

RECOMMENDED BY: The Public Safety Committee

SUBMITTED BY: The Acting Chief Assistant City Attorney

ORDINANCE NO. 12-52

WHEREAS, the Council of the City of Birmingham, Public Safety Committee, set a Public Hearing on the matter of smoking regulations for the City of Birmingham on February 15, 2012;

WHEREAS, at the public hearing on the matter of smoking in public places, numerous witnesses, including representatives from the American Lung Association, business owners and private individuals testified regarding the harmful effects of secondhand smoke in public places;

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, 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that Title 11, Chapter 9, Section 10 of the General Code of the City of Birmingham, 1980, as amended is hereby repealed and the following Title 11, Chapter 9, Section 10 is hereby adopted to read in full as follows: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) “City” means the City of Birmingham, Alabama
- (4) “Cigar Bar” means a licensed establishment in which the primary activity is the sale, manufacture or promotion of cigars or cigar accessories and in which the sale of other products is merely incidental.
- (5) “Common Area” means a hallway, corridor, lobby, aisle, water fountain area, restroom, stairwell, interior and/or exterior general public entryway or exit, refreshment area, or restroom.
- (6) “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.
- (7) “Employee” means a person who works for an employer, whether in consideration for direct or indirect monetary wages or profit, or as a volunteer.
- (8) “Employer” means a person, association, trust, or a business, including a municipal corporation, with one or more employees.
- (9) “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.
- (10) “Flow Line” means the face of the curb and gutter, or if no curb and gutter, the edge of the pavement.
- (11) “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.

- (12) “Hookah bar” means an establishment that is a bar as defined above, whose business is devoted to the serving of Shisha products, and which serves only complimentary snacks. The hookah bar contains no kitchen facilities and has no access to kitchen facilities, catering, or food, other than the complimentary snacks. A hookah bar devotes a minimum of ten (10) percent of net floor space to the display, storage and sale of actual tobacco products, and does not permit the on-premises use of tobacco products not purchased on the premises. A hookah bar must contain a functioning walk-in commercial grade humidifier with a minimum interior area of not less than one hundred (100) square feet and a smoke evacuation system adequate to ensure that smoke from its premises does not infiltrate into areas where smoking is prohibited. The system must be separate from the establishment's HVAC system, vent to the exterior, and be approved by the city building department as having adequate capacity. No patron under the age of twenty-one (21) is allowed in a hookah bar. "Hookah bar" does not include a department or section of a larger commercial establishment
- (13) “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.
- (14) “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.

- (15) “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.
 - (16) “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.
 - (17) “Retail Tobacco Stores” means any person, government, or entity licensed to sell tobacco products to individuals for personal consumption, or who operates a facility where self-service displays of tobacco products are permitted.
 - (18) “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.
 - (19) “Shopping Mall” means an enclosed public walkway or hall area that serves to connect retail or professional establishments.
 - (20) “Smoke” or “Smoking” means inhaling, exhaling, burning, or carrying any lighted or cigar, cigarette, pipe, or other tobacco or plant product intended for inhalation, in any manner or in any form.
 - (21) “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.
 - (22) Tobacco Retailer” means any person, government, or entity who sells tobacco products to individuals for personal consumption, or who operates a facility where self-service displays of tobacco products are permitted
- (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,

- (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.
- (27) Parking decks and parking facilities under the control of the City of Birmingham

(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) In and within, 7 (seven) 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, outdoor seating or serving areas of restaurants and bars located on public property.
- (3) In all outdoor arenas, stadiums, and amphitheaters, smoking shall also be prohibited in, and within 30 (thirty) feet of, bleachers and grandstands for use by spectators at sporting and other public events.
- (4) In, and within 7 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:

- (1) Smoking shall not be prohibited in private residences, except when used as a childcare, adult day care, or health care facility.
- (2) Cigar Bars as defined in Section 2.4. Cigar bars must satisfy all of the following:
 - a. Generates 10 (ten) percent or more of its quarterly gross revenue from the sale of alcoholic beverages for consumption on the premises by customers;
 - b. Generates 80 (eighty) percent or more of its quarterly gross revenue from the rental of humidors and the sale of cigars for consumption on the premises by customers;
 - c. Has a humidor on the premises;
 - d. Cigar bars shall post health warning signage that states: "Warning: Cigar smoking causes lung cancer, heart disease, and other forms of cancer. Cigar tobacco contains nicotine, tar and carcinogens. Cigar smoking is not a safe alternative to cigarette smoking." The signage must be prominent, clearly visible and posted in every room where smoking is permitted. The signage must be written in forty eight (48) inch font or greater. The warning must also be displayed prominently

on each bar menu; and

- e. Does not allow individuals under the age of 21 to enter the premises. Revenue generated from other tobacco sales, including cigarette vending machines, shall not be used to determine whether an establishment satisfies the definition of cigar bar.

(3) Hookah bars as defined in Section 2.10. Hookah bar must satisfy all of the following:

- a. The Hookah Bar must generate 10 (ten) percent or more of its quarterly gross revenue from the sale of alcohol beverages from on premises consumption;
- b. The Hookah Bar must generate 80 (eighty) percent of its quarterly gross revenue from the sale of shisha for on premise consumption and from the sale of accessories used for the smoking of shisha;
- c. The Hookah Bar shall not allow individuals under the age of twenty (21) to enter the premises.
- d. Hookah bars shall post health warning signage that states: “Warning: Hookah smoking causes lung cancer, heart disease, and other forms of cancer. Hookah tobacco (shisha) contains nicotine, tar and carcinogens. Hookah smoking is not a safe alternative to cigarette smoking.” The signage must be prominent, clearly visible and posted in every room where smoking is permitted. The signage must be written in forty eight (48) inch font or greater. The warning must also be displayed prominently on each bar menu.

(4) Retail Tobacco Stores which are the sole occupant of the building in which they are located provided that smoke from these places do not infiltrate into areas where smoking is prohibited under provisions of this ordinance and which derives at least ninety (90) percent of its gross quarterly revenue from the sale of tobacco, tobacco products, or tobacco accessories, such as pipes matches, lighters and ashtrays. Revenue generated from cigarette vending machine sales shall not be used to determine whether a retail store satisfies this requirement.

- (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 within 7 feet” signs or the international “No Smoking within 7 feet” 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 within 7 feet;
- (3) Clearly and conspicuously state on the “No Smoking” sign or the international “No Smoking” symbol the distance requirement that corresponds to the type of establishment in accordance with 2 (e); and
- (4) 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 any County Health Officer or his or her duly authorized representative, the Fire Marshall 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 shall 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 violates Title 11- 9-10 commits a violation, punishable by a fine of \$50 for each violation. A charge of violation shall be treated in the same manner as a traffic violation. Any law enforcement officer may issue a citation pursuant to this section.
- (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 3. Public Education. The City of Birmingham may publish a brochure for affected businesses and individuals explaining the provisions of this Ordinance.

Section 4. 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 5. 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 6. 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 law.

Adopted by the Council at its meeting held on April 17, 2012, and effective ten days thereafter on the 27th day of April, 2012 without the signature or veto of the Mayor



A CERTIFIED COPY

Lee Frazier, City Clerk
Birmingham, Al

A handwritten signature in black ink that reads "Lee Frazier".