




FLUEGEL LAW FIRM P.A.

Attorneys At Law
999 Westview Drive, Suite 1
Hastings, MN 55033-2432

Telephone 651-438-9777
Facsimile 651-438-9775
www.fluegel.com

Donald J. Fluegel *
Daniel J. Fluegel
Benjamin J. Colburn

To: Honorable Mayor and City Council
From: Daniel J. Fluegel, City Attorney 
Date: January 15, 2020
Re: Proposed Ordinance Amendment – Chapter 112: Tobacco Regulations

Council Action Requested.

Conduct a first reading and order a public hearing for March 2, 2020 on the proposed ordinance amendment modifying Chapter 112 of the City Code incorporating Tobacco 21 provisions and direct staff to provide notice of the public hearing to all tobacco licensee as required by Minnesota Statute §461.19.

Background Information.

The Public Safety Committee of the Council at its most recent meeting on January 10, 2020 unanimously voted to recommend to the City Council adoption of amendments to City Code Chapter 112 containing tobacco regulations. The proposed ordinance amendment is attached.

The City Council initiated discussions regarding adoption of Tobacco 21 (T21) regulations in 2018 and since that time, the concept has been discussed by the City Council, the Public Safety Advisory Commission, and the Public Safety Committee of the City Council with information and guidance obtained through the Public Health Law Center at Mitchell Hamline School of Law (PHLC) and other cities who have adopted similar regulations. The current attached ordinance amendment was prepared primarily by the PHLC using their model T21 ordinance but with the language tailored based on input that was provided by the Public Safety Committee of the Council and City Staff.

The proposed ordinance amendment generally updates various sections to be consistent with current state law and best practices definitions and procedures. It defines “Licensed Products” as collectively any tobacco, tobacco-related device, electronic delivery device, or nicotine or lobelia delivery product and prohibits the sale of any licensed product to anyone under age 21. Based on best practices recommended by the PHLC and other sources, this draft removes provisions in the current ordinance that make it unlawful for any individual under age 18 from possessing or using licensed products. However, Minnesota Statute §609.685 (attached) provides that whoever sells or provides tobacco, tobacco-related devices, or electronic delivery devices to a person under the age of 18 is guilty of a misdemeanor for the first violation and a gross misdemeanor for a subsequent violation within 5 years of a previous conviction. That statute also provides that whoever possesses or uses any one of these items while under the age of 18 is guilty of a petty misdemeanor.

The ordinance amendment provides that any violation can result in a civil penalty, license

suspension or revocation of the license. Procedurally, the City has imposed civil penalties as required by Minnesota Statute §461.12 (attached) for first and subsequent violations within any 24-month period. Because the draft prepared by the PHLC and presented to the Public Safety Committee of the Council at its most recent meeting did not include specific reference to the administrative penalties under Minnesota Statute §461.12, I have added that reference at the end of Section 112.11 after the recent meeting. Any licensee alleged to have violated the ordinance is provided notice of the penalty or other sanction and an opportunity for a hearing before the City Council. The ordinance amendment would keep the provisions from the current tobacco ordinance requiring compliance checks be completed at least one time per year. The PHLC proposed increasing the compliance checks to two times per year and while the Police Department may attempt to complete more than one set of compliance checks per year, concern was expressed that requiring two compliance checks per year may place a burden on resources.

While preparing the final draft of this ordinance amendment I realized that in the draft prepared by the PHLC, they had removed the language in City Code 112.06 and 112.08 that was specifically added in 2010 to allow for exclusive tobacco shops (which prohibit entry by persons under age 18) to give customers access to tobacco products without interacting with the clerk. This 2010 change was primarily directed at walk-in cigar humidors where the customer can walk in and handle the product without a clerk. I am attaching a copy of the City Council packet from the March 10, 2010 City Council meeting that discusses this request and the issue. Because exclusive tobacco shops in the City have likely relied on this provision by installing walk in humidors, I have restored that language in Section 112.08 in the attached draft ordinance amendment but I wanted to call this out specifically in this memorandum. This matter will be set on the consent agenda for the first reading and ordering of a public hearing and as the Council is aware, there is an opportunity for any City Council member to pull this matter from the consent agenda and discuss the issue at the first reading. If changes are to be made, it would be much better that discussion and change be made as part of the first reading to avoid the need of re-notification to tobacco licensees resulting from a substantive change in the proposed ordinance amendment at the second reading. Unless any City Council member elects to pull this matter from the consent agenda, staff will assume that we should proceed with leaving this language in the ordinance amendment.

Federal Law Change.

On December 20, 2019, the President signed legislation to amend the Federal Food, Drug, and Cosmetic Act, and raised the federal minimum age of sale of tobacco products from 18 to 21 years. As a result, it is now illegal under federal law for a retailer to sell any tobacco product, including cigarettes, cigars and e-cigarettes, to anyone under age 21. The FDA will be issuing their regulations in the upcoming months. Based on the federal regulations, City Administration will be issuing a letter to all tobacco licensees ensuring that they are aware of the new federal law prohibiting sales to persons under age 21, confirming that the federal law is currently in effect, and notifying them that enforcement action may result if they are found to be making sales to persons under age 21 after the federal law came into effect in December. Because the current tobacco ordinance defines a prohibited sale to include any sale prohibited by federal law, the City has a basis to enforce the federal age 21 sales requirement.

Financial Impact.

The proposed amendment may result in modest increases in civil penalties paid to the City for violations of the ordinance. The increase would stem from potentially more violations if sales to individuals between age 18 and 21 occurred more frequently than we see under the current ordinance. It is also possible the implementation of T21 may result in more hearings before the City Council upon alleged violations, or possibly some legal challenge to the regulation.

Attachments.

Draft Ordinance Amendment Chapter 112: Tobacco Regulations.

City Council Packet from March 10, 2010.

Minnesota Statute §461.12.

Minnesota Statute §609.685.

DAN/ksk

CITY OF HASTINGS, MINNESOTA

ORDINANCE NO. 2020-___, THIRD SERIES

An Ordinance of the City of Hastings Amending City Code Chapter 112: Tobacco Regulations

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF HASTINGS:

HASTINGS CITY CODE CHAPTER 112 IS AMENDED AS FOLLOWS (NEW LANGUAGE IS UNDERLINED; STRIKETHROUGH LANGUAGE IS DELETED):

CHAPTER 112: TOBACCO REGULATIONS

112.01	Purpose and Intent.
112.02	Definitions.
112.03	License.
112.04	Fees.
112.05	Basis for Denial of License.
112.06	Prohibited Acts.
112.07	Responsibility.
112.08	Compliance Checks and Inspections.
112.09	Other Prohibited Acts.
112.10	Exceptions and Defenses.
112.11	Illegal acts
112.12	Civil Enforcement
112.13 <u>112.12</u>	<u>Hearings and appeals</u>
<u>112.13</u>	<u>Exceptions and defenses</u>
<u>112.14</u>	<u>Severability</u>
112.14 <u>112.15</u>	<u>Effective Date</u>

§ 112.01 PURPOSE.

To further the official public policy of the State of Minnesota in regard to preventing young people from starting to smoke as stated in M.S. § 144.391, as it may be amended from time to time, this chapter regulates the sale, possession, and use of tobacco, tobacco products, and tobacco-related devices, electronic delivery devices, and nicotine or lobelia delivery products for the purpose of enforcing and furthering existing laws. (Prior Code, § 5.34)

§ 112.02 DEFINITIONS AND INTERPRETATIONS.

Except as otherwise be provided or clearly implied by context, all terms shall be given their commonly accepted definitions. The singular shall include the plural and the plural shall include the

singular. The masculine shall include the feminine and the neuter, and vice versa. The term “shall” means mandatory and the terms “may” means permissive. For the purpose of this chapter, the following definitions shall 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.

COMPLIANCE CHECKS. The system the city uses to investigate and ensure that those authorized to sell ~~tobacco, tobacco products, and tobacco related devices~~ licensed products are following and complying with the requirements of this chapter. **COMPLIANCE CHECKS** may involve the use of ~~persons under the age of 21 minors~~ as authorized by this chapter. **COMPLIANCE CHECKS** shall also mean the use of ~~minors~~ persons under the age of 21 who attempt to purchase ~~tobacco, tobacco products, or tobacco related devices~~ licensed products for education, research and training purposes as authorized by state and federal laws.

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.

INDIVIDUALLY PACKAGED. The practice of selling any tobacco or tobacco product wrapped individually for sale. Individually wrapped tobacco and tobacco products shall include, but not be limited to, single cigarette packs, single bags or cans of loose tobacco in any form, and single cans or others packaging of snuff or chewing tobacco. Cartons or other packaging containing more than a single pack or other container as described in this subdivision shall not be considered individually packaged.

LOOSIES. The common term used to refer to a single or individually packaged cigarette.

~~**MINOR.** Any natural person who has not yet reached the age of 18 years.~~

MOVABLE PLACE OF BUSINESS. Any form of business 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.

RETAIL ESTABLISHMENT. Any place of business where ~~tobacco, tobacco products, or tobacco-related devices~~ licensed products are available for sale to the general public. Retail establishments shall include, but to be limited to, grocery stores, convenience stores, and restaurants.

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

SELF-SERVICE MERCHANDISING. ~~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. Open displays of tobacco, tobacco products, or tobacco related devices in any manner where any person shall have access to the tobacco, tobacco products, or tobacco related devices, without the assistance or intervention of the licensee or the licensee's employees. The assistance or intervention shall involve the actual physical exchange of the tobacco, tobacco products, or tobacco related device between the customer and the licensee or employee. Self-service merchandising shall not include vending machines, nor any case or storage unit secured and inaccessible to the general public.~~

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 OR TOBACCO PRODUCTS. Means 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; little cigars; cheroots; stogies; periques; granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco; snuff; snuff flour; cavendish; plug and twist tobacco; fine-cut and other chewing tobacco; shorts; refuse scraps, clippings, cuttings and sweepings of tobacco, and other kinds and forms of tobacco. **TOBACCO OR TOBACCO PRODUCTS** excludes any tobacco product that has been approved by the United States 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. Ord. No. 2011-12, 3rd Series, passed 06-06-11

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. Any tobacco product as well as pipe, rolling papers, or other device intentionally designed or intended to be used in a manner which enable the chewing, sniffing, or smoking of tobacco or tobacco products.

VENDING MACHINE. Any mechanical, electrical or electronic, or other type of device which dispenses tobacco, tobacco products, or tobacco related devices licensed products upon the insertion of money, tokens, or other form of payment directly into the machine by the person seeking to purchase the tobacco, tobacco products, or tobacco related device licensed products and includes vending machines equipped manual, electric, or electronic locking devices. (Prior Code, § 5.34)

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. (Ord. 2014-01, 3rd Series passed on 1-06-14)

SMOKING. Inhaling or exhaling smoke from any lighted or heated cigar, cigarette, pipe, or any other lighted or heated tobacco or plant product. Smoking includes carrying a lighted or heated cigar, cigarette, pipe, or any other lighted or heated tobacco or plant product intended for inhalation. (Ord. 2014-01, 3rd Series passed on 1-06-14)

§ 112.03 LICENSE.

(A) *Generally.* No person shall sell or offer to sell any tobacco, tobacco products, or tobacco related device licensed products without first having obtained a license to do so from the City of Hastings.

(B) *Application.* An application for a license to sell tobacco, tobacco products, or tobacco related device licensed products shall be made on a form provided by the city. The application shall 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, a copy of the educational materials the applicant intends to use to educate employees and any additional information the city deems necessary. Upon receipt of completed application, the City Clerk shall forward the application to the Council for action at a City Council meeting. If the Clerk determines an application is incomplete, the Clerk shall return the application to the applicant with notice of the information necessary to make the application complete.

(C) *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. A background check on the applicant is required before an application will be forwarded to the Council. The Clerk shall forward the application to the Police Department within a reasonable period of time. The application and investigation results will be forwarded to the Council for action. If the Council approves the license, the Clerk shall issue the license to the applicant. If the Council denies the license, notice of the denial shall be given to the applicant along with notice of the applicant's right to appeal the Council's decision.

(D) *Term.* All tobacco licenses shall be for a period of one (1) year and shall expire on June 30 of each year, regardless of when the license was originally issued. Thereafter, all licenses eligible for renewal, will be renewed for one (1) year. All tobacco licensees, despite when the license is issued, will be subject to an annual compliance check.

(E) *Revocation or suspension.* Any license issued under this chapter may be revoked or suspended as provided in this chapter.

(F) *Transfers.* All licenses issued under this chapter shall be issued only for the premises to which the license was issued and only for the person to whom the license was issued. No transfer of any license to another person or location shall be valid without the prior approval of the City Council.

(G) *Movable place of business.* No license shall be issued to a movable place of business. Only fixed-location business shall be eligible to be licensed under this chapter.

(H) *Display.* All licenses shall be posted and displayed in plain view of the general public on the licensed premise.

(I) *Renewals.* The renewal of a license issued under this section shall be handled in the same manner as the original application. The request for a renewal shall be made at least 30 days but no more than 60 days before the expiration of the current license. ~~The issuance of a license under this chapter shall be considered a privilege and not an absolute right of the applicant and shall not entitle the holder to an automatic renewal of the license.~~ (Prior Code, § 5.34) (Am. Ord. 2009-05, 3rd Series, passed 4- 20-2009) Penalty, see § 10.99

~~(J)~~ *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.

~~(K)~~ *Smoking.* Smoking shall not be permitted and no person shall smoke within the indoor area of any establishment with a retail tobacco license. Smoking for the purposes of sampling ~~tobacco- and tobacco-related products~~ licensed products is prohibited. (Ord. 2014-01, 3rd Series, passed 01-06-2014)

~~(L)~~ *Samples.* No person shall distribute samples of any licensed product free of charge or at a nominal cost.

§ 112.04 FEES.

No license shall be issued under this chapter until the appropriate fee shall be paid in full. The fee for a license under this chapter shall be set by ordinance. (Prior Code, § 5.34)

§ 112.05 BASIS FOR DENIAL OF A LICENSE.

(A) *Generally.* The following shall be grounds for denying issuance or a renewal of a license under this chapter. Except as may otherwise be provided by law, the existence of any particular ground for denial does not mean that the city must deny the issuance or renewal of the license. If a license is mistakenly issued or renewed to a person, it shall be revoked upon discovery the person was ineligible for the license under this section. The city will provide the license holder with notice of the revocation, along with information on the right to appeal.

(B) *Specifically.*

(1) The applicant is under the age of 21~~18~~ years.

(2) The applicant has been convicted within the past 5 years of any violation of a federal, state, or other law, ordinance provision, or other regulation relating to ~~tobacco or tobacco products, or tobacco-related devices.~~licensed products.

(3) The applicant had a license to sell ~~tobacco, tobacco products, or tobacco related devices revoked~~licensed products revoked within the preceding 12 months of the date of application.

(4) The applicant fails to provide information required in the 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 such a license.

(6) The applicant or license holder has outstanding fines, penalties, or property taxes owed to the city. (Prior Code, § 5.34)

§ 112.06 PROHIBITED SALES.

It shall be a violation of this chapter for any person to sell or~~;~~ offer for sale, ~~give away, furnish,~~ or otherwise deliver any ~~tobacco, tobacco products, or tobacco related devices~~any licensed products:

(A) To any person under the age of 21~~18~~ years:

(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.

~~(1)~~(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.

~~(A)~~ By means of any type of vending machine, except as may otherwise be provided in this chapter;

~~(B)~~ By means of self-service methods whereby the customer does not need to make a verbal or written request to an employee of the licensed premise in order to receive the tobacco, tobacco product, or tobacco related device and whereby there is not a physical exchange of the tobacco, tobacco product, or tobacco related device between the licensee or the licensee's employee unless 90% of the licensee's total annual sales volume consists of tobacco, tobacco products, or tobacco related services.

~~(C)~~(B) By means of loosies as defined in § 112.02;

~~(D)~~(C) Containing opium, morphine, jimpson weed, bella donna, strychnos, cocaine, marijuana, or other deleterious, hallucinogenic, toxic, or controlled substances except nicotine and substances found naturally in tobacco or added as part of an otherwise lawful manufacturing process; or

~~(E)~~(D) By any other means, to any other person, or in any other manner or form prohibited by federal, state, or other local law, ordinance provision, or other regulation. (Prior Code, § 5.34) (Am. Ord. 2010- 04, 3rd Series, passed 3-15-2010) Penalty, see § 10.99

§ 112.07 VENDING MACHINES.

It shall be unlawful for any person licensed under this chapter to allow the sale of ~~tobacco, tobacco products, or tobacco related devices~~ licensed products by the means of a vending machine unless minors persons under the age of 21 are at all times prohibited from entering the licensed establishment. (Prior Code, § 5.34) Penalty, see § 10.99

§ 112.08 SELF-SERVICE SALES.

It shall be unlawful for a licensee under this chapter to allow the sale of ~~tobacco, tobacco products, or tobacco related devices~~ licensed products by any means of self-service merchandising whereby the customer may have access to the items without having to request the item from the licensee or the licensee's employee and whereby there is not a physical exchange of the ~~tobacco, tobacco products, or tobacco related device~~ licensed products between the licensee or his or her clerk and the customer. All ~~tobacco, tobacco products, and tobacco related devices~~ licensed products shall either be stored behind a counter or other 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 ~~tobacco, tobacco products, or tobacco related devices~~ licensed products at the time this chapter is adopted shall comply with this section within 60 days following the effective date of this chapter. This section shall not apply to any licensee

whose total annual sales volume of ~~tobacco, tobacco product, or tobacco-related devices~~ licensed products is 90% or more of their total sales and where the licensee ensures that no person under age 21 is present, or permitted to enter, at any time. (Prior Code, § 5.34) (Am. Ord. 2010-04, 3rd Series, passed 3-15-10) -Penalty, see § 10.99

§ 112.09 RESPONSIBILITY.

All licensees under this chapter shall be responsible for their employees in regard to the sale of ~~tobacco, tobacco products, or tobacco-related devices~~ licensed products on the licensed premise, and the sale of such an item by an employee shall be considered a sale by the licensed holder. Nothing in this section shall be construed as prohibiting the city from also subjecting the clerk to whatever civil penalties are appropriate under this chapter, state or federal law, or other applicable law or regulation. (Prior Code, § 5.34)

§ 112.10 COMPLIANCE CHECKS AND INSPECTIONS.

All licensed premises shall be open to inspection to the city police or other authorized city official during regular business hours. From time to time, but at least once per year, the city shall conduct unannounced compliance checks in accordance with state law. 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. ~~to ensure compliance with the provisions of this chapter. The compliance checks shall utilize, with the written consent of their parents or guardians, minors over the age of 15 years but less than 18 years, to enter the licensed premise to attempt to purchase tobacco, tobacco products or tobacco-related devices.~~ ~~Minors used for the purpose of compliance checks shall be approved and supervised by city designated law enforcement officers or other designed city personnel. Minors used for compliance checks shall not be guilty of the unlawful purchase or attempt to purchase tobacco, unlawful possession of tobacco, tobacco products, or tobacco-related devices when the items are obtained as a part of the compliance check. No minor used in compliance checks shall attempt to use a false identification misrepresenting the minor's age, and all minors lawfully engaged in a compliance check shall answer all questions about the minor's age asked by the licensee or his or her employee and shall produce any identification, if it exists, for which he or she is asked. Nothing in this section shall prohibit compliance checks authorized by state or federal laws for educational, research, or training purposes, or required for the enforcement of a particular state or federal law.~~ (Prior Code, § 5.34)

§ 112.11 ILLEGAL ACTS.

(A) *Generally.* Unless otherwise provided, the following acts shall be a violation of this chapter.

(B) *Illegal sales.* It shall be a violation of this chapter for any person to sell or otherwise provide any ~~tobacco, tobacco products, or tobacco-related devices~~ any licensed products to any ~~minor~~ person under the age of 21.

(C) *Illegal possession.* It shall be a violation of this chapter for any minor to ~~have in his or her~~

possession any tobacco, tobacco products, or tobacco related device. This division (C) shall not apply to minors lawfully involved in a compliance check.

~~(D) *Illegal use.* It shall be a violation of this chapter for any minor to smoke, chew, sniff, or otherwise use any tobacco, tobacco product, or tobacco related device and it shall be a violation of this chapter for any person to purchase or otherwise obtain the items on behalf of a minor. It shall further be a violation for any person to coerce or attempt to coerce a minor to illegally purchase or otherwise obtain or use any tobacco, tobacco product, or tobacco related device. This subdivision shall not apply to minors lawfully involved in a compliance check.~~

~~(E) *Illegal procurement.* It shall be a violation of this chapter for any minor to purchase or attempt to purchase or otherwise obtain any tobacco, tobacco product, or tobacco related device, and it shall be a violation of this chapter for any person to purchase or otherwise obtain the items on behalf of a minor. It shall further be a violation to coerce or attempt to coerce a minor to illegally purchase or otherwise obtain or use any tobacco, tobacco product, or tobacco related device. This division (E) shall not apply to minors lawfully involved in a compliance check.~~

(C) *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.

~~(F)(D) *Use of false identification.* It shall be a violation of this chapter for any minor person under the age of 21 to attempt to disguise his or her true age by the use of a false form of identification, whether the identification is that of another person or one on which the age of the person has been modified or tampered with to represent an age older than the actual age of the person. (Prior Code, § 5.34) Penalty, see § 10.99~~

~~§ 112.12 CIVIL ENFORCEMENT.~~

~~The license holder shall be responsible for the conduct of its agents or employees while they are on the licensed premises. Any violation of this chapter shall be considered an act of the license holder for purposes of imposing a civil penalty, license suspension, or revocation. Each violation, and every day in which a violation occurs or continues, shall constitute a separate offense. (Prior Code, § 5.34)~~

§ 112.132 HEARINGS AND APPEALS.

(A) *Notice.* Upon discovery of a suspected violation, the alleged violator shall be issued, either personally or by mail, a citation that sets forth the alleged violation and penalty and which shall inform the alleged violator of his or her right to be heard on the accusation. The administrative penalties for illegal sales of licensed products contained in M.S. § 461.12, as it may be amended from time to time, shall apply unless the City Council determines that a more severe administrative penalty, suspension or revocation shall be imposed.

(B) *Generally.* Following receipt of a notice of denial issued under this chapter or notice of violation and penalty issued under this section, or a notice of revocation, an applicant or license holder may request a hearing before the City Council. A request for a hearing shall be made by the applicant or license holder in writing and filed with the City Clerk within 10 days of the mailing of the notice of denial or alleged violation. Following receipt of a written request for hearing, the applicant or license holder shall be afforded an opportunity for a hearing before the City Council.

(C) *Findings.* If after the hearing, the applicant is found ineligible for a license or is found to have violated this chapter, the City Council may affirm the denial, impose a fine, issue a suspension or revocation, or impose any combination thereof. The decision shall be in writing and shall set forth the reasons for the findings of the City Council. Copies shall be provided to the applicant or license holder. Likewise, if the City Council finds that no violation occurred or finds grounds for not imposing any penalty, the findings shall be recorded and a copy provided to the applicant or license holder.

(D) *Decision.* If the City Council determines that a violation of this chapter did occur, that decision, along with the City Council's reasons for finding a violation and the penalty to be imposed under this chapter, shall be recorded in writing, a copy of which shall be provided to the accused violator. Likewise, if the hearing officer finds that no violation occurred or finds grounds for not imposing any penalty, the findings shall be recorded and a copy provided to the acquitted accused violator.

(E) *Default.* If the applicant or license holder has been provided written notice of the denial or violation and if no request for a hearing is filed within the 10-day period, then the denial, penalty, suspension, or revocation imposed pursuant to this section shall take effect immediately by default. The City Clerk shall mail the notice of the denial, fine, suspension, or revocation to the applicant or license holder.

(F) *Hearings.* If a person accused of violating this section so requests, a hearing shall be scheduled, the time and place of which shall be provided to the accused violator.

(G) *Hearing officer.* The hearing shall be held before the City Council and shall be open to the public.

(H) *Appeals.* Any appeal of the decision of the City Council must be filed with the District Court within 10 days of the mailing of the City Council's decision.

(I) *Misdemeanor prosecution.* Nothing in this section shall prohibit the city from seeking prosecution as a misdemeanor for any alleged violation of this chapter by a person 21 years of age or older. If the city elects to seek misdemeanor prosecution, no administrative monetary penalty shall be imposed. If the city elects to seek misdemeanor prosecution, the city is not precluded from suspending or revoking the license of a licensee as provided by this chapter.

(J) *Continued violation.* Each violation, and every day in a violation occurs or continues, shall constitute a separate offense. (Prior Code, § 5.34) Penalty, see § 10.99

§ 112.13 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. Nothing in this chapter shall prevent the providing of tobacco, tobacco products, or tobacco related devices as part of a lawfully recognized religious, spiritual, or cultural ceremony. It shall be an affirmative defense to the violation of this chapter for a person to have reasonably relied on proof of age as described by state law. (Prior Code, § 5.34)

§ 112.14 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.

§ 112.15 EFFECTIVE DATE.

This ordinance becomes effective seven (7) days after ~~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.

Council member _____ moved a second to this Ordinance, and upon being put to a vote it was adopted by a majority of all Council members present.

Adopted by the Hastings City Council on this _____ day of _____, 2020, by the following vote:

Ayes
Nays:
Absent:

CITY OF HASTINGS

Mary Fasbender, Mayor

ATTEST:

Julie A. Flaten, City Clerk

I hereby certify that the above is a true and correct copy of the Ordinance presented to and adopted by the City of Hastings, County of Dakota, Minnesota, on the _____ day of _____, 2020, as disclosed by the records of the City of Hastings on file and of record in the office.

City Clerk

City of Hastings

To: Mayor Hicks & City Councilmembers
 From: Melanie Mesko Lee, Assistant City Administrator
 Re: Ordinance Amendments Related to Self-Serve Tobacco
 Date: March 10, 2010

Council Action Requested:

Hold the public hearing and approve the second reading for an ordinance amendment relating to self-serve tobacco.

Background Information:

The Administrative Committee of the Council (Hollenbeck [chair], Nelson, Schultz) has met recently (January 27 and February 18) to consider a request to amend the current tobacco code to permit self serve tobacco under limited circumstances.

Current code states:

Chapter 112.02. Definitions & Interpretations

SELF-SERVICE MERCHANDISING. Open displays of tobacco, tobacco products, or tobacco related devices in any manner where any person shall have access to the tobacco, tobacco products, or tobacco related devices, without the assistance or intervention of the licensee or the licensee's employees. The assistance or intervention shall involve the actual physical exchange of the tobacco, tobacco products, or tobacco related device between the customer and the licensee or employee. Self-service merchandising shall not include vending machines, nor any case or storage unit secured and inaccessible to the general public.

This item was brought forward at the request of an applicant who owns tobacco stores in other cities and is interested in opening a tobacco store in Hastings. Current code prohibits self-serve of any tobacco or tobacco related products/devices. The applicant and his attorney were present to discuss their request at the January 27 meeting. He stated that his practice is to limit access to his stores by posting as "under 18 not permitted" and carding patrons who appear to be under the age of 27.

There was discussion by the Committee about access to minors, what items would be sold, what items would be available for self-serve (examples include "roll your own" supplies, pipe tobacco, little cigars, humidors) vs. which items would be behind glass/counters (examples include cigarettes, chewing tobacco), and not allowing sale of drug paraphernalia.

Upon closer review by the committee, should the Council support amending the current tobacco code to permit self serve tobacco under limited circumstances, the following language would be recommended by the Administrative Committee,:

§ 112.06 PROHIBITED SALES.

It shall be a violation of this chapter for any person to sell, offer for sale, give away, furnish, or otherwise deliver any tobacco, tobacco products, or tobacco related devices:

- (C) By means of self-service methods whereby the customer does not need to make a verbal or written request to an employee of the licensed premise in order to receive the tobacco, tobacco product, or tobacco related device and whereby there is not a physical exchange of the tobacco, tobacco product, or tobacco related device between the licensee or the licensee's-employee unless 90% of the licensee's total annual sales volume consists of tobacco, tobacco products, or tobacco related devices.

§ 112.08 SELF-SERVICE SALES.

It shall be unlawful for a licensee under this chapter to allow the sale of tobacco, tobacco products, or tobacco related devices by any means whereby the customer may have access to the items without having to request the item from the licensee or the licensee's employee and whereby there is not a physical exchange of the tobacco, tobacco products, or tobacco related device between the licensee or his or her clerk and the customer. All tobacco, tobacco products, and tobacco related devices shall either be stored behind a counter or other 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, tobacco, tobacco products, or tobacco related devices at the time this chapter is adopted shall comply with this section within 60 days following the effective date of this chapter. This section shall not apply to any licensee whose total annual sales volume of tobacco, tobacco product, or tobacco related devices is 90% or more.

If you have any questions, please let me know.

CITY OF HASTINGS, MINNESOTA

ORDINANCE NO. 2010- , THIRD SERIES

AN ORDINANCE OF THE CITY OF HASTINGS, MINNESOTA
 AMENDING CHAPTER 112: TOBACCO REGULATIONS
 OF THE HASTINGS CITY CODE PERTAINING TO SELF SERVE TOBACCO

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF HASTINGS AS FOLLOWS:

Chapter 112: Tobacco Regulations of the Hastings City Code is hereby amended as follows:

CHAPTER 112: TOBACCO REGULATIONS

§ 112.06 PROHIBITED SALES.

It shall be a violation of this chapter for any person to sell, offer for sale, give away, furnish, or otherwise deliver any tobacco, tobacco products, or tobacco related devices:

- (A) To any person under the age of 18 years;
- (B) By means of any type of vending machine, except as may otherwise be provided in this chapter;
- (C) By means of self-service methods whereby the customer does not need to make a verbal or written request to an employee of the licensed premise in order to receive the tobacco, tobacco product, or tobacco related device and whereby there is not a physical exchange of the tobacco, tobacco product, or tobacco related device between the licensee or the licensee's employee unless 90% of the licensee's total annual sales volume consists of tobacco, tobacco products, or tobacco related devices.
- (D) By means of looses as defined in § 112.02;
- (E) Containing opium, morphine, jimson weed, bella donna, strychnos, cocaine, marijuana, or other deleterious, hallucinogenic, toxic, or controlled substances except nicotine and substances found naturally in tobacco, or added as part of an otherwise lawful manufacturing process; or
- (F) By any other means, to any other person, or in any other manner or form prohibited by federal, state, or other local law, ordinance provision, or other regulation.

§ 112.08 SELF-SERVICE SALES

It shall be unlawful for a licensee under this chapter to allow the sale of tobacco, tobacco products, or tobacco related devices by any means whereby the customer may have access to the items without having to request the item from the licensee or the licensee's employee and whereby there is not a physical exchange of the tobacco, tobacco products, or tobacco related device between the licensee or his or her clerk and the customer. All tobacco, tobacco products, and tobacco related devices shall either be stored behind a counter or other 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 tobacco, tobacco products, or tobacco related devices at the time this chapter is adopted shall comply with this section within 60 days following the effective date of this chapter. This section shall not apply to any licensee whose total annual sales volume of tobacco, tobacco product, or tobacco related devices is 90% or more.

Section 34.04 Effective Date.

This ordinance shall be effective seven (7) days after publication.

Moved by Councilmember _____, seconded by Councilmember _____ to adopt the ordinance as presented.

Adopted by the Hastings City Council on this ___ day of _____, 2010, by the following vote:

Ayes:
Nays:
Absent:

CITY OF HASTINGS

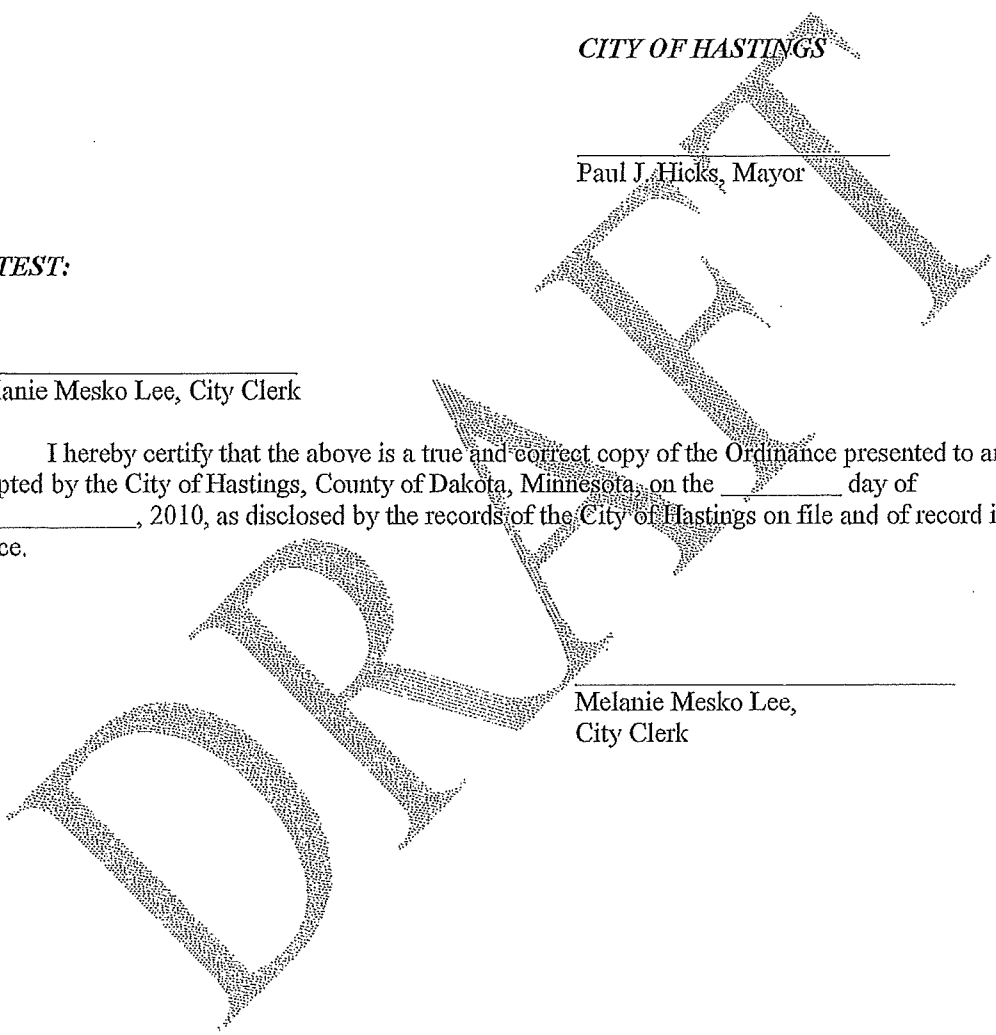
Paul J. Hicks, Mayor

ATTEST:

Melanie Mesko Lee, City Clerk

I hereby certify that the above is a true and correct copy of the Ordinance presented to and adopted by the City of Hastings, County of Dakota, Minnesota, on the _____ day of _____, 2010, as disclosed by the records of the City of Hastings on file and of record in the office.

Melanie Mesko Lee,
City Clerk



461.18 BAN ON SELF-SERVICE SALE OF PACKS; EXCEPTIONS.

Subdivision 1. **Except in adult-only facilities.** (a) No person shall offer for sale tobacco or tobacco-related devices, or electronic delivery devices as defined in section 609.685, subdivision 1, or nicotine or lobelia delivery products as described in section 609.6855, in open displays which are accessible to the public without the intervention of a store employee.

(b) [Expired August 28, 1997]

(c) [Expired]

(d) This subdivision shall not apply to retail stores which derive at least 90 percent of their revenue from tobacco and tobacco-related devices and where the retailer ensures that no person younger than 18 years of age is present, or permitted to enter, at any time.

Subd. 2. **Vending machine sales prohibited.** No person shall sell tobacco products, electronic delivery devices, or nicotine or lobelia delivery products from vending machines. This subdivision does not apply to vending machines in facilities that cannot be entered at any time by persons younger than 18 years of age.

Subd. 3. **Federal regulations for cartons, multipacks.** Code of Federal Regulations, title 21, part 897.16(c), is incorporated by reference with respect to cartons and other multipack units.

History: 1997 c 227 s 6; 2010 c 305 s 10; 2014 c 291 art 6 s 29

461.12 MUNICIPAL LICENSE OF TOBACCO, TOBACCO-RELATED DEVICES, AND SIMILAR PRODUCTS.

Subdivision 1. **Authorization.** A town board or the governing body of a home rule charter or statutory city may license and regulate the retail sale of tobacco, tobacco-related devices, and electronic delivery devices as defined in section 609.685, subdivision 1, and nicotine and lobelia delivery products as described in section 609.6855, and establish a license fee for sales to recover the estimated cost of enforcing this chapter. The county board shall license and regulate the sale of tobacco, tobacco-related devices, electronic delivery devices, and nicotine and lobelia products in unorganized territory of the county except on the State Fairgrounds and in a town or a home rule charter or statutory city if the town or city does not license and regulate retail sales of tobacco, tobacco-related devices, electronic delivery devices, and nicotine and lobelia delivery products. The State Agricultural Society shall license and regulate the sale of tobacco, tobacco-related devices, electronic delivery devices, and nicotine and lobelia delivery products on the State Fairgrounds. Retail establishments licensed by a town or city to sell tobacco, tobacco-related devices, electronic delivery devices, and nicotine and lobelia delivery products are not required to obtain a second license for the same location under the licensing ordinance of the county.

Subd. 2. **Administrative penalties; licensees.** If a licensee or employee of a licensee sells tobacco, tobacco-related devices, electronic delivery devices, or nicotine or lobelia delivery products to a person under the age of 18 years, or violates any other provision of this chapter, the licensee shall be charged an administrative penalty of \$75. An administrative penalty of \$200 must be imposed for a second violation at the same location within 24 months after the initial violation. For a third violation at the same location within 24 months after the initial violation, an administrative penalty of \$250 must be imposed, and the licensee's authority to sell tobacco, tobacco-related devices, electronic delivery devices, or nicotine or lobelia delivery products at that location must be suspended for not less than seven days. No suspension or penalty may take effect until the licensee has received notice, served personally or by mail, of the alleged violation and an opportunity for a hearing before a person authorized by the licensing authority to conduct the hearing. A decision that a violation has occurred must be in writing.

Subd. 3. **Administrative penalty; individuals.** An individual who sells tobacco, tobacco-related devices, electronic delivery devices, or nicotine or lobelia delivery products to a person under the age of 18 years must be charged an administrative penalty of \$50. No penalty may be imposed until the individual has received notice, served personally or by mail, of the alleged violation and an opportunity for a hearing before a person authorized by the licensing authority to conduct the hearing. A decision that a violation has occurred must be in writing.

Subd. 4. **Minors.** The licensing authority shall consult with interested educators, parents, children, and representatives of the court system to develop alternative penalties for minors who purchase, possess, and consume tobacco, tobacco-related devices, electronic delivery devices, or nicotine or lobelia delivery products. The licensing authority and the interested persons shall consider a variety of options, including, but not limited to, tobacco free education programs, notice to schools, parents, community service, and other court diversion programs.

Subd. 5. **Compliance checks.** A licensing authority shall conduct unannounced compliance checks at least once each calendar year at each location where tobacco, tobacco-related devices, electronic delivery devices, or nicotine or lobelia delivery products are sold to test compliance with sections 609.685 and 609.6855. Compliance checks must involve minors over the age of 15, but under the age of 18, who, with the prior written consent of a parent or guardian, attempt to purchase tobacco, tobacco-related devices, electronic delivery devices, or nicotine or lobelia delivery products under the direct supervision of a law enforcement officer or an employee of the licensing authority.

Subd. 6. **Defense.** It is an affirmative defense to the charge of selling tobacco, tobacco-related devices, electronic delivery devices, or nicotine or lobelia delivery products to a person under the age of 18 years in violation of subdivision 2 or 3 that the licensee or individual making the sale relied in good faith upon proof of age as described in section 340A.503, subdivision 6.

Subd. 7. **Judicial review.** Any person aggrieved by a decision under subdivision 2 or 3 may have the decision reviewed in the district court in the same manner and procedure as provided in section 462.361.

Subd. 8. **Notice to commissioner.** The licensing authority under this section shall, within 30 days of the issuance of a license, inform the commissioner of revenue of the licensee's name, address, trade name, and the effective and expiration dates of the license. The commissioner of revenue must also be informed of a license renewal, transfer, cancellation, suspension, or revocation during the license period.

History: 1941 c 242 s 3; 1941 c 405 s 3; 1951 c 382 s 1; Ex1959 c 73 s 2; 1973 c 123 art 5 s 7; 1982 c 572 s 2; 1997 c 227 s 4; 1Sp2001 c 5 art 7 s 63; 2010 c 255 s 7; 2010 c 305 s 4-9; 2014 c 291 art 6 s 28

609.685 SALE OF TOBACCO TO CHILDREN.

Subdivision 1. **Definitions.** For the purposes of this section, the following terms shall have the meanings respectively ascribed to them in this section.

(a) "Tobacco" means cigarettes and 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 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 excludes any tobacco product that has been approved by the United States 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.

(b) "Tobacco-related devices" means cigarette papers or pipes for smoking or other devices intentionally designed or intended to be used in a manner which enables the chewing, sniffing, smoking, or inhalation of vapors of tobacco or tobacco products. Tobacco-related devices include components of tobacco-related devices which may be marketed or sold separately.

(c) "Electronic delivery device" means any product containing or delivering nicotine, lobelia, or any other substance intended for human consumption that can be used by a person to simulate smoking in the delivery of nicotine or any other substance through inhalation of vapor from the product. 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 United States 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.

Subd. 1a. **Penalty to sell.** (a) Whoever sells tobacco, tobacco-related devices, or electronic delivery devices to a person under the age of 18 years is guilty of a misdemeanor for the first violation. Whoever violates this subdivision a subsequent time within five years of a previous conviction under this subdivision is guilty of a gross misdemeanor.

(b) It is an affirmative defense to a charge under this subdivision if the defendant proves by a preponderance of the evidence that the defendant reasonably and in good faith relied on proof of age as described in section 340A.503, subdivision 6.

Subd. 2. **Other offenses.** (a) Whoever furnishes tobacco, tobacco-related devices, or electronic delivery devices to a person under the age of 18 years is guilty of a misdemeanor for the first violation. Whoever violates this paragraph a subsequent time is guilty of a gross misdemeanor.

(b) A person under the age of 18 years who purchases or attempts to purchase tobacco, tobacco-related devices, or electronic delivery devices and who uses a driver's license, permit, Minnesota identification card, or any type of false identification to misrepresent the person's age, is guilty of a misdemeanor.

Subd. 3. **Petty misdemeanor.** Except as otherwise provided in subdivision 2, whoever possesses, smokes, chews, or otherwise ingests, purchases, or attempts to purchase tobacco, tobacco-related devices, or electronic delivery devices and is under the age of 18 years is guilty of a petty misdemeanor.

Subd. 4. **Effect on local ordinances.** Nothing in subdivisions 1 to 3 shall supersede or preclude the continuation or adoption of any local ordinance which provides for more stringent regulation of the subject matter in subdivisions 1 to 3.

Subd. 5. **Exceptions.** (a) Notwithstanding subdivision 2, an Indian may furnish tobacco to an Indian under the age of 18 years if the tobacco is furnished as part of a traditional Indian spiritual or cultural ceremony. For purposes of this paragraph, an Indian is a person who is a member of an Indian tribe as defined in section 260.755, subdivision 12.

(b) The penalties in this section do not apply to a person under the age of 18 years who purchases or attempts to purchase tobacco, tobacco-related devices, or electronic delivery devices while under the direct supervision of a responsible adult for training, education, research, or enforcement purposes.

Subd. 6. **Seizure of false identification.** A retailer may seize a form of identification listed in section 340A.503, subdivision 6, if the retailer has reasonable grounds to believe that the form of identification has been altered or falsified or is being used to violate any law. A retailer that seizes a form of identification as authorized under this subdivision shall deliver it to a law enforcement agency within 24 hours of seizing it.

History: 1963 c 753 art 1 s 609.685; 1981 c 218 s 1,2; 1986 c 352 s 4; 1989 c 290 art 3 s 33,34; 1992 c 588 s 1; 1993 c 224 art 9 s 44,45; 1994 c 636 art 2 s 44; 1999 c 139 art 4 s 2; 2000 c 472 s 5-9; 2010 c 305 s 11; 2014 c 291 art 6 s 33