



**MINUTES OF THE CITY COUNCIL MEETING OF
THE CITY OF HAYWARD
City Council Chambers
777 B Street, Hayward, CA 94541
Tuesday, October 19, 2010, 7:00 p.m.**

MEETING

The meeting of the City Council was called to order by Mayor Sweeney at 7:00 p.m., followed by the Pledge of Allegiance led by Council Member Peixoto.

ROLL CALL

Present: COUNCIL MEMBERS Zermeño, Halliday, Peixoto, Salinas, Henson
MAYOR Sweeney
Absent: COUNCIL MEMBER Quirk

PUBLIC COMMENTS

Mr. Clarence R. Fischer, Cherry Way resident, indicated that he received an Emergency Services Facilities Tax invoice and refund check for the property where he used to reside. Mr. Fisher requested help in resolving the matter so that the current property owner is billed correctly.

Mr. Mike Francels, Palo Alto resident, spoke about the Statewide Proposition 19 – Marijuana Legalization Initiative on the November 2, 2010 ballot. Mr. Francels mentioned that passage of the proposition would likely increase problems that could lead to the use of stronger forms of drug use.

Ms. Wynn Greich, Industrial Parkway SW resident, mentioned the book entitled, The Case Against Fluoride, written by Paul Connett, James Beck, and M.S. Micklem, and noted that hazardous waste ends up in drinking water. Ms. Greich referred to the presentation at a prior Council meeting and disputed the argument that no pharmaceuticals were found in San Francisco's Hetch-Hetchy water. She shared several newspaper articles related to pharmaceuticals found in water.

Ms. Nathaly Arriola, Thomas Avenue resident and Mt. Eden High School graduate, noted that she was accepted to the Hispanic Congressional Caucus Institute in Washington D.C. Ms. Arriola spoke about having great mentors while growing up in Hayward and thanked Hayward schools for the education that prepared her to go on to higher education. She mentioned having visited the Hayward Labor Center and was pleased to see the work being done there.

Mr. Otis Sanders, Nu Revelations business owner on Foothill Blvd, mentioned he recently opened his business and shared how welcoming and helpful his fellow Hayward business owners and City staff have been. Mr. Sanders invited everyone to a book signing to be held at Nu Revelations on Saturday, October 23, 2010, from noon until 5:00 p.m., and a car show on October 31, 2010, sponsored by the Cobblers Store, from 10:00 a.m. until 5:00 p.m.

CONSENT

1. Adoption of Ordinance Amending Chapter 5, by Adding Article 11 of the Hayward Municipal Code Relating to Sanitation and Health to Prohibit the Use of Polystyrene Foam Disposable Food Service Ware and to Require Recyclable or Compostable Food Service Ware Within City Limits (*Introduced 10/12/10*)

Staff report submitted by City Clerk Lens, dated October 19, 2010, was filed.

It was moved by Council Member Henson, seconded by Council Member Halliday, and carried unanimously with Council Member Quirk absent, to adopt the following:

Ordinance 10-12, "Ordinance Amending Chapter 5, By Adding Article 11 of the Hayward Municipal Code Relating to Sanitation and Health to Prohibit the Use of Polystyrene Foam Disposable Food Service Ware and to Require Recyclable or Compostable Food Service Ware Within City Limits"

2. Install Water Line at Golf Course Access Road Project: Approval of Plans and Specifications and Call for Bids

Staff report submitted by Deputy Director of Public Works Ameri, dated October 19, 2010, was filed.

It was moved by Council Member Henson, seconded by Council Member Halliday, and carried unanimously with Council Member Quirk absent, to adopt the following:

Resolution 10-158, "Resolution Approving Plans and Specifications for Install Water Line at Golf Course Access Road Project, Project No. 7139, and Call for Bids"

3. Harassment and Retaliation Policy

Staff report submitted by City Attorney Lawson, dated October 19, 2010, was filed.

It was moved by Council Member Henson, seconded by Council Member Halliday, and carried unanimously with Council Member Quirk absent, to adopt the following:

Resolution 10-159, "Resolution Adopting a Policy Against Harassment and Retaliation for Elected and Appointed City of Hayward Officials"



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LEGISLATIVE BUSINESS

4. Revisions to Smoking Pollution Control Ordinance

Staff report submitted by Development Services Director Rizk, dated October 19, 2010, was filed.

City Manager David provided a synopsis of the report.

City Manager David confirmed for Council Member Peixoto that the current smoking ordinance applies to the entire City and is not more stringent in the Downtown area. In response to Council Member Peixoto's inquiry, Ms. David noted that cars are considered private property and therefore people can smoke in their cars even if the vehicles are located in public parking lots.

In response to Mr. Peixoto's inquiry as to what the administrative impact would be if Council approved a limited expansion of opportunities for smoking during the next two years, Ms. David noted that the administrative impact would be complaint driven. Lt. Lindblom indicated that the impact on police enforcement would be similar to the yearly facility examinations in place for massage businesses. It was noted that if there is an economic impact, the Police Department would need to do cost recovery.

City Manager David clarified for Council Member Zermefio that a smoking permit for a golf course is a different situation as it is a completely open air venue.

Council Member Henson expressed concern that the "public place" language in Section 5-6.05 – Reasonable Smoking Distance Required – 20 Feet, of the Ordinance, is somewhat confusing as it relates to private places that are considered public areas. City Manager David noted that the confusion is due to the lack of clarity that "public right-of-way" as a definition of "public place" also means streets and sidewalks. In response to Mr. Henson's inquiry if the proposed changes intersect with State law especially in regards to children, City Attorney Lawson responded that the State law generally applies to work places and childcare facilities and added that the City's Ordinance is consistent with State law. In response to Mr. Henson's inquiry, Ms. David said that only one business has come forward stating economic difficulty. She added that under the current Ordinance, the Cigar Socials event would not be allowed.

Council Member Salinas noted that changes to the Smoking Ordinance relate to health issues surrounding the dangers of smoking and second-hand smoke, and the slow economy and the need to support businesses by giving them the flexibility to generate revenue to remain viable. He expressed concern about last year's Alameda County Health Department report that cited Hayward as one of the four unhealthiest areas in the County and cited the major health risk factors. Mr. Salinas added that Hayward is a city of kids with one-third of the population under the age of 25,

and 24% of the population under the age of 18. He noted that the City is promoting a healthy lifestyle for children and their families and felt that the proposed Ordinance was fair.

City Manager David confirmed for Council Member Halliday that the Hookah Smoke Bars are considered private members-only clubs. In response to Ms. Halliday's question if church places are subject to the City's Smoking Ordinance, City Attorney Lawson explained that the definition of a public place is inclusive of buildings where people are invited in and noted that a church would be considered a public place. Ms. David clarified for Ms. Halliday that the current ordinance prohibits outside smoking areas and that the alternate proposal would allow for designated smoking areas.

Mayor Sweeney opened the public hearing at 7:43 p.m.

Mr. Jesse Garrett, Community Prevention of Alcohol Related Problems (COMMPRE) Prevention Specialist and representing the Hayward Coalition for Healthy Youth, noted that he submitted a letter to Council and the City Clerk. Mr. Garrett noted that the Coalition was disappointed that the proposed changes to the current Ordinance were being considered at the request of a single business. Mr. Garrett disagreed with Bijou's argument of lost revenue related to Cigar Socials. He noted opposition to the alternative amendments to the Ordinance and added that the American Lung Association would clarify the "public area" language to include doorways, streets and sidewalks. Lastly, Mr. Garrett noted that the Coalition is in favor of maintaining the Ordinance as written and upholding the recommendation by the Police Department to remove the 20 feet distance requirement.

Mr. Chuck Horner, Lyford Street resident, spoke in favor of the current Ordinance. Mr. Horner asked Council to protect the community and strengthen the Ordinance. He shared that tobacco is a difficult addiction to overcome. He said he does not want to be exposed to this health problem and did not want to see more strain placed on the Police Department. He asked Council to follow other cities that have taken steps to strengthen their ordinances. Mr. Horner noted that if smoking was allowed, there will be an increase in insurance premiums. He was not in favor of making exceptions and compromises.

Ms. Barbara Quintero, Orchard Avenue resident, favored maintaining the Ordinance as written or strengthening it. Ms. Quintero mentioned that she is a smoker and does not expect cities to change their ordinances.

Ms. Sara Lamnin, Sebastopol Lane resident, representing Hayward Community Action Network (CAN), noted that 75% of the downtown population smokes and added that CAN has helped enforce the current Smoking Ordinance. Ms. Lamnin encouraged Council to better promote when items are going to be on the agenda and noted that CAN could be used as a resource.

Mr. Froilan Corona, Dodge Avenue resident and Bijou patron, supported amending the Ordinance to allow for a designated smoking area. Mr. Corona favored having a separate area where adults can smoke and not bother other patrons.



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Mr. Mike Martinez, City Walk Place resident and Bijou patron, spoke about his pleasant experience at Bijou, which gave him a good perception of Hayward. He noted that Bijou is one of the finest run businesses in the downtown area. He commented that Bijou should not be criticized for bringing this item forward and noted how the current Ordinance is economically impacting Bijou. Mr. Martinez noted that the proposed area is away from the public and this is an exception that will help a downtown business and also the entire city.

Mr. Tim McDaniel, Kelly Street resident, Bijou patron and non-smoker, noted the request for an exception to the current Ordinance should be granted. He commented that the way Bijou had the smoking area set-up did not expose others to second-hand smoke. Mr. McDaniel said that Bijou is an upscale business that he likes to patronize.

Ms. Tina Naicker, Revere Avenue resident, Bijou patron and a social smoker, noted that she is worried about going to Bijou with the current Ordinance in place because she is afraid she may get a ticket if she smokes. She said that this fear of being prosecuted is shared with other people and that keeps them from coming to downtown and that leads to the decline of the business. She agreed with the proposed amendments and said that changes will not undermine the overall Ordinance as it allows for consistent enforcement in designated areas. She said the proposed amendments will meet the interests of both businesses and the public.

Mr. Phillip Chan, co-owner of Bijou Restaurant, noted that the current Smoking Ordinance was adopted due to problems that existed at that time. He said the proposed amendment would allow Bijou to provide a designated smoking area away from the other patrons and where minors are not allowed. He stated that if any complaints arise regarding the smoking area, then he will shut it down. He thanked Council for considering the item and to Bijou's patrons for expressing their support.

Council Member Peixoto acknowledged meeting Mr. Phillip Chan and his representative, Mr. Jesús Armas and visiting the area designated for smoking. In discussing the revenue loss with Mr. Chan, Mr. Peixoto inquired how Bijou was able to ascertain that the loss was due to the Ordinance and not to the economic downturn. Mr. Chan responded that friends, family and former patrons informed him that they no longer came to Hayward because of the Ordinance and the fear of being cited. Mr. Peixoto noted that the business next door, Buffalo Bills, does not seem to be struggling economically. Mr. Chan noted that Bijou is only open for dinner. Mr. Chan noted that the language in the Ordinance is confusing as it relates to the 20 foot distance requirement. He stated that he and his partner, Mr. Young, are amenable to following regulations. He asked Council to look at the proposed amendment as a way to help local businesses as well as letting adults make adult decisions.

Council Member Henson asked Mr. Chan how the loss of revenue was attributed in part to the cessation of the Cigar Social. Mr. Chan explained that the Cigar Social was an upscale event, held once a week, and involved sampling cigars and pairing them with signature alcohol. He commented

that these events generated a significant amount of revenue until the weather changed. In response to Mr. Henson's inquiry regarding what Bijou will do if the current Ordinance remains in place, Mr. Chan said that Bijou would need to find other creative ways of generating revenue.

Council Member Halliday, also a Bijou patron, noted that she met with Mr. Young and visited the proposed smoking area. In response to Ms. Halliday's question regarding the type of ventilation system to meet the criteria for designated smoking areas, Mr. Chan mentioned the plan to use commercial fans and perhaps utilizing air curtains, which are used in restaurants and casinos to keep out the smoke.

Council Member Salinas acknowledged Bijou's argument regarding the loss of revenue because of the Smoking Ordinance and asked if Mr. Chan knew of any examples of successful business models in cities with smoking ordinances that were able to attract clientele by promoting themselves as healthy businesses with a smoke-free environment. Mr. Chan was not aware of any examples.

Ms. Serena Chen, Policy Director for the American Lung Association, expressed she was pleased when Hayward passed a comprehensive Smoking Ordinance and noted that since then a "report card" was created for cities in California. Ms. Chen referred to a chart, provided for the record, and mentioned that Hayward has an overall grade of C based on smoke-free outdoor air, smoke-free housing, and the sale of tobacco regulations. Ms. Chen pointed out that if the proposed amendment was approved, Hayward's grade would drop to a D. She added that the standard in most Alameda County cities is to ban outdoor smoking in restaurants, bars and coffee shops. She informed Council that second-hand smoke outdoors has just as much toxicity when in close proximity as indoors. She appreciated Council Member Salinas' familiarity with the report "Death by Unnatural Causes", and added that Hayward has the second highest asthma hospitalization rate in Alameda County, which is over double the hospitalization asthma rate for the State.

Ms. Julie Waters, representing Project RIDE, mentioned working with the Asian import car scene to promote smoke-free events and monitoring how the tobacco industry targets these events. Ms. Waters spoke about the challenge of going smoke-free at the Alameda County Fair Grounds. She mentioned that expensive car events and race track venues tend to attract cigar smokers and added that cigar companies target young people. Ms. Waters spoke about protecting the City's population under the age of 25 from the cigar industry. Ms. Walters thanked Council for taking on this issue.

Ms. Janice Louie, representing the Alameda County Public Health Department, provided a flyer for the record and emphasized that asthma is the highest leading cause of death. Ms. Louie pointed out that health is also an economic issue for the community. She shared that New York restaurants reported an increase in business when a smoking ban was imposed.

Ms. Jessica Lehman, Community Resources for Independent Living (CRIL) representative, mentioned that smoking affects people with disabilities as they are often subjected to environments where they are more likely to be exposed to smoke, such as public transportation. Ms. Lehman noted that making an exception for one business is not the answer and added that over 80 percent of people in Hayward do not smoke. She shared that she will not patronize a business where there is



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smoking allowed and did not agree that this should be encouraged in the community. She felt that this was a class issue. Ms. Lehman stated CRIL's support for maintaining the current Ordinance.

Ms. Dolores Tejada, CRIL representative, submitted a handout for the record and noted that when smoking is allowed in outdoor patios at restaurants there is no safe environment. Ms. Tejada mentioned that if there are multiple smokers, then the smoke can travel even further and can affect patrons at next door businesses. Ms. Tejada noted that no ventilation exists that can protect persons from second-hand smoke. Ms. Tejada supported strengthening the Ordinance and protecting the health of Hayward residents.

Ms. Linda Pratt, COMMPRE representative, expressed opposition to the alternative amendments to the Ordinance as this would constitute going backwards in terms of protecting the health of the community and the environment, but was in favor of removing Section 5-6.05. Ms. Pratt stated the COMMPRE did not agree with the premise that the Ordinance had caused financial loss. She raised concerns related to the definition of the term "unenclosed," the policy surrounding alcohol, the lack of language for minors, the reference to neighbors, and the issue of enforcement. Ms. Pratt offered that there are agencies available for technical assistance for the Council.

Mr. Doug Ligibel, Grand Terrace resident, Keep Hayward Clean and Green Task Force volunteer, noted he is a Bijou patron but also asthmatic and would not be able to frequent the restaurant. Mr. Ligibel also questioned the effect that this would pose to the Police Department. He noted that there are market strategies to attract clientele. Mr. Ligibel shared personal experiences and stated that second-hand smoke is a serious problem and difficult to control.

Mr. Dan Henriques, currently homeless, noted that smoking is known to endanger and kill people. Mr. Henriques said that people who smoke are suicidal.

Mayor Sweeney closed the public hearing at 8:48 p.m.

Discussion ensued regarding the staff's recommendation to remove section 5-6.05, related to the 20 feet distance and the amendment to the "rights-of-way" language. City Attorney Lawson explained that Council could introduce an amendment to Section 5-6.02(e) – which defines "public place" by adding the words "sidewalks and streets," after the phrase "rights-of-way." He added that if Council was amenable, the amendment could be introduced and come back in the form of an adoption at a subsequent meeting after being properly noticed by the City Clerk three days prior to adoption.

Mayor Sweeney made the motion to introduce an ordinance that would remove Section 5-6.05-Reasonable Smoking Distance Required – 20 Feet, and amend Section 5-6.02(e) by adding the words "sidewalks and streets" to the definition of "public place" after "rights-of-way." Council Member Henson seconded the motion.

Mayor Sweeney acknowledged the hard work of Mr. Chan and Mr. Young to run a successful business. Mr. Sweeney pointed out, as expressed by Council Member Salinas and other speakers, that this is a public health issue and that there is scientific evidence that smoking kills. Mayor Sweeney noted that Hayward has lost business and customers in the downtown area due to smoking. He commented on having received complaints about the enforcement of the Ordinance. He noted that the public policy goal for smoking is effective and straightforward because it prohibits smoking in public places and in areas that are open to the public. Mayor Sweeney added that the City needs to protect the progress that has been made and to continue to seek other ways to improve the health and safety of the residents.

Council Member Henson concurred with Mayor Sweeney's comments and commented that he wants Bijou to be successful and for the owners to seek alternative methods to generate revenue. Mr. Henson suggested that Mr. Chan meet with Economic Development Manager Brooks and his team. He spoke about the hard work done to implement the Ordinance and felt the City is succeeding in its efforts. Mr. Henson said that there are issues with smoking indoors that could be strengthened. He concurred with Council Member Salinas that this is a public health issue and noted the City's asthma rates are high.

In response to Council Member Zermeño's inquiry about complaints about Southland restaurant establishments and employees smoking in the back of such establishments, Lt. Lindblom said the Police Department receives complaints about smoking mainly in the downtown area, but not in the Southland area. Mr. Zermeño commented that at a prior meeting Council passed a ban on Styrofoam that could have been perceived as anti-business and felt the action on this item could also be perceived in the same light. Mr. Zermeño pointed out that other businesses may come forward requesting smoking areas and he did not see the proposed amendment as weakening the Ordinance, but rather as an adjustment during these difficult economic times. Mr. Zermeño was inclined to support the motion, but was concerned that it would be perceived as anti-business.

Council Member Salinas mentioned he is a Bijou patron and acknowledged the hard work of Mr. Chan and Mr. Young to accommodate their patrons. Mr. Salinas believed that there are effective business strategies that promote revenue and mentioned Buon Appetito as an example of a successful business. He shared he contacted a restaurant and asked if the Ordinance would undermine the business and was told that patrons did not seem to support outdoor smoking. Mr. Salinas believes that there are models that businesses can employ to help generate more business and mentioned that Economic Development Manager Brooks could help facilitate business strategies. He also suggested that the Hayward Chamber of Commerce could help in this regard.

Council Member Peixoto expressed sharing the same concerns as Council Member Zermeño and that was why he visited Bijou Restaurant. Mr. Peixoto appreciated the fact that Bijou is an upscale restaurant, but could not concur with the argument that the drop in revenue was related to the Ordinance. He pointed out that the economy is slow in recovering and that Bijou serves a narrow customer base. He noted that during difficult economic times the public will seek more affordable options and suggested that Bijou's owners need to address this factor. Mr. Peixoto supported the motion with the proposed amendments.



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Council Member Halliday appreciated the discussion and the community input. Ms. Halliday noted that the City has made considerable strides in the downtown area in the last couple of years, which could be attributed to the Smoking Ordinance. Ms. Halliday shared the complaints she has received in regards to the vacant storefronts and noted that the City needs to find a new business model and Economic Development Manager Brooks and the new Council Economic Development Committee could help facilitate this. Ms. Halliday commented that Bijou is a good establishment and hoped that it will be able to survive and thrive. Ms. Halliday supported the motion.

It was moved by Mayor Sweeney, seconded by Council Member Henson, and carried unanimously with Council Member Quirk absent, to adopt the following:

Introduction Ordinance 10-__, "Ordinance Amending Section 5-6.02(e) and Deleting Section 5-6.05 of Chapter 5, Article 6 of the Hayward Municipal Code Regarding the Use of Tobacco Products In or Around Public Places in the City of Hayward"

COUNCIL REPORTS, REFERRALS, AND FUTURE AGENDA ITEMS

Council Member Peixoto invited everyone to attend the Matt Jimenez Golf Tournament at TPC Stonebrae on Monday, October 25, 2010.

Council Member Zermefio encouraged all to eat in downtown Hayward.

Council Member Salinas congratulated Nathaly Arriola for being accepted at the Hispanic Congressional Caucus Institute in Washington D.C.

Mayor Sweeney announced the Keep Hayward Clean and Green Task Force Clean-Up Event on Saturday, October 23, 2010, at Glassbrook Elementary School at 8:30 a.m.

ADJOURNMENT

Mayor Sweeney adjourned the meeting at 9:14 p.m.

APPROVED:

Michael Sweeney, Mayor, City of Hayward

ATTEST:

Miriam Lens, City Clerk, City of Hayward

DRAFT