



To: Contra Costa County Board of Supervisors
From: Daniel Peddycord, RN, MPA/HA, Director of Public Health
Re: Staff Report on Clarification Questions from Family and Human Services Committee
Date: June 13, 2017

On May 24, 2016, the Board of Supervisors directed staff to develop comprehensive ordinances that included fourteen policy options to address youth tobacco influences in the retail environment. The report highlighted how the tobacco retail environment influences youth smoking behavior and described policy options to strengthen the County's ordinance to protect youth from tobacco influences and to help prevent youth from initiating smoking. The Policy Options were developed at the direction of the Family and Human Services Committee, amidst increasing evidence that youth friendly tobacco products were available and sold in Contra Costa County, and that youth are even more susceptible to tobacco advertising and promotions than to peer pressure. The Campaign for Tobacco Free Kids reports that the estimated portion spent for CA tobacco marketing each year is \$592.6 million.¹

A report describing the draft ordinances, presentations to the Planning Commission, and education to tobacco retailers on the draft ordinance provisions, was presented to the Family and Human Services Committee on April 24, 2017. The Committee voted to move the report and ordinances to the full Board of Supervisors for discussion and asked staff to clarify three issues for that discussion. These questions and the Department's responses follow below.

I. The Impact of the Provision that Prohibits the Sale of Flavored Tobacco Products on Cigars.

Background.

The Board directed staff to include a provision that would prohibit the sale of flavored (non-cigarette) tobacco products, such as candy, fruit and spice characterizing flavors in little cigars, hookah tobacco and dissolvable tobacco products, as well as in electronic smoking devices and vapor solutions for these devices. Under the federal Family Smoking Prevention and Tobacco Control Act, it is illegal for manufacturers to make *cigarettes* that contain "characterizing flavors" other than that of tobacco, including flavors such as strawberry, grape, orange, clove, cinnamon, pineapple, and vanilla, coconut, licorice, cocoa or chocolate. The Act was adopted in 2009 largely because these flavored products were attractive and marketed to youth and young adults,^{2,3,4,5} and because younger smokers are more likely to have tried these products than older smokers.⁶

Though there is a federal ban on flavored cigarettes (excluding menthol), flavored non-cigarette tobacco products are not prohibited under federal law, have become increasingly common, and are available in a variety of flavors that appeal to children and young adults.⁷ The U.S. Food and Drug Administration and the U.S. Surgeon General have stated that flavored tobacco products are considered to be "starter" products for youth and help establish smoking habits that can lead to long-term addiction.⁸ Adding flavorings to tobacco products such as little cigars, cigarillos, and smokeless tobacco can mask the natural harshness and taste of tobacco, making these products easier to use and increasing their appeal among youth.⁹



How the Draft Ordinance will impact the sale of cigars.

Ordinance No. 2017-01, Tobacco Product and Retail Sales Control, prohibits the sale of flavored tobacco products in the entire unincorporated county. A "flavored tobacco product" is defined as any tobacco product, other than cigarettes as defined by federal law, that contains a constituent that imparts a characterizing flavor. "Characterizing flavor" is defined as a distinguishable taste or aroma imparted by a tobacco product, or any by-product produced by the tobacco product, that is perceivable by an ordinary consumer by either the sense of taste or smell, other than the taste or aroma of tobacco. A "characterizing flavor" includes, but is not limited to, a taste or aroma relating to a fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, menthol, mint, wintergreen, herb, or spice.

The prohibition on flavored tobacco products includes e-cigarettes, vape pens, e-liquids, snuff, chewing tobacco, little cigars, cigarillos, hookah tobacco, and the vapor solutions for electronic smoking devices as well as other flavored tobacco products that research has shown are attractive to youth and are very often gateway products to a life of tobacco addiction.

Representatives from the tobacco industry have expressed concern over how the prohibition would apply to premium cigar products that are generally sold at a price of \$5 dollars or more for a single item. It is the understanding of staff that cigars of this nature generally do not present with a characterizing aroma or taste that would cause them to be subject to the prohibition on flavored tobacco products. Rather, through research, staff have found these products to present with a characterizing flavor of tobacco. It is the intention of staff to focus attention on those products that are found to have a characterizing flavor other than tobacco, and that a list of these products will be developed for compliance monitoring purposes.

Yolo and Santa Clara Counties and the Cities of El Cerrito and Los Gatos have adopted similar jurisdiction-wide ordinances that prohibit the sale of flavored tobacco products, with Yolo, Santa Clara and Los Gatos prohibiting the sale of menthol cigarettes. Ordinances that prohibit the sale of flavored tobacco products, including menthol cigarettes, have just recently been introduced in the cities of San Francisco and Oakland.

II. The Rationale for requiring a minimum Pack Size of ten (10) for little cigars and cigarillos.

Background.

The Board directed staff to include a provision in the draft ordinance that would require a 10/pack minimum pack size for sale of cigars, including cigarillos and little cigars, because the smaller pack size makes these products cheap and thus more appealing to youth, who are generally a price sensitive market. The draft ordinance exempts premium cigars costing \$5 or more from the pack size provision of the ordinance.

The Food and Drug Administration's Family Smoking Prevention and Tobacco Control Act of 2009, as well as California state law, require a minimum pack size of twenty for cigarettes and banned the sale of single cigarettes. Although the sale of individual cigarettes is banned by federal and state law,¹⁰ neither federal nor state laws restrict the sale of small packs of cigars. These products are typically sold individually or in small packs for as little as 3 for 99 cents, making them more affordable and appealing to youth.¹¹ What is alarming about the trends in tobacco use is that while cigarette use is decreasing, the use of other tobacco products, including cigarillos and little cigars, is increasing.¹² The 2016 Contra Costa

Healthy Stores for a Healthy Community Store Survey showed that 50% of Contra Costa retailers selling tobacco products sell these products as singles.¹³

Rationale for Minimum Pack Size of Ten (10) in the Draft Ordinance.

Ordinance No. 2017-01, Tobacco Product and Retail Sales Control, prohibits the sale of cigarillos and little cigars in pack sizes under 10/pack, as was recommended by Health Services and supported by the Board in May, 2016. The cities of El Cerrito, Hayward, Huntington Park and Sonoma currently require a minimum pack size of 5/pack, and those ordinances were adopted to respond to the preponderance of single cigarillos and little cigars that were offered for sale for as little as 59 cents each or 3-packs for 99 cents. Over the past year, since these ordinances were adopted and since the May 24, 2016 Health Services report to the Board, 5 packs of little cigars and cigarillos are now available for “5 for 99 cents”.

The draft ordinance prohibits the sale of these products in unincorporated Contra Costa in pack sizes under 10/pack. The ordinance does not regulate manufacturing package size. Local jurisdictions have the authority to regulate the minimum package size for sale of tobacco products. The draft ordinance exempts cigars costing \$5 or more from the pack size provision of the ordinance.

III. Potential Impact of 10-year “sun-setting clause” in draft Ordinance No. 2017-10 Tobacco Retailing Businesses on non-conforming use licensed retailers of tobacco products.

Background.

Research has demonstrated that youth are more likely to experiment with tobacco products when retailers are located near schools, and that the number of tobacco retailers in a community affects youth smoking behaviors.¹⁴ The density of tobacco retailers, particularly in neighborhoods surrounding schools, has been associated with increased youth smoking rates.¹⁵ A study of California neighborhoods found that the density and proximity of tobacco retailers influence smoking behaviors, including number of cigarettes smoked per day.¹⁶ Of additional concern, widespread presence of tobacco in retail settings normalizes the use of tobacco products and triggers smoking urges among former smokers and those attempting to quit.¹⁷ Restricting the location of new tobacco retailers near schools and other youth sensitive areas, as well as within a certain distance to each other, reduces tobacco influences in the community. California law limits alcohol licenses based on density, and this policy applies that same rationale to tobacco retailers. The Board of Supervisors directed staff to include two provisions in the draft ordinances to address tobacco retailer density and location:

- 1) Prohibit any new tobacco retailers to be located within 1000 feet of schools, parks, playgrounds, and libraries.
- 2) Prohibit the location of any new tobacco retailers within 500 feet of existing tobacco retailers.

Impact of the “Sun-setting” Clause on current licensed tobacco retailers.

Under draft ordinance No. 2017-10, Tobacco Retailing Businesses Ordinance, existing retailers, within 1000 feet of schools, parks, playgrounds and libraries (or within 500 feet of another retailer), who wish to sell their business as eligible to apply for a new County tobacco retailer license, must sell within ten years of the effective date of the Tobacco Retailing Businesses Ordinance No. 2017-10 for that location to be eligible to apply for a tobacco retail permit and subsequently sell tobacco products. If an existing retailer is located within 1000 feet of a newly established school, park, playground or library, and that existing retailer wishes to sell their business as eligible to apply for a new County Tobacco Retailer License, the business must be sold within ten years of the establishment of the new school, park, playground or library.

The County's *existing* Tobacco Retailer Licensing Ordinance requires retailers that sell tobacco products to renew their license on an annual basis, and prohibits transfer of the license to any other owner or location. *Draft Ordinance 2017-10*, Tobacco Retailing Businesses Ordinance in the Zoning Code allows existing tobacco retailers that are located within 1000 feet of schools, parks, playgrounds and libraries, (or within 500 feet of an existing retailer) to renew their tobacco retailer license annually into perpetuity, as long as they comply with the County's Tobacco Retailer Licensing Ordinance. The 10-year "sun-setting" for non-conforming use, licensed tobacco retailers, was developed to be consistent with the Board's direction to reduce youth tobacco influences in the retail environment.

This provision was developed after studying similar laws in CA, and finding that some jurisdictions in the state with similar laws do not allow existing store sites within 1000 feet of schools, parks, playgrounds and/or libraries that are sold to be eligible for a Tobacco Retailer License at all. According to the CA American Lung Association, nine California jurisdictions enacted similar tobacco retailing density provisions between 2011 and 2015. Three of these jurisdictions prohibit tobacco retailing at the locations after the business is sold (no matter when the sale occurs); one "sunset" the provision at 5 years; and one has a similar 10-year sunset provision. The other 4 jurisdictions allow the location to be sold as eligible to apply for a tobacco retailer license at any time. The 10-year "sunset" clause in the draft ordinance allows retailers the time to develop an alternative business plan, and the County Tobacco Prevention Program has developed a list of resources to help with this.

As of January, 2016, there were a total of 93 licensed tobacco retailers in the unincorporated county, and 48 of these were located within 1000 feet of a school, park, playground, and/or library. Fifty-Seven retailers in the unincorporated county were located within 500 feet of another licensed tobacco retailer, and 13 of these 57 stores were also within 1000 feet of a school. (*note*: There is overlap between the stores located within 1000 feet schools, parks, playgrounds, and /or libraries and stores within 500 feet of another retailer.) As written, each licensed tobacco retailer that exists within these "buffer zones" at the effective date of the draft Zoning ordinance would be operating as "non-conforming" use, and each subject to the 10-year sun-setting clause.

¹ Federal Trade Commission Cigarette Report for 2014. Issued November 2016.

² Carpenter CM, Wayne GF, Pauly JL, et al. 2005. "New Cigarette Brands with Flavors that Appeal to Youth: Tobacco Marketing Strategies." *Health Affairs*. 24(6): 1601–1610;

³ Lewis M and Wackowski O. 2006. "Dealing with an Innovative Industry: A Look at Flavored Cigarettes Promoted by Mainstream Brands." *American Journal of Public Health*. 96(2): 244–251.

⁴ Connolly GN. 2004. "Sweet and Spicy Flavours: New Brands for Minorities and Youth." *Tobacco Control*. 13(3): 211–212.

⁵ U.S. Department of Health and Human Services. 2012. *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General*. Atlanta: U.S. National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, p. 537, www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/full-report.pdf.

⁶ U.S. Department of Health and Human Services. 2012. *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General*. Atlanta: U.S. National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, p. 539, www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/full-report.pdf.

⁷ U.S. Department of Health and Human Services. 2012. *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General*. Atlanta: U.S. National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, p. 164, 205, www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/full-report.pdf; Morris DS and Fiala SC. 2013. "Flavoured, Non-cigarette Tobacco for Sale in the USA: An Inventory Analysis of Internet Retailers." *Tobacco Control*. [Electronic publication ahead of print], <http://tobaccocontrol.bmj.com/content/early/2013/08/08/tobaccocontrol-2013-051059.full>.

-
- ⁸ Food and Drug Administration. 2011. *Fact Sheet: Flavored Tobacco Products*, www.fda.gov/downloads/TobaccoProducts/ProtectingKidsfromTobacco/FlavoredTobacco/UCM183214.pdf; U.S. Department of Health and Human Services. 2012. *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General*. Atlanta: U.S. National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, p. 539, www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/full-report.pdf.
- ⁹ King BA, Dube SR, and Tynan MA. 2013. "Flavored Cigar Smoking Among U.S. Adults: Findings from the 2009–2010 National Adult Tobacco Survey." *Nicotine & Tobacco Research*. 15(2): 608–614; Nelson DE, Mowery P, Tomar S, et al. 2006. "Trends in Smokeless Tobacco Use Among Adults and Adolescents in the United States." *American Journal of Public Health*. 96(5): 897–905.
- ¹⁰ 21 C.F.R. § 1140.14(d); Cal. Penal Code § 308.2
- ¹¹ California Department of Public Health. (2012). *Tobacco in the Retail Environment*, www.cdph.ca.gov/programs/tobacco/Documents/Tobacco%20Retail%20Environment%20Fact%20Sheet_Easy%20Print.pdf
- ¹² Cullen J, Mowery P, Delnevo C, et al. 2011. "Seven-Year Patterns in US Cigar Use Epidemiology Among Young Adults Aged 18-25 Years: A Focus on Race/Ethnicity and Brand." *American Journal of Public Health* 101(10): 1955-1962.
- ¹³ Healthy Stores for a Healthy Community. 2016 Contra Costa County Local Data.
- ¹⁴ McCarthy, W.J., Mistry, R., Lu, Y., Patel, M., Zheng, H., Dietsch, B., Density of tobacco retailers near schools: effects on tobacco use among students. *American Journal of Public Health*, 2009. 99(11): p. 2006 2013.
- ¹⁵ Henriksen L, Feighery EC, Schleicher NC, et al. 2008. "Is Adolescent Smoking Related to Density and Proximity of Tobacco Outlets and Retail Cigarette Advertising Near Schools?" *Preventive Medicine* 47: 210-214.
- ¹⁶ Chuang YC, Cubbin C, Ahn D, et al. 2005. "Effects of Neighbourhood Socioeconomic Status and Convenience Store Concentration on Individual Level Smoking." *Journal of Epidemiology and Community Health* 59: 568-573.
- ¹⁷ McDaniel PA and Malone RE. 2011. "Why California Retailers Stop Selling Tobacco Products, and What Their Customers and Employees Think About It When They Do." *BMC Public Health* 11: 848.

