



# CITY COUNCIL AGENDA REPORT

MEETING DATE: SEPTEMBER 1, 2015

ITEM NUMBER: PH-1

**SUBJECT: CODE AMENDMENT CO-15-02: AN AMENDMENT TO TITLE 8 AND TITLE 13 OF THE COSTA MESA MUNICIPAL CODE RELATED TO VAPING IN PUBLIC FACILITIES AND THE REGULATION OF SMOKING LOUNGE USES**

**FROM: PLANNING DIVISION / DEVELOPMENT SERVICES DEPARTMENT**

**PRESENTATION BY: STEPHANIE ROXAS, ASSOCIATE PLANNER**

**DATE: AUGUST 20, 2015**

**FOR FURTHER INFORMATION CONTACT: STEPHANIE ROXAS, AICP (714) 754-5667  
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## **RECOMMENDATION**

Pursuant to the Planning Commission's recommendation, give first reading to Ordinance No. 15-10 (Attachment 1), to be read by title only, and waive further reading.

## **BACKGROUND**

### ***Moratorium Expires on November 5, 2015***

On November 5, 2013, the City Council adopted Urgency Ordinance No. 13-07 approving an initial 45-day moratorium on hookah lounges prohibiting the establishment of new hookah lounges within City limits. On December 3, 2013, the City Council extended the moratorium for an additional 10 months and 15 days. On October 7, 2014 the City Council approved a twelve month extension of the moratorium to allow for further study of regulatory options for hookah lounges. The moratorium will expire on November 5, 2015.

### ***Local Laws for Smoking Lounges***

Staff reviewed ordinances from other Orange County cities relative to the regulation of smoking lounge uses. The following table lists which cities prohibit and permit smoking lounges, and more information on their regulations is provided in Attachment 5.

| City Prohibits Smoking Lounges |              | City Requires a CUP for Smoking Lounges<br>(*Permitted ministerially subject to criteria) |               |
|--------------------------------|--------------|---|---------------|
| Irvine                         | San Clemente | Anaheim*  | Laguna Beach  |
| Laguna Niguel                  | Santa Ana    | Buena Park*   | Lake Forest   |
| Newport Beach                  | Seal Beach   | Fountain Valley   | Mission Viejo |
| Orange                         |              | Huntington Beach*   | Westminster*  |

## ***Planning Commission Actions***

Over the last few years, staff and the Planning Commission evaluated different regulatory options and considered potential Code amendments that would mitigate the negative effects associated with hookah lounge uses. During this time, the City also experienced an increase in the number of e-cigarette retail establishments, so this work effort was also extended to electronic cigarettes, or “e-cigarettes”. Currently, electronic cigarettes are not regulated by the Food and Drug Administration or the City’s Zoning Code.

On July 27, 2015, the Planning Commission held a public hearing to consider Code Amendment CO-15-02 amending Costa Mesa Municipal Code Title 8, Chapter 8 related to vaping in public facilities and Title 13 (Zoning Code) to create regulations for new smoking lounge establishments. The meeting minutes are provided as Attachment 2, and a list of existing businesses notified of the public hearing is provided as Attachment 3. The proposed regulations within the ordinance were developed in response to specific areas of concerns previously cited by the Planning Commission and City Council. During the hearing, several members of the public generally spoke of the distinction between tobacco and electronic cigarette/vaping products and their users. The Planning Commission recommended approval of the draft ordinance with several modifications intended to address the concerns raised relative to vaping businesses. A summary of the public comments and links from the Planning Commission meeting are provided below:

Planning Commission Staff Report:

<http://www.costamesaca.gov/ftp/planningcommission/agenda/2015/2015-07-27/PH-2.pdf>

Meeting Minutes: (Attachment 2)

<http://www.costamesaca.gov/modules/showdocument.aspx?documentid=19185>

| <b>Planning Commission Hearing: July 27, 2015</b>              |  |
|--|--|
| <b>Name, Affiliation</b>                                       | <b>Summary of Public Comments Related to Vaping / E-Cigarettes</b>   |
| Austin Hopper,<br>supplier of electronic<br>cigarette products | Thanked the City for the ordinance and appreciated the City’s efforts to support existing businesses by allowing them to operate as normal.  |
| Douglas Hughes,<br>vapor business owner                        | Stated reasons why electronic cigarettes are less harmful than tobacco.  |
| Norm Bour,<br>Vapor Mentor                                     | Stated the City is “pro-business” compared to other cities that have required CUP’s for vape shops. He commended the City for allowing the existing businesses to continue operating.                          |
| Laura McCollum,<br>SoCal Vape Expo                             | Wanted to see bans on the vaping industry in the general Southern California region stopped.   |
| Shane Simpson,<br>C3 Vapors                                    | Gave personal testimony on how vaping has helped him quit smoking and changed his life. Does not like vaping to be associated with tobacco.  |
| Lucy Noble,<br>Alley Blends LLC                                | Wanted the City to continue allowing product testing inside vape shops. She also spoke about the benefits of electronic cigarettes.  |
| John Cavanaugh,<br>owner of vaping retail<br>businesses        | Owens several businesses in the Costa Mesa area and thanked the City for the ordinance. Supported the Commission’s proposed modifications to the ordinance to distinguish between vaping and tobacco products. |

## **ANALYSIS**

The draft ordinance recommended by the Planning Commission is provided as Attachment 1. Each proposed regulation was developed in response to a specific issue/concern raised by the Planning Commission or City Council at previous meetings, which are summarized in the table below and detailed further in this report.

| <b>Issue</b>   | <b>Proposed Regulation</b>  |
|--|---|
| 1. Smoking lounges are not currently regulated by the Zoning Code.   | 1. Add a definition and create zoning regulations specifically pertaining to smoking lounges.   |
| 2. In the past, retail stores have expanded their business to include lounge uses without City approval.                 | 2. Add a definition for “smoking/vaping retailers” to preclude the establishment of lounge uses as part of a retail store.  |
| 3. The City’s current ban on smoking in parks and facilities does not include electronic cigarettes.                     | 3. Prohibit vaping in specified public places by amending the definition of “smoking” in Title 8, Chapter V of the Code.  |
| 4. Existing businesses would become nonconforming by the proposed ordinance.   | 4. Consider the existing two, legally-established smoking lounges as legal nonconforming uses, which may be subject to discontinuation or closure in the future under specific circumstances.   |
| 5. Smoking lounges may be incompatible with residential areas and public uses.   | 5. Create standards to allow several zoning districts where new smoking lounges may be permitted by right or conditionally permitted.   |
| 6. The Zoning Code does not have regulations to address “nuisance” type impacts from smoking lounges.                    | 6. Create operational and development standards to address various potential issues, including but not limited to: <ul style="list-style-type: none"> <li>○ Noise</li> <li>○ Public Safety</li> <li>○ Building Safety</li> <li>○ Parking</li> </ul> |
| 7. Additional concerns were raised by vaping industry representatives at the July 27, 2015, Planning Commission meeting. | 7. The Planning Commission recommended changes to the definitions to distinguish between tobacco and electronic cigarette/vaping products.  |

In developing the recommend ordinance, staff researched other cities, evaluated regulatory options, and identified best practices in the regulation of smoking lounges. For the City Council's reference, Attachments 5 and 6 summarize smoking lounge and outdoor vaping regulations from other Orange County cities, and Attachment 7 references where the language in the draft ordinance originated from.

1. Add a definition and create zoning regulations specifically pertaining to smoking lounges.

Smoking lounge uses are not defined by the Zoning Code. Currently, smoking lounges are treated like restaurants and regulated accordingly. The proposed change recognizes smoking lounges as a separate and distinct use. In addition to adding this use to the Citywide Land Use Matrix, the ordinance creates a section in the Special Land Use Regulations chapter of the Zoning Code to create additional zoning standards specifically for smoking lounges (detailed in subsection #6 of this report).

2. Add a definition for "smoking/vaping retailers" to preclude the establishment of lounge uses as part of a retail store.

The recommended ordinance does not affect existing, legally-permitted retail stores of electronic cigarettes, vape-related products, tobacco products, and cigars. The intention of this proposed regulation is to allow existing smoking/vaping retail businesses to continue their current business operations, while establishing specific parameters to distinguish between new retail and lounge establishments.

The ordinance would distinguish between retail shops and smoking lounges. In the past, establishments have opened in the City indicating on their business license applications that they are retail uses only, but eventually established lounges without City approval. To develop a definition, staff visited most of the smoking/vaping retailers in the City to understand their business operations. The presence of food/beverage service and a large lounge seating area would typically result in a higher volume of customers and traffic that is greater than a conventional retail shop.

Proposed "Smoking/Vaping Retailer" Definition –

*A smoke shop, electronic cigarette retailer, vapor cigarette retailer, or any other retail business that sells tobacco, electronic cigarettes, and related products primarily for off-site consumption. Smoking/vaping retailers shall not include food or beverage service, outdoor seating, or an indoor seating area greater than 100 square feet in area.*

All existing smoking/vaping retail businesses comply with this proposed definition. Furthermore, the recommended ordinance allows vaping retailers to continue offering product testing within the store, which is a common practice in this business industry.

3. Prohibit vaping in specified public places by modifying the current prohibition of smoking in public facilities (Title 8, Chapter V).

The Costa Mesa Municipal Code (Title 8 - Health and Sanitation, Chapter V) currently prohibits smoking in designated "no smoking" areas within public facilities and parks.

Because these provisions predated the technology of electronic cigarettes, this smoking prohibition does not refer to electronic cigarettes. However, electronic cigarettes are designed to resemble conventional cigarettes with unknown risk factors potentially causing confusion and uncertainty with the enforcement of this regulation. By making minor changes to the definitions in Title 8 of the Code, the existing prohibition would also prohibit vaping and electronic cigarettes in parks and public facilities. The proposed changes to the definition are red-lined below:

*“Smoke” or “smoking” means and includes any of the following:*

- *The consumption of tobacco products, electronic cigarettes, and related products by burning, inhalation, vaporization, or other forms of ingestion.*
- *The holding or carrying of a lighted or electronically-charged smoking device; or*
- *Emitting or exhaling the smoke or vapor directly from a cigar, cigarette, pipe, electronic cigarette or any other lighted smoking device or substance.*

The entire Code chapter is provided as Attachment 4 with the recommended Code changes denoted in red. Attachment 6 summarizes other cities that have passed laws limiting smoking/vaping in outdoor areas.

4. Consider the existing two, legally-established smoking lounges as legal nonconforming uses, which may be subject to discontinuation or closure in the future under specific circumstances.

There are two businesses that are directly abutting residential uses; however, under the current zoning requirements the City requires these businesses to close by 11 p.m.

- i. Orange County Cigars – 2470 Newport Boulevard
  - Hours of Operation: 3:00 p.m. to 10:00 p.m.
  - Size of Lounge Area: Approximately 1,000 sq. ft.
- ii. Coastline Hookah Lounge (formerly Sultana Hookah) – 698 W. 19<sup>th</sup> Street
  - Hours of Operation: 5:00 p.m. to 11:00 p.m.\*  
(\*Code Enforcement activity is pending on this property due to business operations past the required 11 p.m. closure. Operating past 11 p.m. is not permitted by the current Zoning Code. An extension of the business hours would constitute a loss in its status as a legal, nonconforming use.)
  - Size of Lounge Area: Approximately 1,000 sq. ft.

The recommended ordinance allows these two smoking lounges to continue operating at their existing locations as legal nonconforming uses. The purpose of this regulation is to ensure that the ordinance does not disrupt or displace existing, law-abiding businesses. In this case, the legal nonconforming status signifies that:

- If the business is discontinued or abandoned for 6 consecutive months (or for 18 nonconsecutive months during a three year period), it shall be considered discontinued and cannot be established.
- Structural alterations such as building additions or expansion of the lease area shall not be approved. Ordinary maintenance is allowed.

- No changes to the hours of operation beyond 11 p.m. shall be permitted.
- No changes to the size of the current business shall be permitted.

5. Create standards to allow several zoning districts where new smoking lounges may be permitted by right or conditionally permitted.

As previously noted, the Zoning Code does not address smoking lounges. Currently, smoking lounges are treated like restaurants and are permitted by right in a wide range of areas throughout the City. Under the proposed Code amendment, new smoking lounges would be permissible by right or by approval of a conditional use permit in three zoning districts, which are summarized in the table:

| Zoning District                            | Examples of Locations  | Proposed Regulation                                   |
|--|--|---|
| C1-S<br>(Shopping Center)                  | <ul style="list-style-type: none"> <li>• Harbor Center (2300 Harbor)</li> <li>• K-Mart Center (2200 Harbor)</li> <li>• 17<sup>th</sup> Street Village (241 &amp; 267 E. 17<sup>th</sup> Street)</li> </ul> | CUP /<br>Public Hearing<br>Required                   |
| PDC<br>(Planned Development<br>Commercial) | <ul style="list-style-type: none"> <li>• The Triangle (1870 Harbor)</li> <li>• Costa Mesa Courtyards (1835 Newport)</li> <li>• Mesa Verde Shopping Center (2701 Harbor)</li> </ul>                         | CUP /<br>Public Hearing<br>Required                   |
| MP<br>(Industrial Park)                    | <ul style="list-style-type: none"> <li>• Industrial properties along Redhill Ave, Airway Ave, Pullman St, and Fischer Ave</li> </ul>   | Permitted, subject to<br>compliance with<br>standards |

Attachment 8 is a map exhibit identifying these zones in the City. The C1-S and PDC districts include large commercial lots typically containing multiple building structures that could buffer potential noise. The MP district includes large industrial properties generally located near the airport with few surrounding residential uses. The proposed zoning standards provides some opportunity for new smoking lounges to establish through a streamlined process, with reserving the ability for the City to review new applications in commercial areas on a case-by-case basis.

To prevent the establishment of new smoking lounges in a concentrated area, the draft ordinance also requires smoking lounges to be separated by a minimum distance of 1,500 feet. For example, this regulation would not allow two smoking lounges within the same commercial center.

Note for the Record: The ordinance proposed at the Planning Commission hearing included separation requirements between smoking lounges and sensitive uses (i.e., schools and parks). Given that the recommended ordinance would already limit new smoking lounges to specific zones, the additional distance separation requirements are unnecessary, and consequently have been removed from the draft ordinance.

6. Create operational and development standards to address various potential issues.

As noted above, the recommended ordinance includes the creation of a new section in the Zoning Code containing special land use regulations for smoking lounges. This new section would include operational and development standards applicable to all smoking lounges (new and existing), and the standards would be included as conditions of approval. However, to provide flexibility and give the City discretion to consider unique circumstances, applicants may request modifications to the standards through the Conditional Use Permit process. The proposed operational and development standards modeled after other cities (Anaheim, Westminster, Santa Ana) are intended to address specific areas of concern, which are summarized below.

| <b>Areas of Concern</b>  | <b>Proposed standards include:</b>  |
|--------------------------|---|
| Noise                    | <ul style="list-style-type: none"><li>○ Hours of operation limited to 8:00 a.m. - 11:00 p.m.</li><li>○ Outdoor business activities are prohibited.</li><li>○ Live entertainment is prohibited.</li><li>○ Businesses are subject to compliance with the City's Noise Control standards and enforcement actions.</li></ul>            |
| Public Safety            | <ul style="list-style-type: none"><li>○ Employees and customers must be over the age of 18.</li><li>○ Alcoholic beverages are prohibited.</li><li>○ The City has the discretion to require security guards.</li><li>○ The interior of the business must be visible (i.e. no window coverings) and adequately illuminated.</li></ul> |
| Building and Fire Safety | <ul style="list-style-type: none"><li>○ Business must comply with maximum building occupancy.</li><li>○ Adequate ventilation must be provided.</li></ul>  |
| Parking                  | <ul style="list-style-type: none"><li>○ New smoking lounges must provide parking at a ratio of 17 spaces per 1,000 sq. ft. of floor area.</li></ul>   |

In addition, the Food and Drug Administration is currently proposing legislation that would regulate electronic cigarettes. Accordingly, the ordinance includes a standard requiring all businesses to operate in compliance with all applicable Federal, State, County, and local laws, in the event laws relative to electronic cigarettes change in the future.

7. Planning Commission recommended changes to distinguish between tobacco and electronic cigarette/vaping products.

As noted previously, the Planning Commission recommended modifications to the definitions to address public comments regarding the differences between tobacco and electronic cigarette/vaping products and their users. For example, under the Planning Commission's changes, vape shops are no longer referred to as "tobacco retailers" and a definition was added for electronic cigarettes.

Proposed "Electronic Cigarette" Definition –

*An electronic and/or battery-operated device used to provide an inhalable dose of nicotine by delivering a vaporized solution. The term includes any such device*

*manufactured, distributed, marketed, or sold as an electronic cigarette, an electronic cigar, an electronic cigarillo, an electronic pipe, an electronic hookah, or any other product name or descriptor. The term does not include any medical inhaler prescribed by a licensed doctor.*

### **ADDITIONAL OUTREACH**

The City reached out to other agencies, City departments, and local groups to provide an opportunity to review the draft ordinance and provide staff with comments and input. Outreach included, but was not limited to, the Orange County Health Care Agency (OCHCA), Newport Mesa School District, Costa Mesa Police Department, and American Lung Association in California. In addition, a representative from OCHCA will provide a brief presentation to the City Council at the public hearing on September 1<sup>st</sup> and be available to answer any questions regarding current legislation and the health aspects of smoking/vaping.

Staff also conducted outreach to the business community, including contacting the existing smoking lounges and smoking/vaping retailers in the City via phone calls, emails, and site visits to inform them of the pending Code changes. Public notices were mailed to all existing smoking lounges and smoking/vaping retailers in the City apprising them of the Planning Commission and City Council hearings. This outreach provided businesses with an opportunity to ask questions and express any concerns to staff regarding the proposed ordinance. In addition, because a large number of representatives from the vaping industry attended the Planning Commission meeting on July 27, 2015, staff reached out to several business owners to ensure the proposed ordinance addressed any sensitivities related to electronic cigarette/vaping businesses.

All correspondence received from the public are provided as Attachment 9.

### **LEGAL REVIEW**

The draft ordinance has been reviewed by the City Attorney's Office.

### **ALTERNATIVES**

The City Council may take the following actions:

1. *Continue the meeting to address additional changes to the draft ordinance.* The deadline for Council to adopt an ordinance, under the current moratorium, is November 5, 2015. The ordinance would need to be considered by September 15, 2015.
2. *Direct staff to modify the ordinance and forward to City Council for consideration.* If the ordinance is not ultimately adopted by the City Council, smoking lounges may continue to be established with no formal regulations in the Zoning Code. Furthermore, individuals may continue to use electronic cigarettes in public parks, and the existing moratorium on new hookah lounges would need to be extended.

## CONCLUSION

The draft ordinance recommended by the Planning Commission does not require any existing, legally-permitted smoking lounge, hookah parlor, smoke shop, or electronic cigarette/vaping retail business to close or relocate their business. The draft ordinance is intended to allow existing businesses to continue their current business operations, while creating standards to ensure new smoking lounges operate in a manner that is compatible with the surrounding area.

Over the last two years, the City Council and Planning Commission have expressed a desire to formally regulate smoking lounges to minimize their negative impacts, including increased levels of noise, loitering, odors, public nuisances, disturbances of the peace, and the creation of unsafe conditions and situations. Staff researched other cities to evaluate regulatory options and identify best practices in the regulation of smoking lounges. Furthermore, staff developed the draft ordinance in response to specific issues and areas of concern raised by the City Council and Planning Commission at prior meetings. Code Amendment CO-15-02 would provide for the comprehensive regulation of new and existing smoking lounges and smoking/vaping retailers to ensure businesses are operated in a manner that is compatible with surrounding uses and properties.

Planning Commission recommended that the City Council approve and give first reading to the ordinance.

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Associate Planner

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- Attachments:
1. [Draft Ordinance Recommended by the Planning Commission](#)
  2. [Minutes from Planning Commission hearing \(July 27, 2015\)](#)
  3. [List of existing smoking lounges and smoking/vaping retailers](#)
  4. [CMMC Title 8, Chapter V with recommended changes red-lined](#)
  5. [City Survey – Summary of smoking lounge regulations](#)
  6. [City Survey – Laws limiting smoking/vaping in outdoor areas](#)
  7. [Reference list for draft ordinance citing other cities](#)
  8. [Map of zoning districts allowing new smoking lounges](#)
  9. [Public Correspondence](#)

cc:

- Chief Executive Officer
- Assistant Chief Executive Officer
- Economic Development & Development Services Director / Deputy CEO
- City Attorney
- Public Services Director

Transportation Svs. Mgr.  
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