

MBHE ORDINANCE NO. 2022-03

AN ORDINANCE REQUIRING A LICENSE TO SELL TOBACCO PRODUCTS WITHIN THE CITY OF MIDDLETOWN.

WHEREAS, the City of Middletown Board of Health desires to ensure proper training and enforcement of the restrictions on sales of tobacco products to those under the age of 21; and

NOW, THEREFORE, BE IT ORDAINED by the City of Middletown Board of Health, Butler and Warren Counties, Ohio, that:

Section 1

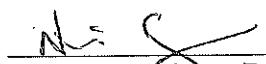
The Board of Health of the City of Middletown, Ohio hereby adopts this Ordinance requiring a license for sale of tobacco products, as provided for in Exhibit "A", attached hereto and incorporated herein by reference.

Section 2

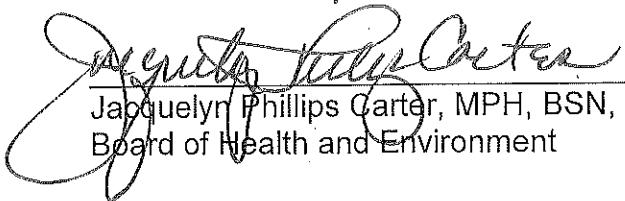
The initial licenses required by this Ordinance shall be issued to retailers no later than January 1, 2024. The license period is expected to occur during the third or fourth quarter of 2023.

Section 3

This ordinance shall take effect and be in force at the earliest time permitted by law.


Nicole Condrey, President
Board of Health and Environment

First Reading 9/13/2022
Second Reading 10/11/2022
Third Reading 11/8/2022
Date Adopted 11/8/2022
Effective Date 1/1/2024


Jacquelyn Phillips Carter, MPH, BSN, RN,
Board of Health and Environment

Approved as to form:

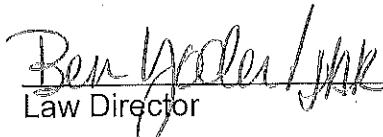

Ben Yoder, JMK
Law Director

EXHIBIT "A"

NOTE TO THE CODIFIER: Proposed to be added as Middletown Codified Ordinance
Chapter XXXX License for Sale of Tobacco Products

§XXXX.01 DEFINITIONS

All terms not defined in this regulation shall have their normal meaning unless otherwise specified in the City of Middletown Codified Ordinance.

- A. **LICENSE-** means a license issued by the City of Middletown Board of Health for retail sale of tobacco products.
- B. **LICENSEE-** means the holder of valid license for the retail sale of tobacco
- C. **APPLICANT-** means any natural person that applied for and was issued a retail tobacco sales license or a temporary retail tobacco sales license
- D. **TOBACCO RETAILER-** means any person, partnership, joint venture, society, club, trustee, trust, association, organization, or corporation who owns, operates, or manages any tobacco retail establishment. Tobacco retailer does not mean that non-management employees of any tobacco retail establishment.
- E. **TOBACCO RETAIL ESTABLISHMENT-** means any place of business where tobacco products are available for sale to the general public, including but not limited to grocery stores, tobacco product shops, kiosks, convenience stores, gasoline service stations, bars and restaurants.
- F. **MOBILE RETAIL ESTABLISHMENT-** means any place of business not operated from a permanent structure and/or reasonably capable of changing locations in a relatively short amount of time, including but not limited to, trailers, vehicles, and tents.
- G. **SELF-SERVICE DISPLAYS-** means any display form which customers may select a tobacco product without the assistance from the tobacco retailer or the tobacco retailer's agent or employee and without direct person to person transfer between the purchaser and the tobacco retailer or tobacco retailer's agent or employee. A tobacco vending machine is a form of self-service display.
- H. **TOBACCO PRODUCT-** Means any product that is made or derived from tobacco or that contains any form of nicotine, if it is intended for human consumption or is likely to be consumed, whether smoked, heated, chewed, absorbed, dissolved, inhaled, or ingested by any other means, including, but not limited to, a cigarette, an electronic smoking device, a cigar, pipe tobacco, chewing tobacco, snuff, or snus. The phrase also means any component or accessory used in the consumption of a tobacco product, such as filters, rolling papers, pipes, blunt or hemp wraps, and liquids used in electronic smoking devices, whether or not they contain nicotine. The phrase does not include any product that is a drug, device, or combination product, as those terms are defined or described in 21 U.S.C. §§ 321 and 353(g).
- I. **TOBACCO VENDING MACHINE-** means any machine or device designated for or used for the vending of cigarettes, cigars, tobacco or tobacco products upon the insertion of coins, trade checks or slugs.

- J. SALE- includes delivery, barter, exchange transfer or gift, or offer thereof, and each transaction made by any person, whether as principal, proprietor, agent, servant or employee.
- K. POSSESS OR POSSESSION- shall mean having control over a tobacco product.
- L. ELECTRONIC SMOKING DEVICE- shall mean any device that can be used to deliver aerosolized or vaporized nicotine to the person inhaling from the device, including, but not limited to, an e-cigarette, e-cigar, e-pipe, vape pen or e-hookah. Electronic smoking device includes any component, part, or accessory of such a device, whether or not sold separately, and includes any substance intended to be aerosolized or vaporized during the use of the device. Electronic smoking device does not include drugs, devices, or combination products authorized for sale by the U.S. Food and Drug Administration, as those terms are defined in the Federal Food, Drug and Cosmetic Act.
- M. LICENSED PRODUCT- means the term that collectively refers to any tobacco product.
- N. ARM'S LENGTH TRANSACTION- means a sale in good faith and for valuable consideration that reflects the fair market value between two informed and willing parties, neither of which is under any compulsion to participate in the transaction. A sale between relatives, related companies or partners, or sale for which a significant purpose is avoiding the effect of the violations of this section is not an Arm's Length Transaction.

§XXXX.02 License Required

- A. Beginning January 1, 2024: No person shall sell or offer to sell any Tobacco Product without first having obtained a license to do so from the Board of Health.
- B. An application for a license must be made on a form provided by the City of Middletown Health Department. The application must 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 city deems necessary. If the Health Department determines that an application is incomplete, it will be returned to the applicant with notice of the information necessary to make the application complete. The license fee is two hundred and fifty dollars (\$250.00).
- C. The license term begins January 1 and ends December 31. In cases of applications for a new license submitted after January 1 of a given year and more than sixty (60) days before the following January 1, the Health Commissioner or his/her designee may issue a license for the remainder of the calendar year at a pro rata value.
- D. Any license issued may be suspended or revoked following the procedures set forth in Section XXXX.03.
- E. All licenses issued are valid only on the premises for which the license was issued and only for the tobacco retailer to whom the license was issued.
- F. Mobile Retail Establishments prohibited: only fixed-location tobacco retail establishments are eligible to be licensed.
- G. The issuance of a license is a privilege and does not entitle the license holder to an automatic renewal of the license.

§XXXX.03 DENIAL, SUSPENSION, AND REVOCATION OF LICENSE.

(A) DENIAL OF LICENSE. Grounds for denying the issuance or renewal of a license include, but are not limited to, the following:

- ✓ 1. The applicant is under twenty-one (21) years of age;
- ✓ 2. The applicant has been convicted within the past five (5) years of any violation of a federal, state, or local law, ordinance provision, or other regulation relating to licensed products;
- ✓ 3. The applicant has had a license to sell licensed products suspended or revoked within the preceding thirty-six (36) months of the date of application;
- 4. The applicant fails to provide the information required on the licensing 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;
- 6. The applicant is in arrears with respect to any fine imposed for violation of this Section;

For purposes of this Section, "applicant" shall include entities with common ownership or management to the entity or natural person listed on the application.

(B) SUSPENSION OF LICENSE: Any license may be suspended for a definite period, not to exceed six (6) months, as determined by the Board of Health. Prior to reinstatement of the license following the expiration of the suspension, the licensee shall remit a one hundred dollars (\$100.00) License reinstatement administration fee. A license may be suspended for the following reasons:

1. A business owned or operated by the licensee applicant engaging in the sale of Tobacco Products within the City is the subject of a court order or City resolution or final order declaring such business to be a public nuisance where said nuisance has not been abated, or where the court has ordered that sales of Tobacco Products shall cease pursuant to any temporary restraining order, preliminary injunction, or permanent injunction issued by said court;
2. Substantiated evidence that licensee or agent of licensee has sold or otherwise distribute any Tobacco Product to any person under (21) within the city more than one time in the past twelve (12) months;
3. The finding by a federal or state agency or court that the licensee applicant has violated a federal or state rule or regulation governing the sale of Tobacco Products;
4. Entry of the Health Commissioner or his/her designee is refused or inspection, or investigation is refused, hindered, or thwarted;
5. For a second or any subsequent violation of this section within a thirty-six (36) month period of the first violation; and/or
6. The licensee is in arrears with respect to any fine imposed for any civil penalty levied under this Section.

(C) REVOCATION OF LICENSE: A license may be revoked for any of the following reasons:

1. The licensee applicant is determined to have knowingly included false or misleading information in the license application or renewal license application;
2. Substantiated evidence that licensee or agent of licensee has sold or otherwise distribute any Tobacco Product to any person under (21) within the City more than one time in the past twelve (12) months;
3. Entry of Health Department is refused, or inspection or investigation is refused, hindered, or thwarted;
4. Upon the discovery that the person was ineligible for the license under this ordinance and license was mistakenly issued or renewed to a person;
5. A period of suspension imposed under Subsection (c) herein has elapsed and the licensee remains in arrears of payment of such fine or penalty; and/or
6. The licensee has been subject to three (3) or more suspensions in the previous thirty-six (36) month period.

§XXXX.04 RENEWAL OF LICENSE

- A. Licenses issued under this chapter may be renewed within thirty (30) days of January 1, for a fee of two hundred and fifty dollars (\$250.00), unless the permit was revoked as provided in this chapter.
- B. Board of Health shall provide renewal applications to the current Licensee(s) found to be in good standing within 90 days of December 31.

§XXXX.05 POSTING OF SIGNS

- A. No tobacco retailer shall sell, permit the sale of, or distribute tobacco products in the City unless both the tobacco license and a printed notice(s) as outlined herein Section XXXX.05(B) is posted at any location where tobacco products are available for purchase.
- B. All licenses must be posted and displayed in a conspicuous location at all times in plain view of the general public in the tobacco retail establishment.
- C. All notices must be posted in a manner conspicuous to both employees and consumers, unobstructed from view in their entirety, and within six feet of each register where tobacco products are available for purchase and must state "It is illegal for any person under the age of twenty-one (21) to purchase tobacco or alternative nicotine products". The City of Middletown shall provide the license and notice upon approval or renewal of the license. The notice(s) must be at least 8.5"x14" and the words on the notice must be legibly printed in high contrast red color with capitalized letters at least one-half inch high.
- D. Additional copies of the license may be printed by Health Department, for a nominal fee, upon good showing of need.

§XXXX.06 TRANSFERABILITY OF A LICENSE.

All licenses issued are valid only on the premises for which the license was issued and only for the person to whom the license was issued. The transfer of any license to another location or person is prohibited.

§XXXX.07 TOBACCO VENDING MACHINES.

Any person, firm or corporation that owns, leases, possesses or controls one or more tobacco vending machines shall obtain a valid license for each machine pursuant to Section XXXX.02.

§XXXX.08 DISTRIBUTION OF TOBACCO PRODUCTS TO MINORS.

- A. No Licensee shall sell or distribute Tobacco Product(s) to any person under twenty-one (21) years old.
- B. Before selling or otherwise distributing any Tobacco Product the tobacco retailer's agent or employee shall verify that the purchaser is at least twenty-one (21) years of age. Each tobacco retailer or tobacco retailer's agent or employee shall examine the purchaser's government-issued photographic identification. Verification is not required of a person over the age of thirty (30). That a purchaser appeared to be thirty (30) years of age or older shall not constitute a defense to a violation of this section.

§XXXX.09 OUT-OF-PACKAGE SALES PROHIBITED; TOBACCO SAMPLES PROHIBITED.

- A. It is unlawful to sell cigarettes out of the manufactured package with required health warnings. It is unlawful to sell cigarettes in packages of fewer than twenty (20) cigarettes per package.
- B. No person shall distribute samples of any tobacco products free of charge or at a nominal cost. The distribution of tobacco products as a free donation is prohibited.

§XXXX.10 NON-RETALIATION.

No person or employer shall discharge, refuse to hire or in any manner retaliate against any employee, applicant for employment or customer because such employee, applicant or customer reported violations of any provisions of this section.

§XXXX.11 ENFORCEMENT AND PENALTIES; APPEALS.

- A. The City and/or its Health Commissioner or his/her designee shall have authority to implement and enforce the provisions of this Chapter. All licensed premises must be open to inspection by City Health Department inspectors or other authorized designees during regular business hours. The tobacco retail establishment may be subject to two (2) compliance checks per year. The City and/or its Health Commissioner or his/her designee may enter at reasonable times to inspect or investigate and examine or copy records to determine compliance with this Chapter. The City and/or its Health Commissioner or his/her designee may apply for and any judge of a court of record may issue an appropriate search warrant necessary to achieve the purposes of this Chapter within the court's territorial jurisdiction. Compliance checks may also include the participation of a person at least eighteen (18) years of age, but under the age of twenty-one (21), to enter the licensed premises to attempt to purchase licensed products. Unannounced follow-up compliance checks of all non-compliant tobacco retail establishments are required within

three months of any violation of this ordinance. The results of all compliance checks shall be published by the Health Department at least annually and made available to the public upon request.

- B. If the Health Commissioner or his/her designee denies the issuance of a license, or suspends or revokes a license, or issues a citation with or without civil penalty for violating this section, the Health Commissioner or his/her designee shall send to the applicant, or licensee, by certified mail, return receipt requested, written notice of the action and the right to an appeal. Upon receipt of written notice of the denial, suspension, or revocation, the licensee subject to license denial or revocation or citation and civil fine shall have the right to appeal to the Board of Health. An appeal must be filed within thirty (30) days after the receipt of notice of the decision. The appellant shall bear the burden of proof. The Board of Health shall be the final, administrative decision maker.
- C. CIVIL PENALTIES. In addition to the denial, suspension, or revocation of a license, the Health Commissioner or his/her designee may impose the following civil penalties for violations of this Chapter:
 - 1. For a first violation, a fine no less than five hundred dollars (\$500.00)
 - 2. For a second violation within a thirty-six (36) month period, a fine no less than seven hundred and fifty dollars (\$750.00) and the license shall be suspended a minimum of thirty (30) days no more than sixty (60) days.
 - 3. For a third violation within a thirty-six (36) month period, a fine no less than one thousand dollars (\$1,000.00) and the license shall be suspended for a minimum of thirty (30) days.
 - 4. For a fourth and any subsequent violations within a thirty-six (36) month period, the license shall be revoked.
- D. TOBACCO RETAILING WITHOUT A VALID LICENSE. In addition to any other penalty authorized by law, if a court of competent jurisdiction determines, or the Health Commissioner or his/her designee finds based on a preponderance of evidence, after notice and an opportunity to be heard, that any tobacco retailer has engaged in Tobacco Retailing at a location without a valid Tobacco Retailer's license, either directly or through the tobacco retailer's agents or employees, the tobacco retailer shall be ineligible to apply for, or to be issued, a Tobacco Retailer's license as follows:
 - 1. After a first violation of this section at a location within any thirty-six (36) month period, no new license may issue for the tobacco retailer or the location (unless ownership of the business at the location has been transferred in an Arm's Length Transaction), until thirty (30) days have passed from the date of the violation.
 - 2. After a second violation of this section at a location within any thirty-six (36) month period, no new license may issue for the tobacco retailer or the location (unless ownership of the business at the location has been transferred in an Arm's Length Transaction), until ninety (90) days have passed from the date of the violation.

3. After of a third or subsequent violation of this section at a location within any thirty-six (36) month period, no new license may issue for the tobacco retailer or the location (unless ownership of the business at the location has been transferred in an Arm's Length Transaction), until five (5) years have passed from the date of the violation.

E. ADDITIONAL REMEDIES. The remedies provided by this Section are cumulative and in addition to other remedies available at law or in equity.

§XXXX.12 INJUNCTIVE RELIEF.

- A. The provisions of this Chapter are health ordinances applicable to real property in the City and may be enforced by civil action pursuant to the Revised Code.
- B. Repeated violations of this Chapter may constitute a public nuisance. The Law Director and/or his/her designee may bring a cause of action to abate such nuisance and enjoin the recurrence of such violations and for such other relief may be available at law or in equity.

§XXXX.13 SEVERABILITY.

If any provision, clause, sentence or paragraph of this Chapter or the application thereof to any person or circumstance shall be held to be invalid, such invalidity shall not affect the provisions of this Chapter which can be given effect without the invalid provisions or application, and to this end the provisions are declared to be severable.

§XXXX.14 OTHER LAWS.

This Chapter does not intend and shall not be interpreted to regulate any conduct where the regulation of such conduct has been preempted by the United States or the State of Ohio.

§XXXX.15 PROMULGATION OF RULES.

The Health Commissioner is hereby authorized to establish rules and regulations as they deem necessary for the enforcement of this Chapter.