

ORDINANCE NO.

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF LONG BEACH AMENDING THE LONG BEACH MUNICIPAL CODE BY ADDING CHAPTER 5.94 PROHIBITING THE SALE OF FLAVORED TOBACCO PRODUCTS WITHIN THE CITY OF LONG BEACH

WHEREAS, the City of Long Beach has a substantial interest in promoting compliance with federal, state, and local laws intended to regulate tobacco sales; in discouraging the illegal purchase of tobacco products by persons under 21 years of age; in promoting compliance with laws prohibiting sales of tobacco products to persons under 21 years of age; and in protecting youth and underserved populations from the harms of tobacco; and

WHEREAS, State law expressly authorizes cities to enact local tobacco retail licensing ordinances, and allows for the suspension or revocation of a local license for a violation of any state tobacco control law. (California Business & Professions Code § 22971.3); and

WHEREAS, State law prohibits the sale or furnishing of cigarettes, tobacco products, and smoking paraphernalia to persons under 21 years of age except active duty military personnel who are 18 years of age or older (California Penal Code § 308); and

WHEREAS, data released by the United States Centers for Disease Control and Prevention (CDC) and the United States Food and Drug Administration (FDA) last year show a rapid increase in use of electronic smoking devices by youth, with one (1) in five (5) youth using electronic smoking devices in 2019 - an "epidemic" that requires "historic action" according to the United States Surgeon General and the FDA; and

WHEREAS, more than eighty percent (80%) of high school students who

OFFICE OF THE CITY ATTORNEY
CHARLES PARKIN, City Attorney
411 West Ocean Boulevard, 9th Floor
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1 consume tobacco use an electronic smoking device; and

2 WHEREAS, from 2016 to 2018, vaping among California high school
3 students rose twenty-seven percent (27%); and

4 WHEREAS, in 2018, 10.9% of California high school students reported
5 using electronic smoking devices; and

6 WHEREAS, the federal Family Smoking Prevention and Tobacco Control
7 Act, enacted in 2009, prohibited candy and fruit flavored cigarettes, largely because
8 these flavored products were marketed to youth and young adults, and younger smokers
9 were more likely than older smokers to have tried these products; and

10 WHEREAS, adding menthol and other flavorings to tobacco can mask the
11 natural harshness and taste of tobacco, making these products easier to use and
12 increasing their appeal among youth; and

13 WHEREAS, dramatic increases in youth vaping have been attributed to the
14 appeal of flavored vapor products and alternative nicotine products as well as advertising
15 and promotional activities by companies targeted at youth; and

16 WHEREAS, the California Department of Public Health (CDPH) reports that
17 electronic smoking devices are available in more than fifteen thousand (15,000) flavors
18 that may be attractive to children, such as mango, bubble gum, and mint; and

19 WHEREAS, nationally there is a public health crisis, with an alarming
20 outbreak in recent months of lung injuries among previously healthy individuals who have
21 used vaping products; and

22 WHEREAS, according to the CDC as of October 29, 2019, there have been
23 one-thousand eight hundred eighty-eight (1,888) cases of E-cigarette, or Vaping, Product
24 Use Associated Lung Injury (EVALI) and thirty-seven (37) deaths nationally; and

25 WHEREAS, California has reported over one hundred (100) cases of EVALI
26 since late June, including three (3) deaths in patients aged 14-70; and

27 WHEREAS, in Long Beach, three (3) cases of EVALI were reported by
28 October 2019; and

1 WHEREAS, due to the public health crisis, the CDC and the CDPH are
2 urging everyone to refrain from vaping, no matter the substance or source; and

3 WHEREAS, in response to the public health crisis caused by vaping, bans
4 of flavored electronic smoking devices have been enacted in cities and counties
5 throughout the state of California, including, but not limited to, Richmond, Livermore, San
6 Francisco City and County, and Los Angeles County; and

7 WHEREAS, no specific types of electronic smoking devices or liquids have
8 been conclusively identified to be the cause of the EVALI illnesses at this time; the FDA
9 is testing vaping products from cases around the United States to determine which
10 specific products or ingredients may be the cause; and

11 WHEREAS, until a cause has been identified, the City Council must act
12 promptly, in accordance with health advisories issued by the CDC and CDPH, to protect
13 residents of Long Beach, and failure to act promptly will result in serious prejudice to the
14 public health and interest, particularly Long Beach's youth.

15 NOW, THEREFORE, the City Council of the City of Long Beach ordains as
16 follows:
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18 Section 1. Findings. The City Council finds and determines that the facts
19 set forth in the recitals of this Ordinance are true and correct and hereby incorporates
20 them herein by this reference.
21

22 Section 2. Chapter 5.94 is hereby added to the Long Beach Municipal
23 Code to read as follows:
24

25 Chapter 5.94

26 SALE OF FLAVORED TOBACCO PRODUCTS
27

28 5.94.010 Purpose and intent.

1 A. The purpose of this Chapter is to encourage responsible
2 tobacco retailing and to discourage violations of tobacco related laws,
3 especially those that prohibit or discourage the sale or distribution of
4 tobacco to minors. It is not the purpose of this ordinance to expand or
5 reduce the degree to which the activities regulated by federal or state law
6 are criminally proscribed or to alter the penalties provided for violations of
7 federal or state tobacco-related laws.

8 B. This Chapter shall remain in effect for one (1) year from the
9 effective date of this Chapter, unless further extended by the City Council.

10
11 5.94.020 Definitions.

12 Unless the particular provision or the context otherwise requires, the
13 definitions and provisions contained in this section shall govern the
14 construction, meaning and application of words and phrases used in this
15 Chapter:

16 A. "Accessory" means equipment, products, or materials that are
17 used, intended for use, or designed for use in smoking, vaping, ingesting,
18 inhaling, or otherwise introducing tobacco or tobacco products into the
19 human body and can be an object or device that is not essential in itself but
20 adds to the beauty, convenience, or effectiveness of something else.

21 B. "City" means the City of Long Beach.

22 C. "Code" means the Long Beach Municipal Code.

23 D. "Component" means any item intended or reasonably
24 expected to be used with or for the human consumption of a tobacco
25 product.

26 E. "Electronic smoking device" means the following:

27 1. Any device or delivery system that can be used to
28 deliver an inhaled dose of nicotine or other substances in aerosolized or

1 vaporized form to a person, including any component, part, or accessory of
2 the device that is used during its operation.

3 2. "Electronic smoking device" includes electronic
4 cigarettes as defined in section 30121 of the California Revenue and
5 Taxation Code, and any other device manufactured, distributed, marketed,
6 or sold as an electronic cigar, an electronic cigarillo, an electronic pipe, an
7 electronic hookah, vape pen, or any other product name or descriptor, that
8 can be used to deliver nicotine in aerosolized or vaporized form to a person.

9 3. "Electronic smoking device" does not include any
10 product that has been approved by the United States Food and Drug
11 Administration for sale as a tobacco cessation product or for other
12 therapeutic purposes where that product is marketed and sold solely for
13 such approved use.

14 F. "Electronic smoking device fluid" means any liquid or
15 substance that can be used by an electronic smoking device.

16 G. "Flavor" means an artificial or naturally-occurring substance
17 that contains a taste or smell, other than the taste or smell of tobacco, that
18 is imparted either prior to or during the consumption of the product or any
19 byproduct produced by the tobacco product, including, but not limited to,
20 any taste or smell relating to chocolate, coffee, cocoa, menthol, mint,
21 wintergreen, vanilla, honey, coconut, licorice, nuts, fruit, or any candy,
22 dessert, alcoholic or non-alcoholic beverage, herb, spice, or any concept
23 flavor. "Flavor" includes flavor in any form, mixed with or otherwise added to
24 any tobacco product or nicotine delivery device, including electronic
25 devices.

26 H. "Part" means a piece or segment of something, which
27 combined with other pieces makes up the whole.

28 I. "Person" means any individual, entity, firm, partnership, joint

1 venture, limited liability company, association, social or professional club,
2 fraternal organization, corporation, estate, trust, business trust, receiver,
3 trustee, syndicate, or other group or combination of the above acting as a
4 single unit.

5 J. "Tobacco paraphernalia" means any item designed, marketed,
6 or reasonably expected to be used for the consumption, use, or preparation
7 of a tobacco product.

8 K. "Tobacco product" means the following:

9 1. Any product containing, made from, or derived from
10 tobacco or nicotine, whether natural or synthetic, that is intended for human
11 consumption, whether smoked, heated, chewed, absorbed, dissolved,
12 inhaled, snorted, sniffed, vaped, or ingested by any other means, including,
13 but not limited to, cigarettes, cigars, little cigars, chewing tobacco, pipe
14 tobacco, snuff, or electronic smoking device fluid; or

15 2. Any electronic smoking device that delivers nicotine or
16 other substances, whether natural or synthetic, to the person inhaling from
17 the device, including, but not limited to, an electronic cigarette, electronic
18 cigar, electronic pipe, electronic hookah, or vaping device; or

19 3. Any component, part, or accessory intended or
20 reasonably expected to be used with a tobacco product, whether or not sold
21 separately.

22 4. "Tobacco product" does not include any product that
23 has been approved by the United States Food and Drug Administration for
24 sale as a tobacco cessation product or for other therapeutic purposes
25 where that product is marketed and sold solely for such approved use.
26 Examples of the products approved by the United States Food and Drug
27 Administration for the cessation of smoking include skin patches, lozenges,
28 gum, and prescription medications.

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5. "Tobacco product" does not include any drugs, devices, or combination of products authorized for sale by the United States Food and Drug Administration, as those terms are defined in the Federal Food, Drug and Cosmetic Act, provided the drug, device, or combination products are not otherwise prohibited by this Chapter as a flavored tobacco product.

L. "Tobacco retailer" means any person, in whole or in part, and all associated owners, employees, managers, or agents, who sells, offers for sale, exchanges, or offers to exchange any tobacco, tobacco product, or tobacco paraphernalia for consideration, without regard to the quantity sold, offered for sale, exchanged, or offered to exchange, including, any person licensed pursuant to Chapter 5.81 or Chapter 5.88 of this Code.

M. "Sell" or "sale" means to transfer, deliver, exchange, redeem, or barter, in any manner or by any means whatsoever, for consideration, including, but not limited to, providing a tobacco product as a gift or promotional item in combination with the sale of any other product or item, through any means.

5.94.030 Sale of flavored tobacco products prohibited.

A. Notwithstanding any other law, a person, including a tobacco retailer, shall not sell or offer for sale, or distribute any tobacco product containing a flavor, or any component, part, or accessory intended to impart, or imparting a flavor in any form, to any tobacco product or nicotine delivery device, including electronic smoking devices.

B. For purposes of determining whether a tobacco product contains a flavor, a public statement or claim, whether express or implied, made or disseminated by the person responsible for the manufacture of a tobacco product, or by any person authorized or permitted by the manufacturer to make or disseminate a public statement concerning such

1 products, that a product has or produces a taste or smell other than a taste
2 or smell of tobacco will be considered by the City to constitute presumptive
3 evidence that the tobacco product contains a flavor. For purposes of this
4 section, a "public statement or claim" shall include, but is not limited to, text,
5 color, and/or images on the product's labeling or packaging that are used to
6 explicitly or implicitly communicate that a tobacco product has a flavor.

7 C. There shall be a rebuttable presumption that anyone in
8 possession of four (4) or more tobacco products containing a flavor as part
9 of a commercial enterprise, including, but not limited to, individual flavored
10 tobacco products, packages of flavored tobacco products, or any
11 combination thereof, possesses such flavored tobacco products with intent
12 to sell, offer for sale, exchange, or offer to exchange.

13 D. Any person licensed pursuant to this Code to sell tobacco
14 products containing a flavor shall have one-hundred eighty (180) calendar
15 days from the effective date of this Chapter to comply with the provisions of
16 this Chapter.

17
18 5.94.040 Enforcement and penalties.

19 A. Violations.

20 1. It is unlawful for any person to violate any provision, or
21 to fail to comply with any of the conditions or requirements of this Chapter.

22 2. Whenever in this Chapter any act or omission is made
23 unlawful, it shall include causing, permitting, aiding, abetting, suffering, or
24 concealing the fact of such act or omission.

25 3. Violation of any provision of this Chapter shall be
26 considered a strict liability; accordingly, the City shall not be required to
27 prove knowledge, criminal intent, or any other mental state to establish a
28 violation of this Chapter.

1 4. No property owner in charge of, or in possession of,
2 any real property within the City shall cause, permit, maintain, conduct, or
3 otherwise suffer or allow a public nuisance as defined in this Chapter to
4 exist.

5 B. Remedies cumulative. The remedies provided for in this
6 Chapter are not mutually exclusive. Pursuit of any one remedy does not
7 preclude the City from availing itself of any or all available administrative,
8 civil, or criminal remedies, at law or equity. The remedies provided by this
9 Chapter are cumulative and in addition to any other remedies available at
10 law or in equity.

11 C. Declaration of public nuisance.

12 1. Any violation of the provisions of this Chapter is hereby
13 deemed unlawful and a public nuisance.

14 2. As a nuisance per se, any violation of this Chapter is
15 subject to any of the following remedies, including, without limitation:
16 injunctive relief, revocation of applicable permits or licenses, revocation of
17 the certificate of occupancy for the real property where the violation
18 occurred, disgorgement and payment to the City of all monies unlawfully
19 obtained, costs of abatement, costs of investigation, attorney fees, and any
20 other relief or remedy available at law or equity.

21 D. Liability of employees and agents. In construing and enforcing
22 the provisions of this Chapter, the act, omission, or failure of an agent,
23 officer, representative, or other person acting for or employed by a tobacco
24 retailer, within the scope of his or her employment or office, will be in every
25 case be deemed the act, omission, or failure of the tobacco retailer.

26 E. Failure to comply with any of the provisions of this Chapter will
27 constitute grounds for suspension, denial, or revocation of any permit
28 issued pursuant to this Code, including, but not limited to, Chapter 5.81 or

1 Chapter 5.88. The noticing and hearing requirements for suspension or
2 revocation of the permit shall be governed by the provisions of Chapter 5.06
3 of this Code.

4 F. Penalties.

5 1. Criminal penalty. Any person who violates any
6 provision of this Chapter is guilty of a misdemeanor, and upon conviction
7 thereof, may be punished by a fine of not more than one thousand dollars
8 (\$1,000.00), or by imprisonment in the City or county jail for a period not
9 exceeding six (6) months, or by both such fine and imprisonment.

10 2. Administrative Citations.

11 a. In addition to all other legal remedies at law,
12 violations of this Chapter are enforceable using the administrative citation
13 procedures set forth in Chapter 9.65 of this Code.

14 b. Administrative penalties imposed pursuant to
15 this Section also constitute a personal obligation on each person who
16 causes, permits, maintains, conducts, or otherwise suffers or allows the
17 nuisance to exist. In the event administrative penalties are imposed
18 pursuant to this Section on two (2) or more persons for the same violation,
19 all such persons are jointly and severally liable for the full amount of the
20 penalties imposed.

21 c. In addition to any other remedy, the City may
22 prosecute a civil action through the City Attorney to collect any
23 administrative penalty imposed pursuant to this Chapter.

24 3. Actions for injunctive relief and civil penalties.

25 a. As an alternative, or in addition to any other
26 remedy, the City Attorney may enforce the provisions of this Chapter
27 against any tobacco retailer and/or property owner in any court of
28 competent jurisdiction. The City Attorney may apply to such court for an

1 order seeking injunctive relief to abate or remove any nuisance caused,
2 maintained, or permitted by any tobacco retailer and/or property owner, to
3 restrain any tobacco retailer and/or property owner from taking any action
4 contrary to the provisions of this Chapter or other applicable law; and/or to
5 require any tobacco retailer and/or property owner to take any action to
6 comply with this Chapter or other applicable law.

7 b. In any civil court action brought by the City
8 Attorney pursuant to this Section in which the City succeeds in obtaining an
9 order from the court, the City shall be entitled to recover from any tobacco
10 retailer and/or property owner all of the City's costs of investigation,
11 enforcement, abatement, destruction, and litigation, including but not limited
12 to attorneys' fees.

13 G. Civil penalties.

14 1. Violations of this Chapter are subject to a civil action
15 brought by the City Attorney, punishable by a civil fine not less than two
16 hundred and fifty dollars (\$250) and not exceeding one thousand dollars
17 (\$1,000) per violation.

18 2. In assessing the amount of a civil penalty, the court
19 shall consider any one or more of the relevant circumstances presented by
20 any of the parties to the case, including, but not limited to, the following:

- 21 a. The nature and seriousness of the violation;
22 b. Any economic benefit gained through the
23 violation;
24 c. The number of violations;
25 d. The length of time over which the violation
26 occurred;
27 e. The willfulness of the defendant's violation; and
28 f. The defendant's assets, liabilities, and net worth.

1 3. The City Attorney is authorized, without further
2 direction from the City Council, to institute any civil actions permitted
3 pursuant to this subsection.

4 H. Liens and Special Assessments.

5 1. Notwithstanding any other provision of this Chapter to
6 the contrary, the costs incurred by the City in the abatement of a violation or
7 nuisance may be placed against any privately owned and affected property
8 as either a nuisance abatement lien or a special assessment lien pursuant
9 to California Government Code Section 38771 et seq., as amended from
10 time-to-time, or a lien pursuant to California Government Code Section
11 54988, as amended from time to time.

12 2. Liens. All actual costs required by this Section
13 constitute a lien upon the property upon which the tobacco retailer is
14 situated. The lien for any inspection, enforcement, or abatement costs may
15 attach thirty (30) days after the responsible parties are notified of the costs,
16 and will remain until the costs are paid or the premises is sold in payment
17 thereof.

18 3. Lien enforcement. The City may enforce a lien under
19 this Chapter in any manner permitted by law, including filing a civil action
20 either to foreclose on its liens or to obtain a money judgment or both, or
21 pursuing non-judicial foreclosure.

22 4. Conversion of liens. The City may elect, upon thirty
23 (30) calendar days written notice to all known and record owners of the
24 privately owned and affected property, to convert any nuisance abatement
25 lien authorized by this Chapter to a special assessment lien, or vice versa.
26 Costs recoverable under this Chapter may include those categories of costs
27 and fees set forth in Civil Code Section 3496, regardless of the type of
28 nuisance involved.

1 5. Special Assessment. If the property is specially
2 assessed, said assessment may be collected at the same time and in the
3 same manner as ordinary real property taxes are collected and will be
4 subject to the same penalties and the same procedure and sale in case of
5 delinquency as provided for ordinary real property taxes. All laws applicable
6 to the levy, collection, and enforcement of real property taxes are applicable
7 to the special assessment.

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9 5.94.050 Severability.

10 In the event any provision in this Chapter is deemed invalid, illegal, or
11 unenforceable, the validity, legality and enforceability of the remaining
12 provisions shall not in any way be affected or impaired thereby and such
13 provision is ineffective only to the extent of such invalidity, illegality, or
14 unenforceability.

15
16 Section 3. The City Council finds that this Ordinance is not subject to
17 environmental review under the California Environmental Quality Act pursuant to Title 14
18 of the California Code of Regulations (CEQA Guidelines) Section 15060 (c)(2) (the
19 activity will not result in a direct or reasonably foreseeable indirect physical change in the
20 environment) and Section 15060(c)(3) (the activity is not a project as defined in Section
21 15378) because it has no potential for resulting in physical change to the environment,
22 directly or indirectly.

23
24 Section 4. The City Clerk shall certify to the passage of this ordinance by
25 the City Council and cause it to be posted in three (3) conspicuous places in the City of
26 Long Beach, and it shall take effect on the thirty-first (31st) day after it is approved by the
27 Mayor.

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I hereby certify that the foregoing Ordinance was adopted by the City Council of the City of Long Beach at its meeting of _____, 2019, by the following vote:

Ayes: Councilmembers: _____

Noes: Councilmembers: _____

Absent: Councilmembers: _____

City Clerk

Approved: _____
(Date)

Mayor

OFFICE OF THE CITY ATTORNEY
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