

ORDINANCE NO. _____

AN ORDINANCE OF THE COUNCIL OF THE CITY OF BURBANK
AMENDING TITLE 3, CHAPTER 4, ARTICLE 25, RETAIL TOBACCO
SALES, OF THE BURBANK MUNICIPAL CODE TO PROHIBIT THE
SALE OF FLAVORED TOBACCO PRODUCTS

City Attorney's Synopsis

This ordinance amends Burbank Municipal Code, Title 3, Chapter 4, Article 25, Retail Tobacco Sales, to prohibit the sale of flavored tobacco products in the City of Burbank.

The City Council of the City of Burbank finds:

A. Tobacco use continues to take a terrible toll—physically, emotionally and financially—on families throughout California. Tobacco remains the number one cause of preventable death, disease and disability in the U.S. and in California¹:

- Every year, nearly 40,000 Californians die from a tobacco-related disease;
- 3.4 million California adults still smoke;
- The cost of smoking in California is \$18.1 billion, or \$4,603 per smoker. All Californians are paying these costs, not just smokers.

B. In November 2018, the federal government released the latest National Youth Tobacco Survey (NYTS)² findings. Some of the most relevant findings are as follows:

- More than 3.6 million middle and high school students were current e-cigarette users in 2018, a dramatic increase of more than 1.5 million students since the year before.
- The number of U.S. high school students who reported being current e-cigarette users increased 78 percent between 2017 and 2018 to 3.05 million users.
- The increased popularity of e-cigarettes among youth raises a number of health concerns: risk of addiction to nicotine early on in life; potential harm from nicotine exposure to the developing adolescent brain; and exposure to chemicals associated with adverse health effects.
- Research shows that, compared with non-users, youth who use e-cigarettes are more likely to transition to conventional cigarettes – risking a lifetime of addiction to smoking and resulting smoking-attributable disease.
- There was a significant increase in flavored e-cigarette use within the past year, from 60.9 percent to 67.8 percent.

¹ California Tobacco Control Program Overview, California Department of Public Health, June 2017.
<https://www.cdph.ca.gov/Programs/CCDPHP/DCDIC/CTCB/CDPH%20Document%20Library/AboutUS/ProgramOverview/AboutUsProgramOverview081216.pdf>

² FDA NEWS RELEASE: Results from 2018 National Youth Tobacco Survey, November 15, 2018
<https://www.fda.gov/news-events/press-announcements/results-2018-nationalyouth-tobacco-survey-show-dramatic-increase-e-cigarette-use-among-youth-over>

- Research shows youth and young adults identify flavors as a primary reason for e-cigarette use.
 - Additionally, there is evidence³ indicating youth who first tried a flavored tobacco product have a higher likelihood of current tobacco use compared to those who first tried an unflavored product.
 - The sharp rise in e-cigarette use has resulted in an increase in overall youth tobacco product use, reversing a decline seen in recent years.
- C. The federal Department of Health and Human Services reports⁴:
- Companies are marketing e-cigarettes by promoting flavors and using a wide variety of media channels and approaches that have been used in the past for marketing conventional tobacco products to youth and young adults.
 - Research has found that youth who use a tobacco product, such as e-cigarettes, are more likely to go on to use other tobacco products like cigarettes.
 - The use of products containing nicotine in any form among youth, including in e-cigarettes, is unsafe.
- D. The Surgeon General reports⁵:
- The e-liquids in e-cigarettes are most often flavored; a study estimated that 7,700 unique flavors exist and that most of them are fruit or candy flavors.
 - Industry documents show that tobacco companies marketed flavored little cigars and cigarillos to youth to facilitate their uptake of cigarettes. Companies also intended flavored smokeless tobacco products to facilitate “graduation” to unflavored products that more easily deliver more nicotine to the user.
 - The Surgeon General officially declared e-cigarette use among our nation’s youth an epidemic (December 18, 2018).
- E. Data from FDA’s Population Assessment of Tobacco and Health found in 2014 that nearly 80 percent of youth ages 12-17 and nearly 75 percent of young adults ages 18-25, who were current tobacco users, reported their first tobacco product ever used was flavored.
- F. In California
- In California, 67.7 percent of current and former smokers start by the age

³ Referencing the [Population Assessment of Tobacco and Health \(PATH\) Study](#)

⁴ U.S. Department of Health and Human Services. E-Cigarette Use Among Youth and Young Adults: A Report of the Surgeon General—Executive Summary. Atlanta, GA: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2016

⁵ E-Cigarette Use Among Youth and Young Adults: A Report of the Surgeon General 2016 U.S. Department of Health And Human Services Public Health Service Office of the Surgeon General Rockville, MD

of 18, and 98.1 percent start by the age of 26.⁶

- One in eight California high school students currently use a tobacco product. Of those that currently use tobacco, an overwhelming majority use electronic smoking devices (84.3 percent). In addition, 86.4 percent of youth tobacco users reported using flavored tobacco products.⁷

G. There is no scientific evidence that e-cigarettes help smokers successfully quit traditional cigarettes. Further, e-cigarette users are no more likely to quit than regular smokers, with one study finding 89 percent of e-cigarette users still using them one year later. Another study found that e-cigarette users are a third less likely to quit cigarettes.⁸

H. Tobacco Products Scientific Advisory Committee (Committee) Report⁹ on menthol cigarettes to the federal Food and Drug Administration, as required by federal law, found:

- Cigarettes marketed as menthol have sufficient menthol content for menthol to be a "characterizing flavor."
- Adolescents 12 to 17 years of age smoke menthol cigarettes at a higher rate than any other age group (NSDUH 2009). Among adolescent smokers, 49.9 percent of those in middle school and 44.9 percent of those in high school report that they usually smoke a menthol cigarette brand.
- The prevalence of menthol cigarette smoking is highest among African Americans across all socio-demographic and smoking-related categories
- Use of menthol cigarettes is rising among adolescents and menthol cigarette use is very high among minority youth.
- There is an abundance of empirical studies to show that the tobacco industry does target its marketing efforts toward youth and young adults and that youth are strategically important for the customer base.
- The evidence is sufficient to conclude that a relationship is more likely than not that the availability of menthol cigarettes increases the likelihood of addiction and the degree of addiction in youth smokers.
- Menthol cigarettes have an adverse impact on public health in the U.S.
- The Committee has found that the availability of menthol cigarettes has adverse impact on public health by increasing the numbers of smokers with resulting premature death and avoidable morbidity.

⁶ CALIFORNIA TOBACCO FACTS AND FIGURES 2019 California Department of Public Health California Tobacco Control Program Vuong TD, Zhang X, Roeseler A. California Tobacco Facts and Figures 2019. Sacramento, CA: California Department of Public Health; May 2019. <http://tobaccofreeca.com/wp-content/uploads/2016/10/2016-California-Tobacco-Facts-Figures.pdf>

⁷ Id.

⁸ California Department of Public Health, California Tobacco Control Program, *State Health Officer's Report on E-Cigarettes: A Community Health Threat*, Sacramento, CA 2015

⁹ Tobacco Products Scientific Advisory Committee (TPSAC) Report http://www.njgasp.org/wp-content/uploads/2014/05/FDA_TPSAC_report_menthol_March_2011.pdf

I. Based on the findings of their study, the Committee recommended to the FDA, removal of menthol cigarettes from the marketplace, which would benefit public health in the U.S.

J. California tobacco retail environment is studied on a yearly basis. Below are some of the findings from different studies.

- There was a more than five-fold increase in the retail availability of electronic nicotine delivery systems (ENDs including e-cigs) from 11.5 percent in 2011 to 66.7 percent in 2014. More than half of stores sold flavored varieties of e-cigarettes.¹⁰
- Most stores (82.9 percent) sold flavored varieties of little cigars or cigarillos such as fruit, sweet or candy flavors, most common, as well as alcohol based flavors.¹¹
- Menthol cigarettes were available nearly everywhere that cigarettes were sold (97.4 percent of stores).¹²
- Beginning June 9, 2016, California law prohibits retailers from selling tobacco products to individuals under age 21. Prior to that date, California law prohibited the selling of tobacco to youth under age 18.
- In 2017, after the law change, 13.1 percent of retailers sold ENDs to minors and 14.2 percent sold tobacco to minors. In 2018 the rate selling ENDs to minors rose to 22 percent and other tobacco products was 17.6 percent.¹³
- Tobacco and vape shops have the lowest compliance, with one out of three tobacco and vape shops selling to underage minors.¹⁴

K. The federal Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act), enacted in 2009, prohibited candy and fruit-flavored cigarettes but excluded a ban on menthol flavor cigarettes.

L. Neither federal nor California state laws restrict the sale of menthol cigarettes or flavored non-cigarette tobacco products, such as cigars, cigarillos, smokeless tobacco, hookah tobacco, electronic smoking devices, and the solutions used in those devices.

M. The City Council has a substantial interest in protecting young people from the harms of tobacco use, curtailing their introduction to tobacco products and reversing the trend of young people using flavored tobacco products including menthol cigarettes.

¹⁰ Schleicher N, Johnson T, Ahmad I, Henriksen L. Tobacco Marketing in California's Retail Environment Final report for the California Tobacco Advertising Survey (2011-2014) Submitted to the California Tobacco Control Program , California Department of Public Health. 2015.
http://www.cdph.ca.gov/programs/tobacco/Documents/CDPH%20CTCP%20Refresh/Research%20and%20Evaluation/Reports/Tobacco%20Marketing%20in%20Californias%20Retail%20Environment_Notations_Final%202.9.16.pdf.

¹¹ Id.

¹² Id.

¹³ <https://www.cdph.ca.gov/Programs/CCDPHP/DCDIC/CTCB/CDPH%20Document%20Library/ResearchandEvaluation/FactsandFigures/2018YATPSChartsADA.pdf>

¹⁴ Id.

N. To assist in achieving the above stated interests, the City Council through this ordinance, is banning the sale of flavored tobacco products in the City.

The Council of the City of Burbank does ordain as follows:

1. Section 3-4-2501, Purpose and Intent, is amended to read as follows:

“3-4-2501: PURPOSE AND INTENT:

A. It is the intent of the City Council, in enacting this ordinance, to encourage responsible tobacco retailing and to discourage violations of tobacco-related laws, especially those which prohibit or discourage the sale or distribution of tobacco and nicotine products to minors.

B. Further, it is the intent of the Council in enacting the amendments to this ordinance to further the public health of all Burbank’s constituents, but especially underage consumers, and the amendments are focused on those products marketed directly to our community’s youth.”

2. Section 3-4-2502, Definitions, is amended to read as follows:

“3-4-2502: DEFINITIONS:

For the purpose of this Article 25, Retail Tobacco Sales, the following terms shall have the meanings defined in this section unless the context clearly requires otherwise:

A. **ARM’S LENGTH TRANSACTION:** Shall mean a sale in good faith and for valuable consideration that reflects the fair market value in the open market, between two informed and willing parties, neither of which is under any compulsion to participate in the transaction. A sale between relatives, partners, corporate or other entities which have some or all of the same directors and/or principles, or any sale for which a significant purpose is avoiding the effect of the violations of this article is not an Arm’s Length Transaction.

B. **CHARACTERIZING FLAVOR:** Shall mean a taste or aroma, other than the taste or aroma of tobacco, imparted prior to or during consumption of a Tobacco Product or any byproduct produced by the Tobacco Product including, but not limited to, tastes or aroma relating to menthol, mint, wintergreen, fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb or spice. Provided, however, that 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.

C. **CONSUMER:** Shall mean a Person who purchases a Tobacco Product for consumption and not for Sale to another.

D. DEPARTMENT: Shall mean the City's Community Development Department.

E. FLAVORED TOBACCO PRODUCT: Shall mean any Tobacco Product that contains a constituent that imparts a Characterizing Flavor. For purposes of this definition, "constituent" means any ingredient, substance, chemical or compound, other than tobacco, water or reconstituted tobacco sheet added by the manufacturer to the Tobacco Product during the processing, manufacturing or packing of the Tobacco Product.

BF. PERSON: Shall mean any natural person, partnership, cooperative association, corporation, personal representative, receiver, trustee, assignee, or any other legal entity.

EG. PROPRIETOR: Shall mean a Person with an ownership or managerial interest in a tobacco retail establishment. An ownership interest shall be deemed to exist when a Person has a ten percent (10%) or greater interest in the stock, assets, or income of a business other than the sole interest of security for debt. A managerial interest shall be deemed to exist when a Person can or does have or share ultimate control over the day-to-day operations of a business.

DH. SELF-SERVICE DISPLAY: Shall mean the open display of Tobacco Products or Tobacco Paraphernalia in a manner that is accessible to the general public without the assistance of the retailer or employee of the retailer. A Vending Machine is a form of Self-Service Display.

I. TOBACCO BAR: Shall mean a smoking bar including a hookah bar that, in the calendar year ending December 31, 2018, and each calendared year thereafter, generated 70 percent or more of its total annual gross income from the on-site sale of tobacco products and the rental of on-site humidors or hookah pipes, not including any sales from vending machines, and is registered with the Department.

J. TOBACCO PARAPHERNALIA: Shall mean cigarette papers or wrappers, pipes, holders of smoking materials of all types, cigarette rolling machines, and any other instrument or paraphernalia designed for the smoking, preparation, storing, ingestion or consumption of Tobacco Products.

K. TOBACCO PRODUCT: Shall mean (1) any product containing, made, or derived from tobacco or nicotine that is intended for human consumption, whether smoked, heated, chewed, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means, including, but not limited to Cigarettes, Cigars, Little Cigars, chewing tobacco, pipe tobacco, snuff; and (2) any electronic smoking device that delivers nicotine or other substances to the Person inhaling from the device including, but not limited to, an electronic cigarette, electronic cigar, electronic pipe or electronic hookah. "Tobacco Product" also includes any

component, part, or accessory of a Tobacco Product, whether or not sold separately. "Tobacco Product" does not include drugs, devices, or combination products authorized for sale by the U.S. Food and Drug Administration including cessation products specifically approved by the U.S. Food and Drug Administration for use in treating nicotine or tobacco dependence.

L. TOBACCO RETAILER: Shall mean any Person who sells, offers for sale, or does or offers to exchange for any form of consideration, in public view, tobacco, Tobacco Products, or Tobacco Paraphernalia. Any person who distributes free or low cost samples of Tobacco Products or Tobacco Paraphernalia shall be deemed to be a Tobacco Retailer under this Article.

M. VENDING MACHINE: Shall mean a machine, appliance, or other mechanical device operated by currency, token, debit card, credit card, or any other form of payment that is designed or used for vending purposes, including, but not limited to, machines or devices that use remote control locking mechanisms.

N. YOUTH DECOY: Shall mean a person under the age of 48 ²¹ who is used by the police department to conduct random onsite sting investigations to determine compliance with tobacco retailing laws."

3. Section 3-4-2508 is renumbered to 3-4-2509 and Section 3-4-2509 is renumbered to 3-4-2510 (see #4 & 5, below); and a new Section 3-4-2508 is being added as follows:

"3-4-2508: SALE OF FLAVORED TOBACCO PRODUCTS PROHIBITED:

A. It shall be a violation of this Article for any Tobacco Retailer or any of the Tobacco Retailer's agents or employees to sell or offer for sale, or to possess with intent to sell or offer for sale, any Flavored Tobacco Product except in a Tobacco Bar, whose sales of Flavored Tobacco Products are limited to onsite use only.

B. There shall be a rebuttable presumption that a Tobacco Retailer in possession of four or more Flavored Tobacco Products, including but not limited to individual Flavored Tobacco Products, packages of Flavored Tobacco Products, or any combination thereof, possesses such Flavored Tobacco Products with intent to sell or offer for sale.

C. There shall be a rebuttable presumption that a Tobacco Product is a Flavored Tobacco Product if a Tobacco Retailer, manufacturer, or any employee or agent of a Tobacco Retailer or manufacturer:

1. Makes or disseminates a public statement or claim to the effect that the Tobacco Product imparts a Characterizing Flavor; or

2. Uses text and/or images on the Tobacco Product's Labeling or Packaging that explicitly indicate that the Tobacco Product imparts a Characterizing Flavor."

4. Section 3-4-2508 is renumbered to 3-4-2509 and amended; as follows:

"3-4-2509: COMPLIANCE MONITORING AND ENFORCEMENT:

A. The provisions of this chapter shall be enforced by the Burbank Police Department, an authorized designee of the Community Development Department, or by any other person or persons so designated by the City Manager.

B. Compliance checks shall determine, at a minimum, if the Tobacco Retailer is conducting business in a manner that complies with tobacco laws regulating youth access to tobacco and is complying with the ban on selling, offering for sale or possession with the intent to sell Flavored Tobacco Products.

C. The City may use persons under the age of 21, but not younger than 15 (youth decoys) to conduct random onsite sting inspections to determine whether or not a Tobacco Retailer is in compliance with all state and local laws relative to retail sales of tobacco products and tobacco paraphernalia. These youth decoys may be used for compliance and enforcement activities supervised by a peace officer. Participation in these enforcement and compliance activities by a person under the age of 18 shall not constitute a violation of Penal Code section [308](#) and the person under 18 years of age is immune from prosecution under any provision of law prohibiting the purchase of tobacco products by a person under 18 years of age."

5. Section 3-4-2509 is renumbered to 3-4-2510 and amended, as follows:

"3-4-2510: SUSPENSION AND REVOCATION:

A. In addition to any other penalty authorized by law, a Tobacco Retailer's license may be suspended or revoked by the Community Development Director if it is determined that the licensee or his or her agents or employees has violated the conditions of the license imposed pursuant to this article, or Section 3-4-2508, or any other state or federal law pertaining to the sale of tobacco products to underage minors.

B. A Tobacco Retailer's license may be revoked by the Community Development Director if one of the following conditions exist.

1. The information contained in the application, including supplemental information, if any, is found to be false in any material respect;

2. The license was issued in error or on the basis of false or misleading information supplied by a Proprietor.

C. The procedure used for revocation shall substantially conform to that set forth in Title 2, Chapter 1 Article 15 of the Burbank Municipal Code or its successor provisions.

D. Upon a finding of a first license violation, the license may be suspended for up to thirty (30) days:

1. Upon a finding of a second license violation within a five-year period of the first violation, or a first violation of Section 3-4-2508, the license may be suspended for up to ninety (90) days;

2. Upon a finding by the City of a third license violation or a second violation of Section 3-4-2508 within five years of the first violation, the license may be revoked.

E. A Tobacco Retailer whose license has been revoked may not apply for a new tobacco retailer's license for a period of 60 days after the effective date of the revocation.

F. Any decision to revoke or suspend a license may be appealed according to the provisions of Section [2-1-1501](#) of the Burbank Municipal Code herein. An appeal shall stay all proceedings in furtherance of the appealed action.

G. During any period of license suspension or revocation, the Tobacco Retailer must remove from public view all tobacco products and tobacco-related advertising."

6. Section 3-4-2511, Outreach and Education, is being added as follows:

"3-4-2511: OUTREACH AND EDUCATION:

The Department, in conjunction with the Police Department shall develop and conduct a Tobacco Retailer outreach and education program designed to inform Tobacco Retailers about the ban on Flavored Tobacco Products before enforcement of Section 3-4-2508 begins on May 1, 2020."

7. Adoption of this Ordinance is not a project within the meaning of Section 15378 of the CEQA Guidelines in that it (a) is an ordinance of general policy and procedure and does not constitute a project within the meaning of CEQA and (b) has no potential for resulting in either a direct or a reasonably foreseeable indirect physical change in the environment.

8. If any provision of this Ordinance or its application is held invalid by a court of competent jurisdiction, such invalidity shall not affect other provisions, sections, or applications of the Ordinance, which can be given effect without the invalid provision or application, and to this end each phrase, section, sentence, or word is declared to be severable.

9. This Ordinance shall become effective at 12:01 a.m. on the thirty-first (31st) day after the date of adoption.

10. Enforcement Date. Notwithstanding the effective date of this Ordinance, Section 3-4-2508, Sale of Flavored Tobacco Products Prohibited, will not be enforced until May 1, 2020.

PASSED AND ADOPTED this ____ day of October, 2019.

Emily Gabel-Luddy
Mayor of the City of Burbank

Attest:

Approved as to Form
Office of the City Attorney

Zizette Mullins, MMC, City Clerk

Amy Albano, City Attorney

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss.
CITY OF BURBANK)

I, Zizette Mullins, MMC, City Clerk of the City of Burbank, do hereby certify that the foregoing Ordinance No. _____ was duly and regularly passed and adopted by the Council of the City of Burbank at its regular meeting held on the ____ day of October, 2019, by the following vote:

AYES:

NOES:

ABSENT:

I further certify that said Synopsis was published as required by law in a newspaper of general circulation in the City of Burbank, California on the ____ day of _____, 2019.

Zizette Mullins, MMC, City Clerk