

**City of Brisbane  
Agenda Report**

Date: City Council Meeting of November 19, 2015

To: Mayor and City Council

From: Michael H. Roush, City Attorney  
Teresa L. Stricker, Deputy City Attorney

Subject: 45-Day Moratorium on Vape Shops

**CITY COUNCIL GOALS**

To achieve the best mix of land uses that serves the needs of the community and enhances the quality of life in Brisbane.

To protect the public safety, health and welfare of the community.

**PURPOSE**

The purpose of this item is for the Council to determine whether to adopt, as an urgency measure, an interim ordinance that would impose a 45-day moratorium on the establishment and operation of any new retailer that specializes in selling electronic cigarettes products – so called “vape shops” – to allow the City time to study options to regulate such establishments in Brisbane.

If adopted by a 4/5 affirmative vote of Council, the ordinance would take effect immediately.

**RECOMMENDATION**

Consider whether to adopt, as urgency measure, an interim ordinance that would impose a 45-day moratorium on the establishment and operation of any new vape shop in Brisbane. The moratorium would not apply to retailers, like grocers or convenience stores, that sell a wide range of products including electronic cigarettes.

Adoption of the interim ordinance requires a 4/5 affirmative vote of Council. If adopted on November 19, 2015, the moratorium would expire on January 3, 2016 unless Council extends the moratorium after conducting a noticed public hearing as permitted under state law.

**BACKGROUND AND DISCUSSION**

With the recent increase in electronic cigarette use, vape shops have started to establish themselves in a number of cities statewide.

Because state law bans the sale of electronic cigarettes to minors, vape shops are engaged in an adult-only use. Some cities have found that this use can create undesirable effects on surrounding commercial

establishments and residential areas, and, as a result, require a commitment of police and code enforcement resources that is greater than what is required by most other retail establishments.

Because of these undesirable effects on the community, and concerns about the long term health risks of electronic cigarette use, many cities have adopted regulations specifically designed to regulate retailers of electronic cigarettes. Some cities have adopted zoning regulations limiting the location and/or number of such establishments, or making such uses conditional. Others have banned vape shops altogether. And a number of cities, including among others Hayward, Union City, Fremont, South San Francisco, Seal Beach, Camarillo, Cerritos, and Duarte, have adopted moratoria to the City to study options and then implement regulations that work best for their individual communities.

Currently, there are no vape shops in Brisbane, and the City does not have any regulations that address vape shops. Under the City's current zoning ordinance, however, a vape shop may be established and operated in any zoning district that allows retail businesses as a permitted use. Although, if adopted, the smoking ordinance the Council considered at its last meeting would extend the City's existing tobacco retailer permit license requirements to all retailers that sell electronic cigarettes, that ordinance would not prevent a vape shop from being established in any zone where retail uses are currently permitted.

Based on concerns that a vape shop might be established in Brisbane, at its meeting on October 15, 2015, Council directed staff to prepare a moratorium preventing the establishment and operation of any vape shop while the City determines what regulations should be imposed on such businesses. In particular, the City needs to (1) assess and address community concerns regarding the establishment and operation of electronic cigarette retailers in the City; (2) study the potential impacts that electronic cigarette retailers may have on public health, safety and welfare; (3) study and determine what local regulations may be appropriate or necessary for electronic cigarette retailers; (4) study and determine the appropriate zoning and location for electronic cigarette retailers; and (5) determine appropriate controls over the sale of electronic cigarette products for protection of public health and welfare.

Government Code section 65858 permits the Council to adopt, as an urgency measure, an interim zoning ordinance prohibiting land uses "that may be in conflict with any contemplated zoning proposal" that the City "intends to study or consider within a reasonable time." Such an interim ordinance must contain legislative findings by the Council to establish a "current and immediate threat to the public health, safety or welfare." The interim ordinance requires at least a 4/5 affirmative vote of Council and takes effect immediately. The ordinance expires 45 days after adoption unless at a noticed public hearing Council extends the moratorium for up to another 10 months and 15 days.

The proposed interim ordinance before Council, if adopted, would impose a 45-day moratorium on the establishment or operation of any vape shop. The proposed ordinance does not apply to retailers, like grocers or convenience stores, that sell a broad range of products including electronic cigarettes and electronic cigarette products. The ordinance also does not apply to retailers specializing in the sale of conventional tobacco products.

The proposed ordinance requires the Community Development Director to prepare a report describing the measures the City has taken to alleviate the conditions that led to the adoption of the ordinance, and submit that report for the Council's consideration, as required by Government Code Section 65858(d), at the December 8, 2015 Council meeting.

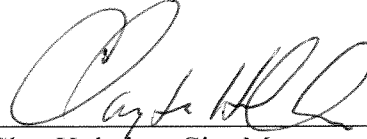
**FISCAL IMPACT**

The fiscal impact of the proposed interim ordinance will be staff time, including the costs of legal services, associated with studying options for regulating electronic cigarette retailers and implementing any changes to the City's zoning regulations.



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Teresa L. Stricker, Deputy City Attorney



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Clay Holstine, City Manager

## ORDINANCE NO. 603

### AN URGENCY MEASURE, PURSUANT TO GOVERNMENT CODE SECTION 65858, ADOPTING AN INTERIM ORDINANCE IMPOSING A 45-DAY MORATORIUM ON ESTABLISHING, OPERATING, PERMITTING AND/OR LICENSING OF ANY NEW ELECTRONIC CIGARETTE RETAILER WITHIN THE CITY OF BRISBANE

THE CITY COUNCIL OF BRISBANE HEREBY ORDAINS AS FOLLOWS:

#### SECTION 1: FINDINGS

The City Council makes the following findings:

1. The City's General Plan policies include "establish[ing] a mix of land uses that best serves the needs of the community," "integrat[ing] physical, social, environmental and financial elements of the community for the benefit of current and future residents," and "adopt[ing] development standards which protect and enhance the quality of life in Brisbane."
2. The City's Zoning Ordinance aims "to promote and protect the public health, safety, peace, comfort, convenience and general welfare," and "to control the physical development of the city in such a matter as to achieve the arrangement of land uses and open spaces described in the general plan."
3. The use of electronic smoking devices is a recent trend that is proliferating in California, including in Brisbane.
4. A study published in the Journal of Environment and Public Health suggests that electronic smoking devices "may have the capacity to 're-normalize' tobacco use in a demographic that has had significant de-normalization of tobacco use previously."

5. It is well-accepted that nicotine is a highly addictive neurotoxin. Nicotine is included in the Proposition 65 list of chemicals known to the state to cause cancer, birth defects and reproductive harm.
6. Although the long-term health effects of using electronic cigarettes are still unknown, initial studies have found carcinogens and toxic chemicals in electronic cigarette aerosols, including nicotine:
  - A recent scientific study confirmed that electronic smoking devices that contain nicotine also emit nicotine in the released vapor.
  - The United States Food and Drug Administration (the "FDA") conducted laboratory analysis of electronic cigarette samples and found they contained carcinogens and toxic chemicals to which both users and bystanders could potentially be exposed.
  - A study published in the American Journal of Public Health found similar results to those identified in FDA testing and concluded that the electronic smoking devices tested demonstrated poor quality control, toxic contaminants, misrepresentation of the nicotine delivered and insufficient evidence of the overall public health benefit.
  - A recent study found a total of 22 elements in vapors produced by electronic smoking devices, and three of these elements (lead, nickel, and chromium) appear on the FDA's "Harmful and Potentially Harmful Chemicals List."
  - Recent studies show that the aerosol emitted by electronic cigarettes contains 10 chemicals listed on the Proposition 65 list of

chemicals known to the state to cause cancer, birth defects and reproductive harm.”

- Recent studies also show that the aerosol emitted by electronic cigarettes contains ultrafine particles that are inhaled and trapped in the lungs, absorbed by the blood stream and delivered to the brain and other organs.
7. Manufacturers of electronic smoking devices have not submitted clinical studies about the safety and efficacy of these products to the FDA, and therefore, consumers currently have no way of knowing what types or concentrations of potentially harmful chemicals they are inhaling and exhaling when they use these products.
  8. Although the City is supportive of tobacco cessation programs and modalities that have proven efficacy and utilize safe FDA-approved products, to date, electronic smoking devices are not an FDA-approved smoking cessation device.
  9. The World Medical Association has determined that electronic smoking devices "are not comparable to scientifically-proven methods of smoking cessation" and that "neither their value as therapeutic aids for smoking cessation nor their safety as cigarette replacements is established.”
  10. State law makes it illegal for any business to sell electronic cigarettes or tobacco products to a minor under the age of 18.
  11. According to the California Department of Public Health, illegal sales of tobacco products to youth occur far more frequently at retailers that specialize in selling tobacco products than at general retailers that have only ancillary tobacco sales.

12. Retailers that specialize in selling electronic cigarettes (“vape shops”) provide a similar potential for illegal sales of electronic cigarettes to youth, particularly with the growing use of electronic cigarettes.
13. Vape shops are engaged in an adult-only use and that use may not be appropriate in all zoning districts that allow for other types of retail uses or that are near zoning districts where sensitive receptors, including children, elderly and the infirm, are present.
14. Other Bay Area cities have found that the establishment of vape shops in their communities can create undesirable effects on surrounding commercial establishments and residential areas and typically require a commitment of police and code enforcement resources that is greater than the commitment required by most other retail establishments.
15. Because the City’s Zoning Ordinance currently contains no regulations pertaining specifically to electronic cigarette retailers, vape shops may be established and operated in any zone in the City in which commercial retail uses are permitted.
16. The City’s current Zoning Ordinance does not address the impacts the location and manner of development, establishment, and operation of vape shops may have on public health, safety, and welfare concerns, including, but not limited to, the impacts these businesses may have on surrounding uses and sensitive receptors.
17. Additional time is needed to allow City staff to analyze the potential impacts of vape shops in Brisbane and determine what modifications to the City’s Zoning Ordinance are appropriate.

18. Until such time as the City institutes specific land use controls over vape shops, the community is at risk that such businesses could be established prior to the adoption of measures necessary for the protection of public health, safety and welfare.
19. Because the long-term effects of electronic cigarettes is still unknown, the issuance or approval of any building permit, planning permit, business license, or other permit or license, for vape shops prior to the City's completion of its review of the need for modifications to the Zoning Ordinance, and implementation of such modifications, would result in a current and immediate threat to the public health, safety and welfare.
20. The potential establishment and operation of vape shops in the City before the City can adopt regulations for such businesses presents a current and immediate threat to the public health, safety and welfare.
21. According to the Center for Tobacco Policy, currently ninety-four cities and counties statewide require retailers to obtain a license to sell electronic cigarettes.
22. The Council is currently considering adopting an ordinance that would extend Brisbane's existing tobacco retailer license requirements to all retailers that sell electronic cigarettes.
23. Other cities statewide have placed moratoria on electronic cigarette retailers to allow further study to determine how to regulate those businesses.
24. Many cities have adopted, or are in the process of adopting, restrictions regulating electronic cigarette retailers.



25. The City needs additional time to (1) assess and address community concerns regarding the establishment and operation of vape shops and other electronic cigarette retailers in the City; (2) study the potential impacts that electronic cigarette retailers may have on public health, safety and welfare; (3) study and determine what local regulations may be appropriate or necessary for electronic cigarette retailers; (4) study and determine the appropriate zoning and location for electronic cigarette retailers; and (5) determine appropriate controls over the sale of electronic cigarette products for protection of public health and welfare.
26. Pursuant to Government Code Section 65858, the City has the authority to adopt an interim ordinance prohibiting any uses that may be in conflict with contemplated zoning proposals that the City intends to study or consider.
27. For the reasons set forth above, this Ordinance is necessary to preserve the public health, safety and welfare and to avoid a current and immediate threat to the health, safety and welfare of the community.
28. Adoption of the interim urgency ordinance is exempt from environmental review under the California Environmental Quality Act (CEQA), pursuant to Public Resources Code Section 21065, based on the finding that this ordinance is not a “project” within the meaning of Section 15378 of the State CEQA Guidelines, because it has no potential for resulting in physical change in the environment, directly or ultimately, and additionally, adoption of the ordinance is exempt from the California Environmental Quality Act (CEQA), pursuant to CEQA Guidelines Sections 15061(b)(3) and 15306.

## **SECTION 2: Definitions**

For purposes of this Ordinance, the following definitions apply:

- A. “Electronic cigarette” means an electronic and/or battery-operated device, the use of which may resemble conventional smoking that can be used to deliver an inhaled dose of nicotine or other substances. “Electronic cigarette” includes any such device, whether manufactured, distributed, marketed, or sold as an electronic cigarette, an electronic cigar, an electronic cigarillo, an electronic pipe, an electronic hookah, a vapor cigarette or any other product name or descriptor.
  
- B. “Electronic cigarette retailer” means any retail establishment that is primarily engaged in selling electronic cigarettes and/or substances intended to be inhaled through the use of electronic cigarettes. “Electronic cigarette retailer” does not include any establishment that sells only as an ancillary use electronic cigarettes and/or substances intended to be inhaled through the use of electronic cigarettes.

## **SECTION 3: Moratorium on New Electronic Cigarette Retailers**

Pursuant to Government Code Section 65858, from and after the effective date of this Ordinance, no permit or any other applicable license or entitlement for use, including but not limited to, the issuance of a business license, business permit, building permit, use permit or zoning text amendment shall be approved or issued for the establishment or operation of a new electronic cigarette retailer in the City of Brisbane. New electronic cigarette retailers are hereby prohibited.

## **SECTION 4: Duration of Moratorium**

In accordance with Government Code section 65858, this Ordinance shall be in full force and effect for forty-five (45) days immediately from its adoption by the City Council by at least six (4/5) affirmative votes. This 45-day period may be extended by the City Council as set forth in Government Code section 65858.

**SECTION 5: Administration and Interpretation**

The Community Development Director, or that person's designee, is hereby authorized to administer and interpret the provisions of this Ordinance, including but not limited to, review of business license applications, specific use permits applications, variance requests, building permit applications, and other land use approvals, to determine whether the requested business license, use permit, variance, building permit or other land use approval is subject to the terms of this Ordinance.

**SECTION 6: Report Required**

The Community Development Director, or that person's designee, shall prepare a report describing the measures the City has taken to alleviate the conditions that led to the adoption of this Ordinance, and submit that report for Council's consideration, as required by Government Code Section 65858(d), at the December 8, 2015 meeting of Council.

**SECTION 7: Severability**

If any section, subsection, sentence, clause or phrase of this Ordinance is for any reason held to be invalid or unconstitutional, such decision shall not affect the validity of the remaining portions of this Ordinance.

**SECTION 8: Publication**

This Ordinance or a comprehensive summary thereof shall be published in newspaper of general circulation of the City within fifteen (15) days after its adoption.

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The above and foregoing Interim Ordinance was passed and adopted by at least a 4/5 affirmative vote at a regular meeting of the City Council of the City of Brisbane held on the nineteenth day of November 2015, by the following vote:

AYES:  
NOES:

ABSENT:  
ABSTAIN:

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Terry O'Connell, Mayor

ATTEST:

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Sheri Marie Spediacci, City Clerk

APPROVED AS TO FORM:



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Teresa L. Stricker, Deputy City Attorney