

ORDINANCE NO. 082, 2021
OF THE COUNCIL OF THE CITY OF FORT COLLINS
AMENDING CHAPTER 12 OF THE CODE OF THE CITY OF FORT COLLINS
REGARDING SMOKING MATERIALS

WHEREAS, Chapter 12, Article III of the City Code regulates smoking in public areas, including on City property, in the Downtown Smoke-Free Zone, and places of employment; and

WHEREAS, Chapter 12, Article V of the City Code regulates the sale and use of tobacco products by minors, currently defined as persons under eighteen years of age; and

WHEREAS, in 2019 the State of Colorado amended its Clean Indoor Air Act, C.R.S. Sections 25-14-202, *et seq.* in House Bill 19-1076 to make the Act applicable to electronic smoking devices, more commonly referred to as “vaping,” and to expand the area where smoking could be prohibited; and

WHEREAS, in 2020 the State of Colorado amended its regulations prohibiting the sale of tobacco, tobacco products or nicotine products to all persons under twenty-one years of age in House Bill 20-1001 and codified in C.R.S. Section 25-14-301; and

WHEREAS, the City Council wishes to incorporate the state statutory changes relative to smoking and vaping into the City Code for consistency in enforcement and public expectation and will continue to regulate in these areas under its home rule authority in a manner more restrictive than the state’s minimum requirements, particularly as these regulations pertain to the sale and delivery of tobacco, vaping and other smoking materials to underage persons less than twenty-one years of age; and

WHEREAS, Colorado law permits home rule municipalities to impose concurrent regulations regarding smoking and sale of smoking materials that may be more, but not less, restrictive than state statute depending on local circumstances; and

WHEREAS, the City staff has observed numerous commercial businesses that are marketing, packaging or selling hemp and other plant-like material, alone or combined with unregulated chemical compounds such as kratom and Delta-8 cannabinoids, for sale to underage persons less than twenty-one years of age to be smoked; and

WHEREAS, the City Council wishes to prohibit the sale of plant products or materials, or any liquid, vapor or aerosol, that is packaged, marketed, sold or intended for smoking or vaping to persons under twenty-one years of age; and

WHEREAS, the City Council has determined that the proposed amendments are in the best interests of the City and are necessary for the health, safety and welfare of the City’s citizens.

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF FORT COLLINS as follows:

Section 1. That the City Council hereby makes and adopts the determinations and findings contained in the recitals set forth above.

Section 2. That Section 12-56 of the Code of the City of Fort Collins is hereby amended to read as follows:

Sec. 12-56. Definitions.

The following words, terms and phrases, when used in this Article, shall have the meanings ascribed to them in this Section:

...

Electronic smoking device or ESD shall mean any product that contains or delivers nicotine or any other substance intended for human consumption and that can be used by a person to enable the inhalation of vapor or aerosol from the product and is commonly described as vaping. This includes any product whether manufactured, distributed, marketed or sold as an e-cigarette, e-cigar, e-pipe, e-hookah, or vape pen or under any other product name or descriptor. An ESD does not include a humidifier or similar device that emits only water vapor, or an inhaler, nebulizer, or vaporizer that is approved by the federal food and drug administration for the delivery of medication.

Employee shall mean any person who is employed by any employer in consideration for direct or indirect monetary wages or profit, and any person who volunteers their services without wages or other compensation.

...

Establishment shall mean the buildings or facilities in which a business, enterprise or undertaking, whether or not for profit, is conducted. If a single business or undertaking is conducted in two (2) or more adjacent buildings, those buildings together shall comprise the *establishment* for the purpose of this Article.

...

Retail tobacco business shall mean an establishment utilized primarily for the retail sale of tobacco, electronic smoking devices, and smoking products and accessories, for off-site use and consumption, and in which the sale of other products and nonsales activities are merely incidental. The term *retail tobacco business* shall not include any establishment that is in the business of selling retail or medical marijuana. For an establishment to be considered a *retail tobacco business* for purposes of this definition:

- (1) The revenues of the business must be generated primarily from the on-site sale of tobacco, electronic smoking devices, and smoking products and accessories. The sale of incidental goods other than tobacco, electronic smoking devices, or smoking products and accessories may generate limited revenues of no more than eight (8) percent of the total on-site revenues of the retail tobacco business.

...

Smoke or *smoking* shall mean inhaling, exhaling, burning, or carrying any lighted or heated cigar, cigarette, or pipe or any other lighted or heated tobacco, marijuana, hemp, cloves, smoking material or other plant product packaged, marketed, sold or intended for inhalation, whether natural or synthetic, in any manner or in any form. *Smoke* or *smoking* also includes the use of an ESD and the act of vaping.

...

Smoking material shall mean any natural or synthetic plant-based matter, material or product, or any liquid, vapor or aerosol, that is packaged, marketed, sold or intended for smoking or vaping.

Smoking material includes, but is not limited to:

- (1) Tobacco, cloves, marijuana or hemp; or
- (2) Liquids, vapors or aerosols intended to be consumed with an electronic smoking device or by a device requiring the use of flame or heat; or
- (3) Any product or material packaged, marketed, sold, or intended to smoke or vape kratom, Delta-8 cannabinoids, or synthetic marijuana. There shall be a rebuttable presumption that any such product or material packaged, marketed, intended or held out for sale without any instruction as to how to be consumed is intended to be smoked.

...

Tobacco shall mean cigarettes, cigars, cheroots, stogies and periques; granulated, plug cut, crimp cut, ready rubbed and other smoking tobacco; snuff and snuff flour, cavendish, plug and twist tobacco; fine-cut and other chewing tobacco; shorts, refuse scraps, clippings, cuttings, and seepings of tobacco; and other kinds and forms of tobacco, prepared in such manner as to be suitable for both chewing or for smoking in a cigarette, pipe, electronic smoking device or otherwise, or both for chewing and smoking.

Section 3. That Section 12-57 of the Code of the City of Fort Collins is hereby amended to read as follows:

Sec. 12-57. Findings; purposes.

- (a) The City Council has found and determined as follows:
 - (1) It is in the best interest of the people who live, work and play in the City to protect the public from involuntary exposure to emissions from secondhand smoke and electronic smoking devices (ESD) in the Downtown Smoke-Free Zone, on City-owned property and

in most indoor areas open to the public, in public meetings, in food service establishments, and in places of employment; and

(2) Numerous studies have found that tobacco smoke is a major contributor to indoor air pollution, and that breathing secondhand smoke is a cause of disease, including lung cancer, in non smokers. At special risk are children, elderly people, individuals with cardiovascular disease and individuals with impaired respiratory function, including asthmatics and those with obstructive airway disease; and

a. Secondhand smoke has been classified as a Class A carcinogen like asbestos by the Environmental Protection Agency; and

b. Secondhand smoke contains almost five thousand (5,000) chemicals, sixty (60) which are known toxins and carcinogens, including arsenic, formaldehyde, hydrogen cyanide and radioactive elements; and

c. There is no safe level of exposure to secondhand smoke; and

d. Health hazards induced by breathing secondhand smoke include lung cancer, heart disease, respiratory infection and decreased respiratory function, including bronchoconstriction and bronchospasm; and

(3) ESD emissions consist of ultrafine particles that are significantly more highly concentrated than particles within conventional tobacco smoke. There is conclusive evidence that most ESDs contain and emit not only nicotine but also many other potentially toxic substances and that ESDs increase airborne concentrations of particulate matter and nicotine in indoor environments. In addition, studies show that people exposed to ESD emissions absorb nicotine at levels comparable to the levels experienced by passive smokers. Many of the elements identified in ESD emissions are known to cause respiratory distress and disease, and ESD exposure damages lung tissues. For example, human lung cells that are exposed to ESD aerosol and flavorings show increased oxidative stress and inflammatory responses.

...

Section 4. That Section 12-62 of the Code of the City of Fort Collins is hereby amended to read as follows:

Sec. 12-62. Where smoking is not prohibited.

Notwithstanding any other provision of this Article to the contrary, retail tobacco businesses shall be exempt from the smoking prohibition set forth in § 12-59 above, provided that the following conditions shall apply:

...

(4) Persons under twenty-one (21) years of age shall not be permitted on the premises of the business, and proof of age shall be required for all persons entering the business. The retail tobacco business shall be responsible for providing adequate staffing and training to ensure an effective system for preventing persons under twenty-one (21) years of age from entering the business.

(5) In addition to other signs required to be posted pursuant to this Article, any retail tobacco business shall post and maintain a sign at all public entrances thereto, in a conspicuous position clearly visible upon entry, stating the phrase "Persons under the age of 21 not permitted". In addition, the sign, or another similarly posted sign, shall state the phrase "Surgeon General's Warning: Smoking Can Cause Lung Cancer, Heart Disease, Emphysema, and May Complicate Pregnancy". Any sign required hereunder shall meet the size and location requirements of Subsection 12-63(b).

Section 5. That Section 12-63(a)(3) and (b) of the Code of the City of Fort Collins are hereby amended to read as follows:

Sec. 12-63. Posting of signs.

(a) The owner, operator, manager and other persons in control of an establishment shall be responsible for posting and maintaining the following signs in said establishment, as applicable:

...

(3) In an establishment in which smoking is allowed pursuant to this Article, a sign using the words "*Smoking Permitted*" and/or the international smoking symbol shall be posted conspicuously at all public entrances and in a position clearly visible upon entry into the establishment stating either:

a. "Smoking Permitted. Persons under twenty-one (21) years of age may not enter."; or

b. In the case of a retail tobacco business that desires to allow the use of ESDs but not other forms of smoking on the premises, "Vaping Permitted. Persons under twenty-one (21) years of age may not enter."

(b) All signs referred to in this Section shall be a minimum size of twenty-four (24) square inches and shall be placed at a height of between four (4) and six (6) feet above the floor.

...

Section 6. That Section 12-64 of the Code of the City of Fort Collins is hereby amended to read as follows:

Sec. 12-64. - Enforcement.

(a) Enforcement of this Article shall be implemented by the City Manager or their designee.

...

(c) Any citizen may register a complaint of alleged violation of this Article by filing a sworn complaint with the City Manager or their designee.

...

(e) The City Manager may make such rules and regulations as they deem necessary and beneficial for the interpretation and enforcement of the terms of this Article. Any such rules and regulations shall become effective upon the filing of the same with the office of the City Clerk and the publication in a newspaper of general circulation published in the City of a notice stating the general subject matter and the availability of the same in the office of the City Clerk.

Section 7. That Chapter 12, Article V of the Code of the City of Fort Collins is hereby amended to read as follows:

ARTICLE V.
SALE AND USE OF TOBACCO, TOBACCO PRODUCTS
AND ELECTRONIC SMOKING DEVICES

Sec. 12-96. Definitions.

The following words, terms and phrases, when used in this Article, shall have the meanings ascribed to them in this Section:

Electronic smoking device or ESD shall mean any product that contains or delivers nicotine or any other substance intended for human consumption and that can be used by a person to enable the inhalation of vapor or aerosol from the product and is commonly described as vaping. This includes any product whether manufactured, distributed, marketed or sold as an e-cigarette, e-cigar, e-pipe, e-hookah, or vape pen or under any other product name or descriptor. An ESD does not include a humidifier or similar device that emits only water vapor, or an inhaler, nebulizer, or vaporizer that is approved by the federal food and drug administration for the delivery of medication.

...

Retail tobacco business shall mean an establishment utilized primarily for the retail sale of tobacco, tobacco products, electronic smoking devices, and smoking products and accessories, for off-site use and consumption, and in which the sale of other products and nonsales activities are merely incidental. The term *retail tobacco business* shall not include any establishment that is in the business of selling retail or medical marijuana. For an establishment to be considered a *retail tobacco business* for purposes of this definition:

(1) The revenues of the business must be generated primarily from the on-site sale of tobacco, electronic smoking devices, and smoking products and accessories. The sale of

incidental goods other than tobacco, electronic smoking devices, and smoking products and accessories may generate limited revenues of no more than eight (8) percent of the total on-site revenues of the retail tobacco business.

(2) The business shall not operate under another license associated with sale or consumption of liquor, food or marijuana.

(3) The business shall not exceed two thousand five hundred (2,500) square feet of gross floor area in size, and no more than twenty (20) percent of the business may be utilized as a seating area, lounge or other area intended to accommodate smoking for the purpose of sampling tobacco, electronic smoking devices, and smoking products and accessories that are offered for sale.

(4) An establishment in operation as of July 1, 2006, that as of that date was an establishment utilized primarily for the retail sale or promotion of tobacco, electronic smoking devices, and smoking products and accessories, and that met the requirements in Paragraphs (1) and (2) above, shall be deemed to constitute a retail tobacco business for so long as the establishment:

- a. Continues to meet the requirements in Paragraphs (1) and (2) above; and
- b. Does not expand the size of the area in which smoking is allowed from the size of said area as it existed on July 1, 2006; and
- c. At all times after December 31, 2006, operates in compliance with the requirements of Subparagraph 12-62(a)(2) of this Article.

Smoke or smoking shall mean inhaling, exhaling, burning, or carrying any lighted or heated cigar, cigarette, or pipe or any other lighted or heated tobacco, cloves, hemp, smoking material or other plant product packaged, marketed, sold or intended for inhalation, whether natural or synthetic, in any manner or in any form. *Smoke* or *smoking* also includes the use of an ESD and the act of vaping.

Smoking material shall mean any natural or synthetic plant-based matter, material or product, or any liquid, vapor or aerosol, that is packaged, marketed, sold or intended for smoking or vaping. *Smoking material* includes, but is not limited to:

- (1) Tobacco, cloves or hemp; or
- (2) Liquids, vapors or aerosols intended to be consumed with an electronic smoking device or by a device requiring the use of flame or heat; or
- (3) Any product or material packaged, marketed, sold, or intended to smoke or vape kratom, Delta-8 cannabinoids, or synthetic marijuana. There shall be a rebuttable presumption that any such product or material packaged, marketed, intended or held out for sale without any instruction as to how to be consumed is intended to be smoked.

Tobacco shall mean cigarettes, cigars, cheroots, stogies and periques; granulated, plug cut, crimp cut, ready rubbed and other smoking tobacco; snuff and snuff flour, cavendish, plug and twist tobacco; fine-cut and other chewing tobacco; shorts, refuse scraps, clippings, cuttings, and seepings of tobacco; and other kinds and forms of tobacco, prepared in such manner as to be suitable for both chewing or for smoking in a cigarette, pipe, electronic smoking device or otherwise, or both for chewing and smoking.

...

Underage person shall mean any natural person under twenty-one (21) years of age.

...

Sec. 12-97. Sale of tobacco, smoking material, tobacco products or electronic smoking devices.

(a) No person shall sell, offer for sale, distribute, dispense or give away tobacco, smoking material, tobacco products or electronic smoking devices in a public place by or from a vending machine.

(b) No person shall permit a vending machine that dispenses tobacco, smoking material, tobacco products or electronic smoking devices to be located, installed, kept or maintained in any public place owned or leased by such person.

(c) Notwithstanding the provisions of Subsections (a) and (b) of this Section, tobacco, smoking material, tobacco products or electronic smoking devices may be sold through a vending machine located in a public place where access by underage persons is prohibited.

(d) No person shall furnish to an underage person, by gift, sale or any other means, any tobacco, smoking material, tobacco products or electronic smoking devices. Before giving, selling, distributing, dispensing, or offering to sell to an individual any cigarette, smoking material, tobacco product, or nicotine product, a person shall request from the individual and examine a government-issued photographic identification that establishes that the individual is twenty-one (21) years of age or older. It shall be an affirmative defense to prosecution under this Subsection, however, that the person furnishing the tobacco, smoking material, tobacco products or electronic smoking devices to the underage person was presented with and reasonably relied upon a document which identified the underage person receiving the product as being twenty-one (21) years of age or older.

(e) Every person in charge or control of a retail business of any kind shall stock and display all tobacco, smoking material, tobacco products or electronic smoking devices in such business in a manner so as to make all such tobacco, smoking material, tobacco products or electronic smoking devices reasonably inaccessible to customers, thereby requiring a direct, face-to-face exchange of the tobacco, smoking material, tobacco products or electronic smoking devices from an employee of the business to the customer. The provisions of this Subsection shall not apply to vending

machines and to self-service displays of tobacco, smoking material, tobacco products or electronic smoking devices that are located in a public place where access by underage persons is prohibited.

(f) Any person who sells or offers for sale at retail any tobacco, smoking material, tobacco products or electronic smoking devices, including by means of a vending machine, shall display a warning sign as specified in this Subsection. If the tobacco, smoking material, tobacco products or electronic smoking devices are sold or offered for sale by use of a vending machine, said warning sign shall be displayed visibly and prominently on the front of the vending machine at all times. If the tobacco, smoking material, tobacco products or electronic smoking devices are sold or being offered for sale in any other manner, said warning sign shall be displayed in the premises at all times in a visible and prominent place within close proximity to the point of sale of the tobacco, smoking material, tobacco product or electronic smoking device. Such warning sign, whether displayed on a vending machine or otherwise, shall have a minimum height of five (5) inches and a minimum width of seven (7) inches, and in large, bold type shall read as follows:

WARNING

IT IS ILLEGAL FOR ANY PERSON UNDER 21 YEARS OF AGE TO PURCHASE, POSSESS OR USE TOBACCO, SMOKING MATERIAL, TOBACCO PRODUCTS AND ELECTRONIC SMOKING DEVICES AND, UPON CONVICTION, A FINE MAY BE IMPOSED.

IT IS ILLEGAL FOR ANY PERSON TO SELL OR GIVE TOBACCO, SMOKING MATERIAL, TOBACCO PRODUCTS AND ELECTRONIC SMOKING DEVICES TO A PERSON UNDER 21 YEARS OF AGE AND, UPON CONVICTION, A FINE AND IMPRISONMENT MAY BE IMPOSED.

Sec. 12-98. Underage persons prohibited from purchasing, possessing or using tobacco, tobacco products or electronic smoking devices.

(a) No underage person shall purchase, possess, consume or use any tobacco, smoking material, tobacco products or electronic smoking devices. For purposes of this Subsection, *to possess tobacco, smoking material, tobacco product or electronic smoking device* shall mean that the underage person has or holds any amount of tobacco, smoking material, tobacco product or electronic smoking device anywhere on their person, or owns or has custody of tobacco, smoking material, tobacco products or electronic smoking devices or has tobacco, smoking material, a tobacco product or an electronic smoking device within their immediate presence and control. *To consume or use tobacco, smoking material, tobacco products or electronic smoking devices* shall mean, for purposes of this Subsection, to smoke, ingest, absorb, inhale, use or chew any tobacco, smoking material, tobacco products or electronic smoking devices.

(b) No underage person shall obtain or attempt to obtain any tobacco, smoking material, tobacco products or electronic smoking devices by misrepresentation of age or by any other method.

(c) Any person who violates any part of this §12-98 is guilty of a petty offense punishable by a fine in accordance with §1-15(h).

Sec. 12-99. Violations, penalties, presumptions and accountability.

(a) Each day that a person violates any section of this Article shall be considered as a separate and distinct violation.

(b) Any person who violates any section of this Article shall, upon conviction, be subject to the penalties in § 1-15 of this Code; provided, however, that a fine of at least one hundred dollars (\$100.) shall be imposed for any violation of Subsection 12-97(d). In addition, the Chief Municipal Judge may require any underage person convicted of a violation under § 12-98 to complete up to twenty-four (24) hours of court-approved public service and at such cost to the underage person as may be established by resolution of the City Council.

(c) Proof that a package or container has affixed to it a label which identifies the package or container as containing tobacco, smoking material, tobacco products or electronic smoking devices shall raise the evidentiary presumption and constitute prima facie evidence in any prosecution of a violation under any section of this Article of the fact that the substance within such package or container at the time of the violation was tobacco, smoking material, a tobacco product or electronic smoking device. Such presumption, however, may be rebutted by the presentation at trial of any probative and competent evidence that the substance within the package or container was not tobacco, smoking material, a tobacco product or electronic smoking device.

(d) Proof that Subsection 12-97(d) has been violated three (3) times or more within a one-year period by one (1) or more employees at a particular location of a retail business that sells or offers for sale tobacco, smoking material, tobacco products or electronic smoking devices shall raise the evidentiary presumption and constitute prima facie evidence in any prosecution of the owner or manager of such business under Subsection 12-97(d), that such owner or manager, with intent to promote or facilitate the violation, aided, abetted or advised the employee in planning or committing the third and subsequent violations of Subsection 12-97(d) within such one-year period or, in the case where the owner of the business is a corporation, that the conduct constituting the third and subsequent violations was engaged in, authorized, solicited, requested, commanded or knowingly tolerated by the corporate owner's board of directors or by a high managerial agent acting within the scope of their employment on behalf of the corporate owner. For purposes of this Section, *high managerial agent* shall mean an officer of the corporate owner or any other employee of the corporate owner in a position of comparable authority with respect to the formulation of corporate policy or the supervision in a managerial capacity of subordinate employees. These presumptions shall not arise with respect to an owner who did not own or a manager who did not manage such business for any period of time within the one-year period during which the three (3) or more violations of Subsection 12-97(d) occurred. Further, these presumptions may be rebutted at trial by the presentation of any probative and competent evidence.

Introduced, considered favorably on first reading, and ordered published this 15th day of June, A.D. 2021, and to be presented for final passage on the 6th day of July, A.D. 2021.

Mayor

ATTEST:

City Clerk

Passed and adopted on final reading on this 6th day of July, A.D. 2021.

Mayor

ATTEST:

City Clerk