

ORDINANCE NO. 1010 N.S.

AN ORDINANCE OF THE CITY OF EL PASO DE ROBLES
ADDING CHAPTER 9.51 TO THE MUNICIPAL CODE
REGARDING SYNTHETIC DRUGS

WHEREAS, California State Law, through Health & Safety Code Sections 11357.5 and 11375.5, prohibits the sale or any other distribution of certain synthetic drugs often marketed as “bath salts” or “incense;” and

WHEREAS, according to the National Institute on Drug Abuse (“NIDA”), synthetic cannabinoid compounds or synthetic cannabinoid derivative products (hereinafter “psychoactive herbal incense”) contain dried, shredded plant material and chemical additives that are responsible for psychoactive (mind-altering) effects, including extreme anxiety, paranoia, and hallucinations. In addition, there is an emerging family of drugs commonly referred to as “bath salts” or “psychoactive bath salts” that contain one or more chemicals relating to cathinone, an amphetamine-like stimulant found naturally in the Khat plant. Some users of psychoactive bath salts may experience euphoria and increased sociability, while others experience paranoia, agitation, hallucinatory delirium, and psychotic and violent behavior, with deaths being reported in several instances; and

WHEREAS, because the chemicals in psychoactive herbal incense have a high potential for abuse and no medical benefit, the Drug Enforcement Administration (“DEA”) has designated the five active chemicals most frequently found in psychoactive herbal incense as Schedule I controlled substances, making it illegal to sell, buy, or possess them under federal law. In July 2012, President Obama signed the Synthetic Drug Abuse Prevention Act of 2012, which permanently placed a number of chemicals found in psychoactive herbal incense and psychoactive bath salts into Schedule I of the Controlled Substances Act. On April 12, 2013, the DEA used its emergency scheduling authority to schedule three more types of synthetic cannabinoids, temporarily designating them as Schedule I substances; and

WHEREAS, according to NIDA, psychoactive herbal incense products are popular among young people and, of the illicit drugs used by high school seniors, psychoactive herbal incense is second only to marijuana; and

WHEREAS, the City Council hereby finds that many communities in California have recognized the danger of synthetic drugs, such as psychoactive herbal incense and psychoactive bath salts, which have been documented to cause hallucinations, agitation, psychosis, aggression, suicidal and homicidal ideations, cannibalism and death; and

WHEREAS, while state and federal law prohibit certain compounds that are used to create synthetic drugs, state and federal law are not comprehensive enough to eliminate the distribution and sale of all synthetic drugs in the City. Specifically, the City Council finds that the makers of synthetic drugs continually alter the composition of the compounds in their products so as to not come under the purview of state and federal law and other laws and regulations attempting to prohibit the sale of synthetic drugs.

WHEREAS, while the question of whether a given product is being distributed or sold for use as a recreational drug must be determined on a case-by-case basis, the City Council finds that the following evidentiary factors are helpful in determining whether a given product is in fact a synthetic drug:

1. Marketing: Synthetic drugs are rarely, if ever, suitable for their marketed uses. For example, a synthetic drug in the form of a powder might be marketed as “glass cleaner,” even though the powder cannot reasonably be used to clean glass.

2. Sales Location: Synthetic drugs are typically sold in liquor stores, smoke shops and gas stations, yet synthetic drugs are marketed as products that are not typically sold by these businesses. For example, synthetic drugs are often marketed as bath salts, spice, incense, potpourri, skin treatments, cleaning products and plant food; however, these types of products are typically not sold in liquor stores, smoke shops or gas stations.

3. Warning Labels: Synthetic drugs often use warning labels such as: “not for human consumption” and “not for purchase by minors.” Bona fide bath salts, incense, cleaning products and the like do not typically bear such labels. Of particular relevance are labels that indicate a given product does not contain chemical compounds banned by state law, which bona fide bath salts, incense, cleaning products and the like would not have any reason to advertise.

4. Price: Synthetic drugs are typically more expensive than products that are used for a synthetic drug’s marketed use. For example, a synthetic drug marketed as “glass cleaner” might be priced at \$50.00 for an eighth of an ounce, while bona fide glass cleaner is priced at approximately \$5.00 for 26 ounces.

5. Similarity to Illicit Street Drugs: Synthetic drugs often resemble illicit street drugs and/or use brand names and packaging that are designed to make the product appear similar to illicit street drugs. For example, many synthetic drugs are sold as white powders packaged in vials (resembling cocaine) or dyed green to appear similar to marijuana. Additionally, brand names are often similar to street slang for illicit drugs and have no relation to the products that are purportedly being sold. These brand names are always changing, but include “Eight Ballz,” “Spice,” “Black Mamba,” “K-2,” “Puff,” “Sugar Sticks,” “Green Buddha,” “Diablo Botanical Incense,” “Scooby Snax Potpourri,” “Grape Ape Herbal Incense,” “Aurora Incense,” “Three Monkey Incense,” “Mr. and Mrs. Marley,” “Cloud 9 Incense,” and a group of synthetic drugs marketed as from “The Spice Guy”; and

WHEREAS, to avoid the continuing threat to public health, safety and welfare that would occur if synthetic drugs were permitted in the City, the City Council finds it necessary to declare that an individual or business that possesses synthetic drugs is a threat to the public health, safety and welfare and is therefore subject to the City’s administrative, criminal and civil enforcement procedures, and in the case of a business, revocation of a business license; and

WHEREAS, by enacting this Ordinance, the City ordains that nothing herein shall be deemed to conflict with federal law, including but not limited to its treatment of controlled substances, state law, including but not limited to Health and Safety Code Section 11357.5 and Section 11375.5, or to license any activity that is prohibited thereunder except as mandated by such laws. This ordinance shall not apply to any activity already regulated by Health and Safety Code Sections 11357.5, 11375.5, 11401, the federal Controlled Substances Act or pre-empted by any state or federal law or regulation; and

THE CITY COUNCIL OF THE CITY OF EL PASO DE ROBLES DOES HEREBY ORDAIN AS FOLLOWS:

SECTION 1. Recitals. The above recitals are incorporated as though set forth in this section.

SECTION 2. Amendment. Chapter 9.51 of the El Paso de Robles Municipal Code is hereby added to read in full as set forth in the attached Exhibit A, incorporated by this reference.

SECTION 3. Severability. Should any provision of this Ordinance, or its application to any person or circumstance, be determined by a court of competent jurisdiction to be unlawful, unenforceable or otherwise void, that determination shall have no effect on any other provision of this Ordinance or the application of this Ordinance to any other person or circumstance and, to that end, the provisions hereof are severable.

SECTION 4. Effective Date. This Ordinance shall take effect thirty (30) days upon its final passage as provided in section 36937 of the Government Code.

SECTION 5. Publication. The City Clerk will certify to the passage of this Ordinance by the City Council of the City of El Paso de Robles, California and cause the same to be published once within fifteen (15) days after its passage in a newspaper of general circulation, printed, published and circulated in the City in accordance with Government Code section 36933.

SECTION 6. Inconsistency. To the extent that the terms or provisions of this Ordinance may be inconsistent or in conflict with the terms or conditions of any prior City ordinance(s), motion, resolution, rule, or regulation governing the same subject matter thereof, such inconsistent and conflicting provisions of prior ordinances, motions, resolutions, rules and regulations are hereby repealed.

Introduced at a regular meeting of the City Council held on November 18, 2014, and passed and adopted by the City Council of the City of El Paso de Robles on the _____ day of _____ 2014 by the following roll call vote, to wit:

AYES:

NOES:

ABSENT:

ABSTAIN:

Steven Martin, Mayor

ATTEST:

Caryn Jackson, Deputy City Clerk

EXHIBIT A

Chapter 9.51 PSYCHOACTIVE HERBAL INCENSE, PSYCHOACTIVE BATH SALTS AND OTHER SYNTHETIC DRUGS

Sections:

- 9.51.010 Purpose and intent.
- 9.51.020 Definitions.
- 9.51.030 Provision, display for sale, sale or distribution of synthetic drugs prohibited.
- 9.51.040 Provision, display for sale, sale or distribution of substances claimed or represented to be synthetic drugs prohibited.
- 9.51.050 Possession of synthetic drugs prohibited.
- 9.51.060 Public nuisance.
- 9.51.070 Confiscation of synthetic drugs.
- 9.51.080 Revocation of business license.
- 9.51.090 Penalties.
- 9.51.100 Seizure of evidence.
- 9.51.110 Exclusions.

9.51.010 Purpose and intent.

Recreational use of psychoactive herbal incense, psychoactive bath salts and similar products known as “synthetic drugs” has been documented to cause hallucinations, agitation, psychosis, aggression, suicidal and homicidal ideations, cannibalism and death. While state and federal laws and regulations prohibit some synthetic drugs, the makers of these drugs continually alter the composition of the compounds in their products so as to escape the purview of these laws and regulations.

It is the purpose and intent of this Chapter to prohibit the sale or possession of psychoactive herbal incense and psychoactive bath salts, as those terms are defined herein, in the city to protect and preserve the public peace, safety, health, and welfare of those within the city and to provide the city with reasonable measures to address the dangers to the community posed by synthetic drugs, including those not regulated by state or federal law. Nothing in this Chapter shall be construed to cease or limit or encroach in any way upon any field of law occupied by federal law or by the laws of the state of California.

9.51.020 Definitions.

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

“Business” shall have the same meaning as the term is defined in section 5.04.010 of the El Paso de Robles Municipal Code.

“Consume,” “consuming” or “consumption” shall mean to ingest, inhale, inject, smoke or snort (insufflate).

“Distribute,” “distributing” or “distribution” shall mean to furnish, give away, exchange, transfer, deliver or supply, whether for monetary gain or not.

“Person” shall include any natural person, business, firm, company, corporation, public corporation, club, trust, partnership, association or similar organization.

“Possess,” “possessing” or “possession” shall mean to have for consumption, distribution or sale in one’s actual or constructive custody or control, or under one’s authority or power, whether such custody, control, authority or power be exercised solely or jointly with others.

“Provide,” “providing” or “provision” shall mean offering to distribute or sell a product or substance to any person.

“Psychoactive bath salts” shall mean any crystalline or powder product that contains a synthetic chemical compound that, when consumed, elicits psychoactive or psychotropic stimulant effects. The term “psychoactive bath salts” includes without limitation:

(1) Products that elicit psychoactive or psychotropic stimulant effects and contain any of the following intoxicating chemical compounds:

(A) Salvia Divinorum or Salvinorum 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;

(B) Cathinone (2-amino-1-phenyl-1-propanone), 4- methylmethcathinone (2-methylamino-1-(4-methylphenyl)propan-1-one), 4-methoxymethcathinone (1-(4-methoxyphenyl)-2-(methylamine)propan-1-one), MDPV (methylenedioxypropylone), MDMA (3, 4- methylenedioxy-N-methylamphetamine), methylene (3,4-methylenedioxy- N-methylcathinone), methcathinone (2-(methylamino)-1-phenyl-propan-1- one), flephedrone (4-fluoromethcathinone), 3-FMC (3-fluoromethcathinone), ethcathinone (2-ethylamino-1-phenyl-propan-1-one), butylone (β-keto-N-methylbenzodioxolylbutamine), a-PPP (a- pyrrolidinopropiophenone), MPPP (4-methyl-a-pyrrolidinopropiophenone), MDPPP (3',4'-methylenedioxy-a-pyrrolidinopropiophenone), a-PVP (1-phenyl-2-(1-pyrrolidinyl)-1-pentanone) or naphyrone (1-naphthalen-2-yl-2- pyrrolidin-1-ylpentan-1-one), 6-APDB (6(2aminopropyl)2,3 dihydrobenzo-furan), and analogs of MDA (3,4-methylenedioxyamphetamine);

(C) Any derivative of the above listed intoxicating chemical compounds;

(D) Any synthetic substance and its isomers with a chemical structure similar to the above listed compounds;

(E) Any chemical alteration of the above listed intoxicating chemical compounds; or

(F) Any other substantially similar chemical structure or compound; and

(2) Products that elicit psychoactive or psychotropic stimulant effects and are marketed under any of the following trade names: Bliss, Blizzard, Blue Silk, Bonzai Grow, Charge Plus, Charlie, Cloud Nine, Euphoria, Hurricane, Ivory Snow, Ivory Wave, Lunar Wave, Ocean, Ocean

Burst, Pixie Dust, Posh, Pure Ivory, Purple Wave, Red Dove, Scarface, Snow Leopard, Stardust, Vanilla Sky, White Dove, White Night and White Lightning. The term “psychoactive bath salts” shall not include any product, substance, material, compound, mixture or preparation that is specifically excepted by the California Uniform Controlled Substances Act (“UCSA”) (Health and Safety Code §§ 11000 et seq.), listed in one of the UCSA’s schedules of controlled substances (Health and Safety Code §§ 11053-11058), regulated by one of the UCSA’s Synthetic Drug Laws (Health and Safety Code §§ 11357.5, 11375.5 and 11401), regulated by the Federal Controlled Substances Act (the “CSA”) (21 USC §§ 801 et seq.) or approved by the Food and Drug Administration (“FDA”).

“Psychoactive herbal incense” shall mean any organic product consisting of plant material that contains a synthetic stimulant compound that, when consumed, elicits psychoactive or psychotropic euphoric effects. The term “psychoactive herbal incense” includes without limitation:

(1) Products that elicit psychoactive or psychotropic euphoric effects and contain any of the following chemical compounds:

(A) Cannabicyclohexanol (2-[(1R,3S)-3-hydroxycyclohexyl]-5-(2-methylnonan-2-yl)phenol), JWH-018 (naphthalene-1-yl-(1-pentylindol-3-yl)methanone), JWH-073 (naphthalen-1-yl-(1-butylindol-3-yl)methanone), JWH-200 ((1-(2-morpholin-4-ylethyl)indol-2-yl)-naphthalen-1-ylmethanone), HU-210 or 1.1-dimethylheptyl-11-hydroxy-delta8-tetrahydrocannabinol ((6aR,10aR)-9-(Hydroxymethyl)-6,6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo [c]chromen-1-ol), CP 47, 497 (2-[(1R,3S)-3-hydroxycyclohexyl]-5-(2-methyloctan-2-yl)phenol) and the dimethylhexyl, dimethyloctyl and dimethylnonyl homologues of CP 47,497 (2-[1R,3S)-3-hydroxycyclohexyl]-5-(2-methyloctan-2-yl)phenol) or AM-2201 (1-[(5-fluoropentyl)-1H-indol-3-yl]- (naphthalen-1-yl)methanone), 1-Pentyl-3 (2-methoxyphenylacetyl)indole (also known as JWH-250), 1-Hexyl-3-(1-naphthoyl)indole (also known as JWH-019), 1-Pentyl-3-(4-chloro-1-naphthoyl)indole (also known as JWH-398), N-benzylpiperazine (also known as BZP), 1-(3-trifluoromethylphenyl)piperazine (also known as TFMPP);

(B) Any derivative of the above listed intoxicating chemical compounds;

(C) Any synthetic substance and its isomers with a chemical structure similar to the above listed intoxicating chemical compounds;

(D) Any chemical alteration of the above listed intoxicating chemical compounds;

(E) Any other substantially similar chemical structure or compound; or

(F) Any other synthetic cannabinoid.

(2) Products that elicit psychoactive or psychotropic euphoric effects and are marketed under any of the following names: K2, K3, Spice, Genie, Smoke, Potpourri, Buzz, Spice 99, Voodoo, Pulse, Hush, Mystery, Earthquake, Black Mamba, Stinger, Ocean Blue, Serenity, and Fake Weed. The term “psychoactive herbal incense” shall not include any product, substance, material, compound, mixture, or preparation that is specifically excepted by the UCSA (Health and Safety Code §§ 11000 et seq.), listed in one of the UCSA’s schedules of controlled substances (Health and Safety Code §§ 11053—11058) regulated by one of the UCSA’s Synthetic Drug Laws (Health and

Safety Code §§ 11357.5, 11375.5 and 11401), regulated by the CSA (21 USC §§ 801 et seq.) or approved by the FDA.

“Psychoactive” or “psychotropic stimulant effects” shall mean affecting the central nervous system or brain function to change perception, mood, consciousness, cognition or behavior in ways that are similar to the effects of cocaine, methylphenidate or amphetamines.

“Psychoactive” or “psychotropic euphoric effects” shall mean affecting the central nervous system or brain function to change perception, mood, consciousness, cognition or behavior in ways that are similar to the effects of cannabis.

“Sell,” “selling” or “sale” shall mean to furnish, exchange, transfer, deliver or supply for monetary gain.

“Synthetic drug” shall include psychoactive bath salts and psychoactive herbal incense, as those terms are defined hereinabove.

9.51.030 Provision, display for sale, sale or distribution of synthetic drugs prohibited.

(a) It is unlawful for any person to store, provide, display for sale, distribute or sell any synthetic drug within the City of El Paso de Robles.

(b) It is unlawful for any person to permit the storage, provision, display for sale, distribution or sale of any synthetic drugs from any real property owned, possessed, managed or controlled by such person in the City of El Paso de Robles.

(c) Merely disclaiming a synthetic drug as “not safe for human consumption” will not avoid the application of this section.

9.51.040 Provision, display for sale, sale or distribution of substances claimed or represented to be synthetic drugs prohibited.

(a) It is unlawful for any person to claim or represent that a product that person is storing, providing, displaying for sale, distributing or selling is a synthetic drug within the City of El Paso de Robles.

(b) To determine if a person is claiming or representing that a product is a synthetic drug, the enforcing officer may consider any of the following evidentiary factors:

(1) The product is not suitable for its marketed use (such as a crystalline or powder product being marketed as “glass cleaner”);

(2) The business providing, displaying for sale, distributing or selling the product does not typically provide, distribute or sell products that are used for that product’s marketed use (such as a liquor store selling “plant food”);

(3) The product contains a warning label that is not typically present on products that are used for that product's marketed use (such as "not for human consumption," "not for purchase by minors," or "does not contain chemicals banned by section 11357.5");

(4) The product is significantly more expensive than products that are used for that product's marketed use (such as half of a gram of a substance marketed as "glass cleaner" costing \$50.00);

(5) The product resembles an illicit street drug (such as cocaine, methamphetamine or marijuana); or

(6) The product's name or packaging uses images or slang referencing an illicit street drug (such as "Eight Ballz" or "Green Buddha").

(c) Merely disclaiming a substance claimed or represented to be a synthetic drug as "not safe for human consumption" will not avoid the application of this section.

9.51.050 Possession of synthetic drugs prohibited.

It is unlawful for any person to possess any synthetic drug within the City of El Paso de Robles.

9.51.060 Public nuisance.

(a) It is a public nuisance for any person to store, provide, display for sale, distribute or sell any synthetic drug, or any substance claimed or represented to be a synthetic drug, within the City of El Paso de Robles.

(b) It is a public nuisance for any person to allow the storage, provision, display for sale, distribution or sale of any synthetic drug, or any substance claimed or represented to be a synthetic drug, on property owned, controlled or managed by such person within the City of El Paso de Robles.

(c) To determine if a person is claiming or representing that a substance or product is a synthetic drug, the enforcing officer may consider any of the evidentiary factors set forth in section 9.51.040 of this Chapter.

(d) A criminal conviction is not required for establishing the occurrence of nuisance activity pursuant to this Chapter. The occurrence of nuisance activity may be established by documented evidence that the nuisance activity was witnessed by a code enforcement officer, peace officer or other witness willing to testify.

9.51.070 Confiscation of synthetic drugs.

Because the use of synthetic drugs has been documented to cause hallucinations, agitation, psychosis, aggression, suicidal and homicidal ideations, cannibalism and death, any violation of this Chapter presents a grave and imminent danger not only to the person consuming the synthetic drug, but also to the public at large. Any Police Officer who issues a criminal citation under this Chapter shall confiscate any synthetic drugs and store them, pending the conclusion of the criminal case.

9.51.080 Revocation of business license.

No person holding a city business license and owning or operating a business in the city may use that business to store, provide, distribute or sell any synthetic drug or any substance claimed or represented to be a synthetic drug. A violation of this section by the holder of a city business license shall constitute grounds for modification, suspension, revocation, or any combination thereof, of said license.

9.51.090 Penalties.

(a) Misdemeanor violation. Failure to comply with any of the requirements of this Chapter is a misdemeanor punishable by imprisonment in the city or county jail for a period not exceeding six (6) months or by fine not exceeding one thousand dollars (\$1,000.00), or by both, provided that where the city attorney determines that such action would be in the interest of justice, he/she may specify in the accusatory pleading that the offense shall be an infraction.

(b) Infraction violation. Where the city attorney determines that, in the interest of justice, a violation of this Chapter is an infraction, such infraction is punishable by a fine not exceeding one hundred dollars (\$100.00) for a first violation, a fine not exceeding two hundred dollars (\$200.00) for a second violation of the same provision within one (1) year, and a fine not exceeding five hundred dollars (\$500.00) for each additional infraction violation of the same provision within one (1) year.

(c) The fine amounts set forth above may be modified, from time to time, by city council resolution. In no event shall such fine amounts exceed the amounts authorized by state law.

(d) Each person committing, causing, or maintaining a violation of this Chapter or failing to comply with the requirements set forth herein shall be deemed guilty of a separate offense for each and every day during any portion of which any violation of any provision of this Chapter is committed, continued, maintained, or permitted by such person and shall be punishable accordingly.

(e) In addition to the penalties provided in this Section, any public nuisance under this Chapter may be abated by the city by civil process by means of a restraining order, preliminary or permanent injunction or in any manner provided by law for the abatement of such nuisance. The city shall also be entitled to recover its full reasonable costs of abatement. The prevailing party in any proceeding associated with the abatement of a public nuisance shall be entitled to recovery of attorneys' fees incurred in any such proceeding, where the city has elected at the initiation of that individual action or proceeding to seek recovery of its own attorneys' fees.

(f) In lieu of issuing a criminal citation, the city may issue an administrative citation pursuant to Chapter 1.03 of the El Paso de Robles Municipal Code to any person responsible for committing, causing or maintaining a violation of this Chapter. Nothing in this Section shall preclude the city from also issuing a citation upon the occurrence of the same offense on a separate day.

(g) The remedies set forth in this Chapter are cumulative and additional to any and all other legal remedies available whether set forth elsewhere in the El Paso de Robles Municipal Code, or in state or federal laws, regulations, or case law.

9.51.100 Seizure of evidence.

Any product(s) or substance(s) possessed, stored, provided, distributed or sold in violation of any provision of this Chapter shall be seized by the enforcing officers and removed, stored and disposed of in accordance with law.

9.51.110 Exclusions.

(a) This Chapter shall not apply to drugs or substances lawfully prescribed or to intoxicating chemical compounds that have been approved by the federal Food and Drug Administration or which are specifically permitted by California law, including without limitation, intoxicating chemical compounds that are specifically excepted by the California Uniform Controlled Substances Act (Health and Safety Code § 11000 et seq.).

(b) This Chapter shall not apply to drugs or substances that are prohibited by state or federal law, including without limitation, California Health and Safety Code §§ 11357.5, 11375.5, 11401 and the Federal Controlled Substances Act.

(c) This Chapter shall not be deemed to prohibit any act that is positively permitted, prohibited or preempted by any state or federal law or regulation.