



## STAFF REPORT TO THE CITY COUNCIL

**DATE:** Regular Meeting of July 25, 2017

**TO:** Honorable Mayor and Members of the City Council

**SUBMITTED BY:** Forrest Ebbs, Community Development Director *FE*

**SUBJECT:** Ordinance Amending Tobacco and Paraphernalia Retailer Regulations by Repealing Antioch City Code Sections 5-16.01 and 6-8.14, and Repealing and Replacing Sections 9-5.203 and 9-5.3843 (First Reading).

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### **RECOMMENDED ACTION**

It is recommended that the City Council introduce the Ordinance amending City regulations regarding tobacco and paraphernalia retailers by prohibiting new tobacco and paraphernalia retailer businesses, subject to certain exceptions, and establishing legal non-conforming use procedures for established tobacco and paraphernalia retailer businesses.

### **STRATEGIC PURPOSE**

Strategy D-1: Improve existing community partnerships and realize new partnerships to help improve neighborhoods and reduce blight.

Strategy D-2: Create a multifaceted team of resources that can assemble to address areas that habitually experience any combination of criminal, illegal, blighting, and nuisance activities and/or conditions.

### **FISCAL IMPACT**

The proposed ordinance will affect a small number of existing businesses and is not anticipated to have any significant impact on sales or business license taxes.

### **DISCUSSION**

The City Council previously expressed an interest in seeing a more comprehensive ordinance that addressed existing and future tobacco retailers. The proposed ordinance is in response to these comments.

This item was initially considered by the City Council at its June 27, 2017 meeting. The public hearing was opened and continued to the July 25, 2017 meeting so that staff might improve the ordinance based on comments received from the Contra Costa

Tobacco Prevention Project. In addition, staff was asked to explore additional options for restricting the sale of tobacco products and smoking, in general.

At this point, staff recommends that the City Council move forward with the proposed Ordinance, which affects zoning and land use and will be housed in the Zoning Ordinance. The additional smoking restrictions that were presented to the City Council would then be pursued in a separate effort through a more comprehensive amendment of existing Title 6, Chapter 9 (Smoking) of the Antioch Municipal Code. This approach will allow for more immediate implementation of the prohibition on new tobacco retailers and the amortization of existing tobacco retailers. It will also recognize that the two efforts, though complementary and of similar spirit, address two distinct functions of the Municipal Code – *Zoning* (Title 9) and *Sanitation and Health* (Title 6).

### Background

On May 17, 2017, the Planning Commission conducted a public hearing and considered the subject amendments to the City tobacco regulations. The Planning Commission voted 5-1 to recommend approval of the amendments. The resolution and the minutes from the May 17, 2017 meeting are attached (Attachments “B” and “C”).

The proposed ordinance (Attachment “A”) would create new definitions in Antioch Municipal Code (AMC) Section 9-5.3843 (Tobacco and Paraphernalia Retailers) for the following terms: “Drug Paraphernalia”, “Drug Paraphernalia Retailer”, “Person”, “Sold or Transferred”, “Tobacco Product”, and “Tobacco Retailer”.

In addition, the ordinance would make the following substantive changes to existing regulations:

Current City regulations codify the State laws regarding display and sales of drug paraphernalia (see AMC § 5-16.01; Cal. Health and Safety Code § 11364.5), including State regulations limiting the display of drug paraphernalia to separate rooms in which persons under the age of 18 not accompanied by a parent or guardian are excluded.

- AMC Title 5, Chapter 16, which codifies State laws regarding drug paraphernalia retailers, would be repealed so that the Municipal Code relies entirely on the State laws as they may be amended.
- AMC section Title 6, Chapter 8, section 6-8.14, which requires tobacco retailers to possess tobacco retailer licenses, would be repealed and replaced by a Use Permit requirement in AMC section 9-5.3843(E)(2).
- AMC section 9-5.3843 would set forth the City’s regulations for tobacco and paraphernalia retailers. The new regulations would do the following:
  - Completely prohibit the creation and operation of any new tobacco and/or paraphernalia retailer businesses subject to certain exceptions described below.
  - The prohibition on tobacco and paraphernalia retailers would not apply to the following businesses:

- Pharmacists, physicians, dentists, podiatrists, or veterinarians who furnish or prescribe drug paraphernalia as permitted by law.
- Any manufacturer, wholesaler, or retailer licensed by the Board of Pharmacy to sell or transfer drug paraphernalia.
- Any tobacco retailer or drug paraphernalia retailer operating with a valid Use Permit issued by the City.
- The following businesses would be permitted to obtain a Use Permit to begin operating as tobacco retailers:
  - Convenience stores that are ancillary to a gas station and having less than 20% of their sales area devoted to tobacco products.
  - Retail businesses larger than 5,000 square feet with less than 5% of their sales area devoted to tobacco products.
- The above businesses would be prohibited from selling tobacco unless these additional conditions are met:
  - Convenience stores would not be able sell drug paraphernalia.
  - The business is not located within 500' of any school, public park, playground, recreational center, or child care center.
- Existing tobacco and paraphernalia retailers that do not have Use Permits would be considered legal non-conforming uses that could continue to operate subject to the following conditions:
  - A tobacco retailer or drug paraphernalia retailer may be sold and transferred at any point prior to January 1, 2023.
  - From January 1, 2023 onward, a tobacco retailer or drug paraphernalia retailer may not be sold or transferred.

The City conducted a basic analysis of the projected impacts of the 2023 prohibition on sales and transfer of existing stores without Use Permits. The analysis concluded that existing tobacco and paraphernalia retailers would not be detrimentally impacted by the 2023 prohibition. Tobacco and paraphernalia retailers typically operate within existing retail spaces and do not require special equipment, plumbing or electrical upgrades, or other substantial start-up costs. In 2016, all eleven of the existing tobacco and/or paraphernalia retailers in the City reported to the Finance Department average gross receipts of \$189,170. Over a period of five years, an average tobacco and/or paraphernalia retailer would generate \$945,000 in gross receipts. As such, a typical retailer would realize profits even if the retailer only operated as a tobacco and/or paraphernalia retailer for five years. The proposed Ordinance finds that the prohibition on transfer or sale of retailers will eventually reduce the number of tobacco and paraphernalia retailers in Antioch thereby serving significant public health and welfare benefits while ensuring no detrimental impacts to established retailers who may continue operating indefinitely. The amendments allow established retailers the opportunity to generate profits for as long as they continue to operate.

The proposed amendments balance the rights of business operators while also addressing the City's long term goals of reducing the presence and impacts of such operations.

**ATTACHMENTS**

- A. Draft Ordinance
- B. Resolution from Planning Commission dated May 17, 2017
- C. Minutes from May 17, 2017 Planning Commission Meeting

# ATTACHMENT "A"

ORDINANCE NO. \_\_\_\_\_

## AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF ANTIOCH DEFINING AND ESTABLISHING ZONING REGULATIONS FOR TOBACCO AND PARAPHERNALIA RETAILERS

**SECTION 1. Findings.** The Antioch City Council hereby finds, determines and declares as follows:

**A.** The City of Antioch holds the right to make and enforce all laws and regulations not in conflict with general laws, and the City holds all rights and powers established by state law.

**B.** On April 22, 2014, the City Council adopted Ordinance No. 2086-C-S extending a moratorium on Tobacco and Paraphernalia Retailers pursuant to findings regarding a current and immediate threat to the public health, safety and welfare from the effects and impacts of Tobacco and Paraphernalia Retailers, including but not limited to incidents involving burglary and attempted burglary, armed robbery, fights and disturbances including those involving juveniles, petty theft, assault, threats, loitering, panhandling, harassment, stolen vehicles, and passing counterfeit bills. The findings in Ordinance No. 2086-C-S are incorporated into this ordinance.

**C.** The Planning Commission conducted a duly noticed public hearing on May 17, 2017 at which time a resolution was approved to initiate and recommend to the City Council that this ordinance be adopted. The City Council held duly noticed public hearings on June 27, 2017 and July 25, 2017 at which time all interested persons were allowed to address the Council regarding adoption of this ordinance.

**D.** The City Council finds that the public necessity, convenience, and general welfare require a prohibition on the establishment and operation of any new tobacco and/or paraphernalia retailers, and require regulations providing that established tobacco and/or paraphernalia retailers may continue as legal nonconforming uses, and that legal nonconforming tobacco and/or paraphernalia retailers may not sell or transfer the business after January 1, 2023. These amendments are not detrimental to properties within Antioch because potential financial impacts to existing tobacco and paraphernalia retailers would be nominal due to the minimal initial investment required to establish a tobacco or paraphernalia retailer, and because existing businesses may continue to operate indefinitely. Tobacco and paraphernalia retailers typically operate within existing retail spaces and do not require special equipment, plumbing or electrical upgrades, or other substantial start-up costs. In 2016, all eleven of the existing tobacco and/or paraphernalia retailers in the City reported to the Finance Department average gross receipts of \$189,170. Over a period of five years, a typical tobacco and/or paraphernalia retailer would generate \$945,000 in gross receipts. As such, a typical retailer would realize profits even if the retailer only operated as a tobacco and/or paraphernalia retailer for five years. The City Council finds that the prohibition on transfer or sale of retailers will eventually reduce the number of tobacco and paraphernalia retailers in Antioch thereby serving significant public health and welfare

benefits while ensuring no detrimental impacts to established retailers who may continue operating indefinitely. The amendments allow established retailers the opportunity to generate profits for as long as they continue to operate.

E. The City Council finds that the Municipal Code amendments are in conformance with the Antioch General Plan.

**SECTION 2.** Title 5, Chapter 16 is hereby repealed.

**SECTION 3.** Title 6, Chapter 8, Section 6-8.14 is hereby repealed.

**SECTION 4.** Section 9-5.203 is hereby amended to repeal the definitions of *TOBACCO AND PARAPHERNALIA RETAILER*.

**SECTION 5.** Title 9, Chapter 5, Section 9-5.203, definition of *TOBACCO PRODUCT* is hereby repealed and replaced with the following language:

*TOBACCO PRODUCT*

(A) A product containing, made, or derived from tobacco or nicotine that is intended for human consumption, whether smoked, heated, chewed, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means, including, but not limited to, cigarettes, cigars, little cigars, chewing tobacco, pipe tobacco, or snuff.

(B) Any device that delivers nicotine or other vaporized liquids to the person inhaling from the device, including, but not limited to, an electronic cigarette, cigar, pipe, vaporizer pen, or hookah.

(C) Any component, part, or accessory of a tobacco product, whether or not sold separately. *TOBACCO PRODUCT* does not include any product that has been approved by the United States Food and Drug Administration for sale as a tobacco cessation product or for other therapeutic purposes where such product is marketed and sold solely for such an approved purpose.

**SECTION 6.** Title 9, Chapter 5, Article 38, Section 9-5.3843 is hereby repealed in its entirety and replaced with the following language, with no other amendments to this Section:

**9-5.3843 TOBACCO AND PARAPHERNALIA RETAILERS**

**(A) DEFINITIONS**

*DRUG PARAPHERNALIA.* Drug paraphernalia shall have that definition set forth in California Health and Safety Code section 11364.5, as it may be amended.

*DRUG PARAPHERNALIA RETAILER.* Any establishment that sells drug paraphernalia as defined herein.

*PERSON.* Any natural person, partnership, cooperative association, corporation,

personal representative, receiver, trustee, assignee, or any other legal entity.

*SOLD OR TRANSFERRED.* Any assignment, delegation, designation, sale, or transfer of real property or interests in real property, including but not limited to (1) A change to the name of the operator on the City of Antioch business license; (2) A change in the leaseholder of the commercial space; (3) A change to the name listed on any other official government document related to the business.

*TOBACCO PRODUCT.*

(A) A product containing, made, or derived from tobacco or nicotine that is intended for human consumption, whether smoked, heated, chewed, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means, including, but not limited to, cigarettes, cigars, little cigars, chewing tobacco, pipe tobacco, or snuff.

(B) Any device that delivers nicotine or other vaporized liquids to the person inhaling from the device, including, but not limited to, an electronic cigarette, cigar, pipe, vaporizer pen, or hookah.

(C) Any component, part, or accessory of a tobacco product, whether or not sold separately. TOBACCO PRODUCT does not include any product that has been approved by the United States Food and Drug Administration for sale as a tobacco cessation product or for other therapeutic purposes where such product is marketed and sold solely for such an approved purpose.

*TOBACCO RETAILER.* Any establishment that sells tobacco products as defined herein.

**(B) TOBACCO RETAILERS PROHIBITED.**

It is unlawful for any person to cause or permit the creation of, or operation of, a tobacco retailer. The operation of a tobacco retailer shall constitute a public nuisance subject to abatement under this Code.

**(C) DRUG PARAPHERNALIA RETAILERS PROHIBITED.**

It is unlawful for any person to cause or permit the creation of, or operation of, a drug paraphernalia retailer business. The operation of a drug paraphernalia retail business shall constitute a public nuisance subject to abatement under this Code.

**(D) NONCONFORMING USES.**

(1) Tobacco retailers or drug paraphernalia retailers lawfully established and operating prior to the effective date of this ordinance may continue to operate as non-conforming uses, provided that the retailer complies with the following provisions:

(a) A tobacco retailer or drug paraphernalia retailer may be sold and transferred at any point prior to January 1, 2023.

(b) From January 1, 2023 onward, a tobacco retailer or drug paraphernalia retailer may not be sold or transferred.

(c) All nonconforming tobacco retailers and drug paraphernalia retailers shall comply with State regulations regarding the sale of tobacco products

and drug paraphernalia, as these laws may be amended from time to time.

**(E) EXCEPTIONS.**

(1) The prohibition described in 9-5.3843 subdivision (B) shall not apply to the following:

(a) Any pharmacist or other authorized person who sells or furnishes drug paraphernalia upon the prescription of a physician, dentist, podiatrist, or veterinarian as permitted by law.

(b) Any physician, dentist, podiatrist, or veterinarian who furnishes or prescribes drug paraphernalia to his or her patients as permitted by law.

(c) Any manufacturer, wholesaler, or retailer licensed by the Board of Pharmacy to sell or transfer drug paraphernalia.

(d) Any tobacco retailer or drug paraphernalia retailer operating with a valid Use Permit issued by the City.

(2) The following business types shall be permitted to sell tobacco products subject to approval of a Use Permit in zoning districts where such business types are allowed under the Zoning Code:

(a) Convenience stores when ancillary to a gas station and having less than 20% of their sales area devoted to tobacco products.

(i) The sale of drug paraphernalia is prohibited.

(b) Retail businesses larger than 5,000 square feet with less than 5% of their sales area devoted to tobacco products.

(c) A Use Permit shall not be issued for a business that is located within 500 feet of any school, public park, playground, recreational center, or child care center.

**SECTION 7. CEQA.**

This Ordinance will not have a significant effect on the environment pursuant to CEQA Guidelines sections 15060(c)(2) and 15061(b)(3) because it can be seen with certainty that there is no possibility that the Ordinance will result in a physical change in the environment or a significant effect on the environment. The Ordinance will not expand the range of uses permitting in the Zoning Code nor will it increase the development intensity of uses authorized in the Zoning Code.

**SECTION 8. Publication; Effective Date.**

This Ordinance shall take effect and be enforced thirty (30) days from and after the date of its adoption by the City Council at a second reading and shall be posted and published in accordance with the California Government Code.



**SECTION 9. Severability.**

Should any provision of this Ordinance, or its application to any person or circumstance, be determined by a court of competent jurisdiction to be unlawful, unenforceable or otherwise void, that determination shall have no effect on any other provision of this Ordinance or the application of this Ordinance to any other person or circumstance and, to that end, the provisions hereof are severable.

\* \* \* \* \*

I **HEREBY CERTIFY** that the foregoing ordinance was introduced at a regular meeting of the City Council of the City of Antioch held on the 25<sup>th</sup> day of July and passed and introduced at a regular meeting thereof, held on the \_\_\_ day of \_\_\_\_\_, by the following vote:

**AYES:**

**NOES:**

**ABSENT:**

\_\_\_\_\_  
**Sean Wright, Mayor, City of Antioch**

**ATTEST:**

\_\_\_\_\_  
**Arne Simonsen, City Clerk of the City of Antioch**

**ATTACHMENT "B"**

**RESOLUTION NO. 2017-11**

**RESOLUTION OF THE PLANNING COMMISSION OF THE CITY OF ANTIOCH  
RECOMMENDING THAT THE CITY COUNCIL ADOPT AN ORDINANCE  
REPEALING, REPLACING AND AMENDING ZONING REGULATIONS FOR  
TOBACCO AND PARAPHERNALIA RETAILERS**

**WHEREAS**, the Planning Commission of the City of Antioch did receive an application from the **City of Antioch** requesting approval of amendments to the Zoning Ordinance of the Antioch Municipal Code; and,

**WHEREAS**, Pursuant to CEQA Guidelines sections 15060(c)(2) and 15061(b)(3), the proposed amendments to the Antioch Municipal Code are exempt from CEQA because it can be seen with certainty to have no possibility of a physical change to the environment or a significant impact on the environment; and,

**WHEREAS**, the Planning Commission provided notice of public hearing as required by law; and,

**WHEREAS**, on May 17, 2017, the Planning Commission held a public hearing on the matter, and received and considered evidence, both oral and documentary.

**NOW, THEREFORE BE IT RESOLVED** that the Planning Commission, after reviewing the staff report and considering testimony offered, does hereby recommend that the City Council **ADOPT** the attached ordinance amending regulations for Tobacco and Paraphernalia Retailers.

\* \* \* \* \*

**I HEREBY CERTIFY** the foregoing resolution was duly adopted by the Planning Commission of the City of Antioch, County of Contra Costa, State of California, at a regular meeting of said Planning Commission held on the 17<sup>th</sup> day of May, 2017, by the following vote:

**AYES:** *Husary, Motts, Mason, Conley and Zacharatos*

**NOES:** *Turnage*

**ABSTAIN:** *None*

**ABSENT:** *Parsons*

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Forrest Ebbs, Secretary to the  
Planning Commission

# ATTACHMENT "C"

## CITY OF ANTIOCH PLANNING COMMISSION

Regular Meeting  
6:30 p.m.

May 17, 2017  
City Council Chambers

Chair Zacharatos called the meeting to order at 6:30 P.M. on Wednesday, May 17, 2017 in the City Council Chambers. She stated that all items that can be appealed under 9-5.2509 of the Antioch Municipal Code must be appealed within five (5) working days of the date of the decision. The final appeal date of decisions made at this meeting is 5:00 P.M. on Wednesday, May 24, 2017.

### ROLL CALL

Present: Commissioners Husary, Motts, Mason, Turnage, Conley and Chair Zacharatos  
Absent: Vice Chair Parsons  
Staff: Director of Community Development, Forrest Ebbs  
Assistant City Engineer, Lynne Filson  
Associate Planner, Kevin Scudero  
Interim City Attorney, Samantha Chen  
Acting Captain, Tony Morefield  
Minutes Clerk, Kitty Eiden

### PLEDGE OF ALLEGIANCE

### PUBLIC COMMENTS

None.

### CONSENT CALENDAR

1. Approval of Minutes: April 5, 2017

*On motion by Commissioner Conley, seconded by Commissioner Turnage, the Planning Commission approved the minutes of April 5, 2017, as presented. The motion carried the following vote:*

**AYES:** Mason, Turnage, Conley and Zacharatos  
**NOES:** None  
**ABSTAIN:** Husary, Motts  
**ABSENT:** Parsons

## CONTINUED PUBLIC HEARING

2. **Z-17-01 – Tobacco Ordinance Amendment** – The City of Antioch is proposing text amendments to Chapter 16: Drug Paraphernalia, Section 6-8.14-Tobacco Retailer License, Section 9-5.203-Definitions and Section 9-5.3843 Tobacco and Paraphernalia Retailers of the Antioch Municipal Code. The amendments include, but are not limited to, changes to definitions related to tobacco and paraphernalia retailers, the display of tobacco paraphernalia, licenses required for retail tobacco sales, and the prohibition of tobacco and paraphernalia retailers. The proposed ordinance would be applicable city-wide. This project is exempt from the California Environmental Quality Act.

Director of Community Development Ebbs presented the staff report dated May 12, 2017, recommending that the Planning Commission approve the attached resolution recommending that the City Council adopt the ordinance amending City regulations regarding tobacco and paraphernalia retailers by prohibiting new tobacco and paraphernalia retailer businesses, subject to certain exceptions, and establishing legal non-conforming use procedures for established Tobacco and Paraphernalia Retailer businesses.

Commissioner Turnage questioned if an individual would be prohibited from selling their business after 2023 even if they owned it prior to the ordinance being passed and if so would that create an ex post facto issue.

In response to Commissioner Turnage, Director of Community Development Ebbs stated the ordinance would prevent owners from selling their business after 2023 and explained the entire ordinance was developed in partnership with a land use attorney who was careful it would not expose the City to litigation.

Commissioner Turnage expressed concern for applying an ordinance to an existing business noting that their intent may be to sell the business as part of their retirement.

In response to Commissioner Conley, Director of Community Development Ebbs added that if the intent was for the business owner to pass the business to successors, they had 5 years to add them to the corporation or create a trust.

In response to Commissioner Mason, Director of Community Development Ebbs reported notification of this evening's meeting was sent to all the current Tobacco and Paraphernalia Retail operators in the City.

In response to Chair Zacharatos, Director of Community Development Ebbs explained Council directed staff to develop an ordinance that addressed existing tobacco retailers and they felt the ordinance before the Planning Commission this evening was a reasonable solution.

Chair Zacharatos opened the closed the public hearing with no speakers requesting to speak.

**RESOLUTION NO. 2017-11**

On motion by Commissioner Conley, seconded by Commissioner Motts, the Planning Commission members present unanimously approved the resolution recommending that the City Council adopt the ordinance amending tobacco and paraphernalia retailer regulations by repealing Antioch City Code Sections 5-16.01 and 6-8.14 and repealing and replacing sections 9-5.203 and 9-5.3843. The motion carried the following vote:

- AYES:** *Husary, Motts, Mason, Conley and Zacharatos*
- NOES:** *Turnage*
- ABSTAIN:** *None*
- ABSENT:** *Parsons*