



# City of Emeryville

CALIFORNIA

## MEMORANDUM

**DATE:** September 4, 2018

**TO:** Mayor and Members of the City Council

**FROM:** Michael A. Guina, City Attorney

**SUBJECT:** **Second Reading Of An Ordinance Of The City Council Of The City Of Emeryville Repealing And Replacing Chapter 29 Of Title 5 Of The Emeryville Municipal Code, "Smoking Pollution Control"; Ceqa Determination: Exempt Pursuant To Section 15061(B)(3) Of The California Ceqa Guidelines**

**Resolution Of The City Council Of The City Of Emeryville Authorizing The City Manager To Execute A Memorandum Of Understanding Between The City Of Emeryville And The County Of Alameda Public Health Department Regarding Provision Of Education And Outreach For City's Smoking Pollution Control Ordinance And Rescinding Resolution No. 18-115**

## RECOMMENDATION

Staff recommends that the City Council adopt the second reading of the proposed ordinance to amend Chapter 29 of Title 5 of the Emeryville Municipal Code, "Smoking Pollution Control", and adopt the above-referenced resolution.

## BACKGROUND

### Legal Framework

#### *California State Law*

In 1995, the State adopted AB 13, which enacted Labor Code section 6404.5. Labor Code section 6404.5, as originally enacted, restricted smoking in "enclosed spaces at places of employment"; yet, some workplaces remained exempt from tobacco control measures.

In 2004, the State adopted AB 846, which prohibited smoking within twenty (20) feet of main entrances, exits and operable windows of all public buildings in California, but did not regulate private buildings.<sup>1</sup>

In 2006, the State adopted AB 2067, which provided a definition of "covered parking lot"<sup>2</sup> in order to make clear that smoking within lobbies, lounges, waiting areas, elevators,

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<sup>1</sup> Government Code § 7596, et seq.

<sup>2</sup> Government Code § 7596(a)(3)(A).

stairwells, and restrooms that are a structural part of the covered parking lot is prohibited. Also, a definition for “enclosed space” was added that prohibits smoking in enclosed spaces of certain places of employment to include lobbies, lounges, waiting areas, elevators, stairwells, and restrooms that are a structural part of the building that is the place of employment.

In 2016, the State further expanded its prohibition on smoking to limit the effects of secondhand smoke. AB 7 amended Labor Code section 6404.5 to prohibit smoking in all enclosed places of employment, thereby eliminating the vast majority of the exemptions under the original legislation. In addition, SB 5 amended the definition of smoking and tobacco product as defined in Business and Professions Code section 22950.5 to expand the state prohibition on smoking.<sup>3</sup> Business and Professions Code section 22950.5(c) defines smoking to mean:

inhaling, exhaling, burning, or carrying any lighted or heated cigar, cigarette, or pipe, or any other lighted or heated tobacco or plant product intended for inhalation, whether natural or synthetic, in any manner or in any form. ‘Smoking’ includes the use of an electronic smoking device for the purpose of circumventing the prohibition of smoking.

Such a definition is inclusive of smoking of cannabis or cannabis products.

In addition, in 2016, the voters of California passed Proposition 64, known as the Adult Use of Marijuana Act. Although the purpose of Proposition 64 was primarily to legalize recreational use of cannabis, there are a few provisions that relate to the smoking of cannabis. Specifically, Health and Safety Code section 11362.3(a)(2) was added, and provides that nothing in Proposition 64 permits a person to smoke cannabis or cannabis products in a location where smoking tobacco is prohibited. In addition, Health and Safety Code section 11362.3(a)(1) provides that Proposition 64 does not permit a person to smoke (or ingest) cannabis or cannabis products in a public place, except at a cannabis dispensary or retailer that meets certain requirements.

In sum, the 2016 amendments to state law construed together implement a prohibition on smoking of all products in places of employment, whether tobacco or cannabis, no matter the delivery method.

### *Local Regulations*

Cities may regulate smoking in areas not covered by state laws. In 1988, the City Council first enacted Ordinance No. 88-07 which restricted smoking in certain enclosed places, such as hotel lobbies, retail stores, pharmacies, banks and other offices, waiting rooms, health facilities, schools and enclosed theatres. In 2006, in light of recent state law changes with the enactments of AB 13, AB 846 and AB 2067, the City considered adopting a new smoking pollution control ordinance. In 2006, the City Council adopted Ordinance No. 06-021, which was codified as Chapter 29 of Title 5 of the Emeryville

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<sup>3</sup> See also Gov. Code § 7597(c) and Labor Code § 6404.5(l), which incorporate the definition of smoking set forth in Business and Professions Code § 22950.5(c).

Municipal Code. In 2010, the City Council amended section 5-29.03 of the Emeryville Municipal Code to clarify that the chapter did not apply to open air barbeques.

## **Reasons for Smoking Pollution Control Measures**

### *Secondhand Tobacco Smoke*

The dangers of secondhand tobacco smoke are well-documented. The United States Environment Protection Agency (“EPA”) has identified secondhand smoke as a Type A carcinogen, the most dangerous class of carcinogen for which there is no safe level of exposure. On June 27, 2006, the United States Surgeon General issued a comprehensive scientific report entitled *The Health Consequences of Involuntary Exposure to Tobacco Smoke*. The report concludes that there is no risk-free level of exposure to secondhand smoke. In a news release announcing the report Surgeon General Richard Carmona was quoted as saying, “The health effects of secondhand smoke exposure are more pervasive than we previously thought. The scientific evidence is now indisputable: secondhand smoke is not a mere annoyance. It is a serious health hazard that can lead to disease and premature death in children and non-smoking adults.” The report concludes that only smoke free environments can ensure protection from secondhand smoke; and that mitigation measures such as separating smokers from non-smokers, cleaning the air, and ventilating buildings cannot eliminate exposure of non-smokers to secondhand smoke.

The report further concludes that non-smokers exposed to secondhand smoke increase their risk of developing heart disease by 25 to 30 percent, and that secondhand smoke causes a 20 to 30 percent increase in the risk of lung cancer from for those living with a smoker. The report also adopts the estimates of the California Environmental Protection Agency concluding that secondhand smoke accounts for 46,000 premature deaths from heart disease and 3,000 premature deaths from cancer in the United States each year. The report addresses the particularly severe effects of secondhand smoke on children, concluding that children exposed to secondhand smoke are at an increased risk for sudden infant death syndrome (SIDS), acute respiratory infections, ear problems, and more severe asthma.

In addition, on January 26, 2006, the California Air Resources Board (ARB) formally identified secondhand smoke as a Toxic Air Contaminant (TAC) based on a comprehensive report regarding exposure and health effects of secondhand smoke. TAC is an air pollutant that may cause or contribute to an increase in deaths or serious illness, or that may pose a present or potential hazard to human health. As part of the report, the Office of Environmental Health Hazard Assessment established links between exposure to secondhand smoke and adverse health effects, including premature births, low birth-weight babies, and SIDS.

### *Effects of Electronic Cigarettes*

In light of the findings by the state and federal governments related to the effects of secondhand smoke, as well as the accompanying smoking pollution controls enacted by California, the use of electronic cigarettes increased, presumably in an effort to circumvent the smoking pollution controls related to tobacco. For example, from 2011 to

2015, the percentage of students who had used e-cigarettes in the past 30 days, increased from 1.5% to 16.0% for high school students, and .6% to 5.3% for middle school students.<sup>4</sup> However, the use of electronic cigarettes does not eliminate potential adverse health effects. For example, nicotine is highly addictive, and is toxic to the developing brain of children and adolescents.<sup>5</sup> In addition, as it relates to secondhand smoke effects, although electronic cigarettes generally emit lower levels of dangerous toxins, they still emit heavy metals, ultrafine particulate, and cancer-causing agents, such as acrolein.<sup>6</sup> Thus, the Center for Disease Control recommends prohibiting the smoking of electronic cigarettes in the same manner as conventional cigarettes.

### *Effects of Cannabis Smoke*

Smoking pollution control measures for cannabis and cannabis products is an emerging issue in light of the recent state law regarding both the medical and recreational use of cannabis. Since 1970, the Federal Controlled Substances Act, 21 U.S.C. Section 801, *et. seq.*, has prohibited the manufacture, cultivation, distribution and possession of cannabis, commonly referred to as marijuana, which means there is not the same depth of research on the effects of cannabis smoke, compared to tobacco and nicotine. Nonetheless, the American Lung Association has stated that “Smoke is harmful to lung health. Whether from burning wood, tobacco or cannabis, toxins and carcinogens are released from the combustion of materials. Smoke from cannabis combustion has been shown to contain many of the same toxins, irritants and carcinogens as tobacco smoke.”<sup>7</sup> Furthermore, “Secondhand marijuana smoke contains many of the same toxins and carcinogens found in directly inhaled marijuana smoke....”<sup>8</sup> Smoking cannabis can lead to chronic bronchitis, and can injure the cell linings of large airways, leading to symptoms such as chronic cough, phlegm production, wheeze and acute bronchitis.<sup>9</sup> Proponents of cannabis use have acknowledged the adverse effects of smoking cannabis.<sup>10</sup> Accordingly, proponents of cannabis use recommend vaping cannabis over smoking to achieve the same intended effects as smoking cannabis.<sup>11</sup> Vaping cannabis is preferable compared to smoking because vaporizers heat the cannabis to release its active ingredients without burning the materials, but there is still not enough research to for any recommendation for establishing a safe level of exposure of cannabis vaping, either directly or through secondhand contact. Some research shows lower tars in the smoke,

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<sup>4</sup> “Electronic Nicotine Delivery Systems: Key Facts”. CDC Office on Smoking and Health (May 2016) available at <http://www.cdc.gov/tobacco/stateandcommunity/pdfs/ends-key-facts2015-508tagged.pdf> (last accessed on 8/22/16).

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> “Smoking Facts: Marijuana and Lung Health”. American Lung Association available at <http://www.lung.org/stop-smoking/smoking-facts/marijuana-and-lung-health.html> (last accessed on 8/22/16).

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> Armento, Paul. Senior Policy Analyst. “Cannabis Smoke and Cancer: Assessing the Risk”. The National Organization for the Reform of Marijuana Laws (May 2006), p. 2 (available at [http://norml.org/pdf\\_files/NORML\\_Cannabis\\_Smoke\\_Cancer.pdf](http://norml.org/pdf_files/NORML_Cannabis_Smoke_Cancer.pdf) last accessed on 8/22/16.)

<sup>11</sup> *Ibid.*

but other studies show toxic levels of ammonia in the vapor, which can cause lung irritation, nervous system effects and asthma attacks.<sup>12</sup>

Please see Attachment 2, a fact sheet produced by the State of California, Health and Human Services Agency, regarding use of cannabis and tobacco for further information, and references.

#### *Prior City Council Direction*

On September 20, 2016, the City Council held a study session to consider modifying Chapter 29, of Title 5 of the Emeryville Municipal Code, "Smoking Pollution Control Ordinance". The City Council first considered whether the City should place the same restrictions on the "smoke" from e-cigarettes and other vaporizers, and the smoke from cannabis as it does on tobacco. The second issue considered was whether all multi-residential housing, whether a condominium project or rental project, should prohibit smoking in the same manner. Ultimately, the City Council determined that it needed further information before providing direction on these issues. The City Council directed staff to work with the Housing Committee to conduct surveys and outreach within the community to determine community preferences.

City staff partnered with the Alameda County Public Health Department Tobacco Control Program (ACPHD-TCP) to obtain assistance with the community survey and outreach. With input from cities across Alameda (including Emeryville), the ACPHD-TCP conducted an online survey for all cities in Alameda to obtain community input on issues related to smoking.

On February 1, 2017, ACPHD-TCP presented survey results to the Housing Committee. Overall, the Housing Committee felt that sufficient data had been collected to determine community smoking preferences. Although one member of the Committee would have preferred for the questions asked in the survey to mirror exactly the questions asked by the Council, the Committee understood that because this was a county-wide survey, that was not possible. Overall, the Committee found that the data collected indicates a community preference to have multi-unit residences that are free of all smoke regardless of the type of housing (rental and owner-occupied condominium). Therefore, the Committee recommended that the City's ordinance reflect those preferences. However, the Committee requested that for multi-unit residences, staff look into creating space where smoking could occur, yet not impact residents.

On October 3, 2017, the City Council held a study session to consider the results from the survey conducted by ACPHD-TCP, and to provide direction on a proposed ordinance. Overall the Council was supportive of the ordinance presented with some modifications. First, Council indicated that it would like to consider an ordinance that prohibits smoking throughout hotels, but the Councilmembers wanted to provide hotels with an opportunity to comment on such a regulation if the hotels' policies allowed for smoking on the

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<sup>12</sup> "FAQs: Marijuana and Methods of Use". Colorado Department of Public Health and Education (available at [https://www.colorado.gov/pacific/sites/default/files/M\\_RM\\_Marijuana-and-Methods-of-Use-FAQs.pdf](https://www.colorado.gov/pacific/sites/default/files/M_RM_Marijuana-and-Methods-of-Use-FAQs.pdf) (last accessed on 8/22/16).)

premises. Second, the Council wanted assurances that in addition to tobacco, the proposed ordinance would prohibit the smoking of synthetic tobacco products. Third, the Council indicated that it would like to partner with ACPHD-TCP for enforcement of the new ordinance, and was amenable to ACPHD-TCP's revisions to the proposed ordinance to facilitate enforcement. Fourth, the Council indicated it would like transit stops to be smoke-free.

On July 10, 2018, the City Council adopted the first reading of the proposed ordinance without any modifications. The City Council also considered the draft memorandum of understanding, and had no further comments (discussed in further detail below). On July 24, 2018, the City Council reintroduced the proposed ordinance to eliminate Section 5-29.09, which prohibited smoking in smoking lounges. On August 3, 2018, the City Council reintroduced the proposed ordinance to re-insert Section 5-29.09, which prohibits smoking in smoking lounges, except for the smoking of cannabis in permitted cannabis lounges.

Also on August 3, 2018, the City Council adopted Resolution No. 18-115 authorizing the City Manager to execute the MOU with ACPHD-TCP. However, Resolution No. 18-115 was premised on the second reading of the ordinance occurring on August 3, 2018, which it did not. To ensure that the record remains factually accurate, staff recommends adopting the attached resolution, which reflects the accurate dates based on staff's recommendation, and which rescinds Resolution No. 18-115.

## **DISCUSSION**

Attachment 1 is a proposed ordinance for Council's consideration. Overall, the ordinance continues to adhere to City's current structure on smoking pollution control. It is poised as a repeal and replace because staff has used this opportunity to make some revisions that relate to the form (e.g., defined terms are capitalized throughout the ordinance, removing superfluous defined terms).

Overall, the ordinance treats all smoke, whether it is from tobacco or cannabis or their products, and whether it is from an electronic smoking device or not, the same. This is accomplished by defining smoke and smoking to include smoke from and smoking of tobacco, and electronic smoking devices. (See Section 5-29.02(k)-(l).) State law prohibits the smoking of cannabis or cannabis products in areas where tobacco smoke is prohibited. (See Health and Safety Code §§ 11362.3 and 11362.79.) Therefore, the ordinance and state law function together to prohibit the smoking of cannabis and cannabis products in the same areas where the smoking of tobacco and tobacco products is prohibited.

The ordinance also prohibits smoking in all multi-unit family housing, whether it is owned (e.g., condominiums) or rented (e.g., large rental complex). Section 5-29.04(b)(1) prohibits smoking in all multi-unit residences, and the prior exception for condominium developments has been removed from the ordinance. A single-family home with an attached accessory dwelling unit is considered multi-unit residence for purposes of the ordinance. (See Section 5-29.02(e); 5-29.07(b).) A prohibition on smoking in all multi-unit residences not only furthers the public health objectives by reducing second hand

smoke, but also supports other City Council goals. Families with children tend to prefer smoke-free housing, and therefore, such a City prohibition on smoking in multi-unit housing may make housing more family friendly. In addition, smoke-free units tend to have lower maintenance costs compared to smoking units because the landlord does not incur the same cleaning costs during turnover, thereby removing one type of cost that may be passed to prospective tenants. Under the existing Section 5.29.06, owners of multi-unit housing (or homeowners' association) will be required to post no smoking or smoking signs as appropriate. In addition, rental agreements for occupancy in a multi-unit residence will require notice of the smoking prohibition, as well as lease terms regarding the smoking prohibition, and sellers of multi-unit residences will be required to provide notice to prospective buyers about the smoking prohibition.

Smoking is also prohibited throughout hotels. Per Council's direction and upon staff's request, ACPHD-TCP reached out to the hotels located in Emeryville to survey their policies on smoking. The survey found that smoking is already prohibited at the hotels through corporate policy.

Although the proposed ordinance prohibits smoking throughout much of Emeryville, there are still some locations where an individual could smoke. Those places include: unenclosed areas away from areas where smoking is prohibited, single family residences (unless the house is used as a child or health care facility or there is an attached accessory dwelling unit on the property), medical research and treatment sites, a designated smoking area in the common area of multi-unit residence complexes, and a cannabis dispensary, if the conditional use permit allows for smoking of cannabis on site. Individuals also can smoke in the public right of way (e.g., sidewalks).

## **FISCAL IMPACT**

There is no fiscal impact in the adoption of the ordinance. However, at the prior study session, the Council had expressed concern about the impact on the Police Department from enforcing a more stringent ordinance, since the Police Department would be the City department to enforce the new regulations. To enforce the ordinance, staff proposed partnering with Alameda County Public Health Department-Tobacco Control Program ("ACPHD-TCP"). There is no cost in partnering with ACPHD-TCP. Included as Attachment 3 is the proposed Memorandum of Understanding Between the City of Emeryville and the County of Alameda Public Health Department ("MOU").

The purpose of the MOU is to identify the roles and responsibilities between ACPHD-TCP and the City as it relates to the proposed ordinance. Complainants would call either ACPHD-TCP directly or would be directed to contact ACPHD-TCP. Once a complaint is received, DPH would draft a letter to the landlord, property owner, or condo association to provide education about the impact of secondhand smoke in multi-unit housing and information about the City's smoke-free policy. The goal of ACPHD-TCP would be to obtain voluntary compliance with the City's ordinance. If after several attempts, ACPHD-TCP is not successful in achieving voluntary compliance, then the matter would be referred to the City's Police Department for code enforcement.

A violation of the ordinance is considered an infraction, and may also be subject to an administrative citation and fine. San Mateo County Department of Health and several San Mateo county cities utilize a similar approach, and have done so for several years. Overall, the program is considered successful, given that only one or two citations have been issued since its inception. Marin County and its jurisdictions also utilize a similar approach. Marin County reports that over the past 6-7 years, the County has received on average about 2 calls per month total from all Marin County jurisdictions combined. Of the complaints received, approximately 95% of them are resolved without code enforcement from the City.

Staff recommends a delayed effective date for the ordinance. The time between the second reading of the ordinance and the effective date would be used by the City and ACPHD-TCP to conduct outreach and technical assistance to affected parties, including landlords, property managers, residents, and condo associations. Outreach materials would include draft lease terms, a sample amendment to HOA rules, information on the health impacts of secondhand smoke, and the complaint process. In addition, a delayed effective date will allow the City and ACPHD-TCP to determine the logistics for partnering on enforcement. The recommended effective date is December 1, 2018.

#### **STAFF COMMUNICATION WITH THE PUBLIC**

As mentioned above, City staff has been working with ACPHD-TCP to prepare this item to bring forward to the City Council. In addition, City staff has communicated with ChangeLab Solutions, a non-profit located in Oakland, that supports states, local governments and neighborhoods to create laws and policies to improve residents' health.

#### **CONCLUSION**

Staff recommends that the City Council take the following action:

1. Adopt the second reading of the ordinance.
2. Adopt the proposed resolution.

**PREPARED BY:** Andrea Visveshwara, Assistant City Attorney

**APPROVED AND FORWARDED TO THE  
CITY COUNCIL OF THE CITY OF EMERYVILLE:**

  
Michael Guina, City Attorney



## **ATTACHMENTS**

1. Proposed Ordinance
2. Proposed Resolution
3. Memorandum of Understanding