



**CITY OF BOULDER  
CITY COUNCIL AGENDA ITEM**

**MEETING DATE: February 3, 2015**

**AGENDA TITLE:** Second reading and consideration of a motion to order published, by title only, and adopt Ordinance No. 8015 amending Chapter 6-4, B.R.C. 1981, adding a new section, 6-4-3.5 “Smoking Prohibited in Public Places,” including electronic smoking devices in the definition of smoking, and setting forth related details; **or in the alternative**, consideration of a motion to order published, by title only, and adopt Ordinance No. 8017 amending Chapter 6-4, B.R.C. 1981, adding a new section, 6-4-3.5 “Smoking Prohibited in Public Places,” and setting forth related details.

**PRESENTER/S**

Jane S. Brautigam, City Manager  
Thomas A. Carr, City Attorney  
Maureen Rait, Executive Director of Public Works  
Jeff Dillon, Interim Director of Parks and Recreation  
Yvette Bowden, Deputy Director of Parks and Recreation  
Sandra Llanes, Senior Assistant City Attorney  
Lisa Martin, Urban Parks Manager  
Eric M. Ameigh, Public Works Projects Coordinator

**EXECUTIVE SUMMARY**

In January 2014, City Council provided staff with general direction to develop a proposal to ban smoking in parks, on open space, and in other public places that would further council’s goal of making Boulder as healthy and smoke-free as possible. In response, an interdepartmental staff team developed a draft ordinance. After consulting numerous boards and commissions and soliciting council feedback on the draft ordinance at a [Sept. 23, 2014 study session](#), staff has refined the ordinance for formal council consideration.

The existing code prohibits smoking in buildings (with some exceptions) and within 15 feet of any entryway, including patios. The proposed ordinance extends the ban to public outdoor spaces such as open space, multi-use paths, parks, within the downtown Business Improvement District, within 25 feet of bus stops, and within a defined area surrounding Boulder High School.

At [first reading on Nov. 18, 2014](#), council passed both Ordinance 8015 (Attachment A), which includes a ban on electronic smoking devices, and 8017 (Attachment B), which does not. Council requested the two different versions in order to keep its options open until the community had the opportunity to comment on the ordinances. Staff recommends that council adopt Ordinance 8015, which includes electronic smoking devices.

The ordinance presented and passed at first reading contains a typographical error; it prohibits smoking within 20 feet of a bus stop rather than the 25 feet council requested at the Sept. 23, 2014 study session. Staff recommends that council choose to amend the ordinance on second reading using the suggested motion language referencing Attachment C to this agenda memo. The ordinance will then be read for a third time at the Feb. 17, 2015 council meeting, where the item will be on the consent agenda.

If council passes an ordinance at third reading on Feb. 17, it will become effective on March 19, 2015. Law enforcement personnel will provide warnings and education with limited enforcement from March 19 through April 30 and then begin typical enforcement, as needed. A robust public information campaign will commence late in the first quarter of 2015 to inform the public about the expanded smoking ban before enforcement begins.

#### **Suggested Motion Language**

*Staff requests council consideration of this matter and action in the form of the following motion:*

Motion to amend at second reading Ordinance No. 8015 amending Chapter 6-4, B.R.C. 1981, adding a new section, 6-4-3.5 “Smoking Prohibited in Public Places,” including electronic smoking devices in the definition of smoking, incorporating the amendment made in Attachment C, and setting forth related details.

*Or, in the alternative:*

Motion to amend at second reading Ordinance 8017 amending Chapter 6-4, B.R.C. 1981, adding a new section, 6-4-3.5 “Smoking Prohibited in Public Places,” incorporating the amendment made in Attachment C, and setting forth related details.

#### **BOARD AND COMMISSION FEEDBACK**

Significant board and commission feedback helped to shape the proposed ordinances. In addition to board and commission input, the proposed ordinances reflect the changes requested by council at its [Sept. 23, 2014 study session](#).

#### **PUBLIC FEEDBACK**

Community feedback on the proposal to expand the ban on smoking has been somewhat mixed. Many positive comments have been made, although opposition to the inclusion of electronic smoking devices has emerged.

Some community members have spoken out against the inclusion of electronic smoking devices on the grounds that there are no demonstrated secondhand effects and that the devices are successfully used for smoking cessation. As of this writing, a Change.org petition asking council to exempt electronic smoking devices from the ban has gathered over 400 signatures, though it is unclear how many signatories are city residents.

## **BACKGROUND**

The Boulder community has a long history of commitment to both health and quality of life. As part of that commitment, the city has historically regulated smoking in public places. In 1975, the first ordinance regulating smoking in public places was adopted, making Boulder one of the first communities in Colorado to enact a smoking ban. In 2009, the ordinance was updated to reflect and comply with the Colorado Clean Indoor Act of 2006. It was also in 2009 that council adopted an ordinance banning smoking within 15 feet of building entrances. In late 2012, council adopted an ordinance banning smoking on the Pearl Street Mall. In January 2014, a city manager rule banning smoking went into effect on the municipal campus and a second rule banned smoking in the area around Boulder High School in October 2014.

In early 2014, City Council reaffirmed the city's commitment to clean air and enjoyment of public spaces by directing city staff to develop a proposal that would eliminate the possibility of outdoor secondhand smoke in nearly all of the city's heavily used public gathering spaces and recreational facilities. At a study session on Jan. 28, 2014, council provided staff with general direction to develop a proposal to ban smoking in parks, on open space, and in other public places. In addition, council directed staff to do its best to ensure that the proposed smoking ban would be enforceable. Staff was directed to take a proposal to relevant boards and commissions before returning to council later in the year for consideration of the proposal.

The staff team responded to council's direction with a proposed ordinance that was then reviewed by a variety of city boards and commissions in the areas affected by the proposed ordinance. The staff proposal was discussed at a Sept. 23, 2014 council study session. After incorporating council feedback and requested changes, the draft ordinance contained the following key provisions:

1. Smoking was to be banned:

- on all city parkland;
- on all city open space;
- within 25 feet of all bus stops;
- on all multi-use paths and within 15 feet of their boundaries;
- on public property and right of ways within the boundaries of the downtown Business Improvement District; and

- in a defined area surrounding Boulder High School.

2. The definition of smoking was to include electronic smoking devices, including electronic cigarettes.

Following the study session, council received some public feedback indicating that electronic smoking devices should be exempted from the ban. Council requested that a second version of the ordinance, exempting electronic smoking devices, be prepared for consideration so that it might wait to make such a decision until the community had a chance to comment at a public hearing.

Council passed both versions of the ordinance at first reading on Nov. 18, 2014 – one including electronic smoking devices and one exempting the devices. There were no other questions from council at first reading. Council may decide whether to include or exclude electronic smoking devices after the staff presentation and public hearing on Feb. 3, 2015, or at third reading on Feb. 17, 2015.

The regulations prohibiting smoking have evolved and the implementation of these proposed changes will be monitored. Should impacts warrant consideration of additional changes in the future, such as the application of the prohibition to the University Hill General Improvement District, those changes will be vetted by the relevant boards and/or commissions and scheduled for council consideration.

For additional background, see the [Nov. 18, 2014 first reading memo](#).

## **ANALYSIS**

### *General Considerations*

Staff considered the different mechanisms to ban smoking in the desired areas. After internal discussions, it was clear that an ordinance was preferred over a city manager rule because ordinances are more easily enforceable by law enforcement personnel. An ordinance has a clear statute number for officers to remember. A city manager rule is enforced under a statute number that encompasses all city manager rules, but not any one rule specifically. An ordinance also carries more weight in court. For example, violations of an ordinance can result in jail time, but violations of a city manager rule cannot.

### *Electronic Smoking Devices*

Staff supports the inclusion of electronic smoking devices in the ordinance. 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. Electronic smoking devices may also be filled with substances other than nicotine, including marijuana, meth, and other illegal substances. These factors make enforcement challenging for police. The U.S. Food and Drug Administration has not yet provided any definitive guidance on electronic smoking devices, so consumers do not fully know the potential risks of their use. However, according to extensive secondary research by Boulder County Public Health

staff, the vapor has been proven to contain more than just water; it often includes harmful or potentially harmful chemicals. Many organizations are recommending regulating electronic smoking devices, including; the World Health Organization, the National Association of City and County Health Officials, the American Heart Association, the American Lung Association, and others.

In addition, there is the potential for children to associate the use of electronic smoking devices with a normative or healthy lifestyle. The use of electronic smoking devices in smoke-free locations also 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.

For more information on electronic smoking devices, see the attached fact sheets from the Boulder County Department of Public Health and California-based public health nonprofit ChangeLab Solutions (Attachment D).

#### *Open Space and Mountain Parks (OSMP)*

The recommended ordinance bans smoking on all OSMP properties, including trails, without exception. A lack of secondhand smoke will enhance the visitor experience and an absolute prohibition on smoking will help mitigate a potential fire hazard on OSMP properties. Designated public access points to OSMP currently provide the regulatory infrastructure necessary to notify users of the smoking ban.

#### *Parks and Recreation*

The recommended ordinance bans smoking in all city-owned, maintained, and leased park land, park property and recreation facilities, including Flatirons Golf Course and Chautauqua. The prohibition will also extend to leased facilities such as the Dairy Center for the Arts, Boulder History Museum, and Boulder Museum for Contemporary Art (BMoCA). Smoking is already banned inside these buildings and the ordinance will ban smoking across the entirety of the properties.

#### *Downtown*

The recommended ordinance bans smoking within the boundaries of the Business Improvement District (BID), including alleys. When Downtown Boulder Inc. surveyed its membership in June 2014, more than 60 percent of respondents supported the draft proposal. Anecdotally, it seems that the Pearl Street Mall smoking ban has been seen as a successful initiative.

#### *Multi-use Paths*

The recommended ordinance bans smoking on all [multi-use paths](#) and within 15 feet on each side of a multi-use path. Staff has determined that this is the most comprehensive way to enhance the path user experience, although there are a few factors to consider.

1. Some multi-use paths are also sidewalks, such as on the east side of 28<sup>th</sup> Street between Arapahoe Avenue and Pearl Street and on the north side of Arapahoe Avenue between Folsom and 55<sup>th</sup> streets. The city publicizes sidewalks designated as multi-use

paths on the [Map of Bike and Pedestrian Routes](#), [Map of Sidewalks for Biking and Skateboarding](#), and [Map of Boulder's Multi-Use Path Network](#). Additionally, these sidewalks are distinguished from regular sidewalks by signage.

2. Some stretches of multi-use paths are on University of Colorado (CU) property where the city has an easement. The university is currently a smoke-free campus, with only a few areas that allow smoking. Therefore, it is expected that CU will support the smoking ban on all multi-use paths. The city and CU have an intergovernmental agreement where city police can enforce local ordinances on CU (state-owned) property. Therefore, the city would be able to enforce this ordinance regardless of the property ownership rights associated with the location. The city has also general police powers granted by Colorado law to enforce its laws within the city boundaries, including the CU campus.

### *Transit Facilities*

The city is coordinating with the Regional Transportation District (RTD) regarding the proposed smoking ban. City staff's recommendation is to ban smoking within 25 feet of all transit passenger waiting areas, including bus stop benches and shelters. The ordinance presented and passed at first reading contains a typographical error; it prohibits smoking within 20 feet of a bus stop rather than the 25 feet council requested at the Sept. 23, 2014 study session. Staff recommends that council choose to amend the ordinance on second reading using the suggested motion language referencing Attachment C to this agenda memo.

RTD is generally supportive of a smoking ban around its bus stops, but would not support an ordinance that required RTD to create additional signage or enforce a smoking ban. RTD has a limited security force whose primary focus is to deal with safety and security on mass transportation vehicles.

With respect to existing RTD mass transportation vehicles, RTD public buildings, and within 15 feet of facility entryways, RTD has posted "No Smoking" signage in conformance with the Colorado Clean Indoor Air Act (state law C.R.S. 25-14-201, et seq.). RTD currently has no other smoking restrictions. Additionally, RTD has signs that designate the Boulder Transit Center at 14<sup>th</sup> and Walnut streets as a "No Smoking" zone and RTD informational signage within bus shelters also includes the international "No Smoking" symbol.

Transit-related amenities on public streets, such as benches and shelters, are not always under RTD control. Some of these amenities are maintained by local jurisdictions. Transit stop locations are designated by signage, and such signage is generally under the control of RTD. RTD recommends that additional signage be installed on these assets to assist with public information and enforcement of the smoking ban. RTD is amenable to allowing signage at its stops of a mutually agreeable size and in a mutually agreed-upon location. All new signage would be furnished, installed and maintained by the city. RTD would also want to review the size and placement of any new "No Smoking" signage produced by the city to ensure that the messages, along with RTD's existing signage regarding bus routes and services, are clearly visible. City staff is exploring a decal

displaying the international “No Smoking” symbol, supplemented by “within 25 feet” to install on RTD benches and shelters.

#### *Municipal Campus and Boulder High School Area Smoking Ban Rules*

The recommended ordinance makes permanent the prohibition against smoking on the Municipal Campus and the Boulder High School area, as established in existing city manager rules.

#### **STAFF RECOMMENDATION**

Staff recommends that council amend Ordinance 8015, which includes electronic smoking devices, at second reading in preparation for adoption at third reading. Staff recommends proceeding with the option that includes electronic smoking devices for the reasons listed below.

- The potential health effects, both for users and for secondhand inhalers, have not been fully studied so they cannot be assumed to be safe.
- Use of electronic smoking devices models vaporizing or smoking as normal behavior to young people.
- The nicotine cartridges used in electronic smoking devices come in many flavors that may be attractive to children and young people.
- Confusion could result for both the public and law enforcement personnel if the use of electronic smoking devices is allowed in areas where smoking is banned.
- Based on staff research, the emerging best practice in smoking bans is to also ban electronic smoking devices.

#### **NEXT STEPS**

If council amends an ordinance at second reading, the next steps will include:

- **Feb. 17, 2015:** Third reading on the consent agenda.
- **March 19, 2015:** The ordinance goes into effect.
- **November 2014 – March 2015:** City staff will work in cooperation with Boulder County Department of Public Health’s Tobacco Education and Prevention Program to develop smoking cessation messaging and prepare citywide outreach content for print and online media.
- **March 19 – April 30, 2015:** The public education campaign and warning period will occur. During this time period, the Boulder Police Department will focus its efforts on warnings; though officers may issue tickets, if necessary.
- **May 1, 2015:** The warning period will end and the Boulder Police Department will begin writing tickets more regularly. However, officers will continue to use their discretion and warnings may be more appropriate for first-time offenders.

- **April 2015:** Open Space and Mountain Parks staff will begin their seasonal outreach efforts.

## **ATTACHMENTS**

- **Attachment A** – Ordinance amending Chapter 6-4, B.R.C. 1981 (includes a ban on electronic smoking devices).
- **Attachment B** – Ordinance amending Chapter 6-4, B.R.C. 1981 (does not include a ban on electronic smoking devices).
- **Attachment C** – Proposed Alternative Ord. Language Correcting Scrivener’s Error
- **Attachment D** – Electronic Cigarette Fact Sheets from Boulder County Department of Public Health and ChangeLab Solutions.

ORDINANCE NO. 8015

AN ORDINANCE AMENDING CHAPTER 6-4, B.R.C. 1981, ADDING A NEW SECTION 6-4-3.5 “SMOKING PROHIBITED IN PUBLIC PLACES,” INCLUDING ELECTRONIC SMOKING DEVICES IN THE DEFINITION OF SMOKING, AND SETTING FORTH RELATED DETAILS.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BOULDER, COLORADO:

**Section 1.** Chapter 6-4, “Regulation of Smoking,” B.R.C. 1981, is amended as follows:

**6-4-1. Legislative Intent.**

The purpose of this chapter is to protect the public health, safety, and welfare by prohibiting smoking in designated public places and prohibiting smoking in buildings open to the public or serving as places of work, except in certain buildings or parts of buildings where the council has determined that smoking should not be prohibited, and fixing the requirements of property owners in this regard. ~~In addition,~~ this chapter also regulates access of minors to tobacco products.

In addition, the city council finds that electronic smoking devices are battery operated devices designed to deliver nicotine, flavor, and/or other substances through a vapor inhaled by the user and that use of electronic smoking devices has increased significantly in recent years. The city council further finds that 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.

City council finds that 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.

Therefore, the purpose of this chapter is also to protect the public health, safety, and welfare by discouraging the use of electronic smoking devices around non-users, especially children; by protecting the public from exposure to secondhand byproducts of electronic smoking devices where they live, work, and play; 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; and by reducing the potential for children to associate the use of electronic smoking devices with a normative or healthy lifestyle.

**6-4-2. Definitions.**

The following terms used in this chapter have the following meanings unless the context clearly indicates otherwise:

1 “Bar” means any indoor area that is operated and licensed as a tavern liquor license under Article  
2 47 of Title 12, C.R.S., primarily for the sale and service of alcohol beverages for on premises  
consumption and where the service of food is secondary to the consumption of such beverages.

3 “Boulder High School Area” means the entire area between the east curb line of Broadway  
4 Street, the south curb line of Arapahoe Avenue, the west curb line of 17<sup>th</sup> Street, and the north  
5 curb line of University Avenue, provided, however, that this definition shall not apply to the  
6 public right of way associated with Hillside Road, to moving vehicles traveling on any public  
7 right of way in the area described, or unless otherwise prohibited by this Chapter, to real property  
8 that is privately owned.

9 “Building” means any structure enclosed for protection from the weather, whether or not  
10 windows or doors are open. If a person leases or possesses only a portion of a building, the term  
11 “building” applies to the leasehold or possessory interest as well.

12 “City Municipal Campus,” as used in this Chapter shall mean the entire area between the east  
13 curb line of 13<sup>th</sup> Street, to the east curb line of 9<sup>th</sup> Street and between the north curb line of  
14 Arapahoe Avenue and the south curb line of Canyon Boulevard, provided, however, that this  
15 definition shall not apply to moving vehicles on Broadway or 13<sup>th</sup> Street or, unless otherwise  
16 prohibited by this Chapter, to real property that is privately owned.

17 “Cigar-tobacco bar” means a bar that, in the calendar year ending December 31, 2005, generated  
18 at least five percent or more of its total annual gross income or fifty thousand dollars in annual  
19 sales from both the onsite sale of tobacco products and the rental of onsite humidors. In any  
20 calendar year after December 31, 2005, a bar that fails to generate at least five percent of its total  
21 annual gross income or fifty thousand dollars in annual sales both from the onsite sale of tobacco  
22 products and the rental of onsite humidors, shall not be defined as a “cigar-tobacco bar” and shall  
23 not thereafter be included in the definition, regardless of sales figures.

24 “Dwelling,” as used in this chapter, means any place used primarily for sleeping overnight and  
25 conducting activities of daily living, not including a hotel or motel room or suite or bed and  
breakfast.

“Downtown Boulder Business Improvement District” is as depicted in Appendix 8-B of Chapter  
8-6.

“Electronic smoking device” means an electric or battery-operated device, the use of which  
resembles conventional smoking, which can be used to deliver substances, including, but not  
limited to, nicotine, tobacco, or marijuana, to the person using such device. Electronic smoking  
device shall include, without limitation, an electronic cigarette, cigar, cigarillo, pipe, or hookah.  
Electronic smoking device shall not include any product approved by the food and drug  
administration as a drug or medical device that is used in accordance with its purpose.

“Enclosed area,” as used in this chapter, means an area which contains a structure made up of a  
roof and two or more walls regardless of the composition of the walls or roof. This includes, but  
is not limited to, the following: park shelters, event tents, bus shelters, patio awnings and  
canopies.

1 “Entryway” means the outside of any doorway leading into and exiting from a building or  
2 enclosed area. “Entryway” also includes the area of public or private property within fifteen feet  
of the doorway.

3 “Mall” means the Downtown Boulder Mall as defined in Ordinance No. 4267, as amended by  
4 Ordinance No. 4543 and any successor ordinance.

5 “Public,” as used in this Chapter shall mean any property that is city owned; city maintained; city  
6 owned and leased to others; designated by the city as a path or trail for bicycles or pedestrians; or  
a transit stop as defined in this section.

7 “Public conveyance” means any motor vehicle or other means of conveyance licensed by the  
8 Public Utilities Commission of the state for the transportation of passengers for hire, and  
includes, without limitation, busses, taxicabs, limousine services, and airport passenger services.

9 “Smoke” or “smoking” means the lighting of any cigarette, cigar, ~~or~~, pipe or activation of an  
10 electronic smoking device, or the possession of any lighted cigarette, cigar, ~~or~~ pipe, or activated  
electronic smoking device regardless of its composition.

11 “Tobacco product” means cigarettes, cigars, cheroots, stogies, periques, and other products  
12 containing any measurable amount of tobacco, granulated, plug cut, crimp cut, ready rubbed, and  
other smoking tobacco, snuff, snuff flour, cavendish, plug and twist tobacco, fine-cut and other  
13 chewing tobaccos, shorts, refuse scraps, clippings, cuttings and sweepings of tobacco, and other  
kinds and forms of tobacco, prepared in such manner as to be suitable for both chewing or for  
14 smoking in a cigarette, pipe, electronic smoking device or otherwise, or both for chewing and  
smoking. Tobacco also includes cloves, marijuana, and any other plant matter or product that is  
15 packaged for smoking.

16 “Tobacco store” means a retail business open to the public where alcohol is not sold, if more  
17 than eighty-five percent of its gross revenue from that location is from the retail sale of cigarettes  
and tobacco products or products related to the use of cigarettes and tobacco products.

18 “Transit Stop,” as used in this chapter, means a public conveyance passenger waiting area  
19 designated by signage attached to a post and the public right of way around the stop, including  
but not limited to the bus shelter, and bench.

### 20 **6-4-3. Smoking Prohibited Within Buildings and Enclosed Areas.**

- 21 (a) No person shall smoke within any building or enclosed area except in one of the  
following locations:
- 22 (1) In any dwelling. This exception does not extend to a city owned dwelling;  
23 or a lobby, common elevator, common hallway or any other common area  
of a building containing attached dwelling units;
- 24 (2) In a hotel/motel room or bed and breakfast guest room rented to one or  
25 more guests if the total percentage of such smoking rooms in such  
hotel/motel or bed and breakfast does not exceed twenty-five percent. This

1 exception does not extend to a lobby, common elevator, common hallway  
2 or any other common area of a hotel/motel or bed and breakfast;

3 (3) In a tobacco store;

4 (4) In a cigar-tobacco bar which existed as of December 31, 2005, provided  
5 that it does not expand its size or change its location from the size and  
6 location in which it existed as of December 31, 2005;

7 (5) In a building or on property which is occupied by the state of Colorado,  
8 the United States government, Boulder County or the Boulder Valley  
9 School District which was not designated as a smoke free area by the  
10 manager of such area. The city council urges such governmental entities to  
11 designate smoke free areas in order to promote full access by the public  
12 and protect the health of employees;

13 (6) In private homes, private residences and private automobiles; not to  
14 include any such home, residence or vehicle being used for child care or  
15 day care or a private vehicle being used for the public transportation of  
16 children or as part of health care or day care transportation; or

17 (7) In a limousine under private hire.

18 (b) Unless excepted under subsection (a) of this section, the prohibitions of this  
19 chapter apply to all buildings or enclosed areas which serve as places of work, but  
20 this subsection (b) neither enlarges nor diminishes the meaning of subsection (a)  
21 of this section.

22 (c) Nothing in this chapter shall prevent an owner, lessee, principal manager or  
23 person in control of any place, including, without limitation, any motor vehicle,  
24 outdoor area or dwelling, from prohibiting smoking completely in such place, and  
25 no person shall fail to abide by such a private prohibition.

#### **6-4-3.5. Smoking Prohibited in Public Areas.**

No person shall smoke in a public area:

20 (a) in the Downtown Boulder Business Improvement District including the Mall;

21 (b) on any park, parkland or facility;

22 (c) on any open space and mountain parks property;

23 (d) on any trail, path or multi-use path and within fifteen feet of curtilage to any trail,  
24 path or multi-use path;

25 (e) within twenty-five feet of a library facility;

1           (f)     within twenty-feet of a transit stop;

2           (g)     within the City Municipal Campus; and

3           (h)     within the Boulder High School Area as defined in this Chapter.

4     ~~**6-4-5.5 Smoking Prohibited on the Mall.**~~

5     ~~No person shall smoke on the Mall.~~

6     **6-4-6. Signs Required to Be Posted.**

7     To advise persons of the existence of “No Smoking” or “Smoking Permitted” areas, no owner,  
8     lessee, principal manager or person in control of a building, enclosed area or an establishment  
9     within a building shall fail to post signs with letters no less than one inch high or symbols no less  
10    than three inches high as follows:

11           (1)     Where smoking is prohibited in the entire establishment, a sign using the words  
12           “No Smoking” or the international no-smoking symbol shall be posted  
13           conspicuously either on all public entrances or in a position clearly visible on  
14           entry into the building, enclosed area or establishment.

15           (2)     Where certain areas are designated as smoking areas pursuant to this chapter, a  
16           sign using the words “No Smoking Except in Designated Areas” shall be posted  
17           conspicuously either on all public entrances or in a position clearly visible on  
18           entry into the building or establishment.

19           (3)     In tobacco stores, a sign shall be posted conspicuously either on all public  
20           entrances or in a position clearly visible on entry into the building or  
21           establishment using the words “Smoking Permitted: children under eighteen years  
22           of age must be accompanied by a parent or guardian.”

23           (4)     A sign using the words “No Smoking within fifteen feet of the entryway” shall be  
24           posted conspicuously on all entryways of buildings, enclosed areas or  
25           establishments.

          (5)     The requirements of this section do not apply to an exempt dwelling or any public  
          areas designated in section 6-4-3.5.

**Section 2.** This ordinance is necessary to protect the public health, safety, and welfare of  
the residents of the city, and covers matters of local concern.

**Section 3.** The city council deems it appropriate that this ordinance be published by title  
only and orders that copies of this ordinance be made available in the office of the city clerk for  
public inspection and acquisition.

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INTRODUCED, READ ON FIRST READING, AND ORDERED PUBLISHED BY

TITLE ONLY this 18th day of November, 2014.

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Mayor

Attest:

\_\_\_\_\_  
City Clerk

READ ON SECOND READING, PASSED, ADOPTED, AND ORDERED  
PUBLISHED BY TITLE ONLY this 3rd day of February, 2015.

\_\_\_\_\_  
Mayor

Attest:

\_\_\_\_\_  
City Clerk

ORDINANCE NO. 8017

AN ORDINANCE AMENDING CHAPTER 6-4, B.R.C. 1981, ADDING A NEW SECTION 6-4-3.5 “SMOKING PROHIBITED IN PUBLIC PLACES,” AND SETTING FORTH RELATED DETAILS.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BOULDER, COLORADO:

**Section 1.** Chapter 6-4, “Regulation of Smoking,” B.R.C. 1981, is amended as follows:

**6-4-1. Legislative Intent.**

The purpose of this chapter is to protect the public health, safety, and welfare by prohibiting smoking in designated public places and prohibiting smoking in buildings open to the public or serving as places of work, except in certain buildings or parts of buildings where the council has determined that smoking should not be prohibited, and fixing the requirements of property owners in this regard. ~~In addition,~~ this chapter also regulates access of minors to tobacco products.

**6-4-2. Definitions.**

The following terms used in this chapter have the following meanings unless the context clearly indicates otherwise:

“Bar” means any indoor area that is operated and licensed as a tavern liquor license under Article 47 of Title 12, C.R.S., primarily for the sale and service of alcohol beverages for on premises consumption and where the service of food is secondary to the consumption of such beverages.

“Boulder High School Area” means the entire area between the east curb line of Broadway Street, the south curb line of Arapahoe Avenue, the west curb line of 17<sup>th</sup> Street, and the north curb line of University Avenue, provided, however, that this definition shall not apply to the public right of way associated with Hillside Road, to moving vehicles traveling on any public right of way in the area described, or unless otherwise prohibited by this Chapter, to real property that is privately owned.

“Building” means any structure enclosed for protection from the weather, whether or not windows or doors are open. If a person leases or possesses only a portion of a building, the term “building” applies to the leasehold or possessory interest as well.

“City Municipal Campus,” as used in this Chapter shall mean the entire area between the east curb line of 13<sup>th</sup> Street, to the east curb line of 9<sup>th</sup> Street and between the north curb line of Arapahoe Avenue and the south curb line of Canyon Boulevard, provided, however, that this definition shall not apply to moving vehicles on Broadway or 13<sup>th</sup> Street or, unless otherwise prohibited by this Chapter, to real property that is privately owned.

1 “Cigar-tobacco bar” means a bar that, in the calendar year ending December 31, 2005, generated  
2 at least five percent or more of its total annual gross income or fifty thousand dollars in annual  
3 sales from both the onsite sale of tobacco products and the rental of onsite humidors. In any  
4 calendar year after December 31, 2005, a bar that fails to generate at least five percent of its total  
5 annual gross income or fifty thousand dollars in annual sales both from the onsite sale of tobacco  
6 products and the rental of onsite humidors, shall not be defined as a “cigar-tobacco bar” and shall  
7 not thereafter be included in the definition, regardless of sales figures.

8 “Dwelling,” as used in this chapter, means any place used primarily for sleeping overnight and  
9 conducting activities of daily living, not including a hotel or motel room or suite or bed and  
10 breakfast.

11 “Downtown Boulder Business Improvement District” is as depicted in Appendix 8-B of Chapter  
12 8-6.

13 “Enclosed area,” as used in this chapter, means an area which contains a structure made up of a  
14 roof and two or more walls regardless of the composition of the walls or roof. This includes, but  
15 is not limited to, the following: park shelters, event tents, bus shelters, patio awnings and  
16 canopies.

17 “Entryway” means the outside of any doorway leading into and exiting from a building or  
18 enclosed area. “Entryway” also includes the area of public or private property within fifteen feet  
19 of the doorway.

20 “Mall” means the Downtown Boulder Mall as defined in Ordinance No. 4267, as amended by  
21 Ordinance No. 4543 and any successor ordinance.

22 “Public,” as used in this Chapter shall mean any property that is city owned; city maintained; city  
23 owned and leased to others; designated by the city as a path or trail for bicycles or pedestrians; or  
24 a transit stop as defined in this section.

25 “Public conveyance” means any motor vehicle or other means of conveyance licensed by the  
Public Utilities Commission of the state for the transportation of passengers for hire, and  
includes, without limitation, busses, taxicabs, limousine services, and airport passenger services.

“Smoke” or “smoking” means the lighting of any cigarette, cigar, pipe, or the possession of any  
lighted cigarette, cigar, or pipe, regardless of its composition.

“Tobacco product” means cigarettes, cigars, cheroots, stogies, periques, and other products  
containing any measurable amount of tobacco, granulated, plug cut, crimp cut, ready rubbed, and  
other smoking tobacco, snuff, snuff flour, cavendish, plug and twist tobacco, fine-cut and other  
chewing tobaccos, shorts, refuse scraps, clippings, cuttings and sweepings 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, or both for chewing and smoking. Tobacco also includes cloves,  
marijuana, and any other plant matter or product that is packaged for smoking.

1 “Tobacco store” means a retail business open to the public where alcohol is not sold, if more  
2 than eighty-five percent of its gross revenue from that location is from the retail sale of cigarettes  
and tobacco products or products related to the use of cigarettes and tobacco products.

3 “Transit Stop,” as used in this chapter, means a public conveyance passenger waiting area  
4 designated by signage attached to a post and the public right of way around the stop, including  
but not limited to the bus shelter, and bench.

5 **6-4-3. Smoking Prohibited Within Buildings and Enclosed Areas.**

6 (a) No person shall smoke within any building or enclosed area except in one of the  
7 following locations:

8 (1) In any dwelling. This exception does not extend to a city owned dwelling;  
or a lobby, common elevator, common hallway or any other common area  
9 of a building containing attached dwelling units;

10 (2) In a hotel/motel room or bed and breakfast guest room rented to one or  
11 more guests if the total percentage of such smoking rooms in such  
12 hotel/motel or bed and breakfast does not exceed twenty-five percent. This  
exception does not extend to a lobby, common elevator, common hallway  
or any other common area of a hotel/motel or bed and breakfast;

13 (3) In a tobacco store;

14 (4) In a cigar-tobacco bar which existed as of December 31, 2005, provided  
15 that it does not expand its size or change its location from the size and  
location in which it existed as of December 31, 2005;

16 (5) In a building or on property which is occupied by the state of Colorado,  
17 the United States government, Boulder County or the Boulder Valley  
18 School District which was not designated as a smoke free area by the  
manager of such area. The city council urges such governmental entities to  
19 designate smoke free areas in order to promote full access by the public  
and protect the health of employees;

20 (6) In private homes, private residences and private automobiles; not to  
21 include any such home, residence or vehicle being used for child care or  
day care or a private vehicle being used for the public transportation of  
children or as part of health care or day care transportation; or

22 (7) In a limousine under private hire.

23 (b) Unless excepted under subsection (a) of this section, the prohibitions of this  
24 chapter apply to all buildings or enclosed areas which serve as places of work, but  
25 this subsection (b) neither enlarges nor diminishes the meaning of subsection (a)  
of this section.

- 1 (c) Nothing in this chapter shall prevent an owner, lessee, principal manager or  
2 person in control of any place, including, without limitation, any motor vehicle,  
3 outdoor area or dwelling, from prohibiting smoking completely in such place, and  
4 no person shall fail to abide by such a private prohibition.

5 **6-4-3.5. Smoking Prohibited in Public Areas.**

6 No person shall smoke in a public area:

- 7 (a) in the Downtown Boulder Business Improvement District including the Mall;  
8 (b) on any park, parkland or facility;  
9 (c) on any open space and mountain parks property;  
10 (d) on any trail, path or multi-use path and within fifteen feet of curtilage to any trail,  
11 path or multi-use path;  
12 (e) within twenty-five feet of a library facility;  
13 (f) within twenty-feet of a transit stop;  
14 (g) within the City Municipal Campus; and  
15 (h) within the Boulder High School Area as defined in this Chapter.

16 **~~6-4-5.5 Smoking Prohibited on the Mall.~~**

17 ~~No person shall smoke on the Mall.~~

18 **6-4-6. Signs Required to Be Posted.**

19 To advise persons of the existence of “No Smoking” or “Smoking Permitted” areas, no owner,  
20 lessee, principal manager or person in control of a building, enclosed area or an establishment  
21 within a building shall fail to post signs with letters no less than one inch high or symbols no less  
22 than three inches high as follows:

- 23 (1) Where smoking is prohibited in the entire establishment, a sign using the words  
24 “No Smoking” or the international no-smoking symbol shall be posted  
25 conspicuously either on all public entrances or in a position clearly visible on  
entry into the building, enclosed area or establishment.
- (2) Where certain areas are designated as smoking areas pursuant to this chapter, a  
sign using the words “No Smoking Except in Designated Areas” shall be posted  
conspicuously either on all public entrances or in a position clearly visible on  
entry into the building or establishment.
- (3) In tobacco stores, a sign shall be posted conspicuously either on all public  
entrances or in a position clearly visible on entry into the building or

1 establishment using the words “Smoking Permitted: children under eighteen years  
2 of age must be accompanied by a parent or guardian.”

3 (4) A sign using the words “No Smoking within fifteen feet of the entryway” shall be  
4 posted conspicuously on all entryways of buildings, enclosed areas or  
5 establishments.

6 (5) The requirements of this section do not apply to an exempt dwelling or any public  
7 areas designated in section 6-4-3.5.

8 **Section 2.** This ordinance is necessary to protect the public health, safety, and welfare of  
9 the residents of the city, and covers matters of local concern.

10 **Section 3.** The city council deems it appropriate that this ordinance be published by title  
11 only and orders that copies of this ordinance be made available in the office of the city clerk for  
12 public inspection and acquisition.  
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INTRODUCED, READ ON FIRST READING, AND ORDERED PUBLISHED BY

TITLE ONLY this 18th day of November, 2014.

\_\_\_\_\_  
Mayor

Attest:

\_\_\_\_\_  
City Clerk

READ ON SECOND READING, PASSED, ADOPTED, AND ORDERED  
PUBLISHED BY TITLE ONLY this 3rd day of February, 2015.

\_\_\_\_\_  
Mayor

Attest:

\_\_\_\_\_  
City Clerk

**ATTACHMENT C  
Proposed Alternative Ord. Language  
Correcting Scrivener’s Error**

**If Council desires to change Section 6-4-3.5 (f) to prevent smoking within twenty-five feet of a transit stop, the following Motion language will amend that section as shown below. A second reading amendment requires the ordinance to have a third reading.**

Motion to amend on second reading Ordinance No. 8015 amending Chapter 6-4, B.R.C. 1981, adding a new section, 6-4-3.5 “Smoking Prohibited in Public Places,” including electronic smoking devices in the definition of smoking, incorporating the amendment made in Attachment C, and setting forth related details;

*Or in the alternative*

Motion to amend on second reading Ordinance 8017 amending Chapter 6-4, B.R.C. 1981, adding a new section, 6-4-3.5 “Smoking Prohibited in Public Places,” incorporating the amendment made in Attachment C, and setting forth related details.

**6-4-3.5. Smoking Prohibited in Public Areas.**

**No person shall smoke in a public area:**

- (a) in the Downtown Boulder Business Improvement District including the Mall;**
- (b) on any park, parkland or facility;**
- (c) on any open space and mountain parks property;**
- (d) on any trail, path or multi-use path and within fifteen feet of curtilage to any trail, path or multi-use path;**
- (e) within twenty-five feet of a library facility;**
- (f) within twenty-**five** feet of a transit stop;**
- (g) within the City Municipal Campus; and**
- (h) within the Boulder High School Area as defined in this Chapter.**

## Electronic Nicotine Delivery Systems (ENDS)

ENDS, including electronic cigarettes (i.e. e-cigarettes, or e-cigs) typically contain a battery-operated heating device that vaporizes a nicotine-containing solution, creating an aerosol that is then inhaled. They may be either disposable or refillable. Using ENDS is commonly referred to as vaping, and the aerosol is often referred to as vapor. Products come in over 7,000 flavors, including food and candy flavors, such as chocolate, strawberry, mint, and piña colada.



### HEALTH RISKS

The safety and efficacy of ENDS have not been fully studied, though the World Health Organization has determined that there is sufficient evidence for negative implications in brain development and cautions against use by children, youth, women of reproductive age, and pregnant women. These products are not considered to be safe or effective replacements for other tobacco products.

Recent studies have found that ENDS can contain as much nicotine as a regular cigarette – or more. The liquid nicotine solution is very toxic and can potentially be spilled onto skin or accidentally swallowed.

- Cartridges generally contain up to 20 mg of nicotine. The lethal dose of nicotine for small children is approximately 10 mg.

Consistency in the manufacturing of ENDS and e-juice or e-liquid is a concern. Inconsistencies that could impact health have been found, including differing levels of nicotine from one cartridge to another in the same product.

- U.S. Food and Drug Administration (FDA) analysis of ingredients in a small sample of cartridges from two leading brands found that one contained diethylene glycol, a toxic chemical used in antifreeze, and several others contained carcinogens, including nitrosamines.
- Some electronic devices claim to be nicotine-free. In tests of several of them, however, all but one had measurable levels of nicotine present.
- Refillable ENDS may make it possible to refill cartridges with liquid marijuana or other substances, including homemade e-liquids. Serious injuries have occurred when the devices were modified or filled with liquids that were not compatible with the heating element temperature.

## LAWS & REGULATIONS

E-cigarettes are not currently regulated by the FDA. They do not contain any health warnings comparable to FDA-approved nicotine replacement products or conventional cigarettes. It is illegal for youth under 18 to buy or possess them in Colorado; it is also illegal for adults to sell or give them to anyone under 18.

## AS NICOTINE REPLACEMENT THERAPY

Nicotine replacement therapy (NRT) is for temporary use as a smoking cessation aid. FDA-approved NRT exists in a variety of forms, including: dermal patches, gum, lozenges, and inhalers. These products all have standardized amounts of nicotine, and undergo rigorous quality control.

ENDS are marketed as a means to avoid discomfort from smoke-free laws, and to continue nicotine use in places where traditional smoking is not allowed. They are not subject to quality control requirements, and have been demonstrated to have wide variability across brands and products, including containing levels of nicotine significantly different from the labelled amount. Continuous exposure to nicotine deepens addiction, and makes quitting nicotine more difficult for current tobacco users. Watching someone else use ENDS has been found to trigger cravings in former smokers, and may increase relapse.

*“If large numbers of adult smokers become users of both traditional cigarettes and e-cigarettes — rather than using e-cigarettes to quit cigarettes completely — the net public health effect could be quite negative.” Dr. Tim McAfee, Director of the Office on Smoking and Health, Center for Disease Control and Prevention (CDC)*

## SECONDHAND AEROSOL

Aerosol from ENDS can contain nicotine, heavy metals, nitrosamines, and a variety of other chemicals and ultrafine particulates, depending on the liquid used and the temperature of the heating element. It dissipates faster than secondhand cigarette smoke, though exposure patterns are not well studied. One study has demonstrated that bystanders were exposed to the same level of nicotine as the user, through secondhand aerosol. Though it may be marketed as water vapor, ENDS aerosol has consistently been demonstrated to contain more than water.

## YOUTH

Unrestricted advertising, appealing flavors, messages of freedom, rebellion, and discretion, low prices, and ready availability have led to over a quarter of a million middle and high school students that had never smoked a cigarette using e-cigarettes in the United States in 2013. Of those, almost half reported that they intended to use conventional cigarettes in the next year, according to the CDC. Youth respond strongly to advertising, price, and behavior modeling from parents, peers, and community members.

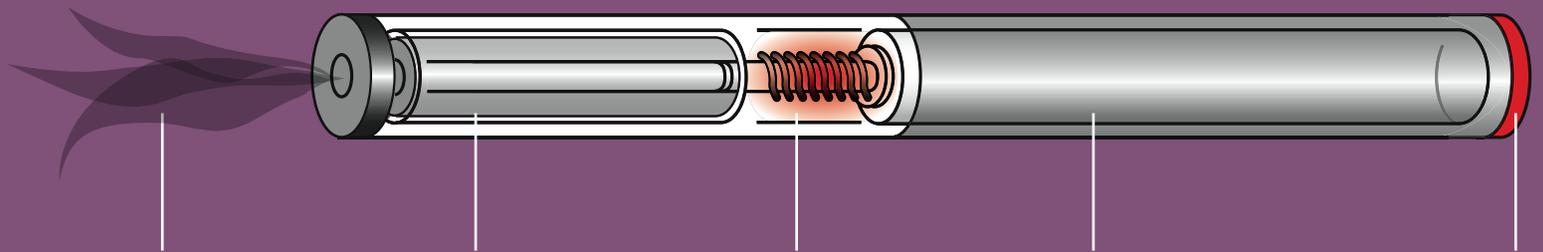
To learn more about ENDS, and other tobacco-related products and issues, please contact Boulder County Tobacco Education and Prevention Partnership (TEPP) staff at 303.413.7524.

# Regulating Toxic Vapor

## A Policy Guide to Electronic Smoking Devices

*This fact sheet provides information about the public health concerns related to electronic smoking devices, the steps that have been taken to regulate electronic smoking devices, and what additional measures communities can take to limit access to and the availability of electronic smoking devices.*

Electronic smoking devices (also known as “electronic cigarettes,” “e-cigarettes,” “electronic nicotine delivery systems,” “e-cigars,” “e-cigarillos,” “e-pipes,” “e-hookahs,” “hookah pens,” etc.) are battery operated devices often designed to look like and be used in a similar manner to conventional tobacco products.<sup>1</sup> Electronic smoking devices are used to inhale a vaporized liquid solution that frequently, though not always, contains nicotine. Because the liquid solution is converted into vapor, electronic smoking device use is sometimes referred to as “vaping,” rather than smoking. The increasing popularity of electronic smoking devices, combined with loopholes in some existing tobacco control laws, have the potential to renormalize tobacco use.<sup>2</sup>



**Vapor** is inhaled by the user and exhaled into the environment putting bystanders at risk of secondhand vapor exposure

**Cartridge** contains liquid that is converted into vapor  
*Note: This liquid often comes in flavors that are appealing to youth like chocolate or mint*

**Atomizer** creates vapor from the nicotine solution in the cartridge  
*Note: More recent designs have combined the atomizer and flavor cartridge*

**Battery** is often rechargeable, typically lithium-ion

**LED light** comes on during inhalation to mimic the glow of a traditional tobacco product

## Policy Rationales for Restricting the Availability & Use of Electronic Smoking Devices

### Hazardous Contents

Liquid solutions have addictive levels of nicotine sometimes 20 mg or higher<sup>3</sup> and contain potentially life-threatening carcinogens and toxic chemicals.<sup>4,5</sup> More than one study, including one conducted by the U.S. Food and Drug Administration (FDA), have found that electronic smoking devices contain a number of dangerous substances including tobacco-specific nitrosamines, which are human carcinogens;<sup>6</sup> tobacco-specific impurities suspected of being harmful to humans like anabasine, myosmine, and  $\beta$ -nicotyrine;<sup>7,8</sup> and inconsistent labeling of nicotine levels in electronic smoking device products.<sup>9,10</sup> In one instance, diethylene glycol, an ingredient used in antifreeze and toxic to humans, was found.<sup>11</sup>



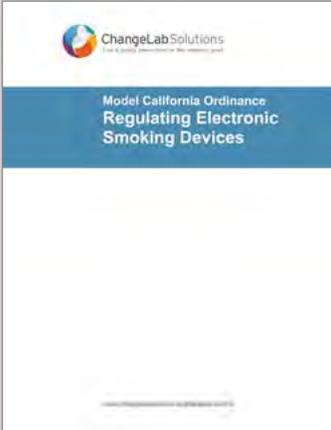
**ChangeLab Solutions**

Law & policy innovation for the common good.

This fact sheet includes information about model language ChangLab Solutions has developed to assist California cities and counties interested in regulating electronic smoking devices. ChangeLab Solutions’ model ordinances offer a variety of policy options that can be tailored to the specific goals and needs of a particular community. For more information, please visit [www.changelabsolutions.org/landing-page/model-policies](http://www.changelabsolutions.org/landing-page/model-policies).

While ChangeLab Solutions’ *Model California Ordinance Regulating Electronic Smoking Devices* was designed for

California communities, it can be adapted for use in other states. It is important to carefully review the existing law in your state, to understand the allowable regulations of other tobacco products, like electronic smoking devices. The best way to do this is to consult with an attorney licensed in your jurisdiction.



### Exposure to Secondhand Vapor

The composition of the vapor emitted by an electronic smoking device has been found to contain several carcinogens, such as formaldehyde, acetaldehyde, lead, nickel, and chromium.<sup>12,13,14</sup> Additionally, electronic smoking devices have been found to contain other hazardous substances such as PM<sub>2.5</sub>, acrolein, tin, toluene, and aluminum,<sup>15,16,17</sup> which are associated with a range of negative health effects such as skin, eye, and respiratory irritation,<sup>18,19,20,21</sup> neurological effects,<sup>22</sup> damage to reproductive systems,<sup>23</sup> and even premature death from heart attacks and stroke.<sup>24</sup>

Though the quantity of these harmful compounds contained in the vapor emitted by electronic smoking devices is often less than what is found in traditional cigarette smoke,<sup>25,26</sup> at least sodium, iron, aluminum, and nickel have been found in *higher* concentrations in emitted vapor than in cigarette smoke.<sup>27,28</sup>

This is especially troubling given that more than one peer reviewed study has concluded that exposure to vapor from an electronic smoking devices may cause passive or secondhand vaping.<sup>29,30,31</sup>

## Attachment D Electronic Cigarette Fact Sheets

### Rapid Growth in Popularity

There are over 400 brands of electronic smoking devices on the market.<sup>32</sup> Awareness levels of electronic smoking device products among the general population has increased dramatically, from between 40.8 and 44.1 percent in 2010, to 60.9 percent in 2011.<sup>33</sup> Further, the number of current smokers who have ever used an electronic smoking device more than doubled between 2010 and 2011, with 21.2 percent of current smokers reporting they have tried electronic smoking devices in 2011.<sup>34</sup>

### Youth Appeal

The increase in use of electronic smoking devices among youth grades 6 to 12 is troubling. In 2012, 6.8 percent of all youth between 6th and 12th grade reported trying electronic smoking devices and 10 percent of high school students have tried them.<sup>35</sup>

*Between 2011 and 2012, the percentage of all youth in grades 6 to 12 who had tried electronic smoking devices doubled.<sup>36</sup>*

The solutions used in electronic smoking devices are often made in tempting flavors like chocolate and mint and are promoted as being healthy and environmentally friendly,<sup>37</sup> making them especially alluring to youth.<sup>38</sup> Recent national analyses of electronic smoking device users have indicated that young adults tend to be more likely to have tried them,<sup>39</sup> and that the perception of electronic smoking devices among smokers is that they are a safe alternative to cigarettes.<sup>40</sup>

### Some Electronic Smoking Devices Do Not Contain Tobacco

While many electronic smoking devices contain nicotine, some devices claim to be 100 percent nicotine and tobacco free.

Determining which electronic smoking devices are truly nicotine free may be difficult for local tobacco control enforcement, given that manufacturers are not required to disclose the ingredients that make up the liquid solution used in electronic smoking devices. Further, product testing has revealed that the information and ingredients listed on the packaging of electronic smoking devices can be misleading or incorrect.<sup>41</sup>

In some cases, vapor lounges or individuals create their own liquid solutions, and there is no way to be sure these homemade solutions are properly labeled or even safe for consumption. For these reasons, local jurisdictions may wish to regulate all electronic smoking devices, whether or not they contain nicotine. If so, communities will need to craft their policies carefully to ensure that all the products they wish to regulate are adequately covered (see the section, *Policy Options for Regulating the Use & Sale of Electronic Smoking Devices*, on page 5).

**Renormalization of Tobacco Use**

As electronic smoking devices are used in places where tobacco products' use has previously been prohibited, such as workplaces, restaurants, and bars, and as marketing of electronic smoking devices expands into outlets where other tobacco products are prohibited such as television commercials,<sup>42</sup> electronic smoking devices have the potential to renormalize tobacco use. By encouraging experimentation with tobacco, especially among youth, electronic smoking devices have the potential to increase nicotine addiction among young people<sup>43</sup> and serve as a gateway to other tobacco products.<sup>44</sup>

**Lack of Regulations Ensuring Safety & Quality Control**

Electronic smoking devices have often been represented as a safe alternative to cigarettes. However, there are significant concerns about the safety of these products. For example, the vapor inhaled by electronic smoking device users often contains nicotine levels that are inconsistent with their labeling. Two separate studies found that the nicotine levels of two individual products from different manufacturers were over 20 percent higher than what their labeling indicated.<sup>45,46</sup>

Additionally, some cartridges can be refilled with liquid nicotine solution, creating the potential for exposure to dangerous concentrations of nicotine.<sup>47</sup> A recent analysis of

electronic smoking device refill liquids found that “[t]he bottles of e-liquid are dangerous as they contain up to 720 mg of nicotine,” which is a potentially lethal amount of nicotine.<sup>48</sup>

Analysis of reports of poisonings from electronic smoking devices finds that people are more likely to report adverse health effects when compared to traditional cigarettes.<sup>50</sup>

*Poisonings from electronic smoking devices have increased dramatically in the last three and half years from “one [a month] in September 2010 to 215 a month in February 2014.”<sup>49</sup>*

Clinical studies about the safety and efficacy of electronic smoking devices for their intended use have not been submitted to the FDA.<sup>51</sup> This means that consumers have no way of knowing whether electronic smoking devices are safe for their intended use, what types or concentrations of potentially harmful chemicals the products contain, and what dose of nicotine the products deliver.



**Public Health Support for the Regulation of Electronic Smoking Devices**

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.”<sup>52</sup> The World Medical Association has determined 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.”<sup>53</sup>

Moreover, the State of California’s Tobacco Education and Research Oversight Committee (TEROC) “opposes the use of [electronic smoking devices] in all areas where other tobacco products are banned.”<sup>54</sup>

## The Legal & Regulatory Landscape

In many places, electronic smoking devices are completely unregulated. However, there is a growing patchwork of laws throughout the U.S. that regulate how electronic smoking devices are sold and, in some cases, where they are used. Here is an overview of the laws governing electronic smoking devices, as of May 2014. The current gaps in regulation are highlighted and the policy options available to local governments are explained.

### At the Federal Level

As of February, 2014, the only existing federal restrictions on electronic smoking device use are as follows:

- The U.S. Department of Transportation interprets existing federal regulations against smoking on airplanes to apply to electronic smoking devices.<sup>55</sup>
- The U.S. Air Force and U.S. Navy have both stated that their existing regulations governing tobacco use will apply to electronic smoking devices.<sup>56,57</sup>

The 2009 Family Smoking Prevention and Tobacco Control Act (“the Tobacco Control Act”), which regulates the manufacturing and marketing of tobacco products, does not apply to electronic smoking devices, nor are electronic smoking devices subject to federal taxes. Therefore, no federal regulations currently exist for electronic smoking devices. There are also no federal regulatory standards for safety or quality control for electronic smoking devices before they can be sold to consumers. Under federal law, it is entirely legal to sell electronic smoking devices to children. Electronic smoking device advertisements are routinely seen on television, where conventional tobacco advertisements have not been seen for decades, and electronic smoking device manufacturers may freely introduce new products that have not been evaluated for safety.

### The FDA issues the “deeming rule”

On April 25, 2014, the FDA took a significant step toward regulating these products by releasing its proposed “deeming rule,” which would extend the agency’s regulatory authority to a variety of tobacco products, including electronic smoking devices.<sup>58</sup> Although the Tobacco Control Act does not explicitly list all tobacco products by name, Congress gave FDA authority to issue a regulation deeming that any or all tobacco products are covered by the Tobacco Control Act. If the proposed deeming rule is finalized, it would extend several provisions of the Tobacco Control Act to electronic smoking devices. These provisions include the federal prohibition on sales to minors, the federal prohibition on free sampling, federal warning label requirements, and the requirement that tobacco manufacturers register with the FDA and seek the agency’s review of new tobacco products.

## Attachment D Electronic Cigarette Fact Sheets

Until such time as the deeming rule is adopted, the FDA’s Center for Tobacco Products does not have authority to regulate the sale or use of electronic smoking devices as tobacco products. The FDA Center for Drug Evaluation and Research has limited authority to regulate electronic smoking devices as drugs or devices, but only if they are marketed for therapeutic purposes.<sup>59</sup>

*The popularity of electronic smoking devices has boomed, and calls to regulate them have increased at all jurisdictional levels.*

The FDA’s proposed deeming rule must go through a public notice and comment process before the agency can implement the rule, and the FDA will likely make changes to the rule in response to this process. Given the large volume of comments the agency has received, it will take at least a year, if not longer, for the FDA to implement the final rule. Thus, it is unclear when the FDA will release final regulations on electronic smoking devices.

### The Deeming Rule & Preemption

Many jurisdictions have questions about whether the FDA deeming rule would affect state or local laws. The proposed deeming rule makes clear that state and local governments can continue to adopt and enforce laws relating to tobacco product sales, use, distribution, and advertising (within constitutional limitations). According to the deeming rule, these state and local laws can be “in addition to, or more stringent, than the requirements of the Tobacco Control Act and its implementing regulations.”<sup>60</sup> For example, the deeming rule would not affect states’ and localities’ ability to pass laws regulating where electronic smoking devices can be used, taxing electronic smoking devices, or requiring retailers to obtain a local license to sell electronic smoking devices. The deeming rule does identify some areas where local and state action could be preempted if the rule is finalized as written, including laws relating to manufacturing standards and labeling.



### At the State Level

In California, it is illegal to sell or otherwise furnish an electronic smoking device to a person under 18 years of age. For purposes of this state law, an electronic device is defined as a device that can deliver a dose of nicotine to the user through a vaporized solution.<sup>61</sup> Local law enforcement agencies have the general authority to enforce this law under California Penal Code Section 830.1. Violators are subject to a fine of up to \$200 for a first violation; \$500 for a second violation; and \$1,000 for a third or subsequent violation.

The California smokefree workplace law, by contrast, does not expressly prohibit the use of electronic smoking devices in enclosed workplaces.<sup>62</sup>

## Local Policy Options for Regulating the Use & Sale of Electronic Smoking Devices

### Regulating Use

Because the California state smokefree workplace law does not expressly prohibit the use of electronic smoking devices in places covered by that law,<sup>63</sup> many California communities are interested in prohibiting electronic smoking device use wherever conventional smoking is already prohibited. As discussed, it has been found that electronic smoking device vapor contains a variety of substances that are known to be toxic or carcinogenic. When electronic smoking devices are used in public places, bystanders may be involuntarily exposed to those chemicals resulting from secondhand vapor.

There is also considerable concern that the use of electronic smoking devices in places that are covered by a smokefree air law hinders enforcement of those laws.<sup>64</sup> Certain types of electronic smoking devices are often hard to distinguish from conventional cigarettes, and the confusion that results from inconsistently allowing their use in places where smoking is prohibited could have a chilling effect on enforcement of those laws altogether.<sup>65</sup> Relaxed enforcement of smokefree air laws could open the door for people to smoke conventional tobacco products in violation of smokefree laws without fear of consequences. Allowing electronic smoking device use in places that are otherwise smokefree also bears the risk of “re-normalizing” tobacco use, giving the mistaken impression that electronic smoking devices are safe or healthy rather than simply “less dangerous” than conventional cigarettes.<sup>66</sup>

There are different ways for local governments to regulate electronic smoking device use. The most appropriate solution depends on whether there is an existing law in the jurisdiction that regulates smoking, and what the scope of any such law is.

### Attachment D Electronic Cigarette Fact Sheets

The first step in regulating electronic smoking device use is therefore to review your local laws that govern smoking. In some cases, electronic smoking devices may actually be covered by an existing smokefree law.

To determine whether electronic smoking devices are covered by an existing smokefree law, look to see if the ordinances definition of “smoke” is broad enough to cover vapor or aerosol, or if the definition of “smoking” expressly includes the use of electronic smoking devices, electronic cigarettes, electronic nicotine delivery systems, personal vaporizers, etc.

If it is determined that a jurisdiction’s existing smokefree air law already applies to electronic smoking devices, the next step is to determine if that law is being enforced. It’s possible that law enforcement may not be aware that the law applies to electronic smoking devices.

### Amending an existing smokefree air law

For California jurisdictions that already have a local smokefree air law, one way to address electronic smoking devices is to amend the definitions of “smoke” and “smoking” in the law to explicitly include “electronic smoking device vapor” and “electronic smoking device use.” For model definitions of “smoke” and “smoking” that cover electronic smoking devices, see ChangeLab

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*More than one peer reviewed study has concluded that exposure to vapor from a electronic smoking devices may cause passive or secondhand vaping.*<sup>67,68,69</sup>

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Solutions’ *Model Comprehensive Smokefree Places Ordinance*.<sup>70</sup> Advocates who take this approach should be mindful of the fact that opening up any law to add an amendment gives potential opponents the opportunity to weaken it. For example, opponents might try to narrow the scope of places where smoking is prohibited.

In California, many cities and counties have smokefree air laws that cover some outdoor areas, but do not cover indoor workplaces, which are smokefree under state law. If one of these cities were to amend its ordinance to cover electronic smoking devices merely by updating its definitions of “smoke” and “smoking”, it would still not cover electronic smoking device use in indoor workplaces because the change still only applies to those places covered by *local* law. For this reason, in addition to updating its definitions of “smoke” and “smoking”, the jurisdiction would also need to amend its local smokefree air law to expressly prohibit the use of electronic cigarettes in those places of employment covered by the state smokefree workplace law.

**Adopting a stand-alone law**

Another option is to pass a stand-alone law specifically to prohibit electronic smoking device use in any place where smoking is prohibited by law. The advantage of this approach is that it provides a catch-all to regulate electronic smoking device use in exactly the same way as conventional tobacco use, regardless of whether existing smokefree air laws are local, state, or federal, and would apply prospectively to any future smokefree air laws passed in that jurisdiction. This approach does not require any existing law to be amended, reducing the likelihood that opponents could use the opportunity to weaken or repeal it. For model language prohibiting electronic smoking device use in places where smoking is prohibited, see ChangeLab Solutions’ *Model California Ordinance Regulating Electronic Smoking Devices*.<sup>71</sup>

**Adopting a new smokefree air law & working with private companies**

Finally, there are some jurisdictions where there may not yet be a local smokefree air law. These jurisdictions are completely free to include electronic smoking devices in any smokefree air law drafted in the future.

It’s important to remember that many locations are also subject to voluntary smokefree policies created by individual property owners/managers or businesses. For example, the Starbucks Coffee Company prohibits smoking in all outdoor seating areas in its cafes.<sup>72</sup> Many hotel chains, such as Marriot and Westin, have also adopted policies to prohibit smoking entirely on their premises.<sup>73</sup> Private entities have a free hand to prohibit electronic smoking device use, and communities can work with them to develop or enhance such policies.

To help determine the most appropriate solution for a specific community to address electronic smoking device use, ChangeLab Solutions has developed a visual flow chart, which is available on our website at: [www.changelabsolutions.org/publications/e-cig-ord](http://www.changelabsolutions.org/publications/e-cig-ord).

**Regulating Sales**

In California, localities can regulate how electronic smoking devices are sold in a variety of ways, up to and including prohibiting the sale of electronic smoking devices altogether. In practice, when deciding precisely how to regulate electronic smoking devices, many jurisdictions seek to achieve consistency with existing laws governing conventional cigarettes and other tobacco products.

For example, jurisdictions may: prohibit the sale of electronic smoking devices to minors and require retailers to check ID; require retailers to keep electronic smoking device paraphernalia/ accessories behind the counter; and prohibit the distribution of free samples of electronic smoking devices.

*As of May 2014 “71 cities and counties in California [require] retailers to obtain a license to sell e-cigarettes.”<sup>74</sup>*

Any jurisdiction wishing to regulate sales of electronic smoking devices should first become familiar with the scope of existing laws regarding tobacco. It is possible that existing laws regulating tobacco sales (e.g. a local tobacco retailer licensing law) already apply to electronic smoking devices. To determine whether an existing sales restriction applies to electronic smoking devices, look to the definitions in the law (“tobacco,” “tobacco product,” etc.). In many cases, a law has a very inclusive definition of tobacco that includes all products that contain nicotine (and would therefore apply to electronic smoking devices that contain nicotine, or that are packaged with cartridges or e-liquid containing nicotine). In other cases, electronic smoking devices may be mentioned directly. If it is determined that existing tobacco laws in a jurisdiction already apply to electronic smoking devices, the next step is to determine if those laws are being enforced. It’s possible that law enforcement may not be aware that the law(s) apply to electronic smoking devices.

**Amending an existing tobacco retailer licensing law**

In cases where a local jurisdiction has an existing law governing tobacco sales that does not apply to electronic smoking devices, it is possible to amend that law to cover those products. One way to do this is to broaden the definitions of “tobacco product” and “tobacco paraphernalia,” to cover electronic smoking devices and their associated products, such as e-liquid. This can be done simply by referencing these products by name in the definitions.



For model definitions that cover electronic smoking devices in this way, contact ChangeLab Solutions for assistance.\* The advantage of this approach is that it is a simple way to uniformly and consistently apply a variety of tobacco laws to electronic smoking devices.

However, there are some reasons to be cautious with this approach. For example, opening up an existing law to the amendment process creates an opportunity for opponents of the law to limit the law's scope to (for instance) exempt certain types of products from the definition of "tobacco product" like new dissolvable tobacco or nicotine lozenges. This approach is also problematic in that it only affects the laws of the specific jurisdiction. If a city or county has a law prohibiting tobacco vending machines, and they amend the definition of "tobacco product" in their municipal code so that it includes electronic smoking devices, it would not address regulatory gaps at the state level, e.g. a state law like California's which prohibits self-service displays of tobacco products but does not prohibit self-service displays of electronic smoking devices.

**Adopting a stand-alone law**

In lieu of amending an existing tobacco retailer licensing law, a jurisdiction can adopt a stand-alone ordinance that regulates electronic smoking device in all the same ways that conventional tobacco products are regulated. For example, local governments can require retailers to check the ID of people who purchase electronic smoking device, prohibit self-service displays of electronic smoking devices, and prohibit retailers from giving out free samples to the public. Several states including California<sup>75</sup> have passed stand-alone laws that prohibit the sale of electronic smoking devices to minors. Many local governments in jurisdictions around the country have passed similar laws.<sup>76</sup> For communities that are interested in stand-alone laws such as these, see ChangeLab Solutions' *Model California Ordinance Regulating Electronic Smoking Devices* as a reference.<sup>77</sup>



**Adopting a new tobacco retailer licensing (TRL) law**

Local jurisdictions that don't already have a tobacco retailer licensing law might consider adopting one that covers both traditional tobacco products and electronic smoking devices and the various liquids sold with them as tobacco products and tobacco or smoking paraphernalia. Tobacco retailer licensing laws require retailers to abide by all applicable local, state and federal tobacco laws in order to maintain their license, and can contain a wide variety of additional conditions. For example, a TRL law may require retailers to agree not to sell electronic smoking devices to minors, to keep all electronic smoking devices behind the counter, or to agree not to give out electronic smoking device samples to prospective customers.

The advantage of including electronic smoking devices in a TRL law is that the requirements for tobacco retailing can be consistently applied to electronic smoking devices and other tobacco products in a uniform way, simplifying and streamlining enforcement. There are numerous city and county governments which have enacted TRL laws that apply to electronic smoking devices along with all other tobacco products.<sup>78</sup> For more information about tobacco retailer licensing, see *License to Kill? Tobacco Retailer Licensing as an Effective Enforcement Tool*, as well as ChangeLab Solutions' *Model Tobacco Retailer Licensing Ordinance*.<sup>79</sup>

\* Note, in some cases a jurisdiction may wish to regulate only those electronic smoking devices that contain nicotine or that can be used to deliver nicotine. This can be done by amending the definition of "tobacco product" to include all products containing nicotine that is either derived from tobacco or synthetically produced, and by changing the definition of tobacco or smoking-related "paraphernalia" to include devices that can be used to deliver a tobacco or nicotine product. For more on this approach, see ChangeLab Solutions' *Model Tobacco Retailer Licensing Ordinance* at: [www.changelabsolutions.org/publications/model-TRL-Ordinance](http://www.changelabsolutions.org/publications/model-TRL-Ordinance)

### Taxing Electronic Smoking Devices

Finally, it may be possible for state and/or local governments to levy taxes on electronic smoking devices. In most jurisdictions, electronic smoking devices are currently not taxed the way that cigarettes and other tobacco products are, and federal law does not preempt state or local governments from taxing electronic smoking devices.

Numerous studies have shown that one of the most clearly effective ways of reducing tobacco use, particularly among minors, is to increase the price of those products.<sup>80</sup> Not only do higher excise taxes on tobacco products lower rates of use, but they also create a source of revenue that can be used to offset health costs related to tobacco and to fund public health efforts.<sup>81</sup>

If there is not an existing state or local law that levies a tax on electronic smoking devices, it may be possible to enact one in order to bring taxes on these products more in line with the taxes on conventional cigarettes and/or other tobacco products. Policy questions that may arise include how to set the taxation rate given the many different forms in which electronic smoking devices and their components are sold, and whether the taxation rate should be lower than the rate for conventional tobacco products. Minnesota is the first state in the country to tax electronic smoking devices as a tobacco product. Although the law itself does not explicitly mention electronic smoking devices, the definition of “tobacco products” is broad enough to cover any product that contains or is derived from tobacco.<sup>82</sup> The Minnesota Department of Revenue has issued a notice clarifying that in its opinion the tobacco products tax applies to electronic smoking devices.<sup>83</sup> As of January 2014, several other states are considering this strategy, for example Delaware, Maine, Massachusetts, New Mexico, Oklahoma, and Utah.<sup>84</sup>

### How We Can Help

Additional materials related to electronic smoking devices are available on our [website](#) including our *Model California Ordinance Regulating Electronic Smoking Devices*.

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### Electronic Smoking Devices & the Minnesota Department of Revenue

In October, 2012, the Minnesota Department of Revenue clarified its position that the state’s tobacco products tax applies to electronic smoking devices. More specifically, the notice states that electronic smoking devices (or any components thereof) that contain nicotine constitute tobacco products under the assumption that all nicotine is derived from tobacco. Products containing nicotine that are not derived from tobacco are exempt from the tax; however, the burden is on the taxpayer to prove this to the department. Furthermore, the sales price of an entire electronic smoking device “kit” or package is subject to the tax unless a wholesaler sells the nicotine-containing component (such as a cartridge or liquid bottle) separately and can isolate the cost of the product.

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## Attachment D Electronic Cigarette Fact Sheets

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- <sup>59</sup> See *Sottera, Inc. v. FDA*, 627 F.3d 891 (D.C. Cir. 2010).
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- <sup>62</sup> California Labor Code § 6404.5.
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## Attachment D Electronic Cigarette Fact Sheets