

ORDINANCE NO. 1430

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF KILGORE, TEXAS, AMENDING CHAPTER 15, "NUISANCES" OF THE CODE OF ORDINANCES, CITY OF KILGORE, TEXAS, BY ADOPTING REGULATIONS PROHIBITING SMOKING IN PUBLIC PLACES AND IN PLACES OF EMPLOYMENT/WORKSITES, WITH SOME EXCEPTIONS; ESTABLISHING A SEVERABILITY CLAUSE; DECLARING A PENALTY; AND ESTABLISHING AN EFFECTIVE DATE.

WHEREAS, it is the intent of the Kilgore City Council to promote the public health, safety and welfare; and

WHEREAS, municipalities may, under their police powers, enact reasonable regulations to promote the health, safety and general welfare of citizens; and

WHEREAS, the City of Kilgore is a home-rule municipality acting under its Charter adopted by the electorate pursuant to Article 11, Section 5 of the Texas Constitution and Chapter 9 of the Texas Local Government Code; and

WHEREAS, Texas Local Government Code Section 51.072(a) states that a home-rule municipality has full power of self government; and

WHEREAS, Texas Local Government Code Section 51.072(b) provides that the grant of powers to a municipality under the Texas Local Government Code does not prevent by implication or otherwise, the municipality from exercising the authority incident to self-government; and

WHEREAS, Texas Local Government Code Section 51.001(1) provides that the governing body of a municipality may adopt, publish, amend, or repeal an ordinance, rule or police regulation that is for good government, peace, or order of the municipality; and

WHEREAS, Texas Local Government Code Section 51.001(2) provides that the governing body of a municipality may adopt, publish, amend, or repeal an ordinance, rule or police regulation that is necessary or proper for carrying out a power granted by law to the municipality or to an office or department of the municipality; and

WHEREAS, Section 3 of the Kilgore City Charter states that the City of Kilgore may make any and all rules and regulations by ordinances and resolutions; and

WHEREAS, Section 3 of the Kilgore City Charter provides that the City may license and regulate persons, corporations, and associations engaged in any business, occupation, profession or trade; and

WHEREAS, Section 3 of the Kilgore City Charter states that the City may define, prohibit, abate, suppress and prevent all things detrimental to the health, morals, comfort, safety, convenience and welfare of the inhabitants of the City; and

WHEREAS, Section 3 of the Kilgore City Charter states that the City of Kilgore may make and enforce local police, sanitary, and other regulations, and may pass such ordinances as may be expedient for maintaining and promoting the peace, good government and welfare of the City, and for the performance of the functions thereof; and

WHEREAS, Section 3 of the Kilgore City Charter provides that the City shall have all powers that now are, or hereafter may be granted to municipalities by the constitution or laws of Texas, and that all such powers, whether express or implied, shall be exercised and enforced, in the manner prescribed by the Charter, and when not prescribed by the Charter, in such manner as shall be provided by ordinances and resolutions of the City Council; and

WHEREAS, Section 3 of the Kilgore City Charter states that the enumeration of particular powers by the Charter shall not be held or deemed to be exclusive, but in addition to the powers enumerated in the Charter, the City shall have, and may exercise all other powers which, under the constitution and laws of Texas, it would be competent for the Charter specifically to enumerate; and

WHEREAS, Section 2 of the Kilgore City Charter states that pursuant to the provisions of and subject only to the limitations imposed by State law and the Charter, all powers of the City shall be vested in an elective Council, which shall, among other duties, enact legislation; and

WHEREAS, in 2006, the U. S. Surgeon General released a report focusing on the effects of secondhand smoke. Secondhand smoke is composed of side stream smoke (the smoke released from the burning end of a cigarette) and exhaled mainstream smoke (the smoke exhaled by the smoker). Secondhand smoke has been designated as a known human carcinogen by the U.S. Environmental Protection Agency, the National Toxicology Program, and the International Agency for Research on Cancer, and an occupational carcinogen by the National Institute for Occupational Safety and Health; and

WHEREAS, the findings of said report state there is no risk-free level of exposure to secondhand smoke and that breathing even a little secondhand smoke can be harmful to your health; and

WHEREAS, the U. S. Surgeon General has concluded that secondhand smoke causes lung cancer, heart disease, acute respiratory effects and can cause sudden infant death syndrome and other health consequences in infants and children; and

WHEREAS, the simple separation of smokers from nonsmokers within the same airspace does not eliminate the exposure of nonsmokers to secondhand smoke, given that no safe level of exposure to carcinogens has been found; and

WHEREAS, other Texas cities have enacted similar smoking ordinances prohibiting smoking in all public places including Abilene, Austin, Baytown, Beaumont, Benbrook, Copperas Cove, El Paso, Laredo, Marshall, Pasadena, Pearland, Plano, Socorro, Southlake, Tyler, Vernon, and Victoria; and

WHEREAS, many health professionals in Kilgore have expressed concern for stronger smoking regulations and a need to eliminate exposure to secondhand smoke in public places; and

WHEREAS, the Kilgore City Council has conducted two public hearings to receive community input about current and potential smoking regulations both in verbal and written communications; and

WHEREAS, accordingly, the City Council recognizes that secondhand smoke poses a serious public health hazard, that nonsmokers need protection from secondhand smoke exposure and that therefore, regulation by the City Council of the burning of tobacco in public places and places of employment is imperative in order to protect the public health and welfare of the citizens of the City of Kilgore; and

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

PART I: That Kilgore City Code Chapter 15, Nuisances, Article IV, "Smoking Prohibited", is hereby adopted to read as follows:

ARTICLE IV. SMOKING PROHIBITED

Sec. 15-45. Purpose.

The purpose of this Article is to (1) improve and protect the public's health by eliminating smoking in Public Places and Places of Employment/Workplaces; (2) promote the right of nonsmokers to breathe smoke-free air; and (3) recognize that the need to breathe smoke free air shall have priority over the choice to smoke.

Sec. 15-46. Definitions.

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

a. *Bar* means any enclosed establishment that is devoted to the serving of alcoholic beverages for consumption by guests on the premises and in which the serving of food is only incidental to the consumption of such beverages, and where minors are not allowed admittance unless they are accompanied by a parent or guardian. For purposes of this definition, the serving of food is incidental to the consumption of alcoholic beverages if the gross receipts from the sale of food is fifty percent (50%) or less of the annual gross receipts of the establishment.

b. *Business* means any 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.

c. *Employee* means any person who is employed by any employer in consideration for direct or indirect monetary wages or profit.

d. *Employer* means any person, partnership, corporation, including a municipal corporation, or non-profit entity, which employs the services of one or more individual persons.

e. *Enclosed Area* means all space between a floor and ceiling which is enclosed on all sides by solid walls or windows (exclusive of door or passage ways) which extend from the

floor to the ceiling, including all space therein screened by partitions which do not extend to the ceiling or are not solid.

f. *Place of Employment/Workplace* means any enclosed area under the control of a public or private employer which employees normally frequent during the course of employment, including, but not limited to, work areas, employee lounges and restrooms, conference and classrooms, employee cafeterias and hallways. A private residence is not a Place of Employment unless it is used as a child care, adult day care or health care facility.

g. *Private Organization* means an entity whether incorporated or not, which is the owner, lessee, or occupant of a building or portion thereof used exclusively for such organization's purposes, which is operated solely for a recreational, fraternal, social, patriotic, political, benevolent, or athletic purpose, but not for pecuniary gain, and which only sells alcoholic beverages incidental to its operation. The affairs and management of the organization are conducted by a board of directors, executive committee, or similar body chosen by the members at an annual meeting. The organization has established bylaws and/or a constitution to govern its activities. The organization has been granted an exemption from the payment of federal income tax as a non-profit organization under 26 U.S.C. Section 501. The term "Private Organization" shall not include any portion of a building or premises, whether owned or leased by a non-profit corporation, when said portion is in use by an entity that is not a non-profit corporation organized under 26 U.S.C. Section 501.

h. *Private Place* means any enclosed area to which the public is not invited or in which the public is not permitted, including but not limited to, personal residences, private clubs or personal automobiles. A privately-owned business, open to the public, is not a private place.

i. *Public Place* means any enclosed area to which the public is invited or in which the public is permitted, including but not limited to, banks, educational facilities, health facilities, laundromats, public transportation and affiliated facilities, reception areas, production and marketing establishments, retail service establishments, retail stores and malls, theaters and waiting rooms. A private residence is not a public place.

J. *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 for sale food to the public, guests, or employees, as well as kitchens and catering facilities in which food is prepared on the premises for serving elsewhere.

k. *Retail Tobacco Store* means a retail store utilized primarily for the sale of tobacco products and accessories and in which the sale of other products is merely incidental. For purposes of this article, other products that are merely incidental means not exceeding ten percent (10%) of annual gross sales. Sales of incidental products shall not include the sale of alcohol regardless of percentage of total gross sales.

l. *Service Line* means any indoor line at which one (1) or more persons are waiting for or receiving service of any kind, whether or not such service involves the exchange of money.

m. *Smoking* means inhaling, exhaling, burning or carrying any lighted cigar, cigarette, pipe, weed, or plant in any manner or in any form.

n. *Sports Arena* means sports pavilions (football, baseball, softball, and soccer), gymnasiums, health spas, boxing arenas, swimming pools, roller and ice rinks, bowling alleys

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.

Sec. 15-47. Prohibition of Smoking in Public Places.

a. Smoking shall be prohibited in all places of employment or workplaces and enclosed public places within the City of Kilgore, including, but not limited to, the following places:

1. Elevators.
2. Restrooms, lobbies, reception areas, hallways and any other common-use areas.
3. Buses, bus terminals, taxicabs, train stations, and other facilities and means of public transit under the authority of the City of Kilgore, as well as ticket, boarding, and waiting areas of public transportation facilities.
4. Service lines.
5. Retail stores and shopping malls.
6. All enclosed areas available to and customarily used by the general public in all businesses, including but not limited to, attorneys offices and other offices, banks, Laundromats, hotels and motels.
7. Bars, restaurants, and nightclubs – unless 50% of its revenue is generated by alcohol sales.
8. Galleries, libraries, zoos, and museums.
9. Any facility which is primarily used for exhibiting any motion picture, stage, drama, lecture, musical recital or other similar performance, except that performers may smoke when the smoking is part of a stage production.
10. Indoor sports arenas and convention halls.
11. Every room, chamber, place of meeting or public assembly, under the control of any board, council, commission, committee, including joint committees, or agencies, of the City of Kilgore during such time as a public meeting is in progress.
12. Waiting rooms, hallways, wards and semiprivate rooms of health facilities, including, but not limited to, hospitals, clinics, physical therapy facilities, doctors offices, and dentists offices.
13. Lobbies, hallways, and other common areas in apartment buildings, condominiums, trailer parks, retirement facilities, nursing homes, and other multiple-unit residential facilities.
14. Polling places.
15. Bingo facilities and bowling alleys.
16. Sexually oriented businesses – unless 50% of its revenue is generated by alcohol sales.
17. Places of Employment/Workplaces.

Sec. 15-48. Prohibition of Smoking in Places of Employment/Workplace and within a Distance of Thirty Feet of Places where Smoking is Prohibited.

a. It shall be the responsibility of employers to provide a smoke-free place of employment for all employees.

b. Smoking shall be prohibited in all indoor and outdoor areas used by employees, in Places of Employment without exception. This includes common work areas, auditoriums, classrooms, conference and meeting rooms, private offices, elevators, hallways, medical facilities, cafeterias, employee lounges, stairs, restrooms, vehicles, and all other enclosed facilities.

c. Each employer having control of any enclosed Place of Employment/Workplace shall post a copy of Section 15-52 in the Place of Employment within thirty (30) calendar days after the effective date of this Article and in the future prior to receiving any required Certificate of Occupation from the City.

Sec. 15-49. Prohibition of Smoking in Specified Outdoor Areas.

Smoking shall be prohibited in the following outdoor areas:

- a. Boarding and waiting areas of public transportation facilities.
- b. City parks, playgrounds, and recreation areas.

Sec. 15-50. Reasonable Distance. Prohibition of Smoking within Distance of Thirty (30) feet of Public Place or Place of Employment/Workplace.

Smoking is prohibited within a distance of not less than thirty (30) feet outside entrances, operable windows, and ventilation systems of Enclosed Areas where smoking is prohibited in any Public Place or Place of Employment/Workplace.

Sec. 15-51. Exemptions from Prohibition.

Notwithstanding any other provision of this Article to the contrary, the following areas shall not be subject to the smoking restrictions of this Article:

- a. A private residence, unless it is used as a child care, adult daycare or health care facility.
- b. A Retail Tobacco Store.
- c. A Private Organization, such as a country club.
- d. Facilities and property otherwise defined by this ordinance that are under the ownership, custody or control of another governmental or educational institution.
- e. Bars or Sexually Oriented Businesses if 50% of their revenue is generated from alcohol sales.
- f. Outdoor areas, including outdoor patios, that are adjacent to bars or restaurants and that are served by employees of such bars or restaurants, but which are at least thirty (30) feet from outside entrances, operable windows, and ventilation systems of Enclosed Areas where smoking is prohibited by this Article. For purposes of this subsection, the term "outdoor area" shall mean an outdoor area that does not have a roof, and has at least one side which does not extend to the ceiling or is not solid.

Sec. 15-52. Posting of Signs.

a. The owner, manager or other person having control of a Public Place or Place of Employment/Workplace or other area where smoking is prohibited by this Article shall have a conspicuously posted sign clearly stating NO SMOKING or displaying the international No Smoking symbol (consisting of a pictorial representation of a burning cigarette enclosed in a red circle with red bar across it). The signs shall have bold lettering of not less than one (1) inch in

height and must be posted at each entrance and within the building or other areas where smoking is prohibited.

b. All ashtrays and other smoking paraphernalia shall be limited in facilities to that required for the enforcement of extinguishing of smoking materials in Public Places and Places of Employment.

Sec. 15-53. Enforcement.

a. Enforcement of this Article shall be by City employees and/or contractors as designated by the City Manager or designee.

b. Notice of the provisions set forth in this Article shall be given to all applicants for a certificate of occupancy or any other license to operate a business in the City of Kilgore.

c. Any person may register a complaint under this Article to initiate enforcement with any agency or official designated herein.

d. The above designated enforcement persons shall, while an establishment is undergoing otherwise mandated inspections, inspect for compliance with this Article.

e. Any owner, manager, operator or employee of any establishment regulated by this Article shall be responsible for informing persons violating this Article of the provisions.

Sec. 15-54. Non-retaliation.

No person or employee shall discharge, refuse to hire or in any manner retaliate against any employee, applicant for employment or customer because such employee, applicant or customer exercises any right to a smoke-free environment afforded by this Article.

Sec. 15-55. Violations and Penalties.

a. It shall be unlawful for the owner, manager or other person having control of a Public Place or Place of Employment or other area where smoking is prohibited by this Article to allow smoking or to fail to comply with any of the provisions of this Article.

b. It shall be unlawful for any person to smoke in any area where smoking is prohibited by the provisions of this Article, or to violate any provision of this Article.

c. Any person who violates any provision of this Article shall be guilty of a misdemeanor and shall be punished by a fine of up to the maximum allowed by law. Each day such violation shall continue or be permitted shall be deemed a separate offense. It is hereby declared that the culpable mental state required by Texas Penal Code Section 6.02 or successor, is specifically negated and clearly dispensed with, and an offense under this Article is declared to be a strict liability offense.

Sec. 15-56. Other Applicable Laws.

This Article shall not be interpreted nor construed to permit smoking where it is otherwise restricted by other applicable laws.

Sec. 15-57 to 15-67. Reserved.

PART 2: That if any provision or any section of this ordinance shall be held to be void or unconstitutional, such holding shall in no way affect the validity of the remaining provisions or sections of this ordinance, which shall remain in full force and effect.

PART 3: This ordinance shall become effective 30 days after approval and publication as required by law.

ADOPTED this the 9th day of June, 2009

CITY OF KILGORE, TEXAS

/s/

JOE T. PARKER, MAYOR

ATTEST:

/s/

KAREN CUSTER, CITY CLERK

APPROVED AS TO FORM AND EFFECT:

/s/

ROBERT G. SCHLEIER, JR., CITY ATTORNEY