

ORDINANCE NO. 2019-03-12-001

AN ORDINANCE OF THE CITY OF KEMPNER, TEXAS PROVIDING REGULATIONS PROHIBITING SMOKING OF TOBACCO PRODUCTS AND ELECTRONIC SMOKING MATERIALS IN CERTAIN ENCLOSED AND NON-ENCLOSED AREAS WITHIN THE CITY LIMITS; PROHIBITING SMOKING ON CITY PREMISES AND OTHER PROPERTY; REPEALING ALL ORDINANCES OR PARTS OF ORDINANCES IN CONFLICT HEREWITH; PROVIDING A SAVINGS CLAUSE; PROVIDING FOR EFFECTIVE DATE AND PUBLICATION; PROVIDING A SEVERABILITY CLAUSE; PROVIDING FOR INCLUSION IN THE CODE; PROVIDING FOR A PENALTY; PROVIDING FOR PROPER NOTICE AND OPEN MEETINGS.

WHEREAS, the City of Kempner (the “City”) is a General Law Type A Municipality pursuant to the laws of The State of Texas, by and through its duly elected council members;

WHEREAS, pursuant to Local Government Code section 51.012, the City is authorized and empowered to adopt and enforce ordinances not inconsistent with state law, that are necessary to protect and welfare and safety of its inhabitants (TEXAS LOCAL GOVERNMENT CODE § 51.012);

WHEREAS, the City Council of the City serves as the elected governing body, responsible for the promotion and protection of the public health and safety of its citizens and inhabitants;

WHEREAS, cigarettes and secondhand smoke contain more than 7,000 chemicals, including 69 known or suspected substances that cause cancer;

WHEREAS, nicotine is a known neurotoxin that is also one of the most highly addictive substances available for public consumption;

WHEREAS, smoking in public places creates a public health risk for adults and children inhaling secondhand smoke;

WHEREAS, according to the 2006, 2010 and 2014 Surgeon Generals’ Reports, exposure to low levels of secondhand smoke causes serious medical conditions in nonsmoking adults and children, including heart disease, stroke, respiratory disease, and lung cancer;

WHEREAS, the National Cancer Institute determined in 1999 that secondhand smoke is responsible for the early death of approximately 53,000 Americans annually;

WHEREAS, the City finds that smoking tobacco is a form of air pollution, a danger to health and a public nuisance; and

WHEREAS, the City finds that this Ordinance is necessary to protect the public health and welfare by prohibiting smoking in public places and places of employment.

NOW THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF KEMPNER, TEXAS, THAT:

SMOKING REGULATIONS

SECTION 1. DEFINITIONS

The following words and phrases, whenever used in this Ordinance, shall be construed as defined in this section:

BAR means an establishment that is devoted to service of alcoholic beverages for consumption by guests on the premises and in which the serving of food is only incidental to the consumption of those beverages, including but not limited to, taverns, nightclubs, cocktail lounges, and cabarets;

BUSINESS means a sole proprietorship, partnership, joint venture, corporation, or other business entity formed for profit-making purposes, including retail establishments where goods or services are sold, as well as, professional corporations and other entities where legal, medical, dental, engineering, architectural, or other professional services are delivered.

CIGARETTE VENDING MACHINE means any self-service device which, upon insertion of coin(s), paper currency, token(s), card(s) or key(s) or any other item(s) dispenses one (1) or more cigarettes, as defined above, provided that the term shall neither be deemed to include any machine that is in storage, in transit or otherwise not set up for use and operation nor be deemed to include any machine that is situated on a train, bus or other public conveyance.

EMPLOYEE means a person who is employed by an employer in consideration for direct or indirect monetary wages or profit, and a person who volunteers his or her services for a non-profit entity.

EMPLOYER means a person, business, partnership, association, corporation, including a municipal corporation, trust, or non-profit entity that employs the services of one (1) or more i persons.

ENCLOSED AREA means all space between a floor and ceiling that is bounded on at least two sides by walls, doorways or windows, whether open or closed. A wall includes any retractable divider, garage door, or other physical barrier, whether temporary or permanent and whether or not containing openings of any kind.

HEALTH CARE FACILITY means an office or institution providing care or treatment of diseases, whether physical, mental, or emotional, or other medical, physiological, or psychological conditions, including but not limited to, hospitals, rehabilitation hospitals or other clinics, including weight control clinics, nursing homes, homes for the aging or chronically ill, laboratories, and offices of

surgeons, chiropractors, physical therapists, physicians, dentists, and all specialists within these professions. The definition shall include all waiting rooms hallways, private rooms, semiprivate rooms, and wards within health care facilities.

PARK includes neighborhood/community/large urban/natural areas and parks that are the basic unit of a park system and are recreational and social centers for those living in the nearby service area or from several neighborhoods and possibly may serve a broader community-based recreation need. Parks include areas that preserve unique landscapes and open spaces and areas that accommodate group activities and recreational facilities, consolidated programmed athletic fields, and their associated facilities.

PLACE OF EMPLOYMENT means an area under the control of a public or private employer that employees normally frequent during the course of employment, including, but not limited to, work areas, employee lounges, restrooms, conference rooms, meeting rooms, classrooms, employee cafeterias, hallways, and vehicles. A private residence is not a “place of employment” unless it is used as a child care, adult day care, or health care facility.

PRIVATE CLUB means an organization, whether incorporated or not, which:

1. Is the owner, lessee, or occupant of a building or portion thereof used exclusively for club purposes at all times;
2. Is operated solely for a fraternal purpose but not for pecuniary gain;
3. Only sells alcoholic beverages incidental to its operation;
4. Conducts its affairs and management through a board of directors, executive committee, or similar body chosen by the members at an annual meeting;
5. Has established bylaws or a constitution to govern its activities; and
6. Has been granted an exemption from the payment of federal income tax as a club under 26 U.S.C. Section 501.

PUBLIC PLACE means an enclosed area to which the public is invited or in which the public is permitted, including but not limited to, banks, bars, bingo facilities, educational facilities, gaming facilities, health care facilities, hotels and motels, laundromats, public transportation facilities, reception areas, restaurants, retail food production and marketing establishments, retail stores, shopping malls, sports arenas, theaters, and waiting rooms. A private residence is not a “public place” unless it is used as a child care, adult day care, or health care facility.

RESTAURANT means an eating establishment, including but not limited to, coffee shops, cafeterias, sandwich stands, and private and public school cafeterias which gives or offers food for sale to public, guests, or employees, as well as kitchens and catering facilities in which food is prepared on the premises for serving elsewhere. The term “restaurant” shall include a bar area within the restaurant.

RETAIL TOBACCO STORE (include or not?) means a retail utilized primarily for the sale of tobacco products, smoking implements, or smoking accessories for on-premises consumption and in which the sale of other products is merely incidental, which shall include but not limited to hookah

lounges, cigar bars and humidors. In this definition, “primarily” means that the sale of tobacco products, smoking implements, or smoking accessories shall be at least 65% of the total sales revenues.

SHOPPING MALL means an enclosed public walkway or hall area that serves to connect retail or professional establishments.

SMOKE means the gasses, particles or vapors released into the air as a result of combustion, electrical ignition or vaporization, including from an electronic smoking devise, when the purpose of the combustion, electrical ignition or vaporization is human inhalation of the gases, particles or vapors. Smoke does not mean the combustion of material solely for olfactory purposes that does not contain any tobacco or nicotine.

SMOKING means inhaling, exhaling, burning, or carrying any lighted or heated cigar, cigarette, including electronic cigarette, pipe, or any other lighted or heated tobacco, nicotine or plant product intended for inhalation, in any manner or in any form, including vaping.

SECTION 2. APPLICATION OF ORDINANCE TO CITY-OWNED FACILITIES

All enclosed facilities, including buildings and vehicles owned, leased, or operated by the City, shall be subject to the provisions of this Ordinance.

SECTION 3. PROHIBITION OF SMOKING IN PUBLIC PLACES

Smoking shall be prohibited in all enclosed public places within the City, including but not limited to, the following places:

Areas available to and customarily used by the general public in businesses and non-profit entities patronized by the public, including but not limited to, professional offices, banks, laundromats, hotels, and motels;

1. Bars;
2. Billiard halls;
3. Bingo facilities;
4. Civic Center facilities;
5. Gaming facilities;
6. Health care facilities;
7. Childcare and adult day care facilities;
8. Lobbies, hallways, and other common areas in apartment buildings, condominiums, trailer parks retirement facilities, nursing homes, and other multiple-unit residential facilities;
9. Polling places;
10. Public transportation facilities, including buses and taxicabs, and ticket, boarding, and waiting areas of public and transit depots;
11. Restaurants;
12. Restrooms, lobbies, reception areas, hallways, and other common-use areas;

13. Retail stores;
14. Rooms, chambers, places of meeting or public assembly, including school buildings under the control of an agency, board, commission, committee or Council of the City or a political subdivision of the State when a public meeting is in progress, to the extent the place is subject to the jurisdiction of the City;
15. Shopping malls; and
16. Sports arenas, including enclosed areas in outdoor arenas.

SECTION 4. PROHIBITION OF SMOKING IN PLACES OF EMPLOYMENT

- A. Smoking shall be prohibited in enclosed areas within places of employment. This includes common work areas, auditoriums, classrooms, conference and meeting rooms, elevators, hallways, medical facilities, cafeterias, employee lounges, stairs, restrooms, and all other enclosed areas.
- B. This prohibition on smoking shall be communicated by employers to all existing employees by the effective date of this Ordinance and to all prospective employees upon their application for employment.

SECTION 5. DISTRIBUTION, DISPLAY AND SALE OF TOBACCO PRODUCTS, AND CIGARETTE MACHINES

- A. Distribution, display, and sale of smoking tobacco products or smoking paraphernalia on any public right-of-way, city park or any city-owned building or facility is hereby prohibited.
- B. Cigarette vending machines.
 1. Subject to the defenses provided in subsection (2) below, it shall be unlawful for any business owner, manager and employee in control of cigarette vending machines within the city to intentionally, knowingly, recklessly, or with criminal negligence allow the display or use of any cigarette vending machine upon any property within the City.
 2. It is a defense to prosecution under the provision of this subsection (b) that:
 - a. The cigarette vending machine is situated in a premise where entry by and person under the age of eighteen (18) is prohibited by law, or
 - b. The cigarette vending machine is located in a workplace with the permission of the employer, provided that the employer has no persons under the age of eighteen (18) employed at the workplace, and further provided that the cigarette vending machine is situated at a location within the workplace to which persons other than those employed at the workplace are not permitted to have access.

- C. Penalty. A violation of this subsection is hereby declared to be a misdemeanor crime, and upon conviction, shall be punishable by a fine of not more than two thousand dollars (\$2,000.00).

SECTION 6. PROHIBITION OF SMOKING IN OUTDOOR AREAS

Smoking shall be prohibited in the following outdoor places:

- a. Within a reasonable distance of fifteen (15) feet outside entrances, operable windows and ventilation system of enclosed areas, where smoking is prohibited so as to ensure tobacco smoke does not enter those areas;
- b. In, and within fifteen (15) feet of, all outdoor sports arenas, stadiums, and amphitheatres;
- c. In, and within fifteen (15) feet of, all outdoor public transportation stations, platforms, and shelters under the authority of the City; and
- d. In, and within fifteen (15) feet of, all pavilions and playgrounds located within city-owned parks.

SECTION 7. WHERE SMOKING IS NOT REGULATED

Notwithstanding any other provision of the Ordinance to the contrary, the following areas shall be exempt from the above-stated provisions;

- a. Hotel and motel rooms that are rented to guests and are designated as smoking rooms; provided, however, that not more than twenty-five (25) percent of rooms rented to guests in a hotel or motel may be so designated;
- b. Outdoor areas except those listed specifically in the provisions in aforementioned Sections;
- c. Outdoor seating areas of restaurants designated as smoking areas in accordance with aforementioned Sections;
- d. Private residences, except if used as a child care, adult day care, or health care facility; and
- e. Retail tobacco stores; provided, however, that smoke from these places does not infiltrate into areas where smoking is prohibited under the provisions of this Ordinance.

SECTION 8. PERSONS UNDER THE AGE OF EIGHTEEN (18) YEARS IN SMOKING AREA

Notwithstanding any other provision of this Ordinance, persons under the age of eighteen (18) years may be admitted in establishments, facilities or other areas that allow smoking in accordance with the provisions of this Ordinance if such persons are accompanied by their parent or legal guardian.

SECTION 9. DECLARATION OF ESTABLISHMENT AS NON-SMOKING

Notwithstanding any other provision of this Ordinance, an owner, operator, manager, or other person in control of an establishment, facility, or outdoor area may declare that entire establishment, facility, or

outdoor area as a non-smoking place. Smoking shall be prohibited in any place in which a sign conforming to the requirements contained herein.

SECTION 10. POSTING OF SIGNS

- A. "No Smoking" signs or 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) shall be clearly and conspicuously posted in every public place and place of employment where smoking is prohibited by this Ordinance, by the owner, operator, manager, or other person in control of that place.
- B. Every public place and place of employment where smoking is prohibited by this Ordinance shall have posted at every entrance a conspicuous sign clearly stating that smoking is prohibited.
- C. All ashtrays and other smoking paraphernalia shall be removed from any area where smoking is prohibited by this Ordinance by the owner, operator, manager, or other person having control of the area.
- D. Areas which are exempt from the provisions of aforementioned sections of this Ordinance shall post a standard sign at each entrance, to be designated by the City informing potential patrons that the area allows smoking, and warning patrons of the negative health effects associated with secondhand smoke.
- E. The City will not provide the signs required to the owners or operators required to comply with requirements of this Ordinance.

SECTION 11. RETALIATION PROHIBITED

No person or employer shall discharge, refuse to hire, or in any manner retaliate against an employee, applicant for employment, or customer because the employee, applicant, or customer exercises any rights afforded by this Ordinance or reports or attempts to prosecute a violation of this Ordinance.

SECTION 12. ENFORCEMENT AUTHORIZATION

- A. The Police Department and Code Compliance Division, in addition to any authority having jurisdiction to enforce the provisions of this Ordinance.
- B. Any citizen who desires to register a complaint under this Ordinance may initiate enforcement with the Police Department.
- C. The Police Department, and Code Compliance Division, or their designees shall, while an establishment is undergoing otherwise mandated inspections, inspect for the compliance with this Ordinance.

- D. An owner, manager, operator, or employee of an establishment regulated by this Ordinance shall inform persons violating this Ordinance of the appropriate provisions thereof.
- E. Notwithstanding any other provision of this Ordinance, an employee or private citizen may bring legal action to enforce this Ordinance.
- F. In addition to the remedies provided by the provisions of this section, the Police Department, and Code Compliance Division, or other designees, or any person aggrieved by the failure of the owner, operator, manager, or other person in control of a public place or a place of employment to comply with the provisions of this Ordinance may apply for injunctive relief to enforce those provisions in any court of competent jurisdiction.

SECTION 13. VIOLATIONS AND PENALTIES

Any person, firm corporation, agent, employer or employee who intentionally, knowingly, recklessly or with criminal negligence violated any provision of this Ordinance shall, upon conviction, be fined an amount not more than two hundred dollars (\$200.00); provided, however, that in the event a defendant has previously been convicted under this Ordinance, such defendant shall be fined an amount not more than five hundred (\$500.00) for a second conviction hereunder, and shall be fined an amount not more than two thousand dollars (\$2000.00) for a third conviction hereunder and for each conviction thereafter. Each day that a violation is committed or permitted to exist shall constitute a separate offense.

SECTION 14. OTHER APPLICABLE LAWS

This Ordinance shall not be interpreted or construed to permit smoking where it is otherwise restricted by other applicable laws.

SECTION 15. REPEALER CLAUSE

This Ordinance shall be cumulative of all other ordinances dealing with the same subject and any provision of any ordinance in direct conflict with any provision of this Ordinance is hereby repealed and the provisions of this Ordinance shall supersede any provisions in conflict herewith; all provisions of any other ordinance not in conflict herewith shall remain in full force and effect.

SECTION 16. SAVINGS CLAUSE

All rights and remedies of the City are expressly saved as to any and all violations of the provisions of any ordinances affecting smoking regulations within the City which have accrued at the time of the effective date of this Ordinance; and, as to such accrued violations and all pending litigation, both civil and criminal, whether pending in court or not, under such ordinances, same shall not be affected by this Ordinance but may be prosecuted until final disposition by the courts.

SECTION 17. SEVERABILITY CLAUSE

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

SECTION 18. PUBLICATION AND EFFECTIVE DATE

This Ordinance shall take effect immediately from and after its passage and publication in accordance with the provisions of the Texas Local Gov't. Code.

SECTION 19. PROPER NOTICE AND OPEN MEETINGS

It is hereby officially found and determined that meeting at which this Ordinance was passed was open to the public and that public notice of the time, place and purpose of said meeting was given as required by the Open Meetings Act, Chapter 551 of the Texas Gov't. Code.

APPROVED BY THE CITY COUNCIL OF THE CITY OF KEMPNER, TEXAS, on this the _____ day of _____, 2019.

CITY OF KEMPNER, TEXAS

Carolyn Crane, Mayor

ATTEST:

Stacy Roberts, City Secretary