ORDINANCE NO. ORD-19-0033

AN ORDINANCE OF THE CITY COUNCIL OF THE
CITY OF LONG BEACH AMENDING THE LONG BEACH
MUNICIPAL CODE BY ADDING CHAPTER 5.94
PROHIBITING THE SALE OF CERTAIN FLAVORED
TOBACCO PRODUCTS WITHIN THE CITY OF LONG
BEACH

WHEREAS, the City of Long Beach has a substantial interest in promoting compliance with federal, state, and local laws intended to regulate tobacco sales; in discouraging the illegal purchase of tobacco products by persons under 21 years of age; in promoting compliance with laws prohibiting sales of tobacco products to persons under 21 years of age; and in protecting youth and underserved populations from the harms of tobacco; and

WHEREAS, State law expressly authorizes cities to enact local tobacco retail licensing ordinances, and allows for the suspension or revocation of a local license for a violation of any state tobacco control law. (California Business & Professions Code § 22971.3); and

WHEREAS, State law prohibits the sale or furnishing of cigarettes, tobacco products, and smoking paraphernalia to persons under twenty-one (21) years of age except active duty military personnel who are eighteen (18) years of age or older (California Penal Code § 308); and

WHEREAS, data released by the United States Centers for Disease Control and Prevention (CDC) and the United States Food and Drug Administration (FDA) last year show a rapid increase in use of electronic smoking devices by youth, with one (1) in five (5) youth using electronic smoking devices in 2019 - an "epidemic" that requires "historic action" according to the United States Surgeon General and the FDA; and
WHEREAS, more than eighty percent (80%) of high school students who consume tobacco use an electronic smoking device; and

WHEREAS, from 2016 to 2018, vaping among California high school students rose twenty-seven percent (27%); and

WHEREAS, in 2018, 10.9% of California high school students reported using electronic smoking devices; and

WHEREAS, the federal Family Smoking Prevention and Tobacco Control Act, enacted in 2009, prohibited candy and fruit flavored cigarettes, largely because these flavored products were marketed to youth and young adults, and younger smokers were more likely than older smokers to have tried these products (hereafter "2009 Flavor Ban"); and

WHEREAS, adding menthol and other flavorings to tobacco can mask the natural harshness and taste of tobacco, making these products easier to use and increasing their appeal among youth; and

WHEREAS, in response to the 2009 Flavor Ban, adolescent smokers were more likely to choose menthols, suggesting substitution toward the one remaining legal cigarette flavor; and

WHEREAS, evidence suggests that cigar and pipe tobacco use significantly increased in response to 2009 Flavor Ban; and

WHEREAS, a survey taken between 2004-2014 by National Survey on Drug Use and Health (NSDUH) reported that 54% of youth ages 12-17 years of age who smoke use menthol cigarettes; and

WHEREAS, according to the Population Assessment of Tobacco and Health (PATH), among youth ages 12-17 who report using cigars or cigarillos, 74% cited flavor being the primary reason for use; and

WHEREAS, cigars and cigarillos are exempt from federal restrictions on product characteristics like flavorings, packaging, and marketing strategies aimed at youth; and
WHEREAS, dramatic increases in youth vaping have been attributed to the appeal of flavored vapor products and alternative nicotine products as well as advertising and promotional activities by companies targeted at youth; and

WHEREAS, the California Department of Public Health (CDPH) reports that electronic smoking devices are available in more than fifteen thousand (15,000) flavors that may be attractive to children, such as mango, bubble gum, and mint; and

WHEREAS, nationally there is a public health crisis, with an alarming outbreak in recent months of lung injuries among previously healthy individuals who have used vaping products; and

WHEREAS, according to the CDC as of October 29, 2019, there have been one-thousand eight hundred eighty-eight (1,888) cases of E-cigarette, or Vaping, Product Use Associated Lung Injury (EVALI) and thirty-seven (37) deaths nationally; and

WHEREAS, California has reported over one hundred (100) cases of EVALI since late June, including three (3) deaths in patients aged 14-70; and

WHEREAS, in Long Beach, three (3) cases of EVALI were reported by October 2019; and

WHEREAS, due to the public health crisis, the CDC and the CDPH are urging everyone to refrain from vaping, no matter the substance or source; and

WHEREAS, in response to the public health crisis caused by vaping, bans of flavored electronic smoking devices have been enacted in cities and counties throughout the state of California, including, but not limited to, Richmond, Livermore, San Francisco City and County, and Los Angeles County; and

WHEREAS, no specific types of electronic smoking devices or liquids have been conclusively identified to be the cause of the EVALI illnesses at this time; the FDA is testing vaping products from cases around the United States to determine which specific products or ingredients may be the cause; and

WHEREAS, until a cause has been identified, the City Council must act promptly, in accordance with health advisories issued by the CDC and CDPH, to protect
residents of Long Beach, and failure to act promptly will result in serious prejudice to the
public health and interest, particularly Long Beach's youth; and

WHEREAS, to the extent this ordinance applies to minors, diversion and
education are preferred alternatives to the imposition of criminal penalties.

NOW, THEREFORE, the City Council of the City of Long Beach ordains as
follows:

Section 1. Findings. The City Council finds and determines that the facts
set forth in the recitals of this Ordinance are true and correct and hereby incorporates
them herein by this reference.

Section 2. Chapter 5.94 is hereby added to the Long Beach Municipal
Code to read as follows:

Chapter 5.94

SALE OF CERTAIN FLAVORED TOBACCO PRODUCTS

5.94.010 Purpose and intent.

A. The purpose of this Chapter is to encourage responsible
tobacco retailing and to discourage violations of tobacco related laws,
especially those that prohibit or discourage the sale or distribution of
tobacco to minors. It is not the purpose of this ordinance to expand or
reduce the degree to which the activities regulated by federal or state law
are criminally proscribed or to alter the penalties provided for violations of
federal or state tobacco-related laws.

B. This Chapter shall remain in effect for one (1) year from the
effective date of this Chapter, unless further extended by the City Council.

C. This Chapter shall not apply to any person licensed pursuant
to Chapter 5.88 of this Code.

5.94.020 Definitions.

Unless the particular provision or the context otherwise requires, the definitions and provisions contained in this section shall govern the construction, meaning and application of words and phrases used in this Chapter:

A. "Accessory" means equipment, products, or materials that are used, intended for use, or designed for use in smoking, vaping, ingesting, inhaling, or otherwise introducing tobacco or tobacco products into the human body and can be an object or device that is not essential in itself but adds to the beauty, convenience, or effectiveness of something else.

B. "City" means the City of Long Beach.

C. "Cigarillo" means any roll of tobacco other than a cigarette wrapped entirely or in part in tobacco or any substance containing tobacco and weighing no more than three pounds per thousand units. "Cigarillo" includes, but is not limited to, tobacco products known or labeled as small cigar or little cigar.


E. "Component" means any item intended or reasonably expected to be used with or for the human consumption of a tobacco product.

F. "Electronic smoking device" means the following:

1. Any device or delivery system that can be used to deliver an inhaled dose of nicotine or other substances in aerosolized or vaporized form to a person, including any component, part, or accessory of the device that is intended or reasonably expected to be used during its operation, whether or not sold separately. "Electronic smoking device"
includes, but is not limited to, electronic cigarettes, electronic cigars, electronic pipes, electronic hookahs, vapes, vaporizers, or vape pens.

2. "Electronic smoking device" includes electronic cigarettes as defined in section 30121 of the California Revenue and Taxation Code, and any other device manufactured, distributed, marketed, or sold as an electronic cigar, an electronic cigarillo, an electronic pipe, an electronic hookah, vape pen, or any other product name or descriptor, that can be used to deliver nicotine in aerosolized or vaporized form to a person.

3. "Electronic smoking device" does not include any product that has been approved by the United States Food and Drug Administration for sale as a tobacco cessation product or for other therapeutic purposes where that product is marketed and sold solely for such approved use.

G. "Electronic smoking device fluid" means any liquid or substance that can be used by an electronic smoking device.

H. "Flavor" means an artificial or naturally-occurring substance that contains a taste or smell, other than the taste or smell of tobacco, that is imparted either prior to or during the consumption of the product or any byproduct produced by the tobacco product, including, but not limited to, any taste or smell relating to chocolate, coffee, cocoa, menthol, mint, wintergreen, vanilla, honey, coconut, licorice, nuts, fruit, or any candy, dessert, alcoholic or non-alcoholic beverage, herb, spice, or any concept flavor. "Flavor" includes flavor in any form, mixed with or otherwise added to any tobacco product, including electronic smoking devices.

I. "Flavored cigarillo" means any cigarillo that imparts a flavor.

J. "Flavored electronic smoking device" means any electronic smoking device that imparts a flavor.

K. "Flavored electronic smoking device fluid" means any
electronic smoking device fluid that imparts a flavor.

L. "Menthol cigarettes" means any roll of mentholated tobacco wrapped in paper or in any substance not containing mentholated tobacco, or any roll of mentholated tobacco wrapped in any substance containing mentholated tobacco which is likely to be offered to, or purchased as a menthol cigarette, because of its appearance, the type of mentholated tobacco used in the filler, or its packaging and labeling.

M. "Part" means a piece or segment of something, which combined with other pieces makes up the whole.

N. "Person" means any individual, entity, firm, partnership, joint venture, limited liability company, association, social or professional club, fraternal organization, corporation, estate, trust, business trust, receiver, trustee, syndicate, or other group or combination of the above acting as a single unit.

O. "Prohibited products" means the following:

1. "Flavored cigarillos", as defined by this Section;
2. "Flavored electronic smoking devices", as defined by this Section;
3. "Flavored electronic smoking device fluid", as defined by this Section; and
4. "Menthol cigarettes", as defined by this Section.

P. "Tobacco paraphernalia" means any item designed, marketed, or reasonably expected to be used for the consumption, use, or preparation of a tobacco product.

Q. "Tobacco product" means the following:

1. Any product containing, made from, or derived from tobacco or nicotine, whether natural or synthetic, that is intended for human
consumption, whether smoked, heated, chewed, absorbed, dissolved, 
inhaled, snorted, sniffed, vaped, or ingested by any other means, including, 
but not limited to, cigarettes, cigars, cigarillos, chewing tobacco, pipe 
tobacco, snuff, or electronic smoking device fluid; or 

2. Any electronic smoking device; or 

3. Any component, part, or accessory intended or 
reasonably expected to be used with a tobacco product, whether or not sold 
separately.

4. "Tobacco product" does not include any product that 
has been approved by the United States Food and Drug Administration for 
sale as a tobacco cessation product or for other therapeutic purposes 
where that product is marketed and sold solely for such approved use.
Examples of the products approved by the United States Food and Drug 
Administration for the cessation of smoking include skin patches, lozenges, 
gum, and prescription medications.

5. "Tobacco product" does not include any drugs, devices, 
or combination of products authorized for sale by the United States Food 
and Drug Administration, as those terms are defined in the Federal Food, 
Drug and Cosmetic Act, provided the drug, device, or combination products 
are not otherwise prohibited by this Chapter.

R. "Tobacco retailer“ means any person, in whole or in part, and 
all associated owners, employees, managers, or agents, who sells, offers 
for sale, exchanges, or offers to exchange any tobacco, tobacco product, or 
tobacco paraphernalia for consideration, without regard to the quantity sold, 
offered for sale, exchanged, or offered to exchange, including, any person 
licensed pursuant to Chapter 5.81 of this Code. For purposes of this 
Chapter, "tobacco retailer" shall not include any person licensed pursuant to 
Chapter 5.88 of this Code.
S. "Sell" or "sale" means to transfer, deliver, exchange, redeem, or barter, in any manner or by any means whatsoever, for consideration, including, but not limited to, providing a tobacco product as a gift or promotional item in combination with the sale of any other product or item, through any means.

5.94.030 Sale of certain flavored tobacco products prohibited.

A. Notwithstanding any other law, a person, including a tobacco retailer or any employee of a tobacco retailer, shall not sell or offer for sale, or distribute any prohibited product.

B. For purposes of determining whether a prohibited product contains a flavor, a public statement or claim, whether express or implied, made or disseminated by the person responsible for the manufacture of a prohibited product, or by any person authorized or permitted by the manufacturer to make or disseminate a public statement concerning such products, that a prohibited product has or produces a taste or smell other than a taste or smell of tobacco will be considered by the City to constitute presumptive evidence that the prohibited product contains a flavor. For purposes of this section, a "public statement or claim" shall include, but is not limited to, text, color, and/or images on the product’s labeling or packaging that are used to explicitly or implicitly communicate that a prohibited product has a flavor.

C. There shall be a rebuttable presumption that anyone in possession of four (4) or more prohibited products as part of a commercial enterprise, including, but not limited to, individual prohibited products, packages of prohibited products, or any combination thereof, possesses such prohibited products with intent to sell, offer for sale, exchange, or offer to exchange.
D. After one-hundred eighty (180) calendar days from the effective date of this Chapter, it shall be a violation of this Chapter for a tobacco retailer or an employee of a tobacco retailer to sell, offer for sale, or distribute any prohibited product.

5.94.040 Enforcement and penalties.

A. Violations.

1. It is unlawful for any person to violate any provision, or to fail to comply with any of the conditions or requirements of this Chapter.

2. Whenever in this Chapter any act or omission is made unlawful, it shall include causing, permitting, aiding, abetting, suffering, or concealing the fact of such act or omission.

3. Violation of any provision of this Chapter shall be considered a strict liability; accordingly, the City shall not be required to prove knowledge, criminal intent, or any other mental state to establish a violation of this Chapter.

4. No property owner in charge of, or in possession of, any real property within the City shall cause, permit, maintain, conduct, or otherwise suffer or allow a public nuisance as defined in this Chapter to exist.

B. Remedies cumulative. The remedies provided for in this Chapter are not mutually exclusive. Pursuit of any one remedy does not preclude the City from availing itself of any or all available administrative, civil, or criminal remedies, at law or equity. The remedies provided by this Chapter are cumulative and in addition to any other remedies available at law or in equity.

C. Declaration of public nuisance.

1. Any violation of the provisions of this Chapter is hereby
1. deemed unlawful and a public nuisance.

2. As a nuisance per se, any violation of this Chapter is subject to any of the following remedies, including, without limitation: injunctive relief, revocation of applicable permits or licenses, revocation of the certificate of occupancy for the real property where the violation occurred, disgorgement and payment to the City of all monies unlawfully obtained, costs of abatement, costs of investigation, attorney fees, and any other relief or remedy available at law or equity.

D. Liability of employees and agents. In construing and enforcing the provisions of this Chapter, the act, omission, or failure of an agent, officer, representative, or other person acting for or employed by a tobacco retailer, within the scope of his or her employment or office, will be in every case be deemed the act, omission, or failure of the tobacco retailer.

E. Failure to comply with any of the provisions of this Chapter will constitute grounds for suspension, denial, or revocation of any permit issued pursuant to this Code, including, but not limited to, Chapter 5.81. The noticing and hearing requirements for suspension or revocation of the permit shall be governed by the provisions of Chapter 5.06 of this Code.

F. Penalties.

1. Criminal penalty. Any person who violates any provision of this Chapter is guilty of a misdemeanor, and upon conviction thereof, may be punished by a fine of not more than one thousand dollars ($1,000.00), or by imprisonment in the City or county jail for a period not exceeding six (6) months, or by both such fine and imprisonment.

2. Administrative Citations.

   a. In addition to all other legal remedies at law, violations of this Chapter are enforceable using the administrative citation procedures set forth in Chapter 9.65 of this Code.
b. Administrative penalties imposed pursuant to this Section also constitute a personal obligation on each person who causes, permits, maintains, conducts, or otherwise suffers or allows the nuisance to exist. In the event administrative penalties are imposed pursuant to this Section on two (2) or more persons for the same violation, all such persons are jointly and severally liable for the full amount of the penalties imposed.

c. In addition to any other remedy, the City may prosecute a civil action through the City Attorney to collect any administrative penalty imposed pursuant to this Chapter.

3. Actions for injunctive relief and civil penalties.

a. As an alternative, or in addition to any other remedy, the City Attorney may enforce the provisions of this Chapter against any tobacco retailer and/or property owner in any court of competent jurisdiction. The City Attorney may apply to such court for an order seeking injunctive relief to abate or remove any nuisance caused, maintained, or permitted by any tobacco retailer and/or property owner, to restrain any tobacco retailer and/or property owner from taking any action contrary to the provisions of this Chapter or other applicable law; and/or to require any tobacco retailer and/or property owner to take any action to comply with this Chapter or other applicable law.

b. In any civil court action brought by the City Attorney pursuant to this Section in which the City succeeds in obtaining an order from the court, the City shall be entitled to recover from any tobacco retailer and/or property owner all of the City's costs of investigation, enforcement, abatement, destruction, and litigation, including but not limited to attorneys' fees.

G. Civil penalties.
1. Violations of this Chapter are subject to a civil action brought by the City Attorney, punishable by a civil fine not less than five hundred dollars ($500) and not exceeding one thousand dollars ($1,000) per violation.

2. In assessing the amount of a civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following:
   a. The nature and seriousness of the violation;
   b. Any economic benefit gained through the violation;
   c. The number of violations;
   d. The length of time over which the violation occurred;
   e. The willfulness of the defendant's violation; and
   f. The defendant's assets, liabilities, and net worth.

3. The City Attorney is authorized, without further direction from the City Council, to institute any civil actions permitted pursuant to this subsection.

H. Liens and Special Assessments.

1. Notwithstanding any other provision of this Chapter to the contrary, the costs incurred by the City in the abatement of a violation or nuisance may be placed against any privately owned and affected property as either a nuisance abatement lien or a special assessment lien pursuant to California Government Code Section 38771 et seq., as amended from time-to-time, or a lien pursuant to California Government Code Section 54988, as amended from time to time.

2. Liens. All actual costs required by this Section constitute a lien upon the property upon which the tobacco retailer is
situated. The lien for any inspection, enforcement, or abatement costs may attach thirty (30) days after the responsible parties are notified of the costs, and will remain until the costs are paid or the premises is sold in payment thereof.

3. Lien enforcement. The City may enforce a lien under this Chapter in any manner permitted by law, including filing a civil action either to foreclose on its liens or to obtain a money judgment or both, or pursuing non-judicial foreclosure.

4. Conversion of liens. The City may elect, upon thirty (30) calendar days written notice to all known and record owners of the privately owned and affected property, to convert any nuisance abatement lien authorized by this Chapter to a special assessment lien, or vice versa. Costs recoverable under this Chapter may include those categories of costs and fees set forth in Civil Code Section 3496, regardless of the type of nuisance involved.

5. Special Assessment. If the property is specially assessed, said assessment may be collected at the same time and in the same manner as ordinary real property taxes are collected and will be subject to the same penalties and the same procedure and sale in case of delinquency as provided for ordinary real property taxes. All laws applicable to the levy, collection, and enforcement of real property taxes are applicable to the special assessment.

5.94.050 Severability.

In the event any provision in this Chapter is deemed invalid, illegal, or unenforceable, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby and such provision is ineffective only to the extent of such invalidity, illegality, or
unenforceability.

Section 3. The City Council finds that this Ordinance is not subject to environmental review under the California Environmental Quality Act pursuant to Title 14 of the California Code of Regulations (CEQA Guidelines) Section 15060 (c)(2) (the activity will not result in a direct or reasonably foreseeable indirect physical change in the environment) and Section 15060(c)(3) (the activity is not a project as defined in Section 15378) because it has no potential for resulting in physical change to the environment, directly or indirectly.

Section 4. The City Clerk shall certify to the passage of this ordinance by the City Council and cause it to be posted in three (3) conspicuous places in the City of Long Beach, and it shall take effect on the thirty-first (31st) day after it is approved by the Mayor.
I hereby certify that the foregoing Ordinance was adopted by the City Council of the City of Long Beach at its meeting of December 3, 2019, by the following vote:

Ayes: Councilmembers: Pearce, Price, Supernaw, Mungo, Andrews, Uranga, Austin, Richardson.

Noes: Councilmembers: None.

Absent: Councilmembers: Zendejas.

Approved: Dec. 5, 2019 (Date)
AFFIDAVIT OF POSTING

STATE OF CALIFORNIA ) ss
COUNTY OF LOS ANGELES )
CITY OF LONG BEACH )

Tamela Austin being duly sworn says: That I am employed in the Office of the City Clerk of the City of Long Beach; that on the 5th day of December 2019, I posted three true and correct copies of Ordinance No. ORD-19-0033 in three conspicuous places in the City of Long Beach, to wit: One of said copies in the lobby of Civic Chambers; one of said copies in the Main Library; and one of said copies on the front counter of the Office of the City Clerk.

Subscribed and sworn to before me
This 5th day of December 2019.