



OFFICE OF THE
CITY ATTORNEY

SHARON SIEDORF CARDENAS
CITY ATTORNEY

CITY OF SACRAMENTO
CALIFORNIA

August 18, 1992

921 TENTH STREET
SUITE 700
SACRAMENTO, CA
95814-2717

PH 916-264-5346
FAX 916-264-7455

Law and Legislation Committee
City Council Chambers
Sacramento, CA 95814

Honorable Members in Session:

SUBJECT: An Ordinance Amending Section 37.22 of the Sacramento City Code, Relating to Exemption Procedures in the Clean Indoor Air and Health Protection Ordinance

LOCATION: City

SUMMARY

This report describes the Sacramento Environmental Commission's experience with applications for exemption from the Clean Indoor Air and Health Protection Ordinance ("the smoking ordinance," which regulates smoking in public places and the workplace) and recommends a change in exemption procedures.

RECOMMENDATION

The Sacramento Environmental Commission recommends that the Law and Legislation Committee approve a proposed ordinance modifying the exemption procedures contained in the Clean Indoor Air and Health Protection Ordinance to require that exemption applicants submit in advance in writing all evidence justifying the exemption and endorse its enactment by the full City Council.

BACKGROUND

The City Council adopted the Clean Indoor Air and Health Protection Ordinance, which regulates smoking in public places and the workplace, on October 9, 1990. As of May 9, 1992, smoking is prohibited entirely in most public places, including restaurants and recreation halls. Bars, tobacco stores, private clubs, and meeting rooms/banquet rooms when occupied for private functions are the primary exceptions.

Law and Legislation Committee
Re: **Exemption Procedures in the Clean
Indoor Air and Health Protection Ord.**
August 18, 1992

The smoking ordinance contains provisions for exemptions or modifications of the regulations based on (1) a showing of significant financial hardship due to compliance, or (2) the proposed implementation of an alternative approach or technology which would provide equivalent protection from the health hazards of sidestream smoke.

Application for exemption is submitted to the Environmental Health Division of the Sacramento County Environmental Management Department. After holding a hearing at which the applicant may present evidence, the Sacramento Environmental Commission determines whether to grant or deny the exemption. The applicant may appeal the Commission's decision to the City Council. Under current practice, appeals will be heard by a hearing examiner appointed by the City.

Since the smoking ordinance took effect, the Environmental Commission has heard three exemption applications, from a bingo parlor, a bowling alley, and an American Legion post which holds public bingo games. At least two other applications are pending, and many inquiries about exemptions have recently been received by the Environmental Health Division, which may result in additional applications.

The bingo parlor's application was based on the provision of separate ventilation systems for the smoking area and the non-smoking area, and was granted. The other two, sought due to financial hardship, were denied.

The appeal of the bowling alley operator to the City Council was referred to a hearing examiner who upheld the Commission's denial. The American Legion post also filed a notice of appeal, noting that they would introduce additional evidence of the financial hardship at the appeal hearing.

Upon review of the American Legion's notice of appeal, Environmental Health Division staff and the Environmental Commission became concerned that the current process allows the exemption applicant to provide evidence at the appeal hearing which was not presented to the Commission. If this is permitted, they reason, staff and the Commission are wasting time evaluating, hearing, and making a decision, based upon less than all the available evidence. The Chair of the Commission and Environmental Health Division staff met with the City Attorney's office to explore solutions to this problem.

In the short term, the American Legion appeal was resolved by sending the matter back to the Environmental Commission for further hearing.

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The long-term solution which appears most practical would (1) require that an applicant for an exemption submit all of its evidence justifying the exemption in writing to the Environmental Health staff in advance of the Environmental Commission hearing on the exemption, and (2) prohibit the introduction of additional evidence at any appeal hearing. This change would permit staff to prepare a recommendation to the Commission based on all the evidence which the appellant intends to submit, and would avoid the introduction of new evidence at a later appeal hearing, unless the applicant has a satisfactory explanation as to why the evidence was not available at the time of the original submittal.

The City Attorney believes it should be noted that the technical requirements contained in the preceding paragraph represent a significant departure from the way other appeals are currently handled by the City. In general, an applicant for an exemption or a party appealing denial or revocation of a permit or entitlement does not have to submit all his or her evidence in advance of the hearing; rather, the applicant is free to present any relevant evidence at the hearing. Moreover, the appeal hearings are generally de novo, meaning that all of the issues will be reviewed again and new evidence may be provided. The Committee should consider whether different treatment is appropriate for Environmental Commission matters.

Other possible solutions which the Environmental Commission does not recommend would be to make the Environmental Commission's decision final, with no appeal to the City Council/Hearing Examiner, or to eliminate the exemption for financial hardship set forth in the smoking ordinance.

FINANCIAL CONSIDERATIONS

There is a fee, based upon time expended and usually no less than \$450, for appeal hearings held at McGeorge School of Law or elsewhere. The proposed ordinance would not eliminate this fee. If the Council were to eliminate the appeal from the Environmental Commission, hearing expenses could be saved.

POLICY CONSIDERATIONS

The major consideration is whether to treat applicants before the Environmental Commission differently from applicants before other boards and commissions. Persons appearing before the Planning Commission, Housing Codes Advisory and Appeals Board, and Building Codes Advisory and Appeals Board are not required to submit all their evidence in writing before the hearing. Nor are they precluded from introducing new evidence at an appeal hearing before the City Council/Hearing Examiner.

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In many instances, the City Code provides for administrative decisions relating to permits to be made by the City Manager, Chief of Police, and others. These decisions also can be appealed to the City Council/Hearing Examiner, and it is common for new evidence to be provided at the appeal hearing.

Imposing the new evidence requirements for hearings before the Environmental Commission will add to the "technicalities" that face a smoking exemption applicant.

MBE/WBE

Not applicable.

Respectfully submitted,

SHARON SIEDORF CARDENAS
City Attorney

By:



DIANE B. BALTER
Deputy City Attorney

Law and Legislation Committee
August 25, 1992
All Districts

RECOMMENDATION APPROVED:



DAVID MARTINEZ
Deputy City Manager

Person to contact with questions:
Raymond Hackett
County Environmental Health Division
386-6111

ORDINANCE NO.

ADOPTED BY THE SACRAMENTO CITY COUNCIL

ON DATE OF _____

AN ORDINANCE AMENDING SECTION 37.22 OF THE SACRAMENTO CITY CODE, RELATING TO EXEMPTION PROCEDURES CONTAINED IN THE CLEAN INDOOR AIR AND HEALTH PROTECTION ORDINANCE

BE IT ENACTED BY THE COUNCIL OF THE CITY OF SACRAMENTO:

SECTION 1.

Section 37.22 of the Sacramento City Code is amended to read as follows:

§ 37.22 Exemption Procedures.

Any owner or manager of a business or other establishment subject to this chapter may apply to the Chief of the Environmental Health Division for an exemption or modification to its provision. Exemptions may only be granted on (1) a showing by the petitioner of significant financial hardship due to compliance, or (2) the proposed implementation of an alternative approach or technology which would provide equivalent protection from the health hazards of sidestream smoke.

An application for exemption shall be accompanied by a reasonable fee to cover the cost of preparation for the hearing. The application shall include all evidence which the applicant proposes to present in support of the application, as well as any data required by the Division. The Division will review the application and submit it, with recommendations, for hearing by the Sacramento Environmental Commission. The applicant shall be entitled to comment on the evidence at the hearing, but shall not be permitted to introduce additional evidence unless, in the exercise of reasonable diligence, the evidence could not have been produced at the time of application. The hearing shall be held within sixty (60) days of the receipt of the application.

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ORDINANCE NO.: _____

DATE ADOPTED: _____

The Commission will, after taking into consideration the evidence received at the hearing, issue its findings and decision within thirty (30) days after completion of the hearing. The Division will complete procedural action on the application and notify interested parties within twenty (20) days after its receipt from the Commission.

The applicant may appeal the Commission's decision to the City Council within thirty (30) days after the date on which the Division sends notice of the decision to the applicant. Upon appeal, the City Council shall set a hearing within sixty (60) days and make a final determination at that hearing. The appeal may be referred to a hearing examiner.

No additional evidence shall be introduced at the appeal hearing unless, in the exercise of reasonable diligence, the evidence could not have been produced at the hearing before the Environmental Commission.

DATE PASSED FOR PUBLICATION:

DATE ENACTED:

DATE EFFECTIVE:

MAYOR

ATTEST:

CITY CLERK

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An application for exemption ~~will~~ shall be accompanied by a reasonable fee to cover the cost of preparation for the hearing, ~~and~~ ~~the application will~~ shall include all evidence which the applicant proposes to present in support of the application, as well as any data required by the Division. The Division will review the application and submit it, with recommendations, for hearing by the Sacramento Environmental Commission. The applicant ~~will~~ shall be entitled to present comment on the evidence at the hearing, but shall not be permitted to introduce additional evidence unless, in the exercise of reasonable diligence, the evidence could not have been produced at the time of application, ~~which will be scheduled.~~ The hearing shall be held within sixty (60) days

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of the receipt of the application.

The Commission will, after taking into consideration the ~~testimony evidence~~ received at the hearing, issue its findings and ~~recommendations decision~~ within ~~twenty (20) thirty~~ (30) days ~~of the after~~ completion of the hearing. The Division will complete procedural action on the application and notify interested parties within twenty (20) days ~~of after~~ its receipt from the Commission.

The applicant may appeal the Commission's decision to the City Council within thirty (30) days ~~of receipt of the action notification by the Division after the date on which the Division sends notice of the decision to the applicant.~~ Upon appeal, the City Council will shall set a hearing within sixty (60) days and make a final determination at that hearing. The appeal may be referred to a hearing examiner.

No additional evidence shall be introduced at the appeal hearing unless, in the exercise of reasonable diligence, the evidence could not have been produced at the hearing before the Environmental Commission.

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