



# Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** Richard Doyle  
City Attorney

**SUBJECT:** Ordinance Regulating Outdoor  
Smoking in San Jose

**DATE:** March 23, 2012

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## **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. The County and Breathe California 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.

The existing Municipal Code provisions require that no smoking signs be posted *in* buildings where smoking is prohibited. The proposed Ordinance will require the posting of no smoking signs *at* any building where smoking is prohibited. This amendment is intended to include outdoor areas of building premises such as bars and restaurants and residential complexes. It may also include certain service line areas directly adjacent to buildings. Staff intends to work with the County and with the VTA about no smoking signs for services lines for mobile vendors and at bus stops.

#### **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 County of Santa Clara's Department of Environmental Health has committed to assist with outreach and training on the implementation of this Ordinance. The Administration is also finalizing a memorandum of understanding with Breathe California to provide education and outreach related to policy implementation and assistance in the intake and handling of complaints.

**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   
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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.
- GF. 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~~ at 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.

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

AYES:

NOES:

ABSENT:

DISQUALIFIED:

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CHUCK REED  
Mayor

ATTEST:

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DENNIS D. HAWKINS, CMC  
City Clerk