

# Ordinance 21: RETAIL TOBACCO SALES

Adopted on August 31, 1999 by the Hennepin County Board of Commissioners.

Amended on November 1, 2016 by the Hennepin County Board of Commissioners.

Amended on \_\_\_\_, 2019 by the Hennepin County Board of Commissioners.

An ordinance relating to the sale of tobacco, tobacco-related devices, electronic delivery devices, and nicotine and lobelia products in Hennepin County and to reduce the illegal sale of such items to and by minors. This ordinance is enacted pursuant to Minnesota Statutes §§ 461.12 to 461.21.

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The Hennepin County Board of Commissioners Ordains:

### **Section 1: PURPOSE AND SCOPE**

This ordinance aims to protect youth and young adults in Hennepin County from the serious and harmful health effects associated with tobacco use. This ordinance is intended to regulate the sale of commercial tobacco, tobacco-related devices, electronic delivery devices, and nicotine or lobelia delivery products.

### **Section 2: APPLICABILITY AND 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 Hennepin County and in any city or town located in Hennepin 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 Minnesota Statutes, Chapter 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 3: 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 Minn. Stat. § 461.20(a), as may be amended from time to time.

**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 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.

**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.

**HEALTH AUTHORITY.** The Community Health Services Administrator as defined by Minn. Stat. § 145A.02 subd. 6a, as may be amended from time to time, and other employees, agents, or contractors as the Hennepin County Board may designate.

**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. A standard window screen (0.011 gauge with an 18 by 16 mesh count) is not considered a wall.

**LICENSED PRODUCTS.** 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 or individually packaged Cigars or cigarettes, or any other Licensed Product that has been removed from its intended retail packaging and offered for Sale. Loosies does not include individual Cigars with a retail price, after any discounts are applied and before any sales taxes are imposed, of at least \$3.00 per Cigar.

**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 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. The phrase includes but is not limited to grocery stores, tobacco products shops, convenience 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 any manner where any person has access to the Licensed Products without the assistance or intervention of the licensee or the licensee's employee.

**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 4: 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 the 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 Health Authority will timely review the application. If 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 Health Authority shall review the application for conformance with this Ordinance and all applicable law. The Health Authority 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 Health Authority approves the application, the county will issue the license to the applicant. If the Health Authority 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) **Appeal of license denial.** An applicant may appeal a denial following the procedure set forth in Section 12.
- (E) **Term.** All licenses issued are valid for one calendar year from the date of issue.
- (F) **Revocation or suspension.** Any license issued may be suspended or revoked following the procedure set forth in Section 12.
- (G) **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.
- (H) **Moveable Place of Business.** No license will be issued to a Moveable Place of Business. Only fixed location businesses are eligible to be licensed.
- (I) **Display.** All licenses must be posted and displayed at all times in plain view of the general public on the licensed premises.
- (J) **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.
- (K) **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.
- (L) **Minimum clerk age.** Individuals employed by a licensed Retail Establishment under this Ordinance must be at least 16 years of age to sell Licensed Products.
- (M) **Instructional program.** Licensees must ensure that all sales clerks 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 5: 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 6. 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.
- (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 7: PROHIBITED SALES

- (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 any other means, to any other person, or 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 must be posted in a manner that is clearly visible to anyone who is or is considering making a purchase.

(C) **Self-Service Sales.** No person shall allow the Sale of Licensed Products by any Self-Service Displays where the customer may have access to those 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 from the licensee or the licensee's employee to the customer. All Licensed Products must be stored behind the sales counter, in another 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 must comply with this section within 90 days of the effective date of this Ordinance.

(D) **Flavored Products.** No person shall sell or offer for Sale any Flavored Products. This prohibition does not apply to Retail Establishments that:

- (1) Prohibit persons under 21 from entering at all times;
- (2) Derive at least 90 percent of their gross revenues from the Sale of Licensed Products; and
- (3) Meet all of the following building or structural criteria:
  - (a) Shares no wall with and has no part of their structure adjoined to any other business or retailer unless the wall is permanent, completely opaque, and without doors, windows, and pass-throughs to the other business or retailer;
  - (b) Shares no walls with and has no part of their structure directly adjoined to another licensed Tobacco retailer; and
  - (c) Is accessible by the public only by an exterior door.

Any Retail Establishment that sells Flavored Products must provide financial records documenting its annual Sales, upon request by the county.

- (E) **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 Packaging. 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.
- (F) **Cigars.** No person shall sell or offer to sell any Cigar, sold individually or as a multi-unit package, and regardless of whether it is within its intended retail packaging, for a sales price, after any discounts are applied and before sales taxes are imposed, of less than \$3.00 per Cigar.

### **Section 8: 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 9: COMPLIANCE CHECKS AND INSPECTIONS**

All licensed premises must be open to inspection by law enforcement or other authorized county officials during regular business hours.

At least twice per year, the county will conduct Compliance Checks with respect to the minimum age to purchase products licensed under this ordinance. In accordance with state law, the county will conduct a Compliance Check that involves the participation of a person between the ages of 15 and 17. The county will also conduct a Compliance Check that involves the participation of a person between the ages of 18 and 20. In both Compliance Checks, persons under the minimum purchase age will enter licensed premises to attempt to purchase Licensed Products. Prior written consent of a parent or guardian is required for any person under the age of 18 to participate in a Compliance Check. Persons participating in Compliance Checks will be supervised by law enforcement or other designated personnel.

Additionally, from time to time, the county will conduct inspections to determine compliance with any or all other aspects of this Ordinance.

### **Section 10: OTHER PROHIBITED ACTS**

Unless otherwise provided, the following acts are a 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 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 use any form of a 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.
- (C) **Samples prohibited.** No person shall distribute samples of any Licensed Product free of charge or at a nominal cost.
- (D) **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.

#### Section 11: 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 12: VIOLATIONS, PENALTIES AND ADMINISTRATIVE HEARING

##### (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 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.
- (2) **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 \$200 for a first violation; \$500 for a second offense at the same licensed premises within a 24-month period; and \$1,000 for a third or subsequent offense at the same location within a 24-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, the license will be revoked.

- (2) **Other individuals.** Individuals, other than persons under the age of 21 regulated by division (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 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.
  - (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.
- (D) **Administrative hearing.**
- (1) **Right of appeal.** Where a license application or renewal is denied or a licensee receives a suspension, summary suspension, or revocation notice, the applicant or licensee may appeal the action to the Health Authority by requesting an administrative hearing within ten County working days of the date of the notice. The notice of the action shall state the right to an administrative hearing.
  - (2) **Administrative hearing.** If any applicant or licensee makes a written request for an administrative hearing, such hearing shall be held before the Community Health Services Administrator as defined by Minn. Stat. § 145A.02 subd. 6a, as may be amended from time to time, or his/her designee.
  - (3) **Schedule.** The administrative hearing shall be held no later than 45 calendar days after the date of service of the request for a hearing was received unless the appellant requests an extension of time. If an extension is requested, the hearing shall be held no later than 90 calendar days after the date of service of the request for a hearing.
  - (4) **Notice.** The Health Authority shall mail notice of the administrative hearing to the appellant at least ten calendar days prior to the hearing. Such notice shall include (1) a statement of time, place, and nature of the hearing; and (2) a reference to the particular section of this Ordinance or the adopted statutes or rules that have been violated.
  - (5) **Witnesses and evidence.** All parties shall have full opportunity to respond to and present evidence and witnesses.

- (6) **Standard of proof.** The appellant shall have the burden of proving its position by clear and convincing evidence. All findings of fact, conclusions of law, and decisions by the Community Health Services Administrator or his/her designee shall be based on evidence presented and matters officially noticed.
- (7) **Rules of evidence.** The Rules of Evidence, as applied in the District Court, shall not apply to the hearing, but irrelevant, immaterial, and unduly repetitious evidence shall be excluded. The hearing shall be confined to matters raised in the Health Authority's written notice of suspension, summary suspension, or revocation or in the appellant's written request for a hearing.
- (8) **Record of hearing.** The hearing shall be taped or videotaped and minutes shall be kept.
- (9) **Notice of decision.** The determination of the Community Health Services Administrator or his/her designee and a copy of the minutes of the administrative hearing shall be forwarded to the appellant within ten County working days of the conclusion of the administrative hearing. The determination will be effective on the sixth County working day following the date the notice is sent.
- (10) **Request for reconsideration of hearing decision.** The written notice must state the effective date of the adverse action. The notice must state that the appellant has the right to request a reconsideration of the hearing decision within five County working days of receipt of the notice. The reconsideration shall consist of a review of the record by the Health Authority. The review shall be conducted within five County working days of the receipt for the request for reconsideration. A written notice of determination will be forwarded to the appellant within five County working days of the reconsideration decision. The determination will become effective after three working days after the notice of decision is mailed.

### **Section 13. 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 14: NOTICE**

The County shall make reasonable efforts to send Tobacco retailers regulated by this Ordinance thirty (30) days mailed notice of proposed amendments to this Ordinance.

### **Section 15. EFFECTIVE DATE**

This ordinance becomes effective on January 1, 2020.