



Jesse Arreguín
Councilmember, District 4

ACTION CALENDAR
November 19, 2013

To: Honorable Mayor and Members of the City Council

From: Councilmember Jesse Arreguín

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

RECOMMENDATION:

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

1. Delay the effective date of the ordinance to May 1, 2014, rather than March 1, 2014 as previously directed by the City Council, so that staff has adequate time to draft amendments based on this referral and bring back a final ordinance for Council adoption. Also delay the requirement that landlords notify tenants effective January 1, 2014. A delayed implementation date would also provide enough time for the city to conduct outreach to owners and tenants of the new requirements and increase smoking cessation resources before the ordinance goes into effect.
2. All initial leases or rental agreements signed on or after May 1, 2014 shall include language expressly prohibiting smoking in the units or in any common areas of a multi-unit residence.
3. That all initial leases or rental agreements signed after May 1, 2014, also notify tenants which units in the building do not have leases which expressly prohibit smoking.
4. Failure to provide either of the lease provisions noted above will allow the new tenant to break the lease without penalty. (the language proposed by the Manager on October 1st along with the modifications proposed by the Rent Board on October 1st suffices).

5. That the City or Rent Board actively encourage and try to get tenants to sign voluntary lease addendums which prohibit smoking. Any voluntary lease addendum should be on a City/Rent Board developed form.
6. That the Rent Board establish and maintain a registry of all rental units in multi-unit housing indicating which units have leases that expressly prohibit smoking & require owners to notify the Rent Stabilization Board of lease provisions prohibiting smoking, and that the city require that owners of units registered with the Rent Board and those that aren't registered provide information on which units have no-smoking lease clauses.
7. That owners be required to post signs in common areas of all multi-unit housing indicating smoking is prohibited.
8. That the City allocate staff to enforce violations of this ordinance through an initial investigation, written warning and followed by progressively increasing fines of \$250, \$500, \$1000 and \$1,500 for each infraction. Consistent with the previous staff drafted ordinance, there should be a cap on the number of private right of actions that any individual resident may file in a year against another smoking resident.
9. Includes the private right of action but strengthen it by allowing each resident to collect no more than \$1,000 in a calendar year through private right of action. *Doing this allows us to show that we are not tolerating or condoning smoking but believe that real financial penalties (rather than an unequal risk of lost housing) should be an appropriate penalty that can be applied in a more uniform way. Also making a violation the ordinance an infraction does not give an owner automatic grounds to evict a tenant.*

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

10. Warnings be required by landlords and by the City before any enforcement action can be taken.

The City Council should authorize sufficient staff and a funding source for proper enforcement and outreach. Previously, the City Manager indicated such a program would cost in the neighborhood of \$120,000 annually to implement. Councilmember Maio indicated that the inspectors associated with the Rental Housing Safety Program be charged with implementing the Ordinance. If the RHSP fee were increased by \$5 per unit, there would be sufficient resources to fund the necessary staff to implement the

provisions of the Tobacco-Free Multi-Family Housing Ordinance I am proposing. If there needs to be a specific nexus between a no smoking ordinance and the RHSP program, City staff should explore amending the housing code so that smoking is a violation that can be cited and enforced by RHSP Housing code inspectors.

BACKGROUND:

On October 1, 2013, the City Council directed staff to draft an ordinance that bans smoking in all multi-unit housing effective March 1, 2014 and requires landlords to notify tenants of the new regulations. The Council discussed declaring smoking a nuisance and requiring that owners evict tenants that are alleged to continue smoking after receiving notice from the City that a complaint had been logged. Similar to the Barking Dog Ordinance, repeated complaints, rather than independent City confirmation, would be the basis for determining that a resident of multi-unit housing was in fact smoking in violation of the Ordinance. There was no discussion of the City issuing fines when they found a resident was smoking in violation of the Ordinance, only that tenants may face eviction for doing so. In May, Council directed staff to provide sufficient notice to residents (over a year notice) before they faced liability through a private right of action. This notice was to be performed by the city in coordination with information about smoking cessation classes. However, in October, Council shifted the obligation for notifying tenants to the landlord and truncated the notice. Including the other provisions proposed by the City Manager and advisory commissions were not addressed in the motion adopted by the Council.

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

Council Discussed No Fines for Violations

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

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

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

are enforced based upon an individual's ability to own the property they live in.

Council did not require No-Smoking Lease Provisions

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

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

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

No Registry of Smoke-Free Units

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

No Standardized Language for Voluntary Lease Addendum

Nothing in what was adopted on October 1st mentions the City or Rent Board attempting to secure voluntary lease addendums from existing tenants using standardized language. Such a process was proposed so that owners that did attempt to evict tenants smoking in violation of their leases would be more likely to prevail and not be liable for attorney costs.

No Language to Prevent Discriminatory or Selective Enforcement by Landlords

Nothing in what was discussed or adopted on October 1st mentions how the City will ensure that the enforcement by owners (evictions) will be done in a non-discriminatory way. As was pointed out repeatedly, since the inception of vacancy decontrol there is an incentive to have longer-term tenants removed (by eviction or threat of eviction). As was pointed out by myself, a tenant could face eviction procedures based upon unsubstantiated complaints by a neighbor or property manager, lose one's home based upon a complaint. As noted above, this is a risk that an owner occupant does not face.

If Council adopts the Ordinance discussed on October 1st and includes language that puts tenants that do not have prohibitions in their lease at risk of harassment or eviction there is a good chance that the Ordinance itself will be challenged and delayed in court and/or that owners that attempt to evict under the Ordinance will be at risk of not prevailing and facing substantial court related costs. The Council

has asked staff to craft something that will either be illegal or highly risky to any owner trying to enforce it. Thereby rendering it a meaningless or at best, ineffectual gesture.

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

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

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

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

FINANCIAL IMPLICATIONS:

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

CONTACT PERSON:

Jesse Arreguin, Councilmember, District 4 (510) 981-7140

