

**City of Brisbane
Agenda Report**

Date: Special City Council Meeting of December 3, 2015

To: Mayor and City Council

From: Michael H. Roush, City Attorney
Teresa L. Stricker, Deputy City Attorney

Subject: Smoking Ordinance

CITY COUNCIL GOALS

To promote the general health, safety and welfare of the Brisbane’s residents and visitors and those working in the City.

To consider the needs of individuals who smoke or use electronic-cigarettes (“e-cigarettes”).

To allow for continued enforcement of the City’s tobacco retailer permit requirements by San Mateo County (“County”) by bringing the City’s requirements into conformity with the County’s parallel permitting requirements.

PURPOSE

The purpose of this item is for the Council to determine whether to follow the recommendation of the Health and Safety Committee (“Committee”) to introduce an ordinance regulating smoking and vaporizing (also called “vaping”) of a wide variety of substances, imposing certain restrictions on the sale and distribution of tobacco products including e-cigarettes, and bringing the City’s existing tobacco retailer permit requirements into conformity with the County’s parallel permitting requirements by extending the City’s requirements to retailers of e-cigarettes.

Council previously considered an earlier version of the ordinance and sent the proposed ordinance back to the Committee for further consideration and possible revision.

If adopted, the proposed ordinance currently before Council would impose a variety of new regulations in Brisbane. The proposed ordinance would:

1. Ban smoking of traditional tobacco products and other products in certain public places and businesses patronized by the public;
2. Ban the use of e-cigarettes and vaporizing of other substances in certain public places and businesses patronized by the public;
3. Ban smoking in common areas and individual units of multi-unit residences;
4. Ban the use of e-cigarettes and vaporizing of other substances in common areas and individual units of multi-unit residences;
5. Apply to the smoking of marijuana and does *not* contain an exemption for the smoking of medical marijuana in individual units of a multi-unit residence;
6. Apply to the vaporizing of marijuana and does *not* contain an exemption for the vaporizing of medical marijuana in individual units of a multi-unit residence;
7. Impose limited restrictions on the distribution and sale of tobacco products, including e-cigarettes; and
8. Extend the City's existing tobacco retail permit requirements to e-cigarette retailers.

RECOMMENDATION

Consider whether to follow the Committee's recommendation to introduce the proposed ordinance.

BACKGROUND

A. State Law

State law prohibits the smoking of traditional tobacco products in the following places statewide:

- Enclosed workplaces. (Cal. Labor Code § 6404.5.)
- Indoor workplaces, including restaurants and bars. (Cal. Labor Code § 6404.5.)
- Within 20 feet of main entrances, exits, and operable windows of state, county, and city buildings. (Cal. Gov. Code §§ 7596–7598, 19994.30–19994.33.)
- Playgrounds or tot lot sandbox areas. (Cal. Health & Saf. Code § 104495.)
- Day care facilities, including private residences. (Cal. Health & Saf. Code § 1596.795.)

- Cars, parked or moving, when a minor under the age of 18 is in the car. (Cal. Health & Saf. Code § 118947.)

State law also prohibits the sale of traditional tobacco products to minors under the age of 18 and from vending machines. (Cal. Bus. & Prof. Code §§ 22950–22963.)

State law does *not* currently regulate e-cigarettes except to prohibit the sale of e-cigarettes to minors under the age of 18. (Cal. Health & Saf. Code § 119405.) Recently, however, the state Senate passed SB-5 and that bill is currently before the Assembly. If adopted into law, SB-5 would classify e-cigarettes as tobacco products and apply the same restrictions state law currently imposes on the smoking and sale of traditional tobacco products to e-cigarettes. That said, there have been several bills introduced at the state level in the past to regulate e-cigarettes and each of those bills has been unsuccessful.¹

Local governments are free to impose in their own jurisdictions more restrictive regulations on smoking, tobacco products, electronic cigarette use and electronic cigarette products than the restrictions imposed by state law.

B. San Mateo County

San Mateo County (the “County”) prohibits smoking in the following places:

- Enclosed structures owned or leased by the County wherever located, except private residences leased from the County that are not multi-unit residences;
- Within thirty feet from any enclosed County-owned structure;
- Enclosed areas accessible to the public;
- Businesses patronized by the public and enclosed passageways between such businesses;
- Enclosed and unenclosed common areas in multi-unit residences, except in specifically designated unenclosed smoking areas;
- Individual units in multi-unit residences; and
- All county-owned, operated or maintained beaches, parks and trails.

(See San Mateo County Municipal Code (“County Code”) §§ 4.96.040; 4.97.030, 4.97.040.) The County does *not* regulate smoking in detached, single family residences, hotels or motels.

The County expressly defines “smoking” and “tobacco products” within the meaning of its restrictions to include e-cigarettes. And the County’s ordinance bans

¹In 2009, then-Governor Schwarzenegger vetoed a bill that would have established a state-wide ban on sales of e-cigarettes. In 2013, the state Senate passed Senate Bill 648 to extend the state’s existing restrictions on smoking and tobacco advertising to e-cigarettes. That bill, however, was never heard in the House and was later withdrawn.

smoking and vaporizing of a broad variety of substances, including tobacco products and marijuana. The County exempts from its ban smoking or vaporizing of medical marijuana in any individual unit of a multi-unit residence. (*Id.* § 4.97.080.)

The County also prohibits the sale of any tobacco product, including e-cigarettes, in County-owned and leased buildings (*id.*, §§ 4.96.270), and from vending machines and self-service displays (*id.*, §§ 4.96.320, 4.96.330). The County further prohibits out-of-package sales and distribution of free samples, and coupons for free samples, of any tobacco product, including e-cigarettes. (*Id.* §§ 4.96.300, 4.96.310.)

Businesses may apply for an exemption from the County’s regulations based on “usual circumstances or conditions.” (*Id.* § 4.96.020.) The exemption does not apply to County’s ban on smoking and vaporizing in multi-unit residences.

Violation of any provision of the County’s smoking ban or restrictions on the sale and distribution of tobacco products constitutes an infraction. (*Id.* §§ 4.96.190, 4.97.090.) Violation of the County’s ban on smoking in multi-unit residences more than three times within a year constitutes a misdemeanor. (*Id.* § 4.97.090.)

Critically, the County’s smoking regulations and restrictions on the sale and distribution of tobacco products apply in Brisbane *only* at properties the County may own, lease or maintain. With that narrow exception, the County does *not* regulate smoking or the sale or distribution of tobacco products in Brisbane.

The County requires retailers of tobacco products to obtain a tobacco retailer permit. The County recently amended its tobacco retailer permit requirements to extend those requirements to retailers of e-cigarettes. (*Id.* § 4.98.100.) These provisions also do not apply in Brisbane, although as explained below, the County enforces the City’s tobacco retailer permit provisions in Brisbane.

C. Brisbane’s Current Laws

Brisbane does not currently regulate the use or sale of tobacco products or e-cigarettes beyond requiring retailers of traditional tobacco products to obtain a tobacco retailer permit. (Brisbane Municipal Code § 8.44.010 *et seq.*). The City’s tobacco retailer permit provisions differ from the County’s parallel provisions in only one way: The City does not currently extend those requirements to e-cigarette retailers.

The County enforces the City’s Tobacco Retailer’s Permit provisions on behalf of the City pursuant to County regulations that allow Brisbane to delegate enforcement of the City’s regulations to the County. (See County Code § 4.98.180).

D. Other Jurisdictions

1. Cities in San Mateo County

Many jurisdictions statewide have adopted local smoking and/or e-cigarette use regulations, including every city within San Mateo County except Half Moon Bay and Brisbane.

Some jurisdictions within the County have adopted local ordinances that impose restrictions that are identical to the County's restrictions. Other jurisdictions have adopted some, but not all, of the County's restrictions or have adopted the County's traditional tobacco use restrictions without extending those restrictions to e-cigarette use.

On the other hand, some jurisdictions in the County have adopted more onerous restrictions than those imposed by the County. For example, some jurisdictions have banned smoking and/or the use of e-cigarettes in the following locations:

- Sidewalks
- Outdoor eating areas
- Sports fields and arenas
- Events sponsored by the local entity
- Public transit depots
- Chemical storage areas
- Hotels and motels (in public places and/or guest rooms)
- Indoor or outdoor service lines at business establishments

The County has provided a summary smoking and e-cigarette policies adopted by various jurisdictions within the County. That summary has been provided to Council previously and is again attached to this report.

2. Other Jurisdictions

Many cities and counties nationwide have adopted smoking and e-cigarette regulations. According to the attached October 2015 report prepared by American Nonsmokers' Rights Foundation, 438 cities, towns and counties nationwide regulate electronic cigarette use in their jurisdictions, and 75 of those local governments are in California.

San Francisco has adopted extensive restrictions. While San Francisco does *not* ban smoking or e-cigarette use in individual units in multi-unit dwellings, San Francisco prohibits smoking and e-cigarette use in many of the locations mentioned above as well as the following additional locations:

- Within fifteen feet of the entrances, exits, and operable windows and vents of any building
- Facilities where the business of any governmental body or agency is conducted, including hearing rooms, courtrooms or places of public assembly
- Polling places
- Health facilities
- Educational facilities
- Nonprofit establishments
- Aquariums, galleries, libraries and museums
- Child care facilities
- Facilities used for exhibiting motion pictures, drama, dance, musical performance, lectures or other entertainment
- Convention facilities
- Restaurants, bars and taverns
- Homeless shelters
- Tobacco shops
- Facilities used to conduct charity bingo games
- Farmers' markets
- Taxicabs and other motor vehicles for hire
- Service waiting areas
- City-owned vehicles
- Unenclosed areas that are open to the public if the property is a park, square, garden, sport or playing field, pier, or other property used for recreational purposes or a farmers' market
- Outdoor events on city-owned property

(San Francisco Health Code Art. 19F, 19I, 19L.)

In addition, San Francisco bans the sale of both tobacco products and e-cigarettes in pharmacies or on city-owned or controlled property. (*Id.*, Art. 19J–19K.)

E. The Version of the Smoking Ordinance Last Considered by Council

The proposed smoking ordinance the Council considered on November 5, 2015 was modeled closely after the County's regulations. The proposed ordinance generally imposed the same substantive regulations on smoking and the sale and distribution of tobacco products as the County imposes. And, like the county, the proposed ordinance defined "smoking" and "tobacco products" to include e-cigarettes.

But the prior version of the City's proposed ordinance differed in several substantive ways from the County's regulations. In particular, under that version of the proposed ordinance:

- The City’s ban on smoking and vaporizing would extend to certain specified City-owned beaches, parks, trail and outdoor facilities, and associated parking lots;
- The City’s ban on smoking and vaporizing would apply at City-operated or co-sponsored recreational programs that take place on property not owned by the City, and at all public transit stops in the City;
- Although the County’s ban on smoking in *existing* units or common areas of a multi-unit residence does not take effect until *14 months* after the effective date of the County’s ordinance, the ordinance would shorten the effective date on the City’s smoking ban in *existing* units or common areas of multi-unit residences to *12 months* after the effective date of the City’s ordinance;
- Unlike the County’s ordinance, the ordinance would not exempt smoking or vaporizing of medical marijuana in individual units of a multi-unit residence; and
- The ordinance would impose the same penalties for violation of the smoking ban or restrictions on the sale and distribution of tobacco products that the County imposes for violating its ban on smoking in multi-unit residences.

Additionally, the proposed ordinance the Council previously considered amended the City’s existing Tobacco Retailer Permit requirements to incorporate the broader definition of tobacco products contained in the City’s smoking restrictions. As a result of this change, retailers of e-cigarettes would need to obtain a tobacco retailer permit. As explained previously, this amendment is necessary to conform the City’s tobacco permitting provisions to the County’s parallel permitting provisions, something that is required for the County to continue enforcing the City’s permitting requirements. (See County Code § 4.98.180.)

F. Prior Council Direction and Further Committee Consideration

At its meeting on November 5, 2015, Council directed that the Committee reconsider the proposed ordinance. The Committee met twice since the November 5, 2105 council meeting and directed staff to prepare a revised smoking ordinance for consideration by the full council.

DISCUSSION

A. The Proposed Ordinance Currently Before Council.

Based on recommendations of the Committee, the version of the ordinance currently before the Council has been amended in the following substantive ways from the version of the ordinance Council considered on November 5, 2015:

- The ordinance contains additional and updated findings, primarily regarding:
 - The health risks of electronic-cigarette use;
 - Asthma rates in San Mateo County;
 - The number of states, municipalities, other public entities and private organizations that restrict use of e-cigarettes;
 - HUD policies urging owners and managers of HUD-assisted multi-family housing to adopt 100% smoke free policies on those properties to prevent secondhand smoke exposure;
 - Studies conducted about the distance required from an active smoker to prevent exposure to outdoor secondhand tobacco smoke;
 - A trial court decision finding an HOA liable for damages for failing to adopt policies to prevent secondhand smoke from a condominium resident's patio from entering another resident's unit; and
 - Other types of local regulations – including noise level regulations, fire regulations and limitations on conducting certain types of businesses at home – that restrict certain activities at residences even though those activities are permissible at other locations within the City.
- Clarifies that smoking is permitted on all public sidewalks that are adjacent to the public street.
- Makes the definition of “enclosed” internally consist throughout the ordinance.
- Permits a landlord or HOA to designate as a smoking area a covered, unenclosed common area -- like a carport --so long that the area is at least 30 feet from (i) doors, windows and ventilation systems of all enclosed areas on the property, and (ii) unenclosed areas on the property that facilitate physical activity such as playgrounds and swimming pools.
- Reduces the “no smoking” sign requirements for multi-unit residences by requiring signs only at the following locations: (1) on the outside of each

enclosed building but only if the building contains 6 or more units, (2) at all enclosed common areas, and (3) at all unenclosed common areas that facilitate physical activity, such as playgrounds and swimming pools.

Each of these substantive changes are shown in redline in the version of the proposed ordinance currently before Council.

Additionally, the City Attorney made additional amendments to the ordinance to eliminate unnecessary provisions and clarify certain definitions, including making clearer that single family homes with attached or detached second units or in-law units are not multi-unit residences subject to the ordinance. All substantive amendments made by the City Attorney are shown in redline in the proposed ordinance.

B. Additional Issues

1. Designated Smoking Areas in Multi-Unit Residences

At the last Council meeting, concerns were raised about where smokers in multi-unit residents would be able to smoke if the landlord or governing HOA chose not to designate a smoking area. Questions were raised about whether the ordinance could be amended to require – rather than not simply permit – designation of smoking areas in multi-unit residences.

The City may not *require* private property owners to permit smoking on their private property. California Civil Code section 1947.5 expressly gives landlords the right to make their rental properties smoke-free. Moreover, requiring unwilling property owners to allow smoking or vaping on their private property may subject the City to potential liability claims.

Currently, many HOAs and landlords choose to make their multi-unit residences properties entirely smoke-free. Smokers living or visiting such properties must leave the property to smoke.

If adopted, the proposed ordinance would not alter this situation. Rather, the proposed ordinance would restrict the areas where a landlord or HOA may allow smoking or vaping, should the landlord or HOA choose to allow smoking or vaping on the property.

Based on recommendations of the Committee, the ordinance has been amended to permit landlords and HOAs, if they choose, to designate covered but unenclosed common areas as smoking areas so long as the designated area is at least 30 feet from both (i) any doors, windows and ventilation systems of any enclosed areas at the multi-unit residence, and (i) any unenclosed areas on the property that facilitate activity, such as playgrounds and swimming pools. This change would allow (but not require) an unenclosed carport that meets the 30 foot distance criteria to be designated as a smoking area.

Additionally, under the proposed ordinance, smokers and e-cigarette users may smoke or vape on any City-owned sidewalk that is adjacent to the public street, even if that sidewalk is within 30 feet of a City-owned building or the windows, doors or ventilation system of a multi-unit residence.

2. **Medical Marijuana Exemption**

Based on concerns raised at the November 5, 2015 Council meeting, the Committee asked staff to find out whether the County exempted medical marijuana from its ban on smoking and vaporizing in individual units of multi-unit residences because of legal concerns.

The County Counsel's office reports that the County's decision to include the medical marijuana exemption was *not* made by the County Counsel's office, and was a *policy* determination made after weighing a variety of policy factors.

As the City Attorney previously advised, there is no legal restriction on the Council's ability to adopt an ordinance that bans smoking or vaporizing of medical marijuana. Rather, this is a policy decision for Council.

The Committee continues to recommend that the Council take a consistent approach with smoking and vaporizing in multi-unit residences and *not* exempt from the ordinance smoking or vaporizing of medical marijuana. The Committee pointed to other available methods for individuals to obtain medical benefits from marijuana (for example, ingesting marijuana in a pill form), and concluded that any smoking or vaporizing of marijuana in multi-unit residences poses a health risk and a nuisance to others.

Should the Council nevertheless choose to allow smoking and vaporizing of medical marijuana in individual units of multi-unit residences like the County has done, the Committee recommends two legislative options to accomplish that goal. The first option would establish the same exemption the County adopted:

Section 8.46.080. Medical Marijuana.

Notwithstanding any other provisions of this Chapter, smoking of marijuana for medical purposes as permitted by California Health and Safety Code sections 11362.7 *et seq.* in any unit of a multi-unit residence is not prohibited by this Chapter. Notwithstanding the forgoing, such use of marijuana may be prohibited or regulated by other provisions of this Code, state law, or federal law.

The second option recommended by the Committee would exempt smoking and vaporizing of medical marijuana in individual units of multi-unit residences but only where the individual obtains a doctor's note advising that the individual smoke or vaporize

medical marijuana rather another use marijuana in other ways because of enhanced medicinal effects smoking or vaporizing offers that particular individual. Here is a provision that may be added to the ordinance to achieve that result:

Section 8.46.080. Medical Marijuana.

Notwithstanding any other provisions of this Chapter, smoking of marijuana for medical purposes as permitted by California Health and Safety Code sections 11362.7 *et seq.* in any unit of a multi-unit residence is not prohibited by this Chapter but only if (1) the individual smoking marijuana for medical purposes has obtained a signed letter from a licensed physician recommending that the individual smoke medical marijuana rather than use medical marijuana in a way that does not involve smoking because of enhanced medical benefits smoking offers the particular individual over non-smoking uses of marijuana, (2) a copy of the doctor's note described in this section has been previously provided to the landlord or that person's designee to the extent the particular unit in which the individual smokes marijuana for medical purposes is subject to a lease or rental agreement, and (3) a copy of the note described in this section is provided to a peace officer upon request. Notwithstanding the foregoing, such use of marijuana may be prohibited or regulated by other provisions of this Code, state law, or federal law.

2. Exemption for Businesses

The Committee previously asked staff to find out more information about why the County included in its ordinance a provision allowing businesses to request an exemption from aspects of the County's smoking and vaporizing ban, and how often the County has granted an exemption.

As explained in earlier agenda reports, based on staff's conversations with the County, it is unclear exactly why the County included this provision in its ordinance. And, according to the County, no business has ever applied for the exemption.

The proposed ordinance currently before Council, like the County's ordinance, contains a provision allowing businesses to request an exemption from the requirements of the ordinance based on unusual circumstances or conditions. This exemption would *not* apply to the ban on smoking and vaping in multi-unit residences or to the tobacco retailer licensing requirements.

3. Citations to Support for Findings

Attached to this report is an appendix containing citations to studies, surveys and other information supporting the findings set forth in the proposed ordinance. County health department staff greatly assisted in preparing this document.

FISCAL IMPACT

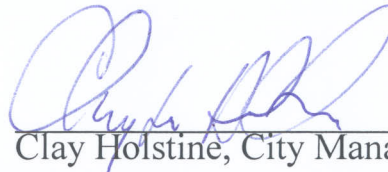
The fiscal impact of the proposed ordinance will be the cost of enforcing the smoking ban and restrictions on the distribution and sale of tobacco products. We understand from the County that most cities within the County that have adopted similar policies have required little by way of enforcement efforts beyond the education stage. The County has offered to take the lead on educating the public about any new smoking or tobacco product policies the City adopts, as the County has done in other jurisdictions.

Additionally, by amending the City's existing tobacco retailer permitting provision to bring those provisions into conformity with the County tobacco retailer permit requirements, the City will be able to continue having the County enforce the City's permitting provisions rather than incur the additional expense of having City staff enforce these City requirements.

Accordingly, we conclude that the proposed ordinance would likely have only a slight fiscal impact on the City and impose only minimal burden on the City's police department.



Teresa L. Stricker, Deputy City Attorney



Clay Holstine, City Manager

Attachments:

- Matrix of Smoking and E-cigarette Policies in San Mateo County Jurisdictions
- American Nonsmokers' Rights Foundation October 7, 2015 compilation of states and municipalities regulating electronic cigarette use
- Non-exhaustive compilation of public and private organizations that regulate use of e-cigarettes as traditional smoking, prepared by San Mateo County Health Department Staff
- Appendix of studies, surveys and other information supporting proposed findings