



Office of the City Manager

01

CONSENT CALENDAR
July 23, 2019

To: Honorable Mayor and Members of the City Council

From: Dee Williams-Ridley, City Manager

Submitted by: Farimah Brown, City Attorney

Kelly Wallace, Director, Health, Housing, and Community Services
Department

Subject: Referral Response: Short-term referral to City Manager to amend Berkeley
Municipal Code 7,441-N.S. to expand the control of flavored tobacco
across the City of Berkeley toward preventing youth and young adult
tobacco use

RECOMMENDATION

Adopt first reading of an Ordinance amending Berkeley Municipal Code sections 9.80.020 and 9.80.035, and adding sections 9.80.031 and 9.80.032 to prohibit the sale of flavored tobacco products, to require a minimum package size for cigars and little cigars, and to require a minimum price for certain tobacco products sold in the City.

FISCAL IMPACTS OF RECOMMENDATION

Prohibiting the sale of flavored tobacco products, which are currently allowed to be sold in the City with some restrictions, could lower tax revenues to the City. If increasing cigar package size achieves its goal of lowering sales of those products, then the ordinance could further lower tax revenues. Requiring a minimum price for tobacco products would increase overall prices and tax revenues, but is also intended to lower sales, which may have the net effect of lowering tax revenues.

CURRENT SITUATION AND ITS EFFECTS

This report responds to a short-term referral from the City Council that originally appeared on the agenda of the December 11, 2018 Council meeting and was sponsored by Councilmembers Davila, Hahn, and Harrison (Attachment 2). At the December 11 meeting, the City Council approved a recommendation to refer to the City Manager to amend the Berkeley Municipal Code to prohibit the sale of flavored tobacco products and require a minimum package size and/or price for cigars and little cigars across the City of Berkeley. (Attachment 3.)

Staff in the Health, Housing, and Community Services Department and the City Attorney's Office have collaborated to review the proposed ordinance referred by

Council, and have prepared a revised ordinance. (Attachment 1a [version with tracked changes]; Attachment 1b [clean version].)

Staff added two sections to the ordinance. The first of these sections, section 9.80.031 (“Sale of Flavored Tobacco Prohibited”), is identical to the prohibition on flavored tobacco as proposed in the referral from Council, but moves it to a stand-alone code section. The second section, section 9.80.032 (“Tobacco Product Pricing and Packaging”), makes slight revisions to the proposed package-size restrictions. It also adds new minimum price requirements for cigarettes, little cigars, and cigars, while prohibiting discounts on tobacco products to prevent the sale of these products below the set base prices. The revised ordinance also includes standard severability and preemption clauses intended to aide with interpretation of the ordinance, as well as additional definitions for two new terms used in section 9.80.032.

BACKGROUND

During the Council meeting held on December 11, 2018 Councilmembers Davila, Hahn, and Harrison sponsored a referral to the City Manager “to amend Berkeley Municipal Code 7,441-N.S.” Staff recommends the amendment of several sections of BMC chapter 9.80, which was last revised on April 7, 2015 by Ordinance 7,441-N.S.

ENVIRONMENTAL SUSTAINABILITY

By restricting tobacco sales near schools and parks, this recommendation will potentially reduce tobacco waste. Tobacco waste is toxic and makes up 34 percent of the total litter collected in California. It is a significant component of storm drain debris and contributes to stormwater pollution that negatively impacts water quality and wildlife in the San Francisco Bay.

RATIONALE FOR RECOMMENDATION

The primary purpose of the amendment to the ordinance is to increase efforts to prevent youth and young adult tobacco use.

ALTERNATIVE ACTIONS CONSIDERED

As requested, staff considered setting a minimum price for cigar and little cigar prices, an approach adopted most recently by the City of Alameda. It is not entirely conclusive whether setting minimum package size or minimum price is more effective, therefore either and both were considered. With flavors being one of the more compelling reasons for use of tobacco products among youth, both minimum package size and minimum price were included.

CONTACT PERSON

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Attachments:

1a: Ordinance (track changes version)

1b: Ordinance (clean version)

2: Original Referral Report from December 11, 2018



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3: Page 12 of Annotated Minutes of December 11, 2018 meeting

ORDINANCE NO.

AMENDING BERKELEY MUNICIPAL CODE SECTIONS 9.80.020, 9.80.030, AND 9.80.035 TO PROHIBIT THE SALE OF FLAVORED TOBACCO PRODUCTS AND TO REQUIRE A MINIMUM PACKAGE SIZE FOR CIGARS AND LITTLE CIGARS

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. Legislative findings:

The City Council hereby finds that:

1. Approximately 480,000 people die in the United States from smoking-related diseases and exposure to secondhand smoke every year, making tobacco use the nation's leading cause of preventable death;ⁱ

2. 5.6 million of today's Americans who are younger than 18 are projected to die prematurely from a smoking-related illness;ⁱⁱ

3. Despite the state's efforts to limit youth access to tobacco, youth are still able to access tobacco products, as evidenced by the following:

- In California, over 67% of current and former adult smokers started by the age of 18 and almost 100% start by age 26;ⁱⁱⁱ

- In 2017, 22.8% of high school students in California had tried cigarette smoking;^{iv}

4. The federal Family Smoking Prevention and Tobacco Control Act ("Tobacco Control Act"), enacted in 2009, prohibited candy- and fruit-flavored cigarettes,^v largely because these flavored products are marketed to youth and young adults,^{vi} and younger smokers were more likely than older smokers to have tried these products;^{vii}

5. 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 these devices;

6. In 2016, an estimated 82% of tobacco retailers in California sold flavored non-cigarette tobacco products, over 90% of tobacco retailers sold menthol cigarettes, and 8 out of 10 tobacco retailers near schools sold flavored non-cigarette tobacco products;^{viii}

7. Mentholated and flavored products have been shown to be "starter" products for youth who begin using tobacco^{ix} and these products help establish tobacco habits that can lead to long-term addiction;^x

8. Flavored tobacco has significant public health implications for youth, people of color, low income populations, and members of LGBTQ+ communities as a result of targeted industry marketing strategies and product manipulation;^{xi}

9. As a result of the FDA ban on all flavored cigarette products (except menthol), tobacco use by youth decreased by 6% and the likelihood of a youth becoming a cigarette smoker post flavor ban fell by 17%;^{xii}

10. Similar to flavored cigars and little cigars, electronic cigarette companies have marketed to minors with sweet flavors to "graduate" users toward unflavored tobacco products;

- The National Youth Tobacco Survey reported that the most commonly selected reasons for use of e-cigarettes among middle and high school students included the availability of "flavors such as mint candy, fruit, or chocolate" (31% of respondents);^{xiii} There was also a 7% increase of high school students who used flavored e-cigarettes

from 61% in 2017 to 68% in 2018, unlike the steady decline of cigarette use seen among youth.^{xiv}

- The Surgeon General has concluded that e-cigarette use among youths and young adults is of public health concern; exposure to nicotine during adolescence can cause addiction and can harm the developing adolescent brain.

- E-cigarette use is strongly associated with the use of other tobacco products among youth and young adults, particularly the use of combustible tobacco products. For example, in 2015, 58.8% of high school students who were current users of combustible tobacco products were also current users of e-cigarettes.^{xv}

11. Youth whose first tobacco product was flavored are more likely to become current tobacco users than those whose first product was tobacco-flavored.^{xvi} Data from the National Youth Tobacco Survey indicate that more than two-fifths of U.S. middle and high school smokers report using flavored little cigars or flavored cigarettes;

12. Although federal and state law ban the sale of individual cigarettes,^{xvii} neither federal nor California state laws restrict the sale of individual little cigars and cigars;

13. Many retailers sell little cigars and cigars individually, making them more affordable and appealing to youth.^{xviii} For example:

- 87.4% of California tobacco retailers sell a popular brand of youth-friendly cigars for less than \$1.00;^{xix}

- From 1995 to 2008, annual sales of cigarillos increased by 255%, and sales of little cigars increased by 316%; and^{xx}

14. The availability of inexpensive tobacco products leads to increased tobacco use as evidenced by more than 100 academic studies that conclusively show that when tobacco products are made more expensive, fewer people use tobacco, fewer initiate tobacco use, and more people quit tobacco use.^{xxi}

Section 2. That Section 9.80.020 of the Berkeley Municipal Code is hereby amended to read as follows:

Section 9.80.020 Definitions.

The following words and phrases, whenever used in this article, shall have the meanings defined in this section unless the context clearly requires otherwise:

A. "Cigar" means any roll of tobacco other than a cigarette wrapped entirely or in part in tobacco or any substance containing tobacco and weighing more than three pounds per thousand units.

B. "Cigarette" means: (1) any roll of tobacco wrapped in paper or in any substance not containing tobacco; and (2) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (1).

C. "Characterizing flavor" means a distinguishable taste or aroma, other than the taste or aroma of tobacco, that is imparted either prior to or during consumption of a tobacco product, or any byproduct produced by the tobacco product, including but not limited to tastes or aromas of menthol, mint, wintergreen, chocolate, vanilla, honey, cocoa, any candy, any dessert, any alcoholic beverage, any fruit, any herb, and any spice; provided, however, that no tobacco product shall be determined to have a characterizing

flavor solely because of the use of additives or flavorings or the provision of ingredient information. ~~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 such statements, that a tobacco product has or produces a characterizing flavor shall establish that the product is a flavored tobacco product.~~

D. "Consumer" means a person who purchases a tobacco product for consumption and not for sale to another.

A-E. "Coupon" means any voucher, rebate, card, paper, note, form, statement, ticket, image, or other issue, whether in paper, digital, or other form, used for commercial purposes to obtain an article, product, service, or accommodation without charge or at a discounted price.

~~B. "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.~~

~~C. "Distinguishable" means perceivable by an ordinary consumer by either the sense of smell or taste.~~

D-F. "Electronic nicotine delivery system" means any electronic and/or battery-operated device that can be used to deliver an inhaled dose of nicotine or other substances, including but not limited to electronic cigarettes, vaporizer pens, electronic cigars, electronic cigarillos, electronic pipes, electronic hookahs, or any other product name or descriptor, and including any component, part, or accessory of such a device, whether or not sold separately, including but not limited to cartomizers, clearomizers, atomizers, and tips.

E-G. "E-liquid" means any liquid, gel or other substance designed for use with an electronic nicotine delivery system, including but not limited to e-juice, smoke juice or any other product name or descriptor. Excluded from this definition is any non-nicotine containing liquid, gel or other substance that contains cannabis in any form as its active ingredient.

H. "Flavored tobacco product" means any tobacco product that imparts a characterizing flavor. ~~containing, made of, or derived from tobacco or nicotine that contains a constituent that imparts a characterizing flavor.~~

I. "Full Retail Price" means the price listed for a Tobacco Product on its Packaging or on any related shelving, advertising, or display where the Tobacco Product is sold or offered for Sale, plus all applicable taxes and fees if such taxes and fees are not included in the listed price.

J. "Labeling" means written, printed, or graphic matter upon any tobacco product or any of its packaging, or accompanying such tobacco product.

K. "Little cigar" means any roll of tobacco, other than a cigarette, wrapped entirely or in part in tobacco or any substance containing tobacco and weighing no more than three pounds per thousand units. "Little cigar" includes, but is not limited to, tobacco products known or labeled as small cigar, little cigar, or cigarillo.

L. "Manufacturer" means any person, including any repacker or relabeler, who manufactures, fabricates, assembles, processes, or labels a tobacco product; or imports a finished tobacco product for sale or distribution into the United States.

F-M. "Package" or "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.

G.N. "Pharmacy" means any retail establishment in which the profession of pharmacy is practiced by a pharmacist licensed by the State of California in accordance with the Business and Professions Code and where prescription pharmaceuticals are offered for sale, regardless of whether the retail establishment sells other retail goods in addition to prescription pharmaceuticals.

H.O. "Proprietor" means a person with an ownership or managerial interest in a business. 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 can or does share, ultimate control over the day-to-day operations of a business.

P. "School" means a building or group of buildings and associated grounds used for educational and/or classroom purposes operated by the Berkeley Unified School District (BUSD) and/or other public or private educational institutions offering a general course of study at primary, secondary or high school levels (grades K through 12) which is equivalent to the courses of study at such levels offered by the BUSD, as specified by City Council Resolution from time to time. Pre-school, vocational or trade programs shall be considered schools only when incidental to the primary use as a school as defined herein. Excluded from this definition are buildings operated by public or private education institutions in which the total student enrollment is less than 25 students and private residences at which students participate in home-based or independent study programs.

I.Q. "Sale" or "Sell" means any transfer, exchange, barter, gift, offer for sale, or distribution for a commercial purpose, in any manner or by any means whatsoever.

J.R. "Tobacco paraphernalia" means items or instruments designed for the consumption, or preparation for consumption, of any substance containing tobacco or derived from tobacco, including but not limited to cigarette papers or wrappers, pipes, hookahs, and cigarette rolling machines.

K.S. "Tobacco product" means:

- 1: any substance containing, made of, or derived from tobacco or nicotine including but not limited to cigarettes, cigars, cigarillos, pipe tobacco, snuff, chewing tobacco, dipping tobacco, bidis, and shisha;
- 2: Any e-liquid;
- 3: Any electronic nicotine delivery system; and
- 4: Any tobacco paraphernalia.

"Tobacco product" does not include drugs, devices or combination products, any cessation product specifically approved/authorized by the United States Food and Drug Administration, as those terms are defined in the Federal Food, Drug and Cosmetic Act. for use in treating nicotine or tobacco dependence.2

L.T. "Tobacco retailer" means any person or business that operates a store, stand, booth concession or other place at which the sales of tobacco products are made to purchasers for personal consumption or use. (Ord. 7441-NS § 3, 2015: Ord. 7377-NS § 2, 2014: Ord. 6720-NS § 2, 2002)

Section 3. That [Section 9.80.031 of the](#) Berkeley Municipal Code is hereby [added](#) to read

as follows:

Section 9.80.031 Sale of Flavored Tobacco Prohibited.

A. 1. It shall be a violation of a tobacco retailer's license for a licensee or his or her agent or employee to sell or offer for sale, or to possess with intent to sell or offer for sale, any flavored tobacco product.

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.

A-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 has:

1. Made a public statement or claim that the tobacco product imparts a characterizing flavor;

2. Used text, color, and/or images on the tobacco product's labeling or packaging to explicitly or implicitly indicate that the tobacco product imparts a characterizing flavor; or

3. Taken action directed to consumers that would be reasonably expected to cause consumers to believe the tobacco product imparts a characterizing flavor.

Section 4. That Section 9.80.032 of the Berkeley Municipal Code is hereby added to read as follows:

Section 9.80.032 Tobacco Product Pricing and Packaging.

A. It shall be a violation of a tobacco retailer's license for a licensee or his or her agent or employee to sell or offer for sale, or to possess with the intent to sell or offer for sale, any tobacco product to any consumer unless such product: (1) is sold in the original manufacturer's packaging intended for sale to consumers; and (2) conforms to all applicable federal labeling requirements.

B. The price of each tobacco product offered for sale shall be clearly and conspicuously displayed to indicate the price of the product.

C. It shall be a violation of a tobacco retailer's license for a licensee or his or her agent or employee to sell or offer for sale, or to possess with the intent to sell or offer for sale, to a consumer:

1. Any little cigar unless it is sold in a package of at least 20 (twenty) little cigars ; or

2. Any cigar unless it is sold in a package of at least 6 (six) cigars [provided, however, that this subsection shall not apply to a cigar that has a price of at least \$7.00 per cigar, including all applicable taxes and fees].

D. No tobacco retailer shall sell to a consumer:

1. Cigarettes at a price that is less than \$8.00 per package of 20 cigarettes, including all applicable taxes and fees;

2. Little cigars at a price that is less than \$20.00 per package of little cigars, including all applicable taxes and fees; or

3. Cigars at a price that is less \$7.00 per cigar, including all applicable taxes and fees.

E. The minimum prices established in subdivision D shall be adjusted annually by the annual average of the percentage change in the Consumer Price Index for all urban consumers for all items for the San Francisco-Oakland-Hayward statistical area as reported by the United States Bureau of Labor Statistics or any successor to that index.

F. No tobacco retailer shall:

1. Honor or redeem, or offer to honor or redeem, a coupon to allow a consumer to purchase a tobacco product for less than the full retail price;

2. Sell any tobacco product to a consumer through a multiple-package discount or otherwise provide any such product to a consumer for less than the full retail price in consideration for the purchase of any tobacco product or any other item; or

3. Provide any free or discounted item to a consumer in consideration for the purchase of any tobacco product.

Section 5. That Berkeley Municipal Code Section 9.80.035 is hereby amended to read as follows:

Section 9.80.035 Limits on eligibility for a tobacco retailer license.

A. No new tobacco retailer license may be issued to a pharmacy.

B. No existing tobacco retailer license may be renewed by a pharmacy.

C. No new tobacco retailer license may be issued to authorize the sale of tobacco products with six hundred (600) feet of any school as measured by a straight line from the nearest point of the property line of the parcel on which the school is located to the nearest point of the property line of the parcel on which the business is located.

~~D. 1. Effective January 1, 2017, no person shall sell, give away, barter, exchange, or otherwise deal in flavored tobacco products within six hundred (600) feet of any school as measured by a straight line from the nearest point of the property line of the parcel on which the school is located to the nearest point of the property line of the parcel on which the business is located.~~

E.D. 1. Effective January 1, 2017, no person shall sell, give away, barter, exchange, or otherwise deal in electronic nicotine delivery systems or e-liquid within six hundred (600) feet of any school as measured by a straight line from the nearest point of the property line of the parcel on which the school is located to the nearest point of the property line of the parcel on which the business is located.

2. Subdivision ~~E~~D.1 shall not prohibit the sale of electronic nicotine delivery systems to persons who demonstrate that they are qualified patients or primary caregivers as defined in Health and Safety Code section 11362.7 or persons with identification cards issued pursuant to Health and Safety Code section 11362.71, provided that such electronic nicotine delivery systems are unaccompanied by any tobacco product defined in Sections 9.80.020.K.1 or 9.80.020.K.2.

~~F. A tobacco retailer lawfully operating prior to March 1, 2015, that is engaged primarily in the sale of electronic nicotine delivery systems or e-liquid and is prohibited from selling electronic nicotine delivery systems and e-liquid due to the proximity to a~~

~~school as specified in subdivision E.1 may obtain an exemption from subdivision E.1 yearly for up to a total of three years, beginning January 1, 2017, if it makes a showing, as determined by the City Manager or his or her designee, that application of subdivision E.1 would result in a taking without just compensation under either the California or the United States Constitution. "Engaged primarily" for purposes of this subsection means that the sale of electronic nicotine delivery systems and e-liquids account for more than 50% of the tobacco retailer's calendar year 2014 gross receipts.~~

~~G.E.~~ A map identifying the areas falling within six hundred (600) feet of schools shall be adopted by the City Council by resolution, and may be amended from time to time. (Ord. 7441-NS § 5, 2015: Ord. 7377-NS § 3, 2014)

Section 5. Effective date.

This Ordinance shall take effect and be in force from and after 30 days after date of enactment; provided, however, that Sections 9.80.031 and 9.80.032~~(C)~~ shall not take effect until 6 months after date of enactment.

Section 6. Preemption.

It is the intent of the City Council of the City of Berkeley to supplement applicable state and federal law and not to duplicate or contradict such law, and this ordinance shall be construed consistently with that intention. Nothing in this ordinance shall be interpreted or applied so as to create any requirement, power, or duty that is preempted by federal or state law.

Section 7. Severability.

If any section, subsection, sentence, clause, phrase, or word of this ordinance, or any application thereof to any person or circumstance, is held to be invalid, unconstitutional, or unenforceable by a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions or applications of the ordinance. The City Council of the City of Berkeley hereby declares that it would have passed this ordinance, and each section, subsection, sentence, clause, phrase, and word not declared invalid, unconstitutional, or unenforceable without regard to whether any other portion of this ordinance or application thereof would be subsequently declared invalid, unconstitutional, or unenforceable.

ⁱ U.S. Department of Health and Human Services. *The Health Consequences of Smoking: 50 Years of Progress. A Report of the Surgeon General*. 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. 2014. Available at: <https://www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf>.

ⁱⁱ U.S. Department of Health and Human Services. *The Health Consequences of Smoking: 50 Years of Progress. A Report of the Surgeon General*. 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. 2014. Available at: <https://www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf>.

ⁱⁱⁱ California Department of Public Health California Tobacco Control Program. *California Tobacco Facts and Figures 2016*. Sacramento, CA: California Department of Public Health. 2016. Available at:

<https://www.cdph.ca.gov/Programs/CCDPHP/DCDIC/CTCB/CDPH%20Document%20Library/ResearchandEvaluation/FactsandFigures/2016FactsFiguresWeb.pdf>.

^{iv} Kann L, McManus T, Harris WA, et al. Youth Risk Behavior Surveillance - United States, 2017. *MMWR Surveill Summ*. 2018;67(8):1-114. doi: 10.15585/mmwr.ss6708a1; Centers for Disease Control and Prevention. Youth Risk Behavior Surveillance — United States, 2017. Supplementary Tables 52-93: Tobacco Use. 2018;

https://www.cdc.gov/healthyyouth/data/yrbs/2017_tables/tobacco_use.htm.

^v 21 U.S.C. § 387g(a)(1)(A).

^{vi} U.S. Department of Health and Human Services. *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General*. 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. 2012. Available at: <https://www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/>; Villanti AC, Collins LK, Niaura RS, Gagosian SY, Abrams DB. Menthol cigarettes and the public health standard: a systematic review. *BMC Public Health*. 2017;17(1):983. doi: 10.1186/s12889-017-4987-z; Villanti AC, Johnson AL, Ambrose BK, et al. Flavored Tobacco Product Use in Youth and Adults: Findings From the First Wave of the PATH Study (2013-2014). *Am J Prev Med*. 2017;53(2):139-151. doi: 10.1016/j.amepre.2017.01.026.

^{vii} U.S. Department of Health and Human Services. *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General*. 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. 2012. Available at: <https://www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/>.

^{viii} California Department of Public Health California Tobacco Control Program. *2016 Healthy Stores for a Healthy Community Survey Results-all counties*. 2016. Available at: <http://healthystoreshealthycommunity.com/media-center/?campaign>.

^{ix} U.S. Department of Health and Human Services. *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General*. 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. 2012. Available at: <https://www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/>; Hersey JC, Ng SW, Nonnemaker JM, et al. Are menthol cigarettes a starter product for youth? *Nicotine Tob Res*. 2006;8(3):403-413. doi: 10.1080/14622200600670389; Wackowski O, Delnevo CD. Menthol cigarettes and indicators of tobacco dependence among adolescents. *Addict Behav*. 2007;32(9):1964-1969. doi: 10.1016/j.addbeh.2006.12.023.

^x U.S. Department of Health and Human Services. *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General*. 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. 2012. Available at: <https://www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/>; Oliver AJ, Jensen JA, Vogel RI, Anderson AJ, Hatsukami DK. Flavored and nonflavored smokeless tobacco products: rate, pattern of use, and effects. *Nicotine Tob Res*. 2013;15(1):88-92. doi: 10.1093/ntr/nts093.

^{xi} United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1 (D.D.C. 2006), aff'd in part, vacated in part, 566 F.3d 1095 (D.C. Cir. 2009), and order clarified, 778 F. Supp. 2d 8 (D.D.C. 2011); U.S. Department of Health and Human Services. *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General*. 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. 2012. Available at: <https://www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/>; Yerger VB, Przewoznik J, Malone RE. Racialized geography, corporate activity, and health disparities: tobacco industry targeting of inner cities. *J Health Care Poor Underserved*. 2007;18(4 Suppl):10-38. doi: 10.1353/hpu.2007.0120; Kreslake JM, Wayne GF, Alpert HR, Koh HK, Connolly GN. Tobacco industry control of menthol in cigarettes and targeting of adolescents and young adults. *Am J Public Health*. 2008;98(9):1685-1692. doi: 10.2105/AJPH.2007.125542; Fallin A, Goodin AJ, King BA. Menthol cigarette smoking among lesbian, gay, bisexual, and transgender adults. *Am J Prev Med*. 2015;48(1):93-97. doi: 10.1016/j.amepre.2014.07.044.

^{xii} Courtemanche CJ, Palmer MK, Pesko MF. Influence of the Flavored Cigarette Ban on Adolescent Tobacco Use. *Am J Prev Med*. 2017;52(5):e139-e146. doi: 10.1016/j.amepre.2016.11.019.

^{xiii} Tsai J, Walton K, Coleman BN, et al. Reasons for Electronic Cigarette Use Among Middle and High School Students — National Youth Tobacco Survey, United States, 2016. *MMWR Morb Mortal Wkly Rep* 2018;67:196–200. Available at: <https://www.cdc.gov/mmwr/volumes/67/wr/mm6706a5.htm>

^{xiv} Cullen KA, Ambrose BK, Gentzke AS, Apelberg BJ, Jamal A, King BA. *Notes from the Field: Use of Electronic Cigarettes and Any Tobacco Product Among Middle and High School Students — United States, 2011–2018*. *MMWR Morb Mortal Wkly Rep* 2018;67:1276–1277. DOI: [http://dx.doi.org/10.15585/mmwr.mm6745a5external icon](http://dx.doi.org/10.15585/mmwr.mm6745a5external%20icon)

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- ^{xv} US Department of Health and Human Services. *E-cigarette use among youth and young adults: a report of the Surgeon General*. 2016. Available at: https://www.cdc.gov/tobacco/data_statistics/sgr/e-cigarettes/pdfs/2016_sgr_entire_report_508.pdf
- ^{xvi} Villanti, A.C., A.L. Johnson, B.K. Ambrose, et al., “Flavored Tobacco Product Use in Youth and Adults: Findings From the First Wave of the PATH Study (2013–2014),” *American Journal of Preventive Medicine*, 53(2):139–151, 2017.
- ^{xvii} 21 C.F.R. § 1140.16(b); Cal. Penal Code §§ 308.2-308.3(a).
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ORDINANCE NO.

AMENDING BERKELEY MUNICIPAL CODE SECTIONS 9.80.020, 9.80.030, AND 9.80.035 TO PROHIBIT THE SALE OF FLAVORED TOBACCO PRODUCTS AND TO REQUIRE A MINIMUM PACKAGE SIZE FOR CIGARS AND LITTLE CIGARS

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. Legislative findings:

The City Council hereby finds that:

1. Approximately 480,000 people die in the United States from smoking-related diseases and exposure to secondhand smoke every year, making tobacco use the nation's leading cause of preventable death;ⁱ

2. 5.6 million of today's Americans who are younger than 18 are projected to die prematurely from a smoking-related illness;ⁱⁱ

3. Despite the state's efforts to limit youth access to tobacco, youth are still able to access tobacco products, as evidenced by the following:

- In California, over 67% of current and former adult smokers started by the age of 18 and almost 100% start by age 26;ⁱⁱⁱ

- In 2017, 22.8% of high school students in California had tried cigarette smoking;^{iv}

4. The federal Family Smoking Prevention and Tobacco Control Act ("Tobacco Control Act"), enacted in 2009, prohibited candy- and fruit-flavored cigarettes,^v largely because these flavored products are marketed to youth and young adults,^{vi} and younger smokers were more likely than older smokers to have tried these products;^{vii}

5. 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 these devices;

6. In 2016, an estimated 82% of tobacco retailers in California sold flavored non-cigarette tobacco products, over 90% of tobacco retailers sold menthol cigarettes, and 8 out of 10 tobacco retailers near schools sold flavored non-cigarette tobacco products;^{viii}

7. Mentholated and flavored products have been shown to be "starter" products for youth who begin using tobacco^{ix} and these products help establish tobacco habits that can lead to long-term addiction;^x

8. Flavored tobacco has significant public health implications for youth, people of color, low income populations, and members of LGBTQ+ communities as a result of targeted industry marketing strategies and product manipulation;^{xi}

9. As a result of the FDA ban on all flavored cigarette products (except menthol), tobacco use by youth decreased by 6% and the likelihood of a youth becoming a cigarette smoker post flavor ban fell by 17%;^{xii}

10. Similar to flavored cigars and little cigars, electronic cigarette companies have marketed to minors with sweet flavors to "graduate" users toward unflavored tobacco products;

- The National Youth Tobacco Survey reported that the most commonly selected reasons for use of e-cigarettes among middle and high school students included the availability of "flavors such as mint candy, fruit, or chocolate" (31% of respondents);^{xiii} There was also a 7% increase of high school students who used flavored e-cigarettes

from 61% in 2017 to 68% in 2018, unlike the steady decline of cigarette use seen among youth.^{xiv}

- The Surgeon General has concluded that e-cigarette use among youths and young adults is of public health concern; exposure to nicotine during adolescence can cause addiction and can harm the developing adolescent brain.

- E-cigarette use is strongly associated with the use of other tobacco products among youth and young adults, particularly the use of combustible tobacco products. For example, in 2015, 58.8% of high school students who were current users of combustible tobacco products were also current users of e-cigarettes.^{xv}

11. Youth whose first tobacco product was flavored are more likely to become current tobacco users than those whose first product was tobacco-flavored.^{xvi} Data from the National Youth Tobacco Survey indicate that more than two-fifths of U.S. middle and high school smokers report using flavored little cigars or flavored cigarettes;

12. Although federal and state law ban the sale of individual cigarettes,^{xvii} neither federal nor California state laws restrict the sale of individual little cigars and cigars;

13. Many retailers sell little cigars and cigars individually, making them more affordable and appealing to youth.^{xviii} For example:

- 87.4% of California tobacco retailers sell a popular brand of youth-friendly cigars for less than \$1.00;^{xix}

- From 1995 to 2008, annual sales of cigarillos increased by 255%, and sales of little cigars increased by 316%; and^{xx}

14. The availability of inexpensive tobacco products leads to increased tobacco use as evidenced by more than 100 academic studies that conclusively show that when tobacco products are made more expensive, fewer people use tobacco, fewer initiate tobacco use, and more people quit tobacco use.^{xxi}

Section 2. That Section 9.80.020 of the Berkeley Municipal Code is hereby amended to read as follows:

Section 9.80.020 Definitions.

The following words and phrases, whenever used in this article, shall have the meanings defined in this section unless the context clearly requires otherwise:

A. "Cigar" means any roll of tobacco other than a cigarette wrapped entirely or in part in tobacco or any substance containing tobacco and weighing more than three pounds per thousand units.

B. "Cigarette" means: (1) any roll of tobacco wrapped in paper or in any substance not containing tobacco; and (2) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (1).

C. "Characterizing flavor" means a distinguishable taste or aroma, other than the taste or aroma of tobacco, that is imparted either prior to or during consumption of a tobacco product, or any byproduct produced by the tobacco product, including but not limited to tastes or aromas of menthol, mint, wintergreen, chocolate, vanilla, honey, cocoa, any candy, any dessert, any alcoholic beverage, any fruit, any herb, and any spice; provided, however, that no tobacco product shall be determined to have a characterizing

flavor solely because of the use of additives or flavorings or the provision of ingredient information.

D. "Consumer" means a person who purchases a tobacco product for consumption and not for sale to another.

E. "Coupon" means any voucher, rebate, card, paper, note, form, statement, ticket, image, or other issue, whether in paper, digital, or other form, used for commercial purposes to obtain an article, product, service, or accommodation without charge or at a discounted price.

F. "Electronic nicotine delivery system" means any electronic and/or battery-operated device that can be used to deliver an inhaled dose of nicotine or other substances, including but not limited to electronic cigarettes, vaporizer pens, electronic cigars, electronic cigarillos, electronic pipes, electronic hookahs, or any other product name or descriptor, and including any component, part, or accessory of such a device, whether or not sold separately, including but not limited to cartomizers, clearomizers, atomizers, and tips.

G. "E-liquid" means any liquid, gel or other substance designed for use with an electronic nicotine delivery system, including but not limited to e-juice, smoke juice or any other product name or descriptor. Excluded from this definition is any non-nicotine containing liquid, gel or other substance that contains cannabis in any form as its active ingredient.

H. "Flavored tobacco product" means any tobacco product that imparts a characterizing flavor.

I. "Full Retail Price" means the price listed for a Tobacco Product on its Packaging or on any related shelving, advertising, or display where the Tobacco Product is sold or offered for Sale, plus all applicable taxes and fees if such taxes and fees are not included in the listed price.

J. "Labeling" means written, printed, or graphic matter upon any tobacco product or any of its packaging, or accompanying such tobacco product.

K. "Little cigar" means any roll of tobacco, other than a cigarette, wrapped entirely or in part in tobacco or any substance containing tobacco and weighing no more than three pounds per thousand units. "Little cigar" includes, but is not limited to, tobacco products known or labeled as small cigar, little cigar, or cigarillo.

L. "Manufacturer" means any person, including any repacker or relabeler, who manufactures, fabricates, assembles, processes, or labels a tobacco product; or imports a finished tobacco product for sale or distribution into the United States.

M. "Package" or "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.

N. "Pharmacy" means any retail establishment in which the profession of pharmacy is practiced by a pharmacist licensed by the State of California in accordance with the Business and Professions Code and where prescription pharmaceuticals are offered for sale, regardless of whether the retail establishment sells other retail goods in addition to prescription pharmaceuticals.

O. "Proprietor" means a person with an ownership or managerial interest in a business. 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 can or does share, ultimate control over the day-to-day operations of a business.

P. "School" means a building or group of buildings and associated grounds used for educational and/or classroom purposes operated by the Berkeley Unified School District (BUSD) and/or other public or private educational institutions offering a general course of study at primary, secondary or high school levels (grades K through 12) which is equivalent to the courses of study at such levels offered by the BUSD, as specified by City Council Resolution from time to time. Pre-school, vocational or trade programs shall be considered schools only when incidental to the primary use as a school as defined herein. Excluded from this definition are buildings operated by public or private education institutions in which the total student enrollment is less than 25 students and private residences at which students participate in home-based or independent study programs.

Q. "Sale" or "Sell" means any transfer, exchange, barter, gift, offer for sale, or distribution for a commercial purpose, in any manner or by any means whatsoever.

R. "Tobacco paraphernalia" means items or instruments designed for the consumption, or preparation for consumption, of any substance containing tobacco or derived from tobacco, including but not limited to cigarette papers or wrappers, pipes, hookahs, and cigarette rolling machines.

S. "Tobacco product" means:

1: Any substance containing, made of, or derived from tobacco or nicotine including but not limited to cigarettes, cigars, cigarillos, pipe tobacco, snuff, chewing tobacco, dipping tobacco, bidis, and shisha;

2: Any e-liquid;

3: Any electronic nicotine delivery system; and

4: Any tobacco paraphernalia.

"Tobacco product" does not include drugs, devices or combination products, authorized by the United States Food and Drug Administration, as those terms are defined in the Federal Food, Drug and Cosmetic Act.²

T. "Tobacco retailer" means any person or business that operates a store, stand, booth concession or other place at which the sales of tobacco products are made to purchasers for personal consumption or use. (Ord. 7441-NS § 3, 2015; Ord. 7377-NS § 2, 2014; Ord. 6720-NS § 2, 2002)

Section 3. That Section 9.80.031 of the Berkeley Municipal Code is hereby added to read as follows:

Section 9.80.031 Sale of Flavored Tobacco Prohibited.

A. It shall be a violation of a tobacco retailer's license for a licensee or his or her agent or employee to sell or offer for sale, or to possess with intent to sell or offer for sale, any flavored tobacco product.

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 has:

1. Made a public statement or claim that the tobacco product imparts a characterizing flavor;
2. Used text, color, and/or images on the tobacco product's labeling or packaging to explicitly or implicitly indicate that the tobacco product imparts a characterizing flavor; or
3. Taken action directed to consumers that would be reasonably expected to cause consumers to believe the tobacco product imparts a characterizing flavor.

Section 4. That Section 9.80.032 of the Berkeley Municipal Code is hereby added to read as follows:

Section 9.80.032 Tobacco Product Pricing and Packaging.

A. It shall be a violation of a tobacco retailer's license for a licensee or his or her agent or employee to sell or offer for sale, or to possess with the intent to sell or offer for sale, any tobacco product to any consumer unless such product: (1) is sold in the original manufacturer's packaging intended for sale to consumers; and (2) conforms to all applicable federal labeling requirements.

B. The price of each tobacco product offered for sale shall be clearly and conspicuously displayed to indicate the price of the product.

C. It shall be a violation of a tobacco retailer's license for a licensee or his or her agent or employee to sell or offer for sale, or to possess with the intent to sell or offer for sale, to a consumer:

1. Any little cigar unless it is sold in a package of at least 20 (twenty) little cigars ; or
2. Any cigar unless it is sold in a package of at least 6 (six) cigars.

D. No tobacco retailer shall sell to a consumer:

1. Cigarettes at a price that is less than \$8.00 per package of 20 cigarettes, including all applicable taxes and fees;
2. Little cigars at a price that is less than \$20.00 per package of little cigars, including all applicable taxes and fees; or
3. Cigars at a price that is less \$7.00 per cigar, including all applicable taxes and fees.

E. The minimum prices established in subdivision D shall be adjusted annually by the annual average of the percentage change in the Consumer Price Index for all urban consumers for all items for the San Francisco-Oakland-Hayward statistical area as reported by the United States Bureau of Labor Statistics or any successor to that index.

F. No tobacco retailer shall:

1. Honor or redeem, or offer to honor or redeem, a coupon to allow a consumer to purchase a tobacco product for less than the full retail price;
2. Sell any tobacco product to a consumer through a multiple-package discount or otherwise provide any such product to a consumer for less than the full retail price in

consideration for the purchase of any tobacco product or any other item; or

3. Provide any free or discounted item to a consumer in consideration for the purchase of any tobacco product.

Section 5. That Berkeley Municipal Code Section 9.80.035 is hereby amended to read as follows:

Section 9.80.035 Limits on eligibility for a tobacco retailer license.

A. No new tobacco retailer license may be issued to a pharmacy.
B. No existing tobacco retailer license may be renewed by a pharmacy.
C. No new tobacco retailer license may be issued to authorize the sale of tobacco products with six hundred (600) feet of any school as measured by a straight line from the nearest point of the property line of the parcel on which the school is located to the nearest point of the property line of the parcel on which the business is located.

D. 1. Effective January 1, 2017, no person shall sell, give away, barter, exchange, or otherwise deal in electronic nicotine delivery systems or e-liquid within six hundred (600) feet of any school as measured by a straight line from the nearest point of the property line of the parcel on which the school is located to the nearest point of the property line of the parcel on which the business is located.

2. Subdivision D.1 shall not prohibit the sale of electronic nicotine delivery systems to persons who demonstrate that they are qualified patients or primary caregivers as defined in Health and Safety Code section 11362.7 or persons with identification cards issued pursuant to Health and Safety Code section 11362.71, provided that such electronic nicotine delivery systems are unaccompanied by any tobacco product defined in Sections 9.80.020.K.1 or 9.80.020.K.2.

E. A map identifying the areas falling within six hundred (600) feet of schools shall be adopted by the City Council by resolution, and may be amended from time to time. (Ord. 7441-NS § 5, 2015: Ord. 7377-NS § 3, 2014)

Section 5. Effective date.

This Ordinance shall take effect and be in force from and after 30 days after date of enactment; provided, however, that Sections 9.80.031 and 9.80.032 shall not take effect until 6 months after date of enactment.

Section 6. Preemption.

It is the intent of the City Council of the City of Berkeley to supplement applicable state and federal law and not to duplicate or contradict such law, and this ordinance shall be construed consistently with that intention. Nothing in this ordinance shall be interpreted or applied so as to create any requirement, power, or duty that is preempted by federal or state law.

Section 7. Severability.

If any section, subsection, sentence, clause, phrase, or word of this ordinance, or any application thereof to any person or circumstance, is held to be invalid, unconstitutional, or unenforceable by a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions or applications of the ordinance. The City Council of the City of Berkeley hereby declares that it would have passed this ordinance, and each

section, subsection, sentence, clause, phrase, and word not declared invalid, unconstitutional, or unenforceable without regard to whether any other portion of this ordinance or application thereof would be subsequently declared invalid, unconstitutional, or unenforceable.

ⁱ U.S. Department of Health and Human Services. *The Health Consequences of Smoking: 50 Years of Progress. A Report of the Surgeon General*. 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. 2014.

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ⁱⁱ U.S. Department of Health and Human Services. *The Health Consequences of Smoking: 50 Years of Progress. A Report of the Surgeon General*. 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. 2014. Available at: <https://www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf>.

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<https://www.cdph.ca.gov/Programs/CCDPHP/DCDIC/CTCB/CDPH%20Document%20Library/ResearchandEvaluation/FactsandFigures/2016FactsFiguresWeb.pdf>.

^{iv} Kann L, McManus T, Harris WA, et al. Youth Risk Behavior Surveillance - United States, 2017. *MMWR Surveill Summ*. 2018;67(8):1-114. doi: 10.15585/mmwr.ss6708a1; Centers for Disease Control and Prevention. Youth Risk Behavior Surveillance — United States, 2017. Supplementary Tables 52-93: Tobacco Use. 2018;

https://www.cdc.gov/healthyyouth/data/yrbs/2017_tables/tobacco_use.htm.

^v 21 U.S.C. § 387g(a)(1)(A).

^{vi} U.S. Department of Health and Human Services. *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General*. 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. 2012. Available at: <https://www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/>; Villanti AC, Collins LK, Niaura RS, Gagosian SY, Abrams DB. Menthol cigarettes and the public health standard: a systematic review. *BMC Public Health*. 2017;17(1):983. doi: 10.1186/s12889-017-4987-z; Villanti AC, Johnson AL, Ambrose BK, et al. Flavored Tobacco Product Use in Youth and Adults: Findings From the First Wave of the PATH Study (2013-2014). *Am J Prev Med*. 2017;53(2):139-151. doi: 10.1016/j.amepre.2017.01.026.

^{vii} U.S. Department of Health and Human Services. *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General*. 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. 2012. Available at: <https://www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/>.

^{viii} California Department of Public Health California Tobacco Control Program. *2016 Healthy Stores for a Healthy Community Survey Results-all counties*. 2016. Available at: <http://healthystoreshealthycommunity.com/media-center/?campaign>.

^{ix} U.S. Department of Health and Human Services. *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General*. 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. 2012. Available at: <https://www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/>;

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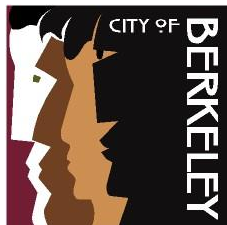
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^x U.S. Department of Health and Human Services. *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General*. Atlanta, GA: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health. 2012. Available at: <https://www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/>; Oliver AJ, Jensen JA, Vogel RI, Anderson AJ, Hatsukami DK. Flavored and nonflavored smokeless tobacco products: rate, pattern of use, and effects. *Nicotine Tob Res*. 2013;15(1):88-92. doi: 10.1093/ntr/nts093.

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- ^{xxi} U.S. Department of Health and Human Services. *The Health Consequences of Smoking: 50 Years of Progress. A Report of the Surgeon General*. 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. 2014. Available at: <https://www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf>; Institute of Medicine. *Ending the Tobacco Problem: A Blueprint for the Nation*. Washington, DC. 2007. Available at: <https://www.nap.edu/catalog/11795/ending-the-tobacco-problem-a-blueprint-for-the-nation>; Community Preventive Services Task Force. *Reducing Tobacco Use and Secondhand Smoke Exposure: Interventions to Increase the Unit Price for Tobacco Products*. 2012. Available at: <https://www.thecommunityguide.org/sites/default/files/assets/Tobacco-Increasing-Unit-Price.pdf>; Centers for Disease Control and Prevention. *State Cigarette Minimum Price Laws—United States, 2009*. *MMWR Morb Mortal Wkly Rep*. 2010;59(13):389-392; Chaloupka FJ, Cummings KM, Morley C, Horan J. Tax, price and cigarette smoking: evidence from the tobacco documents and implications for tobacco company marketing strategies. *Tob Control*. 2002;11(Supplement 1):i62-i72. doi: 10.1136/tc.11.suppl_1.i62; Chaloupka FJ, Yurekli A, Fong GT. Tobacco taxes as a tobacco control strategy. *Tob Control*. 2012;21(2):172-180. doi: 10.1136/tobaccocontrol-2011-050417; Huang J, Gwamnicki C, Xu X, Caraballo RS, Wada R, Chaloupka FJ. A comprehensive examination of own- and cross-price elasticities of tobacco and nicotine replacement products in the U.S. *Prev Med*. 2018. doi: 10.1016/j.yjmed.2018.04.024; Pesko MF, Huang J, Johnston LD, Chaloupka FJ. E-cigarette price sensitivity among middle- and high-school students: evidence from monitoring the future. *Addiction*. 2018;113(5):896-906. doi:

10.1111/add.14119; Jawad M, Lee JT, Glantz S, Millett C. Price elasticity of demand of non-cigarette tobacco products: a systematic review and meta-analysis. *Tob Control*. 2018. doi: 10.1136/tobaccocontrol-2017-054056.



Cheryl Davila
Councilmember District 2

SUPPLEMENTAL AGENDA MATERIAL for Supplemental Packet 1

Meeting Date: December 11, 2018

Item Number: 21

Item Description: Short-term referral to City Attorney and Health Housing and Community Service to amend Berkeley Municipal Code 7,441-N.S. to expand the control of flavored tobacco across the City of Berkeley toward preventing youth and young adult tobacco use

Submitted by: Councilmember Cheryl Davila

Changed referral from City Attorney and HHCS to City Manager.



Cheryl Davila
Councilmember
District 2

CONSENT CALENDAR
December 11, 2018

To: Honorable Mayor and Members of the City Council

From: Councilmembers Cheryl Davila

Subject: Short-term referral to City Manager to amend Berkeley Municipal Code 7,441-N.S. to expand the control of flavored tobacco across the City of Berkeley toward preventing youth and young adult tobacco use

RECOMMENDATION

Short-term referral to City Manager to amend Berkeley Municipal Code 7,441-N.S. according to the changes made in the attached amended ordinance to prohibit the sale of flavored tobacco products and require a minimum package size for cigars and little cigars across the City of Berkeley. The primary purpose of the amendment to the ordinance is to do more to prevent youth and young adult tobacco use.

FISCAL IMPACTS OF RECOMMENDATION

No fiscal impacts.

ENVIRONMENTAL SUSTAINABILITY

Smoking is an environmental pollutant and a fire hazard, and has resulted in a smoking-related public health crisis as well as causes other damage to the environment as a result of the trees and forests destroyed for the creation of rolling paper and packaging, pesticides and the washing of cigarette butts into storm drains that washes them into the ocean, rivers and lakes.¹

BACKGROUND

In support of the Food and Drug Administration's (FDA) announcement about a series of tobacco restriction regulations aimed at combating flavored e-cigarettes and tobacco products that have lured young people into vaping and smoking, we propose doing the same in Berkeley. In addition, the FDA said it would move to outlaw two traditional tobacco products that disproportionately harm African-Americans: menthol cigarettes

¹ City of Berkeley, Tobacco Facts and The Environment,
https://www.cityofberkeley.info/Health_Human_Services/Public_Health/Tobacco_Facts_and_the_Environment.aspx.

and flavored cigars.²

Currently, Berkeley has an ordinance that prohibits the sale of flavored tobacco, including menthol, electronic cigarettes, within six hundred (600) feet of any school.³

The proposal to eliminate the sale of flavored tobacco, including menthol, and single or small package cigars and little cigars recognizes the targeting of young people, and African American young people disproportionately, by marketing and sales of flavored tobacco as well as sales of individual or small package cigars or little cigars. The City of Berkeley can and should follow San Francisco, Richmond and San Mateo in passing an aggressive tobacco control measure to stop the sale of flavored tobacco, including menthol, and require a minimum package size for cigars and little cigars across the City of Berkeley.

Approximately 480,000 people die in the United States from smoking-related diseases and exposure to secondhand smoke every year, making tobacco use the nation's leading cause of preventable death;⁴ more than 16 million Americans are currently living with a disease caused by smoking.⁵ About 1 in 5 deaths each year is attributable to cigarette smoking.⁶ Each year 45,000 African Americans die from tobacco-related deaths.⁷ The World Health Organization has predicted that by the year 2025, 500 million people worldwide will have died from a tobacco related illness.⁸ Tobacco causes more deaths than AIDS, auto accidents, alcohol and drugs, homicides and suicides and fires combined.⁹

Ninety percent of all U.S. smokers start smoking as teenagers.¹⁰ In California, over 67% of current and former adult smokers started by the age of 18 and almost 100% start by age 26.¹¹ In 2017, 22.8% of high school students in California had tried cigarette

² New York Times, [F.D.A. Seeks Restrictions on Teens' Access to Flavored E-Cigarettes and a Ban on Menthol Cigarettes](#), November 15, 2018.

³ As measured by a straight line from the nearest point of the property line of the parcel on which the school is located to the nearest point of the property line of the parcel on which the business is located.

⁴ U.S. Department of Health and Human Services. *The Health Consequences of Smoking: 50 Years of Progress. A Report of the Surgeon General*. 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. 2014. Available at: <https://www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf>.

⁵ City of Berkeley, Health Status Report 2018, City of Berkeley Public Health Division, https://www.cityofberkeley.info/uploadedFiles/Health_Human_Services/Level_3_-_Public_Health/2018-health-status-report-berkeley.pdf, page 64.

⁶ City of Berkeley, Health Status Report 2018, City of Berkeley Public Health Division, https://www.cityofberkeley.info/uploadedFiles/Health_Human_Services/Level_3_-_Public_Health/2018-health-status-report-berkeley.pdf, page 64.

⁷ US Department of Health and Human Services (HHS), "Tobacco Use Among US Racial/Ethnic Minority Groups—African Americans, American Indians and Alaskan Natives, Asian Americans and Pacific Islanders, and Hispanics: A Report of the Surgeon General," 1998, http://www.cdc.gov/tobacco/data_statistics/sqr/1998/complete_report/pdfs/complete_report.pdf.

⁸ City of Berkeley, Tobacco Facts and The Environment, https://www.cityofberkeley.info/Health_Human_Services/Public_Health/Tobacco_Facts_and_the_Environment.aspx.

⁹ Ibid

¹⁰ Ibid

¹¹ California Department of Public Health California Tobacco Control Program. *California Tobacco Facts and Figures 2016*. Sacramento, CA: California Department of Public Health. 2016. Available at: <https://www.cdph.ca.gov/Programs/CCDPHP/DCDIC/CTCB/CDPH%20Document%20Library/ResearchandEvaluation/FactsandFigures/2016FactsFiguresWeb.pdf>.

smoking.¹² Each day in California 300 youth light up for the first time; about one-third of them will die from a tobacco related disease.¹³ 5.6 million of today's Americans who are younger than 18 are projected to die prematurely from a smoking-related illness.¹⁴

Approximately 11% of youth self-report smoking cigarettes.¹⁵ The number is most likely higher. In Berkeley, according to the Health Status Report 2018, cigarette smoking has continued to drop for 7th and 9th graders but fluctuated for 11th graders.¹⁶ The number of students and youth using cigarette quadruples by eleventh grade.¹⁷ There has been a drop in e-cigarette use for students at all grade levels and we want to see these number continue to drop.

Mentholated and flavored products have been shown to be “starter” products for youth who begin using tobacco¹⁸ and these products help establish tobacco habits that can lead to long-term addiction.¹⁹ Flavored tobacco has significant public health implications for youth, people of color, low income populations, and members of LGBTQ+ communities as a result of targeted industry marketing strategies and product manipulation.²⁰ Unlike cigarette use that has steadily declined among youth, the prevalence of the use of non-cigarette tobacco products has remained statistically unchanged and in some cases actually increased among youth.²¹

¹² Kann L, McManus T, Harris WA, et al. Youth Risk Behavior Surveillance - United States, 2017. *MMWR Surveill Summ.* 2018;67(8):1-114. doi: 10.15585/mmwr.ss6708a1; Centers for Disease Control and Prevention. Youth Risk Behavior Surveillance — United States, 2017. Supplementary Tables 52-93: Tobacco Use. 2018; https://www.cdc.gov/healthyyouth/data/yrbs/2017_tables/tobacco_use.htm.

¹³ City of Berkeley, Tobacco Facts and The Environment, https://www.cityofberkeley.info/Health_Human_Services/Public_Health/Tobacco_Facts_and_the_Environment.aspx.

¹⁴ U.S. Department of Health and Human Services. *The Health Consequences of Smoking: 50 Years of Progress. A Report of the Surgeon General.* 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. 2014. Available at: <https://www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf>.

¹⁵ <http://healthystoreshealthycommunity.com/counties/berkeley/>

¹⁶ City of Berkeley, Health Status Report 2018, City of Berkeley Public Health Division, https://www.cityofberkeley.info/uploadedFiles/Health_Human_Services/Level_3_-_Public_Health/2018-health-status-report-berkeley.pdf, page 30.

¹⁷ *Ibid*, page 64.

¹⁸ U.S. Department of Health and Human Services. *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General.* 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. 2012. Available at: <https://www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/>; Hersey JC, Ng SW, Nonnemaker JM, et al. Are menthol cigarettes a starter product for youth? *Nicotine Tob Res.* 2006;8(3):403-413. doi: 10.1080/14622200600670389; Wackowski O, Delnevo CD. Menthol cigarettes and indicators of tobacco dependence among adolescents. *Addict Behav.* 2007;32(9):1964-1969. doi: 10.1016/j.addbeh.2006.12.023.

¹⁹ *Ibid*; Oliver AJ, Jensen JA, Vogel RI, Anderson AJ, Hatsukami DK. Flavored and nonflavored smokeless tobacco products: rate, pattern of use, and effects. *Nicotine Tob Res.* 2013;15(1):88-92. doi: 10.1093/ntr/nts093.

²⁰ *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006), *aff'd in part, vacated in part*, 566 F.3d 1095 (D.C. Cir. 2009), and order clarified, 778 F. Supp. 2d 8 (D.D.C. 2011); U.S. Department of Health and Human Services. *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General.* 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. 2012. Available at: <https://www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/>; Yerger VB, Przewoznik J, Malone RE. Racialized geography, corporate activity, and health disparities: tobacco industry targeting of inner cities. *J Health Care Poor Underserved.* 2007;18(4 Suppl):10-38. doi: 10.1353/hpu.2007.0120; Kreslake JM, Wayne GF, Alpert HR, Koh HK, Connolly GN. Tobacco industry control of menthol in cigarettes and targeting of adolescents and young adults. *Am J Public Health.* 2008;98(9):1685-1692. doi: 10.2105/AJPH.2007.125542; Fallin A, Goodin AJ, King BA. Menthol cigarette smoking among lesbian, gay, bisexual, and transgender adults. *Am J Prev Med.* 2015;48(1):93-97. doi: 10.1016/j.amepre.2014.07.044.

²¹ U.S. Department of Health and Human Services. *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General.* 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. 2012. Available at: <https://www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/>; Johnston LD, O'Malley PM, Bachman JG, Schulenberg JE, Miech RA. *Monitoring the Future national survey results on drug use, 1975–2013: Volume I, Secondary school students.* Ann Arbor, MI: Institute for Social Research, The University of Michigan. 2014. Available at:

Although federal and state law ban the sale of individual cigarettes,²² neither federal nor California state laws restrict the sale of individual little cigars and cigars. Many retailers sell little cigars and cigars individually, making them more affordable and appealing to youth.²³ For example: 87.4% of California tobacco retailers sell a popular brand of youth-friendly cigars for less than \$1.00.²⁴ And, from 1995 to 2008, annual sales of cigarillos increased by 255%, and sales of little cigars increased by 316%.²⁵

The availability of inexpensive tobacco products leads to increased tobacco use as evidenced by more than 100 academic studies that conclusively show that when tobacco products are made more expensive, fewer people use tobacco, fewer initiate tobacco use, and more people quit tobacco use.²⁶

In Berkeley in 2016, 91.4% of stores selling cigarettes sold menthol. That year there was also a 14% increase in percent of stores that sell swisher sweets (akin to a cigarillo) for less than a dollar: In 2013 70.0% sold them versus 84.2% in 2016. There was a 25% increase in stores selling electronic smoking devices: In 2013 57.8% sold them versus 72.9% in 2016.²⁷

http://monitoringthefuture.org/pubs/monographs/mtf-vol1_2013.pdf; Harrell PT, Naqvi SMH, Plunk AD, Ji M, Martins SS. Patterns of youth tobacco and polytobacco usage: The shift to alternative tobacco products. *Am J Drug Alcohol Abuse*. 2017;43(6):694-702. doi: 10.1080/00952990.2016.1225072; Substance Abuse and Mental Health Services Administration. *Results from the 2010 National Survey on Drug Use and Health: Summary of National Findings*. Rockville, MD: Substance Abuse and Mental Health Services Administration. 2011. Available at: <https://www.samhsa.gov/data/sites/default/files/NSDUHNationalFindingsResults2010-web/2k10ResultsRevNSDUHResultsRev2010.pdf>; Wang TW, Gentzke A, Sharapova S, Cullen KA, Ambrose BK, Jamal A. Tobacco Product Use Among Middle and High School Students - United States, 2011-2017. *MMWR Morb Mortal Wkly Rep*. 2018;67(22):629-633. doi: 10.15585/mmwr.mm6722a3; Cobb C, Ward KD, Maziak W, Shihadeh AL, Eissenberg T. Waterpipe Tobacco Smoking: An Emerging Health Crisis in the United States. *American Journal of Health Behavior*. 2010;34(3):275-285. doi: 10.5993/ajhb.34.3.3.

²² 21 C.F.R. § 1140.16(b); Cal. Penal Code § 308.3(a).

²³ California Department of Public Health California Tobacco Control Program. *Tobacco in the Retail Environment*. 2012. Available at:

<https://www.cdph.ca.gov/Programs/CCDCPHP/DCDIC/CTCB/CDPH%20Document%20Library/ResearchandEvaluation/FactsandFigures/TobaccoRetailEnvironmentFactSheetEasyPrint.pdf>.

²⁴ California Department of Public Health California Tobacco Control Program. *2016 Healthy Stores for a Healthy Community Survey Results-all counties*. 2016. Available at: <http://healthystoreshealthycommunity.com/media-center/?campaign>.

²⁵ Cullen J, Mowery P, Delnevo C, et al. Seven-year patterns in US cigar use epidemiology among young adults aged 18-25 years: a focus on race/ethnicity and brand. *Am J Public Health*. 2011;101(10):1955-1962. doi: 10.2105/AJPH.2011.300209.

²⁶ U.S. Department of Health and Human Services. *The Health Consequences of Smoking: 50 Years of Progress. A Report of the Surgeon General*. 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. 2014. Available at:

<https://www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf>; Institute of Medicine. *Ending the Tobacco Problem: A Blueprint for the Nation*. Washington, DC. 2007. Available at: <https://www.nap.edu/catalog/11795/ending-the-tobacco-problem-a-blueprint-for-the-nation>; Community Preventive Services Task Force. *Reducing Tobacco Use and Secondhand Smoke Exposure: Interventions to Increase the Unit Price for Tobacco Products*. 2012. Available at:

<https://www.thecommunityguide.org/sites/default/files/assets/Tobacco-Increasing-Unit-Price.pdf>; Centers for Disease Control and Prevention. State Cigarette Minimum Price Laws—United States, 2009. *MMWR Morb Mortal Wkly Rep*. 2010;59(13):389-392; Chaloupka FJ, Cummings KM, Morley C, Horan J. Tax, price and cigarette smoking: evidence from the tobacco documents and implications for tobacco company marketing strategies. *Tob Control*. 2002;11(Supplement 1):i62-i72. doi: 10.1136/tc.11.suppl_1.i62; Chaloupka FJ, Yurekli A, Fong GT. Tobacco taxes as a tobacco control strategy. *Tob Control*. 2012;21(2):172-180. doi: 10.1136/tobaccocontrol-2011-050417; Huang J, Gwamnicki C, Xu X, Caraballo RS, Wada R, Chaloupka FJ. A comprehensive examination of own- and cross-price elasticities of tobacco and nicotine replacement products in the U.S. *Prev Med*. 2018. doi: 10.1016/j.ypmed.2018.04.024; Pesko MF, Huang J, Johnston LD, Chaloupka FJ. E-cigarette price sensitivity among middle- and high-school students: evidence from monitoring the future. *Addiction*. 2018;113(5):896-906. doi: 10.1111/add.14119; Jawad M, Lee JT, Glantz S, Millett C. Price elasticity of demand of non-cigarette tobacco products: a systematic review and meta-analysis. *Tob Control*. 2018. doi: 10.1136/tobaccocontrol-2017-054056.

²⁷ <http://healthystoreshealthycommunity.com/counties/berkeley/>

As a result of the FDA ban on all flavored cigarette products (except menthol), tobacco use by youth decreased by 6% and the likelihood of a youth becoming a cigarette smoker post flavor ban fell by 17%.²⁸

CONTACT PERSON

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ATTACHMENT:

1: [Tobacco Buffer Zone Ordinance No. 7,441-N.S.](#)

2: [Buffer Zone Resolution](#)

3: Washington Post article on FDA New Tobacco Rules:

https://www.washingtonpost.com/opinions/the-fdas-new-tobacco-rules-are-a-victory-for-public-health/2018/11/17/58116d9a-e9bf-11e8-bbdb-72fdbf9d4fed_story.html?noredirect=on&utm_term=.d8261dd47ca3

4: NY Times article on FDA New Tobacco Rules:

<https://www.nytimes.com/2018/11/15/health/ecigarettes-fda-flavors-ban.html>

²⁸ Courtemanche CJ, Palmer MK, Pesko MF. Influence of the Flavored Cigarette Ban on Adolescent Tobacco Use. *Am J Prev Med.* 2017;52(5):e139-e146. doi: 10.1016/j.amepre.2016.11.019.

ORDINANCE NO. ##,###-N.S.

AMEND BERKELEY MUNICIPAL CODE 7,441-N.S. TO PROHIBIT THE SALE OF FLAVORED TOBACCO PRODUCTS AND REQUIRE A MINIMUM PACKAGE SIZE FOR CIGARS AND LITTLE CIGARS ACROSS THE CITY OF BERKELEY.

BE IT ORDAINED by the Council of the City of Berkeley to amend BMC 7,441-N.S. as follows:

Section 1. Legislative findings:

A. The City Council hereby finds that:

1. Approximately 480,000 people die in the United States from smoking-related diseases and exposure to secondhand smoke every year, making tobacco use the nation's leading cause of preventable death;¹
2. 5.6 million of today's Americans who are younger than 18 are projected to die prematurely from a smoking-related illness;²
3. Despite the state's efforts to limit youth access to tobacco, youth are still able to access tobacco products, as evidenced by the following:
 - In California, over 67% of current and former adult smokers started by the age of 18 and almost 100% start by age 26;³
 - In 2017, 22.8% of high school students in California had tried cigarette smoking;⁴
 - In 2018, 11% of Berkeley high school youth self-report smoking cigarettes and the rate of cigarette smoking quadruples from 10th to 11th graders.⁵
4. The federal Family Smoking Prevention and Tobacco Control Act ("Tobacco Control Act"), enacted in 2009, prohibited candy- and fruit-flavored cigarettes,⁶ largely because these flavored products are marketed to youth and young adults,⁷ and younger smokers were more likely than older smokers to have tried these products;⁸
5. 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 these devices;
6. In 2016, an estimated 82% of tobacco retailers in California sold flavored non-cigarette tobacco products, over 90% of tobacco retailers sold menthol cigarettes, and 8 out of 10 tobacco retailers near schools sold flavored non-cigarette tobacco products;⁹
7. In Berkeley in 2016, 91.4% of stores selling cigarettes sold menthol. There was a 14% increase in percent of stores that sell swisher sweets for less than a dollar: In 2013 70.0% sold them versus 84.2% in 2016. There was a 25% increase in stores selling electronic smoking devices: In 2013 57.8% sold them versus 72.9% in 2016.¹⁰
8. Mentholated and flavored products have been shown to be "starter" products for youth who begin using tobacco¹¹ and these products help establish tobacco habits that can lead to long-term addiction;¹²

9. Flavored tobacco has significant public health implications for youth, people of color, low income populations, and members of LGBTQ+ communities as a result of targeted industry marketing strategies and product manipulation;¹³
10. As a result of the FDA ban on all flavored cigarette products (except menthol), tobacco use by youth decreased by 6% and the likelihood of a youth becoming a cigarette smoker post flavor ban fell by 17%;¹⁴
11. Unlike cigarette use that has steadily declined among youth, the prevalence of the use of non-cigarette tobacco products has remained statistically unchanged and in some cases actually increased among youth;¹⁵
12. Although federal and state law ban the sale of individual cigarettes,¹⁶ neither federal nor California state laws restrict the sale of individual little cigars and cigars;
13. Many retailers sell little cigars and cigars individually, making them more affordable and appealing to youth.¹⁷ For example:
 - 87.4% of California tobacco retailers sell a popular brand of youth-friendly cigars for less than \$1.00;¹⁸
 - From 1995 to 2008, annual sales of cigarillos increased by 255%, and sales of little cigars increased by 316%; and¹⁹
14. The availability of inexpensive tobacco products leads to increased tobacco use as evidenced by more than 100 academic studies that conclusively show that when tobacco products are made more expensive, fewer people use tobacco, fewer initiate tobacco use, and more people quit tobacco use.²⁰

Section 2. That Berkeley Municipal Code Section 9.80.020 is hereby amended as follows:

Section 9.80.020 Definitions.

The following words and phrases, whenever used in this article, shall have the meanings defined in this section unless the context clearly requires otherwise:

A. "Cigar" means any roll of tobacco other than a cigarette wrapped entirely or in part in tobacco or any substance containing tobacco and weighing more than three pounds per thousand.

A-B. "Cigarette" means: (1) any roll of tobacco wrapped in paper or in any substance not containing tobacco; and (2) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described herein.

B-C. "Characterizing flavor" means a ~~distinguishable~~ taste or aroma, other than the taste or aroma of tobacco, that is imparted either prior to or during consumption of a tobacco product or any byproduct produced by the tobacco product, including but not limited to tastes or aromas relating to menthol, mint, wintergreen, chocolate, vanilla, honey, cocoa, any candy, any dessert, any alcoholic beverage, any fruit, any herb, and any spice; provided, however, that no tobacco product shall be determined to have a characterizing flavor solely because of the use of additives or flavorings or the provision of ingredient information. ~~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 such statements, that a tobacco product has or produces a characterizing flavor shall establish that the product is a flavored tobacco product.~~

~~B. "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.~~

~~C. "Distinguishable" means perceivable by an ordinary consumer by either the sense of smell or taste.~~

D. "Consumer" means a person who purchases a tobacco product for consumption and not for sale to another.

~~C.E.~~ D. "Electronic nicotine delivery system" means any electronic and/or battery-operated device that can be used to deliver an inhaled dose of nicotine or other substances, including but not limited to electronic cigarettes, vaporizer pens, electronic cigars, electronic cigarillos, electronic pipes, electronic hookahs, or any other product name or descriptor, and including any component, part, or accessory of such a device, whether or not sold separately, including but not limited to cartomizers, clearomizers, atomizers, and tips.

~~D.F.~~ E. "E-liquid" means any liquid, gel or other substance designed for use with an electronic nicotine delivery system, including but not limited to e-juice, smoke juice or any other product name or descriptor. Excluded from this definition is any non-nicotine containing liquid, gel or other substance that contains cannabis in any form as its active ingredient.

~~E.G.~~ F. "Flavored tobacco product" means any tobacco product ~~containing, made of, or derived from tobacco or nicotine that contains a constituent~~ that imparts a characterizing flavor.

H. "Labeling" means written, printed, or graphic matter upon any tobacco product or any of its packaging, or accompanying such tobacco product.

I. "Little cigar" means any roll of tobacco other than a cigarette wrapped entirely or in part in tobacco or any substance containing tobacco and weighing no more than three pounds per thousand. "Little cigar" includes, but is not limited to, tobacco products known or labeled as small cigar, little cigar, or cigarillo.

J. "Manufacturer" means any person, including any repacker or relabeler, who manufactures, fabricates, assembles, processes, or labels a tobacco product; or imports a finished tobacco product for sale or distribution into the United States.

~~F.K.~~ "Package" or "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.

~~G.L.~~ "Pharmacy" means any retail establishment in which the profession of pharmacy is practiced by a pharmacist licensed by the State of California in accordance with the Business and Professions Code and where prescription pharmaceuticals are offered for sale, regardless of whether the retail establishment sells other retail goods in addition to prescription pharmaceuticals.

H.M. "Proprietor" means a person with an ownership or managerial interest in a business. 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 can or does share, ultimate control over the day-to-day operations of a business.

I.N. "School" means a building or group of buildings and associated grounds used for educational and/or classroom purposes operated by the Berkeley Unified School District (BUSD) and/or other public or private educational institutions offering a general course of study at primary, secondary or high school levels (grades K through 12) which is equivalent to the courses of study at such levels offered by the BUSD, as specified by City Council Resolution from time to time. Pre-school, vocational or trade programs shall be considered schools only when incidental to the primary use as a school as defined herein. Excluded from this definition are buildings operated by public or private education institutions in which the total student enrollment is less than 25 students and private residences at which students participate in home-based or independent study programs.

J.O. "Sale" or "Sell" means any transfer, exchange, barter, gift, offer for sale, or distribution for a commercial purpose, in any manner or by any means whatsoever.

K.P. "Tobacco paraphernalia" means items or instruments designed or marketed for the consumption, use, or preparation for consumption, of any substance containing tobacco or derived from tobacco, including but not limited to cigarette papers or wrappers, pipes, hookahs, and cigarette rolling machines.

L.Q. "Tobacco product" means:

1. any substance containing, made of, 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, cigarillos, pipe tobacco, snuff, chewing tobacco, dipping tobacco, bidis, and shisha;
2. any e-liquid;
3. any electronic nicotine delivery system; and
4. any tobacco paraphernalia.

"Tobacco product" does not include drugs, devices, or combination products authorized for sale any cessation product specifically approved by the United States Food and Drug Administration, as those terms are defined in the Federal Food, Drug and Cosmetic Act. for use in treating nicotine or tobacco dependence.

M.R. "Tobacco retailer" means any person or business that operates a store, stand, booth concession or other place at which the sales of tobacco products are made to purchasers for personal consumption or use.

Section 3. That Berkeley Municipal Code Section 9.80.030 is hereby amended to read as follows:

Section 9.80.030 Requirement for tobacco retail licensure.

- A. It shall be unlawful for any person to act as a tobacco retailer without first obtaining and maintaining a valid tobacco retailer's license pursuant to this chapter, for each location at which that activity is to occur.
- B. It shall be a violation of a tobacco retailer's license for a licensee or his or her agent or employee to violate any local, state, or federal tobacco-related law.
- C. It shall be a violation of a tobacco retailer's license for a licensee or his or her agent or employee to sell or offer for sale, or to possess with intent to sell or offer for sale, any flavored tobacco product.
1. 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.
 2. 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 has:
 - a) made a public statement or claim that the tobacco product imparts a characterizing flavor;
 - b) used text and/or images on the tobacco product's labeling or packaging to explicitly or implicitly indicate that the tobacco product imparts a characterizing flavor; or
 - c) taken action directed to consumers that would be reasonably expected to cause consumers to believe the tobacco product imparts a characterizing flavor.
- D. It shall be a violation of a tobacco retailer's license for a licensee or his or her agent to sell any tobacco product to any consumer unless such product: (1) is sold in the original manufacturer's packaging intended for sale to consumers; and (2) conforms to all applicable federal labeling requirements.
- E. It shall be a violation of a tobacco retailer's license for a licensee or his agent or employee to sell to a consumer:
1. any little cigar unless it is sold in a package of at least 20 (twenty) little cigars; or
 2. any cigar unless it is sold in a package of at least at least 6 (six) cigars [provided, however, that this subsection shall not apply to a cigar that has a price of at least [\$X.00] per cigar, including all applicable taxes and fees].

G.F. Any tobacco retailer who as of September 15, 2015, was lawfully selling electronic nicotine delivery systems or e-liquids and was not otherwise required to have a tobacco retailer's license shall be exempt from the requirements of subdivision A of this Section until January 1, 2016.

Section 4. That Berkeley Municipal Code Section 9.80.035 is hereby amended to read as follows:

Section 9.80.035 Limits on eligibility for a tobacco retailer license.

- A. No new tobacco retailer license may be issued to a pharmacy.
- B. No existing tobacco retailer license may be renewed by a pharmacy.

- C. No new tobacco retailer license may be issued to authorize the sale of tobacco products within six hundred (600) feet of any school as measured by a straight line from the nearest point of the property line of the parcel on which the school is located to the nearest point of the property line of the parcel on which the business is located. ~~D. Effective January 1, 2017, no person shall sell, give away, barter, exchange, or otherwise deal in flavored tobacco products within six hundred (600) feet of any school as measured by a straight line from the nearest point of the property line of the parcel on which the school is located to the nearest point of the property line of the parcel on which the business is located.~~
- D. Effective January 1, 2017, no person shall sell, give away, barter, exchange, or otherwise deal in electronic nicotine delivery systems or e-liquid within six hundred (600) feet of any school as measured by a straight line from the nearest point of the property line of the parcel on which the school is located to the nearest point of the property line of the parcel on which the business is located.
1. Subdivision ~~D~~E.1 shall not prohibit the sale of electronic nicotine delivery systems to persons who demonstrate that they are qualified patients or primary caregivers as defined in Health and Safety Code section 11362.7 or persons with identification cards issued pursuant to Health and Safety Code section 11362.71, provided that such electronic nicotine delivery systems are unaccompanied by any tobacco product defined in Sections 9.80.020.K.1 or 9.80.020.K.2.
- E. A tobacco retailer lawfully operating prior to March 1, 2015, that is engaged primarily in the sale of electronic nicotine delivery systems or e-liquid and is prohibited from selling electronic nicotine delivery systems and e-liquid due to the proximity to a school as specified in subdivision ~~D~~E.1 may obtain an exemption from subdivision ~~D~~E.1 yearly for up to a total of three years, beginning January 1, 2017, if it makes a showing, as determined by the City Manager or his or her designee, that application of subdivision ~~D~~E.1 would result in a taking without just compensation under either the California or the United States Constitution. "Engaged primarily" for purposes of this subsection means that the sale of electronic nicotine delivery systems and e-liquids account for more than 50% of the tobacco retailer's calendar year 2014 gross receipts.
- F. A map identifying the areas falling within six hundred (600) feet of schools shall be adopted by the City Council by resolution, and may be amended from time to time.

Section 5. Effective date.

This Ordinance shall take effect and be in force from and after **January 11, 2019**; provided, however, that Section 9.80.030(C) shall not take effect until **June 11, 2019**, thereby giving retailers 6 months to sell or move around related merchandise.

¹ U.S. Department of Health and Human Services. *The Health Consequences of Smoking: 50 Years of Progress. A Report of the Surgeon General*. 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. 2014. Available at: <https://www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf>.

² U.S. Department of Health and Human Services. *The Health Consequences of Smoking: 50 Years of Progress. A Report of the Surgeon General*. 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. 2014. Available at: <https://www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf>.

- ³ California Department of Public Health California Tobacco Control Program. *California Tobacco Facts and Figures 2016*. Sacramento, CA: California Department of Public Health. 2016. Available at: <https://www.cdph.ca.gov/Programs/CCDCPHP/DCDIC/CTCB/CDPH%20Document%20Library/ResearchandEvaluation/FactsandFigures/2016FactsFiguresWeb.pdf>.
- ⁴ Kann L, McManus T, Harris WA, et al. Youth Risk Behavior Surveillance - United States, 2017. *MMWR Surveill Summ*. 2018;67(8):1-114. doi: 10.15585/mmwr.ss6708a1; Centers for Disease Control and Prevention. Youth Risk Behavior Surveillance — United States, 2017. Supplementary Tables 52-93: Tobacco Use. 2018; https://www.cdc.gov/healthyyouth/data/yrbs/2017_tables/tobacco_use.htm.
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- ⁶ 21 U.S.C. § 387g(a)(1)(A).
- ⁷ U.S. Department of Health and Human Services. *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General*. 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. 2012. Available at: <https://www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/>; Villanti AC, Collins LK, Niaura RS, Gagosian SY, Abrams DB. Menthol cigarettes and the public health standard: a systematic review. *BMC Public Health*. 2017;17(1):983. doi: 10.1186/s12889-017-4987-z; Villanti AC, Johnson AL, Ambrose BK, et al. Flavored Tobacco Product Use in Youth and Adults: Findings From the First Wave of the PATH Study (2013-2014). *Am J Prev Med*. 2017;53(2):139-151. doi: 10.1016/j.amepre.2017.01.026.
- ⁸ U.S. Department of Health and Human Services. *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General*. 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. 2012. Available at: <https://www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/>.
- ⁹ California Department of Public Health California Tobacco Control Program. *2016 Healthy Stores for a Healthy Community Survey Results-all counties*. 2016. Available at: <http://healthystoreshealthycommunity.com/media-center/?campaign>.
- ¹⁰ <http://healthystoreshealthycommunity.com/counties/berkeley/>
- ¹¹ U.S. Department of Health and Human Services. *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General*. 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. 2012. Available at: <https://www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/>; Hersey JC, Ng SW, Nonnemaker JM, et al. Are menthol cigarettes a starter product for youth? *Nicotine Tob Res*. 2006;8(3):403-413. doi: 10.1080/14622200600670389; Wackowski O, Delnevo CD. Menthol cigarettes and indicators of tobacco dependence among adolescents. *Addict Behav*. 2007;32(9):1964-1969. doi: 10.1016/j.addbeh.2006.12.023.
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- ¹³ United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1 (D.D.C. 2006), aff'd in part, vacated in part, 566 F.3d 1095 (D.C. Cir. 2009), and order clarified, 778 F. Supp. 2d 8 (D.D.C. 2011); U.S. Department of Health and Human Services. *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General*. 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. 2012. Available at: <https://www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/>; Yegerer VB, Przewoznik J, Malone RE. Racialized geography, corporate activity, and health disparities: tobacco industry targeting of inner cities. *J Health Care Poor Underserved*. 2007;18(4 Suppl):10-38. doi: 10.1353/hpu.2007.0120; Kreslake JM, Wayne GF, Alpert HR, Koh HK, Connolly GN. Tobacco industry control of menthol in cigarettes and targeting of adolescents and young adults. *Am J Public Health*. 2008;98(9):1685-1692. doi: 10.2105/AJPH.2007.125542; Fallin A, Goodin AJ, King BA. Menthol cigarette smoking among lesbian, gay, bisexual, and transgender adults. *Am J Prev Med*. 2015;48(1):93-97. doi: 10.1016/j.amepre.2014.07.044.
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- ¹⁵ U.S. Department of Health and Human Services. *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General*. 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. 2012. Available at: <https://www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/>; Johnston LD, O'Malley PM, Bachman JG, Schulenberg JE, Miech RA. *Monitoring the Future national survey results on drug use, 1975-2013: Volume I, Secondary school students*. Ann Arbor, MI: Institute for Social Research, The University of Michigan. 2014. Available at: http://monitoringthefuture.org/pubs/monographs/mtf-vol1_2013.pdf; Harrell PT, Naqvi SMH, Plunk AD, Ji M, Martins SS. Patterns of youth tobacco and polytobacco usage: The shift to alternative tobacco products. *Am J Drug Alcohol Abuse*. 2017;43(6):694-702. doi: 10.1080/00952990.2016.1225072; Substance Abuse and Mental Health Services Administration. *Results from the 2010 National Survey on Drug Use and Health: Summary of National Findings*. Rockville, MD: Substance Abuse and Mental Health Services Administration. 2011. Available at: <https://www.samhsa.gov/data/sites/default/files/NSDUHNationalFindingsResults2010-web/2k10ResultsRev/NSDUHResultsRev2010.pdf>; Wang TW, Gentzke A, Sharapova S, Cullen KA, Ambrose BK, Jamal A. Tobacco Product Use Among Middle and High School Students - United States, 2011-2017. *MMWR Morb Mortal Wkly Rep*. 2018;67(22):629-633. doi: 10.15585/mmwr.mm6722a3; Cobb C, Ward KD, Maziak W, Shihadeh AL, Eissenberg T. Waterpipe Tobacco Smoking: An Emerging Health Crisis in the United States. *American Journal of Health Behavior*. 2010;34(3):275-285. doi: 10.5993/ajhb.34.3.3.
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- ¹⁷ California Department of Public Health California Tobacco Control Program. *Tobacco in the Retail Environment*. 2012. Available at:

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¹⁸ California Department of Public Health California Tobacco Control Program. *2016 Healthy Stores for a Healthy Community Survey Results-all counties*. 2016. Available at: <http://healthystoreshealthycommunity.com/media-center/?campaign>.

¹⁹ Cullen J, Mowery P, Delnevo C, et al. Seven-year patterns in US cigar use epidemiology among young adults aged 18-25 years: a focus on race/ethnicity and brand. *Am J Public Health*. 2011;101(10):1955-1962. doi: 10.2105/AJPH.2011.300209.

²⁰ U.S. Department of Health and Human Services. *The Health Consequences of Smoking: 50 Years of Progress. A Report of the Surgeon General*. 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. 2014. Available at: <https://www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf>; Institute of Medicine. *Ending the Tobacco Problem: A Blueprint for the Nation*. Washington, DC. 2007. Available at: <https://www.nap.edu/catalog/11795/ending-the-tobacco-problem-a-blueprint-for-the-nation>; Community Preventive Services Task Force. *Reducing Tobacco Use and Secondhand Smoke Exposure: Interventions to Increase the Unit Price for Tobacco Products*. 2012. Available at: <https://www.thecommunityguide.org/sites/default/files/assets/Tobacco-Increasing-Unit-Price.pdf>; Centers for Disease Control and Prevention. State Cigarette Minimum Price Laws—United States, 2009. *MMWR Morb Mortal Wkly Rep*. 2010;59(13):389-392; Chaloupka FJ, Cummings KM, Morley C, Horan J. Tax, price and cigarette smoking: evidence from the tobacco documents and implications for tobacco company marketing strategies. *Tob Control*. 2002;11(Supplement 1):i62-i72. doi: 10.1136/tc.11.suppl_1.i62; Chaloupka FJ, Yurekli A, Fong GT. Tobacco taxes as a tobacco control strategy. *Tob Control*. 2012;21(2):172-180. doi: 10.1136/tobaccocontrol-2011-050417; Huang J, Gwamnicki C, Xu X, Caraballo RS, Wada R, Chaloupka FJ. A comprehensive examination of own- and cross-price elasticities of tobacco and nicotine replacement products in the U.S. *Prev Med*. 2018. doi: 10.1016/j.ypmed.2018.04.024; Pesko MF, Huang J, Johnston LD, Chaloupka FJ. E-cigarette price sensitivity among middle- and high-school students: evidence from monitoring the future. *Addiction*. 2018;113(5):896-906. doi: 10.1111/add.14119; Jawad M, Lee JT, Glantz S, Millett C. Price elasticity of demand of non-cigarette tobacco products: a systematic review and meta-analysis. *Tob Control*. 2018. doi: 10.1136/tobaccocontrol-2017-054056.

Council Consent Items

- 23. Short-term referral to City Attorney and Health Housing and Community Service to amend Berkeley Municipal Code 7,441-N.S. to expand the control of flavored tobacco across the City of Berkeley toward preventing youth and young adult tobacco use**
From: Councilmember Davila
Recommendation: Short-term referral to City Attorney and Health Housing and Community Service to amend Berkeley Municipal Code 7,441-N.S. according to the changes made in the attached amended ordinance to prohibit the sale of flavored tobacco products and require a minimum package size for cigars and little cigars across the City of Berkeley. The primary purpose of the amendment to the ordinance is to do more to prevent youth and young adult tobacco use.
Financial Implications: None
Contact: Cheryl Davila, Councilmember, District 2, 981-7120
Action: Councilmembers Hahn and Harrison added as co-sponsors. Approved recommendation as revised in Supplemental Communications Packet #1 to make the referral to the City Manager and further amended to include consideration of minimum package size and/or price.
- 24. Referral to City Manager to establish Recreational Vehicle Waste Discharge Facility on City Property and Referral to FY 2020/21 Budget Process**
From: Councilmembers Harrison and Davila
Recommendation:
1. Refer to the City Manager to establish a recreational vehicle waste discharge facility on City property and equitable administrative fee program, and
2. Refer costs associated with the facility to the FY 2020/21 Budget Process.
Financial Implications: See report
Contact: Kate Harrison, Councilmember, District 4, 981-7140
Action: Approved recommendation amended to include consideration of 1) method of pump out; 2) cost; 3) locations; and 4) capacity.