

OFFICE OF THE CITY ATTORNEY
FARGO, NORTH DAKOTA

ORDINANCE NO. 5312

AN ORDINANCE AMENDING SECTION 10-0103 AND 10-0105 OF ARTICLE 10-01 OF CHAPTER 10 OF THE FARGO MUNICIPAL CODE RELATING TO THE SALE OF TOBACCO PRODUCTS TO MINORS AND USE AND POSSESSION BY MINORS PROHIBITED, SECTION 10-1002 OF ARTICLE 10-10 OF CHAPTER 10 OF THE FARGO MUNICIPAL CODE RELATING TO SALE OF TOBACCO PRODUCTS THROUGH VENDING MACHINES, SECTION 35-0103 OF ARTICLE 35-01 OF CHAPTER 35 OF THE FARGO MUNICIPAL CODE RELATING TO SUSPENSION OF AUTHORITY TO SELL TOBACCO PRODUCTS AND IMPOSITION OF ADMINISTRATIVE PENALTIES, AND SECTION 1-0305 OF ARTICLE 1-03 OF CHAPTER 1 OF THE FARGO MUNICIPAL CODE RELATING TO CLASSIFICATION OF ORDINANCE VIOLATIONS.

WHEREAS, the electorate of the city of Fargo has adopted a home rule charter in accordance with Chapter 40-05.1 of the North Dakota Code; and,

WHEREAS, Section 40-05.1-06 of the North Dakota Century Code provides that the City shall have the right to implement home rule powers by ordinance; and,

WHEREAS, Section 40-05.1-05 of the North Dakota Century Code provides that said home rule charter and any ordinances made pursuant thereto shall supersede state laws in conflict therewith and shall be liberally construed for such purposes; and,

WHEREAS, the Board of City Commissioners deems it necessary and appropriate to implement such authority by the adoption of this ordinance;

NOW, THEREFORE,

Be It Ordained by the Board of City Commissioners of the City of Fargo:

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Section 1. Amendment.

10-0103. - Sale of tobacco to ~~minors~~ individuals under twenty-one (21) years of age and use and possession by ~~minors~~ individuals under 21 years of age prohibited.

- A. For purposes of this section the definitions in 10-1001 shall apply.
- B. No person shall sell or furnish to an ~~minor~~ individual under 21 years of age, or procure for an ~~minor~~ individual under 21 years of age, cigarettes, including clove cigarettes, cigarette papers, cigars, e-cigarettes, snuff, or tobacco products in any other form in which it may be utilized for smoking, vaping, or chewing. As used in this section, "sell" includes dispensing from a vending machine under the control of the vendor. ~~It shall be a defense to this subsection if the person furnishing tobacco to a minor did so as part of a cultural or religious practice; provided, however, that in no event shall any sale or other exchange for value be lawful.~~ A person in violation of this subsection shall be guilty of an infraction.
- C. No person under the age of ~~18~~ 21 shall sell, possess, purchase, attempt to purchase, smoke, or use cigarettes, including clove cigarettes, cigars, cigarette papers, e-cigarettes, snuff, or tobacco products in any other form in which it may be utilized for smoking, vaping, or chewing.
 - 1. Subsections (B) and (C) shall not apply to persons under the age of ~~18~~ 21 who purchase or attempt to purchase said tobacco products listed in this subsection while under the direct supervision of the police department, the city health department, or the city attorney's office, for training, education, research, or enforcement purposes.
 - 2. ~~Subsection (B) shall further not apply to an employee less than 18 years of age employed by a licensed tobacco dealer or distributor where said employee under the age of 18 years handles tobacco products listed in this subsection as part of that the employee's employment.~~ Subsections (B) and (C) do not apply to an individual under 21 years of age who possesses cigarettes, cigarette papers, cigars, snuff, tobacco in any other form in which it may be used for

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smoking or chewing, electronic smoking devices, or alternative nicotine products when required in the performance of the individual's duties as an employee, however, in no event shall any sale or other exchange for value with a person under 21 years of age be lawful.

3. It shall be a defense to subsections (B) and (C), ~~above~~, if the ~~minor's individual under 21 years of age possession or use~~ possesses or uses of tobacco ~~relates related~~ to a cultural or religious practice; including, without limitation, the use or possession of tobacco during any religious or cultural ceremony; ~~however, in no event shall any sale or other exchange for value with a person under 21 years of age be lawful.~~
4. Non-criminal violation. ~~Minors fourteen (14) years of age or older~~ A person found to have violated subsection (B) or (C), above, and is at least 14 years of age must pay a fee of \$25 and must attend and complete within sixty (60) days of the date of offense a tobacco education program or cessation class approved by the Fargo Municipal Court.
5. Payment procedure. Any individual who has been cited for a violation of subsection ~~(B)(C)~~ must post bond in the amount stated on the citation within fourteen (14) days of the date of the citation and must also, within said fourteen (14) day period, notify the Fargo Municipal Court whether he or she requests a hearing before one of the judges of the Fargo Municipal Court. At such hearing, the individual who has been cited for a violation of subsection ~~(B)(C)~~ may make a statement in explanation of that individual's action and the judge may waive, reduce, or suspend the fee or bond, or both. If the individual cited elects to forfeit the bond or fails to appear before the Fargo Municipal Court at a time scheduled for a hearing, that individual has admitted the violation and has waived the right to a hearing on the issue of commission of the violation. The bond required to secure appearance before the court is the same as the fee schedule set forth in subparagraph 4, above. This section does not allow a citing officer to receive the fee or bond.
 - (a) If an individual cited for a violation of subsection ~~(B)(C)~~ requests a hearing on the issue of the commission of the violation cited, the clerk of court will schedule a hearing date no later than 90 days after the

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citation was issued. If said individual has not already done so, at the time of a request for a hearing on the issue on commission of the violation, the individual cited shall deposit with the court an appearance bond equal to the fee for the violation cited.

- (b) The failure to post bond or to pay an assessed fee, or attend a tobacco education or tobacco cessation class when required to do so is punishable as contempt of court. Such person adjudged guilty of contempt for failure to pay a fee or fine or to attend a tobacco education class or tobacco cessation class when required to do so may be sentenced by the court to a sanction or order designed to ensure compliance with the payment of the fee or fine or attendance at a tobacco education class or tobacco cessation class, to an alternative sentence or a sanction including community service. An ~~minor~~ individual under 21 years of age may not be imprisoned for the contempt.

- 6. Burden of proof. The prosecution must prove the commission of a cited violation under subsection ~~(B)~~(C), above, by a preponderance of the evidence.
- 7. Notice to parent or legal guardian. A law enforcement officer that cites a minor for violation of this section shall mail a notice of the violation to the parent or legal guardian of the minor within ten (10) days of the citation.
- 8. Penalty for contempt. A person adjudged guilty of contempt for failure to pay a fee or fine or to attend a tobacco education class or tobacco cessation class when required to do so may be sentenced by the court to a sanction or order designed to ensure compliance with the payment of the fee or fine or attendance at a tobacco cessation class to an alternative sentence or sanction including community service and may require the person to pay an additional fee or fine of up to \$500.

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Section 2. Amendment.

10-0105. - Sale of flavored e-liquids to ~~minors~~ individuals under 21 years of age prohibited.

1. No person shall sell, offer for sale, or distribute in this city any flavored e-liquid or electronic smoking device containing flavored e-liquid to an ~~minor~~ individual under 21 years of age.

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Section 3. Amendment.

10-1002. - Sale of tobacco products through vending machines limited.

No person shall sell or dispense any tobacco product through the use of a vending machine, except as follows:

- A. A vending machine may be used to dispense tobacco products on the premises of an establishment licensed to sell alcoholic beverages, either on-sale or off-sale; provided, that if an on-sale establishment is also a restaurant where minors are permitted as provided in § 25-1509(C) of the Fargo Municipal Code, a vending machine located in that portion of the premises where ~~minors~~ individuals under 21 years of age are allowed must be operable only by activation of an electronic switch operated by an employee of the establishment before each sale, or by insertion of tokens provided by an employee of the establishment before each sale.
- B. A vending machine which was in place prior to August 1, 1992, may be used to dispense tobacco products in an area within a factory, business, office or other place not open to the general public or to which persons under ~~18~~ 21 years of age are not generally permitted access.

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In the event of violation of this ordinance, the owner of the vending machine and the owner of the premises where the vending machine is located will both be deemed to have committed an infraction, as defined in § 1-0301 of Fargo Municipal Code.

Section 4. Amendment.

35-0103. - Suspension of authority to sell tobacco products and imposition of administrative penalties.

The authority granted under this chapter shall be suspended and administrative penalties imposed for violation of §§ 10-0103 or 10-0105 of the Fargo Municipal Code or North Dakota Century Code §§ 12.1-31-03 or 12.1-31-03.3 prohibiting the sale of tobacco, e-liquids and other tobacco products to ~~minors~~ individuals under 21 years of age, or for a violation of the provisions of this chapter, as follows:

- A. First offense — A \$500 administrative penalty shall be assessed to the business: and the probationary period as defined in section 35-0101(5) shall commence.
- B. Second offense — Three-day suspension: In the event of a second offense within the probationary period, the court shall suspend the person's authority to sell tobacco, e-liquids, and tobacco products for a period of three days. A \$500 administrative penalty shall be assessed to the business if the offense involves the sale to an ~~minor~~ individual under 21 years of age.
- C. Third offense — Ten-day suspension: In the event of a third offense within the probationary period the court shall suspend the person's authority to sell tobacco, e-liquids, and tobacco products for a period of 10 days. A \$500 administrative penalty shall be assessed to the business if the offense involves the sale to an ~~minor~~ individual under 21 years of age.
- D. Subsequent offenses — Thirty-day suspension: In the event of an offense occurring after a third offense within the probationary period the court shall suspend the person's authority to sell tobacco, e-liquids, and tobacco products for a period of 30 days. A \$500 administrative penalty shall be assessed to the business if the offense involves the sale to an ~~minor~~ individual under 21 years of age.

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- E. Offenses during periods of suspension. In the event an offense is committed by a person while that person's authority to sell tobacco, e-liquids, or other tobacco products is under suspension, the authority to sell granted in this article shall be suspended for one year from the sale that occurred during the period of suspension.
- F. One offense per 24 hours. For purposes of establishing the number of offenses committed by a person who has been granted the authority to sell tobacco, e-liquids, or tobacco products a person is deemed to have committed only one offense during any 24-hour period.

Section 5. Amendment.

1-0305. - Classification of ordinance violations.

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(C)(3). For a violation of the following ordinance, a fee of \$25.00.

Section 10-0103(~~BC~~) (tobacco possession by ~~minors~~ an individual under 21 years of age prohibited).

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Section 6. Penalty.

Every person, firm or corporation violating 10-0103(B) and 10-1002 shall be guilty of an infraction and shall be punished by a fine not to exceed \$1,000; the court to have power to suspend said sentence and to revoke the suspension thereof.

Every person, firm or corporation violating 10-0103(C) shall be guilty of a noncriminal offense and punished by a fee of \$25.

Every person, firm or corporation violating 10-0105 shall be guilty of an infraction and shall be punished by a \$500 fine; the court to have power to suspend said sentence and to revoke the suspension thereof.

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Section 7. Effective Date.

This ordinance shall be in full force and effect from and after its passage and approval.

/s/
Dr. Timothy J. Mahoney, M.D., Mayor

Attest:

/s/
Steven Sprague, City Auditor

First Reading:	7-12-21
Second Reading:	7-26-21
Final Passage:	7-26-21
Publication:	8-4-21