



public health law & policy
technical assistance legal center

Smokefree Outdoor Areas Ordinance

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

Revised August 2011
(Originally issued June 2009)

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

This material was made possible by funds received from the
California Department of Public Health, under contract #09-11182.

Questions should be submitted to: www.phlpnet.org/tobaccoquestions

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INTRODUCTION

Public Health Law & Policy (PHLP) 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 (e.g., smokeless tobacco);
- 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 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 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 current version of the Model Ordinance (revised August 2011) includes minor changes, such as updated “findings” and definitions. For example, the definitions of Smoke and Smoking now include the use of electronic cigarettes. In addition, the private citizen enforcement provision has been slightly revised.

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 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.

PHLP also has 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 PHLP ordinances can be combined with this ordinance. For example, PHLP can provide language to prohibit smoking in all *indoor* workplaces that are currently exempt from California's smokefree workplace law (Labor Code section 6404.5). If you have questions about how to adapt this ordinance for your community, please contact PHLP through our website at www.phlpnet.org/tobaccoquestions to request assistance.

**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. *Tobacco Use: The Nation's Leading Killer*. 2011, p. 2. Available at: www.cdc.gov/chronicdisease/resources/publications/aag/pdf/2011/Tobacco_AAG_2011_508.pdf.

² US Department of Health and Human Services, Centers for Disease Control and Prevention. *Tobacco Use: Targeting the Nation's Leading Killer*. 2011, p. 2. Available at: www.cdc.gov/chronicdisease/resources/publications/aag/pdf/2011/Tobacco_AAG_2011_508.pdf.

³ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Tobacco Use: The Nation's Leading Killer*. 2011, p. 2. Available at: www.cdc.gov/chronicdisease/resources/publications/aag/pdf/2011/Tobacco_AAG_2011_508.pdf.

⁴ Leistikow B, Zubair K, Connolly GN, 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. *How Tobacco Smoke Causes Disease: The Biology and Behavioral Basis for Smoking-Attributable Disease: A Report of the Surgeon General*. 2010, p. 9. Report highlights available at: www.surgeongeneral.gov/library/tobaccosmoke/factsheet.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 3,000 deaths from lung cancer and 46,000 deaths from heart disease 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 is 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 also 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. *Tobacco Use: Targeting the Nation’s Leading Killer*. 2011, p. 2. Available at: www.cdc.gov/chronicdisease/resources/publications/aag/pdf/2011/Tobacco_AAG_2011_508.pdf.

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. *Tobacco Use: Targeting the Nation’s Leading Killer*. 2011, p. 2. Available at: www.cdc.gov/chronicdisease/resources/publications/aag/pdf/2011/Tobacco_AAG_2011_508.pdf.

¹¹ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Tobacco Use: Targeting the Nation’s Leading Killer*. 2011, p. 2. Available at: www.cdc.gov/chronicdisease/resources/publications/aag/pdf/2011/Tobacco_AAG_2011_508.pdf.

¹² US Department of Health and Human Services, Centers for Disease Control and Prevention. *Fact Sheet – Smokeless Tobacco Facts*, www.cdc.gov/tobacco/data_statistics/fact_sheets/smokeless/smokeless_facts/index.htm#chewing (last updated

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
- 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;¹⁹ 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:

January 28, 2011).

¹³ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Tobacco Use: Targeting the Nation’s Leading Killer*. 2011, p. 2. Available at: www.cdc.gov/chronicdisease/resources/publications/aag/pdf/2011/Tobacco_AAG_2011_508.pdf.

¹⁴ Hatsukami DK and Severson HH. “Oral Spit Tobacco: Addiction, Prevention, and Treatment.” *Nicotine and Tobacco Research*, 1(1): 21-44, 1999. Abstract available at: <http://ntr.oxfordjournals.org/content/1/1/21.abstract>.

¹⁵ “Prolonged Use of Swedish Moist Snuff Increases Risk of Fatal Cardiovascular Disease and Stroke.” *Medical News Today*, November 15, 2007, www.medicalnewstoday.com/articles/88868.php.

¹⁶ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Fact Sheet – Economic Facts about U.S. Tobacco Production and Use*, www.cdc.gov/tobacco/data_statistics/fact_sheets/economics/econ_facts/index.htm#costs (last updated March 9, 2011).

¹⁷ US Department of Health and Human Services, Centers for Disease Control and Prevention. *Fact Sheet – Economic Facts about U.S. Tobacco Production and Use*, www.cdc.gov/tobacco/data_statistics/fact_sheets/economics/econ_facts/index.htm#costs (last updated March 9, 2011).

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); see also US Department of Health and Human Services, Centers for Disease Control and Prevention. *Fact Sheet – Fast Facts*, www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/index.htm (last updated March 9, 2011).

¹⁹ 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;²⁰ 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;²¹ and
- Smoking cigarettes near building entryways can increase air pollution levels by more than two times as compared to background levels, with maximum levels reaching the “hazardous” range on the US EPA’s Air Quality Index.²²
- 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 2009, 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

²⁰ 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. 80, 87. 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 the Air & Waste Management Association*, 57: 522-534, 2007. Available at: www.ashaust.org.au/pdfs/OutdoorSHS0705.pdf.

²¹ 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): 1045-1052, p. 1049-51, 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, p. 1626, 2008. Available at: www.repace.com/pdf/Repace_Ch_15_Outdoor_Smoke.pdf.

²² Kaufman P, Zhang, B, Bondy S, et al. “Not just ‘a few wisps’: real-time measurement of tobacco smoke at entrances to office buildings.” *Tobacco Control*. Published Online First: 21 December 2010. doi:10.1136/tc.2010.041277. Abstract available at: <http://tobaccocontrol.bmj.com/content/early/2010/12/21/tc.2010.041277.abstract>

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, p. 1626, 2008. Available at: www.repace.com/pdf/Repace_Ch_15_Outdoor_Smoke.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, p. 1626, 2008. Available at: www.repace.com/pdf/Repace_Ch_15_Outdoor_Smoke.pdf.

²⁵ Bronstein AC, Spyker DA, Cantilena LR, et al. American Association of Poison Control Centers. “2009 Annual Report of the American Association of Poison Control Centers’ Centers’ National Poison Data System (NPDS): 27th Annual Report” *Clinical Toxicology*, 48(10): 979–1178, p. 1124, 2010. Available at:

- Children who ingest cigarette butts can experience vomiting, nausea, lethargy, and gagging;²⁶ and

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

- It is estimated that over two billion cigarette butts are discarded every day worldwide, and that Americans alone discard more than 175 million pounds of cigarette butts every year;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

www.aapcc.org/dnn/Portals/0/correctedannualreport.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.

²⁷ Surfrider Foundation, San Diego Chapter, Hold on to Your Butt, www.surfridersd.org/hotyb.php. (last visited March 10, 2011).

²⁸ Surfrider Foundation, San Diego Chapter, Hold on to Your Butt, www.surfridersd.org/hotyb.php. (last visited March 10, 2011).

²⁹ Surfrider Foundation, San Diego Chapter, Hold on to Your Butt, www.surfridersd.org/hotyb.php. (last visited March 10, 2011).

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. Abstract available at: www.ncbi.nlm.nih.gov/pmc/articles/PMC2927851/?tool=pubmed.

³¹ Neighmond P. “Smoking Bans Help People Quit, Research Shows.” *National Public Radio*, October 25, 2007, 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>.

WHEREAS, the U.S. Food and Drug Administration conducted laboratory analysis of electronic cigarette samples and found they contained carcinogens and toxic chemicals to which users and bystanders could potentially be exposed;³³ and

WHEREAS, creating smokefree areas helps protect the health of the 86.9% of Californians who are nonsmokers;³⁴ 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 97% thought that secondhand smoke is harmful, 88% thought secondhand smoke was harmful even outdoors, 65% were bothered by secondhand smoke, and 73% support laws restricting smoking in outdoor public places;³⁵ 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;³⁶ and
- As of 2010, there are at least 273 California cities and counties with local laws restricting smoking in recreational areas, 85 with smokefree outdoor dining laws, and 23 that restrict smoking on sidewalks in commercial areas;³⁷ and

WHEREAS, state law prohibits smoking within 25 feet of playgrounds and tot lots and expressly authorizes local communities to enact additional restrictions;³⁸ and state law prohibits smoking within 20 feet of entryways and operable windows of government buildings;³⁹ and

WHEREAS, there is no Constitutional right to smoke;⁴⁰

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,

³³ US Food and Drug Administration. *News Release, FDA and Public Health Experts Warn About Electronic Cigarettes*. July 22, 2009. Available at: www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm173222.htm.

³⁴ California Department of Public Health, *News Release, State's Latest Tobacco Ads Debut*. December 20, 2010. Available at: www.cdph.ca.gov/Pages/NR10-099.aspx.

³⁵ 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.

³⁶ 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>.

³⁷ American Lung Association in California *State of Tobacco Control 2010 – California Local Grades*, 2010. p. 9. Available at: www.lungusa.org/associations/states/california/assets/pdfs/sotc-2010/sotc2010_full-report.pdf.

³⁸ Cal. Health & Safety Code § 104495 (West 2008).

³⁹ Cal. Gov't Code § 7597 (West 2008).

⁴⁰ Public Health Law & Policy, Technical Assistance Legal Center. *There Is No Constitutional Right to Smoke*. 2005. Available at www.phlpnet.org/tobacco-control/products/there-no-constitutional-right-smoke.

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, 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.

[“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 PHLP 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.

If a community wants to make all indoor workplaces smokefree, please contact PHLP for language to eliminate the exceptions contained in California’s smokefree workplace law (Labor Code section 6404.5).

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; 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.

Note: If Section [(*5)(g)] – private citizen enforcement – is included in the ordinance, keep this specific definition of “Person.”

This definition incorporates numerous entities including Business, Employer, Nonprofit Entity, landlord, and individual. 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, cabs of motor trucks, etc.), please contact PHLP for suggested language.

(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, 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 only include publicly owned or operated recreational facilities, then 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 [____>(*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 PHLP’s “Model California Ordinance Regulating Smoking and Tobacco Use on Beaches,” available 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 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 [____>(*2)(a)] of this Model Ordinance prohibits Smoking only in outdoor Service Areas.

(o) “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 material contains no tobacco or nicotine and the purpose of inhalation is solely olfactory, such as, for example, smoke from incense. The term “Smoke” includes, but is not limited to, tobacco smoke, electronic cigarette vapors, and marijuana smoke.

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

This definition includes marijuana, but Smoking marijuana for medical purposes can be excluded from the prohibitions of this ordinance should a community decide to do so. Please contact PHLP 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, an operating electronic cigarette, a lighted cigar, or a lighted cigarette of any kind; or lighting or igniting a pipe, a hookah pipe, a cigar, or a cigarette of any kind.

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

If a community also wants to make all indoor workplaces smokefree, please contact PHLP for language to eliminate the exceptions contained in California’s smokefree workplace law (Labor Code section 6404.5).

(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, 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.

(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 but not limited to 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 only 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 PHLP 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 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 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 the Person Smoking is 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 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.

[(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 that 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 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 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 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 / 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 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 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 eliminate 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 PHLP 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) 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 traditional 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). 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, if 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” should 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.

(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.

[(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.]

Upon a settlement or judgment based upon, in whole or in part, any violation which 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 [____(*5)(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 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 or not such agreements are reasonably designed to address the violation of the law. This is designed to avoid potentially collusive or otherwise abusive settlement agreements. Finally, the City Attorney or County Counsel also has the ability to set aside a court judgment if the Private Enforcer fails to comply with the requisite notice requirements.

[(i) 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.

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.