City of Bloomington Common Council

Legislative Packet

Wednesday, 05 April 2017

Regular Session

All legislation and background material contained herein.

Office of the Common Council
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City of Bloomington Indiana

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(812) 349-3409
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To: **Council Members**
From: **Council Office**
Re: **Weekly Packet Memo**
Date: **April 5, 2017**

Packet Related Material

Memo
Agenda
Calendar
Notices and Agendas:

- **Notice of Council Meeting with Evergreen Partners (Salary Consultants)** on Wednesday, April 5, 2017 at 5:30 pm in the Council Library

Legislation for Second Reading:

None

Legislation and Background Material for First Reading:

- **Ord 17-18** To Amend Title 6 of the Bloomington Municipal Code Entitled "Health and Sanitation" – Re: Changes to Chapter 6.12 "Smoking in Public Places and Places of Employment" that Define an "Electronic Smoking Device" [ESD] and Add the Use of an ESD to the Definition of "Smoking"
  - Memo to Council from Beverly Calender-Anderson, Director, Community and Family Resources
  - BMC 6.12 Annotated with Changes

Contact: Beverly Calender-Anderson at 812-349-3430, andersb@bloomington.in.gov

- **Ord 17-19** To Amend Title 14 of the Bloomington Municipal Code (BMC) Entitled "Peace and Safety" (Deleting Section 14.36.130 through 150 [Stench Bombs] and Amending Section 14.36.160 [Fencing Around Swimming Pools and Other Water-Filled Excavations])
  - Memo to Council, from Mike Rouker, City Attorney
  - BMC 14.36 Annotated with Changes

Contact: Mike Rouker at 812-349-3426, roukerm@bloomington.in.gov

Minutes from Regular Session:

None

Memo

No Legislation under Second Readings and Resolutions but Two Ordinances under First Readings at the Regular Session on Wednesday, April 5th

There are no items under Second Readings and Resolutions, but two ordinances under First Readings at the Regular Session next Wednesday. These ordinances are enclosed in this packet and summarized below.

First Readings

Items One – Ord 17-18 – Amending Chapter 6.12 of the BMC (Smoking in Public Places and Places of Employment) to Define an Electronic Smoking Device (ESD) and Prohibit the Use of such Devices Where Smoking is Prohibited in the City

The first of two items to be introduced next Wednesday is **Ord 17-18**. It amends BMC Chapter 6.12 (Smoking in Public Places and Places of Employment) to define an Electronic Smoking Device (ESD) and prohibit its use where smoking is otherwise prohibited in the City.

History of Local Smoking Regulations

Before addressing the changes to the Smoking Ordinance proposed by this legislation, I thought it would useful to provide some historical context. The history of the City smoking regulations began almost 40 years ago and reveals an incremental effort to prohibit smoking in public places. The first ordinance, Ord 78-48, now appears as a modest first step which prohibited smoking in elevators and city buses when they were open to the public. It also limited smoking in restaurants, health care facilities, public meetings, theaters, libraries, museums, and galleries to designated smoking areas or when those places were not open to the public. Smoking was allowed in theater lobbies, bars, and at private functions in restaurants, but only bars and theater lobbies could be set aside entirely for smoking. Persons in control of these places were required to post signs and violators were subject to a fine of no more than $100.

The second ordinance, Ord 87-17, extended the smoking prohibition to "any enclosed area used by the general public," but continued to allow smoking in designated smoking areas as well as in retail tobacco stores. It limited the designated smoking

areas in restaurants to no more than 75% of the seating and made the defacing of signs a violation.

The third ordinance, Ord 91-87, prohibited smoking in City facilities (except those areas serving as living quarters).

The fourth ordinance, Ord 93-24, prohibited new designated smoking areas and attempted to eliminate existing designated smoking areas over time by removing them when the business changed location, ceased to operate for six months, or changed ownership. This approach matched similar language adopted by the Monroe County Board of Health.

The fifth and unsuccessful ordinance, Ord 99-52, attempted to close a loop-hole in the previous ordinance by defining "change of ownership". It failed, in part, because of the difficulty of defining change of ownership and also because some council members were uncomfortable with the complete elimination of smoking in bars.

Most of these earlier ordinances were sponsored by Councilmember Pam Service. The sixth and most comprehensive ordinance, Ord 03-06, was sponsored by Council member, Dr. Anthony Pizzo. It eliminated the “designated smoking areas” and prohibited smoking: in the workplace; closer than a “reasonable distance” from buildings; in more than 25% of any hotel’s or motel’s rooms; and, in certain outdoor areas where persons gather for a period of time.

Proposed Changes

The proposed changes would prohibit “the use of an ESD” and “the inhalation or exhalation of smoke from an ESD” anywhere that smoking is prohibited in the City. To do so, the changes define “ESD” and add the aforementioned language to the definition of “Smoking” in Section 6.12.010.

The definition for Electronic Smoking Device reads as follows:

> Electronic Smoking Devices” (ESD) means a device that is capable of providing an inhalable dose of nicotine by delivering a vaporized solution. The term includes the components and cartridges. ESDs shall not include any product approved by the United States Food and Drug Administration for sale as a drug or medical device.

Rationale for Change

The memo submitted by Beverly Calender-Anderson, Director of Community and Family Resources delves into Electronic Smoking Device history, health concerns, and regulations.

According to the memo, ESDs were first imported in 2006 and "include vaporizers, vape pens, electronic cigarettes, cigars or pipes." They "use liquid containing nicotine, as well as varying compositions of other ingredients … [which are] heated into an aerosol that the user inhales."

Rather than serving as a means of tapering someone off nicotine use, as some proponents have argued, the memo notes concerns about the increase in nicotine use among youth and young adults. In 2016, these concerns led, in part, the US Food and Drug Administration (FDA), to extend "its regulatory authority to all tobacco products, including ESDs" which now prohibit the sale of ESDs to persons under the age of 18.

According to the memo, upon adopting these regulations, the City would join other Indiana localities including Indianapolis, Franklin, Greenwood, with other cities and counties likely to follow.

In support of the proposal, the memo argues that the ordinance will:

- Protect the health and safety of the community by eliminating ESD vapor from public places and places of employment;
- Ease enforcement of existing ordinances by avoiding confusion among members of the public about the extent of our regulations (where, for example, someone may see a person using an ESD and believe that smoking a cigarette would be permissible); and
- Discourage youth and young adults from taking up the behavior early on and risking nicotine addiction in the future.

Item Two – Ord 17-19 – Amending Chapter 14.36 (Unlawful Conduct) – Deleting Regulation of Stench Bombs – Amending Requirements for Fencing around Water-Filled Excavation

The second item for First Reading at the Regular Session next week is **Ord 17-19**. It amends BMC Chapter 14.36 (Unlawful Conduct) by revising the provision regarding fencing around water-filled excavations (BMC 14.36.160) and by

removing provisions regarding stench bombs (BMC 14.36.130 through 150). Please see the thorough memo from Mike Rouker, City Attorney for the details.

Fencing Around Pools and Other Water-Filled Excavations

BMC 14.36.160 requires the installation of fencing of at least 5' in height around swimming pools, ponds, quarries, and other water-filled excavations with at least 3' of water. These provisions apply to the public and the City itself. However, while the City fences its pools, it has not done so in regard to these other kinds of water facilities. This is, in part, because fencing creates unintended problems (e.g. impeding the flow of stormwater), detracts from the purpose and enjoyment of some facilities (e.g. Griffy Lake), and are expensive to install and maintain.

For these reasons and the exposure to liability it creates for the City and others, City Legal proposes that fencing requirements be removed in regard to all but residential swimming pools. And, in regard to the latter, City Legal proposes that local code make failing to comply with the requirements set forth in Indiana Administrative Code regarding residential swimming pools[1] a violation of local code and subject to the general penalties provisions in local code.[2] Rouker, in his memo, footnotes the approaches taken by localities around the state which, he says, either mirror or defer (by silence) to these state regulations.

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[1] 675 IAC 14-4.3-296 (3) [S4226.3] requires that access to residential pools shall be restricted by one (1) of the following means:
(A) Walls or fencing not less than four (4) feet high and completely surrounding the pool and deck area with the exception of self-closing and latching gates and doors, both capable of being locked.
(B) Other means not less than four (4) feet high and deemed impenetrable by the enforcing authority at the time of construction and completely surrounding the pool and deck area when the pool is not in use.
(C) A combination of clauses (A) and (B) that completely surrounds the pool and deck with the exception of self-closing and latching gates and doors which are capable of being locked. This applies to clauses (A) and (B) and this clause only.
(D) A power safety pool cover that:
(i) shall provide a continuous connection between the cover and the deck, so as to prohibit access to the pool when the cover is completely drawn over the pool;
(ii) shall be mechanically operated such that the cover cannot be drawn open or retracted without the use of a:
(AA) key; or
(BB) key and switch; or
(CC) touch pad with a personal access code;
(iii) is installed with track, rollers, rails, guides, or other accessories necessary to accomplish items (i) and (ii), in accordance with the manufacturer's instructions; and
(iv) shall bear an identification tag indicating that the cover satisfies the requirements of ASTM F 1346-19 (Reapproved 2003), Standards Performance Specification for Safety Covers and Labeling Requirements for All Covers for Swimming Pools, Spas, and Hot Tubs, as published by ASTM International, 100 Barr Harbor Drive, PO Box C700, West Conshohocken, Pennsylvania 19428-2959 for power safety pool covers.
[2] BMC 1.01.130 provides for a maximum penalty of $2,500 for each violation with each day the violation continues being subject to the same maximum fine.

Stench Bombs

In the course of reviewing this chapter of local code, City Legal took the opportunity to remove three antiquated and unused sections that regulate foul behavior that appears to have gone out of fashion – the use or possession of stench bombs. At the Internal Work Session, Mike Rouker, noted that other provisions of the Indiana criminal code could be invoked if this conduct should occur.

NOTICE AND AGENDA
BLOOMINGTON COMMON COUNCIL REGULAR SESSION
6:30 P.M., WEDNESDAY, APRIL 05, 2017
COUNCIL CHAMBERS
SHOWERS BUILDING, 401 N. MORTON ST.

I. ROLL CALL

II. AGENDA SUMMATION

III. APPROVAL OF MINUTES

IV. REPORTS (A maximum of twenty minutes is set aside for each part of this section.)

1. **Councilmembers**
2. **The Mayor and City Offices**
3. **Council Committees**
4. **Public***

V. APPOINTMENTS TO BOARDS AND COMMISSIONS

VI. LEGISLATION FOR SECOND READING AND RESOLUTIONS

VII. LEGISLATION FOR FIRST READING

1. Ordinance 17-18 – To Amend Title 6 of the Bloomington Municipal Code Entitled "Health and Sanitation" – Re: Changes to Chapter 6.12 (Smoking in Public Places and Places of Employment) that Define an "Electronic Smoking Device" [ESD] and Add the Use of an ESD to the Definition of "Smoking"

2. Ordinance 17-19 – To Amend Title 14 of the Bloomington Municipal Code (BMC) Entitled "Peace and Safety" (Deleting Section 14.36.130 through 150 [Stench Bombs] and Amending Section 14.36.160 [Fencing Around Swimming Pools and Other Water-Filled Excavations])

VIII. ADDITIONAL PUBLIC COMMENT* (A maximum of twenty-five minutes is set aside for this section.)

IX. COUNCIL SCHEDULE

X. ADJOURNMENT

**Members of the public may speak on matters of community concern not listed on the agenda at one of the two Reports from the Public opportunities. Citizens may speak at one of these periods, but not both. Speakers are allowed five minutes; this time allotment may be reduced by the presiding officer if numerous people wish to speak.*

***Auxiliary aids for people with disabilities are available upon request with adequate notice. Please call (812)349-3409 or e-mail council@bloomington.in.gov.*

Posted & Distributed: March 31, 2017

City of Bloomington
Office of the Common Council

NOTICE

Members of the Bloomington Common Council
will meet

On Wednesday, 05 April 2017
5:30 pm
Council Library
with Evergreen Partners
in interest of a salary study

As a quorum of the Council is expected to be present, this gathering will constitute a meeting of the Common Council under Indiana Open Door Law (I.C. § 5-14-1.5). For that reason, this statement provides notice that this meeting will occur and is open for the public to attend, observe, and record what transpires.

Posted: Friday, March 31, 2017

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City of Bloomington
Office of the Common Council

To Council Members
From Council Office
Re Weekly Calendar – 02-08 April 2017

Sunday, 02 April

2:00 pm Bloomington Commission on the Status of Women Equal Pay Day Event, Chambers

Monday, 03 April

12:00 pm Board of Public Works Work Session, McCloskey
12:00 pm Affordable Living Committee, Hooker Conference Room
5:00 pm Utilities Service Board, 600 E. Miller Dr.
5:00 pm Bloomington Redevelopment Commission, McCloskey

Tuesday, 04 April

5:30 pm Board of Public Works, Chambers
6:30 pm Sister Cities International- Cubamistad, Dunlap
6:30 pm Sister Cities International- Postoltega, Kelly

Wednesday, 05 April

2:00 pm Hearing Officer, Kelly
5:30 pm Common Council meeting with Evergreen Consultants, Council Library
5:30 pm Commission on Hispanic and Latino Affairs, McCloskey
6:30 pm Bloomington Commission on Sustainability Work Session, Kelly
6:30 pm Common Council Regular Session, Chambers

Thursday, 06 April

4:00 pm Bloomington Digital Underground Advisory Commission, McCloskey
5:30 pm Commission on the Status of Women, McCloskey

Friday, 07 April

7:30 am Health and Wellness Fair, Kelly and McCloskey
12:00 pm Common Council Internal Work Session, Council Library
1:30 pm Metropolitan Planning Organization Policy Committee, Chambers

Saturday, 08 April

8:00 am Bloomington Community Farmers' Market, 401 N. Morton St.

*Auxiliary aids for people with disabilities are available upon request with adequate notice. Please contact the applicable board or commission or call (812) 349-3400.

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ORDINANCE 17-18

TO AMEND TITLE 6 OF THE BLOOMINGTON MUNICIPAL CODE ENTITLED "HEALTH AND SANITATION"
– Re: Changes to Chapter 6.12 (Smoking in Public Places and Places of Employment) that Define an "Electronic Smoking Device" [ESD] and Add the Use of an ESD to the Definition of "Smoking"

WHEREAS, pursuant to its home rule power, the City of Bloomington may promote the quality of life, health, safety, and welfare of its citizens; and

WHEREAS, Electronic Smoking Devices (ESD), such as E-Cigarettes and Vape Pens, have emerged as an alternative to smoking; and

WHEREAS, in 2013, then-CDC Director Tom Frieden, M.D., M.P.H. stated the "increased use of e-cigarettes by teens is deeply troubling. Nicotine is a highly addictive drug. Many teens who start with e-cigarettes may be condemned to struggling with a lifelong addiction to nicotine and conventional cigarettes"; and

WHEREAS, the use of ESDs is visually similar to the smoking of conventional cigarettes, and has already been observed in locations where smoking is prohibited, creating concern and confusion, and threatening to interfere with enforcement of the City's current Smoking Ordinance; and

WHEREAS, the use of ESDs in places where smoking is prohibited may increase the social acceptability and appeal of smoking, particularly for youth and young adults, potentially undermining the enormous progress that has been made over the years in discouraging smoking, and could send a message to adults and youth that these potentially harmful products are in fact safe; and

WHEREAS, in 2016, the United States Food and Drug Administration (FDA) finalized a rule that extended its regulatory authority to all tobacco products, including ESDs. As a result, ESDs may not be sold to persons under the age of 18; and

WHEREAS, while the FDA prohibits state and local regulation on some aspects of tobacco products (such as labeling and registration), state and local governments *are* permitted to enact and enforce certain laws regarding tobacco products that are in addition to or more stringent than the requirements imposed by federal law (including the usage of tobacco products—including ESDs—by individuals of any age); and

WHEREAS, across Indiana—including Indianapolis, Franklin, Greenwood, and Howard County—and the nation, local governments have included ESDs in their smoke free ordinances; and

WHEREAS, the City of Bloomington finds that prohibiting the use of ESDs in public places and places of employment will protect the health and safety of the citizens of the City of Bloomington; and

WHEREAS, the City of Bloomington finds that prohibiting the use of ESDs in public places and places of employment will better facilitate continued enforcement of the City's current Smoking Ordinance; and

WHEREAS, the City of Bloomington finds that prohibiting the use of ESDs in public places and places of employment will protect youth and young adults from observing behaviors that could encourage them to smoke;

NOW, THEREFORE, BE IT HEREBY ORDAINED BY THE COMMON COUNCIL OF THE CITY OF BLOOMINGTON, MONROE COUNTY, INDIANA, THAT:

SECTION 1. The definition of the word “Electronic Smoking Devices” shall be added to Section 6.12.010, entitled “Definitions”, and read as follows:

> “Electronic Smoking Devices” (ESD) means a device that is capable of providing an inhalable dose of nicotine by delivering a vaporized solution. The term includes the components and cartridges. ESDs shall not include any product approved by the United States Food and Drug Administration for sale as a drug or medical device.

SECTION 2. Section 6.12.010, entitled Definitions, shall be amended by adding the following phrase to the end of the definition of the word “Smoking” after the word “form”: “; the use of an ESD; or, the inhalation or exhalation of smoke from any ESD.”

SECTION 3. If any section, sentence, chapter or provision of this ordinance, or the application thereof to any person or circumstances shall be declared invalid, such invalidity shall not affect any other section, sentence, chapter, provision or application of this ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this ordinance are declared to be severable.

SECTION 4. This ordinance shall be in full force and effect from and after its passage by the Common Council of the City of Bloomington, with approval of the Mayor, and after any required waiting and/or notice periods under Indiana law.

PASSED AND ADOPTED by the Common Council of the City of Bloomington, Monroe County, Indiana, upon this _____ day _____, 2017.

_____
SUSAN SANDBERG, President
Bloomington Common Council

ATTEST:

_____
NICOLE BOLDEN, Clerk
City of Bloomington

PRESENTED by me to the Mayor of the City of Bloomington, Monroe County, Indiana, upon this _____ day of _____, 2017.

_____
NICOLE BOLDEN, Clerk
City of Bloomington

SIGNED AND APPROVED by me upon this _____ day of _____, 2017.

_____
JOHN HAMILTON, Mayor
City of Bloomington

SYNOPSIS

This ordinance seeks to amend the City’s current Smoking Ordinance by prohibiting the use of Electronic Smoking Devices in the same public places and places of employment where smoking is already prohibited.

MEMO:

To: Bloomington Common Council
From: Beverly Calender-Anderson, Director, Community and Family Resources
Date: March 27, 2017
Re: Proposed Amendment to Chapter 6.12—Prohibiting the Use of Electronic Smoking Devices in Public Places and Places of Employment

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The proposed ordinance amends Chapter 6.12 of the Bloomington Municipal Code. Chapter 6.12 currently prohibits smoking (which is defined as the "inhaling, exhaling, burning or carrying any lighted cigar, cigarette, weed, plant or other combustible substance in any manner or in any form") in all public places and all places of employment. Generally speaking the only areas inside of the City's limits where smoking is permitted are: (1) private residences—unless said residences are used as child care centers, adult care centers or health care centers; (2) twenty-five percent of hotel rooms; and (3) retail tobacco stores. If amended, Chapter 6.12's prohibitions would extend to Electronic Smoking Devices (ESD).

In 2006, the first ESDs were imported into the United States. ESDs include vaporizers, vape pens, electronic cigarettes, and e-pipes. In many cases, these ESDs are manufactured to look like conventional cigarettes, cigars, or pipes. ESDs use liquid containing nicotine, as well as varying compositions of other ingredients (including flavorings). The liquid is heated into an aerosol that the user inhales.

<u>The Dangers of Electronic Smoking Devices</u>

A 2016 Surgeon General Report concluded, among other things:

1. that ESD use is strongly associated with the use of other tobacco products;
2. that ESD aerosol is not harmless; it can contain harmful and potentially harmful constituents, including nicotine and other chemicals known to have adverse health effects; and
3. that action, such as incorporating ESDs into smokefree policies, can and should be taken at the national, state, local, tribal, and territorial levels to address ESD use among youth and young adults.[1]

<u>Federal Regulation of Electronic Smoking Devices</u>

ESDs were unregulated at the federal level until 2016, when the Food and Drug Administration finalized a rule that provided for federal regulation of the manufacture, import, packaging, labeling, advertising, promotion, sale, and distribution of ESDs.

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[1] Surgeon General, <u>E-Cigarette Use Among Youth and Young Adults</u>, Executive Summary, available at https://e-cigarettes.surgeongeneral.gov/documents/2016_SGR_Exec_Summ_508.pdf.

When this rule was finalized, the then-Health and Human Services Secretary Sylvia Burwell said:

> We have more to do to help protect Americans from the dangers of tobacco and nicotine, especially our youth. As cigarette smoking among those under 18 has fallen, the use of other nicotine products, including e-cigarettes, has taken a drastic leap. All of this is creating a new generation of Americans who are at risk of addiction. Today's announcement is an important step in the fight for a tobacco-free generation—it will help us catch up with changes in the marketplace, put into place rules that protect our kids and give adults information they need to make informed decisions.

Regulation of Electronic Smoking Devices in Indiana

Throughout Indiana, local government has begun to include ESDs in the smokefree policies. This includes Indianapolis[2], Franklin[3], Greenwood[4], with Kokomo and Howard County set to join them April 1, 2017.[5]

The Proposed Ordinance

Staff believes that the Proposed Ordinance will help accomplish at least three things:

1. It will protect the health and safety of the citizens of the City of Bloomington by eliminating harmful ESD aerosol vapor from public places and places of employment.
2. Given the similarity that many ESDs have to conventional cigarettes, it will facilitate continued enforcement of the City's current smoking ordinance.
3. It will protect youth and young adults from observing behaviors that could encourage them to smoke ESDs, conventional cigarettes, or other tobacco products.

Accordingly, the Administration respectfully asks that Chapter 6.12 be amended to prohibit the use of ESDs in all public places and all places of employment. In addition to the possible health risks, the Administration believes such a ban is necessary so as not to glamorize smoking—a reasonable consequence of the use of ESDs.

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[2] Indianapolis Code Ch. 616 (available at https://www.municode.com/library/in/indianapolis_-_marion_county/codes/code_of_ordinances?nodeId=TITIIIPUHEWE_CH616NOAR)
[3] Franklin Code Ch. 8 (available at https://www.municode.com/library/in/franklin/codes/code_of_ordinances?nodeId=CO_TIT8HESA_CH8.36SM)
[4] Greenwood Code Sec. 6-349 (available at http://library.amlegal.com/nxt/gateway.dll/Indiana/greenwood_in/thegeneralordinancesofthecityofgreenwood?f=templates$fn=default.htm$3.0$vid=amlegal:greenwood_in)
[5] George Myers, Updated: Common Council passes smoking ban resolution; smoking to soon be banned in Kokomo bars, clubs, Kokomo Tribune, available at http://www.kokomotribune.com/news/local_news/updated-common-council-passes-smoking-ban-resolution-smoking-to-soon/article_93300f78-02dd-11e7-9650-eb248ed3307d.html.

Changes to Chapter 6.12 Entitled "Smoking in Public Places and Places of Employment" of the BMC Proposed by Ordinance 17-18

Title 6 HEALTH AND SANITATION

Chapters:

Chapter 6.04 - REFUSE AND YARD WASTE COLLECTION BY THE CITY

Chapter 6.05 - COMMERCIAL REFUSE HAULING AND COLLECTION

Chapter 6.06 - GARBAGE AND WEEDS

Chapter 6.07 - SNOW AND ICE REMOVAL

Chapter 6.12 - SMOKING IN PUBLIC PLACES AND PLACES OF EMPLOYMENT

Chapter 6.15 - USED MOTOR OIL DEPOSITORY

Chapter 6.12 SMOKING IN PUBLIC PLACES AND PLACES OF EMPLOYMENT

Sections:

6.12.010 Definitions.

6.12.020 Application of city-owned facilities.

6.12.030 Prohibition of smoking in public places.

6.12.040 Policies regarding smoking in places of employment.

6.12.050 Reasonable distance.

6.12.060 Where smoking not regulated.

6.12.070 Posting of signs—Removing of paraphernalia.

6.12.080 Enforcement.

6.12.090 Violations and penalties.

6.12.100 Public education.

6.12.110 Other applicable laws.

6.12.010 Definitions.

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

"Bar" means any building, room or area used primarily for the sale of alcoholic beverages for consumption by guests on the premises and in which the sale of food and the provision of entertainment is merely incidental to the sale of alcoholic beverages.

"Bars with lawful, preexisting designated smoking areas" means any business which:

(a) Is solely open to patrons and employees who the law requires to be at least eighteen years of age; and

(b) Was in operation or had commenced construction before July 1, 1994, and has not ceased to operate for at least six months, changed location, or changed ownership after that date.

"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.

► Change made by Section 1 of Ordinance 17-18

"Electronic Smoking Devices" (ESD) means a device that is capable of providing an inhalable dose of nicotine by delivering a vaporized solution. The term includes the components and cartridges. ESDs shall not include any product approved by the United States Food and Drug Administration for sale as a drug or medical device.

"Employee" means any person who is employed by any employer for direct or indirect monetary wages or profit, including those employed full-time, part-time, on a temporary basis, or by contract through a third party.

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

"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, "office landscaping" or similar structures.

"Place of employment" 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, private offices, employee lounges and restrooms, conference and class rooms, 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.

"Private club" means a facility:

(a) Owned or operated by an association or corporation, which shall:

(1) Not be operated for pecuniary gain; and

(2) Consist of a membership:

(i) Formed as a lodge, local chapter, or corresponding unit of a fraternal order recognized on a national basis; or

(ii) Comprised of persons who have served in the armed forces of the United States; or

(iii) Formed as a recognized, exclusive association of persons organized for a joint or common purpose for which application for membership, the payment of dues, and self governance by the membership are distinguishing characteristics; and

(b) Where entry into, and use of the facility is restricted to members and guests of members.

"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 facilities, reception areas, restaurants, retail food production and marketing establishments, retail service establishments, retail stores, theaters and waiting rooms. A private residence is not a "public place."

"Restaurant" means any coffee shop, cafeteria, sandwich stand, private and public school cafeteria, and any other eating establishment which gives or offers for sale food to the public, guests, or employees, as well as kitchens in which food is prepared on the premises for serving elsewhere, including catering facilities.

"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. The term does not include retail stores where food or beverages are sold for consumption on the premises or where an area has been set aside on the premises for customers to consume food or beverages.

"Service line" means any indoor line at which one or more persons are waiting for or receiving service of any kind, whether or not such service involves the exchange of money.

► Change made by Section 2 of Ordinance 17-18

"Smoking" means inhaling, exhaling, burning or carrying any lighted cigar, cigarette, weed, plant or other combustible substance in any manner or in any form**; the use of an ESD; or, the inhalation or exhalation of smoke from any ESD.**

"Sports arena" means sports pavilions, 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.

(Ord. 03-06 § 2, 2003).

6.12.020 Application of city-owned facilities.

All enclosed facilities owned by the city shall be subject to the provisions of this chapter including city vehicles.

(Ord. 03-06 § 3, 2003).

6.12.030 Prohibition of smoking in public places.

(a) Smoking shall be prohibited in the following public places and other public places similarly situated, including, but not limited to, the following areas:

(1) Elevators;

(2) Restrooms, lobbies, reception areas, hallways and any other common-use areas;

(3) Buses, taxicabs, and other means of public transit under the authority of the city, and ticket, boarding, and waiting areas of public transit depots;

(4) Service lines;

(5) Retail stores;

(6) All areas available to and customarily used by the general public in all businesses and non-profit entities patronized by the public;

(7) Restaurants, bars, and private clubs, except as provided for in Section 6.12.060(b);

(8) Public areas of aquariums, galleries, libraries, and museums;

(9) Any facility which is primarily used for exhibiting any motion picture, stage, drama, lecture, musical recital or other similar performance, except performers when smoking is part of a theatrical production;

(10) Sports arenas and convention halls, including bowling facilities;

(11) Every room, chamber, place of meeting or public assembly, including school buildings under the control of any board, council, commission, committee, including joint committees, or agencies of the city or any political subdivision of the state during such time as a public meeting is in progress, to the extent such place is subject to the jurisdiction of the city;

(12) 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) Places of employment.;

(16) The following outdoor areas:

(A) Seating provided by eating establishments and bars,

(B) Within courtyards and other areas where air circulation may be impeded by architectural, landscaping or other barriers,

(C) Any place where people are using or waiting for a service, entry, or a transaction, including but not limited to ATM's, bank teller windows, telephones, ticket lines, bus stops and cab stands,

(D) Any place where food and/or drink is offered for sale;

(17) Private functions in other public places like bars, restaurants, hotels, and motels.

(b) Notwithstanding any other provisions of this section, any owner, operator, manager or other person who controls any establishment or facility may declare that entire establishment or facility as a nonsmoking establishment.

(Ord. 03-06 § 4, 2003).

6.12.040 Policies regarding smoking in places of employment.

(a) It shall be the responsibility of employers to provide a smoke-free workplace for all employees, but employers are not required to incur any expense to make structural or other physical modifications.

(b) Within one hundred twenty days of the adoption of this chapter, each employer having an enclosed place of employment located within the city shall adopt, implement, make known and maintain a written smoking policy which shall contain the following requirements:

Smoking shall be prohibited in all enclosed facilities within a place 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 with more than one occupant, and all other enclosed facilities.

(c) The smoking policy shall be communicated to all employees within three weeks of its adoption.

(d) All employers shall supply a written copy of the smoking policy upon request to any existing or prospective employee.

(Ord. 03-06 § 5, 2003).

6.12.050 Reasonable distance.

Smoking shall occur at a reasonable distance outside any area where smoking is prohibited to insure that tobacco smoke does not enter the area through entrances, windows, ventilation systems or any other means. It shall be a violation for smoke to be detected in any area where smoking is prohibited.

(Ord. 03-06 § 6, 2003).

6.12.060 Where smoking not regulated.

(a) Notwithstanding any other provision of this chapter to the contrary, the following areas shall not be subject to the smoking restrictions of this chapter:

  (1) Private residences, except when used as a child care, adult day care or health care facility;

  (2) Twenty-five percent of hotel and motel rooms rented to guests;

  (3) Retail tobacco stores.

(b) Bars with lawful, preexisting designated smoking areas and private clubs shall not be subject to the smoking restrictions of this chapter until January 1, 2005. These businesses and entities shall lose their designated smoking areas before that time if, after passage of the ordinance codified in this chapter, they cease to operate for at least six months, change location, change their name, or change ownership.

(c) Notwithstanding any other provisions of this section, any owner, operator, manager or other person who controls any establishment described in this section may declare that entire establishment as a nonsmoking establishment.

(Ord. 03-06 § 7, 2003).

6.12.070 Posting of signs—Removing of paraphernalia.

(a) "No Smoking" signs or the international "No Smoking" symbol (consisting of a pictorial representation of a burning cigarette enclosed in a red circle with a red bar across it) shall be clearly, sufficiently and conspicuously posted in every building or other area where smoking is prohibited by this chapter, by the owner, operator, manager or other person having control of such building or other area.

(b) Every public place where smoking is prohibited by this chapter shall have posted at every entrance a conspicuous sign clearly stating that smoking is prohibited.

(c) All ashtrays and other smoking paraphernalia shall be removed from any area where smoking is prohibited by this chapter by the owner, operator, manager or other person having control of such area.

(Ord. 03-06 § 8, 2003).

6.12.080 Enforcement.

(a) Enforcement of this chapter shall be implemented by the mayor's office, or his or her designee(s).

(b) Any citizen who desires to register a complaint under this chapter may initiate enforcement with the department or positions designated by the mayor's office.

(c) Upon finding that any provision of this chapter has been violated, the enforcement designee(s) shall issue a notice of violation (NOV) to the person(s) responsible for the violation. The NOV shall be in

writing and shall be served upon the person(s) responsible for the violation by one or more of the following methods: delivery in person or first class mail. The NOV shall state:

(1) The location of the violation;

(2) The nature of the violation;

(3) The fine assessed for the violation;

(4) That the fine is paid at the city legal department; and

(5) That the fine may be contested in the Monroe County Circuit Courts.

(Ord. 03-06 § 9, 2003).

6.12.090 Violations and penalties.

(a) It shall be unlawful for any person who owns, manages, operates or otherwise controls the use of any premises subject to regulation under this chapter to fail to comply with any of its provisions.

(b) It shall be unlawful for any person who owns, manages, operates or otherwise controls the use of any premises subject to regulation under this chapter to knowingly or willfully allow smoking to occur where prohibited by this chapter. It is a defense to this section, if the foregoing persons or their employees act in a reasonable and timely manner to personally inform the violator of the prohibition and request that he or she refrain from smoking.

(c) It shall be unlawful for any person to smoke in any area where smoking is prohibited by the provisions of the ordinance codified in this chapter.

(d) Any person who violates any provision of this chapter shall be subject to a fine of one hundred dollars for each violation of this chapter, which shall be processed through the ordinance violations bureau established by Chapter 2.27 of the Bloomington Municipal Code. If, after multiple violations by the same person or at the same business, the city legal department has reason to believe that the fines will not be effective in enforcing this chapter, then the city legal department shall be empowered to seek any other remedies provided by law.

(Ord. 03-06 § 10, 2003).

6.12.100 Public education.

The city may engage in programs to explain and clarify the purposes and requirements of this chapter to citizens affected by it, and to guide owners, operators and managers in their compliance with it. Such programs may include publication of a brochure for affected businesses and individuals explaining the provisions of this chapter.

(Ord. 03-06 § 11, 2003).

6.12.110 Other applicable laws.

This chapter shall not be interpreted or construed to permit smoking where it is otherwise restricted by other applicable laws.

(Ord. 03-06 § 12, 2003).

ORDINANCE 17-19

TO AMEND TITLE 14 OF THE BLOOMINGTON MUNICIPAL CODE (BMC) ENTITLED "PEACE AND SAFETY"
(Deleting Section 14.36.130 through 150 [Stench Bombs] and Amending Section 14.36.160 [Fencing Around Swimming Pools and Other Water-Filled Excavations])

WHEREAS, Bloomington Municipal Code Sections 14.36.130 through 14.36.150 currently regulate stench bombs; and

WHEREAS, these Code provisions originate in the 1957 Code and have never been amended since; and

WHEREAS, the City of Bloomington cannot locate any record of a violation associated with stench bombs; and

WHEREAS, the regulation of stench bombs by ordinance is unnecessary; and

WHEREAS, Bloomington Municipal Code Section 14.36.160 mandates the installation of fences next to any water-filled excavation with a depth exceeding thirty-six inches; and

WHEREAS, Bloomington Municipal Code Section 14.36.160 is unduly onerous; and

WHEREAS, Bloomington Municipal Code Section 14.36.160 unnecessarily exposes the City to liability;

NOW, THEREFORE, BE IT HEREBY ORDAINED BY THE COMMON COUNCIL OF THE CITY OF BLOOMINGTON, MONROE COUNTY, INDIANA, THAT:

SECTION 1. Sections 14.36.130 through 14.36.150, which presently regulate stench bombs, shall be deleted in their entirety without replacements.

SECTION 2. Section 14.36.160, currently entitled "Fences adjacent to swimming pools, ponds, quarries or other water-filled excavations - Required," shall be renamed to read as follows: "Fences adjacent to residential swimming pools - Required."

SECTION 3. Section 14.36.160, currently entitled "Fences adjacent to swimming pools, ponds, quarries or other water-filled excavation – Required," shall have the body of the Section deleted in its entirety and replaced with the following:

> "Every person in possession of land upon which is situated a residential swimming pool who fails to restrict access to such swimming pool in accordance with the requirements of the Indiana Administrative Code shall be subject to the general penalty provisions set forth in Section 1.01.130 of this Municipal Code."

SECTION 4. If any section, sentence or provision of this ordinance, or the application thereof to any person or circumstances shall be declared invalid, such invalidity shall not affect any of the other sections, sentences, provisions, or applications of this ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this ordinance are declared to be severable.

SECTION 5. This ordinance shall be in full force and effect from and after its passage by the Common Council of the City of Bloomington, approval of the Mayor and all other requirements of the Indiana Code.

PASSED AND ADOPTED by the Common Council of the City of Bloomington, Monroe County, Indiana, upon this _____ day of _____, 2017.

_____
SUSAN SANDBERG, President
Bloomington Common Council

ATTEST:

_____
NICOLE BOLDEN, Clerk
City of Bloomington

PRESENTED by me to the Mayor of the City of Bloomington, Monroe County, Indiana, upon this _____ day of _____, 2017.

_____
NICOLE BOLDEN, Clerk
City of Bloomington

SIGNED and APPROVED by me upon this _____ day of _____, 2017.

_____
JOHN HAMILTON, Mayor
City of Bloomington

SYNOPSIS

This ordinance amends Title 14 of local code entitled "Peace and Safety." First, it deletes BMC Sections 14.36.130 through 14.36.150, which regulate stench bombs, in their entirety. Second, it amends Section 14.36.160, which requires fences adjacent to any body of water with a depth exceeding thirty-six inches. The amendments tie the requirements for fencing around pools to those found in the Indiana Administrative Code, but remove requirements for fencing around other water-filled excavations.

CITY OF BLOOMINGTON
LEGAL DEPARTMENT
MEMORANDUM

TO: **Members of the Common Council**
FROM: **Michael Rouker, City Attorney**
RE: **Bloomington Municipal Code § 14.36.130 - § 14.36.160**
DATE: **March 31, 2017**

MEMORANDUM

The Legal Department recommends that the Council approve amending Title 14 of the Bloomington Municipal Code ("BMC") to a) eliminate Sections 14.36.130-150 regarding "Stench Bombs," and b) revise or eliminate certain requirements regarding the fencing of pools and other water excavations.

STENCH BOMBS

Sections 14.36.130-150 of the BMC currently prohibit any person from selling, giving to another person, throwing or depositing upon the person or property of another, or possession of, stench bombs. A "Stench bomb" is described as a "noxious or offensive smelling or injurious liquid gas or solid substance termed 'stinking bean' or 'stench bomb' in any form or device from which such liquid gas or solid substance is liberated or is likely to be liberated." These Code sections were part of the 1957 municipal code and they have been carried through subsequent Code iterations to the present day. However, staff has been unable to uncover any violations of these provisions or any enforcement of them. Therefore, as part of an ongoing effort to update the BMC and bring it in line with present day needs and practices, the Legal Department recommends eliminating Sections 14.36.130-150 of the BMC because they are unnecessary.

FENCING OF POOLS AND WATER BODIES

Section 14.36.160 of the BMC currently requires fences to be installed around all swimming pools, ponds, quarries, and other water-filled excavations. Residential pools are already regulated under the Indiana Administrative Code ("IAC") at Section 675 IAC 14-4.3-296. This provision mandates installation of one of the following safety features for residential pools: (a) four-feet of fencing completely surrounding the pool, (b) an alternative, equivalent four-foot impenetrable barrier, or (c) a power safety pool cover that meets national and industry

standards. In order to eliminate confusion for property owners with pools, Legal recommends that the Council adopt the state standards as the City's standards for all swimming pools.[1]

With regard to fencing bodies of water other than pools, there is no evidence that the City ever installed barriers around City-owned water features, nor any record suggesting that the City enforced this provision with regard to bodies of water owned by private entities. The City has not focused on this provision for three reasons: (1) fences are expensive to erect and maintain; (2) in some places, fences would actually have negative unintended effects, namely they impede the flow of storm water; and (3) fences are unsightly and detract from the aesthetic value of Bloomington's green spaces.

Additionally, because the City has failed to fence its own bodies of water, the City is exposing itself to liability. A "negligence per se" legal standard applies to civil actions against entities that violate a statute or ordinance. In other words, a person injured in an unfenced City-owned body of water who filed a claim against the City would not have to prove that the City was negligent. To collect from the City, an injured person would merely need to prove that (1) the City was not in compliance with its ordinance and (2) that the injured party was a person who was intended to be protected by the ordinance. Virtually any person injured in an unfenced City-owned body of water would be capable of satisfying this minimal evidentiary burden.

CONCLUSION

The administration recommends altering Section 14.36.160 of the Municipal Code to state that the City will follow the Indiana Administrative Code with regard to fences around swimming pools. In addition, due to liability concerns, the administration advises remaining silent with regard to fences around other bodies of water. If the Council opts to move forward, this change will bring Bloomington's code into line with the City's decades-long practices and protect it from potential liability by removing any argument that the City's lack of fencing around bodies of water constitutes negligence per se.

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[1]Other similarly-sized Indiana Cities' municipal codes tend to either mirror state standards with regard to pools or stand silent regarding barriers around bodies of water, in which case the Administrative Code provisions apply. See e.g., Fort Wayne Mun. Code § 156.03 (requires fences around pools, without specifying height, construction type, etc.; fences are not required around other bodies of water); Lafayette Mun. Code § 11.05.010 (requires six-foot fences around pools; fences are not required around other bodies of water); Evansville (does not regulate fences around bodies of water); South Bend Mun. Code § 14-12 - § 14-14 (pools must be surrounded by a 48-inch fence; fences are not required around other bodies of water); Carmel Mun. Code § 6-222(f)(2) (pools must comply with state regulations; fences are not required around other bodies of water); Fishers (does not regulate fences around bodies of water); Gary Mun. Code § 105-202(d)(4) (fences are required around pools in accordance with state standards; fences are not required around other bodies of water); Hammond Mun. Code § 150.132 (requires six-foot fences around pools; fences are not required around other bodies of water).

Changes to Chapter 14.36 Entitled "Unlawful Conduct" of the BMC Proposed by Ordinance 17-19

Title 14 PEACE AND SAFETY

Chapters:

Chapter 14.09 - NOISE CONTROL

Chapter 14.20 - FIREARMS—DEADLY WEAPONS

Chapter 14.28 - ADVERTISING

Chapter 14.36 - UNLAWFUL CONDUCT

Chapter 14.40 - FALSE EMERGENCY ALARMS

Chapter 14.50 - RESERVED

Chapter 14.36 UNLAWFUL CONDUCT

Sections:

14.36.030 Barbed wire fences.

14.36.050 Defacing or destroying city property.

14.36.060 Removal of locks and other closing devices from refrigerators, iceboxes, etc.

14.36.090 Intoxicating beverages—Consumption in public.

14.36.130 Stench bombs—Sale.

14.36.140 Stench bomb—Throwing or depositing upon person or property of another.

14.36.150 Stench bombs—Possession.

14.36.160 Fences adjacent to swimming pools, ponds, quarries or other water-filled excavations—Required.

14.36.030 Barbed wire fences.

It is unlawful for any person to erect, build or maintain a barbed wire fence within the city.

(Prior code § 18-4).

14.36.050 Defacing or destroying city property.

It is unlawful for any person to remove, interfere or meddle with any grade stakes, fences, lights or other guards placed by the city, its agents or employees, or required by ordinance to be placed in or about the streets, alleys and public places of the city, or to destroy or deface, mutilate, change, modify, injure or remove, or to in any manner interfere or meddle with street signs placed by the city on its streets, alleys and public places, or to destroy, deface, mutilate, remove or injure any seats, benches, stands, signs, monuments or other property located in the streets or alleys, parks or buildings or other public places of the city.

(Prior code § 18-5).

14.36.060 Removal of locks and other closing devices from refrigerators, iceboxes, etc.

No icebox, refrigerator, ice chest, icemaker, vertical or chest freezer or any other airtight devices used for the preservation of foods shall be discarded, abandoned, kept for salvage, or stored in a public place or in plain view and accessible to the public unless all locks, catches, and magnetic closing devices are removed or the door removed or secured by lock and chain in such a manner to prevent opening, but this provision shall not apply to persons who, in the ordinary course of their business, buy, sell, store or repair new or used refrigerators or other such devices. Such persons may store such devices on their premises, provided that the devices are stored in a safe manner at all times, and are made inaccessible to the public before the end of the business day.

(Ord. 77-77 § 1, 1977).

14.36.090 Intoxicating beverages—Consumption in public.

It is unlawful for any person, within the city limits, to consume any alcoholic beverage in or on any publicly owned place or upon any public street, highway or accessway; provided, however, that it is not unlawful to consume beer or wine, regardless of where it was purchased, at an event for which the Indiana Alcohol and Tobacco Commission has issued a temporary beer permit, as authorized by Indiana Code 7.1-3-6-1 et seq., or a temporary wine permit, as authorized by Indiana Code 7.1-3-16-5 et seq., to a qualified person to sell beer or wine or both at that event; and provided, however, that it is not unlawful to consume beer, wine, or any other alcoholic beverage within the Clubhouse at the Cascades Golf Course and the Buskirk-Chumley Theatre when such consumption is in accordance with the rules and regulations of, and the statutes regarding, the Indiana Alcohol and Tobacco Commission. It is also not unlawful to consume beer or wine on the Cascades Golf Course grounds outside the Clubhouse provided that the beer or wine consumed is procured at the Clubhouse and provided that such consumption is in accordance with the rules and regulations of, and the statutes regarding, the Indiana Alcohol and Tobacco Commission.

(Ord. 05-32 § 1, 2005).

(Ord. No. 12-12, § 1, 6-7-2012)

► Change made by Section 1 of Ordinance 17-19

~~14.36.130 Stench bombs—Sale.~~

~~It is unlawful for any person to sell or expose for sale or give away any vile, noxious or offensive smelling or injurious liquid gas or solid substance commonly known or termed "stinking bean" or "stench bomb" in any form or device from which such liquid gas or solid substance is liberated or is likely to be liberated.~~

~~(Prior code § 18-24).~~

~~14.36.140 Stench bomb—Throwing or depositing upon person or property of another.~~

~~It is unlawful for any person to throw or deposit, or attempt to throw or deposit, or aid or abet in throwing or depositing upon the person or property of another, any vile, noxious or offensive smelling or injurious liquid, gas or solid, commonly known or termed as a "stinking bean" or any "stench bomb" in a form or device from which such liquid, gas or solid is liberated, or is likely to be liberated, and which being liberated would molest, discomfort or discommode any person or damage any property.~~

~~(Prior code § 18-25).~~

~~14.36.150 Stench bombs—Possession.~~

~~It is unlawful for any person to have in his possession or under his control any "stinking bean" or other device as set forth in Sections 14.36.130 and 14.36.140, with the intent to use the same in violation of such sections or with the intention that the same be used in violation of such sections.~~

~~(Prior code § 18-26).~~

► Change made by Section 2 of Ordinance 17-19

14.36.160 Fences adjacent to swimming pools~~, ponds, quarries or other water-filled excavations—~~Required.

~~Every person in possession of land upon which is situated a swimming pool, pond, quarry or other water-filled excavation exceeding the depth of thirty-six inches at its deepest point who fails to fence the area adjacent to such swimming pool, pond, quarry or excavation with a chain link, wire or board fence at least five feet high and with no opening, except gates or doors, of more than four inches in width so that the pool, pond, quarry or excavation is made inaccessible to children, shall be subject to the general penalty provisions of this code.~~

► Change made by Section 3 of Ordinance 17-19

"Every person in possession of land upon which is situated a residential swimming pool who fails to restrict access to such swimming pool in accordance with the requirements of the Indiana Administrative Code shall be subject to the general penalty provisions set forth in Section 1.01.130 of this Municipal Code."

(Ord. 81-5 § 13, 1981: Ord. 73-36 § 1, 1973: prior code § 24A-1).