



STAFF REPORT

Date: April 16, 2014
To: Mayor and Members of City Council
From: William R. Galstan, Special Counsel *William R. Galstan*
Cc: Bryan Montgomery, City Manager; Derek P. Cole, City Attorney;
Brent Smith, Chief Building Official; Dan Gomez, Chief of Police;
Denice Dennis, Contra Costa Health Services Tobacco Control
Project Director
SUBJECT: Ordinance Dealing with Outdoor Smoking and Use of E-
Cigarettes by Minors

FOR CONSIDERATION AT THE CITY COUNCIL MEETING OF MAY 13, 2014

Background and Analysis

When the City Council recently took action approving the ordinance dealing with smoking at apartments, it was pointed out that our existing ordinances do not prevent smoking at various outdoor locations. The County and several Contra Costa cities have ordinances dealing with outdoor-area smoking regulations. Based on Council's request, we provide the attached ordinance for consideration.

The issue of use of electronic cigarettes ("e-cigarettes") was also raised at our previous meetings. This topic will be discussed in a separate section of this staff report.

The proposed ordinance would prohibit smoking in most—if not all—outdoor areas that are owned by the City of Oakley, including but not limited to: parks, sports facilities, picnic areas, playgrounds, walking paths, hiking trails, amphitheaters, plazas, nature interpretative areas, ball fields, fishing piers, pools, etc. and on streets and sidewalks closed for farmers' markets, festivals or parades. Smoking while walking on a city-owned sidewalk or street is not prohibited.

Additionally, the ordinance would prohibit smoking in several privately-owned outdoor areas, including restaurant outdoor seating, exterior areas of shopping centers, vehicle display areas, swap meets, Christmas tree lots, gardening centers, temporary outdoor sales areas, bus shelters (which are frequently owned by advertising companies) and similar locations.

In the above respects, the proposed ordinance is quite similar to the ordinances already adopted by the County and several Contra Costa cities.

E-cigarette discussion

Quite a bit of information has been garnered from general-circulation publications, and articles are attached to this staff report. Since these publications are neither industry publications nor public health publications, their content can be expected to be more neutral and objective. Note that I have not endeavored to conduct comprehensive research on this subject—these articles are ones that I have encountered just in the normal course of reading.

The one thing that all the articles agree upon is that to date, there is very little regulation of e-cigarettes and not much scientific research to show that e-cigarette use is dangerous to health. The one regulation that does exist is California Health & Safety Code Sec. 119405, which outlaws the sale of e-cigarette supplies to minors. The federal government health agencies are conducting research and are expected to issue regulations—of some type—in the relatively near future.

By way of background, an e-cigarette is a cartridge filled with a nicotine solution with a battery powering a coil that heats the solution into a vapor. There is no combustion of any material, and thus no smoke. The vapor is taken into the user and then exhaled.

Following are some of the more interesting/informative comments about e-cigarettes that are found in the attached publication articles. I have not attempted to quote information that is either negative or positive about these products, but merely to convey information, which is sometimes inconsistent. The reader should read the entirety of each article to obtain a full understanding of it.

The *Bloomberg Businessweek* article notes that “the effects of inhaling nicotine vapor are not totally understood, but there is no evidence to date that it causes cancer.” The article goes on to state that nicotine “helps regulate your mood, and it is an appetite suppressant...it’s a cognitive enhancer, and there’s some hotly contested evidence that it may slow the onset of Alzheimer’s Disease...even without the combustion, nicotine is a vasoconstrictor that narrows blood vessels and drives up blood pressure.” The article also contains a graph showing the amazing variety of flavors of the liquid to be vaporized that are available (everything from mango and guava to honeydew melon and cream to graham cracker cookie to menthol, strawberry and watermelon).

The *Consumer Reports* article asks “are they safe to use?” and responds “we don’t know yet”. The main concern of the article, as well as that of many other commentators, is that the kid-friendly flavors that are offered could hook kids and teens on nicotine “or serve as a gateway to real cigarettes.” It is also noted that e-cigarettes contain one-tenth of the vapor that is emitted from a real cigarette. Finally,

the article notes that e-cigarettes “might help smokers quit” but does not recommend e-cigarette use for that purpose. We are also aware of a Kaiser Permanente publication that does not encourage use of e-cigarettes as a method of quitting tobacco smoking.

The cities of Walnut Creek, Richmond, Concord, and the County include e-cigarettes in the definition of “smoking” and preclude use of e-cigarettes in the same areas that tobacco smoking is prohibited. However, from all of the above discussion, it appears prudent **not** to regulate e-cigarette use as part of the proposed ordinance. If challenged in a lawsuit, I do not think we could muster sufficient scientific information to justify such regulation, especially as pertains to outdoor areas. The larger and more financially-robust cities mentioned above are in a better position to absorb the costs of litigating this issue than are we.

However, the headline here and a very important factor is a provision in this ordinance pertaining to use of e-cigarettes by minors. State law bans the **sale** of e-cigarettes to minors, and this ordinance bans the **use** of e-cigarettes by minors. There does seem to be a legitimate concern that the kid-friendly flavors available for e-cigarettes could encourage use and lead to a “gateway” toward actual tobacco use. We suggest that the Police Department and perhaps Code Enforcement undertake enforcement patrols at establishments selling e-cigarettes to ensure that sales are not being made to minors, and that minors observed using the product be cited.

Fiscal Impact

The ordinance does not appear to have any direct fiscal impact. The City may wish to post more no-smoking signs on its property, although this is not a requirement. There may be modest demands on enforcement personnel, such as the Police Department and Code Enforcement.

Recommendation

- 1) Introduce the ordinance by title only;
- 2) Introduce the ordinance making amendments and additions to Title 4, Chapter 19 of the Oakley Municipal Code dealing with smoking in outdoor areas and prohibiting use of electronic cigarettes by minors;
- 3) Adopt the Resolution making legislative findings regarding prohibiting use of electronic cigarettes by minors.

Attachments

- A) Ordinance making amendments and additions to Title 4, Chapter 19 of the Oakley Municipal Code;
- B) Resolution making legislative findings regarding prohibiting use of electronic cigarettes by minors;

- C) *Consumer Reports* article, March 2014;
- D) *Bloomberg Businessweek* article, Feb. 16, 2014;
- E) *SF Daily Journal* article, March 3, 2014.

ORDINANCE NO. _____

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF OAKLEY
AMENDING SECTION 4.19.004(f) AND ADDING SECTIONS 4.19.009, 4.19.009.1
AND 4.19.011 TO THE OAKLEY MUNICIPAL CODE, DEALING WITH
SMOKING IN OUTDOOR AREAS AND PROHIBITING USE OF ELECTRONIC
CIGARETTES BY MINORS**

The City Council of the City of Oakley does ordain as follows:

Section 1. Section 4.19.004(f) is amended to read as follows:

f. "Smoking" means engaging in an act that generates smoke, such as, for example, possessing a lighted pipe, a lighted hookah pipe, a lighted cigar, or a lighted cigarette of any kind, including a lighted marijuana joint, pipe, or other implement. "Smoking" includes smoking marijuana for medical or recreational purposes.

Section 2. Sections 4.19.009 and Section 4.19.009.1 are hereby added to the Oakley Municipal Code, to read as follows:

4.19.009 Prohibition of Smoking at City-Owned Facilities.

Smoking, as defined in Section 4.19.004(f), is prohibited at any enclosed or outdoor area owned by the City of Oakley, including, but not limited to the following: parks, sports facilities, picnic areas, playgrounds, walking paths, hiking trails, amphitheaters, plazas, nature interpretative areas, or special-use recreational facilities such as ball fields, fishing piers, swimming pools, skateboard parks, etc. This section does not apply to smoking in privately-owned vehicles traveling on City-owned streets, nor to pedestrians on concrete sidewalks. However this Section shall apply to streets or sidewalks closed for authorized farmer's markets, festivals or parades. The presence or absence of signs prohibiting smoking shall not be a defense to a charge of smoking in violation of this Section.

4.19.009.1 Prohibition of Smoking at Designated Private Facilities.

Smoking, as defined in Section 4.19.004(f), is prohibited at any outdoor area which is privately owned at the following locations: outdoor dining areas at bars and restaurants; all areas within twenty feet of doors, windows, air ducts and ventilation systems; exterior areas of shopping centers and malls; automobile or vehicle display areas; swap meets, nurseries, Christmas Tree lots, temporary outdoor sales and display areas, bus shelters, movie lines and outdoor sales areas and other similar locations. "No smoking" signs consisting of letters of not less than one inch in height, or the international "no smoking" symbol shall be conspicuously posted in every building or other place where smoking is

regulated by section by the owner, operator, manager or other person having control of the place. The lack of a sign being posted shall not be a defense to a charge of smoking in violation of this section.

Section 3. Section 4.19.011 is hereby added to the Oakley Municipal Code, to read as follows:

4.19.011 Use of Electronic Cigarettes by Minors Prohibited.

The use of any electronic cigarette by a minor is prohibited throughout the City of Oakley. "Electronic cigarette" means a device that can provide an inhalable dose of nicotine by delivering a vaporized solution, irrespective of whether liquid nicotine is actually being vaporized. The legislative findings supporting this provision are contained in a separate Resolution adopted by the City Council.

Section 4. California Environmental Quality Act (CEQA) Finding.

This ordinance is exempt from CEQA pursuant to CEQA Guidelines Section 15061(b)(3), Review for Exemption, because it can be seen with certainty that the project will not have a significant effect on the environment; therefore the project is not subject to CEQA.

Section 5. Severability.

In the event any section or portion of this ordinance shall be determined to be invalid or unconstitutional, such section or portions shall be deemed severable and all other sections or portions hereof shall remain in full force and effect.

Section 6. Effective Date and Publication.

This ordinance shall take effect and be in force thirty (30) days from and after the date of its passage. The City Clerk shall cause the ordinance to be published within fifteen (15) days after its passage in a newspaper of general circulation, or by publishing a summary of the proposed ordinance, posting a certified copy of the proposed ordinance in the City Clerk's Office at least five (5) days prior to the City Council meeting at which the ordinance is to be adopted, and within fifteen (15) days after its adoption, publishing a summary of the ordinance with the names of the Council Members voting for and against the ordinance.

The foregoing ordinance was adopted with the reading waived at a regular meeting of the Oakley City Council on _____, 2014 by the following vote:

AYES:

NOES:

ABSTENTIONS:

ABSENT:

APPROVED:

Randy Pope, Mayor

ATTEST:

Libby Vreonis, City Clerk

Date

RESOLUTION NO. _____

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF OAKLEY MAKING
LEGISLATIVE FINDINGS REGARDING PROHIBITION OF USE OF
ELECTRONIC CIGARETTES BY MINORS**

WHEREAS the City Council of the City of Oakley is in the process of introducing and adopting an ordinance which would prohibit the use of electronic cigarettes by minors; and

WHEREAS the statement of legislative findings supporting such an ordinance are more efficiently stated in a separate Resolution, rather than being recited in the Ordinance;

NOW, THEREFORE, BE IT RESOLVED that the Oakley City Council hereby makes the following findings:

1. In adopting state law, Health & Safety Code Sec. 119405, the Legislature determined: that the United States Food and Drug Administration (FDA) studies warned the public about potential health risks associated with use of electronic cigarettes; that there are reported attempts to sell electronic cigarettes to minors at shopping malls and stores frequented by adolescents; that electronic cigarettes are sold with flavored cartridges to appeal to minors; that a prohibition on the sale of electronic cigarettes is necessary to protect the health of minors from a product with contents that have not been comprehensively studied.
2. The City Council finds that the use of flavored cartridges having sweeter flavors like "pina colada" and hard candies (S.F. Daily Journal, March 3, 2014) are targeted to be attractive to young people who have not yet taken up the habit of smoking tobacco;
3. There is a substantial danger that the use of electronic cigarettes by minors may be an entrance point and encourage young people to move on to smoking tobacco products, which are conclusively proven to be a significant health risk;

4. While Health & Safety Code Sec. 119405 prevents the sale of electronic cigarettes to minors, it does not take the next necessary step and prohibit the use of electronic cigarettes by minors;
5. The adoption of an ordinance prohibiting use of electronic cigarettes by minors will help protect the public health, safety and welfare.

The foregoing resolution was adopted at a regular meeting of the City Council of the City of Oakley held on the _____ day of May, 2014, by Councilmember _____, who moved its adoption, which motion being duly seconded by Councilmember _____, was upon voice vote carried and the resolution adopted by the following vote:

AYES:

NOES:

ABSTENTION:

ABSENT:

APPROVED:

Randy Pope, MAYOR

ATTEST:

Libby Vreonis, CITY CLERK

Date

E-cigarettes: Still many questions

MAYBE A FRIEND or family member uses one. Maybe you've seen one being fired up in a place where you thought smoking was banned, such as a restaurant or sporting arena. Or maybe you're using one yourself to try to kick a tobacco habit.

Whatever your experience is with electronic cigarettes, it seems that the battery-powered devices, which deliver a vaporized form of nicotine and mimic the feel of traditional cigarettes, are here to stay. Sales grew from about \$500 million in 2012 to an estimated \$1.5 billion in 2013. That's a fraction of the tobacco cigarette market—roughly \$100 billion per year—but reflects a 200 percent growth, in contrast to the steady decline in tobacco cigarette sales.

E-cigarettes are marketed as a more socially permissible alternative to smoking. But what exactly are users—and the people around them—breathing in? Are the cigarettes safe? And with kid-friendly flavors such as Cherry Crush, Peach Schnapps, and Vivid Vanilla, who are they really being marketed to? Here are answers to some key questions about electronic cigarettes.

What's in them?

The main component is a refillable or replaceable cartridge of liquid "juice" that contains nicotine, solvents, and flavors. When users draw on the device, it causes the battery to heat the liquid solution, which is then atomized into an inhalable vapor. The claimed levels of nicotine vary. Blu e-cigs, for example, offer cartridges

of varying strengths, from no nicotine to approximately 13 to 16 milligrams, with each cartridge containing enough for 250 or more "puffs." Some other brands list nicotine as a percentage of volume. Less clear is what's used to create the piña colada, vanilla, bubblegum, and other flavors.

How are they regulated?

At the moment, they aren't. At press time, the Food and Drug Administration was

allowed. You can find a list of local bans at no-smoke.org/pdf/ecigs/laws.pdf.

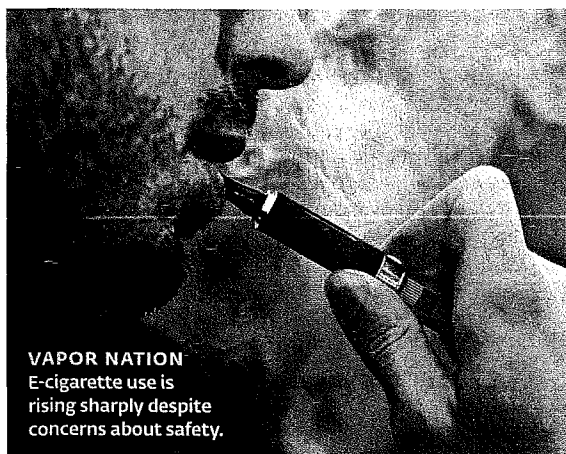
Are they safe to use?

We don't know yet. They expose users and people around them to fewer toxins than tobacco cigarettes, but that doesn't mean they're risk-free. Nicotine is very addictive, so e-cigs—especially the fruit and candy-flavored ones, health officials warn—could hook kids and teens on the stimulant or serve as a gateway to real cigarettes. And because they're unregulated, you don't necessarily know what's in them. In 2009 the FDA detected diethylene glycol, a toxic chemical used in antifreeze, in some e-cig samples and carcinogens called nitrosamines in others. Questions also linger over secondhand "vapor." A December 2013 study compared exhaled vapor from three e-cigarette brands with exhaled tobacco smoke and found that the e-cig vapor contained about one-tenth the level found in tobacco smoke. But the researchers didn't test for some of the other potentially unsafe components of vapor that earlier studies had found, including formaldehyde and metal particles.

Do they help smokers quit?

They might, though they're not approved for that by the FDA. And as with approved quitting methods, the results aren't that impressive. In a study of 657 smokers published last fall, e-cigs were about as effective as nicotine patches and were slightly better than placebo e-cigarettes, which contained no nicotine. But the differences were minor, and the overall number of people who quit with any method was low. After six months, about 7 percent of those in the e-cigarettes group and 6 percent of those who used nicotine patches stopped smoking vs. 4 percent of those who used placebo e-cigs.

Bottom line. The main reason it's so hard to say whether e-cigarettes are safe is that they simply haven't been around long enough to know. It took decades for the risks of tobacco cigarettes to emerge, and nobody knows yet what the long-term effects of "vaping" will be. If you're trying to give up real cigarettes, stick with better studied methods: nicotine gum, patches, and counseling. And if you don't smoke, don't start with e-cigs just for fun.



VAPOR NATION
E-cigarette use is rising sharply despite concerns about safety.

expected to release a proposed rule that would allow the agency to regulate them as they do other tobacco products. That could result in restrictions on the advertising or sale to minors and would probably require companies to disclose ingredients and conform to certain manufacturing standards. In the meantime, some states and municipalities—most recently New York City—have enacted bans on e-cigarettes in public parks and indoor venues where cigarette smoking isn't

Who's making money on e-cigarettes

Initially, e-cigarettes were the domain of small, largely Internet-based outfits. But they have caught the attention of Big Tobacco companies, several of which are now behind the biggest and most aggressively marketed e-cig brands. Market leader Blu is owned by Lorillard, maker of Newport, Kent, and other cigarette brands; Reynolds American (maker of Camel) and Altria (which owns Philip Morris USA, maker of Marlboro) have also gotten in on the game, launching the Vuse and MarkTen brands, respectively. Other signs that e-cigs have hit the mainstream? Victory Electronic Cigarettes trades on the Nasdaq stock exchange. And perhaps most telling, you can now find a variety of electronic cigarette brands at your local Sam's Club and Walmart.



The first time J. Andries Verleur tried an e-cigarette in 2008, he burned his lip and accidentally inhaled the nicotine fluid. "It was one of the worst products I ever tried," he recalls, "but the idea was amazing."

Verleur, a heavy smoker, was living in Prague and happened to spot the strange new product in a Vietnamese grocery store. The crude early version obviously didn't work very well, but Verleur, a serial entrepreneur, immediately realized that if it did work, it could upend the tobacco industry. That was worth looking into: Cigarettes are a global business that generates more than half a trillion dollars every year, according to data from Euromonitor International.

In its simplest form, an e-cigarette is a cartridge filled with a nicotine solution and a battery powering a coil that heats the solution into vapor, which one sucks in and exhales like smoke. Typically, it looks like a regular cigarette, except the tip, embedded with an LED, often glows blue instead of red. The active ingredient in e-cigarettes is the same nicotine found in cigarettes and nicotine patches.

The effects of inhaling nicotine vapor are not totally understood, but there is no evidence to date that it causes cancer. Experts and logic seem to agree that it's a lot better than setting chopped-up tobacco leaves on fire and inhaling the nicotine along with thousands of combustion byproducts, some of which are definitely carcinogenic. Because cancer is the main drawback of smoking for a lot of people, the delivery of nicotine without lighting a cigarette is very attractive. And because it produces a wispy vapor instead of acrid smoke, an e-cigarette lets you bring your smoking back indoors, where lighting up in an enclosed space is no longer socially, or legally, acceptable.

Verleur saw right away that if e-cigarettes could be made as convenient and satisfying as a pack of smokes, he'd make a killing. He enlisted the help of his brother, an engineer working for an Agilent Technologies spinoff; booked a trip to China; and began meeting with manufacturers. In 2009 he

formed his company, V2Cigs, with four employees working out of an apartment in Miami.

Five years later, V2Cigs has six manufacturing facilities in Shenzhen, China, a Miami headquarters, 250 employees, and 5 million customers worldwide. Verleur says more than a million of those are in the U.S., where Bloomberg Industries projects total e-cigarette sales could reach \$1.5 billion this year. Other competitors now include NJoy, Vapor, and Victory Electronic Cigarettes, as well as the major tobacco manufacturers and hundreds of others.

It all still represents a tiny fraction of what Americans spend on tobacco, but it's pretty solid for an industry that barely existed five years ago. A projection by Bloomberg Industries shows e-cigarette sales could surpass that of the traditional tobacco product by as early as 2023. Who will dominate the market is a different question, and one that may be answered not by the markets, but by the government.

A primitive, battery-operated "smokeless non-tobacco cigarette" was patented as early as 1963 and described in *Popular Mechanics* in 1965. Thomas Schelling, a Nobel prize-winning economist who helped start the Institute for the Study of Smoking Behavior and Policy at Harvard University's Kennedy School in the 1980s, recalls that people in the 1960s were talking about a charcoal-based vaporizer that would heat some sort of nicotine solution. While those early versions might have been safer than a regular cigarette, they were too expensive and cumbersome to become a substitute for a pack of Camels in a country where, as Schelling notes, "you're never more than 5 or 10 minutes away from a smoke."

In a way, electronic cigarettes were made possible by cell phones. The drive to make phones smaller and lengthen their battery life led to the development of batteries and equipment small enough to fit in a container the size and shape of a cigarette. There's some dispute over who invented the modern e-cigarette, but the first commercially marketed device was created by a Chinese pharmacist, Hon Lik, and introduced to the Chinese market as a smoking cessation device in

2004. From there, e-cigarettes made their way to small shops such as that of the Vietnamese grocer who sold Verleur his first one four years later.

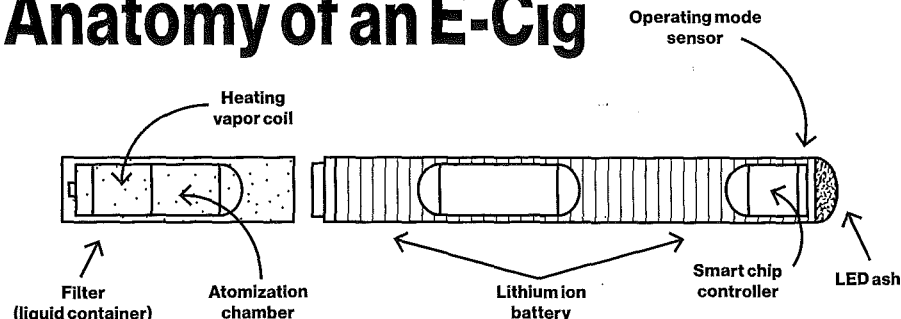
E-cigarettes beat the traditional kind in one big way: You can legally have them shipped to you in the comfort and privacy of your home. (It's not legal to send traditional cigarettes through the U.S. mail.) Blu, made by Greensboro (N.C.)-based Lorillard, one of the biggest producers of tobacco cigarettes, makes a starter pack that comes with a charger that doubles as a storage container, and it looks just like a pack of cigarettes. It also comes with two batteries and five nicotine cartridges good for about 150 puffs apiece. The pack costs about \$80 before shipping, which is roughly equal to the price of 8 to 16 packs of cigarettes. (Disposable e-cigarettes are cheaper to start, but in the long run they're much less economical.) Because nicotine cartridges are exempt from tobacco taxes, which now make up much of the retail cost of a cigarette, a pack of cartridges is competitive with old-fashioned smokes, especially if you live in an expensive jurisdiction such as New York.

E-cigarette cartridges come in classic tobacco and menthol flavors—Verleur's company even offers V2 Red, Sahara, and Congress, clearly aimed at loyal smokers of Marlboros, Camels, and Parliaments. But most companies also have less conventional flavors. Blu offers Peach Schnapps, Java Jolt, Vivid Vanilla, Cherry Crush, and Pifia Colada, presumably for people who don't just like a drink with a cigarette, but in one.

Jeff Ky is a salesman at My Vapez in Arlington, Va., where you can buy a variety of e-cigarettes and larger vaporizers that look like cigars. The array of flavors is astonishing, and he says the fruity flavors, not the traditional tobacco styles, are the most popular. Potential customers come into his store looking to quit and usually buy the classic tobacco flavor. Once they've kicked traditional cigarettes, they often start wanting something sweeter tasting, which Lorillard says is also its experience with Blu. Ky's best-selling flavor is cantaloupe-kiwi, and he uses a mixture that's supposed to taste like Strawberry Nesquik. Cartridges also come in varying strengths, ranging from high concentrations of nicotine to low concentrations to no nicotine at all for smokers trying to quit.

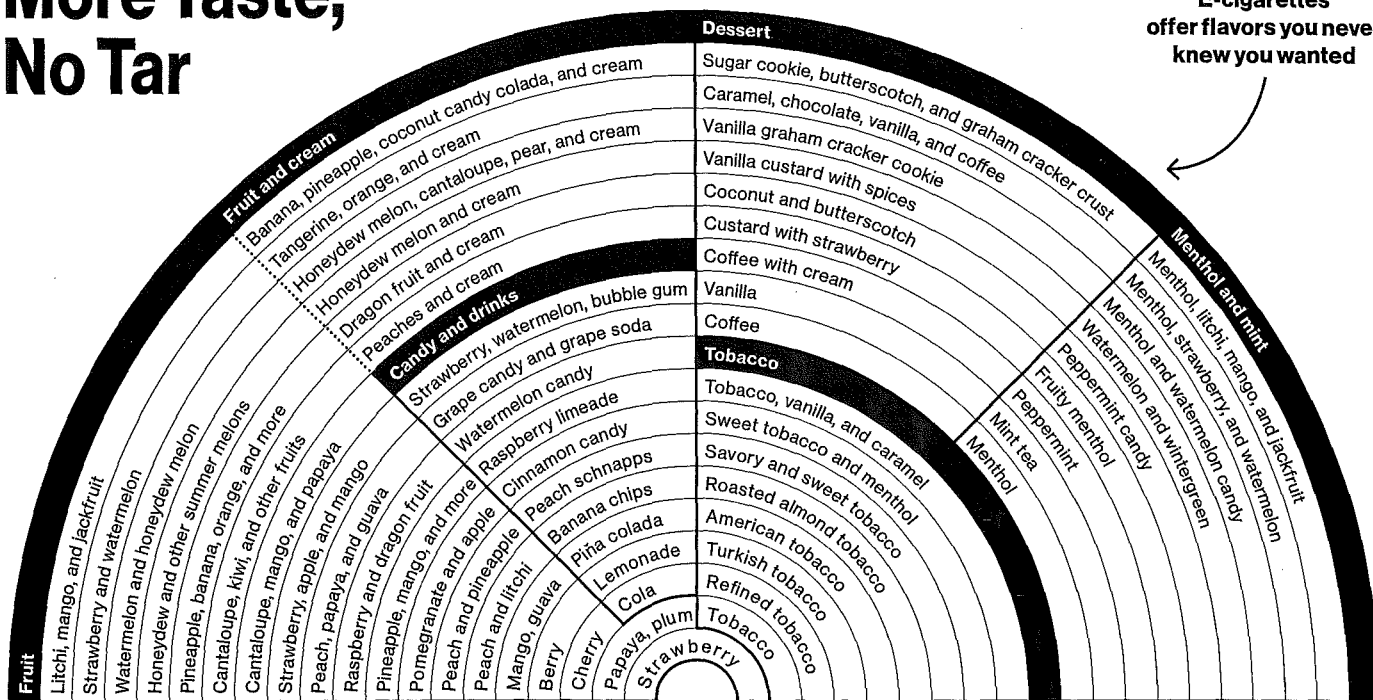
To find out how they tasted and if they were anything like a real cigarette, I ordered online a starter pack of Blu in menthol with a high concentration of nicotine. When the pack arrived, I had to read the directions carefully just to figure out how to charge the battery, which looked like the white part of a traditional cigarette, and then connect it to

Anatomy of an E-Cig



More Taste, No Tar

E-cigarettes
offer flavors you never
knew you wanted



the nicotine cartridge, which looked like a filter.

After I'd put it together, I had something surprisingly close to one of the cigarettes I used to smoke. The mentholated tobacco flavor rolled sinuously over my tongue, hit the back of my throat in an unctuously familiar cloud, and rushed through my capillaries, buzzing along my dormant nicotine receptors. The only thing missing was the unpleasant clawing feeling in my chest as my lungs begged me not to pollute them with tar and soot.

I couldn't wait to try them in a bar, so I met a friend for a drink at a local Washington watering hole. I hadn't had a cigarette in a bar since sometime in the late 1990s, and I felt self-conscious, maybe a little bit lonely: There's no social aspect, or even the hint of an invitation, in an e-cigarette. You don't pass the pack around, and no one is going to bum an e-cigarette off of you. "It becomes more like a hobby," says Ky of his customers, with users showing off their newest gear. But yes, an e-cigarette still tastes good with a drink.

In fact, it tastes almost too good. Like most smokers, I quit cigarettes several times before succeeding, and each time I quit, I had reached a point where I was basically glad to put down the cigarettes because they made me feel terrible. E-cigarettes don't hurt and don't offer the same incentive to quit. You could use one on the treadmill if you were so inclined.

Nicotine helps regulate your mood, and it is an appetite suppressant, too, which is why smokers who quit generally gain weight. It's a cognitive enhancer, and there's some hotly contested evidence that it may slow the onset of Alzheimer's disease. For

a sedentary knowledge worker facing the declines of middle age, that's an attractive combination. Indeed, one academic who does research in this area confided that he's thinking of taking up e-cigarettes because of the advantages of nicotine, even though he's never smoked. (He is not prepared to go on the record recommending that people add nicotine to their diets.)

The professor and I are exactly why some public-health experts want e-cigarettes treated like regular cigarettes: plastered with warnings, laden with taxes, and definitely not sold in flavors such as piña colada. "If e-cigarettes were regulated so that they became a way to get people off cigarettes, we would lead the cheer. But the issues are complicated," says Matt Myers, president of Campaign for Tobacco-Free Kids. "E-cigarettes are not harmless. You want to discourage people who do not currently use e-cigarettes from taking up the habit. Our concern is that it will re-glamorize smoking and lead people to switch to cigarettes, or experiment with cigarettes."

In October the European Parliament rejected a proposal to regulate e-cigarettes as medical devices. The U.S. Food and Drug Administration, which is in the process of drafting rules, is expected by observers to follow suit. The decision is important to pharmaceutical companies such as GlaxoSmithKline and Pfizer, which sell nicotine patches and gums that are regulated as medical tools and may not want unregulated competition.

The proposed regulations could be anything from basic rules ensuring that the nicotine cartridges contain what they're supposed to and that the devices are safe

to a scheme of the kind that Myers wants, with restrictions on flavored products and sexy marketing campaigns. Tight regulation would make the market much more complicated for upstarts such as V2Cigs, which don't have the marketing or lobbying muscle of Big Tobacco.

Some local government officials and regulators in other countries have already made a decision. Under former Mayor Michael Bloomberg (who owns Bloomberg LP, parent of *Bloomberg Businessweek*), New York in December expanded the ban on smoking in public places to include electronic cigarettes. In Chicago, Mayor Rahm Emanuel pushed for the same restrictions, and they have been adopted. Brazil has banned e-cigarettes outright.

As nothing but a replacement product for existing smokers, e-cigarettes seem like a public-health win. Widespread adoption by current smokers "could potentially reduce smoking deaths by more than 90 percent," says Joel Nitzkin, a public-health physician who is a senior fellow at free-market think tank R Street in Washington.

But what if current smokers aren't the only people who use them? What if e-cigarettes lure back people who used to smoke or attract new smokers? What if people who otherwise would have quit keep using nicotine? And perhaps the No. 1 argument: What if e-cigarettes make smoking normal again in public places, with the attendant annoyance of a neighbor or officemate blowing nicotine-laced steam everywhere?

Since the Office of the Surgeon General warned of its dangers in the 1960s, smoking has declined dramatically and is quite rare among the U.S. middle class. That's

because of its health risks, but also because of the social stigma and inconvenience associated with smoking. With the exception of some hipsters, smoking is largely a lower-income phenomenon. "You may be establishing something you want to establish in your group, but it's a pretty downscale group," says Mark Kleiman, a professor of public policy at the University of California at Los Angeles.

But if the stigma is undone, "we could go back to 50 percent of the population routinely using nicotine," Kleiman says. That doesn't mean he thinks we should ban e-cigarettes. "Given the certain gain from switching current smokers to e-cigs and the uncertain signs of the effects of adding new users, it seems to me that we should get public policy out of the way for now while watching to see how many of today's happy e-cig users become unhappy users three years from now."

A 2011 study published in the *Journal of Public Health Policy* concluded that "a preponderance of the available evidence shows [e-cigarettes] to be much safer than tobacco cigarettes and comparable in toxicity to conventional nicotine replacement products." It also said there's "reason to believe that they offer an advantage over traditional nicotine delivery devices." The other main ingredients in e-cigarettes are what the FDA calls "generally recognized as safe": glycerine, found in many foods, and propylene glycol, the main ingredient in theatrical fog.

E-cigarettes don't only assuage the desire for nicotine but also the desire to have a cigarette, which isn't exactly the same thing: One study found that even an e-cigarette rigged to deliver "minimal" nicotine could reduce cravings in a substantial minority of smokers. V2Cigs' Verleur estimates that while half of his customers use his product to replace cigarettes, either completely or in places where they aren't allowed to smoke, about one-quarter start at the highest concentration and work their way down toward the no-nicotine version, at which point some stop entirely, while others keep buying the nicotine-free ones.

Even without the combustion, nicotine is a vasoconstrictor that narrows blood vessels and drives up blood pressure. Doing that a dozen times a day is less bad than getting lung cancer, but it's still not great. Besides, there is no study on what inhaling those "generally recognized as safe" compounds might do to your lungs if you inhale them daily for a few decades. It's hard to imagine that the health effects could be worse than setting something on fire and deliberately breathing the smoke. But they're probably not as good as quitting. "The antismokers think we're going to win—that we can get to zero tobacco," says Kleiman. If that's what you believe, then you're likely to endorse stiff

restrictions on e-cigarettes. On the other hand, if you think U.S. tobacco consumption will stay stubbornly stuck between 10 percent and 20 percent of the population for the foreseeable future—which means tobacco deaths will remain in the hundreds of thousands annually—you're more likely to be agitating for the federal government to take a light hand, even if it means opening the door to the possibility of a renewed national mania for nicotine.

Among the FDA's most difficult decisions will be determining whether e-cigarettes will be a gateway product, encouraging young smokers to develop a nicotine habit that might lead to tobacco use. After all, many of the things that make e-cigarettes attractive to smokers make them even more attractive to minors. It's actually pretty unpleasant to start smoking—it causes dizziness, it causes coughing, and it usually takes kids a while to learn to inhale—but anyone can inhale e-cigarette vapor on the first puff. And since e-cigarettes don't have much odor, they're harder for parents to detect. During the debate over New York's policy, a September report from the Centers for Disease Control and Prevention showing e-cigarette use on the rise among teenagers was prominently discussed. Spokesmen for Altria Group, Reynolds American, and Lorillard—the Big Three of tobacco—are in agreement that children should be prevented from buying e-cigarettes, just as they are prevented from buying the regular kind.

Small e-cigarette manufacturers who exploited the power of the Internet have had the nascent market largely to themselves, but that's changing. "A year and a half ago, there were over 450 e-cigarette companies in the U.S. market, many of them mom-and-pop operations," Verleur says. There are still a few hundred companies out there, most of them tiny. According to Verleur, "over 70 percent of U.S. market share is held by about 10 companies."

Lorillard, which makes Kent and Newport cigarettes, has joined the e-cigarette market aggressively. It almost has to, according to Kenneth Shea of Bloomberg Industries, not only because cigarette sales have plateaued, but because 90 percent of the company's sales come from menthol cigarettes, which the FDA is under pressure to ban, as it banned other flavored tobacco products that public-health advocates argued were especially appealing to children. In 2012, Lorillard bought Blu for \$135 million in cash and has boosted its distribution to more than 125,000 stores. The brand is the market leader.

Big Tobacco's advantages will probably strengthen once the FDA releases its proposed rules. Analysts expect some restrictions on Internet sales because

it's too easy for minors to get the devices online. But while it's relatively easy for a small company to become established on the Internet, it's much harder to secure scarce shelf space behind a drugstore counter. The tighter the FDA regulation, the more valuable distribution networks and marketing power become. And of course, the more lobbyists a company can afford, the more likely it is to get regulations it likes.

Altria and Reynolds, which are the market leaders in sales of regular cigarettes, are entering the market as well. On Feb. 3, Altria announced it was buying e-cigarette company Green Smoke for \$110 million. They have also created their own products, MarkTen (Altria) and Vuse (Reynolds). Their e-cigarettes look sleek, but like traditional cigarettes come in only two flavors: regular and menthol. They're rolled out exclusively through retailers. Altria has launched its MarkTen in only two test markets, as Reynolds has with its Vuse. In November the *Wall Street Journal* reported that in Colorado, where Vuse was introduced in July, the product gained 55 percent of the e-cigarette market in a few months.

For all the taxes and regulations that have been slapped on the companies, their profit margins are healthy: Demand for their product is inelastic, consumers are loyal, and most of the market is controlled by Altria, Reynolds, and Lorillard. Tobacco is a business they would clearly rather not endanger with a misstep in the e-cigarette market—either by enraging the government or by cannibalizing their own sales.

The tobacco companies are also entering the market without any of their iconic brands, which tend to lose customers only when smokers quit or die. There's no Camel or Marlboro e-cigarette. The Tobacco Master Settlement Agreement reached with state attorneys general in 1998 makes it tricky to use cigarette brands on other merchandise. Although some company will probably test that in the future, clearly no one's feeling so bold yet. Doing without a major brand is a big handicap, particularly because the small companies have already spent years establishing a brand. Verleur points out that he and his competitors have experience working out technical issues with the electronics and the nicotine solution, neither of which are likely to be core strengths at a company that specializes in burning leaves. He waits for the government's decision on which the fate of his business rests. The more lightly the area is regulated, the better chance the upstarts will have of taking on Big Tobacco and winning. "It's our sincere hope," he says, "that regulators and legislators take a responsible approach towards our category." For now, he's working on expanding V2Cigs' line. He has just released an e-cigarette for women. **B**

Municipalities face cloudy e-cig issues

By G. Ross Trindle, III and Andrew D. Maiorano

A hot new product on the market has become a source of confusion for some cities and counties: electronic cigarettes. Similar to, but distinctly different from, traditional tobacco cigarettes, much remains unknown about the casual and long-term use of electronic cigarettes. That has local governments concerned about public health and safety risks. Some California cities have even banned the establishment of new retail stores selling e-cigarettes while continuing to evaluate the health and public safety risks.

Electronic cigarettes — e-cigs or e-cigarettes — are battery-powered devices that typically look similar to traditional tobacco cigarettes or cigars. E-cigs simulate smoking by vaporizing a liquid solution as the user inhales. The user exhales a vapor cloud that resembles the smoke from a traditional cigarette. The similarity in design and use can make it difficult to distinguish between a traditional tobacco product and the new electronic versions.

This liquid solution that goes into the e-cig — juice, e-juice or e-liquid — contains various amounts of nicotine, a few other chemicals, and can have concentrated flavors mixed in to provide flavor. Flavors range from classic tobacco to sweeter flavors like pina colada and hard candies. The juice often is sold in a bottle or in pre-filled disposable cartridges for easier use.

Given the mechanics of e-cigarettes, many users of the devices claim that they are not “smoking” but instead are “vaping” (short for vaporizing) the e-juice. Indeed, no material is combusted when the device is used as advertised.

Although the long-term health effects and risks of continued use of e-cigarettes are uncertain, their increased popularity is not. Currently, the U.S. Food and Drug Administration’s Center for Drug Evaluation and Research only regulates e-cigarettes that are marketed for therapeutic purposes. The FDA, however, expressed its intent to seek to have its regulatory capabilities for “tobacco products” broadened to include e-cigarettes and other similar novel products included within its regulatory purview. Similarly, California Health and Safety Code Section 119405 only prohibits the sale of e-cigarettes to minors, while expressly referencing that California law is subject to any federal regulation of the devices, including the regulations of the FDA. This current state of the law does not provide much guidance for local governments as



John Hartigan, proprietor of Vapeology LA, takes a puff of an electronic cigarette at his store in Los Angeles, Dec. 4, 2013. Associated Press

they seek to deal with the growing popularity of vaping.

Some municipalities in California have taken a more conservative approach to the issue by placing a moratorium on the establishment of new retail stores selling e-cigs pending further scientific study of the issue. Others have chosen more aggressive approaches involving the regulation or prohibition of the sale or use of e-cigarettes under certain conditions or in certain locations.

California Government Code Section 65858 allows cities and counties to adopt an interim urgency ordinance (moratorium), in order to protect the public safety, health and welfare of residents from a current and immediate threat. These prohibitions extend to any use that may conflict with a city’s or county’s general zoning plan, any specific plan, or zoning proposal that the legislative body is studying within a reasonable time. Given their urgent nature, the moratorium measures become effective immediately upon adoption, but require a four-fifths vote of the legislative body and are only valid for a 45-day period. This period can, under certain circumstances, be extended by the legislative body for up to a year or longer (including the original 45 days) should further study be required. In the last year alone, several cit-

ies including Alhambra, Norwalk, Cerritos, Seal Beach and Bellflower have passed moratoria relating to the establishment of certain new retailers selling e-cigs. For example, Norwalk’s city council noted that its moratorium was passed due to the possible effects of e-cig sales, including the devices’ promotion of illegal drug use, the negative impacts on the welfare of children and minors due to increased exposure to illegal drug-related paraphernalia, and the high concentration of illegal drug use in neighborhoods. Bellflower’s moratorium, by contrast, is broader and not only places a moratorium on the establishment of e-cigarette retailers, but on e-cigarette manufacturers as well. Regardless of scope, the important takeaway is that these cities are taking the time to study the impact of e-cigs before deciding on what action, if any, to take to regulate or ban these devices. Other municipalities, however, are taking more aggressive positions.

Poway, for example, recently chose to broaden the definition of “smoking” in its municipal code to include e-cigarettes, and to extend its existing prohibition on “smoking” to include public buildings, grounds, parks and trails. The practical result of such action appears to be a ban on the use of e-cigs in these public areas. In jus-

tification of the ban, Poway cited the unknown health risks associated with extended use of e-cigs, the increasing popularity of the devices with minors who may then turn to using traditional cigarettes, and concerns about enforcing smoke-free ordinances due to the difficulty in distinguishing between regular cigarettes and e-cigs. Poway’s ban also referenced a limited study by the FDA finding that e-cigs contain carcinogens and toxic chemicals, giving further support to the belief that the FDA is studying e-cigs in preparation for regulating the devices.

Similarly, Beverly Hills recently decided to regulate the sale and use of e-cigarettes within city limits. The city’s staff report chronicled how the city council first addressed this issue in November 2013, directing its Health & Safety Commission to review and provide policy recommendations on the sale and use of e-cigarettes in the city. After studying the issue, the commission recommended that e-cigarettes be regulated similarly to tobacco products.

Specifically, the recommendations of the commission that were adopted by the city council included: prohibiting the use of e-cigarettes in all open air dining areas, in all city buildings and parks, and in

enclosed places of employment and day care facilities where state law prohibits the smoking of tobacco products. Other regulations include prohibiting the sale of e-cigarettes in self-serve vending machines and requiring all e-cigarette retailers in the city to obtain a permit prior to selling e-cigarette products. The Beverly Hills ordinance adopting these regulations referenced certain initial studies into e-cigarettes which, according to the ordinance, revealed that certain e-liquids contained toxic ingredients and carcinogens and that all but one tested cartridge labeled as containing no

nicotine did in fact contain low levels of nicotine.

Critics of the decision to ban or regulate e-cigarettes point to the perceived lack of evidence proving that there are health hazards associated with the use of the devices. These critics also stress the importance that the devices may have on those seeking relief from an addiction to traditional tobacco cigarettes.

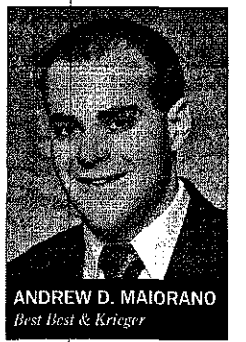
While the long-term impacts of the use of e-cigarettes are still being evaluated, the federal and state governments have yet to pass comprehensive regulations concerning the devices. In the meantime, local governments in California do have options, ranging from taking no action until the state and federal government issue more guidance and regulations for the industry, to an outright ban on the sale and manufacture. The question does not appear to be whether the popularity of e-cigarettes will continue to grow, but instead it is where and how such growth will occur. And at least for now, the answer rests with local governments.

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Cable merger unprecedented in scope

By John Bergmayer

A merger between Comcast and Time Warner Cable would create a nationwide broadband behemoth of unprecedented scope. It would have the power to singlehandedly control the future of media and Internet services in this country. Both the Department of Justice and the Federal Communications Commission have the power to stop this merger, and they should use it.

Just look at the numbers. While it is likely that after the merger Comcast would have “just” under 30 percent of the nationwide pay TV market, in the market for high-speed broadband (or bundled pay TV/broadband service), Comcast would have over 50 percent. It would control more than 30 million households, while its nearest rival would have around 10 million. These numbers show how this merger is not just about TV, it’s about the Internet and the future of the way that people access information, video and services online. To Comcast, it doesn’t matter if you want to “cut the cord” and do without cable TV. Who else are you going to buy your Internet from if Comcast is the only choice? Plus, with control over so many subscribers, Comcast can demand that Internet companies like Netflix pay to keep their services working. Indeed, in February Netflix agreed to pay Comcast for better access to Comcast’s network. Comcast’s goal is to become the toll collector that everyone has to pay off if they want to get anything done.

It is simply dangerous for just one company to be so much bigger than its rivals, and to have so much leverage with the companies — Hollywood studios, television networks, independent programmers and Internet services — that need to access its pipes in order to reach consumers. In many markets, Comcast is already a monopoly, since it does not face effective competition from alternative broadband providers. By getting even larger nationwide, Comcast will gain what economists call a “monopsony”: It will be by far the most important buyer of content that is destined for consumers. Its word will be law. The result for consumers will be higher costs for Internet services, reduced choice, reduced investment and lost jobs. Any cost-savings that Comcast gets from its size are not likely to be passed along to its subscribers, and its actions could even raise the costs its much-smaller rivals have to pay to access the same content.

In fact, it’s the customers who do not subscribe to Comcast or Time Warner Cable that might have reason to fear this merger most. If Comcast is able to pay programmers less, they’ll have to make up the cost from other pay TV distributors, who would then pass along the increase to consumers. If an Internet company needs to pay off Comcast to get its service working, its costs will go up, but customers of other ISPs wouldn’t see any improvement in their service.

Comcast, ever hungry to extend its reach, recently bought NBC Universal. By getting even bigger, it would have even more

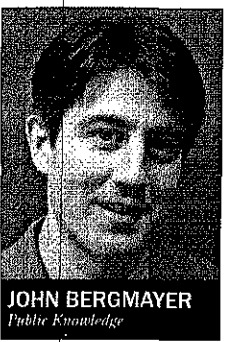
opportunities to try to squeeze out what remaining competitors there are, and more incentive to do so. It will be able to raise the price it charges for its own programming while paying others less for theirs. By withholding content from competitors, such as online video companies, it would reduce their ability to offer an attractive service. By giving preferential treatment to its own content (such as favorable positions on the cable lineup, or by exempting its own broadband services from Internet usage caps), it could dominate the content market, as well.

When it bought NBC Universal, regulators required Comcast to meet several conditions. It has flouted many of these. The purpose of the conditions was to try to replicate the effect of a competitive market, boost video competition from online providers, and protect the Open Internet. At best, the result of these conditions has been mixed. Instead of using conditions and rules to try to replicate the pro-consumer effects of competition, policymakers should take steps to promote and protect actual competition.

In 1984, after many years of litigation, the federal government finally broke up the Bell System. While, as a regulated monopoly, Ma Bell provided adequate (but stagnant) service, we’ve seen that competition produces better results for consumers. Prices go down, and technology improves. Thanks to the Department of Justice’s actions to promote competition in communications markets, and the FCC’s efforts to ensure that the phone network remained a neutral, open platform

for innovation, we now have free nationwide calling, cell phones and the commercial Internet. But we’ve let our guard down, and discovered that competition in the communications industry needs to be protected. Allowing Comcast to buy Time Warner Cable would be a step back to the monopoly days, where competition did not work to ensure low prices and high-quality service, and where the marketplace was replaced by bureaucracy. Policymakers in Washington DC recently did the right thing by preventing AT&T from buying out T-Mobile. They will act when the consumer harm is as obvious as it is here, and when the public demands it. It’s time for them to step up again and protect competition in the communications marketplace.

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