

ORDINANCE NO. 287

AN ORDINANCE REGULATING THE POSSESSION, SALE AND CONSUMPTION OF TOBACCO AND TOBACCO-RELATED DEVICES AND PRODUCTS WITHIN THE CITY OF BRAHAM, MINNESOTA

The City Council of Braham, Minnesota ordains:

SECTION 1. PURPOSE AND INTENT.

Because the City recognizes that the sale of 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 hereby accepts and adopts, have shown that most smokers begin smoking before they have reached the age of 18 years and that almost no one starts smoking after age 25; and because national data show that about 95% of adult smokers begin smoking before they turn 21 and the ages of 18 to 21 are a critical period when many smokers move from experimental smoking to regular, daily use; and because tobacco use has been shown to be the cause of several serious health problems which subsequently place a financial burden on all levels of government; this Ordinance intends to regulate the sale of 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 effects associated with use and initiation, and to further the official public policy of the state in regard to preventing young people from starting to smoke as stated in M.S. § 144.391, as it may be amended from time to time.

In making this determination, the City Council of the City of Braham accepts the findings presented by the Isanti County Public Health Department at the May 7, 2019 Braham City Council Meeting and referenced in the Isanti County Ordinance Regulating the Possession, Sale and Consumption of Tobacco and Tobacco-Related Devices and Products within the County of Isanti, adopted March 20, 2019.

AUTHORITY. This Ordinance is enacted pursuant to Minnesota Statutes Chapters 461 and 145A allowing for local ordinances to set more restrictive regulations on the provision of tobacco, tobacco products, tobacco-related devices, electronic delivery devices, and nicotine or lobelia delivery devices.

JURISDICTION. Pursuant to Minnesota Statute 145A.05, Subd. 1 and Subd. 9, this Ordinance shall apply to all licenses issued by the City of Braham.

SECTION 2. DEFINITIONS.

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

CIGARS. Any roll of tobacco that is wrapped in tobacco leaf or in any substance containing tobacco, with or without a tip or mouthpiece, that is not a cigarette as defined in M.S. § 297F.01, subd. 3 as amended from time to time.

COMPLIANCE CHECKS. The system the City of Braham uses to investigate and ensure that those authorized to sell licensed products are following and complying with the requirements of this Ordinance. Compliance checks shall involve the use persons under age 21 as authorized by this Ordinance. Compliance checks shall also mean the use of persons under age 21 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 other units of government for the purpose of enforcing appropriate federal, state or local laws and regulations relating to licensed products.

ELECTRONIC DELIVERY DEVICE. Means any product containing or delivering nicotine, lobelia, or any other substance intended for human consumption through inhalation of vapor or liquid from the product. Electronic delivery device shall include any component part of such a product, whether or not sold separately. Electronic delivery device includes, but is not limited to, device 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 does not include drugs, devices, or combination products authorized for sale by the United States Food and Drug Administration, as those terms are defined in the Federal Food, Drug and Cosmetic Act.

HOOKAH.

“Hookah” shall mean a pipe with a long, flexible tube by which the smoke is drawn through a jar of water and thus cooled for the use of tobacco or tobacco-related products.

INDIVIDUALLY PACKAGED. The practice of selling any tobacco or tobacco product wrapped individually for sale. Individually wrapped tobacco and tobacco products shall include but not be limited to single cigarette packs, single bags or cans of loose tobacco in any form, and single cans or other packaging of snuff or chewing tobacco. Cartons or other packaging containing more than a single pack or other container as described in this definition shall not be considered individually packaged.

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 PRODUCTS. Collectively refers to any tobacco, tobacco-related device, electronic delivery device, or nicotine or lobelia delivery product.

LOOSIES. Term used to refer to single or individually packaged cigarettes, cigars 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 cigars with a retail price, before any sales taxes, of more the \$2.00 per cigar.

MINOR. Any natural person who has not yet reached the age of 18 years.

MOVEABLE PLACE OF BUSINESS. Any form of business operated out of a truck, van, automobile, kiosk, trailer 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 DEVICES. Any product containing or delivering nicotine or lobelia intended for human consumption, or any part of such a product, that is not tobacco as defined in this section, not including drugs, devices, or combination products authorized for sale by the United States Food and Drug Administration, as those terms are defined in the Federal Food, Drug and Cosmetic Act.

PUBLIC PLACE. Any enclosed, indoor area used by the general public, including, but not limited to, restaurants; bars; any other food or liquor establishment; retail and other commercial establishments; educational facilities; hospitals; nursing homes; auditoriums; arenas; meeting rooms; waiting rooms; and common areas of rental apartment buildings.

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

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

SAMPLING. The lighting of tobacco, tobacco products, tobacco-related devices or the activation of and inhaling of vapor from electronic cigarettes in a retail establishment by a customer or potential customer for the purpose of sampling the product or device before a purchase.

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 of the product between the clerk and the customer.

SMOKING. Means inhaling, exhaling, burning, or carrying any lighted or heated cigar, cigarette, pipe, hookah, or any other lighted or heated product, whether natural or synthetic, containing, made, or derived from nicotine, tobacco, marijuana, or other plant, that is intended for inhalation. Smoking also includes carrying or using an activated electronic delivery device.

SMOKING LOUNGE. A tobacco products shop which allows customers to be seated.

TOBACCO or TOBACCO PRODUCTS. Includes cigarettes and 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; 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; dipping tobaccos; and other kinds and forms of tobacco. Tobacco or tobacco product does not include drugs, devices, or combination products authorized for sale by the United States Food and Drug Administration, as those terms are defined in the Federal Food, Drug and Cosmetic Act.

TOBACCO PRODUCTS SHOP. Means any licensed retail establishment that derives at least 90 percent of its revenue from tobacco or tobacco products and where no person under the age of twenty-one (21) is present, or permitted to enter, at any time.

TOBACCO-RELATED DEVICES. Includes any pipe, rolling papers, or other device intentionally designed or intended to be used with tobacco products. Tobacco-related devices includes components of tobacco-related devices which may be marketed or sold separately.

VAPOR LOUNGE. A vapor products shop which allows customers to be seated.

VAPOR PRODUCTS SHOP. A retail establishment with an entrance door opening directly to the outside that derives more than ninety percent (90%) of its gross revenue from the sale of electronic delivery devices, electronic cigarettes and related products and in which the sale of other products is merely incidental. "Vapor products shop" does not include a vapor products department or section of any individual business establishment with any type of food, liquor, or restaurant license.

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.

SECTION 3. LICENSE.

(A) License required. No person, business, or entity shall sell or offer to sell any licensed products without first having obtained a license to do so from the City of Braham.

(B) Application. An application for a license to sell licensed products shall be made on a form provided by the City of Braham. The application shall 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 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 City Council meeting. If the City Clerk determines an application 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 either approve or deny the license, or it may delay action for a reasonable period of time as necessary to complete any investigation of the application or the applicant it deems necessary. If the City Council approves 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 City Council's decision.

(D) Term. All licenses issued under this section shall be valid for one calendar year, expiring on Dec. 31.

(E) Revocation or suspension. Any license issued under this section may be revoked or suspended as provided in Section 13.

(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 without the prior approval of the City Council.

(G) Moveable place of business. No license shall be issued to a moveable place of business. Only fixed location businesses shall be eligible for licensing under this section.

(H) Display. All licenses shall be posted and displayed in plain view of the general public on the licensed premise.

(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 30 days but not more than 60 days before the expiration of the current license.

(J) 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.

(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.

Penalty, see Section 13.

SECTION 4. FEES.

No license shall be issued under this Ordinance until the appropriate license fee shall be paid in full. The fee for a tobacco license under this Ordinance shall be established in the City Council. Established fees and charges may be amended from time to time.

Penalty, see Section 13.

SECTION 5. BASIS FOR DENIAL OF LICENSE.

(A) Grounds for denying the issuance or renewal of a license under this Ordinance include but are not limited to the following:

- (1) The applicant is under the age of 21 years.
- (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 revoked within the preceding 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 Ordinance.

(D) Penalty, see Section 13.

SECTION 6. PROHIBITED SALES.

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

- (A) To any person under the age of 21 years.
- (B) By 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 premise in order to receive the licensed product and whereby there is not a physical exchange of the licensed product between the licensee, or the licensee's employee, and the customer.
- (D) By means of loosies as defined in Section 2.

(E) 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.

(F) 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.

Penalty, see Section 13.

SECTION 7. SELF-SERVICE SALES.

It shall be unlawful for a licensee under this Ordinance to allow the sale of licensed products by any means where by 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 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 Ordinance is adopted shall comply with this section within 90 days following the effective date of this Ordinance.

Penalty, see Section 13.

SECTION 8. RESPONSIBILITY.

(A) All licensees under this Ordinance shall be responsible for the actions of their employees in regard to the sale of licensed products 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 Ordinance, state or federal law, or other applicable law or regulation.

(B) Notice of the legal sales age and the age verification requirement shall be posted at each location where licensed products are offered for sale. The required signage, which will be provided to the licensee by the City, shall be posted in a manner so that it is clearly visible to anyone who is considering or making a purchase.

Penalty, see Section 13.

SECTION 9. COMPLIANCE CHECKS AND INSPECTIONS.

All licensed premises shall be open to inspection by the Braham Police Department or other authorized/designated personnel during regular business hours. From time to time, but at least once per year, the City shall conduct compliance checks by persons over the age of 15 years but

less than 21 years to enter the licensed premise to attempt to purchase licensed products. Prior written consent from a parent or guardian is required for any person under the age of 18 who participates in a compliance check. Persons used for the purpose of compliance checks shall be supervised by Braham Police Department designated law enforcement officers or other designated City personnel. Persons used for compliance checks shall not be guilty of unlawful possession of licensed products when those items are obtained as a part of the compliance check. No persons used in compliance checks shall attempt to use a false identification misrepresenting the persons' age, and all persons lawfully engaged in a compliance check shall answer all questions about the person's age asked by the licensee or his or her employee and shall produce any identification, if any exists, for which he or she is asked. Nothing in this section shall prohibit compliance checks authorized by state or federal laws for educational, research, or training purposes, or required for the enforcement of a particular state or federal law.

Penalty, see Section 13.

SECTION 10. OTHER ILLEGAL ACTS.

Unless otherwise provided,

- (A) Illegal sales. It shall be a violation of this Ordinance for any person to sell or otherwise provide any licensed product to any person under age 21.
- (B) Illegal possession. It shall be a violation of this Ordinance for any person under 18 to have in his or her possession any tobacco, tobacco product, tobacco-related device, electronic cigarettes, electronic delivery device or nicotine or lobelia delivery device. This division (B) shall not apply to minors lawfully involved in a compliance check.
- (C) Illegal use. It shall be a violation of this Ordinance for any person under 18 to smoke, chew, sniff or otherwise use any tobacco, tobacco product, tobacco-related device, or electronic delivery device.
- (D) Illegal procurement. It shall be a violation of this Ordinance for any person under 18 to purchase or attempt to purchase or otherwise obtain any tobacco, tobacco product, tobacco-related device, or electronic delivery device, and it shall be a violation of this Ordinance 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 tobacco, tobacco product, tobacco-related device, electronic delivery device. This division (D) shall not apply to minors lawfully involved in a compliance check.
- (E) Use of false identification. It shall be a violation of this Ordinance for any person under the age of 18 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.

Penalty, see Section 13.

SECTION 11. EXCEPTIONS AND DEFENSES.

Nothing in this Ordinance shall prevent the providing of traditional tobacco or tobacco-related devices to a person under age 21 as part of a lawfully recognized religious, spiritual, or cultural ceremony. It shall be an affirmative defense to the violation of this Ordinance for a person to have reasonably relied on proof of age as described by state law.

SECTION 12. SEVERABILITY.

If any section or provision of this Ordinance 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.

SECTION 13. VIOLATIONS AND PENALTY.

(A) Misdemeanor prosecution. Nothing in this section shall prohibit the City from seeking prosecution for persons 21 years of age and older as a misdemeanor for any alleged violation of this Ordinance.

(B) Violations.

(1) Notice. A person violating this Ordinance may be issued, either personally or by mail, a citation that sets forth the alleged violation and that informs the alleged violator of his or her right to a hearing on the matter. The citation shall provide notice that a hearing must be requested within ten (10) business days of receipt and that hearing rights shall be terminated if a hearing is not promptly requested. The citation shall provide information on 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 ten (10) business days of the issuance of the citation and delivered to the City Clerk or other designated City officer. Failure to request a hearing within ten (10) business days of the issuance of the citation will terminate the person's right to a hearing.

(b) The City Clerk or other designated City officer shall set the time and place for the hearing. Written notice of the hearing time and place shall be mailed or delivered to the accused violator at least ten (10) business days prior to the hearing.

(3) **Hearing Officer.** The hearing officer designed by the Braham City Council shall serve as the hearing officer. The hearing officer must be an impartial person retained by the City to conduct the hearing.

(4) **Decision.**

(a) A decision shall be issued by the hearing officer within ten (10) business days. 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 under division (B) of this section, shall be recorded in writing, a copy of which shall be provided to the City and the accused violator by in person delivery or mail as soon as practicable. Likewise, if the hearing officer finds that no violation occurred or finds grounds for not imposing any penalty, those findings shall be recorded and a copy provided to the City and the acquitted accused violator by in person delivery or mail as soon as practicable.

(b) **Costs.** If the citation is upheld by the hearing officer, the City's actual expenses in holding the hearing up to a maximum of \$1,000.00 shall be paid by the person requesting the hearing.

(c) The decision of the hearing officer is final.

(5) **Appeals.** Appeals of any decision made by the hearing officer shall be filed in the district court for the City in which the alleged violation occurred within ten (10) business days.

(6) **Continued violation.** Each violation, and every day in which a violation occurs or continues, shall constitute a separate offense.

(C) Administrative penalties.

(1) Licensees. Any licensee found to have violated this Ordinance, or whose employee shall have violated this Ordinance, shall be charged an administrative fine of \$75 for a first violation of this Ordinance; \$200 for a second offense at the same licensed premises within a 24-month period; and \$250 for a third or subsequent offense at the same location within a 24-month period. In addition, after the third offense, the license shall be suspended for not less than seven consecutive days.

(2) Other individuals. Other individuals, other than persons 18 to 20 years found to be in violation of this Ordinance shall be charged an administrative fine of \$50 for a first violation of this Ordinance; \$75 for a second offense within a 24-month period; and \$100 for a third or subsequent offense.

(3) Minors. People under age 18 found in unlawful possession of or who unlawfully purchase or attempt to purchase licensed products, shall be subject to an administrative fine of \$25 for a first violation of this Ordinance; \$50 for a second offense; and \$75 for a third or subsequent offense within a 24-month period, or may be subject to tobacco-related education classes, diversion programs, community services, or another penalty that the City believes will be appropriate and effective.

(4) Administrative Fines and Penalties. The administrative fines or other penalties under this Ordinance may be established from time to time by the Ordinance Establishing Fees and Charges, as it may be amended from time to time.

(5) Statutory penalties. If the administrative penalties authorized to be imposed by Minn. Stat. § 461.12, as it may be amended from time to time, differ from those established in this section, then the stronger of the penalties shall prevail.

SECTION 14. EFFECTIVE DATE.

This ordinance becomes effective January 1, 2020 and upon its publication or upon the publication of a summary of the Ordinance as provided by Minn. Stat. § 412.191, subd. 4, as it may be amended from time to time, which meets the requirements of Minn. Stat. § 331A.01, subd. 10, as it may be amended from time to time.

Passed by the City Council of Braham, Minnesota this _____ day of _____, _____.

Mayor

Attested: _____
Clerk/Administrator