



(Revised 07/2015-City Manager)

Ordinance

CITY OF WACO

Council Date:	Originating Department:	Presentation By:	Reference #:
07/7/2015	Health	Sherry Williams	10.1 – ORD-2015-412

Item:

Consider an ordinance repealing and replacing in its entirety, Article IV, "Smoking Regulations" in Chapter 16, "Nuisances" of the Code of Ordinances in order to provide regulations prohibiting smoking of tobacco products and electronic smoking materials in certain enclosed and non-enclosed areas within the city limits; prohibiting smoking on city premises and other property; repealing all ordinances or parts of ordinances in conflict herewith; providing a savings clause; providing a severability clause; providing for inclusion in the code; providing for a penalty; and finding and determining that the meeting at which this ordinance is passed is open to the public as required by law. FIRST READING

Background:

The current smoking ordinance was adopted in 2002 and amended in 2008 and 2015.

At the request of the City Council, the Waco-McLennan County Public Health District has reviewed and updated its model smoking ordinance to include regulations that, if adopted, will make the City of Waco a 100% smoke free city. The Center for Disease Control and Prevention considers a smoke-free ordinance to be comprehensive if it prohibits smoking in all indoor areas of private workplaces, restaurants, and bars. The proposed ordinance repeals the current smoking regulations in Chapter 16, Article IV of the Code of Ordinances and replaces them with an ordinance based on the Health District's 100% smoke free model ordinance with revisions based on city council comments from the meeting of June 16, 2015.

The editing markings (additions/deletions) in the attached ordinance indicate changes from the ordinance as presented at the June 16, 2015 city council meeting.

Attachments:

2015 Smoking Ordinance (DOCX)

Fiscal Impact:**Project Schedule:**

The proposed effective date of the ordinance is January 1, 2016.

ORDINANCE NO. 2015-_____

AN ORDINANCE OF THE CITY OF WACO, TEXAS, REPEALING AND REPLACING IN ITS ENTIRETY ARTICLE IV, "SMOKING REGULATIONS" IN CHAPTER 16, "NUISANCES" OF THE CODE OF ORDINANCES OF THE CITY OF WACO IN ORDER TO PROVIDE REGULATIONS PROHIBITING SMOKING OF TOBACCO PRODUCTS AND ELECTRONIC SMOKING MATERIALS IN CERTAIN ENCLOSED AND NON-ENCLOSED AREAS WITHIN THE CITY LIMITS; PROHIBITING SMOKING ON CITY PREMISES AND OTHER PROPERTY; REPEALING ALL ORDINANCES OR PARTS OF ORDINANCES IN CONFLICT HEREWITH; PROVIDING A SAVINGS CLAUSE; PROVIDING A SEVERABILITY CLAUSE; PROVIDING FOR INCLUSION IN THE CODE; PROVIDING FOR A PENALTY; AND FINDING AND DETERMINING THAT THE MEETING AT WHICH THIS ORDINANCE IS PASSED IS OPEN TO THE PUBLIC AS REQUIRED BY LAW.

WHEREAS, the City Council of the City of Waco finds that smoking tobacco products creates nuisances, poses health risks, and causes fires; and

WHEREAS, the U.S. Surgeon General's report has stated that there is no safe level of second hand smoke, and second hand smoke is a known cause of lung cancer, heart disease, low birth-weight births, chronic lung ailments (such as bronchitis and asthma) other health risks and premature death in children and adults who do not smoke; and

WHEREAS, the U.S. Surgeon General's report has stated that despite significant progress since the first Surgeon General's report, issued over 50 years ago (1964), smoking remains the single largest cause of preventable disease and death in the United States; and

WHEREAS, the U.S. Surgeon General's report states that involuntary exposure to secondhand smoke remains a serious public health hazard that can be prevented by making homes, workplaces, and public places completely smoke-free; and

WHEREAS, the City Council finds that nicotine is addictive and that the use of nicotine-containing electronic cigarettes can lead to some respiratory changes and dangers similar to those occurring through the use of traditional tobacco products; and

WHEREAS, the City Council finds that liquid nicotine is often distributed in flavors, such as cherry, chocolate and vanilla, that are designed to appeal to young people and thereby

creates a path for nonsmokers to become addicted to smoking, which can lead to the further spread of nuisances and health risks from smoking; and

WHEREAS, on April 25, 2014, the U.S. Food and Drug Administration proposed regulating electronic cigarettes as tobacco products, due to the presence of tobacco-derived nicotine therein and the dangers posed thereby, with said regulations to be at 21 CFR Parts 1100, 1140, and 1143, published at <http://federalregister.gov/a/2014-09491>,

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF WACO, THAT:

SECTION 1. Article IV, "Smoking Regulations," of Chapter 16 "Nuisances" of the Code of Ordinances of the City of Waco, Texas shall be and is hereby repealed and replaced in its entirety to read as follows:

ARTICLE IV. SMOKING REGULATIONS

Section 16-120. Definitions.

The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

- (a) *Bar* means an establishment which has more than fifty (50) percent of its annual gross sales from alcoholic beverages.
- (b) *Business* means any sole proprietorship, partnership, joint venture, corporation or other business entity formed for profit-making or non-profit purposes, including retail establishments where goods or services are sold as well as professional corporations and other entities where legal, medical, dental, engineering, architectural or other professional services are delivered.
- (c) *Cigar Lounge* means an establishment that derives more than fifty (50) percent of its quarterly gross revenue from the sale of cigars for consumption on the premises by customers. A cigar lounge does not allow individuals under the age of 18 to enter the premises, and does not have a permit or license to sell alcoholic beverages, but may serve food and nonalcoholic beverages for consumption on the premises by customers.
- (d) *Director* means the Director of the Waco McLennan County Public Health District or the director's designated representative.
- (e) *Electronic Smoking Device* ~~shall mean~~ means an electronic, mechanical heating element or battery operated device that delivers nicotine or other substances for inhalation. This term shall include every variation and type of such devices whether they are manufactured, distributed, marketed or sold as an electronic cigarette, an electronic cigar, an electronic cigarillo, an electronic pipe, an electronic hookah or any other product name or descriptor. The term does not include a prescription medical device unrelated to the cessation of smoking.

- (f) *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.~~
- (g) *Employer* means any person, partnership, corporation, including a municipal corporation, or non-profit entity, which employs the services of one or more individual persons.
- (h) *Enclosed or Enclosed Area* means all space between a floor and ceiling, 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. A parking garage shall be considered an enclosed area whether or not it is enclosed on at least two sides.
- (i) *Food Establishment* means any operation engaged in the preparation of food, which gives food or offers food for sale to the public, guests or employees.
- (j) *Hookah Bar* means an establishment with a permit or license to sell alcoholic beverages pursuant to the Texas Alcoholic Beverage Code and: (a) generates 60 percent or more of its quarterly gross revenue from the sale of alcoholic beverages for consumption on the premises by customers; (b) generates 30 percent or more of its quarterly gross revenue from the sale of shisha for consumption on the premises by customers and the sale of accessories used for smoking shisha (not any other tobacco products); and (c) does not allow individuals under the age of 21 to enter the premises.
- (k) *Hookah Lounge* means an establishment that derives more than fifty (50) percent of its quarterly gross revenue from the sale of shisha for consumption on the premises by customers and the sale of accessories used for smoking shisha. A hookah lounge does not allow individuals under the age of 18 to enter the premises, and does not have a permit or license to sell alcoholic beverages, but may serve food and nonalcoholic beverages for consumption on the premises by customers.
- (l) *Park* means the outdoor areas of land dedicated and used as parkland, or city--owned land used for a park or recreational purpose ~~that is under~~including, but not limited to, the ~~administrative control of Waco Mammoth Site, the Parks and Recreation Department. The term includes~~Cameron Park Zoo, city-owned athletic fields, nature preserves, golf courses and swimming pools.
- (m) *Place of Employment* means any area under the control of a public or private employer which employees may frequent during the course of employment, including, but not limited to, private offices, work areas, employee lounges and restrooms, conference and class rooms, employee cafeterias, hallways, enclosed portions of construction sites, temporary offices and vehicles. A private residence is not a "place of employment" unless it is used as a childcare, adult day care or health care facility.
- (n) *Playground* means any park or recreational area designed in part to be used by children that has play or sports equipment installed or that has been designated or landscaped for play or sports activities, or any similar facility located on public or private school grounds or on City grounds.
- (o) *Public* means ordinary people in general; the community, open to or shared by all the people of an area

- (p) *Public Event* means an event which is open to and may be attended by the general public, including but not limited to, such events as concerts, fairs, farmers' markets, festivals, parades, performances, and other exhibitions, regardless of any fee or age requirement.
- (q) *Public Place* means any enclosed area to which the public is invited or in which the public is permitted or is a place of employment and includes but is not limited to: bars; retail stores; grocery stores; offices; professional, commercial or financial establishments; public and private institutions of education; food establishments; health care facilities; nursing and convalescent homes; residential treatment facilities; child care facilities; laundromats, buildings owned or occupied by political subdivisions; public transportation facilities and vehicles; reception areas; theaters and waiting rooms. For the purpose of this section, a "public place" does not include a private residence.
- (r) *Retail Electronic Smoking Device Store* means any commercial establishment that derives at least fifty-one (51) percent of its annual gross receipts from the sale of electronic smoking devices and accessories.
- (s) *Retail Tobacco Store* means any commercial establishment that derives at least fifty-one (51) percent of its annual gross receipts from the sale of tobacco and tobacco accessories.
- (t) *Shisha* means flavored tobacco smoked in a hookah, usually mixed with molasses or honey and often fruit pulp or dried fruits
- (u) *Smoke* means the gases, particles or vapors released into the air as a result of combustion, electrical ignition or vaporization, including from an electronic smoking device, when the purpose of the combustion, electrical ignition or vaporization is human inhalation of the gases, particles or vapors. Smoke does not mean the combustion of material solely for olfactory purposes that does not contain any tobacco or nicotine.
- (v) *Smoking and "smokes"* means engaging in an act that generates smoke, such as possessing a lighted pipe, a lighted hookah pipe, a lighted cigar, a lighted cigarette, or an operating electronic smoking device.
- (w) *Tobacco* means any tobacco, cigarette, cigar, pipe, weed, or plant, which may be utilized for smoking, chewing, inhalation or other means of ingestion or absorption.

Section 16-121. Smoking prohibited areas.

- (a) Smoking is hereby prohibited in all enclosed public places.
- (b) Smoking is hereby prohibited in the following non-enclosed public places: Parks and playgrounds as defined in this Article, and at public events held on property owned or occupied by the City and used for city purposes.
- (c) Smoking is prohibited in all enclosed areas that are owned or occupied by the City and used for city purposes, including, but not limited to, buildings and vehicles. In addition, the City Manager may designate any non-enclosed areas owned or occupied by the City and used for city purposes, as nonsmoking.
- (d) Notwithstanding any other provision of this section, any owner, operator, manager or other person who controls any establishment, facility or business may declare a portion of, or that entire establishment, facility or business including any non-enclosed areas, as nonsmoking.

Section 16-122. Smoking prohibited in places of employment.

~~(a) It shall be the responsibility of employers to (a)~~ Except as provided in Subsection 16-124 "Exceptions," an employer shall provide a smoke free workplace for all employees. Employers are not required to incur any expense to make structural or other physical modifications to create smoking areas.

~~(b) Within 90 days of~~ If an employer requires employees to work in an area where smoking is allowed under Subsection 16-124, the employer shall make reasonable accommodations for an employee who requests assignment to a smoke-free area.

~~(b)(c)~~ Prior to the effective date of this article, each employer who has an enclosed place of employment located within the City, shall make known to employees that smoking shall be prohibited in all enclosed ~~facilities within a place of employment. This includes, but is not limited to, common work areas, auditoriums, classrooms, conference and meeting rooms, private offices, elevators, hallways, medical facilities, cafeterias, employee lounges, stairs, restrooms and vehicles~~ areas within the place of employment as those terms are defined in this Article.

Section 16-123. Reasonable distance.

~~Except in areas where~~ Smoking is ~~otherwise hereby~~ prohibited ~~herein, smoking shall only occur at a reasonable distance of any place within~~ twenty-five (25) feet ~~or more outside of~~ any entrances, windows, ventilation systems or any other openings of an enclosed area where smoking is prohibited ~~to insure that smoke does not enter the area.~~

Section 16-124. Exceptions.

(a) Notwithstanding any other provision of this article to the contrary, the following areas shall be exempt from Sections 16-121 ~~and 16-122~~; 16-122 and 16-123 and shall constitute an affirmative defense to prosecution for violation of such sections:

- (1) Private residences, except for residences used as a day care, adult day care or health care facility.
- ~~(2)~~ Private or semi-private rooms in a nursing home or long-term care facility that are occupied by individuals who smoke and have requested in writing to be placed in a room where smoking is permitted if the facility has a smoking policy in compliance with state law.
- ~~(2)(3)~~ Retail Tobacco Stores and Retail Electronic Smoking Device Stores for sampling purposes but only in a separate smoking room enclosed on all sides that exhausts directly to the outside environment.
- ~~(3)(4)~~ Cigar Lounges, Hookah Bars and Hookah Lounges as defined herein that were in business and operating within the city limits of the City as of the date of adoption of this ordinance, met as of the date of adoption of this ordinance and continuously meet the applicable definitions herein, and do not expand in size or change locations after the date of adoption of this ordinance. Any such establishment that ceases to operate as such for longer than thirty (30) consecutive days or ceases to meet the definition of the same type of establishment at any time after the adoption of this ordinance shall cease to be exempt from the requirements of this Article.

~~(4)~~(5) Outdoor areas of places of employment except those areas described in Section 16-123 or that are declared nonsmoking by an authorized person under Section 16-121 (c) - (d) or Section 16-124 (b) of this Article.

(6) Those outdoor areas within twenty-five (25) feet of a door that lead only from an outdoor area where smoking is allowed to an area where smoking is prohibited, provided there exists a functioning air curtain that prevents smoke from entering the non-smoking area when the door is opened. The door must remain closed except when someone is entering or exiting the area.

~~(5)~~(7) No more than twenty-five percent (25%) of hotel and motel rooms in any such establishment. Rooms for smoking must be clearly designated as such.

(8) Those outdoor areas of Cameron Park, Brazos Park East, Riverbend Park, Indian Spring Park, and Martin Luther King, Jr. Park that are specified and clearly designated as approved smoking areas for a special event, in a permit for the event approved by the city's special events committee.

(9) Golf courses between the tee of the first hole and the end of the green for the final hole. Smoking is prohibited in all other areas of golf facilities, including without limitation putting greens, practice tees and the par three junior course.

(b) Notwithstanding any other provision of this section, any owner, operator, manager or other person who controls any establishment or business described in this section may declare a portion of, or that entire establishment as nonsmoking.

(c) Smoking that is regulated under the Texas Education Code, the Texas Health and Safety Code, the Texas Penal Code or any other state or federal law shall be governed by such other applicable law instead of this Article.

Section 16-125. Posting of Signs.

(a) "No Smoking" signs in English and Spanish 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 at every entrance to every building or other area where smoking is prohibited by this article, by the owner, operator, manager or other person who has control of such building or other area.

(b) All ashtrays shall be removed from any area where smoking is prohibited by this article by the owner, operator, manager or other person who has control of such area except for ashtrays displayed for sale and not for use on the premises.

Section 16-126. Enforcement.

(a) The Police Department of the City and/or the Director or the Director's designated representative shall be responsible for the enforcement of this article.

(b) Complaints against persons violating this article shall be made to the Director or the director's representative for investigation.

(c) The Director or his or her representative, the building official, code enforcement officer, or the fire department of the City, shall while an establishment is undergoing otherwise mandated inspections, inspect for compliance with this ordinance.

- (d) 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 16-127. No duty or obligation.

In undertaking the enforcement of this article, the city is assuming an undertaking only to promote the general health, safety and welfare of its citizens. The city is not assuming any duty or obligation, nor is it imposing any duty and/or obligation on its officers and/or employees, nor is it liable in money damages or otherwise to any person who claims that the city and/or one of its officers and/or employees breached any such obligation and the breach proximately caused injury.

Section 16-128. Violations and Penalties.

- (a) It shall be unlawful for any person who owns, manages, operates or otherwise controls the use of any premises subject to regulation under this article to fail to comply with any of its provisions.
- (b) It shall be unlawful for any person to smoke in any area where smoking is prohibited by the provisions of this article.
- (c) Any person who violates any provision of this article shall be subject to the penalty for violating this ordinance as provided for in Sec. 1-14 of the Code of Ordinances of the City, which shall be a minimum fine of not less than \$50.00 nor more than a maximum fine of \$500.00 as follows:
 - (1) A fine not to exceed fifty dollars (\$50.00) for a first violation.
 - (2) A fine not to exceed two hundred dollars (\$200.00) for a second violation of this article within one (1) year.
 - (3) A fine not to exceed five hundred dollars (\$500.00) for each additional violation of this article within one (1) year.

SECTION 2. Conflict with other ordinances.

All ordinances or parts of ordinances in conflict with the provisions of this ordinance are hereby repealed.

SECTION 3. Severability.

The terms and provisions of this ordinance shall be deemed to be severable and that if any section, subsection, sentence, clause, or phrase of this ordinance shall be declared to be invalid or unconstitutional, the same shall not affect the validity of any other section, subsection, sentence, clause, or phrase of this ordinance and the remainder of such ordinance shall continue in full force and effect the same as if such invalid or unconstitutional provision had never been a part hereof.

SECTION 4. Savings Clause.

Nothing in this ordinance shall be constructed to affect any suit or proceeding pending in any court, or any rights acquired, or liability incurred, or any cause or causes of action acquired or

existing, under any act or prior ordinance; nor shall any legal right or remedy of any character be lost, impaired, or affected by this ordinance.

SECTION 5. Other applicable laws.

Nothing in this article excuses noncompliance with any federal or state law, city ordinance or any rule or regulation adopted pursuant thereto that prohibits smoking.

SECTION 6. Inclusion in the Code.

It is the intention of the City Council and it is hereby ordained that the provisions of this ordinance shall become and be part of the Code of Ordinances of the City of Waco, Texas, and that sections of this ordinance be renumbered or re-lettered to accomplish such intention.

SECTION 7. Effective date.

This article shall be effective ~~thirty (30) days~~ from and after ~~the date of adoption~~ January 1, 2016.

SECTION 8. Compliance to notice and open meetings requirements of the Texas Open Meetings Act.

It is hereby officially found and determined that the meeting at which this ordinance was passed was open to the public, and that public notice of the time, place and purpose of said meeting was given as required by law.

PASSED AND APROVED:

First Reading: the ~~16th~~7th day of ~~June~~July, 2015.

Second Reading: the ____ day of _____, 20__.

Malcolm Duncan, Mayor

ATTEST:

Esmeralda Hudson, City Secretary

APPROVED AS TO FORM & LEGALITY:

Jennifer Richie, City Attorney