

STATE OF COLORADO     )  
                                      ) ss.  
County of Otero            )

At a Regular Meeting of the Board of County Commissioners for Otero County, Colorado, held at the Courthouse in La Junta, Colorado, on the 30th day of September, A.D., 2019, there were present:

<input checked="" type="checkbox"/>	Keith Goodwin,	Chairman
<input checked="" type="checkbox"/>	Jim Baldwin,	Commissioner
<input checked="" type="checkbox"/>	John Hostetler,	Commissioner
<input checked="" type="checkbox"/>	Lynda "Lyn" Scott,	Clerk to the Board
<input checked="" type="checkbox"/>	Amy White-Tanabe,	County Administrator

when the following proceedings, among others, were had and done, to-wit:

#### **Ordinance #2019 – 1**

#### **AN ORDINANCE REQUIRING A TOBACCO RETAIL LICENSE FOR CERTAIN RETAILERS WITHIN THE UNINCORPORATED AREA OF OTERO COUNTY, COLORADO.**

**WHEREAS**, the General Assembly of the State of Colorado empowers Counties with the authority to adopt and enforce ordinances and resolutions regarding health, safety and welfare issues as otherwise prescribed by law;<sup>1</sup> and

**WHEREAS**, cigarettes are designed and manufactured to be addictive, such that smoking initiation leads to dependence and difficulty quitting;<sup>2</sup> and

**WHEREAS**, the Surgeon General has determined that smoking may cause lung cancer, heart disease and other serious diseases; and

**WHEREAS**, the Centers for Disease Control and Prevention have reported a more than 800% increase in electronic cigarette use among middle school and high school students between 2011 and 2015; and

**WHEREAS**, the absence of tobacco retailers in areas children frequent may help prevent young people from picking up on "environmental cues" to start smoking sent by an abundance of retail outlets that offer access to tobacco and exposure to tobacco marketing;<sup>3</sup> and

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<sup>1</sup> Colorado General Assembly, HB19-1033, Effective Date 7/01/2019

<sup>2</sup> U.S. Department of Health & Human Services, The Health Consequences of Smoking – 50 Years of Progress: A Report of the Surgeon General (2014)

<sup>3</sup> Lisa Henriksen, *et al.*, "Is adolescent smoking related to the density and proximity of tobacco outlets and retail cigarette advertising near schools?". 47 PREV. MED. 210 - 214 (Aug., 2008).

**WHEREAS**, the requirement for a tobacco retail license will not unduly burden legal business activities of retailers who sell tobacco to adults;

**WHEREAS**, House Bill 19-1033 provides that the Board of County Commissioners has the power to adopt a resolution or an ordinance to regulate the possession or purchasing of cigarettes, tobacco products, or nicotine products, as defined by Section 18-13-121 (5), by a minor or to regulate the sale of cigarettes, tobacco products, or nicotine products to minors; and

**WHEREAS**, the Board of County Commissioners believes that in order to protect the public health, safety and welfare of the minors residing in Otero County, Colorado, a tobacco retail license should be required for all retailers selling tobacco products in their establishments;

**NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF OTERO AS FOLLOWS:**

**Section I. Definitions.**

A. ***“Arm’s Length Transaction”*** means a sale in good faith and for valuable consideration that reflects the fair market value in the open market between two informed and willing parties, neither of which is under any compulsion to participate in the transaction. A sale between relatives, related companies or partners, or a sale for which a significant purpose is avoiding the effect of the violations of Section X or Section XI is not an Arm’s Length Transaction.

B. ***“Board”*** means the Board of County Commissioners of the County of Otero and State of Colorado.

C. ***“Cigarette, tobacco product, or nicotine product”*** means:

A product that contains nicotine or tobacco or is derived from tobacco and is intended to be ingested or inhaled by or applied to the skin of an individual; or

Any device that can be used to deliver tobacco or nicotine to the person inhaling from the device, including an electronic cigarette, cigar, cigarillo, or pipe.

Notwithstanding the aforesaid, “cigarette, tobacco product, or nicotine product” does not mean a product that the Food and Drug Administration of the United States Department of Health and Human Services has approved as a tobacco use cessation product.

D. ***“County”*** means the County of Otero and State of Colorado.

E. ***“Department”*** means the Otero County Sheriff’s Department and any agency or person designated by the Department to enforce the provisions of this Ordinance.

F. ***“Effective Date”*** means the date on which this Ordinance shall take effect, i.e., thirty-one days after the Ordinance is published a second time by title only, together with any amendments to the first reading. (See C.R.S. 30-15-405.)

G. ***“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 that may be aerosolized or vaporized by such 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, as those terms are defined in the Federal Food, Drug, and Cosmetic Act.

H. ***“License Administrator”*** means the person(s) within the County designated by the Board of County Commissioners with responsibilities for license issuance, renewal and collection of license fees.

I. ***“Licensee”*** means a sole proprietorship, corporation, partnership or other enterprise engaged in the sale, manufacture, or promotion of Tobacco Products that has obtained a Tobacco Retail License from Otero County, Colorado.

J. ***“Person”*** means any individual, corporation, business trust, estate trust, partnership, association, company, organization, sole proprietorship or any other legal entity.

K. ***“Self-Service Display”*** means the open display of any Tobacco Product(s) in a manner that is physically accessible in any way to the general public without the assistance of the Licensee or an employee of the Licensee and a direct person-to-person transfer between the purchaser and the Licensee or employee of the Licensee. A vending machine is a form of self-service display.

L. ***“Smoking”*** means the act of burning, heating, activating or carrying of any device, including, but not limited to a cigarette, cigar, pipe, hookah, or electronic smoking device, electronic cigarette, vape pen, e-hookah or similar device, by any other product name or descriptor, that results in the release of smoke, vapors or aerosols when the apparent or usual purpose of the burning, heating or activation of the device is human inhalation.

M. ***“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 as defined in this Section 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 contains tobacco or nicotine, including but not limited to filters, rolling papers, blunt or hemp wraps, hookahs, and pipes.

"Tobacco product" does not mean drugs, devices, or combination products authorized for sale by the U.S. Food and Drug Administration, as those terms are defined in the Federal Food, Drug, and Cosmetic Act.

N. **"Tobacco Retailer"** means any person who sells, offers for sale, exchanges or offers to exchange for any form of consideration, Tobacco Products. "Tobacco Retailing" shall mean the doing of any of these things. This definition is without regard to the quantity of Tobacco Product(s) sold, offered for sale, exchanged, or offered for exchange.

## **Section II. Requirements and Prohibitions.**

A. **License Required.** It shall be unlawful for any person to act as a Tobacco Retailer in the County without first obtaining and then maintaining a valid Tobacco Retail License pursuant to this Ordinance for each location where the activity is to occur. Tobacco Retailing without a valid Tobacco Retail License is a nuisance as a matter of law.

B. **Lawful Business Operation.** In the course of Tobacco Retailing or in the operation of the business for which a License issued, it shall be a violation of this Ordinance for a Licensee, or any of the Licensee's agents or employees, to violate any local, state, or federal law applicable to Tobacco Products or Tobacco Retailing.

C. **Display of License.** Each Tobacco Retail License shall be prominently displayed on the premises of the Licensee in a publicly-visible location.

D. **Positive Identification Required.** No person engaged in Tobacco Retailing shall give, sell, distribute, dispense or offer for sale any Tobacco Product(s) to another person who appears to be under the age of thirty (30) years without first examining a government issued photographic identification of the recipient to confirm that the recipient is at least the minimum age under state law to purchase and possess a Tobacco Product.

E. **Minimum Age for Selling, Stocking, Retrieving or Otherwise Handling Tobacco Products.** No person who is younger than the minimum age established by Colorado law for the purchase or possession of any Tobacco Products shall sell, stock, retrieve or otherwise handle Tobacco Products or engage in Tobacco Retailing.

F. **Self-Service Displays Prohibited.** Tobacco Retailing by means of a Self-Service Display is prohibited.

G. **False and Misleading Advertising Prohibited.** Any person who sells Tobacco Products without a valid Tobacco Retail License, including a Tobacco Retailer whose License has been suspended or revoked:

(1) Shall not display Tobacco Products in public view. The public display of Tobacco Products without a License is in violation of this Ordinance and shall constitute Tobacco Retailing without a License; and

(2) Shall not display any advertisement relating to Tobacco Products that promotes the sale or distribution of such products from the location that could lead a reasonable consumer to believe that such products can be obtained from the location.

H. **Mobile Vending.** No Tobacco Retail License shall authorize Tobacco Retailing at other than a fixed location.

I. **Under-Age Applicant.** An applicant not of legal age to purchase or possess a Tobacco Product is ineligible to obtain a Tobacco Retail License.

J. **Schools.** Tobacco Retailing is prohibited near schools, public and private, as follows:

(1) No new License may issue, and no existing License may be renewed, to authorize Tobacco Retailing within one thousand (1,000) feet of a public or private school as measured by a straight line from the nearest point of the property line of the parcel on which the School is located to the nearest point of the property line of the parcel on which the applicant's business is located. For the purposes of this Ordinance:

(a) School means: a private or public kindergarten, elementary, middle, junior high, or high school.

K. **Tobacco Retailer Operating Lawfully on Effective Date.** A Tobacco Retailer operating lawfully on the Effective Date of this Ordinance who is ineligible to receive or renew a Tobacco Retail License for a location pursuant to Section II (J), may apply for and receive a one-time, non-renewable Tobacco Retail License for the location pursuant to the standard License application procedure described above.

### **Section III. License Application.**

A. Application for a Tobacco Retail License shall be submitted in the name of each applicant proposing to conduct Tobacco Retailing and shall be signed by the same or an authorized agent thereof. If the authorized agent is signing the application, the applicant shall submit a letter signed by the applicant(s) consenting to the submission of the application.

B. All Tobacco Retail License applications shall be submitted on a form supplied by the License Administrator, and shall contain the following information:

- (1) The name, address, and telephone number of each applicant seeking a License;
- (2) The business name, address, and telephone number of the single-fixed location where a License is sought. A copy of proof of ownership of the property (ex: deed) or a copy of proof of control of the property (ex.: lease agreement) must be attached.
- (3) A name and mailing address authorized by each applicant authorized to receive all communications and notices (the “authorized address”) required by, authorized by, or convenient to the enforcement of this Ordinance. If an authorized address is not supplied, each applicant shall be understood to consent to the provision of notice at the business address specified in Section III, subparagraph B. (2) above;
- (4) Brief description of goods or taxable services to be sold;

A copy of the Applicant’s Colorado Sales Tax License shall be attached to the application form.

C. A Tobacco Retailer shall inform the County in writing of any change in the information submitted on the application for a Tobacco Retail License within ten (10) business days of said change.

D. Applicable law.

- (1) It is the responsibility of each applicant to be informed regarding all laws applicable to Tobacco Retailing, including those laws affecting the issuance of a Tobacco Retail License.

(2) No applicant may rely on the issuance of a Tobacco Retail License as a determination by the County that the applicant has complied with all laws applicable to Tobacco Retailing.

(3) A License issued contrary to this Ordinance, contrary to any other law, or on the basis of false or misleading information supplied by an applicant shall be revoked.

(4) Nothing in this Ordinance shall be construed to vest in any person obtaining and maintaining a Tobacco Retail License any status or right to act as a Tobacco Retailer in contravention of any provision of law.

#### **Section IV. Issuance of a License.**

A. Upon the receipt of a completed application for a Tobacco Retail License and the paid Tobacco Retail License fee pursuant to Section VIII of this Ordinance, if required, the License Administrator shall issue a License unless substantial evidence demonstrates that one or more of the following bases for denial exists:

- (1) The information presented in the application is inaccurate or false. Intentionally supplying inaccurate or false information shall be a violation of this Ordinance.
- (2) The application seeks authorization for a Tobacco License at a location where this Ordinance prohibits issuance of Tobacco Retail License.
- (3) The application seeks authorization for a Tobacco License for an applicant for whom this Ordinance prohibits a License to be issued.
- (4) The application seeks authorization for Tobacco Retailing that is prohibited or unlawful pursuant to this Ordinance or that is unlawful pursuant to any other law.

#### **Section V. License Term, Renewal and Expiration.**

A. The term of a License is for the calendar year of the date of issuance of the License, i.e., the License will expire on December 31<sup>st</sup> of the year it was issued subject to Section VIII, D., below.

B. Each Tobacco Retailer shall apply for the renewal Tobacco Retail License and submit the applicable license fee no later than thirty (30) days prior to expiration of the term.

C. Tobacco Retail License is invalid if the appropriate fee has not been timely paid in full or if the term of the License has expired.

D. Expiration of License. A Tobacco Retail License that is not timely renewed shall expire at the end of its term. To renew a License not timely renewed pursuant to subparagraph (B), the applicant must:

- (1) Submit the application renewal form and License fee; and
- (2) Submit a signed affidavit affirming that the applicant:
  - (a) has not sold and will not sell any Tobacco Products after the License expiration date and before the License is renewed; or
  - (b) has waited the period of time required by this Ordinance for Tobacco Retailing without a valid License before seeking renewal of the License.

#### **Section VI. License Nontransferable.**

A. **Tobacco Retail License Transfer Not Allowed.** A Tobacco Retail License shall not be transferred from one person to another or from one location to another. A new Tobacco Retail License is required whenever a Tobacco Retail location has a change in ownership in an Arm's Length Transaction.

- (1) Notwithstanding any other provision of this Ordinance, prior violations at a Licensed location shall continue to be counted against the location and License ineligibility periods shall continue to apply to the Licensed location unless:
  - (a) the business location has a change in ownership in an Arm's Length Transaction; and
  - (b) the new business owner(s) provides the County with clear and convincing evidence that the new business owner(s) has acquired or is acquiring the location in an Arm's Length Transaction.

#### **Section VII. License Conveys Limited, Conditional Privilege.**



Nothing in this Ordinance shall be construed to grant any person obtaining and maintaining a Tobacco Retail License any status or right other than the limited conditional privilege to act as a Tobacco Retailer at the location in the County identified on the face of the License. Nothing in this Ordinance shall be construed to render inapplicable, supersede, or apply in lieu of, any other provision of applicable law

#### **Section VIII. Fee for License.**

A. The fee to issue or to renew a Tobacco Retail License shall be \$50.00 per calendar year.

(1) The License fee shall be calculated so as to recover only the cost of administration, education and enforcement of this Ordinance, including, for example, issuing a License, administering the License program, retailer education, retailer inspection and compliance checks, documentation of violations, and prosecution of violators, but shall not exceed the cost of the regulatory program authorized by this Ordinance.

B. License fees are non-refundable except as may be required by law.

C. As deemed appropriate by the Board of County Commissioners, the License fee may be increased in accordance with Article X, Section 20, of the Colorado Constitution.

D. The License Fee shall be prorated at a rate of 1/365 of the amount of the annual License fee times the number of days remaining in the calendar year as of the date the License becomes effective.

#### **Section IX. Compliance Monitoring.**

A. Compliance with this Ordinance shall be monitored by the County. In addition, any peace officer may enforce the penal provisions of this Ordinance. The County may designate any number of additional persons to monitor compliance with this Ordinance.

B. The Department shall inspect each Tobacco Retailer at least two (2) times per twelve-(12) month period. Following each inspection, the Department shall file a report with the County setting forth the results of its inspection. Nothing in this paragraph shall create a right of action in any Licensee or other person against the County or its agents.

C. The County shall not enforce any law establishing a minimum age for Tobacco Retail purchases or possession against a person who otherwise might be in violation of such law because of the person's age (hereinafter "Under-Aged Operative") if the potential violation occurs when:

- (1) the Under-Aged Operative is participating in an inspection supervised by the County Sheriff or his deputies, a Peace Officer, Code Enforcement official, or person(s) designated by the County to monitor compliance with this Ordinance;
- (2) the Under-Aged Operative is acting as an agent of a person(s) designated by the County to monitor compliance with this Ordinance; or
- (3) the Under-Aged Operative is participating in an inspection funded in part, either directly or indirectly, through subcontracting by the Otero County Health Department, Colorado Department of Public Health and Environment or the Colorado Department of Revenue.

#### **Section X. Suspension or Revocation of License and Appeal.**

A. In addition to any other penalty authorized by law, a Tobacco Retail License shall be suspended or revoked if the County finds based on a preponderance of the evidence, after the Licensee is afforded notice and an opportunity to be heard, that the Licensee, or any of the Licensee's agents or employees, has violated any of the requirements, conditions, or prohibitions of this Ordinance or has pleaded guilty, "no contest" or its equivalent, or admitted to a violation of any law designated in Section II.

- (1) Upon a finding by the County of a first violation of this Ordinance at a Licensed location, the Licensee or the Licensee's employee committing the violation may be offered a deferral if the Licensee or the Licensee's employee agrees to attend a training class offered by the Otero County Health Department, such terms to be set forth in the deferral document, and pays all fines as set forth below.
- (2) If an additional violation occurs during the deferral period, then the original violation shall enter and the new violation will be considered a second violation.

In the event the Licensee or the Licensee's employee does not wish to enter into a deferral, then the License shall be suspended or revoked as follows:

- (1) Upon a finding by the County of a first violation of this Ordinance at a Licensed location, the License shall be suspended for seven days.
- (2) Upon a finding by the County of a second violation of this Ordinance at a Licensed location, the License shall be suspended for thirty days.
- (3) Upon a finding by the County of three or more violations of this Ordinance at a Licensed location, the License shall be revoked and the Licensee shall be deemed ineligible for a License for one year.

B. Appeal of Suspension or Revocation. A decision by the County to suspend or revoke a License is appealable to the Otero County District Court and any appeal must be filed in writing with the Otero County District Court within 21 days of mailing of the County's decision. If such an appeal is timely made, it shall stay enforcement of the appealed action. An appeal to the Otero County District Court is not available for a revocation made pursuant to subsection (1) below.

(1) Revocation of License Wrongly Issued. A Tobacco Retail License shall be revoked if the County finds, after the Licensee is afforded notice and an opportunity to be heard, that one or more of the bases for denial of a License under this Ordinance existed at the time application was made or at any time before the License issued. The decision by the County shall be the final decision. Such a revocation shall be without prejudice to the filing of a new License application.

## **Section XI. Penalties and Fines.**

A. Each violation of any local, state or federal law pertaining to the sale of Tobacco Products or any violation of any law designated above shall be subject to the penalties and fines as follows:

(1) For the first violation of this Ordinance, the Licensee and/or Employees or Agents shall be imposed a fine of \$150.00.

(2) After a second violation of this Ordinance, the Licensee and/or Employees or Agents shall be imposed a fine of \$300.00.

(3) After a third or subsequent violation of this Ordinance, the Licensee and/or Employees or Agents shall be imposed a fine of \$500.00.

## **Section XII. Tobacco Retailing Without Valid License.**

A. In addition to any other penalty authorized by law, if the County finds, based on a preponderance of evidence, after notice and an opportunity to be heard, that any person has engaged in Tobacco Retailing at a location without a valid Tobacco Retail License, either directly or through the person's agents or employees, the person shall be ineligible to apply for, or to be issued, a Tobacco Retailer License as follows:

(1) After a first violation of this Section at a location no new License may be issued at the location (unless ownership of the business at the location has been changed in an Arm's Length Transaction), until seven days have passed from the date of the violation.

(2) After a second violation of this Section at a location no new License may be issued at the location (unless ownership of the business at the location has been changed in an Arm's Length Transaction), until thirty days have passed from the date of the violation.

(3) After a third or subsequent violation of this Section at a location no new License may be issued at the location (unless ownership of the business at the location has changed in an Arm's Length Transaction), until three years have passed from the date of the violation.

### **Section XIII. Additional Remedies.**

A. The remedies provided by this Ordinance are cumulative and in addition to any other remedies available at law or in equity.

B. Whenever evidence of a violation of this Ordinance is obtained in any part through the participation of an Under-aged Operative to purchase a Tobacco Product, such individual shall not be required to appear or give testimony in any civil or administrative process brought to enforce this Ordinance and the alleged violation shall be adjudicated based upon the sufficiency and persuasiveness of the evidence presented.

C. Violations of this Ordinance are subject to a civil action brought by the County Attorney and are punishable by a civil fine not less than \$100.00 and not exceeding \$1,000.00 per violation.

For purposes of the civil remedies provided in this Ordinance:

(1) Each day that a Tobacco Product is offered for sale in violation of this Ordinance shall constitute a separate violation of the License; or

(2) Each individual retail Tobacco Product distributed, sold, or offered for sale in violation of this Ordinance shall constitute a separate violation of the License.

D. Violations of this Ordinance may, in the discretion of the County Attorney, be prosecuted as infractions or misdemeanors when the interests of justice so require.

E. Violations of this Ordinance are hereby declared to be public nuisances.

F. In addition to other remedies provided by this Ordinance or by other law, any violation of this Ordinance may be remedied by a civil action brought by the County, including, for example, administrative or judicial nuisance abatement proceedings, civil or criminal code enforcement proceedings, and suits for injunctive relief.

### **Section XIV. Severability.**

If any section, subsection, paragraph, sentence, clause or phrase of this Ordinance is for any reason held or determined to be unconstitutional or invalid, such decision shall not affect the validity of the remaining portions hereof.

**Section XV. Conflict.**

That all former County ordinances, resolutions, rules or regulations, or parts thereof, in conflict with this Ordinance are hereby repealed.

INTRODUCED, FIRST READ AND ORDERED PUBLISHED in full in the Rocky Ford Daily Gazette this 30th day of September, 2019.

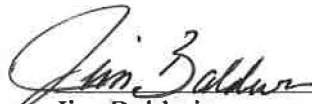
ATTEST:

BOARD OF COUNTY COMMISSIONERS OF  
OTERO COUNTY, STATE OF COLORADO:

  
Clerk & Recorder



  
Keith Goodwin, Chairman


  
Jim Baldwin

  
John Hostetler

ADOPTED ON SECOND AND FINAL READING on the 15th day of  
October, 2019.

ATTEST:

BOARD OF COUNTY COMMISSIONERS OF  
OTERO COUNTY, STATE OF COLORADO:

  
Clerk & Recorder

  
Keith Goodwin, Chairman

