

ORDINANCE NO. 2010-08-___

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MCKINNEY, TEXAS, AMENDING CHAPTER 70, ARTICLE VII, "SMOKING," THE CODE OF ORDINANCES OF THE CITY OF MCKINNEY RELATIVE TO RESTRICTED SUBSTANCES; PROVIDING DEFINITIONS; PROVIDING A PURPOSE; RESTRICTING THE SALE, DELIVERY, OFFER, OR GIFT OF RESTRICTED SUBSTANCES; RESTRICTING THE USE OR POSSESSION OF RESTRICTED SMOKING MATERIAL; RESTRICTING THE USE OR POSSESSION OF RESTRICTED SMOKING PARAPHERNALIA; PROVIDING DEFENSES TO PROSECUTION; ESTABLISHING A PENALTY; PROVIDING FOR THE REPEAL OF CONFLICTING ORDINANCES; PROVIDING A SEVERABILITY CLAUSE; PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, the City Council of the City of McKinney, Texas ("City Council"), has been provided with documentation from competent, well recognized medical professionals and law enforcement officials of the growing presence of a new and potentially dangerous substance affecting the public health, safety and welfare of the citizens, particularly the youth of the City of McKinney ("City"); and

WHEREAS, in response to these warnings, the City Council has secured information indicating that this threat is presented in the form of retail products sold or distributed as a mixture of dried vegetation that when covered or mixed with certain specific chemicals, produces the physiological and psychological effects of a controlled substance such as marijuana; and

WHEREAS, such substances are competently reported to cause hallucinations, vomiting, agitation, panic attacks, tachycardia, elevated blood pressure, pallor, numbness and tingling, disorientation, loss of time awareness and, in some cases, tremors and seizures as documented by the National Drug Intelligence Center of the United States Department of Justice in EWS Report 000006 issued May 18, 2010; and

WHEREAS, the medical evidence and treatment response and documentation of these symptoms and events have been confirmed by Doctor Anthony J. Scalzo, the Medical Director of the State of Missouri Poison Control Center in Special Newsletter Alert, Volume 4, Issue 1, 2010, issued by the Missouri Poison Control Center to the medical community; and

WHEREAS, the substances identified above are considered to be generally described as synthetic cannabinoids or salvia divinorum (collectively referred to as "Substances") which may be distributed, sold and marketed under such names as "K-2", "K-2 SUMMIT", "K-2 SEX", "GENIE", "DASCENTS", "ZOHAI". "SAGE", "SPICE", "KO KNOCK-OUT 2", "SPICE GOLD",

"SPICE DIAMOND", "YUCATAN FIRE", "SOLAR FLARE". "PEP SPICE", "FIRE N' ICE", and "SALVIA DIVINORUM," among others; and

WHEREAS, the Substances have not yet been designated as controlled substances under the laws of the State of Texas or under the laws of the United States; and

WHEREAS, the Substances may be marketed as incense, but are commonly being used as an alternative to marijuana which is an identified and documented controlled substance, the sale and use of which is prohibited under the laws of the State of Texas and the United States; and

WHEREAS, the synthetic cannabinoids may be presented under a variety of street names but share common ingredients, including JWH-01 8 and JWH-073; and

WHEREAS, salvia divinorum contains the ingredient known as Salvinorin A; and

WHEREAS, these unregulated Substances produce a very potent, intoxicating effect which is estimated by the medical community to produce effects ranging from three to one hundred times greater and more potent than tetrahydrocannabinol ("THC"), the active ingredient in marijuana; and

WHEREAS, the Substances manifest all of the demonstrated attributes of substances that deprive individuals of judgment, coordination and the ability to conduct themselves in a safe and appropriate manner in modern society; and

WHEREAS, the available medical and law enforcement information on these Substances indicates that individuals under the effects of these Substances may be a clear and present danger to themselves and others; and

WHEREAS, it is anticipated that the Texas Legislature will consider appropriate regulation of these type of commodities in its upcoming legislative session, but that it is essential for the City to impose some type of reasonable restriction on these products until a state-wide regulatory system may be properly implemented; and

WHEREAS, the risk posed by these substances creates a danger to the public health and safety that must be immediately addressed by the adoption of a local ordinance to protect the interests of the citizens of McKinney, Texas; **NOW, THEREFORE,**

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MCKINNEY, TEXAS:

SECTION 1. All of the above premises are found to be true and correct and are incorporated into the body of this Ordinance as if copied in their entirety.

SECTION 2. Chapter 70, Article VII, "Smoking," of the Code of Ordinances of the City of McKinney is hereby amended, in part, as follows:

"DIVISION I. Generally

Secs. 70-175 – 70-179. - Reserved.

DIVISION II. Tobacco Products

Sec. 70-180. - Smokeless tobacco.

A person commits an offense if he uses or expectorates any smokeless tobacco product in any of the following indoor or enclosed areas: all buildings owned, operated or managed by the city in which public business is conducted or public activities occur whether or not the business or activity requires direct participation, observation, or no participation by the general public.

Sec. 70-181. - Places where smoking is prohibited.

(a) Smoking shall be prohibited in most public places and enclosed places of employment within the city, including, but not limited to, the following places:

- (1) Within any enclosed facility within all places of employment and/or within any enclosed area available to and customarily used by the general public in all businesses, including but not limited to, retail stores, offices, banks, laundry mats, warehouses, manufacturing facilities, leasing centers, food establishments and restaurants, including private club restaurants, and country clubs, except where specifically provided for in section 70-182(a), below;
- (2) Hotels and motels, except as provided for in section 70-182(a)(8), below;
- (3) Buses, bus terminals, taxicabs, airports and other facilities and means of public transit, as well as ticket, boarding, and waiting areas of public transit depots;
- (4) Movie theaters, drama and recital theaters, lecture halls, galleries, libraries, museums, conference centers, meeting rooms, and outdoor amphitheaters;
- (5) In or within 25 feet of sports stadiums, stadium seating, ticketing, queuing, and waiting areas, concession stands, and restrooms, whether public or

private;

- (6) In public parks, including but not limited to public recreation fields, pools, children's playground equipment, concession stands, and restrooms, except as provided for in section 70-182(a)(5), below;
- (7) Waiting rooms, hallways, wards, private and semiprivate rooms of physical and mental health facilities, including, but not limited to, hospitals, clinics, physical therapy facilities, doctors' offices, and dentists' offices;
- (8) Lobbies, hallways, and other common areas in apartment buildings, condominiums, trailer parks, retirement facilities, nursing homes, and other multiple-unit residential facilities;
- (9) Elevators;
- (10) Restrooms, lobbies, reception areas, hallways and any other common-use areas;
- (11) Service lines and waiting queues, whether indoor or outdoor;
- (12) Polling places;
- (13) Every room, chamber, place of meeting or public assembly, including school buildings under the control of any board, council, commission, committee, including joint committees, or agencies of the city or any political subdivision of the state during such time as a public meeting is in progress, to the extent such place is subject to the jurisdiction of the city; and
- (14) Within 25 feet of any door, operable window/vent or other opening to an indoor enclosed area.

Sec. 70-182. - Places where smoking is not prohibited.

(a) Notwithstanding any other provision of this Division II to the contrary, the following areas shall not be subject to the smoking restrictions of this Division II:

- (1) Private residences, including porch and yard areas, except when used as a child care, adult day care, health care facility, or home occupation;
- (2) Personal automobiles;
- (3) Outdoor places of employment, except where employees have to provide the public with service such as food or beverage service, within 25 feet of any door, operable window/vent or other opening to an indoor enclosed

area, service lines and waiting queues, or as prohibited in section 70-181(a), above;

- (4) Public sidewalks, except within 25 feet of any door, operable window/vent or other opening to an indoor enclosed area, service lines and waiting queues, or as prohibited in section 70-181(a), above;
- (5) Parking lots within public parks, except within 25 feet of any door, operable window/vent or other opening to an indoor enclosed area, service lines and waiting queues, or as prohibited in section 70-181(a), above;
- (6) Retail tobacco stores, where a retail store is utilized primarily for the sale of tobacco products and accessories and in which the sale of other products is merely incidental. Separate ventilation and HVAC systems that prevent the commingling of air with other businesses, common areas, hallways and other non-smoking areas shall be required;
- (7) Enclosed areas within private clubs that are not customarily used by or accessible to the general public may be designated as a smoking room for the use of tobacco products, subject to the following definitions and requirements:
 - a. For purposes of section 70-182, "private club" shall mean any club wherein:
 - i. The membership is not open to the general public; and
 - ii. The club's land and improvements are owned or controlled by the members, where "controlled by" shall mean through a long term lease or other managing interest in real property such as may commonly be found in private country clubs or fraternal organizations.
 - b. For purposes of section 70-175, "private club" shall not mean a private club restaurant as defined in the Zoning Ordinance of the City of McKinney or by Texas Alcoholic Beverage Commission.
 - c. Smoking rooms shall meet all of the following physical and operational standards:
 - i. Smoking rooms shall be required to post signs at the entrance to the room that state "Smoking Room, Members Only";

- ii. Smoking rooms shall be required to provide a foyer with two doors separating the smoking and non-smoking areas;
 - iii. Smoking rooms shall be required to provide separate ventilation and HVAC systems that prevent the commingling of air with any other part of the private club; and
 - iv. Smoking rooms shall be separate from the private country club's banquet or dining areas, bar or lounge areas, employee areas, kitchens, retail and pro shop areas, locker rooms, restrooms, other common areas, hallways, and other non-smoking areas and shall not be operated with food or beverage service except in a self-serve manner.
- (8) Not more than ten percent of hotel and motel rooms rented to guests shall be designated as smoking rooms. The following standards shall apply:
- a. All smoking rooms shall be on the same floor, shall be contiguous to the other smoking rooms and shall be configured and ventilated in a manner to restrict the smoke from these rooms from infiltrating into areas where smoking is prohibited under provisions of this Division II;
 - b. Separate ventilation and HVAC systems that prevent the commingling of air with other rooms, hallways and all other non-smoking areas shall be required; and
 - c. The status of rooms as smoking or nonsmoking may not be changed, except to add additional nonsmoking rooms.

Sec. 70-183. - Posting of signs.

- (a) The owner, manager or other person having control of such building or premise where smoking is prohibited by this Division II shall have a conspicuously posted sign clearly stating "No Smoking" at each entrance, whether for the public, employees or deliveries, and at restroom entrances.
- (b) Such "No Smoking" signs shall have bold lettering of not less than one inch in height. The international "No Smoking" symbol may also be used (consisting of a pictorial representation of a burning cigarette enclosed in a red circle with red bar across it).
- (c) Any owner, manager, or other person having control of any establishment regulated by this Division II shall be responsible for posting appropriate signage.

Sec. 70-184. - Enforcement.

- (a) Enforcement of this Division II shall be implemented by the city manager or his/her designee by issuance of a citation.
- (b) It is the duty of the owner, manager, operator or person-in-charge of any establishment regulated by this Division II:
 - (1) To post signs in accordance with section 70-183 of this Division II;
 - (2) To not provide ashtrays, matches, lighters or other smoking related paraphernalia in a regulated premise;
 - (3) To advise a person who violates this Division II that smoking is not allowed; and
 - (4) To request a person remove themselves from this location after that person has been advised that smoking is not allowed and that person willfully continues to smoke.

Sec. 70-185. - Offenses and penalties.

- (a) It shall be unlawful for any person to smoke in any area where smoking is prohibited by the provisions of this Division II.
- (b) It shall be unlawful for any person who owns, manages, operates or otherwise controls the use of any premises subject to regulation under this Division II to fail to comply with the following sections and subsections of this Division II:
 - (1) Section 70-184(b); and
 - (2) Sections 70-185(a) and 70-185(b).
- (c) Any person who violates any provision of this Division II shall be guilty of a misdemeanor infraction, punishable by a fine not to exceed \$500.00.
- (d) Every act in violation shall constitute a separate offense.
- (e) Unless otherwise specifically set forth herein allegation and evidence of culpable mental state are not required for the proof of an offense of this Division II.

Secs. 70-186 - 70-189. - Reserved.

DIVISION III. Other Prohibited Substances.

Sec. 70-190. - Definitions

Restricted Smoking Material shall mean any substance, however marketed, which can reasonably be converted for smoking purposes whether it is presented as incense, tobacco, herbs, spices or any blend thereof if it includes any of the following chemicals or a comparable chemical:

- (1) Salvia divinorum or salvinorin A; all parts of the plant presently classified botanically as salvia divinorum, whether growing or not, the seeds thereof, any extract from any part of such plant, and every compound, manufacture, salts, derivative, mixture or preparation of such plant, its seeds or extracts;
- (2) 2-[(1R,3S)-3-hydroxycyclohexyl]-5-(2-methyloctan-2-yl)phenol (also known as CP47,497) and homologues;
- (3) (6aS,10aS)-9-(hydroxymethyl)-6,6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c]chromen-1-ol (also known as HU-211 or Dexanabinol);
- (4) 1-pentyl-3-(1-naphthoyl)indole (also known as JWH-018);
- (5) 1-butyl-3-(1-naphthoyl)indole (also known as JWH-073); or
- (6) 1-pentyl-3-(4-methoxynaphthoyl)indole (also known as JWH-081).

Products containing some or all of the above substances are currently being marketed under the following commercial names:

“K-2”, “K-2 SUMMIT”, “K-2 SEX”, “GENIE”, “DASCENTS”, “ZOHAI”, “SAGE”, “SPICE”, “KO KNOCK-OUT 2”, “SPICE GOLD”, “SPICE DIAMOND”, “YUCATAN FIRE”, “SOLAR FLARE”, “PEP SPICE”, “FIRE N’ ICE”, AND “SALVIA DIVINORUM”.

Any product containing any of the chemical compounds set forth above shall be subject to the provisions of this Ordinance, regardless of whether they are marketed under alternative names.

Restricted Smoking Material Paraphernalia shall mean any paraphernalia, equipment or utensil that is used or intended to be used in ingesting or inhaling illegal smoking materials and may include:

- (1) A metal, wooden, acrylic, glass, stone, plastic, or ceramic pipe with or without a screen, permanent screen, hashish head, or punctured metal bowl;
- (2) A water pipe;
- (3) A carburetion tube or device;
- (4) A smoking or carburetion mask;
- (5) A chamber pipe;
- (6) A carburetor pipe;
- (7) An electric pipe;
- (8) An air-driven pipe;
- (9) A chillum;
- (10) A bong; or
- (11) An ice pipe or chiller.

Sec. 70-191. - Restricted Smoking Materials: Purpose.

The purpose of this Division III is to prohibit the sale or delivery of restricted smoking materials as defined within the city limits of the City of McKinney, Texas, and to prohibit the possession of restricted smoking materials within the city limits of the City of McKinney. Any form of delivery to include a simple gift constitutes a violation of this Division III.

Sec. 70-192. - Sale, Delivery, Offer, or Gift.

It shall be unlawful for any person to sell, offer to sell, deliver to or to give any restricted smoking material to any person.

Sec. 70-193. - Use or Possession of Restricted Smoking Material.

It shall be unlawful for any person to have in their possession or to use restricted smoking materials within the corporate limits of the City of McKinney.

Sec. 70-194. - Use or Possession of Restricted Smoking Paraphernalia:

It shall be unlawful for any person to have in their possession any restricted smoking paraphernalia with the intent to use it, to ingest, inhale or otherwise

consume restricted smoking material. It is a violation of this Section, if a person is found in possession of restricted smoking paraphernalia and appropriate forensic testing is done on the paraphernalia showing traces of restricted smoking material are present on the restricted smoking paraphernalia.

Sec. 70-195. - Defenses to Prosecution.

(a) It shall be a defense to prosecution for a violation of this Division III if the use of the restricted smoking material is at the direction or under a prescription issued by a licensed physician or dentist authorized to prescribe controlled substances within the State of Texas.

(b) It shall be a defense to prosecution under the terms of this Division III if an individual charged with a violation can provide proper and complete historic documentation that the use of such materials is a portion of a religious undertaking or activity of a religious denomination in which they have long standing historic membership supported by documentation from clergy or spiritual leader recognized by the State of Texas.

Sec. 70-196. - Offenses and Penalties.

(a) Any person who violates any provision of this Division III shall be guilty of a misdemeanor infraction, punishable by a fine not to exceed \$500.00.

(b) Every act in violation of this Division III shall constitute a separate offense.

(c) Unless otherwise specifically set forth herein allegation and evidence of culpable mental state are not required for the proof of an offense of this Division III.

Secs. 70-197 - 70-199. - Reserved."

Section 3. Any person, firm or corporation who violates any section of Article VII, "Smoking," of Chapter 70 of the Code of Ordinances of the City of McKinney, Texas, as so amended, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined any sum not in excess of \$2,000.00, and assessed court costs as provided by law.

Section 4. This Ordinance shall be cumulative of all other ordinances of the City and shall not repeal any of the provisions of said ordinances except in those instances where provisions of those ordinances are in direct conflict with the provisions of this Ordinance and such ordinances shall remain intact and are hereby ratified, verified and affirmed.

Section 5. If any section, article, paragraph, sentence, clause, phrase or word in this Ordinance, or application thereof to any person or circumstance, is held invalid or unconstitutional by a court of competent jurisdiction, such

holding shall not affect the validity of the remaining portions of the Ordinance, and the City Council hereby declares it would have passed such remaining portions of the Ordinance despite such invalidity, which remaining portions shall remain in full force and effect.

Section 6. This Ordinance shall become effective from and after the date of its final passage and publication as provided by law, and it is accordingly so ordained.

The caption of this ordinance shall be published one (1) time in a newspaper having general circulation in the City of McKinney, Texas, and shall become effective _____, 2010.

DULY PASSED AND APPROVED BY THE CITY COUNCIL OF THE CITY OF MCKINNEY, TEXAS ON THE _____ DAY OF _____, 2010.

CITY OF MCKINNEY, TEXAS

BRIAN LOUGHMILLER, Mayor

CORRECTLY ENROLLED:

SANDY HART, TRMC, MMC
City Secretary

DATE: _____

APPROVED AS TO FORM:

MARK S. HOUSER
City Attorney