



Legislation Text

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ORDINANCE Amending Chapter 4.36 of the San Leandro Municipal Code Prohibiting the Sale of Menthol Cigarettes in San Leandro, effective January 1, 2023

AN ORDINANCE OF THE CITY OF SAN LEANDRO TO AMEND CHAPTER 4.36 “TOBACCO RETAILERS” OF THE SAN LEANDRO MUNICIPAL CODE TO INCLUDE MENTHOL TOBACCO PRODUCTS IN THE DEFINITION OF FLAVORED TOBACCO PRODUCTS

WHEREAS, the California Constitution, Article XI, Section 7, provides cities and counties with the authority to enact ordinances to protect the health, safety, welfare, and morals of their citizens; and

WHEREAS, California courts have affirmed the power of a city to regulate business activity in order to discourage violations of law in such cases as Cohen v. Board of Supervisors (1985) 40 Cal.3d 277, Bravo Vending v. City of Rancho Mirage (1993) 16 Cal.App.4th 383, and Prime Gas v. City of Sacramento (2010) 184 Cal.App.4th 697; and

WHEREAS, local zoning controls allow local governments to regulate the operation of lawful businesses to avoid circumstances which facilitate violations of state, federal, and local laws; and

WHEREAS, based in part on the information contained in this section, the City Council finds that the failure of tobacco retailers to comply with all tobacco control laws, particularly laws prohibiting the sale of tobacco products to minors, presents an imminent threat to the public health, safety, and welfare of the residents of the City San Leandro; and

WHEREAS, approximately 480,000 people die in the United States from tobacco-related diseases every year, making it the nation’s leading cause of preventable death; and

WHEREAS, the California Legislature has recognized the danger of tobacco use and has made reducing youth access to tobacco products a high priority, as evidenced by the following:

- The Legislature has declared that smoking is the single most important source of preventable disease and premature death in California; that keeping children from beginning to use tobacco products in any form shall be among the highest priorities in disease prevention for the State of California;
- State law prohibits the sale or furnishing of cigarettes, tobacco products, and smoking paraphernalia to anyone under the age of 21; requires that tobacco retailers check the identification of tobacco purchasers who reasonably appear to be under 21 years of age; requires that retailers of tobacco products post conspicuous notices stating that selling tobacco products to anyone under 21 years of age is illegal;

prohibits the sale of tobacco products and paraphernalia through self-service displays with limited exceptions; prohibits the sale of “bidis” (filterless cigarettes wrapped in temburni or tendu leaf) except in adult-only establishments; prohibits the manufacture, distribution, or sale of cigarettes in packages of less than 20 and prohibits the manufacture, distribution, or sale of “roll-your-own” tobacco in packages containing less than 0.60 ounces of tobacco; and

WHEREAS, despite local, state, and federal efforts to limit youth access to tobacco, minors are still able to access tobacco products, as evidenced by the following: in 2009, 10.9% of all students in grades 9-12, including 6.7% of female students and 15% of male students were current cigar users; in 2009, 3.9% of all students in grades 6-8 were current cigar users; in if cigarette smoking continues at the current rate among youth in this country, 5.6 million of today’s youth younger than 18 years old will die early from a smoking-related illness, which amounts to about 1 of every 13 Americans aged 17 years or younger who are alive today with an estimated 4.47 million youth tobacco users in 2020; and

WHEREAS, research demonstrates that local tobacco retail ordinances dramatically reduce youth access to cigarettes, as evidenced by the following:

- A review of thirty three California communities with strong tobacco retailer licensing ordinances shows that the youth sales rate declined in nearly each community;
- A study of the effect of licensing and enforcement methods used in the Philadelphia area revealed a decrease in sales to minors from 85% in 1994 to 43% in 1998;
- A study of several Minnesota cities found that an increased licensing fee in conjunction with strict enforcement of youth access laws led to a decrease from 38.8% to 4.9% in the number of youth able to purchase tobacco; and

WHEREAS, the federal Family Smoking Prevention and Tobacco Control Act, enacted in 2009, prohibited candy and fruit-flavored cigarettes, largely because these flavored products were marketed to youth and young adults, and younger smokers were more likely to have tried these products than older smokers; and although the manufacture and distribution of flavored cigarettes (excluding menthol) is banned by federal law, neither federal nor California laws restrict sales of flavored non-cigarette tobacco products, such as cigars, cigarillos, smokeless tobacco, hookah tobacco, and electronic smoking devices and the nicotine solutions used in these devices; and

WHEREAS, flavored non-cigarette tobacco products have become increasingly common and are available in a variety of flavors that appeal to children and young adults, including apple, cherry, chocolate, grape, peach, strawberry, and vanilla; and

WHEREAS, the U.S. Surgeon General has stated that flavored tobacco products are considered to be “starter” products that help establish smoking habits that can lead to long-term addiction; and

WHEREAS, data from the National Youth Tobacco Survey indicate that approximately two-fifths of U.S. middle and high school smokers report using flavored little cigars or flavored cigarettes; and

WHEREAS, tobacco companies have used flavorings such as mint and wintergreen in smokeless tobacco products as part of a “graduation strategy” to encourage new users to start with products with lower levels of nicotine and progress to products with higher levels of nicotine; and

WHEREAS, the U.S. Centers for Disease Control and Prevention has reported current electronic cigarette use (use on at least 1 day in the past 30 days) among high school students increased from 4.5 percent in 2013 to 13.4 percent in 2014, rising from approximately 660,000 to 2 million students. Among middle school students, current e-cigarette use more than tripled from 1.1 percent in 2013 to 3.9 percent in 2014-an increase from approximately 120,000 to 450,000 students; and

WHEREAS, the Governor of California signed Senate Bill 793 on August 28, 2020 to prohibit tobacco retailers from offering for sale, or possessing with the intent to sell or offer for sale, a flavored tobacco product or a product flavor enhancer, which would include menthol cigarettes and other menthol tobacco products. Senate Bill 793 has not gone into effect due to a referendum campaign led by tobacco companies; and

WHEREAS, the City Council finds that the reports referenced herein are relevant to the problems addressed by the City of San Leandro in enacting this ordinance to preserve and safeguard public health, safety and welfare by protecting against the negative secondary effects and adverse impacts of tobacco use and electronic cigarette use among youth; and

WHEREAS, the federal Family Smoking Prevention and Tobacco Control Act (the “FDA law”) completely bans free distribution of all tobacco products except smokeless tobacco, which can still be distributed in “qualified adult-only facilities”; and

WHEREAS, the FDA law does not prohibit the free distribution of coupons or nominally priced tobacco products; and

WHEREAS, California state law prohibits the sale or distribution of free or nominal-cost cigarettes or smokeless tobacco products (or coupons, coupon offers, or rebate offers for such products) on public grounds or on private grounds that are open to the public; and

WHEREAS, California state law specifically allows adoption of a local ordinance related to the distribution of free or nominal-cost tobacco products that is “more restrictive” and provides that a stricter local ordinance shall govern in the case of any inconsistency between the local ordinance and state law; and

WHEREAS, the FDA law also expressly grants state and local governments the right to enact measures that are more restrictive than those in the federal law; and

WHEREAS, the City of San Leandro has a substantial interest in promoting compliance with federal, state, and local laws prohibiting the sale or furnishing of tobacco products and electronic cigarette products to minors; in discouraging the illegal purchase of tobacco and electronic cigarette products by minors; in promoting compliance with laws prohibiting sales of cigarettes and tobacco products to minors; and in protecting children from being lured into illegal activity through adult misconduct; and

WHEREAS, the City Council finds that a local licensing system for tobacco retailers is appropriate to ensure that retailers comply with tobacco control laws and business standards of the City of San Leandro, to protect the health, safety, and welfare of our residents; and

WHEREAS, a requirement for a tobacco retailer license will not unduly burden legitimate business activities of retailers who sell or distribute cigarettes or other tobacco products or electronic cigarettes to adults. It will, however, allow the City to regulate the operation of lawful businesses to discourage violations of federal, state, and local tobacco and electronic cigarette-related laws; and

WHEREAS, the flavored tobacco ordinance of the City of San Leandro was implemented in the fall of 2017. To date, no holder of a San Leandro tobacco retailer license is known to have gone out of business because of the flavored tobacco ordinance; and

WHEREAS, it is the intent of the City Council, in amending this ordinance, to include the sale of menthol cigarettes or menthol flavored tobacco products, in its efforts to curb the sales of all flavored tobacco products and to encourage responsible tobacco retailing, and to especially prohibit or discourage the sale or distribution of tobacco and nicotine products to minors, but not to expand or reduce the degree to which the acts regulated by federal or state law are criminally proscribed or to alter the penalties provided therein.

Now, therefore, the City Council of the City of San Leandro does **ORDAIN** as follows:

SECTION I. Recitals. The above recitals are true and correct and made a part of this ordinance.

SECTION I. Amendment of Code. Chapter 4-36-100 of Title 4 of the San Leandro Municipal Code is hereby amended to read as follows (with additions in italics and deletions in strikethrough):

CHAPTER 4-36 TOBACCO RETAILERS

SECTION 4-36-100 DEFINITIONS.

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

...

“Characterizing flavor” means a distinguishable taste or aroma, other than the taste or aroma of tobacco, imparted by a tobacco product or any byproduct produced by the tobacco product, including, but not limited to, tastes or aromas relating to any fruit, chocolate, vanilla, honey, candy, coca, dessert, alcoholic beverage, *menthol*, mint, wintergreen, 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 a characterizing flavor. Characterizing flavor includes flavor in any form, mixed with, or otherwise added to tobacco product or nicotine delivery device, including electronic smoking devices.

...

“Flavored tobacco product” means any tobacco product (~~other than cigarettes as defined by the U.S. Food and Drug Administration~~) that contains a constituent that imparts a characterizing flavor. This includes *menthol cigarettes* and tobacco products, cigars, little cigars, pipe tobacco, hookah tobacco, snuff, chewing tobacco, dipping tobacco, bidis, blunts, and electronic cigarettes or electronic smoking devices.

(a) For purposes of this definition, “constituent” means any ingredient, substance, chemical, or compound, other than tobacco, water, or reconstituted tobacco sheet, which is added by the manufacturer to a tobacco product during the processing, manufacture, or packing of the tobacco product.

(b) Further, a tobacco product is presumed to be a flavored tobacco product if a manufacturer or any of the manufacturer’s agents or employees has:

(1) Made a public statement or claim that the tobacco product has or produces a characterizing flavor, including, but not limited to, text and/or images on the product’s labeling or packaging that are used explicitly or implicitly to communicate information about the flavor, taste, or aroma of a tobacco product; or

(2) Taken actions directed to consumers that would be reasonably expected to result in consumers believing that the tobacco product imparts a characterizing flavor.”

SECTION III. CEQA. Approval of the amendment is exempt from further environmental review under the general rule in California Environmental Quality Act (CEQA) Guidelines Section 15061(b)(3) that CEQA only applies to projects that have the potential for causing a significant effect on the environment. As a series of text amendments and additions, it can be seen with certainty that there is no possibility that the ordinance will have a significant effect on the environment.

SECTION IV. Approval. The City Council hereby approves the amendments to the Municipal Code, more particularly, amending Chapter 4.36, as shown above, which is incorporated herein by reference and available for review in the City Clerk's office during normal business hours.

SECTION V. Severability. If any provision of this ordinance or the application thereof to any person or circumstance is held invalid, the remainder of the ordinance, including the application of such part or provision to other persons or circumstances shall not be affected thereby and shall continue in full force and effect. To this end, provisions of this ordinance are severable. The City Council hereby declares that it would have passed each section, subsection, subdivision, paragraph, sentence, clause, or phrase hereof irrespective of the fact that any one or more sections, subsections, subdivisions, paragraphs, sentences, clauses, or phrases be held unconstitutional, invalid, or unenforceable.

SECTION VI. Publication and effective date. This ordinance shall take effect thirty (30) days after adoption. The City Clerk is directed to publish the title once and post a complete copy thereof on the City Council Chamber bulletin board for five (5) days prior to adoption.

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