



AGENDA REPORT

Meeting Date: April 22, 2014

Item Number: E-5

To: Honorable Mayor & City Council

From: Laurence S. Wiener, City Attorney

Subject: AN ORDINANCE OF THE CITY OF BEVERLY HILLS REGULATING TOBACCO AND ELECTRONIC CIGARETTE USE IN OUTDOOR SERVICE LINES, FARMERS MARKETS, PUBLIC PLAZAS AND OUTDOOR PUBLIC GATHERING PLACES

Attachments: 1. Ordinance

RECOMMENDATION

Staff recommends that the City Council move to waive the full reading and adopt the ordinance entitled "AN ORDINANCE OF THE CITY OF BEVERLY HILLS REGULATING TOBACCO AND ELECTRONIC CIGARETTE USE IN OUTDOOR SERVICE LINES, FARMERS MARKETS, PUBLIC PLAZAS AND OUTDOOR PUBLIC GATHERING PLACES".

INTRODUCTION

The ordinance expands the City's smoking regulations to prohibit smoking in outdoor services lines, farmers markets, public plazas and outdoor public gatherings.

DISCUSSION

At its meeting of April 1, 2014, the City Council conducted a first reading and introduced this ordinance. At the April 1 meeting, the City Council revised the ordinance to allow designated smoking areas in private plazas provided that the designated area is not within twenty feet of an entrance or exit to a building or a designated pedestrian pathway. This revision has now been incorporated into the ordinance.

This ordinance will take effect on June 1, 2014.

FISCAL IMPACT

The Health & Safety Commission recommends a public education and outreach campaign to inform the community about the changes to the City's smoking regulations. Staff has estimated a cost of approximately \$20,000 for e-cigarette outreach and believes that outreach regarding this ordinance can be included within that same budget.

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Laurence S. Wiener, City Attorney

Attachment 1

ORDINANCE NO. 14-O-

AN ORDINANCE OF THE CITY OF BEVERLY HILLS
REGULATING TOBACCO AND ELECTRONIC CIGARETTE
USE IN OUTDOOR SERVICE LINES, FARMERS MARKETS,
PUBLIC PLAZAS AND OUTDOOR PUBLIC GATHERING
PLACES.

THE CITY COUNCIL OF THE CITY OF BEVERLY HILLS HEREBY ORDAINS AS
FOLLOWS:

Section 1. On April 1, 2014, the City Council considered the introduction of this Ordinance at a duly noticed public meeting and on the basis of the record thereof finds the following facts to be true:

A. Tobacco use and exposure to secondhand smoke cause death and disease and impose great social and economic costs; and

B. The Centers for Disease Control and Prevention have found that more than 480,000 people die in the United States from tobacco-related diseases every year, making it the nation's leading cause of preventable death;¹ and

C. The World Health Organization estimates that by 2030, tobacco will account for eight million deaths per year, making it the greatest cause of death worldwide;² and

D. The U.S. Environmental Protection Agency has found secondhand smoke to be a risk to public health and has classified secondhand smoke as a group A carcinogen, the most dangerous class of carcinogen;³ and

¹ Centers for Disease Control and Prevention. *Tobacco-Related Mortality*. February 6, 2014.
http://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/tobacco_related_mortality

² World Health Organization. *Tobacco Fact Sheet No. 339*. July 2013.
<http://www.who.int/mediacentre/factsheets/fs339/en/>

³ U.S. Environmental Protection Agency. *Health Effects of Exposure to Secondhand Smoke*.
<http://www.epa.gov/smokefree/healtheffects.html>

E. Secondhand smoke is responsible for an estimated 42,000 deaths among non-smokers each year in the United States, which includes 7,333 lung cancer deaths and 33,951 deaths due to heart disease;⁴ and

F. Electronic cigarettes, commonly known as e-cigarettes, e-cigars, e-cigarillos, e-pipes, and e-hookahs, are battery operated devices designed to look like and be used in the same manner as conventional tobacco products. Electronic cigarettes employ the use of a cartridge, generally containing up to 20 mg of nicotine to deliver vaporized nicotine to users. Some cartridges used by electronic cigarettes can be re-filled with liquid nicotine solution, creating the potential for exposure to dangerous concentrations of nicotine;⁵ and

G. The U.S. Food and Drug Administration (“FDA”) conducted laboratory analysis of electronic cigarettes and found the following: 1) Diethylene glycol, an ingredient used in antifreeze and toxic to humans, was found in one cartridge; 2) Certain tobacco-specific nitrosamines, which are human carcinogens, were detected in half of the samples tested; 3) Tobacco-specific impurities suspected of being harmful to humans—anabasine, myosmine, and β -nicotyrine—were detected in a majority of the samples tested; 4) All but one tested cartridge labeled as containing no nicotine did in fact contain low levels of nicotine; 5) Three identically labeled cartridges emitted markedly different amounts of nicotine with each puff. Nicotine levels per 100 mL puff ranged dramatically from 26.8 to 43.2 mcg nicotine; and 6) One high-nicotine cartridge delivered twice as much nicotine to users as was delivered by a nicotine inhalation product approved by the FDA for use as a smoking cessation aid which was used as a control; and

⁴ U.S. Department of Health and Human Services. *The Health Consequences of Smoking—50 Years of Progress. A Report of the Surgeon General*. 2014. http://www.cdc.gov/tobacco/data_statistics/sgr/50th-anniversary/index.htm

⁵ Yamin, C.K., Bitton A., and Bates, D.W. *E-Cigarettes: A Rapidly Growing Internet Phenomenon*. *Annals of Internal Medicine*, 153:607-609, 2010.

H. The FDA has raised concerns that electronic cigarettes, which are often marketed in appealing flavors, can increase nicotine addiction among young people and may lead youth to try conventional tobacco products;⁶ and

I. The FDA has also raised concerns that electronic cigarettes are marketed and sold to young people and are readily accessible online and via mall kiosks;⁷ and

J. A study published in the American Journal of Public Health found similar results to the FDA testing and concluded that the electronic cigarettes tested so far have demonstrated “poor quality control; toxic contaminants, albeit at low levels; misrepresentation of the nicotine delivered; and insufficient evidence of the overall public health benefit”;⁸ and

K. Clinical studies about the safety and efficacy of electronic cigarettes for their intended use have not been submitted to the FDA, and for this reason, consumers currently have no way of knowing: 1) whether electronic cigarettes are safe for their intended use; 2) what types or concentrations of potentially harmful chemicals the products contain; and 3) what dose of nicotine the products deliver;⁹ and

L. The World Medical Association has determined that electronic cigarettes “are not comparable to scientifically-proven methods of smoking cessation” and that “neither their value

⁶ U.S. Food and Drug Administration. *E-Cigarette: Questions and Answers*. 2010. www.fda.gov/forconsumers/consumerupdates/ucm225210.htm

⁷ U.S. Food and Drug Administration. *News Release, FDA and Public Health Experts Warn About Electronic Cigarettes*. July 22, 2009. www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm173222.htm

⁸ Cobb, N.K., Byron, J., and Abrams, D.B., et al. *Novel Nicotine Delivery Systems and Public Health: The Rise of the 'E-Cigarette'*. American Journal of Public Health, 100 (12): 2340-2342, 2010.

⁹ U.S. Food and Drug Administration. *FDA Warns Of Health Risk Posed By E-Cigarettes*. 2009. www.fda.gov/downloads/forconsumers/consumerupdates/UCM173430.pdf

as therapeutic aids for smoking cessation nor their safety as cigarette replacements is established”;¹⁰ and

M. The federal law restricting the sale of tobacco products to minors currently applies only to cigarettes, cigarette tobacco, roll-your-own tobacco, and smokeless tobacco, not electronic cigarettes. 21 U.S.C. § 387a(b). However, California law prohibits the sale of electronic cigarettes to minors. Health & Safety Code § 119405; and

N. Between 2010 and 2011, rates of both awareness and use of unregulated electronic cigarettes by adults increased significantly;¹¹ and

O. Electronic cigarettes often mimic conventional tobacco products in shape, size, and color, with the user exhaling a smoke-like vapor similar in appearance to the exhaled smoke from cigarettes and other conventional tobacco products; and

P. A study published in the Journal of Environmental and Public Health suggests that electronic cigarettes “may have the capacity to ‘re-normalize’ tobacco use in a demographic that has had significant denormalization of tobacco use previously”;¹² and

Q. Recent newspaper reports from across the nation indicate that electronic cigarettes have a propensity for exploding while charging or in use. These explosions have caused severe burns and physical injuries to users. Additionally, these explosions have caused property damage; and

¹⁰ World Medical Association. *Statement on Electronic Cigarettes and Other Electronic Nicotine Delivery Systems*. October 2012. [www.wma.net/en/30publications/10policies/e19/index.html.pdf?print-media-type&footer-right=\[page\]/\[toPage\]](http://www.wma.net/en/30publications/10policies/e19/index.html.pdf?print-media-type&footer-right=[page]/[toPage])

¹¹ King, B.A., Alam, S., and Promoff, G., et al. “Awareness and Ever Use of Electronic Cigarettes Among U.S. Adults, 2010-2011.” *Nicotine and Tobacco Research*.

¹² McMillen, R., Maduka, J., and Winickoff, J. “Use of Emerging Tobacco Products in the United States.” *Journal of Environmental and Public Health*.

R. The use of electronic cigarettes in smoke free locations threatens to undermine compliance with smoking regulations and reverse the progress that has been made in establishing a social norm that smoking is not permitted in certain locations; and

S. The City of Beverly Hills has been among a growing list of progressive cities throughout the nation which have adopted more stringent local smoking and tobacco control ordinances to protect public health. In 2008, the City Council adopted the “90210 Fresh Air Dining Ordinance” (BHMC Title 5, Chapter 4), which banned smoking in all outdoor dining areas. In 2010, the City Council adopted an ordinance to regulate tobacco retailers through an annual permitting process (BHMC Title 4, Chapter 2, Section 2101, *et seq*). On March 4, 2014, the City Council adopted an ordinance to regulate electronic cigarette retailers just as the City regulates cigarette retailers, and to regulate electronic cigarettes in a manner similar to tobacco.

Section 2. The City Council hereby renumbers Section 5-4-12 (“Penalties and Enforcement”) of Chapter 4 (“Smoking Regulations”) of Title 5 (“Public Health, Welfare, and Sanitation”) of the Beverly Hills Municipal Code to be Section 5-4-16 and amends it to read as follows:

“5-4-16: Penalties and Enforcement:

A. It is unlawful for any person who owns, manages, operates or otherwise controls the use of any premises subject to the regulation under this chapter to fail to comply with its provisions.

B. It is unlawful for any person to smoke in any area where smoking is prohibited by the provisions of this chapter.

C. The city prosecutor, any peace officer and any city code enforcement officer shall have the authority to enforce the provisions of this chapter.

D. Punishment under this Municipal Code shall not preclude punishment pursuant to any provision of law pertaining to smoking or littering. Nothing in this chapter precludes any person from seeking any other remedies, penalties or procedures provided by law. The remedies provided in this Municipal Code are cumulative and in addition to any other remedies available at law or in equity.”

Section 3. The City Council hereby adds new Section 5-4-12 (“Prohibition of Smoking in Outdoor Service Lines”) to Chapter 4 (“Smoking Regulations”) of Title 5 (“Public Health, Welfare, and Sanitation”) of the Beverly Hills Municipal Code to read as follows:

“5-4-12: Prohibition of Smoking in Outdoor Service Lines:

Smoking is prohibited in all outdoor service lines. For purposes of this section, an outdoor service line shall mean any outdoor area designed to be or regularly used by one or more persons to receive or wait to receive a service, enter a public place, or make a transaction whether or not such service or transaction includes the exchange of money including, for example, ATMs, bank teller windows, telephones, ticket lines, information kiosks and takeout counters.”

Section 4. The City Council hereby adds new Section 5-4-13 (“Prohibition of Smoking in Farmers Markets”) to Chapter 4 (“Smoking Regulations”) of Title 5 (“Public Health, Welfare, and Sanitation”) of the Beverly Hills Municipal Code to read as follows:

“5-4-13: Prohibition of Smoking in Farmers Markets:

Smoking is prohibited in all farmers markets. For purposes of this section, a farmers market shall mean any food market at which local farmers sell fruit and vegetables and other items such as meat, cheese, and bakery products directly to consumers, whether on public or private property.”

Section 5. The City Council hereby adds new Section 5-4-14 (“Prohibition of Smoking in Public and Private Plazas”) to Chapter 4 (“Smoking Regulations”) of Title 5 (“Public Health, Welfare, and Sanitation”) of the Beverly Hills Municipal Code to read as follows:

“5-4-14: Prohibition of Smoking in Public and Private Plazas:

Smoking is prohibited in all public and private plazas except in areas of private plazas that are specifically set aside for smoking and designated by posted signage, provided that such areas are not within twenty feet of building entrances or exits or designated pathways. For purposes of this section, a public and private plaza shall mean any publicly owned unenclosed place, other than a sidewalk, that is paved and permanently set aside for pedestrian use, including, for example, a courtyard, plaza or promenade.”

Section 6. The City Council hereby adds new Section 5-4-15 (“Prohibition of Smoking at Outdoor Public Gatherings”) of Chapter 4 (“Smoking Regulations”) of Title 5 (“Public Health, Welfare, and Sanitation”) of the Beverly Hills Municipal Code to read as follows:

“5-4-15: Prohibition of Smoking at Outdoor Public Gatherings:

Smoking is prohibited at all outdoor public gatherings, except in areas specifically set aside for smoking and designated by posted signage. For purposes of this section, an outdoor public gathering shall mean an unenclosed area where members of the general public are attending, viewing or participating in a group activity, such as a special event, parade or fair.”

Section 7. CEQA. The City Council hereby finds that it can be seen with certainty that there is no possibility the adoption of this Ordinance will have a significant adverse effect on the environment because the Ordinance only expands upon existing cigarette and electronic

cigarette use restrictions. It is therefore exempt from California Environmental Quality Act review pursuant to Title 14, Section 15061(b)(3) of the California Code of Regulations.

Section 8. Severability. If any section, subsection, subdivision, sentence, clause, phrase, or portion of this Ordinance or the application thereof to any person or place, is for any reason held to be invalid or unconstitutional by the final decision of any court of competent jurisdiction, the remainder of this Ordinance shall remain in full force and effect.

Section 9. Publication. The City Clerk shall cause this Ordinance to be published at least once in a newspaper of general circulation published and circulated in the City within fifteen (15) days after its passage in accordance with Section 36933 of the Government Code, shall certify to the adoption of this Ordinance and shall cause this Ordinance and the City Clerk's certification, together with proof of publication, to be entered in the Book of Ordinances of the Council of this City.

Section 10. Effective Date. This ordinance shall go into effect and be in full force and effect at 12:01 a.m. on June 1, 2014.

LILI BOSSE
Mayor of the City of
Beverly Hills, California

ATTEST:

BYRON POPE
City Clerk

(SEAL)

APPROVED AS TO FORM:



LAURENCE S. WIENER
City Attorney

APPROVED AS TO CONTENT:

JEFFREY C. KOLIN
City Manager