

ORDINANCE NO. 23-103
BY: Ifeolu Claytor

Enacting new Chapter 549 of the Business Regulation Code and repealing Chapter 386 of the Health Code of the Codified Ordinances of the City to require tobacco retailers to obtain an annual permit, and authorizing the city or its agent to administer the permit, and enforce the prohibitions of sales to persons under 21 years of age, including by assessing civil penalties.

WHEREAS, the sale of tobacco products to persons under the age of 21 has been illegal in the City and throughout the State of Ohio for several years, but the City has not had the resources for regular enforcement of the law and inspections of tobacco retailers in the City to determine compliance with the law; and

WHEREAS, in Ordinance 17-91, enacted on November 13, 2017, this Council amended the City's Administrative and Health Codes to delegate the duties and authority of the City's Health Department, which had previously conducted periodic enforcement activity of the tobacco sales restrictions, to the Cuyahoga County Board of Health (CCBH); and

WHEREAS, the CCBH is a general health district as defined under Ohio law (ORC 3709.01), and the City is permitted by Ohio law to contract with the County Health District (ORC 3709.08); and

WHEREAS, since the Council's delegation of health activities and enforcement to CCBH, the City has entered into periodic contracts with the CCBH to act as the City's agent for and to conduct health activities and enforcement on the City's behalf; and

WHEREAS, CCBH has an optional program to oversee and conduct administrative and enforcement activities related to the legal restrictions on sales of tobacco products to persons under 21 years of age, including the administration of a permitting requirement for all businesses that sell tobacco products; and

WHEREAS, the City desires to contract with CCBH to perform such functions on the City's behalf, which requires the City to enact amendments to the Codified Ordinance requiring businesses that sell tobacco products to obtain an annual permit, establishing a fee for such permits, imposing requirements for such permits, and authorizing enforcement actions by the City and/or the CCBH as the agent of the City for violations of the permitting requirements and restrictions on sales to persons under age 21, including through the imposition of civil penalties.

NOW, THEREFORE, BE IT ORDAINED by the Council of the City of Shaker Heights, State of Ohio:

Section 1. Chapter 386, including Sections 386.01 through 386.12, and 386.99, of the Health Code of the Codified Ordinances of the City of Shaker Heights as heretofore in effect are hereby repealed.

Section 2. New Chapter 549, including Sections 549.01 through 549.09, of the Business Regulation Code of the Codified Ordinances of the City of Shaker Heights are hereby enacted, as follows:

CHAPTER 549

Cigarette and Tobacco Vendors; Sales to Persons Under Age 21

549.01 DEFINITIONS.

For the purpose of this Chapter:

(a) "Distribute" has the same meaning as set forth in Section 737.16 of the Codified Ordinances.

(b) "Permit" means an annual permit issued by the City or the City's permitting agent for retail sale of tobacco products pursuant to Section 549.03 herein.

(c) "Permittee" means the holder of a valid permit under this Chapter.

(d) "Permitting agent" means an entity with which the City has contracted to administer permit applications, enforcement, and/or provisions contained in this Chapter.

(e) "Person under 21" means a natural person who has not yet reached the age of 21 years.

(f) "Proof of age" means a driver's license, a commercial driver's license, a military identification card, a passport, or an identification card issued under R.C. 4507.50 to 4507.52 that shows that a person is 21 years of age or older and not a person under 21.

(g) "Tobacco product" means any product that is made from tobacco or derived from tobacco or that contains nicotine, whether natural or synthetic, that is intended for human consumption or is likely to be consumed, whether smoked, heated, chewed, snorted, sniffed, absorbed, dissolved, inhaled or ingested by any other means, including, but not limited to, cigarettes, e-liquids, cigars, little cigars, pipe tobacco, chewing tobacco, snuff, or snus. "Tobacco product" also means electronic devices, including any device that can be used to deliver aerosolized or vaporized nicotine or any other substance to the person inhaling from the device including, but not limited to, e-cigarettes, e-cigars, e-pipes, vapor products, or e-hookahs. "Tobacco product" includes any component, part, or accessory used in the consumption of tobacco products, whether or not it contains nicotine including, but not limited to, filters, cartridges, pods, pens, rolling papers, or pipes. "Tobacco product" does not include any of the following:

(1) Any product that is a "drug" as that term is defined in 21 U.S.C. 321(g) (1) or successor section; or

(2) Any product that is a "device" as that term is defined in 21 U.S.C. 321(h) or successor section; or

(3) Any product that is a "combination product" as described in 21 U.S.C. 353(g) or successor section.

549.02 SALE TO PERSONS UNDER 21 PROHIBITED.

(a) No permittee or agent of permittee shall sell or otherwise distribute any tobacco product to any person under 21, as set forth in Section 737.16 of the Codified Ordinances.

(b) Before selling or otherwise distributing any tobacco product to another person, the person selling or distributing the tobacco product shall verify the age of any person who appears to be under 30 years of age by a proof of age.

(c) No person shall sell or otherwise distribute tobacco products by or from a vending machine except in an area within a business office, or other place not open to the general public, or in an area to which persons under 21 are not permitted, as set forth in Section 737.16 of the Codified Ordinances.

(d) No person shall knowingly distribute or furnish without charge or at nominal charge, or cause to be furnished or distributed without charge or at nominal charge, cigarettes or other tobacco products, or coupons for cigarettes or other tobacco products, in any public place or at any event open to the public, except in retail tobacco stores.

(e) It shall be unlawful for any person to sell, permit to be sold, or offer for sale any tobacco product by means of self-service displays or any other means other than vendor-assisted sales.

(f) It shall not be a violation of this Section to sell or otherwise distribute any product that has been approved as a tobacco cessation aid by the United States Food and Drug Administration.

549.03 ANNUAL PERMIT REQUIRED.

(a) No person shall engage in retail sales or distribution of tobacco products within the City without a valid permit issued by the City or its permitting agent.

(b) The following items shall be required in applying for a permit, or renewing a permit under this Section:

- (1) A valid vendor's license from the Ohio Department of Taxation;
- (2) If applicable, a license required by R.C. Chapter 5743;
- (3) The location where the permit applicant proposes to engage in retail sales of tobacco products;
- (4) A nonrefundable permit administration fee of \$100.00; and
- (5) Such other information as determined by the City or its permitting agent to be necessary to administer the permitting system provided herein and to effectuate the purposes of this Chapter.

(c) Permit fees are due at the time of application and are not refundable. A permit shall not be renewed if the tobacco retailer has any outstanding fines or penalties pursuant to this Chapter.

(d) A permit granted under this Section shall be valid from the date of issuance until December 31 of the year of issuance and shall not be prorated.

(e) An application for a permit for a new location that is received by the City or its permitting agent on or after October 1st shall be eligible for a permit that is valid for the balance of that specific calendar year as well as the entire following calendar year. This applies only to a new location that begins to operate on or after October 1st. It does not apply to a location that has been open and operating without a permit prior to October 1st.

(f) Permit administration fees, reinstatement fees, and civil penalties collected in administering this Chapter may be collected by the City or its permitting agent and shall be credited to the general fund of the City or its permitting agent to defray the costs of administration and enforcement of this Chapter as agreed to by the City and its permitting agent. The City and its permitting agent may agree that the permitting agent will retain all or a portion of the fees as compensation for its services as the permitting agent.

(g) For purposes of this Section, "valid permit" means a permit issued under this Section that has not expired, that is not within a period of suspension or failure-to-reinstate status, and that has not been revoked under this Chapter or any provision of applicable law.

(h) A separate permit shall be required for each retail sales location regardless of whether or not a person owns or operates more than one retail sales location within the City.

(i) A penalty equal to 25 percent of the applicable permit fee shall be assessed and collected by the City or its permitting agent for permit fee renewal payments that are not received or postmarked by the first day of January.

549.04 PERMIT REVOCATION, DENIAL, OR SUSPENSION.

(a) An application for a permit or a permit renewal may be denied for any of the following reasons:

- (1) The permit applicant had a permit revoked within the previous three years for any location in Cuyahoga County;
- (2) The permit applicant is determined to have knowingly included false or misleading information in the permit application or renewal permit application;
- (3) The applicant's current permit has been suspended and the period of suspension has not elapsed;
- (4) The business that is the subject of the permit application is the subject of an administrative or court order declaring such business to be a public nuisance and the nuisance has not been abated, an order by the City that the sales of tobacco products shall cease, or an order by a court that the sales of tobacco products shall cease pursuant to a temporary restraining order preliminary injunction, or permanent injunction issued by that court;
- (5) The permit applicant is in arrears with respect to any fine imposed for violation of this Chapter;
- (6) The permit applicant has failed to provide any of the items required under Subsection 549.03(b); or
- (7) The applicant has been convicted of a violation of Section 737.16 of the Codified Ordinances within the previous 24 months prior to the submission of an application.

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

(c) A permit may be suspended for a definite period, not to exceed six months, as determined by the City or its permitting agent. Prior to reinstatement of the permit following expiration of the suspension, the permittee shall remit a permit reinstatement administration fee as established by the City or its permitting agent. A permit may be suspended for any of the following reasons:

- (1) The business holding the permit is the subject of an administrative or court order declaring such business to be a public nuisance and the nuisance has not been abated, an order by the City that sales of tobacco products shall cease, or an order by a court that sales of tobacco products shall cease pursuant to a temporary restraining order, preliminary injunction, or permanent injunction issued by that court;
- (2) Substantiated evidence that permittee or an agent of permittee has sold or otherwise distributed any tobacco product to any person under 21 within the City more than one time in the past 12 months;

- (3) The finding by a federal or state agency or court that the permittee has violated a federal or state rule or regulation governing the sale of tobacco products, including, but not limited to that the permittee or its agent has been convicted of a violation of Section 737.16 of the Codified Ordinances within the previous 24 months;
- (4) Refusal by the permittee or its agent of entry by the City or its permitting agent pursuant to Section 549.08, refusal of entry for inspection, or refusal of, hindrance of or actions to thwart an investigation by permittee or its agent;
or
- (5) The permittee is in arrears with respect to any fine imposed for any civil penalty levied under this Chapter.
- (d) A permit may be revoked for any of the following reasons:
 - (1) The permit applicant is determined to have knowingly included false or misleading information in the permit application or renewal permit application.
 - (2) Substantiated evidence that permittee or its agent has sold or otherwise distributed any tobacco product to any person under 21 within the City more than one time in the past 12 months;
 - (3) The finding by a federal or state agency or court that the permittee has violated a federal or state rule or regulation governing the sale of tobacco products, including, but not limited to that the permittee or its agent has been convicted of a violation of Section 737.16 of the Codified Ordinances within the previous 24 months;
 - (4) Refusal by the permittee or its agent of entry by the City or its permitting agent pursuant to Section 549.08, refusal of entry for inspection, or refusal of, hindrance of or actions to thwart an investigation by permittee or its agent;
or
 - (5) A period of suspension imposed under Subsection (c) herein has elapsed and the permittee remains in arrears of payment of such fine or penalty; or
 - (6) The permittee has been subject to three or more suspensions in the previous 24-month period.

549.05 NON-TRANSFERABILITY.

A permit is non-transferable. A new permit will be issued at no cost to the permittee who changes location in the City no more than one time during a calendar year. Any sale or transfer of ownership of permittee's business will require a new application and subsequent permit issuance.

549.06 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.

549.07 POSTING OF SIGNS; EDUCATION; OUTREACH.

(a) A sign stating "Under 21 Sales of Tobacco and Nicotine Products and Devices Prohibited by Law" and "Pursuant to Chapter 549 of the Codified Ordinances of the City of Shaker Heights" shall be posted at each permitted

location. The sign(s) posted shall be the sign required and provided by the City or its permitting agent. The sign(s) shall be clearly and conspicuously posted at or near the point of sale of any location tobacco products and/or alternative nicotine products are sold.

(b) The City or its permitting agent shall collaborate with the community to prepare and distribute education materials and required signage to all vendors and educate the general public on the implementation and compliance with this Chapter.

549.08 VIOLATIONS; ENFORCEMENT; APPEALS.

(a) The City and its permitting agent shall have authority to implement and enforce the provisions of this Chapter.

(b) It is a violation of this Chapter for any business, or any person, subject to the requirements of this Chapter to operate without a current permit issued under this Chapter. The City or its permittee may issue a notice of violation of this Chapter and/or an order to cease any operation or portion of an operation that is in violation of the requirements of this Chapter.

(c) The City or its permitting agent may conduct an inspection of any business subject to the requirements of this Chapter, including, but not limited to, after receipt of a permit application and prior to issuing a permit. The City or its permitting agent may inspect each business holding a permit annually, or more frequently as deemed necessary, to ascertain compliance with this Chapter. The City or its permitting agent may enter at reasonable times to inspect or investigate and examine or copy records to determine compliance with this Chapter. The City or its permitting agent may apply for and any judge of a court of record may issue an appropriate search warrant necessary to achieve the purpose of this Chapter within the court's territorial jurisdiction. If entry is refused or inspection or investigation is refused, hindered or thwarted after the City or its permitting agent receives permission or a warrant to inspect, the City or its permitting agent may take enforcement action, or suspend or revoke a permit as set forth herein.

(d) In addition to the denial, suspension, or revocation of a permit, the City or its permitting agent may impose the following civil penalties for violations of this Chapter:

(1) For a first violation, a penalty of \$250.00;

(2) For a second violation within two years of the previous violation, a penalty of \$500.00; and

(3) For a third or subsequent violation within two years of a previous violation, a penalty of \$1,000.00.

(e) When the City or its permitting agent determines to issue a civil penalty for a violation, to deny a permit application, or to suspend or revoke a permit, the City or permitting agent shall notify permittee of said determination by sending written notice of said determination by U.S. first-class mail to the address provided on the permit application.

(f) The City or its permitting agent shall not be required to conduct an evidentiary hearing prior to sending notice of a determination as set forth in Subsection (e) herein.

(g) Any person, including the permittee or an applicant for a permit, may file an appeal to the City's Board of Appeals pursuant to Chapter 132 of the Codified Ordinances from any determination or order of the City or its agent that is issued under this Chapter. An appeal must be submitted to the City's Director of Law in writing within thirty days from the date of the

determination or order being appealed. Failure to file a written appeal with the Board within the time prescribed herein shall constitute a waiver of the right to appeal. Except in cases of emergency, the filing of an appeal from any such determination or order shall suspend action on enforcement of such determination or order until the appeal is acted upon by the Board. No fee shall be required for an appeal made under this section.

(h) The City may pursue enforcement action, including criminal enforcement action pursuant to Section 737.16 of the Codified Ordinances, instead of or in addition to any enforcement action taken under this Chapter. Nothing in this Chapter, and no enforcement taken under this Chapter, is intended to override or allow anything prohibited by, or any violations of the requirements set forth in, Section 737.16 of the Codified Ordinances.

549.09 INJUNCTION RELIEF.

(a) The provisions of Sections 549.01 through 549.08 are health ordinances applicable to real property and business operations in the City and may be enforced by civil action pursuant to the Ohio Revised Code and the Codified Ordinances, and the authority of the City under the Ohio Constitution.

(b) Repeated violations of this Chapter may constitute a public nuisance, which may be the subject of City enforcement and/or abatement action as set forth in Chapter 107 of the Codified Ordinances. In addition to any actions of the City taken pursuant to Chapter 107, the Director of Law 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.

Section 3. This Ordinance shall be effective on the earliest date permitted by law. Businesses that sell tobacco products in the City shall be required to obtain an annual permit, as set forth in Section 549.03 and all related and pertinent Sections of Chapter 549, on and after March 1, 2024.

Enacted November 27, 2023

Approved this _____ day of _____, 2023.

DAVID E. WEISS, Mayor

Attest:

WILLIAM M. ONDREY GRUBER
Clerk of Council Pro Tem
Coun23/1127-Tobacco21-Permit-CODORD