

**CITY OF KERRVILLE, TEXAS
ORDINANCE NO. 2023-27**

AN ORDINANCE AMENDING CHAPTER 58, ARTICLE III OF THE CITY'S CODE OF ORDINANCES, TITLED "SMOKING IN ENCLOSED PUBLIC PLACES AND PLACES OF EMPLOYMENT"; TO CLARIFY VARIOUS SECTIONS; REVISE REGULATIONS IN ACCORDANCE WITH STATE LAW, TO INCLUDE THE DEFINITION OF A "MINOR"; AND TO CHANGE DEFENSES TO AFFIRMATIVE DEFENSES; ORDERING PUBLICATION; AND PROVIDING OTHER MATTERS RELATED TO THE SUBJECT

WHEREAS, the City of Kerrville is a home-rule city acting under its home-rule Charter adopted by the electorate pursuant to Article XI, Section 5 of the Texas Constitution; and,

WHEREAS, it is recognized throughout the country that smoking is injurious to the health of both smokers as well as persons who are in the presence of those who are smoking, including at workplaces and other locations where the public gathers, such as in restaurants, grocery stores, hospitals, schools, and retail establishments; and,

WHEREAS, the City Council enacted Ordinance 2001-16 on September 19, 2001, which regulated smoking in public places; and

WHEREAS, Ordinance 2001-16 was codified into Chapter 58 "Health and Safety Code", Article III "Smoking in Enclosed Public Places and Places of Employment" of the City's Code of Ordinances ("Code"); and

WHEREAS, City Council desires to amend Chapter 58, Article III of the Code to clarify various sections, to include definitions, and to align the City's regulations with changes to state law; and

WHEREAS, the City Council finds that in order to promote the public health, safety, and welfare of the City and its citizens, it is in the best interest of the City and its citizens to amend the Chapter 58, Article III of the Code of Ordinances as set forth below;

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF KERRVILLE, KERR COUNTY, TEXAS:

SECTION ONE. Chapter 58, Article III, of the Code of Ordinances of the City of Kerrville, Texas, is amended by adding the language that is underlined (added)

and deleting the language that is stricken (~~deleted~~) to the sections as follows:

“CHAPTER 58 HEALTH & SANITATION
ARTICLE III. SMOKING IN ENCLOSED PUBLIC PLACES AND PLACES
OF EMPLOYMENT; USE OF ELECTRONIC VAPING DEVICES

Sec. 58-61. Purpose.

The purpose of this article is to protect the public health and welfare by prohibiting smoking in certain public places and places of employment.

Sec. 58-62. Definitions.

The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Bar means an establishment in which more than 50 percent of the annual gross sales is derived from the sale of alcoholic beverages for on-premises consumption.

Bingo hall means an establishment that is used as a bingo hall at least one day a week and that is regulated pursuant to the Bingo Enabling Act found within Chapter 2001 of the Texas Occupations Code.

Business means any sole proprietorship, partnership, joint venture, corporation, or other business entity, including establishments where goods or services are sold as well as entities where professional services are delivered or sold.

Downtown streets means all or a part of any of those streets located within the **“Central City” “Downtown Arts and Culture”** zoning district, as amended, pursuant to the city's zoning ordinance, and in general, those streets including and east of Francisco Lemos, including and north of Water Street, including and west of Tivy Street, and including and south of Barnett Street.

Electronic vaping device means any electronically or battery powered device that uses an atomizer or similar device allowing users to inhale nicotine vapor or any other vapor to simulate the smoking of tobacco or other substances, to include electronic cigarettes (e-cigarettes), electronic pipes (e-pipes), electronic cigars (e-cigars) and any other type of electronic nicotine delivery system or any part thereof.

Employee means any person who is employed by any employer in the consideration for monetary compensation or profit.

Employer means any person, partnership, corporation, governmental entity, or nonprofit entity, who employs the services of one or more employees.

Enclosed area means all space between a floor and ceiling which is enclosed on all sides by solid walls or windows, exclusive of door or passageways, which extend from the floor to the ceiling, including all space therein screened by partitions which do not extend to the ceiling or are not solid.

Large public gathering means an outdoor assembly of 100 or more persons that may reasonably be expected to continue for two hours or more.

Liquid nicotine means any liquid product composed either in whole or in part of pure nicotine and propylene glycol and/or any other substance and manufactured for use with an electronic vaping device.

Minor means any person under the age of **1821** years of age.

Place of employment means any enclosed area under the control of an employer where employees normally frequent during the course of employment, including but not limited to work areas, employee lounges and restrooms, conference and classrooms, employee cafeterias and hallways. A private residence is not a place of employment unless it is used for adult day care, paid child care for unrelated children, or health care facility.

Private membership club means an association of people that:

- (1) Grants membership to an applicant after submission of a written application to the club for determination of eligibility and/or approval;
- (2) Owns, leases, or rents a building, or a space in a building of such extent and character as is suitable and adequate for the club's membership and their guests; and
- (3) Collects annual membership fees, dues, or other income from its members that defrays a substantial portion of the operating expenses of the club.

Public place means any enclosed area to which the public is invited or to which the public is permitted. A private residence is not a public place.

Restaurant means any coffee shop, cafeteria, sandwich stand, private and public school cafeteria, and any other eating establishment which gives or offers food for sale to the public, guests, or employees, except that the term "restaurant" shall not include a "bar" as defined in this section.

Retail store means any establishment the primary purpose of which is to sell or offer for sale to consumers, not for resale, any goods, wares, merchandise, or articles for use or consumption off-premises.

Retail tobacco store means a retail store utilized primarily for the sale of tobacco products, electronic vaping devices, liquid nicotine, and accessories and in which the sale of other products is merely incidental.

Retailer means a person who engages in the practice of selling electronic vaping devices, liquid nicotine, or tobacco products to consumers.

Separate ventilation means a separate heating, ventilation, and air conditioning (HVAC) system such that air coming from the room is exhausted directly to the outside and not circulated within the building or mixed with the general dilution ventilation for the building and that creates a negative pressure away from the door

into the room sufficient to substantially prevent the flow of smoke or smoke odors from a designated smoking area to other areas of the building.

Service line means any line in which one or more persons are waiting for or receiving service of any kind, whether or not such service involves the exchange of money.

Smokes and smoking mean the possessing, carrying, or holding of a lighted cigar, cigarette, pipe, or any other lighted smoking equipment or device that contains any tobacco product; ~~and/or~~ the lighting of or setting on fire, emitting or exhaling the smoke of a pipe, cigar, or cigarette of any kind; and/or the use of an electronic vaping device and/or liquid nicotine.

Sports arena means sports pavilions, gymnasiums, health spas, boxing arenas, swimming pools, roller and ice rinks, bowling alleys, and similar places where members of the general public assemble either to engage in physical exercise, participate in athletic competition, or witness sports events.

See. 58-63. Application of article to city-owned facilities.

~~All enclosed facilities owned by the city shall be subject to the provisions of this article.~~

See. 58-64. Prohibition of smoking within city parks.

~~No person shall smoke or use an electronic vaping device within any city park and recreation area, as defined within chapter 74 of this Code.~~

See. 58-65. Prohibition of smoking on or along downtown streets during large public gatherings.

~~No person shall smoke on or adjacent to downtown streets, which includes the public sidewalk, during large public gatherings.~~

Sec. 58-663. Prohibition of smoking in certain public places.

(a) ~~Except for public places not regulated in accordance with section 58-69 or where smoking is otherwise permitted in designated smoking areas in compliance with section 58-71, A person commits an offense in violation of this Article if he/she smokes in any of the following public places: no person shall smoke in any enclosed public place within the city, including but not limited to the following places:~~

- (1) Elevators.
- (2) Restrooms, lobbies, reception areas, hallways, and any other common-use areas.
- (3) Buses, taxicabs, and other means of public transit under the authority of the city, and ticket, boarding, and waiting areas of public transit depots.

- (4) Service lines.
- (5) Retail stores.
- (6) All areas available to and customarily used by the general public in all business and nonprofit entities patronized by the public.
- (7) Restaurants.
- (8) Bars.
- (9) Private membership clubs.
- (10) ~~Public~~a Areas of aquariums, galleries, libraries, and museums ~~when~~ open to the public.
- (11) Any public theatre, or any facility ~~which~~that is primarily used for exhibiting any motion picture, stage or dramatic production, lecture, musical recital or other similar performance, or any auditorium, stage, dressing room, fly or property room belonging to any such place, except performers, when smoking is part of a stage production.
- (12) Sports arenas and convention halls, including bowling facilities.
- (13) Every room, chamber, place of meeting or public assembly, including school buildings under the control of any board, council, commission, committee, including joint committees, or agencies of the city or any political subdivision of the state during such time as a public meeting is in progress, to the extent such place is subject to the jurisdiction of the city.
- (14) Waiting rooms, hallways, wards and semiprivate rooms of health facilities, including but not limited to hospitals, clinics, physical therapy facilities, doctors' offices, and dentists' offices.
- (15) Polling places.
- (16) City buildings; City parks, as defined within chapter 74 of this Code; or any portion thereof owned or leased by the City and used for City purposes;
- (17) Any establishment or facility, or any portion thereof that has been designated as nonsmoking by the owner, operator, manager, or other person who controls the establishment or facility.
- (18) Downtown streets, which includes the adjacent public sidewalks, during large public gatherings.

(b) It shall be an affirmative defense to a violation of this section that the signs required to be posted in section 58-~~7067~~ are~~were~~ not posted at the location where the offense occurred.

Sec. 58-674. Prohibition of smoking in places of employment.

- (a) *Applicability of section.* This section shall be applicable only to employers who employ three or more employees who are not related to the employer. For purpose of this section, an employee is related to an employer if the employee is related within the third degree of consanguinity or the third degree of affinity as determined in accordance with [V.T.C.A., Chapter 573 of the Texas Government Code](#)~~ch. 573~~.
- (b) *Smoking limited to designated area.* No person shall smoke in a place of employment except in a room with separate ventilation that has been designated as a smoking room by the employer.
- (c) *Designation of entire workplace prohibited; exception.* An employer is prohibited from designating an entire place of employment as a smoking area unless all employees smoke.
- (d) *Smoking policy required.* Not later than 90 days after the effective date of the ordinance from which this article is derived, each employer having an enclosed place of employment located within the city shall adopt, implement, make known, and maintain a written smoking policy that contains at least the following:
 - (1) A provision indicating that smoking is prohibited in the place of employment or that smoking is prohibited in the place of employment except in the designated smoking area;
 - (2) A provision indicating to whom within the place of employment complaints or questions regarding compliance with the employer's policy may be directed; and
 - (3) A section that reads "Questions regarding the City of Kerrville's ordinance regulating smoking in this place of employment or complaints regarding alleged violations of such ordinance may be directed to the City of Kerrville Health Department, 701 Main Street, Kerrville, Texas 78028, phone (830) 257-8000."
- (e) *Written copy provided.* All employers shall post a written copy of the smoking policy in a conspicuous place within the place of employment.

Sec. 58-685. Smoking near entrances prohibited.

No person shall knowingly or intentionally smoke within 20 feet of any entrance of an enclosed area where smoking is prohibited. It shall be an [affirmative](#) defense to the violation of this section that:

- (1) The person smoking within the area regulated by this section immediately extinguished the smoking materials upon entering the area without continuing to smoke; and
- (2) The signs required to be posted in accordance with subsections 58-7067(a) and (b) were not posted.

Sec. 58-696. Locations ~~W~~here smoking is not prohibited.

~~Notwithstanding any other provision of this article to the contrary, s~~Smoking shall not be prohibited in the following areas:

- (1) Private residences, except when used as a child care, adult day care, or health care facility.
- (2) Hotel and motel rooms rented to guests.
- (3) Retail tobacco stores.
- (4) An enclosed area within a public place where a private social event is then taking place and the event is under the control of the sponsor of the event and not the owner or operator of the public place.
- (5) Nursing home facilities and other assisted living facilities.
- (6) Buildings specifically designated as bingo halls prior to the adoption of the ordinance from which this section is derived.
- (7) Churches, synagogues, mosques, and other places of worship, along with their associated buildings.
- (8) Designated smoking areas:
 - a. Within places of employment as authorized by section 58-674; and
 - b. Within restaurants as authorized by section 58-7168.
- (9) Any building while it is being operated as a bingo hall on the days bingo is played in the building.

Sec. 58-7067. Posting of signs.

The owner, operator, manager or other person having control of an enclosed public place must conspicuously post the following signs at the following locations:

- (1) At the public and employee entrances to public places where smoking is prohibited in the entire public place, signs that state "NO SMOKING PERMITTED IN THIS BUILDING" or language substantially similar thereto which indicates smoking is prohibited within the public place, which signs may include, but not be limited to "No Smoking" signs of the international "No Smoking" symbol, consisting of a pictorial representation of a burning cigarette enclosed in a red circle with a red bar across it.
- (2) At the public and employee entrances to public places in which are located designated smoking areas authorized by this article, signs that read "NO SMOKING EXCEPT IN DESIGNATED SMOKING AREAS" or substantially similar language.

- (3) At entrances to designated smoking areas within a restaurant, signs that state "SMOKING PERMITTED IN THIS AREA" or substantially similar language.

Sec. 58-7168. Designation of smoking areas in restaurants.

- (a) *Designated areas described.* The owner or manager of a restaurant may designate a smoking area in the restaurant that complies with the following:
 - (1) Such designated smoking area must be located in a separately ventilated totally enclosed area of the restaurant;
 - (2) The total of all designated smoking areas may not exceed 30 percent of the seating area of the restaurant;
 - (3) The designated smoking area cannot be located in such a manner that requires patrons to travel through the smoking area to reach a nonsmoking area, cashier, or restroom; and
 - (4) The designated smoking area must contain ashtrays, containers, or other facilities for extinguishing smoking materials.
- (b) *Unenclosed smoking areas.* Notwithstanding subsection (a) of this section, an owner or manager of a restaurant operating on November 1, 2001, that allows smoking in public areas that do not comply with subsection (a) of this section may continue to allow smoking in such restaurants in designated smoking areas until November 1, 2004, without complying with subsection (a)(1) of this section but only subject to the following:
 - (1) The total of all designated smoking areas may not exceed 30 percent of the seating area of the restaurant;
 - (2) The designated smoking area cannot be located in such a manner that requires patrons to travel through the smoking area to reach a nonsmoking area, cashier, or restrooms;
 - (3) The designated smoking area must contain ashtrays, containers, or other facilities for extinguishing smoking materials;
 - (4) The designated smoking area may not be located within five feet of the entrance, customer waiting area, or a nonsmoking area of the restaurant;
 - (5) The designated smoking area must be located in an area where air is not drawn or blown into or across nonsmoking areas;
 - (6) In addition to the signs required by section 58-70(2), a sign not less than nine inches tall by 15 inches wide must be posted at each public entrance to the restaurant that states "WARNING DESIGNATED SMOKING AREAS ARE NOT ENCLOSED. CUSTOMERS MAY BE SUBJECT TO SECOND HAND TOBACCO SMOKE."

Sec. 58-~~72~~69. Removal of ashtrays.

All ashtrays and other smoking paraphernalia shall be removed from any area where smoking is prohibited by this article by the owner, operator, manager, or other person having control of such area. It shall be an affirmative defense to a violation of this section that:

- (1) The ashtray or other smoking paraphernalia constitutes inventory for sale for off-premises use; or
- (2) The ashtray is located within the area exterior to the entrance to the place where smoking is otherwise prohibited for the purpose of allowing people to extinguish smoking materials prior to entering such place.

Sec. 58-~~73~~730. Enforcement.

- (a) ~~City department of development services~~City Manager to enforce. Enforcement of this article shall be implemented by ~~the department of development services~~the City Manager or designee.
- (b) *Filing citizen complaints.* Any citizen who desires to register a complaint under this article may do so with the city health officer.

Sec. 58-~~74~~741. Violations and penalties.

- (a) *Failure to comply with article.* It shall be unlawful for any person ~~who owns, manages, operates, or otherwise controls the use of a public place or place of employment subject to regulation under this article to intentionally or knowingly~~ fail to comply with the requirements of this article ~~regarding the posting of signs, placement of ashtrays or other suitable containers, the adoption of smoking policies for places of employment, and/or the designation of smoking areas.~~
- (b) *Fines to be assessed.* A person convicted of a violation of any provision of this article shall be required to pay a fine of not less than \$100.00 or more than \$~~500~~2,000.00.

Sec. 58-~~75~~752. Other applicable laws.

This article shall not be interpreted or construed to permit smoking where it is otherwise restricted by other applicable federal, state, or local laws, ordinances, or regulations.

Sec. 58-~~76~~763. Right to establish own policy.

This article shall not be construed as:

- (1) Prohibiting any owner, operator, manager, or other person who controls any establishment or facility to declare the entire establishment or facility as a nonsmoking establishment;

- (2) Require any owner, operator, manager, employer, or other person who controls any establishment or facility to establish designated smoking areas; or
- (3) Preempting any owner, operator, manager, employer, or other person who controls any establishment or facility from taking any lawful action to enforce the policies and procedures established for such establishment or facility relating to smoking.

Sec. 58-774. Sale or provision of electronic vaping devices and/or liquid nicotine to a minor.

- (a) It is unlawful and a person or retailer commits an offense if the person sells, provides, or causes to be sold or provided an electronic vaping device and/or liquid nicotine to a minor.
- (b) ~~If the offense under this section occurs in connection with a sale of an electronic vaping device and/or liquid nicotine at a business by an employee of the business, the employee who committed the offense is subject to prosecution.~~
- (eb) This section is intended to apply strict liability to sellers and providers of electronic vaping devices and/or liquid nicotine. A culpable mental state is not required to prove a violation of this section.
- (dc) It is a defense to prosecution under this section that the person to whom the electronic vaping device and/or liquid nicotine was sold or provided presented to the person who sold or provided the electronic vaping device and/or liquid nicotine an apparently valid Texas driver's license or identification card, issued by the department of public safety and containing a physical description consistent with the person's appearance that purported to establish the person was 18 years of age or older.

Sec. 58-785. Purchase of electronic vaping device and/or liquid nicotine by a minor.

- (a) It is unlawful and a person commits an offense if he is a minor and intentionally or knowingly purchases or attempts to purchase an electronic vaping device and/or liquid nicotine within the incorporated limits of the city.
- (b) It is unlawful and a person commits an offense if he or she is a minor and the minor (1) falsely states to any person engaged in the business of selling electronic vaping devices and/or liquid nicotine within the incorporated limits of the city that the minor person is not a minor or (2) presents to any person engaged in the business of selling electronic vaping devices and or liquid nicotine within the incorporated limits of the city any document that purports to establish that the minor is not a minor.

- (c) It is not a violation of this section if the minor purchases an electronic vaping device and/or liquid nicotine while under the direction and supervision of a police officer in the process of enforcing any provision of this article.
- (d) It is not a violation of this section if the minor was at least 18 years of age and presents at the time of purchase a valid military identification card of the United States military forces or the state military forces.
- (e) It is not a violation of this section if the minor can show they purchased the cigarette, electronic vaping device, or tobacco product in the presence of an employer, if the possession or receipt is part of their duties as an employee.
- (f) It is not a violation of this section if the minor was participating in an inspection or test for seller compliance in accordance with Section 161.088 of the Texas Health and Safety Code.

Sec. 58-796. Possession of electronic vaping devices and/or liquid nicotine by a minor.

- (a) It is unlawful and a person commits an offense if he is a minor as defined under this article and intentionally or knowingly possesses an electronic vaping device and/or liquid nicotine within the incorporated limits of the city.
- (b) It is an affirmative defense to prosecution under this section that the minor's parent or legal guardian consented to the possession of the electronic vaping device and/or liquid nicotine by the minor and such possession was either in the residence of the minor's parent or legal guardian or in the presence of the minor's parent or legal guardian.
- (c) It is an affirmative defense to prosecution under this section that the minor possessed an electronic vaping device and/or liquid nicotine as an employee of a commercial establishment that sells or distributes electronic vaping devices and/or liquid nicotine pursuant to a requirement by the minor's employer that the minor possessed electronic vaping device and/or liquid nicotine in the performance of the minor's duties as an employee of the commercial establishment.
- (d) It is not a violation of this section if the minor possesses the electronic vaping device and/or liquid nicotine while under the direction and supervision of a peace officer in the process of enforcing any provision of this article.”

SECTION TWO. The City Secretary is authorized and directed to submit this amendment to the publisher of the City's Code of Ordinances and the publisher is authorized to amend the Code to reflect the adopted amendments, to correct any typographical errors, and to index, format, number, and letter the paragraphs to the existing Code, as appropriate.

SECTION THREE. The provisions of this Ordinance are to be cumulative of all other ordinances or parts of ordinances governing or regulating the same subject matter as that covered herein; provided, however, that all prior ordinances or parts of ordinances inconsistent with or in conflict with any of the provisions of this Ordinance are expressly repealed to the extent of any such inconsistency or conflict.

SECTION FOUR. If any section, subsection, sentence, clause, or phrase of this Ordinance is, for any reason, held to be unconstitutional or invalid, such holding will not affect the validity of the remaining portions of this Ordinance. The City Council of the City of Kerrville, Texas, declares that it would have passed this Ordinance and each section, subsection, sentence, clause, or phrase hereof irrespective of the fact that any one or more sections, subsections, sentences, clauses, or phrases be declared unconstitutional or invalid.

SECTION FIVE. Pursuant to Texas Local Government Code §52.013(a) and Section 3.07 of the City's Charter, the City Secretary is authorized and directed to publish the descriptive caption of this Ordinance in the manner and for the length of time prescribed by the law as an alternative method of publication.

SECTION SIX. The penalty for violation of this Ordinance shall be in accordance with the general penalty provisions contained in Section 1-7, or its successor section, of the Code of Ordinances of the City of Kerrville, Texas, which provides for a fine not exceeding TWO THOUSAND DOLLARS (\$2,000.00).

SECTION SEVEN. This Ordinance will become effective immediately upon the expiration of ten days following publication, as provided for by Section 3.07 of the City Charter.

PASSED AND APPROVED ON FIRST READING, this the 10 day of OCTOBER, A.D., 2023.

PASSED AND APPROVED ON SECOND AND FINAL READING, this the 24 day of OCTOBER, 2023.

APPROVED AS TO FORM:


Michael C. Hayes, City Attorney


Judy Eychner, Mayor

ATTEST:


Shelley McElhannon, City Secretary