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Referred to

March 27, 2007
Date

ORDINANCE 2007-O-06

AN ORDINANCE TO REPEAL AND REENACT FITCHBURG ORD. SECTION 14.10:
THE SMOKE-FREE FITCHBURG ORDINANCE

INTENT AND PURPOSE. The Common Council of the City of Fitchburg hereby finds that:

WHEREAS, smoking of cigarettes and using tobacco products is hazardous to an individual's health; and

WHEREAS, the U.S. Surgeon General has concluded that secondhand smoke exposure causes disease and premature death or disease in children and adults who do not smoke; and

WHEREAS, there is no risk-free level of exposure to secondhand smoke; and

WHEREAS, establishing smokefree workplaces is the only effective way to ensure that secondhand smoke exposure does not occur in the workplace, because ventilation and other air cleaning technologies cannot completely control exposure to secondhand smoke; and

WHEREAS, this ordinance is adopted for the purpose of protecting the public health, safety, comfort and general welfare of the people of the City of Fitchburg, especially recognizing the rights of nonsmokers who constitute a majority of the population; educating citizens affected by this ordinance; and assisting owners, operators; and managers in maintaining compliance; and

WHEREAS, a total prohibition on the smoking of tobacco products could have the effect of closing a currently operating establishment where a primary business purpose of the establishment is the smoking of tobacco products on premises; and

WHEREAS, a total prohibition on smoking or the use of tobacco products may have a disparate detrimental effect on certain existing businesses within the City; and

WHEREAS, the City seeks to ameliorate some of the potential detrimental impact on those currently operating businesses where a total prohibition on smoking and the use of tobacco products could have the effect of closing a currently operating establishment or cause a disparate detrimental effect on certain existing businesses; and

WHEREAS, the City has been actively engaged in the creation of an ordinance prohibiting the use of tobacco since June of 2006.

NOW, THEREFORE, the Common Council of the City of Fitchburg ordains as follows:

The Fitchburg Code of Ordinances is modified as follows:

1. Ord. Chapter 7, Exhibit A shall be modified as follows:
 - A. The title of Section 14.10 shall be amended to read “Smoking Prohibited in Certain Areas.”
 - B. The Enforcement Officials responsible for the enforcement of Section 14.10 shall be the Dane County Division of Public Health and the Police Department.
2. Ord. Chapter 7, Exhibit B shall be modified as to amend the title to Section 14.10 to read “Smoking Prohibited in Certain Areas.”
3. Ord. Sec. 14.10 is hereby repealed and replaced by:

14.10 SMOKING PROHIBITED IN CERTAIN AREAS

- (1) **Purpose.** The Common Council of the City of Fitchburg finds and declares that the purposes of this ordinance are:
 - (a) To protect the public health and welfare by prohibiting smoking in public places and places of employment; and
 - (b) This ordinance shall be liberally construed so as to further its purpose. It shall not be interpreted or construed to permit smoking where smoking is otherwise restricted by applicable laws.
- (2) **Definitions.**
 - (a) **Bed and breakfast establishment** has the meaning set forth in Sec. 254.61(1), Wis. Stats.
 - (b) **Chewing tobacco** means snuff, snuff flour, cavendish; plug and twist tobacco; fine cut and other chewing tobaccos; refuse scraps, clippings, cuttings and sweepings of tobacco and other kinds and forms of tobacco prepared in such manner as to be suitable for chewing.
 - (c) **Childcare facility** means any state licensed or county certified child care facility including, but not limited to licensed family day care or licensed group day care centers, licensed day camps, certified school-age programs and Head Start programs.
 - (d) **Cigarette** means any roll of tobacco wrapped in paper or any substance other than chewing tobacco or tobacco products.
 - (e) **City buildings** means all City-owned buildings and those portions of buildings leased and operated by the City.

- (f) **Common areas of buildings** means all areas not part of a tenant's leased premises, including but not limited to lobbies, community rooms, hallways, laundry rooms, stairwells, elevators, enclosed parking facilities, pool areas, and restrooms contiguous thereto.
- (g) **Common areas of malls** means those areas within a mall customarily accessible to patrons.
- (h) **Educational facility** means any building used principally for educational purposes in which a school is located or a course of instruction or training program is offered that has been approved or licensed by a state agency or board.
- (i) **Employee** means any person who is employed by any employer for direct or indirect monetary wages or profit, including those full time, part-time, temporary or contracted for from a third party; employee also means any person who serves as a volunteer for a business or nonprofit entity.
- (j) **Employer** means any person, partnership, limited liability company, corporation, or other entity, including a public or non-profit entity who employs the services of one (1) or more individual persons.
- (k) **Enclosed area** means all space between a floor and ceiling that is enclosed on all sides by solid walls or windows (exclusive of door or passage ways) that extend from floor to ceiling, including all space therein screened by partitions that do not extend to the ceiling, are not solid, or are landscaping or similar structures.
- (l) **Entrance** means a doorway and adjacent area that gives direct access to a building from a contiguous street, plaza, sidewalk or parking lot.
- (m) **Existing** means the establishment has been granted an alcohol license by the City on or before June 1, 2006 and that both the individual licensee (or individual agent in the case of a corporation, partnership or LLC) as listed on the alcohol license and the owners of the real property on which the establishment is located have not changed since June 1, 2006. Any change in either the licensee or the owner of real estate shall cause the establishment to cease to meet the definition of "Existing". In the event the "owner of real estate" is a corporation, partnership or LLC, any change in the ownership of the corporation, partnership or LLC owning the real estate, excluding the purchase or transfer of a share of ownership from a current owner to another current owner, shall cause the establishment to cease to meet the definition of "Existing". Any expansion of the establishment shall cause the establishment to cease to meet the definition of "Existing". Any remodeling, repair or renovation of the establishment where the total cost of the remodeling, repair or renovation exceeds

\$20,000, other than renovations necessary to create the enclosure described in 14.10(1)(n)(3) below, shall cause the establishment to cease to meet the definition of “Existing”.

- (n) **Existing Bowling Center** means an establishment devoted primarily to recreational bowling where all of the following apply:
 - 1. The Bowling Center is Existing as defined by this ordinance;
 - 2. The Bowling Center allows smoking in a bar area no greater than 4000 square feet; and
 - 3. The area where smoking is allowed is separated from the remainder of the establishment by a walled or glass enclosure.
- (o) **Existing Small Tavern** means a tavern where all of the following apply:
 - 1. The Small Tavern is Existing as defined by this ordinance;
 - 2. The exterior footprint of the establishment is no greater than 5000 square feet; and
 - 3. The sales of alcohol constitute at least 75% of gross revenues.
- (p) **Food** means a raw, cooked, or processed edible substance or ingredient used or intended for use or for sale in whole or in part for human consumption. It does not include ice, beverages or chewing gum.
- (q) **Health care facility** has the meaning set forth in Sec. 155.01(6), Wis. Stats.
- (r) **Hotel and motel** have the meaning set forth in Sec. 254.61(3), Wis. Stats.
- (s) **Mall** means an enclosed, indoor area containing common areas and discrete businesses primarily devoted to the retail sale of goods and services.
- (t) **Medical services** has the meaning set forth in Sec. 647.01(6), Wis. Stats.
- (u) **Nonsmoking** means smoking is prohibited.
- (v) **Person in charge** means the person who ultimately controls, governs or directs the activities aboard a public conveyance or within or at a place where smoking is regulated under this section, regardless of the person's status as owner or lessee.
- (w) **Place of employment** means an enclosed area controlled by the employer that 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' within the meaning of this ordinance unless used as a childcare facility, an adult daycare facility or a healthcare facility.

- (x) **Private residence** means premises owned, rented or leased for temporary or permanent habitation.
- (y) **Public place** means any enclosed area to which the public is invited or in which the public is permitted. A private residence is not a public place.
- (z) **Restaurant** means an establishment defined in Sec. 254.61(5), Wis. Stats. This includes restaurants within a mall and adjacent seating. Restaurant shall also include a bar or tavern area within a restaurant.
- (aa) **Room** means a space within a building completely enclosed with walls, partitions, floor and ceiling, except for openings for light, ventilation, ingress and egress.
- (bb) **Smokefree** means absence from the ambient air of the smoke by-product from the burning, inhaling, exhaling, or carrying of a lighted cigarette, cigar, pipe, weed, plant, or other combustible substance in any manner in any form.
- (cc) **Smoking** means to smoke or carry a lighted pipe, cigar, cigarette or tobacco-related products in any form.
- (dd) **Sports arena** means sports pavilions, stadiums, gymnasiums, health spas, boxing arenas, swimming pools, roller and indoor ice rinks, and bowling centers.
- (ee) **Tavern** means any establishment in which fermented malt beverages or intoxicating liquors are sold for consumption upon said premises and whose sale of alcohol beverages accounts for more than fifty percent (50%) of the establishment's gross receipts of the most recent licensing year.
- (ff) **Tobacco Bar** means a tavern that generates ten percent (10%) or more of its total annual gross income from the on-site sale of tobacco products, not including any sales from vending machines.
- (gg) **Tobacco product** means cigars; cheroots; stogies; periques; granulated, plug cut, crimp cut, ready-rubbed and other smoking tobacco; shorts; refuse scraps, clippings, cuttings and sweepings of tobacco and other kinds

and forms of tobacco prepared in such a manner, as to be suitable for smoking in a pipe or otherwise smoking; but tobacco product does not include cigarettes or chewing tobacco.

- (3) **Prohibition of Smoking in Public Places.** Except as otherwise provided, it shall be unlawful for any person to smoke cigarettes or tobacco products in public places, including but not limited to the following:
- (a) Elevators and enclosed stairwells of City parking ramps
 - (b) Public forms of transportation, including but not limited to motor buses, taxicabs, or other public passenger vehicles
 - (c) Theatres, libraries, museums, auditoriums, and convention halls that are used by or open to the public
 - (d) Any childcare facility
Incorporated herein by reference are the following Wisconsin statutory and administrative code sections and any amendments or renumbering thereof: Sec. 101.123(1)(ad) and (2)(bm), Wis. Stats; Secs. HFS 45.02(4), 45.06(8)(g), 46.03(13), 46.06(2)(h), and 46.08(2)(c), Wis. Admin. Code.
 - (e) Retail stores
 - (f) Health care facilities
 - (g) Waiting rooms, hallways, rooms of health care laboratories
 - (h) Waiting rooms, hallways, rooms in offices of any physician, dentist, psychologist, chiropractor, optometrist or optician, or other medical services provider
 - (i) Meeting and conference rooms in which people gather for educational, business, professional, union, governmental, recreational, political or social purposes
 - (j) Polling places
 - (k) Service lobbies, waiting areas, and the common areas open to the public of financial institutions, business and professional offices, and multi-unit commercial facilities
 - (l) Self-service laundry facilities
 - (m) Enclosed, indoor areas of restaurants

- (n) Common areas of malls
 - (o) Public bus and transfer point shelters
 - (p) Common areas of buildings that contain three (3) or more rental units. Written Rental Agreements shall include reference to this subdivision. Subparagraph (9)(b) shall not apply to this subdivision.
 - (q) City buildings
 - (r) City-owned or leased motor vehicles
 - (s) Sports arenas
 - (t) Enclosed, indoor areas of taverns
 - (u) Bed and breakfast establishments, hotels and motels, except as provided in 5(d)
 - (v) Educational facilities
- (4) **Prohibition of Smoking in Places of Employment.**
- (a) It shall be unlawful for any person to smoke cigarettes or tobacco products in places of employment.
 - (b) Every building that is a place of employment shall have at least one entrance that is smokefree. For buildings with fewer than four (4) entrances, no more than one entrance may be designated as a smoking entrance. For buildings with four (4) or more entrances, no more than twenty-five percent (25%) of all entrances may be designated as a smoking entrance.
- (5) **Exceptions.** The following areas shall not be subject to the smoking restrictions of this section:
- (a) Any stage of any theater when used in connection with any theatrical performance and so noticed in the program
 - (b) Tobacco bars, subject to the following:
 - 1. Smoking of tobacco products and cigarettes is permitted;
 - 2. Service of food is not permitted;
 - 3. The tobacco bar was in existence on June 1, 2006 and has remained at the same physical location since June 1, 2006;

4. To qualify for this exemption the owner must file written proof prescribed and sworn to by a Certified Public Accountant certifying the tobacco bar's total gross income and the percentage of tobacco product sales from the tobacco bar. The City Clerk or City Attorney may at any time request further information, including an audit of the tobacco bar's records, if there is reason to believe the financial data may not be accurate;
 5. Tobacco bars shall display signs, in accordance with the standards in Paragraph (6), that state that cigars, cigarettes and pipes may be smoked in the tobacco bar, and warning of the dangers of secondhand smoke, in language and form as approved by the Public Safety and Human Services Committee.
- (c) Existing Bowling Centers and Existing Small Taverns subject to the following:
1. For an Existing Small Tavern to qualify for this exemption the owner must file written proof prescribed and sworn to by a Certified Public Accountant certifying the Existing Small Tavern's total gross income and the percentage of alcohol product sales from the Existing Small Tavern. The City Clerk or City Attorney may at any time request further information, including an audit of the Existing Small Tavern's records, if there is reason to believe the financial data may not be accurate; and
 2. The exemption for Existing Bowling Centers and Existing Taverns shall expire on the earlier of:
 - i. The date the Existing Bowling Center or Existing Small Tavern ceases to meet the definition of Existing; or
 - ii. April 1, 2011.
- (d) Hotel and motel rooms that are rented to guests and are designated as smoking rooms; provided, however, that not more than ten percent (10%) of rooms rented to guests in a hotel or motel may be so designated. All smoking rooms on the same floor must be contiguous and smoke from these rooms must not infiltrate into areas where smoking is prohibited under the provisions of this ordinance. The status of rooms as smoking or nonsmoking may not be changed, except to add additional nonsmoking rooms.
- (6) **Signage.**
- (a) Signs prohibiting, prohibiting except in designated areas, or permitting smoking, as the case may be, shall be posted conspicuously at every building, structure, or public place entrance and in prominent locations throughout the premises by the proprietor, employer or other person in

charge of each building, structure or public place specified in Paragraphs 3-6. Signs in outdoor areas designated as nonsmoking shall be placed so that the public has reasonable notice of the prohibition. Signs shall reference "Fitchburg Ord. 14.10".

- (b) Restaurants and taverns shall post, in a conspicuous place at each entrance normally used by the public, a sign not smaller than eleven by eight and one-half (11" x 8 ½") inches indicating they are smokefree. Each sign and the language contained therein shall be clearly visible from a distance of at least ten (10) feet. The signage lettering shall be in bold and the lettering shall be a minimum of two (2) inches in height. Each sign shall contain the phone number for the Dane County Division of Public Health and the non-emergency number for the Police Department. Signs shall reference "Fitchburg Ord. 14.10".
- (c) It shall be unlawful for any person to remove, deface, or destroy any sign required by this Section, or to smoke in any place where any such sign is posted.

(7) **Enforcement.**

- (a) The Director of the Dane County Division of Public Health and the Chief of Police or their designees, shall have the power, whenever they may deem it necessary, to enter upon the premises named in this section to ascertain whether the premises are in compliance with this ordinance. A compliance time of not less than one week shall be granted. Enforcement may be by citation, as permitted by Sec. 7.03, or through issuance of a summons and complaint.
- (b) The proprietor, employer or other person in charge of premises regulated hereunder, upon either observing or being advised of a violation, shall make reasonable efforts to prevent smoking in prohibited areas by:
 - 1. Approaching smokers who fail to voluntarily comply with this section and requesting that they extinguish their cigarette or tobacco product and refrain from smoking, or
 - 2. Refusing service to anyone smoking in a prohibited area.
- (c) Any person who desires to register a complaint under this section may contact the Dane County Division of Public Health or the Police Department.
- (d) Ashtrays, cigarette vending machines and other smoking paraphernalia shall not be located in areas where smoking is prohibited.

(8) **Retaliation Prohibited.** No person shall discharge, refuse to hire, refuse to serve or in any other manner retaliate against any employee, applicant for employment,

customer, service user, business patron or any other person because that person exercises any rights afforded by this section.

- (9) **Clean Indoor Air.**
 - (a) **Intent and Construction.** The City of Fitchburg finds that it is in the interests of the health, safety and welfare of the community to adopt by reference Sec. 101.123, Wis. Stats., and subsequent amendments, additions and recodifications. It is the intent of the Common Council that where there may be conflict between Sec. 101.123, Wis. Stats. and Sec. 14.10, that the section most restrictive of smoking and tobacco use shall apply. This ordinance shall not be construed to mean that progressive discipline of City employees for violations of laws, rules, and regulations is only authorized where explicitly provided by ordinance.
 - (b) **Penalty.** The penalties provided by Sec. 101.123, Wis. Stats. shall be in addition to the penalties provided for violation of Sec. 14.10 when a person has violated both laws. In addition to the penalties provided by Sec. 14.10 and Sec. 101.123, Wis. Stats., any City employee who violates any provision of Sec. 14.10 or Sec. 101.123, Wis. Stats., may also be subject to progressive discipline by his or her employer.
- (10) **Severability.** The provisions of this section are severable. If any provision of this section is held to be invalid or unconstitutional or if the application of any provision of this section to any person or circumstance is held to be invalid or unconstitutional, such holding shall not affect the other provisions or applications of this section which can be given effect without the invalid or unconstitutional provisions or applications. It is hereby declared to be the intent of the Common Council that this section would have been adopted had any invalid or unconstitutional provision or applications not been included herein.
- (11) **Adopted Date.** This Sec. 14.10 was duly adopted by the City of Fitchburg Common Council on _____.
- (12) **Effective Date.** This Sec. 14.10 shall take effect on April 1, 2008.

Adopted this ____ day of _____, 2007.

Tanya O'Malley, Deputy City Clerk

Thomas Clauder, Mayor

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