

Chapter 737 "TOBACCO PRODUCT SALES"

737.01 DEFINITIONS.

As used in this chapter:

- (a) "Department" means the Franklin County Public Health.
- (b) "License" means a license issued by the Department on behalf of the City of Gahanna for retail sale of tobacco products.
- (c) "Licensee" means the holder of a valid license for the retail sale of tobacco products.
- (d) "Person" means any natural person.
- ~~(e) "Cigarette" has its typical definition of a paper cylinder of finely cut tobacco for smoking, but also includes clove cigarettes and hand-rolled cigarettes.~~
- (f) "Distribute" means to furnish, give, or provide cigarettes, other tobacco products, alternative nicotine products, electronic smoking devices, or papers used to roll cigarettes to the ultimate consumer of the cigarettes.
- (g) "Sale" includes delivery, barter, exchange, transfer, or gift, or offer thereof, and each such transaction made by any person, whether as principal, proprietor, agent, servant or employee.
- ~~(h) "Public place" means any area to which the public is invited or in which the public is permitted, including, but not limited to, any right of way, mall or shopping center, park, playground and any other property owned by the City, and any school district or any park district property.~~
- (i) "Tobacco Retailer" means any person, partnership, joint venture, ~~society, club,~~ trustee, trust, association, organization, limited liability company, or corporation who owns, operates, or manages any tobacco retail establishment. Tobacco retailer does not mean non-management employees of any tobacco retail establishment.
- (j) "Tobacco retail establishment" means any place of business where tobacco products are available for sale to the general public, ~~in the ordinary course of business. The term includes but is not limited to grocery stores, tobacco products shops, kiosks, convenience stores, gasoline service stations, bars, and restaurants.~~
- (k) "Tobacco product" means (1) Any product containing, made of, or derived from tobacco or nicotine that is intended for human consumption or is likely to be consumed, whether inhaled, absorbed, or ingested by any other means, including, but not limited to, a cigarette, a cigar, pipe tobacco, chewing tobacco, snuff, or snus; (2) Any electronic smoking device and any substances that may be aerosolized or vaporized by such device, whether or not the substance contains nicotine; or (3) Any component, part, or accessory of (1) or (2), whether or not any of these contain tobacco or nicotine, including but not limited to liquids used in electronic smoking device, filters, rolling papers, blunt or hemp wraps, and pipes.
- Tobacco product does not include any nicotine cessation product that has been authorized by the U.S. Food and Drug Administration to be marketed and for sale as "drugs," "devices," or "combination products," as defined in the Federal Food, Drug, and Cosmetic Act.
- (l) "Possess" or "Possession" means having control over a thing or substance, but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found.

Commented [KS1]: Needs proper code formatting.

Commented [KS2]: Cigarette is not used within the ordinance and does not need defined.

Commented [KS3]: Public Place is not used within the ordinance and does not need defined.

Commented [JS4]: Generally, society and club organizations are not open to the public and would require a warrant to enter. There may be a public health inspection exemption for these groups if licensed.

Commented [JS5]: Contradicts i and j as societal and club organizations are not open to the general public but they are required to be licensed.

(m) "Electronic smoking device" is any device that may be used to deliver any aerosolized or vaporized nicotine or any other substance to the person inhaling from the device, including, but not limited to, an e-cigarette, e-cigar, e-pipe, vape pen or e-hookah; electronic smoking device also includes any component, part, or accessory of such a device, whether or not sold separately, and includes any substance intended to be aerosolized or vaporized during the use of the device whether or not the substance contains nicotine. Electronic smoking device does not include drugs, devices, or combination products authorized for sale by the U.S Food and Drug Administration, as those terms are defined in the Federal Food, Drug and Cosmetic Act.

(n) "Moveable Place of Business" means any form of business that is operated out of a kiosk, truck, van, automobile or other type of vehicle or transportable shelter and that is not a fixed address or other permanent type of structure licensed for over-the counter sales transactions.

Commented [KS6]: How would special events at a non-retailer location occur. See change in (j)

(o) "Licensed Product" means the term that collectively refers to any tobacco product.

(p) "Arm's Length Transaction" means a sale in good faith and for valuable consideration that reflects the fair market value between two informed and willing parties, neither of which is under any compulsion to participate in the transaction. A sale for which a significant purpose is avoiding the effect of the violations of this chapter is not an Arm's Length Transaction.

(q) "Youth-Oriented Facility" includes, but is not limited to: a private or public kindergarten, elementary, middle, junior high, or high school; a library; a playground open to the public; a youth center, defined as a facility where youth, come together for programs and activities, a recreational community facility open to the public, defined as an area, place, structure, or other facility that is used either permanently or temporarily for community recreation, even though it may be used for other purposes; a gymnasium, playing court, playing field, and swimming pool; an arcade open to the public; and/or a park open to the public or to all the residents of a private community.

Commented [MV7]: The scope of this definition needs to be reviewed as Gahanna has 800+ acres of park that fit in this definition.

737.02 POSTING OF SIGNS

(a) No tobacco retailer shall sell, permit the sale of, or distribute tobacco products in the City of Gahanna unless both the tobacco license and a printed notice(s) as outlined herein Section 737.02(b) is posted at any location where tobacco products are available for purchase.

(b) All notices must be posted in a manner conspicuous to both employees and consumers, unobstructed from view in their entirety, and within six feet of each register where tobacco products are available for purchase and must state "It is illegal for any person under the age of 21 to purchase tobacco or alternative nicotine products". The ~~City of Gahanna Department~~ shall provide the license and notice upon approval or renewal of the license or by request by the licensee. The notice(s) must be at least 14" by 11" and the words on the notice must be legibly printed in high contrast red color with capitalized letters at least one-half inch high. Additional copies of the license shall be printed by the licensee in accordance with the instructions provided by the Department upon approval of the license application.

Commented [MV8]: This should be Department as defined above, not the City of Gahanna

737.03 SALE TO PERSONS UNDER THE AGE OF 21 PROHIBITED. PROOF OF AGE

~~(a) No person shall sell any tobacco products to any person under the age of 21.~~

Commented [KS9]: Already codified in ORC 2927.02

(b) Before selling or otherwise distributing any tobacco product the tobacco retailer's agent or employee shall verify that the purchaser is at least 21 years of age. Each tobacco retailer or tobacco retailer's agent or employee shall examine the purchaser's government-issued photographic identification. Verification is not required of a person over the age of 30. That a purchaser appeared to be 30 years of age or older shall not constitute a defense to a violation of this section.

737.04 LICENSE REQUIRED.

(a) No person shall sell or offer to sell any licensed product without first having obtained a license to do so from the Department.

(b) An application for a license must be made on a form provided by the Department. The application must contain the full name of the applicant, the applicant's residential and business addresses and telephone numbers, the name of the business for which the license is sought, and any additional information the city or Department deems necessary. If the Department determines that an application is incomplete, it will be returned to the applicant with notice of the information necessary to make the application complete.

(c) The fee for a license shall be initially set, and subsequently reviewed and adjusted annually, by the City/Department; however, the fee for a license shall not be less than ~~\$400.00-\$500.00~~

~~(1) (4)~~ Licensing fees are due at the time of application and are not refundable.

~~(2)~~ A license cannot be renewed if the Tobacco Retailer has outstanding fines pursuant to this Chapter.

(d) The license term is one calendar year, beginning on March 1. In cases of applications for a new license submitted after March 1 of a given year and more than sixty (60) days before the following March 1, the Department may issue a license for the remainder of the standard term period, but such license term will only extend to the following last day of February.

(e) Any license issued may be suspended or revoked following the procedures set forth in this chapter.

(f) All licenses issued are valid only on the premises for which the license was issued and only for the ~~person~~ entity to whom the license was issued.

~~(g) All licenses must be posted and displayed in a conspicuous location at all times in plain view of the general public in the tobacco retail establishment.~~

~~(h)(g)~~ A renewal application will be mailed to the establishment 30-60 days prior to March 1 of the calendar year. The renewal application must be received by the Department/City of Gahanna, along with any fees, by March 1 of the calendar year and may face fines if any or all of the renewal application is received after March 1.

~~(i)(h)~~ Issuance is a privilege and not a right. The issuance of a license is a privilege and does not entitle the license holder to an automatic renewal of the license.

~~(i)(i)~~ No person shall distribute samples of any tobacco products free of charge or at a nominal cost. The distribution of tobacco products as a free donation is prohibited.

737.05 TRANSFERABILITY OF A LICENSE

(a) Subject to the provisions of Sections 737.07 and 737.08, a licensee may assign such license to a third party, or permit a third party to assume such license in connection with an Arm's Length Transaction of the Licensee's business operations, whether by acquisition of all assets or merger or otherwise.

(b) In addition, Licensees may not assign or transfer the license granted to it, directly, or indirectly, whether voluntarily or involuntarily or by operation of law without the written consent of the City Council of the City of Gahanna ~~Department~~, which shall not be unreasonably conditioned, delayed or withheld and upon confirmation that the Assignee does not meet any of the criteria of Sections 737.07(a) or 737.07(d).

737.06 OUT-OF-PACKAGE SALES PROHIBITED; TOBACCO SAMPLES PROHIBITED.

~~(a) OUT-OF-PACKAGE SALES PROHIBITED. It is unlawful to sell cigarettes out of the manufactured package~~

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Commented [KS10]: Duplicate from 737.02 (b)

Commented [JS11]: (H) This statement should be legally evaluated for exposure to a claim of deprivation of due process.

Commented [KS12]: ORC 2927.02 allows samples with proof of age.

Commented [LJ13]: The two subsections of 737.05 initially appear to be contradictory. Can they be rewritten to provide more clarity?

Commented [KS14]: ALL Assets are allowed to transfer ownership

~~with required health warnings. It is unlawful to sell cigarettes in packages of fewer than twenty cigarettes per package.~~

Commented [KS15]: ORC 2927.02 already prohibits the sale of cigarettes outside of manufactures packaging.

737.07 DENIAL, SUSPENSION, AND REVOCATION OF LICENSE.

(a) DENIAL OF LICENSE. Grounds for denying the issuance or renewal of a license include, but are not limited to, the following:

- (1) The licensee applicant is under 21 years of age;
- (2) The licensee applicant has been convicted within the past five years of any violation of a federal, state, or local law, ordinance provision, or other regulation relating to tobacco products;
- (3) The licensee applicant has had a license to sell tobacco products suspended or revoked within the preceding thirty-six (36) months of the date of application;
- (4) The licensee applicant fails to provide the information required on the licensing application or provides false or misleading information;
- (5) The licensee applicant is prohibited by federal, state, or other local law, ordinance, or other regulation from holding a license;
- (6) The licensee applicant is in arrears with respect to any fine imposed for violation of this Chapter;
- (7) The business for which the license is requested is a moveable place of business. Only fixed-location tobacco retail establishments are eligible to be licensed.

Commented [MV16]: Changed to licensee applicant for clarity

Commented [KS17]: These seem to be in conflict with the suspension and revocation provisions.

Commented [KS18]: These seem to be in conflict with the suspension and revocation provisions.

Commented [JS19R18]: Concur that a conflict exists.

Commented [KS20]: This can replace Number 2 above.

~~(b) For purposes of subdivision (a) of this Section, "applicant" shall include entities with common ownership or management to the entity or natural person listed on the application.~~

Commented [KS21]: Ownership can be added to the definitions section and removed from here.

~~(c)~~(b) **SUSPENSION OF LICENSE:** Any license may be suspended for a definite period, not to exceed six (6) months, as determined by the Department. Prior to reinstatement of the license following the expiration of the suspension, the licensee shall remit a One Hundred Dollars (\$100) License reinstatement administration fee. A license may be suspended for the following reasons:

Commented [MV22]: The suspension timelines need charted to see where overlap occurs to determine if the time periods match

- (1) A business owned or operated by the licensee applicant engaging in the sale of Tobacco Products within the City is the subject of a court order or City resolution or final order declaring such business to be a public nuisance where said nuisance has not been abated, or where the court has ordered that sales of Tobacco Products shall cease pursuant to any temporary restraining order, preliminary injunction, or permanent injunction issued by said court;
- (2) Substantiated evidence that licensee or agent of licensee has sold or otherwise distribute any Tobacco Product to any Person Under 21 within the city more than one time in the past twelve (12) months;
- (3) The finding by a federal or state agency or court that the license applicant has violated a federal or state rule or regulation governing the sale of Tobacco Products;
- (4) Entry of the Department is refused or inspection, or investigation is refused, hindered, or thwarted;
- (5) For a second or any subsequent violation of this chapter within a thirty-six (36) month period of the first violation; and/or
- (6) The licensee is in arrears with respect to any fine imposed for any civil penalty levied under this Chapter.

Commented [JS23]: Does the public nuisance section need to be amended to reflect the application of this section?

Commented [MV24]: There should be a set number of sells that equals a license suspension

Commented [KS25]: This is in conflict with number 2 above, both in number and time period.

Commented [JS26R25]: Concur

~~(d)(c)~~ **REVOCATION OF LICENSE:** A license may be revoked for any of the following reasons:

- (1) The licensee applicant is determined to have knowingly included false or misleading information in the license application or renewal license application;
- (2) Substantiated evidence that licensee or agent of licensee has sold or otherwise distribute any Tobacco Product to any Person Under 21 within the City more than one time in the past twelve (12) months;
- (3) Entry of Department is refused, or inspection or investigation is refused, hindered, or thwarted;
- (4) Upon the discovery that the person was ineligible for the license under this ordinance and license was mistakenly issued or renewed to a person;
- (5) A period of suspension imposed under Subsection(c) herein has elapsed and the licensee remains in arrears of payment of such fine or penalty; and/or
- (6) The licensee has been subject to three (3) or more suspensions in the previous thirty-six (36) month period.

Commented [MV27]: The timelines need charted to see where overlap occurs to determine if the time periods match with the suspension timelines

Commented [KS28]: This reads the same as the suspension language in section c above..

Commented [MV29R28]: This should be a set number of sells that gets the license revoked.

Commented [MV30R28]: Or a set number of suspensions that equal a revocation

Commented [KS31]: This is in conflict with number 2 above, both in number and time period. I would consider this being 24 months (from 36).

Commented [MV32R31]: 2 can be removed then it clears up the prior comment above.

Commented [MV33]: This feet requirement needs reviewed with the map

737.08 LIMITS ON ELIGIBILITY FOR A TOBACCO RETAILER LICENSE

a) Proximity to youth-oriented facilities. No license may be issued, ~~and no existing license may be renewed, except as specified in 737.08(c)~~, to authorize tobacco sales within 1,000 feet of a youth-oriented facility as measured by a straight line from the nearest point of the property line of the parcel on which the youth-oriented facility is located to the nearest point of the property line of the parcel on which the applicant's business is located.

b) Proximity to other tobacco retailers. No license may be issued, ~~and no existing license may be renewed, except as specified in 737.08(c)~~ to authorize tobacco sales within 1,000 feet of a tobacco retailer location already licensed pursuant to this Article as measured by a straight line from the nearest point of the property line of the parcel on which the applicant's business is located to the nearest point of the property line of the parcel on which an existing licensee's business is located.

c) Notwithstanding sections 737.08(a) and 737.08(b), all Tobacco Retailers operating lawfully on the date this ordinance is adopted that would otherwise be eligible for a Tobacco Retail license for the location for which a license is sought but for the provisions of the aforementioned sections, may receive, renew or transfer a license for that location so long as all of the following conditions are met:

- (1) The license is timely obtained and is renewed ~~timely without lapse~~ or permanent revocation ~~(as opposed to temporary suspension)~~;
- (2) The Tobacco Retailer is not closed for business or otherwise suspends tobacco sales, whether voluntarily or due to license suspension for more than ~~one hundred and eighty (180) sixty (60) consecutive days~~, however this provision is inapplicable if the closure is due to major construction/remodeling with prior notice to the Department;
- (3) The Tobacco Retailer does not ~~substantially change~~ the business premises or business operation. A substantial change to the business operation includes, but is not limited to, the transferring of a location or a transfer of ownership for which a significant purpose is avoiding the effect of violations of this ordinance; and
- (4) The Tobacco Retailer retains the right to operate under other applicable laws.

Commented [KS34]: Without lapse needs to be defined in the definitions. Is also in conflict with 2 below.

Commented [JS35R34]: Without lapse seems overly broad and does not provide any remedy for the retailer.

Commented [MV36R34]: My suggestion is to remove "without lapse". If a business misses a deadline by 1 day - they can't renew? Seems extreme. If it says timely, then Department can determine what timely is

Commented [KS37]: This is in conflict with a 6 month suspension.

Commented [KS38]: As determined by whom?

- (5) If the City of Gahanna determines that a Tobacco Retailer has substantially changed their business premises or operation and the Tobacco Retailer disputes this determination, the Tobacco Retailer bears the burden of proving by a preponderance of evidence that such change(s) do not constitute a substantial change.

737.09 LIMITS ON POPULATION AND DENSITY

a) The total number of tobacco retailer licenses to be issued within the City of Gahanna shall be limited to 26.

Commented [MV39]: Number needs confirmed.

b) No new license may be issued to authorize tobacco sales if the number of tobacco retailer licenses already issued equals or exceeds the total number of authorized licenses pursuant to Subsection 737.09(a).

c) The Mayor of the City of Gahanna, or their designee, may seek Council's approval to authorize additional tobacco retailer licenses.

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~~(1) Notwithstanding subsection 737.09(a), a Tobacco Retailer operating lawfully on the date this ordinance is adopted that would otherwise be eligible for a Tobacco Retailer license for the location for which a license is sought may receive or renew a license for that location so long as all of the following conditions are met:~~

~~i. the license is timely obtained and is renewed without lapse or permanent revocation (as opposed to temporary suspension);~~

~~ii. the Tobacco Retailer is not closed for business or otherwise suspends Tobacco sales, whether voluntarily or due to license suspension for more than sixty (60) consecutive days however this provision is inapplicable if the closure is due to major construction/remodeling with prior notice to the Department;~~

~~iii. the Tobacco Retailer does not substantially change the business premises or business operation. A substantial change to the business operation includes, but is not limited to, the transferring of a location:~~

~~a. to a new Proprietor(s) in an Arm's Length Transaction; or~~

~~b. for which a significant purpose is avoiding the effect of violations of this ordinance; and~~

~~iv. the Tobacco Retailer retains the right to operate under other applicable laws;~~

~~v. If the City of Gahanna determines that a Tobacco Retailer has substantially changed their business premises or operation and the Tobacco Retailer disputes this determination, the Tobacco Retailer bears the burden of proving by a preponderance of evidence that such change(s) do not constitute a substantial change;~~

~~vi. The Mayor of the City of Gahanna, or their designee, may seek Council's approval to authorize additional tobacco retailer licenses if by their determination the business provides significant economic benefit to the community.~~

Commented [KS40]: This section is unnecessarily duplicated from 737.08 (c).

Commented [KS41]: Moved above under (b) to (c)

737.10 NON-RETALIATION.

No person or employer shall discharge, refuse to hire or in any manner retaliate against any employee, applicant for employment or customer because such employee, applicant or customer reported violations of any provisions of this chapter.

737.11 ENFORCEMENT AND PENALTIES; APPEALS.

(a) The Department ~~and/or the City of Gahanna Division of Police and/or City of Gahanna Code Enforcement~~ shall have authority to implement and enforce the provisions of this Chapter. All licensed premises must be

open to inspection by the inspectors, officers, or other authorized designees during regular business hours. The tobacco retail establishment shall be subject to a minimum of two (2) compliance checks per year, to be conducted by the Department. The Department and/or the ~~City of Gahanna Division of Police and/or City of Gahanna Code Enforcement~~ may enter at reasonable times to inspect or investigate and examine or copy records to determine compliance with this Chapter. Any enforcement agency may apply for and any judge of a court of record may issue an appropriate search warrant necessary to achieve the purposes of this Chapter within the court's territorial jurisdiction. Compliance checks may also include the participation of a person at least 18 years of age, but under the age of 21, to enter the licensed premises to attempt to purchase licensed products. Unannounced follow-up compliance checks of all non-compliant tobacco retail establishments are required within three months of any violation of this ordinance. The results of all compliance checks shall be published at least annually and made available to the public upon request.

Commented [JS42]: Striking reference to Gahanna Division of Police having enforcement responsibilities under this section.

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Commented [JS43]: We have the ability to enforce underage sales under GCO/ORC.

(b) If the Department denies the issuance of a license, or suspends or revokes a license, or issues a citation with or without civil penalty for violating this chapter, the Department shall send to the applicant, or licensee, by certified mail, return receipt requested, written notice of the action and the right to an appeal. Upon receipt of written notice of the denial, suspension, or revocation, the licensee subject to license denial or revocation or citation and civil fine shall have the right to appeal to the Department. An appeal must be filed within thirty (30) days after the receipt of notice of the decision. The appellant shall bear the burden of proof. The Department finds based on a preponderance of evidence, after notice and an opportunity to be heard. Department shall be the final, administrative decision maker.

Commented [KS44]: The Department should not be the appeal agency. Court? Council? Other City Board?

Commented [JS45R44]: Concur this creates a potential due process claim if appealed to the same entity charged with enforcement.

Commented [MV46R44]: Need to determine if FCPH has an appeal board set up of different employees than the enforcement ones, if so, it solves due process issue.

Commented [KS47]: What should this period be? 18 Months? 24 Months? 36 Months is a long time.

Commented [MV48R47]: Time periods need to be the same throughout and follow each other

Commented [KS49]: What should this period be? 24 Months? 36 Months is a long time.

(c) CIVIL PENALTIES. In addition to the denial, suspension, or revocation of a license, the Department may impose the following civil penalties on the tobacco retailer for violations of this Chapter:

- (1) For a first violation, a fine no less than \$500.
- (2) For a second violation within a 36-month period, a fine no less than \$750 and the license shall be suspended a minimum of 30 days no more than 60 days.
- (3) For a third violation within a 36-month period, a fine no less than \$1,000 and the license shall be suspended for a minimum of 60 days.
- (4) For a fourth and any subsequent violations within a 36-month period, the license shall be revoked.

(d) TOBACCO RETAILING WITHOUT A VALID LICENSE. In addition to any other penalty authorized by law, if a court of competent jurisdiction determines, or the Department finds based on a preponderance of evidence, after notice and an opportunity to be heard, that any tobacco retailer has engaged in Tobacco Retailing at a location without a valid Tobacco Retailer's license, either directly or through the tobacco retailer's agents or employees, the tobacco retailer shall be ineligible to apply for, or to be issued, a Tobacco Retailer's license as follows:

- (1) After a first violation of this section at a location within any 36-month period, no new license may issue for the tobacco retailer or the location (unless ownership of the business at the location has been transferred in an Arm's Length Transaction), until thirty (30) days have passed from the date of the violation.
- (2) After a second violation of this section at a location within any 36-month period, no new license may issue for the tobacco retailer or the location (unless ownership of the business at the location has been transferred in an Arm's Length Transaction), until ninety (90) days have passed from the date of the violation.
- (3) After of a third or subsequent violation of this section at a location within any 36-month period, no new license may issue for the tobacco retailer or the location (unless ownership of the business at the location has been transferred in an Arm's Length Transaction), until five (5) years have passed from the date of the violation.

Commented [KS50]: What should this period be? 18 Months? 24 Months? 36 Months is a long time.

(e) ADDITIONAL REMEDIES. The remedies provided by this Chapter are cumulative and in addition to other remedies available at law or in equity.

Commented [KS51]: Seems punitive after transfer. Understanding the need to have a disclosure of who the ownership is.

737.12 INJUNCTIVE RELIEF.

(a) The provisions of Chapter 1308 of the Codified Ordinances of Gahanna, Ohio are health ordinances applicable to real property in the City and may be enforced by civil action pursuant to the Gahanna City Code and the Ohio Revised Code.

(b) Repeated violations of this Chapter may constitute a public nuisance. The City Attorney and/or ~~their his or her~~ designee may bring a cause of action to abate such nuisance and enjoin the recurrence of such violations and for such other relief may be available at law or in equity.

Commented [JS52]: Again, do we need to amend 1308.04? The applicable subsection is (a), but it is a long list of general conditions. Does it need to direction reference or be more specific?

737.13 SEVERABILITY.

If any provision, clause, sentence or paragraph of this chapter or the application thereof to any person or circumstance shall be held to be invalid, such invalidity shall not affect the provisions of this chapter which can be given effect without the invalid provisions or application, and to this end the provisions are declared to be severable.

737.14 OTHER LAWS.

This Chapter does not intend and shall not be interpreted to regulate any conduct where the regulation of such conduct has been preempted by the United States or the State of Ohio, nor shall it limit in any way the City of Gahanna Division of Police or Code Enforcement from conducting their statutory and permissible duties.