



City of Culver City

Mike Balkman Council
Chambers
9770 Culver Blvd.
Culver City, CA 90232

Staff Report

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Item #: A-3.

CC - Introduction of an Ordinance Amending Certain Provisions of Chapter 11.15, Tobacco Retailer Licensing, of the Culver City Municipal Code to Prohibit the Sale of Flavored Tobacco Products, Including Menthol

Meeting Date: October 14, 2019

Contact Person/Dept: Heather Baker/City Attorney

Phone Number: (310) 253-5660

Fiscal Impact: Yes ☐ No ☒

General Fund: Yes ☐ No ☒

Public Hearing: ☐ **Action Item:** ☒ **Attachments:** ☒

Commission Action Required: Yes ☐ No ☒ **Date:**

Public Notification: (E-Mail) Meetings and Agendas - City Council; Notify Me - Culver City News and Events; Stay Informed - Smoking (09/24/19, 10/04/19 and 10/09/19); (Mail) Culver City Tobacco Retailer Licensees (09/24/19); and (Publication) Culver City News (09/26/19)

Department Approval: Carol Schwab (10/09/19)

RECOMMENDATION

Staff recommends the City Council introduce an Ordinance amending certain provisions of Chapter 11.15, Tobacco Retailer Licensing, of the Culver City Municipal Code to prohibit the sale of flavored tobacco products, including menthol.

BACKGROUND

The following is a chronology of the City Council's prior discussion of the regulation of tobacco products:

- **August 10, 2015:** City Council amended Chapter 11.15, Tobacco Retailer Licensing, of the Culver City Municipal Code (CCMC) to amend the definitions of "tobacco paraphernalia" and "tobacco product" to specifically include electronic smoking devices and electronic smoking device paraphernalia, as it was unclear from the previous definitions as to whether these were subject to a tobacco retailer license. This amendment to CCMC Chapter 11.15 also added

new definitions for “electronic smoking device” and “electronic smoking device paraphernalia.” The purpose of the amendment was to make it clear that (1) a retailer engaged in the sale of electronic smoking devices and paraphernalia must obtain a tobacco retailer license; and (2) the sale of electronic smoking devices and paraphernalia to underaged individuals is unlawful. The existing provisions of Chapter 11.15 are included with this report as Attachment 1.

- **January 14, 2019:** Vice Mayor (then Council Member) Eriksson requested support to agendize a general discussion of electronic smoking devices (“E-Cigarettes”). Mayor (then Vice Mayor) Sahli-Wells mentioned she had been in discussions with the Los Angeles County Department of Public Health (LADPH) and USC professors regarding a potential ban of flavored E-Cigarettes and requested that a discussion of such a ban be incorporated into the requested agenda item. The City Council supported this request and directed staff to bring this item to a future City Council meeting for discussion.
- **May 28, 2019:** The City Council considered the various policy options with regard to both (1) E-Cigarette usage (identifying areas where it could be prohibited); and (2) regulation of the sale of flavored/menthol tobacco products (including a complete prohibition, an exemption for menthol and an exemption for adults only establishments). After thoroughly discussing these matters, the City Council directed staff to return with the following separate items: (1) a proposed Ordinance prohibiting the sale of flavored/menthol tobacco products within the City, without exceptions; (2) a proposed Ordinance prohibiting the use of E-Cigarettes in all outdoor public places where smoking is prohibited (City parks and recreational areas and outdoor dining areas) **[NOTE: This item is tentatively scheduled to return to City Council on January 27, 2020.];** and (3) further discussion on whether to prohibit the use of E-cigarettes in multi-unit housing **[NOTE: On August 26, 2019, the City Council gave further direction to hold off on returning with this item until otherwise requested/directed.].**
- **August 26, 2019:** The City Council considered the introduction of a proposed Ordinance prohibiting the sale of flavored tobacco products, including menthol, without exceptions. During its discussion the City Council voiced two issues of concern based on numerous comments from the public, and requested additional information on the following:
 1. **Economic Impact.** Several of the speakers who were tobacco retailers claimed a ban on the sale of flavored tobacco products would have a significant financial impact on them, or put them out of business, if the City were to adopt a full flavor ban without exceptions. In response to these claims, the City Council was interested in more information, including an understanding of the number of tobacco retailers in the City and, specifically, those retailers that operated tobacco stores (smoke shops).
 2. **Hookahs.** Several speakers were in support of exempting hookah bars/lounges from the flavor ban, claiming hookah is a cultural experience and that youth are not permitted in hookah bars/lounges, so there is not the same impact on youth as with E-Cigarettes. The City Council requested more information pertaining to hookahs, including related health impacts, in order to consider whether or not to carve out an exemption.

For more detailed background information, please see the May 28 and August 26, 2019 staff reports (Attachments 2 and 3, respectively).

This staff report focuses on the issues raised at the August 26th meeting and provides additional information requested by the City Council with regard to: (1) a possible exemption from the flavor ban for hookah bars/lounges, if the City Council determines such an exemption is warranted; and (2) the economic impact of a flavor ban on retailers in general and, specifically smoke shops/tobacco stores (retailers that sell primarily tobacco products), and potential options to address an economic impact.

DISCUSSION

Hookahs

At its August 26, 2019 meeting, the City Council requested additional information regarding hookahs before deciding whether or not to carve out an exception from the flavor ban for hookah bars/lounges.

What is Hookah¹: Hookah is a device used to smoke tobacco (called shisha or waterpipe tobacco) or other substances such as flavored tobacco products. A typical hookah has a head, a metal body, a water bowl, and a flexible hose with a mouthpiece that people put into their mouths to inhale tobacco smoke. Tobacco is heated with charcoal and the tobacco smoke passes through water to cool it before being inhaled. Hookah smoking typically occurs in a group setting as a social activity.

Retail Environment: According to information obtained from the City's business tax certificate records, of the approximately 49 tobacco retailers in the City, there are only two confirmed tobacco retailers that sell hookah products. Of those, only one is a hookah bar/lounge where hookah products are consumed on site. This data is based on the description of the business provided by each tobacco retailer on their business tax certificate application. If there are others, they did not disclose to the City that hookah products and/or consumption are part of their business model.

Health Impacts: The California Department of Public Health (CDPH) issued a 2018 *Hookah Fact Sheet*¹ (Attachment 4), which provides:

- In a single 60 minute hookah session, smokers can inhale up to 200 times the volume of smoke than from a single cigarette.
- The charcoal used in the tobacco heating process produces high levels of carbon monoxide, heavy metals, and cancer-causing chemicals.
- Other chemicals found in hookah smoke, including volatile aldehydes, can lead to many health risks, including lung disease, clogged arteries and heart disease, leukemia, and oral, lung and bladder cancers.
- Sharing mouthpieces while hookah smoking can spread infectious diseases such as tuberculosis, herpes, influenza and hepatitis.
- When using hookah, very little nicotine is filtered out when the smoke passes through the water in the pipe. While peak nicotine levels in the blood are similar for cigarette smoking and hookah smoking, the relatively long duration of hookah smoking leads to higher levels of nicotine exposure.

Hookah Use Among Youth and Young Adults:

- The CDPH's *Hookah Fact Sheet* (see Attachment 4) also states:

- Hookah smoking is most common among individuals who are between the ages of 18-24 years (6.1% compared to 1.9% for other adults).
- Hookah use is popular among teens. In 2016, the rate of hookah use among California high school students surpassed cigarette smoking at 4.8% (hookah) compared to 4.3% (cigarettes).
- Hookah is appealing to youth and young adults because it is often smoked in groups and is considered a social activity, and the hookah tobacco comes in a variety of flavors, such as apple, peach, mint, strawberry and cola.
- Hookah smoking is linked to increased likelihood of smoking combustible cigarettes.
- According to the *2018 National Youth Tobacco Survey* (NYTS), 4.1% of high schoolers and 1.2% of middle schoolers, totaling over 700,000 youth, have used hookah in the past month.²
- The government-sponsored 2013-2014 *Population Assessment on Tobacco and Health* (PATH) study found that 60.6% of current hookah users aged 12-17 use hookah because they think it might be less harmful than cigarettes.³
- CDPH's survey of *Tobacco Sales to Young Adults Under Age 21 Years by Store Type, 2019*⁴, reported that tobacco stores/smoke shops sold tobacco products, including E-Cigarettes, to young adults under 21 years of age 30.6% of the time, which is the second highest sales rate in the state of California and nearly twice the statewide rate of 17.9%.

The City Council also requested information with regard to any complaints of underaged persons being permitted on premises. Staff contacted the Police Department who reported that they have not received any complaints in this regard.

Other Cities with Exemption for Adults Only Establishments:

- At this time, there are no cities that specifically exempt hookah bars from their flavor ban; however, there are a few that have adopted an exemption for adults only establishments, which could include a hookah bar/lounge. These cities include Oakland, Palo Alto, Los Gatos, Santa Clara County and Manhattan Beach.
- Hermosa Beach adopted an ordinance in December 2018 that included an adults only exemption; however, the Hermosa Beach City Council subsequently removed the exemption and adopted a full flavor ban, without any exceptions, in May 2019.
- The City of Burbank introduced, for first reading, its flavor ban ordinance on September 24, 2019, which provided an exemption for "shisha" (the flavored tobacco used in hookah pipes). Burbank's City Council will be considering adoption of the ordinance sometime in October.

The City of Oakland has reported implementation challenges with its adults only exemption, as some retailers are changing their business models or working around loopholes in the definition of "tobacco store" in order to meet the eligibility requirements for the adults-only exemption. (See Attachment 5 for Alameda County's report on the implementation challenges of Oakland's flavored tobacco ordinance.)

In order to avoid potential issues similar to the City of Oakland, the City Council could limit the exemption to only existing adults-only establishments, but not permit new adults-only establishments to sell flavored tobacco. Additional options are discussed further below in the "Ordinance" section of this report. If desired, the City Council may introduce the proposed Ordinance either with or without an exception for hookah bars/lounges or a broader exception for adults only establishments, which would include tobacco stores (tobacco stores are discussed further below).

Economic Impact on Retailers, including Tobacco Stores

In addition to the proposed flavor ban's impact on hookah stores/lounges, the City Council also requested information regarding the economic impact of a flavor ban on retailers in general, and, specifically, tobacco stores/smoke shops (retailers that sell primarily tobacco products), in order to consider whether or not to provide an additional amortization period for such retailers.

Retail Environment: There are approximately 49 tobacco retailers in Culver City, according to the City's business tax certificate records. Of the 49 tobacco retailers, based on the description of the business provided by the retailers on their business tax certificate applications, a substantial majority of the retailers (approximately 40 retailers or 82%) are grocery stores, convenience stores, liquor stores, pharmacies, mini marts, gas stations, and the like. The remaining nine retailers appear to be adults only establishments, including one hookah bar/lounge and eight tobacco stores, selling primarily tobacco products and paraphernalia.

Under state law (Stop Tobacco Access to Kids Enforcement Act), a "tobacco store" is defined as a retail business that meets all of the following requirements:

1. Sells primarily tobacco products.
2. Generates more than 60% of its gross revenues annually from the sale of tobacco products and tobacco paraphernalia.
3. Does not permit any underaged person to be present or enter the premises at any time, unless accompanied by the person's parent or legal guardian.
4. Does not sell alcoholic beverages or food for consumption on the premises.

The City's revenue reporting requirements do not require that the retailer break down their gross receipts by category, so staff does not have information about whether a tobacco retailer's revenue from the sale of tobacco products is at least 60% of their total annual revenue. If the City Council were to include an exemption for adults only establishments, adjustments would need to be made to the reporting requirements for those businesses in order to ensure that retailers meet the minimum requirements to be considered an adults only tobacco store.

Available Data on Economic Impacts: Staff has conducted a search of readily available and accessible data regarding the potential economic impact on tobacco retailers if the City Council were to adopt a full flavor ban, without an exemption for adults only establishments (e.g. tobacco store, hookah bar/lounge). There is not a significant amount of information available, but there are a few resources that have evaluated the economic impacts of flavor bans:

- City and County of San Francisco, report on *Banning the Sale of Flavored Tobacco Products: Economic Impact Report* (June 2017) (Attachment 6). In its report the San Francisco Controller's Office opined on the expected effects a flavor ban would have on its local economy, finding:
 - Reduced sales may harm retailer, but the anticipated reduction of cigarette smoking could lead to long-term health benefits. Therefore, consumers, other retailers, and the public sector could benefit from replaced retail sales, improved health, and lower health care costs in the future.
 - Existing users may replace the consumption of flavored tobacco products with unflavored, in which case there could be essentially no impact on either consumers or

- retailers, since the sales of one type of tobacco product could be replaced by another.
- If, as a result of the flavor ban, consumers choose to buy online or out-of-town, there could be a net loss to local retailers.
- In an absence of detailed data on tobacco consumption in the city, the report is unable to estimate the relative importance of the above-listed economic responses to the adoption of the flavor ban.
- *Letter Issued by the California LGBT Tobacco Education Partnership* (Attachment 7): The Project Director for this organization, who is also the Chair of the San Francisco Tobacco Free Coalition, issued a letter stating:
 - San Francisco's ordinance was crafted deliberately to contain no exemptions in order to create a level playing field across all businesses that hold a tobacco retailer license.
 - During educational visits, San Francisco businesses appreciated that all businesses are treated equally under the ordinance.
 - In contrast, feedback from other communities, such as Berkeley and Oakland, who feel the exemptions should be eliminated because of the unfair competition that is created among tobacco retailers.
 - To date, no holder of a San Francisco tobacco retailer license is known to have gone out of business because of the flavored tobacco ordinance. (Note: Information received from staff with the City and County of San Francisco indicates that, although there is no demonstrable evidence, to their knowledge no tobacco retailer has closed their business as a result of the flavor ban.)
- *National Association of Convenience Stores (NACS)*: According to a press release published on April 11, 2018, while tobacco products, including cigarettes, cumulatively were 34.1% of in-store sales dollars, they accounted for only 17.1% of gross profit dollars.⁵

Amortization Period: There are two issues relating to amortization the City Council should consider:

1. Effective date of the Flavor Ban for all Tobacco Retailers: When a potential flavor ban was first discussed by the City Council on May 28, 2019, staff was directed to include an effective date for the flavor ban of 90 days from adoption in order to give tobacco retailers a period of time to sell off existing stock. The County of Los Angeles recently adopted its ordinance, which provided retailers with 180 days before the ban went into effect. The City Council may establish whatever effective date for the flavor ban it deems appropriate. All other provisions of the Ordinance would go into effect 30 days after adoption.
2. Additional Amortization Period for Tobacco Stores: If the City Council determines to exempt tobacco stores from the flavor ban, it should also consider whether to allow the exemption in perpetuity, or whether to include an amortization period after which the tobacco stores will be subject to the ban, like all other tobacco retailers. At the August 26th meeting, Council Member Fisch proposed an amortization period of three years or the expiration of the current lease, whichever is earlier. Options in this regard have been included in the proposed Ordinance.

Ordinance

The proposed Ordinance (Attachment 8) amends certain provisions of Chapter 11.15 to prohibit the sale of flavored tobacco products, including menthol.

A summary of the amendments to Chapter 11.15 include:

- Modification to the purpose and intent of the Chapter (Section 11.15.005);
- New definitions (Section 11.15.010) for the following terms: Characterizing Flavor, Consumer, Flavored Tobacco, Little Cigar, Labeling, Manufacturer, Package or Packaging, Person, Sale or Sell;
- Modification or clarifications to the definitions (Section 11.15.010) for the following terms: Electronic Smoking Device, Tobacco Paraphernalia, Tobacco Product, Tobacco Retailer, Tobacco Retailing (definitions for Hookah, Hookah Lounge, Hookah Tobacco and Tobacco Store have been included as options in the event the City Council determines to adopt related exemptions); and
- Amendments to licensee requirements and prohibitions (Section 11.15.015), including:
 - Addition of a prohibition on the sale of flavored tobacco products, which includes menthol products (Section 11.15.015.D);
 - Standards of evidence (rebuttable presumption) to show a licensee is in violation of the prohibition of flavored tobacco products (Section 11.15.015.D.2 and D.3);
 - Addition to the on-site sales requirement (Section 11.15.015.H);
 - Additional requirement that a tobacco retailer licensee and the licensee's agents and employees must operate in compliance with all applicable tobacco-related local, state and federal laws. (Section 11.15.015.I); and
 - Other minor revisions for clarity.

Based on the issues raised at the August 26, 2019 City Council meeting, the following optional provisions regarding adults only establishments have been included in the proposed Ordinance for City Council's consideration (see optional Section 11.15.015.D.4 in Attachment 8 for further detail):

- Exemption for all adults only establishments, including hookah bars/lounges and tobacco stores;
- Exemption only for hookah bars/lounges, but excluding tobacco stores;
- Exemption only for existing hookah bar, but excluding new hookah bars/lounges and tobacco stores;
- Exemption only for existing hookah bar and existing tobacco stores (with no amortization period); or
- Exemption only for existing hookah bar and existing tobacco stores (with an amortization period of three years or expiration of current lease, whichever is earlier).

In addition, the findings of the proposed Ordinance have been updated to reflect recent reports on vaping incidents. Subsequent to the City Council's initial consideration of the proposed Ordinance, on October 3, 2019, the CDC reported that as of October 1, 2019, 1,080 lung injury cases associated with using E-Cigarette, or vaping, products have been reported to CDC from 48 states and 1 U.S. territory; 18 deaths have been confirmed in 15 states; and all patients have reported a history of using E-Cigarette, or vaping, products.⁶

The City Council may introduce the ordinance with, or without, the options provided, in addition to any other changes it may deem appropriate.

NOTES

¹California Department of Public Health, *Hookah Fact Sheet 2018*,

<https://www.cdph.ca.gov/Programs/CCDPHP/DCDIC/CTCB/Pages/EducationMaterials.aspx> (accessed October 7, 2019).

²Centers for Disease Control and Prevention, *Tobacco Product Use Among Middle and High School Students - United States, 2011-2017*, <https://www.cdc.gov/mmwr/volumes/67/wr/mm6722a3.htm> (accessed October 7, 2019).

³Ambrose, BK, et al., "Flavored Tobacco Product Use Among US Youth Aged 12 - 17 Years, 2013-2014," *Journal of the American Medical Association*, published online October 26, 2015.

⁴California Department of Public Health, California Tobacco Control Program, *Tobacco Sales to Young Adults Under Age 21 Years by Store Type, 2019*, Page 2,

https://www.cdph.ca.gov/Programs/CCDPHP/DCDIC/CTCB/CDPH%20Document%20Library/ResearchandEvaluation/FactsandFigures/YATPSforCDPHCTCPWebsite_9-26-2019.pdf (accessed October 8, 2019).

⁵National Association of Convenience Stores (NACS), *Convenience Stores Sales, Profits Edged Higher in 2017*, April 11, 2018, <https://www.convenience.org/Media/Press-Releases/2018/PR041118#.XZ0XJeRYbVg>

<https://www.convenience.org/Media/Press-Releases/2018/PR041118> (accessed October 8, 2019)

⁶Centers for Disease Control and Prevention, *Outbreak of Lung Injury Associated with E-Cigarette Use, or Vaping*, posted October 3, 2019, https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html (accessed October 9, 2019)

FISCAL ANALYSIS

There is no fiscal impact involved with the introduction of the proposed Ordinance. Should the City Council introduce, and ultimately adopt, the Ordinance, it is anticipated there will be minimal fiscal impact. Currently, there is a fee established for the issuance and administration of the tobacco retailer license. The added regulations to prohibit the sale of flavored/menthol tobacco products impact the retailer's conduct, but do not add any additional permit requirements. The penalties and administrative fines imposed under the current regulations would also apply to any new regulations adopted by the proposed Ordinance. Since enforcement of these new restrictions would be folded into the current level of enforcement pertaining to tobacco retailer licensees, staff does not anticipate a noticeable increase in cost. If, however, enforcement efforts were increased, there would be an associated cost with such efforts, which are difficult to predict at this time. Also, any penalties and administrative fines that would be imposed would help to offset any increased cost.

ATTACHMENTS

1. 2019-10-14_ATT_CCMC Chapter 11.15
2. 2019-10-14_ATT_2019-05-28 Staff Report
3. 2019-10-14_ATT_2019-08-26 Staff Report (excluding Attachment 1)
4. 2019-10-14_ATT_CDPH Hookah Fact Sheet
5. 2019-10-14_ATT_Oakland Report on Implementation Challenges
6. 2019-10-14_ATT_San Francisco Economic Impact Report
7. 2019-10-14_ATT_CA LGBT Tobacco Education Partnership Letter
8. 2019-10-14_ATT_Proposed Ordinance

MOTION

That the City Council:

Introduce an Ordinance amending certain provisions of Chapter 11.15, Tobacco Retailer

Licensing, of the Culver City Municipal Code to prohibit the sale of flavored tobacco products, including menthol.