

# AGENDA REPORT

## City Council

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**MEETING DATE:** August 26, 2020

**PREPARED BY:** Nick Zornes  
Planner IV

**DEPT. DIRECTOR:** Lillian Doherty

**DEPARTMENT:** Development Services

**INTERIM CITY MANAGER:** Jennifer Campbell

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**SUBJECT:**

Introduction of Ordinance No. 2020-13 for amendments to Title 11 of the Encinitas Municipal Code to prohibit the sale and distribution of flavored tobacco products in the City of Encinitas and increase the minimum age in accordance with new Federal law.

**RECOMMENDATION:**

1. Introduce City Council Ordinance No. 2020-13 titled "An Ordinance of The City of Encinitas Adopting Amendments to Title 11 of The Encinitas Municipal Code to Prohibit the Sale and Distribution of Flavored Tobacco Products in the City of Encinitas." (Attachment 1)

**FISCAL CONSIDERATIONS:**

There are no direct fiscal impacts associated with the recommended action.

**BACKGROUND:**

On May 20, 2020, the City Council was presented with a recommendation from the Youth Commission by the Parks, Recreation and Cultural Arts Department to prohibit the sale and distribution of flavored tobacco products in the City of Encinitas. The agenda report from the meeting is provided herein as Attachment 2 for reference.

City Council unanimously supported the Youth Commission recommendation and directed City staff to prepare a draft ordinance consistent with the City of Solana Beach's ordinance that prohibits the sale and distribution of flavored tobacco products. City Council provided further direction to City staff to incorporate a modification to the draft ordinance exempting all hookah related business from the ordinance, which is consistent with the approved ordinance of the County of San Diego.

**ANALYSIS:**

The City of Encinitas prohibits any smoking within public places or in a place of enjoyment which also includes: beaches, parks, trails and outdoor/patio dining areas of eating establishments. Further, the

City of Encinitas regulates the sale or display of tobacco products in the City to prevent adverse impacts affecting the public health and welfare of its citizens, and particularly minors.

Currently, the California State Legislature is considering Senate Bill 793 (SB 793) (Attachment 3). The proposed bill would prohibit the sale and distribution of flavored tobacco products or tobacco product flavor enhancers statewide. Cities throughout the State of California are creating similar ordinances to locally prohibit the sale and distribution of flavored tobacco products. This ordinance would be consistent with the prohibitions within SB 793.

Based on the recommendation by the Youth Commission and the direction provided by the City Council, City staff recommends incorporating the prohibition of the sale and distribution of flavored tobacco products as a new Chapter within Title 11 (HEALTH) of the Encinitas Municipal Code. In addition, City staff recommends updating Chapter 11.10 (SALE, DISPLAY AND PROMOTION OF TOBACCO PRODUCTS) to be consistent with the Federal Food, Drug and Cosmetic Act, as amended, commonly known as "Tobacco 21," which prohibits the sale of tobacco products to persons under 21 years of age, which went into effect nationwide on December 20, 2019 (Attachment 4). Once adopted, Ordinance No. 2020-13 will:

- State that the sale of tobacco products to persons under 21 of age is prohibited by law;
- Add definitions related to flavored tobacco products;
- Add restrictions on sale and distribution of flavored tobacco products;
- Provide an exemption for shisha [hookah] tobacco products and products that have been approved by the Food and Drug Administration for sale as a tobacco cessation product; and
- Provide an operative date of the ordinance of January 1, 2021 providing existing businesses located within the City limits an opportunity to sell thru current inventory of flavored tobacco products prior to the prohibition going into effect.

As noted in the Youth Commission's May 20, 2020 recommendation to the City Council, the City's business registration process does not require retailers to disclose all the types of products being sold. However, City staff has verified that approximately 34 businesses currently sell flavored tobacco products in the City of Encinitas. Staff has sent direct mail to all licensed retailers that potentially sell flavored tobacco products, including gas stations, convenience stores, grocery stores, drug stores, etc. to inform retailers of the Flavored Tobacco prohibition and will continue outreach and education efforts.

Enforcement of the proposed ordinance will be managed by the City's Code Enforcement Division of the Development Services Department. Enforcement will be initiated when a complaint is received, prompting an investigation by Code Enforcement. Based upon the results, the City would have the authority to enforce the proposed Ordinance, which may include assessing monetary penalties in accordance with Encinitas Municipal Code Section 1.08. In practice, as the proposed Ordinance becomes operative, it is anticipated that education will be a key strategy to bring awareness and to facilitate compliance in the initial period after the ordinance is in effect.

#### **ENVIRONMENTAL CONSIDERATIONS:**

The action considered is exempt from the California Environmental Quality Act (CEQA), because it is not a "project" under Section 15378(b)(5) of CEQA Guidelines. The action involves an organizational or administrative activity of government that will not result in the direct or indirect physical change in the environment.

This item does not relate to the Climate Action Plan.

**ATTACHMENT:**

1. Draft City Council Ordinance No. 2020-13
2. May 20, 2020 Agenda Report with Youth Commission Recommendation
3. California Legislative Information for SB 793
4. Federal Food, Drug, and Cosmetic Act Amendment (December 20, 2019)

**DRAFT ORDINANCE NO. 2020-13****AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF ENCINITAS, CALIFORNIA,  
ADOPTING AMENDMENTS TO TITLE 11 (HEALTH) OF THE ENCINITAS MUNICIPAL CODE  
TO PROHIBIT THE SALE AND DISTRIBUTION OF FLAVORED TOBACCO PRODUCTS IN  
THE CITY OF ENCINITAS.**

The City Council of the City of Encinitas does hereby find and declares as follows:

**WHEREAS**, tobacco use remains the leading cause of preventable death in the United States, killing more than 480,000 people each year. It causes or contributes to many forms of cancer, as well as heart disease and respiratory diseases, among other health disorders. Tobacco use remains a public health crisis of the first order, in terms of the human suffering and loss of life it causes, the financial costs it imposes on society, and the burdens it places on our health care system;

**WHEREAS**, the National Survey on Drug Use and Health in 2017 found that four-fifths of people who smoke become daily smokers before turning twenty-one. Developing adolescent brains are especially vulnerable to the effects of nicotine;

**WHEREAS**, flavored tobacco products have also become increasingly popular and are sold for cigars, cigarillos, smokeless tobacco, shisha or hookah tobacco, and liquid nicotine solutions used in e-cigarettes. They come in a variety of flavors such as chocolate, berry, cherry, apple, wintergreen and peach and are sold in colorful packaging, which can make them especially appealing to young people;

**WHEREAS**, e-cigarettes entered the marketplace around 2007, and since 2014, they have been the most commonly used tobacco product among youth in the United States and include flavors that are appealing to youth;

**WHEREAS**, according to the Centers for Disease Control and Prevention (“CDC”), the number of middle and high school students who reported being current users of tobacco products increased 36 percent — from 3.6 million to 4.9 million students — between 2017 and 2018. This dramatic increase, which has erased past progress in reducing youth tobacco use, is directly attributable to a nationwide surge in e-cigarette use by adolescents;

**WHEREAS**, the FDA has reported, according to a 2013-2014 survey, 81 percent of youth e-cigarette users cited the availability of appealing flavors as the primary reason for use;

**WHEREAS**, the widespread use of flavored tobacco products and e-cigarettes by youth has significant public health consequences. As stated by 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”;

**WHEREAS**, there is a growing body of research concluding that there are significant health risks associated with e-cigarette use. For example, daily e-cigarette use is associated with increased odds of a heart attack. The American Lung Association has warned that the inhalation of harmful chemicals through vaping may cause irreversible lung damage and lung disease;

**WHEREAS**, on August 27, 2019 the California Department of Public Health ("CDPH") issued a Health Alert for "Vaping-Associated Pulmonary Injury" stating 36 cases of vaping-associated pulmonary injury requiring hospitalization have been reported to CDPH since June;

**WHEREAS**, on August 30, 2019, the CDC released a health advisory on a multistate outbreak of severe pulmonary disease associated with using e-cigarette products. The CDC report 215 possible cases of severe pulmonary diseases have been reported from 25 states and additional reports of pulmonary illness are under investigation. Some of these cases of severe pulmonary diseases have resulted in death;

**WHEREAS**, on December 20, 2019, the President signed legislation amending the Federal Food, Drug, and Cosmetic Act, and raising the federal minimum age for sale of tobacco products from 18 to 21 years;

**WHEREAS**, on May 20, 2020, City Council directed City staff to draft an ordinance to prohibit the sale and distribution of flavored tobacco products in the City of Encinitas, with the exception of shisha for use in hookah;

**WHEREAS**, the City finds that the proposed amendments to the City's Municipal Code are exempt from environmental review pursuant to General Rule, Section 15061(b)(3) of the California Environmental Quality Act (CEQA) Guidelines since there would be no possibility of a significant effect on the environment;

**WHEREAS**, the City Council conducted a Public Hearing on August 26, 2020 and \_\_\_\_\_ for the purpose of considering amendments to Title 11 of the Encinitas Municipal Code;

**WHEREAS**, the City Council has duly considered the totality of the record and all evidence submitted into the record, including public testimony and the evaluation and recommendations by staff, presented at said hearing; and

**WHEREAS**, notices of said public hearings were made at the time and in the manner required by law.

**NOW THEREFORE**, the City Council of the City of Encinitas, California, hereby ordains as follows:

**SECTION ONE: CHAPTER 11.10 (SALE, DISPLAY AND PROMOTION OF TOBACCO PRODUCTS) OF TITLE 11, HEALTH**

Chapter 11.10 (SALE, DISPLAY AND PROMOTION OF TOBACCO PRODUCTS) of Title 11 (HEALTH) of the Encinitas Municipal Code is hereby amended as follows (~~strikeout~~ is used to denote existing text being deleted; underline is used to denote new text being added):

Subsection (A) of section 11.10.050 (Exceptions to Location of Tobacco Products and Advertising Displays Inside Retail Establishments) is amended to read as follows:

- A. Section 11.10.040 shall not apply to commercial establishments where access to the premises by persons under ~~48~~21 years of age is prohibited by law.

Subsection (A) of section 11.10.080 (Posting of Signs Regarding Tobacco Sales to Minors) is amended to read as follows:

- A. Any person or business selling or otherwise distributing tobacco products shall post conspicuously a notice in their place of business at each point of purchase stating that the sale of tobacco products to persons under ~~48~~21 years of age is prohibited by law. The notice shall also state that photo identification is required to purchase tobacco products. The character depicting the notice shall be at least one-half inch in height.

## **SECTION TWO: CHAPTER 11.11 (SALE AND DISTRIBUTION OF FLAVORED TOBACCO PRODUCTS) OF TITLE 11, HEALTH**

Chapter 11.11 (SALE AND DISTRIBUTION FLAVORED TOBACCO PRODUCTS) is hereby added in its entirety to Title 11 (HEALTH) of the Encinitas Municipal Code to read as follows:

### **Chapter 11.11 SALE AND DISTRIBUTION OF FLAVORED TOBACCO PRODUCTS**

#### **11.11.010 Purpose and Intent.**

The City Council recognizes the inherent danger of tobacco products and that the use of tobacco products has devastating health and economic consequences. The City Council further recognizes that tobacco use is the leading cause of preventable illness and death in the United States, and that tobacco product use is started and established primarily during adolescence.

Allowing flavored tobacco products to be sold in the City increases access to these harmful and dangerous products. To that end, no flavored tobacco products shall be sold in the City except as specifically enumerated below.

#### **11.11.020 Definitions.**

For purposes of this chapter, the following definitions shall apply:

“Characterizing Flavor” means a distinguishable taste or aroma or both, other than the taste or aroma of tobacco, imparted by a Tobacco Product or any byproduct produced by the Tobacco Product. Characterizing Flavors include, but are not limited to, tastes or aromas relating to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, menthol, mint, wintergreen, herb, or spice. A Tobacco Product shall not be determined to have a Characterizing Flavor solely because of the use of additives or flavorings or the provision of ingredient information. Rather, it is the presence of a Distinguishable taste or aroma or both, as described in the first sentence of this definition, that constitutes a Characterizing Flavor.

“Distinguishable” means perceivable by either the sense of smell or taste.

“Distribute” or “Distribution” means the transfer, by any person other than a common carrier, of a Tobacco Product at any point from the place of manufacture or thereafter to the person who sells the tobacco product to an individual for personal consumption.

“Electronic Cigarette” has the meaning set forth in Section 30121 of the California Revenue and Taxation Code, as may be amended from time to time.

“Flavored Shisha Tobacco Product” means any shisha tobacco product that contains a constituent that imparts a Characterizing Flavor.

“Flavored Tobacco Product” means any Tobacco Product that imparts a Characterizing Flavor. A public statement or claim made or disseminated by the manufacturer of a Tobacco Product, or by any person authorized or permitted by the manufacturer to make or disseminate public statements concerning such Tobacco Product, that such Tobacco Product has or produces a Characterizing Flavor shall constitute presumptive evidence that the Tobacco Product is a Flavored Tobacco Product.

“Hookah” means a type of waterpipe, used to smoke shisha or other Tobacco Products, with a long flexible tube for drawing aerosol through water. Components of a Hookah may include heads, stems, bowls, and hoses.

“Hookah Tobacco Retailer” means a tobacco retailer that is engaged in the retail sale of Shisha Tobacco Products, Hookah, and Hookah smoking accessories.

“Sell,” “Sale,” and “to Sell” mean any transaction where, for any consideration, ownership of a Tobacco Product is transferred from one person to another, including but not limited to any transfer or title or possession for consideration, exchange, or barter, in any manner or by any means.

“Shisha Tobacco Product” means a Tobacco Product smoked or intended to be smoked in a Hookah. “Shisha Tobacco Product” includes, and may be referred to as, hookah tobacco, waterpipe tobacco, maassel, narghile, and argileh. “Shisha Tobacco Product” does not include any electronic devices, such as an electronic hookah, electronic cigarette, or electronic tobacco product.

“Tobacco Product” means any tobacco cigarette, electronic cigarette cartridge, cigar, pipe tobacco, smokeless tobacco, snuff or any other form of tobacco which may be utilized for smoking, chewing, inhaling, vaping or other manner of ingestion.

#### 11.11.030 Prohibition on Sale or Distribution of Flavored Tobacco Products.

- A. It is unlawful to Sell or Distribute any Flavored Tobacco Product to a person in the City of Encinitas.
- B. There shall be a rebuttal presumption that a Tobacco Product, other than a cigarette, is a Flavored Tobacco Product if a manufacturer or any of the manufacturer’s agents or employees, in the course of their agency or employment, has made a statement or claim directed to consumers or to the public that the Tobacco Product has or produces a Characterizing Flavor, including, but not limited to, text, color, and/or images on the product’s labeling or packaging that are used to explicitly or implicitly communicate that the Tobacco Product has a Characterizing Flavor.

- C. This section shall not apply to a product that has been approved by the Food and Drug Administration for sale as a tobacco cessation product or for other therapeutic purposes, where the product is marketed and sold solely for such an approved purpose.
- D. This section shall not apply to the sale or distribution of Shisha Tobacco Products for use in a Hookah.

#### 11.11.040 Enforcement.

- A. The City Manager, or designee, is authorized to establish regulations and to take any and all actions reasonable and necessary to obtain compliance with this chapter, including, but not limited to, inspecting the premises of any business to verify compliance.
- B. Any person, business or tobacco retailer violating this chapter shall be guilty of an infraction, which shall be punishable by a fine in accordance with Chapter 1.08 of the Encinitas Municipal Code, or a misdemeanor, which shall be punishable by a fine not exceeding one thousand dollars, by imprisonment not exceeding six months, or by both such fine and imprisonment. In addition to criminal fines, any person, business or tobacco retailer violating this chapter shall also be subject to civil penalties or administrative fines or both under Chapter 1.08 of the Encinitas Municipal Code.
- C. The City Attorney may seek legal injunctive or other equitable relief to enforce this chapter.
- D. Administrative enforcement of this chapter shall proceed pursuant to Chapter 1.08 of the Encinitas Municipal Code.
- E. Each violation of this chapter shall be considered a separate offense.
- F. The remedies and penalties provided in this section are cumulative and not exclusive, and nothing in this chapter shall preclude any person from pursuing any other remedies provided by law.
- G. Notwithstanding any other provision of this chapter, this chapter may be enforced through any remedy as provided for in this section upon its effective date.

#### 11.11.050 Conflict with Federal or State Law.

Nothing in this chapter shall be interpreted or applied so as to create any requirement, power, or duty that is preempted by federal or state law.

#### 11.11.060 Severability.

If any section, subsection, subdivision, paragraph, sentence, clause, phrase or portion of this chapter is, for any reason, held to be invalid or unconstitutional by any court of competent jurisdiction, such decision shall not affect the validity or effectiveness of the remaining portions of this chapter. The City Council hereby declares that it would have adopted the ordinance codified in this chapter and each section, subsection, subdivision, paragraph, sentence, clause, phrase and portion of this chapter irrespective of the fact that one or more sections, subsections, subdivisions, paragraphs, sentences, clauses, phrases or portions thereof may be declared invalid or unconstitutional. To this end, the provisions of this chapter are declared severable.

#### 11.11.070 Operative Date.

The operative date of this chapter is January 1, 2021.



### **SECTION THREE: SEVERABILITY**

If any section, subsection, subdivision, paragraph, sentence, clause, phrase or portion of this chapter is, for any reason, held to be invalid or unconstitutional by any court of competent jurisdiction, such decision shall not affect the validity or effectiveness of the remaining portions of this chapter. The City Council hereby declares that it would have adopted the ordinance codified in this chapter and each section, subsection, subdivision, paragraph, sentence, clause, phrase and portion of this chapter irrespective of the fact that one or more sections, subsections, subdivisions, paragraphs, sentences, clauses, phrases or portions thereof may be declared invalid or unconstitutional. To this end, the provisions of this chapter are declared severable.

### **SECTION FOUR: PUBLIC NOTICE AND EFFECTIVE DATE**

Within 15 days of adoption, the City Clerk of the City of Encinitas shall cause this Ordinance to be published pursuant to the provisions of Government Code section 36933. This Ordinance will become effective 30 days after the adoption of the Ordinance.

### **SECTION FIVE: OPERATIVE DATE**

This Ordinance shall become operative on January 1, 2021.

### **SECTION SIX: INTRODUCTION**

This Ordinance was introduced on August 26, 2020.

**PASSED AND ADOPTED** this \_\_\_ day of \_\_\_\_\_, 2020 by the following vote to wit:

AYES:

NAYS:

ABSTAIN:

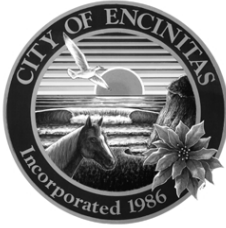
ABSENT:

\_\_\_\_\_  
Catherine S. Blakespear, Mayor, City of Encinitas

### **ATTESTATION AND CERTIFICATION:**

I hereby certify that this is a true and correct copy of Ordinance No. 2020-09 which has been published pursuant to law.

\_\_\_\_\_  
Kathy Hollywood, City Clerk



# AGENDA REPORT

## City Council

**MEETING DATE:** May 20, 2020

**PREPARED BY:** Christian Hernandez,  
Recreation Supervisor

**DEPT. DIRECTOR:** Jennifer Campbell

**DEPARTMENT:** Parks, Recreation and  
Cultural Arts

**CITY MANAGER:** Karen P. Brust

**SUBJECT:**

Recommendation by the Youth Commission to prohibit the sale and distribution of flavored tobacco products in the City of Encinitas.

**RECOMMENDATION:**

Review the recommendation from the Youth Commission to prohibit the sale and distribution of flavored tobacco in the City of Encinitas.

**STRATEGIC PLAN:**

This item relates to the Operating Principals of the Strategic Plan that is for City Council Commissions to provide expert advice.

**FISCAL CONSIDERATIONS:**

There are no fiscal impacts associated with this item.

**BACKGROUND:**

As an advisory body, the Youth Commission is charged with gathering information and making recommendations to the City Council on matters related to their identified work plan activities within the community and may advise on policies and plans for the development and operation of programs and services for the benefit of the Encinitas community.

The City Council voted to approve the Youth Commission work plan on November 13, 2019 with the addition of Goal #10 stating: "Youth Commission to review vaping ordinance passed by San Diego County and make a recommendation to the City Council on the topic of vaping for the City of Encinitas."

A presentation was made by Kelly McCormick from the San Dieguito Alliance for Drug Free Youth on December 5, 2019 on the dangers of vaping. In addition to the presentation, Ms. McCormick has spoken at various Youth Commission meetings during public comment advocating for a ban on flavored tobacco for the City of Encinitas.

On February 5, 2020, San Diego County Supervisor Nathan Fletcher made a presentation to the Youth Commission regarding the County of San Diego Ordinance (Attachment 1) banning the sale and distribution of flavored smoking products and imposing a temporary ban on the sale or distribution of electronic smoking devices in the unincorporated areas of the county. Supervisor

Fletcher explained how monumental this ordinance was for the County of San Diego and shared research that led to its decision.

On April 8, 2020, the City of Solana Beach became one of the first cities in San Diego County to pass an ordinance (Attachment 2) banning the sale and distribution of flavored tobacco products.

The Youth Commission was provided with information from the City of Solana Beach and the County of San Diego to make an informed recommendation to the City Council.

### **ANALYSIS:**

Flavored tobacco products have become increasingly popular and are sold as cigars, cigarillos, smokeless tobacco, shisha or hookah tobacco, and liquid nicotine solutions used in electronic cigarettes. Flavored tobacco products come in a variety of flavors such as chocolate, berry, cherry, apple, and wintergreen which are enticing to young people. In 2009, the United States Food and Drug Administration (“FDA”) banned cigarettes with characterizing flavors other than menthol (e.g., cherry, chocolate).

The FDA does not ban flavors from other tobacco products, although, according to the FDA, research suggests flavors may also make these products more enticing to youth and young adults. Data from FDA’s Population Assessment of Tobacco and Health found that nearly 80 percent of youth ages 12 – 17 and nearly 75 percent of young adults ages 18 – 24 who were current tobacco users in 2014, reported that the first tobacco product they ever used was flavored.

The widespread use of flavored tobacco products and e-cigarettes by youth has significant public health consequences. 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, there is a growing body of research concluding that there are significant health risks associated with e-cigarette use. For example, daily e-cigarette use is associated with increased odds of a heart attack. The American Lung Association has warned that the inhalation of harmful chemicals through vaping may cause irreversible lung damage and lung disease.

The City’s business registration process does not require retailers to disclose all the types of products being sold. Through an online search and phone calls, it has been determined that approximately 15 – 20 businesses currently sell flavored vape or tobacco products in Encinitas.

The Youth Commission met on May 6, 2020, via Zoom, to discuss the topic of vaping in Encinitas. The Youth Commission engaged in a healthy discussion on the topic of flavored tobacco, nicotine and tobacco products. The Encinitas Youth Commission voted unanimously to recommend to City Council to prohibit the sale and distribution of flavored tobacco in the City of Encinitas similar to Solana Beach.

Staff recommends that Council reviews the recommendation from the Youth Commission and directs staff to return with an ordinance prohibiting the sale and distribution of flavored tobacco in the City of Encinitas.

### **ENVIRONMENTAL CONSIDERATIONS:**

The action considered is exempt from the California Environmental Quality Act, (CEQA), because it is not a “project” under Section 15378(b)(5) of CEQA Guidelines. The action involves an organizational or administrative activity of government that will not result in the direct or indirect physical change in the environment.

This item does not relate to the Climate Action Plan.

**ATTACHMENT:**

1. County of San Diego Ordinance Adding Provisions to Smoking Related Prohibitions in the Unincorporated Area of the County
2. City of Solana Beach Staff Report for 2<sup>nd</sup> Reading of Ordinance 513

ORDINANCE NO. \_\_\_\_\_(N.S.)

AN ORDINANCE ADDING PROVISIONS TO TITLE 3, DIVISION 2 OF THE SAN DIEGO COUNTY REGULATORY CODE REGARDING SMOKING RELATED PROHIBITIONS IN THE UNINCORPORATED AREA OF THE COUNTY

The Board of Supervisors of the County of San Diego ordains as follows:

Section 1. Title 3, Division 2 of the San Diego County Code is amended to add Chapter 8.7 as follows:

SEC. 32.871. FINDINGS AND INTENT.

- (a) Smoking is the leading cause of preventable death in the United States and California. Smoking kills more than 480,000 Americans each year, including secondhand smoke that kills approximately 41,000 Americans who do not smoke.
- (b) The United States Surgeon General concluded in 2006 that there is no safe level of exposure to secondhand smoke.
- (c) The California Air Resources Board placed secondhand smoke in the same category as the most toxic automotive and industrial air pollutants by categorizing it as a toxic air contaminant for which there is no safe level of exposure.
- (d) The California Environmental Protection Agency included secondhand smoke on the Proposition 65 list of chemicals known to the State of California to cause cancer, birth defects, and other reproductive harm.
- (e) Secondhand smoke is responsible for as many as 7,300 deaths from lung cancer and 34,000 deaths from heart disease among adult nonsmokers each year in the United States. Secondhand smoke is particularly hazardous to individuals with cardiovascular disease, and individuals with impaired respiratory function, including those with asthma or obstructive airway disease.
- (f) Exposure to secondhand smoke can occur at significant levels outdoors, and secondhand exposure can reach levels attained indoors depending on direction and amount of wind, and number and proximity of smokers.
- (g) Californians working in the service and hospitality industry have much greater exposure to secondhand smoke when there is an outdoor dining area at their workplace because State law does not regulate smoking in outdoor dining areas to the same extent as indoor dining areas.
- (h) Aerosols created by electronic smoking devices contain varying concentrations of particles and chemicals; some studies found particle sizes and nicotine concentrations similar to, or even exceeding, conventional cigarette smoke.
- (i) For the reasons stated above, smoking in and around public outdoor dining areas is a public nuisance.
- (j) It is the intent of the Board to provide for the public health, safety, and welfare, by reducing secondhand smoke exposure in public outdoor dining areas.

SEC. 32.872. DEFINITIONS.

- (a) “Outdoor dining area” means any portion of a permitted food facility that contains areas designated, established, or regularly used for consuming food or drink outdoors, in a covered area, or otherwise outside the confines of the interior premises.
- (b) “Shisha” means a flavored smoking product that is traditionally mixed with molasses, honey, fruit pulp, or dried fruits and is sold for use in a water pipe known as a hookah.
- (c) “Smoking” has the meaning set forth in section 22950.5 of the California Business and Professions Code.

SEC. 32.873. SMOKING PROHIBITED IN AND AROUND OUTDOOR DINING AREAS.

- (a) Smoking is prohibited in all outdoor dining areas, and within 25 feet from the perimeter of such areas, in the unincorporated area of the County.
- (b) Smoking is prohibited within 40 feet from a permitted food facility that is a mobile food or temporary food facility, including a food truck or food cart, in the unincorporated area of the County.
- (c) The owner, operator, manager, or other person in control of an area subject to this section shall install signage notifying employees, patrons, and visitors of the prohibition on smoking. The signage required in this section shall include the text “No Smoking” in letters not less than one inch in height displayed against a contrasting background. Signs of similar size containing the international “no smoking” symbol consisting of a pictorial representation of a burning cigarette and an electronic cigarette enclosed in a red circle with a red bar across it, may be used in addition to, or in lieu of, the required text signs. The signage shall be clearly and conspicuously posted at congregating points in, and at entrance points to, areas subject to this section.
- (d) The owner, operator, manager, or other person in control of an area subject to this section who witnesses smoking in violation of this section shall immediately inform any person in violation to cease smoking.
- (e) No ashtrays shall be placed, installed, or retained in an area where smoking is prohibited by this section.
- (f) This section shall not apply to a facility or location whose business operation, as its principal use, is devoted to the on-premises smoking of shisha, including, but not limited to, establishments known variously as hookah bars, hookah lounges, hookah parlors, or hookah cafes.

SEC. 32.874. VIOLATIONS.

Any person who violates the provisions of this chapter shall be subject to an infraction as set forth in section 11.116 of this code in conjunction with or in addition to any other remedy set forth in section 11.121 of this code or allowed by law. The County’s Chief Administrative Officer may designate one or more County officers to enforce and administer any remedy authorized by this code.

Section 2. Title 3, Division 2 of the San Diego County Code is amended to add Chapter 8.8 as follows:

## CHAPTER 8.8. SALE OR DISTRIBUTION OF FLAVORED SMOKING PRODUCTS.

### SEC. 32.881. FINDINGS AND INTENT.

- (a) Smoking is the leading cause of preventable death in the United States and California. Smoking kills more than 480,000 Americans each year, including secondhand smoke that kills approximately 41,000 who do not smoke. Three-fifths of lifelong smokers die from smoking-related diseases, including many forms of cancer, heart disease, respiratory diseases, among other health disorders.
- (b) The National Survey on Drug Use and Health in 2017 found that four-fifths of people who smoke become daily smokers before turning twenty-one. Developing adolescent brains are especially vulnerable to the effects of nicotine.
- (c) The findings of the 2019 National Youth Tobacco Survey, released by the Centers for Disease Control and Prevention and Food and Drug Administration, showed that more than 5 million U.S. middle and high school students reported current e-cigarette use, an increase of more than 1.5 million students from the 2018 findings. The survey also found that 27.5 percent of high school students reported current e-cigarette use, a percentage that has increased dramatically since 2018.
- (d) The 2019 National Youth Tobacco Survey also found that, among current exclusive e-cigarette users, approximately 72 percent of high school students and 60 percent of middle school students used flavored e-cigarettes. Flavors, such as fruit, menthol, mint, candy, or dessert, hide the harshness of nicotine, making initiation of nicotine use easier among youth. Menthol and mint flavors are particularly important to prohibit; menthol flavoring makes it easier to start smoking and harder to quit. The marketing of menthol cigarettes has disproportionately targeted African-American communities for decades.
- (e) Youth get access to tobacco products through stores, the Internet, and social sources such as friends or classmates. Eliminating youth access requires action on all three fronts. State and federal action is needed, but curbing retail sales is often addressed by local government. The 2018 Young Adult Tobacco Purchase Survey showed that tobacco and vape shops made sales to underage decoys 49.8 percent of the time, twice the rate of any other category of retailer.
- (f) For the reasons stated above, the sale or distribution of flavored smoking products is a public nuisance.
- (g) It is the intent of the Board to provide for the public health, safety, and welfare, by prohibiting the sale or distribution of flavored smoking products in the unincorporated area of the County.

### SEC. 32.882. DEFINITIONS.

For the purposes of this chapter:

- (a) “Distribution” means to give smoking products to the general public at no cost, or at nominal cost, or to give coupons, coupon offers, gift certificates, gift cards, or other

similar offers, or rebate offers for smoking products to the general public at no cost or at nominal cost.

- (b) “Flavored Smoking Product” is a product containing, made, or derived from tobacco or nicotine that is intended for smoking, and that emits a taste or smell, other than the taste or smell of tobacco, including, but not limited to, any taste or smell relating to fruit, menthol, mint, wintergreen, chocolate, cocoa, vanilla, honey, candy, dessert, alcoholic beverage, herb, or spice.
- (c) “Shisha” means a flavored smoking product that is traditionally mixed with molasses, honey, fruit pulp, or dried fruits and is sold for use in a water pipe known as a hookah.
- (d) “Smoking” has the meaning set forth in section 22950.5 of the California Business and Professions Code.

#### SEC. 32.883. PROHIBITION ON SALE OR DISTRIBUTION OF FLAVORED SMOKING PRODUCTS.

- (a) The sale or distribution of all flavored smoking products is prohibited in the unincorporated area of the County.
- (b) This section shall not apply to the sale or distribution of shisha for use in a hookah.
- (c) This section shall not apply to a product that has been approved by the Food and Drug Administration for sale as a tobacco cessation product or for other therapeutic purposes, where the product is marketed and sold solely for such an approved purpose.

#### SEC. 32.884. VIOLATIONS.

- (a) Any person who violates the provisions of this chapter shall be subject to an infraction as set forth in section 11.116 of this code in conjunction with or in addition to any other remedy set forth in section 11.121 of this code or allowed by law.
- (b) The County’s Chief Administrative Officer may designate one or more County officers to enforce and administer any remedy authorized by this code.

Section 3. Title 3, Division 2 of the San Diego County Code is amended to add Chapter 8.9 as follows:

#### CHAPTER 8.9. TEMPORARY PROHIBITION ON THE SALE OR DISTRIBUTION OF ELECTRONIC SMOKING DEVICES.

##### SEC. 32.891. FINDINGS AND INTENT.

- (a) Electronic smoking devices are battery-operated devices that heat “e-liquid” solutions of chemicals, turning them into an aerosol that is inhaled in a manner similar to smoking a cigarette. There is a tremendous variety of e-liquids on the market. They often have varying compositions of flavorings, propylene glycol, vegetable glycerin, and other ingredients. Most have nicotine. Electronic smoking devices are also increasingly used to deliver tetrahydrocannabinol (THC) or cannabidiol (CBD).
- (b) Currently, the electronic smoking market is largely unregulated. In 2009, Congress passed the Family Smoking Prevention and Tobacco Control Act, which extended the



federal Food and Drug Administration's (FDA) authority to regulate tobacco products, including requiring that all new tobacco products receive FDA premarket clearance to be sold in the United States. However, FDA granted electronic tobacco products a grace period and extended it. Currently, manufacturers are required to submit Premarket Tobacco Product Applications to FDA by May 12, 2020.

- (c) E-cigarettes are not approved by FDA as an aid to quit smoking. Studies indicate no evidence of definitive long-term efficacy of e-cigarettes as a cessation aid and many people become 'dual users' instead of completely quitting combustible cigarettes. E-cigarette manufacturers could request approval to market their products as a "modified risk tobacco product" or a cessation aid. Without this FDA approval manufacturers may not make safety or health claims for their products.
- (d) The long-term health consequences of electronic smoking devices are unclear, but evidence is mounting that there are serious risks. Research suggests vegetable glycerin and propylene glycol, which produce the aerosol cloud, are toxic to cells in lungs. Research also indicates that the metals in heating coils enter the aerosol that is pulled into the lungs. A review of the research on vaping by the National Academies of Sciences, Engineering, and Medicine concluded that there was "conclusive evidence that in addition to nicotine, most e-cigarette products contain and emit numerous potentially toxic substances." This review noted the presence of known carcinogens, like formaldehyde and acrolein, but expressed the most concern about the unknown effects of flavorings.
- (e) A longitudinal study, published in the *American Journal of Preventive Medicine*, in December 2019, revealed statistically significant associations between former e-cigarette use and current e-cigarette use with having incident respiratory disease.
- (f) The findings of the 2019 National Youth Tobacco Survey, released by the Centers for Disease Control and Prevention (CDC) and FDA, showed that more than 5 million U.S. middle and high school students reported current e-cigarette (use within the last 30 days), an increase of more than 1.5 million students from the 2018 findings. The survey also found that 27.5 percent of high school students reported current e-cigarette use, a percentage that has increased dramatically since 2018.
- (g) Electronic smoking devices have been implicated in an acute public health crisis that began in the summer of 2019. E-cigarette, or vaping, product use associated lung injury (EVALI), formerly known as vaping-associated pulmonary injury (VAPI), has led to hospitalizations and deaths nationwide, including in California. There have been 41 confirmed or probable EVALI cases in San Diego County as of December 18, 2019 (most recent data as of docket date). In response, the California Department of Public Health has urged the public to immediately cease using electronic smoking devices, regardless of whether they include THC, CBD, or nicotine. Investigations to date on the cause of the outbreak have identified vitamin E acetate, an additive in some e-cigarette, or vaping, products containing THC, as closely associated with EVALI. There may be other contributing causes of EVALI, and it is notable that some individuals with EVALI did not report using THC-containing products. Regardless of the specific ingredients ultimately pinpointed as contributing to this outbreak, EVALI is indicative of the uncertainties and potential harms of widespread recreational electronic smoking device use in a minimally regulated market.
- (h) For the reasons stated above, the sale or distribution of electronic smoking devices is a

public nuisance.

- (i) It is the intent of the Board to provide for the public health, safety and welfare, by temporarily prohibiting the sale or distribution of electronic smoking devices in the unincorporated area of the County.

#### SEC. 32.892. DEFINITIONS.

For the purposes of this chapter:

- (a) "Distribution" means to give smoking products to the general public at no cost, or at nominal cost, or to give coupons, coupon offers, gift certificates, gift cards, or other similar offers, or rebate offers for smoking products to the general public at no cost or at nominal cost.
- (b) "Electronic smoking device" is defined as an electronic and/or battery-operated device, which can be used to deliver an inhaled dose of nicotine or other substances whether manufactured, distributed, marketed, or sold as an electronic cigarette, an electronic cigar, an electronic cigarillo, an electronic pipe, or any other product name or descriptor. For the purposes of this chapter, "electronic smoking device" does not include any product that the Food and Drug Administration has either granted premarket approval, or approved for use as a tobacco cessation product or for other therapeutic purposes where the product is marketed and sold solely for such an approved purpose.
- (c) "E-cigarette, or vaping, product use associated lung injury outbreak" or "EVALI outbreak" is an outbreak of a severe and sometimes fatal illness that was identified in the summer of 2019 and is the subject of an ongoing investigation by the Centers for Disease Control and Prevention.

#### SEC. 32.893. TEMPORARY PROHIBITION.

- (a) The sale or distribution of an electronic smoking device is prohibited within the unincorporated area of the County for one year from the effective date of the ordinance codified in this chapter.
- (b) This section shall not apply to electronic smoking devices that, at the conclusion of the ongoing investigation by the CDC, are not identified as a causal factor in the e-cigarette, or vaping, product use associated lung injury outbreak. The health officer shall issue a public notice at the termination of the CDC's investigation regarding whether this condition has been met.

#### SEC. 32.894. VIOLATIONS.

Any person who violates the provisions of this chapter shall be subject to an infraction as set forth in section 11.116 of this code in conjunction with or in addition to any other remedy set forth in section 11.121 of this code or allowed by law. The County's Chief Administrative Officer may designate one or more County officers to enforce and administer any remedy authorized by this code.

SEC. 32.895. SUNSET.

This chapter shall remain in effect for one year from the effective date of the ordinance codified in this chapter and shall terminate thereafter.

Section 4. Effective Date. This ordinance shall take effect thirty (30) days after its adoption. Within fifteen (15) days after the date of adoption of this ordinance, a summary shall be published once with the name of those members voting for and against the same in a newspaper of general circulation published in San Diego County.

Section 5. Operative Date. This ordinance shall become operative on July 1, 2020.

APPROVED AS TO FORM AND LEGALITY  
COUNTY COUNSEL

By: Kyle Sand, Senior Deputy County Counsel



## STAFF REPORT CITY OF SOLANA BEACH

**TO:** Honorable Mayor and City Councilmembers  
**FROM:** Gregory Wade, City Manager  
**MEETING DATE:** April 8, 2020  
**ORIGINATING DEPT:** City Manager's Office/City Attorney's Office  
**SUBJECT:** Adoption of (2<sup>nd</sup> Reading) Ordinance 513 Adding Chapter 6.18 to the Solana Beach Municipal Code to Prohibit the Sale and Distribution of Flavored Tobacco Products

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### **BACKGROUND:**

On February 26, 2020, the City Council introduced Ordinance 513 which would prohibit the sale and distribution of flavored tobacco products in the City. This item is before the City Council for the second reading and adoption of Ordinance 513.

### **DISCUSSION:**

Despite progress in reducing smoking, tobacco use is still the leading cause of preventable death in the United States. Tobacco kills more than 480,000 people in this country annually. Smoking, and now vaping, continues to be a public health crisis.

Flavored tobacco products have become increasingly popular and are sold for cigars, cigarillos, smokeless tobacco, shisha or hookah tobacco, and liquid nicotine solutions used in electronic cigarettes (e-cigarettes). E-cigarettes are extremely popular among the youth. There were 1.5 million more youth e-cigarette users in 2019 than 2018, and those who were using e-cigarettes were using more often. Frequent use of e-cigarettes increased from 20% in 2017 to 28% in 2018 among current high school e-cigarette users. The FDA has reported, according to a 2013-2014 survey, 81% of youth e-cigarette users cited the availability of appealing flavors as the primary reason for use.

The widespread use of flavored tobacco products and e-cigarettes by youth has significant public health consequences. 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, there is a growing body of research

COUNCIL ACTION:

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**AGENDA ITEM C.3.**

concluding that there are significant health risks associated with e-cigarette use. For example, daily e-cigarette use is associated with increased odds of a heart attack. And the American Lung Association has warned that the inhalation of harmful chemicals through vaping may cause irreversible lung damage and lung disease.

Currently, the e-cigarette device market is largely unregulated; however, on January 2, 2020, the FDA issued a policy prioritizing enforcement against certain unauthorized flavored e-cigarette products including fruit, candy, mint and dessert flavors from small, cartridge-based e-cigarettes. But menthol and tobacco-flavored e-cigarettes will be allowed to remain on the market. The FDA flavor ban will also entirely exempt large, tank-based vaping devices. Importantly, the policy still permits all flavors to continue to be sold in devices that cannot be refilled and are designed to be disposed of after the flavored nicotine has run dry. This is causing youth users to simply switch to disposable e-cigarettes.

The State has banned the sale of e-cigarettes to persons under the age of 21, with the exception of active duty military personnel who must be at least 18 (see Bus. & Prof. Code secs. 22958, 22963). California also requires electronic cigarette cartridges and solutions to be sold in child-resistant packaging. (Health & Safety Code sec. 119406(a).) Cities and counties are also attempting to regulate the use and distribution of e-cigarettes products and cities have been granted the authority for such regulations which can be more restrictive than state law. (Gov. Code sec. 7597; Bus. & Prof. Code 22962.)

[DK1]

At the current time, the City of Solana Beach prohibits smoking and the use of e-cigarettes in certain locations in the City. The draft ordinance proposes to prohibit the sale and distribution of flavored tobacco products including those used with e-cigarettes which are used much more frequently by youth. The prohibition on the sale of flavored tobacco products, including menthol cigarettes and chewing tobacco, would go into effect six months after the effective date of this ordinance.

#### **CEQA COMPLIANCE STATEMENT:**

The adoption of this ordinance will not have a significant adverse effect on the environment because the ordinance only prohibits the sale and distribution of flavored tobacco products. It is therefore exempt from California Environmental Quality Act review pursuant to Title 14, Section 15061(b)(3) of the California Code of Regulations.

#### **FISCAL IMPACT:**

There is no fiscal impact as a result of this item.

#### **OPTIONS:**

- Adopt Ordinance 513 adding Chapter 6.18 to the Solana Beach Municipal Code to Prohibit the Sale of Flavored Tobacco Products.

- Provide direction.

**DEPARTMENT RECOMMENDATION:**

Staff recommends the City Council adopt Ordinance 513 adding Chapter 6.18 to the Solana Beach Municipal Code to prohibit the sale and distribution of flavored tobacco products.

**CITY MANAGER'S RECOMMENDATION:**

Approve Department Recommendation.

  
\_\_\_\_\_  
Gregory Wade, City Manager

Attachments:

1. Ordinance 513

## **ORDINANCE 513**

### **AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF SOLANA BEACH, CALIFORNIA, ADDING CHAPTER 6.18 TO THE SOLANA BEACH MUNICIPAL CODE TO PROHIBIT THE SALE AND DISTRIBUTION OF FLAVORED TOBACCO PRODUCTS**

**WHEREAS**, tobacco use remains the leading cause of preventable death in the United States, killing more than 480,000 people each year. It causes or contributes to many forms of cancer, as well as heart disease and respiratory diseases, among other health disorders. Tobacco use remains a public health crisis of the first order, in terms of the human suffering and loss of life it causes, the financial costs it imposes on society, and the burdens it places on our health care system; and

**WHEREAS**, the National Survey on Drug Use and Health in 2017 found that four-fifths of people who smoke become daily smokers before turning twenty-one. Developing adolescent brains are especially vulnerable to the effects of nicotine; and

**WHEREAS**, flavored tobacco products have also become increasingly popular and are sold for cigars, cigarillos, smokeless tobacco, shisha or hookah tobacco, and liquid nicotine solutions used in e-cigarettes. They come in a variety of flavors such as chocolate, berry, cherry, apple, wintergreen and peach and are sold in colorful packaging, which can make them especially appealing to young people; and

**WHEREAS**, e-cigarettes entered the marketplace around 2007, and since 2014, they have been the most commonly used tobacco product among youth in the United States and include flavors that are appealing to youth; and

**WHEREAS**, according to the Centers for Disease Control and Prevention ("CDC"), the number of middle and high school students who reported being current users of tobacco products increased 36%— from 3.6 million to 4.9 million students—between 2017 and 2018. This dramatic increase, which has erased past progress in reducing youth tobacco use, is directly attributable to a nationwide surge in e-cigarette use by adolescents; and

**WHEREAS**, the FDA has reported, according to a 2013-2014 survey, 81% of youth e-cigarette users cited the availability of appealing flavors as the primary reason for use; and

**WHEREAS**, the widespread use of flavored tobacco products and e-cigarettes by youth has significant public health consequences. As stated by 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"; and

**WHEREAS**, there is a growing body of research concluding that there are significant health risks associated with e-cigarette use. For example, daily e-cigarette use is associated with increased odds of a heart attack. The American Lung Association has warned that the

inhalation of harmful chemicals through vaping may cause irreversible lung damage and lung disease; and

**WHEREAS**, on August 30, 2019, the CDC released a health advisory on a multistate outbreak of severe pulmonary disease associated with using e-cigarette products. The CDC report 215 possible cases of severe pulmonary diseases have been reported from 25 states and additional reports of pulmonary illness are under investigation. Some of these cases of severe pulmonary diseases have resulted in death; and

**WHEREAS**, on August 27, 2019 the California Department of Public Health issued a Health Alert for “Vaping-Associated Pulmonary Injury” stating 36 cases of vaping-associated pulmonary injury requiring hospitalization have been reported to the California Department of Public Health since June; and

**WHEREAS**, the City of Solana Beach wishes to address what appears from the evidence to be a major public health crisis and protect its youth;

**NOW, THEREFORE**, the City Council of the City of Solana Beach hereby ordains as follows:

**Section 1.** All of the above statements are true and correct and incorporated herein as findings.

**Section 2.** Chapter 6.18 is added to the Solana Beach Municipal Code to read as follows:

## **6.18 REGULATION OF THE SALE AND DISTRIBUTION OF FLAVORED TOBACCO PRODUCTS**

### **6.18.010 Purpose**

The City Council recognizes the inherent danger of tobacco products and that the use of tobacco products has devastating health and economic consequences. The City Council further recognizes that tobacco use is the leading cause of preventable illness and death in the United States, and that tobacco product use is started and established primarily during adolescence.

Allowing flavored tobacco products to be sold in the City increases access to these harmful and dangerous products. To that end, no flavored tobacco products shall be sold in the City except as specifically enumerated below.

### **6.18.020 Definitions.**

For purposes of this chapter, the following definitions shall apply:

“Characterizing flavor” means a distinguishable taste or aroma or both, other than the taste or aroma of tobacco, imparted by a Tobacco Product or any byproduct produced by the Tobacco Product. Characterizing Flavors include, but are not limited to, tastes or aromas relating to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, menthol, mint, wintergreen, herb, or spice. A Tobacco Product shall not be determined to have a Characterizing Flavor solely because of the use of additives or flavorings or the provision of ingredient information. Rather, it is the presence of a Distinguishable taste or aroma or both, as described in the first sentence of this definition, that constitutes a Characterizing Flavor.



“Distinguishable” means perceivable by either the sense of smell or taste.

“Distribute” or “Distribution” means the transfer, by any person other than a common carrier, of a Tobacco Product at any point from the place of manufacture or thereafter to the person who sells the tobacco product to an individual for personal consumption.

“Electronic Cigarette” has the meaning set forth in Section 30121 of the California Revenue and Taxation Code, as may be amended from time to time.

“Flavored Tobacco Product” means any Tobacco Product that imparts a Characterizing Flavor. A public statement or claim made or disseminated by the manufacturer of a Tobacco Product, or by any person authorized or permitted by the manufacturer to make or disseminate public statements concerning such Tobacco Product, that such Tobacco Product has or produces a Characterizing Flavor shall constitute presumptive evidence that the Tobacco Product is a flavored Tobacco Product.

“Sell,” “Sale,” and “to Sell” mean any transaction where, for any consideration, ownership of a Tobacco Product is transferred from one person to another, including but not limited to any transfer or title or possession for consideration, exchange, or barter, in any manner or by any means.

“Tobacco Product” means any tobacco cigarette, electronic cigarette cartridge, cigar, pipe tobacco, smokeless tobacco, snuff or any other form of tobacco which may be utilized for smoking, chewing, inhaling, vaping or other manner of ingestion.

#### 6.18.030 Prohibition on Sale or Distribution of Flavored Tobacco Products

- A. It is unlawful to Sell or Distribute any Flavored Tobacco Product to a person in Solana Beach.
- B. There shall be a rebuttal presumption that a Tobacco Product, other than a cigarette, is a Flavored Tobacco Product if a manufacturer or any of the manufacturer’s agents or employees, in the course of their agency or employment, has made a statement or claim directed to consumers or to the public that the Tobacco Product has or produces a Characterizing Flavor, including, but not limited to, text, color, and or/images on the product’s labeling or packaging that are used to explicitly or implicitly communicate that the Tobacco Product has a Characterizing Flavor.
- C. This section shall not apply to a product that has been approved by the Food and Drug Administration for sale as a tobacco cessation product or for other therapeutic purposes, where the product is marketed and sold solely for such an approved purpose.

#### 6.18.040 Enforcement.

- A. The city manager, or designee, is authorized to establish regulations and to take any and all actions reasonable and necessary to obtain compliance with this chapter, including, but not limited to, inspecting the premises of any business to verify compliance.
- B. Any person, business or tobacco retailer violating this chapter shall be guilty of an infraction, which shall be punishable by a fine in accordance with Chapters 1.16 or 1.18 of the Solana Beach Municipal Code, or a misdemeanor, which shall be punishable by a fine not exceeding one thousand dollars, or by imprisonment in the County Jail for a

period not exceeding six months or by both such fine and imprisonment. In addition to criminal fines, any person, business or tobacco retailer violating this chapter shall also be subject to civil penalties or administrative fines or both under Chapters 1.16 and 1.18 of the Solana Beach Municipal Code.

- C. The city attorney may seek legal, injunctive, or other equitable relief to enforce this chapter.
- D. Administrative enforcement of this chapter shall proceed pursuant to Chapter 1.18 of the Solana Beach Municipal Code.
- E. Each violation of this chapter shall be considered a separate offense.
- F. The remedies and penalties provided in this section are cumulative and not exclusive, and nothing in this chapter shall preclude any person from pursuing any other remedies provided by law.
- G. Notwithstanding any other provision of this chapter, this chapter may be enforced through any remedy as provided for in this section upon its effective date.

#### 6.18.050 No Conflict with Federal or State Law

Nothing in this chapter shall be interpreted or applied so as to create any requirement, power, or duty that is preempted by federal or state law.

#### 6.18.060 Severability

If any section, subsection, sentence, clause, phrase, or word of this chapter, or any application thereof to any person or circumstance, is held to be invalid or unconstitutional by a decision of a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions or applications of this chapter. The City Council declares that it would have adopted each section, subsection, subdivision, paragraph, sentence, clause or phrase hereof, irrespective of the fact that any one or more other sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases hereof be declared invalid or unenforceable..

**Section 3.** The City Council finds that this Ordinance is exempt from the provisions of the California Environmental Quality Act ("CEQA") pursuant to Section 15061(b)(3) because there is no possibility that the activity in question may have a significant effect on the environment..

**Section 4.** Severability. If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this Chapter, or its application to any person or circumstance, is for any reason held to be invalid or unenforceable, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases of this Chapter, or its application to any other person or circumstance. The City Council declares that it would have adopted each section, subsection, subdivision, paragraph, sentence, clause or phrase hereof, irrespective of the fact that any one or more other sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases hereof be declared invalid or unenforceable.

**EFFECTIVE DATE:** This Ordinance shall be effective thirty (30) days after its adoption. Within fifteen (15) days after its adoption, the City Clerk of the City of Solana Beach shall cause

this Ordinance to be published pursuant to the provisions of Government Code Section 36933.

**INTRODUCED AND FIRST READ** at a regular meeting of the City Council of the City of Solana Beach, California, on the 12th day of February, 2020; and

**THEREAFTER ADOPTED** at a regular meeting of the City Council of the City of Solana Beach, California, on the 8<sup>th</sup> day of April, 2020, by the following vote:

AYES: Councilmembers –  
NOES: Councilmembers –  
ABSTAIN: Councilmembers –  
ABSENT: Councilmembers –

\_\_\_\_\_  
JEWEL EDSON, Mayor

APPROVED AS TO FORM:

ATTEST:

\_\_\_\_\_  
JOHANNA N. CANLAS, City Attorney

\_\_\_\_\_  
ANGELA IVEY, City Clerk



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**SB-793 Flavored tobacco products.** (2019-2020)

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**Date Published: 06/18/2020 09:00 PM**

AMENDED IN SENATE JUNE 18, 2020

AMENDED IN SENATE MAY 05, 2020

CALIFORNIA LEGISLATURE— 2019–2020 REGULAR SESSION

## SENATE BILL

**NO. 793**

**Introduced by Senators Hill, Glazer, McGuire, Pan, Skinner, and Wiener**

**(Principal coauthor: Senator Durazo)**

(Principal coauthors: Assembly Members Bauer-Kahan, Berman, Bloom, Gonzalez, McCarty, Muratsuchi, Robert Rivas, and Wood)

(Coauthors: Senators [Allen](#), Archuleta, Beall, Dodd, Lena Gonzalez, Hertzberg, Jackson, Leyva, Monning, ~~and Nielsen~~ [Nielsen](#), [Portantino](#), and [Rubio](#))

(Coauthors: Assembly Members Boerner Horvath, Bonta, Chiu, Chu, **Frazier**, Cristina Garcia, Levine, **Limón**, Mullin, O'Donnell, Petrie-Norris, Luz Rivas, Santiago, Mark Stone, Ting, and Wicks)

**January 06, 2020**

An act to add Article 5 (commencing with Section 104559.5) to Chapter 1 of Part 3 of Division 103 of the Health and Safety Code, relating to tobacco products.

## LEGISLATIVE COUNSEL'S DIGEST

SB 793, as amended, Hill. Flavored tobacco products.

Existing law, the Stop Tobacco Access to Kids Enforcement (STAKE) Act, prohibits a person from selling or otherwise furnishing tobacco products, as defined, to a person under 21 years of age. Existing law also prohibits the use of tobacco products in county offices of education, on charter school or school district property, or near a playground or youth sports event, as specified.

This bill would prohibit a tobacco retailer, or any of the tobacco retailer's agents or employees, from selling, offering for sale, or possessing with the intent to sell or offer for sale, a flavored tobacco product or a tobacco product flavor enhancer, as those terms are ~~defined.~~ *defined, except as specified.* The bill would make a violation of this prohibition an infraction punishable by a fine of \$250 for each violation. The bill would state the intent of the Legislature that these provisions not be construed to preempt or prohibit the adoption and implementation of local ordinances related to the prohibition on the sale of flavored tobacco products. The bill would state that its provisions are severable. By creating a new crime, the bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: yes

## THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

**SECTION 1.** Article 5 (commencing with Section 104559.5) is added to Chapter 1 of Part 3 of Division 103 of the Health and Safety Code, to read:

### Article 5. Tobacco Sale Prohibition

**104559.5.** (a) For purposes of this section, the following definitions apply:

(1) "Characterizing flavor" means a distinguishable taste or aroma, or both, other than the taste or aroma of tobacco, imparted by a tobacco product or any byproduct produced by the tobacco product. Characterizing flavors include, but are not limited to, tastes or aromas relating to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, menthol, mint, wintergreen, herb, or spice. A tobacco product shall not be determined to have a characterizing flavor solely because of the use of additives or flavorings or the provision of ingredient information. Rather, it is the presence of a distinguishable taste or aroma, or both, as described in the first sentence of this definition, that constitutes a characterizing flavor.

(2) "Constituent" means any ingredient, substance, chemical, or compound, other than tobacco, water, or reconstituted tobacco sheet, that is added by the manufacturer to a tobacco product during the processing, manufacture, or packing of the tobacco product.

*(3) "Flavored shisha tobacco product" means any shisha tobacco product that contains a constituent that imparts a characterizing flavor.*

~~(3)~~

(4) "Flavored tobacco product" means any tobacco product that contains a constituent that imparts a characterizing flavor.

*(5) "Hookah" means a type of waterpipe, used to smoke shisha or other tobacco products, with a long flexible tube for drawing aerosol through water. Components of a hookah may include heads, stems, bowls, and hoses.*

*(6) "Hookah tobacco retailer" means a tobacco retailer that is engaged in the retail sale of shisha tobacco products, hookah, and hookah smoking accessories.*

~~(4)~~

(7) "Labeling" means written, printed, pictorial, or graphic matter upon a tobacco product or any of its packaging.

~~(5)~~

(8) "Packaging" means a pack, box, carton, or container of any kind, or, if no other container, any wrapping, including cellophane, in which a tobacco product is sold or offered for sale to a consumer.

~~(6)~~

(9) "Retail location" means both of the following:

(A) A building from which tobacco products are sold at retail.

(B) A vending machine.

~~(7)~~

(10) "Sale" or "sold" means a sale as defined in Section 30006 of the Revenue and Taxation Code.

*(11) "Shisha tobacco product" means a tobacco product smoked or intended to be smoked in a hookah. "Shisha tobacco product" includes, and may be referred to as, hookah tobacco, waterpipe tobacco, maassel, narghile,*

*and argileh. "Shisha tobacco product" does not include any electronic devices, such as an electronic hookah, electronic cigarette, or electronic tobacco product.*

~~(8)~~

(12) "Tobacco product" means a tobacco product as defined in paragraph (8) of subdivision (a) of Section 104495, as that provision may be amended from time to time.

~~(9)~~

(13) "Tobacco product flavor enhancer" means a product designed, manufactured, produced, marketed, or sold to produce a characterizing flavor when added to a tobacco product.

~~(10)~~

(14) "Tobacco retailer" means a person who engages in this state in the sale of tobacco products directly to the public from a retail location. "Tobacco retailer" includes a person who operates vending machines from which tobacco products are sold in this state.

(b) (1) A tobacco retailer, or any of the tobacco retailer's agents or employees, shall not sell, offer for sale, or possess with the intent to sell or offer for sale, a flavored tobacco product or a tobacco product flavor enhancer.

(2) There shall be a rebuttable presumption that a tobacco product is a flavored tobacco product if a manufacturer or any of the manufacturer's agents or employees, in the course of their agency or employment, has made a statement or claim directed to consumers or to the public that the tobacco product has or produces a characterizing flavor, including, but not limited to, text, color, images, or all, on the product's labeling or packaging that are used to explicitly or implicitly communicate that the tobacco product has a characterizing flavor.

*(c) Subdivision (b) shall not apply to the sale of flavored shisha tobacco products by a hookah tobacco retailer if all of the following conditions are met:*

*(1) The hookah tobacco retailer has a valid license to sell tobacco products issued pursuant to Chapter 2 (commencing with Section 22971.7) of Division 8.6 of the Business and Professions Code.*

*(2) The hookah tobacco retailer does not permit any person under 21 years of age to be present or enter the premises at any time.*

*(3) The hookah tobacco retailer shall operate in accordance with all relevant state and local laws relating to the sale of tobacco products.*

*(4) If consumption of tobacco products is allowed on the premises of the hookah tobacco retailer, the hookah tobacco retailer shall operate in accordance with all state and local laws relating to the consumption of tobacco products on the premises of a tobacco retailer, including, but not limited to, Section 6404.5 of the Labor Code.*

~~(e)~~

(d) A tobacco retailer, or agent or employee of a tobacco retailer, who violates this section is guilty of an infraction and shall be punished by a fine of two hundred fifty dollars (\$250) for each violation of this section.

~~(f)~~

(e) This section does not preempt or otherwise prohibit the adoption of a local standard that imposes greater restrictions on the access to tobacco products than the restrictions imposed by this section. To the extent that there is an inconsistency between this section and a local standard that imposes greater restrictions on the access to tobacco products, the greater restriction on the access to tobacco products in the local standard shall prevail.

**SEC. 2.** The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

**SEC. 3.** No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a

crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

# RAISING THE FEDERAL MINIMUM AGE OF SALE OF TOBACCO PRODUCTS TO 21

On December 20, 2019, the President signed legislation amending the Federal Food, Drug, and Cosmetic Act, and raising the federal minimum age for sale of tobacco products from 18 to 21 years.



**Effective immediately, it is now illegal for a retailer to sell any tobacco product—including cigarettes, cigars, and e-cigarettes—to anyone under 21.**



The new federal minimum age of purchase applies to all retail establishments and persons with no exceptions.

## Will there be any transition period?

When the law went into effect, FDA recognized that both the agency and some retailers would need to update their practices to implement the new law—commonly referred to as “Tobacco 21” or “T21”—and stated that FDA would use only minors under the age of 18 in the compliance check program during the ramp-up period. During this period of transition, FDA expected retailers to follow the law and take measures to ensure an individual purchasing tobacco products is 21 or older, including manually checking IDs. Now that a reasonable transition period has concluded, FDA has begun utilizing individuals under the age of 21 in its nationwide compliance check inspection program to determine retailer compliance. FDA also expects that retailers will continue to verify the age of anyone under the age of 27.

## What resources is FDA offering to assist retailers?

FDA has free resources available to assist retailers in calculating the age of customers. Retailers who use FDA’s **This Is Our Watch**® digital age verification calendar may update the minimum purchase age on the calendar to 21 years. Instructions on how to do so can be found **on the back of this sheet**. Retailers who would like a **This Is Our Watch**® digital age verification calendar may order one free of charge from FDA’s Center for Tobacco Products Exchange Lab. Additionally, retailers who use FDA’s Age Calculator app should update the age limit to 21 years through the app settings. Instructions are provided within the help feature of the app.

FDA has launched a hub for all T21 information on its website and will be updating the web page and other materials, including regulations, in the near future to reflect the change in law. Visit the page at: <https://www.fda.gov/tobacco-products/retail-sales-tobacco-products/tobacco-21>.

## How and when will FDA enforce the new minimum age?

FDA’s enforcement of the federal minimum age of purchase for tobacco products is ongoing. To date, the agency has conducted more than 1 million compliance checks of tobacco retailers. FDA will continue to conduct compliance check inspections of tobacco product retailers to determine a retailer’s compliance with federal laws and regulations.



# HOW TO USE FDA'S DIGITAL AGE VERIFICATION CALENDAR

**THIS IS  
OUR  
WATCH**  
WE I.D. TOBACCO PURCHASES

FDA's free digital age verification calendar helps retailers quickly determine if a customer is old enough to legally purchase tobacco products. The calendar can be programmed to display the exact date a customer must have been born on or before to legally buy tobacco products. Under federal law, the minimum age of tobacco purchase is 21. To program or change the age verification calendar to determine whether a customer is 21 years of age or older, follow the steps listed below.

1. **Insert Batteries.** The default date will read 01-01-2019.
2. Turn the calendar over. On the back panel are five buttons: **MODE**, **SET**, **18**, **19 ▲** and **21 ▼**.
3. To set or change the current date, press **SET** for three seconds. Use the **▲** and **▼** buttons to change the year, month, and day. Press **SET** to confirm each value. Press **MODE** to switch to time mode.
4. To set the current time, press **SET** for three seconds. Use the **▲** and **▼** buttons to change the hour and minute (based on a 24-hour clock). Press **SET** to confirm each value. When finished, press **MODE** to exit.
5. After correctly setting the date and time, to set the legal purchase age, press **21**, and the year will adjust to the most recent date customers must have been born on or before to purchase tobacco products. For example: If today's date is January 1, 2020, the calendar will display January 1, 1999.
6. If a calendar was previously set to reflect a different legal age of purchase other than 21, this can be easily changed by pressing **SET** for three seconds and repeating step 5 above.



Retailers who do not have a This Is Our Watch® digital age verification calendar may order one from the FDA Center for Tobacco Products Exchange Lab, online at: <https://digitalmedia.hhs.gov/tobacco>.