



Ordinance 20 - 08

An Ordinance Amending Chapter 26, Article II, Tobacco of the City of Elk River, Minnesota, City Code

The City Council of the City of Elk River does hereby ordain as follows:

SECTION 1. That § 26-31. - Definitions, of the City of Elk River Code of Ordinances shall be amended to read as follows:

The following words, terms and phrases, when used in this Article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Compliance checks means the system the city uses to investigate and ensure that those authorized to sell tobacco, tobacco-related devices, nicotine, or electronic delivery devices are following and complying with the requirements of this Article and state and federal laws. Compliance checks shall involve the use of Compliance check minors as authorized by this Article. 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 tobacco, tobacco-related devices, nicotine, or electronic delivery devices.

Compliance check minor means any person at least 17 years of age, but under the age of 21, used by the city to conduct compliance checks. Provided that prior written consent of a parent or guardian shall be required if the person is under the age of 18.

Electronic delivery device means any product containing or delivering nicotine, lobelia, or any other substance, whether natural or synthetic, intended for human consumption through inhalation of aerosol or vapor from the product. Electronic delivery devices includes but is not limited to devices manufactured, marketed, or sold as electronic cigarettes, electronic cigars, electronic pipe, vape pens, modes, tank systems, or under any other product name or descriptor. Electronic delivery device shall include any component part of such a product that is not tobacco as defined in this section, whether or not marketed or sold separately. Electronic delivery device excludes drugs, devices, or combination products, as those terms are defined in the Federal Food, Drug, and Cosmetic Act, that are authorized for sale by the United States Food and Drug Administration.

Moveable place of business means any form of business operated out of a kiosk, truck, van, automobile, or other type of vehicle or transportable shelter and not a fixed address storefront or other permanent type of structure authorized for sales transactions.

Sale means any transfer of goods for money, trade, barter, or other consideration.

Self-service merchandising means open displays of tobacco, tobacco-related devices, nicotine, or electronic delivery devices in any manner where any person shall have access to the tobacco, tobacco-related devices, nicotine, or electronic delivery devices 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 tobacco, tobacco-related device, nicotine, or electronic delivery device between the customer and the licensee or employee. Self-service merchandising shall not include vending machines.

Tobacco means 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 including but not limited to cigars; cheroots; stogies; perique; granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco; snuff; snuff flour; cavendish; plug and twist tobacco; fine cut and other chewing tobaccos; shorts; refuse scraps, clippings, cuttings and sweepings of tobacco; and other kinds and forms of tobacco. Tobacco excludes any drugs, devices, or combination products, as those terms are defined in the Federal Food, Drug, and Cosmetic Act, that are authorized for sale by the United States Food and Drug Administration.

Tobacco products shop means a place of business that has an entrance door opening directly to the outside, that cannot be entered at any time by persons younger than 21 years of age, and that derives more than 90 percent of its gross revenue from the sale of tobacco, tobacco-related devices, or electronic delivery devices, and in which the sale of other products is merely incidental. "Tobacco products shop" does not include a tobacco department or section of any individual business establishment with any type of liquor, food, or restaurant license.

Tobacco-related device means cigarette papers or pipes for smoking or other devices intentionally designed or intended to be used in a manner which enables the chewing, sniffing, smoking or inhalation of aerosol or vapors of tobacco or tobacco products. Tobacco-related devices include components of tobacco-related devices which may be marketed or sold separately.

Vending machine means any mechanical, electric or electronic or other type of device which dispenses tobacco, tobacco-related devices, nicotine, or electronic delivery devices upon the insertion of money, tokens, or other form of payment directly into the machine by the person seeking to purchase the tobacco, tobacco product, or tobacco-related device, nicotine, or electronic delivery device.

SECTION 2. That § 26-32. - Purpose of Article, of the City of Elk River Code of Ordinances shall be amended to read as follows:

Because the city recognizes that many persons under the age of 21 years purchase or otherwise obtain, possess, and use tobacco, tobacco-related devices, nicotine, and electronic delivery devices, and that such sales, possession, and use are violations of both state and federal laws, and because studies, which are hereby accepted and adopted, 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 smoking has been shown to be the cause of several serious health problems which subsequently place a financial burden on all levels of government, this Article shall be intended to regulate the sale, possession, and use of tobacco, tobacco-related devices, nicotine, or electronic delivery devices for the purpose of enforcing existing laws, to protect persons under the age of 21 years against the serious effects associated with the illegal use of tobacco, tobacco-related devices, nicotine, or electronic delivery devices and to prevent young people from starting to smoke as stated in Minn. Stat. § 144.391.

Unregulated electronic delivery devices, commonly referred to as electronic cigarettes, or e-cigarettes, closely resemble and purposefully mimic the act of smoking by having users inhale vaporized liquid nicotine or other substances created by heat through an electronic ignition system. After testing a number of e-cigarettes from two leading manufacturers, the Food and Drug Administration (FDA) determined that various samples tested contained not only nicotine but also detectable levels of known carcinogens and toxic chemicals, including tobacco-specific nitrosamines and diethylene glycol, a toxic chemical used in antifreeze. The FDA's testing also suggested that quality control processes used to manufacture these products are inconsistent or non-existent. (Summary of results: Laboratory analysis of electronic cigarettes conducted by FDA, Food and Drug Administration (FDA), July 22, 2009; <http://www.fda.gov/NewsEvents/PublicHealthFocus/ucm173146.htm>)

E-cigarettes produce a vapor of undetermined and potentially harmful substances, which may appear similar to smoke emitted by traditional tobacco products. Their use in workplaces and public places where smoking of traditional tobacco products is prohibited creates concern and confusion and leads to difficulties in enforcing the smoking prohibitions.

SECTION 3. That § 26-33. - Responsibility of licensee for acts of employees, of the City of Elk River Code of Ordinances shall be amended to read as follows:

All licensees under this Article shall be responsible for the actions of their employees in regard to the sale of tobacco, tobacco-related devices, nicotine, or electronic delivery devices on the licensed premises, and the sale of such 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

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are appropriate under this Article, state or federal law, or other applicable laws or regulations.

SECTION 4. That § Sec. 26-34. - Inspection of licensed premises, of the City of Elk River Code of Ordinances shall be amended to read as follows:

All licensed premises shall be open to inspection by the city police department or other authorized city official during regular business hours.

SECTION 5. That § Sec. 26-35. - Compliance checks, of the City of Elk River Code of Ordinances shall be amended to read as follows:

- (a) **Authorized.** From time to time, but at least once per year, the city shall conduct unannounced compliance checks at each location where tobacco, tobacco-related devices, nicotine, or electronic delivery devices are sold.
- (b) **Use of compliance check minors to conduct checks.**
 - (1) The city shall conduct compliance checks by engaging compliance check minors to enter the licensed premises to attempt to purchase tobacco, tobacco-related devices, nicotine, or electronic delivery devices.
 - (2) Compliance check minors shall be supervised by designated law enforcement officers or other designated city personnel.
 - (3) Compliance check minors shall not be guilty of the unlawful purchase or attempted purchase or the unlawful possession of tobacco, tobacco-related devices, nicotine, or electronic delivery devices when such items are obtained or attempted to be obtained as a part of the compliance check.
 - (5) No compliance check minor shall attempt to use a false identification misrepresenting their age, and all compliance check minors lawfully engaged in a compliance check shall answer all questions about their age if asked by the licensee or his employee, and shall produce any identification, if any exists, for which he or she is asked.
- (c) **State and federal compliance checks.** 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.

SECTION 6. That § Sec. 26-36. - Exceptions and defenses, of the City of Elk River Code of Ordinances shall be amended to read as follows:



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- (a) Nothing in this Article shall prevent the provision of tobacco, tobacco-related devices, nicotine, or electronic delivery devices to a person under the age of 21 years as part of a lawfully recognized religious, spiritual, or cultural ceremony.
- (b) It shall be an affirmative defense to a violation of this Article for a person to have relied in good faith upon proof of age as described in Minn. Stats. § 340A.503, subd. 6.
- (c) The penalties in section 26-73 do not apply to a person under the age of 21 years who purchases or attempts to purchase tobacco, tobacco-related devices or electronic delivery devices while under the direct supervision of a responsible adult for training, education, research, or enforcement purposes.
- (d) A product containing or delivering nicotine intended for human consumption, or any part of such a product, that is not tobacco or an electronic delivery device, as defined by section 26-31, may be sold to persons under the age of 21 years if the product has been approved or otherwise certified for legal sale by the United States Food and Drug Administration for tobacco use cessation, harm reduction, or for other medical purposes, and is being marketed and sold solely for that approved purpose.

SECTION 7. That § Sec. 26-37. - Violations relating to underage persons, of the City of Elk River Code of Ordinances shall be amended to read as follows:

- (a) **Illegal sales.** It shall be a violation of this Article for any person to sell, offer to sell, give, or otherwise furnish any tobacco, tobacco-related device, nicotine, or electronic delivery device to any person under the age of 21 years.
- (b) **Illegal procurement.** It shall be a violation of this Article for any person to purchase or otherwise obtain tobacco, tobacco-related devices, nicotine, or electronic delivery devices on behalf of a person under the age of 21 years. It shall further be a violation for any person to coerce or attempt to coerce a person under the age of 21 years to illegally purchase or otherwise obtain or use any tobacco, tobacco product, tobacco-related device, nicotine, or electronic delivery devices.
- (c) **Use of false identification.** It shall be a violation of this Article for any person under the age of 21 years to purchase or attempt to purchase tobacco, tobacco-related devices, or electronic delivery devices using a driver's license, permit, Minnesota identification card, or any other type of false identification to misrepresent the person's age.

SECTION 8. That § Sec. 26-38. - Vending machines, of the City of Elk River Code of Ordinances shall be amended to read as follows:



It shall be unlawful for any person to sell tobacco, tobacco-related devices, nicotine, or electronic delivery devices by the means of a vending machine, except in a licensed tobacco products shop.

SECTION 9. That § Sec. 26-39. - Self-service sales, of the City of Elk River Code of Ordinances shall be amended to read as follows:

- (a) **Single packages.** It shall be unlawful for a licensee under this Article to allow the sale of single packages of cigarettes, tobacco, tobacco-related devices, nicotine, or electronic delivery devices in open 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 there is not a physical exchange of the single package of cigarettes, tobacco, tobacco-related device, nicotine, or electronic delivery device between the licensee or his clerk and the customer.
- (b) **Cartons and multipack units.**
- (1) Cartons and other multipack units of packages of cigarettes or smokeless tobacco may be offered and sold through open displays accessible to the public.

SECTION 10. That § Sec. 26-40. - Tobacco products shop, of the City of Elk River Code of Ordinances shall be amended to read as follows:

- (a) Tobacco products shops as defined by this Article cannot be entered at any time by persons younger than 21 years of age.
- (b) The self-service restrictions prescribed in section 26-39 shall not apply to licensed tobacco products shops.
- (c) No license may be issued for a tobacco products shop where:
- (1) The proposed location is ineligible for a license under city ordinance or state law.
 - (2) The proposed location is in a zoning district where the business is not allowed pursuant to chapter 30 of this Code. This restriction shall not apply to tobacco product shops which were in conformance with chapter 30 on July 21, 2008.
 - (3) The proposed location is located within 500 feet of a school or park property.
 - a. The distance limitations shall be measured from property line to property line at the nearest point or from property line to the nearest point of the leased premises if the tobacco products shop is located in a multi-tenant facility.



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- b. This restriction shall not apply to tobacco product shops which were properly licensed pursuant to chapter 26 of this Code and in conformance with chapter 30 of this Code on July 21, 2008.
- (4) The proposed location is in a multi-tenant facility and does not have its own separate ventilation system, unless the licensee agrees, and the license provides, that there shall be no smoking allowed in the tobacco products shop. Violation of this condition in a license shall be grounds for revocation of the license.

SECTION 11. That § Sec. 26-66. - Term and renewal, of the City of Elk River Code of Ordinances shall be amended to read as follows:

All licenses issued under this division shall expire on December 31 of the year issued. Licenses must be renewed annually.

Application for renewal shall be made at least 60 days before the expiration and shall be in the form and manner required for the original license, and subject to the same criteria.

Upon the timely submission of an application for renewal, the office of the city clerk shall renew each license meeting the requirements for the issuance of the original license no later than 30 days before the expiration. Late applications shall be acted upon within 30 days of the application date.

SECTION 12. That § 26-67. - Required, of the City of Elk River Code of Ordinances shall be amended to read as follows:

- (a) License required. No person shall sell or offer to sell any tobacco, tobacco-related devices nicotine, or electronic delivery devices without having a current license to do so as issued by the office of the city clerk.
- (b) Age verification. At each location where tobacco, tobacco-related devices, electronic delivery devices, or nicotine or lobelia delivery products are sold, the licensee shall verify, by means of government-issued photographic identification containing the bearer's date of birth, that the purchaser or person attempting to make the purchase is at least 21 years of age. Verification is not required if the purchaser or person attempting to make the purchase is 30 years of age or older. It shall not constitute a defense to a violation of this subdivision that the person appeared to be 30 years of age or older.
- (c) Signage. At each location where tobacco, tobacco-related devices, electronic delivery devices, or nicotine or lobelia delivery products are sold, the licensee shall display a sign in plain view to provide public notice that selling any of these products to any person under the age of 21 is illegal and subject to penalties. The notice shall be placed in a conspicuous location in the licensed establishment and shall be readily visible to any person who is purchasing or attempting to purchase these products. The sign shall provide notice that all persons responsible for selling these



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products must verify, by means of photographic identification containing the bearer's date of birth, the age of any person under 30 years of age.

SECTION 13. That § Sec. 26-68. - Application, of the City of Elk River Code of Ordinances shall be amended to read as follows:

The application for the license provided for in this division shall be made by filing the annual license fee and completing an application form as provided by the office of the city clerk. For new applications, the police department shall conduct the required background investigation before consideration of licensure by the office of the city clerk. In addition to such information as the city clerk's office may require, the application shall include:

- (1) Whether the applicant is a natural person, corporation, partnership, or other form of organization;
- (2) The name of the applicant and all persons with an ownership interest in the business;
- (3) The permanent home address and the home telephone number of the applicant and all persons associated in the business;
- (4) The address of the premises to be licensed;
- (5) Whether all real estate taxes, assessments, or other financial claims of the city, state, or federal government for the business and premises to be licensed have been paid and, if not paid, the years for which delinquent;
- (6) Whether the applicant has ever used or been known by a name other than his/her true name, and if so, what was the name, or names, and information concerning dates and places where used;
- (7) A statement as to whether or not the applicant, the person managing the business, or all persons associated in the business have been convicted of any crime or violation of any city, state, or federal law, involving activities licensed under this Article, the nature of the offense and the punishment or penalty assessed therefor; and
- (8) Other localities where the applicant has had or currently has a tobacco license.

SECTION 14. That § Sec. 26-69. - License eligibility, of the City of Elk River Code of Ordinances shall be amended to read as follows:

- (a) All license applications under this division shall be made to the office of the city clerk and referred to the chief of police and such other municipal departments or offices as the city clerk deems necessary for verification and investigation of the facts set forth in the application. The chief of police and other department heads or officers consulted shall submit their reports and recommendations to the city clerk.



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- (b) 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.
- (c) A tobacco license shall not be issued upon any of 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 tobacco, tobacco-related devices, nicotine, or electronic delivery devices.
 - (3) The applicant has had a license to sell tobacco, tobacco-related devices nicotine, or electronic delivery devices, denied, revoked, or suspended within the preceding three years 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 local law, ordinance, or other regulation, from holding such a license.
 - (6) Any taxes or utility bills for the premises for which the license will be issued are delinquent.
 - (7) Failure to pay the yearly application fee.
- (d) Where a reasonable basis is found to impose reasonable conditions/restrictions on the license, taking into consideration one or more of the facts or circumstances, a license may have reasonable conditions/restrictions imposed on the manner and circumstances under which the licensed activity shall be conducted to preserve the public peace and protect and promote good order and security.
- (e) Failure of any person to comply with any of the ordinances of the city or the laws of the state, or any conditions/restrictions imposed on a license, shall be grounds for denying, revoking or suspending a license granted under this division. The city shall have the discretion to consider, in granting, denying, revoking, suspending, or renewing a license, any reasonable facts or circumstances relating to public health, safety, and welfare.
- (f) If a license is denied by the office of the city clerk, the city clerk shall notify the applicant of the determination in writing, including the facts and specific section or sections of this Article upon which this determination was made, and of their right to a hearing before the city council.
- (g) Except as otherwise provided in this chapter 26, Article II, tobacco licenses shall be governed by the requirements and procedures set forth in chapter 38, Article II of this Code, including the notice and hearing provisions set forth therein.

SECTION 15. That § Sec. 26-71. - No transfers, of the City of Elk River Code of Ordinances shall be amended to read as follows:



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- (a) All licenses issued under this division 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. Relocation or sale of the business shall require the approval and issuance of a new license.
- (b) Transfer of 25 percent or more of the ownership interest of a business entity, or of a controlling interest of it, whichever is less, will be deemed a sale of the business. If the licensee is a business entity that is wholly owned by another entity, the same provisions about the transfer of ownership or a controlling interest will apply to the parent entity and any second parent entity that wholly owns the parent entity.
- (c) A sale of the business as defined in this section without the approval and issuance of a new license shall result in the unlicensed sale of tobacco, tobacco-related devices, nicotine, or electronic delivery devices, as the case may be. Transfer of this amount of ownership interest without prior council approval is a ground for revocation or suspension of the license. In addition, each day the licensee operates under the license after a transfer has taken place without obtaining council approval will be a separate violation of this Article.

SECTION 16. That § Sec. 26-73. - Penalty, of the City of Elk River Code of Ordinances shall be amended to read as follows:

- (a) **Administrative penalties for sales and furnishing; Licensees.** Any licensee found to have violated this Article, or whose employee has violated this Article, shall be subject to the Administrative Penalties set forth in Minn. Stat. §461.12, Subd. 3, as amended from time to time.
- (c) **Other offenses.**
 - (1) Use where prohibited. It is a violation of this section for any person to use an electronic delivery device in an area where prohibited by this section, or to use an electronic delivery device in an area where prohibited by a private policy established by the proprietor or other person in charge of the area.
 - (2) Proprietors. It is a violation of this section for the proprietor, person, or entity that owns, leases, manages, operates, or otherwise controls the use of an area in which the use of an electronic delivery device is prohibited under this section to knowingly fail to comply with or enforce the provisions of this section.
- (d) **Alternative penalties for use of false identification; persons under age 21.** Persons under 21 years of age who use or attempt to use false identification to purchase tobacco, tobacco-related products or tobacco-related devices may be subject to tobacco-related education classes, diversion programs, community service, or other penalty that the city believes will be appropriate or effective.
- (e) **Notice.** No administrative penalty or license suspension or revocation may take effect until the licensee or other individual has received notice, served personally by



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mail, of the alleged violation and of the opportunity for a hearing pursuant to chapter 38, Article II.

- (f) **Prosecution of violation as misdemeanor.** Unless otherwise noted, any person violating any provision of this Article, or other similar state law, shall be guilty of a misdemeanor, and upon conviction shall be subject to the penalties for a misdemeanor as prescribed by state law. Each day a violation continues shall be considered a separate misdemeanor offense punishable by a separate misdemeanor penalty. Nothing in this Article shall prohibit the city from seeking misdemeanor prosecution, administrative penalties, or both., and does not affect the city's right to suspend or revoke the license of a licensee as the city council deems appropriate.

That this ordinance shall take effect August 1, 2020 and be published as provided by law.

Passed and adopted by the City Council of the City of Elk River this 20th day of July, 2020.

John J. Dietz, Mayor

ATTEST:

Tina Allard, City Clerk

