



Jesse Arreguín
Councilmember, District 4

REVISED AGENDA MATERIAL

Meeting Date: December 3, 2013

Item Number: # 28

Item Description: Referral to City Manager: Amendments to Tobacco-Free Multi-Unit Housing Ordinance

Submitted by: Councilmember Jesse Arreguín

The subject and recommendation of the item has been revised from a referral to the City Manager to instead recommend that the Council include specific amendments in the City Manager's proposed Tobacco-Free Multi-Unit Housing Ordinance on the December 3, 2013 City Council agenda (Item # 30).

The recommendations have been revised to remove the amendments the City Manager's ordinance already includes. The recommendations have also been revised to include new amendments based on the December 3rd draft ordinance. The background section has also been revised to remove language about the recommendations that have been deleted, and to provide additional information on the new amendments proposed.

I have also removed any references to expanding the smoking ban to single family homes. I am not suggesting that we explore covering single-family homes and instead the item focuses on improvements to the ordinance banning smoking in multi-unit properties.

I have written the specific legal text of the amendments to include in the ordinance which are reflected in Attachment 1. I have also marked up the City Manager's proposed ordinance to include the changes so Council can see directly where they would fit and so that Council could adopt the amended ordinance if it so chose.



Jesse Arreguín
Councilmember, District 4

REVISED
ACTION CALENDAR
November 19, 2013

To: Honorable Mayor and Members of the City Council

From: Councilmember Jesse Arreguín

Subject: ~~Referral to City Manager:~~ Amendments to Tobacco-Free Multi-Unit Housing Ordinance

RECOMMENDATION:

Include the following amendments in the proposed Tobacco-Free Multi-Unit Housing Ordinance. The legal text of amendments to include in the ordinance are attached to this report:

~~Refer to the City Manager for incorporation in a draft Tobacco-Free Multi-Unit Housing Ordinance~~

~~the following proposals:~~

- ~~1. Delay the effective date of the ordinance to May 1, 2014, rather than March 1, 2014 as previously directed by the City Council, so that staff has adequate time to draft amendments based on this referral and bring back a final ordinance for Council adoption. Also delay the requirement that landlords notify tenants effective January 1, 2014. A delayed implementation date would also provide enough time for the city to conduct outreach to owners and tenants of the new requirements and increase smoking cessation resources before the ordinance goes into effect.~~
- ~~2. All initial leases or rental agreements signed on or after May 1, 2014 shall include language expressly prohibiting smoking in the units or in any common areas of a multi-unit residence.~~
- ~~3.1. _____ That all initial leases or rental agreements signed after May 1, 2014, also notify tenants which units in the building do not have lease clausess which expressly prohibit smoking. The City Manager's proposed ordinance only~~

requires that rental applications include information on the no smoking law, and does not require information be included in leases (which tenants are actually given a copy of). It also does not require that leases include information on which units in the building have no smoking clauses.

4.2. ~~_____ Failure on the part of a property owner to ~~provide~~include either of the no smoking lease provisions noted above or notification of the smoking law will allow the new tenant to break the lease without penalty. ~~(the language proposed by the Manager on October 1st along with the modifications proposed by the Rent Board on October 1st suffices).~~~~

5. ~~That the City or Rent Board actively encourage and try to get tenants to sign voluntary lease addendums which prohibit smoking. Any voluntary lease addendum should be on a City/Rent Board developed form.~~

3. The City or its designee shall offer current tenants a voluntary lease addendum to prohibit smoking in units and common areas of buildings. The addendum should be on a form developed and approved by the City or its designee.

6.4. ~~_____ To help implement the Rent Board's registry of units with no-smoking lease clauses, require that units not covered under rent control provide information to the Rent Board about which units contain no-smoking lease provisions. That the Rent Board establish and maintain a registry of all rental units in multi-unit housing indicating which units have leases that expressly prohibit smoking & require owners to notify the Rent Stabilization Board of lease provisions prohibiting smoking, and that the city require that owners of units registered with the Rent Board and those that aren't registered provide information on which units have no smoking lease clauses.~~

7. ~~That owners be required to post signs in common areas of all multi-unit housing indicating smoking is prohibited.~~

5. Modify the enforcement procedure outlined in B.M.C. Section 12.70.035 as follows: A) After an initial complaint from a resident of the building on a form developed by the City and signed under penalty of perjury, the City will send out a warning letter. B) If within the proceeding six-month period two different tenants in the building sign complaints under penalty of perjury that the resident is smoking in violation of the law, the City will issue an administrative citation NOT an infraction. C) If there are additional

complaints by residents of the building that the individual is smoking, the violator will continue to be issued administrative citations with fines increasing.

D) If someone is a repeat violator, the City can deem the individual guilty of an infraction but only after an investigation by City staff, and foundational evidence is provided determining that the individual was in fact smoking in their unit or on the property in violation of city law.

~~8. That the City allocate staff to enforce violations of this ordinance through an initial investigation, written warning and followed by progressively increasing fines of \$250, \$500, \$1000 and \$1,500 for each infraction. Consistent with the previous staff drafted ordinance, there should be a cap on the number of private right of actions that any individual resident may file in a year against another smoking resident.~~

~~9.~~

~~10. 6. Include the private right of action proposed in the October 1, 2013 staff ordinance, includes the private right of action but strengthen it by allowing each resident to collect no more than \$1,000 in a calendar year through private right of action. (Including private right of action as an additional option, but not the primary means of enforcement, will provide an additional means for neighbors affected by second hand smoke to hold a smoker accountable. This is especially important if after City enforcement someone continues to smoke, or the landlord fails to evict someone for smoking in violation of their lease.) *Doing this allows us to show that we are not tolerating or condoning smoking but believe that real financial penalties (rather than an unequal risk of lost housing) should be an appropriate penalty that can be applied in a more uniform way. Also making a violation the ordinance an infraction does not give an owner automatic grounds to evict a tenant.*~~

~~Also include the mandatory mediation provisions included in the ordinance proposed by the Manager on October 1,~~

7. Modify B.M.C. Section 12.70.037 to either: 1) Require that landlords provide written notice to tenants of the law using an Appendix or disclosure form to be developed by the City, or 2) Eliminate requirement that landlords notify but instead require that the City or its designee notify tenants of the new law by March 1, 2014. ~~Warnings be required by landlords and by the City before any enforcement action can be taken.~~

~~The City Council should authorize sufficient staff and a funding source for proper enforcement and outreach. Previously, the City Manager indicated such a program would cost in the neighborhood of \$120,000 annually to implement. Councilmember Maio indicated that the inspectors associated with the Rental Housing Safety Program be charged with implementing the Ordinance. If the RHSP fee were increased by \$5 per unit, there would be sufficient resources to fund the necessary staff to implement the provisions of the Tobacco Free Multi Family Housing Ordinance I am proposing. If there needs to be a specific nexus between a no smoking ordinance and the RHSP program, City staff should explore amending the housing code so that smoking is a violation that can be cited and enforced by RHSP Housing code inspectors.~~

BACKGROUND:

On October 1, 2013, the City Council directed staff to draft an ordinance that bans smoking in all multi-unit housing effective March 1, 2014 and requires landlords to notify tenants of the new regulations. ~~The Council discussed declaring smoking a nuisance~~**Council switched from private to City enforcement, and settled on an enforcement procedure based on initial complaints triggering a warning and subsequent complaints resulting in citation. Including the other provisions proposed by the City Manager and advisory commissions were not addressed in the motion adopted by the Council.** ~~and requiring that owners evict tenants that are alleged to continue smoking after receiving notice from the City that a complaint had been logged.~~

Based on the City Council's direction, the City Manager has introduced an ordinance which is largely based on the city's Barking Dog policy in which ~~Similar to the Barking Dog Ordinance,~~ repeated complaints, rather than independent City confirmation, would be the basis for determining that a resident of multi-unit housing was in fact smoking in violation of the Ordinance. ~~There was no discussion of the City issuing fines when they found a resident was smoking in violation of the Ordinance, only that tenants may face eviction for doing so.~~ In May, Council directed staff to provide sufficient notice to residents (over a year notice) before they faced liability through a private right of action. This notice was to be performed by the city in coordination with information about smoking cessation classes. However, in October, Council shifted the obligation for notifying tenants to the landlord and truncated the notice **period and did not provide clear guidelines on what information and in what form owners would be notifying tenants.** ~~Including the other provisions proposed by the City Manager and advisory commissions were not addressed in the motion adopted by the Council.~~

The ordinance proposed by the City Manager has several problems that must be corrected if Berkeley is to have a fair and effective ban on smoking in multi-unit properties.

The process as discussed on October 1st is problematic for a number of reasons:

Council Discussed No Fines for Violations

~~While discussion centered around nuisance and eviction, there was no discussion or direction that the City levy a fine against an individual found in violation of the Ordinance or what would be a fine sufficient to deter smoking. Absent a mechanism to fund city enforcement of the ordinance, we are shifting the burden to property owners.~~

Owner Occupants in Multi-Family Buildings Face Disparate Treatment and Face No Penalties or Ineffectual Penalties

Even if there is a fine added to the Ordinance, the onus, risk and incentive to not smoke in multi-family housing falls disproportionately and unfairly on the backs of tenants while condo owners, TIC owners and owner occupants in multi-family housing are either exempt or facing ineffectual penalties. **If this is truly a public health issue, we should not establish disparate treatment in how the rules are enforced based upon an individual's ability to own the property they live in.**

Council did not require No Smoking Lease Provisions

~~Nothing in what was adopted on October 1st mentions anything about requiring all leases signed after a designated date to include a no smoking clause. All parties working on this issue for the past several years have agreed that this is the most effective means to achieve smoke free housing in Berkeley.~~

No Notification to New or Prospective Tenants about Smoke-Free Units

Nothing in what was adopted on October 1st requires notification to new or prospective tenants of which units expressly prohibit smoking in the lease. Prospective tenants should have knowledge of this before they decide to move in next door to someone that does not have such a restriction in their lease.

No Notification of the Smoking Law in New Leases

While the proposed ordinance would require that tenants receive written notice at the time of application for an apartment, it does not require that there be a disclosure of the smoking law with the lease. Most tenants do not receive a copy of their application but rather a copy of their lease.

Tenants also receive and sign disclosures as addendums to leases. Also while the ordinance says that owners will notify tenants of the smoking law it does not specify what language owners should include in the written notice. The Soft Story Ordinance and Condominium Conversion Ordinance include either specific language for the written notice to tenants or require that the City develop the notice. Absent specific direction from the city on the form of disclosure, this policy is ripe for abuse.

No Registry of Smoke-Free Units

Nothing in what was adopted on October 1st mentions a registry of those units that expressly prohibit smoking. This was identified as an important tool for consumer information as well as a way to track effectiveness of the ordinance.

The Rent Board has indicated that it will develop a registry of units registered under its ordinance. If the City Council would like to ensure that the Rent Board has an effective registry it should adopt language requiring that units not registered with the Rent Board provide information on which units contain no-smoking lease provisions, similar to the requirements of the recently adopted Automatically Renewing Leases Ordinance.

No Standardized Language for Voluntary Lease Addendum

Nothing in what was adopted on October 1st or in what is proposed in the December 3rd draft states that the voluntary lease addendums use standardized language developed by the City. In fact the proposed addendum language attached to the December 3rd staff report from the California Apartment Association is not a voluntary addendum but is a unilateral agreement since there is no mention that the agreement is voluntary or that the tenants agree to the language of the addendum. As such it is illegal under Berkeley's rent control law and cannot be used. In order to avoid situations where landlords are using language that is not legal and cannot prevail if they attempt to evict tenants for smoking, then the City or its designee should develop the addendum language for all owners to use.

The Rent Stabilization Board has developed a voluntary lease addendum for owners to use which complies with the provisions of the Rent Ordinance, and has distributed this lease addendum for about a month. Here is a link to a copy of the Rent Board's voluntary addendum: [http://www.cityofberkeley.info/Rent Stabilization Board/Home/Smoking Prohibition Addendum.aspx](http://www.cityofberkeley.info/Rent%20Stabilization%20Board/Home/Smoking%20Prohibition%20Addendum.aspx)

~~mentions the City or Rent Board attempting to secure voluntary lease addendums from existing tenants using standardized language. Such a process was proposed so that owners that did attempt to evict tenants smoking in violation of their leases would be more likely to prevail and not be liable for attorney costs.~~

Enforcement should be by Administrative Citation and NOT Infraction.

While the enforcement mechanism proposed in the December 3rd ordinance is an improvement, it contains several key flaws.

The ordinance requires that an individual make a complaint to the City if a resident is smoking in their unit or in common areas of a building. The ordinance does not require that the person making the initial complaint be a resident of the building.

The ordinance also does not require that when tenants complain using the City-issued form that they sign under penalty of perjury. Given the ramifications of making a complaint and to avoid neighbors filing frivolous complaints, a requirement of penalty of perjury should be included.

Once the City receives two separate complaints from neighbors that someone is smoking, then it automatically determines that the person is guilty of an infraction.

While there should be a determination that the person has violated and fines should be issued, an infraction is not the best approach. Under state law an infraction is a criminal violation. But more importantly, unless someone pays the penalty or “bail forfeiture”, they have to appear before a judge in county court, and in order for the citation to be upheld the neighbors who made the complaint have to give sworn testimony that the person was smoking in violation of city law. At the October 1st Council meeting, Councilmembers raised concerns about putting the burden of enforcement on neighbors taking neighbors to court. Under the infraction model, that still would happen.

According to city staff NO OTHER evidence will be used in determining that someone is guilty of an infraction. There is no opportunity to appeal an infraction citation, and while someone would appear before a judge, the only evidence that would be used is witness testimony. Infractions must

also occur before the presence of the ticketing officer, and in most other cases police or City staff would not issue an infraction unless it observed the violation and had evidentiary proof.

The proposed ordinance does not require any evidentiary proof that a violation occurred, and just testimony can result in someone being found to have committed a criminal violation. There is a fundamental lack of due process with issuing a citation without any verification or evidence, or right to appeal.

I am suggesting that rather than going straight to an infraction, that the City fine a person for violating the ordinance as an administrative citation under B.M.C. Chapter 1.28. If someone is a repeat violator and only after an investigation and additional evidence, the City can treat subsequent violations as an infraction. This would still send a message to violators that they have to stop smoking or else they will face significant monetary penalties, and still not raise issues about the lack of due process.

~~No Language to Prevent Discriminatory or Selective Enforcement by Landlords
Nothing in what was discussed or adopted on October 1st mentions how the City will ensure that the enforcement by owners (evictions) will be done in a non-discriminatory way. As was pointed out repeatedly, since the inception of vacancy decontrol there is an incentive to have longer term tenants removed (by eviction or threat of eviction). As was pointed out by myself, a tenant could face eviction procedures based upon unsubstantiated complaints by a neighbor or property manager, lose one's home based upon a complaint. As noted above, this is a risk that an owner occupant does not face.~~

~~If Council adopts the Ordinance discussed on October 1st and includes language that puts tenants that do not have prohibitions in their lease at risk of harassment or eviction there is a good chance that the Ordinance itself will be challenged and delayed in court and/or that owners that attempt to evict under the Ordinance will be at risk of not prevailing and facing substantial court related costs. The Council has asked staff to craft something that will either be illegal or highly risky to any owner trying to enforce it. Thereby rendering it a meaningless or at best, ineffectual gesture.~~

The Council needs to adopt real protections against second hand smoke that can begin making a difference immediately that do not shift the onus to others to enforce potentially in a disparate way. If this is a City public health issue, the City needs to take the lead on enforcement, prevention and protection of due process for all involved.

~~While an ordinance to ban smoking in multi-family buildings should be adopted immediately, going forward Council should also consider adopting an ordinance that:~~

- ~~1. Prohibits smoking in any dwelling (including single family dwellings) in which a child under the age of 18 resides or is present.~~
- ~~2. Prohibits smoking in any dwelling (including single family dwellings) in which a non-smoking elder, 62 years of age or older is present.~~
- ~~3. Prohibits smoking in any dwelling (including single family dwellings) in which a non-smoking lodger is present.~~

~~Enforcement of smoking in single family homes would be addressed through city staff enforcement and fines as outlined above.~~

FINANCIAL IMPLICATIONS:

~~Costs associated with staff researching and developing amendments to include in the proposed ordinance coming back to Council. Unknown.~~

CONTACT PERSON:

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Attachments:

1. Text of Amendments to Include in Tobacco-Free Multi-Unit Housing Ordinance
2. City Manager's Draft Ordinance including proposed amendments

Text of Proposed Amendments to Tobacco-Free Multi-Unit Housing Ordinance

Recommendation 1: Require that Leases Notify Tenants of Smoke-Free Units

Section 12.70.037 Required Lease Term for New Leases

D. Applications **and every lease or other rental agreement for initial occupancy shall include information from the landlord with language developed by the City regarding Sections 12.70.035 and 12.70.037. Every lease or other rental agreement for initial occupancy of a new or existing multi-unit residence shall include information on which units in the multi-unit residence do not have a lease clause prohibiting smoking in that unit.**

Recommendation 2: Tenants can break lease without penalty if owners do not include no-smoking clauses or fail to notify of tenant of law

Section 12.70.037

Adding new subdivisions F and G

F. A tenant exposed to smoke may terminate his or her tenancy without penalty or liability if: (1) his or her landlord has failed to enforce the clause required by subsection A against the person who has exposed the tenant to smoke; (2) his or her landlord was required to include the nonsmoking clause in subsection A in the lease or other rental agreement of the person who has exposed the tenant to smoke and failed to include the nonsmoking clause; or (3) his or her landlord failed to provide notice as provided in subsection D.

G. For any tenancy initiated on or after May 1, 2014, a tenant who smokes at the time of initiating the lease tenancy may terminate his or her tenancy within the first ninety days of tenancy without penalty or liability if his or her landlord did not include the nonsmoking clause required by subsection A in the lease or other rental agreement, unless that tenant represented to the landlord that he or she was not a smoker prior to signing the lease. This subsection will expire on May 1, 2016.

Recommendation 3: Voluntary lease addendums will be on form developed by City

Section 12.70.037

B. Landlords shall offer current tenants a voluntary lease addendum **on a form developed and approved by the City or its designee** providing that it is a material breach of the lease or other rental agreement for the tenant, or any other person subject to the control of the tenant or present by the invitation or permission of the tenant, to engage in smoking in any unit of the multi-unit residence or any common area of the multi-unit residence.

Recommendation 4: Requiring non-Rent Controlled units provide information on smoke-free units to Rent Board

Adding Section 12.70.039

Section 12.70.039 Rent Board notification of lease restrictions prohibiting smoking

A. A landlord who has leased a residential rental unit pursuant to a lease which includes a provision prohibiting smoking in the rental unit and on the property and who is subject to the registration requirements of BMC Section 13.76.080 shall notify the Rent Stabilization Board at the time the landlord files a Vacancy Registration Form for a new tenancy that the lease includes a lease provision prohibiting smoking in the rental unit and on the property.

B. A landlord who has leased a residential rental unit pursuant to a lease which includes a provision prohibiting smoking in the rental unit and on the property and who is not subject to the registration requirements of Section BMC 13.76.080 shall notify the Rent Stabilization Board within 20 days from the date of lease execution that the lease includes a lease provision prohibiting smoking in the rental unit and on the property.

Recommendation 5: Modified enforcement procedure in BMC Section 12.70.035

Section 12.70.035 Smoking prohibited in multi-unit residence

C. If the City receives a complaint **from a resident** of a violation of subdivision A, it may issue a notice to the person(s) responsible, informing him or her of the requirements of this Section. The tenant(s) of a unit, or owner-occupant(s) of an owner-occupied unit, shall be deemed the person(s) responsible for the violation where the violation was caused by the tenant(s) or owner-occupant(s) of the unit, or one or more persons subject to the control of, or present by the invitation or permission of, the tenant(s) or owner-occupant(s). **In order for the City to initiate enforcement under this Section, each person who makes a claim of violation of this Section must lodge the complaint on a form specified by the City and signed under penalty of perjury.**

D. If within a six-month period following issuance of a notice under subdivision C, the City receives at least two complaints from residents of at least two separate units of the same multi-unit residence, or in the case of a two-unit multi-unit residence, from a resident of the other unit of the violation of subdivision A by the same person(s) provided notice under subdivision C, the person(s) responsible for the violation shall be **issued an administrative citation under Chapter 1.28. If additional complaints of a violation are made, the City shall issue additional administrative citations.** ~~guilty of an infraction as provided for in Berkeley Municipal Code Chapter 1.20.~~ **If the tenant(s) or owner-occupant(s) commits continued violations of subdivision A,** ~~In addition, the City may employ any other remedies permitted by law, including but not limited to Chapter 1.28~~ **the determination of an infraction as provided for in Berkeley Municipal Code Chapter 1.20, if the City has visited the property and determined that the tenant(s) or owner occupant(s) had committed a violation of subdivision A and based on evidence of a violation.** ~~In order for the City to initiate enforcement under this Section, each person who makes a claim of a violation of this Section must lodge the complaint on a form specified by the City.~~

Recommendation 6: Private Right of Action if enforcement is not adequate to stop neighbor from smoking

Adding new Section 12.70.125

Section 12.70.125 Private Right of Action

A. In addition to the remedies in Section 12.70.035 and 12.70.120, any person who smokes in any portion of a multi-unit residence or any common area of a multi-unit residence in violation of Section 12.70.035(A) shall be liable to any other legal resident of the multi-unit residence who is exposed to the smoke for damages in the amount of not less than one hundred dollars (\$100) and not exceeding two hundred fifty dollars (\$250) for each occasion on which he or she exposes the other legal resident to smoke and not exceeding total liability of \$1,000 in a calendar year.

B. This section is enforceable only by private action filed in a court of competent jurisdiction.

C. Remedies granted under this section shall not be a misdemeanor or infraction, and the enforcement of this section shall be by private parties only. Nothing in this section may be used as grounds to terminate a tenancy.

Recommendation 7: Written Notice to Existing Tenants of Law

Section 12.70.037 Required Lease Term for New Leases
OPTION 1:

E. Landlords shall provide written notice **using language developed and approved by the City** to all existing tenants of the requirements of Section 12.70.035 and 12.70.037 no later than March 1, 2014.

OPTION 2:

E. **The City or its designee** Landlords shall provide written notice to all existing tenants of the requirements of Section 12.70.035 and 12.70.037 no later than March 1, 2014.

ORDINANCE NO #,### - N.S.

AMENDING BERKELEY MUNICIPAL CODE SECTIONS 12.70.010, 12.70.020, 12.70.030, 12.70.050 AND 12.70.120, AND ADDING SECTIONS 12.70.035, 12.70.037, **12.70.039 AND 12.70.125** TO PROHIBIT SMOKING IN ADDITIONAL LOCATIONS

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. That Berkeley Municipal Code Section 12.70.010 is hereby amended to read as follows:

12.70.010 Legislative findings.

A. The City Council does hereby find that:

1. Numerous studies have found that tobacco smoke is a major contributor to indoor air pollution, and that breathing secondhand smoke is a cause of disease, including lung cancer, in nonsmokers. At special risk are elderly people, individuals with cardiovascular disease, and individuals with impaired respiratory function, including asthmatics and those with obstructive airway disease;

2. Health hazards induced by breathing secondhand smoke include lung cancer, heart disease, respiratory infection, decreased respiratory function, broncho- constriction, and broncho-spasm;

3. 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;¹

4. The United States Environmental Protection Agency 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;²

5. The U.S. Surgeon General has concluded that there is no risk-free level of exposure to secondhand smoke;³

¹ U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *Annual Smoking – Attributable Mortality, Years of Potential Life Lost, and Economic Costs – United States 1995- 1999* Morbidity and Mortality Weekly Report at 51(14):300-303 (2002), (last accessed March 23, 2005).

² 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), (last accessed March 23, 2005).

³ 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*

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6. Just 30 minutes of exposure to secondhand smoke is sufficient to damage blood vessels in a healthy nonsmoker;⁴

7. 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;⁵

8. Secondhand smoke exposure adversely affects fetal growth with elevated risk of low birth weight and increased risk of Sudden Infant Death Syndrome in infants of mothers who smoke;⁶

9. In the United States, secondhand smoke is thought to cause about 46,000 heart disease deaths each year;⁷

10. Secondhand smoke can seep under doorways and through wall cracks;⁸

11. The only way to fully protect nonsmokers from secondhand smoke is to completely eliminate smoking in indoor spaces. Separating smokers from nonsmokers, cleaning the air, and ventilating buildings cannot completely eliminate exposure to secondhand smoke;⁹

12. Cigarette butts pose a health threat to children. Small children who had ingested cigarette butts exhibited symptoms of illness such as spontaneous vomiting, nausea, lethargy, and gagging;¹⁰ and

13. Cigarette butts are a major and persistent source of litter. In the last 25 years of coastal clean-ups, cigarette and cigarette filters ranked as the number

General 11 (2006), (last accessed Sept. 19, 2006).

⁴ Christian Heiss, MD, Dr Med., Nicolas Amabile, MD., Andrew C. Lee, MD, et al. *Brief Secondhand Smoke Exposure Depresses Endothelial Progenitor Cells Activity and Endothelial Function*, J Am Coll Cardiol, 2008; 51:1760-1771,jacc.2008.01.040

⁵ Cal. Air Resources Bd., Resolution 06-01, at 5 (Jan. 26, 2006), (last accessed Oct. 6, 2006).

⁶ Office of Env'tl. Health Hazard Assessment, Cal. Env'tl. Prot. Agency, *Health Effects of Exposure to Environmental Tobacco Smoke, Final Report* at 4-30 (1997), (last accessed February 28, 2005).

⁷ California Environmental Protection Agency, Office of Environmental Health Hazard Assessment.

⁸ J. Wagner et al., *Environmental Tobacco Smoke Leakage from Smoking Rooms*, Journal of Occupational and Environmental Hygiene, 1:110-118 (2004), (last accessed April 7, 2005).

⁹ 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), (last accessed February 22, 2013).

¹⁰ Ingestion of Cigarettes and Cigarette Butts by Children, *Morbidity and Mortality Weekly Report*, Centers for Disease Control and Prevention. February 14, 1997 / 46(06); 125-128.

69 one source of waste comprising nearly 32% of all collected litter items.¹¹
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72 B. Accordingly, the City Council finds and declares that the purposes of this
73 chapter are (1) to protect the public health and welfare by prohibiting smoking in
74 public places, places of employment, and specially designated public play areas
75 where small children are at risk of choking on or ingesting cigarette butts and
76 other toxic tobacco litter, (2) to guarantee the right of nonsmokers to breathe
77 smoke-free air, and to recognize that the need to breathe smoke-free air shall
78 have priority over the desire to smoke, and (3) to promote self-enforcement
79 through educational outreach regarding smoking prohibitions.
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81
82 Section 2. That Berkeley Municipal Code Section 12.70.020 is hereby amended
83 to read as follows:
84

85 **12.70.020 Definitions.**

86 A. "Bar" means any area or a room utilized primarily for the sale of alcoholic
87 beverages for consumption by patrons on the premises and in which the serving
88 of food and the provision of entertainment is merely incidental to the sale of
89 alcoholic beverages. Although a restaurant may contain a bar, the term bar shall
90 not include a restaurant or any dining area. Although a nightclub may contain a
91 bar, the term bar shall not include a place of entertainment commonly known as
92 a nightclub irrespective of the fact that payment for entertainment may be made
93 through the purchase of alcoholic beverages.
94

95 B. "Business" means a sole proprietorship, partnership, joint venture, corporation
96 or other business entity formed for profit-making purposes, including retail
97 establishments where goods or services are sold as well as professional
98 corporations and other entities where legal, medical, dental, engineering,
99 architectural or other professional services are delivered.
100

101 C. "Commercial area sidewalk" means any sidewalk in front of or adjoining any
102 property designated on the City's Official Zoning Map appended to the City's
103 Zoning Ordinance with a "C" prefix.
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105 D. "Common area of multi-unit residence" means any enclosed area or
106 unenclosed area that may be used by more than the residents of a single unit or
107 room, including but not limited to shared lobbies, courtyards, lounges, hallways,
108 elevators, stairs, community rooms, playgrounds, gym facilities, swimming pools,
109 parking garages, parking lots, living and dining areas, kitchens, bathrooms,
110 laundry rooms, lobbies, waiting rooms, and television rooms.
111

112 E. "Contract employee" means any person who performs work for a business or

¹¹ Ocean Conservancy. Tracking Trash: 25 years of Action for the Ocean. Report of the 2011 Ocean Conservancy's International Coastal Cleanup. Washington, DC: 2011.

113 non- profit entity, but who is paid by an agency which contracts with said
114 business or non- profit entity to supply such workers.
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116 F. "Dining area" means an enclosed area containing a counter or table upon
117 which meals are served.
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119 G. "Employee" means any person who is employed by any employer in the
120 consideration for direct or indirect monetary wages or profit, and any person who
121 volunteers his or her services for a non-profit entity. Employees include those
122 employed full-time, part-time, temporary or contracted for from a third party.
123

124 H. "Employer" means any person, partnership, corporation, including a municipal
125 corporation, business entity or non-profit entity, who employs the services of one
126 or more individual persons.
127

128 I. "Enclosed" means all space between a floor and ceiling which is enclosed on
129 all sides by solid walls or windows (exclusive of door or passage ways) which
130 extend from the floor to the ceiling, including all space therein screened by
131 partitions which do not extend to the ceiling or are not solid, office landscaping or
132 similar structures.
133

134 J. "Health care facility" means all public and private health care facilities,
135 including, but not limited to, hospitals, health clinics, mental health clinics,
136 physician's offices, and dentist's offices.
137

138 K. "Motion picture theater" means any theater engaged in the business of
139 exhibiting motion pictures.
140

141 L. "Multi-unit residence" means a building or portion thereof that contains more
142 than one unit.
143

144 M. "Non-profit entity" means any corporation, unincorporated association or other
145 entity created for charitable, philanthropic, educational, character building,
146 political social or other similar purposes, the net proceeds of which are
147 committed to the portion of objects or purposes of the organization and not for
148 private gain.
149

150 N. "Open to the public" means available for use by or accessible to the general
151 public during the normal course of business conducted by either private or public
152 entities.
153

154 O. "Place of employment" means any area under the control of a public or private
155 employer which employees normally frequent during the course of employment,
156 including, but not limited to, conference and class rooms, employee cafeterias,
157 employee lounges and restrooms, hallways, and work areas. A private residence
158 is not a place of employment unless it is used as a childcare or health care
159 facility.

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P. "Public place" means any enclosed or designated outdoor areas in Section 12.70.030 to which the public is invited or in which the public is permitted, including but not limited to:

1. Banks.
2. Educational facilities.
3. Health care facilities.
4. Public transportation facilities.
5. Reception areas.
6. Restaurants.
7. Retail stores.
8. Retail service establishments.
9. Retail food production and marketing establishments.
10. Waiting rooms.
11. A private residence is not a public place unless used as a licensed childcare, licensed adult care or health care facility.

Q. "Recreational area" means any outdoor area, owned or operated by the City of Berkeley, 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, tot play areas, playgrounds, or sports fields, walking paths, gardens, hiking trails, bike paths, athletic fields, skateboard parks and amusement parks;

R. "Restaurant" means any coffee shop, cafeteria, short order cafe, luncheonette, tavern, cocktail lounge, sandwich stand, soda fountain, private and public school cafeteria or catering establishment, and any other eating establishment, organization, club (including veterans club), boardinghouse, guest house or political subdivision, the primary function of which is to give, sell or offer for sale, food to the public, guests, patrons, or employees, as well as kitchens in which food is prepared on the premises for serving elsewhere, including catering functions, except that the term restaurant shall not include a tavern or cocktail lounge if said tavern or cocktail lounge is a "bar" as defined in subsection A of this section.

S. "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.

T. "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.

U. "Smoke" or "smoking" means and includes inhaling or exhaling upon, burning,

206 or carrying any lighted smoking equipment for tobacco, or any other plant or
207 product used for personal habit commonly known as smoking.

208
209 V. "Sports arena" means sports pavilions, gymnasiums, health spas, boxing
210 arenas, swimming pools, roller and ice rinks, bowling alleys and other similar
211 places where members of the general public assemble to either engage in
212 physical exercise, participate in athletic competition or witness sports events.

213
214 W. "Senior citizen residence" means an apartment house, retirement home,
215 boarding house, or residence hall which is developed for or substantially
216 rehabilitated or renovated for senior citizens.

217
218 X. "Tot play area" means a designated play area within a public park designed
219 for use by children under five years of age. Where such areas are not contained
220 by a fence, the boundary of a tot play area shall be considered ten feet from the
221 perimeter of the play area as defined by the edge of the resilient surface safety
222 material surrounding the sand area.

223
224 Y. "Unit" means a personal dwelling space, even where lacking cooking facilities
225 or private plumbing facilities, including but not limited to a dwelling unit as defined
226 in Chapter 23F.04, an apartment, a common interest development such as a
227 condominium, townhouse or tenant-in-common, a room in a group living
228 accommodations as defined in Chapter 23F.04, a room in a senior citizen
229 residence, a room in a nursing home, or assisted living facility, a dormitory room,
230 and a Single Residential Occupancy (SRO) room. Unit shall include any
231 associated exclusive-use enclosed or unenclosed areas, including but not limited
232 to a private balcony, porch, deck, or patio.

233
234 Z. "Work area" or "workplace" means any area of a place of employment,
235 including outdoor construction sites, in which two or more employees are
236 assigned to perform work for an employer.

237
238
239 Section 3. That Berkeley Municipal Code Section 12.70.030 is hereby amended
240 to read as follows:

241
242 **12.70.030 Locations where smoking is prohibited.**

243
244 Smoking shall be prohibited in all public places including but not limited to the
245 following unless otherwise provided and in all places where the owner or person
246 in charge of the establishment has posted a nonsmoking sign:

247
248 A. Restaurants, including any outdoor seating area provided by or attached to a
249 restaurant;

250
251 B. Elevators in buildings generally open to the public, including elevators in

252 apartment buildings, irrespective of the number of living units in such apartment
253 buildings;
254
255 C. In all rooms, wards, waiting rooms, lobbies and public hallways of every health
256 care facility. The exemptions set forth in Section 12.70.050 shall not apply to this
257 subsection;
258
259 D. Within every room, chamber, place of meeting or public assembly, including
260 school buildings under the control of any board, council, commission, committee,
261 including joint committees, or agencies of the City during such time as a public
262 meeting is in progress;
263
264 E. In waiting rooms, lobbies, public hallways and all other areas of every building
265 under direct or indirect control of the City;
266
267 F. Within all parts of any buildings which are primarily used for exhibiting any
268 motion picture, stage drama, dance, musical performance or other similar
269 performance, including nightclubs, and within any room, hall or auditorium that is
270 occasionally used for exhibiting any motion picture, stage drama, dance, musical
271 performance or other similar performance during the time that said room, hall or
272 auditorium is open to the public for such exhibition; provided, however, that
273 smoking is permitted on a stage when such smoking is part of a stage
274 production;
275
276 G. In museums, libraries, aquariums and galleries;
277
278 H. In all enclosed parts of hotels, motels and resorts open to the general public,
279 including, but not limited to guest rooms, registration areas, lobbies, hallways and
280 conference rooms; provided, however, that 25 percent of the rooms rented to
281 guests may be maintained as fixed smoking rooms;
282
283 I. In buses, trains, taxicabs and other means of public transit while operating
284 within the boundaries of the City, and in ticket areas and waiting rooms of transit
285 terminals and stations;
286
287 J. In sports arenas and outdoor theaters;
288
289 K. Within all areas open to the public in business establishments dealing in
290 goods or services and not otherwise mentioned in this section, including, but not
291 limited to food and grocery stores, drugstores, supermarkets, automobile
292 showrooms, banks, savings and loan offices, insurance offices, and attorneys
293 offices;
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295 L. Public restrooms;
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297 M. Service areas;

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N. All enclosed areas available to and customarily used by the general public in all businesses or non-profit entities patronized by the public, including, but not limited to, attorney offices and other offices, banks, laundromats, hotels and motels;

O. In all enclosed common areas in senior citizen residences, including but not limited to, laundry rooms, lobbies, lounges, hallways, waiting rooms, television rooms and dining areas. The City Council finds that smoking should be prohibited in senior citizen residences in particular in light of the increased health risks and discomfort which secondhand smoke may create for senior citizens who may be confined to limited areas within their residences;

P. Bars;

Q. Video arcades, card rooms, game rooms, pool halls, dance halls, bingo parlors and other amusement centers;

R. Parking garages;

S. All outdoor areas used for public seating in conjunction with any retail or food establishment in an exclusively pedestrian area that is enclosed on at least three sides, whether or not provided by or attached to a restaurant;

T. Recreational areas;

U. Within 50 feet of any entrance, exit, operational window, or air intake vent to any building that is used as a health care facility, licensed child or adult care facility, or senior center, and within 25 feet of any entrance, exit, operational window, or air intake vent to any other building that is open to the public, except while passing on the way to another destination. For purposes of this section, entrance or exit shall mean an opening into a building from a contiguous street, sidewalk, walkway or parking area, and "air intake vent" shall mean an opening into a building that draws in air from the outside as part of a building ventilation system;

V. Within 25 feet of any bus stop;

W. Commercial area sidewalks;

X. Licensed child and adult care facilities; and

Y. Senior centers.

Section 4. That Berkeley Municipal Code Section 12.70.035 is hereby added to read as follows:

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12.70.035 Smoking prohibited in multi-unit residences.

- A. Effective May 1, 2014, smoking is prohibited in all units of multi-unit residences and all common areas of multi-unit residences.
- B. All common areas of multi-unit residences shall have signage indicating that smoking is prohibited consistent with the signposting requirements of Section 12.70.060.A.
- C. If the City receives a complaint **from a resident** of a violation of subdivision A, it may issue a notice to the person(s) responsible, informing him or her of the requirements of this Section. The tenant(s) of a unit, or owner-occupant(s) of an owner-occupied unit, shall be deemed the person(s) responsible for the violation where the violation was caused by the tenant(s) or owner-occupant(s) of the unit, or one or more persons subject to the control of, or present by the invitation or permission of, the tenant(s) or owner-occupant(s). **In order for the City to initiate enforcement under this Section, each person who makes a claim of violation of this Section must lodge the complaint on a form specified by the City and signed under penalty of perjury.**
- D. If within a six-month period following issuance of a notice under subdivision C, the City receives at least two complaints from residents of at least two separate units of the same multi-unit residence, or in the case of a two-unit multi-unit residence, from a resident of the other unit of the violation of subdivision A by the same person(s) provided notice under subdivision C, the person(s) responsible for the violation shall be **issued an administrative citation under Chapter 1.28. If additional complaints of a violation are made, the City shall issue additional administrative citations.** ~~guilty of an infraction as provided for in Berkeley Municipal Code Chapter 1.20.~~ **If the tenant(s) or owner-occupant(s) commits continued violations of subdivision A,** ~~In addition,~~ the City may employ any other remedies permitted by law, including but not limited to ~~Chapter 1.28~~ **the determination of an infraction as provided for in Berkeley Municipal Code Chapter 1.20, if the City has visited the property and determined that the tenant(s) or owner occupant(s) had committed a violation of subdivision A and based on evidence of a violation.** ~~In order for the City to initiate enforcement under this Section, each person who makes a claim of a violation of this Section must lodge the complaint on a form specified by the City.~~
- E. Use of medical cannabis by a person for whom using medical cannabis is not a crime under California law shall be exempt from this Section.
- F. Sales contracts for condominiums entered into on or after May 1, 2014 shall disclose the requirements of Sections 12.70.035 and 12.70.037.

392 Section 5. That Berkeley Municipal Code Section 12.70.037 is hereby added to
393 read as follows:

394
395 **12.70.037 Required Lease Term for New Leases**
396

397 A Every lease or other rental agreement for the initial occupancy of a new or
398 existing unit in a multi-unit residence entered into on or after May 1, 2014, shall
399 include a clause providing that it is a material breach of the lease or other rental
400 agreement for the tenant, or any other person subject to the control of the tenant
401 or present by invitation or permission of the tenant, to engage in smoking in any
402 unit of the multi-unit residence or any common area of the multi-unit residence.
403

404 B. Landlords shall offer current tenants a voluntary lease addendum **on a form**
405 **developed and approved by the City or its designee** providing that it is a
406 material breach of the lease or other rental agreement for the tenant, or any other
407 person subject to the control of the tenant or present by the invitation or
408 permission of the tenant, to engage in smoking in any unit of the multi-unit
409 residence or any common area of the multi-unit residence.
410

411 C. The use of medical cannabis by a person for whom using medical cannabis is
412 not a crime under California law shall not constitute smoking in a unit of a multi-
413 unit residence under the mandatory clause under subdivision A or the voluntary
414 clause under subdivision B, unless it is separately prohibited under another term
415 of the lease or other rental agreement.
416

417 D. Applications **and every lease or other rental agreement for initial**
418 **occupancy** shall include information from the landlord **with language**
419 **developed by the City** regarding Sections 12.70.035 and 12.70.037. **Every**
420 **lease or other rental agreement for initial occupancy of a new or existing**
421 **multi-unit residence shall include information on which units in the multi-**
422 **unit residence do not have a lease clause prohibiting smoking in that unit.**
423

424
425 OPTION 1:

426
427 E. Landlords shall provide written notice **using language developed and**
428 **approved by the City** to all existing tenants of the requirements of Section
429 12.70.035 and 12.70.037 no later than March 1, 2014.
430

431 OPTION 2:

432
433 E. **The City or its designee** Landlords shall provide written notice to all existing
434 tenants of the requirements of Section 12.70.035 and 12.70.037 no later than
435 March 1, 2014.
436

437

438 **F. A tenant exposed to smoke may terminate his or her tenancy without**
439 **penalty or liability if: (1) his or her landlord has failed to enforce the clause**
440 **required by subsection A against the person who has exposed the tenant**
441 **to smoke; (2) his or her landlord was required to include the nonsmoking**
442 **clause in subsection A in the lease or other rental agreement of the person**
443 **who has exposed the tenant to smoke and failed to include the**
444 **nonsmoking clause; or (3) his or her landlord failed to provide notice as**
445 **provided in subsection D.**
446

447 **G. For any tenancy initiated on or after May 1, 2014, a tenant who**
448 **smokes at the time of initiating the lease tenancy may terminate his or her**
449 **tenancy within the first ninety days of tenancy without penalty or liability if**
450 **his or her landlord did not include the nonsmoking clause required by**
451 **subsection A in the lease or other rental agreement, unless that tenant**
452 **represented to the landlord that he or she was not a smoker prior to**
453 **signing the lease. This subsection will expire on May 1, 2016.**
454

455
456 Section 6. That Berkeley Municipal Code Section 12.70.039 is hereby added to
457 read as follows:

458
459 **Section 12.70.039 Rent Board notification of lease restrictions prohibiting**
460 **smoking**
461

462 **A. A landlord who has leased a residential rental unit pursuant to a lease**
463 **which includes a provision prohibiting smoking in the rental unit and on**
464 **the property and who is subject to the registration requirements of BMC**
465 **Section 13.76.080 shall notify the Rent Stabilization Board at the time the**
466 **landlord files a Vacancy Registration Form for a new tenancy that the lease**
467 **includes a lease provision prohibiting smoking in the rental unit and on the**
468 **property.**
469

470 **B. A landlord who has leased a residential rental unit pursuant to a lease**
471 **which includes a provision prohibiting smoking in the rental unit and on**
472 **the property and who is not subject to the registration requirements of**
473 **Section BMC 13.76.080 shall notify the Rent Stabilization Board within 20**
474 **days from the date of lease execution that the lease includes a lease**
475 **provision prohibiting smoking in the rental unit and on the property.**
476

477
478 Section 7. That Berkeley Municipal Code Section 12.70.050 is hereby amended
479 to read as follows:

480
481 **12.70.050 Where smoking is not regulated.**
482

483 A. This chapter is not intended to regulate smoking in the following places and

484 under the following conditions within the City:

485

486 1. Retail tobacco stores;

487

488 2. Private residences, which may serve as a place of employment except when
489 used as a childcare or health care facility and except as stated in Sections
490 12.70.035 and 12.70.037.

491

492 B. Notwithstanding any other provision of this section, any owner, operator,
493 manager or other person who controls a business or other establishment may
494 declare that entire establishment as a nonsmoking establishment.

495

496

497 Section 8. That Berkeley Municipal Code Section 12.70.120 is hereby amended
498 to read as follows:

499

500 **12.70.120 Enforcement.**

501

502 A. The Health, Housing, and Community Services Department shall enforce the
503 provisions of this chapter as to facilities inspected and permitted by the Division
504 of Environmental Health.

505

506 B. The Health, Housing, and Community Services Department shall enforce the
507 smoke- free workplace provisions in Section 12.70.040 of this Chapter and
508 Section 6404.5 of the California Labor Code.

509

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

513

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

516

517 E. Nothing in this chapter shall be construed to preclude enforcement of any
518 provision by the Police Department or by any other law enforcement agency.

519

520

521 Section 9. That Berkeley Municipal Code Section 12.70.125 is hereby added to
522 read as follows:

523

524 **Section 12.70.125 Private Right of Action**

525

526 **A. In addition to the remedies in Section 12.70.035 and 12.70.120, any**
527 **person who smokes in any portion of a multi-unit residence or any**
528 **common area of a multi-unit residence in violation of Section 12.70.035(A)**
529 **shall be liable to any other legal resident of the multi-unit residence who is**

530 exposed to the smoke for damages in the amount of not less than one
531 hundred dollars (\$100) and not exceeding two hundred fifty dollars (\$250)
532 for each occasion on which he or she exposes the other legal resident to
533 smoke and not exceeding total liability of \$1,000 in a calendar year.

534

535 B. This section is enforceable only by private action filed in a court of
536 competent jurisdiction.

537

538 C. Remedies granted under this section shall not be a misdemeanor or
539 infraction, and the enforcement of this section shall be by private parties
540 only. Nothing in this section may be used as grounds to terminate a
541 tenancy.

542

543

544 Section 10. Posting.

545 Copies of this Ordinance shall be posted for two days prior to adoption in the
546 display case located near the walkway in front of Old City Hall, 2134 Martin
547 Luther King Jr. Way. Within fifteen days of adoption, copies of this Ordinance
548 shall be filed at each branch of the Berkeley Public Library and the title shall be
549 published in a newspaper of general circulation.

550

551