

ORDINANCE NO. 10 _____

AN ORDINANCE OF THE CITY OF WEST HOLLYWOOD
AMENDING THE WEST HOLLYWOOD MUNICIPAL CODE
TO PROHIBIT SMOKING IN OUTDOOR DINING AND
OTHER PUBLIC AREAS AND ELIMINATE EXISTING
REGULATIONS THAT ARE DUPLICATIVE OF STATE LAW

The City Council of the City of West Hollywood does hereby ordain as follows:

Section 1. Subsection 1.08.010.e. of Title 1, Chapter 1.08 of the West Hollywood Municipal Code is hereby amended by amending the third category of offenses listed therein to read as follows:

Chapter 7.08 Smoking in Public Places and Outdoor Dining Areas;

Section 2. Chapter 7.08 of Title 7 of the West Hollywood Municipal Code is amended in its entirety to read as follows

Chapter 7.08 Smoking in Public Places and Outdoor Dining Areas ~~and Places of Employment~~

7.08.010 Purpose.

The smoking of tobacco, or any other weed or plant, is a positive danger to health and a material annoyance, inconvenience, discomfort and a health hazard to those who are ~~present in confined spaces exposed to the resulting smoke.~~ State law prohibits smoking in enclosed places of employment. In order to serve public health, safety and welfare, the purpose of this chapter is to also prohibit the smoking of tobacco, or any weed or plant, in public places and places designated for outdoor dining and congregation, ~~places of employment~~ except in designated smoking areas. This chapter shall be interpreted in a manner supplementary to and consistent with California Labor Code Section 6404.5 and California Health and Safety Code Sections 104495 and 118875, et seq., as amended, and in all cases of conflict between this ordinance and any state law, the applicable state law provision shall prevail.

7.08.020 Definitions.

As used in this chapter:

1. "Bar" shall mean ~~an area which is devoted to the serving of alcoholic beverages for consumption by guests on the premises and in which the serving of food is only incidental to the consumption of such beverages.~~ Although a restaurant may contain a bar, the term "bar" shall

not include the restaurant dining area, an establishment: (1) that sells or offers for sale alcoholic beverages pursuant to a license from the Department of Alcoholic Beverage Control; (2) that limits entry to persons of a certain age during some or all operating hours; and (3) where food service, if any, is subordinate to the sale of alcoholic beverages. Does not include a bar area that is an integrated part of a restaurant.

2. “Employee” shall mean any person who is employed by any employer in consideration for direct or indirect monetary wages or profit.

3. “Employer” shall mean any person who employs the services of an individual person.

4. “Enclosed” shall mean closed in by a roof and four walls with appropriate openings for ingress and egress.

5. “Hookah Café” shall mean any facility or location whose business operation, whether as its primary use or as an accessory use, is denoted by the smoking of tobacco or other substances through one or more pipes (commonly known as a hookah, waterpipe, shisha or narghile) designed with a tube passing through an urn of water that cools the smoke as it is drawn through it, including but not limited to establishments known variously as hookah bars, hookah lounges or hookah cafes.

6. Minor means a person who is under eighteen years of age.

7. Nightclub means a bar or similar establishment that provides live entertainment (music and/or dancing, comedy, etc.) in conjunction with alcoholic beverage sales.

8. Open Air Dining Area means any unenclosed area located on private or public property made available to or customarily used by the general public that is designed, established or regularly used for consuming food and/or beverages, or where food or beverages are served whether or not for compensation. This includes without limitation restaurants, restaurants at hotels and private clubs, cafes, and coffee shops.

9. Outdoor Service Area means any unenclosed area where one or more persons wait for, receive or exchange goods or services of any kind; including without limitation lines or waiting areas for: (a) ATM machines; (b) information kiosks; (c) banks; (d) restaurants and other food service; (e) tickets and admission to a theater or other venue event; (f) car washes and vehicle service establishments; and (g) valet parking pick-up areas.

105. “Place of Employment” shall have the same meaning as the term is used in California Labor Code Section 6404.5, as amended, mean any enclosed 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, conference rooms, restrooms, hallways, elevators, and employee cafeterias. A private residence is not a “place of

employment,” except for private residences licensed as family day care homes, during the hours of operation as family day care homes and in those areas where children are present.

11. “Private Membership Club” shall mean a facility where (1) entry into and use of the facility is restricted to members and guests of members; (2) membership is subject to approval by club members or club management; (3) the members are required to pay dues for use and/or maintenance of the facilities.

12. ~~6.~~ “Public Place” shall mean any enclosed public place within an establishment where smoking is prohibited by law, in which the public is permitted, including without limitation, public restrooms, elevators, stairwells and parking facilities, to the extent not otherwise governed by or exempted from California Labor Code Section 6404.5 and California Health and Safety Code Section 118875, et seq. ~~any enclosed area to which the public is invited or in which the public is permitted, including, but not limited to, retail stores, retail service establishments, restaurants, every publicly or privately owned theater, auditorium, or enclosed facility which is open to the public for the primary purpose of exhibiting any motion picture, stage drama, musical recital, athletic event or any other performance or event, waiting rooms, reception areas, educational facilities, health facilities, the meeting room of the City Council or any board, commission or committee of the city during any meeting thereof, and public transportation facilities; including hallways, elevators, escalators, lobbies, reception areas, restrooms and similar areas within such establishments. A private residence is not a “public place;” however, an elevator in a residential building shall constitute a public place.~~

13. ~~7.~~ “Restaurant” means an establishment that: (1) sells, or offers for sale, food and beverages during all hours it is open for business; (2) prepares food on-site in a kitchen capable of preparing food from its component ingredients and otherwise meets the definition of a “bona fide public eating place” contained in California Business & Professions Code §23038; and (3) where service of alcoholic beverages is secondary to service of food. ~~shl mean any coffee shop, cafeteria, luncheonette, tavern, cocktail lounge, sandwich stand, soda fountain, private and public school cafeteria or eating establishment, and any other eating establishment, organization, club, including veterans’ club, boardinghouse, or guesthouse which gives or offers for sale food to the public, guests, patrons, or employees as well as kitchens in which food is prepared on the premises for serving elsewhere, including catering functions, except that the term “restaurant” shall not include a cocktail lounge or tavern if said cocktail lounge or tavern is a “bar” or “nightclub” as defined above.~~

~~8.~~ “Service line” shall mean any indoor line at which one or more persons are waiting for or receiving service of any kind, whether or not such service involves the exchange of money.

14. ~~9.~~ “Smoke” or “smoking” shall mean and include the carrying of a lighted pipe, or lighted cigar, or lighted cigarette of any kind, or the lighting, burning, inhaling or exhaling of the smoke of a pipe, cigar, or cigarette of any kind.

15. “Unenclosed” means a predominantly outdoor area that does not meet the definition of “enclosed.”

7.08.030 Smoking Regulations.~~Prohibition~~

a. ~~No person shall smoke in a public place or place of employment except in designated smoking areas.~~ In addition to all places where smoking is prohibited under state or federal law, in which case those laws apply, no person shall smoke in, and smoking areas shall not be established or designated in:

1. Open Air Dining Areas, pursuant to subsection (e) below;
2. Outdoor Service Areas;
3. Enclosed Public Places;
4. Any area where the owner, operator, manager or other person exercising management and control over the property has declared the area, where smoking would otherwise be allowed, to be a non-smoking area and posted the appropriate signage as set forth in this chapter; and
5. Within five feet of the entrance, divider, opening or doorway to a smoke-free Open Air Dining Area, or Outdoor Service Area, where smoking is prohibited by this chapter, except while actively passing by on the way to another destination.

b. No employer and no owner, operator, manager, employee or other person having control of a place of employment or a public place shall make ashtrays available in any area where smoking is prohibited.

c. No owner, operator, manager, employee or other person having control of a restaurant shall place matchbooks on tables or otherwise make matchbooks or matches available to patrons; provided, however, that upon request a promotional matchbook may be provided to a patron only when departing the restaurant.

d. No person shall dispose of smoking waste or place or maintain a receptacle for smoking waste in an area where smoking is prohibited by this chapter or other law, or within a distance of five feet from an area where smoking is prohibited.

e. Notwithstanding section (a) above, smoking may be permitted and smoking areas may be designated in the following places:

(1) an Open Air Dining Area of a Bar or Nightclub;

(2) an Open Air Dining Area of a Restaurant that does and is otherwise permitted to limit entry to persons of a certain age during some or all operating hours, provided that

during any time that smoking is allowed on the premises, minors are excluded from the entire business establishment;

(3) an unenclosed congregation area of a Restaurant, provided that food is not served to patrons in this area, and the area is completely separate and segregated from any Outdoor Dining Area where smoking is not permitted, smoke cannot be detected or smelled in the nonsmoking area;

(4) areas excluded from the definition of “Place of Employment” in California Labor Code Sections 6404.5(d), as may be amended from time to time; and

(5) at the specific Hookah Cafes that are open and in continuous operation at the same location on or prior to February 1, 2011, provided that the operators have submitted a smoking operations plan for review and approval in compliance with Section 7.08.050; and

(6) at the specific Private Membership Clubs that are open and in continuous operation at the same location on or prior to February 1, 2011, provided that the operators have submitted a smoking operations plan for review and approval in compliance with Section 7.08.050.

f. Any person who owns, operates, manages or otherwise exercises management and control over a public place, place of employment or any other establishment may designate the entire property, business or facility as a no-smoking area.

g. No business owner, operator or manager shall knowingly or intentionally allow smoking in an Open Air Dining Area or Outdoor Service Area that is under his, her or its control in a manner that violates this chapter. This law does not require the physical ejection of any person from the business or the taking of steps to prevent smoking under circumstances that would involve a significant risk of physical harm.

h. A violation of this section shall be subject to the administrative penalty provisions of Sections 1.08.030 through 1.08.070. The City Manager shall have primary responsibility for the enforcement of the regulations contained herein. Nothing in this section shall preclude the City Manager from seeking to obtain voluntary compliance by way of a warning, notice, or informational material.

7.08.040 Designation of Smoking Areas.

a. Designation Not Permitted. Smoking areas shall not be designated in retail stores, food markets, retail service establishments, restaurants (excluding bar areas within restaurants), public conveyances and transportation, taxicabs, theaters, auditoriums, public assembly rooms, elevators, pharmacies, libraries, museums, galleries, hospitals, restrooms, indoor service lines,

child care facilities (including those in a private home) and senior citizen facilities which are open or available to the public, except as provided in this section.

~~_____ b. Designation Permitted in Particular Places.~~

~~_____ 1. Places of Employment. Smoking areas may be designated in a separate and noncontiguous congregation area such as a lounge or cafeteria which does not constitute more than fifty percent of such available congregation area in the premises. Smoking areas may be designated in work areas only if such areas are separated by walls, floor to ceiling partitions, distance or other methods in such a way as to keep the nonsmoking areas free from tobacco or any weed or plant smoke to the maximum extent possible. No employee shall be required to work in a designated smoking area, and in all cases of conflict, the preferences of nonsmoking employees as regards working areas shall prevail. Employers shall disseminate information concerning the requirements of this chapter to employees.~~

~~_____ 2. Restaurants. Any or all portions of outdoor dining areas of restaurants and eating establishments may be designated for smoking.~~

~~_____ 3. Other Congregation Areas. Smoking areas may be designated in public congregation areas such as waiting rooms, lobbies and lounges provided that such areas are separate and noncontiguous from nonsmoking areas and do not constitute more than fifty percent of such space in the premises.~~

~~7.08.050 Exclusions.~~

~~_____ No smoking areas are not required in areas which are described in California Labor Code Sections 6404.5(d)(1), (2), (3), (4), (5), (6), (9), (10), (11), (12), (13) or (14), as they may be amended from time to time, and which are not considered places of employment.~~

~~_____ Notwithstanding the foregoing, nothing in this section shall prohibit the designation of an entire public place, place of employment or any other establishment as a no-smoking area.~~

~~7.08.0640 Posting.~~

~~a. Signs not less than eight inches by ten inches in size stating "No Smoking" with letters not less than one inch in height and including the international "No Smoking" symbol (consisting of a pictorial representation of a burning cigarette enclosed in a red circle with a diagonal red bar) shall be clearly, sufficiently and conspicuously posted by the owner, operator, manager or other person having control of every room, building or other place where smoking is regulated by this chapter either (i) on a wall not less than eight feet nor more than ten feet above floor level, or (ii) on moveable freestanding signs between three feet and five feet in height. In rooms containing tables for patrons or customers, an additional sign not less than four inches by six inches in size containing the same message in the same size lettering shall be placed on each table. Each of the foregoing signs shall, in addition, include a reference to "Chapter 7.08 of the~~

West Hollywood Municipal Code,” and include a telephone number designated by the City to which complaints of violations of this chapter may be reported.

~~b. For an Open Air Dining Area of a Restaurant where smoking is permitted pursuant to 7.08.030.e.2, the required sign shall conspicuously state the designated hours during which smoking is permitted in the Outdoor Dining Area because minors are excluded from the business establishment, and state the designated hours when smoking is prohibited because minors are permitted onsite.—Every theater owner, manager or operator shall post signs conspicuously in the lobby stating that smoking is prohibited in all areas and, in the case of motion picture theaters, such information shall be shown upon the screen for at least five seconds prior to the showing of each feature motion picture.~~

~~c. “No Smoking” signs shall be specifically placed in retail food production and marketing establishments, including grocery stores and supermarkets open to the public, so that they are clearly visible to persons in checkout lines, and clearly visible to persons at meat and produce counters. The manner of such posting including the wording, size, color, design, and place of posting whether on the walls, doors, tables, counters, stands or elsewhere shall be at the discretion of the owner, operator, manager, or other person having control of such room, building, or other place so long as clarity, sufficiency, and conspicuousness are apparent in communicating the intent of this chapter.~~

~~b. A violation of this section shall be subject to the administrative penalty provisions of Sections 1.08.030 through 1.08.070. The City Manager shall have primary responsibility, with the assistance of the Sheriff’s Department as may be necessary or desirable, for the enforcement of the regulations contained herein. Nothing in this section shall preclude the City Manager from seeking to obtain voluntary compliance by way of a warning, notice, or informational material.~~

7.08.050 Smoking Operations Plan.

a. The owner or operator of any establishment where outdoor smoking is permitted under 7.08.030.e, shall be required to submit a smoking operations plan to the Director of Community Development for review and approval before on-site smoking will be permitted. The plan shall include information required by the Director as needed for a complete understanding of the proposed smoking operations and to establish compliance with this chapter. Examples of the information that may be required include the location of any areas where smoking will be permitted on-site, where smoking will be prohibited, any applicable buffer zones, the times when smoking is permitted because minors are excluded from the business establishment and other information necessary to establish compliance with this Chapter. The owner or operator shall maintain a current smoking operations plan on file with the Director.

b. The owner or operator shall maintain a copy of its smoking operations plan on-site and shall produce and exhibit the same whenever requested to do so by any person authorized to enforce the provisions of this chapter or the West Hollywood Municipal Code.

c. An approved smoking operations plan shall be automatically suspended if the smoking operations shown in the approved plan are modified for any reason, there is a change in business operation that affects the smoking operations shown in the plan, there is a change in business ownership, or the physical layout of the establishment is reconfigured or redesigned. A new smoking operation plan shall be submitted for review and approval before smoking shall be allowed on the premises.

d. Where the placement of adjacent buildings where smoking is permitted, or similar practical problems prevent compliance with the five foot buffer zone required under 7.08.030.a.5 above, smoking may be permitted in the buffer zone provided that the business owner or operator submits a smoking operations plan in compliance with this Section.

e. The Community Development Director shall have the authority to promulgate rules, regulations and procedures as may be necessary to effectuate the purpose of this section.

7.08.060 Enforcement.

a. Duty to Inform. Owners, operators, managers or employees of same shall be required to orally inform persons violating this chapter of the provisions thereof. The duty to inform such violator shall arise when such owner, operator, manager or employee of same becomes aware of such violation.

b. Civil Action. Any aggrieved person may enforce the provisions of this chapter by means of a civil action.

c. Injunction. Any person who commits, or proposes to commit, an act in violation of this chapter may be enjoined therefrom by any court of competent jurisdiction. An action for injunction under this subsection may be brought by any aggrieved person, by the City Attorney, or by any person or entity which will fairly and adequately represent the interests of the protected class.

d. Costs and Fees. In any action under this section by an employee alleging retaliation or discrimination by an employer for exercising rights under this chapter, the prevailing party shall be awarded costs and reasonable attorneys' fees.

~~7.08.080 Retaliation.~~

~~— No person or employer shall discharge, refuse to hire, or in any manner retaliate against any employee or applicant for employment because such employee or applicant exercises any rights afforded by this chapter or acts to enforce any of the provisions of this chapter.~~

7.08.0790 Violations.

a. A violation of this Chapter shall be subject to the administrative penalty provisions of Sections 1.08.030 through 1.08.070.

~~Any owner, operator, manager or other person in control of a place of employment, public place, restaurant, service line or other establishment subject to this chapter shall be guilty of a misdemeanor for failing to comply with the requirements of this chapter.~~

~~— b. Any person smoking in a location which is designated as a nonsmoking area pursuant to this chapter shall be guilty of a misdemeanor.~~

b. The City Manager shall have primary responsibility, with the assistance of the Sheriff's Department as may be necessary or desirable, for the enforcement of the regulations contained herein. Nothing in this section shall preclude the City Manager from seeking to obtain voluntary compliance by way of a warning, notice, or informational material.

c. Any person violating Labor Code Section 6404.5, as amended, shall be guilty of an infraction, which as set forth in such Section 6404.5(j) requires local law enforcement agencies to enforce those provisions.

Section 3. Grace Period. A grace period shall follow the effective date of this ordinance to permit a period of public education. The provisions of this ordinance shall become effective and enforceable starting at 11:00 P.M. on January 1, 2012.

a. Within thirty days of the effective date of this Ordinance:

1. Any business with an Open Air Dining Area or Outdoor Service Area where smoking will be prohibited by this ordinance shall post a notice near an entrance, exit or cashier area in size 14 font or larger that is clearly visible and readable to a majority of customers that shall remain posted through the end of the one year grace period that states:

i. Beginning January 1, 2012, smoking is prohibited in the open air dining area [and/or outdoor service area] of this business and within five (5) feet of this business.

b. Permanent signs

1. The permanent signs required pursuant to 7.08.040 shall be posted no later than January 1, 2012.

c. Any business required to submit a smoking operations plan to the City shall submit such plan for review and approval by October 1, 2011.

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