

**ORDINANCE NO. \_\_\_\_\_**

**AN ORDINANCE TO REPEAL TITLE 11, CHAPTER 9, SECTION 10, “SMOKING IN PUBLIC PLACES” AND ADOPT IN FULL A NEW TITLE 11, CHAPTER 9, SECTION 10, “CITY OF BIRMINGHAM SMOKE FREE ORDINANCE OF 2011”.**

**ORDINANCE NO. \_\_\_\_\_**

**WHEREAS**, numerous studies have shown that exposure to second hand smoke, a known carcinogen, causes disease and premature death in children and adults who do not smoke and that health hazards induced by breathing secondhand smoke may include lung cancer, heart disease, respiratory infection and decreased respiratory function; and

**WHEREAS**, studies have shown that during periods of active smoking, peak and average outdoor tobacco smoke levels at outdoor cafes and bar patios rival indoor tobacco smoke concentrations; and

**WHEREAS**, studies have shown that residual tobacco contamination, or “thirdhand smoke”, from cigarettes, cigars, and other tobacco products is left behind after smoking occurs and builds up on surfaces and furnishings. This highly toxic particulate matter, including nicotine can linger in spaces long after smoking has ceased and clings to walls and ceilings and be absorbed into carpets, draperies, upholsteries, and be reemitted into the air; and

**WHEREAS**, the Food and Drug Administration (FDA) has also determined that “e-cigarettes” contain not only nicotine, but also detectable levels of known carcinogens and toxic chemicals from which a vapor, similar to traditional tobacco products of undetermined and potentially harmful substances are emitted; and

**WHEREAS**, business owners should, in the interest of public health, provide a work environment that does not expose workers or customers to unreasonably dangerous conditions and should take precautions not to expose workers or customers to toxic chemicals found in secondhand smoke.

**NOW, THEREFORE** the Council of the City of Birmingham finds that secondhand smoke is a form of air pollution, a danger to health, and a material public nuisance, and deems it appropriate to enact the following ordinance to (1) protect the public health and welfare by prohibiting smoking in public places and places of employment, (2) guarantee the right of non-smokers, and (3) recognize the need to breathe smoke-free air.

**Section 1. BE IT HEREBY ORDAINED** by the Council of the City of Birmingham that Title 11, Chapter 9, Section 10 of the General Code of the City of Birmingham, 1980, as amended is hereby repealed and the following Title 11, Chapter 9, Section 10 is hereby adopted to read in full as follows:

**Section 2. Smoking in public places and places of employment**

- (a) **Definitions.** In this Section, the following definitions shall apply:
- (1) “Bar” means an establishment that is devoted to the serving of alcoholic beverages for consumption by guests on the premises and in which the serving of food is only incidental to the consumption of those beverages, including but not limited to, taverns, nightclubs, cocktail lounges, and cabarets.
  - (2) “Business” means a sole proprietorship, partnership, joint venture, corporation, or other business entity, either for-profit or not-for-profit, including retail establishments where goods or services are sold; professional corporations and other entities where legal, medical, dental, engineering, architectural, or other professional services are delivered; and private clubs.
  - (3) “E-cigarette” means any electronic oral device, such as one composed of a heating element, battery, and/or electronic circuit, which provides a vapor of nicotine or any other substances, and the use or inhalation of which simulates smoking. The term shall include any such device, whether manufactured, distributed, marketed, or sold as an e-cigarette, e-cigar, e-pipe, or under any other product name or descriptor.
  - (4) “Employee” means a person who works for an employer, whether in consideration for direct or indirect monetary wages or profit, or as a volunteer.

- (5) “Employer” means a person, association, trust, or a business, including a municipal corporation, with one or more employees.
- (6) “Enclosed Area” means all space between a floor and a ceiling that is bounded on at least two sides by walls, doorways, or windows, whether open or closed. A wall includes any retractable divider, garage door, or other physical barrier, whether temporary or permanent and whether or not containing openings of any kind.
- (7) “Health Care Facility” means an office or institution providing care or treatment of diseases, whether physical, mental, or emotional, or other medical, physiological, or psychological conditions, including but not limited to, hospitals, rehabilitation hospitals or other clinics, including weight control clinics, nursing homes, long-term care facilities, homes for the aging or chronically ill, laboratories, and offices of surgeons, chiropractors, physical therapists, physicians, psychiatrists, dentists, and all specialists within these professions. This definition shall include all waiting rooms, hallways, private rooms, semiprivate rooms, and wards within health care facilities.
- (8) “Place of Employment” means an area under the control of a public or private employer, including, but not limited to, work areas, private offices, employee lounges, restrooms, conference rooms, meeting rooms, classrooms, employee cafeterias, hallways, construction sites, temporary offices, and vehicles. A private residence is not a “place of employment” unless it is used as a child care, adult day care, or health care facility.
- (9) “Private Club” means an organization, whether incorporated or not, which is the owner, lessee, or occupant of a building or portion thereof used exclusively for club purposes at all times, which is operated solely for a recreational, fraternal, social, patriotic, political, benevolent, or athletic purpose, but not for pecuniary gain, and which only sells alcoholic beverages incidental to its operation. The affairs and management of the organization are conducted by a board of directors, executive committee, or similar body chosen by the members at an annual meeting. The organization has established bylaws and/or a constitution to govern its activities, requires applications to be filled out for membership, and maintains membership records that show the date of application, admission, name and address for each member, and serial number of the membership card issued. The organization has been

granted an exemption from the payment of federal income tax as a club under 26 U.S.C. Section 501.

- (10) “Public Place” means an area to which the public is permitted. A private residence is not a “public place” unless it is used as a child care, adult day care, or health care facility.
- (11) “Restaurant” means an eating establishment, including but not limited to, coffee shops, cafeterias, sandwich stands, and private and public school cafeterias, which gives or offers for sale food to the public, guests, or employees, as well as kitchens and catering facilities in which food is prepared on the premises for serving elsewhere. The term “restaurant” shall include a bar area within the restaurant.
- (12) “Service Line” means an indoor or outdoor line in which one or more persons are waiting for or receiving service of any kind, whether or not the service involves the exchange of money, including but not limited to, ATM lines, concert lines, food vendor lines, movie ticket lines, and sporting event lines.
- (13) “Shopping Mall” means an enclosed public walkway or hall area that serves to connect retail or professional establishments.
- (14) “Smoke” or “Smoking” means inhaling, exhaling, burning, or carrying any lighted or heated cigar, cigarette, pipe, or other tobacco or plant product intended for inhalation, in any manner or in any form. “Smoking” also includes the use of an e-cigarette which creates a vapor, in any manner or in any form, or the use of any oral smoking device for the purpose of circumventing the prohibition of smoking in this Section.
- (15) “Sports Arena” means a place where people assemble to engage in physical exercise, participate in athletic competition, or witness sports or other events, including sports pavilions, stadiums, gymnasiums, health spas, boxing arenas, swimming pools, roller and ice rinks, and bowling alleys.

(b) **Public Places.** Smoking shall be prohibited in all enclosed public places within the City of Birmingham, including but not limited to, the following places:

- (1) Aquariums, galleries, libraries, and museums.
- (2) Banks.
- (3) Bar and lounges.

- (4) Bingo facilities.
- (5) Child care and adult day care facilities.
- (6) Convention facilities.
- (7) Educational facilities, both public and private.
- (8) Elevators.
- (9) Gaming facilities, including bingo facilities.
- (10) Health care facilities.
- (11) Hotels and motels.
- (12) Laundromats.
- (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) Private Clubs.
- (16) Professional Offices.
- (17) Public transportation vehicles, including buses and taxicabs, under the authority of the City of Birmingham, and ticket, boarding, and waiting areas of public transportation facilities, including bus, train, and airport facilities.
- (18) Restaurants and retail food production.
- (19) Restrooms, lobbies, reception areas, waiting rooms, hallways, and other common-use areas.
- (20) Retail service establishments.
- (21) Retail stores.
- (22) Rooms, chambers, places of meeting or public assembly, and other enclosed areas and vehicles owned, leased, or operated by the City of Birmingham, including areas under the control of an agency, board, commission, or committee of the City, to the extent the place is subject to the jurisdiction of the City.
- (23) Service lines.
- (24) Shopping malls.
- (25) Sports arenas, including enclosed places in outdoor arenas.

(26) Theaters and other facilities primarily used for exhibiting motion pictures, stage dramas, lectures, musical recitals, or other similar performances.

(c) ***Regulation of Smoking in Places of Employment.***

(1) Smoking shall be prohibited in all enclosed areas of places of employment located within the City of Birmingham, including, but not limited to: common work areas, auditoriums, classrooms, conference and meeting rooms, private offices, elevators, hallways, medical facilities, cafeterias, employee lounges, stairs, restrooms, vehicles.

(2) This prohibition also applies to rooms, chambers, places of meeting or public assembly, and other enclosed areas and vehicles owned, leased, or operated by the City of Birmingham, including areas under the control of an agency, board, commission, or committee of the City, to the extent the place is subject to the jurisdiction of the City.

(3) This prohibition on smoking shall be communicated to all existing employees by the effective date of this Section and to all prospective employees upon their application for employment.

(d) ***Regulation of Smoking in Residential Facilities.*** Smoking shall be prohibited in the following enclosed residential facilities:

(1) All private and semi-private rooms in nursing homes.

(2) All hotel and motel rooms that are rented to guests.

(e) ***Regulation of Smoking in Outdoor Public Places.*** Smoking shall be prohibited in the following outdoor places:

(1) Within a reasonable distance of 30 feet outside entrances, windows, and ventilation systems of enclosed areas where smoking is prohibited, so as to prevent tobacco smoke from entering those areas.

(2) In, and within 20 feet of, outdoor seating or serving areas of restaurants and bars.

(3) In all outdoor arenas, stadiums, and amphitheaters. Smoking shall also be prohibited in, and within 20 feet of, bleachers and grandstands for use by spectators at sporting and other public events.

- (4) In, and within 20 feet of, all outdoor public transportation stations, platforms, and shelters under the authority of the City of Birmingham.
- (5) In all outdoor service lines.
- (f) ***Exemptions.*** Notwithstanding any other provision of this Section to the contrary, the following areas shall be exempted from the provisions of this section smoking shall not be prohibited in private residences, unless used as a childcare, adult day care, or health care facility.
1. Retail tobacco store; provided that smoke from these places do not infiltrate into an area where smoking is prohibited under this article.
  2. Private clubs, except when being used for an event to which the general public is invited.
- (g) ***Designation of an Establishment or Outdoor Area as Nonsmoking.*** Notwithstanding any other provision of this Section, an owner or other person in control of an establishment, facility, or outdoor area may declare that entire establishment, facility, or outdoor area as a nonsmoking place. Smoking shall be prohibited in any place in which a sign conforming to the requirements of Section 11-9-10(h) is posted.
- (h) ***Signage.*** The owner, or other person in control of a public place or place of employment where smoking is prohibited by this Section shall:
- (1) Clearly and conspicuously post “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) in that place.
  - (2) Clearly and conspicuously post at every entrance to that place a sign stating that smoking is prohibited.
  - (3) Clearly and conspicuously post on every vehicle that constitutes a place of employment under this Section at least one sign, visible from the exterior of the vehicle, stating that smoking is prohibited.

(i) ***Nonretaliation; nonwaiver of rights.***

- (1) No person or employer shall discharge, refuse to hire, or in any manner retaliate against an employee, applicant for employment, customer, because that employee, applicant, or customer exercises any rights afforded by this Section or reports or attempts to prosecute a violation of this Section. Notwithstanding Section 11-9-10(k), violation of this provision shall be a misdemeanor, punishable by a fine not to exceed \$1,000 for each violation.
- (2) An employee who works in a setting where an employer allows smoking does not waive or otherwise surrender any legal rights the employee may have against the employer or any other party.

(j) ***Enforcement.***

- (1) This Section shall be enforced by the county health officer or his or her duly authorized representative, any duly sworn police officer employed by the City of Birmingham, or as otherwise allowed by law.
- (2) Notice of the provisions of this Section shall be given to all applicants for a business license in the City of Birmingham.
- (3) Any citizen who desires to register a complaint under this Section may initiate enforcement with an entity responsible for enforcement, such as the Jefferson County Department of Health or Police Department.
- (4) The County Health Department, the Fire Department, or their designees shall, while an establishment is undergoing otherwise mandated inspections, inspect for compliance with this Section.
- (5) Any owner, manager, operator, or employee of an area regulated by this Section shall direct a person who is smoking in violation of this Section to extinguish the product being smoked. If the person does not stop smoking, the owner, manager, operator, or employee may refuse service and shall immediately ask the person to leave the premises. If the person in violation refuses to leave the premises, the owner, manager, operator, or employee shall contact a law enforcement agency.
- (6) Notwithstanding any other provision of this Section, an employee or private citizen may bring legal action to enforce this Section.

(7) In addition to the remedies provided by the provisions of this Section, the City of Birmingham, the county health officer, or any person aggrieved by the failure of the owner, operator, manager, or other person in control of a public place or a place of employment to comply with the provisions of this Section may apply for injunctive relief to enforce those provisions in any court of competent jurisdiction.

**(k) *Violations and penalties.***

(1) A person who knowingly or intentionally smokes in an area where smoking is prohibited by the provisions of this Section commits an offense, punishable by a fine of \$50 per offense. A charge of violation shall be treated in the same manner as a traffic violation.

(2) Except as otherwise provided in Section I (1), a person who owns, manages, operates, or otherwise controls a public place or place of employment and who fails to comply with the provisions of this Section shall be guilty of an offense, punishable by:

a. A fine of one hundred dollars (\$100) for a first violation. A charge of violation shall be treated in the same manner as a traffic violation.

b. A fine of two hundred dollars (\$200) for a second violation within one (1) year. A charge of violation shall be treated in the same manner as a traffic violation.

c. A fine of five hundred dollars (\$500) for each additional violation within one (1) year. A charge of violation shall be treated in the same manner as a traffic violation.

(3) In addition to the fines established by this Section, violation of this Section by a person who owns, manages, operates, or otherwise controls a public place or place of employment may result in the suspension or revocation of any permit or license issued to the person for the premises on which the violation occurred.

(4) Violation of this Section is hereby declared to be a public nuisance, which may be abated by the City of Birmingham, the county health officer, or a designee by restraining order, preliminary and permanent injunction, or other means provided for by law, and the entity or person seeking abatement may take action to recover the costs of the nuisance abatement.

- (5) Each day on which a violation of this Section occurs shall be considered a separate and distinct violation.
- (1) ***Other applicable laws.*** This Section shall not be interpreted or construed to permit smoking where it is otherwise restricted by other applicable laws.

**Section 2. Public Education.** The City of Birmingham may publish a brochure for affected businesses and individuals explaining the provisions of this Ordinance.

**Section 3. Governmental Agency Cooperation.** The City of Birmingham will request other governmental and educational agencies having facilities within Jefferson and Shelby Counties to establish local operating procedures in cooperation and compliance with this Ordinance. This includes urging all Federal, State, County, and School District agencies to update their existing smoking regulations to be consistent with the current health findings regarding secondhand smoke.

**Section 4. Severability.** If any word, provision, clause, sentence, paragraph, or subsection of this Ordinance or the application thereof to any person or circumstances shall be held invalid by a court of competent jurisdiction then the remaining provisions of this Ordinance shall be in full force and effect.

**Section 5. Effective Date.** Section 5. Effective Date. This Ordinance shall be effective after approval by the Council of the City of Birmingham and Mayor and publication as required by law, provided that the effective date shall be 30 days after publication as required by

**Section 6. Preservation.** That nothing in this ordinance or the repeal of Ordinance No. 04-96 shall be construed to repeal or otherwise affect the validity of the enforcement action for any offense or act committed or done or any penalty or forfeiture incurred or any contract or right established or accruing before the effective date of this ordinance; provided that no contract right or arrangement may be renewed or entered that would violate the provisions of this ordinance, as amended: (a) Nothing in this Code or the ordinance adopting this Code shall be construed to

repeal or otherwise affect the validity of any of the following: Any offense or act committed or done or any penalty or forfeiture incurred or any contract or right established or accruing before the effective date of this Code;

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