

ORDINANCE #2020-1259

ORDINANCE AMENDING CHAPTER 122 OF THE BROOKLYN PARK CITY CODE
PERTAINING TO TOBACCO REGULATIONS

~~Text with strikeout is proposed for deletion~~
Underlined text is proposed for insertion

The City of Brooklyn Park Does Ordain:

Section 1. The headings of the sub chapters in Chapter 122 of the Brooklyn Park City Code are amended to read as follows:

CHAPTER 122: TOBACCO REGULATIONS

Section

- 122.01 Purpose and intent
- 122.02 Definitions
- 122.03 License
- 122.04 Fees
- 122.05 Basis for denial of license
- 122.06 Prohibited sales
- ~~122.07 Vending machines~~
- ~~122.08 Self-service sales~~
- 122.09 Responsibility
- 122.10 Compliance checks and inspections
- 122.11 Other illegal-prohibited acts
- 122.12 Exceptions and defenses
- 122.19 Violations and penalty

Section 2. Section 122.01 of the Brooklyn Park City Code is amended to read as follows:

§ 122.01 PURPOSE AND INTENT.

Because the city recognizes that many persons under the age of ~~18~~ 21 years purchase or otherwise obtain, possess and use tobacco, tobacco products, tobacco-related devices, electronic delivery devices, and nicotine or lobelia delivery devices; 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 chapter is intended to regulate the sale, possession, and use of tobacco, tobacco products, tobacco-related devices, and nicotine or lobelia delivery devices for the purpose of enforcing and furthering existing laws, to protect minors against the serious effects associated with the illegal use of tobacco, tobacco products, tobacco-related devices, electronic delivery devices and nicotine or lobelia delivery devices and to further the official public policy of the State of Minnesota as stated in M.S. § 144.391.

Section 3. Section 122.02 of the Brooklyn Park City Code is amended to read as follows:

§ 122.02 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 chapter, the following definitions apply unless the context clearly indicates or requires a different meaning.

CHILD-RESISTANT PACKAGING. Packaging that meets the definition set forth in Code of Federal Regulations, title 16, section 1700.15(b), as in effect on January 1, 2015, and was tested in accordance with the method described in Code of Federal Regulations, title 16, section 1700.20, as in effect on January 1, 2015.

COMPLIANCE CHECKS. The system the city uses to investigate and ensure that those authorized to sell ~~tobacco, tobacco products, tobacco-related devices, electronic delivery devices and nicotine or lobelia delivery devices~~ licensed products are following and complying with the requirements of this chapter. 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 the purpose of enforcing appropriate federal, state or local laws and regulations relating to ~~tobacco, tobacco products, tobacco-related devices, electronic delivery devices and nicotine or lobelia delivery devices.~~ licensed products.

ELECTRONIC DELIVERY DEVICE. Any product containing or delivering nicotine, lobelia, or any other substance, whether natural or synthetic, intended for human consumption ~~that can be used by a person to simulate smoking in the delivery of nicotine or any other substance~~ 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 nicotine cessation product that has been approved or certified authorized by the United States Food and Drug Administration to be marketed and for sale as “drugs,” “devices,” or “combination products,” as defined in the Federal Food, Drug, and Cosmetic Act ~~tobacco-cessation product, as a tobacco-dependence product, or for other medical purposes, and is marketed and sold for such an approved purpose.~~

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

~~—INDIVIDUALLY PACKAGED.~~ The practice of selling any tobacco or tobacco product wrapped individually for sale. ~~Individually wrapped tobacco and tobacco products include but are not 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 are not considered individually packaged.~~

~~LOOSIES. The common term used to refer to a single or individually packaged cigarettes, cigars, and any other licensed products 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.~~

~~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 kiosk, truck, van, automobile or other type of vehicle or transportable shelter and that is not a fixed address, store front or other permanent type of structure licensed for over-the-counter authorized for sales transactions.~~

~~NICOTINE OR LOBELIA DELIVERY DEVICE. 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 includeing any product, that is not tobacco as defined in this section, not including any nicotine cessation product that has been approved or otherwise certified for legal sale authorized by the United States Food and Drug Administration for tobacco cessation, harm reduction, or to be marketed and for sale as "drugs," "devices," or "combination products," as defined in the Federal Food, Drug, and Cosmetic Act. other medical purposes, and is being marketed and sold solely for that approved purchase.~~

~~RETAIL ESTABLISHMENT. Any place of business where tobacco, tobacco products, tobacco-related devices, electronic delivery devices, or nicotine or lobelia delivery devices licensed products are available for sale to the general public. The phrase RETAIL ESTABLISHMENT includes but is not limited to grocery stores, tobacco products shops, convenience stores, liquor stores, gasoline service stations, bars, and restaurants.~~

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

~~SELF-SERVICE MERCHANDISING. Open displays of tobacco, tobacco products, tobacco-related devices, electronic delivery devices, or nicotine or lobelia delivery devices licensed products in any manner where any person has access to the tobacco, tobacco products, tobacco-related devices, electronic delivery devices, or nicotine or lobelia delivery devices licensed products without the assistance or intervention of the licensee or the licensee's employee and where a . The assistance or intervention entails the actual physical exchange of the tobacco, tobacco product, tobacco-related device, electronic delivery devices, or nicotine or lobelia delivery device licensed products between the customer and the licensee or employee is not required in order to access the licensed products.~~

~~TOBACCO or TOBACCO PRODUCTS. Any substance or item product containing, made, or derived tobacco leaf, including but not limited to 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 cigarettes, cigars, pipe tobacco, snuff, fine cut or other chewing tobacco, cheroots, stogies, perique, granulated, plug cut, crimp cut, ready-rubbed, and other smoking tobacco, snuff flowers, cavendish, shorts, plug and twist tobaccos, dipping tobaccos, refuse scraps, clippings, cuttings, and sweepings of tobacco, and other kinds and forms of tobacco leaf prepared in such manner as to be suitable for chewing, sniffing or smoking. This term TOBACCO does not include ~~any tobacco nicotine cessation product that has been approved or otherwise certified for legal sale authorized by the United States Food and Drug Administration to be marketed and for sale as "drugs," "devices," or "combination products," as defined in the Federal Food, Drug, and Cosmetic Act. tobacco cessation, harm reduction, or for other medical purposes, and is being marketed and sold solely for that approved purchase.~~

TOBACCO-RELATED DEVICES. Any ~~tobacco product as well as a pipes, wraps,~~ rolling papers or other device intentionally designed or intended to be used in a manner which enables the chewing, sniffing or smoking of tobacco or tobacco products with tobacco products.

VENDING MACHINE. Any mechanical, electric or electronic, or other type of device which dispenses ~~tobacco, tobacco products, tobacco related devices, electronic delivery devices, or nicotine or lobelia delivery devices~~ 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. ~~tobacco, tobacco product, tobacco related device, electronic delivery devices, or nicotine or lobelia delivery device.~~

Section 4. Section 122.03 of the Brooklyn Park City Code is amended to read as follows:

§ 122.03 LICENSE.

(A) License required. It is unlawful to sell or offer to sell any ~~tobacco, tobacco products, tobacco related device, electronic delivery devices, or nicotine or lobelia delivery device~~ licensed product without first having obtained a license to do so from the city.

(B) Application. An application for a license to sell ~~tobacco, tobacco products, tobacco related devices, electronic delivery devices, or nicotine or lobelia delivery devices~~ licensed products must be made on a form provided by the city. The application must contain the full name of the applicant, the applicant's residential and business addresses and telephone numbers, the name and address of the business for which the license is sought, and any additional information the city deems necessary. Upon receipt of a completed application, the Licensing Division must forward the application to the City Council for action at its next regularly scheduled City Council meeting. If the licensing Division determines that an application is incomplete, they will 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 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 City Council approves the application, the Licensing Division will issue the license to the applicant. If the City Council denies the application, notice of the denial will be given to the applicant along with notice of the applicant's right to appeal the decision.

(D) Term. All licenses issued under this chapter terminate on December 31 of the calendar year in which issued.

(E) Revocation or suspension. Any license issued under this chapter may be revoked or suspended as provided in § 122.99.

(F) Transfers. All licenses issued under this chapter are valid only on the premises for which the license was issued and only for the person to whom the license was issued.

~~(G) Moveable place of business. No license will be issued to a movable place of business.~~

(GH) Display. All licenses must be posted and displayed at all times in plain view of the general public on the licensed premise.

(HI) Renewals. The renewal of a license may be approved by the City Manager or designated official provided that the licensee meets all of the requirements for renewal. If the renewal of a license is denied by the City Manager or designated official, the licensee has the right to appeal that decision to the City Council. The issuance of a license ~~issued~~ under this chapter is considered a privilege and not an absolute right of the applicant and does not entitle the holder to an automatic renewal of the license.

Section 5. Section 122.05 of the Brooklyn Park City Code is amended to read as follows:

§ 122.05 BASIS FOR DENIAL OF LICENSE.

The following are grounds for denying the issuance or renewal of a license under this chapter; 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. If a license is mistakenly issued or renewed to a person, it must be revoked upon the discovery that the person was ineligible for the license under this section.

(A) The applicant is under the age of 2148 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 ~~tobacco or tobacco products, tobacco-related devices, electronic delivery devices, or nicotine or lobelia delivery devices~~ licensed products.

(C) The applicant has had a license to sell ~~tobacco, tobacco products, tobacco-related devices, electronic delivery devices, or nicotine or lobelia delivery devices~~ licensed products revoked within the preceding 12 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.

(F) The applicant is applying for a renewal of a license under this section and there have been three or more illegal sales of ~~tobacco, tobacco products, tobacco-related devices, electronic delivery devices, or nicotine or lobelia delivery devices~~ to minors licensed products to persons under the age of 21 documented at the licensed place of business in the preceding 12 months.

(G) The proposed location of a store that has over 40% of the floor area (not including controlled access storage or office areas) dedicated to ~~the display or sale of tobacco, tobacco product, tobacco-related device, electronic delivery devices, or nicotine or lobelia delivery~~

~~device~~licensed products display or sale, is within 500 feet of a public or private elementary, junior high (or middle), or senior high school.

(H) The applicant has failed to pay any outstanding administrative penalties.

(I) The business for which the license is requested is a moveable place of business. Only fixed-location retail establishments are eligible to be licensed.

Section 6. Section 122.06 of the Brooklyn Park City Code is amended to read as follows:

§ 122.06 PROHIBITED SALES.

(A) General. It is a violation of this chapter for any person to sell or offer to sell any ~~tobacco, tobacco product, tobacco-related device, electronic delivery devices, or nicotine or lobelia delivery device~~ licensed product:

~~(A) If the person does not hold a valid license.~~

~~(B) To any person under the age of 18 years.~~

~~(1C) By means of any type of vending machine.~~

~~(2) By means of loosies.~~

~~(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.~~

~~(4D) By means of self-service display. All licensed products must be stored 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 tobacco, tobacco product, tobacco-related device, electronic delivery devices, or nicotine or lobelia delivery device and whereby there is not a physical exchange of the tobacco, tobacco product, tobacco-related device, or nicotine or lobelia delivery device between the licensee, or the licensee's employee, and the customer behind the sales counter, in a locked case, in a storage unit, or in another area not freely accessible to the general public. Any retailer selling licensed products at the time this ordinance is adopted must comply with this section within 90 days of the effective date of this ordinance. This provision does not apply to tobacco shops that have an entrance door opening directly to the outside and which derive more than 90% of its gross revenue from the sale of licensed products and which cannot be entered at any time by persons younger than 21 years of age.~~

~~(E) By means of loosies as defined in 122.02.~~

~~(F) 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.~~

~~(G) If the seller is under the age of 16 years.~~

(5H) By any other means, to any other person, on in any other manner or form prohibited by federal, state, or other local law, ordinance provision, or other regulation.

(B) Legal age. It is a violation of this chapter for any person to sell or offer to 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 containing the bearer's date of birth 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, age verification requirement, and possible penalties for underage sales 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.

(C) Liquid packaging. No person shall sell or offer to sell any liquid, whether or not such liquid contains nicotine, which is intended for human consumption and use in an electronic delivery device, in packaging that is not child resistant. Upon request by the city, a licensee must provide a copy of the certificate of compliance or full laboratory testing report for the packaging used.

Section 7. Section 122.07 of the Brooklyn Park City Code is repealed.

Section 8. Section 122.08 of the Brooklyn Park City Code is repealed.

Section 9. Section 122.09 of the Brooklyn Park City Code is amended to read as follows:

§ 122.09 RESPONSIBILITY.

All licensees under this chapter are responsible for the actions of their employees, or any persons acting on their behalf, in regard to the sale, offer to sell or furnishing of tobacco, tobacco products, tobacco-related devices, electronic delivery devices, or nicotine or lobelia delivery devices licensed products on the licensed premises, ~~and~~ The sale, offer to sell, or furnishing of such an item any licensed product by an employee is considered an act - sale of by the license holder. Nothing in this section is construed as prohibiting the city from also subjecting the clerk to whatever penalties are appropriate under this chapter, state or federal law, or other applicable law or regulation.

Section 10. Section 122.10 of the Brooklyn Park City Code is amended to read as follows:

§ 122.10 COMPLIANCE CHECKS AND INSPECTIONS.

All licensed premises must be open to inspection by ~~the Police Department~~ law enforcement or other authorized city official during regular business hours. From time to time, but at least once per year as often as required by state law, the city will conduct compliance checks. In accordance with state law, the city will conduct a compliance check that involves the participation of a person at least 17 years of age, but under the age of 21 to enter the licensed premises to attempt to purchase licensed products. Prior written consent from a parent or guardian is required for any person under the age of 18 to participate in a compliance check. ~~following the procedures and requirements outlined in Minnesota state statutes.~~ Nothing in this

section prohibits other compliance checks authorized by state or federal law for educational, research, or training purposes, or as required for the enforcement of any local ordinance, or state or federal law.

Section 11. Section 112.11 of the Brooklyn Park City Code is amended to read as follows:

§ 122.11 OTHER PROHIBITED ILLEGAL ACTS.

Unless otherwise provided, the following acts are a violation of this chapter:

~~—(A) Illegal sales. It is a violation of this chapter for any person to sell or otherwise provide any tobacco, tobacco product, tobacco-related device, electronic delivery devices, or nicotine or lobelia delivery device to any minor.~~

~~—(B) Illegal possession. It is a violation of this chapter for any minor to have in the minor's possession any tobacco, tobacco product, tobacco-related device, electronic delivery devices, or nicotine or lobelia delivery device. This division (B) does not apply to minors lawfully involved in a compliance check.~~

~~—(C) Illegal use. It is a violation of this chapter for any minor to smoke, chew, snuff or otherwise use any tobacco, tobacco product, tobacco-related device, electronic delivery devices, or nicotine or lobelia delivery device.~~

~~(DA) Prohibited furnishing or illegal procurement. It is a violation of this chapter for any minor person 21 years of age or older to purchase or attempt to purchase or otherwise obtain any tobacco, tobacco product, tobacco-related device, electronic delivery devices, or nicotine or lobelia delivery device licensed product on behalf of a person under the age of 21. and it is a violation of this chapter for any person to purchase or otherwise obtain such items on behalf of a minor. It is further a violation for any person 21 years of age and older to coerce or attempt to coerce a minor person under the age of 21 to illegally purchase or otherwise obtain attempt to purchase or use any tobacco, tobacco product, tobacco-related device, electronic delivery devices, or nicotine or lobelia delivery device licensed product. This division (D) does not apply to minors lawfully involved in a compliance check.~~

~~(EB) Use of false identification. It is a violation of this chapter for any minor person to attempt to disguise their 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 using that identification.~~

~~(C) It is a violation of this chapter to allow the sampling of licensed products except in compliance with Minnesota Statutes, Section 144.4167.~~

Section 12. Section 112.12 of the Brooklyn Park City Code is amended to read as follows:

§ 122.12 EXCEPTIONS AND DEFENSES.

Nothing in this chapter prohibits a native Indian from furnishing tobacco, tobacco products or tobacco-related devices to an Indian under the age of 21 years if the tobacco is furnished as a part of a traditional Indian spiritual or cultural ceremony. It is 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 13. Section 112.99 of the Brooklyn Park City Code is amended to read as follows:

§ 122.99 VIOLATIONS AND PENALTY.

(A) Violations.

(1) Notice. Upon discovery of a suspected violation, the alleged violator must be issued, either personally or by mail, a citation that sets forth the alleged violation and which must inform the alleged violator of their right to be heard on the accusation.

(2) Hearings. If a person accused of violating this chapter so requests, a hearing will be scheduled, the time and place of which must be published and provided to the accused violator.

(3) Hearing Officer. The City Council will periodically approve a list of persons, from which the City Manager or designated agent will randomly select a hearing officer to hear and determine a matter for which a hearing is requested.

(4) Decision. If the hearing officer determines that a violation of this chapter 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, must be recorded in writing, a copy of which must be provided to the accused violator. Likewise, if the hearing officer finds that no violation occurred or finds grounds for not imposing any penalty, the findings must be recorded, and a copy provided to the acquitted accused violator. The decision of the hearing officer is final, subject to an appeal as described in [A][5] of this section.

(5) Appeals. Appeals of any decision made by the hearing officer must be filed in the Hennepin County district court for the city within 10 business days of the date of the decision. in which the alleged violation occurred.

(6) Misdemeanor prosecution. Nothing in this section prohibits the city or any other legitimate jurisdiction from seeking criminal prosecution for an alleged violation of this chapter or any other state or federal law regulating tobacco products.

(7) Continued violation. Each violation, and every day in which a violation occurs or continues, constitutes a separate offense.

(B) Administrative penalties.

(1) Licensees. Any licensee found to have violated this chapter, or whose employee has ve violated this chapter, will be charged as follows:

(a) First violation of this chapter, an administrative fine of \$300 75.

(b) Second offense at the same licensed premises within a 36 24-month period, an administrative fine of \$6200.

(c) Third or any subsequent offense at the same licensed location within a 36 24-month period, an administrative fine of -\$1000 250 and the license will be suspended for a period of not less than [30] seven consecutive days and may be revoked.

~~—(d) Fourth offense at the same licensed location within a 24-month period, an administrative fine of \$300 and the license will be suspended for 30 days.~~

~~—(e) Fifth offense at the same licensed location within a 24-month period, an administrative fine of \$350 and the license will be revoked.~~

~~—(f) It is an affirmative defense to the charge of selling tobacco to a person under the age of 18 years in violation of this ordinance that the licensee or individual making the sale relied in good faith upon proof of age as follows:~~

~~1. A valid driver's license or identification card issued by the State of Minnesota, another state, or a province of Canada, and including the photograph and date of birth of the licensed person; or~~

~~2. A valid military identification card issued by the United States Department of Defense; or~~

~~3. In the case of a foreign national, from a nation other than Canada, by a valid passport.~~

~~(2) Employees of licensees and oOther individuals. IOther individuals, other than minors persons under the age of 21 regulated by division (B)(3) of this section, found to be in violation of this chapter will may be charged an administrative fee of \$50.~~

~~(3) Persons under the age of 21Minors. charges for minors found in unlawful possession of, or who unlawfully purchase or attempt to purchase, tobacco, tobacco products, or tobacco related devices, will be routed through the Hennepin County Juvenile diversion program. Persons under the age of 21 who use a false identification to purchase or attempt to purchase licensed products may only be subject to non-criminal, non-monetary civil penalties or remedies such as tobacco-related education classes, diversion programs, community services, or another non-monetary, civil penalty that the city determines to be appropriate. The City Council will consult with educators, parents, guardians, persons under the age of 21, public health officials, court personnel, and other interested parties to determine an appropriate remedy for persons under the age of 21 in the city in the best interest of the underage person. The remedies for persons under 21 who use a false identification to purchase or attempt to purchase licensed products may be established by ordinance and amended from time to time.~~

~~(4) Statutory penalties. If the administrative penalty for violations against licensed retailers under division (B)(1) 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.~~

~~(4) Criminal prosecution. Nothing in this section prohibits the city from seeking criminal prosecution for violations of this chapter or any other state or federal law regulating tobacco, tobacco products, tobacco-related devices, electronic delivery devices, or nicotine or lobelia delivery devices.~~

ATTEST:

JEFFREY LUNDE, MAYOR

DEVIN MONTERO, CITY CLERK

Approved as to Form by City Attorney

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