

EDINA'S FLAVORED TOBACCO PRODUCTS POLICY

A Case Study



On June 16, 2020, Edina – a suburb in Minneapolis, Minnesota – passed a citywide prohibition on the sale of menthol and all flavored commercial tobacco¹ products.

The passage of the law was the result of direct efforts by the City's Public Health Department. Despite being a relatively small city,² Edina faced significant opposition when tobacco industry giant R.J. Reynolds legally challenged the City's flavor restriction ordinance a day after its enactment. Litigation is ongoing.

Background and Laying the Groundwork for Action

In 2019, one in four eleventh-grade Minnesotans four (26.4 percent) reported current e-cigarette use, up 9.3 percent from 2016.³ Similarly, e-cigarette use also increased among



eighth and ninth grade students by 5 to 7 percent to 11.1 percent and 16.3 percent respectively.⁴ While the prevalence of e-cigarette use was rapidly increasing among youth in the state, combustible tobacco use dropped slightly to 5.3 percent in 2019, down from 8.4 percent in 2016.⁵ In 2019, 67.4 percent of Minnesota high school students and 56.6 percent of middle school students who reported tobacco use reported using menthol or other flavored products.

The dramatic uptick in teen vaping within only a few short years — a phenomenon spurred on by menthol and flavored product availability — is one reason Edina public health officials began advocating for a comprehensive flavor ban.⁶ Beyond addressing the rising rate of youth vaping and the outbreak of vaping related injuries within the City, Public Health Department officials claimed that the ban demonstrated Edina’s commitment to the health of its residents, particularly its low-income population, youth, and residents of color who are targeted in flavored tobacco marketing campaigns.⁷

Before implementing its menthol and flavor ban, the City of Edina had already established itself as a tobacco control leader within the state. In July 2017, Edina became the first Minnesota city to raise the age limit for purchasing tobacco products from 18 to 21.⁸ While Edina was not the first in the state to institute a flavor ban that included menthol (Minneapolis, Edina’s largest neighbor, was the first to vote to expand its flavor restriction to include menthol in 2017, effective 2018),⁹ Edina’s comprehensive flavor regulation continues to position the City as a leader in Minnesota tobacco control work.

Edina’s Menthol Ban

In December 2019, the Edina Community Health Commission prepared a report, recommending that the City Council develop a menthol and flavored tobacco ban.¹⁰ The flavor restriction was also outlined as a 2020 community health initiative in the Community Health Commission’s Community Health Workplan.¹¹ The City met this goal, largely due to the dedicated efforts of the City’s Community Health Commission.¹² Although Edina’s process was ultimately successful, it is important to consider how engaging community — particularly marginalized communities that are disproportionately impacted by menthol and flavored tobacco products — in both the drafting and advocacy process can result in more effective policies.

In developing Edina’s flavor restriction policy language, Edina’s public health officials sought technical assistance from the Public Health Law Center in drafting a policy with clear and simple language.¹³ In addition to providing flavor policy specific technical assistance, the Public Health Law Center offered clarifying updates to Edina’s other existing tobacco regulations for the City to consider.



The end result was a blanket ban of the sale and distribution of any tobacco or tobacco-related product or device that contains any taste or smell other than that of tobacco, including menthol, within the City.¹⁴ On June 16, 2020, all four of Edina’s City Council members and Edina’s Mayor unanimously voted to pass Edina’s flavor restriction ordinance.¹⁵

Implementation

On September 1, 2020, Edina’s flavor ban took effect. Prior to this date, retailers were provided notice via the mail that explained the restriction and when enforcement would begin.¹⁶ Although Edina’s City Code specifies that retailers found in violation of the City’s tobacco laws may be subject to administrative penalties including fines and loss of licensure,¹⁷ the Edina Public Health staff worked collaboratively with retailers during the first several weeks after the provision took effect to allow for any remaining flavored inventory to be sold down without penalty.¹⁸

Immediate Opposition

Ordinance opponents, however, did not wait for the flavor ban to take effect before making their voices heard. Less than one day after the City Council approved the ordinance, two local convenience retailers, along with tobacco industry giant R.J. Reynolds (RJR), sued the city. The convenience store plaintiffs argued that the comprehensive flavor ban jeopardized their business models, which rely on tobacco sales to adults.¹⁹ The store owners claimed that

the blanket sales prohibition, coupled with the COVID-19 pandemic and civil unrest in the Twin Cities area following the murder of George Floyd, were too much for their businesses to handle.²⁰ The store owners suggested that a better compromise would have been restricting the sale of flavored e-cigarettes alone, citing that the rate of combustible tobacco use among Edina eleventh graders is only one fifth (5 percent) of the number who report e-cigarette usage (approximately 25 percent).²¹

The Legal Challenge

The complaint brought by RJR and the store owners alleged, among other things, that the City's ordinance was preempted by the federal Tobacco Control Act (TCA), which prohibits local and state governments from setting tobacco product standards.²² RJR filed for a preliminary injunction to halt the implementation of the ordinance, while the City filed a motion to dismiss the lawsuit.²³

On August 31, 2020, the Minnesota district court denied RJR's motion for a preliminary injunction and granted the City's motion to dismiss.²⁴ While this outcome mirrored outcomes in other flavor restriction litigation around the country, the court's reasoning differed from preceding decisions. Most courts around the U.S. have held that flavored tobacco sales restrictions are not product standards under the TCA because they do not regulate how a product is made; rather, the restrictions only apply to the final product.²⁵ The Minnesota district court, however, found that the flavor regulation was a product standard, concluding that there was no difference between prohibiting the addition of flavor to tobacco products and prohibiting the addition of any other ingredient.²⁶ Although the Minnesota court determined that Edina's ordinance was a product standard and thus was preempted, it ultimately held that the clause was valid under the TCA's savings clause, finding it a "requirement[] relating to the sale ... of ... tobacco products by individuals of any age...."²⁷ The district court also found that the implied preemption argument failed and noted that the FDA's failure to regulate menthol products did not prevent states or localities from doing so.²⁸

On September 4, 2020, RJR appealed the district court's decision to the U.S. Court of Appeals for the Eighth Circuit. In addition to the briefs submitted by the parties, the Public Health Law Center, along with twenty-four other national public health and medical organizations, filed an amicus brief²⁹ with the court on behalf of the City of Edina.³⁰ The Center's brief argues that the TCA preserves local authority over tobacco product sales and that the long history of state and local tobacco regulation, dating back over a century, supports a narrow interpretation of the TCA's preemption provision.³¹ The brief points out that the prohibition on the sale of flavored tobacco is not a "product standard," as determined by the lower court, because it does not pertain to the manufacture of tobacco products, but only to tobacco sales.³² This position, though contradictory to the Minnesota district court in this case, is in line with *every other judicial interpretation* of a



state or local flavor restriction nationwide.³³ Finally, the Center’s brief argues that Edina’s flavor ban is not impliedly preempted because local or state laws that provide stricter standards than those imposed nationally do not pose an obstacle to the federal regulatory scheme.³⁴

As of July 2022, the Edina litigation is ongoing and remains on appeal in the Eighth Circuit. Oral arguments were heard on May 12, 2021.

Epilogue

Drawing on the City’s experience passing a Tobacco 21 law, Edina Community Health Commission officials predicted that other cities within the state would follow suit and restrict menthol and other flavored tobacco products within their borders.³⁵ Edina’s prediction has proven accurate. When Edina passed its flavor ban, it joined sixteen Minnesota cities to impose restrictions on flavored tobacco sales.³⁶ In 2022, twenty-five localities within the state were found to have imposed a flavor restriction, eighteen of which include menthol products in their restrictions.³⁷

Because Edina’s flavor ordinance passed so recently, data describing its effectiveness is limited at this time. The City, however, continues to contract with the Bloomington Public Health Department to connect Edina residents with health education and promotion resources, including resources around tobacco cessation.³⁸ Bloomington’s Public Health Department offers direct links to the Minnesota Department of Health’s Quit Partner (formerly Quit Plan) service and provides a list of other state and national organizations and programs that assist with cessation.³⁹

Lessons Learned

Although Edina's menthol and flavored tobacco ban story is still ongoing, Edina's process and the opposition it has faced offer some valuable lessons for states and cities looking to follow Edina's example:

- **Forge organizational partnerships.** Edina's flavor restriction was almost exclusively developed within its Public Health Department. Consider reaching out to local and national organizations that have expertise in tobacco control advocacy or a presence in community early in the process. Draw on the experience of these organizations both when drafting policy language and in advocating for the policy's passage.
- **Engage community stakeholders.** Think of the flavor restriction policy as an equal partnership between government and community. Hold listening sessions and trainings with community members — particularly from populations specifically targeted by the tobacco industry (Black, Asian Pacific Islander, Native American, LGBTQ+, and youth) — to amplify their voices and educate them on the importance of a flavor restriction measure.
- **Seek legal technical assistance.** Consult with legal technical assistance organizations, like the Public Health Law Center, when devising new tobacco control policy language. Consider taking the opportunity to revisit related existing tobacco control laws to clarify confusing or contradictory language.
- **Devise an implementation strategy that supports retailers and informs the community.** Ensure a robust plan is in place following the passage of a flavor sales restriction. Create an enforcement timeline and develop an accessible way for retailers to ask questions and receive timely answers. Continue community engagement and education efforts to increase community understanding as to why the flavor ban is important and to foster support. Also, while making use of established statewide tobacco cessation resources is important, communities like Edina should consider developing more cessation resources that are tailored for their residents and that are locally available, particularly as surrounding communities follow their lead and prohibit the sale of flavored and menthol tobacco products.
- **Build momentum.** Capitalize on any recent tobacco control successes and keep the ball rolling. Prior to implementing its flavor ban, Edina had received attention as the first city in the state to raise the legal age to purchase tobacco products to 21. Look to neighboring communities and learn from those that have already adopted flavor restriction policies and encourage others to begin the process.

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Endnotes

- 1 The Public Health Law Center recognizes that traditional and commercial tobacco are different in the ways they are planted, grown, harvested, and used. Traditional tobacco is and has been used in sacred ways by Indigenous communities and tribes for centuries. Comparatively, commercial tobacco is manufactured with chemical additives for recreational use and profit, resulting in disease and death. For more information, visit <http://keepitsacred.itcmi.org>. When the word “tobacco” is used throughout this document, a commercial context is implied and intended.
- 2 In 2020, Edina’s population was found to be 53,494. *Quick Facts: Edina City, Minnesota*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/edinacityminnesota/BZA110220> (last visited Jul. 15, 2022).
- 3 *Tobacco Data Highlights from the 2019 Minnesota Student Survey*, MINN. DEP’T OF HEALTH (Oct. 9, 2019), https://www.health.state.mn.us/communities/tobacco/data/docs/2019_mss_data_highlights.pdf.
- 4 *Id.*
- 5 *Id.*
- 6 Josh Skluzacek, *Edina Bans Sale of Flavored Tobacco Products, Including Menthol*, *KSTP.COM EYEWITNESS NEWS* (Jun. 17, 2020), <https://kstp.com/kstp-news/local-news/edina-bans-sale-of-flavored-tobacco-products-including-menthol>.
- 7 Jennifer Bennerotte, *City Council Bans Sale of Flavored Tobacco: Sept. 1 Ban Aimed to Curb Youth Vaping*, 7 EDITION: EDINA 1,3 (Jul. 2020), <https://www.edinamn.gov/ArchiveCenter/ViewFile/Item/627>.
- 8 Dan Gunderson, *Edina Poised to Become First Minn. City to Make Tobacco Buying Age 21*, *MPR NEWS* (May 2, 2017), <https://www.mprnews.org/story/2017/05/02/edina-raise-tobacco-age-21-18>; Tim Nelson, *Edina Raises Age to Buy Tobacco to 21*, *MPR NEWS* (May 3, 2017), <https://www.mprnews.org/story/2017/05/03/edina-raises-age-buy-tobacco-21>.
- 9 Linda M. Bosma et al., *Restricting Sales of Menthol Tobacco Products: Lessons Learned from Policy Passage and Implementation in Minneapolis, St. Paul, and Duluth, Minnesota*, 5 HEALTH EQUITY, 439 (2021).
- 10 Minutes of the Regular Meeting of the Edina City Council, Sec. IX.B. Ordinance 2020-08; Amending Ch. 12 of the Edina City Code Concerning Tobacco — First Reading Held (Jun. 2, 2020), <https://edina.novusagenda.com/AgendaPublic/meetings.aspx> (search “6/2/2020” in date range; then choose “City Council Meeting Legal Minutes”).
- 11 CITY OF EDINA, MINN., COMMUNITY HEALTH: 2020 DRAFT COMMISSION WORK PLAN TEMPLATE 1 (Jan. 27, 2021), <https://www.edinamn.gov/DocumentCenter/View/9855/Community-Health-Work-Plan-PDF?bidId=>.
- 12 *Community Health Commission*, CITY OF EDINA, MINN., <https://www.edinamn.gov/1543/Community-Health-Commission> (last visited Jul. 11, 2022).
- 13 Public Health Law Center, <https://www.publichealthlawcenter.org/> (last visited Jul. 11, 2022).
- 14 EDINA, MINN., CODE OF ORDINANCES ch. 12, art. VI, § 12-189 (2020).

- 15 Minutes of the Regular Meeting of the Edina City Council, Sec. IX.D. Ordinance 2020-08; Amending Ch. 12 of Edina City Code Concerning Tobacco — Adopted (Jun. 16, 2020), <https://edina.novusagenda.com/AgendaPublic/meetings.aspx> (search “6/16/2020” in date range; then choose “City Council Meeting Legal Minutes”).
- 16 Telephone Interview with Jeff Brown, RS, Community Health Administrator, City of Edina (Jul. 21, 2022).
- 17 EDINA, MINN., CODE OF ORDINANCES ch. 12, art. VI, § 12-282 (2017).
- 18 Telephone Interview with Jeff Brown, RS, Community Health Administrator, City of Edina (Jul. 21, 2022).
- 19 Anita Lang & Mark Olson, Letter: *Edina’s Flavored Tobacco Ban Left No Choice but to Sue*, SUN CURRENT (Jul. 1, 2020), https://www.hometownsource.com/sun_current/community/edina/letter-edinas-flavored-tobacco-ban-left-no-choice-but-to-sue/article_d6a1b4a8-bba5-11ea-a646-6ff133edd865.html.
- 20 *Id.*
- 21 *Id.*
- 22 *R.J. Reynolds Tobacco Company, et al. v. City of Edina et al. (2020)*, Public Health Law Center, <https://www.publichealthlawcenter.org/litigation-tracker/rj-reynolds-tobacco-company-et-al-v-city-edina-et-al-2020> (last visited Jul. 13, 2022) [hereinafter *Litigation Tracker*].
- 23 *Id.*
- 24 *Id.*; *R.J. Reynolds Tobacco Co. v. City of Edina*, 482 F. Supp. 3d 875, 876 (D. Minn. 2020).
- 25 *Litigation Tracker*, *supra* note 22.
- 26 *R.J. Reynolds*, 482 F. Supp. 3d at 879.
- 27 *Id.* at 880 (quoting 21 U.S.C. § 387p(a)(2)(B)).
- 28 *Id.* at 883-84.
- 29 An amicus brief, often termed a “friend-of-the-court brief,” is a brief filed by a person or entity who is not a named party in a case in support of one side’s argument. See Brief, *Black’s Law Dictionary* (11th ed. 2019).
- 30 *Litigation Tracker*, *supra* note 22.
- 31 Brief for Public Health Law Center et al. as Amici Curiae Supporting Defendants-Appellees at 6-7, *R.J. Reynolds Tobacco Co. v. City of Edina*, No. 20-2852 (8th Cir. Dec. 2, 2020).
- 32 *Id.* at 14.
- 33 *Id.* at 17.
- 34 *Id.* at 24-25.
- 35 Andrew Wig, *Edina Bans Sale of Flavored Tobacco Products, is Promptly Sued*, SUN CURRENT (Jun. 19, 2020), https://www.hometownsource.com/sun_current/community/edina-bans-sale-of-flavored-tobacco-products-is-promptly-sued/article_34ee86b8-b268-11ea-af28-c76a7bf122b0.html.
- 36 *Id.*
- 37 Laura Bach, *States & Localities That Have Restricted the Sale of Flavored Tobacco Products*, CAMPAIGN FOR TOBACCO-FREE KIDS (Jun. 16, 2022), <https://www.tobaccofreekids.org/assets/factsheets/0398.pdf>.
- 38 *Public Health*, CITY OF EDINA, MINN., <https://www.edinamn.gov/217/Public-Health> (last visited Jul. 14, 2022).
- 39 *Quitting Smoking*, CITY OF BLOOMINGTON PUBLIC HEALTH DIV., <https://www.bloomingtonmn.gov/ph/quitting-smoking> (last visited Jul. 14, 2022).