

CITY ATTORNEY'S OFFICE

MEMORANDUM

May 30, 2007

To: Urban Services Committee
From: Jim Brewer, Deputy City Attorney
Re: Sidewalk Cafes/Questions from Committee

Issue:

Does the City of Corvallis have the authority to prohibit smoking within the fenced areas of a sidewalk cafe.

Brief Answer:

Yes.

Background:

Currently, both the Corvallis Municipal Code and the Oregon Revised Statutes are silent regarding smoking within a sidewalk café permit area. State law dealing with smoking (and limiting the authority of cities to prohibit smoking in some situations) does not address smoking outside. The Corvallis Municipal Code provisions currently prohibit smoking outside businesses within a reasonable distance (and not less than 10 feet) from a service line or entrance to any place of business. Other than the reference to serving lines and entrances, the Corvallis Municipal Code does not directly address smoking in areas that are not “enclosed”. The Code provisions specifically state that any business may declare an entire establishment as a non-smoking establishment. This could be seen as including sidewalk café areas under permit from the City.

Discussion:

The City has the authority to grant sidewalk cafes as permits to occupy the right of way or as leases of the right of way. Sidewalk café permits are granted by the City so long as the business meets the requirements in the Code. Nothing prohibits the City from amending the sidewalk café provisions to require that any establishment choosing to operate a sidewalk café must designate the sidewalk café as a no-smoking area. This could apply to either sidewalk cafes that do have fenced areas or sidewalk cafes that do not have fenced areas, or both. The City Council would need to amend the sidewalk café ordinance provisions to make it clear that prohibiting smoking within the sidewalk café areas would be a condition for obtaining a sidewalk café permit.

If the City Council chooses to do this, then it is clear that a business that allowed customers to smoke within the sidewalk café areas would be in violation of the sidewalk café permit. It is not as clear whether either the business or a person smoking in a sidewalk café permit area would also violate the no-smoking ordinance. Arguably, accepting a non-smoking requirement as part of the conditions for a sidewalk café permit would make the sidewalk café permit area part of a no-smoking premises, and a person smoking (or allowing smoking) in these areas would be in violation of the no-smoking ordinance. Practically, a business has some authority to prohibit patrons from smoking, but less ability to prohibit pedestrians that cross into the permit area. This would seem to create some challenges for business owners and law enforcement, especially for those sidewalk cafes that do not require fencing. If the City Council decides to prohibit smoking in sidewalk cafes, and wants to enforce such a prohibition against patrons or pedestrians walking through a sidewalk café area, the best practice would be for the City Council to review and amend the smoking ordinance so that it clearly and specifically addresses issues related to sidewalk cafes.

Conclusion:

The City of Corvallis has the authority to amend the Corvallis Municipal Code provisions regarding sidewalk café permits so that smoking would not be allowed within the sidewalk café permit areas. The City also has the authority to amend the Corvallis Municipal Code provisions regulating smoking, so that smoking within a sidewalk café permit area would be prohibited. The City could amend either or both ordinances to prohibit smoking in sidewalk café permit areas.