MARY JO LANZAFAME
ASSISTANT CITY ATTORNEY

KEELY M. HALSEY
DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

Jan I. Goldsmith
CITY ATTORNEY

1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

July 30, 2012

REPORT TO THE HONORABLE MEMBERS OF THE
PUBLIC SAFETY AND NEIGHBORHOOD SERVICES COMMITTEE

PROPOSAL TO RESTRICT SMOKING IN MULTI-FAMILY HOUSING

INTRODUCTION

On February 15, 2012, the City's Public Safety and Neighborhood Services Committee received a report from a citizens' group regarding smoking in multi-unit housing facilities. At that meeting, the citizens' group proposed that the City Council adopt an ordinance to address such smoking. The Committee requested that the City Attorney analyze the provisions of that proposed ordinance, which is attached to this memorandum as Exhibit A.[1]

The proposed ordinance would make it unlawful for a person to smoke on any multi-family property of four or more units if doing so "substantially interferes with another person's use, comfort and enjoyment of that multi-family property." It would create a rebuttable presumption that anyone who does so is deemed to have committed a private nuisance. The proposed ordinance would limit landlords' liability for nuisance if they take certain steps to address smoking incidents. Finally, it would allow both private parties and the City Attorney to bring civil actions against persons who "knowingly" commit violations.

This memorandum identifies some of the legal issues raised by the proposed ordinance and offers additional information the City Council may want to consider in making a policy decision on this matter.

ANALYSIS

I. EXISTING LAW RELATIVE TO SECONDHAND SMOKING NUISANCES

Under existing law, individuals have the ability to bring claims for private and public nuisance to address bothersome secondhand smoke. The California Civil Code defines "nuisance" to mean "[a]nything which is injurious to health . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable

[1] This Office recently prepared a memorandum titled "Potential Prohibition of Smoking in Multi-Family Properties," dated October 24, 2011, that briefly described existing nuisance law and provided information regarding California Senate Bill No. 332. That bill became law effective January 1, 2012 and allows landlords to prohibit smoking on their properties, including inside dwelling units.

enjoyment of life or property . . . ." Cal. Civ. Code § 3479. A nuisance that affects an entire community or neighborhood or any considerable number of persons at the same time, although the extent of the annoyance or damage to individuals may be unequal, is a public nuisance, and all other nuisances are considered private nuisances. Cal. Civ. Code §§ 3480, 3481.

Multi-family property dwellers can initiate lawsuits using existing law to combat secondhand smoke that poses a public or private nuisance. If one person's smoking activity interferes with the comfortable enjoyment of another individual's life or property, that individual can bring an action under the Civil Code for private nuisance.[2] Normally, if the nuisance is also a public nuisance and the individual suffers special injury, he or she can bring a claim for public nuisance as well. Cal. Civ. Code § 3495. Specifically with respect to smoking, however, the Courts have upheld a private party's right to pursue claims for private and public nuisance as a result of secondhand smoke (even where the damage he or she suffers is of the same kind that the public suffers). *Birke v. Oakwood Worldwide*, 169 Cal. App. 4th 1540, 1550-51 (2009).[3] Thus, an individual bothered by another person's smoking can avail him- or herself of existing legal remedies.

The proposed ordinance is similar to existing nuisance law. It goes beyond existing nuisance law, however, in the following ways: by stating that a violation creates a rebuttable presumption that the person has committed a private nuisance; limiting when a landlord can be held responsible for such a private nuisance; and giving the City Attorney authority to enforce these private disputes between private parties.

II. POTENTIAL LEGAL ISSUES RELATED TO THE PROPOSED ORDINANCE

This Office has identified several legal issues in the ordinance as written. First, it imposes new evidentiary burdens on existing nuisance law that might limit a private party's ability to pursue legal remedies that are currently available under the Civil Code. While existing law allows a person to pursue a nuisance claim against his or her landlord for both public and private nuisance related to secondhand smoke, the proposed ordinance shields landlords from certain private nuisance suits.

The proposed ordinance also conflicts in some respects with existing San Diego Municipal Code provisions. For example, it provides a definition of "smoking" that differs from its definition elsewhere in the code. SDMC § 43.1002. It defines "multi-family property" in a manner that differs from the Land Development Code's definition of "multiple dwelling unit." SDMC § 113.0103. These types of issues create internal inconsistencies that should be avoided.

Perhaps more significant, however, are the legal issues associated with the proposed ordinance's creation of a public cause of action for a private wrong, its potential Constitutional insufficiency related to its definition of prohibited activity, and the enforcement issues it raises.

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[2] The remedies for private nuisance are civil action or abatement, though the nature of the offense would likely make civil action the more practical remedy. Cal. Civ. Code §§ 3501, 3502.

[3] In *Birke*, the Second District Court of Appeal determined that the resident of an apartment complex had adequately pleaded claims of public and private nuisance for secondhand smoke.

As written, the proposed ordinance might improperly interfere with private issues because there is normally no role for a public agency in private nuisance disputes between private parties. If the City attempted to extend its authority to private disputes, this Office has identified grounds on which the ordinance would be vulnerable to challenge. The most likely are whether a government has the authority to declare what constitutes a private nuisance, whether a government has standing to bring a civil action on behalf of a private party, and whether a government is within its rights to use public funds and resources for that purpose.

In order for an ordinance to pass Constitutional muster on equal protection and due process grounds, the City Council would have to be able to show that the ordinance bears a rational basis to a legitimate public interest. *Heller v. Doe by Doe* 509 U.S. 312, 319-320 (1993). Assuming for the sake of this analysis that the City Council could articulate a legitimate public health purpose as its rationale for adopting the ordinance, an argument could be made that it lacks a rational basis because it only governs smokers in multi-unit properties of four or more units as opposed to two or more, or dwelling units within certain proximities of one another.

In order to withstand scrutiny, any ordinance regulating smoking would have to define the prohibited activity in a clear manner. For that reason, the proposed ordinance presents an additional Constitutional issue regarding vagueness. The Constitution requires that laws must be specific. If an ordinance is not sufficiently specific, it is void and unenforceable. If a law is stated in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application, it violates the U.S. and state constitutional due process provisions. *Garcia v. Four Points Sheraton LAX*, 188 Cal. App. 4th 364, 386 (2010).

An argument could be made that the proposed ordinance does not sufficiently describe the prohibited smoking activity. There is no way to determine what type of smoking activity would reach the threshold of substantial interference because the threshold is subject to many variables, such as a person's sensitivity to smoke. A related issue is that, as written, the ordinance could only be enforced against persons who "knowingly" violate the law, which creates an ambiguity.

The vagueness of the proposed ordinance also creates potential impediments to effective enforcement. For one, a vague definition of prohibited activity would make it difficult to discern whether a particular smoking act meets the definition. Making that determination would require a subjective assessment and would be particularly challenging for a public enforcer. Whereas an individual could readily determine whether he or she has suffered a substantial interference, a public body would not be in a position to make that decision. It would be very difficult for City staff to determine whether some private party's smoking behavior substantially interfered with another individual's use, comfort, and enjoyment of a property.

III. ADDITIONAL INFORMATION FOR COMMITTEE CONSIDERATION

Administrative and costs issues fall outside the scope of this legal analysis, but the Council might choose to request more information from the citizens' group or from staff in order to allow for informed decisionmaking on this issue.

Based on the legal concerns identified herein, the Council could determine that the remedies available under existing nuisance law adequately address secondhand smoke. Conversely, notwithstanding the legal issues identified with respect to the proposed ordinance, the Council could consider other options, including the following alternatives that this Office offers for discussion.

One alternative would be for the Council to declare secondhand smoke a *public* nuisance. As described above, an individual harmed by secondhand smoke already has the option to bring actions for public and private nuisance. In addition, the California Government Code permits local jurisdictions to declare what constitutes a nuisance. Cal. Gov't Code § 38771. Making a declaration of public nuisance has precedent in local law. Doing so would permit the City to bring a civil action with respect to the nuisance. Cal. Civ. Code § 3491. The effectiveness of public enforcement would depend in large part on whether the ordinance provided a sufficiently specific definition of prohibited nuisance activity.

A declaration of public nuisance could also make it easier for individuals to succeed in their nuisance actions, by easing the applicable burden of proof. This is due to the fact that, once a legislative body makes a declaration of nuisance, a court will not substitute its independent judgment for that of the city that a certain condition or activity is significant enough to constitute a nuisance. *City of Bakersfield v. Miller*, 64 Cal. 2d 93, 100 (1966), *cert. denied,* 384 U.S. 988 (1966).

The Council could also choose to enact an ordinance that does not rely on nuisance law. Government agencies have adopted many such rules to address smoking. In San Diego, that legislation has focused on limiting smoking in public places. For example, in 2006, the City adopted an ordinance restricting smoking in public parks and beaches and, in 2007, it extended that restriction to include piers, boardwalks, and other areas. San Diego Ordinances O-19508 (July 18, 2006) and O-19620 (May 21, 2007). In addition, the state prohibits smoking within 20 feet of the entrances to or windows of public buildings. Cal. Gov't Code § 7597. The state also restricts smoking in certain workplaces, including restaurants and bars. Cal. Lab. Code § 6404.5.

Regardless, any ordinance would be subject to the Constitutional limitations discussed above regarding equal protection, due process, and vagueness. For that reason, the ordinance would have to represent a rational means of achieving a legitimate pubic purpose, and the definition of prohibited behavior would have to be defined in clear and objective terms that create a "bright line" rule.

Thus, depending on whether the Council wanted to prohibit smoking in certain land use designations or under certain conditions, it would need to be able to articulate a reason on which to base its decision. For example, if the Council had information regarding the negative health effects of secondhand smoke and evidence regarding how proximity to smoke implicates those health risks, it might use that information as a basis to prohibit smoking on multi-family properties where that proximity is met, it might prohibit smoking within a certain number of feet from an open door or window of a residential unit, or it might enact some other regulation.

While considering this issue, the Council should keep in mind that a clear and narrowly tailored rule would have the best chance of surviving a legal challenge.

CONCLUSION

This Office has identified some of the legal issues raised by the proposed ordinance. Existing law provides a means for private parties to pursue claims for secondhand smoking nuisances. Upon consideration, the Council may determine that those remedies are sufficient to address the harm caused by secondhand smoke.

Should it determine that additional regulation is warranted, however, the Council should undertake additional discussion regarding what harm it wants to prevent and what prohibition might achieve its goals. Any ordinance would need to include a reasonable and specific definition of the prohibited activity so that it is possible to objectively determine whether a violation has occurred. Such a "bright line" approach would help to create legally defensible and practically enforceable restrictions.

Upon receiving direction from the full City Council, this Office would be happy to work with staff to draft an ordinance that meets Council's policy objectives.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/_____
Keely M. Halsey
Deputy City Attorney

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Attachment: Exhibit A
RC-2012-18
Doc. No. 411334