



**Rent Stabilization Board &
Community Health Commission**

DATE: May 7, 2013

TO: Honorable Mayor and Members of the City Council

FROM: Lisa Stephens, Chair, Berkeley Rent Stabilization Board
Linda Franklin, Chair, Community Health Commission
Pam Speich, Immediate Past Chair, Community Health Commission

SUBJECT: Agenda Item 26 – Proposed Ordinance on Tobacco-Free Multi-Unit Housing

Recommendation:

That the City Council adopt the proposed ordinance prohibiting tobacco smoking which involuntarily exposes neighbors to secondhand smoke in all multi-unit housing in Berkeley, with five minor modifications as described below.

Background:

In January 2012, the City Council requested that the Rent Board and the Community Health Commission analyze possible smoke-free housing ordinance options. Previously, Rent Board staff and the Board's Safe and Sustainable Housing Committee participated in numerous meetings dating as far back as 2006. The members of the Community Health Commission and Rent Board have worked closely together to craft elements of an ordinance which maximizes the goal of realizing smoke-free housing in Berkeley while minimizing or eliminating the threat of harassment and displacement of long-term tenants. The Rent Board and Community Health Commission adopted identical recommendations, which were guided by seven core assumptions/goals:

1. That the City Council wants to reach the maximum level of non-smoking in multi-family housing possible, in a way that does not place a financial burden on the City for enforcement and implementation.
2. That those tenants with **existing** leases that do not already expressly prohibit smoking may be subject to a private right of action from neighbors but cannot and should not be put at risk of eviction for smoking in their home.

3. That existing leases may not be unilaterally altered to prohibit smoking, but non-smoking provisions should be required in new tenancies. Tenants violating the terms of their lease would be at risk of eviction.
4. That tenants who do not have leases expressly prohibiting smoking should be encouraged to voluntarily amend their existing lease to prohibit smoking, provided all parties are fully informed of their rights and the potential implications of changing their lease.
5. That any ordinance adopted should **not** have the result of encouraging or allowing the harassment of tenants, especially long-term tenants, to the point that they would feel forced to vacate their units (i.e., excessive fines could do this).
6. That the City Council would want to take an approach that avoids, limits and resolves conflicts rather than creates new conflicts or heightens existing conflicts, if this can be done without significant cost to the City. This is best done whenever possible through consumer education, improved disclosure, and mediation rather than through litigation.
7. Only those directly affected by the tobacco smoke (i.e. residents in the building) may bring a cause of action.

We wish to thank the City Health and Housing staff who have worked on this proposed ordinance. Over many years they have done a tremendous job in shepherding an ordinance that we all hope will improve the health and safety of our residents. Because of the timing of the ordinance coming before the council, neither Rent Board or the Community Health Commission has had an opportunity to review this draft language. However, we feel that the staff have done a very good job addressing most of our major concerns, and have crafted an ordinance that will greatly improve the current situation. Our comments below are not criticisms but recommendations for ways in which we believe the ordinance can be improved to increase effectiveness in achieving the goals noted above while avoiding unintended consequences and not significantly increasing the cost of implementation.

Recommended Additions or Modifications to the Ordinance as Proposed :

The Rent Board and Community Health Commission have each adopted motions that support the proposed ordinance if the following modifications are included:

1. Before a private right of action can be initiated, the affected party must first attempt informal resolution/mediation. This is similar to what is required in Santa Monica's recently-adopted ordinance.
2. To avoid cases of harassment and the unintended possibility that a long-term tenant will be economically evicted from their home, there should be a limit on the number of private right of action claims in any calendar year. This can be done either by limiting the number of claims filed or by limiting the maximum amount that can be awarded in any 12-month period.

3. Add the word “initial” to the first sentence of Section 12.70.037 A. so that it reads “Every lease or other rental agreement for the *initial* occupancy of a new or existing unit in a multi-unit residence entered into after July 1, 2014 shall include a clause providing that it is a material breach of the lease...”
4. All new leases must provide notice of which units in the building do not have leases expressly restricting smoking.
5. The City (or designated agency) shall maintain a registry of the status of units in multi-family rental housing. This registry will designate units with leases that expressly prohibit smoking, and units with no such lease restriction.

Explanation of Recommended Modifications to the Proposed Ordinance

The Community Health Commission and the Rent Board both realize that multi-unit housing will not become completely smoke-free upon adoption of this ordinance. There will be a transition period – perhaps a decade or longer – before laws, leases, community culture and available resources for cessation have created an environment in which multi-unit housing in Berkeley is truly smoke-free. Our shared goal has been to get to that point as quickly, as painlessly and as cooperatively as possible.

All of the requested modifications to the ordinance as currently proposed are designed to reduce conflict, primarily through consumer information, and avoid the displacement of long-term tenants during Berkeley’s transition to a smoke-free multi-unit housing city.

1. Mediation Before Litigation – This seems like a simple concept: that before you can file a lawsuit in small claims court, you need to attempt to resolve the conflict through discussion. If the other party is unwilling to meet to discuss and mediate the dispute, it would be permissible to proceed with the private right of action. The Rent Board has several trained mediators and would be willing to offer mediation in these cases for a fee to cover costs (\$50- \$100 per case). There are several other local agencies that provide alternative dispute resolution services at little or no charge.
2. Reasonable Limits on the Private Right of Action – It is not the intent of this ordinance to create a vehicle for either party to harass the other. It is also not the intent of the ordinance to result in the economic eviction of long-term tenants. The ordinance as currently written allows a fine of between \$100-\$250 “for each occasion on which he or she exposes the other legal resident to smoke.” While we do not believe this is the intent, arguably, a neighbor could sue his/her neighbor for \$5,000 or more per day if they claim the offending party smoked a pack of 20 cigarettes a day in their unit (20 occasions x \$250). They could potentially do this on a recurring basis. To avoid unintended consequences, which are contradictory to our understanding of the intent of the proposed ordinance, there needs to be some limit on the maximum amount that can be recovered through the private right of action in any year.

3. Adding “Initial”: Clarification of Which Tenancies Must Sign a Lease Prohibiting Smoking – The intent of the proposed ordinance is to require all *new* tenancies begun after July 1, 2014 to contain a provision in the lease that expressly prohibits smoking in the unit. Individuals violating these prohibitions are subject to eviction. The staff report also acknowledges that it is a priority to ensure compatibility with the Rent Stabilization Ordinance, which prohibits unilateral changes in the terms of leases. These stated intents are both supported by our respective commissions. However, because the Rent Stabilization Ordinance also allows for the eviction of a tenant if they fail to sign a new lease which is substantially identical to the old lease, we are concerned that the current proposed language may be misunderstood or misused by some owners or misconstrued by a court hearing an eviction case. This is understandable given that state law, adopted in 2011, allows unilateral changes in the terms of leases to prohibit smoking. Berkeley, San Francisco, Oakland, Santa Monica and other cities with “Just Cause” for eviction protections are exempt from this change in state law. We believe that these unintended situations can be avoided by adding the word “Initial” to the first sentence of this section. This will make it clearer that lease renewals for long-term tenants entered into after July 1, 2014 are not covered (because they are not for the initial occupancy).
4. New Leases Should Inform Tenants Which Units Prohibit Smoking in the Lease – This proposal is crucial to reduce and avoid new cases of conflict. Lease prohibition (and the potential threat of eviction) is the most effective weapon in the arsenal to eliminate smoking in a unit. The private right of action provides some incentive to alter behavior but is not the same as the risk of losing one’s housing. A prospective new tenant should be given the information necessary to make an informed decision as to the likelihood that they will have a smoker nearby and decide if it is worth the risk and/or potential conflict. They also should know the full range of remedies they have available if they move in and their neighbor is smoking. If a prospective tenant hears that all multi-unit housing in Berkeley is smoke-free and then signs a lease with that provision, it is quite likely they will assume that they will not encounter tobacco smoke if they move in. If this is not a reasonable assumption, they should be notified of that fact in the lease they are signing. Until we know that all units restrict smoking via the lease and violating tenants can be evicted for smoking in their unit, it is important that potential new tenants be informed if they may be moving next door to a person who is not restricted from smoking by the lease. The proposed ordinance allows the unwitting new tenant to terminate their tenancy without penalty under certain circumstances if their neighbor is smoking. Would it not be better, for both the new tenant and the landlord, for that person to be informed of the risk and maybe take another unit?
5. Registry of Multi-Unit Rentals that Prohibit Smoking in the Lease – Several years ago, Council was concerned about the ability to track the effectiveness/success rate of any ordinance restricting smoking in multi-unit housing. While it would be infeasible (and probably

undesirable) to monitor who is and who is not actually smoking in their unit, tracking and measuring how many units have leases restricting smoking can be done with relative ease and economy. This information could be available to members of the public and accessible via the Internet allowing prospective tenants to decide if they even want to apply for certain vacant units with a neighboring smoker. Such consumer information will save both landlords and tenants time, and save prospective tenants the money for a credit check on an apartment they ultimately will not be interested in. It also avoids the potential for conflict as described above. We believe that making more information available leads to better choices and less conflict. We do not believe it is in any way analogous to the experience at the inception of the Rental Housing Safety Program a decade ago. Because the Rent Board already tracks the rent and services on over 22,000 units each year and the overwhelming majority of units not required to list their rents with the Rent Board are already listed in the database, we believe it can be accomplished with relative ease. If desired, the Board would add two boxes to the existing registration forms – “Is smoking restricted by Lease? (Y/N) and the date the restriction began. Once a unit had this lease restriction, there would be no need to track future tenancies/leases. If Council wishes to include units constructed between 1980 and the date the ordinance goes into effect, you will need to take action similar to the action you took in January 2013 when Council adopted Chapter 13.79, Automatically Renewing Leases. That Ordinance requires that all landlords who include automatic renewal clauses in their leases notify the Rent Board at the inception of a tenancy. The Board would only be involved in tracking and posting of information received and take no role in any enforcement of the ordinance. The Board believes this can be accomplished with a one-time cost of \$5,000.

Finally, the Rent Board has been very concerned with issues **equity** since we entered this discussion in 2006. We want to be clear that this ordinance should cover all multi-family housing including condominiums and tenancies in common, and all residents in multi-family housing situations. We also recognize that this ordinance does not deal with issues of smoking in single family homes, be they owner occupied or rentals.