



TOWN OF APPLE VALLEY

TOWN COUNCIL STAFF REPORT

To: Honorable Mayor and Town Council **Date:** May 13, 2014

From: John Brown, Town Attorney **Item No:** 14
Best, Best & Krieger

Subject: ORDINANCE NO. 462 - AN ORDINANCE OF THE TOWN COUNCIL OF THE TOWN OF APPLE VALLEY AMENDING SECTIONS 11.68.020 AND 11.68.040 OF CHAPTER 11.68 OF TITLE 11 OF THE TOWN OF APPLE VALLEY MUNICIPAL CODE, TO REVISE THE DEFINITION OF SMOKING TO INCLUDE ELECTRONIC SMOKING DEVICES AND TO REVISE VARIOUS PROVISIONS REGARDING THE PROHIBITION OF SMOKING IN OR UPON PUBLIC FACILITIES AND PUBLIC PARKS OF THE TOWN

T.M. Approval: _____

Budgeted Item: Yes No N/A

RECOMMENDED ACTION:

1. Move to waive the reading of Ordinance No. 462 in its entirety and read by title only.
2. Move to introduce Ordinance No.. 462, an Ordinance of the Town Council of the Town of Apple Valley amending Sections 11.68.020 of Chapter 11.68 of Title 11 of the Town of Apple Valley Municipal Code, to revise the definition of smoking to include electronic smoking devices and to revise various provisions regarding the prohibition of smoking in or upon public facilities and public parks of the Town.

DISCUSSION:

The use of electronic smoking devices is a recent trend that is proliferating. This trend undermines the Town's laws against smoking in any Town Park or Facility and exposing the public to secondhand electronic smoking device vapors which have not been scientifically proven as safe. These electronic smoking devices are commonly referred to as "e-cigarettes," "e-cigars," "e-cigarillos," "e-pipes," or "e-hookahs," and are often made to look like conventional tobacco products in shape, size, and color. In fact, electronic smoking devices are designed to be used in the same manner as conventional tobacco products with the user exhaling a smoke-like vapor similar in appearance to the exhaled smoke from cigarettes and other conventional tobacco products.

Recent studies have shown that: electronic smoking devices may have the capacity to "re-normalize" tobacco use in a demographic that has had significant denormalization of tobacco use previously; electronic smoking devices often contain nicotine which is a highly addictive neurotoxin that is included in the list of Chemicals Known to the State to Cause Cancer or Reproductive Toxicity; electronic smoking devices can contain a total of 22 elements in vapors

produced by electronic smoking devices and three of these elements (lead, nickel, and chromium) appear on the Federal Food and Drug Association's "Harmful and Potentially Harmful Chemicals list"; and electronic smoking devices demonstrated poor quality control, toxic contaminants, misrepresentation of the nicotine delivered and insufficient evidence of the overall public health benefit.

The United States Food and Drug Administration ("FDA") has not yet issued regulations regarding electronic cigarettes. However, the FDA has recently proposed to extend its authority to regulate electronic smoking devices. Some of the proposed regulations may include banning sales to minors, prohibiting free samples, banning vending machine sales unless a location does not permit minors, requiring warnings about nicotine and its addictive properties, and requiring listing the ingredients in e-liquids (i.e. the liquids inside electronic smoking devices). Notwithstanding, California Health and Safety Code section 119405 prohibits the sale of electronic cigarettes to minors. While state law prohibits sales to minors, such state law is not comprehensive enough to prohibit the use of electronic smoking devices in Town Parks and Facilities. This ordinance shall not apply to any activity already regulated by Health and Safety Code Section 119405 or pre-empted by any State or Federal law or regulation. By enacting this Ordinance, the Town ordains that nothing herein shall be deemed to conflict with federal or state law, or otherwise or to license any activity that is prohibited thereunder except as mandated by such laws.

In furtherance of the Town's ability to establish regulations to protect the health, welfare and safety of Town residents and visitors, this Ordinance will help protect them from exposure to the secondhand byproducts of electronic smoking devices, facilitate uniform enforcement of smoke-free air laws, reduce the potential for re-normalizing smoking where tobacco use is prohibited, and protect youth from observing behavior that could encourage them to smoke. The Ordinance legislatively prohibits the use of electronic smoking devices in Town Parks and Facilities and broadens the Town's Municipal Code definition of smoking to include smoking from electronic or battery operated smoking devices.

FISCAL IMPACT:

N/A

ATTACHMENT:

Ordinance No. 462

ORDINANCE NO. 462

AN ORDINANCE OF THE TOWN COUNCIL OF THE TOWN OF APPLE VALLEY AMENDING SECTIONS 11.68.020 AND 11.68.040 OF CHAPTER 11.68 OF TITLE 11 OF THE TOWN OF APPLE VALLEY MUNICIPAL CODE, TO REVISE THE DEFINITION OF SMOKING TO INCLUDE ELECTRONIC SMOKING DEVICES AND TO REVISE VARIOUS PROVISIONS REGARDING THE PROHIBITION OF SMOKING IN OR UPON PUBLIC FACILITIES AND PUBLIC PARKS OF THE TOWN

WHEREAS, the use of electronic smoking devices is a recent trend that is proliferating. This trend undermines the Town's laws against smoking in any Town Park or Facility and exposing the public to secondhand electronic smoking device vapors which have not been scientifically proven as safe; and

WHEREAS, electronic smoking devices, commonly referred to as "e-cigarettes," "e-cigars," "e-cigarillos," "e-pipes," or "e-hookahs," are electronic devices often made to look like conventional tobacco products in shape, size, and color; and

WHEREAS, electronic smoking devices are designed to be used in the same manner as conventional tobacco products with the user exhaling a smoke-like vapor similar in appearance to the exhaled smoke from cigarettes and other conventional tobacco products; and

WHEREAS, a study published in the Journal of Environment and Public Health suggests that electronic smoking devices "may have the capacity to 're-normalize' tobacco use in a demographic that has had significant denormalization of tobacco use previously";¹ and

WHEREAS, nicotine is a highly addictive neurotoxin and is included in the Prop 65 list of Chemicals Known to the State to Cause Cancer or Reproductive Toxicity.² Nicotine is known to cause birth defects and is particularly dangerous for vulnerable populations including children, pregnant women and people with cardiovascular conditions; and

WHEREAS, a recent study found a total of 22 elements in vapors produced by electronic smoking devices, and three of these elements (lead, nickel, and chromium) appear on the FDA's "Harmful and Potentially Harmful Chemicals list";³ and

¹ McMillen R, Maduka J and Winickoff J. "Use of Emerging Tobacco Products in the United States." *Journal of Environmental and Public Health*, <http://dx.doi.org/10.1155/2012/989474>, 2012.

² State of California Environmental Protection Agency. *Chemicals Known to the State to Cause Cancer or Reproductive Toxicity*. December 20, 2013. http://oehha.ca.gov/prop65/prop65_list/files/P65single122013.pdf

³ Williams M, Villareal A, Bozhilov K, Lin S, Talbot P. "Metal and Silicate Particles Including Nanoparticles Are Present in Electronic Cigarette Cartomizer Fluid and Aerosol." *PLoS ONE* 8(3): e57987. <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0057987>

WHEREAS, a study published in the American Journal of Public Health found similar results to those identified in FDA testing and concluded that the electronic smoking devices tested demonstrated poor quality control, toxic contaminants, misrepresentation of the nicotine delivered and insufficient evidence of the overall public health benefit;⁴ and

WHEREAS, the United States Food and Drug Administration ("FDA") has not yet issued regulations regarding electronic cigarettes. However, the FDA has recently proposed to extend its authority to regulate electronic smoking devices. Some of the proposed regulations may include banning sales to minors, prohibiting free samples, banning vending machine sales unless a location does not permit minors, requiring warnings about nicotine and its addictive properties, and requiring listing the ingredients in e-liquids (i.e. the liquids inside electronic smoking devices). Notwithstanding, California Health and Safety Code section 119405 prohibits the sale of electronic cigarettes to minors. While state law prohibits sales to minors, such state law is not comprehensive enough to prohibit the use of electronic smoking devices in Town Parks and Facilities. This ordinance shall not apply to any activity already regulated by Health and Safety Code Section 119405 or pre-empted by any State or Federal law or regulation. By enacting this Ordinance, the Town ordains that nothing herein shall be deemed to conflict with federal or state law, or otherwise or to license any activity that is prohibited thereunder except as mandated by such laws; and

WHEREAS, the Town is supportive of tobacco cessation programs and modalities that have proven efficacy and utilize safe FDA-approved products; but to date, electronic smoking devices are not an FDA-approved smoking cessation device; and

WHEREAS, the World Medical Association has determined that electronic smoking devices "are not comparable to scientifically-proven methods of smoking cessation" and that "neither their value as therapeutic aids for smoking cessation nor their safety as cigarette replacements is established";⁵ and

WHEREAS, the confusion caused by the visual similarity between electronic smoking devices and traditional tobacco products may impact individuals and the owners of establishments seeking to comply with the Town's laws against smoking in any Town Park or Facility and will threaten the Town's enforcement of these laws; and

WHEREAS, the use of electronic smoking devices in smoke-free locations threatens to reverse the progress that has been made in establishing the social norm that smoking is not permissible in public places or places of employment; and

WHEREAS, the use of electronic smoking devices in smoke-free locations may

⁴ Cobb NK, Byron J, Abrams DB, et al. "Novel Nicotine Delivery Systems and Public Health: The Rise of the 'E-Cigarette'" *American Journal of Public Health*, 2010. <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2978165/>

⁵ World Medical Association. *Statement on Electronic Cigarettes and Other Nicotine Delivery Systems*. 2012. <http://www.wma.net/en/30publications/10policies/e19/>

increase the social acceptability and appeal of smoking, particularly for youth, undermining the progress that has been made over the years in discouraging smoking; and

WHEREAS, prohibiting the use of electronic smoking devices in smoke-free locations will protect traditionally smoke-free locations such as daycare centers, schools, libraries, public parks, playgrounds and beaches and will prevent people, including children, from involuntarily inhaling nicotine and potentially harmful chemicals scientifically proven to exist in the secondhand vapor of electronic smoking devices; and

WHEREAS, The Town Council, in conjunction with the efforts of the Healthy Apple Valley program, believe that eliminating smoking in Town Parks will enhance the experience of all park patrons; and

WHEREAS, in order to protect the health, welfare and safety of Town residents and visitors by protecting them from exposure to the secondhand byproducts of electronic smoking devices, facilitating uniform enforcement of smoke-free air laws, reducing the potential for re-normalizing smoking where tobacco use is prohibited, and protecting youth from observing behavior that could encourage them to smoke, the Town has decided to legislatively prohibit the use of electronic smoking devices in all areas where the smoking of tobacco products is currently prohibited.

NOW, THEREFORE, the Town Council of the Town of Apple Valley does ordain as follows:

SECTION 1. The above recitals are true and correct and are incorporated herein by this reference.

SECTION 2. Subdivision (m) to section 11.68.020 of Chapter 11.68 of Title 11 of the Town of Apple Valley Municipal Code is hereby added to read as follows:

“ ...

(m) “Smoking” shall mean engaging in an act that generates gases, particles or vapors released into the air as a result of combustion, electrical ignition or vaporization, including from a lighted pipe, a lighted hookah pipe, a lighted cigar, a lighted cigarette, or an electronic or battery operated smoking device that delivers vapors for inhalation, when the purpose of the combustion, electrical ignition or vaporization is human inhalation of the gases, particles or vapors. Smoking does not include the combustion of material solely for olfactory purposes that does not contain any tobacco or nicotine. Smoking shall include smoking from every variation and type of electronic or battery operated smoking device that delivers vapors for inhalation whether they are 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.”

SECTION 3. Subdivision (q) to section 11.68.040 of Chapter 11.68 of Title 11 of the Town of Apple Valley Municipal Code is hereby repealed and replaced in its entirety as follows:

“ ...

(q). Smoking is prohibited in any Park, Facility, Neighborhood Park, or Community Park.”

SECTION 4. Except as expressly amended and repealed hereby, all other provisions of Title 11 of the Town of Apple Valley Municipal Code shall remain in full force and effect.

SECTION 5. Based on the entire record before the Town Council, and all written and oral evidence presented to the Town Council, the Town Council hereby finds that this ordinance is exempt from review under the California Environmental Quality Act (“CEQA”), pursuant to Sections 15060(c)(2) (the activity will not result in a direct or reasonably foreseeable indirect physical change in the environment) and 15060(c)(3) (the activity is not a project as defined in Section 15378) of the CEQA Guidelines, California Code of Regulations, Title 14, Chapter 3, because it has no potential for resulting in physical change to the environment, directly or indirectly.

SECTION 6. If any provision of this Ordinance or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this ordinance are severable. The Town Council hereby declares that it would have adopted this Ordinance irrespective of the invalidity of any particular portion thereof.

SECTION 7. This Ordinance shall be adopted by a majority vote of the Town Council. Upon adoption, the Mayor shall sign this Ordinance, and the Town Clerk shall certify to the adoption of this Ordinance and cause it, or a summary of it, to be published once within fifteen (15) days of adoption in a newspaper of general circulation printed and published within the Town of Apple Valley, and shall post a certified copy of this Ordinance, including the vote for and against the same, in the Office of the Town Clerk in accordance with Government Code § 36933.

SECTION 8. This Ordinance shall become effective thirty days from and after its adoption.

APPROVED and **ADOPTED** and signed by the Mayor attested by the Town Clerk this 13th day of May, 2014.

ATTEST:

Art Bishop, Mayor

La Vonda Pearson, Town Clerk

APPROVED AS TO FORM:

APPROVED AS TO CONTENT:

John Brown, Town Attorney

Frank Robinson, Town Manager