

ORDINANCE NO. 2021-12

AN ORDINANCE TO AMEND AND REENACT TITLE 2, CHAPTER 5, ARTICLE A OF THE MOORHEAD MUNICIPAL CODE RELATING TO TOBACCO

BE IT ORDAINED by the City Council of the City of Moorhead as follows:

SECTION 1. Title 2, Chapter 5, Article A of the Moorhead Municipal Code is hereby amended and reenacted to read as follows:

ARTICLE A. SALES OF COMMERCIAL TOBACCO AND RELATED DEVICES AND PRODUCTS

- 2-5A-1: DEFINITIONS
- 2-5A-2: LICENSE
- 2-5A-3: BASIS FOR DENIAL OF LICENSE
- 2-5A-4: QUALIFICATIONS OF LICENSEE
- 2-5A-5: ADMINISTRATIVE REMEDIES
- 2-5A-6: CRIMINAL PENALTIES
- 2-5A-7: PROHIBITED SALES
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- 2-5A-11: OTHER ~~ILLEGAL~~ PROHIBITED ACTS
- 2-5A-12: EXCEPTIONS AND DEFENSES
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- 2-5A-14: EFFECTIVE DATE

2-5A-1: DEFINITIONS:

Except as may otherwise be provided or clearly implied by context, all terms shall be given their commonly accepted definitions. For the purpose of this section, the following definitions shall apply unless the context clearly indicates or requires a different meaning:

CHILD RESISTANT PACKAGING: Packaging that meets the definition set forth in code of federal regulations, title 16, section 1700.15(b), as in effect on January 1, 2015, and was tested in accordance with the method described in code of federal regulations, title 16, section 1700.20.

CIGAR: Any roll of tobacco that is wrapped in tobacco leaf or in any other substance containing tobacco, with or without a tip or mouthpiece, which is not a cigarette as defined in Minnesota statutes section 297F.01, subdivision 3, as may be amended from time to time.

COMPLIANCE CHECKS: The system the city uses to investigate and ensure that those authorized to sell licensed products are following and complying with the requirements of this article.

Compliance checks shall involve the use of persons under the age of twenty-one (21) who purchase or attempt to purchase licensed products. ~~minors as authorized by this article. Compliance checks shall also mean the use of minors who attempt to purchase licensed products for educational research and training purposes as authorized by state and federal laws.~~ Compliance checks may also be conducted by the city or other units of government for educational, research, and training purposes or for the purpose of enforcing appropriate federal, state or local laws and regulations relating to licensed products.

DELIVERY SALE: The sale of any licensed product to any person for personal consumption and not for resale when the sale is conducted by any means other than an in-person, over-the counter sales transaction in a licensed retail establishment. DELIVERY SALE includes but is not limited to the sale of any licensed product when the sale is conducted by telephone, other voice transmission, mail, the internet, or app-based service. DELIVERY SALE includes delivery by licensees or third parties by any means, including curbside pick-up.

ELECTRONIC DELIVERY DEVICES: Any product containing or delivering nicotine, lobelia, or any other substance, whether natural or synthetic, intended for human consumption that can be used by a person to simulate smoking in the delivery of nicotine or any other substance through the inhalation of aerosol or vapor from the product. Electronic delivery devices includes, but is not limited to, devices manufactured, marketed, or sold as e-cigarettes, e-cigars, e-pipes, vape pens, mods, tank systems, or under any other product name or descriptor any component part of a product, whether or not marketed or sold separately. Electronic delivery device does not include includes any component part of any product that has been approved or certified by the United States food and drug administration for sale as a tobacco cessation product, as a tobacco dependence product, or for other medical purposes, and is marketed and sold for such an approved purpose.

FLAVORED PRODUCT: Any licensed product that contains a taste or smell, other than the taste or smell of tobacco, that is distinguishable by an ordinary consumer either prior to or during the consumption of the product, including, but not limited to, any taste or smell relating to chocolate, cocoa, menthol, mint, wintergreen, vanilla, honey, fruit, or any candy, dessert, alcoholic beverage, herb, or spice. A public statement or claim, whether express or implied, made or disseminated by the manufacturer of a licensed product, or by any person authorized or permitted by the manufacturer to make or disseminate public statements concerning such products, that a product has or produces a taste or smell other than a taste or smell of tobacco will constitute presumptive evidence that the product is a flavored product.

INDOOR AREA: All space between a floor and a ceiling that is bounded by walls, doorways, or windows, whether open or closed, covering more than fifty percent (50%) of the combined surface area of the vertical planes constituting the perimeter of the area. A wall includes any retractable divider, garage door, or other physical barrier, whether temporary or permanent. A standard (0.011 gauge with an 18 x 16 mesh count) window screen is not considered a wall.

LICENSED PRODUCTS: The term that collectively refers to tobacco, tobacco related devices, electronic delivery devices, or nicotine or lobelia delivery products.

~~LOOSIES: The common term used to refer to a single cigarette, cigars, or individually packaged cigar or cigarette, or any other licensed product that has been removed from its intended retail packaging and offered for sale. The term "loosies" does not include individual premium cigars that are hand-constructed, have a wrapper made entirely from whole tobacco leaf, and have a filler and binder made entirely of tobacco, except for adhesives or other materials used to maintain size, texture, or flavor with a retail price, after any discounts are applied and before any sales taxes are imposed, of at least two dollars sixty cents (\$2.60) per cigar.~~

~~MINOR: Any natural person who has not yet reached the age of eighteen (18) years.~~

MOVABLE PLACE OF BUSINESS: Any form of business operated out of a kiosk, truck, van, automobile or other type of vehicle or transportable shelter and not a fixed address storefront or other permanent type of structure authorized for sales transactions.

NICOTINE OR LOBELIA DELIVERY PRODUCTS: Any product containing or delivering nicotine or lobelia intended for human consumption, or any part of such a product that is not tobacco or an electronic delivery device as defined in this section. Nicotine or lobelia delivery products does not include any product that has been approved or otherwise certified for legal sale by the United States food and drug administration for tobacco use cessation or for other medical purposes, and is being marketed and sold solely for that approved purpose.

RETAIL ESTABLISHMENT: Any place of business where licensed products are available for sale to the general public. The phrase shall include, but not be limited to, grocery stores, gas stations, convenience stores, bars, restaurants, and drugstores.

SALE: Any transfer of goods for money, trade, barter or other consideration.

SELF-SERVICE DISPLAY: The open display of licensed products in any manner where any person has access to the licensed products without the assistance or intervention of the licensee or the licensee's employee and where a physical exchange of the licensed product from the licensee or the licensee's employee to the customer is not needed in order to access the licensed products.

~~SELF-SERVICE MERCHANDISING: Open displays of licensed products in any manner where any person shall have access to the licensed products without the assistance or intervention of the licensee or the licensee's employee. The assistance or intervention shall entail the actual physical exchange of the licensed products between the customer and the licensee or employee. Self-service sales are interpreted as being any sale where there is not an actual physical exchange between the clerk and the customer.~~

~~SMOKING: Inhaling, or exhaling, burning, or carrying smoke from any lighted or heated cigar, cigarette, pipe, or any other lighted or heated product containing, made, or derived from nicotine, tobacco, marijuana, or other plant, whether natural or synthetic, that is intended for inhalation. other tobacco or plant product, or inhaling or exhaling aerosol or vapor from an electronic delivery device. Smoking also includes carrying or using an activated electronic delivery device being in possession of a lighted or heated cigar, cigarette, pipe, or other tobacco or plant product intended for inhalation, or an electronic delivery device that is turned on or is otherwise activated.~~

~~TOBACCO OR TOBACCO PRODUCTS:~~ Any product containing, made, or derived from tobacco that is intended for human consumption, whether chewed, smoked, heated, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means, or any component, part, or accessory of a tobacco product; including, but not limited to, cigarettes; cigars; cheroots, stogies; perique; granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco; snuff; snuff flour; cavendish; plug and twist tobacco; fine cut and other chewing tobaccos; shorts; refuse scraps, clippings, cuttings and sweepings of tobacco; and other kinds and forms of tobacco. Tobacco excludes any product that has been approved by the United States food and drug administration for sale as a tobacco cessation product, as a tobacco dependence product, or for other medical purposes, and is being marketed and sold solely for such an approved purpose.

~~TOBACCO RELATED DEVICES:~~ Any rolling Cigarette papers, wraps, pipes for smoking, or other devices intentionally designed or intended to be used in a manner which enables the chewing, sniffing, smoking, or inhalation of vapors of tobacco or tobacco products. Tobacco related devices include components of tobacco related devices which may be marketed or sold separately.

VENDING MACHINE: Any mechanical, electric or electronic, or other type of device which dispenses licensed products upon the insertion of money, tokens or other form of payment directly into the machine by the person seeking to purchase the licensed product. (Ord. 2016-05, 6-13-2016)

2-5A-2: LICENSE:

A. License Required: No person shall, directly or indirectly, or by means of any device, keep for retail sale, sell at retail, or otherwise dispose of any licensed products without a license therefor.

B. Application: An application for a license to sell licensed products must be made on a form provided by the city. Application for a license shall state the full name and the residential and business addresses and telephone numbers of the applicant, the name of the business, the location of the building intended to be used by the applicant under the license, the kind of business conducted at such location, and such other information as shall be required by the city ~~application form.~~

C. License Fee. No license shall be issued under this article until the appropriate license fees are paid in full. The fees for such licenses will be established by the city's fee schedule.

D. Term: All licenses issued under this section shall be valid for one calendar year from the date of issue.

E. Revocation Or Suspension: Any license issued under this section may be revoked or suspended as provided in the administrative remedies section of this article.

F. Transfers: All licenses issued under this section shall be valid only on the premises for which the license was issued and only for the person to whom the license was issued. No transfer of any license to another location or person shall be valid. If a transfer is needed, the applicant will need to reapply and submit new payment of license fees.

G. Moveable Place of Business: No license shall be issued to a movable place of business. Only fixed location businesses shall be eligible to be licensed under this section.

H. Display: All licenses shall be posted and displayed in plain view of the general public on the licensed premises.

I. Issuance As Privilege And Not A Right: The issuance of a license issued under this section shall be considered a privilege and not an absolute right of the applicant and shall not entitle the holder to an automatic renewal of the license.

J. Smoking Prohibited: Smoking shall not be permitted, and no person shall smoke within the indoor area of any establishment with a retail license. Smoking, including smoking for the purpose of the sampling of licensed products, is prohibited within the indoor area of any retail establishment licensed under this ordinance.

K. Distribution Of Samples: No person shall distribute samples of any licensed product free of charge or at nominal cost.

L. Background Check: The police department shall conduct a criminal background check on the applicant. In the event a national criminal background investigation is required, the applicant shall be responsible for all additional fees incurred for such and, upon request, provide additional information required to complete this process. All applicants are required to complete an informed consent authorizing the disclosure of all criminal history record information. The city clerk and the police department shall review such application and, without further authorization on the part of the council, issue such license to the applicant if the applicant is eligible therefor. (Ord. 2016-05, 6-13-2016)

M. Renewals. The renewal of a license issued under this ordinance will be handled in the same manner as the original application. The request for a renewal must be made at least thirty (30) days, but no more than sixty (60) days, before the expiration of the current license.

N. Age Verification. Licenses must verify by means of government-issued photographic identification that the purchaser is at least twenty-one (21) years of age. Verification is not required for a person over the age of thirty (30). That the person appeared to be thirty (30) years of age or older does not constitute a defense to a violation of this subsection.

O. Signage. Notice of the legal sales age and age verification requirement must be always posted prominently and in plain view at each location where licensed products are offered for sale. The required signage, which will be provided to the licensee by the city, must be posted in a manner that is clearly visible to anyone who is or is considering making a purchase.

2-5A-3 : BASIS FOR DENIAL OF LICENSE:

A. Grounds for denying the issuance or renewal of a license include, but are not limited to, the following:

1. The applicant is under the age of ~~eighteen (18)~~ twenty-one (21) years.
2. The applicant has been convicted within the past five (5) years of any violation of a federal, state, or local law, ordinance provision, or other regulation relating to licensed products.
3. The applicant has had a license to sell licensed products suspended or revoked within the preceding twelve (12) months of the date of application.
4. The applicant fails to provide any information required on the application, or provides false or misleading information.
5. The applicant is prohibited by federal, state, or other local law, ordinance, or other regulation from holding a license.

B. However, except as may otherwise be provided by law, the existence of any particular ground for denial does not mean that the city must deny the license.

C. If a license is mistakenly issued or renewed to a person, it shall be revoked upon the discovery that the person was ineligible for the license under this article. (Ord. 2016-05, 6-13-2016)

2-5A-4: QUALIFICATIONS OF LICENSEE:

No license shall be issued to any applicants for sale of licensed products at any place other than their established place of business, nor shall any license be issued for the sale of licensed products at a movable place of business, nor at more than one place of business. (Ord. 2016-05, 6-13-2016)

2-5A-5: ADMINISTRATIVE REMEDIES:

A. Licensees: Any licensee found to have violated this article, or whose employees have violated this article, shall be subject to the following penalties, and such violation shall be cause for the imposition of an administrative penalty, license suspension, and/or license revocation as set forth below:

1. The first violation shall be subject to an administrative penalty of ~~seventy-five~~ three hundred dollars (~~\$300.00~~) (~~\$75.00~~).
2. The second violation at the same licensed premises within ~~twenty-four (24)~~ thirty-six (36) months of the first violation, shall subject licensee to a three (3) day suspension of the license and an administrative penalty of ~~two hundred~~ six hundred dollars (~~\$200.00~~) (\$600.00).
3. The third violation within a ~~twenty-four (24)~~ thirty-six (36) month period shall subject licensee to a ~~seven (7)~~ thirty (30) day suspension of the license and an administrative penalty of ~~two hundred fifty~~ one thousand dollars (~~\$250.00~~) (\$1,000.00).

4. ~~Subsequent violations within the probationary period shall subject licensee to a thirty (30) day license suspension and an administrative penalty of three hundred dollars (\$300.00). Upon a fourth violation within a thirty-six (36) month period the license will be revoked.~~
5. ~~If any sale of a licensed product occurs on licensee's premises during a period of suspension, the license shall be revoked and the licensee shall not be able to reapply for a license for a period of twelve (12) months.~~

B. ~~Other Individuals: Employees and other individuals, Individuals, other than minors persons under the age of twenty-one (21) regulated by subsection C of this section, who are found to be in violation of this ordinance may article shall be charged an administrative fine of fifty dollars (\$50.00). If an employee or other individual is criminally prosecuted for violations of this section and subject to criminal fines and penalties, this provision will not apply.~~

C. ~~Minors Persons Under The Age Of 21: Minors Persons under the age of twenty-one (21) who violate this ordinance may only be subject to non-criminal, non-monetary penalties such as found in unlawful possession of or who unlawfully purchase or attempt to purchase licensed products shall be subject to an administrative fine, or may be subject to tobacco related education classes, diversion programs, community services, or another penalty that the city believes will determines to be appropriate and effective. The administrative fine or other penalty shall be established by the city council upon consultation will consult with court personnel, educators, parents, children, and other with interested parties of the courts, educators, parents and children to determine an appropriate penalty for minors persons under the age of twenty-one (21) in the city. This administrative fine or other The penalty may be established by ordinance and amended from time to time.~~

D. ~~Administrative Hearing/Waiver: Upon receipt of information indicating that a violation has occurred, the city manager or his/her designee shall personally serve or send by certified mail notice to the person accused of the violation. The notice shall indicate the nature of the violation and whether such violation will result in an administrative penalty, license suspension, or license revocation. The notice shall also indicate that the person has the option of requesting a hearing before the city council prior to the license suspension, revocation, or imposition of a penalty, or waiving such hearing and accepting the disposition described in the notice. The person shall file a written request for a hearing within ten (10) days of the date specified in the license violation notice, or licensee shall be deemed to have waived its right to a hearing. Upon receipt of a hearing request, the city manager or his designee shall schedule a hearing before the city council at the earliest opportunity and shall send a hearing notice by certified mail. The decision of the city council must be in writing. (Ord. 2016-05, 6-13-2016)~~

2-5A-6: CRIMINAL PENALTIES:

A. ~~Penalty: The penalty for violation of any of the provisions of this article shall be a misdemeanor.~~

A. ~~Penalty: The penalty for violation of any of the provisions of this article shall be a misdemeanor.~~ Subsequent Offenses: Nothing in this section prohibits the city from seeking

prosecutions as a misdemeanor for an alleged second violation of this ordinance by a person twenty-one (21) years of age or older within five (5) years of a previous conviction under the ordinance.

B. Immunity Clause: A person under twenty-one (21) years of age who purchases or attempts to purchase licensed products while under the direct supervision of a responsible adult for training, education, research, or enforcement purposes which have been approved by the city manager or his designee shall not be subject to a criminal penalty. (Ord. 2016-05, 6-13-2016)

2-5A-7: PROHIBITED SALES:

It shall be a violation of this section for any person to sell or offer to sell any licensed product:

- A. To any person under the age of twenty-one (21) years.
- B. By any means of any type of vending machine.
- C. By means of self-service methods whereby the customer does not need to make a verbal or written request to an employee of the licensed premises in order to receive the licensed product and whereby there is not a physical exchange between the licensee, or the licensee's employee, and the customer.
- D. By means of "loosies" as defined in Section 2-5A-1 of this article.
- E. Containing opium, morphine, jimson weed, belladonna, strychnos, cocaine, marijuana, or other deleterious, hallucinogenic, toxic, or controlled substances except nicotine and other substances found naturally in tobacco or added as part of an otherwise lawful manufacturing process. It is not the intention of this provision to ban the sale of lawfully manufactured cigarettes or tobacco products.
- F. It shall be a violation of this article for any person to sell or offer to sell any liquid, whether or not such liquid contains nicotine, which is intended for human consumption and use in an electronic delivery device, in packaging that is not child resistant. Upon request, a licensee shall provide a copy of the certificate of compliance or full laboratory testing report for the packaging used.
- G. At any place other than for where the license was issued.
- H. By any other means, to any other person, on any other manner or form prohibited by federal, state or other local law, ordinance, provision or other regulation. (Ord. 2016-05, 6-13-2016)
- I. By means of delivery sales. All sales of licensed products must be conducted in person, in a licensed retail establishment, in over-the-counter sales transactions.

J. To accept or redeem any coupon, price promotion, or other instrument or mechanism, whether in paper, digital, electronic, mobile, or any other form, that provides any licensed products to a consumer at no cost or at a price that is less than the non-discounted, standard price listed by a retailer on the item or on any related shelving, posting, advertising, or display at the location where the item is sold or offered for sale, including all applicable taxes.

K. To sell or offer for sale any flavored products.

2-5A-8: SELF-SERVICE SALES:

~~It shall be unlawful for a licensee under this section to~~ No person shall allow the sale of licensed products by self-service displays where ~~any means whereby~~ the customer may have access to those items without having to request the item from the licensee or the licensee's employee and whereby there is not a physical exchange of the licensed product between the licensee or the licensee's employee ~~his or her clerk~~ and the customer. All licensed products shall either be stored behind a counter or other area not freely accessible to customers, or in a case or other storage unit not left open and accessible to the general public. Any retailer selling licensed products at the time this chapter is adopted shall comply with this section within ninety (90) days following the effective date of this section. (Ord. 2016-05, 6-13-2016)

2-5A-9: RESPONSIBILITY:

All licensees under this section shall be responsible for the actions of their employees in regard to the sale of licensed product on the licensed premises, and the sale of an item by an employee shall be considered a sale by the license holder. Nothing in this section shall be construed as prohibiting the city from also subjecting the clerk to whatever penalties are appropriate under this section, state or federal law, or other applicable law or regulation. (Ord. 2016-05, 6-13-2016)

2-5A-10: COMPLIANCE CHECKS:

All licensed premises must be open to inspection by law enforcement or other authorized city officials during regular business hours. From time to time, but at least four (4) times per year, the city will conduct compliance checks. In accordance with state law, the city will conduct a compliance check that involves the participation of a person at least seventeen (17) years of age, but under the age of twenty-one (21) to enter the licensed premises to attempt to purchase licensed products. Prior written consent from a parent or guardian is required for any person under the age of eighteen (18) to participate in a compliance check. Persons used for the purpose of compliance checks will be supervised by law enforcement or other designated personnel. Any person holding a license to sell licensed products shall be subject to a minimum of four (4) compliance checks per year to determine if licensed products are being sold or disbursed to minors. Minors employed by the city or its police department in connection with compliance checks shall not be banned from entering any license holder's premises. If it is determined that any person holding a license to sell licensed products has banned a minor employed by or volunteering with the city or its police department in connection with the compliance checks, the license shall be suspended for a period of not less than fourteen (14) days. (Ord. 2016-05, 6-13-2016)

2-5A-11: OTHER ~~ILLEGAL~~ PROHIBITED ACTS:

~~Unless otherwise provided, the following acts shall be a violation of this section:~~

~~A. Illegal Sales: It shall be a violation of this section for any person to sell or otherwise provide any licensed product to any minor.~~

~~B. Illegal Possession: It shall be a violation of this section for any minor to have in his or her possession any licensed product. This subsection shall not apply to minors lawfully involved in a compliance check.~~

~~C. Illegal Use: It shall be a violation of this section for any minor to smoke, chew, sniff or otherwise use any licensed product.~~

~~D. Illegal Procurement: It shall be a violation of this section for any minor to purchase any licensed product, and it shall be a violation of this section for any person to purchase or otherwise obtain those items on behalf of a minor. It shall further be a violation for any person to coerce or attempt to coerce a minor to illegally purchase or otherwise obtain or use any licensed product. This subsection shall not apply to minors lawfully involved in a compliance check.~~

~~E. Use Of False Identification: It shall be a violation of this section for any minor to attempt to disguise his or her true age by the use of a false form of identification, whether the identification is that of another person or one on which the age of the person has been modified or tampered with to represent an age older than the actual age of the person. (Ord. 2016-05, 6-13-2016)~~

Prohibited Furnishing or Procurement: It is a violation of this ordinance for any person twenty-one (21) years of age or older to purchase or otherwise obtain any licensed product on behalf of a person under the age of twenty-one (21). It is a violation for any person twenty-one (21) years of age and older to coerce or attempt to coerce a person under the age of twenty-one (21) to purchase or attempt to purchase any licensed product.

2-5A-12: EXCEPTIONS AND DEFENSES:

Nothing in this section shall prevent the providing of any licensed product to a person under twenty-one (21) years of age as part of a lawfully recognized religious, spiritual, or cultural ceremony. It shall be an affirmative defense to the violation of this section for a person to have reasonably relied on proof of age as described by state law. (Ord. 2016-05, 6-13-2016)

2-5A-13: SEVERABILITY:

If any section or provision of this article is held invalid, such invalidity shall not affect other sections or provisions which can be given force and effect without the invalidated section or provision. (Ord. 2016-05, 6-13-2016)

2-5A-14: EFFECTIVE DATE:

This ordinance becomes effective at midnight on January 1, 2022.

SECTION 2. This ordinance shall take effect upon publication in accordance with the Moorhead City Charter.

Passed by the City Council of the City of Moorhead this ___ day of _____, 2021.

APPROVED BY:

Michelle (Shelly) Carlson, Mayor

ATTEST:

Christina Rust, City Clerk

First Consideration:

Second Consideration:

Date of Publication: