



## CITY MANAGER'S OFFICE

CITY HALL  
10300 TORRE AVENUE • CUPERTINO, CA 95014-3255  
TELEPHONE: (408) 777-3223 • FAX: (408) 777-3366  
CUPERTINO.ORG

## CITY COUNCIL STAFF REPORT

Meeting: February 4, 2020

### **Subject**

First reading of Municipal Code Amendments to the Cupertino Municipal Code, repealing and replacing Cupertino Municipal Code Chapter 5.50 of Title 5 (Business Licenses and Regulations), adopting new policies to regulate the sale of tobacco, such as prohibiting the sale or distribution of electronic cigarette products, extending the look-back period for permit suspensions from 24 months to 60 months, requiring a minimum age for individuals selling tobacco products, and amending the administrative appeal process for permit violations.

### **Recommended Action**

1. Conduct the first reading of Ordinance No. 20-\_\_\_\_: "An ordinance of the City Council of the City of Cupertino repealing and replacing Chapter 5.50 of Title 5 (Business Licenses and Regulations) to regulate the sale of tobacco products";
2. Find that the proposed actions are exempt from CEQA.

### **Background**

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 implement tobacco prevention policies that have been shown to reduce youth access and exposure to tobacco products. Exploring these tobacco control policies is also part of the current City Work Program.

On November 5, 2019, the City Council conducted the first reading of Ordinance No. 19-2190 that prohibits the sale of flavored tobacco products and, among other requirements, requires that retailers in the City obtain a local tobacco retailer permit. On that same day, Santa Clara County also made amendments to their tobacco ordinance, including a ban on the sale of electronic cigarette/vaping products. Councilmembers expressed general support for similar amendments and directed staff to bring back an ordinance conforming to the County's ordinance after conducting additional, abbreviated outreach to the community and retailers within the City. If the City adopts an ordinance that mirrors the County's, the County will oversee the administration and enforcement of the City's tobacco ordinance.

On November 19, 2019, the City Council approved and enacted Ordinance No. 19-2190 with the expectation that staff would return with an updated ordinance including conforming amendments consistent with the County.

### **Discussion**

While the County made a variety of changes in their most recent amendments, the most significant change was the ban on the sale of electronic cigarette (e-cigarette) products, including vaping products. Electronic cigarette products include any devices, accessories, or liquids that can be used to deliver nicotine in an aerosolized or vaporized form. Recent studies have shown that middle school and high school youth are using e-cigarette products at a rapidly increasing rate. According to a survey funded by Santa Clara County, nearly 1 in 3 Santa Clara County teens – 31.6 percent – reported that they have used an e-cigarette at least once. E-cigarettes were the most popular tobacco product, with approximately one out of seven high school students (13.2%) currently using them in Santa Clara County. Susceptibility of future e-cigarette use among Santa Clara County teens is high: 2 in 5 students (40.1%) who had never used a tobacco product said they would use one if offered by a best friend and more than 1 in 4 high school students (28.0%) reported that they had been offered a tobacco product in the past month. In addition to the high e-cigarette exposure among youth, there have been several unexplained pulmonary illnesses associated with e-cigarette products. As of October 15, 2019, 1,479 cases of acute lung injury, including 33 deaths, had been reported to the Centers for Disease Control and Prevention (CDC).

The proposed ordinance, if adopted, will significantly reduce youth access to e-cigarette products and the associated risk of addiction, illness, and death. Santa Clara County, Los Gatos, and Morgan Hill have adopted bans on the sale of e-cigarette products. Los Altos, San Jose, Palo Alto, and Saratoga are exploring adopting a similar ban.

In addition to the ban on the sale of electronic cigarette products, the proposed ordinance includes the following amendments to conform with the County:

- New definitions of key terms and incorporation of definitions applicable;
- A requirement that individuals selling tobacco products must be at least 21 years old, consistent with the minimum age to purchase tobacco products as established by state law;
- Clarification that the ordinance applies to both the sale and distribution of tobacco products;
- Clarification that flavored tobacco products include mint and menthol products;
- Clarification of the enforcement and appeals process to be consistent with current practice in enforcement by the County. This includes increasing the “look-back” period for permit suspension from 24 months to 60 months. The look-back period is the window of time in which violations are accumulated and is used to determine whether it is a first, second, or subsequent violation.

### **Administration and Enforcement**

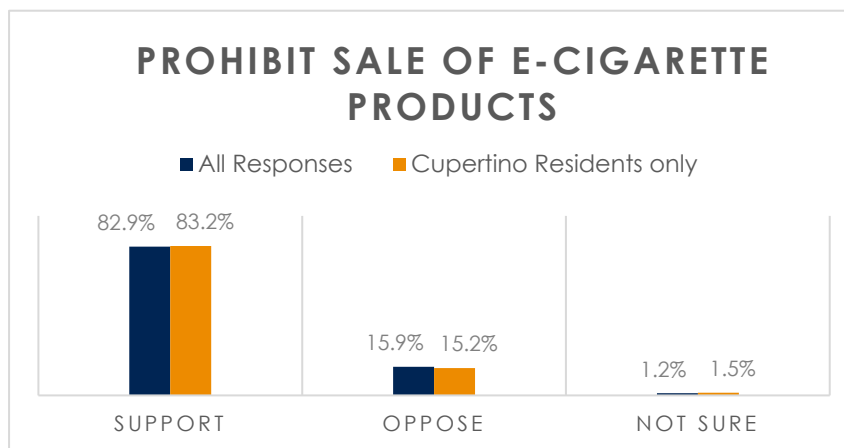
If the City adopts these ordinance elements to match the County's ordinance, the County's Department of Environmental Health will continue to administer, implement, and enforce Cupertino's ordinance. This would include monitoring retailers for compliance with tobacco control laws and decoy operations to determine if retailers are illegally selling tobacco products to underage individuals. The specific roles, responsibilities, and protocols for such administration and enforcement would be established in a Memorandum of Understanding (MOU) between the City and the County in the coming months. To allow time for the City and County to enter into this MOU and for retailers to sell down existing product, the proposed operative date for the ordinance's proposed requirements on tobacco retailers is July 1, 2020, at which time all provisions and penalties shall be enforceable as to tobacco retailers.

### Outreach

Staff conducted outreach on the proposed amendments to the tobacco ordinance from November 2019 to January 2020. This outreach effort involved a communitywide survey, a community meeting, and outreach to the business community.

#### 1. Online Survey

Staff posted an online survey through OpenGov from November 25, 2019 – January 6, 2020, in order to gather feedback from the community about the proposed ban on the sale of e-cigarette/vaping products. The survey was advertised through the City website, social media, email notifications, and the December Scene. Members of the public were also encouraged to take the survey at the tobacco policies community meeting held on December 18, 2019. The survey received 246 responses. For a full summary of responses please see Attachment C. Below are the responses to the proposed ban on e-cigarette products:



As seen in the chart above, the majority of respondents (82.9%) were in favor of the proposed e-cigarette ban. Of the 246 total respondents, 197 respondents identified that they lived in Cupertino, and are represented by the orange column above. Survey results for those 197 respondents were almost identical to the overall responses. The survey also allowed respondents to provide additional comments and the survey received 76 comments. Fifty-four of those comments were in support of the proposed policies, while 14 were

opposed. Four of the commenters in opposition were mainly concerned that this ban would take away an adult's right to choose and felt e-cigarettes were a healthier alternative to traditional cigarettes. The claim that e-cigarettes are a healthier alternative to traditional cigarettes is a topic of debate and has not been confirmed by the Food and Drug Administration. Many of the 54 supportive commenters indicated that they are pleased that the City is helping to reduce youth access to tobacco.

## 2. Community Meeting

The City hosted a community meeting on December 18, 2019 to gather feedback on the proposed ban on the sale of e-cigarette/vaping products. A total of 8 community members attended. A couple comments were raised regarding the lack of tobacco regulations in Sunnyvale since someone could go across city limits to purchase e-cigarette products. One attendee commented that they felt prohibition was much more dangerous than legal vaping products. Another attendee mentioned that after the flavored tobacco ban, the e-cigarette ban seemed obvious and wondered why they had not been banned already. A couple attendees expressed strong support for the e-cigarette ban. To view the feedback received at this community meeting, please see Attachment D.

Four attendees were local tobacco retailer representatives. They expressed that a ban on the sale of e-cigarette products would be unfair to law-abiding businesses. They also expressed concern with the potential of not being allowed to continue selling any kind of tobacco products as they had stores located within 1,000 feet of schools. Under the current ordinance, new tobacco retailers cannot locate within 1,000 feet of schools, however, existing retailers within 1,000 feet of schools are exempt and may continue to sell tobacco products, provided that the retailers obtain a permit prior to July 1, 2020 pursuant to the requirements of this ordinance. They expressed their concerns that removing this exemption would negatively affect their sales. For example, a customer that comes in to purchase tobacco products will also typically purchase other goods, such as coffee, while they are there. Here is an excerpt from written feedback from a 7-Eleven store manager describing how tobacco sales encourage other sales such as coffee:

"I think [not grandfathering existing businesses within 1,000 feet of schools] would really put undue burden on businesses [that have been] operating next to schools for years and years. I have many adult customers, who stopped by my business in the morning to buy coffee along with smoke. Due to [the] minimum wage increase, we [are] already struggling on [a] daily basis to survive but [without the grandfathering exemption], I will lose many more of my coffee customers and I would be in [a] position where I have to close my business and leave many people unemployed." To view the entire comment, and other feedback received from the community, please see Attachment D.

Under the proposed ordinance, the exemption to grandfather in existing retailers within 1,000 feet of schools remains unchanged. Retailers that are currently within 1,000 feet of schools would be allowed to continue selling tobacco products assuming they comply with the

remaining provisions of the ordinance. For example, they would need to maintain a valid tobacco retailer permit and would still be prohibited from selling flavored tobacco products and e-cigarette products.

### 3. Business Outreach

In order to reach the City's existing tobacco retailers, a letter was mailed to each of the 23 tobacco retailers in the City. The letter included information on the recently adopted policies and information on the proposed amendments. This letter also invited retailers to the community meeting and to take the survey. As a follow-up, City staff hand-delivered the same letter to each retailer to ensure that it was received and to gather any feedback on the policies. Most managers and/or employees said that they were expecting this after the ban on flavored tobacco products. A 7-Eleven store manager stated that if the City chooses to not grandfather existing businesses within 1,000 feet from schools then those retailers should receive reasonable compensation for the loss of sales. Paul and Eddie's Monte Vista Inn, Marina Food, Rite Aid, and the two 99 Ranch Market locations reported that they do not sell e-cigarette products. The Walgreens store manager reported that all Walgreens stores will stop selling e-cigarettes completely by May 2020. The Deep Cliff Golf Course reported that they no longer sell tobacco products of any kind. The Bateh Brothers liquor store reported that they were closing.

City staff sent out an additional letter due to the County's decision to include the requirement that all sales clerks selling tobacco must be the legal age to purchase tobacco. After visiting stores regarding this topic, it was discovered that existing retailers already practice this and tend not to hire people under 21 years old. Marina Food and the two 99 Ranch Market locations explained that they have their tobacco behind the customer service desk and that only the store managers sell behind that counter. According to the Public Health Law Center, underage clerks are more likely to sell tobacco products to their underage peers and having a minimum clerk age can reduce an underage clerk's exposure to tobacco products.

City staff also attended the Cupertino Chamber of Commerce's Legislative Action Committee (LAC) meeting on December 6, 2019. The City received feedback in support of these policies and answered the LAC's questions regarding enforcement and implementation. One member mentioned that Apple recently removed all apps that sold e-cigarette/vaping products from their app store and appreciated that the City is also working on this issue. One member was against the e-cigarette ban because he believed that e-cigarettes were a healthy alternative to traditional cigarettes. Overall, the LAC was generally supportive of the City's proposed policies to reduce youth access to tobacco.

### CEQA Exemption

The proposed ordinance is not a project within the meaning of section 15378 of the California Environmental Quality Act ("CEQA") Guidelines because it has no potential for resulting in physical change in the environment; and further find that in the event that this Ordinance is found to be a project under CEQA, it is subject to the CEQA exemption contained in CEQA Guidelines

section 15061(b)(3) because it can be seen with certainty to have no possibility of a significant effect on the environment.

#### Conclusion and Next Steps

The City has the opportunity to help prevent youth from using tobacco by prohibiting the sale of e-cigarette/vaping products. Adopting the proposed ordinance would demonstrate the City's commitment to protecting the health of its residents. For these reasons, it is recommended to adopt the proposed ordinance. Adopting these conforming amendments will also allow the City to continue the partnership with Santa Clara County and receive permit administration and enforcement support.

#### Sustainability Impact

No impact.

#### Fiscal Impact

The City was 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. 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 annually for the tobacco retailer permit and a one-time application fee of \$340.

---

Prepared by: Katy Nomura, Assistant to the City Manager  
Astrid Robles, Management Fellow

Reviewed by: Dianne Thompson, Assistant City Manager

Approved for Submission by: Deborah Feng, City Manager

#### Attachments:

- A – Draft Ordinance to Regulate the Sale of Tobacco Products
- B – Draft Ordinance to Regulate the Sale of Tobacco Products Redline
- C – Survey Results
- D – Community Feedback
- E – Tobacco Free Communities Policies in Santa Clara County