



TO: City Council

FROM: Megan Garibaldi, City Attorney

CONTACT: Winnie Cai, Assistant City Attorney

SUBJECT: Consideration of Next Steps for Ordinance No. 21-09, Amending Chapter 5.07 of Title 5 of the Goleta Municipal Code Banning the Sales of Flavored Tobacco

RECOMMENDATION:

Staff seeks Council direction on the following options:

- A. Repeal Ordinance No. 21-09 in its entirety and direct staff to return with an ordinance to effectuate the repeal of Ordinance No. 21-09; or
- B. Submit the Referendum on Ordinance No. 21-09 to the voters for consideration at either (a) the next special election (June 7, 2022) or (b) the next regular municipal election (November 8, 2022), and direct staff to return with the requisite resolution to call such election.

BACKGROUND:

On October 5, 2021, the City Council adopted Ordinance No. 21-09 Amending Chapter 5.07 of Title 5 of the Goleta Municipal Code Banning the Sales of Flavored Tobacco, with an effective date of December 4, 2021.

A referendum petition against Ordinance No. 21-09 was submitted to the City Clerk's Office, and on October 8, 2021, the City Attorney provided an impartial summary of the adopted ordinance to the proponents, per Elections Code Section 9238.

On November 5, 2021, the referendum petitioners submitted signatures to the City Clerk. The City Clerk reviewed the petition for compliance with the Elections Code, performed a prima facie review of the signatures and counted 5,407 unverified signatures, of which 2,040 signatures needed to be verified by the County Registrar of Voters.

The Santa Barbara County Registrar of Voters office sent a Certification Letter to the City Clerk confirming that the Referendum contained the required 2,040 signatures on December 8, 2021.

At the December 21, 2021 City Council meeting, the City Council received and filed the signature verification calculations from the Santa Barbara County Clerk-Recorder and the City Clerk, certifying the sufficiency of the Referendum Petition against Ordinance No. 21-09, Amending Chapter 5.07 of Title 5 of the Goleta Municipal Code Banning the Sales of Flavored Tobacco. This action had the effect of suspending Ordinance No. 21-09.

In accordance with the Elections Code, the City Council now has two options for how it may choose to proceed. It must either: (1) repeal Ordinance No. 21-09 in its entirety, or (2) submit it to the voters for consideration at either the next special election in June 2022 or regular election in November 2022. Council asked a number of questions related to this topic at its last meeting to help further evaluate the options. Staff has provided answers to each question below.

DISCUSSION:

What is the difference between the effect of the prohibitions in the City's ordinance and SB 793 (i.e., the State legislation that bans flavored tobacco)?

Senate Bill 793 (SB 793) bans the sales of flavored tobacco but creates exceptions for (1) sales of flavored tobacco by a hookah tobacco retailer who is licensed as a tobacco retailer by the State and does not permit anyone under 21 years of age to enter the premises; and (2) sales of flavored tobacco in loose leaf tobacco and premium cigars. By comparison, the City's Ordinance No. 21-09 bans the sale of all flavored tobacco products and does not exempt the sale of flavored tobacco in hookah, loose leaf tobacco, and premium cigars.

At the last meeting, there was a question posed as to whether the hookah pipe, loose leaf tobacco and premium cigars are popular delivery devices for youth for purposes of ingesting tobacco. This question was aimed at ascertaining whether the State's exemption for flavored tobacco in hookah, loose leaf tobacco, and premium cigars would have any practical effect in Goleta. The prevalent data is that youth predominantly prefer to vape flavored tobacco, which is the central focus of SB 793 and a critical focus of Ordinance No. 21-09.

At first blush, it may seem that the practical effect of the State's exemption for flavored tobacco in hookah, loose leaf tobacco, and premium cigars could have fairly little import in Goleta because the City currently does not have any hookah lounges or tobacco retailers that only sell tobacco products for the hookah. However, prior trends with tobacco delivery products indicate that products that are not popular now can quickly become popular in the future if those devices afford an opportunity to otherwise circumvent a clear ban (as was the recent case with respect to electronic cigarettes and vaping pens, discussed further below). Our research indicates that the tobacco

industry has historically found new ways to keep their products on the market, and often has aimed those efforts at youth. These efforts may include popularizing currently disfavored delivery devices among youth to maximize the ability to sell flavored tobacco products in those delivery devices, for example, to maximize the exemptions under SB 793 (but that would still be banned under the City's ordinance).

An example of the tobacco industry's quick reaction to a ban on flavored tobacco occurred in 2009 when the Tobacco Control Act was passed by a bipartisan Congress and signed into law by the President. The Act banned the sale of cigarettes with flavored tobacco at a time when cigarettes were the predominant form of nicotine delivery. A few years later, electronic cigarettes and vaping pens were invented and introduced in youth and quickly became the dominant device of nicotine delivery. These electronic devices and vaping pens, which contained flavored tobacco, circumvented the federal ban on the sales of flavored tobacco in that the ban applied only to cigarettes.

In summary, SB 793, which bans flavored tobacco but exempts the ban if the flavored tobacco is ingested through a certain delivery device (hookah pipe, loose leaf tobacco and premium cigars), leaves open the possibility that flavored tobacco can still be marketed to youth and that, in time, may result in a different popularity of device for continued use of flavored tobacco. The City's ordinance, by comparison, does significantly more to foreclose that possibility.

Should the City wait and see what happens with SB 793 instead of putting its own ordinance on a ballot? Given that hookah, loose leaf and premium cigars are not popular tobacco products in youth in the community, would the City by and large achieve its goal of banning flavored tobacco if SB 793 is approved in November 2022?

If the referendum on SB 793 is defeated by the voters in November 2022, as noted above, it would have the effect of banning the sales of flavored tobacco on a Statewide basis. However, even if that occurs, it is possible the law will not immediately take effect due to litigation that may stay the law's efficacy pending resolution of those lawsuits. Before the petition to referendum SB 793 was verified and accepted, the tobacco industry filed a number of lawsuits to obtain an injunction to stay the effective date of SB 793 (January 1, 2021) claiming that SB 793 was preempted by the 2009 Tobacco Prevention Act, a federal law which banned cigarettes with flavored tobacco. However, these cases have been stayed or dismissed because the issue of whether SB 793 is preempted by federal law is not ripe in that there is no certainty that SB 793 will go into effect unless the referendum is defeated in November, thus approving the law.

Therefore, even if the referendum on SB 793 is defeated by the voters, the tobacco industry would likely refile or seek to reinstate the preemption lawsuits. If they are successful, this could stay the effective date of SB 793 for a number of years. In short, SB 793's effective approval on the November 2022 ballot (by defeat of the referendum) does not mean that sales of flavored tobacco will be banned in Goleta at that time; it

may well take a number of years for that to occur, assuming the lawsuits challenging SB 793 are ultimately defeated. This is the rationale that other cities and counties have followed in passing their own flavored tobacco bans despite that SB 793 will be voted on in November. This same analysis was also part of Council's rationale before it passed Ordinance No. 21-09 last fall.

What is the difference between enforcement of SB 793 and enforcement of the City's Ordinance?

SB 793 would be enforced by local law enforcement (County Sheriff). Violators of State law can also face the consequence of having their state license to sell cigarettes and tobacco products suspended or revoked. Such a consequence would affect a retailer's ability to obtain a City license, which is predicated upon a retailer's acquisition of a state license and compliance with State laws.

By comparison, the City's ordinance would be enforced by the City's code compliance staff with the help of Santa Barbara County Tobacco Prevention, which coordinates with the Sheriff to conduct sting operations. When violations are established, the City will issue administrative citations in accordance with the Municipal Code. Historically, the City has issued an administrative citation with a \$100 penalty for first violations of a Municipal Code violation relating to tobacco retailing (but not the enforcement of Ordinance No. 21-09, which has not been enforceable due to the referendum process). The City's tobacco retailing regulations also allow for the City to suspend or revoke a license for violations.

If the referendum is put to the voters, would the measure be better placed on the ballot for the June 2022 or November 2022 election?

At the last City Council meeting, there was discussion as to potential pros and cons of placing the measure on the June or November 2022 elections. One critical question in this discussion was whether having two measures related to flavored tobacco bans (i.e., the City's ordinance and SB 793) on the same ballot (i.e., the November 2022 election) would create confusion. While there is potential for confusion in those circumstances, the City will have the ability to educate the public about the ordinance. That education could include clarifying the difference between the City's ordinance and SB 793. The City will have the opportunity to provide an impartial analysis of the ordinance and use its myriad of media to educate the public about Ordinance No. 21-09, including any confusion that may arise relating to SB 793 being at the same ballot. Moreover, any of the large health advocacy groups, such as the American Cancer Society, American Lung Association in California and American Academy of Pediatrics, will be educating the public about SB 793. It is probable that the education on SB 793 may draw more attention and support for the City's ordinance.

Another source of potential concern discussed at the last meeting was whether there would be any impact, to the potential outcome of the City's ordinance if the City were simultaneously to place a sales tax or other revenue measure on the November 2022 ballot (should Council be inclined to do so). Since both measures are substantially very

different, one is a ban on flavored tobacco products whereas the other is a revenue measure, it is not likely that a voter would get confused by both measures being on the ballot. The flavored tobacco ban is not an imposition on the voter whereas the sales tax or other revenue measure is. It is possible, too, that placing both measures on the November 2022 ballot may create greater voter turnout inasmuch as certain voters may be motivated to vote because of a particular measure being on the ballot and, as a result, vote on both measures presented by the City.

What other cities have passed flavored tobacco bans and have their respective ordinances faced referenda?

From staff's research, we found a total of 112 jurisdictions across California have passed flavored tobacco bans. That included the six public agencies that have adopted flavored tobacco bans since the City's adoption of Ordinance No. 21-09:

1. Sacramento County Unincorporated
2. Redwood City
3. Walnut Creek
4. Baldwin Park
5. Pasadena
6. Cloverdale

With the limited exceptions noted below, none of the ordinances associated with the 112 ordinances banning flavored tobacco have been subject to referendum, based on staff's research.

Staff is aware of one jurisdiction that encountered a referendum on its flavored tobacco ban and put the question to the voters. The City and County of San Francisco passed an ordinance to ban the sale of flavored tobacco products in 2017. Petitioners gathered enough signatures to referend the ordinance, and the San Francisco Board of Supervisors placed the ordinance as a measure on the June 5, 2018 ballot. In June 2018, the voters of San Francisco overwhelmingly voted (68 percent to 32 percent) in favor of defeating the referendum and approving the ordinance.

What are the costs, in terms of staff time and elections costs, of placing this item on the ballot?

The cost of placing the ordinance on an election is anticipated to be approximately \$25,000 to \$35,000. The amount of City staff time needed to get this item ready for an election, including the work that went into this staff report, is anticipated to be about 25 hours from the City Clerk's Office and approximately 20 hours from the City Attorney's Office. Future actions that are necessary to place this item on a ballot for a future election include:

- a. Bringing a report to Council for consideration of Resolutions Calling and Giving Notice of an Election, Consolidating with the Santa Barbara County for Election

Services, Directing the City Clerk to have the City Attorney prepare an Impartial Analysis, and Deciding on Arguments for and Against and Rebuttals.

- b. Drafting the City Attorney Impartial Analysis
- c. Once Council adopts the resolution calling for the election, the City Clerk's office would then place a notice "Noticing the Election" per EC 12111 (One time not later than one week before the election)
- d. After the election, the City Clerk's office would bring a report back to the City Council to "Certify the Election" per EC 10262
- e. Coordination between the City Clerk's office and the County Registrar of Voters

The cost of the staff time would be approximately \$1,500-\$2,500 for the City Clerk's Office and \$3,000-\$5,000 for City Attorney's Office.

What is the harm to youth if we do not place the item on the ballot?

Staff has asked County Tobacco Prevention to provide the answer to this question, and the following response was received:

- Every year an estimated 18,500 high school students across California start smoking e-cigarettes— of which 96% are using flavored tobacco. (Tobacco Free Kids, 2021.)
- Deaths: There are no monthly/annual death statistics regarding teens because tobacco-related deaths generally are from cancer, respiratory illnesses, stroke and heart disease, which manifest in later years. Tragically, though, there was an outbreak of EVALI (e-cigarette or vaping use-associated lung injury) in 2019, resulting in 2,807 vape-related hospitalizations and 68 deaths in the United States. However, these deaths should not be extrapolated to an annual number, as this outbreak has not reoccurred.
- Occurrence of Vaping in Middle and High School. Another way of looking at the importance of time when it comes to protecting youth is that:
 - Middle school: 1 in 20 students vape
 - High school: 1 in 5 students vape

(Source: CDC. E-cigarette Use Among Middle and High School Students — United States, 2020. MMWR Morb. Mortal Wkly. Rep 2020.)

- High school is a critical environment when it comes to being introduced to flavored tobacco. Once youths enter high school, flavored vape use increases four-fold. A delay from June to November would mean an entire new cohort (about 500 freshman students at Dos Pueblos) would be entering high school and would have increased exposure to these addictive, harmful products.

Based on the above statistics, how many will get hooked on flavored tobacco between now and November 2022?

County Tobacco Prevention staff responded as follows to this question:

- Statewide about 15,000 high schoolers will get hooked on flavored tobacco, based on 2020 data.

If the City repeals the ordinance, it is not allowed to adopt another ordinance that is “materially identical” to Ordinance No. 21-09. If the City chose to repeal Ordinance No. 21-09, what ordinance could the City consider banning in its place?

Elections Code section 9241 prohibits a city from passing an ordinance, after it has repealed an ordinance that was the subject of a referendum and not placed on an election, that is “materially identical” to the ordinance that had been repealed. This restriction does not foreclose the entire subject matter from all ordinances generally, however. Rather, the Council may deal further with the subject matter of the suspended ordinance, by enacting an ordinance essentially different from the ordinance protested against, avoiding, perhaps, the objections made to the first ordinance. Based on the current state of the law, the details as to what a new ordinance entails will be critical in evaluating whether it is essentially different.

One example of a potentially different ordinance that still deals with the same objective (i.e., minimizing the use of tobacco products for the overall public health) may be an ordinance that focuses on regulating or banning the tobacco delivery device in lieu of the tobacco product itself. With that said, it should be noted that the banning of a specific delivery device aimed at banning a certain product (i.e., flavored tobacco) has limited efficacy. Delivery devices, unlike the tobacco product itself, are a more singular purchase such that once the delivery device is acquired elsewhere, if the tobacco product itself is still available for recurring purchase, there remains little deterrent to the actual use of tobacco.

Moreover, delivery products that are not popular now can become popular in the future and/or new delivery devices can be invented or slightly changed from existing products, again minimizing the efficacy of such a ban. For example, in 2009, the Tobacco Control Act, passed by a bipartisan Congress and signed into law by the President, banned the sale of cigarettes with flavored tobacco at a time when cigarettes were the predominant form of nicotine delivery. A few years later, electronic cigarettes and vaping pens were invented and introduced in youth and quickly became the dominant device of nicotine delivery. These electronic devices and vaping pens, which contained flavored tobacco, circumvented the federal ban on the sales of flavored tobacco in that the ban applied only to cigarettes. Ultimately, banning the product itself is likely to far more effective than banning the delivery device.

FISCAL IMPACTS:

The fiscal impact to rescinding the ordinance would be staff time required to bring an ordinance back to repeal Ordinance No. 21-09.

The fiscal impact to placing the ordinance as a measure on a ballot would be about \$25,000-\$35,000 for the cost of placing the measure on an election and \$4,500-\$7,500 for staff time (cost of election and staff time).

ALTERNATIVES:

All options have been discussed above.

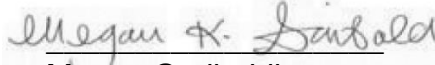
Reviewed By:

Legal Review By:

Approved By:



Kristine Schmidt
Assistant City Manager



Megan Garibaldi
City Attorney



Michelle Greene
City Manager