



OFFICE OF THE CITY ATTORNEY  
Long Beach, California

**ORD-20**

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November 12, 2019

HONORABLE MAYOR AND CITY COUNCIL  
City of Long Beach  
California

RECOMMENDATION:

Recommendation to declare ordinance amending the Long Beach Municipal Code by adding Chapter 5.94 prohibiting the sale of flavored tobacco products within the City of Long Beach, read the first time and laid over to the next regular meeting of the City Council for final reading. (Citywide)

DISCUSSION

Pursuant to your request on October 1, 2019, this ordinance has been prepared and is submitted for your consideration.

SUGGESTED ACTION:

Approve recommendation.

Very truly yours,

CHARLES PARKIN, City Attorney

By

TAYLOR ANDERSON  
Deputy City Attorney

TMA:bg A19-05646  
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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           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.

8  
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  
CHARLES PARKIN, City Attorney  
411 West Ocean Boulevard, 9th Floor  
Long Beach, CA 90802-4511