

RESOLUTION 21-0022

A RESOLUTION OF THE MANHATTAN BEACH CITY COUNCIL APPROVING A HARDSHIP EXEMPTION AUTHORIZING 1002 MANHATTAN BEACH BLVD PARTNERS LLC TO TEMPORARILY SELL TOBACCO PRODUCTS UNTIL JUNE 30, 2021, AT THE ARCO/AM PM GAS STATION LOCATED AT 1002 MANHATTAN BEACH 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 devoted 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 first 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. On June 12, 2019, the following item appeared on the City's Agenda Forecast: "Report on Complete Ban on Tobacco and Vaping." On the Agenda Forecast dated July 31, 2019, the tentative agenda for October 1, 2019, contained the following item: "Consider a Complete Ban of Sales of Tobacco Products." At a duly noticed City Council meeting held on October 1, 2019, the City Council entertained several comments from the public regarding a prohibition, including comments from several retailers. 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.

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, 2020. 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, upon application the City Council may grant a hardship exemption upon considering the following factors 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.

The City Council established October 31, 2020, as the deadline for submitting an application for a hardship exemption, providing businesses with ample time to facilitate a transition to non-tobacco products, deplete stock, and assess whether they might need more time to comply with the prohibition.

SECTION 4. 1002 Manhattan Beach Blvd LLC (“Applicant”) failed to meet the October 31, 2020 deadline for filing an application for a hardship exemption. Thus, pursuant to Ordinance No. 20-0007, Applicant has been prohibited from selling tobacco

products since January 1, 2021. Based upon the failure to timely file for an exemption or extension, the City has the absolute right to not consider nor grant the untimely request. However, the Applicant has demonstrated extenuating circumstances to support its untimely request, and, at a duly noticed City Council meeting, the City Council granted the extraordinary relief of considering the untimely application. Applicant has requested a hardship exemption to allow tobacco sales at its store located at 1002 Manhattan Beach Boulevard for an additional nine months. Applicant stated that the reason for requesting an additional nine months to comply with the Ordinance is to sell the convenience store's current inventory. 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 gas station that primarily sells fuel. In addition, the Applicant sells beer, wine, lottery tickets, convenience items, beverages, snacks, and other items. Ordinance No. 20-0007 does not affect Applicant's ability to continue selling fuel and such goods. The City has provided ample time to gas station/convenience store to deplete its stock of tobacco products, which is, at most, an ancillary part of its sales. Further, the Applicant was well aware of the tobacco prohibition prior to purchasing the gas station/convenience store. Any investment in the property should not have relied on the ability to sell tobacco products. Thus, Applicant's investment backed expectations should not include the sale of tobacco products.

SECTION 5. Based upon the foregoing, the City Council makes the following findings:

1. Applicant failed to meet the October 31, 2020 deadline for filing an application for a hardship exemption. On that basis alone, the City has the absolute right to neither consider nor grant the untimely request. However, the Applicant has demonstrated extenuating circumstances to support its belated request. By granting this extraordinary relief, the City is not waiving any rights it may have with respect to the late filing.
2. 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. Arco AM/PM is a gas station, with an accompanying convenience store that sells beer, wine, lottery tickets, convenience items, beverages, snacks, and other items. The sale of tobacco products does not constitute a major portion of its sales.
3. Applicant has requested nine months to deplete its remaining inventory valued at \$10,000. Allowing Applicant to continue selling tobacco products on a temporary basis until June 30, 2021 provides Applicant with ample time to deplete its stock.

4. 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, for the sole purpose of depleting existing stock, subject to the following conditions:

1. Applicant hereby acknowledges and understands that, allowing such temporary sales does not confer a vested right to Applicant to sell tobacco products after June 30, 2021.
2. The gas station/convenience store 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 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 a covenant, in a 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 February 16, 2021

AYES:
NOES:
ABSENT:
ABSTAIN:

SUZANNE HADLEY
Mayor

ATTEST:

LIZA TAMURA
City Clerk