

Draft dated ~~11/2/2020~~11/3/2020

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 Electronic Tobacco Products, and prohibit unlawful transactions consisting of selling or giving tobacco products to youth under the age of 21."

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 Electronic Tobacco Products, and on the unlawful transactions consisting of selling or giving tobacco products to youth under the age of 21.**

**Sections**

8.38.010	Findings
8.38.020	Enforcement of Health and Quarantine Ordinances Extraterritorially Outside City Limits
8.38.030	Definitions
8.38.040	Sale of Tobacco Products by Self-Service Display Prohibited.
8.38.050	Sale of Flavored Electronic Tobacco Products Prohibited
8.38.060	Unlawful transactions with youth
8.38.070	Compliance and Inspections.
8.38.080	Violations and Penalties.

**8.38.010 Findings.**

Montana state law grants a city council legislative power to address public health, safety and general welfare concerns pursuant to health and quarantine ordinances inside the city limits. In addition, pursuant to section 7-4-4306 MCA city health and quarantine ordinances may be enforced extraterritorially outside the city limits within five (5) miles of the city limits if both the board of county commissioners and local health board approve the city ordinance as well. The City Council hereby finds and declares as follows with respect to this ordinance:

WHEREAS, state law prohibits the sale or distribution of tobacco products and electronic smoking devices to minors (MCA § 16-11-305); 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.<sup>i</sup> 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;<sup>ii</sup> and

WHEREAS, 99% of e-cigarettes sold in U.S. convenience stores contain nicotine.<sup>iii</sup> Even e-cigarette products that claim to contain zero nicotine have been found to contain nicotine.<sup>iv</sup> 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;<sup>v</sup> 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;<sup>vi</sup> and

WHEREAS, As of February 18, 2020, **2,807** hospitalized lung injury cases associated with the use of e-cigarette, or vaping, products have been reported to CDC from **50** states, the District of Columbia, and 2 U.S. territories (Puerto Rico and U.S. Virgin Islands). As of February 18, 2020, the Montana Department of Public Health and Human Services (DPHHS) has confirmed **8** cases in Montana, which includes **1** death<sup>vii</sup>; and

WHEREAS, \$440 million is spent on healthcare each year in Montana due to smoking;<sup>viii</sup> 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;<sup>ix</sup> 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;”<sup>x</sup> and

WHEREAS, research conducted over the past few decades show that the tobacco products 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 products, keeping some users from quitting, and achieving greater consumption among users;<sup>xi</sup> 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;<sup>xii</sup> and

WHEREAS, more than half of teenagers visit a convenience store at least once a week, and tobacco product marketing is more prevalent in stores where youth shop frequently;<sup>xiii</sup> and

WHEREAS, According to the 2019 Montana Youth Risk Survey, when asked how Montana youth in grades 9-12 obtain their electronic vapor products, they responded:

- I did not use any electronic vapor products during the past 30 days - 69.9%
- I bought them in a store such as a convenience store, supermarket, discount store, gas station or vape store - 5.7.%
- I got them on the internet - 0.7%
- a person who can legally buy these products gave them to me - 2.6%
- I took them from a store or another person - 2.6%
- I got them some other way - 3.4%<sup>xiv</sup>; and

WHEREAS, youth reported product flavoring as a top reason for using tobacco within the past 30 days;<sup>xv</sup> and

WHEREAS, e-cigarette use predicts the onset of combustible tobacco product use;<sup>xvi</sup> 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;<sup>xvii</sup> and

WHEREAS, On Dec. 20, 2019, the President of the United States signed legislation amending the Federal Food, Drug, and Cosmetic Act, and raising the federal minimum age of sale of tobacco products from 18 to 21 years. It is now illegal for a retailer to sell any tobacco product—including cigarettes, cigars and e-cigarettes—to anyone under 21<sup>xviii</sup>; and

WHEREAS, the CDC and FDA analyzed nationally represented data from the 2020 Youth Tobacco Survey, a cross-sectional, school based, self-administered survey of U.S. middle school (grades 6-8) and high school (grades 9-12) students conducted during January 16-March 16, 2020. The data showed that in 2020, approximately one in five high school students and one in twenty middle school students currently used e-cigarettes; by comparison, in 2019, 27.5% of high school students (4.11 million) and 10.5 % of middle school students (1.24 million) reported current e-cigarette use<sup>xx</sup>; and

WHEREAS, the Principal of Big Sky High School located in Missoula Montana, submitted public comment for the ordinance on October 20, 2020, stating that "As Principal of Big Sky High School, I write in support of the proposed ordinance to restrict the sale of flavored tobacco products in Missoula. As an MCPS high school administrator, I see first-hand the impact of this marketing tactic. In Missoula...we are experiencing an epidemic of e-cigarette use among youth. [T]he arrival of e-cigarettes and the continued marketing of flavored products, and their presence in local stores, presents an uphill challenge<sup>xx</sup>; and

WHEREAS, a Missoula School Resource Officer testified in Case Number DV-19-388 in Montana Twenty-First Judicial District Court, Ravalli County, and Honorary Judge Jennifer B. Lint found under the Findings of Fact numbers 23-24 the Officer is a sworn peace officer who is frequently citing students for Minor in Possession of vaping devices, accessories and liquid; and that the vaping and tobacco use statistics in the YRBS are reflected in what he sees as a School Resource Officer<sup>xxi</sup>.

WHEREAS, in the same litigation referenced in the prior Whereas statement, neither party disputed that youth vaping has exploded, that nicotine is harmful to youth's neural development, and that youths are attracted to the flavored liquids<sup>xxii</sup>.

WHEREAS, 21% of adults in Montana smoke;<sup>xxiii</sup> 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;<sup>xxiv</sup> and

WHEREAS, in Montana, 58 percent of high school students have tried e-cigarettes and more than 30 percent use them regularly. From 2017 to 2019, frequent vaping among Montana high school students increased by **243%** and daily use increased by **263%**<sup>xxv</sup>

WHEREAS, the Montana State Legislature and State of Montana have for decades been concerned about youth possession and consumption of tobacco products and prohibited youth possession or consumption of tobacco products by youth as is evidenced by Montana state criminal law 45-5-637 Montana Code annotated (MCA) and Montana Youth Court Act law 41-5-203 MCA; and

WHEREAS current Montana state criminal law 45-5-637 makes possession or consumption of tobacco

products, alternative nicotine products, or vapor products by persons under 18 years of age unlawful as well as makes it unlawful for a person under 18 years of age to attempt to purchase a tobacco product, alternative nicotine product, or vapor product.

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 electronic tobacco products and self-service access to tobacco products, prohibit unlawful transactions consisting of selling or giving tobacco products to a minor under the age of 21, making it easier to quit and more difficult to start.

#### **8.38.020 Enforcement of Health and Quarantine Ordinances Extraterritorially Outside City Limits.**

This chapter is adopted by the Missoula City Council for enforcement inside the city limits. If both the County commissioners and the local health board approve enforcement of this chapter extraterritorially within five (5) miles of the city limits this chapter is thereafter enforceable outside the city limits, within five (5) miles of the city limits.

#### **8.38.030 Definitions.**

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

- 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.

~~H. "Vapor product" means a noncombustible product that may contain nicotine and that uses a heating element, power source, electronic circuit, or other electronic, chemical, or mechanical means, regardless of shape or size, to produce vapor from a solution or other substance. The term includes an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or similar product or device and a vapor cartridge or other container that may contain nicotine in a solution or other form that is intended to be used with or in an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or similar product or device. The term does not include a product regulated as a drug or device by the United States food and drug administration under Chapter V of the Federal Food, Drug and Cosmetic Act~~

#### **8.38.040 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.

A. 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.

B. ~~This section does not apply to facilities where the Tobacco Retailer ensures that no person younger than 21 years of age is present or allowed to enter the business at any time.~~

#### **8.38.050 Sale of Flavored ~~Electronic~~ Tobacco Products used in Electronic Smoking Devices Prohibited**

It is 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 a Flavored ~~Electronic~~ Tobacco Products or a Tobacco Product Flavor Enhancer that is or can be used in an Electronic Smoking Device.

A person commits the offense of unlawful transactions with youth~~under~~ if the person knowingly sells or gives any tobacco product to a person under the age of 18.~~se~~

#### 8.38.070 Compliance and Inspections.

- A. The Missoula City-County Health Department is responsible for enforcing the provisions of sections 8.38.040 and 8.38.050.
- 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 sections 8.38.040 and 8.38.050.
- C. Local law enforcement is responsible for enforcing the provisions of section 8.38.060

#### 8.38.080 Violations and Penalties.

~~A. It is a violation for a Tobacco Retailer to fail to comply with the requirements of sections 8.38.040 and 8.38.050.~~

~~A. It is a violation for a Tobacco Retailer to fail to comply with the requirements of sections 8.38.040 and 8.38.050.~~

~~2.1.~~ A Tobacco Retailer convicted of violating a provision of these sections shall be subject to a fine not exceeding five hundred dollars for each offense.

~~3.2.~~ Each day of violation constitutes a separate offense.

~~4.3.~~ Assessment of penalties does not bar enforcement of these sections by injunction or other appropriate remedy.

~~5. 4.~~ Failure to comply with any provision of these sections shall constitute grounds for the denial of, refusal to renew, suspension of any food, liquor, tobacco, or other business license issued by the City of Missoula. ~~If the business is located outside the city limits within the five (5) mile extraterritorial geographic area the Missoula County Commissioners shall be responsible for addressing any business failure to comply with any provision of these sections that could constitute grounds for the denial of, refusal to renew, suspension of any food, liquor, tobacco or other business license issued by the county.~~

- B. A person convicted violating section 8.38.060 shall be fined an amount not to exceed \$250. A person convicted of a second or subsequent violation of section 8.38.060 shall be fined an amount not to exceed \$500.

#### Effective Date

The effective date of this chapter shall be effective January 11, 2021. 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.

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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)

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<sup>i</sup> 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.

<sup>ii</sup> How smoking and nicotine damage your body, American Heart Association, 2015

<sup>iii</sup> 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>

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

<sup>v</sup> Truth Initiative (2019) E-cigarettes: Facts, stats and Regulations. <https://truthinitiative.org/research-resources/emerging-tobacco-products/e-cigarettes-facts-stats-and-regulations>

<sup>vi</sup> 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].

<sup>vii</sup> Montana DPHHS Tobacco Use Prevention Program: Youth and Tobacco Use

<sup>viii</sup> Centers for Disease Control and Prevention. (2017). Extinguishing the tobacco epidemic in Montana. Retrieved January 19, 2018, from <https://www.cdc.gov/tobacco/about/osh/program-funding/pdfs/montana-508.pdf>

<sup>ix</sup> 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

<sup>x</sup> Levy DT, Pearson JL, Villanti AC, et al. Modeling the future effects of a menthol ban on smoking prevalence and smoking-attributable deaths in the United States. *Am J Public Health*. 2011;101(7):1236-1240. doi:10.2105/AJPH.2011.300179.

<sup>xi</sup> American Heart Association/Campaign for Tobacco Free Kids/Counter Tools. (2012). Deadly Alliance: How Big Tobacco and Convenience Stores Partner to Market Tobacco Products and Fight Life-Saving Policies; National Cancer Institute. (2008). The Role of the Media in Promoting and Reducing Tobacco Use. Bethesda (MD): U.S. Department of Health and Human Services, National Institutes of Health, National Cancer Institute. Tobacco Control Monograph No 19. NIH Publication No. 07-6242.

<sup>xii</sup> Henriksen et al. (2004). Reaching Youth at the Point of Sale: Cigarette Marketing is More Prevalent at Stores Where Adolescents Shop Frequently, 12 TOBACCO CONTROL 315, 317

<sup>xiii</sup> American Heart Association/Campaign for Tobacco Free Kids/Counter Tools. (2012). Deadly Alliance: How Big Tobacco and Convenience Stores Partner to Market Tobacco Products and Fight Life-Saving Policies; Sanders-Jackson, A, et al., "Convenience store visits by US adolescents: Rationale for healthier retail environments," *Health & Place* 34:63- 66, 2015

<sup>xiv</sup> 2019 Montana Youth Risk Behavior Survey High School Results

<sup>xv</sup> Ambrose, B. K., Day, H. R., Rostron, B., Conway, K. P., Borek, N., Hyland, A., & Villanti, A. C. (2015). Flavored Tobacco Product Use Among US Youth Aged 12-17 Years, 2013-2014. *Jama*, 314(17), 1871. doi:10.1001/jama.2015.13802

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<sup>xvi</sup> Barrington-Trimis, J.L. (2016). The e-cigarette social environment, e-cigarette use, and susceptibility to cigarette smoking. *Journal of Adolescent Health*. 59(1), 75-80. <https://doi.org/10.1016/j.jadohealth.2016.03.019>; Leventhal, A.M., et al. (2015). Association of electronic cigarette use with initiation of combustible tobacco product smoking in early adolescence. *JAMA*. 314(7): 700-707. doi:10.1001/jama.2015.8950; Soneji, S., Barrington-Trimis, J.L., Wills, T.A., Leventhal, A., Unger, J.B., et al. (2017). E-Cigarette Use and Subsequent Cigarette Smoking Among Adolescents and Young Adults: A Systematic Review and Meta-Analysis. *JAMA Pediatrics*; Watkins, S.L., Glantz, S.A., & Chaffee, B.W. (2018). Association of non cigarette tobacco use with future cigarette smoking among youth in population assessment of tobacco and health (PATH) study, 2013-2015. *JAMA Pediatrics*. doi:10.1001/jamapediatrics.2017.4173; Miech, R., Patrick, M., O'Malley, P., Johnston, L. (2017). E-cigarette use as a predictor of cigarette smoking: results from a 1-year follow up of a national sample of 12th grade students; King, A.C., Smith, L.J., McNamara, P.J. & Cao, D. (2017). Second Generation Electronic Nicotine Delivery System Vape Pen Exposure Generalizes as a Smoking Cue. *Nicotine Tob Res*; 327; Cobb, C.O., Hendricks, P.S., Eissenberg, T. (2015) Electronic cigarettes and nicotine dependence: evolving products, evolving problems. *BMC Med*. 13:119. <https://doi.org/10.1186/s12916-015-0355-y>.

<sup>xvii</sup> Montana Youth Risk Behavior Survey, 2019

<sup>xviii</sup> Food and Drug Administration, Center for Tobacco Products, January 15, 2020.

<sup>xix</sup> Wang, Teresa W., Neff, Linda J., Park-Lee, Eunice, Ren, Chunfeng, Cullen, Karen A., King, Brian A., (September 18, 2020), Centers for Disease Control and Prevention, Morbidity and Mortality Weekly Report.

<sup>xx</sup> Oct. 20, 2020 public comment submitted to Missoula City Council via Group City Council email, entitled "Support of Ordinance".

<sup>xxi</sup> pages 16-17 of Opinion by Judge Lint in Case Number DV-19-388, Opinion and Order, signed on December 17, 2019, Montana Smokefree Association Inc, Freedom Vapes LLC, Liberty SMOke Inc, and Ublaze Vapor Inc., Petitioners, vs. Montana Department of Public Health and Human Services; Sheila Hogan in her capacity as the Director of the Montana Department of Health and Human Services and, Stephen C. Bullock, in his official capacity as Governor of the State of Montana.

<sup>xxii</sup> pages 19, finding of fact #29 of Opinion by Judge Lint in Case Number DV-19-388, Opinion and Order, signed on December 17, 2019, Montana Smokefree Association Inc, Freedom Vapes LLC, Liberty SMOke Inc, and Ublaze Vapor Inc., Petitioners, vs. Montana Department of Public Health and Human Services; Sheila Hogan in her capacity as the Director of the Montana Department of Health and Human Services and, Stephen C. Bullock, in his official capacity as Governor of the State of Montana.

<sup>xxiii</sup> Behavioral Risk Factor Surveillance System, 2019

<sup>xxiv</sup> Montana Youth Risk Behavior Survey, 2019

<sup>xxv</sup> Montana Risk Factor Surveillance System, 2019