



Office of the Mayor

CONSENT CALENDAR
October 25, 2005

To: Members of the City Council
From: Mayor Tom Bates
Subject: Tobacco Prevention Policies

RECOMMENDATION:

The Council refers the following three issues to the Community Health Commission for further investigation, with a request to return to Council by June 2006 with specific policy recommendations that would reduce the life threatening impacts of smoking and second-hand smoke and tobacco industry promotions to young adults. The three issues are: a) Eliminate tobacco industry bar nights in Berkeley; b) Include “second-hand smoke” in Berkeley’s General Nuisance ordinance; and, c) Require new, publicly funded, multi-unit housing developments to be smoke-free.

The Council also requests that the City Attorney research and inform the Council on whether it has the legal authority to prohibit smoking in cars that are transporting children in the city limits.

BACKGROUND:

IMPACT OF SECOND-HAND SMOKE

- No other consumer product has such a devastating impact on the health of a community as tobacco. More than 440,000 people in the US die every year from smoking-related diseases¹.
- Tobacco causes more deaths than AIDS, auto accidents, alcohol and drugs, homicides, suicides, and fires combined; The World Health Organization (WHO) estimates that by 2030, tobacco will account for 10 million deaths per year².
- The third leading cause of death in the United States is exposure to secondhand smoke, killing approximately 57,000 Americans every year³, approximately 4,700 of which occur in California.⁴
- The Environmental Protection Agency categorizes secondhand smoke as a known human carcinogen, placing it in the most dangerous category, reserved for substances including radon, benzene, and asbestos.

- People who are routinely exposed to secondhand smoke are three times more likely to develop lung cancer.⁵
- Many nonsmokers exposed to outdoor tobacco smoke suffer immediate symptoms including breathing difficulties, eye irritation, headache, nausea, and asthma attacks.
- 87.9% of non-smokers showed detectable levels of cotinine (a metabolite of nicotine) in their blood, the most likely source of which is secondhand smoke exposure⁶.
- Secondhand smoke exposure adversely affects fetal growth with elevated risk of low birth weight and increased risk of Sudden Infant Death Syndrome (SIDS) in infants of mothers who smoke. Breathing secondhand smoke is a significant health hazard not only for pregnant women and their unborn children, but also infants and children, elderly people, and individuals with cardiovascular disease, impaired respiratory function, including asthmatics and those with obstructive airway disease⁷.
- Cigarettes, cigars, pipes, and other smoking materials are the leading cause of fire deaths in the United States⁸, causing an estimated 31,200 structure fires and 830 deaths in 2001⁹.
- The cost of California taxpayers from illnesses caused by tobacco use is \$6,000,000,000.00 (6 billion) annually¹⁰.

INFORMATION ON ELIMINATING TOBACCO INDUSTRY BAR NIGHTS

As early as the 1980's the tobacco industry began targeting its marketing efforts at bars and nightclubs. These efforts have included promotions such as free giveaways of tobacco products and paraphernalia, tobacco product surveys, activities to build mailing lists for future marketing efforts, games with tobacco products as prizes, and even performances by dancers and other individuals dressed in tobacco paraphernalia.

According to internal documents, tobacco industry marketing executives have moved toward promoting cigarettes and other tobacco products at bars and nightclubs for a variety of reasons. Tobacco marketing is thought by the tobacco industry to be more socially acceptable in bars where minors are kept out by law¹¹. That is, bars represent one of the few available adult-only venues where the tobacco industry can advertise and promote their products freely while avoiding potential public criticism that these marketing efforts spill over into an underage market. In fact, the high concentration of young adults (21-34) enables tobacco companies to more effectively market their products to that key demographic group and attract lifelong customers. It is not surprising that one of the main reasons for smoking uptake among adolescents is social influence, especially peer smoking and peer approval of smoking¹¹.

During the past year and currently, the tobacco industry has sponsored parties and bar nights in two popular Berkeley nightspots very near the UC campus: the Thalassa Pool Hall and the Down-Low Club. During the bar nights, the tobacco industry sponsors live entertainment and special give-away promotions to the bar patrons. For example, during the Marlboro Ranch Parties, a tobacco industry representative approaches each patron in the bar to offer an expensive Zippo lighter in exchange for their smoking preferences and their contact information. Philip Morris uses this information to mail and e-mail special promotions and advertisements, offering discount coupons for cigarettes, more paraphernalia, drawings for trips and free tickets to car races and popular music concerts.

Tobacco industry sponsored bar nights efforts are very effective in marketing tobacco to young adults. In a study conducted by the Cancer Prevention and Control Program at UC San Diego, researchers found that about 20% of all young adults and about 30% of those at risk for future smoking (including current smokers) were exposed to tobacco advertising and promotions in bars and clubs¹². These California results may be conservative, but none-the-less indicate that the group potentially influenced is sizable.

Of those who attended bars and clubs at least sometimes, 41.7% reported seeing cigarette advertisements on the walls or furniture, 36.5% reported seeing them on napkins, coasters, or tobacco industry promotional items, and 15.4% saw tobacco company representatives handing out free cigarette samples. Overall, 57.9% of bar and club attendees reported observing at least one of these advertising and promotional practices. Compared to non-smokers not at risk, non-smokers at risk and smokers showed higher reported rates of seeing advertising on walls or furniture or on items such as napkins and coasters. Having a tobacco promotional item or being willing to use one was also related to bar and club attendance.

The link between smoking and drinking is quite clearly established; about three quarters of young adult smokers in this study reported that they enjoyed smoking while drinking. Drinking might reduce a never smoker's inhibitions about trying a cigarette, a former smoker's resolve to remain a non-smoker, or a social smoker's intent to smoke only a cigarette or two in the evening.¹³ Also, research suggests that people perceive an added effect from smoking if they consume alcohol at the same time.¹⁴

A primary goal of tobacco industry bar night promotions, aside from attracting new smokers and keeping regular smokers hooked, is to turn "social smokers" into dependent ones. This study indicated that social smoking is prevalent among college-aged students. "Social smoking" was defined as agreeing with the statement, "I only smoke when others are smoking." About 30% of current smokers in this study were defined as 'social smokers,' which is about the same as in a Massachusetts population study of 18-30 year olds, but less than a study of college students indicating that 51% were social smokers.¹⁵

Bars are an ideal place for tobacco companies to advertise their products. Moreover, bars and clubs are settings, in which former established smokers are likely to relapse. Results indicate that smokers, former smokers vulnerable to relapse, and experimenters and never smokers susceptible to smoking were more likely to visit bars and clubs than never smokers committed not to smoke.

Bars and nightclubs are also thought to create a more festive environment where individuals are more open to new experiences, such as smoking. The consumption of alcohol at bars and nightclubs also reduces inhibitions leading individuals to become involved in behaviors they do not normally engage in. Studies have shown that adolescents who own tobacco promotional items, or are willing to use tobacco promotional items, are more likely to smoke¹¹. While these industry bar nights may initially create occasional smokers, from? stress or pressure, this occasional smoking behavior may become more frequent and/or transfer to situations outside of this specific bar environment.

As a result of these and other marketing activities that have created a more interactive and tobacco friendly environment in bars and nightclubs nationwide, more and more young adults have begun smoking. Each day in California 300 youth light up for the first time; about one-third of them will die from a tobacco related disease. In 1998 the percentage of young adults, 18 to 25, who smoked increased to 41.6% from 34.6% in 1994. In 1998 the percentage of college students who smoked increased to 28.5% from 22.3% in 1993.¹⁶

At this point, we propose that the staff of the Tobacco Prevention Program, working with the Community Health Commission and the City Attorney, conduct further research and come back to the City Council with policy recommendations for eliminating those components of bar nights that can be regulated by the City without offending the First Amendment or the preemption provision of the Federal Cigarette Labeling and Advertising Act (FCLAA). The reason we propose holding off on making immediate policy recommendations is that there is a relevant case currently pending before the California Supreme Court. In *Lockyer v. R.J. Reynolds* (S121009), the Court is considering whether the FCLAA preempts the ability of state and local jurisdictions to regulate the distribution of free samples of cigarettes. Within 90 days, the Court is expected to issue a decision that will clarify how far a city can go in regulating certain aspects of bar nights.

ADDING "SECONDHAND SMOKE" AS A GENERAL NUISANCE

While state law provides extensive protection from exposure to secondhand smoke in workplaces, this same type of protection is not yet available for people living in multi-unit residences, such as apartment buildings, senior housing, or single resident occupancy hotels.

Evidence abounds documenting the exposure to secondhand smoke as a nuisance, and the uninvited presence of secondhand smoke on property is a nuisance and a trespass. If secondhand smoke is declared a nuisance, nuisance abatement laws can be used to address secondhand smoke around doorways, at businesses, in public venues, and anywhere else it may occur. However, declaring secondhand smoke a nuisance is particularly helpful in the housing context because it eliminates the need to prove that some particular level of exposure has occurred and then to prove that such exposure is an unjustified intrusion or hazard.

California Government Code section 38771 explicitly states that cities may declare nuisances by ordinance. Counties may declare a nuisance pursuant to the broad police power set forth in the California Constitution, article XI, section 10.

INFORMATION ON MULTI-UNIT HOUSING

While state law provides extensive protection from exposure to secondhand smoke in workplaces, this same type of protection is not yet available for people living in multi-unit residences, such as apartment buildings, senior housing, or single resident occupancy hotels. The regulation of smoking in multi-unit housing can be enforced to different degrees, from restricting smoking in common areas to prohibiting smoking in individual units.

Most Californians do not smoke and a majority favor limitations on smoking in multi-unit residences. To be exact:

- 84% of Californians are non-smokers¹⁷
- 70% of Californians surveyed by the California Department of Health Services approve of apartment complexes requiring at least half of rental units be non-smoking¹⁸
- 67% of Californians surveyed favor limiting smoking in outdoor common areas of apartment buildings.¹⁹

There are many reasons why smoking should be restricted in multi-family housing. While a person may argue that he is only hurting himself when he smokes, the statistics verify the harm done to society as secondhand smoke seeps under doorways and through wall cracks. The dangers of exposure to secondhand smoke is evident in the state laws prohibiting smoking in virtually all indoor places of employment; this is consistent with the state policy to provide for the public health, safety, and welfare of its people by discouraging the inherently dangerous behavior of smoking around non-tobacco users.

In fact, no person may argue that he can do whatever he wants as long as it is in his own room because there is no Constitutional right to smoke. Rather, we propose that the Community Health Commission investigate the authorization and implications of residential rental agreements to include a prohibition on smoking of tobacco products because California law declares that anything that is injurious to health or obstructs the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance. State law would not prohibit a local ordinance of this type, and it would effectively protect children and the public from nonconsensual exposure to secondhand smoke in and around their home.

INFORMATION ON SECOND-HAND SMOKE IN CARS WHERE CHILDREN ARE PRESENT

In 2004, then State Assemblyman Marco Firebaugh sponsored a bill making it illegal for persons to smoke tobacco in a vehicle when small children were present and/or in a safety restraint system. The California State Senate approved this bill, however it never received Assembly concurrence.

Public health researchers have concluded that secondhand smoke causes cancer and heart disease and can also aggravate respiratory conditions such as asthma. A new Surgeon General's report warned that babies exposed to secondhand smoke were twice as likely to be victims of sudden infant death syndrome than those who were not around secondhand smoke. Seeing that small children do not have the option to leave a vehicle if their guardian is smoking, this ordinance would help to protect the health of children by reducing their exposure to secondhand smoke.

If that bill had passed, California would have been the first state to ban smoking in vehicles when small children were inside. If the City of Berkeley were to pass this resolution, it would provide strong support for such a state bill if it were ever resurrected in the state legislature.

At this point, we refer this to the City Attorney to conduct further research and come back to the City Council with policy recommendations. The Council also requests that the City Attorney research and inform the Council on whether it has the legal authority to prohibit smoking in cars that are transporting children in the city limits.

FINANCIAL IMPLICATIONS:

The fiscal impact of this recommendation will be the staff time necessary to provide sufficient background and information to the CHC Commission. The Tobacco Prevention Program has a grant to address the tobacco industry bar nights project through account # 055-4596-440. They will be also be able to absorb the work of adding secondhand smoke to the nuisance ordinance

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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-U.S. 1995-1999* available at <http://www.edc.gov/mmwr/PDF/wk/mm5114.pdf>. (last accessed February 28, 2005)

² U.S. Dep't of Health and Human Services., Centers for Disease Control and Prevention, *Reducing Tobacco Use: A Report of the Surgeon General* at 437 (2001), available at http://www.cdc.gov/tobacco/sgr/sgr_2000/chapter8.pdf (Last accessed March 23, 2005).

³ Glantz, SA, Parmley, WW. *Passive Smoking and Heart Disease: Epidemiology, Physiology and Biochemistry*. National Institutes of Health, Jan., 1991: 83(1): 1-12

⁴ California Environmental Protection Agency. *Health Effects of Exposure to Tobacco Smoke*. Washington (1997)

⁵ Picard, A, *Secondhand Smoke Can triple Risk of Lung Cancer*, Globe and Mail, July 12, 2001, Canada

⁶ J.L. Pirkle et al., *Exposure of the US Population to environmental tobacco smoke: The Third National Health and Nutrition Examination Survey, 1988 to 1991*, JOURNAL OF AMERICAN MEDICINE, 275(16):1233-40 (1996), available at <http://jama.ama-assn.org/cgi/content/abstract/275/16/1233> (abstract only) (last accessed March 23, 2005).

⁷ Office of Environment. Health Hazard Assessment, Cal. Environment 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)

⁸ Bruce N. Leistikow, M.D. M.S., Daniel C. Martin, Christina E. Milano, *Fire Injuries, Disasters, and Costs from Cigarettes and Cigarette Lights: A Global Overview* 91 PREVENTATIVE MEDICINE 31 AT 91 (2000), available at <http://leistikow.ucdavis.edu/SmokingFires.pdf> (last accessed April 6, 2005).

⁹ National Fire Port. Association., *The Smoking-Material Fire Problem*, available at <http://www.nfpa.org/itemDetail.asp?categoryID=294&itemID=19303&URL=Research%20&%20Reports/Fact%20sheets/Home%20safety/Smoking%20material-related%20fires> (last accessed March 4, 2005).

¹⁰ Glantz, Stanton A. and William Pamley. UC San Francisco (1991).

¹¹ Katz, S. K., Lavack, *Tobacco related bar promotions: insights from tobacco industry documents*, available at www.tobaccocontrol.com;

¹² Gilpin, E.A., et al, *How Effective Are Tobacco Industry Bar and Club Marketing Efforts in Reaching Young Adults?* Tobacco Control 2005; 14:186-192

¹³ MacDonald TX, Zanna MP, Fong GT, *Decision making in altered states: effects of alcohol on attitudes toward drinking and driving*. *J Pers Soc Psychology* 1995; 68: 973-85.

¹⁴ McKoe SA, Hinson R, Rounsavilla D, et al. *Survey of subjective effects of smoking while drinking among college students*. *Nicotine Tab Res* 2004; 6: 111-17.

¹⁵ Maron S, Rigotti NA, Wechsler H. *Social smoking by U.S. College Students*. Abstract PA9-7. Presented at the Society for Research on Nicotine and Tobacco, New Orleans, February 19-22, 2003.

¹⁶ Sepe, E, *Smooth Moves: Bar and Nightclub Tobacco Promotions that Target Young Adults*, American Journal of Public Health, Mar., 2002: Vol. 92, No. 3: (414-419)

¹⁷ Tobacco Control Section, Cal. Dep't of **Health** Services., *California Tobacco Control Update 2004* at 10, available at <http://www.dhs.ca.gov/tobacco/documents/2004TCSupdate.pdf> (last accessed April 7, 2005)

¹⁸ Tobacco Control Section, Cal. Dep't of **Health** Services., *2004 Field Research Poll Results* at 16 (2004), available at <http://www.dhs.ca.gov/tobacco/documents/2004TCSupdate.pdf> (last accessed March 4, 2005).

¹⁹ Ctr. For Tobacco Policy and Org., Am. Lung Association of Cal., *Statewide Tobacco Renter Study* (2004), available at http://www.californialung.org/thecenter/community/documents/SFH-Survey-Data_001.doc (last accessed March 4, 2005).