

## Staff Report

**ENFORCEMENT OF E-CIGARETTE PROHIBITIONS**

April 14, 2015

In the fall of 2014, Council requested staff assessment of enforcement and constitutional issues potentially associated with enacting a new ordinance banning the use of electronic nicotine delivery devices in public places.

Currently, there are actions being considered at both the state and federal levels that would regulate alternative nicotine products or vapor products. While none of the considered state or federal actions would prohibit public use of these devices, there does seem to be an effort to better define the risk associated with nicotine vapors, additives, and the consequences of exposure. With broader discussion of this information, it seems likely there will be greater public acceptance of reasonable regulations.

Enforcement

When the Council establishes a new ordinance, there is typically an enforcement strategy or an enforcement authority identified. In 2001, Ames adopted an ordinance creating a new chapter 21A, Smoking in Public Places, which was to be enforced by the Ames Police Department. When the State legislature passed the statewide regulation of smoking in public places, they very intentionally dedicated the enforcement role to the Iowa Department of Public Health. This seems to reflect the widespread recognition that smoking was primarily a health issue and the use of sworn law enforcement was a potential mismatch between the law enforcement skill set and the nature of the issues being addressed by the legislation. By using the Health Department as the enforcement agent, the State strengthened the educational focus of The Smokefree Air Act. At the local level, however, these responsibilities often default back to the police department in the absence of a health department or health inspector.

Law Enforcement resources are typically most effective when a majority of the public accepts both the rationale for a law and the need for enforcement. When a law makes common public behavior into a violation, enforcement actions become more difficult and can erode the community relationship. For example, at the time Ames first established Non Smoking areas, there had been widespread and consistent public education about smoking and the risk associated with secondhand smoke. **If local regulation is adopted, the enforcement would most likely fall to the Ames Police Department. While officers would be able to do some education, the Police Department does not have the kind of public health education infrastructure that was used in the implementation of the Smokefree Air Act.**

## Constitutional Issues

The main constitutional concern in enacting local regulation prohibiting the use of these products in public places is possible preemption by State law. The Ames ordinance prohibiting smoking in public places enacted in 2001 was challenged by a group of local restaurant and bar owners and appealed to the Iowa Supreme Court. The Supreme Court held that the City was preempted from establishing more stringent standards on smoking in public places than those established by State law. This is due to the fact that the previous State code regulations on smoking included a provision on uniform application. The former section 142B.6 specifically provided that, “the provisions of [Chapter 142B, Smoking Prohibitions] shall supersede any local law or regulation which is inconsistent with or conflicts with the provisions of this [c]hapter.” The Court found that the City’s ordinance conflicted with a former section of that chapter; thus, finding that the State law preempted the City from enacting the 2001 ordinance.

In 2008, the State legislature enacted a new chapter regulating smoking, Chapter 142D, The Smokefree Air Act, which repealed Chapter 142B, Smoking Prohibitions. In this new legislation, the State chose to eliminate the provision on uniform application. Although the State does not regulate alternative nicotine products and vapor products in the new chapter, the legislature also made recent amendments to Chapter 453A, Cigarette and Tobacco Taxes, in 2014, addressing regulation of certain aspects related to these types of products. The amendment: (1) establishes an age requirement for the use and possession of these products; (2) requires distributors, wholesalers, vendors, and retailers to obtain a permit to sell or distribute these products; (3) limits the product placement of these devices; and (4) restricts the places where the products can be given away. Chapter 453A includes the same provision on uniform application as the repealed 142B.

Given that Chapter 453A includes the same provision on uniform application as 142B, a court would likely find, as in the previous Supreme Court case, that the City is preempted from enacting local regulations on alternative nicotine products and vapor products, at least to the extent the regulation pertains to (1) age restrictions; (2) permitting requirements; (3) taxation; and (4) product placement. **However, since Chapter 453A does not address regulations related to prohibiting the use of these products in public places and The Smokefree Air Act does not include a provision on uniform application, the City is likely not preempted from enacting local regulation on this specific issue.**