

June 16, 2021

TO THE CITY COUNCIL MEMBERS:

The regularly scheduled meeting of the City Council's **Ordinance Committee** will be held on **Tuesday** evening, **June 22, 2021** at **6:00 p.m.** This meeting will be conducted by Zoom/Teleconference. The public may listen into this meeting by calling the following conference line and then entering the conference code:

Dial-in Number#: (929) 436-2866
Meeting ID#: 984 964 381

If you are unable to dial in, please contact the Committee Co-chairs, Councilman Marcus A. Brown at (203) 275-9731 or Councilwoman Eneida L. Martinez at (475) 422-2886.

If you have submitted an item that appears on the agenda below and are receiving this notice, it is imperative that you or a representative dial in to represent that item.

AGENDA

Approval of Committee Minutes: April 27, 2021 (Regular Meeting)

- 21-20** Proposed Amendments to the Municipal Code of Ordinances, amend Chapter 8.90 – Regulation of the Sales and Marketing of Tobacco Products. *(Note: Item can be found on the City Clerk's Website: City Council Agendas/Minutes; City Council; 2020-2021; Full/Minutes/Size; 2021-02-16.pdf)*
- 52-20** Proposed Resolution for a Policy to Prevent the Water Pollution Control Authority (WPCA) Foreclosure Crisis as State and Federal COVID-19 Pandemic Foreclosure Moratoriums Expire. *(Note: Item can be found on the City Clerk's Website: City Council Agendas/Minutes; City Council; 2020-2021; Full/Minutes/Size; 2021-04-19.pdf)*

Very truly yours,

Frances Ortiz
Assistant City Clerk

FO: lp

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Ec: Mayor Joseph P. Ganim
T. Gaudett, Mayoral Aide
E. Adams, Dir., Gov't Accountability & Integrity
J. Hawkins, CAO
J. Gomes, Assistant CAO
D. Shamas, Chief of Staff
R. Christopher Meyer, City Attorney
J. Bohannon, Jr., Deputy City Attorney
M. Anastasi, Esquire
E. Jackson-Shaheed, Acting Director, Health & Social Svcs.
L. McBennett Mappa, General Manager, WPCA
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June 23, 2021

Ordinance Committee
City Council
City of Bridgeport
45 Lyon Terrace
Bridgeport, CT 06610

**Re: SUBSTITUTE LEGAL OPINION / Proposed Ordinance #21-20 Proposed Resolution
for Amendment to Code of Ordinances, Sec. 8.90 Regulation of the Sales and
Marketing of Tobacco Products**

Dear Honorable Committee Members:

The Office of the City Attorney has reviewed the above-referenced proposed ordinance and recommends that the ordinance not be enacted as drafted for the following reasons:

- While more than three hundred (300) localities nationwide have enacted restrictions on the sale of flavored tobacco products, we are aware of no Connecticut municipality that has imposed a ban on flavored tobacco products. It is noted that while in February 2021, the City of Hartford introduced an ordinance on this subject, to date Hartford does not appear to have enacted any such local legislation.
- The CT State Legislature during the current legislative session had been considering various bills including SB 326 *An Act Concerning The Sale Of Certain Electronic Nicotine Delivery Systems, Vapor Products, Cigarettes and Tobacco Products*, proposing to prohibit the marketing and sale of various tobacco products including flavored tobacco products. It is our current understanding that all such bills have been defeated.

Most recently an 11th hour amendment deleted Sections 490-495 from the State Budget Implementer Bill, which provisions would have prohibited the sale of electronic nicotine delivery systems and vapor products with non-tobacco flavoring agents, effective January 1, 2022.

Nevertheless, to date at least five (5) other states (MA, NY, NJ, RI and CA) have prohibited the sales of flavored tobacco products, flavored e-cigarettes and/or menthol cigarettes; and there remains optimism that the State of Connecticut will follow suit in the foreseeable future. In addition, the Food and Drug Administration (FDA) has proposed a nationwide ban on menthol cigarettes that is currently under public review.

- Upon review of the Connecticut General Statutes and Regulations, the matter of licensing and regulating retail sales of tobacco products is within the jurisdiction of the State of Connecticut. However, the State Legislature expressly granted Connecticut municipalities certain public health regulatory and police powers. See Conn. Gen. Statute Sec. 7-148, particularly subsections 7-148 (b), (c)(7)(H) (ii) and (c)(10). Therefore, what is not so evident is whether the courts would rule that proposed ordinance #21-20 if enacted would be deemed pre-empted by virtue of the State having “occupied the entire field” in this substantive area. Indeed, the State Legislature’s recent reticence to enact prohibitions on flavored tobacco products would seem to undercut such a claim.

See also, *Bauer v. Waste Management of Connecticut, Inc.*, 234 Conn. 234 (1995) (preemption occurs only when the legislature has demonstrated an intent to occupy the entire field of regulation or when a local ordinance irreconcilably conflicts with a state statute); *Modern Cigarette, Inc., v. Orange*, 256 Conn. 105 (2001) (upheld town’s authority to prohibit cigarette vending machines); and *Beacon Falls v. Posick*, 212 Conn. 570, at 584 (1989) (when a statute authorizes a municipality to regulate a certain activity, a prohibition of that activity will be valid if it is rationally related to the protection of the community’s public health, safety, and general welfare).

- Regardless of the ultimate outcome, costly and high-exposure (but obviously avoidable) civil litigation should reasonably be anticipated in the event Ordinance #21-20 were to be adopted to prohibit the display, marketing, advertisement and/or sale of flavored tobacco products. The City Council will have to make the policy determination as to whether the City of Bridgeport should serve as the test case on this subject matter.
- **It is respectfully submitted that regulation or prohibition of flavored tobacco products is a subject matter that may be best left to the State for a variety of reasons, including:**

- (a) marketing and sales of flavored and menthol tobacco products is a public health and safety regulatory matter of general statewide, and indeed national, concern;
- (b) piecemeal regulation / prohibition on a local level would simply displace the location of retail sales to adjoining communities, rather than eliminate the offending activity;
- (c) the costs of defense to be incurred, and the third-party civil liability financial exposure to be endured, as consequences of the inevitable legal challenges to such discretionary local legislation would be substantial and unfairly borne solely by the City of Bridgeport, which can least afford such expenditures as compared to more affluent Connecticut communities; and

(d) it would appear legally and financially prudent for the City of Bridgeport to refrain from enactment of Ordinance #21-20 to permit the subject to be substantively addressed on a statewide basis [or alternatively to refrain from legislating, at least until other municipalities with greater fiscal resources have set the local legislative precedent and “cleared the field” of the inevitable legal challenges].

- **It is further respectfully submitted that due to the obvious and substantial public health and safety concerns surrounding this subject matter, the City Council might want to consider the alternative route of adopting a Resolution:**

- (a) encouraging the CT State Legislature to adopt laws to ban statewide the display, marketing, advertisement and sale of flavored tobacco products,
- (b) urging Bridgeport’s State Legislative Delegation to introduce, support, promote and vote for the enactment of such state legislation and
- (c) directing the filing of copies of such City Council Resolution with all CT State Legislators and the Office of the Governor.

Very truly yours,
/s/ Mark T. Anastasi
Mark T. Anastasi, Esq.

Cc: Joseph P. Ganim, Mayor
Lydia Martinez, City Clerk
Frances Ortiz, Asst. City Clerk
Janene Hawkins, CAO
Thomas Gaudett, Mayor’s Office
R. Christopher Meyer, City Attorney
John P. Bohannon, Jr., Deputy City Attorney

NOTE:

This Substitute Legal Opinion is necessitated by my having presented factually erroneous information at last evening’s Ordinance Committee meeting, for which I apologize to the Committee.

I submitted to the Ordinance Committee a Legal Opinion on Resolution #21-20 earlier Tuesday and followed it up with a Revised Opinion. The Revised Opinion (which is the version that was posted on the City Clerk’s website with the Committee Agenda) mistakenly relied upon a version of the State Budget Implementer Bill that was amended just prior to final enactment. The various 11th hour amendments by the House and Senate to the Implementer Bill included DELETION of Sections 490-495, which are those provisions which had pertained to a proposed statewide flavored tobacco product prohibition.

Regardless of the final amendments to the Implementer Bill, the recommendation that proposed ordinance #21-20 be denied, stands; although based on somewhat altered reasoning.