



Jesse Arreguín
Councilmember, District 4

ACTION CALENDAR
September 17, 2013

To: Honorable Mayor and Members of the City Council
From: Councilmember Jesse Arreguín
Subject: Mercury Dental Amalgams

RECOMMENDATION

1. Refer to the Agenda Committee the scheduling of a Work Session on Dental Amalgam
2. Refer to the Work Session and for future City Council discussion all the proposed recommendations, proposals, including the ordinance, by the Community Environmental Advisory Commission, Community Health Commission, City Manager, and City Councilmembers Capitelli, Maio, and Arreguin

BACKGROUND:

Mercury is an extremely toxic element that can have deleterious effects on human health and the environment, **with no known safe level of exposure**. Dental amalgams primarily consist of mercury, and such mercury is emitted in minute amounts as vapor. While there is legitimate scientific debate over whether mercury dental amalgam is safe, the City of Berkeley is charged with protecting the public health and welfare of its residents, and pursuant to the precautionary principle, is required to err on the side of side of health and safety.

Given the confusion surrounding the issue of dental amalgam, the various proposals, and the City’s charge to err on the side of protecting the health and safety of the public, it is advisable for City Council to conduct a workshop to be better informed and to fully evaluate which proposal(s) best protect the residents of the City of Berkeley.

The purpose of this ordinance is to take protective action to ensure that every Berkeleyan has an equal right to know the effects that dental restorative materials, particularly dental amalgam, may have on their health and safety by extending and supplementing State law to further its intent. Specifically, this ordinance:

1. Extends the requirement to provide the Dental Materials Fact Sheet from only once to each time prior to a procedure involving dental restorative materials
2. Requires that a notice be provided to patients informing them of their rights to a Dental Materials Fact sheet in order to advance private enforcement

3. Requires signed acknowledgement of receipt of the Fact Sheet and Notice to better ensure that patients are fully informed
4. Extends similar Proposition 65 signage requirements to dental practices that employ fewer than 10 employees and do not currently post such signage
5. Provides a private right of action to ensure that dental practices abide by the requirements without expending City resources on monitoring and enforcement

Subsequent to City Council's referral to the Community Health and Environmental Advisory Commissions on this issue, the California Dental Association (CDA), a professional interest group with registered lobbying activity in Sacramento, has since become heavily involved given that the recommendations on the issue have the potential to financially impact their members and their ability to offer dental amalgam unimpeded by additional disclosure. Most notably, CDA provided a State Legislative Counsel Bureau (SLCB) opinion requested by State Senator Bill Emmerson (presumably at the behest of CDA) that has altered the perceived ability of the City of Berkeley to legally make additional regulations that are different from those established by the state, so long as they are not inconsistent with the purpose of the laws governing licensed professionals.

Though the opinion's effective conclusion on the narrow question of informed consent is correct in that it conditions a procedure, and thereby infringes upon the state-protected scope of practice of dentists, the opinion contains incorrect reasoning that is being used to discourage the City of Berkeley. Specifically, the opinion erroneously claims that the City of Berkeley is wholly preempted since the regulation of dentistry is fully occupied by the State.

This claim by SLCB is in direct contradiction of *California Veterinary Medical Association v. City of West Hollywood*; the court found that the California Veterinary Medical Practices Act (VMPA), which regulates the practice veterinary medicine, does not preempt local ordinances by so fully occupying the field that it does not tolerate additional local action. Similarly, the Dental Practices Act (DPA) regulates the practice of dentistry in the same schematic fashion and without an express preemption. Accordingly, DPA does not "fully occupy the field," and thereby does not implicitly preempt local action.

Absent an explicit or implied preemption, actions taken by the City of Berkeley on this issue are only hampered by conflict preemption –local law cannot be duplicative nor inconsistent with State law.

Opponents of dental amalgam disclosure also point to Business and Professions Code 460 as preempting the City of Berkeley. However, they fail to disclose that when 460 was amended in 2009 by Senate Bill (SB) 762 to protect the scope of practice of state-licensed professionals, it was narrowly crafted to preserve local police powers at the behest of the California State Association of Counties, League of California Cities, and others. Tellingly, during the passage of SB 762, the California Dental Association stated in bill analysis by the Senate Business, Professions, and Economic Development Committee that they "believe strongly that regulation of the DCA licensees should rest

exclusively with state government...” and the local government should not have any say in the conduct of their practice.

FINANCIAL IMPLICATIONS:

Unknown; some staff time required.

CONTACT PERSON:

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Attachments:

1. Proposed Ordinance
2. California Veterinary Medical Association v. City of West Hollywood
3. California Dental Materials Fact Sheet

ORDINANCE NO.

ADDING CHAPTER X.XX TO THE BERKELEY MUNICIPAL CODE REQUIRING THE PROVISION OF THE STATE DENTAL MATERIALS FACT SHEET TO PATIENTS PRIOR TO EVERY DENTAL RESTORATION PROCEDURE AND REQUIRING A SIGNED ACKNOWLEDGEMENT OF RECEIPT OF THE FACT SHEET, REQUIRING THE INSTALLATION OF SIGNAGE WARNING PATIENTS OF THE USE OF HAZARDOUS MATERIALS FOR DENTAL RESTORATION WORK, AND CREATING A PRIVATE RIGHT OF ACTION FOR ENFORCEMENT OF THIS CHAPTER

Section 1. That Chapter X.XX is hereby added to the Berkeley Municipal Code to read as follows:

CHAPTER X.XX DISCLOSURE OF DENTAL RESTORATIVE MATERIALS

Sections:

- X.XX.010 Purpose
- X.XX.020 Definitions
- X.XX.030 Provision of State Dental Materials Fact Sheet
- X.XX.040 Signed Acknowledgement Required by Patient
- X.XX.050 Signage Requirements
- X.XX.060 Remedies - Civil penalty - Not exclusive

Section X.XX Purpose

Mercury is an extremely toxic element that can have deleterious effects on human health and the environment, with no known safe level of exposure. Dental amalgam consists primarily of mercury, and such mercury is emitted in minute amounts as vapor. While there is legitimate scientific debate over whether dental amalgam is safe, the City of Berkeley is charged with protecting the public health and welfare of its residents, and pursuant to the precautionary principle, is required to err on the side of health and safety.

The purpose of this ordinance is to take protective action to ensure that every Berkeleyan has an equal right to know the effects that dental amalgams may have on their health and safety. Specifically, this ordinance furthers the intent of California Business and Professions Code Sections 1648.10 and 1648.15, which requires the provision of the Dental Materials Fact Sheet developed by the Board of Dental Examiners of California to patients, by extending its provision prior to each time that dental restorative materials are used with signed acknowledgment of receipt. This ordinance ensures that patients are informed about dental restorative materials each time those materials are used so that patients can make informed decisions in consultation with their dentist. Additionally, this ordinance extends the posted signage requirements California Health and Safety Code 25249.5-25249.13 warning of the potential health effects of mercury in any dental practice that employs fewer than 10

employees and does not currently post signage consistent with Health and Safety Code 25249.5-25249.13.

X.XX.020 Definitions

"Dentist" means any person licensed by the Board of Dental Examiners of California for the purpose practicing dentistry.

"Fact sheet" means the Dental Materials Fact Sheet mandated by California Business and Professions Code Section 1648.10 (a) and developed by the Board of Dental Examiners of California which describes risks and efficacy of various types of dental restorative materials that may be used to repair a dental patient's oral condition or defect.

"Dental restorative materials" means any structure or device placed into a patient's mouth with the intent that it remain there for an indefinite period beyond the completion of the dental procedure, including material used for filling cavities, or rebuilding or repairing the organic structure of, a tooth or teeth, but excluding synthesized structures or devices intended to wholly replace an extracted tooth or teeth, such as implants.

X.XX.030 Provision of State Dental Materials Fact Sheet

In addition to the requirements of California Business and Professions Code Sections 1648.10 and 1648.15, all dental practices in the City of Berkeley must provide the State Dental Materials Fact Sheet to patients each time prior to a procedure involving the use of dental restorative materials to correct a dental patient's oral condition or defect.

This section shall not apply to any surgical, endodontic, periodontic, or orthodontic dental procedure in which dental restorative materials are not used.

X.XX.040 Notification of Dental Materials Fact Sheet Provision Requirements

All dental practices in the City of Berkeley must provide a clear and conspicuous Dental Fact Sheet rights statement each time prior to a procedure involving the use of dental restorative materials to correct a dental patient's oral condition or defect. The "Dental Fact Sheet rights statement" shall mean the following statement or a statement substantially similar to the following statement: "The City of Berkeley has deemed it an important right for patients to be fully informed about the materials that may be used in certain dental procedures. Prior to any procedure involving dental restorative materials, your dentist must provide you with a Dental Materials Fact Sheet, which describes the risks and efficacy of various types of dental restorative materials that may be used to repair a tooth or teeth, so that you may make an informed decision in consultation with your dentist. If you do not receive a Dental Materials Fact Sheet, you may be entitled to a cash reward pursuant to BMC X.XX.010-070."

X.XX.050 Signed Acknowledgement Required by Patient

In addition to the requirements of California Business and Professions Code Section 1648.15, a form acknowledging receipt of the Fact Sheet and the Dental Fact Sheet rights statement shall be signed by patients, or by a parent or guardian if that patient is a minor, each time they receive the Fact Sheet, and shall be placed in the patient's dental record.

X.XX.060 Signage Requirements

In addition to the requirements of California Health and Safety Code Section 25249.5-25249.13, any dental office where dental procedures are performed, that employ fewer than 10 employees, and do not currently post signage consistent California Health and Safety Code Section 25249.5-25249.13 must have a clearly and conspicuously posted warning sign of not less than 8" by 10" with the following statement in at least 30-point type:

"WARNING: While in this office, you may be exposed to mercury, a chemical known to the State of California to cause birth defects or other reproductive harm."

Failure to comply with the signage requirements of this Chapter may result in enforcement by the City Attorney.

X.XX.070 Remedies – Civil penalty – Not exclusive

A. The remedies provided under this section are in addition to any the City or any person might have under applicable law.

B. Any dentist shall be liable to the patient for a civil penalty of two hundred fifty dollars (\$250.00) if the dentist fails to comply with the provisions of this Chapter.

C. Any person aggrieved by the dentist's failure to comply with the provisions of this Chapter may bring a civil action against the dentist for all appropriate relief. In any action to recover damages resulting from a violation of this Chapter, the prevailing plaintiff(s) shall be entitled to reasonable attorneys' fees in addition to other costs, and in addition to any liability for damages imposed by law.

Section 2. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of Council Chambers, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.