

ORDINANCE NO. OR-1737-09

AN ORDINANCE AMENDING CHAPTER IX. "HEALTH AND SANITATION" OF THE CODE OF THE CITY OF MANSFIELD BY AMENDING ARTICLE IV., REGULATION OF SMOKING IN ITS ENTIRETY TO READ AS HEREIN AFTER; PRESCRIBING THE PENALTY FOR THE VIOLATION HEREOF; MAKING THIS ORDINANCE CUMULATIVE; PROVIDING A SEVERABILITY CLAUSE; PROVIDING FOR GOVERNMENTAL IMMUNITY; PROVIDING FOR INJUNCTIONS; PROVIDING FOR PUBLICATION AND NAMING AN EFFECTIVE DATE.

WHEREAS, there is a substantial body of evidence which reveals that the smoking of tobacco is a positive danger to health and a material annoyance, inconvenience, discomfort and a health hazard to those who are present in confined spaces; and

WHEREAS, Section 48.01 of the Penal Code of the State of Texas prohibits the possession of a burning tobacco product or the smoking of tobacco in the facility of a public primary or secondary school or an elevator, enclosed theater or movie house, library, museum, hospital, transit system bus, or intrastate bus, plane, or train which is a public place; and

WHEREAS, there exists other enclosed public places and places of employment wherein the possession of a burning tobacco product or the smoking of tobacco is not regulated by the laws of the State of Texas.

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

SECTION 1.

Article IV. the Regulation of Smoking of Chapter IX. "Health and Sanitation" of the Code of the City of Mansfield be amended in its entirety to read as follows:

Section 9.68 Definitions.

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

- A. **"Administrative Area"** shall mean any enclosed indoor area, under the control of an employer, to which employees, but not the general public, except by specific invitation, have access to during the course of employment, including, but not limited to, work areas, employee lounges, employee restrooms, conference rooms, and employee cafeterias.
- B. **"Adult's Only Establishment"** shall mean any place of business that limits its customers to individuals 18 years of age or older and that employees no one below the age of 18. Businesses of this category may include restaurants, bars, sports bars, billiard halls, bingo parlors, retail tobacco shops or other comparable businesses.

- C. **“Air Barrier”** shall mean a system that creates an air curtain to prevent the drift or penetration of tobacco smoke from a smoking area to a non-smoking area not allowing drift or penetration from the ceiling down to 24 inches above the floor.
- D. **“Air Purification System”** shall mean an electrically powered hospital grade, hepa media filter that will clean all of the air in a designated smoking area every 15 minutes as follows: not less than 95 percent of three tenths (0.3) micron particulates efficiency including dust, smoke, pollen, mold spores, bacteria, tobacco smoke, viruses, and allergens and not less than 95 percent removal of gases, vapors, volatile organic compounds (V.O.C.) and odors and contains an air barrier system or other barrier system if required by a licensed professional engineer, to prevent air from the smoking area from being drawn across the non-smoking area.
- E. **“Bar”** shall mean an establishment licensed by the State of Texas for the sale of alcoholic beverages that derives more than 75% of the establishment’s gross revenue from the on-premise sale of alcoholic beverages for on-premise consumption. For the purposes of this definition, gross revenue shall be calculated using the total amount of gross revenue received from the sale of alcoholic beverages and from the sale of food by the establishment for the preceding 12-month period. Such establishment shall make available to the city or its agents, during reasonable hours, its books and records for inspection if required by the city.
- F. **“Billiard Hall”** shall mean a place of amusement whose chief purpose is providing the use of billiard/pool tables to the public.
- G. **“Bingo Parlor”** shall mean a facility regulated under V.C.S., Article 179d – “Bingo Enabling Act.”
- H. **“Bus”** shall mean every motor vehicle designed for carrying more than 10 passengers and used for the transportation of persons, and every motor vehicle, other than a taxi cab, designed and used for the transportation of persons for compensation.
- I. **“Business”** shall mean any sole proprietorship, partnership, joint venture, corporation, or other business entity formed for profit-making or non-profit purposes, including but not limited to, banks, laundromats, hotels, motel, retail establishments, professional corporations, and other entities where legal, medical, dental, engineering, architectural or other professional services are delivered.
- J. **“City”** shall mean the City of Mansfield.
- K. **“Eating Establishment”** shall mean any place where food is served for on-premises consumption and which is accessible by the public or a substantial group of the public.
- L. **“Employee”** shall mean any person, partnership, corporation, municipal corporation, non-profit entity, or other entity who employs the services of one or more individual persons.
- M. **“Employer”** shall mean any person who employs the services of an individual person.

- N. **“Enclosed Area”** shall mean an area closed in by a roof and walls with appropriate openings for ingress and egress.
- O. **“Health Facility”** shall mean any institution that provides medical, surgical, and overnight facilities for patients, including but not limited to, hospitals, clinics, physical therapy facilities, doctors’ offices, dentists’ offices, nursing homes, adult care facilities, convalescent homes, and residential treatment centers/homes.
- P. **“Major Renovation”** shall mean changing the amount of floor space in a building by one third (1/3).
- Q. **“Minor”** shall mean any person under 18 years of age.
- R. **“Net Floor Area”** shall mean the total floor area of the interior of an eating establishment, excluding the kitchen, restrooms, storage areas, and offices.
- S. **“Person”** shall mean any individual, partnership, cooperative, association, corporation, or venture.
- T. **“Physical Barrier”** shall mean a barrier that will form an effective membrane continuous from outside wall to outside wall, from a smoke barrier to a smoke barrier, from floor to floor or roof above, or a combination thereof, including continuity through all concealed spaces, such as above suspended ceilings, interstitial structural and mechanical spaces. Transfer grilles, louvers and similar openings shall not be used in these partitions. Self closing, tight fitting doors are permitted in such barriers.
- U. **“Place of Employment”** shall mean any enclosed area under the control of an employer including but not limited to work areas, employee lounges, restrooms, conference rooms, classrooms, employee cafeterias and hallways. A private residence shall not be considered a place of employment.
- V. **“Portable Air Purification System”** shall mean a portable electrically powered hospital grade, hepa media filter that will clean all of the air in a designated smoking area every 15 minutes as follows: not less than 95 percent of three tenths (0.3) micron particulates efficiency including dust, smoke, pollen, mold spores, bacteria, tobacco smoke, viruses and allergens and not less than 95 percent removal of gases, vapors, volatile organic compounds (V.O.C.) and odors.
- W. **“Private Club”** shall mean any building, premise or portion thereof which is permitted by the State and allowed by special use permit by the City as a private club for the storing, possession, and dispensing for on-premises consumption of alcoholic beverages. However, “private club” does not include a premise operated by an organization which is not available to and not customarily used by the general public and entry and privileges thereto are established by regulations that are created by an organization distinct from a Texas Alcohol and Beverage private club membership.

- X. **“Private Function”** shall mean the rental of a ballroom, restaurant, private club, or other facility for the sole purpose of entertaining, private parties, events, or other social functions.
- Y. **“Public Business”** shall mean any deliberation between a quorum of members of any board, commission, department, committee or agency within the executive or legislative department of the State of Texas, or the City Council or any Board or Commission of the City of Mansfield at which any public business or public policy is discussed or considered or at which any formal action is taken.
- Z. **“Public Place”** shall mean any enclosed area in which the public is invited or permitted, including, but not limited to, banks, educational facilities, health facilities, laundromats, public transportation facilities, reception areas, restaurants, marketing establishments, retail service establishments, retail stores, theaters, and waiting rooms. A private residence is not a “public place,” nor is a facility while it is being used for a private function, such as a reception, party, etc. Private clubs are not considered a “public place.”
- AA. **“Restaurant”** shall mean any place where food is manufactured, packaged, produced, processed, transported, stored, sold, commercially prepared, vended, or otherwise handled. The term includes any such place regardless of the duration of the permit or whether there is a charge for the food. The term includes, but is not limited to, a coffee shop, cafeteria, sandwich shop, private or public school cafeteria, and any other eating establishment that gives or offers food to the public, guests, or employees, including catering facilities. The term shall not include a cocktail lounge or tavern if said cocktail lounge or tavern is a “bar” as defined in this section. The term does not include private homes where food is prepared or served for guests and individual family consumption.
- BB. **“Retail or Service Establishment”** shall mean any establishments which sells goods or services to the general public.
- CC. **“Retail Tobacco Store”** shall mean a retail store whose primary business is the sale of tobacco products and accessories and in which the sale of products is merely incidental.
- DD. **“Sell”** shall mean to offer for sale, convey, exchange, barter, or trade.
- EE. **“Service Line”** shall mean any indoor line or area where persons wait for goods or service of any kind, regardless of whether or not an exchange of money will occur. Such service includes, but is not limited to, sales, giving of information, directions, advice, and the transfer of money or goods.
- FF. **“Smoking”** shall mean inhaling, exhaling, burning or carrying any lighted cigar, cigarette, pipe, tobacco product, weed, plant, or other combustible substance whose smoke is intended to be inhaled.
- GG. **“Sports Arena”** shall mean sports pavilions, gymnasiums, health spas, boxing arenas, swimming pools, roller and ice rinks, and other similar places where members of the

general public assemble either to engage in physical exercise, participate in athletic competition or witness sports events.

- HH. **“Tobacco Product”** shall mean any tobacco, cigarette, cigar, pipe tobacco, smokeless tobacco, snuff, or any other form of tobacco, which may be utilized for smoking, chewing, inhalation or other manner of ingestion or absorption.
- II. **“Tobacco Shop”** shall mean a retail establishment whose annual gross revenues from the sale of tobacco products and smoking accessories are at least 50 percent of total revenue.
- JJ. **“Tobacco Vending Machine”** shall mean any mechanical, electric or electronic self-serving device which, upon insertion of money, tokens, or any other form of payments, dispenses tobacco products.
- KK. **“Valid Identification”** shall mean a valid driver’s license or an identification card issued by the Department of Public Safety which contains a physical description and a photograph consistent with the person’s appearance. The proof of identification may include a driver’s license issued by Texas or another state, a passport, or an identification card issued by a State or the Federal government.
- LL. **“Ventilation System”** shall mean an HVAC system designed by a licensed professional engineer to meet the requirements of this ordinance and all other requirements of the City’s building code. A ventilation system must provide an air change every 15 minutes; exhaust the air to the exterior of the building and the air from the smoking area cannot be drawn across the non-smoking area; and has an air barrier system, if required by a licensed professional engineer, to prevent air from the smoking area from being drawn across the non-smoking area.
- MM. **“Workplace”** shall mean any enclosed area of a structure, or portion thereof, intended for occupancy by employees who provide primarily clerical, professional or business services of a business entity, or which provide primarily clerical, professional or business services to other business entities or to the public at that location.

Section 9.69 Smoking Prohibited – Public Places.

A. City Owned Buildings:

All enclosed buildings owned or leased by the City of Mansfield shall be designated non-smoking with no designated smoking section.

Exception: Jail cells located in City facilities used for the incarceration of prisoners may be designated as a smoking area at the discretion of the Director of Public Safety. All other areas shall be designated as non-smoking areas.

B. Places Where Smoking is Prohibited :

A person commits an offense if he smokes or possesses a burning tobacco, weed, or other plant product in any of the following indoor or enclosed areas:

1. Public or private schools.
2. City buildings.
3. Public elevators and stairwells.
4. Buses, taxi cabs, and other means of public transportation.
5. All boarding and waiting areas of public transit depots.
6. Public restrooms, lobbies, reception areas, hallways and any other common use area.
7. Service lines and waiting queues, whether indoor or outdoor.
8. Retail or service establishments.
9. Businesses, including all areas available to and customarily used by the general public.
10. Aquariums, galleries, libraries, and museums.
11. Day care centers, except that day care centers that are also private homes shall be considered private residences when the children or adults receiving care have gone home.
12. Every publicly or privately owned theater, auditorium or other enclosed facility which is open to the public for the primary purpose of exhibiting any motion picture, stage drama, musical recital, athletic event or any other performance or event, except when smoking is part of a stage production.
13. Any portion of any publicly or privately owned area to which the public has access. This section does not apply to private residences.
14. Any seating area of any publicly or privately owned outdoor athletic facility.
15. Health care facilities and hospitals.
16. Hotels and motels, except as provided for in Section 9.72 (A)(2).
17. Within 30 feet of any door, operable window/vent or other opening to an indoor enclosed area of a use listed above.

C. Exceptions:

1. An Adult's Only Establishment as defined in Section 9.68 of this Ordinance is exempt from the non-smoking provisions set forth above under the following circumstances:
 - a. It must prohibit the entry of customers below the age of 18;
 - b. It may have no employees or guests below the age of 18;
 - c. It must prominently display a sign by all public entrances reflecting that this is an adult's only establishment and that no one under 18 years of age is permitted within the establishment and that it permits smoking in all areas and that there are no non-smoking facilities contained within.
2. A business establishment listed above under Section 9.69 B where smoking would otherwise be prohibited may construct a separate but contiguous facility of the same business where smoking is permitted. The facility must be separated from the non-smoking facility by a solid wall which extends from floor to ceiling, must have a separate entrance and must not share a common heating and air conditioning system which allows the passage of air from one facility to the other. It may have no employees or guests below the age of 18. The smoking portion of the business must display a sign at all public entrances reflecting that this is an adult's only establishment and that no one under 18 years of age is permitted within the establishment and that smoking is permitted in all areas and that there are no non-smoking facilities contained within. A business establishment operating pursuant to this section may serve both the smoking and non-smoking dining areas from a single kitchen provided that the facility is designed and constructed in a manner that does not permit smoke from the smoking portion to pass through the kitchen to the non-smoking area. An establishment operating under this section may serve both the smoking and non-smoking areas from a single set of restrooms provided that they are located within the non-smoking portion of the establishment and the facility is designed and constructed in such a manner as to prevent smoke from the smoking area being drawn into the non-smoking area when patrons pass from one portion of the establishment to the other.
3. It is an exception to Subsection B15 of 9.69 that a hospital provide a room in which a patient may reside and smoke providing that all patients assigned to that room are agreeable and the Administrator of the facility concurs with the designation. A room placed in this status shall prominently display a sign which states "smoking is permitted in this room".

D. Defenses:

1. It is a defense to prosecution under this section that the conveyance or public place within which the offense occurred did not have prominently displayed a reasonably sized notice that smoking was prohibited.

Section 9.70 Regulation Of Smoking – Eating Establishments, Nightclubs, Adult Entertainment Establishments, Billiard Halls, Bingo Parlors, And Bowling Centers.

- A. A person commits an offense if he or she smokes tobacco or possesses a burning tobacco product in an eating establishment, bar, night club, adult entertainment establishment, billiard hall, bingo parlor, or bowling center unless it operates in compliance with 9.69C.
- B. An owner, manager, or operator of an eating establishment, bar, night club, adult entertainment establishment, billiard hall, bingo parlor, or bowling center commits an offense if he or she allows smoking of a tobacco product in the establishment unless it operates in compliance with 9.69C.

C. Defenses:

- 1. It is a defense to a prosecution under Subsection (A) of this Section that the establishment did not have prominently displayed a reasonably sized notice that smoking was prohibited.

D. Existing Businesses and Facilities:

- 1. All businesses and facilities in operation on the effective date of this Ordinance shall have 18 months from the passage of this ordinance to be in compliance.

E. Owner/Operator Responsibility:

- 1. The owner, manager, or operator of an eating establishment, bar, night club, adult entertainment establishment, billiard hall, bingo parlor, or bowling center commits an offense if he or she designates or maintains a smoking area in violation of this Ordinance.
- 2. The owner or manager of an establishment governed by this Ordinance commits an offense if he or she fails to post and maintain any signs required by this Ordinance.

Section 9.71 Regulation of Smoking – Workplace

- A. An employer who owns, occupies, or controls a workplace may:
 - 1. Have and implement a written policy on smoking which conforms to this chapter.
 - 2. Make the policy available for inspection by employees and communicate said policy to all employees at least three weeks prior to its adoption.
 - 3. Prominently display reasonably sized signs that smoking is prohibited.

4. Provide facilities in sufficient numbers in such locations as to be readily accessible for the extinguishment of smoking materials.
5. Not discharge, retaliate, or discriminate against an employee who:
 - a) Files a complaint or causes a proceeding to be instituted under or related to this article, or
 - b) Testifies or will testify in a proceeding instituted under this article, or
 - c) Exercises on his own behalf or the behalf of others any right afforded by this article.

Section 9.72 Where Smoking is not Regulated.

- A. Notwithstanding any other provision of this chapter to the contrary, the following areas shall not be subject to the smoking restrictions of this chapter:
 1. Private residences, including porch and yard areas, except when used as a child care, adult day care or health care facility.
 2. Not more than ten percent (10%) of hotel and motel rooms rented to guests shall be designated as smoking rooms. The following standards shall apply:
 - a. All smoking rooms shall be on the same floor, shall be contiguous to the other smoking rooms and shall be configured and ventilated in a manner to restrict the smoke from these rooms from infiltrating into areas where smoking is prohibited under provisions of this article;
 - b. Separate ventilation and HVAC systems that prevent the commingling of air with other rooms, hallways and all other non-smoking areas shall be required; and
 - c. The status of rooms as smoking or non-smoking may not be changed, except to add additional non-smoking rooms.
 3. Retail tobacco stores, where a retail store is utilized primarily for the sale of tobacco products and accessories and in which the sale of other products is merely incidental. Separate ventilation and HVAC systems that prevent the commingling of air with other businesses, common areas, hallways and other non-smoking areas shall be required.
 4. Enclosed meeting or assembly rooms in restaurants, hotels, motels, and other public places while the entire room is being used for a private function provided it has a portable air purification system (defined herein).
- B. Notwithstanding any other provision of this section, any owner, operator, manager, or other person who controls any establishment described in this section may designate the entire establishment as a non-smoking establishment.

Section 9.73 Posting of Signs, Placing of Receptacles

A. Signs:

All signs shall be in letters not less than 1 inch high with a stroke of not less than 1/8 inch on a contrasting background.

1. A place or conveyance regulated by Section 9.69; that is required to be totally non-smoking shall have signs conspicuously posted at all public entrances which state: **“No Smoking – City Ordinance.”**
2. If a place or conveyance regulated by Section 9.69C, permits smoking, it shall post and maintain the sign required in 9.69C.

B. Receptacles:

A place, establishment or conveyance regulated by Sections 9.69B or 9.70 which is partially or totally non-smoking shall have facilities for the extinguishment of smoking materials located no farther than 30' or closer than 15' feet of all public entrances and within all designated smoking areas. The owner, manager, or operator of a place, conveyance or establishment commits an offense if he fails to post signs and provide extinguishment facilities as required by this section.

Section 9.74 Exemptions

- A. Any owner or manager of a business, facility, room, structure, or other establishment existing on the effective date of this Ordinance which is subject to Sections 9.69, 9.71, and 9.73 may apply for an exemption or modification to any provision of this article due to unusual circumstances or conditions. Such exemption may be granted by the City Council, only if the evidence presented by the applicant for exemption demonstrates that:
1. The applicant cannot comply with the provisions of this article for which an exemption is requested without incurring expenses for structural or other physical modifications, other than posting signs, to buildings and structures, or
 2. Due to such unusual circumstances, the failure to comply with the provision for which the exemption is requested will not result in a danger to health or annoyance, inconvenience, or discomfort.

Section 9.75 Penalty for Violation

Any person, firm, corporation, agent, or employee thereof who violates any of the provisions of this article shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined an amount not less than \$25.00 nor more than \$200.00; provided, however, in the event the actor has previously been convicted under this section, the actor shall be fined an amount not less than \$50.00 nor more than \$500.00 for a second conviction hereunder, and shall be fined an amount not less than \$100.00 nor more than \$1,000.00

for a third conviction hereunder and for each conviction thereafter. Each day that a violation is permitted to exist shall constitute a separate offense.

Section 9.76 **Culpability**

There shall be no requirement of a culpable mental state for a violation of this article.

SECTION 2.

This ordinance shall be cumulative of all provisions of ordinances and of the Code of Ordinances of the City of Mansfield, Texas, as amended, except where the provisions of this ordinance are in direct conflict with the provisions of such ordinances and such Code, in which event the conflicting provisions of such ordinances and such Code are hereby repealed.

SECTION 3.

It is hereby declared to be the intention of the City Council that the phrases, clauses, sentences, paragraphs, and sections of this ordinance are severable, and if any phrase, clause sentence, paragraph or section of this ordinance shall be declared unconstitutional by the judgment or decree of any court of competent jurisdiction, such unconstitutionality shall not affect any of the remaining phrases, clauses, sentences, paragraphs, and sections of this ordinance, since the same would have been enacted by the City Council without the incorporation of this ordinance of any such unconstitutional phrase, clause, sentence, paragraph, or section.

SECTION 4.

Any person, firm, partnership, association, or corporation who shall violate any of the provisions of this ordinance shall be guilty of a misdemeanor, and upon conviction thereof in the Municipal Court of the City of Mansfield, Texas, such violation shall be liable for a fine in an amount not to exceed \$1,000.00 in accordance with Section 1 of this ordinance and each and every instance of the violation of this ordinance shall constitute a separate offense and shall be punishable by separate fines for each offense.

SECTION 5.

All rights and remedies of the City of Mansfield are expressly saved as to any and all violations of the provisions of Chapter 9 of the Code of Ordinance of the City of Mansfield, as amended, or any other ordinances affecting smoking 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 6.

The City of Secretary of the City of Mansfield is hereby directed to publish in the official newspaper of the City of Mansfield, the caption, penalty clause, publication clause and effective date clause of this ordinance one (1) time within 10 days after the third and final reading of this ordinance as required by the Charter of the City of Mansfield.

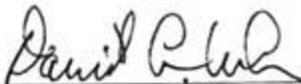
SECTION 7.

This ordinance shall be in full force and effect from and after its passage and publication as required by law, and it is so ordained.

FIRST READING APPROVED ON THIS 8TH DAY OF DECEMBER, 2008.

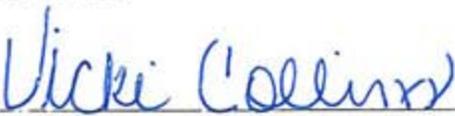
SECOND READING APPROVED ON THIS 26TH DAY OF JANUARY, 2009.

DULY PASSED ON THE THIRD AND FINAL READING BY THE CITY COUNCIL OF THE CITY OF MANSFIELD, TEXAS THIS 9TH DAY OF FEBRUARY 2009.



David L. Cook, Mayor

ATTEST:



Vicki Collins, City Secretary

APPROVED AS TO FORM AND LEGALITY:



City Attorney