

ORDINANCE NO. 109

**ENACTING THE CITY OF ELEPHANT BUTTE CLEAN INDOOR AIR ORDINANCE;
PROVIDING FOR SMOKEFREE AREAS; PROVIDING PENALTIES.**

**BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF ELEPHANT
BUTTE**

Section 1. Short Title. This ordinance may be cited as the Clean Indoor Air Ordinance.

Section 2. Purpose. Whereas one of the duties of government is to protect the public health, safety and welfare of its citizens, the City of Elephant Butte governing body recognizes environmental tobacco smoke as detrimental to the public health and declares as the purpose of this Ordinance to protect the public health and safety by prohibiting smoking in indoor public places and indoor workplaces.

Section 3. Definitions. As used in this Ordinance:

A. "bar" means an establishment that is devoted to the selling or serving of alcoholic beverages for consumption by patrons on the premises and in which the serving of food is only incidental to the consumption of those beverages, including taverns, nightclubs, cocktail lounges and cabarets;

B. "cigar bar" means an establishment that:

(1) is a bar as defined in Subsection A of this section; and

(2) is engaged in the business of selling cigars for consumption by patrons on the premises and generates ten percent or more of its total annual gross revenue or at least ten thousand dollars (\$10,000) in annual sales from the sale of cigars, not including any sales from vending machines. A cigar bar that fails to generate at least ten percent of its total annual sales from the sale of cigars in the calendar year after December 31, 2006, not including sales from vending machines, shall not be defined as a cigar bar and shall not thereafter be known as such regardless of sales figures. A cigar bar shall agree to provide adequate information to

demonstrate to the City of Elephant Butte's satisfaction compliance with this definition;

C. "department" means the department of health;

D. "designated outdoor smoking area" means an area where smoking may be permitted, designated by an employer or manager, outside an indoor workplace or indoor public place; provided that the following conditions are maintained:

(1) smoking shall not be permitted near any building entrance, including a door, window or ventilation system of any facility where smoking is prohibited under the provisions of this Ordinance, so as to prevent secondhand smoke from entering the indoor workplace or indoor public place; and

(2) employees or members of the general public are not required to walk through the smoking area to gain entrance to the indoor workplace or indoor public place;

E. "employer" means an individual, a partnership, a corporation or the state that employs the services of one or more individuals and includes the City of Elephant Butte

F. "enclosed" means any interior space predominantly or totally bounded on all sides and above by physical barriers, regardless of whether such barriers consist of or include uncovered openings, screened or otherwise partially covered openings or open or closed windows;

G. "indoor public place" means the enclosed area within any governmental or nongovernmental place to which the public is invited or in which the public is permitted regardless of whether work or public business, meetings or hearings occur at any given time;

H. "indoor workplace" means any enclosed place where one or more persons engage in work, including lobbies, reception areas, offices, conference and meeting rooms, employee cafeterias and lunchrooms, break rooms and employee lounges, classrooms, auditoriums, hallways, stairways, waiting areas, elevators and restrooms and includes all indoor workplaces and enclosed parts regardless of whether work occurs at any given time;

I. "private club" means an organization, whether incorporated or not, that is the owner, lessee or occupant of a building or portion thereof used exclusively for the organization's purposes at all times, that is operated solely for recreational, fraternal, social, patriotic, political, benevolent or athletic purposes, but not for pecuniary gain, and that only sells alcoholic beverages incidental to its operation. The organization shall have bylaws or a constitution to govern its activities and shall have been granted an exemption as a club under the provisions of Section 501 of the Internal Revenue Code of 1986, as amended;

J. "restaurant" means a coffee shop, cafeteria, private or public school cafeteria or eating establishment and any other eating establishment that gives or offers for sale food to the public, patrons or employees, including kitchens and catering facilities in which food is prepared on the premises for serving elsewhere or a bar area within or attached to the premises;

K. "retail tobacco store" means a retail store used primarily for the sale of tobacco products and accessories and in which the sale of other products is merely incidental, including smoke shops, cigar shops or hookah lounges, and does not include establishments that offer for sale alcoholic beverages for consumption by patrons on the premises;

L. "secondhand smoke" means smoke emitted from lighted, smoldering or burning tobacco when the smoker is not inhaling, smoke emitted at the mouthpiece during puff drawing and smoke exhaled by the smoker;

M. "smoke-free area" means any building or other enclosed space where smoking is prohibited;

N. "smoking" means inhaling, exhaling, burning, carrying or holding any lighted tobacco product, including all types of cigarettes, cigars and pipes and any other lighted tobacco product; and

O. "smoking-permitted area" means any building or other enclosed space where smoking may be permitted; provided that secondhand smoke does not infiltrate any area where smoking is prohibited pursuant to this Ordinance.

Section 4. Smoking Prohibited.

A. It is unlawful for a person to smoke in any indoor workplace or indoor public place or in buses, taxicabs or other means of public transit not specifically exempted pursuant to this Ordinance.

Section 5. Smoking-Permitted Areas. Notwithstanding any other provision of this Ordinance, smoking-permitted areas include the following:

A. a private residence, except during hours of business operation while it is being used commercially to provide child care, adult care or health care or any combination of those activities;

B. a retail tobacco store;

C. a cigar bar;

D. the facilities of a tobacco manufacturing company licensed by the United States to manufacture tobacco products that are operated by the company in its own name and that are used exclusively by the company in its business of manufacturing, marketing or distributing its tobacco products; provided that smoke does not infiltrate other indoor workplaces or other indoor public places where smoking is otherwise prohibited under this Ordinance;

E. a state-licensed gaming facility, casino or bingo parlor;

F. an indoor workplace to the extent that tobacco smoking is an integral part of a smoking cessation program that is approved by the department or of medical or scientific research that is conducted in the indoor workplace and in which each room of the indoor workplace in which tobacco smoking is permitted complies with signage requirements;

G. designated outdoor smoking areas;

H. private clubs;

I. a limousine under private hire;

J. hotel and motel rooms that are rented to guests and are designated as smoking-permitted rooms; provided that not more than twenty-five percent (25%) of rooms rented to guests in a hotel or motel may be so designated;

K. enclosed areas within restaurants, bars, hotel and motel conference or meeting rooms while these places are being used for private functions; provided that none of these areas are open to the general public while the private functions are occurring and provided that smoke does not infiltrate other indoor workplaces or indoor public places where smoking is otherwise prohibited under this Ordinance.

L. a site that is being used in connection with the practice of cultural or ceremonial activities by Native Americans and that is in accordance with the federal American Indian Religious Freedom Act, 42 U.S.C. 1996 and 1996a;

M. a business of a sole proprietor or a business with fewer than two employees that is not commonly accessible to the public; provided that:

(1) the business is not a restaurant or bar;

(2) the employer or manager of such business shall provide a smoke-free work environment for each employee requesting a smoke-free work environment; and

(3) cigarette smoke does not infiltrate other smoke-free work environments as

provided for in this Ordinance; and

N. a theatrical stage or a motion picture or television production set when it is necessary for performers to smoke as part of the production.

Section 6. Prohibition of Smoking Near Entrances, Windows and Ventilation Systems.

Smoking is prohibited near entrances, windows and ventilation systems of all workplaces and public places where smoking is prohibited by this Ordinance. An individual who owns, manages, operates or otherwise controls the use of any premises subject to the provisions of this Ordinance shall establish a smoke free area that is a minimum of ten (10) feet from any entrances, windows and ventilation systems to any enclosed areas where smoking is prohibited. The reasonable distance shall be a distance sufficient to ensure that persons entering or leaving the building or facility shall not be subjected to breathing tobacco smoke and to ensure that tobacco smoke does not enter the building or facility through entrances, windows, ventilation systems or any other means.

Section 7. Responsibilities of Employers.

A. Employers shall provide that their places of employment meet the requirements of this Ordinance.

B. An employer shall adopt, implement, post and maintain a written smoking policy pursuant to this Ordinance.

Section 8. Posted Smoke free and Smoking-Permitted Areas.

A. To advise persons of the existence of smoke free areas or smoking-permitted areas, signs shall be posted as follows:

(1) for each indoor workplace or indoor public place where smoking is prohibited pursuant to this Ordinance, a "NO SMOKING" sign shall be posted where it is clear, conspicuous and easily legible at each public entrance. Posting of "NO SMOKING" signs is the responsibility of the owner, operator, manager or other person having control of the indoor workplace or indoor public place; and

(2) for each indoor workplace or indoor public place where smoking is permitted pursuant to this Ordinance, a "SMOKING PERMITTED" sign shall be posted where it is clear,

conspicuous and easily legible at each public entrance, unless an owner, operator or manager chooses to prohibit smoking in all or part of an indoor workplace or indoor public place where smoking is otherwise permitted.

B. Nothing in this Ordinance shall be construed so as to require the posting of signs at a residence, except during the hours of business operation while it is being used commercially to provide child care, adult care or health care or any combination of those activities.

Section 9. Enforcement.

A. Enforcement of this Ordinance shall be by citation from the *Code Enforcement Officer*.

B. A person may register a complaint regarding an alleged violation pursuant to this Ordinance to initiate enforcement with the City of Elephant Butte.

C. The designated enforcement agencies may inspect an establishment for compliance with this Ordinance.

Section 10. Violations. It is unlawful for a person who owns, manages, operates or otherwise controls the use of premises subject to regulation under this Ordinance to violate its provisions. The owner, manager or operator of premises subject to regulation shall not be subject to a penalty if a person on the premises is in violation of this Ordinance as long as the owner, manager or operator has posted signs, implemented the appropriate policy and informed the person that the person is in violation.

Section 11. Penalties. A person eighteen years of age or older who violates a provision of this Ordinance is subject to:

A. a fine not to exceed one hundred dollars (\$100) for the first violation;

B. a fine not to exceed two hundred dollars (\$200) for the second violation within any consecutive twelve-month period of the first violation; and

C. a fine not to exceed five hundred dollars (\$500) for the third and each subsequent violation within any consecutive twelve-month period of a previous violation.

Section 12. Non-retaliation –Non-waiver.

A. A person or employer shall not discharge, refuse to hire or in any manner retaliate against an employee, applicant for employment or patron because that employee, applicant or patron exercises any rights afforded by this Ordinance or reports or attempts to prosecute a violation of this Ordinance.

B. An employee who works in a setting where an employer allows smoking does not waive or otherwise surrender any legal rights the employee may have against the employer or any other party.

Section 13. Severability. If any section, subsection, paragraph, phrase or other portion of this Ordinance shall be declared invalid for any reason whatsoever by a court of competent jurisdiction, then such decision shall not affect the validity or enforceability of the remaining portions of this Ordinance.

Section 14. Effective Date. This Ordinance shall be in full force and effect five days after its adoption, approval and publication as provided by law.

PASSED, APPROVED AND ADOPTED THIS 1ST DAY OF AUGUST, 2007.