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March 2, 2020

TO: The Honorable Dereck E. Davis, Chair
The Honorable Kathleen M. Dumais, Vice-Chair
Members of the House Economic Matters Committee
Lowe House Office Building
6 Bladen St., Room 231
Annapolis, MD 21401

FROM: Jocelyn Collins, Maryland and DC Government Relations Director
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SUBJECT: HB 1283 (PG 312-20) Prince George's County—Alcoholic Beverages—Cigar Lounge License

Position: **OPPOSE**

Dear Chairman Davis and Members of the House Economic Matters Committee,

Please accept these comments on behalf of the American Cancer Society Cancer Action Network (ACS CAN), ACS CAN, the nonprofit, nonpartisan advocacy affiliate of the American Cancer Society, supports evidence-based policy and legislative solutions designed to eliminate cancer as a major health problem. As the nation's leading advocate for public policies that are helping to defeat cancer, ACS CAN ensures that cancer patients, survivors, and their families have a voice in public policy matters at all levels of government.

We are writing to express opposition to HB 1283 (*PG 312-20*) *Prince George's County—Alcoholic Beverages—Cigar Lounge License*. As written, the proposed legislation significantly undermines the strong smoke-free workplace protections currently in place in Maryland. The proposed legislation creates a Class B-CL License in Prince George's County for cigar lounges to allow for the selling of alcohol and food. Currently, the Clean Indoor Air Act expressly restricts smoking in establishments licensed under the Alcoholic Beverages Article. MD. CODE ANN. HEALTH-GEN. §24-501.

Allowing this license creates a significant loophole in indoor smoking protections and would make it easier to exempt establishments from the smoke-free law which weakens decades of progress in preventing exposure to secondhand smoke.

Reports from two different Surgeon Generals have found that there is no safe level of exposure to secondhand smoke.^{1 2} While ventilation or air purification systems are sometimes promoted as a way to reduce exposure to secondhand smoke, ventilation cannot remove all secondhand smoke and does not purify the air at rates fast enough to protect people from harmful toxins. The Surgeon General has concluded that even separating smokers from nonsmokers, cleaning the air, and ventilating buildings cannot eliminate exposure of nonsmokers to secondhand smoke. The only effective way to fully protect nonsmokers from exposure to secondhand smoke is to completely eliminate smoking in indoor public spaces.³

Secondhand smoke should not be an occupational hazard for workers. Job related exposure to secondhand smoke is a significant, but entirely preventable, cause of premature death among U.S. workers. Business owners that allow smoking in the workplace increase their costs of doing business, while workers suffer health problems. Employers pay increased health, life, and fire insurance premiums, make higher workers' compensation payments, incur higher worker absenteeism, and settle for lower work productivity.^{4 5 6 7 8 9 10 11}

The National Institute of Occupational Health and Safety (NIOSH) and the US Surgeon General found that occupational exposure to SHS increases workers' risk of lung cancer and other diseases. Patrons were also found to have significantly elevated levels of a tobacco-specific lung carcinogen after a four-hour visit to a casino that allowed smoking.^{12 13}

This year, 3,930 Maryland residents are expected to be diagnosed with lung cancer and it is estimated that over 2,310 will die of the disease.

Maryland has been a national leader in protecting all of its citizens from the known, indisputable hazards of secondhand smoke in the workplace and public places. A statewide smoke-free law that covers all indoor public places has been in place since 2008, and it's working! The law protects both workers and patrons at all business establishments throughout the state, including the state's existing casinos. This 100% smoke-free law has been good for health and good for business.

Allowing an exemption for Prince George's County cigar lounges to allow for the sale of both food and alcohol, seriously undermines the law, and most importantly forces workers to choose between their health and a paycheck. We urge you to reject this exemption that eliminates the healthy, sensible, fair and comprehensive smoke-free law in Maryland.

¹ U.S. Department of Health and Human Services (HHS). *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General*. U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, Coordinating Center for Health Promotion, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2006.

² HHS. *How Tobacco Smoke Causes Disease: The Biology and Behavioral Basis for Smoking-Attributable Disease*. U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, Coordinating Center for HHS, 2006.

³ Kristein, M.M. (1983). How Much Can Business Expect to Profit from Smoking Cessation? *Preventive Medicine*. 12:358-381.

⁴ Marion Merrell Dow, Inc. (1991). The Economic Impact of Smoking: In the Workplace; On Cardiovascular Health; On Wound Health and Recovery from Surgery; On Infants and Children; On Pulmonary Health; On Dental and Oral Health. Medical Information Services, Inc.

⁵ Musich, S., Napier, D. and D.W. Edington (2001). The Association of Health Risks With Workers' Compensation Costs. *Journal of Occupational and Environmental Medicine* 43(6): 534-541.

⁶ Halpern et al. (2001).

⁷ Ryan et al. (1992).

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⁹ Penner & Penner (1990).

¹⁰ HHS (2014).

¹² Anderson KE, Kliris J, Murphy L, et al (2003). Metabolites of a Tobacco-Specific Lung Carcinogen in Nonsmoking Casino Patrons. *Cancer Epidemiol Biomarkers Prev* 12(12):1544-6.

¹³ Americans for Nonsmokers' Rights. Smokefree Casinos. <https://nonsmokersrights.org/smokefree-casinos>

Smoke-free Policies: Good for Business



The Surgeon General's reported in 2006ⁱ and again 2010ⁱⁱ that there is no risk-free level of exposure to secondhand smoke (SHS). Smoke-free laws and policies provide immediate and long-term health benefits for both people who smoke and those who do not and are good for businesses and workers. In fact, a recent report by the National Cancer Institute and the World Health Organization concluded that "smoke-free policies do not have negative economic consequences for businesses, including restaurants and bars, with a small positive effect being observed in some cases."ⁱⁱⁱ

FACT: Smoke-free Laws Do NOT Harm Restaurants

Numerous studies examining the impact of state and local smoke-free restaurant laws have found that these laws do not hurt, and may even benefit, restaurant sales.

- Studies examining the impact of local or statewide smoke-free laws in California, New York, Massachusetts, Arizona, Indiana, Wisconsin, Florida, Maryland, Kentucky, Kansas, North Carolina, Alabama, Indiana, Mississippi, Missouri, South Carolina, Texas, West Virginia, and North Dakota found that smoke-free laws had either positive or no effects on restaurant revenues and other economic indicators.^{iv,v, vi,vii, viii, ix, x,xi, xii,xiii, xiv}
 - For example, one year after the passage of a strong smoke-free ordinance went into effect in New York City, the city's bars and restaurants experienced an 8.7 percent increase in tax receipts – an increase of approximately \$1.4 million – and the rate of restaurant openings remained unchanged.^{xv}
 - As another example, a 2012 study of restaurants and bars in 11 Missouri cities found that eight of the cities experienced increases in sales after local smoke-free ordinance implementation and the other three did not experience any decline.^{xvi}
- Smoke-free ordinances may actually increase restaurant resale values. Smoke-free restaurants in California and Utah had a 16 percent (or \$15,300) median increase in sale price compared to restaurants in communities where smoking was permitted.^{xvii}
- More people are demanding smoke-free establishments. In Michigan, a 2011 poll found that 74 percent of likely voters support the state's smoke-free law, compared with 66 percent that supported the law before it went into effect. In addition, 93 percent of respondents indicated that they go to restaurants and bars just as or more often than they did before the law took effect.^{xviii}

FACT: Smoke-free Laws Do NOT Harm Bars

Numerous studies have also found that smoke-free bar laws do not hurt, and may even benefit, bar sales.

- Research examining the impact of smoke-free ordinances in communities in California, Florida, Kentucky, Massachusetts, Maryland, Minnesota, New York, Oregon, Texas, North Dakota, Alabama, Indiana, Mississippi, Missouri, South Carolina, and West Virginia showed that these laws had no negative effect on bar sales or service workers' employment.^{xix, xx, xxi, xxii, xxiii, xxiv, xxv, xxvi, xxvii, xxviii, xxix, xxx} In fact, bar businesses are no more sensitive to changes in smoking behavior than other hospitality businesses.^{xxxi}
- A 2007 study found that smoke-free ordinances had no significant effect on the resale value and profitability of bars, contrary to the 30 percent decrease in value purported by the tobacco industry.^{xxxii} These data were supported by studies in nine states including Texas and Florida, all of which reported no effect or an increase in bar revenue and employment following passage of smoke-free laws.^{xxxiii, xxxiv, xxxv}
- Public support for smoke-free bars is strong. Surveys conducted in Montana and Nebraska found that a vast majority respondents planned to visit bars, restaurants, bowling allies and other service industries equally or more frequently than they did prior to the implementation of smoke-free laws in their communities.^{xxxvi, xxxvii} A 2010 Ohio poll also found that nearly three in four voters believed that bar employees should be protected from SHS in their workplaces.^{xxxviii}

FACT: Smoke-free Laws Do NOT Reduce Tourism

Several studies have shown that smoke-free policies do not affect tourism or hotel/motel revenues.^{xxxix, xl, xli, xlii, xliii}

- One study found that smoke-free laws were associated with increased hotel revenues in four localities: Los Angeles, CA, New York City, NY, Mesa, AZ, and the state of Utah.^{xliv}
- Another study found that the number of tourists that visited California and New York increased after the implementation of these states' smoke-free policies. Additionally, the study looked at seven other localities and observed no significant changes in tourism following the implementation of smoke-free policies.^{xlv}
- Approximately one year after Florida's smoke-free law took effect, researchers found no significant change in the number of visits to recreational sites across the state. Moreover, the number of people employed in the leisure and hospitality industry increased almost 2 percent.^{xlvi}
- One study of Hawaii that controlled for economic trends of the recession and seasonal trends found that the law was associated with positive trends in tourism and tourism employment five years after implementation of their statewide law.^{xlvii}

FACT: Smoke-free Laws SAVE Businesses Money

The costs of secondhand smoke are significant. The 2014 Surgeon General's report estimated the economic value of lost wages, fringe benefits, and workforce associated with premature mortality due to SHS exposure to be \$5.6 billion per year nationwide. This estimate excludes the losses due to morbidity and far underestimates the total economic impact of SHS.^{xlviii}

- Smoking employees have significantly higher absenteeism and injury, accident, and disciplinary rates than their nonsmoking colleagues.^{xliv, l, li, lii, liii, liv}
- Some business owners have been found liable in lawsuits filed by sick employees seeking damages related to smoking in the workplace.^{lv, lvi, lvii, lviii, lix}
- Business owners that allow smoking in the workplace increase their costs of doing business: Employers pay increased health, life, and fire insurance premiums, make higher workers' compensation payments, incur higher worker absenteeism, and settle for lower work productivity.^{lx, lxi, lxii, lxiii, lxiv, lxv, lxvi, lxvii} Other costs associated with smoking in the workplace are increased housekeeping and maintenance costs.
- One year after New York City's smoke-free law took effect, smoking among the city's adults declined 11 percent, resulting in 140,000 fewer people who smoke, and preventing 45,000 premature deaths. These declines in smoking and related disease saved over \$500 million annually in tobacco-related health care costs, part of which would have been incurred by local businesses.^{lxviii, lxix}

Conclusion

Existing research strongly indicates that smoke-free laws are good for businesses, for workers, and for customers. Research published in leading scientific journals has shown consistently and conclusively that smoke-free laws have no adverse effects on the hospitality industry,^{lxx, lxxi} and actually benefit businesses. The 2006 Surgeon General's Report furthers this point, concluding that "evidence from peer-reviewed studies shows that smoke-free policies and regulations do not have an adverse economic impact on the hospitality industry."^{lxxii} No one should have to choose between their job and their health.

ACS CAN strongly supports legislative and regulatory measures that prohibit smoking in public places and work environments. Furthermore, ACS CAN opposes preemptive state and federal legislation that restricts local authorities from regulating smoke-free air and urges policymakers and community leaders to support smoke-free efforts, which reduce and prevent disease, suffering and death from tobacco.

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The Effect of Secondhand Smoke on Worker Health

The need for smoke-free laws



More than 40 years after former U.S. Surgeon General Jesse Steinfeld first exposed the potential health risks of secondhand smoke (SHS) in 1971,ⁱ and nearly 30 years after a subsequent Surgeon General's report stated that SHS causes lung cancer and other diseases,ⁱⁱ all U.S. workers still do not have the right to breathe smoke-free air. In the late 1980s, 91.7 percent of Americans had an indicator of SHS exposure in their bloodstreamⁱⁱⁱ and, at that time, only 3 percent of workers nationally reported a "no smoking" policy at their place of employment.^{iv} Soon thereafter, laws prohibiting smoking in workplaces and other public venues began to be enacted at the local, state, and national levels to minimize the impact of SHS. In 2006 and again in 2010, two Surgeon Generals concluded unequivocally that there is no safe level of exposure to SHS.^{v vi}

All U.S. workers still do not have the right to breathe smoke-free air.

Today, smoke-free policies have effectively reduced the number of people exposed to SHS in the workplace.^{vii,viii,ix,x} The proportion of nonsmokers with detectable levels of a SHS indicator has dropped to 40 percent.^{xi} This level of exposure is still too high, and unfortunately, not all workers have the same level of protections. Currently, over 73 percent of the U.S. population is covered by 100 percent smoke-free state or local smoke-free workplace laws, 77 percent is covered by 100 percent smoke-free restaurant laws, and 66 percent is covered by 100 percent smoke-free bar laws.^{xii} However, only 58 percent of the population is covered by 100 percent smoke-free laws covering all three of these types of venues.^{xiii}

Hospitality Workers are at Higher Risk for SHS Exposure

The workplace is a major source of SHS exposure for adults, and SHS exposure in the workplace has been linked to an increased risk of heart disease and lung cancer among nonsmoking adults. Blue collar and service workers are more likely than white collar workers to be exposed to SHS at the workplace^{xiv} and are less likely to be covered by smoke-free policies.^{xv,xvi}

- According to one study, prior to the implementation of a smoke-free law, employees working full-time in restaurants or bars that allowed indoor smoking were exposed to levels of air pollution 4.4 times higher than safe annual levels established by the U.S. Environmental Protection Agency (EPA) because of their occupational exposure to tobacco smoke pollution.^{xvii}

Bartenders, servers, and casino workers are particularly unlikely to be protected by smoke-free policies and more likely to breathe SHS even when smoke-free policies are in effect for other types of workplaces.^{xviii,xix} Without smoke-free laws, bars and lounges have among the highest concentrations of SHS of all public spaces – exposing bartenders to even greater levels of SHS than restaurant workers.^{xx}

- When there are not smoke-free policies in effect, levels of SHS in bars are 3.9 to 6.1 times higher than levels measured at office worksites and up to 4.5 times higher than levels in homes with one or more smokers.^{xxi}
- Bartenders are more likely than many other workers to report eye, nose, or throat irritation or symptoms.^{xxii}
- A study examining the effects of SHS exposure in San Francisco, CA, restaurants and bars before the state's smoke-free law took effect found that 74 percent of bartenders surveyed had respiratory symptoms (e.g., wheezing, cough, etc.), and 77 percent had sensory irritation symptoms (e.g. red, teary, or irritated eyes, runny nose, sneezing, sore or scratchy throat, etc.).^{xxiii}

Casino workers are exposed to high levels of SHS in the workplace and are at higher risk for developing SHS-related illnesses.

- The National Institute for Occupational Safety and Health (NIOSH) conducted a health hazard evaluation at a casino in Atlantic City, NJ and found that workers had exceptionally high levels of a SHS exposure indicator in their bloodstreams.^{xxiv} In particular, the study found generalized exposure to SHS throughout the entire gaming area. Casino workers who staffed nonsmoking tables did not have lower levels of SHS exposure than casino workers who staffed smoking tables.^{xxv}
- A study of nonsmokers' exposure to SHS in Pennsylvania casinos found that smoke particles were 4 to 6 times greater inside casinos than outside, even with ventilation and few people smoking at the time.^{xxvi} Additionally, the extent of SHS in the casinos was not confined only to the smoking areas.^{xxvii}

Smoke-free Policies Improve Workers' Health

Smoke-free policies reduce exposure to SHS in office and non-office worksites and nicotine concentration levels in the bloodstream of the adults who work there.^{xxviii} Although SHS exposure declined among all worker groups between 1988 and 2002, the decline was greatest among blue collar and service workers, who experienced a 76 percent decline in a SHS indicator during that 14-year time period.^{xxix} Also during that time, the number of local 100 percent smoke-free ordinances in effect increased from 0 to 47 nationwide.^{xxx} We expect these declines in SHS exposure to be continuing with more laws in effect since then. As of October 2018, there were 1,497 localities and 36 states, D.C., American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands requiring 100 percent smoke-free workplaces, restaurants, or bars, of which 1,010 localities and 25 states, D.C., Puerto Rico, and the U.S. Virgin Island laws cover all three of these types of venues.^{xxxi}

The evidence shows that implementing smoke-free policies has immediate benefits for restaurant and bar workers' health. The Surgeon General reports that in high-risk settings such as bars, smoke-free policies can lead to reductions of 80-90 percent of SHS exposure.^{xxxii} Additional studies examining the impact of specific smoke-free laws have similar findings:

- In Wisconsin, three to six months after the implementation of the statewide smoke-free law, nonsmoking bar workers experienced a significant improvement in respiratory health.^{xxxiii}
- The percentage of hospitality workers exposed to SHS declined from 91 percent to 14 percent in just a single year after New York's smoke-free law went into effect. The amount of time that hospitality workers were exposed to SHS on the job decreased by 98 percent—from 12.1 hours to 0.2 hours.^{xxxiv} Reports of one or more sensory symptoms—affecting the eyes, nose, or throat—declined from 88 percent to 38 percent just one year after the smoke-free law took effect.^{xxxv}
- Nonsmoking bar and restaurant employees in Oregon communities without smoke-free laws had higher levels of a tobacco-specific lung carcinogen than similar workers in communities with a smoke-free law in effect. Workers in communities without smoke-free laws also had higher levels of the carcinogen after their work shift than they did previously.^{xxxvi}
- A study of Minnesota hospitality workers showed that after implementation of a smoke-free law, concentrations of a SHS indicator in the bloodstream decreased by more than 50 percent in a majority of workers.^{xxxvii}

Smoke-free laws also prompt many smokers to quit.

- During the three months following the passage of Nebraska's smoke-free law, 16 percent of callers to the state's Quitline said that they were influenced to call as a result of the smoke-free law.^{xxxviii}
- A recent study found that Kentucky counties with smoke-free laws had higher quitline call rates and lower smoking rates than counties without smoke-free laws. In fact, individuals in communities with smoke-free laws were 18% less likely to smoke.^{xxxix}
- The Community Preventive Services Task Force attributed a 2.7 reduction in overall tobacco use in the US between 2009 and 2011 to smoke-free laws.^{xl}

Smoke-free policies reduce long-term risk of lung cancer and cardiovascular disease among workers and patrons alike.

- Passage of a comprehensive smoke-free law is associated with lower rates of hospitalizations and death from heart attacks, heart disease, strokes, and respiratory diseases.^{xli} A 2014 study of hospitality workplaces found that smoke-free policies significantly lowered two cardiovascular risk factors in non-smoking employees.^{xlii}
- Smoke-free laws that cover a broader range of venues, including all workplaces, restaurants, and bars, further reduce the risk of disease and death.^{xliii}
- Following implementation of Massachusetts's statewide smoke-free law, heart attack deaths declined in cities and towns that previously did not have local smoke-free laws in place. There was no significant change in heart attack deaths in jurisdictions that previously had a local law, suggesting that the decline in heart attack deaths was due to the smoke-free law.^{xliv}
- One year after New York State implemented a comprehensive smoke-free law, heart attack hospital admissions decreased by over 3,800, an 8 percent decline statewide.^{xlv}
- A 2011 ACS CAN report found that if all states that lacked comprehensive smoke-free laws at that time passed one, more than a million adults would quit smoking and about 400,000 youth would never start, preventing 624,000 deaths.^{xlvi} About 70,000 of these preventable deaths would occur in non-smokers.^{xlvii}

ACS CAN on Secondhand Smoke and Worker Health

Exposure to SHS is an occupational hazard for many U.S. workers, including casino, restaurant, bar, and hotel employees, and a preventable cause of disease and death. ACS CAN believes that all people should have the right to breathe smoke-free air. No one should have to choose between their livelihood and their health.

ACS CAN strongly supports legislative and regulatory measures that limit smoking in hospitality venues, work environments, and other public places. Furthermore, ACS CAN opposes preemptive state and federal legislation that restricts local authorities from regulating smoke-free air and urges policymakers and community leaders to support smoke-free efforts, which reduce and prevent disease, suffering, and death from tobacco.

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Clearing the Air:

The Facts About Ventilation



The only effective way to fully protect nonsmokers from exposure to secondhand smoke is to eliminate smoking in indoor public spaces.

Secondhand smoke is a serious health hazard. Ventilation technologies do not sufficiently protect individuals from the harmful effects of breathing in secondhand smoke. Reports from two different Surgeon Generals have found that there is no safe level of exposure to secondhand smoke.^{i, ii} While ventilation or air purification systems are sometimes promoted as a way to reduce exposure to secondhand smoke, ventilation cannot remove all secondhand smoke and does not purify the air at rates fast enough to protect people from harmful toxins. The Surgeon General has concluded that even separating smokers from nonsmokers, cleaning the air, and ventilating buildings cannot eliminate exposure of nonsmokers

to secondhand smoke. The only effective way to fully protect nonsmokers from exposure to secondhand smoke is to completely eliminate smoking in indoor public spaces.ⁱⁱⁱ

The Facts on Secondhand Smoke and Air Quality

Secondhand smoke is a major source of particulate matter, a type of air pollution. Conventional air cleaning systems can remove large particles, but not the smaller particles or gases found in secondhand smoke.^{iv} Particulate matter, of the size found in cigarette smoke, is easily and deeply inhaled into the lungs and can lead to disease and death. Exposure to secondhand tobacco smoke has been causally linked to cancer, respiratory and cardiovascular diseases, and numerous other adverse health effects.^v

Numerous studies over the past two decades have repeatedly shown that secondhand smoke is a cause of pollution and smoke-free laws are the only effective way to reduce exposure to secondhand smoke. For example:

- The pollution generated from three lit cigarettes in a room of 197 cubic feet was higher than the pollution generated from a diesel engine in a closed private garage.^{vi}
- Between 90 and 95 percent of airborne pollution in Delaware hospitality venues was caused by smoking before the state's smoking ban went into effect.^{vii} Levels of cancer-causing pollutants were found to be 4 times greater than National Ambient Air Quality Standards (NAAQS) outdoor requirements in six Delaware bars, one casino, and one pool hall before implementation of a statewide smoking ban.^{viii}
- Studies have found that in restaurants and bars where smoking was previously allowed, particulate matter decreased 80-90 percent within months of a smoke-free policy taking effect.^{ix}

The American Society of Heating, Refrigeration, and Air-Conditioning Engineers:^{xii}

- Concludes that the only way to eliminate the health risks of secondhand smoke exposure is to prohibit the smoking behavior
- Furthermore, no engineering approaches, including ventilation and air cleaning technologies, can eliminate the health risk.
- Includes marijuana smoke in the definition of environmental tobacco smoke (also called secondhand smoke).

What is Ventilation?

Ventilation uses controlled airflow to curb airborne contaminants.^x Despite the fact that ventilation systems cannot remove carcinogens found in secondhand smoke from a workplace or public place, the tobacco industry and their allies have promoted ventilation as a method to accommodate both smokers and non-smokers. There are two types of ventilation that are commonly used in commercial and industrial buildings.^{xi}

- **Local exhaust ventilation** attempts to trap pollutants at or near their source. It is geared toward environments with high pollution levels and requires low levels of air circulation. The theory is that pollutants are trapped at their source and are not diffused throughout the air.^{xii} Ventilated ashtrays are one example of local exhaust technology. Once a cigarette is placed into an ashtray, a filter would isolate any pollutants emitted from the burning tip. Canopy hoods are another example and work by filtering out any smoke that is exhaled directly above restaurant and gaming tables. In practice, local exhaust ventilation is not fully effective and requires substantial maintenance, making the technology ineffective, inefficient and costly for businesses to operate.
- **Dilution ventilation**, also known as general ventilation, involves saturating a room with clean, unpolluted air in an attempt to dilute airborne contaminants—in this case tobacco smoke—to safe and comfortable levels. The process requires high levels of air circulation and works best in environments with low pollution levels spread over a large area. However, exposure to secondhand smoke, at any level, is neither safe nor acceptable; the health consequences are immediate and can be life-threatening. Because dilution ventilation allows tobacco smoke to travel throughout a room, it offers little protection from secondhand smoke exposure and can even distribute secondhand smoke throughout a building.^{xiii, xiv} In addition to being ineffective, it may be costly for businesses to install.

Ventilation is Ineffective

The U.S. Surgeon General has concluded that separating smokers from nonsmokers, air cleaning technologies, and ventilating buildings cannot eliminate secondhand smoke exposure.^{xv} Research has shown that “tornado-like levels of ventilation” would be needed in restaurants, bars, and gaming establishments to protect hospitality workers from secondhand smoke.^{xvi} For example:

- Placing hoods over gaming, restaurant and bar tables to filter secondhand smoke would require “impracticably high” minimum airflows in excess of 300 cubic feet per minute per hood (cfm/hood).^{xvii}
- Ventilation was unable to control pollution in seven hospitality venues that were surveyed in Boston, Massachusetts, prior to the city’s smoke-free ordinance. Indoor air pollution levels were four times higher than NAAQS outdoor requirements.^{xviii}
A study of 36 tribal casinos found that air pollution was more than four times as high in the non-smoking gaming areas of casinos that allowed smoking than smoke-free casinos when there was no separation from smoking gaming areas. Even when there was complete separation between smoke-free and non-smoking gaming areas, air pollution was an average of 40 percent greater in the non-smoking areas of casinos that allowed smoking than completely smoke-free casinos.^{xix}

A study comparing indoor air quality at U.S. airports with and without smoking lounges found significantly more secondhand smoke particles in airports with smoking lounges, even in non-smoking parts of the airport. In airports with smoking lounges, the amount of secondhand smoke in the areas adjacent to the smoking lounges – where smoking was not allowed – was four times higher than the average amount of secondhand smoke in the non-smoking parts of airports that allowed smoking and five times higher than the average amount of secondhand smoke in completely smoke-free airports.^{xx} Despite ventilation, secondhand smoke from the airport smoking lounges penetrated the non-smoking parts of the airports, exposed non-smoking employees and travelers to secondhand smoke.

Manufacturers and sellers of air filtration technologies admit that their products do not protect consumers from the health risks imposed by secondhand smoke.^{xxi} The American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE) re-affirmed in 2016, that the only means of effectively eliminating the health risk associated with indoor exposure is to prohibit smoking activity.^{xxii} According to ASHRAE:

- No other engineering approaches, including current and advanced dilution ventilation or air cleaning technologies, have been demonstrated or should be relied upon to control health risks from secondhand smoke exposure in spaces where smoking occurs.^{xxiii}
- While some engineering measures may reduce secondhand smoke exposure and some of the corresponding odor and irritation, smoke-free air cannot be accomplished with any engineering or other approaches besides prohibiting smoking.^{xxiv}

Even the tobacco industry acknowledges that ventilation and air filtration technologies are ineffective at removing secondhand smoke.

- British American Tobacco (BAT) acknowledged that its Colt air filtration unit was only 34 percent efficient at removing particulate matter from tobacco smoke. The unit failed to eliminate carbon monoxide and other volatile organic compounds found in cigarette smoke.^{xxv} The Colt unit only reduced “haze, tobacco-smoke aroma and total perceived smoke,” thus making the air more comfortable to breath, but not less harmful.^{xxvi}
- Phillip Morris USA states that “the public should be guided by the conclusions of public health officials regarding the health effects of secondhand smoke.”^{xxvii} The company further acknowledges that “the conclusions of public health officials concerning environmental tobacco smoke are sufficient to warrant measures that regulate cigarette smoking in public places.” Even the tobacco company itself does not promote ventilation as an alternative to smoke-free laws.

ACS CAN on Ventilation

ACS CAN supports local, state, and federal initiatives to eliminate public exposure to secondhand smoke, including 100 percent smoke-free laws, prohibiting smoking in all workplaces, including restaurants, bars and casinos, which are key to protect nonsmokers, children and workers from the deadly effects of secondhand smoke.

ACS CAN does not support smoke-free laws that allow for separating smokers from nonsmokers or ventilating buildings as alternatives to requiring a 100 percent smoke-free environment, as the evidence is overwhelming that these measures cannot eliminate exposure of nonsmokers to secondhand smoke.

ACS CAN’s work to create 100 percent smoke-free environments is part of a comprehensive approach to addressing tobacco use and exposure to secondhand smoke in the United States.

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PRINCE GEORGE'S COUNTY COUNCIL

COMMITTEE REPORT

2017 Legislative Session

Reference No.: CB-20-2017

Draft No.: 2

Committee: HEALTH, EDUCATION AND HUMAN SERVICES

Date: 4/18/2017

Action: FAV(A)

REPORT:

Committee Vote: Favorable with Amendments, 4-0 (In favor: Council Members Toles, Taveras, Harrison and Turner. Absent: Franklin).

Staff gave an overview of the purpose of the legislation. CB-20-2017 seeks to amend the County's smoking ban by allowing smoking within a tobacco bar, tobacco lounge, cigar bar, or cigar lounge, as defined within the proposed legislation. The tobacco bar, tobacco lounge, cigar bar, or cigar lounge shall comply with the County's standard for ventilation as established by the Department of Permitting, Inspections and Enforcement (DPIE) and must display signs either allowing or prohibiting smoking on the premises at each entrance.

The initial draft which contained definitions of Cigar Bar, Cigar Lounge, Tobacco Bar, and Tobacco Lounge were revised to one definition of Retail Tobacco Business because those previous definitions did not adequately reflect the purpose of the legislation and the need to comply with the State Clean Indoor Air Act.

The sponsor expressed the need for the legislation to be more competitive with neighboring jurisdictions indicating that these types of establishments' exist outside of the County. CB-20-2017 will allow smoking in certain establishments by exception to Section 19-131 of the County Code. CB-15-2017 is the zoning companion piece allowing for a Special Exception for the use.

CB-20-2017 was amended in Committee as follows:

- 1) At the end of Section 19-131(b)(1)(A), was added "and has a valid use and occupancy permit issued by the Department of Permitting Inspection and Enforcement." This was to satisfy the DPIE representative concerns.
- 2) Moved language from Section 19-131(b)(1)(D) to Section 19-131(d) and replaced it with the following language:

Smoking is not prohibited by this Section in a retail tobacco business as defined by Section 27-107.01(a)(202.1) of the County Code, where a food and beverage area are

incidental, provided that it complies with the standard for ventilation of such a facility as defined under Subtitle 4 of the County Code.

The Co-sponsor indicated that there is an exception to state law which allows smoking in certain establishments that allows food and beverages that is incidental to the establishment (49% of the square footage must be designated to the original purpose). A Health Department food facility permit will still be required and if any alcoholic beverages are served establishments will still have to comply with alcoholic beverage laws.

The Health Department representative indicated that CB-20-2017 complies with the “Clean Indoor Act.” Audits and Investigations found no adverse financial impact on the County.

The Committee voted favorable 4-0 with amendments.



TO: Hon. Derrick Leon Davis, Chair, Prince George's County Council
FROM: William Tilburg, Managing Director, Legal Resource Center
DATE: June 12, 2017
RE: Letter of Information – CB-020-2017 – Exceptions to Smoking Ban in Eating and Drinking Establishments

Dear Chairman Davis:

Council Bill 020-2017 attempts to exempt certain businesses from the Prince George's County ordinance restricting smoking in eating and drinking establishments. However, a county ordinance regulating indoor smoking is only legal and valid to the extent it is consistent with, or more stringent than state law. The Maryland Clean Indoor Air Act (CIAA) prohibits smoking in any "indoor area open to the public" and any "indoor place of employment," which includes eating and drinking establishments. MD. CODE ANN. HEALTH-GEN. § 24-504. Importantly, the CIAA expressly includes establishments licensed to sell alcoholic beverages in the ban. MD. CODE ANN. HEALTH-GEN. 24-501(e)(2). The State law also establishes "floor preemption," meaning that county and municipal governments can only enact and enforce local laws regulating indoor smoking that are "more stringent" than the CIAA. MD. CODE ANN. HEALTH-GEN. §24-510. Therefore, a county ordinance is only permissible if it increases, rather than decreases, the State's indoor smoking restrictions. An example of a local ordinance validly establishing "more stringent measures" is the Council's adoption of CB-034-2015, which extended the county indoor smoking ban to include e-cigarettes.

The CIAA does include a narrow exception from the indoor smoking ban for retail tobacco businesses where "(i) the primary activity is the retail sale of tobacco products and accessories; and (ii) the sale of other products is *incidental*." MD. CODE ANN. HEALTH-GEN. §24-505. While "incidental" is not defined in statute, the plain meaning of the word is "occurring merely by chance or without intention" and "accompanying, but not a major part of something." The plain meaning definition closely aligns with how the State has traditionally interpreted and enforced the statute. More importantly, the Maryland General Assembly has considered and rejected at least five bills since 2011 that would authorize cigar bars and lounges to sell food and/or alcohol.¹ In addition, dozens of cigar bars and lounges sought "waivers" from the CIAA between 2008 and 2011, because absent a waiver the law prohibited these establishments from continuing to sell food or alcohol. In 2017, the county delegations for Frederick and Harford – both home-rule counties – introduced bills seeking to authorize alcohol sales at cigar lounges in their jurisdictions. The bills sought to permit a maximum of 17% and 20% of total revenue at the cigar bars to come from alcohol and other non-tobacco products. Implicit in the introduction of these bills is that the sale of alcohol is not permitted in establishments seeking to qualify for the retail tobacco business exemption under the State's clean indoor air law.

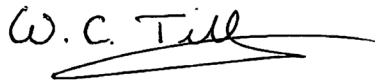
¹ See the following bills introduced to the Maryland General Assembly: HB396 (2017), HB1445 (2017), SB326 (2017), HB1069 (2016 – passed without smoking exception), and HB605 (2011).

Finally, my office has been made aware of cigar lounges operating in other counties that sell food and alcohol. These businesses are operating outside the bounds of the law. The CIAA expressly restricts smoking in establishments licensed under the Alcoholic Beverages Article. MD. CODE ANN. HEALTH-GEN. §24-501. Moreover, no county council or county commissioners, including in those jurisdictions where these other businesses are operating, have adopted an ordinance or resolution to authorize the sale of alcohol at retail tobacco businesses in contravention of state law. Baltimore City permits indoor smoking in retail tobacco businesses that derive at least 75% of their revenue from the “sale of non-cigarette tobacco products,” but these businesses may not sell alcohol. BALT. CITY HEALTH CODE, 12-107(b)(3). Also, the City ordinance pre-dates the CIAA and the Baltimore City Law Department and Baltimore City Health Department believe it is at least as stringent as the state law. To my knowledge, the State has neither affirmed nor challenged the City ordinance.

I hope you have found this letter helpful. If you have any questions, please do not hesitate to contact the me at wtilburg@law.umaryland.edu or (410) 706-0580.

Regards,

William C. Tilburg

A handwritten signature in black ink that reads "W. C. Tilburg". The signature is written in a cursive style with a long, sweeping horizontal line extending to the right from the end of the name.

William C. Tilburg, JD
Managing Director, Legal Resource Center
University of Maryland Carey School of Law

The Maryland-National Capital Park and Planning Commission
Prince George's County Planning Department
Development Review Division
301-952-3530



Note: Staff reports can be accessed at <http://mncppc.igmp2.com/Citizens/Default.aspx>.

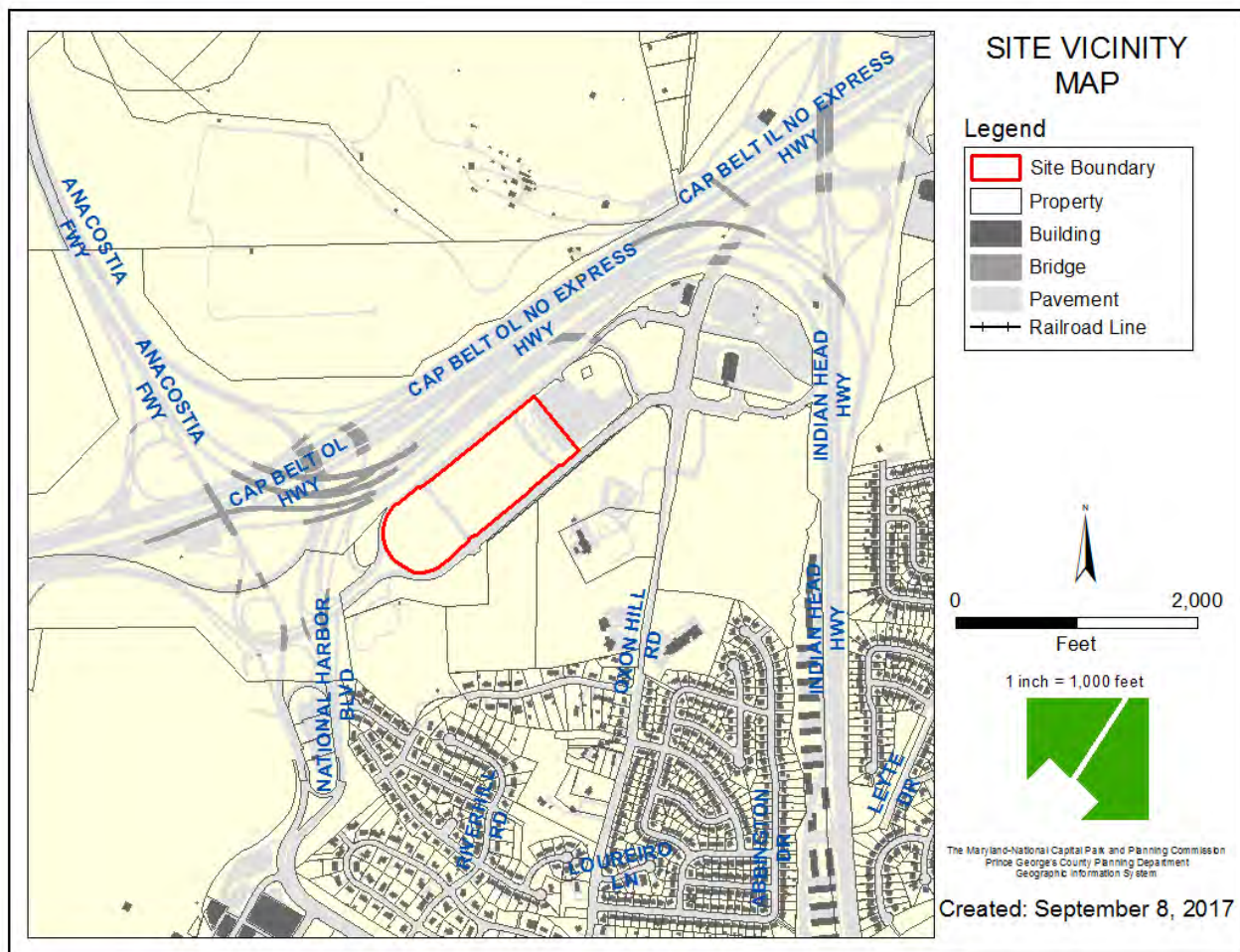
Special Exception

SE-4807

Application	General Data	
Project Name: MGM National Harbor Retail Tobacco Business Location: In the southwest quadrant of the intersection of I-95/495 (Capital Beltway) and MD 210 (Indian Head Highway). Applicant/Address: MGM National Harbor, LLC 101 MGM National Avenue Oxon Hill, MD 20745 Property Owner: Same as applicant	Planning Board Transmittal Date:	11/08/18
	Staff Report Date:	10/24/18
	Date Accepted:	08/13/18
	Planning Board Action Limit:	11/10/18
	Plan Acreage:	23.0635
	Zone:	M-X-T
	Gross Floor Area:	2,038 sq. ft
	Lots:	0
	Parcels:	1
	Planning Area:	80
	Council District:	08
	Election District	12
	Municipality:	N/A
	200-Scale Base Map:	209SE01

Purpose of Application	Notice Dates	
The establishment of a Retail Tobacco Business (RTB) within an existing entertainment establishment of a commercial nature with video lottery facility uses in accordance with Section 27-548.01.04 of the Zoning Ordinance.	Informational Mailing	09/11/17
	Acceptance Mailing:	08/06/18
	Sign Posting Deadline:	10/08/18

Staff Recommendation		Staff Reviewer: Ras Tafari Cannady II Phone Number: 301-952-3411 E-mail: Ras.Cannady@ppd.mncppc.org	
APPROVAL	APPROVAL WITH CONDITIONS	DISAPPROVAL	DISCUSSION
	X		



THE MARYLAND-NATIONAL CAPITAL
PARK AND PLANNING COMMISSION

PRINCE GEORGE'S COUNTY PLANNING BOARD

TECHNICAL STAFF REPORT:

TO: The Prince George's County Planning Board
The Prince George's County District Council

VIA: Sherri Conner, Acting Supervisor, Subdivision and Zoning Section
Development Review Division

FROM: Ras Tafari Cannady II, Senior Planner, Subdivision and Zoning Section
Development Review Division

SUBJECT: Special Exception SE-4807

REQUEST: The establishment of a Retail Tobacco Business (RTB) within an existing entertainment establishment of a commercial nature with video lottery facility uses in accordance with Section 27-548.01.04 of the Zoning Ordinance.

RECOMMENDATION: **APPROVAL with conditions**

NOTE:

The Planning Board has scheduled this application on the consent agenda for transmittal to the Zoning Hearing Examiner on the agenda date of November 8, 2018.

You are encouraged to become a person of record in this application. The request must be made in writing and addressed to the Prince George's County Office of the Zoning Hearing Examiner, County Administration Building, Room 2184, 14741 Governor Oden Bowie Drive, Upper Marlboro, MD 20772. Questions about becoming a person of record should be directed to the Hearing Examiner at 301-952-3644. All other questions should be directed to the Development Review Division at 301-952-3530.

FINDINGS:

1. **Location:** The proposed use is located within an existing building on Parcel 4-A, known as the MGM-National Harbor Casino. The site is comprised of 23.0635 acres of land in the Mixed Use-Transportation Oriented (M-X-T) Zone. The subject site is generally located approximately one mile northeast of the Woodrow Wilson Bridge, in the southwest quadrant of the intersection of I-95/495 (Capital Beltway) and MD 210 (Indian Head Highway), in Planning Area 80 and Council District 8. The tract is south of I-95/495 and west of Oxon Hill Road, with frontage on MGM National Avenue to the south. The subject site is on an elevated plateau overlooking the waterfront entertainment/retail complex portion of National Harbor.
2. **History and Previous Approvals:** The subject site is a part of the larger development known as National Harbor, which has a long approval history and consists of two major land areas; the “Waterfront Parcel” and the “Beltway Parcel.” The subject site is part of the Beltway Parcel, which is defined as Parcels 1, 2, 3, 4-A, 5, 6, and 7. All M-X-T-zoned properties within the National Harbor development were rezoned through eight zoning map amendments approved in the 1980s and 1990s.

The Beltway and Waterfront Parcel areas were originally zoned Rural Residential (R-R) when it first became subject to the zoning authority in 1957. On July 12, 1983, the subject property was rezoned to M-X-T via Zoning Map Amendments A-5635-C and A-5636-C. Zoning Map Amendment A-5635 originally requested to rezone 79 acres of R-R property to R-H property in 1967. This proposal was amended to rezone 66.55 acres of R-R property to M-X-T property in 1983. Concurrently, Zoning Map Amendment A-5636 originally requested to rezone 14.07 acres of R-R property to C-2 property. Both subject applications were later consolidated with applications A-5619, A-5620, A-5621, creating a comprehensive concept plan, A-9433 subject to 20 conditions, permitting the comprehensive rezoning of the land area included in A-9433 to M-X-T on July 12, 1983. This comprehensive plan was later amended on October 7, 1988 by the Prince George’s County District Council. The conditions of amended Zoning Map Amendment A-9433 do not affect this development proposal. The 1984 *Approved Subregion VII Master Plan and Sectional Map Amendment* classified the overall property within the Beltway Parcel as M-X-T zoning.

This site is subject to Conceptual Site Plan CSP-98012, which was approved by the District Council on June 10, 1998, subject to 35 conditions. The conditions do not affect the review of this special exception (SE).

An amendment to the CSP, CSP-98012-01, was approved by the Planning Director on September 4, 2008. This amendment revised the zone boundaries of the Waterfront Parcel as allowed by Note 1 of the parent CSP. A second amendment to the CSP, CSP-98012-02 (PGCPB Resolution No. 15-117) was approved by the Prince George’s County Planning Board on November 5, 2015, adding 3.14 acres of land to the Waterfront Parcel.

Subsequently, Preliminary Plan of Subdivision (PPS) 4-01048 (PGCPB Resolution No. 01-163(C)(A)) for the subdivision of 534 acres into 98 lots and 8 parcels was approved by the Planning Board on July 26, 2001, subject to 32 conditions. The following PPS conditions, in **boldface** type, are applicable to this SE, followed by staff comment:

11. ***[Total development within the Beltway Parcel of the subject property shall be limited to the following:**

- a. **200,000 square feet of retail space.**
- b. **1,220,000 square feet of general office space.**
- c. **850 hotel rooms.**
- d. **A visitors' center.**

Alternatively, other permitted uses which generate no more than 2,702 AM peak hour trips and 2,565 PM peak hour trips.]

Total development within the Beltway Parcel of the subject property shall be limited to the following:

- a. **200,000 square feet of retail space.**
- b. **443,000 square feet of general office space.**
- c. **850 hotel rooms.**
- d. **A visitors' center.**

***Denotes amendment**

Underlining indicates new language

[Brackets] indicates deleted language

Alternatively, other permitted uses which generate no more than the number of peak hour trips (1,226 AM peak hour trips and 2,565 PM peak hour trips) generated by the development shown on the currently approved Conceptual Site Plan SP-98012 may be allowed. Upon the modification of said conceptual plan (or approval of a succeeding application), the above level of development may be modified to allow the above uses, except that a maximum of 1,220,000 square feet of general office space may be allowed (or other uses generating no more than 2,702 AM and 2,565 PM peak hour vehicle trips).

The proposed use of an Retail Tobacco Business (RTB) does not seek to amend the 200,000-square-foot cap on retail development as approved by this condition. Pursuant to an e-mail from the Transportation Planning Section (Burton to Cannady II) dated September 20, 2018, staff finds that given the proposed use will be contained within the confines of an existing facility, no additional vehicular trips are anticipated.

On September 27, 2005, the Prince George's County Council adopted Council Bill CB-20-2005 amending the definition of a waterfront entertainment/retail complex, to permit residential uses.

In April of 2006, the *Approved Master Plan and Sectional Map Amendment for the Henson Creek-South Potomac Planning Area* (Henson Creek-South Potomac Master Plan and SMA) retained the subject site in the M-X-T Zone. Detailed Site Plan DSP-07073 was approved by the Planning Board on July 9, 2009 (PGCPB Resolution No. 09-114) for 39.4 acres of land, which included the subject property.

There have been several amendments to DSP-07073. A summary of all amendments are included within the backup of this technical staff report. Specifically, DSP-07073-01 approved the existing development on the subject property. The DSP-07073 conditions of approval, including condition of subsequent revisions, do not affect the review of this SE.

Currently, the subject property is known as Parcel 4-A, recorded in Plat Book SJH 243-61, approved by the Planning Board on November 20, 2015.

The following final plat note, in **boldface** type, is applicable to this SE, followed by staff comment:

5. **Total development of the National Harbor Subdivision, pursuant to approval of Conceptual Site Plan SP-98012, Preliminary Plan of Subdivision 4-01048 and enactment of Council Bill 20-2005, shall include 2,600,000 square feet of retail, dining and entertainment development, 200,000 square feet of conference center, 3,600 hotel rooms, 443,000 square feet of general office space, visitors' center (collectively, 7.34 million square feet) and 2,500 Waterfront Parcel residential dwelling units or such other alternative uses that generate no more than 5,775 AM and 5,699 PM peak-hour vehicle trips. The development is premised on the satisfaction of the transportation conditions expressed in Condition Nos. 13, 14, 15, 16 and 19 of the corrected amended resolution of Preliminary Plan of Subdivision 4-01048.**

The proposed retail space located within the MGM Casino is within the previously approved 2,600,000 square feet of retail development permitted pursuant to approval of Conceptual Site Plan SP-98012, PPS 4-01048, and enactment of Council Bill 20-2005. The retail space is located on the lower main casino level which includes other retail and restaurant uses within the MGM National Harbor Casino. There is an escalator that guests use to access the atrium or second level gaming floor. Excluding the hotel and four parking levels located below the casino, there are two casino or gaming floor levels. All gaming, restaurant, and retail uses are only accessible from the interior of the MGM National Harbor Casino. There is no direct exterior access to gaming, restaurant, or retail uses. In addition, pursuant to an e-mail from the Transportation Planning Section (Burton to Cannady II) dated September 20, 2018, staff finds that given the proposed use will be contained within the confines of an existing facility, no additional vehicular trips are anticipated.

3. **Neighborhood and Surrounding Uses:** The general neighborhood is bounded to the north by I-95/495 (Capital Beltway), MD 210 (Indian Head Highway) to the east, Broad Creek to the south, and the Potomac River to the west. The immediate uses surrounding the subject property are as follows:

North— MGM National Avenue and Capital Beltway (I-95) – The land across I-95/495 from the Beltway Parcel is occupied by the Oxon Hill Children’s Farm, owned by the National Park Service, located within the Reserved Open Space (R-O-S) Zone.

South and West— MGM National Avenue and various roadways and highway access ramps – Across said road are lands owned by The Maryland-National Capital Park and Planning Commission (M-NCPPC), Betty Blume Neighborhood Park, and the grounds of Oxon Hill Manor.

East— Existing surface parking in the M-X-T Zone, to be redeveloped with a 1,271,000-square-foot, 17-story, mixed-use building in accordance with the approval of DSP-07073-02 for the Beltway Parcel.

4. **Request:** The establishment of an RTB within an existing entertainment establishment of a commercial nature with video lottery facility uses. More specifically, the applicant is proposing one 2,038-square-foot space for the retail sale and consumption of tobacco products, to be limited to 1,145.5 square-feet of gross floor area (56.2%), with a food and beverage component, to be limited to 892.5 square-feet of gross floor area (43.8%).

5. **Development Data Summary:**

	EXISTING	PROPOSED
Zone(s)	M-X-T	M-X-T
Use(s)	Commercial/Retail/Entertainment Establishment	Retail Tobacco Business (Retail)
Acreage	23.0635 (Parcel 4A)	23.0635 (Parcel 4A)
Parcels	1	1
Gross Floor Area	2,038 sq. ft. (Retail)	2,038 sq. ft. (RTB)
Lots	0	0

6. **Required Findings:** Section 27-317(a) of the Prince George’s County Zoning Ordinance provides that:

(a) **A Special Exception may be approved if:**

- (1) **The proposed use and site plan are in harmony with the purposes of this Subtitle.**

The purposes of Subtitle 27 of the Prince George’s County Code, as set forth in Section 27-102(a)(1) through (15) of the Zoning Ordinance, are generally to protect the health, safety, and welfare of the public; to promote compatible relationships between various land uses; to guide orderly development; and to ensure adequate public facilities and services. Specific to the M-X-T Zone, as set forth in Section 27-542(a) of the Zoning Ordinance, the purposes relate to promoting the orderly development and redevelopment of land in the vicinity of major interchanges, major intersections, major intersections, major transit stops, and designated General Plan Centers so that these areas will enhance the economic status of the County; create compact, mixed-use, walkable communities enhanced by a mix of residential, commercial, recreational, open

space, employment, and institutional uses. As outlined in the applicant's statement of justification (SOJ) dated June 7, 2018, adopted herein by reference, with the recommended conditions, staff finds that the uses and the site plans, as proposed, are in harmony with the purposes of this Subtitle.

(2) The proposed use is in conformance with all the applicable requirements and regulations of this Subtitle.

As outlined within this technical staff report, this application has demonstrated conformance with the requirements and regulations of the Zoning Ordinance.

(3) The proposed use will not substantially impair the integrity of any validly approved Master Plan or Functional Master Plan, or in the absence of a Master Plan or Functional Map Plan, the General Plan.

The subject site was rezoned to the M-X-T Zone through several zoning map amendment applications. The proposed use is a permitted use in the zone at the location proposed which is interior to an existing 1,078,237-square-foot facility. The retail store is accessed from the interior of the existing building with no separate direct access from the exterior of the building.

The Henson Creek-South Potomac Master Plan and SMA retained the subject site in the M-X-T Zone. The previously approved CSP for the larger development, including the Beltway Parcel, specifically defines a mix of retail, commercial office, hotel, and a visitor's center.

The Beltway Parcel was envisioned in the CSP as a high-density urban environment with 725,000 square feet of retail space, 200,000 square feet of general office space, 1,000 hotel rooms, and a 50,000-square-foot visitor's center, or other uses not exceeding the designated trip cap. At the time of PPS, the plan called for the same mix of uses, but with an increase in the amount of office space (to 443,000 square feet) and a reduction in retail space (to 200,000 square feet) and hotel rooms (850). The current MGM-National Harbor Casino is developed as a landmark building, fulfilling the vision of a high intensity development that was intended when the property was placed in the M-X-T Zone. Per the applicant's SOJ, the proposed RTB is proposed for the convenience of the MGM-National Harbor Casino patrons.

The subject property is located within the National Harbor Regional Transit District. The 2014 *Plan Prince George's 2035 Approved General Plan's* defined Regional Transit Districts as "high-density, vibrant, and transit-rich mixed-use areas envisioned to capture the majority of future residential and employment growth and development in the County" (page 106).

The master plan recommends mixed-use land uses on the subject property. The request for an RTB use within the existing MGM-National Harbor Casino is not inconsistent with the purposes and standards of the M-X-T Zone, as well as the master plan.

Staff finds that this application for the establishment of a RTB located within the interior of the MGM-National Harbor Casino, will not substantially impair the integrity of the Henson Creek-South Potomac Master Plan and SMA.

(4) The proposed use will not adversely affect the health, safety or welfare of residents or workers in the area.

The applicant's SOJ, dated June 7, 2018, highlights the instillation of a high-volume heating, ventilation, and air conditional system (HVAC) specifically designed for the RTB, in which the HVAC is designed with capacities in accordance with Chapter 4 and 5 of the International Mechanical Code for Smoking Lounges located in Retail Stores and Public Spaces pursuant to Subtitle 4 of the County Code. Per the applicant, a critical component of the HVAC system is that it provides the proper percentage exchange of the room's air with outside air that is either heated or cooled to match the ambient temperature of the room. The proposed HVAC system will meet the dual purpose of providing a smoking venue for patrons, while also affording an environment of clean fresh air. As stated within the discussion portion of this report, Subtitle 4 will regulate appropriate ventilation to be reviewed at the time of permit.

None of the responses from any of the referral agencies received by staff indicate that the proposed establishment of an RTB located within the interior of the MGM-National Harbor Casino, subject to specific conditions, will adversely affect the health, safety, or welfare of residents or workers in the area.

(5) The proposed use will not be detrimental to the use or development of adjacent properties or the general neighborhood.

The Henson Creek-South Potomac Master Plan and SMA recommends mixed-use land uses for the subject property. The subject use is located within the existing MGM National Harbor Casino site within the Beltway Parcel at National Harbor.

The MGM National Harbor Casino parcel does not abut existing residentially-zoned neighborhoods and is more than 550 feet from residential development. The subject site, which has a long and narrow configuration is surrounded by roadways and highways.

This SE is for a 2,038-square-foot RTB use within the interior of the 1,078,237-square-foot MGM National Harbor Casino. The application will be subject to the requirements of Subtitle 4 of the County Code, to ensure proper ventilation of the retail space. The operational compliance to Subtitle 4 will be determined by the Prince George's County Department of Permitting, Inspections and Enforcement at the time of permitting.

Staff finds that the proposed use of a 2,038-square-foot RTB within the interior of the 1,078,237-square-foot MGM-National Harbor Casino will not be detrimental to the use or development of adjacent properties or the general neighborhood.

(6) The proposed site plan is in conformance with an approved Tree Conservation Plan.

The site has an approved Type II Tree Conservation Plan, TCPII-023-01-03, and was grandfathered from the natural resources inventory process because it has an associated PPS that was approved prior to September 2010. The site is entirely developed, and the proposed application area is inside the existing MGM National Harbor Casino, allowing the proposed site plan to remain in conformance with the approved TCPII. No revision to the TCPII is proposed with this application.

(7) The proposed site plan demonstrates the preservation and/or restoration of the regulated environmental features in a natural state to the fullest extent possible in accordance with the requirement of Subtitle 24-130(b)(5).

There is no proposed exterior site work or grading associated with the proposed RTB; therefore, this standard does not apply. This site has an approved Type II Tree Conservation Plan, TCPII-023-01-23, which was originally approved with Conceptual Site Plan CSP-98012 and Detailed Site Plan DSP-07073, respectively. The approved TCPII shows the site cleared of all woodland with an off-site woodland conservation requirement of 17.39 acres.

7. Specific Special Exception Requirements:

Section 27-415.01. Tobacco shops, electronic cigarette shops or a retail tobacco business.

(a) Tobacco shops, electronic cigarette shops, or a retail tobacco business may be permitted by Special Exception, subject to the following:

(1) The structure in which the use is proposed shall be located at least three hundred (300) feet from any school, library, park, recreational facility, and historic site, resource, or district identified on any applicable Historic Site and District Plan, a National Register Site, or an Historic District. This provision shall not apply to a Retail Tobacco Business within a Recreational or Entertainment Establishment of a Commercial Nature with Video Lottery Facility uses in accordance with Section 27-548.01.04 of this Subtitle.

The MGM-National Harbor Casino's Detailed Site Plan (DSP-07073-01) was approved by the Planning Board (PGCPB Resolution No. 14-36) on June 9, 2014, and affirmed by the District Council on July 14, 2014, as an entertainment establishment of a commercial nature with a video lottery facility. Therefore, the above referenced standard does not apply to the proposed RTB application.

(2) In its final decision to approve a Special Exception for the use, the Council may impose other reasonable requirements deemed necessary to safeguard the health, safety, morals, and general welfare of the community, taking into account the character of surrounding properties and the general neighborhood, and any other uses on the subject property.

As stated within the applicant's SOJ dated June 7, 2018, the applicant will comply with any requirements deemed necessary by the Council to safeguard the health, safety, morals, and general welfare of the community, taking into account the character of surrounding properties and the general neighborhood, and any other uses on the subject property.

- (3) **No Special Exception shall be permitted for a tobacco shop, electronic cigarette shop, or a retail tobacco business located within 2,000 feet of another tobacco shop, electronic cigarette shop, or a retail tobacco business.**

The subject application complies with this standard. The closest tobacco retailer identified as being proximate to the front entrance to the MGM-National Harbor Casino is identified as "Tobacco Land - Tobacco Shop," located approximately 5,550 feet northeast at 6259 Livingston Road, Oxon Hill, Maryland 20745.

8. **Zone Standards:** The applicant's proposal for the establishment of an RTB within a specialty designed venue located within the interior of MGM-National Harbor Casino complies with the requirements of Section 27-542(a), M-X-T Zone (Mixed Use-Transportation Oriented, of the Zoning Ordinance. This proposal is in compliance with the requirements of Section 27-542 of the Zoning Ordinance.
9. **Parking Regulations:** In accordance with the parking and loading regulations contained in Section 27-574 of the Zoning Ordinance, the number of parking spaces required in the M-X-T Zone were calculated by the applicant and submitted for Planning Board approval at the time of DSP approval. Previously approved Detailed Site Plan DSP-07073-11 shows a requirement of 4,599 parking spaces, which includes 58 handicap spaces (8 van-accessible), and 5 loading spaces. The subject property continues to provide 4,705 parking spaces, which includes 70 handicap spaces (8 van-accessible), and 5 loading spaces as approved on DSP-07073-11. The use is replacing a previous retail use and this use generates the same demand on parking. Therefore, there is no change to the required number of parking spaces.
10. **2010 Prince George's County Landscape Manual Requirements:** The subject application, which does not propose a structural change of the MGM-National Harbor Casino, remains in conformance with the landscape plans approved with DSP-07073, and subsequent revision, and Alternative Compliance AC-14005.
11. **Tree Canopy Coverage:** The project is not subject to the requirements of Subtitle 25, Division 3, The Tree Canopy Coverage Ordinance, because the passage of Council Bill CB-19-2013 amended Section 25-127, Applicability, which now exempts the project as stated below:

(b) **Exemptions**

- (1) **The following are exempt from this Division:**

(J) **Properties in a commercial, industrial or mixed-use zone subject to a Detailed Site Plan or Specific Design Plan approved before September 1, 2010 or maintained an active grading permit since September 1, 2010.**

The subject property is located a mixed-use zone and the applicable Detailed Site Plan (DSP-07073) was approved prior to September 1, 2010, qualifying the project for the exemption delineated above.

12. **Signage Regulations:** The subject application does not include any proposed signage.
13. **Referral Comments:** The following referrals were received and are incorporated herein by reference; all of the comments are addressed on the site plan, or as part of this technical staff report:
 - a. Environmental Planning Section dated August 23, 2018 (Schneider to Cannady II)
 - b. Permit Review Section dated August 16, 2018 (Gallagher to Cannady II)
 - c. Special Projects Section dated August 21, 2018 (Mangalvedhe to Cannady II)
 - d. Community Planning Division dated September 5, 2018 (Zamore to Cannady II)
 - e. Transportation Planning Section dated September 21, 2018 (Burton to Cannady II)
 - f. Prince George's County Department of Permitting, Inspections and Enforcement (Formukong to Cannady II)
14. **Discussion:**

Section 27-107.01. – Definitions.

(202.1) Retail Tobacco Business: A retail store where the primary use is the retail sale of tobacco products and tobacco smoking accessories which may include on site consumption in accordance with Section 19-131 of the County Code and the incidental sale of food and or beverage provided the gross floor area of the food and or beverage area does not exceed forty-nine percent (49%) of the gross floor area.

The floor plan prepared by the applicant's architect, Hamilton Anderson Associates entitled "Proposed Retail Tobacco Store Floor Plan" provides a breakdown of the gross floor area (GFA) within the RTB. The applicant is proposing the retail sale and consumption of tobacco products to be limited to 1,145.5 square feet of gross floor area (56.2%), and the food and beverage component to be limited to 892.5 square feet of gross floor area (43.8%) of the total 2,308-square-foot retail space. As mandated by the County Code, the applicant's proposal conforms to the requirement for the gross floor area of the food and beverage area to not exceed 49% of the gross floor area.

Section 19-131. - Smoking Prohibited.

- (a) **It shall be unlawful for any person to smoke or use an electronic cigarette in any eating and drinking establishment open to the public except as provided in (b) below.**
- (b) **Smoking is not prohibited by this Section in the bar and dining area of an eating and drinking establishment that:**

- (1) (A) **Is a club as defined in the State alcoholic beverages law and has a valid use and occupancy permit issued by the Department of Permitting Inspection and Enforcement;**
- (B) **Has an alcoholic beverages license issued to private clubs under the State alcoholic beverages law; and**
- (C) **Allows consumption of alcoholic beverages on its premises; or**
- (2) **Is licensed pursuant to Section 6-201(r)(13) of the State alcoholic beverages law.**

A valid alcoholic beverage license permitting the on-site consumption of beer, wine and liquor was issued in accordance with the State alcoholic beverages law by the State of Maryland on November 4, 2016 and has been successfully renewed in each year since. The applicant has provided a copy of the 2018 Facility Liquor License issued on March 29, 2018, with an expiration date of May 31, 2019 with the subject application.

- (c) **Use of an electronic cigarette is not prohibited by this section in a facility that has been awarded a video lottery operation license by the Maryland Video Lottery Location Commission under State Government Article, Title 9, Subtitle 1A.**

The MGM-National Harbor Casino is currently operating under video lottery operations in accordance with its valid license issued by the State of Maryland on December 8, 2016, with an expiration date of December 8, 2031. The applicant has provided a copy of the Video Lottery and Table Games Operations License issued by the State of Maryland with the subject application.

- (d) **Smoking is not prohibited by this Section in a retail tobacco business as defined by Section 27-107.01(a)(202.1) of the County Code, where a food and beverage area are incidental, provided that it complies with the standard for ventilation of such a facility as defined under Subtitle 4 of the County Code.**

The applicant is proposing the retail sale and consumption of tobacco products with an incidental food and beverage area. The applicant's SOJ, submitted on June 7, 2018, states the following: "According to mechanical designed prepared for the RTB by Hamilton Anderson Associates, the heating, ventilation, and air conditioning system (HVAC) is designed with capacities in accordance with Chapter 4 and 5 of the International Mechanical Code for Smoking Lounges located in Retail Stores and Public Spaces pursuant to Subtitle 4 of the County Code." A critical component of the HVAC system is that it provides the proper percentage exchange of the room's air with outside air that is either heated or cooled to match the ambient temperature of the room. Conformance with the building code requirements pursuant to Subtitle 4 will be evaluated at the time of building permit.

RECOMMENDATION

A special exception use is considered compatible with uses permitted by-right within the M-X-T Zone, as long as specific special exception criteria are met. Unless unique adverse impacts are identified, the special exception may be approved. The appropriate standard for determining whether the use would create an adverse impact upon surrounding properties is to show that the proposed use, at this particular location proposed, would not have adverse impacts above and beyond those inherently associated with the special exception use, regardless of its location within the M-X-T Zone.

Based on the applicant's statement of justification dated June 7, 2018, the analysis contained in the technical staff report, associated referrals, and materials in the record, the applicant has demonstrated conformance with the required special exception findings as set forth in Section 27-317 (in general) and Section 27-415.01, for tobacco shops, electronic cigarette shops or a retail tobacco business, of the Zoning Ordinance in this instance. Therefore, staff recommends approval of Special Exception SE-4807, MGM National Harbor Retail Tobacco Business, subject to the following conditions of approval:

1. Prior to the certification of the special exception, the site plan shall be revised as follows:
 - a. Edit General Note 16 to state "CSP-98012 Approved on 6/10/1998."
 - b. List the gross and net acreage of Parcel 4-A (gross/net) within the general notes.
 - c. List the gross floor area of the special exception use within the general notes.
 - d. Update the general plan notes to reflect the current information as approved under Detailed Site Plan DSP-07073-01.
2. The installation and maintenance of a sprinkler system that is NFPA 13 Standards for the Installation of Sprinkler Systems compliant to mitigate the fire risk.
3. The installation and maintenance of automated external defibrillators (AEDs) in accordance with Code of Maryland Regulations (COMAR) requirements (COMAR 30.06.01-05).

BRIAN E. FROSH
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CHIEF DEPUTY ATTORNEY GENERAL

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THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

February 12, 2019

The Honorable Benjamin F. Kramer
401 Miller Senate Office Building
Annapolis, Maryland 21401-1991

Dear Senator Kramer:

You have asked for advice concerning whether the Maryland Indoor Clean Air Act (“the Act”) permits a county to create limited exceptions to the restrictions in the Act. You have also asked whether the Act would permit smoking at a retail tobacco business which also sells food and beverages, including alcoholic beverages, and the proceeds from food and beverages account for up to 49% of the income of the retail tobacco business. It is my view that the Act does not permit a county to create exceptions to the Act. It is also my view that it is unlikely that the Maryland Department of Health (“MDH”) would conclude that a retail tobacco business that made almost 50% of its income from nontobacco sales would qualify for the exemption from the Act for retail tobacco businesses.

The Act prohibits smoking in an indoor area open to the public; an indoor place in which meetings are open to the public under the Open Meetings Act; a government-owned or government-operated means of mass transportation; or an indoor place of employment. Health-General Article (“HG”), § 24-504. It also prohibits smoking in an indoor place of employment. Labor and Employment Article, § 5-608(a). Subject to certain conditions, private homes, hotel rooms, retail tobacco businesses, other types of tobacco businesses or research or educational laboratories for the purpose of conducting scientific research into the health effects of tobacco smoke are not subject to the Act. HG § 24-505. The Act has a preemption provision that states that it does not preempt a county from “enacting and enforcing more stringent measures to reduce involuntary exposure to environmental tobacco smoke.” HG § 24-510. Finally, HG § 24-509 originally permitted a county health officer to grant a waiver from the application of specific provisions of the Act if the applicant for the waiver could show that compliance would cause undue hardship. Waivers were available only until January 31, 2011, however, and waivers that had already been granted terminated on that date. HG § 24-509(d).

State law preemption of local law can be express or implied or can arise from a conflict between the two. *Board of County Commissioners v. Perennial Solar*, 239 Md. App. 380, 386 (2018). Preemption by implication occurs when a local law deals with an area in which the legislature “has acted with such force that an intent by the State to occupy the entire field must be implied.” *Talbot County v. Skipper*, 329 Md. 481, 488 (1993). Conflict preemption arises where

a local government seeks to permit acts which State law prohibits or to prohibit acts that are permitted by a State statute. *County Council v. Montgomery Ass'n*, 274 Md. 52, 58 (1975).

In this instance, it is clear that an ordinance that creates an exception to the Act to allow smoking in places where it is barred by State law is in conflict with State law. It also seems clear that the Act, by effectively regulating smoking in all indoor places except those specifically exempted and by specifically permitting local regulation only when it is more strict than the Act shows an intent to occupy the entire field of indoor smoking regulation, thus foreclosing any local regulation that is less strict. Therefore, it is my view that the Act prevents a local government from creating exceptions to its requirements.

The exception for retail tobacco businesses applies where: (i) the primary activity is the retail sale of tobacco products and accessories; and (ii) the sale of other products is incidental. HG § 24-505(3). The term “incidental” has been defined as “subordinate to something of greater importance” or “having a minor role.” Black’s Law Dictionary, page 830 (9th ed. 2009). It also ordinarily refers to a thing that is related to the thing of greater importance. The online version of the Oxford Dictionary defines the term to mean: (1) Happening as a minor accompaniment to something else; or (2) Occurring by chance in connection with something else.¹ Thus, the Court of Appeals has held that practice time was a subordinate, ancillary consequence of being employed by a team to play in football games. *Pro-Football, Inc. v. McCants*, 428 Md. 270, 287 (2012). As an example, lending a car to a customer while repairing a car for the customer has been held to be incidental to the operation of a garage and thus covered by its insurance, *Henry ex rel. Weis v. General Cas. Co. of Wisconsin*, 593 N.W.2d 913, 918-919 (Wisc. App. 1999), while the sale of shotgun shells by a garage was found not to be incidental to the operation of the garage and not covered by its insurance, *Automobile Underwriters, Inc. v. Hitch*, 349 N.E.2d 271, 275 (Ind. App. 1976).

More on point, federal court cases interpreting the cabaret tax uniformly held that substantial income from food, refreshments, or merchandise would cause the loss of the tax exemption for ballrooms and dance halls.² *Stevens v. United States*, 302 F.2d 158 (5th Cir. 1962) (62.7% of revenue); *Luna v. Campbell*, 302 F.2d 166 (5th Cir. 1962) (60.8% of revenue); *Billen v. United States*, 273 F.2d 667 (10th Cir. 1960) (50% of revenue); *Landau v. Riddell*, 255 F.2d 252 (9th Cir. 1958) (47.11% of revenue); *Dance Town, U.S.A., Inc. v. United States*, 319 F.Supp. 634,

¹ <https://en.oxforddictionaries.com/definition/incidental>

² The Cabaret tax, since repealed, then provided: “In no case shall such term include any ballroom, dance hall, or other similar place where the serving or selling of food, refreshment, or merchandise is merely incidental, unless such place would be considered, without the application of the preceding sentence, as a ‘roof garden, cabaret, or other similar place.’” Internal Revenue Code of 1939, 26 U.S.C. § 1700(e)(1).

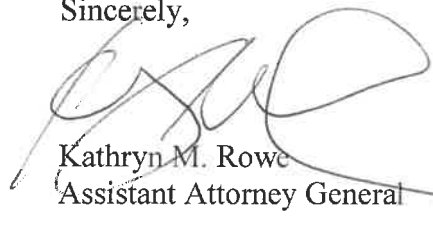
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635-636 (S.D. Tex. 1970) (45.1% of revenue); *Kantor v. United States*, 154 F.Supp. 58 (N.D.Tex.1956) (40% of revenue). In addressing this issue, the court in the Landau case said:

Can we say that as a matter of law almost 50% of the income from a business operation is 'merely incidental'? The mere asking of the question indicates that the answer must be 'no.'

While the interpretation of the Act is up to MDH, it is my view that it is unlikely that it would conclude that sales unrelated to the sale of tobacco totalling almost 50% of the revenue of a retail tobacco business would be considered "incidental."

Sincerely,



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