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DELVD 06-06-14

John W Small Jr  
BERKELEY County 01:34:57 PM  
Instrument No 20140032174  
Date Recorded 06/06/2014  
Document Type AFFAD  
Pages Recorded 9  
Book-Page 1074-228

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# **BERKELEY COUNTY, WEST VIRGINIA CLEAN AIR REGULATION OF 2014**

**A Regulation Prohibiting Smoking in  
All Workplaces and Public Places**

**By**

**BERKELEY COUNTY BOARD OF HEALTH**

# THE BERKELEY COUNTY HEALTH DEPARTMENT CLEAN AIR REGULATION

## **SECTION 1000. TITLE**

This Regulation shall be known as the Berkeley County Clean Air Regulation.

## **SECTION 1001. FINDINGS AND PURPOSE**

The United States Surgeon General and other authoritative public health authorities have determined that involuntary inhalation of tobacco smoke (a) is a cause of numerous diseases in healthy non-smokers; (b) is a major contributor to indoor air pollution; (c) places children, unborn children of pregnant women, elderly people, and individuals with cardiovascular and/or respiratory disease at special risk; (d) is a trigger for acute episodes of respiratory distress and myocardial infarction; (e) increases the lifetime exposure to carcinogenic tobacco smoke of both smokers and non-smokers; (f) burdens the health care system by increasing the number and frequency of required hospital admissions and emergency visits thereby increasing the public and private expenditures required for the treatment; (g) reduces the life expectancy of persons consistently exposed to secondary smoke and (h) causes substantial losses in productivity through smoking related absences from work and school.

Unregulated high-tech smoking devices, commonly referred to as electronic cigarettes, or "E-cigarettes," closely resemble and purposefully mimic the act of smoking by having users inhale vaporized liquid nicotine created by heat through an electronic ignition system. After testing a number of e-cigarettes from two leading manufacturers, the Food and Drug Administration (FDA) determined that various samples tested contained not only nicotine but also detectable levels of known carcinogens and toxic chemicals, including tobacco-specific nitrosamines and diethylene glycol, a toxic chemical used in antifreeze. The FDA's testing also suggested that "quality control processes used to manufacture these products are inconsistent or non-existent."<sup>1</sup> "E-cigarettes produce a vapor of undetermined and potentially harmful substances, which may appear similar to the smoke emitted by traditional tobacco products. Their use in workplaces and public places where smoking of traditional tobacco products is prohibited creates concern and confusion and leads to difficulties in enforcing the smoking prohibitions. E-cigarette use among middle and high school age students significantly increases the risk of nicotine addiction and use of conventional cigarettes."<sup>2</sup>

The United States Surgeon General and other authoritative public health authorities have determined that clean indoor air regulations prevent disease by contributing to the reduction of the rate of smoking and nicotine addiction among the general population and by discouraging potential new smokers from becoming addicted to smoking.

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<sup>1</sup> Summary of results: laboratory analysis of electronic cigarettes conducted by FDA, "Food and Drug Administration (FDA), July 22, 2009; <http://www.fda.gov/NewsEvents/PublicHealthFocus/ucm173146.htm> Accessed on: October 22, 2009.)

<sup>2</sup> *Electronic Cigarette Use Among Middle and High School Students*, Morbidity and Mortality Weekly Report, Centers for Disease Control, and Prevention, Vol.62, No. 35, September 6, 2013, Pg.729

As stated in the December 2, 2003 WV Supreme Court Case #31120 (Foundation for Independent Living, Inc., a West Virginia non-profit organization; Philip Dingess and Wanda Dingess, DBA Adam's Avenue Floral; Blevin's entertainment, Inc., DBA Blevin's Roofing Company, and other similarly situated individuals and business, Plaintiffs Below, Appellees v. The Cabell-Huntington Board of Health, Defendant Below, Appellant) :

"In attempting to minimize the effects of tobacco smoke on the general public in public places, the regulations of [boards of health] address a serious health issue which the Legislature has recognized. Based upon the foregoing observations, we find that clean indoor air regulations of local boards of health that place restrictions on smoking in enclosed public places (1) are consistent with the findings of the Legislature "that smoking may cause lung cancer, heart disease, emphysema and other serious health problems," (2) advance the legislatively prescribed public policy "to provide the state with a citizenry free from the use of tobacco," and (3) fall within the bounds of authority granted by the Legislature to such boards....."

Accordingly, the purposes of this Regulation are:

1. to protect the public health and welfare by prohibiting smoking and use of E-cigarette devices and hookahs (See Item "G" in definition section below) in public places and places of employment,
2. to recognize that where the need to breathe smoke-free air conflicts with the desire to smoke, the need to breathe smoke-free air shall have priority,
3. to facilitate smoking cessation by active smokers, and
4. to discourage youth from taking up the habit and thereby developing a nicotine addiction.

#### **SECTION 1002. DEFINITIONS**

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

- a. "Business" means any sole proprietorship, partnership, joint venture, corporation or other business entity of any kind or character, including but not limited to trade or professional services.
- b. "Employee" means any person employed by an employer for direct or indirect monetary wages or anything of value, or any person who volunteers for a entity. This definition shall also include any independent contractor.
- c. "Employer" means any entity or person who employs the paid or volunteer services of one or more persons.
- d. "Enclosed Area" means all space between a floor and ceiling which is enclosed, that is bounded on at least two sides by walls, doorways or windows, whether open or closed. A wall includes any retractable divider, garage door, or other physical barrier, whether temporary or permanent, and whether or not containing openings of any kind.
- e. "Healthcare Facility" means an office or institution providing care or treatment of diseases, whether physical, mental, emotional, or other medical, physiological, or psychological conditions including but not limited to: hospitals, rehabilitation hospitals, nursing homes, weight control clinics, laboratories, offices of surgeons, chiropractors, physical therapists, physicians, dentists and all specialists within these professions. Healthcare facility includes all waiting rooms, hallways, private rooms, semiprivate rooms, and any adjacent outdoor property, including parking lots and sidewalks under its control.

- f. "E-cigarette" means any electronic oral device, such as one composed of a heating element, battery, and/or electronic circuit, which provides a vapor of nicotine or any other substances, and the use or inhalation of which simulates smoking. The term shall include any such device, whether manufactured, distributed, marketed, or sold as an e-cigarette, e-cigar, e-pipe, or under any other product name or descriptor.
- g. "Hookah" also known as a waterpipe, narghile, argghila, qalyān, or shisha, means a single or multi-stemmed instrument for vaporizing and smoking flavored tobacco called shisha in which the vapor or smoke is passed through a water basin often glass-based before inhalation.
- h. "Hotel and Motel" means any facility, building or buildings, publically or privately owned (including a facility located in a state, county or municipal park), in which the public may, for consideration, obtain sleeping accommodations. The term shall include but not be limited to boarding houses, hotel, motels, inns, bed and breakfasts, and courtyard included within the grounds of said location. This term shall include any facility of any type of character which is temporarily or permanently is used by any person or persons who may , whether or not for consideration, obtain sleeping or other living accommodations while supporting or caring for a person or persons in a healthcare facility as defined in (e).
- i. "Place of Employment" means any enclosed area under the control of a public or private employer that employees are required to enter, leave or pass through during the course of employment, including private offices; work areas; restrooms; conference and classrooms; break rooms; cafeterias; and other common areas. A private residence, unless used to provide child care, foster care, adult care, or other similar social service care on the premises, is not a place of employment. Vehicles provided by an employer for use by employees, during the course of employment shall be considered as places of employment for purposes of these regulations.
- j. "Private Club" means an entity falling within the definition of Private Club as defined in Section 60-7-2 of the West Virginia Code, for purposes of State Control of Alcoholic Liquors. Private Club also means an organization, whether incorporated or not, which is the owner, lessee, or occupant of a building or portion thereof used exclusively for club purposes at all times, which is operated solely for a recreational, fraternal, social, patriotic, political, benevolent, or athletic purpose or those with a retail liquor license.
- k. "Public Place" means any area to which the public is invited or in which the public is permitted, regardless of whether the building is owned in whole or in part by private persons or governmental entities. A "public place" includes, but is not limited to hospitals, hotel and motels, restaurants, retail stores, offices, bingo operations, commercial establishments, elevators, indoor theaters, public transit, libraries, museums, concert halls, public conveyances, bowling alleys, educational facilities, auditoriums, meeting rooms, schools, exhibition halls, convention facilities, polling places, bars, private clubs, gaming facilities, healthcare facilities or clinics, enclosed shopping centers, retail service establishments, financial institutions, public and private educational facilities, ticket areas, public hearing facilities, public restrooms, waiting areas, offices and warehouses. A private residence is not a "public place" unless used to provide childcare, foster care, adult care, or other similar social service care on the premises.
- l. "Restaurant" means any coffee shop, cafeteria, sandwich stand, private and public school cafeteria, and any other establishment which gives or offers for sale food or 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.

- m. "Retail Store" means any establishment that sells goods or services of any kind or character directly to members of the general public including but not limited to grocery stores, specialty stores, department stores, pharmacies, banks, automobile dealerships, showrooms, professional offices, service stations, repair or maintenance stores, barber or beauty shops, dry cleaners, and laundromats.
- n. "Service Line" whether or not enclosed, means any 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.
- o. "Smoking" means inhaling, exhaling, burning, or carrying any lighted or heated cigar, cigarette, or pipe, or any other lighted or heated tobacco or plant product intended for inhalation, in any manner or in any form. "Smoking" also includes the use of a hookah or similar device and/or E-cigarette device which creates a vapor, in any manner or in any form, or the use of any other oral smoking device for the purpose of circumventing the prohibition of smoking in this regulation.
- p. "Sports Arena" whether enclosed or not, 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 to witness sports events.
- q. "Retail Tobacco Store" means an establishment that does not have any employees and would be considered "Owner Operated" and derives more than eighty percent of its gross revenue from the sale of loose tobacco, plants, or herbs and cigars, cigarettes, pipes, and other smoking devices for burning tobacco and related smoking accessories and in which the sale of other products is merely incidental. "Retail tobacco store" does not include a tobacco department or section of a larger commercial establishment or any establishment with any type of liquor, food or restaurant license. It also is a facility that is located in a structure that is completely separated from any other structure and smoke from the retail tobacco business does not migrate into any closely located areas where smoking is prohibited. Clear signage will be posted that prohibits the entry of persons under the age of eighteen.

### **SECTION 1003. REGULATION OF SMOKING IN PUBLIC PLACES**

- A. Smoking shall be prohibited in all enclosed public places, businesses and places of employment within Berkeley County, including, but not limited to the following places:
  - 1. All means of public transit including taxis and buses, and all associated transportation support areas, including ticket, boarding and waiting areas.
  - 2. Aquariums, galleries, libraries and museums.
  - 3. Child care and adult day care facilities.
  - 4. Retail stores. Except those meeting the definition of retail tobacco store.
  - 5. All restaurants, bars, private clubs or those having a retail liquor license.
  - 6. 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 any political subdivision of the State.
  - 7. All patient rooms, waiting rooms and other public or private areas in health facilities, including, but not limited to hospitals, clinics, pharmacies, physical therapy facilities, doctors' offices, dentists' offices and chiropractic offices.
  - 8. Shopping malls including indoor flea markets.
  - 9. Hotels and motels.

10. Lobbies, hallways, and other common areas in multi unit apartment buildings, dormitories, condominiums, manufactured home communities, retirement facilities, nursing homes, and other multiple-unit residential facilities.
11. Any theater, arena, convention center, auditorium, or other similar facility.
12. Gymnasiums, fitness and exercise centers, and bowling facilities.
13. Polling places.
14. Auction houses.
15. All fire, police or jail indoor facilities
16. All emergency medical services facilities
17. Gaming establishments and Bingo operations
18. Manufacturing facilities, plants and warehouses.
19. Office buildings.
20. Barber shops and beauty parlors.
21. Churches

B. Smoking shall be prohibited in the following outdoor public places within Berkeley County:

1. Outdoor service lines, ticketing areas and boarding areas. Whether enclosed or not.
2. Concourse and outdoor seating areas of sports stadiums, ball fields, concert venues, theaters, race tracks, other recreational venues, fairs, festivals, carnivals, outdoor flea markets and rodeos unless a dedicated "Authorized smoking Area" has been authorized and approved by the Berkeley County Board of Health or its designee.
3. Outdoor serving areas of restaurants.
4. All outdoor property, including parking lots and sidewalks, of any healthcare facilities.

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

D. Designated Outdoor Smoking Areas: In locations where outdoor smoking is not otherwise prohibited, to ensure the public access into public venues free from tobacco smoke exposure and to prevent tobacco smoke from entering protected areas, outdoor designated smoking areas shall occur at a distance of 20 feet or more outside any entrance, exit, or ventilation units of any buildings or enclosed area where smoking is prohibited. This shall include fresh air intake area for the heating, ventilation, air-conditioning (HVAC) system of any building.

#### **SECTION 1004. REGULATION OF SMOKING IN ENCLOSED PLACES OF EMPLOYMENT**

It shall be the responsibility of all employers to provide a smoke-free workplace for all employees. Each employer having an enclosed place of employment located within Berkeley 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. This includes common work areas, auditoriums, classrooms, conference and meeting rooms, private offices, elevators, hallways, healthcare facilities, cafeterias, employee lounges, stairs, restrooms, company vehicles and all other enclosed facilities. Exception for those meeting the definition of "Retail Tobacco Store".

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

#### **SECTION 1005. WHERE SMOKING IS NOT REGULATED**

- A. Notwithstanding any other provisions of this Regulation to the contrary, the following areas shall not be subject to the smoking restrictions of this Regulation:
  - 1. Private residences, including individual apartments or housing units which are part of a multi-unit residential housing project or apartment building, except when used as a child care facility, adult care, foster care or other similar social care.
  - 2. Retail tobacco stores
- B. Notwithstanding any other provision of this section, any person who controls any establishment described in this section may declare that entire establishment as a non-smoking facility.

#### **SECTION 1006. POSTING OF SIGNS**

- A. Because rules regulating smoking are primarily self-enforcing, their success depends heavily upon adequate signage in a visible location as provided Berkeley County Board of Health. Failure to post signage as directed shall be deemed a violation of this ordinance.
- B. "No Smoking" signs shall be prominently posted in every building or other place where smoking is controlled by this Regulation, by the owner, operator, manager or other person having control of such building or other place.
- C. Every public place where smoking is prohibited by this regulation shall have posted at every entrance a conspicuous sign clearly stating that smoking is prohibited.
- D. 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.

#### **SECTION 1007. ENFORCEMENT**

- A. Enforcement of this article shall be implemented by the Berkeley 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 Cities of Martinsburg and Hedgesville and will be available at the Berkeley County Health Department, Berkeley County Council Office, Berkeley County Tax Department and Berkeley County Assessor's Office.
- C. Any citizen who desires to register a complaint under this chapter may initiate enforcement with the Berkeley County Health Department.
- D. The Health Department shall inspect for compliance of this regulation.
- 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.

#### **SECTION 1008. NON-RETALIATION**

No person or employer shall discharge, refuse to hire or in any way retaliate against any employee, applicant for employment or member of the public because such person exercises any rights afforded by this Regulation.

## **SECTION 1009. OTHER APPLICABLE LAWS**

This Regulation shall not be interpreted or construed to permit smoking where it is otherwise restricted by other applicable laws, ordinances or regulations.

## **SECTION 1010. SEVERABILITY**

If any portion of this Regulation or the application thereof shall be held invalid, the other provisions of this Regulation shall not be affected, and to this end the provisions of this Regulation are declared to be severable.

## **SECTION 1011. VIOLATIONS AND PENALTIES**

### **A. Violations:**

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

- 1) Any person who owns, manages, operates or otherwise controls the use of a premise shall commit a willful violation if they:
  - a. Knowingly permit smoking on a premises subject to their control in an area where smoking is prohibited by the provisions of this Clean Air Regulation, or
  - b. Knowingly violate any other provision of this Clean Air Regulation.
- 2) Any person who smokes 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 Air Regulation.

### **B. Penalties:**

#### **§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.

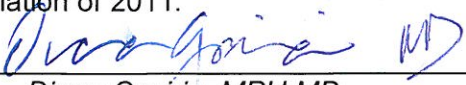
## **SECTION 1012. EFFECTIVE DATE**

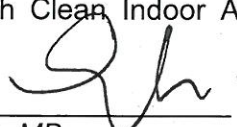
This Regulation, as adopted, shall become effective on July 1, 2014.

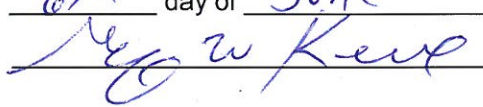
This Regulation shall supersede previous Berkeley County Board of Health Clean Indoor Air Regulations.

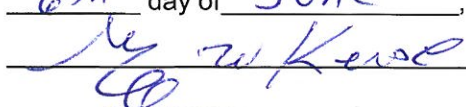
**SECTION 1013. REPEAL AND REPLACEMENT OF FORMER REGULATION**

This regulation repeals and replaces the Berkley County Board of Health Clean Indoor Air Regulation of 2011.

  
Diana Gavia, MPH, MD  
Health Officer

  
Jerry Fogle, MD  
Board of Health Chair

Taken, subscribed and sworn to before me this  
6th day of June, 20 14.  
 Notary

Taken, subscribed and sworn to before me this  
6th day of June, 20 14.  
 Notary

FILED: \_\_\_\_\_

