

ORDINANCE NO. 7,441–N.S.

AMENDING BERKELEY MUNICIPAL CODE SECTIONS 9.80.010, 9.80.020, 9.80.030, AND 9.80.035 AND ADDING SECTION 9.80.037 TO REQUIRE A RETAIL TOBACCO LICENSE TO SELL ELECTRONIC NICOTINE DELIVERY SYSTEMS AND E-LIQUIDS, AND TO PROHIBIT ISSUANCE OF NEW RETAIL TOBACCO LICENSES AND SALES OF FLAVORED TOBACCO PRODUCTS, ELECTRONIC NICOTINE DELIVERY SYSTEMS, AND E-LIQUIDS WITHIN 600 FEET OF SCHOOLS

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. Legislative findings:

A. The City Council hereby finds that:

1. Children are particularly influenced by cues suggesting that smoking is acceptable;¹
2. The density of tobacco retailers, particularly in neighborhoods surrounding schools, has been associated with increased youth smoking rates;²
3. A study of California high school students found that the prevalence of smoking was higher at schools in neighborhoods with five or more tobacco outlets than at schools in neighborhoods without tobacco outlets;³
4. A California study found that the density of tobacco retailers near schools was positively associated with the prevalence of students reporting experimental smoking;⁴
5. Electronic smoking devices and other non-FDA approved nicotine delivery products have a high appeal to youth due to their high tech design and availability in child friendly flavors like cotton candy, bubble gum, chocolate chip cookie dough and cookies and cream milkshake;
6. A CDC study showed that in 2011 4.7% of all high school students had tried e-cigarettes and that in 2012 that percentage more than doubled to 10.0% of all high school students;⁵

¹ DiFranza JR, Wellman RJ, Sargent JD, et al. 2006. "Tobacco Promotion and the Initiation of Tobacco Use: Assessing the Evidence for Causality." *Pediatrics* 6: e1237-e1248.

² Henriksen 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?" *Preventive Medicine* 47: 210-214.

³ Henriksen 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?" *Preventive Medicine* 47: 210-214.

⁴ McCarthy WJ, Mistry R, Lu Y, et al. 2009. "Density of Tobacco Retailers Near Schools: Effects on Tobacco Use Among Students." *American Journal of Public Health*, 99(11): 2006-2013.

⁵ Centers for Disease Control. "E-cigarette use more than doubles among U.S. middle and high school students from 2011-2012." CDC Press Release, September 2013.

7. 6.8% of all youth between 6th and 12th grade report trying electronic smoking devices, according to an MMWR report;⁶
8. A University of Michigan national survey of substance use among students in 8th, 10th and 12th grade found that more teens use e-cigarettes than traditional, tobacco cigarettes or any other tobacco product—the first time a U.S. national study shows that teen use of e-cigarettes surpasses use of tobacco cigarettes. Specifically, 9 percent of 8th-graders, 16 percent of 10th graders, and 17 percent of 12th-graders reported e-cigarette use;⁷
9. Menthol cigarettes and flavored e-cigarettes, little cigars, and flavored smokeless products are targeted toward youth;⁸
10. In addition to its candy-like appeal, menthol's sensory effects and ability to mask irritation make menthol cigarettes appealing as a starter product. Youths disproportionately smoke menthols, in part because of these sensory characteristics and targeted marketing by the tobacco industry;⁹
11. E-cigarettes may be a first product used by youth not using other tobacco products: 20.3% of middle school youth and 7.2% of high school youth who had tried e-cigarettes had not tried a conventional tobacco cigarette;¹⁰
12. Flavored tobacco products can promote youth initiation and help young occasional smokers to become daily smokers by reducing or masking the natural harshness and taste of tobacco smoke and increasing the acceptability of a toxic product;¹¹
13. With colorful packaging and sweet flavors, flavored tobacco products are often hard to distinguish from the candy displays that they are frequently placed near the cash register in retail outlets;¹²

⁶ Corey, C., Johnson, S., Apelberg, B., et al. (2013). "Notes from the Field: Electronic Cigarette Use Among Middle and High School Students - United States, 2011- 2012." *Morbidity and Mortality Weekly Report (MMWR)*. 62(35):729–730.

⁷ Johnston, L. D., O'Malley, P. M., Miech, R.A., Bachman, J. G., & Schulenberg, J. E.. Monitoring the Future national results on adolescent drug use: Overview of key findings, 2014. Ann Arbor, Mich.: Institute for Social Research, the University of Michigan, scheduled for publication January 2015.

⁸ Tobacco Education and Research Oversight Committee. Changing Landscape: Countering New Threats, 2015-2017. Toward a Tobacco-Free California Master Plan. Sacramento, CA: Tobacco Education and Research Oversight Committee. 2014.

⁹ Youn, O.L., and Glantz, S. A. Menthol: Putting the pieces together. *Tobacco Control*. May 2011, pp ii1-ii7.

¹⁰ Centers for Disease Control & Prevention. *Notes from the field: electronic cigarette use among middle and high school students – United States, 2011-2012*. *Morbidity and Mortality Weekly Report*. 62(35): 729-730. 2013.

¹¹ G.F. Wayne and G.N. Connolly, "How Cigarette Design Can Affect Youth Initiation into Smoking: Camel Cigarettes 1983–93," *Tobacco Control* 11, no. 1 Supp. (2002): I32–I39.

¹² Campaign for Tobacco-Free Kids. *Big Tobacco's Guinea Pigs: How an Unregulated Industry Experiments on America's Kids & Consumers*. February 20, 2008.

14. Flavored tobacco products are often sold individually or in two-packs, increasing their affordability and appeal to children;⁴

15. Approximately 74% of licensed tobacco retailers in Berkeley operate within 1000 feet of a school. Block lengths vary, but 1000 feet is approximately 3-4 blocks;

16. Overall, studies suggest that youth who may have otherwise never smoked cigarettes are now getting hooked on nicotine due to e-cigarettes, and that adolescents who use e-cigarettes are more likely to progress from experimenting with cigarettes to becoming established smokers;¹³ and

17. According to the Surgeon General of the United States, smoking is “fundamentally a pediatric disease.” Approximately 90% of adult smokers started by age 18 and almost no one begins smoking after age 21.¹⁴

Section 2. That Berkeley Municipal Code Section 9.80.010 is hereby amended to read as follows:

9.80.010 Purpose.

The purposes of this chapter are to reduce minors’ access and exposure to tobacco products and to discourage violations of tobacco-related laws that prohibit or discourage the sale or distribution of tobacco products to minors and that prohibit the display of tobacco products within reach of the public, 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 therefore.

Nothing in this chapter shall be construed to grant any person obtaining and maintaining a tobacco retailer’s license any status or right other than the right to act as a tobacco retailer at the location in the City identified on the face of the permit, subject to compliance with all other applicable laws and ordinances. Nothing in this chapter shall be construed to render inapplicable, supersede, or apply in lieu of any other provision of applicable law, including, without limitation, any condition or limitation on indoor smoking made applicable to business establishments by California Labor Code Section 6404.5.

Section 3. That Berkeley Municipal Code Section 9.80.020 is hereby amended to read as follows:

¹³ California Department of Public Health. *Electronic Cigarettes: A Summary of the Public Health Risks and Recommendations for Health Care Professionals Health Advisory*. January 28, 2015.

¹⁴ U.S. Department of Health and Human Services. *The Health Consequences of Smoking—50 Years of Progress: A Report of the Surgeon General*. Atlanta, GA: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2014.

9.80.020 Definitions.

The following words and phrases, whenever used in this article, shall have the meanings defined in this section unless the context clearly requires otherwise:

A. "Characterizing flavor" means a distinguishable taste or aroma, other than the taste or aroma of tobacco, that is imparted either prior to or during consumption of a tobacco product, including but not limited to tastes or aromas of menthol, mint, wintergreen, chocolate, vanilla, honey, cocoa, any candy, any dessert, any alcoholic beverage, any fruit, any herb, and any spice; provided, however, that no tobacco product shall be determined to have a characterizing flavor solely because of the use of additives or flavorings or the provision of ingredient information. A public statement or claim made or disseminated by the manufacturer of a tobacco product, or by any person authorized or permitted by the manufacturer to make or disseminate such statements, that a tobacco product has or produces a characterizing flavor shall establish that the product is a flavored tobacco product.

B. "Constituent" means 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.

C. "Distinguishable" means perceivable by an ordinary consumer by either the sense of smell or taste.

D. "Electronic nicotine delivery system" means any electronic and/or battery-operated device that can be used to deliver an inhaled dose of nicotine or other substances, including but not limited to electronic cigarettes, vaporizer pens, electronic cigars, electronic cigarillos, electronic pipes, electronic hookahs, or any other product name or descriptor, and including any component, part, or accessory of such a device, whether or not sold separately, including but not limited to cartomizers, clearomizers, atomizers, and tips.

E. "E-liquid" means any liquid, gel or other substance designed for use with an electronic nicotine delivery system, including but not limited to e-juice, smoke juice or any other product name or descriptor. Excluded from this definition is any non-nicotine containing liquid, gel or other substance that contains cannabis in any form as its active ingredient.

F. "Flavored tobacco product" means any tobacco product containing, made of, or derived from tobacco or nicotine that contains a constituent that imparts a characterizing flavor.

G "Pharmacy" means any retail establishment in which the profession of pharmacy is practiced by a pharmacist licensed by the State of California in accordance with the Business and Professions Code and where prescription pharmaceuticals are offered for sale, regardless of whether the retail establishment sells other retail goods in addition to prescription pharmaceuticals.

H. "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 percent (10%)

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 can or does have, or can or does share, ultimate control over the day-to-day operations of a business.

I. "School" means a building or group of buildings and associated grounds used for educational and/or classroom purposes operated by the Berkeley Unified School District (BUSD) and/or other public or private educational institutions offering a general course of study at primary, secondary or high school levels (grades K through 12) which is equivalent to the courses of study at such levels offered by the BUSD, as specified by City Council Resolution from time to time. Pre-school, vocational or trade programs shall be considered schools only when incidental to the primary use as a school as defined herein. Excluded from this definition are buildings operated by public or private education institutions in which the total student enrollment is less than 25 students and private residences at which students participate in home-based or independent study programs.

J. "Tobacco paraphernalia" means items or instruments designed for the consumption, or preparation for consumption, of any substance containing tobacco or derived from tobacco, including but not limited to cigarette papers or wrappers, pipes, hookahs, and cigarette rolling machines.

K. "Tobacco product" means:

1. any substance containing, made of, or derived from tobacco or nicotine including but not limited to cigarettes, cigars, cigarillos, pipe tobacco, snuff, chewing tobacco, dipping tobacco, bidis, and shisha;
2. any e-liquid;
3. any electronic nicotine delivery system; and
4. any tobacco paraphernalia.

"Tobacco product" does not include any cessation product specifically approved by the United States Food and Drug Administration for use in treating nicotine or tobacco dependence.

L. "Tobacco retailer" means any person or business that operates a store, stand, booth concession or other place at which the sales of tobacco products are made to purchasers for personal consumption or use.

Section 4. That Berkeley Municipal Code Section 9.80.030 is hereby amended to read as follows:

9.80.030 Requirement for tobacco retail licensure.

A. It shall be unlawful for any person to act as a tobacco retailer without first obtaining and maintaining a valid tobacco retailer's license pursuant to this chapter, for each location at which that activity is to occur.

B. It shall be a violation of a tobacco retailer's license for a licensee or his or her agent or employee to violate any local, state, or federal tobacco-related law.

C. Any tobacco retailer who as of September 15, 2015 was lawfully selling electronic nicotine delivery systems or e-liquids and was not otherwise required to have a tobacco retailer's license shall be exempt from the requirements of subdivision A of this Section until January 1, 2016.

Section 5. That Berkeley Municipal Code Section 9.80.035 is hereby amended to read as follows:

9.80.035 Limits on eligibility for a tobacco retailer license.

A. No new tobacco retailer license may be issued to a pharmacy.

B. No existing tobacco retailer license may be renewed by a pharmacy.

C. No new tobacco retailer license may be issued to authorize the sale of tobacco products with six hundred (600) feet of any school as measured by a straight line from the nearest point of the property line of the parcel on which the school is located to the nearest point of the property line of the parcel on which the business is located.

D. Effective January 1, 2017, no person shall sell, give away, barter, exchange, or otherwise deal in flavored tobacco products within six hundred (600) feet of any school as measured by a straight line from the nearest point of the property line of the parcel on which the school is located to the nearest point of the property line of the parcel on which the business is located.

E. 1. Effective January 1, 2017, no person shall sell, give away, barter, exchange, or otherwise deal in electronic nicotine delivery systems or e-liquid within six hundred (600) feet of any school as measured by a straight line from the nearest point of the property line of the parcel on which the school is located to the nearest point of the property line of the parcel on which the business is located.

2. Subdivision E.1 shall not prohibit the sale of electronic nicotine delivery systems to persons who demonstrate that they are qualified patients or primary caregivers as defined in Health and Safety Code section 11362.7 or persons with identification cards issued pursuant to Health and Safety Code section 11362.71, provided that such electronic nicotine delivery systems are unaccompanied by any tobacco product defined in Sections 9.80.020.K.1 or 9.80.020.K.2.

F. A tobacco retailer lawfully operating prior to March 1, 2015 that is engaged primarily in the sale of electronic nicotine delivery systems or e-liquid and is prohibited from selling electronic nicotine delivery systems and e-liquid due to the proximity to a school as specified in subdivision E.1 may obtain an exemption from subdivision E.1 yearly for up to a total of three years, beginning January 1, 2017, if it makes a showing, as determined by the City Manager or his or her designee, that application of subdivision E.1 would result in a taking without just compensation under either the California or the United States Constitution. "Engaged primarily" for purposes of this subsection means that the sale of electronic nicotine delivery systems and e-liquids account for more than 50% of the tobacco retailer's calendar year 2014 gross receipts.

G. A map identifying the areas falling within six hundred (600) feet of schools shall be adopted by the City Council by resolution, and may be amended from time to time.

Section 6. That Berkeley Municipal Code Section 9.80.037 is hereby added to read as follows:

9.80.037 Medical cannabis dispensary.

Sale by a dispensary to its members of tobacco paraphernalia or electronic nicotine delivery systems does not require a tobacco retailer license, provided that such tobacco paraphernalia and electronic nicotine delivery systems are unaccompanied by any tobacco product defined in Sections 9.80.020.K.1 or 9.80.020.K.2.

Section 7. Posting.

Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of Old City Hall, 2134 Martin Luther King Jr. Way. Within fifteen days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.

At a regular meeting of the Council of the City of Berkeley held on September 15, 2015, this Ordinance was passed to print and ordered published by posting by the following vote:

Ayes: Anderson, Arreguin, Capitelli, Droste, Maio, Moore, Wengraf, Worthington and Bates.

Noes: None.

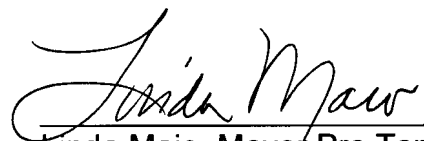
Absent: None.

At a regular meeting of the Council of the City of Berkeley held on September 29, 2015, this Ordinance was adopted by the following vote:

Ayes: Arreguin, Capitelli, Droste, Maio, Moore, Wengraf, Worthington and Bates.

Noes: None.

Absent: Anderson.


Linda Maio, Mayor Pro Tempore

ATTEST: 
Mark Numainville, City Clerk

Date signed: October 1, 2015