

STAFF REPORT

DATE: March 24, 2020

TO: City Council

FROM: Kelly Stachowicz, Assistant City Manager
Carrie Dyer, Management Analyst

SUBJECT: Adoption of Amended Municipal Regarding Ban on Flavored Tobacco Sales

Recommendation

1. Hold a public hearing to take comments regarding adoption of an update to the existing Tobacco Retail License Ordinance to ban the sale of flavored tobacco products in Davis city limits.
2. Adopt ordinance that amends Section 34.06.010 of the Municipal Code (Tobacco Retail Permit) making it a violation of the Tobacco Retail Permit to sell flavored tobacco product, as defined by the City, in Davis city limits.

Fiscal Impact

There is no fiscal impact to the City. All costs for administration, implementation and enforcement will be borne by Yolo County, offset by revenue provided to the County by the tobacco retailers as part of the Tobacco Retail License program.

Council Goal(s)

Ensure a safe, healthy, equitable community

Background and Analysis

On February 25, 2020, City Council introduced an ordinance that amends section 34.06.010 of the Municipal Code (Tobacco Retail Permit) to acknowledge the amendment the County made to its Code, making it a violation of the Tobacco Retail Permit to sell flavored tobacco product, as defined by the City, in Davis city limits. Staff recommends that Council hold a public hearing and adopt the amended ordinance.

Yolo County defines Flavored Tobacco Product as “any Tobacco Product that contains a constituent that imparts a characterizing flavor to the tobacco product or smoke produced by the tobacco product, either by the addition of artificial or natural flavors or an herb or spice, including menthol, strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, or coffee.” However, based on the Council discussion on February 11, the proposed City ordinance also incorporates a definition for “Characterizing Flavor” to address natural tobacco and non-flavored pipe tobacco, which are not included in the proposed City language to be included in the ban.

If approved, the ban covers flavored tobacco or nicotine, as defined by the City, including cigarettes, e-cigarettes, cigars, pipe tobacco, etc. It does not include FDA-approved nicotine

products for use in treating dependence. The proposed ban does not prohibit vaping or prohibit the use or possession of flavored tobacco products, nor does it include non-tobacco products such as cannabis.

At the February 11 City Council meeting, it was requested that businesses be allotted a period of time prior to the ban going into effect to move the product from their shelves. Staff is proposing an effective date of June 1, 2020.

Banning the sale of flavored tobacco and flavored tobacco products within city limits is a start in addressing the concern that flavored tobacco products are marketed primarily to youth. The California Department of Public Health states that that 80.8% of 12-17 year olds who have ever used tobacco started use with a flavored product. Recently, according to the Davis Joint Unified School District website, the district is following the path of many other school districts and has “filed a lawsuit against JUUL Labs, Inc. for the company’s role in cultivating and fostering an e-cigarette epidemic that disrupts the education and learning environment across the District.” E-Cigarettes are often sold in a variety of flavors that appeal to the younger population.

Staff will continue to work with Yolo County Health and Human Services Agency to coordinate appropriate enforcement based on Council direction.

Attachments:

1. Ordinance

ORDINANCE NO. XXXX

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF DAVIS, AMENDING CHAPTER 34 OF THE DAVIS MUNICIPAL CODE TO AMEND ARTICLE 34.06 AND TO ADOPT AND INCORPORATE BY REFERENCE CHAPTER 15 OF TITLE 6 OF THE YOLO COUNTY CODE REGARDING TOBACCO RETAIL PERMITS AND THE SALE OF FLAVORED TOBACCO PRODUCTS

WHEREAS, cigarette smoking and other tobacco use is a continuing public health problem; and

WHEREAS, to confront this issue, the State of California has adopted numerous laws regulating the retail sale of tobacco; and

WHEREAS, the City has a substantial interest in promoting compliance with laws that regulate the sales and use of tobacco products; and

WHEREAS, Section 22971.3 of the Business & Professions Code expressly permits local governments to enact local tobacco retail licensing ordinances, and allows for the suspension or revocation of a local permit for a violation of any State tobacco control law; and

WHEREAS, as part of its tobacco regulations, the City previously adopted the County of Yolo's ("County") tobacco retail licensing ordinance, which requires tobacco retailers to obtain a local permit to sell tobacco products or tobacco paraphernalia, and allows for the suspension or revocation of the permit for a violation of any tobacco control law; and

WHEREAS, in 2016, the County amended its tobacco retailer permit regulations to prohibit licensed tobacco retailers from selling, offering for sale, or exchanging flavored tobacco; and

WHEREAS, in furtherance of its substantial interest in regulating the sale and use of tobacco products, the City desires to adopt and incorporate by reference the County's 2016 amendments to the County Ordinance to clarify that licensed tobacco retailers cannot sell, offer for sale, or exchange flavored tobacco within the City limits.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF DAVIS DOES HEREBY ORDAIN AS FOLLOWS:

Section 1. Article 34.06 of Chapter 34 of the Davis Municipal Code is hereby repealed, provided that such repeal shall not affect or excuse any violation of said Article occurring prior to the effective date of this Ordinance. A new Article 34.06 is hereby added to Chapter 34 of the Davis Municipal Code to read as follows:

"Tobacco Retailer Permit

34.06.010 Adoption of Yolo County Code Relating to Tobacco Retailer Permits

- A. Title 6, Chapter 15 of the Yolo County Code, pertaining to tobacco retailer permits, and a copy of which is on file in the office of City Clerk is hereby adopted, except for Sections 6.15.04, 6.15.10(b)(2), and 6.15.15(f)(1)(A)(ii), by reference into this code and shall be enforced within the limits of the City. The provisions of such are hereby referred to, adopted, and made a part hereof as if fully set out in this Article except as modified hereinafter.
- B. All references to the term "unincorporated areas of the County of Yolo" in Title 6, Chapter 15 of the Yolo County Code shall be to the term "City limits." All references to the term "Chapter" in Title 6, Chapter 15 of the Yolo County Code shall be to the term "Article." All references to the term "Code" in Title 6, Chapter 15 of the Yolo County Code shall be to the Davis Municipal Code. The reference to the term "County" in Section 6-15.07(c) of the Yolo County Code shall be to the term "City." The reference to the term "County of Yolo" in Section 6-15.15(f) of the Yolo County Code shall be to the term "City." The reference to the term "Board of Supervisors of the County of Yolo" in Section 6-15.16 of the Yolo County Code shall be to the term "City Council."

34.06.020 Particular Tobacco Retailer Permit Regulations

- A. Section 6-15.02 is amended to add a new definition for “Characterizing Flavor,” with all other definitions to be renumbered and read as follows:
 - (a) “Arm's Length Transaction” means a sale in good faith and for valuable consideration that reflects the fair market value in the open market between two informed and willing parties, neither of which is under any compulsion to participate in the transaction. A sale between relatives, related companies or partners, or a sale for which a significant purpose is avoiding the effect of the violations of this Chapter, is not an Arm's Length Transaction.
 - (b) “Characterizing Flavor” means a taste or aroma, other than the taste or aroma of tobacco, 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, fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb, or spice; provided, however, that a Tobacco Product shall not be determined to have a Characterizing Flavor solely because of the use of additives or flavorings or the provision of ingredient information.
 - (c) “Cigar” means (1) any roll of tobacco wrapped entirely or in part in tobacco or in any substance containing tobacco; or (2) any paper or wrapper that contains tobacco and is designed for smoking or ingestion of tobacco products. For the purposes of this subsection, "cigar" includes, but is not limited to, tobacco products known or labeled as “cigar,” “cigarillo,” “tiparillo,” or “little cigar.”
 - (d) “Department” means the Department of Health and Human Services.
 - (e) “Director” shall mean the Director of the Department of Health and Human Services or her/his written designee.

- (f) “Electronic smoking device” means an electronic device which can be used to deliver an inhaled dose of nicotine, or other substances, including any component, part, or accessory of such a device, whether or not sold separately. "Electronic smoking device" includes any such electronic smoking device, whether manufactured, distributed, marketed, or sold as an electronic cigarette, an electronic cigar, an electronic cigarillo, an electronic pipe, an electronic hookah, or any other product name or descriptor.
- (g) “Flavored Tobacco Product” means any Tobacco Product that contains a constituent that imparts a characterizing flavor to the tobacco product or smoke produced by the tobacco product, either by the addition of artificial or natural flavors or an herb or spice, including menthol, strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, or coffee.
- (h) “Person” means any natural person, partnership, cooperative association, corporation, personal representative, receiver, trustee, assignee, or any other legal entity.
- (i) “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 share ultimate control over the day-to-day operations of a business.
- (j) “Self-Service Display” means the open display of Tobacco Products or Tobacco Paraphernalia in a manner that is accessible to the general public without the assistance of the retailer or employee of the retailer. A Vending Machine is a form of Self-Service Display.
- (k) “Significant Tobacco Retailer” means any Tobacco Retailer whose principal or core business is selling Tobacco Products, Tobacco Paraphernalia, or both, as evidenced by any of the following: (i) twenty percent (20%) or more of floor area and display area is devoted to the sale or exchange of Tobacco products, Tobacco Paraphernalia, or both; (ii) fifty percent (50%) or more of completed sales transactions include a Tobacco Product or Tobacco Paraphernalia; or (iii) sixty-seven percent (67%) or more of gross sales receipts are derived from the sale or exchange of Tobacco Products, Tobacco Paraphernalia, or both.
- (l) “Smoking” means possessing a lighted Tobacco Product, lighted Tobacco Paraphernalia, or any other lighted weed or plant (including a lighted pipe, cigar, hookah pipe, or cigarette of any kind), or the lighting of a Tobacco Product, Tobacco Paraphernalia, or any other weed or plant (including a pipe, cigar, hookah pipe, or cigarette of any kind).
- (m) “Tobacco Paraphernalia” means cigarette papers or wrappers, pipes, holders of smoking materials of all types, cigarette-rolling machines, and any other item designed for the smoking, preparation, storing, consumption or ingestion of Tobacco Products.
- (n) “Tobacco Product” means: (1) any substance containing tobacco leaf, including but not limited to cigarettes, cigars, pipe tobacco, hookah tobacco, snuff, chewing tobacco, dipping tobacco, bidis, or any other preparation of tobacco; (2) any product or

formulation of matter containing biologically active amounts of nicotine that is manufactured, sold, offered for sale, or otherwise distributed with the expectation that the product or matter will be introduced into the human body, but does not include any product specifically approved by the United States Food and Drug Administration for use in treating nicotine or tobacco product dependence; and (3) any electronic device that delivers nicotine or other substances to the person inhaling from the device, including but not limited to an electronic cigarette, cigar, pipe, or hookah;

- (o) “Tobacco Retailer” means any Person who sells, offers for sale, or does or offers to exchange for any form of consideration, tobacco, Tobacco Products, or Tobacco Paraphernalia, or who distributes free or low cost samples of Tobacco Products or Tobacco Paraphernalia, without regard to the quantity of tobacco, Tobacco Products, or Tobacco Paraphernalia sold or offered for sale, exchanged or offered for exchange, or distributed or offered for distribution. "Tobacco Retailing" means the doing of any of these things.
- (p) “Tobacco Retailing Permit Hearing Authority” or “Hearing Authority” means one or more persons assigned by the County Administrative Officer the responsibility of conducting a hearing pursuant to this Chapter, and may hereafter be referred to as the Hearing Authority. The County Administrative Officer shall assign hearing responsibility to any of the following: (1) County management personnel whom the County Administrative Officer finds to be qualified by training and experience to conduct such hearings; (2) any person(s) qualified by training or experience whom the County Administrative Officer may employ or who are retained by contract to conduct such hearings; or (3) Administrative Law Judges assigned by the State Office of Administrative Hearings. The County Administrative Officer is hereby authorized to contract in the name of the County for the retention of hearing services at rates that do not exceed the financial limitations established by the County's annual budget and contracting rules, regulations and policies.
- (q) “Vending Machine” means a machine, appliance, or other mechanical device operated by currency, token, debit card, credit card, or any other form of payment that is designed or used for vending purposes, including, but not limited to, machines or devices that use remote control locking mechanisms.

B. Section 6-15.12, regarding permit revocations, shall read as follows:

Sec. 6-15.12. Revocation of Permit.

- (a) In addition to any other penalty authorized by law, a Tobacco Retailer’s Permit shall be revoked if any court of competent jurisdiction determines, or if the Director finds after the Tobacco Retailer or Permittee is afforded notice and an opportunity to be heard, that the Tobacco Retailer or Permittee, or any of the Tobacco Retailer’s or Permittee’s officers, agents or employees, has violated any of the requirements, conditions, or prohibitions of this Article or, in a different legal proceeding, has pleaded guilty, “no contest” or its equivalent, or admitted to, a violation of any law designated in Section [6-15.10](#).

(b) A Tobacco Retailer's Permit shall be revoked if the Department finds, after the Permittee is afforded reasonable notice and an opportunity to be heard, that one or more of the bases for denial of a Permit under Section [6-15.07](#) existed at the time the Permit application was submitted or at any time thereafter and before the Permit issued. The revocation shall be without prejudice to the filing of a new Permit application.

(c) A decision to revoke a Permit is appealable to the Tobacco Retailing Permit Hearing Authority pursuant to Section [6-15.13](#). If such an appeal is made within the time provided in that Section, it shall stay enforcement of the appealed action.

(d) A notice of revocation shall be personally served on, or sent by certified mail to, the Permit holder. The notice shall state the basis of the Department's determination(s) and the revocation, and shall include an advisement of the right to appeal as set forth in Section [6-15.13](#).

(e) During the period that any permit is revoked, the Proprietor shall prominently display a notice advising the public of the revocation, in the form and in the manner designated by the Department.

(f) After revocation pursuant to subsection (a) above, a new permit may be issued only in accordance with the following:

- (1) After revocation for a first violation of this Article at any location within any sixty- (60) month period, no new Permit may issue for that location, or that Proprietor or other Person, until not less than ten (10) days have passed from the date of revocation.
- (2) After revocation for a second violation of this Article at any location within any sixty- (60) month period, no new Permit may issue for that location, or that Proprietor or other Person, until not less than ninety (90) days have passed from the date of revocation.
- (3) After revocation for a third violation of this Article at any location within any sixty- (60) month period, no new Permit may issue for that location, or that Proprietor or other Person, until not less than one (1) year has passed from the date of revocation.
- (4) After revocation for four or more violations of this Article at any location within any sixty- (60) month period, no new Permit may issue for that location, or that Proprietor or other Person, until not less than five (5) years have passed from the date of revocation.

C. Section 6-15.14, regarding enforcement and violations, shall read as follows:

Sec. 6-15.14. Enforcement: Tobacco Retailing Without a Permit; Tobacco Retailing in Violation of Article.

(a) In addition to any other penalty authorized by law, if the Department finds or any court of competent jurisdiction determines, after notice and an opportunity to be heard, that any Person has engaged in Tobacco Retailing at a location without a valid Tobacco Retailer's license, either directly or through the Person's agents or employees, the Person shall be ineligible to apply for or be issued a Tobacco Retailing license for that location as follows:

- (1) After a first violation of this Article at a location within any sixty- (60) month period, no license may issue for the Person at the location until not less than thirty (30) days have passed from the date of the violation.
- (2) After a second violation of this Article at a location within any sixty- (60) month period, no license may issue for the Person at the location until not less than ninety (90) days have passed from the date of the violation.
- (3) After of a third or subsequent violation of this Article at a location within any sixty- (60) month period, no license may issue for the Person at the location until not less than five (5) years have passed from the date of the violation.

(b) Tobacco Products and Tobacco Paraphernalia offered for sale or exchange in violation of this Article are subject to seizure by the Department or any peace officer, and shall be forfeited after the licensee and any other owner of the Tobacco Products and Tobacco Paraphernalia seized is given reasonable notice by the Department and an opportunity to demonstrate that the Tobacco Products and Tobacco Paraphernalia were not offered for sale or exchange in violation of this Article. The decision by the Department may be appealed pursuant to the procedures set forth in Section [6-15.13](#). Forfeited Tobacco Products and Tobacco Paraphernalia shall be destroyed.

(c) Each day after the effective date of this Article on which Tobacco Products or Tobacco Paraphernalia are offered for sale in violation of this Article shall constitute a violation of this Article separate and apart from any other violation of this Article.

(d) For a first or second alleged violation of this Article within any sixty- (60) month period, the Director may engage in settlement negotiations and, with the City Attorney's concurrence, may enter into a settlement agreement with a Tobacco Retailer alleged to have violated this Article without approval from the City Council. Notice of any settlement shall be provided to the Board, and no hearing shall be held. Settlements shall not be confidential and shall contain the following minimum terms:

- (1) After a first alleged violation of this Article at a location within any sixty- (60) month period:
 - (A) An admission that the violation occurred and a stipulation that the violation will be counted when considering what penalty will be assessed for any future violations;
 - (B) An agreement to stop acting as a Tobacco Retailer for at least one (1) day; and;
 - (C) A settlement payment to the City of at least one thousand dollars (\$1,000).
- (2) After a second alleged violation of this Article at a location within any sixty- (60) month period:
 - (A) An admission that the violation occurred and a stipulation that the violation will be counted when considering what penalty will be assessed for any future violations;
 - (B) An agreement to stop acting as a Tobacco Retailer for at least ten (10) days; and,
 - (C) A settlement payment to the City of at least five thousand dollars (\$5,000).

D. Section 6-15.15, regarding additional enforcement regulations, shall read as follows:

Sec. 6-15.15 Additional Enforcement.

(a) Causing, permitting, aiding, abetting, or concealing a violation of any provision of this Article shall also constitute a violation of this Article.

(b) Violations of this Article may, in the discretion of the District Attorney, be prosecuted as criminal infractions or misdemeanors.

(c) Violations of this Article are subject to a civil action brought by the District Attorney, punishable as follows:

- (1) A fine not less than two hundred fifty dollars (\$250) and not exceeding one thousand dollars (\$1,000) for a first violation in any sixty- (60) month period;
- (2) A fine not less than one thousand dollars (\$1,000) and not exceeding two thousand five hundred dollars (\$2,500) for a second violation in any sixty- (60) month period; or
- (3) A fine not less than two thousand five hundred dollars (\$2,500) and not exceeding five thousand dollars (\$5,000) for a third or subsequent violation in any sixty- (60) month period.

(d) Any violation of this Article is hereby declared to be a public nuisance as well as a private nuisance that is presumed to at least nominally damage each and every resident of the community in which the business operates.

(e) In addition to other remedies provided by this Article or by other law, any violation of this Article may be remedied by a civil action brought by the District Attorney, including but not limited to, administrative or judicial nuisance abatement proceedings, civil or criminal code enforcement proceedings, and suits for injunctive relief.

(f) Any Person, including the C, acting for the interests of itself, its members, or the general public (hereinafter “the Private Enforcer”) may bring a civil action to enforce this Article.

(1) Upon proof of a violation, a court shall award to the Private Enforcer the following:

(A) Damages in the amount of either:

- (i) Upon proof, actual damages; or,
- (ii) With insufficient or no proof of the amount of actual damages, five hundred dollars (\$500) for each violation of this Article (hereinafter “Statutory Damages”). Unless otherwise specified in this Article, each day of a continuing violation shall constitute a separate violation. Notwithstanding any other provision of this Article, no Private Enforcer suing on behalf of the general public shall recover Statutory Damages based upon a violation of this Article if a previous claim brought on behalf of the general public for Statutory Damages and based upon the same violation has been adjudicated, whether or not the Private Enforcer was a party to that adjudication.

(B) Exemplary damages, where it is proven by clear and convincing evidence that the defendant is guilty of oppression, fraud, malice, or a conscious disregard for the public health.

(C) Injunctive Relief.

- (i) Notwithstanding any legal or equitable bar against a Private Enforcer seeking relief on his/her/its own behalf, a Private Enforcer may bring an action to enforce this Article solely on behalf of the general public. When a Private Enforcer brings an action solely on behalf of the general public, nothing about such an action shall

act to preclude or bar the Private Enforcer from bringing a subsequent action based upon the same facts but seeking relief on the Private Enforcer's own behalf.

(ii) Nothing in this Article shall prohibit the Private Enforcer from bringing an action in small claims court to enforce this Article, so long as the amount in demand and the type of relief sought are within the jurisdictional requirements of small claims court as set forth in California Code of Civil Procedure section 116.220.

(g) Whenever evidence of a violation of this Article is obtained in any part through the participation of a Person under the age of eighteen (18) years old, such a Person shall not be required (but shall be permitted) to appear or give testimony in any civil or administrative process brought to enforce this Article and the alleged violation shall be adjudicated based upon the sufficiency and persuasiveness of the evidence presented.

(h) The remedies provided by this Article are cumulative and in addition to any other remedies available at law or in equity.

(i) Any peace officer may enforce the penal provisions of this Article.

Section 2. CEQA. The City Council hereby finds that it can be seen with certainty that there is no possibility the adoption of this Ordinance will have a significant adverse effect on the environment because the Ordinance only updates the City's regulations for the sale of tobacco products, including a new prohibition on the sale of flavored tobacco products. The adoption of this Ordinance is therefore exempt from California Environmental Quality Act review pursuant to Title 14, Section 15061(b)(3) of the California Code of Regulations. because the Ordinance is covered by the general rule common sense exemption that CEQA applies only to projects which have the potential for causing a significant effect on the environment.

Section 3. To the extent the provisions of this Ordinance are substantially the same as previous provisions of the Davis Municipal Code, these provisions shall be construed as continuations of those provisions and not as new enactments.

Section 4. Severability. If any section, subsection, subdivision, sentence, clause, phrase, or portion of this Ordinance is, for any reason, held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Ordinance. The City Council hereby declares that it would have adopted this Ordinance and each section, subsection, subdivision, sentence, clause, phrases, or portion thereof irrespective of the fact that any one or more sections, subsections, subdivisions, sentences, clauses, phrases, or portions thereof be declared invalid or unconstitutional.

Section 5. Effective Date of Ordinance. This Ordinance shall go into effect and be in full force and operation on June 1, 2020.

INTRODUCED on the 25th day of February, 2020, and PASSED AND ADOPTED, by the City Council of the City of Davis this ___ day of March, 2020, by the following votes:

AYES:

NOES:

ABSENT:

Brett Lee
Mayor

ATTEST:

Zoe Mirabile
City Clerk