

ORDINANCE NO. 7,321–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;¹

4. The United States Environmental Protection Agency has found secondhand smoke to be a risk to public health and has classified secondhand smoke as a group A carcinogen, the most dangerous class of carcinogen;²

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

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

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

² U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *Exposure to Environmental Tobacco Smoke and Cotinine Levels — Fact Sheet* (2004), (last accessed March 23, 2005).

³ U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General* 11 (2006), (last accessed Sept. 19, 2006).

⁴ Christian Heiss, MD, Dr Med., Nicolas Amabile, MD., Andrew C. Lee, MD, et al. *Brief Secondhand Smoke Exposure Depresses Endothelial Progenitor Cells Activity and Endothelial Function*, J Am Coll

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

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

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

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

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

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

13. Cigarette butts are a major and persistent source of litter. In the last 25 years of coastal clean-ups, cigarette and cigarette filters ranked as the number one source of waste comprising nearly 32% of all collected litter items.¹¹

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

Cardiol, 2008; 51:1760-1771,jacc.2008.01.040

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

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

⁷ California Environmental Protection Agency, Office of Environmental Health Hazard Assessment. *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), (last accessed April 7, 2005).

⁹ U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General* 11 (2006), (last accessed February 22, 2013).

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

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

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.

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, courtyards, lounges, hallways, elevators, stairs, community rooms, playgrounds, gym facilities, swimming pools, parking garages, parking lots, living and dining areas, kitchens, 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 unit.

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

Z. "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; and

Y. Senior centers.

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

12.70.035 Smoking prohibited in multi-unit residences.

A. Effective May 1, 2014, smoking is prohibited in all units of multi-unit residences and all common areas of multi-unit residences.

B. All common areas of multi-unit residences shall have signage indicating that smoking is prohibited consistent with the signposting requirements of Section 12.70.060.A.

C. If the City receives a complaint of a violation of subdivision A, it may issue a notice to the person(s) responsible, informing him or her of the requirements of this Section. The tenant(s) of a unit, or owner-occupant(s) of an owner-occupied unit, shall be deemed the person(s) responsible for the violation where the violation was caused by the tenant(s) or owner-occupant(s) of the unit, or one or more persons subject to the control of, or present by invitation or permission of, the tenant(s) or owner-occupant(s).

D. If within a six month period following issuance of a notice under subdivision C, the City receives at least two complaints from residents of at least two separate units of the same multi-unit residence, or in the case of a two-unit multi-unit residence, from a resident of the other unit of a violation of subdivision A by the same person(s) provided notice under subdivision C, the person(s) responsible for the violation shall be guilty of an infraction as provided for in Berkeley Municipal Code Chapter 1.20. In addition, the City may employ any other remedies permitted by law, including but not limited to Chapter 1.28. In order for the City to initiate enforcement under this Section, each person who makes a claim of a violation of this Section must lodge the complaint on a form specified by the City.

E. Use of medical cannabis by a person for whom using medical cannabis is not a crime under California law shall be exempt from this Section.

F. Sales contracts for condominiums entered into on or after May 1, 2014 shall disclose the requirements of Sections 12.70.035 and 12.70.037.

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 Leases

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

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

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

D. Applications for tenancy shall include information from the landlord regarding Sections 12.70.035 and 12.70.037.

E. Landlords shall provide written notice to all existing tenants of the requirements of Sections 12.70.035 and 12.70.037 no later than March 1, 2014.

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 Ordinance 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.

At a regular meeting of the Council of the City of Berkeley held on December 3, 2013 this Ordinance was passed to print and ordered published by posting by the following vote:

Ayes: Anderson, Arreguin, Capitelli, Maio, Moore, Wengraf, Worthington, Wozniak and Bates.

Noes: None.

Absent: None.