



MEMORANDUM

Date: December 28, 2018

To: The Honorable Chairman and Members
Pima County Board of Supervisors

From: C.H. Huckelberry,
County Administrator

A handwritten signature in black ink, appearing to be "CH", is written over the printed name "C.H. Huckelberry".

Re: **Board of Health Increase in the Age of Tobacco Product Purchase in Pima County**

Historically Pima County has not regulated the sales of tobacco products. Currently this type of activity falls under the Arizona Revised Statutes 13-3622, 13-802 and Federal Tobacco Control Regulations. Enforcement activities for the State of Arizona are conducted by the Arizona Attorney General's Office. However, in the last two years the Attorney General conducted only 243 inspections in all of Pima County as part of its routine enforcement activities. Their data documents a fail rate of 15% for Pima County in 2017 compared to 12% for the rest of Arizona.

Since 2015, and in response to concerning trends in youth tobacco use and the advent of electronic cigarettes, the Pima County Board of Health (BOH) has reviewed a variety of measures that would affect the health of the County. To that end the BOH has unanimously requested that the Board of Supervisor consider revising Pima County Ordinance Chapter 8.50 – Smoking, to impose the same restrictions and prohibitions on electronic nicotine delivery systems (E-cigarettes) use and retail, as those created by the State and implemented by through the Smoke Free Arizona Program. They further recommended the Board raise the minimum age for purchase of tobacco products from eighteen to twenty-one, and create a retail permit that would create a mechanism for enforcement and regular inspection.

Strategically this recommendation coincides with national efforts aimed at raising the minimum legal age for tobacco and nicotine related sales in the United States to twenty-one.

As of December 6, 2018, six states (California, New Jersey, Massachusetts, Oregon, Hawaii and Maine) have raised the minimum age for purchase of tobacco products to twenty-one. With input from the Pima County Attorney's office, the Health Department has reviewed and prepared suggested revisions to Ordinance Chapter 8.50 – Smoking and the Pima County Health Code that would be responsive to the direction of the Board of Health and in alignment with the City of Tucson. Proposed updates to the current smoking ordinance add language pertaining to electronic nicotine delivery systems, raise the minimum legal sales age for tobacco products to twenty-one, and creates a retail permit system for vendors who sells tobacco products. This permit will provide Pima County the ability to provide education along with assurance and compliance checks in addition to creating a revenue stream to fund enforcement.

The Honorable Chairman and Members, Pima County Board of Supervisors
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I have asked the Health Department to convene a series of community meetings to review the Board of Health proposal. The goal is to elicit feedback from the private sector and to incorporate community stakeholder input into the final language for presentation to the Board of Supervisors for their consideration and action.

CHH/mp

Attachments

c: Paul Horowitz, President Board of Health
Jan Leshner, Chief Deputy County Administrator
Dr. Francisco Garcia, Assistant County Administrator for Community and Health Services
Jonathan Pinkney, Deputy County Attorney

Date: December 28, 2018

To: Chuck Huckleberry
County Administrator

From: Marcy Flanagan *MF*
Director, Health

Via: Jan Leshar, Chief Deputy County Administrator *JL*
Francisco Garcia, Assistant County Administrator *FG*

Re: **Proposal to Increase the Age of Tobacco Product Purchase in Pima County**

Background

The Pima County Health Department's Tobacco and Chronic Disease Prevention program was established in 1995 in response to the passage of House Bill 2275 that empowered the Arizona Department of Health Services to develop and deliver programs to educate the public about the health risks associated with tobacco use, reduce the initiation of tobacco use, and to assist those who were currently using to quit. Pima County takes a comprehensive approach to tobacco prevention by supporting measures that help reduce tobacco initiation and nicotine addiction among youth, reduce the number of adult tobacco users, and protect residents and families from the harms associated with secondhand smoke and vapor exposure. This approach is consistent with the Centers for Disease Control and Prevention's Best Practices for Comprehensive Tobacco Control Programs.

This proactive strategy is increasingly important as we recognize the impact that new tobacco products are having on youth. More than 95% of long-term smokers start before age twenty-one. The 2018 National Youth Survey, found that vaping increased by 78% among high school students since last year and 48% among youth in middle school. The survey also found that the spike in e-cigarette use among youth in high school has led to an overall increase in tobacco product use of 38% in this population. This is important because youth e-cigarettes use is associated with subsequent transition to conventional cigarettes, which increases their risk of chronic illness including cancer as well as cardiac and respiratory disease. Furthermore among minors who currently smoke, their primary source of tobacco products are eighteen to twenty-year old peers.

The 2018 Arizona Youth Survey, estimates that 21% of the Pima County youth in grades 8, 10 and 12 have ever smoked cigarettes, 7% have done so multiple times in the month prior. Additionally, 41% of youth in Pima County used electronic cigarettes at least once in their lifetime, a significant increase from 36% in 2016. Of these, 20% used electronic cigarettes on multiple occasions during the prior month, an increase from 15% in 2016.

Discussion

Pima County has not regulated the sales of tobacco products. Currently this falls under the Arizona Revised Statutes 13-3622 and 13-802, and federal tobacco control regulations. Enforcement activities for the State of Arizona are conducted by the Arizona Attorney General's Office under a program called Counter Strike. In 2017 and 2018 the Attorney General conducted a total of 243 inspections in all of Pima County as part of its routine enforcement activities. Their data documents a fail rate of 15% for Pima County in 2017 compared to 12% for the rest of Arizona.

In 2015, the Pima County Board of Health (BOH) unanimously approved the development of a tobacco licensing regime that was designed to identify establishments retailing these products, restrict the location of vendors, and enhanced compliance activities, all with the purpose of preventing sales to minors. This approach was developed collaboratively by a local coalition spearheaded by the American Lung Association and the American Cancer Society. The concept was vetted with a variety of stakeholders including the Tucson Chamber of Commerce and the Metropolitan Pima Alliance. Concerns articulated by retailers and commercial real estate development entities community caused the Health Department to reassess this strategy.

In October 2016, again the BOH was briefed on evolving trends in electronic nicotine delivery systems and the impact on youth tobacco product use. It formed a sub-committee in January 2017 to engage Pima County Tobacco Control Program staff expertise and collaboratively study the issue of youth tobacco misuse with the goal of developing strategies they might recommend to the Board of Supervisors. Largely as a result of this work, in August of 2018 the Pima County Board of Health unanimously and officially requested that the Board of Supervisor consider revising Pima County Ordinance Chapter 8.5 – Smoking, to impose the same restrictions and prohibitions on electronic nicotine delivery systems (E-cigarettes) use and retail, as those created by the State and implemented by through the Smoke Free Arizona Program. The Board of Health further recommended the Board raise the minimum age for purchase of tobacco products from eighteen to twenty-one, and create a retail permit that would create a mechanism for enforcement and regular inspection.

Strategically, the timing of this BOH initiative coincides with national efforts aimed at raising the minimum legal age for tobacco and nicotine related sales in the United States to 21. As of December 6, 2018, six states (California, New Jersey, Massachusetts, Oregon, Hawaii and Maine have raised the age to 21. In Arizona, Cottonwood and Douglas joined 380 other local jurisdictions across the country that increased the minimum age to purchase tobacco products to 21. More significantly, the City of Tucson conducted a study session that concluded with direction to the City Manager to develop a legal framework to do the same as well as to explore a collaborative approach to enforcement with Pima County.

Conclusion

Strengthening tobacco restrictions in the Pima County health code by increasing the age to purchase such products is essential to protect youth from initiating tobacco use, prevent addiction, and decrease tobacco related disease and death. Such action needs to include mechanisms for ensuring compliance and enforcement.

With input from the Pima County Attorney's office, the Department has reviewed and prepared suggested revisions to Ordinance Chapter 8.50 – Smoking and the Pima County Health Code that would be responsive to the direction of the Board of Health and in alignment with the City of Tucson. Proposed updates to the current smoking ordinance add language pertaining to electronic nicotine delivery systems, raise the minimum legal sales age for tobacco products to twenty-one, and creates a retail permit system for vendors who sells tobacco products. This permit will provide Pima County the ability to provide education along with assurance and compliance checks in addition to creating a revenue stream to fund enforcement.

During the next three months, the Health Department and the Board of Health will convene a series of community based stakeholder conversations to review this proposal. The goal is to elicit feedback from retailers and to incorporate community stakeholder input into the final language for presentation to the Board of Supervisors.

We therefore respectfully seek your approval to 1) elicit feedback from diverse stakeholders across Pima County in coordination with the City of Tucson; and 2) present the final ordinance to the Board of Supervisors for their consideration and action.

✓ Approved _____ Disapproved

C. Huckelberry 12/28/18
Chuck Huckelberry, County Administrator

c: Paul Horowitz, President of the Board of Health

Chapter 8.50 - SMOKING

Sections:

8.50.010 - Definitions.

In this chapter:

1. "Designated Smoking Area" means an area within a restaurant where smoking is allowed pursuant to Section 8.50.031.
2. "Environmental Tobacco Smoke" means smoke from the burning of a tobacco product and smoke exhaled by a smoker.
3. "Restaurant" means a business facility open for the primary purpose of serving food prepared for consumption, either on or off the premises, for compensation where annual state sales tax from the sale of food and nonalcohol beverages exceeds fifty percent (50%) of the total annual state sales tax for every consecutive twelve (12) month period.
4. "Seating Area" means all floor space of the restaurant except the floor space of those areas which are:
 - a. Used exclusively for the preparation of food or beverages or both (including alcoholic beverages);
 - b. Used exclusively for the storage of food, beverages, and supplies;
 - c. Used exclusively for office space; and
 - d. Rest rooms.
5. "Smoke-free" means air that does not contain any emissions from smoking.
6. "Smoking" or "smoke" means the act of burning any tobacco product, weed, filler or plant of any kind in a cigarette, cigar, pipe or in any other device.

(Ord. 2001-137 § 1 (part), 2001; Ord. 1992-9 § 2 (part), 1992)

8.50.020 - Smoking prohibited.

No person shall smoke within any enclosed structure or vehicle except as permitted by this chapter.

(Ord. 2001-137 § 1 (part), 2001; Ord. 1992-9 § 2 (part), 1992)

8.50.030 - Exemptions.

- A. The following places or circumstances are exempt from the provisions of this chapter:
1. Bowling alleys;
 2. Pool halls;
 3. Bars;
 4. Restaurants for which an exemption has been granted pursuant to the terms of this chapter;
 5. Retail tobacco stores;
 6. Hotel and motel rooms when rented to guests;
 7. Hotel and motel conference and meeting rooms when being used for private functions;
 8. Assembly rooms when being used for private functions;
 9. A private home;
 10. A private, non-commercial vehicle;
 11. A commercial vehicle occupied by only one person;
 12. An office occupied by only one person;
 13. Any area not within an enclosed structure or vehicle;
 14. Smoking by performers when smoking is required by a script as an integral part of a performance.
 15. Nonprofit civic fraternal organizations, such as the Veterans of Foreign Wars or the Benevolent and Protective Order of Elks.
- B. No exemption set forth in subsection A of this section shall exist if an area is placarded as "No Smoking" pursuant to Section 8.50.040.

(Ord. 2001-137 § 1 (part), 2001; Ord. 1992-9 § 2 (part), 1992)

8.50.031 - Exemptions for Smoking in Restaurants

- A. All restaurants shall be smoke-free. However, restaurants may allow smoking under the following conditions:
1. In an area designated as a smoking area which meets all the requirements of this section; or
 2. If granted, and in compliance with, a hardship exception pursuant to Section 8.50.033.

- B. A designated smoking area must be:
1. Physically separated from all other areas of the restaurant;
 2. Independently ventilated so that air is not vented into or does not drift into any areas required to be smoke-free;
 3. No greater in size than twenty-five percent (25%) of the total square footage of the seating area of the restaurant;
 4. Physically located so that customers can receive all services provided by the restaurant without having to walk through the designated smoking area or be exposed to environmental tobacco smoke;
 5. Clearly marked as a designated smoking area by the posting of legible warning sign(s) at all entrances to the designated smoking area which read(s) "NOTICE: SMOKING AREA. Smoking is known to cause cancer, heart disease, and lung diseases in smokers as well as nonsmokers." The sign(s) shall be black letters on a white background and at least 8.5 inches by 11 inches in size.
- C. A designated smoking area may include areas immediately adjacent to and outside of the restaurant, if:
1. At least fifteen (15) feet from the smoke-free area and public entrances and exits; and,
 2. Smoke from the outdoor designated smoking area cannot enter the smoke-free area of the restaurant.
- D. A designated smoking area may not include:
1. An entry lobby;
 2. Waiting areas;
 3. Rest rooms and the pathway between the rest rooms and dining area; or,
 4. Areas where minors customarily congregate.
- E. The department of development services is authorized to make requirements consistent with the Pima County Building Code, to assure compliance with this section.

(Ord. 2001-137 § 1 (part), 2001)

8.50.032 - Hardship Phase-In to Create a Designated Smoking Area

A.

The owner of an existing restaurant may apply for a hardship phase-in to allow a period beyond the date prescribed to make the necessary modifications to create a designated smoking area which meets the requirements of Section 8.50.031, if completing those modifications within the date prescribed would create an undue financial hardship.

- B. For purposes of this section only, an "undue financial hardship" means that the applicant does not have current funds, or the current ability to borrow and repay funds, necessary and sufficient to remodel the restaurant to create a designated smoking area which complies with Section 8.50.031. The owner bears the burden of showing that compliance would create an undue financial hardship.
- C. The time allotted for a hardship phase-in to create a designated smoking area shall not exceed one (1) year.
- D. A hardship phase-in to create a designated smoking area application shall be submitted to the health department and shall contain the following:
 - 1. An estimate from appropriately licensed contractor(s) of the costs of modifying the seating area of the restaurant to be a designated smoking area which meets the requirements of Section 8.50.031;
 - 2. Financial statements prepared by a licensed certified public accountant for the twelve (12) months immediately prior to the month in which a hardship phase-in application is filed purporting to show an undue financial hardship;
 - 3. A time and task schedule for complying with all requirements of Section 8.50.031 if a hardship phase-in is granted; and,
 - 4. A sworn statement that, if a phase-in is granted, the applicant shall complete the structural, HVAC, signage, and all other modifications necessary to meet the requirements of Section 8.50.031(B) and (C) in accordance with the time and task schedule.
- E. A restaurant owner must apply for a hardship phase-in to create a designated smoking area within ninety (90) days of the effective date of this ordinance. If application for hardship phase-in to create a designated smoking area is not made within this time period, the restaurant must be smoke-free.
- F. The entire restaurant shall remain smoke-free until the modifications for the designated smoking area are completed.
- G. Restaurants constructed, opened, or remodeled after the effective date of this ordinance, must immediately comply with Section 8.50.031 and shall not be eligible for a hardship phase-in.

(Ord. 2001-137 § 1 (part), 2001)

8.50.033 - Hardship Smoking Exception

- A. The owner of an existing restaurant may apply for a hardship smoking exception to allow smoking throughout the restaurant, if compliance creates an undue financial hardship.
- B. For purposes of this section only, an "undue financial hardship" for the initial hardship smoking exception means at least a fifteen percent (15%) reduction in state sales tax receipts from the sale of food and nonalcohol beverages for two (2) consecutive months wherein the restaurant has operated smoke-free as compared to the same two (2) consecutive months during the year prior to compliance with this chapter. For restaurants which have not been open for an entire year prior to the date of application for a hardship smoking exception, an "undue financial hardship" for the initial hardship smoking exception means at least a fifteen percent (15%) reduction in state sales tax receipts from the sale of food and nonalcohol beverages for two (2) consecutive months wherein the restaurant has operated smoke-free as compared to the two (2) consecutive months immediately prior to those two (2) months of smoke-free operation. For purposes of this section only, an "undue financial hardship" for subsequent hardship smoking exceptions means at least a fifteen percent (15%) reduction in state sales tax receipts from the sale of food and nonalcohol beverages for two (2) consecutive months wherein the restaurant has returned to operating smoke-free as compared to the same two (2) consecutive months of the immediately preceding year during which the restaurant operated under a hardship smoking exception. Such a showing shall constitute prima facie evidence and a rebuttable presumption of an undue financial hardship.
- C. The initial application for a smoking hardship exception must be made within one hundred twenty (120) days from the effective date of this ordinance. Subsequent applications for a smoking hardship exception shall be made as indicated in this section. If application for a smoking hardship exception is not made within the time periods set forth in this section, the restaurant must be smoke-free.
- D. An initial hardship smoking exception application shall be submitted to the health department and shall contain the following:
 - 1. A description of all efforts made, or which reasonably could be made, to operate the restaurant successfully as a smoke-free environment; and,

2. Exact copies of state sales tax statements submitted by the restaurant to the state of Arizona, which can serve to compare state sales taxes of food and nonalcohol beverages for a two (2) consecutive month period of smoke-free operation and the same two (2) consecutive month period in the year immediately prior to smoke-free operation.
 3. Evidence which demonstrates that the purported drop in state sales tax between the year in which the exemption is sought and the prior comparison year has occurred under similar circumstances and is not due to extraneous factors. Evidence must show that the business operated in substantially the same manner including, but not limited to, operating during the same number of hours, being open the same number of days, being open on the same high business days, such as holidays; and, serving from a menus similar in selection and cost.
- E. A hardship smoking exception, if granted, shall not exceed two (2) years.
- F. All entries to the restaurant must be clearly marked by the posting of a legible warning sign(s) which read(s): "NOTICE: SMOKING PERMITTED. This establishment permits smoking which is known to cause cancer, heart disease, and lung diseases in smokers as well as non-smokers." The sign(s) shall be black letters on a white background and at least 8.5 inches by 11 inches in size.
- G. The entire restaurant shall remain smoke-free unless and until a hardship smoking exception is granted.
- H. Upon the expiration of a hardship smoking exception, the restaurant must be smoke-free, but may apply for a subsequent hardship smoking exception no less than sixty (60) days and no more than one hundred twenty (120) days after the expiration of a hardship smoking exception.
- I. Subsequent hardship smoking exception applications shall be submitted to the health department and shall contain the following:
1. A description of all efforts made, or which reasonably could be made, to operate the restaurant successfully as a smoke-free environment; and,
 2. State sales tax statements prepared by a licensed certified public accountant, which compare state sales tax receipts for food and nonalcohol beverages for a two (2) consecutive month period of smoke-free operation in the year the application is made and the same two (2) consecutive month period in the year immediately prior where the restaurant operated under a hardship smoking exception.

- J. Restaurants constructed, opened, or remodeled after the effective date of this ordinance must immediately be smoke-free or in compliance with Section 8.50.031 and shall not be eligible for a hardship smoking exception.

(Ord. 2001-137 § 1 (part), 2001)

8.50.034 - Application process and hearing

- A. Applications for either a hardship phase-in to create a designated smoking area or a hardship smoking exception shall be made to the health department pursuant to procedures developed by the department director.
- B. The county shall hold an administrative hearing, before a hearing officer, to review the application for a hardship phase-in to create a designated smoking area or a hardship smoking exception and to consider the recommendations of appropriate county departments within thirty (30) days of the health department's receipt of an application for hardship phase-in to create a designated smoking area or a hardship smoking exception. The hearing officer shall issue a ruling within seven (7) days after the hearing and to mail a copy of his decision to the applicant and to the health department within seven (7) days after the ruling is made.

(Ord. 2001-137 § 1 (part), 2001)

8.50.040 - Control of property.

- A. Unless an area is exempt from the provisions of this chapter pursuant to Sections 8.50.030, 8.50.032, or 8.50.033, the owner or person in lawful control of property shall conspicuously post "No Smoking" signs at all entrances to said property.
- B. "No Smoking" signs shall depict letters of not less than one inch in height or the international "No Smoking" symbol consisting of a pictorial representation of a burning cigarette enclosed in a red circle of not less than six inches in diameter and with a red bar across it.
- C. Any owner or person in lawful control of property that would otherwise be exempt from the provisions of this chapter pursuant to Section 8.50.030 may placard the property as "No Smoking."
- D. The owner or person in lawful control of property shall keep all nonexempt areas of the property smoke-free. If a nonexempt area cannot be kept smoke-free due to smoking in an exempt area, the owner or person in lawful control of the exempt area shall placard the exempt area as "No Smoking."

(Ord. 2001-137 § 3 (part), 2001; Ord. 1992-9 § 2 (part), 1992)

8.50.050 - Applicability.

- A. The provisions of this chapter shall apply to the unincorporated areas of Pima County.
- B. The provisions of this chapter shall apply to all property owned or controlled by Pima County.
- C. The provisions of this chapter may apply to the incorporated areas of Pima County pursuant to the provisions of Arizona Revised Statutes Section 11-251.05, subsection C.
- D. The provisions of this chapter shall not apply to any place where smoking is allowed pursuant to federal or state law.
- E. Nothing in this chapter excuses noncompliance with any other Pima County Code, state or federal law, or any rule or regulation adopted pursuant thereto.

(Ord. 2001-137 § 3(part), 2001; Ord. 1992-9 § 2 (part), 1992)

8.50.060 - Penalties.

- A. Any person who smokes in an area placarded with a "No Smoking" sign is guilty of a Class 3 misdemeanor.
- B. Any person who owns, manages, operates, or otherwise controls a restaurant who commits any of the following is guilty of a Class 3 misdemeanor:
 - 1. Failing to placard property with "No Smoking" signs as required by Section 8.50.040;
 - 2. Failing to placard a designated smoking area with warning signs as required by Section 8.50.031(B)(5);
 - 3. Failing to comply with the terms of an order granting a hardship phase-in to create a designated smoking area or hardship smoking exception.
 - 4. Allowing a person to smoke in a restaurant area other than the designated smoking area;
 - 5. Allowing smoke from a designated smoking area to diffuse or drift into the smoke-free areas of the restaurant.
- C. Each day of a violation described in paragraphs A or B of this section shall constitute a separate offense and is punishable as such.

D. For violations described in paragraphs B and C of this section, no judge, magistrate, or justice of the peace may suspend the imposition of a minimum fine of at least one-hundred dollars (\$100). Fines may be assessed in excess of one-hundred dollars (\$100) to the maximum prescribed for a Class 3 misdemeanor.

(Ord. 2001-137 § 3 (part), 2001; Ord. 1992-9 § 2 (part), 1992)