

CITY OF ROCKY FORD

ORDINANCE #957

AN ORDINANCE REPEALING ORDINANCE NO. 902 KNOWN AND CITED AS THE “NON-CIGARETTE TOBACCO PRODUCT RETAIL LICENSE FOR THE CITY OF ROCKY FORD, COLORADO” AND ENACTING A NEW ORDINANCE TO BE KNOWN AND CITED AS THE “TOBACCO PRODUCT RETAIL LICENSE FOR THE CITY OF ROCKY FORD, COLORADO”.

WHEREAS, on September 9, 2014, the City of Rocky Ford adopted Ordinance No. 902 known and cited as the “Non-Cigarette Tobacco Product Retail License for the City of Rocky Ford, Colorado”; and

WHEREAS, the City Council of the City of Rocky Ford finds it in the best interest of the public health, safety and welfare to repeal Ordinance No. 902 and replace it with this Ordinance to be known and cited as the “Tobacco Product Retail License for the City of Rocky Ford, Colorado”; and

WHEREAS, the dangers associated with youth access to tobacco products are well recognized; and

WHEREAS, a local licensing system for tobacco product retailers selling tobacco products is appropriate to protect the health, safety and welfare of young people in the City of Rocky Ford; and

WHEREAS, it is the intent of the City Council of the City of Rocky Ford to prohibit the sale of tobacco products, including cigarettes (hereinafter “tobacco products”) to persons under twenty-one (21) years of age in accordance with State law; to encourage responsible tobacco product retail practices related to the sale of tobacco products; to require a local license for all tobacco products retailers and to promote public health, safety and welfare for the citizens of the City of Rocky Ford, Colorado.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF ROCKY FORD, COLORADO, AS FOLLOWS:

Article 1. Definitions.

The following words and phrases, when used in this Ordinance shall have the meanings defined in this section unless the context clearly requires otherwise:

“Arm’s length transaction” means a sale for valuable consideration between two willing parties. A sale between relatives, related companies or partners will create a rebuttable presumption that an “arm’s length transaction” did not occur. A sale for which a significant purpose is to avoid the effect of the violations of this Ordinance is not an “arm’s length transaction.”

“Cigarette” means any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains: (1) any roll of tobacco wrapped in

paper or in any substance not containing tobacco; or (2) tobacco, in any form, that is functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette; or (3) any roll of tobacco wrapped in any substance containing tobacco that, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in section (1) of this definition. The term "cigarette" includes roll-your-own, *i.e.*, any tobacco that, because of its appearance, type, packaging, or labeling, is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes. For purposes of this definition of "cigarettes", 0.09 ounces of roll-your-own tobacco shall constitute one individual "cigarette".

“Consumer” means a person who acquires or seeks to acquire tobacco products for personal, family, or household use.

“Department” means the Director of Finance for the City of Rocky Ford and any agency or person designated by the Director of Finance to enforce or administer the provisions of this Ordinance.

“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. For purposes herein, electronic smoking device(s) does not include drugs, including marijuana, devices, or combination products authorized for sale by the United States Food and Drug Administration as those terms are defined in the Federal Food, Drug and Cosmetic Act.

“Licensee” means the owner or holder of a Tobacco Product Retail License.

“Licensed” when used in reference to a retailer, means a retailer who holds a valid current license under this article.

“Minimum legal sales age” means any person younger than the minimum age established by the laws of Colorado.

“Person” shall mean any natural person, partnership, Limited Liability Company, cooperative association, corporation, personal representative, receiver, trustee, assignee, or any other legal entity that engages in for profit or nonprofit activity.

“Retail Tobacco Business” shall mean a sole proprietorship, corporation, limited liability company, partnership, or other enterprise engaged primarily in the sale, manufacture, or promotion of tobacco, tobacco products, or smoking devices or accessories, either at wholesale or retail. For purposes of enforcement of this Ordinance, retail tobacco business includes, but is not limited to, a sole proprietorship, corporation, limited liability company or other enterprise engaged primarily in the sale or manufacture of hookah, shisha products and smoking related products or held out as a smoking tobacco product, or any sole proprietorship, corporation, limited liability company, partnership, or other enterprise engaged in the promotion of hookah or shisha smoking, sometimes referred to as a hookah bar, cafe’ or lounge.

“Self-service display” means the open display or storage of tobacco products in a manner that is physically accessible in any way to the general public without the assistance of the retailer or employee of the retailer, and a direct person-to-person transfer between the purchaser and the retailer or employee of the retailer.

“Tobacco product” includes (1) any product that contains tobacco or nicotine, or is made or derived from tobacco that is intended or expected to be ingested, smoked, inhaled, placed in oral or nasal cavities, or applied to the skin, or (2) any electronic device that can be used to deliver nicotine or tobacco to the person using the device, including but not limited to an electronic cigarette, cigar, cigarillo or pipe. The term “tobacco product” does not include any drugs, devices or combination products authorized for sale by the United States Food and Drug Administration as those terms are defined in the Federal Food Drug and Cosmetic Act.

Article 2. Requirements and Prohibitions.

(A) Tobacco product retail license required.

It shall be unlawful for any person to act as a tobacco product retailer in the City of Rocky Ford without obtaining and maintaining a valid tobacco product retail license pursuant to this Ordinance for each location at which tobacco product retailing is to occur. Tobacco product retailing without a valid license is a nuisance as a matter of law.

(B) Lawful business operation.

In the course of tobacco product retailing or in the operation of the business or maintenance of the location for which a license is 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 product retailing.

(C) Display of license.

Each tobacco product retail license shall be prominently displayed in a publicly-visible location at the licensed location.

(D) Positive identification required.

No person engaged in tobacco product retailing shall sell or transfer a tobacco product to another person who appears to be under the age of fifty (50) years without first examining the photographic government issued identification of the recipient to confirm that the recipient is at least the minimum age under state law to purchase and possess the tobacco product.

(E) Minimum age for persons selling tobacco products.

No person in the course of employment who is younger than the minimum age established by the laws of Colorado for the sale of tobacco products shall sell, stock, retrieve or otherwise handle tobacco products.

(F) Self-service displays prohibited.

Tobacco product retailing by means of a self-service display is prohibited.

(G) False and misleading advertising prohibited.

A tobacco product retailer without a valid tobacco product retail license, including, for example, a person whose license has been suspended or revoked:

(1) Shall keep all tobacco products out of public view. The public display of tobacco products in violation of this provision shall constitute tobacco product retailing without a license under Ordinance; and

(2) Shall not display any advertisement relating to tobacco products that promotes the sale or distribution of such products from the tobacco product retailer's location during suspension or revocation of the License that could lead a reasonable consumer to believe that such products can be obtained at that location.

Article 3. Limits on eligibility.

(A) A tobacco product retail license may only be issued to authorize tobacco product retailing at a fixed location. For example, tobacco product retailing by persons on foot or from vehicles is prohibited.

(B) No tobacco product retail license shall be issued to anyone under 21 years of age.

Article 4. Application procedure.

(A) Application for a tobacco product retail license shall be submitted in the name of each retailer proposing to conduct tobacco product sales and shall be signed by each retailer or an authorized agent thereof. It is the responsibility of each retailer to be informed regarding all local, state and federal laws applicable to tobacco product retailing, including those laws affecting the issuance of a tobacco product retail license. No retailer may rely on the issuance of a tobacco product retail license as a determination by the City of Rocky Ford that the retailer has complied with all applicable tobacco product retailing laws.

(B) A tobacco product retail license issued contrary to this Ordinance, contrary to any other law, or on the basis of false or misleading information supplied by a retailer shall be revoked pursuant to this Ordinance.

(C) Nothing in this Ordinance shall be construed to vest in any person obtaining and maintaining a tobacco product retail license any status or right to act as a tobacco retailer in contravention of any provision of law.

(D) Applications shall be submitted on a form supplied by the City of Rocky Ford and shall contain the following information:

(1) The name, address, and telephone number of each owner of the retail business seeking a license.

(2) The business name, address, and telephone number of the single-fixed location for which a license is sought.

(3) A single name and mailing address authorized by each retailer to receive all communications and notices (the “authorized address”) required by, authorized by, or convenient to the enforcement of this Ordinance.

(4) If an authorized address is not supplied, each retailer shall be understood to consent to the provision of notice at the business address specified in subparagraph (2) of this Article.

(5) Whether or not any retailer or any agent of the retailer has admitted violating, or has been found to have violated, this Ordinance and, if so, the dates and locations of all such violations within the previous five years.

(6) Such other information as the City of Rocky Ford deems necessary for the efficient administration or enforcement of this Ordinance.

(E) A licensed tobacco product retailer shall inform the City of Rocky Ford in writing of any change in the information submitted on an application for a tobacco product retail license within 30 business days of said change.

Article 5. Issuance of a license.

Upon the receipt of a completed tobacco product retail license application and receipt of the total license fee required by this Ordinance, the City of Rocky Ford shall issue a license to the applicant unless a preponderance of the evidence demonstrates that one or more of the following bases for denial exists:

(A) The information presented in the application is inaccurate or false. Intentionally supplying inaccurate or false information shall be a violation of this Ordinance.

(B) The application seeks authorization for tobacco product retailing at a location where this Ordinance prohibits issuance of tobacco product retail licenses. However, this subparagraph shall not constitute a basis for denial of a license if the applicant provides the City of Rocky Ford with documentation demonstrating by clear and convincing evidence that the applicant has acquired or is acquiring the location or business in an arm’s length transaction.

(C) The application seeks authorization for a tobacco product retail license for a retailer to whom this Ordinance prohibits a license to be issued.

(D) The application seeks authorization for tobacco product retailing that is prohibited or is unlawful pursuant to this Ordinance, or that is unlawful pursuant to any local, state or federal law.

Article 6. License term, renewal and expiration.

(A) **Term of license.** The term of the tobacco product retail license is one (1) year.

(1) A tobacco product retail license is invalid if the appropriate fee has not been timely paid in full or if the term of the license has expired.

(B) Renewal of license. Each tobacco product retailer shall apply for the renewal of his or her license and submit the license fee no later than 30 days prior to expiration of the term.

(1) A tobacco product retail license is invalid if the appropriate renewal fee has not been timely paid in full or if the term of the license has expired.

(C) Expiration of license. A tobacco product 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 retailer must:

(1) Submit the license fee and application renewal form; and

(2) Submit a signed affidavit affirming that the retailer:

(i) has not sold and will not sell any tobacco products after the license expiration date and before the license is renewed; or

(ii) has waited the appropriate ineligibility period established for tobacco product retailing without a license as set forth in this Ordinance before seeking renewal of the license.

Article 7. License non-transferable.

(A) A tobacco product retail license may not be transferred from one person to another or from one location to another. A new tobacco product retail license is required whenever a tobacco product location has a change in ownership.

(B) Notwithstanding any other provision of this Ordinance, prior violations at a location shall continue to be counted against a location and license ineligibility periods shall continue to apply to a location unless:

(1) the location has been fully transferred to a new owner(s); and

(2) the new owner(s) provide the City of Rocky Ford with clear and convincing evidence that the new owner(s) have acquired or are acquiring the location in an arm's length transaction.

Article 8. License conveys a limited, conditional privilege.

Nothing in this Ordinance shall be construed to grant any person obtaining and maintaining a license to sell tobacco products any status or right other than the limited conditional privilege to act as a tobacco product retailer at the location in the City of Rocky Ford 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, including but not limited to, any provision of this Ordinance.

Article 9. Fee for license.

The fee to issue or to renew a tobacco product retail license shall be established from time to time by resolution of the City Council of the City of Rocky Ford. The fee shall be calculated so as to recover the cost of administration 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. All fees and interest upon proceeds of fees shall be used exclusively to fund the purpose of the license. Fees are non-refundable except as may be required by law.

Article 10. Compliance monitoring.

(A) Compliance with this Ordinance shall be monitored by the City of Rocky Ford. In addition, any peace officer may enforce the penal provisions of this Ordinance.

(B) The City of Rocky Ford or other person designated by the City to enforce the provisions of this Ordinance shall check the compliance of each tobacco product retailer at least two times per twelve (12) month period.

(C) Compliance checks shall be conducted so as to allow the City of Rocky Ford to determine, at a minimum, if the tobacco product retailer is conducting business in a manner that complies with this Ordinance.

(D) Nothing in this Ordinance shall create a right of action in any licensee or other person against the City or its agents.

(E) The City of Rocky Ford shall not enforce any law establishing a minimum age for tobacco purchases or possession against a person who otherwise might be in violation of such law because of the person's age (hereinafter "underaged operative") if the potential violation occurs when:

- (1) the underage operative is participating in a compliance check supervised by a peace officer or a code enforcement official of the City;
- (2) the underage operative is acting as an agent of a person designated by the City to monitor compliance with this Ordinance; or
- (3) the underage operative is participating in a compliance check funded in part, either directly or indirectly through subcontracting, by the Otero County Health Department or the Colorado Department of Health and Environment.

Article 11. Suspension and revocation of license.

(A) Suspension of license for violation.

In addition to any other penalty authorized by law, a tobacco product retail license shall be suspended if a court of competent jurisdiction determines or the Department finds based on a

preponderance of the evidence, after the licensee is afforded notice and an opportunity to be heard that the licensee has violated any of the requirements, conditions, or prohibitions of this Ordinance or has pleaded guilty, “no contest” or its equivalent. A tobacco product retailer whose license has been suspended is deemed not to have a valid license during the suspension period for purposes of this Ordinance.

(1) After suspension for a first violation of this Ordinance at a location within any twelve (12) month period, no person may engage in tobacco product retailing at the location until fifteen (15) days have passed from the date of suspension.

(2) After suspension for a second violation of this Ordinance at a location within any twenty-four (24) month period, no person may engage in tobacco product retailing at the location until thirty (30) days have passed from the date of suspension.

(3) After suspension for a third violation of this Ordinance at a location within any thirty-six (36) month period, no person may engage in tobacco product retailing at the location until ninety (90) days have passed from the date of suspension.

(B) Revocation of license for violation.

After suspension for a fourth violation of this Ordinance within any forty-eight (48) month period, the tobacco product retail license shall be revoked and the licensee shall be ineligible for one (1) year from the date of suspension to apply for a new tobacco product retail license within the City of Rocky Ford.

(C) Appeal of suspension of license.

A decision of the Department to suspend a tobacco product retail license is appealable to the City Manager and/or his/her designee and must be filed with the City Clerk within 10 days of the mailing of the Department’s decision. If an appeal is made, it shall stay enforcement of the appealed action.

(D) Appeal of revocation.

A decision of the Department to revoke a license may be appealed to the City Council and must be filed with the City Clerk within 10 days of mailing of the Department’s decision. If such an appeal is made, it shall stay enforcement of the appealed action. An appeal to the City Council is not available for a revocation made pursuant to Article 13.

Article 12. Penalties and fines.

Each such violation of any local, state or federal law pertaining to the sale of tobacco products to persons under the minimum legal sales age or any violation of any law designated above shall be subject to administrative fines as follows:

(A) First Violation within one year - a fine not to exceed one hundred (\$100) dollars;

- (B) Second Violation within one year - a fine not to exceed two hundred (\$200) dollars;
- (C) Third Violation within one year - a fine not to exceed three hundred (\$300) dollars;
- (D) Fourth Violation within one year - a fine not to exceed five hundred (\$500) dollars;
- (E) Penalties and Fines collected under this Ordinance shall be paid directly to the Department and used to support education, administration or enforcement of tobacco product retail licenses in the City of Rocky Ford.

Article 13. Revocation of license wrongly issued.

A tobacco product retail license shall be revoked if the City Council 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 contained in this Ordinance existed at the time application was made or at any time before the license was issued. The decision by the City Council shall be the final decision. Such a revocation shall be without prejudice to the filing of a new license application.

Article 14. Tobacco product retailing without a license.

(A) In addition to any other penalty authorized by law, if a court of competent jurisdiction determines, or the Department finds based on a preponderance of evidence, after notice and an opportunity to be heard, that any person has engaged in tobacco product retailing at a location without a valid tobacco product 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 product retailing license as follows:

(1) After a first violation of this Article at a location within any 12-month period, no new license may issue for the person or the location (unless ownership of the business at the location has been transferred in an arm's length transaction), until 14 days have passed from the date of the violation.

(2) After a second violation of this Article at a location within any 24-month period, no new license may be issued for the person or the location (unless ownership of the business at the location has been transferred in an arm's length transaction), until 30 days have passed from the date of the violation.

(3) After of a third or subsequent violation of this Article at a location within any 36-month period, no new license may issue for the person or the location (unless ownership of the business at the location has been transferred in an arm's length transaction), until 1 year has passed from the date of the violation.

(B) Tobacco products offered for sale or exchange in violation of this Article are subject to seizure by the Department or any peace officer and shall be forfeited after the licensee and/or any other owner of the tobacco products seized is given reasonable notice and an opportunity to demonstrate that the tobacco products were not offered for sale or exchange in violation of this Ordinance.

(C) The decision by the Department may be appealed to the City Council and must be filed with the City Clerk within 10 days of mailing of the Department's decision. If such an appeal is made, it shall stay enforcement of the appealed action.

(D) Forfeited tobacco products shall be destroyed after all internal appeals have been exhausted and the time in which to seek judicial review has expired without the filing of a lawsuit, or if such a suit is filed, after judgment in that suit becomes final.

(E) For the purposes of the civil remedies provided in this Ordinance:

(1) each day on which a tobacco product is offered for sale in violation of this Ordinance shall constitute a separate violation of this Ordinance; or

(2) each individual tobacco product that is distributed, sold, or offered for sale in violation of this Ordinance shall constitute a separate violation of this Ordinance.

Article 15. Enforcement.

(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 a person under the age of twenty-one (21) years, such a person 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 City Attorney, punishable by a civil fine not less than \$200 and not exceeding \$1,000 per violation.

(D) Violations of this Ordinance may, at the discretion of the City Attorney, be prosecuted as infractions or misdemeanors when the interests of justice so require.

(E) Causing, permitting, aiding, abetting, or concealing a violation of any provision of this Ordinance shall also constitute a violation of this Ordinance.

(F) Violations of this Ordinance are hereby declared to be public nuisances.

(G) 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 City Attorney, including, administrative or judicial nuisance abatement proceedings, civil or criminal code enforcement proceedings, and suits for injunctive relief.

Article 16. 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. The City Council hereby declares that it would have adopted each section, subsection, paragraph, sentence, clause or phrase hereof, irrespective of the fact that any one or more other sections, subsections, paragraphs, sentences, clauses or phrases hereof be declared invalid or unenforceable.

Article 17. Repeal.

Any and all former City ordinances, resolutions, rules or regulations, or parts thereof, in conflict with this Ordinance are hereby repealed.

Article 18. Exemptions.

All Medical and Recreational Marijuana Retail Establishments are exempt from all provisions of this Ordinance unless tobacco products as defined above are sold. All refillable electronic delivery devices and tobacco paraphernalia as defined above, sold by Marijuana Retail Establishments, are intended to be used for Marijuana consumption only.

Article 19. Effective date.

BE IT FURTHER ORDAINED by the City Council that this Ordinance shall take effect 30 days after publication following adoption.

INTRODUCED, READ, AND PASSED ON FIRST READING at a regular meeting of the City Council on the 8 day of December, 2020, and ordered published in full in the Rocky Ford Daily Gazette.

ATTEST:

CITY OF ROCKY FORD

Rebecca Hornum
City Clerk

Doreen Jung
Mayor

ADOPTED AND PASSED ON SECOND AND FINAL READING at a regular meeting of the City Council on the 12th day of January, ~~2020~~ 2021, and ordered published by title only in the Rocky Ford Daily Gazette.

ATTEST:

CITY OF ROCKY FORD

Rebecca Hornum
City Clerk

Doreen Jung
Mayor

