

RESOLUTION 21-0009

A RESOLUTION OF THE MANHATTAN BEACH CITY COUNCIL APPROVING A HARDSHIP EXEMPTION PURSUANT TO SECTION 4 OF MANHATTAN BEACH ORDINANCE NO. 20-0007 AUTHORIZING AVIATION LIQUOR TO TEMPORARILY SELL TOBACCO PRODUCTS UNTIL JUNE 30, 2021, AT THE LIQUOR STORE LOCATED AT 975 AVIATION BOULEVARD, SUBJECT TO CONDITIONS

THE MANHATTAN BEACH CITY COUNCIL RESOLVES, FINDS AND DETERMINES AS FOLLOWS:

SECTION 1. The Manhattan Beach City Council adopted Ordinance No. 20-0007 on February 18, 2020, amending the Manhattan Beach Municipal Code to prohibit the retail sale of tobacco products after December 31, 2020. Prior to adoption of the ordinance, the City Council conducted numerous public meetings throughout 2019-2020 to consider input from the public and from tobacco retailers concerning the health impacts of tobacco. The issue of whether retail tobacco sales should be banned was raised by two Councilmembers at the City Council meeting on June 4, 2019. Thereafter, the proposed tobacco ban appeared on a regular basis on the City's "Agenda Forecast," which was distributed to the public every two weeks as part of the City Council agenda for the period of June through September in 2019. On June 12, 2019, the following item appeared on the City's Agenda Forecast: "Report on Complete Ban on Tobacco and Vaping." The Agenda Forecast dated July 31, 2019 contained the following item on the tentative agenda for the October 1, 2019 City Council meeting: "Consider a Complete Ban of Sales of Tobacco Products." At a duly noticed City Council meeting held on October 1, 2019, the City Council considered several comments from the public regarding a prohibition, including comments from retailers. At least two of the four retailers that requested a hardship extension provided information at that time. After a lengthy discussion, careful consideration of all the evidence presented, and deliberation, the Council directed staff to draft an ordinance that prohibits the retail sale of all tobacco products. The Council also directed staff to develop a hardship exemption process that would allow retailers to apply for an exemption from the terms of the ordinances.

SECTION 2. Staff drafted an ordinance prohibiting the sale of tobacco products and placed it on the agenda for a duly noticed City Council meeting held on December 17, 2019. Item 16 on the published agenda is titled: "Consider Introducing an Ordinance to Prohibit the Sale of Tobacco Products in the City and Discuss and Provide Direction Relating to Incentives for Tobacco Retailers." Prior to taking any action, the City Council considered input from the public, including: an academic paper entitled "An argument for phasing out sales of cigarettes," authored by Dr. Elizabeth A. Smith from the University of California, San Francisco; presentations by medical doctor Tony Kuo, the Director of the Los Angeles County Department of Health and Safety Chronic Disease and Injury Prevention Division and University of San Francisco Professor Ruth Malone; and

comments from tobacco retailers and a consultant who stated she represented all 17 tobacco retailers in the City and 60,000 tobacco retailers nationwide. After the close of public comment, the City Council opted to proceed with the proposed prohibition of retail tobacco sales, and discussed a number of policies that would assist retailers in their transition. The Council directed staff to:

- Provide retailers up until January 1, 2021, to comply with the prohibition.
- Provide a hardship exemption application process so that retailers can apply, at no cost, to extend their compliance periods beyond January 1, 2021.
- Provide retailers with consulting services, at no cost to the retailer, to assist in the transition.

SECTION 3. Pursuant to Section 4 of Ordinance No. 20-0007, tobacco retailers may apply for a hardship exemption. Upon application, the City Council may grant a hardship exemption upon considering the following factors, among others, in determining hardship:

1. The percentage of the retail sales over the last three years that have derived from tobacco products;
2. The amount of investment in the business;
3. The present actual and depreciated value of any business improvements dedicated to the retail sale of tobacco products;
4. The applicable Internal Revenue Service depreciation schedule or functional non-confidential equivalent;
5. The remaining useful life of the business improvements that are dedicated to the sale of tobacco products;
6. The remaining lease term of the business, if any;
7. The ability of the retailer to sell other products;
8. The opportunity for relocation of the business and the cost of relocation; and
9. A business plan demonstrating how long the business will need to sell tobacco products to recoup any investment backend expectations, and a plan for phasing out the sale of those products.

Ordinance No. 20-0007 provides that the retailer “shall bear the burden of proof in establishing, by a preponderance of the evidence, that the application of this Ordinance

... to the retailer's business is unreasonable, and will cause significant hardship to the retailer by not allowing the retailer to recover his or her investment backed expectations."

SECTION 4. Aviation Liquor ("Applicant") has requested a hardship exemption to allow tobacco sales at its liquor store located at 975 Aviation Boulevard (the "Property") indefinitely. Applicant did not provide substantial evidence that the application of Ordinance No. 20-0007 to Applicant's business is unreasonable and will cause significant hardship to Applicant by not allowing the recovery of its investment backed expectations. Applicant operates a liquor store that sells beer, wine spirits, and convenience items; Ordinance No. 20-0007 does not affect Applicant's ability to continue selling such goods in his liquor store. Applicant contends that "while tobacco may be 20%-23% of our overall sales, 75% of our overall sales are derived from patrons who purchase tobacco products." Applicant's argument rests, not on evidence that tobacco products are a significant portion of its sales, but that, out of convenience, persons buying alcohol and other goods will shop "across the street" at a competitor in Redondo Beach if they also want tobacco, instead of making two trips. This claim is unsupported by any empirical data, and is speculative. The City has provided ample time to Aviation Liquor to deplete its stock of tobacco products, which is an ancillary part of its sales.

SECTION 5. Based upon the foregoing, and in accordance with Section 4 of Ordinance No. 20-0007, the City Council makes the following findings:

1. Applicant has not met its burden in establishing, by a preponderance of the evidence, that the application of Ordinance No. 20-0007 to its business is unreasonable, and will cause significant hardship to it by not allowing it to recover its investment backed expectations in selling tobacco products.
2. Allowing Applicant to continue selling tobacco products on a temporary basis for an additional six months provides Applicant with ample time to deplete its stock, and transition from non-tobacco products.
3. Allowing such temporary sales until June 30, 2021, subject to conditions, shall not be construed as conferring any rights, vested or otherwise, to allow such use to continue after June 30, 2021.

SECTION 6. Based upon the foregoing and substantial evidence in the record, the City Council hereby grants a hardship exemption to allow Applicant to sell tobacco products until June 30, 2021, subject to the following conditions:

1. Applicant hereby acknowledges and understands that allowing such sales to continue during this temporary time period does not confer a vested right to Applicant to sell tobacco products after June 30, 2021.
2. The business on the Property shall be operated in compliance with all applicable laws, including City's Municipal Code.
3. Applicant shall not sell any tobacco products at the site after June 30, 2021.

4. Applicant shall not replenish its existing tobacco products stock.
5. In the event of any litigation or other proceeding by which a party seeks to enforce its rights pursuant to this Resolution, the prevailing party shall be entitled to recover actual attorneys' fees, experts' fees, and other costs, in addition to all other relief to which that party may be entitled.
6. Applicant shall enter into an agreement, in form acceptable to the City Attorney, agreeing to these conditions, within 30 days of the date of this Resolution.

SECTION 7. The City Clerk shall certify to the adoption of this Resolution.

ADOPTED January 5, 2021

SUZANNE HADLEY
Mayor

ATTEST:

LIZA TAMURA
City Clerk