



STAFF REPORT

Meeting Date: February 5, 2019

To: Honorable Mayor and City Council

From: Logan Phillippo, Policy & Management Analyst *LP*
Michael George, Management Analyst *MG*

Subject: Request by Mayor Gold and Vice Mayor Mirisch to Explore Prohibiting the Sale of All Tobacco Products in Beverly Hills

Attachments: None

INTRODUCTION

At the request of Mayor Gold and Vice Mayor Mirisch, the intent of this report is to introduce the topic for discussion and to explore the possibility of a ban on the sale of all tobacco products in Beverly Hills.

The City already prohibits the sale of flavored tobacco products. While many cities have also prohibited the sale of flavored tobacco products, no city in the United States has passed a ban on the sale of all tobacco products. Although a California municipality likely has the legal right to adopt such an ordinance, the City should anticipate legal challenges.

Staff is seeking City Council direction on whether to further research the topic

DISCUSSION

According to a report from the California Department of Public Health, tobacco use is a risk factor for numerous chronic diseases including cancer, cardiovascular disease, emphysema, chronic obstructive pulmonary disease, pneumonia, diabetes, and arthritis. Exposure to tobacco smoke also poses a risk for chronic disease. In 2016, it was estimated that 34,000 people in California died from diseases attributed to smoking. In California, 63.6% of cigarette smokers started by the age of 18. Another study from the Centers for Disease Control and Prevention estimated that over 40,000 annual deaths in California are related to smoking and that 440,600 California youths under age 18 will die prematurely from smoking.

Policy Context

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

Smoking Activity. 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. One of the primary goals of these policies is to protect the public from unwanted exposure to secondhand smoke.

Sale of Tobacco Products. While the City prohibits smoking in many locations, the City does allow the sale of non-flavored tobacco products through a regulatory permit process (see next paragraph). On August 21, 2018, the City Council formally adopted an ordinance prohibiting the sale of flavored tobacco products. The ban on the sale of flavored products became effective in full on December 21, 2018, after one City Council Study Session and two Health and Safety Commission meetings that included a discussion of policy details as well as input from residents and tobacco retailers.

The City currently has a tobacco and electronic cigarette retailer permitting process, which was implemented through an ordinance adopted in 2010. Since then, tobacco retailers have been required to obtain a City-issued permit, in addition to state licensing, in order to sell tobacco products in Beverly Hills.

According to the Beverly Hills Municipal Code, a tobacco product includes:

- a) Any product containing, made, or derived from tobacco or nicotine that is intended for human consumption, including, but not limited to, cigarettes, cigars, pipe tobacco, snuff, chewing tobacco, and smokeless tobacco;
- b) Any electronic cigarette; and
- c) Any component, part, or accessory intended or reasonably expected to be used with a tobacco product, whether or not sold separately.

The Municipal Code definition of a tobacco product does not include a drug, device, or combination product authorized for sale by the U.S. Food & Drug Administration as a tobacco use cessation product such as nicotine patches, gum or lozenges.

According to a report from the American Lung Association released in April 2018, more than 100 California cities have adopted policies that regulate the sale of tobacco products through permit or licensing process. Some cities, including Beverly Hills, also prohibit sales of flavored tobacco products. To Staff's knowledge, no city in the United States has adopted a regulation to ban the sale of all types of tobacco products.

In 2014, in the small town of Westminster, Massachusetts, the Board of Health considered a proposed regulation that would have made it the first municipality in the United States to ban sales of all tobacco products. The proposal attracted national attention and the town faced considerable public opposition. The local board ultimately dropped the proposal. ASH (Action on Smoking & Health), a nonprofit organization based in Washington, D.C., has reported that the cities of Mecca and Medina in Saudi Arabia have comprehensive prohibitions on the sale of all tobacco products, as do the countries of Bhutan and Tajikistan.

Legal Context

The City could legally adopt a ban on the sale of all tobacco products. Neither federal nor California law would preempt a comprehensive ban on tobacco sales. Federal law grants the U.S. Food & Drug Administration authority to regulate all tobacco products and expressly preserves the power of local governments to enact additional or “more stringent” regulations related to or prohibiting tobacco sales. Since the California legislature has not fully occupied the field of tobacco sales, California cities are free to implement any tobacco sales regulation or restriction provided they do not involve the collection of taxes or the penal aspects of tobacco sales to minors.

Courts have not yet reviewed citywide bans on tobacco sales, so there is still uncertainty as to whether a court would uphold this type of ban if challenged. Local tobacco sales regulations have been challenged on grounds beyond state or federal preemption.

Given that no other city in the United States has adopted a comprehensive ban on all tobacco products, the City is likely to face legal challenges. The City should be willing to appropriately address these challenges, which could include substantial litigation expenses with the tobacco industry.

Prohibiting the retail sale of tobacco products in the City would likely require an amendment to Article 21 (Tobacco and Electronic Cigarette Retailer Permitting Regulations) of Chapter 2 (Regulatory Business Permits) of Title 4 (Regulation of Certain Types of Businesses and Activities) of the Beverly Hills Municipal Code. A tobacco products sales ban would not require an amendment to the Zoning Code as the City is not regulating the use of land. Instead, the City is regulating, or rather, prohibiting the sale of a particular product in the City.

Tobacco Retailers in Beverly Hills

There are currently 28 establishments with active City-issued Tobacco and Electronic Cigarette Retailer Permits. Three retailers appear to be cigar lounges. Two are grocery stores, six are gas stations, eight are within hotels, and nine consist of convenience stores or pharmacies. The three cigar lounges that sell primarily tobacco products or allow smoking include the Buena Vista Cigar Club, the Grand Havana Room, and Nazareth’s Fine Cigars.

Composition of Existing Retailers

| Category | Number of Retailers |
|--|---------------------|
| Cigar lounges | 3 |
| Grocery stores | 2 |
| Gas stations | 6 |
| Associated with hotels (i.e. gift shops) | 8 |
| Convenience stores or pharmacies | 9 |
| Total | 28 |

In 2012 there were approximately 45 retailers, but that number has steadily declined to approximately 28 current retailers. 19 of the City’s existing tobacco retailers have held permits since 2010, when the City adopted such requirements. One has held a permit since 2011, two since 2012, four since 2015, one since 2017, and one since 2018.

Summary of Public Engagement

The City has conducted outreach to existing retailers and other interested parties of the February 5, 2019, Study Session discussion. This includes:

- An email to the Health and Safety Commission on January 10, 2019;
- A notification to the public at the January 28, 2019, Health and Safety Commission Regular Meeting;
- A brief update at the Chamber's Government Affairs Committee meeting on January 10, 2019—the Committee members provided preliminary input, but the Committee did not take any action;
- Hardcopy letters and emails distributed to active holders of the City's Tobacco and Electronic Cigarette Retailer Permit distributed on January 16, 2019;
- Updates/discussions with the Board of Directors at the Chamber of Commerce and the Conference and Visitors Bureau;
- Emails to the Beverly Hills Conference and Visitors Bureau, the Rodeo Drive Committee, and the Beverly Hills Chamber of Commerce on January 16, 2019;
- Discussions regarding policy recommendations among individual Health and Safety Commissioners or Staff with organizations that support reducing exposure to smoke and tobacco; and
- Emails to those who spoke on items related to flavored tobacco and smoking regulations at the August 7, 2018, City Council Study Session, the January 22, 2018, Health and Safety Commission meeting, and the February 26, 2018, Health and Safety Commission meeting. This includes organizations such as Los Angeles County Department of Public Health, the American Lung Association and the National Association of Tobacco Outlets.

Although those participating in discussions generally agree that tobacco use is dangerous, banning the sales of all tobacco products remains controversial. Since this is the City's first discussion of a ban on all tobacco sales, no community meeting has been held and Staff has gathered limited feedback from the business community on the proposed policy. However, initial concerns have been expressed about the impact on tourists who are smokers coming to the City. Through public discourse regarding other City smoking and tobacco ordinances adopted in previous years, some residents have expressed support for a ban on the sales of all tobacco products. Some residents and businesses have also expressed opposition, stating that a ban could be construed as a government overreach.

Policy Considerations

Policy factors to consider would be:

1. Whether or not to exempt all existing retailers from a sales ban—no new permits;
2. Whether or not to allow a carve-out for certain business types;
3. An appropriate amount of time to allow retailers to comply;
4. Appropriate enforcement protocols; and
5. Other items that may emerge through public discussions.

The extent to which a business relies on revenue generated from tobacco sales will vary dependent upon its category and business model. For a large grocery store selling a high volume of varied products, tobacco products might represent a small or even insignificant portion of overall sales. For small businesses such as gift shops within hotels, tobacco sales might represent a much larger portion of sales. Additionally, though a hotel might not directly sell tobacco products, the availability of tobacco products for sale at gift shops might be considered an amenity to guests. For cigar lounges, an ordinance prohibiting tobacco sales could force the businesses to shut down operations permanently.

Given that some businesses may rely on tobacco sales as a primary source of revenue and that some businesses may have existing inventory and lease agreements, a sufficient time period for implementing such an ordinance should be evaluated.

Staff has discussed options with experts in the field of retail tobacco sales, who have indicated that a phased approach to prohibiting tobacco sales might be appropriate. For example, the City may choose to adopt a provision exempting existing retailers from a ban, but not issue any new permits (permits must be renewed annually or will expire). Or, the City could prohibit tobacco sales at certain business such as pharmacies. Under this approach, tobacco products would still be available for sale in Beverly Hills, but at fewer locations.

FISCAL IMPACT

Should City Council choose to adopt a ban on the sales of all tobacco products, the most direct fiscal impact to the City would be the elimination of revenue from issuing/renewing Tobacco and Electronic Cigarette Retailer Permits. The Fiscal Year 2018-19 fee for these permits is \$236, paid on an annual basis by each retailer. Since there are currently 28 permit holders, Staff estimates the loss of this permit revenue. The permit fee is intended for cost recovery. Part of the permit fee allows the Police Department to perform an annual sting operation with a youth decoy to check compliance with state law, which prohibits sales to those under 21 years of age.

Staff estimates that any impacts to sales tax revenues would be negligible in comparison to the City's \$30+ million in sales tax General Fund revenues.

Community stakeholders have previously express concerns that a tobacco sales ban could negatively affect tourism and related City revenues. However, there is no data available to measure the economic extent of this impact, if any.

RECOMMENDATION

Staff recommends that City Council review the information provided in this report and provide direction to Staff. If directed, Staff will perform additional analysis, conduct outreach with stakeholders, and recommend feasible approaches.

Pamela Mottice-Muller *PAM*

Approved By