

100 EAST PRATT STREET
BALTIMORE MARYLAND 21202
410/752-9700
FAX 410/727-5460

WASHINGTON DC OFFICE
202/296-1642
FAX 202/828-4130

ATTORNEYS AT LAW

TYDINGS & ROSENBERG LLP

THOMAS M. WILSON, III
410/752-9708
twilson@tydingslaw.com

July 1, 2008

BY HAND DELIVERY

Baltimore City Health Department
210 Guilford Avenue
Baltimore, Maryland 21202
Attn: Rianna Brown

Dear Ms. Brown:

Enclosed please find the comments made on behalf of the Cigar Association of America, Inc., regarding the Proposed Regulation Banning the Sale of Single, Cheap Cigars in Baltimore City. The comments were requested by the Baltimore City Health Department May 28, 2008, for submission to you by 5:00 p.m. today.

Very truly yours,



Thomas M. Wilson, III
Counsel to the Cigar Association of
America, Inc.

TMW:pe/enc.

COMMENTS ON PROPOSED REGULATION
BANNING THE SALE OF SINGLE, CHEAP CIGARS IN BALTIMORE CITY

On Behalf of the
Cigar Association of America, Inc.

July 1, 2008

Thomas M. Wilson, III
Franklin M. Lee
Tydings & Rosenberg LLP
100 East Pratt Street, 26th Floor
Baltimore, Maryland 21202
(410) 752-9700

Kellie L. Newton
McKenna Long & Aldridge LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500

Counsel for Cigar Association of
America, Inc.

I. INTRODUCTION

The Cigar Association of America, Inc., and its members (“CAA”) submit these comments in response to the Proposed Regulation Banning the Sale of Single, Cheap Cigars in Baltimore City (the “Proposed Regulation”), issued by the Baltimore City Health Department and proposed for adoption by the Baltimore City Health Commissioner (the “Commissioner”).¹

CAA believes that there are substantial legal and practical flaws in the Proposed Regulation. First, the CAA believes that the Proposed Regulation is legally invalid under Maryland law as expressed by the Maryland Court of Appeals because it exceeds the authority granted to the Commissioner by the underlying ordinance (the Health Code of Baltimore City). *Mayor and City Council of Baltimore v. William E. Koons, Inc.*, 270 Md. 231 (1973). Second, the Proposed Regulation is not likely to achieve its stated purpose, but will instead deprive adult consumers of a legal product, and local businesses of revenue generated by sales of these products. For these and other reasons discussed herein, the CAA believes that the Proposed Regulation is invalid and should not be adopted.²

¹ The CAA is a national trade association comprised of cigar manufacturers, importers, distributors, and major suppliers to the cigar industry. The CAA’s members include companies that manufacture, distribute, import, and sell the vast majority of cigars sold in the United States today. The major manufacturing members of the CAA are Altadis, USA, Inc., Swisher International, Inc., Swedish Match North America, and Lane Ltd.

² The “Background” section of the Proposed Regulation Packet is replete with factual mistakes, mischaracterizations, incorrect assumptions, and statements without supporting authority. For example, a cigar is not “defined” by its wrapping (p. 1); cigars have a number of defining characteristics, most notably (according to the federal government) the type of tobacco used in the filler. Similarly, “little cigar” is a federally created and recognized tax classification, defined most prominently (again) by the type of tobacco used in the filler, and by weight; little cigars are not (as the Proposed Regulation suggests) “brown cigarettes.” In these comments, however, the CAA focuses primarily on the Commissioner’s clear lack of authority to promulgate the Proposed Regulation, but reserves the right to address these issues at a later, more appropriate time.

II. DISCUSSION

a. The Purported Legal Authority

As authority for the Proposed Regulation, the Commissioner relies on § 2-104(2) of the Baltimore City Health Code (“Health Code”), which charges the Commissioner with responsibility for the “prevention of disease . . . and nuisances affecting public health,” and § 2-105(5), which charges him or her with the duty “to remove and abate [those] nuisances.” In addition, and more specifically, the Commissioner relies on the rulemaking authority granted by § 2-106 in seeking to ban the sale of “single, cheap cigars” as a nuisance and a public health hazard.³ The Commissioner’s claim of authority is invalid because (1) “single, cheap cigars” do not constitute a nuisance, and (2) the Commissioner has failed to follow the specific instructions in the Health Code regarding responsibilities for when he or she suspects a health hazard.

1. “Single, cheap cigars” are not a “nuisance” within the meaning of the Health Code.

The Health Code both defines a “nuisance,” *id.* § 5-101(b), and specifies the procedure for its abatement, *id.* §§ 5-201 through 5-210. The entirety of Title 5 (“Nuisance Control”) of the Health Code makes clear that the nuisances it addresses are *conditions* that affect *property*. For example, the Commissioner’s duties with respect to nuisances are to “inspect[] all property in the City . . . to discover nuisances,” *id.* § 5-102(1), and to remove “all nuisances so discovered,” *id.* § 5-102(2). When such an inspection discloses “a nuisance or potential nuisance, Subtitle 2 [Nuisance Abatement-Generally] authorizes the Commissioner to issue a written notice” to the “person in charge of the property on which the condition exists,” *id.* § 5-202(1); “from which the condition originates,” *id.* § 5-202(2); or “that fronts on the street in which the condition exists,”

³ “Cheap” is defined as a wholesale price of \$2.00 or less per cigar. A cigar that sells at wholesale for \$2.00 will sell at retail for approximately \$3.50.

id. § 5-202(3).⁴ In sum, under the express language of the Baltimore Health Code, “single, cheap cigars” cannot be considered a nuisance.

Courts have recognized the principle that nuisance ordinances are intended to apply to real property, and not to the lawful sale of legal products. For example, Camden County, New Jersey, sued various manufacturers of handguns, claiming that their products were marketed and distributed in a manner that constituted a public nuisance. *See Camden County Board of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536 (3d Cir. 2001). In affirming the district court’s dismissal of the complaint, the Third Circuit observed that “[t]raditionally, the scope of nuisance claims has been limited to interference connected with real property or infringement of public rights.” *Id.* at 539. Reasoning that the word nuisance ““has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie,”” *id.* at 540 (quoting W. Page Keeton et al., *Prosser and Keeton on Torts* § 86 at 617-18 (5th ed. 1984)), the court noted that “no New Jersey court has ever allowed a public nuisance claim to proceed against manufacturers for lawful products that are lawfully placed in the stream of commerce,” *id.*

In the same vein, the Maryland Court of Appeals has opined that it “fail[s] to see how the solicitation or conduct of a legitimate mercantile business or trade can be resolved into a health, safety, or general welfare regulation” by a town ordinance’s labeling it a nuisance. *Jewel Tea Co. v. Town of Bel Air*, 172 Md. 536, 540 (1937). The Proposed Regulation--which labels as a nuisance the lawful placement of lawful products in the lawful stream of commerce based solely on the quantity of products in a package and the wholesale price of those products--does not even possess the authority of an ordinance. Indeed, the Maryland Court of Appeals has observed that

⁴ Moreover, any “notice issued under [that] subtitle must: (2) specify the law being violated.” *Id.* § 5-203(2). Manifestly, “the law” so specified must be part of the Health Code, not a regulation purporting to help enforce it.

not even the General Assembly has the “power to declare arbitrarily and capriciously any or every act a nuisance.” *Adams v. Commissioners of Town of Trappe*, 204 Md. 165, 174 (1954).

Stated most directly, there is no way that the sale of “single, cheap cigars” qualifies as a “condition” that adversely affects “property.” Accordingly, such transactions cannot constitute a nuisance as that term is used in the underlying ordinance--the Health Code.

2. The promulgation of a regulation is not the Health Code’s required remedy for a suspected health hazard.

In addition to declaring that “single, cheap cigars” are a nuisance, the Commissioner also deems them to be a health hazard for which there is no present remedy in the Health Code. There is no basis for the Commissioner’s conclusion that the purported facts referenced at page 6 constitute a health hazard under the Health Code.⁵ Assuming for the sake of argument, however, that the Commissioner’s representation has some merit, the Commissioner’s solution--the Proposed Regulation--violates the express language of the city Health Code. The Health Code explicitly provides that “in the absence of a law needed to correct a health hazard, [the Commissioner] is to report and recommend to the Mayor any extraordinary action needed.” Health Code § 2-105(3).

Rather than following the dictates of § 2-105(3), the Commissioner has instead opted to promulgate a regulation pursuant to § 2-106(a) to deal with the perceived health hazard. But § 2-106(a) only allows the Commissioner “to adopt and enforce . . . regulations to carry out this [Health Code] article,” and banning the sale of “single, cheap cigars” is most certainly no part of that article. If the Commissioner believes that the sale of “single, cheap cigars” really presents a

⁵ The Proposed Regulation contends that “single, cheap cigars pose a public health hazard” for three reasons: “First, their low cost makes them more accessible to young people. Second, health warnings are not included in purchase. Third, they compete favorably with higher cost cigarettes . . .” As with other factual misstatements in the Proposed Regulation, the CAA reserves the right to address them at a later, more appropriate time.

health hazard, then the Commissioner’s sole remedy is to recommend that the Mayor take some extraordinary action, not to propose an invalid regulation to carry out a provision found nowhere in the Health Code. As the Maryland Court of Appeals observed in *Koons*,

‘[legislation may not be enacted by an administrative agency [there, a committee created to enforce the Baltimore housing code; here, the Commissioner] under the guise of its exercise of the power to make . . . regulations by issuing a . . . regulation which is inconsistent or out of harmony with, or which alters, adds to, extends or enlarges, subverts, or impairs, limits, or restricts the act being administered.’

Koons, 270 Md. at 237 (quoting 1 Am. Jur. 2d Administrative Law § 132 (1962)). The Health Code contains no provision that addresses “single, cheap cigars.” A regulation that would ban their sale clearly and impermissibly “adds to, extends, or enlarges” that code.

That the Proposed Regulation would enlarge the duties of the Commissioner, as contrasted to assisting him or her in carrying out existing duties, is manifest from its text. Without exception, each time the Proposed Regulation refers to itself it uses the word “subtitle,” rather than “regulation.” Specifically, the “subtitle” label is employed five times in three sections of the five-section Proposed Regulation (*see* Proposed Regulation §§ C(1), C(2), D(1), D(2), and E), while the word “regulation” is never employed. It seems evident that the Proposed Regulation was drafted as a proposed subtitle of Title 12 (“Tobacco Products”) of the Health Code, rather than as a proposed regulation. That legislative function may only be performed by the Baltimore City Council, not the Commissioner. *Koons*, 270 Md. at 237.

b. The Ineffectiveness of the Proposed Regulation

Even if the Proposed Regulation could be lawfully adopted, there is no record on which to conclude that it would achieve its stated goal of discouraging cigar smoking by “underage youth” and “young people older than 18.” Proposed Regulation Packet at 9.

As to “underage youth,” the Proposed Regulation adds nothing. Subtitle 5 of the Health Code (“Distribution to Minors”) flatly prohibits the distribution of “tobacco products” to minors. *See* § 12-502(a). Further, the term “tobacco products” is defined by § 12-501(c)(2)(ii) as including any “cigar.” Thus, if subtitle 5 of title 12 of the Health Code were enforced by the Commissioner, cigar purchases by underage youth would not be a problem.

With respect to “young people older than 18,” it seems highly unlikely that the Proposed Regulation would effect them at all. That is because the Proposed Regulation neither prohibits nor discourages such a young adult from patronizing those “retail tobacco establishments,” Proposed Regulation § C(1), that are expressly exempt from the Proposed Regulation. Indeed, the only effect that the Proposed Regulation would be likely to have on “young people older than 18” would be to steer them toward either an exempt tobacconist in Baltimore City, a retailer outside the city limits, or any number of other sources should they desire to purchase a single cigar having a wholesale price of \$2.00 or less. Proposed Regulation § C(2).

To be sure, the adoption of the Proposed Regulation would likely do little more than ensure both expensive litigation and substantial confusion and disruption in the Baltimore retail tobacco market. In addition to extraterritorial and other constitutional issues under federal law and state law,⁶ its imprecise drafting ensures that, in its present form, the Proposed Regulation would not even apply to the sale of “single, cheap cigars.”⁷

But even if the legal hurdles were overcome and the drafting problems were corrected, it is still highly unlikely that the Proposed Regulation would come close to approaching its goal.

⁶ To the extent that § B(1) purports to prohibit a Baltimore retailer from purchasing cigars in packages of less than five in transactions that take place wholly outside Maryland, it is extraterritorial in application and thus a violation of the so-called “dormant” Commerce Clause. *See e.g., Healy v. The Beer Institute*, 491 U.S. 324, 336 (1989).

⁷ Each subsection of section B of the Proposed Regulation proscribes the sale of a “package of cigars.” Because it is literally impossible for one cigar to constitute a “package of cigars,” section B does not ban the sale of “single, cheap cigars.”

The Proposed Regulation alleges that the “low cost” of certain cigars makes them more accessible to young people. The Proposed Regulation, however, does not (and, of course, cannot) raise the price of a cigar. A cigar that costs \$1.00 at retail if sold individually will still cost \$1.00 (or maybe less) in a pack of five. It defies logic to argue that, to discourage use of a product, Baltimore should force people to buy more of that product. Indeed, there is no record that such an approach works. What is clear is that the Proposed Regulation will deprive adult consumers of a legal product, and retail establishments of the revenue derived from the sale of such products.

III. CONCLUSION

For the reasons stated in these Comments, CAA respectfully submits that the Proposed Regulation is legally invalid, practically ineffective, and, accordingly, should not be adopted.