

**CITY OF ALBANY
SOCIAL AND ECONOMIC JUSTICE COMMISSION
STAFF REPORT**

Agenda Date: June 10, 2009

Reviewed by: _____

SUBJECT: Evaluation of need to add private enforcement language to the Albany Ordinance.

REPORT BY: Robert Zweben, City Attorney

BACKGROUND

About one year ago the City passed an updated smoking ordinance, number 08-03, that prohibits smoking in designated places. This matter came up on the City Council's agenda for a one-year review. The Council referred a question about private enforcement to your commission. The Council wishes to know whether your commission would recommend adding additional language to provide for the ability of citizens to proceed with private enforcement.

This suggestion was brought forward last year when Ordinance 08-03 was adopted. The Council did not adopt it. A citizen again brought it up this year. Attached to the staff report to the City Council was sample language from ordinances of the cities of Dublin, Loma Linda, and Belmont. Each of these cities has enacted provisions to restrict smoking, to some degree, within the individual units of multi-unit housing. Albany's ordinance does not contain similar restrictions. A year ago the suggestion to enact such restrictions was not approved.

DISCUSSION

Question presented to your Commission:

Is the Commission inclined to recommend to the City Council to amend the ordinance to include private enforcement provisions? I view this as a policy question. If the Commission decides to recommend the addition of private enforcement provisions, then the City Attorney would draft proposed language for the Council's consideration.

In deciding whether to recommend adding private enforcement language, the Commission may want to take into account the following:

1. The private enforcement language, when adopted by other cities, has been part and parcel of provisions that restrict smoking within units in multi-family structures. While some city may have private enforcement language even though it does not restrict smoking within units, staff is not aware of any such city doing so.

2. Since the Albany ordinance was adopted in 2008, no citizen complaint has been received to suggest the present enforcement provisions are inadequate.

3. Private enforcement provisions may promote litigation between neighbors.

STAFF RECOMMENDATION

Unless the Commission determines that it believes the present enforcement provisions are inadequate and that private enforcement provisions are needed, I would recommend that the Commission recommend that no further enforcement provisions be added to the City's smoking ordinance at this time.

Should future experience suggest that additional provisions be added or if the Albany ordinance were expanded to prohibit smoking within the individual units in multi-family structures, then this matter should be revisited.

SUSTAINABILITY IMPACT

No discernable impact.

FINANCIAL IMPACT

Not measurable at this time.

Attachments:

Ordinance #08-03

AN ORDINANCE OF THE ALBANY CITY COUNCIL PROHIBITING SMOKING IN OR AROUND WORKPLACES, RECREATIONAL AREAS, AND OTHER PLACES AND AMENDING THE ALBANY MUNICIPAL CODE

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 438,000 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 causes as many as 300,000 children in the United States to suffer from lower respiratory tract infections, such as pneumonia and bronchitis, exacerbates childhood asthma, and increases the risk of acute chronic middle ear infection in children; 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, it is estimated that 13.2% of California high school students smoke; and

WHEREAS, with certain exceptions, state law prohibits smoking inside an enclosed place of employment; and

WHEREAS, 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; and

WHEREAS, state law prohibits smoking within twenty-five feet of 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; 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 ALBANY CITY COUNCIL HEREBY ORDAINS AS FOLLOWS:

Section 1

Sections 17-1.0 through 17-1.15 are hereby deleted in their entirety and new Sections 17-1.0, et seq. are enacted to read as follows:

Section 2

17-1.0 TITLE

Chapter 17-1.0 shall be known as Smoking Pollution Control.

17-1.1 Findings and Purpose

The City Council of the city finds that:

- a. Numerous studies have found that tobacco smoke is a major contributor to indoor air pollution; and
- b. Reliable studies have shown that breathing secondhand smoke is a significant health hazard for certain population groups, including elderly people, individuals with cardiovascular disease, and individuals with impaired respiratory function, including asthmatics and those with obstructive airway disease; and
- c. Health hazards induced by breathing secondhand smoke include lung cancer, respiratory infection, decreased exercise tolerance, decreased respiratory function, bronchoconstriction, and bronchospasm; and

d. Nonsmokers who suffer allergies, respiratory diseases and other ill effects of breathing secondhand smoke may experience a loss of job productivity or may be forced to take periodic sick leave because of such adverse reactions; and

e. Numerous studies have shown that a majority of both nonsmokers and smokers desire to have restrictions on smoking in public places and places of employment; and

f. Smoking is a documented cause of fires, and cigarette and cigar burns and ash stains on merchandise and fixtures cause economic losses to businesses; and

g. Accordingly, the City Council finds and declares that the purposes of this chapter are (1) to protect the public health and welfare by prohibiting smoking in public places, places of employment, and specifically designated public play areas where small children are at risk of choking on or ingesting cigarette butts and other toxic tobacco litter, and (2) to guarantee the right of nonsmokers to breathe smoke-free air, and to recognize that the need to breathe smoke-free air shall have priority over the desire to smoke.

17-1.2 DEFINITIONS.

For the purposes of this section the following definitions shall govern unless the context clearly requires otherwise:

a. "Bar" means any area utilized primarily for the sale of alcoholic beverages for consumption by patrons on the premises and in which the serving of food is merely incidental to the sale and consumption of alcoholic beverages and in which persons younger than twenty-one (21) years of age are at all times excluded. Although a restaurant may contain a bar, the term "Bar" shall not include a restaurant Dining Area.

b. "Business" means any sole proprietorship, partnership, joint venture, corporation, association, or other entity formed for profit-making purposes or that has an Employee, as defined in this section.

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

d. "Employee" means any person who is employed; retained as an independent

contractor by any Employer, as defined in this section; or any person who volunteers his or her services for an Employer, association, nonprofit, or volunteer entity.

e. "Employer" means any person, partnership, corporation, municipal corporation, association, nonprofit or other entity who employs or retains the service of one or more persons, or supervises volunteers.

f. "Enclosed" means:

1. any covered or partially covered space having walls, privacy fences, tents, windbreaks, or other structures or fixtures causing it to be closed to the outside that are five (5) feet or taller surrounding more than 50% of its perimeter area such as, for example, a covered porch with more than two walls; or

2. any space open to the sky (hereinafter "uncovered") having more than 75% of its perimeter area walled in or otherwise closed to the outside such as, for example, a courtyard, with the exception of a Bar as defined in this ordinance.

g. "Multi-Unit Residence" means a premises that contains two (2) or more Units. A single-family house shared by roommates is not a Multi-Unit Residence for purposes of this section.

h. "Multi-Unit Residence Common Area" means any indoor or outdoor common area of a Multi-Unit Residence accessible to and usable by residents of different Units, including but not limited to halls and paths, lobbies, laundry rooms, common cooking areas, outdoor eating areas, play areas, swimming pools, and parking areas.

i. "Nonprofit Entity" means any entity that meets the requirements of California Corporations Code section 5003 as well as any corporation, unincorporated association or other entity created for charitable, religious, philanthropic, educational, political, social or similar purposes, the net proceeds of which are committed to the promotion of the objectives or purposes of the entity and not to private gain. A public agency is not a nonprofit entity within the meaning of this section.

j. "Place of Employment" means any area under the legal or de facto control of an Employer, Business or Nonprofit Entity that an Employee or the general public may have cause

to enter in the normal course of operations, but regardless of the hours of operation, including, for example, indoor and outdoor work areas, construction sites, vehicles used in employment or for business purposes, taxis, buses, employee lounges, conference and banquet rooms, Bars, restaurants, bingo and gaming facilities, long-term health facilities, warehouses, and private residences that are used as childcare or healthcare facilities subject to licensing requirements.

k. "Playground" means any park or Recreational Area designed in part to be used by children that has play or sports equipment installed or has been designated or landscaped for play or sports activities, or any similar facility located on public or private school grounds, or on City grounds.

l. "Reasonable Distance" means a distance that ensures that occupants of an area in which Smoking is prohibited are not exposed to secondhand smoke created by smokers outside the area. This distance shall be a minimum of twenty-five (25) feet.

m. "Recreational Area" means any area, public or private, open to the general public for recreational purposes regardless of any fee or age requirement, including, for example, parks, picnic areas, beaches, gardens, walking paths, bike paths, hiking trails, sporting facilities and sports fields, stadiums, and playgrounds.

n. "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, and cab stands.

o. "Significant Tobacco Retailer" means any tobacco retailer that derives seventy-five percent (75%) or more of gross sales receipts from the sale or exchange of tobacco products and tobacco paraphernalia.

p. "Smoking" means possessing a lighted Tobacco Product, lighted pipe, lighted cigar, or lighted cigarette of any kind, or the lighting of a Tobacco Product, pipe, cigar, or cigarette of any kind, including, but not limited to, tobacco, or any other weed or plant.

q. "Tobacco Product" means any substance containing tobacco leaf, including but not limited to cigarettes, cigars, pipe tobacco, snuff, chewing tobacco, dipping tobacco, bidis, or

any other preparation of tobacco.

r. "Unit" means: (1) a dwelling space consisting of essentially complete independent living facilities for one or more persons, including, for example, permanent provisions for living and sleeping, and any private outdoor spaces like balconies and patios; and (2) senior citizen housing and single room occupancy hotels, as defined in California Health and Safety Code section 50519(b)(1), even where lacking private cooking facilities or private plumbing facilities. "Unit" does not include lodging in a hotel or motel that meets the requirements set forth in California Civil Code section 1940(b)(2).

17-1.3 PROHIBITION OF SMOKING IN PLACES OF EMPLOYMENT AND CERTAIN OTHER AREAS

a. Enclosed Places. Smoking shall be prohibited in the following Enclosed places within the City except in places listed in subsection (d) below, and except in such places in which Smoking is already prohibited by state or federal law in which case the state or federal law applies:

1. Places of Employment;
2. Multi-Unit Residence Common Areas;
3. Enclosed areas adjacent to an Enclosed area in which Smoking is prohibited by any other section of this code, state law, or federal law and that have a common or shared air space such as, without limitation, openings, cracks, air ventilation systems, doorways, hallways, and stairways. Notwithstanding any other provision, the fact that smoke enters one Enclosed area from another Enclosed area is conclusive proof that the areas share a common or shared air space;

5. Enclosed areas that have a common or shared ventilation, air conditioning or heating system with an Enclosed area in which Smoking is prohibited. Notwithstanding any other provision, the fact that smoke enters one Enclosed area from another Enclosed area is conclusive proof that the areas share a common or shared air space.

b. Unenclosed Places. Smoking shall be prohibited in the following unenclosed

places within the City except in such places in which Smoking is already prohibited by state or federal law in which case the state or federal law applies:

1. Places of Employment;
2. Service Areas;
3. Recreational Areas and Playgrounds;
4. Dining Areas, except unenclosed areas of a Bar that does not serve food, with the exception of the unenclosed areas of any Bars where food has been served for at least 90 days prior to the passage of this ordinance. If Smoking is permitted in such an unenclosed area, the entire Smoking section must be limited to one clearly designated area prominently marked with signs, and must be located at least five (5) feet from any doorway or opening into an Enclosed area. Smoking in an unenclosed area of a Bar is only permitted provided the smoke does not enter adjacent Enclosed or unenclosed areas, excluding public sidewalks, in which Smoking is prohibited by any law or by the owner, lessee or licensee of the adjacent property;

5. Multi-Unit Residence Common Areas;

(a) Smoking is prohibited in all Multi-Unit Residence Common Areas except that a landlord may designate a portion of the outdoor area of premises as a Smoking area as provided in paragraph (b) below.

(b) A designated Smoking area:

- (1) must be located a Reasonable Distance from any indoor area where Smoking is prohibited;
- (2) must not include, and must be a Reasonable Distance from, outdoor areas primarily used by children including, but not limited to, areas improved or designated for play or swimming;
- (3) must constitute no more than twenty-five percent (25%) of the total outdoor area of the premises for which it is designated;
- (4) must have a clearly marked perimeter;
- (5) must be identified by conspicuous signs; and

(6) must not overlap with any area in which Smoking is otherwise prohibited by this section or other provisions of this Code, state law, or federal law.

6. Sidewalks adjacent to any public or private school property;
7. The sites of public events during the events including, for example, sports events, theatrical performances, speeches, ceremonies, pageants, farmers' markets, parades, and fairs; and
8. Sidewalks on Solano Avenue, between San Pablo Avenue and the City of Berkeley jurisdictional border.

c. No person shall dispose of Smoking waste within the boundaries of an area in which Smoking is prohibited, including inside the perimeter of any Reasonable Distance required by this section.

d. Unless otherwise prohibited by law, Smoking is permitted in the following Enclosed places:

1. Significant tobacco retailers, if at all times minors are prohibited from entering the store;
2. By performers during theatrical productions, if Smoking is an integral part of the story in the theatrical production;
3. Private residential units, except those used as a child care or health care facility subject to licensing requirements; and
4. Up to twenty percent (20%) of hotel and motel guest rooms, if the hotel or motel permanently designates particular guest rooms as nonsmoking rooms such that eighty (80%) or more of its guest rooms are nonsmoking and ashtrays and matches are permanently removed from such nonsmoking rooms. Permanent "no smoking" signage shall be posted in nonsmoking rooms.
5. In a unit of a Multi-Unit Residential Building, if the unit is occupied by a person who has an ownership interest in the property.

17-1.4 REASONABLE SMOKING DISTANCE REQUIRED—25 FEET

a. Smoking in unenclosed areas shall be prohibited within a Reasonable Distance from any entrance, opening, crack, or vent into an Enclosed area in which Smoking is prohibited, except while actively passing on the way to another destination, and so long as smoke does not enter any Enclosed area in which Smoking is prohibited by any law or by the owner, lessee or licensee of the adjacent property.

b. Smoking in unenclosed areas shall be prohibited within a Reasonable Distance from any unenclosed area in which Smoking is prohibited under Section 17-1.3(b)(1-8) of this section except while actively passing on the way to another destination.

17-1.5 DUTY OF PERSON, EMPLOYER, BUSINESS, LANDLORD, OR NONPROFIT ENTITY

a. No Person, Employer, Business, landlord, or Nonprofit Entity shall knowingly permit the Smoking of Tobacco Products in an area which is under the legal or de facto control of the Person, Employer, Business, landlord, or Nonprofit Entity and in which Smoking is prohibited by this section, this Code, or any other state or federal law provided, however, that this prohibition does not apply to a Person, Employer, Business, landlord, or Nonprofit Entity already compelled to act under state or federal law.

b. No Person, Employer, Business, landlord, or Nonprofit Entity shall knowingly or intentionally permit the presence or placement of ash receptacles, such as, for example, ash trays or ash cans, within an area which is under the legal or de facto control of the person, Employer, Business, landlord, or Nonprofit Entity and in which Smoking is prohibited, including, without limitation, inside the perimeter of any Reasonable Distance required by this section.

c. Notwithstanding any other provision of this section, any owner, landlord, Employer, Business, Nonprofit Entity, or other person who controls any property, establishment, or Place of Employment regulated by this chapter may declare any part of such area in which Smoking would otherwise be permitted to be a nonsmoking area.

d. "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 Enclosed and unenclosed place in which Smoking is prohibited by this chapter, by the Person, Employer, Business, landlord, or Nonprofit Entity that has legal or de facto control of such place. At least one sign with the City phone number where complaints can be directed must be conspicuously posted in every place in which Smoking is prohibited. For purposes of this chapter, the City Administrator or designee shall be responsible for the posting of signs in regulated facilities owned or leased in part by the City. Notwithstanding this provision, the presence or absence of signs shall not be a defense to the violation of any other provision of this section.

e. Disclosure of Smoking Policy in New and Existing Multi-unit Housing

1. Every landlord of a Multi-Unit Residence shall maintain a list of designated nonsmoking Units, a list of designated smoking units, and a floor plan identifying the relative position of Smoking and nonsmoking Units. The floor plan also shall identify the location of any designated Smoking areas. At the time the lease is signed, the tenant shall also initial or sign that they received these documents. The list and plan shall be incorporated as exhibits into the lease signed by the Tenant and Landlord.

2. All sellers of condominium units are required to disclose to prospective buyers in writing whether Smoking has been permitted in the Unit and the Smoking policies for the complex.

17-1.6 PENALTIES AND ENFORCEMENT.

a. Any person who violates any provisions of this section shall be guilty of an infraction, punishable by:

1. A fine, not less than fifty (\$50.00) dollars or more than one hundred (\$100.00) dollars for the first violation.

2. A fine, not less than one hundred (\$100.00) dollars nor more than two-hundred fifty (\$250.00) dollars for the second violation within a year.

3. A fine, not less than two-hundred fifty (\$250.00) dollars nor more than five hundred (\$500.00) dollars for each additional violation of this section within a year.

b. Notwithstanding any other penalty provision in this section, on the proper application, a court is hereby authorized to issue an injunction to prohibit any continued violations or nuisances that fall within the acts prohibited under this section.

c. Upon a proper showing and hearing before the City Council that determines that a Business establishment has violated the prohibitions contained in this section more than three (3) times in any calendar year, the City Council has the discretion to revoke the business license of the establishment.

d. Causing, permitting, aiding, abetting, or concealing a violation of any provision of this ordinance shall also constitute a violation.

e. The remedies provided by this section are cumulative and in addition to any other remedy available at law or in equity.

f. Enforcement of this chapter shall be the responsibility of the police department. Any peace officer or code enforcement official also may enforce this chapter.

Section 3: Publication

This ordinance shall be published in a newspaper of general circulation in the City of Albany, which said newspaper is designated for that purpose, or it shall be posted in three locations.

Section 4: Severability

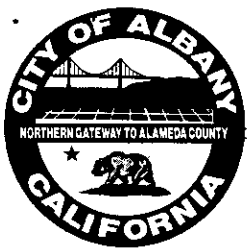
If any section, subsection, sentence, clause, or phrase of this ordinance is for any reason held to be invalid, such decision shall not affect the validity of the remaining portions of the ordinance, and each section, subsection, sentence, clause, or phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clause or phrases be declared invalid.

Section 5: Effective Date

This ordinance shall become effective 30 days on or after its final passage and adoption.



ROBERT S. LIEBER
MAYOR



City of Albany

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• Teen Center
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STATE OF CALIFORNIA)
COUNTY OF ALAMEDA) ss
CITY OF ALBANY)

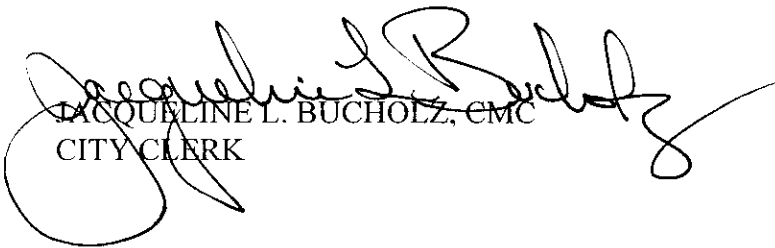
I, **JACQUELINE L. BUCHOLZ**, City Clerk of the City of Albany, California, do hereby certify that the whole number of members of the City Council of said City of Albany is five and that the foregoing is a true and correct copy of Ordinance No. 08-03 which was passed and adopted by the said City Council, approved and signed by the Mayor of said City, and attested by the City Clerk of said City, all at a regular meeting of the said Council on the 19th day of May 20 08 A.D., and that the same was so passed and adopted by the following votes and duly published or posted according to State law.

AYES: Council Members Atkinson, Javandel, Wile & Mayor Lieber

NOES: Council Member Okawachi

ABSENT: None

In witness whereof, I have hereunto set my hand and affixed the official seal of the City of Albany, this 4th day of June, 20 08.


JACQUELINE L. BUCHOLZ, CMC
CITY CLERK

The City of Albany is dedicated to maintaining its small town ambience, responding to the needs of the community, and providing a safe, healthy environment now and in the future.



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**CITY OF ALBANY
CITY COUNCIL REFERRAL
TO COMMISSION/COMMITTEE/BOARD**

Commission/Committee/Board: Social & Economic Justice Commission

Staff Liaison: Acting Liaison Aaron Walker

City Council Meeting Date: May 18, 2009

City Council Motion: To refer to the Social & Economic Justice Commission to provide a recommendation regarding the “private right to action” to include statistics from other cities and legal cases to support the recommendation either for or against. These items are to come back to Council within three months.

Timeline: September 2009 (due to summer recess)

Comments: See staff report and attachments, and excerpt of minutes from City Council meeting of May 18, 2009

8-2. Smoking Ordinance

(File # 560-90)

The Fire Chief reported that before Council is a one-year review of Ordinance #09-03. The Fire Chief went over some statistics from the Center for Disease Control and the American Cancer Society. The Fire Chief noted that No Smoking stickers have been distributed to businesses on Solano Avenue and the stickers have also been posted in bus shelter areas. In January, a mailing went to apartment owners regarding information on the hazards of smoking and that a designated smoking area to be established to be incorporated into the lease document signed by both landlord and tenant.

Council Member Lieber expressed his support for “private right to action” and suggested that this be sent back to the Social & Economic Justice Commission for review.

Ira Sharenow, Albany resident, thanked the Council and the Fire Chief for the strong support of this Ordinance and noted that he suggested the “private right to action” last year.

Janna Katz, American Cancer Society, congratulated the City on bringing up its grade and spoke about the rights of the non-smoker and reiterated that this is a public health issue.

Allan Maris, Albany resident, urged the Council to be very cautious regarding the “private right to action” and to make sure the City looks at other city laws and cases. Expressed disappointment that there was no representative from the Social & Economic Justice Commission at the meeting. The City Administrator clarified that this item did not come from the Social & Economic Justice Commission, as it is just a one-year review of the City’s current Ordinance.

MOTION:

Moved by Council Member Lieber to refer the issue of “private right to action” to the Social & Economic Justice Commission and the City Attorney.

ON THE QUESTION:

Council Member Lieber noted that this action should go through the small claims court.

Mayor Atkinson expressed concern that this issue would result in a lot of “suing” and that a very clear process is needed.

Council Member Thomsen stated that there hasn’t been any problems to date and would be very hesitant to go support “private right to action”.

Council Member Lieber clarified his motion that the Social & Economic Justice Commission develops language for the “private right to action” that would be appropriate for the City of Albany and then come back with a recommendation on where the Commission stands.

AMENDED MOTION:

Moved by Council Member Wile, seconded by Council Member Javandel to ask the Social & Economic Justice Commission to recommend whether there should be a “private right to action” section in the City’s Ordinance. If so, develop the language to come back within three months for Council action.

ON THE QUESTION:

Council Member Lieber stated his goal is to reduce smoking in our society and believe that people should have “private right to action” and supports tenants rights.

AMENDED MOTION:

Moved by Council Member Javandel, seconded by Council Member Wile to refer to the Social & Economic Justice Commission to provide a recommendation regarding the “private right to action” to include statistics from other cities and legal cases to support the recommendation either for or against. These items are to come back to Council within three months.

AYES: Council Members Javandel, Lieber, Thomsen, Wile & Mayor Atkinson

NOES: None

ABSENT: None

Motion carried and so ordered.

**CITY OF ALBANY
CITY COUNCIL AGENDA
STAFF REPORT**

Agenda Date: 5/18/09
Reviewed by: BP

SUBJECT: One Year Review of Ordinance #08-03, Prohibiting Smoking in or around workplaces, recreational areas, and other places and amending the Albany Municipal Code

REPORT BY: Marc McGinn, Fire Chief
Judy Lieberman, Assistant City Administrator

STAFF RECOMMENDATION

Receive one-year review report.

BACKGROUND

In May of 2008, City Council passed Ordinance #08-03, substantially revising and strengthening the City's laws regarding second hand smoke. At that time, Council also requested a review of how the ordinance was working after one year. The main highlights of the ordinance were as follows:

- 1) Upgraded the Albany Municipal Code to include all provisions of State Law, and added a findings and purpose section that includes the health hazards of second-hand smoke and the right of non-smokers to breathe smoke-free air.
- 2) Prohibited smoking in enclosed spaces such as places of employment, multi-unit residence common areas, enclosed areas that are adjacent to areas in which smoking is prohibited, and enclosed areas that share a common ventilation system with areas in which smoking is prohibited.
- 3) Prohibited smoking in unenclosed places including the following:
 - a. Places of employment
 - b. Service areas (such as ATMs, Bus stops, etc.)
 - c. Recreational areas and playgrounds (includes parks, sports fields, gardens, hiking paths, etc.);
 - d. Dining Areas, with the exception of Bars that do not serve food, and with the exception of Bars that have been serving food over the past 90 day period (allows The Pub and The Mallard Club to maintain smoking in their courtyards.)

- e. Multi-Unit Residence Common Areas, except that the landlord may designate a portion of the outdoor area as a smoking area
 - f. Sidewalks adjacent to Albany public or private schools.
 - g. Public Events, such as sports events, parades, fairs, etc.
 - h. Solano Avenue
- 4) Added a definition of reasonable distance of 25 feet (State law is 20 feet)
 - 5) Added 80% of hotel rooms (should Albany have a hotel.)
 - 6) Required landlords in multi-family housing to maintain a list of designated non-smoking and smoking units, including a floor plan that shows designated smoking area. The list and plan is to be incorporated into the lease document signed by both landlord and tenant. Requires condominium seller to disclose whether smoking has been permitted in the unit and the smoking policies of the condominium complex.

DISCUSSION

City Actions: The passage of the ordinance was placed on the front page of the City's web site as a significant news item. The ordinance, a one page summary, and list of resources were also permanently posted on the City's web-site, under "*I want to/Learn more/About Smoke Free Albany.*"

- 1) The city ordered "No Smoking on Solano" stickers to be made available at no charge to businesses on Solano Avenues. In July a group of Albany High School student volunteers put together a packet that included a one-page summary of the ordinance and the sticker, and individually distributed this information to all of the Solano Avenue merchants. Any business that did not receive a sticker and notice in person received one via the mail. (264 businesses total)
- 2) The city ordered "No Smoking within 25 feet of doorway" stickers for merchants on San Pablo Avenue or other commercial locations that are not on Solano Avenue. The same group of student volunteers also distributed these stickers (with the letter) to businesses on San Pablo Avenue and to locations not on San Pablo Avenue. Any business that did not receive a sticker and notice in person received one via the mail. (220 businesses total)
- 3) "Smoke-free" stickers were also ordered for all city parks, and these were placed on existing park signs over the summer.
- 4) On July 29, 2008, the City also sent a mailing to all Albany landlords and to the Condominium Associations, informing them of the new laws. (248 properties) Staff received 10 phone calls from landlords with inquiries about the ordinance, mostly wanting additional stickers.
- 5) From the months of September through November 2008, the Fire Department attempted to make personal contact with each business. We were successful in making Solano and San Pablo Ave. 80-90% compliant with displaying "No Smoking" signs. Annual company inspections will encourage businesses to comply with the requirement to post/maintain "No Smoking" signage. A business may post its own notice, and does not have to use the City sticker. Additionally, the Fire Department worked with AC Transit to post permanent metal signs on all of the AC Transit bus shelters, which was completed in April 2009.

The Albany Chamber of Commerce and the Solano Avenue Association report little or no comment from Albany merchants, although the Chamber notes that initially their membership was mixed on the overall proposal. The Chamber notes that they have the stickers available for free for merchants to use, although some merchants do not like the stickers on their doors/windows. The Solano Avenue Association notes that their Solano Stroll web page has been updated to reflect that the Solano Avenue Stroll is now "Alcohol and tobacco free." Over the course of the past year, staff has received two complaints about people smoking on Solano Avenue.

The Police Department reports that between June 19, 2008 and April 8, 2009, there were three calls for service relating to violations of this ordinance. All three reported violations were located on Solano between San Pablo and Masonic. The first was on June 24th, 2008; police responded and advised those in violation of the new, one week old ordinance (warning given). The second was in March 2009 and was related to contractors working in the area. The third was also in March 2009 and was reported a day after the offense was to have occurred.

One comment has been received requesting modification to the ordinance to allow "private right to action". The stated goal of this request is that if a tenant smokes in a non-smoking area of an apartment building, including possibly his/her own unit (if that is supposed to be non-smoking) or allows house guests to smoke, then a tenant that has been exposed to the smoke will have a private right of action that the offender committed a nuisance.

Attached is language under consideration as well as language in place in other cities on the issue of smoking policy in multi-family housing and private right to action provided by the requesting resident for Council consideration.

Also attached is a 2008 State of Tobacco Control "report card" presented at the last Council meeting by a representative of the American Lung Association that grades Alameda county cities on their smoking and tobacco regulations. Albany was graded an "A" in the category of "Smokefree Outdoor Air", and a "C" in "Smokefree Housing." It was graded an "F" in "Reducing Sales of Tobacco Products" but this was prior to City Council passage of the tobacco sales regulation ordinance in early 2009.

SUSTAINABILITY IMPACT

Reduction in use of tobacco products and in exposure to second-hand smoke and cigarette butts reduces risks to public health.

FINANCIAL IMPACT

The costs for stickers, signage and mailing costs have been approximately \$2,500.

Attachments

1. Ordinance No. 08-03

2. Options for language on private right to action in multi-family housing
3. 2008 State of Tobacco Control – Local Grades

2008 State of Tobacco Control - Local Grades

Category	Alameda County														
	Unincorp	Alameda	Albany	Berkeley	Dublin	Emeryville	Fremont	Hayward	Livermore	Newark	Oakland	Piedmont	Pleasanton	San Leandro	Union City
Smokefree Outdoor Air Grade	D	F	A	A	B	B	F	A	D	C	B	F	C	F	C
Dining	4	0	2	4	4	4	0	4	0	4	4	0	4	0	0
Entryways	2	0	4	4	4	4	2	4	2	4	4	0	2	0	4
Public Events	0	0	4	4	2	0	0	2	0	0	0	0	0	0	0
Recreation Areas	0	0	4	4	2	4	0	4	2	0	4	0	0	0	0
Service Areas	0	0	4	4	4	4	0	4	0	4	4	0	4	0	4
Sidewalks	0	0	1	1	0	0	0	0	0	0	0	0	0	0	0
Total Points	6	0	19	20	16	16	2	18	4	12	16	0	10	0	8
Smokefree Housing Grade	D	F	C	D	A	D	D	F	D	D	B	F	D	F	D
Nonsmoking Units	0	0	0	0	3	0	0	0	0	0	0	0	0	0	0
Nonsmoking Common Areas	2	0	4	2	4	4	2	0	2	2	4	0	2	0	2
Disclosure	0	0	3	0	3	0	0	0	0	0	4	0	0	0	0
Nuisance	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0
Total Points	2	0	7	2	11	4	2	0	2	2	8	0	2	0	2
Reducing Sales of Tobacco Products Grade	D	D	F	A	F	D	F	F	F	F	A	F	F	D	F
Tobacco Retailer Licensing	0	0	0	4	0	0	0	0	0	0	4	0	0	0	0
Conditional Use Permit	0	1	0	0	0	1	0	0	0	0	1	0	0	1	0
Sales in Pharmacies	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sampling of Tobacco Products	1	0	0	0	0	0	0	0	0	0	1	0	0	0	0
Total Points	1	1	0	4	0	1	0	0	0	0	6	0	0	1	0

Smokefree Outdoor Air Grade: A (18+), B (13-17), C (8-12), D(3-7), F (0-2)

Smokefree Housing Grade: A (11+), B (8-10), C (5-7), D (2-4), F (0-1)

Reducing Sales of Tobacco Products Grade: A (4+), B (3), C (2), D (1), F (0)

CRITERION SHORT CUT SHEET

Category	GRADING CRITERION				
	A	B	C	D	F
Overall Tobacco Control Grade					
Total Points					
Smokefree Outdoor Air Grade	A	B	C	D	F
Dining	Bars & Restau 100%		Some exemptions		No restrictions
Entryways	20 feet		< 20 ft		No restrictions
Public Events	all 100%		Desig or some		No restrictions
Recreation Areas	all 100%	all w/designat	Some 100%	Some parks, w/design	No restrictions
Service Areas	at least 4	at least 3	at least 2	At least one	No restrictions
Sidewalks	One bonus point for sidewalk restrictions within specific commercial or downtown areas				
Total Points					
Smokefree Housing Grade	A=4	B=3	C=2	D=1	F=0
Nonsmoking Units	75-100%	50-74%	25-49%		No restrictions or < 25%
Nonsmoking Common Areas	all indoor/outdoor		Indoor only		No restrictions
Disclosure	Apts & Condos	One or the other			No restrictions
Nuisance	One bonus point				
Total Points					
Reducing Sales of Tobacco Products Grade					
Tobacco Retailer Licensing	1) Annual cost-covering fee;2) annual renewal; 3)required; other tob laws; 4) fines & revocation				
Conditional Use Permit	#1 + three	#1 + two	#1 + one	#1 only	No fee or no restrictions
Sales in Pharmacies	One bonus pt				
Sampling of Tobacco Products	One bonus pt				
Total Points					

Overall Tobacco Control Grade: A (11-12), B (8-10), C (5-7), D (2-4), F (0-1); points from other three grades - A (4), B (3), C (2), D (1), F (0)
 Smokefree Outdoor Air Grade: A (18+), B (13-17), C (8-12), D (3-7), F (0-2)
 Smokefree Housing Grade: A (11+), B (8-10), C (5-7), D (2-4), F (0-1)
 Reducing Sales of Tobacco Products Grade: A (4+), B (3), C (2), D (1), F (0)

Sample Language

17-1.5 DUTY OF PERSON, EMPLOYER, BUSINESS, LANDLORD, OR NONPROFIT ENTITY

e. Disclosure of Smoking Policy in New and Existing Multi-unit Housing

1. Every landlord of a Multi-Unit Residence shall maintain a list of designated nonsmoking Units, a list of designated smoking units, and a floor plan identifying the relative position of Smoking and nonsmoking Units. The floor plan also shall identify the location of any designated Smoking areas. At the time the lease is signed, the tenant shall also initial or sign that they received these documents. The list and plan shall be incorporated as exhibits into the lease signed by the Tenant and Landlord.

(3) The lease shall contain a clause or written notice stating that it is a material breach of the lease or agreement to (i) violate any law regulating smoking while on the premises, (ii) smoke in violation of a nonsmoking lease term, such as smoking in a nonsmoking Unit, or (iii) smoke in any Multi-Unit Residence Common Area in which smoking is prohibited by the Landlord; and

(4) The lease shall contain a clause or written notice stating that all lawful occupants of the Multi-Unit Residence are express third-party beneficiaries of the above required clauses.

a. The Rental Agreement terms required by subsection (a) are hereby incorporated by force of law into any lease or other agreement for the occupancy of a Unit in a Multi-Unit Residence made on or after the enactment date of the ordinance which adopted this section.

b. A Tenant who breaches the smoking regulations of a Rental Agreement or knowingly allows another Person to do so shall be liable to: (i) the Landlord; and (ii) to any lawful occupant of the Multi-Unit Residence who is exposed to secondhand smoke as a result of that breach. A Landlord shall not be liable to any Person for a Tenant's breach of smoking regulations if the Landlord has fully complied with section INSERT.

c. Failure to enforce any smoking regulation of a Rental Agreement on one or more occasions shall not constitute a waiver of the lease or agreement provisions required by this chapter and shall not prevent future enforcement of any such smoking regulation on another occasion.

2. All sellers of condominium units are required to disclose to prospective buyers in writing whether Smoking has been permitted in the Unit and the Smoking policies for the complex.

17-1.6 Secondhand Smoke as a Nuisance [This is amendment language]

Nonconsensual exposure to secondhand smoke within a Multi-Unit Residence, Multi-Unit Residence Common Areas and within buffer zones is a health hazard and a **nuisance**.

17-1.6 PENALTIES AND ENFORCEMENT. [change the number to 17-1.7]

Dublin, California

<http://www.codepublishing.com/ca/dublin.html>

5.56.055 Prohibition of smoking in multi-unit residences.

A. Multi-Unit Residences.

1. In every multi-unit residence, at least fifty percent (50%) of the units (including private outdoor spaces associated with such units, such as balconies, patios, and decks), must be designated as nonsmoking units by January 1, 2011;
2. Nonsmoking units must be contiguously grouped together both horizontally and vertically and physically separated from smoking units to the maximum extent practicable;
3. Landlords shall, within ninety (90) days of the effective date of the ordinance which adopted this section, notify each unit of its implementation schedule and plan for complying with this section;
4. Smoking is prohibited in nonsmoking units in multi-unit residences;
5. Landlords may designate a higher percentage of nonsmoking units or do so within an earlier time frame than required under subsection (A)(1) of this section.

B. Required Lease Terms.

1. Every lease or other agreement for the occupancy of a unit in a multi-unit residence shall, by January 1, 2011, include:
 - a. A clause stating that smoking is prohibited in the unit if the unit has been designated as a nonsmoking unit;
 - b. A clause stating that it is a material breach of the lease or agreement to (i) violate any law regulating smoking while on the premises; (ii) smoke in a nonsmoking unit; or (iii) smoke in any multi-unit residence common area in which smoking is prohibited by the landlord;
 - c. A clause stating that all lawful occupants of the multi-unit residence are express third-party beneficiaries of the above required clauses.**
2. The California Apartment Association's Form 34.0, Revised January 2007, meets the requirements for lease terms as outlined and is an option for use to comply with this section;

3. The lease or agreement terms required by subsection (B)(1) of this section are hereby incorporated by force of law into any lease or other agreement for the occupancy of a unit in a multi-unit residence made on or after January 1, 2011, and which does not fully comply with subsection (B)(1) of this section;

4. A tenant who breaches the smoking regulations of a lease or knowingly allows another person to do so shall be liable to: (i) the landlord; and (ii) any lawful occupant of the multi-unit residence who is exposed to secondhand smoke as a result of that breach. A landlord shall not be liable to any person for a tenant's breach of smoking regulations if the landlord has fully complied with subsection (B)(1) of this section;

5. Failure to enforce any smoking regulation of a lease or agreement on one or more occasions shall not constitute a waiver of the lease or agreement provisions required by this chapter and shall not prevent future enforcement of any such smoking regulation on another occasion.

C. Disclosure by Landlords of Multi-Unit Residences.

1. Every landlord shall maintain a list of designated smoking and nonsmoking units and a floor plan identifying the relative position of smoking and nonsmoking units. The floor plan also shall identify the location of any designated smoking areas. A copy of this list, floor plan, and a copy of any procedures for addressing smoking-related complaints shall accompany every new lease or other agreement for the occupancy of a unit in a multi-unit residence. If a copy of the list and floor plan is not so supplied, the unit subject to the lease shall be a nonsmoking unit.

Loma Linda, California

<http://municipalcodes.lexisnexis.com/codes/lomalinda/>

8.12.057 Required lease terms.

A. Every new lease or other agreement entered into after the effective date of this section for the occupancy of a unit in a multi-unit residence, other than a renewal of an existing lease to a tenant subject to Section 8.10.055(B), shall include:

1. A clause stating that smoking is prohibited in the unit, if the unit has been designated as a nonsmoking unit;
2. A clause stating that it is a material breach of the lease or agreement to: (a) violate any law or rule regulating smoking while on the premises; (b) smoke inside a nonsmoking unit or (c) smoke in any multi-unit residence common area in which smoking is prohibited by the landlord or by law; and

3. A clause stating that all lawful occupants of units in the multi-unit residence are third-party beneficiaries of the clauses required by subsections (A)(1) and (A)(2) of

this section.

B. The lease or agreement terms required by subsection A of this section are incorporated by force of law into any lease or other agreement for the occupancy of a unit in a multi-unit residence made on or after the effective date of this section which lease does not fully comply with subsection A of this section.

C. A tenant who breaches the smoking regulations included in a lease pursuant to subsection A of this section, or incorporated into a lease by subsection B of this section, or who knowingly allows another person to do so shall be liable to: (1) the landlord; and (2) to any lawful occupant of a unit in the multi-unit residence who is exposed to secondhand smoke as a result of that breach.

D. A landlord shall not be liable to any person for a tenant's breach of smoking regulations if:

1. The landlord has fully complied with subsection A of this section, and
2. Upon receiving a signed written complaint regarding prohibited smoking, the landlord provides a written warning to the offending tenant, stating that such tenant may be evicted if another complaint is received. Upon receipt of a second signed, written complaint against the offending tenant, the landlord may evict such tenant, but will not be held liable for the failure to do so.

E. Failure to enforce any smoking regulation of a lease or agreement on one or more occasions shall not constitute a waiver of the lease or agreement provisions required by this section and shall not prevent future enforcement of any such smoking regulation.

(Ord. 677 § 2 (part), 2008)

Belmont, California

<http://www.municode.com/resources/gateway.asp?pid=10411&sid=5>

Sec. 20.5-5. Required lease terms.

(a) For legal occupants on the effective date of this chapter, lease or rental agreement renewals for the occupancy of a unit in a multi-unit residence in which smoking is prohibited shall include:

- (1) A clause stating that smoking is prohibited in the unit if the unit has been designated as a non-smoking unit;
- (2) A clause stating that it is a material breach of the lease or agreement to (i) violate any law regulating smoking while on the premises; (ii) smoke in violation of a non-smoking lease term, such as smoking in a non-smoking unit; or (iii) smoke in any multi-unit residence common area in which smoking is prohibited by the landlord; and
- (3) A clause stating that all lawful occupants of the multi-unit residence are express third-party beneficiaries of the above required clauses.**

(4) A clause stating that terms (1)--(3) become effective fourteen (14) months after the effective date of this chapter, unless the landlord specifies an earlier effective date;

(b) For new tenants not in occupancy on the effective date of this chapter, every lease or other rental agreement for the occupancy of a unit in a multi-unit residence in which smoking is prohibited shall include:

(1) A clause stating that smoking is prohibited in the unit if the unit has been designated as a non-smoking unit;

(2) A clause stating that it is a material breach of the lease or agreement to (i) violate any law regulating smoking while on the premises; (ii) smoke in violation of a non-smoking lease term, such as smoking in a non-smoking unit; or (iii) smoke in any multi-unit residence common area in which smoking is prohibited by the landlord; and

(3) A clause stating that all lawful occupants of the multi-unit residence are express third-party beneficiaries of the above required clauses.

(c) The lease or agreement terms required by subsection (a) or (b) are hereby incorporated by force of law into any lease or other agreement for the occupancy of a unit in a multi-unit residence made on or after the effective date of the ordinance which adopted this section and which does not fully comply with subsection (a) or (b).

(d) A tenant who breaches the smoking regulations of a lease or knowingly allows another person to do so shall be liable to: (i) the landlord; and (ii) to any lawful occupant of the multi-unit residence who is exposed to secondhand smoke as a result of that breach. A landlord shall not be liable to any person for a tenant's breach of smoking regulations if the landlord has fully complied with subsection (a).

(e) Failure to enforce any smoking regulation of a lease or agreement on one or more occasions shall not constitute a waiver of the lease or agreement provisions required by this ordinance and shall not prevent future enforcement of any such smoking regulation on another occasion.

(Ord. No. 1032, § II, 10-9-07)