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Tobacco and Smoking Related Uses

Background: Section 6404.5 of the California Labor Code regulates smoking within places of employment. The stated intent of the State Law is to “prohibit the smoking of tobacco products in all (100 percent of) enclosed places of employment in this state”. In general, smoking is prohibited at any indoor place of employment, including lobbies, lounges, waiting areas, stairwells, and restrooms. However the prohibition does not apply to a very limited set of specified categories, including some businesses with a total of five or fewer employees, and retail or wholesale tobacco shops (with or without private smokers’ lounges). Additionally, the City’s Zoning Ordinance (a part of the Walnut Creek Municipal Code) further regulates land use.

Action: The City regulates tobacco and smoking related uses as follows, pursuant to the provisions of the California Labor Code and the Walnut Creek Municipal Code:

Tobacco shops:

Smoking may be allowed at a “retail or wholesale tobacco shop”, pursuant to the Labor Code. Retail or wholesale tobacco shops are defined by Labor Code section 6404.5(d)(4)(B) as “any business establishment the main purpose of which is the sale of tobacco products, including, but not limited to, cigars, pipe tobacco, and smoking accessories.” Items other than tobacco products (such as chewing gum, mints, newspapers, water, etc.) may be sold at such a business, so long as it primarily sells tobacco products¹. A retail or wholesale tobacco shop operating under this provision of the Labor Code is not limited to five or fewer employees. Retail tobacco shops are classified as a “Retail Sales/Rentals” land use, and wholesale tobacco shops are classified as a “Wholesaling, Distribution and Storage” land use, pursuant to Section 10-2.1.403 of the Zoning Ordinance; both are allowed to operate only in those zoning districts where such land uses are permitted by the applicable zoning regulations.

Private smokers’ lounge (accessory to a tobacco shop):

Smoking may be allowed in a “private smokers’ lounge”, as stated in the Labor Code. Private smokers’ lounges are defined by Labor Code section 6404.5(d)(4)(A) as “any enclosed area in or attached to a retail or wholesale tobacco shop that is dedicated to the use of tobacco products, including, but not limited to, cigars and pipes.” Pursuant to the definition noted above, a private smokers’ lounge must be private (i.e., not open or accessible to the general public) and must be located in an enclosed area that is in or attached to a retail or wholesale tobacco shop. In other words, a private smokers’ lounge must be part of an establishment whose primary purpose is to sell tobacco products – a private smokers’ lounge cannot operate independently of, or separately from, a retail or wholesale tobacco shop. In addition, a private smokers’ lounge must also be “dedicated to the use of tobacco products” (i.e., smoking is the only use or consumptive activity that may take place in a private smokers’ lounge). Accordingly, a private smokers’ lounge may only involve the use of tobacco products, and not non-tobacco products such as food or alcohol.

¹ See also Sections 4-4.100 through 4-4.101 and 5-4.101 through 5-4.207 of the Walnut Creek Municipal Code for additional regulations relating to the sale and distribution of tobacco products.

Additionally, a private smokers' lounge operating under this provision of the Labor Code is only permitted when it is accessory to the tobacco shop, and is therefore classified as part of the "Retail Sales/Rentals" or "Wholesaling, Distribution and Storage" land use by the Zoning Ordinance. As an accessory land use, the private smokers' lounge must be "subordinate and incidental" to the tobacco shop, pursuant to Sections 10-2.1.303 and 10-2.1.403 of the Zoning Ordinance. A private smokers' lounge operating under this provision of the Labor Code is not limited to five or fewer employees.

Bars and taverns:

Smoking is specifically prohibited in bars and taverns pursuant to Section 6404.5(d)(14)(ii) of the Labor Code, regardless of the number of employees. Bars and taverns are defined by the Labor Code as "facilities primarily devoted to the serving of alcoholic beverages for consumption by guests on the premises, in which the serving of food is incidental". Facilities that operate with a Type 40, 42, or 48 License from the California Department of Alcoholic Beverage Control are generally considered to be a bar or tavern.

Hookah and smoking lounges:

Businesses whose primary activity consists of a lounge or seating area where patrons smoke tobacco or non-tobacco products (such as a hookah lounge) are not defined by, or of the same general nature as, any of the land use classifications listed in Section 10-2.1.403 of the Zoning Ordinance, and as such are not allowed within the City of Walnut Creek pursuant to Section 10-2.1.204(E). Such land uses could only be allowed through a Zoning Ordinance text amendment, and are also subject to the applicable regulations contained within the California Labor Code.

Businesses with five or fewer employees

Smoking may be allowed in certain other businesses with a total of five or fewer employees (the total number of people employed by the business, both full time and part time; *not* the total number of employees working on a particular shift or at any one time), subject to the following restrictions contained in Labor Code section 6404.5(d)(14):

- (A) The smoking area is not accessible to minors.
- (B) All employees who enter the smoking area consent to permit smoking. No one, as part of his or her work responsibilities, shall be required to work in an area where smoking is permitted.
- (C) Air from the smoking area shall be exhausted directly to the outside by an exhaust fan. Air from the smoking area shall not be recirculated to other parts of the building.
- (D) The employer shall comply with any ventilation standard or other standard utilizing appropriate technology, including, but not limited to, mechanical, electronic, and biotechnical systems, adopted by the Occupational Safety and Health Standards Board or the federal Environmental Protection Agency. If both adopt inconsistent standards, the ventilation standards of the Occupational Safety and Health Standards Board shall be no less stringent than the standards adopted by the federal Environmental Protection Agency.

The exception for businesses with five or fewer employees does not apply to bars or taverns. Smoking is specifically prohibited in all bars or taverns, regardless of the number of employees, pursuant to Labor Code section 6404.5(d)(14)(ii).