




Office of the City Attorney

Memorandum

February 23, 2016

TO: Honorable Mayor and City Council

FROM: **John A. Nagel, City Attorney** 
Melissa C. Tronquet, Assistant City Attorney

SUBJECT: Amendment of SMC Chapter 9.28 (Regulation of Smoking)
Amortization of Hookah Uses

BACKGROUND

Emra Gures, the owner of Taverna Bistro, submitted a letter to the council requesting removal of the two-year amortization provision for land use entitlements for hookah use in section 9.28.030(d) of the amended smoking ordinance. He claims that requiring discontinuance of hookah uses within that two-year period is an unconstitutional taking, and that he would be entitled to compensation if the City does require him to end that use.

As discussed below, amortization schemes that reasonably balance the public interest and the private loss are constitutional ways to reconcile conflicting interests. Amortization periods of one to five years have been upheld in a variety of cases. In this case, given that hookah is only a small part of Mr. Gures' larger business, a two year amortization period is reasonable.

DISCUSSION

Gures ("Owner" operates two restaurants within the City of Sunnyvale (Taverna Lounge (now Taverna Beer Garden), located at 769 North Mathilda; and Taverna Bistro, located at 133 South Murphy Ave. In 2011 and 2007, respectively, the City approved use permits that revised the approved uses for Owner's existing restaurants to allow hookah on outdoor patios at both establishments. Consistent with the requirements of the City's smoking ordinance in effect at the time of application for smoking on outdoor patios, the permits limited hookah to 40% of the outdoor patio.

It does not appear from Owner's advertising that hookah is a major part of the business for either dining establishment; the website for Taverna Beer Garden does not mention hookah, and while the website for Taverna lounge prominently displays a "cigar menu", the only mention of hookah is a statement on the menu to "visit our Hookah Lounge Bar in the back patio for a relaxing drink." Thus, a customer researching these

establishments may not even be aware that hookah is offered. The two use permits issued to Owner for hookah are the only two approvals that the City has on file for hookah use.

Courts have long upheld reasonable amortization schemes as a way to satisfy due process. *See, e.g., Metromedia, Inc. v. City of San Diego* (1980) 26 Cal. 3d 848 (1980), judgment rev'd on other grounds, 453 U.S. 490, 101 S. Ct. 2882, (1981) (finding that an amortization period that ranged from one to four years, depending on the depreciated value of the sign, was not facially unreasonable); *National Advertising Co. v. County of Monterey* (1970) 1 Cal. 3d 875; *Beverly Oil Co. v. City of Los Angeles* (1953) 40 Cal. 2d 552; *Tahoe Regional Planning Agency v. King* (1991) 233 Cal. App. 3d 1365. Generally, **so long as the proposed amortization scheme is reasonable and commensurate with the investment involved**, it will meet constitutional standards. (emphasis added) *See Metromedia v. City of San Diego, supra*. Amortization programs are appropriate when included in regulations adopted in furtherance of a City's police power to protect public health, safety and welfare. For example, in *Davidson v. Cty. of San Diego* (1996) 49 Cal. App. 4th 639, 650, the court held that amortization periods were appropriately applied to prevent operation of a crematorium from being a danger or nuisance to the public, "because vested rights may be impaired by subsequent police power enactments reasonably necessary to protect the public's health and safety."

The reasonableness of the duration of an amortization period is case-specific to each case and depends on the use to be removed, and the harm to the public if the use continues. *National Advertising Co. v. County of Monterey* (1970) 1 Cal. 3d 875.

Examples of reasonable amortization periods include:

- A five year period for a plumbing business to cease operation in an area rezoned to residential was reasonable. *City of Los Angeles v. Gage*, 127 Cal.App.2d 442.
- A two-year period to eliminate a cement plant use from an area rezoned to light manufacturing. *Livingston Rock & Gravel Co. v. Los Angeles County* (1954) 43 Cal. 2d 121.
- A 1.5 year period for termination of an auto wrecking yard as a nonconforming use. *People v. Gates* (1974) 41 Cal. App. 3d 590.
- A one year period to relocate or change adult entertainment business within one year upheld, with the court noting that "Nothing in the Constitution forbids municipalities from requiring non-conforming uses to close, change their business, or relocate within a reasonable time period. *World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186, 1199-200 (9th Cir. 2004), as amended on denial of reh'g and reh'g en banc (July 12, 2004).

Similarly, a regulation barring sale of tobacco products in pharmacies on the effective date of the ordinance was upheld, with the court finding that "the amended ordinance merely regulates the sale of tobacco products; it does not force Plaintiff to engage in a certain type of business...**although Plaintiff has alleged it has a vested property right in its permits, it cannot overcome the fact that the enactment of the**

amended ordinance was a reasonable and permissible use of Defendants' police power." (emphasis added) *Safeway Inc. v. City & Cty. of San Francisco* 797 F. Supp. 2d 964, 971 (N.D. Cal. 2011)

In this case, the proposed two-year period to cease hookah use is reasonable because hookah is just one aspect of Owner's larger restaurant and bar business, is not advertised as a significant part of the business of either restaurant, and is commensurate with the investment involved. Both restaurants existed and were successful prior to addition of the hookah use. Furthermore, the costs associated with obtaining the use permit and the purchasing of the hookahs (water pipes) was not a significant investment, especially when compared to the investment made to open and operate the restaurant. The recitals in the first four and one-half pages of the ordinance detail the substantial public health and safety risks associated with smoking and second-hand smoke. Those risks to the public, when balanced against the secondary function that hookah appears to play in Owner's restaurants, far outweigh his right to maintain hookah smoking indefinitely. Moreover, a two-year period to end that use is reasonable given that many of the cases that involved the cessation or relocation of an entire business involved periods of one to five years.

The City Council has discretion to impose any reasonable amortization period to eliminate uses that are inconsistent with an ordinance, such as the smoking ordinance, designed to protect the public health, safety and welfare. The City's study on the proposed changes to the smoking ordinance details both the risks to the public health caused by smoking, and describes the overwhelming public input in favor of eliminating smoking in outdoor dining. The proposed two-year amortization period for hookah use permits is reasonable and consistent with cases addressing amortization.