

ORDINANCE NO. 41-2014

AN ORDINANCE AMENDING CHAPTER 10: FIRE PROTECTION AND PREVENTION, ARTICLE III: FIRE PREVENTION CODE, DIVISION 2: SMOKING RESTRICTIONS OF THE CODE OF THE CITY OF ABILENE, TEXAS

WHEREAS, on December 21, 2006, the City Council of the City of Abilene adopted an ordinance banning smoking in all public places and places of employment; and,

WHEREAS, the City Council has investigated and determined that CHAPTER 10: FIRE PROTECTION AND PREVENTION, ARTICLE III: FIRE PREVENTION CODE, DIVISION 2: SMOKING RESTRICTIONS of the City of Abilene Code of Ordinances should be amended to add regulations relating to electronic cigarettes and/or e-cigarettes and liquid nicotine as set forth herein; and

WHEREAS, the City Council has further investigated and determined that the smoking of electronic cigarettes and/or e-cigarettes and liquid nicotine have been demonstrated to have a detrimental effect on others in close proximity to the smoker; and

WHEREAS, the City Council has further investigated and determined that it is the right of all citizens to be able to choose for themselves whether to smoke either actively or passively; and

WHEREAS, the City Council has further investigated and determined that it will be advantageous and beneficial to the City and its citizens to provide patrons of retail and service establishments a smoke-free environment; and

WHEREAS, the City Council has further investigated and determined that it will be advantageous and beneficial to the Citizens and its inhabitants to regulate smoking in public places in the City, with certain exceptions, to reduce detrimental effects on not only the smoker, but others in close proximity to the smoker and to further the health, safety and welfare of the City and its citizens; and

WHEREAS, the City Council has further investigated and determined that the state and federal governments have been slow to respond meaningfully to the public health crisis caused by smoking, and to implement measures to curb smoking and its inherent dangerous effects on the general public's health; and

WHEREAS, the City Council has further investigated and determined that the dangers posed by tobacco are not limited to cigarettes, pipes or other traditional forms of smoking; and

WHEREAS, the City Council has further investigated and determined that the new, unregulated high-tech smoking devices, commonly referred to as electronic cigarettes or e-cigarettes, have recently become more available to consumers; and

WHEREAS, the City Council has further investigated and determined that nicotine is a known neurotoxin that is also one of the most highly addictive substances available for public consumption; and

WHEREAS, the City Council has investigated and determined that, the manufacturers and marketers of electronic cigarettes or e-cigarettes purposefully and intentionally advertise their products as safe nicotine delivery devices and smoking cessation modalities; and

WHEREAS, the City Council has further investigated and determined that laboratory tests conducted by the U.S. Food and Drug Administration (“FDA”) have shown that electronic cigarettes or e-cigarette vapors contain carcinogens, including nitrosamines. Further, the FDA tests showed that electronic cigarettes or e-cigarettes vapors were found to contain toxic chemicals such as, diethylene glycol, a common ingredient in antifreeze. While some manufacturers of electronic cigarettes or e-cigarettes dispute the FDA’s findings as limited in scope and sample, these manufacturers have not submitted, for independent peer review, any of their findings that purportedly support their safety and smoking cessation claims; and

WHEREAS, the City Council has further investigated and determined that concurrent with this lack of suitable information, manufacturers of electronic cigarettes or e-cigarettes offer their liquid nicotine cartridges in a variety of flavors, including, but not limited to, cherry, chocolate and vanilla, which flavorings the FDA and public health advocates warn are purposefully meant to appeal to and attract young people; and

WHEREAS, the City Council has further investigated and determined that the appeal created by the flavored electronic cigarettes, e-cigarettes and/or liquid nicotine may lead young people into a lifetime of nicotine addiction; and

WHEREAS, the City Council has further investigated and determined that the nicotine content provided by electronic cigarettes or e-cigarettes is unknown and unspecified and presents a significant risk of rapid addiction or overdose; and

WHEREAS, the City Council has further investigated and determined that protecting the citizens of the City against an untested nicotine product like electronic cigarettes, e-cigarettes and liquid nicotine represents sound public health and fiscal policy; and

WHEREAS, the City Council has further investigated and determined that a ban on the sale of electronic cigarettes, e-cigarettes, liquid nicotine and like products in the City to persons under the age of eighteen (18) and a prohibition on self-service merchandising in the retail sale of electronic cigarettes, e-cigarettes, liquid nicotine and like products in order to minimize their physical accessibility to minors serves an important public

interest in furtherance of the health, safety and general welfare of the citizens of the City;
and

WHEREAS, the City Council has further investigated and determined that the Texas Legislature currently prohibits the possession, purchase, consumption or receipt of cigarettes or tobacco products by minors, and the City enforces such regulations; and

WHEREAS, the City Council has further investigated and determined that the Texas Legislature currently regulates vendor assisted sales and vending machines of cigarettes or tobacco products, including, but not limited to, prohibiting the use of the same by minors; and

WHEREAS, the City Council has further investigated and determined that all legal notices required for amending the Code of Ordinances have been given in the manner and form set forth by law, and public hearings have been held on the proposed textual amendments and all other requirements of notice and completion of such procedures have been fulfilled; and

WHEREAS, the City Council has further investigated and determined that in order to promote the public health, safety and welfare of the City and its citizens, it is in the best interest of the City and its citizens to amend the Code of Ordinances as set forth below.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY ABILENE, TEXAS:

Part 1: That the findings set forth above are incorporated into the body of this Ordinance as if fully set forth herein.

Part 2: That Chapter 10, Article III, Division 2, SMOKING RESTRICTIONS, is amended as set forth in Exhibit "A" attached hereto.

Part 3: That any person, firm, or corporation violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine as set forth in Section 1-9 of the Code of the City of Abilene. Said ordinance, being a penal ordinance, becomes effective ten (10) days after its publication in the newspaper as provided by Section 19 of the Charter of the City of Abilene, Texas.

PASSED ON FIRST READING this 10th day of July, 2014.

PASSED ON SECOND AND FINAL READING this 24th day of July, 2014.

ATTEST:


CITY SECRETARY


MAYOR

APPROVED:


CITY ATTORNEY

EXHIBIT “A”

Chapter 10, Article III, Division 2, SMOKING RESTRICTIONS, is amended as follows:

Chapter 10 Article III Division 2 SMOKING RESTRICTIONS

Sections:

Sec. 10-80 Purpose

Sec. 10-81 Definitions

Sec. 10-82 Prohibition of Smoking in Public Places

Sec. 10-83 Prohibition in Places of Employment

Sec. 10-84 Prohibition of Smoking in Seating Areas at Outdoor Events

Sec. 10-85 Reasonable Distance

Sec. 10-86 Application of Article to City Owned Facilities

Sec. 10-87 Exemptions from Prohibition

Sec. 10-88 Posting of Signs

Sec. 10-89 Health District Program

Sec. 10-90 Enforcement

Sec. 10-91 Non-retaliation

Sec. 10-92 Violations and Penalties

Sec. 10-93 Possession, purchase, consumption or receipt of electronic cigarettes or e-cigarettes and/or liquid nicotine by minors prohibited

Sec. 10-94 Sale of electronic cigarette or e-cigarette or liquid nicotine to persons younger than 18 years of age prohibited; proof of age required

Sec. 10-95 Vendor assisted sales required; self-service merchandising prohibited

Sec. 10-96 Other Applicable Laws

Sec. 10-97 Severability

Sec. 10-98 Effective Date

Sec. 10-99 Reserved

Sec. 10-80. Purpose.

The purpose of this chapter is to (1) improve and protect the public's health by eliminating smoking in public places and places of employment; (2) promote the right of nonsmokers to breathe smoke-free air; and, (3) recognize that the need to breathe smoke-free air shall have priority over the choice to smoke.

Sec. 10-81. Definitions.

The following words and phrases, whenever used in this Article, shall be construed as defined in this section:

Bar means an area that is devoted to the serving of alcoholic beverages for consumption by guests on the premises and in which the serving of food is only incidental to the consumption of such beverages. A "bar" includes those facilities located within a restaurant, hotel, motel or other similar transient occupancy establishment and those establishments that allow guests to bring their own alcoholic beverages for consumption on premises. For purposes of this ordinance, a bar includes any place where alcohol is consumed, whether purchased on or brought to the premises.

Business means any sole proprietorship, partnership, joint venture, corporation or other business entity formed for profit-making purposes, including retail establishments where goods or services are sold as well as professional corporations and other entities where legal, medical, dental, engineering, architectural or other professional services are delivered.

Electronic cigarette means any electronic oral device, such as one composed of a heating element, battery, and/or electronic circuit, which provides a vapor of nicotine or any other substance, and the use or inhalation which simulates the smoking of a tobacco cigarette, pipe or cigars. "Electronic cigarette" includes any such device, whether manufactured, distributed, marketed, or sold as an electronic cigarette, an electronic cigar, an electronic cigarillo, an electronic pipe, electronic hookah, or under any other similar product name or descriptor. The term electronic cigarette does not include any asthma inhaler or other device that may be specifically approved by United States U.S. Food and Drug Administration as a nicotine delivery device.

Employee means any person who is employed by any employer in consideration for direct or indirect monetary wages or profit.

Employer means any person, partnership, corporation, including a municipal corporation, or non-profit entity, which employs the services of one or more individual persons.

Enclosed Area means all space between a floor and ceiling which is enclosed on all sides by solid walls or windows (exclusive of door or passage ways) which extend from the

floor to the ceiling, including all space therein screened by partitions which do not extend to the ceiling or are not solid.

Place of Employment means any enclosed area under the control of a public or private employer which employees normally frequent during the course of employment, including, but not limited to, work areas, employee lounges and restrooms, conference and classrooms, employee cafeterias and hallways. A private residence is a "place of employment" if it is used as a child care, adult day care or health care facility.

Private Club means an organization, whether incorporated or not, which is the owner, lessee, or occupant of a building or portion thereof used exclusively for club purposes at all times, which is operated solely for a recreational, fraternal, social, patriotic, political, benevolent, or athletic purpose, but not for pecuniary gain, and which only sells alcoholic beverages incidental to its operation. The affairs and management of the organization are conducted by a board of directors, executive committee, or similar body chosen by the members at an annual meeting. The organization has established bylaws and/or a constitution to govern its activities. The organization has been granted an exemption from the payment of federal income tax as a club under 26 U.S.C. Section 501.

Private Place means any enclosed area to which the public is not invited or in which the public is not permitted, including but not limited to, personal residences, private clubs or personal automobiles. A privately-owned business, open to the public, is not a "private place".

Public Place means any enclosed area to which the public is invited or in which the public is permitted, including but not limited to, banks, educational facilities, health facilities, laundromats, public transportation and affiliated facilities, reception areas, production and marketing establishments, retail service establishments, retail stores and malls, theaters and waiting rooms. A private residence is not a "public place".

Restaurant means an eating establishment, including but not limited to, coffee shops, cafeterias, sandwich stands, and private and public school cafeterias, which gives or offers for sale food to the public, guests, or employees, as well as kitchens and catering facilities in which food is prepared on the premises for serving elsewhere.

Retail Tobacco Store means a retail store utilized primarily for the sale of tobacco products and accessories and in which the sale of other products is merely incidental. For purposes of this article, other products that are merely incidental means not exceeding ten percent (10%) of gross sales. Sales of incidental products shall not include the sale of alcohol regardless of percentage of total gross sales.

Service Line means any indoor line at which one (1) or more persons are waiting for or receiving service of any kind, whether or not such service involves the exchange of money.

Smoking means inhaling, exhaling, burning or carrying any lighted cigar, cigarette, pipe, weed, or plant in any manner or in any form.

Sports Arena means sports pavilions, gymnasiums, health spas, boxing arenas, swimming pools, roller and ice rinks, bowling alleys and other similar places where members of the general public assemble either to engage in physical exercise, participate in athletic competition, or witness sports events.

Sec. 10-82. Prohibition of Smoking in Public Places.

(a) Smoking shall be prohibited in all enclosed public places, as well as those outdoor areas designated in Sec. 10-84 and 10-85, within the City of Abilene, including, but not limited to, the following places:

- (1) Elevators.
- (2) Restrooms, lobbies, reception areas, hallways and any other common-use areas.
- (3) Buses, bus terminals, taxicabs, train stations, airports and other facilities and means of public transit under the authority of the City of Abilene, as well as ticket, boarding, and waiting areas of public transportation facilities.
- (4) Service lines.
- (5) Retail stores, shopping malls and restaurants.
- (6) All enclosed areas available to and customarily used by the general public in all businesses, including but not limited to, attorneys' offices and other offices, banks, laundromats, hotels and motels.
- (7) Bars.
- (8) Galleries, libraries, and museums.
- (9) Any facility which is primarily used for exhibiting any motion picture, stage, drama, lecture, musical recital or other similar performance, except that performers may smoke when the smoking is part of a stage production.
- (10) Indoor sports arenas and convention halls.
- (11) Every room, chamber, place of meeting or public assembly, including school buildings, under the control of any board, council, commission, committee, including joint committees, or agencies of the City of Abilene or any political subdivision of the State during such time as a public meeting is in progress.

(12) Waiting rooms, hallways, wards and semiprivate rooms of health facilities, including, but not limited to, hospitals, clinics, physical therapy facilities, doctors' offices, and dentists' offices.

(13) Lobbies, hallways, and other common areas in apartment buildings, condominiums, trailer parks, retirement facilities, nursing homes, and other multiple-unit residential facilities.

(14) Polling places.

(15) Bingo facilities.

(16) Adult entertainment enterprises.

Sec. 10-83. Prohibition of Smoking in Places of Employment.

(a) It shall be the responsibility of employers to provide a smoke-free place of employment for all employees.

(b) Each employer having any enclosed place of employment located within the City of Abilene shall adopt, implement and maintain a written smoking policy, which shall contain the following requirements:

Smoking shall be prohibited in all enclosed facilities within a place of employment without exception. This includes common work areas, auditoriums, classrooms, conference and meeting rooms, private offices, elevators, hallways, medical facilities, cafeterias, employee lounges, stairs, restrooms, vehicles, and all other enclosed facilities.

Additionally, smoking is prohibited within a reasonable distance of not less than 20 feet outside entrances, operable windows, and ventilation systems of enclosed areas where smoking is prohibited.

(c) The smoking policy shall be communicated to all employees within four (4) weeks of its adoption.

(d) All employers shall supply a written copy of the smoking policy upon request to any existing or prospective employee.

Sec. 10-84. Prohibition of Smoking at Public Outdoor Events.

Smoking shall be prohibited at all public outdoor events, including seating areas for use by spectators.

Sec. 10-85 Reasonable Distance

Smoking is prohibited within a reasonable distance of not less than 20 feet outside entrances, operable windows, and ventilation systems of enclosed areas where smoking is prohibited.

Sec. 10-86. Application of Article to City-Owned Facilities.

All facilities, including zoos, parks, playgrounds, golf courses, buildings and vehicles owned, leased or operated by the City of Abilene, shall be subject to the provisions of this Article. City owned facilities shall not be construed to include private boating on city lakes.

Sec. 10-87. Exemptions from Prohibition.

(a) Notwithstanding any other provision of this Article to the contrary, the following areas shall not be subject to the smoking restrictions of this Article:

(1) Private residences, except when used as a child-care, adult day care or health care facility.

(2) Hotel and motel rooms that are rented to guests and are designated as smoking rooms; provided, however, that no more than twenty percent (20%) of hotel and motel rooms rented to guests may be so designated. All smoking rooms on the same floor must be contiguous and smoke from these rooms must not infiltrate into areas where smoking is prohibited under the provisions of this Article. The status of rooms as smoking or nonsmoking may not be changed, except to add additional nonsmoking rooms.

(3) Private and semiprivate rooms in nursing homes and long-term care facilities that are occupied by one (1) or more persons, all of whom are smokers and have requested in writing to be placed in a room where smoking is permitted; provided that smoke from these places does not infiltrate into areas where smoking is prohibited under the provisions of this Article.

(4) Outdoor areas at places of employment except those covered in Sec. 10-84 and Sec. 10-85 and B, below.

(5) Retail Tobacco Stores:

- a. in stand alone physical facilities or other retail space provided that smoke from the subject store does not infiltrate areas where smoking is prohibited under the provisions of this Article; and
- b. where sales of incidental products shall not exceed ten percent (10%) of total gross sales; sales of incidental products shall not include the sale of alcohol regardless of percentage of total gross sales; and
- c. where no alcohol is consumed on the premises.

(6) Private clubs that have no employees, except when being used for a function to which the general public is invited. This exemption shall not apply to any organization that is established for the purpose of avoiding compliance with this Article.

(b) Notwithstanding any other provision of this section, any owner, operator, manager or other person who controls any public place or place of employment described in this section may declare the entire establishment to be non-smoking.

Sec. 10-88. Posting of Signs.

(a) The owner, manager or other person having control of a public place or place of employment or other area where smoking is prohibited by this Article shall have a conspicuously posted sign clearly stating "NO SMOKING" or displaying the international "No Smoking" symbol (consisting of a pictorial representation of a burning cigarette enclosed in a red circle with red bar across it). The signs shall have bold lettering of not less than 1 inch in height and must be posted at each entrance and within the building or other areas where smoking is prohibited.

(b) All ashtrays and other smoking paraphernalia shall be limited in facilities to that required for the enforcement of extinguishing of smoking materials in public places and places of employment.

Sec. 10-89. Public Health Authority Program.

The Public Health Authority shall promote the purposes and requirements of this ordinance to the public affected by it, and guide owners, operators and managers in their compliance with it. Such promotion may include publication of a brochure for affected businesses and individuals explaining the provisions of this ordinance.

Sec. 10-90. Enforcement.

(a) Enforcement of this Article shall be by the Public Health Authority or designee, Environmental Enforcement Officers, Building Official or designee, City of Abilene Firefighters, Peace Officers, Code Enforcement Officers and the City Manager or designee.

(b) Notice of the provisions set forth in this Article shall be given to all applicants for a certificate of occupancy or any other license to operate a business in the City of Abilene.

(c) Any person may register a complaint under this Article to initiate enforcement with any agency or official designated herein.

(d) The Public Health Authority or its designee, Building Inspections Division and the Abilene Fire Department shall, while an establishment is undergoing otherwise mandated inspections, inspect for compliance with this ordinance.

(e) Any owner, manager, operator or employee of any establishment regulated by this Article shall be responsible for informing persons violating this Article of the provisions.

Sec. 10-91. Non-retaliation.

No person or employee shall discharge, refuse to hire or in any manner retaliate against any employee, applicant for employment or customer because such employee, applicant or customer exercises any right to a smoke-free environment afforded by this Article.

Sec. 10-92. Violations and Penalties.

(a) It shall be unlawful for the owner, manager or other person having control of a public place or place of employment or other area where smoking is prohibited by this Article to fail to comply with all of its provisions.

(b) It shall be unlawful for any person to smoke in any area where smoking is prohibited by the provisions of this Article.

(c) Any person who violates any provision of this Article shall be guilty of a misdemeanor, punishable by a fine as set forth in Sec. 1-9 of the Code of the City of Abilene.

Sec. 10-93. Possession, purchase, consumption or receipt of electronic cigarettes or e-cigarettes and/or liquid nicotine by minors prohibited

(a) A person who is younger than 18 years of age commits an offense if the individual:

(1) Possesses, purchases, consumes or accepts an electronic cigarette, e-cigarette or liquid nicotine; or

(2) Falsely represents himself or herself to be 18 years of age or older by displaying proof of age that is false, fraudulent or not actually proof of the individual's own age in order to obtain possession of, purchase or receive an electronic cigarette, e-cigarette or liquid nicotine.

(b) It shall be a defense to prosecution for a violation of this section if the individual younger than 18 years of age possessed the electronic cigarette, e-cigarette or liquid nicotine in the presence of:

(1) An adult parent, a guardian or a spouse of the individual; or

(2) An employer of the individual, if possession or receipt of the electronic cigarette, e-cigarette or liquid nicotine is required in the performance of the employee's duties as an employee.

(c) It shall also be a defense to prosecution for a violation of this section that the individual younger than 18 years of age is participating in an inspection or test of compliance in accordance with Section 161.088, Health and Safety Code.

Sec. 10-94. Sale of electronic cigarette or e-cigarette or liquid nicotine to persons younger than 18 years of age prohibited; proof of age required

(a) A person or retailer commits an offense if the person or retailer with criminal negligence:

(1) Sells, gives or causes to be sold or given an electronic cigarette or e-cigarette or liquid nicotine to someone who is younger than 18 years of age; or

(2) Sells, gives or causes to be sold or given an electronic cigarette or e-cigarette or liquid nicotine to another person who intends to deliver it to someone who is younger than 18 years of age.

(b) If an offense under this section occurs in connection with a sale by an employee of the owner of a store in which electronic cigarettes, e-cigarettes and/or liquid nicotine is/are sold at retail, the employee is criminally responsible for the offense and is subject to prosecution.

(c) It is a defense to prosecution under subsection (a)(1) that the person to whom the electronic cigarette, e-cigarette or liquid nicotine was sold or given presented to the defendant apparently valid proof of identification.

(d) A proof of identification satisfies the requirements of subsection (c) if it contains a physical description and photograph consistent with the person's appearance, purports to establish that the person is 18 years of age or older and was issued by a governmental agency. The proof of identification may include a driver's license issued by this state or another state, a passport or an identification card issued by a state or the federal government.

Sec. 10-95. Vendor assisted sales required; self-service merchandising prohibited

(a) Except as provided by Subsection (b), a retailer or other person may not:

(1) Offer electronic cigarettes, e-cigarettes or liquid nicotine for sale in a manner that permits a customer direct access to the electronic cigarettes, e-cigarettes or liquid nicotine;

(2) Offer for sale or display for sale electronic cigarettes, e-cigarettes or liquid nicotine by means of self-service merchandising; or

(3) Install or maintain an open display unit containing electronic cigarettes, e-cigarettes or liquid nicotine.

(b) It is a defense to prosecution under subsection (a) if:

(1) A facility or business is not open to persons younger than 18 years of age at any time;

(2) A facility or business is a premises for which a person holds a package store permit issued under the Alcoholic Beverage Code; or

(3) An open display unit is located in an area that is inaccessible to customers.

Sec. 10-96. Other Applicable Laws.

This Article shall not be interpreted nor construed to permit smoking where it is otherwise restricted by other applicable laws.

Sec. 10-97. Severability.

If any provision, clause, sentence or paragraph of this Article or the application thereof to any person or circumstance shall be held invalid, such invalidity shall not affect the other provisions of this Article which can be given effect without the invalid provision or application, and to this end the provisions of this Article are declared to be severable.

Sec.10-98. Effective Date.

This Ordinance shall be effective on and after January 3, 2007. Signage as required by Sec. 10-88 shall be in place within four (4) weeks after the effective date.

Sec. 10-99. Reserved.