

CITY OF UTICA
MACOMB COUNTY MICHIGAN
ORDINANCE NO. 167

AN ORDINANCE REGARDING THE POSSESSION OF TOBACCO AND VAPOR PRODUCTS

THE CITY OF UTICA ORDAINS:

Sec. 1. - Title.

This division shall be known and cited as the "City of Utica Tobacco and Vapor Products Ordinance."

Sec. 2. - Purpose and findings.

- (a) The purpose of this article is to protect the public health, safety and welfare of the property and persons in the city by prohibiting persons under eighteen (18) years of age from possessing tobacco products and vapor products, and prohibiting the sale of tobacco products and vapor products to persons under eighteen (18) years of age.
- (b) Persons under age eighteen (18) are prohibited by law from purchasing or possessing cigarettes and other tobacco products, and retailers are prohibited from selling them to minors. There are new tobacco-less products, however, commonly referred to as "electronic cigarettes," "e-cigarettes," "e-cigars," "e-cigarillos," "e-pipes," "e-hookahs," or "electronic nicotine delivery systems," which allow the user to simulate cigarette smoking and ingest nicotine. These products may be purchased by minors and are being marketed without age restrictions or health warnings and come in different flavors that appeal to young people.
- (c) E-cigarettes, and similar devices, are a relatively new nicotine delivery system. While devices vary in their appearance and specific method of operation, they have a few basic elements in common. A solution of water, dissolved nicotine, and other ingredients (usually flavoring) is heated with a heating element (usually battery-powered). This vaporizes the nicotine solution, which passes

into a mouthpiece and is inhaled in a manner similar to cigarette smoking. Often, glycerol or propylene glycol is added to the solution to give the appearance of smoke when the solution is vaporized. The concentration of nicotine contained in the solution can be customized by the retailer to the buyer's specifications, and many manufacturers make nicotine-free solutions.

- (d) The production and distribution of e-cigarettes is not currently regulated by federal or state authorities, and the U.S. Food and Drug Administration has not completed testing of these products. But, initial studies by the FDA have determined that e-cigarettes can increase nicotine addiction among young people and contain chemical ingredients known to be harmful, which may expose users and the public to potential health risks.
- (e) The use of e-cigarettes and similar devices has increased significantly in recent years, as evidenced by the fact that:
 - Between 2011 and 2012 the percentage of all youth in grades 6 to 12 who had tried electronic smoking devices doubled;
 - Six and eighth tenths (6.8) percent of all youth between 6th and 12th grade report trying electronic smoking devices;
 - Ten (10) percent of high school students have tried electronic smoking devices;
 - Nine and three tenths (9.3) percent of youth who have used electronic smoking devices have never smoked conventional cigarettes; and
 - Between 2010 and 2011, rates of both awareness and use of unregulated electronic smoking devices by adults also increased significantly.
- (f) Existing studies on electronic smoking devices' vapor emissions and cartridge contents have found a number of dangerous substances including:
 - Chemicals known to cause cancer such as formaldehyde, acetaldehyde, lead, nickel and chromium;
 - PM_{2.5}, acrolein, tin, toluene, and aluminum, which are associated with a range of negative health effects such as skin, eye and respiratory irritation, neurological effects, damage to reproductive systems, and even premature death from heart attacks and stroke;
 - Inconsistent labeling of nicotine levels in electronic smoking device products; and
 - In one instance, diethylene glycol, an ingredient used in antifreeze and toxic to humans.

- (g) Several studies have concluded that exposure to vapor from electronic smoking devices may cause passive or secondhand vaping.
- (h) Some cartridges used by electronic smoking devices can be refilled with liquid nicotine solution, creating the potential for exposure to dangerous concentrations of nicotine, and as a result:
- In one instance, diethylene glycol, an ingredient used in antifreeze and toxic to humans;
 - Poisonings from electronic smoking devices have increased dramatically in the last three and one-half (3½) years from "one (1) [a month] in September 2010 to two hundred fifteen (215) a month in February 2014;"
 - Analysis of reports of poisonings from electronic smoking devices finds that calls reporting exposure to electronic smoking devices are much more likely to involve adverse health effects when compared to calls reporting exposure to conventional cigarettes.
- (i) Clinical studies about the safety and efficacy of these products have not been submitted to the FDA for the over four hundred (400) brands of electronic smoking devices that are on the market and for this reason, consumers currently have no way of knowing:
- Whether electronic smoking devices are safe;
 - What types or concentrations of potentially harmful chemicals the products contain; and
 - What dose of nicotine the products deliver.
- (j) The World Health Organization has strongly advised consumers against the use of electronic smoking devices until they are "deemed safe and effective and of acceptable quality by a competent national regulatory body."
- (k) The World Medical Association has determined that electronic smoking devices "are not comparable to scientifically-proven methods of smoking cessation" and that "neither their value as therapeutic aids for smoking cessation, nor their safety as cigarette replacements is established."
- (l) A study published in the Journal of Environmental and Public Health suggests that electronic smoking devices "may have the capacity to "re-normalize" tobacco use in a demographic that has had significant denormalization of tobacco use previously."

- (m) Electronic smoking devices often mimic conventional tobacco products in shape, size and color, with the user exhaling a smoke-like vapor similar in appearance to the exhaled smoke from cigarettes and other conventional tobacco products.
- (n) The use of electronic smoking devices in smoke-free locations threatens to undermine compliance with smoking regulations and reverse the progress that has been made in establishing a social norm that smoking is not permitted in public places and places of employment.
- (o) In September of 2013, forty (40) state attorneys general (including Michigan's) signed a letter to the Commissioner of the United States Food and Drug Administration, outlining their concerns with e-cigarettes and requesting the implementation of regulations that would address the advertising, ingredients, and sale to minors of e-cigarettes at the federal level.
- (p) It is the intent of the city council, in enacting the ordinance codified in this division, to provide for the public health, safety and welfare by facilitating uniform and consistent enforcement of smoke-free air laws; by reducing the potential for re-normalizing smoking in public places and places of employment; by reducing the potential for children to associate the use of electronic smoking devices with a normative or healthy lifestyle; and by prohibiting the sale or distribution of electronic smoking devices to minors.
- (q) Therefore, the City of Utica Council determines that prohibiting the sale, giving, or furnishing of e-cigarettes to minors and prohibiting the purchase, possession, or use of e-cigarettes by minors is in the City's best interests and will promote public health, safety and welfare. For purposes of this division, the city is adopting the term "vapor product" to address e-cigarettes and all similar devices, because this term has been defined by the Michigan House and Senate in Senate Bills 667 and 668, enrolled in June of 2014, as part of proposed amendments to the Youth Tobacco Act, being Public Act 31 of 1915.

Sec. 3. - Definitions.

For the purpose of construction and application of this division, the following definitions shall apply:

Minor means an individual who is less than eighteen (18) years of age.

Person who sells tobacco products at retail means a person whose ordinary course of business consists, in whole or in part, of the retail sale of tobacco products subject to state sales tax.

Person who sells vapor products at retail means a person whose ordinary course of business consists, in whole or in part, of the retail sale of vapor products.

Possession of a tobacco product shall mean either actual physical control of the tobacco product without necessarily owning that product, or the right to control the tobacco product even though it is in a different room or place than where the person is physically located.

Public place means a public street, sidewalk, or park or any area open to the general public in a publicly owned or operated building or premises, or in a public place of business.

Tobacco product means a product that contains tobacco and is intended for human consumption, including but not limited to, cigarettes, non-cigarette smoking tobacco, or smokeless tobacco, as those terms are defined in Section 2 of the Tobacco Products Tax Act, and cigars. Tobacco product does not include a vapor product or a product regulated as a drug or device by the United States Food and Drug Administration.

Use a tobacco product or vapor product means to smoke, chew, suck, inhale, or otherwise consume a tobacco product or vapor product.

Vapor product means a noncombustible product containing nicotine that employs a heating element, power source, electronic circuit, or other electronic, chemical or mechanical means, regardless of shape or size, that can be used to produce vapor from nicotine in a solution or other form. Vapor product includes an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or similar product or device and a vapor cartridge or other container of 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. Vapor product does not include a product regulated as a drug or device by the United States Food and Drug Administration.

Sec. 4. - Prohibited conduct.

- (a) Subject to subsection (c), a minor shall not do any of the following:
- (1) Purchase or attempt to purchase a tobacco product or vapor product.
 - (2) Possess or attempt to possess a tobacco product or vapor product.
 - (3) Use a tobacco product or vapor product in a public place.
 - (4) Present or offer to an individual a purported proof of age that is false, fraudulent, or not actually his or her own proof of age for the purpose of purchasing, attempting to purchase, possessing, or attempting to possess a tobacco product or vapor product.

- (b) An individual who violates subsection (a) shall be subject to the following penalties:
- (1) For the first violation, and for each violation committed by a person under age seventeen (17), the person is responsible for a civil infraction punishable by a civil fine of fifty dollars (\$50.00).
 - (2) For a second or subsequent violation, a person is guilty of a misdemeanor punishable by a fine of not more than fifty dollars (\$50.00) for each violation.
 - (3) In addition, pursuant to a probation order for any second or subsequent violation of subsection (a), the court may require an individual to:
 - a. Perform not more than sixteen (16) hours of community service in a hospice, nursing home, or long-term care facility for a first offense violation, thirty-two (32) hours of community service for a second offense violation, and forty-eight (48) hours of community service for a third or subsequent offense violation.
 - b. Participate in a health promotion and risk reduction program.
 - c. Pay any costs or fees related to participation in a health promotion and risk reduction program ordered by the court.
- (c) Subsection (a) does not apply to a minor participating in any of the following:
- (1) An undercover operation in which the minor purchases or receives a tobacco product or vapor product under the direction of the minor's employer and with the prior approval of the local prosecutor's office as part of an employer-sponsored internal enforcement action.
 - (2) An undercover operation in which the minor purchases or receives a tobacco product or vapor product under the direction of the state police or a local police agency as part of an enforcement action, unless the initial or contemporaneous purchase or receipt of the tobacco product or vapor product by the minor was not under the direction of the state police or the local police agency and was not part of the undercover operation.
 - (3) Compliance checks in which the minor attempts to purchase tobacco products for the purpose of satisfying federal substance abuse block grant youth tobacco access requirements, if the compliance checks are conducted under the direction of a substance abuse coordinating agency as defined in the Public Health Code, 1978 PA 368, MCL 333.6103, and with the prior approval of the state police or a local police agency.

- (d) Subsection (a) does not apply to the handling or transportation of a tobacco product or vapor product by a minor under the terms of that minor's employment.
- (e) This section does not prohibit an individual from being charged with, convicted of or found responsible for, or sentenced for any other violation of law that arises out of the violation of subsection (a).

State Law reference— MCL 722.641 et seq.

Sec. 5. - Sales of individual cigarettes.

- (a) Except as otherwise provided in subsection (b) of this section, a person who sells tobacco products at retail shall not sell a cigarette separately from its package.
- (b) Subsection (a) above, does not apply to a person who sells tobacco products at retail in a tobacco specialty retail store or other retail store that deals exclusively in the sale of tobacco products and smoking paraphernalia.
- (c) A person who violates subsection (a) of this section is guilty of a misdemeanor, punishable by a fine of not more than five hundred dollars (\$500.00) for each offense.

State Law reference— MCL 722.642a.

Sec. 6. - Furnishing to minors.

- (a) A person shall not sell, give or furnish a tobacco product or vapor product to a minor, including, but not limited to, through a vending machine. A person who violates this subsection or subsection (h) of this section is guilty of a misdemeanor punishable by a fine of not more than fifty dollars (\$50.00) for each violation.
- (b) A person who sells tobacco products or vapor products at retail shall post, in a place close to the point of sale and conspicuous to both employees and customers, a sign that includes the following statement:

"The purchase of a tobacco product or vapor product by a minor under 18 years of age and the provision of a tobacco product or vapor product to a minor are prohibited by law. A minor who unlawfully purchases or uses a tobacco product or vapor product is subject to criminal penalties."
- (c) If the sign required under subsection (b) above, is more than six (6) feet from the point of sale, it shall be five and one-half (5½) inches by eight and one-half (8½) inches and the statement required under subsection (b) shall be printed in 36-

point bold-faced type. If the sign required under subsection (b) is six (6) feet or less from the point of sale, it shall be two (2) inches by four (4) inches and the statement required under subsection (b) shall be printed in 20-point bold-faced type.

- (d) The signs required by subsection (c) above, may be procured from the department of community health pursuant to state law. The seller may add the "vapor product" language to the sign if the department of community health does not or will not include it.
- (e) It is an affirmative defense to a charge under subsection (a) of this section, that the defendant had in force at the time of arrest and continues to have in force, a written policy to prevent the sale of tobacco products and vapor products to persons under eighteen (18) years of age and that the defendant enforced and continues to enforce the policy. A defendant who proposes to offer evidence of the affirmative defense described in this subsection shall file and serve notice of the defense, in writing, with the court and serve a copy of the notice on the city attorney. The defendant shall serve the notice not less than fourteen (14) days before the date set for trial.
- (f) If the city attorney proposes to offer testimony to rebut the affirmative defense described in subsection (e) above, the city attorney shall file a notice of rebuttal, in writing, with the court and serve a copy of the notice on the defendant. The city attorney shall serve the notice not less than seven (7) days before the date set for trial and shall include in the notice the name and address of each rebuttal witness.
- (g) Subsection (a) of this section does not apply to the handling or transportation of a tobacco product or vapor product by a minor under the terms of the minor's employment.
- (h) Before selling, offering for sale, giving, or furnishing a vapor product to an individual, a person shall verify that the individual is at least eighteen (18) years of age by doing one (1) of the following:
 - (1) If the individual appears to be under twenty-seven (27) years of age, examining a government-issued photographic identification that establishes that the individual is at least eighteen (18) years of age.
 - (2) For sales made by the internet or other remote sales method, performing an age verification through an independent, third-party age verification service that compares information available from a commercially available database, or aggregate of databases, that are regularly used by government agencies and businesses for the purpose of age and identity verification to

the personal information entered by the individual during the ordering process that establishes that the individual is eighteen (18) years of age or older.

State Law reference— MCL 722.641.

Sec. 7.- Effective Date.

This ordinance shall be effective upon publication of notice of adoption.