

Ordinance No. 625-17

AN EMERGENCY ORDINANCE

To repeal Section 433.01 of the Codified Ordinances of Cleveland, Ohio, 1976, as amended by Ordinance No. 711-04, passed October 18, 2004; and to supplement the codified ordinances by enacting new Section 433.01 relating to driving or physical control while under the influence of alcohol or drugs, tests, presumptions, and penalties; and to repeal Section 433.011 of the codified ordinances, relating to intoxication, reckless operation and speed.

Council Member Kelley

WHEREAS, this ordinance constitutes an emergency measure providing for the usual daily operation of a municipal department; now, therefore,

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF CLEVELAND:

Section 1. That the following sections of the Codified Ordinances of Cleveland, Ohio, 1976:

Section 433.01, as amended by Ordinance No.711-04, passed October 18, 2004, is repealed.

Section 433.011, as amended by Ordinance No. 835-03, passed June 10, 2003, relating to Physical Control of Vehicle While Under the Influence; Testimony and Evidence Regarding Field Sobriety Test, is repealed.

Section 2. That the Codified Ordinances of Cleveland, Ohio, 1976 are supplemented by enacting new Section 433.01 to read as follows:

Section 433.01 Driving or Physical Control While Under the Influence of Alcohol or Drugs; Tests; Presumptions; Penalties

(a) *Driving under the influence.*

(1) No person shall operate any vehicle, streetcar, or trackless trolley within this city, if, at the time of the operation, any of the following apply:

A. The person is under the influence of alcohol, a drug of abuse, or a combination of them.

B. The person has a concentration of 0.08% or more but less than 0.17% by weight per unit volume of alcohol in the person's whole blood.

C. The person has a concentration of 0.096% or more but less than 0.204% by weight per unit volume of alcohol in the person's blood serum or plasma.

D. The person has a concentration of 0.08 grams or more but less than 0.17 grams by weight of alcohol per two hundred and ten (210) liters of the person's breath.

E. The person has a concentration of 0.11 grams or more but less than 0.238 grams by weight of alcohol per one hundred (100) milliliters of the person's urine.

F. The person has a concentration of 0.17% or more by weight per unit volume of alcohol in the person's whole blood.

G. The person has a concentration of 0.204% or more by weight per unit volume of alcohol in the person's blood serum or plasma.

H. The person has a concentration of 0.17 grams or more by weight of alcohol per two hundred and ten (210) liters of the person's breath.

I. The person has a concentration of 0.238 grams or more by weight of alcohol per one hundred (100) milliliters of the person's urine.

J. Except as provided in division (1) of this section, the person has a concentration of any of the following controlled substances or metabolites of a controlled

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substance in the person's whole blood, blood serum or plasma, or urine that equals or exceeds any of the following:

1. The person has a concentration of amphetamine in the person's urine of at least five hundred (500) nanograms of amphetamine per milliliter of the person's urine or has a concentration of amphetamine in the person's whole blood or blood serum or plasma of at least one hundred (100) nanograms of amphetamine per milliliter of the person's whole blood or blood serum or plasma.

2. The person has a concentration of cocaine in the person's urine of at least one hundred fifty (150) nanograms of cocaine per milliliter of the person's urine or has a concentration of cocaine in the person's whole blood or blood serum or plasma of at least fifty (50) nanograms of cocaine per milliliter of the person's whole blood or blood serum or plasma.

3. The person has a concentration of cocaine metabolite in the person's urine of at least one hundred fifty (150) nanograms of cocaine metabolite per milliliter of the person's urine or has a concentration of cocaine metabolite in the person's whole blood or blood serum or plasma of at least fifty (50) nanograms of cocaine metabolite per milliliter of the person's whole blood or blood serum or plasma.

4. The person has a concentration of heroin in the person's urine of at least two thousand (2,000) nanograms of heroin per milliliter of the person's urine or has a concentration of heroin in the person's whole blood or blood serum or plasma of at least fifty (50) nanograms of heroin per milliliter of the person's whole blood or blood serum or plasma.

5. The person has a concentration of heroin metabolite (6-monoacetyl morphine) in the person's urine of at least ten (10) nanograms of heroin metabolite (6-monoacetyl morphine) per milliliter of the person's urine or has a concentration of heroin metabolite (6-monoacetyl morphine) in the person's whole blood or blood serum or plasma of at least ten (10) nanograms of heroin metabolite (6-monoacetyl morphine) per milliliter of the person's whole blood or blood serum or plasma.

6. The person has a concentration of L.S.D. in the person's urine of at least twenty-five (25) nanograms of L.S.D. per milliliter of the person's urine or a concentration of L.S.D. in the person's whole blood or blood serum or plasma of at least ten (10) nanograms of L.S.D. per milliliter of the person's whole blood or blood serum or plasma.

7. The person has a concentration of marihuana in the person's urine of at least ten (10) nanograms of marihuana per milliliter of the person's urine or has a concentration of marihuana in the person's whole blood or blood serum or plasma of at least two (2) nanograms of marihuana per milliliter of the person's whole blood or blood serum or plasma.

8. Either of the following applies:

a. The person is under the influence of alcohol, a drug of abuse, or a combination of them, and, as measured by gas chromatography mass spectrometry, the person has a concentration of marihuana metabolite in the person's urine of at least fifteen (15) nanograms of marihuana metabolite per milliliter of the person's urine or has a concentration of marihuana metabolite in the person's whole blood or blood serum or plasma of at least five (5) nanograms of marihuana metabolite per milliliter of the person's whole blood or blood serum or plasma.

b. As measured by gas chromatography mass spectrometry, the person has a concentration of marihuana metabolite in the person's urine of at least thirty-five (35) nanograms of marihuana metabolite per milliliter of the person's urine or has a concentration of marihuana metabolite in the person's whole blood or blood serum or plasma of at least fifty (50) nanograms of marihuana metabolite per milliliter of the person's whole blood or blood serum or plasma.

9. The person has a concentration of methamphetamine in the person's urine of at least five hundred (500) nanograms of methamphetamine per milliliter of the person's urine or has a concentration of methamphetamine in the person's whole blood or blood serum or plasma of at least one hundred (100) nanograms of methamphetamine per milliliter of the person's whole blood or blood serum or plasma.

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10. The person has a concentration of phencyclidine in the person's urine of at least twenty-five (25) nanograms of phencyclidine per milliliter of the person's urine or has a concentration of phencyclidine in the person's whole blood or blood serum or plasma of at least ten (10) nanograms of phencyclidine per milliliter of the person's whole blood or blood serum or plasma.

11. The State Board of Pharmacy has adopted a rule pursuant to RC 4729.041 that specifies the amount of salvia divinorum and the amount of salvinorin A that constitute concentrations of salvia divinorum and salvinorin A in a person's urine, in a person's whole blood, or in a person's blood serum or plasma at or above which the person is impaired for purposes of operating any vehicle, streetcar, or trackless trolley within this state, the rule is in effect, and the person has a concentration of salvia divinorum or salvinorin A of at least that amount so specified by rule in the person's urine, in the person's whole blood, or in the person's blood serum or plasma.

(2) No person who, within twenty (20) years of the conduct described in division (a)(2)A. of this section, previously has been convicted of or pleaded guilty to a violation of this division or a substantially equivalent State law or municipal ordinance, division (a)(1) or (b) of this section or a substantially equivalent State law or municipal ordinance, shall do both of the following:

A. Operate any vehicle, streetcar, or trackless trolley within this City while under the influence of alcohol, a drug of abuse, or a combination of them;

B. Subsequent to being arrested for operating the vehicle, streetcar, or trackless trolley as described in division (a)(2)A. of this section, being asked by a law enforcement officer to submit to a chemical test or tests under RC 4511.191 or any substantially equivalent municipal ordinance, and being advised by the officer in accordance with RC 4511.192 or any substantially equivalent municipal ordinance of the consequences of the person's refusal or submission to the test or tests, refuse to submit to the test or tests.

(b) *Underage alcohol consumption.* No person under twenty-one (21) years of age shall operate any vehicle, streetcar, or trackless trolley within this City if, at the time of the operation, any of the following apply:

(1) The person has a concentration of at least 0.02% but less than 0.08% by weight per unit volume of alcohol in the person's whole blood;

(2) The person has a concentration of at least 0.03% but less than 0.096% by weight per unit volume of alcohol in the person's blood serum or plasma;

(3) The person has a concentration of at least 0.02 grams but less than 0.08 grams by weight of alcohol per two hundred and ten (210) liters of the person's breath;

(4) The person has a concentration of at least 0.028 grams but less than 0.11 grams by weight of alcohol per one hundred (100) milliliters of the person's urine.

(c) *Prosecution; limitation on convictions.* In any proceeding arising out of one (1) incident, a person may be charged with a violation of division (a)(1)A. or (a)(2) and a violation of division (b)(1), (b)(2) or (b)(3) of this section, but the person may not be convicted of more than one (1) violation of these divisions.

(d) *Evidence; tests.*

(1) A. In any criminal prosecution for a violation of division (a)(1)A. of this section or for an equivalent offense that is vehicle-related, the result of any test of any blood or urine withdrawn and analyzed at any health care provider, as defined in RC 2317.02, may be admitted with expert testimony to be considered with any other relevant and competent evidence in determining the guilt or innocence of the defendant.

B. In any criminal prosecution for a violation of division (a) or (b) of this section or for an equivalent offense that is vehicle-related, the court may admit evidence on the concentration of alcohol, drugs of abuse, controlled substances, metabolites of a controlled substance, or a combination of them in the defendant's whole blood, blood serum or plasma, breath, urine or other bodily substance at the time of the alleged violation as shown by chemical analysis of the substance withdrawn within three (3) hours of the time of the alleged violation.

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The three (3) hour time limit specified in this division regarding the admission of evidence does not extend or affect the two (2) hour time limit specified in RC 4511.192(A) as the maximum period of time during which a person may consent to a chemical test or tests as described in that section. The court may admit evidence on the concentration of alcohol, drugs of abuse, or a combination of them as described in this division when a person submits to a blood, breath, urine, or other bodily substance test at the request of a law enforcement officer under RC 4511.191 or a substantially equivalent municipal ordinance, or a blood or urine sample is obtained pursuant to a search warrant. Only a physician, a registered nurse, an emergency medical technician-intermediate, an emergency medical technician-paramedic, or a qualified technician, chemist or phlebotomist shall withdraw a blood sample for the purpose of determining the alcohol, drug, controlled substance, metabolite of a controlled substance, or combination content of the whole blood, blood serum or blood plasma. This limitation does not apply to the taking of breath or urine specimens. A person authorized to withdraw blood under this division may refuse to withdraw blood under this division, if in that person's opinion, the physical welfare of the person would be endangered by the withdrawing of blood. The bodily substance withdrawn under this division (d)(1)B. shall be analyzed in accordance with methods approved by the Ohio Director of Health by an individual possessing a valid permit issued by the Director pursuant to RC 3701.143.

C. As used in division (d)(1)B. of this section, "emergency medical technician-intermediate" and "emergency medical technician-paramedic" have the same meanings as in RC 4765.01.

(2) In a criminal prosecution for a violation of division (a) of this section or for an equivalent offense that is vehicle-related, if there was at the time the bodily substance was withdrawn a concentration of less than the applicable concentration of alcohol specified in divisions (a)(1)B., (a)(1)C., (a)(1)D. and (a)(1)E. of this section or less than the applicable concentration of a listed controlled substance or a listed metabolite of a controlled substance specified for a violation of division (a)(1)J. of this section, that fact may be considered with other competent evidence in determining the guilt or innocence of the defendant. This division does not limit or affect a criminal prosecution for a violation of division (b) of this section.

(3) Upon the request of the person who was tested, the results of the chemical test shall be made available to the person or the person's attorney, immediately upon the completion of the chemical test analysis. If the chemical test was obtained pursuant to division (d)(1)B. of this section, the person tested may have a physician, a registered nurse or a qualified technician, chemist or phlebotomist of the person's own choosing administer a chemical test or tests, at the person's expense, in addition to any administered at the request of a law enforcement officer. If the person was under arrest as described in division (g)(5) of this section or RC 4511.191(A)(5), the arresting officer shall advise the person at the time of the arrest that the person may have an independent chemical test taken at the person's own expense. If the person was under arrest other than described in RC 4511.191(A)(5), the form to be read to the person to be tested, as required under division (g) of this section, shall state that the person may have an independent test performed at the person's expense. The failure or inability to obtain an additional chemical test by a person shall not preclude the admission of evidence relating to the chemical test or tests taken at the request of a law enforcement officer.

(4) A. As used in division (d)(4)B. and (d)(4)C. of this section, "National Highway Traffic Safety Administration" means the National Highway Traffic Safety Administration established as an administration of the United States Department of Transportation under 96 Stat. 2415 (1983), 49 U.S.C. 105.

B. In any criminal prosecution for a violation of division (a) or (b) of this section, of a municipal ordinance relating to operating a vehicle while under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse, or of a municipal ordinance relating to operating a vehicle with a prohibited concentration of alcohol, a controlled substance, or a metabolite of a controlled substance in the whole blood, blood serum or plasma, breath, or urine, if a law enforcement officer has administered a field sobriety test to the operator of the vehicle involved in the violation and if it is shown by clear and convincing evidence that the officer administered the test in substantial compliance with the testing standards for any reliable, credible and generally accepted field sobriety tests that were in effect at the time the tests were administered, including but not limited to any testing standards then in effect that were set by the National Highway Traffic Safety Administration, all of the following apply:

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1. The officer may testify concerning the results of the field sobriety test so administered.

2. The prosecution may introduce the results of the field sobriety test so administered as evidence in any proceedings in the criminal prosecution.

3. If testimony is presented or evidence is introduced under division (d)(4)B.1. or (d)(4)B.2. of this section and if the testimony or evidence is admissible under the Rules of Evidence, the court shall admit the testimony or evidence and the trier of fact shall give it whatever weight the trier of fact considers to be appropriate.

C. Division (d)(4)B. of this section does not limit or preclude a court, in its determination of whether the arrest of a person was supported by probable cause or its determination of any other matter in a criminal prosecution or juvenile court proceeding of a type described in that division, from considering evidence or testimony that is not otherwise disallowed by division (d)(4)B. of this section.

(e) Laboratory report.

(1) Subject to division (e)(3) of this section, in any criminal prosecution for a violation of division (a)(1)B., (a)(1)C., (a)(1)D., (a)(1)E., (a)(1)F., (a)(1)G., (a)(1)H., (a)(1)I. or (a)(1)J. or (b)(1), (b)(2), (b)(3) or (b)(4) of this section or for an equivalent offense that is substantially equivalent to any of those divisions, a laboratory report from any laboratory personnel issued a permit by the Department of Health authorizing an analysis as described in this division that contains an analysis of the whole blood, blood serum or plasma, breath, urine or other bodily substance tested and that contains all of the information specified in this division shall be admitted as prima facie evidence of the information and statements that the report contains. The laboratory report shall contain all of the following:

A. The signature, under oath, of any person who performed the analysis;

B. Any findings as to the identity and quantity of alcohol, a drug of abuse, a controlled substance, a metabolite of a controlled substance, or a combination of them that was found;

C. A copy of a notarized statement by the laboratory director or a designee of the director that contains the name of each certified analyst or test performer involved with the report, the analyst's or test performer's employment relationship with the laboratory that issued the report, and a notation that performing an analysis of the type involved is part of the analyst's or test performer's regular duties;

D. An outline of the analyst's or test performer's education, training and experience in performing the type of analysis involved and a certification that the laboratory satisfies appropriate quality control standards in general and, in this particular analysis, under rules of the Ohio Department of Health.

(2) Notwithstanding any other provision of law regarding the admission of evidence, a report of the type described in division (e)(1) of this section is not admissible against the defendant to whom it pertains in any proceeding, other than a preliminary hearing or a grand jury proceeding, unless the prosecutor has served a copy of the report on the defendant's attorney or, if the defendant has no attorney, on the defendant.

(3) A report of the type described in division (e)(1) of this section shall not be prima facie evidence of the contents, identity or amount of any substance if, within seven (7) days after the defendant to whom the report pertains or the defendant's attorney receives a copy of the report, the defendant or the defendant's attorney demands the testimony of the person who signed the report. The judge in the case may extend the seven (7) day time limit in the interest of justice.

(f) Limitation of liability.

(1) Except as otherwise provided in this division, any physician, registered nurse, emergency medical technician-intermediate, emergency medical technician-paramedic, or qualified technician, chemist or phlebotomist who withdraws blood from a person pursuant to this section or RC 4511.19, 4511.191 or 4511.192, and any hospital, first-aid station or clinic at which blood is withdrawn from a person pursuant to this section or RC 4511.19, 4511.191 or

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4511.192, is immune from criminal liability and civil liability based upon a claim of assault and battery or any other claim that is not a claim of malpractice, for any act performed in withdrawing blood from the person. The immunity provided in this division also extends to an emergency medical service organization that employs an emergency medical technician-intermediate or emergency medical technician-paramedic who withdraws blood under this section. The immunity provided in this division is not available to a person who withdraws blood if the person engages in willful or wanton misconduct.

(2) As used in division (f)(1), “emergency medical technician-intermediate” and “emergency medical technician-paramedic” have the same meanings as in RC 4765.01. (RC 4511.19(A) - (F))

(g) *Implied consent.*

(1) *Definitions.* For the purpose of this division (g), the following definitions shall apply unless the context clearly indicates or requires a different meaning.

A. “Alcohol monitoring device” means any device that provides for continuous alcohol monitoring, any ignition interlock device, any immobilizing or disabling device other than an ignition interlock device that is constantly available to monitor the concentration of alcohol in a person’s system, or any other device that provides for the automatic testing and periodic reporting of alcohol consumption by a person and that a court orders a person to use as a sanction imposed as a result of the person’s conviction of or plea of guilty to an offense.

B. “Physical control” has the same meaning as in RC 4511.194.

C. “Community Addiction Services Provider” has the same meaning as in RC 5119.01.

(2) *Implied consent to chemical tests.* Any person who operates a vehicle, streetcar, or trackless trolley upon a highway or any public or private property used by the public for vehicular travel or parking within this municipality or who is in physical control of a vehicle, streetcar, or trackless trolley shall be deemed to have given consent to a chemical test or tests of the person’s whole blood, blood serum or plasma, breath, or urine to determine the alcohol, drug of abuse, controlled substance, metabolite of a controlled substance, or combination content of the person’s whole blood, blood serum or plasma, breath, or urine if arrested for a violation of division (a), (b) or (o) of this section, RC 4511.19(A) or (B), 4511.194 or a substantially equivalent municipal ordinance or any other municipal O.V.I. ordinance.

(3) *Tests at request of law enforcement agent.* The chemical test or tests under division (g)(2) of this section shall be administered at the request of a law enforcement officer having reasonable grounds to believe the person was operating or in physical control of a vehicle, streetcar, or trackless trolley in violation of a division, section or ordinance identified in division (g)(2) of this section. The law enforcement agency by which the officer is employed shall designate which of the tests shall be administered.

(4) *Effect of death or unconsciousness.* Any person who is dead or unconscious, or who otherwise is in a condition rendering the person incapable of refusal, shall be deemed to have consented as provided in division (g)(2) of this section and the test or tests may be administered, subject to RC 313.12 to 313.16.

(5) *Chemical tests.*

A. If a law enforcement officer arrests a person for a violation of division (a) or (b) of this section, RC 4511.19(A) or (B), 4511.194 or a substantially equivalent municipal ordinance, or a municipal O.V.I. ordinance and if the person if convicted would be required to be sentenced under division (h)(1)(C), (h)(1)(D), or (h)(1)(E), or under RC 4511.19(G)(1)(c), (G)(1)(d) or (G)(1)(e), the law enforcement officer shall request the person to submit, and the person shall submit, to a chemical test or tests of the person’s whole blood, blood serum or plasma, breath, or urine for the purpose of determining the alcohol, drug of abuse, controlled substance, metabolite of a controlled substance, or combination content of the person’s whole blood, blood serum or plasma, breath, or urine. A law enforcement officer who makes a request pursuant to this division that a person submit to a chemical test or tests is not required to advise the person of the consequences of submitting to, or refusing to submit to, the test or tests and is not required to give the person the form described in division (g)(7) of this section, but the officer shall advise the person at the time of the arrest that if the person refuses to take a

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chemical test the officer may employ whatever reasonable means are necessary to ensure that the person submits to a chemical test of the person's whole blood or blood serum or plasma. The officer shall also advise the person at the time of the arrest that the person may have an independent chemical test taken at the person's own expense. Divisions (g)(3) and (g)(4) of this section apply to the administration of a chemical test or tests pursuant to this division.

B. If a person refuses to submit to a chemical test upon a request made pursuant to division (g)(5)A. of this section, the law enforcement officer who made the request may employ whatever reasonable means are necessary to ensure that the person submits to a chemical test of the person's whole blood or blood serum or plasma. A law enforcement officer who acts pursuant to this division to ensure that a person submits to a chemical test of the person's whole blood or blood serum or plasma is immune from criminal and civil liability based upon a claim for assault and battery or any other claim for the acts, unless the officer so acted with malicious purpose, in bad faith, or in a wanton or reckless manner.
(RC 4511.191(A))

(6) *Advice required.* Except as provided in division (g)(5) of this section, the arresting law enforcement officer shall give advice in accordance with this division to any person under arrest for a violation of division (a), (b) or (o) of this section, RC 4511.19(A) or (B), 4511.194 or a substantially equivalent municipal ordinance, or any other municipal O.V.I. ordinance. The officer shall give that advice in a written form that contains the information described in division (g)(7) of this section and shall read the advice to the person. The form shall contain a statement that the form was shown to the person under arrest and read to the person by the arresting officer. One (1) or more persons shall witness the arresting officer's reading of the form, and the witnesses shall certify to this fact by signing the form. The person must submit to the chemical test or tests, subsequent to the request of the arresting officer, within two (2) hours of the time of the alleged violation and, if the person does not submit to the test or tests within that two (2) hour time limit, the failure to submit automatically constitutes a refusal to submit to the test or tests.

(7) *Certification of arrest.* Except as provided in division (g)(5) of this section, if a person is under arrest as described in division (g)(6) of this section, before the person may be requested to submit to a chemical test or tests to determine the alcohol, drug of abuse, controlled substance, metabolite of a controlled substance or combination content of the person's whole blood, blood serum or plasma, breath or urine, the arresting officer shall read the following form to the person:

"You now are under arrest for (specifically state the offense under state law or a substantially equivalent municipal ordinance for which the person was arrested – operating a vehicle under the influence of alcohol, a drug, or a combination of them; operating a vehicle while under the influence of a listed controlled substance or a listed metabolite of a controlled substance; operating a vehicle after underage alcohol consumption; or having physical control of a vehicle while under the influence).

"If you refuse to take any chemical test required by law, your Ohio driving privileges will be suspended immediately, and you will have to pay a fee to have the privileges reinstated. If you have a prior conviction of O.V.I., O.V.U.A.C., or operating a vehicle while under the influence of a listed controlled substance or a listed metabolite of a controlled substance under state or municipal law within the preceding 20 years, you are now under arrest for state O.V.I., and, if you refuse to take a chemical test, you will face increased penalties if you subsequently are convicted of the state O.V.I.

(Read this part unless the person is under arrest for solely having physical control of a vehicle while under the influence.) "If you take any chemical test required by law and are found to be at or over the prohibited amount of alcohol, a controlled substance, or a metabolite of a controlled substance in your whole blood, blood serum or plasma, breath, or urine as set by law, your Ohio driving privileges will be suspended immediately, and you will have to pay a fee to have the privileges reinstated.

"If you take a chemical test, you may have an independent chemical test taken at your own expense."

(8) *Actions required by arresting officer.* If the arresting law enforcement officer does not ask a person under arrest as described in division (g)(5) of this section or division (g)(6) of this section to submit to a chemical test or tests under RC 4511.191 or this section, the arresting officer shall seize the Ohio or out-of-state driver's or commercial driver's license or permit of the person and immediately forward it to the court in which the arrested person is to appear on

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the charge. If the arrested person is not in possession of the person's license or permit or it is not in the person's vehicle, the officer shall order the person to surrender it to the law enforcement agency that employs the officer within twenty-four (24) hours after the arrest, and, upon the surrender, the agency immediately shall forward the license or permit to the court in which the person is to appear on the charge. Upon receipt of the license or permit, the court shall retain it pending the arrested person's initial appearance and any action taken under RC 4511.196.

(9) *Duties of officer.*

A. If a law enforcement officer asks a person under arrest as described in division (g)(5) of this section to submit to a chemical test or tests under that division and the test results indicate a prohibited concentration of alcohol, a controlled substance, or a metabolite of a controlled substance in the person's whole blood, blood serum or plasma, breath, or urine at the time of the alleged offense, or if a law enforcement officer asks a person under arrest as described in division (g)(6) of this section to submit to a chemical test or tests under RC 4511.191 or this section, the officer advises the person in accordance with this section of the consequences of the person's refusal or submission, and either the person refuses to submit to the test or tests or, unless the arrest was for a violation of division (o) of this section, RC 4511.194 or a substantially equivalent municipal ordinance, the person submits to the test or tests and the test results indicate a prohibited concentration of alcohol, a controlled substance or a metabolite of a controlled substance in the person's whole blood, blood serum or plasma, breath or urine at the time of the alleged offense, the arresting officer shall do all of the following:

1. On behalf of the Registrar of Motor Vehicles, notify the person that, independent of any penalties or sanctions imposed upon the person, the person's Ohio driver's or commercial driver's license or permit or nonresident operating privilege is suspended immediately, that the suspension will last at least until the person's initial appearance on the charge, which will be held within five (5) days after the date of the person's arrest or the issuance of a citation to the person, and that the person may appeal the suspension at the initial appearance or during the period of time ending thirty (30) days after that initial appearance;

2. Seize the driver's or commercial driver's license or permit of the person and immediately forward it to the Registrar. If the arrested person is not in possession of the person's license or permit or it is not in the person's vehicle, the officer shall order the person to surrender it to the law enforcement agency that employs the officer within twenty-four (24) hours after the person is given notice of the suspension, and, upon the surrender, the officer's employing agency immediately shall forward the license or permit to the Registrar;

3. Verify the person's current residence and, if it differs from that on the person's driver's or commercial driver's license or permit, notify the Registrar of the change;

4. Send to the Registrar, within forty-eight (48) hours after the arrest of the person, a sworn report that includes all of the following statements:

a. That the officer had reasonable grounds to believe that, at the time of the arrest, the arrested person was operating a vehicle, streetcar, or trackless trolley in violation of RC 4511.19(A) or (B) or a municipal O.V.I. ordinance or for being in physical control of a stationary vehicle, streetcar, or trackless trolley in violation of RC 4511.194 or a substantially equivalent municipal ordinance;

b. That the person was arrested and charged with a violation of RC 4511.19(A) or (B), 4511.194 or a substantially equivalent municipal ordinance, or a municipal O.V.I. ordinance;

c. Unless division (g)(9)A.4.e. of this section applies, that the officer asked the person to take the designated chemical test or tests, advised the person in accordance with this section of the consequences of submitting to, or refusing to take, the test or tests, and gave the person the form described in division (g)(7) of this section;

d. Unless division (g)(9)A.4.e. of this section applies, that either the person refused to submit to the chemical test or tests or, unless the arrest was for a violation of RC 4511.194 or a substantially equivalent municipal ordinance, the person submitted to the chemical test or tests and the test results indicate a prohibited concentration of alcohol, a controlled substance, or a metabolite of a controlled substance in the person's whole blood, blood serum or plasma, breath or urine at the time of the alleged offense;

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e. If the person was under arrest as described in division (g)(5) of this section and the chemical test or tests were performed in accordance with that division, that the person was under arrest as described in that division, that the chemical test or tests were performed in accordance with that division, and that test results indicated a prohibited concentration of alcohol, a controlled substance, or a metabolite of a controlled substance in the person's whole blood, blood serum or plasma, breath, or urine at the time of the alleged offense.

B. Division (g)(9)A. of this section does not apply to a person who is arrested for a violation of division (o) of this section, RC 4511.194 or a substantially equivalent municipal ordinance, or any other substantially equivalent municipal ordinance, who is asked by a law enforcement officer to submit to a chemical test or tests under this section, and who submits to the test or tests, regardless of the amount of alcohol, a controlled substance, or a metabolite of a controlled substance that the test results indicate is present in the person's whole blood, blood serum or plasma, breath or urine.

(10) *Sworn report of arresting officer.*

A. The arresting officer shall give the officer's sworn report that is completed under this section to the arrested person at the time of the arrest, or the Registrar of Motor Vehicles shall send the report to the person by regular first-class mail as soon as possible after receipt of the report, but not later than fourteen (14) days after receipt of it. An arresting officer may give an unsworn report to the arrested person at the time of the arrest, provided the report is complete when given to the arrested person and subsequently is sworn to by the arresting officer. As soon as possible, but not later than forty-eight (48) hours after the arrest of the person, the arresting officer shall send a copy of the sworn report to the court in which the arrested person is to appear on the charge for which the person was arrested.

B. The sworn report of an arresting officer completed under this section is prima facie proof of the information and statements that it contains. It shall be admitted and considered as prima facie proof of the information and statements that it contains in any appeal under RC 4511.197 relative to any suspension of a person's driver's or commercial driver's license or permit or nonresident operating privilege that results from the arrest covered by the report. (RC 4511.192)

(11) *Suspension effective immediately.* A suspension of a person's driver's or commercial driver's license or permit or nonresident operating privilege under this section for the time described in RC 4511.191(B) or (C) is effective immediately from the time at which the arresting officer serves the notice of suspension upon the arrested person. Any subsequent finding that the person is not guilty of the charge that resulted in the person's being requested to take the chemical test or tests under division (g)(1) through (g)(5) of this section does not affect the suspension.

(12) *Initial appearance.* If a person arrested for operating a vehicle, streetcar, or trackless trolley in violation of division (a) or (b) of this section, RC 4511.19(A) or (B), or any other municipal O.V.I. ordinance, or for being in physical control of a vehicle in violation of division (o) of this section or RC 4511.194 or a substantially equivalent municipal ordinance, regardless of whether the person's driver's or commercial driver's license or permit or nonresident operating privilege is or is not suspended under RC 4511.191(B) or (C) or RC Chapter 4510, the person's initial appearance on the charge resulting from the arrest shall be held within five (5) days of the person's arrest or the issuance of the citation to him or her, subject to any continuance granted by the court pursuant to RC 4511.197 regarding the issues specified in that section. (RC 4511.191(D))

(h) *Penalty for driving under the influence.*

(1) Whoever violates any provisions of divisions (a)(1)A. through (a)(1)I. or (a)(2) of this section is guilty of operating a vehicle under the influence of alcohol, a drug of abuse, or a combination of them. Whoever violates division (a)(1)J. of this section is guilty of operating a vehicle while under the influence of a listed controlled substance or a listed metabolite of a controlled substance. The court shall sentence the offender for either offense under RC Chapter 2929, except as otherwise authorized or required by divisions (h)(1)A. through (h)(1)E. of this section:

A. Except as otherwise provided in division (h)(1)B., (h)(1)C., (h)(1)D. or (h)(1)E. of this section, the offender is guilty of a misdemeanor of the first degree and the court

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shall sentence the offender to all of the penalties and sanctions provided in RC 4511.19(G)(1)(a)(i) to (G)(1)(a)(iv).

B. Except as otherwise provided in division (h)(1)E. of this section, an offender who, within ten (10) years of the offense previously has been convicted of or pleaded guilty to one (1) violation of division (a) or (b) of this section, or one (1) other equivalent offense is guilty of a misdemeanor of the first degree. The court shall sentence the offender to all of the penalties and sanctions provided in RC 4511.19(G)(1)(b)(i) to (G)(1)(b)(v).

C. Except as otherwise provided in division (h)(1)E. of this section, an offender who, within ten (10) years of the offense, previously has been convicted of or pleaded guilty to two (2) violations of division (a) or (b) of this section or other equivalent offenses is guilty of a misdemeanor. The court shall sentence the offender to all of the penalties and sanctions provided in RC 4511.19(G)(1)(c)(i) to (G)(1)(c)(vi).

D. Except as otherwise provided in division (h)(1)E. of this section, an offender who, within ten (10) years of the offense, previously has been convicted of or pleaded guilty to three (3) or more violations of division (a) or (b) of this section or other equivalent offenses or an offender who, within twenty (20) years of the offense, previously has been convicted of or pleaded guilty to five (5) or more violations of that nature is guilty of a felony to be prosecuted under appropriate state law.

E. An offender who previously has been convicted of or pleaded guilty to a violation of RC 4511.19(A) that was a felony, regardless of when the violation and the conviction or guilty plea occurred, is guilty of a felony to be prosecuted under appropriate state law.

(2) An offender who is convicted of or pleads guilty to a violation of division (a) of this section and who subsequently seeks reinstatement of the driver's or occupational driver's license or permit or nonresident operating privilege suspended under this section or RC 4511.19 as a result of the conviction or guilty plea shall pay a reinstatement fee as provided in RC 4511.191(F)(2).

(3) A. If an offender is sentenced to a jail term under RC 4511.19(G)(1)(b)(i) or (G)(1)(b)(ii) or (G)(1)(c)(i) or (G)(1)(c)(ii) and if, within sixty (60) days of sentencing of the offender, the court issues a written finding on the record that, due to the unavailability of space at the jail where the offender is required to serve the term, the offender will not be able to begin serving that term within the sixty (60) day period following the date of sentencing, the court may impose an alternative sentence as specified in RC 4511.19(G)(3) that includes a term of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring.

B. As an alternative to the mandatory jail terms as required by RC 4511.19(G)(1), the court may sentence the offender as provided in RC 4511.19(G)(3).

(4) If an offender's driver's or occupational driver's license or permit or nonresident operating privilege is suspended under division (h) of this section or RC 4511.19(G) and if RC 4510.13 permits the court to grant limited driving privileges, the court may grant the limited driving privileges in accordance with that section. If division (A)(7) of that section requires the court impose as a condition of the privileges that the offender must display on the vehicle that is driven subject to the privileges restricted license plates that are issued under RC 4503.231, except as provided in division (B) of that section, the court shall impose that condition as one (1) of the conditions of the limited driving privileges granted to the offender, except as provided in RC 4503.231(B).

(5) Fines imposed under this section for a violation of division (a) of this section shall be distributed as provided in RC 4511.19(G)(5).

(6) If title to a motor vehicle that is subject to an order of criminal forfeiture under division (h)(1)C., (h)(1)D. or (h)(1)E. of this section is assigned or transferred and RC 4503.234(B)(2) or (B)(3) applies, in addition to or independent of any other penalty established by law, the court may fine the offender the value of the vehicle as determined by publications of the National Automobile Dealers Association. The proceeds of any fine so imposed shall be distributed in accordance with division (C)(2) of that section.

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(7) In all cases in which an offender is sentenced under division (h) of this section, the offender shall provide the court with proof of financial responsibility as defined in RC 4509.01. If the offender fails to provide that proof of financial responsibility, the court, in addition to any other penalties provided by law, may order restitution pursuant to RC 2929.18 or 2929.28 in an amount not exceeding five thousand dollars (\$5,000.00) for any economic loss arising from an accident or collision that was the direct and proximate result of the offender's operation of the vehicle before, during, or after committing the offense for which the offender is sentenced under division (h) of this section.

(8) As used in division (h) of this section, "electronic monitoring" has the same meaning as in RC 2929.01.

(i) *Penalty for operating a vehicle after underage alcohol consumption.* Whoever violates division (b) of this section is guilty of operating a motor vehicle after underage alcohol consumption and shall be punished as follows:

(1) Except as otherwise provided in division (i)(2) of this section, the offender is guilty of a misdemeanor of the fourth degree. In addition to any other sanction imposed for the offense, the court shall impose a class six (6) suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license or nonresident operating privilege from the range specified in RC 4510.02(A)(6); The court may grant limited driving privileges relative to the suspension under sections 4510.021 and 4510.13 of the Revised Code. The court may grant unlimited driving privileges with an ignition interlock device relative to the suspension and may reduce the period of suspension as authorized under section 4510.022 of the Revised Code . If the court grants unlimited driving privileges under section 4510.022 of the Revised Code, the court shall suspend any jail term imposed under division (H) (1) of this section as required under that section.

(2) If, within one (1) year of the offense, the offender previously has been convicted of or pleaded guilty to one (1) or more violations of division (a) or (b) of this section or other equivalent offense or offenses, the offender is guilty of a misdemeanor of the third degree. In addition to any other sanction imposed for the offense, the court shall impose a class four (4) suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license or nonresident operating privilege from the range specified in RC 4510.02(A)(4). The court may grant limited driving privileges relative to the suspension under sections 4510.021 and 4510.13 of the Revised Code

(3) If the offender also is convicted of or also pleads guilty to a specification of the type described in RC 2941.1416 and if the court imposes a jail term for the violation of division (b) of this section, the court shall impose upon the offender an additional definite jail term pursuant to RC 2929.24(E).

(4) The offender shall provide the court with proof of financial responsibility as defined in RC 4509.01. If the offender fails to provide that proof of financial responsibility, then, in addition to any other penalties provided by law, the court may order restitution pursuant to RC 2929.28 in an amount not exceeding five thousand dollars (\$5,000.00) for any economic loss arising from an accident or collision that was the direct and proximate result of the offender's operation of the vehicle before, during, or after committing the violation of division (b) of this section.

(j) *Treatment programs.*

(1) No court shall sentence an offender to an alcohol treatment program under this section unless the treatment program complies with the minimum standards for alcohol treatment programs adopted under RC Chapter 5119 by the Director of Mental Health and Addiction Services.

(2) An offender who stays in a drivers' intervention program or in an alcohol treatment program under an order issued under this section shall pay the cost of the stay in the program. However, if the court determines that an offender who stays in an alcohol treatment program under an order issued under this section is unable to pay the cost of the stay in the program, the court may order that the cost be paid from the court's Indigent Drivers' Alcohol Treatment Fund.

(k) *Appeal; effect on suspension.* If a person whose driver's or commercial driver's license or permit or nonresident operating privilege is suspended under this section or RC 4511.19 files an appeal regarding any aspect of the person's trial or sentence, the appeal itself

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does not stay the operation of the suspension.

(l) *Exception; direction of health professional.* Division (a)(1)J. of this section does not apply to a person who operates a vehicle, streetcar, or trackless trolley while the person has a concentration of a listed controlled substance or a listed metabolite of a controlled substance in the person's whole blood, blood serum or plasma, or urine that equals or exceeds the amount specified in that division, if both of the following apply:

(1) The person obtained the controlled substance pursuant to a prescription issued by a licensed health professional authorized to prescribe drugs.

(2) The person injected, ingested or inhaled the controlled substance in accordance with the health professional's directions.

(m) *Applicability to RC 2923.16(D).* The prohibited concentrations of a controlled substance or a metabolite of a controlled substance listed in division (a)(1)J. of this section also apply in a prosecution of a violation of RC 2923.16(D) in the same manner as if the offender is being prosecuted for a prohibited concentration of alcohol.

(n) *Applicability of terms.* All terms defined in RC 4510.01 apply to this section. If the meaning of a term defined in RC 4510.01 conflicts with the meaning of the same term as defined in RC 4501.01 or 4511.01, the term as defined in RC 4510.01 applies to this section.
(RC 4511.19(G) - (M))

(o) *Physical control of vehicle while under the influence.*

(1) *Definition.* As used in this division (o), "physical control" means being in the driver's position of the front seat of a vehicle or in the driver's position of a streetcar or trackless trolley and having possession of the vehicle's, streetcar's, or trackless trolley's ignition key or other ignition device.

(2) *Generally.* No person shall be in physical control of a vehicle, streetcar, or trackless trolley if, at the time of the physical control, any of the following apply:

A. The person is under the influence of alcohol, a drug of abuse, or a combination of them.

B. The person's whole blood, blood serum or plasma, breath or urine contains at least the concentration of alcohol specified in divisions (a)(1)B., (a)(1)C., (a)(1)D. or (a)(1)E. of this section.

C. Except as provided in division (o)(5) of this section, the person has a concentration of a listed controlled substance or a listed metabolite of a controlled substance in the person's whole blood, blood serum or plasma, or urine that equals or exceeds the concentration specified in division (a)(1)J. of this section.

(3) *Field sobriety test.*

A. In any criminal prosecution or juvenile court proceeding for a violation of this section, if a law enforcement officer has administered a field sobriety test to the person in physical control of the vehicle involved in the violation and if it is shown by clear and convincing evidence that the officer administered the test in substantial compliance with the testing standards for any reliable, credible and generally acceptable field sobriety tests that were in effect at the time the tests were administered, including but not limited to any testing standards then in effect that were set by the National Highway Traffic Safety Administration, all of the following apply:

1. The officer may testify concerning the results of the field sobriety test so administered.

2. The prosecution may introduce the results of the field sobriety test so administered as evidence in any proceedings in the criminal prosecution or juvenile court proceeding.

3. If testimony is presented or evidence is introduced under division (o)(3)A.1. or (o)(3)A.2. of this section and if the testimony or evidence is admissible under the Rules of Evidence, the court shall admit the testimony or evidence, and the trier of fact shall give

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it whatever weight the trier of fact considers to be appropriate.

B. Division (o)(3)A. of this section does not limit or preclude a court, in its determination of whether the arrest of a person was supported by probable cause or its determination of any other matter in a criminal prosecution or juvenile court proceeding of a type described in that division, from considering evidence or testimony that is not otherwise disallowed by division (o)(3)A. of this section.

(4) *Penalty.* Whoever violates this division (o) is guilty of having physical control of a vehicle while under the influence, a misdemeanor of the first degree. In addition to other sanctions imposed, the court may impose on the offender a class seven (7) suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license or nonresident operating privilege from the range specified in RC 4510.02(A)(7).

(5) *Exception.* Division (o)(2)C. of this section does not apply to a person who is in physical control of a vehicle, streetcar, or trackless trolley while the person has a concentration of a listed controlled substance or a listed metabolite of a controlled substance in the person's whole blood, blood serum or plasma, or urine that equals or exceeds the amount specified in division (a)(1)J. of this section if both of the following apply:

A. The person obtained the controlled substance pursuant to a prescription issued by a licensed health professional authorized to prescribe drugs.

B. The person injected, ingested or inhaled the controlled substance in accordance with the health professional's directions.
(RC 4511.194)

(p) *Definitions.* For the purpose of this section, the following definitions shall apply unless the context clearly indicates or requires a different meaning.

(1) "Community residential sanction," "continuous alcohol monitoring," "jail," "mandatory prison term," "mandatory term of local incarceration," "prison term" and "sanction" have the same meanings as in RC 2929.01.

(2) "Drug of abuse" has the same meaning as in RC 4506.01.

(3) "Equivalent offense" means any of the following:

A. A violation of RC 4511.19(A) or (B);

B. A violation of a municipal O.V.I. ordinance;

C. A violation of RC 2903.04 in a case in which the offender was subject to the sanctions described in division (D) of that section;

D. A violation of RC 2903.06(A)(1) or 2903.08 or a municipal ordinance that is substantially equivalent to either of those divisions;

E. A violation of RC 2903.06(A)(2), (A)(3) or (A)(4), 2903.08(A)(2), or former RC 2903.07, or a municipal ordinance that is substantially equivalent to any of those divisions or that former section, in a case in which a judge or jury as the trier of fact found that the offender was under the influence of alcohol, a drug of abuse, or a combination of them;

F. A violation of RC 1547.11(A) or (B);

G. A violation of a municipal ordinance prohibiting a person from operating or being in physical control of any vessel underway or from manipulating any water skis, aquaplane or similar device on the waters of this state while under the influence of alcohol, a drug of abuse, or a combination of them or prohibiting a person from operating or being in physical control of any vessel underway or from manipulating any water skis, aquaplane or similar device on the waters of this state with a prohibited concentration of alcohol, a controlled substance, or a metabolite of a controlled substance in the whole blood, blood serum or plasma, breath, or urine;

H. A violation of an existing or former municipal ordinance, law of another state, or law of the United States that is substantially equivalent to RC 4511.19(A) or (B) or

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1547.11(A) or (B);

I. A violation of a former law of this state that was substantially equivalent to RC 4511.19(A) or (B) or 1547.11(A) or (B).

(4) “Equivalent offense that is vehicle-related” means an equivalent offense that is any of the following:

A. A violation described in division A., B., C., D. or E. of the definition for “equivalent offense” provided in this division (p);

B. A violation of an existing or former municipal ordinance, law of another state, or law of the United States that is substantially equivalent to RC 4511.19(A) or (B);

C. A violation of a former law of this state that was substantially equivalent to RC 4511.19(A) or (B).

(5) “Mandatory jail term” means the mandatory term in jail of three (3), six (6), ten (10), twenty (20), thirty (30) or sixty (60) days that must be imposed under RC 4511.19(G)(1)(a), (G)(1)(b), or (G)(1)(c) upon an offender convicted of a violation of division (A) of that section and in relation to which all of the following apply:

A. Except as specifically authorized under RC 4511.19, the term must be served in a jail.

B. Except as specifically authorized under RC 4511.19, the term cannot be suspended, reduced or otherwise modified pursuant to RC 2929.21 through 2929.28 or any other provision of the Ohio Revised Code.

(6) “Municipal O.V.I. ordinance” and “municipal O.V.I. offense” mean any municipal ordinance prohibiting a person from operating a vehicle while under the influence of alcohol, a drug of abuse, or a combination of them or prohibiting a person from operating a vehicle with a prohibited concentration of alcohol, a controlled substance, or a metabolite of a controlled substance in the whole blood, blood serum or plasma, breath or urine.
(RC 4511.181)

Section 3 That this ordinance is declared to be an emergency measure and, provided it receives the affirmative vote of two-thirds of all the members elected to Council, it shall take effect and be in force immediately upon its passage and approval by the Mayor; otherwise it shall take effect and be in force from and after the earliest period allowed by law.

RNS:rns
5-15-17

FOR: Councilmember Kelley

Council Member Kelley

AN EMERGENCY ORDINANCE

To repeal Section 433.01 of the Codified Ordinances of Cleveland, Ohio, 1976, as amended by Ordinance No. 711-04, passed October 18, 2004; and to supplement the codified ordinances by enacting new Section 433.01 relating to driving or physical control while under the influence of alcohol or drugs, tests, presumptions, and penalties; and to repeal Section 433.011 of the codified ordinances, relating to intoxication, reckless operation and speed.

READ FIRST TIME on MAY 15, 2017
and referred to DIRECTORS of Public Safety, Finance, Law;
COMMITTEES on Safety, Finance

REPORTS

CITY CLERK

READ SECOND TIME

CITY CLERK

READ THIRD TIME

PRESIDENT

CITY CLERK

APPROVED

MAYOR

Recorded Vol. **104** Page _____

Published in the City Record _____

**PASSAGE RECOMMENDED BY
COMMITTEE ON
SAFETY**

FILED WITH COMMITTEE

**PASSAGE RECOMMENDED BY
COMMITTEE ON
FINANCE**

FILED WITH COMMITTEE
