



MILPITAS PLANNING COMMISSION STAFF REPORT

February 26, 2014

APPLICATION: **Zoning Definition Amendments - Zoning Amendment No. ZA14-0001** - A City-initiated request to consider a zoning amendment to create definitions for Electronic Smoking Device and Head/Smoke/Tobacco Shops and other related amendments for inclusion in the City's Zoning Ordinance.

RECOMMENDATION: **Staff recommends that the Planning Commission:** Adopt Resolution No. 14-009 recommending the City Council adopts an amendment to the Zoning Ordinance defining Electronic Smoking Device and Head/Smoke/Tobacco Shops and other related amendments – (Zoning Amendment No. ZA14-0001).

LOCATION:
Address/APN: City-wide

PEOPLE:
Project Applicant: City of Milpitas Planning Division
Project Planner: Scott Ruhland, Senior Planner

LAND USE:
General Plan Designation: Commercial and Mixed Use Designations
Zoning District: Commercial and Mixed Use Districts, Recreation and Entertainment Overlay District

ENVIRONMENTAL: Categorically exempt from further environmental review pursuant to Section 15061(b)(3) in that CEQA only applies to projects that have the potential for causing a significant effect on the environment.

EXECUTIVE SUMMARY

The City's Zoning Ordinance does not have a definition of "Tobacco Shop" or similar related uses, although they are mentioned in the Zoning Ordinance. Recent new technology in tobacco and tobacco related products has resulted in new products and services that are not currently regulated by the City's Zoning Ordinance. Although, retail tobacco stores require a Conditional Use Permit, there is not a definition of such use, or for other related uses in the Zoning Ordinance. The proposed zoning amendments consist of the following new definitions and related amendments:

- 1) Create a new definition for "Tobacco/Head/Smoke Shop"
- 2) Create a new definition for "Electronic Smoking Device"
- 3) Amend related Zoning Ordinance sections for consistency with the new terminology and definitions.

BACKGROUND

History

Recently, staff has received a number of inquiries about tobacco stores, electronic cigarettes, and other similar related uses. Specifically, staff has received inquiries from retail businesses regarding the sale of electronic cigarettes, nicotine vaporizers and similar devices. Staff has found that that Zoning Ordinance is unclear on the regulation and classification of these types of uses. Staff has interpreted these uses to fall within the “Tobacco Shop” type of use, which is the general term referenced in the Ordinance. However, the Zoning Ordinance does not define Tobacco Shop or other tobacco related uses. The Zoning Ordinance, Live-Work provisions, also includes a use entitled “Head/Tobacco/Smoke Shop” that does not exist anywhere else in the Zoning Ordinance.

Further, the FDA and healthcare providers question the safety of electronic smoking devices to both users and those in close proximity to users, despite the claims of harmlessness by manufacturers. The FDA has also raised concerns that electronic smoking devices, which, are often marketed in appealing flavors, can increase nicotine addiction among young people and may lead youth to try conventional tobacco products. To address these issues and in order to clarify the intent and regulation of these types of uses, staff is proposing an amendment to better define and classify tobacco and similar uses.

The Application

The following is a summary of the request:

- *Zoning Amendment:* Amend specific sections of the Zoning Ordinance to include new definitions and related amendments for consistency.

PROJECT DESCRIPTION

Overview

The proposed amendment will create two new zoning definitions, “Electronic Smoking Device” and “Tobacco/Head/Smoke Shop”. Other amendments for zoning consistency are also proposed.

The definitions are proposed as follows:

“Electronic Smoking Device” means an electronic and/or battery-operated device, the use of which may resemble smoking that can be used to deliver an inhaled dose of nicotine or other substances. “Electronic Smoking Device” includes any such device, whether manufactured, distributed, marketed, or sold as an electronic cigarette, an electronic cigar, an electronic cigarillo, an electronic pipe, an electronic hookah, vaporizer or any other product name or descriptor.

“Head/Smoke/Tobacco Shop” means a retail establishment primarily engaged in the selling of smoking and tobacco products and accessories, and other products, devices and components reasonably assumed to be used for smoking and/or the inhalation or injection of any substances. Tobacco products may include but are not limited to cigarettes, cigars, loose leaf tobacco, tobacco pipes, Electronic Smoking Devices and accessories.

vaporizers and accessories and any other product, device or component used in the inhalation or injection of tobacco, nicotine or other substance. For the purposes of this definition only, “primarily engaged” means when thirty percent (30%) or more of products sold at the retail establishment are smoking and tobacco products and accessories, and other products, devices and components reasonably assumed to be used for smoking and/or inhalation or injection of any substances.

The amendment will also update the Commercial Use Districts, and Recreational and Entertainment Overlay use tables with the new use term “Head/Smoke/Tobacco Shop”. Currently the term used is “Tobacco Shop”. Please see Attachment B for the proposed Ordinance language.

Location and Context

The new definitions will apply City-wide and be applicable to locations where those uses are conditionally permitted, which includes the Commercial zoning districts and areas with the Recreation and Entertainment Overlay District.

PROJECT ANALYSIS

General Plan and Zoning Conformance

The project is consistent with the intent of the General Plan to regulate the general health, safety and welfare of Milpitas residents. Creation of definitions for certain activities and businesses helps to regulate land use and implement zoning provisions. The definitions help determine the classification of uses which promotes the orderly and safe development of the City.

The proposed amendments to the Zoning Ordinance have been checked for internal consistency with other provisions of the Ordinance. The creation of definitions and amendment to implement the definitions conform to other provisions of the Ordinance.

FINDINGS FOR APPROVAL (OR DENIAL)

A finding is a statement of fact relating to the information that the Planning Commission has considered in making a decision. Findings shall identify the rationale behind the decision to take a certain action.

Zoning Amendment (Section XI-10-57.02(G)(3))

- 1. The proposed amendment is consistent with the General Plan.*

The project is consistent with this finding because the creation of definitions for these uses furthers the General Plan goal of promoting the health, safety and general welfare of Milpitas residents as further described in the Recitals section of the attached proposed Ordinance. Definitions of use and classification of such uses promotes the orderly and safe development of the City.

- 2. The proposed amendment will not adversely affect the public health, safety and welfare.*

As described in details in the Recitals section of the proposed Ordinance, the project is consistent with this finding because regulating tobacco related uses promotes public health and classifies these types of similar uses. This allows the City to better regulate these uses based on changing technology and new methods of smoking and inhaling nicotine and or other substances.

ENVIRONMENTAL REVIEW

The Planning Division conducted an environmental assessment of the project in accordance with the California Environmental Quality Act (CEQA). The project is categorically exempt from further CEQA review under Section 15061(b)(3) of the CEQA Guidelines in that the project has no potential to cause a significant effect on the environment. Staff has determined that creating definitions for these uses and related amendments for consistency has no potential to cause a significant effect on the environment since the amendment related to classification and regulations of certain uses. These are considered policy amendments and have no direct connection or effect on the environment.

PUBLIC COMMENT/OUTREACH

Staff provided public notice the application in accordance with City and State public noticing requirements. At the time of writing this report, there have been no inquiries from the public. A notice was published in the Milpitas Post on February 14, 2014 (Two Fridays before the meeting). A public notice was also provided on the City's Website, www.ci.milpitas.ca.gov, and posted at City Hall.

CITY COUNCIL REVIEW

This project requires review by the City Council and is tentatively scheduled on the March 18, 2014 Council agenda.

CONCLUSION

In summary, the proposed definitions and related amendments for consistency will better classify and regulate tobacco related uses. The amendments provide clarification for use by staff and the public so the clear intention of the zoning ordinance is identified and not left to interpretation by staff. Overall, these amendments will help to promote the health, safety and general welfare of Milpitas residents.

RECOMMENDATION

STAFF RECOMMENDS THAT the Planning Commission:

1. Open and Close Public Hearing; and
2. Adopt Resolution 14-009 recommending City Council adopts an amendment to the Zoning Ordinance defining Electronic Smoking Device and Head/Smoke/Tobacco Shops and other related amendments –(Zoning Amendment No. ZA14-0001) based on the findings

ATTACHMENTS

A: Resolution No. 14-009

B: Ordinance No. 38.813