

CURRENT* PUBLIC MISPERCEPTIONS AND UNTRUTHS RELATED TO THE PROPOSED

“CIGAR BAR” LOOPHOLE FOR LMCO CHAPTER 90 – LOUISVILLE METRO’S “SMOKING ORDINANCE”

Numerous public statements and even verbiage within the proposed ordinance amendment (O-302-21 V.1) to create a loophole in the current effective “Smoking Ordinance” (LMCO Chapter 90) for the city of Louisville Metro indicate significant misunderstanding of both the history of the development of the current ordinance and the practicalities of the proposed amendment.

From the text of the amendment: Cigars “are perceived as less harmful than other tobacco products, contain fewer product specific regulations, lower tax rates and higher social acceptability;”

There are actually two significantly incorrect statements within this one justification for the proposal. First, “perceptions” have nothing to do with the actual health risks created by smoking cigars. From an individual consumer standpoint the amount of nicotine in a cigar is significantly greater than that found in a cigarette and regular cigar consumption carries the same health risks: lung and heart disease, numerous cancers and oral diseases. From a secondhand smoke perspective – the primary public health foundation for the creation of the smokefree ordinance – the chemicals are the same and while individual users may only be exposed for the period of time they visit the bar the employees would be the only ones in the city exposed to this health hazard every time they go to work.

- <https://www.mayoclinic.org/healthy-lifestyle/quit-smoking/expert-answers/cigar-smoking/faq-20057787>

Secondly, while there is no specific state cigar tax in Kentucky Federal regulations tax each cigar at 52.75% of the sales price. In Kentucky, where the average cost of a pack of cigarettes is \$5.36 per pack, even combining the Federal (\$1.01/pack) and State excise taxes (\$1.10/pack) yields a lower tax rate (39.4%) than that assessed on cigars.

- <https://www.salestaxhandbook.com/kentucky/tobacco>

Public statements have been reported that in Louisville Metro “indoor cigar smoking is only available to those who are ‘superwealthy’ and can afford membership to ‘hyperexclusive’ organizations.”

Under LMCO Chapter 90 there are no exemptions for indoor smoking of tobacco products anywhere in Louisville Metro in any establishment open to the public (including private businesses or clubs) regardless of social or economic status.

- LMCO 90.03(A)

Public references have been made to the “grandfathering” of seven established Hookah lounges that were already in existence when the law was updated in 2017.

While this exemption does exist it should be clarified that NO HOOKAH CONTAINING NICOTINE is allowed to be consumed indoors. Only herbal-based, non-nicotine shisha can be smoked indoors. All nicotine-containing products must still be smoked outside. ALSO these hookah lounges are prohibited from the sale alcoholic beverages and cannot be licensed as a Food Service Establishment. Likewise, no new hookah lounges are allowed to be established and these exemptions cannot be sold or transferred.

- LMCO 90.03(A.4)

Public references have been made to the allowance of indoor “tasting” or e-cigarette/vape products at retail stores.

Similar to the hookah exemption, any indoor “tasting” of e-cigarette/vape “juice”/flavors must ONLY involve those products that DO NOT CONTAIN NICOTINE. All nicotine-containing products are prohibited from indoor consumption. Again, this is primarily in place for the health benefits to the employees that work in the stores for several hours each day.

- LMCO 90.03(A.3)

Public statements indicate that Council Members have "not yet [even] heard from a cigar business or talked to anyone who has said, 'Hey I want to open this type of business up.'"

This amendment is a "solution" to a concern that doesn't even exist in our community. As the historical context below shows, it will certainly only cause additional legal troubles and unnecessary expenses for Louisville Metro as we are working to overcome a global pandemic and rebuild our economy. Promoting additional health will undermine an exceptional public health law that has truly changed the culture of tobacco use in our community over the past 15 years.

"Loopholes" create unnecessary legal issues: A brief history of LMCO Chapter 90

Historically, there were multiple steps that led to the development of the current smokefree ordinance. The initial smoking ordinance, passed in 2005, contained many exemptions for hospitality businesses including some unique considerations for ventilation, proximity, etc. This was so bad and difficult to both understand and enforce that it was amended a year later to a "mostly" comprehensive law that still contained one specific exemption for Churchill Downs. The Metro Louisville Hospitality Coalition filed lawsuits challenging this exemption and Jefferson County Circuit Court found the exemption for Churchill Downs to be unconstitutional under Kentucky's equal protection clause. A subsequent ruling by a different judge in Jefferson County Circuit Court determined that the entire law was unconstitutional in spite of the presence of the "severability clause" present in the ordinance and prevented enforcement of the law pending appeal.

Louisville Metro appealed that ruling to the Kentucky Court of Appeals while the Metro Council simultaneously amended the ordinance striking the Churchill Downs exemption and effectively creating the comprehensive law in its current form that took effect in 2007 (prior to the existence/propagation/increased prevalence of hookah and e-cigarettes/vape in Louisville and subsequent amendment in 2017). The Court of Appeals overturned the ruling of unconstitutionality recognizing the relevance of the severability clause (and the fact that the clause ruled unconstitutional had itself already been removed from the ordinance) and the ordinance took full effect.

In 2009 an Appeal for Discretionary Review was made to and denied by the Kentucky Supreme Court allowing the law to remain in force. It was amended in 2017 to specifically include hookah and e-cigarettes/vape in the indoor smoking restrictions and again in 2020 to add licensing guidelines.

BY DEFINITION, CIGARS ARE ROLLED IN TOBACCO LEAVES AND CONTAIN NICOTINE, A PRODUCT INHERENT IN THE LEAF ITSELF. TO BE CONSISTENT WITH THE PUBLIC HEALTH INTENT THAT IS THE FOUNDATION OF THE CURRENT ORDINANCE, ANY LOOPHOLES OR EXEMPTIONS ADDED SHOULD LIKEWISE PREVENT INDOOR CONSUMPTION OF NICOTINE BASED PRODUCTS AND SHOULD NOT ALLOW FOOD OR ALCOHOLIC BEVERAGES TO BE SOLD. OTHERWISE, THE METRO COUNCIL WILL SIMPLY BE ONCE AGAIN OPENING THE DOOR FOR LAWSUITS THAT WILL LIKELY ONCE AGAIN FIND THE NEW EXEMPTIONS UNCONSTITUTIONAL UNDER THE EQUAL PROTECTION CLAUSE OF THE KENTUCKY CONSTITUTION.

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