



CITY OF  
**HAYWARD**  
HEART OF THE BAY

## **PLANNING COMMISSION**

**NOVEMBER 21, 2013**

---

## Table of Contents

Agenda . . . . .	2
Establishment of zoning regulations related to the retail sales of tobacco and tobacco-related products, including electronic cigarettes, within the City of Hayward	
Staff Report . . . . .	4
Attachment I - Planning Commission Agenda Report and meeting minutes, May 31, 2012 . . . . .	13
Attachment II - Matrix of Local Ordinances Restricting Tobacco Retailers Within a Certain Distance of Schools, The Center for Tobacco Policy and Organization, July 2013. . . . .	28
Attachment III - Tobacco Retailer Licensing Is Effective, The Center for Tobacco Policy and Organization, September 2013 . . . . .	34
Attachment IV - Tobacco Retailer Licensing and Electronic Cigarettes, The Center for Tobacco Policy and Organization, July 2013 . . . . .	36
Attachment V - Notes from the Field: Electronic Cigarette Use Among Middle and High School Students ? United States, 2011?2012, Centers for Disease Control and Prevention, September 6, 2013 . . . . .	37
Attachment VI - A Prescription for Health: Tobacco Free Pharmacies, Change Lab Solutions, July 2013. . . . .	40
Attachment VII - Cigarettes Generate Big Revenue for Convenience Stores; Analysis of 2013 State of the Industry Report, The Center for Tobacco Policy and Organization, 2013 . . . . .	44
Attachment VIII - Tobacco Retailer Licensing: An Effective Tool for Public Health, Change Lab Solutions, September 2012 . . . . .	45
Approval of minutes	
October 17, 2013 . . . . .	49



CITY OF HAYWARD  
777 B STREET, HAYWARD, CA 94541-5007  
(510) 583-4205 / [www.hayward-ca.gov](http://www.hayward-ca.gov)  
LIVE BROADCAST – LOCAL CABLE CHANNEL 15

**AGENDA**  
**HAYWARD PLANNING COMMISSION**  
**THURSDAY, NOVEMBER 21, 2013 , AT 7:00 PM**  
**COUNCIL CHAMBERS**

---

**MEMBERS OF THE AUDIENCE WISHING TO ADDRESS THE PLANNING COMMISSION:**

Obtain a speaker's identification card, fill in the requested information, and give the card to the Commission Secretary. The Secretary will give the card to the Commission Chair who will call on you when the item in which you are interested is being considered. When your name is called, walk to the rostrum, state your name and address for the record and proceed with your comments. The Chair may, at the beginning of the hearing, limit testimony to three (3) minutes per individual and five (5) minutes per an individual representing a group of citizens for organization. Speakers are expected to honor the allotted time.

---

**ROLL CALL**

**SALUTE TO FLAG**

**PUBLIC COMMENT:** (The PUBLIC COMMENTS section provides an opportunity to address the Planning Commission on items not listed on the agenda. The Commission welcomes your comments and requests that speakers present their remarks in a respectful manner, within established time limits and focus on issues which directly affect the City or are within the jurisdiction of the City. As the Commission is prohibited by State law from discussing items not listed on the agenda, your item will be taken under consideration and may be referred to staff for further action).

**NON-ACTION ITEMS:** (Work Session items are non-action items. Although the Commission may discuss or direct staff to follow up on these items, no formal action will be taken. Any formal action will be placed on the agenda at a subsequent meeting in the action sections of the agenda).

**WORK SESSION:**

1. Establishment of zoning regulations related to the retail sales of tobacco and tobacco-related products, including electronic cigarettes, within the City of Hayward

[Staff Report](#)

[Attachment I - Planning Commission Agenda Report and meeting minutes, May 31, 2012](#)

[Attachment II - Matrix of Local Ordinances Restricting Tobacco Retailers Within a Certain Distance of Schools, The Center for Tobacco Policy and Organization, July 2013](#)

[Attachment III - Tobacco Retailer Licensing Is Effective, The Center for Tobacco Policy and Organization, September 2013](#)



Assistance will be provided to persons requiring accommodations for disabilities in compliance with the Americans with Disabilities Act of 1990. Persons needing accommodation should contact Sonja Dal Bianco 48 hours in advance of the meeting at (510) 583-4204, or by using the TDD line for those with speech and hearing disabilities at (510) 247-3340.

[Attachment IV - Tobacco Retailer Licensing and Electronic Cigarettes, The Center for Tobacco Policy and Organization, July 2013](#)

[Attachment V - Notes from the Field: Electronic Cigarette Use Among Middle and High School Students ? United States, 2011?2012, Centers for Disease Control and Prevention, September 6, 2013](#)

[Attachment VI - A Prescription for Health: Tobacco Free Pharmacies, Change Lab Solutions, July 2013](#)

[Attachment VII - Cigarettes Generate Big Revenue for Convenience Stores; Analysis of 2013 State of the Industry Report, The Center for Tobacco Policy and Organization, 2013](#)

[Attachment VIII - Tobacco Retailer Licensing: An Effective Tool for Public Health, Change Lab Solutions, September 2012](#)

**ACTION ITEMS:** (The Commission will permit comment as each item is called for Public Hearing. Please submit a speaker card to the Secretary if you wish to speak on a public hearing item).

2., None

#### **COMMISSION REPORTS:**

3. Oral Report on Planning and Zoning Matters
4. Commissioners' Announcements, Referrals

#### **APPROVAL OF MINUTES**

5. [October 17, 2013](#)

#### **ADJOURNMENT**

**PLEASE TAKE NOTICE** that if you file a lawsuit challenging any final decision on any public hearing item listed in this agenda, the issues in the lawsuit may be limited to the issues which were raised at the City's public hearing or presented in writing to the City Clerk at or before the public hearing. **PLEASE TAKE FURTHER NOTICE** that the City Council has adopted Resolution No. 87-181 C.S., which imposes the 90 day deadline set forth in Code of Civil Procedure section 1094.6 for filing of any lawsuit challenging final action on an agenda item which is subject to Code of Civil Procedure section 1094.5.

**NOTE:** Materials related to an item on this agenda submitted to the Planning Commission after distribution of the agenda packet are available for public inspection in the Permit Center, first floor at the above address. Copies of staff reports for agenda items are available from the Commission Secretary and on the City's website the Friday before the meeting.



**DATE:** November 21, 2013

**TO:** Planning Commission

**FROM:** Linda Ajello, AICP, Associate Planner

**SUBJECT:** Establishment of zoning regulations related to the retail sales of tobacco and tobacco-related products, including electronic cigarettes, within the City of Hayward

## **RECOMMENDATION**

That the Planning Commission review and provide comment on this report and the staff recommendations for the establishment of regulations related to the sales of tobacco and tobacco-related products, including electronic cigarettes.

## **SUMMARY**

In response to City Council direction and concerns with the negative health consequences of tobacco use among youth, due partially to availability and generally unregulated land use regulations in Hayward, staff is recommending changes to the zoning ordinance to establish regulations pertaining to the retail sales of tobacco and tobacco-related products in an effort to reduce the sales of said products to youths. The proposed tobacco retail sales regulations would require that any new tobacco retail sales establishment that is less than 10,000 square feet be limited to the General Commercial Zoning District, not be located within 500 feet of schools, parks and other sensitive receptor, and be subject to approval of a Conditional Use Permit (CUP). Also, staff is recommending that all new and existing retailers obtain a Tobacco Retailers License (TRL), which would include operational standards, compliance inspections and enforcement provisions. Staff is also seeking input from the Commission on a possible ban on the sale of tobacco and tobacco-related products in pharmacies.

## **BACKGROUND**

Currently, the City's Zoning Ordinance does not list the sale of tobacco as a permitted use in any zoning district, nor does it define tobacco and tobacco-related products. With the prevalence of the establishment of "smoke shops" and other establishments selling tobacco and tobacco-related products in recent years, and with the introduction of a variety of new tobacco related products, such as flavored tobacco, electronic cigarettes, hookahs and candy flavored cigars, it is clear that the City needed to develop standards pertaining to the sale of such items in order to prevent sales to youth.

In late 2011/early 2012, staff received direction from City Council to develop regulations pertaining to the sales of tobacco and tobacco-related products. In conjunction with the Alameda County Health Department and the Hayward Police Department, staff reviewed available studies and draft ordinances. Sources of information included several other jurisdictions in Alameda County and northern California, the American Lung Association, Change Lab Solutions (formerly TALC) and the Center for Disease Control (CDC). In addition, staff used the results of decoy operations performed by the Hayward Police Department.

Staff developed draft regulations and presented them to the Planning Commission on May 31, 2012 for consideration. At that time, staff recommended amendments to define Tobacco Retail Sales, restricting said use to the General Commercial (GC) Zoning District and require that all new establishments not be located within 500 feet from schools and other sensitive receptors, and obtain a Conditional Use Permit (CUP). Overall, the Planning Commission was supportive of the proposed regulations, but after lengthy discussion, the Commission felt that additional work was needed and directed staff to come back with clear regulations that would target the prevention of sales of tobacco and tobacco-related products to youth (see Attachment I).

## DISCUSSION

*Retention of Previous Key Provisions* - In addition to further developing draft regulations for the retail sales of tobacco and tobacco-related products, staff is proposing to continue with some key provisions that were established in the previous draft, as follows:

- Restrict the location allowing sale of tobacco or tobacco-related products to the General Commercial (CG) Zoning District;
- Require the approval of a Conditional Use Permit (CUP) at all new locations, with some exceptions (see discussion below);
- Allow tobacco sales, as a secondary use, in retail stores over 10,000 square feet in any zoning district;
- Create a definition for tobacco sales, to include the regulation of the sale of drug paraphernalia, electronic cigarettes and other specified items;
- Require a 500 foot separation requirement from sensitive receptors;
- Prohibit any new tobacco retailers from operating within 500 feet of an existing tobacco retailer; and
- Require that all new and existing stores selling tobacco and tobacco-related products, including electronic cigarettes, in Hayward obtain a Tobacco Retailers License (TRL).

The CG district was originally selected because it provides regional serving retail opportunities along major transportation corridors with minimal impact to neighborhood-serving commercial areas. If the Commission wishes, staff can explore the possibility of allowing new tobacco sales establishments in additional zoning districts; however, given the number of existing establishments, staff would not recommend doing so. By requiring a CUP for new establishments (other than certain situations as noted below), the City could evaluate proposed tobacco sale locations to ensure they are compatible with the surrounding properties. The intent of a separation requirement (see later discussion under '*Additional Research*') is to keep said establishments away from sensitive receptors, such as schools, parks, libraries, playgrounds, recreation centers, day care centers and health care facilities (i.e., areas where children or sick people are typically present), as well as to

ensure that there is not an oversaturation of tobacco sales establishments in one area. In the City of Hayward, there are currently 142 tobacco retail sales establishments and six “vapor” or electronic cigarette retailers, the majority of which are located in close proximity to schools and other sensitive receptors. The establishment of the separation requirement would prevent any new tobacco retailer from opening up within 500 feet from any existing establishment and any sensitive receptors.

Definitions - Staff has also been working on developing comprehensive definitions to identify tobacco and tobacco-related products to ensure that the tobacco retailers are clear as to the type of products that are allowed to be sold and what products would be prohibited. Some of the key definitions are as follows:

“Electronic Smoking Device” means an electronic and/or battery-operated device, the use of which may resemble smoking that can be used to deliver an inhaled dose of nicotine or other substances. “Electronic Smoking Device” includes any such device, whether manufactured, distributed, marketed, or sold as an electronic cigarette, an electronic cigar, an electronic cigarillo, an electronic pipe, an electronic hookah, a vapor cigarette or any other product name or descriptor.

“Imitation Tobacco Product” means either: any edible non-tobacco product designed to resemble a tobacco product; or any non-edible non-tobacco product designed to resemble a tobacco product that is intended to be used by children as a toy. Examples of imitation tobacco products include, but are not limited to, candy or chocolate cigarettes, bubble gum cigars, shredded bubble gum resembling spit tobacco, and shredded beef jerky in containers resembling snuff tins. An electronic cigarette is not an imitation tobacco product.

“Smoke” means the gases, particles, or vapors released into the air as a result of combustion, electrical ignition or vaporization, when the apparent or usual purpose of the combustion, electrical ignition or vaporization is human inhalation of the byproducts, except when the combusting or vaporizing material contains no tobacco or nicotine and the purpose of inhalation is solely olfactory, such as, for example, smoke from incense. The term “Smoke” includes, but is not limited to, tobacco smoke, electronic cigarette vapors, and marijuana smoke.

“Tobacco Sales Establishment” means any establishment that sells tobacco, tobacco products, electronic smoking devices, tobacco paraphernalia, imitation tobacco products or any combination thereof.

“Tobacco Paraphernalia” means cigarette papers or wrappers, pipes, holders of smoking materials of all types, cigarette rolling machines, and any other item designed for the smoking or ingestion of tobacco products.

“Tobacco Products” means any substance containing tobacco leaf, including but not limited to cigarettes, cigars, pipe tobacco, hookah tobacco, snuff, chewing tobacco, dipping tobacco, snus, bidis, or any other preparation of tobacco; and any product or

formulation of matter containing biologically active amounts of nicotine that is manufactured, sold, offered for sale, or otherwise distributed with the expectation that the product or matter will be introduced into the human body, but does not include any cessation product specifically approved by the United States Food and Drug Administration for use in treating nicotine or tobacco dependence.

*Additional Research* - Over the past several months, staff has been able to resume work on the draft regulations. As part of the research required to further develop the draft regulations, staff reviewed similar ordinances in other jurisdictions, as well as studies on the subject matter from various organizations. One such resource utilized by staff, created by The Center for Tobacco Policy and Organization, was a matrix of local ordinances that restrict tobacco retailers within a certain distance of schools (Attachment II). The matrix is current as of July 2013 and includes 29 California cities and counties.

The statewide policies included in the matrix were restrictions pertaining to distance of said business from schools, which range from 500 feet to 1,500 feet, with the majority (16 of 29 ordinances) restricting the sales of tobacco within 1,000 feet of schools. In addition to schools, the majority of surveyed jurisdictions (21 of 29 ordinances) also restricted tobacco retailers from within certain distance of other youth-oriented areas. The most common “other” location is parks and playgrounds. Nineteen cities and counties restrict tobacco retailers near parks in addition to schools. Based on this information, and the number and location of existing tobacco retailers in Hayward, staff is recommending a 500-foot separation from schools and other sensitive receptors for all new tobacco retail sales establishments.

The Center for Tobacco Policy and Organization also conducted a study regarding the effectiveness of retail tobacco licensing (see Attachment III). Based on a study of 33 California communities that have retail tobacco ordinances in place, those ordinances with strong enforcement provisions in communities that actively enforce were indeed effective in reducing tobacco sales to minors. An example of such enforcement is through the establishment of a financial deterrent via fines and penalties, including the suspension and revocation of the license. However, the study concluded that an ordinance by itself will not automatically decrease sales rates; proper education and enforcement about the local ordinance and state youth access laws were also needed.

*Electronic Cigarettes* - An e-cigarette is a battery powered device that allows users to inhale a vapor containing nicotine or other substances. According to the Food and Drug Administration (FDA), the safety of these devices is still unknown, and initial studies have found carcinogens and toxic chemicals in the vapor, including ingredients used to make anti-freeze. California is one of the states to place a ban on the sale of electronic cigarettes to minors, but there currently are not any state laws regulating where people can use e-cigarettes. Cities do have the ability to adopt local regulations to define “smoking” to include the use of e-cigarettes and to place restrictions of the use on them in certain public areas. In California, there are currently 59 cities and counties that require retailers to obtain a license to sell electronic cigarettes, including Contra Costa County, and the Bay Area cities of Dublin, Concord, Richmond, Albany and Oakland (see Attachment IV). These jurisdictions have added special language in the definition of tobacco products in their local tobacco retailer ordinance to include electronic cigarettes. Further, in recent months, several California cities have placed moratoriums on electronic cigarettes to allow further study to determine if and

how to regulate them. These jurisdictions include the cities of Seal Beach, Union City, Bellflower, Duarte and Orange County.

The State Assembly is currently considering Senate Bill 648, which was introduced by Sen. Ellen Corbett, D-San Leandro, which would extend restrictions and prohibitions against smoking cigarettes and other tobacco products, to include electronic cigarettes. The California Senate voted 21-10 in favor; the bill awaits hearing by the California Assembly, possibly in 2014.

A recent study released by the Center for Disease Control (CDC) (see Attachment V) related to middle and high school students who currently use e-cigarettes, indicates:

- 9.3 percent of all students in grades 6-12 reported that they had never smoked traditional cigarettes;
- 76.3 percent of all students in grades 6-12 reported current conventional cigarette smoking;
- 20.3 percent of middle school students reported that they had never smoked traditional cigarettes;
- 61.1 percent of middle school students reported current conventional cigarette smoking;
- 7.2 percent of high school students reported that they had never smoked traditional cigarettes; and
- 80.5 percent of high school students reported current conventional cigarette smoking.

In conclusion, the CDC study states that experimentation with e-cigarettes among U.S. middle and high school students doubled during 2011-2012, with an estimated 1.78 million students having used an e-cigarette as of 2012. Furthermore, an estimated 160,000 students who reported using e-cigarettes had never used conventional cigarettes. Because the overall health effects of the use of e-cigarettes is still not known, there is particular concern over how the use of nicotine and other tobacco products may negatively impact youth.

Based on recent data, including the CDC report, it appears that the use of electronic cigarettes may be gaining popularity among youths, including those who have never smoked traditional cigarettes. E-cigarettes come in a variety of fruit and candy flavors, such as watermelon, cotton candy and gummy bear, which are feared to attract and addict youth to nicotine at an early age. According to the Surgeon General<sup>1</sup>, young people are sensitive to nicotine. The younger they are when they start using tobacco, the more likely they are to become addicted to nicotine and the more heavily addicted they will become. If a person does not begin smoking before the age of 26, they are less likely to ever start. Additionally, while many electronic cigarette manufacturers advertise these devices as a smoking cessation device, the FDA has not approved them as such. Since the long-term effects of electronic cigarettes are still unknown and because of their growing attraction and use by youth, staff is recommending that electronic cigarettes be included in the tobacco retail sales regulations and is seeking concurrence from the Commission.

---

<sup>1</sup> [http://www.cdc.gov/tobacco/data\\_statistics/sgr/2012/consumer\\_booklet/pdfs/consumer.pdf](http://www.cdc.gov/tobacco/data_statistics/sgr/2012/consumer_booklet/pdfs/consumer.pdf)

Tobacco Sales in Pharmacies - Over the last several years, a number of cities and counties have passed regulations to ban the sale of tobacco products in pharmacies. Because pharmacies are a place where people generally go to get health care advice and medicine to improve their health, many health advocates feel that the sale of both tobacco products, which have been proven to cause death, and the medicines used to treat tobacco-related illnesses, presents a troubling conflict of interest. The City of San Francisco was the first city in the nation to place a ban on sales of tobacco products in pharmacies. The law was challenged in three lawsuits, one which resulted in a revision to the law to omit an exemption for grocery stores and big box stores with pharmacies. Ultimately, the court decisions in all three cases demonstrated that there is no legal barrier to banning the sale of tobacco in pharmacies, so long as the law treats all retailers that contain pharmacies equally (see Attachment VI). Because many pharmacies are located in or in close proximity to schools, residential neighborhoods and other areas where children are present, staff is recommending that a similar law be considered as part of the tobacco retail sales regulations for the City of Hayward and is seeking concurrence from the Commission.

Additional Recommendations -

- Similar to the City's regulations pertaining to the sale of alcohol, staff is recommending that the sale of tobacco products be allowed without need of a conditional use permit in retail stores having 10,000 square feet or more area in any zone district where the primary use is allowed; however, no more than five (5) percent of such floor area could be devoted to the sale, display and storage of tobacco or tobacco related products combined. This provision would allow larger grocery stores and big box retail stores to sell tobacco products as a secondary use in any zoning district for which the primary use is allowed. (See discussion below regarding potential impacts to businesses.)
- In addition, staff is recommending specific operational standards that would apply to all new and existing tobacco retail sales establishments. For instance, the staff's recommendation would restrict product packaging to prohibit the sale of single cigarettes and cigars.
- In 2009, the City and County of San Francisco passed a law prohibiting the sale of tobacco in pharmacies. One argument for this law is that pharmacies are a place that people attribute to improving one's health and that selling tobacco is in conflict with this. Since the law was passed in San Francisco, other communities, including the Bay Area jurisdictions of Richmond and San Mateo County, have adopted similar tobacco-free pharmacy laws. Staff supports a similar ban for Hayward and is seeking direction from the Commission as to whether or not this should be further evaluated. If the direction is to include pharmacies in the proposed regulations, the aforementioned provision for big box stores and large retailers will need to be modified to state that said stores cannot have a pharmacy that sells tobacco products.
- Include electronic cigarettes in the new regulations.

Potential Impacts to Businesses - There are currently one hundred and forty two (142) licensed tobacco retailers in the City of Hayward and four (4) electronic cigarette establishments. These existing establishments would become legal-non-conforming under the proposed regulations and

would be allowed to continue to operate in accordance with the Section 10-1.2900 of the City's Zoning Ordinance – Non-conforming Uses. Per the Non-Conforming Use provision of the City of Hayward Zoning Ordinance, these retailers would be allowed to continue operation as a tobacco retail sales establishment, as long as the non-conforming use is not expanded or has not been discontinued for a period of six consecutive months or more. Also, additional development of any property on which a legal non-conforming use exists is required to have all new uses conform. Thus, non-conforming tobacco sales locations would gradually cease operating.

All tobacco retail sales establishments, including those that are existing and considered legal non-conforming, new establishments requiring a CUP, and shops that sell tobacco as a secondary use and do not require a CUP, would be required to obtain an annual Tobacco Retailer License from the City. All establishments would be subject to compliance with operational standards, as well as annual inspections. The enforcement provisions would give the City's Code Enforcement Division the authority to issue administrative fines, fees, penalties and/or citations and/or abatement to violators of the provisions of the ordinance. Staff is currently working on developing an annual fee amount that will serve to recover the costs for annual inspections and enforcement at the local level. In addition to the annual inspections to be conducted by Code Enforcement, the Hayward Police Department will continue its existing Youth Decoy Program.

Staff has received two specific concerns with the recommendations. One concern is the impact the recommendations would have on small gas stations and convenience stores. Staff has endeavored to learn how much of the revenues earned by gas stations and convenience stores is from tobacco sales. According to the Association for Convenience and Petroleum Retailing (NACS), in 2012, cigarette sales accounted for more than a third of sales inside convenience stores and generated more than \$622,248 in sales revenue for the average convenience store (See Attachment VII). Each of these existing gas stations and convenience stores would be able to continue to sell tobacco, but they would be required to get a Tobacco Retail License (TRL) and would be subject to annual monitoring and compliance checks. Going forward, all existing gas stations and convenience stores selling tobacco products would be considered non-conforming uses, which could limit their ability to expand their business. Any new tobacco retailer would be subject to approval of a CUP and conformance with all standards and regulations pertaining to tobacco retail sales.

The second concern pertains to the exemption for large retailers with ancillary sales of tobacco products. Per the recommended regulations, an existing small smoke shop would become a non-conforming use or a CUP would be required for a new shop, whereas the larger ( $\geq 10,000$  sq. ft.) retailer that does not contain a pharmacy, with small areas devoted to tobacco sales, display, etc., would not become non-conforming or be required to obtain a CUP. However, studies have shown that the occurrences of sales of tobacco and tobacco products to youths are typically not occurring at the larger establishments<sup>2</sup>. While most small retailers and convenience stores rely on employee training to prevent sales of tobacco products to youth, many large format retail stores, such as grocery stores, have price scanners which will prompt the clerk to verify age for tobacco products which could explain why violations occur less frequently at the large format retailers than the gas stations and convenience stores<sup>3</sup>. Furthermore, since the Hayward Police Department began conducting the Youth Decoy Operations in 2010, of the 77 citations issued, only one occurrence

---

<sup>2</sup> <http://www.cdph.ca.gov/programs/tobacco/Documents/CTCPRetailerPresentation07.pdf>

<sup>3</sup> [http://stic.neu.edu/trri/No\\_Sale/pt3.htm](http://stic.neu.edu/trri/No_Sale/pt3.htm)

was at a large format retailer. The remaining 76 citations were issued to gas stations, convenience stores and tobacco stores.

## **PUBLIC CONTACT**

On October 28, 2013, a Community Meeting was held in which all 146 existing tobacco and electronic cigarette retailers were invited. The purpose of the meeting was to inform the existing tobacco retailers of the upcoming Tobacco Retail Sales Regulations and to gather feedback, comments and concerns. Twenty (20) people attended the meeting, including local tobacco and electronic cigarette retailers and youth advocates from the Castro Valley Community Action Network (CV CAN) and the Hayward Coalition for Healthy Youth (HCHY).

The owners of one of the electronic cigarette stores in Hayward reiterated their dismay, expressed previously at the October 2, 2013 Downtown Business Improvement Area (DBIA) meeting, regarding the inclusion of electronic cigarettes in the proposed regulations, arguing that electronic cigarettes are not a tobacco product. They went on to state that they are “anti-tobacco” and in the business of helping people quit tobacco. One tobacco retailer expressed support for the regulations, because he felt it would help hold storeowners who sell tobacco products minors accountable. Another retailer in the audience did not agree, stating that they are responsible business owners and strictly adhere to the laws pertaining to sales to minors. Staff commended them and all of the other responsible business owners in the City, but went on to point out that, based on the results of the HPD Youth Decoy Program, there are retailers selling tobacco products to minors in Hayward. Several Hayward student advocates, who participate in the Hayward Police Department Youth Decoy Program, spoke on their experiences as decoys and how easy it was for them to purchase tobacco products as minors. They also spoke on their experiences at school with other kids who use the various candy flavored tobacco and electronic cigarette products targeted at youths and expressed support for the proposed regulations.

Further, staff conducted additional community outreach by making oral presentations about the forthcoming regulations to the Community and Economic Development Committee (CEDC) at their September 16, 2013 meeting, Keep Hayward Clean and Green (KHGC) on September 26, 2013 and the Downtown Business Improvement Area (DBIA) on October 2, 2013. Overall, all three groups were supportive of the proposed regulations.

## **NEXT STEPS**

A work session before the City Council is scheduled on December 17, 2013. Staff will incorporate input from Council, from the public received at the October 28, 2013 community meeting, and from the Planning Commission at this work session, to develop recommended comprehensive regulations pertaining to tobacco retail sales establishments in Hayward. The regulations will be presented at a community meeting in early to mid-January, and at noticed public hearings to the Planning Commission for consideration in late January 2014 and to the City Council in late February 2014.



Prepared by: Linda Ajello, AICP, Associate Planner

Recommended by: Patrice Siefers, MPA, Planning Manager

Approved by:



---

David Rizk, AICP  
Development Services Director

Attachments:

- |                 |                                                                                                                                                                                      |
|-----------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Attachment I    | Planning Commission Agenda Report and meeting minutes, May 31, 2012                                                                                                                  |
| Attachment II   | Matrix of Local Ordinances Restricting Tobacco Retailers Within a<br>Certain Distance of Schools, The Center for Tobacco Policy and<br>Organization, July 2013                       |
| Attachment III  | Tobacco Retailer Licensing Is Effective, The Center for Tobacco Policy<br>and Organization, September 2013                                                                           |
| Attachment IV   | Tobacco Retailer Licensing and Electronic Cigarettes, The Center for<br>Tobacco Policy and Organization, July 2013                                                                   |
| Attachment V    | Notes from the Field: Electronic Cigarette Use Among Middle and High<br>School Students — United States, 2011–2012, Centers for Disease Control<br>and Prevention, September 6, 2013 |
| Attachment VI   | A Prescription for Health: Tobacco Free Pharmacies, Change Lab<br>Solutions, July 2013                                                                                               |
| Attachment VII  | Cigarettes Generate Big Revenue for Convenience Stores; Analysis of<br>2013 State of the Industry Report, The Center for Tobacco Policy and<br>Organization, 2013                    |
| Attachment VIII | Tobacco Retailer Licensing: An Effective Tool for Public Health, Change<br>Lab Solutions, September 2012                                                                             |



**DATE:** May 31, 2012

**TO:** Planning Commission

**FROM:** Tim R. Koonze, Associate Planner

**SUBJECT:** Text Amendment Application Number PL-2012-0140 / City of Hayward (Applicant) – Establish zoning regulations regarding the retail sale of tobacco.

### RECOMMENDATION

That the Planning Commission recommends that the City Council: 1) adopts the attached Initial Study and Negative Declaration (Attachment II), 2) approves the Zoning Ordinance text amendment to permit the sale of tobacco and tobacco products in the General Commercial (CG) District with the approval of a conditional use permit, and 3) adds a definition of tobacco sales to the Zoning Ordinance, subject to the attached findings (Attachment VI).

### SUMMARY

In response to Council direction in late 2011/early 2012, and because the sale of tobacco products is not specifically listed anywhere in the City's Zoning Ordinance, which is challenging for staff, staff is recommending provisions be added to the Zoning Ordinance that would limit the retail sale of tobacco to the General Commercial Zoning District with a conditional use permit. A conditional use permit would require a noticed public hearing before the Planning Commission.

### BACKGROUND

According to the United States Department of Health and Human Services, cigarettes are responsible for approximately 443,000 deaths – one in every five deaths – each year in the United States. The chronic diseases caused by tobacco use lead the causes of death and disability in the United States. The economic burden of cigarette use includes \$193 billion annually in health care cost and loss of productivity.

Smoking is not a right protected by the United States Constitution. Specifically, smoking is neither a specially protected liberty nor a right to privacy under the "due process clause" of the Constitution. In addition, smokers are not a specially protected category under the "equal protection clause" of the Constitution. Consequently, the United States Constitution allows for the enactment of smoke free laws that relate to the legitimate government goals of public health, safety, and welfare.

Since 1998, the State of California has continued to implement legislation that restricts smoking and exposure to second-hand smoke (SHS). These include no smoking in public school facilities and athletic events, in public playgrounds and tot lots, as well as day care centers in private residences. State action has also banned smoking in workplaces, in all restaurants and bars, and smoking in the presence of a minor (17 years or younger) while in a moving vehicle and to treat it as a misdemeanor offense when cited with a larger offense. Through a provision in California Government Code 7597, the State of California allows for local governments to adopt and enforce additional smoking and tobacco control ordinances, regulations, and policies that are more restrictive than the applicable standards required by the State of California.

On that basis, in 1996, the City enacted the first Smoking Pollution Control Ordinance, found in Chapter 5, Article 6 of the Hayward Municipal Code (HMC). The ordinance allowed smoking in private residences, bars, tobacco shops that exclusively sold tobacco, and halls and rooms rented for private events. Smoking was prohibited in all enclosed areas customarily used by the public, such as restaurants, theaters, auditoriums, and public transit, including taxi cabs.

Since 1996, the City of Hayward has implemented policies to make Hayward a healthier city. On May 27, 2008, the City Council amended the Smoking Pollution Control Ordinance prohibiting the use of tobacco products in or around public places in the City of Hayward. The premise for such action relates to the desire of the Council to protect the health and well being of the general public by reducing impacts associated with second hand smoke especially on children (refer to 2008 staff report, Attachment VII). The Ordinance included a prohibition to smoke within 20 feet of any enclosed public place and on public sidewalks and streets.

After the City began to enforce the new smoking ordinance, downtown restaurant operators expressed concerns that the enforcement of the Ordinance made the Downtown a less desirable location for those patrons given citations for smoking on the way to and from the restaurants. In addition, restaurant patrons have expressed concern over their safety if they were to smoke in less visible areas around the Downtown. According to some restaurant operators in the Downtown, patrons desiring to smoke have been known to leave restaurants to smoke in their car and/or parking lots. Operators indicate that patrons who leave dining establishments don't always return, which represents a loss of business.

City staff, working with the Council and restaurant operators, came to a solution of eliminating the requirement that smoking could not occur within 20 feet of an opening into a building. This allowed restaurants with limited outdoor space to still provide designated smoking areas. The Ordinance was amended on October 19, 2010 (refer to 2010 staff report, Attachment VIII).

The City furthered its goal to become a healthier city by adopting a resolution to become a member of the Healthy Eating Active Living (HEAL) Cities Campaign, thereby setting goals to provide its citizens and employees with healthier choices (refer to Attachment IX).

In a continuing effort to make Hayward a healthy city and in striving to improve the health and welfare of its citizens, and in response to previous City Council direction, staff recommends limiting the retail sale of tobacco and tobacco products to one commercial zoning district with the approval of a conditional use permit. The conditional use permit would allow the Planning Commission at a

noticed public hearing (or City Council on appeal) to determine if a site is suitable for tobacco sales and if the sale of tobacco would be compatible with surrounding uses. Staff also proposes a definition for tobacco sales to ensure that the tobacco retailers are clear as to the type of products that are allowed to be sold and what products would be prohibited.

## DISCUSSION

Staff is proposing the following changes to the Zoning Ordinance:

- Allow retail sales of tobacco and tobacco products only in the Commercial (CG) District with approval of a conditional use permit;
- Allow tobacco sales, as a secondary use, in retail stores over 10,000 square feet in any zoning district;
- Prohibit tobacco sales within 500 feet of sensitive receptors; and
- Create a definition for tobacco sales, to include the prohibition of the sale of drug paraphanelia and other specified items.

Currently, the City's Zoning Ordinance does not list the sale of tobacco as a permitted use in any zoning district. As there is no restriction of tobacco sales, the Planning Director has made the determination that tobacco sales were a general retail item permitted in any commercial zoning district, except in the Downtown core area.

Continuing with the City's direction to maintain a healthier Hayward and to minimize smoking and access to tobacco products within the City limits, staff recommends restricting the sale of tobacco or tobacco related products to the General Commercial (CG) District. The CG District is located primarily along the City's major arterials of Mission Boulevard, Jackson Street, and Foothill Boulevard (refer to Attachment I). This CG District was selected as it provides regional serving retail opportunities along major transportation corridors with minimal impact to neighborhood-serving commercial areas. It is proposed that tobacco sales would be subject to the approval of a conditional use permit (CUP) (see Attachment III). By requiring a CUP, the City could evaluate proposed tobacco sale locations to ensure they are compatible with the surrounding properties.

Similar to the regulations for alcohol sales, the sale of tobacco products would be allowed without the need for a conditional use permit only in retail stores having 10,000 square feet or more in area in any zoning district; however, no more than 5 percent of such floor area could be devoted to the sale, display and storage of tobacco or alcohol products combined. This provision allows larger grocery stores and box retail stores to sell tobacco products as a secondary use. In addition, the sale of tobacco would be prohibited within 500 feet of sensitive receptors such as schools, parks, library, playground, recreation center, day care center, health care facilities or any other similar use (see Attachment IV).

Staff also proposes the following definition for "Tobacco Sales Establishments," which would limit tobacco retail establishments to any establishment involving the sale of tobacco and tobacco products (see Attachment V). The definition would read as follows:

**Tobacco Sales Establishment** – Any establishment that sells tobacco products such as cigarettes, cigars, chewing tobacco, and pipe tobacco, as well as tobacco related products such as pipes, lighters, ash trays, and other products associated with the use of tobacco. The sale of drug paraphernalia, items that are considered “kid friendly” such as flavored tobacco products, containers with secret compartments commonly referred to as “stash cans” and single cigarettes shall be prohibited.

The proposed regulations would prohibit tobacco sales in retail stores that commonly sell tobacco such as small grocery stores, minimarts, and gas stations. The proposed text amendment that would be presented in final form to the City Council for consideration would include revisions to the text for all of the commercial zoning districts where such uses are listed, to include a reference to the new recommended tobacco sales general regulations text that is shown in Attachment IV. For example, any place in the Zoning Ordinance where a convenience market is listed as an allowed use, there would be a reference to the General Regulations section of the Zoning Ordinance, which is proposed to reflect the text in Attachment IV. All existing retailers of tobacco products would be considered legal non-conforming uses and could continue selling tobacco unless the tobacco sales are discontinued for a period of six months or more, pursuant to Section 10-1.2915, Nonconforming Uses, of the Zoning Ordinance, and the City determines they cannot be re-established in accordance with Federal and State laws.

*Text Amendment Findings for Approval* - In order for the Text Amendment to be approved, the following findings must be made:

***A. Substantial proof exists that the proposed change will promote public health, safety, convenience and general welfare of the residents of Hayward.***

According to the United States Department of Health and Human Services, cigarettes are responsible for approximately 443,000 deaths each year in the United States. The chronic diseases caused by tobacco use lead the causes of death and disability in the United States. Regulating the sale of tobacco and tobacco related products will promote public health, safety, convenience and general welfare of the residents of Hayward as it is a continuation of the City’s direction to maintain a healthier Hayward and to minimize the exposure of its citizens to tobacco by restricting the sale of tobacco or tobacco related products to certain commercial areas.

***B. The proposed change is in conformance with the purposes of this Ordinance and all applicable, officially adopted policies and plans.***

The City of Hayward has established various policies to create a healthier Hayward. On May 20, 2008, City Council amended Chapter 5, Article 6 of the Hayward Municipal Code prohibiting the use of tobacco products in or around public places in the City of Hayward. On July 26, 2011, the City adopted a Resolution for the City of Hayward to become a member of the Healthy Eating Active Living (HEAL) Cities Campaign. Hayward joined a group of over 75 other California cities that are setting goals to provide residents and employees with healthier choices. The approval of this text amendment would be consistent with the goals of making Hayward a healthier City.

- C. Streets and public facilities existing or proposed are adequate to serve all uses permitted when the property is reclassified.*

This finding is not applicable in that this application does not involve a reclassification.

- D. All uses permitted when property is reclassified will be compatible with present and potential future uses, and further, a beneficial effect will be achieved which is not obtainable under existing regulations.*

This finding is not applicable in that this application does not involve a reclassification.

Environmental Review - An Initial Study and Negative Declaration (IS/ND) have been prepared for the project pursuant to the California Environmental Quality Act (CEQA) (see Attachment II). No significant environmental impacts are expected to result from the project. The review period for the environmental documents ends May 30, 2012. No response to the notice indicating availability of the IS/ND had been received when this staff report was completed.

## **PUBLIC CONTACT**

On May 21, 2012, a Notice of this Public Hearing and Availability of the Draft Negative Declaration was published in *The Daily Review*. At the time this report was prepared, staff had not received any public comments.

## **NEXT STEPS**

Should the Planning Commission recommend that the City Council adopt the proposed text amendments, a public before the City Council will be held, tentatively scheduled for June 26, 2012. The decision of the City Council would be final.

Prepared by: Tim R. Koonze, Associate Planner

Recommended by:



---

Richard Patenaude, AICP  
Planning Manager



Approved by:



---

David Rizk, AICP  
Development Services Director

Attachments:

- Attachment I Zoning Map Showing the Location of CG Zoning District
- Attachment II Initial Study and Negative Declaration
- Attachment III Addition of Tobacco Sales to the General Commercial District of the Zoning Ordinance
- Attachment IV Addition of Tobacco Sales Requirements to the General Regulations of the Zoning Ordinance
- Attachment V Addition of Definition For Tobacco Sales Establishments in the Definition Section of the Zoning Ordinance
- Attachment VI Findings for Approval for the Text Amendment Application
- Attachment VII City Council Report Amending the Smoking Pollution Control Ordinance 2008
- Attachment VIII City Council Report Amending the Smoking Pollution Control Ordinance 2010
- Attachment IX City Council Report by Adopting a Resolution for the City of Hayward to Become a Member of the Healthy Eating Active Living (HEAL) Cities Campaign

Assistant City Attorney Maureen Conneely advised the Commission to make a final action or at least steps toward a final action. She pointed out there were no conditions of approval or findings for approval, but said it would be appropriate for the Commission to direct staff to prepare both since it appeared a majority of the Commission was inclined to approve the business.

Commissioner Mendall said he wanted to make that motion and he asked that staff to be very strict with the conditions of approval. He said he wanted to see conditions that constrained the use by limiting the number of cars that could be painted, limit the hours of operation, and that staff monitor the fumes, if possible, so the City ended up with a fairly mild, innocuous use that would not effect the neighbors. Commissioner Lamnin seconded the motion, agreed with the restrictions, and asked staff to make the revised staff report available to the neighbors so they would be ensured that they were safe and property values protected. She emphasized that the Commission had heard their concerns.

Commissioner Lavelle said she would be supporting the motion and she asked staff if the decision would be made administratively or if the conditions of approval and the findings for approval would come back for Commission review. Planning Manager said the matter would come back to the Commission and confirmed for Commissioner Lavelle that it could take four to six weeks for that to happen. Commissioner Lavelle said she wanted to make sure the applicant understood that the business would have to wait for final approval before opening.

Commissioner Mendall urged neighbors to remain involved and if there were conditions that they thought would make the proposed business a good neighbor, to express those to staff and to the applicant so when the matter came back in four weeks everyone could be comfortable with the conditions and everyone could move forward and feel good about the decision.

The motion passed 4:3:0.

AYES:	Commissioners Lamnin, Lavelle, Mendall Chair Márquez
NOES:	Commissioners Faria, Loché, McDermott
ABSENT:	
ABSTAINED:	

2. Text Amendment Application PL-2012-0140 / City of Hayward (Applicant) – Establish zoning regulations regarding the retail sale of tobacco.

Associate Planner Tim Koonze gave a synopsis of the report.

Commissioner Lamnin asked if there had been any response from the Chamber of Commerce or any other businesses and Associate Planner Koonze said no, but Planning Manager Patenaude interjected saying that during discussions with 7-11, representatives had expressed concern. The proposed regulations wouldn't apply to current 7-11 locations, which would be entitled to continue selling tobacco, but would impact several planned future locations. Mr. Patenaude said that representatives had indicated that tobacco sales comprised 25% of total sales dollars and with alcohol sales of approximately 12-13%, together almost 40% of 7-11's total dollar sales. Representatives had indicated to staff that they would be unlikely to open any new stores in Hayward if the regulations were approved, he said.

Commissioner Lamnin asked if there was a fee for a Conditional Use Permit (CUP) and Planning Manager Patenaude said currently there was a fee deposit of \$5,000 to apply and fees for time and materials were added to that for a total of around \$8-9,000. He noted that the deposit amount was going up July 1<sup>st</sup> to start at

**DRAFT**





**MINUTES OF THE SPECIAL MEETING OF THE  
CITY OF HAYWARD PLANNING COMMISSION  
Council Chambers  
Thursday, May 31, 2012, 7:00 p.m.  
777 B Street, Hayward, CA94541**

---

around \$8-9,000. Commissioner Lamnin asked if all that money went to planning and development staff and not to enforcement efforts and Planning Manager Patenaude said that was correct. Commissioner Lamnin asked if there was any mechanism to recoup enforcement costs and Mr. Patenaude said no. Commissioner Lamnin asked if the proposed regulations would have any impact on hookah bars and Planning Manager Patenaude said any new establishment would need a CUP in a General Commercial District, existing hookah bars would be a legal non-conforming use.

Commissioner Mendall asked why allow tobacco sales at a large store but not a small store. He asked what the logic or reasoning was behind that. Planning Manager said it was a policy issue and followed the direction given to staff to restrict the sale of tobacco. Commissioner Mendall made the point that the impact to smaller stores would be greater because tobacco sales comprised a larger percentage of total sales. He said if the City was trying to limit the number of places tobacco was sold, why not limit sales at the businesses that would be less likely to be impacted. Planning Manager Patenaude said that was another approach that could be taken, but noted that in other cities restricting the sale of tobacco at larger stores had created legal issues. Commissioner Mendall asked if the same legal issues wouldn't apply to smaller stores and then he asked if it was just that the smaller stores didn't have the money to sue. Planning Manager Patenaude said the one particular case was a suit by pharmacies, which would fall in the store size range of 10,000 square feet and above.

Assistant City Attorney Conneely explained that the City of San Francisco enacted a ban on the sale of tobacco products at pharmacies and the tobacco industry sued the City and ultimately the case was disposed before it went to trial. The matter was going to be heard, she said, because the court had found there was a rational basis for banning tobacco products at pharmacies where, they said, sales should benefit health, not hurt it. Ms. Conneely explained that the tobacco industry asked for a restraining order and the District Court Judge denied it. That was the only recorded case that she was aware of, she said, that dealt with at which establishments the sale of tobacco was appropriate.

Commissioner Mendall said it felt like an arbitrary recommendation on where tobacco should be sold, and if there was a lawsuit, there should be a rational basis to support the restriction. Restricting tobacco sales at a pharmacy made sense, he said, but if the City was going to restrict sales at gas stations then the City better have a good reason for allowing sales at the grocery store next door. Planning Manager Patenaude said one rational for the zone district limitation was to limit sales to new establishments along major corridors rather than in neighborhoods. Commissioner Mendall said that was a sound basis to limit sales to General Commercial zoning districts, but not to single out certain types of businesses. He asked the Assistant City Attorney if he was off-base with wanting a logical, defensible argument for saying "yes here, no there," and Ms. Conneely said she didn't think he was off-base.

Before expanding regulations, Commissioner Faria asked about enforcement and how much time and effort it took to enforce current regulations. Planning Manager Patenaude said he wasn't clear about the question because there was no ordinance in place regulating sales and Commissioner Faria said not sales, but the smoking ordinance already in place that prohibited smoking on the sidewalk and in public areas. She asked how much enforcement effort that was taking and could the City handle the extra burden of expanded regulations. Planning Manager Patenaude said enforcement of the current ordinance wasn't the City's highest priority, although he knew of some citations issued, and he said Hayward police was not capable of fully enforcing the ordinance. Mr. Patenaude pointed out that the difference was a control of uses and sales and where they were to take place rather than a behavioral issue. By limiting the sale of tobacco to the General

**DRAFT**

Commercial District, he said, Community Preservation could deal with businesses selling tobacco in other districts more effectively and enforcement rates would be higher.

Commissioner McDermott asked if an existing business that sold tobacco changed ownership would it still be grandfathered in and Planning Manager Patenaude said yes, a change of ownership would not affect use. Based on a previous matter that came before the Commission, Commissioner McDermott said the City should have a clear definition so there no question of interpretation of the ordinance. She said it appeared to her that police had had some confusion about enforcement and changes were made to make the ordinance clearer. Commissioner McDermott said this report seemed to be a working document.

Commissioner Loché said that the City did not list the sale of tobacco as a permitted use wasn't good and he said he applauded that the Commission was having this discussion. In the presentation, he said, staff mentioned that there were 150 locations where tobacco sales occur. He asked staff how many were within 500 feet of sensitive receptors and Planning Manager Patenaude said existing businesses would not be subject to that limitation and that he didn't know what percentage would fall within that radius. Commissioner Loché said he was trying to imagine what stores were 10,000 square feet and above and he said he knew 7-11 was under and Lucky was over, but what about a Fresh & Easy. Planning Manager Patenaude said stores less than 10,000 square feet would include typical convenience markets and gas stations, while larger would include Trader Joes and Fresh & Easy. Commissioner Loché asked if there had been any research conducted that showed smaller businesses were more likely to sell to minors and Mr. Patenaude said that would certainly be something to look into. Commissioner Loché said when looking at an ordinance that would effect small businesses in such a major way, there would need to be a clear understanding of why the City would go down that road.

Commissioner Mendall asked if the 500 foot restriction to sensitive receptors would apply to large stores as well as small and staff said no. Commissioner Mendall commented that there could be a Lucky right next to a school or a park selling cigarettes and staff said yes. He said Union City passed something similar to the proposed regulations in the last year or so and he asked staff if they had spoken to representatives and what they learned. Associated Planner Koonze said Union City adopted a 1,000 foot restriction to sensitive receptors and according to a planner at Union City, pretty much rendered the city a non-tobacco sale area. Mr. Koonze said nine gas stations that already sold tobacco products in the City were grandfathered in and the modification Commissioner Mendall mentioned allowed a tenth station, that was under construction at the time the restriction was original put in place, to also sell tobacco products.

Chair Márquez asked if staff had had any discussion with COMPRE about local businesses selling tobacco products to minors and staff said no.

Chair Márquez opened the Public Hearing at 8:39 p.m.

Francesca Lomotan, with business address on Second Street, spoke on behalf of the Hayward Coalition for Healthy Youth which was comprised of diverse set of community members striving to make the City of Hayward a safer and healthier place for kids to live. She said the coalition was excited that regulations restricting the sale of tobacco to minors were being established and the definition of tobacco sales was being included. Ms. Lomotan said the coalition was especially happy that in the definition of "a tobacco sales establishment" the sale of kid-friendly items was being prohibited. While the coalition was supportive of the proposed ordinance, she said, they had a few suggestions including requiring 500 feet between tobacco retailers and a 1,000 foot radius from sensitive receptors because their research had determined that there was already a high concentration of retailers located near to three middle schools and two high schools in Hayward. She mentioned that in Alameda County, five cities had already adopted ordinances restricting tobacco retailers within a certain distance of schools including Albany (500 feet), Union City and Oakland (1,000 feet), Berkeley (1,400 feet) and San Leandro (1,500 feet). Ms. Lomotan said lastly, the coalition asked



**MINUTES OF THE SPECIAL MEETING OF THE  
CITY OF HAYWARD PLANNING COMMISSION  
Council Chambers  
Thursday, May 31, 2012, 7:00 p.m.  
777 B Street, Hayward, CA94541**

for the prohibition of single cigars sales and that the coalition appreciated the City's continuing efforts to make Hayward a healthy city.

Janice Louie, with the Coalition as well as the Alameda County Public Health Department, said she was there to support the proposed ordinance. She provided materials for the Commissioners from the Center of Tobacco Policy that included a matrix of local ordinances that restricted tobacco sales within a certain distance of schools and summarized policies from 24 cities in California. She noted that 14 out of 24 cities had a 1,000 foot restriction of tobacco sales from schools. Ms. Louie said studies had shown that the density of tobacco retailers in neighborhoods near schools had been associated with an increase in smoking and that one-third of illegal sales occurred within a 1,000 feet of schools. She also mentioned that many of the ordinances limited how close retailers could be to each other. She concluded by saying the coalition supported the staff recommendation and asked the Commission to consider a 1,000 foot distance from sensitive receptors and 500 feet between retailers. Ms. Louie mentioned that at the May 10<sup>th</sup> Planning Commission meeting she distributed information regarding teen-friendly cigars and she asked that language be included in the proposed ordinance limiting the sale of single cigarettes and cigars.

Commissioner Mendall asked Ms. Louie if she had any opinion or comment about restricting sales at small businesses rather than large businesses or if there was any evidence that showed a gas station was a riskier place for children to buy cigarettes than a grocery store. Ms. Louie asked for clarification and Commissioner Mendall asked if it was the number of the places that sold tobacco products that was dangerous or the type of place that sold tobacco and Ms. Louie said the data she had read had indicated that it was the type of store; smaller stores were more likely to sell single purchase items like kid-friendly cigars that cost less than a candy bar. She said Alameda County was going to do a survey to find out how accessible these items were. Commissioner Mendall said that was a good argument to limit the sale of that particular product, but not necessarily that a mini mart was more dangerous than a Lucky and Ms. Louie said it came down to product availability and she noted that small grocery stores located near schools carried more single-sale items.

Commissioner Lamnin asked Ms. Louie if there was any difference or impact on enforcement efforts by cities that had use permits versus tobacco retailer licenses and Ms. Louie said the State of California had been encouraging local jurisdictions to adopt their own ordinances and she said those that do had more leverage against retailers that sold tobacco products than those that did not.

Doug Ligibel, Mesa Circle resident, speaking as a retired state-certified addiction professional, a nationally-certified rehab counselor, and a member of the Coalition, said that he wanted to focus on tobacco industry specifically targeting youth. He said the tobacco industry spent a million dollars an hour marketing their products, and 80% of underage smokers chose brands from the top three most heavily advertised products. Mr. Ligibel said that restricting the sale of tobacco was a good direction for the City to take, but that he agreed with the Coalition that the City needed to look at schools and how far the City was willing to have tobacco retailers able to operate, he said he supported 1,000 feet away from schools. Mr. Ligibel concluded that the City of Hayward had an over-saturation of tobacco sales just as it did alcohol retail sales, specifically in the downtown area, and he encouraged the Commission to listen to the Coalition because they made some really good points.

Deisy Bates, Ambrose Court resident, said she was there as a parent leader in the community and that her three children were born, raised and educated in Hayward. As part of her interest in the community, Ms. Bates said she was a member of the Coalition since inception because she cares for Hayward youth. She said she picked up her youngest son from school every day (he's a junior at Mt. Eden High School), because she

**DRAFT**

didn't want him to walk by the gas station and houses on Hesperian Boulevard at Panama because of the debris. She pointed out that most middle schools students didn't have the privilege of being picked up by their parents and by walking to and from school they had access to tobacco. She also said those kids were not going to go to Lucky or Safeway or Costco they were going to go to gas stations and small retailers that sell tobacco. She said it was very concerning how accessible these items were and how low the price. Ms. Bates, as a parent in the community, urged the Commission to consider the staff recommendation and in addition, adding a 1,000 foot radius from sensitive receptors and requiring 500 feet between tobacco retailers.

Sanjiv Patel, Starboard Lane resident, asked the City to consider the goal of the proposed ordinance saying he thought it was to reduce smoking in the general population and to reduce underage smoking. He said the goal was not to increase bureaucracy, but as written, the ordinance did exactly that. Mr. Patel pointed out that it was already illegal to sell cigarettes to minors regardless of whether the establishment was located opposite the school or 10,000 feet away. He said by not allowing the sale of tobacco near schools the only thing that was being achieved was not additional laws, but just the implementation of existing laws. Mr. Patel asked what the proposed ordinance did about the implementation of the existing law and he concluded: nothing. How do you make sure young kids do not get their hands on tobacco, he asked; remove the radius requirement and increase the enforcement of the existing law by having additional decoy operations. Mr. Patel said that would require additional funds so he suggested charging a fee for a tobacco license. He said he was a tobacco retailer and he was requesting the City add more fees so the Hayward could limit underage smoking. He also asked what the logic was behind allowing large businesses to sell tobacco and not small businesses. Mr. Patel said the third concern the City should have was the unintentional consequence of the proposed ordinance and he gave this example: in the last couple of years three gas stations closed in Hayward and if this ordinance was in place they would still be closed because no business owner would take the chance to reopen without a tobacco license. He reiterated what happened in Union City and asked if the City Hayward wanted to implement the ordinance right away or think it through first. Mr. Patel urged the City to not pass the proposed ordinance, but instead do more research and come back with a more comprehensive plan that would actually reduce smoking, underage smoking and second-hand smoke.

Commissioner Lamnin thanked Mr. Patel for coming and after confirming he was a business owner asked what business and Mr. Patel said he owned a gas station at Mission and Garin. He noted that the gas station had been closed but they he was able to reopen because the proposed ordinance was not in place.

Nick Patel, Starboard Lane resident, asked if anyone had thought about the impact of a 500 foot radius limit and he said after a quick search of the Mission Boulevard/Tennyson Road area, taking into consideration the school and church, it would pretty much cover the entire area allowing no new tobacco retailer to come in. He said when he expanded the search to City-wide, what was left was probably a very small area. With so many vacant properties, Mr. Patel pointed out that if the regulation passed there would be no new gas stations, convenience stores, or grocery stores less than 10,000 square feet that could come in and start a business. He asked if the City wanted to discourage businesses from coming in to these vacant properties that were basically magnets for crime and other unwanted activities, or did the City want to support business. Mr. Patel said he was not a smoker and was all for discouraging smoking and underage smoking but he said there were other ways to do this. He agreed with Commissioner Mendall that a law that restricted the sell of small cigars would have an impact and would be the right thing to do rather than just a distance limitation. He also suggested a restriction on signs that attract youth to tobacco retailers. Mr. Patel concluded by asking that the City revisit the ordinance and come up with a better solution that would actually help reduce smoking.

Ronald Gruel, parent and longtime Hayward resident living in the Jackson Triangle, said he commuted by local schools and saw small shops and the accessibility students had to tobacco products. Mr. Gruel asked what would be a healthy thing to do for Hayward and he said setting boundaries was perfect. He mentioned one gas station was closed because an underground tank was leaking and after a pump was installed it still "burst up" once in a while and dissipated toxins into the air. He said a new business couldn't move in because





**MINUTES OF THE SPECIAL MEETING OF THE  
CITY OF HAYWARD PLANNING COMMISSION  
Council Chambers  
Thursday, May 31, 2012, 7:00 p.m.  
777 B Street, Hayward, CA94541**

---

the site was still cleaning. Mr. Gruel said it was critical that youth have new facilities at which to play, have healthy activities, and to be engaged.

Julie Waters, with the American Lung Association with offices in Oakland, thanked the Commission for taking the issue on. She said tobacco had a devastating effect on all communities, but disproportionately on the communities in Hayward. Ms. Waters said CUPs were one of the most effective ways to get people to quit smoking or not start smoking in the first place. She said looking at the map presented by staff, Hayward's "main drag" had nothing but back to back retailers and when looking at a community where the prevalence of smoking was around 15%, she said the City already had an abundance of existing retailers. Ms. Waters said she heard the Commissioners discussing increasing the radius from sensitive receptors to 1,000 feet and she explained that this was important because in her experience, a large parking lot could take up the entire 500 feet and allow the business to come in right next to a school without any notice. She said a CUP was an effective method to prevent kids from smoking and that was the ultimate goal. Ms. Waters said the tobacco industry was well aware that the younger a person is when they start smoking, the more addicted they will become and they specifically target youth. She said studies show that if someone starts smoking after age 19 they won't become addicted. Younger kids will develop sensation-seeking brain receptors that make them even more addicted to cigarettes, she said, and that was why the tobacco industry targeted youth. She concluded by saying the city should take any measure necessary to prevent youth access to tobacco.

Commissioner Lamnin asked Ms. Waters how a CUP would limit youth access versus some other enforcement method. Ms. Waters said a CUP limited the number of establishments where tobacco would be available. She said unlike alcohol retailers that had been in business longer, businesses like donut shops and gas stations were applying for retail licenses and when looking at state statistics, these were the kinds of places with the highest buy rate. She said liquor stores were better because they had more to lose; they didn't want to lose their liquor license. Gas stations had a buy rate of around 20%, she said, and donut shops had the highest rate at about 30%.

Chair Márquez closed the Public Hearing at 9:06 p.m.

Commissioner Loché said under definitions "stash cans" and "single cigarette" were mentioned but not "single cigars." Associate Planner Koonze said that language could be added as part of the definition.

Commissioner Lamnin said the single cigar issue needed to be addressed because, as was noted in the report, tobacco manufacturers work around current restrictions and make cigars so small they look like cigarettes. She also suggested candy flavors, flavors in general, and candy shaped packaging be prohibited to counteract the trend of smoking addiction starting in youth. Commissioner Lamnin thanked staff for their research, clarity and the desire for consistency, but said she wasn't sure if the CUP piece of the ordinance addressed all of the issues. She heard there was an over saturation of tobacco retailers in Hayward, but she said she was really concerned about the high concentration of retailers near middle schools. Commissioner Lamnin acknowledged concerns about the need for 1,000 foot radius near sensitive receptors, but said notification would have to be made and training may be needed so carding takes place and youth don't have access. She said she also had concerns about where tobacco was located at stores; was it stored next to candy displays or was it kept up high. Said she wasn't quite ready to make a motion because she wasn't sure how all the information fit together.

Commissioner Mendall said the goal of reducing smoking by underage children was the right one, and he was glad the City was working on an ordinance to do that, but said he wasn't sure if what he had in front of

**DRAFT**

him was the most effective way to do that. He said requiring a CUP if a retailer was within 1,000 feet of school was great because the matter would come before the Planning Commission and they would have to make a conscious decision to allow it, but the density of uses and proximity to kids was what mattered and the degree of compliance from those businesses. Commissioner Mendall said Mr. Patel's suggestion to double fees and use the money to increase enforcement was a good idea because it was the businesses violating the existing law that were the biggest part the problem. Creating a definition that eliminated the kid-friendly stuff was a "no brainer," he said, and using a broad definition would be good. He noted that cigars were usually sold individually so he suggested creating a minimum price that was high enough to eliminate the 49 cent cigars and the ones the kids might buy. Commissioner Mendall concluded by saying the ordinance needed more work and that logical arguments were needed to back the recommendations. He said in his opinion, the proposed ordinance was not defensible and he wanted to kick it back to staff for additional work focusing on keep tobacco products away from teens rather than picking establishments that can and cannot sell tobacco in what felt like an arbitrary way.

Commissioner Loché mentioned that he worked less than a mile away from the gas station on Hesperian mentioned by Mr. Gruel, and his daughter attended school right around the corner, and he said he could see exactly what Mr. Gruel was referring too. He said there should definitely be a restriction on tobacco sales within at least 500 feet of schools. He noted that when he said "sensitive receptors," he meant schools in particular. Commissioner Loché said there should be no single cigar sales even if it made it more difficult to purchase cigars. He said he wasn't against stiff restrictions on some of these tobacco sales. Regarding the size of the business where tobacco was being sold, he said the focus should be on the type of the tobacco sold and agreed that more work was needed on the proposed ordinance. Commissioner Loché said requiring a CUP was a good thing, and having the item come before the Commission was a step in the right direction.

Commissioner Lavelle said they all knew that smoking was a significant public health issue; smoking cigarettes was dangerous to one's health, and the Commission didn't want to do anything that would thwart the processes to reduce the number of youth who start smoking. But she said she was opposed to the ordinance philosophically because society can't legislate everything away including the negative influences or all the things that young people can't do. Kids do a lot of things they aren't supposed to, she said, including smoking marijuana which was against the law and police have great difficulty enforcing laws about that issue among others. She said she considered cigarette smoking as being lower down on the list of negative influences and didn't require such strict restrictions included in the ordinance. She said she agreed with many of the pronged approaches especially through public education and through the state's efforts citing that California was behind only Utah in the fewest number of adults who smoked.

Commissioner Lavelle said Commissioner Mendall got right to the issue that concerned her when she read the report and that was restricting sales of cigarettes at small businesses in favor of the large ones. She said that was not fair and noted there were already many small businesses in Hayward that sold these products. She said she understood that requiring a CUP for tobacco sales was one of four approaches that had worked in other locations, but she said that would create more government process in the City that, in her opinion, they didn't need. Commissioner Lavelle said the City had a lot of issues it needed to deal with and had CUPs for a lot of other uses and adding the proposed ordinance would make it extremely difficult to sell one product among many. She said she just didn't agree with that philosophically.

Commissioner Lavelle said that she passed an Arco gas station that she had bought gas at many times and it was boarded up. She said that added to the many businesses that were boarded up along Mission Boulevard and she said she didn't want to thwart a potential new owner at that location from doing business here by requiring that he go through a CUP process just to sell cigarettes. That just doesn't seem right, she said.

Commissioner Lavelle said she heard the comments made about approaches to reduce smoking by youth, but in her opinion, parents had the most significant influence on their children. She said she wished parents had more time to be more involved with their children's lives, however, the economy made that very difficult. As



**MINUTES OF THE SPECIAL MEETING OF THE  
CITY OF HAYWARD PLANNING COMMISSION  
Council Chambers  
Thursday, May 31, 2012, 7:00 p.m.  
777 B Street, Hayward, CA94541**

---

a non-parent she acknowledged she didn't have to deal with this issue in her own home, but she reiterated that parents were the number one influence to get kids not to smoke. As a society, as a community, as churches, as business people, as responsible citizens, she said all of us needed to get the message out to youth that they should not take up smoking and that it was dangerous. She concluded that she didn't think this ordinance was the way to go about doing that.

Commissioner McDermott agreed with Commissioner Mendall that more work needed to be done on the ordinance and she said she was leaning toward kicking it back to staff. She said it needed to be more definitive and in some cases, a little more broad based regarding the description of tobacco products. She said she had the highest respect for Commissioner Lavelle, and agreed that parents played a role in their children's lives, but when they are teenagers, she said, the peer pressure is very, very strong. She noted that her mother was a smoker who started at the age of 16 and died of cancer. Commissioner McDermott said she and her siblings constantly told her mom "Don't smoke," but she was so addicted that even when she was diagnosed with lung cancer she wasn't able to stop. She said she wished as parents they did have that much of an influence on kids in regards to smoking specifically, but unfortunately the truth of the matter was, she said, we don't. Commissioner McDermott said sometimes government did need to take measures to provide certain restrictions so kids could be protected because they were so easily influenced, especially in junior high and high school.

Commissioner Faria agreed with Commissioner McDermott that peer groups had a lot of influence on teens and she also agreed that additional clarification was needed regarding the small businesses versus the larger businesses. She said smoking was a public health issue and she saw the impact of smoking on a daily basis not only on the smokers themselves, but on their families. Commissioner Faria said an ordinance was needed, but the proposed ordinance needed more work and some clarification.

Commissioner Lamnin noted that many members of her family smoked, some still did, but it was the images of black lungs that she saw in kindergarten that kept her from starting. She said more than a CUP process, they needed an education process and she made a recommendation to send the proposed ordinance back to staff to include members of the coalition, business owners, Chamber of Commerce members, and community members who may not have known the City was addressing this issue, to determine if the City needed a CUP, a tobacco retailers license, an administrative use permit, or strictly an educational program. She asked what the City should do to address the asthma rates and safety of youth in the community and what could the City do to make the biggest impact on the folks who were here. She also expressed concern about the consistency of the ordinance and the question of why this store and not that store. Research shows, she said, that restrictions on tobacco reduced tobacco use and not just for existing users, so she concluded by asking staff to get some more voices involved.

Commissioner Mendall seconded the recommendation and asked that staff come back with a clear recommendation that targeted sales to youth and built out from there. He mentioned he was a parent too and acknowledged that while parents had a lot of power, if kids were walking by a store right next to their school every day to buy a candy bar on their way home from school and they see the cigarettes, that mattered too. Commissioner Mendall said if the City could just make it a little bit easier for parents that would be a good thing. Rather than try to craft a specific set of recommendations, Commissioner Mendall asked staff to use what they had heard to bring the issue back.

Chair Márquez clarified the motion and commented that she when she read the report she found it confusing because it mentioned collaboration with the Healthy Program and employees and the City and then it moved

**DRAFT**

to tobacco. She said when she thought of “healthy living” she thought of more physical activity and education, and while she agreed with many of the comments made by the other Commissioners, she said she would like to see more on enforcement and what the community could do to create more healthy activities for youth and their families in the community. Chair Márquez mentioned there were a lot of underutilized facilities, and education about tobacco and alcohol use could be tied into after school and sports programs. She said it was a great discussion with a lot of good points, but she questioned how the City could enforce the proposed ordinance and what the difference was between selling tobacco products at locations under 10,000 square feet versus above. She said she would like to know if the Coalition had a survey of how many outlets were actually selling to youth and said the City should target those outlets and work with them to reduce sales and the signage and advertisements. She concluded by saying that a lot of work needed to be done and while she admired the work that had already been done, the Commission wanted to dig into this a little bit deeper.

The motion passed 7:0:0.

AYES: Commissioners Faria, Lamnin, Lavelle, Loché, McDermott, Mendall  
Chair Márquez

NOES:

ABSENT:

ABSTAINED:

## COMMISSION REPORTS

### 3. Oral Report on Planning and Zoning Matters

Planning Manager Patenaude discussed future meeting topics and as a follow-up to past discussions, mentioned that the appeal to bring a Walmart grocery store into the former Circuit City site was denied by Council and the proposed condo project on Maple Court with a change to add some live/work units on the groundfloor was approved by Council.

### 4. Commissioners’ Announcements, Referrals

Commissioner Lamnin said she had the honor of being one of the representatives from the Planning Commission on the Sustainability Committee as well as the development review process focus group and she said as a Planning Commission it had been really valuable, but due to work commitments she asked that someone else take her place. The Sustainability Committee needed three representatives and the focus group needed one, she said.

Commissioner Mendall said that was a great idea and said he had been to two of the meetings himself and found them very informative. He said the discussions between staff and the architects touched on what the Commission did and agreed that one or two Commissioners should attend or at least they should read the minutes. The Commissioners discussed when and where the groups met and Chair Márquez said she was interested in participating and would look into it.

Commissioner Lavelle reminded all registered voters to participate in the election on June 5, 2012.

## APPROVAL OF MINUTES

### 5. April 12, 2012 approved unanimously

April 26, 2012 approved unanimously with one minor change and Commissioners Lavelle and McDermott abstaining

**DRAFT**





## Matrix of Local Ordinances Restricting Tobacco Retailers Near Schools

### July 2013

In order to reduce illegal sales of tobacco products to minors and prevent youth from getting addicted to tobacco products, many cities and counties in California have restricted the location of tobacco retailers near schools. Studies have shown that the density of tobacco retailers, particularly in neighborhoods surrounding schools, has been associated with increased smoking rates and that one-third of illegal tobacco sales take place within 1,000 feet of schools.

This matrix lists 29 municipalities in California that have adopted an ordinance to restrict the location of tobacco retailers within a certain distance of schools. The cities and counties are listed in reverse chronological order from the most recently passed. To be included on this matrix, the ordinance must require all tobacco retailers or significant tobacco retailers to be located 500 feet or more away from schools. The definition of significant tobacco retailers varies by ordinance, therefore, the strength of each of these 29 ordinances varies and policy details are included in this matrix help to highlight these differences.

#### Type of Ordinance

There are four different ways for local governments to restrict the location of tobacco retailers and the first section of the matrix designates which type of policy each municipality has adopted. While each of these policy options can accomplish the goal of restricting tobacco retailers near schools, using the tobacco retailer licensing ordinance to do this is the best approach for dealing with current tobacco retailers located within the restricted area around a school, it is more efficient to enforce, and therefore it is recommended. For this reason, the tobacco retailer licensing column is highlighted. Full explanations for each of the four policy types, along with the matrix abbreviation and information about how many municipalities have adopted that type of policy, are listed below.

1. **Tobacco Retailer Licensing Ordinance (TRL)** – this type of law requires all tobacco retailers to obtain a license in order to sell tobacco products in the municipality and a requirement can be added to the licensing ordinance that a retailer cannot obtain a license if they are located within a certain distance of schools. Because tobacco retailer licenses are only granted for a set period of time (one year) and must be renewed annually, it is more efficient to implement location restrictions through a licensing ordinance by simply not renewing licenses for businesses in prohibited locations. Seven municipalities use this type of policy to restrict sales near schools.
2. **Zoning Ordinances (Zoning)** – zoning regulations establish what type of uses are allowed for each type of property or district. A zoning ordinance can be used to specifically prohibit a tobacco retailer from operating within a certain distance of schools. Six municipalities use this policy to restrict sales near schools.
3. **Conditional Use Permit (CUP)** – the requirement that a business obtain a Conditional Use Permit (CUP) is a requirement typically imposed through a community's zoning code that allows a city or county to make an individualized determination about the use of a property in a specific location. If a proposed use, such as tobacco retailing near schools is not "permitted" by the zoning code or "prohibited," it can be "conditionally permitted" depending on site-specific factors. A retailer would have to apply for a CUP in order to open a business in a specific location. A restriction on the issuance of a CUP can be that the tobacco retailer is not located within a certain distance of schools. Sixteen municipalities have adopted this type of policy.

4. **Direct Regulation (Reg)** – this type of law is enacted under the general police powers of the municipality to protect the health, safety, welfare and morals of their citizens. Unlike TRL, zoning, and CUP ordinances, for this type of law an enforcement mechanism must be specifically created or incorporated by referencing another part of the municipal code (TRL and zoning ordinances already include enforcement procedures that apply to any violation.) A regulatory ordinance can be enforced in many ways, for example through civil suit or criminal prosecution, administrative citations, or as a nuisance through administrative, civil or criminal nuisance abatement proceedings. No cities has adopted this type of ordinance to restrict tobacco retailers near schools.

#### **Type of Tobacco Retailers that are Subject to the Ordinance**

Another significant distinction for these policies is whether the policy restricts the location of all tobacco retailers or just significant tobacco retailers. The column on the right side contains the information about which type of retailers are subject to the ordinance. The municipalities that contain an “X” in the column are the strongest type of policy and restrict every retailer that sells tobacco products within a certain distance of schools. Twelve municipalities have adopted this type of ordinance, including every ordinance that has been adopted since April 2010. The other policy option is to only restrict the location of significant tobacco retailers. Eight municipalities have adopted an ordinance that only applies to significant tobacco retailers. One municipality has adopted an ordinance that only applies to retailers other than significant tobacco retailers.

#### **Other Important Policy Provisions**

In addition, the Matrix also contains information about five other policy provisions relevant to restrictions on the sale of tobacco products near schools. For each of these provisions, the full question is listed below along with information on trends and most common responses from the 29 ordinances:

- *Does the policy prohibits tobacco retailers from being located within what distance of schools?* The restrictions range from 500 feet to 1,500 feet, with the majority (18 of 29) restricting sales within 1,000 feet of schools.
- *Does the policy apply to existing retailers (no grandfathering)?* A majority of the policies (28 of 29) do not subject existing retailers to the location restrictions but would only apply to new retailers and grandfather in existing retailers. However, for several of these cities and counties, there were no existing retailers within that restricted distance from schools.
- *What other youth-oriented areas do the distance requirements apply to other than schools?* In addition to schools, the majority of these policies (22 of 29) also restrict tobacco retailers within a certain distance of other youth-oriented areas. The most popular other location is parks and/or playgrounds, which 18 cities and counties restrict tobacco retailers near in addition to schools.
- *Does the policy restrict tobacco retailers from being located within a certain distance of other tobacco retailers?* In addition to schools and other youth-oriented areas, some of these ordinances contain a density provision that restricts tobacco retailers from being located near other tobacco retailers. Nine ordinances contain this provision and the distance restrictions range from 200 to 1,500 feet.

#### **Resources**

The Center has additional resources on restricting tobacco retailers near schools and tobacco retailer licensing ordinances available at [www.center4tobaccopolicy.org/localpolicies-licensing](http://www.center4tobaccopolicy.org/localpolicies-licensing). ChangeLab Solution has model ordinance language available for tobacco retailer licensing ordinances, conditional use permits and zoning ordinances at <http://changelabsolutions.org/>.

City/County Date Passed	Type of Policy				Distance (in feet) from schools?	Apply to existing retailers (no grandfathering)?	What other youth-oriented areas (other than schools) are included?	Restricts retailers within a certain distance of other retailers?	Apply to every retailer who sells tobacco products?
	TRL	Zoning	CUP	Reg					
Carpinteria May 2013		X			1,000	No	None	No	X
Oroville March 2013		X			500	No	Residences, parks, and places of worship	No	X
Dublin December 2012		X			1,000	No	500 feet from playgrounds, parks libraries, and City owned and operated recreational facilities	Yes (1,000 feet)	X
Sacramento June 2012			X		1,000	No (but retailers are allowed within the restricted area if 10% or less floor space has tobacco products)	None	No	X
Huntington Park December 2011	X				500	No	Library, playground, youth center, recreational facility open to the public, arcade open to the public, parks	Yes (200 feet)	X
West Hollywood March 2011	X				600	No	None	No	
Santa Barbara County November 2010	X				1,000	No	None	No	X
Santa Clara County November 2010	X				1,000	No	None	Yes (500 feet)	X
South Pasadena November 2010	X				500	No (but there were no retailers within restricted area)	None	No	X
Riverbank July 2010	X				500	Yes	Playgrounds	No	X
Adelanto May 2010		X			1,000	No	Playground, church, public library or childcare facility	No	X

City/County Date Passed	Type of Policy				Distance (in feet) from schools?	Apply to existing retailers (no grandfathering)?	What other youth- oriented areas (other than schools) are included?	Restricts retailers within a certain distance of other retailers?	Apply to every retailer who sells tobacco products?
	TRL	Zoning	CUP	Reg					
Calabasas April 2010	X				500	No (but there were no retailers within restricted area)	None	No	X
Palmdale January 2010			X		500	No	Commercial daycare center, hospitals, parks, libraries, recreation centers	No	X
Union City January 2010			X		1,000	No	Park, playground, library, recreation center, religious institution, youth-oriented establishment	Yes (1,000 feet)	
Vallejo December 2009			X		1,000	No	Church, public recreation area	Yes (1,000 feet)	
Windsor November 2009			X		600	No (but there were no retailers within restricted area)	Religious institutions, libraries and parks	No	
Saratoga October 2009			X		1,000	No	Parks	Yes (500 feet)	X
Rohnert Park April 2009			X		500	No	Religious assembly, public facility, multi-unit residential development	Yes (500 feet)	
Albany February 2009			X		500	Yes	Childcare centers, public libraries, public community centers, parks or playgrounds	No	
Oakland April 2008			X		1,000	No	Residential zone, library, park, playground, recreation center, licensed daycare facility	No	X
La Mirada November 2007			X		600	No	Church, temple, park	Yes (500 feet)	

City/County Date Passed	Type of Policy				Distance (in feet) from schools?	Apply to existing retailers (no grandfathering)?	What other youth- oriented areas (other than schools) are included?	Restricts retailers within a certain distance of other retailers?	Apply to every retailer who sells tobacco products?
	TRL	Zoning	CUP	Reg					
Mountain View February 2005			X		1,000	No (if existing retailers are caught selling to minors twice in a 36 month period, they must apply for a CUP)	Childcare facility or preschool other than family daycare, playground, youth center, recreational facility	No	
Pasadena February 2004			X		1,000	No	Game arcade, internet access studio, library, licensed childcare facility other than family daycare, park and recreation facility, theater	No	
San Rafael February 2003			X		1,000	No	Parks, libraries, arcades, youth/teen centers, community/recreation centers, licensed daycare centers, shopping malls, houses of worship with youth programs	No	
Marin County 2002			X		1,000	No	Childcare facility or preschool other than family daycare, playground, youth or teen center, community or recreation center, arcade, park, library, houses of worship with youth activities	No	
Berkeley November 2001			X		1,400	No	Public Park	No	
San Leandro July 2001			X		1,500	No	Park, library, recreational facility	Yes (1,500 feet)	
Novato April 2001		X			1,000	No	Parks or other land use oriented to minors as	No	

City/County Date Passed	Type of Policy				Distance (in feet) from schools?	Apply to existing retailers (no grandfathering)?	What other youth- oriented areas (other than schools) are included?	Restricts retailers within a certain distance of other retailers?	Apply to every retailer who sells tobacco products?
	TRL	Zoning	CUP	Reg					
							determined by zoning administrator		
Vista June 1997		X			1,000	No	None	No	



## Tobacco Retailer Licensing Is Effective

SEPTEMBER 2013

More than 100 communities in California have adopted strong local tobacco retailer licensing ordinances in an effort to reduce illegal sales of tobacco products to minors. This table includes strong policies defined as one that includes the following four components:

- License that all retailers must obtain in order to sell tobacco products and that must be renewed annually.
- A fee set high enough to sufficiently fund an effective program including administration of the program and enforcement efforts. An enforcement plan, that includes compliance checks, should be clearly stated.
- Coordination of tobacco regulations so that a violation of any existing local, state or federal tobacco regulation violates the license.
- A financial deterrent through fines and penalties including the suspension and revocation of the license. Fines and penalties should be outlined in the ordinance.

The table below lists illegal sales rates to minors before and after a strong licensing law was enacted in communities where data is available and enough time (usually at least a year) has passed after the ordinance was enacted to determine results. These sales rates were determined by youth tobacco purchase surveys administered by local agencies. It is important to note that results from the youth tobacco purchase surveys are somewhat dependent on certain factors that differ in each community, such as the age of the youth and the number of stores surveyed.

The results overwhelmingly demonstrate that local tobacco retailer licensing ordinances with strong enforcement provisions are effective. Rates of illegal tobacco sales to minors have decreased, often significantly, in all municipalities with a strong tobacco retailer licensing ordinance where there is before and after youth sales rate data available. However, a licensing ordinance by itself will not automatically decrease sales rates; proper education and enforcement about the local ordinance and state youth access laws are always needed.

### **Before and after youth sales rate data is available for the following 33 California communities with strong licensing ordinances -**

Banning, Baldwin Park, Beaumont, Berkeley, Burbank, Calabasas, Coachella, Contra Costa County, Corona, Davis, Delano, Desert Hot Springs, El Cajon, Elk Grove, Grass Valley, Grover Beach, Kern County, La Canada Flintridge, Los Angeles County, Murrieta, Norco, Pasadena, Riverside, Sacramento, Sacramento County, San Fernando, San Francisco, San Luis Obispo, Santa Barbara County, Tehachapi, Vista and Yolo County.

For more resources on these ordinances, including the Matrix of Strong Local Tobacco Retailer Licensing Ordinances with policy and enforcement details for every strong ordinance in the state, visit

[www.Center4TobaccoPolicy.org/localpolicies-licensing](http://www.Center4TobaccoPolicy.org/localpolicies-licensing).

For model tobacco retailer licensing ordinance language, visit ChangeLab Solutions at [changelabsolutions.org](http://changelabsolutions.org).

## Table of youth sales rates before and after the adoption of a strong tobacco retailer licensing ordinance

City/County	Date Passed	Annual Fee	Youth Sales Rate Before Ordinance	Most Recent Youth Sales Rate
Banning	August 2006	\$350	77%	21%
Baldwin Park	October 2008	\$342	34%	9%
Beaumont	December 2006	\$350	63%	20%
Berkeley	December 2002	\$427*	38%	4.2%
Burbank	February 2007	\$235	26.7%	4%
Calabasas	June 2009	\$0*	30.8%	5%
Coachella	July 2007	\$350	69%	11%
Contra Costa County	January 2003	\$160*	37%	3.8%
Corona	October 2005	\$350	50%	17%
Davis	August 2007	\$344	30.5%	7.8%
Delano	June 2008	\$165	23%	5.6%
Desert Hot Springs	August 2007	\$350	48%	4%
El Cajon	June 2004	\$698	40%	1%
Elk Grove	September 2004	\$270	17%	16.7%
Grass Valley	November 2009	\$100	27%	0%
Grover Beach	September 2005	\$224	46%	0%
Kern County	November 2006	\$165	34%	13.3%
La Canada Flintridge	June 2009	\$50*	47.1%	0%
Los Angeles County	December 2007	\$235	30.6%	8%
Murrieta	May 2006	\$350	31%	7%
Norco	March 2006	\$350	40%	6%
Pasadena	January 2004	\$225	20%	0%
Riverside	May 2006	\$350	65%	31%
Sacramento	March 2004	\$324	27%	15.1%
Sacramento County	May 2004	\$287	21%	7.1%
San Fernando	October 2008	\$250	38.5%	3%
San Francisco	November 2003	\$175*	22.3%	13.4%
San Luis Obispo	August 2003	\$255	17%	15.5%
San Luis Obispo County	October 2008	\$342	33.3%	5%
Santa Barbara County	November 2010	\$235	21%	9%
Tehachapi	February 2007	\$165	8%	16.7%
Vista	May 2005	\$250	39%	1.9%
Yolo County	May 2006	\$344	28%	11.1%

\*City or County fee does not fully cover administration and enforcement of the tobacco retailer license. Rather, the fee is supplemented with another stable source of funds, such as Master Settlement Agreement (MSA) funds or general funds. See the Center's Matrix of Strong Local Tobacco Retailer Licensing Ordinances for full details about the administration and enforcement of these ordinances.



## Tobacco Retailer Licensing and Electronic Cigarettes

JULY 2013

Cities and counties across California are taking steps to protect kids from new and emerging tobacco products. One such product that has seen an increase in use and advertising is electronic cigarettes, or e-cigarettes. According to the US Food and Drug Administration (FDA), an e-cigarette is a battery powered device that allows users to inhale a vapor containing nicotine or other substances. The safety of these devices is still unknown, and initial studies have found carcinogens and toxic chemicals in the vapor, including ingredients used to make anti-freeze. Furthermore, FDA has not found e-cigarettes to be safe and effective in helping smokers quit.

For these reasons, a handful of states, including California, have passed laws prohibiting the sale of e-cigarettes to minors. However, aside from that, e-cigarettes are still mostly unregulated in California. As a result, local cities and counties in California have taken steps to ensure that e-cigarettes are regulated and monitored in their communities.

Below is a list of the 59 cities and counties in California that require a retailer to obtain a license to sell e-cigarettes. These cities and counties have done this through special language in the definition of tobacco product in their local tobacco retailer licensing ordinance. They state that a tobacco product includes:

*Any product or formulation of matter containing biologically active amounts of nicotine that is manufactured, sold, offered for sale, or otherwise distributed with the expectation that the product or matter will be introduced into the human body, but does not include any cessation product specifically approved by the United States Food and Drug Administration for use in treating nicotine or tobacco dependence.*

This language can be found in [ChangeLab Solution's Tobacco Retailer Licensing Model Ordinance](#). For specific questions about a city or county policy, please contact the Center. Additional resources on tobacco retailer licensing produced by the Center are available at <http://www.center4tobaccopolicy.org/localpolicies-licensing>.

Carpinteria (May 2013)	Solana Beach (July 2009)	Compton (July 2007)
Contra Costa County (April 2013)	Calabasas (June 2009)	Lomita (May 2007)
Watsonville (March 2013)	Richmond (June 2009)	Wasco (March 2007)
Dublin (November 2012)	Albany (February 2009)	Burbank (February 2007)
Lynwood (October 2012)	South Pasadena (February 2009)	California City (February 2007)
City of Santa Cruz (October 2012)	Baldwin Park (October 2008)	Santa Ana (October 2006)
Parlier (April 2012)	Perris (August 2008)	Banning (August 2006)
Oxnard (February 2012)	Gardena (July 2008)	Lancaster (June 2006)
El Monte (November 2011)	Wildomar (July 2008)	San Jacinto (June 2006)
Huntington Park (November 2011)	Delano (June 2008)	Hollister (May 2006)
Malibu (November 2011)	Oakland (April 2008)	Murrieta (May 2006)
Concord (September 2011)	Hemet (March 2008)	City of Riverside (May 2006)
Hawaiian Gardens (July 2011)	Pacific (February 2008)	Yolo County (May 2006)
Santa Cruz County (April 2011)	Nevada City (November 2007)	Norco (March 2006)
Eastvale (January 2011)	Inglewood (October 2007)	Corona (October 2005)
Palmdale (January 2010)	Glendale (September 2007)	Arroyo Grande (February 2005)
Menifee (December 2009)	Moreno Valley (September 2007)	El Cajon (June 2004)
Grass Valley (November 2009)	Davis (August 2007)	
Montebello (September 2009)	Desert Hot Springs (August 2007)	
Firebaugh (August 2009)	Lake Elsinore (August 2007)	
Culver City (July 2009)	Coachella (July 2007)	



## Morbidity and Mortality Weekly Report (MMWR)

# Notes from the Field: Electronic Cigarette Use Among Middle and High School Students — United States, 2011– 2012

## *Weekly*

**September 6, 2013 / 62(35);729-730**

Electronic cigarettes, or e-cigarettes, are battery-powered devices that provide doses of nicotine and other additives to the user in an aerosol. Depending on the brand, e-cigarette cartridges typically contain nicotine, a component to produce the aerosol (e.g., propylene glycol or glycerol), and flavorings (e.g., fruit, mint, or chocolate) (1). Potentially harmful constituents also have been documented in some e-cigarette cartridges, including irritants, genotoxins, and animal carcinogens (1). E-cigarettes that are not marketed for therapeutic purposes are currently unregulated by the Food and Drug Administration, and in most states there are no restrictions on the sale of e-cigarettes to minors. Use of e-cigarettes has increased among U.S. adult current and former smokers in recent years (2); however, the extent of use among youths is uncertain.

Data from the 2011 and 2012 National Youth Tobacco Survey (NYTS), a school-based, pencil-and-paper questionnaire given to U.S. middle school (grades 6–8) and high school (grades 9–12) students, were used to estimate the prevalence of ever and current ( $\geq 1$  day in the past 30 days) use of e-cigarettes, ever and current ( $\geq 1$  day in the past 30 days) use of conventional cigarettes, and use of both. NYTS consists of a cross-sectional, nationally representative sample of students in grades 6–12 from all 50 states and the District of Columbia (3).

During 2011–2012, among all students in grades 6–12, ever e-cigarette use increased from 3.3% to 6.8% ( $p < 0.05$ ) (Figure); current e-cigarette use increased from 1.1% to 2.1% ( $p < 0.05$ ), and current use of both e-cigarettes and conventional cigarettes increased from 0.8% to 1.6% ( $p < 0.05$ ). In 2012, among ever e-cigarette users, 9.3% reported never smoking conventional cigarettes; among current e-cigarette users, 76.3% reported current conventional cigarette smoking.

Among middle school students, ever e-cigarette use increased from 1.4% to 2.7% during 2011–2012 ( $p < 0.05$ ) (Figure); current e-cigarette use increased from 0.6% to 1.1% ( $p < 0.05$ ), and current use of both e-cigarettes and conventional cigarettes increased from 0.3% to 0.7% ( $p < 0.05$ ). In 2012, among middle school ever e-cigarette users, 20.3% reported never smoking conventional cigarettes; among middle school current e-cigarette users, 61.1% reported current conventional cigarette smoking.

Among high school students, ever e-cigarette use increased from 4.7% to 10.0% during 2011–2012 ( $p < 0.05$ ) (Figure); current e-cigarette use increased from 1.5% to 2.8% ( $p < 0.05$ ), and current use of both e-cigarettes and conventional cigarettes increased from 1.2% to 2.2% ( $p < 0.05$ ). In 2012, among high school ever e-cigarette users, 7.2% reported never smoking

conventional cigarettes; among high school current e-cigarette users, 80.5% reported current conventional cigarette smoking.

E-cigarette experimentation and recent use doubled among U.S. middle and high school students during 2011–2012, resulting in an estimated 1.78 million students having ever used e-cigarettes as of 2012. Moreover, in 2012, an estimated 160,000 students who reported ever using e-cigarettes had never used conventional cigarettes. This is a serious concern because the overall impact of e-cigarette use on public health remains uncertain. In youths, concerns include the potential negative impact of nicotine on adolescent brain development (4), as well as the risk for nicotine addiction and initiation of the use of conventional cigarettes or other tobacco products.

CDC and the Food and Drug Administration will continue to explore ways to increase surveillance and research on e-cigarettes. Given the rapid increase in use and youths' susceptibility to social and environmental influences to use tobacco, developing strategies to prevent marketing, sales, and use of e-cigarettes among youths is critical.

## Reported by

*Catherine Corey, MSPH, Baoguang Wang, MD, Sarah E. Johnson, PhD, Benjamin Apelberg, PhD, Corinne Husten, MD, Center for Tobacco Products, Food and Drug Administration. Brian A. King, PhD, Tim A. McAfee, MD, Rebecca Bunnell, PhD, René A. Arrazola, MPH, Shanta R. Dube, PhD, Office on Smoking and Health, National Center for Chronic Disease Prevention and Health Promotion, CDC. **Corresponding contributor:** Brian A. King, [baking@cdc.gov](mailto:baking@cdc.gov), 770-488-5107.*

## References

1. Cobb NK, Byron MJ, Abrams DB, Shields PG. Novel nicotine delivery systems and public health: the rise of the "e-cigarette." *Am J Public Health* 2010;100:2340–2.
2. King BA, Alam S, Promoff G, Arrazola R, Dube SR. Awareness and ever use of electronic cigarettes among U.S. adults, 2010–2011. *Nicotine Tob Res* 2013;15:1623–7.
3. CDC. National Youth Tobacco Survey. Atlanta, GA: US Department of Health and Human Services, CDC; 2013. Available at [http://www.cdc.gov/tobacco/data\\_statistics/surveys/nyts](http://www.cdc.gov/tobacco/data_statistics/surveys/nyts).
4. Dwyer JB, McQuown SC, Leslie FM. The dynamic effects of nicotine on the developing brain. *Pharmacol Ther* 2009;122:125–39.

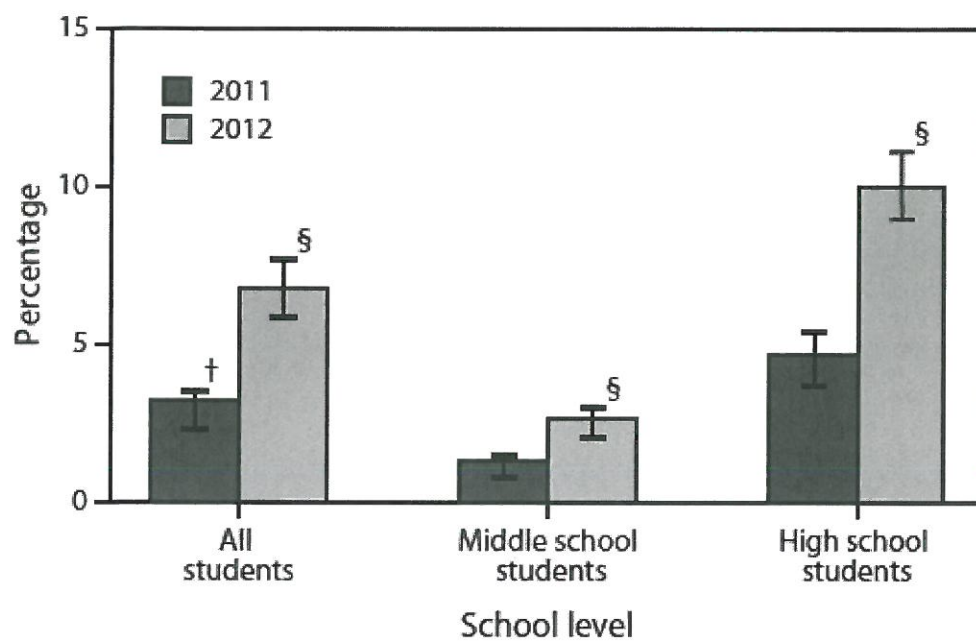
\* Ever electronic cigarette use defined as having ever used electronic cigarettes, even just one time.

<sup>†</sup> 95% confidence interval.

<sup>§</sup> Statistically significant difference between 2011 and 2012 (chi-square,  $p < 0.05$ ).

**FIGURE. Ever electronic cigarette use\* among middle and high school students, by year — National Youth Tobacco Survey, United States, 2011–2012**





**Alternate Text:** The figure above shows ever electronic cigarette (e-cigarette) use among middle and high school students, by year, in the United States during 2011-2012. During 2011-2012, among all students in grades 6-12, ever e-cigarette use increased from 3.3% to 6.8% ( $p < 0.05$ ); current e-cigarette use increased from 1.1% to 2.1% ( $p < 0.05$ ), and current use of both e-cigarettes and conventional cigarettes increased from 0.8% to 1.6% ( $p < 0.05$ ).

Use of trade names and commercial sources is for identification only and does not imply endorsement by the U.S. Department of Health and Human Services.

References to non-CDC sites on the Internet are provided as a service to *MMWR* readers and do not constitute or imply endorsement of these organizations or their programs by CDC or the U.S. Department of Health and Human Services. CDC is not responsible for the content of pages found at these sites. URL addresses listed in *MMWR* were current as of the date of publication.

All *MMWR* HTML versions of articles are electronic conversions from typeset documents. This conversion might result in character translation or format errors in the HTML version. Users are referred to the electronic PDF version (<http://www.cdc.gov/mmwr>) and/or the original *MMWR* paper copy for printable versions of official text, figures, and tables. An original paper copy of this issue can be obtained from the Superintendent of Documents, U.S. Government Printing Office (GPO), Washington, DC 20402-9371; telephone: (202) 512-1800. Contact GPO for current prices.

**\*\*Questions or messages regarding errors in formatting should be addressed to [mmwrq@cdc.gov](mailto:mmwrq@cdc.gov).**

Page last reviewed: September 06, 2013

Page last updated: September 06, 2013

Content source: [Centers for Disease Control and Prevention](#)

Centers for Disease Control and Prevention 1600 Clifton Rd. Atlanta, GA 30333, USA  
800-CDC-INFO (800-232-4636) TTY: (888) 232-6348 - [Contact CDC-INFO](#)

→



## A Prescription for Health: Tobacco Free Pharmacies

Pharmacies are where people go for medicine and health care advice. But most pharmacies in this country also sell cigarettes – items that, when used as directed, kill more than 400,000 Americans every year.<sup>1</sup> Given the enormous burden of tobacco use, many health advocates want to see the sale of tobacco products banned in pharmacies.<sup>2</sup> This fact sheet outlines the health concerns associated with allowing tobacco sales at pharmacies and shows what local policymakers can do in their communities.



### There are many reasons why health advocates oppose the sale of tobacco in pharmacies:

#### Sends a mixed message

Pharmacists are perceived by many as among the most trusted of health care professionals.<sup>3</sup> By selling tobacco products, pharmacies reinforce positive social perceptions of smoking, convey tacit approval of tobacco use, and send a message that it is not so dangerous to smoke.<sup>4,5</sup> Children and young people are particularly influenced by cues suggesting that smoking is acceptable.<sup>6</sup>

#### Makes it harder for smokers to quit

Smokers attempting to quit are more successful when they turn to cessation aids such as nicotine replacement gum and “the patch”<sup>7</sup>— items often found side-by-side with tobacco products at the pharmacy checkout (see photo below). Research shows that exposure to tobacco products and marketing often frustrates efforts to quit by stimulating physical cravings and emotional ties to smoking.<sup>8</sup> Pharmacy tobacco sales can compromise the ability of smokers to quit right at the moment when they are seeking out the help they need.

#### Creates a conflict of interest

Pharmacies that sell tobacco products also sell medicines to treat asthma, emphysema, heart disease, and cancer—illnesses caused or made worse by tobacco use.<sup>9</sup> The sale of both tobacco products and the medicines used to treat tobacco-related illnesses presents a troubling conflict of interest.



## Pharmacy vs. Drugstore

Although tobacco is rarely sold from behind a pharmacy counter these days, the term pharmacy here refers to all types of stores that contain a licensed pharmacy on the premises. This might include drugstores, grocery stores, warehouse stores, and more. Note: A California court has held that it is illegal to discriminate between different kinds of pharmacies. If a jurisdiction bans the sale of tobacco products in pharmacies, the jurisdiction cannot exempt grocery or big box stores from the ban. The ban must apply equally across all types of pharmacies (drugstores, grocery, or big box stores).<sup>10</sup>

## Economic Impact of Tobacco-Free Pharmacies

Nearly 90 percent of California's tobacco-free independent pharmacies have reported either no change or an increase in business since they stopped selling tobacco products.<sup>13</sup> Likewise, more than 95 percent of consumers have said they would continue shopping at stores that became tobacco-free as much or more often.<sup>14</sup>

In 1994, the sale of tobacco products was banned in Ontario, Canada. The restriction had no significant impact on business for drugstores.<sup>15</sup> In fact, the year following the ban saw 120 new drugstore openings in Ontario.<sup>16</sup> As of May 31, 2013, only one of Canada's ten provinces allows tobacco sales in pharmacies.<sup>17</sup>



## What Can Communities Do to Reduce Pharmacy Tobacco Sales?

### Push for Voluntary Action

A first step is to call upon local pharmacies to voluntarily stop the sale of tobacco products. For example, in the early 1970s, various health organizations launched a campaign calling for the voluntary removal of tobacco from pharmacies in San Francisco. By 2003 more than 65 percent of the city's independent pharmacies had become tobacco-free retailers.<sup>11</sup> Although a campaign calling for voluntary action may be a successful approach for small, pharmacist-owned stores, the majority of U.S. pharmacies are chain drugstores with corporate ownership,<sup>12</sup> which are unlikely to voluntarily stop selling tobacco.

### Enact a Law

The American Pharmacists Association, the California Pharmacists Association, and the California Medical Association have called for state and local laws prohibiting tobacco sales in drugstores and pharmacies<sup>18</sup> because they believe that doing so supports the public health and social welfare of the communities in which they practice.<sup>19</sup> Several localities have done just that.

In 2008, San Francisco passed a law prohibiting the sale of tobacco products in most types of pharmacies; the law was later amended to include all pharmacies. In 2009, Boston prohibited the sale of tobacco products by a variety of health care institutions and retailers that operate as health care institutions, including pharmacies. A number of communities across the country have since enacted similar tobacco-free pharmacy laws. (See sidebar on page 3.)

Local laws prohibiting tobacco sales in pharmacies have survived several lawsuits, including constitutional challenges based on the First Amendment and Equal Protection guarantees.<sup>20</sup> The court decisions in these cases have held that that local governments have the legal authority to prohibit tobacco sales in pharmacies.<sup>21</sup>



## Communities with Tobacco-Free Pharmacy Laws\*

### California

Currently, three jurisdictions in California prohibit tobacco sales in pharmacies:<sup>25</sup>

Richmond

San Francisco

Santa Clara County

### Massachusetts

More than 50 cities and towns in Massachusetts have enacted tobacco-free legislation and regulations.<sup>26, 27</sup>

A partial list includes:

Boston

Everett

Fall River

Lancaster

Newton

Pittsfield

Southborough

Walpole

Worcester

\*Current as of April 2013.

ChangeLab Solutions is a nonprofit organization that provides legal information on matters relating to public health. The legal information provided in this document does not constitute legal advice or legal representation. For legal advice, readers should consult a lawyer in their state.

This fact sheet was made possible by funds received from Grant Number 09-11182 with the California Department of Public Health, California Tobacco Control Program.

© 2013 ChangeLab Solutions

Photos courtesy of Flickr Creative Commons: Army Medicine (page 1 - upper) and H.I.L.T. (page 2), and ChangeLab Solutions (page 1 - lower)

## Impact on Tobacco Retailer Density

More than 90 percent of Americans live within five miles of a pharmacy.<sup>22</sup> A high density of tobacco retailers has been associated with increased smoking rates, particularly among youth<sup>23</sup> – and tobacco retailer density is highest in low-income communities and communities of color, which are already at greater risk of many health problems.<sup>24</sup> Removing tobacco from pharmacies instantly reduces the number of tobacco retailers in a community.

## A Model Ordinance from ChangeLab Solutions

One way a community can restrict the sale of tobacco products is as part of a tobacco retailer licensing (TRL) law. Under a local TRL law, the city or county government requires all businesses that sell tobacco products to obtain a license from the government in exchange for the privilege of selling these products to consumers.<sup>28</sup> ChangeLab Solutions has model ordinance language restricting the sale of tobacco products in all retail stores that also contain a licensed pharmacy, which is designed to be “plugged into” a TRL ordinance. ChangeLab Solutions staff can also draft a stand-alone law for any community that wants to create this restriction outside of a licensing program.

Visit us at [www.changelabsolutions.org](http://www.changelabsolutions.org) to learn more.



## Endnotes

- <sup>1</sup> US Department of Health and Human Services, Centers for Disease Control and Prevention. 2008. *Morbidity and Mortality Weekly Report: Annual Smoking - Attributable Mortality, Years of Potential Life Lost, and Productivity Losses - United States 2000-2004*. 57(45): p. 1226-1228. [www.cdc.gov/mmwr/preview/mmwrhtml/mm5745a3.htm](http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5745a3.htm)
- <sup>2</sup> American Health Association, American Stroke Association. 2009. *Eliminating the Sale of Tobacco Products in Pharmacies*. [www.heart.org/idc/groups/heart-public/@wcm/@adv/documents/downloadable/ucm\\_304805.pdf](http://www.heart.org/idc/groups/heart-public/@wcm/@adv/documents/downloadable/ucm_304805.pdf); Brief of Amici Curiae Tobacco Control Legal Consortium, et al. at 8, *Philip Morris USA v. City and County of San Francisco*, 345 Fed. Appx. 276 (9th cir. 2009) (No. 09-17649).
- <sup>3</sup> Jones JM. 2011. *Record 64% Rate Honesty, Ethics of Member of Congress Low: Ratings of Nurses, Pharmacists, and Medical Doctors Most Positive*. [www.gallup.com/poll/151460/Record-Rate-Honesty-Ethics-Members-Congress-Low.aspx](http://www.gallup.com/poll/151460/Record-Rate-Honesty-Ethics-Members-Congress-Low.aspx)
- <sup>4</sup> Katz MH. 2008. "Banning Tobacco Sales in Pharmacies: The Right Prescription." *Journal of the American Medical Association*, 300(12):1451-1453.
- <sup>5</sup> Hudmon KS, Fenlon CM, and Corelli RL. 2006. "Tobacco Sales in Pharmacies: Time to Quit." *Tobacco Control*, 15(1): 35-38.
- <sup>6</sup> DiFranza JR, Wellman RJ, Sargent JD, et al. 2006. "Tobacco Promotion and the Initiation of Tobacco Use: Assessing the Evidence for Causality." *Pediatrics*, 117(6):e1237-e1248.
- <sup>7</sup> Stead LF, Perera R, Bullen C, et al. 2012. "Nicotine Replacement Therapy for Smoking Cessation." *Cochrane Database of Systematic Reviews*, 11: CD000146.
- <sup>8</sup> Hoek J, Gifford H, Pirikahu G, et al. 2010. "How Do Tobacco Retail Displays Affect Cessation Attempts? Findings from a Qualitative Study." *Tobacco Control*, 19(4): 334-337.
- <sup>9</sup> Katz, *supra* note 4.
- <sup>10</sup> *Walgreen Co. v. City & County of San Francisco*, 185 Cal. App. 4th 424, 110 Cal. Rptr. 3d 498 (2010).
- <sup>11</sup> Eule B, Sullivan MK, Schroeder SA, et al. 2004. "Merchandising of Cigarettes in San Francisco Pharmacies: 27 Years Later." *Tobacco Control*, 13: 429-432.
- <sup>12</sup> Hudmon et al., *supra* note 5.
- <sup>13</sup> Katz, *supra* note 4.
- <sup>14</sup> *Id.*
- <sup>15</sup> Physicians for a Smoke-Free Canada. 2010. *Tobacco-Free Pharmacies*. [www.smoke-free.ca/eng\\_home/2010/pharmacy-background-2010.pdf](http://www.smoke-free.ca/eng_home/2010/pharmacy-background-2010.pdf)
- <sup>16</sup> Taylor MC. Physicians for a Smoke-Free Canada. *Banning Cigarettes in Pharmacies Does Not Result in Pharmacy Closures*. [www.smoke-free.ca/pdf\\_1/pharmacy.pdf](http://www.smoke-free.ca/pdf_1/pharmacy.pdf)
- <sup>17</sup> Diego Marchese, Heart and Stroke Foundation and Scott McDonald, BC Lung Association. 2012. Letter to the Editor. "B.C. Last Holdout on Pharmacy Tobacco Sales." *Vancouver Sun*, December 5. [www.vancouversun.com/last+holdout+pharmacy+tobacco+sales/7653124/story.html](http://www.vancouversun.com/last+holdout+pharmacy+tobacco+sales/7653124/story.html)
- <sup>18</sup> Tobacco Education and Research Oversight Committee for California. 2006. *Confronting a Relentless Adversary: A Plan for Success Toward a Tobacco-Free California 2006-2008*.
- <sup>19</sup> Hudmon et al., *supra* note 5.
- <sup>20</sup> *Philip Morris USA v. City and County of San Francisco*, 345 Fed. Appx. 276 (9th cir. 2009); *Walgreen Co. v. City & County of San Francisco*, 185 Cal. App. 4th 424, 110 Cal. Rptr. 3d 498 (2010); *Safeway Inc. v. City & County of San Francisco*, 797 F. Supp. 2d 964 (N.D. Cal. 2011).
- <sup>21</sup> For more information on these cases, see "Is it legal to ban tobacco sales in pharmacies?" at [www.changelabsolutions.org/tobacco-control/question/is-it-legal-ban-tobacco-sale](http://www.changelabsolutions.org/tobacco-control/question/is-it-legal-ban-tobacco-sale)
- <sup>22</sup> National Association of Chain Drug Stores. 2012. Statement of the National Association of Chain Drug Stores for U.S. Senate Armed Services Committee Personnel Subcommittee Hearing on FY2013 Defense Authorization. p. 2. [www.nacds.org/pdfs/pr/2012/3\\_28\\_SASC\\_TRICARE\\_comments.pdf](http://www.nacds.org/pdfs/pr/2012/3_28_SASC_TRICARE_comments.pdf)
- <sup>23</sup> Henricksen L, Feighery EC, Schleicher NC, et al. 2008. "Is Adolescent Smoking Related to Density and Proximity of Tobacco Outlets and Retail Cigarette Advertising Near Schools?" *Preventative Medicine*, (47)2: 210-214.
- <sup>24</sup> Rodriguez D, Carlos HA, Adachi-Mejia AM, et al. 2012. "Predictors of tobacco outlet density nationwide: a geographic analysis." *Tobacco Control*. <http://tobaccocontrol.bmj.com/content/early/2012/04/03/tobaccocontrol-2011-050120.full.pdf+html>
- <sup>25</sup> Richmond, Cal., Code of Ordinances art. VII, ch. 7.107.020 (2012); City and County of S.F., Cal., Health Code art. 19J § 1009.91-98 (92) (2010); Santa Clara County, Cal., Ordinance Code tit. A, div. A18, ch. XXIII § A18.370 (c) (2010).
- <sup>26</sup> Municipal Tobacco Control Technical Assistance Program. 2013. *Local Summary of Tobacco Sales Bans in Pharmacies*. [http://smokingcessationleadership.ucsf.edu/webinar\\_30\\_mass\\_muni\\_list\\_pharmacy.pdf](http://smokingcessationleadership.ucsf.edu/webinar_30_mass_muni_list_pharmacy.pdf)
- <sup>27</sup> Boston, Mass., Boston Public Health Commission Regulation Restricting the Sale of Tobacco Products in the City of Boston (Dec. 11, 2008); Everett, Mass., Regulation of the Everett Board of Health Restricting the Sale of Tobacco Products in the City of Everett (July 19, 2010); Fall River, Mass., Rev. Ordinances pt. II, ch. 34 § 34-320 (2011); Lancaster, Mass., Regulations of the Town of Lancaster Board of Health Restricting the Sale of Tobacco Products and Non-Nicotine Products not Approved by FDA (Dec. 2, 2010); Newton, Mass., Newton Code ch. 20, art. I, §20-2 (2012); Pittsfield, Mass., Board of Health Youth Access and Environmental Tobacco Smoke Regulations (June 6, 2012); Southborough, Mass., Board of Health Rules and Regulations Relative to the Restriction of Sale, Vending and Distribution of Tobacco and Tobacco Products within the Town of Southborough (Dec. 15, 2010); Walpole, Mass., Board of Health Regulations Restricting the Sale of Tobacco Products in the Town of Walpole (Oct. 21, 2010); Worcester, Mass., Rev. Ordinances pt. I, ch. 8, § 3(g)(5) (2008).
- <sup>28</sup> In California, local tobacco retailer licensing laws are specifically authorized by the state tobacco retailer licensing law, which says that "[l]ocal licensing laws may provide for the suspension or revocation of the local license for any violation of a state tobacco control law." Cal. Bus. & Prof. Code § 22971.3.





## Cigarettes Generate Big Revenue for Convenience Stores

### Analysis of 2013 State of the Industry Report



The Association for Convenience & Petroleum Retailing (NACS) is an international trade association that represents convenience and fuel retailers. NACS releases an annual report on product sales, store operations, motor fuel and other topics of interest to the convenience store industry. This report is important to the tobacco control community because it includes figures about cigarette and tobacco product sales at convenience stores, which demonstrate just how lucrative selling tobacco can be. This fact sheet highlights data from the 2013 State of the Industry Annual Report of 2012 data. Please note, all of these numbers are national averages for 2012 data, not California specific.

#### Cigarettes Are the Number One Product Sold at Convenience Stores and Generate \$622,248 in Sales

- Cigarettes accounted for 36.27% of sales inside convenience stores in 2012, by far the number one product. Non-alcoholic packaged beverages were second, with only 14.74% of inside sales.
- This number is a slight decrease from 2011, when cigarettes accounted for 37.73% of sales.
- Average sales of cigarettes per store were \$622,248, a decrease of 0.91% from 2011. This figure is almost \$370,000 higher than any other product's per store average.
- Other tobacco products were the fourth best selling product, accounting for 4.38% of inside sales with average sales of other tobacco products per store at \$78,864, a decrease of 6.48% from 2011.
- Smokeless tobacco products make up 61.09% of other tobacco product sales, followed by cigars at 32.11%.

#### Cigarettes Generate 16.74% of Gross Margin and Are a Very Important Product for Convenience Stores' Bottom Line

- Convenience stores were the top sellers of cigarettes nationwide. According to this report, in 2012, 86.2% of total cigarette sales were made at convenience stores.
- Other tobacco products were the most common item found in stores, with 99.56% of stores selling them. This is significantly higher than its fifth place standing last year. Cigarettes were sold in 99.09% of stores, the sixth most common item found in stores.
- The average gross margin dollars per store for cigarettes was \$88,908.
- While cigarettes were the top selling product, they rank second in gross margin dollar contribution. Cigarettes contributed 16.74% of the average gross margin dollars per store, ranking behind non-alcoholic packaged beverages which were first at 18.78% and \$99,708.

#### What This Means for Local Tobacco Retailer Licensing Ordinances

Convenience store owners and other cigarette retailers often oppose efforts to enact strong local tobacco retailer licensing ordinances, which 107 cities and counties in California have adopted (as of June 2013) in order to reduce illegal sales of tobacco products to minors. A strong local tobacco retailer licensing ordinance requires all tobacco retailers to obtain a license with an annual renewal fee and includes enforcement efforts that result in the suspension of a retailer's license for selling tobacco products to minors. The State of the Industry Report shows just how lucrative selling cigarettes is to convenience stores. It is a product that accounts for more than a third of sales inside convenience stores and generates more than \$622,248 in sales for the average convenience store. Being unable to sell cigarettes for a month or longer due to a suspended license would be very detrimental to the bottom line of any store.

Sources: The Tobacco Education Clearinghouse of California (TECC) has a copy of the 2013 State of the Industry Report available for checkout. Call (800) 258-9090 to borrow the report.

The Center has many other resources related to local tobacco retailer licensing ordinances, including a matrix of communities with strong local licensing ordinances and a fact sheet on the effectiveness of local licensing efforts, available at [www.Center4TobaccoPolicy.org/localpolicies-licensing](http://www.Center4TobaccoPolicy.org/localpolicies-licensing).

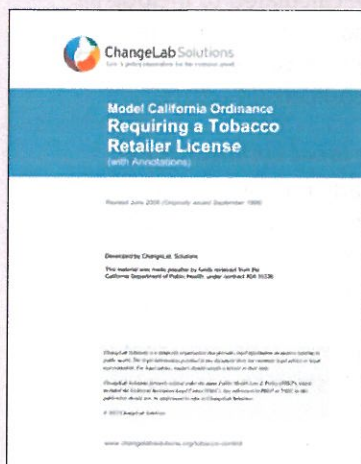




**ChangeLab Solutions**  
Law & policy innovation for the common good.

ChangeLab Solutions has developed model language for a tobacco retailer licensing law in California cities and counties. The model language offers a variety of policy options that can be tailored to the specific goals and needs of your community.

In addition to the core provisions, ChangeLab Solutions has drafted supplementary “plug-in” provisions, which offer additional policy options that can be incorporated into the law. For more information, please see our resources on Tobacco Retailer Licensing at [www.changelabsolutions.org/publications/model-TRL-ordinance](http://www.changelabsolutions.org/publications/model-TRL-ordinance).



While ChangeLab Solutions’ model language for a tobacco retailer licensing law was designed for California communities, the model can be adapted for use in other states as well. It is important to carefully check the existing law in your state to learn if local tobacco retailer licensing is allowed. Consult with an attorney licensed in your jurisdiction.

## Tobacco Retailer Licensing An Effective Tool for Public Health

*Communities are adopting tobacco retailer licensing laws as one way to ensure compliance with tobacco laws and to combat the public health problems associated with tobacco use. In this fact sheet, we explain how tobacco retailer licensing works, why many communities are pursuing this policy, and what goes into creating and implementing a strong tobacco retailer licensing law.*

### What is tobacco retailer licensing?

Licensing is a common policy tool that state and local governments use to regulate businesses like alcohol retailers, pharmacists, or restaurants. A local government may want to similarly license tobacco retailers in order to protect public health and safety by ensuring that retailers comply with responsible retailing practices.

Under a local tobacco retailer licensing law, the city or county government requires all businesses that sell tobacco products to obtain a license from the government in exchange for the privilege of selling these products to consumers.<sup>1</sup> Local governments may require licensed retailers to pay an annual fee, which can fund administration and enforcement activities such as store inspections and youth purchase compliance checks. Increasingly, tobacco retailer licensing is being used to promote other innovative policy solutions as well, including controlling the location and density of tobacco retailers and imposing additional restrictions on the sale and promotion of tobacco products.<sup>2</sup>

As of June 2012, more than 100 cities and counties in California had adopted a local tobacco retailer licensing law.<sup>3</sup> The Center for Tobacco Policy & Organizing (The Center) classifies 94 of these as “strong,”<sup>4</sup> meaning the laws have at a minimum:

- a requirement that all tobacco retailers obtain a license and renew it annually;
- an annual licensing fee high enough to fund sufficient enforcement;
- meaningful penalties for violators through fines and penalties, including the suspension and revocation of the license;<sup>5</sup> and
- a provision stating that any violation of existing local, state or federal tobacco laws constitutes a violation of the local law.







## Why adopt a tobacco retailer licensing law?

Many communities adopt tobacco retailer licensing laws because they are effective tools for limiting the negative public health consequences of tobacco use. While this tool provides many benefits, there are three main advantages to a tobacco retailer licensing law. First, these laws have been shown to be effective at limiting youth access to tobacco. Second, strong laws with annual fees create self financing programs that allow for regular enforcement. Third, a tobacco retailer licensing law facilitates comprehensive local enforcement of all tobacco related laws. Each of these points is discussed below.

### Protecting youth

Despite state laws prohibiting sales of tobacco to minors, a 2007 survey found that nearly three-quarters of youth access enforcement agencies statewide issued warnings to merchants selling tobacco products to minors during the prior year.<sup>6</sup> Fortunately, strong local tobacco retailer licensing laws—that is, laws that meet the criteria above—have proven effective at reducing illegal tobacco sales to minors. The Center has found that local tobacco retailer licensing is extremely effective at reducing illegal sales to underage youth: the organization surveyed 31 municipalities that have implemented and enforced a strong tobacco retailer licensing law and found that the rates of illegal sales to minors decreased, often significantly, in all communities surveyed.<sup>7</sup>

### A self-financing program

An important strength of licensing is that the government may impose a licensing fee that is sufficient to cover the costs of enforcement. Because funding enforcement is often the best way to ensure compliance with a policy, ChangeLab Solutions recommends that the fee be calculated to include all enforcement activities. For more information on how to calculate a fee for a local tobacco retailer license, see our tobacco licensing cost worksheet at: [www.changelabsolutions.org/publications/tobacco-licensure-costs](http://www.changelabsolutions.org/publications/tobacco-licensure-costs).

### A comprehensive enforcement mechanism for local communities

A number of federal and California state laws already regulate tobacco sales and establish penalties for illegal sales to minors. But these laws each have separate enforcement mechanisms and penalty structures, making it difficult to enforce them at the local level. A local tobacco retailer licensing law, on the other hand, empowers *local law enforcement* to impose *meaningful penalties* for illegal sales to minors and ensure compliance with all existing laws—ensuring that local communities can prioritize enforcement even when state and federal authorities are unable to do so.

Meanwhile, some of these state and federal laws fail to address important public health concerns related to tobacco. For example, the federal regulations authorized by the 2009 Tobacco Control Act currently apply only to cigarettes and smokeless tobacco products—they do not apply to little cigars or other tobacco products that are aggressively marketed to youth. A local tobacco retailer licensing law is a tool communities can use to help bridge these gaps and address public health concerns in their communities.



An electronic cigarette with charger.

### What is a tobacco product?

When people think of tobacco products, they may think of cigarettes, cigars, and chewing tobacco, but there are other products communities may want to restrict. Our model language defines tobacco products broadly to include all products containing tobacco leaf (including hookah, snuff, snus, and dissolvables) as well as nicotine-only products such as electronic cigarettes. This definition is written to restrict emerging tobacco industry products without interfering with FDA-approved cessation devices—like nicotine patches.



## What else can a tobacco retailer licensing law do?

While a tobacco retailer licensing law may be the best tool to prevent sales to minors, it can also promote other innovative policy solutions, controlling the location and density of tobacco retailers, imposing additional restrictions on the sale of other tobacco products like little cigars, and preventing the sale of drug paraphernalia.

### **Zoning:**

#### ***location and density of retailers***

Another common way to limit where tobacco retailers can locate is through land use laws, also known as zoning laws. For a comparison between land use laws and licensing laws, see ChangeLab Solutions' factsheet, *Licensing & Zoning: Tools for Public Health*, available at: [www.changelabsolutions.org/publications/licensing-zoning](http://www.changelabsolutions.org/publications/licensing-zoning).

### **Location and density of retailers**

Local governments can use tobacco retailer licensing to control both the location and density of tobacco retailers in their communities. A licensing law could, for example, prohibit licenses for any businesses operating too close to a school or other area frequented by youth. Because tobacco sales near schools and child-oriented areas have been shown to increase youth smoking<sup>8</sup>, this policy can be used to keep tobacco retailers out of areas where youth typically congregate. A tobacco retailer licensing law also could cap the total number of licenses issued based on population, controlling the overall density of tobacco retailers in a community. California law limits alcohol licenses based on density, and this policy applies that same rationale to tobacco retailers.



*Cigarillos in grape, strawberry and blueberry flavors, sold for under a dollar a piece.*

### **Little cigars and cigarillos**

A tobacco retailer licensing law can also prohibit the sale of individual or small packages of low-priced cigars, including little cigars and cigarillos. Due to their low prices and candy flavoring, these products are particularly appealing to youth, and though they are often similar to cigarettes, they are not subject to the same restrictions against selling the product individually or in small quantities. This policy allows communities to close this loophole and regulate a product that is increasingly used by youth. For more on this policy, see our fact sheet at: [www.changelabsolutions.org/publications/limiting-teen-friendly-cigars](http://www.changelabsolutions.org/publications/limiting-teen-friendly-cigars).

### **Drug paraphernalia**

Many communities are using tobacco retailer licensing laws to address the sale of drug paraphernalia in their neighborhoods. Through this provision, a retailer found to have violated state laws regarding drug paraphernalia will also be in violation of the local tobacco retailer license, and the penalties of the licensing ordinance will apply. In this way, the tobacco retailer licensing law becomes an additional tool for local law enforcement to combat sales of drug paraphernalia. For more information on this policy option, see our fact sheet on this topic at: [www.changelabsolutions.org/publications/drug-paraphernalia](http://www.changelabsolutions.org/publications/drug-paraphernalia).

These are just a few examples of cutting-edge policy solutions for tobacco control. These innovative policy solutions—referred to as “plug-in” provisions—can be incorporated into our model language for a tobacco retailer licensing law. For more information about plug-in provisions, including the ones mentioned here, see: [www.changelabsolutions.org/publications/policy-provisions-trl](http://www.changelabsolutions.org/publications/policy-provisions-trl).



*Meth pipes for sale at a smoke shop in San Francisco, California.*

## **Implementation and enforcement**

It's up to individual communities to decide who will implement and enforce a tobacco retailer licensing law. Multiple agencies might be involved: one agency may issue the license (the city manager, for example, or the agency that issues general business licenses), while another agency, such as the environmental health or police department, may monitor compliance.

There is no one right way to implement and enforce a local tobacco retailer licensing program. That said, successful programs share some characteristics.



<sup>1</sup> In California, local tobacco retailer licensing laws are specifically authorized by the state tobacco retailer licensing law, which says that "[l]ocal licensing laws may provide for the suspension or revocation of the local license for any violation of a state tobacco control law." Cal. Bus. & Prof. Code § 22971.3.

<sup>2</sup> See generally McLaughlin I. *License to Kill?: Tobacco Retailer Licensing as an Effective Enforcement Tool*. Tobacco Control Legal Consortium, 2010. Available at: <http://publichealthlawcenter.org/sites/default/files/resources/tclc-syn-retailer-2010.pdf>

<sup>3</sup> American Nonsmokers' Rights Foundation. *California Municipalities with Laws Restricting Youth Access to Tobacco*. 2011. Available at: [www.changelabsolutions.org/publications/anrf-list](http://www.changelabsolutions.org/publications/anrf-list) (List includes only those laws which provide for suspension or revocation of a license).

<sup>4</sup> The Center. *Table of Strong Local Tobacco Retailer Licensing Ordinances*. 2012. Available at: [www.center4tobaccopolicy.org/local-policies-licensing](http://www.center4tobaccopolicy.org/local-policies-licensing).

<sup>5</sup> The threat of license suspension creates a greater financial deterrent to retailers than a simple fine. For many stores, especially convenience stores, tobacco sales make up a substantial portion of their revenue. Losing the authority to sell tobacco products for a month can cost retailers far more than the largest fines that can be imposed under existing California laws, like Penal Code section 308 or the STAKE Act. See Cal. Penal Code § 308 (violators can be fined \$200, \$500, or \$1000 for first, second, or third violations, respectively); Cal. Bus. & Prof. Code 22958 (violators can be fined \$400-600 for a first violation and are subject to harsher penalties for each additional violation in a 5-year period).

<sup>6</sup> Rogers T, Feighery EC, Haladjian HH. *Current Practices in Enforcement of California Laws Regarding Youth Access to Tobacco Products and Exposure to Secondhand Smoke*. Sacramento, CA: California Department of Public Health, 2008. Available at: [www.cdph.ca.gov/programs/tobacco/Documents/CTCPEnforcementReport08-05.pdf](http://www.cdph.ca.gov/programs/tobacco/Documents/CTCPEnforcementReport08-05.pdf).

<sup>7</sup> The Center. *Tobacco Retailer Licensing Is Effective*. 2011. Available at: [www.center4tobaccopolicy.org/CTPO/\\_files/\\_file/Tobacco%20Retailer%20Licensing%20is%20Effective%20March%202011.pdf](http://www.center4tobaccopolicy.org/CTPO/_files/_file/Tobacco%20Retailer%20Licensing%20is%20Effective%20March%202011.pdf).

<sup>8</sup> Henriksen et al. "Is Adolescent Smoking Related to the Density and Proximity of Tobacco Outlets and Retail Cigarette Advertising Near Schools?" *Preventative Medicine*. 47(210): 210-214, 2008. Abstract only is available at: [www.sciencedirect.com/science/article/pii/S0091743508002089](http://www.sciencedirect.com/science/article/pii/S0091743508002089).

For one thing, they are overseen by a single government agency with dedicated staff members. They also plan early for enforcement that engages all the key players. And they require a license fee that is large enough to cover the full costs of administering and enforcing the program. To assist agencies in coordinating and planning, ChangeLab Solutions created a checklist that includes all the recommended elements of a successful program. The checklist is available at: [www.changelabsolutions.org/publications/implementation-checklist-TRL](http://www.changelabsolutions.org/publications/implementation-checklist-TRL).

To help understand the variety of local approaches to tobacco retailer licensing, in 2006 we studied four communities that are effectively enforcing their local tobacco retailer licensing laws: Contra Costa County, Santa Barbara County, the City of Willits, and the City of Los Angeles. We chose these communities because they were among the first in California to suspend the tobacco licenses of retail outlets that violated sales-to-youth or other tobacco control laws. Read our review of these programs (visit: [www.changelabsolutions.org/publications/case-studies-local-trl-ords](http://www.changelabsolutions.org/publications/case-studies-local-trl-ords)) to see how, despite their differences, they all achieve the goal of holding retailers accountable for violations of tobacco sales laws.

## Licensing for healthy food retailers

Communities can use licensing to improve public health in other ways by ensuring that retailers are not only complying with existing laws but also benefiting the communities they serve. For example, in neighborhoods with limited access to fresh produce and staple foods, a licensing system could require food retailers to carry these items. For more information on healthy food retailer licensing, see our Model Licensing Ordinance for Healthy Food Retailers at: [www.changelabsolutions.org/publications/HFR-licensing-ord](http://www.changelabsolutions.org/publications/HFR-licensing-ord).



## For more information

**For support with model language and legal issues:**

ChangeLab Solutions

[www.changelabsolutions.org](http://www.changelabsolutions.org)

**For support with campaign issues:**

The Center for Tobacco Policy & Organizing, a project of the American Lung Association in California (The Center)

[www.Center4TobaccoPolicy.org](http://www.Center4TobaccoPolicy.org)



ChangeLab Solutions

[changelabsolutions.org](http://changelabsolutions.org)

*This material was developed by ChangeLab Solutions with funds received from the California Department of Public Health, under contract #09-11182.*

*ChangeLab Solutions formerly existed under the name Public Health Law & Policy (PHLP), which included the Technical Assistance Legal Center (TALC).*

*The legal information provided in this document does not constitute legal advice or legal representation. For legal advice, readers should consult a lawyer in their state.*

© 2012 ChangeLab Solutions

Photos: Lydia Daniller (cover, top of page 2), ChangeLab Solutions (bottom of page 2, top of page 3), SFCityAttorney on flickr.com (bottom of page 3), and Flickr Creative Commons DC Central Kitchen (page 4)



**MINUTES OF THE REGULAR MEETING OF THE  
CITY OF HAYWARD PLANNING COMMISSION  
Council Chambers  
Thursday, October 17, 2013, 7:00 p.m.  
777 B Street, Hayward, CA94541**

---

**MEETING**

A regular meeting of the Hayward Planning Commission was called to order at 7:00 p.m. by Chair Faria.

**ROLL CALL**

Present: COMMISSIONERS: Loché, Trivedi, McDermott, Lamnin, Márquez, Lavelle  
CHAIRPERSON: Faria  
Absent: COMMISSIONER: None  
CHAIRPERSON: None

Commissioner Lamnin led in the Pledge of Allegiance.

Staff Members Present: Camire, Conneely, Frascinella, Golubics, Irizarry, Madhukansh-Singh, Rizk, Siefers

General Public Present: 27

**PUBLIC COMMENTS**

None

**PUBLIC HEARING**

1. Request to Modify Conditions of Approval (PL-2010-0046) to Allow Minors on Weekends, to Request for adoption of a Mitigated Negative Declaration and Mitigation Monitoring and Reporting Program associated with a Text Amendment Application (No. PL-2013-0097 TA) that would add "Health Club" and "Kennel Ancillary to Pet Store" as primary uses and "Kennel (Pet Boarding and Day Care Only)" as an administrative use in the Central Business Zoning District (Hayward Municipal Code Section 10-1.1300); and approval of a proposed new 44,983 square-foot health club at 24518 Hesperian Boulevard (Southland Mall property). Sean Wood for Rouse Properties, Inc. (Applicant/Owner)

Director David Rizk introduced the new Planning Commissioner Pat Siefers to the Planning Commission.

Associate Planner Camire provided a synopsis of the staff report. She stated that staff supported the approval of the project because the health club amenities that were currently lacking at Southland Mall will be built, there will be opportunities for Pet Boarding and Pet Day Care Facilities which were common at regional shopping centers and lacking in the neighborhood of the proposed project site, the health club building would not preclude a future grocery store in the area, and that the

**DRAFT**

1

City's policies on the HEAL campaign and proposed General Plan for a health community would be met. Staff recommended that the Planning Commission recommend that the City Council adopt the Mitigated Negative Declaration and Mitigation Monitoring & Reporting Program and approve the requested Text Amendment and Site Plan Review applications, subject to the Findings and Conditions of Approval.

Associate Planner Camire confirmed for Commissioner Lavelle that the health club would have a completely enclosed indoor swimming pool. Associate Planner Camire also confirmed that if the applicant wanted to modify the hours of operation of the health club to remain open 24 hours every day of the week, this would be permitted under current City regulations.

Associate Planner Camire stated that there were three other Health Club facilities in Hayward which have similar amenities, such as indoor swimming pools. She noted that the proposed health club facility was needed at the proposed location.

Commissioner McDermott acknowledged that neighborhood near Southland Mall was underserved due to an absence of a nearby grocery store and that the residents in the area have expressed a need for this.

Associate Planner Camire confirmed for Commissioner McDermott that Rouse Properties owned all of the property located at the Southland Mall site, with the exception of Sears. Commissioner McDermott commented that Rouse Properties had previously mentioned that they would be proactive in bringing a grocery store to this site. Associate Planner Camire responded that Rouse Properties had communicated to staff that they were searching for grocery retailers.

Commissioner McDermott asked why the former Lucky's site was still vacant. Associate Planner Camire indicated that the applicant could best answer Commissioner McDermott's question.

Commissioner Márquez asked staff if the applicant would reconfigure the layout of the parking lot. Associate Planner Camire stated that the parking lot would remain the same; however, some landscaping work would be performed in the parking lot. She pointed out that there would be additional landscaping along Hesperian Boulevard as well.

Commissioner Márquez raised the question of what lighting improvements would be made to the surrounding parking lot. Commissioner Márquez suggested that potential retailers such as a Fresh & Easy Neighborhood Market or Trader Joes might be appropriate for the proposed location.

Commissioner Márquez asked if the swimming pools would be equipped with something similar to a lift that would increase the accessibility of the pools to residents that may have physical challenges. Associate Planner Camire responded that language could be added to include this in the conditions of approval.

Commissioner Lamnin said the staff report addressed that increased safety of building occupants could be ensured by limiting the number of windows at the proposed health club.

Associate Planner Camire noted receiving comments from the Airport Land Use Commission (ALUC) in how the building could be made safer and in compliance with the Airport Land Use





**MINUTES OF THE REGULAR MEETING OF THE  
CITY OF HAYWARD PLANNING COMMISSION  
Council Chambers  
Thursday, October 17, 2013, 7:00 p.m.  
777 B Street, Hayward, CA94541**

---

Compatibility Plan. She mentioned that the applicant agreed to provide additional emergency exits in the building. Associate Planner Camire confirmed that the design of the health club consisted of decreasing the number of windows on the side walls of the building, noting that the windows on the side walls would be glass panels.

Commissioner Lamnin added that the design should incorporate skylights as the building would have a limited number of windows.

Commissioner Loché asked if it would be difficult for a new grocery store to locate to a different part of the building, given that the health club would be occupying the site that was formerly occupied by Lucky supermarket.

Associate Planner Camire responded that any future proposed site for a grocery store at the Southland Mall site within Safety Compatibility Zones 2 and 3 would have to be reviewed by the ALUC.

Director Rizk added that it was difficult for staff to state whether it would be easier or more difficult for a grocery store to locate at the site previously occupied by Lucky supermarket or at a different location at the Southland Mall site, because this was dependent upon ALUC. He shared that the reason that the ALUC did not take any action at the September 18, 2013 meeting was because there were only four of the seven ALUC commissioners present. Director Rizk stated that a vote was taken by the ALUC to determine if the proposed health club was consistent with the Airport Land Use Compatibility Plan; however, this motion failed due to a vote count of three commissioners in favor and one against the motion. The proposed health club was to not exceed the occupancy level of the former Lucky Supermarket and the areas that it was replacing. He said that if the same criteria was used in the future, and if this project was approved for a grocery store where the grocery store would go in a location to the south of the proposed health club, staff would have to conduct a preliminary analysis to show that the number of occupants for the grocery store would not exceed the retail space occupants. Director Rizk said that the main criteria would be to not exceed the occupancy levels of the previously existing uses at those sites.

Associate Planner Camire confirmed for Commissioner Loché that the intent of the Text Amendment Application to add a Kennel Ancillary to a Pet Store was because the applicant wanted to include permitted uses for future potential tenants.

Associate Planner Camire clarified for Commissioner Trivedi that the applicant's plans were to demolish the site of the former supermarket, the loading dock, and 8,600 square feet of retail space. She added that the remaining retail space would not be demolished.

In response to Commissioner Lamnin's question, Associate Planner Camire responded that staff did not conduct an analysis to see if the proposed project would have an impact on the physical fitness studio in the mall.

Associate Planner Camire clarified for Chair Faria that the proposed space for a future grocery store is 29,000 square feet.

In response to Chair Faria's question, Associate Planner Camire stated that she had spoken with the Southgate Area Home Owner's Association and had also sent copies of the plans to them. She noted that the concern that residents of the neighborhood expressed was the need to have a grocery store on site.

Chair Faria opened the public hearing at 7:32 p.m.

Mr. Sean Wood, Director of Development for Rouse Properties, thanked staff for their hard work. He mentioned that Rouse Properties owns thirty-two properties, all of which are malls that are ready for redevelopment. He indicated that although Southland Mall is older and that there are many challenges that his company is faced with there is a lot of interest on the part of Rouse Properties, its shareholders, and from the community to improve the site. Mr. Wood stated that the health club project would be the catalyst that would help improve the remaining retail space at this site. He said that Rouse Properties is actively looking to redevelop other parts of Southland Mall as well.

Mr. Wood confirmed for Commissioner Márquez that the City Sports Club facility located on Whipple Road is approximately the same square footage as the proposed project. He shared that Rouse Properties performed a photometric study of entire site and thus, the applicant will be adding lighting to some areas and will also be improving lighting in other areas. He noted that there will be lighting fixtures mounted to the side walls of the building that face the parking lot. Mr. Wood stated that there are a lot of trees in the parking lot that shaded the lighting in the area.

Commissioner Márquez asked the applicant how receptive Rouse Properties is to attracting grocery stores such as Trader Joes, Fresh & Easy Neighborhood Market and Sprout Farmers Market as potential tenants at the site.

Mr. Wood stated that his company had spoken with all three of the grocery stores referenced by Commissioner Márquez regarding opening a grocery store at the proposed Southland Mall location. Mr. Wood indicated that Fresh & Easy Neighborhood Market which was recently sold and that Sprouts Farmers Market toured the site and they did not express interest in the site. He noted that it would be a win for Rouse Properties if they could get Trader Joes to open a store at this site. Mr. Wood mentioned that they had shown the site plan to many grocery retailers. Rouse Properties had informed grocery stores interested in the site that the front entrance to the grocery store would have to face Hesperian Boulevard, and the grocery retailers have been receptive to this. The applicant shared that his company could construct a building which would be in the range of 45,000 to 48,000 square feet in size, noting that this was more in par with the size of grocery retailers like Safeway. He said that bringing a grocery store to this location is something which Rouse Properties is actively working on.

Commissioner Trivedi asked the applicant if they have considered having an ethnic grocery store at the proposed site, such as 99 Ranch Market or Chavez Supermarket.

Mr. Wood responded that Rouse Properties is open to the idea of having an ethnic grocery store based at the proposed site.



**MINUTES OF THE REGULAR MEETING OF THE  
CITY OF HAYWARD PLANNING COMMISSION  
Council Chambers  
Thursday, October 17, 2013, 7:00 p.m.  
777 B Street, Hayward, CA94541**

---

Commissioner Trivedi asked the applicant what obstacles there are with the current site that are making it difficult to open a grocery store there.

Mr. Wood said that one of the challenges with the site was that there is limited parking available; however, he noted that the parking issue could be addressed. Mr. Wood also shared that one of the interested grocers wanted to have the main entrance to the market face Macys which was against Rouse Properties' recommendation.

In response to Commissioner Trivedi's question, Mr. Wood responded that his company had conversations with different retailers. Mr. Wood indicated that Rouse Properties is attempting to be proactive in seeking approval of the text amendment for the kennel ancillary to pet store so that it would be an easier process to have a potential tenant open a pet boarding or pet day care facilities at the Southland Mall. He commented that Southland Mall was over fifty years old and that Rouse Properties would like to be proactive in opening up the mall to other future retail uses at the site.

Commissioner McDermott shared that there was an increase in the Asian and Hispanic population residing in Hayward. She was pleased that the applicant was actively searching for a grocery store that could occupy the proposed site and noted that the addition of a grocery store at Southland Mall could boost business at the mall itself.

In response to Commission McDermott's question, Mr. Wood said that the entire health club facility will be compliant with the Americans with Disabilities Act (ADA) standards. He was unaware if there was a lift in the swimming pool which would enable disabled persons to get in and out of the pool; however, he stated that this could be added as a condition of approval. He confirmed for Commissioner McDermott that the childcare services offered by the Kids Klub at the health club would be included in the membership and that members could utilize this service only while working out at the facility.

Chair Faria asked the applicant what the cost of a membership at the proposed health club would be; however, he did not have that information available to him.

Commissioner McDermott shared that the City Sports Club on Whipple Road had a \$149 initiation fee in addition to a \$39 monthly membership fee.

Commissioner Lamnin asked the applicant if the proposed health club could be a potential risk to the existing health club, Planet Fitness, also located at Southland Mall.

Mr. Wood responded that Planet Fitness had a lower membership rate and that the two facilities offered different amenities from one another. He pointed out that both Planet Fitness and City Sports Club were closely situated to one another on Mowry Avenue in Newark as well and that both facilities are performing well.

Commissioner Márquez recommended that the health club offer promotions such as a one week

trial period for the facility and it should also offer a senior discount.

Commissioner Loché added that Chabot College was near the health club and that the facility should offer a student discount as well.

Mr. Edward Bogue, resident of 729 Poinciana Street and President of the Southgate Area Home Owner's Association, emphasized that his community is in need of a grocery store at the Southland Mall site. He stated that although the proposed site of the health club was the HOA's first choice, they feel that there were still other opportunities at this location to open a grocery store. He expressed his support of the text amendment and the application for the health club. Mr. Bogue shared that he is not opposed to the hours of operation of the health club and further noted that he would be amenable to the facility operating 24 hours a day.

Chair Faria closed the public hearing at 7:51 p.m.

Commissioner Márquez made a motion to request that the City Council adopt the Mitigated Negative Declaration and Mitigation Monitoring and Reporting Program associated with a Text Amendment Application, that would add "Health Club" and "Kennel Ancillary" as primary uses and "Kennel (Pet Boarding and Day Care Only)" as an administrative use in the Central Business Zoning District, and approval of the proposed health club at 24518 Hesperian Boulevard, per staff recommendation, with an amendment to add a condition of approval requiring the applicant to comply with ADA standards and ensuring that disabled persons were able to gain access to the swimming pool located inside the health club.

Commissioner Márquez said that she liked the proposed project and mentioned that City Sports Club was a well-run business. She indicated that the health club will be a positive addition to the neighborhood. Commissioner Márquez was pleased with the efforts being made by Rouse Properties in getting a grocery store to locate at the proposed site and emphasized the need for this in the community.

Commissioner Trivedi seconded the motion and stated that he is glad to see that a nice, new development would be occurring at the proposed site. He said that he is looking forward to seeing some of the empty storefronts at the proposed site being occupied by new businesses.

Commissioner Lamnin expressed her support of the motion. She recommended that Mr. Wood speak with Macys because she had received comments from the community that a lot of products were unavailable at the Southland Mall Macys.

Commissioner McDermott supported the motion and said that rejuvenation of Southland Mall was important to the community. She stated that the addition of a new facility such as the health club may help to attract other potential businesses to Southland Mall. Commissioner McDermott shared that she had observed that pet stores located at malls bring in more customers and she noted that the addition of a pet store could also be beneficial to boosting business at Southland Mall.

Commissioner Loché supported the motion, commenting that he visited a City Sports Club and that it was a beautiful facility and that this health club would be welcomed by the community. He stated that it was good to see a new development occurring along Hesperian Boulevard as this was



**MINUTES OF THE REGULAR MEETING OF THE  
CITY OF HAYWARD PLANNING COMMISSION  
Council Chambers  
Thursday, October 17, 2013, 7:00 p.m.  
777 B Street, Hayward, CA94541**

---

sometimes viewed as the forgotten area in Hayward since most of the current developments have been occurring in Downtown Hayward and Mission Boulevard Corridor areas.

Commissioner Lavelle indicated her support of the motion. She appreciated the efforts being made by Rouse Properties in searching for a grocery store that could serve the Southland neighborhood. Commissioner Lavelle supported having an Asian grocery store noting that this was overdue to have in the community. She stated that there were already a few successful Hispanic supermarkets in the community. Commissioner Lavelle commented that the proposed site of the health club was perfect for new modern design and also pointed out that the restaurants in the Southland Mall area were doing well. She encouraged City Sports Club to be innovative in the programs that they offer and recommended that the facility consider coordinating outdoor activities.

Commissioner Márquez acknowledged Mr. Bogue for being present and for his comments regarding the need for a grocery store at the Southland Mall site. She conveyed to Rouse Properties that there are examples of malls that have gone through transformations and improved for the better and she expressed the same hope for Southland Mall. Commissioner Márquez recommended to the applicant to consider modifying the façade of the mall by having outdoor entrances to its stores.

Chair Faria supported the motion, commenting that the health club will be a significant improvement to the area and also appreciated the efforts being made to bring a grocery store to the Southland Mall site.

AYES: Commissioners Loché, Trivedi, McDermott, Lamnin, Márquez, Lavelle  
Chair Faria  
NOES: None  
ABSENT: None  
ABSTAINED: None

2. Request for adoption of a Mitigated Negative Declaration and Mitigation Monitoring and Reporting Program and approval of a Conditional Use Permit (Application No. PL-2012-0069) and Vesting Tentative Tract Map (Application No. PL-2013-0070) associated with 194 townhomes and 16,800 square feet of commercial space on an 11.33 acre site located at 22301 Foothill Boulevard. Integral Communities (Applicant); MDS Realty II & 22301 Foothill Hayward, LLC (Owners)

Senior Planner Golubics provided a synopsis of the report. He pointed out that staff proposed to modify Conditions of Approval Nos. 12 and 47. The staff recommendation was that Condition of Approval No. 47 be stricken, as this was similar to Condition No. 12; and Condition No. 12 was the preferred one. There was Condition of Approval No. 26(h) which addressed traffic improvements. A previous condition required raised medians on Hazel to prevent left turn movements out of the project site. He noted that the staff recommendation was to change the language from having raised medians to incorporating “pork chop” islands. Staff recommended that Condition of Approval No. 64(d) which related to the grading and building permit requirements be modified to state that “Prior

to issuance of Building or Grading Permits, a final clearance **if required** shall be obtained from..” in order to give flexibility to the applicant.

Senior Planner Golubics said that staff looked at the fiscal impact analysis of the project. He stated that if the townhomes – which range in price from \$518,000 to \$608,000 – if the entire project was sold at the minimum sales price of \$518,000 there would be a negative impact of \$9,609 on the finances of the City; however if the entire project was sold at the higher price, then City would gain \$7,279. If the entire development were to sell for mixed prices between this range then it would not be a drain on City resources.

Staff recommended that the Planning Commission also adopt the mitigated negative declaration and mitigation monitoring and reporting program for the project.

Senior Planner Golubics clarified for Commissioner Trivedi that the cost differential to the City would be for the whole project, and were based upon the lower and higher end of the suggested sales prices of the homes. The deficit or impact to the City would be \$9,609 using the lower sales figure. These were conservative estimates made by staff using their analysis tools. The sale price of \$608,000 would be a gain to the City of \$7,279.

In response to Commissioner Trivedi’s question regarding the traffic impacts of the proposed development, Senior Planner Golubics stated that in comparing the traffic at the time when Mervyns was in operation to the present day, there was a significant reduction in traffic as evidenced today.

Commissioner Loché thanked staff for the report. In response to Commissioner Loché’s question, staff confirmed that the development would be located approximately ½ mile away from the Hayward BART station. Commissioner Loché expressed that he was doubtful that individuals residing at the proposed development would walk to the BART station as they would have to cross some major roadways.

Senior Planner Golubics indicated that there was no direct route leading from the project site to the BART station. He mentioned that the traffic analysis which was performed revealed that there was a reduced impact on traffic as people were using transit options and were walking to the existing retail and commercial uses in the downtown area.

Director Rizk noted that there may not be a notable change in the traffic impact, but there was reduction in traffic nonetheless in terms of people walking to BART and/or taking buses.

Transportation Manager Frascinella stated that the development was considered to be transit oriented due to its close proximity to BART. He noted that the development was projected to result in a 9% reduction of vehicle trips in the area.

Senior Planner Golubics responded to Commissioner Loché’s question that staff was not aware if the applicant had any confirmed businesses that could occupy commercial spaces within the project. He further noted that there were certain permitted and conditional uses that would be allowed in the Central City Commercial (CC-C) zoning district.

Commissioner Lamnin appreciated the amount of work that staff and the applicant have done on the



**MINUTES OF THE REGULAR MEETING OF THE  
CITY OF HAYWARD PLANNING COMMISSION  
Council Chambers  
Thursday, October 17, 2013, 7:00 p.m.  
777 B Street, Hayward, CA94541**

---

project. She asked staff to address what type of drain the proposed development may have on City resources.

Senior Planner Golubics responded that the financial drain on City resources would be the services that would be offered to new residents at the development site; these would consist of police, fire, sewer and water services. He confirmed for Commissioner Lamnin that this would be mitigated by the community facilities district which was included in the conditions of approval.

Senior Planner Golubics noted for Commissioner Lamnin that there will be a new building code that will become available January 1, 2014 and this will include green standards that were much higher than the City standards that were in place today.

Commissioner Márquez thanked staff for the report. She asked staff to address why rental units were no longer an option in the proposed development.

Senior Planner Golubics responded that the developer made the decision to have a for-sale housing product instead of rental units and he indicated that the developer could elaborate more on the reasoning behind this business decision.

Commissioner Lavelle asked staff to clarify if one of the open space areas was intended to be used for a park or if it was a bio-retention area.

Senior Planner Golubics indicated that this space was ended to be used as a park and also as a bio-retention area; however, he noted that the final design of this had not been put forth yet. He stated that this section of the development was not included in the open space requirement and confirmed for Commissioner Lavelle that the open space requirement had already been met in the proposed plan because every townhome in the development will have a private outdoor deck in addition to there being group open space areas.

Senior Planner Golubics stated that another nearby place for residents of the new development to visit for recreational use was the Carlos Bee Park.

Commissioner Lavelle expressed that the Conditions, Covenants and Restrictions (CC&Rs) should not prohibit homeowners in the proposed development from being able to barbeque on their private outdoor decks, especially if the development did not possess a park where residents could barbecue.

Senior Planner Golubics stated that staff would make a note of this when they are reviewing the CC&Rs, prior to forwarding this to the City Attorney's Office for review.

Commissioner Lavelle stated that it was odd that the developer was required to report information on the sales price and the annual income levels of future residents and she also indicated that it was important to be cognizant of the fact that the prices of the townhomes may even fluctuate after the development of the site to an amount outside of the described price range of \$518,000 to \$608,000.



Senior Planner Golubics responded that Commissioner Lavelle raised a good point regarding Condition of Approval No. 12 needing more flexibility. He noted that the goal behind the estimated pricing range of the townhomes in the development site was intended to bring in households that had a higher level of income.

Commissioner Lavelle pointed out that Condition of Approval No. 47 which was proposed to be removed by staff, contained language that would allow the Development Services Department to review the sales price information of the townhomes in the development site, and she noted that Condition of Approval No. 12 did not have this language. Commissioner Lavelle commented that the language of Condition of Approval No. 12 appeared odd to her because she had not seen such language included in conditions of approval before. She stated that she was aware that the intent of the proposed development was to draw households with upper and middle level incomes to Hayward and that she was agreeable with this.

Director Rizk commented that the objectives of Conditions of Approval Nos. 12 and 47 was that the targeted population of residents would be attracted to the development site as the townhomes will have moderate to higher range sales prices. He expressed that Condition of Approval No. 12 does provide the flexibility which Commissioner Lavelle had alluded to. Director Rizk stated that staff could revise the language of Condition of Approval No. 46 to state that the household income level may generally be in the range of \$133,600.

Commissioner Lavelle stated that the language of Condition of Approval No. 46 needs to be modified to note that the \$133,600 average annual household income level was in support of the City's goals to attract middle income level residents to the proposed neighborhood.

Commissioner Lavelle expressed to staff that the design and layout depicted in the current drawings of the townhomes (Attachment V) were vague. She stated new developments in the City should have a design which was modern and attractive, especially if the goal was to attract middle to high income level homeowners.

Director Rizk stated that the language of Condition of Approval No. 46 does include that residential units will be constructed using high quality materials and finishes and this condition of approval will allow staff to review the design plans of the project as they become available. Commissioner Lavelle responded that she would prefer that more specific language be added to the condition of approval.

Commissioner Lavelle asked staff what will happen to the park dedication in-lieu fees which the developer will be paying to the City amounting to \$2,210,630 and how will this be utilized in the future.

Mr. Larry Lepore, Park Superintendent of the Hayward Area Recreation and Park District (HARD), stated that the park dedication in-lieu fees were required to be deposited into a trust account which was managed by the City and HARD. He noted that the City of Hayward had five zones and the park dedication in-lieu fees could be utilized for HARD projects belonging to these five zones.

Chair Faria mentioned that the staff report did not contain sufficient floor plans of the proposed



**MINUTES OF THE REGULAR MEETING OF THE  
CITY OF HAYWARD PLANNING COMMISSION  
Council Chambers  
Thursday, October 17, 2013, 7:00 p.m.  
777 B Street, Hayward, CA94541**

---

development. She asked staff if the residential units would have charging stations for electric vehicles.

In response to Chair Faria's question, Senior Planner Golubics stated that charging stations for electric vehicles may be included as a requirement for the developer to have on-site. He noted that on page 21 of the staff report, there were four different unit configurations (floor plans).

In response to Commissioner Márquez's question, Director Rizk responded that four community meetings were held over the last year and a half.

Chair Faria opened the public hearing at 8:58 p.m.

Mr. Mark Butler, representative for Integral Communities, thanked staff for working with his company for the last two years on the development project. He noted that the project started off as a much larger community that consisted of 557 rental units and this was reduced to 194 for-sale units, after doing lots of community outreach.

Commissioner McDermott disclosed that she met Mr. Butler regarding the proposed development.

In response to Commissioner McDermott's question, Mr. Butler shared that the community outreach also consisted of meeting with members of Prospect Hill, who preferred the for-sale housing over the rental units. He commented that the reduction in the housing units also helped to soften concerns about increased traffic. Mr. Butler noted that to disperse the traffic in the development area, more access points were added along Hazel Avenue, City Center Drive, and Foothill Boulevard. He added that a pedestrian corridor was added along San Lorenzo Creek. Mr. Butler pointed out that there will be a buffer between the townhomes along Foothill Boulevard which will serve to separate these units from the street.

Commissioner Márquez disclosed that she met with Mr. Butler regarding the development project.

In response to Commissioner Márquez's question, Mr. Butler indicated that the retail space will be constructed at the same time as the residential community. He shared that Integral Communities had spoken with some prominent landlord families that were situated in Hayward; however, they have not started the marketing for the retail sites yet.

Mr. Butler responded to Commissioner Márquez's question that there were no plans to utilize a shuttle service from the development to BART.

Commissioner Lamnin disclosed that she met with Mr. Butler and expressed her appreciation for developing a good plan for the community and for the investment that Integral Communities was making in Hayward. She asked Mr. Butler how much retail space the development would consist of.

Mr. Butler responded that there was a total of 16,800 square feet of commercial space; however,

they have not yet determined how many retail uses will occupy the commercial site.

Commissioner Lamnin asked if the project considered having first floor living space, pointing out that one of the floor plan options presented by Integral Communities had the potential of having a bedroom and bathroom on the first floor; however, the kitchen facilities and remainder of the living space was all upstairs.

Mr. Butler stated that all of the units have a large garage for two cars with extra storage space, noting that some of the plans could even accommodate three cars to being parked side by side. He shared that one of the floor plans had a standard bonus room downstairs and three of the four plans had the option of adding a bedroom to the first floor. He noted for Commissioner Lamnin that a master suite could be built on the first floor which would consist of a bedroom, bathroom, and a kitchenette.

Commissioner Trivedi said that the proposed project did not contain many community amenities and asked Mr. Butler to clarify who the targeted population was that would be purchasing the housing units.

Mr. Butler responded that there were landscaped paseos that run between the front doors of the housing units, noting that neighboring units had common meeting areas and that there was a place for residents to place their barbecue grill. He commented that the design plan of the proposed development was better than the Grove at Cannery Park townhouses and described the location of the proposed development as being a better location than the Cannery, and thus being a proven marketplace. Mr. Butler exemplified that the targeted population of homeowners for the proposed site could be mid-level managers or individuals working in Silicon Valley or the peninsula. He explained that the townhomes would have luxury amenities like wood cabinets and optional features such as stainless steel appliances, granite countertops.

In response to Commissioner McDermott's question, Mr. Butler noted that the proposed development would approximately be priced \$25,000 more than the townhomes being sold at the Grove at Cannery Park.

Commissioner McDermott pointed out that some higher-end homes nowadays already came standard with amenities such as granite countertops and stainless steel appliances.

Mr. Butler stated that he was not aware of what the exact cost of the residential units would be including the optional features as the development would be built by a venture partner of Integral Communities; however, he shared that the optional features may raise the price of the homes by approximately 3-4%.

Mr. Butler clarified for Commissioner Márquez that all of the living space for the residential units were on the second and third floors; however, it was optional to have living space on all three levels by having ground floor living and this would be possible in three of the four floor plans. He said the units that have the ground floor living in addition to the second and third floors would depend on the builder. Mr. Butler noted that this design might work for someone who was disabled, for instance.

Commissioner Márquez commented that it was important to her that the development take into



**MINUTES OF THE REGULAR MEETING OF THE  
CITY OF HAYWARD PLANNING COMMISSION  
Council Chambers  
Thursday, October 17, 2013, 7:00 p.m.  
777 B Street, Hayward, CA94541**

---

account that a design plan was needed which would promote aging in place of potential residents at the development site.

Mr. Butler confirmed for Commissioner Trivedi that the development would not be a gated community and that the streets, park and trail would be privately maintained.

Mr. Kim Huggett, President of the Hayward Chamber of Commerce, stated that twelve of the fourteen businesses that were participating in the Hayward Restaurant Walk supported the proposed project. He shared that there were potentially four restaurants that may be coming to Hayward and that these restaurants also expressed interest that the proposed development would attract residents with disposable income to Hayward. Mr. Huggett shared the idea that the downtown area can be rejuvenated by creating residential units. He noted that the business members of the Chamber were pleased with the Planning Commission's recent decision to approve sixty units of senior housing on A Street.

Ms. Gail Brooks, property owner at Vista Del Plaza Lane, stated that her property was situated diagonally across the former Mervyns headquarters and indicated that she was in opposition to the proposed development. Her preference was to have the site remain as a commercial use as this would create jobs. Ms. Brooks said that if the site was to remain commercial use, there would be less crime occurring in the neighborhood. She noted that there were a myriad of problems related to Foothill Boulevard and some of these problems were automobile air population and the homeless problem. She said that if the Planning Commission did approve the project, her recommendation was that the AC Transit bus stop be moved from the north part of City Center Drive to the south part of City Center. Ms. Brooks shared that the intersection at Hazel Avenue and City Center Street was a heavily traveled section and suggested that traffic be directed to the opposite side of the development where drivers could make a right or left turn. Ms. Brooks recommended that before the development of the residential units was completed, that the City require that the developer have a major retailer committed to the proposed retail site in order to avoid more empty storefronts in Hayward.

Ms. Brooks confirmed for Commissioner McDermott that it was her opinion that the proposed development would create more traffic congestion.

Mr. Frank Goulart, with business address on Main Street, noted that for CEQA purposes, the parking lot of the former Mervyns headquarters experienced some flood problems in the past. He shared that the proposed development area was an ancient lake bed and requested that a condition of approval be added requiring that Native Americans be notified when digging was occurring on the site. Mr. Goulart stated that the Integral Communities team had been friendly and responsive to his concerns; however, he disagreed with changing the Mervyns site from a commercial zone to a residential zone. He stated that the Mervyns site was originally intended to be changed into a new commercial development site and the goal was to preserve the Historic Mission Corridor. Mr. Goulart agreed with utilizing the ground floor for commercial uses and having residential uses on top. He commented that the residential uses above the ground floor commercial space could be used

for student housing for California State University East Bay students. Mr. Goulart mentioned that the study conducted by Dr. Howard and the San Luis Obispo University students explored having a convention center at the Mervyns site in addition to a couple soccer fields, and he commented that this would have been a good economic generator for the City. He compared the proposed development to the development by the downtown Hayward BART station which he described as being a dangerous area because there was a lack of commercial activity mixed into the area. Mr. Goulart advised the Planning Commission to hold off on taking action as the site of the proposed project was a prime commercial property in downtown Hayward, and he noted that this was the only location in downtown Hayward where a convention center could be located.

Mr. Larry Lepore, stated that HARD staff had worked directly with Integral Communities in developing a bike path and he expressed his support of the development. He shared that the vision was to have a trail from the shoreline going all the way to the ridge trail. Mr. Lepore commented that it was important to ensure that trail links do happen in order to continue with the vision, and he indicated that the developer had linked the pathway in the development site with the trail.

Mr. Lepore confirmed for Chair Faria that he was satisfied with the increase in the width of bike path to eight feet.

Mr. Charles Butterfield, real estate broker with Butterfield Real Estate Firm based in San Jose, stated that he had over thirty years of experience in real estate. He claimed that the Mervyn's building was an important historic structure in Hayward. Mr. Butterfield stated that the payment amount of approximately \$2.2 million was not an adequate amount to pay for the compensation of the park dedication in-lieu fee for 3.2 acres of land. He recommended that the development should not rely upon parking on public streets for additional overflow parking. Mr. Butterfield disagreed that the traffic impacts caused by the proposed development would be insignificant stating that residents at the proposed development would not be taking BART to commute to work in the Silicon Valley as BART does not continue that far.

Ms. Latina Ellis, resident of Hazel Avenue, stated that her home was located directly across from the Mervyns site and she emphasized that she works, lives, and plays in Hayward. She was concerned as to how the nearby existing community that she resides in would be affected by the proposed development, especially during the construction period. Ms. Ellis wondered if the proposed development would eventually lead to the redevelopment of the surrounding neighborhood where she resides. She shared that there would be increased traffic on Hazel Avenue as a result of the development.

Mr. Michael Urioste, resident of Prospect Street, commented that it appeared to him that a decision had already been made and that the proposed development was going to be approved, whether he as a member of the community liked the project or not. He shared that he had made several efforts to get a copy of the study conducted by Dr. Howard on other possible uses at the former Mervyns headquarters, and he indicated that he was unable to get a copy of this report.

In response to Mr. Urioste's comments, Commissioner McDermott stated that as a Planning Commissioner, she always made an informed decision regarding Planning matters after she had read and reviewed all of the information made available to her in staff reports.



**MINUTES OF THE REGULAR MEETING OF THE  
CITY OF HAYWARD PLANNING COMMISSION  
Council Chambers  
Thursday, October 17, 2013, 7:00 p.m.  
777 B Street, Hayward, CA94541**

---

Mr. Larry Ball, resident of Hazel Avenue, said the current neighborhood was ethnically diverse and that it consisted of good people and blue-collar workers. He indicated that individuals passing by the neighborhood seem to be the ones causing the problems. Mr. Ball stated that the lighting in the neighborhood was bad and that they were experiencing problems tied to prostitution and homelessness, all caused by blight. He shared that the residents in his neighborhood feel neglected, noting that his neighborhood was not consulted regarding the proposed development even though they were located across the street from the site of the project. Mr. Ball expressed that a commercial development at the former Mervyns site may benefit the members of his neighborhood through the provision of jobs.

Commissioner Lamnin requested that staff follow up with Mr. Ball and organize a neighborhood partnership meeting where the problems related to lighting and crime can be examined.

Commissioner McDermott commented that a project of this magnitude should have consulted the surrounding neighborhood.

Mr. Mark Donahue, a Hayward resident, stated that the former Mervyns site was viable to be restored. He indicated that the housing units at the proposed project will take a longer period of time to sell than the developer had described. Mr. Donahue shared that there will be a four to five year interruption to the existing community on Hazel Avenue. He shared that he had a business plan for the proposed site which could be used to employ 15,000 people.

Chair Faria closed the public hearing at 10:07 p.m.

Commissioner Lavelle stated that she was generally in support of the project. She clarified that the Planning Commission had the responsibility of either approving the project or denying it. Commissioner Lavelle recommended that the following language be added to Condition of Approval No. 46, "Higher incomes households has been defined as...annual income of \$133,600, **to demonstrate meeting the City's goals for diverse housing.**" Commissioner Lavelle stated that staff had proposed that Condition of Approval No. 47 be removed. She recommended that this condition of approval be substituted with another statement saying that **"A specific design element should include details on the windows of the units, including such items as awnings, shutters, and other window designs. The roofing of the townhomes should consist of varying materials and colors."** Commissioner Lavelle noted that on Condition of Approval No. 42, there was reference to the final exteriors of the building, she requested that the following text be added to the end of this condition: **"there shall be no pink, orange, or purple paint on the exterior of any of the buildings."** She commented that the downtown area needed a consistent look and feel and she stated that the proposed project should look equally attractive and modern.

Commissioner Trivedi expressed that he was still torn about the project and that he didn't think that it was probable to have a new corporate entity occupying the entire former Mervyns site. He indicated that he was in support of having part of the site consist of housing units. He commented that although the proposed development attempted to attract a specific target population to the

downtown area as potential homeowners, he expressed that he was underwhelmed with the designs of the townhomes which were presented by the developer. Commissioner Trivedi stated that it was important to have more commercial opportunities in the proposed site. He said that the townhomes appeared to be crammed into the proposed site and that there were not many amenities available to prospective residents, causing him to doubt the attractiveness of the housing units at the given price point.

Commissioner Loché shared that he met with the developer during a previous phase. He stated that the developers operated in good faith on this project and this was exemplified in how they reached out to the community. Commissioner Loché stated that he was a proponent for bringing more residential uses to the downtown area, which was why he supported the senior housing project; however, he pointed out that the proposed site was a key location in the downtown and that he believed it was possible to have a business entity in this commercial site. He recommended that it was too soon to decide what to do with the proposed site. Commissioner Loché mentioned that the Mervyns headquarters closed in 2008 and that the last five years of the economy were the worst since the Great Depression. He stressed that it would be a mistake if the City gave up right now in finding a new company to occupy the former Mervyns site. Commissioner Loché said that no residents in Hayward have said to him that the proposed development was what the City needed at this location; instead, the feedback that he got was either that the building was sitting vacant so let's put anything in there or that the proposed development was not right for this site. He indicated that a project which was a better fit for the site was needed. Commissioner Loché underscored that he could not support the project for these reasons.

Commissioner Lamnin said that she was equally challenged regarding her stance on the proposed project. She acknowledged the hard work that Integral Communities had done in putting together the proposed development, emphasizing how responsive they had been to the community and that the developer acted as a good neighbor to the community. She disagreed that this project was reflective of what the surrounding neighbors envisioned for the site. Commissioner Lamnin shared that in the past, she worked near Hazel Avenue and thus she understood the traffic problems the proposed development might create. She stated that a project which had first floor retail and had multi-floor renters above the retail uses would be more acceptable to her. She mentioned that a development with mixed units that were for-sale and rental units would be beneficial to the area. Commissioner Lamnin said that the community had voiced that they wanted families and students to be able to live in the downtown area. Commissioner Lamnin recommended that the proposed development project be revised and modified to include university and retail inclusion, in addition to the development contributing to the creation of jobs for members of the community.

Commissioner Lamnin made a motion that the applicant revise the proposed development and then bring this project back to the Planning Commission for reconsideration.

Commissioner Márquez seconded the motion.

Commissioner McDermott stated that one of the major concerns in the development area was parking. In regards to the utilization of public transit, she noted that the public would be more inclined to use public transportation if it were made easily accessible.

Mr. Goulart confirmed for Commissioner McDermott that the Prospect Hill residents were opposed





**MINUTES OF THE REGULAR MEETING OF THE  
CITY OF HAYWARD PLANNING COMMISSION  
Council Chambers  
Thursday, October 17, 2013, 7:00 p.m.  
777 B Street, Hayward, CA94541**

---

to having housing on the ground floor.

Commissioner McDermott stated that prior to starting an establishment at a certain location the business would perform a demographic study of the area. She stated that the development project being proposed by Integral Communities would help shift the demographics of the community, making the City more attractive to other businesses. She pointed out that downtown businesses were hoping for uses that would sustain their business. Commissioner McDermott said that she was not supportive of a motion requiring that this item be brought back.

Commissioner Márquez seconded the motion requiring that the item be brought back to the Planning Commission for approval after it had been revised. She realized the importance of having residential units in the downtown area as it would rejuvenate the economy; however, she felt that the proposed housing development was too dense and it might lead to increased traffic concerns in the future. Commissioner Márquez expressed that she had mixed feelings about modifying the zoning of the site from commercial to mixed use. She noted that if the economic situation was different, the City could bring in anchor stores to the area such as Target, Michaels, Starbucks, to name a few which would assist in job creation as this was a dire need in the community. Commissioner Márquez stated that she liked the binder which was presented to Planning Commissioners during summer 2013 as this design plan contained residential uses that were apartment units and the plan also included beautiful outdoor amenities. She was disappointed that a lot of features from the previous design plan have changed. Commissioner Márquez stressed the importance of having housing options for students and also having housing units that would support the aging in place of Hayward's older residents. She indicated that there were too many unknowns and concerns with the proposed project. She applauded Integral Communities for their hard work; however, she was not comfortable going forward with the project based upon the information received at the present meeting.

Commissioner Lamnin indicated that the project presented over the summer was different than the current proposal, noting that the previous design plan seemed to have addressed more of the communities' concerns. She said that the current proposal included the option for residents to have up to a three car garage which identified that the intent of residents living in this neighborhood would be to drive. Commissioner Lamnin stated that there were many questions with the current plan and that it seemed incomplete.

Commissioner Lavelle commented that if the preference was to not permit the residential units to have three car garages, conditions could be placed requiring that the ground floor space be used for an in-law unit or adding an additional bedroom. Commissioner Lavelle noted that three car garages would be a preferred option because this would help reduce the number of vehicles being parked on the streets.

Commissioner Lamnin rephrased her motion, to deny the proposed application without prejudice and give Integral Communities the opportunity to come back with a revised plan and direct staff to bring back findings for denial.

Commissioner Márquez seconded the motion.

Chair Faria noted that Hayward was in need of jobs and businesses; however, she did not think that it was possible to have a large company build a store other than a mall at the proposed site. Chair Faria pointed out that the progression of technology had resulted in most people shopping online and that due to this more stores have downsized their facilities. She said that mixed development such as the proposed project was needed because it contained residential units which would help to support the downtown area.

AYES: Commissioners Loché, Trivedi, Lamnin, Márquez

NOES: Commissioners McDermott and Lavelle  
Chair Faria

ABSENT: None

ABSTAINED: None

### **COMMISSION REPORTS:**

#### **3. Oral Report on Planning and Zoning Matters**

Director Rizk responded to Commission Lamnin's request about an alleged auto repair that was occurring on the streets of Pompano Avenue. He reported that Code Enforcement staff looked into this and they did not see any auto repair occurring on the street.

Director Rizk shared that there will be a Special Planning Commission Meeting held on Thursday, October 24, 2013 which will be a General Plan Update Work Session. He noted that on Thursday, November 7, 2013, the first item which the Planning Commission will review will be a text amendment related to internet gaming and the second item will be related to the housing element stated in the General Plan Update and also related to transitional and supportive housing.

#### **4. Commissioners' Announcements, Referrals**

None

### **APPROVAL OF MINUTES**

5. The minutes of September 5, 2013 were unanimously approved.

6. The minutes of September 19, 2013 were unanimously approved with one correction and Chair Faria abstaining.

### **ADJOURNMENT**

Chair Faria adjourned the meeting at 10:42 p.m.

### **APPROVED:**



**MINUTES OF THE REGULAR MEETING OF THE  
CITY OF HAYWARD PLANNING COMMISSION  
Council Chambers  
Thursday, October 17, 2013, 7:00 p.m.  
777 B Street, Hayward, CA94541**

---

---

Dianne McDermott, Secretary  
Planning Commission

**ATTEST:**

---

Avinta Madhukansh-Singh, Senior Secretary  
Office of the City Clerk