

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 CERTAIN 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 twenty-one (21) years of age except active duty military personnel who are eighteen (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

OFFICE OF THE CITY ATTORNEY
CHARLES PARKIN, City Attorney
411 West Ocean Boulevard, 9th Floor
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1 WHEREAS, more than eighty percent (80%) of high school students who
2 consume tobacco use an electronic smoking device; and

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

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

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

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

15 WHEREAS, in response to the 2009 Flavor Ban, adolescent smokers were
16 more likely to choose menthols, suggesting substitution toward the one remaining legal
17 cigarette flavor; and

18 WHEREAS, evidence suggests that cigar and pipe tobacco use significantly
19 increased in response to 2009 Flavor Ban; and

20 WHEREAS, a survey taken between 2004-2014 by National Survey on
21 Drug Use and Health (NSDUH) reported that 54% of youth ages 12-17 years of age who
22 smoke use menthol cigarettes; and

23 WHEREAS, according to the Population Assessment of Tobacco and
24 Health (PATH), among youth ages 12-17 who report using cigars or cigarillos, 74% cited
25 flavor being the primary reason for use; and

26 WHEREAS, cigars and cigarillos are exempt from federal restrictions on
27 product characteristics like flavorings, packaging, and marketing strategies aimed at
28 youth; and

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

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

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

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

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

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

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

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

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

27 WHEREAS, until a cause has been identified, the City Council must act
28 promptly, in accordance with health advisories issued by the CDC and CDPH, to protect

1 residents of Long Beach, and failure to act promptly will result in serious prejudice to the
2 public health and interest, particularly Long Beach's youth; and

3 WHEREAS, to the extent this ordinance applies to minors, diversion and
4 education are preferred alternatives to the imposition of criminal penalties.

5 NOW, THEREFORE, the City Council of the City of Long Beach ordains as
6 follows:

7
8 Section 1. Findings. The City Council finds and determines that the facts
9 set forth in the recitals of this Ordinance are true and correct and hereby incorporates
10 them herein by this reference.

11
12 Section 2. Chapter 5.94 is hereby added to the Long Beach Municipal
13 Code to read as follows:

14
15 Chapter 5.94

16 SALE OF CERTAIN FLAVORED TOBACCO PRODUCTS

17
18 5.94.010 Purpose and intent.

19 A. The purpose of this Chapter is to encourage responsible
20 tobacco retailing and to discourage violations of tobacco related laws,
21 especially those that prohibit or discourage the sale or distribution of
22 tobacco to minors. It is not the purpose of this ordinance to expand or
23 reduce the degree to which the activities regulated by federal or state law
24 are criminally proscribed or to alter the penalties provided for violations of
25 federal or state tobacco-related laws.

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

28 C. This Chapter shall not apply to any person licensed pursuant

1 to Chapter 5.88 of this Code.

2
3 5.94.020 Definitions.

4 Unless the particular provision or the context otherwise requires, the
5 definitions and provisions contained in this section shall govern the
6 construction, meaning and application of words and phrases used in this
7 Chapter:

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

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

14 C. "Cigarillo" means any roll of tobacco other than a cigarette
15 wrapped entirely or in part in tobacco or any substance containing tobacco
16 and weighing no more than three pounds per thousand units. "Cigarillo"
17 includes, but is not limited to, tobacco products known or labeled as small
18 cigar or little cigar.

19 D. "Code" means the Long Beach Municipal Code.

20 E. "Component" means any item intended or reasonably
21 expected to be used with or for the human consumption of a tobacco
22 product.

23 F. "Electronic smoking device" means the following:

24 1. Any device or delivery system that can be used to
25 deliver an inhaled dose of nicotine or other substances in aerosolized or
26 vaporized form to a person, including any component, part, or accessory of
27 the device that is intended or reasonably expected to be used during its
28 operation, whether or not sold separately. "Electronic smoking device"

1 includes, but is not limited to, electronic cigarettes, electronic cigars,
2 electronic pipes, electronic hookahs, vapes, vaporizers, or vape pens.

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

16 H. "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, including electronic smoking devices.

25 I. "Flavored cigarillo" means any cigarillo that imparts a flavor.

26 J. "Flavored electronic smoking device" means any electronic
27 smoking device that imparts a flavor.

28 K. "Flavored electronic smoking device fluid" means any

1 electronic smoking device fluid that imparts a flavor.

2 L. "Menthol cigarettes" means any roll of mentholated tobacco
3 wrapped in paper or in any substance not containing mentholated tobacco,
4 or any roll of mentholated tobacco wrapped in any substance containing
5 mentholated tobacco which is likely to be offered to, or purchased as a
6 menthol cigarette, because of its appearance, the type of mentholated
7 tobacco used in the filler, or its packaging and labeling.

8 M. "Part" means a piece or segment of something, which
9 combined with other pieces makes up the whole.

10 N. "Person" means any individual, entity, firm, partnership, joint
11 venture, limited liability company, association, social or professional club,
12 fraternal organization, corporation, estate, trust, business trust, receiver,
13 trustee, syndicate, or other group or combination of the above acting as a
14 single unit.

15 O. "Prohibited products" means the following:

- 16 1. "Flavored cigarillos", as defined by this Section;
17 2. "Flavored electronic smoking devices", as defined by
18 this Section;
19 3. "Flavored electronic smoking device fluid", as defined
20 by this Section; and
21 4. "Menthol cigarettes", as defined by this Section.

22
23 P. "Tobacco paraphernalia" means any item designed, marketed,
24 or reasonably expected to be used for the consumption, use, or preparation
25 of a tobacco product.

26 Q. "Tobacco product" means the following:

- 27 1. Any product containing, made from, or derived from
28 tobacco or nicotine, whether natural or synthetic, that is intended for human

1 consumption, whether smoked, heated, chewed, absorbed, dissolved,
2 inhaled, snorted, sniffed, vaped, or ingested by any other means, including,
3 but not limited to, cigarettes, cigars, cigarillos, chewing tobacco, pipe
4 tobacco, snuff, or electronic smoking device fluid; or

5 2. Any electronic smoking device; or

6 3. Any component, part, or accessory intended or
7 reasonably expected to be used with a tobacco product, whether or not sold
8 separately.

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

13 Examples of the products approved by the United States Food and Drug
14 Administration for the cessation of smoking include skin patches, lozenges,
15 gum, and prescription medications.

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

21 R. "Tobacco retailer" means any person, in whole or in part, and
22 all associated owners, employees, managers, or agents, who sells, offers
23 for sale, exchanges, or offers to exchange any tobacco, tobacco product, or
24 tobacco paraphernalia for consideration, without regard to the quantity sold,
25 offered for sale, exchanged, or offered to exchange, including, any person
26 licensed pursuant to Chapter 5.81 of this Code. For purposes of this
27 Chapter, "tobacco retailer" shall not include any person licensed pursuant to
28 Chapter 5.88 of this Code.

1 S. “Sell” or “sale” means to transfer, deliver, exchange, redeem,
2 or barter, in any manner or by any means whatsoever, for consideration,
3 including, but not limited to, providing a tobacco product as a gift or
4 promotional item in combination with the sale of any other product or item,
5 through any means.

6
7 5.94.030 Sale of certain flavored tobacco products prohibited.

8 A. Notwithstanding any other law, a person, including a tobacco
9 retailer or any employee of a tobacco retailer, shall not sell or offer for sale,
10 or distribute any prohibited product.

11 B. For purposes of determining whether a prohibited product
12 contains a flavor, a public statement or claim, whether express or implied,
13 made or disseminated by the person responsible for the manufacture of a
14 prohibited product, or by any person authorized or permitted by the
15 manufacturer to make or disseminate a public statement concerning such
16 products, that a prohibited product has or produces a taste or smell other
17 than a taste or smell of tobacco will be considered by the City to constitute
18 presumptive evidence that the prohibited product contains a flavor. For
19 purposes of this section, a “public statement or claim” shall include, but is
20 not limited to, text, color, and/or images on the product’s labeling or
21 packaging that are used to explicitly or implicitly communicate that a
22 prohibited product has a flavor.

23 C. There shall be a rebuttable presumption that anyone in
24 possession of four (4) or more prohibited products as part of a commercial
25 enterprise, including, but not limited to, individual prohibited products,
26 packages of prohibited products, or any combination thereof, possesses
27 such prohibited products with intent to sell, offer for sale, exchange, or offer
28 to exchange.

1 D. After one-hundred eighty (180) calendar days from the
2 effective date of this Chapter, it shall be a violation of this Chapter for a
3 tobacco retailer or an employee of a tobacco retailer to sell, offer for sale, or
4 distribute any prohibited product.

5
6 5.94.040 Enforcement and penalties.

7 A. Violations.

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

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

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

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

21 B. Remedies cumulative. The remedies provided for in this
22 Chapter are not mutually exclusive. Pursuit of any one remedy does not
23 preclude the City from availing itself of any or all available administrative,
24 civil, or criminal remedies, at law or equity. The remedies provided by this
25 Chapter are cumulative and in addition to any other remedies available at
26 law or in equity.

27 C. Declaration of public nuisance.

28 1. Any violation of the provisions of this Chapter is hereby

1 deemed unlawful and a public nuisance.

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

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

14 E. Failure to comply with any of the provisions of this Chapter will
15 constitute grounds for suspension, denial, or revocation of any permit
16 issued pursuant to this Code, including, but not limited to, Chapter 5.81.
17 The noticing and hearing requirements for suspension or revocation of the
18 permit shall be governed by the provisions of Chapter 5.06 of this Code.

19 F. Penalties.

20 1. Criminal penalty. Any person who violates any
21 provision of this Chapter is guilty of a misdemeanor, and upon conviction
22 thereof, may be punished by a fine of not more than one thousand dollars
23 (\$1,000.00), or by imprisonment in the City or county jail for a period not
24 exceeding six (6) months, or by both such fine and imprisonment.

25 2. Administrative Citations.

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

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

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

11 3. Actions for injunctive relief and civil penalties.

12 a. As an alternative, or in addition to any other
13 remedy, the City Attorney may enforce the provisions of this Chapter
14 against any tobacco retailer and/or property owner in any court of
15 competent jurisdiction. The City Attorney may apply to such court for an
16 order seeking injunctive relief to abate or remove any nuisance caused,
17 maintained, or permitted by any tobacco retailer and/or property owner, to
18 restrain any tobacco retailer and/or property owner from taking any action
19 contrary to the provisions of this Chapter or other applicable law; and/or to
20 require any tobacco retailer and/or property owner to take any action to
21 comply with this Chapter or other applicable law.

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

28 G. Civil penalties.

1 1. Violations of this Chapter are subject to a civil action
2 brought by the City Attorney, punishable by a civil fine not less than five
3 hundred dollars (\$500) and not exceeding one thousand dollars (\$1,000)
4 per violation.

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

- 8 a. The nature and seriousness of the violation;
- 9 b. Any economic benefit gained through the
10 violation;
- 11 c. The number of violations;
- 12 d. The length of time over which the violation
13 occurred;
- 14 e. The willfulness of the defendant's violation; and
- 15 f. The defendant's assets, liabilities, and net worth.

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

19 H. Liens and Special Assessments.

20 1. Notwithstanding any other provision of this Chapter to
21 the contrary, the costs incurred by the City in the abatement of a violation or
22 nuisance may be placed against any privately owned and affected property
23 as either a nuisance abatement lien or a special assessment lien pursuant
24 to California Government Code Section 38771 et seq., as amended from
25 time-to-time, or a lien pursuant to California Government Code Section
26 54988, as amended from time to time.

27 2. Liens. All actual costs required by this Section
28 constitute a lien upon the property upon which the tobacco retailer is

1 situated. The lien for any inspection, enforcement, or abatement costs may
2 attach thirty (30) days after the responsible parties are notified of the costs,
3 and will remain until the costs are paid or the premises is sold in payment
4 thereof.

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

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

16 5. Special Assessment. If the property is specially
17 assessed, said assessment may be collected at the same time and in the
18 same manner as ordinary real property taxes are collected and will be
19 subject to the same penalties and the same procedure and sale in case of
20 delinquency as provided for ordinary real property taxes. All laws applicable
21 to the levy, collection, and enforcement of real property taxes are applicable
22 to the special assessment.

23
24 5.94.050 Severability.

25 In the event any provision in this Chapter is deemed invalid, illegal, or
26 unenforceable, the validity, legality and enforceability of the remaining
27 provisions shall not in any way be affected or impaired thereby and such
28 provision is ineffective only to the extent of such invalidity, illegality, or

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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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