



CITY OF BEVERLY HILLS
POLICY AND MANAGEMENT

MEMORANDUM

TO: Health and Safety Commission

FROM: Logan Phillippo, Senior Management Analyst

DATE: February 6, 2018

SUBJECT: Flavored Tobacco Products

ATTACHMENT:

1. Draft Ordinance Amending Existing Regulations
2. BHMC 4-2-21 (proposed modifications redlined, sample only)
3. Focus on Flavors, Office of Attorney General of California

INTRODUCTION

Staff is requesting Commission input on a draft ordinance that would modify the City's Tobacco and Electronic Cigarette Retailer Regulations as set forth in Article 21 of Chapter 2 of Title 4 of the Beverly Hills Municipal Code ("BHMC"). The proposed modifications would restrict the sales of flavored tobacco products in Beverly Hills.

Attachment 1 provides the Draft Ordinance that is submitted for Commission input. Attachment 2 shows, by redline for sample purposes only, the corresponding modifications to BHMC 4-2-21, which would be amended by the Draft Ordinance. Attachment 3 provides an opinion from the California Attorney General regarding the authority of state or local government to restrict or prohibit the sale or distribution of flavored tobacco products. Attachment 3 is summarized in the Discussion section of this report.

The City has been discussing the development of a policy that would restrict the sale of flavored tobacco products for approximately three to four months. On November 30, 2017, the City Council Health and Safety Commission Liaisons (Mayor Bosse and Vice Mayor Gold) met with Chair Demeter (at the time serving as Vice Chair) and Commissioner Nazarian (at the time serving as Chair) and a representative from the County Health Department to discuss such policies. The Liaisons agreed that the next steps would include further study of the topic and consideration of public input at future Health and Safety Commission meetings for a balanced conversation.

The Commission discussed this item at the previous Health and Safety Commission Regular Meeting on January 22, 2018. The Commission heard input from 14 speakers and read 8 letters as part of public comment. 12 speakers were in support of restrictions and 2 speakers were opposed. 4 letters were in support of restrictions and 4 letters were opposed.

The Commission voted (5-0) in support of two items:

1. The development of a policy to ban the sale of flavored tobacco products in Beverly Hills; and

2. The development of a policy that would ban mint, menthol, spearmint or wintergreen products in addition to other flavors.

DISCUSSION

Restricting **the sale of tobacco products** differs from **City smoking restrictions**. The following two paragraphs distinguish these two concepts.

City Smoking Restrictions. In order to promote healthy living, the City has long supported no-smoking policies. Most recently in 2017, the City prohibited smoking in the public-right-of-way, increased the open air dining no-smoking buffer zone from five feet to 20 feet, and adopted a new ordinance to prohibit smoking in multi-unit residences. These policies address the locations where smoking is prohibited. This includes the smoking of traditional tobacco products, electronic cigarette products and marijuana products.

Sale of Tobacco Products. While the City prohibits smoking in many locations, the sale of tobacco products, is permitted in the Beverly Hills Municipal Code. BHMC Section 4-2-2102 defines a tobacco product as “any manufactured substance made from the tobacco plant, including, but not limited to, cigarettes, cigars, pipe tobacco, snuff, chewing tobacco and smokeless tobacco, or products prepared from tobacco and designed for smoking or ingestion.”

The County Health Department has indicated support of policies that restrict the sale of **flavored** tobacco products, which is not a product type specifically addressed in the Beverly Hills Municipal Code. The City already has a process for permitting tobacco retailers, through an ordinance that was adopted in 2010. Since 2010, tobacco retailers in Beverly Hills have been required to obtain a tobacco retailer's permit for each location where tobacco products are sold. This is in addition to State licensing requirements. As of October 12, 2017, there are 27 licensed cigarette and tobacco product retailers in Beverly Hills.

According to a report from the American Lung Association, more than 100 California communities have adopted policies to regulate the sale of tobacco in the retail environment. 11 California communities have included flavored tobacco restrictions.

<u>Municipality</u>	<u>Effective Date</u>
1. Santa Clara	November 2010
2. Hayward	June 2014
3. Sonoma	June 2015
4. Berkeley	September 2015
5. El Cerrito	September 2015
6. Manhattan Beach	December 2015
7. Yolo	October 2016
8. Novato	January 2017
9. Los Gatos	May 2017
10. San Francisco *	June 2017*
11. Contra Costa	July 2017

**Suspended by the filing of a referendum petition.*

The Commission requested that Staff provide information related to San Francisco’s regulations restricting the sale of flavored tobacco products and the voter referendum seeking to repeal these regulations. The Commission additionally requested a summary of the opinion from the

California Attorney General regarding the authority of state or local government to restrict or prohibit the sale or distribution of flavored tobacco products. These two items are discussed below.

San Francisco Flavored Tobacco Restrictions and Subsequent Repeal

On June 27, 2017, the City and County of San Francisco adopted an ordinance prohibiting the sale and distribution of all tobacco flavored products. The ordinance does not contain any exceptions to the ban. After the ordinance was adopted, a referendum was brought to stop the implementation of the ordinance. Under the San Francisco Charter, a resident can force a referendum protesting an ordinance by, prior to the ordinance's effective date, gathering enough signatures (at least 10% of the number of votes cast for all candidates for mayor in the last preceding general municipal election for mayor) supporting the referendum. The Referendum Against the City and County of San Francisco's Ordinance Prohibiting the Sale of Flavored Tobacco Products, Including Menthol Cigarettes qualified for the ballot and will be considered at the June 2018 election. The referendum seeks to repeal the ordinance, and does not raise any legal challenges to the ordinance. If the referendum fails and the ban remains in effect, it is still possible that the tobacco industry would seek to challenge the ordinance.

Summary of California Attorney General Opinion

In March 2016, the California Department of Public Health published a report, funded by the Center for Disease Control and written by California's deputy attorney general, discussing the legality of local bans of flavored tobacco products. The report, titled "Focus on Flavors," primarily discussed the federal Family Smoking Prevention and Tobacco Control Act ("FSPTCA") and three subsequently enacted flavored-tobacco ordinances that were challenged and upheld by courts. The report concludes that "no court, to date, has been required to consider the validity of a complete prohibition of sales and distribution of all types of [flavored] tobacco products [...]. There does not, however, appear to be a legal barrier to a state or local government enacting a complete sales prohibition on the sale of menthol cigarettes, flavored tobaccos products, and/or flavored electronic cigarettes."

The FSPTCA gave the Food and Drug Administration ("FDA") the authority to regulate cigarettes, cigarette tobacco, roll-your-own tobacco, smokeless tobacco, and any other tobacco products that the FDA deems to be under its authority. See 21 U.S.C. § 387a(b). The FSPTCA expressly preserves the power of local governments to enact additional or more stringent regulations related to or prohibiting "the sale, distribution, possession, exposure to, access to, advertising and promotion of, or use of tobacco products by individuals of any age, information reporting to the State, or measures relating to fire safety standards for tobacco products," which may be in addition to or more stringent than the requirements of the Act (the "Preservation Clause"). [21 U.S.C. § 387p(a)(1).] Local governments, however, are preempted from regulating in the areas of "tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products [e.g. nicotine gum and patches]," (the "Preemption Clause"). See 21 U.S.C. § 387p(a)(2)(A). The Preemption Clause is followed by an exception (the "Savings Clause"), which states that local regulation of the sale, distribution, or possession of tobacco products by individuals of any age is not preempted. See 21 U.S.C. § 387p(a)(2)(B). While the Preservation Clause and Savings Clause may at first glance appear to be redundant, the Savings Clause in fact allows local authorities to enact a regulation regarding the sale, distribution, or possession of tobacco products even if such a regulation can be said to relate to a product standard or other preempted area.

The report examined three different local ordinances that banned flavored tobacco products and that were upheld in court. The first case to examine a post-FSPTCA flavored tobacco ban is *U.S. Smokeless Tobacco Mfg. Co. LLC v. City of New York* (2d Cir. 2013) 708 F.3d 428. In that case, New York City prohibited the sale of all flavored tobacco products—except for menthol, mint, and tobacco-flavored products in all establishments besides “tobacco bars.” The plaintiffs argued that the ordinance, on its face regulated sales of tobacco products and was therefore a preempted product standard regulation because of the effect it would have on tobacco manufacturers. The court rejected this argument, drawing a distinction between a sales regulation that incentivizes manufacturers to create certain products, versus a regulation that would require a manufacturer to “alter the construction, components, ingredients, additives, constituents and properties of their products.” Furthermore, the court held that even if the ordinance did indirectly set a product standard, the FSPTCA’s Savings Clause in fact allows local governments to enact sales regulations relating to product standards. The plaintiffs countered by asserting that the Savings Clause does not save from preemption outright bans related to product standards, pointing out that while the Preservation Clause expressly allows “prohibitions,” the Savings Clause only mentions “requirements relating to the sale” of tobacco products. [Ibid.] The court rejected this argument as well, reasoning that the ordinance, while severe, was not an outright ban because it allowed the sale of some flavors (menthol, tobacco) in some places (tobacco bars). The court therefore explicitly declined to opine on whether the plaintiffs’ interpretation of the Savings Clause was correct.

Months after the Second Circuit upheld New York City’s ordinance, the First Circuit upheld a very similar ordinance enacted by Providence, Rhode Island. In *Nat’l Ass’n of Tobacco Outlets, Inc. v. City of Providence, R.I.* (1st Cir. 2013) 731 F.3d 71, Providence adopted an ordinance prohibiting all retailers besides “tobacco bars” from selling flavored tobacco products, except for menthol, mint, and tobacco flavors. The plaintiffs in this case made many of the same preemption arguments as the Smokeless Tobacco plaintiffs, and the First Circuit agreed with the Second Circuit’s reasoning for rejecting those arguments in every instance.

In 2013, Chicago adopted an ordinance that banned the sale of all flavored tobacco products, including menthol, within 500 feet of a school—except at shops that derive over 80% of their revenue from tobacco products, i.e. “tobacco shops.” *Indeps. Gas & Serv. Stations Associations, Inc. v. City of Chicago* (N.D. Ill. 2015) 112 F. Supp. 3d 749, 751. The district court fully adopted the Second Circuit’s reasoning in rejecting all of the Independents Gas plaintiffs’ preemption arguments. The collective takeaway from these cases is that courts in three distinct jurisdictions have all subscribed to the same reasoning in holding that cities have the power to enact severe restrictions on the sale of flavored tobacco products—including, in one case, menthol-flavored products. While a court has not yet affirmed that cities may enact a comprehensive ban of flavored tobacco products, the FSTCPA itself states that a city may enact a regulation “prohibiting the sale [...] of tobacco products [to] individuals of any age.” 21 U.S.C. § 387p(a)(1).

Summary of Outreach Activity to Tobacco Retailers

Staff has notified existing City-permitted tobacco retailers of public meetings regarding restricting the sale of flavored tobacco products. For the January 22, 2018 Commission Regular Meeting, this included outreach by telephone and email. For this February 26, 2018 Commission Regular Meeting, this includes outreach by email and post-office mail. Staff has additionally updated the website to provide updates of the ongoing policy discussions.

Implementation Timeframe

Typically ordinances go into effect 31 days after adoption by City Council. Staff is recommending the ordinance to include an implementation timeframe and is requesting Commission input. The implementation period should allow sufficient time for the City to disseminate the proper notifications and allow sufficient time for permitted tobacco retailers to exhaust any existing inventory. Any implementation period would be additional to the 31 days it takes for an ordinance to go into effect.

RECOMMENDATION

Staff recommends that the Commission review and provide input on the Draft Ordinance and to provide input regarding the implementation period. If the Commission supports the Draft Ordinance as presented and reaches a consensus on the implementation period, Staff recommends the Commission vote to recommend that the City Council adopt the Draft Ordinance. Staff will be available to answer any questions.