



COUNTY OF SAN DIEGO

AGENDA ITEM

BOARD OF SUPERVISORS

GREG COX
First District

DIANNE JACOB
Second District

KRISTIN GASPAR
Third District

NATHAN FLETCHER
Fourth District

JIM DESMOND
Fifth District

DATE: January 14, 2020 and January 28, 2020

04

TO: Board of Supervisors

SUBJECT

AN ORDINANCE ADDING PROVISIONS TO TITLE 3, DIVISION 2 OF THE SAN DIEGO COUNTY REGULATORY CODE REGARDING SMOKING RELATED PROHIBITIONS IN THE UNINCORPORATED AREA OF THE COUNTY (DISTRICTS: ALL)

OVERVIEW

On October 15, 2019 (2), the San Diego County Board of Supervisors (Board) authorized staff to develop recommendations to prohibit the sale and distribution of all flavored products for “smoking” as defined by State law; establish a one-year moratorium on the sale and distribution of all electronic smoking devices; and prohibit “smoking,” as defined by State law, in outdoor dining patio areas, to include a buffer zone outside of outdoor dining patio areas. County of San Diego (County) staff has developed the proposed ordinance as directed. The goals of the three policy priorities are to help address 1) the public health crisis, resulting from e-cigarette or vaping-associated pulmonary lung injury (EVALI) observed nationwide and locally; 2) the alarming increase in youth and young adult e-cigarette use; and 3) the need to extend protections from secondhand smoke exposure to outdoor dining areas.

The action taken on October 15, 2019 (2), was in response to the public health concerns associated with flavored tobacco products for smoking, e-cigarette devices, and secondhand smoke exposure. The proposed ordinance was crafted with a positive public health impact in mind. Today’s request requires two steps. On January 14, 2020, it is requested that the Board consider an ordinance adding provisions to Title 3, Division 2 of the San Diego County Code of Regulatory Ordinances regarding smoking-related prohibitions in the unincorporated area. If the Board takes the actions recommended, then on January 28, 2020, the proposed ordinance will be brought back to the Board for consideration and adoption.

These actions support the County of San Diego’s *Live Well San Diego* vision by implementing comprehensive policies that protect the public’s health from the harms of smoking and exposure to secondhand smoke.

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RECOMMENDATION(S)
CHIEF ADMINISTRATIVE OFFICER

On January 14, 2020:

1. Find that the proposed action is not a project pursuant to California Environmental Quality Act (CEQA) State Guidelines Sections 15060(c)(3) and 15378 and is exempt from CEQA pursuant to Section 15061(b)(3) because it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment.
2. Approve the introduction of the Ordinance (first reading), read the title, and waive further reading of the Ordinance:

AN ORDINANCE ADDING PROVISIONS TO TITLE 3, DIVISION 2 OF THE SAN DIEGO COUNTY REGULATORY CODE REGARDING SMOKING RELATED PROHIBITIONS IN THE UNINCORPORATED AREA OF THE COUNTY.

If, on January 14, 2020, the San Diego County Board of Supervisors approves action as recommended, then, on January 28, 2020: Consider and adopt the following Ordinance:

AN ORDINANCE ADDING PROVISIONS TO TITLE 3, DIVISION 2 OF THE SAN DIEGO COUNTY REGULATORY CODE REGARDING SMOKING RELATED PROHIBITIONS IN THE UNINCORPORATED AREA OF THE COUNTY.

FISCAL IMPACT

Funds for this request are included in the Fiscal Year 2019-21 Operational Plan in the Health and Human Services Agency (HHS). If approved, today's recommendations will result in estimated costs of \$61,000 for the provision of outreach and education to eating establishments and tobacco retailers impacted by the ordinance. HHS will use existing appropriations in Fiscal Year 2019-20 funded with Realignment. There will be no change in the net General Fund cost and no additional staff years. Any need for additional resources in subsequent years will be evaluated and requested as part of future efforts to establish a Tobacco Retailer Licensing program to be presented to the San Diego County Board of Supervisors in April 2020.

BUSINESS IMPACT STATEMENT

If approved, these recommendations could potentially impact a number of businesses in the unincorporated areas who rely on the sale of flavored tobacco products and/or electronic smoking devices. Staff review of the California Department of Tax and Fee Administration-licensed businesses indicates that there are nine (9) licensed tobacco retailers whose predominate inventory includes flavored tobacco products and/or electronic smoking devices. There are approximately 366 retailers that may sell flavored products or electronic smoking devices, which may be impacted. There are approximately 365 permitted food establishments with outdoor dining, which may be impacted. Per industry standard, a period of transition would be provided to encourage voluntary compliance and adjustment to the new regulatory requirements.

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ADVISORY BOARD STATEMENT

This item will be presented to the Health Services Advisory Board on January 7, 2020, for review and comment.

BACKGROUND

Smoking is the leading preventable cause of death in the United States, causing more than 480,000 deaths each year. Secondhand smoke causes another 41,000 preventable deaths each year in nonsmoking persons, according to the Centers for Disease Control and Prevention (CDC). Smoking, and now vaping, continues to be a public health crisis. While there are several statewide regulations that seek to reduce the ease and availability of smoking, the County of San Diego (County) seeks to further improve public health with the implementation of the proposed ordinance in the sections below. On October 15, 2019 (2), the San Diego County Board of Supervisors (Board) directed staff to return with recommendations to address the following:

- 1A. Prohibit the sale and distribution of all flavored products for “smoking” as defined by State law.
- 1B. Establish a one-year moratorium on the sale and distribution of all electronic smoking devices.
- 1C. Prohibit “smoking,” as defined by State law, in outdoor dining patio areas, and a buffer zone outside of outdoor dining patio areas.

Flavored Tobacco Products and Electronic Smoking Devices (No. 1A and 1B)

According to the California Department of Public Health (CDPH), teenagers and young adults make up about half of the e-cigarette or vaping-associated pulmonary lung injury (EVALI) cases hospitalized in California, and the only common linkage is e-cigarette use. The findings of the 2019 National Youth Tobacco Survey, released by the CDC and U.S. Food and Drug Administration (FDA), showed that more than 5 million U.S. middle and high school students reported current e-cigarette use, an increase of more than 1.5 million students from the 2018 findings. The survey also found that 27.5% of high school students reported current e-cigarette use, a percentage that has increased dramatically since 2018. The CDC also reports that most e-cigarettes contain nicotine and other chemicals that can harm a young person’s developing brain. Additionally, a 2019 RAND Corporation study showed that youth who use e-cigarettes might be more likely to smoke and vape in early adulthood, adding to a growing body of evidence that youth use of e-cigarettes is associated with a greater likelihood of smoking combustible cigarettes in young people.

The 2019 National Youth Tobacco Survey also found that, among current exclusive e-cigarette users, approximately 72% of high school students and 60% of middle school students used flavored e-cigarettes. In 2009, the Family Smoking Prevention and Tobacco Control Act made it illegal at the federal level to sell cigarettes with “characterizing” flavors other than menthol or tobacco. However, the ban did not extend to e-cigarettes. According to the survey, youth reported product flavoring as being one of the top reasons for using e-cigarettes. This evidence points to the important role flavors play in the initiation of tobacco use among youth. Like combustible cigarettes, e-cigarettes can produce harmful exposures to secondhand smoke. E-cigarette vapor

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may contain nicotine, ultrafine particles, and low levels of toxins, which can exacerbate respiratory ailments like asthma and expose non-smokers to other harmful chemicals.

Currently, the electronic smoking device market is largely unregulated however, on January 2, 2020, the Food and Drug Administration (FDA) issued a policy prioritizing enforcement against certain unauthorized flavored e-cigarette products, including fruit and mint flavors, that appeal to youth. Under this policy, companies that do not cease manufacturing, distributing, and the sale of unauthorized flavored cartridge-based e-cigarettes (other than tobacco or menthol) within 30 days risk enforcement actions by the FDA. It is not yet clear how the FDA will enforce this policy, but it is anticipated that enforcement on a local level may be requested. The FDA's policy may have impacts on the County's final implementation of these efforts.

The FDA is required to grant premarket clearance to each new tobacco product before it can be sold. However, the FDA gave electronic smoking device products on the market as of August 8, 2016 an extended grace period. Furthermore, e-cigarettes are not approved by the FDA as an aid to quit smoking. Studies indicate no evidence of definitive long-term efficacy of e-cigarettes as a cessation aid and many people become 'dual users' instead of completely quitting combustibles. E-cigarette manufacturers could request approval to market their products as a "modified risk tobacco product" or a cessation aid. As of November 1, 2019, only one manufacturer has submitted this request. Lacking this FDA approval, manufacturers may not make safety or health claims for their products. Electronic smoking device manufacturers are required to submit Premarket Tobacco Product Applications by May 12, 2020.

The CDC reports that, in addition to creating an epidemic of nicotine addiction among youth, electronic smoking devices have also led to an acute public health crisis called EVALI. An ingredient in illegal tetrahydrocannabinol (THC) e-liquids, vitamin E acetate, has been indicated as a chemical of concern in the EVALI outbreak. According to the CDC, many of the chemicals used in nicotine e-liquids may cause lung injury, similar to vitamin E acetate. Additionally, while these chemicals are widely available because they are commonly used in food and household products, which are Generally Recognized As Safe (GRAS) by the FDA, the impact when inhaled is unknown or dangerous.

On October 15, 2019 (2), the Board authorized staff to develop recommendations to prohibit the sale and distribution of all flavored tobacco products for "smoking" as defined by State law and to establish a one-year moratorium on the sale and distribution of all electronic smoking devices. The Ordinance presented here will:

- Prohibit the sale and distribution of all flavored products for "smoking" as defined by State law with the exemption of "shisha" products to be used in hookahs.
- Establish a one-year prohibition on the sale and distribution of all electronic smoking devices.

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CDPH has urged everyone to refrain from vaping until current investigations are complete. According to weekly updates provided by the CDC, as of December 27, 2019, 2,561 hospitalized EVALI cases have been reported from all 50 states in the U.S., the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. Fifty-five deaths are confirmed across the country. In San Diego County, as of December 18, 2019, there have been 41 confirmed and probable EVALI cases reported. It is in the public interest to temporarily prohibit the sale of electronic smoking devices until experts can conclusively determine the source of EVALI.

Prior to full implementation of enforcement and to ensure a response to the public health crisis, the County's Tobacco Control Resource Program will conduct an educational and outreach phase. This may include dissemination of information through mailers, the County website, and in-person retailer trainings. Enforcement of both the sale and distribution of flavored products and an electronic smoking devices ban should be facilitated through a Tobacco Retailer Licensing program, which is included as a recommendation from the October 15, 2019 (2) Board item and will be presented to the Board in April 2020. Other jurisdictions that have adopted bans for flavored smoking products and/or electronic smoking devices have integrated these new restrictions into their existing Tobacco Retailer Licensing programs or adopted a Tobacco Retailer Licensing program. Finally, a public health campaign has been launched within the existing Tobacco Control Resource Program and in coordination with the CDPH.

Smoke-free Outdoor Dining (No. 1C)

According to the CDC, secondhand smoke causes 41,000 deaths annually in non-smoking persons, in addition to the 480,000 deaths in smoking persons annually. Smoke-free air laws, including smoke-free outdoor dining laws, can reduce smoking prevalence, increase smoking cessation, and reduce the incidence of smoking among youth. California established the first statewide smoke-free workplace law in 1995 (Assembly Bill 13; Section 6404.5 of the Labor Code), and since then the CDC has performed studies that verify how smoke-free air laws have been shown to reduce smoking prevalence, increase smoking cessation, reduce cigarette consumption, and reduce the incidence of smoking among youth and young adults. Ten cities in San Diego County have adopted ordinances that further limit acceptable smoking locations, including within parks and beaches, entryways and sidewalks, outdoor areas of multi-unit housing, and outdoor dining patios. These combined policies help reduce exposure to harmful secondhand smoke. As of February 2019, 116 municipalities in California have restricted smoking in all outdoor dining areas. More than half of the municipalities within San Diego County have adopted a ban on smoking in outdoor dining patios, and today's action asks the County to join that coalition. The American Lung Association State of Tobacco Control 2019 – California Local Grades report was released to track progress on key tobacco control policies in California municipalities. The 2019 report issued the unincorporated areas of San Diego County with an overall tobacco control grade of "F." If today's action is approved, the tobacco control grade for unincorporated San Diego County may potentially increase in future reports.

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On October 15, 2019 (2), the Board authorized staff to develop recommendations to prohibit “smoking” as defined by State law, in outdoor dining patio areas, and within a buffer zone outside outdoor dining patio areas. The proposed ordinance will do the following:

- Prohibit “smoking,” as defined by State law, in outdoor dining patio areas, to include a buffer zone outside of these areas.
 - Address secondhand smoke exposure in outdoor dining areas, excluding facilities or locations whose business operation is primarily devoted to the on-premises smoking of “shisha”, including but not limited to, establishments such as hookah bars, hookah lounges, hookah parlors, or hookah cafes.
 - Require restaurant owners to enforce the ordinance through posting of “No Smoking” or “Smoke-Free” signs and removal of existing ashtrays or other ash receptacles.
 - Establishes a 25-foot buffer zone for outdoor dining areas and a 40-foot buffer zone for permitted mobile food facilities (e.g., food trucks).

Enforcement of the smoke-free outdoor dining provisions will rely on a complaint-based approach, wherein restaurant owners and their patrons can inform the County of any individuals in violation. This enforcement approach is an industry-standard for local regulation of smoke-free outdoor dining laws.

This ordinance is focused on creating the greatest positive public health impact for San Diego County residents by addressing 1) the public health crisis, resulting from EVALI observed nationwide and locally; 2) the alarming increase in youth and young adult e-cigarette use; and 3) the need to extend protections from secondhand smoke exposure to outdoor dining areas. If approved, today’s action will allow the County to protect the health of the public from the harms of smoking and secondhand smoke by implementing comprehensive policies that address this public health issue.

ENVIRONMENTAL IMPACT STATEMENT

Section 15060(c)(3) of the California Environmental Quality Act (CEQA) Guidelines provides that activities identified in Section 15378 of the CEQA Guidelines are not subject to CEQA review. Section 15378 provides that administrative activities of governments that will not result in a direct or indirect physical change in the environment are exempt from CEQA review. The proposed action is administrative in nature as it prohibits the sale of particular types of smoking products and smoking in and around outdoor dining areas. Therefore, the proposed action is not subject to CEQA review. In addition, it can also be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment by merely regulating the sale of particular smoking products and prohibiting smoking in and around outdoor dining areas since these prohibitions would apply to a narrow group of smokers and retailers.

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LINKAGE TO THE COUNTY OF SAN DIEGO STRATEGIC PLAN

Today's proposed actions support the Building Better Health and Living Safely Strategic Initiatives in the County of San Diego's 2020-2025 Strategic Plan, as well as the County's *Live Well San Diego* vision by encouraging healthy behaviors and developing policies that protect the public's health from the harms of smoking and exposure to secondhand smoke.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Helen N. Robbins-Meyer".

HELEN N. ROBBINS-MEYER
Chief Administrative Officer

ATTACHMENT(S)

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AGENDA ITEM INFORMATION SHEET

REQUIRES FOUR VOTES: Yes No

WRITTEN DISCLOSURE PER COUNTY CHARTER SECTION 1000.1 REQUIRED

Yes No

PREVIOUS RELEVANT BOARD ACTIONS:

October 15, 2019 (02), Addressing the public health crisis from cigarettes and electronic smoking devices; May 20, 2014 (10), Regulating the Use of Electronic Smoking Devices; July 30, 2002 (16), An Ordinance adding Chapter 8.6 to Title 3, Division 2 of the San Diego County Regulatory Code Regarding Smoking Related Prohibitions in the Unincorporated Area of the County relating to the sale of tobacco products to minors;

BOARD POLICIES APPLICABLE:

A-99 – Tobacco and Electronic Smoking Device Use, Prevention and Cessation

BOARD POLICY STATEMENTS:

N/A

MANDATORY COMPLIANCE:

N/A

ORACLE AWARD NUMBER(S) AND CONTRACT AND/OR REQUISITION NUMBER(S):

N/A

ORIGINATING DEPARTMENT: Health and Human Services Agency

OTHER CONCURRENCE(S): N/A

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