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INTER-OFFICE CORRESPONDENCE

MEMORANDUM NO. 2019-193

TO: Charles F. Dodge, City Manager

CC: Aner Gonzalez, Assistant City Manager
Michael Stamm, Jr., Director Planning and Economic Development

FROM: Samuel S. Goren, City Attorney
Ian P. Singer, Assistant City Attorney

DATE: September 25, 2019

RE: Increasing Minimum Age to Purchase Electronic Vaping Products from 18 to 21 / Banning Sales of Electronic Vaping Products

Pursuant to a recent request, we have reviewed the City's Code of Ordinances, federal law, as well as Florida law as to whether the City may either ban the sales of, or increase the age to purchase, electronic nicotine dispensing devices¹ and nicotine products² from age 18 to 21.

Electronic nicotine dispensing devices and nicotine products are currently legal products, and as such, the City is unable to outright ban the sale of them. With respect to age requirements, Florida law does not currently preempt the City from raising the minimum age to purchase electronic nicotine dispensing devices and nicotine products from 18 to 21. However, Section 743.07, F.S., provides that all persons who are 18 years of age or older shall enjoy the same rights and privileges as all persons 21 years or older, except as otherwise excluded by the State Constitution and the State's Beverage Law.

¹ An "electronic nicotine dispensing device" is defined in the City's Code as "[a]ny electronic or battery operated device which can be used to deliver an inhaled dose of nicotine or other substances and includes those composed of a mouthpiece, heating element, and battery or electronic circuits that provide a vapor of liquid nicotine and/or other substances to the user. This term shall include such devices whether they are manufactured, distributed, marketed, or sold as an electronic cigarette, an electronic cigar, an electronic cigarillo, an electronic pipe, an electronic hookah, an e-cigarette, an e-cigar, an e-pipe, vaporizer or under any other product name, and whether it is utilizing liquid nicotine or any other substance at the time of use by a person."

² Section 877.112(1)(a), F.S. defines "nicotine products" as "any product that contains nicotine, including liquid nicotine, that is intended for human consumption, whether inhaled, chewed, absorbed, dissolved, or ingested by any means, but does not include a: 1) tobacco product, as defined in s. 569.002; (2) product regulated as a drug or device by the United States Food and Drug Administration under Chapter V of the federal Food, Drug, and Cosmetic Act; or (3) product that contains incidental nicotine."

City's Code of Ordinances

Sections 155.146(B)(12)(b) and 155.146(C)(12)(a) of the City's Code of Ordinances (the "Code") prohibit the sale of electronic nicotine dispensing devices and nicotine products to any person under the age of eighteen (18) years. The City's Code also prohibits the use of electronic nicotine dispensing devices in all locations throughout the City where smoking is prohibited, as well as in all public areas in the City, including parks and recreational areas. *See* section 155.146(C)(12)(b)-(c) of the City's Code.

Additionally, the City's Code regulates the location of stores that sell electronic nicotine dispensing devices and nicotine products. The City's zoning code allows the sale of electronic nicotine dispensing devices and nicotine products **only** as an accessory use.

Florida Law

Part II, Chapter 386, F.S., more commonly referred to as the Florida Clean Indoor Air Act (the "Act") and section 877.112, F.S. provide state-level regulations for the sale and use of nicotine dispensing devices³ and nicotine products. The Act primarily prohibits smoking or vaping⁴ indoors with certain exceptions. Further, the Act expressly preempts the regulation of "smoking"⁵, as that term is defined by Florida law, to the state. However, the Act also provides that the City may impose more restrictive regulations on the **use** of vapor-generating⁶ devices than is provided for by law. *See* section 386.209, F.S. As such, the provisions of the Act permit the City to regulate the **use** of vapor-generating devices but do not expressly permits or prohibit the City's regulation of the sale thereof.

Additionally, section 877.112, F.S. strictly prohibits the sale of any nicotine product or nicotine dispensing device to any individual who is under 18 years

³ The state defines a "nicotine dispensing device" as "any product that employs an electronic, chemical or mechanical means to produce vapor from a nicotine product, including, but not limited to, an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or other similar device or product, any replacement cartridge for such device, and any other container of nicotine in a solution or other form intended to be used with or within an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or other similar device or product." *See* section 877.112(1)(a), F.S.

⁴ "Vape" or "vaping" means "to inhale or exhale vapor produced by a vapor-generating electronic device or to possess a vapor-generating electronic device while that device is actively employing an electronic, a chemical or a mechanical means designed to produce vapor or aerosol from a nicotine product or any other substance. The term does not include the mere possession of a vapor-generating electronic device." *See* section 386.203(13), F.S.

⁵ "Smoking" is defined as the "inhaling, exhaling, burning, carrying, or possessing any lighted tobacco product, including cigarettes, cigars, pipe tobacco, and any other lighted tobacco product." *See* section 386.203(11), F.S.

⁶ A "vapor-generating device" is defined as "any product that employs an electronic, a chemical, or a mechanical means capable of producing vapor or aerosol from a nicotine product or any other substance, including, but not limited to, an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or other similar device or product, any replacement cartridge for such device, and any other container of a solution or other substance intended to be used with or within an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or other similar device or product." *See* section 386.203(15), F.S.

of age, and subsection 877.112(6), F.S. prohibits an individual under the age of 18 from knowingly possessing any nicotine product or nicotine dispensing device.

Importantly, section 743.07, F.S. provides that all individuals who have attained the age of 18 shall enjoy the same rights, privileges, and obligations of those individuals 21 years of age or older, except as otherwise excluded by the State Constitution or Florida's Beverage Law.

Conclusion

Electronic nicotine dispensing devices and nicotine products are currently legal in the State of Florida and the City is unable to adopt a regulation to outright ban the sale of such items. Further, there exists no legal prohibition that would preclude the City Commission from enacting legislation to increase the minimum age from 18 to 21 to purchase electronic nicotine dispensing devices and nicotine products. However, such action could potentially be subject to a legal challenge brought pursuant to section 743.07, F.S. Further, if the City desires to seek an Attorney General's Opinion on the validity of an ordinance here, our office will be glad to assist in the preparation and transmittal of such a request.

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