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CITY ATTORNEY

REPORT NO. R 1 4 - 0 0 0 4
JAN 0 8 2014

REPORT RE:

**DRAFT ORDINANCE AMENDING SECTIONS 41.50 AND 63.44 OF THE
LOS ANGELES MUNICIPAL CODE TO REVISE THE DEFINITION OF
SMOKING TO INCLUDE ELECTRONIC SMOKING DEVICES AND
TO REVISE VARIOUS PROVISIONS REGARDING THE PROHIBITION OF
SMOKING IN CERTAIN PLACES**

The Honorable City Council
of the City of Los Angeles
Room 395, City Hall
200 North Spring Street
Los Angeles, CA 90012

Honorable Members:

This Office has prepared and now transmits for your consideration the enclosed draft ordinance, approved as to form and legality. This draft ordinance would amend Sections 41.50 and 63.44 of the Los Angeles Municipal Code (LAMC) to revise the definition of smoking to include electronic smoking devices and would revise various provisions regarding the prohibition of smoking in certain places.

Summary of Ordinance Provisions

LAMC Section 41.50 is the City's primary no-smoking law and prohibits the smoking of tobacco in many public places. The proposed ordinance would amend the existing definitions of smoke and smoking in Section 41.50.A to incorporate electronic smoking devices, which includes e-cigarettes and other similar devices. LAMC Section 41.50.B would be amended to prohibit smoking, including the use of electronic smoking devices, where the smoking of tobacco is prohibited by local, state or federal law. LAMC Section 63.44 parallels Section 41.50 by prohibiting smoking in parks and recreation areas, including City beaches. Changes similar to those proposed for

Section 41.50 are also proposed for Section 63.44, thereby ensuring electronic smoking devices are treated the same as tobacco products in City parks and recreation areas.

Currently, LAMC Section 41.50.B lists 18 places where smoking is prohibited in the City of Los Angeles. At the time Section 41.50.B was first enacted, State law had yet to address smoking in public places. However, in 1994, the State of California passed the California Smoke-Free Indoor Workplace Law, codified in Labor Code Section 6404.5. This law prohibited tobacco smoking in all enclosed places of employment and expressly preempted local regulation of tobacco smoking in indoor workplaces. The first 16 places addressed in LAMC Section 41.50.B are indoor locations that are now covered by State law. Accordingly, the proposed ordinance repeals Sections 41.50.B(1) through 41.50.B(16). The amended section would make clear, however, that smoking, including the use of electronic smoking devices, is prohibited anywhere smoking of tobacco is prohibited by local, state or federal law.

The State Labor Code only addresses indoor areas and, thus, leaves open the possibility for local jurisdictions to regulate smoking in outdoor areas. Existing LAMC Subsections 41.50.B(17) (prohibits smoking at City permitted farmer's markets) and 41.50B(18) (prohibits smoking in outdoor dining areas) both regulate outdoor smoking and are not preempted by State law. Therefore, these subsections are retained, but renumbered, and made applicable to electronic smoking devices.

The Rise of E-Cigarettes

The use of electronic smoking devices is a recent trend that is proliferating in the City of Los Angeles and throughout the nation. Electronic smoking devices have not been approved by the Food and Drug Administration (FDA) for smoking cessation. In fact, the FDA has expressed concerns about the safety of electronic smoking devices following FDA testing that found some devices contain toxins and carcinogens. Subsequent scientific studies have also raised concern about the safety of electronic smoking devices to bystanders who involuntarily inhale the released vapor. For example, a recent scientific study found lead, nickel and chromium (elements listed on the FDA's List of Harmful and Potentially Harmful Chemicals) in the vapors produced by electronic smoking devices. Another recent scientific study confirmed that electronic smoking devices that contain nicotine also emit nicotine in the vapor that is released. Prohibiting electronic smoking devices in traditionally smoke-free locations is necessary in order to protect nonusers, including children and vulnerable populations, from involuntary inhalation of these chemical vapors.

The proposed ordinance is also necessary to protect the City's smoke-free air laws. The use of electronic smoking devices is often visually similar to the smoking of cigarettes and has already been observed in locations where smoking is prohibited. This has created concern for nonsmokers, confusion amongst business owners seeking to comply with the City's smoke-free air laws, and threatens to interfere with the City's

enforcement of smoke-free air laws. The City is also concerned that the use of electronic smoking devices in smoke-free locations may increase the social acceptability of smoking, particularly for youth, and reverse the progress that has been made over the years to discourage smoking.

The Los Angeles County Department of Public Health supports amending local smoke-free policies to include electronic smoking devices. To date, over 40 cities and counties in California have enacted ordinances to include electronic smoking devices in their existing smoke-free laws.

Council Rule 38 Referral

A copy of this draft ordinance was sent, pursuant to Council Rule 38, to the Department of Recreation and Parks, the Fire Department and the Police Department with a request that all comments, if any, be presented directly to the City Council or its Committees when this matter is considered.

If you have any questions regarding this matter, please contact Deputy City Attorney Celina Porras at (213) 978-7970. She or another member of this Office will be present when you consider this matter to answer any questions you may have.

Very truly yours,

MICHAEL N. FEUER, City Attorney

By 

DAVID MICHAELSON
Chief Assistant City Attorney

DM:CP:pj
Transmittal

ORDINANCE NO. _____

An ordinance amending Sections 41.50 and 63.44 of the Los Angeles Municipal Code to revise the definition of smoking to include electronic smoking devices and to revise various provisions regarding the prohibition of smoking in certain places.

WHEREAS, the City of Los Angeles has been at the forefront of promoting smoke-free air laws to protect people from involuntary exposure to the dangers of secondhand smoke; and

WHEREAS, the use of electronic smoking devices is a recent trend that is proliferating in the City of Los Angeles. This trend is undermining the City's smoke-free air laws and exposing the public to secondhand electronic smoking device vapors which have not been scientifically proven as safe; and

WHEREAS, electronic smoking devices, commonly referred to as "e-cigarettes," "e-cigars," "e-cigarillos," "e-pipes," "e-hookahs," are electronic devices often made to look like conventional tobacco products in shape, size and color; and

WHEREAS, electronic smoking devices are designed to be used in the same manner as conventional tobacco products with the user exhaling a smokelike vapor similar in appearance to the exhaled smoke from cigarettes and other conventional tobacco products; and

WHEREAS, a study published in the Journal of Environment and Public Health suggests that electronic smoking devices "may have the capacity to 're-normalize' tobacco use in a demographic that has had significant denormalization of tobacco use previously";¹ and

WHEREAS, nicotine is a highly addictive neurotoxin and is included in the Prop 65 list of Chemicals Known to the State to Cause Cancer or Reproductive Toxicity.² Nicotine is known to cause birth defects and is particularly dangerous for vulnerable populations including children, pregnant women and people with cardiovascular conditions; and

WHEREAS, a recent scientific study confirmed that electronic smoking devices that contain nicotine also emit nicotine in the released vapor and involuntarily expose nonsmokers to nicotine;³ and

¹ McMillen R, Maduka J and Winickoff J. "Use of Emerging Tobacco Products in the United States." *Journal of Environmental and Public Health*, doi:10.1155/2012/989474, 2012.

² State of California Environmental Protection Agency. *Chemicals Known to the State to Cause Cancer or Reproductive Toxicity*. December 20, 2013.
http://oehha.ca.gov/prop65/prop65_list/files/P65single122013.pdf

³ Czogala J, Goniewicz M, Fidelus B, Zielinksa-Danch W, Travers M, Sobczak, A. "Secondhand Exposure to Vapors from Electronic Cigarettes" *Nicotine and Tobacco Research*, Advance online publication. doi:10.1093/ntr/ntt203, 2013.

WHEREAS, a recent study found a total of 22 elements in vapors produced by electronic smoking devices, and three of these elements (lead, nickel, and chromium) appear on the FDA's "Harmful and Potentially Harmful Chemicals List";⁴ and

WHEREAS, a study published in the American Journal of Public Health found similar results to those identified in FDA testing and concluded that the electronic smoking devices tested demonstrated poor quality control, toxic contaminants, misrepresentation of the nicotine delivered and insufficient evidence of the overall public health benefit;⁵ and

WHEREAS, the Los Angeles County Department of Public Health supports amending local smoke-free policies to include e-cigarettes because "studies indicate that e-cigarettes pose potential dangers for users, as well as for non-users who passively inhale these chemical vapors";⁶ and

WHEREAS, manufacturers of electronic smoking devices have not submitted clinical studies about the safety and efficacy of these products to the FDA; and, therefore, consumers currently have no way of knowing what types or concentrations of potentially harmful chemicals they are inhaling and exhaling when they use these products;⁷ and

WHEREAS, the City is supportive of tobacco cessation programs and modalities that have proven efficacy and utilize safe FDA-approved products; but to date, electronic smoking devices are not an FDA-approved smoking cessation device; and

WHEREAS, the World Medical Association has determined that electronic smoking devices "are not comparable to scientifically-proven methods of smoking cessation" and that "neither their value as therapeutic aids for smoking cessation nor their safety as cigarette replacements is established";⁸ and

WHEREAS, the confusion caused by the visual similarity between electronic smoking devices and traditional tobacco products may impact individuals and the owners of establishments seeking to comply with the City's smoke-free laws and will threaten the City's enforcement of these laws; and

⁴ Williams M, Villareal A, Bozhilov K, Lin S, Talbot P. "Metal and Silicate Particles Including Nanoparticles Are Present in Electronic Cigarette Cartomizer Fluid and Aerosol." PLoS ONE 8(3): e57987. doi:10.1371/journal.pone.0057987, 2013.

⁵ Cobb NK, Byron J, Abrams DB, et al. "Novel Nicotine Delivery Systems and Public Health: The Rise of the 'E-Cigarette'" *American Journal of Public Health*, 100 (12): 2340-2342, 2010.

⁶ Los Angeles County Department of Public Health. *Addressing the Rising Prevalence of Electronic Cigarette Use in Los Angeles County*. October 3, 2013.

⁷ U.S. Food and Drug Administration. *FDA Warns of Health Risks Posed by E-Cigarettes*. (2009/2013) <http://www.fda.gov/forconsumers/consumerupdates/ucm173401.htm>

⁸ World Medical Association. *Statement on Electronic Cigarettes and Other Nicotine Delivery Systems*. 2012. <http://www.wma.net/en/30publications/10policies/e19/>

WHEREAS, the use of electronic smoking devices in smoke-free locations threatens to reverse the progress that has been made in establishing the social norm that smoking is not permissible in public places or places of employment; and

WHEREAS, the use of electronic smoking devices in smoke-free locations may increase the social acceptability and appeal of smoking, particularly for youth, undermining the progress that has been made over the years in discouraging smoking; and

WHEREAS, prohibiting the use of electronic smoking devices in smoke-free locations will protect traditionally smoke-free locations such as daycare centers, schools, libraries, public parks, playgrounds and beaches and will prevent people, including children, from involuntarily inhaling nicotine and potentially harmful chemicals scientifically proven to exist in the secondhand vapor of electronic smoking devices; and

WHEREAS, in order to protect the health, welfare and safety of City residents and visitors by protecting them from exposure to the secondhand byproducts of electronic smoking devices, facilitating uniform enforcement of smoke-free air laws, reducing the potential for re-normalizing smoking where tobacco use is prohibited, and protecting youth from observing behavior that could encourage them to smoke, the City has decided to legislatively prohibit the use of electronic smoking devices in all areas where the smoking of tobacco products is currently prohibited.

NOW, THEREFORE,

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

Section 1. Section 41.50 of the Los Angeles Municipal Code is amended in its entirety to read as follows:

SEC. 41.50. SMOKING PROHIBITED IN DESIGNATED AREAS.

A. Definitions. As used in this section:

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. **“Smoke”** shall mean the gases, particles or vapors released into the air as a result of combustion, electrical ignition or vaporization, including from an electronic smoking device, when the purpose of the combustion, electrical ignition or vaporization is human inhalation of the gases, particles or vapors. Smoke does not mean the combustion of material solely for olfactory purposes that does not contain any tobacco or nicotine.

3. **“Smoking”** shall mean engaging in an act that generates smoke, such as possessing a lighted pipe, a lighted hookah pipe, a lighted cigar, a lighted cigarette, or an operating electronic smoking device.

4. **“Electronic Smoking Device”** shall mean an electronic or battery-operated device that delivers vapors for inhalation. This term shall include every variation and type of such devices whether they are manufactured, distributed, marketed or sold as an electronic cigarette, an electronic cigar, an electronic cigarillo, an electronic pipe, an electronic hookah or any other product name or descriptor.

5. **“Outdoor Dining Area”** shall mean:

a. An outdoor area 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, and all non-enclosed areas within 10 feet thereof. 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 its patrons to be 18 or older; or

(ii) A restaurant, business or non-commercial building that is completely closed to the general public for a private event.

b. An outdoor area 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, and all non-enclosed areas within 10 feet thereof; or

c. An outdoor area comprised of a 40-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 area dedicated by the business as a place for the consumption of food or drinks that are regularly sold or provided by that business.

B. Prohibitions.

1. Smoking, as defined in Section 41.50.A.3, shall be prohibited in all places where the smoking of tobacco is prohibited by local, state or federal law.

2. Smoking, as defined in Section 41.50.A.3, shall also be prohibited in the following places:

a. City permitted farmer's markets as defined in Section 12.24.X.6; and

b. Outdoor dining areas.

C. No-Smoking Signs.

1. Any business or person having the authority to manage and control any area designated as a no-smoking area shall post or cause to be posted "No Smoking" signs in conspicuous locations within the designated no-smoking areas. All such signs shall clearly and conspicuously recite the phrase "**NO SMOKING**" and/or use the international no-smoking symbol and shall cite Section 41.50 of the Los Angeles Municipal Code. The signs shall be posted not less than 5 feet nor more than 8 feet above floor level and shall be of sufficient number and location to ensure that any person in the designated no-smoking area shall see at least one of the signs. For outdoor dining areas, the additional requirements shall be followed:

a. Any business with an outdoor dining area as defined in Section 41.50 A.5.a, such as a restaurant, and any person authorized to manage or control an outdoor dining area as defined in Section 41.50 A.5.b, such as a food court, shall post no-smoking signs of sufficient number to ensure that the no-smoking prohibition is clearly visible and readable to patrons in the outdoor dining area and to persons passing outdoors within 10 feet of the outdoor dining area. The no-smoking signs shall contain the international no-smoking symbol and state in size 14 font or larger, "No smoking in this outdoor dining area or within 10 feet of this outdoor dining area"; or

b. Any business with an outdoor dining area as defined in Section 41.50 A.5.c, such as a food kiosk, food cart or mobile food truck, shall post a no-smoking sign located near the cashier that is clearly visible and readable to its customers. The no-smoking sign shall contain the international no-smoking symbol and state in size 14 font or larger, "No smoking within 40 feet of this business."

2. It shall be unlawful to willfully mutilate or destroy any signs required by this section.

D. Penalty. Except as otherwise expressly provided herein, violation of any provision or failure to comply with any requirement of this section is an infraction.

E. Discrimination Unlawful. It shall be unlawful for an employer to discharge or in any manner discriminate against any employee who exercises his or her rights under this section if the dominant intent of the employer is retaliation against the

employee for exercising those rights. Violation of this provision shall be a misdemeanor.

Sec. 2. Subsection A of Section 63.44 of the Los Angeles Municipal Code is amended in its entirety to read as follows:

SEC. 63.44. REGULATIONS AFFECTING PARK AND RECREATION AREAS.

A. Definitions. As used in this section:

“Beach” shall include public seashore and shoreline areas bordering the Pacific Ocean that are owned, managed or controlled by the City.

“Park” shall include every public park, roadside rest area, playground, zoological garden, ocean, beach or other recreational facility area, together with any parking lot, reservoir pier, swimming pool, golf course, court, field, bridle path, trail, or other recreational facility, or structure thereon, in the City of Los Angeles and under the control, operation or management of the Board of Recreation and Park Commissioners, the Los Angeles County Department of Parks and Recreation, the Los Angeles County Department of Beaches, or the Los Angeles Memorial Coliseum Commission. **“Park”** does not include any State Historic Park located within the City of Los Angeles.

“Board” shall mean the Board of Recreation and Park Commissioners.

“Smoke” shall mean the gases, particles or vapors released into the air as a result of combustion, electrical ignition or vaporization, including from an electronic smoking device, when the purpose of the combustion, electrical ignition or vaporization is human inhalation of the gases, particles or vapors. Smoke does not mean the combustion of material solely for olfactory purposes that does not contain any tobacco or nicotine.

“Smoking” shall mean engaging in an act that generates smoke, such as possessing a lighted pipe, a lighted hookah pipe, a lighted cigar, a lighted cigarette, or an operating electronic smoking device.

“Electronic Smoking Device” shall mean an electronic or battery-operated device that delivers vapors for inhalation. This term shall include every variation and type of such devices whether they are manufactured, distributed, marketed or sold as an electronic cigarette, an electronic cigar, an electronic cigarillo, an electronic pipe, an electronic hookah or any other product name or descriptor.

Sec. 3. Paragraph 24 of Subsection B of Section 63.44 of the Los Angeles Municipal Code is amended to read as follows:

24. Smoking, as defined in Section 63.44.A, is prohibited. A violation of this subdivision shall be punishable as an infraction.

(a) **Exception.** Smoking is permitted in the following areas:

(1) City golf courses, except for the following courses where smoking is only allowed in designated areas and not in all areas of the course:

Roosevelt Golf Course

Wilson Golf Course

Harding Golf Course

Tregnan Golf Academy

(2) Those areas within parks that are specified in a permit issued by the Recreation and Parks Film Office authorizing smoking by actors during filming; and

(3) Designated smoking areas at the Autry National Center, the Greek Theater, and the Los Angeles Zoo.

(b) **No-Smoking Signs.** The Department shall post and maintain "No Smoking" signs in conspicuous locations. All these signs shall clearly and conspicuously recite the phrase "**NO SMOKING**" and/or use the international no-smoking symbol and shall cite this subdivision of Section 63.44 of the Los Angeles Municipal Code.

Sec. 4. Paragraph 25 of Subsection B of Section 63.44 of the Los Angeles Municipal Code is added to read as follows:

25. No person shall discard, dispose of, or deposit any tobacco product, including cigarette and cigar butts and ashes, except in approved containers specifically placed and designated for receipt of trash, refuse, rubbish, litter or other kind of waste materials. A violation of this subdivision shall be punishable as an infraction.

Sec. 5. **SEVERABILITY.** Pursuant to the provisions of Los Angeles Municipal Code Section 11.00 (k), if any provision of this ordinance is found to be unconstitutional or otherwise invalid by any court of competent jurisdiction, that invalidity shall not affect the remaining provisions of this ordinance which can be implemented without the invalid provision, and, to this end, the provisions of this ordinance are declared to be severable.

Sec. 6. 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 _____.

HOLLY L. WOLCOTT, Interim City Clerk


By _____
Deputy

Approved _____

Mayor

Approved as to Form and Legality

MICHAEL N. FEUER, City Attorney

By  _____
DAVID MICHAELSON
Chief Assistant City Attorney

Date 1/8/14

File No. _____