scope, completed actions, and next steps. Staff will continue to complete the steps outlined in the work plan and anticipates bringing the proposed Title 6.87, Tobacco Retail License Ordinance amendments to City Council for action in spring 2021

CLIMATE SMART SAN JOSE

The recommendation in this memorandum has no effect on Climate Smart San José energy, water, or mobility goals.

PUBLIC OUTREACH

Staff will implement a stakeholder outreach strategy in spring 2021. This memorandum will be posted on the City's website for the December 10, 2020 Neighborhood Services and Education Committee meeting.

COORDINATION

Staff has consulted the Santa Clara County Public Health Department in developing the content of this report. This memorandum has been coordinated with the City Attorney's Office.

COMMISSION RECOMMENDATION/INPUT

No commission recommendation or input is associated with this action.

CEQA

Not a Project, File No. PP17-009, Staff Reports, Assessments, Annual Reports, and Information Memos that involve no approvals of any City action.

/s/

ROSALYNN HUGHEY, Director
Planning, Building, and Code Enforcement

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

Attachment A: City Council Policy Priority #12: Flavored Tobacco and E-Cigarettes Work Plan
Attachment B: City of San José: Tobacco Businesses and School Proximity Map