

**City of Brisbane
Agenda Report**

Date: City Council Meeting of December 17, 2015

To: Mayor and City Council

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

Subject: Extension of Vape Shop Moratorium

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 ordinance that would extend for an additional 10 months and 15 days the moratorium imposed by Interim Ordinance No. 603 on the establishment and operation of any new retailer that specializes in selling electronic cigarettes products – so called “vape shops” – to allow the City sufficient time to study options and conduct the required public processes to adopt electronic cigarette retailer regulations in Brisbane.

RECOMMENDATION

Consider whether to adopt, as urgency measure, an ordinance that would extend for an additional 10 months and 15 days the 45-day moratorium Interim Ordinance No. 603 imposed on the establishment and operation of any new vape shop in Brisbane. Adoption of an urgency ordinance extending the moratorium requires a 4/5 affirmative vote of the Council.

The moratorium imposed by Interim Ordinance No. 603 currently expires on January 3, 2016. If a 10 month and 15 day extension is adopted as permitted under state law, the moratorium would expire on November 18, 2016.

BACKGROUND

A. Challenges with Vape Shops in Other Jurisdictions

As explained in an earlier agenda report, 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 creates undesirable effects on surrounding commercial establishments and residential areas, and, as a result, requires a commitment of police and code enforcement resources that is greater than what is required by most other retail uses.

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, adopted moratoria to study options and then adopted regulations that work best for their individual communities.

B. The Status of Vape Shops in Brisbane

Aside from the temporary moratorium adopted on November 19, 2015 which is discussed below, the City does not have any zoning regulations that specifically address electronic cigarette retailers. Under the City's current zoning ordinance, a vape shop may be established and operated in Brisbane in any zoning district that allows retail businesses as a permitted use. Currently, however, there are no vape shops in the City.

The smoking ordinance the Council adopted on December 8, 2015, which will take effect on January 7, 2016, among other things, imposes limited restrictions on the sale and distribution of electronic cigarette products. Specifically, once it takes effect, the smoking ordinance will ban (1) the sale of electronic cigarette products in City-owned and leased buildings, (2) the sale of electronic cigarette products from vending machines and self-service displays, (2) out-of-package sales of electronic cigarette products, and (3) the distribution of free electronic cigarette products and coupons for free electronic cigarette products. (Ordinance No. 602, enacting Brisbane Municipal Code §§8.45.140-180.) Additionally, the smoking ordinance will extend the City's existing tobacco retailer permit requirements under Chapter 8.44 of the Brisbane Municipal Code to all retailers that sell electronic cigarette products. The smoking ordinance will not, however, prevent a vape shop from being established in any zone in which retail uses are permitted.

C. The 45-Day Moratorium Imposed by Interim Ordinance No. 603

Based on concerns that a vape shop might be established in Brisbane, on November 19, 2015, the Council adopted Interim Ordinance No. 603 imposing a 45-day moratorium on establishing, operating, permitting and/or licensing of any vape shop in Brisbane to allow the City time to study appropriate options for regulating electronic cigarette retailers and to complete the necessary public processes for adopting such regulations. The moratorium currently expires on January 3, 2016.

The moratorium does not apply to retailers, such as grocers or convenience stores, that sell a broad range of products including electronic cigarettes products. Likewise, the moratorium does not apply to retailers specializing in the sale of conventional tobacco products. A copy of Interim Ordinance No. 603 is attached to this report.

DISCUSSION

On December 8, 2015, Council issued a report, as required by Government Code section 65858(d), outlining the measures the City has taken since adoption of Interim Ordinance No. 603 to alleviate the conditions that led to the adoption of that ordinance and the work program City staff is developing for the drafting of legislation to impose regulations on electronic cigarette retailers for consideration by the Planning Commission, as previously directed by the Council.

As the report Council issued explains, the work program staff is developing is intended to: (1) assess and address community concerns regarding the establishment and operation of vape shops and other electronic cigarette retailers in the City; (2) consider the potential impacts that electronic cigarette retailers 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 the protection of public health and welfare.

As part of the work program, staff intends to research the various electronic cigarette regulations that have been adopted or are under consideration by other local jurisdictions, and contact public health experts with relevant expertise to obtain further information about potential public health risks. Once staff's preliminary research has been completed, and staff has identified a range of regulatory options for the Planning Commission to consider, one or more workshops will be scheduled before the Planning Commission to provide further direction so that staff may draft proposed legislation for consideration by the Planning Commission and, ultimately, the Council. Any draft legislation will be subject to the required public hearing processes before both the Planning Commission and the Council.

Staff anticipates completing its preliminary research to allow for the Planning Commission to conduct workshops in mid-2016. Staff anticipates that any formal public hearing processes related to the possible adoption of electronic cigarette retailer regulations would be completed by the end of 2016.

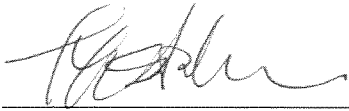
There is insufficient time before the 45-day moratorium imposed by Interim Ordinance No. 603 expires on January 3, 2016 for staff to complete its preliminary work, the Planning Commission to conduct one or more workshops, and for the Planning Commission and the Council to complete the formal public hearing processes required to adopt any new regulations.

Government Code section 65858 permits the Council to adopt, after conducting a noticed public hearing, an urgency ordinance extending Interim Ordinance No. 603 for an additional 10 months and 15 days. The ordinance extending the moratorium, like the original 45-day moratorium, must contain legislative findings by the Council to establish a "current and immediate threat to the public health, safety or welfare" to justify the extension.

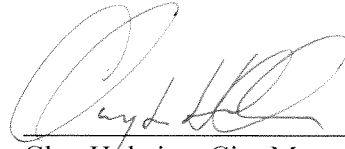
The ordinance extending the moratorium requires at least a 4/5 affirmative vote of the Council. If extended for an additional 10 months and 15 days as proposed, the moratorium would expire on November 18, 2016, unless, after conducting another noticed public hearing, the Council extends the moratorium for up to one additional year as allowed by state law.

FISCAL IMPACT

The fiscal impact of the proposed urgency ordinance will be staff time, including the costs of legal services, associated with studying options for regulating electronic cigarette retailers, drafting legislation and conducting any of the public processes required to adopt such regulations.



Teresa L. Stricker, Deputy City Attorney



Clay Holstine, City Manager

ORDINANCE NO. 604

AN URGENCY MEASURE, PURSUANT TO GOVERNMENT CODE SECTION 65858, ADOPTING AN INTERIM ORDINANCE EXTENDING FOR AN ADDITIONAL 10 MONTHS AND 15 DAYS INTERIM ORDINANCE NO. 603 WHICH IMPOSED A 45-DAY MORATORIUM ON ESTABLISHING, OPERATING, PERMITTING AND/OR LICENSING OF ANY NEW ELECTRONIC CIGARETTE RETAILER (VAPE SHOP) 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. On November 19, 2015, to protect the public safety, health and welfare, the Council adopted Interim Ordinance No. 603 imposing a 45-day moratorium on establishing, operating, permitting and/or licensing of any new retailer specializing in selling electronic cigarette products ("vape shop").
2. The 45-day moratorium imposed by Interim Ordinance No. 603 expires on January 3, 2016.
3. On December 8, 2015, Council issued a report outlining (a) the measures the City has taken since adoption of Interim Ordinance No. 603 to alleviate the conditions that led to the adoption of that ordinance and (b) the work program City staff is developing for the drafting of legislation to impose regulations on electronic cigarette retailers for consideration by the Planning Commission, as directed by the Council.
4. That work program is intended to (a) assess and address community concerns regarding the establishment and operation of vape shops and other electronic cigarette retailers in the City; (b) consider the potential impacts that electronic cigarette retailers have on public health, safety and welfare; (c) study and determine what local regulations may be appropriate or necessary for electronic cigarette retailers; (d) study and

- determine the appropriate zoning and location for electronic cigarette retailers; and (e) determine appropriate controls over the sale of electronic cigarette products for the protection of public health and welfare.
5. As part of the work program, City staff intends to research the various electronic cigarette regulations that other jurisdictions have adopted or are considering and contact public health experts with relevant expertise to obtain further information about potential public health risks.
 6. Once staff's preliminary research has been completed, and staff has identified a range of regulatory options for the Planning Commission to consider, one or more workshops will be scheduled before the Planning Commission to provide further direction in crafting draft legislation for consideration by the Planning Commission and, ultimately, the Council. Any draft legislation will be subject to the required formal public hearing processes before both the Planning Commission and the Council.
 7. Staff anticipates completing its preliminary research to allow for workshops to be held before the Planning Commission in mid-2016. Staff anticipates that any formal public hearing processes related to the possible adoption of electronic cigarette retailer regulations would be completed by the end of 2016.
 8. There is insufficient time before the moratorium imposed by Interim Ordinance No. 603 expires on January 3, 2016, for staff to complete its preliminary work, the Planning Commission to hold one or more workshops, and for the Planning Commission and the Council to complete the formal public hearing processes required to adopt electronic cigarette retailer regulations.
 9. To protect against a current and immediate threat to the public health, safety or welfare, the Council has the authority, pursuant to Government Code section 65858, to adopt – after conducting a noticed public hearing – an urgency ordinance to extend Interim Ordinance No. 603 for an additional 10 months and 15 days.

10. Without an extension of the original 45-day moratorium imposed by Interim Ordinance No. 603, there would be a current and immediate threat to the public health, safety and welfare as set forth in the findings supporting the adoption Interim Ordinance No. 603, all of which are incorporated herein by reference.
11. On December 17, 2015, the Council conducted a noticed public hearing regarding its consideration of a possible 10 month and 15 day extension of the moratorium imposed by Interim Ordinance No. 603.
12. For the reasons set forth above, a 10 month and 15 day extension of the moratorium imposed by Interim Ordinance No. 603 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.
13. Adoption of this 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: Extension of Moratorium on New Electronic Cigarette Retailers

In accordance with Government Code section 65858, the moratorium imposed by Interim Ordinance No. 603 is extended for an additional 10 months and 15 days.

SECTION 3: 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 Interim Ordinance No. 603, and submit that report for Council's

consideration, as required by Government Code section 65858(d), no later than 10 days prior to the expiration of Interim Ordinance No. 603, as extended by this urgency ordinance, or Council's consideration of any additional extension of Interim Ordinance No. 603.

SECTION 4: Severability

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

SECTION 5: Publication

 This urgency ordinance and Interim Ordinance No. 603, or a comprehensive summary thereof, shall be published in newspaper of general circulation of the City within fifteen (15) days after adoption of this urgency ordinance.

* * *

The above and foregoing urgency 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 seventeenth day of December 2015, by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

Cliff Lenz, Mayor

ATTEST:

Sheri Marie Spediacci, City Clerk

APPROVED AS TO FORM:



Teresa L. Stricker, Deputy City Attorney

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 four (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.


Terry O'Connell, Mayor


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: Councilmembers Conway, Lentz, Liu, and Miller

NOES: Mayor O'Connell

ABSENT: None

ABSTAIN: None


Sheri Marie Spediacci, City Clerk

CITY OF BRISBANE

CERTIFICATE OF POSTING

STATE OF CALIFORNIA)
COUNTY OF SAN MATEO)

NOTICE IS HEREBY GIVEN that during the course of a regular meeting on Thursday, November 19, 2015 the City Council of the City of Brisbane adopted Ordinance No. 603 entitled:

ORDINANCE NO. 603

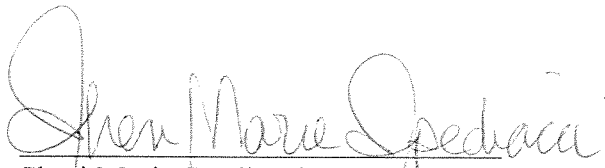
**AN URGENCY ORDINANCE OF THE CITY OF BRISBANE
PURSUANT TO GOVERNMENT CODE SECTION 65858, ADOPTING AN
INTERIM ORDINANCE IMPOSING A 45-DAY MORATORIUM ON
ESTABLISHING, OPERATING, PERMITTING AND/OR LICENSING OF ANY
NEW ELECTRONIC CIGARETTE RETAILER WITHIN THE CITY OF
BRISBANE**

The undersigned, for and on behalf of the Brisbane City Clerk, caused a copy of this Ordinance to be posted in the following places in the City of Brisbane:

Brisbane City Hall Offices, 50 Park Place
Brisbane Community Center/Library, 250 Visitacion Avenue
Mission Blue Park Tennis Courts, 475 Mission Blue Drive

Dated 12/3/15. Said posting was completed on 12/3/15.

I declare under penalty of perjury the foregoing is true and correct.


Sheri Marie Spediacci
City Clerk