



Office of the City Manager

CONSENT CALENDAR

October 27, 2020

To: Honorable Mayor and Members of the City Council

From: Dee Williams-Ridley, City Manager

Submitted by: Lisa Warhuus, Director, Health, Housing, and Community Services

Subject: Amending Berkeley Municipal Code Chapter 12.70 Sections 12.70.020 V, 12.70.035 E and 12.70.037 C to be in accordance with California Health and Safety Code

RECOMMENDATION

Adopt first reading of an Ordinance amending Berkeley Municipal Code Chapter 12.70 to update Section 12.70.020 Definitions section V and repealing Section 12.70.035.E and 12.70.037.C and adjusting the definition of "smoke" or "smoking" to include medical cannabis to align with the State of California Health and Safety code.

FISCAL IMPACTS OF RECOMMENDATION

Amending the Berkeley Municipal Code Chapter 12.70 will not result in fiscal impacts to the City.

CURRENT SITUATION AND ITS EFFECTS

Currently, the City of Berkeley's Smoke Free Multi-Unit Housing Ordinance 12.70.035 has an exemption for medical cannabis. In 2016, the State of California approved the Control, Regulate and Tax Adult Use of Marijuana Act (Prop 64). With the approval of Prop 64, the State of California also updated the California Health and Safety code specifically, (Division 10. Uniform controlled substance act, [1100-11651] Chapter 6 Offense and Penalties Article 2 Cannabis [11357-11362.9] 11326.3, (a) Section 11362.1) which does not permit any person to "Smoke cannabis or cannabis products in a location where smoking is prohibited", smoking marijuana is prohibited anywhere that the smoking of tobacco products is prohibited. The California Health and Safety code supersedes the local exemption for medicinal marijuana in locations where tobacco smoke is prohibited. This amendment would conform local law to state law.

BMC 12.70.020 defines smoking as. "Smoke" or "smoking" means and includes either (1) inhaling or exhaling upon, burning, or carrying any lighted smoking equipment for tobacco, nicotine or any other plant or product used for personal habit commonly known as smoking or (2) inhaling or exhaling upon, vaporizing, or otherwise using any electronic smoking device. Since the passage of Prop 64, this definition would now include marijuana (medicinal or recreational).

The local exemption for medicinal marijuana is confusing for Berkeley residents and needs clarity on what current city and state parameters are regarding second hand smoke in multi-unit housing.

BACKGROUND

The United States Environmental Protection Agency 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.¹ The only way to fully protect nonsmokers from secondhand smoke is to completely eliminate smoking in indoor spaces, including that from cannabis use. Separating smokers from nonsmokers, cleaning the air, and ventilating buildings cannot completely eliminate exposure to secondhand smoke.² As research has increasingly shown the damaging effects of exposure to secondhand smoke, Berkeley has implemented bans on smoking in public places such as restaurants, bars, grocery stores, and parks.

In 2013, City Council approved an ordinance amending Berkeley Municipal Code Chapter 12.70 to address tobacco smoking which involuntarily exposes neighbors to secondhand smoke in all multi-unit housing in the City.

ENVIRONMENTAL SUSTAINABILITY

The inclusion of medicinal marijuana in the definition of “smoking” to align with the State definition can potentially improve air quality and decrease second hand smoke exposure.

RATIONALE FOR RECOMMENDATION

Amending the definition of smoke/smoking will align Berkeley’s Municipal Code with the State of California statute.

CONTACT PERSON

Janice Chin, Public Health Division Manager, HHCS, (510) 981-5121

Attachments:

1a: Ordinance (showing track changes-underline for additions, strikethrough to strike language)

1b: Ordinance (clean version with final language)

¹ U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, *Exposure to Environmental Tobacco Smoke and Cotinine Levels – Fact Sheet* (2004) available at http://www.cdc.gov/tobacco/research_data/environmental/factsheet_ets.htm (last accessed March 23, 2005).

² U.S. Dep’t of Health and Human Servs., Centers for Disease Control and Prevention, *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General* 11 (2006), available at <http://www.surgeongeneral.gov/library/secondhandsmoke/report/chapter1.pdf> (last accessed February 22, 2013).

ORDINANCE NO. -N.S.

AMENDING BERKELEY MUNICIPAL CODE CHAPTER 12.70 SMOKING POLLUTION CONTROL

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. That Berkeley Municipal Code Subsection 12.70.020.V is amended to read as follows:

12.70.020 Definitions

V. "Smoke" or "smoking" means and includes either (1) inhaling or exhaling upon, burning, or carrying any lighted smoking equipment for tobacco, nicotine, cannabis or any other plant or product used for personal habit commonly known as smoking or (2) inhaling or exhaling upon, vaporizing, or otherwise using any electronic smoking device.

Section 2. That Berkeley Municipal Code Section 12.70.035 is amended to read as follows:

12.70.035 Smoking prohibited in multi-unit residences

A. Effective May 1, 2014, smoking is prohibited in all units of multi-unit residences and all common areas of multi-unit residences.

B. All common areas of multi-unit residences shall have signage indicating that smoking is prohibited consistent with the signposting requirements of Section 12.70.060.A.

C. If the City receives a complaint of a violation of subdivision A, it may issue a notice to the person(s) responsible, informing them of the requirements of this Section. The tenant(s) of a unit, or owner-occupant(s) of an owner-occupied unit, shall be deemed the person(s) responsible for the violation where the violation was caused by the tenant(s) or owner-occupant(s) of the unit, or one or more persons subject to the control of, or present by invitation or permission of, the tenant(s) or owner-occupant(s).

D. If within a six month period following issuance of a notice under subdivision C, the City receives at least two complaints from residents of at least two separate units of the same multi-unit residence, or in the case of a two-unit multi-unit residence, from a resident of the other unit of a violation of subdivision A by the same person(s) provided notice under subdivision C, the person(s) responsible for the violation shall be guilty of an infraction as provided for in Berkeley Municipal Code Chapter 1.20. In addition, the City may employ any other remedies permitted by law, including but not limited to Chapter 1.28. In order for the City to initiate enforcement under this Section, each person who makes a claim of a violation of this Section must lodge the complaint on a form specified by the City.

~~E. Use of medical cannabis, including through the use of an electronic smoking device, within the enclosed area of a unit by a person for whom using medical cannabis is not a crime under California law shall be exempt from this Section.~~

EF. Sales contracts for condominiums entered into on or after May 1, 2014 shall disclose the requirements of Sections 12.70.035 and 12.70.037.

Section 3. That Berkeley Municipal Code Section 12.70.037 is amended to read as follows:

12.70.037 Required Lease Term for New Leases

A. Every lease or other rental agreement for the initial occupancy of a new or existing unit in a multi-unit residence entered into on or after May 1, 2014, shall include a clause providing that it is a material breach of the lease or other rental agreement for the tenant, or any other person subject to the control of the tenant or present by invitation or permission of the tenant, to engage in smoking in any unit of the multi-unit residence or any common area of the multi-unit residence.

B. Landlords shall offer all current tenants a voluntary lease addendum providing that it is a material breach of the lease or other rental agreement for the tenant, or any other person subject to the control of the tenant or present by invitation or permission of the tenant, to engage in smoking in any unit of the multi-unit residence or any common area of the multi-unit residence.

~~C. The use of medical cannabis, including through the use of an electronic smoking device, by a person for whom using medical cannabis is not a crime under California law shall not constitute smoking in a unit of a multiunit residence under the mandatory clause under subdivision A or the voluntary clause under subdivision B, unless it is separately prohibited under another term of the lease or other rental agreement.~~

~~CD.~~ Applications for tenancy shall include information from the landlord regarding Sections 12.70.035 and 12.70.037.

DE. Landlords shall provide written notice to all existing tenants of the requirements of Sections 12.70.035 and 12.70.037 no later than March 1, 2014.

Section 4. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.

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- B. All common areas of multi-unit residences shall have signage indicating that smoking is prohibited consistent with the signposting requirements of Section 12.70.060.A.
- C. If the City receives a complaint of a violation of subdivision A, it may issue a notice to the person(s) responsible, informing them of the requirements of this Section. The tenant(s) of a unit, or owner-occupant(s) of an owner-occupied unit, shall be deemed the person(s) responsible for the violation where the violation was caused by the tenant(s) or owner-occupant(s) of the unit, or one or more persons subject to the control of, or present by invitation or permission of, the tenant(s) or owner-occupant(s).
- D. If within a six month period following issuance of a notice under subdivision C, the City receives at least two complaints from residents of at least two separate units of the same multi-unit residence, or in the case of a two-unit multi-unit residence, from a resident of the other unit of a violation of subdivision A by the same person(s) provided notice under subdivision C, the person(s) responsible for the violation shall be guilty of an infraction as provided for in Berkeley Municipal Code Chapter 1.20. In addition, the City may employ any other remedies permitted by law, including but not limited to Chapter 1.28. In order for the City to initiate enforcement under this Section, each person who makes a claim of a violation of this Section must lodge the complaint on a form specified by the City.
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- B. Landlords shall offer all current tenants a voluntary lease addendum providing that it is a material breach of the lease or other rental agreement for the tenant, or any other person subject to the control of the tenant or present by invitation or permission of the tenant, to engage in smoking in any unit of the multi-unit residence or any common area of the multi-unit residence.
- C. Applications for tenancy shall include information from the landlord regarding Sections 12.70.035 and 12.70.037.
- D. Landlords shall provide written notice to all existing tenants of the requirements of Sections 12.70.035 and 12.70.037 no later than March 1, 2014.

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