

11. Adopt Ordinance No. NS-XXXX - AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF SANTA ANA AMENDING ARTICLE III ENTITLED TOBACCO RETAIL LICENSE OF CHAPTER 18 OF THE SANTA ANA MUNICIPAL CODE PROHIBITING THE SALE OF FLAVORED TOBACCO PRODUCTS

First reading at the March 1, 2022 City Council meeting and approved by a vote of 7-0.

Published in the Orange County Reporter on March 4, 2022.

Department(s):

Recommended Action: Place ordinance on second reading and adopt.



City Manager Office
www.santa-ana.org/cm
Item # 11

City of Santa Ana
20 Civic Center Plaza, Santa Ana, CA 92701
Staff Report
March 15, 2022

TOPIC: Flavored Tobacco

AGENDA TITLE:

Adopt Ordinance No. NS-XXXX - AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF SANTA ANA AMENDING ARTICLE III ENTITLED TOBACCO RETAIL LICENSE OF CHAPTER 18 OF THE SANTA ANA MUNICIPAL CODE PROHIBITING THE SALE OF FLAVORED TOBACCO PRODUCTS

RECOMMENDED ACTION

Place ordinance on second reading and adopt.

DISCUSSION

Background

At the March 1, 2022 meeting, the City Council approved the first reading of an ordinance prohibiting the sale of flavored tobacco products—including hookah. Flavored tobacco product means any tobacco product that imparts a characterizing flavor.

The ordinance includes a definition of tobacco product that is also used in Senate Bill 793, and is cited below:

“Tobacco product” means any of the following: (1) a product containing, made or derived from tobacco or nicotine that is intended for human consumption, whether smoked, heated or chewed, absorbed, dissolved, inhaled, snorted, sniffed or ingested by any other means, including but not limited to, cigarettes, cigars, little cigars, hookah tobacco, chewing tobacco, pipe tobacco or snuff; (2) an electronic device that delivers nicotine or other vaporized liquids to the person inhaling from the device, including but not limited to, an electronic cigarette, cigar, pipe or hookah; (3) any component, part or accessory of a tobacco product whether or not sold separately. “Tobacco product” does not include a nicotine replacement product approved by the US Food and Drug Administration.

Enforcement

The ordinance (Exhibit 1) amends Sec. 18-92 of Chapter 18, Article III the Santa Ana Municipal Code to declare that it shall be unlawful for any tobacco retailer in Santa Ana

to tell any flavored tobacco product. To enforce such an ordinance, the Santa Ana Police Department will expand its current Tobacco Retailer License program enforcement operations as follows:

- Weekly business compliance checks to ensure that no flavored tobacco products are sold on premises.
- Increased use of undercover decoy programs to identify businesses selling prohibited tobacco products.
- Additional infraction citations issued when illicit products are located.
- Increased permit staff time to revoke tobacco retailer licenses for habitual business offenders.

The current funding associated with the Tobacco Retailer License program has the capacity to absorb the added responsibility to ensure compliance with the proposed prohibition on the sale of flavored tobacco.

If adopted, the ordinance would take effect 30 days thereafter.

ENVIRONMENTAL IMPACT

There is no environmental impact associated with this action.

FISCAL IMPACT

There is no fiscal impact associated with this action.

EXHIBIT(S)

1. Ordinance

Submitted By: Kristine Ridge, City Manager

Approved By: Kristine Ridge, City Manager

ORDINANCE NO. NS-XXXX

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY
OF SANTA ANA AMENDING ARTICLE III ENTITLED
TOBACCO RETAIL LICENSE OF CHAPTER 18 OF THE
SANTA ANA MUNICIPAL CODE PROHIBITING THE SALE
OF FLAVORED TOBACCO PRODUCTS

WHEREAS, pursuant to the City's police power, as granted broadly under Article XI, Section 7 of the California Constitution, and Santa Ana Charter Section 200, the Santa Ana City Council has the authority to enact and enforce ordinances and regulations for the public peace, health, and welfare of the City and its residents.

WHEREAS, the City Council finds and determines that the recent increase in use of e-cigarettes by middle and high school students is a grave public health concern.

WHEREAS, according to the American Lung Association, smoking is the number one preventable cause of death in the United States killing over 480,000 people per year¹.

WHEREAS, the U.S. Center for Disease Control and Prevention ("CDC") has definitively linked smoking to more severe illness from COVID-19².

WHEREAS, a recent CDC study found that 99% of e-cigarettes sold in assessed venues in the United States contain nicotine.

WHEREAS, use of nicotine can harm the developing brain and the brain continues developing until age 25.

WHEREAS, use of nicotine in adolescence can lead to lower impulse control and mood disorders³.

WHEREAS, there is evidence that youth may be sensitive to nicotine and that teens can feel dependent on nicotine sooner than adults.

WHEREAS, as of 2017, more than two (2) million teens were currently using e-cigarettes.⁴

¹ <https://www.lung.org/research/sotc/facts>

² <https://www.lung.org/research/sotc/facts>

³ E-Cigarette Use Among Youth and Young Adults: A Report of the Surgeon General. 2016.

⁴ Wang, TW, Centzke A, Sharapova S, Cullen KA, Ambrose BK, Jamal A, Tobacco Product Use Among Middle and High School Students- United States, 2011-2017. MMWR Morb Mortal Wkly Rep 2018; 67:629-633

WHEREAS, according to the 2020 National Youth Tobacco Survey, more than 23.6% of high school students in the United States use at least one tobacco product, including e-cigarettes, as well as 6.7% of middle school students.

WHEREAS, in 2021, 84.7% of youth who reported using e-cigarettes reported using flavored tobacco. The most commonly used flavors were fruit (71.6%), candy, desserts or other sweets (34.1%), mint (30.2%) and menthol (28.8%).⁵

WHEREAS, flavorings in tobacco products can make the products more appealing to youth⁶.

WHEREAS, according to the CDC, each day about 1,600 youth try their first cigarette⁷.

WHEREAS, according to the CDC, widespread marketing of e-cigarettes and the lower cost (when compared to traditional tobacco products) have contributed to the use of e-cigarettes among youth.

WHEREAS, if cigarette smoking continues at the current rate among youth in the United States, 5.6 million people currently under the age of 18, will die early from a smoking-related illness.⁸

WHEREAS, many cities throughout California have banned the sale of flavored tobacco including but not limited to, Buena Park, San Jose, La Verne, Los Angeles, Pasadena, El Monte, Glendale, Burbank and Laguna Niguel.

WHEREAS, the California State Legislature passed SB 793 banning the sale of flavored tobacco in 2020 but the statute is stayed pending the outcome of a referendum on the statewide ballot for the November 8, 2022 General Election.

WHEREAS, the staff report for this ordinance dated March 1, 2022, shall be incorporated herein by this reference, and together with this ordinance, any amendments or supplements, and oral testimony, shall constitute the necessary findings for this ordinance.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF SANTA ANA DOES ORDAIN AS FOLLOWS:

⁵ Park-Lee E, Ren C. Sawdey M, et al. Notes from the Field: E-Cigarette Use Amount Middle and High School Students- National Youth Tobacco Survey, United States, 2021. Morbidity and Mortality Weekly Report, 2021. 70:1387-9.

⁶ Centers for Disease Control and Prevention. Flavored Tobacco Product Use Among Middle and High School Students—United States, 2014. Morbidity and Mortality Weekly Report, 2015;64(38):1066–70.

⁷ https://www.cdc.gov/tobacco/data_statistics/fact_sheets/index.htm?s_cid=osh-stu-home-spotlight-001

⁸ https://www.cdc.gov/tobacco/data_statistics/fact_sheets/youth_data/tobacco_use/index.htm

Section 1. The recitals and statements of fact set forth in the Recitals to this ordinance are true and correct, constitute a substantive part of this ordinance, and are incorporated herein by this reference and adopted by the City Council.

Section 2. Sections 18-90, 18-91, 18-92 and 18-103 of Article III entitled "Tobacco Retail License" of Chapter 18 of the Santa Ana Municipal Code are hereby amended to read in their entirety as follows:

Sec. 18-90. Definitions.

The following words and phrases, whenever used in this article, shall have the meanings defined in this section unless the context clearly requires otherwise:

- (a) "Department" means the Santa Ana Police Department.
- (b) "Characterizing flavor" means any tobacco product that contains a taste or smell, other than the taste or smell of tobacco, this is distinguishable by an ordinary consumer either prior to, or during consumption of, a tobacco product, including but not limited to, any taste or smell relating to fruit, menthol, mint, wintergreen, chocolate, cocoa, vanilla, honey, molasses, or any candy, dessert, alcoholic beverage, herb or spice. A tobacco product shall not be determined to have a characterizing flavor solely because of the use of additives or flavorings or the provision of ingredient information. Rather, it is the presence of a distinguishable taste or aroma, or both, as described in the first sentence of this definition that constitutes characterizing flavor.
- (c) "Chief" means the Chief of Police or designee.
- (d) "Flavored tobacco product" means any tobacco product that imparts a characterizing flavor. There is a rebuttable presumption that a tobacco product is a flavored tobacco product if a tobacco retailer, manufacturer, or any employee or agent of a tobacco retailer or manufacturer has (i) made a public statement or claim that the tobacco product imparts a characterizing flavor; (ii) used text and/or images on the tobacco product's labeling or packaging to explicitly or implicitly indicate that the tobacco product imparts a characterizing flavor or (iii) taken action directed to consumers that would be reasonably expected to cause consumers to believe the tobacco product imparts a characterizing flavor.
- (e) "Person" means any natural person, partnership, cooperative association, corporation, personal representative, receiver, trustee, assignee, or any other legal entity, and includes the definition of "person" found in Section 1-2 of the Code.
- (f) "Proprietor" means a person with an ownership or managerial interest in a business. An ownership interest shall be deemed to exist when a person has a ten percent (10%) or greater interest in the stock, assets, or income of a business other than the sole interest of security for debt. A managerial interest shall be deemed to exist

when a person can or does have or share ultimate control over the day-to-day operations of a business.

(g) "Tobacco product" means any of the following: (1) a product containing, made or derived from tobacco or nicotine that is intended for human consumption, whether smoked, heated or chewed, absorbed, dissolved, inhaled, snorted, sniffed or ingested by any other means, including but not limited to, cigarettes, cigars, little cigars, hookah tobacco, chewing tobacco, pipe tobacco or snuff; (2) an electronic device that delivers nicotine or other vaporized liquids to the person inhaling from the device, including but not limited to, an electronic cigarette, cigar, pipe or hookah; (3) any component, part or accessory of a tobacco product whether or not sold separately. "Tobacco product" does not include a nicotine replacement product approved by the US Food and Drug Administration.

(h) "Tobacco retailer" means any person or business who sells, offers for sale, or does or offers to exchange for any form of consideration, flavored tobacco product, tobacco, tobacco products, or tobacco paraphernalia, or who distributes free or low cost samples of tobacco products or tobacco paraphernalia. "Tobacco retailing" shall mean the doing of any of these things. This definition is without regard to the quantity of tobacco, tobacco products sold, offered for sale, exchanged, or offered for exchange.

Sec. 18-91. Tobacco retailer license.

(a) It shall be unlawful for any person to act as a tobacco retailer, or to display or advertise the sale of tobacco products without obtaining and maintaining a valid tobacco retailer's license pursuant to this article for each location at which that activity is to occur.

(b) It shall be unlawful for a licensed tobacco retailer, or an agent or employee thereof to violate any local, state, or federal tobacco-related law.

(c) Each day on which a prohibited act occurs shall constitute a separate violation.

(d) It shall be unlawful for a licensed tobacco retailer or any of the licensee's agents or employees, to violate any local, state, or federal law applicable to sale, display or advertising of tobacco products or tobacco retailing.

(e) Each tobacco retailer license shall be prominently displayed in a publicly visible location at the licensed location.

Sec. 18-92. - Limits on tobacco retail license.

- (a) No license shall be issued to authorize tobacco retailing at other than a fixed business place. Tobacco retailing by persons on foot or from vehicles is prohibited.
- (b) No license shall be issued to authorize tobacco retailing at any location for which a tobacco retailer license suspension is in effect or during a period of ineligibility following a revocation.
- (c) It shall be unlawful for a tobacco retailer, or any of the tobacco retailer's agents or employees, to sell, offer for sale, possess with intent to sell or offer for sale, a flavored tobacco product.

* * *

Sec. 18-103. Tobacco retailing without a license—Seizure.

- (a) Tobacco products, including flavored tobacco products, offered for sale or exchange in violation of this article are subject to seizure by the chief or any peace officer and shall be forfeited after the licensee and any other owner of the tobacco products, including flavored tobacco products, seized is given reasonable notice and an opportunity to demonstrate that the tobacco products, including flavored tobacco products were not offered for sale or exchange in violation of this article.
- (b) Forfeited tobacco products, including flavored tobacco products shall be maintained and destroyed pursuant to the chief's policy for seized evidence.

Section 3. The City Council finds that this ordinance is not subject to the California Environmental Quality Act (CEQA) pursuant to sections 15060(c)(2), 15060(c)(3) and 15061(b)(3) of the State CEQA Guidelines because it will not result in a direct or reasonably foreseeable indirect physical change in the environment, because there is no possibility it will have a significant effect on the environment, and it is not a "project," as defined in section 15378 of the State CEQA Guidelines.

Section 4. If any section, subsection, phrase, or clause of this ordinance is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this ordinance. The City Council hereby declares that it would have passed this ordinance and each section, subsection, phrase or clause thereof irrespective of the fact that any one or more sections, subsections, phrases, or clauses be declared invalid or unconstitutional.

Section 5. The Clerk of the Council shall certify to the adoption of this ordinance and cause the same to be published in the manner prescribed by law.

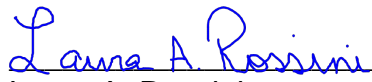
Section 6. This ordinance will take effect thirty (30) days after adoption of the second reading by the City Council.

ADOPTED this ____ day of _____, 2022.

Vicente Sarmiento
Mayor

APPROVED AS TO FORM:

Sonia R. Carvalho, City Attorney



Laura A. Rossini
Chief Assistant City Attorney

AYES: Councilmembers: _____

NOES: Councilmembers: _____

ABSTAIN: Councilmembers: _____

NOT PRESENT: Councilmembers: _____

CERTIFICATE OF ATTESTATION AND ORIGINALITY

I, Daisy Gomez, Clerk of the Council, do hereby attest to and certify the attached Ordinance No. NS-XXXX to be the original ordinance adopted by the City Council of the City of Santa Ana on _____.

Date: _____

Clerk of the Council
City of Santa Ana

Middleton, Samuel

From: Thomas Lawton <Thomas.L@fumari.com>
Sent: Monday, March 14, 2022 9:10 AM
To: eComment
Subject: Agenda Item 11 Article 3 Chapter 18 Public Comment / Request

Good afternoon Honorable Mayor and City Council,
thank you for giving me the opportunity to submit a written public statement.

My name is Thomas Lawton, I am a member of the National Hookah Community Association as well as the Government Affairs Representative for Fumari and submit this statement to speak on agenda item #11, article III chapter 18 . We actively support the implementation of the Tobacco Retail Licensing program and agree that matters should be taken to ensure that tobacco products stay out of the hands of the youth. I ask that you please honor my request and remove this item from the consent calendar for proper discussion and consideration.

Before you inadvertently vote to ban the nearly thousand-year cultural tradition of hookah with the flavor ban being considered on agenda item # 11, I ask the city council to consider adding a hookah exemption to the proposed flavored tobacco ban. The flavor ban is meant to put an end to the youth vaping epidemic, although there is no teen hookah epidemic.

The FDA and CDC reports have made it clear that hookah is not the problem with youth and there are no facts that support a ban on hookah. Failing to exempt hookah from the flavor ban will inadvertently affect the livelihood of hookah retailers and lounges. According to the FDA teen hookah use is at 0.8% nationally, the lowest it has ever been. The COVID pandemic coupled with rising costs of inflation has caused financial hardships for retailers who have worked very hard to remain open to serve their customers. If tobacco retailers and hookah lounges are forced to stop selling traditional flavored tobacco products, then customers will simply drive to another store in a neighboring city or purchase their preferred products on-line. Or even worse, Santa Ana will allow an unregulated illicit market the opportunity to flourish with this ban. The additional loss of sales would translate into lost jobs and likely store closures for many minority owned hookah retailers.

I ask that city council reconsiders the flavored tobacco ban ordinance until Californians vote in November on whether the California statewide flavored tobacco ban law under Senate Bill 793 is approved or repealed. The voters should be allowed to have their voices heard. Please see the hookah exemption language from SB793 below:

(c) Subdivision (b) does not apply to the sale of flavored shisha tobacco products by a hookah tobacco retailer if all of the following conditions are met:

- (1) The hookah tobacco retailer has a valid license to sell tobacco products issued pursuant to Chapter 2 (commencing with Section 22971.7) of Division 8.6 of the Business and Professions Code.
- (2) The hookah tobacco retailer does not permit any person under 21 years of age to be present or enter the premises at any time.
- (3) The hookah tobacco retailer shall operate in accordance with all relevant state and local laws relating to the sale of tobacco products.
- (4) If consumption of tobacco products is allowed on the premises of the hookah tobacco retailer, the hookah tobacco retailer shall operate in accordance with all state and local laws relating to the consumption of tobacco products on the premises of a tobacco retailer, including, but not limited to, Section 6404.5 of the Labor Code.

SB793 balances the interests of law makers by addressing youth access and usage of flavored tobacco products, while protecting the cultural tradition of hookah. The SB793 hookah exemption limits sales to 21 and over establishments, meaning you must be 21 and over to enter a retail establishment or lounge in order to purchase hookah and requires these establishments to comply with local and state laws. This shows that law makers can reach their regulatory goals without creating unintended consequences such as eliminating the rich cultural tradition of hookah.

Please remember, hookah is not part of the youth tobacco use epidemic. Thank you for your consideration.



THOMAS LAWTON
GOVERNMENT AFFAIRS
OFFICE: (619) 331-3535 EXT. 708
FUMARI INC.

Middleton, Samuel

From: Jennifer Speck <jspecky99@icloud.com>
Sent: Tuesday, March 15, 2022 12:36 PM
To: eComment
Subject: Ban on Menthol Cigarettes and Flavored Tobacco

Greetings, Mayor and Council-members.

My name is Jennifer Speck, bans have never worked in this country and this flavor ban will be no different. The state wide ban is coming in a few months, so let's have empathy to taxpaying and Community serving retailers. Give them the necessary time to re-organize their business model.

Thank you,
All

Sent from my iPhone

Middleton, Samuel

From: Lynda Barbour, ACS <Lynda.Barbour@cancer.org>
Sent: Tuesday, March 15, 2022 3:40 PM
To: eComment
Subject: Item 11 IN support

I write in favor of Item 11, the ordinance to eliminate the sale of flavored tobacco products in Santa Ana.

The American Cancer Society Cancer Action Network thanks council for your first vote and urges your continued support for this ordinance that takes a strong stance to protect Santa Ana youth from the tobacco industry's addictive products

Sincerely,
Lynda Barbour
Sr. Government Relations Dir
ACS CAN

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Lynda Barbour, MPH
American Cancer Society
619-682-7416