

Draft dated 9/28/2020

Ordinance

An ordinance of the Missoula City Council creating Title 8, Chapter 8.38 Missoula Municipal Code entitled "Restrictions on the Display of Tobacco Products and the Sale of Flavored Tobacco Products."

Be it ordained that Chapter 8.38 Missoula Municipal Code is established as follows:

Chapter 8.38

Restrictions on the Display of Tobacco Products and the Sale of Flavored Tobacco Products

Sections

- 8.38.010 Findings.
- 8.38.020 Extraterritorial Application outside City Limits.
- 8.38.040 Definitions.
- 8.38.050 Sale of Tobacco Products by Self-Service Display Prohibited.
- 8.38.060 Sale of Flavored Tobacco Products Prohibited.
- 8.38.080 Compliance and Inspections.
- 8.38.090 Violations and Penalties.

8.38.010 Findings.

The Missoula City Council, the Missoula Board of County Commissioners, and the Missoula City-County Health Board hereby find that and declare as follows:

WHEREAS, state law prohibits the sale or distribution of tobacco products and electronic smoking devices to minors (MCA § 16-11-305); and

WHEREAS, 21% of adults in Montana smoke;¹ and

WHEREAS, 10% of youth reported trying their first cigarettes before age 13, and 33.5% of Montana high school youth reported currently using any tobacco product, including e-cigarettes in 2019;² and

WHEREAS, youth exposed to nicotine are at higher risk for addiction than adults because youth brains are still forming and making permanent connections until age 25.³ Nicotine exposure in youth can disrupt the formation of brain circuits that control attention, learning, impulse control, and mood; and

WHEREAS, nicotine is a dangerous and highly addictive chemical. It can cause an increase in blood pressure, heart rate, flow of blood to the heart and a narrowing of the arteries (vessels that carry blood). Nicotine may also contribute to the hardening of the arterial walls, which in turn, may lead to a heart attack. This chemical can stay in your body for six to eight hours depending on how often you smoke. Also, as with most addictive substances, there are some side effects of withdrawal;⁴ and

WHEREAS, 99% of e-cigarettes sold in U.S. convenience stores contain nicotine.⁵ Even e-cigarette products that claim to contain zero nicotine have been found to contain nicotine.⁶ Many of the newer, pod-based e-cigarette products contain high concentrations of nicotine in the form of nicotine salts, thus making these products as or more addictive than combustible cigarettes;⁷ and

WHEREAS, smoking causes cancer, heart disease, stroke, lung diseases, diabetes, and chronic obstructive pulmonary disease (COPD), which includes emphysema and chronic bronchitis. Smoking also increases risk for tuberculosis, certain eye diseases, and problems of the immune system, including rheumatoid arthritis;⁸ and

WHEREAS, although smokers are most likely to use electronic smoking devices such as e-cigarettes, almost a third of current users are nonsmokers, suggesting that e-cigarettes contribute to primary nicotine addiction and to renormalization of tobacco use;⁹ and

WHEREAS, federal law prohibits the sale or distribution of flavored cigarettes, excluding menthol; and

WHEREAS, the Federal Food and Drug Administration's enforcement priorities focus on flavored e-cigarettes, excluding menthol, and do not address all flavored tobacco products, such as menthol e-cigarettes, flavored cigars and flavored smokeless tobacco, thus allowing for youth to turn to other flavored products in absence of their "preferred" flavors; and

WHEREAS, the FDA has stated that "all tobacco products, including flavored tobacco products, are as addictive and carry the same health risks as regular tobacco products;"¹⁰ and

WHEREAS, youth reported product flavoring as a top reason for using tobacco within the past 30 days;¹¹ and

WHEREAS, menthol in cigarettes results in more youth initiation to smoking¹² and is the source of addiction for more than half of all teen smokers;¹³ and

WHEREAS, by adding menthol to cigarettes, tobacco companies mask the natural harshness and taste of tobacco. The minty flavor makes tobacco products milder, and therefore easier to use, harder to quit, and more appealing to youth and new users.¹⁴ Like menthol, flavorings help mask the naturally harsh taste of tobacco, making it easier for young people to start and continue using tobacco products;¹⁵ and

WHEREAS, e-cigarette use predicts the onset of combustible tobacco product use;¹⁶ and

WHEREAS, e-cigarettes are now the most commonly used tobacco product among Montana's youth. 58.3% of Montana high school students have used an electronic smoking device in their lifetime;¹⁷ and

WHEREAS, \$440 million is spent on healthcare each year in Montana due to smoking;¹⁸ and

WHEREAS, 59,000 Montana kids alive now will become smokers, and 19,000 Montana kids alive now will die prematurely from smoking;¹⁹ and

WHEREAS, tobacco companies use predatory marketing tactics to target youth, particularly susceptible consumers, by placing a large number of tobacco products at retail stores popular with the young, often within reach and near gum and candy;²⁰ and

WHEREAS, more than half of teenagers visit a convenience store at least once a week, and cigarette marketing is more prevalent in stores where youth shop frequently;²¹ and

WHEREAS, research conducted over the past few decades show that the tobacco industry's marketing activities, including flavors and placement within children's reach in convenience stores, have been a

key factor in leading young people to take up tobacco, keeping some users from quitting, and achieving greater consumption among users;²² and

WHEREAS, two-thirds of Montanans agree with a law that would prohibit the sale of flavored tobacco products in all stores where youth under the age of 18 are allowed;²³ and

NOW THEREFORE, it is the intent of the Missoula City Council in enacting this ordinance to protect public health and welfare by reducing access to flavored e-cigarette tobacco products and self-service access to tobacco products, making it easier to quit and more difficult to start.

8.38.020 Extraterritorial Application Outside City Limits.

This health ordinance is adopted by the City of Missoula, which operates pursuant to a city voter approved self-governing charter form of government established in accordance with the provisions of Montana state law pertaining to self-government local government. 7-4-4306 MCA allows this ordinance to also be in effect outside the city limits, but within 5 miles of the city limits when approved by the Missoula County Commissioners and the Missoula City-County Health Board.

8.38.040 Definitions.

The following words and phrases, whenever used in this chapter, have the meanings defined in this section:

- A. "Electronic Smoking Device" means any device that may be used to deliver any aerosolized or vaporized substance to the person inhaling from the device, including, but not limited to, an e-cigarette, e-cigar, e-pipe, vape pen, or e-hookah. Electronic Smoking Device includes any component, part, or accessory of the device, and also includes any substance that may be aerosolized or vaporized by such device, whether or not the substance contains nicotine. Electronic Smoking Device does not include drugs, devices, or combination products authorized for sale by the U.S. Food and Drug Administration, as those terms are defined in the Federal Food, Drug, and Cosmetic Act.
- B. "Flavored Tobacco Product" means a tobacco product that imparts a taste or smell other than the taste or smell of tobacco, that is distinguishable by an ordinary consumer either prior to, or during the consumption of, a tobacco product, including, but is not limited to, the taste or smell of menthol, mint, wintergreen, fruit, chocolate, cocoa, vanilla, honey, or the taste or smell of any candy, dessert, alcoholic beverage, herb, or spice. A tobacco product shall be presumed to be a flavored tobacco product if a retailer, manufacturer, or a manufacturer's agent or employee has made a statement or claim directed to consumers or the public, whether expressed or implied, that the product or device imparts a distinguishable taste or aroma other than the taste or aroma of tobacco or uses text, images, or coloring on the tobacco product's labeling or packaging to explicitly or implicitly indicate that the tobacco product imparts a taste or aroma other than the taste or aroma of tobacco.
- C. "Self-Service Display" means the open display or storage of Tobacco Products in a manner that is physically accessible in any way to the general public without the assistance of the retailer or employee of the retailer and a direct person-to-person transfer between the purchaser and the retailer or employee of the retailer.
- D. "Tobacco Product" means any product containing, made, or derived from tobacco or that contains nicotine that is intended for human consumption or is likely to be consumed, whether smoked, heated, chewed, absorbed, dissolved, inhaled, or ingested, or by any other means, including but

not limited to a cigarette, a cigar, hookah, pipe tobacco, chewing tobacco, snuff, snus and electronic smoking device. Notwithstanding any provision to the contrary, "Tobacco Product" includes any component, part, or accessory intended or reasonably expected to be used with a Tobacco Product, whether or not any of these contain tobacco or nicotine, including but not limited to filters, rolling papers, blunt or hemp wraps, hookahs, and pipes, and whether or not any of these are sold separately. The term "Tobacco Product" does not include drugs, devices or combination products approved for sale by the U.S. Food and Drug Administration, as those terms are defined in the Federal Food, Drug and Cosmetic Act.

- E. "Tobacco Product Flavor Enhancer" means any product designed, manufactured, produced, marketed or sold to impart a taste or smell other than the taste or smell of tobacco when added to any tobacco product.
- F. "Tobacco Retailer" means any person, partnership, joint venture, society, club, trustee, trust, association, organization, or corporation who owns, operates, or manages any Tobacco Retail Establishment. Tobacco Retailer does not mean the non-management employees of any Tobacco Retail Establishment.
- G. "Tobacco Retail Establishment" means any place of business where tobacco products are available for sale to the general public. The term includes but is not limited to grocery stores, tobacco products shops, kiosks, convenience stores, gasoline service stations, bars, and restaurants.

8.38.050 Sale of Tobacco Products by Self-Service Display Prohibited.

No Tobacco Retailer shall sell or offer to sell Tobacco Products by means of a Self-Service Display. The purchaser shall not take possession of the Tobacco Product until after payment has been received and processed. This section does not prohibit retailing of cigarettes by means of a vending machine located in places where alcoholic beverages are sold and consumed on the premises and where the vending machine is under the direct line-of-sight supervision of the owner or an employee of the establishment.

8.38.060 Sale of Flavored Tobacco Products Prohibited.

It shall be unlawful for any Tobacco Retailer, licensed under MCA § 16-11-303, to sell, offer for sale, give, possess with the intent to sell or offer for sale, or otherwise distribute Flavored Tobacco Products or Tobacco Product Flavor Enhancer.

8.38.080 Compliance and Inspections.

- A. The Missoula City-County Health Department is responsible for enforcing the provisions of this chapter.
- B. The Missoula City-County Health Department or other authorized agents may enter and inspect premises of Tobacco Retail Establishments during reasonable hours, including whenever the retailer is open, to evaluate compliance with this chapter.

8.38.090 Violations and Penalties.

- A. It is a violation for a Tobacco Retailer to fail to comply with the requirements of this chapter.
- B. A violation of this chapter, whether the violation occurs inside the city limits or within 5 miles of the city limits, is subject to the jurisdiction of the City of Missoula Municipal Court.

- C. A Tobacco Retailer convicted of violating a provision of this chapter shall be subject to a fine not exceeding five hundred dollars for each offense.
- D. Each day of violation constitutes a separate offense.
- E. Assessment of penalties does not bar enforcement of this chapter by injunction or other appropriate remedy.
- F. Failure to comply with any provision of this chapter shall constitute grounds for the denial of, refusal to renew, suspension of any food, liquor, tobacco, or other business license issued by the city.
- G. Any fines collected under this chapter shall be used for implementation and enforcement of the chapter.

Effective Date

The effective date of this chapter shall be ninety (90) days from the date of its enactment.

Severability.

If any section, subsection, sentence, clause, phrase or word of this ordinance is for any reason held to be invalid or unconstitutional, such decision shall not affect the validity of the remaining portions of this ordinance. The Council hereby declares that it would have passed this ordinance and each section, subsection, sentence, clause, phrase and words thereof, irrespective of the fact that any one or more sections, subsections, sentences, for any reason this ordinance should be declared invalid or unconstitutional, then the remaining ordinance provisions will be in full force and effect.

First reading and preliminary adoption on the 5th day of October, 2020, by a vote of: Second and final reading and adoption on the ___ day of ____, 2020 by a vote of:

ATTEST:

APPROVED:

Martha L. Rehbein, CMC City Clerk

John Engen Mayor

(S E A L)

¹ Behavioral Risk Factor Surveillance System, 2018

² Montana Youth Risk Behavior Survey, 2019

³ U.S. Department of Health and Human Services. E-Cigarette Use Among Youth and Young Adults. A Report of the Surgeon General. Atlanta, GA: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2016.

⁴ How smoking and nicotine damage your body, American Heart Association, 2015

⁵ American Public Health Association (2017) Sales of Nicotine-Containing electronic Cigarette Products: United States 2015, <https://ajph.aphapublications.org/doi/abs/10.2105/AJPH.2017.303660>

⁶ American Cancer Society (2019) What Do We Know About E-cigarettes? <https://www.cancer.org/cancer/cancer-causes/tobacco-and-cancer/e-cigarettes.html>

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- ⁷ Truth Initiative (2019) E-cigarettes: Facts, stats and Regulations. <https://truthinitiative.org/research-resources/emerging-tobacco-products/e-cigarettes-facts-stats-and-regulations>
- ⁸ U.S. Department of Health and Human Services. *The Health Consequences of Smoking—50 Years of Progress: A Report of the Surgeon General*. Atlanta: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2014 [accessed 2016 Dec 20].
- ⁹ McMillen, R.C., Gottlieb, J.D., Whitmore Shaefer, R.M., Winickoff, J.P. & Klein, J.D. (2014). Trends in Electronic Cigarette Use Among U.S. Adults: Use is Increasing in Both Smokers and Nonsmokers. *Nicotine & Tobacco Research*, 1-8. doi:10.1093/ntr/ntu213
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²³ Montana Department of Public Health and Human Services. Montana Adult Tobacco Survey, 2019. Helena (MT): Chronic Disease Bureau. Montana Tobacco Use Prevention Program.