

## Chapter 185. Board of Health Regulations

### Article X. Sale and Use of Tobacco and Nicotine Delivery Products

#### § 185-56 FINDINGS AND PURPOSE:

##### Findings

Tobacco use is the leading preventable cause of death in the United States. Billions of dollars are expended annually for health care costs associated with treating tobacco-related illness. The 1986 Surgeon General's report "The Health Consequences of Involuntary Smoking," documented the risk to nonsmokers as a result of exposure to environmental tobacco smoke. In 1993, the Environmental Protection Agency classified environmental tobacco smoke as a human carcinogen.

Countless scientific studies have documented the public health and environmental hazards of both smoking and exposure to the by-products of smoking. Not only is tobacco smoke a major cause of indoor air pollution, but breathing secondhand smoke is a cause of lung cancer, cardiovascular diseases, and respiratory illness. At special risk are children, the elderly, and individuals with heart and blood vessel disease and impaired lung function due to conditions such as asthma, bronchitis and emphysema. In 2007, Kelpis et al. (J. Air & Waste Management Association, 57:522-534) reported that outdoor tobacco smoke levels can be substantial and potentially harmful to exposed individuals. We are faced with a public health issue that is both profound and urgent. The right of an individual to choose to smoke is not at issue here. The issue addressed here is the right of individuals to breathe smoke-free air in public places and in the workplace.

Because tobacco use is a leading cause of death and because there is overwhelming evidence that nicotine is addictive, it would be prudent to discourage the use of tobacco, especially by young people, in consideration of the fact that approximately 90% of all adult smokers began smoking before the age of twenty. It is estimated that more than 3,000 young people begin smoking every day in the U.S. and 14.1% of these young smokers usually obtained tobacco products by buying them in a store (i.e. convenience store, supermarket, or discount store) or gas station, despite state laws prohibiting the sale of tobacco products to minors. Many non-cigarette tobacco products, such as cigars and cigarillos, can be sold in a single "dose" thereby incurring a relatively low tax as compared to cigarettes. These are available in fruit, candy and alcohol flavors and are popular among youth. Nicotine solutions, which are consumed via electronic or battery-operated delivery smoking devices such as electronic cigarettes, are sold in dozens of flavors, such as cotton candy and bubble gum, that appeal to youth. The U.S. Department of Health and Human Services has concluded that nicotine is as addictive as cocaine or heroin and the Surgeon General has determined that nicotine exposure during adolescence may have lasting adverse consequences for brain development. Therefore, access to tobacco products by individuals under the age of 21 has become a major public health problem.

In addition to causing adverse effects on health, tobacco products contribute to environmental pollution, particularly in coastal communities, where cigarettes and cigarette filters represent the greatest contributor to non-biodegradable litter found on

beaches and the banks of marine estuaries (Executive Office of Energy and Environmental Affairs, Massachusetts COASTSWEEP). Furthermore, cigarette butts (smoked and unsmoked, with and without tobacco) have been reported to be acutely toxic to both fresh and saltwater fish (Slaughter, et al., Tobacco Control 2011; 20(Suppl 1):i25-i29 doi: 10.1136/tc2010.040170). There is also concern regarding toxicity due to ingestion of cigarettes and cigarette butts by children (US Centers for Disease Control and Prevention; *MMWR* 1997; 46:125-8).

### **Purpose**

The first purpose of this regulation is to protect the public health and welfare by restoring and preserving the right of all citizens to breathe clean air. Exposure to secondhand smoke presents a serious public health risk. Of particular concern is the workplace environment of persons who may be subjected to sustained, involuntary exposure to hazardous materials in the air. This regulation prohibits smoking in public places and in the workplace, both as defined in § **185-58**.

A second purpose is to discourage our younger citizens from smoking in the first place. Vending machines afford the opportunity for the sale of tobacco products to minors. This regulation prohibits the use of vending machines for the sale of tobacco products and establishes regulations relative to the sale and distribution of tobacco products in the Town of Orleans.

Now, therefore it is the intention of the Orleans Board of Health to regulate the sale and use of tobacco products.

### **§ 185-57 AUTHORITY**

This regulation is promulgated under the authority granted to the Orleans Board of Health pursuant to Massachusetts General Laws Chapter 111, Section 31 that states "boards of health may make reasonable health regulations." It is also promulgated pursuant to Massachusetts General Laws Chapter 270, Section 22 (j), which states in part "nothing in this section shall permit smoking in an area in which smoking is or may hereafter be prohibited by law, including, without limitation, any other law or health regulation. Nothing in this section shall preempt further limitation of smoking by the commonwealth or political subdivision of the commonwealth."

### **§ 185-58 DEFINITIONS**

For the purpose of this regulation, the following words shall have the following meanings:

#### **Blunt Wrap**

Any tobacco product manufactured or packaged as a wrap or as a hollow tube made wholly or in part for tobacco that is designed or intended to be filled by the consumer with loose tobacco or other fillers.

#### **Business Agent**

An individual who has been designated by the owner or operator of any establishment to be the manager or otherwise in charge of said establishment.

#### **Cigar**

Any roll of tobacco that is wrapped in leaf tobacco or in any substance containing tobacco with or without a tip or mouthpiece not otherwise defined as a cigarette under Massachusetts General Law, Chapter 64C, Section 1, Paragraph 1.

**Cigar Wrap – see Blunt Wrap**

**Characterizing Flavor**

A distinguishable taste or aroma, other than the taste or aroma of tobacco, menthol, mint or wintergreen, imparted or detectable either prior to or during consumption of a tobacco product or component thereof, including, but not limited to, tastes or aromas relating to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb or spice; provided, however, that no tobacco product shall be determined to have a characterizing flavor solely because of the provision of ingredient information or the use of additives or flavorings that do not contribute to the distinguishable taste or aroma of the product.

**Compensation**

Money, gratuity, privilege, or benefit received from an employer in return for work performed or services rendered.

**Component Part**

Any element of a tobacco product, including, but not limited to, the tobacco, filter and paper, but not including any constituent.

**Constituent**

Any ingredient, substance, chemical or compound, other than tobacco, water or reconstituted tobacco sheet, that is added by the manufacturer to a tobacco product during the processing, manufacturing or packaging of the tobacco product. Such term shall include a smoke constituent.

**Distinguishable**

Perceivable by either the sense of smell or taste.

**E-Cigarette**

Any electronic device, not approved by the United States Food and Drug Administration, composed of a mouthpiece, heating element, battery and/or electronic circuits that provides a vapor of liquid nicotine to the user, or relies on vaporization of any liquid or solid nicotine. This term shall include such devices whether they are manufactured as e-cigarettes, e-cigars, e-pipes or under any other product name.

**Educational Institution**

Any public or private college, school, professional school, scientific or technical institution, university or other institution furnishing a program of higher education.

**Employee**

Any individual who performs services for an employer; or an individual or person who performs a service for compensation for an employer at the employer's workplace, including a contract employee, temporary employee, and independent contractor who performs a service in the employer's workplace for more than a de minimis amount of time.

**Employer**

A person, partnership, association, corporation, trust, or other organized group that utilizes the services of one (1) or more employees; or an individual, person, partnership, association, corporation, trust, organization, school, college, university or other educational institution or other legal entity, whether public, quasi-public, private, or non-profit which uses the services of one(1) or more employees at one (1) or more workplaces, at any one (1) time, including the Town of Orleans.

**Enclosed/Indoor**

A space bounded by walls, sides, screen, vinyl or acrylic weatherization panels, with or without windows or fenestrations, continuous from floor to ceiling and enclosed by one (1) or more doors, including but not limited to an office, function room or hallway. Enclosed space does not include "outdoor space" as defined in this regulation.

**Facility**

Any real property (including any abutting real property) and any buildings thereon.

**Flavored Tobacco Product**

Any tobacco product or component part thereof that contains a constituent that has or produces a characterizing flavor. A public statement, claim or indicia made or disseminated by the manufacturer of a tobacco product, or by any person authorized or permitted by the manufacturer to make or disseminate public statements concerning such tobacco product, that such tobacco product has or produces a characterizing flavor shall constitute presumptive evidence that the tobacco product is a flavored tobacco product.

**Health Care Institution**

An individual, partnership, association, corporation or trust or any person or group of persons that provides health care services and employs health care providers licensed, or subject to licensing, by the Massachusetts Department of Public Health under M.G.L. c. 112 or a retail establishment that provides pharmaceutical goods and services and subject to the provisions of 247 CMR 6.00. "Health care institution" includes, but is not limited to, hospitals, clinics, health centers, pharmacies, drug stores, doctor offices, optician/optometrist offices and dentist offices.

**Minimum Legal Sales Age (MLSA)**

The age an individual must be before that individual can be sold a tobacco product in the Town of Orleans.

**Minor**

A person under eighteen years of age.

**Nicotine Delivery Product**

Any manufactured article or product made wholly or in part of a tobacco substitute or containing nicotine that is expected or intended for human consumption, but not including a tobacco substitute prescribed by a licensed physician or a product that has been approved by the United States Food and Drug Administration for sale as a tobacco use cessation or harm reduction product or for other medical purposes and which is being marketed and sold solely for that approved purpose. Nicotine delivery product includes, but is not limited to, e-cigarettes.

**Non-Residential Roll-Your-Own (RYO) Machine**

A mechanical device made available for use (including to an individual who produces cigars, cigarettes, smokeless tobacco, pipe tobacco, or roll-your-own tobacco solely for the individual's own personal consumption or use) that is capable of making cigarettes, cigars or other tobacco products. RYO machines located in private homes used for solely personal consumption are not Non-Residential RYO machines.

**Outdoor Space**

An outdoor area, open to the air at all times and cannot be enclosed by a wall, screen, vinyl or acrylic weatherization panels or side covering.

**Permit Holder**

Any person engaged in the sale or distribution of tobacco or nicotine delivery products directly to consumers who applies for and receives a Tobacco and Nicotine Delivery Product Sales Permit or any person who is required to apply for a Tobacco and Nicotine Delivery Product Sales Permit pursuant to these regulations, or his or her business agent.

**Person**

Any individual, firm, partnership, association, corporation, company or organization of any kind, including but not limited to, an owner, operator, manager, proprietor or person in charge of any establishment, business or retail store

**Premium Cigar**

A premium cigar is defined as: “a cigar that (1) is wrapped in whole tobacco leaf; (2) contains a 100 percent leaf tobacco binder; (3) contains primarily long filler tobacco; (4) is made by combining manually the wrapper, filler, and binder; (5) has no filter, tip, or non-tobacco mouthpiece and is capped by hand; (6) has a retail price (after any discounts or coupons) of no less than \$10 per cigar; (7) does not have a characterizing flavor other than tobacco; and (8) weighs more than 6 pounds per 1000 units”.

**Public Place**

An enclosed, indoor area that is open to and used by the general public, including but not limited to: licensed child care facilities, educational facilities, clinics, nursing homes, all elevators, stairwells, halls, lobbies and entrance ways accessible to the public, common areas (not including actual sleeping quarters) of guest houses, bed and breakfasts, inns, hotels and motels, public restrooms, laundromats, hair salons and barbershops, libraries, Town buildings, museums, retail food establishments, food service establishments, indoor sports arenas, bowling alleys, skating rinks, enclosed shopping malls, theaters, auditoriums, public transit facilities, and any function rooms or halls when use is open to the general public.

**Retail Tobacco Store**

An establishment which is not required to possess a retail food permit whose primary purpose is to sell or offer for sale to consumers, but not for resale, tobacco products and paraphernalia, in which the sale of other products is merely incidental, and in which the entry of persons under the age of 21 is prohibited at all times, and maintains a valid permit for the retail sale of tobacco products as required to be issued by the Orleans Board of Health.

**Self-Service Display**

Any display or roll your own (RYO) machine from which customers may select or make a tobacco product or a nicotine delivery product without assistance from an employee or store personnel.

**Schools**

Public or private elementary or secondary schools

**Smoke Constituent**

Any chemical or chemical compound in mainstream or side stream tobacco smoke that either transfers from any component of the tobacco product to the smoke or that is formed by the combustion or heating of tobacco, additives or other component of the tobacco product.

## **Smoking**

The lighting of a cigar, cigarette, pipe, e-cigarette or other tobacco product or possessing a lighted cigar, cigarette, pipe, e-cigarette or other tobacco or non-tobacco product designed to be combusted and inhaled.

## **Smoking Bar**

An establishment that primarily is engaged in the retail sale of tobacco products for consumption by customers on the premises and is required by Mass. General Law Ch. 270, Section 22 to maintain a valid permit to operate a smoking bar issued by the Massachusetts Department of Revenue. "Smoking bar" shall include, but not be limited to, those establishments that are commonly known as "cigar bars" and "hookah bars." Smoking Bars are prohibited in the Town of Orleans.

## **Tobacco Product**

Any product containing, made, or derived from tobacco or nicotine that is intended for human consumption, whether smoked, chewed, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means, including, but not limited to: cigarettes, cigars, little cigars, chewing tobacco, pipe tobacco, snuff, or electronic cigarettes, electronic cigars, electronic pipes, electronic hookah, or similar products, regardless of nicotine content, that rely on vaporization or aerosolization. "Tobacco product" includes any component or part of a tobacco product. "Tobacco product" does not include any product that has been approved by the United States Food and Drug Administration either as a tobacco use cessation product or for other medical purposes and which is being marketed and sold or prescribed solely for the approved purpose.

## **Vending Machine**

Any automated or mechanical self-service device, which upon insertion of money, tokens or any other form of payment, dispenses or makes cigarettes, any other tobacco product or nicotine delivery product.

## **Workplace**

A structure or facility or portion thereof, at which one (1) or more employees perform a service for an employer, or other spaces rented to or otherwise used by the public; and where the employer has the right or authority to exercise control over the space. Terms not defined herein shall be defined as set forth in M.G.L. Ch. 270 §22 and/or 105 CMR 661. To the extent any of the definitions herein conflict with M.G.L. Ch. 270 §22 and/or 105 CMR 661, the definition contained in this regulation shall control.

## **§ 185-59 PROHIBITION OF SMOKING IN PUBLIC PLACES**

- A. Smoking, as defined in this regulation, shall be prohibited in all public places.
- B. Pursuant to M.G.L. Ch. 270, §22(j) smoking, as defined in this regulation is also hereby prohibited in:
  - (1) Smoking bars (cigar bars and hookah bars).
  - (2) Retail tobacco stores (tobacconists and smoke shops).
  - (3) Town-owned conservation land.
  - (4) Nursing Homes.
  - (5) Membership Associations (private clubs).
  - (6) Hotels and Motels.
  - (7) Bed and Breakfasts and Lodging Homes, except in the areas accessed exclusively by the owner(s).

- (8) All outdoor areas of restaurants, bars, taverns where food and/or beverages are sold, served or otherwise consumed or carried.
- (9) Public transportation, bus and taxi waiting areas.

#### **§ 185-60 PROHIBITION OF SMOKING IN WORKPLACES**

- A. It shall be the responsibility of the employer to provide a smoke free environment for all employees working in a workplace including the facility/land on which the workplace is located. Smoking may be permitted in a designated outdoor space, provided that the outdoor space is physically separated from an enclosed workspace, entrance/exit to the workspace, and there is no migration of smoke into the workspace, indoor entrance, and area accessible to the public, or a place of public gathering.
- B. Smoking shall be prohibited in Orleans in accordance with M.G.L. Ch. 270, Section 22 (commonly known as the "Smoke-Free Workplace Law").
- C. Smoking shall be prohibited in tobacco retail stores and smoking bars.
- D. The use of e-cigarettes is prohibited wherever smoking is prohibited pursuant to M.G.L. Ch. 270, Section 22 and these regulations.

#### **§ 185-61 POSTING**

Each person having control of premises where smoking is prohibited by this regulation shall display on the premises conspicuously, including the primary entrance doorways, appropriate signs reading "No Smoking." When "No Smoking" is applicable, posting the international symbol for "No Smoking" (consisting of a pictorial representation of a burning cigarette enclosed in a red circle with a red bar across it) shall be deemed as compliance.

#### **§ 185-62 TOBACCO AND NICOTINE DELIVERY PRODUCT SALES TO PERSONS UNDER THE AGE OF 21 PROHIBITED.**

- A. No person shall sell tobacco products, including nicotine delivery products, or permit tobacco products, including nicotine delivery products, to be sold to a person under the minimum legal sales age; or not being the individual's parent or legal guardian, give tobacco products and or nicotine delivery products, as defined herein, to a person under the minimum legal sales age. The minimum legal sales age in the Town of Orleans is 21.
- B. Required Signage.
  - (1) In conformance with and in addition to Massachusetts General Law, Chapter 270, Section 7, a copy of Massachusetts General Laws, Chapter 270, Section 6, shall be posted conspicuously by the owner or other person in charge thereof in the shop or other place used to sell tobacco and nicotine delivery products at retail. The notice shall be provided by the Massachusetts Department of Public Health and made available from the Orleans Board of Health. The notice shall be at least 48 square inches and shall be posted conspicuously by the permit holder in the retail establishment or other place in such a manner so that a person standing at or approaching the cash register may readily see it. The notice shall

directly face the purchaser and shall not be obstructed from view or placed at a height of less than four (4) feet or greater than nine (9) feet from the floor. The owner or other person in charge of a shop or other place used to sell tobacco products at retail shall conspicuously post any additional signs required by the Massachusetts Department of Public Health.

- (2) The owner or other person in charge of a shop or other place used to sell tobacco products at retail shall conspicuously post signage provided by the Orleans Board of Health that discloses current referral information about smoking cessation.
  - (3) The owner or other person in charge of a shop or other place used to sell tobacco products including nicotine delivery products, as defined herein, at retail shall conspicuously post a sign stating that "The sale of tobacco products, including nicotine delivery products to individuals under 21 years of age is prohibited." The notices shall be no smaller than 8.5 inches by 11 inches and shall be posted conspicuously in the retail establishment or other place in such a manner so that a person standing at or approaching the cash register may readily see them. These notices shall directly face the purchaser and shall not be obstructed from view or placed at a height of less than four (4) feet or greater than nine (9) feet from the floor.
- C. Identification: Each person selling or distributing tobacco or nicotine delivery products shall verify the age of the purchaser by means of a valid government-issued photographic identification containing the bearer's date of birth that the purchaser is 21 years of age or older. Age verification is required for any person under the age of 30.
- D. All retail sales of tobacco products or nicotine delivery products must be face-to-face between the seller and the buyer.

#### **§ 185-63 TOBACCO AND NICOTINE DELIVERY PRODUCT SALES PERMIT**

- A. No person shall sell or otherwise distribute tobacco or nicotine delivery products at retail within the Town of Orleans without first obtaining a Tobacco and Nicotine Delivery Product Sales Permit issued annually by the Orleans Board of Health. Only owners of establishments with a permanent, non-mobile location in Orleans are eligible to apply for a permit and sell tobacco products or nicotine delivery products at the specified location in Orleans.
- B. As part of the Tobacco and Nicotine Delivery Product Sales Permit application process, the applicant will be provided with the Orleans Board of Health Tobacco and Nicotine Delivery Product Sales Regulation. Each applicant is required to sign a statement declaring that the applicant has read said regulation and that the applicant is responsible for instructing any and all employees who will be responsible for tobacco and nicotine delivery product sales regarding both state laws regarding the sale of tobacco and this regulation.
- C. Each applicant who sells tobacco is required to provide proof of a current tobacco sales license issued by the Massachusetts Department of Revenue before a Tobacco and Nicotine Delivery Product Sales Permit can be issued.

- D. The Orleans Board of Health shall annually determine the fee for a Tobacco and Nicotine Delivery Product Sales Permit. All such permits shall be renewed annually by January 1st of each year.
- E. A separate permit is required for each retail establishment selling tobacco or nicotine delivery products.
- F. Each Tobacco and Nicotine Delivery Product Sales Permit shall be displayed at the retail establishment in a conspicuous place.
- G. No Tobacco and Nicotine Delivery Product Sales Permit holder shall allow any employee to sell tobacco products or nicotine delivery products, as defined herein, until such employee reads this regulation and state laws regarding the sale of tobacco products and nicotine delivery products and signs a statement, a copy of which will be placed on file in the office of the employer, that he or she has read this regulation and state laws.
- H. A Tobacco and Nicotine Delivery Product Sales Permit is non-transferable. A new owner of an establishment that sells tobacco or nicotine delivery products must apply for a new permit. No new permit will be issued unless and until all outstanding penalties incurred by the previous permit holder are satisfied in full.
- I. Issuance of a Tobacco and Nicotine Delivery Product Sales Permit shall be conditioned on an applicant's consent to unannounced, periodic inspections of his or her retail establishment to ensure compliance with this regulation.
- J. Issuance and holding of a Tobacco and Nicotine Delivery Product Sales Permit shall be conditioned on an applicant's on-going compliance with current Massachusetts Department of Revenue requirements and policies including, but not limited to, minimum retail prices of tobacco and nicotine delivery products.  
  
Proof of the agreement to abide must be demonstrated by enclosing a copy of the establishment's Massachusetts Department of Revenue's tobacco sales permit with the annual application for a Tobacco and Nicotine Delivery Product Sales Permit as required in these regulations.
- K. A Tobacco and Nicotine Delivery Product Sales Permit will not be renewed if the permit holder has failed to pay all fines issued and the time period to appeal the fines has expired and/or any outstanding permit suspensions have not been satisfied.

#### **§ 185-64 ADDITIONAL PROHIBITIONS**

- A. Commercial Roll-Your-Own Machines – Non-residential Roll-Your-Own Machines are prohibited in the Town of Orleans.
- B. Sale of Blunts – No person or entity shall sell or distribute blunts/cigar wraps within the Town of Orleans or possess blunts/cigar wraps within the Town of Orleans with the intent to sell or distribute them.
- C. Cigar Sales Regulated
  - (1) No person shall sell or distribute or cause to be sold or distributed any package containing three (3) or fewer cigars.

- (2) This section shall not apply to:
- a. The sale of premium cigars, as defined in this regulation, having a retail price of ten dollars (\$10.00) or more.
  - b. A person or entity engaged in the business of selling or distributing cigars for commercial purposes to another person or entity engaged in the business of selling or distributing cigars for commercial purposes with the intent to sell or distribute outside the boundaries of the Town of Orleans.
- D. Sale of Flavored Tobacco Products Prohibited – No person shall sell or distribute or cause to be sold or distributed any flavored tobacco product.
- E. Free Distribution and Coupon Redemption – No person shall distribute, or cause to be distributed, any free samples of tobacco products or nicotine delivery products. No means, instruments or devices that allow for the redemption of tobacco products for free or at a reduced price below the minimum retail price determined by the Massachusetts Department of Revenue shall be accepted by any permit holder.
- F. Out-of-Package Sales – No person may sell or cause to be sold, or distribute or cause to be distributed, any cigarette package that contains fewer than twenty (20) cigarettes, including single cigarettes.
- G. Self-Service Displays – All self-service displays of tobacco products and/or nicotine delivery products are prohibited. All humidors including, but not limited to, walk-in humidors must be locked.
- H. Vending Machines – No vending machines for dispensing nicotine delivery products, cigarettes or other tobacco products are allowed in the Town of Orleans.
- I. A Tobacco and Nicotine Delivery Product Sales Permit shall not be issued to any new applicant for a retail location within 500 feet of a public or private elementary or secondary school as measured by a straight line from the nearest point of the property line of the school to the nearest point of the property line of the site of the applicant's business premises. Applicants who purchase an existing business that holds a current Tobacco and Nicotine Delivery Product Sales Permit at the time of the sale of said business may apply, within sixty (60) days of such sale, for the permit held by the Seller if the Buyer intends to sell tobacco products, as defined herein.
- J. Prohibition of the Sale of Tobacco Products and Nicotine Delivery Products by Educational Institutions. – No educational institution located in the Town of Orleans shall sell or cause to be sold tobacco products, as defined herein. This includes all educational institutions as well as any retail establishments that operate on the property of an educational institution.
- K. Smoking Bars, as defined in this regulation, are prohibited in the Town of Orleans.

## **§ 185-65 PROHIBITION OF SALE OF TOBACCO AND NICOTINE DELIVERY PRODUCTS BY HEALTH CARE INSTITUTIONS**

No health care institution located in the Town of Orleans shall sell or cause to be sold tobacco products and or nicotine delivery products, as defined herein. No retail establishment that operates or has a health care institution within it, such as a pharmacy, optician/optometrist or drug store, shall sell or cause to be sold tobacco products, as defined herein.

## **§ 185-66 VARIANCE PROCEDURES**

- A. An owner/employer/licensee may apply to the Orleans Board of Health for a variance from the provisions of these regulations except where prohibited by state law. The application must state in writing the reasons and justification for the request. The applicant must establish that enforcement of the regulations would do manifest injustice. The Orleans Board of Health will conduct a public hearing on the request, at which time the applicant or a designated agent shall present the request and the basis for the request. (Exception: The Building Code Board of Appeals must issue a variance to the ventilation requirements.)
- B. Any variance approved by the Orleans Board of Health is nontransferable to an owner/licensee/employer other than the applicant.
- C. Any variance approved by the Orleans Board of Health must be renewed annually unless otherwise stated as part of the variance approval.
- D. A variance approval will not be unreasonably withheld provided that the intent and purpose of this regulation as declared in § **185-56** is not compromised.

## **§ 185-67 VIOLATIONS, ENFORCEMENT, PENALTIES**

- A. Smoking in public places and workplaces.
  - (1) An owner, manager, or other person in control of a building, vehicle, facility or vessel who violates § **185-59** or § **185-60** shall be punished by a fine of:
    - (a) For the first violation: \$100;
    - (b) For a second violation occurring within 36 months of the date of the first offense: \$200; and
    - (c) For a third or subsequent violation occurring within 36 months of the second violation: \$300.
  - (2) Each calendar day on which a violation occurs shall be considered a separate offense.
  - (3) This regulation shall be enforced by the Orleans Board of Health and its designees.
  - (4) Violations of §§ **185-59** and **185-60** may be disposed of by a civil penalty using the non-criminal method of disposition procedures contained in Section 21D of Chapter **40** of Massachusetts General Law. The

disposition of fines assessed shall be subject to Section 188 of Chapter 111.

- (5) If an owner, manager or other person in control of a building, vehicle or vessel violates this regulation repeatedly, demonstrating egregious noncompliance as defined by regulation of the Massachusetts Department of Public Health, the Orleans Board of Health may revoke or suspend the license to operate and shall send notice of the revocation or suspension to the Massachusetts Department of Public Health.
- (6) Any person may register a complaint to initiate an investigation and enforcement with the Orleans Board of Health, the local inspection department or the equivalent.
- (7) Any person who knowingly smokes in an area subject to this regulation, in which a "No Smoking" sign or its equivalent is conspicuously displayed, shall be disposed of by a civil penalty of one hundred dollars (\$100.00) for each offense using the non-criminal method of disposition procedures contained in Section 21D of Chapter **40** of Massachusetts General Law.

**B. Sale of tobacco and nicotine delivery products.**

- (1) It shall be the responsibility of the establishment, permit holder and/or his or her business agent to ensure compliance with all sections of this regulation pertaining to his or her distribution of tobacco and/or nicotine delivery products. The violator shall receive:
  - (a) In the case of a first violation, a fine of one hundred dollars (\$100.00).
  - (b) In the case of a second violation within 36 months of the date of the current violation, a fine of two hundred dollars (\$200.00) and the Tobacco and Nicotine Delivery Product Sales Permit shall be suspended for seven (7) consecutive business days.
  - (c) In the case of three or more violations within a 36 month period, a fine of three hundred dollars (\$300.00) and the Tobacco and Nicotine Delivery Product Sales Permit shall be suspended for thirty (30) consecutive business days.
  - (d) Each calendar day on which a violation occurs shall be considered a separate offense.
- (2) Refusal to cooperate with inspections pursuant to this regulation shall result in the suspension of the Tobacco and Nicotine Delivery Product Sales Permit for thirty (30) consecutive business days.
- (3) In addition to the monetary fines set above, any permit holder who engages in the sale or distribution of tobacco or nicotine delivery products directly to a consumer while his or her permit is suspended shall be subject to the suspension of all Orleans Board of Health issued permits for thirty (30) consecutive business days.
- (4) The Orleans Board of Health shall provide notice of the intent to suspend a Tobacco and Nicotine Delivery Product Sales Permit, which notice shall

contain the reasons therefor and establish a time and date for a hearing which date shall be no earlier than seven (7) days after the date of said notice. The permit holder or its business agent shall have an opportunity to be heard at such hearing and shall be notified of the Board of Health's decision and the reasons therefor in writing. After a hearing, the Orleans Board of Health shall suspend the Tobacco and Nicotine Delivery Product Sales Permit if the Board finds that a sale to a person under the age of 21 occurred. For purposes of such suspensions, the Board shall make the determination notwithstanding any separate criminal or non-criminal proceedings brought in court hereunder or under the Massachusetts General Laws for the same offense. All tobacco products and nicotine delivery products shall be removed from the retail establishment upon suspension of the Tobacco and Nicotine Delivery Product Sales Permit. Failure to remove all tobacco and nicotine delivery products shall constitute a separate violation of this regulation.

- C. Non-criminal disposition – Whoever violates any provision of this regulation may be penalized by the non-criminal method of disposition as provided in Massachusetts General Laws, Chapter 40, Section 21D or by filing a criminal complaint at the appropriate venue. Each day any violation exists shall be deemed to be a separate offense.
- D. The Orleans Board of Health may apply for injunctive relief to enforce the provisions of this subsection in a court of competent jurisdiction.
- E. Enforcement – The Orleans Board of Health, Town Administrator, Department of Public Works & Natural Resources, Conservation Commission, Health Department, Police Department, and such other individuals as may be designated by the Board of Health may enforce this Regulation. Any citizen who desires to register a complaint pursuant to the regulation may do so by contacting the Orleans Board of Health or its designated agent(s) and the Board shall investigate.

#### **§ 185-67.1 SEVERABILITY**

If any provision of these regulations is declared invalid or unenforceable, the other provisions shall not be affected thereby but shall continue in full force and effect.

#### **§ 185-67.2 CONFLICT WITH OTHER LAWS OR REGULATIONS**

Notwithstanding the provisions of § 185-59 of this regulation, nothing in this regulation shall be deemed to amend or repeal applicable fire, health or other regulation so as to permit smoking in areas where it is prohibited by such fire, health or other regulations.

#### **§ 185-67.3 EFFECTIVE DATE**

This regulation shall take effect on November 1, 2016, unless otherwise stated in the regulation.

Jan Schneider, M.D., Chairman  
Joseph Hartung, Vice Chairman  
David Currier  
Judith A. Di Brigida  
John Smith Jr.

**ORLEANS BOARD OF HEALTH**

**Date Approved: July 21, 2016**

**Effective Date: November 1, 2016**