



Office of the City Manager

ACTION CALENDAR
May 7, 2013

To: Honorable Mayor and Members of the City Council
From:  Christine Daniel, City Manager
Submitted by: Jane Micallef, Director, Health, Housing & Community Services
Subject: Tobacco Free Multi-Unit Housing: Amending Berkeley Municipal Code Chapter 12.70

RECOMMENDATION

Adopt first reading of an Ordinance amending Berkeley Municipal Code Chapter 12.70 to prohibit tobacco smoking which involuntarily exposes neighbors to secondhand smoke in all multi-unit housing in the City with enforcement through private right of action; to require that all new leases include a non-smoking clause; and to permit any tenant who is involuntarily exposed to tobacco smoke to terminate his or her lease without penalty if the landlord fails to include or enforce the non-smoking clause.

FISCAL IMPACTS OF RECOMMENDATION

Outreach and education costs and increased cessation services related to implementing these ordinance amendments can be funded through ongoing state and county tobacco grants in the Public Health Division and Rent Board resources. Shifting tobacco grant dollars to cover the costs of these new activities will mean a reduction in other activities currently carried out with these grant funds providing education and enforcement of current tobacco laws particularly Public Health staffs' ability to respond to the general smoking-complaint calls that we get regarding smoking on streets, at bus stops, and other public places

CURRENT SITUATION AND ITS EFFECTS

On January 31, 2012, City Council requested the Community Health Commission and the Rent Stabilization Board analyze the potential for adopting a smokefree housing ordinance in Berkeley. For the past year, staff has reviewed previous staff work on this issue from 2007 through 2011, analyzed smokefree housing laws adopted by other California cities, consulted with ChangeLab Solutions (which provides legal and technical assistance in developing smokefree environments), and explored a variety of enforcement and funding options for Berkeley. Staff consulted with colleagues throughout the Department, the City Attorney's Office, the Community Health Commission, the Rent Stabilization Board, the City's Animal Care Services staff, several other commissions, and community stakeholders.

Staff's work on a smokefree ordinance has focused on the following priorities:

1. Protect Berkeley residents from non-consensual secondhand tobacco smoke exposure in their homes;
2. Include an enforcement mechanism that ensures implementation and aligns with available resources;
3. Ensure compatibility with the Rent Stabilization Ordinance; and
4. Neither encourage evictions nor create barriers to housing formerly homeless individuals.

The proposed ordinance satisfies all of these goals by amending the City's Tobacco Ordinance (BMC 12.70) to prohibit tobacco smoking which involuntarily exposes neighbors to secondhand smoke in all Berkeley multi-unit housing and to require all new leases to include a non-smoking clause. The ordinance applies to all residential units and indoor and outdoor spaces for the private use of the residents including balconies, patios, and storage units. The proposed ordinance exempts the use of medical marijuana from the prohibitions on smoking. Staff believes that if adopted, this would be the first ban on secondhand tobacco smoke in 100% of all multi-unit housing in a rent controlled city in the United States. Santa Monica passed the first smoke-free housing ordinance adopted by a city with rent control in California but it only applies to new vacancies and new buildings resulting in a delay of many years in a total ban in 100% of all multi-unit housing.¹

The proposed ordinance will be enforced solely through private right of action due to the lack of sufficient resources or a viable source to fund more robust enforcement. Private right of action means residents of the same multifamily building who are personally affected by secondhand smoke will be able to take the smoking neighbor to court. Penalties for exposing fellow residents to secondhand smoke will be monetary damages of \$100 to \$250 for each occurrence. The ordinance also requires all new leases to include a non-smoking clause. A tenant will be able to terminate his or her lease without penalty if the tenant is involuntarily exposed to smoke because the landlord failed to include the clause in a new lease or enforce the clause.

Smoking complaints between neighboring tenants can be difficult to enforce. In developing this recommendation, staff explored comparable types of enforcement situations in which it is unlikely enforcement personnel will directly observe the offending act such as excessive dog barking, excessive noise, and use of gasoline powered leaf blowers. Staff determined that the City's enforcement of the excessive dog barking ordinance could be used as a model for enforcement of a city-wide ban on smoking in multi-unit housing. However, the estimated cost of enforcement utilizing this model is approximately \$120,000 annually and there is no feasible funding mechanism

¹ Santa Monica Municipal Code 4.44.040

to generate the necessary funds. For this reason, staff recommends enforcement through private right of action at this time.

Implementation of the amended ordinance will include:

1. **A robust education and outreach program.** After adoption of the ordinance, Tobacco Prevention Program staff in the Public Health Division will collaborate with Rent Stabilization Board staff to provide a minimum of 12 months of outreach and education to property owners, landlords and tenants. Activities will include informational mailings, on-site technical assistance and the provision of non-smoking notification packets and no-smoking signs.
2. **Information and referral.** Beginning July 1, 2014, Tobacco Program staff will respond to residents who contact the City with complaints about secondhand smoke in multi-unit housing. These residents will receive a copy of the ordinance, information about the dangers of secondhand smoke, guidelines for working with a neighbor to resolve a complaint about secondhand smoke, referrals to mediation services and information about their rights to terminate their lease without penalty. They will also be provided with reference materials and template communications for pursuing a private right of action if the problem continues.

The proposed ordinance provides maximum protection to tenants seeking to limit their exposure to second hand smoke in their homes given the constraints of available resources and the legal limitations that exist in a city with a strict rent control ordinance. Since the City could not mandate an existing tenant to agree to amend his or her lease to include a no smoking clause, a non-smoking ordinance in multi-unit housing which relies solely on enforcement of lease provisions does not achieve a smoke free environment for all residents of multi-unit housing. It would take years to achieve 100% smoke free housing and would involve complicated administrative systems that track new and existing tenants. Therefore, staff recommends the proposed prohibition on tobacco smoking which involuntarily exposes neighbors to secondhand smoke in all Berkeley multi-unit housing in addition to the requirement that landlords include a non-smoking clause in new leases. This prohibition is similar to Assembly Bill 746 introduced in the state legislature on February 21, 2013 and defeated in the Assembly Committee on Housing and Community Development on April 17, 2013. It would have banned all tobacco smoking inside any multi-unit residence. AB 746 would have subjected violators to an initial warning, and subsequent infractions of up to \$100 for a second offense, and up to \$200 for a third offense, but did not require a nonsmoking lease clause or provide for a private right of action.

Staff worked extensively with City Commissions and community stakeholders in developing its recommendation. The original staff recommendation did not include a non-smoking lease clause in new leases due to previous community concerns that it could lead to evictions. However, in consultation with commissions, stakeholders and residents who voiced strong support for it, staff added the lease provision to increase the public health protections for tenants and give them the option to terminate their

lease without penalty if they are involuntarily exposed to tobacco smoke in their unit. In response to input from the Rent Stabilization Board, staff added a provision that if a new lease initiated after 7/1/14 does not contain a non-smoking clause, a new tenant that smokes has the option to terminate their lease without penalty for the first ninety days of the lease term. This provision expires on 7/30/16 since awareness of the non-smoking requirement will have been broadly communicated by that time, and does not apply if the tenant has represented to the landlord that he or she was not a smoker prior to signing the lease.

Staff met several times with the Rent Stabilization Board Ad Hoc Committee on Smoke-Free Housing and the Community Health Commission sub-committee on Smoke-Free Housing and with the full Rent Stabilization Board on January 28, 2013. The Rent Stabilization Board's recommendation differs from the staff recommendation in only one respect—the Rent Board recommends a requirement that property owners register which units in their properties have tenants with no smoking clauses in their lease with the City. The City could provide prospective tenants with this information to assist them in making informed decisions when seeking housing in multi-unit buildings. Staff does not recommend a registration requirement as it would be unduly administratively burdensome. (See the Alternatives Considered section of this report.) The Rent Board will be forwarding their proposed amendment to BMC 12.70 to Council.

On February 14, 2013, the Community Health Commission voted to adopt the Rent Board's recommendation. (M/S/C (Lee/Franklin) Move to accept the content of the smoke-free housing recommendation as presented by the Rent Board on February 14, 2013, to be formatted appropriately before presentation to City Council. **Ayes:** Commissioners Fang, Franklin, Kwanele, Lee, Lewis-Hatheway, Speich, Stein, Straus, Tempelis, and Williams; **Noes:** None; **Abstain:** None; **Absent from vote:** Commissioner Rosales; **Excused:** Commissioner Lam.

Staff met with the Homeless Commission on January 23, 2013, the Medical Cannabis Commission on February 7, 2013, and the Commission on Aging on February 20, 2013 and after discussion these commissions took no position on the draft proposal to amend the BMC to prohibit smoking in all multi-unit housing.

Staff met with the Housing Advisory Commission on February 7, 2013, and after discussion they formed a sub-committee to explore the issue further and bring it back to the full Commission for possible action prior to the April 30th City Council meeting.

BACKGROUND

Secondhand smoke is thought to cause about 46,000 heart disease deaths each year.² The United States Environmental Protection Agency has found secondhand smoke to

² California Environmental Protection Agency, Office of Environmental Health Hazard Assessment. *Proposed Identification of Environmental Tobacco Smoke as a Toxic Air Contaminant: Part B Health Effects*, 2005

be a risk to public health and has classified secondhand smoke as a group A carcinogen, the most dangerous class of carcinogen.³ The U.S. Surgeon General has concluded that there is no risk-free level of exposure to secondhand smoke and estimates that living with a smoker increases a nonsmoker's chances of developing lung cancer by 20 to 30 percent.⁴ Secondhand smoke exposure also 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.⁵

Just 30 minutes of exposure to secondhand smoke is sufficient to damage blood vessels in a healthy nonsmoker.⁶ 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.⁷

Berkeley has a long history dating back to 1977 of taking action to protect residents' health from the effects of tobacco use. As research has increasingly shown the damaging effects of exposure to secondhand smoke, bans on smoking in public places such as restaurants, bars, grocery stores, and parks have been implemented with accompanying City enforcement mechanisms.

This same type of extensive protection is not yet widely available for people living in multi-unit housing. The City of Berkeley Tobacco Prevention Program currently provides advice, assistance, and advocacy to residents exposed to secondhand tobacco smoke. This assistance includes supplying the public with "No Smoking" signs; letters to landlords encouraging construction improvements; referrals to dispute resolution; encouragement to use clear communication strategies; provision of local and statewide resources; information about the hazards of secondhand smoke exposure; quit resources; and assistance to landlords willing to create no-smoking policies.

³ U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, *Exposure to Environmental Tobacco Smoke and Cotinine Levels – Fact Sheet* (2004) available at http://www.cdc.gov/tobacco/research_data/environmental/factsheet_ets.htm (last accessed March 23, 2005).

⁴ U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General 11* (2006), available at <http://www.surgeongeneral.gov/library/secondhandsmoke/report/chapter1.pdf> (last accessed February 22, 2013).

⁵ 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), available at <http://www.oehha.org/pdf/chapter4.pdf> (last accessed February 28, 2005).

⁶ 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

⁷ U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General 11* (2006), available at <http://www.surgeongeneral.gov/library/secondhandsmoke/report/chapter1.pdf> (last accessed February 22, 2013).

In developing this recommendation, staff analyzed tobacco free housing laws adopted by other California cities and model language provided by ChangeLab Solutions, a state-funded technical assistance organization. There are twenty-three cities in California with some level of prohibition on smoking in multi-unit housing. Staff reviewed key elements of these ordinances and discussed enforcement of the ordinances with those responsible in seven of these cities (Richmond, Belmont, Dublin, Novato, Rohnert Park, Santa Monica and Calabasas). Only Richmond and Belmont have 100% tobacco free units. San Rafael will require 100% of units to be tobacco free beginning in November 2013. With the exception of Richmond, cities with these ordinances do not report active enforcement. With the exception of Santa Monica, none of these cities has rent control. Key findings are summarized below.

City	Ordinance	Enforcement Mechanism
Belmont	100% of multi-unit housing leases are required to include a prohibition of smoking clause.	Primarily provide education and information and do not have many smoking complaints.
Calabasas	Requires 80% of units to be tobacco free.	Primarily provide education and information and do not have many smoking complaints.
Dublin	Requires 50% of units to be tobacco free and applies only to complexes of 16 or more units.	Does not actively enforce the ordinance.
Novato	Requires 50% of units to be tobacco free and applies only to complexes of 10 or more units.	Does not actively enforce the ordinance.
Richmond	100% of multi-unit housing leases are required to include a prohibition of smoking clause.	Richmond's Police Department Regulatory Unit enforces the ordinance. There was a one year education and outreach period. Enforcement is complaint driven, with notification of the landlord, followed by officers going into the field to investigate if the smoking is not resolved by the landlord. There is a first warning to abate within 5-7 days, with a second warning within 10 days, culminating in a citation if not abated.
Rohnert Park	Requires 75% of units to be tobacco free.	Does not have any staff designated to enforce the ordinance.
San Rafael	100% of multi-unit housing leases are required to include a prohibition of	Effective November 2013. Non-smoking clause will be enforced by landlords and property managers. Marin County Public

City	Ordinance	Enforcement Mechanism
	smoking clause.	Health Department will respond to complaints of continued smoking.
Santa Monica	Prohibits smoking in newly occupied units. Current tenants register their units with property owners as smoking or non-smoking.	Private right of action.

Staff explored both voluntary and mandated approaches and assessed resources required for each. Staff evaluated various options to assess whether they are legally feasible, fiscally responsible, compatible with Berkeley’s rent control law, and enforceable, while not encouraging evictions or putting an unfair burden on lower socio-economic populations, the recently homeless, property owners, or individual tenants.

RATIONALE FOR RECOMMENDATION

The proposed ordinance achieves the goal of protecting Berkeley residents of multi-unit housing from involuntary exposure to secondhand smoke in their homes while meeting all criteria identified by staff:

- Protect Berkeley residents from non-consensual secondhand tobacco smoke exposure in their homes;
- Include an enforcement mechanism to ensure implementation that aligns with available resources;
- Ensure compatibility with the Rent Stabilization Ordinance; Neither encourage evictions nor create barriers to housing formerly homeless individuals.

ALTERNATIVE ACTIONS CONSIDERED

Staff carefully examined many alternatives in the process of developing a recommendation compatible with the priorities identified above. The proposed BMC amendment prohibiting tobacco smoking in all multi-unit housing in the City of Berkeley is among the strongest health protections available to residents in the state and is similar to Assembly Bill 746 introduced in the state legislature on February 21, 2013 and defeated in Committee on April 17, 2013 which would have banned all tobacco smoking inside any multiunit residence.

Staff thoroughly explored a number of enforcement strategies that take into consideration the fact that enforcement personnel are unlikely to observe the act. Staff considered enforcement modeled after the City’s excessive dog barking ordinance, which addresses the issue of proof by requiring two neighbors to file a written complaint (citizen’s arrest) and subjects violators to an infraction citation. This model addresses the City’s primary interest of protecting tenants against non-consensual second hand tobacco smoke, is compatible with the Rent Stabilization Ordinance, avoids eviction, and works in all types of multi-unit housing including owner occupied housing. However, staff estimate the annual

cost of enforcement for this type of program to be approximately \$120,000 (primarily personnel costs). There is no funding source to cover these costs.

Most cities mandate smoke free housing via lease provisions. This strategy would not work well in Berkeley for the following reasons:

1. Unlike in most cities, Berkeley's tenant protection laws make it impossible to mandate smoke free lease addendums for existing leases. While tenants could voluntarily adopt a smoke free lease addendum, a sitting tenant could not be compelled to agree to this new lease provision. This approach would leave many smoking units for decades without addressing secondhand smoke exposure for many Berkeley residents.
2. Because a number of units with existing tenants would not have non-smoking lease provisions, it would create a significant administrative burden for property managers and City staff to track smoking prohibited versus smoking permitted units resulting in a substantial cost to administer the program.

In assessing the administrative costs of enforcing smokefree lease provisions, staff considered the example of the Rental Housing Safety Program's (RHSP) gas heating certification program. Adopted in 2003, the gas heating certification program required owners of multifamily rental housing to obtain a third-party gas heating appliance inspection annually and submit documentation to the City. Owners were cited for noncompliance. Citation income was expected to offset staffing costs. Staff found reviewing the certifications, documenting compliance, following up with noncompliant units, and citing them to be very burdensome administratively. Although the requirement was changed to require inspections once every five years, this program requirement eventually consumed forty percent of the unit's staff time until it was eliminated in 2011. An accumulated shortfall of \$396,806 was written off in FY 2009. A lease-based smokefree housing ordinance enforced by the City would have many parallels and is likely to be equally unsustainable.

Staff learned that most other cities that have adopted a smoke free housing ordinance do not staff enforcement of the ordinance and have a nearly negligible number of complaints. Based on Public Health's experience with other types of tobacco and code enforcement, staff anticipates a high volume of complaints, at least in the first several years. If the City had an enforcement role, it would require the resources to sustain it.

Richmond has the most active enforcement of any ordinance City staff reviewed, with enforcement through its Police Department. Staff rejected this approach for Berkeley on the grounds that it would be excessively resource-intensive and would result in community concerns about police officers entering residents' homes for tobacco enforcement.

The table below presents the options staff considered for the ordinance before arriving at this report's recommendation.

Options Considered	Reason for Rejection
<p>A. Model an ordinance on the City's excessive dog barking ordinance, which requires two neighbors filing a written complaint (citizen's arrest) and subjects violators to an infraction citation.</p>	<p>This model best fit the staff's priorities regarding addressing non-consensual second hand tobacco smoke, a practical enforcement mechanism, compatibility with the Rent Stabilization Ordinance, and avoiding eviction. Staff estimated the annual cost of enforcement at \$120,000. Staff was unable to identify a feasible funding mechanism (see next table).</p>
<p>B. Define non-consensual secondhand tobacco smoke exposure in multi-unit housing as a "nuisance".</p>	<p>Nuisance violations are potential grounds for eviction. This approach was rejected because it would probably result in evictions.</p>
<p>C. Solely prohibit tobacco smoking in all newly constructed multi-unit rental housing.</p>	<p>This approach would leave the large numbers of tenants in older rental housing unprotected from non-consensual exposure to secondhand tobacco smoke.</p>
<p>D. Solely require a no-tobacco-smoking clause in 100% of new leases. Existing tenants covered under rent control would be exempt from the requirement but would be asked to voluntarily sign a lease addendum that designates their unit non-smoking.</p>	<p>This approach would continue exposing other tenants to non-consensual secondhand tobacco smoke. The City's Rent Stabilization Ordinance makes it impossible to adopt mandatory lease addendums. The resulting exceptions would make the ordinance nearly impossible to enforce. It would be logistically burdensome and financially prohibitive to enforce. It would incur a significant paperwork burden on landlords and city staff to track "smoking prohibited" and "smoking permitted" units.</p>
<p>E. Add a no-tobacco-smoking clause in 90% of new leases.</p>	<p>This approach would continue exposing other tenants to non-consensual secondhand tobacco smoke. It would be logistically burdensome and financially prohibitive to enforce. It would incur a</p>

Options Considered	Reason for Rejection
	significant paperwork burden on landlords and city staff to track “smoking prohibited” and “smoking permitted” units.
F. Encourage voluntary tobacco smoke free housing. Provide education for landlords and tenants on how to voluntarily add smoke free lease addendums. Implement a smoke free certificate program for buildings with smokefree leases for new tenancies.	This would continue exposing large numbers of tenants to non-consensual secondhand tobacco smoke.

Staff explored a number of ways to fund enforcement. The mechanism that seemed most logical was a local tobacco sales tax, but California state law does not allow these types of taxes. Revenue sources considered to support enforcement efforts include:

Funding Options Considered	Reason for Rejection
A. Increase the Rental Housing Safety Program (RHSP) fee on rental housing.	This alternative would only allow for enforcement in rental housing. Staff was unable to identify a parallel funding source for ownership housing.
B. Increase the retail license fee on tobacco retailers.	There is not a sufficient connection between the services provided to retailers for the fee and the enforcement of the smokefree housing ordinance to make this permissible under state law.
C. Place a tobacco sales tax measure on the ballot for the voters to decide.	State law precludes local tobacco taxes.
D. Revise the City’s existing Tobacco Program grant agreements with the State to focus on smokefree housing enforcement.	The California Department of Public Health funds local public health departments to implement tobacco control activities in their communities. Program requirements include a range of tobacco prevention activities and new initiatives within each three-year funding cycle. Ongoing enforcement activities are not eligible for these funds.

CONTACT PERSON

Janet Berreman, Health Officer, HH&CS, 981-5301

Kate Clayton, Health Services Supervisor, HH&CS, 981-5314

Attachments:

1: Ordinance (clean version)

2: Ordinance (track changed version)

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 AND 12.70.037, 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, bronchoconstriction, 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;⁸ and 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.⁹

4. The U.S. Surgeon General has concluded that there is no risk-free level of exposure to secondhand smoke;¹⁰

5. Just 30 minutes of exposure to secondhand smoke is sufficient to damage blood vessels in a healthy nonsmoker;¹¹

6. The California Air Resources Board has put secondhand smoke in the same category as the most toxic automotive and industrial air pollutants by categorizing it as a toxic air contaminant for which there is no safe level of exposure;¹²

7. 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

⁸ 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).

⁹ 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).

¹⁰ 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).

¹¹ 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

¹² Cal. Air Resources Bd., Resolution 06-01, at 5 (Jan. 26, 2006).

mothers who smoke;¹³

8. In the United States, secondhand smoke is thought to cause about 46,000 heart disease deaths each year;¹⁴

9. Secondhand smoke can seep under doorways and through wall cracks;¹⁵ and

10. 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;¹⁶

B. Accordingly, the City Council finds and declares that the purposes of this chapter are (1) to protect the public health and welfare by prohibiting smoking in public places, places of employment, and specially designated public play areas where small children are at risk of choking on or ingesting cigarette butts and other toxic tobacco litter, (2) to guarantee the right of nonsmokers to breathe smoke-free air, and to recognize that the need to breathe smoke-free air shall have priority over the desire to smoke, and (3) to promote self-enforcement through educational outreach regarding smoking prohibitions.

Section 2. That Berkeley Municipal Code Section 12.70.020 is hereby amended to read as follows:

12.70.020 Definitions.

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

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

C. "Commercial area sidewalk" means any sidewalk in front of or adjoining any property designated on the City's Official Zoning Map appended to the City's Zoning Ordinance with a "C" prefix.

¹³ 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).

¹⁴ California Environmental Protection Agency, Office of Environmental Health Hazard Assessment. *Proposed Identification of Environmental Tobacco Smoke as a Toxic Air Contaminant: Part B Health Effects*, 2005

¹⁵ J. Wagner et al., *Environmental Tobacco Smoke Leakage from Smoking Rooms*, JOURNAL OF OCCUPATIONAL AND ENVIRONMENTAL HYGIENE, 1:110-118 (2004).

¹⁶ 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).

D. "Common area of multi-unit residence" means any enclosed area or unenclosed area that may be used by more than the residents of a single unit or room, including but not limited to, shared lobbies and courtyards, lounges, hallways, elevators and stairs, community rooms, playgrounds, gym facilities and swimming pools, parking garages and parking lots, living and dining areas, kitchens and bathrooms, laundry rooms, lobbies, waiting rooms and television rooms.

E. "Contract employee" means any person who performs work for a business or non-profit entity, but who is paid by an agency which contracts with said business or non-profit entity to supply such workers.

F. "Dining area" means an enclosed area containing a counter or table upon which meals are served.

G. "Employee" means any person who is employed by any employer in the consideration for direct or indirect monetary wages or profit, and any person who volunteers his or her services for a non-profit entity. Employees include those employed full-time, part-time, temporary or contracted for from a third party.

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

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

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

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

L. "Multi-unit residence" means a building or portion thereof that contains more than one dwelling unit as defined in Chapter 23F.04, including but not limited to apartments, common interest developments, such as condominiums, townhouses and tenants-in-common, group living accommodations as defined in Chapter 23F.04, senior citizen residence, nursing homes, dormitories, and single room occupancy hotels, as well as any exclusive-use enclosed or unenclosed area associated with the dwelling unit, including but not limited to a private balcony, porch, deck, or patio.

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

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

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

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

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

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

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

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

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

12.70.030 Locations where smoking is prohibited.

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

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

B. Elevators in buildings generally open to the public, including elevators in apartment buildings, irrespective of the number of living units in such apartment buildings;

C. In all rooms, wards, waiting rooms, lobbies and public hallways of every health care facility. The exemptions set forth in Section 12.70.050 shall not apply to this subsection;

D. Within every room, chamber, place of meeting or public assembly, including school buildings under the control of any board, council, commission, committee, including joint committees, or agencies of the City during such time as a public meeting is in progress;

E. In waiting rooms, lobbies, public hallways and all other areas of every building under direct or indirect control of the City;

F. Within all parts of any buildings which are primarily used for exhibiting any motion picture, stage drama, dance, musical performance or other similar performance, including nightclubs, and within any room, hall or auditorium that is occasionally used for exhibiting any motion picture, stage drama, dance, musical performance or other similar performance during the time that said room, hall or auditorium is open to the public for such exhibition; provided, however, that smoking is permitted on a stage when such smoking is part of a stage production;

G. In museums, libraries, aquariums and galleries;

H. In all enclosed parts of hotels, motels and resorts open to the general public, including, but not limited to guest rooms, registration areas, lobbies, hallways and conference rooms; provided, however, that 25 percent of the rooms rented to guests may be maintained as fixed smoking rooms;

I. In buses, trains, taxicabs and other means of public transit while operating within the boundaries of the City, and in ticket areas and waiting rooms of transit terminals and stations;

J. In sports arenas and outdoor theaters;

K. Within all areas open to the public in business establishments dealing in goods or services and not otherwise mentioned in this section, including, but not limited to food and grocery stores, drugstores, supermarkets, automobile showrooms, banks, savings and loan offices, insurance offices, and attorneys offices;

L. Public restrooms;

M. Service areas;

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;

Y. Senior centers.

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

12.70.035 Exposure to smoke in multi-unit residences.

A. Effective July 1, 2014, any person who smokes in any portion of a multi-unit residence or any common area of a multi-unit residence 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.

B. Use of marijuana by a person for whom using marijuana is not a crime under California law shall be exempt from this section.

C. Violations of this section are enforceable only by private action filed in a court of competent jurisdiction.

D. Violation of this section is not 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.

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

12.70.037 Required lease term for new and renewed leases.

A Every lease or other rental agreement for the occupancy of a new or existing unit in a multi-unit residence entered into after July 1, 2014, shall include a clause providing that it is a material breach of the lease or other rental agreement for tenant or any other person subject to the control of the tenant or present by invitation or permission of the tenant to engage in smoking in any of the following areas: (a) the unit; (b) any exclusive-use enclosed or unenclosed area associated with the unit, including but not limited to a private balcony, porch, deck, or patio; or (c) any common area of the multi-unit residence.

B. A tenant exposed to smoke may terminate his or her tenancy without penalty or liability if either: (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; or (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.

C. For any tenancy initiated on or after July 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 June 30, 2016.

D. Use of marijuana by a person for whom using marijuana is not a crime under California law shall not constitute a violation of the clause in subsection A.

Section 6. That Berkeley Municipal Code Section 12.70.050 is hereby amended to read as follows:

12.70.050 Where smoking is not regulated.

A. This chapter is not intended to regulate smoking in the following places and under the following conditions within the City:

1. Retail tobacco stores;

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

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

Section 7. That Berkeley Municipal Code Section 12.70.120 is hereby amended to read as follows:

12.70.120 Enforcement.

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

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

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

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

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

Section 8. Posting.

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

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 AND 12.70.037, 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;~~and.~~

2. Health hazards induced by breathing secondhand smoke include lung cancer, heart disease, respiratory infection, decreased respiratory function, bronchoconstriction, 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 and 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

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

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

6. The California Air Resources Board has put secondhand smoke in the same category as the most toxic automotive and industrial air pollutants by categorizing it as a toxic air contaminant for which there is no safe level of exposure;⁵

7. 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

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).

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).

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 General* 11 (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).

mothers who smoke;⁶

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

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

10. 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

B. Accordingly, the City Council finds and declares that the purposes of this chapter are (1) to protect the public health and welfare by prohibiting smoking in public places, places of employment, and specially designated public play areas where small children are at risk of choking on or ingesting cigarette butts and other toxic tobacco litter, (2) to guarantee the right of nonsmokers to breathe smoke-free air, and to recognize that the need to breathe smoke-free air shall have priority over the desire to smoke, and (3) to promote self-enforcement through educational outreach regarding smoking prohibitions.

Section 2. That Berkeley Municipal Code Section 12.70.020 is hereby amended to read as follows:

12.70.020 Definitions.

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

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

C. "Commercial area sidewalk" means any sidewalk in front of or adjoining any property designated on the City's Official Zoning Map appended to the City's Zoning Ordinance with a "C" prefix, ~~which are listed on the Map as General Commercial, Central Commercial, Elmwood Commercial, North Shattuck Commercial, South Area~~

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).

⁷ California Environmental Protection Agency, Office of Environmental Health Hazard Assessment, *Proposed Identification of Environmental Tobacco Smoke as a Toxic Air Contaminant: Part B Health Effects, 2005*

⁸ J. Wagner et al., *Environmental Tobacco Smoke Leakage from Smoking Rooms*, JOURNAL OF OCCUPATIONAL AND ENVIRONMENTAL HYGIENE, 1:110-118 (2004).

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).

~~Commercial, Solano Avenue Commercial, Telegraph Commercial, and West Berkeley Commercial.~~

D. "Common area of multi-unit residence" means any enclosed area or unenclosed area that may be used by more than the residents of a single unit or room, including but not limited to, shared lobbies and courtyards, lounges, hallways, elevators and stairs, community rooms, playgrounds, gym facilities and swimming pools, parking garages and parking lots, living and dining areas, kitchens and bathrooms, laundry rooms, lobbies, waiting rooms and television rooms.

E. "Contract employee" means any person who performs work for a business or non-profit entity, but who is paid by an agency which contracts with said business or non-profit entity to supply such workers.

EF. "Dining area" means an enclosed area containing a counter or table upon which meals are served.

FG. "Employee" means any person who is employed by any employer in the consideration for direct or indirect monetary wages or profit, and any person who volunteers his or her services for a non-profit entity. Employees include those employed full-time, part-time, temporary or contracted for from a third party.

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

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

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

JK. "Motion picture theater" means any theater engaged in the business of exhibiting motion pictures.

L. "Multi-unit residence" means a building or portion thereof that contains more than one dwelling unit as defined in Chapter 23F.04, including but not limited to apartments, common interest developments, such as condominiums, townhouses and tenants-in-common, group living accommodations as defined in Chapter 23F.04, senior citizen residence, nursing homes, dormitories, and single room occupancy hotels, as well as any exclusive-use enclosed or unenclosed area associated with the dwelling unit, including but not limited to a private balcony, porch, deck, or patio.

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

NL. "Open to the public" means available for use by or accessible to the general public during the normal course of business conducted by either private or public entities.

OM. "Place of employment" means any area under the control of a public or private employer which employees normally frequent during the course of employment, including, but not limited to, conference and class rooms, employee cafeterias,

employee lounges and restrooms, hallways, and work areas. A private residence is not a place of employment unless it is used as a childcare or health care facility.

NP. "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.

QE. "Recreational aArea" 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;

RP. "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.

SQ. "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.

~~R. "Semiprivate room" means a room in a health care facility containing two beds for patients of the facility.~~

TS. "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.

UT. "Smoke" or "smoking" means and includes inhaling or exhaling upon, burning or carrying any lighted smoking equipment for tobacco, or any other plant or product used for personal habit commonly known as smoking.

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

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

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

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

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

12.70.030 Locations where smoking is prohibited.

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

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

B. Elevators in buildings generally open to the public, including elevators in apartment buildings, irrespective of the number of living units in such apartment buildings;

C. In ~~semiprivate~~ all rooms, wards, waiting rooms, lobbies and public hallways of every health care facility. The exemptions set forth in Section 12.70.050 shall not apply to this subsection;

D. Within every room, chamber, place of meeting or public assembly, including school buildings under the control of any board, council, commission, committee, including joint committees, or agencies of the City during such time as a public meeting is in progress;

E. In waiting rooms, lobbies, public hallways and all other areas of every building under direct or indirect control of the City;

F. Within all parts of any buildings which are primarily used for exhibiting any motion picture, stage drama, dance, musical performance or other similar performance, including nightclubs, and within any room, hall or auditorium that is occasionally used for exhibiting any motion picture, stage drama, dance, musical performance or other similar performance during the time that said room, hall or auditorium is open to the public for such exhibition; provided, however, that smoking is permitted on a stage when such smoking is part of a stage production;

G. In museums, libraries, aquariums and galleries;

H. In all enclosed parts of hotels, motels and resorts open to the general public, including, but not limited to guest rooms, registration areas, lobbies, hallways and conference rooms; provided, however, that 25 percent of the rooms rented to guests may be maintained as fixed smoking rooms;

I. In buses, trains, taxicabs and other means of public transit while operating within the boundaries of the City, and in ticket areas and waiting rooms of transit terminals and stations;

J. In sports arenas and outdoor theaters;

K. Within all areas open to the public in business establishments dealing in goods or services and not otherwise mentioned in this section, including, but not limited to food and grocery stores, drugstores, supermarkets, automobile showrooms, banks, savings and loan offices, insurance offices, and attorneys offices;

L. Public restrooms;

M. Service areas;

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; ~~provided further, that this prohibition does not prevent the designation of a separate room or area where smoking is permitted so long as said smoking rooms are not common passages through the senior citizen residence.~~ 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;

Y. Senior centers.

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

12.70.035 Exposure to smoke in multi-unit residence.

A. Effective July 1, 2014, any person who smokes in any portion of a multi-unit residence or any common area of a multi-unit residence 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.

B. Use of marijuana by a person for whom using marijuana is not a crime under California law shall be exempt from this section.

C. Violations of this section are enforceable only by private action filed in a court of competent jurisdiction.

D. Violation of this section is not 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.

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

12.70.037 Required lease term for new and renewed leases.

A. Every lease or other rental agreement for the occupancy of a new or existing unit in a multi-unit residence entered into after July 1, 2014, shall include a clause providing that it is a material breach of the lease or other rental agreement for tenant or any other person subject to the control of the tenant or present by invitation or permission of the tenant to engage in smoking in any of the following areas: (a) the unit; (b) any exclusive-use enclosed or unenclosed area associated with the unit, including but not limited to a private balcony, porch, deck, or patio; or (c) any common area of the multi-unit residence.

B. A tenant exposed to smoke may terminate his or her tenancy without penalty or liability if either: (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; or (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.

C. For any tenancy initiated on or after July 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 June 30, 2016.

D. Use of marijuana by a person for whom using marijuana is not a crime under California law shall not constitute a violation of the clause in subsection A.

Section 6. That Berkeley Municipal Code Section 12.70.050 is hereby amended to read as follows:

12.70.050 Where smoking is not regulated.

A. This chapter is not intended to regulate smoking in the following places and under the following conditions within the City:

1. Retail tobacco stores;
2. Private residences, which may serve as a place of employment except when used as a childcare or health care facility and except as stated in sections 12.70.035 and 12.70.037.

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

Section 7. That Berkeley Municipal Code Section 12.70.120 is hereby amended to read as follows:

12.70.120 Enforcement.

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

B. The Health, Housing, and Community Services Department shall enforce the smoke-free workplace provisions in Section 12.70.040 of this Chapter and Section 6404.5 of the California Labor Code.~~The Public Safety Department or Health and Human Services Department shall perform a checklist evaluation for compliance with all requirements of this chapter while an establishment is undergoing otherwise mandated inspections.~~

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

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

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

Section 8. Posting.

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

