

COUNCIL CHAMBER

City of Berea, Ohio

ORDINANCE No. 2019-48

By Bick Skoczen Sponsored By Councilman Bick Skoczen

AN ORDINANCE

ENACTING NEW CODIFIED ORDINANCE CHAPTER 957, ILLEGAL DISTRIBUTION, USE OR PERMITTING USE OF CIGARETTES, ALTERNATIVE NICOTINE PRODUCTS, ELECTRONIC SMOKING DEVICES OR OTHER TOBACCO PRODUCTS, OF PART NINE, GENERAL OFFENSES CODE, OF THE CODIFIED ORDINANCES OF THE CITY OF BEREА, AND EXPRESSLY REPEALING SECTION 937.16, ILLEGAL DISTRIBUTION OF CIGARETTES, OTHER TOBACCO PRODUCTS, OR ALTERNATE NICOTINE PRODUCTS.

WHEREAS, tobacco use is the leading cause of preventable death in the United States; and

WHEREAS, cigarette smoking is responsible for more than 480,000 deaths each year in the United States, including more than 41,000 deaths resulting from secondhand smoke exposure; and

WHEREAS, persons under the age of eighteen (18) are prohibited by law from purchasing or possessing cigarettes and other tobacco products, and retailers are prohibited from selling them to minors, however, new tobacco-less products, commonly referred to as "electronic smoking devices" and allow users to simulate cigarette smoking, are able to be purchased by minors and are being marketed without age restriction or health warnings in a variety of flavors that appeal to young people; and

WHEREAS, the production and distribution of electronic cigarettes and similar vaping devices is not currently regulated by federal or state authorities, and the U.S. Food and Drug Administration ("FDA") has not completed testing of these products, however, initial studies by the FDA have determined that e-cigarettes and similar vaping devices can increase nicotine addiction among young people and have been found to contain chemical ingredients known to be harmful, which may expose users and the public to potential health risks; and

WHEREAS, electronic cigarette use, from 2017 to 2018, increased 78 percent among high school students and 48 percent among middle school students; and

WHEREAS, the Council of the City of Berea is concerned about the growing trend in electronic cigarette use and vaping, especially amongst young people, and desires to protect the public health, safety and welfare of all residents of the City of Berea.

NOW, THEREFORE, BE IT ORDAINED, by the Council of the City of Berea, State of Ohio:

SECTION 1. That new Chapter 957, Illegal Distribution, Use or Permitting Use of Cigarettes, Alternative Nicotine Products, Electronic Smoking Devices or Other Tobacco Products, of Part Nine, General Offenses Code, of the Codified Ordinances of the City of Berea is hereby enacted, and will read as follows:

Chapter 957 Illegal Distribution, Use or Permitting Use of Cigarettes, Alternative Nicotine Products, Electronic Smoking Devices or Other Tobacco Products

957.01 Definitions

(A) "Age verification" means a service provided by an independent third party (other than a manufacturer, producer, distributor, wholesaler, or retailer of cigarettes, other tobacco products, alternative nicotine products, papers used to roll cigarettes or electronic cigarettes) that compares information available from a commercially available database, or aggregate of databases, that regularly are used by government and businesses for the purpose of age and identity verification to personal information provided during an internet sale or other remote method of sale to establish that the purchase is eighteen years or older.

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(B) "Alternative nicotine product" means, any device that consists of or contains nicotine that can be ingested into the body by any means, including, but not limited to, chewing, smoking, absorbing, dissolving or inhaling. "Alternative nicotine product" does not include any of the following:

- (1) Any cigarette or other tobacco product;
- (2) Any product that is a "drug" as that term is defined in 21 U.S.C. 321(g)(1);
- (3) Any product that is a "device" as that term is defined in 21 U.S.C. 321(h);
- (4) Any product that is a "combination product" as described in 21 U.S.C. 353(g).

(C) "Child" means a person who is under eighteen (18) years of age.

(D) "Cigarette" includes any roll for smoking made wholly or in part of tobacco, irrespective of size or shape, and whether or not such tobacco is flavored, adulterated or mixed with any other ingredient, the wrapper or cover of which is made of paper, papers used to roll cigarettes, reconstituted cigarette tobacco, homogenized cigarette tobacco, cigarette tobacco sheet or any similar materials. "Cigarette" includes clove cigarettes and hand-rolled cigarettes.

(E) "Distribute" means to furnish, give, or provide cigarettes, alternative nicotine products, electronic smoking devices or other tobacco products, to the ultimate consumer of the cigarettes, other tobacco products, alternative nicotine products, papers used to roll cigarettes or electronic cigarettes.

(F) "Electronic smoking device" means any electronic product or device that produces a vapor that delivers nicotine or any other substance to the person inhaling from the device to simulate smoking and that is likely to be offered to or purchased by consumers as an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, "vaping" device or e-hookah, with the exception of those devices or products listed in Section 357.01(B)(1 through 4). An electronic smoking device shall include 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.

(G) "Proof of age" means a driver's license, a commercial driver's license, a military identification card, a passport, or an identification card issued pursuant to Ohio R.C. 4507.50 to 4507.52 that shows that a person is eighteen (18) years of age or older.

(H) "Tobacco product" means any product that is made from tobacco, including, but not limited to, a cigarette, a cigar, pipe tobacco, chewing tobacco or snuff.

(I) "Vending machine" has the same meaning as "coin machine" in section 2913.01(I) of the Revised Code.

(J) "Youth Smoking Education Program" means a private or public agency that is related to tobacco use, prevention, and cessation, that utilizes educational methods focusing on the negative health effects of smoking and using tobacco products or electronic smoking devices, and that is no more than twelve (12) hours in duration.

957.02 Illegal Distribution or Permitting Use of Cigarettes, Alternative Nicotine Products, Electronic Smoking Devices or Tobacco Products

(A) No manufacturer, producer, distributor, wholesaler, or retailer or agent, employee, or representative of a manufacturer, producer, distributor, wholesaler or retailer of cigarettes, alternative nicotine products, electronic smoking devices or tobacco products shall do any of the following:

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- (1) Give, sell or otherwise distribute cigarettes, alternative nicotine products, electronic smoking devices or other tobacco products to any child; or
 - (2) Give away, sell or distribute cigarettes, alternative nicotine products, electronic smoking devices or other tobacco products in any place that does not have posted in a conspicuous place a sign stating that giving, selling or otherwise distributing cigarettes, alternative nicotine products, electronic smoking devices or other tobacco products to a person under eighteen (18) years of age is prohibited by law; or
 - (3) Knowingly furnish any false information regarding the name, age or other identification of any child with purpose to obtain cigarettes, alternative nicotine products, electronic smoking devices or other tobacco products for that child; or
 - (4) Manufacture, sell or distribute any pack or other container of cigarettes containing fewer than twenty (20) cigarettes or any package of roll-your-own tobacco containing less than six-tenths of one ounce of tobacco; or
 - (5) Sell cigarettes, alternative nicotine products, electronic smoking devices or tobacco products in a smaller quantity than that placed in the pack or other container by the manufacturer; or
 - (6) Give, sell or otherwise distribute cigarettes, alternative nicotine products, electronic smoking devices or tobacco products over the internet or through another remote method without age verification.
- (B) No person shall sell or offer to sell cigarettes, alternative nicotine products, electronic smoking devices or tobacco products by or from a vending machine, except in the following locations:
- (1) An area within a factory, business, office or other place not open to the general public;
 - (2) An area to which children are not generally permitted access;
 - (3) Any place, upon all of the following conditions:
 - (a) The vending machine is located within the immediate vicinity and in plain view, and in control of the person who owns or operates the place, or an employee of that person, so that all cigarettes, alternative nicotine products, electronic smoking devices and tobacco products will be readily observed by the person who owns or operates the place or an employee of that person. For the purposes of this section, a vending machine located in an unmonitored area, including an unmonitored coatroom, restroom or outer waiting area, shall not be considered located within the immediate vicinity or in plain view, or in the control of the person who owns or operates the place, or an employee of that person.
 - (b) The vending machine is inaccessible to the public when the facility is closed.
- (C) The following are affirmative defense to a charge under subsection (A)(1) of this section:
- (1) The child was accompanied by a parent or spouse of the child who is eighteen (18) years of age or older, or legal guardian or legal custodian of the child.

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(2) The person who gave, sold or distributed cigarettes, alternative nicotine products, electronic smoking devices or tobacco products to a child is a parent, or spouse of the child who is eighteen (18) years of age or older, or legal guardian or legal custodian of the child.

(D) It is not a violation of subsection of this section for a person to give or otherwise distribute to a child, cigarettes, alternative nicotine products, electronic smoking devices or tobacco products while the child is participating in a research protocol if all of the following apply:

(1) The parent, guardian or legal custodian of the child has consented in writing to the child participating in the research protocol; and

(2) An institutional human subject's protection review board, or an equivalent entity, has approved the research protocol; and

(3) The child is participating in the research protocol at the facility or location specified in the research protocol.

(E) (1) Whoever violates subsection (A) or (B) of this section is guilty of illegal distribution or permitting use of cigarettes, alternative nicotine products, electronic smoking devices or other tobacco products. Except as otherwise provided in this section, illegal distribution or permitting use of cigarettes, alternative nicotine products, electronic smoking devices or other tobacco products is a misdemeanor of the fourth degree. If the offender previously has been convicted of a violation of Section 357.02, illegal distribution or permitting use of cigarettes, alternative tobacco products, electronic smoking devices or other tobacco products is a misdemeanor of the third degree.

(2) Any cigarettes, alternative nicotine products, electronic smoking devices or other tobacco products that are given, sold or otherwise distributed to a child in violation of this section and that are used, possessed, purchased, or received by a child are subject to seizure and forfeiture as contraband in accordance with Chapter 2981 of the Ohio Revised Code.

957.03 Possession, Use, Purchase or Receiving Cigarettes, Alternative Nicotine Products, Electronic Smoking Devices or Tobacco Products Prohibited by Minors

(A) No child shall do any of the following unless accompanied by a parent, or spouse of the child who is eighteen (18) years of age or older, or legal guardian or legal custodian of the child:

(1) Use, consume, or possess cigarettes, alternative nicotine products, electronic smoking devices or tobacco products;

(2) Purchase or attempt to purchase cigarettes, alternative nicotine products, electronic smoking devices or tobacco products;

(3) Order, pay for, or share the cost of cigarettes, alternative nicotine products, electronic smoking devices or tobacco products;

(4) Except as provided in subsection (C) of this section, accept or receive cigarettes, alternative nicotine products, electronic smoking devices or tobacco products.

For purposes of this section, the prohibition against using, possessing, purchasing, ordering, paying for, accepting or receiving an electronic smoking device, is a violation of

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this section regardless of whether the electronic smoking device in question actually contains nicotine or any other substance capable of producing a vapor.

(B) No child shall knowingly furnish false information concerning that child's name, age, or other identification for the purpose of obtaining cigarettes, alternative nicotine products, electronic smoking devices or tobacco products.

(C) (1) It is not a violation of (A)(4) of this section for a child to accept or receive cigarettes, alternative nicotine products, electronic smoking devices or tobacco products if the child is required to do so in the performance of the child's duties as an employee of that child's employer and the child's acceptance or receipt of cigarettes, alternative nicotine products, electronic smoking devices or tobacco products occurs exclusively within the scope of the child's employment.

(2) It is not a violation of (A)(1), (2), (3) or (4) of this section if the child possesses, purchases or attempts to purchase, orders, pays for, shares the cost of, or accepts or receives cigarettes, alternative nicotine products, electronic smoking devices or tobacco products while participating in an inspection or compliance check conducted by a federal, state, local, or corporate entity at a location in which cigarettes, alternative nicotine products, electronic smoking devices or tobacco products are sold or distributed.

(3) It is not a violation of (A)(1) or (3) of this section for a child to accept, receive, use, consume or possess cigarettes, alternative nicotine products, electronic smoking devices or tobacco products while participating in a research protocol if all of the following apply:

(a) The parent, legal guardian, legal custodian or spouse over eighteen (18) years of age of the child has consented in writing to the child participating in the research protocol; and

(b) A review board sanctioned by the appropriate federal or state agency, or an equivalent entity, has approved the research protocol; and

(c) The child is participating in the research protocol at the facility or location specified in the research protocol.

(D) A juvenile court may not adjudicate a child a delinquent or unruly child for a violation of Section 957.03.

(E) If a juvenile court finds that a child violated division (B)(1), (2), (3), or (4) or (C) of this section, the court may do either or both of the following:

(1) Require the child to attend a youth smoking education program or other smoking treatment program approved by the court, if one is available;

(2) Impose a fine of not more than one hundred dollars.

(F) If a child disobeys a juvenile court order issued pursuant to division (F) of this section, the court may do any or all of the following:

(1) Increase the fine imposed upon the child under division (F)(2) of this section;

(2) Require the child to perform not more than twenty hours of community service;

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(3) Suspend for a period of thirty days any temporary instruction permit, probationary driver's license, or driver's license issued to the child.

(G) A child alleged or found to have violated division (A) or (B) of this section shall not be detained under any provision of this chapter or any other provision of the Revised Code.

SECTION 2. That current Section 937.16, Illegal Distribution of Cigarettes, Other Tobacco Products, or Alternate Nicotine Products, attached hereto as Exhibit "A" and incorporated herein, shall be expressly repealed.

SECTION 3. That it is found and determined that all formal actions of this Council concerning and relating to the adoption of this Ordinance were adopted in an open meeting of this Council, and that all deliberations of this Council and of any of its committees that resulted in such formal actions were in meetings open to the public in compliance with all legal requirements, including Section 121.22 of the Ohio Revised Code.

SECTION 4. That this Ordinance shall take effect and be in force from and after the earliest period allowed by law.

PASSED: May 20, 2019

ATTEST: [Signature]
Clerk of Council

[Signature]
President of Council

APPROVED: May 21, 2019
[Signature]
Mayor

Approved as to Form:

[Signature]
Director of Law