

Date: July 28, 2020

Ord. #01-20

TOBACCO ORDINANCE
Repealing Ordinance No. 2-99 dated August 24, 1999 and
Establishing New Ordinance

On motion of Commissioner Gabrielson, seconded by Commissioner Reinartz, the following Ordinance was unanimously passed and adopted by the Mower County Board of Commissioners at a meeting held July 28, 2020 at the Government Center, Austin, Minnesota.

WHEREAS, a Notice of Intention to consider a new Tobacco Ordinance was published in the *Austin Daily Herald* on June 27 and July 18, 2020; and

WHEREAS, the County Board held a public hearing on said proposed new/replacement ordinance on July 28, 2020; and

BE IT ORDAINED by the Mower County Board of Commissioners that Tobacco Ordinance No. 2-99 dated August 24, 1999 is hereby repealed and the following new Mower County Tobacco Ordinance is hereby adopted:

MOWER COUNTY
TOBACCO ORDINANCE

Section 1-1: Title

This ordinance shall be known as the Mower County Tobacco Ordinance, and will be referred to herein as ‘this ordinance.’

Section 1-2: PURPOSE:

Because the county recognizes that the sale of commercial tobacco, tobacco-related devices, electronic delivery devices, and nicotine or lobelia delivery products to persons under the age of 21 violates both state and federal law; and because studies, which the county accepts and adopts, have shown that high school use of any commercial tobacco product has increased to 27.6% in Minnesota; and because vast majority of people who smoke begin smoking before they have reached the age of 21 years, and that those persons who have reached the age of 21 years without having started smoking are significantly less likely to begin smoking; and because commercial tobacco use has been shown to be the cause of many serious health problems which subsequently place a financial burden on all levels of government, this ordinance is intended to regulate the sale of commercial tobacco, tobacco-related devices, electronic delivery devices, and nicotine or lobelia delivery products for the purpose of enforcing and furthering existing laws, to protect youth and young adults against the serious health effects associated with use and initiation, and to further the official public policy of the state to prevent young people from starting to smoke, as stated in Minn. Stat. § 144.391, as it may be amended from time to time.

In making these findings, the County Board accepts the conclusions and recommendations of: the U.S. Surgeon General reports, *E-cigarette Use Among Youth and Young Adults* (2016), *The Health Consequences of Smoking—50 Years of Progress* (2014) and *Preventing Tobacco Use Among Youth and Young Adults* (2012); the Centers for Disease Control and Prevention in their studies, *Tobacco Use Among Middle and High School Students — United States, 2011– 2015*(2016), and *Selected Cigarette Smoking Initiation and Quitting Behaviors Among High School Students, United States, 1997(1998)*; and of the following scholars in these scientific journals: Chen, J., & Millar, W. J. (1998). Age of smoking initiation: implications for quitting. *Health Reports*, 9(4), 39-46; D’Avanzo, B., La Vecchia, C., & Negri, E. (1994). Age at starting smoking and number of cigarettes smoked. *Annals of Epidemiology*, 4(6), 455–459; Everett, S. A., Warren, C. W., Sharp, D., Kann, L., Husten, C. G., & Crossett, L. S. (1999). Initiation of cigarette smoking and subsequent smoking behavior among U.S. high school students. *Preventive Medicine*, 29(5), 327–333; Giovino, G. A. (2002). Epidemiology of tobacco use in the United States. *Oncogene*, 21(48), 7326–7340; Khuder, S. A., Dayal, H. H., & Mutgi, A. B. (1999). Age at smoking onset and its effect on smoking cessation. *Addictive Behaviors*, 24(5), 673–677; Luke, D. A., Hammond, R. A., Combs, T., Sorg, A., Kasman, M., Mack-Crane, A., Henriksen, L. (2017). Minnesota Department of Health. (2020). Data Highlights from the 2019 Minnesota Youth Tobacco Survey. Saint Paul, MN; Tobacco Control Legal Consortium. (2006). *The Verdict Is In: Findings from United States v. Philip Morris, The Hazards of Smoking*. University of California - San Francisco. Truth Tobacco Industry Documents, <https://www.industrydocumentslibrary.ucsf.edu/tobacco/>; Xu, X.,

Bishop, E. E., Kennedy, S. M., Simpson, S. A., & Pechacek, T. F. (2015) Annual healthcare spending attributable to cigarette smoking: an update. *American Journal of Preventive Medicine*, 48(3), 326–333, copies of which are adopted by reference.

Section 1-3: Jurisdiction

This ordinance governs the licensing and regulation of the sale of tobacco, tobacco-related devices, electronic delivery devices, and nicotine or lobelia delivery products in the unorganized territory of Mower County and in any city or town located in Mower County that does not license and regulate retail sales of tobacco, tobacco-related devices, electronic delivery devices, and nicotine or lobelia delivery products in conformance with the minimum requirements of Minn. Stat. § 461. Retail establishments licensed by a city or town are not required to obtain a second license for the same location under this ordinance.

Section 1-4: DEFINITIONS: Except as may otherwise be provided or clearly implied by context, all terms are given their commonly accepted definitions. For the purpose of this ordinance, the following definitions 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, as in effect on January 1, 2015.

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 Minn. Stat. § 297F.01, subd. 3, as may be amended from time to time.

COMPLIANCE CHECKS: The system the county uses to investigate and ensure that those authorized to sell licensed products are following and complying with the requirements of this ordinance. **COMPLIANCE CHECKS** involve the use of persons under the age of 21 who purchase or attempt to purchase licensed products. **COMPLIANCE CHECKS** may also be conducted by the county or other units of government for educational, research, and training purposes or for investigating or enforcing federal, state, or local laws and regulations relating to licensed products.

ELECTRONIC DELIVERY DEVICES. Any product containing or delivering nicotine, lobelia, or any other substance, whether natural or synthetic, intended for human consumption through the inhalation of aerosol or vapor from the product. **ELECTRONIC DELIVERY DEVICE** 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. **ELECTRONIC DELIVERY DEVICE** includes any component part of a product, whether or not marketed or sold separately. **ELECTRONIC DELIVERY DEVICE** does not include any product that has been approved or certified by the U.S. 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.

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 50 percent 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.

LICENSED PRODUCT. The term that collectively refers to any tobacco, tobacco-related device, electronic delivery device, or nicotine or lobelia delivery product.

LOOSIES. The common term used to refer to single cigarettes, cigars, and any other licensed product that have been removed from their original retail packaging and offered for sale. **Loosies** does not include 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.

MOVEABLE PLACE OF BUSINESS. Any form of business that is operated out of a kiosk, truck, van, automobile or other type of vehicle or transportable shelter and not a fixed address store front or other permanent type of structure authorized for over-the-counter sales transactions.

NICOTINE OR LOBELIA DELIVERY PRODUCT. Any product containing or delivering nicotine or lobelia intended for human consumption, or any part of such a product, that is not a tobacco or an electronic delivery device as defined in this section. NICOTINE OR LOBELIA DELIVERY PRODUCT does not include any product that has been approved or otherwise certified for legal sale by the U.S. Food and Drug Administration as a tobacco-cessation product, a tobacco-dependence product, 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. Retail establishment includes but is not limited to grocery stores, tobacco products shops, convenience stores, liquor stores, gasoline service stations, bars, and restaurants.

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

SELF-SERVICE DISPLAY. The open display of licensed products in a retail establishment 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 required in order to access the licensed products.

SMOKING. Inhaling, exhaling, burning, or carrying any lighted or heated cigar, cigarette, or 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. SMOKING also includes carrying or using an activated electronic delivery device.

TOBACCO. Any product containing, made, or derived from tobacco that is intended for human consumption, whether chewed, smoked, 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 does not include any product that has been approved by the U.S. 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 DEVICE. Any rolling papers, wraps, pipes, or other device intentionally designed or intended to be used with tobacco products. TOBACCO-RELATED DEVICE includes components of tobacco-related devices or tobacco products, which may be marketed or sold separately. TOBACCO-RELATED DEVICES may or may not contain tobacco.

VENDING MACHINE. Any mechanical, electric or electronic, or other type of device that 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.

Section 1-5: LICENSE:

(A) *License Required.* No person shall sell or offer to sell any licensed product without first having obtained a license to do so from the county.

(B) *Application.* An application for a license to sell licensed products must be made on a form provided by Mower County. The application must contain the full name of the applicant, the applicant's residential and business addresses and telephone numbers, the name of the business for which the license is sought, and any additional information the county deems necessary. Upon receipt of a completed application, the County Auditor will forward the application to the Mower County Board for action at its next regularly scheduled meeting. If the County Auditor determines that an application is incomplete, it will be returned to the applicant with notice of the information necessary to make the application complete.

(C) *Action.* The Mower County Board may approve or deny the application for a license, or it may delay action for a reasonable period of time to complete any investigation of the application or the applicant deemed necessary. If the Mower County Board approves the application, the County Auditor will issue the license to the applicant. If the Mower County Board denies the application, notice of the denial will be given to the applicant along with notice of the applicant's right to appeal the decision.

- (D) *Term.* All licenses issued are valid for one calendar year from the date of issue.
- (E) *Revocation or suspension.* Any license issued may be suspended or revoked following the procedures set forth in Article 12.
- (F) *Transfers.* All licenses issued are valid only on the premises for which the license was issued and only for the person to whom the license was issued. The transfer of any license to another location or person is prohibited.
- (G) *Display.* All licenses must be posted and displayed at all times in plain view of the general public on the licensed retail establishment.
- (H) *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 30 days, but no more than 60 days, before the expiration of the current license.
- (I) *Issuance as privilege and not a right.* The issuance of a license is a privilege and does not entitle the license holder to an automatic renewal of the license.
- (J) *Smoking prohibited.* 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) *Samples prohibited.* No person shall distribute samples of any licensed product free of charge or at a nominal cost.
- (L) *Instructional program.* Licensees must ensure that all employees complete a training program on the legal requirements related to the sale of licensed products and the possible consequences of license violations. Any training program must be pre-approved by the county. Licensees must maintain documentation demonstrating their compliance and must provide this documentation to the county at the time of renewal, or whenever requested to do so during the license term.

Section 1-6: FEES: No license will be issued under this ordinance until the appropriate license fees are paid in full. The fees will be established by the county's fee schedule and may be amended from time to time.

Section 1-7: 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 21 years of age.
 - (2) The applicant has been convicted within the past five 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 12 months of the date of application.
 - (4) The applicant fails to provide any of the information required on the licensing 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.
 - (6) The business for which the license is requested is a moveable place of business. Only fixed-location retail establishments are eligible to be licensed.
- (B) Except as may otherwise be provided by law, the existence of any particular ground for denial does not compel the county to deny the license.
- (C) If a license is mistakenly issued or renewed to a person, it will be revoked upon the discovery that the person was ineligible for the license under this ordinance. The county will provide the license holder with notice of the revocation, along with information on the right to appeal.

Section 1-8: PROHIBITED ACTS:

- (A) *In general.* No person shall sell or offer to sell any licensed product:
 - (1) By means of any type of vending machine.

- (2) By means of loosies as defined.
- (3) Containing opium, morphine, jimson weed, bella donna, 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 other products subject to this ordinance.
- (4) By means of self-service display. All licensed products must be stored behind the sales counter, in a locked case, in a storage unit, or in another area not freely accessible to the general public. Any retailer selling licensed products at the time this ordinance is adopted must comply with this section within 90 days of the effective date of this ordinance.
- (5) By any other means, to any other person, on in any other manner or form prohibited by federal, state or other local law, ordinance provision, or other regulation.

(B) *Legal age.* No person shall sell any licensed product to any person under the age of 21.

- (1) *Age verification.* Licensees must verify by means of government-issued photographic identification that the purchaser is at least 21 years of age. Verification is not required for a person over the age of 30. That the person appeared to be 30 years of age or older does not constitute a defense to a violation of this subsection.
- (2) *Signage.* Notice of the legal sales age and age verification requirement must be posted prominently and in plain view at all times at each location where licensed products are offered for sale. The required signage, which will be provided to the licensee by the county, must be posted in a manner that is clearly visible to anyone who is or is considering making a purchase.

(C) *Liquid packaging.* No person shall 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 by the county, a licensee must provide a copy of the certificate of compliance or full laboratory testing report for the packaging used.

Section 1-9: RESPONSIBILITY: All licensees are responsible for the actions of their employees in regard to the sale, offer to sell, and furnishing of licensed products on the licensed premises. The sale, offer to sell, or furnishing of any licensed product by an employee shall be considered an act of the licensee. Nothing in this section shall be construed as prohibiting the county from also subjecting the employee to any civil penalties that the county deems to be appropriate under this ordinance, state or federal law, or other applicable law or regulation.

Section 1-10: COMPLIANCE CHECKS AND INSPECTIONS All licensed premises must be open to inspection by law enforcement or other authorized county officials during regular business hours. From time to time, but at least twice per year, the county will conduct compliance checks. In accordance with state law, the county will conduct compliance checks that involve the participation of persons at least 17 years of age, but under the age of 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 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.

Section 1-11: OTHER PROHIBITED ACTS: Unless otherwise provided, the following acts are an administrative violation of this ordinance:

- (A) *Prohibited furnishing or procurement.* It is a violation of this ordinance for any person 21 years of age or older to purchase or otherwise obtain any licensed product on behalf of a person under the age of 21. It is also a violation for any person 21 years of age and older to coerce or attempt to coerce a person under the age of 21 to illegally purchase or attempt to purchase any licensed product.
- (B) *Use of false identification.* It is a violation of this ordinance for any person under the age of 21 to use any form of false identification, whether the identification is that of another person or has been modified or tampered with, to represent an age older than the actual age of the person using that identification in order to purchase licensed products.

Section 1-12: EXCEPTIONS AND DEFENSES:

- (A) *Religious, Spiritual, or Cultural Ceremonies or Practices.* Nothing in this ordinance prevents the provision of tobacco or tobacco-related devices to any person as part of an indigenous practice or a lawfully recognized religious, spiritual, or cultural ceremony or practice.
- (B) *Reasonable Reliance.* It is an affirmative defense to a violation of this ordinance for a person to have reasonably relied on proof of age as described by state law.

Section 1-13: VIOLATIONS AND PENALTIES:

(A) *Violations.*

- (1) Notice. A person violating this ordinance may be issued, either personally or by mail, a citation from the county that sets forth the alleged violation and that informs the alleged violator of their right to a hearing on the matter and how and where a hearing may be requested, including a contact address and phone number.
- (2) Hearings.
 - (a) Upon issuance of a citation, a person accused of violating this ordinance may request in writing a hearing on the matter. Hearing requests must be made within 10 business days of the issuance of the citation and delivered to the County Auditor or other designated county officer. Failure to properly request a hearing within 10 business days of the issuance of the citation will terminate the person's right to a hearing.
 - (b) The County Auditor or other designated county officer will set the time and place for the hearing. Written notice of the hearing time and place will be mailed or delivered to the accused violator at least 10 business days prior to the hearing.
- (3) Hearing Officer. The Mower County Board will designate a hearing officer. The hearing officer will be an impartial employee of the county or an impartial person retained by the county to conduct the hearing.
- (4) Decision. A decision will be issued by the hearing officer within 10 business days of the hearing. If the hearing officer determines that a violation of this ordinance did occur, that decision, along with the hearing officer's reasons for finding a violation and the penalty to be imposed, will be recorded in writing, a copy of which will be provided to the county and the accused violator by in-person delivery or mail as soon as practicable. If the hearing officer finds that no violation occurred or finds grounds for not imposing any penalty, those findings will be recorded and a copy will be provided to the county and the acquitted accused violator by in-person delivery or mail as soon as practicable. The decision of the hearing officer is final, subject to an appeal as described in section 11, division (A)(6) of this section.
- (5) Costs. If the citation is upheld by the hearing officer, the county's actual expenses in holding the hearing up to a maximum of \$1000 must be paid by the person requesting the hearing.
- (6) Appeals. Appeals of any decision made by the hearing officer must be filed in Mower County district court within 10 business days of the date of the decision.
- (7) Continued violation. Each violation, and every day in which a violation occurs or continues, shall constitute a separate offense.

(B) *Administrative penalties.*

- (1) Licensees. Any licensee found to have violated this ordinance, or whose employee violated this ordinance, will be charged an administrative fine of \$300 for a first violation; \$600 for a second offense at the same licensed premises within a 36-month period; and \$1000 for a third or subsequent offense at the same location within a 36-month period. Upon the third violation, the license will be suspended for a period of not less than 30 consecutive days. Upon a fourth violation within a 36-month period, the license will be revoked.
- (2) Employees of Licensees and Other individuals. Individuals, other than persons under the age of 21 regulated by paragraph (B)(3) of this section, who are found to be in violation of this ordinance will be charged an administrative fine of \$50.
- (3) Persons under the age of 21. Persons under the age of 21 who use a false identification to purchase or attempt to purchase licensed products may only be subject to non-criminal, non-monetary civil penalties such as tobacco-related education classes, diversion programs, community services, or another penalty that the county determines to be appropriate. The Mower County Board will consult with court personnel, educators, parents, children, and other interested parties to determine an appropriate penalty for persons under the age of 21 in the county. The penalty may be established by ordinance and amended from time to time.
- (4) Statutory penalties. If the administrative penalty authorized to be imposed by Minn. Stat. § 461.12, as it may be amended from time to time, differ from that established in this section, then the higher penalty will prevail.

(C) *Misdemeanor prosecution.* Nothing in this section prohibits the county from seeking prosecution as a misdemeanor for any alleged violation of this ordinance by a person 21 years of age or older.

Section 1-14: SEVERABILITY: If any section or provision of this ordinance is held invalid, such invalidity will not affect other sections or provisions that can be given force and effect without the invalidated section or provision.

Section 1-15: EFFECTIVE DATE:

Approved and adopted this 28TH day of July, 2020, by the Mower County Board.

This Ordinance shall be in full force and effect on the 1st day of August, 2020, after its approval and publication as provided by law.

BE IT FURTHER ORDAINED that the Mower County Tobacco Ordinance adopted herein is effective upon publication. (*Published in the Austin Daily Herald on August 1, 2020*).

Passed and approved this 28th day of July, 2020.