

**TOWN OF BASALT, COLORADO
ORDINANCE NO. 05
SERIES OF 2018**

**AN ORDINANCE OF THE TOWN COUNCIL OF THE TOWN OF BASALT, COLORADO,
AMENDING CHAPTER 6 OF THE MUNICIPAL CODE OF THE TOWN OF BASALT –
BUSINESS LICENSES AND REGULATIONS - TO ADD A NEW ARTICLE VI ENTITLED:
LICENSING OF TOBACCO RETAILERS.**

WHEREAS, Smoking rates in the U.S. have declined substantially since the Surgeon General's 1964 report, from 42 percent to now about 18 percent; however, it remains one of the biggest public health problems in the United States as almost 500,000 Americans still die prematurely each year from diseases related to cigarette smoking. This makes up 85% of deaths from lung cancer. In Colorado, like most other states, it is the number one cause of preventable death, and accounts for 5,100 deaths a year; and

WHEREAS, 90% of adult smokers started smoking before the age of 18 and each day more than 3,000 adolescents in the U.S. try their first cigarette; and

WHEREAS, Since 2014, after decades of effective anti-smoking campaigns and decreasing smoking rates in the U.S., there has been a surprising upturn in youth tobacco use; and

WHEREAS, over 225 U.S. localities and the states of California and Hawaii have enacted into law regulations prohibiting the sale of tobacco products to individuals under the age of 21 and research has shown such regulations are effective in decreasing high school tobacco use by up to 50%; and

WHEREAS, Research has shown that teens purchase cigarettes from their peers and that 90% of the "social sources" (friends and family) of tobacco for the 12-18 year olds are 18-21 year olds. It has also been shown that youth typically do not make the effort to travel to neighboring localities if the age has increased to 21 in their city; and

WHEREAS, the Town Council finds that this ordinance furthers and is necessary for the promotion of the public health, safety, and welfare.

NOW THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE TOWN OF BASALT,
COLORADO:

Section 1.

That Chapter 6 – Business Licenses and Regulations - of the Municipal Code of the Town of Basalt, Colorado, is hereby amended by the addition of a new Article VI – Licensing of Tobacco Retailers, which Article shall read as follows:

Article VI

LICENSING OF TOBACCO RETAILERS

Sec. 6-150 Incorporation of general licensing provisions.

The provisions of Chapter 6 Town of Basalt Municipal Code (Business Licenses and Regulations) and Sec. 2-238 (Fines, Penalties and Administrative Fees), shall apply to this Article except where they are specifically modified by the provisions of this Article.

Sec. 6-151 Definitions.

The following definitions shall apply throughout this Article:

- (a) *Cigarette* means any product that contains tobacco or nicotine, that 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;
 - (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 or 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 subparagraph (1)(a) above.
 - (4) the term includes all "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.
- (b) *Electronic Smoking Device* means an electronic device that, when activated, emits a vapor, aerosol, fume or smoke that may be inhaled or absorbed by the user, including, but not limited to, an e-cigarette, e-cigar, e-pipe, vape pen, e-hookah and similar devices. Electronic smoking device includes any component, part, or accessory of such a device, whether or not sold separately, and includes any substance, with or without nicotine, intended to be aerosolized, vaporized or produces a fume or smoke during the use of the device intended for human consumption.
- (c) *Licensee* means the owner or holder of a Tobacco Product Retailer License.
- (d) *License* refers to the Tobacco Product Retailer license.
- (e) *Licensing Administrator* means the person(s) within the Town government designated with responsibilities by the Town Manager for license issuance, renewal and collection of fees.
- (f) *Minimum Legal Sales Age* means twenty-one (21) years of age or older.

- (g) *Mobile Vending* means any sales other than at a fixed location.
- (h) *Person* means natural person, a joint venture, joint-stock company, partnership, association, firm, club, company, corporation, business, trust or organization, or the manager, lessee, agent, servant, officer or employee of any of them.
- (i) *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. A vending machine is a form of self-service display.
- (j) *Tobacco Product* means 1) any product which contains, is made or derived from tobacco or used to deliver nicotine or other substances intended for human consumption, whether heated, chewed, absorbed, dissolved, inhaled, snorted, sniffed or ingested by any other means, including, but not limited to Cigarettes, cigars, little cigars, chewing tobacco, pipe tobacco, snuff, bidis, snus, mints, hand gels; and 2) electronic smoking device; 3) notwithstanding any provision of subsections 1) and 2) to the contrary, "tobacco product" includes any component, part, accessory or associated tobacco paraphernalia of a tobacco product whether or not sold separately. 4) The term "Tobacco Product" does not include: (i) any product that contains marijuana; and (ii) any product made from or derived from tobacco and approved by the Food and Drug Administration (FDA) for use in connection with cessation of smoking.
- (k) *Tobacco Product Retail Location* or *Retail Location* means any premises where Tobacco Products are sold or distributed to a consumer including, but not limited to, hookah bar, lounge or café, any grounds occupied by a retailer, any store, stand, outlet, vehicle, cart, location, vending machine or structure where Tobacco Products are sold.
- (l) *Tobacco Product Retailer* means any Person who sells, offers for sale, or does or offers to exchange for any form of consideration, Tobacco or Nicotine Products, or Tobacco Paraphernalia. "Tobacco Retailing" shall mean the doing of any of these things. This definition is without regard to the quantity of Tobacco Products or Tobacco Paraphernalia sold, offered for sale, exchanged, or offered for exchange.
- (m) *Tobacco Product Retailing* means the selling, offering for sale, or exchanging for any form of consideration a Tobacco Product.
- (n) *Tobacco Paraphernalia* means any item designed for the consumption, use or preparation of Tobacco Products.
- (o) *Vending machine* shall mean any mechanical, electrical, or electronic self-service device which, upon insertion of money, tokens, or any other form of payment, dispenses product.

Sec. 6-152 Minimum legal sales age.

Tobacco Products shall not be sold to any person under the Minimum Legal Sales Age.

Sec. 6-153 License requirements and prohibitions.

(a) Tobacco Product Retailer License required.

- (1) It shall be unlawful for any person to act as a Tobacco Product Retailer in the Town unless he or she has obtained a License and maintains the same in full force and effect pursuant to this Article for each location where Tobacco Product Retailing occurs.
- (2) No license may be issued to authorize Tobacco Product retailing anywhere other than at a fixed location that is designated in the License application and approved by the Licensing Administrator. Tobacco Product Retailing by persons on foot, from vehicles or through Mobile Vending is prohibited.

(3) Tobacco Retailing without a valid License is a nuisance as a matter of law.

(b) Display of License. Each License shall be prominently displayed in a publicly visible location at the licensed Tobacco Product Retail Location.

(c) Display of Minimum Legal Sales Age Requirements. The requirement of the Minimum Legal Sale Age for the purchase of Tobacco Retail Product shall be prominently displayed in the entrance (or other clearly visible location) of the Tobacco Product Retail Location.

(d) Other Prohibitions.

- (1) A Tobacco Product Retail Location may only have one active License at one time. Every License is separate and distinct and specific to a designated location. The License cannot be assigned, delegated, sold, inherited or otherwise transferred between persons or transferred to a different location, except as provided in this Article. No Licensee shall exercise the privileges of any other License or delegate the privileges of its own License.
- (2) A person or entity may not apply for a License for a one year period after a License has been revoked.

Sec. 6-154 Conditions of the Tobacco Product Retail License.

The following conditions shall apply to the Licensee:

- (a) Prohibition of self-service displays. Licensees shall stock and display all Tobacco Products in a manner so as to make all such products inaccessible to customers without the assistance of a retail clerk, thereby requiring a direct face-to-face exchange of the Tobacco Product from an employee of the business to the customer.
- (b) Restriction on sales to underage person. No person engaged in Tobacco Product Retailing shall sell or transfer a Tobacco Product to another person unless that recipient is at least twenty-one (21) years of age. It is an affirmative defense to prosecution that the seller was presented with the ID showing the person to be over the minimum age.

- (c) No Licenses shall be issued within 500' of schools. No Licenses will be issued to retailers located within 500 feet from any public or parochial school as determined by the Licensing Administrator. This restriction shall not apply to an existing Retail Location within 500 feet of a school.

Sec. 6-155 Application procedure.

- (a) An application for a License shall be submitted and signed by an individual authorized by the person or entity making application for the License. It is the responsibility of each applicant and/or Licensee to be informed regarding all laws applicable to tobacco retailing, including those laws affecting the issuance of said License. No applicant and/or Licensee may rely on the issuance of a License as a determination by the Town that the proprietor has complied with all applicable tobacco retailing laws.
- (b) All applications shall be submitted on a form supplied by the Licensing Administrator.
- (c) A licensed Tobacco Product Retailer shall inform the Licensing Administrator in writing of any change in the information submitted on an application for a License within thirty (30) business days of a change.
- (d) All License applications shall be accompanied by the payment in full of all fees as required in the Basalt Municipal Code, Sec. 2-381 Fines, penalties and administrative fees.

Sec. 6-156 Issuance of a Tobacco Product License.

Upon the receipt of a completed application for a License as required by this Article, the Licensing Administrator shall sign and issue a License within thirty (30) days which period may be extended by the Licensing Administrator for good cause unless substantial evidence demonstrates that one or more of the following bases for denial exists:

- (a) The information presented in the application is incomplete, inaccurate or false;
- (b) The applicant seeks authorization for a License at a location where this Article prohibits the issuance of a License;
- (c) The applicant seeks a License for a location that is not appropriately zoned for the use;
- (d) The applicant seeks authorization for a License and the applicant's current License is suspended or revoked;
- (e) The applicant is not qualified to hold the requested License under the provisions of this Article; or
- (f) The applicant and/or retail location is not in compliance with all Town, state or federal laws;
- (g) The applicant is indebted to, or obligated in any manner to the Town for unpaid taxes, liens or other monies; or

- (h) The payment of the licensing fee in the full amount chargeable for such License does not accompany such License application.

Sec. 6-157 Denial of Tobacco Product License.

- (a) If the Licensing Administrator denies the issuance of the License, the Licensing Administrator shall notify the applicant in writing by regular mail postage prepaid on the address shown in the application. The notice shall include the grounds for denial. Notice is deemed to have been properly given upon mailing.
- (b) An applicant has the right to appeal the Licensing Administrator's denial of an application to the Hearing Officer that shall be appointed by the Town Manager. Such an appeal shall be initiated by filing a written request with the Licensing Administrator within twenty (20) days of the date of the notice of denial of the issuance of a License.
- (c) The applicant's failure to timely appeal the decision of the Licensing Administrator is a waiver of the applicant's right to contest the denial of the issuance of the License.
- (d) The appeal, including any right to further appeals, shall be conducted and controlled by the provisions of Rule 106(a)(4) of the Colorado Rules of Civil Procedure. The standard of proof at such appeal shall be a preponderance of the evidence and the burden of proof shall be upon the applicant. The Licensee's failure to timely appeal the decision is a waiver of the Licensee's right to contest the suspension or revocation of the License.

Sec. 6-158 License term, renewal and expiration.

- (a) Term. All Licenses issued under this Code shall be for the period of one (1) year or a fraction thereof and shall expire on the last day of December of each calendar year unless otherwise specifically provided.
- (b) Renewal of License. A Licensee shall apply for the renewal of the License and submit the renewal License fee no later than thirty (30) days prior to expiration of the existing term. The Licensing Administrator shall renew the License prior to the end of the term, provided that the renewal application and fee were timely submitted and the Licensing Administrator is not aware of any fact that would have prevented issuance of the original License or issuance of the renewal.
- (c) Expiration of License. A License that is not timely renewed shall expire at the end of its term. The failure to timely obtain a renewal of a License requires submission of a new application. There shall be no sale of any Tobacco Products after the License expiration date and before the new License is issued.

Sec. 6-159 License non-transferable.

- (a) A License shall not be transferred from one (1) person to another or from one location to another.

- (b) When a License has been issued to a husband and wife, or to general or limited partners, the death of a spouse or partner shall not require the surviving spouse or partner to obtain a new License for the remainder of the term of that License. All rights and privileges granted under the original License shall continue in full force and effect as to such survivors for the balance of the term of the License.

Sec. 6-160 Fee for License.

- (a) The fee to issue or to renew a License shall be pursuant to the Town's Fee Schedule, a copy of which may be obtained from the Town Clerk and is available at Town Hall. The Town Council will adopt the Fee Schedule which may be changed from time to time by ordinance of the Town Council. The fee shall be calculated so as to recover the direct and indirect costs of administration and enforcement of this Article, including, for example, issuing a License, administering the License program, retailer education and training, retailer inspection, community outreach and education, documentation of violations, and prosecution of violators, but shall not exceed the cost of the regulatory program authorized by this Article. Fees are nonrefundable except as may be required by law. In addition, from time to time, as deemed appropriate by License Administrator, the License fee may be increased in accordance with Article X Section 20 of the Colorado Constitution.
- (b) The amount of fees charged by the Town pursuant to this Section shall be reviewed and, if necessary, adjusted to reflect the direct and indirect costs incurred by the Town in connection with the adoption, administration and enforcement of this Article.
- (c) The amount of the fees charged by the Town pursuant to this Article shall be fixed by Town Council pursuant to Sec. 2-381 Fines, penalties and administrative fees of the Municipal Code.

Sec. 6-161 Compliance monitoring.

- (a) Compliance monitoring of this Article shall be by the Basalt Police Department, as the Basalt Police Department (or designee) deems appropriate.
- (b) The Basalt Police Department shall have discretion to consider previous compliance check history or prior violations of a Licensee in determining how frequently to conduct compliance checks of the Licensee with respect to individual Licensees.
- (c) The Basalt Police Department shall inspect each Tobacco Product Retailer at least two (2) times per twelve (12) month period. Nothing in this paragraph shall create a right of action in any Licensee or other Person against the Town or its agents.
- (d) Compliance checks shall be conducted as the Basalt Police Department deems appropriate, including the use of decoys, so as to allow the Basalt Police Department to determine, at a minimum, if the Tobacco Product Retailer is conducting business in a manner that complies with laws regulating access to Tobacco Products. When the Basalt Police Department deems appropriate, the compliance checks shall determine compliance with other laws applicable to Tobacco Products.

Sec. 6-162 Suspension or Revocation of License.

(a) The following shall be grounds for suspension or revocation of the Licensee's License:

- (1) A violation by a Licensee or Licensee's officers, agents, or employees of any of the provisions of this Article, or any laws of the United States, the State of Colorado or ordinances of the Town relating to the sale or furnishing of tobacco or Cigarettes to minors, or the storage or display of Cigarettes or tobacco products.
- (2) Violations of any conditions imposed by the Licensing Administrator or Hearing Officer in connection with the issuance or renewal of a License.
- (3) Failure to pay State or local taxes that are related to the operation of the business associated with the License.
- (4) Loss of right to possession of the licensed premises.
- (5) Fraud, misrepresentation, or a false statement of material fact contained in the original or renewal license application;

(b) The Town Manager shall appoint a Hearing Officer to hear all actions relating to the suspension or revocation of Licenses pursuant to this Article. The Hearing Officer shall have the authority to suspend, revoke, or impose remedial sanctions for violations.

(c) The Licensing Administrator shall commence suspension or revocation proceedings by petitioning the Hearings Officer to issue an order to the Licensee to show cause why the Licensee's License(s) should not be suspended or revoked. The Hearing Officer shall issue such an order to show cause if the petition demonstrates that probable cause exists to determine that one or more grounds exist pursuant to subsection (a) to suspend or revoke the Licensee's License. The order to show cause shall set the matter for a public hearing before the Hearing Officer.

(d) Notice of the order to show cause order and hearing date shall be mailed to Licensee by regular mail, postage prepaid, at the address shown on the License no later than thirty (30) days prior to the hearing date. Notice is deemed to have been properly given upon mailing.

(e) The notice to show cause hearing and any subsequent right to appeal shall be conducted and controlled by the provisions of Rule 106(a)(4) of the Colorado Rules of Civil Procedure. The standard of proof at such hearings shall be a preponderance of the evidence and the burden of proof shall be upon the Licensing Administrator.

(f) In determining whether a License should be suspended or revoked, and in determining whether to impose conditions in the event of a suspension, the Hearing Officer shall consider the following factors:

- (1) The nature and circumstances of the violation;

- (2) Corrective action, if any taken by the Licensee;
- (3) Prior violations, if any by the Licensee;
- (4) The likelihood of recurrence of the violation;
- (5) Whether the violation was willful; and
- (6) Previous sanctions, if any, imposed on the Licensee.

Sec. 6-163 Penalties and fines.

- (a) Licensees: penalties and fines. In addition to any other penalty authorized by law, and if the Hearing Officer determines based on a preponderance of the evidence, that the Licensee, or any of the Licensee's agents or employees, has violated any of the requirements, conditions, or prohibitions of this Article, or has pleaded guilty, "no contest" or its equivalent, or admitted to a violation of any law relating to the sale of tobacco to minors including but not limited to C.R.S. sections 18-13-121 and 24-35- 503, the Hearing Officer may consider a fine pursuant to the Town's Fee Schedule and/or suspension or revocation of the License.

The actual sanction imposed upon a Licensee for any violation may vary from the above-stated guidelines when warranted by the specific facts and circumstances of the case.

- (b) After the effective date of this ordinance, it shall be unlawful for any Tobacco Product Retailer to sell a Tobacco Product without a License as mandated under this Article, or with a suspended or revoked License. In addition, the Hearing Officer may impose civil penalties pursuant to the Fee Schedule for each separate Tobacco Product sold during the period of non-compliance with this Article. A retailer whose License has been suspended or revoked 1) shall not display Tobacco Products in public view during the timeframe in which the License is suspended or revoked; and 2) advertisements relating to Tobacco Products that promote the sale or distribution of such products from the location that could lead a reasonable person to believe that such products can be obtained from that location shall not be displayed.

Sec. 6-164 Enforcement.

- (a) The remedies provided by this Article are cumulative and in addition to any other remedies available at law or in equity. In addition to other remedies provided by this Article or by other law, any violation of this Article may be remedied by a civil action brought by the Town Attorney, including but not limited to nuisance abatement proceedings and injunctive relief.
- (b) Causing, permitting, aiding, abetting, or concealing a violation of any provision of this Article shall cause the offender to be subject to the penalties set forth herein or in the Basalt Municipal Code.

Sec. 6-165 No rights in License.

Every License issued under this Article confers only a limited and conditional privilege subject to the requirements, conditions, limitations and qualifications of this Article. The License does not confer a property right of any kind. The License and privilege created by the License may be further regulated, limited or completely extinguished at the discretion of Town Council or the electorate of the Town, as provided in this Article, without any compensation to the Licensee. Nothing contained in this Article grants to any Licensee any vested right to continue operating under the provisions of this Article as they existed at the time the License was approved or issued, and every License shall be subject to any ordinance or prohibition adopted after the License was approved or issued.

Sec. 6-166 Effective date.

This Article shall become effective as of July 1, 2018 and enforceable on and after that date. Any Tobacco Product Retailer without a License after the effective date will be in violation of this Article.

Section 2: Litigation

This ordinance shall not affect any existing litigation and shall not operate as an abatement of any action or proceeding now pending under or by virtue of the ordinances repealed or amended as herein provided, and the same shall be conducted and concluded under such prior ordinances.

Section 3: Severability

If any section, subsection, sentence, clause, phrase, or portion of this ordinance is for any reason held invalid or unconstitutional in a court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and shall not affect the validity of the remaining portions thereof.

Section 4: Public Hearing

A public hearing shall be held at second reading of this Ordinance on the 27th day of March, 2018, in the Town Council Chambers, Town Hall, Basalt, Colorado. Notice of said public hearing will be in a newspaper of general circulation within the town of Basalt, not less than 3 days prior to the public hearing.

READ ON FIRST READING, ORDERED PUBLISHED AND SET FOR PUBLIC HEARING TO BE HELD ON TUESDAY, March 27, 2018 by a vote of 7 TO 0 this 13th day of March, 2018.

AFTER A PUBLIC HEARING AND SECOND READING, THE ORDINANCE WAS ADOPTED by a vote of 4 to 0 on March 27, 2018.

TOWN OF BASALT, COLORADO

BY:



Jacquie R. Whitsitt, Mayor

ATTEST:



Pamela K Schilling, Town Clerk



APPROVED AS TO FORM:



Tom Smith, Town Attorney

Ord 05 2018 - Increasing Age to 21 for Tobacco and Nicotine Sales in Basalt

First Publication: 03/22/18
Final Publication: 04/05/18
Effective date: 04/19/18