

Office of the City Manager

ACTION CALENDAR
September 15, 2015

To: Honorable Mayor and Members of the City Council
 From: *DWR* Dee Williams-Ridley, Interim City Manager
 Submitted by: Kelly Wallace, Interim Director, Health, Housing & Community Services Department
 Subject: Amending BMC Chapter 9.80 – Tobacco Retailers

RECOMMENDATION

Adopt first reading of an Ordinance amending Berkeley Municipal Code Sections 9.80.010, 9.80.020, 9.80.030 and 9.80.035, and adding Section 9.80.037 to:

1. Require a Tobacco Retail License (TRL) to sell Electronic Nicotine Delivery Systems (ENDS) and e-liquids;
2. Implement a buffer zone around schools and public parks, with a grace period of three years to minimize economic hardship for qualifying retailers, that would:
 - a. Prohibit the sale of ENDS, e-liquids, and flavored (including menthol) tobacco products within 1,000 feet of schools and parks, effective January 1, 2017 (Option 1);

OR

- b. Prohibit the sale of all tobacco products (conventional and electronic) within 600 feet of schools and parks, effective immediately for new retailers and January 1, 2019 for existing retailers (Option 2).

SUMMARY

On May 12, 2015, in response to Council's interest in protecting Berkeley youth from the negative impacts of tobacco and ENDS, staff presented a recommendation to revise the BMC to prohibit all tobacco sales—both conventional and electronic—within 1000 feet of schools and parks. Details of that recommendation are in the Council report of that date (Attachment 1).

The recommendations in this current report are in response to Council's direction on May 12, 2015. Council expressed concern about the economic impact of the recommendation on small businesses, about the definition of public parks to include UC's "People's Park," and about potentially limiting the ability of medical cannabis users to purchase electronic delivery systems. Two options are presented here (Attachments 2 and 3), in accordance with Council direction to return with alternative recommendations.

Options 1 and 2 both:

- Require a TRL to sell ENDS and e-liquids (products for use in ENDS);
- Provide a 3-year grace period for implementing sales restrictions within the buffer zones, for qualifying affected retailers.

Option 1:

- Prohibits the sale, within 1000 feet of schools and parks, of:
 - All flavored, including menthol, conventional tobacco products; and
 - All ENDS and e-liquids.
- Exempts from this prohibition the sale of ENDS to medical cannabis users.
- Goes into effect on January 1, 2017.

Option 2:

- Prohibits the issuance or renewal of TRLs within 600 feet of schools and parks.
- This has the impact of prohibiting the sale, within the 600 foot buffer zone, of all tobacco products, defined to include:
 - Conventional tobacco and paraphernalia; and
 - ENDS and e-liquids.
- Goes into effect immediately for new retailers; January 1, 2019 for existing retailers.

Option 1 retains the larger 1000 foot “buffer zone” presented on 5/12/15. However, the need to distinguish flavored from non-flavored products presents implementation and enforcement challenges. There is no standard reference source for determining whether a product is flavored, so retailers and enforcement staff must assess each individual product according to the definition created in BMC 9.80.020 A.

Option 2 presents a smaller 600 foot buffer zone, but eliminates all tobacco product sales within this buffer zone. It thus reduces youth exposure and access to all tobacco products, while having an impact on fewer retailers and minimizing barriers to implementation and enforcement.

The density of retailers selling conventional and electronic tobacco products in areas frequented by youth is associated with youth tobacco use. Restricting the availability of these products near schools and parks has received strong support from the Community Health Commission. The California Department of Public Health has issued a Health Advisory detailing the many adverse effects of electronic cigarettes and the public health risks posed by the marketing, sale and use of ENDS especially to children and teens.

FISCAL IMPACTS OF RECOMMENDATION

Each TRL the City issues generates \$498 of annual revenue. Revenue generated from TRLs will be impacted as follows:

- Options 1 and 2: Retailers who currently sell ENDS, but do not also sell conventional tobacco products, will be newly required to obtain TRLs. The number of such retailers is unknown, but is expected to be small and therefore any revenue generated would be minimal.
- Option 1: Minimal to no anticipated reduction in TRL revenue, as retailers within the 1000 foot buffer zone remain eligible for TRLs.
- Option 2: Approximately 31% of licensed tobacco retailers in Berkeley operate within 600 feet of a school or public park. Currently the City has 84 active TRLs (excluding pharmacies). Elimination of 31% (26) of these TRLs would result in annual revenue reduction of approximately \$12,948.

Any reduction in sales of tobacco products near schools and parks, as a result of either Option 1 or 2, will result in reduction of local sales tax revenue of unknown amount. There will be associated financial impacts on retailers, especially on small businesses. Resources are available to assist small businesses in revising their business plans, and City staff will seek additional resources to support small businesses in this transition (Attachment 4)

Outreach and education costs related to implementing these ordinance amendments can be funded through ongoing State and county tobacco grants in the Public Health Division (PHD). Staff time for enforcement of Option 2 can be incorporated into the existing work of the Environmental Health Division. Enforcement of Option 1 would require additional staff time and resources in Environmental Health. Estimated increase in staff work is equivalent to 0.25 FTE of a Registered Environmental Health Specialist, at a cost of approximately \$35,000 annually. It may be possible to recover some portion of these costs through fee increases once program activity data is evaluated.

CURRENT SITUATION AND ITS EFFECTS

Since 2010, Council has taken multiple actions to protect Berkeley youth from the negative impacts of tobacco by adopting ordinances prohibiting smoking in multi-unit housing and prohibiting the use of ENDS in all places where smoking is prohibited. On May 12, 2015, in response to Council's interest in protecting Berkeley youth from the negative impacts of tobacco and ENDS, staff presented a recommendation to revise the BMC to prohibit all tobacco sales—both conventional and electronic—within 1000 feet of schools and parks. The recommended BMC amendments and additions included a 2-year grace period available to retailers, and was projected to have an impact on 75% of current Berkeley TRL holders.

Council took action on May 12, 2015 directing staff to explore prohibiting e-products and flavored conventional tobacco products within 1000 feet of schools and parks; to consider alternative buffer zones for other tobacco products; to allow e-paraphernalia to be sold; and to consider prohibiting the sale of ENDS and flavored conventional tobacco products citywide (while allowing purchase of ENDS for medical cannabis) (Attachment 5).

The proposed amendments and additions to the City's tobacco retail ordinance are in response to Council's directions. They differ from the prior proposal in the following ways:

- Decreased impact on retailers:
 - Later implementation dates: 1/1/17 (Option 1) or 1/1/19 (Option 2)
 - Three year grace period for qualifying retailers (Options 1 and 2)
 - Continued sale of conventional tobacco products allowed (Option 1)
 - Smaller percentage of existing tobacco retailers impacted (Option 2);
- Definition of parks excludes property of the University of California (Options 1 and 2);
- Medical cannabis users' needs are addressed:
 - Medical Cannabis dispensaries are explicitly exempted from the TRL requirement for sale of ENDS and tobacco paraphernalia (Options 1 and 2)
 - Sale of ENDS to medical cannabis card-holders is not restricted (Option 1)

The full text of both options are attached (Attachments 2 and 3), as are maps showing the 1000 and 600 foot buffer zones (Attachments 6a and 6b). The essential components of the two options are as follows:

Options 1 and 2:

Section 9.80.020 is amended to include definitions of "Electronic nicotine delivery system," "e-liquid," "School," and "Public park." Schools are defined to include K-12 schools with at least 25 students. Property of the University of California is excluded from the definition of public park. The definition of "Tobacco product" is expanded to include ENDS and e-liquid in addition to traditional tobacco products (i.e. cigarettes, cigars, etc.) and "Tobacco paraphernalia." The proposed definition of tobacco product has the effect of requiring a TRL for sale of ENDS and e-liquids.

Section 9.80.030 is amended to provide that existing retailers of ENDS and e-liquids are exempt from the TRL requirement until January 1, 2016.

Section 9.80.037 is added to provide that medical cannabis dispensaries are not required to have a TRL for sale of tobacco paraphernalia or ENDS, unaccompanied by any other tobacco product.

Option 1:

Section 9.80.020 is further amended to add definitions of "Flavored tobacco product" and related terms. Menthol-flavored tobacco products are included in the definition of "flavored."

Section 9.80.035 is amended as follows:

- a. To prohibit the sale of all flavored tobacco products, ENDS and e-liquid within 1,000 feet of any school or public park, effective January 1, 2017;
- b. To exempt from this prohibition the sale of ENDS to medical cannabis users ;
- c. To provide a 3 year grace period, for retailers of ENDS and/or e-liquids only, within the 1000 foot buffer zone who establish that the sales prohibition constitutes a "regulatory taking" under the California or U.S. Constitution.

Option 2:

Section 9.80.035 is amended as follows:

- a. To prohibit the issuance or renewal of TRLs to all tobacco product retailers within 600 feet of any school or public park, effective immediately for new retailers, and in three years (effective January 1, 2019) for existing retailers;
- b. To provide a 3 year grace period (through December 31, 2021) for tobacco retailers within the 600 foot buffer zone who establish that the sales prohibition constitutes a “regulatory taking” under the California or U.S. Constitution.

The grace period serves to reduce economic hardship for qualifying retailers. The ordinance provides the opportunity of a grace period for retailers who can establish that they would experience severe economic impact on the retailer’s business under the “regulatory taking” clause of the California or U.S. Constitution. This process would allow certain businesses, such as those primarily engaged in the sale of tobacco products (such as smoke shops and vaping shops) additional time to adjust their business plans or relocate their businesses.

At the regularly scheduled meeting of the Community Health Commission (CHC) on June 25, 2015, the Commission took the following action:

1. M/S/C (Namkung/Shaw) The CHC is in total support of any measure that will decrease youth tobacco usage, and the proposal submitted by the Tobacco Prevention Program from Berkeley Public Health seems excellent and the Commission would concur with either option. In addition, the CHC is in support of the City of San Francisco’s Police Code Article 10, Sec. 674 to ban all publicly visible advertising of tobacco within the City limits. The CHC recommends Council direct Staff to explore implementing a similar ordinance in Berkeley.

Ayes:	Commissioners Chen, Franklin, Kwanele, Namkung, Rosales, Shaw, Smith, Soichet, Speich, Stein, and M. Wong
Noes:	None
Abstain:	None
Absent:	Commissioner Nathan and A. Wong
Excused:	Commissioner Engelman, Lee and Thornton
Motion passed.	

BACKGROUND**Tobacco sales near schools and targeting of youth**

According to the United States Food and Drug Administration (FDA), smoking is “fundamentally a pediatric disease¹.” Flavored tobacco products are targeted toward

¹ Hilts, Philip J. “FDA Head Calls Smoking a Pediatric Disease.” The New York Times 9 Mar. 1995.

youth² and promote smoking by reducing or masking the natural harshness and taste of toxic tobacco products.³ As a result, youth disproportionately smoke menthols,⁴

A 2013 survey conducted by City of Berkeley Public Health Division staff revealed that over 86% of flavored non-cigarette tobacco products in Berkeley are sold within 1,000 feet of K-12 schools. A June 2014 public opinion poll conducted by City of Berkeley Public Health Division staff in Berkeley demonstrated strong support (81%) for banning sales of tobacco products near schools.⁵

Retail licensing for electronic smoking devices

E-cigarettes pose health risks to both their users and those exposed to their use. These health risks are described in detail in the State Health Officer's Report on E-Cigarettes⁶ and the State Health Advisory of January 28, 2015⁷. Most significantly, public use of e-cigarettes threatens to re-normalize smoking behavior and thus to undo decades of public health success in decreasing smoking rates across the country and in the Berkeley community. In 2014, for the first time, teen use of e-cigarettes surpassed teen use of conventional cigarettes in the US.⁸

ENVIRONMENTAL SUSTAINABILITY

By restricting tobacco sales near schools and parks, this recommendation will potentially reduce tobacco waste. Tobacco waste is toxic, is a significant component of storm drain debris, and contributes to stormwater pollution that negatively impacts water quality and wildlife in the San Francisco Bay.

RATIONALE FOR RECOMMENDATION

All tobacco products pose health risks to school-age youth: risk of lifetime nicotine addiction, risks of exposure to first and second hand smoke and vapor, and risks of normalization of smoking and vaping behaviors. Council recognizes these risks. Both options presented will be significant steps forward in Berkeley's efforts to protect residents, and especially youth, from the health impacts of tobacco exposure.

² Tobacco Education and Research Oversight Committee. Changing Landscape: Countering New Threats, 2015-2017. Toward a Tobacco-Free California Master Plan. Sacramento, CA: Tobacco Education and Research Oversight Committee. 2014.

³ G.F. Wayne and G.N. Connolly, "How Cigarette Design Can Affect Youth Initiation into Smoking: Camel Cigarettes 1983-93," *Tobacco Control* 11, no. 1 Supp. (2002): I32-I39.

⁴ Youn, O.L., and Glantz, S. A. Menthol: Putting the pieces together. *Tobacco Control*. May 2011, pp ii1-ii7.

⁵ In-person poll of Berkeley community members (did not include merchants), n=125 total respondents

⁶ <http://www.cdph.ca.gov/programs/tobacco/Documents/Media/State%20Health-e-cig%20report.pdf>

⁷ <http://www.cdph.ca.gov/Documents/EcigHealthAdvisory01282015.pdf>

⁸ Johnston, L. D., O'Malley, P. M., Miech, R.A., Bachman, J. G., & Schulenberg, J. E.. Monitoring the Future national results on adolescent drug use: Overview of key findings, 2014. Ann Arbor, Mich.: Institute for Social Research, the University of Michigan, scheduled for publication January 2015.

E-cigarettes and related products are aggressively marketed to youth and are gateway products to nicotine use and addiction. The recommendation to require TRLs for ENDS is consistent with recently adopted BMC amendments to regulate electronic smoking devices in the same way as conventional tobacco products, and further strengthens protections for youth.

Option 1 creates a larger physical buffer zone in areas frequented by youth, but retains tobacco sales throughout that buffer zone. It would eliminate the products most directly targeted to youth (e-products and flavored tobacco including menthol), but retain sales of other tobacco products within the buffer zone. This option minimizes impact on retailers, by allowing continued sale of conventional unflavored tobacco products at all locations within the buffer zone for which a TRL is obtained. Implementation and enforcement of this option will be challenging because there is no standard reference source for identifying flavored tobacco products. Thus retailers attempting to comply with the ordinance, and City staff tasked with its enforcement, will need to exercise individual judgment in determining products that are or are not allowed to be sold. In order to permit continued sale of ENDS to medical cannabis users within the buffer zone, retailers will need to develop expertise in checking for and recognizing valid medical cannabis documents. This presents an added burden for retailers.

Option 2 creates a smaller physical buffer zone in areas frequented by youth, but within this zone no TRLs would be issued and hence sales of all tobacco products would be eliminated. This option has a more significant impact on retailers than option 1, but rather than the 74% of TRL holders affected by the May 12, 2015 proposed 1000 foot buffer, the 600 foot buffer impacts 31% of current TRL holders. This option presents fewer enforcement challenges than Option 1 and provides a buffer zone around schools and parks which is free of all tobacco sales.

ALTERNATIVE ACTIONS CONSIDERED

A buffer zone of 1000 feet for all tobacco products was considered and rejected by City Council. The two alternative proposals outlined above achieve a balance of focusing on restrictions most immediately beneficial to youth while reducing the burden on local businesses. Multiple alternatives were considered and are described in the 5/12/15 Council Report (Attachment 1).

Staff considered combining Options 1 and 2. In this alternative, flavored and e-products could be banned within 1000 feet of schools and parks effective in 2017, and all TRL's within 600 feet of schools and parks could be prohibited effective in 2019. This option would provide a limited impact in the shorter term (flavored and e-products only) followed by the more comprehensive impact (all tobacco products). This would give affected retailers time to prepare for the TRL restrictions. This alternative was rejected due to the increased complexity and potential for confusion due to managing two buffer zones, two sets of restrictions, and two timelines.

Staff considered the option of carving out menthol-flavored cigarettes from the definition of flavored tobacco products. The federal 2009 Family Smoking Prevention and

Tobacco Control Act (Tobacco Control Act) prohibits flavored cigarettes but exempted menthol flavored cigarettes for further study by the FDA. However, federal and state law preserve for municipalities the authority to enact laws relating to the sale of tobacco products, which would include the sale of menthol and other flavored tobacco products. Additionally some communities, such as Chicago, have included menthol under the umbrella of restricted flavored tobacco products. Menthol has the same effect as other flavors: by reducing or masking the harshness and taste of tobacco smoke, it eases the initiation of youth into tobacco use and nicotine addiction. Therefore this alternative was rejected.

Council requested that staff explore the option of banning flavored tobacco products and all ENDS (except those related to medical cannabis) citywide. As noted above, federal and state law preserve for local agencies the ability to pass laws restricting tobacco sales within their jurisdiction. However, such laws must also comply with various Constitutional restrictions. Taking these considerations into account, staff recommends a more measured restriction specifically linked to reducing youth access to and exposure to tobacco products in areas most frequented by youth (nears schools and parks), and providing a phase in period for existing businesses to reduce the economic impact of current license holders.

The CHC requested that Council direct staff to explore implementing an ordinance in Berkeley similar to the City of San Francisco's Police Code Article 10, Sec. 674 limiting public advertising of tobacco within the City limits. Staff has determined that the San Francisco ordinance applies to advertising on publicly owned buildings. More work in this area can be undertaken at Council's direction.

CONTACT PERSON

Janet Berreman, Health Officer, 981-5301

Attachments:

1. 5/12/15 Council Report
2. Ordinance Option 1
 - a. Clean copy
 - b. Track changes
3. Ordinance Option 2
 - a. Clean copy
 - b. Track changes
4. Resources for Small Business Owners
5. Minutes Council meeting 5/12/15 (excerpt)
6. Buffer zone maps
 - a. 1000 feet
 - b. 600 feet



Office of the City Manager

ACTION CALENDAR
May 12, 2015

To: Honorable Mayor and Members of the City Council
From: Christine Daniel, City Manager
Submitted by: Jane Micallef, Director, Health, Housing & Community Services
Department
Subject: Amendment to BMC Chapter 9.80 – Tobacco Retailers

RECOMMENDATION

Adopt first reading of an Ordinance amending Berkeley Municipal Code Sections 9.80.010, 9.80.020 and 9.80.035, and adding Sections 9.80.037 and 9.80.095 as follows:

1. Require a Tobacco Retail License (TRL) to sell Electronic Nicotine Delivery Systems (ENDS);
2. Prohibit sale of all tobacco products within a 1,000 foot buffer zone around schools and public parks, with a grace period of one to two years to minimize economic hardship; and
3. Define violation of Chapter 9.80 as a public nuisance.

SUMMARY

Since 2010, Council has taken multiple actions to protect Berkeley youth from the negative impacts of tobacco by adopting ordinances prohibiting smoking in multi-unit housing and prohibiting the use of ENDS in all places smoking is prohibited. To further protect youth, the recommendations in this report serve to create a tobacco free buffer zone around schools and parks by prohibiting the issuance of TRLs within the buffer zone. This will restrict the sale of conventional tobacco products and ENDS in areas frequented by youth. This recommendation has received strong support from the Community Health Commission. The California Department of Public Health recently issued a Health Advisory detailing the many adverse effects of electronic cigarettes and the public health risks posed by the marketing, sale and use of ENDS especially to children and teens.

FISCAL IMPACTS OF RECOMMENDATION

Retailers who currently sell ENDS, but do not also sell conventional tobacco products, will be newly required to obtain TRLs. The number of such retailers is unknown, but is expected to be small and therefore any revenue generated would be minimal.

Revenue generated for the City from TRLs will be impacted. Each TRL generates \$498 of annual revenue. Preliminary information suggests that revenue will decrease due to loss of TRLs issued to retailers within 1,000 feet of schools and public parks if all TRLs in the buffer zone are prohibited. Approximately 75% of licensed tobacco retailers in Berkeley operate within 1,000 feet of a school or public park. Currently the City has 84 active TRLs (excluding pharmacies). Elimination of 75% of these would result in annual revenue reduction of approximately \$31,374.

Reduction in retail sales of tobacco products near schools and parks will result in reduction of local sales tax revenue of unknown amount.

Outreach and education costs related to implementing these ordinance amendments can be funded through ongoing State and county tobacco grants in the Public Health Division (PHD). Staff time for enforcement can be incorporated into the existing work of the Environmental Health Division.

CURRENT SITUATION AND ITS EFFECTS

Since 2010, Council has taken multiple actions to protect Berkeley youth from the negative impacts of tobacco by adopting ordinances prohibiting smoking in multi-unit housing and prohibiting the use of ENDS in all places where smoking is prohibited. Council has also provided direction to the City Manager to further protect youth by considering measures that restrict tobacco sales, particularly the sale of flavored tobacco, in areas frequented by youth and that regulate the sale of ENDS (See Attachments 3-5).

The proposed amendments and additions to the City's tobacco retail ordinance are responsive to Council's directions. Section 9.80.020 is amended to include definitions of "Electronic nicotine delivery system," "School," and "Public park" and to expand and clarify the definition of "Tobacco product" to include ENDS as well as both traditional tobacco products (i.e. cigarettes, cigars, etc.) and "Tobacco paraphernalia." Section 9.80.035 is amended to prohibit the issuance or renewal of TRLs to all tobacco product retailers within 1,000 feet of any school or public park (Attachment 9). The ordinance includes a grace period provision to reduce economic hardship for specified types of retailers, many of which are small businesses, by allowing them to apply for a one-time license or license renewal to sell down existing inventory of these products. The ordinance also provides a limited subgroup of retailers that meet specific criteria an additional one time TRL (not to exceed December 31, 2017). This additional grace period allows businesses primarily engaged in the sale of tobacco products (such as smoke shops and vaping shops) with long-term leases additional time to sell current inventory, adjust their business plans or relocate their businesses.

Section 9.80.037 is added to exempt medical cannabis dispensaries from the requirement for a TRL for the sale of non-tobacco/nicotine containing tobacco paraphernalia (such as papers/rolling machines) or electronic paraphernalia (such as refillable e-cigarettes) to dispensary members. Section 9.80.095 is added to define

violation of Chapter 9.80, including the sale of tobacco products within 1000 feet of schools and public parks in violation of the ordinance, as a public nuisance.

At the regularly scheduled meeting of the Community Health Commission (CHC) on February 26, 2015, the Commission took the following action:

1. M/S/C (Rosales/Stein) We wholeheartedly support Council's direction to strengthen youth tobacco prevention. Therefore we strongly support, in its totality, the staff recommendation to amend BMC sections 9.80.020 and 9.80.035 and to add sections 9.80.037 and 9.80.095 as to be brought to Council on April 7, 2015.

Ayes: Commissioners Chen, Franklin, Namkung, Nathan, Rosales, Shaw, Soichet, Speich, Stein, Thornton. A. Wong, and M. Wong
Noes: None
Abstain: None
Absent from vote: Commissioner Lee
Excused: Commissioner Kwanele

Motion passed.

BACKGROUND

Tobacco sales near schools and targeting of youth

According to the Surgeon General of the United States, approximately 90% of adult smokers started by age 18 and almost no one begins smoking after age 21.¹ The United States Food and Drug Administration (FDA) has declared smoking to be “fundamentally a pediatric disease².” In a 2013 survey conducted by City of Berkeley Public Health Division staff, individually packaged tobacco products like “Swisher Sweets” could be purchased for under \$1 in over 90% of tobacco retailers. This same study revealed that over 86% of candy, mint and liquor flavored non-cigarette tobacco products in Berkeley are sold within 1,000 feet of K-12 schools. A June 2014 public opinion poll conducted by City of Berkeley Public Health Division staff in Berkeley demonstrated strong support (81%) for banning sales of tobacco products near schools.³

¹ U.S. Department of Health and Human Services. The Health Consequences of Smoking—50 Years of Progress: A Report of the Surgeon General. Atlanta, GA: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2014.

² Hilts, Philip J. “FDA Head Calls Smoking a Pediatric Disease.” The New York Times 9 Mar. 1995.

³ In-person poll of Berkeley community members (did not include merchants), n=125 total respondents

Adolescents frequently visit tobacco outlets near schools and are routinely exposed to tobacco advertising.^{4, 5} Stores within 1,000 feet of schools contain more cigarette advertising than do those farther away.^{6, 7}

Additionally, a University of Michigan national survey of substance use by students in 8th, 10th and 12th grade found that more teens use e-cigarettes than traditional tobacco cigarettes or any other tobacco product—the first time a U.S. national study shows that teen use of e-cigarettes surpasses use of tobacco cigarettes. The 2014 survey asked more than 40,000 students in about 400 secondary schools whether they had used an e-cigarette or a tobacco cigarette in the past 30 days. More than twice as many 8th- and 10th-graders reported using e-cigarettes as reported using tobacco cigarettes. Specifically, 9 percent of 8th-graders, 16 percent of 10th graders, and 17 percent of 12th-graders reported e-cigarette use.⁸

Retail licensing for electronic smoking devices

E-cigarettes pose health risks to both their users and those exposed to their use. These risks are related to several characteristics of e-cigarettes:

- “Gateway” to conventional tobacco products
- Unregulated status
- Content of e-cigarette vapor
- Nicotine addiction
- Re-normalizing of smoking behavior.

These health risks are described in detail in the State Health Officer’s Report on E-Cigarettes and the State Health Advisory of January 28, 2015 (Attachments 6 & 7). Most significantly, public use of e-cigarettes threatens to re-normalize smoking behavior and thus to undo decades of public health success in decreasing smoking rates across the country and in the Berkeley community.

On October 21, 2014 Council adopted an ordinance restricting the use of electronic smoking devices in the same manner as conventional cigarette-smoking is restricted. Regulating retail sales of e-cigarettes similarly recognizes that the health risks posed by

⁴ Feighery, E.C., Henriksen, L., Wang, Y., Schleicher, N.C., Fortmann, S.P. An evaluation of four measures of adolescents' exposure to cigarette marketing in stores. *Nicotine & Tobacco Research*. 8, 751–759, 2006.

⁵ Henriksen, L., Feighery, E.C., Schleicher, N.C., Haladjian, H.H., Fortmann, S.P., Reaching youth at the point of sale: cigarette marketing is more prevalent in stores where adolescents shop frequently. *Tobacco Control* 13, 315–318, 2004.

⁶ Pucci, L.G., Joseph Jr., H.M., Siegel, M., Outdoor tobacco advertising in six Boston neighborhoods: evaluating youth exposure. *American Journal of Preventive Medicine*. 15, 155–159, 1998.

⁷ Rogers, T., Feighery, E.C., Tenca, E., Butler, J., Weiner, L. Community mobilization to reduce point-of-purchase advertising of tobacco products. *Health Education Quarterly*. 22, 427–442, 1995.

⁸ Johnston, L. D., O'Malley, P. M., Miech, R.A., Bachman, J. G., & Schulenberg, J. E.. Monitoring the Future national results on adolescent drug use: Overview of key findings, 2014. Ann Arbor, Mich.: Institute for Social Research, the University of Michigan. 2015.

electronic products are such that they warrant the same level of regulation as conventional tobacco products.

ENVIRONMENTAL SUSTAINABILITY

By restricting tobacco sales near schools and parks, this recommendation will potentially reduce tobacco waste. Tobacco waste is toxic and makes up 34 percent of the total litter collected in California. It is a significant component of storm drain debris and contributes to stormwater pollution that negatively impacts water quality and wildlife in the San Francisco Bay.

RATIONALE FOR RECOMMENDATION

All tobacco products pose health risks to school-age youth. Therefore, staff recommends that Council prohibit the licensing of retail sales of all tobacco products, including electronic products, near schools and parks. While there is no formula to determine an appropriate buffer to reduce youth access and exposure to tobacco products, tobacco retail density around schools has been shown to have a significant impact on the prevalence of youth experimental tobacco use, contributing to higher prevalence of youth smoking in neighborhoods with high tobacco retail density.⁹ In the aforementioned 2013 survey conducted by City of Berkeley Public Health Division staff, it was revealed that over 86% of candy, mint and liquor flavored non-cigarette tobacco products in Berkeley are sold within 1,000 feet of K-12 schools. (Attachment 8)

E-cigarettes and related products are aggressively marketed to youth and are gateway products to nicotine use and addiction. The recommendation to require TRLs for ENDS is consistent with the recently adopted BMC amendments to regulate electronic smoking devices in the same way as conventional tobacco products, and similarly strengthens protections for youth.

ALTERNATIVE ACTIONS CONSIDERED

The referral from Councilmembers Moore and Anderson (Attachment 4) proposed the consideration of a school buffer zone only for all flavored tobacco products (including menthol)¹⁰. However, differential licensing and enforcement for flavored, menthol, and non-flavored tobacco products was deemed prohibitively complex and likely to impede effective implementation. Public Health does not differentiate between flavored and non-flavored tobacco products, as use of tobacco products of all types is harmful.

Staff considered and rejected a school buffer zone of 500 feet (Attachment 4) because it would not adequately reduce tobacco use by youth. Five hundred feet is approximately one to two blocks, and would present only a minor barrier to the tobacco retail

⁹ Henriksen, L, Feighery, E., Schleicher, N., Cowling, D., Kline, R., Fortmann, S. Is adolescent smoking related to the density and proximity of tobacco outlets and retail cigarette advertising near schools? Preventative Medicine 47 210-214, 2008.

¹⁰ Flavored tobacco products are a subset of all tobacco products – both conventional and electronic – and include cigarettes, e-cigarettes, and other tobacco products. These products are marketed heavily to youth.

environment that is within easy walking distance of schools and parks. One thousand feet is approximately three to four blocks and presents a more significant barrier.

Councilmembers Arreguin and Moore's referral (Attachment 5) to the Planning Commission was to consider revising the zoning ordinance to expand the buffer zone around schools and public parks in which all new uses involving tobacco sales would be prohibited. (Currently, only new "smoke shops" are prohibited within 1,400 feet of schools and parks.) Staff recommends instead that the Council amend the BMC ordinance regarding TRLs, because TRLs are renewed annually and apply to both current license holders and new businesses. This approach allows for broader and more rapid implementation of the buffer zone and obviates the necessity for any amendment to the Zoning Ordinance.

Staff considered and rejected a buffer zone around churches, day care centers, etc. (Attachment 3). Such establishments are more transient in nature and would not significantly increase or decrease the impact of the current buffer zone proposal. Enforcement around these establishments was deemed prohibitively complex and likely to impede effective implementation.

Staff also considered banning the sales of tobacco products altogether. Staff determined that the proposed approach best achieves a balance of focusing on restrictions most immediately beneficial to youth while reducing the financial burden on local businesses and the financial impact on the City. Elimination of 100% of current TRLs would result in annual revenue reduction of approximately \$41,832 and reduction of local sales tax revenue of unknown amount.

CONTACT PERSON

Janet Berreman, Health Officer, 981-5301

Attachments:

1. Ordinance (clean copy)
2. Ordinance (track changes)
3. 2010-07-13 Referral to City Manager and Community Health Commission Tobacco Free School Zones
4. 2014-02-25 Strengthen Youth Tobacco Prevention
5. 2014-09-09 referral to Planning Commission Tobacco
6. CDPH State Health Officer's Report on E-cigarettes
7. CDPH Health Advisory on E-Cigarettes
8. California Healthy Stores Healthy Community Survey Report – City of Berkeley
9. Buffer zone map

[Option #1] ORDINANCE NO. -N.S.

AMENDING BERKELEY MUNICIPAL CODE SECTIONS 9.80.010, 9.80.020, 9.80.030, AND 9.80.035 AND ADDING SECTION 9.80.037 TO REQUIRE A RETAIL TOBACCO LICENSE TO SELL ELECTRONIC NICOTINE DELIVERY SYSTEMS AND E-LIQUIDS, AND TO PROHIBIT SALES OF FLAVORED TOBACCO PRODUCTS, ELECTRONIC NICOTINE DELIVERY SYSTEMS AND E-LIQUIDS WITHIN 1000 FEET OF SCHOOLS AND PUBLIC PARKS

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

Section 1. Legislative findings:

A. The City Council hereby finds that:

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

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

² Henriksen L, Feighery EC, Schleicher NC, et al. 2008. "Is Adolescent Smoking Related to Density and Proximity of Tobacco Outlets and Retail Cigarette Advertising Near Schools?" *Preventive Medicine* 47: 210-214.

³ Henriksen L, Feighery EC, Schleicher NC, et al. 2008. "Is Adolescent Smoking Related to Density and Proximity of Tobacco Outlets and Retail Cigarette Advertising Near Schools?" *Preventive Medicine* 47: 210-214.

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

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

7. 6.8% of all youth between 6th and 12th grade report trying electronic smoking devices, according to an MMWR report;⁶

8. A University of Michigan national survey of substance use among students in 8th, 10th and 12th grade found that more teens use e-cigarettes than traditional, tobacco cigarettes or any other tobacco product—the first time a U.S. national study shows that teen use of e-cigarettes surpasses use of tobacco cigarettes. Specifically, 9 percent of 8th-graders, 16 percent of 10th graders, and 17 percent of 12th-graders reported e-cigarette use;⁷

9. Menthol cigarettes and flavored e-cigarettes, little cigars, and flavored smokeless products are targeted toward youth;⁸

10. In addition to its candy-like appeal, menthol's sensory effects and ability to mask irritation make menthol cigarettes appealing as a starter product. Youths disproportionately smoke menthols, in part because of these sensory characteristics and targeted marketing by the tobacco industry;⁹

11. E-cigarettes may be a first product used by youth not using other tobacco products: 20.3% of middle school youth and 7.2% of high school youth who had tried e-cigarettes had not tried a conventional tobacco cigarette;¹⁰

12. Flavored tobacco products can promote youth initiation and help young occasional smokers to become daily smokers by reducing or masking the natural harshness and taste of tobacco smoke and increasing the acceptability of a toxic product;¹¹

13. With colorful packaging and sweet flavors, flavored tobacco products are often hard to distinguish from the candy displays that they are frequently placed near the cash register in retail outlets;¹²

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

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

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

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

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

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

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

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

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

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

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

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

9.80.010 Purpose.

The purposes of this chapter are to reduce minors’ access and exposure to tobacco products and to discourage violations of tobacco-related laws that prohibit or discourage the sale or distribution of tobacco products to minors and that prohibit the display of tobacco products within reach of the public, but not to expand or reduce the degree to which the acts regulated by federal or state law are criminally proscribed or to alter the penalty provided therefore.

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

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

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

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

9.80.020 Definitions.

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

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

B. "Constituent" means any ingredient, substance, chemical, or compound, other than tobacco, water, or reconstituted tobacco sheet, that is added by the manufacturer to a Tobacco Product during the processing, manufacture, or packing of the Tobacco Product.

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

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

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

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

G "Pharmacy" means any retail establishment in which the profession of pharmacy is

practiced by a pharmacist licensed by the State of California in accordance with the Business and Professions Code and where prescription pharmaceuticals are offered for sale, regardless of whether the retail establishment sells other retail goods in addition to prescription pharmaceuticals.

H. "Proprietor" means a person with an ownership or managerial interest in a business. An ownership interest shall be deemed to exist when a person has a ten percent (10%) or greater interest in the stock, assets or income of a business other than the sole interest of security for debt. A managerial interest shall be deemed to exist when a person can or does have, or can or does share, ultimate control over the day-to-day operations of a business.

I. "Public park" means any public property within the boundaries of the City of Berkeley, excluding public property under the ownership or control of the Regents of the University of California, used as a playground, park, community garden or open space, as specified by City Council Resolution from time to time.

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

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

L. "Tobacco product" means:

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

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

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

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

9.80.030 Requirement for tobacco retail licensure.

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

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

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

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

9.80.035 Limits on eligibility for a tobacco retailer license.

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

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

C. Effective January 1, 2017, no person shall sell, give away, barter, exchange, or otherwise deal in flavored tobacco products within one thousand (1000) feet of any school or public park as measured by a straight line from the nearest point of the property line of the parcel on which the school or public park is located to the nearest point of the property line of the parcel on which the business is located.

D. 1. Effective January 1, 2017, no person shall sell, give away, barter, exchange, or otherwise deal in electronic nicotine delivery systems or e-liquid within one thousand (1000) feet of any school or public park as measured by a straight line from the nearest point of the property line of the parcel on which the school or public park is located to the nearest point of the property line of the parcel on which the business is located.

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

E. A tobacco retailer lawfully operating prior to March 1, 2015 that is engaged primarily in the sale of electronic nicotine delivery systems or e-liquid and is prohibited from

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

F. A map identifying the areas falling within 1000 feet of schools and public parks shall be adopted by the City Council by resolution, and may be amended from time to time.

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

9.80.037 Medical cannabis dispensary.

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

Section 7. Posting.

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

[Option #1] ORDINANCE NO. -N.S.

AMENDING BERKELEY MUNICIPAL CODE SECTIONS 9.80.010, 9.80.020, 9.80.030, AND 9.80.035 AND ADDING SECTION 9.80.037 TO REQUIRE A RETAIL TOBACCO LICENSE TO SELL ELECTRONIC NICOTINE DELIVERY SYSTEMS AND E-LIQUIDS, AND TO PROHIBIT SALES OF FLAVORED TOBACCO PRODUCTS, ELECTRONIC NICOTINE DELIVERY SYSTEMS AND E-LIQUIDS WITHIN 1000 FEET OF SCHOOLS AND PUBLIC PARKS

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

Section 1. Legislative findings:

A. The City Council hereby finds that:

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

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

² Henriksen L, Feighery EC, Schleicher NC, et al. 2008. "Is Adolescent Smoking Related to Density and Proximity of Tobacco Outlets and Retail Cigarette Advertising Near Schools?" *Preventive Medicine* 47: 210-214.

³ Henriksen L, Feighery EC, Schleicher NC, et al. 2008. "Is Adolescent Smoking Related to Density and Proximity of Tobacco Outlets and Retail Cigarette Advertising Near Schools?" *Preventive Medicine* 47: 210-214.

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

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

7. 6.8% of all youth between 6th and 12th grade report trying electronic smoking devices, according to an MMWR report;⁶

8. A University of Michigan national survey of substance use among students in 8th, 10th and 12th grade found that more teens use e-cigarettes than traditional, tobacco cigarettes or any other tobacco product—the first time a U.S. national study shows that teen use of e-cigarettes surpasses use of tobacco cigarettes. Specifically, 9 percent of 8th-graders, 16 percent of 10th graders, and 17 percent of 12th-graders reported e-cigarette use;⁷

9. Menthol cigarettes and flavored e-cigarettes, little cigars, and flavored smokeless products are targeted toward youth;⁸

10. In addition to its candy-like appeal, menthol's sensory effects and ability to mask irritation make menthol cigarettes appealing as a starter product. Youths disproportionately smoke menthols, in part because of these sensory characteristics and targeted marketing by the tobacco industry;⁹

11. E-cigarettes may be a first product used by youth not using other tobacco products: 20.3% of middle school youth and 7.2% of high school youth who had tried e-cigarettes had not tried a conventional tobacco cigarette;¹⁰

12. Flavored tobacco products can promote youth initiation and help young occasional smokers to become daily smokers by reducing or masking the natural harshness and taste of tobacco smoke and increasing the acceptability of a toxic product;¹¹

13. With colorful packaging and sweet flavors, flavored tobacco products are often hard to distinguish from the candy displays that they are frequently placed near the cash register in retail outlets;¹²

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

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

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

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

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

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

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

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

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

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

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

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

9.80.010 Purpose.

The purposes of this chapter are to reduce minors’ access and exposure to tobacco products and to discourage violations of tobacco-related laws that prohibit or discourage the sale or distribution of tobacco products to minors and that prohibit the display of tobacco products within reach of the public, but not to expand or reduce the degree to which the acts regulated by federal or state law are criminally proscribed or to alter the penalty provided therefore.

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

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

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

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

9.80.020 Definitions.

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

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

B. "Constituent" means any ingredient, substance, chemical, or compound, other than tobacco, water, or reconstituted tobacco sheet, that is added by the manufacturer to a Tobacco Product during the processing, manufacture, or packing of the Tobacco Product.

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

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

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

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

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

HA. –"Proprietor" means a person with an ownership or managerial interest in a business. An ownership interest shall be deemed to exist when a person has a ten percent (10%) or greater interest in the stock, assets or income of a business other than the sole interest of security for debt. A managerial interest shall be deemed to exist when a person can or does have, or can or does share, ultimate control over the day-to-day operations of a business.

I. "Public park" means any public property within the boundaries of the City of Berkeley, excluding public property under the ownership or control of the Regents of the University of California, used as a playground, park, community garden or open space, as specified by City Council Resolution from time to time.

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

KG. "Tobacco paraphernalia" means items or instruments designed for the consumption, or preparation for consumption, of any substance containing tobacco or derived from tobacco, including but not limited to cigarette papers or wrappers, pipes, hookahs, holders of smoking materials of all types, and cigarette rolling machines, and any other item designed for the smoking or ingestion of tobacco products.

LB. "Tobacco product" means:

1. any substance containing, made of, or derived from tobacco or nicotine leaf, including but not limited to cigarettes, cigars, cigarillos, pipe tobacco, snuff, chewing tobacco, dipping tobacco, bidis, and shisha;

2. any e-liquid;

3. any electronic nicotine delivery system; and

~~4. or any other instrument or any tobacco paraphernalia which is designed for the smoking or ingestion of tobacco or products prepared from tobacco.~~

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

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

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

9.80.030 Requirement for tobacco retail licensure.

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

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

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

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

9.80.035 Limits on eligibility for a tobacco retailer license.

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

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

C. Effective January 1, 2017, no person shall sell, give away, barter, exchange, or otherwise deal in flavored tobacco products within one thousand (1000) feet of any school or public park as measured by a straight line from the nearest point of the property line of the parcel on which the school or public park is located to the nearest point of the property line of the parcel on which the business is located.

D. 1. Effective January 1, 2017, no person shall sell, give away, barter, exchange, or otherwise deal in electronic nicotine delivery systems or e-liquid within one thousand (1000) feet of any school or public park as measured by a straight line from the nearest

point of the property line of the parcel on which the school or public park is located to the nearest point of the property line of the parcel on which the business is located.

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

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

F. A map identifying the areas falling within 1000 feet of schools and public parks shall be adopted by the City Council by resolution, and may be amended from time to time.

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

9.80.037 Medical cannabis dispensary.

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

Section 7. Posting.

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

[Option #2] ORDINANCE NO. -N.S.

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

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

Section 1. Legislative findings:

A. The City Council hereby finds that:

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

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

² Henriksen L, Feighery EC, Schleicher NC, et al. 2008. "Is Adolescent Smoking Related to Density and Proximity of Tobacco Outlets and Retail Cigarette Advertising Near Schools?" *Preventive Medicine* 47: 210-214.

³ Henriksen L, Feighery EC, Schleicher NC, et al. 2008. "Is Adolescent Smoking Related to Density and Proximity of Tobacco Outlets and Retail Cigarette Advertising Near Schools?" *Preventive Medicine* 47: 210-214.

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

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

7. 6.8% of all youth between 6th and 12th grade report trying electronic smoking devices, according to an MMWR report;⁶

8. A University of Michigan national survey of substance use among students in 8th, 10th and 12th grade found that more teens use e-cigarettes than traditional, tobacco cigarettes or any other tobacco product—the first time a U.S. national study shows that teen use of e-cigarettes surpasses use of tobacco cigarettes. Specifically, 9 percent of 8th-graders, 16 percent of 10th graders, and 17 percent of 12th-graders reported e-cigarette use;⁷

9. Menthol cigarettes and flavored e-cigarettes, little cigars, and flavored smokeless products are targeted toward youth;⁸

10. In addition to its candy-like appeal, menthol's sensory effects and ability to mask irritation make menthol cigarettes appealing as a starter product. Youths disproportionately smoke menthols, in part because of these sensory characteristics and targeted marketing by the tobacco industry;⁹

11. E-cigarettes may be a first product used by youth not using other tobacco products: 20.3% of middle school youth and 7.2% of high school youth who had tried e-cigarettes had not tried a conventional tobacco cigarette;¹⁰

12. Approximately 31% of licensed tobacco retailers in Berkeley operate within 600 feet of a school. Block lengths vary, but 600 feet is approximately 2 blocks;

13. Overall, studies suggest that youth who may have otherwise never smoked cigarettes are now getting hooked on nicotine due to e-cigarettes, and that adolescents who use e-cigarettes are more likely to progress from experimenting with cigarettes to becoming established smokers;¹¹ and

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

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

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

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

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

¹¹ California Department of Public Health. *Electronic Cigarettes: A Summary of the Public Health Risks and Recommendations for Health Care Professionals Health Advisory*. January 28, 2015.

14. According to the Surgeon General of the United States, smoking is “fundamentally a pediatric disease.” Approximately 90% of adult smokers started by age 18 and almost no one begins smoking after age 21.¹²

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

9.80.010 Purpose.

The purposes of this chapter are to reduce minors’ access and exposure to tobacco products and to discourage violations of tobacco-related laws that prohibit or discourage the sale or distribution of tobacco products to minors and that prohibit the display of tobacco products within reach of the public, but not to expand or reduce the degree to which the acts regulated by federal or state law are criminally proscribed or to alter the penalty provided therefore.

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

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

9.80.020 Definitions.

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

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

¹² U.S. Department of Health and Human Services. *The Health Consequences of Smoking—50 Years of Progress: A Report of the Surgeon General*. Atlanta, GA: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2014.

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

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

D. "Proprietor" means a person with an ownership or managerial interest in a business. An ownership interest shall be deemed to exist when a person has a ten percent (10%) or greater interest in the stock, assets or income of a business other than the sole interest of security for debt. A managerial interest shall be deemed to exist when a person can or does have, or can or does share, ultimate control over the day-to-day operations of a business.

E. "Public park" means any public property within the boundaries of the City of Berkeley, excluding public property under the ownership or control of the Regents of the University of California, used as a playground, park, community garden or open space, as specified by City Council Resolution from time to time.

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

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

H. "Tobacco product" means:

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

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

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

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

9.80.030 Requirement for tobacco retail licensure.

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

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

C. Any tobacco retailer who as of September 15, 2015 was lawfully selling electronic nicotine delivery systems or e-liquids and was not otherwise required to have a tobacco retailer’s license shall be exempt from the requirements of subdivision A of this Section until January 1, 2016 and shall be considered an existing tobacco retailer for that location for purposes of Sections 9.80.035.C and 9.80.035.D.

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

9.80.035 Limits on eligibility for a tobacco retailer license.

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

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

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

D. Effective January 1, 2019, no existing tobacco retailer license may be renewed to authorize the sale of tobacco products within six hundred (600) feet of any school or public park as measured by a straight line from the nearest point of the property line of the parcel on which the school or public park is located to the nearest point of the property line of the parcel on which the business is located.

E. A tobacco retailer lawfully operating prior to March 1, 2015 that is ineligible to renew a tobacco retailer's license due to the proximity to a school or public park as specified in subdivision D may obtain the right to renew its license yearly, beginning January 1, 2019, for up to a total of three years if it makes a showing, as determined by the City Manager or his or her designee, that denying renewals would result in a taking without just compensation under either the California or the United States Constitution.

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

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

9.80.037 Medical cannabis dispensary.

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

Section 7. Posting.

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

[Option #2] ORDINANCE NO. -N.S.

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

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

Section 1. Legislative findings:

A. The City Council hereby finds that:

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

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

² Henriksen L, Feighery EC, Schleicher NC, et al. 2008. "Is Adolescent Smoking Related to Density and Proximity of Tobacco Outlets and Retail Cigarette Advertising Near Schools?" *Preventive Medicine* 47: 210-214.

³ Henriksen L, Feighery EC, Schleicher NC, et al. 2008. "Is Adolescent Smoking Related to Density and Proximity of Tobacco Outlets and Retail Cigarette Advertising Near Schools?" *Preventive Medicine* 47: 210-214.

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

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

7. 6.8% of all youth between 6th and 12th grade report trying electronic smoking devices, according to an MMWR report;⁶

8. A University of Michigan national survey of substance use among students in 8th, 10th and 12th grade found that more teens use e-cigarettes than traditional, tobacco cigarettes or any other tobacco product—the first time a U.S. national study shows that teen use of e-cigarettes surpasses use of tobacco cigarettes. Specifically, 9 percent of 8th-graders, 16 percent of 10th graders, and 17 percent of 12th-graders reported e-cigarette use;⁷

9. Menthol cigarettes and flavored e-cigarettes, little cigars, and flavored smokeless products are targeted toward youth;⁸

10. In addition to its candy-like appeal, menthol's sensory effects and ability to mask irritation make menthol cigarettes appealing as a starter product. Youths disproportionately smoke menthols, in part because of these sensory characteristics and targeted marketing by the tobacco industry;⁹

11. E-cigarettes may be a first product used by youth not using other tobacco products: 20.3% of middle school youth and 7.2% of high school youth who had tried e-cigarettes had not tried a conventional tobacco cigarette;¹⁰

12. Approximately 31% of licensed tobacco retailers in Berkeley operate within 600 feet of a school. Block lengths vary, but 600 feet is approximately 2 blocks;

13. Overall, studies suggest that youth who may have otherwise never smoked cigarettes are now getting hooked on nicotine due to e-cigarettes, and that adolescents who use e-cigarettes are more likely to progress from experimenting with cigarettes to becoming established smokers;¹¹ and

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

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

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

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

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

¹¹ California Department of Public Health. *Electronic Cigarettes: A Summary of the Public Health Risks and Recommendations for Health Care Professionals Health Advisory*. January 28, 2015.

14. According to the Surgeon General of the United States, smoking is “fundamentally a pediatric disease.” Approximately 90% of adult smokers started by age 18 and almost no one begins smoking after age 21.¹²

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

9.80.010 Purpose.

The purposes of this chapter are to reduce minors’ access and exposure to tobacco products and to discourage violations of tobacco-related laws that prohibit or discourage the sale or distribution of tobacco products to minors and that prohibit the display of tobacco products within reach of the public, but not to expand or reduce the degree to which the acts regulated by federal or state law are criminally proscribed or to alter the penalty provided therefore.

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

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

9.80.020 Definitions.

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

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

¹² U.S. Department of Health and Human Services. *The Health Consequences of Smoking—50 Years of Progress: A Report of the Surgeon General*. Atlanta, GA: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2014.

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

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

AD. –"Proprietor" means a person with an ownership or managerial interest in a business. An ownership interest shall be deemed to exist when a person has a ten percent (10%) or greater interest in the stock, assets or income of a business other than the sole interest of security for debt. A managerial interest shall be deemed to exist when a person can or does have, or can or does share, ultimate control over the day-to-day operations of a business.

E. "Public park" means any public property within the boundaries of the City of Berkeley, excluding public property under the ownership or control of the Regents of the University of California, used as a playground, park, community garden or open space, as specified by City Council Resolution from time to time.

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

GG. "Tobacco paraphernalia" means items or instruments designed for the consumption, or preparation for consumption, of any substance containing tobacco or derived from tobacco, including but not limited to cigarette papers or wrappers, pipes, hookahs, ~~holders of smoking materials of all types, and~~ cigarette rolling machines, ~~and any other item designed for the smoking or ingestion of tobacco products.~~

BH. "Tobacco product" means:

1. any substance containing, [made of, or derived from](#) tobacco [or nicotine leaf](#), including but not limited to cigarettes, cigars, [cigarillos](#), pipe tobacco, snuff, chewing tobacco, dipping tobacco, bidis, [shisha](#),
2. [any e-liquid](#),
3. [any electronic nicotine delivery system, and](#)
4. ~~or any other instrument or~~ [tobacco](#) paraphernalia ~~which is designed for the smoking or ingestion of tobacco or products prepared from tobacco~~.
"Tobacco product" does not include any cessation product specifically approved by the United States Food and Drug Administration for use in treating nicotine or tobacco dependence.

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

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

9.80.030 Requirement for tobacco retail licensure.

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

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

C. [Any tobacco retailer who as of September 15, 2015 was lawfully selling electronic nicotine delivery systems or e-liquids and was not otherwise required to have a tobacco retailer's license shall be exempt from the requirements of subdivision A of this Section until January 1, 2016 and shall be considered an existing tobacco retailer for that location for purposes of Sections 9.80.035.C and 9.80.035.D.](#)

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

9.80.035 Limits on eligibility for a tobacco retailer license.

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

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

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

D. Effective January 1, 2019, no existing tobacco retailer license may be renewed to authorize the sale of tobacco products within six hundred (600) feet of any school or public park as measured by a straight line from the nearest point of the property line of the parcel on which the school or public park is located to the nearest point of the property line of the parcel on which the business is located.

E. A tobacco retailer lawfully operating prior to March 1, 2015 that is ineligible to renew a tobacco retailer's license due to the proximity to a school or public park as specified in subdivision D may obtain the right to renew its license yearly, beginning January 1, 2019, for up to a total of three years if it makes a showing, as determined by the City Manager or his or her designee, that denying renewals would result in a taking without just compensation under either the California or the United States Constitution.

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

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

9.80.037 Medical cannabis dispensary.

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

Section 7. Posting.

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

Resources for Small Business Owners

HHCS staff will explore the possibility of finding additional resources to support businesses during the transition period following adoption of TRL ordinance amendments. While there is no guarantee of additional funding or of any specific level of support, there will be a concerted effort to bring in additional resources.

The following resources are currently available to Small Business owners:

Alameda County Small Business Development Center (ACSBDC)

2120 University Avenue, Berkeley, CA 94704 (on the 7th floor of the WeWorks Building).

“Through expert [no-cost counseling](#), top-notch [free seminars](#) and [low-cost technology training](#), to support in navigating licensing & permit issues and identifying resources, the Alameda SBDC guides small businesses to increased success rates. Serving all of Alameda County, the Alameda County SBDC connects small business owners with Business Advisors who work hands-on with clients to address challenges, seize opportunities and grow our clients' bottom line.”

Tel: (510) 208-0410

<http://acsbdc.org/>

Small Business Administration (SBA)

The SBA offers general and technical assistance to new and established businesses. Services include loan programs, business counseling, management training, conferences, referrals and reference libraries.

Small Business Information Center

Tel: (510) 273-6000

Tel: (800) 827-5722

Email: answerdesk@sba.gov

http://www.sba.gov/starting_business/

Service Corps of Retired Executives (SCORE)

Retired business professionals volunteer to provide free counseling to individuals starting small businesses. Counseling and workshops are available at a cost. Visit their site at:

<http://www.eastbayscore.org/>

Action: 27 speakers. M/S/C (Bates/Anderson) to direct the City Manager to bring back a draft ordinance to Council that includes the following:

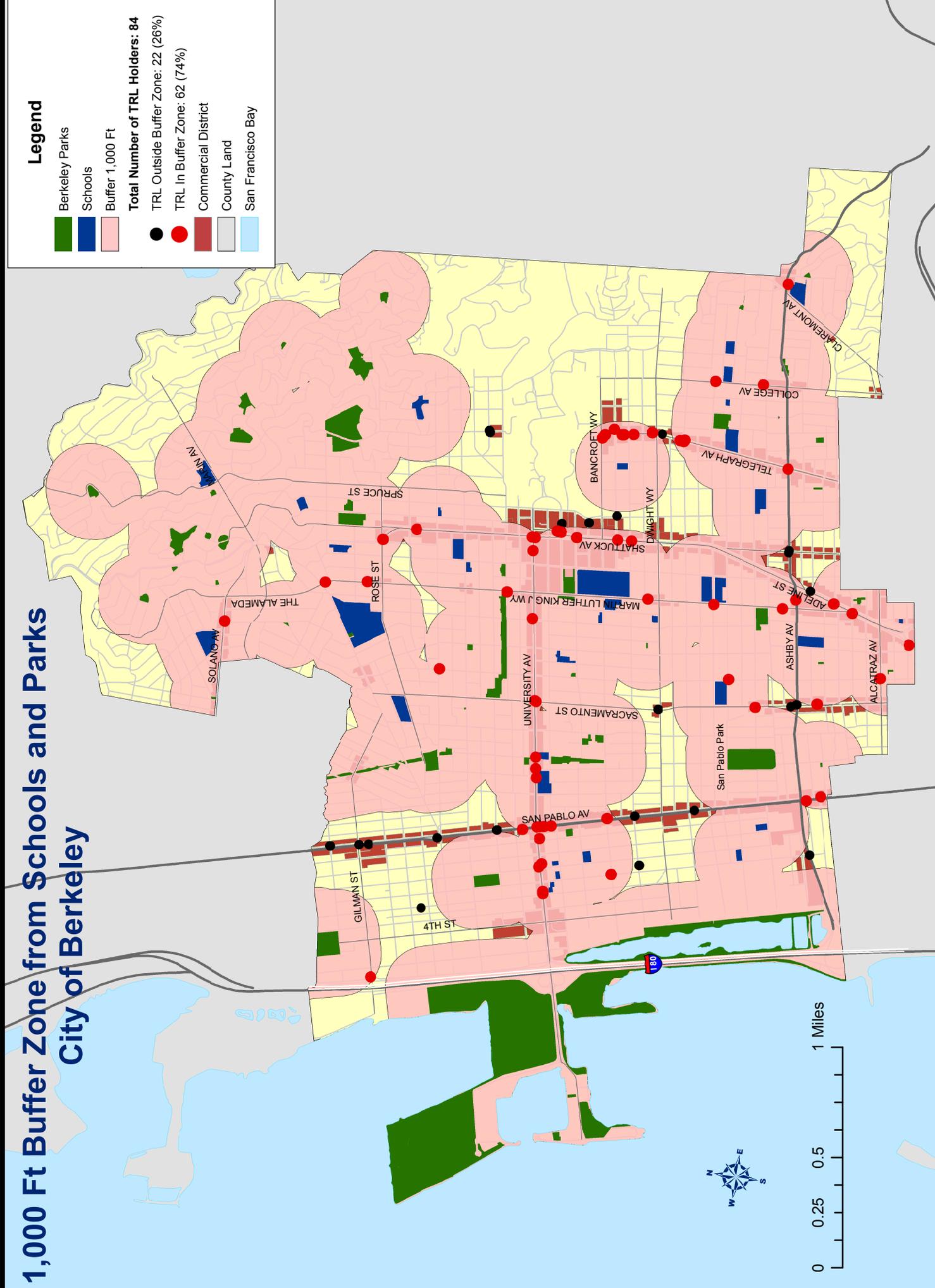
1. Create a 1000 foot buffer from parks and schools applied to sales of Electronic Nicotine Delivery Systems (ENDS) that include tobacco and/or nicotine products and to sales of flavored cigarettes.
2. Consider an alternate buffer zone for other tobacco products.
3. Allow vaping and e-cigarette paraphernalia to be sold (without tobacco/nicotine).
4. Consider whether the City could ban ENDS and flavored cigarettes throughout the City, but allow ENDS-type delivery products for medical cannabis.

Vote: Ayes – Maio, Moore, Anderson, Arreguin, Capitelli, Wengraf, Droste, Bates; Noes – Worthington.

1,000 Ft Buffer Zone from Schools and Parks City of Berkeley

Legend

-  Berkeley Parks
-  Schools
-  Buffer 1,000 Ft
-  Total Number of TRL Holders: 84
-  TRL Outside Buffer Zone: 22 (26%)
-  TRL In Buffer Zone: 62 (74%)
-  Commercial District
-  County Land
-  San Francisco Bay



600 Ft Buffer Zone from Schools and Parks City of Berkeley

Attachment 6b

Legend

- Berkeley Parks
- Schools
- Buffer 600 Ft
- Total Number of TRL Holders: 84
- TRL Outside Buffer Zone: 58 (69%)
- TRL in Buffer Zone: 26 (31%)
- Commercial District
- County Land
- San Francisco Bay

