



STAFF REPORT

Date: January 28, 2014
To: Mayor and Members of the City Council
From: William R. Galstan, Special Counsel *William R. Galstan*
Cc: Bryan Montgomery, City Manager; Derek Cole, City Attorney
Subject: Ordinance regulating smoking at apartment complexes

Background and Analysis

Late last year, Council received complaints from apartment residents about second-hand smoke nuisances at their homes. On October 8, 2013 our office presented a draft ordinance that could address these issues. The City Council authorized a time period for public comment on the draft ordinance.

Several email comments were received from citizens. I also received comments and had a meeting with: Denice Dennis, Tobacco Prevention Project Manager, Contra Costa Health Services; Theresa Karr, regional executive director of the California Apartment Association; and representatives of The Commons apartment complex.

Based on this input, this office determined to redraft the ordinance using the existing County ordinance as a model. In this way, there will be more consistency in regulations in our geographic area, including the nearby unincorporated areas of Bethel Island, Discovery Bay, Knightsen, etc. To our knowledge, the cities of Brentwood and Antioch have not adopted smoking ordinances dealing with apartments.

Because apartment residents live in close proximity to each other and because second-hand smoke can drift from balconies and patios, regulations seem to be appropriate to offer a measure of protection for non-smokers. The attached ordinance has the following features:

- It applies to apartments with more than two units;
- Prohibits smoking in apartment common areas and within 20- feet of doors, windows and air ducts/ventilation systems;
- Prohibits smoking on all outdoor decks, patios, porches and carports;

- Prohibits smoking in units designated as non-smoking;
- Requires all new apartment projects built after adoption of the ordinance to be 100% non-smoking. (This provision is a common feature of many city ordinances and is not opposed by the Apartment Association);
- Requires landlords to designate smoking and non-smoking units (although all units can be designated non-smoking. Requires managers to provide a floor plan to tenants showing location of such units;
- Once a unit has been designated non-smoking, it cannot in the future be designated as a smoking-permitted unit;
- Requires landlords to provide tenants with their complaint policy;
- Requires landlords to insert a provision in all new and renewed leases that violation of the ordinance and apartment policy is a “material breach” of the lease, potentially leading to eviction;
- Requires the posting of signs at designated locations.

The ordinance also prohibits both medical and recreational¹ marijuana use in all places where tobacco smoking is prohibited.

The ordinance would take effect 90 days after its adoption, to allow apartment managers to take all the steps required. This is a typical provision of such ordinances.

Violations would be enforced by apartment managers through the lease provisions. Violations would also constitute infractions and subject the person to an administrative citation and \$100.00 fine.

The ordinance appears to provide substantial protections for nonsmokers where currently there are no such regulations in place.

Fiscal Impact

None perceived.

Recommendation

Waive the first reading and introduce the ordinance.

Attachment

- 1) Ordinance adding Article 2 to Chapter 19 of Title 4 of the Oakley Municipal Code.

¹ In the event that California, like Colorado, adopts laws allowing recreational use.

ORDINANCE NO. XX-14**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF OAKLEY
ADDING ARTICLE 2 TO CHAPTER 19 OF TITLE 4 OF THE
OAKLEY MUNICIPAL CODE, DEALING WITH SMOKING
IN MULTI-UNIT RESIDENCES**

The City Council of the City of Oakley does ordain as follows:

Section 1. The title "Article 1. GENERAL REGULATIONS" is hereby added to precede Section 4.19.002 of the Oakley Municipal Code.

Section 2. Article 2 is hereby added to Chapter 19 of Title 4 of the Oakley Municipal Code, to read as follows:

Article 2. MULTI-UNIT RESIDENCES**4.19.102. Purpose and findings.**

The City Council has received a number of complaints from non-smoker residents of multi-unit residences that residents who smoke in the project are causing second-hand smoke to intrude into the non-smokers' units.

- The U.S. Surgeon General has concluded that there is no risk-free level of exposure to second-hand smoke.
- The California Air Resources Board has placed second-hand 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.
- The California Environmental Protection Agency has included second-hand smoke on the Proposition 65 list of chemicals known to the State of California to cause cancer, birth defects and other reproductive harm.

The City Council, by enacting this Article, intends to establish reasonable regulations to protect the public health, safety and welfare against the health hazards and harmful effects of the use of addictive tobacco products; and further to maintain a balance between the desires of persons who smoke and the need of nonsmokers to breathe smoke-free air, while recognizing that where these conflict, the need to breathe smoke-free air shall have priority. Because of the close proximity of living units in multi-unit residences, and sometimes due to shared heating, cooling and ventilation systems, and because of voids between units, second-hand smoke is a particularly sensitive issue to residents in multi-unit residences.

4.19.104. Definitions.

“Landlord” means any person who owns property let for residential use that is subject to this Article and/or any person who manages such property.

“Multi-unit residence” means a building that contains two or more dwelling units, including but not limited to apartments, condominiums, senior citizen housing, nursing homes and single occupancy hotels. A single family home with an attached or detached second unit is not a multi-unit residence, nor is a mobile home park, or a marina.

“Multi-unit residence common area” means any indoor or outdoor area of a multi-unit residence accessible to and usable by residents of different dwelling units, including but not limited to halls, lobbies, laundry rooms, common cooking areas, stairwells, outdoor eating areas, play areas, swimming pools and carports.

“Person” means any natural person, partnership, cooperative association, corporation, personal representative, receiver, trustee, assignee, or any other legal entity including governmental agencies.

“Project” means a multi-unit residence, irrespective of the number of buildings or differing ownership thereof, which uses a common name or a common management.

“Smoke” means the gases, particles or vapors released into the air as a result of combustion, when the apparent or usual purpose of the combustion is human inhalation of the byproducts, but not including smoke from incense where no tobacco, nicotine or marijuana is present. The term “smoke” includes, but is not limited to, tobacco smoke, electronic cigarette vapors, marijuana smoke, and crack cocaine smoke.

“Smoking” means engaging in an act that generates smoke, such as for example: possessing a lighted pipe, a lighted hookah pipe, a lighted cigar, an operating electronic cigarette, or a lighted cigarette of any kind, including a lighted marijuana joint, pipe or other implement. “Smoking” includes smoking marijuana for medical or recreational purposes.

“Unit” means a personal dwelling space.

4.19.106. Smoking prohibited.

Smoking is prohibited, and landlords of multi-unit residences must prohibit smoking, in the following areas:

- (a) All multi-unit residence common areas, except that a landlord may designate a portion of an outdoor common area as a smoking area. A designated smoking area of an outdoor common area of a multi-unit residence must not overlap with any area where smoking is otherwise prohibited by local, state, or federal law; must be located at least 25 feet in all directions from non-smoking areas; must not include areas primarily used by children; must be no more than 25% of the total outdoor common area; must have a clearly marked perimeter; and must be identified by conspicuous signs.
- (b) All areas within 20 feet of doors, windows, air ducts and ventilation systems, except while passing on the way to another destination.
- (c) All outdoor balconies, porches, decks, patios and carports.
- (d) All units designated as non-smoking units by the landlord.
- (e) All dwelling units in any new multi-unit residence that receives a building permit on or after April 1, 2014.

4.19.108. Disclosure of non-smoking multi-unit residential units.

In a multi-unit residence where units are rented or leased to tenants, the owner and manager of the project shall do all of the following:

- (a) Designate units where smoking is prohibited and where smoking is permitted, although all units may be designated as non-smoking. To the extent practicable, in the judgment of the landlord, smoking-permitted units and smoking-prohibited units should be separated so as to minimize the intrusion of second-hand smoke into non-smoking units. Once a unit has been designated by the landlord as a non-smoking unit, it may not revert to or be designated as a smoking-permitted unit. If a tenant who is a smoker vacates a smoking-designated unit, the landlord can determine whether to re-designate that unit as non-smoking, or to retain the smoking-permitted designation.
- (b) Maintain and keep on file at the premises: (1) a list of all designated non-smoking units at the project; and (2) a floor plan of the project that identifies the location of all designated non-smoking units, any units where smoking is permitted, and any designated outdoor smoking areas.
- (c) Disclose whether a policy for handling smoking complaints is in effect at the project, and if so, the terms of that policy.

- (d) Provide a copy of the list and floor plan and a copy of the policy addressing smoking complaints in effect at a multi-unit residence to each tenant along with every new lease or rental agreement for the occupancy of a unit in a multi-unit residence.
- (e) Make available upon request to the City for inspection at reasonable times the documents specified above.

4.19.110. Required lease terms.

- (a) Commencing not later than the operative date of this Ordinance, every lease and other rental agreement for the occupancy of a dwelling in a multi-unit residence that is entered into, renewed or continued month-to-month must include the terms specified in subsection (b) of this section on the earliest possible date allowed by law after providing legal notice.

- (b) Required terms:

- (1) For any multi-unit residence where the landlord has designated separate smoking and non-smoking dwelling units, a clause stating that smoking is prohibited in all dwelling units that have been designated as non-smoking units and in common areas must be included in the written agreements specified in subsection (a) of this section.
- (2) For any multi-unit residence where the landlord has prohibited smoking in all dwelling units, a clause stating that smoking is prohibited in all dwelling units and common areas must be included in the written agreements specified in subsection (a) of this section.
- (3) A clause stating that it is a material breach of the lease or rental agreement to: (i) violate any law regarding smoking while on the premises; (ii) smoke in a non-smoking dwelling unit; or (iii) smoke in any project common area where smoking is prohibited, must be included in the written agreements specified in subsection (a) of this section.

- (c) Lawful use of the California Apartment Association's Form 34.0, revised January 2014 and as amended from time to time, may be used to comply with this section.

- (d) A landlord's failure to enforce any smoking regulation of a lease or agreement on one or more occasions does not constitute a waiver of the lease or agreement provisions required by this section, and does not prevent future enforcement of the lease or agreement provisions required by this section.

(e) A landlord is not liable under this Article to any person for a tenant's breach of smoking regulations if:

1. The landlord has fully complied with all provisions of this Article; and
2. Upon receiving a signed written complaint regarding prohibited smoking, the landlord provides a warning to the offending tenant, stating that the tenant may be evicted if another complaint is received. Upon receiving a second signed, written complaint against the offending tenant, the landlord may evict the tenant or pursue other legal remedies available, but is not liable for failure to do so.
3. The landlord maintains copies of the items specified in (2) above and makes such copies available upon request by the City at reasonable times.

4.19.112. Posting of signs.

Not later than the operative date of this ordinance, each landlord shall post signs pursuant to this section.

- (a) Signs shall have letters of no less than one (1) inch in height or shall feature the international "No Smoking" symbol (consisting of a pictorial representation of a burning cigarette enclosed in a red circle with a red bar across it).
- (b) Signs shall be posted at each point of ingress into the multi-unit residence and at least one other conspicuous place in the common area.
- (c) If the landlord wishes to recite the Oakley Municipal Code provisions relating to smoking, the sign may reference "Oakley Municipal Code Title 4 Chapter 19."
- (d) The presence or absence of signs shall not be a defense to a charge of smoking in violation of any other provision of this Chapter.

4.19.114. Compliance.

A person who owns, manages, operates or otherwise controls the use of any place where smoking is prohibited by this Article may not knowingly or intentionally permit smoking in places where smoking is prohibited. For purposes of this section, a person has acted knowingly or intentionally if he or she has not taken the following actions to prevent smoking by another person: 1) requested that the person refrain from smoking; 2) requested that a person who is smoking leave the place if the person refuses to stop smoking after being asked to stop; 3) not complied with the requirements of this Article. This section does not require the physical ejecting of a person from a place or taking steps to prevent smoking under circumstances that would involve a risk of physical harm.

Noncompliance with the terms of this Article is a public nuisance and is subject to the enforcement and remedy provisions contain in this Code.

Section 3. In the event any section or portion of this ordinance shall be determined invalid or unconstitutional, such section or portions shall be deemed severable and all other sections or portions hereof shall remain in full force and effect.

Section 4. This ordinance is not subject to the California Environmental Quality Act pursuant to Sec. 15060(c)(2), (the activity will not result in a direct or reasonably foreseeable indirect physical change in the environment) and 15060(c)(3), (the activity is not a project as defined in Sec. 15378 of the CEQA Guidelines because it has no potential for resulting in physical change to the environment, directly or indirectly). This is an administrative policy-making action of the City Council.

In addition, even if CEQA were applicable, it can be seen with certainty, pursuant to CEQA Guidelines Sec. 15061(b)(3) (the "common sense" exemption) that there is no possibility that the activity in question may have a significant effect on the environment. Because apartment complexes subject to this ordinance often have common ventilation systems, and because the windows, doors and balconies of individual units within the complexes are closely connected, the enforcement of the ordinance will ameliorate exposure of persons residing or visiting the apartments to second-hand smoke from other units or common areas. As the ordinance would require that smoking occur only in designated areas of apartment complexes, it would also eliminate odor-related nuisances associated with the permeation of second-hand smoke.

Section 5. This Ordinance shall become effective and be in full force and effect 30 days following the date of its adoption. The City Clerk shall cause the ordinance to be published within fifteen (15) days after its passage in a newspaper of general circulation, or by publishing a summary of the proposed ordinance, posting a certified copy of the proposed ordinance in the City Clerk's office at least five (5) days prior to the City Council meeting at which the ordinance is to be adopted, and within fifteen (15) days after its adoption, publishing a summary of the ordinance with the names of the Council members voting for and against the ordinance.

Section 6. Although this Ordinance shall become effective as specified above, it shall not become operative, nor be enforced or create an obligation of any person to comply with it, until 90 calendar days have elapsed from the date of its effectiveness as specified above. Thereafter, this Ordinance shall be fully effective, operative, and enforceable.

The foregoing ordinance was adopted with the reading waived at a regular meeting of the Oakley City Council on _____, 2014 by the following vote:

AYES:

NOES:

ABSTENTIONS:

ABSENT:

APPROVED:

Randy Pope, Mayor

ATTEST:

Libby Vreonis, City Clerk

Date