

*This document shows the changes made by the Bar and Video Lottery Association to the original clean indoor air regulation proposed the Tobacco Prevention Partnership. Language removed from the Tobacco Prevention Partnership's proposal is shown in ~~red strikethrough~~ and language inserted is shown in **highlight**. Our commentary regarding the validity and probable effects of the changes is shown in **green**.*

A Regulation Eliminating Smoking in Public Places and Places of Employment

Sec. 1000. Title

This article shall be known as the Monongalia County Clean Indoor Air Regulation of 200_.

Sec. 1001. Findings and Purpose

The United States Surgeon General and numerous other credible authorities and medical researchers have determined:

(A) That involuntary inhalation of secondhand or tobacco smoke can cause or contribute to numerous serious health problems and diseases, including heart disease, cancer, respiratory illness, and acute episodes of decreased respiratory function, including broncho-constriction and broncho-spasm in healthy nonsmokers.

(B) That the presence of secondary tobacco smoke is a major contributor to indoor air pollution.

(C) That children, elderly people and individuals with cardiovascular and/or respiratory diseases are at increased risk.

(D) That the simple separation of smokers and nonsmokers within the same airspace may reduce, but does not eliminate the exposure of nonsmokers to environmental tobacco smoke. Smoking bans remain the most viable and cost-effective method of protecting patrons. The Environmental Protection Agency (EPA) has classified secondhand smoke as a Group A Carcinogen, known to cause cancer in humans.

In an attempt to make their proposal sound like a legitimate clean indoor air regulation, the Bar and Video Lottery Association doesn't disagree that secondhand smoke pollutes the air, causes serious health problems, and is especially dangerous for heart patients, elderly people and children. They even left in the section about smoking bans being the best way to protect people. But they've publicly made their stance on those issues quite clear: they really think that public smoking shouldn't be regulated at all – and that's pretty much what their proposed regulation ultimately tries to accomplish.

Sec. 1002. Definitions

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

A. "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.

B. "Employee" means any person who is employed by any employer in the consideration for direct or indirect monetary wages or profit, and any person who volunteers his or her services for a non-profit entity.

C. "Employer" means any person, partnership, corporation, including a municipal corporation, or non-profit entity, which employs the services of one or more individual persons.

D. "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, "office landscaping" or similar structures.

E. "Place of Employment" means any 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, private offices, employee cafeterias and hallways. A private residence is not a "place of employment" unless it is used as a childcare, adult day care or health care facility.

F. "Public Place" means any enclosed area to which the public ~~is invited or in which the public~~ (under the age of 18) is permitted, including but not limited to, banks, educational facilities, health facilities, laundromats, public transportation facilities, reception areas, restaurants, ~~bars~~, retail food production and marketing/grocery establishments, retail service establishments, retail stores, theaters, and waiting rooms. This shall include all rooms and offices of any agency that receives any monetary support from Monongalia County.

The Bar and Video Lottery Association proposal changes the definition of a public place from "any area in which the public is invited... or permitted" to "any area in which the public under the age of 18 is permitted." This effectively prevents video lottery rooms, strip bars, adult book stores, sex shops and other "adult" businesses from even being considered public places and exempts them from all clean indoor air requirements.

It is also possible that any business could just put up a sign saying "only over 18 is permitted to enter" and instantly become exempt.

G. "Restaurant" means any coffee shop, cafeteria, sandwich stand, private and public school cafeteria, **bars**, and any other establishment which gives or offers for sale food or **non alcohol** beverage to the public, guests, or employees, as well as kitchens in which food is prepared on the premises for serving elsewhere, including catering facilities.

Inserting the word "non-alcohol" allows restaurants that serve alcohol to be defined as bars.

H. "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.

I. "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.

J. "Smoking" means inhaling, exhaling, burning or carrying any lighted cigar, cigarette, pipe, weed, plant or other combustible substance in any manner or in any form.

K. "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.

L. A "private function" shall be defined as a function in which no fee is charged and no tickets are sold, and no public announcements are made to the event and/or function.

M. "Bar" means any establishment holding state licenses to sell beer, wine and/or alcoholic beverages of any sort to members thereof and/or to the general public within the such establishment's licensed premises, including, without limitation, "cigar bars", "pipe bars", and "tobacco bars" of all sorts, and further including the physically separated bar areas of restaurants, hotels, and other smoking facilities in which smoking of any sort would otherwise not be permitted, provided, however, that such bar areas shall have separate ventilation systems or other mechanisms available to prevent the free movement of smoke from such areas into any adjoining nonsmoking areas.

Note that a "bar" is defined as establishment that sells, not just serves, alcohol. There are many establishments that sell beer, wine or alcoholic beverages to the general public -- practically every grocery, gas station and convenience store in the county, liquor stores, restaurants, hotels, bowling alleys and probably others. This change alone could greatly expand the number of establishments that can allow smoking over our current regulation.

The language about physical separation and ventilation is confusing – since they exempt bars from regulation completely, it is unclear whether "bars" would actually have to meet these requirements.

N. "Video Lottery Room" means (1) a separated space or area within a private club or other business, or (2) wholly separate premises, in which the primary business is the provision for operation by members of the public over age 21 entering such separated area or space or separate premises of Video Gaming Machines licensed by the State of West Virginia. Provided, however, Video Lottery Rooms shall have separate ventilation systems or other mechanisms available to prevent the free movement of smoke from such areas into any adjoining nonsmoking areas.

In contrast to the definition of bar, this definition seems to be fairly limited in scope. But it allows smoking in video lottery rooms that share space with nonsmoking areas with "ventilation systems or other mechanisms". Ventilation does not effectively remove tobacco toxins from the air. The references to "other mechanisms" opens the door to legitimizing filters and other air cleaners that have never been acceptable in our county.

Sec. 1003. Application of Article to County-Owned Facilities

All enclosed facilities including buildings and vehicles owned by Monongalia County or any agency that receives any monetary support from Monongalia County shall be subject to the provisions of this regulation.

Sec. 1004. Prohibition of Smoking in Public Places

- A. Smoking shall be prohibited in all enclosed public places within Monongalia County, including, but not limited to, the following places:
1. Elevators.
 2. Restrooms, lobbies, reception areas, hallways and any other common-use areas.
 3. Buses, taxicabs, airports and other means of public transit under the authority of Monongalia County, and ticket, boarding, and waiting areas of public transit depots.
 4. Service lines.
 5. All retail stores.
 6. All areas available to and customarily used by the general public in all businesses and non-profit entities patronized by the public, including but not limited to, attorneys' offices and other offices, banks, laundromats, hotels and motels.
 7. Restaurants, **but no including outdoor seating areas of restaurants.**
 8. Public areas of aquariums, galleries, libraries and museums.
 9. Any facility which is primarily used for exhibiting any motion picture, stage, drama, lecture, musical recital or other similar performance.
 10. Sports arenas and convention halls, including bowling facilities.
 11. Every room, chamber, place of meeting or public assembly, including school buildings under the control of any board, council, commission, committee, including joint committees, or agencies of Monongalia County or any political

subdivision of the State during such time as a public meeting is in progress, to the extent such place is subject to the jurisdiction of the County. This shall include any agency that receives any monetary support from Monongalia County.

12. Waiting rooms, hallways, wards, private and semiprivate rooms of health facilities, including, but not limited to, hospitals, clinics, physical therapy facilities, doctors' offices, dentists' offices, nursing homes, and any other health care providers.
13. Lobbies, hallways, and other common areas ***in apartment buildings, condominiums, trailer parks, retirement facilities, nursing homes, and other multiple-unit residential facilities.***
14. Polling places.
15. Auction houses.
16. Enclosed shopping malls including indoor flea markets.
17. All fire department facilities.
18. All emergency medical services facilities.

19. Any Vehicle in which children under the age of 18 are present, either at the time of such smoking or on any frequent or regular basis.

One can certainly argue that children need to be protected from tobacco smoke in a parents' vehicle. Children seldom have a choice about riding in a smoke-filled car. Even though several jurisdictions have passed similar laws, it remains to be seen what the courts think about the civil liberties ramifications.

It is interesting that the Bar and Video Lottery Association, who was so quick to raise a civil liberties argument against regulating smoking in their "private" businesses, would propose a law regulating smoking in private vehicles. Surely a private vehicle is more private than a business inviting and encouraging public patronage?

This provision represents several subtle strategies. First, it raises a civil liberties issue where there previously was none. Second, it is likely to decrease public acceptance of a clean indoor air regulation. Third, it makes the regulation seem ridiculous because the requirement can't be enforced. (Health inspectors don't have the authority to stop vehicles.)

By adding this requirement the Bar and Video Lottery Association is trying to make you think they'll go further to protect children. In reality, it is nothing but a disingenuous attempt to obstruct legitimate and effective clean indoor air policy.

20. County owned Parks (Only in designated areas)

21. Rail Trail (Must be 15 feet away from center of paved trail)

OK, let's get this straight: they're expanding indoor smoking throughout the county and regulating it outdoors?

B. Notwithstanding any other provision of this section, any owner, operator, manager or other person who controls any establishment or facility may declare that entire establishment or facility as a nonsmoking establishment.

~~C. In any dispute arising under this regulation, the health concerns of the nonsmoker shall be given precedence.~~

C. The provisions of this Section 1004 shall not apply to Bars or Video Lottery Rooms unless the owners thereof elect to designate their premises as a nonsmoking establishment.

Sec. 1005. Prohibition of Smoking in Places of Employment

A. It shall be the responsibility of employers to provide a smoke-free workplace for all employees **or attach a informational sheet listing all the dangers of secondhand smoke on all job applications that involving premises where smoking is not prohibited.**

B. Within **30120** days of the effective date of this article, each employer having an enclosed place of employment located within Monongalia County shall adopt, implement, make known and maintain a written smoking policy which shall contain the following requirements:

Smoking shall be prohibited in all enclosed facilities within a place of employment **without exception with the exception of Bars and Video Lottery Rooms. This includes "Enclosed facilities shall be deemed to include common work areas, auditoriums, classrooms, conference and meeting rooms, private offices multi-party offices (unless all persons therein consent to smoking),** elevators, hallways, medical facilities, cafeterias, employee lounges, stairs, restrooms, vehicles, and all other enclosed facilities.

In addition to specifically exempting bars and video lottery rooms, allowing smoking in offices will allow smoke to contaminate the air throughout an entire building or workplace. This change would effectively defeat any and all smoke-free workplace requirements.

C. All employers shall supply a written copy of the smoking policy upon request to any existing or prospective employee.

D. Any place in which smoking is allowed pursuant to the terms hereof, or which is an area in which smoking is not regulated hereunder, shall not be considered a place of employment for the purposes of this Section 1005.

The informed consent clause they added at the beginning is rendered irrelevant; it applies only to establishments that allow smoking and this statement exempts them from having to comply with the requirements of this section.

Sec. 1006. Prohibition of Smoking in Outdoor Areas

A. Smoking shall be prohibited in the following outdoor places:

~~4.~~ Designated smoking areas shall occur at a reasonable distance **of 15 feet or more** outside any entrance, exit, or ventilation units of any buildings or enclosed area where smoking is prohibited to insure that tobacco smoke

does not enter the area through entrances, windows, ventilation systems or any other means. This shall include fresh air intake area for the heating, ventilation, air-conditioning (HVAC) system of any building.

~~**2. In outdoor seating or serving areas of restaurants.**~~

Sec. 1007. Where Smoking Not Regulated

- A. Notwithstanding any other provision of this article to the contrary, the following areas shall be exempt from Section 1005:
 - 1. Private residences, except when used as a childcare, adult daycare, health care facility, or homes that are registered with West Virginia Department of Health as personal or residential board facility.
 - 2. No more than twenty-five percent (25%) of hotel and motel rooms rented to guests.
 - 3. Bingo halls distribute more than one hundred bingo cards or bingo sheets as allowed under WV Code Section 47-20-281, as stipulated by the WV State Supreme Court of Appeals, December 2, 2003
 - 4. Residents, prior to September 4, 2003, of personal care home, who had smoking privileges under WV 64CSR 14-8.12.3 as stipulated by the WV State Supreme Court of Appeals, December 2, 2003

5. Bars and Video Lottery Rooms

Bars and video lottery rooms are specifically exempted. Remember that vague and expansive definition of bars? We'll have the potential for hundreds of businesses that are completely exempt from meeting any requirements.

Sec. 1008. Posting of Signs

- A. "No Smoking" signs or the international "No Smoking" symbol (consisting of a pictorial representation of a burning cigarette enclosed in a red circle with a red bar across it) shall be clearly and conspicuously posted in every building or other area where smoking is prohibited by this article, by the owner, operator, manager or other person having control of such building or other area.
- B. Every public place where smoking is prohibited by this Article shall have posted at every entrance a conspicuous sign clearly stating that smoking is prohibited.
- C. All ashtrays and other smoking paraphernalia shall be removed from any area where smoking is prohibited by this article by the owner, operator, manager or other person having control of such area.

Sec. 1009. Enforcement

- A. Enforcement of this article shall be implemented by the Monongalia County Health Officer, or his or her designee.
- B. Notice of the provisions set forth in this article shall be given to all applicants for a business license in the County of Monongalia.

- C. Any citizen who desires to register a complaint under this chapter may initiate enforcement with the Monongalia County Health Department **or its on-call designated health officer.**
- D. The Health Department shall, while an establishment is undergoing otherwise mandated inspections, inspect for compliance of this ordinance.
- E. Any owner, manager, operator or employee of any establishment regulated by this article shall ~~inform persons violating this article of the appropriate provisions thereof.~~ **immediately report to the Monongalia County Health Department or its on-call designated health officer of such infraction and such health officer shall immediately appear on the premises and take such action against such smoking persons as may be allowed under the law.**
- F. **The Health department shall employ such person or persons who may be necessary to assure the availability of one or more designated health officers on a 24 hour, 365-day per year basis, to receive reports of violations of the provisions hereof and immediately investigate and act on the same, it being understood and recognized that it would be and unconstitutional delegation of state or county power to expect the same to be enforced by business and property owners.**

The purpose of these changes is to make the regulation impossible to enforce. Owners and employees do not even have to approach customers to inform them that smoking is not allowed. Instead, enforcement is solely the responsibility of the health department, who must “immediately appear on the premises” and take action against the person smoking. To that end, the health department must employ enforcement officers on a “24 hour, 365-day per year basis.” This would cost taxpayers at least \$120,000 per year, and maybe a lot more.

The justification for these added requirements and expenses is that it would be “unconstitutional” for the county to expect business owners to enforce the law. But there are plenty of other laws that hold them responsible for the actions of their patrons. For example, bar employees must not permit anyone to give drinks to minors. Nor can they knowingly allow patrons to use illegal drugs. There is no significant difference between these laws and one requiring them not to permit smoking.

Sec. 1010. Nonretaliation

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 exercises any right to a smoke-free environment afforded by this article.

Sec. 1011. Violations and Penalties

Willful violation of this Clean Indoor Air Regulation is an unlawful act.

Any person who owns, manages, operates or otherwise controls the use of a premise shall commit a willful violation if they:

- ~~(1) Knowingly permit smoking on a premises subject to their control in an area where smoking is prohibited by the provisions of this clean indoor air regulation, or~~
~~(2) Knowingly violate any other provision of this clean indoor air regulation.~~

Any person who smokes or possesses a burning cigarette, cigar or pipe tobacco in an area of a premise where smoking is prohibited with knowledge that he or she is in a non-smoking area commits a willful violation of this clean indoor air regulation.

These changes remove the ability of the health department to take enforcement action against the owner or operator of a facility for allowing or even encouraging smoking on their premises. The individual smoker would be the only party responsible for smoking violations and the only one to suffer penalties – assuming a health inspector can catch them in the act.

Penalties:

The Board of Health may, at its option, seek civil relief and/or file a misdemeanor complaint under W.VA. Code 16-2-15 against any person who willfully violates this clean indoor air regulation. Enforcement through civil process, includes, but is not limited to a petition for injunctive relief.

Any person who willfully violates this clean indoor air regulation, may be charged with a misdemeanor under W.Va. Code 16-2-15 and, upon conviction, be subject to a monetary fine. At the time of the adoption of this Clean Indoor Air Regulation, West Virginia Code 16-2-15 provided as follows.

Chapter 16-2-15. Obstructing local health officers and others in the enforcement of public health laws; other violations, penalties.

Any person who willfully obstructs any local health officer, public health nurse, sanitarian or any other person charged with the enforcement of any public health law, in the performance of that person's legal duties in enforcing the law, is guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not less than fifty dollars and not more than five hundred dollars.

Any person who willfully violates any of the provisions of this article, or any of the rules or orders adopted or issued pursuant to the provisions, for which a penalty is not otherwise provided, is guilty of a Misdemeanor and, upon conviction, shall be punished by a fine of not less than two hundred dollars and Not more than one thousand dollars.

Magistrates have concurrent jurisdiction with the circuit courts of this state for violations of Provisions of this article.

Sec. 1012. Public Education

The Monongalia County Health Department shall engage in a continuing program to explain and clarify the purposes and requirements of this ordinance to citizens affected by it, and to guide owners, operators and managers in their compliance with it. Such program may include publication of a brochure for affected businesses and individuals explaining the provisions of this regulation.

Sec. 1013. Other Applicable Laws

This article shall not be interpreted or construed to **permit prohibit** smoking where it is otherwise **restricted permissible by under** other applicable laws.

This change says it all – the Bar and Video Lottery Association wants to permit and expand smoking whenever and wherever possible.

Sec. 1014. Severability

If any provision, clause, sentence or paragraph of this article or the application thereof to any person or circumstances shall be held invalid, such invalidity shall not affect the other provisions of this article which can be given effect without the invalid provision or application, and to this end the provisions of this article are declared to be severable.

Sec. 1015. Effective Date

This article shall become effective _____.

To sum it up, the Bar and Video Lottery Association didn't just exempt their bars and video lottery establishments -- they expanded smoking far beyond current levels, gutted the workplace provisions and made any enforcement action impossible. They proposed wasting taxpayer dollars and banning smoking in private cars. Do you really want your public health policy makers to listen to them?

The Tobacco Prevention Partnership's proposal is based on current medical research that clearly shows secondhand smoke harms, and yes, even kills people. The twenty percent or so of the population who smoke expose the rest of the population. Eliminating exposure for many people is as simple as passing a smoke-free regulation.

Smoke-free regulations are endorsed as necessary and sound public health policy by medical experts the world over, including the US Surgeon General. Our smoke-free regulation has been endorsed locally by medical professionals, business people, student and faculty groups, and thousands of individuals.

Smoke-free workplace regulations are the only effective way to protect workers. Because ventilating and filtering don't work, if anybody smokes, everybody is exposed. Research has shown that most people just can't refuse to take jobs because of secondhand smoke. In Morgantown, the bar industry is particularly attractive to student workers who need nighttime employment. The Tobacco Prevention Partnership's proposal protects all workers equally.

We have plenty of evidence to show that the economic harm that the bar and video owners so greatly fear won't happen. Just drive around Morgantown and try to find a single sign that the current clean indoor regulation has damaged the economy. Smoke-free establishments are thriving.

Sometimes business owners who are inclined to have smoke-free establishments feel they have to allow smoking in order to compete. It's not that smoking is so popular; owners are just so afraid of losing business that they won't even try going smoke-free. This has been the case with the bars in our county to date. If bar owners aren't offered a level playing field, smoke-free bars will remain rare.

Studies from around the world show smoke-free regulations can improve the economy and save business owners money. We're not saying that short-sighted business people who have catered to smokers and alienated non-smokers for the past 15 years might not suffer some short-term effects, but in the overall picture, smoke-free policies don't hurt business.

No matter how many times they say it, there is simply no constitutional right to smoke. The right to privacy does not extend to businesses, especially those inviting the public to enter. The courts have already ruled that smoke-free laws are constitutional – there is no reason to keep rehashing it every time one is proposed.

The bottom line is that the Tobacco Prevention Partnership's clean indoor air proposal is the right one, right now. Smoking in public is on its way out. Entire countries are banning public smoking. Entire states are banning public smoking. Most of the counties in West Virginia have already banned public smoking. The future has arrived in Monongalia County. Are we going to ignore it and make excuses? Are we going to listen to bar owners instead of public health experts when we create public health policy? Are we going to value individual profits above public health? Surely not.

The Monongalia County Board of Health should embrace the future and do what needs to be done to protect the overwhelming majority of the workers, residents and visitors to our county. Pass the smoke-free regulation. It is simply the right thing to do.