



# TOWN OF FAIRFAX

## SUPPLEMENTAL STAFF REPORT

August 7, 2019

**TO:** Mayor and Town Council

**FROM:** Garrett Toy, Town Manager *GT*

**SUBJECT:** Introduce and read by title an Ordinance Amending Chapter 8.44 of the Fairfax Municipal Code, Title 8, Entitled "Clean Indoor and Outdoor Air and Health Protection - Smoking Regulations" to prohibit the sale of menthol-favored tobacco products; CEQA Categorical Exemption, CEQA Guidelines Sections 15060(c)(2), 15060(c)(3)

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### **RECOMMENDATION**

Introduce and read by title only an Ordinance of the Town Council of the Town of Fairfax Amending Chapter 8.44 of the Fairfax Municipal Code, Title 8, Entitled "Clean Indoor and Outdoor Air and Health Protection - Smoking Regulations" to prohibit the sale of menthol-flavored tobacco products.

### **DISCUSSION**

Attached is a revised ordinance which reflects suggestions from the Smoke-Free Marin Coalition along with additional revisions from legal counsel. Specifically, we aligned the definition language to better match the County of Marin and other Marin jurisdictions' policies, beefed up the "whereas" clauses, and eliminated the exemptions for pipe tobacco and chew.

### **FISCAL IMPACT**

N/A

### **ATTACHMENT**

Ordinance

ORDINANCE NO. \_\_\_\_

**AN ORDINANCE OF THE TOWN COUNCIL OF THE TOWN OF FAIRFAX  
AMENDING SECTIONS 8.44.010 (FINDINGS AND PURPOSE), 8.44.020 (DEFINITIONS)  
AND 8.44.210 (REQUIREMENTS AND PROHIBITIONS) OF CHAPTER 8.44  
OF TITLE 8 OF THE FAIRFAX MUNICIPAL CODE  
TO PROHIBIT THE SALE OF FLAVORED TOBACCO PRODUCTS**

The Town Council of the Town of Fairfax hereby finds that:

**WHEREAS**, tobacco use remains the leading cause of preventable death in the United States, killing more than 480,000 people each year. It causes or contributes to many forms of cancer, as well as heart disease and respiratory diseases, among other health disorders. Tobacco use remains a public health crisis of the first order, in terms of the human suffering and loss of life it causes, the financial costs it imposes on society, and the burdens it places on our health care system.

**WHEREAS**, flavored tobacco products are commonly sold by California tobacco retailers. For example: 97.4% of stores that sell cigarettes sell menthol cigarettes; 94.5% of stores that sell little cigars sell them in flavored varieties; 84.2% of stores that sell electronic smoking devices sell flavored varieties; and 83.8% of stores that sell chew or snus sell flavored varieties.

**WHEREAS**, each day, about 2,500 children in the United States try their first cigarette; and another 400 children under 18 years of age become new regular, daily smokers. 81% of youth who have ever used a tobacco product report that the first tobacco product they used was flavored. Flavored tobacco products promote youth initiation of tobacco use and cause young occasional smokers to become daily smokers by reducing or masking the natural harshness and taste of tobacco smoke and thereby increasing the appeal of tobacco products. As tobacco companies well know, menthol, in particular, cools and numbs the throat to reduce throat irritation and make the smoke feel smoother, making menthol cigarettes an appealing option for youth who are initiating tobacco use. Tobacco companies have used flavorings such as mint and wintergreen in smokeless tobacco products as part of a “graduation strategy” to encourage new users to start with tobacco products with lower levels of nicotine and progress to products with higher levels of nicotine. It is therefore unsurprising that young people are much more likely to use menthol-, candy- and fruit-flavored tobacco products, including not just cigarettes but also cigars, cigarillos, and hookah tobacco, than adults. Data from the National Youth Tobacco Survey indicate that more than two-fifths of U.S. middle school and high school smokers report using flavored little cigars or flavored cigarettes. Further, the Centers for Disease Control and Prevention has reported a more than 800% increase in electronic cigarette use among middle school and high school students between 2011 and 2015. Nicotine solutions, which are consumed via electronic smoking devices such as electronic cigarettes, are sold in thousands of flavors that appeal to youth, such as cotton candy and bubble gum.

**WHEREAS**, between 2004 and 2014, overall smoking prevalence decreased, but use of menthol cigarettes increased among both young adults (ages 18-25) and other adults (ages 26+). These statistics are consistent with the finding that smoking menthol cigarettes reduces the likelihood of successfully quitting smoking. Scientific modeling has projected that a national ban on menthol cigarettes could save between 300,000 and 600,000 lives by 2050.

**WHEREAS**, to address this problem, the Town desires to amend the Fairfax Municipal Code to prohibit the sale of flavored tobacco products, including menthol-flavored tobacco products, in the Town.

**NOW, THEREFORE, THE TOWN COUNCIL OF THE TOWN OF FAIRFAX DOES ORDAIN AS FOLLOWS:**

**Section 1.** The above recitals are true and correct and are hereby incorporated into this Ordinance.

**Section 2.** Paragraph (W) is hereby added to Section 8.44.010 ("FINDINGS AND PURPOSE") of the Fairfax Municipal Code as follows:

"(W) Flavored tobacco products promote youth initiation of tobacco use and cause young occasional smokers to become daily smokers by reducing or masking the natural harshness and taste of tobacco smoke and thereby increasing the appeal of tobacco products."

**Section 3.** Section 8.44.020 ("DEFINITIONS") of the Fairfax Municipal Code is hereby amended to add definitions of the terms "Characterizing Flavor," "Constituent," "Distinguishable," "Flavored Tobacco Product," "Labeling" and "Packaging," and to revise the definition of "Tobacco Product" as follows:

**CHARACTERIZING FLAVOR.** A distinguishable taste or aroma or both, other than the taste or aroma of tobacco, imparted by a Tobacco Product or any byproduct produced by the Tobacco Product. Characterizing Flavors include, but are not limited to, tastes or aromas relating to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, menthol, mint, wintergreen, herb, or spice.

**CONSTITUENT.** Any ingredient, substance, chemical, or compound, other than tobacco, water, or reconstituted tobacco sheet that is added by the manufacturer to a Tobacco Product during the processing, manufacture, or packing of the Tobacco Product.

**DISTINGUISHABLE.** Perceivable by either the sense of smell or taste.

**FLAVORED TOBACCO PRODUCT.** Any Tobacco Product that contains a Constituent that imparts a Characterizing Flavor.

**LABELING.** Written, printed, pictorial, or graphic matter upon any Tobacco Product or any of its Packaging.

**PACKAGING.** A pack, box, carton, or container of any kind or, if no other container, any wrapping (including cellophane) in which a Tobacco Product is sold or offered for sale to a consumer.

**TOBACCO PRODUCT.**

- (1) Any product containing, made, or derived from tobacco or nicotine that is intended for human consumption, whether smoked, heated, chewed, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means, including, but not limited to cigarettes, cigars, pipe tobacco, hookah tobacco, snuff, chewing tobacco, dipping tobacco, or any other preparation of tobacco; or
- (2) Any device or component, part, or accessory that delivers nicotine alone or combined with other substances to the person using the device including but not limited to cigarettes, electronic cigarettes, cigars, or pipes, whether or not the device or component is sold separately. "Tobacco Product" does not include any product that has been approved by the United States Food and Drug Administration for use as a tobacco cessation product where such product is marketed and sold solely for such an approved purpose."

All other definitions set forth in Section 8.44.020 shall remain in full force and effect.

**Section 3.** Section 8.44.210 (E) of the Fairfax Municipal Code is hereby amended and restated as follows:

"(E) *Minimum age for persons selling tobacco.* No person who is younger than the age of 21 shall engage in tobacco retailing."

**Section 4.** Section 8.44.210 (H) of the Fairfax Municipal Code is hereby amended and restated as follows:

"(H) *Flavored tobacco products.*

- (1) The sale or distribution by a tobacco retailer of any flavored tobacco product is prohibited, unless:
  - (a) The tobacco product consists of a package of cigars containing at least five cigars or more; or
  - (b) The tobacco product consists of a single cigar for which the retail price exceeds \$5.
- (2) There shall be a rebuttable presumption that a tobacco product is a flavored tobacco product if a manufacturer or any of the manufacturer's agents or employees, in the course of their agency or employment, has made a statement or claim directed to consumers or to the public that the tobacco product has or produces a characterizing flavor, including, but not limited to, text, color, and/or images on the product's labeling or packaging that are

used to explicitly or implicitly communicate that the tobacco product has a characterizing flavor.

- (3) The Town Manager, or his or her designee, may adopt rules, regulations, or guidelines for the implementation and enforcement of this Section 8.44.210 (H).”

All other provisions and definitions contained in Section 8.44.210 of the Fairfax Municipal Code shall remain in full force and effect.

**Section 5. Compliance with California Environmental Quality Act.** The Town Council finds that this ordinance is not subject to the California Environmental Quality Act (CEQA) pursuant to Sections 15060(c)(2) (the activity will not result in a direct or reasonably foreseeable indirect physical change in the environment) and 15060(c)(3) (the activity is not a project as defined in Section 15378) of the CEQA Guidelines, California Code of Regulations, Title 14, Chapter 3, because it has no potential for resulting in physical change to the environment, directly or indirectly.

**Section 6. Effective Date and Posting.** This Ordinance shall be effective September 1, 2020 following its adoption by the Town Council. Copies of this Ordinance shall, within fifteen days after its passage and adoption, be posted in three public places in the Town of Fairfax, to wit: 1. Bulletin Board, Town Hall Offices; 2. Bulletin Board, Fairfax Post Office; and 3. Bulletin Board, Fairfax Women’s Club.

The foregoing Ordinance was introduced at a regular meeting of the Town Council on the 17th day of July 2019, and duly adopted at the next regular meeting of the Town Council on the 7th day of August 2019, by the following vote, to wit:

AYES:  
NOES:  
ABSENT:  
ABSTAIN:

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BARBARA COLER, Mayor

ATTEST:

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Hannah Politzer, Deputy Town Clerk