

CLAY COUNTY ORDINANCE 2012-2

The Clay County Board hereby ordains as follows:

TITLE: This Section shall be known as the Clay County Tobacco Ordinance

REPEALER: Chapter 4-1-3 of the Clay County Code is hereby repealed in its entirety. The following shall be incorporated in the appropriate chapter and section of the Clay County Code in its place.

PURPOSE

Smoking causes premature death, disability, and chronic disease, including cancer and heart disease, and lung disease;

Smoking related diseases result in excess medical care costs; and

Smoking initiation occurs primarily in adolescence.

Clay County desires to prevent young people from starting to smoke, to encourage and assist smokers to quit, and to promote clean indoor air.

SCOPE

This ordinance will cover all unincorporated areas of Clay County and to all licenses issued by Clay County.

DEFINITIONS.

Except as may otherwise be provided or clearly implied by context, all terms shall be given their commonly accepted definitions. For the purpose of this Section, the following definitions shall apply unless the context clearly indicates or requires a different meaning.

COMPLIANCE CHECKS. The system the county uses to investigate and ensure that those authorized to sell tobacco, tobacco products, tobacco-related devices, and nicotine or lobelia delivery devices are following and complying with the requirements of this ordinance.

COMPLIANCE CHECKS shall involve the use of minors as authorized by this ordinance.

COMPLIANCE CHECKS shall also mean the use of minors who attempt to purchase tobacco, tobacco products, tobacco-related devices, or nicotine or lobelia delivery devices for educational, research and training purposes as authorized by state and federal laws.

COMPLIANCE CHECKS may also be conducted by other units of government for the purpose of enforcing appropriate federal, state or local laws and regulations relating to tobacco, tobacco products, tobacco-related devices, and nicotine or lobelia delivery devices.

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 other packaging of snuff or chewing tobacco. Cartons or other packaging containing more than a single pack or other container as described in this definition shall not be considered individually packaged.

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.

LOOSIES. The common term used to refer to a single or individually packaged cigarette or any other tobacco product that has been removed from its packaging and sold individually. The term "loosies" does not include individual cigars with a retail price, before any sales taxes, of more than \$2.00 per cigar.

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

MOVEABLE PLACE OF BUSINESS. Any form of business operated out of a 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 DEVICES. Any product containing or delivering nicotine or lobelia intended for human consumption, or any part of such a product, that is not tobacco as defined in this section, not including any product that has been approved or otherwise certified for legal sale by the United States Food and Drug Administration for tobacco use cessation, harm reduction, 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, tobacco-related devices, or nicotine or lobelia delivery devices are available for sale to the general public. The phrase shall include but not be limited to grocery stores, convenience stores, restaurants, and drug stores.

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

SELF-SERVICE MERCHANDISING. Open displays of tobacco, tobacco products, tobacco-related devices, or nicotine or lobelia delivery devices in any manner where any person shall have access to the tobacco, tobacco products, tobacco-related devices, or nicotine or lobelia delivery devices, without the assistance or intervention of the licensee or the licensee's employee. The assistance or intervention shall entail the actual physical exchange of the tobacco, tobacco product, tobacco-related device, or nicotine or lobelia delivery device between the customer and the licensee or employee. Self-service sales are interpreted as being any sale where there is not an actual physical exchange of the product between the clerk and the customer.

SMOKING. Inhaling or exhaling smoke from any lighted or heated cigar, cigarette, pipe, or any other lighted or heated tobacco or plant product. Smoking also includes carrying a lighted or heated cigar, cigarette, pipe, or any other lighted or heated tobacco or plant product intended for inhalation.

TOBACCO or TOBACCO PRODUCTS. Tobacco and tobacco products includes 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; 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.

TOBACCO-RELATED DEVICES. Tobacco-related devices includes any tobacco product as well as a pipe, rolling papers, ashtray, or other device intentionally designed or intended to be used in a manner which enables the chewing, sniffing or smoking of tobacco or tobacco products.

VENDING MACHINE. Any mechanical, electric or electronic, or other type of device which dispenses tobacco, tobacco products or tobacco-related devices upon the insertion of money, tokens or other form of payment directly into the machine by the person seeking to purchase the tobacco, tobacco product or tobacco-related device.

LICENSE

(A) *License required.* No person shall sell or offer to sell any tobacco, tobacco products, tobacco-related device, or nicotine or lobelia delivery device without first having obtained a license to do so from the county.

(B) *Application.* An application for a license to sell tobacco, tobacco products, tobacco-related devices, or nicotine or lobelia delivery devices shall be made on a form provided by the county. 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, and any additional information the county deems necessary. If the Clay County Public Health Department shall determine that an application is incomplete, the application will be returned to the applicant with notice of the information necessary to make the application complete.

(C) *Action.* The Public Health Department shall issue the license to the applicant. If the Public Health Department denies the license, notice of the denial shall be given to the applicant along with notice of the applicant's right to appeal the decision.

(D) *Term.* All licenses issued under this section shall be valid for one calendar year from the date of issue.

(E) *Revocation or suspension.* Any license issued under this section may be revoked or suspended.

(F) *Transfers.* All licenses issued under this section shall be valid only on the premises for which the license was issued and only for the person to whom the license was issued. No transfer of any license to another location or person shall be valid. If a transfer is needed, the applicant will need to reapply and submit new payment of licensee fees.

(G) *Moveable place of business.* No license shall be issued to a moveable place of business. Only fixed location businesses shall be eligible to be licensed under this section.

(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.

(J) *Penalty For Late Payment:* There will be a penalty if the license application is not returned before the expiration of the current license. The fees for late payment shall be established in the Tobacco Fee Schedule, as it may be amended from time to time.

(K) *Issuance as privilege and not a right.* The issuance of a license issued under this section 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.

(L) *Proximity to youth-oriented facilities.* It shall be unlawful for any person to sell, offer for sale, giveaway or deliver tobacco products within one hundred feet (100') of any school building, child care facility or other building used for education or recreational purposes by persons under the age of eighteen (18) years.

(M) *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 is prohibited.

FEES.

No license shall be issued under this Section until the appropriate license fee shall be paid in full. The fee for a license under this Section shall be established in the Tobacco Fee Schedule, as it may be amended from time to time.

BASIS FOR DENIAL OF LICENSE.

(A) Grounds for denying the issuance or renewal of a license under this chapter include but are not limited to the following:

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

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

(3) The applicant has had a license to sell tobacco, tobacco products, tobacco-related devices, or nicotine or lobelia delivery devices revoked within the preceding 12 months of the date of application.

(4) The applicant fails to provide any information required on 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 a license.

(B) However, except as may otherwise be provided by law, the existence of any particular ground for denial does not mean that the county must deny the license.

(C) If a license is mistakenly issued or renewed to a person, it shall be revoked upon the discovery that the person was ineligible for the license under this Section.

PROHIBITED SALES

It shall be a violation of this Section for any person to sell or offer to sell any tobacco, tobacco product, tobacco-related device, or nicotine or lobelia delivery device:

(A) To any person under the age of 18 years.

(B) By means of any type of vending machine.

(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, tobacco-related device, or nicotine or lobelia delivery device and whereby there is not a physical exchange of the tobacco, tobacco product, tobacco-related device, or nicotine or lobelia delivery device between the licensee, or the licensee's employee, and the customer.

(D) By means of loosies as defined in Definitions Section.

(E) Containing opium, morphine, jimson weed, bella donna, strychnos, cocaine, marijuana, or other deleterious, hallucinogenic, toxic or controlled substances except nicotine and other substances found naturally in tobacco or added as part of an otherwise lawful manufacturing process. It is not the intention of this provision to ban the sale of lawfully manufactured cigarettes or other tobacco products.

(F) By any other means, to any other person, on in any other manner or form prohibited by federal, state or other local law, ordinance provision, or other regulation.

SELF-SERVICE SALES

It shall be unlawful for a licensee under this Section to allow the sale of tobacco, tobacco products, tobacco-related devices, or nicotine or lobelia delivery devices by any means where by the customer may have access to those 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 product, tobacco-related device, or nicotine or lobelia delivery device between the licensee or his or her clerk and the customer. All tobacco, tobacco products, tobacco-related devices, and nicotine or lobelia delivery 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, tobacco-related devices, or nicotine or lobelia delivery devices at the time this chapter is adopted shall comply with this Section within 90 days following the effective date of this Section.

RESPONSIBILITY

All licensees under this Section shall be responsible for the actions of their employees in regard to the sale of tobacco, tobacco products, tobacco-related devices, or nicotine or lobelia delivery devices on the licensed premises, and the sale of an item by an employee shall be considered a sale by the license holder. Nothing in this section shall be construed as

prohibiting the county from also subjecting the clerk to whatever penalties are appropriate under this Section, state or federal law, or other applicable law or regulation.

COMPLIANCE CHECKS AND INSPECTIONS

All licensed premises shall be open to inspection by the County during regular business hours. From time to time, but at least once per year, the County shall conduct compliance checks by engaging, 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, tobacco-related devices, or nicotine or lobelia delivery devices. Minors used for the purpose of compliance checks shall be supervised by County designated law enforcement officers or other designated County personnel. Minors used for compliance checks shall not be guilty of unlawful possession of tobacco, tobacco products, tobacco-related devices, or nicotine or lobelia delivery devices when those 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 any 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.

OTHER ILLEGAL ACTS

Unless otherwise provided, the following acts shall be a violation of this Section:

- (A) *Illegal sales.* It shall be a violation of this Section for any person to sell or otherwise provide any tobacco, tobacco product, tobacco-related device, or nicotine or lobelia delivery device to any minor.
- (B) *Illegal possession.* It shall be a violation of this Section for any minor to have in his or her possession any tobacco, tobacco product, tobacco-related device, or nicotine or lobelia delivery device. This division (B) shall not apply to minors lawfully involved in a compliance check.
- (C) *Illegal use.* It shall be a violation of this Section for any minor to smoke, chew, sniff or otherwise use any tobacco, tobacco product, tobacco-related device, or nicotine or lobelia delivery device.
- (D) *Illegal procurement.* It shall be a violation of this Section for any minor to purchase or nicotine or lobelia delivery device, and it shall be a violation of this Section for any person to purchase or otherwise obtain those 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, tobacco-related device, or nicotine or lobelia delivery device. This division (D) shall not apply to minors lawfully involved in a compliance check.
- (E) *Use of false identification.* It shall be a violation of this Section for any minor 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.

EXCEPTIONS AND DEFENSES

Nothing in this Section shall prevent the providing of tobacco, tobacco products, tobacco-related devices, or nicotine or lobelia delivery devices to a minor as part of a lawfully recognized religious, spiritual, or cultural ceremony. It shall be an affirmative defense to the violation of this Section for a person to have reasonably relied on proof of age as described by state law.

SEVERABILITY

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

VIOLATIONS AND PENALTY

(A) *Misdemeanor prosecution.* Nothing in this section shall prohibit the County from seeking prosecution as a misdemeanor for any alleged violation of this ordinance.

(B) *Violations.*

(1) *Notice.* A person violating this Section may be issued, either personally or by mail, a citation that sets forth the alleged violation and that informs the alleged violator of his or her right to a hearing on the matter. The citation shall provide notice that a hearing must be requested within ten (10) business days of receipt and that hearing rights shall be terminated if a hearing is not promptly requested. The citation shall provide information on how and where a hearing may be requested, including a contact address and phone number.

(2) *Hearings.*

(a) Upon issuance of a citation, a person accused of violating this chapter may request in writing a hearing on the matter. Hearing requests must be made within ten (10) business days of the issuance of the citation and delivered to the Public Health Department. Failure to request a hearing within ten (10) business days of the issuance of the citation will terminate the person's right to a hearing.

(b) The Director of Public Health shall set the time and place for the hearing. Written notice of the hearing time and place shall be mailed or delivered to the accused violator at least ten (10) business days prior to the hearing.

(3) *Hearing Officer.* The Director of Public Health shall serve as the hearing officer.

(4) *Decision.*

(a) A decision shall be issued by the hearing officer within ten (10) business days. If the hearing officer determines that a violation of this chapter did occur, that decision, along with the hearing officer's reasons for finding a violation and the penalty to be imposed under division (B) of this section, shall be recorded in writing, a copy of which shall be provided to the County and the accused violator by in person delivery or mail as soon as practicable Likewise, if the hearing

officer finds that no violation occurred or finds grounds for not imposing any penalty, those findings shall be recorded and a copy provided to the County and the acquitted accused violator by in person delivery or mail as soon as practicable.

(b) *Costs.* If the citation is upheld by the hearing officer, the County's actual expenses in holding the hearing up to a maximum of \$200.00 shall be paid by the person requesting the hearing.

(c) The decision of the hearing officer is final.

(5) *Appeals.* Appeals of any decision made by the hearing officer shall be filed in the district court for the County in which the alleged violation occurred within ten (10) business days.

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

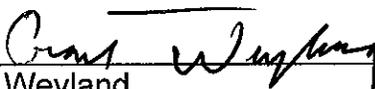
(C) *Administrative penalties.*

A Tobacco Fee Schedule for Administrative Penalties will be adopted by the Clay County Board of Commissioners simultaneously with this Ordinance, which may be amended from time to time by resolution of the Board.

EFFECTIVE DATE.

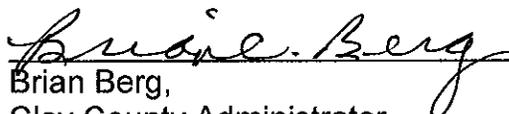
Effective Date: This Ordinance shall be effective the date of enactment.

Adopted by the Clay County Board of Commissioners this 24 day of July, 2012.



Grant Weyland
Chairman, Clay County Board of Commissioners

ATTEST:



Brian Berg,
Clay County Administrator

The Clay County Board of Commissioners hereby adopts this fee schedule consistent with Clay County Ordinance 2012-2.

It may be amended in the future by resolution of the Board of Commissioners.

Clay County Tobacco Fee Schedule

Fee for Tobacco Sales License

The licensee fee for a retail tobacco license is two hundred dollars (\$200.00). This fee shall be periodically set by the County. This fee is an estimate of the monies sufficient to cover the cost of issuing the license and the expense cost of enforcing the ordinances.

Penalty For Late Payment

Penalty For Late Payment: There will be a penalty if the license application is not returned before the expiration of the current license. The fees for late payment may be amended from time to time.

1. One to seven (7) days late, a fifteen percent (15%) penalty.
2. Eight (8) to thirty (30) days late, a twenty five percent (25%) penalty.
3. After expiration of thirty (30) days from the due date, the activity for which a license is required shall cease. If a new license or permit is approved, the fee shall consist of the amount set forth for new licenses and permits plus twenty five percent (25%) late penalty fee.

Administrative Penalties.

Violations:

First Violation: A licensee or an employee who sells tobacco products or tobacco-related devices to a person under the age of eighteen (18) year, or violates any other provision of this Section, the licensee shall be charged an administrative penalty of one hundred dollars (\$100.00) and receive a written violation warning from the County.

Second Violation: For a second violation, an administrative penalty of two hundred dollars (\$200) shall be imposed, and the licensee's authority to sell tobacco products or tobacco-related devices shall be suspended for three (3) days, these three (3) days will be designated by the licensing authority.

If found unlawfully selling tobacco or tobacco-related devices during a period of suspension, the license shall be revoked. This would be subject to the same rights of appeal as stated in the Clay County Tobacco Ordinance.

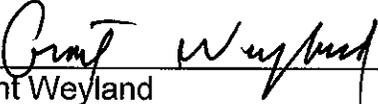
Third Violation: For a third violation, an administrative penalty of four hundred dollars (\$400.00) shall be imposed, and the licensee's authority to sell tobacco products or tobacco-related devices shall be suspended for ten (10) days, these ten (10) days will be designated by the licensing authority.

If found unlawfully selling tobacco or tobacco-related devices during a period of suspension, the license shall be revoked. This would be subject to the same rights of appeal as stated in the Clay County Tobacco Ordinance

Fourth Violation: For a fourth violation, the licensee's authority to sell tobacco products or tobacco-related devices shall be revoked.

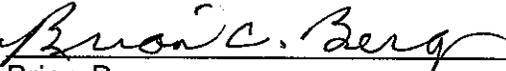
Other individuals. Other individuals, other than minors regulated by this section, found to be in violation of this Section shall be charged an administrative fine of one hundred dollars (\$100).

Adopted by the Clay County Board of Commissioners this 24 day of July, 2012.



Grant Weyland
Chairman, Clay County Board of Commissioners

ATTEST:



Brian Berg,
Clay County Administrator