



**TOWN OF LOS GATOS  
COUNCIL AGENDA REPORT**

MEETING DATE: 11/05/2019

ITEM NO: 16

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DATE: October 31, 2019  
TO: Mayor and Town Council  
FROM: Robert Schultz, Town Attorney  
SUBJECT: First Reading and Introduction of An Ordinance of the Town of Los Gatos Amending Chapter 18, Article VI, Section 18.60.020 of the Los Gatos Town Entitled Permits for Retailers of Tobacco Products to Prohibit the Sale of Electronic Cigarettes

**RECOMMENDATION:**

Staff recommends that Town Council accept public comment and then move for introduction and first reading of an Ordinance, by title only, amending Chapter 18, Article VI, Section 18.60.020 of the Town Code to prohibit the sale of electronic cigarettes and all flavored tobacco products, and modify other provisions of the prior Ordinance relating to permits for retailers of tobacco products (Attachment 2).

**BACKGROUND:**

In 2016, the Town Council recognized the dangers of smoking and secondary smoke and adopted amendments to the Town's Smoking Regulations to prohibit smoking in the Town's public spaces, including outdoor dining areas, entryways, public events, recreation areas, and service areas and multi-family residential units. In addition, in 2017, the Town Council adopted an ordinance (Attachment 1) to address regulating the sales of tobacco by businesses in Los Gatos. After the Tobacco Retailers Ordinance was adopted by the Town Council, the Town entered into an Agreement with the County of Santa Clara that allowed the County of Santa Clara to administer the ordinance and collect the annual permit fees.

On October 1, 2019, the Town Council discussed potential amendments to the Tobacco Retailers Ordinance due to the concerns associated with the growth in sales of e-cigarettes, electronic smoking devices and electronic smoking device paraphernalia, such as vaping

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Town Attorney

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Reviewed by: Town Manager, Assistant Town Manager, and Finance Director

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BACKGROUND (Continued):

devices. While the Town's efforts to reduce underage tobacco use have proven successful, the growing availability of e-cigarettes has reversed those positive trends. In addition to the problems associated with underage use, according to many studies, the sale of electronic cigarettes poses a broad risk to public health in general.

Based on the Council's direction on October 1, 2019, staff in coordination with the County of Santa Clara recommends the following set of updates to our Ordinance (Attachment 2) in order to better prevent and reduce the use of tobacco products and electronic smoking products, especially by youth under the age of 21:

1. Repeal and reenact The Town's Tobacco Retail Licensee (TRL) Ordinance to conform with the County's TRL Ordinance since the County is the Town's designee to implement and enforce the Town's TRL Ordinance;
2. Amend the TRL Ordinance to prohibit the sale and distribution of all electronic cigarette products;
3. Amend the TRL Ordinance to eliminate the exemption allowing certain retailers (i.e. Cigar Shops) to sell flavored tobacco products and add "mint, menthol" to the list of flavors; and
4. Modify other provisions of the prior Ordinance relating to permits for retailers of tobacco products and to conform with the County's TRL Ordinance.

DISCUSSION:

*Youth at Risk*

The Surgeon General has declared e-cigarette use among youth an epidemic. While youth use of combustible cigarettes has decreased dramatically, e-cigarette use—or "vaping"—among middle and high school students nationally increased by 78 percent between 2017 and 2018, with over 3.6 million youth currently using e-cigarettes in 2018.<sup>1</sup> The proportion of current e-cigarette users in high school who reported use on 20 days or more in the past 30-day period increased from 20 percent in 2017 to 27.7 percent in 2018. In 2019, the national prevalence of

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<sup>1</sup> Cullen KA, Ambrose BK, Gentzke AS, Apelberg BJ, Jamal A, King BA. Use of Electronic Cigarettes and Any Tobacco Product Among Middle and High School Students — United States, 2011–2018. MMWR Morb Mortal Wkly Rep. 2018;67(45):1276-1277.

DISCUSSION (continued):

e-cigarette use during the previous 30 days was more than 1 in 4 students in the 12th grade, more than 1 in 5 in the 10th grade, and more than 1 in 11 in the 8th grade.<sup>2</sup> Use of e-cigarettes among undergraduate college students increased from 4.9 percent to 10.2 percent between 2017 and 2018.<sup>3</sup>

In addition, nearly 1 in 3 Santa Clara County teens – 31.6 percent – report that they have used an e-cigarette at least once. E-cigarettes were the most popular tobacco product, with approximately one out of seven high school students (13.2%) currently using them in Santa Clara County. Susceptibility of future e-cigarette use among Santa Clara County teens is high: 2 in 5 students (40.1%) who had never used a tobacco product said they would use one if offered by a best friend and more than 1 in 4 high school students (28.0%) had been offered a tobacco product in the past month.

Much of the growth in youth usage is attributable to e-cigarette companies' marketing directly to youth. In 2014, 18 million (7 out of 10) middle and high school students were exposed to e-cigarette ads. E-cigarettes are also marketed in a variety of flavors, more than 15,000, that appeal to youth, including gummy bear, birthday cake, cotton candy, and fruit punch. Most current tobacco users in Santa Clara County reported using a flavored tobacco product (82.3%), with use of flavored e-cigarettes among County teens at 82.6%. Flavored tobacco product use was high across all genders, races/ethnicities, and grades.

Youth report purchasing e-cigarettes in stores, online, and obtaining products from friends. More than 2 in 5 teens in Santa Clara County (45.4%) reported purchasing their own e-cigarettes, with over a quarter of this group saying they buy them directly from a local store. Among those who purchased e-cigarettes in a local store, 62.5% purchased them at a vape shop. In 2019, the number of violations for sales to minors at tobacco retailers in the unincorporated area increased to 12 violations (out of 43 undercover enforcement checks), up from only 1 violation (out of 34 undercover enforcement checks) in 2018. This included one violation at an adult-only tobacco store in the unincorporated area.<sup>4</sup>

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<sup>2</sup> Miech R, Johnston L, O'Malley PM, Bachman JG, Patrick ME. Trends in Adolescent Vaping, 2017–2019. *N Engl J Med*. September 2019;NEJMc1910739.

<sup>3</sup> American College Health Association. American College Health Association-National College Health Assessment II: Undergraduate Student Reference Group Executive Summary. Silver Spring, MD; 2017-2018.

<sup>4</sup> Zhu S-H, Lee J, Zhuang YL, Branden K, Cole A, Wolfson T, Gamst A (2019). Tobacco use among high school students in Santa Clara County: Findings from the 2017-18 California Student Tobacco Survey. San Diego, California: Center for Research and Intervention in Tobacco Control (CRITC), University of California, San Diego; and Centers for Disease Control and Prevention. E-cigarette Ads and Youth (2017). <https://www.cdc.gov/vitalsigns/ecigarette-ads/index.html>.

DISCUSSION (continued):

*General Health Risks*

Also, according to the Surgeon General, “most e-cigarettes contain nicotine – the addictive drug in regular cigarettes, cigars, and other tobacco products. Nicotine exposure during adolescence can harm the developing brain – which continues to develop until about age 25. Nicotine exposure during adolescence can impact learning, memory, and attention. Using nicotine in adolescence can also increase risk for future addiction to other drugs. In addition to nicotine, the aerosol that users inhale and exhale from e-cigarettes can potentially expose both themselves and bystanders to other harmful substances, including heavy metals, volatile organic compounds, and ultrafine particles that can be inhaled deeply into the lungs.”<sup>5</sup>

E-cigarette use can also play a role in adolescent social maladjustment, including poor learning and academic performance, increased aggressive and impulsive behavior, poor sleep quality, attention deficits, impaired memory, cognition, and increased depression and suicidal ideation.<sup>6</sup> Daily e-cigarette use is associated with increased risk of irreversible cardiovascular and lung disease through the inhalation of harmful chemicals.<sup>7</sup> Secondhand emissions from e-cigarettes are also dangerous because they contain nicotine; ultrafine particles; flavorings such as diacetyl, a chemical linked to serious lung disease; volatile organic compounds such as benzene, which is found in car exhaust; and heavy metals, such as nickel, tin, and lead.

In addition to these negative long-term health effects, e-cigarette use is now associated with a wave of dangerous, life-threatening illnesses. As of October 15, 2019, 1,479 cases of lung injury associated with the use of e-cigarette or vaping products in 49 states and one U.S. territory have been reported to the Center for Disease Control (CDC). Thirty-three deaths have been confirmed in 24 states. The California Department of Public Health issued a health advisory urging everyone to refrain from vaping due to public health risks posed by vaping any product, including the use of electronic cigarettes, as vaping has recently been linked to severe breathing problems, lung damage, and even death. Since the CDC’s August 30, 2019 Health Advisory, there have been two reported cases of lung injury associated with e-cigarette use in Santa Clara County. One of these cases was in an adolescent, and both individuals required hospitalization.

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<sup>5</sup> Surgeon General’s Advisory on E-cigarette Use Among Youth (2008). <https://e-cigarettes.surgeongeneral.gov/documents/surgeon-generals-advisory-on-e-cigarette-use-among-youth-2018.pdf>.

<sup>6</sup> Tobore TO. On the potential harmful effects of E-Cigarettes (EC) on the developing brain: The relationship between vaping-induced oxidative stress and adolescent/young adults social maladjustment. *J Adolesc.* 2019;76:202-209.

<sup>7</sup> American Lung Association. The Impact of E-Cigarettes on the Lung (2011). <https://www.lung.org/stop-smoking/smoking-facts/impact-of-e-cigarettes-on-lung.html>; Bein K, Leikauf GD. Acrolein - a pulmonary hazard. *Mol Nutr Food Res* 55(9):1342-60.

DISCUSSION (continued):

*Regulatory Recommendations*

Based upon Council direction on October 1, 2019, staff in coordination with the County discussed banning the sale and distribution of e-cigarettes in the Town of Los Gatos. The proposed additions to the Tobacco Permitting Ordinance respond to Council's request by: (1) a ban on the sale of electronic cigarette products; and (2) the elimination of the exemption that allows qualifying adult stores to sell flavored tobacco products. These additional provisions will be phased in as retailers' permits expire. Retailers with existing permits will be allowed to sell tobacco products pursuant to the current version of the ordinance until either the end of their permit term or July 1, 2020, whichever occurs earlier. All new permits and permit renewals will be issued subject to the proposed ordinance.

The proposed ordinance also increases the "look-back" period for permit suspension from 24 months to 60 months. Under the current ordinance, a retailer's permit is suspended for 30 calendar days after a first violation. If a second violation occurs within a 24-month period after the first violation, the retailer's permit is suspended for 90 days. For subsequent violations within a 24-month period, the retailer's permit is suspended for up to one year. Consistent with look-back provisions in several other tobacco ordinances adopted by cities within Santa Clara County, the amended ordinance increases these 24-month look-back periods to 60-month periods.

Finally, the proposed ordinance includes several additional modifications to improve the clarity of the Tobacco Permitting Ordinance and its consistency with the County's Ordinance Code. Notable additions include:

- New definitions of key terms and incorporation of definitions applicable throughout the Ordinance Code;
- Clarification that the Tobacco Permitting Ordinance applies to both sale and distribution of tobacco products;
- Clarification that flavored tobacco products include mint and menthol products;
- Clarification of the enforcement and appeals process to standardize with current practice in enforcement matters.

CONCLUSION:

Council should move for introduction and first reading of an Ordinance, by title only, amending Chapter 18, Article VI, Section 18.60.020 of the Town Code to prohibit the sale of electronic cigarettes and all flavored tobacco products, and modify other provisions of the prior Ordinance relating to permits for retailers of tobacco products.

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SUBJECT: Amendments to the Tobacco Retailers Ordinance

DATE: October 29, 2019

Attachments:

1. Ordinance No. 2259
2. Draft Ordinance