

REGULAR

NUMBER: 227.5

TITLE: AN ORDINANCE OF THE CITY OF MILPITAS AMENDING THE MILPITAS MUNICIPAL CODE TO REGULATE SMOKING IN UNENCLOSED PLACES

HISTORY: This Ordinance was introduced (first reading) by the City Council at its meeting of _____, upon motion by _____ and was adopted (second reading) by the City Council at its meeting of _____, upon motion by _____. The Ordinance was duly passed and ordered published in accordance with law by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

ATTEST:

APPROVED:

Mary Lavelle, City Clerk

Jose S. Esteves, Mayor

APPROVED AS TO FORM:

Michael J. Ogaz, City Attorney

RECITALS AND FINDINGS:

WHEREAS, tobacco use causes death and disease and continues to be an urgent public health challenge, as evidenced by the following:

- Tobacco-related illness is the leading cause of preventable death in the United States, accounting for about 443,000 deaths each year; and
- Scientific studies have concluded that tobacco use can cause chronic lung disease, coronary heart disease, and stroke, in addition to cancer of the lungs, larynx, esophagus, and mouth; and
- Some of the most common types of cancers including stomach, liver, uterine, cervix, and kidney are related to tobacco use; and

WHEREAS, secondhand smoke has been repeatedly identified as a health hazard, as evidenced by the following:

- The U.S. Surgeon General concluded that there is no risk-free level of exposure to secondhand smoke; and
- The California Air Resources Board placed secondhand smoke in the same category as the most toxic automotive and industrial air pollutants by categorizing it as a toxic air contaminant for which there is no safe level of exposure; and
- The California Environmental Protection Agency included secondhand smoke on the Proposition 65 list of chemicals known to the state of California to cause cancer, birth defects, and other reproductive harm; and

WHEREAS, exposure to secondhand smoke causes death and disease, as evidenced by the following:

- Secondhand smoke is responsible for as many as 3,000 deaths from lung cancer and 46,000 deaths from heart disease among nonsmokers each year in the United States; and
- Exposure to secondhand smoke increases the risk of coronary heart disease by approximately thirty percent; and
- Secondhand smoke exposure causes lower respiratory tract infections, such as pneumonia and bronchitis in as many as 300,000 children in the United States under the age of 18 months each year; and exacerbates childhood asthma; and

WHEREAS, tobacco use and exposure to secondhand smoke impose great social and economic costs, as evidenced by the following:

- The total annual economic burden of smoking in the United States is \$193 billion; and
- From 2001-2004, the average annual health care expenditures attributable to smoking were approximately \$96 billion; and
- The medical and other costs to nonsmokers due to exposure to secondhand smoke were estimated at over \$10 billion per year in the United States in 2005; and
- California's Tobacco Control Program saved the state and its residents \$86 billion in health care expenditures between the year of its inception, 1989, and 2004, with savings growing yearly; and

WHEREAS, exposure to secondhand smoke anywhere has negative health impacts, and exposure to secondhand smoke does occur at significant levels outdoors, as evidenced by the following:

- Levels of secondhand smoke exposure outdoors can reach levels attained indoors depending on direction and amount of wind and number and proximity of smokers; and
- Irritation from secondhand smoke begins at levels as low as 4 micrograms per cubic meter, and in some outdoor situations this level can be found as far away as 13 feet from the burning cigarette; and
- Smoking cigarettes near building entryways can increase air pollution levels by more than two times as compared to background levels, with maximum levels reaching the "hazardous" range on the federal Environmental Protection Agency's Air Quality Index; and
- To be completely free from exposure to secondhand smoke in outdoor places, a person may have to move nearly 25 feet away from the source of the smoke, about the width of a two-lane road; and

WHEREAS, cigarette butts are a major and persistent source of litter, as evidenced by the following:

- It is estimated that over two billion cigarette butts are discarded every day worldwide, and that Americans alone discard more than 175 million pounds of cigarette butts every year; and
- Cigarette butts are often cast onto sidewalks and streets, and frequently end up in storm drains that flow into streams, rivers, bays, lagoons and ultimately the ocean; and
- Cigarette filters, made of plastic cellulose acetate, take approximately 15 years to decompose; and

WHEREAS, laws restricting the use of tobacco products have recognizable benefits to public health and medical costs, as evidenced by the following:

- Cities with smoke-free laws see an appreciable reduction in hospital admittances for heart attacks in the months and years after such laws are passed; and
- Smoking bans help people reduce the number of cigarettes they smoke or quit altogether; and
- Strong smoking regulations for restaurants decrease the number of children who transition from experimenting with smoking to becoming actual smokers; and

WHEREAS, the U.S. Food and Drug Administration conducted laboratory analysis of electronic cigarette samples and found they contained carcinogens and toxic chemicals to which users and bystanders could potentially be exposed; and

WHEREAS, creating smoke-free areas helps protect the health of the 86.9% of Californians who are nonsmokers; and

WHEREAS, society is becoming less tolerant and less accepting of cigarette smoking, as evidenced by the following,

- A 2008 survey of California voters found that 97% thought that secondhand smoke is harmful, 88% thought secondhand smoke was harmful even outdoors, 65% were bothered by secondhand smoke, and 73% support laws restricting smoking in outdoor public places; and
- People living in cities with strong smoke-free air laws are more likely to believe smoking is not acceptable and that smokers should attempt to quit smoking; and
- As of 2010, there are at least 273 California cities and counties with local laws restricting smoking in recreational areas, 85 with smoke-free outdoor dining laws, and 23 that restrict smoking on sidewalks in commercial areas; and

WHEREAS, state law prohibits smoking within 25 feet of playgrounds and tot lots and expressly authorizes local communities to enact additional restrictions; and state law prohibits smoking within 20 feet of entryways and operable windows of government buildings; and

WHEREAS, there is no constitutional right to smoke.

NOW, THEREFORE, the City Council of the City of Milpitas does ordain as follows:

SECTION 1. RECORD AND BASIS FOR ACTION

The City Council has duly considered the full record before it, which may include but is not limited to such things as the City staff report, testimony by staff and the public, and other materials and evidence submitted or provided to the City Council. Furthermore, the recitals set forth above are found to be true and correct and are incorporated herein by reference.

SECTION 2. AMENDMENT OF CHAPTER 215 OF TITLE V OF THE MILPITAS MUNICIPAL CODE

Chapter 215 of Title V is hereby amended and replaced in its entirety to read as follows:

215-1.10 – Purpose

The City Council of the City of Milpitas recognizes the right and need of those who wish to breathe fresh air. In order to service the public health, safety, and general welfare, the purpose of this Chapter is to protect the public from exposure

to secondhand smoke where they live, work, and play by prohibiting smoking in unenclosed public places, workplaces, and other specified locations to discourage the inherently dangerous behavior of smoking around non-tobacco users, especially children.

215-1.15 – Definitions

This section is hereby enacted to include the following definitions:

(a) “Common Area” shall mean every Unenclosed Area of a Multi-Unit Residence that residents of more than one residential unit of that Multi-Unit Residence are entitled to enter or use, including, for example, paths, courtyards, playgrounds, swimming pools, parking lots, and picnic areas.

(b) “Dining Area” shall mean any area, including streets, sidewalks and picnic areas, which is available to or customarily used by the general public or an employee, and which is designed, established, or regularly used for consuming food or drink.

(c) “Employer” shall mean any person, business, nonprofit entity or governmental entity that retains the service of one or more employees, volunteers, or independent contractors.

(d) “Enclosed Area” shall include an area that has:

- (1) any type of overhead cover whether or not that cover includes vents or other openings and at least three (3) walls or other vertical boundaries of any height whether or not those boundaries include vents or other openings; or
- (2) four (4) walls or other vertical boundaries that exceed six (6) feet in height whether or not those boundaries include vents or other openings.

(e) “Multi-Unit Residence” shall mean property containing two (2) or more residential units. The term “Multi-Unit Residence” includes but is not limited to an apartment building, a condominium complex, a long-term health care facility, an assisted living facility, a hospital, or a hotel or motel. For purposes of this Chapter, a single-family home and a single-family home with an in-law or second unit are not a Multi-Unit Residence.

(f) “Place of Employment” shall mean any area under the legal or de facto control of an Employer that an employee or the general public may have cause to enter in the normal course of the operations, regardless of the hours of operation.

(g) “Playground” shall mean any tot lot, park or recreational area specifically designed to be used by children that has play equipment installed, or any similar facility located on public property.

(h) “Public Place” shall mean any place, publicly or privately owned, which is open to the general public regardless of any fee or age requirement.

(i) “Service Area” shall mean any publicly or privately owned area, including streets and sidewalks, that is designed to be used or is regularly used by one or more persons to receive a service, wait to receive a service or to make a transaction, whether or not such service or transaction includes the exchange of money. The term “Service Area” includes but is not limited to areas including or adjacent to information kiosks, automatic teller machines (ATMs), ticket lines, bus stops or shelters, mobile vendor lines or cab stands.

(j) “Smoke” shall mean the gases, particles, or vapors released into the air as a result of combustion, electrical ignition or vaporization, when the apparent or usual purpose of the combustion, electrical ignition or vaporization is human inhalation of the byproducts, except when the combusting material contains no tobacco or nicotine and the purpose of inhalation is solely olfactory, such as, for example, smoke from incense. The term “Smoke” includes, but is not limited to, tobacco smoke, electronic cigarette vapors, and marijuana smoke.

(k) “Smoking” shall mean engaging in an act that generates Smoke, such as, for example: the lighting and/or carrying of a lighted cigarette of any kind, lighted pipe, lighted hookah pipe, lighted cigar, or an operating electronic cigarette or pipe.

(l) “Sport Facility” shall mean any athletic field, tennis court, basketball court, swimming pool, park, golf course, skateboard park, walking path, bike path, and other similar place where members of the public assemble to engage in physical exercise, participate in athletic competitions, or witness sports events, including bleacher areas, spectator seating areas, and concession stands.

(m) “Unenclosed Area” shall mean any area that is not an Enclosed Area.

215-1.20 – Prohibition of Smoking In and Near City Facilities

Smoking shall be prohibited in all buildings owned or leased by the City of Milpitas, including City vehicles, and within 25 feet of entrances, exits, open windows, and ventilation-intake systems of any City-owned or leased building.

215-1.25 – Prohibition of Smoking in Certain Unenclosed Plances

Except as specified in Section 215-1.29 Smoking—Optional Areas, Smoking shall be prohibited in the following Unenclosed Areas within the City of Milpitas, except in places where Smoking is already prohibited by state or federal law, in which case those laws apply:

- (a) All Playgrounds owned and operated by the City of Milpitas.
- (b) Any Sports Facility owned by the City of Milpitas, including bleacher areas, spectator seating areas and concession stands.
- (c) Within twenty-five (25) feet of City-owned Playgrounds and Sports Facilities.
- (d) Common Areas of Multi-unit Residences.
- (e) Dining Areas.
- (f) Places of Employment.
- (g) Service Areas.
- (h) Other Public Places, with the exception that Smoking is permitted on streets and sidewalks being used only in a traditional capacity as pedestrian or vehicular thoroughfares, unless otherwise prohibited by this Chapter or other law.

215-1.29 – Smoking – Optional Areas

Notwithstanding any other provisions of this Chapter to the contrary, the following areas shall not be subject to the Smoking restrictions of this Chapter:

- (a) Smoking at theatrical production sites or for other artistic or expressive purposes.
- (b) Smoking on streets and sidewalks being used only in a traditional capacity as pedestrian or vehicular thoroughfares, unless otherwise prohibited by this Chapter or other law.

215-1.30 – Postings of Signs

"No Smoking" signs with letters of not less than one inch (1") in height, or the international "No Smoking" symbol (consisting of a pictorial representation of a burning cigarette enclosed in a red circle with a red bar across it) shall be clearly, sufficiently, and conspicuously posted in or outside of every building or other place where Smoking is prohibited pursuant to this Chapter, by the owner, operator, manager, or other person having control of such building or other place. When a sign is posted on the exterior of a building to indicate "No Smoking," it shall include the distance limitations contained in this Chapter. Notwithstanding this provision, the presence or absence of signs shall not be a defense to a charge of Smoking in violation of any other provision of this Chapter.

215-1.35 – Other Requirement and Prohibitions

- (a) No person, business, landlord, Employer, or nonprofit entity shall knowingly permit Smoking in an area which is under the legal or de facto control of that person, business, landlord, Employer or nonprofit entity and in which Smoking is prohibited by law, unless otherwise required by state or federal law.
- (b) No person, business, landlord, Employer, or nonprofit entity shall knowingly or intentionally permit the presence or placement of ash receptacles, such as, for example, ash trays or ash cans, within an area under the legal or de facto control of that person, business, landlord, Employer or nonprofit entity and in which Smoking is prohibited by law. Notwithstanding the foregoing, the presence of ash receptacles in violation of this subsection shall not be a defense to a charge of Smoking in violation of any provision of this Chapter.
- (c) No person shall dispose of used Smoking or tobacco product waste within the boundaries of an area in which Smoking is prohibited.
- (d) No person, business, landlord, Employer, or nonprofit entity shall intimidate, threaten any reprisal, or effect any reprisal, for the purpose of retaliating against another person who seeks to attain compliance with this Chapter.

- (e) Each instance of Smoking in violation of this Chapter shall constitute a separate violation. For violations other than for Smoking, each day of a continuing violation of this Chapter shall constitute a separate violation.

215-1.40 – Inspection

The City Manager, or his or her designee(s), shall have the authority to enforce the provisions of this Chapter. Such enforcement shall include the right to enter any area where Smoking is prohibited by this Chapter, at any time such an area is open to the public or during regular business hours for the purpose of making reasonable inspections to observe and enforce compliance with this Chapter.

SECTION 3. SEVERABILITY

The provisions of this Ordinance are separable, and the invalidity of any phrase, clause, provision or part shall not affect the validity of the remainder.

SECTION 4. EFFECTIVE DATE AND POSTING

In accordance with Section 36937 of the Government Code of the State of California, this Ordinance shall take effect thirty (30) days from and after the date of its passage. The City Clerk of the City of Milpitas shall cause this Ordinance or a summary thereof to be published in accordance with Section 36933 of the Government Code of the State of California.

Rob Means 1421 Yellowstone, stated there are a number of things going on. He said let's get out of the curb, because clearly the wave is coming. He quoted President Barack Obama "never has it been more important to have a national drug control strategy guided by sound principals of public safety and public health", meaning even he [Obama] is on board for medical marijuana at a national level. Mr. Means said this state is more progressive than that. He said of 70% of people asked if they think marijuana should be regulated and taxed like wine, they will answer yes. He said the populace is there, the governmental structure just hasn't caught up. He would take a conservative approach and isolate these places [for dispensaries] while we get more familiar with what's going on, meanwhile training our officers, so people are in the game, and things operate smoothly. He said so when one does open up, say in the civic center, we are more prepared for that move because of having this experience. He said they [Subcommittee] are on the right track and to keep going.

Linda Windisch, Lacey Drive. She said that Mr. Ogaz is starting to make good points. There are court cases that are contradictions. She said there are so much contradictions on what is decided, that to step into that now, she feels, would be a mistake. She says we have seen in other cities throughout California where they stepped into this, and realized they made a mistake, and they look at shutting down businesses. She feels that is unfair to allow a business, and then shut them down. She says to make sure we do it right in the first place with so much controversy and disagreement in the law, just between localities and the state, I think it would be a mistake to step into this. She said she read articles that state law contradicts federal law. Federal law states that medical marijuana is illegal. Having a business that sells medical marijuana is against the law. She said she read cases that the Federal DEA is going after the property owner, shutting down the businesses and taking the property from the land owner. She doesn't want Milpitas to be in that situation where Milpitas is shutting down businesses and having their property seized. These are solid reasons that we should not be stepping into this until the legal issues are solved. Bottom line, Ms. Windisch stated, she would rather not have at all, but if we are forced to have it in Milpitas, we should only do this if and when we are forced to do this.

Council Member Polanski thanked those that spoke. She stated we are moving into this and ensuring this is done correctly. She said this, as Council Member Gomez stated, that we want to look at all the options, court cases, and be ready in case something happened. She doesn't think we are advocating to change our current ordinance, at this time, but we need to have some strong steps in place, and that are regulations meet our needs if these other things take place.

Chair Gomez added he always thought of this as a "moving" document/policy paper that says based on what we know now, here's how to protect the schools, neighborhood, businesses. This could be coming, so we better be prepared.

Council Member Polanski said we have been studying this since September and we have been gathering as much information as possible and she appreciates staff for their work and the public that has come to the meetings.

B. Tobacco Prevention Policies Discussion

This item was discussed prior to item 5a Medical Marijuana Facilities Update.

Chair Armando Gomez reviewed that the last meeting the Subcommittee decided there were two elements to discuss: 1) smoking in parks and 2) registration program. He believes they would start with smoking in parks then deal with the registration program at a later time.

Sergeant Kevin Corvin stated Police focused on a smoke free ordinance in parks. He stated there were definitions from the old ordinance that were change. The old ordinance stated no

smoking within 25 feet of tot lots. This new ordinance will have new definitions which includes sports facility including parks. Under 2-15.125, which discusses the prohibition of smoking in unenclosed areas means that all parks and facilities own and operated by the City can prohibit smoking. Sergeant Corvin provided the Subcommittee with a binder of the ordinance information.

Council Member Polanski confirmed these regulations are all over the Bay Area. She directed her question to the Chief of Police Dennis Graham and Sergeant Corvin, asking if there would be impacts on enforcing this ordinance. Chief Graham didn't believe there would be a problem, granted, it would be another area to enforce, with limited resources, though he feels Police can do it. He believes citizens would report this and Police can take action. As time goes on, stated Chief Graham, most people will read signage and the smoking at parks would cease.

Councilmember Gomez opened this item to public form.

Veenu King from the Milpitas Youth Advisory Commission & advocate for tobacco prevention for youth. From the clean ups she has done, they found 1,793 cigarette butts at Dixon Landing Park in one hour. She thinks the Subcommittee should consider and support the policy.

Francis Capili, Coyote Street. He said he is a resident with a 2-month old son and wants [the Subcommittee] to invest in the youth and support the ordinance. He also stated for outdoor restaurant dining, he was at El Toritos and cigar smoke ruined his outdoor dining experience. He urged the Subcommittee to reconsider the outdoor dining ordinance. In regards to licensing, he sees students from the High School hanging around Foothill Plaza. They may be 18, or not, but they leave a lot of cigarette butts in the parking lot. In closing, he mentioned his grandfather who died of lung cancer and emphysema. He was a smoker, and now Francis has asthma. He asked for [the Subcommittee] to consider the future of Milpitas.

Sara Wright, Breathe California, stated how she works with youth throughout the country to implement policies for smoke free parks, outdoor smoking ordinances, and it is feasible to implement them [ordinances]. She thinks it is possible and worth doing.

Rob Means, 1421 Yellowstone Avenue, stated he is here on behalf of a level playing field. He stated over 400,000 deaths due to cigarette smoke, with alcohol 50,000 a year. He stated people shouldn't smoke in the park, let them smoke at home like "pot" [marijuana] smokers.

Sergeant Corvin stated in the draft ordinance, there is a reference to dining area, including streets, sidewalk and picnic areas.

Chair Gomez asked for clarification in terms of enforcement.

Chair Gomez stated he is okay with this ordinance. Councilmember Polanski stated she is definitely willing to move this item to the full council.

City Manager Tom Williams clarified this meeting would actually be the 2nd meeting in April, April 17.

C. Sports Park