



CITY OF BEVERLY HILLS
POLICY AND MANAGEMENT

MEMORANDUM

TO: Health and Safety Commission

FROM: Logan Phillippo, Policy & Management Analyst 

DATE: February 25, 2019

SUBJECT: Study of Banning the Sale of All Tobacco Products in Beverly Hills

ATTACHMENTS:

1. Outreach/notice letter Date February 14, 2019
2. Public Letters/Input Received
3. Various media coverage

INTRODUCTION

At the February 5, 2019 Study Session, City Council discussed the possibility of adopting a ban on the sale of all tobacco products in Beverly Hills and directed Staff and the Health and Safety Commission to explore the topic in detail and to return to City Council with a recommendation.

Staff is transmitting this report as an introduction to the topic and is seeking Commission input and questions. Staff can research and return at the next Commission meeting for a more in-depth policy discussion.

DISCUSSION

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 Westminister, 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.

A Hawaii state lawmaker has proposed a policy to raise the legal age of smoking in the Hawaii to 100 over the next five years, however, it is unclear if the proposal as-is will ultimately gain traction in the state legislature.

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.

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

**There appears to be two permits associated with one gas station.*

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 upcoming Commission discussions. An outreach letter of these meetings is included as Attachment 1. In addition, Staff provided extensive outreach for the February 5 City Council discussion. This included:

- o An email to the Health and Safety Commission on January 10, 2019;
- o A notification to the public at the January 28, 2019, Health and Safety Commission Regular Meeting;
- o 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;
- o 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. Staff has received public comment and members of the public provided comment the February 5 Study Session. Several residents, health-oriented organizations and Beverly Hills High School students expressed support for a ban. However, several business owners, including tobacco retailers, expressed opposition to a ban. Initial concerns have also been expressed about the impact on tourists who are smokers coming to the City. Additionally, 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

There are several policy factors the Commission should consider.

1. Studying the definition of a tobacco product.
2. Whether or not to exempt all existing retailers from a sales ban—no new permits.

The Commission could consider whether to “grandfather in” existing businesses. The City would not issue new permits. Over time, the number of retailers would remain the same or reduce through attrition.

3. Whether or not to allow a carve-out for certain business types.

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. Additionally, some cities have already prohibited tobacco sales at pharmacies.

4. An appropriate amount of time to allow retailers to comply.

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 any policy should be evaluated.

5. Appropriate enforcement protocols and any penalty/appeals processes.

If a retailer illegally sells prohibited products, any penalties that might be appropriate. Violation of existing permit requirements includes an escalation process that ultimately leads to revocation of the permit. However, since such products would be illegal to sale, the Commission might consider an escalation process that includes fines.

6. Partnerships with other agencies and Cities nearby.

City Council expressed interest in partnering with outside agencies and/or Cities that may also be interested in adopting a ban on the sale of tobacco products. Further, there are several organizations who might provide legal and or monetary support in the event a ban were challenged.

FISCAL IMPACT

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 expressed 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. Individual business would also face an economic impact through reduced sales. Staff anticipates business will provide comment on the extent to which a ban would impact their sales.

RECOMMENDATION

This is the Commission's initial discussion on the topic to ban the sale of all tobacco products in Beverly Hills. Staff recommends the Commission review the information provided in this report and pose initial questions or comments. Staff will perform additional analysis, conduct outreach with stakeholders, and recommend feasible approaches at subsequent meetings.

City Council directed Staff and the Health and Safety Commission to return with a recommendation in the next four months. Staff recommends the Commission consider a framework for public discussion over the next four Commission meetings. Staff is proposing the following schedule (shown next page).

- Monday, February 25, 2019 – Introduction of the Topic
- Monday, March 25, 2019 – Detailed Policy Discussion and Public Input
- Monday, April 22, 2019 – Detailed Policy Discussion and Public Input
- Monday, May 20, 2019 – Finalize Policy and Recommendation

Staff also recommends the Commission read into record the public input received to date through written correspondence. These letters have been included as Attachment 2.