



MEMORANDUM

Date: January 7, 2015

To: Mayor Sawyer and Council Members

Cc: Sean McGlynn, Chuck Regalia, Terri Griffin, and Caroline Fowler

From: Erin Morris, Senior Planner

Subject: Smoking Regulations Update – Follow-up from December 16, 2014 Study Session

At the December 16, 2014 Study Session for the Smoking Regulations Update, the Council raised a number of questions about the proposed regulations and issues associated with the regulation of smoking in general. Below, staff has provided an initial response to the key issues raised by Council members. A complete staff report addressing all of the issues will be provided in the packet for the February 10, 2015 Council meeting.

1. **Matrix Comparing Local Regulations**

The Council requested information about how the City's current and proposed regulations compare with other jurisdictions in Sonoma County. A matrix summarizing smoking regulations in Sonoma County cities and in unincorporated Sonoma County has been prepared, and includes current and proposed regulations for Santa Rosa. Over the past five years, more than half of the jurisdictions have updated their regulations including Healdsburg, Petaluma, Rohnert Park, Sebastopol, unincorporated Sonoma County, and Windsor. Three cities have not updated smoking regulations since 1994 or earlier, including Cloverdale, Cotati, and Sonoma.

As depicted in the matrix, there are differences between various local jurisdictions, but Santa Rosa's proposed smoking regulations are similar to others. Of the jurisdictions with recently updated regulations, the majority have adopted regulations that prohibit smoking in multifamily housing.

2. **Secondhand Smoke as a Nuisance**

As directed by Council on August 26, 2014, staff researched the proposal to declare smoke a nuisance to make it easier for private parties exposed to nonconsensual secondhand smoke to pursue action in court. Staff found that few jurisdictions in California have done so, and for jurisdictions that have taken this approach, the provisions generally have not been utilized. Staff is aware of only one California case where a city's declaration of secondhand smoke as a nuisance was considered. While the trial court did find the city's determination persuasive and an injunction was issued against the secondhand smoke, secondhand smoke exposure continued and it is not clear that the effort achieved desirable results for the parties involved. Based on this and other research, staff did not include nuisance provisions in the draft smoking regulations recently presented to Council.

At the study session, Council members expressed interest in further exploration of this issue. Additional information about the issue of secondhand smoke as a nuisance is provided below.

Santa Rosa's Nuisance Abatement Law

The Santa Rosa City Code does not address secondhand smoke as a nuisance. It provides for several conditions that constitute a nuisance, related to animal control, weeds, graffiti, violation of the Medical Cannabis Dispensary regulations, private sewage systems, contaminated storm water, noise, and hazardous structures.

Declaration of Nuisance by City Ordinance

Cities have the authority under their police power (Cal.Const., art. XI, § 7) to declare what constitutes a nuisance by ordinance. (Gov Code, §§ 38771) The effect of such a declaration is to make the nuisance a nuisance *per se*, which means that there is no burden of proof on a plaintiff beyond the fact that the nuisance actually exists. (*City of Costa Mesa v Soffer* (1993) 11 Cal.App.4i11 378, 382.)

This lesser burden of proof applies if a city brings an action in court to abate a public nuisance. Once a city has declared something to be a nuisance, an individual who files suit alleging a private nuisance would be able to use this declaration to support his or her private nuisance action as long as the individual sustains a private injury. The Court of Appeal held that "a plaintiff may maintain a private nuisance action based on a public nuisance when the nuisance causes an injury to plaintiff's private property, or to a private right incidental to such private property" (*Newhall Land and Farming Company v Superior Court of Fresno County* (1993) 19 Cal.App.4' 334, 342.)

Existing Secondhand Smoke Ordinances

Two cities in Sonoma County identify secondhand smoke as a nuisance. Rohnert Park's "Use of Tobacco" ordinance (Chapter 8.32) states that smoking in any area where smoking is prohibited constitutes a public nuisance and may be abated as such including the application of any of the enforcement remedies provided in the City of Rohnert Park's Municipal Code or under any applicable state or federal statute or pursuant to any other lawful power the city may possess. There are at least four other California cities, including Alameda, Baldwin Park, Compton, and Tiburon, that take a similar approach by declaring that smoking in areas where smoking is prohibited constitutes a public nuisance.

Sebastopol's ordinance takes a broader approach, in that it states that "for all purposes within the City, nonconsensual exposure [to] smoke is a nuisance, and the uninvited presence of smoke on property is a nuisance and a trespass." Six other cities, including Belmont, Calabasas, Carpinteria, Dublin, Larkspur, and Union City identify nonconsensual exposure to smoke as a nuisance.

Option for Council's Consideration

Staff will update the draft smoking regulations to provide an option for addressing second hand smoke as a nuisance in order to assist potential plaintiffs should any decide to pursue their own private nuisance action. A draft of the revised regulations will be posted on the City of Santa Rosa's web site by January 12, 2015 and the Council will be notified. The staff report will further discuss the issues associated with addressing nonconsensual smoke exposure as a nuisance, and include a staff recommendation.

3. Medical Marijuana

The proposed smoking regulations treat the byproducts of marijuana usage (smoke or vapor) the same as other kinds of smoke. The Council asked whether users of medical marijuana would be able to smoke or vaporize the drug within an attached multifamily unit if smoking is prohibited in multifamily units. The short answer is "no," since the proposed regulations address all types of smoke and vapor.

At the Study Session, the City Attorney shared that a medical marijuana user could potentially request to smoke or vaporize medical marijuana within their multifamily unit as a reasonable accommodation under the Fair Housing Act. State and federal law requires that landlords provide "reasonable accommodations" to tenants with disabilities to give tenants with disabilities an equal opportunity as other tenants to use and enjoy a dwelling unit or common area. If a tenant requested a reasonable accommodation for medical marijuana use within their unit, with or without a doctor's note, the landlord could consider

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the request. However, if smoking is prohibited within all of the units on the property, the landlord would not be required to grant the accommodation.

Sebastopol is one of few cities in California that specifically excludes smoking medical marijuana from the definition of smoking. In 2010, there were few studies documenting the effects of marijuana smoke through secondhand exposure. Since then, there have been studies that address the effects of marijuana smoke and vapor. In response to the Council's request, the staff report for February 10, 2015 will discuss options for addressing this issue and include a staff recommendation.

Attachment: Matrix of Smoking Regulations in Sonoma County Cities and Unincorporated Sonoma County