CITY OF OAKLAND

AGENDA REPORT

OFFICE OF THE CITY CLERK
2006 MAR -2 AM 9:54

TO: Office of the City Administrator
ATTN: Ms. Deborah Edgerly
FROM: Office of the City Administrator, Special Activity Unit
DATE: March 14, 2006

RE: Informational Report On the Smoking and Tobacco Ordinances, Smoking Complaints in 2005, and Current Smoking/Tobacco Issues

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SUMMARY

The Office of the City Administrator's Special Activity Unit is the primary administrative enforcement agency for Oakland's Smoking Pollution Control Ordinance, Chapter 8.30 of the Oakland Municipal Code (OMC). This ordinance prohibits smoking inside of all enclosed areas used by the public, including places of employment, businesses patronized by the public, and restaurants. Additionally, the Office of the City Administrator, with the assistance of the primary legal enforcement agency, the Alcohol Beverage Action Team (ABAT) unit of the Oakland Police Department (OPD), enforces the state law that prohibits smoking inside bars and bingo halls. In October, 2005, the City Council amended OMC section 8.30.060B to specify that smoking outside all buildings that are places of employment must be at least 25 feet from doorways, windows and air vents. Previously the ordinance required smoking at a 'reasonable distance' from the work building, which the City Administrator had, through Administrative Instruction, interpreted, for City buildings only, as 25 feet. The City Administrator also has oversight of OMC Chapter 8.34 that prohibits the placement of tobacco product vending machines in places accessible to minors, and Chapter 8.32 that prohibits tobacco product and tobacco accessory giveaways.

Reversing a multi-year trend of a decreasing number of smoking complaints, the total number of complaints received by this office relating to smoking in and around places of employment, public businesses, and restaurants more than doubled from **fifteen (15) in 2004 to thirty-one (31) in 2005!** Complaints relating to smoking in bars continued at the 2004 level of **one (1) in 2005**, and there were **no complaints about minor-accessible vending machines**, down from one (1) in 2004.

During 2005 the Office of the City Administrator continued to work collaboratively with OPD and with a consortium of agencies, including the Tobacco Control Program of the Alameda County Health Department, the American Lung Association, and other East Bay cities. The Office of the City Administrator, with the assistance of other City enforcement agencies, will continue to provide oversight and enforcement of smoking laws in 2006.

Item: _____
Public Safety Committee
March 14, 2006

FISCAL IMPACT

This is an informational report. Fiscal impacts are not included.

On November 15, 2005, the City Council accepted a grant of $25,000 (Resolution No. 79592 C.M.S.) awarded by the Alameda County Public Health Department. The grant covered certain costs related to the enforcement of laws regarding underage possession of tobacco products, the prohibition against smoking in bars, and the enforcement of the Smoking Pollution Control Ordinance during the period of November 1, 2005 through May 31, 2006.

BACKGROUND

The Smoking Pollution Control Ordinance, adopted on July 29, 1986, prohibits smoking inside enclosed places in the City of Oakland that are accessible to the general public, including places of employment, restaurants, and businesses. Further, the ordinance mandates that smoking outside regulated buildings occur at a minimal distance of 25 feet from doors and windows. California Labor Code section 6404.5 prohibits smoking in bars and gaming clubs (bingo halls are included under gaming clubs). Although the City of Oakland does not have gaming clubs, it had five (5) bingo halls in 2004, including the East Oakland Senior Center. The City Administrator's Administrative Hearing Officer processes citizens' complaints or inquiries regarding city ordinances and state laws on smoking or other tobacco products.

KEY ISSUES AND IMPACTS

Smoking Pollution Control Ordinance, OMC Chapter 8.30

Smoking Complaints: **Thirty-one (31) smoking complaints** were filed in 2005 in the categories reflected below. As in the past, the majority of these complaints were resolved upon the first contact with the offending business owners or managers. Of the 31 complaints, only six (6) were second complaints against businesses that had already received one warning letter. Unlike previous years, although there were a few complaints about smoking inside buildings, almost all of the complaints, including those where smoking was reported inside, were about establishments where outdoor smoking was permitted too close to doors and windows of that business or neighboring businesses. In 2004, only seven (7) of the fifteen (15) complaints received were specified smoking outside of buildings. In 2005, only three (3) complaints were directed solely to the indoor aspect of smoking at a particular building.

The most common complaints were from patrons of restaurants, cafes, or coffee shops where smoking at outside tables resulted in smoke drifting in through open windows and from owners of businesses whose business neighbors either smoked themselves or allowed smoking outside, such that smoke entered the doors and windows of the complaining business owner. Most of these complaints involve businesses along Oakland's retail business corridors, where business entryways are close enough that a 25 foot rule is tantamount to making those corridors no-smoking zones. Although a few business owners

and patrons have complained to the City Administrator, none accepted the invitation to voice their concerns to the City Council during the passage of the "25 foot" amendment.

Eliminating second complaints, the breakdown of complaints by business types is as follows:

Bars	**1**
Tobacco Shops	**1**
Educational Institutions	**1**
Office Buildings	**3**
Personal Services	**3**
Retail	**6**
Restaurants/Cafes/Coffee Shops	**10**
Total	**25**

A list of the establishments that have been the subject of complaints is included as Attachment A.

Enforcement

In the past, the City Administrator sent a warning letter to all establishments that were the subject of complaints. The letter stated the nature of the complaint, explained state and local laws, included no-smoking signs for the establishment to post, outlined the penalties for violations, and established a date by which compliance was expected. If a second complaint was received, a letter was sent demanding immediate compliance, and warning that an enforcement officer could cite them for any future violations. The letters are copied to the ABAT Unit and to the Police Service Area (PSA) lieutenant. On the basis of the state Labor Code, the ABAT Unit then issues citations for indoor smoking.

Outdoor smoking, however, was another matter:

- State law contains no prohibition, except in regards to smoking outside government buildings.
- The OMC wording of 'reasonable distance' did not create an enforceable standard.
- The 25 foot distance designated by Administrative Instruction 4001 as the definition of "reasonable distance" applied only to City buildings.

Therefore, no enforcement of outdoor smoking was done. Fortunately, in most cases, compliance was voluntary.

The 2005 amendment to the Smoking Pollution Control Ordinance greatly increased the ability of OPD to enforce against violators of the outdoor smoking law. With funding from the Alameda County Public Health Department and the American Lung Association of the East Bay, the City Administrator's office sent a letter (Attachment B) with the December 2005 business tax mailing. The letter explained the change in the Oakland ordinance and the business owner's responsibility to post 'No Smoking' signs on the interior of the premises and signs specifying the 25 foot minimum on entry doors and other openings where smoke may enter.

The City Administrator's office will continue to send one warning letter prior to requesting OPD intervention. Business owners are not expected to be confrontational with non-compliant customers but may be cited for violations of the signage requirement, and individuals may be cited for smoking violations.

The City Administrator's Special Activity Unit received numerous calls in response to the December 2005 mailing. Many of the calls were from owners of rental property regarding the applicability of the ordinance to their properties. The ordinance includes the enclosed common areas of multi-unit housing, such as laundry rooms and/or community rooms. These areas are subject to both the ban on indoor smoking and the 25 foot minimum on outdoor smoking. One caller mentioned that people have become so accustomed to 'no smoking' signs on buildings that they ignore them and are therefore unlikely to notice the 25 foot requirement. Because the intent of signs is to obtain voluntary compliance, the caller suggested that the City place the stickers in less conventional places.

ABAT's Role in Tobacco Enforcement in 2005

The Alameda County Department of Public Health awarded the Oakland Police Department Alcoholic Beverage Action Team (ABAT) a $15,000 grant for the period of November 1, 2004 through January 1, 2005 (Resolution No. 78893 CMS), and $15,000 grant for the period of March 1, 2005 through June 1, 2005 (Resolution No. 79101 CMS) and a $25,000.00 grant for the period of November 1, 2005 through May 31, 2006 (Resolution No. 79592 CMS). A portion of the grants was used to enforce the laws regarding underage possession of tobacco products. In 2005 ABAT visited fifty-one (51) tobacco outlets to conduct underage decoy operations. They found substantial compliance among Oakland vendors, as only one (4) of the 51 or 7.84 percent of vendors sold tobacco products to the decoy. With the exception of San Lorenzo, where no sales were made from 11 outlets visited, Oakland's percentage of tobacco sales to minors was the lowest of the 8 jurisdictions reporting to the Alameda County Department of Public Health.

ABAT utilized the balance of the grant to enforce the prohibition against smoking in bars. Because of their expertise on smoking laws and issues, ABAT regularly checks for compliance with smoking laws as part of their ongoing monitoring of Oakland's alcohol outlets, bars, and restaurants. The grant allowed them to conduct 75 additional site visits, between January and June of 2005[1], specifically to check for smoking law compliance in bars. ABAT issued 5 citations for smoking in the bars visited.

Additionally, ABAT, both independently and in cooperation with the state Board of Equalization, conducts investigations regarding tax stamp compliance. Between March and June of 2005[2], 57 stores were visited, and seizures of illegal products were made at 6 of the stores.

[1] Data provided by Alameda County Tobacco Control Program. Statistics not yet available for balance of year.
[2] Data provided by Alameda County Tobacco Control Program. Statistics not yet available for balance of year.

Governmental Agency Cooperation

The Smoking Pollution Control Ordinance requires that the City Administrator make annual requests to other governmental and educational agencies having facilities in the City of Oakland to establish local operating procedures regarding smoking that are consistent with Oakland's smoking ordinance. Due to requests made in prior years, all governmental and educational agencies with facilities in the City of Oakland have smoking policies that are consistent with the City of Oakland's smoking ordinance.

Tobacco Product Vending Machine Ordinance

The Tobacco Product Vending Machine Ordinance (Chapter 8.34 OMC) prohibits the placement of tobacco product vending machines in places that are accessible to minors. No person is allowed to maintain, use, or permit the placement, maintenance, or use, of any tobacco product vending machine on his or her premises for the purpose of selling or distributing any tobacco products or tobacco accessories when persons under the age of twenty-one (21) years have access to the premises. All tobacco product vending machines are located in bars or taverns, which are not accessible to persons under the age of twenty-one (21) years. *California Labor Code section 6404.5 bans smoking in bars but does not* require the removal of such machines.

As part of its bar check process, ABAT monitors Oakland's bars to ensure that tobacco vending machines are not accessible to underage persons. No complaints were received in 2005 regarding violations of the tobacco product vending machine ordinance.

Non-Sale Distribution of Tobacco Products and Tobacco Accessories (Giveaways)

This ordinance (Chapter 8.32, OMC) makes it unlawful for any person to engage in the non-sale distribution of any tobacco product or tobacco accessory within the City of Oakland for any purpose, including but not limited to promotional, marketing, advertising, testing, and consumer research purposes.

No complaints were received in 2005 regarding violations of this ordinance.

Smoking/Tobacco-Related Issues

2004 Issues

The 2004 report listed the following concerns brought to the City Administrator's attention by the Alameda County Public Health Department.

1. Reasonable Distance - The negative effect on citizen understanding and enforcement efforts due to the City ordinance's lack of a specific number of feet from a building door one must be in order to smoke outside

As outlined above, the 'reasonable distance' problem was resolved by the City Council's action amending the ordinance to require a minimum of 25 feet from building openings for smoking outside of regulated buildings.

2. Smoking Lounges and Hookah Bars – Whether Oakland establishments that offer these services are in violation of state and/or local laws

The legality of Oakland's smoking lounges has been a troubling question throughout 2005. The most common scenario involves bars that either establish a separate room or a semi-outdoor area, such as a covered patio enclosed on three sides for smokers. The question is whether, as places of employment or public gathering, are such bars subject to the 25 foot minimum requirement for outdoor smoking or, pursuant to OMC section 8.30.080A, or are they not subject to the smoking restrictions of Chapter 8.30? The exclusion for bars became part of Oakland's law when bars were also excluded from the state Labor Code regarding smoking in the workplace. Although it has been pre-empted by state law in regard to the interior of bars, an argument could be made that, since it remains in the Oakland ordinance, it pertains to areas outside of bars, which are not regulated by the state. The Office of the City Attorney is researching the issue.

Oakland's one known hookah bar, located at 302 E. 18th St. has no ABC license and therefore is not exempt as a bar. Although they have set up an outdoor patio for smoking of the hookah and have attempted to place the smoking area at least 25 feet from entries to the neighboring business, fabric panels drop down in the evening to shield the patio from the elements, thus blurring the line between outdoor smoking, which is not prohibited, and smoking in enclosed public places, which is prohibited. The greatest concern regarding hookah, from the point of view of the American Lung Association and the Alameda County Tobacco Control Program, is the misconception that, because the smoke goes through a water pipe, it is safer than that of cigarettes. Data provided by the Alameda County Public Health Department indicates that hookah smoke contains 600 times more nicotine than cigarette smoke. This is particularly troubling, as the hookah fad is especially popular with young people, including those under 21 years of age, who are excluded from establishments that serve alcohol. The City of Dublin has recently enacted legislation to prevent the establishment of hookah bars, and the American Lung Association is actively encouraging other cities to do the same to protect the health of their youth and young adults.

3. Tobacco Retailer/Smoke Shop Licensing – The potential for establishing a business permit process to control the proliferation of these establishments and fund monitoring and enforcement activity.

In order to effectively enforce laws prohibiting sales to minors, as well as Oakland's zoning restrictions which require a Conditional Use Permit for tobacco oriented businesses, the City must know who tobacco retailers and smoke shops are and where they are located. A City license/special activity permit requirement for all businesses that sell tobacco products would identify locations where tobacco is sold, allowing a determination of whether they meet Oakland's zoning requirements. It would also fund the monitoring and enforcement of their activities. The funding currently provided to ABAT by the Alameda County Tobacco Control Program covers only 10 underage decoy operations in businesses that are not bars.

TALC, the Technical Assistance Legal Center, has drafted model legislation to allow cities to more easily enact a licensing program. Locally, Berkeley, El Ceritto, and Richmond require tobacco retailers to be licensed, and Dublin is beginning the process to implement a licensing ordinance.

Current Issues

Early this year (2006) the California Air Resources Board (ARB) declared secondhand smoke a toxic air contaminant (TAC). This designation was based on research completed in 2005 by the Air Resources Board that documented the presence and effects of environmental tobacco smoke (ETS), more commonly known as secondhand smoke. According to the ARB smokers release 40 tons of nicotine into California air each year, 365 tons of soot and ash and 1,900 tons of carbon dioxide. In addition to the deaths of smokers, the ARB linked 400 non-smoker lung cancer deaths, 3,600 deadly heart attacks and 31,000 asthma attacks in children to ETS. Effects causally associated with ETS exposure include low birth weight, Sudden Infant Death Syndrome (SIDS), respiratory tract and ear infections in children, asthma, lung cancer, nasal sinus cancer, breast cancer, and heart disease.

As required by the California Health and Safety Code for all TACs, the state must analyze whether regulatory action is warranted. Locally, the designation gives new impetus to the health agencies that advocate local action to protect the health of citizens. AC-PACT, Alameda County Policy Approach to Confronting Tobacco, a collaborative of health agencies and cities, lists smoke free bus stops and service lines (such as ATM and movie lines) as its major goal for Oakland this year. AC-PACT selected this goal due to the number of Oakland children who rely on public buses to travel to and from school and the complaints received by collaborative members from children and their parents about smoking at the bus stops and other places where children wait with adults. Locally, the cities of Berkeley and Dublin prohibit smoking at bus stops and Dublin, Fremont, Hayward, Livermore, Newark, Pleasanton, and Union City prohibit smoking in service lines.

The American Lung Association (ALA) applauds the leadership position taken by Oakland in establishing a 25 foot buffer zone for smoking outside of buildings used by the public. The ALA hopes Oakland will continue to demonstrate its concern for protecting the health of its citizens and has developed a 'wish list' of smoking-related legislation to address Oakland-specific issues:

1. Add secondhand smoke to the City's nuisance abatement ordinance. The ALA views Oakland's nuisance ordinance as a unique and powerful tool. They are pressing other cities to adopt a similar ordinance in regard to smoking, and they ask Oakland to specifically authorize enforcement against secondhand smoke as a violation of the ordinance, particularly in light of the state's Toxic Air Contaminant designation.

2. Prohibit smoking in outdoor dining areas. As the largest number of outdoor smoking complaints in Oakland relate to restaurants, cafes, and coffeeshops, this would eliminate all questions about whether smoking was permissible in any area of the restaurant, whether the table was 25 feet from any opening, etc. Locally, smoking in outdoor dining

areas is prohibited in the cities of San Ramon, Berkeley, Davis, Dublin, Newark, Pleasanton, and Union City and in unincorporated areas of the County of Alameda.

3. Define a tobacco shop as a workplace, therefore requiring it to be smokefree by state law. Currently, state law exempts tobacco shops from the on-site smoking prohibition, but allows local governments to enact more restrictive legislation. In Oakland, the consequence of the exemption is that business neighbors of a smoke shop report being severely impacted. Even if all of the smoking is done within the closed confines of the tobacco shop, shared ventilation systems carry the smoke to other areas of the building. Lessees of professional office space, especially those that provide direct services have been forced to choose between moving to new offices and losing clients.

4. Prohibit smoking in licensed family daycare homes. Smoking laws have been incredibly silent on specific protections for children, the population most vulnerable to the negative effects of secondhand smoke. Combined with the fact that smoking is not regulated by the state in residential units, the result is that smoking is currently prohibited only during hours of operation and only in the areas where children are present. The ARB study cited that individuals in homes with indoor smokers are exposed to between 740 and 1,940 times more secondhand smoke per day than those having only brief encounters. The ARB concluded, "Such exposures are especially of concern for developing young children because they are likely to recur daily and may result in serious health consequences."

SUSTAINABLE OPPORTUNITIES

Economic

The success of these anti-smoking initiatives will reduce the amount of sales taxes collected from tobacco products and business taxes collected from tobacco retailers.

Fewer smokers and a reduction in secondhand smoke may result in a reduction in medial expenses for smoking related illnesses.

Environmental

The enforcement of tobacco laws will help provide a healthier environment for Oakland residents and visitors.

Social Equity

A clean and healthy environment benefits the entire city.

DISABLITY AND SENIOR CITIZEN ACCESS

There are no ADA or senior citizen access issues contained in this report.

RECOGNITION OF CITY AND NON-CITY PARTNERS

As noted above, the Oakland Police Department provided outstanding support during 2005 in the enforcement of tobacco laws in the City of Oakland. Two major areas of focus were the enforcement of laws regarding underage possession of tobacco products and enforcement of the smoking ban in bars. Special recognition is given to the members of the Alcohol Beverage Action Team (ABAT) and the Alameda County Tobacco Control Project, for their cooperative efforts in educating the public and ensuring compliance with tobacco laws. The City Council is to be commended for their initiative in establishing a 25 foot smoke-free zone outside of buildings where smoking is regulated.

ACTION REQUESTED OF THE CITY COUNCIL

Staff requests the Public Safety Committee accept this report.

Respectfully submitted,

Barbara B. Killey

Barbara B. Killey

Prepared by: Barbara Killey
Administrative Hearing Officer
Special Activity Unit, CAO

APPROVED AND FORWARDED TO THE
PUBLIC SAFETY COMMITTEE.

Office of the City Administrator

2005 SMOKING LETTERS SENT, DUE TO COMPLAINTS

7 Seas Bar	4001 MacArthur Blvd.	07/21/05	
Barclay's Restaurant	5940 College Ave.	07/21/05	
Bldg. Mgr.	1800 Harrison	03/28/05	
Crogan's Montclair	6101 LaSalle Ave.	06/27/05	
Firelli Nails	5026 Woodminster Ln	06/27/05	
Gee How Oak Tin Asoc	320 8th St	06/27/05	
Glenview Hardware	4218 Park Blvd.	06/27/05	
Golden Gate Locksmith	6206 LaSalle	10/21/05	
Hair Taylor	2068 Antioch Ct	01/25/05	
Hudson Bay Cafe	5401 College Ave	06/27/05	
Hudson Bay Cafe	5401 College Ave.	07/21/05	second warning
Jamba Juice	2060 Mountain Blvd.	06/27/05	
La Salle Cigars	6218 LaSalle Ave.	12/05/05	
Le Bon Bon	2050 Mountain Blvd.	07/21/05	
Mills College	5000 MacArthur Blvd		
Montclair Barbershop	2050A Mountain Blvd.	01/25/05	
Montclair Barbershop	2050A Mountain Blvd.	06/27/05	second warning
Montclair Safeway	2096 Mountain Blvd.	06/27/05	
N & M Grocery	2731 13th Ave	07/21/05	
Noah's	2060 Mountain Blvd.	06/27/05	
Royal Grounds	2058 Mountain Blvd.	01/25/05	
Royal Grounds	2058 Mountain Blvd.	06/27/05	second warning
SavMor Groceries	4219 Park Blvd.	06/27/05	
Scottish Rite Center	1547 Lakeside Dr	08/03/05	
Starbucks Coffee	2059 Mountain Blvd.	01/25/05	
Starbucks Coffee	2059 Mountain Blvd.	06/27/05	second warning
Ultimate Grounds	4225 Park Blvd	06/27/05	
Ultimate Grounds	4225 Park Blvd	07/21/05	second warning
Village Sounds	2052 Mountain Blvd.	01/25/05	
Village Sounds	2052 Mountain Blvd.	06/27/05	second warning
Woodminster Cafe	*5020 Woodminster Ln.*	*06/27/05*	

Attachment A

CITY OF OAKLAND

1 FRANK H. OGAWA PLAZA – OAKLAND, CALIFORNIA 94612

Office of the City Administrator
Barbara B. Killey
Assistant to the City Administrator

Phone: (510) 238-2257
Fax: (510) 238-7084
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TO: Employers, Business Owners and Managers

December 1, 2005

SUBJECT: Signs Regarding Smokefree Doorways, Windows, and Vents

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Dear Employers, Business Owners and Managers:

On October 18, 2005, the Oakland City Council amended the City's Smoking Pollution Control Ordinance, Chapter 8.30 of the Oakland Municipal Code (OMC), to require that "Smoking outside of the work building shall occur at a **minimum distance of 25 feet from any building entrance, exit, window and air intake vent of the building**". The ordinance became effective immediately. This law will protect workers in Oakland from exposure to outdoor tobacco smoke that drifts into workplaces. Creating smokefree doorways also protects members of the public from exposure to secondhand smoke, which is particularly important for children and persons with asthma, emphysema, lung cancer, other respiratory diseases, and allergies.

The Smoking Pollution Control Ordinance has always required building and business owners to post "No Smoking" signs where applicable, so that their employees and patrons may be aware of and comply with the law. For your convenience, we have included a sign on the back of this letter.

If you are an employer or the owner or manager of a building where anyone is employed, AND that building has doors, windows, or air intake vents that open onto a street, sidewalk, parking area, or other outdoor area where people may smoke, please post a sign on each applicable opening. The sign should be readily visible to people outside, posted as close to eye level as possible, and should specify "No Smoking Within 25 Feet of Entryways, Doors, and Windows."

How To Get The Signs

You may post the sign on the back of this notice, and you may make as many copies as you need. The Community Health Education Institute (CHEI) is working in conjunction with the City and the County Health Department to provide free self-adhesive signs to Oakland's businesses. You can obtain these signs by calling CHEI at (510) 841-8686 or emailing them at CHEI97@aol.com. PDF copies of the signs in English, Spanish and Chinese can also be downloaded from the American Lung Association of the East Bay's website, www.alaebay.org.

Please call (510) 238-2257 if you have questions or need more information. You can find the complete text of the Smoking Pollution Control Ordinance on line at www.oaklandnet.com. Thank you for your efforts to protect the health of your employees and the public.



NO SMOKING

Including OUTDOOR areas *within* 25 *feet* of entryways, doors & windows

Oakland Municipal Code, Chapter 8.30

To report violations, call the City Administrator's Office at (510) 238-2257

This project was made possible by funds received from the Alameda County Health Services Agency, Public Health Department Tobacco Master Settlement Funds