



**Contra  
Costa  
County**

To: Board of Supervisors  
From: Anna Roth, Health Services Director  
Date: November 12, 2019

Subject: Ordinance No. 2019-34 prohibiting the sale of electronic smoking devices and e-liquids

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**RECOMMENDATION(S):**

INTRODUCE Ordinance No. 2019-34 to prohibit the sale of tobacco vaping products, flavored tobacco products, and menthol cigarettes, and to prohibit the sale or delivery of cannabis vaping products, WAIVE reading, and FIX November 19, 2019, for adoption.

**FISCAL IMPACT:**

There are minimal fiscal impacts associated with the amendment of the Tobacco Retailing Ordinance, as a portion of Prop 56 and 99 funding Contra Costa Health Service receives for its Tobacco Prevention Project could be allocated for implementation.

**BACKGROUND:**

**1. Introduction**

On September 10, 2019, the Board of Supervisors directed staff to prepare an ordinance that would prohibit the sale of vaping products in the unincorporated county to address mounting concerns related to the rapid increase in use of these product by minors and the co-occurring epidemic of serious lung disease that has been linked to the use of vaping devices.

On October 07, 2019, staff presented a report to the Family and Human Services Committee regarding the proposed prohibition on the sale of vaping products. The Committee accepted

☒ APPROVE

☐ OTHER

☒ RECOMMENDATION OF CNTY

☐ RECOMMENDATION OF BOARD

ADMINISTRATOR

COMMITTEE

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Action of Board On: **11/12/2019** ☒ APPROVED AS RECOMMENDED ☐ OTHER

Clerks Notes:

**VOTE OF SUPERVISORS**

AYE: John Gioia, District I Supervisor  
Candace Andersen, District II Supervisor  
Diane Burgis, District III Supervisor  
Karen Mitchoff, District IV Supervisor  
Federal D. Glover, District V Supervisor

I hereby certify that this is a true and correct copy of an action taken and entered on the minutes of the Board of Supervisors on the date shown.

ATTESTED: November 12, 2019

David Twa, County Administrator and Clerk of the Board of Supervisors

By: June McHuen, Deputy

Contact: Rryn Shumacher,  
(925)313-6825

the report and discussed the recommendations presented by staff. The Committee recommended that staff review the FDA approval process for new tobacco products, including e-cigarettes, and to address cannabis vaping products in the proposed ordinance. The Committee further recommended that the proposed ordinance prohibit the sale of flavored tobacco products in the entire unincorporated county.

2.

## BACKGROUND: (CONT'D)

### **Summary of Ordinance No. 2019-34**

Ordinance No. 2019-34 implements the Board of Supervisor's direction to prohibit the sale of vaping products and implements the Family and Human Services Committee's further recommendations regarding flavored tobacco products. Specifically, the ordinance:

- Amends Division 445 (Secondhand Smoke and Tobacco Product Control) of the County Ordinance Code to prohibit the sale of any electronic smoking device or e-liquid that is required to obtain, but has not yet obtained, a premarket review order from the U.S. Food and Drug Administration pursuant to the federal Family Smoking Prevention and Tobacco Control Act.
- Amends Chapter 413-4 (Commercial Cannabis Health Permits) of the County Ordinance Code to prohibit the sale or delivery of any e-liquid that contains tetrahydrocannabinol or any other cannabinoid, and to prohibit the sale or delivery of any electronic smoking device that can be used to deliver tetrahydrocannabinol or any other cannabinoid in aerosolized or vaporized form.
- Amends Section 445-6.006 of the County Ordinance Code to prohibit the sale of flavored tobacco products and menthol cigarettes. Currently, the sale of these products is only prohibited within 1,000 feet of a public or private school, playground, park, or library. The proposed ordinance will make the prohibition effective in all of the unincorporated County.

### **3. Tobacco Vaping Products**

Nationwide, electronic cigarette and electronic smoking device use has increased at alarming rates since the first electronic smoking device products became available about 10 years ago. While there have been many successful efforts to reduce underage tobacco use, the growing availability of electronic cigarettes and flavored tobacco products has reversed positive trends in public health. Electronic cigarettes have often been depicted as an effective cessation device for adults, although the FDA has not approved the product for this use. At a Congressional hearing held by US House Committee on Energy and Commerce in September 2019, Dr. Norman "Ned" Sharpless, the Acting Commissioner of the FDA stated that "e-cigarette products are not safe." Dr. Sharpless went on to state that all electronic cigarettes currently on the market are illegal because they haven't been assessed by the FDA. Additionally, at least one study has concluded that for every additional adult who quits smoking using electronic cigarettes, there are 80 additional youth who initiate daily tobacco use through electronic cigarettes (Soneji et. al. 2018).

The proposed ordinance would prohibit the sale of any electronic smoking device or e-liquid that is required to obtain, but has not yet obtained, a premarket review order from the U.S. Food and Drug Administration pursuant to the federal Family Smoking Prevention and Tobacco Control Act.

To protect the public, especially youth, against the health risks created by tobacco products, Congress enacted the Family Smoking Prevention and Tobacco Control Act

(Act) in 2009. Among other things, the Act authorizes the U.S. Food and Drug Administration (FDA) to set national standards governing the manufacture of tobacco products, to limit levels of harmful components in tobacco products, and to require manufacturers to disclose information and research relating to the products' health effects.

A central requirement of the Act is the FDA's premarket review of all new tobacco products. Specifically, every "new tobacco product"—defined to include any tobacco product not on the market in the United States as of February 15, 2007—must be authorized by the FDA for sale in the United States before it may enter the marketplace. A new tobacco product may not be marketed until the FDA has found that the product is: (1) appropriate for the protection of the public health upon review of a premarket application; (2) substantially equivalent to a grandfathered product; or (3) exempt from substantial equivalence requirements.

In determining whether the marketing of a tobacco product is appropriate for the protection of the public health, the FDA must consider the risks and benefits of the product to the population as a whole, including users and nonusers of the tobacco product, and taking into account the increased or decreased likelihood that existing users of tobacco products will stop using tobacco products and the increased or decreased likelihood that those who do not use tobacco products will start using tobacco products. Where an application is insufficient to show that permitting the new tobacco product would be appropriate for the protection of the public health, the Act requires the FDA to deny the application for premarket review.

Virtually all tobacco vaping products sold today entered the market after 2007 and are considered "new tobacco products," but have not yet obtained a premarket review order from the FDA. In 2017, the FDA issued Guidance that purported to give vaping product manufacturers until August 2022 to submit their application for premarket review. That Guidance further purported to allow unapproved products to stay on the market indefinitely, until such time as the FDA complies with its statutory duty to conduct a premarket review to determine whether a new tobacco product poses a risk to public health. More recently, in May and June 2019, a federal District Court vacated the FDA's 2017 Guidance and ordered that applications for some new tobacco products be filed with the FDA by May 2020. However, it is still not clear how or when the FDA will conduct the required premarket reviews for the numerous unapproved products currently on the market.

The FDA's delay in reviewing tobacco vaping products has allowed manufacturers to introduce and market products that appeal to kids and set the stage for the youth e-cigarette epidemic. Manufacturers have introduced sweet-flavored, high-nicotine products like Juul without any review of their appeal to kids or public health impact. The result was a 135% increase in e-cigarette use among high school students from 2017 to 2019. Unfortunately, nearly all tobacco vaping products (except IQOS) on the market have not obtained a premarket review order and the FDA has not taken appropriate action

to enforce the requirements of the Tobacco Control Act.

#### **4. Cannabis Vaping Products**

The proposed ordinance would prohibit the sale or delivery of any e-liquid that contains tetrahydrocannabinol or any other cannabinoid, and to prohibit the sale or delivery of any electronic smoking device that can be used to deliver tetrahydrocannabinol or any other cannabinoid in aerosolized or vaporized form.

Currently the United States is experiencing a public health crisis as a result of the high number of pulmonary injuries related to vaping which are assaulting our communities in epidemic proportions. As of October 29, 2019, 1,888 cases (the youngest is 13) of electronic cigarette, or vaping, product use associated lung injury had been reported to the Centers for Disease Control and Prevention (CDC) from 49 states, the District of Columbia and 1 U.S. territory. 37 deaths have been confirmed, occurring in 24 states across the nation, with 3 having been confirmed in California. Among 867 patients with information on substances used in electronic cigarettes (as of October 15, 2019), about 86% reported using THC-containing products; 34% reported exclusive use of THC-containing products.

The CDC has recommended that the public not use electronic cigarettes or vaping products that contain THC. The CDC has also recommended that people should not buy any type of electronic cigarette or vaping product, particularly those containing THC, off the street, or modify or add any substances to electronic cigarette or vaping products that are not intended by the manufactory, including products purchased through retail establishments.

The California Department of Public Health, the CDC, and the FDA have released a health alert to inform communities about the health risks associated with vaping any product, including the use of electronic cigarettes, as vaping has been linked to severe breathing problems and lung damage developed in a matter of months or even weeks. The advisory recommends all users to refrain from vaping, no matter the substance or source. Vaping nicotine or cannabis is dangerous and potentially deadly for any user.

After the approval of Proposition 64 in November 2016 that legalized recreational adult use of cannabis in California, Contra Costa County implemented measures to regulate the establishment of commercial cannabis businesses in the unincorporated areas of the County, including the retail sale and delivery of cannabis and cannabis products. Currently, the County is considering eligible proposals for some forms of commercial cannabis businesses.

There is growing evidence of harms associated with youth cannabis use. In a recent systematic review and meta-analysis of studies published in JAMA Pediatrics August 2019, findings revealed a significant increase in the odds of past or current and subsequent cannabis use in adolescents and young adults who used electronic cigarettes. The odds of cannabis use were 3.5 times greater in adolescents and young adults who had

a history of electronic cigarette use compared with individuals who denied use. These findings highlight the importance of addressing the rapid increases in electronic cigarette use among youths to help limit cannabis use in this population. Adolescents (aged 12 to 17 years) exhibited a stronger association between electronic cigarette and cannabis use than those conducted in young adults.

Proposition 64 reserved to local jurisdictions broad authority to regulate commercial cannabis businesses. Specifically, a local jurisdiction may establish standards, requirements, and regulations regarding health and safety in addition to those imposed by the State.

### **5. Flavored Tobacco Products**

Four out of five youth who vape nicotine, vape flavored nicotine (NIH, 2019). Youth who are 15-16 years-old are more likely to use JUUL than any other age group (Truth Initiative, 2019). Given the relationship between vaping and the associated epidemic of serious lung disease staff recommends, consistent with the recommendation from the Family and Human Services Committee, that the sale of flavored tobacco products and menthol cigarettes be prohibited in all of the unincorporated county.

In July 2017, the Board adopted Ordinance No. 2017-01 that, among other things, prohibited the sale of flavored tobacco products and menthol cigarettes within 1,000 feet of a public or private school, playground, park, or library. The proposed amendment extends the prohibition on flavored tobacco products to the entire unincorporated county.

### **CONSEQUENCE OF NEGATIVE ACTION:**

The sale and delivery of electronic smoking devices and e-liquids and the sale of flavored tobacco products in Contra Costa County will continue to negatively impact the health of the community and will continue the expansion of tobacco influence on youth through vape and vaping associated products.

### **CHILDREN'S IMPACT STATEMENT:**

The proposed ordinance would prohibit the sale or delivery of electronic smoking devices and e-liquids and prohibit the sale of flavored tobacco products in the entirety of the entire unincorporated county. The intent of the proposed ordinance is to reduce tobacco influence on youth and the associated negative health impacts.

### **CLERK'S ADDENDUM**

**Speakers: Lynn Silver, UCSF; Nathan Rock, John Swett High School; Greg Kremenliar, NORML; Lauren Groni; Cameron Shotwell; William Latimer; Akshaj Molorotia; Susan Canedeh; Marc Whitlaw; Yanett Torres; Cherise Khaund; Dominic Vines, Courage; Rosa Ceja; Silvia Hinojasa; Francisco Tahuado; Jacquelyn Vera; Jack Parker, Courage; Nicole McNab; Melody Mender; Ali Wohlgemuth; Laura Custodio; Sharell Scales Preston; Erica Costa, American Lung Association; Nabila Sher, AMPD Coalition; Alisa Padon, Public Health institute; Pamela Epstein, Eden Enterprise; Shareef El Sissi, Eden Enterprises; Laurie Light, Garden of Eden; Susan Rock; Mary Jaccodine, CC Tobacco Coalition; Jaime Rich, ADAPT Lamorinda; Margo Connolly, ACS CAN; Kathryn Defen, ADAPT; Blythe Young, American Heart Association; Shameka Bolts; Marcesha Cendir; Jo'Mya**

**Futch; Andrea Rosillo; Kemly Ocampo; Andrea Melendez, YTAPP; Ryan McNevin; Bryan Miller, American Cancer Society; Lori Brenner, American Cancer Society; Kathy Hoyt, ADAPT San Ramon; Nate Landaa; Andrea Hobbs, Eden Enterprises.**

**The following submitted written commentary (attached): Rachel Kincaid, Discovery Counseling Center; Mathew P. White, M.D. and Suzanne Tavano, PhD, Contra Costa Behavioral Health; Matt Light; Marvin Cohen, Sara Bone, Marge Graham, Brad Waite, Kathy Johnson, Stephen Shuss, Rick Young, of Rossmore; Congressman Mark DeSaulnier; Ryan Orihood, Bay Area Community Resources; Jen Grand-Lejano, American Cancer Society; Pamela N. Epstein Esq. LLM, Counsel for Eden Enterprises; parawin; Laura Nathan; Jacob Cogshall; Amy McNamare, Associate Superintendent, Acalanes Union High School District.**

**ATTACHMENTS**

Ordinance No. 2019-34 Redline

Ordinance No. 2019-34 Clean

Family and Human Services Committee Report