

CITY OF UNALASKA
UNALASKA, ALASKA

ORDINANCE 2021-02

AN ORDINANCE AMENDING TITLE 6 OF THE UNALASKA CODE OF ORDINANCES TO ADOPT A NEW CHAPTER 6.56 EXCISE TAX ON TOBACCO PRODUCTS

BE IT ENACTED by the City Council of the City of Unalaska:

Section 1: Form. This is a code ordinance.

Section 2: Amendment to Title 6. Title 6 of the Unalaska Code of Ordinances is hereby amended by adding a new Chapter, numbered 6.56, to read as follows:

CHAPTER 6.56 EXCISE TAX ON TOBACCO

§ 6.56.010	Purpose
§ 6.56.020	Definitions
§ 6.56.030	Levy of excise tax on tobacco
§ 6.56.040	Exemptions
§ 6.56.050	Registration
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§ 6.56.080	Form of return
§ 6.56.090	Returns and information confidential; exceptions
§ 6.56.100	Amended returns
§ 6.56.110	Extension of time to file return
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§ 6.56.130	Procedures on delinquency
§ 6.56.140	Repayment plans
§ 6.56.150	Period of limitation
§ 6.56.160	Recordkeeping
§ 6.56.170	Withholding of personal property of distributor failing to withhold
§ 6.56.180	Tax rulings

§6.56.010 PURPOSE.

(A) The tax levied by this chapter is intended to improve public health by reducing consumption of cigarettes and tobacco products in the City of Unalaska.

(B) The revenue generated by the tax levied under this chapter is dedicated to the City of Unalaska Community Support Grant Program for the benefit of public health programs or tobacco education and cessation programs in Unalaska.

(C) The tax imposed by this chapter is an excise tax on the privilege of bringing cigarettes or tobacco products into the City of Unalaska for commercial purposes. It is the intent and purpose of this chapter to provide for the collection of the excise tax from a distributor who brings, or causes to be brought, cigarettes or tobacco products into the City of Unalaska. The excise tax is levied when a distributor brings, or causes to be brought, cigarettes or tobacco products into the City of Unalaska from outside the City of Unalaska.

§6.56.020 DEFINITIONS.

For the purposes of this chapter, unless the context otherwise requires, the following words and phrases shall have the meanings defined herein.

(A) Cigarette means a roll for smoking of any size or shape, made wholly or partly of tobacco, whether the tobacco is flavored, adulterated, or mixed with another ingredient, if the wrapper or cover of the roll is made of paper or a material other than tobacco.

(B) Distributor means a person who brings cigarettes or tobacco products, or causes them to be brought, into the City of Unalaska, and who sells or distributes them to others in the City of Unalaska.

(C) Electronic smoking product means, without including marijuana as defined in AS 11.71.900,

(1) any product containing or delivering nicotine or any other substance intended for human consumption that can be used by a person through inhalation of vapor or aerosol from the product, of any size or shape, whether the product is manufactured, distributed, marketed, or sold as an e-cigarette, e-cigar, e-pipe, e-hookah, vape pen, or any other product name or descriptor; or

(2) a component, solution, alternative tobacco product, e-liquid, e-juice, vapor product, flavoring, or other related product of an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or other similar device of any size or shape used for, or to assist with, aerosolizing and inhaling chemical substances that may cause an adverse effect on human health.

(D) In transit means passing through the City of Unalaska while solely in the possession of a common carrier, shipping, cargo, or freight operator or private carrier, other than a distributor, and where title to the goods does pass not while in the City of Unalaska.

(E) Tobacco product means:

(1) A cigar;

(2) A cheroot;

(3) A stogie;

(4) A perique;

(5) Snuff and snuff flour;

(6) Smoking tobacco, including granulated, plug-cut, crimp-cut, ready-rubbed, and any form of tobacco suitable for smoking in a pipe or cigarette;

(7) Chewing tobacco, including cavendish, twist, plug, scrap, and tobacco suitable for chewing;

(8) An article or product made wholly or in part of tobacco or a tobacco substitute or otherwise containing nicotine, other than a cigarette, that is expected or intended for human consumption, but not including a product prescribed by a licensed physician or a product that has been approved by the United States Food and Drug Administration for sale as a tobacco use cessation product or for other medical purposes and which is being marketed and sold solely for that approved purpose; and

- (9) An electronic smoking product.
- (F) Wholesale price means the price the distributor pays for a tobacco product, after deduction of a discount or other reduction received by the distributor for quantity or cash.

§ 6.56.040 EXEMPTIONS.

The tax imposed under this chapter does not apply to:

- (A) Cigarettes or tobacco products brought into the City of Unalaska by an exchange, commissary, or ship's stores operated by one of the uniformed services of the United States as defined in 5 U.S.C. § 2101, nor shall such exchange, commissary, or ship's stores be considered a distributor.
- (B) Cigarettes or tobacco products if the United States Constitution, the Alaska Constitution, or other federal or state laws prohibit the levying of the tax on the product by the city.
- (C) Cigarettes or tobacco products in transit.

§ 6.56.050 REGISTRATION.

- (A) No person may sell, purchase, possess or bring cigarettes or tobacco products into the City of Unalaska as a distributor without first registering with the city. All business in the city holding a business license endorsement required by AS 43.70.075 shall register. The registration shall be on a form provided by the city and must include the information requested by the city.
- (B) The registration required by this chapter is in addition to any other registration or license required by law.

§ 6.56.060 APPLICATION FOR TAX REFUND.

If a distributor has remitted tobacco products tax in excess of what is due to the city, the distributor may apply to the city for a refund within one year of the date the overpayment was made. The city shall audit the distributor's account and may request any additional information the city requires to determine that a refund is due. If the city determines that a refund is due, the distributor may take a credit on the next tobacco products tax report, or the city shall pay the refund of the tax paid with interest at 3.5% per annum beginning 30 days from the date of the application for refund, with all documentation and information necessary to determine a refund is due, is received. A claim for refund not filed within one year of the date the tax was remitted to the city is forever barred. A distributor may claim a refund only where the distributor has filed a timely tobacco products tax return and therewith remitted the tobacco products taxes due under that return.

§ 6.56.070 REMITTANCE OF TAX LEVIED.

Distributors shall complete and file required returns and remit the tax levied in accordance with the following schedule:

- (A) QUARTERLY. Unless otherwise provided for in this chapter, distributors shall on or before the last day of the month succeeding the end of each quarter year ending March

31, June 30, September 30, and December 31, prepare a return for the preceding quarter year upon forms furnished by the city. Returns shall be filed personally at city hall by 5:00 p.m. or postmarked on the last day of the month following the end of each quarter year. In the event the last day of the month falls on a legal holiday or weekend, the return may be filed on the first business day following.

(B) **FILINGS TO BE CONTINUOUS.** A distributor which has filed a tobacco products tax return will be presumed to be a distributor in successive quarters unless that distributor files a return showing termination or sale of the business.

§ 6.56.080 FORM OF RETURN.

On forms furnished by the city and available at city hall, the distributor shall furnish the required information, sign the form and certify that the form correctly states the information set forth therein.

§ 6.56.090 RETURNS AND INFORMATION CONFIDENTIAL; EXEMPTIONS.

Returns filed with the city for the purpose of complying with the terms of this chapter and all data obtained from such returns are confidential, and such returns, and data obtained shall be kept from inspection by all private persons, except as necessary to investigate violations of and to enforce this chapter. Nothing contained in this section shall be construed to prohibit the delivery to a person, or their duly authorized representative, of a copy of any return or report filed by them, nor to prohibit the publication of statistics, nor to prohibit the furnishing of information on the reciprocal basis to other agencies of the State of Alaska or the United States concerned with the enforcement of tax laws.

§ 6.56.100 AMENDED RETURNS.

(A) A distributor may file an amended return, with supporting documentation, and the city may accept the amended return, but only in the following circumstances:

- (1) The amended return is filed within one year of the original due date for the return;
- (2) The distributor provides a written justification for requesting approval of the amended return; and
- (3) The distributor agrees to submit to an audit upon request of the city.

(B) The city shall notify the distributor in writing (by email or otherwise) whether the city accepts or rejects an amended return, including the reasons for any rejection.

(C) The city may adjust a return for a distributor if, after investigation, the city determines the figure included in the original returns are incorrect, and the city adjusts the return within two years of the original due date for the return.

(D) A distributor may file a supplemental tobacco products tax return, with supporting documentation, and the city may accept the supplemental return, but only in the following circumstances:

- (1) The distributor provides a written justification for requesting approval of the supplemental return;
- (2) The distributor agrees to submit to an audit upon request of the city.

§ 6.56.110 EXTENSION OF TIME TO FILE RETURN.

Upon written application of a distributor, stating the reasons therefor, the city may extend the time to file a tobacco products tax return but only if the city finds each of the following:

- (A) For reasons beyond the distributor's control, the distributor has been unable to maintain in a current condition the books and records that contain the information required to complete the return;
- (B) Such extension is a dire necessity for bookkeeping reasons and would avert undue hardship upon the distributor;
- (C) The distributor has a plan to cure the problem that caused the distributor to apply for an extension and the distributor agrees to proceed with diligence to cure the problem;
- (D) At the time of the application, the distributor is not delinquent in filing any other tobacco products tax return, in remitting tobacco products tax to the city or otherwise in violation of this chapter; and
- (E) No such extension shall be made retroactively to cover existing delinquencies.

§ 6.56.120 CESSATION OR TRANSFER OF BUSINESS.

(A) A distributor who sells, leases, conveys, forfeits, transfers or assigns the majority of their business interest, including to a creditor or secured party, shall make a final tobacco products tax return within 30 days after the date of such conveyance.

(B) At least ten business days before any such sale is completed, the distributor shall send to the city clerk, by approved communication (email confirmation, certified first-class mail, postage prepaid) a notice that the distributor's interest is to be conveyed and shall include the name, address and telephone number of the person or entity to whom the interest is to be conveyed.

(C) Upon notice of sale and disclosure of buyer, the city shall be authorized to disclose the status of the distributor's tobacco products tax account to the named buyer or assignee.

(D) Upon receipt of notice of a sale or transfer, the city shall send the transferee a copy of this code with this section highlighted.

(E) Neither the city's failure to give the notice nor the transferee's failure to receive the notice shall relieve the transferee of any obligations under this section.

(F) Following receipt of the notice, the city shall have 60 days in which to perform a final tobacco products tax audit and assess tobacco products tax liability against the seller of the business. If the notice is not mailed at least ten business days before the sale is completed, the city shall have 12 months from the date of the completion of the sale or the city's knowledge of the completion of the sale within which to begin a final tobacco products tax audit and assess tobacco products tax liability against the seller of the business. The city may also initiate an estimated assessment if the requirements for such an assessment exist.

(G) A person acquiring any interest of a distributor in a business required to remit the tax under this chapter assumes the liability of the distributor for all taxes due the city,

whether current or delinquent, whether known to the city or discovered later, and for all interest, penalties, costs and charges on such taxes.

(H) Before the effective date of the transfer, the transferee of a business shall obtain from the city an estimate of the delinquent tobacco products tax, penalty and interest, if any, owed by the distributor as of the date of the transfer, and shall withhold that amount from the consideration payable for the transfer, until the distributor has produced a receipt from the city showing that all tax obligations imposed by this chapter have been paid. A transferee that fails to withhold the amount required under this subsection shall be liable to the city for the lesser of the amount of delinquent tobacco products tax, penalty and interest due from the distributor as of the date of transfer, and the amount that the transferee was required to withhold.

(I) In this section, the term "transfer" includes the following:

- (1) A change in voting control, or in more than 50% of the ownership interest in a distributor that is a corporation, limited liability company or partnership; or
- (2) A sale of all or substantially all the assets used in the business of the distributor; or
- (3) The initiation of a lease, management agreement or other arrangement under which another person becomes entitled to the remote distributor's or marketplace facilitator's gross receipts from sales, rentals or services.

(J) A distributor who terminates the business without the benefit of a purchaser, successor or assign shall make a final tax return and settlement of tax obligations within 30 days after such termination. If a final return and settlement are not received within 30 days of the termination, the distributor shall pay a penalty of \$500, plus an additional penalty of \$25 for each additional 30 day period, or part of such a period, during which the final return and settlement have not been made, for a maximum of six additional periods.

§ 6.56.130 PROCEDURES ON DELINQUENCIES.

(A) **PENALTY.** A penalty equal to 5% of the delinquent tax shall be added to the tax for the first month, or any part thereof, and an additional 5% shall be added to the tax due for each month, or fraction thereof, of delinquency until a total penalty of 20% of the tobacco products tax due has accrued. The penalty shall be assessed and collected in the same manner as the tax is assessed and collected. The penalty does not bear interest.

(B) **INTEREST.** In addition to the penalty provided in subsection (A) above, interest assessed on delinquent tax shall accrue at the rate of 15% per annum. Interest shall accrue from the date of delinquency until paid in full and shall be collected in the same manner as the delinquent tax is collected.

(C) **PRIORITY FOR CREDITING PAYMENTS.** All payments received shall be applied in the following order:

- (1) Penalties due, beginning with the oldest penalty;
- (2) Interest due, beginning with the interest due on the oldest month; and
- (3) Taxes due, beginning with the taxes due from the oldest month.

(D) **WRITTEN DEMAND AND ADDITIONAL PROCEDURES.** If a distributor fails to file the return or make the remittance in accordance with § 6.56.070 or § 6.56.080, the city may do any or all of the following things:

- (1) Cite the offender for a violation of this chapter. Any person, firm, or entity violating any provision of this chapter is guilty of a minor offense and shall be subject to a penalty as provided in § 1.24.040 or if no fine is there established, in an amount not to exceed \$500 for each violation or day a violation exists. In all cases where a person is found to have violated this chapter, the court shall order the person to file an accurate tobacco products tax return within 15 days, in addition to any fine that may be imposed as a result of the violation. Prosecution under this subsection does not limit the ability of the city to recover any amount of unpaid taxes through civil action or as otherwise provided by this chapter.
 - (2) File a civil complaint against the distributor for violation of any obligation in this chapter.
 - (3) Make a tobacco products tax assessment against the distributor, with the assessment based upon an estimate of tax levied and owed by the distributor during the period and institute civil action to recover the amount of the tobacco products tax, interest, and penalty due and to request injunctive relief. The estimate of tax may all be derived from past tobacco products tax returns of the distributor or their predecessor, the general economic level of the business community, information from tobacco products tax audits conducted by the city, if available, returns of comparable businesses and any other information believed to be reliable or helpful to the city in making an estimate of the tobacco products tax due. Notice of the estimated assessment of tobacco products taxes due shall be furnished the distributor by the city via first-class mail to the last known address of the distributor or via hand-delivery to the distributor and the estimated assessment shall become final for the purposes of determining liability of the distributor to the city after 30 days of the date of mailing or hand-delivery of the estimated assessment to the distributor unless the distributor earlier files with the city an accurate tobacco products tax return, supported by satisfactory records or documentation indicating a lesser liability.
 - (4) The tax, interest and penalty imposed under this chapter shall constitute a lien in favor of the city upon all the property of the distributor whether tangible or intangible and wherever located. The lien arises upon delinquency and continues until the liability is satisfied or the lien is foreclosed. The lien is not valid as against a mortgagee, pledgee, purchaser or judgment lien creditor until notice of the lien is filed in the office of the recorder for the Aleutian Islands or Anchorage recording district. The manner provided for Federal tax liens under AS 40.19.010 et seq. are by this reference incorporated herein as if set forth in full.
- (E) WAIVER. A penalty assessed under this section for the delinquent remittance of tobacco products tax or failure to file a tobacco products tax return may be waived by the city manager, upon written application of the distributor accompanied by a payment of all delinquent tobacco products tax, interest and penalty otherwise owed by the distributor, within 45 calendar days after the date of delinquency. A distributor may not be granted more than one waiver of penalty under this subsection in any one calendar year. The city manager shall report such waivers of penalty to the city council, in writing.

§ 6.56.140 REPAYMENT PLANS.

- (A) The city may agree to enter into a repayment plan with a delinquent distributor. No repayment plan shall be valid unless agreed to by both parties in writing.

(B) A distributor shall not be eligible to enter into a repayment plan with the city if the distributor has defaulted on a repayment plan in the previous two calendar years.

(C) The repayment plan shall include a secured promissory note that substantially complies with the following terms:

- (1) The distributor agrees to pay a minimum of 10% down payment on the tax, interest and penalty amount due. The down payment shall be applied first to penalty, then to accumulated interest, and then to the tax owed.
- (2) The distributor agrees to pay the balance of the tax, penalty and interest owed in monthly installments over a period not to exceed two years.
- (3) Interest at a rate of 15% per annum shall accrue on the principal sum due. Interest shall not apply to penalties owed or to interest accrued at the time the repayment plan is executed or accruing during the term of the repayment plan.
- (4) If the distributor is a corporation or a limited liability entity the distributor agrees to provide a personal guarantee of the obligations under the repayment plan.
- (5) The distributor agrees to pay all future tax bills in accordance with the provisions of this chapter.
- (6) The distributor agrees to provide a security interest in the form of a tobacco products tax lien for the entire unpaid balance of the promissory note to be recorded by the city at the time the repayment plan is signed. The distributor shall be responsible for the cost of recording the tax lien.

(D) If a distributor fails to pay two or more payments as required by the repayment plan agreement, the distributor shall be in default and the entire amount owed at the time of default shall become immediately due. The city will send the distributor a notice of default. The city may immediately foreclose on the tobacco products tax lien or take any other remedy available under the law.

§ 6.56.150 PERIOD OF LIMITATION.

(A) The amount of any tobacco products tax imposed under this chapter may be determined and assessed at any time within a period of six years after the tax became due and payable. The period shall begin on the date when a return is required to be filed. Where no tobacco products tax return has been filed, or where a fraudulent return has been filed, then the period of limitation does not begin to run until discovery of the delinquency or fraud occurs. No proceeding for the collection of the tobacco products tax shall be begun after the expiration of this period.

(B) No obligation to remit tax established by § 6.56.030 shall be applied retroactively.

§ 6.56.160 RECORDKEEPING.

(A) Every distributor shall retain for a period of six years all of the tobacco products tax returns, reports, forms, records and supporting schedules as may be necessary to determine the amount of tax required to be remitted.

(B) All such records and documentation required to be retained shall be made available for examination at reasonable times by the city or agents of the city, for the

purpose of ascertaining the correctness of a return for the purpose of determining the amount of tax levied.

§ 6.56.170 WITHHOLDING OF PERSONAL PROPERTY OF DISTRIBUTOR FAILING TO WITHHOLD.

(A) The city manager may by notice, served personally or by first-class mail, require any employer, person, officer or department of the state, political subdivision or agency of the state, having in their possession, or under their control, any credits or other personal property or other things of value, belonging to a distributor, to withhold, from the credits or other personal property or other things of value, the amount of any tax, interest, or penalties due from the distributor or the amount of any liability incurred by that person for failure to withhold and transmit amounts due from a distributor and to transmit the amount withheld to the city at the times that the city manager may designate. However, in the case of a depository institution, as defined in § 19(b) of the Federal Reserve Act (12 U.S.C.A. § 461(b)(1)(A)), amounts due from a distributor under this section shall be transmitted to the city not less than ten business days from receipt of the notice. To be effective, the notice shall state the amount due from the distributor and shall be delivered or mailed to any branch or office where the city manager reasonably believes credits or other property is held.

(B) When the city, pursuant to this section issues a levy upon, or requires by notice, any person, or financial institution, as applicable, to withhold all, or a portion of, a financial asset for the purpose of collecting a delinquent tax liability, the person, or financial institution, that maintains, administers, or manages that asset on behalf of the distributor, or has the legal authority to accept instructions from the distributor as to the disposition of that asset, shall liquidate the financial asset in a commercially reasonable manner within 90 days of the issuance of the order to withhold. Within five days of liquidation, the person, or financial institution, as applicable, shall remit to the city the proceeds of the liquidation, less any reasonable commissions or fees, or both, which are charged in the normal course of business.

(C) If the value of the financial assets to be liquidated exceeds the tax liability, the distributor may, within 60 days after the service of the order to withhold upon the person, or financial institution, instruct the person, or financial institution, as to which financial assets are to be sold to satisfy the tax liability. If the distributor does not provide instructions for liquidation, the person, financial institution, or securities intermediary shall liquidate the financial assets in a commercially reasonable manner and in an amount sufficient to cover the tax liability, and any reasonable commissions or fees, or both, which are charged in the normal course of business, beginning with the financial assets purchased most recently.

(D) Any corporation or person failing to withhold the amounts due from any distributor and transmit them to the city after service of the notice shall be liable for those amounts. However, in the case of a depository institution, if a notice to withhold is mailed to the branch where the account is located or principal banking office, the depository institution shall be liable for a failure to withhold only to the extent that the accounts can be identified in information normally maintained at that location in the ordinary course of business.

§ 6.56.180 TAX RULINGS.

(A) The city manager or designee shall adopt and amend procedures and forms for the administration of this chapter, and shall adopt guidelines for the determination of the taxability of transactions.

(B) The city manager or their designee shall take all steps necessary and appropriate to administer this chapter which includes the authority to enter into payment plans for delinquent tobacco products taxes, penalties and interest.

Section 3: Amendment to Title 6. Title 6, Chapter 56 of the Unalaska Code of Ordinances is hereby amended by adding a new Section, numbered 6.56.030, to read as follows:

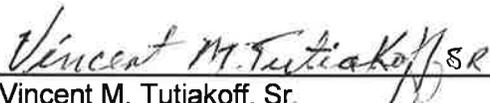
§ 6.56.030 LEVY OF EXCISE TAX ON TOBACCO.

(A) An excise tax of \$2.00 per pack of cigarettes brought into the City of Unalaska is hereby levied.

(B) An excise tax on tobacco products at the rate of 40% of the wholesale price of tobacco products brought into the City of Unalaska is hereby levied.

Section 4: Effective Date. Section 2 of this ordinance shall be effective ninety days after passage. Section 3 of this ordinance shall be effective of October 1, 2021.

PASSED AND ADOPTED by a duly constituted quorum of the Unalaska City Council on March 30, 2021.



Vincent M. Tutiakoff, Sr.
Mayor

ATTEST:



Marjie Veeder, CMC
City Clerk



MEMORANDUM TO COUNCIL

To: Mayor and City Council Members
From: Marjie Veeder, City Clerk
Through: Erin Reinders, City Manager
Date: March 23, 2021
Re: Ordinance 2021-02 Amending Title 6 of the Unalaska Code of Ordinances to Adopt a New Chapter 6.56 Excise Tax on Tobacco Products

SUMMARY: On March 9, council voted to schedule Ordinance 2021-02 for public hearing and second reading on March 23, with several council members voicing concerns, summarized below, but providing no specific direction nor offering amendments to the ordinance. No changes have been made to the ordinance presented on March 9.

PREVIOUS COUNCIL ACTION: See the staff memo from March 9 for full list of previous council action and discussion of this topic. Comments from council members from the March 9 meeting are summarized below:

- Council member Gregory voiced full support of the ordinance as written and urged fellow council members to move the ordinance forward
- Council member Bell voiced support of the ordinance and rate of levy, but felt the voters should have the opportunity to approve the tax on the October general election ballot; he stated since it was voted on in 2017 and voted down bringing it back two years later doesn't seem like the right process (*see clarifying information in discussion below*)
- Council member Coleman stated she does not support excise tax as a revenue generator; feels the revenue must have a specific dedication to a smoking cessation program; and does not support city council having the ability to dedicate the revenue each budget cycle and feels the intended dedication would be forgotten in future years (*see information provided in discussion below*)
- Council member Robinson supports an intended purpose of excise tax to discourage use of tobacco; wants specific dedication of revenue to tobacco education or the medical field in general; suggested a three year "phase in"; and doesn't want the revenue to go to the general fund
- Council member Nicholson said he would support the ordinance if the revenue were specifically dedicated
- Council member Tungul left the meeting before this item was addressed

DISCUSSION:

FOLLOW UP TO COUNCIL COMMENTS

In 2017, Council approved Ordinance 2017-04, amending the code of ordinances to increase the rate of sales tax on alcohol, marijuana and tobacco from 3% to 6%. The driving factor was the legalization of marijuana in Alaska. Excise tax was not included. As a requirement of law, sales tax increases must be ratified by voters. This sales tax increase was not approved by voters. The timing of this tobacco excise tax ordinance has nothing to do with the 2017 ordinance or the related ballot measure. The tobacco excise tax ordinance was prepared and presented by staff and the city attorney as directed by council, at the urging of APIA, and has no relationship to the previous ordinance in 2017. Council has the authority to levy excise tax without voter approval. Similarly, council sets the rate of levy for property tax each year, which also is not approved by voters.

Council member Coleman voiced concern about the intended dedication of funds being forgotten in future years. This point is well taken because research was required in the not too distant past to find ballot dedication language for the bed tax and the 1% sales tax fund. It was for this specific reason that the dedication language for the tobacco excise tax was included in the ordinance, to be codified for ease of reference.

Additionally, Council has the authority, as pointed out by the city attorney, to amend this or any other ordinance: "As a general principle, a council cannot pass an ordinance that it is unable to amend or repeal at a future date. An ordinance dedicating funds to a specific purpose can be revised by the council the same as any other ordinance." (Memo from Charles Cacciola dated 9/23/2019.)

EXISTING TOBACCO EDUCATION PROGRAMS IN UNALASKA

I spoke with UCSD Superintendent John Conwell, who indicated that tobacco education is provided to students once at the junior high level and once at the senior high level as part of the existing health curriculum. Additionally, if a student is found smoking, they are assigned a tobacco self-study program through the school counseling department. The school district includes these programs as part of their normal curriculum and there is no specific cost associated with the educational programs. Mr. Conwell added that tobacco use by students is presently not a pervasive problem in the student body at UCSD.

According to Mr. Conwell, APIA typically provides tobacco education programs to UCSD students on an annual basis; brings speakers to the school; and in the past provided custom-made signs discouraging use of tobacco and tobacco products. Due to COVID-19, these programs haven't been offered in the last year.

Unalaska's Department of Parks, Culture & Recreation does not provide their own tobacco education or cessation programs, as this is somewhat outside their scope. However, PCR has worked with APIA in the past to provide program space for APIA's tobacco education and cessation programs. Again, due to COVID-19, these programs haven't been offered in the last year.

Information about potential dedication of the excise tax revenue follows, in no particular order:

REVENUE GENERATION

Though the tobacco excise tax does not appear to have the support of council as a revenue generator, that purpose is a valid consideration given the present budget climate in the City and the State.

DEDICATION TO APIA

APIA provided information about their Tobacco Prevention & Control Program, why it's important to invest in tobacco prevention, the associated cost of their program, and how Unalaska might invest in tobacco cessation services and other health initiatives using the tobacco excise tax revenue. [See attached](#). Funding for these existing programs is provided, in part, by the City of Unalaska through the community grant program. APIA has also detailed the benefit of a dedicated tobacco cessation clinician for our region and the related cost.

APIA Current Tobacco Cessation Program Cost

Salary	\$102,808
Training	\$45,000
Travel	\$12,000
Supplies	\$10,000
NRT	\$5,000
Advertising	<u>\$6,000</u>
Total	\$180,808

Cost Estimate for dedicated Tobacco Treatment Specialist

Salary (excluding benefits)	\$45,000
Training	<u>\$1,500</u>
Total	\$46,500

City funding of APIA through the Community Support Grant Program, for behavioral health programs, for the last three years (note, grants not restricted to tobacco cessation treatment):

- FY19 \$120,500
- FY20 \$205,350
- FY21 \$145,000

DEDICATION TO IFHS

The City provides monetary support to the IFHS Clinic, both through the community support grant program and other support:

Community Support Grants to IFHS

- FY19 \$180,000
- FY20 \$180,000
- FY21 \$161,260

Additional Support

- April 2019 (emergency loan) \$500,000
- April 2020 (emergency grant)..... \$500,000

- July 2020 (CARES)..... \$500,000
- November 2020 (CARES)..... \$400,000

DEDICATION TO THE
COMMUNITY SUPPORT GRANT PROGRAM

The existing City of Unalaska Community Support Grant Program provides funding to 10-12 entities each year. The total support provided for the last three years was:

Community Support Grants

- FY19 \$1,273,752
- FY20 \$1,469,236
- FY21 \$1,311,608

The present target funding level for the grant program is 3.5% of the average revenue for the General Fund for the five most recently completed fiscal years, plus the Bed Tax amount for the most recently completed fiscal year.

Council could consider using the excise tax revenue to help fund the existing grant program, freeing up general fund monies in an amount equal to the excise tax revenue.

Alternatively, the excise tax revenue could be added to the grant program formula with an earmark for public health or tobacco program, thereby increasing the overall amount available for community grants. With this option, council could restrict the excise tax revenue amount to grants for the benefit of public health or tobacco cessation and education programs. APIA, IFHS or other entities would then apply for that funding through the existing grant program.

COUNCIL ACTION ALTERNATIVES:

Council may choose to:

- Vote tonight on the ordinance as presented - “I move to adopt Ordinance 2021-02.”
- Amend the ordinance before final vote - see suggested language below
- Refer the matter to a committee for further study - “I move to refer Ordinance 2021-02 to a committee to consist of no more than three council members, the Mayor and the City Clerk *{or others}*, to further study potential dedication of revenue generated by the proposed Tobacco Excise Tax and present the committee’s findings, recommendations and a proposed ordinance at a future meeting of the City Council.”

AMENDMENT: If council wants to amend the ordinance this evening, council may consider the following language, or variations of it:

TO AMEND THE PURPOSE

I move to amend Ordinance 2021-02, at section **6.56.010 PURPOSE**, paragraph (A), to strike the words “generate revenue and” from the first line.

(A) The tax levied by this chapter is intended to ~~generate revenue and~~ improve public health by reducing consumption of cigarettes and tobacco products in the City of Unalaska.

TO AMEND REVENUE DEDICATION

The revenue dedication language at 6.56.010(B), as presented, reads:

(B) Each annual budget shall determine what portion of the tax levied by this chapter shall be dedicated to smoking cessation or related public health programs

(1) Dedicate to the IFHS Clinic: I move to amend Ordinance 2021-02, at section 6.56.010(B), striking the language of paragraph (B) and replacing it with:

(B) The revenue generated by the tax levied under this chapter is dedicated for the benefit of public health in Unalaska, and is to be remitted to the **Iliuliuk Family & Health Services Clinic of Unalaska** on an annual basis to be used for public health or tobacco cessation programs in Unalaska

OR

(2) Dedicate to APIA: I move to amend Ordinance 2021-02, at section 6.56.010(B), striking the language of paragraph (B) and replacing it with:

(B) The revenue generated by the tax levied under this chapter is dedicated for the benefit of public health in Unalaska, and is to be remitted to the **Aleutian Pribilof Islands Association** on an annual basis to be used for public health or tobacco cessation programs in Unalaska

OR

(3) Dedicate to the Community Support Grant Program: I move to amend Ordinance 2021-02, at section 6.56.010(B), striking the language of paragraph (B) and replacing it with:

(B) The revenue generated by the tax levied under this chapter is dedicated to the **City of Unalaska Community Support Grant Program** for the benefit of public health programs or tobacco education and cessation programs in Unalaska

If Council chooses to dedicate the excise tax revenue to a particular entity, it may be wise to consider whether the entities would need to request the funds on yearly basis; whether any justification or accounting will be required; and whether any conditions on the use of the funds will be imposed.

Please also keep in mind that it is inadvisable to dedicate particular dollar amounts in the ordinance. If the excise tax successfully reduces consumption of the related products, the revenue would be expected to decrease over time.

FINANCIAL IMPLICATIONS:

- At the rate of levy presently contained in the ordinance, the City may realize up to \$835,000 annually from tobacco excise tax based on estimates provided by vendors.
- Depending on how council chooses to proceed, there may be financial implications to the general fund or the community grant program.
- The cost of implementation to the City is not known, but those costs will be absorbed within the departmental budgets, primarily Clerks and Finance.
- Additionally, the city has incurred attorney fees in the development of this ordinance, which was directed by council. Attorney fees have been paid out of existing budgets.

STAFF RECOMMENDATION / PROPOSED MOTION: This is a Council decision and staff makes no recommendation.

ATTACHMENTS: [March 9 council packet materials](#); and [information provided by APIA](#).

MEMORANDUM TO COUNCIL

To: Mayor and City Council Members
From: Marjie Veeder, City Clerk
Through: Erin Reinders, City Manager
Date: March 9, 2021
Re: Ordinance 2021-02 Amending Title 6 of the Unalaska Code of Ordinances to Adopt a New Chapter 6.56 Excise Tax on Tobacco Products

SUMMARY: On November 10, 2020, Council last discussed tobacco excise tax, with a proposed ordinance included in the council packet. Staff requested direction from council as to the rate of levy and potential dedication of revenue. The proposed ordinance is presented this evening for council's consideration and first reading, with public hearing and adoption anticipated on March 23, 2021.

PREVIOUS COUNCIL ACTION:

- 2017: Council approved Ordinance 2017-07, amending the code of ordinances to increase the rate of sales tax on alcohol, marijuana and tobacco from 3% to 6%. Voters struck down the proposed sales tax increase by 35 votes: 263 yes votes and 298 no votes.
- November 2018: APIA presented to Council about tobacco tax, requesting the city increase tax on tobacco with the goal of deterring use, especially by young people. Council directed the City Manager to bring back information on a tax increase for tobacco products.
- July 2019: Council again discussed tobacco tax during the work session and asked the city manager to bring back further information on Tobacco Excise Tax; a combination Tobacco Excise Tax with increased sales tax on alcohol and marijuana; fund dedication options; and potential rates.
- November 2020: Council discussed tobacco excise tax and provided general direction to proceed with an ordinance levying excise tax on tobacco. The rate of levy in Ordinance 2021-02 is \$3 per pack, and 75% of the wholesale price on other tobacco products. As to dedication, no clear direction was provided, so the dedication language provided in the proposed ordinance at paragraph 6.56.010(B) is: "Each annual budget shall determine what portion of the tax levied by this chapter shall be dedicated to smoking cessation or related public health programs."

DISCUSSION:

Taxing Rationale. Rationale used for considering tax increases includes changing behavior to curb the use of the associated products due to cost increase. Another purpose might be to help fund the response to the public health impacts and societal costs related to these products. Additionally, the tax increase can be viewed as a revenue generator.

Decision Making Authority. City Council may impose excise tax without voter ratification.

Dedicated Revenue Use. Council may dedicate tax revenue. The impact is that dedicated funding may reduce spending from the general fund or free up that dollar amount in the general fund to support other expenses.

Funds can be dedicated “generally”, such as “to mitigate the public health consequences of tobacco use”; or a specific dedication, such as “to the Iliuliuk Family & Health Services Clinic for the benefit of community health”. This is a policy choice for council, each with pros and cons. A broader purpose provides greater flexibility, but would require budget appropriation annually. A more specific dedication may eliminate the need to revisit the appropriation each year, but results in inflexibility if circumstances change. Council can also include an “escape” valve in the event circumstances change in the future by making the dedication subject to annual appropriation, as we have done with the proposed ordinance language.

Council may choose not to dedicate the revenue, in which case the revenue would go to the general fund to support city operations. In light of decreased funding from the state, this is a valid consideration.

Potential Taxing Rates. Discussion this evening is limited to excise tax. The rate of levy is Council’s decision, with the draft ordinance using \$3 per pack and 75% of wholesale price on other tobacco products. Past discussions included a range of \$1 to \$4 per pack of cigarettes and 50% on other tobacco products (OTP).

In the State’s model tax policy they recommend a minimum of \$2 per pack so that the price increase is significant enough to reach the desired behavioral change (decreased consumption of tobacco) and that it increases the overall price at least 10% from the current price. They claim a tobacco price increase that is too low or insignificant will not deliver those results over time, especially if coupons and tobacco sales take place at retail stores. Since much work goes into passing a single increase it is also recommend to try for the mid-rate (\$2/pack) or higher when possible. The recommended 75% of the wholesale price on OTP (other tobacco products) is to ensure price parity to cigarettes, because they don’t want people to be influenced by the lower price and switch to a cheaper product that still delivers nicotine. The average tobacco excise around the State of Alaska is about \$2.46 per pack and 64% for other tobacco products. Examples of tobacco excise tax levies from other Alaska communities are:

	Cigarettes per Pack	Other Tobacco Products
Sitka	\$2.46	90%
Juneau	\$3.00	45%
Ketchikan	\$2.00	75%
Bethel	\$2.21	45%

In discussion with five top sellers to tobacco in Unalaska, it appears that \$9 is the going rate for a pack of cigarettes. These sellers also provided their estimated annual sales of tobacco. Dividing their annual sales by 9 gave an estimated number of packs sold per year (leaving other tobacco products out of the calculation for discussion purposes). Using the number of packs per year, we were able to estimate potential excise tax revenue at \$1, \$2, \$3 and \$4 per pack:

POTENTIAL EXCISE TAX REVENUE

	Est Annual Sales	Packs Per Year at \$9/pack	Tax Rate: \$1/Pack	Tax Rate: \$2/Pack	Tax Rate: \$3/Pack	Tax Rate: \$4/Pack
Vendor 1	\$ 1,620,000	180,000	\$ 180,000	\$ 360,000	\$ 540,000	\$ 720,000
Vendor 2	\$ 676,000	75,111	\$ 75,111	\$ 150,222	\$ 225,333	\$ 300,444
Vendor 3	\$ 150,000	16,667	\$ 16,667	\$ 33,333	\$ 50,000	\$ 66,667
Vendor 4	\$ 20,000	2,222	\$ 2,222	\$ 4,444	\$ 6,667	\$ 8,889
Vendor 5	\$ 40,000	4,444	\$ 4,444	\$ 8,889	\$ 13,333	\$ 17,778
Total	\$ 2,506,000		\$ 278,444	\$ 556,889	\$ 835,333	\$ 1,113,778

These are only estimates, and not every seller of tobacco products was contacted. However, this data will provide council an estimate of potential revenue from a tobacco excise tax at various rates.

Effective Date. If Council chooses to impose an excise tax on tobacco, the draft ordinance provides an effective date 90 days after adoption, but the tax is suspended until October 1, 2021. That time lapse will allow staff to work with vendors, develop forms and processes to administer the tax and allow for the vendors to register with the City.

Timing of Sales Tax Increase. If Council chooses to proceed with increasing sales tax, Council would take action through an ordinance, which could be put to the voters for ratification in October 2021.

ALTERNATIVES:

1. Take no action
2. Modify the language of the Ordinance
3. Schedule the Ordinance in the present form for public hearing and second reading on March 23, 2021 or a later regular meeting date selected by Council

FINANCIAL IMPLICATIONS: At the rate of levy presently contained in the ordinance, the City may realize up to \$835,000 annually from tobacco excise tax. The cost of implementation to the City is not clear, but those costs will be absorbed within the departmental budgets, primarily Clerks and Finance.

LEGAL: Staff has worked closely with the City Attorney on this issue, and Charles Cacciola has provided a memorandum reviewing the changes made to the ordinance since November 2020. Mr. Cacciola is available by telephone to respond to council inquiries.

STAFF RECOMMENDATION: This is a Council decision.

PROPOSED MOTION: If council chooses to proceed, it would be appropriate to move to schedule Ordinance 2021-02 for public hearing and second reading on March 23, 2021.

ATTACHMENTS: Three memos from the City Attorney

1. [March 3, 2021 discussing the proposed ordinance;](#)
2. [September 23, 2019 reviewing dedication of tax proceeds to a specific purpose \(both excise tax and sales tax\); and](#)
3. [January 28, 2019: Taxing Tobacco – Sales and Excise](#)

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MEMORANDUM

To: Mayor Tutiakoff, Sr.
City Council

From: Charles A. Cacciola 

Date: March 3, 2021

Re: Tobacco Excise Tax Ordinance 2021-02

Ordinance 2021-02 follows from a draft tobacco excise tax ordinance the council discussed at its November 10, 2020 work session. This memo summarizes the intent and effect Ordinance 2021-02 and changes from the November work session draft.

1. Summary of Ordinance 2021-02

Ordinance 2021-02 amends the city code with a new Chapter 6.56 to levy an excise tax on cigarettes and tobacco products brought into the City of Unalaska. The levy is \$3.00 per pack of cigarettes and 75% of the wholesale price on other tobacco products. The tobacco distributor is directly responsible for paying the tax, unlike a sales tax where the tax falls directly on the consumer but is collected by the seller. (Of course, the consumer pays a higher price for the tobacco product to cover the distributor's tax obligation.) Also distinct from a new sales tax, an excise tax does not require voter ratification.

Ordinance 2021-02 has a staggered effective date. All sections of the proposed excise tax chapter *except for the levy* are effective 90 days from the date the ordinance is adopted. The levy is effective as of October 1, 2021. The staggered effective date is intended to provide the city administration and tobacco distributors sufficient time to establish the registration system, register distributors, and adopt necessary policies and practices before needing to pay and remit the tax, which will not occur until October 2021.

Though the tobacco excise tax is distinct from the city's sales tax, many administrative and collections provisions of the proposed Chapter 6.56 mirror provisions found in the city's sales tax code. Tobacco distributors are also "sellers" under the sales tax code. Distributors will be able to file and remit excise tax returns together with the distributor's sales tax returns, minimizing the administrative burden on distributors and the clerk's office.

Remote sales into the City of Unalaska, and application of the tax to remote distributors, were discussed at the November work session. Alaska Statute 43.50.105 declares the shipping of cigarettes direct to consumers to be a criminal offense. Thus, the city does not need to impose the tax on remote distributors of cigarettes. This state statute does not, however, prohibit direct to consumer shipping of other tobacco products. For the same reasons the city could not effectively impose sales tax on remote sellers prior to the Alaska Remote Seller Sales Tax Commission and adoption of the remote sellers sales tax code, it cannot effectively enforce the excise tax on remote distributors shipping non-cigarette tobacco products direct to consumers in the City of Unalaska. Unfortunately, the proposed excise tax cannot be collected through the ARSSTC sales tax system. The city's sales tax *will* be collected on remote sales of other tobacco products, but the city cannot effectively collect the tobacco excise tax from such distributors.

Finally, Ordinance 2021-02 contemplates an annual dedication of some portion of the excise tax to smoking cessation and related public health programs.

2. Changes from November 10 Draft Ordinance

Ordinance 2021-02 addresses concerns expressed at the November work session and also includes changes to facilitate administration of the tax and clarify the ordinance's intent and effect.

i. Effective Date.

The most significant change to the form of the ordinance is that the code section levying the tax (UCO § 6.56.030) now appears in a separate ordinance section (Section 3), while the remainder of the proposed Chapter 6.56 appears in Section 2 of the ordinance. This change is to facilitate the staggered effective date of the registration aspects of the chapter and the obligation to pay and remit the tax. The effective date of the tax levy has also been pushed out to October 1 instead of July 1.

ii. *Purpose - § 6.56.010.*

The proposed Chapter 6.56 now begins with a section codifying the purpose of the tax, generating revenue and improving public health by reducing tobacco consumption. This section also provides that with each annual budget the city shall determine what portion of the tax proceeds will be dedicated to smoking cessation and related public health programs.

iii. *Definitions - § 6.56.020.*

The definition section has been significantly revised with formal and substantive changes, including the addition of several defined terms. Foremost, *tobacco product* now includes *electronic smoking product*, which is given a separate definition that did not appear in the earlier draft. *Electronic smoking product* is defined using a definition from existing state statute. *In transit* is now defined, which was done to clarify an exemption to the tax.

iv. *Exemptions - § 6.56.040.*

This section is changed to clarify the exemption for US Armed Forces ship's commissaries. The section is also changed to simplify the in-transit exemption through use of the defined term.

Private fishing and commercial vessels are not exempt. If such a vessel has a store that distributes cigarettes or tobacco products, it must either refrain from distributing such products while in the City of Unalaska or register as distributor and remit the tax to the city.

We will be attending the March 9, 2021 council meeting to assist the council in its consideration of this ordinance.

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MEMORANDUM

To: Erin Reinders
City Manager

From: Charles A. Cacciola 

Date: September 23, 2019

Re: Dedicating Tax Proceeds to a Specific Purpose – Excise and Sales

The council has expressed interest in establishing a tobacco excise tax and/or an additional sales tax levy on marijuana and alcohol. It is also interested in dedicating the proceeds from these taxes to a specific purpose. This memo explains the council’s authority to dedicate tax proceeds to a specific purpose and provides examples of different approaches to dedication.

A. Dedication of Tax Proceeds by Ordinance is Lawful

Article IX, ¶ 7 of the state constitution provides that the “proceeds of any state tax or license shall not be dedicated to any special purpose”. Based on the text, legislative history,¹ existing municipal practice within the state,² and judicial precedent,³ this restriction applies to the state only, not to municipalities.

¹ See e.g., *State v. Alex*, 646 P.2d 203 (Alaska 1982); *State v. Ketchikan Gateway Borough*, 366 P. 3d 86 (Alaska 2016).

² E.g., Anchorage Code of Ordinances §12.20.220; Fairbanks General Code §74-117; City and Borough of Juneau Code Ordinance No 2017—22(am); Haines Borough Code § 3.80.220; Homer City Code § 9.16.010; Kodiak City Code § 3.08.025.

³ E.g., *State v. Ketchikan Gateway Borough*, 366 P. 3d 86 (Alaska 2016).

Alaska Statute Title 29 does not prohibit a council from dedicating tax proceeds to a specific purpose.⁴ Accordingly, the council is authorized to adopt such ordinances.⁵ Nor do the City's ordinances prohibit an ordinance dedicating certain tax proceeds to a particular purpose, although any appropriation remains subject to budget procedure.⁶

Whether the council wishes to pursue a general use (e.g., “to mitigate the public health consequences of tobacco use”) or a specific one (“subject to appropriation, to the Iliuliuk Family & Health Services Clinic for the benefit of community health”)⁷ is a policy choice, each with benefits and drawbacks: A broader purpose allows for greater flexibility in the future, but requires more work, potentially each year, to determine precisely how the funds are to be used in furtherance of the purpose. A more specific use may reduce or eliminate the need to revisit the question each year, but can also result in inflexibility should circumstances change.

B. Challenges of Dedication of Sales Tax Proceeds by Ordinance

As a general principle, a council cannot pass an ordinance that it is unable to amend or repeal at a future date. An ordinance dedicating funds to a specific purpose can be revised by the council the same as any other ordinance, though, as explained below, this can become a more complicated question if proposed dedication is put before the voters in the same ballot proposition that ratifies the increase in the sales tax rate.

An ordinance levying a tobacco excise tax is effective without voter ratification. (As a practical concern, an ordinance adopting such a tax should have an effective date that provides City and business administrators sufficient time to adopt implementing policies.) Because the council can adopt a tobacco excise tax the same as it would any other code ordinance, it can adopt an

⁴ See AS 29.35.100(a).

⁵ See AS 29.35.260(a). Moreover, AS 29.35.010(9) grants all municipalities authority “to expend money for a community purpose, facility, or service for the good of the municipality to the extent the municipality is otherwise authorized by law to exercise power necessary to accomplish the purpose or provide the facility or service”.

⁶ See UCO Chap. 6.12; see also AS 29.35.100(a).

⁷ Dedication to a use outside of municipal government draws closer to constitutional limitations and requires careful scrutiny. We nevertheless believe that dedicating certain tax proceeds to the clinic, subject to annual appropriation, is a constitutionally valid “public purpose” as required by Art. IX, Sec. 6 of the Alaska Constitution and further authorized by AS 29.35.010(9).

ordinance that dedicates some or all of the proceeds of the tax to a particular purpose in the same manner.⁸

On the other hand, “an increase in the rate of levy of a sales tax approved by ordinance does not take effect until ratified by the majority of the voters at an election.”⁹ If voters are asked to approve a rate increase on the same ballot proposition containing a dedication of the proposed tax’s proceeds, the proposition may garner additional public support and votes; other voters may support the rate increase but not the dedication thereof, eroding support for the rate increase proposition if the increase and dedication are put forth as a single ballot proposition.

The fundamental challenge with including a dedication as an express and absolute condition in the ballot proposition authorizing the rate increase is that the council’s authority to later amend the dedication is uncertain. This question is complicated by the fact that a dedication cannot be the subject of an initiative ordinance,¹⁰ so the two-year moratorium on council repeal of an initiative does not serve to impose a time limitation the council amending the dedication.¹¹ Most likely, a sales tax rate increase ballot proposition that includes an unconditional dedication would permanently prohibit the council from amending the dedication without also repealing the rate increase.¹² (Alternatively though unlikely, the entire ballot proposition could be seen as an unlawful delegation of the council’s responsibility for the budget.)¹³

⁸ Historically, excise taxes have served dual purposes – raising revenue and shaping consumer conduct. In particular, Tobacco excise taxes seek to reduce tobacco consumption owing to the public health costs associated with tobacco use. Dedicating proceeds of an excise tax to mitigate such costs is a natural complement to the tax’s purpose.

⁹ AS 29.45.670.

¹⁰ Dedication by initiative ordinance would run afoul of art. XI, § 7 of the state constitution and AS 29.26.100, which provide that “The initiative shall not be used to dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation.” *See Alliance of Concerned Taxpayers, Inc. v. Kenai Peninsula Borough*, 273 P.3d 1128, 1136-1138 (Alaska 2012); *see also City of Fairbanks v. Fairbanks Convention and Visitors Bureau*, 818 P.2d 1153 (Alaska 1991).

¹¹ *See* AS 29.26190(a).

¹² *See City of St. Mary’s v. St. Mary’s Native Corporation*, 9 P.3d 1002 (Alaska 2000) (“when a local government grants an exemption by ordinance and the exemption is not subjected to a public vote, it may repeal that exception by ordinance without a public vote”).

¹³ *See* AS 29.35.100(a); *City of Fairbanks v. Fairbanks Convention and Visitors Bureau*, 818 P.2d 1153, 1158 (Alaska 1991).

C. Examples of Dedication of Tax Proceeds

Including a dedication in the same ballot proposition that authorizes an increase in the sales tax rate poses complicated and uncertain questions as to the effect of the dedication and how it may be amended. Most municipal dedications of sales taxes avoid these problems, entirely or in part, by (i) not putting the dedication before the voters, (ii) posing the dedication as a separate ballot proposition, (iii) stating the dedication as a non-binding expression of intent,¹⁴ (iv) limiting the duration of the tax increase conditioned upon the dedication, or (v) providing an “escape valve” in the dedication.

(i) *Non-Binding Expression of Intent*

Juneau has a permanent 1%, a temporary 1%, and a temporary 3% sales tax rate.¹⁵ These temporary levies were scheduled to be automatically repealed in 2017 and 2018, respectively. In 2016¹⁶ and 2017,¹⁷ the Juneau assembly put the question of five-year extensions of these temporary levies to the voters. The ballots stated the *intent* of the assembly to use the proceeds of the temporary levies, if extended, for a specific purpose.¹⁸ However, the Juneau code and ballot propositions do not specifically *require* the proceeds to be used for the specified purposes. The assembly could, through the budget process, appropriate the proceeds for other use. This authority is also established in Juneau’s charter.¹⁹

Juneau’s approach ultimately leaves appropriation to the assembly’s discretion. The decision to appropriate proceeds contrary to the intended dedication erects a political, rather than legal, protection for the dedication.

(ii) *Code Dedication Not Put Before Voters*

¹⁴ No ordinance dedicates any portion of Unalaska’s bed tax to a specific use. The City’s Community Support Program Guidelines consider funding of the program to be provided by bed tax proceeds, but these guidelines do not create a dedication of the proceeds.

¹⁵ CBJC §69.50.020.

¹⁶ City and Borough of Juneau Ord. No. 2016-19.

¹⁷ City and Borough of Juneau Ord. No. 2017-22(am).

¹⁸ City and Borough of Juneau Ord. No. 2016-19; City and Borough of Juneau Ord. No. 2017-22(am).

¹⁹ City and Borough of Juneau Charter, § 9.11 – 9.13.

The City of Kodiak has an ordinance separate from the levying ordinance that dedicates use of sales tax proceeds.²⁰ Voter approval of the tax rate increase was not conditioned on the dedication.²¹ Moreover, Kodiak’s charter clarifies that its council may, by motion, resolution, or ordinance transfer appropriations to any other item of appropriation, whether or not such other items are within the same department, office, or agency.²² The Haines Borough follows a similar structure.²³

By codifying the dedication separate from the ballot proposition, the council would need to introduce and have a public hearing on any ordinance that would alter the dedication, at which time City residents can be heard on the matter. Similar to a non-binding intent, dedicating tax proceeds by council code ordinance erects a political, rather than legal, barrier to amending or repealing the dedication.

(iii) Posing the dedication as a separate ballot proposition

One solution to the problems of putting the question of dedication of certain tax proceeds before the voters in connection with required voter ratification of the increased rate is to have two separate ballot propositions:

1. Should the City of Unalaska levy an additional 5%, for a total levy of 8%, on all retail sales of marijuana and alcoholic beverages?
2. If proposition 1 is approved, shall the City use the proceeds of the increased rate to mitigate impacts on public health related to alcohol and marijuana use?

By having two different propositions appear on the same ballot, the increased rate on alcohol and marijuana is permanently authorized, independent of the dedication. The council could, in the future, amend the dedication without losing authorization for the increased rate. Once again, altering the dedication approved by the voters becomes a political question, not a legal one.

The City of Homer took this approach, in part, in 2006 when it extended a temporary 3/4% additional levy.²⁴ The ballot had separate propositions. The first asked voters to authorize

²⁰ Kodiak City Code § 3.08.025.

²¹ See City of Kodiak Ordinance No. 1155 (2003).

²² City of Kodiak Charter, § V-6.

²³ Haines Borough Code § 3.80.220; Haines Borough Charter § 9.02.

²⁴ City of Homer Ordinance No. 06-42.

an extension of the additional levy. The second (and third) proposition authorized the use of the proceeds for new local roads and new local non-motorized trails.

(iv) *Limiting the duration of the rate increase conditioned upon a dedication*

Like Juneau, Homer dedicates sales tax proceeds that accrue from a *temporary* levy. Unlike Juneau, the duration of the additional levy is not limited by a number of years, but by the dedication itself: The supplemental levies are dedicated to the payment of specific debt incurred for capital projects.²⁵ The supplemental levy terminates when the debt is retired.²⁶

The Homer city council has sought voter approval to suspend²⁷ and modify dedications,²⁸ although it is unclear if Homer believes it is legally obligated to obtain voter approval or “that it is in the best interest of the community to ask the voters if they will authorize amendments to” the dedications.²⁹ In any case, by limiting the levy to paying down specific debts, Homer avoided the problem of having a permanent dedication where the increased rate would continue even if the purpose of the dedication becomes outdated.

If the council wishes the dedication to appear in the same ballot proposition that authorizes the rate increase, one option is to place a time limit on the dedication. *E.g.*:

Should the City of Unalaska levy an additional 5%, for a total levy of 8%, on all retail sales of marijuana and alcoholic beverages with the proceeds of such tax use, *for a period of not less than two years*, to mitigate impacts on public health related to alcohol and marijuana use?

(v) *Including an “escape valve” in the dedication*

Fairbanks dedicates use of its hotel/motel tax revenue to a specific purpose “unless the city council votes otherwise.”³⁰ The dedication is “subject to annual appropriation.”³¹ In short, dedication is the default, but the council retains ultimate control of the funds and can deviate

²⁵ Homer City Code §9.16.010(b)-(d).

²⁶ Homer City Code §9.16.010(d).

²⁷ City of Homer Ordinance No. 15-36(A-2).

²⁸ City of Homer Ordinance No. 06-42.

²⁹ City of Homer Ordinance No. 06-42.

³⁰ *City of Fairbanks v. Fairbanks Convention and Visitors Bureau*, 818 P.2d 1153, 1154 (Alaska 1991).

³¹ Fairbanks Code of Ordinances §74-117(c).

from the dedication by affirmative council action. The ultimate effect is, as with Juneau, that altering the use of the dedicated tax proceeds is a political question.

Anchorage follows a hybrid approach for the dedication of its bed tax. One-third is dedicated to financing a new civic center and the Egan Civic and Convention Center.³² However, “If all or a portion of the taxes levied and dedicated to the purposes in subsection C. are no longer needed for the purposes described in subsection C., including repayment of bonded indebtedness, *the assembly shall consider* whether the tax increase levied pursuant to AO 2005-17, approved by the voters as ballot proposition 2 on April 5, 2005, shall be eliminated or reduced.”³³ Again, this approach makes amending the dedication into a political question, on which the voters can be heard at public hearing the ordinance that would amend the dedication, rather than instituting a legal barrier.

CONCLUSION

The council may dedicate certain tax proceeds to a specific purpose provided that the proceeds are used for a public purpose. Should the council wish to dedicate any tax proceeds, it should first consider the use to which the proceeds will be dedicated. If the dedicated proceeds arise from an increased sales tax rate, which must be ratified by the voter before the increase takes effect, the council must consider a second policy question – how closely it wants to tie the dedication to voter ratification of the rate increase.

Please let us know if you have any further questions on this matter.

³² Anchorage Municipal Charter, § 14.05.

³³ ACO § 12.20.020(D) (emphasis added).

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MEMORANDUM

To: Thomas Thomas
City Manager

From: Charles A. Cacciola

Date: January 28, 2019

Re: Taxing Tobacco – Sales and Excise

The council is interested in imposing additional taxes on tobacco. You asked for an overview of the merits of doing so by an excise tax or by a supplemental sales tax levy.

Excise Tax Overview

An excise tax is a tax imposed on the performance of an act, the engaging in an occupation, or the enjoyment of a privilege.¹ The power to levy an excise tax, though not explicitly provided by statute, is enjoyed by all Alaska municipalities.²

Common features distinguish excise taxes from sales taxes, but the line is not always clear. Sales taxes tend to be imposed at the final sale to the consumer. Excise taxes are imposed at other points in the commercial cycle, for example, at the time of production,³ or importation into a city.⁴ As a result, the cost to the consumer is indirect: A

¹ 16 Eugene McQuillan, *The Law of Municipal Corporations* § 44.190 (3rd ed.2003).

² *See e.g. Fannon v. Matanuska-Susitna Borough*, 192 P. 3d 982 (Alaska 2008).

³ For example, the state levies a \$50-per-ounce excise tax on any part of the bud and flower and \$15 an ounce for the remainder of the plant that is due at the time the marijuana is harvested.

municipality levies the tax on the producer or merchant, who passes it onto the consumer by including it in the product's price, distinguishing excise taxes from a sales tax that is added at the time the consumer purchases the product.

Excise taxes target specific good or acts, unlike broad-based sales taxes. They are often customized to the major industries of the taxing jurisdiction. (The state's Commercial Passenger Vessel Excise Tax - \$34.50 per cruise ship passenger per voyage and paid by the operator - is a paradigmatic example.) Another common, though not defining, distinction is that excise taxes are often assessed at a flat rate (*e.g.*, \$50 per ounce on marijuana; \$2 per pack of cigarettes).

Finally, excise taxes often have a goal beyond generating revenue. Because an excise tax is imposed on a specific industry or product, they are used to influence behavior, such as deterring smoking, drinking (although municipalities cannot impose an excise tax on alcohol, the state can and does⁵), and fuel consumption,⁶ often with consideration given to the significant social costs resulting from the activity.

For Alaska municipalities, excise taxes offer collection opportunities superior to sales taxes and can capture transactions that a retail sales tax cannot (such as production, importation, etc.). But a major reason Alaska municipalities levy excise taxes (and almost only on tobacco) is that sales tax increases require voter approval in most municipalities, including Unalaska.⁷ No ballot question is required for excise taxes. Excise taxes also have favorable optics because the tax is included in list prices consumers see: People are more accepting of a \$2-a-pack cigarette excise tax than of a 30% sales tax added at the register, even if the total cost is the same.

⁴ Importation of tobacco products into a municipality is often the "privilege" that invokes tobacco excise taxes. *E.g.* Juneau City and Borough Code 69.08.20(a) "The City and Borough hereby levies an excise tax of \$3.00 per pack of cigarettes brought into the City and Borough after April 1, 2015."

⁵ State alcohol excise rates depend upon the beverage that is distributed. *See* <http://www.tax.alaska.gov/programs/documentviewer/viewer.aspx?2>

⁶ The federal excise tax on gasoline is 18.4 cents per gallon and 24.4 cents per gallon for diesel fuel.

⁷ *See* AS 29.45.670. Home-rule municipalities are exempt from the statutory voter requirement, but many home-rule charters nevertheless require sales tax increases be put on the ballot.

Tobacco Sales Tax

Imposing higher taxes on tobacco by way of a supplemental sales tax levy has two distinct advantages. First, required code changes are minimal. So too is the administrative burden resulting from collection of the additional taxes. Second, a supplemental sales tax levy on tobacco also enables a municipality to impose that same sales tax rate on sales of alcoholic beverages. (Municipalities are prohibited from imposing excise tax on alcohol and can impose a sales tax no higher than it imposes on other goods or services.⁸)

The disadvantages to using a supplemental sales tax levy are varied. First, as with any sales tax increase, the rate would not be effective until it is ratified by the voters.⁹ Second, to achieve a levy similar to common excise taxes (i.e., \$2-\$3 dollars a pack), the additional levy would exceed 20% of the selling price. Though this is not a legal barrier, practical considerations – including public perception – militate against such high sales tax rates. A sales tax is also likely less convenient for merchants as they will need to apply multiple tax rates to different items and are likely to have customers that are upset that a pack of cigarettes advertised as \$8 rings up as \$10 with tax.

Tobacco Excise Tax

An excise tax is the common method of imposing significant tax burdens on tobacco. The federal government imposes a \$1 per pack excise tax.¹⁰ The State of Alaska imposes \$2.00 a pack and numerous municipalities impose \$2-\$3 a pack.¹¹ The advantages of an excise tax are essentially the inverse of the disadvantages to a sales tax: Voter ratification is not required. The tax is imposed upon the merchant and is therefore included in the advertised selling price, not added at the register. Similarly, none of the City's sales tax exemptions would be applicable to an excise tax.

The disadvantages are also the inverse of a supplemental sales tax: A new code chapter would be required and implementing the tax would impose some additional

⁸ AS 04.21.010.

⁹ AS 29.45.670.

¹⁰ Technically \$1.0066 as the actual levy is \$50.33 per thousand cigarettes.

¹¹ *E.g.*, Juneau - \$3; Anchorage \$2.46; Bethel \$2.21; Haines \$2.00; Ketchikan \$2.00; Kotzebue \$2. The Fairbanks North Star Borough stands out at an 8% levy on the wholesale price.

burdens on the city administration. But these burdens are not extreme. As noted, many Alaska municipalities have tobacco excise taxes, providing strong models on which to base the necessary ordinances. While excise tax registration and collection would be separate from sales tax procedures, the two are similar in practice. Initial implementation will impose moderate administrative burdens, but once underway processing a tobacco excise tax is no more resource consuming than processing a sales tax return.

Excise taxes on cigarettes are often set on a per-pack basis. Because other tobacco products (cigars, loose tobacco, etc.) are not distributed in standardized packaging, they tend to be taxed at a percentage of the wholesale price. In Alaska, such levies range from a low of 8% in the Fairbanks North Star Borough to the state's 75% rate. Most municipal levies appear to be clustered around 50%.

Conclusion

Tobacco taxes are used to raise revenue¹² and deter tobacco consumption. The preferred method of Alaska municipalities appears to be excise taxes, but supplemental sales taxes are possible. If the council wishes to pursue a tax on tobacco products, it should first determine whether it wishes to do so as an excise or sales tax and, following that determination, the appropriate rate of levy.

Please let us know if you have any further questions.

¹² The Ketchikan Gateway Borough collected \$1,074,563 in tobacco taxes in 2017.

Marjorie Veeder

From: Caroline Nevak <carolinen@apiai.org>
Sent: Tuesday, March 16, 2021 5:51 PM
To: Marjorie Veeder
Cc: Sue Unger
Subject: Cost of APIAs Tobacco Cessation Program
Attachments: Costs of APIA Tobacco Cessation Program.docx

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Hi Marjorie,

I hope you are doing well.

I want to share our APIA Wellness Program website to support your presentation, which includes our Tobacco Prevention & Control Program (TCP) and our tobacco cessation services in the region. Here is the link: <https://www.apiai.org/tobacco-prevention-intervention-program/>

In addition, please find below information to share with your community as you continue to educate others about the importance of the proposed tobacco tax increase.

Why invest in tobacco prevention?

Smoking is the leading preventable cause of death, with an estimated 700 Alaska adults dying from tobacco-related disease each year. Per the FY2020 Alaska Tobacco Prevention and Control Regional Profile Report for Southwest region, ([FY20 Alaska Southwest Regional Profile Tobacco Report](#)) 27% of adults are current smokers, 22% of adults currently use smokeless tobacco, and 14% report using e-cigarettes or electronic nicotine delivery products. Additionally, 3% of adults smoked cigars or cigarillos or used a hookah. The burden of tobacco use includes the cost of medical care for tobacco-related disease and lost productivity for employers. Investing in tobacco prevention supports the health of the community, and increasing the price of tobacco is proven to be effective in decreasing smoking among adults and preventing youth from using tobacco. That said, adults reported as “Never Smokers” is at 48.2% and for former smokers is at 23.9% from the FY19 Annual Report.

What are the costs of APIA’s Tobacco Cessation Program?

APIA’s Tobacco Cessation Program includes Anchorage, Atka, Nikolski, St. George, and Unalaska. We have estimated that APIA’s Tobacco Cessation Program costs approximately **\$102,808 per year in salary alone**. The majority of this amount is directed towards services in Unalaska. In addition, the cost of training our current staff as Tobacco Treatment Specialists (TTS) has cost an **additional \$45,000**. *Please see the detailed attachment for a specific breakdown of these costs.*

How could Unalaska invest in tobacco cessation services and other health initiatives using tax revenue from tobacco sales?

Dedicating a proportion of tax revenue from tobacco sales to local public health initiatives, including tobacco cessation, is a strong strategy to improve individual and community health in Unalaska. One recommendation

to consider with the tax revenue would be to support a full-time TTS to serve both clinics (APIA and IFHS) in Unalaska.

Currently, APIA's tobacco cessation efforts are accomplished through staff at our clinics, such as behavioral health clinicians, CHAPs, and other providers. Nine providers in our region have received tobacco treatment specialist training and a percentage of their time is allocated to tobacco cessation efforts, although none of our providers are exclusively TTS. We have reached out to IFHS to find out more about their tobacco cessation services, however, we have not been able to connect. So, at this time, we are not aware of the tobacco services that IFHS provides.

If Unalaska had a staff person entirely dedicated to tobacco cessation efforts, this could potentially have a significant impact on reducing tobacco use in Unalaska. The local TTS can offer support to individuals in a consistent manner that also reflects the cultural and social values of the community. Furthermore, the focused position can support health systems coordination to improve screening for tobacco use and supporting cessation in treatment work plans. Having a TTS dedicated solely to tobacco cessation efforts would not only take some burden off of providers but it would also provide a specialist who can focus entirely on tobacco cessation, which can include outreach and education efforts. In Southwest Public Health Region, the average salary for supporting a full-time employee is \$45,000 per year (excluding fringe benefits). The fees to obtain/maintain TTS certification and registration for ongoing training is not expected to exceed \$1,500 per year plus travel expenses.

By directing a set proportion of funds to support a TTS position in Unalaska, the community would be able to receive cessation support that is recommended to include a combination of counseling and FDA-approved nicotine replacement therapy to support quit attempts.

If you have any questions or want more information, please let me know.

Thank you,
Caroline Nevak

Quyana,

Caroline Nevak

Tobacco Prevention Coordinator

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With Spirit and Strength

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Costs of APIA's Tobacco Cessation Program

Staff time - Currently, there are **12 staff** at APIA (Anchorage, Nikolski, Atka, Unalaska, and St. George) who are involved in tobacco cessation efforts at different levels. Some staff provide direct client services as Tobacco Treatment Specialists, while others work on tobacco prevention, systematic improvements to screening and referral, and educational purposes. The percentage of each person's time devoted to tobacco cessation efforts ranges from 5%-40%. Collectively, we estimate that these 12 staff **cost the Tobacco Cessation Program approximately \$102,808 in salary alone per year (excluding indirect costs)**. The majority of this amount is directed towards services in Unalaska. With the generous support of the City of Unalaska Support Grant funds, APIA funds at least one Behavioral Health Clinician. This Clinician is a trained Tobacco Treatment Specialist, which has overlap with these efforts.

Staff trained as Tobacco Treatment Specialists (TTS) - 9 staff from APIA have been trained as TTS over the past 5 years. This training is recommended for staff every two years. The training is generally for one week and registration through ANTHC costs approximately \$1,200. In addition to registration, staff must travel into Anchorage for a minimum of 5-nights to attend this training. Thus, travel for this training from staff in the region is approximately \$3,800 per person. In addition, there are the costs of staff time to attend this training as it takes 5 full days to complete the training.

- Registration 9 staff trained as TTS= \$10,800
- Travel/per diem for 9 staff to attend TTS Training in Anchorage= \$34,200
- **\$45,000 Total cost to train 9 staff as TTS (excluding salary)**

Travel/per diem - The APIA Tobacco Prevention Coordinator travels out to the region to attend health fairs, to support tax increase initiatives, school presentation, and other events throughout the year. Approximately 4 trips on average are taken each year for these efforts. **A total of approximately \$12,000 per year is spent on travel and per diem by the Tobacco Prevention Coordinator.**

Supplies -APIA has funds to purchase program supplies for the Tobacco Cessation Program, such as quit tobacco pouches filled with items such as gum, mints, fidgets, stress balls, etc. In addition, resources are supplied for special events, health fairs, and school-related functions. **A total of approximately \$10,000 per year is spent on supplies for the Tobacco Cessation Program.**

Nicotine Replacement Therapies (NRTs) - NRTs, such as gum, patches, lozenges, etc. are helpful when quitting tobacco use. The goal is to have these supplies available to people who are enrolled in the tobacco cessation program and would otherwise have to wait for their first NRTs to be sent from Anchorage after their first appointment. There is often a delay in getting these NRTs to people who are motivated to quit. **APIA spends approximately \$5,000 per year for the convenience of NRTs in our local clinics.**

Advertising - **Approximately \$6,000 of the Tobacco Cessation Program budget at APIA has been dedicated to advertising,** to include radio announcements, newspaper ads, and development of ads.

There are additional costs to the Tobacco Cessation Program that are not listed or quantified above. These include: tobacco free campus signage, clinic signage with tobacco free messaging, postage, consulting with other entities for Tobacco Prevention educational efforts (i.e., Rural Cap).