

ORDINANCE NO. 19-1940

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF CARSON, CALIFORNIA AMENDING SECTION 63150.5.1 (DEFINITIONS), ADDING SECTION 63150.5.12 (SALE OF ELECTRONIC CIGARETTES NOT APPROVED BY FDA PROHIBITED), AND ADDING SECTION 63150.5.13 (SALE OF FLAVORED TOBACCO PRODUCTS), TO PART 5 (BUSINESSES, PROFESSIONS, TRADES AND OCCUPATIONS REQUIRING A PERMIT) OF CHAPTER 3 (BUSINESS, PROFESSIONS AND TRADES) OF ARTICLE VI (TAXES AND LICENSES) OF THE CARSON MUNICIPAL CODE TO PROHIBIT THE RETAIL SALE OF ELECTRONIC CIGARETTES AND OTHER VAPING DEVICES THAT HAVE NOT BEEN APPROVED BY THE U.S. FOOD AND DRUG ADMINISTRATION FOR INTRODUCTION INTO INTERSTATE COMMERCE, AND TO PROHIBIT THE RETAIL SALE OF FLAVORED TOBACCO PRODUCTS

WHEREAS, pursuant to Article XI, Section 7 of the California Constitution, the City has the police power to make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws; and

WHEREAS, electronic cigarettes, vapes, vape pens, vape mods, other vaping devices, or other electronic nicotine delivery systems (collectively “E-Cigarettes”), have become the most commonly used tobacco product among adolescents in the United States since they entered the marketplace in or around 2007; and

WHEREAS, according to the CDC, the number of middle and high school students who reported being current users of tobacco products increased 36% from 3.6 million to 4.9 million between 2017 and 2018. The increase is largely attributable to a nationwide surge in E-Cigarette use by adolescents. There were 1.5 million more youth E-Cigarette users in 2018 than in 2017. Frequent use of E-Cigarettes among current high school E-Cigarette users increased from 20% in 2017 to 28% in 2018; and

WHEREAS, a February 2019 National Institute of Health report found that over 17.6% of 8th graders, 32.3% of 10th graders, and 37.3% of 12th graders reported trying vaping last year nationwide; and

WHEREAS, according to the Center on Addiction, the use of E-Cigarettes involves the heating of a product usually containing a propylene glycol or vegetable glycerin-based liquid with nicotine, flavoring, and other chemicals and metals into an aerosol for inhalation; and

WHEREAS, there are over 15,000 vaping flavors available on the market, including flavors such as bubble gum, cotton candy, fruit punch, menthol, and wintergreen, which have the effect of making E-Cigarettes more attractive to minors; and

WHEREAS, in addition to vaping products, other tobacco products, including cigarettes and hookah shisha, are often flavored in ways that make them attractive to minors, thus increasing the risk that minors will use, and potentially become addicted to, these products; and

WHEREAS, as of November 13, 2019, 2172 cases of E-Cigarette use-associated lung injuries had been reported to the CDC from across 49 states, including California, and 42 deaths had been confirmed from 24 states, including California; and

WHEREAS, the U.S. Surgeon General, the California Department of Public Health, the American Lung Association, and the National Academies of Science, Engineering and Medicine have issued warnings and advisories to the public about the health risks associated with the use of E-Cigarettes; and

WHEREAS, the United States Food and Drug Administration (“FDA”) has not fully analyzed the effects of E-Cigarettes or their appropriateness for the public health, nor has the FDA approved or authorized E-Cigarettes for marketing or distribution in interstate commerce; and

WHEREAS, in an attempt to address the health risks associated with tobacco products, the federal government in 2009 enacted the Family Smoking Prevention and Tobacco Control Act (“FSPTCA”), which, among other things, made E-Cigarettes subject to the FDA’s regulatory authority, similar to cigarettes.

WHEREAS, despite the adoption of the FSPTCA, virtually all E-Cigarettes currently sold have not been approved by the FDA. In 2017, the FDA issued guidance that gives E-Cigarette manufacturers until August 8, 2022, to submit an application for pre-market review. The guidance purported to allow unapproved E-Cigarette products to stay on the market until such time as the FDA complies with its statutory duty to conduct a pre-market review to determine whether a new tobacco product poses a risk to public health (a time which is currently unknown); and

WHEREAS, under the foregoing timeline, by the time E-Cigarette manufacturers are required to submit their pre-market review applications, E-Cigarettes will have been on the market for fifteen years without any FDA analysis or approval, and years could elapse thereafter before the FDA completes such analysis or approves any E-Cigarettes for commercial marketing or distribution; and

WHEREAS, if current trends continue, six million more youth in the United States will begin using E-Cigarettes just between now and 2022; and

WHEREAS, in order to protect the public health, safety and welfare of the residents and visitors of the City of Carson, the City Council hereby intends to: (1) prohibit, City-wide, the retail sale of any and all E-Cigarettes which have not received FDA authorization for

introduction into interstate commerce; and (2) prohibit the retail sale of all flavored tobacco products City-wide; and

WHEREAS, it is the Council’s intent that if and when a specific E-Cigarette product receives such FDA approval, such product would then become eligible for sale in the City of Carson consistent with this Ordinance pursuant to a City tobacco and electronic cigarette permit issued in accordance with Carson Municipal Code Sections 63150.5 *et seq.*, while all other non-approved E-Cigarette products would remain prohibited under this Ordinance until such time as they receive the requisite FDA approval.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF CARSON, CALIFORNIA DOES ORDAIN AS FOLLOWS:

SECTION 1. The foregoing recitals are true and correct and are incorporated herein as findings of fact.

SECTION 2. The City Council finds and determines that this Ordinance is exempt from the requirements of the California Environmental Quality Act (CEQA) because: (1) it does not constitute a “project” under CEQA Guidelines Section 15378(b)(2) in that it constitutes general policy and procedure making; (2) it does not constitute a “project” under CEQA Guidelines Section 15378(b)(5) in that it has no potential for resulting in physical change to the environment, either directly or indirectly; and (3) in the alternative, it is exempt from CEQA pursuant to CEQA Guidelines Section 15061(b)(3), in that it can be seen with certainty that there is no possibility that this Ordinance will have a significant effect on the environment, because the Ordinance merely prohibits the retail sale of flavored tobacco products and non-FDA-approved E-Cigarettes.

SECTION 3. Section 63150.5.1 (Definitions) of Part 5 (Businesses, Professions, Trades and Occupations Requiring a Permit) of Chapter 3 (Businesses, Professions and Trades) of Article VI (Taxes and Licenses) of the Carson Municipal Code is hereby amended to read in its entirety as follows (additions shown in ***bold italics***, deletions shown in ~~strikethrough~~):

“63150.5.1 Definitions.

‘Characterizing flavor’ means a taste or aroma, other than the taste or aroma of tobacco, imparted either prior to or during consumption of a tobacco product or any byproduct produced by the tobacco product, including but not limited to tastes or aromas relating to menthol, mint, wintergreen, chocolate, vanilla, honey, cocoa, cotton candy, bubble gum, or any type of fruit, candy, alcoholic beverage, dessert, herb, or spice.

‘City’ means the City of Carson, California.

‘Code Enforcement Officer’ means any employee or agent of the City who is designated to enforce any provision of this Code.

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‘Director’ means the City’s Finance Officer or his or her designee.

“Electronic cigarette” means an electronic and/or battery-operated device, the use of which may resemble smoking, which can be used to deliver an inhaled dose of nicotine or other substances *in an aerosol or other related form*. The term includes any such device, whether manufactured, distributed, marketed, or sold as an electronic cigarette, an e-cigarette, an electronic cigar, an electronic cigarillo, an electronic pipe, an electronic hookah, *a vape, a vape pen, an advanced personal vaporizer, a vape mod, a vaping device of any other kind*, or any other product name or descriptor. The term does not include any inhaler prescribed by a licensed doctor.

‘Flavored tobacco product’ means any tobacco product that imparts a characterizing flavor. A public statement or claim made or disseminated by the manufacturer of a tobacco product, or by any person authorized or permitted by the manufacturer to make or disseminate public statements concerning such tobacco product, to the effect that such tobacco product has or produces a characterizing flavor shall constitute presumptive evidence that the tobacco product is a flavored tobacco product.

‘Newly established business’ means a business which was not engaged in tobacco and electronic cigarette retailing within the City during the immediately preceding permit renewal period.

‘Person’ means any natural person, partnership, cooperative association, domestic or foreign corporation, receiver, trustee, assignee, or any other legal entity.

‘Tobacco and electronic cigarette paraphernalia’ means cigarette papers or wrappers, pipe holders, smoking materials of all types, cigarette rolling machines, *hookahs*, and any other item designed to facilitate smoking or the ingestion of tobacco products. *“Tobacco and electronic cigarette paraphernalia” includes “electronic cigarette.”*

‘Tobacco and electronic cigarette retailer’ means any person who sells, offers for sale, or offers to exchange, for any form of consideration, tobacco, tobacco products, or tobacco *and electronic cigarette* paraphernalia; “tobacco and electronic cigarette retailing” shall mean engaging in any of these things.

‘Tobacco product’ means any substance containing, *made, or derived from* tobacco leaf *or nicotine*, including but not limited to any tobacco cigarette, cigar, pipe tobacco, snuff, *hookah shisha*, smokeless tobacco or any other form of tobacco which may be utilized for smoking, chewing, inhaling or other manner of ingestion.”

SECTION 4. A new Section 63150.5.12 (Sale of Electronic Cigarettes Not Approved by FDA Prohibited) is hereby added to Part 5 (Businesses, Professions, Trades and Occupations Requiring a Permit) of Chapter 3 (Businesses, Professions and Trades) of Article VI (Taxes and

Licenses) of the Carson Municipal Code, to read in its entirety as follows (additions shown in ***bold italics***, deletions shown in ~~strikethrough~~):

“63150.5.12 Sale of Electronic Cigarettes Not Approved by FDA Prohibited.

Notwithstanding any provision of Section 63150.5 *et seq.* (Sections 63150.5 through 63150.11, inclusive) or any other provision of the Carson Municipal Code, is it unlawful in the City to sell, offer to sell, exchange, or offer to exchange, for any form of consideration, any electronic cigarette unless and until that product has been approved and authorized for introduction into interstate commerce by the United States Food and Drug Administration pursuant to 21 U.S.C. §387j, as may be amended from time to time. Neither this Section 63150.5.12 nor any other provision of Section 63150.5 *et seq.* shall be construed or interpreted to apply to the sale of “drug paraphernalia,” as that term is defined in California Health & Safety Code Section 11014.5, and as may be amended from time to time.”

SECTION 5. A new Section 63150.5.13 (Sale of Flavored Tobacco Products Prohibited) is hereby added to Part 5 (Businesses, Professions, Trades and Occupations Requiring a Permit) of Chapter 3 (Businesses, Professions and Trades) of Article VI (Taxes and Licenses) of the Carson Municipal Code, to read in its entirety as follows (additions shown in ***bold italics***, deletions shown in ~~strikethrough~~):

“63150.5.13 Sale of Flavored Tobacco Products Prohibited.

Notwithstanding any provision of Section 63150.5 *et seq.* (Sections 63150.5 through 63150.11, inclusive) or any other provision of the Carson Municipal Code, it is unlawful in the City for any tobacco and electronic cigarette retailer to sell, offer to sell, exchange, or offer to exchange, for any form of consideration, any flavored tobacco product.”

SECTION 6. SEVERABILITY. If any section, subsection, sentence, clause, phrase, or portion of this ordinance is, for any reason, held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance. The City Council hereby declares that it would have adopted this ordinance and each section, subsection, sentence, clause, phrase, or portion thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses, phrases, or portions thereof may be declared invalid or unconstitutional.

SECTION 7. EFFECTIVE DATE. This ordinance shall be in full force and effect thirty (30) days after its adoption.

SECTION 8. CERTIFICATION. The City Clerk shall certify to the adoption of this ordinance, and shall cause the same to be posted and codified in the manner required by law.

PASSED, APPROVED and ADOPTED at a regular meeting of the City Council on this ____ day of _____, 2020.

ATTEST:

ALBERT ROBLES, Mayor

DONESIA GAUSE-ALDANA, City Clerk

APPROVED AS TO FORM:

SUNNY K. SOLTANI, City Attorney