



Council Date: March 20, 2012

SUBJECT: Proposed Amendments to SMC Chapter 9.28 Regulation of Smoking-to Include a Ban on Smoking in Parks and in Outdoor Dining Areas

REPORT IN BRIEF

On June 14, 2011, the Sunnyvale City Council approved budget modification No. 31 to appropriate \$76,292 of grant funds from the Santa Clara County Public Health Department. The primary objective of the grant was to research, critically evaluate, and adopt more restrictive smoking and tobacco use prevention policies.

A wide variety of tobacco policies were explored with the goal of increasing the amount of smoke-free places and areas within the City of Sunnyvale. By creating more smoke-free zones, the public's exposure to the known negative effects of secondhand smoke is lessened.

Staff recommends that Council amend Sunnyvale Municipal Code (SMC) Chapter 9.28 – Regulation of Smoking, to prohibit smoking in the following places:

- public parks as defined by Sunnyvale Municipal Code 9.62.010(3) “park, reservation, playground, swimming pool, recreation center or any other area in the city, owned or used by the city and devoted to active or passive recreation.”
- outdoor dining areas
- within 20 feet of outdoor dining areas

Additionally, staff recommends that Council amend Chapter 9.28 to prohibit smoking at

- public property designated by the city manager as non-smoking

If adopted, staff would implement a public outreach campaign to educate residents and businesses of the newly adopted policies.

Staff also recommends that SMC Chapter 9.28 – Regulation of Smoking, be amended and simplified because most of the language has been superseded by, or is duplicative of, state law.

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BACKGROUND

Tobacco is a known hazardous product that is clinically proven to cause disease and death. Exposure to secondhand smoke has been proven to cause serious life threatening illnesses such as lung cancer, heart disease, and asthma. Because of the serious health consequences of tobacco use and exposure, governments at the local, state, and federal levels have a strong interest in limiting the public's exposure to secondhand smoke and ensuring that tobacco products are not sold to minors.

California was the first state to implement a smoke-free restaurant law in 1995, as part of Assembly Bill 13 (AB13), and a smoke-free bar law in 1998, an extension of AB13. With enactment of these laws, businesses feared that their profits would decrease. However, numerous studies done on the effects of these laws concluded that revenues increased after these laws went into effect because patronage by non-smokers increased more than patronage by smokers decreased. Health Economics (2005) published the report *Smoke-free laws and bar revenues in California – the last call*. The report concluded that “Statewide and county-level analyses all point to a similar conclusion – an increase (relative to trend) in restaurant revenues after smoking is banned in restaurants, and an increase in bar revenues after smoking is banned in bars.” Moreover, in 2010, Starbucks implemented a no-smoking policy at all of their California locations. This policy applies to all outdoor patios and outdoor areas of their stores.

In March 2010, the Santa Clara County Public Health Department was awarded 6.975 million dollars for tobacco prevention efforts from the Centers for Disease Control and Prevention. The program is funded through the American Recovery and Reinvestment Act.

In July 2011, the County provided Sunnyvale with \$76,292 of those funds to achieve the following two objectives:

1. Implement more restrictive smoking policies to reduce the public's exposure to secondhand smoke.
2. Explore the implementation of a policy requiring all tobacco retailers to obtain an annual license to sell tobacco products in an effort to reduce teen smoking.

Sunnyvale has a history of implementing more restrictive smoking policies, beyond what is already prohibited by state law. For example, in 1986 the City Council amended SMC 9.28 - Regulation of Smoking, to provide that at least sixty percent of outdoor dining areas be reserved for non-smokers. Also, in 2011, as a result of complaints from the public, the Sunnyvale Public Library banned smoking in the library plaza. Because it is a library policy intended to discourage smoking, rather than an ordinance provision, staff is unable to cite violators.

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Neighborhood Preservation opened five smoking-related cases in 2011 and zero in 2010. Staff does not open and investigate complaints pertaining to smoking if they are not code violations. Of the cases that were opened, the majority pertained to smoking inside and outside of restaurants.

The Santa Clara County Public Health Department and the American Lung Association each issue annual reports where they grade cities based upon their tobacco policies and enforcement.

Sunnyvale received a B grade on the 2010-11 Community's Health on Tobacco Report Card issued by the County. Grades are based upon four categories: tobacco advertising, youth access to tobacco, sales and display of tobacco, and above and beyond. Sunnyvale received a B grade because of proactive and aggressive sign enforcement in an effort to reduce tobacco advertising and because several law enforcement sting operations are conducted each year to reduce the incidences of youth access to tobacco. Under the current grading system, without the implementation of a Tobacco Retailer Licensing program (detailed in the Discussion section of this report), it is unlikely that Sunnyvale will receive an A grade.

Sunnyvale received an F grade on the American Lung Association's State of Tobacco Control report for 2012. Their grading criteria are particularly strict. Grades are primarily based upon adopted codes pertaining to smoke-free outdoor air, smoke-free multi-unit housing, and reducing tobacco sales. If Council adopts a ban on smoking in parks and in outdoor dining areas, Sunnyvale will receive additional points. However, under the current grading system, without adopting much more restrictive policies such as a ban on smoking in multi-family housing units, it is unlikely that Sunnyvale will raise its grade above a D. Campbell received a D grade despite their recently adopted ban on smoking in outdoor dining areas and parks.

EXISTING POLICY

Environmental Management

Goal 3.7A. Improve Sunnyvale's Air Quality and reduce the exposure of its citizens to air pollutants.

Socio-Economic

Goal 5.1A. Preserve and enhance the physical and social environment and facilitate positive relations and a sense of well-being among all community members, including residents, workers and businesses.

Policy 5.1A.5 Maintain City neighborhoods as safe, healthy places to live.

Policy 5.1A.6 Encourage neighborhood patterns that encourage social interaction and avoid isolation.

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DISCUSSION

According to the US Department of Health and Human Services, Centers for Disease Control and Prevention, about 440,000 people die from tobacco use in the United States each year and an estimated 49,000 of these deaths are attributed to exposure to secondhand smoke. Also, numerous studies show that an overwhelming majority of people want more restrictions on smoking in public places and places of employment.

For these reasons, more and more cities and counties in the United States, and in California particularly, are adopting bans on smoking in outdoor public areas in an effort to reduce exposure to the known hazardous and unwanted effects of secondhand smoke.

This activity by local governments has also been prompted by the increasing recognition that secondhand smoke is extremely toxic. In 2006, the California Air Resources Board officially declared tobacco smoke a Toxic Air Contaminant. Also, the United States Surgeon General (2006) issued a landmark report: *The Health Consequences of Involuntary Exposure to Tobacco Smoke* concluding that “There is no safe level of exposure to secondhand smoke. Breathing even a little secondhand smoke can be harmful to your health.”

Public Parks

In 2002, California banned smoking within 25 feet of tot lots and playgrounds. Approximately 300 municipalities in California have already adopted more restrictive smoking bans in recreational areas beyond state law. These bans vary from a complete ban on smoking in all recreation areas including parks, community center properties, and golf courses to a partial ban such as only in skate parks or on beaches.

Municipal code section 9.62.010(3) defines public parks as “park, reservation, playground, swimming pool, recreation center or any other area in the city, owned or used by the city and devoted to active or passive recreation.” A smoking ban in public parks would include all public recreation areas such as the golf courses and the Sunnyvale Community Center property. Currently, the only agencies in the County that have this type of comprehensive ban are Cupertino, Saratoga, and the County of Santa Clara.

A ban on smoking in public parks would reduce the public’s exposure to the negative effects of secondhand smoke, particularly within more sensitive populations including children and older adults. It could also have other positive effects such as an increase in park usage; a reduction of tobacco-related litter; a reduced fire risk from still-burning discarded cigarette butts; and preventing discarded cigarette butts from being picked up by children, pets, and wildlife.

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Public Property Designated by the City Manager as Non-Smoking

Council may also consider adopting an ordinance amendment to include a ban on smoking in any location on public property that has been designated by the City Manager as non-smoking. If adopted, the current policy ban on smoking at the Library Public Plaza would be enforceable. Furthermore, the City Manager could designate any other public area, such as the Civic Center (City Hall) property, as non-smoking at any time without amending Chapter 9.28-Regulation of Smoking.

Outdoor Dining

If adopted, the proposed ordinance amendment would prohibit smoking in all outdoor dining areas, and within 20 feet of any outdoor dining area. There are over 250 restaurants in Sunnyvale and approximately 40 have been approved for outdoor dining. It is unknown how many restaurants currently allow smoking in outdoor dining areas.

Approximately 60 municipalities in California have banned smoking in all outdoor dining areas. In Santa Clara County, the jurisdictions that ban smoking in all outdoor dining areas include: Campbell, Los Gatos, and Mountain View, in addition to the County of Santa Clara. The cities of Morgan Hill, Palo Alto, and San Jose are considering a similar ban.

A complete ban on smoking in outdoor dining areas, with a 20 foot buffer zone, would decrease the public's exposure (general public and dining public) to the negative effects of secondhand smoke. Restaurants that currently allow smoking in outdoor dining areas are already limited by code in that they are required to reserve sixty percent of the area for non-smokers.

There are approved Planning permits for two outdoor hookah lounges: Taverna Bistro on S. Murphy Avenue in 2006 and Taverna Lounge on N. Mathilda Avenue in 2011. (A hookah is a single or multi-stemmed instrument used for smoking flavored tobacco. Smoke is passed through a glass water basin before it's inhaled.) Although both restaurants were approved to have an outdoor hookah use, they are still required to reserve sixty percent of the outdoor areas for non-smokers. If Council approves the ban on smoking in outdoor dining areas, both hookah businesses would be considered legal non-conforming uses due to the previously approved use permits.

Tobacco Retailer Licensing (TRL) Program

Staff conducted a comprehensive analysis of implementing a TRL program. Ultimately, staff recommends against it because the administration costs are relatively unknown and because it would pose a financial burden (an estimated \$400 per business, per year) on over 100 businesses that sell tobacco products in the City.

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Education

If Council approves more restrictive smoking policies, staff would conduct an educational campaign with the public and with effected businesses so that the general public, including smokers, are aware of the prohibited areas. Staff would also post “No Smoking” signs in public areas where smoking is prohibited.

Enforcement

Most jurisdictions that pass more restrictive smoking bans do not intend for staff to proactively patrol areas in search of people smoking in prohibited areas. Sunnyvale, consistent with most jurisdictions, would rely on self-enforcement. However, in cases where a business owner is intentionally allowing patrons to smoke, he or she could be cited administratively or for an infraction. This would be similar to how smoking inside restaurants is currently handled.

Smokers who are in violation could be cited for an infraction. Public Safety staff who are already in the area, on other assignments, would have the ability to enforce the law.

FISCAL IMPACT

Minimal fiscal impact is expected. Signage in public parks would be paid out of grant funds. Public education would include a variety of media outlets such as the City’s website and Twitter. Enforcement is expected to be a lower-priority and minimal.

PUBLIC CONTACT

Public contact was made through posting of the Parks and Recreation agenda on the City’s official-notice bulletin board, on the City’s Web site, and the availability of the agenda and report in the Office of the City Clerk.

Public outreach notices were mailed to 250 businesses with an approved restaurant use and a public meeting was held on March 15. A survey was included on the City’s Web site to gauge public opinion about a ban on smoking in public parks and a ban on smoking in outdoor dining areas. Feedback from the public outreach meeting and survey results will be provided at the Council meeting.

The Parks and Recreation Commission considered this item on March 7, 2012 and recommended by a 4-1 vote that Council accept the staff recommendation. The dissenting vote came from the Chair who supported a ban on smoking in playgrounds and outdoor dining areas, but not golf courses.

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ALTERNATIVES

1. Amend Chapter 9.28 – Regulation of Smoking, to prohibit smoking in
 - a. Public parks.
 - b. Any location on public property where smoking is not otherwise prohibited by law may be designated by the city manager as a “no smoking” area. Such areas shall be posted with appropriate signage.
 - c. Outdoor dining areas.
 - d. Within twenty (20) feet of any outdoor dining area where smoking is prohibited by this section.
2. Amend and simplify sections of Chapter 9.28 – Regulation of Smoking, because most of the language has been superseded by, or is duplicative of, state law.
3. Adopt a modified version of one or more of the proposed amendments.
4. Do not adopt any of the proposed amendments.

RECOMMENDATION

Staff recommends alternatives 1 and 2.

1. Amend Chapter 9.28 – Regulation of Smoking, to prohibit smoking in
 - a. Public parks.
 - b. Any location on public property where smoking is not otherwise prohibited by law may be designated by the city manager as a “no smoking” area. Such areas shall be posted with appropriate signage.
 - c. Outdoor dining areas.
 - d. Within twenty (20) feet of any outdoor dining area where smoking is prohibited by this section.
2. Amend and simplify sections of Chapter 9.28 – Regulation of Smoking, because most of the language has been superseded by or is duplicative of state law.

Reviewed by:

Frank Grgurina, Director, Public Safety

Prepared by: Christy Gunvalsen, Neighborhood Preservation Manager

Reviewed by:

David A Kahn, City Attorney

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Approved by:

Gary M. Luebbers
City Manager

Attachments

- A. Draft Ordinance Amending Chapter 9.28 - Regulation of Smoking
- B. Excerpt from Draft Minutes - Parks and Recreation Commission Meeting
from March 7, 2012

ORDINANCE NO. _____

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF SUNNYVALE TO AMEND CERTAIN SECTIONS OF TITLE 9 (PUBLIC PEACE, SAFETY OR WELFARE) OF THE SUNNYVALE MUNICIPAL CODE RELATED TO REGULATION OF SMOKING

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF SUNNYVALE DOES ORDAIN AS FOLLOWS:

SECTION 1. SECTION 9.28.010 AMENDED. Section 9.28.010 of Chapter 9.28 (Regulation of Smoking) of Title 9 (Public Peace, Safety or Welfare) of the Sunnyvale Municipal Code is hereby amended to read as follows:

9.28.010. Definitions.

The following words and phrases, whenever used in this chapter, shall be construed as defined in this section:

(a) "Bar" or "tavern" means any facility primarily devoted to the serving of alcoholic beverages for consumption by guests on the premises in which the serving of food is incidental. "Bar or tavern" includes those facilities located within a hotel, motel, or other similar transient occupancy establishment. However, when located within a building in conjunction with another use, including a restaurant, "bar" or "tavern" includes only those areas used primarily for the sale and service of alcoholic beverages. "Bar or tavern" does not include the dining areas of a restaurant, regardless of whether alcoholic beverages are served therein.

(b) "Dining area" means any area containing a counter or tables where meals are served.

~~(2) "Employee" means any person who is employed by an employer in the consideration for direct or indirect monetary wages or profit.~~

~~(3) "Employer" means any person who employs the services of an individual person.~~

~~(4) "Employment" means the carrying on of any trade, enterprise, project, industry, business, occupation or work in which any person is engaged or permitted to work for hire except household domestic service.~~

~~(5) "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.~~

(c) "Gaming club" means any gaming club, as defined in Section 19802 of the Business and Professions Code, or bingo facility, as defined in Section 326.5 of the Penal Code, that restricts access to minors under eighteen years of age.

(d) "Public park" means any park, reservation, playground, swimming pool, recreation center or any other area in the city, owned or used by the city and devoted to active or passive recreation.

~~(7) "Place of employment" means any place, and the premises appurtenant thereto, where employment is carried on, except a place the health and safety~~

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jurisdiction over which is vested by law in, and actively exercised by, any state or federal agency other than the Department of Industrial Relations. "Place of employment" does not include any of the places exempted pursuant to Labor Code section 6404.5(d).

~~(8) "Restaurant" means any coffee shop, cafeteria, short order cafe, luncheonette, tavern, cocktail lounge, sandwich stand, soda fountain, private and public school cafeteria or eating establishment, and any other eating establishment, organization, club (including veterans club), boardinghouse, or guesthouse, the primary function of which is to give, sell or offer for sale, food to the public, guests, patrons, or employees, except that the term "restaurant" shall not include a tavern or a cocktail lounge if the tavern or cocktail lounge is a "bar" as defined in subsection (1) of this section.~~

~~(9e) "Retail or wholesale tobacco store" means a store utilized primarily for the sale of tobacco products and smoking accessories and in which the sale of other products is merely incidental.~~

~~(10e) "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 the personal habit commonly known as smoking.~~

SECTION 2. SECTION 9.28.020 AMENDED. Section 9.28.020 of Chapter 9.28 (Regulation of Smoking) of Title 9 (Public Peace, Safety or Welfare) of the Sunnyvale Municipal Code is hereby amended to read as follows:

9.28.020. Locations where smoking is prohibited.

~~(a) Restaurants:~~

~~—(1) Indoor Restaurants. Smoking is prohibited and is unlawful in every indoor restaurant. This prohibition shall not apply to any rooms which are being used for private functions, except while food or beverage functions are taking place (including setup, service and cleanup), or when the room is being used for exhibit purposes.~~

~~—(2) Outdoor Eating Areas. Sixty percent of outdoor eating areas for all eating establishments shall be reserved for nonsmokers. Smoking is prohibited and unlawful in such areas.~~

~~—(b) Elevators. Smoking is prohibited in elevators in buildings generally open to and used by the public, including elevators in apartment buildings, irrespective of the number of living units in such apartment buildings.~~

~~—(c) Hospitals and Health Care Facilities. Smoking is prohibited in all portions of hospitals, clinics, physicians' and dentists' offices and all other public and private health care facilities. Smoking is permitted in medical research or treatment sites if integral to the research and treatment being conducted and is permitted in patient smoking areas in long term health care facilities, as defined in Health and Safety Code Section 1418. Smoking may be permitted pursuant to the exceptions set forth in Section 9.28.043.~~

~~—(d) Places of Public Assembly. Smoking is prohibited in hearing rooms or places of public assembly in which the business of the city or any of its boards or commissions is conducted.~~

~~—(e) Public Lobbies, Public Hallways. Smoking is prohibited in waiting rooms, lobbies and public hallways of every building under direct or indirect control of the city.~~

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~~—(f)—Theaters, Auditoriums. Smoking is prohibited within all parts of any building which is primarily used for exhibiting any motion picture, stage drama, dance, musical performance or other similar performance, 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 the 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)—Museums, Libraries, Galleries. Smoking is prohibited in museums, libraries and galleries. Smoking may be permitted pursuant to the exceptions set forth in Section 9.28.043.~~

~~—(h)—Hotels, Motels, Resorts. Smoking is prohibited in all enclosed parts of hotels, motels and resorts, including, but not limited to, registration areas, lobbies, hallways and conference rooms. The management of any such establishment may designate up to sixty five percent of the rooms rented to guests as “smoking rooms” and smoking may be permitted in such rooms. The management of any such establishment may permit smoking in a designated contiguous portion of a lobby which contains no more than twenty five percent of the total floor area of the lobby. If the total area of the lobby is two thousand feet or less, the designated portion shall not exceed fifty percent of the total floor area of the lobby.~~

~~—(i)—Public Transit. Smoking is prohibited 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)—Gymnasiums, Fieldhouses, Stadiums and Outdoor Theaters. Smoking is prohibited in gymnasiums, fieldhouses, stadiums and outdoor theaters; provided, however, that smoking may be permitted in unenclosed portions of outdoor theaters commonly known as drive in movie theaters; and provided, further, that smoking may be permitted in designated portions of an outdoor stadium or outdoor theater containing no more than fifty percent of the total seating capacity of the stadium or theater and so located as to afford seating of no more than equal quality to the seating in the nonsmoking portions of the stadium or theater. Smoking may be permitted pursuant to the exceptions set forth in Section 9.28.043.~~

~~—(k)—Business Establishments. Smoking is prohibited within all areas 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; provided, that restaurants are not included in this provision. Smoking may be permitted pursuant to the exceptions set forth in Section 9.28.043.~~

~~—(l)—Public Restrooms. Smoking is prohibited and is unlawful in public restrooms.~~

~~—(m)—Indoor Service Lines. Smoking is prohibited and is unlawful in indoor service lines.~~

~~(n)—Bars, Taverns, and Gaming Clubs.~~

~~—(1)—Smoking is prohibited and is unlawful in enclosed bars, taverns, and gaming clubs, which are places of employment for any one or any number of employees at any time, and which are not completely and totally owner operated.~~

~~In order to be considered "owner operated," the establishment must meet the following conditions:~~

~~—(i) No one is paid to assist, on a temporary or regular basis, in the in-house operation of the business, whether serving customers or performing other duties or services on the premises, including but not limited to janitorial or bookkeeping services.~~

~~—(ii) No salaried or contract employees shall be employed on the premises by the business. "Employees" of the bar, tavern or gaming club shall be deemed to include independent contractors or their employees who perform any type of work including, but not limited to bartending, janitorial services, catering, bookkeeping or accounting services. Any person who performs any sort of entertainment or other type of service on the premises and receives any sort of compensation, including but not limited to tips from the business owner, customers, or other persons, shall also be deemed an "employee" for purposes of this section.~~

~~—(iii) The bar, tavern or gaming club facility shall not be used or rented by anyone else who hires or uses others to work there as employees.~~

~~—(2) Any bar, tavern, or gaming club which claims to be an "owner-operated" business pursuant to this section, shall provide to the director of community development a written application under oath, signed by each owner of the business, and certifying that the business has no employees within the meaning of this section, is totally "owner operated" as defined herein, and will not engage or employ any employees on the premises without prior notice to the director of community development and a written request to have such certification revoked. Such application shall be made upon a form to be provided by city, and shall include such information as the director of community development reasonably requires to determine if the bar, tavern, or gaming club is exempt from the prohibition against permitting or allowing smoking within such business by reason of being owner operated.~~

~~—(3) Upon receipt of the application for certification as an "owner-operated" bar, tavern, or gaming club, the director of community development shall investigate the application. If the director determines that the business is "owner operated," the director shall issue a certification of such status to the business which shall be valid for one year, or such earlier time as the business requests a withdrawal of the certification. The owner of such business shall apply within sixty days of the expiration of the certification for a renewed certificate of owner operation and shall similarly provide information under oath to the director.~~

~~—(4) A copy of each certificate of "owner operated" status shall be posted in a prominent place in the public area of each such bar, tavern or gaming room.~~

~~—(5) Unless a current and valid "owner operated" certificate is posted in accordance with this section, it shall be presumed that the business is not "owner operated," and smoking or permitting smoking in such business by any person shall be unlawful. This presumption is rebuttable. In any judicial or administrative proceeding, the owner of the business has the burden of establishing that the business is owner occupied.~~

~~—(6) Notwithstanding the foregoing, in the event that any state statute or regulation adopts a different definition of "owner operated" as to bars, taverns,~~

or gaming clubs, for purposes of the definition of "place of employment" pursuant to Labor Code Section 6404.5, that definition shall superseded and govern over the definition contained herein.

~~—(o) In any other place of business as defined by Labor Code Section 404.5, or as the same shall be later amended, in which smoking is prohibited by the Labor Code, and/or any regulations adopted to enforce such provisions of the Labor Code.~~

Except as otherwise provided in Section 9.28.030, smoking is prohibited in the following locations in the city:

(a) All areas where smoking is prohibited by state or federal law, including but not limited to indoor workplaces, bars and restaurants (California Labor Code Section 6404.5); state, county, and city buildings (California Government Code Sections 7596-7598); and tot lots and playgrounds (California Health & Safety Code Section 104495).

(b) Elevators.

(c) Outdoor dining areas.

(d) Within twenty (20) feet of any outdoor dining area where smoking is prohibited by this section.

(e) Gymnasiums, fieldhouses, stadiums and outdoor theaters.

(f) Public parks. ~~—(Mini, neighborhood, and community parks as designated by the City.)~~

(g) Any other location on public property where smoking is not otherwise prohibited by law may be designated by the city manager as a "no smoking" area. Such areas shall be posted with appropriate signage.

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SECTION 3. SECTION 9.28.030 AMENDED. Section 9.28.030 of Chapter 9.28 (Regulation of Smoking) of Title 9 (Public Peace, Safety or Welfare) of the Sunnyvale Municipal Code is hereby amended to read as follows:

9.28.030. Smoking ~~permitted~~ optional areas.

~~Smoking shall not be prohibited in the following places within the city:~~

~~—(a) Bars which are not enclosed such as in a patio, and bars, taverns and gaming clubs which are solely owner operated, as described in Section 9.28.020(n), and in which a certificate of such "owner operated" status has been posted;~~

~~—(b) Retail or wholesale tobacco stores;~~

~~—(c) An entire room or hall which is used for a private function which function is under the control of the sponsor of the function and not under the control of the owner or manager of the room or hall, but only while such room or hall is used for a private function, and not while food or beverage functions are taking place (including setup, service and cleanup activities) or when the room is being used for exhibit purposes. The fact that the owner or manager of the room or hall provides food or entertainment to the participants of a private function does not mean that the owner or manager has control of the function;~~

~~—(d) Any property owned or leased by county, state or federal governmental entities in which the health and safety jurisdiction is vested by law in, and actually exercised by, a state or federal agency other than the Division of Occupational Safety and Health;~~

~~—(e) Private residences, except as noted in Section 9.28.010(6);~~

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~~(f) Hotel and motel rooms rented to guests in compliance with Section 9.28.020(h);~~

~~Subject to any applicable provisions of state and federal law, in which case those laws apply, the following areas are not subject to the smoking restrictions in this chapter:~~

~~(a) Private residences, except when used as places of business for child or elder care, or as a home business employing one or more employees other than residents, during the hours the residence is used for business.~~

~~(b) Designated guest rooms in hotels and motels, in conformance with state law.~~

~~(c) Lobbies, meeting and banquet rooms in hotels and motels, in conformance with state law.~~

~~(d) Theatrical production sites, if smoking is an integral part of the story in the theatrical production.~~

~~(e) Employee breakrooms designated for smoking, in conformance with state law.~~

~~(f) Patient smoking areas in long-term health care facilities, as defined in Section 1418 of the Health and Safety Code.~~

~~(g) Retail or wholesale tobacco stores, in conformance with state law.~~

~~(h) Owner-occupied bars, taverns, and gaming clubs that meet the following conditions:~~

~~(1) No one is paid to assist, on a temporary or regular basis, in the in-house operation of the business, whether serving customers or performing other duties or services on the premises, including but not limited to janitorial or bookkeeping services.~~

~~(2) No salaried or contract employees shall be employed on the premises by the business. "Employees" of the bar, tavern or gaming club shall be deemed to include independent contractors or their employees who perform any type of work including, but not limited to bartending, janitorial services, catering, bookkeeping or accounting services. Any person who performs any sort of entertainment or other type of service on the premises and receives any sort of compensation, including but not limited to tips from the businesses owner, customers, or other persons, shall also be deemed an "employee" for purposes of this section.~~

~~(3) The bar, tavern or gaming club facility shall not be used or rented by anyone else who hires or uses others to work there as employees.~~

~~(4) Any bar, tavern, or gaming club which claims to be an "owner-operated" business pursuant to this section, shall provide to the director of community development a written application under oath, signed by each owner of the business, and certifying that the business has no employees within the meaning of this section, is totally "owner operated" as defined herein, and will not engage or employ any employees on the premises without prior notice to the director of community development and a written request to have such certification revoked. Such application shall be made upon a form to be provided by city, and shall include such information as the director of community development reasonably requires to determine if the bar, tavern, or gaming club is exempt from the prohibition against permitting or allowing smoking within such business by reason of being owner-operated.~~

(5) Upon receipt of the application for certification as an "owner-operated" bar, tavern, or gaming club, the director of community development shall investigate the application. If the director determines that the business is "owner-operated," the director shall issue a certification of such status to the business which shall be valid for one year, or such earlier time as the business requests a withdrawal of the certification. The owner of such business shall apply within sixty days of the expiration of the certification for a renewed certificate of owner operation and shall similarly provide information under oath to the director.

(6) A copy of each certificate of "owner-operated" status shall be posted in a prominent place in the public area of each such bar, tavern or gaming room.

(7) Unless a current and valid "owner-operated" certificate is posted in accordance with this section, it shall be presumed that the business is not "owner-operated," and smoking or permitting smoking in such business by any person shall be unlawful. This presumption is rebuttable. In any judicial or administrative proceeding, the owner of the business has the burden of establishing that the business is owner-occupied.

(8) Notwithstanding the foregoing, in the event that any state statute or regulation adopts a different definition of "owner-operated" as to bars, taverns, or gaming clubs, for purposes of the definition of "place of employment" pursuant to Labor Code Section 6404.5, that definition shall superseded and govern over the definition contained herein.

(g) Notwithstanding any other provision of this section, any owner, operator, manager or other person who controls a business may declare that entire business, or designated sections thereof, as a nonsmoking establishment.

SECTION 4. SECTION 9.28.043 DELETED. Section 9.28.043 of Chapter 9.28 (Regulation of Smoking) of Title 9 (Public Peace, Safety or Welfare) of the Sunnyvale Municipal Code is hereby deleted in its entirety:

9.28.043. Exceptions:

~~(a) Employers may designate breakrooms for smoking; provided, that all the following conditions are met:~~

~~—(1) Air from the smoking room is exhausted directly to the outside by an exhaust fan.~~

~~(2) All ventilation standards, or other standards utilizing appropriate technology, adopted by the Occupational Safety and Health Standards Board or the federal Environmental Protection Agency are met.~~

~~(3) The smoking room is located in a nonwork area where no one is required to enter in conjunction with work responsibilities, other than for custodial or maintenance purposes.~~

~~(4) There are sufficient nonsmoking breakrooms to accommodate nonsmokers.~~

~~(b) Employers with a total of five or fewer employees, either full time or part time, may permit smoking where all of the following conditions are met:~~

~~(1) The smoking area is not accessible to minors.~~

~~(2) All employees who enter the smoking area consent to permit smoking. No one is required to enter in conjunction with work responsibilities.~~

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~~(3) Air from the smoking area is exhausted directly to the outside by an exhaust fan.~~

~~(4) All ventilation standards, or other standards utilizing appropriate technology, adopted by the Occupational Safety and Health Standards Board or the federal Environmental Protection Agency are met.~~

SECTION 5. SECTION 9.28.050 AMENDED. Section 9.28.050 of Chapter 9.28 (Regulation of Smoking) of Title 9 (Public Peace, Safety or Welfare) of the Sunnyvale Municipal Code is hereby amended to read as follows:

9.28.050. Unlawful acts designated.

(a) It is unlawful for any person to smoke in a place within the city where smoking is prohibited.

(b) ~~It is unlawful for any person who owns, manages or otherwise controls the use of any premises subject to the prohibition of this chapter to fail to post signs as required by this chapter.~~ No employer or other person with responsibility for management or control of a place where smoking is prohibited shall knowingly and intentionally allow smoking in violation of this chapter.

SECTION 6. EXEMPTION FROM CEQA. The City Council finds, pursuant to Title 14 of the California Code of Regulations, Section 15378(b)(4), and that this ordinance is not a project and thus, not subject to the requirements of the California Environmental Quality Act (CEQA).

SECTION 7. CONSTITUTIONALITY; SEVERABILITY. If any section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be invalid by a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance. The City Council declares that it would have adopted this ordinance and each section, subsection, sentence, clause and phrase thereof irrespective of the fact that any one or more section, subsection, sentence, clause or phrase be declared invalid.

SECTION 8. EFFECTIVE DATE. This ordinance shall be in full force and effect 30 days from and after the date of its adoption.

SECTION 9. POSTING AND PUBLICATION. The City Clerk is directed to cause copies of this ordinance to be posted in three (3) prominent places in the City of Sunnyvale and to cause publication once in *The Sun*, the official newspaper for publication of legal notices of the City of Sunnyvale, of a notice setting forth the date of adoption, the title of this ordinance, and a list of places where copies of this ordinance are posted, within 15 days after adoption of this ordinance.

Introduced at a regular meeting of the City Council held on _____, 2012, and adopted as an ordinance of the City of Sunnyvale at a regular meeting of the City Council held on _____, 2012, by the following vote:

AYES:

NOES:

ABSTAIN:

ABSENT:

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EXCERPT FROM DRAFT MINUTES

SUNNYVALE PARKS AND RECREATION COMMISSION SPECIAL MEETING MARCH 7, 2012

The Sunnyvale Parks and Recreation Commission met in special session in City Hall Council Chambers at 456 W. Olive Avenue, Sunnyvale, CA 94086 at 7 p.m. with Chair Pochowski presiding.

CALL TO ORDER

Chair Pochowski called the meeting to order at 7 p.m.

SALUTE TO THE FLAG

ROLL CALL

Commissioners Present:

Chair Robert Pochowski
Vice Chair Robert Kinder
Commissioner Howard Chuck
Commissioner Robert Harms
Commissioner Craig Pasqua (arrived 7:02 p.m.)

Commissioners Absent:

None

Council Liaison:

Councilmember Jim Davis (present)

Staff Present:

Superintendent of Community Services Nancy Bolgard Steward
Superintendent of Parks Scott Morton
Golf and Tennis Manager Mark Petersen
Neighborhood Preservation Manager Christy Gunvalsen
Administrative Aide Karen Smith

PUBLIC HEARINGS/GENERAL BUSINESS

2. Draft Report - Proposed Amendments to SMC Chapter 9.28 Regulation of Smoking—to Include a Ban on Smoking in Parks and in Outdoor Dining Areas

Ms. Gunvalsen, Neighborhood Preservation Manager, presented the staff report.

Commissioners' questions were answered including clarification that the Community Center property is considered a recreation center in a public park; what type and how many smoking complaints have been received; smoking complaints are not investigated if they are not code violations; grading criteria on Santa Clara County's Community's Health on Tobacco Report Card and the American Lung Associations' State of Tobacco Control Report;

The Public Hearing was opened.

Mr. Larry Alba and his son Philip, Sunnyvale residents, spoke in favor of the smoking ban in public parks and outdoor dining areas. He said that secondhand smoke negatively affects his family. He asked that consideration be given to include businesses in the smoking ban and to install more non-smoking signage.

Ms. Jenny Redding, Sunnyvale resident, spoke in favor of the smoking ban in public parks. She lives near Ponderosa Park which she said is used by many smokers. She would like to be able to enjoy a smoke-free park.

Ms. Christine Veitch, Sunnyvale resident, lives near Fair Oaks Park. She spoke in favor of prohibiting smoking in parks. She said there are many activities in Fair Oaks Park and much smoking and secondhand smoke. She said that if the smoking ban is enacted, it would show that the City cares about its residents' health.

The Public Hearing was closed.

MOTION: Commissioner Kinder moved and Commissioner Chuck seconded to recommend that Council accept staff's recommendation, Alternatives 1 and 2.

- 1. Amend Chapter 9.28 – Regulation of Smoking, to prohibit smoking in**
 - a. Public parks.**
 - b. Any location on public property where smoking is not otherwise prohibited by law may be designated by the city manager as a “no smoking” area. Such areas shall be posted with appropriate signage.**
 - c. Outdoor dining areas.**
 - d. Within twenty (20) feet of any outdoor dining area where smoking is prohibited by this section.**
- 2. Amend and simplify sections of Chapter 9.28 – Regulation of Smoking, because most of the language has been superseded by or is duplicative of state law.**

Commissioner Harms questioned the Commission's authority to make a recommendation regarding outdoor dining areas. Superintendent Steward said that even though outdoor dining areas do not fall under the purview of the Commission, the Commission can make a recommendation if they desire.

Chair Pochowski said the smoking ban is too restrictive, and he has an issue with the smoking ban in wide open areas. He gave an example of a person in a golf cart who is responsibly and legally smoking; he does not want to take away this person's right to smoke. However, he is in favor of banning smoking in playgrounds and outdoor dining areas.

Commissioner Kinder said that health care is a concern today and, because of the serious health consequences of tobacco use and exposure, enacting this smoking ban would be a great step towards limiting the public's exposure to secondhand smoke.

Commissioner Chuck said Ponderosa Park has many smokers. He spoke in favor of the smoking ban and said it would give him a stronger voice in confronting smokers.

Commissioner Pasqua is a coach and tennis player. He said smoking negatively affects kids and athletes and is in favor of the proposal.

VOTE: 4-1 motion passed. Chair Pochowski dissented.

ATTEST:

APPROVED:

City Clerk

Date of Attestation: _____

(SEAL)

Mayor

APPROVED AS TO FORM AND LEGALITY:

David E. Kahn, City Attorney