



# CITY OF CARSON

## Legislation Text

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### Report to Mayor and City Council

Tuesday, December 03, 2019

Discussion

#### **SUBJECT:**

**CONSIDERATION OF INTRODUCTION OF ORDINANCE NO. 19-1940, AN ORDINANCE PROHIBITING THE SALE OF ELECTRONIC CIGARETTES AND OTHER VAPING DEVICES THAT HAVE NOT BEEN APPROVED BY THE FDA FOR INTRODUCTION INTO INTERSTATE COMMERCE (CITY COUNCIL)**

#### **I. SUMMARY**

Electronic cigarettes and other vaping devices, also known as “vapes,” have recently been linked to numerous lung injuries and deaths throughout the U.S. Despite the reported injuries and deaths, the U.S. Food and Drug Administration (“FDA”) has not yet analyzed the appropriateness of such products (hereinafter “E-Cigarettes”) for public safety or approved them for commercial marketing or distribution.

To address these risks and to protect the public health and safety of the City’s residents, and especially its youth, on November 5, 2019, the City Council voted unanimously to adopt Resolution No. 19-178, directing staff to prepare regulations prohibiting the sale of E-Cigarettes in the City pending FDA approval. Pursuant to that direction, staff and the City Attorney’s office have prepared the attached proposed ordinance for the Council’s consideration (Exhibit 1).

The impetus for Resolution No. 19-178 was a desire to follow the action taken by the Los Angeles City Council when it approved a motion of one of its city councilmembers to provide direction to its staff to prepare regulations prohibiting E-Cigarettes pending FDA approval. However, the City of Los Angeles has not yet considered or adopted an ordinance to enact final regulations pursuant to that direction, and the draft regulations are not publicly available.

In lieu of waiting to ascertain the precise details of final regulations that the City of Los Angeles prepares or adopts, and in light of the current nationwide public health crisis being caused by vaping, the City of Carson has opted to move forward with preparation and consideration of introduction and first reading of the proposed ordinance attached hereto as Exhibit 1.

## **II. RECOMMENDATION**

TAKE the following action:

1. INTRODUCE for first reading, by title only and with further reading waived, Ordinance No. 19-1940, AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF CARSON, CALIFORNIA, AMENDING SECTION 63150.5.1 (DEFINITIONS) OF, AND ADDING SECTION 63150.5.12 (SALE OF ELECTRONIC CIGARETTES NOT APPROVED BY FDA PROHIBITED) 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.

## **III. ALTERNATIVES**

1. TAKE another action the City Council deems appropriate.

## **IV. BACKGROUND**

### Public Health Crisis

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. According to the CDC, between 2017 and 2018, 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. 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 2017. Frequent use of E-Cigarettes among high schoolers increased from 20% in 2017 to 28% in 2018.

As of November 13, 2019, 2,172 cases of E-Cigarette product use-associated lung injuries had been reported to the CDC from across 49 states, including California. A total of 42 deaths have been confirmed spanning 24 states, including California.

A February 2019 National Institute of Health report found that over 17.6% of 8<sup>th</sup> graders, 32.3% of 10<sup>th</sup> graders, and 37.3% of 12<sup>th</sup> graders reported trying vaping last year

nationwide.

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.

In an attempt to address the health risks associated with tobacco products and E-Cigarettes, 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.

Nonetheless, virtually no E-Cigarettes sold today have been approved by the U.S. Food and Drug Administration ("FDA") for commercial marketing or distribution.

In 2017, the FDA issued guidance giving E-Cigarette manufacturers until August 8, 2022 to submit an application for pre-market review. The guidance purports to allow unapproved 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).

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. Alarming, if current trends continue, six million more youth in the United States will begin using E-Cigarettes between now and then, and years could elapse thereafter before any formal FDA approval is issued. Meanwhile, the evidence suggests that E-Cigarette use is and will continue to be a major ongoing public health crisis, as the number of reported injuries and deaths rapidly rises.

#### City's Authority to Regulate and Existing Municipal Regulations

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. (Cal. Const. Art. XI, §7). E-cigarettes are a proper subject of these regulations.

Currently, the City regulates the sale of E-Cigarettes by requiring E-Cigarette retailers to maintain a special regulatory permit in addition to a City business license. (CMC §63150.5 *et seq.*).

#### Proposed Ordinance

The proposed ordinance (Exhibit 1) would amend the definitions of "electronic cigarette," "tobacco and electronic cigarette paraphernalia," "tobacco and electronic cigarette retailer," and "tobacco product," set forth in Section 63150.5.1 of the City's tobacco and electronic cigarette permitting ordinance (Carson Municipal Code Sections 63150.5 *et seq.*, hereinafter referred to as the "Permitting Ordinance," attached hereto as Exhibit 2), to add express language to ensure it is clear that the Permitting Ordinance applies to vaping and to vaping devices of all types, whether referred to as vapes, vape pens, vape mods,

advanced personal vaporizers, or otherwise.

The proposed ordinance would then add a new Section 63150.5.12 to the Permitting Ordinance to provide that notwithstanding any other provision of the Permitting Ordinance, it is unlawful to sell any E-Cigarette unless the product to be sold has been approved and authorized for introduction into interstate commerce by the FDA pursuant to applicable federal law.

The new Section 63150.5.12 would contain a caveat stating neither it nor any other provision of the Permitting Ordinance applies to “drug paraphernalia,” as defined in Health & Safety Code Section 11014.5 to mean “all equipment, products and materials of any kind which are designed for use or marketed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of [the California Uniform Controlled Substances Act.” This caveat is designed to ensure that the Permitting Ordinance, as amended by the proposed ordinance, is not interpreted or applied in a way that implicates state law preemption issues related to regulation of “drug paraphernalia.”

The intent of the proposed ordinance is that if and when a particular E-Cigarette product is approved by the FDA, it would then be eligible for sale in the City of Carson, subject to compliance with the Permitting Ordinance. This would happen, if at all, on a product-by-product basis as particular products are approved by the FDA. Meanwhile, sale of all other E-Cigarette products remaining unapproved by the FDA would continue to be prohibited in the City unless and until the time that such products are approved by the FDA, if ever.

## **V. FISCAL IMPACT**

None.

## **VI. EXHIBITS**

1. Draft Ordinance No. 19-1940 (pp. 5-9).
2. Carson Municipal Code Sections 63150.5 *et seq.* (existing Permitting Ordinance) (pp. 10-16).

Prepared by: City Attorney's Office