

**DATE:** May 20, 2008

**TO:** Mayor and City Council

**FROM:** City Manager

**SUBJECT:** An Ordinance Amending Chapter 5, Article 6 of the Hayward Municipal Code, Prohibiting the Use of Tobacco Products in or around Public Places in the City of Hayward

#### **RECOMMENDATION**

That Council approves and adopts the proposed amendments to the Smoking Pollution Control Ordinance in Chapter 5, Article 6 of the Hayward Municipal Code.

#### **SUMMARY**

The proposed amendments to the Smoking Pollution Control Ordinance address the public health, safety and welfare issues related to tobacco use and second-hand smoke. Recent reports and studies about the impacts of second-hand smoke, especially on children, confirm the importance of reducing exposure to second-hand smoke in protecting the health and welling being of the general public. The proposed Ordinance seeks to achieve this purpose by the following amendments to Chapter 5, Article 6 of the Hayward Municipal Code:

1. Prohibiting smoking in all facilities, areas, and vehicles owned, leased, operated, or controlled by the City of Hayward or the Hayward Redevelopment Agency;
2. Prohibiting smoking in public places and certain other areas, whether enclosed or unenclosed, including:
  - Public transit boarding and waiting areas;
  - Elevators and restrooms;
  - Service lines;
  - Retail stores;
  - Sites of public events;
  - Enclosed common areas of hotels and motels and 35% of rented rooms;
  - Enclosed and unenclosed areas of restaurants, dining areas and bars;
  - Any facility used primarily for exhibits and performances;

- Every room, chamber, and meeting place used for public assembly; and
  - All sports arenas, and recreational, park, and playground areas.
3. Establishing a reasonable smoking distance of at least 20 feet outside any enclosed public place where smoking is prohibited, that will encompass public sidewalks and streets, and include private residences used as child care or health care facilities;
  4. Requiring the posting of a “No Smoking” sign or symbol in every building or other place regulated by this Ordinance;
  5. Prohibiting distribution of free tobacco samples, and restricting tobacco vending machines; and
  6. Imposing administrative and civil enforcement and penalties for violations.

## **BACKGROUND**

Smoking is not a right protected by the United States Constitution. Specifically, smoking is neither a specially protected liberty nor a right to privacy under the “due process clause” of the Constitution. In addition, smokers are not a specially protected category under the “equal protection clause” of the Constitution. Consequently, the United States Constitution allows for the enactment of smoke-free laws that relate to the legitimate government goals of public health, safety, and welfare.

Since 1998, the State of California has continued to implement legislation that restricts smoking and exposure to second-hand smoke (SHS). These include no smoking in public school facilities and athletic events, in public playgrounds and tot lots, as well as day care centers in private residences. State action has also banned smoking in workplaces, in all restaurants and bars, and within 20 feet of any door, window, or air intake of any government building, including buildings owned, leased, or occupied by any government entity, including public universities. State legislation was recently passed to ban smoking in the presence of a minor (17 years or younger) while in a moving vehicle, and to treat it as a misdemeanor offense when cited with a larger offense.

Through a provision in California Government Code 7597, the State of California allows for local governments, like the City of Hayward, to adopt and enforce additional smoking and tobacco control ordinances, regulations, and policies that are more restrictive than the applicable standards required by the State of California. On that basis, in 1996, the City enacted the first Smoking Pollution Control Ordinance, found in Chapter 5, Article 6 of the Hayward Municipal Code (HMC), and now proposes to amend that section of the HMC.

## **DISCUSSION**

With this State legislative authority, a number of California cities have enacted local ordinances that limit smoking and restrict public exposure to second-hand smoke. These cities include

Belmont, Berkeley, Calabasas, Chico, Davis, Dublin, El Cajon, Fremont, Hayward, Livermore, Newark, Oakland, Pleasanton, San Francisco, San Jose, and San Ramon.

Belmont has banned smoking in parks and other public places, as well as inside apartments and condominiums. Calabasas has banned smoking in all indoor and outdoor public places, except for a handful of scattered, designated outdoor smoking areas. This is believed to be the strictest ban in the United States. El Cajon implemented a smoking ban on city streets, in outdoor patios in restaurants, and outside of the local shopping mall. Anyone caught smoking in public areas faces a fine of up to \$500. In Oakland, smoking is not permitted 25 feet from any building, window, opening or vent. In Santa Monica, smoking is banned within 20 feet of entrances, exits, or operable windows of a public building, and in local parks and parking lots. Santa Monica also banned smoking on local beaches, as did Monterey, San Diego County, and Orange County.

In addition, smoking restrictions have been implemented by both the Hayward Area Recreation and Park District (HARD), and the Hayward Unified School District (HUSD). HARD prohibits smoking and the disposal of smoking debris within 15 feet of any of its buildings, facilities, and trails or nature areas, and within 25 feet of any play structure. HUSD has a tobacco-free schools policy and prohibits the use of tobacco products at all times on district property and in district vehicles.

The rationale for the current proposal to amend Chapter 5, Article 6 of the Hayward Municipal Code (“Smoking Pollution Control”) is based on recent scientific findings about the impact of exposure to second-hand smoke, and verifications of the serious health risks associated with second-hand smoke exposure. The California Environmental Protection Agency has proposed that second-hand smoke be classified as a toxic air contaminant and known human carcinogen. This places second-hand smoke in the most dangerous category of toxic substances along with radon, benzene, and asbestos. In addition, environmental tobacco smoke experts at the University of California at Berkeley and the University of California at San Francisco agree that at least 20 feet from a doorway would be needed to provide protection from the carcinogenic particulate in second-hand smoke.

Concerns about adverse impact of smoke free laws on the customer base of restaurants and bars have not materialized. A review by the University of California, San Francisco of data provided by the California Board of Equalization concluded that there were no adverse effects on the restaurant and tourist industries because of public smoking limitations. Therefore, it is likely that reducing the amount of exposure to second-hand smoke with a required 20-foot buffer from entryways and building openings will also not discourage patronage of these venues.

Enforcement will initially address problem areas where second-hand smoke presents public health concerns.

## **FISCAL IMPACT**

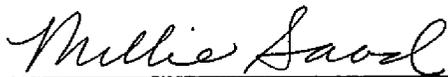
There will be an initial cost to the City for the creation of No Smoking signs that will be placed on publicly owned property. These costs may be offset by revenues from fines associated with enforcement through the proposed Administration Citation Ordinance. The number of citations

issued for violations is difficult to predict and entirely dependent on compliance by the businesses and the general public.

### **PUBLIC CONTACT NEXT STEPS**

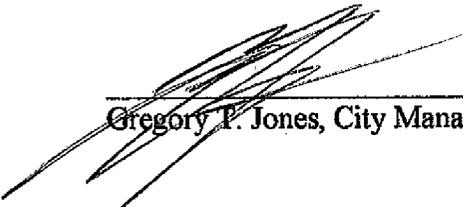
Once adopted by the City Council, the City Manager's Department will begin public awareness outreach to businesses and to the general public through the local media, the City website, and a variety of other approaches. The required No Smoking signage will also be undertaken for all City buildings, facilities, and park areas.

Prepared by:



Millie Saad, Assistant to the City Manager

Approved by:

  
\_\_\_\_\_  
Gregory P. Jones, City Manager

Attachment: Draft Ordinance

# DRAFT

ORDINANCE NO. \_\_\_\_\_

*mal*  
5/14/08

AN ORDINANCE AMENDING CHAPTER 5, ARTICLE 6 OF  
THE HAYWARD MUNICIPAL CODE, PROHIBITING THE  
USE OF TOBACCO PRODUCTS IN OR AROUND PUBLIC  
PLACES IN THE CITY OF HAYWARD

THE CITY COUNCIL OF THE CITY OF HAYWARD DOES ORDAIN AS FOLLOWS:

Section 1. Chapter 5, Article 6 of the Hayward Municipal Code, the Smoking Pollution Control Ordinance, is hereby amended, to read in full as follows:

ARTICLE 6

SMOKING POLLUTION CONTROL

SEC. 5-6.00 TITLE. This article shall be known as the 'Smoking Pollution Control Ordinance.'

SEC. 5-6.01 FINDINGS AND PURPOSE. The City Council of the City of Hayward hereby finds that:

- a. Numerous studies have found that tobacco smoke is a major contributor to indoor pollution;
- b. The U.S. Environmental Protection Agency has determined that second-hand smoke is a Class-A carcinogen for which there is no safe exposure level;
- c. Reliable studies have shown that breathing second hand smoke is a particular health hazard for certain population groups, including elderly people, individuals with cardiovascular disease, and individuals with impaired respiratory function, including asthmatics and those with obstructive airway disease;
- d. Health hazards induced by breathing second-hand smoke include lung cancer, respiratory infection, decreased exercise tolerance, decreased respiratory function, bronchoconstriction, and bronchospasm;
- e. Nonsmokers with allergies or respiratory diseases, and those who suffer other ill effects of breathing second-hand smoke may experience a loss of job productivity or may be forced to take periodic sick leave because of adverse reactions to same;

- f. The simple separation of smokers and nonsmokers within the same airspace may reduce, but does not eliminate, the exposure of nonsmokers to second-hand smoke;
- g. Numerous studies have shown that a majority of both nonsmokers and smokers desire to have restrictions on smoking in public places;
- h. Smoking is a documented cause of fires;
- i. Cigarette, cigar burns, and ash stains on merchandise and fixtures cause economic losses to businesses;
- j. The Surgeon General has determined that cigarettes and other forms of tobacco are as addictive as drugs such as heroin and cocaine;
- k. The free distribution of cigarettes encourages people to begin smoking, and tempts those who had to quit to begin smoking again;
- l. With certain exceptions, state law prohibits smoking inside an enclosed place of employment;
- m. State law prohibits public school students from smoking or using tobacco products while on campus, while attending school-sponsored activities, or while under the supervision of school district employees;
- n. State law prohibits smoking in playgrounds and tot lots and within 20 feet of the main entrances and exists of public buildings while expressly authorizing local communities to enact additional restrictions.

WHEREFORE, it is the intent of the City Council of the City of Hayward in enacting this ordinance to provide for the public health, safety, and welfare by discouraging the inherently dangerous behavior of tobacco use around non-tobacco users; by protecting children from exposure to smoking and tobacco while they play; by reducing the potential for children to associate smoking and tobacco with a healthy lifestyle; by protecting the public from smoking and tobacco-related litter and pollution; and by affirming and promoting the family atmosphere of the City's public places.

SEC. 5-6.02 DEFINITIONS. The following words and phrases, whenever used in this article, shall be construed as defined in this section:

- a. 'Business' means any sole proprietorship, partnership, joint venture, corporation, or other business entity formed for profit-making purposes, including retail establishments where goods or services are sold, as well as professional corporations and other entities where legal, medical, dental, engineering, architectural, or other professional services are delivered.

b. 'Dining area' means any area, both enclosed and unenclosed, available to or customarily used by the general public, that is designed, established, or regularly used for the consuming food or drink;

c. 'Enclosed' means closed in by a roof and walls on all sides with appropriate openings for ingress and egress.

d. 'Playground' means any park or recreational area designed in part to be used by children that has play or sports equipment installed or has been designated or landscaped for play or sports activities, or any similar facility located on public or private school grounds, or on City grounds.

e. 'Public Place' means any place to which the public is invited or in which the public is permitted, including, but not limited to, any rights-of-way, banks, educational facilities, health facilities, public transportation facilities, reception areas, retail food production and marketing establishments, retail service establishments, retail stores, theaters, and waiting rooms.

f. 'Reasonable distance' means any distance necessary to insure that occupants of a building are not exposed to second-hand smoke created by smokers outside of the building.

g. 'Recreational area' means any area, public or private, open to the public for recreational purposes regardless of any fee requirement, including, for example, parks, gardens, sporting facilities, and playgrounds.

h. 'Service line' means any place where one or more persons are waiting for or receiving service of any kind, whether or not such service includes the exchange of money, including but not limited to ATMs, bank teller windows, telephones, ticket lines, bus stops, and taxi stands.

i. 'Smoking' means inhaling, exhaling, burning, or carrying a lighted pipe, lighted cigar, or lighted cigarette of any kind, or the lighting of a pipe, cigar, or cigarette of any kind, including, but not limited to, tobacco, or any other weed, plant, or combustible substance, including medical marijuana.

j. 'Sports arena' means enclosed or outdoor sports pavilions, gymnasiums, health spas, boxing arenas, swimming pools, roller and ice rinks, bowling alleys, and other similar places where members of the public assemble to engage in physical exercise, participate in athletic competition, or witness sports events.

k. 'Tobacco Product' means any substance containing tobacco leaf, including but not limited to cigarettes, cigars, pipe tobacco, snuff, chewing tobacco, dipping tobacco, bidis (flavored cigarettes), or any other preparation of tobacco.

SEC. 5-6.02 APPLICATION TO CITY FACILITIES, AREAS, AND VEHICLES. Smoking shall be prohibited in all facilities, areas, and vehicles owned, leased, operated, or controlled by the City of Hayward or the Hayward Redevelopment Agency, and all such areas shall be subject to the provisions of this Article.

SEC. 5-6.03. PROHIBITION OF SMOKING IN PUBLIC PLACES, AND CERTAIN OTHER AREAS.

a. Smoking shall be prohibited in any and all public places within the City of Hayward, whether enclosed or unenclosed, including but not limited to the following:

1. Elevators and restrooms;
2. Buses, taxicabs, and other means of public transit offered within the City, and in ticket, boarding, and waiting areas of public transit depots, including bus shelters;
3. Service lines;
4. The sites of public events including, for example, sports events, entertainment, speaking performances, ceremonies, pageants, and fairs; provided however that this prohibition shall not prevent the establishment of a separate, designated smoking area set apart from the primary event area and no larger;
5. Retail stores, except in areas in the stores not open to the public;
6. Within enclosed common areas for hotels and motels, as well as 35 percent of private hotel and motel rooms rented to transients, as defined by Hayward Municipal Code, Chapter 8, Article 4.
7. Restaurants, dining areas, and bars, whether enclosed or unenclosed;
8. Public areas of libraries and museums when open to the public;
9. Any facility used primarily for exhibiting any motion picture, stage drama, lecture, music recital, or other similar performance, except when smoking is part of any such production by the performers;
10. Every room, chamber, and place of meeting or public assembly, including school buildings under the control of any board, council, commission, committee, or agencies of the City or any political subdivision of the State during such time as a public meeting is in progress, to the extent such place is subject to the jurisdiction of the City.
11. Sports arenas, recreational areas, parks, playgrounds, and greenways.

b. Notwithstanding any other provision of this Article, any person, business, nonprofit entity, owner, operator, manager, or employer who controls any premises described in this section may declare that entire establishment as a non-smoking establishment.

c. No person shall dispose of smoking waste within the boundaries of an area in which smoking is prohibited, including inside the perimeter of any Reasonable Distance required by this Article.

**SEC. 5-6.04. REASONABLE SMOKING DISTANCE REQUIRED-20 FEET.**

a Smoking shall occur at a reasonable distance of at least 20 feet outside any enclosed area where smoking is prohibited to ensure that smoke does not enter the area through entrances, windows, ventilation systems, or any other means to ensure that those indoors and those entering or leaving the building are not involuntarily exposed to secondhand tobacco smoke.

b The prohibition in subsection (a) shall not apply to areas of private property that are not part of public place, playground, recreational area, or service area.

**SEC. 5-6.05. AREAS NOT SUBJECT TO SMOKING REGULATIONS.**

a Private residences, except when used as a child care or a health care facility.

b Hotel and motel rooms rented to guests; provided, however that each hotel and motel designates not less than 35 percent of their guest rooms as non-smoking rooms and removes ashtrays from these rooms. Permanent “no smoking” signage shall be posted in nonsmoking rooms.

**SEC. 5-6.06. POSTING OF SIGNS.**

a “Smoke Free” or “No Smoking” signs or 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) shall be clearly, sufficiently, and conspicuously posted in every building or other place where smoking is regulated by this section, by the owner, operator, manager, or other person having control of such building or other place.

1. Every theater owner, manager, or operator shall conspicuously post signs in the lobby stating that smoking is prohibited within the theater or auditorium.

2. Every restaurant shall have posted at every entrance a conspicuous sign clearly stating that smoking is prohibited.

**SEC. 5-6.07. TOBACCO SAMPLES PROHIBITED.** No person shall knowingly distribute, furnish without charge, or cause to be furnished without charge for a commercial purpose, cigarettes or other tobacco products, or coupons for cigarettes or other tobacco products, at any event open to the public or in any public place, including but not limited to any public way, mall or shopping center, park, playground, or any property owned by the City or any other public agency, except in a retail tobacco store.

**“SEC. 5-6.08. TOBACCO VENDING MACHINES RESTRICTED.** No cigarette or other tobacco product may be sold, offered for sale, or distributed by or from a vending machine or other applicable or similar device designed or used for vending purposes, except in a bar.

**“SEC. 5-6.09. ENFORCEMENT OFFICER.** Enforcement shall be implemented by the City Manager or designee.

**“SEC. 5.6.10. CIVIL AND ADMINISTRATIVE ENFORCEMENT AND PENALTIES FOR VIOLATIONS.**

a. It shall be unlawful for any person to smoke in any area restricted by the provisions of this section.

b. It shall be unlawful for any person who owns, manages, operates, or otherwise controls any use of any premises subject to any regulation under this section to fail to comply with its provisions.

c. Violations of this Article are subject to civil and administrative enforcement, punishable by a civil fine. The citation shall also give notice of the right to request an administrative hearing to challenge the validity of the citation and the time for requesting that hearing as provided for in Chapter 1, Article 7 of the Hayward Municipal Code.

d. Any person who smokes in an area where smoking is prohibited is guilty of trespass and, if the area is accessible by the public during the normal course of operations, such smoking constitutes a public nuisance.

e. Causing, permitting, aiding, abetting, or concealing a violation of any provision of this ordinance shall also constitute a violation.

f. Upon a proper showing and hearing before the City Council that determines that a business establishment has violated the provisions contained in this section more than three times in any calendar year, the City Council has the discretion to revoke the business license of the establishment.

g. The remedies provided by this Article are cumulative and in addition to any other remedy available at law or in equity.

SEC. 5-6.11. OTHER APPLICABLE LAWS. This Article shall not be interpreted or construed to permit smoking where it is otherwise restricted by any other applicable law or regulation.

Section 2. Severance. Should any part of this ordinance be declared by a final decision by a court or tribunal of competent jurisdiction to be unconstitutional, invalid, or beyond the authority of the City, such decision shall not affect the validity of the remainder of this ordinance, which shall continue in full force and effect, provided that the remainder of the ordinance, absent the unexcised portion, can be reasonably interpreted to give effect to the intentions of the City Council.

Section 3. In accordance with the provisions of Section 620 of the City Charter, this ordinance shall become effective 30 days from and after the date of its adoption.

INTRODUCED at a regular meeting of the City Council of the City of Hayward, held the \_\_\_\_ day of \_\_\_\_\_, 2008, by Council Member \_\_\_\_\_.

ADOPTED at a regular meeting of the City Council of the City of Hayward held the \_\_\_\_ day of \_\_\_\_\_, 2008, by the following votes of members of said City Council.

AYES:

NOES:

ABSTAIN:

ABSENT:

APPROVED: \_\_\_\_\_  
Mayor of the City of Hayward

DATE: \_\_\_\_\_

ATTEST: \_\_\_\_\_  
City Clerk of the City of Hayward

APPROVED AS TO FORM:

\_\_\_\_\_  
City Attorney of the City of Hayward