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CITY COUNCIL STAFF REPORT

Meeting: August 6, 2019

Subject

Study session regarding policy options to prevent youth access to tobacco products, including flavored tobacco products, and to reduce the density of tobacco retailers.

Recommended Action

Provide direction on policy options to prevent youth access to tobacco products, including flavored tobacco products, and to reduce the density of tobacco retailers.

Background

Tobacco use remains the number one preventable cause of death and disease in California, causing nearly 40,000 deaths in California every year. In Santa Clara County, one in eight deaths annually is attributed to smoking-related illness or diseases, such as cancer, heart disease, and respiratory diseases. More than one in ten youth in the County currently use tobacco products, including electronic smoking devices.

The Santa Clara County's Healthy Cities Program seeks to address these tobacco-related health concerns by promoting policies and practices to provide tobacco-free and smoke-free communities. Currently, Cupertino has adopted four out of 14 recommended tobacco prevention strategies in the Healthy Cities Program (Attachment B). Although the City prohibits smoking in many outdoor areas, it does not require a local tobacco retailer license, prohibit the sale of flavored tobacco products, or place limits on where tobacco retailers may locate. The American Lung Association provides an evaluation of local tobacco control policies through a State of Tobacco Control Report (Attachment C). Cupertino currently has an overall "D" grade on this report, including an "F" grade in the category of reducing sales of tobacco products.

The Santa Clara County Public Health Department (PHD) has provided funding to cities to support tobacco prevention strategies known to have the highest impact on reducing tobacco-related disparities and inequities. As part of this funding, the City of Cupertino received a \$48,608 grant from the PHD to:

1. Explore restricting the sale of flavored tobacco products, including menthol cigarettes.
2. Decrease youth access to tobacco products, such as by prohibiting new businesses from selling tobacco near schools.

3. Explore policies to reduce the density of tobacco retailers.

These tobacco prevention policies have been shown to reduce youth access and exposure to tobacco products. As part of the current grant, the PHD is also providing technical assistance to help Cupertino explore and implement these policies.

The grant from the PHD will enable Cupertino to potentially prevent youth access and exposure to flavored tobacco products and reduce the number of tobacco retailers, while improving the City's tobacco control "grade". Exploring these tobacco control policies is also part of the current City Work Program.

Support from Local Schools

In March, the Fremont Union High School District sent a letter to the City Council requesting that the City pass an ordinance to prohibit retailers near schools from selling e-cigarettes (Attachment D). In May, the Fremont Union High School District (FUHSD) Board of Trustees passed a resolution indicating that they support and encourage local cities to restrict the sale of tobacco products in order to prevent youth access and use (Attachment E). The resolution specifically encourages prohibiting the sale of flavored tobacco products and reducing the concentration and density of tobacco retailers, particularly near schools and other youth-sensitive areas.

Discussion

To reduce youth access to tobacco products, staff is exploring the following best practices:

1. Prohibiting the sale of flavored tobacco products, including menthol cigarettes, throughout the City
2. Reducing the availability of tobacco by:
 - Prohibiting new tobacco retailers from locating within a certain distance from schools or other youth-sensitive areas (e.g. 1,000 feet).
 - Prohibiting new tobacco retailers from locating within a certain distance from existing tobacco retailers (e.g. 500 feet) or capping the total number of tobacco retailers by population.
 - Prohibiting the sale of tobacco products at pharmacies.

These options are discussed in more detail below with information regarding health impacts, existing laws in other jurisdictions, potential arguments from opposing viewpoints, and options for implementation and enforcement. It is worth noting that some jurisdictions have recently passed more comprehensive restrictions on the sale of tobacco products. In June 2019, Beverly Hills voted to prohibit the sale of all tobacco products (with an exception for hotels and high-end cigar clubs/lounges). In San Francisco and Livermore, the sale of all e-cigarettes will be prohibited in 2020, not just flavored products. While these more restrictive options are available, the focus of this report will be on the options outlined above which are more common and are endorsed by the PHD's Healthy Cities campaign.

1. Prohibiting the Sale of Flavored Tobacco Products

The most comprehensive approach to addressing the availability of flavored tobacco and nicotine products is to prohibit the sale of such products in the City. Such a prohibition would apply to flavored e-cigarettes, e-liquids, flavored cigars, little cigars, flavored hookah, and menthol cigarettes. E-liquids are nicotine solutions that are used with e-cigarettes. These liquid solutions are available in dozens of flavors that are attractive to youth, such as gummy bear and cotton candy.

As of May 2019, 35 communities in California have passed laws to restrict the sale of flavored tobacco products (Attachment F). Most of the recently-adopted laws include a complete prohibition on the sale of flavored tobacco products, including menthol cigarettes. In Santa Clara County, Los Gatos, Palo Alto, Saratoga, and the unincorporated County prohibit the sale of flavored tobacco products. Morgan Hill and Sunnyvale have received funding from the Santa Clara County Department of Public Health to consider flavored tobacco bans during the next two years. However, some local governments have adopted less comprehensive laws, making concessions that limit the impact of the laws (Attachment F). These exceptions include:

- Exempting menthol cigarettes.
- Exempting tobacco stores that do not allow minors.
- Grandfathering existing retailers.
- Limiting the restriction on flavored tobacco products to areas around youth-oriented locations, such as schools are parks.

In Santa Clara County, Los Gatos, Palo Alto, and the unincorporated County exempt tobacco stores that do not allow minors. In Saratoga, menthol cigarettes are exempted. From a public health perspective, none of these less comprehensive options are recommended for various reasons. In particular:

- Menthol cigarettes are widely used by youth and young adults and are considered a “starter” product for minors.
- Exempting tobacco stores that do not allow minors creates an uneven playing field for retailers. Data indicates that specialty tobacco stores illegally sell to minors at rates higher than other types of retailers.
- Grandfathering existing tobacco retailers undermines the effectiveness of the policy since it would not address the current availability of flavored tobacco products in the City.
- Limiting flavored tobacco restrictions to stores around schools also creates an uneven playing field for retailers and does not account for the reality that minors live and spend time throughout the community, not just near schools.

As mentioned above, recent laws passed by California communities typically include a complete prohibition on the sale of flavored tobacco products in the jurisdiction.

Flavored tobacco products are considered “starter” products for youth who begin to use tobacco, establishing tobacco habits that can lead to long-term addiction. Nearly 81% of youth ages 12 to 17 who use tobacco products report that the first product they used was flavored.

Although federal law prohibits the sale of candy- and fruit-flavored cigarettes, this law does not prohibit the sale of menthol cigarettes or flavored, non-cigarette tobacco products, such as cigars, little cigars, smokeless tobacco, hookah tobacco, electronic smoking devices, and the e-liquid used in these devices.

In Santa Clara County, 93% of tobacco retailers sell menthol cigarettes and nearly 80% of tobacco retailers (including those near schools) sell flavored, non-cigarette tobacco products. In a 2016 survey, 62% of Santa Clara residents surveyed would support banning the sale of flavored tobacco products such as menthol cigarettes and fruit-flavored little cigars (Attachment G).

2. Reducing the Availability of Tobacco Products

Many communities are looking for strategies to reduce the availability of tobacco products in order to reduce youth access to such products. These restrictions can also help target enforcement of tobacco control laws and reduce perceptions that tobacco use is normal. The City could apply one or more strategies to gradually reduce the number of licensed tobacco retailers.

A. Limiting Tobacco Retailer Density

One of the strategies is to limit tobacco retailer density. This can be done by prohibiting new tobacco retailers within a certain distance of schools or other youth-oriented facilities. For example, a potential regulation could be that tobacco retailers may not locate within 1,000 feet of schools or playgrounds. Another option is to prohibit new tobacco retailers within a certain distance of existing tobacco retailers. A limit could be placed on the total number of tobacco retailers either as a citywide cap or according to population size. For example, a potential regulation could be that no more than one tobacco retailer per 2,500 people is allowed.

As of September 2016, 51 local governments in California restrict the location of tobacco retailers within a certain distance of schools. The most common buffer zone in such laws is 1,000 feet. However, some communities have customized the policy by choosing a different buffer zone and/or adding additional youth-oriented locations, such as childcare facilities, youth centers, libraries, playgrounds, parks, and recreational facilities. In Santa Clara County, Gilroy, Los Gatos, Palo Alto, Saratoga, and the unincorporated County restrict the location of new tobacco retailers. All of these jurisdictions require that tobacco retailers have a 1,000-foot buffer from schools. Saratoga extends the 1,000-foot buffer to City-owned parks as well. With the exception of Gilroy, these jurisdictions also require that new tobacco retailers must be at least 500 feet away from other tobacco retailers.

Research has shown that the density of tobacco retailers is associated with increased youth smoking rates, particularly in neighborhoods around schools. Tobacco retailers near schools with high smoking rates have also been shown to have lower cigarette prices and more in-store promotions. A high density of tobacco retailers has been associated with increased smoking rates, particularly among youth. A study of California neighborhoods found that the density and proximity of tobacco retailers influenced smoking behaviors, including number of cigarettes smoked per day. Excessive tobacco retailer density may exacerbate disparities in tobacco use and tobacco-related harm. Research also shows that the presence of tobacco in retail settings normalizes the use of tobacco products and triggers smoking urges among former smokers and those attempting to quit.

A 2016 survey of Santa Clara County residents found that nearly 88% of respondents would support a policy to prevent stores near schools from selling tobacco products, including e-cigarettes, and that 75% would support a limit on where tobacco retailers can be located (e.g., at least 500 feet from existing tobacco retailers) (Attachment G).

B. Prohibiting Tobacco Sales in Pharmacies

Another strategy to reduce the availability of tobacco products is to prohibit the sale of tobacco products by a certain type of retailer, such as pharmacies. Twenty-three communities across the state prohibit the sale of tobacco in pharmacies. In Santa Clara County, Los Gatos, Palo Alto, Saratoga, and the unincorporated County prohibit the sale of tobacco products in pharmacies. Notably, CVS discontinued the sale of tobacco in pharmacies in 2014. Research has shown that cigarette purchases declined nationally after CVS implemented its policy change and that smokers who had previously purchased their cigarettes exclusively at CVS were more likely to stop buying cigarettes entirely.

Sales of tobacco products in pharmacies may present an inherent conflict of interest and send mixed messages about the health risks posed by tobacco. By selling tobacco products, pharmacies reinforce positive social perceptions of smoking, convey implied approval of tobacco use, and may send a message that it is safe to smoke. The Tobacco Education and Research Oversight Committee for California, the American Pharmacists Association, the California Pharmacists Association, and the California Medical Association have called for the adoption of state and local prohibitions of tobacco sales in drug stores and pharmacies.

Research has shown that more than 95% of consumers have said they would continue shopping at drugstores that became tobacco-free much or more often. A 2016 survey found that 80% of Santa Clara residents would support a ban on the sale of tobacco products in pharmacies (Attachment G). Communities that have adopted policies prohibiting tobacco sales in pharmacies have experienced up to three times greater reduction in tobacco retailer density compared with communities without such policies, even after controlling for the presence of policies restricting tobacco density and location.

Legal Authority

California local governments have the legal authority to prohibit the sale of flavored tobacco products, restrict the location of tobacco retailers, and prohibit the sale of tobacco products in pharmacies.

Three communities outside of California were sued after adopting laws to prohibit the sale of flavored tobacco products: Providence, Rhode Island; New York, New York; and Chicago, Illinois. Courts in all three of these cases upheld local laws, finding that the laws were not preempted by the Family Smoking Prevention and Tobacco Control Act. No communities in California have been sued over a flavored tobacco product restriction. After the City and County of San Francisco adopted a prohibition on the sale of flavored tobacco products, the tobacco industry sponsored a ballot initiative requiring voters to ratify and uphold the law. This initiative was approved by voters in June 2018 and San Francisco's law is currently in effect.

In California, there have been three legal challenges to laws prohibiting the sale of tobacco products in pharmacies. In 2009, the City and County of San Francisco was sued by both Philip Morris and Walgreens after adopting a tobacco pharmacy law that contained an exemption for grocery stores and big box stores. The Philip Morris lawsuit, which claimed that a prohibition on tobacco sales in pharmacies violated their freedom of speech, was dismissed. In the Walgreens lawsuit, the court agreed that the law's exemptions violated the Equal Protection clause of the U.S. Constitution. After the court's decision, San Francisco amended its law to include grocery and big box stores in the pharmacy ban. Following this amendment, Safeway filed a lawsuit against San Francisco under the Due Process Clause of the Fourteenth Amendment, arguing that the City's prohibition on the sale of tobacco products in all pharmacies deprived Safeway from property rights by forcing its pharmacy business to discontinue tobacco sales. However, the court determined that San Francisco's ordinance was a permissible use of the City's police power and did not violate the Fourteenth Amendment. There have been no subsequent legal challenges to local bans on tobacco sales in pharmacies. Similarly, the City is not aware of any legal challenges to local laws restricting the location of tobacco retailers.

Potential Opposition Arguments

The tobacco control policies being considered by Cupertino are part of a comprehensive tobacco control strategy recommended by the PHD and adopted by dozens of other cities and counties across California. Although some communities have received opposition to proposed policies, elected officials ultimately adopted the laws in order to protect public health and, in particular, to protect youth from the trends of vaping and e-cigarettes.

Three of the most common opposition arguments to these policies are listed below, along with potential responses.

1. **Argument:** Additional government regulation is not needed in this area.

- Response:** Despite existing state and federal laws, there is an epidemic of youth e-cigarette use. Schools are seeing the effects of e-cigarette use by teenagers and calling on the City to take action.
2. **Argument:** E-cigarettes are an important tool to help adults quit smoking.
Response:
- The proposed policies are limited to the sale of flavored tobacco products. While flavors can appeal to people of all ages, children and adolescents have a higher preference for sweet flavors and use flavored e-cigarettes more than adults.
 - E-cigarettes are not approved by the Food and Drug Administration (FDA) as a smoking cessation device and no manufacturer of e-cigarettes has applied to be an approved and effective smoking cessation treatment.
 - Adult e-cigarette users will still have access to non-flavored e-liquids, and those wishing to quit have a range of FDA-approved cessation therapies to choose from.
3. **Argument:** The proposed policies would hurt local businesses
Response:
- Retailers in permissible areas will still be able to sell tobacco products, just not the flavored tobacco products that have been proven to appeal to youth.
 - Existing retailers located within the restricted buffer zones around schools, etc., would be allowed to continue to operate (although such stores would no longer be able to sell flavored tobacco products, as mentioned above).

For additional information on these and other topics, see *Tough Questions on Flavored Tobacco Products* from the Center for Tobacco Policy and Organizing (Attachment H).

Proposed Outreach

The City will solicit input from local school districts, residents, and businesses on the proposed tobacco control policy options. All of the outreach will be funded by the grant from the PHD. The following methods of outreach are recommended to inform the public and to solicit feedback on the proposed policy options:

1. Teen Commission and Public Safety Commission
 - Staff will present the various policy options to the Teen Commission and the Public Safety Commission to receive input. Once proposed regulations are developed, staff will return to these Commissions for a recommendation to Council.

2. Online Survey
 - A survey about potential policy options will be created and posted using Open City Hall. The survey will ask about support for the proposed tobacco control policy options as well as whether respondents believe that flavored tobacco products are easy for youth to obtain.
 - The survey will be open for 30-60 days.
 - The survey will be advertised through the City's website, Next Door, the City's social media accounts, and a mailer to all City residents and businesses (including tobacco retailers). The City will work with local school districts to distribute the survey to their students and parent communities as well.
3. Community Forums
 - Two or more community forums will be held to solicit input from residents, visitors, employees, and business owners on the proposed tobacco control policy options.
 - The City will work with local school districts to conduct some of these forums at school sites to better engage students and parents.
 - These forums will be advertised through methods similar to the online survey (see above).
4. Mailers: The City will send two Citywide mailers to all residents and businesses:
 - The first mailer will notify residents and businesses of the potential policies under consideration and will provide information on the online survey, the dates of the community outreach meetings (as available), and information on how to sign up to receive updates on the topic.
 - If the Council adopts new tobacco control policies, a second mailer will be sent informing residents and businesses of the new law.

Implementation and Enforcement

Typically, communities adopt a restriction on the sale of flavored tobacco products and on the location and type of tobacco retailers as a condition of a local tobacco retailer license (TRL). Although the State of California requires a license to sell tobacco products, more than 150 cities and counties also require a local TRL. A local TRL is generally adopted to:

- Create more comprehensive restrictions than State law on the sale or marketing of tobacco products in the retail environment;
- Allow for meaningful penalties for violation of tobacco control laws, such as license suspension; and
- Help fund local enforcement of tobacco control laws through the local licensing fee.

Cupertino does not currently require a TRL. Although it is possible to adopt a prohibition on the sale of flavored tobacco products without a local TRL, the City would not have a dedicated source

of funding to monitor compliance with the flavored tobacco restrictions. Currently, all but two of the 35 California communities that restrict the sale of flavored tobacco products also require a tobacco retailer license.

Restrictions on the location of tobacco retailers may be adopted as a component of a local tobacco retailer license or as independent requirements, such as amendments to the zoning code. New retailers within prohibited areas (e.g. 1,000 feet of schools) would be ineligible for a tobacco retailer license. Attrition would be required to reduce the number of existing tobacco retailers based on location or density. As existing businesses close or change the nature of their business, new businesses in those locations would not be eligible for a license.

A prohibition on the sale of tobacco products in pharmacies could also be included as a condition of a local tobacco retailer license or as a stand-alone requirement. Existing pharmacies would be given a grace period to discontinue the sale of tobacco products.

Most communities that have adopted a restriction on the sale of flavored tobacco products delay the effective date of the ordinance by approximately six months. This grace period gives the cities an opportunity to educate retailers and to allow retailers to sell their existing inventory of flavored tobacco products. As of the ordinance's effective date, retailers would no longer be able to sell flavored tobacco products. A violation of the law would also constitute a violation of the retailer's tobacco license, if a local license is required.

Santa Clara County is willing to partner with the City of Cupertino to administer, implement, and monitor its tobacco retailer licensing law if the City adopts a TRL that mirrors the County's requirements below. To cover the costs of the program, the County typically collects a \$425 license fee paid by tobacco retailers. The cost of the license in Cupertino would be calculated to reflect the costs to administer and enforce the program. To participate, Cupertino's TRL ordinance must include the following:

1. Require retailers to obtain and annually renew a tobacco retailer license.
2. Require retailers to post a notice saying that the sale of tobacco products to anyone under 21 years of age is illegal and subject to penalties.
3. Require retailers to check the identification for any purchaser who appears to be under 30 years of age
4. Prohibit the sale of tobacco products from a vending machine.
5. Prohibit retailers from covering more than 15% of windows and clear doors with any type of ads or signs.
6. Prohibit the sale of flavored tobacco products, including menthol cigarettes
7. Prohibit new tobacco retailers from locating within 1,000 feet of a school (existing retailers within this radius may continue to sell tobacco products assuming they are operating lawfully, renew their TRL on time, and do not transfer ownership).

8. Prohibit new tobacco retailers from locating within 500 feet of another tobacco retailer (existing retailers in these locations may continue to sell tobacco products assuming they are operating lawfully, renew their TRL on time, and do not transfer ownership).
9. Prohibit the sale of tobacco products from pharmacies.
10. Prohibit mobile tobacco retailing or tobacco retailing at a temporary event.

Conclusion

The City has the opportunity to help prevent youth from using tobacco by prohibiting the sale of flavored tobacco products and reducing the availability of tobacco in the City. These policies would demonstrate the City's commitment to protecting the health of its residents, and would improve the City's performance on the County's Healthy Cities Initiative and the American Lung Association's State of Tobacco Control grades.

Sustainability Impact

No impact.

Fiscal Impact

The City has been awarded \$48,608 to cover the costs of developing the proposed regulations and conducting the associated outreach. No additional funding is requested at this time. There may be additional funding requirements for implementation and enforcement depending which policy options the Council chooses. Additional allocation of resources will be proposed based on Council's preference for a specific program, if needed. If the City adopts the County's regulations, the County will implement and enforce the City's program at no cost to the City. The County would recover costs through charging a fee of approximately \$425 for the Tobacco Retailer License.

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Attachments:

- A – Tobacco Free Communities Policies in Santa Clara County
- B – Healthy Cities Program 2018 Cupertino Dashboard
- C – American Lung Association Report Card
- D – Letter to Cupertino City Council from FUHSD
- E – FUHSD Resolution 1819-21
- F – Matrix of 35 Local Ordinances Restricting Flavored Tobacco
- G – Healthy Stores for a Healthy Community 2016 Survey
- H – Tough Questions on Flavored Tobacco Products