

Legistar #

130679

DRAFT 102014

ORDINANCE NO: 130679

1
2 **An ordinance of the City of Gainesville, Florida amending the**
3 **City Code of Ordinances related to smoking and the use of**
4 **nicotine dispensing devices; by repealing the provisions of**
5 **Chapter 11.5 that are preempted by state law and adopting**
6 **new provisions in Chapter 11.5 to regulate the use of nicotine**
7 **dispensing devices; amending the definition of “smoke or**
8 **smoking” in Section 11.5-40; adding a penalty provision to**
9 **Section 2-339; providing directions to the codifier; providing a**
10 **severability clause; providing a repealing clause; and**
11 **providing an immediate effective date.**
12

13 **WHEREAS,** electronic cigarettes, also known as e-cigarettes, are battery-powered
14 products that permit users to inhale vaporized nicotine, flavor, and other chemicals, without
15 fire, smoke, ash or carbon dioxide; and

16 **WHEREAS,** most electronic cigarettes and other nicotine dispensing devices
17 (hereinafter referred to collectively as "electronic cigarettes") are manufactured to resemble
18 cigarettes, cigars or pipes, but some are manufactured to resemble pens and Universal Serial
19 Bus (USB) memory sticks; and

20 **WHEREAS,** sales of electronic cigarettes have grown rapidly in the United States,
21 and after doubling every year since 2008, sales in 2013 were projected to reach \$1.7 billion; and

22 **WHEREAS,** consumers are led to believe that electronic cigarettes are a safe alternative
23 to traditional cigarettes, despite the fact that most electronic cigarettes contain nicotine and have
24 the potential to be addictive; and

25 **WHEREAS,** there is no federal regulatory oversight ensuring the safety of the
26 ingredients in electronic cigarettes; and

DRAFT 102014

1 **WHEREAS**, the National Association of Attorneys General issued a letter to the
2 Commissioner of the United States Food & Drug Administration (FDA) urging the FDA
3 to immediately regulate the sale and advertising of electronic cigarettes; and

4 **WHEREAS**, the letter was signed by 42 attorneys general, including Florida Attorney
5 General Pam Bondi; and

6 **WHEREAS**, in 2002, Florida voters approved an amendment to the Florida
7 Constitution that:

8 1. Prohibited smoking of lighted tobacco products in enclosed workplaces with
9 certain exceptions; and

10 2. Authorized the Legislature to enact implementing legislation, Article X, Section
11 20 of the Florida Constitution; and

12 **WHEREAS**, to implement the constitutional amendment, during Special Session A in
13 2003, the Florida Legislature enacted House Bill 63A (Chapter 2003-398, Laws of Florida),
14 which substantially amended the Florida Clean Indoor Air Act to prohibit a person from smoking
15 lighted tobacco products in an enclosed indoor workplace, while drastically reducing exceptions
16 contained in the prior version; and

17 **WHEREAS**, the exceptions where smoking lighted tobacco products is still permitted
18 include, among others, the following:

19 1. Custom smoking rooms in airport in-transit lounges meeting certain criteria;

20 2. Private residences not being used commercially to provide child care, adult care or
21 health care;

22 3. Designated smoking guest rooms at public lodging establishments; and

DRAFT 102014

1 4. Stand-alone bars devoted predominantly or totally to serving alcohol, and in which
2 the serving of food, if any, is merely incidental to the consumption of alcoholic
3 beverages; and

4 **WHEREAS**, the term "smoking" was defined in both the constitutional amendment and
5 Chapter 2003-398 to mean inhaling, exhaling, burning, carrying, or possessing any "lighted
6 tobacco product," including cigarettes, cigars, pipe tobacco, and any other lighted tobacco
7 product; and

8 **WHEREAS**, Chapter 2003-398 expressly preempted regulation of smoking lighted
9 tobacco products to the state and superseded any municipal or county ordinance on the
10 subject; and

11 **WHEREAS**, electronic cigarettes are not "lighted" the way a cigarette is ignited with a
12 match; and

13 **WHEREAS**, instead, electronic cigarettes function by heating into a vapor a liquid
14 consisting of tobacco, nicotine, flavored water or other chemicals; and

15 **WHEREAS**, while electronic cigarettes typically (though not always) contain nicotine,
16 electronic cigarettes usually do not contain tobacco; and

17 **WHEREAS**, for these reasons, electronic cigarettes do not fall within the state law
18 prohibition on a person smoking a "lighted tobacco product" in an enclosed indoor workplace;
19 and

20 **WHEREAS**, in addition, electronic cigarettes do not fall within the state preemption of
21 local regulation of smoking a "lighted tobacco product" in an enclosed indoor workplace; and

DRAFT 102014

1 **WHEREAS**, the City has received multiple complaints regarding the use of electronic
2 cigarettes within enclosed indoor workplaces within the City; and

3 **WHEREAS**, concerns have been raised as to the safety, health and environmental
4 effects of the vapor emitted from electronic cigarettes, both to the persons using electronic
5 cigarettes and to people in the surrounding area who may have to breathe the vapor emitted from
6 electronic cigarettes secondhand; and

7 **WHEREAS**, it is difficult to determine which electronic cigarettes are emitting
8 nicotine and carcinogens and which are simply emitting a flavored vapor, but in either case,
9 the contents of the vapors are unknown and unregulated, thereby causing concern by
10 those in close proximity to the person using the electronic cigarette as to the health
11 risks; and

12 **WHEREAS**, the Florida Legislature enacted Senate Bill 224 (Chapter 2014-65, Laws of
13 Florida) prohibiting the delivery and/or possession of nicotine dispensing devices and nicotine
14 products by minors, without preempting additional regulations by municipalities; and

15 **WHEREAS**, for the reasons set forth above, the City Commission desires to prohibit
16 the use of electronic cigarettes and other nicotine dispensing devices in enclosed indoor
17 workplaces to the same extent that the smoking of lighted tobacco products is prohibited by the
18 Florida Clean Indoor Air Act and the City Commission desires to repeal the provisions of the
19 City code that are now preempted to the state.

20 **WHEREAS**, it is the intent of the Commission to prohibit the use of electronic
21 cigarettes and other nicotine dispensing devices in any enclosed indoor work place in

DRAFT 102014

1 a manner consistent with the state law prohibition on the use of lighted tobacco
2 products under the Florida Clean Indoor Air Act, and

3 **WHEREAS**, the City desires to prohibit the use of nicotine dispensing devices
4 at a city facility and Regional Transit System bus stops and bus shelters to the same
5 extent that smoking is prohibited.

6 **NOW, THEREFORE, BE IT RESOLVED BY THE CITY COMMISSION OF**
7 **THE CITY OF GAINESVILLE, FLORIDA:**

8 **Section 1.** Article II. Clean Indoor Air of Chapter 11.5 of the City Code is
9 repealed in its entirety as follows:

10 ~~Sec. 11.5-16. Title.~~

11 ~~This article regulating smoking in government buildings and in certain private~~
12 ~~establishments where the public is invited, shall be known as the Clean Indoor Air~~
13 ~~Ordinance of 1984.~~

14 ~~Sec. 11.5-17. Purpose and intent.~~

15 ~~(a) The smoking of tobacco, or any other weed or plant, is a positive danger to health~~
16 ~~and is a material annoyance, inconvenience, discomfort, and health hazard to those who~~
17 ~~are present in confined spaces, and in order to serve the public health, safety and welfare,~~
18 ~~the declared purpose and intent of this article is to prohibit smoking in public areas~~
19 ~~where the public is invited to frequent and confined nonpublic work spaces of~~
20 ~~government buildings and in public areas and in confined nonpublic work spaces of~~
21 ~~privately owned buildings.~~

DRAFT 102014

1 ~~(b) Even though a "no smoking" sign is not posted in areas and spaces regulated by~~
2 ~~this article, it is expressly implied and the public shall take notice that no smoking is~~
3 ~~permitted in such regulated areas and spaces. Smoking in indoor public spaces or~~
4 ~~facilities as well as confined nonpublic work spaces is therefore allowed only if a sign is~~
5 ~~posted indicating that smoking is permitted in a specified area or areas.~~

6 ~~(c) In view of the foregoing implied notice, a person who endeavors to enforce the~~
7 ~~provisions of this article shall first advise a person believed to be in violation hereof of~~
8 ~~the prohibitions of this article and to thereafter request that person to extinguish the~~
9 ~~smoking materials being used by that person.~~

10 ~~Sec. 11.5-18. Definitions~~

11 ~~The following words, terms and phrases, when used in this article, shall have the~~
12 ~~meanings ascribed to them in this section, except where the context clearly indicates a~~
13 ~~different meaning:~~

14 ~~*Confined nonpublic work space* shall mean any nonpublic indoor work area which~~
15 ~~physically shares the same uninterrupted ceiling space and ventilation.~~

16 ~~*Confined space* shall mean any indoor area which physically shares the same~~
17 ~~uninterrupted ceiling space and ventilation.~~

18 ~~*Employee* shall mean any person who employed by any employer in consideration for~~
19 ~~direct or indirect monetary wages or profits.~~

20 ~~*Employer* shall mean any person who employs the services of an individual person.~~

DRAFT 102014

1 ~~Government-owned and/or operated building shall mean any and all buildings~~
2 ~~intended for human occupancy owned, rented or operated by any federal, state or local~~
3 ~~government entity.~~

4 ~~Place of employment shall mean any enclosed indoor area under the control of a~~
5 ~~public or private employer which employees normally frequent during the course of~~
6 ~~employment including, but not limited to, work areas, employee lounges, conference~~
7 ~~rooms and employee cafeterias. A building or portion thereof used as a private residence~~
8 ~~is not considered a "place of employment" for the purposes of this article.~~

9 ~~Privately owned and/or operated building shall mean any and all buildings intended~~
10 ~~for human occupancy which are not government buildings as defined in this section.~~

11 ~~Public area shall mean any enclosed indoor area to which the general public may~~
12 ~~enter without expressed invitation or permission even though entrance may require the~~
13 ~~purchase of a ticket for admission but shall not include a private dwelling. This definition~~
14 ~~applies, but is not limited to, retail stores, retail service establishments, retail food~~
15 ~~production and marketing establishments, restaurants, theaters, waiting rooms, reception~~
16 ~~areas, educational facilities, health facilities, public transportation facilities, and all~~
17 ~~government and private buildings.~~

18 ~~Separate as used in section 11.5-20(a) shall mean not a part of the nonsmoking area~~
19 ~~and distinct from that area.~~

20 ~~Smoke or smoking shall mean the intake and exhalation by a person of smoke from~~
21 ~~tobacco, a tobacco substitute or other weed or plant, and also possessing, carrying,~~

DRAFT 102014

1 ~~holding or otherwise having control of a lighted pipe, cigar, cigarette or other lighted~~
2 ~~smoking equipment.~~

3 ~~*Work station* shall mean that desk, table or other piece of furniture or piece of~~
4 ~~machinery or other device at which an employee performs work for which he/she~~
5 ~~receives direct or indirect monetary wages or profits from his/her employer.~~

6 ~~Sec. 11.5-19. Smoking— Prohibited in specified areas.~~

7 ~~It shall be unlawful for any person to smoke in any area where smoking is prohibited.~~

8 ~~Sec. 11.5-20. Same— In government owned and/or operated buildings.~~

9 ~~In government owned and/or operated buildings, smoking shall be prohibited as~~
10 ~~follows:~~

11 ~~(1) *Public areas.* Except as provided in this article, smoking is prohibited in public~~
12 ~~areas of government owned and/or operated buildings. At the discretion of the~~
13 ~~governmental agency responsible for each government building, separate smoking~~
14 ~~areas of not more than 33 percent of public floor area may be designated. These~~
15 ~~areas must be plainly identified through the posting of appropriate signs.~~

16 ~~(2) *Confined nonpublic work spaces.* Except as hereinafter provided, smoking is~~
17 ~~prohibited in nonpublic work spaces of government owned and/or operated~~
18 ~~buildings. Each governmental agency responsible for government owned and/or—~~
19 ~~operated buildings shall adopt, implement and maintain a written smoking policy~~
20 ~~which shall contain at a minimum the following provisions and requirements:~~

21 ~~a.— Smoking is prohibited in confined nonpublic work spaces of government—~~
22 ~~owned and/or operated buildings except as follows:~~

DRAFT 102014

1. ~~An employee may request a "smoking permitted" area around his/her confined nonpublic work space. Using already available means of ventilation or separation or partition of office space, the employer shall attempt to reach reasonable accommodations, insofar as possible, to provide a "smoking permitted" area that is not objectionable to any other employees with work stations in the same combined nonpublic work space. The employer shall attempt to reach reasonable accommodations, insofar as possible, between the preference of those objecting to the "smoking permitted" designated area and those not objecting. However, the employer is not required by this article to make any expenditures or structural changes to accommodate the respective preferences in attempting to provide a "smoking permitted" designated area.~~

2. ~~If an accommodation which is satisfactory to all employees objecting to the "smoking permitted" designated area cannot be reached in any confined nonpublic work space, the preferences of those objecting to smoking shall prevail, and the employer shall not allow a "smoking permitted" area at all in that confined nonpublic work space. Where the employer permits smoking in a confined work space, the area in which smoking is permitted shall be clearly demarcated and posted with signs indicating the area in which smoking is permitted.~~

b. ~~The governmental agency responsible for each publicly owned and/or operated building shall announce the smoking policy in each such building to all employees working in the confined nonpublic work spaces in the city and~~

DRAFT 102014

1 notice of the smoking policy shall be posted conspicuously in all confined
2 nonpublic work spaces under each employer's jurisdiction. Where a smoking
3 policy has not been timely adopted and conspicuously posted, it shall be
4 presumed for the purposes of this article that smoking is prohibited
5 everywhere in the affected building.

6 ~~Sec. 11.5-21. Same~~ In privately owned and/or operated buildings.

7 In privately owned and/or operated buildings, smoking shall be prohibited as follows:

8 (1) ~~Public areas.~~ Except as provided in this article, smoking is prohibited in public
9 areas of privately owned and/or operated buildings. At the discretion of the
10 private agency, responsible for operating the facility, public smoking areas not to
11 exceed sixty-seven (67) percent of the total public area may be designated and
12 plainly identified with signs in public areas of privately owned and/or operated
13 buildings.

14 (2) ~~Confined nonpublic work spaces.~~ Except as provided in this article, smoking is
15 prohibited in confined nonpublic work spaces of privately owned and/or operated
16 buildings. Each private agency responsible for privately owned and/or operated
17 buildings shall adopt, implement and maintain a written smoking policy which
18 shall contain at a minimum the following provisions and requirements:

19 a. Smoking is prohibited in confined nonpublic work spaces of privately owned
20 and/or operated buildings except as follows:

21 1. Any employee may request a "smoking permitted" area around his/her
22 confined nonpublic workspace. Using already available means of

DRAFT 102014

1 ~~ventilation or separation or partition of office space, the employer shall~~
2 ~~attempt to reach reasonable accommodations, insofar as possible, to~~
3 ~~provide a "smoking permitted" area that is not objectionable to any other~~
4 ~~employees with work stations in the same confined nonpublic work space.~~
5 ~~The employer shall attempt to reach reasonable accommodations, insofar~~
6 ~~as possible, between the preferences of those objecting to the "smoking~~
7 ~~permitted" designated area and those not objecting. However, the~~
8 ~~employer is not required by this article to make any expenditures or~~
9 ~~structural changes to accommodate the respective preferences in~~
10 ~~attempting to provide a "smoking permitted" designated area.~~

11 2. ~~If an accommodation which is satisfactory to all employees objecting to~~
12 ~~the "smoking permitted" designated area cannot be reached in any~~
13 ~~confined nonpublic work space, the preferences of those objecting to~~
14 ~~smoking shall prevail, and the employer shall not allow a "smoking~~
15 ~~permitted" area at all in that confined nonpublic work space. Where the~~
16 ~~employer permits smoking in a confined nonpublic work space, the area in~~
17 ~~which smoking is permitted shall be clearly demarcated and posted with~~
18 ~~signs indicating the area in which smoking is permitted.~~

19 b. ~~The private agency responsible for each privately owned and/or operated~~
20 ~~building shall announce the smoking policy in each such building to all~~
21 ~~employees working in the confined nonpublic work spaces in the city, and~~
22 ~~notice of the smoking policy shall be posted conspicuously in all confined~~

DRAFT 102014

1 ~~nonpublic work spaces under each employer's jurisdiction. Where a smoking~~
2 ~~policy has not been timely adopted and conspicuously posted, it shall be~~
3 ~~presumed for the purposes of this article that smoking is prohibited~~
4 ~~everywhere in the affected building.~~

5 ~~Sec. 11.5-22. Where smoking not regulated.~~

6 ~~This article is not intended to regulate smoking in the following places and under the~~
7 ~~following conditions within the city:~~

8 ~~(1) A private residence even though a portion or all of the residence may serve as a~~
9 ~~workplace;~~

10 ~~(2) Areas which are specifically and properly designated as smoking areas in~~
11 ~~accordance with this article;~~

12 ~~(3) Unless otherwise prohibited, an entire room or hall during the time it is used for a~~
13 ~~private social function, providing that the person in responsible charge of the~~
14 ~~room or hall designates all or part of the area for smoking during that time and~~
15 ~~posts appropriate signs indicating that smoking is permitted;~~

16 ~~(4) Performers on stage in a theatrical production, provided that the smoking is a part~~
17 ~~of that theatrical production.~~

18 ~~Sec. 11.5-23. Exemptions.~~

19 ~~The following establishments may permit smoking throughout public areas and~~
20 ~~confined nonpublic work spaces provided that they post "Smoking Permitted" signs on all~~
21 ~~entrances thereto:~~

DRAFT 102014

1 ~~(1) Bars or establishments deriving greater than fifty one (51) percent of their gross~~
2 ~~income from the sale of alcoholic beverages;~~

3 ~~(2) Any restaurant with a seating capacity of fifty (50) or less patrons;~~

4 ~~(3) Retail stores with a ventilated floor space not exceeding two thousand five~~
5 ~~hundred (2,500) square feet;~~

6 ~~(4) Confined nonpublic work spaces where all persons normally occupying the area~~
7 ~~affirmatively consent to smoking by others.~~

8 ~~Sec. 11.5-24. Establishments permitting smoking in more than half of area to provide~~
9 ~~public notice.~~

10 ~~In any building to which the public is invited, if more than fifty (50) percent of the~~
11 ~~public area within the establishment is designated as a smoking area, notice to the public~~
12 ~~shall be conspicuously posted in accordance with this article at all entrances normally~~
13 ~~used by the public.~~

14 ~~Sec. 11.5-25. Posting of signs.~~

15 ~~(a) The agency in charge of any government-owned and/or-operated building or any~~
16 ~~privately owned and/or-operated building shall conspicuously post or cause to be~~
17 ~~posted, in any area designated as a smoking area, signs stating that smoking is~~
18 ~~permitted in such an area. Such signs shall clearly delineate the boundaries of~~
19 ~~such area.~~

20 ~~(b) Each sign posted pursuant to this section shall have letters at least four (4) inches~~
21 ~~high with the principal strokes of letters not less than one-half inch wide. The~~

DRAFT 102014

1 color, design and precise place of posting of such signs shall be left to the
2 discretion of the agency in charge of the premises.

3 (c) In order to increase public awareness, the agency in charge of the premises may,
4 as its discretion also post "No Smoking" or "No Smoking Except in Designated
5 Areas" signs as appropriate.

6 ~~Sec. 11.5-26. Violations.~~

7 Any person who violates any of the provisions of this article shall be subject to
8 punishment as provided in section 1-9 of this Code. The city manager, or his/her
9 designee, in enforcing the provisions of this article shall proceed as follows:

10 (1) In view of the implied notice provision contained in section 11.5-17, a person
11 believed to be in violation of this article shall first be advised of the prohibitions
12 hereof and thereafter be requested to cease the alleged prohibited activity. If such
13 person refuses to cease such activity, prosecutorial action shall then be initiated.

14 (2) In the case of flagrant or repeated violations of this article after notice as outlined
15 in this section, the person responsible for or allowing the violation shall be
16 prosecuted for a violation of this Code as provided in section 1-9

17 **Section 2.** A new Article II. Clean Indoor Air is adopted and made a part of Chapter 11.5
18 of the City Code as follows:

19 **Sec. 11.5-16 Purpose and intent**

20 It is the purpose and intent of this article to limit the use of nicotine dispensing devices to
21 the areas where the use of lighted tobacco products is allowed pursuant to state law.

DRAFT 102014

1 Regulation of where the smoking of lighted tobacco products is allowed is preempted to
2 the State in Section 386.209, Florida Statutes, and the delivery to and possession of nicotine
3 dispensing devices by a minor is prohibited in Section 877.112, Florida Statutes. However,
4 regulation of where the use of nicotine dispensing devices by adults is allowed is not preempted
5 to the State. The city finds that it is in the best interest of the public health, safety and welfare to
6 further regulate the use of nicotine dispensing devices within the city.

7 **Sec. 11.5-17. Definitions**

8 For the purpose of this article, the following words and terms shall have the meanings
9 given herein:

10 *Liquid nicotine* means any liquid product composed either in whole or part of pure
11 nicotine and other substances and manufactured for use with nicotine dispensing devices.

12 *Nicotine dispensing device* means any nicotine dispensing device as defined in
13 Section 877.112, Florida Statutes.

14 *Nicotine product* means nicotine product as defined in Section 877.112, Florida
15 Statutes.

16 *Smoking* means smoking as defined in Section 386.203, Florida Statutes.

17 *Use of a nicotine dispensing device* means the activation, heating or ignition of a
18 nicotine dispensing device which creates a vapor of liquid nicotine and/or other
19 substances which the user can inhale in simulation of smoking.

20 **Sec. 11.5-18. Use of a nicotine dispensing device where smoking prohibited; penalty.**

- 21 1. The use of a nicotine dispensing device is prohibited at all locations within the
22 city at which smoking is prohibited under Chapter 386, Florida Statutes.

DRAFT 102014

1 2. Any person violating any of the provisions of this article shall be subject to the
2 penalties of section 2-339.

3 **Section 3.** Section 11.5-40 within Article IV. Restriction of Outdoor Smoking at a City
4 Facility and at RTS Bus Stops and Bus Shelters is amended as follows:

5 **Sec. 11.5-40. - Definitions.**

6 *Bus and vehicle* shall mean a bus or motor vehicle operated by RTS for the purpose of
7 transporting passengers.

8 *Bus shelter* shall mean any designated place, characterized by a roofed or partially
9 roofed structure, where a RTS bus stops to pick up or let off passengers.

10 *Bus stop* shall mean any designated place where a RTS bus stops to pick up or let off
11 passengers. Bus stops may be designated by the placement of a sign or bench.

12 *Smoke or smoking* shall mean the intake and exhalation by a person of smoke from
13 tobacco, a tobacco substitute or other weed or plant, and also possessing, carrying,
14 holding or otherwise having control of a lighted pipe, cigar, cigarette or other lighted
15 smoking equipment. In addition, for purposes of this article, smoke or smoking shall
16 include the use of a nicotine dispensing device as defined in Section 11.5-17.

17
18 **Section 4.** Section 2-339 of the Code of Ordinances is amended to add the following
19 penalty. Except as amended herein the remainder of Section 2-339 remains in full force and
20 effect:

Section	Description	Class	Penalty
<u>11.5-18</u>	<u>Use of a nicotine dispensing device where smoking prohibited</u>	<u>II</u>	<u>\$75.00</u>

DRAFT 102014

1

2 **Section 5.** It is the intention of the City Commission that the provisions of Sections 1, 2
3 and 3 of this Ordinance shall become and be made a part of the Code of Ordinances of the City
4 of Gainesville, Florida, and that the sections and paragraphs of this Ordinance may be
5 renumbered or relettered in order to accomplish such intentions.

6 **Section 6.** If any word, phrase, clause, paragraph, section or provision of this ordinance
7 or the application hereof to any person or circumstance is held invalid or unconstitutional, such
8 finding shall not affect the other provisions or applications of the ordinance which can be given
9 effect without the invalid or unconstitutional provisions or application, and to this end the
10 provisions of this ordinance are declared severable.

11 **Section 7.** All ordinances or parts of ordinances, in conflict herewith are to the extent of
12 such conflict hereby repealed.

13 **Section 8.** This ordinance shall become effective immediately upon final adoption.

14 PASSED AND ADOPTED this ____ day of _____, 2014.

15

16

17

EDWARD B. BRADDY
MAYOR

18

19 ATTEST:

Approved as to form and legality

20

21

22

23

KURT M. LANNON
CLERK OF THE COMMISSION

NICOLLE M. SHALLEY
CITY ATTORNEY