

City Council Meeting: July 25, 2006

Agenda Item:8-A

To: Mayor and City Council

From: Marsha Jones Moutrie, City Attorney

Subject: Council Request That Staff Review California Air Resources Board Report On Second-Hand Smoke and Recent Legislation In Other Locations, and Summarize Related Measures For Council To Consider

Recommended Action

Staff recommends that Council direct the City Attorney's Office to prepare an ordinance providing the public greater protection from second-hand smoke, also known as environmental tobacco smoke ("ETS") in the following locations: outdoor dining areas; outdoor service areas; areas within 20 feet of entrances or windows to buildings open to the public; the Third Street Promenade; and the Farmers Markets.

Executive Summary

On February 14, 2006 Council directed Staff to review the recent report of the California Air Resources Board classifying second-hand smoke as a toxic air contaminant; review recent legislation in other locations; and suggest measures that Council might take in the area of second-hand smoke regulation.

The Board's report provides the most authoritative finding to date of the health dangers of ETS in California. Meanwhile, many cities throughout the state have already acted to

curb ETS in various locations where it affects non-smokers. Based on a review of other ordinances, Staff has identified three frequently regulated areas for Council to consider regulating: outdoor dining areas, outdoor “service” areas, and a 20-foot radius from entrances to non-residential buildings open to the public. In addition, Staff recommends including smoking prohibitions for the Third Street Promenade and the Farmers Markets.

Discussion

The CARB Report

On January 25, 2006 the Air Resources Board officially identified second-hand smoke, or ETS, as a “toxic air contaminant” pursuant to Health and Safety Code Section 39660.

This action culminated a process of several years during which the Air Resources Board staff developed a report determining the public’s potential exposure to ETS, while the Office of Environmental Health Hazard Assessment determines if exposure to the substance poses a potential health risk. Both agencies then prepared draft reports which were released for public review and comment. The revised reports were submitted to a scientific review panel, an independent panel of nine scientific experts who reviewed the report for scientific accuracy. The panel approved the report and prepared separate findings which were submitted along with the staff report to the Air Resources Board for consideration at a public hearing. The Board then made its final determination that ETS be classified as a “toxic air contaminant.”

The panel’s testing of ETS included outdoor locations throughout the state. Among its

findings was that outdoor nicotine (a marker for ETS) concentrations in some outdoor locations such as outside office buildings, schools, businesses, airports and amusement parks was comparable to those found inside smokers' homes.

The most notable new health finding to come from the scientific studies underlying the Board's report was that ETS exposure increases breast cancer in younger, non-smoking, pre-menopausal women. ETS had already been linked to adult incidences of lung and nasal sinus cancer, heart disease, eye and nasal irritation, and asthma.

Among other facts, the Board's report also noted the following health statistics resulting from second-hand smoke exposure each year in California:

- Over 400 additional lung cancer deaths
- Over 3,600 cardiac deaths
- About 31,000 episodes of children's asthma
- About 21 cases of SIDS
- About 1,600 cases of low birth weight in newborns
- Over 4,700 cases of pre-term delivery

Now that ETS has been identified as a toxic air contaminant, the Board's next step is to prepare a risk reduction report on potential actions to reduce ETS exposure in California in consultation with local agencies, affected industry, and the public. There is a three-year time frame for preparation of that report.

Implications of the CARB Report

The Air Resources Board's Report is the most significant governmental finding to date

about the health dangers of second-hand smoke in California. It is also the first to focus primarily on outdoor second-hand smoke.

In 1992 the U.S. Environmental Protection Agency released a landmark report on ETS. The report found that ETS causes 3,000 deaths a year and classified it as a Class A carcinogen, the most dangerous class of carcinogen. Numerous government studies since 1992 have established that ETS is not only a carcinogen but also causes heart disease and numerous other serious health problems among nonsmokers, especially children, and kills thousands of people each year.

The 2006 Report marks the first time that the state of California has classified ETS as a toxic air contaminant, which is defined as an “air pollutant which may cause or contribute to an increase in mortality or an increase in serious illness, or which may pose a present or potential hazard to human health.” (Health & Safety Code §39655.) Other substances that received the designation include asbestos, diesel exhaust, benzene, lead, and trichloroethylene.

Other Scientific Studies Released Since Council’s Last Action

Stanford University Outdoor ETS Pilot Study (2004): This study found that ETS concentrations in outdoor patio areas can equal the levels found indoors. Many factors affected the outdoor ETS levels, especially distance from the source of smoke.

International Agency for Research on Cancer of the World Health Organization

(2004): A scientific working group of 29 experts from 12 countries reviewed all significant published evidence related to tobacco smoking and cancer, both active and involuntary and officially classified ETS as carcinogenic to humans.

Study published in the British Medical Journal (2004): This study, conducted over twenty years, found that exposure to secondhand smoke is even more dangerous than previously thought and increases the risk of heart disease among non-smokers by as much as 60 percent. This study is the first to show a direct physical link between secondhand smoke exposure and an increased risk of heart disease.

Legislation In Other Locations

Current California state law does not regulate outdoor ETS. However, an increasing number of California cities are regulating outdoor ETS, and their restrictions have been broadened in recent years, even before the release of the Air Resources Board's final designation. Santa Monica most recently has prohibited smoking in public parks (2003) and at its beaches, Pier, and public waiting areas (2004).

The following is a summary of other local legislation that goes beyond Santa Monica's current regulation of ETS. The chart attached hereto as Appendix A summarizes the relevant city laws.

1. Outdoor dining areas

When Staff last reported to Council in 2004, seven California cities prohibited smoking at outdoor dining areas (restaurant patios) in whole or in part. Currently that list of cities is up to at least twenty-four, including Long Beach, Berkeley, Davis, Laguna Hills, Los Gatos, Palo Alto, Santa Barbara, Arcata and Calabasas. Of the twenty-four cities, thirteen have complete bans while five have bans that cover typically 75 percent of outdoor dining areas. Smoking is prohibited at outdoor dining areas at the Sacramento Downtown Mall. In addition, many other jurisdictions nationwide, including the state of Washington and New York City, have completely or partially banned smoking at outdoor dining areas.

A 2001 Statewide Field Institute Poll revealed that 74 percent of all Californians supported smoke-free outdoor dining areas. More recently, a local survey found that 85 percent of adults in Los Angeles County do not smoke and prefer dining outdoors at their favorite restaurant without subjecting themselves and their families to drifting secondhand smoke. According to a recent Los Angeles County Health Survey (2005), 69 percent of Los Angeles County adults agree there should more restrictions on smoking in outdoor public places, including outdoor dining areas.

Locally at least seventeen restaurants participate in Fresh Air Dining program (www.freshairdining.com) and voluntarily prohibit outdoor smoking at their dining areas.

2. Outdoor service areas

Outdoor waiting areas or “service areas” are places that people wait in a fixed

location for a service. These include bus stops, ATM lines, and movie theater lines. In 2004 Council prohibited smoking at outdoor service areas in Santa Monica but only where the service in question is provided by the government (i.e., primarily bus stops). Currently there are nine California cities that prohibit smoking at all outdoor service areas including private locations. These cities are Davis, Laguna Hills, Santa Cruz, Santa Barbara, Arcata, Buellton, Carpinteria, Dublin, and Calabasas.

3. Adjacent to buildings open to the public

The fastest-growing area of local outdoor ETS regulation is against smoking in locations that are adjacent to businesses and other indoor locations where smoking is already prohibited. Los Angeles County officials report that they have received many complaints from individuals about smoking adjacent to building entrances. In 2003 the California Legislature banned outdoor smoking within 20 feet of doors and windows to government buildings (Govt. Code §7597) but expressly left open the possibility of more stringent local regulation. In 2004 the Council clarified and extended slightly the state law rule for government buildings in Santa Monica.

As of 2004, when Council last reviewed the issue, two other cities in California (Berkeley and Davis) had applied the 20 foot smoke-free zone to include non-governmental buildings as well. In the past less than two years, at least seven additional cities have prohibited smoking within specified distances (mostly 20 feet) of “public buildings,” typically defined as any place open to the public. These are Stockton, Thousand Oaks, Calabasas, Palo Alto, San Ramon, Buellton, and Dublin. The laws vary. Some define the

radius to include 20 feet only from actual entrances, exits or windows; while others include any portion of the building. In addition, the state of Washington recently prohibited smoking within 25 feet of non-residential buildings. Four of the California cities (Berkeley, Davis, Palo Alto and Dublin) contain an exemption for smokers who are passing through.

4. Shopping and tourist locations

A growing number of outdoor theme parks, shopping areas and other popular tourist destinations have prohibited smoking. Many of these provide designated areas for smoking. Staff is aware of the following examples:

Tourist destinations:

- Disneyland
- Sea World
- Six Flags (nationwide)
- Universal Studios – designated areas
- Hollywood Bowl
- The Getty Museum – designated areas
- Los Angeles Zoo
- Dodger Stadium
- Petco Park (San Diego Padres home)

Outdoor Shopping areas:

- Northridge Fashion Center
- Simi Valley Town Center (adopted in February 2006 in the wake of the

CARB report and market research)

- La Cumbre Shopping Center (Santa Barbara)
- Sacramento Downtown Mall (outdoor dining areas only)
- Ontario Mills (outdoor outlet mall)

Farmers Markets

The California Farmers Markets Association has its own rule that “smoking is not permitted in produce display and immediate sales area[s].” In addition, the cities of Redlands and Marina, and all of Marin County, prohibit smoking at Farmers Markets.

5. Hotels

State law requires hotels to maintain at least 35 percent of rooms as non-smoking. At least eight California cities have increased that requirement to between 50 and 80 percent of total rooms. An additional four cities prohibit smoking in lobbies or common areas of hotels. Moreover, the Westin hotel chain recently announced that all of its hotels are completely smoke-free; and an increasing number of chains are voluntarily maintaining a large majority of rooms as non-smoking due to customer demand.

In Santa Monica, although Council has not previously legislated in this area, the thirty hotels and motels listed with the Convention and Visitors Bureau maintain an average of 87 percent of rooms as non-smoking. Only five of the thirty hotels and motels have more smoking than non-smoking rooms.

6. Multi-unit residential common areas.

To date there has been no legislation at the state or local level governing smoking inside residences. However, at least eight cities have prohibited smoking at indoor common areas of multi-unit residential buildings. (Staff's position is that these areas already are covered by state law.) In addition, two cities (Davis and Calabasas) have banned smoking at outdoor common areas as well. The City of Arcata prohibits smoking within 20 feet of windows of residential units. Moreover, Thousand Oaks recently adopted a resolution that one third of future publicly funded housing units in the city be maintained as non-smoking.

7. Penalties and enforcement

Santa Monica law currently penalizes violations of its smoking laws as infractions. Other California cities appear fairly evenly divided between making violations infractions, making violations misdemeanors, and giving prosecutors discretion to choose between the two. Some cities provide for liability on the part of businesses or others who control a location and permit unlawful smoking as well as the smokers themselves.

Staff anticipates that enforcement of the proposed ordinance would be handled similarly to each of the previous areas of ETS regulation in Santa Monica, as follows:

- Publicity and public education
- Signage
- Grace period and warnings
- Prosecution of violations if necessary

In each prior area of local regulation and enforcement (bars, parks, beaches and Pier), a similar pattern of evolution was experienced: initial protest and resistance, followed by publicity and education, followed by acceptance and compliance.

8. The Calabasas law

Effective March 17, 2006, the city of Calabasas adopted the strongest outdoor smoking restrictions in the nation. Calabasas prohibits smoking in all public places, indoor and outdoor, with two exceptions: certain designated locations in shopping areas; and in cases where no non-smokers are present and there is no reason to believe that anyone will arrive (e.g., due to time of day). Calabasas provides both criminal and civil remedies for the City Attorney's Office; and a private civil right of action for the general public.

Previous Council Actions

Council has taken two prior actions in the area of outdoor ETS regulation. In April 2003 Council adopted an ordinance that prohibits smoking in all parks in the City. In March 2004 Council adopted an ordinance prohibiting smoking at all City beaches, government service waiting areas, and the Santa Monica Pier.

Recommendations

In light of the ample existing evidence regarding the many significant health dangers of ETS; the recent CARB designation of ETS as a toxic air contaminant and its focus on

risks of outdoor ETS; the strong trend among California cities and other jurisdictions to protect non-smokers from the effects of outdoor ETS; and the stated public policy of the State of California to end smoking among Californians, Council should expand the City's current ETS prohibitions to provide greater protection to the public and employees.

Staff recommends that Council prohibit smoking in the following outdoor areas:

1. all outdoor dining areas;
2. all outdoor service areas;
3. within 20 feet of entrances and windows to buildings open to the public;
4. on the Third Street Promenade; and
5. at all Farmers Markets

These areas share common features that make protection from ETS particularly important. Dining areas, service lines, and the twenty-foot radius from public buildings all involve non-smokers who are stationary and are forced to inhale second-hand smoke when others are smoking nearby. Dining areas and the Farmers Markets involve the display, purchase and consumption of food and drink. The Third Street Promenade, like the City's parks and beaches, is a popular recreation destination that is prone to excess trash accumulation from cigarette butts. It also includes numerous benches, dining patios, waiting lines, and other locations where non-smokers are stationary

Council could consider possible compromises, if it finds them necessary and appropriate, that some other cities have employed. Most notably, designated smoking areas could be

employed in the downtown area generally and the Third Street Promenade in particular. Also, a passing-through exception could be employed with respect to a 20-foot radius rule and the Third Street Promenade (as in Berkeley and Davis).

As to hotels, it appears that local businesses are voluntarily maintaining a non-smoking room percentage (87%) far greater than required by state law (35%). Hence there appears no need for legislation of hotels at this time.

As to multi-unit residential areas, Staff believes that no action is appropriate at this time due to the fact that virtually no other jurisdictions have regulated the area and there is insufficient information about the relative pros and cons.

Public Outreach

Staff has spoken with the following local agencies to determine their positions on the recommended areas for outdoor ETS regulation:

Santa Monica Chamber of Commerce: After speaking with Staff, the Chamber conducted two surveys of local business owners to determine the positions of the local business community on various possible areas of ETS regulation. Both surveys showed a majority of business owners favoring each of Staff's recommended areas of ETS regulation. The only exception was that in the second survey, a majority of respondents opposed a prohibition of smoking on the Third Street Promenade. (See Appendix B for full results.)

Bayside District Corporation: Staff attended a recent Board meeting of the Bayside District at which Board members and members of the public asked questions and voiced concerns about a possible ban on smoking on the Third Street Promenade. The Board voted 7-1 to oppose such a ban.

Convention and Visitors Bureau: Staff spoke with Misti Kerns, President of the Santa Monica Convention and Visitors Bureau about the various possible areas of ETS regulation. The primary concern she expressed was on the issue of signage – both its importance in educating and enforcing such rules for visitors and also in not having the burden fall on the CVB to obtain signs. Kerns indicated that most tourists understand smoking restrictions if they are told beforehand.

California Restaurant Association: Staff spoke with Andrew Casana of the CRA about a possible ban on smoking at outdoor dining areas. He voiced a concern that restaurants might be found liable for smoking taking place outside and adjacent to outdoor dining areas. He stated that the CRA would not oppose a ban on smoking at outdoor dining areas.

Pier Restoration Corporation: The PRC Board met on June 7, 2006 and decided to take no position on the question of additional outdoor smoking regulation.

Apartment Association of Greater Los Angeles: Staff received correspondence from AGLA expressing concern over possible legislation that might impact residential rental properties. Staff attempted to contact AGLA representatives twice and left a message that it did not intend to recommend any regulation in this area.

Budget/Financial Impact

No significant cost is associated with the recommended action. Staff anticipates that signage will be available at no cost or minimal cost to the City. Publicity, education, and enforcement are expected to entail only modest amounts of City Staff time and no specific expense.

[ATTACHMENT 1](#)

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APPENDIX B

CHAMBER OF COMMERCE BUSINESS SURVEYS

First survey - 174 responses (position on banning smoking at these areas):

1. Outdoor dining areas: 61% favor, 38% oppose
2. Outdoor service areas: 61% favor, 38% oppose
3. Twenty-foot radius of building entrances: 63% favor, 35% oppose
4. Increase required non-smoking hotel rooms: 57% favor, 35% oppose
5. Third Street Promenade: 55% favor, 41% oppose
6. Outdoor stadiums and theaters: 66% favor, 30% oppose
7. Common areas of multiunit residential: 61% favor, 36% oppose
8. New smoking ordinance (in general): 61% favor, 38% oppose

Chamber staff felt that the first survey may not have been accurate since more people responded than had originally been sent the survey. The Chamber therefore conducted a second survey, which had 38 responses. Those results were:

1. Outdoor dining areas: 54% favor, 43% oppose
2. Outdoor service areas: 57% favor, 41% oppose
3. Twenty-foot radius of building entrances: 54% favor, 43% oppose
4. Increase required non-smoking hotel rooms: 51% favor, 46% oppose
5. Third Street Promenade: 46% favor, 54% oppose
6. Outdoor stadiums and theaters: 59% favor, 41% oppose
7. Common areas of multiunit residential: 50% favor, 44% oppose
8. New smoking ordinance (in general): 56% favor, 42% oppose

