

Missoula City Council Public Safety and Health Committee Minutes

November 4, 2020

3:00 PM

ZOOM Webinar

Members present: Stacie Anderson (chair), John P. Contos, Mirtha Becerra, Heather Harp, Jordan Hess, Gwen Jones, Julie Merritt, Jesse Ramos, Amber Sherrill, Sandra Vasecka, Bryan von Lossberg, Heidi West

3. COMMITTEE BUSINESS

3.1 Proposal to regulate tobacco sales and prohibit the sale of flavored tobacco products

The sponsors of the tobacco ordinance are bringing back some revisions to the ordinance. They are going to keep this in committee until November 18th.

Mirtha Becerra spoke. They presented an ordinance in October creating Chapter 8.38, Restrictions on the Display of Tobacco Products and the Sale of Flavored Electronic Tobacco Products. Since then they have received extensive public comment from both proponents and opponents to this ordinance. There have been some revisions. The intent remains the same and that is for the Missoula City Council to protect the health and welfare by reducing access to flavored e-cigarette products and self-service access to tobacco products. Some of the changes include: We removed all flavored products and now applies to electronic tobacco products; it added supporting data under WHEREAS sections; clarified definitions; Added section: 8.38.060: Transaction with youth; clarified penalties for violation of ordinance and added a severability clause, and also narrowed the time of enactment to January 11 2021.

The ordinance: No tobacco retailer shall sell or offer to sell tobacco products by means of a self-service display. This section does not apply to facilities where the retailer ensures that no person younger than 21 years of age is present or allowed to enter the business of any time. It shall be unlawful for any Tobacco Retailer, licensed under MCA 5-16-11-303, to sell, offer for sale, give, possess with the intent to sell or offer for sale, or otherwise distribute Flavored electronic Tobacco Products or Tobacco Product Flavor Enhancer. This is the same as the previous version.

Gwen Jones said that those two components will be addressed by the health department. Anyone who knowingly sells or gives tobacco to anyone under the age of 18-we put that in because Montana law does address alcohol or drugs, but it does not address tobacco. Local law enforcement is responsible for the enforcement of sections 38.80.60.

Violations and penalties: They wanted to rework this ordinance, but there were issues raised on enforceability in a court of law. The most recent ordinance is attached to the agenda. It is the last item.

Mirtha Becerra said that while some of these have changed, we stayed true to the issue. This ordinance speaks to that. Ideally we would have a ban on all flavored tobacco products, but we need to hear all sides and come to concessions and agreements, and still remain true to what it is we are trying to accomplish which is to protect our youth.

Stacie said the ordinance is focusing on the sale of vaping and electronic nicotine products as well as addressing the access point.

Arwyn Welander, Tobacco Program Coordinator at the Health Department spoke. They are still backing the policy with the amendments. Anything we can do to support parents in schools within the community with this ordinance is what we need. We are behind. We have a huge vaping epidemic in Missoula. The health department, the board of health and the county commissioners are all in favor of changes we have made to this ordinance moving forward.

Sandra Vesecka asked about slide 2-the flavor ban-said it applies to electronic products-is that only electronic products, or also electronic products? Mirtha said the revision is only for electronic products. Sandra also wants to know why the January 11 start date. If that passes, it only gives the store owners one month? Mirtha said there is nothing significant, but Mirtha said it is usually 30 days from when an ordinance is enacted. This will be extended to 62 days to make it a Monday starting date. Sandra also asked about the part with the flavored vape products being banned. She wasn't so concerned about the dates, but she was concerned about the language being flavored vape products, and she feels it is stricter than the Youth Tobacco Control Act, and she wants to hear from Mr. Nugent whether that is legal to enact. Stacie said that enacting this, MCA still references the age is 18 instead of 21. Jim Nugent said he sent an email. The state law under the youth access states that a person may not distribute or sell a tobacco, alternative product or vapor products under the age of 18. If this about people under the age of 18, and narrowing down, he is not sure he is following the concern, because vapor products are already prohibited. Sandra said she is concerned about banning it to legal consumers. The Youth Access Act is intended to address youth, so arguably the act does not apply to begin with, so unless there is another section of law is being violated, he does not feel the Youth Access Act is being more stringent. We are in a different venue when we talk about adults. Courts will ultimately make the decision. Sandra Vesecka foresees litigation coming before the city regarding this.

Gwen Jones wanted to clarify that this addresses e-cigarettes and flavored tobacco products used in electronic form. Regarding the preemptive opinions adamant that it was legal, and adamant that it was illegal. This is an issue that will be decided in the courts, and it needs to be handled, so we need the strongest ordinance as possible. If there is litigation, this litigation will be in-house and not something that city will pay for. If this something we prevail and wind up having less youth in Missoula having a nicotine habit that is something City Council should be discussing and evaluating.

Heather Harp said one of the concerns she had was the potential for litigation as people eluded to. Not being a lawyer, she does wonder if it goes to the courts, how much of the budget will be expended on a case that could go either direction. Jim Nugent said the cost would be primarily staff time, except if there would be expert witnesses.

Mirtha Becerra said that just because it could end up in court that it does not mean we shouldn't pursue it. There have been many pieces of legislation locally, state-wide and nationally that have been battled out. This is in the best interest to protect our youth and is worth it to take it to court if we need to.

Jesse Ramos asked Jim Nugent about the cost being just staff time. He wants to know if the city could be held liable for costs if a business goes out of business. Jim said typically a lawsuit wouldn't have that type of situation unless the ordinance had been enforced, but typically it goes to litigation before it gets enforced. Jesse asked that if we are confident that this new language is stronger, what the worry about is. Gwen said they sat through hours and hours of meetings, but the bottom line is they tried to connect the tools in this ordinance as closely as possible to the problem and create the nexus based on causation, and because of that it's stronger. She feels it is more closely tailored to the issue. Jim Nugent also stated that the legislative body of the city council members are ones to set policy and it is set by the city council. He keeps them within the parameters of legality, but as far as some of the reasoning or rationale, that's city council cohorts and the city council establishes the policy.

Julie Merritt wanted to clarify questions about hypothetical lawsuits. Litigation is something you cannot predict. If the outcome is predicable, it wouldn't happen. Let's not back people into a corner about potential lawsuits. If we are not taking actions to protect youth, then what are we doing here? Trying to back people into a corner about legality, we need to do what we can to protect youth.

Stacie is going to move to public comment on the revised ordinance.

Tom Byrant, Executive Director and Legal Council for the National Association for Tobacco Outlets says they all share the same concern. Retailers on front lines are ensuring that these items do not fall into the hands of minors. Please remember there is a question of federal preemption that also covers flavored vapor products. He urges them not to support the ordinance and to give careful consideration of the preemption ordinance.

Mitch Bradley owns Hebes Fresh Market in Bozeman, MT and he has banned tobacco altogether in his store in Bozeman. There is a lot of pressure by the large tobacco companies. This is just a larger avenue. They are still immature and they get addicted to this. He feels why give them any reason to do this. He supports them in going forward with this ordinance. He gets great support from the community for banning cigarettes and tobacco in his store. It is not affecting his business whatsoever, and in fact, possibly helps him.

Kimberly Dudik says they have seen over the last 24 hours how important it is to for leaders to protect the citizens. She was asked to look at the interplay between the proposed ordinance and the state preemption doctrines and how this plays into health inequities. After looking at this, she determined the flavored tobacco products require separate regulations from regular tobacco products. They have seen that with federal rules, and state regulations do not preempt local action on regulating all flavored tobacco products. In the Youth Access Act, the subjects that are regulated there cannot be stricter than a local level. Looking at whether or not the locality is preempted by the state law, the State Legislature and Supreme Court, they also side with localities. Missoula has been a leader in protecting citizens' health. A preemption is required for a local

government to not have authority to regulate. There is no preemption, so at best there is an implied preemption. That has been firmly shown in cases. The reason it only applies to the four areas, it would lead to absurd results. It would cause us to mean that the city couldn't regulate anything regarding persons and those results are not what the legislature intended in stopping youth from preventing access to tobacco.

Breanna Hanson called on behalf of Elementary Health Enhancement. They would like to see the ordinance pushed out without the amendments. Any sort of flavored tobacco product is putting youth at risk. She has done a lot of education in school about tobacco and vaping. Please rethink amending the ordinance.

Lauren Wilson, a pediatrician in Missoula and represents the Montana Chapter of Pediatrics spoke. She is reading a letter from Dr. Stenger as well. He encourages the city council to pass the ordinance without the amendments. The flavored vaping product or ban, they will use other flavored products instead. The tobacco industry has demonstrated their use in getting youth to use other products when one is not available. We know that universal flavored bans have been an effective tool. We encourage the city council to adopt the comprehensive ordinance that encompasses all flavored tobacco products. Lauren Wilson echoed his words and wishes they would enact the ordinance as was originally read. If we ban flavored vaping products, they will switch to other tobacco products. We should not send a signal that some sorts of tobacco are okay.

Evelyn Wall echoes what Kimberly Dudik said and is speaking for a minority group and specifically the LGBTQ youth and that is a population that is absolutely targeted. It is not only vape products also flavored cigarettes. This community is extremely vulnerable, and in the current political environment they are even more so. If you are marketing a products to them, you are going to put those health effects on them. Think about the communities that are going to be harmed in the future. It is very important to add police enforcement to any mandates. Are we adding to a stop and frisk environment for those individuals not having positive interactions. Please think carefully about the severity of punishments.

Isaac Enicosciuss, a citizen of Ward 3 is speaking out against the ordinance. Vaping employs over 250 people in Missoula and they are making a motion to ban their jobs and to eliminate an industry in the city. By bringing in police enforcement, he is totally against this and wants to see community working with businesses rather than working from the top down.

Meredith Berkman is a co-founder of Parents Against Vaping spoke. They are a national grassroots group that represents 3 million families across the country. She is appreciative of the participation in Missoula to protect our youth from flavored e-cigarettes. They came to the table because of the epidemic. They understand this is about all kids in all communities and all flavored tobacco products. This is about severe nicotine addiction and it is clear that a society must protect their children...Big tobacco is motivated by profit. Flavors hook kids. We also have to remember that all other flavored tobacco products have been targeted to African Americans resulting in the highest rate of death among African American men. LGBTQ community is also targeted. This is clearly a social justice issue and one that is made even timelier. Of those 3.6 million kids who are vaping, 37% are using menthol vape. If we ban vape products, we only solve part of

the problem. We must protect all kids in all communities. We need to ban all flavored tobacco products.

Earl Allen appreciates the effort that the council has put in. He is the Marketing Manager of the local Noon stores. Once again, the amendments have addressed a lot. It is not perfect for anybody. They are part of the community as well. They care about kids as well. They work hard to keep tobacco products out of the hands of kids. They have the gold standard of compliance. They have done that for years. He appreciates what they have done. He does have concerns and will work on an email. He appreciates them putting in effort to tighten things up.

Cathy Rodgers, pediatrician in Missoula and a COVID investigator for Missoula County spoke. She appreciates them spending the time on this. If we fail to get rid of flavored tobacco products, we will still have kids move to menthol. There is a 45% probability that a youth smoker will go to menthol products or cigars. In Montana they will move to chew that is flavored with mint or menthol. She encourages them to make this for all flavored tobacco products, not just e-cigarettes. There will be more kids affected and ultimately more adults.

Amanda Cahill knows they all received information from her, but just a note that over 400 kids in Missoula are using other types of products than vaping products. It feels unconscionable to leave out more than 400 kids with this type of protection. AHA cannot support a vape only policy. They say not to this lightly, because it makes no sense to leave products on the market that we know will addict kids. There are a lot of different positions about legality, but there is more than enough information to go forward with the original ordinance.

Erin Kepler, store manager of Zootown Superstop spoke. She has been a store manager of 13 years. She is opposed to the flavored tobacco. She fully recognizes the importance of keeping tobacco out of the hands of children. They work hard to be diligent with training and to make sure they are following all the rules. The state increased the age of sale to 21, and she feels they need to give it time to see if it helps in high school. If we ban flavored tobacco, we will affect local small businesses. We need to focus on teaching youth good choices. The efforts should be on continued education and enforcement.

John, sales manager with the Noon's store realizes this is a volatile subject. He feels they are all on the same team where they want to keep restricted products out of the hand of minors. He seconds Erin's comments about the law changing to 21 and see how they do with the accessibility. He appreciates them looking at both sides of the argument. There is still an exception for vending machines. Secondly, he would like to see if there are statics as far as student resource officers and what the number of citations issue are.

Carrie Nyssen thanked the council. She is the senior advocate. Research says nicotine is as addictive as heroin, or alcohol. Using nicotine in adolescents can increase the use of further addition to other drugs. The use of e-cigarettes are more likely to become cigarette smokers. Smokeless tobacco remains popular. 13.2% of Native American high school students smoke cigarettes. Let's not leave any of Missoula's youth behind. They all deserve protection. A comprehensive flavor restriction along with prevention

information is important. Let's reverse the epidemic. It's imperative to protect all youth, no matter what tobacco they are considering.

Annie Tegan with the Coalition of Montana strongly supports reverting back to the initial ordinance. It is for health equity. She adds if they choose to enact a strong policy they will not be alone. Other cities have enacted this. The only way to have significant health impact is to get rid of all flavored products. The flavors are the reason kids are using these products. She understands that retailers are not selling to youth. One in 4 youth is now using these products. Is there a better option?? She does not see one.

Tom Eschelmann works for a local Missoula wholesaler. Thank you for listening to everyone. There are some flaws with the legislation. It will impact local businesses. People will go outside of Missoula. They will go to the internet. The federal government has increased the age to 21. In the wholesale and retail community they have worked really hard to keep products out of the hands of youth. Their company was the first one to scan items and identify what store send them. The flavor ban is not good for Missoula county businesses and it is a small band aid.

Doug Coffin is a professor at the University of Montana. He is familiar with the science and pharmacology. He is speaking as a citizen and not a representative of the university. These nicotine products are a danger to everyone, and not just young adults. He encourages them to track the science. There is a lot of information about the vendors protecting kids, but this is damaging to everyone. The tobacco industry has produced and marketed products to perpetuate the addiction trap. They use litigation and aggressive lobbying to fight every attempt to defend ourselves against the addiction trap. You have to assume you will get sued. In this case, it is an ongoing battle. He encourages them to follow their convictions and the demand of the public and to pass a policy that bans all flavored products,

Karly Schaffer appreciates what their goal is. She does not think it is effective as they think it will be. The biggest thing is that people will be traveling out of the area to get their stuff and they will be buying more in bulk and they may be bringing it back to sell to other people. If it was a statewide thing it would have more of an impact.

CB Pearson said he looked at a whole lot of systems that worked. Earlier he sent them a document. He understands the position of the sponsors, he asks them to go back and include all cigarette products and tobacco products that are flavored. Some of the kids will be left out. The hard to reach kids will be the ones most impacted by this. They are willing to work with them to create the right political environment to get this done. It is about as a community, do we have the political will to pass a strong policy. Recently the house passed a strong bill that prohibited all flavored tobacco products. The political risk is very small.

Kristin Page-Nei is representing the American Cancer Society. She has been working on tobacco prevention. They have been working so hard to make significant progress especially on the approach to cigarettes. They had no idea what they were up against. The council are the leaders, and she says we need to think comprehensively. What is going to be the next product? When the FDA eliminated the flavors of cigarettes except for menthol teens were driven to menthol and other products. Their organization cannot support this amendment. As we try to reduce cancer deaths, they have reduced them because of some of these past tobacco

policies. By ignoring and looking the other way and allowing menthol to continue to be on, we are doing the same things at the local level. It is important for us to address those items. This is a youth onset disease. Please consider going back to the original ordinance and looking closely at this health equity issue.

Brad Longcake thanked the council for listening to all feedback. He knows it is a challenging and emotional item. He knows it is not perfect and he knows everyone is not exactly happy, but it is a great start to see how this will continue to work.

Tom Piere says from a financial standpoint we will drive people out of town. The average chew customer spends about 12-15.00 every time they into the store. Chew is only 7.00. He thinks it is an overreach of the government. He thinks Helena shows the preemption argument, and he doesn't understand why Missoula wants to try it. He appreciates the time and effort. He thinks some of the changes are good.

Michelle Arthur with Town Pump thanked the council for the reconsideration and making the adjustments. She wants to point out that even if the menthol portion comes in, it will affect their business. If there is anything they can do on a local level, she would be willing to be a part of that.

Sandra Vesecka wants to make sure that we leave ample time for comments. Please allow for more time next meeting. The date that they have set was calculated using 60 days from day of enactment. If things move, that will have to be recalculated.

Missoula City Council member Stacie Anderson will request that this item be returned to the Public Safety and Health committee on November 4, 2020 during which time a revised draft of the ordinance will be considered.

4. ADJOURNMENT