



City of Sunnyvale

Agenda Item-No Attachments (PDF)

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REPORT TO COUNCIL

SUBJECT

Introduce an Ordinance to Amend Chapter 9.28 of Title 9 (Public Peace, Safety or Welfare) of the Sunnyvale Municipal Code Relating to Regulation of Smoking in Outdoor Areas; Consider Amendment to Section 9.28.030(d) of Title 9 to Modify or Eliminate the Requirement that Taverna Bistro and Lounge (133 S. Murphy Ave) Comply with the Prohibition on Smoking in Outdoor Dining Areas Following a Two-Year Amortization Period for Use Permit No. 2006-0827 (Hookah); Finding of CEQA Exemption Pursuant to Guideline Section 15061(b)(3)

BACKGROUND

On February 23, 2016, the Council adopted Ordinance 3072-16 to protect against the harmful effects of secondhand smoke by prohibiting smoking in the following areas:

1. Outdoor dining;
2. Within 25 feet of building entryways;
3. Within 25 feet of public transit stops; and
4. In all units, common areas, and within 25 feet of doors and windows of multi-family residences.

The ordinance also established a two-year amortization period for the two restaurants in the City that had previously approved use permits allowing hookah smoking, with conditions, in outdoor dining areas, requiring the outdoor hookah smoking use to cease within two years of adoption of the ordinance (March 23, 2018).

The smokefree areas ordinance was proposed in response to two Study Issues. The comprehensive study was funded by a \$95,000 grant awarded to the City from the Santa Clara County Department of Public Health to examine ways to reduce or eliminate exposure to the harmful effects of secondhand smoke. Staff selected Leslie Zellers, JD (consultant) to conduct the study based on her extensive experience with local ordinances regulating the sale, use, and marketing of tobacco products.

At the first reading of Ordinance 3072-16 on February 9, 2016, Council asked staff to return with options to limit smoking in additional outdoor areas, such as service areas and outdoor events, as described in the RTC No. 15-0383 (Attachment 2) and the accompanying Smokefree Areas Consultant Report (Attachment 3). In the interim, Governor Brown also signed a new tobacco control bill that eliminated several smoking exceptions formerly allowed by state law and acknowledged in SMC Chapter 9.28 related to indoor workplaces such as bars, hotel lobbies, and employee break rooms. The attached draft ordinance also contains minor updates reflecting that change in state law.

In addition, during the second reading of the ordinance on February 23, 2016, the owner of two restaurants subject to the two-year amortization period requested that his business at 133 S. Murphy

Avenue be exempted from regulation. He stated that the second restaurant will be closing within the two-year amortization period and did not request an exemption for that location.

The purpose of this report is to present the draft ordinance reflecting the limits on smoking in additional outdoor areas and discuss the two-year amortization period and potential alternatives for the restaurant at 133 S. Murphy Avenue where outdoor hookah smoking was previously approved through a use permit, with conditions, in 2007.

EXISTING POLICY

General Plan

Goal EM-11 Improved Air Quality (Chapter 7: Environmental Management): Improve Sunnyvale's air quality and reduce the exposure of its citizens to air pollutants.

Policy cc-4.2 (Chapter 4: Community Character - Heritage Preservation): Maintain beautiful and comfortable outdoor public places which provide a shared sense of ownership and belonging for Sunnyvale residents, business owners, and visitors.

Goal SN-1 Acceptable Levels of Risk for Natural and Human-Caused Hazards (Chapter 6: Safety and Noise): Ensure that natural and human-caused hazards are recognized and considered in decisions affecting the community and that land uses reflect acceptable levels of risk based on identified hazards and occupancy.

Council Policy 3.2.4 Zero Waste: It is the policy of the City of Sunnyvale that the City will work to: 1. Reduce that amount of Sunnyvale waste being disposed.

ENVIRONMENTAL REVIEW

Amendments to the City's smoking ordinance are exempt from the California Environmental Quality Act (CEQA) pursuant to CEQA Guidelines section 15061(b)(3) as the activity is covered by the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA.

DISCUSSION

As indicated in the RTC No. 15-0383 (February 9, 2016), the dangers of tobacco use and exposure to secondhand smoke are well documented:

- More than 480,000 people die each year from smoking-related diseases, making tobacco use the nation's leading cause of preventable death.
- The U.S. Surgeon General has concluded that there is no safe level of exposure to secondhand smoke and the California Air Resources Board has classified secondhand smoke as a toxic air contaminant.
- Secondhand smoke is responsible for an estimated 41,000 heart disease-related and lung cancer deaths each year.
- According to the Centers for Disease Control, the only way to fully protect nonsmokers is to eliminate smoking in all homes, worksites, and public places.

Communities have adopted restrictions on smoking in outdoor areas for a number of reasons,

including:

- Studies have shown that exposure to secondhand smoke outdoors can reach levels attained indoors depending on the amount of wind and number and proximity of smokers.
- Cigarette butts are a major and persistent source of litter. In Sunnyvale, the Downtown Streets Team collected more than 83,000 cigarette butts in 2015 in the downtown area.
- Cigarettes are a major source of fires, causing nearly 15,000 non-residential fires nationwide between 2007 and 2011.
- Prohibiting smoking in outdoor areas where children frequent models healthy behavior for children.

As part of the smokefree areas study, staff conducted an online survey through Sunnyvale Open City Hall. Nearly 350 people who live, work, or visit the City responded to the survey. The survey asked if there are any other areas in the City where smoking should be prohibited. Nearly half of the 350 respondents answered “yes” to this question, with the most common responses being to prohibit smoking in:

- Parks
- All places open to the public, including parking lots
- Bus stops, light rail stops, the Caltrain station
- Service lines
- Public sidewalks near essential services such as hospitals, stores, and banks
- Outdoor events such as Farmers’ Market, Art & Wine, street fairs, Murphy Ave. summer festivals
- All of Murphy Ave.
- Shopping areas
- Near schools
- Everywhere

A. DRAFT ORDINANCE

The attached draft ordinance includes four new prohibitions on smoking in outdoor areas for Council’s consideration, in addition to the limitations adopted in Ordinance 3072-16:

1. in and within 25 feet of service areas;
2. at public events;
3. in the pedestrian retail district of the downtown (100 block of South Murphy Avenue); and
4. in all public parks by removing the current exception for golf courses.

Additionally, Council asked staff to provide a more thorough analysis of the restaurant owner’s request to be exempted from the ban on hookah smoking in outdoor dining areas.

1. Service Areas

A restriction on smoking in service areas seeks to protect individuals from the dangers of secondhand smoke where people wait to receive a service or make a transaction, such as ATMs, information kiosks, public transit stops, mobile vendor lines, cab lines, and ticket lines.

According to the American Lung Association’s Center for Tobacco Policy & Organizing, 85 local governments in California prohibit smoking in any type of service area. In Santa Clara County, five

communities prohibit smoking in service areas: Campbell, Morgan Hill, Palo Alto, San Jose, and Santa Clara County.

Such policies ensure that residents will not be exposed to secondhand smoke while waiting for buses, movies, or any other service. Staff recommends prohibiting smoking in and within 25 feet of service areas to be consistent with the previously-adopted ordinance to prohibit smoking within 25 feet of business entryways and public transit stops. If Council adopts a restriction on smoking in service areas, the existing prohibition on smoking within 25 feet of transit stops would be contained within the larger category of service areas.

2. Public Events

Currently, smoking is not prohibited at outdoor public events, such as farmers' markets, the Art & Wine Festival, and downtown music events. Many local governments in California have taken steps to protect their residents from the dangers of secondhand smoke in outdoor areas where people congregate, such as events open to the public. According to the Center for Tobacco Policy & Organizing, 65 cities and counties in California completely prohibit smoking at public events. In Santa Clara County, seven communities have at least some restrictions on smoking at public events: Campbell, Los Gatos, Morgan Hill, Mountain View, Palo Alto, San Jose, and Santa Clara County.

The draft ordinance (Attachment 1) contains a prohibition on smoking in public places when being used for a public event, including a farmers' market, parade, or music festival. The ordinance allows smoking on streets and sidewalks which are being used in a traditional capacity as pedestrian or vehicle thoroughfares.

3. Downtown Pedestrian Retail District (100 block of South Murphy Avenue)

Many communities have opted to create smokefree zones in commercial areas. For example, Palo Alto prohibits smoking in areas zoned as "regional/community commercial" or "neighborhood commercial", including the downtown area on University Avenue, the California Avenue business district, and the Stanford Shopping Center. Similarly, Walnut Creek prohibits smoking in the "pedestrian retail district", which it defines through specific street boundaries.

In the draft ordinance, staff recommends prohibiting smoking in the pedestrian retail district of the downtown, specifically the 100 block of South Murphy Avenue bounded by Washington Avenue and Evelyn Avenue.

4. Public Parks

Currently, the Sunnyvale Municipal Code prohibits smoking at public parks with the exception of golf courses. At the February 9, 2016 Council meeting, Council inquired about the exception for golf courses. Staff stated that Council previously approved a ban on smoking in public parks, with the exception of golf courses. This occurred on March 20, 2012 and the vote was 6-1. Given the broad restrictions on smoking contained in Ordinance 3072-16 and Council's request for options to limit smoking in additional outdoor areas, staff recommends eliminating the exemption for golf courses. In the Sunnyvale Open City Hall online survey, many individuals recommended prohibiting smoking in public parks, which include golf courses; recreational areas; areas children are present; all public areas, sporting venues, and places open to the public.

Cupertino, Morgan Hill, Palo Alto, Saratoga, and Santa Clara County specifically prohibit smoking on public golf courses as part of a larger restriction on smoking in recreational areas. Campbell, Gilroy,

Los Altos, Los Gatos, and Milpitas prohibit smoking in parks and recreational areas generally. Although these laws do not specifically mention golf courses, the definitions of key terms in the laws are broad enough that they would likely apply to golf courses on public land that are open to the general public. It may be that some of these communities do not specifically mention golf courses in their definition of “recreational areas” because they do not have any public golf courses. Statewide, nearly 200 local governments have adopted laws to completely prohibit smoking in recreational areas. Staff from Public Works stated that a ban on smoking at public golf courses would be consistent with several other jurisdictions in the County. It would also help reduce the significant amount of cigarette butt litter at the golf courses, which is an ongoing problem.

5. New State Tobacco Control Laws

On May 4, 2016, Governor Brown signed into law five new tobacco control bills as part of the legislature’s special session. One of the bills, AB 7 X2, closed many loopholes in smoke-free workplace laws, including amending provisions in the Labor Code to eliminate certain exemptions for smoking in hotel lobbies, small businesses, and break rooms. Other exemptions including private smokers’ lounges and retail or wholesale tobacco shops, remain in place.

Section 9.28.050 of the Sunnyvale Municipal Code defined many of the areas that were exempt from smoking regulation under state law as “smoking optional areas.” With the passage of the new state laws, some of the provisions in 9.28.050 are no longer current because smoking is now explicitly prohibited or limited in some of the areas listed. Given the updated law and the fact that 9.28.050 effectively only incorporated the state law by reference, staff is recommending deletion of 9.28.050 rather than amendment. This is not a substantive change as smoking in these areas will continue to be regulated by state law.

B. Amortization of Hookah Smoking at Murphy Avenue Restaurant

Because the City previously approved two use permits allowing limited outdoor hookah smoking at two restaurants, staff included an amortization period in Ordinance 3072-16 to ensure that the prohibition on smoking in outdoor dining periods applied equally across the City. As discussed in the February 23, 2016 memo to the City Council from the City Attorney (Attachment 4), the proposed two-year amortization period is reasonable, defensible, and consistent with amortization periods upheld in cases involving other types of uses, and even more intensive uses than the limited hookah smoking allowed in this case. The business owner has not provided any information about his business suggesting that the two-year period is unreasonable. Since the 2007 use permit specifies that hookah smoking is only allowed in one designated and very limited outdoor area of the restaurant-only up to 40% of that outdoor area-the facts in this case continue to support a finding that a two-year amortization is reasonable.

However, addressing the hookah use in the context of the smoking ordinance amendments is a policy decision. If the Council desires to change its previously approved approach for two-year amortization, it has other options, including:

- Extending the amortization period, from two to five years for example. As noted in the City Attorney’s memorandum, amortization periods anywhere between one and seven years have been upheld for other types of uses. Particularly in this case, where hookah is only authorized as a fraction of the business, a longer amortization period would be defensible.
- Grandfathering the hookah use, as the business owner has requested.

If Council provides the restaurant owner with a longer amortization period, grandfathers the hookah use, or does not make any changes to the already approved two-year amortization period, hookah smoking would only be allowed in the one outdoor area specified in the permit and smoking of any other types of products would be prohibited. However, since the primary purpose of the ban is to protect the public from the known dangers of secondhand smoke exposure, a longer extension or grandfathering in the restaurant for hookah use may be counterproductive to the primary purpose of prohibiting smoking in outdoor dining areas citywide.

FISCAL IMPACT

If the ordinance amendments are adopted, staff anticipates minimal fiscal impact. Public education would be conducted through a variety of outlets (e.g., the City's website and social media accounts) and would be combined with education on the recently adopted limitations on smoking within 25 feet of businesses and in outdoor dining areas. Information about the new requirements and signage would be provided to businesses in the affected areas. Outreach will be funded primarily by the existing \$95,000 grant. Once the ordinance amendments are implemented, staff anticipates relatively minimal costs related to enforcement. Similar provisions in other municipalities have been reported to be largely self-enforcing and have generated few complaints.

PUBLIC CONTACT

Staff conducted an online survey through Sunnyvale Open City Hall under the prior study asking for feedback on a proposal to prohibit smoking in outdoor dining areas, near business entryways, and in multi-family housing. The survey was viewed by 910 people and completed by 349 people during fall 2015. The consultant and staff also hosted four public outreach meetings at the Sunnyvale Community Center. Although the study did not specifically extend to the additional smokefree outdoor areas described in this report, survey respondents did provide input when asked about additional smokefree locations they would like to see in Sunnyvale. These areas included service areas, public events, downtown, public parks, recreational areas, areas where children are present, sporting venues, and places open to the public.

Public contact was made by posting the Council agenda on the City's official-notice bulletin board outside City Hall, at the Sunnyvale Senior Center, Community Center and Department of Public Safety; and by making the agenda and report available at the Sunnyvale Public Library, the Office of the City Clerk and on the City's website.

ALTERNATIVES

1. Find that the ordinance is exempt from environmental review pursuant to California Environmental Quality Act Guidelines section 15061(b)(3).
2. Introduce an Ordinance to amend Chapter 9.28 of Title 9 of the Sunnyvale Municipal Code (Public Peace, Safety or Welfare) Relating to Regulation of Smoking in Outdoor Areas including:
 - a. in and within 25 feet of service areas;
 - b. at public events;
 - c. downtown; and
 - d. in all public parks (removing the exception for golf courses).
3. Introduce a modified ordinance to prohibit smoking in different locations from those included in Alternative 2.
4. Introduce a modified ordinance that changes the two-year amortization in SMC section 9.28.030(d) to either extend the amortization period for hookah use or grandfather the hookah use for the restaurant located at 133 S. Murphy Avenue.

5. Do not introduce any of the proposed amendments.

STAFF RECOMMENDATION

Alternatives 1 and 2: 1) Find that the ordinance is exempt from environmental review pursuant to California Environmental Quality Act Guidelines section 15061(b)(3), and 2) Introduce an Ordinance to amend Chapter 9.28 of Title 9 of the Sunnyvale Municipal Code (Public Peace, Safety or Welfare) Relating to Regulation of Smoking in Outdoor Areas including:

- a. in and within 25 feet of service areas;
- b. at public events;
- c. downtown; and
- d. in all public parks (removing the exception for golf courses).

Staff recommends prohibiting smoking in each of the areas in the proposed ordinance. Such measures would protect residents, employees, and visitors from harmful exposure to secondhand smoke and would demonstrate the City's commitment to protecting the health of its community. Staff also recommends maintaining the two-year amortization period for hookah use at 133 S. Murphy Avenue. After two years, smoking of any kind would be prohibited in all outdoor dining areas, consistent with the overall intent to protect the public from the dangerous effects of secondhand smoke exposure.

Prepared by: Christy Gunvalsen, Neighborhood Preservation Manager

Reviewed by: Frank J. Grgurina, Director, Public Safety

Reviewed by: Manuel Pineda, Director, Public Works

Reviewed by: Kent Steffens, Assistant City Manager

Approved by: Deanna J. Santana, City Manager

ATTACHMENTS

- 1. Draft Ordinance Chapter 9.28 (Regulation of Smoking)
- 2. RTC No. 15-0383
- 3. Smokefree Areas Consultant Report
- 4. City Attorney Memo, dated February 23, 2016 - Amortization of Hookah Uses