

**ORDINANCE NO. 511**

**AN ORDINANCE REPLACING CHAPTER 170 – TOBACCO WITH AN ORDINANCE REGULATING THE SALE OF COMMERCIAL TOBACCO AND RELATED DEVICES AND PRODUCTS WITHIN THE CITY OF BRECKENRIDGE AND AMENDING CHAPTER 86 - FEES OF THE BRECKENRIDGE CITY CODE.**

THE CITY COUNCIL OF THE CITY OF BRECKENRIDGE DOES ORDAIN:

To replace all of Chapter 170 – TOBACCO to read as follows:

**CHAPTER 170  
TOBACCO – REGULATING THE SALE OF COMMERCIAL TOBACCO AND  
RELATED DEVICES AND PRODUCTS.**

**REPEALER: Breckenridge City Ordinance Ch. 170 (Art. III of Ord. No. 265) is hereby repealed in its entirety. The following shall be adopted in its place.**

**§170-1. Purpose and Intent.**

Because the City of Breckenridge recognizes that the sale of commercial tobacco, tobacco-related devices, electronic delivery devices, and nicotine or lobelia delivery products to persons under the age of 18 violates both state and federal laws, this ordinance is intended to regulate the sale of these products for the purpose of enforcing and furthering existing laws, to protect youth and young adults against the serious health effects associated with use and initiation, and to further the official public policy of the state to prevent young people from starting to smoke, as stated in Minn. Stat. § 144.391, as it may be amended from time to time.

**§170-2. 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 ordinance, 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.

**CIGAR.** Any roll of tobacco that is wrapped in tobacco leaf or in any other substance containing tobacco, with or without a tip or mouthpiece, which is not a cigarette as defined in Minn. Stat. § 297F.01, subd. 3, as may be amended from time to time.

**COMPLIANCE CHECKS.** The system the city uses to investigate and ensure that those authorized to sell licensed products are following and complying with the requirements

of this ordinance. 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 enforcing federal, state, or local laws and regulations relating to licensed products.

**ELECTRONIC DELIVERY DEVICE.** Any product containing or delivering nicotine, lobelia, or any other substance, whether natural or synthetic, intended for human consumption 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 product that has been approved or certified by the U.S. Food and Drug Administration for sale as a tobacco-cessation product, as a tobacco-dependence product, or for other medical purposes, and is marketed and sold for such an approved purpose.

**INDOOR AREA.** All space between a floor and a ceiling that is bounded by walls, doorways, or windows, whether open or closed, covering more than 50 percent of the combined surface area of the vertical planes constituting the perimeter of the area. A wall includes any retractable divider, garage door, or other physical barrier, whether temporary or permanent. A standard window screen (0.011 gauge with an 18 by 16 mesh count) is not considered a wall.

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

**LOOSIES.** The common term used to refer to single or individually packaged cigars or cigarettes, or any other licensed product that has been removed from its intended retail packaging and offered for sale. LOOSIES does not include individual cigars with a retail price, after any discounts are applied and before any sales taxes are imposed, of at least \$2.60 per cigar.

**MOVEABLE PLACE OF BUSINESS.** Any form of business that is operated out of a kiosk, truck, van, automobile or other type of vehicle or transportable shelter and not a fixed address store front or other permanent type of structure authorized for sales transactions.

**NICOTINE OR LOBELIA DELIVERY PRODUCT.** Any product containing or delivering nicotine or lobelia intended for human consumption, or any part of such a product, that is not a tobacco or an electronic delivery device as defined in this section. NICOTINE OR LOBELIA DELIVERY PRODUCT does not include any product that has been approved or otherwise certified for legal sale by the U.S. Food and Drug Administration as a tobacco-cessation product, a tobacco-dependence product, or for other medical purposes, and is being marketed and sold solely for that approved purpose.

**PERSON.** Any natural person, partnership, firm, joint stock company, corporation, or other legal entity, including an employee of a legal entity.

**RETAIL ESTABLISHMENT.** Any place of business where licensed products are available for sale to the general public. The phrase includes but is not limited to grocery stores, tobacco products shops, convenience stores, gasoline service stations, bars, and restaurants.

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

**SELF-SERVICE DISPLAY.** The open display of licensed products in any manner where any person has access to the licensed products without the assistance or intervention of the licensee or the licensee's employee.

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

**TOBACCO.** 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; 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 does not include any product that has been approved by the U.S. Food and Drug Administration for sale as a tobacco-cessation product, as a tobacco-dependence product, or for other medical purposes, and is being marketed and sold solely for such an approved purpose.

**TOBACCO-RELATED DEVICE.** Any rolling papers, wraps, pipes, or other device intentionally designed or intended to be used with tobacco products. TOBACCO-RELATED DEVICE includes components of tobacco-related devices or tobacco products, which may be marketed or sold separately. TOBACCO-RELATED DEVICES may or may not contain tobacco.

**VENDING MACHINE.** Any mechanical, electric or electronic, or other type of device that dispenses licensed products upon the insertion of money, tokens, or other form of payment directly into the machine by the person seeking to purchase the licensed product.

**YOUTH-ORIENTED FACILITY.** 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, schools, playgrounds, recreation centers, and parks.

### **§170-3. License.**

**License required.** No person shall sell or offer to sell any licensed product without first having obtained a license to do so from the city.

- (A) **Application.** An application for a license to sell 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 of the business for which the license is sought, and any additional information the city deems necessary. Upon receipt of a completed application, the City Administrator will forward the application to the City Council for action at its next regularly scheduled meeting. If the City Administrator determines that an application is incomplete, it will be returned to the applicant with notice of the information necessary to make the application complete.
- (B) **Action.** The City Council 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 the City Council approves the application, the City Administrator 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.
- (C) **Term.** All licenses issued are valid from date of issuance until December 31 of the issuing year.
- (D) **Revocation or suspension.** Any license issued may be suspended or revoked following the procedures set forth in Section 11.
- (E) **Transfers.** All licenses issued are valid only on the premises for which the license was issued and only for the person to whom the license was issued. The transfer of any license to another location or person is prohibited.
- (F) **Moveable place of business.** No license will be issued to a moveable place of business. Only fixed-location businesses are eligible to be licensed.
- (G) **Display.** All licenses must be posted and displayed at all times in plain view of the general public on the licensed premises.
- (H) **Renewals.** The renewal of a license issued under this ordinance will be handled in the same manner as the original application. The request for a renewal must be made at least 30 days, but no more than 60 days, before the expiration of the current license.
- (I) **Issuance as privilege and not a right.** The issuance of a license is a privilege and does not entitle the license holder to an automatic renewal of the license.

- (J) **Proximity to youth-oriented facilities.** No license will be granted to any person for a retail establishment location that is within 300 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 who has been licensed to sell licensed products in that same location for at least one year before the date this section was enacted into law.
- (K) **Smoking prohibited.** Smoking, including smoking for the purpose of the sampling of licensed products, is prohibited within the indoor area or within 25 feet from any external door, wall, or window of any retail establishment licensed under this ordinance. Smoking for the purpose of sampling licensed products is also prohibited in these areas.
- (L) **Samples prohibited.** No person shall distribute samples of any licensed product free of charge or at a nominal cost.

**§170-4. Fees.**

No license will be issued under this ordinance until the appropriate license fees are paid in full. The fees will be established by the city's fee schedule and may be amended from time to time.

**§170-5. Basis for Denial of License.**

- (A) 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 licensed products.
  - (3) The applicant has had a license to sell licensed products suspended or revoked within the preceding 12 months of the date of application.
  - (4) The applicant fails to provide any of 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.
- (B) Except as may otherwise be provided by law, the existence of any particular ground for denial does not compel the city to deny the license.
- (C) If a license is mistakenly issued or renewed to a person, it will be revoked upon the discovery that the person was ineligible for the license under this ordinance. The city will provide the license holder with notice of the revocation, along with information on the right to appeal.

**§170-6. Prohibited Acts.**

(A) **In general.** No person shall sell or offer to sell any licensed product:

- (1) By means of any type of vending machine.
- (2) By means of loosies as defined.
- (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.
- (4) 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.** No person shall 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 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 and age verification requirement 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) **Self-service sales.** No person shall allow the sale of licensed products by any self-service displays where the customer may have access to those items without having to request the item from the licensee or the licensee's employee and where there is not a physical exchange of the licensed product from the licensee or the licensee's employee to the customer. All licensed products must be stored behind the sales counter, in another area not freely accessible to customers, or in a case or other storage unit not left open and accessible to the general public. Any retailer selling licensed products at the time this ordinance is adopted must comply with this section within 90 days of the effective date of this ordinance.

(D) **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.

### **§170-7: Accountability**

All licensees are responsible for the actions of their employees in regard to the sale, offer to sell, and furnishing of licensed products on the licensed premises. The sale, offer to sell, or furnishing of any licensed product by an employee shall be considered an act of the licensee. Nothing in this section shall be construed as prohibiting the city from also subjecting the employee to any civil penalties that the city deems to be appropriate under this ordinance, state or federal law, or other applicable law or regulation.

### **§170-8. Compliance Checks and Inspections.**

All licensed premises must be open to inspection by law enforcement or other authorized city officials during regular business hours. From time to time, but at least once per year, the city will conduct compliance checks. In accordance with state law, the city will conduct at least one compliance check that involves the participation of a person between the ages of 15 and 17 and at least one compliance check that involves the participation of a person between the ages of 18 and 20 to enter licensed premises to attempt to purchase licensed products. Prior written consent is required for any person under the age of 18 to participate in a compliance check. Persons used for the purpose of compliance checks will be supervised by law enforcement or other designated personnel.

### **§170-9. Other Prohibited Acts.**

Unless otherwise provided, the following acts are an administrative violation of this ordinance:

- (A) **Prohibited furnishing or procurement.** It is a violation of this ordinance for any person 21 years of age or older to purchase or otherwise obtain any licensed product on behalf of a person under the age of 21. It is also a violation for any person 21 years of age and older to coerce or attempt to coerce a person under the age of 21 to illegally purchase or attempt to purchase any licensed product.
- (B) **Use of false identification.** It is a violation of this ordinance for any person under the age of 21 to use any form of false identification, whether the identification is that of another person or has been modified or tampered with, to represent an age older than the actual age of the person using that identification in order to purchase licensed products.

### **§170-10. Exceptions and Defenses.**

- (A) **Religious, Spiritual, or Cultural Ceremonies or Practices.** Nothing in this ordinance prevents the provision of tobacco or tobacco-related devices to any person as part of an indigenous practice or a lawfully recognized religious, spiritual, or cultural ceremony or practice.
- (B) **Reasonable Reliance.** It is an affirmative defense to a violation of this ordinance for a person to have reasonably relied on proof of age as described by state law.

## **§170-11. Violations and Penalties.**

### **(A) Violations.**

- (1) **Notice.** A person violating this ordinance may be issued, either personally or by mail, a citation from the city that sets forth the alleged violation and that informs the alleged violator of his or her right to a hearing on the matter and how and where a hearing may be requested, including a contact address and phone number.
- (2) **Appeal Hearings.**
  - (a) Upon issuance of a citation, a person accused of violating this ordinance may request in writing an appeal hearing on the matter. Appeal hearing requests must be made within 10 business days of the issuance of the citation and delivered to the City Administrator or other designated city officer. Failure to properly request an appeal hearing within 10 business days of the issuance of the citation will terminate the person's right to an appeal hearing.
  - (b) The person requesting the appeal hearing must pay an appeal fee that will be established from time to time by resolution of the City Council; this fee must be paid at the time the request is made for the appeal hearing.
  - (c) The City Administrator or other designated city officer will set the time and place for the appeal hearing. Written notice of the appeal hearing time and place will be mailed or delivered to the accused violator at least 10 business days prior to the hearing.
- (3) **Hearing Officer.** The hearing officer will be an impartial employee of the City and shall be the City Administrator, or the City Administrator's designated representative, unless the City Administrator determines that another impartial person be retained by the city to conduct the hearing.
- (4) **Decision.** A decision will be issued by the hearing officer within 10 business days of the hearing. If the hearing officer determines that a violation of this ordinance did occur, that decision, along with the hearing officer's reasons for finding a violation and the penalty to be imposed, will be recorded in writing, a copy of which will be provided to the city and the accused violator by in-person delivery or mail as soon as practicable. If the hearing officer finds that no violation occurred or finds grounds for not imposing any penalty, those findings will be recorded and a copy will be provided to the city and the acquitted accused violator by in-person delivery or mail as soon as practicable. The decision of the hearing officer is final.
- (5) **Costs.** If the citation is upheld by the hearing officer, the city's actual expenses in holding the hearing up to a maximum fee that will be established from time to time by resolution of the City Council must be paid by the person requesting the hearing.



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

**(B) Administrative penalties.**

- (1) **Licensees.** Any licensee found to have violated this ordinance, or whose employee violated this ordinance, will be charged an administrative fee per the fee schedule that will be amended from time to time by resolution of the City Council. Upon the third violation within a 24-month period, the license will be suspended for a period of not less than 30 consecutive days. Upon a fourth violation within a 24-month period, the license will be revoked.
- (2) **Statutory penalties.** If the administrative penalty 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.

- (C) Misdemeanor prosecution.** Nothing in this section prohibits the city from seeking prosecution as a misdemeanor for any alleged violation of this ordinance by a person 21 years of age or older.

**§170-12. Severability.**

If any section or provision of this ordinance is held invalid, such invalidity will not affect other sections or provisions that can be given force and effect without the invalidated section or provision.

**§170-13. Effective Date.**

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

Amend Chapter 86 to read as follows:

**CHAPTER 86  
FEES**

**§86-1. Enumeration of fees.**

The following schedule of fees is established with respect to licenses, permits and activities required or regulated under the provisions of various chapters of the Code of the City of Breckenridge. Applications for and the issuance of such licenses and permits shall be subject to the provisions of the specific chapter of the Code which is indicated for each type of license or permit. The business, activity or operation for which the license or permit is required shall be subject to all regulations set forth in the chapter to which reference is made. Fees may be adopted or amended by ordinance of the City Council from time to time.

**Code Reference/Type of Fee**

**Fee**

Adding the following fees:

**Chapter 170, Tobacco Fees**

<b>§170-4</b> License Fee:	\$200
<b>§170-11(A)(2)(b)</b> Appeal Fee:	\$100
<b>§170-11(A)(5)</b> Decision and Costs:	Actual expenses of hearing up to a maximum of \$1,000.
<b>§170-11(B)(1)</b> Administrative Penalties:	\$200 for the first offense; \$500 for the second offense at the same licensed premises within a 24-month period; \$750 for a third or subsequent offense at the same licensed premises within a 24-month period.

\_\_\_\_\_  
RUSSELL WILSON, Mayor

ATTEST:

\_\_\_\_\_  
RENAE SMITH, City Administrator

First Reading:	<u>12-16-2019</u>
Posted after 1 <sup>st</sup> reading:	<u>12-19-2019</u>
Second Reading:	<u>01-13-2020</u>
Adopted & Passed:	<u>01-13-2020</u>
Published:	<u>01-19-2020</u>
Posted after published:	<u>01-23-2020</u>