# AN ORDINANCE OF THE [ CITY / COUNTY ] OF [ \_\_\_\_ ] RESTRICTING THE SALE OF FLAVORED TOBACCO PRODUCTS

## MODEL POLICY

**AN ORDINANCE OF [CITY/COUNTY]**

The [CITY/COUNTY] does ordain as follows:

**SECTION I. FINDINGS.** The [CITY/COUNTY] hereby finds and declares as follows:

WHEREAS, scientific reviews by the Tobacco Products Scientific Advisory Committee (TPSAC) and the FDA found marketing of menthol cigarettes likely increases the prevalence of smoking among the entire population, and especially among youth, African Americans,[[1]](#endnote-1) and possibly Hispanic and Latino individuals;[[2]](#endnote-2)

WHEREAS, 19.4% of adults in Missouri smoke;[[3]](#endnote-3) and [INSERT STATISTIC FOR YOUR OWN CITY/COUNTY]

WHEREAS, xx% of youth reported trying their first cigarettes before age 13, and 20.8% of Missouri high school youth reported currently using any tobacco product, including e-cigarettes in 2017;[[4]](#endnote-4) and [INSERT STATISTIC FOR YOUR OWN CITY/COUNTY]

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;[[5]](#endnote-5) and

WHEREAS, youth reported product flavoring as a top reason for using tobacco within the past 30 days;[[6]](#endnote-6) and

WHEREAS, menthol in cigarettes results in more youth initiation to smoking [[7]](#endnote-7) and is the source of addiction for more than half of all teen smokers;[[8]](#endnote-8) 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.[[9]](#endnote-9) Like menthol, flavorings help mask the naturally harsh taste of tobacco, making it easier for young people to start and continue using tobacco products;[[10]](#endnote-10) and

WHEREAS, e-cigarette use predicts the onset of combustible tobacco product use;[[11]](#endnote-11) and

WHEREAS, e-cigarettes are now the most commonly used tobacco product among Missouri’s youth. xx% of Missouri high school students have used an electronic smoking device in their lifetime;[[12]](#endnote-12) and [INSERT STATISTIC FOR YOUR OWN CITY/COUNTY]

NOW THEREFORE, it is the intent of the [CITY/COUNTY], in enacting this ordinance to protect public health and welfare by reducing access to flavored tobacco products, making it easier to quit and more difficult to start.

**SECTION II.** [ARTICLE/CHAPTER] of the [CITY/COUNTY] Code is hereby amended to read as follows:

**SECTION III. DEFINITIONS.** The following words and phrases, whenever used in this article, shall have the meanings defined in this section unless the context clearly requires otherwise:

1. “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 authorized for sale by the U.S. Food and Drug Administration, as those terms are defined in the Federal Food, Drug and Cosmetic Act.
2. “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.
3. “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.
4. “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.
5. “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.
6. “Tobacco product flavor enhancer” is any product designed, manufactured, produced, marketed or sold to produce a characterizing flavor when added to any tobacco product.
7. Vapor Product means any non-combustible product with or without nicotine that employs a heating element, power source, electronic circuit or other electronic, chemical means, regardless of shape or size, which can be used to produce vapor with or without nicotine in a solution or other form. The term includes any electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe or similar product or device, and any vapor cartridge or other container of nicotine in a liquid 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 alternative nicotine or tobacco products. Vapor product does not include drugs, devices, or combination products authorized for sale as a cessation device by the U.S. Food and Drug Administration, as those terms are defined in the Federal Food, Drug and Cosmetic Act

**SECTION IV. SALE OF FLAVORED TOBACCO PRODUCTS PROHIBITED.**

* 1. It shall be unlawful for any retailer to sell or offer for sale any flavored tobacco product or tobacco product flavor enhancer.
  2. There shall be a rebuttable presumption that a tobacco product is a flavored tobacco product if a tobacco retailer, manufacturers, or any employee or agent of a tobacco retailer or manufacturer has:

1. Made a public statement or claim that the tobacco product imparts a taste or smell other than the taste or smell of tobacco;
2. Uses text and/or images on the tobacco product’s labeling or packaging to explicitly or implicitly indicate that the tobacco product imparts a taste or smell other than tobacco; or
3. Taken action directed to consumers that would be reasonably expected to cause consumers to believe the tobacco product imparts a taste or smell other than tobacco.

**SECTION V. COMPLIANCE AND INSPECTIONS**

1. The authority to administer the provisions of this article is vested in the director of health and his or her duly authorized representative(s).
2. Whenever the need arises, the directors of health may call upon other departments of the city to aid in the enforcement of the provisions of this article.
3. Any citizen who desires to register a complaint under this article may initiate enforcement with the health department.
4. The remedies provided by this [ARTICLE/CHAPTER] are cumulative and in addition to any other remedies available at law or in equity.
5. Inspections:
   1. Inspections will occur at least 2 times per year at each Tobacco Retail Establishment.
   2. Unannounced follow-up inspections will be conducted within three months of any violation of this ordinance.

**SECTION VI. VIOLATIONS AND PENALTIES**

It is a violation for any Tobacco Retailer to fail to comply with the requirements of this ordinance. If a Tobacco Retailer is found to have violated this ordinance they shall be charged an administrative penalty as follows:

1. Violations within sixty (60) days of effective date of this ordinance will result in a warning letter and education.
2. First violation. [ENFORCEMENT ENTITY] shall impose a civil fine [or a penalty] of at least $1,500.
3. Second violation within thirty-six (36) months of a first violation. [ENFORCEMENT ENTITY] shall impose a civil fine of at least $3,000.
4. Third violation within thirty-six (36) months of any preceding violation. [ENFORCEMENT ENTITY] shall impose a civil fine of at least $5,000.

Each day of violation constitutes a separate offense. Failure to comply with any provision of this ordinance shall constitute grounds for the denial of, refusal to renew, suspension of, or revocation of any food, liquor, tobacco, or other business license issued by the city. Any fines collected under this ordinance shall be used for implementation and enforcement of the ordinance.

**SECTION VII. EFFECTIVE DATE AND NON-CONFORMING USES.**

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

**SECTION VIII. SEVERABILITY**

If any portion of this ordinance, or its application to any circumstances, is held invalid, the remaining portions shall be considered severable, and shall be given effect to the maximum extent possible.

1. . Food and Drug Administration. *Preliminary Scientific Evaluation of the Possible Public Health Effects of Menthol Versus Nonmenthol Cigarettes*. 2013. *www.fda.gov/downloads/ScienceResearch/SpecialTopics/PeerReviewofScientificInformationandAssessments/UCM361598.pdf*. [↑](#endnote-ref-1)
2. . Tobacco Products Scientific Advisory Committee. *Menthol Cigarettes and Public Health: Review of the Scientific Evidence and Recommendations.* 2011. *www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM269697.pdf*. [↑](#endnote-ref-2)
3. Behavioral Risk Factor Surveillance System, 2018 [↑](#endnote-ref-3)
4. Montana Youth Risk Behavior Survey, 2019 [↑](#endnote-ref-4)
5. 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 [↑](#endnote-ref-5)
6. 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 [↑](#endnote-ref-6)
7. Hersey et al. (2010). Menthol Cigarettes Contribute to the Appeal and Addiction Potential of Smoking for Youth, 12 (suppl. 2) NICOTINE & TOBACCO RESEARCH S216-46 [↑](#endnote-ref-7)
8. Giovino et al. (2013). Differential Trends in Cigarette Smoking in the USA: Is Menthol Slowing Progress? TOBACCO CONTROL 052259, 1–10 [↑](#endnote-ref-8)
9. Carpenter, C.M., Wayne, G.F., Pauly, J.L., Koh, H.K., & Connolly, G.N. (2005). New cigarette brands with flavors that appeal to youth: Tobacco marketing strategies. Tobacco industry documents reveal a deliberate strategy to add flavors known to appeal to younger people. Health Aff. 2005;24(6):1601-1610. doi:10.1377/hlthaff.24.6.1601; Lewis, M.J. & Wackowski, O. (2006). Dealing with an innovative industry: A look at flavored cigarettes promoted by mainstream brands. Am J Public Health. 2006;96(2):244-251. doi:10.2105/AJPH.2004.06120; Connolly, G.N. (2004). Sweet and spicy flavours: new brands for minorities and youth. Tob Control. 2004;13(3):211-212. doi:10.1136/tc.2004.009191; U.S. Department of Health and Human Services Office of Disease Prevention and Health Promotion. (2012) Preventing Tobacco Use Among Youth and Young Adults a Report of the Surgeon General. www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/; Delnovo et al. (2011). Smoking-Cessation Prevalence Among U.S. Smokers of Menthol Versus Non Menthol Cigarettes, 41 AM. J. PREVENTIVE MED. 357-65 [↑](#endnote-ref-9)
10. U.S. Department of Health and Human Services Office of Disease Prevention and Health Promotion. (2012) Preventing Tobacco Use Among Youth and Young Adults a Report of the Surgeon General. www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/. [↑](#endnote-ref-10)
11. 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 noncigarette 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. [↑](#endnote-ref-11)
12. Montana Youth Risk Behavior Survey, 2019 [↑](#endnote-ref-12)