

**City of Culver City, California  
Agenda Item Report**

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| Meeting Date: 3/24/2014                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |  | Item Number: <u>A-2</u>                                                                           |  |
| <b>CITY COUNCIL AGENDA ITEM: Discussion of Draft Ordinance Regulating Smoking in Multi-Unit Housing and Direction to Staff.</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |  |                                                                                                   |  |
| Contact Person/Dept.:<br>Heather Baker/City Attorney                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |  | Phone Number:<br>(310) 253-5660                                                                   |  |
| Fiscal Impact: Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |  | General Fund: Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>                 |  |
| Public Hearing: <input type="checkbox"/>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |  | Action Item: <input checked="" type="checkbox"/> Attachments: <input checked="" type="checkbox"/> |  |
| Commission Action Required: Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |  | Date: _____                                                                                       |  |
| Public Notification: Notice Published in the Culver City News (02/06/14 and 03/20/14); Email: Meetings and Agendas – City Council (03/14/14 and 03/20/14); County of Los Angeles Department of Health Services (02/05/14 and 03/14/14), Culver City Chamber of Commerce, Downtown Business Association (03/14/14 and 03/19/14); Coalition for Smoke-Free Living in Culver City (01/31/14 and 03/14/14); California Apartment Association – Los Angeles (01/31/14 and 03/14/14); and Coalition for a Tobacco Free LA County (comprised of over 70 organizations – this notification was emailed courtesy of the County of Los Angeles Department of Health Services) (02/05/14) and (03/17/14); USPS: Courtesy Notice Mailed to 57 Homeowners Associations (03/17/14).                                                                                                                                                                                                                                                                                                                             |  |                                                                                                   |  |
| Department Approval:<br>Carol Schwab (03/19/14)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |  | City Attorney Approval:<br>Carol Schwab (03/19/14)                                                |  |
| Chief Financial Officer Approval:<br>Jeff Muir (by M. Noller) (03/19/14)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |  | City Manager Approval:<br>John M. Nachbar (03/20/14)                                              |  |
| <p><b><u>RECOMMENDATION:</u></b></p> <p>Staff recommends the City Council discuss the draft ordinance regulating smoking in multi-unit housing and provide direction to staff as deemed appropriate (the “Discussion Draft Ordinance”) (Attachment 1).</p><br><p><b><u>BACKGROUND:</u></b></p> <p>Over the past several months, at prior City Council meetings and through correspondence to City Council Members, the organization Coalition for Smoke-Free Living in Culver City requested the City Council consider the issue of regulating smoking in multi-unit housing and possibly adopt an ordinance in this regard. At the City Council meeting of May 13, 2013, there was a consensus to agendize this matter for discussion.</p> <p>On August 26, 2013, the City Council had a general policy discussion regarding this issue and directed staff to return with a draft ordinance including a “menu of options” for consideration and discussion. In addition, the City Council requested more information regarding other cities’ experiences since adoption of their ordinances.</p> |  |                                                                                                   |  |

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If the City Council were to determine to consider the adoption of an ordinance regulating smoking in multi-unit housing, there are various elements that may be included in such an ordinance, some or all of which may be of interest to the City Council. These policy considerations are set forth in the Discussion Draft Ordinance and discussed later in this report.

**DISCUSSION:**

***Existing Law<sup>1</sup>***

Existing federal and state laws have certain limited provisions relating to smoking in multi-unit housing.

- Labor Code §6404.5: Indoor common areas (including hallways, stairwells, laundry rooms, and recreation rooms) may be subject to the workplace smoking prohibitions contained in Labor Code §6404.5, if these areas are places of employment. For example, an indoor common area may be considered a place of employment if the complex has an employee, such as an on-site property manager, security guard, or maintenance staff who works on the property at any time.
- Civil Code §1947.6: Landlords and condominium associations may prohibit smoking on any portion of the property or in any portion of the buildings, including inside individual dwelling units, in accordance with the requirements of Civil Code §1947.6.<sup>2</sup>
- FHA and FEHA: Tenants of multi-unit residences who have certain disabilities relating to smoke sensitivity may have other legal remedies available under federal and state law to address problems with smoke entering their unit from other units.<sup>3</sup>

Currently, the Culver City Municipal Code (CCMC) does not include any prohibitions or restrictions relating to smoking in multi-unit housing.

***City's Authority to Regulate***

Although currently there are no prohibitions contained in state law against smoking in multi-unit housing (other than common areas that are considered to be "places of employment"), the City is not preempted from establishing its own regulations. Pursuant to Civil Code §1947.5, local governments may adopt regulations and policies that prohibit smoking or tobacco product use in residential dwellings. In addition, it is well established in case law that there is no fundamental right to smoke, nor are laws that prohibit smoking considered discriminatory against

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smokers as a particular group. Therefore, in adopting such laws, the City need only have a rational basis that is related to a legitimate governmental purpose.

In this case, providing for the public health, safety, and welfare is a sufficient, rational basis for establishing a prohibition against smoking in multi-family dwellings.

***Other Cities' Regulations***

Eleven other cities in Los Angeles County {Baldwin Park, Burbank, Calabasas, Carson, Compton, Glendale, Huntington Park, Pasadena, Santa Monica, South Pasadena and Temple City (collectively, "Comparison Cities")} have adopted some type of regulations relating to smoking in multi-unit housing. Many of the Comparison Cities' ordinances also apply to owner-occupied condominiums. Please see the attached matrix for more information regarding the various elements of each city's ordinance (Attachment 2).

***Policy Considerations***

If the City Council determines to establish smoking regulations in multi-unit housing, there are many options to consider for inclusion in an ordinance. These options are identified in the Discussion Draft Ordinance and further discussed below.

1. Applicability of Regulations:

- a. ***Definition of multi-unit residence.*** An important initial step in establishing regulations is to define the type of dwelling(s) that will be subject to the regulations (i.e. apartments, condominiums, long-term health care facilities, single room occupancy hotels (SRO), and motels). The general definition of "multi-unit residence" is a property containing two or more units. However, the City Council has the option of excluding certain types of property from this definition, such as hotels/motels that meet certain requirements, a mobile home park, a single-family home, a single-family home with a detached or attached second unit, a long-term health care facility, an SRO, etc. Seven of the Comparison Cities apply their non-smoking regulations to all condominiums and one additional Comparison City applies its regulations to condominium rental units only. (See Section 9.11.205 of the Discussion Draft Ordinance)
- b. ***Existing and/or new units.*** The City may prohibit smoking in individual units that are in existence at the time of the effective date of an ordinance or new units that receive a certificate of occupancy after the ordinance is in effect, or both. According to the Community Development Department, depending on the scope of the regulations, the ordinance could potentially affect 8,793 multi-family units.

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- i. Designation of existing units. The ordinance may apply to *all* existing units, as is the case in the Comparison Cities of Compton and Pasadena. In the alternative, the ordinance may require a landlord to designate a certain percentage of existing units as non-smoking units. The Comparison Cities of Baldwin Park, Calabasas and South Pasadena require 80% of existing units be designated as non-smoking units. It appears that the remaining Comparison Cities do not require a minimum number of designated non-smoking units, but do require that they designate units as either “smoking” or “non-smoking” through a designation process as described in the “phase-in plan” section below. (See Sections 9.11.230 and 9.11.245 of the Discussion Draft Ordinance)
- ii. New units. With the exception of Carson, all of the Comparison Cities prohibit smoking in newly constructed units. With this provision, the City Council has the option of the percentage of new units that are designated non-smoking and the timing of when new units are subject to the regulations. The City can provide for 100% of all new units to be non-smoking or it can designate a lesser percentage, i.e. up to 100%, but no less than 80% (or some other number). In addition, in defining “new unit,” the City Council may choose to “grandfather” new units that are already under construction at the time of adoption of an ordinance and require compliance in new units built or leased for the first time over 180 days after the effective date of an ordinance. (See Section 9.11.225 of the Discussion Draft Ordinance)
- iii. Phase-in Plan. A “phase-in plan” in general is one approach used by some of the Comparison Cities to balance the public health needs against the potential inconvenience an ordinance may place on smoking tenants and landlords who must implement a new policy. Specifically, a 12-month phase-in plan is generally considered to strike a good balance between the potential legal rights of tenants under existing rental agreements and the legal authority of landlords to modify such rental agreements in compliance with a newly adopted ordinance. Such a phase-in plan could include a period of time for the landlord to notify tenants of proposed designated non-smoking units (i.e. 60 days); a period of time to notify tenants of the final designation of non-smoking units (i.e. 90 days); a deadline for landlords to submit designation documents to the City (i.e. 120 days); and an “effective date” on which the non-smoking regulations will be enforced (i.e. 365 days). Staff received information from the City of Glendale that pre-education of the laws and implementing the new regulations

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gradually have been key factors in gaining cooperation from landlords and tenants.

**c. *Definition of Smoking.***

- i. E-cigarettes. The City's current smoking regulations (smoke-free parks and outdoor dining areas) do not include e-cigarette use in the definition of smoking. The City Council should consider whether to include e-cigarettes in the definition of smoking for purposes of regulating smoking in multi-unit housing. Four of the Comparison Cities (Baldwin Park, Huntington Park, Glendale, and South Pasadena) include e-cigarettes in their prohibitions of smoking in multi-unit housing. Recently, several cities have considered or are considering expanding their smoking regulations in general to prohibit the use of e-cigarettes in all places where smoking is prohibited. (See Section 9.11.205 of the Discussion Draft Ordinance)
- ii. Medical Marijuana. State law (Health and Safety Code Section 11362.79(a)) provides that nothing in the Compassionate Care Act of 1996 (the voter approved Proposition 215 which allows the use of medical marijuana) does not authorize the use of medical marijuana in any place where smoking is prohibited by law. Therefore, without a specific exception called out in an ordinance, the smoking of medical marijuana would be prohibited in non-smoking units. Of the 11 Comparison Cities, it appears that South Pasadena is the only city that specifically exempts smoking of medical marijuana from its multi-unit housing regulations. The remaining Comparison Cities do not have such an exemption. (See Section 9.11.255 of the Discussion Draft Ordinance)

2. Locations Where Smoking is Prohibited: There are various options for prohibiting smoking in certain locations.

- a. ***Common Areas.*** The City may prohibit smoking in indoor and/or outdoor common areas and may provide a landlord or homeowners' association with the authority to designate a portion of a common area as a designated smoking area, subject to certain requirements (i.e. must be an unenclosed area, located a certain distance from a designated non-smoking area or area primarily used by children or used for physical activity, such as a tennis court). (See Sections 9.11.205 and 9.11.215 of the Discussion Draft Ordinance)

- i. Indoor common areas. All of the Comparison Cities have adopted non-smoking provisions for indoor common areas. An indoor common area is generally defined as an enclosed area that residents of more than one unit are entitled to enter or use (i.e. lobbies, hallways, laundry rooms, elevators, stairs, community rooms, gym facilities, parking garages, etc.).

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- ii. Outdoor common areas. All of the Comparison Cities, except for Burbank, Carson, and Temple City, have prohibited smoking in outdoor common areas. An outdoor common area is generally defined as an unenclosed area that residents of more than one unit are entitled to enter or use (i.e. pathways, courtyards, swimming pools, parking lots, etc.).
  - b. **Individual balconies and patios.** Seven of the Comparison Cities prohibit smoking on individual balconies and patios, including Baldwin Park, Burbank, Compton, Glendale, Huntington Park, Santa Monica and Pasadena. Such a restriction is best accomplished by including exclusive-use areas in the definition of “unit.” (See Section 9.11.205 of the Discussion Draft Ordinance)
  - c. **Smoke-free buffer zones.** Such a provision would prohibit smoking in unenclosed areas of a multi-unit residence (i.e. balconies, porches, decks and patios) that are located within a certain distance (i.e. 25 feet) of the doorway, window, opening or other vent into an enclosed non-smoking area. Only four of the Comparison Cities have adopted these smoke-free zones (Baldwin Park, Calabasas, Huntington Park and South Pasadena). This restriction would apply to exclusive-use balconies, porches, decks, and patios of units where smoking would otherwise be allowed, if these areas are within 25 feet of a non-smoking unit or other designated non-smoking area. (See Section 9.11.220 of the Discussion Draft Ordinance)
  - d. **Individual units.** As discussed in further detail in Section 1 above, many of the Comparison Cities prohibit smoking in existing and/or new individual units. If less than 100% of the units are required to be designated non-smoking units, then there are certain requirements that may be imposed to restrict the location of the “smoking” units (i.e. no sharing of ventilation system with non-smoking units; to the maximum extent possible, grouping of non-smoking units together or in a single building). In addition, a designation process would need to be implemented, which may require additional staff resources to be allocated to this effort. (See Sections 9.11.225, 9.11.230 and 9.11.245 of the Discussion Draft Ordinance)
3. Enforcement: If the City Council adopts regulations, enforcement methods may include City enforcement, private enforcement or both. The enforcement provisions of any ordinance would be written to provide options for enforcement and encourage and promote self-regulation and compliance (i.e. clear, conspicuously posted “no smoking” signs; providing residents with a right of private civil action).

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- a. **City enforcement.** Regulations, if adopted, would be included with the City's other smoking regulations and may be subject to the same methods of enforcement, including, but not limited to, administrative citations, infraction and/or misdemeanor citations, and civil action, if the City Council so determines. In the event the City would need to take an enforcement action, it would be handled as resources permit, taking into consideration the existing work plans of the Community Development Department – Enforcement Services Division, the Police Department, and the City Attorney's Office. Should the City Council determine it wishes to make enforcement of any adopted regulations a higher priority, additional resources would need to be dedicated to this effort. (See Section 9.11.260 of the Discussion Draft Ordinance)  
**[Note from the Community Development Director: The Community Development Department will likely handle the implementation and enforcement of any ordinance that is adopted. Depending on the scope of the regulations, this could require a significant amount of staff time (particularly during the first months of the effective date of the ordinance). Due to limited staff resources, the Director recommends that the City Council consider private enforcement of any adopted regulations. Alternatively, the City Council may need to consider allocating resources for temporary enforcement staff to accommodate the potential workload associated with enforcing the ordinance which may impact 8,793 multifamily units.]**
- b. **Private enforcement.** Consistent with the City's enforcement provisions for other smoking regulations, any adopted multi-unit housing non-smoking regulations may be enforced by a private person. If the City Council wanted to limit enforcement of the non-smoking regulations in multi-unit housing to private enforcement only, it could do so. There are other sections in the CCMC (specifically, the view preservation provisions) that limit enforcement solely to private parties involved. (See Section 9.11.265 of the Discussion Draft Ordinance)
- c. **Practices in the Comparison Cities.** The cities of Compton, Glendale and Pasadena provide for local government enforcement of their non-smoking multi-unit housing ordinances. The cities of Huntington Park and Santa Monica provide for private enforcement only. The cities of Baldwin Park, Calabasas, South Pasadena and Temple City provide for both local government enforcement and private enforcement. The City of Glendale has one person specifically assigned to implementation of its ordinance, and its code enforcement staff is the primary enforcement resources. The City of Santa Monica does limited City enforcement for violations of failing to have required signage, but for smoking violations it provides for private enforcement by tenants through small claims court. The City of

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Calabasas, where a majority of its community is non-smokers, has been successful mostly with self-regulation of its ordinance.

4. Penalties:

**a. City enforcement.** If the City Council determines to provide for City enforcement of non-smoking multi-unit housing regulations, staff recommends that the penalties imposed be consistent with the City's other smoking regulations and the general penalty provisions of the CCMC. For example, if an administrative citation were issued for a violation, the fines are as follows: \$100.00 for a first violation; \$200.00 for a second violation within one year; and \$500.00 for each additional violation within one year. As mentioned above, City enforcement may require additional staff resources to be allocated. (See Section 9.11.260 of the Discussion Draft Ordinance)

**b. Private enforcement.** If the City Council determines to provide for a comprehensive scheme for private enforcement of an ordinance, a "plaintiff" could pursue actual, statutory, and punitive damages. (See Section 9.11.265 of the Discussion Draft Ordinance)

5. Outreach and Education: If the City Council directs staff to return with a proposed ordinance for consideration and introduction, staff will also return with a proposed program for providing outreach to and educating landlords, tenants, and condominium associations.

***Public Comment Received***

In response to the public notices sent on this issue for the August 2013 City Council meeting, the City Attorney's Office received public comment from the California Apartment Association (CAA). Attached is CAA's policy statement, which sets forth its position that this should be a market driven issue and landlords should be able to set their own policies, which many landlords have already done. In addition, several other individuals submitted public comment prior to the August meeting.

In addition, in response to the more recent notices for the current agenda item, the City Attorney's Office received a letter from a member of one of the condominium complexes which advocates allowing homeowners' associations to determine what rules are placed within their property boundaries.

All public comment received as of the distribution of this report is included as Attachment 3.

The City Council is requested to consider the above policy issues and provide direction to staff as deemed appropriate.

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**FISCAL ANALYSIS:**

There is no fiscal impact to discussing this item. If an ordinance were to be adopted by the City Council, the additional regulations prohibiting smoking in multi-unit housing may require increased enforcement activity by the Enforcement Services Division, the Police Department, and the City Attorney's Office. In addition, staff time would be required to: 1) prepare and disseminate information about the newly adopted regulations; and 2) implement the provisions of the ordinance, which could be significant depending on the scope of the regulations. These costs cannot be easily quantified at this time. If the City Council directs staff to return with a proposed ordinance and provides policy direction as to the scope of the regulations, staff may be able to return with an estimate of these costs. The more comprehensive the regulations, particularly if the City Council determines to incorporate a "designation process" for fewer than 100% of the units in a multi-family housing complex, the more staff time that will be involved with educating, implementing, and enforcing those regulations.

**ATTACHMENT:**

1. Discussion Draft Ordinance
2. County of Los Angeles Public Health Tobacco Control and Prevention Program Matrix of Non-Smoking Multi-Unit Housing Ordinances in Los Angeles County
3. Public Comments Received

**MOTION:**

That the City Council:

Discuss the draft Ordinance regulating smoking in multi-unit housing and provide direction to staff as deemed appropriate.

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<sup>1</sup> *Tobacco Laws Affecting California 2012*, Public Health Law & Policy, [www.phlpnet.org](http://www.phlpnet.org)

<sup>2</sup> Civil Code §1947.5 requires that landlords who exercise their authority to prohibit smoking must comply with all federal, state and local laws regarding changes to the terms of a lease or rental agreement.

<sup>3</sup> Federal Fair Housing Act; California Fair Employment and Housing Act