



Sent to Council:

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FEB 14 2012
City Manager's Office

Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Leanna Bieganski

SUBJECT: Early Council Packet

DATE: February 14, 2012

Approved

Date

2-14-12

EARLY DISTRIBUTION COUNCIL PACKET FOR FEBRUARY 28, 2012

Please find attached the Early Distribution Council Packet for the February 28, 2012 Council Meeting.

2.x Award of Open Purchase Orders for Concrete Removal, Replacement and Repairs.

Recommendation: Authorize the City Manager to:

- (a) Execute four purchase orders for the purchase of citywide concrete removal, replacement and repairs in the public right-of way with Golden Bay Construction (Hayward, CA), Wilson's Concrete (San José, CA), Duran Hogan Construction (Campbell, CA) and CB Concrete Construction (Los Gatos, CA) for a total amount not-to-exceed amount of \$1,970,000 for all four contractors, for the period January 23, 2012 through January 22, 2013.
- (b) Transfer funds between the four purchase orders as required based on usage and contractor capacity.
- (c) Exercise options to extend the purchase orders for four additional twelve month terms without further Council action other than the appropriation of funds.

CEQA: File No. PP08-186 and PP11-090. (Finance)

4.x Reallocation of Affordable Housing Units Under the North San José Area Development Policy

Recommendation: Adopt a resolution amending the North San José Area Development Policy to:

- (a) Allow reallocation of up to 450 of the remaining affordable housing units in Phase 1 as market-rate housing units to enable a shovel-ready market-rate housing project to proceed in Phase 1 if such project developer ensures by written agreement with the City a substantial benefit to the City towards the provision of

new affordable housing to balance the reduction of affordable housing allocation in Phase 1; and

- (b) Shift the number of reallocated affordable housing units originally reserved for Phase 1 to Phase 2, and correspondingly decrease the number of market-rate housing units in Phase 2, to ensure the vision of a mixed-income community.

CEQA: Resolution No.72768, Addendum to the North San José Policy Update EIR. Council Districts 3 and 4. (Housing/Planning, Building and Code Enforcement)

4.x Report on Bids and Award of Contract for the Sanitary Sewer Condition Assessment Fall 2011 Project.

Recommendation: Report on bids and award of contract for the Sanitary Sewer Condition Assessment Fall 2011 project to the low bidder, Coastline Water Resources, Inc., in the amount of \$1,449,000 and approval of a contingency in the amount of \$145,000. CEQA: Exempt, File No. PP11-084, dated September 7, 2011. (Public Works)

5.x Ordinance to Regulate Outdoor Smoking.

Recommendation: Approve an ordinance amending Chapter 9.44 of Title 9 of the San Jose Municipal Code to regulate outdoor smoking. CEQA: Exempt; File No. PP12-010. (City Attorney's Office)

These items will also be included in the Council Agenda Packet with item numbers.



LEANNA BIEGANSKI
Council Liaison





Subject: Award of Open Purchase Orders for Concrete Removal, Replacement and Repairs

**Council Agenda: 2/28/12
Item:**

City Council Action Request

Department: Finance	CEQA: File No. PP08-186 and PP11-090	Coordination: City Attorney's Office, City Manager's Budget Office	CMO Approval: <i>[Signature]</i> 2/10/12
			Dept. Approval: Julia Cooper /s/

RECOMMENDED ACTION:

Authorize the City Manager to:

1. Execute four purchase orders for the purchase of citywide concrete removal, replacement and repairs in the public right-of way with Golden Bay Construction (Hayward, CA), Wilsons Concrete (San Jose, CA), Duran Hogan Construction (Campbell, CA) and CB Concrete Construction (Los Gatos, CA) for a total amount not-to-exceed amount of \$1,970,000 for all four contractors, for the period January 23, 2012 through January 22, 2013.
2. Transfer funds between the four purchase orders as required based on usage and contractor capacity.
3. Exercise options to extend the purchase orders for four additional twelve month terms without further Council action other than the appropriation of funds.

Desired Outcome: To maintain the City's sidewalks and walk-ways for public safety.

BASIS FOR RECOMMENDATION:

On November 22, 2011, the Finance Department issued a Formal Request for Bid (RFB) that consolidated the City's requirements for citywide concrete removal, replacement and repair services. The bid specified that four multiple awards would be made to the lowest bidders based on a 40/20/20/20 split. The low bid determination was based on rates per square or linear feet as specified. 25 companies downloaded the bid, and eight bids were received by the December 28, 2011, due date. Golden Bay Construction, Willsons Concrete, Duran Hogan Construction and CB Concrete Construction submitted the lowest responsive and responsible bids. No protests were received during the protest period, which ended January 13, 2012.

Multiple awards are required in order to allow flexibility in scheduling work by the various City Departments which include Department of Transportation (DOT) Public Works and the Parks, Recreation and Neighborhood Services Department (PRNS). The initial awards will be split as follows but may be adjusted based on actual usage and contractor capacity:

Golden Bay Construction	40%	\$788,000
Wilson's Concrete	20%	\$394,000
Duran Hogan Construction	20%	\$394,000
CB Concrete Construction	20%	\$394,000
Total		\$1,970,000

The total amount reflects the number of sidewalk repairs identified by City Inspection Staff.

Office of Equality Assurance: Living Wage or Prevailing Wage, whichever is higher, is applicable to work under this purchase order.

This Council item is consistent with Council approved Budget Strategy General Principle #2: "We must focus on protecting our vital core City services."

COST AND FUNDING SOURCE:

Various funds (note the term crosses fiscal years)

FOR QUESTIONS CONTACT: Mark Giovannetti, Purchasing Division Manager, at 408-535-7052



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Joseph Horwedel
Leslye Corsiglia

SUBJECT: SEE BELOW

DATE: February 13, 2012

Approved

Date

2-14-12

COUNCIL DISTRICT: 3 and 4

**SUBJECT: REALLOCATION OF AFFORDABLE HOUSING UNITS UNDER THE
NORTH SAN JOSE AREA DEVELOPMENT POLICY**

RECOMMENDATION

Adopt a resolution amending the North San José Area Development Policy to:

- 1) Allow reallocation of up to 450 of the remaining affordable housing units in Phase 1 as market-rate housing units to enable a shovel-ready market-rate housing project to proceed in Phase 1 if such project developer ensures by written agreement with the City a substantial benefit to the City towards the provision of new affordable housing to balance the reduction of affordable housing allocation in Phase 1; and
- 2) Shift the number of reallocated affordable housing units originally reserved for Phase 1 to Phase 2, and correspondingly decrease the number of market-rate housing units in Phase 2, to ensure the vision of a mixed-income community.

OUTCOME

Affordable units will continue to be built in North San Jose, but in a later phase. Four hundred and fifty units now reserved for affordable housing in Phase 1 of the North San Jose Area Development Policy will be allocated to Phase 2. These changes will enable a shovel-ready market-rate housing development meeting certain criteria to proceed this year in Phase 1, creating much-needed jobs and providing funding that will enable pipeline affordable housing projects that need subsidy to proceed.

BACKGROUND

On November 29, 2011, the Council accepted a staff report on the status of housing development in North San José. As a part of this action, the Council approved the staff recommendation to return to Council with an amendment to the North San José Area Development Policy that would allow reallocation of up to 600 units of the remaining affordable housing unit reservation to market-rate housing units in Phase 1 for use by market-rate housing developers who desired to enter into an agreement with the City to convert the affordable units to market-rate units and make a substantial contribution toward the provision of affordable housing in exchange, enabling the developer to move forward with a market-rate development in Phase 1 rather than wait for Phase 2.

In the November 29th action, staff advised the Council it would return with a request to reallocate up to 600 unreserved affordable housing units for projects that (a) best implement the North San José Area Development Policy criteria, (b) result in the best results for the affordable housing program, (c) broaden the diversity of residential unit mix, and (d) are shovel-ready projects that would begin construction within 18 months.

In May 2011, the Council approved a “loan” of up to 220 affordable housing units from Phase 1 to be used as market-rate housing units for the first phase of the Century Court Towers project. The “loaned” units were assumed to be returned to the affordable unit pool when the development permits for other market-rate units expired in North San José. Similarly, the Council approved a “loan” of up to 275 affordable units from Phase 1 for the first phase of the market-rate Fox Markovits property. To date, very few units have become available from projects no longer being pursued by the parties who had worked on the entitlements--none in the past year.

ANALYSIS

Rationale for Policy Change

The proposed policy change would allow the City to enter into an agreement with a developer that meets the four criteria specified in the November 2011 action.

The City staff has discussed the proposal with several developers interested in proceeding with a Phase 1 market-rate project and asked those developers to submit a proposal to the City for consideration. By the end of January, the City had received one written response from Irvine Apartment Communities for its 450-unit Crescent 6 market rate residential project. Irvine’s proposal offers a payment of \$8.8 million to be used for the construction of affordable housing—an amount in excess of the usual fee that would be received in lieu of a 20% affordable housing requirement. Irvine’s proposed terms also include the payment of fees in 2012, the start of construction by 2013, and completion by fall 2014.

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Subject: Approval of a Reallocation of Affordable Housing Units under the North San José Area Development Policy

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Irvine has a proven track record of performance in San José, with its existing Crescent Park development phases proceeding well ahead of schedule. Its proposed project also meets the four criteria established in the November 2011 action.

This purpose of the recommended action is to amend the North San José Area Development Policy to allow a project meeting the established criteria to proceed. If this action is approved, staff anticipates that a Development Agreement with Irvine will be brought before the Planning Commission and the Council in March. Additionally, the Developer will be required to pay a parkland in-lieu fee per the requirements of the parkland dedication and impact ordinances. The allocation of the parkland in-lieu fee to a specific project will be brought forward as a future Council action. When this is brought forward in the future, a high priority for use of the parkland in-lieu fee will likely be the acquisition and development of parkland adjacent to the Essex Property Trust project site.

Use of Funds

At the Council meeting of February 7, 2012, during the discussion of incentives for North San José industrial development, Councilmember Oliverio asked if any of the funding from an agreement such as this one could be used for other purposes such as funding traffic infrastructure. Staff responded that because the contribution was not a City development impact fee or service fee and was a negotiated amount between the City and Developer contained in a Development Agreement, the Council had discretion in allocating the expenditure of the moneys.

Staff recommends that any funds derived from this change in policy be used for affordable housing, as the funds would help to offset the negative impact from the reallocation of affordable units from Phase 1 to Phase 2. Further, the use of funds for affordable housing is warranted given the extensive history of affordable housing demand in North San José, and the many amendments made that have resulted in developers being allowed to pay fees rather than build affordable units. Use of subsidy funds for restricted affordable housing is required in order to achieve the City's vision of mixed-income communities. In addition, due to the elimination of redevelopment agencies in February 2012, \$40 million in tax increment that was required to be used for affordable housing each year in San José is no longer available. Therefore, funds and funding sources to subsidize any of the more than 1,100 affordable housing units that have been waiting for funding for the past three years are extremely limited.

Assuming the reallocation is approved and the entire amount of reallocated units is utilized, there would remain 174 affordable units available for reservation for an affordable housing development in Phase 1. The 994 units reallocated from Phase 1 would move to Phase 2 and displace an equal number of market-rate units, resulting in Phase 2 having 5,406 market-rate units instead of 6,400 and 2,594 affordable units instead of 1,600.

EVALUATION AND FOLLOW-UP

If this action is approved, staff anticipates that a Development Agreement with Irvine would be brought before the Planning Commission and the Council in March.

POLICY ALTERNATIVES

Alternative # 1: Do not amend the North San José Area Development Policy as proposed.

Pros: No additional affordable housing units from Phase 1 would be lost in the near-term, reinforcing the statement that the City supports the creation of mixed-income communities.

Cons: There are currently insufficient funds to subsidize restricted affordable housing units in San José, so those projects cannot go forward at this time. There would still remain 174 units of affordable housing in the Phase 1 allocation for a future project. The proposed change preserves in the long-term the area's overall affordability requirements, generates income that can be used to subsidize future affordable housing, and recognizes that near-term, feasible, market-rate residential developments should be allowed to go forward in order to support our local economy.

Reasons for not Recommending: The benefits of this proposal outweigh the drawbacks; the recommendation should be approved.

PUBLIC OUTREACH/INTEREST

- Criterion 1:** Requires Council action on the use of public funds equal to \$1 million or greater. **(Required: Website Posting)**
- Criterion 2:** Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City. **(Required: E-mail and Website Posting)**
- Criterion 3:** Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach. **(Required: E-mail, Website Posting, Community Meetings, Notice in appropriate newspapers)**

The proposed amendments meet Criterion 2 and have been posted on the City's website and emailed to interested parties.

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COORDINATION

The preparation of this Memorandum was coordinated with the City Attorney's Office.

FISCAL/POLICY ALIGNMENT

This action is consistent with applicable General Plan policies and City Council-approved direction to amend the North San José Area Development Policy. This action is also consistent with the City's *2007-2012 Five-Year Housing Investment Plan*, adopted by Council on June 12, 2007, to increase the City's supply of affordable housing and with the City's *Consolidated Plan 2010-2015* to provide housing units for very low- and extremely low-income residents.

CEQA

CEQA: Resolution No.72768, Addendum to the North San José Policy Update EIR.

/s/

JOSEPH HORWEDEL, DIRECTOR
Planning, Building and Code Enforcement

/s/

LESLYE CORSIGLIA
Director of Housing

For questions, please contact Joseph Horwedel at 408-535-7900
or Leslye Corsiglia at 408-535-3851.



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: David Sykes

**SUBJECT: SANITARY SEWER
CONDITION ASSESSMENT
FALL 2011 PROJECT**

DATE: 02-06-12

Approved

Date

2/10/12

RECOMMENDATION

Report on bids and award of contract for the Sanitary Sewer Condition Assessment Fall 2011 project to the low bidder, Coastline Water Resources, Inc., in the amount of \$1,449,000 and approval of a contingency in the amount of \$145,000.

OUTCOME

Approval of this construction contract will enable the City to assess the condition of the City's sanitary sewer system near rivers and creeks.

Approval of a ten percent contingency will provide funding to pay for any unanticipated tasks that are necessary for the proper completion of the project.

BACKGROUND

The City's sanitary sewer collection system consists of approximately 2,250 miles of sewers. Approximately ten percent of these sewers cross or are in close proximity to rivers and creeks. The Public Works Pilot Condition Assessment Program, completed in June 2011, recommended that all sewer lines within 200 feet of a channel or creek be inspected in order to determine if there are deficiencies within the system that could potentially result in negative impacts to nearby riparian habitat.

The Sanitary Sewer Condition Assessment Fall 2011 project (SSCA Fall 2011) consists of cleaning and inspecting approximately 1 million feet of sewers located within 200 feet of rivers and creeks. The inspection will be performed by a closed-circuit television (CCTV) camera system in accordance with the National Association of Sewer Service Companies (NASSCO) guidelines and standards. NASSCO has promulgated industry standards which govern the inspection and evaluation of underground pipelines including sanitary sewer systems. Inspection data will be reviewed and analyzed by City staff to determine whether repairs or rehabilitation are necessary for those portions of the system that were inspected as part of the

project. The contractor will also be required to perform construction and construction related work as necessary to obtain the CCTV data which includes, but may not be limited to, sewer flow diversion, grit removal and disposal, and traffic control.

In addition to the SSCA Fall 2011 project, the City has allocated \$10.9 million for CCTV of the sanitary sewer system in the next four years as identified in the Adopted 2012-2016 Capital Improvement Program. This program is on pace to CCTV the entire sanitary sewer system in 10 years.

ANALYSIS

Bids were opened on December 8, 2011, with the following results:

<u>Contractor</u>	<u>Bid Amount</u>	<u>Variance Amount</u>	<u>Over/(Under) Percent</u>
National Plant Services, Inc. (Long Beach, CA)	\$2,675,500	\$919,500	52
Engineer's Estimate	1,756,000	---	---
Veolia Water (Pleasant Hill, CA)	1,725,000	(31,000)	(2)
Coastline Water Resources, Inc. (Sacramento, CA)	1,449,000	(307,000)	(17)

Submitted bids varied from 17% under to 52% over the Engineer's Estimate. The low bid was submitted by Coastline Water Resources, Inc. who completed a similar but smaller project for the City late last year. Staff considers this bid reasonable for the work involved.

Council Policy provides for a standard contingency of ten percent on public works projects involving utilities. The standard contingency is appropriate for this project.

EVALUATION AND FOLLOW-UP

This project is expected to be completed in nine months. No additional follow-up actions are expected at this time.

POLICY ALTERNATIVES

Since the low bid is 17 percent below the Engineer's Estimate and is deemed reasonable so no alternative is considered at this time.

PUBLIC OUTREACH/INTEREST

- Criterion 1:** Requires Council action on the use of public funds equal to \$1 million or greater. **(Required: Website Posting)**
- Criterion 2:** Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City. **(Required: E-mail and Website Posting)**
- Criterion 3:** Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach. **(Required: E-mail, Website Posting, Community Meetings, Notice in appropriate newspapers)**

This project has been listed on BidSync and has been advertised in the *San José Post Record*. Contractor organizations and builders' exchanges have access to bid packages through BidSync. This memo will be posted on the City's website for the February 28, 2012, Council agenda.

COORDINATION

This project has been coordinated with the Departments of Planning, Building and Code Enforcement, Transportation, City Manager's Budget Office, Finance and the Office of Risk Management.

FISCAL/POLICY ALIGNMENT

This project is consistent with the Council-Approved Budget Strategy Economic Recovery Section in that it will spur construction spending in our local economy.

COST SUMMARY/IMPLICATIONS

1. AMOUNT OF RECOMMENDATION/COST OF PROJECT: \$1,449,000

Project Delivery	\$250,000
Construction	1,449,000
Contingency	<u>145,000</u>
TOTAL PROJECT COSTS	\$1,844,000
Prior Year Expenditures	0
REMAINING PROJECT COSTS	\$1,844,000

2. COST ELEMENTS OF CONTRACT:

Traffic Control	\$ 29,000
Video Inspection	620,000
Cleaning	600,000
Removal of Debris	125,000
<u>Diversion</u>	<u>75,000</u>
Total	\$1,449,000

3. SOURCE OF FUNDING: 545 – Sewer Service and Use Charge Capital Improvement Fund

4. OPERATING COSTS: The proposed operating and maintenance costs of this project have been reviewed and it has been determined that the project will have no significant adverse impact on the General Fund operating budget.

BUDGET REFERENCE

Fund #	Appn. #	Appn. Name	RC #	Total Appn.	Amt. For Contract	2011-2012 Adopted Capital Budget (Page)	Last Budget Action (Date, Ord. No.)
Remaining Project Costs				\$1,844,000			
Current Funding Available							
545	7082	Sanitary Sewer Condition Assessments – Phase II	168665	\$3,959,000	\$1,449,000	Capital V-95	10/18/11, Ord. No. 28979
Total Current Funding Available				\$3,959,000	\$1,449,000		

CEQA

Exempt, File No. PP11-084, dated September 7, 2011.

/s/
 DAVID SYKES
 Director of Public Works

For questions please contact Michael O’Connell, Deputy Director, at (408) 535-8300.



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Richard Doyle
City Attorney

SUBJECT: Ordinance Regulating Outdoor
Smoking in San Jose

DATE: February 14, 2012

RECOMMENDATION

Approval of an Ordinance amending Chapter 9.44 of the San Jose Municipal Code to regulate outdoor smoking

OUTCOME

The Ordinance will amend San Jose's smoking regulations to prohibit smoking in outdoor dining areas, outdoor common areas of apartments, condominiums and mobilehome parks and in service lines.

BACKGROUND

San Jose has a long history of regulating smoking in most enclosed areas of buildings that are generally accessible to the public. The County of Santa Clara received grant funds from the Centers for Disease Control and Prevention, for the purpose of implementing population-based approaches to tobacco prevention and control. The County in turn offered to use some of these funds to reimburse the City of San Jose for the cost to prepare the ordinance. They also offered to assist with the education and ordinance implementation if adopted by Council. The City agreed to participate in this effort to test new models of collaboration.

On August 30, 2011, the City Council approved a set of ten priority ordinances, including direction to the City Attorney to draft an ordinance to extend smoking prohibitions to outdoor areas of restaurants, public service lines and unenclosed common areas of multi-family residential properties. Following Council action, the City Attorney's Office met with PBCE staff and with County of Santa Clara staff to discuss the proposed ordinance.

A draft ordinance was placed on the City website and presented for discussion and comment at a public meeting held on December 8, 2011.

ANALYSIS

San Jose's smoking regulations are set forth in Chapter 9.44 of the Municipal Code. Section 9.44.030 generally prohibits smoking in most indoor areas of the City with a few very limited exceptions. The Code also currently prohibits smoking in the seating and outdoor areas of stadiums and sports arenas and City parks (excluding golf courses) and within 25 feet of the entrance to a City library or community center. The proposed Ordinance would expand the prohibition on smoking outdoors to the following areas:

Outdoor Dining Areas which are defined as "any privately owned or public owned area, including streets, sidewalks, and Side Walk Cafes ... which is available or customarily used by the general public and which is designed, established, or regularly used for consuming food or drink." This regulation would prohibit smoking in many outdoor areas of bars and restaurants that currently allow smoking in such outdoor areas.

Service Lines which are defined as "any outdoor line or queue at which one or more persons are waiting for service of any kind, whether or not such service involves the exchange of money." This regulation would prohibit smoking in many outdoor areas where people gather to wait for services, such as ATM's, food stands or trucks, bus stops, and ticket lines.

Outdoor areas of multifamily housing residential projects which include apartments, condominiums and mobilehome parks. San Jose already prohibits smoking in the indoor common areas of these types of uses. The proposed Ordinance would expand the smoking prohibition to the outdoor common areas of such uses. The owners of these properties would be authorized to designate certain permitted smoking areas on the property as long as the designated area remained unenclosed and at least 30 feet away from doorways, windows or air intakes.

NEXT STEPS/FOLLOW UP

At the outset of this project, the County offered to assist with education and implementation of the Ordinance, if adopted by the City Council. The partnership for implementation would also extend to interested non-profits such as Breath California. The Administration continues to work with the County of Santa Clara on the coordination of the education and implementation of the Ordinance, seeking to memorialize the arrangement in a formal memorandum of understanding.

PUBLIC OUTREACH/INTEREST

A community meeting was held in the City Hall Council Chambers on December 8, 2011. Public outreach included newspapers, an announcement on the City's webpage and a flyer included with the annual mailing to property owners/managers of multi-family rentals with Residential Occupancy Permits. In response to the public notice about the

community meeting, seven emails were received. All were in favor of the proposed Ordinance and most recommended additional restrictions on smoking. More than forty people attended the community meeting.

Code Enforcement Official Mike Hannon and Janie Burkhart, Santa Clara County Public Health Program Manager, made a presentation about the draft ordinance. The PowerPoint was posted on Code Enforcement's website at <http://www.sanjoseca.gov/codeEnforcement/PDF/OutdoorSmokingOrdinancePresentation.pdf>

Breathe California submitted a petition with 190 signatures in support of smoke-free dining in outdoor restaurant/bar seating area. Members present spoke in favor of the ordinance and some recommended additional restrictions on smoking. Five members of the community, including Charles Janigian, Present of the California Association of Retail Tobacconists, Inc. opposed the draft ordinance. Twenty people provided public comments or questions during the meeting.

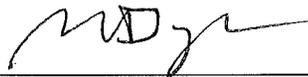
COORDINATION

This memorandum was coordinated with the City Manager's Office and the Department of Planning, Building and Code Enforcement

CEQA

Categorically exempt, PP 12-010.

RICHARD DOYLE
City Attorney

By 
Brian Doyle
Sr. Deputy City Attorney

cc: Debra Figone

For questions please contact Brian Doyle, Senior Deputy City Attorney, at 535-1908

ORDINANCE NO.

**AN ORDINANCE OF THE CITY OF SAN JOSE AMENDING
CHAPTER 9.44 OF TITLE 9 OF THE SAN JOSE
MUNICIPAL CODE TO REGULATE OUTDOOR SMOKING**

WHEREAS, on December 8, 2010, the Rules and Open Government Committee (“Committee”) of the City Council of the City of San José considered a memorandum from Vice Mayor Chirco and Councilmembers Kalra, and Licardo recommending the preparation of a draft ordinance to amend the San José Municipal Code to prohibit smoking in outdoor areas of restaurants, public service lines and unenclosed common areas of multi-family properties; and

WHEREAS, the Committee agreed to evaluate the ordinance as part of the priority setting in February, 2011; and

WHEREAS, on August 30, 2011, the City Council approved a set of ten priorities, including direction to the City Attorney to draft an ordinance to extend smoking prohibitions to outdoor areas of restaurants, public service lines and unenclosed common areas of multi-family residential properties; and

WHEREAS, on December 8, 2011, a meeting was held in the City Hall Council Chambers to receive public comments on the proposed Ordinance; and

WHEREAS, on February 28, 2012, the City Council of the City of San José considered this Ordinance for approval; and

WHEREAS, this Ordinance was found to be categorically exempt from environmental review per the provisions of Section 15061(b)(3) of the California Environmental Quality Act of 1970, as amended, under File No. PP 12-010;

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF SAN JOSE:

SECTION 1. Chapter 9.44 of Title 9 of the San José Municipal Code is amended by adding a new section to be numbered and entitled and to read as follows:

9.44.019 Outdoor Dining Area

“Outdoor Dining Area” means any privately owned or publicly owned area, including streets, sidewalks, and Sidewalk Cafes as defined in Section 20.200.1120 of the San José Municipal Code, which is available or customarily used by the general public and which is designed, established, or regularly used for consuming food or drink.

SECTION 2. Chapter 9.44 of Title 9 of the San José Municipal Code is amended by adding a new section to be numbered and entitled and to read as follows:

9.44.020 Service Line

"Service Line" means any outdoor line or queue at which one or more persons are waiting for or receiving service of any kind, whether or not such service involves the exchange of money.

SECTION 3. Chapter 9.44 of Title 9 of the San José Municipal Code is amended by adding a new section to be numbered and entitled and to read as follows:

9.44.021 Designated Smoking Area

"Designated Smoking Area" means such portion of an Outdoor Common Area that has been designated for smoking by the person with legal control over the common area and which complies with all of the following:

- A. The area is unenclosed.
- B. The area is located at least thirty (30) feet from any operable doorway, window opening or other vent into an enclosed area.
- C. The perimeter of the area is clearly demarcated.
- D. Signs indicate that the area is designated for smoking.

SECTION 4. Section 9.44.030 of Chapter 9.44 of Title 9 of the San José Municipal Code is amended to read as follows:

9.44.030 General Prohibition

Smoking is prohibited in the following places located within the City of San José except as provided in Section 9.44.040:

- A. *Buildings:* All enclosed areas of buildings which are open to the public or which are places of employment.
- B. *Public and common areas of multifamily residential areas:* All enclosed areas of apartments, condominiums and mobilehome parks which are open to public access or to unrestricted common access by the residents of such places.
- C. *Motor vehicles used in work:* In motor vehicles which meet one (1) of the following conditions:

1. Common carriers for public transit;
 2. Vehicles for hire, such as taxicabs;
 3. Vehicles which are operated in the course of employment for the use of more than one (1) person at a time during the time of employment.
- D. *Hotel and motel guest rooms:* The enclosed areas of at least fifty percent (50%) of the guest rooms located in a hotel or motel. To the greatest extent feasible the smoke free rooms shall be grouped together to each other and separated from rooms where smoking is permitted.
- E. *Stadium and sports arenas:* The seating and eating areas of any outdoor stadium or sports arena. Smoking may be permitted only in specifically designated areas which are not located in close proximity to seating or eating areas.
- F. *City parks:* Park is defined in Chapter 13.44 of Title 13 of the San José Municipal Code, as it may be amended. Without limitation of any other provision of this Code, the definition of "park" for purposes of this Section includes sidewalks, trails and pathways in or around park facilities, park strips and other grounds of any park.
- G. In any the following outdoor areas:
1. Areas within twenty-five (25) feet horizontally or vertically of any entrances, exits, operable windows, or air intake openings of any community center or library owned, leased or occupied by the City;
 2. All unenclosed common areas of apartments, condominiums and mobilehome parks which are open to public access or to unrestricted common access by the residents of such places, except for areas that have been designated as a Designated Smoking Area by the owner of the property;
 3. Outdoor Dining Areas;
 4. Service Lines.

SECTION 5. Section 9.44.040 of Chapter 9.44 of Title 9 of the San José Municipal Code is amended to read as follows:

9.44.040 Exceptions

Smoking may be permitted in the following locations:

- A. Private residences, except where state law prohibits smoking.
- B. Retail tobacco stores which sell primarily tobacco products.
- C. Meeting and banquet rooms which meet the standards set forth in Section 6404.5(d)(3) of the California Labor Code.
- ~~D. Outdoor areas of restaurants.~~
- ED. At such areas of the San José International Airport as provided for in Section 9.44.045 of this Chapter.
- FE. On a stage in a theater during a theatrical performance where a performer is smoking when smoking is part of the performance.
- GE. Any property owned or leased by other governmental agencies and used for governmental purposes.
- HG. Upon any outdoor area of any golf course owned or operated by the City that is more than twenty-five (25) feet from any entrance, exit, operable window or air intake opening of any building.

SECTION 6. Section 9.44.055 of Chapter 9.44 of Title 9 of the San José Municipal Code is amended to read as follows:

9.44.055 Enforcement

- A. To the extent that these provisions are duplicative of Labor Code Section 6040.5, any enforcement shall be pursuant to the Labor Code.
- B. The following provisions of this Chapter shall be enforced directly:
 - 1. Subsection A. of Section 9.44.030 in those areas where there is no exception under this Chapter corresponding to an exception to the definition of "place of employment" as set forth in Labor Code Section 6404.5.
 - 2. Subsections B., C., D., ~~and E.~~, F. and G. of Section 9.44.030.

- C. The provisions of this Code which are duplicative or less stringent than Labor Code 6405.5 are hereby suspended and should Labor Code 6404.5 ever be repealed or modified, those suspended sections of this Chapter shall then be enforced.

SECTION 7. Section 9.44.060 of Chapter 9.44 of Title 9 of the San José Municipal Code is amended to read as follows:

9.44.060 Posting of Signs

- A. "No Smoking" signs shall be conspicuously posted in every building, where smoking is prohibited pursuant to this Chapter, by the owner, operator, manager or other person having control of such room, building, or other place.
- B. In any building where smoking is partially permitted "No Smoking" signs shall be placed in the lobby or in conspicuous places near each entrance to the building stating that smoking is prohibited in the building except in the areas designated as smoking areas.
- C. "Smoking Permitted" signs shall be posted at the entrance to and in any room in an air terminal building in which smoking is expressly permitted under Section 9.44.045. All such signs shall conform to the standards for appearance of signs established by the Director of Aviation.
- D. Movie theaters shall indicate on the movie screen prior to each feature motion picture that smoking is prohibited.
- E. "Smoking Permitted" shall be posted in any Designated Smoking Area as permitted pursuant to Section 9.44.021 of this Chapter.

RD:BD
2-14-12

DRAFT

PASSED FOR PUBLICATION of title this _____ day of _____, 2012, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

CHUCK REED
Mayor

ATTEST:

DENNIS D. HAWKINS, CMC
City Clerk