

ORDINANCE NO. 2016-02

AN ORDINANCE OF THE CITY OF ALBANY ENACTING A GENERAL TAX ON THE DISTRIBUTION OF SUGAR-SWEETENED BEVERAGE PRODUCTS

WHEREAS, diabetes, obesity, and tooth decay have been on the rise for decades. Although no group has escaped these epidemics, children as well as low income communities and communities of color have been and continue to be disproportionately affected; and

WHEREAS, although there is no single cause for the rise in diabetes, obesity, and tooth decay, there is overwhelming evidence of the link between the consumption of sugary drinks and the incidence of diabetes, obesity, and tooth decay; and

WHEREAS, sugary drinks such as soft drinks, energy drinks, sweetened teas, and sport drinks offer little or no nutritional value, but massive quantities of added sugar. A single 20-ounce bottle of soda, for instance, typically contains the equivalent of approximately 16 teaspoons of sugar; and

WHEREAS, before the 1950s, the standard soft-drink bottle was 6.5 ounces. In the 1950s, larger size containers were introduced, including the 12-ounce can, which became widely available in 1960. By the early 1990s, 20-ounce plastic bottles had become the norm; and

WHEREAS, at the same time, hundreds of millions of dollars have been spent in an ongoing massive marketing campaign, which particularly targets children and people of color. In 2006 alone, nearly \$600 million was spent in advertising to children under 18. African American and Latino children are also aggressively targeted with advertisements to promote sugar-laden drinks; and

WHEREAS, the resulting impact on consumption should not be surprising. The average American now drinks nearly 50 gallons of sugary drinks a year. The problem is especially acute with children in California. From 1989 to 2008, the percentage of children consuming sugary drinks increased from 79% to 91% and the percentage of total calories obtained from sugary drinks increased by 60% in children ages 6 to 11; and

WHEREAS, this level of consumption has had tragic impacts on community health. Type 2 Diabetes – previously only seen among adults – is now increasing among children. If the current obesity trends are not reversed, it is predicted that one in three children and *nearly one-half* of Latino and African American children born in the year 2000 will develop type 2 diabetes in their lifetimes; and

WHEREAS, childhood obesity has more than doubled in children and tripled in adolescents in the past 30 years; in 2010, more than one-third of children and adolescents were overweight or obese; and

WHEREAS, there are also economic costs. In 2006, for instance, overweight and obesity-related costs in California were estimated at almost \$21 billion; and

WHEREAS, tooth decay, while not as life threatening as diabetes or obesity, still has a meaningful impact, especially on children. In fact, tooth decay is the most common childhood disease, experienced by over 70% of California's 3rd graders. Children who frequently or excessively consume beverages high in sugar are at increased risk for dental cavities. Dental problems are a major cause of missed school days and poor school performance as well as pain, infection, and tooth loss in California; and

WHEREAS, based on the findings set forth above, the purpose of this Ordinance is to diminish the human and economic costs of diseases associated with the consumption of sugary drinks by discouraging their distribution and consumption in Albany through a tax. Specifically, the purpose of this ordinance is to tax the distribution of sugary drinks and the products used to make them; and

WHEREAS, this Ordinance is not intended for the purpose of regulation; and

WHEREAS, this Ordinance does not authorize the conduct of any business or activity in the city, but merely provides for the taxation of distribution of specified products as it occurs; and

WHEREAS, this Ordinance imposes a general tax on the distribution of sugar-sweetened beverages such as high-calorie, low-nutrition products, like soda, energy drinks, and heavily presweetened tea, as well as the added caloric sweeteners used to produce these sugar-sweetened beverages, such as the premade syrup used to make fountain drinks. Certain drinks containing sugar are exempted, including infant formula, milk products, and natural fruit and vegetable juice; and

WHEREAS, this Ordinance provides for a small business exemption for Retailers who transport sugar-sweetened beverage products into the City themselves and then sell those products directly to consumers; and

WHEREAS, this general tax will provide revenue to be available for the general governmental needs of the people of Albany.

NOW THEREFORE, THE PEOPLE OF THE CITY OF ALBANY DO ORDAIN AS FOLLOWS:

Section 1. Article 4-13 is hereby added to Chapter XIII of the Albany Municipal Code, to read as follows:

4-13 SUGAR-SWEETENED BEVERAGE PRODUCT DISTRIBUTION TAX

4-13.1 Excise tax.

- a. In addition to any other taxes imposed by the City, the City hereby levies a tax of one cent (\$0.01) per fluid ounce on the privilege of Distributing Sugar-sweetened beverage products in the City.
- b. For the purposes of this Chapter, the volume, in ounces, of a Sugar-sweetened beverage product shall be calculated as follows:
 1. For a Sugar-sweetened beverage, the volume, in fluid ounces, of Sugar-sweetened beverages distributed to any person in the course of business in the City.
 2. For Added caloric sweeteners, the largest volume, in fluid ounces, of Sugar-sweetened beverages that could be produced from the Added caloric sweeteners. In accordance with rules and regulations promulgated by the City pursuant to Section 4-13.5, the largest volume, in fluid ounces, that would typically be produced from the Added caloric sweeteners shall be determined based on the manufacturer's instructions or, if the Distributor uses the Added caloric sweeteners to produce a Sugar-sweetened beverage, the regular practice of the Distributor.
- c. The tax shall be paid upon the first nonexempt Distribution of a Sugar-sweetened beverage product in the City. To the extent that there is a chain of Distribution within Albany involving more than one Distributor, the tax shall be levied on the first Distributor subject to the jurisdiction of the City. To the extent the tax is not paid as set forth above for any reason, it shall be payable on subsequent Distributions and by subsequent Distributors; provided, that the Distribution of Sugar-sweetened beverage products may not be taxed more than once in the chain of commerce.

4-13.2 Exemptions.

The tax imposed by this Chapter shall not apply:

- a. To any Distributor that is not subject to taxation by the City under the laws of the United States or the State of California;
- b. To any Distribution of a Sugar-sweetened beverage product to a Retailer with less than \$100,000 in annual gross receipts, as defined in Section 4-13.4, in the most recent year;
- c. To any Distribution of Natural or common sweeteners; or

d. To any Distribution of Added caloric sweeteners to a Food and Beverage Sales Retail Store, as defined in Albany Municipal Code Section 20.16.030DD, if the Food and Beverage Sales Retail Store then offers the Added caloric sweetener for sale for later use by customers of that store.

The City Council, without a vote of the people, may, either permanently or temporarily, increase the dollar amount of the threshold for the small-business exemption in Subsection b.

4-13.3 Definitions.

a. "Added caloric sweetener" means any substance or combination of substances that meets all of the following four criteria:

1. Is suitable for human consumption;
2. Adds calories to the diet if consumed;
3. Is perceived as sweet when consumed; and
4. Is used for making, mixing, or compounding Sugar-sweetened beverages by combining the substance or substances with one or more other ingredients including, without limitation, water, ice, powder, coffee, tea, fruit juice, vegetable juice, or carbonation or other gas.

An Added caloric sweetener may take any form, including but not limited to a liquid, syrup, and powder, whether or not frozen. "Added caloric sweetener" includes, without limitation, sucrose, fructose, glucose, other sugars, and high fructose corn syrup, but does not include a substance that exclusively contains natural, concentrated, or reconstituted fruit or vegetable juice or any combination thereof.

b. "Alcoholic beverage" means any beverage subject to tax under Part 14 (commencing with Section 32001) of the California Revenue and Taxation Code, as that Part may be amended from time to time.

c. "Beverage for medical use" means a beverage suitable for human consumption and manufactured for use as an oral nutritional therapy for persons who cannot absorb or metabolize dietary nutrients from food or beverages, or for use as an oral rehydration electrolyte solution for

infants and children formulated to prevent or treat dehydration due to illness. "Beverage for medical use" shall also mean a "medical food" as defined in Section 109971 of the California Health and Safety Code, as that definition may be amended from time to time. "Beverage for medical use" shall not include drinks commonly referred to as "sports drinks" or any other common names that are derivations thereof.

- d. "Business Entity" means any Person except for a natural person.
- e. "City" means the City of Albany, California.
- f. "City Manager" means the City Manager of the City of Albany or his or her designee.
- g. "Consumer" means a natural person who purchases a Sugar-sweetened beverage product in the City for a purpose other than resale in the ordinary course of business.
- h. "Distribution" or "Distribute" means the transfer of title or possession (1) from one Business entity to another for consideration or (2) within a single Business entity, such as by a wholesale or warehousing unit to a retail outlet or between two or more employees or contractors. "Distribution" or "Distribute" shall not mean the retail sale to a Consumer.
- i. "Distributor" means any Person who Distributes Sugar-sweetened beverage products in the City.
- j. "Gross receipts" is defined in Section 4-13.4.
- k. "Milk" means natural liquid milk, regardless of animal source or butterfat content, natural milk concentrate, whether or not reconstituted, regardless of animal source or butterfat content, or dehydrated natural milk, whether or not reconstituted and regardless of animal source or butterfat content, and plant-based milk substitutes, that are marketed as milk, such as soy milk and almond milk.
- l. "Natural or common sweetener" means granulated white sugar, brown sugar, honey, molasses, xylem sap of maple trees, or agave nectar.
- m. "Person" means an individual, trust, firm, joint stock company, business concern, business trust, government, receiver, trustee, syndicate, social club, fraternal organization, estate,

corporation, including, but not limited to, a limited liability company, and association or any other group or combination acting as a unit.

n. "Retailer" means any Person who serves Sugar-sweetened beverage products to a Consumer.

o. "Simple syrup" means a mixture of water and one or more Natural or common sweeteners without any additional ingredients.

p. "Sugar-sweetened beverage" means any beverage intended for human consumption to which one or more Added caloric sweeteners has been added and that contains at least 2 calories per fluid ounce.

1. "Sugar-sweetened beverage" includes, but is not limited to all drinks and beverages commonly referred to as "soda," "pop," "cola," "soft drinks," "sports drinks," "energy drinks," "sweetened ice teas," or any other common names that are derivations thereof.

2. "Sugar-sweetened beverage" shall not include any of the following:

a. Any beverage in which milk is the primary ingredient, i.e., the ingredient constituting a greater volume of the product than any other;

b. Any beverage for medical use;

c. Any liquid sold for use for weight reduction as a meal replacement;

d. Any product commonly referred to as "infant formula" or "baby formula";
or

e. Any alcoholic beverage.

q. "Sugar-sweetened beverage product" means a Sugar-sweetened beverage or Added caloric sweetener.

4-13.4 Definition of Gross Receipts.

"Gross receipts" means the gross receipts of the preceding fiscal year of the Distributor or part thereof, and is defined as follows: the total amount actually received or receivable from all sales;

the total amount of compensation actually received or receivable for the performance of any act or service, of whatever nature it may be, for which a charge is made or credit allowed, whether or not such act or service is done as a part of or in connection with the sale of materials, goods, wares or merchandise; and gains realized from trading in stocks or bonds; interest discounts, rents, royalties, fees, commissions, dividends or other emoluments, however designated.

Included in "gross receipts" are all receipts, cash, credits and property of any kind or nature, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service costs, interest paid or payable, or losses or other expenses whatsoever, except that the following are excluded therefrom:

- a. Cash discounts allowed and taken on sales;
- b. Credit allowed on property accepted as part of the purchase price and which property may later be sold, at which time the sales price shall be included as "gross receipts";
- c. Any tax required by law to be included in or added to the purchase price and collected from the consumer or purchaser;
- c. Such part of the sale price of property returned by purchasers upon rescission of a contract of sale as is refunded either in cash or by credit;
- e. Receipts of refundable deposits, except that such deposits when forfeited and taken into income of the business shall not be excluded when in excess of one dollar;
- f. Amounts collected for others where the business is acting as an agent or trustee and to the extent that such amounts are paid to those for whom collected. These agents or trustees must provide the Finance Department with the names and the addresses of the others and the amounts paid to them. This exclusion shall not apply to any fees, percentages, or other payments retained by the agent or trustees;
- g. Cash value of sales, trades or transactions between departments or units of the same business;
- h. Transaction between a partnership and its partners;
- i. Receipts from services or sales in transactions between affiliated corporations. An "affiliated corporation" is a corporation:

1. The voting and nonvoting stock of which is owned at least eighty percent by such other corporation with which such transaction is had,
2. Which owns at least eighty percent of the voting and nonvoting stock of such other corporation, or
3. At least eighty percent of the voting and nonvoting stock of which is owned by a common parent corporation which also has such ownership of the corporation with which such transaction is had;

j. Receipts derived from the occasional sale of used, obsolete or surplus trade fixtures, machinery or other equipment used by the licensee in the regular course of the licensee's business.

4-13.5 Duties, responsibilities and authority of the City Manager.

a. It shall be the duty of the City Manager to collect and receive all taxes imposed by this Chapter, and to keep an accurate record thereof.

b. The City Manager is hereby charged with the enforcement of this Chapter, except as otherwise provided herein, and may prescribe, adopt, and enforce rules and regulations relating to the administration and enforcement of this Chapter, including provisions for the reexamination and correction of returns and payments, and for reporting. Such rules and regulations may include, but are not limited to, the following:

1. The determination of the frequency with which a Distributor must calculate the tax. This determination shall not constitute an increase of the tax.
2. The determination of the frequency with which a Distributor must pay the tax. This determination shall not constitute an increase of the tax.
3. The determination of whether and how a Distributor must register with the City.
4. The determination of whether and how a Distributor who receives, in the City, Sugar-sweetened beverage products from another Distributor must report to the City the name of that Distributor.

5. The determination of whether and how a Distributor who receives, in the City, Sugar-sweetened beverage products from another distributor must report to the City the volume of Sugar-sweetened beverage products received from that Distributor.

6. The determination of what other documentation is required to be created or maintained by a Distributor.

c. The City Manager shall annually verify that the taxes owed under this Chapter have been properly applied, exempted, collected, and remitted.

4-13.6 Collection.

a. The amount of any tax, penalty, and interest imposed under the provisions of this Chapter shall be deemed a debt to the City. Any Distributor owing money under the provisions of this Chapter shall be liable in an action brought in the name of the City for the recovery of such amount.

b. In order to aid in the City's collection of taxes due under this Chapter, any Retailer that receives Sugar-sweetened beverage products from a Distributor shall, in accordance with rules and regulations promulgated by the City Manager pursuant to Section 4-13.5, either:

1. report to the City all such transactions, the volume in ounces of Sugar-sweetened beverage products received in each transaction, and the identity and contact information of the Distributor from whom the Sugar-sweetened beverage products were received; or

2. collect the tax that would be payable as a result of the transaction by the Distributor from whom the Sugar-sweetened beverage product was received and remit it to the City; or

3. provide to the City evidence that the Distributor from whom the Sugar-sweetened beverage products were received has registered as a Distributor with the City and that registration is current.

c. The City Council is authorized to have the taxes imposed by this Chapter collected by the County of Alameda or the California Board of Equalization in conjunction with the collection of other taxes for the City. If the City Council exercises this authorization, the duties and

responsibilities of the City Manager shall be given, as appropriate, to the County of Alameda or the California Board of Equalization, which may delegate such duties and responsibilities as necessary and as authorized by law.

4-13.7 Refunds.

Whenever any tax under this Chapter has been overpaid or has been erroneously or illegally collected or received by the City, it may be refunded only as provided Albany Municipal Code Section 2-28.1, as that Section now reads or may hereafter be amended by ordinance adopted by the City Council. A vote of the people shall not be required to amend the City's claim procedures. Compliance with the City's claim procedures shall be a prerequisite to any suit or other legal proceeding seeking a refund or any payment of money or damages.

4-13.8 Enforcement.

Except as otherwise provided by this Chapter or by rule or regulation promulgated by the City Manager, the tax imposed by this Chapter shall be administered in the same manner as taxes imposed pursuant to Albany Municipal Code Chapter 5-2 and, without limitation, shall be subject to the same delinquency penalties, appeals processes and other enforcement provisions set forth in Albany Municipal Code Chapter 5-2.

4-13.9 Not a sales and use tax.

The tax imposed by this Chapter is a tax upon the privilege of conducting business, specifically, Distributing Sugar sweetened beverage products within the City of Albany. It is not a sales, use, or other excise tax on the sale, consumption or use of Sugar-sweetened beverage products.

4-13.10 Annual Study Session for Public Input on Tax Expenditures.

The City Council shall conduct an annual special study session, in conjunction with the City's budget process, for the purpose of receiving input and recommendations regarding the expenditure of proceeds from the tax created by this Chapter. Prior to the special study session, the City Council shall solicit recommendations from the City's Parks and Recreation Commission, Social and Economic Justice Commission, and Traffic and Safety Commission, as well as a designated representative of the Albany Unified School District, regarding the use of tax proceeds. Additionally, the City shall solicit recommendations from individuals with specialized expertise in areas such as public health issues and programs relating to diabetes,

obesity and sugary drink consumption; and any other individuals or organizations as deemed appropriate by the City Council.

4-13.11 Annual Audit.

By no later than December 31st of each year after the operative date, the City's independent auditors shall complete a report reviewing the collection, management and expenditure of revenue from the tax levied by this Article.

Section 2. The People of the City of Albany find that all Recitals contained in this Ordinance are true and correct and are incorporated herein by reference.

Section 3. Pursuant to California Constitution article XIII B, the appropriation limit for the City of Albany is hereby increased by the aggregate sum authorized to be levied by this general tax for fiscal year 2016-17 and each fiscal year thereafter.

Section 4. If any provision of this Ordinance or the application thereof to any person or circumstance is held invalid, the remainder of the Ordinance and the application of such provision to other persons or circumstances shall not be affected thereby.

Section 5. This Ordinance relates to the levying and collection of the City Sugar-sweetened Beverage Product Distribution Tax and shall take effect immediately.

Ordinance No. 2016-02 was submitted to the People of the City of Albany at the November 8, 2016 general municipal election. It was approved by the following vote of the People:

YES:

NO:

Ordinance No. 2016-02 was thereby adopted by the voters at the November 8, 2012 election and took effect upon adoption of a resolution declaring the results of the election at a regular meeting of the City Council held on _____, 2016 by the following vote:

AYES:

NOES:

ABSENT:

I HEREBY CERTIFY that the foregoing is a true and correct copy of an ordinance duly and regularly adopted by the People of the City of Albany, California.

Nicole Almaguer, City Clerk