

## Memorandum

To: Honorable Mayor Shetter and members of the Burleson City Council

From: Lisa Duello, Director of Neighborhood Services

Date: February 16, 2009

Subject: Ordinance B-785-09, repealing Chapter 70, Article III, "Smoking in Public Places" of the Code of Ordinances of the City of Burleson and replacing it in its entirety and establishing revised regulations for smoking in public places. (First Reading)

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### **Council Action Requested:**

Approve Ordinance B-785-09, repealing Chapter 70, Article III, "Smoking in Public Places" of the Code of Ordinances of the City Burleson and replacing it in its entirety and establishing revised regulations for smoking in public places.

### **Background Information:**

On January 20, 2009 Burleson City Council considered options for implementing a smoke-free ordinance in the City of Burleson. The options presented included; keeping the city ordinance as is; passing a 100% smoke-free ordinance; considering a more restrictive ordinance than the current; or waiting for the outcome of House Bill 5 relevant to a statewide smoking ban. At this meeting the City Council directed staff to move forward with more stringent regulations similar to the City of Fort Worth.

The current City of Burleson regulations relevant to smoking in public places is 15 years old and does not reflect the current scientific data significant to the health consequences of smoking and secondhand smoke. Many surrounding cities and cities nationwide have updated their regulations to reflect the 2006 Surgeon General report. This scientific evidence in this report indicates that there is no risk-free level of exposure to secondhand smoke and eliminating smoking in indoor spaces fully protects nonsmokers from exposure to secondhand smoke. It is only prudent that the City of Burleson consider the implementation of smoke-free regulations to protect the public from serious health problems, including lung cancer, heart disease and chronic lung ailments such as bronchitis and asthma.

### Smoking Ordinance Comparison Summary

Staff has researched smoking ordinances in the metroplex area, statewide and nationwide. In general, city ordinances have evolved from creating smoking and non-smoking areas, to adding proper ventilation, to banning smoking in some places. In response to the scientific data presented in the 2006 Surgeon Generals Report, many cities and states in the past few years have started banning smoking in all public places.

Staff's research found that within the metroplex area, depending on the age of the ordinances, the majority of the cities smoking regulations were similar to Burleson's.

However, more recent smoking ordinances passed reflects the scientific data in the Surgeons General Report and prohibits smoking to protect the public. As such, the majority of the top 10 cities in Texas and top 10 cities nationwide have passed smoke-free provisions. There are 22 cities in Texas that have a comprehensive smoke-free ordinance and there are 24 states that have statewide smoking bans. Additionally, House Bill 5 relating to a statewide smoking ban is currently showing a strong support.

### Current Ordinance Summary

The current City of Burleson regulations for smoking in public places essentially allows an owner/operator of an establishment to make the decision to prohibit or allow smoking in their facility, provided there is a designated area and proper signage. Approximately 70% of Burleson's establishments already prohibit smoking.

### Proposed Ordinance Summary

The following is a brief summary of the proposed ordinance provisions:

- Several new definitions were added to correspond with the new text.
- Prohibit smoking in all restaurants, including the bar area and outdoor patios; bowling alleys; business office/buildings and within 20 feet of any primary entrance or exit of a regulated facility.

- Provide exceptions to the smoking prohibitions. Smoking is proposed to be allowed in the following establishments:
  - **Bars** – defined as establishments that are licensed by the State and that move more than 70% of their annual gross sales in alcoholic beverages for consumption by guests on the premises.
  - **Outdoor Dining Area and/or Patio** – provided that no more than 30% of the revenue generated from the business is from the sale of food or beverages.
  - **Hotel/Motel Rooms** - provided that no more than 25% of the total number of rooms rented to guests may be designated as smoking rooms.
  - **Private Clubs** - as defined in this Article, as long as the facility is used or operated by the members and is not open to the general public.
  - **Bingo Parlor** - operated under the Bingo Enabling Act, Chapter 2001 of the Occupations Code provided no one under the age of 18 years is allowed in the smoking area and the facility provides an enclosed designated non-smoking area.
  - **Private Meeting Rooms** – as long as the entire room remains private and is not open to the general public such as hotel/motel conference or meeting rooms and public facilities while being used for a private function (with the exception of restaurants).
  - **Private or Semi-Private Room in a Nursing Home or Long Term Care Facility** - that is occupied by persons who smoke and have requested in writing to be placed in a room where smoking is permitted.
  - **Retail Tobacco Stores** – if the store is a stand-alone facility and its primary business is the sale of tobacco products and accessories.

- The owner/operator of an establishment will be in violation of these provisions if he or she knowingly allows a person to smoke. The violations will be punishable, upon conviction, by a fine of an amount not to exceed two thousand dollars (\$2,000.00) for each offense.
- A person who violates the provisions commits a class c misdemeanor, punishable by a fine not to exceed five hundred dollars (\$500.00).

**Board/Citizen Input:**

Prior to the January 20, 2009 meeting staff contacted the affected food establishments to inform them of the discussion item and allow them the opportunity to attend the meeting to express their position on the matter.

Citizen Henry Eder spoke at the January 20, 2009 council meeting against implementing new smoke-free regulations and requested City Council to leave the ordinance as is and wait for the outcome of House Bill 5 relevant to a statewide smoking ban.

A letter (attachment #2) was sent to the permitted establishments regarding the proposed ordinance.

**Financial Considerations:**

N/A

**Attachments:**

1. Ordinance B-785-09
2. Letter to establishments

**Staff Contact:**

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**ORDINANCE B-785-09**

**AN ORDINANCE OF THE CITY OF BURLESON, TEXAS, REPEALING CHAPTER 70, ARTICLE III, "SMOKING IN PUBLIC PLACES" OF THE BURLESON CITY CODE AND REPLACING IT IN ITS ENTIRETY; ESTABLISHING REVISED REGULATIONS FOR SMOKING IN PUBLIC PLACES TO PROTECT THE PUBLIC HEALTH, SAFETY AND WELFARE OF THE CITIZENS OF BURLESON; PROVIDING THAT THIS ORDINANCE BE CUMULATIVE OF ALL OTHER ORDINANCES; PROVIDING A SEVERABILITY CLAUSE; PROVIDING FOR A PENALTY FOR VIOLATION OF THIS ORDINANCE; PROVIDING A SAVINGS CLAUSE; PROVIDING FOR PUBLICATION IN THE OFFICIAL NEWSPAPER; AND PROVIDING FOR AN EFFECTIVE DATE.**

**WHEREAS**, the City of Burleson, Texas is a home rule city acting under its charter adopted by the electorate pursuant to Article XI, Section 5 of the Texas Constitution and Chapter 9 of the Local Government Code; and

**WHEREAS**, the City Council ("City Council") of the City of Burleson, Texas ("Burleson") finds that it will be advantageous, beneficial and in the best interest of the citizens of Burleson to amend Chapter 70, Article III, "Smoking in Public Places" of the Burleson City Code; and

**WHEREAS**, the City Council of Burleson is concerned about the impact of smoking in public places on the public health, safety and welfare; and

**WHEREAS**, it is a generally accepted principle that the use of cigarettes second-hand smoke and other tobacco products constitute a hazard to a person's health; and

**WHEREAS**, the exposure to secondhand smoke has been determined to have numerous health effects on non-smokers; and

**WHEREAS**, the City Council desires to prohibit smoking in certain public places and places of employment to protect the public, as provided below.

**NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BURLESON, TEXAS:**

### **SECTION 1.**

Chapter 70, Article III of the Burleson City Code is amended to read as follows:

#### **Article III. Smoking in Public Places**

##### **Sec. 70-91. Definitions.**

The following words and phrases, whenever used in this Article, shall be construed as defined in this Section.

**Bar** means an establishment licensed by the state which has more than seventy percent (70%) of its annual gross sales from alcoholic beverages for consumption by guests on the premises. Calculation of gross sales shall mean be made from the combined sales of food and beverages. Restaurants that contain a bar are not considered a "bar" for purposes of this Article.

**Billiard hall** means a place of amusement whose chief purpose is providing the use of billiard/pool tables to the public for a fee.

**Bingo parlor** means a facility regulated under the Bingo Enabling Act, Chapter 2001 of the Occupations Code.

**Business** means any sole proprietorship, partnership, joint venture, corporation or other business entity formed for profit-making or non-profit purposes, including but not limited to, banks, laundromats, hotels, motels, retail establishments, professional corporations and other entities where legal, medical, dental, engineering, architectural or other professional services are delivered.

**Employee** means any person who is employed for the consideration of direct or indirect monetary wages or profit, and any person who volunteers his or her services for a profit or non-profit entity.

**Employer** means any person, partnership, corporation, municipal corporation, non-profit entity, or other entity who employs the services of one (1) or more individual persons.

**Enclosed area** means an area closed in by a roof and walls with appropriate openings for ingress and egress.

**Health care facility** means any institution that provides medical, surgical, and overnight facilities for patients, including but not limited to, hospitals, clinics, physical therapy facilities, doctor's offices, dentist's offices, nursing homes, adult care facilities, convalescent homes, and residential treatment centers/homes.

**Outdoor dining area and/or patio** means any non-enclosed contiguous portion of a restaurant that contains seating for members of the public to consume food or drink.

**Person** means any individual, partnership, cooperative, association, corporation or venture.

**Place of employment** means any area under the control of an employer including but not limited to work areas, employee lounges, rest rooms, conference rooms, classrooms, employee cafeterias and hallways. A private residence shall not be considered a place of employment.

**Private club** means an association of persons as members, whether incorporated or unincorporated under the laws of the state, for the promotion of some common object, and organized by a board of representatives, including but not limited to a fraternal organization, private social or dinner club. When used to describe a facility in this Article, "private club" shall mean any enclosed area to which the public is not invited or in which the public is not permitted which is owned, leased or rented by the private club for its members and their guests. A privately-owned business, open to the public, is not a private club.

**Private function** means the rental of a ballroom, private club, or other facility for the sole purpose of entertaining, private parties, events or other social functions that the general public is not able to attend.

**Public place** means any enclosed area in which the public is invited or permitted, including, but not limited to, banks, educational facilities, health facilities, laundromats, public transportation facilities, reception areas, restaurants, marketing establishments, retail service establishments, retail stores, theaters, waiting rooms, bowling alleys and billiard halls.

**Retail tobacco store** means a retail store whose primary business is the sale of tobacco products and accessories and in which the sale of other products is merely incidental.

**Restaurant** means any place where food is manufactured, packaged, produced, processed, transported, stored, sold, commercially prepared, vended, or otherwise handled. The term includes any such place regardless of the duration of the permit or

whether there is a charge for the food. The term includes, but is not limited to, a coffee shop, cafeteria, sandwich shop, private or public school cafeteria, and any other eating establishment that gives or offers food to the public, guests or employees, including catering facilities. The term shall not include a cocktail lounge or tavern if said cocktail lounge or tavern is a "bar" as defined in this Article. The term does not include private homes where food is prepared or served for guests and individual family consumption.

**Service line** means any line or area where persons wait for goods or services of any kind, regardless of whether or not an exchange of money will occur. Such service includes, but is not limited to: sales, giving of information, directions, advice, and the transfer of money or goods.

**Smoking** means inhaling, exhaling, burning or carrying any lighted cigar, cigarette, tobacco product, weed, plant, or other combustible substance whose smoke is intended to be inhaled.

**Sec. 70-92. Smoking prohibited.**

- (a) A person commits an offense if the person smokes in a public place.
- (b) A person commits an offense if the person smokes in an enclosed area in a building or facility owned, leased, or operated by the City.
- (c) A person commits an offense if the person smokes in an enclosed area of a place of employment.
- (d) A person commits an offense if the person smokes within twenty (20) feet from a primary entrance or openable window of an enclosed area in which smoking is prohibited.
- (e) A person commits an offense if the person smokes in an outdoor dining area and/or patio of a restaurant.

(f) Notwithstanding any other provision of this section, any owner, operator, manager, or any other person who controls any establishment or facility may declare the entire establishment or facility as a nonsmoking establishment.

**Sec. 70- 93. Exceptions.**

(a) Notwithstanding any other provision of this Article to the contrary, the following areas shall not be subject to the smoking prohibitions in Section 70-92:

- (1) Bars, as defined in this Article;
- (2) Private residences, except when used as a child care, adult day care or health care facility;
- (3) Outdoor dining area and/or patio of a business that derives less than 30% of its revenue from the sale of food and beverages.
- (3) A private or semi private room in a nursing home or long term health care facility that is occupied by persons who smoke and have requested in writing to be placed in a room where smoking is permitted;
- (4) Hotel and motel rooms; provided that no more than twenty-five percent (25%) of its rooms are rented for temporary overnight occupancy by the public as smoking rooms;
- (5) Retail tobacco stores in stand alone physical facilities;
- (6) Hotel and motel conference or meeting rooms and public facilities while being used for a private function. This exception shall not include restaurants, as defined in this Article;

(7) Private clubs, as defined in this Article, as long as the facility is used or operated by the members and is not open to the general public;

(8) A bingo parlor operated under the Bingo Enabling Act, Chapter 2001 of the Occupations Code if:

a. An enclosed non-smoking area is provided; and

b. No one under the age of eighteen (18) years is admitted to the smoking areas.

(b) Notwithstanding any other provision of this Section, any owner, operator, manager, or other person who controls any establishment described in this section may designate the entire establishment as a nonsmoking establishment.

**Sec.70-94. Owner/operator responsibilities.**

(a) The owner and/or operator of a public place shall conspicuously post a "No Smoking" sign, the international "No Smoking" symbol (depiction of a burning cigarette enclosed in a red circle with a red bar across it), or other sign containing words or pictures that prohibit smoking:

(1) In each public place and workplace where smoking is prohibited by this Article; and

(2) At each entrance to a public place or workplace.

(b) The owner/operator of a public place shall conspicuously post signs in areas where smoking is permitted under Section 70-93.

(c) The owner/operator of a public place and an employer shall remove any and all ashtrays or other smoking accessories from a place where smoking is prohibited.

(d) An owner/operator commits an offense if he or she violates any provision of this section.

(e) An owner/operator commits an offense if he or she knowingly allows a person to remain in a place under the owner/operator's control while such person is smoking in violation of this Article. This offense is punishable, upon conviction, by a fine of an amount not to exceed two thousand dollars (\$2,000.00) for each offense. Each day that a violation is permitted to exist shall constitute a separate offense.

(f) It is not a defense to prosecution of any offense under this Article that an owner/operator failed to post a sign required under this section.

**Sec. 70-95. Employer responsibilities.**

(a) Except as provided in section 70-93, an employer shall provide a smoke-free place of employment.

(b) Employers shall designate all areas of the place of employment including but not limited to, conference rooms, break rooms, rest rooms, and dining areas as nonsmoking.

(c) If an employer requires employees to work in an area described in Section 70-93, the employer shall make reasonable accommodations for an employee who requests an assignment to a smoke free area.

(d) An employer shall notify each employee and applicant for employment in writing that:

(1) Smoking in the place of employment is prohibited; or

(2) Smoking is permitted in the place of employment because it is exempted from the prohibition of smoking under Section 70-93.

(e) A person, employer, building manager, building owner or lessee commits an offense if he or she violates any provision of this section.

**Sec. 70-96. Voluntary designation of a non-smoking facility.**

Nothing in this Article shall prevent the owner/operator of an enclosed area or public place from designating the entire facility and/or area as non-smoking.

**Sec. 70-97. Retaliation prohibited.**

A person commits an offense if the person discharges, refuses to hire, or retaliates against a customer, employee, or applicant for employment because the customer, employee or applicant for employment reports a violation of this Article.

**Sec. 70-98. Structural modification.**

Nothing in this Article shall require the owner, operator, manager or other persons in control of any building, facility, room, establishment to make any structural modifications to comply with the terms of this Article.

**Sec. 70-99. Enforcement.**

(a) The City Manager or his/her designee shall be primarily responsible for the implementation and enforcement of this Article.

(b) Any owner, manager, operator, or employer of any establishment regulated by this Article must inform persons violating this Article of the appropriate provisions thereof.

(c) The City Manager or designee shall investigate complaints and may issue warnings and citations to persons violating this Article.

**Sec. 70-100. Culpability.**

Except as otherwise provided in this Article, there shall be no requirement of a culpable mental state for a violation of this Article.

**Sec. 70-101. Other applicable laws.**

This Article shall not be interpreted or construed to permit smoking where it is otherwise restricted by other applicable law.

**Sec. 70-102. Violation and penalty.**

(a) Unless otherwise stated in this Article, a person who violates the provisions of this Article commits a class c misdemeanor, punishable by a fine not to exceed five hundred dollars (\$500.00).

(b) Each day an offense occurs is a separate violation.

**Sec. 70-103. Permit suspension or revocation; hearing.**

(a) Upon notice and a hearing, the City Manager or his/her designee may suspend or revoke a permit or license issued by the city to the operator of a public place or place of employment where a violation of this Article occurs.

(b) Prior to the revocation or suspension of a permit or license, the City Manager or his /her designee shall set a hearing to determine if grounds exist to revoke or suspend a permit or license due to a violation of this Article.

(c) The City Manager or his or her designee shall act as the hearings officer.

(d) Written notice of the hearing shall be served on the petitioner/violator at least fifteen (15) business days prior to the hearing. Notice shall be served in person or by certified mail, return receipt requested.

(e) Notice shall specify the date, time and place of the hearing. The petitioner/violator must request the hearing be rescheduled within five (5) business days of receiving the written notice if the petitioner/violator cannot attend the hearing at the originally scheduled time.

(f) For purposes of this Section, the hearing officer shall be empowered to administer oaths and to promulgate procedural rules for the conduct of the hearing.

(g) The hearing officer shall base the decision to revoke or suspend the permit or license on a preponderance of the evidence. The petitioner shall bear the burden of proof to show that the permit or license should not be revoked or suspended.

(h) After the conclusion of the hearing, the hearing officer shall make written findings of fact and conclusions of law and shall issue a written decision without undue delay.

(i) A hearing shall exhaust all administrative remedies of the petitioner/violator.

### **SECTION 3.**

This ordinance shall be cumulative of all provisions of ordinances and the Code of the City of Burleson, Texas, except where the provisions of this ordinance are in direct conflict with the provisions of such ordinances and Code, in which event the conflicting provisions of such ordinances and Code are hereby repealed.

#### **SECTION 4.**

It is hereby declared to be the intention of the City Council that the phrases, clauses, sentences, paragraphs, and sections of this ordinance are severable, and if any phrase, clause, sentence, paragraph or section of this ordinance shall be declared unconstitutional by the valid judgment or decree of any court of competent jurisdiction, such unconstitutionality shall not affect any of the remaining phrases, clauses, sentences, paragraphs and sections of this ordinance, since the same would have been enacted by the City Council without the incorporation in this ordinance of any such unconstitutional phrase, clause, sentence, paragraph or section.

#### **SECTION 5.**

All rights and remedies of the City of Burleson are expressly saved as to any and all violations of the provisions of the Burleson City Code or any other ordinances regulating animals that have accrued at the time of the effective date of this ordinance; and, as to such accrued violations and all pending litigation, both civil and criminal, whether pending in court or not, under such ordinances, same shall not be affected by this ordinance but may be prosecuted until final disposition by the courts.

#### **SECTION 6.**

The City Secretary of the City of Burleson is hereby authorized to publish this ordinance in book or pamphlet form for general distribution among the public, and the operative provisions of this ordinance as so published shall be admissible in evidence in all courts without further proof than the production thereof.

#### **SECTION 7.**

The City Secretary of the City of Burleson is hereby directed to publish in the official newspaper of the City of Burleson, the caption, penalty clause, publication

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clause and effective date clause of this ordinance at least two (2) times within fourteen (14) days after the passage of this ordinance as required by Section 36 of the Charter of the City of Burleson.

**SECTION 8.**

This ordinance shall be in full force and effect from and after its passage and publication as required by law, and it is so ordained.

**PASSED AND APPROVED ON THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 2009.**

\_\_\_\_\_

MAYOR

ATTEST:

\_\_\_\_\_

CITY SECRETARY

Passed on First Reading : \_\_\_\_\_

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## ATTACHMENT # 2

February 2, 2009

RE: Proposed City of Burleson Smoking Ordinance

Dear Owner/Operator:

The City of Burleson City Council will consider the first reading of a new smoke-free Ordinance at the February 16, 2009 City Council meeting starting at 7:00 PM. This letter is to inform you of the proposed changes and allow you the opportunity to attend the meeting to express your position on the matter.

The following is a brief summary of the proposed ordinance provisions:

- The proposed regulations will prohibit smoking in all restaurants, including the bar area; bowling alleys; business office/buildings and within 20 feet of any primary entrance or exit of a regulated facility.
- The proposed regulations also provides for exemptions to the requirements. Smoking is proposed to be allowed in the following establishments:
  - **Bars** – defined as establishments that are licensed by the State and that move more than 70% of their annual gross sales in alcoholic beverages for consumption by guests on the premises.
  - **Outdoor Dining Areas/patios** - as long as the area is more than 20 feet from a primary entrance or operable window.
  - **Hotel/Motel Rooms** - provided that no more than 25% of the total number of rooms rented to guests may be designated as smoking rooms.
  - **Private Clubs** - as defined in this Article, as long as the facility is used or operated by the members and is not open to the general public.
  - **Bingo Parlor** - operated under the Bingo Enabling Act, Chapter 2001 of the Occupations Code provided no one under the age of 18 years is allowed in the smoking area and the facility provides an enclosed designated non-smoking area.
  - **Private Meeting Rooms** – as long as the entire room remains private and is not open to the general public such as hotel/motel conference or meeting rooms and public facilities while being used for a private function (with the exception of restaurants).
  - **Private or Semi-Private Room in a Nursing Home or Long Term Care Facility** - that is occupied by persons who smoke and have requested in writing to be placed in a room where smoking is permitted.
  - **Retail Tobacco Stores** – if the store is a stand-alone facility and its primary business is the sale of tobacco products and accessories.

The foregoing information is a brief summary of the proposed ordinance. If you have specific questions or would like a copy of the proposed ordinance, please call me at 817-447-5410, ext. 226. You may also obtain a copy of the proposed ordinance by visiting my office located at 1675 SE John Jones, Burleson, Texas 76028.

Regards,

Lisa Duello  
Director of Neighborhood Services  
[lduello@burlesontx.com](mailto:lduello@burlesontx.com)