



**CITY OF ELK GROVE  
CITY COUNCIL STAFF REPORT**

**AGENDA TITLE:** Consider an Ordinance amending Elk Grove Municipal Code Chapter 4.27 Tobacco Retailers and Chapter 9.24 Distribution of Tobacco Products to Minors strengthening restrictions on the sale and distribution of tobacco and electronic vapor products (CEQA Exempt)

**MEETING DATE:** July 22, 2020

**PREPARED BY:** Shane Diller, Assistant Development Services Director

**DEPARTMENT HEAD:** Darren Wilson, P.E., Development Services Director

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**RECOMMENDED ACTION:**

Staff recommends that the City Council introduce and waive the full reading, by substitution of title only, an ordinance amending Elk Grove Municipal Code Chapter 4.27 Tobacco Retailers and Chapter 9.24 Distribution of Tobacco Products to Minors, strengthening restrictions on the sale and distribution of tobacco and electronic vapor products.

**BACKGROUND INFORMATION:**

California Business and Professions Code Section 22971.3 reserves to cities the ability to enact local tobacco control laws, with the exception of laws related to the collection of state taxes. Section 22971.3 also authorizes cities to implement local tobacco licensing laws.

Consistent with state law, the City of Elk Grove (City) regulates the sale of tobacco products and tobacco paraphernalia through the issuance of a special business license, as set forth in Elk Grove Municipal Code (EGMC) Chapter 4.27. This chapter of the EGMC was adopted in 2005, in part, 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 products to minors, but not to expand or reduce the degree to which the acts regulated by federal or state law are criminally proscribed or to alter the penalty provided for violations.” (EGMC § 4.27.020).

Currently, the City has 57 tobacco retailers licensed by the Development Services Department. These licenses must be renewed annually and are subject to suspension or revocation for violations of state and local laws related to tobacco sales and distribution. In addition to special licensing for tobacco retailers, the City requires that smoke shops and smoking lounges, as defined by EGMC, obtain a Conditional Use Permit (CUP) to operate. (EGMC Table 23.27-1).

Under state and local law, the distribution of tobacco to a minor, including distribution through a vending machine, is unlawful. (EGMC § 9.24.070; Penal Code § 308). For purposes of tobacco purchases under the EGMC and state law, a “minor” is generally considered a person under 21 years of age. However, persons 18 years of age or older that are in active service in the United States Armed Forces may lawfully purchase tobacco products under California state law. (Penal Code § 308).

In 2011, the City adopted a secondhand smoke ordinance. (EGMC Chapter 6.22). Among other regulations, Chapter 6.22 prohibits smoking within 300 feet of a school or other youth-oriented facility. (EGMC § 6.22.060.B). In 2018, the City Council amended the EGMC to prohibit smoking in or near outdoor dining areas.

On February 26, 2020, the City Council expressed a desire to further strengthen the City’s tobacco retail regulations. Some of the topics requested to be addressed were revising the definitions of tobacco products to expressly include vape products and vapor smoking devices; increasing penalties for violations of local laws; and reviewing licensing fees and licensee restrictions.

On March 11, 2020, the City Council adopted an interim urgency ordinance placing a moratorium on the issuance of Tobacco Retail Licenses and Conditional Use Permits (CUPs) for Smoke Shops and Smoking Lounges. On April 8, 2020, the City Council adopted an urgency ordinance extending the moratorium until March 12, 2021.

Tobacco regulations are generally enforced by the Elk Grove Police Department. The Development Services Department enforces the licensing and land use components of tobacco businesses within the City.

### **ANALYSIS/DISCUSSION:**

The City has a substantial interest in promoting compliance with federal, state, and local laws intended to regulate tobacco sales and use; in discouraging the illegal purchase of tobacco products by minors; in promoting compliance with laws prohibiting sales of cigarettes and tobacco products to minors; and in protecting children from being lured into illegal activity through the misconduct of adults.

In recent years, the introduction of vaping and smoking of non-tobacco products, identified by the Centers for Disease Control (CDC) as harmful, has created a market for smoking products not currently captured by tobacco sales regulations in the EGMC. Recently strengthened regulations in the City of Sacramento have put Elk Grove in a position to be an attractive market for tobacco and vape retailers.

A 2018 National Institute of Health (NIH) study showed that vaping use is experiencing a significant increase. In that study, 37% of high school seniors surveyed stated they had used an electronic vaping device. This was up from 28% in 2017 – a 32% increase in a single year. The steady rise in the use of vaping products by minors dictates that the City more stringently regulate electronic vaping products and tobacco sales in general.

Staff has reviewed the City's existing regulations and is proposing the following amendments to accomplish the goal of more strictly regulating tobacco, tobacco products, and electronic vaping products (including flavored tobacco and vape products):

- Amend EGMC Chapter 4.27
  - Ensure that vaping products are regulated in the same way as tobacco products;
  - Define “Characterizing flavor” and reinforce that tobacco products and tobacco paraphernalia, including electronic vape products containing characterizing flavor, may not be sold to minors;

- Require Zoning and Building Code compliance confirmation prior to the issuance of Tobacco Retailer Licenses;
- Enhance license violation penalties by:
  - Increasing the suspension period for a first violation from 30 to 45 days
  - Increasing the suspension period for a second violation within five years from 90 to 180 days and adding a requirement to implement an electronic age verification system after the second violation
  - Changing the penalty for a third violation within five years from a one-year suspension to revocation (previously the penalty for a fourth violation)
- Amend EGMC Chapter 9.24
  - Add electronic vaping products to the definition of Tobacco Product, establishing the same distribution prohibition currently existing in this chapter as it applies to tobacco. This amendment is important since Chapter 9.24 establishes a prohibition on providing tobacco and vape products to minors, which is a distinct act from selling the products as governed under EGMC Chapter 4.27

In addition to these amendments, staff has reviewed the City’s licensing and enforcement practices and has implemented new practices that ensure better communication between the Finance Department, Development Services Department, and Elk Grove Police Department, all of whom perform an aspect of licensing or enforcement of tobacco regulations. These changes will help ensure that all tobacco sellers are licensed, that licensed tobacco retailers are better monitored, and violations are more swiftly enforced.

This ordinance would also repeal the moratorium prohibiting the issuance of Tobacco Retailer Licenses and CUPs for Smoking lounges and Smoke shops (Ordinance 09-2020), allowing staff to resume issuing these licenses and entitlements when this ordinance takes effect.

### **ENVIRONMENTAL ANALYSIS:**

CEQA Guidelines Section 15061(b)(3) states that a project is exempt from CEQA “where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment.” The approval of the proposed EGMC amendments discussed herein does not

approve any physical development project. The proposed EGMC amendments would amend definitions to ensure electronic vaping products be regulated like tobacco products, and impose additional tobacco retail licensing restrictions. The Project would not have a significant effect on the environment and is therefore, exempt from CEQA.

**ALTERNATIVE ACTIONS:**

The City Council could direct staff to make additional revisions to the proposed ordinance or provide alternative direction to staff. Additionally, the Council could decide to take no action at this time. The current licensing moratorium remains in place until March 12, 2021, providing for additional time to develop other options.

While the City Council could direct additional revisions, staff recommends against a no action alternative. The proposed amendments are intended to enhance public health, safety, and welfare, and staff recommends their adoption.

**FISCAL IMPACT:**

Adequate fees are already established to recover the cost of processing and issuing Tobacco Retailer Licenses and required entitlements. The ordinance would be enforced pursuant to routine Police and Code Enforcement efforts, which are included within the City's budget. The ordinance, therefore, is not expected to have any additional fiscal impact on the General Fund.

Council had directed staff to re-evaluate the cost of the Tobacco Retailer License and ensure that it was adequate to provide for full cost recovery. Staff has conducted a time and motion study and determined that the current fee does provide full cost recovery.

**ATTACHMENT:**

1. Ordinance

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF ELK GROVE  
AMENDING ELK GROVE MUNICIPAL CODE CHAPTER 4.27 TOBACCO  
RETAILERS, AND CHAPTER 9.24 DISTRIBUTION OF TOBACCO PRODUCTS TO  
MINORS (CEQA EXEMPT)**

**WHEREAS**, Elk Grove Municipal Code (EGMC) Chapter 4.27 regulates the sale of tobacco in the City of Elk Grove, and;

**WHEREAS**, EGMC Chapter 9.24 establishes a prohibition against the distribution of tobacco products to minors, and;

**WHEREAS**, a 2018 study by the National Institute for Health shows that minors increased their use of electronic vapor products over 30% from the previous year and in order to help protect the health and safety of Elk Grove youth, electronic vapor products should be regulated as stringently as tobacco products, and;

**WHEREAS**, this ordinance amends Chapter 4.27 and Chapter 9.27 of the EGMC to ensure the sale of electronic vapor products and electronic cigarettes are regulated in the same way as tobacco and tobacco paraphernalia, and;

**WHEREAS**, there is no foreseeable possibility that the adoption of this ordinance would have a significant effect on the environment, and its adoption is therefore exempt from the California Environmental Quality Act (CEQA) under State CEQA Guidelines Section 15061(b)(3), Common Sense Exemption.

**NOW, THEREFORE**, the City Council of the City of Elk Grove does ordain as follows:

Section 1: Purpose

The purpose of this ordinance is to amend EGMC Chapter 4.27 Tobacco Retailers and Chapter 9.24 Distribution of Tobacco Products to Minors to more tightly control the sale of tobacco, tobacco paraphernalia, and electronic vaping products.

Section 2: Amend Elk Grove Municipal Code Chapter 4.27 titled Tobacco Retailers.

*(All additions are shown as **bold** text, deletions in ~~strikethrough~~)*

Elk Grove Municipal Code Chapter 4.27 is hereby amended to read as follows:

...

4.27.030 Definitions.

As used in this chapter, the following words and phrases shall have the meanings given them in this section, unless the context clearly requires otherwise:

**A. “Characterizing flavor” means a taste or aroma, other than the taste or aroma of tobacco, imparted either prior to or during consumption of a tobacco product or any byproduct produced by the tobacco product, including, but not limited to, tastes or aromas relating to menthol, mint, wintergreen, fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcohol beverage, herb, or spice.**

**B. “Electronic vaping device” means an electronic device that delivers nicotine or other vaporized liquids to the person inhaling from the device, including, but not limited to, an electronic cigarette, cigar, pipe, or hookah.**

**C.A. “Itinerant tobacco retailing” means engaging in tobacco retailing at other than a fixed location.**

**DB. “License” means a tobacco retailer special business license issued by the City pursuant to this chapter.**

**EG. “Licensee” means any proprietor holding a license issued by the City pursuant to this chapter.**

**FD. “Person” means any individual, firm, partnership, joint venture, limited liability company, association, social club, fraternal organization, corporation, estate, trust, business trust, receiver, trustee, syndicate, or any other group or combination acting as a unit.**

**GE. “Proprietor” means a person with an ownership or managerial interest in a business. An ownership interest shall be deemed to exist when a person has a ten (10%) percent or greater interest in the stock, assets, or income of a business other than the sole interest of security for debt. A managerial interest shall be deemed to exist when a person has, or can have, sole or shared control over the day-to-day operations of a business.**

**HF. “Tobacco product” means any substance containing tobacco leaf, including but not limited to cigarettes, cigars, pipe tobacco, snuff, chewing tobacco, dipping tobacco, bidis, or any other preparation of tobacco, with or without characterizing flavor as defined in this chapter.**

**I G. “Tobacco paraphernalia” means cigarette papers or wrappers, pipes, holders of smoking materials of all types, cigarette-rolling machines, and any other item designed or used for the smoking or ingestion of tobacco products, including electronic vapor devices, with or without characterizing flavor as defined in this chapter.**

**JH. “Tobacco retailer” means any person who sells, offers for sale, exchanges, or offers to exchange for any form of consideration tobacco, tobacco products, electronic vapor devices, or tobacco paraphernalia without regard to the quantity sold, offered for sale, exchanged, or offered for exchange.**

K l. "Tobacco retailing" shall mean selling, offering for sale, exchanging, or offering to exchange for any form of consideration tobacco, tobacco products, or tobacco paraphernalia without regard to the quantity sold, offered for sale, exchanged, or offered for exchange. ...

4.27.040 Requirement for tobacco retailers license.

...

**C. No Tobacco Retailer License shall be issued prior to the City confirming that the applicant's proposed business location complies with the Elk Grove Zoning Code and that a valid Certificate of Occupancy for the building space being proposed for retail is on file with the Elk Grove Development Services Department.**

**D. No Tobacco Retailer License shall be issued to any Smoke shop or Smoking lounge as defined in EGMC Section 23.26.050 without the retailer first having been issued a Conditional Use Permit by the Elk Grove Development Services Department.**

**E. No Tobacco Retailer License holder shall sell any Tobacco paraphernalia or Tobacco product, as defined in this chapter, to any person prohibited from such purchase by California Business and Professions Code Section 22952 or California Penal Code Section 308.**

4.27.110 Suspension or revocation of license.

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1. Upon a finding by the City Manager of a first (1<sup>st</sup>) license violation within any five (5) year period, the license shall be suspended for ~~thirty~~ **forty-five (45)** days.

2. Upon a finding by the City Manager of a second (2<sup>nd</sup>) license violation within any five (5) year period, the license shall be suspended for **one-hundred and eighty (180)**, ~~ninety (90) days~~, **and the licensee shall install and utilize an electronic age verification system approved by the City Manager prior to resuming tobacco sales.**

3. Upon a finding by the City Manager of a third (3<sup>rd</sup>) license violation within any five (5) year period, the license shall be suspended for ~~one (1) year~~ **revoked.**

4. ~~Upon a finding by the City Manager of a fourth (4<sup>th</sup>) license violation within any five (5) year period, the license shall be revoked.~~

...



Section 3: Amend Elk Grove Municipal Code Section 9.24.020 titled Definitions.

*(All additions are shown as **bold** text, deletions in ~~strikethrough~~)*

Elk Grove Municipal Code Section 9.24.020 is hereby amended to read:

...

9.24.020 Definitions.

...

“Tobacco product” shall mean any tobacco cigarette, cigar, pipe tobacco, smokeless tobacco, snuff, or any other form of tobacco, **including electronic vapor devices as defined in EGMC Section 4.27.030** which may be utilized for smoking, chewing, inhalation or other manner of ingestion, **with or without characterizing flavor as defined in EGMC Chapter 4.27.**

...

Section 4:

As of the effective date of this ordinance, Ordinance No. 09-2020, placing a temporary moratorium on all new smoking lounges, smoke shops, and tobacco retailers, is hereby repealed.

Section 5: California Environmental Quality Act (CEQA).

Finding: The Project is exempt from CEQA pursuant to State CEQA Guidelines Section 15061(b)(3).

Evidence CEQA requires analysis of agency approvals of discretionary “projects.” A “project,” under CEQA, is defined as “the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.” (CEQA Guidelines, § 15378.) The proposed Project includes discretionary amendments to the EGMC and is a project under CEQA; but it is exempt from CEQA review as set forth below.

CEQA Guidelines Section 15061(b)(3) states that a project is exempt from CEQA “where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment.” The approval of the code amendments discussed herein does not approve any physical development project. The EGMC amendments would add electronic cigarettes and electronic vapor devices to existing regulations governing the sale, use, and distribution of tobacco; as well as repeal a previous ordinance placing a moratorium on the issuance of certain permits and licenses related to tobacco sales. Therefore, the Project would not result in a direct or indirect physical change in the environment.

#### Section 6: No Mandatory Duty of Care.

This ordinance is not intended to and shall not be construed or given effect in a manner that imposes upon the City or any officer or employee thereof a mandatory duty of care towards persons and property within or without the City, so as to provide a basis of civil liability for damages, except as otherwise imposed by law.

#### Section 7: Severability.

If any provision of this ordinance or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this ordinance are severable. This City Council hereby declares that it would have adopted this ordinance irrespective of the invalidity of any particular portion thereof and intends that the invalid portions should be severed, and the balance of the ordinance be enforced.

#### Section 8: Savings Clause

The provisions of this ordinance shall not affect or impair an act done or right vested or approved or any proceeding, suit or prosecution had or commenced in any cause before such repeal shall take effect; but every such act done, or right vested or accrued, or proceeding, suit or prosecution shall remain in full force and affect to all intents and purposes as if such ordinance or part thereof so repealed had remained in force. No offense committed and no liability, penalty or forfeiture, either civilly or criminally incurred prior to the time when any such ordinance or part thereof shall be repealed or altered by said Code shall be discharged or affected by such repeal or alteration; but prosecutions and suits for such offenses, liabilities, penalties or forfeitures shall be instituted and proceeded with in all respects as if such prior ordinance or part thereof had not been repealed or altered.

#### Section 9: Effective Date and Publication

This Ordinance shall take effect thirty (30) days after its adoption. In lieu of publication of the full text of the ordinance within fifteen (15) days after its passage, a summary of the ordinance may be published at least five (5) days prior to and fifteen (15) days after adoption by the City Council and a certified copy shall be posted in the office of the City Clerk, pursuant to GC 36933(c)(1).

INTRODUCED:  
ADOPTED:  
EFFECTIVE:

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STEVE LY, MAYOR of the  
CITY OF ELK GROVE

ATTEST:

APPROVED AS TO FORM:

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JASON LINDGREN, CITY CLERK

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JONATHAN P. HOBBS,  
CITY ATTORNEY

Date signed: \_\_\_\_\_