



## **Staff Report**

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### FURTHER DISCUSSION AND DIRECTION REGARDING AMENDMENTS TO BELMONT MUNICIPAL CODE SECTION 20.5, REGULATION OF SMOKING

Honorable Mayor and Council Members:

#### **Summary**

At the October 24, 2006 City Council meeting, the Council received public input and discussed possible further regulation of secondhand smoke. The Council indicated that they preferred the Calabasas ordinance (Attachment A), and requested that staff return with a draft ordinance along those lines.

However, after the meeting, staff received significant additional information which staff recommends that the City Council consider before providing direction for preparation of an ordinance for introduction.

#### **Background**

As noted in the last staff report, Belmont currently has a "Regulation of Smoking" ordinance in Chapter 20.5 (Attachment B). This ordinance prohibits smoking in places of employment and most public places, including "lobbies, hallways, stairwells and other common areas in apartment buildings, condominiums, senior citizen retirement or residential care houses, nursing homes and other multi-residential facilities and buildings ..." (Section 20.5-3(n)). Under this chapter, smoking is allowed in certain designated places in bars, hotels, and in private residences. The ordinance allows owners or employees to voluntarily ban smoking in these places. Violations of the chapter are specifically declared a public nuisance in Section 20.5-9(e); enforcement mechanisms include a formal complaint to the City Manager, criminal enforcement, and also a private lawsuit under Section 20.5-10.

In the staff report for the October 24, 2006 meeting, ordinances enacted by the City of Dublin and the City of Calabasas were discussed. Essentially, the Dublin ordinance (Attachment C) does not impose any additional restrictions on where smoking is allowed. Instead, Dublin has simply declared that secondhand smoke is a nuisance and that individuals are free to pursue private civil enforcement if they believe they have been adversely affected by secondhand smoke, regardless of the source or location from which the secondhand smoke emanates.

In contrast, while the Calabasas ordinance seemed at first glance to be more restrictive, in fact upon further examination, it does not restrict smoking in private residences (multi-family or

otherwise). One difference between the Calabasas and the Dublin ordinances is that the Calabasas ordinance contains detailed provisions regarding public enforcement. Discussions with the drafter of the ordinance, Michael Colantuono, confirmed that the issue of secondhand smoke in multi-unit residential buildings was not completely addressed, but may be in the future. Mr. Colantuono also reported that no litigation has been threatened or initiated to date regarding the ordinance. He indicated that the City has initiated an educational campaign to inform citizens and businesses of the requirements of the ordinance. The Sheriff's Department leaves enforcement to City Code Enforcement staff. Mr. Colantuono also indicated that with respect to prohibiting smoking at public schools, there would likely be a state preemption issue. Calabasas maintains a "Frequently Asked Questions" portion of its website regarding the ordinance, which is reproduced as Attachment D.

Since the last meeting, citizens have also written to express their views, both in favor of and against more restrictive rules regarding secondhand smoke. This correspondence is attached as Attachment E.

After the last meeting, staff received information from the American Lung Association and other organizations analyzing a number of policy options. For example, Attachment F is a matrix of policy and enforcement options relating to smoke free housing in multi-unit residences. Attachment G is a synopsis by the Tobacco Control Legal Consortium regarding infiltration of secondhand smoke into condominiums, apartments and other multi-unit dwellings.

### **Discussion**

Based on the discussion at the last meeting and information received since that time, staff believes there are several key issues for discussion at tonight's meeting.

First, should the City prohibit smoking in single family private residences? Such a proposal has the advantage of providing the maximum degree of protection for all Belmont residents against secondhand smoke. It also recognizes that it is difficult, if not impossible, for individuals who smoke in their private homes (single family or otherwise) to completely contain the smoke they generate within the boundaries of their property. On the other hand, no city in California has gone so far as to ban smoking in private single family residences. This may be a reflection of possible significant public opposition to such a proposal, as well as the perception that the City is regulating voluntary behavior in a private residence.

Second, should the City prohibit smoking in individual units of multi-family residences? Many cities in California have adopted a form of such ban. The main question to be addressed is whether the ban would apply to all multi-family residential units, or only those with more than a specific number of units. With respect to Bonnie Brae Terrace and other HUD developments, according to the Tobacco Control Legal Consortium Synopsis, attached as Attachment G, HUD requires landlords to grandfather currently smoking residents. Accordingly, a City ban on smoking in all private residences would not be enforceable in HUD buildings. For these

properties, declaring smoke a secondhand nuisance and allowing individual residents to bring private actions would probably provide the greatest degree of protection for them. It should be noted that while HUD may require landlords to grandfather in existing smokers, such a provision does not provide a license for those smokers to inflict secondhand smoke on others.

Third, should the City ban smoking in outdoor areas, such as yards and patios, of either single family or multi-family residential units, when those outdoor areas do not abut any common area or public space? The advantage of such a ban would be to provide the maximum degree of protection for private property owners who live next to individuals who smoke. On the other hand, individuals affected by secondhand smoke are more likely to be exposed in multi-unit residential facilities than by living next to a single family home occupied by smokers.

Fourth, should the City enforce whatever ordinance it may pass, or should it leave enforcement to the civil courts? In general, under California law, the City is not required to enforce any particular ordinance in any specific way. Cities have broad discretion to either enforce, or not enforce, municipal codes, subject however to the limitation that they may not unlawfully discriminate in such enforcement. An example of a valid policy decision to not enforce an ordinance may occur when an activity on one person's property affects only that person's neighbor, and no one else. Under these circumstances, cities may decide, as a policy matter, that ordinances proscribing the conduct are best left to private enforcement between the neighbors. One main reason for leaving enforcement in these situations to the affected neighbors is that the evidence required to establish responsibility is usually not easily available to City staff, but is easily available to the neighbors. In general, when cities enforce municipal codes, they would prefer to rely on the first-hand testimony of one of their staff members to support the City's case, instead of having to rely on third-party testimony of others.

In discussing possible enforcement of secondhand smoking ordinance with staff, concerns have arisen regarding entry into private residences should the City decide to ban smoking in such residences to conduct code enforcement. Absent a court order, citizens are not required to allow City staff to enter their private residences. For this reason, staff documentation of the existence of a public nuisance is usually done from observation outside the property or with the consent of the property owner. In extreme cases, the City does have the ability to obtain an inspection warrant from the court. Another difficulty would be identifying the individual allegedly smoking in the private residence. Should a City staff member obtain consent to enter a private residence, no one may be smoking at that particular time, even though the odor of cigarette smoke might be obvious. In this situation, it would be difficult to determine to whom staff should issue an administrative citation. The occupants could simply deny that they were smoking, and allege that it was a guest who just left. This is perhaps why the City of Dublin decided to leave such enforcement to the affected private parties, who are best able to observe and testify about the individuals who were smoking.

**General Plan Statement/Consistency**

Regulation of smoking is consistent with General Plan policies to protect the public health, safety and welfare of Belmont citizens.

**Fiscal Impact**

The fiscal impact of any proposed ordinance amendments would depend on whether the City would be expending resources to enforce the ordinance.

**Public Contact**

Posting of City Council agenda.

**Conclusion/Recommendation**

Staff recommends that the Council discuss the various alternatives analyzed in the staff report and provide further direction regarding any ordinance amendment.

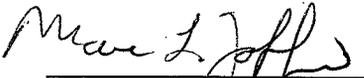
**Alternatives**

1. Direct staff to further study the matter;
2. Table the matter at this time.

**Attachments**

- A. Calabasas Ordinance
- B. Belmont Municipal Code Chapter 20.5
- C. Dublin Ordinance
- D. Calabasas Frequently Asked Questions
- E. Correspondence from citizens
- F. American Lung Association Matrix
- G. Tobacco Control Legal Consortium Synopsis

Respectfully submitted,

  
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City Attorney