

# CITY OF OAKLAND

## AGENDA REPORT

2007 JUN 12 09:40

**TO:** Office of the City Administrator  
**ATTN:** Ms. Deborah Edgerly  
**FROM:** Office of the City Administrator, Special Activity Unit  
**DATE:** June 12, 2007

**RE: Adopt An Ordinance Amending Oakland Municipal Code Chapter 8.30, "Smoking" To Prohibit Smoking At Bus Stops And Other Areas Where The Public Waits For Service, At Outdoor Dining Areas, Public Trails, Parks And Golf Courses, Family Childcare Centers, Common Areas In Multi-Unit Housing, Hotels And Motels, And The Oakland International Airport; Restrict Smoking Outside Bars; And Prohibit Smoking In Individual Units In New Multi-Unit Residential Buildings; Require New Rental Agreements To Disclose Nonsmoking Prohibitions; Deem Unconsented Exposure To Second Hand Smoke In All Multi-Unit Housing A Nuisance And Trespass**

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### SUMMARY

On December 12, 2006, at the request of the Public Safety Committee, the City Administrator presented a report and proposals for amendments to Oakland Municipal Code Chapter 8.30, Oakland's Smoking Ordinance and requested direction from the Committee. The Committee directed the City Administrator's Office to draft amendments to strengthen the protections against exposure to secondhand smoke. The Committee specifically requested provisions regarding the following:

- No smoking in service areas (bus stops, ATMs, ticket lines, cab stands)
- No smoking in outdoor dining areas
- No smoking on public trails and in public parks
- No smoking in common outdoor areas of multi-unit housing
- No smoking in licensed Family Childcare Centers

Following the Public Safety Committee meeting, Committee member Nancy Nadel heard concerns from constituents living in multi-unit housing and recommended staff include a provision restricting smoking in individual units of multi-unit housing. This proposal would only apply to new, not existing, housing. To address the problem of drifting secondhand smoke in existing multi-unit housing, a provision is proposed declaring nonconsensual exposure to secondhand smoke a nuisance. This option would provide protections for non-smokers in all multi-unit housing by facilitating abatement of the nuisance through private nuisance actions brought by private parties, not by City enforcement. These new provisions have been included for the Committee's consideration.

Item: \_\_\_\_\_  
Public Safety Committee  
June 12, 2007

## FISCAL IMPACT

The fiscal impacts of the proposed amendments fall into three categories: 1) Notification, outreach, and education, 2) signage, and 3) enforcement. Notification, education, and outreach can occur on an informal ad hoc basis, by providing information on the City's web site and to meetings of City-sponsored groups, neighborhood associations, etc., and on a formal basis by mailings to those affected by the amendments, or both. The cost of a mailing is estimated at less than \$2,000 if done in conjunction with the annual Business Tax mailing. The cost of notification by mailing is also detailed separately for each amendment in the Key Issues and Impacts section.

The cost of signage, at locations for which the City is responsible, is the most tangible cost of implementing the amendments to the ordinance. Those locations include bus stops (estimated cost of \$19,600) and City parks and trails (nominal cost if notification is done by adding no-smoking stickers to existing signs). Cost estimates for other options for these signs are included in the Key Issues and Impacts section of each proposed amendment.

The cost of enforcement would depend upon the volume of violations and the level of enforcement determined to be appropriate. Three City departments currently enforce the Smoking Chapter: 1) The City Administrator's Office, 2) the Oakland Police Department (OPD), and 3) the Nuisance Enforcement Unit. Violations of the ordinance are reported to the City Administrator's Office, where the City Administrator's designee sends a letter to the alleged violator. The letter attempts to educate the alleged violator on Oakland's law and their responsibility in upholding it. When appropriate, signs for the recipient to post are included with the letter. A subsequent report of violation results in a letter warning that further violations will be referred to the Oakland Police Department and to the City's Nuisance Enforcement Unit. A third complaint results in referral to OPD's Alcoholic Beverage Action Team (ABAT), which receives tobacco enforcement funding from the Alameda County Health Department. If OPD confirms the violation, they submit their report to the City's Nuisance Enforcement Unit, who then contacts the property owner regarding compliance.

The City Administrator's Office receives few calls reporting continued smoking non-compliance after sending the first letter and even fewer third calls requiring referral to OPD. Of a total of 53 complaints received in 2005 and 2006, only four locations were referred to OPD, based upon receiving three or more complaints. It is not anticipated that additional staff will be required for the enforcement of these amendments.

The total costs of notification, signage, and enforcement are expected to be absorbed within current departmental budget allocations.

## BACKGROUND

### ▪ **Secondhand Smoke**

Oakland's Smoking Pollution Control Ordinance, Oakland Municipal Code (OMC) Chapter 8.30, was adopted on July 29, 1986. It prohibits smoking inside enclosed places in the City of Oakland that are accessible to the general public, including places of employment, restaurants, and businesses. Further, a 2005 amendment to the ordinance mandates that smoking outside regulated buildings occur at a minimum distance of 25 feet from doors and windows.

Since 1986, a prodigious amount of research has proven the dangers of smoking and of secondhand smoke. Public understanding of these dangers has resulted in not only a significant decrease in the number of Americans that smoke but has also prompted numerous states and cities to adopt increasingly stronger measures to protect the health of children and non-smokers and to encourage smokers to quit. A list of facts and statistics regarding smoking and secondhand smoke, compiled from the work of both private and governmental organizations, is enclosed as *Attachment A*. This data provides strong support for the adoption of the amendments currently being proposed.

State law does not presently address the issue of outdoor smoking, but it authorizes local jurisdictions to do so. [California Labor Code Section 6404.5(i)]. Recently California cities have begun adopting more proactive laws regarding outdoor smoking and secondhand smoke issues. This legislative activity has been accelerated by the California Air Resources Board's 2006 designation of secondhand smoke as a toxic air contaminant, and the recent U.S. Surgeon General's Report that stated there is no safe level of exposure to secondhand smoke.

The declaration of secondhand smoke as a toxic air contaminant requires the state to analyze whether regulatory action is warranted. This analysis, which is currently being conducted, is a lengthy process, involving review of the scientific research, existing regulation, and potential changes. In the meantime, the protection of non-smokers from the dangers of secondhand smoke falls primarily to individual cities.

### ▪ **State Preemption of Some Smoking Issues**

Oakland's Smoking Pollution Control Ordinance preceded significant State action in this area by 8 years. In 1994 the California legislature passed Labor Code Section 6404.5, specifically prohibiting smoking in most enclosed workplaces and exempting a few specific business types. Some of the exemptions have since expired. For example, smoking was legal in bars until 1998.

Because Oakland's ordinance has had no major revisions since passage of the State law, the effect of the passage of Labor Code Section 6404.5 is that some of Oakland's provisions have become unnecessary and others have been preempted. Staff proposes removing the following sections of Oakland's current ordinance on the basis that California law now controls the regulations involved. Please refer to the proposed ordinance, where these sections (noted below) are in ~~strikethrough~~.

Definition of Restaurant	8.30.050D	8.30.050I
Definition of Semi-private Room	8.30.050E	8.30.060C
8.30.050A	8.30.050F	8.30.080A
8.30.050B	8.30.050G	8.30.080C
8.30.050C	8.30.050H	8.30.080E
		8.30.090B

## KEY ISSUES AND IMPACTS

### ➤ Smoking in Unenclosed (Outdoor) Areas

- ***No smoking in service areas (bus stops, ATMs, ticket lines, cab stands, venue entry lines, etc.) - Proposed Section 8.30.055A***

There are numerous reasons to prohibit smoking in service areas. Of course, any exposure poses a health risk to the public, particularly children and those with respiratory problems. Regarding specific types of service lines in Oakland, low-income residents disproportionately use busses and many school students take busses both to and from school and to after-school activities. At two previous Public Safety Committee meetings, students spoke eloquently about their frustration with regularly having to stand in clouds of smoke while awaiting busses and about the problem of potentially missing the bus if they have to move far enough away to avoid the smoke.

In all types of service lines -- for example movie, ATM, event venues, fast-food walk-up windows -- non-smokers have no alternative, other than leaving the line, to avoid the secondhand smoke of others in the service line. Additionally, since ashtrays may not be present or convenient, smoking in service areas usually creates litter.

Numerous other California cities have taken action in this area. Dublin and Emeryville ban smoking in all service areas, including bus stops. Berkley, Davis, the City of San Mateo, and San Francisco ban smoking at bus stops. Dublin, Fremont, Hayward, Livermore, Newark and Pleasanton ban smoking in service lines. Contra Costa County bans smoking at bus stops and in ATM lines.

The cost of implementation of a prohibition of smoking in service areas would be primarily the cost of signage and notification. Signage at bus stops would be the responsibility of the City. Oakland currently has 1,960 bus stops. The existing poles at bus stops are the property of AC Transit. Adding a sign to their pole would be the ideal approach, and AC Transit has written a letter of support for this approach, so long as the City bears the costs of the project and makes the signs to AC Transit's specifications. Public Works estimates the cost of 9 inch by 12 inch signs at approximately \$10 each for a total of \$19,600. Berkeley's approach was to paint the signs on the sidewalk, but Public Works history indicates that painted sidewalk signs last only approximately two years. For service lines involving private businesses, the signage responsibility would fall to the business owner.

In addition to the cost of signs, installing signs involves a labor component. Due to high priority projects already assigned to Public Works, such as street name sign replacement, installation of nearly 2,000 signs at bus stops could not be worked into the existing schedule in a timely fashion. Public Works staff has suggested the following approach to installing these signs. Because the priority focus of this amendment is the protection of children who take the bus to school, the bus stops serving schools would be identified. The Department would then enlist their eight sign personnel to work on a weekend basis to install the designated signs.

This approach would serve the purpose of protecting the youngest, most vulnerable residents first, allow time to evaluate the effectiveness of the placement and to make adjustments between installations, and provide information to accurately calculate the cost of completing the installation at all stops. According to the 2006-2007 Master Fee Schedule, the cost of sign maintenance workers on an overtime basis is \$64.80 per hour.

To ensure notification of all businesses with outdoor service areas or service lines, a mailing to all Oakland businesses would be necessary. The Business Tax Unit of Financial Services estimates there are 65,000 businesses in Oakland. The mailing house that does mailings for the Business Tax Unit estimates a separate one page mailing to 65,000 businesses would cost \$10,670. As noted in the Fiscal Impacts section, notification by inclusion in the annual Business Tax mailing is estimated at less than \$2,000. A less costly outreach to businesses could also be done through the Chamber of Commerce and the Business Alert Neighborhood Crime Prevention Council.

The cost of enforcement would depend upon the extent to which the City took proactive responsibility for enforcement. Where buildings are involved, such as movie theatres or banks, the existing complaint-driven process could be used. Complaints regarding lack of signage would be registered with the City Administrator's Office, resulting in the generation of an education letter, followed by a warning letter, and, finally, referral to ABAT and the Nuisance Enforcement Unit (NEU).

Enforcement against individual smokers would, of course, be problematic. With even the fastest police response, the violator may have already completed smoking or may have left the service area. Patrol officers, if trained on the ordinance, could issue citations upon observing violations. But, according to Serena Chen of the American Lung Association, most compliance with smoking laws has occurred through education and peer pressure. This would likely be the most effective and practical enforcement method in this case, as well.

- ***No smoking in outdoor non-residential dining areas, including workplace dining areas such as employee courtyards – Proposed Section 8.30.055B***

As with all of the proposed amendments, the major rationale for this amendment is that any exposure to secondhand smoke poses a health risk to employees and to the public, particularly those with respiratory problems. Additionally secondhand smoke negatively impacts the utilization or enjoyment of outdoor dining areas by non-smokers, who, as 84 percent of the adult California population, constitute the vast majority of the patrons. Finally, in spite of Oakland's

law that smokers must be at least 25 feet from doors and windows of work buildings, the City Administrator continues to receive complaints that secondhand smoke from outdoor dining areas drifts indoors through doors and windows to the otherwise protected indoor areas of restaurants.

San Ramon, Berkeley, Davis, Alameda County, Contra Costa County, Dublin, Emeryville, Newark, and Pleasanton ban smoking in outdoor dining areas.

The cost to the City of implementation of this amendment would consist primarily of the notification of affected businesses, which could be accomplished through inclusion in a general mailing, as discussed above regarding service areas, or through a special mailing to restaurants and bars. The Business Tax Unit maintains accounts for almost 1,200 registered eating places, and the mailing house estimates the cost of a mailing to this number of businesses at \$583.

The signage responsibility would fall, as it does currently, on the affected business. In the past, small businesses that require only a few signs have been able to obtain signs from Community Health Education Institute (CHEI), a non-profit that receives grants from the County Health Department. The Executive Director of CHEI has assured the City Administrator that CHEI will do everything possible to provide the necessary signs to businesses should this amendment pass.

The methods and cost of enforcement of this prohibition would be the same as those described above in the service areas discussion. On a complaint-driven basis, the City Administrator would send informational/warning letters to reported violating businesses. Multiple complaints would be referred to ABAT and NEU. As with the service area prohibition, the majority of enforcement would likely be by peer pressure.

▪ ***No smoking on public trails and public parks operated by the City – Proposed Section 8.30.055C***

In acknowledgement of the dangers to children from exposure to secondhand smoke, state law prohibits smoking tobacco products within 25 feet of tot lots and playgrounds.<sup>1</sup> While state law provides no comparable protections for adults in park areas, it explicitly authorizes local jurisdictions to adopt more restrictive measures.

As with the other proposed amendments, there are multiple rationales for adopting more restrictive measures for Oakland's parks and trails. In addition to interfering with the pleasurable use of outdoor City facilities by non-smokers, children should not be exposed to any level of secondhand smoke or to the behavior of smoking. In the case of parks and trails there is the added risk of fire, and the lack or sparseness of ashtrays and other trash receptacles on trails and in parks creates litter. Finally, state law bans only tobacco products at tot lots and playgrounds and does not restrict the use of cannabis. Oakland's definition of smoking, previously applicable only to enclosed spaces, has always included all combustible substances. Passage of this amendment would add the protection against use of all combustible substances in

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<sup>1</sup> Health and Safety Code Section 104495

City tot lots and playgrounds, as well as in parks and on trails. The proposed ordinance would allow for smoking in the parking lots associated with these facilities.

Other jurisdictions with smoking prohibitions in public outdoor areas include San Ramon (public trails), Livermore Area Recreation and Park District (public trails, sports fields, and other Park District facilities), Capitola (parks), Fresno (parks), San Francisco (parks and all areas open to the public, except golf courses), Contra Costa County (parks and public trails), and Emeryville (parks, playgrounds, and greenways). Hayward is also considering legislation in this area.

In the proposed amendment, golf courses are included in the definition of Recreational Area. As proposed, Section 8.30.055C does not provide an exemption that would allow smoking on Oakland golf courses.

According to the Public Works Agency, there are slightly more than 200 City parks. Approximately 120 of these are considered major parks, and approximately 75 percent of the major parks, including all parks with recreation centers or ball fields, have large "Park Rules" signs. These signs list the rules and the sections of Municipal Code that establish the rules. The Park Rules signs are usually added or replaced at parks only upon reports of violating behavior in the absence of signs or of vandalism of the existing signs, so, adding the new rule to the Parks Rules signs would not expeditiously notify the public. Placing No Smoking stickers, showing the universal sign of a cigarette with a line through it, on the Park Rules signs would be an inexpensive, but somewhat temporary, way of informing those using the parks.

An alternative to changing the Parks Rules signs would be the creation of special signs. Most of the major parks have fencing or structures to which the signs could be attached. In the remainder, poles costing approximately \$150 each would be required to post signs. Because fewer signs are involved the cost per sign would likely be more than the \$10 estimate provided for signs at bus stops. Regardless of whether existing signs were modified or new ones created Public Works projects the cost of installation would be minimal, assuming that the signs could be worked into the normal schedule, installing them over a period of time.

Enforcement would be primarily, if not completely, through peer pressure, as the likelihood of 'catching' someone in the act would be small. A spokesperson for the Livermore Area Recreation and Park District, which established its ban in 2005, believes that education and peer pressure have been very effective and there have been few violations, as evidenced by a lack of both complaints and cigarette butts. The Livermore Park District installed a large ashtray on a pole in the parking lot of their main recreation facility, and the District spokesperson reports that smokers are very cooperative about limiting their smoking to that station.

▪ ***No smoking in indoor or outdoor common use areas of multi-housing – Proposed Section 8.30.055D***

Many Oakland residents live in multi-unit housing. These residents currently have no protections from unwanted secondhand smoke in the outdoor common areas, including courtyards, playgrounds, pools, and picnic areas, where they live. This amendment would allow

these Oaklanders to enjoy outdoor common areas without exposure to secondhand smoke. The original City law prohibited smoking in enclosed common use areas of multi-housing complexes. With the revisions to Section 8.30.050, this prohibition will still be included, just renumbered.

The state legislation prohibiting smoking on or within 25 feet of playgrounds and tot lots does not apply to private property. This means that children who live in apartments have no protection or recourse against thoughtless persons who may freely smoke in the play areas. The proposed amendment would protect children playing in the outdoor areas of their residences, when those residences are not single family housing.

The City Administrator's office receives numerous complaints from residents hoping that the City's 25-foot distance for smoking outside of workplaces also applies to residences. This amendment would create smoke-free outdoor common areas and would help to create a buffer, similar to that now existing for workplaces, around the residential units of multi-housing complexes. In addition to the benefits to humans, this amendment would reduce fire hazards and litter. The amendment provides for the establishment of a designated smoking area that is at least 25 feet from other protected areas and that meets other specified criteria (proposed Section 8.30.055D1).

Arcata, Chico, Davis, Contra Costa County (designated smoking area), San Mateo County (no designated area), Emeryville, and Healdsburg have enacted prohibitions against smoking in the common outdoor areas of multi-unit housing.

The cost of implementation would depend upon timing. Landlords could be notified by letter. The Business Tax Section of Financial Services reports that there are 20,225 residential rental property accounts in the Business Tax System. If landlords were notified of changes through the annual Business Tax mailing, the cost would be minimal. As previously noted, inclusion in the Business Tax mailing is estimated at less than \$2000 to notify all Oakland businesses of the amendments to the smoking ordinance. The estimated cost of a separate mailing to residential rental property owners is approximately \$3,979.

Enforcement by existing staff and methods would be adequate unless the extent of reported non-compliance is much greater than has been the case with other smoking prohibitions. Enforcement of signage requirements for landlords could be handled by the City Administrator's current designee on a complaint-driven basis, with follow-up on non-compliant businesses by the OPD ABAT Unit and the City Administrator's Nuisance Enforcement Unit. Enforcement against individual smoking violators would be mainly by education and peer pressure. However, passage of the proposed nuisance provision (proposed Section 8.30.057) would assist residents taking private legal action.

- ***No smoking in licensed residential family child care and adult health care facilities – Proposed Section 8.30.080A***

Current state law prohibits smoking at these facilities "during the hours of operation . . . and in those areas where children are present." This amendment would require that residences licensed



for Family Childcare be smoke-free at all times. Residents of the facilities could smoke outside when children were not present.

This restriction is required because airborne particulate matter from cigarettes takes hours to clear, and this particulate matter remains on carpets, furniture, and walls indefinitely. Children should not be exposed to carcinogens when they come to school or daycare. Pleasanton and Emeryville have established this prohibition.

Residential adult care facilities are also proliferating to keep pace with the burgeoning senior population. Adults utilizing residential care are usually in compromised health and need the same protections from secondhand smoke as do children. Therefore, in the proposed ordinance, the exclusion of private residences from the prohibitions of the smoking ordinance would no longer apply to licensed residential adult care facilities, as well as child care facilities.

The costs of implementing this ordinance would be minimal. Alameda County licenses Family Child Care. They report there are 856 licensed Family Child Care Homes in Oakland, and they could provide the City with a list for notification purposes. The estimated cost of a mailing to these homes is \$554. Enforcement could be done utilizing the existing complaint-driven process of warning letters, followed by verification, followed by fines and/or the Nuisance Abatement process against the property owner.

▪ ***No smoking in new multi-unit housing – Proposed Section 8.30.050D***

Residents of multi-unit housing currently have no protections, either by state or local law against unwanted secondhand smoke drifting into their units. Despite the fact that 89 percent of Alameda County adults are non-smokers<sup>2</sup> and despite proof that exposure to secondhand smoke causes lung cancer, heart disease, and acute respiratory effects, these residents remain unprotected from the effects of secondhand smoke in their living environment.

Non-smokers in multi-unit housing are exposed to unwanted secondhand smoke because shared ventilation systems, and openings, such as closets, that are constructed jointly between or among units allow secondhand smoke to reach non-smoking units. Additionally, smoke drifts into non-smokers' units from smokers who smoke on their balconies or patios, creating health hazards for children and nonsmokers, or requiring them to keep their windows closed year-round.

The City Administrator's office regularly receives calls from residents of multi-unit housing who are suffering from exposure to secondhand smoke and hoping that the City's smoking ordinance applies to such residences. It does not. Therefore, most residents of multi-unit housing currently have little, if any, control over whether they and their families are exposed to secondhand smoke.

A California Department of Finance City/County Population and Housing Estimate from January 2005 lists 81,684 multi-housing units in Oakland. With 2.625 persons per Oakland household, according to the same Housing Estimate, approximately 214,400 Oakland residents live in

<sup>2</sup> California Department of Health Services 2005 Tobacco Survey.

multiple-unit housing. If attached single family homes, which may have some of the same construction characteristics as multi-housing, are added to the count, fifty-five percent (55%) of Oakland housing units meet the O.M.C. definition of multi-housing, and they house 231,866 of Oakland's 412,318 residents.

The proposed amendments are intended to protect the health of non-smokers while ensuring that adequate housing exists to accommodate smokers who desire to smoke inside their homes. Under the proposed amendment, all residential units of multi-unit housing constructed after adoption of the ordinance would be designated as non-smoking units. The existing 81,684 units of multi-unit housing would be unaffected by the amendments, except through the required lease provisions<sup>3</sup> (proposed Section 8.30.050D2), disclosure (proposed Section 8.30.050E), and nuisance (proposed Section 8.30.057) provisions. Owners of existing properties would not have to deal retroactively with existing combinations of smokers and non-smokers in close proximity.<sup>4</sup>

Developing non-smoking housing can be financially attractive. For example, California offers an incentive in the form of tax credits to developers of affordable housing. The tax credits enable developers to raise project equity through the "sale" of tax benefits to investors who take a dollar-for-dollar credit against their tax liability over a period of years. Proposals for affordable housing are approved on the basis of a point system that awards points for how well the proposal meets housing priorities and public policy objectives. A point is awarded for developments in which at least half of the units are non-smoking units.

Developers may also find that smoke-free buildings are more marketable. The property manager of a senior housing development in Colorado Springs, Colorado converted all of the units to non-smoking units and was besieged by seniors living elsewhere. The exodus to the non-smoking development was so great other developments requested their advice on how to convert. Owners of smoke-free multi-unit buildings may also negotiate lower insurance premiums on their property and liability insurance. Additional savings are gained on maintenance. It has been estimated by apartment associations that preparing a unit for a new tenant costs \$3000 more if a smoker was the previous tenant than if the tenant was a non-smoker.

Despite the known health risks of secondhand smoke and complaints of smoking-related health problems from non-smoking residents of multi-unit housing, few California jurisdictions have legislated in this area. In 2004 the City of Thousand Oaks prohibited smoking in one third of affordable apartments funded in part or entirely by the City. The City of Temecula has taken a first vote on a provision that would 1) ban smoking in at least 25 percent of new multi-unit complexes of ten or more units and 2) require existing multi-unit complexes of ten or more units to designate 25 percent of the units as non-smoking within five years. On June 12, 2007, the

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<sup>3</sup> The lease provisions specified by Section 8.30.050D2 will be required only in leases executed after adoption of the ordinance.

<sup>4</sup> If the Committee is interested in extending protections to some existing multi-unit housing, developments consisting of multiple buildings could easily designate individual buildings as non-smoking and either move smoking tenants to other buildings or gradually phase them out as units were vacated. This approach for existing buildings has not been included in the proposed ordinance.

same evening as this report, the City Council of Belmont will be considering a smoking ban that would include all existing and new units of multi-unit housing.

The costs to the City for this amendment would be minimal. Documents explaining City requirements and procedures for reviewing and approving project plans would have to be created.

▪ ***Classification of secondhand smoke as a nuisance in multi-unit residential housing – Proposed Section 8.30.057***

California Civil Code defines a public nuisance as “[a]nything which is injurious to health. . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property. . .”<sup>5</sup> Private nuisances are all nuisances that are not public nuisances.<sup>6</sup>

The State Air Resources Board has declared secondhand smoke as a Toxic Air Contaminant, which would qualify as injurious to health, but specific legislation has yet to emerge. Cities, however, have the authority to declare what constitutes a public nuisance by ordinance.<sup>7</sup> The effect of such a declaration is that it establishes a nuisance *per se*, requiring a plaintiff to prove only that the nuisance actually exists. Without the declaration, an individual alleging a private nuisance must prove that a normal person in the community would find the nuisance to be substantial and unreasonable.<sup>8</sup>

For residents of multi-unit housing, who suffer injury from secondhand smoke, the proposed amendment would facilitate private abatement. Because Oakland’s existing multi-unit housing would be unaffected by the proposed amendments, this provision would provide an important legal tool to the 200,000 plus residents of this type of housing.

The cities of Calabasas and Dublin recently enacted ordinances declaring secondhand smoke a nuisance. Dublin considered enforcement options of 1) private abatement, 2) City enforcement only upon specific authorization of funds, and 3) City enforcement through established policy, such as complaint-based enforcement. Dublin decided upon private abatement only. To provide a flexible way to easily change the enforcement method in the future, the Dublin City Council did not specify the enforcement method in the ordinance but, instead, passed a resolution, stating that “The City shall not expend City Resources or staff time to enforce the provisions of . . . [the] Secondhand Smoke-Nuisance Declaration.” The proposed amendment to Oakland’s ordinance is also silent as to City enforcement.

The cost of implementing this amendment would include notification to owners of multi-unit housing, which would already be covered, if any of the other provisions related to multi-unit

<sup>5</sup> California Civil Code § 3479.

<sup>6</sup> California Civil Code § 3481.

<sup>7</sup> California Constitution, Article XI, § 7.

<sup>8</sup> People ex rel. Gallo v Acuna (1997) 14 Cal. 4<sup>th</sup> 1090, 1105.

housing are adopted. The cost of enforcement would depend upon whether the City Council opted for private enforcement only or for City enforcement as well as private enforcement.

▪ *Miscellaneous recommended amendments*

1. Due to the increased understanding of the longevity of secondhand smoke residue and its negative impacts on health, staff proposes amending the definition of 'Place of employment' to add employee breakrooms and employer-owned vehicles used in employment. The latter would protect non-smokers who utilize the same employer-owned vehicles as smokers. (Section 8.30.030)

2. Section 8.30.120, Nonretaliation, currently protects only persons in an employment setting. Staff recommends extending the protections against retaliation to those who attempt to gain compliance with other aspects of the Chapter as well.

3. Labor Code section 6404.5 preempted OMC section 8.30.050E, which prohibited smoking in theatres and other performance venues. That section, however, also included an exemption for smoking as part of a performance. The exemption, modified to require that smoking be an integral part of the story, has been moved to proposed section 8.30.080C.

4. Changes to OMC Section 8.30.060B and OMC Section 8.30.080, regarding bars, are proposed. The exception for bars in the proposed Section 8.30.060B is intended to clarify a confusing section of Oakland's current law. OMC Section 8.30.080 currently includes bars as one of the places exempted from the restrictions of the Chapter. This Section has been interpreted in two conflicting ways: 1) that it is preempted by state law; or 2) that the exemption is still applicable, but only to the outdoor areas of bars. The first interpretation is based on the fact that, when the City's law was adopted, the state laws prohibiting smoking in enclosed workplaces also exempted bars. Subsequently, the state removed that exemption, and smoking was prohibited inside bars. Because bars are no longer exempt from state law, the argument is that bars are also not exempt under Oakland's ordinance. In this view, bars are subject to the requirement that smokers cannot be within 25 feet of the entrances to the bar. In some cases, the result of this interpretation has been that smokers end up within a few feet of residential areas, which are completely unprotected by either state or local law. When residents call to complain, there is nothing the City can do.

Those who take the position that the exception for bars continues to apply to areas not regulated by state law argue that, since bars have not been de-listed from Oakland's exceptions, they are not subject to the '25 foot rule'. In this view, smokers can smoke immediately outside of a bar since outdoor areas are not regulated by state law.

The proposed amendment attempts to address the problems created by both interpretations. It specifies that smoking can occur outside of the bar but must occur at least ten feet from doors and other openings and that the smoke must not enter prohibited areas, including the enclosed area of the bar. This provides some protection for the patrons and employees of the bar as well

as those of surrounding businesses and residences by not forcing bar patrons closer to those businesses or residences and by mandating that their smoke not enter other protected areas.

## **SUSTAINABLE OPPORTUNITIES**

### ***Economic***

Fewer smokers and a reduction in secondhand smoke will result in a reduction in expenses for smoking related illnesses.

The new anti-smoking initiatives may reduce the amount of sales taxes collected from tobacco products and business taxes collected from tobacco retailers.

### ***Environmental***

The enforcement of tobacco laws will help provide a healthier environment for Oakland residents and visitors.

### ***Social Equity***<sup>9</sup>

Oakland has one of the highest lung cancer mortality rates in the county. Smoking is responsible for 87 percent of lung cancers. African American men are at least 50 percent more likely to develop lung cancer than white men. African American men have a higher mortality rate of cancer of the lung and bronchus (100.8 per 100,000) than do white men (70.1 per 100,000). The passage and enforcement of tobacco control laws has been shown effective in reducing smoking consumption and prevalence and lowering the incidence of lung cancer.

Stroke is associated with cerebrovascular disease and is a major cause of death in the United States. Smoking significantly elevates the risk of stroke. Cerebrovascular disease is twice as high among African American men (53.1 per 100,000) as among white men (26.3 per 100,000) and almost twice as high among African American women (40.6 per 100,000) as among white women (22.6 per 100,000). All of the risks of smoking are enhanced in non-smokers through secondhand smoke.

## **DISABILITY AND SENIOR CITIZEN ACCESS**

The American Lung Association believes that the lack of smoke-free bus stops and other service lines could be a violation of the ADA if it prevents access by persons with respiratory disabilities.

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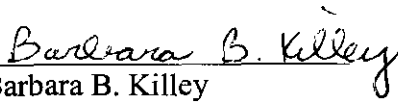
<sup>9</sup> Statistics in this section provided by the American Lung Association.

**ACTION REQUESTED OF THE CITY COUNCIL**

Staff requests that the City Council:

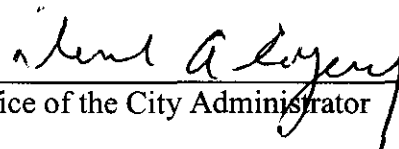
1. Accept this Staff Report
2. Adopt the ordinance amending the existing Smoking ordinance (OMC Chapter 8.30) to provide the residents of Oakland with additional protections from the known adverse effects of secondhand smoke.

Respectfully submitted,

  
Barbara B. Killey

Prepared by: Barbara Killey  
Assistant to the City Administrator  
Special Activity Unit, OCA

APPROVED AND FORWARDED THE  
THE PUBLIC SAFETY COMMITTEE.

  
Office of the City Administrator

# ATTACHMENT A

## **RELEVANT FACTS AND BIBLIOGRAPHY IN SUPPORT OF PROPOSED SMOKING ORDINANCE AMENDMENTS**

Since Oakland's smoking ordinance was originally adopted in 1986 there have been numerous studies accumulating overwhelming evidence of the dangers of smoking and of secondhand smoke. As the public has become more informed about these dangers, smoking in the United States has decreased dramatically, and numerous cities and states have adopted measures to protect their citizens from smoking-related problems. The following facts and statistics, drawn from both private and government sources, are presented in support of the currently proposed amendments.

1. Scientific studies have concluded that cigarette smoking causes chronic lung disease, coronary heart disease, stroke, cancer of the lungs, larynx, esophagus, mouth, and bladder, and contributes to cancer of the cervix, pancreas, and kidneys.<sup>1</sup>
2. More than 440,000 people die in the United States from tobacco-related diseases every year, making it the nation's leading cause of preventable death.<sup>2</sup>
3. The World Health Organization (WHO) estimates that by 2030, tobacco will account for 10 million deaths per year, making it the greatest cause of death worldwide.<sup>3</sup>
4. The U.S. Surgeon General has concluded that there is no risk-free level of exposure to secondhand smoke and neither separating smokers from nonsmokers nor installing ventilation systems effectively eliminates secondhand smoke.<sup>4</sup>
5. The United States Environmental Protection Agency (EPA) has found secondhand smoke to be a risk to public health, and has classified secondhand smoke as a group A carcinogen, the most dangerous class of carcinogen.<sup>5</sup>

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<sup>1</sup> U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *Targeting Tobacco Use: The Nation's Leading Cause of Death 2002*, 2 (2002), available at <http://www.cdc.gov/tobacco/overview/oshaag.pdf> (last accessed August 15, 2003).

<sup>2</sup> U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *Highlights Annual Smoking – Attributable Mortality, Years of Potential Life Lost, and Economic Costs – United States 1995-1999* (2002) MORBIDITY AND MORTALITY WEEKLY REPORT, available at [http://www.cdc.gov/tobacco/research\\_data/economics/mmwr5114.highlights.htm](http://www.cdc.gov/tobacco/research_data/economics/mmwr5114.highlights.htm) (last accessed August 15, 2003).

<sup>3</sup> U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *Reducing Tobacco Use: A Report of the Surgeon General*, 437 (2001).

<sup>4</sup> U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General* 11 (2006), available at <http://www.surgeongeneral.gov/library/secondhandsmoke/report/chapter1.pdf> (last accessed Sept. 19, 2006).

<sup>5</sup> U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *Exposure to Environmental Tobacco Smoke and Cotinine Levels – Fact Sheet* (2004), available at [http://www.cdc.gov/tobacco/research\\_data/environmental/factsheet\\_ets.htm](http://www.cdc.gov/tobacco/research_data/environmental/factsheet_ets.htm) (last accessed October 18, 2006).



6. The California Air Resources Board has put secondhand smoke in the same category as the most toxic automotive and industrial air pollutants by categorizing it as a toxic air contaminant for which there is no safe level of exposure.<sup>6</sup>
7. The California Office of Environmental Health Hazard Assessment has included secondhand smoke on the Proposition 65 list of chemicals known to the State of California to cause cancer, birth defects, and other reproductive harm.<sup>7</sup>
8. Exposure to secondhand smoke is the third leading cause of preventable death in this country, killing over 52,000 non-smokers each year,<sup>8</sup> including 3,000 deaths from lung cancer.<sup>9</sup>
9. Secondhand smoke exposure adversely affects fetal growth with elevated risk of low birth weight, and increased risk of Sudden Infant Death Syndrome (SIDS) in infants of mothers who smoke.<sup>10</sup>
10. Secondhand smoke exposure causes as many as 300,000 children in the United States to suffer from lower respiratory tract infections, such as pneumonia and bronchitis,<sup>11</sup> exacerbates childhood asthma, and increases the risk of acute chronic middle ear infection in children.<sup>12</sup>
11. The total cost of smoking in California was estimated to be \$475 per resident or \$3,331 per smoker per year, for a total of nearly \$15.8 billion in smoking-related costs in 1999 alone.<sup>13</sup>
12. The medical and economic costs to nonsmokers suffering from lung cancer or heart disease caused by secondhand smoke are nearly \$6 billion per year in the United States.<sup>14</sup>

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<sup>6</sup> Cal. Air Resources Bd., Resolution 06-01, at 5 (Jan. 26, 2006), available at <http://www.arb.ca.gov/regact/ets2006/res0601.pdf> (last accessed Oct. 6, 2006).

<sup>7</sup> Cal. Env'tl. Prot. Agency, Office of Env'tl. Health Hazard Assessment, *Chemicals Known to the State to Cause Cancer or Reproductive Toxicity* at 8 and 17, (Aug. 11, 2006), available at [http://www.oehha.ca.gov/prop65/prop65\\_list/files/P65single081106.pdf](http://www.oehha.ca.gov/prop65/prop65_list/files/P65single081106.pdf) (last accessed Oct. 6, 2006).

<sup>8</sup> S.A. Glantz & W. Parmley, *Passive Smoking and Heart Disease: Epidemiology, Physiology, and Biochemistry*, 83(1) *Circulation* 1 (1991) and California Environmental Protection Agency, Office of Env'tl. Health Hazard Management, *Health Effects of Exposure to Environmental Tobacco Smoke: Final Report* (1997).

<sup>9</sup> U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *Targeting Tobacco Use: The Nation's Leading Cause of Death 2002*, 2 (2002), available at <http://www.cdc.gov/tobacco/overview/oshag.pdf> (last accessed August 15, 2003).

<sup>10</sup> Cal. Env'tl. Prot. Agency, Office of Env'tl Health Hazard Assessment, *Health Effects of Exposure to Environmental Tobacco Smoke, Final Report* ES-5 (1997).

<sup>11</sup> U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *Targeting Tobacco Use: The Nation's Leading Cause of Death 2002*, 2 (2002), available at <http://www.cdc.gov/tobacco/overview/oshag.pdf> (last accessed August 15, 2003).

<sup>12</sup> U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *Clean Indoor Air Regulations Fact Sheet* (2001), available at [http://www.cdc.gov/tobacco/sgr/sgr\\_2000/factsheets/factsheet\\_clean.htm](http://www.cdc.gov/tobacco/sgr/sgr_2000/factsheets/factsheet_clean.htm) (last accessed Apr. 23, 2003).

<sup>13</sup> Max W, Rice DP, Zhang X, Sung H-Y, Miller L., *The Cost of Smoking in California, 1999*. California Department of Health Services (2002).

<sup>14</sup> American Academy of Actuaries, *Costs Associated with Secondhand Smoke*, October, 2006, available at [http://www.actuary.org/pdf/health/smoking\\_oct06.pdf](http://www.actuary.org/pdf/health/smoking_oct06.pdf) (last accessed October 11, 2006).

13. Almost 90% of adult smokers started smoking at or before age 18.<sup>15</sup>

14. With certain exceptions, state law prohibits smoking inside an enclosed place of employment.<sup>16</sup>

15. State law prohibits public school students from smoking or using tobacco products while on campus, while attending school-sponsored activities, or while under the supervision or control of school district employees.<sup>17</sup>

16. State law prohibits smoking in playgrounds and tot lots and within twenty feet of the main entrances and exits of public buildings while expressly authorizing local communities to enact additional restrictions.<sup>18</sup>

17. Cigarettes, cigars, pipes and other smoking materials are the leading cause of fire deaths in the United States,<sup>19</sup> causing an estimated 31,200 structure fires and 830 deaths in 2001.<sup>20</sup>

18. Most Californians do not smoke and a majority favor limitations on smoking in multi-unit residences, as evidenced by the following:

- 86% of Californians are non-smokers.<sup>21</sup>
- 70% of Californians surveyed approve of apartment complexes requiring at least half of rental units be non-smoking,<sup>22</sup>
- 67% of Californians surveyed favor limiting smoking in outdoor common areas of

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<sup>15</sup> National Household Surveys on Drug Abuse, unpublished data, 1998. See also, U.S. Dep't of Health & Human Servs. et al., *Preventing Tobacco Use Among Young People: A Report of the Surgeon General*, 101 (1994).

<sup>16</sup> Cal. Lab. Code § 6404.5 (West 2003).

<sup>17</sup> Cal. Educ. Code § 48901(a) (West 2003).

<sup>18</sup> Cal. Health & Safety Code § 104495 (West 2003) and Cal. Gov't Code § 7596 (effective January 1, 2004).

<sup>19</sup> Bruce N. Leistikow, M.D., M.S., Daniel C. Martin, Christina E. Milano, *Fire Injuries, Disasters, and Costs from Cigarettes and Cigarette Lights: A Global Overview* 91 PREVENTIVE MEDICINE 31 at 91 (2000), available at <http://leistikow.ucdavis.edu/SmokingFires.pdf> (last accessed April 6, 2005).

<sup>20</sup> Nat'l Fire Prot. Ass'n, *The Smoking-Material Fire Problem*, available at <http://www.nfpa.org/itemDetail.asp?categoryID=294&itemID=19303&URL=Research%20%20Reports/Fact%20sheets/Home%20safety/Smoking%20material-related%20fires> (last accessed March 4, 2005). See also John R. Hall, Jr., Nat'l Fire Prot. Ass'n, *The Smoking-Material Fire Problem*, (Nov. 2004), available at <http://www.nfpa.org/assets/files/PDF/OS.smokesum2.PDF> (executive summary only) (last accessed March 4, 2005).

<sup>21</sup> Tobacco Control Section, Cal. Dep't of Health Servs., *Adult Smoking Prevalence*, at 1, available at <http://www.dhs.ca.gov/tobacco/documents/pubs/AdultSmoking06.pdf> (last accessed October 18, 2006).

<sup>22</sup> Tobacco Control Section, Cal. Dep't of Health Servs., *2004 Field Research Poll Results* at 16 (2004), available at <http://www.dhs.ca.gov/tobacco/documents/2004TCSupdate.pdf> (last accessed March 4, 2005).

apartment buildings.<sup>23</sup>

19. Secondhand smoke can seep under doorways and through wall cracks.<sup>24</sup>

20. There is no Constitutional right to smoke.<sup>25</sup>

21. State law prohibits smoking in virtually all indoor places of employment reflecting the state policy to protect against the dangers of exposure to secondhand smoke.<sup>26</sup>

22. A local ordinance that authorizes residential rental agreements to include a prohibition on smoking of tobacco products within rental units is not prohibited by state law.<sup>27</sup>

23. California law declares that anything which is injurious to health or obstructs the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance.<sup>28</sup>

24. Local governments have broad latitude to declare nuisances and are not constrained by prior definitions of nuisance.<sup>29</sup>

25. Creating smokefree areas helps protect the 86% of Californians who are non-smokers.<sup>30</sup>

26. Cigarette butts pose a health threat to young children, as evidenced by the following:

- In 2004, American poison control centers received nearly 8,000 reports of children poisoned by the ingestion of cigarette butts.<sup>31</sup>
- Children who ingest cigarette butts can experience vomiting, nausea, lethargy, and gagging.<sup>32</sup>

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23 Ctr. For Tobacco Policy and Org., Am. Lung Ass'n of Cal., *Statewide Tobacco Renter Study* (2004), available at [http://www.californialung.org/thecenter/community/documents/SFH-Survey-Data\\_001.doc](http://www.californialung.org/thecenter/community/documents/SFH-Survey-Data_001.doc) (last accessed March 4, 2005).

24 J. Wagner et al., *Environmental Tobacco Smoke Leakage from Smoking Rooms*, JOURNAL OF OCCUPATIONAL AND ENVIRONMENTAL HYGIENE, 1:110–118 (2004), available at <http://eetd.lbl.gov/IEP/pdf/LBNL-51010.pdf> (last accessed April 7, 2005).

25 Technical Assistance Legal Ctr., Pub. Health Inst., *There Is No Constitutional Right to Smoke* (2004), available at [http://talc.phlaw.org/pdf\\_files/0051.pdf](http://talc.phlaw.org/pdf_files/0051.pdf) (last accessed April 8, 2005).

26 Cal. Lab. Code § 6404.5 (Deerings 2005).

27 Cal. Legislative Counsel Op., 21547, *Secondhand Smoke in Multi-Unit Housing (Apartments & Condos) Smoking Bans: Residential Rental Property*, (September 23, 1999).

28 Cal. Civil Code § 3479 (Deerings 2005).

29 *In Re Jones*, 56 Cal.App.2d 658, 663 (1943). See also, Cal. Const., art. XI, § 7 and Cal. Gov. Code § 38771 (Deerings 2005).

30 Tobacco Control Section, Cal. Dep't of Health Servs., *Adult Smoking Prevalence*, at 1, available at <http://www.dhs.ca.gov/tobacco/documents/pubs/AdultSmoking06.pdf> (last accessed October 18, 2006).

31 Am. Ass'n of Poison Control Ctr. *Annual Report of the Toxic Exposure Surveillance System* at 645 (2004), available at <http://www.aapcc.org/Annual%20Reports/04report/AJEM%20-%20AAPCC%20Annual%20Report%202004.pdf> (last accessed October 23, 2006).

32 U.S. Dep't of Health and Human Servs., Center for Disease Control and Prevention, *Ingestion of Cigarettes*

27. Cigarette butts are a major and persistent source of litter, as evidenced by the following:

- it is estimated that over two billion cigarette butts are discarded every day worldwide, and that Americans alone discard more than 175 million pounds of cigarette butts every year.<sup>33</sup>
- cigarette butts are often cast onto sidewalk and streets, and frequently end up in storm drains that flow into streams, rivers, bays, lagoons and ultimately the ocean.<sup>34</sup>
- cigarette butts, made of plastic cellulose acetate, take approximately 15 years to decompose.<sup>35</sup>

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*and Cigarette Butts by Children – Rhode Island, January 1994–July 1996*, MORBIDITY AND MORTALITY WEEKLY REPORT, 46(06), at 125-128 (1997), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/00046181.htm> (last accessed October 18, 2006).

33 Surfrider Foundation, San Diego Chapter, *Hold on to Your Butt!: Our Beaches and Streets are Not Your Ashtray*, at <http://www.surfridersd.org/hotyb.php> (last accessed October 18, 2006).

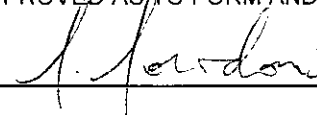
34 Surfrider Foundation, San Diego Chapter, *Hold on to Your Butt!: Our Beaches and Streets are Not Your Ashtray*, at <http://www.surfridersd.org/hotyb.php> (last accessed October 18, 2006).

35 Surfrider Foundation, San Diego Chapter, *Hold on to Your Butt!: Our Beaches and Streets are Not Your Ashtray*, at <http://www.surfridersd.org/hotyb.php> (last accessed October 18, 2006).

OFFICE OF THE CITY CLERK  
CITY OF OAKLAND

APPROVED AS TO FORM AND LEGALITY

INTRODUCED BY COUNCILMEMBER 2007 MAY 8 PM 8:49

  
City Attorney

## OAKLAND CITY COUNCIL

ORDINANCE No. \_\_\_\_\_ C.M.S.

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**ADOPT AN ORDINANCE AMENDING OAKLAND MUNICIPAL CODE CHAPTER 8.30, "SMOKING" TO PROHIBIT SMOKING AT BUS STOPS AND OTHER AREAS WHERE THE PUBLIC WAITS FOR SERVICE, AT OUTDOOR DINING AREAS, PUBLIC TRAILS, PARKS AND GOLF COURSES, FAMILY CHILDCARE CENTERS, COMMON AREAS IN MULTI-UNIT HOUSING, HOTELS AND MOTELS, AND THE OAKLAND INTERNATIONAL AIRPORT; RESTRICT SMOKING OUTSIDE BARS; AND PROHIBIT SMOKING IN INDIVIDUAL UNITS IN NEW MULTI-UNIT RESIDENTIAL BUILDINGS; REQUIRE NEW RENTAL AGREEMENTS TO DISCLOSE NONSMOKING PROHIBITIONS; DEEM UNCONSENTED EXPOSURE TO SECOND HAND SMOKE IN ALL MULTI-UNIT HOUSING A NUISANCE AND TRESPASS**

WHEREAS, scientific studies have concluded that cigarette smoking causes chronic lung disease, coronary heart disease, stroke, cancer of the lungs, larynx, esophagus, mouth, and bladder, and contributes to cancer of the cervix, pancreas, and kidneys; and

WHEREAS, more than 440,000 people die in the United States from tobacco-related diseases every year, making it the nation's leading cause of preventable death; and

WHEREAS, the World Health Organization (WHO) estimates that by 2030, tobacco will account for 10 million deaths per year, making it the greatest cause of death worldwide; and

WHEREAS, the U.S. Surgeon General has concluded that there is no risk-free level of exposure to secondhand smoke and neither separating smokers from nonsmokers nor installing ventilation systems effectively eliminates secondhand smoke; and

WHEREAS, the United States Environmental Protection Agency (EPA) has found secondhand smoke to be a risk to public health, and has classified secondhand smoke as a group A carcinogen, the most dangerous class of carcinogen; and

WHEREAS, the California Air Resources Board has put secondhand smoke in the same category as the most toxic automotive and industrial air pollutants by categorizing it as a toxic air contaminant; and

WHEREAS, the California Office of Environmental Health Hazard Assessment has included secondhand smoke on the Proposition 65 list of chemicals known to the State of California to cause cancer, birth defects, and other reproductive harm; and

WHEREAS, exposure to secondhand smoke is the third leading cause of preventable death in this country, killing over 52,000 non-smokers each year, including 3,000 deaths from lung cancer; and

WHEREAS, secondhand smoke exposure adversely affects fetal growth with elevated risk of low birth weight, and increased risk of Sudden Infant Death Syndrome (SIDS) in infants of mothers who smoke; and

WHEREAS, secondhand smoke exposure adversely affects fetal growth with elevated risk of low birth weight, and increased risk of Sudden Infant Death Syndrome (SIDS) in infants of mothers who smoke; and

WHEREAS, the total cost of smoking in California was estimated to be \$475 per resident or \$3,331 per smoker per year, for a total of nearly \$15.8 billion in smoking-related costs in 1999 alone; and

WHEREAS, the medical and economic costs to nonsmokers suffering from lung cancer or heart disease caused by secondhand smoke are nearly \$6 billion per year in the United States;

WHEREAS, almost 90% of adult smokers started smoking at or before age 18; and

WHEREAS, cigarettes, cigars, pipes and other smoking materials are the leading cause of fire deaths in the United States, causing an estimated 31,200 structure fires and 830 deaths in 2001; and

WHEREAS, most Californians do not smoke and a majority favor limitations on smoking in multi-unit residences, as evidenced by the following:

- 86% of Californians are non-smokers; and
- 70% of Californians surveyed approve of apartment complexes requiring at least half of rental units be non-smoking, and
- 67% of Californians surveyed favor limiting smoking in outdoor common areas of apartment buildings; and

WHEREAS, secondhand smoke can seep under doorways and through wall cracks; and

WHEREAS, creating smokefree areas helps protect the 86% of Californians who are non-smokers; and

WHEREAS, cigarette butts pose a health threat to young children, as evidenced by the following:

- in 2004, American poison control centers received nearly 8,000 reports of children poisoned by the ingestion of cigarette butts; and
- children who ingest cigarette butts can experience vomiting, nausea, lethargy, and gagging; and

WHEREAS, cigarette butts are a major and persistent source of litter, as evidenced by the following:

- it is estimated that over two billion cigarette butts are discarded every day worldwide, and that Americans alone discard more than 175 million pounds of cigarette butts every year; and
- cigarette butts are often cast onto sidewalk and streets, and frequently end up in storm drains that flow into streams, rivers, bays, lagoons and ultimately the ocean; and
- cigarette butts, made of plastic cellulose acetate, take approximately 15 years to decompose; now, therefore

THE COUNCIL OF THE CITY OF OAKLAND DOES ORDAIN AS FOLLOWS:

SECTION 1. It is the intent of the City Council, in enacting this ordinance, to provide for the public health, safety, and welfare by discouraging the inherently dangerous behavior of tobacco use around non-tobacco users; by protecting children from exposure to smoking and tobacco while they play; by reducing the potential for children to associate smoking and tobacco with a healthy lifestyle; by protecting the public from smoking and from tobacco-related litter and pollution; and by affirming and promoting the family atmosphere of the City's public places.

SECTION 2. The City Council finds and determines the forgoing recitals to be true and correct and hereby makes them a part of this ordinance.

SECTION 3. The City Council finds and determines that the adoption of this Ordinance is exempt from CEQA under Sections 15061(b)(3) of the State CEQA Guidelines and authorizes the filing of a Notice of Exemption with the Alameda County Clerk.

SECTION 4. The Oakland Municipal Code is hereby amended as set forth below, additions are indicated by underscoring and deletions are indicated by ~~strike-through type~~; portions of ordinances not cited or not shown in underscoring or strike-through type are not changed:

**8.30.030 Definitions.**

The following words and phrases, whenever used in this chapter, shall be construed as defined in this section:

"Bar" means an area or a room utilized primarily for the sale of alcoholic beverages for consumption by patrons on the premises and in which the serving of food is incidental to the consumption of such beverages.

"Business" means any sole proprietorship, partnership, joint venture, corporation or other business entity formed for profit-making purposes.

"City Manager" means the city of Oakland City Administrator or his or her designee.

"Employee" means any person who is employed by any employer, as defined in this section, in the consideration for direct or indirect monetary wages or profit and any person who volunteers his or her services for a nonprofit entity.

"Employer" means any person, partnership, corporation, or nonprofit entity which employs the service of one or more persons, and includes the city of Oakland.

"Dining Area" means any area available to or customarily used by the general public or employees, that is designed, established, or regularly used for consuming food and drink.

"Enclosed" means closed in by a roof and four or more connected walls with appropriate openings for ingress and egress.

"Multi-housing" complex" means any housing complex with two or more separate units.



"Multi-housing residence" means a residential unit within an Multi-housing complex.

"Multi-housing Common Area" means any common area of a Multi-housing complex accessible to and usable by more than one residence, including but not limited to halls and paths, lobbies, laundry rooms, common cooking areas, outdoor dining areas, play areas, swimming pools, and parking lots.

"Nonprofit entity" means any organization exempt from federal income taxation under Section 501 of the Internal Revenue Code or any organization exempt from State Income Taxation under Section 23708 of the California Revenue and Taxation Code.

"Place of employment" means any enclosed area under the control of any employer which employees normally frequent during the course of employment, including, but not limited to, work areas, employee lounges, breakrooms, and restrooms, conference and classrooms, cafeterias, and hallways, employer-owned vehicles used in employment or for business purposes, hotel and motel lobbies, meeting rooms, and banquet rooms, and warehouses. A private residence is not a place of employment unless ~~and during such times that~~ it is used as licensed health care or a licensed child or adult care facility.

~~Restaurant:~~

~~1. "Restaurant" means any commercial eating establishment, including any coffee shop, cafeteria, tavern, cocktail lounge, sandwich stand, soda fountain, and any other eating establishment, organization, club, boardinghouse or guesthouse which customarily offers food for sale to the general public, guests, patrons or employees.~~

~~2. The term "restaurant" shall not include facilities, areas or rooms used for private functions, or any tavern or cocktail lounge if said tavern or cocktail lounge is a bar as defined in this section.~~

"Recreational Area" means any outdoor area, owned or operated by the City of Oakland, open to the general public for recreational purposes, regardless of any fee or age requirement, including, but not limited to: parklands, including portions of parks, such as picnic areas, playgrounds, or sports fields; walking paths; gardens; hiking trails; bike paths; horseback riding trails; athletic fields; skateboard parks; amusement parks; and golf courses.

"Retail tobacco store" means a retail store utilized primarily for the sale of tobacco products and tobacco accessories and in which the sale of other products is merely incidental.

~~"Semi-private room" means a room in a public or private health care facility containing two or more beds for patients of the facility.~~

~~"Service line" means any indoor line at which one or more persons are waiting for or receiving service of any kind, whether or not such service involves the exchange of money.~~

"Service Area" means any area designed to be or regularly used by one or more persons to receive or wait to receive a service, enter a public place, or make a transaction, whether or not such service includes the exchange of money, including, for example, ATMs, bank teller windows, telephones, ticket lines, bus stops, waiting rooms, and cab stands.

“Smoking” means inhaling, exhaling, burning, or carrying any lighted cigar, cigarette, weed, or other combustible substance.

### **8.30.040 Application of chapter to city-owned facilities.**

All enclosed facilities owned by the city shall be subject to the provisions of this chapter.

### **8.30.050 Prohibition of smoking in enclosed places.**

Smoking shall be prohibited in the following enclosed places:

A. Places of employment;

B. New and existing Multi-housing Common Areas;

C. Service Areas;

~~A. All enclosed areas available to and customarily used by the general public and all businesses patronized by the public, including but not limited to, the public areas of retail stores, banks, multihousing complexes, hotels, and motels. This provision shall not apply to Oakland International Airport, and nonpublic areas of hotels and motels, such as guest or private banquet rooms;~~

~~B. Elevator, public restrooms, indoor service lines, and in ticket, boarding, and waiting areas of public transit depots; provided however that this prohibition shall not prevent (1) the establishment of separate waiting areas for smokers and nonsmokers, or (2) the establishment of at least fifty percent (50%) of a given waiting area as a nonsmoking area;~~

~~C. Retail food marketing establishments, including grocery stores and supermarkets;~~

~~D. Public areas of aquariums, libraries, and museums;~~

~~E. Enclosed theaters, auditoriums, and convention halls, which are used for motion pictures, stage dramas, lectures, musical performances, indoor sporting events, ballets, or other exhibitions. This prohibition shall not apply when smoking is part of any such production or whenever the manager of the theater, auditorium, or convention hall designates a separate room for smoking;~~

~~F. Every room, chamber, and place of meeting or public assembly, including school buildings under the control of any board or commission of the city during such times as a public meeting is in progress, to the extent such place is subject to the jurisdiction of the city;~~

~~G. Waiting rooms, hallways, wards, and semi-private rooms of health facilities, including but not limited to hospitals, clinics, physical therapy facilities, doctors' offices, and dentists' offices. Smoking is permitted in semi-private rooms of health facilities if all patients within the room are smokers and all patients in the room request in writing upon the health care facility's admission forms to be placed in a room where smoking is permitted;~~

~~H. Polling places;~~

~~I. Restaurants.~~

~~1. Smoking Policy. All restaurants must provide at least sixty percent (60%) of their seating capacity for nonsmoking patrons by August 1, 1992. Effective~~

~~August 1, 1993, eighty percent (80%) seating shall be set aside for nonsmoking patrons. Effective August 1, 1994, all shall ban smoking one hundred percent (100%). Restaurants which seat twenty-nine (29) or less persons shall have the discretion to determine the size of their no smoking area depending upon the demands of their patrons. The area set aside for nonsmoking patrons shall be a contiguous area. Notwithstanding the above requirements, a restaurant may establish a greater area for nonsmoking patrons or establish the entire restaurant as smoke free.~~

~~2. All restaurants shall post signs reflecting that "No Smoking" sections are available. The manner of such posting, including the wording, size, color, design, and place of posting shall be at the discretion of the owner/operator. However, the signs shall be clearly, sufficiently, and conspicuously posted.~~

~~If a host or hostess is available to seat patrons, the host or hostess shall ask patrons their preference for nonsmoking or smoking seating.~~

~~3. All restaurant owner/operators should promote smoking cessation programs for their smoking employees and contact local health organizations for information and materials in this effort.~~

~~4. Exemption. An owner or operator of a restaurant may apply to the City Manager or appropriate designees for an exemption from this provision due to financial hardship. Exemptions granted by the City Manager shall be valid for a period not to exceed twelve (12) months, and may be renewed upon application to the City Manager. Applications for renewal shall be reviewed in the same manner as applications for exemption.~~

~~5. Annual Review by Ad Hoc Citizens' Committee. An annual review to assess the economic impact of the increase in nonsmoking seating in restaurants shall be conducted by an ad hoc committee. Based upon its review, the ad hoc committee shall submit its findings and recommendations to the Health, Human Services and the Family Committee no later than July 1, 1993 and July 1, 1994. If the Ad Hoc Citizens' Committee annual report discloses that the smoking pollution control ordinance has caused substantial adverse economic impact upon local businesses, the City Council may, in the exercise of its discretion, amend this chapter to alter the phase in schedule in subsection (1)(1) of this section.~~

#### D. Multi-housing residences designated as non-smoking.

1. In every Multi-housing complex substantially completed more than six months after the effective date of this chapter, all units (including private outdoor spaces associated with such units, such as balconies, patios and decks), shall be designated as non-smoking units.

2. Every rental agreement for the occupancy of unit in a Multi-housing complex shall include:

a. a clause stating that smoking is prohibited in the unit if the landlord, in his discretion, has designated the unit as a non-smoking unit;

b. a clause stating that it is a material breach of the rental agreement to (i) violate any law regulating smoking while on the premises; (ii) smoke in a non-smoking unit; or (iii) smoke in any Multi-housing common area in which smoking is prohibited by the landlord or the homeowners' association or its board; and

c. a clause stating that all lawful occupants of the Multi-housing complex are express third-party beneficiaries of the above required clauses.

3. The rental agreement terms required by subsection (D)(2) are hereby incorporated by force of law into any rental agreement for the occupancy of a unit in a Multi-housing complex made on or after the effective date of this ordinance and that does not fully comply with subsection (D)(2).

4. A tenant who breaches the smoking regulations of a rental agreement or knowingly allows another person to do so shall be liable to: (a) the landlord; and (b) any lawful occupant of the Multi-housing complex who is exposed to secondhand smoke as a result of that breach. A landlord shall not be liable to any person for a lawful occupant's breach of smoking regulations if the landlord has fully complied with subsection (D)(2).

5. Subsections (D)(2) through (D)(4) shall not apply to rental agreements in existence as of the effective date of this ordinance.

E. Disclosure of smoking policy in new and existing Multi-housing

a. All landlords in Multi-housing complexes are required to disclose to prospective tenants whether smoking is permitted in the unit to be rented and, which units are designated smoking units.

b. All sellers of condominium units are required to disclose to prospective buyers respectively whether smoking is permitted in the unit.

### **8.30.055 Prohibition of smoking in unenclosed places**

Smoking shall be prohibited in the following unenclosed places:

A. Service Areas;

B. Dining areas;

C. Recreational Areas, except in parking areas used for parking vehicles of persons accessing the Recreational Area.

D. New and existing Multi-housing Common Areas, except that the landlord may designate a portion of the outdoor area of the premises as a smoking area as provided in subsection 1.

1. A designated smoking area:

a. must be located at least 25 feet from any indoor area where smoking is prohibited;

b. must not include and must be at least 25 feet from outdoor areas primarily used by children, including, but not limited to, areas improved or designated for play or swimming;

c. must be no more than 25% of the total outdoor area of the premises of the Multi-housing complex;

d. must have a clearly marked perimeter;

e. must be identified by conspicuous signs; and

f. must not overlap with any area in which smoking is otherwise prohibited by this chapter or other provisions of this Code, state law, or federal law.

### **8.30.057 Secondhand smoke nuisance in residential setting**

For all purposes within the jurisdiction of the City of Oakland, nonconsensual exposure to secondhand smoke in a Multi-housing complex is a nuisance, and the uninvited presence of secondhand smoke on such premises is a nuisance and a trespass.

### **8.30.060 Smoking policy requirements.**

A. Smoking shall not be permitted in places of employment and employers shall post "No Smoking" or "Smoke Free" signs in accordance with Section 8.30.090. Employers should promote smoking cessation programs for smoking employees and contact local health organizations for assistance and materials in this effort.

B. ~~Smoking outside of the work building~~any enclosed place where smoking is prohibited shall occur at a minimum distance of twenty-five (25) feet from any building entrance, exit, window and air intake vent of the building, except that for bars, smoking shall be prohibited within ten (10) feet from any entrance, exit or operable windows of bars, provided the smoke does not enter adjacent areas in which smoking is prohibited by any law or by the owner, lessee, or licensee of the adjacent property. ~~to insure that smoke does not enter the building and affect occupants therein.~~

C. ~~Exception. In places of employment, employers may provide specific smoking areas for employees provided all of the following conditions are met:~~

~~1. The smoking area shall be provided with a heating, ventilation and air-conditioning (HVAC) system designed such that none of the air from the smoking area will be recirculated into other areas of the building.~~

~~2. The smoking area shall be completely separated from the remainder of the building by solid partitions or glazing without openings other than doors, and all doors leading to the smoking area shall be self-closing. The doors shall be provided with a gasket so installed as to provide a seal where the door meets the stop on both sides and across the top.~~

~~3. If the HVAC system is part of a smoke removal system or pressurization system, any modification to these systems to provide smoking areas will require approval from the Oakland Fire Marshal, and written verification of this approval shall be provided to the City Manager or appropriate designee.~~

CD. This provision shall not apply to exempted governmental and educational agencies with facilities located in the city

### **8.30.070 Power to adopt more restrictive smoking policies.**

Notwithstanding any other provisions of this chapter, any owner, operator, manager or employer or other person who controls any establishment or place of employment or Multi-housing complex regulated by this chapter, may adopt policies relating to smoking which are more restrictive than those provided herein.

### **8.30.080 Smoking optional areas.**

Notwithstanding any other provision of this chapter, to the contrary, the following areas shall not be subject to the smoking restrictions of this chapter:

~~A. Bars;~~

~~AB. Enclosed areas of private, detached, single family residences, except when used as a those used as licensed child care, adult care, or health care facilities;~~

~~C. Unenclosed areas of private, detached, single family residences except, during their hours of operation, those used as licensed child care care, adult care, or health care facilities .~~

~~C. Hotels and motels;~~

~~BD. Retail tobacco stores;~~

~~E. The Oakland International Airport.~~

~~C.D. By performers during theatrical productions, if smoking is an integral part of the story.~~

### **8.30.090 Posting of signs.**

A. "No Smoking" or "Smoke Free" signs, with letters of no less than one inch in height or the international "No Smoking" symbol (consisting of a pictorial representation of a burning cigarette enclosed in a red circle with a red bar across it) shall be clearly, sufficiently and conspicuously posted in every building or other place where smoking is regulated by this chapter, by the owner, operator, manager or other person having control of such building or other place, except that signs are not required inside non-smoking units of Multi-housing complexes. For purposes of this chapter, the City Manager Administrator or appropriate designee shall be responsible for the posting of signs in regulated facilities of the city.

~~B. Every theater or auditorium owner, manager or operator shall conspicuously post signs in the lobby stating that smoking is prohibited within the theater or auditorium, and in the case of motion picture theaters, such information shall be shown upon the screen for at least five seconds prior to the showing of each feature motion picture.~~

C. Notwithstanding this provision, the presence or absence of signs shall not be a defense to the violation of any other provision of this chapter.

### **8.30.100 Enforcement.**

A. Enforcement of this chapter shall be implemented by the City Manager Administrator, or his or her designee.

B. Any citizen who desires to register a complaint under this chapter may initiate enforcement with the City Manager Administrator or his or her designees.

C. Any owner, manager, operator or employee of any establishment regulated by this chapter shall have the right to inform persons violating this chapter of the appropriate provisions thereof.

D. Notwithstanding any other provision of this chapter, a private citizen may bring legal action to enforce this chapter.

#### **8.30.110 Violations and penalties.**

A. It is unlawful for any persons to smoke in any area where smoking is prohibited by the provisions of this chapter.

B. Any person who violates any provision of this chapter shall be guilty of an infraction, punishable by:

1. A fine not exceeding one hundred dollars (\$100.00) for a first violation;
2. A fine not exceeding two hundred dollars (\$200.00) for a second violation of this chapter within one year;
3. A fine not exceeding five hundred dollars (\$500.00) for each additional violation of this chapter within one year.

#### **8.30.120 Nonretaliation.**

No person shall discharge, refuse to hire, or in any manner retaliate against any employee or applicant for employment because such employee or applicant exercises any rights afforded by this chapter.

No person shall intimidate, harass, or otherwise retaliate against any person who seeks to attain compliance with this chapter. Moreover, no person shall intentionally or recklessly expose another person to secondhand smoke in response to that person's effort to achieve compliance with this chapter.

#### **8.30.130 Public education.**

The City Manager shall engage in a continuing program to explain and clarify the purposes of this chapter to citizens affected by it, and to guide owners, operators, and managers in their compliance with it.

#### **8.30.140 Governmental agency cooperation.**

The City Manager ~~Administrator~~ shall annually request other governmental and educational agencies having facilities within the city to establish local operating procedures in cooperation and compliance with this chapter. The City Manager shall urge federal, state, county, and special school district agencies to enforce their existing no smoking regulations and to comply voluntarily with this chapter.

#### **8.30.150 Other applicable laws.**

This chapter shall not be interpreted or construed to permit smoking where it is otherwise restricted by other applicable laws.

**SECTION 5. Severability.** If any article, section, subsection sentence, clause or phrase of this ordinance or exhibit is held to be invalid or unconstitutional, the offending portion shall be severed and shall not affect the validity of remaining portions which shall remain in full force and effect.

**SECTION 6. Effective Date.** This ordinance shall become effective immediately on final adoption if it receives six or more affirmative votes; otherwise it shall become effective upon the seventh day after final adoption.

IN COUNCIL, OAKLAND, CALIFORNIA, \_\_\_\_\_, 20\_\_\_\_\_

**PASSED BY THE FOLLOWING VOTE:**

AYES- BROOKS, BRUNNER, CHANG, NADEL, QUAN, REID, KERNIGHAN and PRESIDENT DE LA FUENTE

NOES-

ABSENT-

ABSTENTION-

ATTEST: \_\_\_\_\_  
LATONDA SIMMONS  
City Clerk and Clerk of the  
Council of the City of Oakland,  
California



# Notice & Digest

**AN ORDINANCE AMENDING OAKLAND MUNICIPAL CODE CHAPTER 8.30, "SMOKING", TO PROHIBIT SMOKING AT BUS STOPS AND OTHER AREAS WHERE THE PUBLIC WAITS FOR SERVICE, AT OUTDOOR DINING AREAS, PUBLIC TRAILS, PARKS AND GOLF COURSES, FAMILY CHILDCARE CENTERS, COMMON AREAS IN MULTI-UNIT HOUSING, HOTELS AND MOTELS, AND THE OAKLAND INTERNATIONAL AIRPORT; RESTRICT SMOKING OUTSIDE BARS; PROHIBIT SMOKING IN INDIVIDUAL UNITS IN NEW MULTI-UNIT RESIDENTIAL BUILDINGS; REQUIRE NEW RENTAL AGREEMENTS TO DISCLOSE NONSMOKING PROHIBITIONS; DEEM UNCONSENTED EXPOSURE TO SECOND HAND SMOKE IN ALL MULTI-UNIT HOUSING A NUISANCE AND TRESPASS**

This ordinance amends Oakland's existing smoking pollution control ordinance (Oakland Municipal Code Chapter 8.30), which prohibits smoking in most enclosed public places to provide protections for Oakland's residents, workforce, and visitors. The amendments extend these protections to several categories of unenclosed places frequented by the public, including bus stops, outdoor dining areas, public trails and public parks, and common areas of multi-unit housing. It also declares that nonconsensual exposure to smoke in multi-housing complexes (multi-unit residences) is a nuisance, designates all units of new construction in multi-housing complexes as smoke-free units, requires lease agreements executed after adoption of the ordinance to disclose nonsmoking prohibitions, and deems non-consensual exposure to secondhand smoke in all multi-unit housing a nuisance and a trespass.