

PROPOSED AMENDED ORDINANCE NO. 48- 22

By: Sam Marcellino

An Ordinance to create Chapter 837, Tobacco Retail License and Regulations and to remove Chapter 636.16 of the Codified Ordinances, Illegal distribution of cigarettes, other tobacco products or alternate nicotine products.

Whereas, The City of Bexley seeks to promote the health, wellness and safety of all residents; and,

Whereas, The City of Bexley has historically been a leader in anti-smoking efforts, being the first community in the State of Ohio to enact an indoor smoking ban; one of the first central Ohio communities to ban the sale of smoking products to persons under the age of 21; and the first to ban flavored vaping products; and,

Whereas, tobacco use remains the leading cause of preventable death in the United States, killing nearly half a million people each year. It causes or contributes to many forms of cancer, as well as heart disease and respiratory diseases, among other health disorders; and

Whereas, it is in the best interest of all parties to protect young people from flavored tobacco products, and these products also disproportionately impact minority populations who smoke menthol cigarettes as a result of targeted marketing practices; and

Whereas, commercial tobacco use is the foremost preventable cause of premature death in America, causing a half million deaths annually, and has been responsible for 20.8 million premature deaths in the U.S. since the first U.S. Surgeon General's report on smoking in 1964;

Whereas, 53% of e-cigarettes are purchased from convenience stores, food, drug and mass retail chains in comparison to 28% from online retailers and 19% from specialty/vape shops; and,

Whereas, the density of tobacco retailers, particularly in neighborhoods surrounding schools, has been associated with increased youth smoking rates; and

Whereas, several studies have found that the density of tobacco retailers near schools was positively associated with the prevalence of students reporting experimental smoking; and

Whereas, a local licensing system for tobacco retailers is appropriate to ensure that retailers comply with federal, state, and local tobacco control laws and business standards in order to protect the health, safety, and welfare of our residents;

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

Section 1.

That Chapter 837, Tobacco Retail License and Regulations, be created as follows:

Chapter 837

Tobacco Retail License and Regulations

837.01 Purpose

This chapter is created to ensure that retailers comply with federal, state, and local tobacco control laws and business standards in order to protect the health, safety, and welfare of our residents.

837.02 Definition

- (a) “Arm’s length transaction” means a sale in good faith and for valuable consideration that reflects the fair market value between two informed and willing parties, neither of which is under any compulsion to participate in the transaction.
- (b) “Compliance checks” mean the system the city uses to investigate and ensure that those authorized to sell tobacco products are following and complying with the requirements of this ordinance. Compliance Checks involve the use of persons over the age of 18, but under the age of 21 who purchase or attempt to purchase tobacco 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 enforcing federal, state, or local laws and regulations relating to tobacco products.
- (c) “Delivery sale” means the sale of any tobacco product to any person for personal consumption and not for resale when the sale is conducted by any means other than an in-person, over-the- counter sales transaction in a licensed retail establishment. Delivery Sale includes but is not limited to the sale of any tobacco product when the sale is conducted by telephone, other voice transmission, mail, the internet, or app-based service. Delivery Sale includes delivery by licensees or third parties by any means, including curbside pick-up.
- (d) “*Electronic smoking device*” means any device that may be used to deliver any aerosolized or vaporized substance to the person inhaling from the device, including, but not limited to, an e-cigarette, e-cigar, e-pipe, vape pen or e-hookah. Electronic

smoking device includes any component, part, or accessory of the device, and also includes any substance intended to be aerosolized or vaporized during the use of the device, whether or not the substance contains nicotine. Electronic smoking device does not include drugs, devices, or combination products authorized for sale by the U.S. Food and Drug Administration for cessation purposes, as those terms are defined in the Federal Food, Drug and Cosmetic Act.

- (e) "Flavored tobacco product" means any tobacco product that imparts a taste or smell, other than the taste or smell of tobacco, either prior to, or during the consumption of, a tobacco product, including, but not limited to, any taste or smell relating to fruit, menthol, mint, wintergreen, chocolate, cocoa, vanilla, honey, or any candy, dessert, alcoholic beverage, herb, or spice.
- (f) "Moveable place of business" means any form of business that is operated out of a kiosk, truck, van, automobile or other type of vehicle or transportable shelter and that is not a fixed address or other permanent type of structure licensed for over-the-counter sales transactions.
- (g) "Person" means any natural person.
- (h) "Purchaser" means any person who obtains or attempts to obtain a tobacco product.
- (i) "Sale" includes transfer or delivery of goods for money, trade, barter, gift, or other consideration.
- (j) "Self-service display" means any display from which customers may select a tobacco product without assistance from the tobacco retailer or the tobacco retailer's agent or employee and without a direct person-to-person transfer between the purchaser and the tobacco retailer or tobacco retailer's agent or employee.
- (k) "Tobacco product" means: (1) any product containing, made of, or derived from tobacco or nicotine that is intended for human consumption or is likely to be consumed, whether inhaled, absorbed, or ingested by any other means, including, but not limited to, a cigarette, a cigar, pipe tobacco, chewing tobacco, snuff, or snus; (2) any electronic smoking device and any substances that may be aerosolized or vaporized by such device, whether or not the substance contains nicotine; or (3) any component, part, or accessory of (1) or (2), whether or not any of these contain tobacco or nicotine, including but not limited to filters, rolling papers, blunt or hemp wraps, and pipes. Tobacco product does not include drugs, devices, or combination products authorized for sale by the U.S. Food and Drug Administration for cessation purposes, as those terms are defined in the Federal Food, Drug and Cosmetic Act.
- (l) "Tobacco retail establishment" means any place of business where tobacco products are available for sale to the general public. The term includes but is not limited to grocery stores, tobacco product shops, kiosks, convenience stores, gasoline service stations, bars, and restaurants.

- (m) "Tobacco retailer" means any person, partnership, joint venture, society, club, trustee, trust, association, organization, or corporation who owns, operates, or manages any tobacco retail establishment. Tobacco retailer does not mean the nonmanagement employees of any tobacco retail establishment.
- (n) "Youth-oriented facility" means any facility with residents, customers, visitors, or inhabitants of which 25 percent or more are regularly under the age of 21 or that primarily sells, rents, or offers services or products that are consumed or used primarily by persons under the age of 21. Youth-oriented facility includes, but is not limited to, a licensed care facility or preschool, day care centers, public or private schools, playgrounds, a library open to the public, recreation centers, and parks.

837.03 License Required

- (a) Each individual tobacco retail establishment location engaging in the sale of tobacco products at a fixed tobacco retail establishment shall secure a tobacco retail license from Franklin County Public Health before engaging or continuing to engage in such business. The tobacco retail license shall be on display at the tobacco retail establishment all times. No tobacco retailer shall sell tobacco products without a valid tobacco retail sales license.
- (b) An application for a license to sell tobacco products must be made on a form provided by Franklin County Public Health. The application must contain the full name of the applicant, the applicant's residential and business addresses and telephone numbers, the name of the business for which the license is sought, and any additional information the city deems necessary.
- (c) Franklin County Public Health may approve or deny the application for a license, or it may delay action for a reasonable period of time to complete any investigation of the application or the applicant deemed necessary. If Franklin County Public Health approves the application, the license will be issued to the applicant. If Franklin County Public Health 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) Denial of License. Grounds for denying the issuance or renewal of a license include, but are not limited to, the following:
 - 1) the applicant is under 21 years of age;
 - 2) the applicant has been convicted within the past five years of any violation of a federal, state, or local law, ordinance provision, or other regulation relating to tobacco products;
 - 3) the applicant has had a tobacco retail license revoked due to violations of this ordinance within the preceding thirty-six (36) months of the date of application;

- 4) the applicant fails to provide the information required on the licensing application or provides false or misleading information;
 - 5) the applicant is prohibited by federal, state, or other local law, ordinance, or other regulation from holding a license;
 - 6) the applicant is in arrears with respect to any fine imposed for violation of this ordinance;
 - 7) the business for which the license is requested is a moveable place of business.
- Only fixed-location tobacco retail establishments are eligible to be licensed.
- (e) For purposes of subdivision (D) of this Section, "applicant" shall include entities with common ownership or management to the entity or natural person listed on the application.
 - (f) If a license is mistakenly issued or renewed, Franklin County Public Health ~~the city~~ shall revoke the license upon the discovery that the applicant was ineligible for the license under this ordinance. The city will provide the applicant or licensee with notice of the revocation, along with information on the right to appeal.
 - (g) The fee for a tobacco retail sales license shall be set by ~~the Health Department~~ Franklin County Public Health, who shall have the authority to adjust the fee as deemed necessary. Such fees shall be calculated to recover the cost of administration and enforcement of this Ordinance, including, but not limited to, issuing licenses, administering the license program, tobacco retailer education, tobacco retailer inspection and compliance checks, documentation of violations, and prosecution of violators. All fees and interest on proceeds from fees shall be used to exclusively fund the administration and enforcement of this Ordinance.
 - (h) All licenses issued are valid only on the premises for which the license was issued and only for the applicant to which the license was issued. The transfer of any license to another location, person, or entity is prohibited.
 - (i) Such license shall be renewed annually and is valid for a period beginning with the date of license to the first day of [Month] next succeeding the date of the license unless sooner revoked as allowed by penalties in this article section, or unless the tobacco retailer to whom it was issued discontinues business, in either of which cases the holder of the license shall immediately return it to Franklin County Public Health. A license shall not be transferred from one tobacco retailer to another or from one location to another.
 - (j) The issuance of a license is a privilege and does not entitle the license holder to an automatic renewal of the license.
 - (k) No tobacco retail license shall be issued or renewed unless the tobacco retailer signs a form stating that the tobacco retailer has read this ordinance and has provided training to all employees on the sale of tobacco products. Such training shall include information

that the sale of tobacco products to persons under 21 years of age is illegal and shall subject the tobacco retailer to penalties, the types of identification legally acceptable for proof of age, and that the sale of flavored tobacco products is illegal and shall subject the tobacco retailer to penalties.

- (l) Tobacco retailing without a valid license. In addition to any other penalty authorized by law, if a court of competent jurisdiction determines, or the Health Department finds based on a preponderance of evidence, after notice and an opportunity to be heard, that any tobacco retailer has engaged in tobacco product retail sales at a location without a valid tobacco retail license, either directly or through the tobacco retailer's agents or employees, the tobacco retailer shall be ineligible to apply for, or to be issued, a tobacco retail license as follows:

- 1) After a first violation of this section at a location within any 36-month period, the location shall receive a written warning from the Department (unless ownership of the business at the location has been transferred in an arm's length transaction).
- 2) After a second violation of this section at a location within any 36-month period, no new license may issue for the tobacco retailer or the location (unless ownership of the business at the location has been transferred in an arm's length transaction), until ninety (90) days have passed from the date of the violation.
- 3) After a third or subsequent violation of this section at a location within any 36-month period, no new license may issue for the tobacco retailer or the location (unless ownership of the business at the location has been transferred in an arm's length transaction), until five (5) years have passed from the date of the violation.

Commented [MF1]: This presumes a revocation of the license after a second violation.

837.04 Prohibited Sales

- (a) Minimum Legal Sales Age for Tobacco Products

The sale of any tobacco product to a person under the age of 21 is prohibited.

- (b) Age Verification

Before distributing any tobacco product, the tobacco retailer or the tobacco retailer's agent or employee shall verify that the purchaser is at least 21 years of age. Each tobacco retailer or tobacco retailer's agent or employee shall examine the purchaser's government-issued photographic identification. No such verification is required for a person over the age of 30. That a purchaser appeared to be 30 years of age or older shall not constitute a defense to a violation of this section.

- (c) Signage

- 1) No tobacco retailer shall sell, permit the sale of, or furnish tobacco products in the City unless a notice, as proscribed in this section, is posted at all locations where tobacco products are available for purchase. All notices must be posted in a manner conspicuous to both employees and consumers, unobstructed from view in their entirety, and within six feet of each register where tobacco products are available for purchase. Franklin County Public Health shall provide this notice, which shall prominently state "No person under the age of 21 may be sold nicotine or tobacco products, including electronic smoking devices". The notice must be at least 14" by 11" and the words on the notice must be legibly printed in such a way as to be highly visible and easily legible.
- 2) Selling tobacco products in any place that does not have a sign consistent with this section is prohibited by law and punishable under this Chapter.

(d) Flavored Tobacco Product Sales Prohibition.

- 1) It shall be unlawful for a tobacco retailer or its agent, employee, or representative to sell or offer for sale any flavored tobacco product.
- 2) There shall be a rebuttable presumption that a tobacco product is a flavored tobacco product if a tobacco retailer, manufacturer, or any employee or agent of a tobacco retailer or manufacturer:
 - i. makes a public statement or claim that a tobacco product imparts a taste or smell other than the taste or smell of tobacco; or
 - ii. uses text, images, or coloring on the tobacco product's labeling or packaging to explicitly or implicitly indicate that the tobacco product imparts a taste or smell other than the taste or smell of tobacco.

(e) Delivery Sales

Delivery sales of tobacco products by any means are prohibited under this ordinance.

(f) Self Service Displays

No tobacco retailer or their employee or agent shall sell or otherwise distribute tobacco products by or from a self-service display, including through vending machines, except in places where persons under the age of 21 are not permitted access at any time.

837.05 Education

Franklin County Public Health shall engage in a continuing public health education program to explain and clarify the purposes and requirements of this ordinance to persons and entities affected by it, and to guide tobacco retailers and their agents or employees in their compliance. The program may include publication of a brochure for affected tobacco retailers explaining the provisions of this ordinance and signage mandated by this ordinance.

837.06 Proximity to youth-oriented facilities

No license shall be granted to any person or entity for a tobacco retail establishment location that is within 1,000 feet of a youth-oriented facility, as measured by the shortest line from the property line of the space to be occupied by the proposed licensee to the nearest property line of a youth-oriented facility. This restriction does not apply to an existing license holder that holds a current state tax license for the sale of tobacco products in that same location for at least one year before the date this section was enacted into law.

837.07 Responsibility

All licensees are responsible for the actions of their employees regarding the sale, offer to sell, and furnishing of tobacco products on the licensed premises. The sale, offer to sell, or furnishing of any tobacco product by an employee shall be considered an act of the licensee.

837.08 Enforcement

Each individual licensed tobacco retail establishment shall be subject to at least two unannounced compliance checks per year. The [Health Department/Designated Authority] shall conduct compliance checks by engaging persons between the ages of 18 and 20 to enter the tobacco retail establishment to attempt to purchase tobacco products. Unannounced follow-up compliance checks of all non-compliant tobacco retailers are required within three months of any violation of this ordinance. The results of all compliance checks shall be published by Franklin County Public Health at least annually and made available to the public upon request.

837.09 Penalties

(a) Tobacco retailers

Any tobacco retailer found to have violated this ordinance in person, by agent, representative, or employee or in any other way shall be subject to:

- 1) For a first violation, a fine no less than \$500;
- 2) For a second violation within a 36-month period, a fine no less than \$750 and the tobacco retailer shall be prohibited from distributing tobacco products for a minimum of seven days;

Commented [MF2]: This seems inconsistent with 837.03(l)(2).

- 3) For a third violation within a 36-month period, a fine no less than \$1,000 and the tobacco retailer shall be prohibited from distributing tobacco products for a minimum of 30 days; and
- 4) For a fourth and any subsequent violation within a 36-month period, a fine no less than \$1,000, revocation of the current tobacco retail license, and prohibition from distributing tobacco products for a period of three years.

(b) Related violations

A violation of any federal, state, or local law, ordinance provision, or other regulation relating to tobacco products is also a violation of this ordinance and shall be considered an enumerated violation under this ordinance. In addition to any other penalty, a tobacco retailer who violates any provision of this ordinance or any federal, state, or local law, ordinance provision, or other regulation relating to tobacco products, shall be subject to penalties stated in this ordinance, including fines and a prohibition of the distribution of tobacco products.

(c) Exceptions

- 1) Nothing in this ordinance prohibits an underage person from handling tobacco products in the course of lawful employment by a tobacco retailer.
- 2) Nothing in this ordinance prevents the provision of tobacco products to any person as part of an indigenous practice or a lawfully recognized religious, spiritual, or cultural ceremony or practice.

837.10 Rules and Regulations

Franklin County Public Health is hereby authorized to promulgate rules and regulations to carry out the purpose and intent of this Ordinance in order to protect the public health, safety, and welfare.

837.11 Liberal Construction

This ordinance shall be liberally construed so as to further its purposes.

837.12 Severability

If any provision of this ordinance, or the application thereof to any person, entity, or circumstance, is held invalid, such invalidity shall not affect any other provision of this ordinance that can be given effect without the invalid provision or application. Each invalid provision or application of this ordinance is severable.

Section 2.

That Section 636.16 shall be removed from the Codified Ordinances and shall no longer be in effect.

Section 3.

That this Ordinance shall take effect and be in force from and after ~~the earliest period allowed by law:~~March 1, 2022.

Passed: _____, 2022

Troy Markham, President of Council

Attest: _____
Matt McPeck, Clerk of Council

Approved: _____, 2022

Benjamin J Kessler, Mayor

First Reading
Second Reading
Third Reading