

## CHAPTER 115: TOBACCO REGULATIONS

### AN ORDINANCE REGULATING THE POSSESSION, SALE AND CONSUMPTION OF TOBACCO AND TOBACCO RELATED DEVICES AND PRODUCTS WITHIN THE CITY OF BROWNS VALLEY, STATE OF MINNESOTA

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#### **§115.01 PURPOSE AND INTENT.**

Because the City 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 18 violates both state and federal laws; and because studies, which the City accepts and adopts, have shown that youth use of any commercial tobacco product has increased to 26.4% in Minnesota; and because nearly 90% of smokers begin smoking before they have reached the age of 18 years, and that almost no one starts smoking after age 25; and because the CDC reports that as of November 20, 2019, there have been 2,290 cases of e-cigarette product use associated lung injury nationwide resulting in 47 deaths (widely known as "vaping" injuries and deaths); and because three of those deaths have occurred in Minnesota; and because the Surgeon General and the FDA Commissioner has labeled the recent uptick in youth use of electronic delivery devices as an "epidemic;" and because marketing analysis, public health research, and commercial tobacco industry documents reveal that tobacco companies have used menthol, mint, fruit, candy, and alcohol flavors as a way to target youth and young adults and that the presence of such flavors can make it more difficult to quit; and because studies show that youth and young adults are especially susceptible to commercial tobacco product availability, advertising, and price promotions at tobacco retail environments; 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 City Council accepts the conclusions and recommendations of: the U.S. Surgeon General reports and advisory, E-cigarette Use Among Youth and Young Adults (2016), The Health Consequences of Smoking-50 Years of Progress (2014), Preventing Tobacco Use Among Youth and Young Adults (2012), and Surgeon General's Advisory on E-Cigarette Use Among Youth (2018); the Centers for Disease Control and Prevention in their studies, Vital Signs: Tobacco Product Use Among Middle and High School Students - United States, 2011- 2018(2019), Selected Cigarette Smoking Initiation and Quitting Behaviors Among High School Students, United States, 1997(1998), and Outbreak of Lung Injury Associated with the Use of E-Cigarette, or Vaping, Products (available at: [https://www.cdc.gov/tobacco/basic\\_information/e-cigarettes/severe-lung-disease.html](https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html)) (2019); 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). Tobacco Town: Computational Modeling of Policy Options to Reduce Tobacco Retailer Density. *American Journal of Public Health*, 107(5), 740-746; Minnesota Department of Health. (2018). Data Highlights from the 2017 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.

## **§115.02 DEFINITIONS.**

Except as may otherwise be provided or clearly implied by context, all terms shall be given their commonly accepted definitions. The singular shall include the plural and the plural shall include the singular. The masculine shall include the feminine and neuter, and vice-versa. The term "shall" means mandatory and the term "may" means permissive. The following terms shall have the definitions given to them:

- (A) ***Compliance Checks***. The system the City uses to investigate and ensure that those authorized to sell licensed products and electronic delivery devices 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 City 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.
- (B) ***Electronic Delivery Device***. 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.

- (C) **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.
- (D) **Licensed Products.** Collectively refers to any tobacco, tobacco-related device, or nicotine or lobelia delivery product.
- (E) **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.
- (F) **Moveable 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 store front or other permanent type of structure authorized for sales transactions.
- (G) **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 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.
- (H) **Retail Establishment.** Any place of business where licensed products are available for sale to the general public. **Retail Establishment** includes, but is not be limited to, grocery stores, tobacco products shops, gasoline service stations, convenience stores, bars, and restaurants.
- (I) **Sale.** Any transfer of goods for money, trade, barter, or other consideration.
- (J) **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 merchandising** shall not include vending machines.
- (K) **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. For the purpose of this Tobacco Sale Ordinance, tobacco-related device does not include electronic delivery devices.

- (L) **Tobacco-Related Devices.** Any rolling papers, wraps, pipes, or other device intentionally designed or intended to be used with tobacco products. **Tobacco-Related Devices** include components of tobacco-related devices or tobacco products, which may be marketed or sold separately. **Tobacco-Related Devices** may or may not contain tobacco. For the purpose of this Tobacco Sale Ordinance, tobacco does not include electronic delivery devices.
- (M) **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 products.

### §115.03 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 City. No license shall be issued to sell electronic delivery devices, in accordance with Section 350.60, Sub. 1 of this Ordinance.
- (B) **Application.** An application for a license to sell licensed products shall be made on a form provided by the City. The application shall contain the full name of the applicant, the applicants residential and business addresses and telephone numbers, the name of the business for which the license is sought, and any additional information the City deems necessary. Upon receipt of a completed application, the City Clerk shall forward the application to the City Council for action at its next regularly scheduled meeting. If the City Clerk shall determine that an application is incomplete, he or she shall return the application to the applicant with notice of the information necessary to make the application complete.
- (C) **Action.** The City Council may approve or deny the license, or it may delay action for such reasonable period of time necessary to complete any investigation of the application or the applicant it deems necessary. If the City Council shall approve the license, the City Clerk shall issue the license to the applicant. If the City Council denies the license, notice of the denial shall be given to the applicant along with notice of the applicant's right to appeal the decision.
- (D) **Term.** All licenses issued under this ordinance shall be valid for one calendar year from the date of issue.
- (E) **Revocation or Suspension.** Any license issued under this ordinance may be revoked or suspended as provided in the Violations and Penalties section of this ordinance.
- (F) **Transfers.** All licenses issued under this ordinance shall be 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) *Moveable Place of Business.* No license shall be issued to a moveable place of business. Only fixed location businesses shall be eligible to be licensed under this ordinance.
- (H) *Display.* All licenses shall be posted and displayed in plain view of the general public on the licensed premises.
- (I) *Renewals.* The renewal of a license issued under this section shall be handled in the same manner as the original application. The request for a renewal shall be made at least thirty (30) days but no more than sixty (60) days before the expiration of the current license.
- (J) *Issuance is a Privilege Not a Right.* The issuance of a license issued under this ordinance 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.
- (K) *Smoking.* Smoking shall not be permitted and no person shall smoke within the indoor area of any establishment with a retail tobacco license. Smoking for the purposes of sampling tobacco and tobacco related products is prohibited.

#### **§115.04 FEES.**

No license shall be issued under this ordinance until the appropriate license fee shall be paid in full. The fee for a license under this ordinance shall be in an amount set from time to time in a fee schedule, adopted by resolution of the City Council.

#### **§115.05 BASIS FOR DENIAL OF LICENSE.**

The following shall be grounds for denying the issuance or renewal of a license under this ordinance:

- (A) The applicant is under the age of 21 years.
- (B) 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 or electronic delivery devices.
- (C) The applicant has had a license to sell licensed products or electronic delivery devices revoked within the preceding twelve months of the date of application.
- (D) The applicant fails to provide any information required on the application, or provides false or misleading information.
- (E) The applicant is prohibited by Federal, State, or other local law, ordinance, or other regulation, from holding such a license.

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. 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 Section:

**§115.06 PROHIBITED SALES.**

- (A) *Electronic delivery devices.* No person shall sell or offer for sale any electronic delivery device.
- (B) *General Provisions.* It shall be a violation of this ordinance for any person to 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.
  - (4) By any other means, to any other persons, on in any other manner or form prohibited by Federal, State, or local law, ordinance provision, or other regulation.
- (C) *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) No person under the age of twenty-one (21) years shall purchase tobacco, tobacco-related devices, electronic delivery devices, or nicotine or lobelia products using a driver's license, a Minnesota identification card, or other form of identification which is false, fictitious, altered, or counterfeited as to age or any other material fact of identification. Use of a false identification to purchase tobacco, tobacco-related devices, electronic delivery devices, or nicotine or lobelia products is a misdemeanor.
  - (3) *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 City, must be posted in a manner that is clearly visible to anyone who is or is considering making a purchase.
  - (4) It is an affirmative defense to a charge under this subdivision if the defendant proves by a preponderance of the evidence that the defendant reasonably and in good faith relied on proof of age as described in M.S.A. §340A.503, Subd. 6.
  - (5) *Exceptions.*
    - (a) Notwithstanding the above-stated provisions, individuals exempted under M.S.A. §609.685 are also exempt from this section.
    - (b) The penalties in this section do not apply to a person under the age of twenty-one (21) years who purchases or attempts to purchase tobacco, tobacco-related devices, electronic delivery devices, or nicotine or lobelia products while under

the direct supervision of a responsible adult for training, education, research, or enforcement purposes.

(D) *Additional provisions.*

- (1) No person shall sell a cigarette outside its original packaging containing health warnings satisfying the requirements of federal law. No cigarettes shall be sold in packages of fewer than twenty (20) cigarettes.
- (2) No person shall sell or dispense tobacco, tobacco-related devices, electronic delivery devices, or nicotine or lobelia delivery devices from a motor vehicle or other movable place of business.
- (3) No person shall offer for sale tobacco, tobacco-related devices, electronic delivery devices, or nicotine or lobelia delivery products in any open displays which are accessible to the public without the intervention of a store employee.
- (4) No person shall sell, offer for sale, or otherwise distribute any liquid, whether or not such liquid contains nicotine, which is intended for human consumption and use in an electronic delivery device.

**§115.07 SELF-SERVICE SALES.**

It shall be unlawful for a licensee under this ordinance to allow the sale of licensed products by any self-service displays where the customer may have access to such items without having to request the item from the licensee or the licensee's employee and where there is not a physical exchange of the licensed product between the licensee or the licensee's employee and the customer. All licensed products shall 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 ordinance is adopted shall comply with this Section within thirty (30) days following the effective date of this ordinance.

**§115.08 FLAVORED PRODUCTS.**

No person shall sell, offer for sale, or otherwise distribute any flavored products.

**§115.09 RESPONSIBILITY.**

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

**§115.10 COMPLIANCE CHECKS AND INSPECTIONS.**

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 twice per year, the City will conduct compliance checks. In accordance with state law, the City will conduct at least one compliance check that involves the participation of a person between the ages of 15 and 17 and at least one compliance check that involves the participation of a person between the ages of 18 and 20 to enter the licensed premises to attempt to purchase licensed products or any electronic delivery devices. 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.

**§115.11 PROHIBITED FURNISHING OR PROCUREMENT.**

Unless otherwise provided, the following acts shall be an administrative violation of this ordinance. 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.

**§115.12 VIOLATIONS.**

- (A) *Notice.* A person violating this ordinance may be issued, either personally or by mail, a citation from the City that sets forth the alleged violation and that informs the alleged violator of his or her right to a hearing on the matter and how and where a hearing may be requested, including a contact address and phone number.
  
- (B) *Hearings.*
  - (1) 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 City Clerk or other designated city 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.
  
  - (2) The City Clerk or other designated city 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.
  
- (C) *Hearing Officer.* The City Council of the City of Browns Valley shall serve as the hearing panel.
  
- (D) *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 City 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 City 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 subsection 5 of this section.
  
- (E) *Appeals.* Appeals of any decision made by the hearing panel shall be filed in the district court for the jurisdiction of the City of Browns Valley in which the alleged violation occurred.
  
- (F) *Continued Violation.* Each violation, and every day in which a violation occurs or continues, shall constitute a separate offense.
  
- (G) *Costs.* If the citation is upheld by the hearing officer, the City's actual expenses in holding the hearing up to a maximum of \$1,000 must be paid by the person requesting the hearing.

**§115.13 PENALTIES.**

- (A) *Licensees.* Any licensee found to have violated this ordinance, or whose employee shall have violated this ordinance, shall be charged an administrative fine of \$200 for a first violation of this ordinance; \$500 for a second violation at the same licensed premises within a twenty four (24) month period; and \$750 for a third or subsequent violation at the same location within a twenty four (24) month period. Upon the third offense, the license shall be suspended for not less than seven days. Upon the fourth violation, the license will be revoked.
- (B) *Other Individuals.* Other individuals, other than persons under the age of 21, found to be in violation of this ordinance shall be charged an administrative fee of \$50.
- (C) *Misdemeanor.* Nothing in this Section shall prohibit the City from seeking prosecution as a misdemeanor for any violation of this ordinance by a person age 21 or older.

**§115.14 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.

**§115.15 SEVERABILITY AND SAVINGS CLAUSE.**

If any section or portion of this ordinance shall be found unconstitutional or otherwise invalid or unenforceable by a court of competent jurisdiction, that finding shall not serve as an invalidation or effect the validity and enforceability of any other section or provision of this ordinance.

**§115.16 EFFECTIVE DATE.**

This ordinance shall take effect upon the passage and publication of this ordinance and a notice for two consecutive weeks stating that printed copies are available at the office of the City Clerk.

**§115.17 REPEALER.**

The former Browns Valley Tobacco Ordinance relating to the sale of licensed products and electronic delivery devices is hereby repealed.