

ORDINANCE NO. 118-2018 (SMS),
Second Reading

By Council Member Stein

An Ordinance enacting Chapter 729, *Tobacco Product Vendors; Sales to Persons Under 21*, of the Codified Ordinances of Cleveland Heights to prohibit sales to persons under 21 and to provide for permitting of businesses who sell tobacco products; and repealing Section 537.16, “Illegal Distribution of Cigarettes, Other Tobacco Products Or Alternate Tobacco Products,” in Chapter 537, *Offenses Against Person*, of the Codified Ordinances of Cleveland Heights.

WHEREAS, tobacco use is the foremost preventable cause of premature death in the United States, responsible for nearly half a million deaths per year in the United States and costing the nation approximately \$300 billion in healthcare and lost worker productivity costs each year; and

WHEREAS, if smoking continues at the current rate among youth in the United States, 5.6 million of today’s Americans under the age of 18 will die early from a smoking-related illness; and

WHEREAS, ninety-five percent (95%) of all adult smokers begin smoking before they turn twenty-one (21) years old, and adolescence is a critical period when many smokers move from experimental smoking to regular, daily use; and

WHEREAS, there is strong evidence that people who begin smoking at an early age are more likely to develop a severe addiction to nicotine than those who start at a later age; and

WHEREAS, electronic nicotine delivery system use among minors has recently tripled, and use of these systems is associated with and may encourage the use of conventional tobacco products; and

WHEREAS, data from the Cuyahoga County Youth Risk Behavior Survey in 2017 indicates that over thirty-five percent (35%) of students in Cuyahoga County reported having used an electronic vapor product and over fifteen percent (15%) of students in Cuyahoga County reported current use of an electronic vapor product; and

WHEREAS, raising the minimum legal sales age for all tobacco products to twenty-one (21) will reduce access to these products by youth, as youth often acquire such products from older friends: over eighty percent (80%) of people purchasing tobacco for minors are between eighteen (18) and twenty (20) years old; and

WHEREAS, over three hundred thirty (330) communities and six (6) states have enacted Tobacco 21 policies, covering over twenty-five percent (25%) of the nation’s population; and

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WHEREAS, raising the age for tobacco sales to 21 and over in the City of Cleveland Heights would lessen the accessibility of tobacco to minors and would assist the City's interest in furthering the health, safety, and general welfare of the City's residents.

BE IT ORDAINED by the Council of the City of Cleveland Heights, Ohio, that:

SECTION 1. Chapter 729, *Tobacco Product Vendors; Sales to Persons Under the Age 21*, of the Codified Ordinances of Cleveland Heights shall be, and is hereby, enacted and adopted in its entirety to read as Exhibit A attached hereto and fully incorporated herein. A complete copy of Exhibit A is also on file with the Clerk of Council.

SECTION 2. Section 537.16, "Illegal Distribution of Cigarettes, Other Tobacco Products Or Alternate Tobacco Products," in Chapter 537, *Offenses Against Person*, of the Codified Ordinances of Cleveland Heights is hereby repealed in its entirety.

SECTION 3. The Clerk of Council is hereby directed to mail letters attaching a copy of this Ordinance and declaring this Council's support that the legal age to purchase tobacco should be changed to twenty-one (21) years old throughout the rest of Ohio and across the nation to Governor John Kasich, Ohio Senate President Larry Obhof, Ohio House Speaker Ryan Smith, Ohio Senator Sandra Williams, Ohio Representative Janine Boyd, U.S. Representative Marcia Fudge, U.S. Senator Robert Portman, U.S. Senator Sherrod Brown, and President Donald Trump.

SECTION 4. Notice of the passage of this Ordinance shall be given by publishing the title and abstract of its contents, prepared by the Director of Law, once in one newspaper of general circulation in the City of Cleveland Heights.

SECTION 5. This Ordinance shall take effect and be in force at the earliest time possible permitted by law.

CAROL ANN ROE, Mayor
President of the Council

SUSANNA NIERMANN O'NEIL
Acting Clerk of Council

PASSED: October 15, 2018

EXHIBIT A

**Chapter 729
CIGARETTE AND TOBACCO VENDORS;
SALES TO PERSONS UNDER 21**

729.01 DEFINITIONS.

For the purpose of this Chapter:

(a) “Distribute” means to furnish, give, or provide Tobacco Products to the ultimate consumer of the Tobacco Product.

(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 729.03 herein.

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

(d) “Permitting Agent” means an entity with which the City of Cleveland Heights 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 twenty-one (21) years of age.

(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 twenty-one (21) years of age or older (i.e., 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);
- (2) Any product that is a “device” as that term is defined in 21 U.S.C. 321(h); or
- (3) Any product that is a “combination product” as described in 21 U.S.C. 353(g).

SECTION 729.02 SALE TO PERSONS UNDER 21 PROHIBITED.

(a) No Permittee or agent of Permittee shall sell or otherwise distribute to any Person Under 21 any Tobacco Product within the City.

(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 thirty (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.

(d) 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.

729.03 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 Revised Code 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 One Hundred Dollars (\$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) A Permit granted under this Section shall be valid from the date of issuance until December 31 of the year of issuance.

(d) 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 City's General Fund to defray the costs of administration and enforcement of this Chapter. Alternatively, 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.

(e) 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.

(f) 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.

(g) A penalty equal to twenty-five percent (25%) 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 of January.

729.04 PERMIT REVOCATION, DENIAL, OR SUSPENSION

(a) Application for a Permit may be denied for any of the following reasons:

- (1) The Permit applicant had a Permit revoked within the previous three (3) years;
- (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) A business owned or operated by the Permit applicant engaging in the sale of Tobacco Products within the City is the subject of a court order or a city resolution or final order declaring such business to be a public nuisance, where said nuisance has not been abated, or where a 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;
- (5) The Permit applicant is in arrears with respect to any fine imposed for violation of this Chapter; and/or
- (6) The Permit applicant has failed to provide any of the items required under Subsection 729.03(b).

(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.

(c) A Permit may be suspended for a definite period, not to exceed six (6) 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 One Hundred Dollars (\$100) Permit reinstatement administration fee. A Permit may be suspended for any of the following reasons:

- (1) A business owned or operated by the Permit 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 Permittee or agent of Permittee 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 Permit

- applicant has violated a federal or state rule or regulation governing the sale of Tobacco Products;
- (4) Entry of a City or its Permitting Agent is refused or inspection, or investigation is refused, hindered, or thwarted; and/or
 - (5) The Permit 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 agent of Permittee 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 a City or its Permitting Agent is refused, or inspection or investigation is refused, hindered, or thwarted;
 - (4) A period of suspension imposed under Subsection(c) herein has elapsed and the Permittee remains in arrears of payment of such fine or penalty; and/or
 - (5) The Permittee has been subject to three (3) or more suspensions in the previous twenty-four (24) month period.

729.05 NON-TRANSFERABILITY.

A Permit is non-transferable. A new Permit will be issued at no cost to the Permittee who changes location. Any sale or transfer of ownership of Permittee's business will require a new application and subsequent permit issuance.

729.06 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.

729.07 POSTING OF SIGNS; EDUCATION; OUTREACH

(a) Effective January 1, 2019, a sign stating "Under 21 Sales of Tobacco and Nicotine Products and Devices Prohibited by Law" and "Pursuant to Chapter 729 of the Cleveland Heights Codified Ordinances" shall be posted. The font for "Pursuant to Chapter 729 of the Cleveland Heights Codified Ordinances" shall be no smaller than 1/2 inch in height. The font for "Under 21 Sales of Nicotine Prohibited by Law" shall be no smaller than 1/6 of an inch in height. The sign 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, required signage to all vendors, hold education events, publicize and/or such other education events or efforts to foster awareness of the requirements of implementation and compliance with this Chapter. The City or its Permitting Agent shall make all reasonable efforts to conduct such education efforts within the first six (6) months of the program and at regular intervals as necessary thereafter.

729.08 ENFORCEMENT, APPEALS

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

(b) The City and/or its Permitting Agent may conduct an inspection of a business prior to issuing a Permit. The City and/or its Permitting Agent may annually inspect each business holding a Permit upon proper identification and upon stating the purpose and necessity of an inspection. The City and/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 and/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 purposes of this Chapter within the court's territorial jurisdiction. If entry is refused or inspection or investigation is refused, hindered, or thwarted, the City and/or its Permitting Agent may suspend or revoke the Permit as set forth herein.

(c) In addition to the denial, suspension, or revocation of a permit, the City and/or its Permitting Agent may impose the following civil penalties for violations of this Chapter:

- (1) For a first violation, written warnings shall be provided to violators.
- (2) For a second violation, within five (5) years of the first violation, \$250.00.
- (3) For third violation within five (5) years of the first violation, \$500.00.
- (4) For a fourth violation within five (5) years of the first violation, \$1,000.00.
- (5) For a fifth violation within five (5) years of the first violation, administrative permit review to determine if the permit should be suspended or revoked.

(d) When the City and/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 and/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.

(e) The City and/or or its Permitting Agent shall not be required to conduct an evidentiary hearing prior to issuing a determination provided for in Subsection (d) herein.

(f) The Permittee may file a written notice of appeal with the City Director of Law within fourteen calendar (14) days after the date the determination was mailed. The process to request said appeal shall be provided in the notice of the determination set forth in subsection (d) herein. The determination shall take effect following the expiration of time to file the notice of appeal.

(g) An appeal hearing shall be heard by the Nuisance Abatement Board of Review which shall follow the relevant hearings procedures set forth in Chapter 553. The burden of proof by preponderance of the evidence shall be upon the City and/or its Permitting Agent. The Nuisance Abatement Board of Review shall be the final, administrative decision maker.

729.09 INJUNCTIVE RELIEF

(a) The provisions of Sections 729.01 through 729.08, are health ordinances applicable to real property in the City and may be enforced by civil action pursuant to the Revised Code.

(b) Repeated violations of this Chapter may constitute a public nuisance. The Law Director 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 or the City may seek relief pursuant to Chapter 553.

729.10 EFFECTIVE DATE

Permits and other requirements set forth in this Chapter shall be effective as of January 1, 2019.