



## CITY OF LAGUNA NIGUEL CITY COUNCIL AGENDA ITEM

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**TO:** Honorable Mayor and Council Members  
**FROM:** Tamara S. Letourneau, City Manager  
**DATE:** November 19, 2019  
**SUBJECT:** Adoption of Ordinance No. 2019-199 (Update to Laguna Niguel Municipal Code to Prohibit the Sale of Flavored Electronic Cigarettes in the City)

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### **RECOMMENDATION**

Staff recommends that the City Council conduct second reading, by title only, and adopt Ordinance No. 2019-199.

### **BACKGROUND**

On November 5, 2019, as part of a duly held public hearing, the City Council conducted the first reading, by title only, of Ordinance No. 2019-199 (Attachment "A") to amend the Laguna Niguel Municipal Code. The proposed Ordinance amends Title 5 (Business and Special Licenses; Business Regulations) and Title 6 (Health and Sanitation) to prohibit the sale of flavored electronic cigarettes in the City. At the meeting, the City Council unanimously concurred with the proposed Ordinance as originally drafted and directed that the Ordinance be placed on the November 19, 2019, City Council agenda for second reading and adoption.

### **ANALYSIS**

The proposed Ordinance addresses the gaps in existing federal and state law by bringing local municipal enforcement authority to the issue and to specifically preclude easy access to flavored electronic cigarette products that contribute to the recent rise in vaping amongst youth. As defined in the Ordinance, flavored electronic cigarette products include any electronic cigarettes product, including e-cigarettes, any component, part, or accessory of e-cigarettes, and associated products such as flavor refills that impart a taste or aroma, other than the taste or aroma of tobacco during consumption.

The Ordinance provides the City with a variety of enforcement mechanisms. The City may cite violators and impose administrative fines for violation. Violations of the flavored e-cigarette prohibitions are a public nuisance and may be abated as such by the City. Other possible remedies include criminal enforcement as a misdemeanor or infraction, as determined by the City Attorney. For the first thirty (30) days after the effective date of the Ordinance, administrative citations shall be the exclusive remedy for a violation.

Thereafter, all additional remedies will be available. The Ordinance shall go into effect thirty (30) days after its final passage and adoption.

**ALTERNATIVES CONSIDERED**

1. The City Council may decide not to approve the proposed Ordinance and instead, direct staff to return with a revised Ordinance to be presented at a future City Council Meeting.
2. The City Council may decide not to approve the proposed Ordinance and take no further action.

**FISCAL REVIEW**

There is no fiscal impact as a result of the adoption of Ordinance No. 2019-199.

**LEGAL REVIEW**

The City Attorney's Office had drafted Ordinance No. 2019-199 and has approved it as to form.

**CONCLUSION**

Staff recommends that the City Council conduct second reading, by title only, and adopt Ordinance No. 2019-199.

Submitted  
By:



Russell Narahara  
Management Analyst

Reviewed  
By:



Kevin G. Ennis  
City Attorney

Reviewed  
By:



Tamara S. Letourneau  
City Manager

Attachment:

- A. Ordinance No. 2019-199

# **ATTACHMENT A**

**Ordinance No. 2019-199**

## ORDINANCE NO. 2019-199

### AN ORDINANCE OF THE CITY OF LAGUNA NIGUEL, CALIFORNIA, PROHIBITING THE SALE OF FLAVORED ELECTRONIC CIGARETTES IN THE CITY, AMENDING THE LAGUNA NIGUEL MUNICIPAL CODE, AND MAKING A FINDING OF EXEMPTION UNDER CEQA IN CONNECTION THEREWITH

The City Council of the City of Laguna Niguel does hereby ordain as follows:

#### Section 1. Purpose and Findings.

A. The City of Laguna Niguel has an interest in protecting the health and safety of its residents, including the youth of the community, from potentially dangerous products. The City Council has become aware of the growing epidemic of electronic cigarette (“e-cigarette”) use, including their use by youth, and the accompanying health risks posed by these products. The City Council acknowledges that limited federal and state regulation intended to prevent youth access to these products exist, but those regulations have proven ineffective in preventing youth access to these addictive and harmful products. The City Council desires to prohibit the sale of flavored e-cigarettes in the community in order to protect youth, as well as all residents, from what has increasingly become a substantial public health risk. The facts and evidence to support the City Council’s findings, determinations, and regulatory actions with respect to flavored e-cigarettes are provided in the following paragraphs of findings.

B. The City Council is informed that e-cigarettes entered the marketplace around 2007, and since 2014, have been the most commonly used tobacco product among youth in the United States.<sup>1</sup> The dramatic surge in youth e-cigarette use (“vaping”) is no accident. Electronic smoking devices are frequently marketed in a variety of flavors with obvious appeal to youth, such as gummy bear, cotton candy, and fruit punch. As of 2017, researchers had identified more than 15,500 unique e-cigarette flavors available online.<sup>2</sup> In addition, e-cigarette companies have effectively used marketing strategies, including celebrity endorsements, magazine advertisements, social media campaigns, paid influencers, and music sponsorships, to reach youth and young adults. A 2016 study found that 78.2% of middle and high school students -- 20.5 million youth -- had been exposed to e-cigarette advertisements from at least one source, an increase from 68.9% only two years before, in 2014.<sup>3</sup>

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<sup>1</sup> [\*E-cigarette Use Among Youth and Young Adults: A Report of the U.S. Surgeon General\*](#), U.S. Department of Health and Human Services (2016)

<sup>2</sup> [\*California Tobacco Facts & Figures 2018\*](#), California Department of Public Health, citing Zhu, S-H, et al., “[Evolution of Electronic Cigarette Brands from 2013-2014 to 2016-2017: Analysis of Brand Websites](#),” J Med Internet Res 2018;20(3):e80

<sup>3</sup> [\*Exposure to Electronic Cigarette Advertising Among Middle and High School Students -- United States, 2014-2016\*](#), Centers for Disease Control

C. According to a recent study, one in five young adults use e-cigarettes daily or recreationally, believe e-cigarettes are harmless and not addictive, and think flavored e-cigarettes are less damaging to a person's health than non-flavored ones.<sup>4</sup>

D. According to the Centers for Disease Control and Prevention ("CDC"), the number of middle and high school students who reported being current users of tobacco products increased 36% -- from 3.6 million to 4.9 million students -- between 2017 and 2018. This dramatic increase, which has erased past progress in reducing youth tobacco use, is believed to be directly attributable to a nationwide surge in the use of electronic smoking devices by adolescents. There were 1.5 million more youth e-cigarette users in 2018 than in 2017, and those who were using e-cigarettes were using them more often. Frequent use of e-cigarettes increased from 20 percent in 2017 to 28 percent in 2018 among current high school e-cigarette users.<sup>5</sup>

E. In December of 2018, the U.S. Surgeon General officially declared e-cigarette use among youth in the United States an epidemic.<sup>6</sup> The Surgeon General issued an advisory on e-cigarette use among youth, noting that action must be promptly taken to protect the health of young people. As stated by the Surgeon General, "Most e-cigarettes contain nicotine -- the addictive drug in regular cigarettes, cigars, and other tobacco products. Nicotine exposure during adolescence can harm the developing brain -- which continues to develop until about age 25. Nicotine exposure during adolescence can impact learning, memory, and attention. Using nicotine in adolescence can also increase risk for future addiction to other drugs. In addition to nicotine, the aerosol that users inhale and exhale from e-cigarettes can potentially expose both themselves and bystanders to other harmful substances, including heavy metals, volatile organic compounds, and ultrafine particles that can be inhaled deeply into the lungs."<sup>7</sup> During the same press conference on e-cigarette use that these statements were made, the Surgeon General was joined by the Secretary of the U.S. Department of Health and Human Services, Alex Azar, who called the historic increase in e-cigarette use by youth, which has outpaced any other substance, an "unprecedented challenge."<sup>8</sup>

F. This epidemic can therefore be attributed in large part to the appeal of flavored e-cigarette products to youth as well as the advertising and promotional activities by companies that glamorize use of e-cigarettes nationwide.

G. In addition to long-term health consequences of using e-cigarettes, as of October 22, 2019, the CDC confirmed that e-cigarette products have resulted in at least 34 deaths and 1,604 cases of lung illnesses over the last several months.<sup>9</sup>

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<sup>4</sup> ["Know the Risks: E-cigarettes and Young People,"](#) U.S. Department of Health and Human Services; *See also National Cancer Opinion Survey Summary*, American Society of Clinical Oncology

<sup>5</sup> [Progress Erased: Youth Tobacco Use Increased During 2017-2018](#), Centers for Disease Control

<sup>6</sup> [Surgeon General's Advisory on E-cigarette Use Among Youth](#), 2018

<sup>7</sup> *Id.*

<sup>8</sup> [Remarks for E-Cigarette Press Conference, December 18, 2018, viewable at \[https://www.youtube.com/watch?v=y\\\_Ou2gooyB0\]\(https://www.youtube.com/watch?v=y\_Ou2gooyB0\)](#)

<sup>9</sup> [Outbreak of Lung Injury Associated with E-Cigarette Use \(Latest Outbreak Information\)](#), Centers for Disease Control (updated every Thursday and last accessed October 24, 2019)



H. The City Council recognizes that tobacco product use starts and becomes established primarily during adolescence. Flavored e-cigarettes promote youth initiation of tobacco use and help 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. Tobacco companies have used flavorings 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. Nicotine solutions, which are consumed via electronic smoking devices such as e-cigarettes, are sold in thousands of flavors that appeal to youth, such as cotton candy and bubble gum.<sup>10</sup>

I. The City Council also recognizes the inherent danger of tobacco products and that the use of tobacco products has devastating health and economic consequences. Tobacco use causes death and disease and continues to be an urgent public health threat for families throughout California, as evidenced by the fact that nearly 40,000 Californians die from a tobacco-related disease each year.<sup>11</sup>

J. The City Council finds that, given the surge in youth e-cigarette use, and ultimately, the rise in tobacco addiction, existing federal and state regulations have been insufficient and too slow in effectively battling the growing epidemic.

K. The federal Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act), enacted in 2009, prohibits cigarettes with characterizing flavors other than tobacco and menthol, largely because these flavored products are marketed to youth and young adults, and younger smokers are more likely than older smokers to try these products. When Congress enacted the Tobacco Control Act, it found that the use of tobacco products by the nation's children is a pediatric disease of "considerable proportions" that results in new generations of tobacco dependent children and adults. Congress further found that virtually all new users of tobacco products are under the minimum legal age to buy the products. The Tobacco Control Act does not, however, prohibit the sale of non-cigarette tobacco products with characterizing flavors, including e-cigarettes. Instead, the Tobacco Control Act allows state and local governments to adopt more stringent requirements relating to or prohibiting the sale, distribution, possession, exposure to, access to, advertising, and promotion of such products.

L. The California STAKE Act (California Business and Professions Code Section 22950 et seq.) prohibits the sale of tobacco products and paraphernalia, including electronic devices that deliver tobacco and nicotine to individuals, other than active military personnel, under the age of 21. Similar to federal law, however, California does not prohibit the sale of flavored non-cigarette tobacco products such as e-cigarettes to persons over 21. The STAKE Act and California Penal Code Section 308 provide for civil and criminal penalties for selling, giving, or furnishing tobacco products or paraphernalia to persons under 21, however, the enforcement of these restrictions by the State has been insufficient to prevent the growing sale of these products to minors.

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<sup>10</sup> [\*E-cigarette Use Among Youth and Young Adults: A Report of the U.S. Surgeon General\*](#), U.S. Department of Health and Human Services (2016)

<sup>11</sup> [\*California Tobacco Control Program Overview\*](#), California Department of Public Health, June 2017

M. Given the prevalence of flavored e-cigarettes designed to appeal to young people in the market, as well as the rising rate of flavored e-cigarette use amongst middle school and high school age students, the City Council believes that existing federal and state regulations are insufficient to prevent youth from accessing these products, exposing them to significant health risks associated with vaping harmful chemicals and from the long-term effects of tobacco use.

N. Based upon the preceding findings, the City Council finds that protecting the citizens, especially minors, of Laguna Niguel against exposure to flavored e-cigarettes represents sound public health and fiscal policy and is consistent with the City's previous efforts to protect children from exposure to smoking.

O. Based upon these findings, the City Council determines that a prohibition on the sale of flavored e-cigarettes is necessary to protect the health and safety of the community.

Section 2. Exemption from CEQA. The City Council hereby finds that it can be seen with certainty that there is no possibility the adoption of this Ordinance will have a significant adverse effect on the environment because the Ordinance only prohibits the sale of flavored electronic cigarettes. The adoption of this Ordinance is therefore exempt from California Environmental Quality Act review pursuant to Title 14, Section 15061(b)(3) of the California Code of Regulations because the Ordinance is covered by the general rule common sense exemption that CEQA applies only to projects which have the potential for causing a significant effect on the environment.

Section 3. Division 3 (Specific Additional License Requirements and Business Regulations) of Title 5 (Business and Special Licenses; Business Regulations) of the Laguna Niguel Municipal Code is hereby amended to add a new Article 15 entitled "Prohibition on Flavored Electronic Cigarette Products" to read as follows:

**"ARTICLE 15. PROHIBITION ON FLAVORED ELECTRONIC CIGARETTE PRODUCTS**

**Sec. 5-3-197. 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:

*Associated Product* means a product intended for use with an electronic cigarette, including but not limited to flavor refills, cartridges, and component parts, whether or not the product contains nicotine.

*Characterizing flavor* means a taste or aroma, other than the taste or aroma of tobacco, imparted either prior to or during consumption of an electronic cigarette product or any byproduct produced by the electronic cigarette product, including, but not limited to, tastes or aromas relating to menthol, mint, wintergreen, fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb, or spice; provided, however, that an electronic cigarette product shall not be determined to have a characterizing flavor solely because of the use of additives or the provision of ingredient information.

*Electronic cigarette* means any electronic and/or battery-operated device or delivery system sold in combination with nicotine or other substances, in aerosolized or vaporized form, including, but not limited to, an e-cigarette, e-cigar, e-pipe, vape pen, or e-hookah. Electronic cigarettes include any component, part, or accessory of such a device that is used during the operation of the device when sold in combination with any liquid or substance containing nicotine. Electronic cigarettes also include any liquid or substance containing nicotine, whether sold separately or sold in combination with any device that could be used to deliver to a person nicotine in aerosolized or vaporized form. Electronic cigarettes do not include any battery, battery charger, carrying case, or other accessory not used in the operation of the device if sold separately. Electronic cigarettes shall not include any drug, device, or combination 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.

*Electronic cigarette paraphernalia* means any item designed or marketed for the consumption, use, or preparation of electronic cigarette products.

*Electronic cigarette product* includes: (1) any electronic cigarette; and (2) any Associated Product, component, part, or accessory intended or reasonably expected to be used with an electronic cigarette, whether or not sold separately.

*Electronic cigarette retailer* means any Person who sells, offers for sale, or does or offers to exchange for any form of consideration, electronic cigarettes, electronic cigarette products or electronic cigarette paraphernalia. "Electronic cigarette retailing" shall mean the doing of any of these things. This definition is without regard to the quantity of electronic cigarette products or electronic cigarette paraphernalia sold, offered for sale, exchanged, or offered for exchange.

*Flavored electronic cigarette product* means any electronic cigarette product that imparts a characterizing flavor. There shall be a rebuttable presumption that an electronic cigarette product is a flavored electronic cigarette product if an electronic cigarette retailer, manufacturer, or any employee or agent of an electronic cigarette retailer or manufacturer has made a statement or claim directed to consumers or to the public that the electronic cigarette product has or produces a characterizing flavor including, but not limited to, text, color, and/or images on the product's labelling or packaging that are used to explicitly or implicitly communicate that the electronic cigarette product has a characterizing flavor.

*Labeling* means written, printed, or graphic matter upon any electronic cigarette product or any of its packaging, or accompanying such electronic cigarette product.

*Manufacturer* means any person, including but not limited to any repacker or relabeler, who manufactures, fabricates, assembles, processes, or labels an electronic cigarette product; or imports a finished electronic cigarette product for sale or distribution into the United States.



*Nicotine* means the chemical substance named 3-(1-Methyl-2-pyrrolidinyl) pyridine or C[10]H[14]N[2], including any salt or complex of nicotine, whether derived from tobacco, or from any other source.

*Packaging* means a pack, box, carton, or container of any kind or, if no other container, any wrapping (including cellophane) in which an electronic cigarette product is sold or offered for sale to a consumer.

*Person* means any natural person, partnership, cooperative association, corporation, personal representative, receiver, trustee, assignee, or any other legal entity.

**Sec. 5-3-198. Sale or Offer for Sale of Flavored Electronic Cigarette Products Prohibited.**

(a) It shall be a violation of this article for any electronic cigarette retailer or any of the electronic cigarette retailer's agents or employees to sell or offer for sale, any flavored electronic cigarette product.

(b) It shall be a violation of this article for any electronic cigarette retailer to possess with intent to sell or offer for sale, any flavored electronic cigarette product. There shall be a rebuttable presumption that an electronic cigarette retailer in possession of four or more flavored electronic cigarette products, including but not limited to individual flavored electronic cigarette products, packages of flavored electronic cigarette products, or any combination thereof, possesses such flavored electronic cigarette products with intent to sell or offer for sale.

**Sec. 5-3-199. Enforcement and Remedies.**

(a) The City Manager, or his or her designee, may enforce this article.

(b) Any person who violates any provision of this article is guilty of a misdemeanor punishable by a fine of \$1,000, or imprisonment for a term of six months, or both, provided that where the city attorney determines that such action may be in the best interests of justice, the city attorney may specify in the accusatory pleadings that the offense shall be an infraction. Each violation of this article, and each day during which any such violation is committed or continued, shall constitute a separate offense.

(c) Any violation of this article is a public nuisance. In addition to the penalties provided in this section, any use or condition caused or permitted to exist in violation of any of the provisions of this article shall be and is declared to be a public nuisance, and may be abated as such by the city.

(d) In addition to other remedies set forth in this section, the City may issue an administrative citation for any violation of this article, as set forth in Article 2 (Administrative Citations) of Division 3 (Citations in Lieu of Immediate Arraignment) of Title 1 (General Provisions) of the Municipal Code.

(e) This section shall not be interpreted to limit the applicable civil or administrative remedies available under law. The remedies set forth in this section are hereby declared to be cumulative and non-exclusive.

(f) The City Manager, or his or her designee, may adopt administrative rules, regulations, or guidelines for the implementation and enforcement of this article.

(g) For thirty (30) days from the effective date of this section, the exclusive remedy of the City for a violation of this article shall be the issuance of an administrative citation as provided in subsection (d) of this section. Such citations issued during this 30-day period shall be without the imposition of a fine or penalty, or an appeal fee, until the person cited has exhausted all of his or her administrative remedies therefore contained in Article 2 (Administrative Citations) of Division 3 (Citations in Lieu of Immediate Arraignment) of Title 1 (General Provisions) of the Municipal Code, and thereafter, such fine and appeal fees shall become due and payable.

#### **Sec. 5-3-200. No Preemption.**

Nothing in this article shall be interpreted or applied so as to create any requirement, power, or duty that is preempted by federal or state law.”

Section 4. Title 6 (Health and Sanitation) of the Laguna Niguel Municipal Code is hereby amended by adding a new Division 8 entitled “Flavored Electronic Cigarette Products” that reads as follows:

### **“DIVISION 8. FLAVORED ELECTRONIC CIGARETTE PRODUCTS**

#### **ARTICLE 1. GENERAL PROVISIONS**

#### **Sec. 6-8-1. Flavored Electronic Cigarette Products; Sale Prohibited.**

The sale, or offering to sell, of flavored electronic cigarette products is prohibited in the City as set forth in Article 15 (Prohibition on Flavored Electronic Cigarette Products) of Division 3 (Specific Additional License Requirements and Business Regulations) of Title 5 (Business and Special Licenses; Business Regulations) of the Municipal Code.”

Section 5. Severability. If any section, subsection, subdivision, sentence, clause, phrase, or portion of this Ordinance is, for any reason, held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Ordinance. The City Council hereby declares that it would have adopted this Ordinance and each section, subsection, subdivision, sentence, clause, phrases, or portion thereof irrespective of the fact that any one or more sections, subsections, subdivisions, sentences, clauses, phrases, or portions thereof be declared invalid or unconstitutional.

Section 6. Effective Date of Ordinance. This Ordinance shall go into effect and be in full force and operation from and after thirty (30) days after its final passage and adoption.

Section 7. City Clerk's Certification. The City Clerk shall certify to the adoption of this Ordinance and cause the same to be posted at the duly designated posting places within the City and published once within fifteen (15) days after passage and adoption as required by law; or, in the alternative, the City Clerk may cause to be published a summary of this Ordinance and post a certified copy of the text of this Ordinance in the Office of the City Clerk five (5) days prior to the date of adoption of this Ordinance, and, within fifteen (15) days after adoption, the City Clerk shall cause to be published the aforementioned summary and shall post a certified copy of this Ordinance, together with the vote for and against the same, in the Office of the City Clerk.

PASSED, APPROVED AND ADOPTED this \_\_\_\_ day of \_\_\_\_\_, 2019.

\_\_\_\_\_  
John Mark Jennings, Mayor

ATTEST:

\_\_\_\_\_  
Eileen C. Gomez, City Clerk