# CITY OF WEST DES MOINES
# CITY COUNCIL MEETING COMMUNICATION

**ITEM:** **DATE:** October 17, 2022

Resolution approving a 28E Agreement between the Iowa Alcoholic Beverages Division and the City of West Des Moines for the purposes of providing and funding local tobacco enforcement activities.

**FINANCIAL IMPACT:**

There will be limited positive financial impact to the City of West Des Moines when the City performs tobacco compliance checks in West Des Moines on behalf of the State of Iowa.

**BACKGROUND:**

Pursuant to state law and an intergovernmental agreement with the Iowa Department of Public Health, the Iowa Alcoholic Beverages Division (Iowa ABD) possess the authority and provides for the enforcement of the State of Iowa's tobacco laws. For a number of years, the Iowa ABD has delegated the responsibility to perform tobacco sale to minor compliance checks of local businesses to the City of West Des Moines and its Police Department. In return, the City receives a flat fee of $75.00 from the State of Iowa for each reported tobacco compliance check.

The Iowa ABD prepared a 28E Agreement for the local authorities to sign for purposes of these tobacco enforcement efforts to formally establish each party's respective obligations. This 28E Agreement is a renewal of the same agreement reviewed by the West Des Moines City Attorney's Office and approved by the City Council on November 1, 2021.

**OUTSTANDING ISSUES** (if any): None

**RECOMMENDATION:**

Approve the 28E Agreement between the Iowa Alcoholic Beverages Division and the City of West Des Moines for the purposes of providing and funding local tobacco enforcement activities.

**Lead Staff Member:** **Chris Scott, Chief of Police**

**STAFF REVIEWS**

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| Department Director | |
| Appropriations/Finance | |
| Legal | |
| Agenda Acceptance | |

**PUBLICATION(S)** (if applicable)

| | |
|---|---|
| Published In | |
| Dates(s) Published | |

**SUBCOMMITTEE REVIEW** (if applicable)

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|---|---|---|---|
| Committee | | | |
| Date Reviewed | | | |
| Recommendation | Yes | No | Split |

**RESOLUTION APPROVING A 28E AGREEMENT BETWEEN THE IOWA ALCOHOLIC BEVERAGES DIVISION AND THE CITY OF WEST DES MOINES FOR THE PURPOSES OF PROVIDING AND FUNDING LOCAL TOBACCO ENFORCEMENT ACTIVITIES**

**WHEREAS,** the provision of tobacco enforcement efforts within the City of West Des Moines promotes the health and well-being of West Des Moines citizens and visitors; and

**WHEREAS,** the State of Iowa, through the Iowa Alcoholic Beverages Division, has offered to reimburse the City of West Des Moines and the City's Police Department for performing tobacco sale to minor compliance checks of local businesses; and

**WHEREAS,** the Iowa Alcoholic Beverages Division and the City of West Des Moines have negotiated an agreement under Iowa Code Chapter 28E to provide and fund local tobacco enforcement activities.

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF WEST DES MOINES, IOWA:**

1. The 28E Agreement between the Iowa Alcoholic Beverages Division and the City of West Des Moines is hereby approved.

2. The Police Chief is authorized to sign the signature page to be attached to the 28E Agreement on behalf of the City of West Des Moines.

3. The Police Department is directed to forward the signed signature page to Karen Freund, Deputy Administrator of Regulatory Affairs, Iowa Alcoholic Beverages Division, 1918 SE Hulsizer Road, Ankeny, Iowa 50021, with the executed signature page to be attached to the 28E Agreement, which the Iowa Alcoholic Beverages Division will then electronically file with the Secretary of State of Iowa.

**PASSED AND APPROVED** this 17th day of October, 2022.

_____
Russ Trimble, Mayor

ATTEST:

_____
Ryan T. Jacobson
City Clerk

# *28E AGREEMENT FOR TOBACCO, ALTERNATIVE NICOTINE AND VAPOR PRODUCT ENFORCEMENT*

**SCHEDULE 3**

**THIS AGREEMENT** is made and entered into on this _____day of _____, 2022 by and between the Iowa Alcoholic Beverages Division ("ABD"), and the West Des Moines Police Department (The "Department"). The parties agree as follows:

**SECTION 1. IDENTITY OF THE PARTIES.**

**1.1** **Iowa ABD.** The ABD is authorized pursuant to Iowa Code Chapter 453A and a Memorandum of Understanding with the Iowa Department of Health and Human Services to provide enforcement for Iowa's tobacco, alternative nicotine and vapor product laws. The ABD's address is: 1918 SE Hulsizer Road, Ankeny, Iowa 50021.

**1.2** **Department.** The Department operates a duly recognized Iowa law enforcement agency. The Department's address is:

**West Des Moines Police Department**
250 George Mills Civic Parkway, West Des Moines, Iowa 50265

**SECTION 2. PURPOSE.** The parties have entered into this Agreement for the purpose of providing and funding tobacco, alternative nicotine and vapor product enforcement activities in compliance with Iowa Code § 453A.2.

**SECTION 3. TERM.** The term of the Agreement shall be from the aforementioned date through June 30, 2023, unless earlier terminated in accordance with the terms of the Agreement.

**SECTION 4. FILING.** Pursuant to Iowa Code § 28E.8, the ABD shall electronically file the Agreement with the Iowa Secretary of State, after the parties have executed the agreement.

**SECTION 5. RESPONSIBILITIES OF THE PARTIES.**

**5.1** **Responsibilities of the Department.**

**5.1.1** **Local Tobacco, Alternative Nicotine and Vapor Product Enforcement.** The Department shall provide tobacco, alternative nicotine and vapor product enforcement of Iowa Code Chapter 453A.

**5.1.2** **Compliance Checks.** "Compliance checks" mean activity to enforce tobacco, alternative nicotine and vapor product laws in accordance with Iowa Code § 453A.2 within the jurisdiction of the Department. Compliance checks also may include

enforcement of § 453A.2 within additional jurisdictions upon agreement of the Parties. ABD shall make available to the Department the location of each tobacco, alternative nicotine and vapor product permit holder subject to a compliance check by the Department at https://tobacco.iowaabd.com/.

**The Department shall perform one (1) compliance check of each tobacco, alternative nicotine and vapor product permit holder within the jurisdiction of the Department during the term of the Agreement. Please note that alternative nicotine and vapor products are age-restricted pursuant to Iowa Code § 453A.2, and are therefore included in the I-PLEDGE program. Attempts to purchase alternative nicotine and vapor products may be conducted at any retailer that sells these products.**

**The Department shall not begin to conduct any retailer compliance checks until October 1, 2022.**

The compliance check shall be completed and submitted for reimbursement to ABD by **February 15, 2023**. The Department should try to complete a compliance check of all seasonal businesses such as golf courses, marinas and bait shops before the businesses close for the 2022 business year, but not before October 1, 2022. If the department is unable to complete the compliance checks on seasonal businesses prior to the businesses close for the 2022 business year, the Department shall work with ABD to establish a plan for completing these compliance checks.

The Department shall conduct a second compliance check on any retailer that is found to be non-compliant during the first inspection. The second compliance check on the non-compliant retailer shall be completed and entered no later than **May 15, 2023.**

Clerks that fail compliance checks shall be ticketed criminally.

The Department shall, within seven (7) business days, notify the retail owner or manager of any violation. Within seventy-two (72) hours of the Department issuing a citation for a violation of Iowa Code § 453A.2(1) to a permit-holder or employee of a permit-holder, the Department must notify the local permit-issuing authority that issued the tobacco, alternative nicotine and vapor product permit to the retailer where the offense was committed.

If the Department fails to complete and submit reimbursement for compliance checks to ABD by **February 15, 2023,** ABD will consult with the Department to establish a plan for completing the remaining compliance checks. In the event that the Department fails to execute the agreed upon plan, the Department agrees that ABD may authorize the Iowa State Patrol or other law enforcement agency to conduct any remaining compliance checks.

5.1.3 **Underage Purchaser Volunteers.** Utilization of underage purchaser volunteers is strongly encouraged where feasible. The Department may compensate the underage purchasers involved in the compliance checks in a manner consistent with Section 6. Underage purchasers from the age of sixteen to twenty years old may be utilized in the program. Keep in mind that the federal government (SYNAR) ***will not allow underage purchasers under the age of sixteen*** to be used to conduct compliance checks. Please ensure that the officers assigned to conduct the compliance checks do not work with an underage purchaser younger than age of sixteen. If utilizing multiple underage purchasers to perform compliance checks, please ensure that a representative mix of 16, 17, 18, 19 and 20 year old underage purchasers are used when feasible.

5.1.4 **Routine Enforcement.** In addition to conducting compliance checks, the Department agrees to regularly enforce underage tobacco, alternative nicotine and vapor product laws by ticketing underage offenders.

5.1.5 **Civil Proceedings.** The Department shall cooperate with city, county and state prosecutors if civil permit proceedings are initiated against a tobacco, alternative nicotine and vapor product permit holder. The Department shall also cooperate in proceedings against cited clerks and underage persons. Cooperation shall include, but not be limited to, sharing investigative reports and copies of issued citations, as well as providing witness statements and testimony.

5.1.6 **Compliance Reports.** The Department shall provide monthly reports to the ABD in the manner prescribed by the ABD.

5.1.7 **Miscellaneous.** The Department shall be responsible for the day-to-day administration of its tobacco, alternative nicotine and vapor product enforcement activities. The Department shall provide all office space, equipment and personnel necessary to conduct tobacco, alternative nicotine and vapor product enforcement activities under the Agreement. The Department is solely responsible for the selection, hiring, disciplining, firing and compensation of its officers.

5.2 **Responsibilities of the ABD.**

5.2.1 **Enforcement Guidance.** The ABD shall provide guidance on tobacco, alternative nicotine and vapor product enforcement to the Department, if needed, and cooperate with the Department in the performance of the Agreement.

5.2.2 **Payment.** The ABD shall pay the Department in the manner described in Section 6.

5.2.3 **Cooperation.** If ABD believes that any officer of the Department fails to perform duties in a manner that is consistent with the Agreement, the ABD shall notify the Department. The Department shall then take such action as necessary to investigate and, if appropriate, discipline or reassign the officer away from tobacco, alternative

nicotine and vapor product enforcement activities. The ABD shall have no authority to discipline or reassign an officer, except that the ABD shall have the authority to stipulate that a particular officer not be assigned to provide services under the Agreement.

5.2.4 **Insurance, Benefits and Compensation.** The ABD shall not provide for, nor pay, any employment costs of the Department's officers including, but not limited to, worker's compensation, unemployment insurance, health insurance, life insurance and any other benefits or compensation, nor make any payroll payments with respect to the Department's officers. The ABD shall have no liability whatsoever for all such employment costs or other expenses relating to, or for the benefit of, the Department's officers.

## SECTION 6. PAYMENT TO DEPARTMENT.

6.1 **Method of Payment.** In consideration for providing the services required by the Agreement, the Department shall be paid on a flat fee basis of seventy-five dollars ($75) per reported compliance check. The flat fee payment for each compliance check constitutes the full and exclusive remuneration for the compliance checks. For example, compensation of underage purchasers is the sole responsibility of the Department and is to be paid from the flat fee payment.

6.2 **Eligible Claims.** Compliance checks that are conducted on or after **October 1, 2022** are eligible for payment provided that the results are reported in accordance with Section 5. Any compliance checks that were funded by a non-departmental entity are not eligible for payment.

6.3 **Allocations.** The costs of the services referred to in Section 6.1 shall be allocated as follows:

6.3.1 **Sole Activity.** Money paid to the Department, pursuant to the Agreement, shall be used to fund overtime of full- or part-time peace officer positions solely for tobacco, alternative nicotine and vapor product enforcement activities described in the Agreement. Money also shall be used for compensation, if any, of underage purchasers. In addition, the Department may use money paid pursuant to the Agreement for reasonable Department expenditures, including, but not limited to, officer training and equipment, provided that such expenditures do not impair the Department's ability to perform tobacco, alternative nicotine and vapor product enforcement activities.

6.3.2 **Payment in Arrears.** The ABD may pay all approved invoices in arrears and in conformance with Iowa Code § 8A.514. The ABD, consistent with Iowa Code § 8A.514, may pay in less than the specified time period. Payment by the ABD in fewer than sixty (60) days, however, does not constitute an implied waiver of that Code section.

**SECTION 7. ADMINISTRATION OF AGREEMENT.** The ABD and the Department shall jointly administer the Agreement.

**SECTION 8. NO SEPARATE ADMINISTRATIVE ENTITY.** No new or separate legal or administrative entity is created by the Agreement.

**SECTION 9. NO PROPERTY ACQUIRED.** The ABD and the Department, in connection with the performance of the Agreement, shall acquire no real or personal property.

**SECTION 10. TERMINATION.**

**10.1** **Termination for Convenience.** Following twenty (20) days written notice, either party may terminate the Agreement, in whole or in part, for convenience without the payment of any penalty or incurring any further obligation to the non-terminating party. Following termination for convenience, the non-terminating party shall be entitled to compensation, upon submission of invoices and proper proof of claim, for services provided under the Agreement to the terminating party up to and including the date of termination.

**10.2** **Termination Due to Lack of Funds or Change in the Law.** Notwithstanding anything in this Contract to the contrary, and subject to the limitations set forth below, ABD shall have the right to terminate this Contract without penalty and without any advance notice as a result of any of the following:

**10.2.1** The legislature or governor fail in the sole opinion of ABD to appropriate funds sufficient to allow ABD to either meet its obligations under this Contract or to operate as required and to fulfill its obligations under this Contract:

**10.2.2** If funds are de-appropriated, reduced, not allocated, or receipt of funds is delayed, or if any funds or revenues needed by ABD to make any payment hereunder are insufficient or unavailable for any other reason as determined by ABD in its sole discretion.

**10.3** **Termination for Cause.** The occurrence of any one or more of the following events shall constitute cause for any party to declare another party in default of its obligations under the Agreement:

**10.3.1** Failure to observe and perform any covenant, condition or obligation created by the Agreement;

**10.3.2** Failure to make substantial and timely progress toward performance of the Agreement;

**10.3.3** Failure of the party's work product and services to conform with any specifications noted herein;

**10.3.4** Infringement of any patent, trademark, copyright, trade dress or any other intellectual property right.

**10.4** **Notice of Default.** If there occurs a default event under Section 10.3, the non-defaulting party shall provide written notice to the defaulting party requesting that the breach or noncompliance be immediately remedied. In the event that the breach or noncompliance continues to be evidenced ten days beyond the date specified in the written notice, the non-defaulting party may either:

**10.4.1** Immediately terminate the Agreement without additional written notice; or,

**10.4.2** Enforce the terms and conditions of the Agreement and seek any available legal or equitable remedies.

In either event, the non-defaulting party may seek damages as a result of the breach or failure to comply with the terms of the Agreement.

## SECTION 11. INDEMNIFICATION.

**11.1** **By ABD.** Consistent with Article VII, Section 1 of the Iowa Constitution and Iowa Code Chapter 669, ABD agrees to defend and indemnify the Department and hold it harmless against any and all liabilities, damages, settlements, judgments, costs and expenses, including reasonable attorney's fees of counsel required to defend the Department, related to or arising out of ABD's negligent or wrongful acts or omissions in the performance of the Agreement.

**11.2** **By the Department.** Consistent with Article VII, Section 1 of the Iowa Constitution and Iowa Code Chapter 670, the Department agrees to defend and indemnify and hold the State of Iowa and ABD harmless from any and all liabilities, damages, settlements, judgments, costs and expenses, including reasonable governmental attorney's fees and the costs and expenses of attorney fees of other counsel required to defend the ABD, related to or arising from any negligent or wrongful acts or omissions of the Department in the performance of this Agreement.

## SECTION 12. CONTACT PERSON.

**12.1** **Contact Person.** At the time of execution of the Agreement, each party shall designate, in writing, a Contact Person to serve until the expiration of the Agreement or the designation of a substitute Contact Person. During the term of the Agreement, each Contact Person shall be available to meet, as otherwise mutually agreed, to plan the services being provided under the Agreement.

## SECTION 13. CONTRACT ADMINISTRATION.

13.1 **Amendments.** The Agreement may be amended in writing from time to time by mutual consent of the parties. All amendments to the Agreement must be fully executed by the parties.

13.2 **Third Party Beneficiaries.** There are no third party beneficiaries to the Agreement. The Agreement is intended only to benefit ABD and the Department.

13.3 **Choice of Law and Forum.** The terms and provisions of the Agreement shall be construed in accordance with the laws of the State of Iowa. Any and all litigation or actions commenced in connection with the Agreement shall be brought in Des Moines, Iowa, in Polk County District Court for the State of Iowa. This provision shall not be construed as waiving any immunity to suit or liability that may be available to the State of Iowa, ABD or the Department.

13.4 **Assignment and Delegation.** The Agreement may not be assigned, transferred or conveyed in whole or in part without the prior written consent of the other party.

13.5 **Integration.** The Agreement represents the entire Agreement between the parties and neither party is relying on any representation that may have been made which is not included in the Agreement.

13.6 **Headings or Captions.** The paragraph headings or captions are for identification purposes only and do not limit nor construe the contents of the paragraphs.

13.7 **Not a Joint Venture.** Nothing in the Agreement shall be construed as creating or constituting the relationship of a partnership, joint venture, association of any kind or agent and principal relationship between the parties. Each party shall be deemed an independent contractor acting toward the expected mutual benefits. No party, unless otherwise specifically provided for herein, has the authority to enter into any contract or create an obligation or liability on behalf of, in the name of, or binding upon the other party to the Agreement.

13.8 **Supersedes Former Agreements.** The Agreement supersedes all prior Agreements between ABD and the Department for the services provided in connection with the Agreement.

13.9 **Waiver.** Except as specifically provided for in a waiver signed by duly authorized representatives of ABD and the Department, failure by any party at any time to require performance by the other party or to claim a breach of any provision of the Agreement shall not be construed as affecting any subsequent breach or the right to require performance with respect thereto or to claim a breach with respect thereto.

13.10 **Notices.** Notices under the Agreement shall be in writing and delivered to the representative of the party to receive notice (identified below) at the address of the party to

receive notice as it appears below or as otherwise provided for by proper notice here under. This person shall be the Contact Person. The effective date for any notice under the Agreement shall be the date of delivery of such notice (not the date of mailing) which may be effected by certified U.S. Mail return receipt requested with postage prepaid thereon or by recognized overnight delivery service, such as Federal Express or UPS. Failure to accept "receipt" shall constitute delivery.

If to ABD:

Jessica Ekman
Tobacco Program Coordinator
Iowa Alcoholic Beverages Division
1918 SE Hulsizer Road
Ankeny, Iowa 50021
515-281-7434
Email: Ekman@IowaABD.com

If to Department:

Chief Chris Scott
West Des Moines Police Department
250 George Mills Civic Parkway
West Des Moines, Iowa 50265
Email: chris.scott@wdm.iowa.gov

**13.11** **Cumulative Rights.** The various rights, powers, options, elections and remedies of any party provided in the Agreement, shall be construed as cumulative and not one of them is exclusive of the others or exclusive of any rights, remedies or priorities allowed any party by law, and shall in no way affect or impair the right of any party to pursue any other equitable or legal remedy to which any party may be entitled as long as any default remains in any way un-remedied, unsatisfied or un-discharged.

**13.12** **Severability.** If any provision of the Agreement is determined by a court of competent jurisdiction to be invalid or unenforceable, such determination shall not affect the validity or enforceability of any other part or provision of the Agreement.

**13.13** **Time is of the Essence.** Time is of the essence with respect to the performance of the terms of the Agreement.

**13.14** **Authorization.** Each party to the Agreement represents and warrants to the other that:

**13.14.1** It has the right, power and authority to enter into and perform its obligations under the Agreement.

**13.14.2** It has taken all requisite action (corporate, statutory or otherwise) to approve execution, delivery and performance of the Agreement, and the Agreement constitutes a legal, valid and binding obligation upon itself in accordance with its terms.

**13.15** **Successors in Interest.** All the terms, provisions and conditions of the Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors, assigns and legal representatives.

**13.16** **Record Retention and Access.** The Department shall maintain books, records and documents which sufficiently and properly document and calculate all charges billed to ABD throughout the term of the Agreement for a period of at least three (3) years following the date of final payment or completion of any required audit, whichever is later. The Department shall permit the Auditor of the State of Iowa or any authorized representative of the State and where federal funds are involved, the Comptroller General of the United States or any other authorized representative of the United States government, to access and examine, audit, excerpt and transcribe any directly pertinent books, documents, papers, electronic or optically stored and created records or other records of the Department relating to orders, invoices, or payments or any other documentation or materials pertaining to the Agreement. The Department shall not impose a charge for audit or examination of the books and records.

**13.17** **Additional Provisions.** The parties agree that any Addendum, Rider or Exhibit, attached hereto by the parties, shall be deemed incorporated herein by reference.

**13.18** **Further Assurances and Corrective Instruments.** The parties agree that they shall, from time to time, execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered, such supplements hereto and such further instruments as may reasonably be required for carrying out the expressed intention of the Agreement.

**SECTION 14. EXECUTION.**

**IN WITNESS WHEREOF,** in consideration of the mutual covenants set forth above and for other good and valuable consideration, the receipt, adequacy and legal sufficiency of which are hereby acknowledged, the parties have entered into the Agreement and have caused their duly authorized representatives to execute the Agreement.

**By Alcoholic Beverages Division**

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| **DeMario A. Luttrell**<br>**Regulatory Compliance Bureau Chief** | **Date** |

**By Law Enforcement Agency**

| | |
|---|---|
| **Department Official** | **Date** |
| **Department Witness** | **Date** |