



CITY OF NEWPORT BEACH ENVIRONMENTAL QUALITY AFFAIRS COMMITTEE AGENDA - REVISED

DATE/TIME: Monday, August 16, 2010
7:00 p.m.

LOCATION: Police Department Auditorium
870 Santa Barbara Drive

This committee is subject to the Ralph M. Brown Act. Among other things, the Brown Act requires that the Commission's agenda be posted at least 72 hours in advance of each meeting and that the public be allowed to comment on agenda items before the Commission and items not on the agenda but are within the subject matter jurisdiction of the Commission. The Commission may limit public comments to a reasonable amount of time, generally either three (3) or five (5) minutes per person.

It is the intention of the City of Newport Beach to comply with the Americans with Disabilities Act (ADA) in all respects. If, as an attendee or a participant at this meeting, you will need special assistance beyond what is normally provided, the City of Newport Beach will attempt to accommodate you in every reasonable manner. Please contact Leilani Brown, City Clerk, at least 72 hours prior to the meeting to inform us of your particular needs and to determine if accommodation is feasible (949-644-3005 or lbrown@newportbeachca.gov).

Roll Call

1. Minutes of April 19, 2010 (*attachment 1*)
2. Minutes of June 21, 2010 (*attachment 2*)
3. Smoking Regulations (*attachment 3 – handouts from presentations on June 21, 2010*)
4. Coastal/Bay Water Quality Committee Representatives' Report
5. Economic Development Committee Representative's Report
6. Report from Staff on Current Projects
7. Public Comments
8. Future Agenda Items
9. Adjournment

NEXT MEETING DATE: September 20, 2010

*Attachments can be found on the City's website <http://www.newportbeachca.gov>. Once there, click on **Agendas and Minutes** then scroll to and click on **Environmental Quality Affairs**. If attachment is not on the web page, it is also available in the City of Newport Beach Planning Department, 3300 Newport Boulevard, Building C, 2nd Floor.

Any writings or documents provided to a majority of the Environmental Quality Affairs Committee regarding any item on this agenda will be made available for public inspection in the Planning Department located at 3300 Newport Blvd., Newport Beach, CA 92663 during normal business hours.

Attachment No. 1

Minutes of April 19, 2010



CITY OF NEWPORT BEACH ENVIRONMENTAL QUALITY AFFAIRS COMMITTEE

DRAFT MINUTES April 19, 2010

The Environmental Quality Affairs Committee held at the City of Newport Beach Police Department Auditorium, 870 Santa Barbara Drive, on **Monday, April 19, 2010.**

Members Present:

A	Nancy Gardner, Council Member	E	Barbara Thibault
X	Michael Henn, Council Member	X	Laura Curran
X	Arlene Greer, Chair	X	Vincent Lepore
X	Kimberly Jameson	X	Kevin Nolen
X	Kevin Kelly		
		A	Sandra Haskell
E	Michael Smith	X	Kathy Harrison
X	Ed Reno	X	Timothy Stoaks
A	Nick Roussos	X	Jay Myers
X	Joan Penfil	X	Charles McKenna
X	Bruce Asper	E	Debra Stevens
A	Merritt Van Sant	E	Michael Alti

Staff Representatives:

Guests:

X	James Campbell, Principal Planner	
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Chairperson Greer called the meeting to order at 7:05 p.m.

1. Minutes of February 22, 2010

Joan Penfil moved and Bruce Asper seconded to approve the minutes of February 22, 2010, as submitted.

Motion passed unanimously

2. Banning Ranch Presentations

- a. Banning Ranch Conservancy – Stephen Ray provided an overview of the Conservancy’s efforts to secure funding for the acquisition of the Banning Ranch property to preserve the site as habitat and open space as a component of the overall River Park concept. He noted the Conservancy’s goal to save the land from development due to the elimination of critical habitat and open space.

- b. Newport Banning Ranch – Mike Mohler provided an overview of the Newport Banning Ranch project that consists of the preservation of 65% of the 400 acre property as open space, environmental remediation/restoration efforts, consolidated oil production, 1,375 residential units, 75,000 square feet of commercial development and a 75 room hotel. He indicated that the comments from EQAC on the Notice of Preparation will be addressed in the forthcoming EIR being prepared by the City.

3. Coastal/Bay Water Quality Committee Representative's Report

Council Member Henn reported that the Committee received a presentation from the Utilities Department on the City's water wells in Fountain Valley. The Committee also heard a presentation on the Poseidon desalination plant proposed in Huntington Beach. Council Member Henn indicated that should the Poseidon facility come on-line in the future, its water production, combined with the City's wells, should make the City 100% independent from State water resources.

4. Economic Development Committee Representative's Report

Chairperson Greer reported that EDC had discussed sales and use taxes and the importance of transient occupancy taxes and the continuing efforts to secure hotel stays in the City for future Rose Bowl and BCS national championship football games. Transient occupancy tax revenue is on the rise and restaurants who participated in the recent Restaurant Weeks experienced increased sales. The next Restaurant Week will be in January of 2011. Chairperson Greer went on to report that the Marriott Hotel in Newport Center is planning an expansion of their ballroom spaces and that the City is examining its way-finding signs to improve their effectiveness. It was reported to the EDC that the blighted property on the north side of Coast Highway east of Dover Drive has been sold and the new owners are developing plans for redeveloping the site. Lastly, Chairperson Greer reminded the Committee 2010 Newport Beach Film Festival begins this week, April 22, 2010, and the Newport to Ensenada Race starts this Friday, April 23, 2010.

5. Report from Staff on Current Projects

Jim Campbell reported that the draft EIR for the Banning Ranch project is expected to be released for public review in mid-June.

6. Public Comments

None

7. Future Agenda Items

May – Smoking Ban update.

8. Adjournment

Chairperson Greer adjourned the meeting at 8:35 p.m.

Attachment No. 2

Minutes of June 21, 2010



CITY OF NEWPORT BEACH ENVIRONMENTAL QUALITY AFFAIRS COMMITTEE

DRAFT MINUTES June 21, 2010

The Environmental Quality Affairs Committee held at the City of Newport Beach Police Department Auditorium, 870 Santa Barbara Drive, on **Monday, June 21, 2010**.

Members Present:

X	Nancy Gardner, Council Member	X	Barbara Thibault
E	Michael Henn, Council Member	X	Laura Curran
X	Arlene Greer, Chair	E	Vincent Lepore
X	Kimberly Jameson	E	Kevin Nolen
E	Kevin Kelly		
		A	Sandra Haskell
A	Michael Smith	A	Kathy Harrison
X	Ed Reno	E	Timothy Stoaks
X	Nick Roussos	X	Jay Myers
A	Joan Penfil	E	Charles McKenna
X	Bruce Asper	E	Debra Stevens
A	Merritt Van Sant	A	Michael Alti

Staff Representatives:

Guests:

X	James Campbell, Principal Planner	Gary Sherwin, Newport Beach Conference and Visitors Bureau Natalie Wolfs, MSW/MPA, Regional Program Director, American Lung Association Abby Michelsen, President, Newport Harbor High School Heart Club
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Due to lack of quorum, Chairperson Greer adjourned the meeting to the next scheduled meeting of July 19, 2010.

Attachment No. 3

Smoking Regulations – Handouts From
Presentations on June 21, 2010

June 15, 2010

Ms. Arlene Greer
Chairwoman
Environmental Quality Affairs Committee
City of Newport Beach
3300 Newport Blvd.
Newport Beach, CA 92663

Western States Affiliate
Orange County
P.O. Box 6046
Irvine, CA 92616-8046
Tel 949 856 3555
Fax 949 856 3364
<http://www.americanheart.org>

Cardiovascular disease and stroke claim more lives each year than the next seven causes combined.

That's just one reason why we are committed to reducing coronary heart disease, stroke and risk by 25-percent by the year 2010.

Dear Ms. Greer:

On behalf of the American Heart Association, I kindly request the support of the Environmental Quality Affairs Committee to establish a smoke-free outdoor policy in the City of Newport Beach.

There is no longer any doubt that exposure to secondhand smoke poses serious health risks. Secondhand smoke, the third leading cause of preventable death in the United States, kills an estimated 53,000 nonsmokers each year.

Studies conducted by both the U.S. Surgeon General and the National Institute of Occupational Safety and Health have found that the simple separation of smokers and nonsmokers in public places does not provide adequate protection for nonsmokers. The facts are startling. Exposure to tobacco smoke, both first and secondhand, is a major risk factor for cardiovascular diseases. The risk of death from coronary heart disease increases by up to 30 percent among people regularly exposed to environmental tobacco smoke.

The American Heart Association strongly supports the effort to establish smoke-free outdoor areas to reduce exposure to the hazards of secondhand smoke and protect public health. According to the CDC, 35,000 Americans die annually from heart disease that results from exposure to secondhand smoke. These are preventable deaths, and it is the responsibility of states and communities to enact policies to protect citizens who have already chosen not to smoke.

The American Heart Association is dedicated to supporting state and local action to protect non-smokers from environmental tobacco smoke. I look forward to working with you on this critical issue for the improved health of all Newport Beach residents and visitors.

Sincerely,



Mike Bolen

American Heart Association
Board of Directors - Western States Affiliate

TABLE OF COMPREHENSIVE OUTDOOR SECONDHAND SMOKE ORDINANCES

The twenty-five cities and counties with comprehensive ordinances are listed on the table below, which details each outdoor area where a community prohibits smoking in its ordinance. When there are limitations or exceptions to the full definition of the seven possible outdoor areas, it is noted with an asterisk.

CITY / COUNTY	OUTDOOR AREA WHERE SMOKING IS PROHIBITED						
	Dining Areas	Entryways	Public Events	Recreation Areas	Service Areas	Sidewalks	Worksites
Richmond June 2009	X	X	X	X	X		
Martinez April 2009	X	X	X	X	X		X
Pasadena October 2008	X	X	X	X	X		
Glendale October 2008	X*	X	X	X	X		X
Dublin October 2008	X	X	X	X*	X		
Thousand Oaks July 2008	X*	X	X	X*	X		
Loma Linda June 2008	X	X	X	X	X	X	X
Albany May 2008	X*	X	X	X	X	X*	X
Hayward May 2008	X	X	X	X	X	X	
Novato April 2008	X*	X	X	X	X		X
Berkeley December 2007	X	X		X	X	X*	X
Ross December 2007	X	X	X	X	X		
Belmont October 2007	X	X	X	X	X		X
El Cajon August 2007	X	X	X	X	X	X	X
Temecula May 2007	X	X	X	X	X		X
Burbank April 2007	X*	X	X	X	X*	X*	
Baldwin Park February 2007	X	X	X*	X	X		
Emeryville December 2006	X	X	X	X	X		
Laguna Woods November 2006	X*	X	X	X	X		
Marin County November 2006	X*	X	X	X	X		X
Contra Costa County October 2006	X	X	X	X	X		
Santa Monica October 2006	X	X	X*	X	X	X*	
Mammoth Lakes June 2006	X	X	X	X	X		X
Santa Rosa June 2006	X	X	X	X	X*	X*	
Calabasas February 2006	X	X	X	X	X	X	X

*Glendale - allows for creation of designated smoking section in outdoor dining
 *Dublin - recreation areas does not include community parks
 *Thousand Oaks - allows restaurants to apply for a permit for a designated outdoor smoking section if certain conditions are met
 *Thousand Oaks - smoking prohibitions only apply to recreational areas under the city's authority; city parks are under a separate jurisdiction
 *Albany - allows exceptions for permitting smoking in outdoor areas at stand-alone bars if certain conditions are met
 *Albany - only prohibits smoking on sidewalks adjacent to school property and sidewalks on Solano Avenue between San Pablo Avenue and the City of Berkeley jurisdictional border
 *Novato - allows exceptions for permitting smoking in outdoor areas at stand-alone bars if certain conditions are met
 *Berkeley - only prohibits smoking on sidewalks in commercial areas

*Burbank - allows restaurants to apply for a designated outdoor smoking section that can cover up to 40% of dining area
 *Burbank - service areas prohibition does not include individual bus stops in public rights-of-way
 *Burbank - only prohibits smoking on sidewalks in downtown Burbank
 *Baldwin Park - only prohibits smoking at farmer's markets
 *Laguna Woods - only applies to restaurants, not bars
 *Marin County - allows exceptions for permitting smoking at outdoor dining at bars if certain conditions are met
 *Santa Monica - only prohibits smoking at farmer's markets
 *Santa Monica - only applies to sidewalks at the Third Street Promenade
 *Santa Rosa - service areas prohibition only includes downtown transit mall
 *Santa Rosa - only applies to sidewalks at Comstock mall and Jeju Way

This material was made possible by funds received from the California Department of Public Health, under contract #09-11173.

HEALTH & ECONOMIC CONSEQUENCES

California Department of Public Health
California Tobacco Control Program
cdph.ca.gov/programs/Tobacco

Smoking causes ischemic heart disease, cancer, stroke, and chronic lower respiratory diseases which are the leading causes of death and disability among adults.^{1,2} Smoking-attributed diseases are an economic burden due not only to health care expenses, but also productivity losses related to disability or early death.³

In 2004, approximately 35,000 deaths in California, among adults aged 35 and older, were attributed to smoking,⁴ not including death by secondhand smoke or burns. In comparison to other causes of death for the same time period and age group, this represents:

- Eight times the death from all infectious diseases combined, including HIV-related deaths.
- Seven times the death from unintentional injuries.
- Four times the death from the endocrine, nutritional, and metabolic diseases combined, including diabetes-related deaths.

Smoking-Related Health Care Costs

The total adult health-related cost of smoking was estimated to be \$18.1 billion in California in 2004. This estimate is half of the total expenditures allocated for health and human services in the 2008-2009 California budget. This equates to an additional \$500 health-related expenditure per California resident, or \$3400 per smoker.⁴

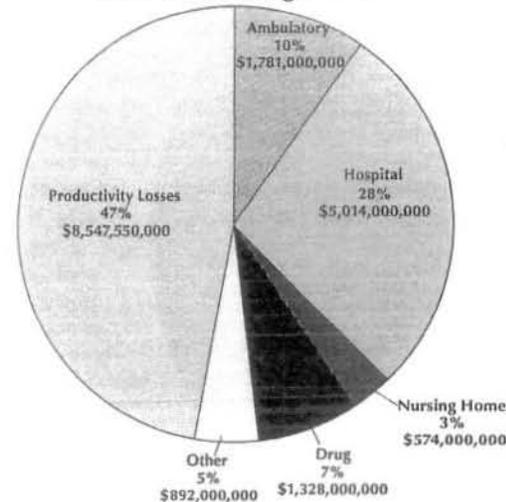
- The direct health care costs associated with smoking in California were estimated to be \$9.6 billion in 2004.⁴
- In addition, productivity losses due to smoking-attributed early death or illnesses were estimated to be \$8.5 billion in California; this does not include secondhand smoke or burn deaths.⁴
- In 2004, approximately 1.2 billion packs of cigarettes were sold in California.⁵ If smokers were to pay for these smoking-related health care costs, the price of a pack of cigarettes would need to be increased by \$9.70.

Health Consequences of Smoking

According to the Center for Disease Control and Prevention, 36,687 adults aged 35 and older died annually from smoking in California in the 2000-2004 period;⁶ this means an average 481,529 years of potential life lost (YPLL) annually in the 2000-2004 period.^{4,6}

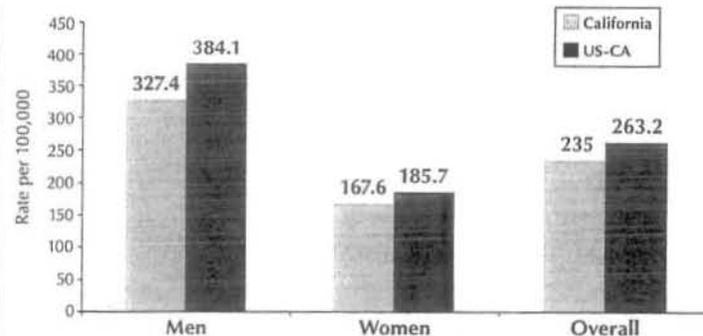
- The smoking-related death rate was three times higher for men than for women in California between 2000-2004.^{4,6}
- The three most common causes of smoking-attributable death were lung cancer, followed by chronic obstructive lung disease and then ischemic heart disease during 2000-2004.^{3,4,7}
- Smoking causes and/or worsens chronic

Cost of Smoking, 2004



Source: Smoking-Attributable Mortality, Morbidity, and Economic Costs (SAMMEC). Accessed on March 25, 2009. Prepared by: California Department of Public Health, California Tobacco Control Program, September 2009.

Tobacco Related Deaths California and the Rest of the United States 2001-2004



Note: Rates are age adjusted.
Source: Smoking-Attributable Mortality, Morbidity, and Economic Costs (SAMMEC). Accessed on Feb. 25, 2009. Prepared by: California Department of Public Health, California Tobacco Control Program, September 2009.

Leading Causes of Death in California, 2005

Cause of death	Count (%)	Age-adjusted rate*
Tobacco related		
Ischemic heart disease	45,059 (19%)	176.0
Trachea, lung, bronchus cancer	13,350 (6%)	52.7
Chronic Obstructive Pulmonary Diseases (COPD)	12,562 (5%)	49.8
Stroke	11,680 (5%)	46.0
Diabetes	7,689 (3%)	26.8
Other tobacco related neoplasms	1,210 (1%)	5.0
Non-Tobacco related		
Non-tobacco related neoplasms	41,176 (18%)	157.6
Non-tobacco related cardiovascular diseases	30,685 (13%)	119.0
External causes of mortality (Injury, etc)	16,815 (7%)	60.1
Non-tobacco related respiratory diseases	11,040 (5%)	43.3
Alzheimer	7,706 (3%)	30.1
All other non-tobacco related diseases	33,812 (15%)	133.8
Total	232,784 (100%)	900.2

* Age adjusted rate per 100,000. 2000 US Standard population.

Source: Centers for Disease Control and Prevention, National Center for Health Statistics. Compressed Mortality File 1999-2005. CDC WONDER On-line Database, compiled from Compressed Mortality File 1999-2005 Series 20 No. 2K, 2008. Accessed at <http://wonder.cdc.gov/cmfi-icd10.html> on June 30, 2009.

obstructive lung diseases like emphysema, bronchitis, and asthma and increases the chances of getting both upper and lower respiratory infection.³

- Smoking causes ischemic heart disease and stroke, which are leading causes of death and physical limitation in active Californians.^{2,3}
- Smoking causes many different types of cancer. The association with lung/bronchus cancer is the strongest, followed by cancer of the larynx, mouth, throat, esophagus, pancreas, kidney, bladder, stomach, cervix, and acute myeloid leukemia.³

Trends in Tobacco-Related Diseases in California, 1988-2005

Since the 1988 passage of Proposition 99 in California, adult smoking rates declined by more than 40% from 22.7% to 13.3% in 2008.⁸ As smoking rates declined, mortality and morbidity rates for diseases related to smoking have also declined.⁹ This parallel trend supports the causal association between these conditions and smoking.

- From 1988 to 2005, lung cancer incidence declined from 70.0 to 53.9 per 100,000 in California.^{9,10}
- Likewise, lung cancer deaths were decreased from 54.1 to 41.7 per 100,000 in California between 1988 and 2005.^{9,10}
- Death rates related to chronic lung diseases also decreased from 11.5 to 4.5 per 100,000 from 1988 to 2005, respectively.⁹
- Since 1988, deaths related to ischemic heart diseases decreased from 187.3 to 65.8 per 100,000 in 2005.⁹
- Similarly, stroke deaths decreased from 42.1 to 24.7 per 100,000 between 1988 and 2005.⁹

References

1. National Center for Health Statistics. Health, United States, 2007 With Chartbook on Trends in the Health of Americans. Hyattsville, MD: 2007. Available at <http://www.cdc.gov/nchs/data/health/us07.pdf#data09>. Accessed 3/10/2009.
2. National Center for Health Statistics. Health, United States, 2008 With Chartbook Hyattsville, MD: 2009. Available at <http://www.cdc.gov/nchs/data/health/us08.pdf>. Accessed 3/11/2009.
3. U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease

Prevention and Health Promotion, Office on Smoking and Health. The 2004 Surgeon General's Report; The Health Consequences of Smoking: what it means to you. 2004. Available at http://www.cdc.gov/tobacco/data_statistics/sgr/sgr_2004/00_pdfs/SGR2004_Whatitmeanstoyou.pdf. Accessed 3/17/2009.

4. Smoking-Attributable Mortality, Morbidity, and Economic Costs (SAMMEC). Available at <http://apps.nccd.cdc.gov/statesystem/>. Accessed 3/9/2009.

5. Lightwood JM, Dinno A, Glantz SA (2008) Effect of the California Tobacco Control Program on Personal Health Care Expenditures. *PLoS Med* 5(8): e178.

6. Adhikari B, Kahende J, Malarcher A, Husten C, Asman K, CDC. State-Specific Smoking-Attributable Mortality and Years of Potential Life Lost --- United States, 2000-2004. *MMWR* (2009). 58(02); 29-33.

7. CDC. Smoking-attributable mortality, years of potential life lost, and productivity losses--United States, 2000-2004. *MMWR* (2008). 57(45): 1226-8.

8. Behavioral Risk Factor Surveillance System (BRFSS) 1984-1992, BRFSS and California Adult Tobacco Survey data is combined for 1993-2008. The data is weighted to the 2000 California population. Note change of smoking definition in 1996 that included

more occasional smokers. Prepared by: California Department of Public Health, California Tobacco Control Program, March 2009.

9. CDC WONDER. Compressed Mortality File. Available at <http://wonder.cdc.gov/mortSQL.html>. Accessed 4/7/2009.

10. California Cancer Registry. Available at <http://www.cancer-rates.info/ca/>. Accessed 4/7/2009.

HEALTH & ECONOMIC CONSEQUENCES

California Department of Public Health
California Tobacco Control Program
P.O. Box 997377 MS 7206
Sacramento, CA 95809-7377

cdph.ca.gov/programs/Tobacco

March 2010

**Survey of 552 Orange County Residents on Protection from
Secondhand Smoke**

Area	Total Score	Average Score*	%
Outdoor Bars /Restaurants	1321	2.39	79.87%
Outdoor malls	1344	2.43	81.16%
Waiting Lines	1411	2.56	85.21%
Entrances	1455	2.64	87.86%
Parks & Rec	1366	2.47	82.48%
Outdoor MUH common areas	1400	2.54	84.54%
Inside MUH Units	1337	2.42	80.74
% MUH Units	1382	2.5	83.45%
SHS=Nuisance	1317	2.39	79.53%

Intercept surveys from 2008-2010, results are not scientific

* Scoring scale: 3=Strongly agree, 2= somewhat agree, 1=somewhat disagree, 0= strongly disagree

Rate of Smoking VS Rates of Conditions Affected by Secondhand Smoke

Condition	Age	OC	State	Source	Year
Smoking Rate	All	13.1%**	13.6%	CHIS*	2007
Asthma Diagnosis	All	13%	13.6%	CHIS	2007
Asthma Symptoms in last yr among those with asthma	All	89.9%	90.5%	CHIS	2007
Heart Disease	All	5.7%	6.3%	CHIS	2005
Cancer	All	9.5%	8.7%	CHIS	2005

*CHIS: California Health Interview Survey **All results are within 95% confidence intervals



EARTH RESOURCE FOUNDATION

2010 Summer Campaigns

“Teaching Environmental Responsibility Where You Live, Work & Play”

www.earthresource.org

Youth Against Styrofoam (YAS)

- Re-visit Newport Beach restaurants to document their compliance with the Newport Beach Styrofoam Ban
- Complete City of Irvine restaurant survey and study. Ordinance hopefully on City Agenda by July or August
- Begin and complete City of Costa Mesa restaurant survey and study. Begin outreach to City Council in collaboration with the Costa Mesa Green Task Force, a newly formed business and citizen association
- Collaborate with Clean Seas Coalition for a wave of local ordinances statewide

“Sea Turtle Don’t Shop” Campaign

- Support the passage of AB1998 – Statewide Plastic Bag Ban
- Establish an educational program for grocery store clerks and baggers

“Hold on to Your Butt”

- Continue to collect amount of cigarette butts on Newport Beach beaches, streets and sidewalks through our cleanup efforts and our partners
- Promote, in collaboration with Surfrider, the Butt Flicker HotLine 1-877-211-butt

Newport Beach Adopt a Beach Program and Zero Trash Coalition

- Continue supporting the Adopt a Beach Captains
- Re-launch the Adopt A Beach Program with assistance from the City – presenting at Water Quality Committee in July
- Zero Trash Coalition: Earth Resource Foundation, Zero Trash- Newport Beach, Surfrider Foundation, Surterre Properties, Keep California Beautiful, El Ranchito, Sharkeys, etc.
 - Monthly First Saturday Beach Cleanups
 - Reporting to City of results and needs for a successful Zero Trash Newport Beach
 - Involvement of businesses in environmental stewardship

“Zero in on Zero Waste – Don’t Let Your Bottomline Go To Waste”

- Zero Waste Conferences and workshops
- Supporting AB32 Zero Waste Initiatives and CalRecycle Mandatory Commercial Recycling Ordinances
- Training, Consulting and Waste Audits for Businesses
- Zero Waste Plans for Cities (Burbank, Glendale, GreenWise Sacramento)

[Today's date]

Senator Simitian
Chair, Senate Environmental Quality
State Capitol, Room 2205
Sacramento, CA 95814
Fax: (916) 322-3519

RE: AB 1998 (Brownley) Single-Use Bag Reduction Act:

Dear Senator Simitian:

On behalf of [name of your organization] I write to express our support of the Single-Use Bag Reduction Act (Assembly Bill 1998) as amended. AB 1998 is scheduled to be heard before the Senate Environmental Quality Committee. AB 1998 would ban plastic single-use carryout bags and require recycled paper carryout bags be sold at supermarkets, retail pharmacies, and convenience stores throughout the state.

[Name of organization] is concerned with the environmental and economic impacts of plastic bag pollution in inland and coastal communities throughout the state. Californians use an estimated 19 billion single-use plastic bags every year. The state spends an estimated \$25 million annually to clean up and landfill these littered bags, which does not include the hundreds of millions of dollars that local governments continually spend to clean littered streets and waterways.

We can no longer recycle our way out of this problem. Despite efforts to expand recycling programs, *less than 5%* of single-use plastic bags are currently being recycled. The rest of these bags end up in our landfills or as litter, clogging stormdrain systems, and making their way to our waterways and ocean. It is estimated that 60–80% of all marine debris, and 90% of floating debris is plastic. Plastic lasts for hundreds of years in our environment and may never biodegrade in the ocean. As a result, it poses a persistent threat to wildlife. Over 267 species worldwide have been impacted by plastic litter, including plastic bags.

Paper bags are not a viable alternative to plastic bags. Paper bag production contributes to deforestation, greenhouse gas emissions, and waterborne wastes from the pulping and paper making process. Even compostable plastic bags made of plant-based sources have not proven to degrade in the ocean. Instead, they require industrial composting facilities, and only a small number of cities currently support the infrastructure to collect and dispose of compostable bags properly.

San Francisco, Malibu, Fairfax, and Palo Alto have banned plastic bags and at least 20 more cities in California are considering this approach. Rather than taking a piecemeal city-by-city approach, AB 1998 will create one uniform policy for addressing all types of single-use bags to encourage consumers to use reusable bags, the most sustainable alternative.

California has a critical role to play in becoming a true leader in eliminating plastic bag waste and preventing the proliferation of plastic pollution in our communities. The passage of AB 1998 will be a major step in breaking our addiction to single-use bags.

Sincerely,

[name, title, organization]



public health law & policy
technical assistance legal center

There Is No Constitutional Right to Smoke

February 2004
Revised April 2005

I. INTRODUCTION

Laws that limit how and where people may smoke should survive a legal challenge claiming that smoking is protected by the state or federal constitution. Smoking is not mentioned anywhere in either constitution. Nevertheless, some people may claim that there is a fundamental “right to smoke.”¹ These claims are usually made in one of two ways: (1) that the fundamental right to privacy in the state or federal constitution includes the right to smoke, or (2) that clauses in the state and federal constitutions granting “equal protection” provide special protection for smokers. Neither of these claims has any legal basis. Therefore, a state or local law limiting smoking usually will be judged only on whether the law is rational, or even plausibly justified, rather than the higher legal standard applied to laws that limit special constitutionally protected rights.

II. THERE IS NO FUNDAMENTAL RIGHT TO SMOKE

The argument that someone has a fundamental right to smoke fails because only certain rights are protected by the constitution as fundamental, and smoking is not one of them. The U.S. Supreme Court has held that “only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty’ are included in the guarantee of personal liberty.”² These rights are related to an individual’s bodily privacy and autonomy within the home.

Proponents of smokers’ rights often claim that smoking falls within the fundamental right to privacy, by arguing that the act of smoking is an individual and private act that government cannot invade. Courts consistently reject this argument. The privacy interest protected by the U.S. Constitution includes only marriage, contraception, family relationships, and the rearing and educating of children.³ Very few private acts by individuals qualify as fundamental privacy interests, and smoking is not one of them.⁴

Developed by the Technical Assistance Legal Center (TALC), a project of Public Health Law & Policy (PHLP). This material was made possible by funds received from the California Department of Public Health, under contract #04-35336.

PHLP 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.

Example: A firefighter trainee challenged a city fire department requirement that trainees must refrain from cigarette smoking at all times, by arguing that “although there is no specific constitutional right to smoke, [there is an] implicit . . . right of liberty or privacy in the conduct of [] private life, a right to be let alone, which includes the right to smoke.”⁵ The court, however, disagreed and distinguished smoking from the recognized fundamental privacy rights.⁶ The court went on to find that the city regulation met the fairly low standard for regulating non-fundamental rights because there was a perfectly rational reason for the regulation, namely the need for a healthy firefighting force.

III. SMOKERS ARE NOT A PROTECTED GROUP OF PERSONS

The second common constitutional claim made by proponents of smokers’ rights is that laws regulating smoking discriminate against smokers as a particular group and thus violate the equal protection clause of the U.S. or the California constitutions. No court has been persuaded by these claims.

The equal protection clauses of the United States and California constitutions, similar in scope and effect,⁷ guarantee that the government will not treat similar groups of people differently without a good reason.⁸ Certain groups of people – such as groups based on race, national origin and gender – receive greater protection against discriminatory government acts under the U.S. and California constitutions than do other groups of people.⁹ Smokers have never been identified as one of these protected groups.¹⁰ Generally, the Supreme Court requires a protected group to have “an immutable characteristic determined solely by the accident of birth.”¹¹ Smoking is not an “immutable characteristic” because people are not born as smokers and smoking is a behavior that people can stop. Because smokers are not a protected group, laws limiting smoking must only be rationally related to a legitimate government purpose.¹²

Example: New York City and New York State enacted laws prohibiting smoking in most indoor places in order to protect citizens from the well-documented harmful effects of secondhand smoke. The challenger argued that the smoking bans violated the Equal Protection Clause because they cast smokers as “social lepers by, in effect, classifying smokers as second class citizens.”¹³ The court responded that “the mere fact that the smoking bans single out and place burdens on smokers as a group does not, by itself, offend the Equal Protection Clause because there is no . . . basis upon which to grant smokers the status of a protected class.”¹⁴ The court proceeded to uphold the smoking bans since they were rationally related to the legitimate government purpose of promoting the public health.

The equal protection clause not only protects certain groups of people, the clause also prohibits discrimination against certain fundamental “interests” that inherently require equal treatment. The fundamental interests protected by the equal protection clause include the right to vote, the right to be a political candidate, the right to have access to the courts for certain kinds of proceedings, and the right to migrate interstate.¹⁵ Smoking is not one of these recognized rights.

If a government classification affects an individual right that is not constitutionally protected, the classification will be upheld if there is any reasonably conceivable set of facts that could provide a rational basis for it.¹⁶ So long as secondhand smoke regulations are enacted to further the government goal of protecting the public’s health from the dangers of tobacco smoke, the regulation should withstand judicial scrutiny if challenged.¹⁷

IV. CONCLUSION

There is no constitutional right to smoke. Claims to the contrary have no legal basis. The U.S. and California constitutions guarantee certain fundamental rights and protect certain classes of persons from all but the most compelling government regulation. However, no court has ever recognized smoking as a protected fundamental right nor has any court ever found smokers to be a protected class. To the contrary, every court that has considered the issue has declared that no fundamental “right to smoke” exists. So long as a smoking regulation is rationally related to a legitimate government objective such as protecting public health or the environment, the regulation will be upheld as constitutional.

¹ Common usage of the term “rights” conflates two distinct legal meanings: those rights that are specially provided for or protected by law (e.g., free speech); and those rights that exist simply because no law has been passed restricting them (e.g., the right to use a cell phone while driving). The latter type of right is always subject to potential regulation. Therefore, this memo addresses only those rights provided for or protected by law. This memo also does not address whether an employer may refuse to employ someone who smokes. While prohibiting smoking at work is permissible, Cal. Labor Code §96(k) protects employees from discrimination based on off-work conduct, though one court held that this statute does not create new rights for employees but allows the state to assert an employee’s independently recognized rights. *Barbee v. Household Auto. Finance Corp.*, 113 Cal. App. 4th 525 (2003).

² *Roe v. Wade*, 410 U.S. 113, 152 (1973).

³ See, for example, *Griswold v. Connecticut*, 381 U.S. 479, 484 (1964) (recognizing the right of married couples to use contraceptives); *Meyers v. Nebraska*, 262 U.S. 390 (1923) (recognizing the right of parents to educate children as they see fit); and *Moore v. East Cleveland*, 431 U.S. 494 (1977) (protecting the sanctity of family relationships).

⁴ *City of North Miami v. Kurtz*, 653 So.2d 1025, 1028 (Fla. 1995) (city requirement that job applicants affirm that they had not used tobacco in preceding year upheld because “the ‘right to smoke’ is not included within the penumbra of fundamental rights protected under [the federal constitution’s privacy provisions]”).

⁵ *Grusendorf v. City of Oklahoma City*, 816 F.2d 539, 541 (10th Cir. 1987).

⁶ *Id.* The court relied heavily on the U.S. Supreme Court decision *Kelley v. Johnson*, 425 U.S. 238 (1976). In *Kelley*, the Court held that a regulation governing hair grooming for male police officers did not violate rights guaranteed under the Due Process Clause even assuming there was a liberty interest in personal appearance.

⁷ U.S. Const. amend. XIV, Cal. Const. art.1 §7. See *Serrano v. Priest*, 5 Cal. 3d 584, 597 n.11 (1971) (plaintiff’s equal protection claims under Article 1 §11 and §21 of state constitution are “substantially equivalent” to claims under equal protection clause of Fourteenth Amendment of U.S. Constitution, and so the legal analysis of federal claim applies to state claim).

⁸ Equal protection provisions generally permit legislation that singles out a class for distinctive treatment “if such classification bears a rational relation to the purposes of the legislation.” *Brown v. Merlo*, 8 Cal. 3d 855, 861 (1973).

⁹ See, for example, *Brown v. Board of Education*, 347 U.S. 483 (1954) (race); *Sugarman v. Dougall*, 413 U.S. 634 (1973) (exclusion of aliens from a state’s competitive civil service violated equal protection clause); *Craig v. Boran*, 429 U.S. 190 (1976) (classifications by gender must serve important governmental objectives and must be substantially related to the achievement).

¹⁰ Even some potentially damaging classifications, such as those based upon age, mental disability and wealth, do not receive any special protections. See, for example, *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) (mentally disabled adults are not protected under Equal Protection Clause); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (education and income classifications are not protected).

¹¹ *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

¹² *Fagan v. Axelrod*, 550 N.Y.S. 2d 552, 560 (1990) (rejecting the argument that a state statute regulating tobacco smoking in public areas discriminated against members of a subordinate class of smokers on the basis of nicotine addiction by holding that “the equal protection clause does not prevent state legislatures from drawing lines that treat one class of individuals or entities differently from others, unless the difference in treatment is ‘palpably arbitrary’ ”). Note, too, that nonsmokers also are not recognized as a protected class, so equal protection claims brought by nonsmokers exposed to smoke in a place where smoking is permitted by law are unlikely to succeed.

¹³ *NYC C.L.A.S.H., Inc. v. New York*, 315 F. Supp. 2d 461, 480, 482 (S.D.N.Y. 2004).

¹⁴ *Id.* at 492.

¹⁵ See, for example, *Baker v. Carr*, 369 U.S. 186 (1962) (improper congressional redistricting violates voters' rights under equal protection); *Turner v. Fouche*, 396 U.S. 346 (1970) (all persons have a constitutional right to be considered for public service); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (residency requirement for receipt of state benefits violates equal protection).

¹⁶ *People v. Leung*, 5 Cal. App. 4th 482, 494 (1992).

¹⁷ *Dutchess/Putnam Restaurant & Tavern Ass'n, Inc. v. Putnam County Dep't of Health*, 178 F. Supp. 2d 396, 405 (N.Y. 2001) (holding that County code regulating smoking in public places does not violate equal protection rights); *City of Tuscon v. Grezaffi*, 23 P.3d 675 (2001) (upholding ordinance prohibiting smoking in bars but not in bowling alleys because it is rationally related to legitimate government interest); *Operation Badlaw v. Licking County Gen. Health Dist. Bd. of Health*, 866 F.Supp. 1059, 1064-5 (Ohio 1992) (upholding ordinance prohibiting smoking except in bars and pool halls); *Rossie v. State*, 395 N.W.2d 801, 807 (Wis. 1986) (rejecting equal protection challenge to statute that banned smoking in government buildings but allowed it in certain restaurants).



public health law & policy
technical assistance legal center

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 talcl@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 harmful, 64% were bothered by secondhand smoke, and 73% support laws restricting

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>.

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 picnic areas.

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.

[“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 barbecue 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.