THE CITY OF SAN DIEGO

REPORT TO THE CITY COUNCIL

DATE ISSUED: February 15, 2012

REPORT NO:

ATTENTION: Honorable Councilmembers and City Attorney Jan Goldsmith

REQUESTED ACTION: Direct the City Attorney's office to provide a legal opinion within 90 days on the submitted draft language addressing secondhand smoke as a nuisance in multi-family properties and to review other municipal ordinances which ban smoking in multi-family properties.

SUMMARY:

On May 13, 2009, the Social Advocates for Youth (SAY) San Diego provided a presentation before PS&NS on non-smoking housing options for San Diego renters. The committee did not take action on the item, but requested a task force be formed with the directive to research similar non-smoking ordinances in other cities and report the results to the Committee. Established as the San Diego Smoke-Free Housing Task Force, the body comprises various stakeholder groups including: the Social Advocates for Youth, San Diego County Apartment Association, California Apartment Association, San Diego Housing Federation, American Lung Association, Tenants Legal Center, Communities Against Substance Abuse, Environmental Health Coalition, the Associate Professor of Epidemiology, Department of Family and Preventive Medicine and individuals representing renters/tenants.

In January of 2010, the Task Force submitted draft language for a proposed non-smoking ordinance to the office of Councilmember Emerald. The Councilmember requested the City Attorney's office review the draft language. On October 24, 2011, the City Attorney's office submitted a Memorandum in response.

The Task Force subsequently reconvened to review the City Attorney's response and made revisions to the proposed draft language. On February 1, 2012, the Task Force voted to approve the draft Secondhand Smoke as Nuisance in Multi-Housing Communities Ordinance. It should be noted that two stakeholders, the San Diego County Apartment Association and the California Apartment Association, expressed opposition to the proposed draft language.

FISCAL CONSIDERATIONS: None at this time

PREVIOUS COUNCIL and/or COMMITTEE ACTION:
PS&NS: On May 13, 2009 -Social Advocates for Youth (SAY) made a presentation on NON-SMOKING HOUSING OPTIONS FOR SAN DIEGO RENTERS

KEY STAKEHOLDERS AND PROJECTED IMPACTS: Tenants and landlords of multi-family properties.

M. Wallace

Originating Department

Attachments(s): Copy of draft language developed by the San Diego Smoke-Free Housing Task Force

PROPOSED DRAFT

Submitted by the San Diego Non-Smoking Housing Task Force

ORDINANCE OF THE CITY OF SAN DIEGO AMENDING THE MUNICIPAL CODE TO ADDRESS SECONDHAND SMOKE AS A NUISANCE IN MULTI-UNIT HOUSING COMMUNITIES

WHEREAS, scientific studies have concluded that cigarette smoking causes chronic lung disease, coronary heart disease, stroke, cancer of the lungs, larynx, esophagus, mouth, and bladder, and contributes to cancer of the cervix, pancreas, and kidneys;[1] and

WHEREAS, more than 440,000 people die in the United States from tobacco-related diseases every year, making it the nation's leading cause of preventable death;[2] and

WHEREAS, the World Health Organization (WHO) estimates that by 2030, tobacco will account for 10 million deaths per year, making it the greatest cause of death worldwide;[3] and

WHEREAS, the U.S. Surgeon General has concluded that there is no risk-free level of exposure to secondhand smoke and neither separating smokers from nonsmokers nor installing ventilation systems effectively eliminates secondhand smoke;[4] and

WHEREAS, the United States Environmental Protection Agency (EPA) 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;[5] and

WHEREAS, the California Air Resources Board has put secondhand smoke in the same category as the most toxic automotive and industrial air pollutants by categorizing it as a toxic air contaminant;[6] and

WHEREAS, the California Office of Environmental Health Hazard Assessment has included secondhand smoke on the Proposition 65 list of chemicals known to the State of California to cause cancer, birth defects, and other reproductive harm;[7] and

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[1] U.S. Dep't of Health and Human Services, Centers for Disease Control and Prevention, *Targeting Tobacco Use: The Nation's Leading Cause of Death 2002.*

[2] U.S. Dep't of Health and Human Services, Centers for Disease Control and Prevention, *Highlights Annual Smoking Attributable Mortality, Years of Potential Life Lost, and Economic Costs – United States 1995-1999* (2002) MORBIDITY AND MORTALITY WEEKLY REPORT.

[3] U.S. Dep't of Health and Human Services, Centers for Disease Control and Prevention, *Reducing Tobacco Use: A Report of the Surgeon General*, 437 (2001).

[4] U.S. Dep't of Health and Human Services, Centers for Disease Control and Prevention, *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General* 11 (2006).

[5] U.S. Dep't of Health and Human Services, Centers for Disease Control and Prevention, *Clean Indoor Air Regulations Fact Sheet* (2001).

[6] Cal. Air Resources Bd., Resolution 06-01, at 5 (Jan. 26, 2006).

[7] Cal. Envtl. Prot. Agency, Office of Envtl. Health Hazard Assessment, *Chemicals Known to the State to Cause Cancer or Reproductive Toxicity* 17, (Aug. 11, 2006).

WHEREAS, exposure to secondhand smoke is the sixth leading cause of preventable death in this country, killing over 53,000 non-smokers each year,[8] and smoking is the number one cause of lung cancer and deaths; [9] and

WHEREAS, secondhand smoke exposure adversely affects fetal growth with elevated risk of low birth weight, and increased risk of Sudden Infant Death Syndrome (SIDS) in infants of mothers who smoke;[10] and

WHEREAS, secondhand smoke exposure causes as many as 300,000 children in the United States to suffer from lower respiratory tract infections, such as pneumonia and bronchitis,[11] exacerbates childhood asthma, and increases the risk of acute chronic middle ear infection in children;[12] and

WHEREAS, the total cost of smoking in California was estimated to be $475 per resident or $3,331 per smoker per year, for a total of nearly $15.8 billion in smoking-related costs in 1999 alone;[13] and

WHEREAS, the medical and economic costs to nonsmokers suffering from lung cancer or heart disease caused by secondhand and third hand smoke are nearly $6 billion per year in the United States;[14]

WHEREAS, almost 90% of adult smokers started smoking at or before age 18;[15] and

WHEREAS, with certain exceptions, state law prohibits smoking inside an enclosed place of employment;[16] and

WHEREAS, state law prohibits smoking in playgrounds and tot lots and also prohibits smoking within twenty feet of the main entrances and exits of public buildings while expressly authorizing local communities to enact additional restrictions.[17]

WHEREAS, state law expands the availability of smoke-free housing in California by allowing landlords to prohibit smoking in rental units.

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[8] S.A. Glantz & W. Parmley, *Passive Smoking and Heart Disease: Epidemiology, Physiology, and Biochemistry*, 83(1) Circulation 1 (1991) and *California Environmental Protection Agency, Office of Envtl. Health Hazard Management, Health Effects of Exposure to Environmental Tobacco Smoke: Final Report* (1997).

[9] U.S. Dep't of Health and Human Servs., Centers for Disease Control and Prevention, *Targeting Tobacco Use: The Nation's Leading Cause of Death 2002*, 2 (2002).

[10] Cal. Envtl. Prot. Agency, Office of Envtl Health Hazard Assessment, *Health Effects of Exposure to Environmental Tobacco Smoke, Final Report* ES-5 (1997).

[11] U.S. Dep't of Health and Human Services., Centers for Disease Control and Prevention, *Targeting Tobacco Use: The Nation's*
Leading Cause of Death 2002, 2 (2002).

[12] U.S. Dep't of Health and Human Services. Centers for Disease Control and Prevention, *Clean Indoor Air Regulations Fact Sheet* (2001).

[13] Max W, Rice DP, Zhang X, Sung H-Y, Miller L., *The Cost of Smoking in California, 1999*; California Department of Health Services (2002).

[14] American Academy of Actuaries, *Costs Associated with Secondhand Smoke*, October, 2006.

[15] National Household Surveys on Drug Abuse, unpublished data, 1998. *See also*, U.S. Dep't of Health & Human Services. et al., *Preventing Tobacco Use Among Young People: A Report of the Surgeon General*, 101 (1994).

[16] Cal. Lab. Code § 6404.5

[17] Cal. Health & Safety Code § 104495 and Cal. Gov't Code § 7597

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF SAN DIEGO, CALIFORNIA, does hereby ordain as follows:

Definitions:

For the purposes of this ordinance, the following terms will have the following definitions:
Person – The term person means any current resident, household member, occupant, tenant, and/or any guest of a current resident, household member, occupant or tenant.
Landlord – The terms landlord means any owner of a multi-family rental property, and/or any manager or property management company responsible for managing a multi-family rental property.
Multi-family Property – The term multi-family property means any residential property consisting of 4 or more units, including multi-family rental properties.
Smoking – The term smoking means possessing (and the term "smoke" means to possess) a lighted pipe, lighted cigar, lighted smoking apparatus or lighted cigarette of any kind, or the lighting of a pipe, cigar smoking apparatus or cigarette of any kind containing any material which may be ignited or emit any smoke when in contact with fire or a heat source, including but not limited to, any tobacco product or tobacco derivative or any other weed, plant or substance whether naturally occurring or synthetically derived that is intended to ignite and/or emit smoke or other gasses, whether visible or not.

I. **Smoking on multi-family property:**

a. Persons covered by this ordinance must follow any current State and/or Federal laws regarding smoking on multi-family properties.
b. In addition, it shall be unlawful for any person covered by this ordinance to commit acts of smoking, including but not limited to tobacco, on any multi-family property that substantially interferes with another person's use, comfort and enjoyment of that multi-family property.
c. Notwithstanding paragraph b. of this Section I, smoking is permitted on any multi-family property as long as the acts of smoking do not substantially interfere with another person's use, comfort and/or enjoyment of that multi-family property or unless these acts of smoking are prohibited by any current state and/or federal law.

II. **Private nuisance**

a. If a person commits acts of smoking in violation of Section Ib. of this ordinance, there is a rebuttable presumption affecting the burden of proof that the person has committed a private nuisance upon the multi-family property.
b. A landlord shall not be deemed to have allowed the maintenance of a private nuisance upon a multi-family property if:
    i. He, she or it has not received a *written* complaint about a person smoking in violation of Section I.b of this ordinance; or
    ii. He, she or it can show through written documentation that, upon receipt of a *written* complaint about a person smoking in violation of Section I.b of this ordinance, reasonable steps were taken by the landlord in response to the complaint. Reasonable steps shall include, but not be limited to (1) up to three verbal warnings (2) if three verbal warnings are ineffective, one written warning issued to the offending person and/or formal legal notices served on the offending person. In the event a landlord elects to commence eviction proceedings against a person based on a violation of this ordinance, such reasonable steps shall be *prima facie* evidence that a landlord has not allowed the maintenance of a private

nuisance upon the multi-family property, even in the event a court refuses to order such eviction.

III. **Enforcement:**

a. The City attorney may bring a civil action to enforce this ordinance against any person who knowingly violates Section I.b. hereof, and to obtain the remedies specified below or otherwise available in equity or at law.

b. Except as otherwise provided herein, any person acting for the interests of him-, herself, or his or her household members (herein a private enforcer) may bring a civil action to enforce this ordinance against any person who knowingly violates Section I.b. hereof, and may obtain the remedies specified below or otherwise available in equity or at law, provided that both of the following requirements are met:

1. The action is commenced more than sixty (60) days after the private enforcer has been given written notice of an alleged violation of this ordinance to the city attorney and to the person who is alleged to have violated the ordinance; and

2. No person acting on behalf of the city or state has commenced or is prosecuting an action regarding the violation(s) which was or were the subject of the notice on the date the private action is filed.

c. A private enforcer shall provide a copy of his, her, or its action to the city attorney within seven days of filing it.

d. Upon proof of violation of Section I.b. of this ordinance, the court may order the following:

1. An award of actual damages suffered by the private enforcer and/or his or her household members,

2. In any action brought to enforce the terms of this ordinance, the court may award reasonable attorney's fees and costs to the prevailing party that is consistent with the terms in the existing rental agreement as between the parties and if any such rental agreement does not provide for an award of attorney's fees and costs, then reasonable attorney's fees and costs may be awarded to the prevailing party if the nonprevailing party brought or defended this action in bad faith.

3. An injunction against further violations of this ordinance by the defendant.

4. Any other relief that is otherwise available in equity or at law.

e. Any damages awarded in an action brought by the city attorney or city prosecutor shall be paid into the city's general fund, unless the court determines that they should be paid to a damaged third party.

f. Nothing in this section shall prohibit a private enforcer from bringing a civil action in small claims court against any person who knowingly violates this ordinance, as long as the amount in demand and the relief sought are within the jurisdiction of the small claims court.

IV. **Retaliation prohibited:**

No person shall intimidate, threaten or effect any retaliation against a person seeking enforcement of this ordinance.

V. **Effective date of this ordinance:**

This ordinance shall be effective 120 days following its passage and adoption.