

# SMOKE-FREE PARKS ORDINANCE [DRAFT]

Monterey County  
Resource Management Agency – Parks Department



# Comprehensive Smokefree [and Tobacco Free] Places Ordinance

## A Model California Ordinance Regulating Smoking (and Tobacco Use) in Indoor and Outdoor Areas

WITH ANNOTATIONS

Updated June 2015  
(Originally issued January 2013)

Developed by ChangeLab Solutions

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## Introduction

ChangeLab Solutions developed this Model Ordinance to help California cities and counties limit tobacco use and unwanted exposure to secondhand smoke both indoors and outdoors. 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 and tobacco-free spaces.

With regard to indoor spaces, this Model Ordinance can assist California cities and counties in making all indoor workplaces smokefree by eliminating the exceptions contained in California's Labor Code section 6404.5, which prohibits smoking in most – but not all – places of employment. The Model Ordinance is also designed to cover all conceivable outdoor spaces, but is fully customizable to fit the specific needs of an individual community. By addressing outdoor tobacco use, this Model Ordinance also helps limit tobacco-related litter and promotes Clean Water Act compliance for storm sewers.

To assist cities and counties in creating smokefree and tobacco-free places, this Model Ordinance includes

- extensive findings documenting the health risks associated with tobacco use and exposure to secondhand tobacco smoke and the vapor produced by electronic smoking devices;
- prohibitions on smoking in enclosed workplaces not covered by the state smokefree workplace law;
- 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 (including the use of smokeless tobacco, for instance) in indoor and outdoor places;
- requirements for posting No Smoking signs; and
- robust enforcement mechanisms, including the option for private individuals and organizations to enforce the provisions of this ordinance.

This 2015 edition includes an updated definition of “Tobacco Product” that specifically incorporates electronic smoking devices (e.g., e-cigarettes) within the definition. This broad definition helps ensure that the use of electronic smoking devices is regulated in the same manner as conventional tobacco products. The Model Ordinance also includes other minor edits to ensure that provisions and other related definitions align with the revised definition of “Tobacco Product.”

Communities that have already updated their local laws to cover electronic smoking devices using prior ChangeLab Solutions model ordinance definitions do not need to update those laws again. The prior definitions were legally sound and effective at expanding your local laws to address electronic smoking devices. The changes being proposed here are simply intended to underscore the principle that electronic smoking devices should be regulated as a form of tobacco product.

The 2015 update, which includes changes made in 2014, now has the following findings:

- Updated findings, based on the 2014 Surgeon General's report on the health consequences of smoking; and
- New findings demonstrating how closing the loopholes in the state smokefree workplace law can contribute to reductions in health inequities.

Some of the comments in the Model Ordinance describe ways to narrow the scope of the smoking restrictions, should that be desired. In addition, optional language is available to broaden the scope of the ordinance to restrict not only smoking but *all* tobacco use (e.g., smokeless tobacco).

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 options are followed by a comment that describes the legal provisions in more detail. Some degree of customization is always necessary 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.

ChangeLab Solutions also has developed a separate ordinance to create smokefree multi-unit housing by limiting smoking inside units and common areas. Some of the areas covered by that ordinance are also included in this Model Ordinance. If your community would like to adopt a more customized approach, it can combine aspects of ChangeLab Solutions' other ordinances with this ordinance. For example, we can provide language to prohibit smoking in some or all units in multi-unit housing. If you have questions about how to adapt this ordinance for your community, please contact ChangeLab Solutions through our website at [www.changelabsolutions.org/tobaccoquestions](http://www.changelabsolutions.org/tobaccoquestions).

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

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:

- 480,000 people die prematurely in the United States from smoking-related diseases every year, making tobacco use the nation's leading cause of preventable death;<sup>1</sup> and
- Tobacco use can cause disease in nearly all organ systems and is responsible for 87 percent of lung cancer deaths, 79 percent of all chronic obstructive pulmonary disease deaths, and 32 percent of coronary heart disease deaths;<sup>2</sup> 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;<sup>3</sup> and
- The California Air Resources Board placed secondhand smoke in the same category as the most toxic automotive and industrial air pollutants by categorizing it as a toxic air contaminant for which there is no safe level of exposure;<sup>4,5</sup> and
- The California Environmental Protection Agency (EPA) 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;<sup>6</sup> and

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

- Levels of secondhand smoke exposure outdoors can reach levels attained indoors depending on direction and amount of wind and number and proximity of smokers;<sup>7,8</sup> and
- Smoking cigarettes near building entryways can increase air pollution levels by more than two times background levels, with maximum levels reaching the “hazardous” range on the United States EPA’s Air Quality Index;<sup>8</sup> and
- To be completely free from exposure to secondhand smoke in outdoor places, a person may have to move nearly 23 feet away from the source of the smoke, about the width of a two-lane road;<sup>8,9</sup> and

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

- Since 1964, approximately 2.5 million nonsmokers have died from health problems caused by exposure to secondhand smoke;<sup>2,10</sup> and
- Secondhand smoke is responsible for an estimated 41,300 heart disease-related and lung cancer-related deaths among adult nonsmokers each year in the United States;<sup>10</sup> and
- Exposure to secondhand smoke increases the risk of coronary heart disease by about 25 percent to 30 percent<sup>11</sup> and increases the risk of stroke by 20 percent to 30 percent;<sup>12</sup> and

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

- Between 2009 and 2012, the total annual economic burden of smoking in the United States was between \$289 billion and \$332.5 billion;<sup>1</sup> and
- From 2005 to 2009, the average annual health care expenditures attributable to smoking were approximately \$132.5 billion to \$175.9 billion in direct medical care costs for adults and \$151 billion in lost productivity;<sup>1</sup> and
- The total annual cost of smoking in California was estimated at \$548 per resident or between \$2,262 and \$2,904 per smoker per year;<sup>13</sup> and
- California’s Tobacco Control Program saved the state and its residents \$134 billion in health care expenditures between the year of its inception, 1989, and 2008, with savings growing yearly;<sup>13</sup> and

WHEREAS, laws restricting the use of tobacco products have recognizable benefits to public health and medical costs with a review of over 80 peer-reviewed research studies showing that smokefree policies effectively do the following:

- Reduce tobacco use: tobacco use is reduced by median of 2.7 percent;<sup>14</sup> and
- Reduce exposure to secondhand smoke: air pollution is reduced by a median of 88 percent and biomarkers for secondhand smoke are reduced by a median of 50 percent;<sup>14</sup> and
- Increase the number of tobacco users who quit by a median of 3.8 percent;<sup>14</sup> and
- Reduce initiation of tobacco use among young people;<sup>14</sup> and
- Reduce tobacco-related illnesses and death: there is a 5.1 percent median decrease in hospitalizations from heart attacks and a 20.1 percent decrease in hospitalizations from asthma attacks after such laws are passed;<sup>14</sup> and

WHEREAS, laws restricting electronic smoking devices use also have benefits to the public as evidenced by the following:

- Research has found at least ten chemicals known to the State of California to cause cancer, birth defects, or other reproductive harm,<sup>6, 15, 16, 17</sup> such as formaldehyde, acetaldehyde, lead, nickel, and toluene;<sup>18, 19, 20</sup> and
- More than one study has concluded that exposure to vapor from electronic smoking devices may cause passive or secondhand vaping;<sup>18, 20, 21</sup> and
- The use of electronic smoking devices in smokefree locations threatens to undermine compliance with smoking regulations and reverse the progress that has been made in establishing a social norm that smoking is not permitted in public places and places of employment;<sup>22</sup> and
- The State of California's Tobacco Education and Research Oversight Committee (TEROC) "opposes the use of e-cigarettes in all areas where other tobacco products are banned;"<sup>23</sup> and

*[ Include the following findings about smokeless tobacco if your community will be incorporating the optional language to create completely tobacco-free 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 is associated with oral, esophageal, and pancreatic cancers;<sup>24</sup> and

- Smokeless tobacco is associated with increased risk for heart disease and stroke,<sup>25, 26, 27</sup> stillbirth and preterm delivery,<sup>1, 28</sup> and Parkinson's disease;<sup>1</sup> and

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

- In 2007, it was estimated that Americans consume 360 billion cigarettes each year;<sup>29, 30</sup> and
- 55.7 percent of smokers admit to littering cigarettes in the last month;<sup>31</sup> and
- In an observational study of nearly 10,000 individuals, after cigarettes were smoked, 45 percent of cigarettes ended up as litter;<sup>30</sup> and
- In 2011, 22.6 percent of all debris collected from beaches and coastal areas are smoking related products;<sup>32</sup> 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;<sup>32, 33</sup> and

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

- In 2012, American poison control centers received nearly 8,648 reports of poisoning by the ingestion of cigarettes, cigarette butts, and other tobacco products and 84.5 percent of these poisonings were in children ages five and younger;<sup>34</sup> and
- Children who ingest cigarette butts can experience vomiting, nausea, lethargy, and gagging;<sup>35</sup> and

WHEREAS, though widely perceived as a comprehensive smokefree air law, exemptions and loopholes in the California Smokefree Workplace Act<sup>36</sup> mean that one in seven Californians faces secondhand smoke exposure at work;<sup>37</sup> and

WHEREAS, exemptions and loopholes in the California Smokefree Workplace Act<sup>36</sup> disproportionately impact low-income and communities of color as evidenced by the following:

- California Labor Code does not prohibit smoking in hotels, cabs of trucks, warehouses, long-term care facilities, outdoor places of employment, small businesses, tobacco shops, and private smokers' lounges, which disproportionately employ individuals of low-income and individuals of color;<sup>38, 39, 40</sup> and



- Male and Hispanic/Latino workers are the most likely to report being exposed to secondhand smoke at work;<sup>41</sup> and

WHEREAS, California cities and counties have the legal authority to adopt local laws that make all indoor places of employment nonsmoking;<sup>42</sup> and

WHEREAS, state law prohibits smoking within 25 feet of playgrounds and tot lots and expressly authorizes local communities to enact additional restrictions;<sup>43</sup> and

WHEREAS, the state smokefree workplace law does not expressly prohibit the use of electronic smoking devices in enclosed workplaces;<sup>36</sup> and

WHEREAS, there is broad public recognition of the dangers of secondhand smoke and support for smokefree air laws, as evidenced by the following:

- A 2008 survey of California voters found that 97 percent thought that secondhand smoke is harmful, 88 percent thought secondhand smoke was harmful even outdoors, 65 percent were bothered by secondhand smoke, and 73 percent support laws restricting smoking in outdoor public places;<sup>44</sup> and

WHEREAS, as of April 2015, there are at least 64 California cities and counties with local laws restricting smoking in workplaces not covered by the state smokefree workplace law;<sup>45</sup> and

WHEREAS, as of April 2014, at least 131 local jurisdictions in California prohibit the use of electronic smoking devices in specific locations;<sup>46</sup> and

WHEREAS, as of January 2015, there are at least 348 California cities and counties with local laws restricting smoking in recreational areas, 129 with local laws restricting smoking in outdoor dining places, and 48 with local laws restricting smoking on sidewalks in commercial areas;<sup>47</sup> and

WHEREAS, there is no Constitutional right to smoke;<sup>48</sup>

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

the [ City / County ].

**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, landlord, or other entity formed for profit-making purposes.
- (b) “Common Area” means every Enclosed Area and 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, paths, lobbies, courtyards, elevators, stairs, community rooms, playgrounds, gym facilities, swimming pools, parking garages, parking lots, restrooms, laundry rooms, cooking areas, and eating areas.

**COMMENT:** Note that California Labor Code section 6404.5 (the state smokefree workplace law) may already prohibit Smoking in indoor Common Areas if the Multi-Unit Residence has Employees, such as maintenance workers, property managers, or others who work on site. The definition of Common 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, that is available to or customarily used by the general public or an Employee, and that is designed, established, or regularly used, for consuming food or drink.

**COMMENT:** This definition covers all Dining Areas, indoors and out, but Section [\_\_\_\_>(\*3)(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) “Electronic Smoking Device” means an electronic device that can be used to deliver an inhaled dose of nicotine, or other substances, including any component, part, or accessory of such a device, whether or not sold separately. “Electronic Smoking Device” includes any such device, whether manufactured, distributed, marketed, or sold as an electronic cigarette, an electronic cigar, an electronic cigarillo, an electronic pipe, an electronic hookah, or any other product name or descriptor.

**COMMENT:** This definition is broad enough to cover all Electronic Smoking Devices regardless of whether they are being used to deliver nicotine or other substances. Regulating the use of all varieties of Electronic Smoking Devices, regardless of their nicotine content, protects bystanders from exposure to the hazardous substances found in Electronic Smoking Device vapor, reduces the risk that children may view the use of Electronic Smoking Devices in smokefree areas as normative, and facilitates uniform enforcement.

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

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

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

- (g) “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 constraint to airflow including, but not limited to, vegetation of any height, whether or not those boundaries include vents or other openings; or

(2) [ four (4) ] walls or other vertical constraints to airflow including, but not limited to, vegetation 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 necessarily 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 the outdoor Smoking restrictions in 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. For instance, reducing the number of walls in this definition would broaden the definition of Enclosed Area and narrow the definition of Unenclosed Area, thereby limiting the scope of the outdoor Smoking restrictions in this ordinance.

An area with partial overhead covering would be analyzed under subparagraph (1), whereas only areas that are completely 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 constraint to airflow, regardless of composition, constitutes an “other vertical constraint to airflow” 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 modifications to existing definitions and/or operative provisions to ensure consistency with the new definition.

(h) “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 of 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. ]

**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 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. Single-family residences are suggested as an exemption because the definition of Unit in this ordinance includes individual bedrooms in a single-family home. Thus a two-bedroom free-standing house would be a Multi-Unit Residence per the definitions in this ordinance, unless the exemption is included.

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.

- (i) “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.

- (j) “Person” means any natural person, cooperative association, Employer, personal representative, receiver, trustee, assignee, or any other legal entity including a government agency.

**COMMENT:** This definition incorporates numerous entities, including Business, Employer, Nonprofit Entity, landlord, and individual. In addition, it includes the City or County.

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.

Note: If Section [(6)(g)] – private citizen enforcement – is included in the ordinance, keep this specific definition of “Person.”

- (k) “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.
- (l) “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, intended as a “catch-all” to include all public areas that do not fall within any other definition in this Model Ordinance.

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 [\_\_\_\_] (\*3(a)(6))

contains optional language that can be used to exclude streets and sidewalks from most Smoking restrictions.

- (m) “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. In addition, the Municipal Code may contain a definition of “reasonable distance”; review any existing definition of “reasonable distance” in the Municipal Code to determine whether revisions to the code may be necessary to include this more precise and measurable definition in your ordinance.

- (n) “Recreational Area” means any area [ , including streets and sidewalks, ] that is [ publicly or privately owned / owned, controlled or used 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, 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 include only publicly owned or operated recreational facilities, then it should select the phrase “*owned, controlled or used 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 [\_\_\_\_>(\*3)(a)] of this Model Ordinance prohibits Smoking only in outdoor Recreational Areas because the state smokefree workplace law (Labor Code section 6404.5) already prohibits smoking inside places of employment. This includes indoor Recreational Areas with employees, such as enclosed roller skating rinks and bowling alleys.

- (o) “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 areas including or adjacent 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 [\_\_\_\_>(\*3)(a)] of this Model Ordinance prohibits Smoking only in outdoor Service Areas because the state smokefree workplace law already prohibits smoking in indoor Service Areas with employees.

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

**COMMENT:** This is a special definition that differs from 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 inhalation. The limitation placed on “Smoke” by this definition is important to prevent unintended consequences, such as inadvertently prohibiting the burning of incense or use of barbecue grills.

At the same time, this definition is designed to be broad enough to cover any emissions released into the air as a result of combustion or heating, so long as the purpose of the combustion or heating is to inhale the byproduct. By clarifying that the term “Smoke” applies to not just solid particles but also vapor and gas, this definition covers products such as electronic cigarettes, electronic hookahs, etc.

- (q) “Smoking” means inhaling, exhaling, burning, or carrying any lighted, heated, or ignited cigar, cigarette, cigarillo, pipe, hookah, Electronic Smoking Device, or any plant product intended for human inhalation.

**COMMENT:** This definition includes the Smoking of marijuana, but Smoking marijuana for medical purposes can be excluded from the prohibitions of this ordinance in some circumstances. Please contact ChangeLab Solutions for assistance.

- (r) “Tobacco Product” means:

- (1) any product containing, made, or derived from tobacco or nicotine that is intended for human consumption, whether Smoked, heated, chewed, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means, including, but not limited to cigarettes, cigars, little cigars, chewing tobacco, pipe tobacco, snuff, and



(2) Any Electronic Smoking Device.

(3) Notwithstanding any provision of subsections (1) and (2) to the contrary, “Tobacco Product” includes any component, part, or accessory of a Tobacco Product, whether or not sold separately. “Tobacco Product” does not include any product that has been approved by the United States Food and Drug Administration for sale as a tobacco cessation product or for other therapeutic purposes where such product is marketed and sold solely for such an approved purpose.

**COMMENT:** This definition is written broadly to include nonconventional tobacco and nicotine products, such as Electronic Smoking Devices, nicotine gel, 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.

(s) “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.

(t) “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, due to the design of this model ordinance, 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 ENCLOSED PLACES**

- (a) Smoking [ and the use of Tobacco Products ] is prohibited in the Enclosed Areas of the following places within the [ City / County of \_\_\_\_ ]:

**COMMENT:** This provision prohibits Smoking (which is defined to include the use of both combustible Tobacco Products and Electronic Smoking Devices) in all Enclosed Areas. The optional language would also prohibit the use of non-combustible Tobacco Products, such as snus and chewing tobacco, in those same places, making the Enclosed Areas entirely tobacco-free.

(1) Places of Employment;

(2) Other Businesses that have a common or shared air space with an Enclosed Area in which smoking is prohibited by law, such as, without limitation, openings, cracks, air ventilation systems, doorways, hallways, and stairways. Notwithstanding any other provision, the fact that Smoke enters one Enclosed Area from another Enclosed Area is conclusive proof that the areas share a common or shared air space;

**COMMENT:** This provision requires that Enclosed Areas that share air space with smokefree enclosed places be smokefree to protect against Smoke drifting into smokefree areas. This provision would apply, for example, to an office space occupied by a solo practitioner who has no Employees and does not see clients in this space.

(3) Public Places; and

(4) Common Areas of Multi-Unit Residences.

- (b) Smoking [ and the use of Tobacco Products ] is prohibited by this [ article / chapter ] in all Enclosed Areas exempted by the California smokefree workplace law (Labor Code section 6404.5(d), as that section may be amended from time to time) [ except as provided below ].

**COMMENT:** This provision clarifies that Smoking is prohibited in all workplaces exempt from the state smokefree workplace law, unless a community adopts some of the optional language below. It also contains optional language that would prohibit the use of non-combustible Tobacco Products in those same locations.

[ (1) Smoking is not restricted by this subsection in up to [ ten percent (10%) ] of guestroom accommodations in a hotel, motel, or similar transient lodging

establishment that meets the requirements of California Civil Code section 1940(b)(2) if the hotel or motel permanently designates particular guestrooms as nonsmoking rooms such that [ ninety percent (90%) ] or more of guestrooms are permanently nonsmoking and ashtrays and matches are permanently removed from such nonsmoking rooms. Permanent “No Smoking” signage shall be placed in nonsmoking guestrooms. ]

**COMMENT:** This optional language is only for those communities that do not want to require 100 percent smokefree hotels or motels.

[ (2) Smoking inside a Tobacco Shop is not prohibited by this subsection if: (a) the Tobacco Shop does not sell edible products, including, for example, food, water, or drinks, or allow such products to be consumed on the premises; (b) the Tobacco Shop prohibits minors from entering the store at all times; and (c) the premises of the Tobacco Shop is an independent freestanding building unattached to any other building, establishment, or use. For the purposes of this exception, “Tobacco Shop” means any tobacco retailer that derives more than [ seventy-five percent (75%) ] of gross sales receipts from the sale or exchange of Tobacco Products and tobacco paraphernalia. ]

**COMMENT:** This optional language is provided for communities that wish to permit Smoking inside a very small subset of *bona fide* Tobacco Shops that don’t allow any food or drink to be consumed inside or don’t share walls with other establishments or residential property. It would apply to Tobacco Shops that sell conventional Tobacco Products as well as stores that sell emerging Tobacco Products, like vape lounges.

Note that reducing the percentage of gross sales receipts required *increases* the number of retailers able to invoke this exception and legally permit Smoking indoors.

[ (3) Smoking in a theatrical production by the actors is not prohibited by this subsection if Smoking is an integral part of the story and the use of a fake, prop, or special effect cannot reasonably convey the idea of Smoking in an effective way to a reasonable member of the anticipated audience. ]

**COMMENT:** This optional language is most likely not required by the free speech provisions of the First Amendment of the U.S. Constitution but is provided for communities that wish to avoid any misperception that First Amendment rights are at issue.

Sec. [ \_\_\_\_ (\*3) ]. PROHIBITION OF SMOKING [ AND TOBACCO PRODUCT USE ]  
IN UNENCLOSED AREAS

**COMMENT:** This section prohibits Smoking in a broad array of outdoor areas. If a community wants to prohibit the use of all Tobacco Products (including those that do not produce Smoke, such as chewing tobacco and snus) in addition to Smoking, then it should include the optional bracketed text referring to the use of Tobacco Products each time Smoking 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 \_\_\_\_ ]:

- (1) Recreational Areas; *Consider adopting an ordinance to modify County Code Chapter 10.70 (Smoking Pollution Control Ordinance) that would prohibit smoking in all publicly accessible areas of Monterey County Parks (Manzanita Park, Royal Oaks Park, Toro Park, Jack's Peak, Laguna Seca, San Lorenzo Park, Lake San Antonio, and Lake Nacimiento) except for designated smoking areas. Designated smoking areas will include: Royal Oaks and Toro Park parking lots; Laguna Seca parking lots, campgrounds, and racetrack area; San Lorenzo Park, San Antonio Lake, and Lake Nacimiento parking lots and campgrounds. Manzanita Park and Jack's Peak Park will be 100% smoke-free and will not have any designated smoking areas.*
- (2) Service Areas;
- (3) Dining Areas;
- (4) Places of Employment;
- (5) Common Areas of Multi-Unit Residences [ , provided, however, 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.

- (i) 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 Person with legal control over a designated Smoking area may be obliged to modify, relocate, or eliminate that 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 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).

- (ii) 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;
  - (iii) 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;
  - (iv) the area must have a clearly marked perimeter;
  - (v) the area must be identified by conspicuous signs;
  - (vi) the area must be completely within an Unenclosed Area; and
  - (vii) 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 but not limited to a farmers' market, parade, craft fair, festival, or any other event open to the general public / , provided that Smoking is permitted on streets and sidewalks used only 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 a community would like to limit the Smoking restrictions to Public Places that are being used as a public event site, it should 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 not 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 those areas 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 designated Smoking areas), include the appropriate language in this subsection. Please contact ChangeLab Solutions 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 conduct an ongoing educational program to explain and clarify the purposes and requirements of this [ article / chapter ], as well as to provide 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 will be in charge of this program.

## Sec. [ \_\_\_\_ (\*4) ]. 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 the Person Smoking is actively passing on the way to another destination ] .

**COMMENT:** This creates a buffer zone around Enclosed smokefree areas, allowing someone to smoke only if the smoker is 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. [ \_\_\_\_ (\*3) ] of this [ article / chapter ], except while the Person Smoking is actively passing on the way to another destination and provided Smoke does not enter any Unenclosed Area in which Smoking is prohibited.

**COMMENT:** This creates a buffer zone around Unenclosed smokefree areas, allowing someone to smoke only if the smoker is passing through the zone.

- [ (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 Residences, within 25 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. [ \_\_\_\_ (\*5) ]. 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 that Person, Employer, or Nonprofit Entity and in which Smoking [ or the use of Tobacco Products ] is prohibited by law.

**COMMENT:** This provision makes anyone who is in control of an area responsible for any Smoking in violation of this and other smokefree laws. Thus, enforcement actions can be taken against a Business, landlord, Employer, or Nonprofit Entity, in addition to the individual Tobacco Product user, who or which knowingly breaks 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 that 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 [ or Tobacco Product use ] is prohibited, including within any Reasonable Distance required by this [ article / chapter ].
- (d) A Person, Employer, or Nonprofit Entity that has legal or de facto control of an area in which Smoking [ and the use of Tobacco Products ] is prohibited by this [ article / chapter ] shall post a clear, conspicuous and unambiguous “No Smoking” [ and “No Use of Tobacco Products” ] or “Smokefree” [ and “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. [ \_\_\_\_ (\*4) ]. [ At least one sign with the [ City / County ] phone number to which complaints can be directed must be placed conspicuously in each place in which Smoking is prohibited. ] For purposes of this section, the [ City Manager / County Administrative Officer ] 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 that have 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 may 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. [ \_\_\_\_ (\*6) ]. **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 the enforcing agency. Drafters may choose to include some or all of these options. Once the ordinance is enacted, the enforcing agency will have the discretion to choose which enforcement tools to use in general and in a particular case. 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, at 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 lawsuit 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. It also facilitates injunctive relief – i.e., a court order compelling someone to stop the nuisance activity.

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 ChangeLab Solutions 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 by which the cost of abatement can be

collected via the property tax roll as a special assessment against the property on which the violation occurs.

- (g) Any Person acting for the interests of itself, its members, or the general public (hereinafter “Private Enforcer”) may bring a civil action in any court of competent jurisdiction, including small claims court, to enforce this [ article / chapter ] against any Person who has violated this [ article / chapter ] two or more times. Upon proof of the violations, a court shall grant all appropriate relief, including: (1) awarding damages; and (2) issuing an injunction or a conditional judgment. [ If there is insufficient or no proof of actual damages for a specific violation, the court shall award [ one-hundred and fifty dollars (\$150) ] for each violation as statutory damages. ]

**COMMENT:** This provision enables private citizens (“Private Enforcers”) to go to court – including trial court or small claims court – to seek *compliance* with the ordinance through an injunction (a trial court order to do or not do something) or a conditional judgment (a small claims court order requiring the defendant to choose between two options, such as “stop smoking or pay money”). Monetary damages are available to compensate for actual financial losses. If the optional last sentence is included, a court would be able to award statutory damages of \$150 per violation when actual damages are difficult or impossible to prove. The amount of statutory damages can be adjusted.

A private citizen may bring a lawsuit against an individual or organization only for alleged *repeat* violations of the law. This limitation is intended to address concerns about the potential for abusive lawsuits.

Note: It is recommended that the term “Person” be included in the list of definitions in Section [ \_\_\_\_(\*1)], even if the Municipal Code already contains another definition of “person,” because this subsection relies on the broadly inclusive definition of “Person” in Section [ \_\_\_\_(\*1)].

- [ (h) Notwithstanding any other provision of this [ article / chapter ], a Private Enforcer may bring a civil action to enforce this [ article / chapter ] only if the following requirements are met:
- (1) The Private Enforcer’s civil action is begun more than [ sixty (60) ] days after the Private Enforcer has given written notice of the alleged violations of this [ article / chapter ] to the [ City Attorney / County Counsel ] and to the alleged violator; and
  - (2) On the date the Private Enforcer’s civil action is filed, no other Person acting on behalf of the [ City / County ] or the state has commenced or is prosecuting an administrative, civil, or criminal action based upon, in whole or in part, any violation which was the subject of the Private Enforcer’s notice [ ; and

[ (3) A Private Enforcer shall provide a copy of his, her, or its action to the [ City Attorney / County Counsel ] within [ seven (7) ] days of filing it. ].

[ (i) Upon a settlement or judgment based upon, in whole or in part, any violation that was the subject of the Private Enforcer's notice, the Private Enforcer shall give the [ City Attorney / County Counsel ] notice of the settlement or judgment and final disposition of the case within [ thirty (30) ] days of the date of the settlement or judgment. No settlement by a Private Enforcer of a violation of this [ article / chapter ] shall be valid or enforceable if, within [ thirty (30) ] days of receiving notice of the settlement, the [ City Attorney / County Counsel ] determines the settlement to be unreasonable in light of the purposes of this [ article / chapter ]. Any settlement or judgment that does not meet the requirements of this subsection may be set aside upon motion to a court of competent jurisdiction by the [ City Attorney / County Counsel ]. ]

**COMMENT:** This optional provision enables a city attorney or county counsel to exercise “oversight” of private citizen enforcement actions permitted in Section [ \_\_\_\_(\*6)(g)], above. If included, this provision allows a city attorney or county counsel to track and monitor Private Enforcer lawsuits, and if desired, pursue local government enforcement instead. This oversight provision is intended to address concerns about the potential for abusive lawsuits.

This provision requires a Private Enforcer seeking to prosecute violations of the smokefree or tobacco-free law to notify the city attorney or county counsel prior to filing the lawsuit. If the optional double-underlined language is included, it would also require the Private Enforcer to share a copy of the complaint with the city Attorney or county counsel. No affirmative action is required by the city attorney or county counsel upon receipt of any of these documents; responding is optional.

The last part of this subsection requires the Private Enforcer to submit a copy of the final settlement or judgment to the city attorney or county counsel. The city attorney or county counsel then has the opportunity to review and evaluate settlement agreements (but not court-issued judgments) to assess whether such agreements are reasonably designed to address the violation of the law. This is designed to avoid potentially collusive or otherwise abusive settlement agreements (“sweetheart deals”). Finally, the city attorney or county counsel also has the authority to set aside a court judgment if the Private Enforcer fails to comply with the requisite notice requirements.

[ (j) 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 restrictions in this ordinance.

## Sec. [ \_\_\_\_ (\*7) ]. OTHER LAWS.

It is not the intention of this [ article / chapter ] to regulate any conduct where the regulation of such conduct has been preempted by the State of California.

**COMMENT:** This section clarifies that the local jurisdiction does not intend to regulate activity if the regulation of such activity is preempted by state law. Labor Code section 6404.5 preempts local governments from adopting smoking prohibitions in areas that are required to be smokefree by the state law. Local jurisdictions, however, are free to enact prohibitions that are stricter or more comprehensive than state law. For example, local jurisdictions may designate as smokefree areas that are not covered by the state smokefree workplace law, such as outdoor workplaces. Additionally, local jurisdictions may prohibit the use of *all* tobacco products, including Electronic Smoking Devices and smokeless tobacco products, anywhere in the jurisdiction, even in areas where conventional smoking is prohibited by state law.

Together with state law, a local jurisdiction can create a more comprehensive smokefree (or tobacco-free) community. This section (and comment) simply addresses the issue of whether a local jurisdiction will enforce *state* or *local* law.

## 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.

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