



OFFICE OF THE CITY ATTORNEY
ROCKARD J. DELGADILLO
CITY ATTORNEY

REPORT NO. R 09 - 0215

JUN 12 2009

REPORT RE:

**DRAFT ORDINANCE AMENDING CHAPTER IV, SECTION 41.50
OF THE LOS ANGELES MUNICIPAL CODE
TO PROHIBIT SMOKING IN OUTDOOR DINING AREAS**

The Honorable Members of the Arts, Parks, Health
and Aging Committee of the Los Angeles City
Room 395, City Hall
200 North Spring Street
Los Angeles, California 90012

Council File No. 08-1544

Honorable Members:

Pursuant to your request, this office has prepared and now transmits for your action the attached draft ordinance, approved as to form and legality. This draft ordinance would amend Chapter IV, Section 41.50 of the Los Angeles Municipal Code (LAMC) to prohibit smoking in outdoor dining areas.

Summary of Ordinance Provisions

This ordinance amends the LAMC to prohibit smoking in outdoor dining areas.

City's Authority to Enact the Proposed Ordinance

A state's public health authority arises from its inherent police power. *Jacobson v. Massachusetts* 197 U.S. 11 (1905) (upholding the State's authority to require smallpox vaccination of all residents.) In California, the State Constitution assigns to Cities those public health powers it does not retain for the State. California Constitution, Article 11, Section 7. Thus, the City has authority to enact the proposed ordinance unless the State has preempted the field of outdoor tobacco control. The State *has* expressly preempted the field of *indoor* workplace tobacco control. Labor Code



Sec. 6404.5 (a). The State has also regulated outdoor smoking in some limited circumstances. Government Code Sections 7596–7598. However, Section 7597(b) expressly permits local government to enact more restrictive ordinances such as the one you have requested. Thus, the City has the authority to adopt the proposed ordinance.

The Proposed Ordinance

The ordinance you have requested would amend the City's primary no-smoking law, LAMC Section 41.50. It would first amend Section 41.50.A. to enumerate the existing paragraphs, and then add a new paragraph 7 defining "outdoor dining area". It would then amend Section 41.50.B to add a new subsection 18. This new subsection would prohibit smoking in outdoor dining areas and within ten feet of them, and create an exception for outdoor areas contiguous to bars, nightclubs that require that their patrons be eighteen or older, and to buildings hosting private events that are completely closed to the public. It establishes the six-month grace period for public education you requested by requiring the businesses that provide food or drink to nearby outdoor areas to post education notices for their customers, and the managers of outdoor areas to do the same in those cases, such as food courts, where the businesses themselves do not control the outdoor dining area. During the grace period, the ordinance's no-smoking provisions will not be enforced. It also adjusts the permanent "no smoking" signage requirement to meet the differing conditions of outdoor dining, and establishes that violations of the new subsection are infractions.

There are two elements of the proposed ordinance that distinguish it from other local ordinances we reviewed. The first is the way the ordinance's findings construct a narrative that educates the public about the importance of local government action in tobacco control. They first describe a historical frame to combat the misunderstanding of some that prohibiting tobacco smoking in public areas is an unwarranted infringement on personal liberty by noting that for much of American history smoking was restricted to private smoking rooms. Then they describe some of the factors that led in the twentieth century to the massive increases of tobacco use and to smoking's expansion into virtually all public settings. These changes occurred long before the dangers of tobacco smoke were well-established, such as the risks of secondhand smoke to both children and adults. They also note that most smokers begin before the age of 18. The findings then note that tobacco control poses particularly great challenges to public health because there are no quick biomedical fixes. Thus, public health advocates have urged policymakers to use a wide range of tobacco control strategies. This proposed ordinance makes use of one such strategy: increasing the public space where tobacco smoke is prohibited. In so doing, it addresses at least two social determinants of health: (1) reducing both the public's exposure to secondhand smoke; and (2) the locations where young people can begin a smoking habit.

The second is the breadth of the ordinance's definition of outdoor dining area. Unlike the other local ordinances we have reviewed, it does not just cover the typical outdoor dining area, such as a restaurant's or hotel's outdoor patio. It also includes outdoor food courts, which may not be controlled by any of the nearby businesses providing food or drink. It also includes such businesses as food kiosks, food carts and mobile food trucks by defining the dining area as within a thirty-foot radius of the business.

If you have any questions regarding this matter, please contact Deputy City Attorney David Schulman at (213) 978-7758. He or another member of this office will be available when you consider this matter to answer any questions you may have.

Sincerely,

ROCKARD J. DELGADILLO, City Attorney

By



DAVID MICHAELSON
Chief Assistant City Attorney

DM:DS:vw
Transmittal

ORDINANCE NO. _____

An Ordinance amending Subsections A and B of Section 41.50 of the Los Angeles Municipal Code to prohibit smoking in outdoor dining areas.

WHEREAS, tobacco smoking was restricted to smoking rooms for much of American history; and

WHEREAS, smoking only moved into public places in the early twentieth century once the manufacture of cigarettes and safety matches made smoking anywhere possible and affordable; and

WHEREAS, cigarettes and safety matches led to a massive increase in tobacco use long before the dangers posed by smoking and secondhand smoke were well-established; and

WHEREAS, tobacco smoke is now the nation's leading cause of preventable death, causing more than 440,000 deaths every year; and

WHEREAS, exposure to secondhand smoke now causes an estimated 46,000 deaths from heart disease, 3,400 deaths from lung cancer, 150,000 – 300,000 lung infections such as pneumonia and bronchitis in children under the age of 18 months, and more than 750,000 middle ear infections in children; and

WHEREAS, the U.S. Environmental Protection Agency has now classified secondhand smoke as a risk to public health, classifying it as a group A carcinogen, the most dangerous class of carcinogens; and

WHEREAS, the majority of smokers begin to smoke before the age of 18, and one out of three begin before the age of 14; and

WHEREAS, public health has now urged policymakers to address a range of social determinants, that is, social factors that contribute to tobacco exposure, since there is no simple biomedical fix for the challenges posed by secondhand smoke; and

WHEREAS, one such factor is prohibiting smoking in public places; and

WHEREAS, doing so reduces the public's exposure to secondhand smoke and limits places where young people can begin to smoke; and

WHEREAS, the City's public health authority arises from the state's police power; and

WHEREAS, the City has exercised this power to reduce smoking in graduated steps, prohibiting smoking on buses in 1964, in elevators in 1975, and in 1985 becoming one of the first major cities to require no-smoking areas in the workplace; and

WHEREAS, the City now determines to exercise its authority to prohibit smoking in outdoor dining areas, and within ten feet therefrom;

NOW, THEREFORE,

**THE PEOPLE OF THE CITY OF LOS ANGELES
DO ORDAIN AS FOLLOWS:**

Section 1. Subsection A of Section 41.50 of the Los Angeles Municipal Code is amended to enumerate its existing subsections as follows:

- A. Definitions.** The following words and phrases, whenever used in this ordinance shall be construed as hereinafter set out, unless it shall be apparent from the context that they have a different meaning.
1. "Bar" shall mean an indoor area utilized primarily for the serving of alcoholic beverages and in which the service of food is only incidental to the consumption of such beverages.
 2. "Employee" shall mean any person who is employed by any employer in consideration for monetary compensation or profit.
 3. "Employer" shall mean any person, partnership, corporation, excluding municipal corporation, who employs the services of more than four persons.
 4. "Place of employment" shall mean any enclosed area under the control of a public or private employer which employees normally frequent during the course of employment, including, but not limited to, work areas, employee lounges, conference rooms, and employee cafeterias. A private residence is not a place of employment.
 5. "Service Line" shall mean any indoor line at which one or more persons are waiting for or receiving service of any kind, whether or not such service involves the exchange of money.
 6. "Smoke" or "Smoking" shall include the carrying or holding of a lighted pipe, cigar or cigarette of any kind, or any other lighted smoking equipment or the lighting or emitting or exhaling the smoke of a pipe, cigar or cigarette of any kind.

7. "Outdoor dining area" shall mean for purposes of this section an outdoor area:
- a. Of a business, such as a restaurant, that is dedicated by the business as a place for the consumption of food or drinks that are regularly sold or provided by that business;
 - b. That is dedicated by the person authorized to manage or control the area as a place for the consumption of food or drinks that are regularly sold or provided by one or more nearby businesses, such as a food court; or
 - c. Within a thirty foot radius of a business, such as a food kiosk, food cart or mobile food truck, that regularly sells or provides food or drinks but has no outdoor area dedicated by the business as a place for the consumption of food or drinks that are regularly sold or provided by that business.
 - d. However, an outdoor dining area shall not include an area that is contiguous to one of the following:
 - (i) A bar, or a nightclub that requires that its patrons be eighteen or older; or
 - (ii) A restaurant, business or non-commercial building that is completely closed to the public for a private event.

Sec. 2. Subsection B of Section 41.50 of the Los Angeles Municipal Code is amended by adding a new paragraph 18 to read as follows:

18. Outdoor dining areas, and all non-enclosed areas within ten feet of them.
- a. Exception. The prohibition against smoking within ten feet of an outdoor dining area shall not apply to persons briefly passing by.
 - b. Grace Period. A six month grace period shall follow the effective date of this ordinance to permit a period of public education.
 - (i) Within thirty days of the effective date of this subsection:
 - (1) Any business with an outdoor dining area as defined in Section 41.50 A.7.a, such as a restaurant, shall post a notice near an entrance, exit, or cashier area in

size 14 font or larger that is clearly visible and readable to a majority of its customers that shall remain posted through the end of the six month grace period and state:

“Beginning [DAY AFTER GRACE PERIOD ENDS], smoking is prohibited in the outdoor dining area of this business during its hours of operation, and within ten feet of it, by order of the City of Los Angeles.”

- (2) Any business that provides food or drink that is regularly consumed in a nearby outdoor dining area as defined in Section 41.50 A.7.b, such as a food court, shall post a notice near an entrance, exit, or cashier area in size 14 font or larger that is clearly visible and readable to a majority of its customers that shall remain posted through the end of the six month grace period and state:

“Beginning [DAY AFTER GRACE PERIOD ENDS], smoking is prohibited in the outdoor dining area near this business during its hours of operation, and within ten feet of it, by order of the City of Los Angeles.”

- (3) Any person authorized to manage or control an outdoor dining area as defined in Section 41.50 A.7.b, such as a food court, shall post enough notices in size 14 font or larger to ensure that their message is clearly visible and readable to most diners in the outdoor dining area, and most persons passing outdoors within ten feet of it, that shall remain posted through the end of the six month grace period and state:

“Beginning [DAY AFTER GRACE PERIOD ENDS], smoking is prohibited in this outdoor dining area during its hours of operation, and within ten feet of it, by order of the City of Los Angeles.”

- (4) Any business with an outdoor dining area as defined in Section 41.50 A.7.c, such as a food kiosk, food cart or mobile food truck, shall post a notice near the cashier area in size 14 font or larger that is clearly visible and readable to a majority of its customers that

shall remain posted through the end of the six month grace period and state:

“Beginning [DAY AFTER GRACE PERIOD ENDS], smoking is prohibited within forty feet of this business during its hours of operation, by order of the City of Los Angeles.”

- (ii) The no-smoking provisions of this subsection shall not be enforced during the grace period.

c. Permanent Signs.

- (i) The following shall comply with the requirements of Section 41.50 D.1.b, except that the words “in this outdoor dining area or within ten feet of it” shall immediately follow the required “NO SMOKING” phrase or international no-smoking symbol, and need not comply with the 5 feet to 8 feet posting requirement as long as they are of sufficient number and locations to ensure that their message is clearly visible and readable to most diners in the outdoor dining area, and most persons passing outdoors within ten feet of it:

- (1) Any business with an outdoor dining area as defined in Section 41.50 A.7.a, such as a restaurant; or
- (2) Any person authorized to manage or control an outdoor dining area as defined in Section 41.50 A.7.b, such as a food court.

- (ii) Any business with an outdoor dining area as defined in Section 41.50 A.7.c, such as a food kiosk, food cart or mobile food truck, shall comply with the requirements of Section 41.50 D.1.b, except that it shall post only one sign, which shall be located near the cashier, shall include the words “within forty feet of this business” immediately follow the required “NO SMOKING” phrase or international no-smoking symbol, and need not comply with the 5 feet to 8 feet posting requirement as long as the sign’s message is clearly visible and readable to a majority of its customers.

- d. Penalties. Failure to comply with any of the requirements of this Section 41.50 B.18 shall be an infraction, as provided for in Section 41.50 H.4.

Sec. 3. The City Clerk shall certify to the passage of this ordinance and have it published in accordance with Council policy, either in a daily newspaper circulated in the City of Los Angeles or by posting for ten days in three public places in the City of Los Angeles: one copy on the bulletin board located at the Main Street entrance to the Los Angeles City Hall; one copy on the bulletin board located at the Main Street entrance to the Los Angeles City Hall East; and one copy on the bulletin board located at the Temple Street entrance to the Los Angeles County Hall of Records.

I hereby certify that this ordinance was passed by the Council of the City of Los Angeles, at its meeting of _____.

JUNE LAGMAY, City Clerk

By _____ Deputy

Approved _____

Mayor

Approved as to Form and Legality

ROCKARD J. DELGADILLO, City Attorney

By  _____
DAVID I. SCHULMAN
Deputy City Attorney

Date 6/12/09

File No. 08-1544