

ORDINANCE NO. O-2019-12

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF TYLER, TEXAS, AMENDING CHAPTER 4, ARTICLE II., DIVISION A. "SMOKING PROHIBITED", OF THE CODE OF ORDINANCES OF THE CITY OF TYLER, TEXAS, RELATED TO THE PROHIBITION OF SMOKING IN PUBLIC PLACES AND PLACES OF EMPLOYMENT/WORKPLACES TO INCLUDE ELECTRONIC CIGARETTES AND SIMILAR SMOKING DEVICES, PROVIDING A SEVERABILITY CLAUSE; PROVIDING FOR A PENALTY; AND ESTABLISHING AN EFFECTIVE DATE

WHEREAS, it is the intent of the City Council to protect the public health, safety and welfare; and

WHEREAS, the City of Tyler is a home-rule municipality acting under its Charter adopted by the electorate pursuant to Article 11, Section 5 of the Texas Constitution and Chapter 9 of the Texas Local Government Code; and

WHEREAS, Texas Local Government Code Section 51.072(a) states that a home-rule municipality has full power of local self-government; and

WHEREAS, Texas Local Government Code Section 51.072(b) provides that the grant of powers to a municipality under the Texas Local Government Code does not prevent, by implication or otherwise, the municipality from exercising the authority incident to local self-government; and

WHEREAS, Section 1 of the Tyler City Charter states that the City of Tyler may make any and all rules and regulations by ordinances and resolutions; and

WHEREAS, Section 1 of the Tyler City Charter provides that the City of Tyler may define, prohibit, abate, suppress and prevent all things detrimental to the health, morals, comfort, safety, convenience and welfare of the inhabitants of the City, and all nuisances and causes thereof; and

WHEREAS, municipalities may, under their police powers, enact reasonable regulations to promote the health, safety and general welfare of citizens; and

WHEREAS, Section 1 of the Tyler City Charter states that the City of Tyler may make and enforce local police, sanitary, and other regulations, and may pass such ordinances as may be expedient for maintaining and promoting the peace, good government and welfare of the City, and for the performance of the functions thereof; and

WHEREAS, Section 1 of the Tyler City Charter provides that the City shall have all powers that now are, or hereafter may be granted to municipalities by the constitution or laws of Texas, and that all such powers, whether expressed or implied, shall be exercised and enforced, in the manner prescribed by the Charter, or when not prescribed in the Charter, in such manner as shall be provided by ordinances or resolutions of the City Council; and

WHEREAS, Section 2 of the Tyler City Charter states that the enumeration of particular powers by the Charter shall not be held or deemed to be exclusive, but in addition to the powers enumerated in the Charter, the City shall have, and may exercise all other powers which, under

the constitution and laws of Texas, it would be competent for the Charter specifically to enumerate; and

WHEREAS, Section 6 of the Tyler City Charter states that pursuant to the provisions of and subject only to the limitations imposed by the State law and the Charter, all powers of the City shall be vested in an elective Council, which shall, among other duties, enact legislation; and

WHEREAS, Texas Local Government Code Section 51.001(1) provides that the governing body of a municipality may adopt, publish, amend, or repeal an ordinance, rule or police regulation that is for the good government, peace, or order of the municipality; and

WHEREAS, Texas Local Government Code Section 51.001(2) provides that the governing body of a municipality may adopt, publish, amend, or repeal an ordinance, rule or police regulation that is necessary or proper for carrying out a power granted by law to the municipality or to an office or department of the municipality; and

WHEREAS, The City of Tyler is committed to ensuring the health of the general public and reducing the potential health risks of addiction and nicotine dependency from the use of electronic smoking devices by youths and adults; and

WHEREAS, The City of Tyler has previously adopted a smoking ordinance that protects the public's health by eliminating smoking in Public Places and Places of Employment/Workplaces; and

WHEREAS, it is important to update the Smoking regulations in Chapter 4 to also prohibit the use of electronic smoking devices in Public Places and Places of Employment/Workplaces.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF TYLER, TEXAS:

PART 1: That Tyler City Code Chapter 4, Article II., "Smoking Prohibited", is hereby amended by amending Section 4-41 to read as follows:

Sec. 4-41. Definitions.

The following words and phrases, whenever used in this Article, shall be construed as defined in this section:

- a. *Bar* means any enclosed 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 such beverages, and where minors are not allowed admittance unless they are accompanied by a parent or guardian. For purposes of this definition, the serving of food is incidental to the consumption of alcoholic beverages if the gross receipts from the sale of food is thirty percent (30%) or less of the annual gross receipts of the establishment.
- b. *Business* means any sole proprietorship, partnership, joint venture, corporation or other business entity formed for profit-making purposes, including retail establishments where goods or services are sold as well as professional corporations and other entities where

legal, medical, dental, engineering, architectural or other professional services are delivered.

- c. *Electronic Smoking Device* means an electronic, mechanical heating element or battery operated device that delivers nicotine or other substances for inhalation. This term shall include every variation and type of such devices whether they are manufactured, distributed, marketed or sold as an electronic cigarette, an electronic cigar, an electronic cigarillo, an electronic pipe, an electronic hookah or any other product name or descriptor.
- d. *Employee* means any person who is employed by any employer in consideration for direct or indirect monetary wages or profit.
- e. *Employer* means any person, partnership, corporation, including a municipal corporation, or non-profit entity, which employs the services of one or more individual persons.
- f. *Enclosed Area* means all space between a floor and ceiling which is enclosed on all sides by solid walls or windows (exclusive of door or passage ways) which extend from the floor to the ceiling, including all space therein screened by partitions which do not extend to the ceiling or are not solid.
- g. *Place of Employment/Workplace* means any enclosed area under the control of a public or private employer which employees normally frequent during the course of employment, including, but not limited to, work areas, employee lounges and restrooms, conference and classrooms, employee cafeterias and hallways. A private residence is not a Place of Employment unless it is used as a child care, adult day care or health care facility.
- h. *Private Organization* means an entity , whether incorporated or not, which is the owner, lessee, or occupant of a building or portion thereof used exclusively for such organization's purposes , 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. The organization has been granted an exemption from the payment of federal income tax as a non-profit organization under 26 U.S.C. Section 501. The term "Private Organization" shall not include any portion of a building or premises, whether owned or leased by a non-profit corporation, when said portion is in use by an entity that is not a non-profit corporation organized under 26 U.S.C. Section 501.
- i. *Private Place* means any enclosed area to which the public is not invited or in which the public is not permitted, including but not limited to, personal residences, private clubs or personal automobiles. A privately-owned business, open to the public, is not a private place.
- j. *Public Place* means any enclosed area to which the public is invited or in which the public is permitted, including but not limited to, banks, educational facilities, health facilities, laundromats, public transportation and affiliated facilities, reception areas, production and marketing establishments, retail service establishments, retail stores and malls, theaters and waiting rooms. A private residence is not a public place.
- k. *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.

- l. *Retail Tobacco Store* means a retail store utilized primarily for the sale of tobacco products and accessories and in which the sale of other products is merely incidental. For purposes of this article, other products that are merely incidental means not exceeding ten percent (10%) of annual gross sales. Sales of incidental products shall not include the sale of alcohol regardless of percentage of total gross sales.
- m. *Service Line* means any indoor line at which one (1) or more persons are waiting for or receiving service of any kind, whether or not such service involves the exchange of money.
- n. *Smoking* means inhaling, exhaling, burning or carrying any lighted cigar, cigarette, electronic smoking device, pipe, tobacco product, weed, plant, or plant product in any manner or in any form.
- o. *Sports Arena* means sports pavilions, gymnasiums, health spas, boxing arenas, swimming pools, roller and ice rinks, bowling alleys and other similar places where members of the general public assemble either to engage in physical exercise, participate in athletic competition, or witness sports events.
- p. *Tobacco Products* means any product that is made from or derived from tobacco, and is intended for human consumption or is likely to be consumed, whether smoked, heated, chewed, absorbed, vaporized, dissolved, inhaled or ingested by any other means, including, but not limited to, a cigarette, a cigar, pipe tobacco, chewing tobacco, snuff, snus, or liquids used in electronic smoking devices. (Ord. No. 0-2008-19; 2/06/08) (Ord. No. 0-2016-11; 2/10/16) (Ord. 0-2019-12; 1/23/19)

PART 2: That Tyler City Code Chapter 4, "Offenses and Miscellaneous Provisions", Article II., "Smoking Prohibited", is hereby amended by amending Section 4-50 to read as follows:

Sec. 4-50. Violations and Penalties.

- a. It shall be unlawful for the owner, manager or other person having control of a Public Place or Place of Employment or other area where smoking is prohibited by this Article to allow smoking or to fail to comply with any of the provisions of this Article.
- b. It shall be unlawful for any person to smoke in any area where smoking is prohibited by the provisions of this Article, or to violate any provision of this Article.
- c. Any person who violates any provision of this Article shall be guilty of a misdemeanor and shall be punished by a fine of not more than three hundred dollars (\$300.00). If a defendant has been previously convicted under this Article, the defendant shall be punished by a fine of not more than five hundred dollars (\$500.00). It is hereby declared that the culpable mental state required by Texas Penal Code Section 6.02 or successor, is specifically negated and clearly dispensed with, and an offense under this Article is declared to be a strict liability offense. (Ord. No. 0-2008-19; 2/06/08) (Ord. No. 0-2016-11; 2/10/16) (Ord. 0-2019-12; 1/23/19)

PART 3: That Tyler City Code Chapter 4, "Offenses and Miscellaneous Provisions", Article II., "Smoking Prohibited", is hereby amended by amending Section 4-52 to read as follows:

Sec. 4-52. Definitions.

Illegal Smoking Material shall mean any substance, however marketed, which can reasonably be converted for smoking purposes whether it is presented as incense, tobacco, tobacco products, herbs, spices or any blend thereof if it includes any of the following chemicals or a comparable chemical:

- a. *Salvia divinorum* or salvinorin A; all parts of the plant presently classified botanically as *salvia divinorum*, whether growing or not, the seeds thereof, any extract from any part of such plant, and every compound, manufacture, salts, derivative, mixture or preparation of such plant, its seeds or extracts; or
- b. 2-[1R,3S]-3-hydroxycyclohexyl]-5-(2-methyloctan-2-yl)phenol (also known as CP47, 497) and homologues; or
- c. (6aS, 10aS)-9-(hydroxymethyl)-6, 6-dimethyl-3-(2-methyloctan-2-yl)-6a, 7, 10, 10a-tetrahydrabenzoc[*c*]chromen-1-ol (also known as HU-211 or Dexanabinol); or
- d. 1-pentyl-2-(1-naphthoyl)indole (also known as JWH-018); or
- e. 1-butyl-3-(1-naphthoyl)indole (also known as JWH-030); or
- f. 1-pentyl-3-(4-methoxynaphthoyl)indole (also known as JWH-081).

Products containing some or all of the above substances are currently being marketed under the following commercial names:

“K-2”, “K-2 SUMMIT”, “K-2 SEX”, “GENIE”, “DACENTS”, “ZOHAI”, “SAGE”, “SPICE”, “KO KNOCK-OUT 2”, “SPICE GOLD”, “SPICE DIAMOND”, “YUCATAN FIRE”, “SOLAR FLARE”, “PEP SPICE”, “FIRE N’ ICE”, and “SALVIA DIVINORUM”.

Any product containing any of the chemical compounds set forth above shall be subject to the provisions of this Division, regardless of whether they are marketed under alternative names.

Ingestion Device Paraphernalia shall mean any paraphernalia, equipment, device or utensil that is used or intended to be used in smoking, ingesting or inhaling illegal smoking materials and shall include, but is not limited to, the following:

- a. A metal, wooden, acrylic, glass, stone, plastic or ceramic pipe with or without a screen, permanent screen, hashish head, or punctured metal bowl;
- b. A water pipe;
- c. A carburetion tube or device;
- d. A smoking or carburetion mask;
- e. A chamber pipe;
- f. A carburetor pipe;
- g. An electric pipe;

- h. An air-driven pipe;
- i. A chillum;
- j. A bong;
- k. An ice pipe or chiller;
- l. A vape;
- m. A vape pen;
- n. A hookah;
- o. A mod;
- p. An electronic cigarette; or
- q. An electronic smoking device

(Ord. 0-2010-90; 08/25/10) (Ord. 0-2019-12; 1/23/19)

PART 4: That Tyler City Code Chapter 4, "Offenses and Miscellaneous Provisions", Article II., "Smoking Prohibited", is hereby amended by amending Section 4-53 to read as follows:

Sec. 4-53. Illegal Smoking Materials. Purpose.

The purpose of this Division B. is to prohibit the sale or delivery of illegal smoking materials as defined within the city limits of the City of Tyler, Texas, and to prohibit the possession of illegal smoking materials within the city limits of the City of Tyler, Texas. Any form of delivery to include a simple gift constitutes a violation of this Division B. *(Ord. 0-2010-90; 08/25/10) (Ord. 0-2019-12; 1/23/19)*

PART 5: That Tyler City Code Chapter 4, "Offenses and Miscellaneous Provisions", Article II., "Smoking Prohibited", is hereby amended by amending Section 4-56 to read as follows:

Sec. 4-56. Use or possession of Ingestion Device Paraphernalia.

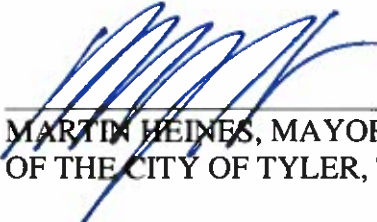
It shall be unlawful for any person to have in his/her possession any ingestion device paraphernalia with the intent to use it, to smoke, ingest, inhale or otherwise consume illegal smoking material. It is a violation of this Section, if a person is found in possession of ingestion device paraphernalia and appropriate forensic testing is done on the paraphernalia showing traces of illegal smoking material are present on the ingestion device paraphernalia. *(Ord. 0-2010-90; 08/25/10) (Ord. 0-2019-12; 1/23/19)*

PART 6: That if any provision or any section of this ordinance shall be held to be void or unconstitutional, such holding shall in no way affect the validity of the remaining provisions or sections of this ordinance, which shall remain in full force and effect.

PART 7: That any person, firm, or corporation violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be

punished by a fine as provided in Section 1-4 of the Tyler Code. Each day such violation shall continue, or be permitted to continue, shall be deemed a separate offense. Since this ordinance has a penalty for violation, it shall not become effective until its publication in the newspaper as provided by Section 85 of the Charter of the City of Tyler, Texas, or later. The effective date after publication shall be January 23, 2019.

PASSED AND APPROVED this 23rd day of January, A. D., 2019.


MARTIN HEINES, MAYOR
OF THE CITY OF TYLER, TEXAS

ATTEST:

APPROVED:


CASSANDRA BRAGER, CITY CLERK




DEBORAH G. PULLUM,
CITY ATTORNEY