

# Memorandum

**TO:** RULES & OPEN GOVERNMENT  
COMMITTEE

**FROM:** Ed Shikada

**SUBJECT:** SEE BELOW

**DATE:** 08/26/10

Approved

Date

8/27/10

**SUBJECT: WORKLOAD ASSESSMENT FOR PROPOSED ORDINANCE  
PROHIBITING SMOKING IN OUTDOOR AND COMMON AREAS**

As directed by the Rules and Open Government Committee on June 9, 2010, staff has prepared a workload assessment for the proposed update to San Jose Municipal Code 9.44.030 and 9.44.040 as initiated by a June 3<sup>rd</sup> memorandum from Councilmembers Kalra and Campos. The workload assessment is attached.

In order to facilitate the completion of this and future workload assessments, staff has formatted the attached report using a new template that attempts to address key elements for City Council consideration. We would appreciate any feedback from Council on this format and its applicability in the future.

EDWARD K. SHIKADA  
Assistant City Manager

For questions on the attached workload assessment, please contact Mike Hannon at 277-4703.

# **PROPOSED PROHIBITION OF SMOKING IN OUTDOOR AND COMMON AREAS**

*Workload Assessment per City Council Policy 0-12*

**Report to the Rules and Open Government Committee  
September 1, 2010**

## **Introduction**

This report provides an outline of the policy issues, cost implications, and other pertinent information for addressing the subject Council referral. The format of this report is intended to provide an easy-to-understand presentation of information, addressing the following topics:

- I. Summary and Context of the Proposal
- II. Scope and Approach to Policy Analysis
- III. Impact on Other Priorities and Relationship to Current City Services
- IV. Alternative Approaches for Consideration
- V. Recommendations

It should be noted that this workload assessment is simply a preliminary analysis of the issue as presented. Further analysis and outreach to interested stakeholders may lead to a modified understanding of the work required to address the subject of this referral, as well as additional policy options for City Council consideration.

## **I. Summary and Background on the Proposal**

On June 9, 2010, the Rules and Open Government Committee discussed a proposal from Council members Kalra and Campos, to prepare a draft ordinance to prohibit smoking in outdoor areas of restaurants before 9:00 p.m. and to prohibit smoking in public service lines and in unenclosed areas of public and common areas of multi-family residential areas. The memorandum from Councilmembers Kalra and Campos, dated June 3, 2010, is attached.

The Rules and Open Government Committee referred the issue to staff for a workload assessment and report back to the Committee in August.

1. What is the purpose/intended outcome of the proposal?

The proposal is directed at reducing the negative health effects of secondhand smoke, specifically in public areas of restaurants and multifamily residential developments.

2. How does the proposal address the issue(s)?

The proposal would amend the San José Municipal Code ("Code") Section 9.44, Regulation of Smoking, specifically General Prohibition, to include outdoor areas of restaurants before 9:00 p.m., public service lines, and unenclosed outdoor common areas of multi-family residential properties.

If directed by the City Council, PBCE's Code Enforcement Division, in coordination with the Police Department and the City Attorney's Office, would prepare amendment(s) to San José Municipal Code ("Code") Section 9.44, Regulation of Smoking, specifically General Prohibition, to include outdoor areas of restaurants before 9:00 p.m., public service lines, and unenclosed outdoor common areas of multi-family residential properties. The proposed amendment would expand outdoor areas wherein smoking is prohibited.

Given the variety of possible subsequent steps, implementation and enforcement of the amended Code sections is not specifically addressed in this workload assessment.

## **II. Scope and Approach to Policy Analysis**

In order to develop a proposed ordinance for City Council consideration, staff would need to conduct an analysis of policy options, conduct outreach, and develop policy recommendations. This analysis would include a review of other similar statutes, and any legal challenges, in restricting smoking in outdoor common areas, including outdoor seating in restaurants, that may have been approved to accommodate the smoking patrons. In addition, staff will examine the enforceability of outdoor smoking regulations. This analysis would also need to take into consideration potential implications, if any, related to upcoming marijuana state ballot measures and any proposed regulation of the use of marijuana for recreational and medical purposes.

1. What is the estimated time and cost to complete the required policy analysis, including coordination with other City departments and/or the Redevelopment Agency?

Code Enforcement staff would work closely with the City Attorney's Office to review the Code and draft the amendments to ensure legal viability of those proposed changes. The current Code section should also be reviewed for inclusion of provisions related to the use of medical marijuana by qualified patient individuals and/or the use of marijuana for

recreational purposes. In addition, the Schedule of Administrative Fines will need to be reviewed and possibly updated to assign fine amounts to new sections being added to the Code.

The review and drafting of an ordinance to amend the Code and updating of the Schedule of Administrative Fines is estimated to take *three to four weeks*, including staff time of all directly participating departments and offices.

The preparation of memoranda and required environmental clearance is estimated to take an additional *8 to 40 hours* of staff time.

The time associated with outreach and public hearings is noted under section 6 below (an additional *16 to 24 hours* of staff hours spread over the entire project period of approximately two months).

This time estimate does not include indirectly affected staff in the City Manager's Office, City Clerk's Office, and other City departments involved with placing items on the Council agenda, broadcasting the meetings, archiving the documents, etc.

2. What community stakeholders are expected to be engaged in the consideration of this policy?

- San Jose Residents
- Working Partnerships USA
- Breathe California
- Silicon Valley Leadership Group
- Businesses with out-door smoking areas that would need to monitor and prohibit smoking until after 9 p.m.
- California Apartment Owners Association
- Santa Clara County Real Estate Board
- San Jose Downtown Association as well as individual Restaurants, Bars and Associations
- Hotel, Motel and Apartment Owners
- National Association of Industrial and Office Parks (NAIOP)
- Neighborhood Business Districts
- Neighborhood Associations
- City of San Jose - for facilities with outdoor smoking currently allowed or not regulated such as the Airport and Convention Center
- County of Santa Clara
- San Jose/Silicon Valley Chamber of Commerce
- Ethnic Chambers of Commerce
- American Lung Association
- Banks with ATM's
- Theater Owners
- Medical Marijuana Patients
- Others

3. What outreach and engagement plan does staff anticipate, including the estimated time and cost to implement the plan?

Code Enforcement staff would convene a single meeting of all community stakeholders to obtain their ideas and feedback on the proposed ordinance (approximately 8 hours of staff time to prepare, convene, and summarize the meeting). If the Council requested additional community meetings, each meeting would require approximately 4 to 6 hours of additional staff time.

Given the expected opposition by certain groups, staff would likely need to follow up with individual or groups of stakeholders, estimated to be an additional 8 to 16 hours of staff time.

### **III. Impact on Other Priorities and Relationship to Current City Services**

1. How would this effort impact other priorities, and what is its relationship to current City services?

The City Attorney's Office has estimated that there are approximately twenty other ordinances currently pending in their office, including, but not limited to: the Medical Marijuana Ordinances, the San Pedro Square Kiosk Ordinance, the Tobacco Permitting Ordinance, the Public Entertainment Ordinance, the Cost-Sharing Ordinance, the Taxicab CNG and Alternative Fuel Ordinance and updates to the Massage Ordinance and the Tow Ordinance. Therefore, developing or amending the Smoking Ordinance would impact and push back deadlines for the listed ordinances.

It should be noted that the County of Santa Clara has expressed an interest in providing funding resources to support this effort. In March 2010, the Santa Clara County Department of Health was awarded a \$6.975 million grant through the Federal Communities Putting Prevention to Work (CPPW) Tobacco Prevention and Control Program, funded through the American Recovery and Reinvestment Act (ARRA), to address tobacco prevention and exposure to second-hand smoke over the next two years.

The Santa Clara County Department of Health indicated that San Jose might be eligible for \$90,000 - \$160,000 of grant funds from the Santa Clara County for tobacco prevention related *policy development work* with the following funding priorities:

Reduce Exposure to Secondhand Smoke

- Establish a countywide model for smoke-free policies on university and college campuses in Santa Clara County by strengthening existing and/or adopting and implementing new campus policies to become 100% smoke-free.
- Restrict smoking in outdoor areas, such as; parks, trails, service lines and outdoor eating areas.
- Strengthen local city smoke-free workplace protection policies to address exemptions in the current city smoke-free policy.

Limit Tobacco Sales to Youth

- Prohibit tobacco retailers from operating within a 1,000 feet radius of schools, parks, or playgrounds, and other youth populated areas.

The availability of these resources may have the potential to support a portion of one staff position within PBCE to conduct many of the duties required for this effort. However, the funding level would be insufficient to reinstate prior staffing in a manner that would avoid impacts to other service priorities.

2. What are ongoing cost, revenue and/or operational considerations related to this proposal?

This workload assessment is to amend Title 9.44 and conduct outreach only. There is no staffing proposed for enforcement.

If fully implemented (complaint response and pro-active enforcement), ongoing annualized funding needed would be \$381,307 to fund 2.0 FTE Code Enforcement Inspectors, 0.10 Code Enforcement Supervisor, 0.10 Code Enforcement Division Manager and 0.05 Code Enforcement Deputy Director, and 0.10 Senior Office Specialist.

If partially implemented (1.0 FTE Code Enforcement Inspector for complaint response only), the ongoing cost would be \$222,828 annually.

If the Council would like the staff to proactively conduct outreach, the preparation of materials would take approximately 40 hours of staff time and cost approximately \$6,500 for printing and mailing.

#### **IV. Alternative Approaches for Consideration**

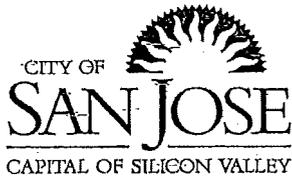
Based on staff's preliminary review of this issue and understanding of ongoing efforts by the County of Santa Clara, a number of options could be considered by the City Council as means to advance the intended outcome of the proposed ordinance. Options identified to date include:

- A. In partnership with the Santa Clara County Health Department, develop *Public Service Announcements*. This would reflect a public education/awareness focus, targeted at the general public.
- B. Expand City Council Resolution 74695, that encourages landlords and property managers of multi-unit housing complexes to promote and market smoke free properties, to encourage our residents to stop smoking in outdoor areas that could affect other residents, such as; parks, trails, service lines and outdoor eating areas. This would similarly reflect a public education/awareness focus, in this case focused on landlords, property managers, and similar business interests.
- C. Request the Santa Clara County Public Health Department, as the lead agency, to develop a County-wide or multi-jurisdictional approach to regulations and conduct related outreach. This would advance the issue from a broader area of impact, and City staff would need to participate in order to ensure that San Jose's interests are represented. However, this level of engagement would be significantly less resource intensive for the City.
- D. Hold this proposal at this time, and reconsider prioritization as a part of the Spring 2011 Council committee workplans or 2011-12 Proposed Budget. This would allow this initiative to be considered within the context of other priorities, and resources allocated accordingly.

#### **V. Recommendations**

In recognition of competing priorities and resource limitations, staff recommends that Option C above – request Santa Clara County lead agency – be pursued. This approach has the potential to realize a greater economy of scale and allow community stakeholders to address their concerns in a coordinated manner across jurisdictional boundaries. Staff would work with the County Public Health Department to design an approach that addresses the issues identified in this workload assessment, and report to the City Council any follow-up actions required.

This recommendation notwithstanding, should the City Council direct staff to proceed with the development of the proposed ordinance, staff will modify workplan priorities as needed.



# Memorandum

**TO:** HONORABLE MAYOR AND  
CITY COUNCIL

**FROM:** Councilmember Ash Kalra  
Councilmember Nora Campos

**SUBJECT:** SEE BELOW

**DATE:** June 9, 2010

Approved

Date

*Ash Kalra*

6/9/10

*Nora Campos*

## REPLACEMENT

**SUBJECT: UPDATE OF SAN JOSÉ MUNICIPAL CODE 9.44.030 AND 9.44.040**

### RECOMMENDATION

1. Direct staff to prepare a draft ordinance amending San José Municipal Code section 9.44.040, to only permit smoking in outdoor areas of restaurants from 9 pm to closing.
2. Direct staff to prepare a draft ordinance amending San José Municipal Code section 9.44.030 to:
  - a) Prohibit smoking in public service lines; and
  - b) Extend the prohibition of smoking to include unenclosed areas of public and common areas of multi-family residential areas.

### BACKGROUND

It has long been known that smoking cigarettes has extremely negative effects on a person's health. It has become increasingly known that secondhand smoke has similar negative impacts on those who are subjected to it. In a report issued in 2006 the Surgeon General stated, "Scientific evidence indicates that there is no risk-free level of exposure to secondhand smoke." According to the Surgeon General, approximately 60 percent of US children ages 3 to 11 years old are exposed to secondhand smoke; that equates to 22 million children. The U.S. Surgeon General Report further stated, "Nonsmokers exposed to secondhand smoke at home or work increase their risk of developing heart disease by 25 to 30 percent and lung cancer by 20 to 30 percent...Even brief exposure to secondhand smoke has immediate adverse effects on the

cardiovascular system and increases risk for heart disease and lung cancer.” According to the U.S. Department of Health and Human Services’ Centers for Disease and Prevention, more than 440,000 people die in the United States from tobacco-related diseases every year. Tobacco related death is the leading cause of preventable death in the United States.

The Centers for Disease Control and Prevention states secondhand smoke, also known as Environmental Tobacco Smoke (ETS), contains over 250 chemicals known to be toxic. According to The National Cancer Institute, 50 of the chemicals are known to cause cancer. Secondhand smoke causes about 3,000 lung cancer deaths and 35,000 heart disease deaths in adult non-smokers in the United States each year, in addition to the harm it creates upon young children. Secondhand smoke exposure causes approximately 38,000 deaths among non-smokers annually in the U.S. Secondhand smoke is known to cause prenatal manifestation of development toxicity, postnatal manifestations of development toxicity, female and male toxicity, adverse respiratory effects, carcinogenic effects and cardiovascular effects.

With knowledge of the deleterious effects of tobacco smoke, the State of California has been a global pioneer in taking drastic steps to reduce the rate of smoking in the population. In the late 1980’s, California started an aggressive anti-smoking education campaign. Soon after, San Luis Obispo became the first city in the world to ban smoking in all buildings open to the public. The entire state followed suit later in the decade. The results of these efforts saw the smoking rate in the state tumble from 22.7% in 1988 to 13.3% in 2006. California’s adult smoking rate was at 14% percent in 2006. California has the second lowest adult smoking rate in the nation after Utah, and among children 12 and under, California has the lowest smoking rate in the nation.

## ANALYSIS

The above recommendations would help create a healthier and family friendly environment throughout the City of San José, while helping with the City’s economic prosperity. Other Municipalities in California, such as San Francisco, Calabasas, and Oakland, have taken the steps to protect residents from unnecessary exposure to harmful secondhand smoke.

According to California Department of Public Health research, 75.8% of Californians agree that smoking should be prohibited in outdoor dining areas at restaurants. Smoke free outdoor dining before 9 pm will allow families to enjoy outdoor dining establishments under safe conditions but also enable restaurants to have the flexibility to allow for limited outdoor availability for smoking patrons.

Although some may suggest smoke-free dining would cause sales to decline, studies have shown that when the California Smoke-Free Workplace Law was extended to restaurants and bars, sales increased in those establishments. According to the California Board of Equalization data, sales increased an additional \$879,816,000 in 1998 in those establishments which sold alcohol, the year the California Smoke-Free Workplace Law went into effect in restaurants. In a phone survey conducted by Breathe California of local eating establishments, 83% of those establishments surveyed said they would not oppose a smoke-free dining ordinance.

The City of San José does not have regulations to protect residents who may be waiting in a service line from the dangers and inconvenience of secondhand smoke. Service lines include areas where people commonly have to wait outdoors, such as ATM and movie theater lines.

Families should not have to be exposed to secondhand smoke while waiting to buy a ticket to a movie or while dining at a restaurant.

Currently, San José Municipal Code section 9.44.030b prohibits smoking in "*Public and common areas of multifamily residential areas*: All enclosed areas of apartments, condominiums and mobile home parks which are open to public access or to unrestricted common access by the residents of such places." Smoking regulations should be extended to unenclosed areas of apartments, condominiums and mobile home parks which are open to public access or to unrestricted common access by residents to prevent secondhand smoke exposure to residents. So, this change would simply require the removal of the word "enclosed" from the current Code.