

RESOLUTION 20-0010

A RESOLUTION OF THE MANHATTAN BEACH CITY COUNCIL APPROVING A HARDSHIP EXEMPTION PURSUANT TO SECTION 4 OF MANHATTAN BEACH ORDINANCE NO. 20-0007 AUTHORIZING MB SMOKE SHOP TO TEMPORARILY SELL TOBACCO PRODUCTS UNTIL APRIL 30, 2021 AT THE PROPERTY LOCATED AT 1005 NORTH 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." That item was repeated on all of the Agenda Forecasts until the following agenda item was listed on the October 1, 2019 agenda: "11. Consider Prohibiting the Retail Sale of Tobacco Products and Electronic Smoking Devices and Paraphernalia." Concurrently with the posting of the agenda on September 25, 2019, City staff reached out to all of the tobacco retailers in the City. By email dated September 25, 2019, MB Smoke Shop (hereinafter "Applicant") responded to the notice by stating its opposition to the "Proposed Tobacco Ban." At the October 1, 2019 City Council meeting, the City Council considered several emails and comments from the public regarding a prohibition, including the comment submitted by Applicant, and comments from other retailers. After a lengthy discussion, careful consideration of all the evidence presented, and deliberation, the Council directed staff to draft two ordinances:

- An urgency ordinance to prohibit the sale of all vaping products, to take effect immediately upon its adoption; and
- A regular ordinance to prohibit the 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. On November 5, 2019, the City Council adopted Urgency Ordinance No. 19-0016-U (hereinafter the “Vaping Products Ban”) to prohibit the sales of all vape products, electronic smoking devices and flavored tobacco. The Vaping Products Ban contained a hardship exemption provision. On November 22, 2019, Applicant’s attorney applied, on behalf of Applicant, for a hardship exemption from the terms of the Vaping Products Ban to allow Applicant to sell vaping products until the expiration of its lease--December 31, 2022--but subsequently withdrew the application prior to Council consideration.

SECTION 3. 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: written material submitted by Applicant’s attorney; 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 that 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 City 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; and
- Provide retailers with consulting services, at no cost to the retailer, to assist in the transition.

After additional opportunities for public comment and input, the Council introduced Ordinance No. 20-0007 on February 4, 2020, and adopted it on February 16, 2020.

SECTION 4. 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 after considering the following factors, among others, in determining hardship:

1. The percentage of the retail sales over the last three years that have been 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 backed 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 5. By letter dated October 29, 2020, Applicant’s attorney applied for a hardship exemption to allow Applicant to continue selling tobacco products at its store located at 1005 North Aviation Boulevard (the “Property”). At that location, Aviation Boulevard is a commercial strip and forms the border between Manhattan Beach and the neighboring city of Redondo Beach. The application requests either a “permanent exemption” or, alternatively, “an exemption that lasts for the life of the lease, which is 2028, at which point the city may allow our client to resubmit an application to extend the term of the exemption.” The application states that 80-85% of the retail sales is derived from tobacco products, with a current inventory of such products valued as “roughly \$200,000.” The Applicant submitted a portion of its tax return that indicates inventory was valued at \$160,140 at the end of the 2019 tax year. The application further states that Applicant has invested \$139,137 (less depreciation of \$48,076) in “fixtures,” although the documentation concerning such investments is unclear and there is no distinction between trade fixtures and personal property. Applicant submitted a document titled “Amendment to Lease” (the “Lease Amendment”), which indicates that Applicant’s lease for the Property was due to expire on October 14, 2019. Under the heading of “Current Products,” the application states “Specialty merchandise sold at MB Smoke include ... “Vape products, Electronic Cigarettes, E Juice/E Liquid...” The sale of such products has been prohibited in Manhattan Beach by the Vaping Products Ban since November 5, 2019. Finally, the application claims that the business has generated considerable goodwill due to its “unique” location, and that Applicant “would have difficulty finding a similar location if forced to relocate.”

SECTION 6. On December 1, 2020, the City Council considered Applicant's request. After public comment, including from Applicant's attorney, the City Council directed staff to return with a draft resolution granting a hardship exemption to extend the compliance period until December 31, 2021, subject to conditions, for Council consideration. A courtesy copy of the draft resolution was emailed to Applicant's attorney on December 30, 2020. On January 5, 2021, the City Council reviewed the draft resolution, asked questions of staff and took public comment. There were no comments from Applicant or its representatives. Councilmembers expressed concern about Applicant's lack of good faith in complying with the City's established regulations of tobacco and related goods, including Applicant's sale of vape products and electronic cigarettes after the effective date of the Vaping Products Ban. After a failed motion to adopt the draft resolution, the City Council continued the matter to allow the Applicant another opportunity to support its application. The Council directed staff to: visit the site to determine compliance with the Vaping Products Ban; and draft a resolution to provide a 90-day extension. On January 6, 2021, staff visited MB Smoke. Staff observed that the illegal vaping products were on display, as well as a sign that stated that MB Smoke cannot sell such products. Staff observed the operator "turn away" five customers seeking the illegal products. Staff does not know when the sign was placed on the counter.

SECTION 7. Based upon the foregoing, and in accordance with Section 4 of Ordinance No. 20-0007, the City Council makes the following findings:

1. Applicant did not provide the City with substantial evidence to support its request for an additional seven years to amortize its business. Most statements and claims in its application are unsupported by any specific evidence, and the application's limited analysis is often speculative and contradictory. Portions of the application are internally inconsistent, or contradict Applicant's application for a hardship exemption from the Vaping Products Ban submitted in November 2019. It is unclear whether Applicant has any real intention of transitioning to non-tobacco products: the shop's own business plan, which was submitted as part of the hardship application, conceded that its plan for phasing out tobacco products "is by no means exact." Further, the City has engaged in dialogue with Applicant since June of 2019 regarding a ban, providing the owner of the business ample time to amortize its investment in tobacco products and deplete inventory.
2. The application, dated October 29, 2020, discloses that Applicant has continued to sell vape products and electronic cigarettes after the effective date of the Vaping Products Ban, which has prohibited such sales since November 5, 2019. Under the heading of "Current Products," the application states "Specialty merchandise sold at MB Smoke include ... "Vape products, Electronic Cigarettes, E Juice/E Liquid..." In November 2019, Applicant's attorney applied for a hardship exemption from the terms of the Vaping Products Ban on behalf of Applicant to allow Applicant to sell vaping products until the expiration of its lease--December 31, 2022--but subsequently withdrew the application prior to Council consideration. Accordingly, Applicant and his

attorney had actual notice of, and by way of their prior application admitted that they were aware of, the Vaping Products Ban in November 2019, but continued to sell vaping products thereafter, at least, as indicated in the application, until October 29, 2020. Staff visited the site on January 6, 2021, the day following the City Council meeting. Staff observed that the illegal products were on display, but that a sign on the counter stated that MB Smoke cannot sell such products. There is no indication as to when the sign was placed on the counter.

3. The asserted value of inventory supplied by Applicant is imprecise. The application states that the current inventory of tobacco products is valued as “roughly \$200,000.” The Applicant submitted a portion of its tax return that indicates its total inventory was valued at \$160,140 at the end of the 2019 tax year. Based upon the numbers provided by the Applicant, it appears that Applicant has increased its inventory, instead of depleting its inventory in light of the Council’s decision in 2019 to prohibit all sales of tobacco products. The tax return does not indicate what portion of the inventory are tobacco-related products. Further, in light of the fact that Applicant has continued to illegally sell vaping products and electronic cigarettes after full knowledge of the effective date-November 5, 2019-of the Vaping Products Ban, it is likely that a portion of the asserted inventory consists of prohibited vaping products.
4. Applicant did not provide any substantial evidence that it cannot relocate its operations. Applicant claims on the one hand that the goodwill value of its business is based upon its “unique” location. On the other hand, Applicant claims that, if it must cease tobacco sales in Manhattan Beach, people will still be able to walk across the street to Redondo Beach to purchase tobacco products. There is nothing in the record indicating that commercial properties across the street in Redondo Beach are unavailable for relocation of Applicant’s store. In addition, many of the business “investments” listed in the application are easily moveable items, including a 2016 Acura RLX automobile. City staff continues to be available to provide Applicant with consulting services, at no cost to Applicant, to assist with relocating its tobacco sales to a location outside of the City.
5. Applicant is well-positioned to transition to selling non-tobacco products at the Property. The Property is a standard retail structure that Applicant can use for other commercial uses. Applicant’s business plan, which was submitted to the City with its hardship exemption application, indicates that Applicant has already identified the sale of “nicotine cessation products” as a potential alternative use of the Property. City staff continues to be available to provide Applicant with consulting services, at no cost to Applicant, to assist in the transition to other commercial uses at the Property.
6. Applicant’s assertion that the “life of the lease” is 2028 is misleading. The Lease Amendment provided by Applicant indicates that Applicant exercised an option in the latter part of 2019 to extend its lease to December 31, 2022, not 2028. Further, the term of the Lease Amendment specifies that the extension

began on October 14, 2019, which would indicate that Applicant's lease was due to expire on October 13, 2019. Accordingly, the lease was due to expire months after the City Council began publically discussing a complete prohibition on the sale of tobacco in Manhattan Beach, and 13 days after the Council directed staff to draft ordinances to ban vape products and the sale of tobacco products.

7. The City provided ample notice to Applicant of the proposed ban prior to the asserted extension of the lease. On June 4, 2019, the City Council directed staff to notify all retailers with a City tobacco retail sales permit that the City was considering a ban on all tobacco products and would consider the ban at a future City Council meeting. Accordingly, City staff notified Applicant. Throughout the period of June – September, the City's Agenda Forecast identified October 1, 2019 as the Council meeting in which the ban would be considered. The Amendment is dated August 1, 2019, but the hand-written date next to Applicant's signature appears to be September 17, 2019, over three months after the tobacco sales ban appeared on the City's Agenda Forecast, and one week before the Applicant submitted an email opposing the ban.
8. With full knowledge of the facts set forth in subsections 6 and 7, and choosing to assume the risk of its actions, Applicant extended its lease term by three years through December 31, 2022, and now claims that the "life of the lease" extends to December 31, 2027, the expiration date for what the Lease Amendment refers to as an "Additional Option Period."
9. A hardship exemption allowing Applicant to sell tobacco products until April 30, 2021, will provide Applicant with sufficient time to sell any existing inventory and either transition to selling other legally permitted products or relocate its operations outside the City. April 30, 2021 is 19 months after the Council's public direction to staff on October 1, 2019 to draft ordinances to ban vape products and the sale of tobacco products.
10. Allowing such temporary sales until April 30, 2021, subject to conditions, shall not be construed as conferring any rights, vested or otherwise, to allow such use to continue after April 30, 2021.
11. Based on the foregoing, Applicant has not met its burden of proof in establishing, by a preponderance of the evidence, that the application of Ordinance 20-0007 to Applicant is unreasonable and will cause significant hardship to Applicant by not allowing for the recovery of its investment backed expectations.

SECTION 8. 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 April 30, 2021, subject to the following conditions:

1. Applicant acknowledges and understands that allowing such sales to continue for this temporary time period does not confer a vested right on Applicant to sell tobacco products after April 30, 2021.
2. Applicant shall terminate all sales of the products (e.g., vape products, electronic cigarettes, etc.) that are prohibited by 19-0016-U (the Vaping Products Ban).
3. Applicant will, in good faith, work with City staff during the exemption period to transition the Property in a manner that ensures compatibility with the applicable zoning standards.
4. Applicant shall not extend its current lease or exercise any additional option periods for the purpose of Applicant contending that it is entitled to a further hardship exemption.
5. The business on the Property shall be operated in compliance with all applicable laws, including City's Municipal Code.
6. To deplete inventory, Applicant shall not purchase any tobacco products after February 1, 2021.
7. No later than February 28, 2021, Applicant shall demonstrate to City staff its efforts to transition to a legally permitted commercial use or to relocate its business to another jurisdiction.
8. 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.
9. Applicant shall enter into a covenant, in form acceptable to the City Attorney, agreeing to these conditions, within 30 days of the date of this Resolution.

SECTION 9. Once again, the City extends its offer to provide MB Smoke with consulting services, at no cost to MB Smoke, to assist in the transition.

SECTION 10. The City Clerk shall certify to the adoption of this Resolution.

ADOPTED January 19, 2021

SUZANNE HADLEY
Mayor

ATTEST:

LIZA TAMURA
City Clerk