



Agenda Item #: _____



Staff Report

City of Manhattan Beach

TO: Honorable Mayor Montgomery and Members of the City Council

THROUGH: ~~David~~ David N. Carmany, City Manager

FROM: Vince Mastro Simone, Senior Management Analyst

DATE: July 5, 2011

SUBJECT: Consideration of FY 11-12 Work Plan Item 32 - Smoking Ban on the Strand

RECOMMENDATION:

Staff recommends that the City Council receive and file this report and direct the City Manager to agenda discussion at a future meeting regarding changes, if any, to the Municipal Code concerning smoking on the Strand and/or in public places.

FISCAL IMPLICATION:

There are no direct fiscal implications associated with the recommended action.

BACKGROUND:

The City Council Work Plan for 2011-2012 includes an item dealing with smoking on the Strand. The text of Item 32 is as follows:

Smoking Ban on the Strand

The Police Department is directed to develop a "No Smoking on the Strand" Ordinance and present to Council for discussion and recommendation.

This agenda item allows the City Council to initiate action on this goal.

In 1987, the City of Manhattan Beach adopted Municipal Code Section 4.116, Regulation of Smoking in Public Areas and Places of Employment. The requirements of this section are mild compared to the requirements now in place at the State and Federal levels. Most, if not all, of this code section has been superseded by State and Federal statutes.

In 2004, the City adopted Municipal Code Section 12.08.320, Smoking Prohibited on Beaches. As the title suggests, this ordinance prohibits smoking on the beach and disposing of cigarettes and cigars on the beach. The existing code sections are provided to you as Attachment A.

The State of California adopted AB-13 to implement Workplace Smoking Restrictions. This bill, Labor Code Section 6404.5, provides that "No employer shall knowingly or intentionally permit, and no person shall engage in, the smoking of tobacco products in an enclosed space at a place of employment." An AB-13 Fact Sheet and the complete text of AB-13 are provided to you as Attachment B. Other State statutes are in the Health and Safety Code, the Vehicle Code and the

Penal Code.

Staff has located an on-line resource for information on controlling tobacco use in public areas. The Public Health Law & Policy (PHLP) organization is a team of attorneys, policy analysts, and urban planners dedicated to building healthy communities nationwide. They help people who want to improve public health conditions where they live, work, play, and commute, whether they are advocates, public health officials, elected representatives, or the public. The website is <http://www.phlpnet.org/tobacco-control/products/tobaccolawsca>.

DISCUSSION:

PHLP provides a summary of current California and Federal tobacco regulations. Attachment C is the summary found at their website. California law now covers the areas of Workplaces, Multi-Unit Residences, State, County and City Buildings, Tot Lots and Playgrounds, Day Care Facilities, Smoking in Vehicles with Children, Public Transit Systems, Airplanes and Trains, Youth Buses and Public Paratransit Vehicles and Adoption of Local Secondhand Smoke Laws. Federal statutes cover the areas of Schools, Day Care Facilities and Airplanes and Trains.

PHLP has developed some model ordinances which may be utilized by local agencies to assist in smoking control efforts. The Smokefree Outdoor Area Model Ordinance is Attachment D. The Smokefree Beaches Model Ordinance is Attachment E. The Smokefree Recreation Area Model Ordinance is Attachment F. The Smokefree Housing Model Ordinance is Attachment G. The City Council may wish to peruse these and perhaps use them as a starting point to initiate discussions on new smoking policies for the City Of Manhattan Beach.

The City Of Manhattan Beach is a supporter of the Vitality City initiative. One of the purposes in the Community Area of their program is to have cities adopt tobacco-free policies for public places. Any updates to City policies and ordinances likely will help the City meet the goals of Vitality City.

The City of Carson recently compiled a summary of the smoking regulations in some other Southern California cities. It is included herein as Attachment H.

CONCLUSION :

The current Municipal Code section relating to smoking has been superseded by State and Federal statutes. Although these State and Federal statutes cover many areas, local agencies may adopt stricter ordinances. Any new ordinance should reflect community standards.

ALTERNATIVES :

The City Council may take any of the following actions:

1. Receive and file this report and take no further action
2. Direct staff to craft a new ordinance, covering the scope the City Council determined by the City Council and bring it back to the City Council for further discussion and action
3. Create an ad-hoc committee of the City Council, composed of 1 or 2 Council Members, City Staff and representatives of the resident and business communities.

ATTACHMENTS: A - Municipal Code Sections 4.116 & 12.08.320
B - AB-13 Fact Sheet and text of AB-13
C - Summary of California Laws

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- D - Smokefree Outdoor Area Model Ordinance
- E - Smokefree Beaches Model Ordinance
- F - Smokefree Recreation Area Model Ordinance
- G - Smokefree Housing Model Ordinance
- H – Summary of Smoking Regulations of Various Cities

Manhattan Beach, California, Code of Ordinances >> Title 4 - PUBLIC WELFARE, MORALS AND CONDUCT >> Chapter 4.116 - REGULATION OF SMOKING IN PUBLIC AREAS AND PLACES OF EMPLOYMENT >>

Chapter 4.116 - REGULATION OF SMOKING IN PUBLIC AREAS AND PLACES OF EMPLOYMENT

Sections:

4.116.010 - Definitions.

4.116.020 - Prohibition—Unlawful smoking.

4.116.030 - Regulation of smoking in places of employment.

4.116.040 - Posting of signs.

4.116.050 - Exceptions.

4.116.060 - Penalties.

4.116.010 - Definitions.

For purposes of this chapter:

- A. "Bar" means an area which is devoted to the serving of alcoholic beverages and in which the service of food is only incidental to the consumption of such beverages. Incidental shall be defined to mean the serving of hors d'oeuvres and snacks, but not including meals.
- B. "City" means the City of Manhattan Beach.
- C. "Employee" means any person who is employed by an employer in consideration for direct or indirect monetary wages or profit.
- D. "Employer" means any person, partnership, corporation, including municipal corporation or public entity, who employs the services of more than three (3) persons.
- E. "Enclosed" means closed in by a roof and walls with appropriate openings for ingress and egress and is not intended to mean areas commonly described as public lobbies.
- F. "Place of employment" means any enclosed area under the control of a public or private employer which employees normally frequent during the course of employment, including, but not limited to work areas, employee lounges, conference rooms, and employee cafeterias. A private residence is not a place of employment.
- G. "Restaurant" means any publicly or privately owned coffee shop, cafeteria, short order cafe, luncheonette, soda fountain, restaurant, or other indoor eating establishment which serves food to the general public.
- H. "Smoke" or "smoking" shall include carrying or holding of a lighted pipe, cigar, or cigarette of any kind or any other lighted smoking equipment or the lighting or emitting or exhaling the smoke, cigar, or cigarette of any kind.

(§ 1, Ord. 1753, eff. July 16, 1987)

4.116.020 - Prohibition—Unlawful smoking.

- A. Smoking is prohibited in the following places:
 - 1. The Manhattan Beach City Hall and any enclosed City of Manhattan Beach facility, including, but not limited to, any room, chamber, place of meeting, or public assembly or in any City of Manhattan Beach vehicle.
 - 2. Those enclosed portions of any building, structure, or other facility open to the general public for the primary purpose of exhibiting any motion picture, stage production, musical recital, or similar performance, but not an area which serves as a lobby.
 - 3. Those areas within the buildings or structures of any health care facility which are open to visitors to the premises except that in such areas there may be enclosed areas designated and set aside on each floor where smoking may be allowed.
 - 4. Any retail food marketing establishments, including grocery stores and supermarkets, except those areas of such establishments designated for the serving of food and drink, restrooms and

offices and areas thereof not open to the public, which may otherwise be regulated by other sections of this ordinance.

- B.** Restaurants with a seating capacity of twenty (20) or more persons shall adopt a non-smoking policy for seating of nonsmokers and must post signs indicating availability of nonsmoking areas. The size and scope of areas designated as nonsmoking shall be determined at the discretion of the establishment, provided, however, the owner, manager, or operator of a restaurant is not required to incur any expense to make structural or physical modifications in satisfying these demands.

(§ 1, Ord. 1753, eff. July 16, 1987; Ord. No. 1907, Amended, 06/16/94)

4.116.030 - Regulation of smoking in places of employment.

The places subject to regulation pursuant to Section 4.116.020 shall not be deemed places of employment for purposes of this section. The following regulations apply to places of employment:

- A.** Within ninety (90) days of the effective date of this chapter, each employer shall adopt, implement and maintain a written smoking policy which shall contain, at a minimum, provisions related to the following:
- 1.** It shall be the responsibility of employers to provide smoke-free work areas for non-smokers to the maximum extent possible but employers are not required to incur any expense to make structural or other physical modifications in providing these areas. Any employer who makes reasonable efforts to develop and promulgate a policy regarding smoking and nonsmoking in the work place shall be deemed to be in compliance with this paragraph, provided that a policy which designates an entire work place as a smoking area shall not be deemed in compliance with this paragraph.
 - 2.** It shall be the responsibility of employers to provide smoke-free areas in cafeterias, lunchrooms, and employee lounges and to post signs indicating availability of said non-smoking areas. The size and scope of areas designated as nonsmoking shall be determined at the discretion of the employer, provided, however, the employer is not required to incur any expense to make structural or physical modifications in providing these areas.
 - 3.** In any dispute arising under the smoking policy, the health concerns of the non-smoker shall be given precedence.
 - 4.** An employer shall post "No Smoking" signs in any area designated as a non-smoking area.
 - 5.** The smoking policy shall be communicated to all current employees within three (3) weeks of the date of adoption, and to all future employees at the time of their entry into employment.

(§ 1, Ord. 1753, eff. July 16, 1987)

4.116.040 - Posting of signs.

- A.** The person having the authority to manage the control in any area designated as a non-smoking area shall post or cause to be posted and prominently displayed, and shall maintain "No Smoking" signs in conspicuous locations within said areas. All such signs shall clearly and conspicuously recite the phrase "NO SMOKING" and/or use the international no-smoking symbol.
- B.** Every restaurant subject to this chapter shall have at its entrance a sign clearly stating that a non-smoking section is available.

(§ 1, Ord. 1753, eff. July 16, 1987)

4.116.050 - Exceptions.

Notwithstanding any other provisions of this chapter to the contrary, the following areas shall not be subject to the smoking restrictions of this chapter:

- A.** Private residences, except when used as a child care or health care facility.
- B.** Bars.
- C.** Restaurant, hotel and motel conference and meeting rooms, and public and private assembly rooms while these places are being used for private functions open only to invitees or members of the organization and their guests.
- D.** A private enclosed office workplace occupied exclusively by smokers, even though such an office workplace may be visited by non-smokers.

Notwithstanding any other provision of this chapter, any owner, operator, manager, or other person who controls any establishment described in this chapter may prohibit smoking in all areas of the establishment.

(§ 1, Ord. 1753, eff. July 16, 1987)

4.116.060 - Penalties.

- A.** It shall be unlawful to wilfully mutilate, destroy or remove any signs required by this chapter.
- B.** It shall be unlawful to smoke in any area where smoking is prohibited by the provisions of this chapter.
- C.** It shall be unlawful for an employer to discharge or in any manner discriminate against any employee who exercises his or her rights provided by this chapter if the dominant interest of the employer is retaliation against the employee for exercising those rights. Violation of this provision shall be a misdemeanor.
- D.** Any person who violates any provision of this chapter shall be guilty of an infraction, except as otherwise provided by this chapter, punishable by:
 - 1.** A fine not to exceed fifty (\$50.00) dollars for the first violation.
 - 2.** A fine not to exceed one hundred (\$100.00) dollars for a second violation of the same provision within one year.
 - 3.** A fine not to exceed two hundred fifty (\$250.00) dollars for each additional violation of the same provision within one year.

(§ 1, Ord. 1753, eff. July 16, 1987)

12.08.320 - Smoking prohibited on beaches.**A. Definitions.** For purposes of this section the following definitions shall apply:

"Beach" shall mean and include the sandy area on either side of the mean high tide line all the way up to, but not including the strand walkway or the parking lots on the west side of the strand walkway and shall also include the entire Manhattan Beach Municipal Pier.

"Smoke/smoking" means the carrying or holding of a lighted pipe, cigar or cigarette of any kind, or any other lighted smoking product or equipment used to burn any tobacco products, weed, plant, or any other combustible substance. Smoking shall include the emitting or exhaling the fumes of any of the foregoing.

B. Prohibitions.

1. No person shall smoke on the beach as defined in this section.
2. No person shall dispose of any cigarette, cigar or other tobacco product or any part thereof on the beach except in a designated waste disposal container.

C. Enforcement.

1. Each separate violation of this section is an infraction.
2. Punishment under this section shall not preclude punishment pursuant to Health and Safety Code Section 13002, Penal Code Section 374.4 or any other law proscribing the act of littering. Nothing in this section shall preclude any person, corporation or governmental entity from seeking any other remedies, penalties or procedures provided by law whether civil or criminal.

(§ 1, Ord. 2066, eff. November 5, 2004)

AB-13 FACT SHEET - CALIFORNIA WORKPLACE SMOKING RESTRICTIONS

Prepared October 1997 by the Cal/OSHA Consultation Service

This fact sheet summarizes the provisions of Labor Code Section 6404.5 prohibiting smoking in places of employment. This summary information should not be relied upon as legal advice. A copy of Section 6404.5 is attached with this Fact Sheet.

Effective Date January 1, 1995

General Provision "No employer shall knowingly or intentionally permit, and no person shall engage in, the smoking of tobacco products in an enclosed space at a place of employment."

Enforcement This law will be enforced by local law enforcement agencies, including but not limited to, local health departments.

For workplaces covered by AB-13, Cal/OSHA is required to respond to complaints regarding smoking in places of employment only after the employer has been found guilty of three violations of this law within the previous year. Complaints received by Cal/OSHA regarding smoking in workplaces not covered by AB-13 smoking restrictions (see Workplace Exceptions below) will result in a letter directing the employer to investigate and correct the problem.

Workplace Exceptions See page 3 of this fact sheet for the complete list from AB-13.

In addition to workplaces specifically listed on page 3 of this fact sheet, any employer with five or fewer employees (full or part-time) may permit smoking where:

1. The smoking area is not accessible to minors.
2. All employees who enter the smoking area consent to permit smoking, and no one is required as part of their job to work in an area where smoking is permitted.
3. Air from the smoking area is exhausted directly outside.

Maximum Fines from Local Agencies

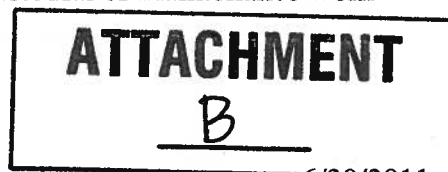
1st violation - \$100

2nd violation - \$200

3rd and subsequent violations - \$500

Maximum Fines from Cal/OSHA After a 3rd violation within the previous year, Cal/OSHA is required to investigate complaints and may cite employers with fines up to \$7,000 for violations classified as general or serious, and fines up to \$70,000 for violations classified as willful serious. Violations can be classified as serious depending upon specific circumstances. For example, where the exposure to second hand smoke causes a serious asthma attack which could have been prevented the violation may be cited as serious.

Breakrooms Breakrooms are exempted from the smoking ban provided air from the room is exhausted directly to the outside by an exhaust fan and the rooms are in a nonwork area where employees are not required to be present as part of their work responsibilities other than custodial or maintenance work when the room is unoccupied.



Where they are provided for smokers, there must also be a sufficient number of breakrooms to accommodate nonsmokers. However, the law does not require employers to provide smoking areas or breakrooms for smokers, or to provide breakrooms for nonsmokers where they are not provided for smokers.

Adequate Compliance Measures (specified in AB-13)

1. Posting of clear and prominent signs stating "No Smoking" at entrances to buildings where smoking is prohibited throughout;
2. In buildings where smoking is permitted in designated areas, posting of a sign at the building entrance stating "Smoking is prohibited except in designated areas;" and
3. Requesting that nonemployees smoking in prohibited areas refrain from doing so unless such a request would involve a risk of physical harm to the employer or any employee.

Note: Employers are not required to physically eject smoking nonemployees from workplaces.

Supersedes Local Laws This law supersedes and pre-empts local laws, ordinances, and regulations with respect to smoking in enclosed places of employment. However, the law does not supersede local authority to regulate work environments exempted from coverage in the law and to require provision of breakrooms for smokers and nonsmokers. This law also does not prevent employers from enacting more restrictive smoking prohibitions in their workplaces.

Workplaces, or portions thereof, not covered by Labor Code Section 6404.5 (AB-13) smoking restrictions:¹

- 65% of the guest rooms of hotels, motels, and similar transient lodging;
- Lobby areas of hotels, motels, and similar transient lodging designated for smoking (not to exceed 25% of the total lobby floor area or, if the lobby area is 2,000 square feet or less, not to exceed 50% of the total lobby floor area);
- Meeting and banquet rooms except while food or beverage functions are taking place (including set-up, service, and clean-up activities or when the room is being used for exhibit activities);
- Retail or wholesale tobacco shops and private smokers lounges;
- Truck cabs or truck tractors, if no nonsmoking employees are present;
- Warehouse facilities with more than 100,00 square feet of total floor space and 20 or fewer full-time employees working at the facility, but does not include any area within such a facility that is utilized as office space;
- Theatrical production sites, if smoking is an integral part of the story;
- Medical research or treatment sites, if smoking is integral to the research or treatment being conducted;
- Private residences, except for homes licensed as family day care homes, during the hours of operation and in those areas where children are present;
- Patient smoking areas in long-term health care facilities.
- Breakrooms designated by employers for smoking, under specified conditions (see page 2 of fact sheet); and
- Employers with five or fewer full or part-time employees, under specified conditions (see page 1 of fact sheet).

¹An exemption for gaming clubs, bars, and taverns expires January 1, 1998.

(Source: www.leginfo.ca.gov 10/10/97)

6404.5.(a) The Legislature finds and declares that regulation of smoking in the workplace is a matter of statewide interest and concern. It is the intent of the Legislature in enacting this section to prohibit the smoking of tobacco products in all (100 percent of) enclosed places of employment in this state, as covered by this section, thereby eliminating the need of local governments to enact workplace smoking restrictions within their respective jurisdictions. It is further the intent of the Legislature to create a uniform statewide standard to restrict and prohibit the smoking of tobacco products in enclosed places of employment, as specified in this section, in order to reduce employee exposure to environmental tobacco smoke to a level that will prevent anything other than insignificantly harmful effects to exposed employees, and also to eliminate the confusion and hardship that can result from enactment or enforcement of disparate local workplace smoking restrictions. Notwithstanding any other provision of this section, it is the intent of the Legislature that any area not defined as a "place of employment" pursuant to subdivision (d) or in which the smoking of tobacco products is not regulated pursuant to subdivision (e) shall be subject to local regulation of smoking of tobacco products.

(b) No employer shall knowingly or intentionally permit, and no person shall engage in, the smoking of tobacco products in an enclosed space at a place of employment.

(c) For purposes of this section, an employer who permits any nonemployee access to his or her place of employment on a regular basis has not acted knowingly or intentionally if he or she has taken the following reasonable steps to prevent smoking by a nonemployee:

(1) Posted clear and prominent signs, as follows:

(A) Where smoking is prohibited throughout the building or structure, a sign stating "No smoking" shall be posted at each entrance to the building or structure.

(B) Where smoking is permitted in designated areas of the building or structure, a sign stating "Smoking is prohibited except in designated areas" shall be posted at each entrance to the building or structure.

(2) Has requested, when appropriate, that a nonemployee who is smoking refrain from smoking in the enclosed workplace.

For purposes of this subdivision, "reasonable steps" does not include (A) the physical ejection of a nonemployee from the place of employment or (B) any requirement for making a request to a nonemployee to refrain from smoking, under circumstances involving a risk of physical harm to the employer or any employee.

(d) For purposes of this section, "place of employment" does not include any of the following:

(1) Sixty-five percent of the guest room accommodations in a hotel, motel, or similar transient lodging establishment.

(2) Areas of the lobby in a hotel, motel, or other similar transient lodging establishment designated for smoking by the establishment. Such an establishment may permit smoking in a designated lobby area that does not exceed 25 percent of the total floor area of the lobby or, if the total area of the lobby is 2,000 square feet or less, that does not exceed 50 percent of the total floor area of the lobby. For purposes of this paragraph, "lobby" means the common public area of such an

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establishment in which registration and other similar or related transactions, or both, are conducted and in which the establishment's guests and members of the public typically congregate.

(3) Meeting and banquet rooms in a hotel, motel, other transient lodging establishment similar to a hotel or motel, restaurant, or public convention center, except while food or beverage functions are taking place, including setup, service, and cleanup activities, or when the room is being used for exhibit purposes. At times when smoking is not permitted in such a meeting or banquet room pursuant to this paragraph, the establishment may permit smoking in corridors and prefunction areas adjacent to and serving the meeting or banquet room if no employee is stationed in that corridor or area on other than a passing basis.

(4) Retail or wholesale tobacco shops and private smokers lounges. For purposes of this paragraph:

(A) "Private smokers lounge" means 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.

(B) "Retail or wholesale tobacco shop" means 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.

(5) Cabs of motor trucks, as defined in Section 410 of the Vehicle Code, or truck tractors, as defined in Section 655 of the Vehicle Code, if no nonsmoking employees are present.

(6) Warehouse facilities. For purposes of this paragraph, "warehouse facility" means a warehouse facility with more than 100,000 square feet of total floor space, and 20 or fewer full-time employees working at the facility, but does not include any area within such a facility that is utilized as office space.

(7) Gaming clubs, in which smoking is permitted by subdivision (f). For purposes of this paragraph, "gaming club" means any gaming club, as defined in Section 19802 of the Business and Professions Code, or bingo facility, as defined in Section 326.5 of the Penal Code, that restricts access to minors under 18 years of age.

(8) Bars and taverns, in which smoking is permitted by subdivision (f). For purposes of this paragraph, "bar" or "tavern" means a facility primarily devoted to the serving of alcoholic beverages for consumption by guests on the premises, in which the serving of food is incidental. "Bar or tavern" includes those facilities located within a hotel, motel, or other similar transient occupancy establishment. However, when located within a building in conjunction with another use, including a restaurant, "bar" or "tavern" includes only those areas used primarily for the sale and service of alcoholic beverages. "Bar" or "tavern" does not include the dining areas of a restaurant, regardless of whether alcoholic beverages are served therein.

(9) Theatrical production sites, if smoking is an integral part of the story in the theatrical production.

(10) Medical research or treatment sites, if smoking is integral to the research and treatment being conducted.

(11) Private residences, except for private residences licensed as family day care homes, during the hours of operation as family day care homes and in those areas where children are present.

(12) Patient smoking areas in long-term health care facilities, as defined in Section 1418 of the Health and Safety Code.

(13) Breakrooms designated by employers for smoking, provided that all of the following conditions are met:

(A) Air from the smoking room shall be exhausted directly to the outside by an exhaust fan. Air from the smoking room shall not be recirculated to other parts of the building.

(B) 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.

(C) The smoking room shall be located in a nonwork area where no one, as part of his or her work responsibilities, is required to enter. For purposes of this paragraph, "work responsibilities" does not include any custodial or maintenance work carried out in the breakroom when it is unoccupied.

(D) There are sufficient nonsmoking breakrooms to accommodate nonsmokers.

(14) Employers with a total of five or fewer employees, either full-time or part-time, may permit smoking where all of the following conditions are met:

(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. An employer who is determined by the division to have used coercion to obtain consent or who has required an employee to work in the smoking area shall be subject to the penalty provisions of Section 6427.

(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.

This paragraph shall not be construed to (i) supersede or render inapplicable any condition or limitation on smoking areas made applicable to specific types of business establishments by any other paragraph of this subdivision or (ii) apply in lieu of any otherwise applicable

paragraph of this subdivision that has become inoperative.

(e) Paragraphs (13) and (14) of subdivision (d) shall not be construed to require employers to provide reasonable accommodation to smokers, or to provide breakrooms for smokers or nonsmokers.

(f)(1) Except as otherwise provided in this subdivision, smoking may be permitted in gaming clubs, as defined in paragraph (7) of subdivision (d), and in bars and taverns, as defined in paragraph (8) of subdivision (d), until the earlier of the following:

(A) January 1, 1998.

(B) The date of adoption of a regulation (i) by the Occupational Safety and Health Standards Board reducing the permissible employee exposure level to environmental tobacco smoke to a level that will prevent anything other than insignificantly harmful effects to exposed employees or (ii) by the federal Environmental Protection Agency establishing a standard for reduction of permissible exposure to environmental tobacco smoke to an exposure level that will prevent anything other than insignificantly harmful effects to exposed persons.

(2) If a regulation specified in subparagraph (B) of paragraph (1) is adopted on or before January 1, 1998, smoking may thereafter be permitted in gaming clubs and in bars and taverns, subject to full compliance with, or conformity to, the standard in the regulation within two years following the date of adoption of the regulation. An employer failing to achieve compliance with, or conformity to, the regulation within this two-year period shall prohibit smoking in the gaming club, bar, or tavern until compliance or conformity is achieved. If the Occupational Safety and Health Standards Board and the federal Environmental Protection Agency both adopt regulations specified in subparagraph (B) of paragraph (1) that are inconsistent, the regulations of the Occupational Safety Standards Board shall be no less stringent than the regulations of the federal Environmental Protection Agency.

(3) If a regulation specified in subparagraph (B) of paragraph (1) is not adopted on or before January 1, 1998, the exemptions specified in paragraphs (7) and (8) of subdivision (d) shall be inoperative on and after January 1, 1998, until such a regulation is adopted. Upon adoption of such a regulation on or after January 1, 1998, smoking may thereafter be permitted in gaming clubs and in bars and taverns, subject to full compliance with, or conformity to, the standard in the regulation within two years following the date of adoption of the regulation. An employer failing to achieve compliance with, or conformity to, the regulation within this two-year period shall prohibit smoking in the gaming club, bar, or tavern until compliance or conformity is achieved. If the Occupational Safety and Health Standards Board and the federal Environmental Protection Agency both adopt regulations specified in subparagraph (B) of paragraph (1) that are inconsistent, the regulations of the Occupational Safety and Health Standards Board shall be no less stringent than the regulations of the federal Environmental Protection Agency.

(4) From January 1, 1997, to December 31, 1997, inclusive, smoking may be permitted in gaming clubs, as defined in paragraph (7) of subdivision (d), and in bars and taverns, as defined in paragraph (8) of subdivision (d), subject to both of the following conditions:

(A) If practicable, the gaming club or bar or tavern shall establish a designated nonsmoking area.

(B) If feasible, no employee shall be required, in the performance of ordinary work responsibilities, to enter any area in which smoking is permitted.

(g) The smoking prohibition set forth in this section shall constitute a uniform statewide standard for regulating the smoking of tobacco products in enclosed places of employment and shall supersede and render unnecessary the local enactment or enforcement of local ordinances regulating the smoking of tobacco products in enclosed places of employment. Insofar as the smoking prohibition set forth in this section is applicable to all (100 percent of) places of employment within this state and, therefore, provides the maximum degree of coverage, the practical effect of this section is to eliminate the need of local governments to enact enclosed workplace smoking restrictions within their respective jurisdictions.

(h) Nothing in this section shall prohibit an employer from prohibiting smoking in an enclosed place of employment for any reason.

(i) The enactment of local regulation of smoking of tobacco products in enclosed places of employment by local governments shall be suspended only for as long as, and to the extent that, the (100 percent) smoking prohibition provided for in this section remains in effect. In the event this section is repealed or modified by subsequent legislative or judicial action so that the (100 percent) smoking prohibition is no longer applicable to all enclosed places of employment in California, local governments shall have the full right and authority to enforce previously enacted, and to enact and enforce new, restrictions on the smoking of tobacco products in enclosed places of employment within their jurisdictions, including a complete prohibition of smoking. Notwithstanding any other provision of this section, any area not defined as a "place of employment" or in which the smoking is not regulated pursuant to subdivision (d) or (e), shall be subject to local regulation of smoking of tobacco products.

(j) Any violation of the prohibition set forth in subdivision (b) is an infraction subject to subdivision (d) of Section 17 of the Penal Code and, notwithstanding Section 19.8 of the Penal Code, is punishable by a fine not to exceed one hundred dollars (\$100) for a first violation, two hundred dollars (\$200) for a second violation within one year, and five hundred dollars (\$500) for a third and for each subsequent violation within one year. This subdivision shall be enforced by local law enforcement agencies including, but not limited to, local health departments, as determined by the local governing body.

(k) Notwithstanding Section 6309, the division shall not be required to respond to any complaint regarding the smoking of tobacco products in an enclosed space at a place of employment, unless the employer has been found guilty pursuant to subdivision (j) of a third violation of subdivision (b) within the previous year.

(l) If any provision of this act or the application thereof to any person or circumstances is held invalid, that invalidity shall not affect other provisions or applications of the act that can be given effect without the invalid provision of application, and to this end the provisions of this act are severable.



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1. WORKPLACES**California Labor Code Section 6404.5**

Scope: It is against the law to smoke in an enclosed space at a place of employment. No employer shall knowingly or intentionally permit smoking in an enclosed space at a place of employment. *Enclosed space* includes lobbies, lounges, waiting areas, elevators, stairwells, and restrooms that are a structural part of the building. *A place of employment* is any place where employment is carried on.

Note: This law applies to places of employment at any time of day or night, regardless of whether any employees are present. (See Legis. Counsel of Cal. Op. 16332, Question No. 18 (May 12, 1995).) Note: This law does not apply to a business that is operated solely by the owner(s) and has no employees because such a business is not considered a place of employment under the law.

Note: In many cases, volunteers may be considered employees for the purposes of determining whether a space is a place of employment. For instance, a person who provides unpaid services but who receives some other kind of benefit from these services (such as reduced-price admission) may be considered an employee. (See Legis. Counsel of Cal. Op. 24807, at 9 (Dec. 20, 1997).)

Note: This law allows local governments to adopt local laws that impose stricter indoor smoking restrictions. (See *City of San Jose v. Dep't of Health Services*, 66 Cal. App. 4th 35, 44 (1998).)

EXEMPTION: The following places are exempt from the smoking ban:

- Up to 65 percent of hotel/motel guest rooms. (**Note:** Hotels and motels may choose to be 100 percent smokefree).
- Up to 25 percent or 50 percent (depending on square footage) of hotel/motel lobbies. (**Note:** *Lobby* is defined as a common public area, which has been interpreted to exclude the hotel bar area.)
- Meeting and banquet rooms in a hotel/motel, except while food and beverage functions are taking place.
- Retail or wholesale tobacco shops (businesses whose main purpose is the sale of tobacco products) and private smokers' lounges (any enclosed area in or attached to a retail/wholesale tobacco shop dedicated to tobacco use).
- Cabs of trucks or tractors, if nonsmoking employees are not present.
- Warehouse facilities (with more than 100,000 sq. ft. of total floor space, and 20 or fewer full-time employees working at the facility), but not areas utilized as office space.
- Theatrical production sites, if smoking is an integral part of the story.
- Medical research and treatment sites, if smoking is integral to the research and treatment being conducted.

- Private residences, except for those licensed as family day care homes during hours of operation and in those areas where children are present.
- Patient smoking areas in long-term health facilities.
- Employee break rooms designated by employers for smoking, provided they meet all of the following criteria: (1) air from the room is exhausted directly to the outside by an exhaust fan; (2) the employer complies with applicable state and federal ventilation standards; (3) the room is located in a non-work area; and (4) there are sufficient nonsmoking break rooms to accommodate nonsmokers.
- Small businesses (with five or fewer full or part time employees) when all four of the following conditions are met: (1) the smoking area is not accessible to minors; (2) all employees who enter the smoking area consent to permit smoking; (3) air from the smoking area is exhausted directly to the outside by an exhaust fan; and (4) the employer complies with all applicable state and federal ventilation standards. (**Note:** This Exception is extremely limited and difficult to meet. For example, it does not apply to bars. (See 82 Ops. Cal. Atty. Gen. 190 (1999).) In addition, minors may not be excluded arbitrarily in order to meet the first condition. (See 79 Ops. Cal. Atty. Gen. 8 (1996).)

ENFORCEMENT: This section may be enforced by local law enforcement agencies including local health departments, as determined by the local governing body. The enforcement agency may refer the violation to the California Occupational Safety and Health Administration (Cal/OSHA) for further enforcement; however, Cal/OSHA is not required to respond to a complaint until after a third conviction under California Labor Code section 6404.5. In addition, under California Labor Code section 2699, an aggrieved employee or former employee may bring a civil action if Cal/OSHA fails to act upon a complaint.

PENALTY: Violators are guilty of an infraction and subject to a fine of up to \$100 for a first violation, \$200 for a second violation within one year, and \$500 for a third or subsequent violation within one year. (**Note:** Cal/OSHA's fines are potentially much greater; Cal/OSHA has fined a violator over \$50,000.)

2. MULTI-UNIT RESIDENCES**California Labor Code Section 6404.5**

Scope: In apartment and condominium complexes, the indoor common areas (including hallways, stairwells, laundry rooms, and recreation rooms) are subject to the workplace smoking prohibitions contained in Labor Code section 6404.5 if these areas are places of employment. (See entry 1 for a summary of Labor Code section 6404.5.) An indoor common area may be a place of employment if the complex has an employee, such as an on-site property manager, security guard, or maintenance worker, who works on the property at any time.

Note: Landlords and condominium associations may adopt policies further restricting where residents smoke. Such policies could prohibit smoking in indoor and outdoor common areas as well as in individual units.

Note: Tenants or condominium owners with certain disabilities relating to smoke sensitivity may have other legal remedies available to address the problem of drifting smoke entering their units. See entries 79 and 80 for more information on remedies available to people with disabilities.

ENFORCEMENT: See entry 1 for a summary of how the California Labor Code may be enforced.

PENALTY: See entry 1 for penalties available under the California Labor Code.

3. STATE, COUNTY, AND CITY BUILDINGS

California Government Code Sections 7596-7598

Scope: Smoking is prohibited:

- inside a public building, which is a building owned and occupied, or leased and occupied, by the state, a county, a city, or a California community college district;
- in an outdoor area within 20 feet of a main exit, entrance, or operable window of a public building;
- in lobbies, lounges, waiting areas, elevators, stairwells, and restrooms that are a structural part of a covered public parking lot or a building to which such a parking lot is attached; and
- in a passenger vehicle owned by the state.

This law explicitly permits local governments and campuses (e.g., a campus of the University of California, the California State University, or the California community college system) to pass more restrictive ordinances, regulations, and policies.

Note: The workplace smoking restrictions in California Labor Code section 6404.5 also apply. (See entry 1.)

Exception: The smoking prohibition does not apply to private living areas of public buildings or to the parking areas of covered public parking lots. Smoking may be allowed in any outdoor area of a public building unless otherwise prohibited by state or local law and a sign describing the prohibition is posted by the state, county, or city agency, or other appropriate entity.

ENFORCEMENT: Not specified.

PENALTY: Not specified.

4. TOT LOTS AND PLAYGROUNDS

California Health and Safety Code Section 104495

Scope: Smoking of tobacco products is prohibited within 25 feet of a playground or tot lot sandbox area. The disposal of tobacco-related waste, such as cigar and cigarette butts, in these areas is also prohibited. A playground is defined as a park or recreational area specifically designed for use by children that has play equipment installed. This includes facilities located on public or private school grounds, or on city, county, or state park grounds.

A tot sandbox area is a play area within a public park designated for use by children under five years of age. The law allows local governments to pass and enforce stricter laws.

Exception: The law does not apply to private property (except for private schools) or to public sidewalks within 25 feet of a playground or tot lot area.

Enforcement: Local law enforcement agencies have the general authority to enforce this law under California Penal Code section 830.1.

Penalty: Violators are guilty of an infraction and subject to a fine of \$250 per violation.

5. SCHOOLS

20 United States Code Section 6083

Scope: It is illegal under federal law to permit smoking within any indoor facility utilized for kindergarten, elementary, or secondary education or library services for children.

Note: The workplace smoking restrictions in California Labor Code section 6404.5 also apply. (See entry 1.)

Note: See entries 14 and 15 for summaries of tobacco possession and use restrictions relating to schools.

Enforcement: The U.S. Department of Education is authorized to enforce this law.

Note: A school or library may use its general power over its property to enforce no-smoking rules against visitors and its general power over its terms of employment to enforce no-smoking rules against employees. A school may use its normal disciplinary powers to enforce no-smoking rules against students.

Penalty: Violators may be liable for a civil penalty of up to \$1,000 for each violation and/or may be subject to an administrative compliance order. Each day a violation continues constitutes a separate violation.

6. DAY CARE FACILITIES

California Health and Safety Code Sections 1596.795, 1596.890

Scope: California law prohibits smoking on the premises of a licensed day care center and in a licensed family day care home (e.g., a day care for children based in the home of the provider) during the hours of operation as a family day care home and in those areas of the family day care home where children are present. The law allows for more stringent local laws.

Note: The workplace smoking restrictions in California Labor Code section 6404.5 also apply. (See entry 1.)

Exception: This law does not prohibit smoking in family day care homes before or after hours of operation as a day care facility.

Enforcement: This law may be enforced by the California Department of Social Services or by local law enforcement agencies.

PENALTY: Violators are guilty of a misdemeanor punishable by a \$1,000 fine and/or imprisonment for no more than 180 days.

20 United States Code Section 6083

SCOPE: It is illegal under federal law to permit smoking within any indoor facility that is used for federally funded health care, day care, or Head Start services for children or that is used by the employees of the provider of such services.

Note: The workplace smoking restrictions in California Labor Code section 6404.5 also apply. (See entry 1.)

EXCEPTION: This law does not apply to any private residence or to areas used for inpatient hospital treatment for drug or alcohol addiction.

Note: California Health and Safety Code section 1596.795 prohibits smoking in family day care homes during hours of operation.

ENFORCEMENT: The U.S. Department of Education is authorized to enforce this law. **Note:** The facilities covered by this law may use their general power over their property to enforce no-smoking rules against visitors and their general power over their terms of employment to enforce no-smoking rules against employees.

PENALTY: Violators may be liable for a civil penalty of up to \$1,000 for each violation and/or may be subject to an administrative compliance order. Each day a violation continues constitutes a separate violation.

7. SMOKING IN VEHICLES WITH CHILDREN

California Health and Safety Code Sections 118947-118949

SCOPE: It is illegal to smoke or possess a lighted pipe, cigar, or cigarette containing tobacco in any motor vehicle in which there is a minor (a person under 18 years of age), regardless of whether the vehicle is in motion or at rest.

ENFORCEMENT: A law enforcement officer may not stop a vehicle for the sole purpose of determining whether the driver is violating this prohibition.

PENALTY: Violation of this section is an infraction punishable by a fine not exceeding \$100 per violation.

8. PUBLIC TRANSIT SYSTEMS

California Health and Safety Code Sections 118925-118945

SCOPE: Smoking is prohibited on public transportation systems and in any vehicle of an entity receiving transit assistance from the state. The law contains sign posting requirements. The law allows for more restrictive local laws.

Note: The workplace smoking restrictions in California Labor Code section 6404.5 also apply. (See entry 1.)

ENFORCEMENT: Local law enforcement agencies have the general authority to enforce this law under California Penal Code section 830.1.

PENALTY: Violators are guilty of an infraction and subject to a fine of up to \$100 for a first violation, up to \$200 for a second violation within one year, and up to \$500 for a third or subsequent violation within one year.

California Penal Code Section 640

SCOPE: Smoking is not allowed on public transportation in areas where it is prohibited by that system.

Note: The workplace smoking restrictions in California Labor Code section 6404.5 also apply. (See entry 1.)

ENFORCEMENT: Local law enforcement agencies have the general authority to enforce this law under California Penal Code section 830.1.

PENALTY: Violators are guilty of an infraction and subject to a fine of up to \$250 and 48 hours of community service.

9. AIRPLANES AND TRAINS

California Health and Safety Code Sections 118925-118945

SCOPE: Smoking is prohibited on any aircraft or Amtrak train, except to the extent permitted by federal law. The law contains sign posting requirements.

Note: The workplace smoking restrictions in California Labor Code section 6404.5 also apply. (See entry 1.)

ENFORCEMENT: Local law enforcement agencies have the general authority to enforce this law under California Penal Code section 830.1.

PENALTY: Violators are guilty of an infraction and subject to a fine of up to \$100 for a first violation, up to \$200 for a second violation within one year, and up to \$500 for a third or subsequent violation within one year.

49 United States Code Section 41706

SCOPE: Smoking is prohibited on domestic U.S. airline flights. Smoking also is prohibited in foreign air travel arriving in or departing from the United States.

EXCEPTION: If a foreign government objects to the prohibition of smoking during foreign air travel, the Secretary of Transportation shall negotiate an alternative.

ENFORCEMENT: The Secretary of Transportation shall prescribe regulations necessary to carry out this section.

PENALTY: Not specified.

Secondhand Smoke

10. YOUTH BUSES AND PUBLIC PARATRANSIT VEHICLES

California Vehicle Code Sections 336, 680, 12523(d)(2), 12523.5(d)(2), 13369(c)(3)

SCOPE: Drivers of a youth bus (a bus other than a school bus used to transport children) may not smoke while operating the bus. Operators of general public paratransit vehicles (motor vehicles designed to carry no more than 24 persons that provide local transportation to the public) may not smoke.

Note: The workplace smoking restrictions in California Labor Code section 6404.5 also apply. (See entry 1.)

ENFORCEMENT: The California Department of Motor Vehicles is authorized to enforce this law.

PENALTY: A violator may be subject to the denial, suspension, or revocation of a certificate to drive a youth bus or general paratransit vehicle.

11. ADOPTION OF LOCAL SECONDHAND SMOKE LAWS

California Health and Safety Code Section 118910

SCOPE: A local governing body may completely ban the smoking of tobacco or may regulate smoking in any manner not inconsistent with state law.

Note: Several state laws explicitly permit cities and counties to pass secondhand smoke laws that have stricter restrictions than those imposed by the state laws. (See entries 1, 2, 3, 4, 6, and 8 for summaries of those state laws.) Some cities and counties have passed local laws banning smoking in areas not covered by state law, including parks, beaches, outdoor dining areas, bus stops, and areas within 20 feet of commercial building entryways. These local laws are enforced by various local agencies and impose various penalties.

ENFORCEMENT: Not applicable.

PENALTY: Not applicable.

POSSESSION AND USE





Smokefree Outdoor Areas Ordinance

A Model California Ordinance Regulating Smoking in Outdoor Areas (with Annotations)

June 2009

Developed by the Technical Assistance Legal Center (TALC),
a project of Public Health Law & Policy.

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INTRODUCTION

The Technical Assistance Legal Center (TALC) developed this Model Ordinance to help California cities and counties limit tobacco use and unwanted exposure to secondhand smoke in outdoor areas. As the dangers of tobacco use and secondhand smoke become increasingly well documented, one of the most important steps a community can take to protect and improve its residents' health is to create more smokefree or tobacco-free spaces. By addressing outdoor tobacco use, this Model Ordinance also helps limit tobacco-related litter.

To assist cities and counties create smokefree and tobacco-free outdoor areas, this Model Ordinance includes:

- Extensive findings based on the latest scientific information documenting the health risks associated with tobacco use and exposure to secondhand tobacco smoke;
- Prohibitions on smoking in outdoor places including parks and other recreational areas, restaurant patios, bus stops, public event sites, and common areas of multi-unit housing;
- Optional language that can be included to prohibit *all* tobacco use in outdoor places;
- Requirements for posting No Smoking signs; and
- Robust enforcement mechanisms including the option for private individuals and organizations to enforce the no-smoking provisions of this ordinance.

The Model Ordinance offers a variety of options. In some instances, blanks (e.g., [____]) prompt you to customize the language to fit your community's needs. In other cases, the ordinance offers you a choice of options (e.g., [choice one / choice two]). Some of the ordinance options are followed by a comment that describes the legal provisions in more detail. Some degree of customization is always necessary in order to make sure that the ordinance is consistent with a community's existing laws. Your city attorney or county counsel will likely be the best person to check this for you.

The Model Ordinance is very broad and covers every conceivable outdoor space, but it can be customized to fit the specific needs of your community. Some of the comments in the Model Ordinance describe how to narrow the scope of the smoking restrictions, should that be necessary. In addition, optional language is available to broaden the scope of the ordinance to restrict not only smoking but *all* tobacco use.

TALC has also developed a separate ordinance to create smokefree multi-unit housing by limiting smoking inside units and common areas, as well as other ordinances specifically designed to create smokefree recreational areas and beaches. Some of the areas covered by those ordinances are also included in this Model Ordinance. If you would like to adopt a comprehensive or more customized approach, some aspects of other TALC ordinances can be combined with this ordinance. If you have questions about how to adapt this ordinance for your community, please contact TALC for assistance at (510) 302-3380 or via e-mail at talca@phlpnet.org.

**AN ORDINANCE OF THE [CITY / COUNTY] OF [____]
AMENDING THE [____] MUNICIPAL CODE TO REGULATE
SMOKING [AND TOBACCO PRODUCT USE] IN OUTDOOR PLACES**

The [City Council of the City / Board of Supervisors of the County] of [____] does ordain as follows:

COMMENT: This is introductory boilerplate language that should be adapted to the conventional form used in the jurisdiction.

SECTION I. FINDINGS.

The [City Council of the City / Board of Supervisors of the County] of [____] hereby finds and declares as follows:

WHEREAS, tobacco use causes death and disease and continues to be an urgent public health challenge, as evidenced by the following:

- Tobacco-related illness is the leading cause of preventable death in the United States,¹ accounting for about 443,000 deaths each year;² and
- Scientific studies have concluded that tobacco use can cause chronic lung disease, coronary heart disease, and stroke, in addition to cancer of the lungs, larynx, esophagus, and mouth;³ and
- Some of the most common types of cancers including stomach, liver, uterine cervix, and kidney are related to tobacco use;⁴ and

WHEREAS, secondhand smoke has been repeatedly identified as a health hazard, as evidenced by the following:

- The U.S. Surgeon General concluded that there is no risk-free level of exposure to secondhand smoke;⁵ and

¹ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Targeting Tobacco Use: The Nation's Leading Cause of Preventable Death*. 2008, p. 2. Available at: www.cdc.gov/nccdphp/publications/aag/pdf/osh.pdf.

² US Department of Health and Human Services, Centers for Disease Control and Prevention. "Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses — United States, 2000-2004." *Morbidity and Mortality Weekly Report*, 57(45): 1226-1228, 2008. Available at: www.cdc.gov/mmwr/preview/mmwrhtml/mm5745a3.htm.

³ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Targeting Tobacco Use: The Nation's Leading Cause of Preventable Death*. 2008, p. 2. Available at: www.cdc.gov/nccdphp/publications/aag/pdf/osh.pdf.

⁴ Leistikow B, Zubair K, et al. "Male Tobacco Smoke Load and Non-Lung Cancer Mortality Associations in Massachusetts." *BMC Cancer*, 8:341, 2008. Available at: www.biomedcentral.com/1471-2407/8/341.

⁵ US Department of Health and Human Services, Office of the Surgeon General. *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General*. 2007. Report highlights available at: www.surgeongeneral.gov/library/secondhandsmoke/factsheets/factsheet7.html.

- The California Air Resources Board placed secondhand smoke in the same category as the most toxic automotive and industrial air pollutants by categorizing it as a toxic air contaminant for which there is no safe level of exposure;⁶ and
- The California Environmental Protection Agency included secondhand smoke on the Proposition 65 list of chemicals known to the state of California to cause cancer, birth defects, and other reproductive harm;⁷ and

Whereas exposure to secondhand smoke causes death and disease, as evidenced by the following:

- Secondhand smoke is responsible for as many as 73,000 deaths among nonsmokers each year in the United States;⁸ and
- Exposure to secondhand smoke increases the risk of coronary heart disease by approximately thirty percent;⁹ and
- Secondhand smoke exposure causes lower respiratory tract infections, such as pneumonia and bronchitis in as many as 300,000 children in the United States under the age of 18 months each year;¹⁰ and exacerbates childhood asthma;¹¹ and

[*Include the following findings about smokeless tobacco if your community will be incorporating the optional language to create completely tobacco-free outdoor spaces.*]

WHEREAS, smokeless tobacco is not a safe alternative to smoking and causes its own share of death and disease, as evidenced by the following:

- Smokeless tobacco use causes leukoplakia, a disease causing white patches to form in the user's mouth that can become cancerous;¹² smokeless tobacco products are known

⁶ Resolution 06-01, Cal. Air Resources Bd. (2006) at 5. Available at: www.arb.ca.gov/regact/ets2006/res0601.pdf; See California Environmental Protection Agency, Air Resources Board. *News Release, California Identifies Secondhand Smoke as a "Toxic Air Contaminant."* Jan. 26, 2006. Available at: www.arb.ca.gov/newsrel/nr012606.htm.

⁷ California Environmental Protection Agency, Office of Environmental Health Hazard Assessment. *Chemicals Known to the State to Cause Cancer or Reproductive Toxicity*. 2006, p. 8 & 17. Available at: www.oehha.ca.gov/prop65/prop65_list/files/P65single081106.pdf.

⁸ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Fact Sheet – Secondhand Smoke*. 2006. Available at: www.cdc.gov/tobacco/data_statistics/fact_sheets/secondhand_smoke/general_facts/index.htm.

⁹ Barnoya J and Glantz S. "Cardiovascular Effects of Secondhand Smoke: Nearly as Large as Smoking." *Circulation*, 111: 2684-2698, 2005. Available at: www.circ.ahajournals.org/cgi/content/full/111/20/2684.

¹⁰ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Targeting Tobacco Use: The Nation's Leading Cause of Preventable Death*. 2008, p. 2. Available at: www.cdc.gov/nccdphp/publications/aag/pdf/osh.pdf.

¹¹ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Fact Sheet – Secondhand Smoke*. 2006. Available at: www.cdc.gov/tobacco/data_statistics/fact_sheets/secondhand_smoke/general_facts/index.htm.

¹² National Cancer Institute. *Smokeless Tobacco and Cancer: Questions and Answers*. 2003, p. 2. Available at: www.smokefree.gov/Docs2/SmokelessTobacco_Q&A.pdf.

to cause lung, larynx, esophageal, and oral cancer;¹³ and the regular use of snuff doubles the user's risk of cardiovascular disease and death;¹⁴ and

- Prolonged use of snus, a form of smokeless tobacco, contributes to high blood pressure, a factor of cardiovascular disease, and to a higher likelihood of suffering a fatal stroke;¹⁵ and

WHEREAS, tobacco use and exposure to secondhand smoke impose great social and economic costs, as evidenced by the following:

- The total annual economic burden of smoking in the United States is \$193 billion;¹⁶ and
- From 2001-2004, the average annual health care expenditures attributable to smoking were approximately \$96 billion;¹⁷ and
- The medical and other costs to nonsmokers due to exposure to secondhand smoke were estimated at over \$10 billion per year in the United States in 2005;¹⁸ and
- The total annual cost of smoking in California was estimated at \$475 per resident or \$3,331 per smoker per year, for a total of nearly \$15.8 billion in smoking-related costs in 1999 alone;¹⁹ and
- California's Tobacco Control Program saved the state and its residents \$86 billion in health care expenditures between the year of its inception, 1989, and 2004, with savings growing yearly;²⁰ and

WHEREAS, exposure to secondhand smoke anywhere has negative health impacts, and exposure to secondhand smoke does occur at significant levels outdoors, as evidenced by the following:

¹³ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Targeting Tobacco Use: The Nation's Leading Cause of Preventable Death*. 2008, p. 2. Available at: www.cdc.gov/nccdphp/publications/aag/pdf/osh.pdf.

¹⁴ Hatsukami DK and Severson HH. "Oral Spit Tobacco: Addiction, Prevention, and Treatment." *Nicotine and Tobacco Research*, 1(1): 21-44, 1999.

¹⁵ Karolinska Institutet. "Prolonged Use of Swedish Moist Snuff Increases Risk of Fatal Cardiovascular Disease and Stroke." *Medical News Today*, November 15, 2007. Available at: www.medicalnewstoday.com/articles/88868.php.

¹⁶ Centers for Disease Control and Prevention. *News Release, Slightly Lower Adult Smoking Rates*. 2008. Available at: www.cdc.gov/media/pressrel/2008/r081113.htm.

¹⁷ Centers for Disease Control and Prevention. *News Release, Slightly Lower Adult Smoking Rates*. 2008. Available at: www.cdc.gov/media/pressrel/2008/r081113.htm.

¹⁸ Behan DF, Eriksen MP and Lin, Y. *Economic Effects of Environmental Tobacco Smoke*. Schaumburg, IL: Society of Actuaries, 2005, p. 2. Available at: [www.soa.org/files/pdf/ETSReportFinalDraft\(Final%203\).pdf](http://www.soa.org/files/pdf/ETSReportFinalDraft(Final%203).pdf).

¹⁹ Max W, Rice DP, Zhang X, et al. *The Cost of Smoking in California, 1999*. Sacramento, CA: Tobacco Control Section, California Department of Health Services, 2002, p. 74. Available at: <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1026&context=ctcre>.

²⁰ Lightwood JM, Dinno A and Glantz SA. "Effect of the California Tobacco Control Program on Personal Health Care Expenditures." *PLoS Med*, 5(8): e178, 2008. Available at: www.plosmedicine.org/article/info:doi/10.1371/journal.pmed.0050178.

- Levels of secondhand smoke exposure outdoors can reach levels attained indoors depending on direction and amount of wind and number and proximity of smokers;²¹ and
- Irritation from secondhand smoke begins at levels as low as 4 micrograms per cubic meter, and in some outdoor situations this level can be found as far away as 13 feet from the burning cigarette;²² and
- To be completely free from exposure to secondhand smoke in outdoor places, a person may have to move nearly 25 feet away from the source of the smoke, about the width of a two lane road;²³ and
- Studies on a cruise ship have found that even while cruising at 20 knots and with unlimited air volume, outdoor smoking areas contained carcinogens in nearly the same amounts as inside the ship's casino where smoking was allowed;²⁴ and

WHEREAS, cigarette butts pose a health threat to young children, as evidenced by the following:

- In 2004, American poison control centers received nearly 8,000 reports of children poisoned by the ingestion of cigarettes, cigarette butts, and other tobacco products;²⁵ and
- Children who ingest cigarette butts can experience vomiting, nausea, lethargy, and gagging;²⁶ and

²¹ Klepeis NE, Ott WR, and Switzer P. *Real-Time Monitoring of Outdoor Environmental Tobacco Smoke Concentrations: A Pilot Study*. San Francisco: University of California, San Francisco and Stanford University, 2004, p. 34, 80. Available at: http://exposurescience.org/pub/reports/Outdoor_ETS_Final.pdf; See also Klepeis NE, Ott WR and Switzer P. "Real-Time Measurement of Outdoor Tobacco Smoke Particles." *Journal of Air and Waste Management Association*, 57: 522-534, 2007. Available at: www.ashaust.org.au/pdfs/OutdoorSHS0705.pdf.

²² Junker MH, Danuser B, Monn C, et al. "Acute Sensory Responses of Nonsmokers at Very Low Environmental Tobacco Smoke Concentrations in Controlled Laboratory Settings." *Environmental Health Perspectives*, 109(10): 1046-1052, 2001. Available at: www.pubmedcentral.nih.gov/picrender.fcgi?artid=1242082&blobtype=pdf; Repace JL. "Benefits of Smoke-Free Regulations in Outdoor Settings: Beaches, Golf Courses, Parks, Patios, and in Motor Vehicles." *William Mitchell Law Review*, 34(4): 1621-1638, 2008. Available at: <http://tobacco.health.usyd.edu.au/site/supersite/contact/pdfs/WilliamMitchellRepace.pdf>.

²³ Repace JL. "Benefits of Smoke-Free Regulations in Outdoor Settings: Beaches, Golf Courses, Parks, Patios, and in Motor Vehicles." *William Mitchell Law Review*, 34(4): 1621-1638, 2008. Available at: <http://tobacco.health.usyd.edu.au/site/supersite/contact/pdfs/WilliamMitchellRepace.pdf>.

²⁴ Repace JL. "Benefits of Smoke-Free Regulations in Outdoor Settings: Beaches, Golf Courses, Parks, Patios, and in Motor Vehicles." *William Mitchell Law Review*, 34(4): 1621-1638, 2008. Available at: <http://tobacco.health.usyd.edu.au/site/supersite/contact/pdfs/WilliamMitchellRepace.pdf>.

²⁵ American Association of Poison Control Centers. *2004 Annual Report of the American Association of Poison Control Centers Toxic Exposure Surveillance System*. Elsevier Inc., 2004, p. 645. Available at: www.poison.org/prevent/documents/TESS%20Annual%20Report%202004.pdf.

²⁶ US Department of Health and Human Services, Centers for Disease Control and Prevention. "Ingestion of Cigarettes and Cigarette Butts by Children – Rhode Island, January 1994-July 1996." *Morbidity and Mortality Weekly Report*, 46(06): 125-128, 1997. Available at: www.cdc.gov/mmwr/preview/mmwrhtml/00046181.htm.

WHEREAS, cigarette butts are a major and persistent source of litter, as evidenced by the following:

- It is estimated that over two billion cigarette butts are discarded every day worldwide, and that Americans alone discard more than 175 million pounds of cigarette butts every year;²⁷ and
- Cigarette butts are often cast onto sidewalks and streets, and frequently end up in storm drains that flow into streams, rivers, bays, lagoons and ultimately the ocean;²⁸ and
- Cigarette filters, made of plastic cellulose acetate, take approximately 15 years to decompose;²⁹ and

WHEREAS, laws restricting the use of tobacco products have recognizable benefits to public health and medical costs, as evidenced by the following:

- Cities with smokefree laws see an appreciable reduction in hospital admittances for heart attacks in the months and years after such laws are passed;³⁰ and
- Smoking bans help people reduce the number of cigarettes they smoke or quit altogether;³¹ and
- Strong smoking regulations for restaurants decrease the number of children who transition from experimenting with smoking to becoming actual smokers;³² and

WHEREAS, creating smokefree areas helps protect the health of the 86.7% of Californians who are nonsmokers;³³ and

WHEREAS, society is becoming less tolerant and less accepting of cigarette smoking, as evidenced by the following,

- A 2008 survey of California voters found that 75% thought that secondhand smoke is

²⁷ Surfrider Foundation, San Diego Chapter, Hold on to Your Butt, www.surfridersd.org/hotyb.php.

²⁸ Surfrider Foundation, San Diego Chapter, Hold on to Your Butt, www.surfridersd.org/hotyb.php.

²⁹ Surfrider Foundation, San Diego Chapter, Hold on to Your Butt, www.surfridersd.org/hotyb.php.

³⁰ US Department of Health and Human Services, Centers for Disease Control and Prevention. "Reduced Hospitalizations for Acute Myocardial Infarction After Implementation of a Smoke-Free Ordinance – City of Pueblo, Colorado, 2002 – 2006." *Morbidity and Mortality Weekly Report*, 57(51&52): 1373-1377, 2009. Available at: www.cdc.gov/mmwr/preview/mmwrhtml/mm5751a1.htm; Glantz SA. "Meta-Analysis of the Effects of Smokefree Laws on Acute Myocardial Infarction: An Update." *Preventive Medicine*, 47(4): 452-453, 2008.

³¹ Neighmond P. "Smoking Bans Help People Quit, Research Shows." *National Public Radio*, October 25, 2007. Available at: www.npr.org/templates/story/story.php?storyId=15610995.

³² Siegel M, Albers AB, Cheng DM, et al. "Local Restaurant Smoking Regulations and the Adolescent Smoking Initiation Process: Results of a Multilevel Contextual Analysis Among Massachusetts Youth." *Archives of Pediatrics and Adolescent Medicine*, 162(5): 477-483, 2008. Available at: <http://archpedi.ama-assn.org/cgi/reprint/162/5/477.pdf>.

³³ Hong M, Barnes RL and Glantz SA. *Tobacco Control in California 2003-2007: Missed Opportunities*. San Francisco: Center for Tobacco Control Research and Education, 2007, p. 9. Available at: <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1074&context=ctcre>.

harmful, 64% were bothered by secondhand smoke, and 73% support laws restricting smoking in outdoor public places;³⁴ and

- People living in cities with strong smokefree air laws are more likely to believe smoking is not acceptable and that smokers should attempt to quit smoking;³⁵ and
- As of 2008, there are 187 California cities and counties with local laws restricting smoking in at least one outdoor area;³⁶ and

WHEREAS, state law prohibits smoking within 25 feet of playgrounds and tot lots and expressly authorizes local communities to enact additional restrictions;³⁷ and state law prohibits smoking within 20 feet of entryways and operable windows of government buildings;³⁸ and

WHEREAS, there is no Constitutional right to smoke;³⁹

NOW THEREFORE, it is the intent of the [City Council / County Board of Supervisors], in enacting this ordinance, to provide for the public health, safety, and welfare by discouraging the inherently dangerous behavior of smoking [and tobacco use] around non-tobacco users, especially children; by protecting the public from exposure to secondhand smoke where they live, work, and play; by reducing the potential for children to wrongly associate smoking [and tobacco use] with a healthy lifestyle; and by affirming and promoting a healthy environment in and around the [City's / County's] outdoor places.

SECTION II. [Article / Chapter] of the [____] Municipal Code is hereby amended to read as follows:

Sec. [____ (*1)]. DEFINITIONS. The following words and phrases, whenever used in this [article / chapter] shall have the meanings defined in this section unless the context clearly requires otherwise:

(a) “Business” means any sole proprietorship, partnership, joint venture, corporation, association, or other entity formed for profit-making purposes.

(b) “Common Area” means every Unenclosed Area of a Multi-Unit Residence that residents of more than one Unit of that Multi-Unit Residence are entitled to enter or use, including, for example, paths, courtyards, playgrounds, swimming pools, parking lots, and

³⁴ Goodwin Simon Victoria Research. *Study of California Voters' Attitudes About Secondhand Smoke Exposure*. Sacramento: Center for Tobacco Policy & Organizing, 2008, p. 1-3. Available at: www.center4tobaccopolicy.org/_files/_files/Results%20of%20SHS%20Poll%20November%202008.pdf.

³⁵ Indiana University. *News Release, Indiana University Research at American Public Health Association Meeting*. October 27, 2008. Available at: <http://newsinfo.iu.edu/tips/page/normal/9085.html#3>.

³⁶ California Clean Air Project, California Secondhand Smoke Policy Database, <http://ccap.etr.org/index.cfm?fuseaction=policydb.home>.

³⁷ Cal. Health & Safety Code § 104495 (West 2008).

³⁸ Cal. Gov't Code § 7597 (West 2008).

³⁹ Public Health Law & Policy, Technical Assistance Legal Center. *There Is No Constitutional Right to Smoke*. 2005. Available at: http://talc.phlaw.org/pdf_files/0051.pdf.

picnic areas.

[“Common Area” means every Enclosed Area or Unenclosed Area of a Multi-Unit Residence that residents of more than one Unit of that Multi-Unit Residence are entitled to enter or use, including, for example, halls and paths, lobbies and courtyards, elevators and stairs, community rooms and playgrounds, gym facilities and swimming pools, parking garages and parking lots, shared restrooms, shared laundry rooms, shared cooking areas, and shared eating areas.]

COMMENT: If you would like to prohibit Smoking in *all* Common Areas of Multi-Unit Residences, indoors and out, you can use the bracketed alternative language for this definition. If you choose this option, please contact TALC for assistance in editing Section [____(*2)] of this ordinance for internal consistency, i.e., ensuring that the title and relevant subsections appropriately reference Enclosed and/or Unenclosed Areas.

Note that California Labor Code section 6404.5 (the state smokefree workplace law) may already prohibit Smoking in indoor Common Areas if the Multi-Unit Residence has Employees, such as maintenance workers, property managers, or others who work on-site.

The definition of Common Area does not include balconies, patios, or decks of individual Units because these are not shared areas.

(c) “Dining Area” means any area, including streets and sidewalks, which is available to or customarily used by the general public or an Employee, and which is designed, established, or regularly used for consuming food or drink.

COMMENT: This definition covers all Dining Areas, indoors and out, but Section [____(*2)(a)] of this Model Ordinance prohibits Smoking only in outdoor Dining Areas. Smoking in indoor Dining Areas is already prohibited by state law (Labor Code section 6404.5) and possibly by your community’s local ordinances.

(d) “Employee” means any Person who is employed or retained as an independent contractor by any Employer or Nonprofit Entity in consideration for direct or indirect monetary wages or profit, or any Person who volunteers his or her services for an Employer or Nonprofit Entity.

COMMENT: This definition makes clear that volunteers and independent contractors are Employees for purposes of this section.

(e) “Employer” means any Business or Nonprofit Entity that retains the service of one or more Employees.

(f) “Enclosed Area” means an area in which outside air cannot circulate freely to all parts of the area, and includes an area that has:

- (1) any type of overhead cover whether or not that cover includes vents or other openings and at least [three (3)] walls or other vertical boundaries of any height whether or not those boundaries include vents or other openings; or
- (2) [four (4)] walls or other vertical boundaries that exceed [six (6)] feet in height whether or not those boundaries include vents or other openings.

COMMENT: This definition describes “enclosed” places that are not covered by the prohibitions in this ordinance. (The definition of Unenclosed Area includes all areas that are not Enclosed Areas.) This definition is narrow so that most areas will be considered Unenclosed Areas and therefore subject to this ordinance.

The number of walls and the height threshold can be customized to meet the needs of your community, and changing these numbers will affect the scope of the ordinance. Reducing the number of walls in this definition would broaden the definition of Enclosed Area, which would result in narrowing the definition of Unenclosed Area, thereby limiting the scope of the outdoor Smoking restrictions in this ordinance.

An area that is partially covered by anything would be analyzed under subparagraph (1), whereas only areas that are totally uncovered would be analyzed under subparagraph (2). It can be difficult to apply Labor Code section 6404.5 to areas that are surrounded by lattice, hedges, and other nonsolid structures. For purposes of this ordinance any vertical boundary, regardless of composition, constitutes an “other vertical boundary” for application of this definition.

NOTE: If the Municipal Code already has Smoking restrictions, it may contain a definition of “enclosed.” Review the Code and make any necessary modification to existing definitions and/or operative provisions to ensure consistency with the new definition.

(g) “Multi-Unit Residence” means property containing two (2) or more Units [, except the following specifically excluded types of housing:

- (1) a hotel or motel that meets the requirements set forth in California Civil Code section 1940(b)(2);
 - (2) a mobile home park;
 - (3) a campground;
 - (4) a marina or port;
 - (5) a single-family home;
 - (6) a single-family home with a detached or attached in-law or second unit when permitted pursuant to California Government Code sections 65852.1, 65852.150, 65852.2 or an ordinance of the [City / County] adopted pursuant to those sections;
- and

(7) _____] .

COMMENT: This definition is intended to be used in conjunction with the definition of Unit in this Model Ordinance, which makes clear that this term is limited to dwelling spaces.

Because the definition of Unit is so broad and includes all types of dwelling places—from rooms in a hotel to tents at a campground—a community may want to limit the types of dwelling places covered by this Model Ordinance. The optional language provides examples of the types of exceptions that communities are likely to consider.

Note that the definition of Multi-Unit Residence without any exemptions would include the following types of dwelling places: apartments, condominiums, townhomes, co-ops, and co-housing; affordable housing (for seniors, for disabled tenants, for Section 8, etc.); long-term health care facilities, assisted living facilities, hospitals, and family support facilities; hotels, motels, single room occupancy (“SRO”) facilities, dormitories, and homeless shelters; mobile home parks, campgrounds, marinas, and ports; single-family homes and single-family homes with an in-law unit.

(h) “Nonprofit Entity” means any entity that meets the requirements of California Corporations Code section 5003 as well as any corporation, unincorporated association or other entity created for charitable, religious, philanthropic, educational, political, social or similar purposes, the net proceeds of which are committed to the promotion of the objectives or purposes of the entity and not to private gain. A government agency is not a Nonprofit Entity within the meaning of this [article / chapter].

COMMENT: This definition is broader than the IRS designation of a nonprofit organization in order to cover more informal groups and associations.

(i) “Person” means any natural person, Business, cooperative association, Nonprofit Entity, personal representative, receiver, trustee, assignee, or any other legal entity including government agencies.

COMMENT: The Municipal Code may contain a definition of “person”; review any existing definition of “person” in the Municipal Code to determine whether to include this definition in your ordinance.

This definition incorporates all entities defined as a Business in this ordinance. In addition, it includes the City and County.

(j) “Place of Employment” means any area under the legal or de facto control of an Employer, that an Employee or the general public may have cause to enter in the normal

course of the operations, regardless of the hours of operation.

COMMENT: This definition is broad enough to cover all areas of a workplace, indoors and out. Section [____(*2)(a)] of this Model Ordinance prohibits Smoking only in the Unenclosed Areas of workplaces; if your community also wants to restrict Smoking in indoor workplaces exempted by the state smokefree workplace law (e.g., retail tobacco shops, warehouses, hotel lobbies, etc.) please contact TALC for assistance.

(k) “Public Place” means any place, publicly or privately owned, which is open to the general public regardless of any fee or age requirement.

COMMENT: This is a very broad definition and is intended as a “catch-all” to include all public areas that do not fall within any other definition in this Model Ordinance.

This definition includes all Public Places, indoors and out, but Section [____(*2)(a)] of this Model Ordinance prohibits Smoking only in outdoor Public Places.

This definition is also broad enough to include all streets and sidewalks, even when they are not being used as an event site or to provide a service to the public. Section [____(*2)(a)(6)] contains optional language that can be used to exclude streets and sidewalks from most Smoking restrictions.

(l) “Reasonable Distance” means a distance of [twenty-five (25)] feet in any direction from an area in which Smoking is prohibited.

COMMENT: The number of feet constituting Reasonable Distance can be changed to ensure a sufficient buffer from drifting Smoke.

(m) “Recreational Area” means any area [, including streets and sidewalks,] that is [publicly or privately owned / owned or operated by the [City / County of _____]] and open to the general public for recreational purposes, regardless of any fee or age requirement. The term “Recreational Area” includes but is not limited to parks, picnic areas, playgrounds, sports fields, golf courses, walking paths, gardens, hiking trails, bike paths, horseback riding trails, swimming pools, roller- and ice-skating rinks, skateboard parks, amusement parks, and beaches.

COMMENT: This definition can apply to all recreational areas that are open to the general public, whether on public or private land. If the community wants to limit the reach of the ordinance to only include publicly owned or operated recreational facilities, then select the phrase “*owned or operated by the City / County of _____*”.

This definition can also be expanded to encompass streets and sidewalks that are used as Recreational

Areas by adding the optional bracketed language *"including streets and sidewalks"*.

This definition includes all Recreational Areas, indoors and out, but Section [____>(*2)(a)] of this Model Ordinance prohibits Smoking only in outdoor Recreational Areas.

This definition includes beaches, which is not defined in this Model Ordinance. If you would like to include a separate, more specific definition of the term "beach," please see the definition included in TALC's "Model California Ordinance Regulating Smoking and Tobacco Use on Beaches," available on TALC's website at www.phlpnet.org.

(n) "Service Area" means any publicly or privately owned area, including streets and sidewalks, that is designed to be used or is regularly used by one or more Persons to receive a service, wait to receive a service or to make a transaction, whether or not such service or transaction includes the exchange of money. The term "Service Area" includes but is not limited to information kiosks, automatic teller machines (ATMs), ticket lines, bus stops or shelters, mobile vendor lines or cab stands.

COMMENT: This definition includes all Service Areas, indoors and out, but Section [____>(*2)(a)] of this Model Ordinance prohibits Smoking only in outdoor Service Areas.

(o) "Smoke" means the gases and particles released into the air by combustion when the apparent or usual purpose of the combustion is human inhalation of the resulting combustion products, such as, for example, tobacco smoke, marijuana smoke, and crack cocaine smoke, except when the combusting material contains no tobacco and the purpose of inhalation is solely olfactory, such as, for example, smoke from incense.

COMMENT: This is a special definition that is more limited than the common understanding of what "smoke" is. For example, smoke from a fireplace or a barbeque grill is not "Smoke" for the purposes of this ordinance because the smoke generated by those activities is not produced for the purpose of inhaling it. The limitation placed on "Smoke" by this definition is important to avoid unintended consequences, such as inadvertently prohibiting the burning of incense.

This definition includes marijuana, but Smoking marijuana for medical purposes can be excluded from the prohibitions of this ordinance should a community decide to do so. Please contact TALC for assistance in drafting a medical marijuana exception.

(p) "Smoking" means engaging in an act that generates Smoke, such as, for example: possessing a lighted pipe, a lighted hookah pipe, a lighted cigar, or a lighted cigarette of any kind; or lighting a pipe, a hookah pipe, a cigar, or a cigarette of any kind.

COMMENT: This definition includes marijuana, but Smoking marijuana for medical purposes can be excluded from the prohibitions of this ordinance in some circumstances; please contact TALC for assistance.

(q) “Tobacco Product” means any substance containing tobacco leaf, and any product or formulation of matter containing biologically active amounts of nicotine that is manufactured, sold, offered for sale, or otherwise distributed with the expectation that the product or matter will be introduced into the human body, but does not include any cessation product specifically approved by the United States Food and Drug Administration for use in treating nicotine or tobacco dependence.

COMMENT: This definition is written broadly to include nontraditional tobacco and nicotine products such as nicotine water and nicotine lollipops, but without interfering with the FDA’s mission of approving products intended to benefit public health, such as nicotine patches and other nicotine cessation products.

(r) “Unenclosed Area” means any area that is not an Enclosed Area.

COMMENT: This definition establishes the scope of the ordinance very broadly, and includes all areas that are not defined as Enclosed Areas.

(s) “Unit” means a personal dwelling space, even where lacking cooking facilities or private plumbing facilities, and includes any associated exclusive-use Enclosed Area or Unenclosed Area, such as, for example, a private balcony, porch, deck, or patio. “Unit” includes but is not limited to an apartment; a condominium; a townhouse; a room in a long-term health care facility, assisted living facility, or hospital; a hotel or motel room; a room in a single room occupancy (“SRO”) facility; a room in a homeless shelter; a mobile home; a camper vehicle or tent; a single-family home; and an in-law or second unit.

COMMENT: This definition is intentionally extremely broad. It is designed to capture all conceivable “dwelling spaces” as the examples illustrate. However, because of the way that this model ordinance is designed, any limitations on the types of housing covered by the ordinance should be added to the defined term “Multi-Unit Residence” and *not* here. For example, some “mobile homes” in mobile home parks may be included in this definition and even cited in the examples, but nevertheless, “mobile homes” can be specifically excluded from the ordinance under the definition of “Multi-Unit Residence.”

**Sec. [____ (*2)]. PROHIBITION OF SMOKING [AND TOBACCO PRODUCT USE]
IN UNENCLOSED AREAS**

COMMENT: If a community wants to prohibit the use of all Tobacco Products in addition to Smoking, then include

the optional bracketed text referring to the use of Tobacco Products each time it is referenced in the ordinance.

(a) Smoking [and the use of Tobacco Products] is prohibited in the Unenclosed Areas of the following places within the [City / County of _____], except places where Smoking [or the use of Tobacco Products] is already prohibited by state or federal law, in which case those laws apply:

COMMENT: The "except places where ..." language avoids potential preemption issues by making clear that the local ordinance is not duplicative of existing law but rather "fills in" gaps in existing state or federal law.

- (1) Recreational Areas;
- (2) Service Areas;
- (3) Dining Areas;
- (4) Places of Employment;

(5) Common Areas [, provided that a Person with legal control over a Common Area may designate a portion of the Unenclosed Area of the Common Area as a designated Smoking area if the area meets all of the following criteria:

COMMENT: The bracketed optional language would permit landlords or property managers, for example, to locate a designated Smoking area in the outdoor portion of the Common Area of a Multi-Unit Residence. By allowing for an outdoor Smoking area, residents will have a place to go where they will not expose their family members or other residents to Smoke.

(a) the area must be located a Reasonable Distance from any Unit or Enclosed Area where Smoking is prohibited by this [article / chapter] or other law; by binding agreement relating to the ownership, occupancy, or use of real property; or by designation of a Person with legal control over the property. In the case of a nonsmoking area created by agreement or designation, this provision does not apply unless the Person designating the Smoking area has actual knowledge of, or has been given notice of, the agreement or designation. A designated Smoking area may require modification or elimination as laws change, as binding agreements are created, and as nonsmoking areas on neighboring property are established.

COMMENT: This clause limits where a Smoking area can be located in order to prevent drifting Smoke from entering smokefree areas. As written, it includes areas on neighboring property that are designated as nonsmoking by contract (e.g., a smokefree lease term

for a rental unit next to, but not a part of, the Multi-Unit Residence) and areas on neighboring property designated by a property owner or lessee as nonsmoking (e.g., a neighboring business).

(b) the area must not include, and must be a Reasonable Distance from, Unenclosed Areas primarily used by children and Unenclosed Areas with improvements that facilitate physical activity including, for example, playgrounds, tennis courts, swimming pools, school campuses, and sandboxes;

(c) the area must be no more than [ten percent (10%)] of the total Unenclosed Area of the Multi-Unit Residence for which it is designated;

(d) the area must have a clearly marked perimeter;

(e) the area must be identified by conspicuous signs;

(f) the area must be completely within an Unenclosed Area; and

(g) the area must not overlap with any Enclosed or Unenclosed Area in which Smoking is otherwise prohibited by this [article / chapter] or other provisions of this Code, state law, or federal law]; and

(6) Other Public Places [, when being used for a public event, including a farmers' market, parade, craft fair, festival, or any other event which may be attended by the general public / , provided that Smoking is permitted on streets and sidewalks being used in a traditional capacity as pedestrian or vehicular thoroughfares, unless otherwise prohibited by this [article / chapter] or other law].

COMMENT: This is a very broad restriction, which can capture all Public Places that are not otherwise specifically defined in the ordinance. If your community would like to limit the Smoking restrictions to Public Places that are being used as a public event site, include the single-underlined optional language. Your community may wish to tailor the public event description in this section to include and/or cross-reference any existing local permit ordinance requirements.

This definition of Public Place is also broad enough to cover streets and sidewalks, even when those areas are not used as an event site or to provide a service to the public. If your community does want such a broad restriction, include the double-underlined optional language. Regardless of which option you include in your ordinance, Smoking on some streets and sidewalks will be restricted by the ordinance if they are within the Reasonable Distance requirement or subject to another nonsmoking law.

If you would like to further customize the Smoking restrictions in your community (such as restricting

Smoking in certain commercial districts or establishing “smokers’ areas”), appropriate language can be included in this subsection. Please contact TALC for assistance in drafting language to fit the needs of your community.

(b) Nothing in this [article / chapter] prohibits any Person, Employer, or Nonprofit Entity with legal control over any property from prohibiting Smoking [and Tobacco Product use] on any part of such property, even if Smoking [or the use of Tobacco Products] is not otherwise prohibited in that area.

[(c) The Director of [___] or his/her designee shall engage in an ongoing educational program to explain and clarify the purposes and requirements of this [article / chapter], as well as providing guidance to Persons, Employers, and Nonprofit Entities about compliance. However, lack of such education shall not be a defense to a violation of this [article / chapter].]

COMMENT: This optional provision would require that the city or county provide education to those affected by this ordinance. You should identify which government official should be in charge of this program.

Sec. [___ (*3)]. REASONABLE SMOKING DISTANCE REQUIRED

(a) Smoking in all Unenclosed Areas shall be prohibited within a Reasonable Distance from any doorway, window, opening, crack, or vent into an Enclosed Area in which Smoking is prohibited, except while actively passing on the way to another destination and provided Smoke does not enter any Enclosed Area in which Smoking is prohibited.

COMMENT: This creates a buffer zone around Enclosed smokefree areas, allowing Smoking only if passing through the zone.

(b) Smoking in Unenclosed Areas shall be prohibited within a Reasonable Distance from any Unenclosed Areas in which Smoking is prohibited under Sec. [___ (*2)] of this [article / chapter], except while actively passing on the way to another destination and provided Smoke does not enter any Unenclosed Area in which Smoking is prohibited.

[(c) The prohibitions in subdivisions (a) and (b) shall not apply to Unenclosed Areas of private residential properties that are not Multi-Unit Residences.]

COMMENT: Subsection (c) is optional; include it if you want to allow Smoking on private residential property that is located within the Reasonable Distance parameters. As written, subsections (a) and (b) would prohibit Smoking on private residential property, other than multi-unit housing, within twenty-five feet of an area in which Smoking is prohibited. For example, if a backyard of a private home abutted an area where Smoking is prohibited, subsections (a) and (b) will prohibit Smoking in that private backyard.

Sec. [____ (*4)]. OTHER REQUIREMENTS AND PROHIBITIONS

(a) No Person, Employer, or Nonprofit Entity shall knowingly permit Smoking [or the use of Tobacco Products] in an area which is under the legal or de facto control of the Person, Employer or Nonprofit Entity and in which Smoking [or the use of Tobacco Products] is prohibited by law, unless otherwise required by state or federal law.

COMMENT: This provision makes anyone who is in control of an area responsible for any Smoking done in violation of this and other no-smoking laws. Thus, enforcement actions can be taken against a Business, landlord, Employer, or Nonprofit Entity, in addition to the individual tobacco user, if they knowingly break the law.

(b) No Person, Employer, or Nonprofit Entity shall knowingly or intentionally permit the presence or placement of ash receptacles, such as, for example, ash trays or ash cans, within an area under the legal or de facto control of the Person, Employer or Nonprofit Entity and in which Smoking [or the use of Tobacco Products] is prohibited by law, including, without limitation, within a Reasonable Distance required by this [article / chapter] from any area in which Smoking [or the use of Tobacco Products] is prohibited. Notwithstanding the foregoing, the presence of ash receptacles in violation of this subsection shall not be a defense to a charge of Smoking [or the use of Tobacco Products] in violation of any provision of this [article / chapter].

(c) No Person shall dispose of used Smoking or Tobacco Product waste within the boundaries of an area in which Smoking is prohibited, including inside the perimeter of any Reasonable Distance required by this [article / chapter].

(d) A Person, Employer, or Nonprofit Entity that has legal or de facto control of an Unenclosed Area in which Smoking [or the use of Tobacco Products] is prohibited by this [article / chapter] shall post a clear, conspicuous and unambiguous “No Smoking” [or No Use of Tobacco Products] or “Smokefree” [or “Tobacco-Free”] sign at each point of ingress to the area, and in at least one other conspicuous point within the area. The signs shall have letters of no less than one inch in height and shall include the international “No Smoking” symbol (consisting of a pictorial representation of a burning cigarette enclosed in a red circle with a red bar across it). Signs posted on the exterior of buildings to comply with this section shall include the Reasonable Distance requirement set forth in Sec. [____ (*3)]. [At least one sign with the [City / County] phone number where complaints can be directed must be conspicuously posted in each place in which Smoking is prohibited.] For purposes of this section, the City Manager or his/her designee shall be responsible for the posting of signs in regulated facilities owned or leased in whole or in part by the [City / County]. Notwithstanding this provision, the presence or absence of signs shall not be a defense to a charge of Smoking [or the use of Tobacco Products] in violation of any other provision of this [article / chapter].

COMMENT: Communities concerned about enforcement,

and with the funds to print local signs, may wish to include the bracketed sentence, which requires signs to have the phone number for complaints. Note that this will be more expensive than using standard signs.

(e) No Person, Employer, or Nonprofit Entity shall intimidate, threaten any reprisal, or effect any reprisal, for the purpose of retaliating against another Person who seeks to attain compliance with this [article / chapter].

(f) Each instance of Smoking [or Tobacco Product use] in violation of this [article / chapter] shall constitute a separate violation. For violations other than for Smoking, each day of a continuing violation of this [article / chapter] shall constitute a separate violation.

Sec. [____ (*5)]. PENALTIES AND ENFORCEMENT.

(a) The remedies provided by this [article / chapter] are cumulative and in addition to any other remedies available at law or in equity.

COMMENT: The following provisions are designed to offer a variety of options to the drafter and to the enforcing agency. Drafters may choose to include some or all of these options. Once the ordinance is enacted, the enforcing agency will have the discretion to choose which enforcement tools to use. As a practical matter, these enforcement options would not be applied simultaneously, although multiple remedies might be used against a particularly egregious violator over time.

(b) Each incident of Smoking [or use of Tobacco Products] in violation of this [article / chapter] is an infraction subject to a [one hundred dollar (\$100)] fine [or otherwise punishable pursuant to section ____ of this code]. Other violations of this [article / chapter] may, in the discretion of the [City Prosecutor / District Attorney], be prosecuted as infractions or misdemeanors when the interests of justice so require. Enforcement of this chapter shall be the responsibility of [____]. In addition, any peace officer or code enforcement official also may enforce this chapter.

COMMENT: The first sentence establishes the penalty for the core type of violation: Smoking where it is prohibited. The fine amount can be modified but cannot exceed \$100 for a first infraction. It is separated from the main enforcement provision that follows, so that law enforcement officers can simply write a ticket for illegal Smoking. The second sentence, sometimes called a "wobbler," affords the prosecuting attorney discretion whether to pursue a violation as an infraction (like a parking ticket) or a misdemeanor (a crime punishable by up to a \$1,000 fine and/or six months in County Jail). Alternatively, violations can be set as *either* an infraction or a misdemeanor in all circumstances. Misdemeanors are more serious crimes for which a jury trial is available to defendants. Fines and other criminal penalties are established by the Penal Code and are typically reflected

in the general punishments provision of a local code.

This provision also designates a primary enforcement agency, which is recommended, but remains flexible by permitting any enforcement agency to enforce the law.

(c) Violations of this [article / chapter] are subject to a civil action brought by the [City / County of _____], punishable by a civil fine not less than [two hundred fifty dollars (\$250)] and not exceeding [one thousand dollars (\$1,000)] per violation.

COMMENT: This provision provides civil fines for violating the ordinance. It requires that a traditional civil suit be filed by the city or county (possibly in small claims court). The fine amounts can be adjusted but cannot exceed \$1,000 per violation. See California Government Code section 36901.

(d) Causing, permitting, aiding, abetting, or concealing a violation of any provision of this [article / chapter] shall also constitute a violation of this [article / chapter].

COMMENT: This is standard language that is typically included in a city or county code and may be omitted if duplicative of existing code provisions.

(e) Any violation of this [article / chapter] is hereby declared to be a nuisance.

COMMENT: By expressly declaring that a violation of this ordinance is a nuisance, this provision allows enforcement of the ordinance by the city or county via the administrative nuisance abatement procedures commonly found in municipal codes.

Note that this declaration merely says that *violating* the ordinance qualifies as a nuisance (e.g., when Smoking in a Recreational Area, the *violation* is the nuisance, not the *Smoke*). It is not the same thing as a local ordinance declaring Smoke a nuisance. Please contact TALC for more information on how a local ordinance can declare that all nonconsensual exposure to secondhand smoke is a nuisance.

(f) In addition to other remedies provided by this [article / chapter] or by other law, any violation of this [article / chapter] may be remedied by a civil action brought by the [City Attorney / County Counsel], including, but not limited to, administrative or judicial nuisance abatement proceedings, civil or criminal code enforcement proceedings, and suits for injunctive relief.

COMMENT: It is common to provide that the local government's lawyers may go to court to seek injunctions and other penalties in addition to fines. The express provision for injunctive relief lowers the showing required to obtain a preliminary or permanent injunction as described in *IT Corp. v. County of Imperial*, 35 Cal. 3d

63 (1983).

A public agency should think carefully about the nuisance abatement procedure it chooses in enforcing this ordinance after it is adopted. A local government may provide for treble damages for the second or subsequent nuisance abatement judgment within a two-year period, as long as the ordinance is enacted pursuant to Government Code section 38773.5. See Government Code section 38773.7. Treble damages are not available, however, under the alternative nuisance abatement procedures in Government Code section 38773.1 (nuisance abatement liens) and Health & Safety Code section 17980 (abatement of substandard buildings). Government Code section 38773.7 (authorizing treble damages) establishes a procedure for nuisance abatement where the cost of the abatement can be collected via the property tax roll as a special assessment against the property on which the violation occurs.

[(g) Except as otherwise provided, enforcement of this [article / chapter] is at the sole discretion of the [City / County]. Nothing in this [article / chapter] shall create a right of action in any Person against the [City / County] or its agents to compel public enforcement of this [article / chapter] against private parties.]

COMMENT: This is an optional provision, which makes clear that a City or County cannot be liable to any Person for failure to enforce the Smoking restrictions in this ordinance.

(h) Any Person acting for the interests of itself, its members, or the general public may bring a civil action to enjoin a violation of this [article / chapter] by a landlord, Employer, Business, or Nonprofit Entity or to enjoin repeat violations of this [article / chapter] by an individual.

COMMENT: This provision enables private citizens to go to court to seek *compliance* with the ordinance through an injunction (a court order to do or not do something). Money damages are not an available remedy. Because an injunction is the only remedy available, small claims court is not an appropriate venue for filing a lawsuit under this provision.

Note that while a landlord, Employer, Business, or Nonprofit Entity may be sued for one violation of this ordinance, an individual can be sued only for repeat violations. This limitation is intended to address concerns about the potential for abusive lawsuits.

SECTION III. STATUTORY CONSTRUCTION & SEVERABILITY. It is the intent of the [City Council / Board of Supervisors] of the [City / County] of [____] to supplement applicable state and federal law and not to duplicate or contradict such law and this ordinance shall be construed consistently with that intention. If any section, subsection, subdivision,

paragraph, sentence, clause or phrase of this ordinance, or its application to any person or circumstance, is for any reason held to be invalid or unenforceable, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases of this ordinance, or its application to any other person or circumstance. The [City Council / Board of Supervisors] of the [City / County] of [_____] hereby declares that it would have adopted each section, subsection, subdivision, paragraph, sentence, clause or phrase hereof independently, irrespective of the fact that any one or more other sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases hereof be declared invalid or unenforceable.

| **COMMENT:** This is standard language.



ATTACHMENT
E

Smokefree Beaches Ordinance

A Model California Ordinance Regulating Smoking and Tobacco Product Use on Beaches (with Annotations)

Revised June 2010
(Originally issued February 2007)

Developed by the Technical Assistance Legal Center (TALC),
a project of Public Health Law & Policy.

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Public Health Law & Policy is a nonprofit organization that provides legal information on matters relating to public health. The legal information provided in this document does not constitute legal advice or legal representation. For legal advice, readers should consult a lawyer in their state.

Introduction

The Technical Assistance Legal Center (TALC) developed this Model Ordinance to help California cities and counties limit exposure to secondhand smoke and limit tobacco use on beaches. As the dangers of secondhand tobacco smoke become increasingly well documented, one of the most important steps a community can take to improve the health of its residents is to create more smokefree or tobacco-free spaces. Local ordinances limiting exposure to secondhand smoke are the most direct and effective way to improve the public's health. By addressing tobacco use outdoors, this Model Ordinance also helps limit tobacco-related litter.

This Model Ordinance offers a variety of options. Communities may choose some or all of the options. In some instances blanks have been left (e.g., [____]) for the language to be customized to fit the needs of a specific community. In other cases, the ordinance offers you a choice of options (e.g., [choice one / choice two]). Some of the ordinance options are followed by a comment that describes the legal provisions in more detail. Some degree of customization is always necessary in order to make sure that the ordinance is consistent with a community's existing laws. Your City Attorney or County Counsel will likely be the best person to check this for you.

If you have questions about how to adapt this ordinance for your community, please contact TALC for assistance at (510) 302-3380 or submit your question via our website at www.phlpnet.org/tobaccoquestions.

**AN ORDINANCE OF THE [CITY / COUNTY] OF [____]
AMENDING THE [____] MUNICIPAL CODE TO REGULATE
SMOKING [AND TOBACCO PRODUCT USE] ON BEACHES**

The [City Council of the City / Board of Supervisors of the County] of [____] does ordain as follows:

| COMMENT: This is introductory boilerplate language that should be adapted to the conventional form used in the jurisdiction. |

SECTION I. FINDINGS. The [City Council of the City / Board of Supervisors of the County] of [____] hereby finds and declares as follows:

WHEREAS, tobacco use causes death and disease and continues to be an urgent public health challenge, as evidenced by the following:

- Tobacco-related illness is the leading cause of preventable death in the United States,¹ accounting for about 443,000 deaths each year;² and
- Scientific studies have concluded that tobacco use can cause chronic lung disease, coronary heart disease, and stroke, in addition to cancer of the lungs, larynx, esophagus, and mouth;³ and

WHEREAS, secondhand smoke has been repeatedly identified as a health hazard, as evidenced by the following:

- The U.S. Surgeon General concluded that there is no risk-free level of exposure to secondhand smoke;⁴ and
- The California Air Resources Board placed secondhand smoke in the same category as the most toxic automotive and industrial air pollutants by categorizing it as a toxic air contaminant for which there is no safe level of exposure;⁵ and

¹ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Targeting Tobacco Use: The Nation's Leading Cause of Preventable Death*. 2008, p. 2. Available at: www.cdc.gov/nccdphp/publications/aag/pdf/osh.pdf.

² US Department of Health and Human Services, Centers for Disease Control and Prevention. "Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses — United States, 2000-2004." *Morbidity and Mortality Weekly Report*, 57(45): 1226-1228, 2008. Available at: www.cdc.gov/mmwr/preview/mmwrhtml/mm5745a3.htm.

³ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Targeting Tobacco Use: The Nation's Leading Cause of Preventable Death*. 2008, p. 2. Available at: www.cdc.gov/nccdphp/publications/aag/pdf/osh.pdf.

⁴ US Department of Health and Human Services, Office of the Surgeon General. *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General*. 2007. Report highlights available at: www.surgeongeneral.gov/library/secondhandsmoke/factsheets/factsheet7.html.

⁵ Resolution 06-01, Cal. Air Resources Bd. (2006) at 5. Available at: www.arb.ca.gov/regact/ets2006/res0601.pdf; See California Environmental Protection Agency, Air Resources Board. *News Release, California Identifies Secondhand Smoke as a "Toxic Air Contaminant."* Jan. 26, 2006. Available at: www.arb.ca.gov/newsrel/nr012606.htm.

- The California Environmental Protection Agency included secondhand smoke on the Proposition 65 list of chemicals known to the state of California to cause cancer, birth defects, and other reproductive harm;⁶ and

Whereas exposure to secondhand smoke causes death and disease, as evidenced by the following:

- Secondhand smoke is responsible for as many as 73,000 deaths among nonsmokers each year in the United States;⁷ and
- Exposure to secondhand smoke increases the risk of coronary heart disease by approximately thirty percent;⁸ and
- Secondhand smoke exposure causes lower respiratory tract infections, such as pneumonia and bronchitis in as many as 300,000 children in the United States under the age of 18 months each year;⁹ and exacerbates childhood asthma;¹⁰ and

[*Include the following findings about smokeless tobacco if your community will be incorporating the optional language to create completely tobacco-free beaches.*]

WHEREAS, smokeless tobacco is not a safe alternative to smoking and also causes death and disease, as evidenced by the following:

- Smokeless tobacco use causes leukoplakia, a disease causing white patches to form in the user's mouth that can become cancerous;¹¹ smokeless tobacco products are known to cause lung, larynx, esophageal, and oral cancer;¹² and the regular use of snuff doubles the user's risk of cardiovascular disease and death;¹³ and
- Prolonged use of snus, a form of smokeless tobacco, contributes to high blood

⁶ California Environmental Protection Agency, Office of Environmental Health Hazard Assessment. *Chemicals Known to the State to Cause Cancer or Reproductive Toxicity*. 2006, p. 8 & 17. Available at: www.oehha.ca.gov/prop65/prop65_list/files/P65single081106.pdf.

⁷ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Fact Sheet – Secondhand Smoke*. 2006. Available at: www.cdc.gov/tobacco/data_statistics/fact_sheets/secondhand_smoke/general_facts/index.htm.

⁸ Barnoya J and Glantz S. “Cardiovascular Effects of Secondhand Smoke: Nearly as Large as Smoking.” *Circulation*, 111: 2684-2698, 2005. Available at: www.circ.ahajournals.org/cgi/content/full/111/20/2684.

⁹ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Targeting Tobacco Use: The Nation's Leading Cause of Preventable Death*. 2008, p. 2. Available at: www.cdc.gov/nccdphp/publications/aag/pdf/osh.pdf.

¹⁰ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Fact Sheet – Secondhand Smoke*. 2006. Available at: www.cdc.gov/tobacco/data_statistics/fact_sheets/secondhand_smoke/general_facts/index.htm.

¹¹ National Cancer Institute. *Smokeless Tobacco and Cancer: Questions and Answers*. 2003, p. 2. Available at: www.smokefree.gov/Docs2/SmokelessTobacco_Q&A.pdf.

¹² US Department of Health and Human Services, Centers for Disease Control and Prevention. *Targeting Tobacco Use: The Nation's Leading Cause of Preventable Death*. 2008, p. 2. Available at: www.cdc.gov/nccdphp/publications/aag/pdf/osh.pdf.

¹³ Hatsukami DK and Severson HH. “Oral Spit Tobacco: Addiction, Prevention, and Treatment.” *Nicotine and Tobacco Research*, 1(1): 21-44, 1999.

pressure, a factor of cardiovascular disease, and to a higher likelihood of suffering a fatal stroke;¹⁴ and

WHEREAS, the U.S. Food and Drug Administration conducted laboratory analysis of electronic cigarette samples and found they contained carcinogens and toxic chemicals to which users and bystanders could potentially be exposed;¹⁵ and

WHEREAS, tobacco use and exposure to secondhand smoke impose great social and economic costs, as evidenced by the following:

- The total annual economic burden of smoking in the United States is \$193 billion;¹⁶ and
- The total annual cost of smoking in California was estimated at \$475 per resident or \$3,331 per smoker per year, for a total of nearly \$15.8 billion in smoking-related costs in 1999 alone;¹⁷ and

WHEREAS, exposure to secondhand smoke anywhere has negative health impacts, and exposure to secondhand smoke does occur at significant levels outdoors, as evidenced by the following:

- Levels of secondhand smoke exposure outdoors can reach levels attained indoors depending on direction and amount of wind and number and proximity of smokers;¹⁸ and
- Irritation from secondhand smoke begins at levels as low as 4 micrograms per cubic meter, and in some outdoor situations this level can be found as far away as 13 feet from the burning cigarette;¹⁹ and

¹⁴ Karolinska Institutet. "Prolonged Use of Swedish Moist Snuff Increases Risk of Fatal Cardiovascular Disease and Stroke." *Medical News Today*, November 15, 2007. Available at: www.medicalnewstoday.com/articles/88868.php.

¹⁵ US Food and Drug Administration. *News Release, FDA and Public Health Experts Warn About Electronic Cigarettes*. 2009. Available at: www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm173222.htm.

¹⁶ Centers for Disease Control and Prevention. *News Release, Slightly Lower Adult Smoking Rates*. 2008. Available at: www.cdc.gov/media/pressrel/2008/r081113.htm.

¹⁷ Max W, Rice DP, Zhang X, et al. *The Cost of Smoking in California, 1999*. Sacramento, CA: Tobacco Control Section, California Department of Health Services, 2002, p. 74. Available at: <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1026&context=ctcre>.

¹⁸ Klepeis NE, Ott WR, and Switzer P. *Real-Time Monitoring of Outdoor Environmental Tobacco Smoke Concentrations: A Pilot Study*. San Francisco: University of California, San Francisco and Stanford University, 2004, p. 34, 80. Available at: http://exposurescience.org/pub/reports/Outdoor_ETS_Final.pdf; See also Klepeis NE, Ott WR and Switzer P. "Real-Time Measurement of Outdoor Tobacco Smoke Particles." *Journal of Air and Waste Management Association*, 57: 522-534, 2007. Available at: www.ashaust.org.au/pdfs/OutdoorSHS0705.pdf.

¹⁹ Junker MH, Danuser B, Monn C, et al. "Acute Sensory Responses of Nonsmokers at Very Low Environmental Tobacco Smoke Concentrations in Controlled Laboratory Settings." *Environmental Health Perspectives*, 109(10): 1046-1052, 2001. Available at: www.pubmedcentral.nih.gov/picrender.fcgi?artid=1242082&blobtype=pdf; Repace JL. "Benefits of Smoke-Free Regulations in Outdoor Settings: Beaches, Golf Courses, Parks, Patios, and in Motor Vehicles." *William Mitchell Law Review*, 34(4): 1621-1638, 2008. Available at: <http://tobacco.health.usyd.edu.au/site/supersite/contact/pdfs/WilliamMitchellRepace.pdf>.

- To be completely free from exposure to secondhand smoke in outdoor places, a person may have to move nearly 25 feet away from the source of the smoke, about the width of a two lane road;²⁰ and

WHEREAS, cigarette butts pose a health threat to young children, as evidenced by the following:

- In 2004, American poison control centers received nearly 8,000 reports of children poisoned by the ingestion of cigarettes, cigarette butts, and other tobacco products;²¹ and
- Children who ingest cigarette butts can experience vomiting, nausea, lethargy, and gagging;²² and

WHEREAS, cigarette butts are a major and persistent source of litter, as evidenced by the following:

- It is estimated that over two billion cigarette butts are discarded every day worldwide, and that Americans alone discard more than 175 million pounds of cigarette butts every year;²³ and
- Cigarette filters, made of plastic cellulose acetate, take approximately 15 years to decompose;²⁴ and
- In just three hours, 340,000 cigarette butts were collected from California beaches during the 2008 Coastal Cleanup Day, making cigarette butts the most common type of trash found 24 years in a row;²⁵ and
- Cigarette filters have been found in the stomachs of birds, fish, whales, and other marine creatures that have mistaken the filters for food, causing the animals to ingest harmful plastic and toxic chemicals;²⁶ and
- Los Angeles County recorded a 40% decrease in cigarette butts after banning smoking on beaches in three cities;²⁷ and

²⁰ Repace JL. “Benefits of Smoke-Free Regulations in Outdoor Settings: Beaches, Golf Courses, Parks, Patios, and in Motor Vehicles.” *William Mitchell Law Review*, 34(4): 1621-1638, 2008. Available at: <http://tobacco.health.usyd.edu.au/site/supersite/contact/pdfs/WilliamMitchellRepac.pdf>.

²¹ American Association of Poison Control Centers. *2004 Annual Report of the American Association of Poison Control Centers Toxic Exposure Surveillance System*. Elsevier Inc., 2004, p. 645. Available at: www.poison.org/prevent/documents/TESS%20Annual%20Report%202004.pdf.

²² US Department of Health and Human Services, Centers for Disease Control and Prevention. “Ingestion of Cigarettes and Cigarette Butts by Children – Rhode Island, January 1994-July 1996.” *Morbidity and Mortality Weekly Report*, 46(06): 125-128, 1997. Available at: www.cdc.gov/mmwr/preview/mmwrhtml/00046181.htm.

²³ Surfrider Foundation, San Diego Chapter, Hold on to Your Butt, www.surfridersd.org/hotyb.php.

²⁴ Surfrider Foundation, San Diego Chapter, Hold on to Your Butt, www.surfridersd.org/hotyb.php.

²⁵ California Coastal Commission. *Press Release: California Finds Silver Lining at the 25th Annual California Coastal Cleanup Day*. Nov. 30, 2009. Available at: www.coastal.ca.gov/publiced/ccd/11.30.09.pressrelease.pdf.

²⁶ Surfrider Foundation, *Cigarette Butt Litter*. Available at: www.surfrider.org/a-z/cig_but.php.

²⁷ Brooke Williams. “Volunteers Comb Coast: Annual Cleanup Turns Up Tons of Trash, Which Generates Helpful Data.” *San Diego Union-Tribune*, Sept. 17, 2006. Available at: www.signonsandiego.com/news/metro/20060917-

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WHEREAS, creating smokefree areas helps protect the health of the 86.7% of Californians who are nonsmokers;²⁸ and

WHEREAS, state law prohibits smoking within 25 feet of playgrounds and tot lots and expressly authorizes local communities to enact additional restrictions;²⁹ and

WHEREAS, there is no Constitutional right to smoke;³⁰

NOW THEREFORE, it is the intent of the [City Council / Board of Supervisors], in enacting this ordinance, to provide for the public health, safety, and welfare by discouraging the inherently dangerous behavior of smoking [and tobacco use] around non-tobacco users, especially children; by protecting the public from exposure to secondhand smoke where they play, exercise, and relax; by protecting the environment from tobacco-related litter; by reducing the potential for children to wrongly associate smoking [and tobacco use] with a healthy lifestyle; and by affirming and promoting a healthy environment in and around the [City's / County's] beaches.

SECTION II. [Article / Section] of the [____] Municipal Code is hereby amended to read as follows:

Sec. [____ (*1)]. DEFINITIONS. The following words and phrases, whenever used in this [article / chapter], shall have the meanings defined in this section unless the context clearly requires otherwise:

(a) "Beach" means the area within the [City / County of ____]: (1) along a shoreline extending [one thousand (1,000)] feet on either side of the mean high water line including all indoor and outdoor areas; and (2) that is possessed or operated by the [City / County of ____] [or that is open to the general public, regardless of any fee or age requirement].

COMMENT: This technical definition of "Beach" is designed to be measurable in all situations and can be adapted to your community (e.g., the number of feet listed in brackets can be changed). A less technical definition may be more appropriate for communities that have beaches with obvious boundaries. One option is to list the names of the specific beaches where the ordinance would apply (for example: "Beach" means Baker Beach and Ocean Beach). Or, the definition could rely on the commonly understood meaning of beach (for example: "Beach" means any beach within the limits of the City).

[9999-2m17cleanup.html](http://www.phlpnet.org/tobacco-control/products/there-no-constitutional-right-smoke).

²⁸ Hong M, Barnes RL and Glantz SA. *Tobacco Control in California 2003-2007: Missed Opportunities*. San Francisco: Center for Tobacco Control Research and Education, 2007, p. 9. Available at: <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1074&context=ctcre>.

²⁹ Cal. Health & Safety Code § 104495 (West 2008).

³⁰ Public Health Law & Policy, Technical Assistance Legal Center. *There Is No Constitutional Right to Smoke*. 2005. Available at: www.phlpnet.org/tobacco-control/products/there-no-constitutional-right-smoke.

Note that the definition of Beach provided above includes both indoor and outdoor spaces located within the described boundaries. The definition also prohibits Smoking in the water itself. For example, Smoking while wading in the water or while on a boat within 1,000 feet of the high water line is prohibited.

If a community wants to prohibit Smoking on private Beaches open to the public, such as resorts, then include the “*open to the general public*” language provided in brackets at the end of the definition. Note that if the bracketed language is included, some coastal businesses could be regulated under this provision. For example, Smoking in a privately-owned outdoor dining or bar area located within 1,000 feet of the high water line would be prohibited despite potentially being legal under California’s smokefree workplaces law (California Labor Code section 6404.5).

(b) “Parking Area” means a parking lot or any other area designated or primarily used for parking vehicles of Persons accessing a Beach.

COMMENT: If Parking Areas are not going to be included in the Smoking restriction, then this definition should be deleted.

(c) “Person” means any natural person, partnership, cooperative association, corporation, personal representative, receiver, trustee, assignee, or any other legal entity except the [City / County of ____].

COMMENT: The Municipal Code likely contains a definition of Person and, if so, the definition provided here can be deleted. The city or county is excluded from the definition so that it does not make itself potentially liable for not fully enforcing the ordinance due to practical limitations.

(d) “Smoke” means the gases, particles, or vapors released into the air as a result of combustion, electrical ignition or vaporization, when the apparent or usual purpose of the combustion, electrical ignition or vaporization is human inhalation of the byproducts, except when the combusting or vaporizing material contains no tobacco or nicotine and the purpose of inhalation is solely olfactory, such as, for example, smoke from incense. The term “Smoke” includes, but is not limited to, tobacco smoke, electronic cigarette vapors, and marijuana smoke.

COMMENT: This is a special definition that is more limited than the common understanding of what smoke is. For example, smoke from a barbeque grill or a campfire is not “Smoke” for the purposes of this ordinance because the smoke generated by those activities is not produced for the purpose of inhaling it. The limitation placed on “Smoke” by this definition is important to avoid unintended consequences, such as inadvertently prohibiting barbequing.

This definition includes marijuana, but Smoking marijuana for medical purposes can be excluded from the prohibitions of this ordinance should a community decide to do so. Please contact TALC for assistance in drafting a medical marijuana exception.

(e) “Smoking” means engaging in an act that generates Smoke, such as for example: possessing a lighted pipe, lighted hookah pipe, an operating electronic cigarette, a lighted cigar, or a lighted cigarette of any kind; or lighting or igniting a pipe, cigar, hookah pipe, or cigarette of any kind.

(f) “Tobacco Product” means any substance containing tobacco leaf, including but not limited to cigarettes, cigars, pipe tobacco, hookah tobacco, snuff, chewing tobacco, dipping tobacco, snus, bidis, or any other preparation of tobacco; and any product or formulation of matter containing biologically active amounts of nicotine that is manufactured, sold, offered for sale, or otherwise distributed with the expectation that the product or matter will be introduced into the human body, but does not include any cessation product specifically approved by the United States Food and Drug Administration for use in treating nicotine or tobacco dependence.

COMMENT: This definition is written broadly to include nontraditional tobacco and nicotine products such as nicotine water and nicotine lollipops, but without interfering with the FDA’s mission of approving products intended to benefit public health, such as nicotine patches and other nicotine cessation products.

If Tobacco Products are not going to be included in the Smoking restriction, then this definition should be deleted.

Sec. [____ (*2)]. SMOKING [AND TOBACCO PRODUCT USE] PROHIBITED

(a) Smoking [or using a Tobacco Product] is prohibited anywhere on a Beach [or in any Parking Area] [except in a designated Smoking area].

COMMENT: If a community wants to prohibit the use of all Tobacco Products in addition to Smoking then include the first set of bracketed text “*or using a Tobacco Product.*” A community also will need to decide if it wants to restrict Smoking in Beach Parking Areas. If so, use the second set of bracketed language “*or in any Parking Area.*” If a community wants the ordinance to apply to all Tobacco Products, including smokeless forms, then it should include the references to Tobacco Products each time Smoking is referenced in the ordinance.

Finally, if a community wants to create designated Smoking areas, then include the language in the final bracket and see below for possible criteria to define the boundaries of the Smoking area. These criteria may be modified as appropriate for the particular community and then the desired specifications should be included in the ordinance itself.

A designated Smoking area:

(1) must be outside;

(2) must not overlap with any area in which Smoking is otherwise prohibited by other provisions of this Code, state law, or federal law;

(3) must be located at least [twenty-five (25) feet] from any indoor area where Smoking is prohibited;

(4) must not include areas primarily used by children and must be located at least [twenty-five (25) feet] from such areas; (5) must be no more than [five percent (5%)] of the total outdoor area of the property on which it is located;

(6) must have a clearly marked perimeter; and

(7) must be identified by conspicuous signs.

(b) Nothing in this [article / chapter] shall be construed to prohibit Smoking [or Tobacco Product use] in any area in which such Smoking [or Tobacco Product use] is already prohibited by state or federal law unless the applicable state or federal law does not preempt additional local regulation.

COMMENT: This provision keeps the ordinance from regulating areas where Smoking is already prohibited by another law that forbids additional local regulation (also known as “preemption”). However, the language is designed to allow the local ordinance to regulate Smoking in areas that are allowed by state or federal law but without leaving any gaps between the local and state or federal law. Again, if you want the ordinance to apply to all Tobacco Products, please use the bracketed text referring to Tobacco Product use.

Sec. [____ (*3)]. OTHER REQUIREMENTS AND PROHIBITIONS

(a) No ash can, ashtray, or other Smoking waste receptacle shall be placed in any area in which Smoking is prohibited by this [article / chapter].

COMMENT: This provision makes placing ash receptacles within a no-smoking area illegal.

(b) No Person shall knowingly permit Smoking [or the use of Tobacco Products] in an area under the Person’s legal or de facto control and in which Smoking [or the use of Tobacco Products] is prohibited by this [article / chapter] or other provisions of this Code, unless otherwise required by state or federal law.

COMMENT: This provision makes anyone who is in control of an area responsible for any Smoking done in violation of this ordinance and other no-smoking laws. This subsection is only needed if the options to regulate Smoking on private beaches or private structures near the beach open to the public are included in the definition of “Beach.”

(c) No Person shall dispose of used Smoking [or Tobacco Product] waste within the boundaries of an area in which Smoking [or Tobacco Product use] is prohibited by this [article / chapter].

(d) “No Smoking” [or “No Use of Tobacco Products”] or “Smokefree” [or “Tobacco-

Free] signs shall be clearly and conspicuously posted and maintained at all main entrances to a Beach [and Parking Area] and additional signs shall be posted in a quantity and manner reasonably likely to inform individuals occupying the Beach [and Parking Area] that Smoking [or Tobacco Product use] is prohibited within the area. The signs shall have letters of no less than one inch in height and shall include the international “No Smoking” symbol (consisting of a pictorial representation of a burning cigarette enclosed in a red circle crossed by a red bar). [At least one sign with the [City / County] phone number where complaints can be directed must be conspicuously posted in each place in which Smoking is prohibited.]

COMMENT: A community that chooses to regulate all Tobacco Product use on Beaches, not just Smoking, could consider requiring additional language or additional signs to clarify that all forms of tobacco use are prohibited.

Communities concerned about enforcement, and with the funds to print local signs, may wish to include the bracketed sentence, which requires signs to have the phone number for complaints. Note that this will be more expensive than using standard signs.

(e) The presence of Smoking waste receptacles in violation of subsection (a) above and the absence of signs required by subsection (d) above shall not be a defense to a violation of any provision of this [article / chapter].

(f) No Person shall intimidate, threaten any reprisal, or effect any reprisal, for the purpose of retaliating against another Person who seeks to attain compliance with this [article / chapter].

(g) Each instance of Smoking [or Tobacco Product use] in violation of this [article / chapter] shall constitute a separate violation. For violations other than Smoking, each day of a continuing violation of this [article / chapter] shall constitute a separate violation.

Sec. [____ (*4)]. PENALTIES AND ENFORCEMENT

(a) The remedies provided by this [article / chapter] are cumulative and in addition to any other remedies available at law or in equity.

COMMENT: The following provisions are designed to offer a variety of options to the drafter and to the enforcing agency. Drafters may choose to include some or all of these options. Once the ordinance is enacted, the enforcing agency will have the discretion to choose which enforcement tools to use. As a practical matter, these enforcement options would not be applied simultaneously, although multiple remedies might be used against a particularly egregious violator over time.

(b) Each incident of Smoking [or Tobacco Product use] in violation of this [article / chapter] is an infraction subject to a [one hundred dollar (\$100)] fine [or otherwise punishable pursuant to section _____ of this code]. Other violations of this [article / chapter] may, in the discretion of the [City Prosecutor / District Attorney], be prosecuted as infractions or misdemeanors when the interests of justice so require. Enforcement of this

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[article / chapter] shall be the responsibility of [____]. In addition, any peace officer or code enforcement official also may enforce this [article / chapter].

COMMENT: The first sentence establishes the penalty for the core type of violation: Smoking where it is prohibited. The fine amount can be modified but cannot exceed \$100 for a first infraction. This enforcement provision allows law enforcement officers to simply write a ticket for illegal Smoking. The second sentence, sometimes called a “wobbler,” affords the prosecuting attorney discretion whether to pursue other types of violations such as an infraction (like a parking ticket) or a misdemeanor (a crime punishable by up to a \$1,000 fine and/or six months in County Jail). Misdemeanors are more serious crimes for which a jury trial is available to defendants. Fines and other criminal penalties are established by the Penal Code and are typically reflected in the general punishments provision of a local code.

This provision also designates a primary enforcement agency, which is recommended, but remains flexible by permitting any enforcement agency to enforce the law.

(c) Violations of this [article / chapter] are subject to a civil action brought by the [City / County of ____], punishable by a civil fine not less than [two hundred fifty dollars (\$250)] and not exceeding [one thousand dollars (\$1,000)] per violation.

COMMENT: This provision provides civil fines for violating the ordinance. It requires that a traditional civil suit be filed by the city or county (possibly in small claims court). The fine amounts can be adjusted but cannot exceed \$1,000 per violation. See California Government Code section 36901.

(d) Causing, permitting, aiding, abetting, or concealing a violation of any provision of this [article / chapter] shall also constitute a violation of this [article / chapter].

COMMENT: This is standard language that is typically included in a city or county code and may be omitted if duplicative of existing code provisions.

(e) Any violation of this [article / chapter] is hereby declared to be a nuisance.

COMMENT: By expressly declaring that a violation of this ordinance is a nuisance, this provision allows enforcement of the ordinance by the city or county via the administrative nuisance abatement procedures commonly found in municipal codes.

Note that this declaration merely says that *violating* the ordinance qualifies as a nuisance (e.g., when Smoking on a Beach, the *violation* is the nuisance, not the *Smoke*). It is not the same thing as a local ordinance declaring secondhand smoke a nuisance. Please contact TALC for more information on how a local ordinance can declare that all nonconsensual exposure to secondhand smoke is a nuisance.

(f) In addition to other remedies provided by this [article / chapter] or by other law, any violation of this [article / chapter] may be remedied by a civil action brought by the [City Attorney / County Counsel], including, but not limited to, administrative or judicial nuisance abatement proceedings, civil or criminal code enforcement proceedings, and suits for injunctive relief.

COMMENT: It is common to provide that the local government's lawyers may go to court to seek injunctions and other penalties in addition to fines. The express provision for injunctive relief lowers the showing required to obtain a preliminary or permanent injunction as described in *IT Corp. v. County of Imperial*, 35 Cal. 3d 63 (1983).

A public agency should think carefully about the nuisance abatement procedure it chooses in enforcing this ordinance after it is adopted. A local government may provide for treble damages for the second or subsequent nuisance abatement judgment within a two-year period, as long as the ordinance is enacted pursuant to Government Code section 38773.5. See Government Code section 38773.7. Treble damages are not available, however, under the alternative nuisance abatement procedures in Government Code section 38773.1 (nuisance abatement liens) and Health & Safety Code section 17980 (abatement of substandard buildings). Government Code section 38773.7 (authorizing treble damages) establishes a procedure for nuisance abatement where the cost of the abatement can be collected via the property tax roll as a special assessment against the property on which the violation occurs.

[(g) Except as otherwise provided, enforcement of this [article / chapter] is at the sole discretion of the [City / County]. Nothing in this [article / chapter] shall create a right of action in any Person against the [City / County] or its agents to compel public enforcement of this [article / chapter] against private parties.]

COMMENT: This is an optional provision, which makes clear that a City or County cannot be liable to any Person for failure to enforce the Smoking restrictions in this ordinance.

(h) Any Person acting for the interests of itself, its members, or the general public may bring a civil action to enjoin a violation of this [article / chapter] by a business or to enjoin repeat violations of this [article / chapter] by an individual.

COMMENT: This provision enables private citizens to go to court to seek an injunction that would require an individual or a business to *comply* with the ordinance. (An injunction is a court order to do or not do something.) Money damages are not an available remedy. Because an injunction is the only remedy available, small claims court is not an appropriate venue for filing a lawsuit under this provision.

Note that while a business may be sued for one violation of this ordinance, an individual can be sued only for repeat violations. This limitation is intended to address concerns about the potential for abusive lawsuits.

SECTION III. STATUTORY CONSTRUCTION & SEVERABILITY. It is the intent of the [City Council / Board of Supervisors] of the [City / County] of [_____] to supplement applicable state and federal law and not to duplicate or contradict such law and this ordinance shall be construed consistently with that intention. If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this ordinance, or its application to any person or circumstance, is for any reason held to be invalid or unenforceable, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases of this ordinance, or its application to any other person or circumstance. The [City Council / Board of Supervisors] of the [City / County] of [_____] hereby declares that it would have adopted each section, subsection, subdivision, paragraph, sentence, clause or phrase hereof, irrespective of the fact that any one or more other sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases hereof be declared invalid or unenforceable.

| **COMMENT:** This is standard language. |



Smokefree Recreational Areas Ordinance

A Model California Ordinance Regulating Smoking and Tobacco Product Use in Recreational Areas (with Annotations)

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Developed by the Technical Assistance Legal Center (TALC),
a project of Public Health Law & Policy.

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Public Health Law & Policy is a nonprofit organization that provides legal information on matters relating to public health. The legal information provided in this document does not constitute legal advice or legal representation. For legal advice, readers should consult a lawyer in their state.

Introduction

The Technical Assistance Legal Center (TALC) developed this Model Ordinance to help California cities and counties limit exposure to secondhand smoke and limit tobacco use in recreational areas such as parks, playgrounds, or sports fields. As the dangers of secondhand tobacco smoke become increasingly well documented, one of the most important steps a community can take to improve the health of its residents is to create more smokefree or tobacco-free spaces. Local ordinances limiting exposure to secondhand smoke are the most direct and effective way to improve the public's health. By addressing tobacco use outdoors, this Model Ordinance also helps limit tobacco-related litter.

This Model Ordinance offers a variety of options. Communities may choose some or all of the options. In some instances blanks have been left (e.g., [____]) for the language to be customized to fit the needs of a specific community. In other cases, the ordinance offers you a choice of options (e.g., [choice one / choice two]). Some of the ordinance options are followed by a comment that describes the legal provisions in more detail. Some degree of customization is always necessary in order to make sure that the ordinance is consistent with a community's existing laws. Your City Attorney or County Counsel will likely be the best person to check this for you.

If you have questions about how to adapt this ordinance for your community, please contact TALC for assistance at (510) 302-3380 or submit your question via our website at www.phlpnet.org/tobaccoquestions.

**AN ORDINANCE OF THE [CITY / COUNTY] OF [____]
AMENDING THE [____] MUNICIPAL CODE TO REGULATE
SMOKING [AND TOBACCO PRODUCT USE] IN RECREATIONAL AREAS**

The [City Council of the City / Board of Supervisors of the County] of [____] does ordain as follows:

| **COMMENT:** This is introductory boilerplate language that should be adapted to the conventional form used in the jurisdiction. |

SECTION I. FINDINGS. The [City Council of the City / Board of Supervisors of the County] of [____] hereby finds and declares as follows:

WHEREAS, tobacco use causes death and disease and continues to be an urgent public health challenge, as evidenced by the following:

- Tobacco-related illness is the leading cause of preventable death in the United States,¹ accounting for about 443,000 deaths each year;² and
- Scientific studies have concluded that tobacco use can cause chronic lung disease, coronary heart disease, and stroke, in addition to cancer of the lungs, larynx, esophagus, and mouth;³ and

WHEREAS, secondhand smoke has been repeatedly identified as a health hazard, as evidenced by the following:

- The U.S. Surgeon General concluded that there is no risk-free level of exposure to secondhand smoke;⁴ and
- The California Air Resources Board placed secondhand smoke in the same category as the most toxic automotive and industrial air pollutants by categorizing it as a toxic air contaminant for which there is no safe level of exposure;⁵ and

¹ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Targeting Tobacco Use: The Nation's Leading Cause of Preventable Death*. 2008, p. 2. Available at: www.cdc.gov/nccdphp/publications/aag/pdf/osh.pdf.

² US Department of Health and Human Services, Centers for Disease Control and Prevention. "Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses — United States, 2000-2004." *Morbidity and Mortality Weekly Report*, 57(45): 1226-1228, 2008. Available at: www.cdc.gov/mmwr/preview/mmwrhtml/mm5745a3.htm.

³ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Targeting Tobacco Use: The Nation's Leading Cause of Preventable Death*. 2008, p. 2. Available at: www.cdc.gov/nccdphp/publications/aag/pdf/osh.pdf.

⁴ US Department of Health and Human Services, Office of the Surgeon General. *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General*. 2007. Report highlights available at: www.surgeongeneral.gov/library/secondhandsmoke/factsheets/factsheet7.html.

⁵ Resolution 06-01, Cal. Air Resources Bd. (2006) at 5. Available at: www.arb.ca.gov/regact/ets2006/res0601.pdf; See California Environmental Protection Agency, Air Resources Board. *News Release, California Identifies Secondhand Smoke as a "Toxic Air Contaminant."* Jan. 26, 2006. Available at: www.arb.ca.gov/newsrel/nr012606.htm.

- The California Environmental Protection Agency included secondhand smoke on the Proposition 65 list of chemicals known to the state of California to cause cancer, birth defects, and other reproductive harm;⁶ and

Whereas exposure to secondhand smoke causes death and disease, as evidenced by the following:

- Secondhand smoke is responsible for as many as 73,000 deaths among nonsmokers each year in the United States;⁷ and
- Exposure to secondhand smoke increases the risk of coronary heart disease by approximately thirty percent;⁸ and
- Secondhand smoke exposure causes lower respiratory tract infections, such as pneumonia and bronchitis in as many as 300,000 children in the United States under the age of 18 months each year;⁹ and exacerbates childhood asthma;¹⁰ and

[*Include the following findings about smokeless tobacco if your community will be incorporating the optional language to create completely tobacco-free recreational areas.*]

WHEREAS, smokeless tobacco is not a safe alternative to smoking and also causes death and disease, as evidenced by the following:

- Smokeless tobacco use causes leukoplakia, a disease causing white patches to form in the user's mouth that can become cancerous;¹¹ smokeless tobacco products are known to cause lung, larynx, esophageal, and oral cancer;¹² and the regular use of snuff doubles the user's risk of cardiovascular disease and death;¹³ and
- Prolonged use of snus, a form of smokeless tobacco, contributes to high blood

⁶ California Environmental Protection Agency, Office of Environmental Health Hazard Assessment. *Chemicals Known to the State to Cause Cancer or Reproductive Toxicity*. 2006, p. 8 & 17. Available at: www.oehha.ca.gov/prop65/prop65_list/files/P65single081106.pdf.

⁷ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Fact Sheet – Secondhand Smoke*. 2006. Available at: www.cdc.gov/tobacco/data_statistics/fact_sheets/secondhand_smoke/general_facts/index.htm.

⁸ Barnoya J and Glantz S. “Cardiovascular Effects of Secondhand Smoke: Nearly as Large as Smoking.” *Circulation*, 111: 2684-2698, 2005. Available at: www.circ.ahajournals.org/cgi/content/full/111/20/2684.

⁹ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Targeting Tobacco Use: The Nation's Leading Cause of Preventable Death*. 2008, p. 2. Available at: www.cdc.gov/nccdphp/publications/aag/pdf/osh.pdf.

¹⁰ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Fact Sheet – Secondhand Smoke*. 2006. Available at: www.cdc.gov/tobacco/data_statistics/fact_sheets/secondhand_smoke/general_facts/index.htm.

¹¹ National Cancer Institute. *Smokeless Tobacco and Cancer: Questions and Answers*. 2003, p. 2. Available at: www.smokefree.gov/Docs2/SmokelessTobacco_Q&A.pdf.

¹² US Department of Health and Human Services, Centers for Disease Control and Prevention. *Targeting Tobacco Use: The Nation's Leading Cause of Preventable Death*. 2008, p. 2. Available at: www.cdc.gov/nccdphp/publications/aag/pdf/osh.pdf.

¹³ Hatsukami DK and Severson HH. “Oral Spit Tobacco: Addiction, Prevention, and Treatment.” *Nicotine and Tobacco Research*, 1(1): 21-44, 1999.

pressure, a factor of cardiovascular disease, and to a higher likelihood of suffering a fatal stroke;¹⁴ and

WHEREAS, the U.S. Food and Drug Administration conducted laboratory analysis of electronic cigarette samples and found they contained carcinogens and toxic chemicals to which users and bystanders could potentially be exposed;¹⁵ and

WHEREAS, tobacco use and exposure to secondhand smoke impose great social and economic costs, as evidenced by the following:

- The total annual economic burden of smoking in the United States is \$193 billion;¹⁶ and
- The total annual cost of smoking in California was estimated at \$475 per resident or \$3,331 per smoker per year, for a total of nearly \$15.8 billion in smoking-related costs in 1999 alone;¹⁷ and

WHEREAS, exposure to secondhand smoke anywhere has negative health impacts, and exposure to secondhand smoke does occur at significant levels outdoors, as evidenced by the following:

- Levels of secondhand smoke exposure outdoors can reach levels attained indoors depending on direction and amount of wind and number and proximity of smokers;¹⁸ and
- Irritation from secondhand smoke begins at levels as low as 4 micrograms per cubic meter, and in some outdoor situations this level can be found as far away as 13 feet from the burning cigarette;¹⁹ and

¹⁴ Karolinska Institutet. "Prolonged Use of Swedish Moist Snuff Increases Risk of Fatal Cardiovascular Disease and Stroke." *Medical News Today*, November 15, 2007. Available at: www.medicalnewstoday.com/articles/88868.php.

¹⁵ US Food and Drug Administration. *News Release, FDA and Public Health Experts Warn About Electronic Cigarettes*. 2009. Available at: www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm173222.htm.

¹⁶ Centers for Disease Control and Prevention. *News Release, Slightly Lower Adult Smoking Rates*. 2008. Available at: www.cdc.gov/media/pressrel/2008/r081113.htm.

¹⁷ Max W, Rice DP, Zhang X, et al. *The Cost of Smoking in California, 1999*. Sacramento, CA: Tobacco Control Section, California Department of Health Services, 2002, p. 74. Available at: <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1026&context=ctcre>.

¹⁸ Klepeis NE, Ott WR, and Switzer P. *Real-Time Monitoring of Outdoor Environmental Tobacco Smoke Concentrations: A Pilot Study*. San Francisco: University of California, San Francisco and Stanford University, 2004, p. 34, 80. Available at: http://exposurescience.org/pub/reports/Outdoor_ETS_Final.pdf; See also Klepeis NE, Ott WR and Switzer P. "Real-Time Measurement of Outdoor Tobacco Smoke Particles." *Journal of Air and Waste Management Association*, 57: 522-534, 2007. Available at: www.ashaust.org.au/pdfs/OutdoorSHS0705.pdf.

¹⁹ Junker MH, Danuser B, Monn C, et al. "Acute Sensory Responses of Nonsmokers at Very Low Environmental Tobacco Smoke Concentrations in Controlled Laboratory Settings." *Environmental Health Perspectives*, 109(10): 1046-1052, 2001. Available at: www.pubmedcentral.nih.gov/picrender.fcgi?artid=1242082&blobtype=pdf; Repace JL. "Benefits of Smoke-Free Regulations in Outdoor Settings: Beaches, Golf Courses, Parks, Patios, and in Motor Vehicles." *William Mitchell Law Review*, 34(4): 1621-1638, 2008. Available at: <http://tobacco.health.usyd.edu.au/site/supersite/contact/pdfs/WilliamMitchellRepace.pdf>.

- To be completely free from exposure to secondhand smoke in outdoor places, a person may have to move nearly 25 feet away from the source of the smoke, about the width of a two lane road;²⁰ and

WHEREAS, cigarette butts pose a health threat to young children, as evidenced by the following:

- In 2004, American poison control centers received nearly 8,000 reports of children poisoned by the ingestion of cigarettes, cigarette butts, and other tobacco products;²¹ and
- Children who ingest cigarette butts can experience vomiting, nausea, lethargy, and gagging;²² and

WHEREAS, cigarette butts are a major and persistent source of litter, as evidenced by the following:

- It is estimated that over two billion cigarette butts are discarded every day worldwide, and that Americans alone discard more than 175 million pounds of cigarette butts every year;²³ and
- Cigarette filters, made of plastic cellulose acetate, take approximately 15 years to decompose;²⁴ and
- In just three hours, 340,000 cigarette butts were collected from California beaches during the 2008 Coastal Cleanup Day, making cigarette butts the most common type of trash found 24 years in a row;²⁵ and
- Cigarette filters have been found in the stomachs of birds, fish, whales, and other marine creatures that have mistaken the filters for food, causing the animals to ingest harmful plastic and toxic chemicals;²⁶ and
- Los Angeles County recorded a 40% decrease in cigarette butts after banning smoking on beaches in three cities;²⁷ and

²⁰ Repace JL. "Benefits of Smoke-Free Regulations in Outdoor Settings: Beaches, Golf Courses, Parks, Patios, and in Motor Vehicles." *William Mitchell Law Review*, 34(4): 1621-1638, 2008. Available at: <http://tobacco.health.usyd.edu.au/site/supersite/contact/pdfs/WilliamMitchellRepace.pdf>.

²¹ American Association of Poison Control Centers. *2004 Annual Report of the American Association of Poison Control Centers Toxic Exposure Surveillance System*. Elsevier Inc., 2004, p. 645. Available at: www.poison.org/prevent/documents/TESS%20Annual%20Report%202004.pdf.

²² US Department of Health and Human Services, Centers for Disease Control and Prevention. "Ingestion of Cigarettes and Cigarette Butts by Children – Rhode Island, January 1994-July 1996." *Morbidity and Mortality Weekly Report*, 46(06): 125-128, 1997. Available at: www.cdc.gov/mmwr/preview/mmwrhtml/00046181.htm.

²³ Surfriider Foundation, San Diego Chapter, Hold on to Your Butt, www.surfriidersd.org/hotyb.php.

²⁴ Surfriider Foundation, San Diego Chapter, Hold on to Your Butt, www.surfriidersd.org/hotyb.php.

²⁵ California Coastal Commission. *Press Release: California Finds Silver Lining at the 25th Annual California Coastal Cleanup Day*. Nov. 30, 2009. Available at: www.coastal.ca.gov/publiced/ccd/11.30.09.pressrelease.pdf.

²⁶ Surfriider Foundation, *Cigarette Butt Litter*. Available at: www.surfriider.org/a-z/cig_but.php.

²⁷ Brooke Williams. "Volunteers Comb Coast: Annual Cleanup Turns Up Tons of Trash, Which Generates Helpful Data." *San Diego Union-Tribune*, Sept. 17, 2006. Available at: www.signonsandiego.com/news/metro/20060917-

WHEREAS, creating smokefree areas helps protect the health of the 86.7% of Californians who are nonsmokers;²⁸ and

WHEREAS, state law prohibits smoking within 25 feet of playgrounds and tot lots and expressly authorizes local communities to enact additional restrictions;²⁹ and

WHEREAS, there is no Constitutional right to smoke;³⁰

NOW THEREFORE, it is the intent of the [City Council / Board of Supervisors], in enacting this ordinance, to provide for the public health, safety, and welfare by discouraging the inherently dangerous behavior of smoking [and tobacco use] around non-tobacco users, especially children; by protecting the public from exposure to secondhand smoke where they play, exercise, and relax; by protecting the environment from tobacco-related litter; by reducing the potential for children to wrongly associate smoking [and tobacco use] with a healthy lifestyle; and by affirming and promoting a healthy environment in and around the [City's / County's] recreational areas.

SECTION II. [Article / Section] of the [____] Municipal Code is hereby amended to read as follows:

Sec. [____ (*1)]. DEFINITIONS. The following words and phrases, whenever used in this [article / chapter], shall have the meanings defined in this section unless the context clearly requires otherwise:

(a) "Parking Area" means a parking lot or any other area designated or primarily used for parking vehicles of Persons accessing a Recreational Area.

COMMENT: If Parking Areas are not going to be included in the Smoking restriction, then this definition should be deleted.

(b) "Person" means any natural person, partnership, cooperative association, corporation, personal representative, receiver, trustee, assignee, or any other legal entity except the [City / County of ____].

COMMENT: The Municipal Code likely contains a definition of Person and, if so, the definition provided here can be deleted. The city or county is excluded from the definition so that it does not make itself potentially liable for not fully enforcing the ordinance due to practical limitations.

9999-2m17cleanup.html.

²⁸ Hong M, Barnes RL and Glantz SA. *Tobacco Control in California 2003-2007: Missed Opportunities*. San Francisco: Center for Tobacco Control Research and Education, 2007, p. 9. Available at: <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1074&context=ctcre>.

²⁹ Cal. Health & Safety Code § 104495 (West 2008).

³⁰ Public Health Law & Policy, Technical Assistance Legal Center. *There Is No Constitutional Right to Smoke*. 2005. Available at: www.phlpnet.org/tobacco-control/products/there-no-constitutional-right-smoke.

(c) “Recreational Area” means any outdoor area [, including streets and sidewalks,] that is [publicly or privately owned / owned or operated by the [City / County of _____]] and open to the general public for recreational purposes, regardless of any fee or age requirement. The term “Recreational Area” includes, but is not limited to parks, picnic areas, , playgrounds, sports fields, golf courses, walking paths, gardens, hiking trails, bike paths, horseback riding trails, swimming pools, roller- and ice-skating rinks, skateboard parks, amusement parks, and beaches.

COMMENT: This definition can apply to all recreational areas that are open to the general public, whether on public or private land. If the community wants to limit the reach of the ordinance to only include publicly owned or operated recreational facilities, then select the phase “*owned or operated by the City / County of _____*”.

This definition can also be expanded to encompass streets and sidewalks that are used as Recreational Areas by adding the optional bracketed language “*including streets and sidewalks*”.

This definition includes beaches, which is not defined in this Model Ordinance. If you would like to include a separate, more specific definition of the term “Beach,” please see the definition in TALC’s Model Smokefree Beaches Ordinance available on TALC’s website at www.phlpnet.org.

(d) “Smoke” means the gases, particles, or vapors released into the air as a result of combustion, electrical ignition or vaporization, when the apparent or usual purpose of the combustion, electrical ignition or vaporization is human inhalation of the byproducts, except when the combusting or vaporizing material contains no tobacco or nicotine and the purpose of inhalation is solely olfactory, such as, for example, smoke from incense. The term “Smoke” includes, but is not limited to, tobacco smoke, electronic cigarette vapors, and marijuana smoke.

COMMENT: This is a special definition that is more limited than the common understanding of what smoke is. For example, smoke from a barbeque grill or a campfire is not “Smoke” for the purposes of this ordinance because the smoke generated by those activities is not produced for the purpose of inhaling it. The limitation placed on “Smoke” by this definition is important to avoid unintended consequences, such as inadvertently prohibiting barbequing.

This definition includes marijuana, but Smoking marijuana for medical purposes can be excluded from the prohibitions of this ordinance should a community decide to do so. Please contact TALC for assistance in drafting a medical marijuana exception.

(e) “Smoking” means engaging in an act that generates Smoke, such as for example: possessing a lighted pipe, lighted hookah pipe, an operating electronic cigarette, a lighted cigar, or a lighted cigarette of any kind; or; or lighting or igniting of a pipe, cigar, hookah pipe, or cigarette of any kind.

(f) "Tobacco Product" means any substance containing tobacco leaf, including but not limited to cigarettes, cigars, pipe tobacco, hookah tobacco, snuff, chewing tobacco, dipping tobacco, snus, bidis, or any other preparation of tobacco; and any product or formulation of matter containing biologically active amounts of nicotine that is manufactured, sold, offered for sale, or otherwise distributed with the expectation that the product or matter will be introduced into the human body, but does not include any cessation product specifically approved by the United States Food and Drug Administration for use in treating nicotine or tobacco dependence.

COMMENT: This definition is written broadly to include nontraditional tobacco and nicotine products such as nicotine water and nicotine lollipops, but without interfering with the FDA's mission of approving products intended to benefit public health, such as nicotine patches and other nicotine cessation products.

If Tobacco Products are not going to be included in the Smoking restriction, then this definition should be deleted.

Sec. [____ (*2)]. **SMOKING [AND TOBACCO PRODUCT USE] PROHIBITED**

(a) Smoking [or using a Tobacco Product] is prohibited anywhere in a Recreational Area [or in any Parking Area] [except in a designated Smoking area].

COMMENT: If a community wants to prohibit the use of all Tobacco Products in addition to Smoking then include the first set of bracketed text "*or using a Tobacco Product.*" A community also will need to decide if it wants to restrict Smoking in Recreational Area Parking Areas. If so, use the second set of bracketed language "*or in any Parking Area.*" If a community wants the ordinance to apply to all Tobacco Products including smokeless forms, then it should include the references to these terms each time Smoking is referenced in the ordinance.

Finally, if a community wants to create designated Smoking areas, then include the language in the final bracket and see below for possible criteria to define the boundaries of the Smoking area. These criteria may be modified as appropriate for the particular community and then the desired specifications should be included in the ordinance itself.

A designated Smoking area:

(1) must be outside;

(2) must not overlap with any area in which Smoking is otherwise prohibited by other provisions of this Code, state law, or federal law;

(3) must be located at least [twenty-five (25) feet] from any indoor area where Smoking is prohibited;

(4) must not include areas primarily used by children and must be located at least [(twenty-five (25) feet] from such areas;

(5) must be no more than [five percent (5%)] of the total outdoor area of the property on which it is located;

(6) must have a clearly marked perimeter; and

(7) must be identified by conspicuous signs.

(b) Nothing in this [article / chapter] shall be construed to prohibit Smoking [or Tobacco Product use] in any area in which such Smoking [or Tobacco Product use] is already prohibited by state or federal law unless the applicable state or federal law does not preempt additional local regulation.

COMMENT: This provision keeps the ordinance from regulating areas where Smoking is already prohibited by another law that forbids additional local regulation (also known as "preemption"). However, the language is designed to allow the local ordinance to regulate Smoking in areas that are allowed by state or federal law but without leaving any gaps between the local and state or federal law. Again, if you want the ordinance to apply to all Tobacco Products, please use the bracketed text referring to Tobacco Product use.

Sec. [____ (*3)]. OTHER REQUIREMENTS AND PROHIBITIONS

(a) No ash can, ashtray, or other Smoking waste receptacle shall be placed in any area in which Smoking is prohibited by this [article / chapter].

COMMENT: This provision makes placing ash receptacles within a no-smoking area illegal.

(b) No Person shall knowingly permit Smoking [or the use of Tobacco Products] in an area under the Person's legal or de facto control in which Smoking [or the use of Tobacco Products] is prohibited by this [chapter / article] or other provisions of this Code, unless otherwise required by state or federal law.

COMMENT: This provision makes anyone who is in control of an area responsible for any Smoking done in violation of this ordinance. This subsection is only needed if the options to regulate Smoking on private property or private structures in a Recreational Area open to the public are included in the definition of "Recreational Area."

(c) No Person shall dispose of used Smoking [or Tobacco Product] waste within the boundaries of an area in which Smoking [or Tobacco Product use] is prohibited by this [article / chapter].

(d) "No Smoking" [or "No Use of Tobacco Products"] or "Smokefree" [or "Tobacco-Free"] signs shall be posted in a quantity and manner reasonably likely to inform individuals occupying the Recreational Area [and Parking Area] that Smoking [or Tobacco Product use] is prohibited within the area. The signs shall have letters of no less than one inch in height and shall include the international "No Smoking" symbol (consisting of a pictorial representation of a burning cigarette enclosed in a red circle crossed by a red bar). [At least 64

one sign with the [City / County] phone number where complaints can be directed must be conspicuously posted in each place in which Smoking is prohibited.]

COMMENT: A community that chooses to regulate all Tobacco Product use in Recreational Areas, not just Smoking, could consider requiring additional language or additional signs to clarify that all forms of tobacco use are prohibited.

Communities concerned about enforcement, and with the funds to print local signs, may wish to include the bracketed sentence, which requires signs to have the phone number for complaints. Note that this will be more expensive than using standard signs.

(e) The presence of Smoking waste receptacles in violation of subsection (a) above and the absence of signs required by subsection (d) above shall not be a defense to a violation of any provision of this [article / chapter].

(f) No Person shall intimidate, threaten any reprisal, or effect any reprisal, for the purpose of retaliating against another Person who seeks to attain compliance with this [article / chapter].

(g) Each instance of Smoking [or Tobacco Product use] in violation of this [article / chapter] shall constitute a separate violation. For violations other than Smoking, each day of a continuing violation of this [article / chapter] shall constitute a separate violation.

Sec. [____ (*4)]. PENALTIES AND ENFORCEMENT

(a) The remedies provided by this [article / chapter] are cumulative and in addition to any other remedies available at law or in equity.

COMMENT: The following provisions are designed to offer a variety of options to the drafter and to the enforcing agency. Drafters may choose to include some or all of these options. Once the ordinance is enacted, the enforcing agency will have the discretion to choose which enforcement tools to use. As a practical matter, these enforcement options would not be applied simultaneously, although multiple remedies might be used against a particularly egregious violator over time.

(b) Each incident of Smoking [or Tobacco Product use] in violation of this [article / chapter] is an infraction subject to a [one hundred dollar (\$100)] fine [or otherwise punishable pursuant to section _____ of this code]. Other violations of this [article / chapter] may, in the discretion of the [City Prosecutor / District Attorney], be prosecuted as infractions or misdemeanors when the interests of justice so require . Enforcement of this [article / chapter] shall be the responsibility of [____]. In addition, any peace officer or code enforcement official also may enforce this [article / chapter].

COMMENT: The first sentence establishes the penalty for the core type of violation: Smoking where it is prohibited. The fine amount can be modified but cannot exceed \$100 for a first infraction. This

enforcement provision allows law enforcement officers to simply write a ticket for illegal Smoking. The second sentence, sometimes called a “wobbler,” affords the prosecuting attorney discretion whether to pursue other types of violations such as an infraction (like a parking ticket) or a misdemeanor (a crime punishable by up to a \$1,000 fine and/or six months in County Jail). Misdemeanors are more serious crimes for which a jury trial is available to defendants. Fines and other criminal penalties are established by the Penal Code and are typically reflected in the general punishments provision of a local code.

This provision also designates a primary enforcement agency, which is recommended but remains flexible by permitting any enforcement agency to enforce the law.

(c) Violations of this [article / chapter] are subject to a civil action brought by the [City / County of ____], punishable by a civil fine not less than [two hundred fifty dollars (\$250)] and not exceeding [one thousand dollars (\$1,000)] per violation.

COMMENT: This provision provides civil fines for violating the ordinance. It requires that a traditional civil suit be filed by the city or county (possibly in small claims court). The fine amounts can be adjusted but cannot exceed \$1,000 per violation. See California Government Code section 36901.

(d) Causing, permitting, aiding, abetting, or concealing a violation of any provision of this [article / chapter] shall also constitute a violation of this [article / chapter].

COMMENT: This is standard language that is typically included in a city or county code and may be omitted if duplicative of existing code provisions.

(e) Any violation of this [article / chapter] is hereby declared to be a nuisance.

COMMENT: By expressly declaring that a violation of this ordinance is a nuisance, this provision allows enforcement of the ordinance by the city or county via the administrative nuisance abatement procedures commonly found in municipal codes.

Note that this declaration merely says that *violating* the ordinance qualifies as a nuisance (e.g., when Smoking in a Recreational Area, the *violation* is the nuisance, not the *Smoke*). It is not the same thing as a local ordinance declaring secondhand smoke a nuisance. Please contact TALC for more information on how a local ordinance can declare that all nonconsensual exposure to secondhand smoke is a nuisance.

(f) In addition to other remedies provided by this [article / chapter] or by other law, any violation of this [article / chapter] may be remedied by a civil action brought by the [City Attorney / County Counsel], including, but not limited to, administrative or judicial nuisance abatement proceedings, civil or criminal code enforcement proceedings, and suits for injunctive relief.

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COMMENT: It is common to provide that the local government's lawyers may go to court to seek injunctions and other penalties in addition to fines. The express provision for injunctive relief lowers the showing required to obtain a preliminary or permanent injunction as described in *IT Corp. v. County of Imperial*, 35 Cal. 3d 63 (1983).

A public agency should think carefully about the nuisance abatement procedure it chooses in enforcing this ordinance after it is adopted. A local government may provide for treble damages for the second or subsequent nuisance abatement judgment within a two-year period, as long as the ordinance is enacted pursuant to Government Code section 38773.5. See Government Code section 38773.7. Treble damages are not available, however, under the alternative nuisance abatement procedures in Government Code section 38773.1 (nuisance abatement liens) and Health & Safety Code section 17980 (abatement of substandard buildings). Government Code section 38773.7 (authorizing treble damages) establishes a procedure for nuisance abatement where the cost of the abatement can be collected via the property tax roll as a special assessment against the property on which the violation occurs.

[(g) Except as otherwise provided, enforcement of this [article / chapter] is at the sole discretion of the [City / County]. Nothing in this [article / chapter] shall create a right of action in any Person against the [City / County] or its agents to compel public enforcement of this [article / chapter] against private parties.]

COMMENT: This is an optional provision, which makes clear that a City or County cannot be liable to any Person for failure to enforce the Smoking restrictions in this ordinance.

(h) Any Person acting for the interests of itself, its members, or the general public may bring a civil action to enjoin a violation of this [article / chapter] by a business or to enjoin repeat violations of this [article / chapter] by an individual.

COMMENT: This provision enables private citizens to go to court to seek *compliance* with the ordinance by an individual or business through an injunction (a court order to do or not do something). Money damages are not an available remedy. Because an injunction is the only remedy available, small claims court is not an appropriate venue for filing a lawsuit under this provision.

Note that while a business may be sued for one violation of this ordinance, an individual can be sued only for repeat violations. This limitation is intended to address concerns about the potential for abusive lawsuits.

SECTION III. STATUTORY CONSTRUCTION & SEVERABILITY. It is the intent of the [City Council / Board of Supervisors] of the [City / County] of [____] to supplement applicable state and federal law and not to duplicate or contradict such law and this ordinance shall be construed consistently with that intention. If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this ordinance, or its application to any person or circumstance, is for any reason held to be invalid or unenforceable, such invalidity or

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unenforceability shall not affect the validity or enforceability of the remaining sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases of this ordinance, or its application to any other person or circumstance. The [City Council / Board of Supervisors] of the [City / County] of [____] hereby declares that it would have adopted each section, subsection, subdivision, paragraph, sentence, clause or phrase hereof, irrespective of the fact that any one or more other sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases hereof be declared invalid or unenforceable.

| **COMMENT:** This is standard language. |

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Smokefree Housing Ordinance

A Model California Ordinance Regulating Smoking in Multi-Unit Residences (with Annotations)

Revised December 2009
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Developed by the Technical Assistance Legal Center (TALC),
a project of Public Health Law & Policy.

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Public Health Law & Policy is a nonprofit organization that provides legal information on matters relating to public health. The legal information provided in this document does not constitute legal advice or legal representation. For legal advice, readers should consult a lawyer in their state.

Introduction

The Technical Assistance Legal Center (TALC) developed this Model Ordinance to help California cities and counties limit exposure to secondhand smoke in multi-unit residences such as apartment buildings, condominium complexes, senior housing, and single resident occupancy hotels. By creating nonsmoking living environments in multi-unit residences, communities can provide an opportunity for everyone to live smokefree – even people who can't afford to live in a single-family home.

The Ordinance's comprehensive design limits exposure to secondhand smoke by restricting smoking in common areas (indoors and outdoors), creating smokefree buffer zones, and prohibiting smoking in individual units. Communities may choose to include some or all of the options offered in the Model Ordinance, depending on the jurisdictions' policy objectives. TALC can help adapt this Model Ordinance to meet an individual community's needs.

To assist cities and counties in creating smokefree multi-unit housing, this Model Ordinance includes:

- Extensive findings based on the latest scientific information documenting the health risks associated with tobacco use and exposure to secondhand smoke;
- Restrictions on smoking in the indoor and outdoor common areas of all types of multi-unit residences, with the option to create designated outdoor smoking areas that meet specific criteria;
- Smokefree buffer zones that can expand to include neighboring property and/or balconies and patios of adjacent units to limit drifting secondhand smoke from entering nonsmoking areas;
- Prohibitions on smoking inside the units of multi-unit residences, including apartments and condominiums;
- Recommended procedures for designating nonsmoking units by landlords and homeowners' associations; and
- Robust enforcement mechanisms including no-smoking lease terms and options for private individuals and organizations to enforce the smokefree housing provisions.

This Model Ordinance is very broad and can be used to limit smoking in *all* types of multi-unit dwelling places – from hotels to long-term health care facilities – as well as apartments and condominiums. Some of the comments in the Model Ordinance describe how to narrow the scope of the smoking restrictions, should that be necessary.

In addition, this Model Ordinance provides a step-by-step approach to designating nonsmoking units, including a recommended implementation process that allows tenants and landlords to become familiar with the new smoking restrictions over a 12-month period. Implementing a smokefree housing law by using a reasonable phase-in period followed by a certain date on which everyone is required to abide by the law is generally perceived to be the most fair and effective approach – balancing public health needs against the potential inconvenience the ordinance puts on tenants who smoke and landlords who must implement the new policy.

Please note: while this Ordinance is not written specifically for communities with rent control laws, there are no legal restrictions that would prevent those cities from adopting a smokefree housing law. However, it is highly recommended that in such jurisdictions the city attorney and rent control board be included in selecting and adopting the specific provisions for a smokefree housing law.

This Model Ordinance offers a variety of options. In some instances, blanks (e.g., [____]) prompt you to customize the language to fit your community's needs. In other cases, the ordinance offers you a choice of options (e.g., [choice one / choice two]). Some of the ordinance options are followed by a comment that describes the legal provisions in more detail. Some degree of customization is always necessary in order to make sure that the ordinance is consistent with a community's existing laws. Your city attorney or county counsel will likely be the best person to check this for you.

TALC has also developed other ordinances to create smokefree outdoor areas, such as parks, beaches, dining patios, and public events. If you would like to adopt a comprehensive or more customized approach, some aspects of other TALC ordinances can be combined with this ordinance. If you have questions about how to adapt this or other TALC ordinances for your community, please contact TALC for assistance at (510) 302-3380 or submit your question via our website at www.phlpnet.org/tobaccoquestions.

**AN ORDINANCE OF THE [CITY / COUNTY OF ____] PROHIBITING SMOKING IN
AND AROUND MULTI-UNIT RESIDENCES AND AMENDING THE [____]
MUNICIPAL CODE**

The [City Council / County Board of Supervisors] of the [City / County of ____] does ordain as follows:

SECTION I. FINDINGS.

The [City Council / County Board of Supervisors] of [____] hereby finds and declares as follows:

WHEREAS, tobacco use causes death and disease and continues to be an urgent public health threat, as evidenced by the following:

- Tobacco-related illness is the leading cause of preventable death in the United States,¹ accounting for about 443,000 deaths each year;² and
- Scientific studies have concluded that tobacco use can cause chronic lung disease, coronary heart disease, and stroke, in addition to cancer of the lungs, larynx, esophagus, and mouth;³ and
- Some of the most common types of cancers, including stomach, liver, uterine cervix, and kidney cancers, are related to tobacco use;⁴ and

WHEREAS, secondhand smoke has been repeatedly identified as a health hazard, as evidenced by the following:

- The U.S. Surgeon General concluded that there is no risk-free level of exposure to secondhand smoke;⁵ and
- The California Air Resources Board placed secondhand smoke in the same category as the most toxic automotive and industrial air pollutants by categorizing it as a toxic air contaminant for which there is no safe level of exposure;⁶ and

¹ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Targeting Tobacco Use: The Nation's Leading Cause of Preventable Death*. 2008, p. 2. Available at: www.cdc.gov/nccdphp/publications/aag/pdf/osh.pdf.

² US Department of Health and Human Services, Centers for Disease Control and Prevention. "Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses – United States, 2000-2004." *Morbidity and Mortality Weekly Report*, 57(45): 1226-1228, 2008. Available at: www.cdc.gov/mmwr/preview/mmwrhtml/mm5745a3.htm.

³ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Targeting Tobacco Use: The Nation's Leading Cause of Preventable Death*. 2008, p. 2. Available at: www.cdc.gov/nccdphp/publications/aag/pdf/osh.pdf.

⁴ Leistikow B, Zubair K, et al. "Male Tobacco Smoke Load and Non-Lung Cancer Mortality Associations in Massachusetts." *BMC Cancer*, 8:341, 2008. Available at: www.biomedcentral.com/1471-2407/8/341.

⁵ US Department of Health and Human Services, Office of the Surgeon General. *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General*. 2007. Report highlights available at: www.surgeongeneral.gov/library/secondhandsmoke/factsheets/factsheet7.html.

⁶ Resolution 06-01, Cal. Air Resources Bd. (2006) at 5. Available at: www.arb.ca.gov/regact/ets2006/res0601.pdf; See California Environmental Protection Agency, Air Resources Board. *News Release, California Identifies Secondhand*

- The California Environmental Protection Agency included secondhand smoke on the Proposition 65 list of chemicals known to the state of California to cause cancer, birth defects, and other reproductive harm;⁷ and

WHEREAS, exposure to secondhand smoke causes death and disease, as evidenced by the following:

- Secondhand smoke is responsible for as many as 73,000 deaths among nonsmokers each year in the United States;⁸ and
- Exposure to secondhand smoke increases the risk of coronary heart disease by approximately thirty percent;⁹ and
- Secondhand smoke exposure causes lower respiratory tract infections, such as pneumonia and bronchitis in as many as 300,000 children in the United States under the age of 18 months each year;¹⁰ and exacerbates childhood asthma;¹¹ and

WHEREAS, the U.S. Food and Drug Administration conducted laboratory analysis of electronic cigarette samples and found they contained carcinogens and toxic chemicals to which users and bystanders could potentially be exposed;¹² and

WHEREAS, tobacco use and exposure to secondhand smoke impose great economic costs, as evidenced by the following:

- The total annual economic burden of smoking in the United States is \$193 billion;¹³ and
- From 2001-2004, the average annual health care expenditures attributable to smoking were approximately \$96 billion;¹⁴ and
- The medical and other costs to nonsmokers due to exposure to secondhand smoke were estimated at over \$10 billion per year in the United States in 2005;¹⁵ and

Smoke as a "Toxic Air Contaminant." Jan. 26, 2006. Available at: www.arb.ca.gov/newsrel/nr012606.htm.

⁷ California Environmental Protection Agency, Office of Environmental Health Hazard Assessment. *Chemicals Known to the State to Cause Cancer or Reproductive Toxicity*. 2006, p. 8 & 17. Available at: www.oehha.ca.gov/prop65/prop65_list/files/P65single081106.pdf.

⁸ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Fact Sheet – Secondhand Smoke*. 2006. Available at: www.cdc.gov/tobacco/data_statistics/fact_sheets/secondhand_smoke/general_facts/index.htm.

⁹ Barnoya, J and Glantz, S. "Cardiovascular Effects of Secondhand Smoke: Nearly as Large as Smoking." *Circulation*, 111: 2684-2698, 2005. Available at: www.circ.ahajournals.org/cgi/content/full/111/20/2684.

¹⁰ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Targeting Tobacco Use: The Nation's Leading Cause of Preventable Death*. 2008, p. 2. Available at: www.cdc.gov/nccdphp/publications/aag/pdf/osh.pdf.

¹¹ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Fact Sheet – Secondhand Smoke*. 2006. Available at: www.cdc.gov/tobacco/data_statistics/fact_sheets/secondhand_smoke/general_facts/index.htm.

¹² US Food and Drug Administration. *News Release, FDA and Public Health Experts Warn About Electronic Cigarettes*. 2009. Available at: www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm173222.htm.

¹³ Centers for Disease Control and Prevention. *News Release, Slightly Lower Adult Smoking Rates*. 2008. Available at: www.cdc.gov/media/pressrel/2008/r081113.htm.

¹⁴ Centers for Disease Control and Prevention. *News Release, Slightly Lower Adult Smoking Rates*. 2008. Available at: www.cdc.gov/media/pressrel/2008/r081113.htm.

¹⁵ Behan DF, Eriksen MP and Lin, Y. *Economic Effects of Environmental Tobacco Smoke*. Schaumburg, IL: Society of

- The total annual cost of smoking in California was estimated at \$475 per resident or \$3,331 per smoker per year, for a total of nearly \$15.8 billion in smoking-related costs in 1999 alone;¹⁶ and
- California's Tobacco Control Program saved the state and its residents \$86 billion in health care expenditures between the year of its inception, 1989, and 2004, with savings growing yearly;¹⁷ and

WHEREAS, smoking is the primary cause of fire-related injuries and deaths in the home, as evidenced by the following:

- Cigarettes, cigars, pipes and other smoking materials are the leading cause of fire deaths in the United States,¹⁸ causing an estimated 142,900 smoking-related fires, 780 deaths, 1,600 injuries, and \$606 million in direct property damage in 2006;¹⁹ and
- One in four fatalities from home fires caused by smoking is NOT the smoker whose cigarette started the fire, and 25% of those deaths were of neighbors or friends of the smoker;²⁰ and
- Smoking in a residence where long-term oxygen therapy takes place is very dangerous as oxygen is a fire accelerant, and 27% of fatalities due to smoking during long-term oxygen therapy occurred in multifamily dwellings;²¹ and
- The United States Fire Administration recommends that people smoke outdoors;²² and

WHEREAS, nonsmokers who live in multi-unit dwellings can be exposed to neighbors' secondhand smoke, as evidenced by the following:

- Secondhand smoke can seep under doorways and through wall cracks;²³ and

Actuaries, 2005, p. 2. Available at: [www.soa.org/files/pdf/ETSReportFinalDraft\(Final%203\).pdf](http://www.soa.org/files/pdf/ETSReportFinalDraft(Final%203).pdf).

¹⁶ Max W, Rice DP, Zhang X, et al. *The Cost of Smoking in California, 1999*. Sacramento, CA: Tobacco Control Section, California Department of Health Services, 2002, p. 74. Available at: <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1026&context=ctcre>.

¹⁷ Lightwood JM, Dinno A and Glantz SA. "Effect of the California Tobacco Control Program on Personal Health Care Expenditures." *PLoS Med*, 5(8): e178, 2008. Available at: www.plosmedicine.org/article/info:doi/10.1371/journal.pmed.0050178.

¹⁸ Leistikow B, Martin DC and Milano CE. "Fire Injuries, Disasters, and Costs from Cigarettes and Cigarette Lights: A Global Overview." *Preventive Medicine*, 31: 91-99, 2000. Available at: <http://leistikow.ucdavis.edu/SmokingFires.pdf>.

¹⁹ Hall JR. *U.S. Smoking-Material Fire Problem*. Quincy, MA: National Fire Protection Association, 2008, p. vii. Available at: www.nfpa.org/assets/files/PDF/OS.Smoking.pdf. (Factsheet available at: www.nfpa.org/assets/files/PDF/smokingfactsheet.pdf.)

²⁰ Hall JR, Ahrens M, Rohr K, et al. *Behavioral Mitigation of Smoking Fires Through Strategies Based on Statistical Analysis*. US Department of Homeland Security, 2006, p. 17. Available at: www.usfa.dhs.gov/downloads/pdf/publications/fa-302-508.pdf.

²¹ US Department of Health and Human Services, Centers for Disease Control and Prevention. "Fatal Fires Associated with Smoking During Long-Term Oxygen Therapy – Maine, Massachusetts, New Hampshire, and Oklahoma, 2000 – 2007." *Morbidity and Mortality Weekly Report*, 57(31): 852-854, 2008. Available at: www.cdc.gov/mmwr/preview/mmwrhtml/mm5731a3.htm?s_cid=mm5731a3_e.

²² Hall JR, Ahrens M, Rohr K, et al. *Behavioral Mitigation of Smoking Fires Through Strategies Based on Statistical Analysis*. US Department of Homeland Security, 2006, p. 19. Available at: www.usfa.dhs.gov/downloads/pdf/publications/fa-302-508.pdf.

²³ Wagner J, Sullivan DP, Faulkner D, et al. "Environmental Tobacco Smoke Leakage from Smoking Rooms." *Journal of*

- Persons living in apartments near smokers can be exposed to elevated pollution levels for 24 hours a day, and at times, the particulate matter exposure can exceed the U.S. Environmental Protection Agency's 24-Hour Health Based Standard;²⁴ and
- The Surgeon General has concluded that eliminating smoking in indoor spaces is the only way to fully protect nonsmokers from secondhand smoke exposure and that separating smokers from nonsmokers, cleaning the air, and ventilating buildings cannot completely prevent secondhand smoke exposure;²⁵ and

WHEREAS, most Californians do not smoke and a majority favor limitations on smoking in multi-unit residences, as evidenced by the following:

- Nearly 87% of Californians and 91% of California women are nonsmokers;²⁶ and
- 74% of Californians surveyed approve of apartment complexes requiring at least half of rental units be nonsmoking;²⁷ and
- 69% of Californians surveyed favor limiting smoking in outdoor common areas of apartment buildings and 78% support laws that create nonsmoking units;²⁸ and
- 62% of California renters feel that there is a need for laws to limit smoking in apartments;²⁹ and

WHEREAS, a local ordinance that authorizes residential rental agreements to include a prohibition on smoking of tobacco products within rental units is not prohibited by California law;³⁰ and

WHEREAS, there is no Constitutional right to smoke;³¹ and

Occupational and Environmental Hygiene, 1: 110-118, 2004. Available at: <http://eetd.lbl.gov/IEP/pdf/LBNL-51010.pdf>.

²⁴ Klepeis N. *Measuring the Seepage of Tobacco Smoke Particles Between Apartment Units*. California's Clean Air Project, 2008. Available at: www.phlpnet.org/sites/phlpnet.org/files/CCAP_Measuring_the_Seepage_Klepeis_article.pdf.

²⁵ US Department of Health and Human Services, Office of the Surgeon General. *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General*. 2006, p. 11. Available at: www.cdc.gov/tobacco/data_statistics/sgr/sgr_2006/index.htm#full.

²⁶ California Department of Health Services. *News Release, New Data Show 91 Percent of California Women Don't Smoke*. 2007. Available at: www.applications.dhs.ca.gov/pressreleases/store/PressReleases/07-37%20dhs%20smoking%20rates-with%20charts.html.

²⁷ Goodwin Simon Victoria Research. *Study of California Voters' Attitudes About Secondhand Smoke Exposure*. 2008. Available at: www.center4tobaccopolicy.org/_files/_files/Results%20of%20SHS%20Poll%20November%202008.pdf (Statewide poll of 600 California voters, conducted November 2008).

²⁸ Goodwin Simon Victoria Research. *Study of California Voters' Attitudes About Secondhand Smoke Exposure*. 2008. Available at: www.center4tobaccopolicy.org/_files/_files/Results%20of%20SHS%20Poll%20November%202008.pdf (Statewide poll of 600 California voters, conducted November 2008).

²⁹ American Lung Association of California, Center for Tobacco Policy and Organizing. *Statewide Apartment Renter Study*. 2004. Available at: www.center4tobaccopolicy.org/_files/_files/5242_Center%20Renter%20Survey%20Results%20May%202004.pdf (A survey of apartment residents throughout California).

³⁰ Cal. Legislative Counsel Op., 21547, *Secondhand Smoke in Multi-Unit Housing (Apartments & Condos) Smoking Bans: Residential Rental Property*, (September 23, 1999). Highlights available at: www.respect-ala.org/drift_samsmokingbans.htm.

³¹ Public Health Law & Policy, Technical Assistance Legal Center. *There Is No Constitutional Right to Smoke*. 2005. Available at: www.phlpnet.org/tobacco-control.

WHEREAS, California law prohibits smoking in virtually all indoor places of employment reflecting the state policy to protect against the dangers of exposure to secondhand smoke;³² and

WHEREAS, California law declares that anything which is injurious to health or obstructs the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance;³³ and

WHEREAS, local governments have broad latitude to declare nuisances and are not constrained by prior definitions of nuisance;³⁴ and

NOW THEREFORE, it is the intent of the [City Council / County Board of Supervisors] in enacting this ordinance, to provide for the public health, safety, and welfare by discouraging the inherently dangerous behavior of smoking around non-tobacco users; by protecting children from exposure to smoking where they live and play; and by protecting the public from nonconsensual exposure to secondhand smoke in and around their homes.

SECTION II. [Article / Section] of the [City / County of _____] Municipal Code is hereby amended to read as follows:

Sec. [_____ (*1)]. DEFINITIONS. For the purposes of this [article / chapter] the following definitions shall govern unless the context clearly requires otherwise:

(a) “Adjacent Property” means any Unenclosed Area of property, publicly or privately owned, that abuts a Multi-Unit Residence [, but does not include property containing detached single-family homes / , but does not include property containing only residential structures].

COMMENT: This definition is used to describe the reach of nonsmoking “buffer zones” around Multi-Unit Residences. It defines where Smoking is prohibited when buffer zones reach beyond the property lines of the Multi-Unit Residence and extend onto neighboring property (see Section *3 “Nonsmoking Buffer Zones”).

Four options are available, listed below from the strongest to the weakest protections.

Option one—*Include Everything*: Include *all* adjoining property, public and private, by omitting all bracketed language. With this option, a smokefree buffer zone might encompass a portion of the backyard of a single-family residence.

Option two—*Include Everything but Single-Family Homes*: Include all adjoining property, public and private, *except* single-family residences by including only the single-underlined language.

³² Cal. Lab. Code § 6404.5 (West 2009).

³³ Cal. Civil Code § 3479 (West 2009).

³⁴ *In Re Jones*, 56 Cal.App.2d 658, 663 (1943); *See also* Cal. Const., art. XI, § 7 and Cal. Gov. Code § 38771 (West 2009).

Option three—*Include Everything but Residential Property*: Include all adjoining property, public and private, *except* residential property (e.g., single-family residences or Multi-Unit Residences) by including only the double-underlined language. This option still includes, for example, outdoor areas of businesses, parking lots, and some places not open to the general public such as members-only clubs

Option four—*Exclude Everything*: Do not include *any* adjoining property in the buffer zones, in which case the entire definition should be deleted.

(b) “Common Area” means every Enclosed Area or Unenclosed Area of a Multi-Unit Residence that residents of more than one Unit of that Multi-Unit Residence are entitled to enter or use, including, for example, halls and paths, lobbies and courtyards, elevators and stairs, community rooms and playgrounds, gym facilities and swimming pools, parking garages and parking lots, shared restrooms, shared laundry rooms, shared cooking areas, and shared eating areas.

COMMENT: Note that California Labor Code section 6404.5 (the state smokefree workplace law) may already prohibit Smoking in indoor Common Areas if the Multi-Unit Residence has employees, such as maintenance workers, property managers, or others who work on-site.

The definition of Common Areas does not include balconies, patios, or decks associated with individual Units because these are not shared areas. Balconies, patios, and decks are included in the definition of Unit.

(c) “Common Interest Complex” means a Multi-Unit Residence that is a condominium project, [a community apartment project,] [a stock cooperative,] [or a planned development] as defined by California Civil Code section 1351.

COMMENT: This definition is used to distinguish owned multi-unit housing (e.g., condominiums and townhomes) from other types of Multi-Unit Residences, such as apartments that are leased, which are defined in the term “Rental Complex” (see below). The distinction between all types of Multi-Unit Residences and those that are owned is necessary if a community decides to regulate smoking in less than 100% of *existing* Units in Multi-Unit Residences (see Sections *5 and *6). This distinction is necessary because of the logistical difficulty in determining which owner-occupied Units should be nonsmoking and which should allow Smoking.

The list of optional Common Interest Complexes includes other types of housing that, like condominiums, have covenants, conditions, and restrictions (CC&Rs) and are managed by a homeowners’ association.

(d) “Enclosed Area” means an area in which outside air cannot circulate freely to all parts of the area, and includes an area that has:

(1) any type of overhead cover whether or not that cover includes vents or other openings and at least [three (3)] walls or other vertical boundaries of any height whether or not those

boundaries include vents or other openings; or

(2) [four (4)] walls or other vertical boundaries that exceed [six (6)] feet in height whether or not those boundaries include vents or other openings.

COMMENT: The number of walls and the height threshold can be customized to meet the needs of your community, and changing these numbers will affect the scope of the ordinance. Reducing the number of walls in this definition would broaden the definition of Enclosed Area, which would result in narrowing the definition of Unenclosed Area. For the purposes of this ordinance, the distinction between “enclosed” and “unenclosed” is primarily relevant to establishing designated Smoking areas (see Section *2) and nonsmoking buffer zones (see Section *3).

An area that is partially covered by anything would be analyzed under subparagraph (1), whereas only areas that are totally uncovered would be analyzed under subparagraph (2). It can be difficult to apply Labor Code section 6404.5 to areas that are surrounded by lattice, hedges, and other nonsolid structures. For purposes of this ordinance any vertical boundary, regardless of composition, constitutes an “other vertical boundary” for application of this definition.

NOTE: If the Municipal Code already has Smoking restrictions, it may contain a definition of “enclosed.” Review the Code and make any necessary modification to existing definitions and/or operative provisions to ensure consistency with the new definition.

(e) “Landlord” means any Person who owns property let for residential use, any Person who lets residential property, and any Person who manages such property, except that “Landlord” does not include a master tenant who sublets a Unit as long as the master tenant sublets only a single Unit of a Multi-Unit Residence.

COMMENT: The Municipal Code may already contain a definition of “Landlord.” If so, the definition provided here can be omitted, although sublessors should specifically be excluded.

(f) “Multi-Unit Residence” means property containing two (2) or more Units [, except the following specifically excluded types of housing:

(1) a hotel or motel that meets the requirements set forth in California Civil Code section 1940(b)(2);

(2) a mobile home park;

(3) a campground;

(4) a marina or port;

(5) a single-family home;

(6) a single-family home with a detached or attached in-law or second unit when permitted pursuant to California Government Code sections 65852.1, 65852.150, 65852.2 or an ordinance of the [City / County] adopted pursuant to those sections; and

(7) _____].

COMMENT: Because the definition of Unit in this ordinance is so broad and includes all types of dwelling places—from rooms in a

hotel to tents at a campground—a community may want to limit the types of dwelling places covered by the smokefree housing ordinance. The optional language provides examples of the types of exceptions that communities are likely to consider.

Note that the definition of Multi-Unit Residence without any exemptions would include the following types of dwelling places: apartments, condominium projects, townhomes, stock cooperatives, and co-housing; affordable housing (for seniors, for disabled tenants, for Section 8, etc.); long-term health care facilities, assisted living facilities, hospitals, and family support facilities; hotels, motels, single room occupancy (“SRO”) facilities, dormitories, and homeless shelters; mobile home parks, campgrounds, marinas, and ports; single-family homes and single-family homes with an in-law unit.

(g) “New Unit” means a Unit that is issued a [certificate of occupancy / final inspection] more than 180 days after [*insert effective date of ordinance*] [and also means a Unit that is let for residential use for the first time more than 180 days after [*insert effective date of ordinance*]].

COMMENT: This definition is used to differentiate between Units that are already built when the ordinance is adopted and Units constructed afterward. The distinction is important because, under this ordinance, all Units built after the ordinance is adopted are required to be nonsmoking, whereas Smoking could be allowed in some Units of existing multi-unit housing.

The definition incorporates a trigger date of 180 days after the ordinance takes effect so as to “grandfather” buildings already under construction.

The *certificate of occupancy or final inspection* is probably the most administrable way to distinguish between existing and New Units. However, a community could distinguish between Units for which land use entitlements have or have not issued or Units which have or have not been occupied by a tenant for the first time.

To include existing housing that may become available to the rental market after the ordinance is adopted, such as an in-law cottage that had previously never been rented, add the optional clause at the end of the definition.

Note that the term “New Unit” is a subset of “Unit,” so whenever the term Unit is used in the ordinance, it includes all New Units.

(h) “Nonsmoking Area” means any Enclosed Area or Unenclosed Area of a Multi-Unit Residence in which Smoking is prohibited by: (1) this [chapter / article] or other law; (2) by binding agreement relating to the ownership, occupancy, or use of real property; or (3) by designation of a Person with legal control over the area. In the case of a Smoking prohibition established only by private agreement or designation and not by this [chapter / article] or other law, it shall not be a violation of this [chapter / article] for a Person to engage in Smoking or to allow Smoking in that area unless: (1) the Person knows that Smoking is not permitted; or (2) a reasonable Person would know that Smoking is not permitted.

(i) "Person" means any natural person, partnership, cooperative association, corporation, personal representative, receiver, trustee, assignee, or any other legal entity including government agencies.

COMMENT: The Municipal Code may contain a definition of "person"; review any existing definition of "person" in the Municipal Code to determine whether to include this definition in your ordinance.

This definition includes most businesses. In addition, it includes the City and County.

(j) "Rental Complex" means a Multi-Unit Residence for which fifty percent (50%) or more of Units are let by or on behalf of the same Landlord.

COMMENT: This definition is used to distinguish traditional rental housing (e.g., apartments, SROs) from other types of Multi-Unit Residences, such as condominiums that are owner-occupied. The distinction between all types of Multi-Unit Residences and those that are leased is necessary if a community decides to regulate smoking in less than 100% of *existing* Units in Multi-Unit Residences (see Section *6). This distinction is necessary because of the logistical difficulty in determining which owner-occupied Units should be nonsmoking and which should allow Smoking.

(k) "Smoke" means the gases, particles, or vapors released into the air as a result of combustion, electrical ignition or vaporization, when the apparent or usual purpose of the combustion, electrical ignition or vaporization is human inhalation of the byproducts, except when the combusting or vaporizing material contains no tobacco or nicotine and the purpose of inhalation is solely olfactory, such as, for example, smoke from incense. The term "Smoke" includes, but is not limited to, tobacco smoke, electronic cigarette vapors, marijuana smoke, and crack cocaine smoke.

COMMENT: This is a special definition that is more limited than the common understanding of what "smoke" is. For example, smoke from a fireplace or a barbeque grill is not "Smoke" for the purposes of this ordinance because the smoke generated by those activities is not produced for the purpose of inhaling it. The limitation placed on "Smoke" by this definition is important to avoid unintended consequences, such as inadvertently prohibiting the burning of incense or use of barbeque grills.

This definition includes e-cigarettes. It also marijuana, but Smoking marijuana for medical purposes can be excluded from the prohibitions of this ordinance should a community decide to include Section *11(b).

(l) "Smoking" means engaging in an act that generates Smoke, such as, for example: possessing a lighted pipe, a lighted hookah pipe, a lighted cigar, an operating electronic cigarette or a lighted cigarette of any kind; or lighting or igniting a pipe, a hookah pipe, a cigar, or a cigarette of any kind.

COMMENT: This definition includes marijuana, but Smoking marijuana for medical purposes can be excluded from the prohibitions of this ordinance should a community decide to include Section *11(b).

(m) "Unenclosed Area" means any area that is not an Enclosed Area.

(n) "Unit" means a personal dwelling space, even where lacking cooking facilities or private plumbing facilities, and includes any associated exclusive-use Enclosed Area or Unenclosed Area, such as, for example, a private balcony, porch, deck, or patio. "Unit" includes without limitation: an apartment; a condominium; a townhouse; a room in a long-term health care facility, assisted living facility, or hospital; a hotel or motel room; a room in a single room occupancy ("SRO") facility; a room in a homeless shelter; a mobile home; a camper vehicle or tent; a single-family home; and an in-law or second unit. Unit includes a New Unit.

COMMENT: This definition is intentionally extremely broad. It is designed to capture all conceivable "dwelling spaces" as the examples illustrate. However, because of the way that this model ordinance is designed, any limitations on the types of housing covered by the ordinance should be added to the defined term "Multi-Unit Residence" and *not* here. For example, some "mobile homes" in mobile home parks may be included in this definition and even cited in the examples but, nevertheless, "mobile homes" can be specifically excluded from the ordinance under the definition of "Multi-Unit Residence."

Sec. [____ (*2)]. NO SMOKING PERMITTED IN COMMON AREAS EXCEPT IN DESIGNATED SMOKING AREAS.

COMMENT: If your Municipal Code already has Smoking restrictions, it may contain a provision for smokefree Common Areas of multi-unit housing. Review the Code and make any necessary modification to existing definitions and/or operative provisions to ensure consistency with new ordinance language.

(a) Smoking is prohibited in all Common Areas pursuant to Section [____ (*9)] except that a Person with legal control over a Common Area, such as, for example, a Landlord or homeowners' association, may designate a portion of the Common Area as a designated Smoking area provided that at all times the designated Smoking area complies with paragraph (b) below.

(b) A designated Smoking area:

(1) Must be an Unenclosed Area.

(2) Must be located at least twenty-five (25) feet from any Enclosed Area that is a Nonsmoking Area. A Person with legal control over a Common Area in which a designated Smoking area has been designated shall modify, relocate or eliminate that designated Smoking area so as to maintain compliance with the requirements of this subsection (b) as laws change, as binding agreements are created, and as Nonsmoking Areas on neighboring property are established.

COMMENT: This clause limits where a designated Smoking area can be located in order to prevent drifting Smoke from entering smokefree areas. As written, it includes areas on neighboring property that are designated as nonsmoking by contract (e.g., a smokefree lease term for a rental unit next to, but not part of, the Multi-Unit Residence) and areas on neighboring property

designated by a property owner or lessee as nonsmoking (e.g., a neighboring business or homeowner).

(3) Must be at least twenty-five (25) feet from Unenclosed Areas primarily used by children and Unenclosed Areas with improvements that facilitate physical activity including, for example, playgrounds, tennis courts, swimming pools, and school campuses.

(4) Must be no more than [ten percent (10%)] of the total Unenclosed Area of the Multi-Unit Residence for which it is designated.

(5) Must have a clearly marked perimeter.

(6) Must be identified by conspicuous signs.

(c) No Person with legal control over a Common Area in which Smoking is prohibited by this [chapter / article] or other law shall knowingly permit the presence of ash trays, ash cans, or other receptacles designed for or primarily used for disposal of Smoking waste within the area.

(d) Clear and unambiguous “No Smoking” signs shall be posted in sufficient numbers and locations to make Common Areas where Smoking is prohibited by this [article / chapter] or other law obvious to a reasonable person. The signs shall have letters of no less than one inch in height or contain the international “No Smoking” symbol (consisting of a pictorial representation of a burning cigarette enclosed in a red circle crossed by a red bar). Such signs shall be maintained by the Person or Persons with legal control over the Common Areas. The absence of signs shall not be a defense to a violation of any provision of this [article / chapter].

Sec. [____ (*3)]. NONSMOKING BUFFER ZONES.

(a) Smoking is prohibited in Unenclosed Areas of Multi-Unit Residence, including balconies, porches, decks, and patios, within twenty-five (25) feet in any direction of any doorway, window, opening, or other vent into an Enclosed Area that is a Nonsmoking Area.

COMMENT: This section addresses the problem of Smoking so close to a “nonsmoking” area that Smoke easily drifts into it. This restriction even applies to Smoking on exclusive-use balconies, porches, decks, and patios of Units where Smoking would otherwise be allowed, *if* these areas are within 25 feet of a nonsmoking Unit. A community can make *all* exclusive-use outdoor areas nonsmoking. To do so, include the optional subsection (d) below.

[(b) Smoking is prohibited in Unenclosed Areas of Adjacent Property within twenty-five (25) feet in any direction of any doorway, window, opening, or other vent into an Enclosed Area that is a Nonsmoking Area.]

COMMENT: To create the most comprehensive smokefree buffer zone, include this option. This subsection creates a smokefree buffer zone that extends to Unenclosed Areas on *neighboring* property that is within 25 feet of any doorway, window, etc., of the Multi-Unit Residence. This comprehensive provision can be fine-tuned by selecting a version of the “Adjacent Property” definition

to exempt certain types of neighboring property, such as property containing detached single-family homes, while still prohibiting Smoking on other private property, such as bar patios and loading docks. If this option is not included in your community's ordinance, the defined term "Adjacent Property" in Section *1 should be deleted.

[(c) Subsections (a) and (b) above do not apply to a Person who is Smoking in the restricted buffer zone area for less than a minute while actively passing on the way to another destination, and who does not enter the buffer zone area while Smoking more than twice per day.]

COMMENT: This optional exemption for a passerby who is Smoking (e.g., Smoking while walking or driving by) is a common component of entryway Smoking bans. However, such an exemption could prove problematic in the multi-unit housing context because a Person who is Smoking could claim to be just passing through but in fact be intentionally violating the ordinance. The timing restriction is an attempt to limit this problem but does not eliminate it completely. Without this exemption, a Person who is Smoking in a buffer zone while passing through it will be in violation of the law.

[(d) Notwithstanding any other provision of this [article / chapter], Smoking is prohibited in all exclusive-use Unenclosed Areas associated with a Unit, such as, for example, a private balcony, porch, deck, or patio.]

COMMENT: This optional subsection prohibits Smoking in *all* exclusive-use outdoor areas that are associated with a Unit even if Smoking is permitted within the Unit (i.e., it is not a designated nonsmoking Unit). By doing so, this subsection unambiguously addresses the problem of Smoke drifting from the balcony or patio of one Unit into a neighboring Unit, a top complaint from residents living in multi-family housing. On the other hand, it might have the effect of leading people to increase their Smoking in the Unit, despite public health and fire safety advice to only engage in Smoking outside.

Sec. [____ (*4)]. SMOKING RESTRICTIONS IN NEW UNITS OF MULTI-UNIT RESIDENCES.

(a) All New Units of a Multi-Unit Residence are hereby designated nonsmoking Units, including any associated exclusive-use Enclosed Areas or Unenclosed Areas, such as, for example, a private balcony, porch, deck, or patio; and including without limitation New Units in a Rental Complex and New Units in a Common Interest Complex.

(b) Smoking in a designated nonsmoking Unit is a violation of this [article / chapter] as provided in Section [____ (*9)].

COMMENT: As written, this section applies to *all* New Units of a Multi-Unit Residence. While the percentage of nonsmoking New Units required is a policy choice and may be modified, 100% nonsmoking Units is recommended. If your community chooses to require a lesser percentage, substitute the following provision:

(a) Up to one hundred percent (100%), but no less than [ninety percent (90%)], of New Units of a Multi-Unit Residence, including, for example, any associated exclusive-use Enclosed Areas or Unenclosed Areas, such as a private balcony, porch, deck, or patio, shall be permanently designated as nonsmoking Units by the Person or Persons causing the construction of the New Units.

(b) Smoking in a designated nonsmoking Unit shall be a violation of this [article / chapter] as provided in Section [____ (*9)].

(c) Designated nonsmoking Units shall not share a ventilation system with a Unit in which Smoking may be allowed. To the maximum extent practicable, nonsmoking Units shall be grouped together vertically and horizontally and physically separated from Units where Smoking may be allowed. Where possible, all units where Smoking may be allowed shall be in a single building of a multi-building Multi-Unit Residence.

(d) The designations required by subsection (a) above shall be permanent; shall be submitted in accordance with Section [____ (*10)]; and shall be submitted by the Person who controls the Multi-Unit Residence in which the New Unit is located prior to any sale or lease of a New Unit and before a New Unit is occupied. The submitted designations must contain a description of each designated nonsmoking Unit sufficient to identify the Unit and must be accompanied by a diagram depicting the location of the designated nonsmoking Units in relation to all other Units.

Sec. [____ (*5)]. NONSMOKING DESIGNATIONS FOR EXISTING UNITS OF A COMMON INTEREST COMPLEX.

COMMENT: This subsection prohibits Smoking inside *all* existing Units in a Common Interest Complex, such as condominiums, but provides an opportunity for the homeowners' association to hold an election to allow Smoking in some of the existing Units. A potential incentive for a Common Interest Complex to establish 100% nonsmoking Units is that *no action* is required to set this standard. Action is only required if the Common Interest Complex wishes to "opt out" of the 100% default established in subsection (a).

If your community wants to prohibit Smoking in *all* existing Units of Common Interest Complexes regardless of owner preferences, omit subsection (c) and the reference to it in subsection (a) ("*provided, however, that a lesser percentage of Units may be designated nonsmoking Units if a Common Interest Complex fully complies with subsection (c) below.*"). On the other hand, if your community wants to regulate *only* Rental Complexes and not Common Interest Complexes, delete this entire Section (*5).

(a) All Units of a Common Interest Complex that are not New Units, including any associated exclusive-use Enclosed Areas or Unenclosed Areas, such as, for example, a private balcony, porch, deck, or patio, are hereby designated nonsmoking Units as of [*insert effective date of*

ordinance + 1 year]; provided, however, that a lesser percentage of Units may be designated nonsmoking Units if a Common Interest Complex fully complies with subsection (c) below.

(b) Smoking in a designated nonsmoking Unit is a violation of this [article / chapter] as provided in Section [___ (*9)].

(c) By a vote of the membership as provided in subsection (1) below, a Common Interest Complex may choose to designate fewer than one-hundred percent (100%) of existing Units as nonsmoking Units by fully complying with the requirements stated in subsections (1) - (4) below. Otherwise subsection (a) above shall apply.

(1) A vote by the membership on the threshold question of allowing less than one hundred percent (100%) of Units to be designated nonsmoking Units must take place before [*insert effective date of ordinance + 270 days*].

COMMENT: The recommended timeframe of 270 days (or nine months) is suggested as a reasonable amount of time to organize and hold the homeowners' association election while adhering to the legally required guidelines.

(2) Up to one hundred percent (100%), but no less than [eighty percent (80%)], of Units that are not New Units, including, for example, any associated exclusive-use Enclosed Areas or Unenclosed Areas, such as, for example, a private balcony, porch, deck, or patio, shall be permanently designated as nonsmoking Units.

(3) Where possible, best efforts shall be made to group nonsmoking Units together, both horizontally and vertically, and physically separate them from Units where Smoking may be allowed.

(4) No later than [*insert effective date of ordinance + 1 year*] the final designations must be made and the following must be submitted in accordance with Section [___ (*10)]:

(i) a description of each designated nonsmoking Unit sufficient to readily identify the Unit; and

(ii) a diagram depicting the location of the designated nonsmoking Units in relation to all other Units.

Sec. [___ (*6)]. NONSMOKING DESIGNATIONS FOR EXISTING UNITS OF A RENTAL COMPLEX.

COMMENT: This subsection prohibits Smoking inside *all* existing Units in a Rental Complex, but provides an opportunity for a Landlord to allow Smoking in some of the existing Units. A potential incentive for a Landlord to establish 100% nonsmoking Units is that only *limited action* is required by a Landlord to set this standard. Substantial action is required if the Landlord wishes to "opt out" of the 100% default established in subsection (a).

If your community wants to prohibit Smoking in *all* existing Units

of Multi-Unit Residences regardless of Landlord preference, omit subsection (d) entirely and all references to subsection (d) in subsections (a)–(c).

(a) All Units of a Rental Complex that are not New Units, including any associated exclusive-use Enclosed Areas or Unenclosed Areas, such as, for example, a private balcony, porch, deck, or patio, are hereby designated nonsmoking Units as of [*insert effective date of ordinance + 120 days*]; provided, however, that a lesser percentage of Units may be designated nonsmoking Units if a Landlord fully complies with subsection (d) below.

(b) Smoking in a designated nonsmoking Unit is a violation of this [article / chapter] as provided in Section [___ (*9)].

(c) Except if a Landlord fully complies with subsection (d) below, at least sixty (60) days before [*insert effective date of ordinance + 120 days*], the Landlord shall provide each tenant with:

(1) a written notice clearly stating that all Units, including the tenant’s Unit, are designated nonsmoking Units and that Smoking in a Unit will be illegal as of [*insert date specified in Sec. *9(c)*]; and

(2) a copy of this [article / chapter].

(d) A Landlord may choose to designate fewer than one-hundred percent (100%) of existing Units that are not New Units of a Rental Complex as nonsmoking Units by fully complying with the requirements stated in subsections (1) - (7) below. However, subsection (a) above shall apply whenever a Landlord takes no action or only partially complies with the requirements of this subsection.

COMMENT: This subsection provides a step-by-step approach to designating nonsmoking and Smoking-allowed Units in Rental Complexes. This ordinance contains a recommended implementation process that allows tenants and Landlords to become familiar with the new Smoking restrictions over a 12-month period. Here is a timeline illustrating the implementation schedule:

Timeline to Designate Nonsmoking Units



Implementing a smokefree housing law by using a reasonable phase-in period followed by a certain date on which everyone is required to abide by the law is generally perceived to be the most fair approach—balancing public health needs against the potential inconvenience the ordinance puts on Smoking tenants and Landlords who must implement the new policy. For legal

reasons, a 12-month phase-in period strikes a good balance between the potential legal rights of tenants under existing agreements and the legal authority of Landlords to modify those agreements as this ordinance requires.

Your community may want to provide additional recommendations or guidelines for Landlords on what other steps a Landlord might want to take when designating nonsmoking Units. These could include conducting a tenant survey to determine who would like to live in a nonsmoking Unit, holding a house meeting to discuss the new policy, and/or hosting cessation classes for tenants.

Alternative approaches to the 12-month phase-in period could include multiple-year phase-in periods based on tenant turnover, waivers to smokers who request them, and permanent grandfathering. A 12-month phase-in approach, however, is a more effective strategy. Please contact TALC for assistance if an alternative to the phase-in period is desired.

(1) The Landlord shall permanently designate up to one hundred percent (100%) of Units, but no less than [eighty percent (80%)] of Units, including, for example, any associated exclusive-use Enclosed Areas or Unenclosed Areas, such as, for example, a private balcony, porch, deck, or patio, as nonsmoking Units by the Landlord.

(2) To the maximum extent practicable, nonsmoking Units must be grouped together both horizontally and vertically and physically separated from Units where Smoking may be allowed. Where possible all Units where Smoking may be allowed shall be in a single building of a multi-building Multi-Unit Residence.

(3) No later than [*insert effective date of ordinance + 120 days*] a Landlord who chooses to designate fewer than 100% of the Units of a Multi-Unit Residences as nonsmoking shall submit the following in accordance with Section [____ (*10)]:

(i) a description of each designated nonsmoking Unit sufficient to identify the Unit; and

(ii) a diagram depicting the location of the designated nonsmoking Units in relation to all other Units.

(4) At least sixty (60) days before submitting the nonsmoking Unit designations required by subsection (3) above, the Landlord shall provide each tenant with:

(i) a written notice of the proposed designations, clearly stating that Smoking in a Unit which is designated as a nonsmoking Unit will be illegal as of [*insert date specified in Section *9(c)*], and inviting comments on the proposed designations of nonsmoking Units within the requisite timeline;

(ii) a diagram depicting the location of the designated nonsmoking Units in relation to all other Units; and

(iii) a copy of this [article / chapter].

COMMENT: This subsection requires Landlords to provide tenants notice of proposed nonsmoking designations before the designations are final. The intent is to allow tenants to provide comments to the Landlord so that the Landlord can accommodate tenant wishes, if possible. Note, however, that the Landlord is not obligated to make changes based on tenants' comments. Existing law prohibits a Landlord from making designations adverse to a tenant's interests for a discriminatory or other illegal purpose.

A copy of this ordinance is required to accompany the notice of a nonsmoking Unit designation so that tenants may assess for themselves their full rights and obligations. Alternatively, the ordinance can be reworded so that a summary of tenants' rights and obligations is required instead of (or in addition to) a copy of the ordinance itself. If this approach is adopted, steps should be taken to ensure the accuracy and appropriateness of any summary, as summaries are inherently incomplete.

(5) A Landlord may modify the proposed designations based upon comments received from tenants.

(6) At least thirty (30) days before submitting the final designations of nonsmoking Units required by subsection (3) above, the Landlord shall provide all tenants written notice of the final designations clearly stating that Smoking in a designated nonsmoking Unit will be illegal as of [*insert date specified in Section *9(c)*], and a copy of the final documents that will be submitted pursuant to Section [____ (*10)] of this [article / chapter]. These final designations may differ from the proposed designations on which tenants were invited to comment.

(7) A Unit in a Rental Complex for which a Landlord is required to submit information pursuant to Section [____ (*10)] of this [article / chapter] but for which such information, for any reason, is not fully and timely submitted is hereby designated as a nonsmoking Unit as of [*insert effective date of ordinance + 120 days*].

Sec. [____ (*7)]. REQUIRED AND IMPLIED LEASE TERMS FOR ALL NEW AND EXISTING UNITS IN RENTAL COMPLEXES.

COMMENT: This section requires that Smoking restrictions be included as part of the lease. Note that the term "Unit" includes the defined term "New Unit," so whenever the term Unit is used in the ordinance, it includes *all* Units, both existing and new.

By including these provisions in lease agreements, Landlords may enforce the Smoking restrictions just like any other condition in the lease, such as common provisions regarding noise, use of laundry facilities, and damage to common areas. Further, by including the "third-party beneficiary" provision, other tenants will be able to enforce a lease's Smoking restrictions. The Landlord and other tenants become an alternate enforcement authority for the Smoking restrictions in addition to possible local government enforcement of the law (see Section *12 Enforcement) and optional private citizen enforcement (see Section *13 Private Enforcement).

Note also that after a Landlord amends an existing rental agreement or enters into a new lease to include these required terms, Smoking in violation of those terms becomes illegal pursuant to Section *9, and not just a material breach of the lease.

(a) Every lease or other rental agreement for the occupancy of a Unit in a Rental Complex, including, for example, New Units and existing Units, entered into, renewed, or continued month-to-month after [*insert effective date of ordinance*], shall include the provisions set forth in subsection (b) below on the earliest possible date when such an amendment is allowable by law when providing the minimum legal notice.

COMMENT: This provision calls for the Landlord to amend a rental agreement at the first opportunity. It is also designed to provide tenants with adequate legal notice of the pending change in their lease terms. The overall objective is to insert the new terms into every lease within one year after the effective date of ordinance (assuming leases are for one year or less).

(b) Every lease or other rental agreement for the occupancy of a Unit in a Rental Complex, including, for example, New Units and existing Units, entered into, renewed, or continued month-to-month after [*insert effective date of ordinance*], shall be amended to include the following provisions:

COMMENT: The following subsections contain both an explicit directive regarding the *legal effect* the required clause must achieve followed by an example clause based on the directive. Because leases vary in terms, format, and language, it is not possible to provide verbatim wording that can be easily dropped into any lease. These clause requirements provide a Landlord with needed flexibility to conform an existing lease while using terms consistent with the rest of the lease. In many cases, a Landlord can probably just use the example language provided with minimal changes.

(1) A clause providing that as of [*insert effective date of ordinance* + one year], it is a material breach of the agreement to allow or engage in Smoking in the Unit unless the Landlord has supplied written notice that the Unit has not been designated a nonsmoking Unit and no other prohibition against Smoking applies. Such a clause might state, “It is a material breach of this agreement for tenant or any other person subject to the control of the tenant or present by invitation or permission of the tenant to engage in smoking in the unit as of [*insert effective date of ordinance* + one year] unless landlord has provided written notice that the unit has not been designated a nonsmoking unit and smoking in the unit is not otherwise prohibited by this agreement, other agreements, or by law.”

(2) A clause providing that it is a material breach of the agreement for tenant or any other Person subject to the control of the tenant or present by invitation or permission of the tenant to engage in Smoking in any Common Area of the property other than a designated Smoking area. Such a clause might state, “It is a material breach of this agreement for tenant or any other person subject to the control of the tenant or present by invitation or permission of the tenant to engage in smoking in any common area of the property, except in an outdoor designated smoking area, if one exists.”

(3) A clause providing that it is a material breach of the agreement for tenant or any other Person subject to the control of the tenant or present by invitation or permission of the tenant to violate any law regulating Smoking while anywhere on the property. Such a clause might state, "It is a material breach of this agreement for tenant or any other person subject to the control of the tenant or present by invitation or permission of the tenant to violate any law regulating smoking while anywhere on the property."

(4) A clause expressly conveying third-party beneficiary status to all occupants of the Rental Complex as to the Smoking provisions of the agreement. Such a clause might state, "Other occupants of the property are express third-party beneficiaries of those provisions in this agreement that concern smoking. As such, other occupants of the property may seek to enforce such provisions by any lawful means, including by bringing a civil action in a court of law."

COMMENT: Declaring other residents third-party beneficiaries grants people living in the Rental Complex limited rights to enforce the Smoking restrictions in leases. Without the declaration, other residents usually have no legal right to enforce the lease terms (because they are not a "party" to the agreement) and the power to enforce the terms of the lease rests solely with the Landlord.

(c) Whether or not a Landlord complies with subsections (a) and (b) above, the clauses required by those subsections shall be implied and incorporated by law into every agreement to which subsections (a) or (b) apply and shall become effective as of the earliest possible date on which the Landlord could have made the insertions pursuant to subsections (a) or (b).

COMMENT: This is a back-up provision to ensure that the Smoking-related terms are included by law, even if the Landlord fails to comply with subsections (a) or (b).

(d) A tenant who breaches a Smoking provision of a lease or other rental agreement for the occupancy of a Unit in a Rental Complex, or who knowingly permits any other Person subject to the control of the tenant or present by invitation or permission of the tenant, shall be liable for the breach to: (i) the Landlord; and (ii) any occupant of the Rental Complex who is exposed to Smoke or who suffers damages as a result of the breach.

COMMENT: This provision provides other tenants legal standing to seek damages or possibly an injunction against someone Smoking in violation of a lease term.

There are two additional enforcement mechanisms in this ordinance:

Section *12 "Enforcement" provides for traditional enforcement by local government officials.

Section *13 "Private Enforcement" grants *any* member of the public the right to enforce the ordinance. Thus, a Landlord, a tenant, or a member of the public could bring a lawsuit to enforce the ordinance in either Superior Court or small claims court if Section *13 is included.

(e) This [article / chapter] shall not create additional liability in a Landlord to any Person for a tenant's breach of any Smoking provision in a lease or other rental agreement for the occupancy of a Unit in a Rental Complex if the Landlord has fully complied with this Section and Section [__ (*6)].

COMMENT: This provision expressly states that the Landlord is not the guarantor of the ordinance's enforcement. That is, the Landlord is not contractually required to enforce the no-Smoking lease terms and other residents cannot force the Landlord to act against a tenant who violates one. Including this provision can be extremely important in efforts to gain Landlord support for the ordinance.

(f) Failure to enforce any Smoking provision required by this [article / chapter] shall not affect the right to enforce such provision in the future, nor shall a waiver of any breach constitute a waiver of any subsequent breach or a waiver of the provision itself.

COMMENT: This is a technical legal provision designed to prevent a court from inferring a permanent waiver of a Smoking-related provision from a pattern of lax enforcement.

Sec. [____ (*8)]. ADDITIONAL DUTIES OF A LANDLORD OF A RENTAL COMPLEX WITH LESS THAN ONE HUNDRED PERCENT (100%) NONSMOKING UNITS.

A Landlord of a Rental Complex with less than one hundred percent (100%) nonsmoking Units shall provide to every prospective tenant, prior to entering into a new lease or other rental agreement for the occupancy of a Unit in a Rental Complex, a copy of the designation documents submitted pursuant to Section [____ (*6)] describing each designated nonsmoking Unit with an accompanying diagram depicting the location of nonsmoking Units in relation to all other Units and any designated Smoking areas.

COMMENT: This section requires the Landlord to notify prospective tenants of the location of nonsmoking Units to Units where Smoking may be permitted. It does not require the Landlord to inquire as to any tenant's personal Smoking habits. Instead, the Landlord merely identifies for prospective tenants which Units allow Smoking and which do not.

If the community decides to make 100% of existing Units in Rental Complexes nonsmoking with no Landlord election, this Section can be omitted.

Sec. [____ (*9)]. SMOKING PROHIBITED BY LAW IN CERTAIN AREAS.

COMMENT: This section consolidates the actual Smoking prohibitions. Rather than state that Smoking is prohibited numerous times in various sections of the ordinance, those sections simply refer the reader to this Section *9. One benefit of consolidation is a uniformity of the Smoking prohibitions between sections.

(a) Smoking in a Common Area, on or after [*insert effective date of ordinance*], other than in a designated Smoking area established pursuant to Section [____ (*2)], is a violation of this [article / chapter].

(b) Smoking in a New Unit, on or after [*insert effective date of ordinance*], is a violation of this [article / chapter].

(c) Smoking in a designated nonsmoking Unit, on or after [*insert effective date of ordinance* + *1 year*], is a violation of this [article / chapter].

(d) No Person shall engage in Smoking in any Nonsmoking Area.

COMMENT: Note that whenever a lease contains a no- Smoking term, this provision makes Smoking in such a Unit *against the law* in addition to being a violation of the lease. This provision also applies to any nonsmoking rules or CC&Rs for a Common Interest Complex.

Thus, when a Landlord amends an existing rental agreement or creates a new one to include the lease terms required by Section *7, Smoking in violation of those lease terms then becomes illegal, not just a lease violation.

(e) No Person with legal control over any Nonsmoking Area shall permit Smoking in the Nonsmoking Area, except as provided in Section [____ (*7)(e)].

COMMENT: This provision makes Smoking in a nonsmoking area or Unit against the law, even if an area is made nonsmoking only by a lease term (rather than an ordinance, for example). It also makes a tenant responsible for Smoking by his or her guests. The exception refers back to the subsection limiting a Landlord's liability for a tenant's breach of a no-smoking term.

Sec. [____ (*10)]. PROCEDURES AND REQUIREMENTS FOR MANDATED SUBMISSIONS.

(a) Submissions required by this [article / chapter] must be received by [*insert the municipal office or official who will administer the record-keeping requirements of the ordinance*] on or before any applicable due date. The submissions shall include all material and information required by this [article / chapter] and such other materials and information as [*insert the designated municipal office or official*] deems necessary for the administration and enforcement of this [article / chapter].

COMMENT: The community should fill in the blanks with the appropriate office, official, or department that can accommodate the record-keeping requirements of this ordinance and that can handle the anticipated requests from the public for access to the information. Communities will likely differ as to which department is best suited to fill this role.

(b) All material and information submitted pursuant to this [article / chapter] constitute disclosable public records and are not private or confidential.

Sec. [____ (*11)]. SMOKING AND SMOKE GENERALLY.

(a) The provisions of this [article / chapter] are restrictive only and establish no new rights for a Person who engages in Smoking. Notwithstanding (i) any provision of this [article / chapter] or other provisions of this Code, (ii) any failure by any Person to restrict Smoking under this [article / chapter], or (iii) any explicit or implicit provision of this Code that allows Smoking in any place, nothing in this Code shall be interpreted to limit any Person's legal rights under other laws with regard to Smoking, including, for example, rights in nuisance, trespass, property damage, and personal injury or other legal or equitable principles.

COMMENT: The subsection spells out that the intent of this ordinance is to create new smokefree areas and to enhance the right of nonsmokers to smokefree environments. This ordinance does not provide smokers with any "safe harbors" from existing laws that might already impose potential liability for Smoking.

Subsection (a) *does not* expand traditional nuisance law in any way, and should generally be included in all ordinances based on this model. Subsection (c) below does potentially expand traditional nuisance law.

(b) Notwithstanding any other provision of this [article / chapter], Smoking marijuana for medical purposes as permitted by California Health and Safety Code sections 11362.7 *et seq.* is not prohibited by this [article / chapter].

(c) For all purposes within the jurisdiction of the [City / County of ____], nonconsensual exposure to Smoke [occurring on or drifting into residential property] is a nuisance, and the uninvited presence of Smoke on [residential] property is a nuisance and a trespass.

COMMENT: The declaration in subsection (c) that Smoke is a nuisance extends far beyond the residential context, unless limited by including the optional language in brackets. Once Smoke is declared a nuisance, nuisance abatement laws can be used to address Smoke around doorways, at businesses, in public venues, and anywhere else it may occur. However, declaring Smoke a nuisance is particularly helpful in the housing context because it eliminates the need to prove that some particular level of exposure has occurred and then to prove that such exposure is an unjustified intrusion or hazard.

California Government Code section 38771 explicitly authorizes cities to declare nuisances by ordinance. Counties may declare a nuisance pursuant to the broad police power set forth in the California Constitution, article XI, section 7.

Sec. [____ (*12)]. PENALTIES AND ENFORCEMENT.

(a) The remedies provided by this [article / chapter] are cumulative and in addition to any other remedies available at law or in equity.

COMMENT: The following provisions are designed to offer a variety of options to the drafter and to the enforcing agency. Drafters may choose to include some or all of these options. Once the ordinance is enacted, the enforcing agency will have the discretion to choose which enforcement tools to use in any given case. As a practical matter, these enforcement options would not be applied in a single case, although multiple remedies might be used against a particularly egregious violator over time.

(b) Every instance of Smoking in violation of this [article / chapter] is an infraction subject to a [one hundred dollar (\$100)] fine. Other violations of this [article / chapter] may, in the discretion of the [City Prosecutor / District Attorney], be prosecuted as infractions or misdemeanors when the interests of justice so require. Enforcement of this chapter shall be the responsibility of [____]. In addition, any peace officer or code enforcement official also may enforce this chapter.

COMMENT: The first sentence establishes the penalty for the core type of violation: Smoking where it is prohibited. The fine amount can be modified but cannot exceed \$100 for a first infraction. (See California Government Code section 36900.) It is separated from the main enforcement provision that follows so that law enforcement officers can simply write a ticket for illegal Smoking. The second sentence, sometimes called a “wobbler,” affords the prosecuting attorney discretion whether to pursue a violation as an infraction (like a parking ticket) or a misdemeanor (a crime punishable by up to a \$1,000 fine and/or six months in County Jail). Alternatively, violations can be set as *either* an infraction or a misdemeanor in all circumstances. Misdemeanors are more serious crimes for which a jury trial is available to defendants. Fines and other criminal penalties are established by the Penal Code and are typically reflected in the general punishments provision of a local code.

This provision also designates a primary enforcement agency, which is recommended, but remains flexible by permitting any enforcement agency to enforce the law.

(c) Violations of this [article / chapter] are subject to a civil action brought by the [City / County of ____], punishable by a civil fine not less than [two hundred fifty dollars (\$250)] and not exceeding [one thousand dollars (\$1,000)] per violation.

COMMENT: This provision provides civil fines for violating the ordinance. It requires that a traditional civil suit be filed by the city or county (possibly in small claims court). The fine amounts can be adjusted but cannot exceed \$1,000 per violation. (See California Government Code section 36901.)

(d) No Person shall intimidate, harass, or otherwise retaliate against any Person who seeks compliance with this [article / chapter]. Moreover, no Person shall intentionally or recklessly expose another Person to Smoke in response to that Person’s effort to achieve compliance with this [article / chapter]. Violation of this subsection shall constitute a misdemeanor.

(e) Causing, permitting, aiding, or abetting a violation of any provision of this [article / chapter] shall also constitute a violation of this [article / chapter].

COMMENT: This is standard language that is typically included in a city or county code and may be omitted if duplicative of existing code provisions.

(f) Any violation of this [article / chapter] is hereby declared to be a public nuisance.

COMMENT: By expressly declaring that a violation of this ordinance is a nuisance, this provision allows enforcement of the ordinance by the city or county via the administrative nuisance abatement procedures commonly found in municipal codes.

Note that this declaration merely says that *violating* the ordinance qualifies as a nuisance (e.g., when Smoking in a nonsmoking area, the *violation* is the nuisance, not the *Smoke*). It is not the same thing as a local ordinance declaring Smoke a nuisance. Please see Section *11(c) for the declaration that nonconsensual exposure to secondhand is a nuisance.

(g) In addition to other remedies provided by this [article / chapter] or otherwise available at law or in equity, any violation of this [article / chapter] may be remedied by a civil action brought by the [City Attorney / County Counsel], including, without limitation, administrative or judicial nuisance abatement proceedings, civil or criminal code enforcement proceedings, and suits for injunctive relief.

COMMENT: It is common to provide that the local government's lawyers may go to court to seek injunctions and other penalties in addition to fines. The express provision for injunctive relief lowers the showing required to obtain a preliminary or permanent injunction as described in *IT Corp. v. County of Imperial*, 35 Cal.3d 63 (1983).

A public agency should think carefully about the nuisance abatement procedure it chooses in enforcing this ordinance after it is adopted. A local government may provide for treble damages for the second or subsequent nuisance abatement judgment within a two-year period, as long as the ordinance is enacted pursuant to Government Code section 38773.7. Treble damages are not available, however, under the alternative nuisance abatement procedures in Government Code section 38773.1 and Health & Safety Code section 17980. Government Code section 38773.5 establishes a procedure for nuisance abatement where the cost of the abatement can be collected via the property tax roll as a special assessment against the property on which the violation occurs.

[(h) Any Person, including a legal entity or organization, acting for the interests of itself, its members, or the general public may bring a civil action for injunctive relief to prevent future such violations or sue to recover such actual or statutory damages as he or she may prove.]

COMMENT: If Section *13 "Private Enforcement" is not included, consider including this simple provision, which provides a far more limited type of private enforcement. If Section *13 is included, this provision should be omitted.

[(i) Except as otherwise provided, enforcement of this [article / chapter] is at the sole discretion of the [City / County of _____]. Nothing in this [article / chapter] shall create a right of action in any Person against the [City / County of _____] or its agents to compel public enforcement of this [article / chapter] against private parties.]

COMMENT: This is an optional provision, which makes clear that a City or County cannot be liable to any Person for failure to enforce the Smoking restrictions in this ordinance.

Sec. [_____ (*13)]. PRIVATE ENFORCEMENT.

COMMENT: This "Private Enforcement" provision makes it possible for any member of the public to sue violators of this ordinance. This "private right of action" section provides an avenue for private persons to file suit. Such a right was curtailed after the passage of Proposition 64 in November 2004, which prohibited the use of California Business and Professions Code section 17200 by private persons to file suits on behalf of the public. However, nothing in Proposition 64 prohibits local governments from creating a private right of action to enforce violations of local law.

Note that although this section is titled "Private Enforcement," the city or county itself can also use these provisions if it deems them preferable to other enforcement options or if it seeks to impose additional sanctions.

For further explanation of the rationale behind and potential impact of this provision, please see TALC's memorandum entitled "The Benefits of Adding a Private Right of Action Provision to Local Tobacco Control Ordinances" available from our website at www.phpnet.org/tobacco-control.

If this "Private Enforcement" provision is not included, consider including the optional language in Section *12(h).

(a) Any Person, including a legal entity or organization or a government agency, acting for the interests of itself, its members, or the general public may bring a civil action to enforce this [article / chapter]. Upon proof of a violation, a court shall award the following:

COMMENT: This provision allows a Person to sue a violator if the Person has been personally harmed or if the Person wants to act as a private attorney general by holding the violator accountable on behalf of the general public.

(1) Damages in the amount of either:

(i) upon proof, actual damages; or

(ii) with insufficient or no proof of damages, \$[500] for each violation of this [article / chapter] (hereinafter "Statutory Damages"). Each day of a continuing violation shall constitute a separate violation. Notwithstanding any other provision of this [article / chapter], no Person suing on behalf of the general public shall recover Statutory Damages based upon a violation of this [article / chapter] if a previous claim brought on behalf of

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the general public by another Person for Statutory Damages and based upon the same violation has been adjudicated, whether or not the Person bringing the subsequent claim was a party to the prior adjudication.

COMMENT: This provision allows for the collection of damages even if it is difficult or impossible to prove the actual amount of damages resulting from a given violation. Statutory damages can add up to a substantial sum because each day of a continuing violation is a separate violation. However, if an action is brought in small claims court, the total amount of damages sought must fall below \$5,000 (or \$7,500 if the small claims suit is brought by a natural person). So, when considering the amount at which to set statutory damages, it is worth considering whether a typical case brought under the ordinance will involve a claim for less than \$5,000 (or \$7,500). Note that this provision protects a person from being sued multiple times on behalf of the general public for the same violation and must do so to prevent the ordinance from being challenged as unconstitutionally punitive.

(2) Exemplary damages, where it is proven by clear and convincing evidence that the defendant is guilty of oppression, fraud, malice, retaliation, or a conscious disregard for the public health.

COMMENT: Exemplary damages are also known as *punitive damages*. They are designed to punish and deter a defendant in a tort case who has acted in an outrageous manner.

(b) The Person may also bring a civil action to enforce this [article / chapter] by way of a conditional judgment or an injunction. Upon proof of a violation, a court shall issue a conditional judgment or an injunction.

COMMENT: In order to get an injunction, a plaintiff would have to sue in another division of superior court and not the small claims division. However, a plaintiff could seek a conditional judgment in small claims court. Note that the difference between an injunction and a conditional judgment is that with the former, the defendant is directly ordered to do something (or to refrain from doing something). With a conditional judgment, however, the defendant is given a choice between fulfilling certain conditions (e.g., ceasing the illegal conduct) or suffering a different judgment (e.g., paying monetary damages). (See *1 Consumer Law Sourcebook: Small Claims Court Laws and Procedures* (California Department of Consumer Affairs 2005.) A conditional judgment could serve as an alternative to damages, or it could be in addition to damages. For example, a small claims court could order some monetary damages along with a conditional judgment giving the defendant a choice between stopping the violations or paying even more money.

(c) Notwithstanding any legal or equitable bar against a Person seeking relief on its own behalf, a Person may bring an action to enforce this [article / chapter] solely on behalf of the general public. When a Person brings an action solely on behalf of the general public, nothing about such an action shall act to preclude or bar the Person from bringing a subsequent action based upon the same facts but seeking relief on his, her or its own behalf.

COMMENT: This is an important clause, so exercise care when considering whether to modify or eliminate it. This clause accomplishes two distinct goals:

First, the clause permits a Person with a special relationship to a particular defendant to sue the defendant even though the Person might otherwise be prohibited from doing so. Attorneys often refer to such prohibitions as *legal and equitable bars*. For example, a tenant may be required to arbitrate—not litigate—any disputes, such as a dispute involving Smoking in a Multi-Unit Residence. Under this clause, a tenant may be required to arbitrate any *personal* claims (e.g., damages for personal injury from Smoke) but can nevertheless sue the tenant violating the ordinance in court as a representative member of the general public. In such a circumstance, the Person could only make the claims that *every* member of the general public could make (e.g., sue for Statutory Damages on behalf of the general public for a violation of this ordinance).

Second, the clause permits a Person who first sues *solely* on behalf of the general public to sue the same defendant later on any personal claims (although such personal claims might still be subject to legal or equitable bars as described above). Normally, repetitive suits based upon essentially the same facts and circumstances are prohibited. Attorneys often use the terms *res judicata*, *collateral estoppel*, or *issue or claim preclusion* for such prohibitions. Under this clause, however, a tenant subjected to Smoking in a Multi-Unit Residence can first sue the tenant violating the ordinance solely on behalf of the general public, receiving the statutory damages amount for each violation. If the tenant is made ill by the Smoke, she can sue the violating tenant later for personal injury.

This clause is not intended to modify well-established legal rules concerning when a plaintiff may bring personal claims. Rather, it simply reflects the reasoning that when a Person brings a claim *solely* on behalf of the general public, the plaintiff is acting as a private attorney general; thus, the existence of personal claims is irrelevant and such claims are unaffected.

(d) Nothing in this [article / chapter] prohibits a Person from bringing a civil action in small claims court to enforce this [article / chapter], so long as the amount in demand and the type of relief sought are within the jurisdictional requirements of that court.

COMMENT: This clause is legally superfluous, but it serves to flag for plaintiffs and courts that small claims court would be an appropriate forum for resolving disputes under this provision.

SECTION III. CONSTRUCTION, SEVERABILITY.

It is the intent of the [City Council / Board of Supervisors] of the [City / County] of [_____] to supplement applicable state and federal law and not to duplicate or contradict such law and this Ordinance shall be construed consistently with that intention. If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this Ordinance, or its application to any person or circumstance, is for any reason held to be invalid or unenforceable, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining sections, subsections,

subdivisions, paragraphs, sentences, clauses or phrases of this Ordinance, or its application to any other person or circumstance. The [City Council / Board of Supervisors] of the [City / County] of [_____] hereby declares that it would have adopted each section, subsection, subdivision, paragraph, sentence, clause or phrase hereof, irrespective of the fact that any one or more other sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases hereof be declared invalid or unenforceable.

COMMENT: This is standard language. Often this "boilerplate" is found at the end of an ordinance, but its location is irrelevant.

SMOKE-FREE POLICIES

Below is a list of where smoking is prohibited in other cities.

Baldwin Park:

1. Any elevator.
2. Any city-owned premises.
3. Any public park.
4. Any service area (defined as any place located outside of an enclosed building where people wait to access goods or services, including farmer's markets, bus stops, the Metrolink Station, ATM's, vending machines, information kiosks, etc.)
5. Any dining area.
6. Within 20 feet of any entrance to, exit from, or any open window of any building open to the public.

Beverly Hills:

1. All open air dining areas located on private or public property, including the public right of way.
2. Within five feet (5') of an open air dining area, except while actively passing on the way to another destination.
3. Cigarette vending machines are prohibited.

Burbank:

1. City facilities and parks (enclosed and non-enclosed) except for in designated smoking areas, certain areas of DeBell Golf Course, and public transit facilities.
2. All sidewalks and public rights-of-way within 20 feet of the property lines of any City facility.
3. All non-enclosed sidewalks, paseos, and other pedestrian areas in Downtown Burbank accessible to the general public.
4. All non-enclosed areas within five feet (5') of any pedestrian path or area in Downtown Burbank.
5. Chandler Bikeway and public rights-of-way within twenty feet (20') of Chandler Bikeway.
6. Outdoor dining areas and non-enclosed areas within five feet (5') of any outdoor dining area.
7. Outdoor service areas and non-enclosed areas within twenty feet (20') of outdoor service areas.
8. City transit vehicles and stations, and non-enclosed areas within twenty feet (20') of transit stations.
9. Outdoor gathering and event areas (permanent or temporary grandstands, bleachers, viewing areas, playing courts and fields, circulation areas, lobbies, foyers, restrooms, concession areas.
10. Outdoor shopping areas and centers, like farmer's markets, swap meet, street fair, plant nursery, etc. Also includes non-enclosed areas within twenty feet (20') of those areas.
11. Elevators
12. Proximity to buildings open to the public: Within twenty feet (20') of building entrance/exit
13. Designated non-smoking areas.
14. Common residential areas, such as swimming pools, hot tub area, children's play areas, enclosed common areas such as laundry rooms, recreation rooms, and gyms.
15. Private residential areas such as private balconies, patios, and non-enclosed areas.

Calabasas:

1. Everywhere in the city, including but not limited to: public places, places of employment, multi-unit residence common areas, enclosed and unenclosed places of hotels, businesses, restaurants and bars, and other public accommodations. (There are designated public smoking areas, as well as a designated number of guest rooms in any hotel or motel, and "smokers' outposts" in unenclosed areas in shopping mall common areas.)

Glendale:

1. On City property, in City vehicles and public transportation vehicles, and at city public transit stations, as well as within twenty feet (20') of city facilities.
2. In a place of employment, and within a twenty foot (20') distance from a place of employment.
3. Enclosed public places, and within a 20 foot (20') distance from an enclosed public place.
4. Non-enclosed public place, outdoor dining area, outdoor event, outdoor seating area, public transit station or stop.
5. Within a 20-foot (20') distance from the property line of a school.
6. Common areas of multiunit rental housing and residential condo complexes, and on outdoor balconies and patios of units.

Pasadena:

1. Any dedicated city park, playground, or recreation center.
2. All public places within the city, including but not limited to: elevators, hospitals and health care facilities, indoor service lines, public meeting rooms and places of public assembly, public restrooms, theaters and auditoriums, restaurants, hotel lobbies, and common areas within hotels and motels, excluding guest rooms.
3. All enclosed workplaces, including on-site cafeterias and lunchrooms, and lounges.
4. Outdoor areas of shopping malls.
5. Unenclosed areas of bars and restaurants.
6. Service waiting lines and within twenty feet (20') of such lines.
7. Outdoor public gathering events/special events/parades/fairs.

Santa Monica:

1. Any elevator.
2. Any public park, public beach, and anywhere on the Santa Monica Pier.
3. Any outdoor service area.
4. Inside any public building.
5. Any outdoor dining area.
6. Within twenty feet (20') of the entrance, exit, or open window of any building open to the public.
7. The Third Street Promenade.
8. Any Farmer's Market.
9. The property of any public library.