

ORDINANCE NO. 7,388–N.S.

IMPOSING A GENERAL TAX ON THE DISTRIBUTION OF SUGAR-SWEETENED
BEVERAGE PRODUCTS

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

Section 1. Findings

- A. Our nation, our state, and our community face a major public health crisis.
- B. Diabetes, obesity, and tooth decay have been on the rise for decades. Although no group has escaped these epidemics, children as well as low income communities and communities of color have been and continue to be disproportionately affected.
- C. While there is no single cause for the rise in diabetes, obesity, and tooth decay, there is overwhelming evidence of the link between the consumption of sugary drinks and the incidence of diabetes, obesity, and tooth decay.
- D. Sugary drinks such as soft drinks, energy drinks, sweetened teas, and sport drinks offer little or no nutritional value, but massive quantities of added sugar. A single 20-ounce bottle of soda, for instance, typically contains the equivalent of approximately 16 teaspoons of sugar.
- E. Before the 1950s, the standard soft-drink bottle was 6.5 ounces. In the 1950s, larger size containers were introduced, including the 12-ounce can, which became widely available in 1960. By the early 1990s, 20-ounce plastic bottles had become the norm.
- F. At the same time, hundreds of millions of dollars have been spent in an ongoing massive marketing campaign, which particularly targets children and people of color. In 2006 alone, nearly \$600 million was spent in advertising to children under 18. African American and Latino children are also aggressively targeted with advertisements to promote sugar-laden drinks.
- G. The resulting impact on consumption should not be surprising. The average American now drinks nearly 50 gallons of sugary drinks a year. The problem is especially acute with children in California. From 1989 to 2008, the percentage of children consuming sugary drinks increased from 79% to 91% and the percentage of total calories obtained from sugary drinks increased by 60% in children ages 6 to 11.
- H. This level of consumption has had tragic impacts on community health. Type 2 Diabetes – previously only seen among adults – is now increasing among children. If the current obesity trends are not reversed, it is predicted that one in three children and *nearly one-half* of Latino and African American children born in the year 2000 will develop type 2 diabetes in their lifetimes.
- I. An Asian resident of Berkeley is almost 3 times more likely than a white resident to have been diagnosed with diabetes, and an African American resident of Berkeley is 14 times more likely than a white resident to be hospitalized for diabetes.
- K. Childhood obesity has more than doubled in children and tripled in adolescents in the past 30 years; in 2010, more than one-third of children and adolescents were overweight or obese.
- N. Our community has not been immune to the challenge of unhealthy weight gain and obesity. In 2008-09, over 40% of Berkeley 9th graders were overweight or obese. These overweight and obese children have a much greater chance of being obese as adults, with all the health risks that entails.

- M. There are also economic costs. In 2006, for instance, overweight and obesity-related costs in California were estimated at almost \$21 billion.
- O. Tooth decay, while not as life threatening as diabetes or obesity, still has a meaningful impact, especially on children. In fact, tooth decay is the most common childhood disease, experienced by over 70% of California's 3rd graders. Children who frequently or excessively consume beverages high in sugar are at increased risk for dental cavities. Dental problems are a major cause of missed school days and poor school performance as well as pain, infection, and tooth loss in California.

Section 2. Purpose and Intent

- A. Based on the findings set forth above, the purpose of this Ordinance is to diminish the human and economic costs of diseases associated with the consumption of sugary drinks by discouraging their distribution and consumption in Berkeley through a tax. Specifically, the purpose of this ordinance is to tax the distribution of sugary drinks and the products used to make them.
- B. This Ordinance is not intended for the purpose of regulation.
- C. This Ordinance does not authorize the conduct of any business or activity in the city, but merely provides for the taxation of distribution of specified products as it occurs.
- D. This Ordinance imposes a general tax on the distribution of sugar-sweetened beverages such as high-calorie, low-nutrition products, like soda, energy drinks, and heavily presweetened tea, as well as the added caloric sweeteners used to produce these sugar-sweetened beverages, such as the premade syrup used to make fountain drinks. Certain drinks containing sugar are exempted, including infant formula, milk products, and natural fruit and vegetable juice.
- E. This Ordinance provides for a small business exemption for Retailers who transport sugar-sweetened beverage products into the City themselves and then sell those products directly to consumers.
- F. This general tax will provide revenue to be available for the general governmental needs of the people of Berkeley.
- G. This Ordinance provides for a Sugar Sweetened Beverage Product Panel of Experts, composed of experts in the areas of public health, child nutrition, nutrition education, and food access programs. The Panel will make recommendations on how and to what extent the City should fund programs to further reduce the consumption of sugar-sweetened beverages in Berkeley and address the consequences of such consumption.

Section 3. New Berkeley Municipal Code Chapter 7.72

That a new Chapter 7.72 is added to the Berkeley Municipal Code is to read as follows:

Chapter 7.72 Sugar-Sweetened Beverage Product Distribution Tax

Section 7.72.010 Excise Tax

- A. In addition to any other taxes imposed by the City, the City hereby levies a tax of one cent (\$0.01) per fluid ounce on the privilege of Distributing Sugar-sweetened beverage products in the City.

- B. For the purposes of this Chapter, the volume, in ounces, of a Sugar-sweetened beverage product shall be calculated as follows:
 - 1. For a Sugar-sweetened beverage, the volume, in fluid ounces, of Sugar-sweetened beverages distributed to any person in the course of business in the City.
 - 2. For Added caloric sweeteners, the largest volume, in fluid ounces, of Sugar-sweetened beverages that could be produced from the Added caloric sweeteners. In accordance with rules and regulations promulgated by the City pursuant to Section 7.72.040, the largest volume, in fluid ounces, that would typically be produced from the Added caloric sweeteners shall be determined based on the manufacturer's instructions or, if the Distributor uses the Added caloric sweeteners to produce a Sugar-sweetened beverage, the regular practice of the Distributor.
- C. The tax shall be paid upon the first non-exempt Distribution of a Sugar-sweetened beverage product in the City. To the extent that there is a chain of Distribution within Berkeley involving more than one Distributor, the tax shall be levied on the first Distributor subject to the jurisdiction of the City. To the extent the tax is not paid as set forth above for any reason, it shall be payable on subsequent Distributions and by subsequent Distributors, provided that the Distribution of Sugar-sweetened beverage products may not be taxed more than once in the chain of commerce.

Section 7.72.020 Exemptions

The tax imposed by this Chapter shall not apply:

- A. To any Distributor that is not subject to taxation by the City under the laws of the United States or the State of California;
- B. To any Distribution of a Sugar-sweetened beverage product to a Retailer with less than \$100,000 in annual gross receipts, as defined in Section 9.04.025, in the most recent year;
- C. To any Distribution of Natural or common sweeteners; or
- D. To any Distribution of Added caloric sweeteners to a Food Products Store as defined in Section 23F.04.010, if the Food Products Store then offers the Added caloric sweetener for sale for later use by customers of that store.

Section 7.72.030 Definitions

- A. "Added caloric sweetener" means any substance or combination of substances that meets all of the following four criteria:
 - 1. Is suitable for human consumption;
 - 2. Adds calories to the diet if consumed;
 - 3. Is perceived as sweet when consumed; and
 - 4. Is used for making, mixing, or compounding Sugar-sweetened beverages by combining the substance or substances with one or more other ingredients including, without limitation, water, ice, powder, coffee, tea, fruit juice, vegetable juice, or carbonation or other gas.

An Added caloric sweetener may take any form, including but not limited to a liquid, syrup, and powder, whether or not frozen. "Added caloric sweetener" includes, without limitation, sucrose, fructose, glucose, other sugars, and high fructose corn syrup, but does not include a substance that exclusively contains natural, concentrated, or reconstituted fruit or vegetable juice or any combination thereof.

- B. "Alcoholic beverage" means any beverage subject to tax under Part 14 (commencing with Section 32001) of the California Revenue and Taxation Code, as that Part may be amended from time to time.
- C. "Beverage for medical use" means a beverage suitable for human consumption and manufactured for use as an oral nutritional therapy for persons who cannot absorb or metabolize dietary nutrients from food or beverages, or for use as an oral rehydration electrolyte solution for infants and children formulated to prevent or treat dehydration due to illness. "Beverage for medical use" shall also mean a "medical food" as defined in Section 109971 of the California Health and Safety Code, as that definition may be amended from time to time. "Beverage for medical use" shall not include drinks commonly referred to as "sports drinks" or any other common names that are derivations thereof.
- D. "Business Entity" means any Person except for a natural person.
- E. "City" means the City of Berkeley, California.
- F. "City Manager" means the City Manager of the City of Berkeley or his or her designee.
- G. "Consumer" means a natural person who purchases a Sugar-sweetened beverage product in the City for a purpose other than resale in the ordinary course of business.
- H. "Distribution" or "Distribute" means the transfer of title or possession (1) from one Business entity to another for consideration or (2) within a single Business entity, such as by a wholesale or warehousing unit to a retail outlet or between two or more employees or contractors. "Distribution" or "Distribute" shall not mean the retail sale to a Consumer.
- I. "Distributor" means any Person who Distributes Sugar-sweetened beverage products in the City.
- J. "Milk" means natural liquid milk, regardless of animal source or butterfat content, natural milk concentrate, whether or not reconstituted, regardless of animal source or butterfat content, or dehydrated natural milk, whether or not reconstituted and regardless of animal source or butterfat content, and plant-based milk substitutes, that are marketed as milk, such as soy milk and almond milk.
- K. "Natural or common sweetener" means granulated white sugar, brown sugar, honey, molasses, xylem sap of maple trees, or agave nectar.
- L. "Person" means an individual, trust, firm, joint stock company, business concern, business trust, government, receiver, trustee, syndicate, social club, fraternal organization, estate, corporation, including, but not limited to, a, limited liability company, and association or any other group or combination acting as a unit.
- M. "Retailer" means any Person who serves Sugar-sweetened beverage products to a Consumer.
- N. "Simple syrup" means a mixture of water and one or more Natural or common sweeteners without any additional ingredients.
- O. "Sugar-sweetened beverage" means any beverage intended for human consumption to which one or more Added caloric sweeteners has been added and that contains at least 2 calories per fluid ounce.
 - 1. "Sugar-sweetened beverage" includes, but is not limited to all drinks and beverages commonly referred to as "soda," "pop," "cola," "soft drinks," "sports

drinks," "energy drinks," "sweetened ice teas," or any other common names that are derivations thereof.

2. "Sugar-sweetened beverage" shall not include any of the following:
 - a. Any beverage in which milk is the primary ingredient, i.e., the ingredient constituting a greater volume of the product than any other;
 - b. Any beverage for medical use;
 - c. Any liquid sold for use for weight reduction as a meal replacement;
 - d. Any product commonly referred to as "infant formula" or "baby formula"; or
 - e. Any alcoholic beverage.
- P. "Sugar-sweetened beverage product" means a Sugar-sweetened beverage or Added caloric sweetener.

Section 7.72.040 Duties, Responsibilities and Authority of the City Manager

- A. It shall be the duty of the City Manager to collect and receive all taxes imposed by this Chapter, and to keep an accurate record thereof.
- B. The City Manager is hereby charged with the enforcement of this Chapter, except as otherwise provided herein, and may prescribe, adopt, and enforce rules and regulations relating to the administration and enforcement of this Chapter, including provisions for the reexamination and correction of returns and payments, and for reporting. Such rules and regulations may include, but are not limited to, the following:
 1. The determination of the frequency with which a Distributor must calculate the tax. This determination shall not constitute an increase of the tax.
 2. The determination of the frequency with which a Distributor must pay the tax. This determination shall not constitute an increase of the tax.
 3. The determination of whether and how a Distributor must register with the City.
 4. The determination of whether and how a Distributor who receives, in the City, Sugar-sweetened beverage products from another Distributor must report to the City the name of that Distributor.
 5. The determination of whether and how a Distributor who receives, in the City, Sugar-sweetened beverage products from another distributor must report to the City the volume of Sugar-sweetened beverage products received from that Distributor.
 6. The determination of what other documentation is required to be created or maintained by a Distributor.
- C. The City Manager shall annually verify that the taxes owed under this Chapter have been properly applied, exempted, collected, and remitted.

Section 7.72.050 Collection

- A. The amount of any tax, penalty, and interest imposed under the provisions of this Chapter shall be deemed a debt to the City. Any Distributor owing money under the provisions of this Chapter shall be liable in an action brought in the name of the City for the recovery of such amount.
- B. In order to aid in the City's collection of taxes due under this Chapter, any Retailer that receives Sugar-sweetened beverage products from a Distributor shall, in accordance with rules and regulations promulgated by the City Manager pursuant to Section 7.72.040, either:

1. report to the City all such transactions, the volume in ounces of Sugar-sweetened beverage products received in each transaction, and the identity and contact information of the Distributor from whom the Sugar-sweetened beverage products were received; or
 2. collect the tax that would be payable as a result of the transaction by the Distributor from whom the Sugar-sweetened beverage product was received and remit it to the City; or
 3. provide to the City evidence that the Distributor from whom the Sugar-sweetened beverage products were received has registered as a Distributor with the City and that registration is current.
- C. The City Council is authorized to have the taxes imposed by this Chapter collected by the County of Alameda or the California Board of Equalization in conjunction with the collection of other taxes for the City. If the City Council exercises this authorization, the duties and responsibilities of the City Manager shall be given, as appropriate, to the County of Alameda or the California Board of Equalization, which may delegate such duties and responsibilities as necessary and as authorized by law.

Section 7.72.060 Refunds

Whenever any tax under this Chapter has been paid more than once or has been erroneously or illegally collected or received by the City, it may be refunded only as provided in Chapter 7.20 of the Berkeley Municipal Code.

Section 7.72.070 Enforcement

Except as otherwise provided by this Chapter or by rule or regulation promulgated by the City Manager, the tax imposed by this Chapter shall be administered in the same manner as taxes imposed pursuant to Chapter 9.04 and, without limitation, shall be subject to the same delinquency penalties, appeals processes and other enforcement provisions set forth in Chapter 9.04.

Section 7.72.080 Not a Sales and Use Tax

The tax imposed by this Chapter is a tax upon the privilege of conducting business, specifically, Distributing Sugar sweetened beverage products within the City of Berkeley. It is not a sales, use, or other excise tax on the sale, consumption or use of Sugar-sweetened beverage products.

Section 7.72.090 Sugar-Sweetened Beverage Product Panel of Experts

- A. There shall be established the Sugar-Sweetened Beverage Product Panel of Experts to make recommendations on how and to what extent the City should establish and/or fund programs to reduce the consumption of sugar-sweetened beverages in Berkeley and to address the effects of such consumption.
- B. An officer or employee of the City designated by the City Manager shall serve as secretary of the Panel.
- C. In accordance with Chapter 2.04, the Panel shall be composed of nine members appointed by the City Council.
- D. Terms shall expire and vacancies shall be filled in accordance with the provisions of Section 2.04.030 through 2.04.145 of this Code.
- E. Each member of the Panel must:

1. Have experience in community-based youth food and nutrition programs; or
 2. Have experience in school-based food and nutrition programs and be referred by the Berkeley Unified School District; or
 3. Have experience in early childhood nutrition education; or
 4. Have experience in researching public health issues or evaluating public health programs related to diabetes, obesity, and sugary drink consumption; or
 5. Be a licensed medical practitioner.
- F. In accordance with Section 3.02.040, members of the Panel may be reappointed but shall not serve more than eight consecutive years.
- G. The Panel shall, by majority vote, do each of the following:
1. Annually appoint one of its members as chair and one of its members as vice-chair;
 2. Approve bylaws to facilitate the proper functioning of the Panel;
 3. Establish a regular time and place of meeting. All meetings shall be noticed as required by law and shall be scheduled in a way to allow for maximum input from the public. Minutes for each meeting shall be recorded, kept, and maintained; and
 4. Publish an annual report that includes the following:
 - a. recommendations on how to allocate the City's general funds to reduce the consumption of sugar sweetened beverages in Berkeley and to address the results of such consumption;
 - b. information, if available, concerning the impact of this Chapter on the public health of the residents of the City; and
 - c. any additional information that the Panel deems appropriate.
- H. Within 15 days of receipt of the publication of the Panel's annual report, the City Manager shall cause the report to be published on the City's Internet website and to be transmitted to the City Council and the Governing Board of the Berkeley Unified School District.
- I. The City Council shall consider, but need not follow, the Panel's recommendations and shall annually inform the Panel as to the extent to which it has implemented the Panel's recommendations.

Section 7.72.100 Increase Appropriations Limits

Pursuant to California Constitution article XIII B, the appropriation limit for the City is increased by the aggregate sum authorized to be levied by this tax for each of the four fiscal years from 2015-16 through 2018-19.

Section 7.72.110 Amendment

The City Council, without a vote of the people, may, either permanently or temporarily, increase the dollar amount of the threshold for the small-business exemption in Section 7.72.020.B.

Section 4. Duration.

This Ordinance shall be effective on January 1, 2015. The last effective date of this Ordinance shall be December 31, 2026, and it shall terminate as of January 1, 2027.

Section 5. Severability.

The People of the City of Berkeley hereby declare that they would have adopted each section, sentence, clause, phrase, word, or portion of this Ordinance, irrespective of the fact that any one or more sections, sentences, clauses, phrases, words, or portions of this Ordinance, or any application thereof, be declared invalid or unenforceable and, to that end, the provisions of this Ordinance are severable. If any section, sentence, clause, phrase, word, or portion of this Ordinance, or any application thereof in any circumstance, is for any reason held to be invalid or unenforceable by a court of competent jurisdiction, the remaining sections, sentences, clauses, phrases, words, or portions of this Ordinance, and applications thereof, shall nonetheless remain in full force and effect.

Section 6. Municipal Affair.

- A. The People of the City of Berkeley hereby declare that the taxation of the privilege of distributing sugar-sweetened beverage products and that the public health impact of sugar-sweetened beverage products separately and together constitute municipal affairs.
- B. The People of the City of Berkeley hereby further declare their desire for this measure to coexist with any similar tax adopted at the county or state levels.

Section 7. California Environmental Quality Act Requirements.

This Ordinance is exempt from the California Environmental Quality Act, Public Resources Code section 21000 et seq., including without limitation Public Resources Code section 21065, CEQA Guidelines section 15378(b)(4) and 15061(b)(3), as it can be seen with certainty that there is no possibility that the activity authorized herein may have a significant effect on the environment and pursuant to Public Resources Code section 21080, subdivision (b)(8) and CEQA Guidelines section 15273 as the approval of government revenues to fund existing services.

The foregoing is a true and correct copy of Ordinance No. 7,388-N.S., and the same was approved by a vote of the electorate of the City of Berkeley on November 4, 2014.

At a regular meeting of the Council of the City of Berkeley held on December 16, 2014 the final adoption of this Ordinance was approved by the following vote:

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

Noes: None.

Absent: Wengraf.



Tom Bates, Mayor

ATTEST: 

Mark Numainville, CMC, City Clerk

Date signed: December 18, 2014