



ChangeLab Solutions

Law & policy innovation for the common good.

Smokefree Housing Ordinance

A Model California Ordinance Regulating Smoking in Multi-Unit Residences

(with Annotations)

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Developed by ChangeLab Solutions

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INTRODUCTION

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

Smokefree multi-unit housing is an important policy initiative to address health inequities among communities of color and low-income populations. Nearly two-thirds of residents of multi-unit housing are people of color, and close to half are low-income or below the poverty level. By adopting laws eliminating exposure to secondhand smoke in people's homes, communities can ensure that smokefree living is not a luxury but instead made available to all residents, regardless of their economic means, race, or ethnicity.

This Model Ordinance is very broad and can be used to limit smoking in *all* types of multi-unit dwelling places, from hotels to long-term health care facilities to apartments and condominiums. The Model Ordinance's comprehensive design limits exposure to secondhand smoke by

- Restricting smoking in the indoor and outdoor common areas of all types of multi-unit residences, with the option to create designated outdoor smoking areas that meet specific criteria;
- Prohibiting smoking inside all units of multi-unit residences, including apartments and condominiums; and
- Providing robust enforcement mechanisms, including no-smoking lease terms and options for private individuals and organizations to enforce the smokefree housing provisions.

To create this updated version of the Model Ordinance, ChangeLab Solutions conducted key informant interviews with a dozen tobacco control professionals and advocates across California. Based on their detailed feedback and experience with the rapidly evolving policy landscape – in which acceptance and appreciation of smokefree housing is constantly growing – ChangeLab Solutions made the following changes to the Model Ordinance:

- *All* units of multi-unit residences, rather than *most* units, are nonsmoking. This approach is more protective of health; when smoking is permissible in even a few units, smoke can travel between smoking and nonsmoking units, exposing residents to secondhand smoke. Several studies have confirmed that smokefree housing policies are the most effective way to fully reduce secondhand smoke exposure in

multi-unit housing. In addition, public health professionals and advocates agree that a 100 percent smokefree policy makes implementation, education, and enforcement of the law clearer and easier, since there are no exceptions to the policy.

- The prohibition of smoking in multi-unit housing includes not only traditional tobacco products, such as cigarettes and cigars, but also marijuana, used either medicinally or recreationally, and newly popular electronic smoking devices, such as e-cigarettes. Research has found that the secondhand smoke from marijuana and the aerosol emitted from electronic smoking devices contain chemicals known to the State of California to cause cancer. The gases from electronic smoking devices also have chemicals known to cause birth defects or other reproductive harm. Users of tobacco products and marijuana have smokeless options available to ingest the active ingredients. By using these alternatives, users can reduce the health risks associated with secondhand emissions, minimize exposure to those toxins, and protect people who live with and adjacent to them.

For communities that wish to allow smoking in some units or create an exemption for the use of electronic smoking devices or medical marijuana, please [contact ChangeLab Solutions](#) for assistance.

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

The Model Ordinance offers a variety of options. In some instances, blanks (e.g., [____]) prompt you to customize the language to fit your community's needs. In other cases, the ordinance offers you a choice of options (e.g., [choice one / choice two]). Some of the ordinance options are followed by a comment that describes the legal provisions in more detail. Some degree of customization is always necessary in order to make sure 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 outdoor areas, such as parks, dining patios, and public events. The Comprehensive Smokefree Places Ordinance also would make 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. If you would like to adopt a more customized approach, some aspects of that ordinance can be combined with the smokefree housing ordinance.

If you have questions about how to adapt ChangeLab Solutions' ordinances for your community, please contact ChangeLab Solutions through our website at www.changelabsolutions.org/tobaccoquestions. The model ordinances, plug-ins, and other tobacco control resources can be found on our website at www.changelabsolutions.org/tobacco-control.

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

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

SECTION I. FINDINGS.

WHEREAS, tobacco use causes death and disease and continues to be an urgent public health threat, 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;¹
- 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;² and

WHEREAS, secondhand smoke has repeatedly been 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;³
- 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;^{4,5}
- 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;⁶
- The American Society of Heating, Refrigerating, and Air Conditioning Engineers (ASHRAE) recommends that multi-unit housing be free from environmental tobacco smoke, marijuana smoke, and electronic smoking devices’ aerosol;⁷ 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;⁸
- 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;⁸
- Exposure to secondhand smoke increases the risk of coronary heart disease by about 25 percent to 30 percent⁹ and increases the risk of stroke by 20 percent to 30 percent;¹⁰
- Secondhand smoke kills more than 400 infants every year;¹¹ and

WHEREAS, secondhand aerosol emitted from electronic smoking devices has been identified as a health hazard, 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,^{6, 12, 13, 14} such as formaldehyde, acetaldehyde, lead, nickel, and toluene;^{15,16, 17}
- More than one study has concluded that exposure to vapor from electronic smoking devices may cause passive or secondhand vaping;^{15,17,18}
- 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;”¹⁹ and

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

- The California EPA included marijuana smoke on the Proposition 65 list of chemicals known to the state of California to cause cancer;^{6,20}
- Marijuana smoke contains at least 33 known carcinogens;²⁰
- Research on the health effects of marijuana smoke has found statistically significant associations with cancers of the lung, head and neck, bladder, brain, and testes;²⁰ and

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

- Several peer-reviewed studies on drifting secondhand smoke in multi-unit housing have confirmed that secondhand smoke can and does transfer between units,^{21,22} creeping under doorways and through wall cracks;¹¹
- More than one study has found that residents of multi-unit housing have high levels of cotinine (a biomarker for nicotine) in their blood and saliva;^{21,22}
- 13 peer-reviewed journal articles have found that between 26 percent and 64 percent of residents of multi-unit housing report secondhand smoke drifting into their home;²¹ and

WHEREAS, harmful residues from tobacco smoke can be absorbed by and cling to virtually all indoor surfaces long after smoking has stopped and then be emitted back into the air, making this “thirdhand smoke” a potential health hazard, as evidenced by the following:

- Thirdhand smoke contains carcinogenic materials that accumulate over time, presenting a health hazard long after the initial smoke is gone;²³
- A study found that thirdhand smoke remains months after nonsmokers have moved into units where smokers previously lived;²⁴
- Human exposure to these thirdhand smoke carcinogens can be through inhalation, ingestion, or skin absorption through contact with carpeting, furnishings, or clothing;²⁵
- Thirdhand smoke potentially poses the greatest danger to infants and toddlers, who crawl on rugs and furnishings and suck on items in the home;²⁵
- Nonsmoking people who are exposed to thirdhand smoke have significantly higher nicotine and cotinine levels than those who have not been exposed to thirdhand smoke;²⁴
- Research has shown that thirdhand smoke damages human cellular DNA;²⁶ and

WHEREAS, smoking is the number one cause of fire deaths, is a leading cause of fire-related injury,²⁷ and contributes to fire-related health inequities, as evidenced by the following:

- In 2011, U.S. fire departments responded to an estimated 90,000 smoking-related fires, which resulted in an estimated 1,640 injuries, 540 deaths, and \$621 million in direct property damage;²⁸
- One in four fatalities is NOT the smoker whose cigarette started the fire, and 25 percent of those who die are neighbors or friends of the smoker;²⁸
- African-American males and American-Indian males have the highest fire death rates;²⁷
- The elderly (people 85 and older) have the highest fire death rate (49.2%),²⁹ and the risk of dying from smoking-related fires increases with age;²⁸
- The U.S. Fire Administration recommends that people smoke outdoors;³⁰ and

WHEREAS, the Surgeon General has concluded that eliminating smoking in indoor spaces is the only way to fully protect nonsmokers from secondhand smoke exposure and that separating smokers from nonsmokers, cleaning the air, and ventilating buildings cannot completely prevent secondhand smoke exposure;³ and

WHEREAS, several studies have confirmed that smokefree multi-unit housing policies are the most effective method to fully reduce secondhand smoke exposure in multi-unit housing;²¹ and

WHEREAS, 32 percent of Californians (or 11.8 million people) live in multi-unit housing,³¹ which accounts for one-seventh of the total multi-unit housing population in the country;³² and

WHEREAS, between 44 percent to 46.2 percent of Californians living in multi-unit housing with personal smokefree home policies are exposed to secondhand smoke in their home;³¹ and

WHEREAS, surveys have found that between 65 percent and 90 percent of multi-unit housing residents who experience secondhand smoke in their home are bothered by the secondhand smoke incursion;²¹ and

WHEREAS, secondhand smoke exposure in multi-unit housing contributes to tobacco-related health inequities. For example, when compared with adults who live in single family homes, adults who live in multi-unit housing are more likely to

- Be from communities of color (62.9% of residents of multi-unit homes versus 49.6% of residents of single family homes);³²
- Be low-income or below the poverty line (46.8% versus 27%);³²
- Have less than a high school diploma (21.4% versus 14.8%);³²
- Be current smokers (17.5% versus 13.2%);³² as well as
- Be uninsured (23.4% versus 14.2%);³² and

WHEREAS, secondhand smoke in multi-unit housing is a significant threat to the health and safety of California children, as evidenced by the following:

- About a quarter of those who live in multi-unit housing (25.2%) are under the age of 18;³¹
- The home is the primary source of secondhand smoke for children;¹¹
- 56.4 percent of youth living in apartment units in which no one smokes have elevated blood cotinine levels above .05 ng/mL, indicating they have been exposed to potentially dangerous levels of secondhand smoke;^{21,33}
- Children who live in apartments have mean cotinine levels that are 45 percent higher than cotinine levels in children who live in detached homes;^{21,33} and

WHEREAS, there are significant savings from adopting a smokefree multi-unit housing policy, as evidenced by the following research:

- Multi-unit housing property owners in California would save \$18.1 million in renovation expenses each year;^{21,34}
- If all subsidized housing were to go smokefree in California, there would be approximately \$72.4 million saved per year, including \$61.1 million in secondhand smoke-related healthcare expenditures, \$5.9 million in renovation expenses, and \$5.4 million in smoking-attributable fire losses;³⁵ and

WHEREAS, a majority of multi-unit housing residents, including a large portion of smokers, support smokefree policies in multi-unit residences,²¹ as evidenced by the following:

- 74 percent of Californians surveyed approve of apartment complexes requiring that at least half of rental units be nonsmoking;³⁶
- 69 percent of Californians surveyed favor limiting smoking in outdoor common areas of apartment buildings;³⁶
- 78 percent support laws that create nonsmoking units;³⁶ and

WHEREAS, a local ordinance that authorizes residential rental agreements to include a prohibition on smoking of tobacco products within rental units is not prohibited by California law,³⁷ and

WHEREAS, there is no Constitutional right to smoke;³⁸ and

WHEREAS, California law declares that anything which is injurious to health or obstructs the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance;³⁹ and

WHEREAS, local governments have broad latitude to declare nuisances and are not constrained by prior definitions of nuisance;⁴⁰⁻⁴² and

WHEREAS, at least 55 California cities and counties have adopted smokefree multi-unit housing ordinances,⁴³ and at least 25 of these jurisdictions have restricted smoking in 100 percent of units;⁴⁴ and

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

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

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

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

COMMENT: This definition is used to describe the reach of nonsmoking “buffer zones” around Multi-Unit Residences. It defines where Smoking is prohibited when buffer zones reach beyond the property lines of the Multi-Unit Residence and extend onto neighboring property (see Section *4 “Nonsmoking Buffer Zones”).

To exclude property containing detached single-family homes (so that residents and guests at such homes may smoke notwithstanding their proximity to multi-family housing), add the bracketed language. Without the bracketed language, a smokefree buffer zone might encompass a portion of the backyard of a single-family residence as well as adjacent outdoor areas of businesses and parking lots.

- (b) “Common Area” means every Enclosed Area and every Unenclosed Area of a Multi-Unit Residence that residents of more than one Unit are entitled to enter or use, including, without limitation, halls, pathways, lobbies, courtyards, elevators, stairs, community rooms, playgrounds, gym facilities, swimming pools, parking garages, parking lots, grassy or landscaped areas, 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 Areas does not include balconies, patios, or decks associated with individual Units because these are not shared areas. Balconies, patios, and decks are included in the definition of Unit.

- (c) “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 that are 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 people may view the use of Electronic Smoking Devices in smokefree areas as acceptable, and facilitates uniform enforcement.

- (d) “Enclosed Area” means an area in which outside air cannot circulate freely to all parts of the area, and includes an area that has
- (1) any type of overhead cover, whether or not that cover includes vents or other openings and at least three (3) walls or other physical 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: For the purposes of this ordinance, the distinction between “enclosed” and “unenclosed” is primarily relevant to establishing designated Smoking areas (see Section *3) and nonsmoking buffer zones (see Section *4).

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). For the purposes of this ordinance, any physical boundary, regardless of composition, constitutes an “other physical boundary” for application of this definition.

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

- (e) “Landlord” means any Person or agent of a Person who owns, manages, or is otherwise legally responsible for a Unit in a Multi-Unit Residence that is leased to a residential tenant, except that “Landlord” does not include a tenant who sublets a Unit (e.g., a sublessor).

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

- (f) “Multi-Unit Residence” means property containing two (2) or more Units, including, but not limited to, apartment buildings, condominium complexes, senior and assisted living facilities, and long-term health care facilities. [Multi-Unit Residences do not include the following:

- (1) a hotel or motel that meets the requirements of California Civil Code section 1940, subdivision (b)(2);

- (2) a mobile home park;
- (3) a campground;
- (4) a marina or port;
- (5) a single-family home, except if used as a child care or health care facility subject to licensing requirements; and
- (6) a single-family home with a detached or attached in-law or second unit permitted pursuant to California Government Code sections 65852.1, 65852.150, 65852.2 or an ordinance of the [City / County] adopted pursuant to those sections, except if the single-family home or in-law/second unit is used as a child care or health care facility subject to licensing requirements.]

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 in this ordinance is very broad and includes all types of dwelling places – from rooms in a hotel to tents at a campground – a community may want to limit the types of dwelling places covered by the smokefree housing ordinance. The optional language provides examples of the types of exceptions communities are likely to consider. Hotels and motels are included in the list of optional exemptions because many communities regulate Smoking in these facilities using a smokefree workplace ordinance, but there is no legal reason why hotels and motels could not be made completely smokefree using this Model Ordinance. 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 includes the following types of dwelling places: apartments, condominium projects, townhomes, stock cooperatives, and co-housing; affordable housing (for seniors, disabled tenants, 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; as well as single-family homes and single-family homes with an in-law unit.

Should your community wish to allow Smoking inside a certain percentage of Units in apartments or condominiums and exclude those Units from the prohibitions in this Model Ordinance, please contact ChangeLab Solutions for assistance.

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

COMMENT: This definition is used to differentiate between Units that are already built and occupied when the ordinance is adopted and Units constructed afterward. The distinction is important because, under this ordinance, all Units built after the ordinance is adopted are required to be nonsmoking as soon as they are deemed ready for occupancy. However, Smoking may be allowed in existing Units for a period of time after the effective date of the ordinance (the implementation period) to allow landlords and tenants time to become aware of and comply with the new ordinance.

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

To include existing housing that may become available to the rental market after the ordinance is adopted, such as an in-law cottage that has not been rented previously, add the optional clause at the end of the definition.

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

- (h) “Nonsmoking Area” means any Enclosed Area or Unenclosed Area in which Smoking is prohibited by
- (1) this [chapter / article] or other law;
 - (2) binding agreement relating to the ownership, occupancy, or use of real property; or
 - (3) designation of a Person with legal control over the area.
- (i) “Person” means any natural person, partnership, cooperative association, corporation, personal representative, receiver, trustee, assignee, or any other legal entity, including government agencies.

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

This definition includes most businesses. In addition, it includes governmental entities, such as a city or county.

- (j) “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 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 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 barbeque 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, as discussed above. By clarifying that the term “Smoke” applies not just to solid particles but also to vapor and gas, this definition covers the vapor emitted by Electronic Smoking Devices, such as electronic cigarettes, electronic hookahs, etc. This definition also includes marijuana smoke. Users of tobacco products and marijuana have smokeless options available to ingest the active ingredients. By using these alternatives, users can reduce the health risks associated with secondhand emissions, minimize exposure to those toxins, and protect people who live with and adjacent to them.

Should your community wish to allow the use of marijuana or Electronic Smoking Devices inside of Units and exclude these from the prohibitions in this Model Ordinance, please contact ChangeLab Solutions for assistance.

- (k) “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 Smoking marijuana and the use of Electronic Smoking Devices. Should your community wish to allow the use of marijuana or Electronic Smoking Devices inside of Units and exclude these from the prohibitions in this Model Ordinance, please contact ChangeLab Solutions for assistance.

- (l) “Unenclosed Area” means any area that is not an Enclosed Area.
- (m) “Unit” means a personal dwelling space, even where lacking cooking facilities or private plumbing facilities, and includes any associated exclusive-use Enclosed Area or Unenclosed Area, such as, for example, a private balcony, porch, deck, or patio. “Unit” includes, without limitation, an apartment; a condominium; a townhouse; a room in a senior facility; a room in a long-term health care facility, assisted living facility, or hospital; a room in a hotel or motel; a dormitory room; a room in a single room occupancy (“SRO”) facility; a room in a homeless shelter; a mobile home; a camper vehicle or tent; a single-family home; and an in-law or second unit. Unit includes, without limitation, a New 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,” *not* to the definition of “Unit.” For example, some “mobile homes” in mobile home parks may be included in this definition and even cited in the examples, but “mobile homes” can be specifically excluded from the ordinance under the definition of “Multi-Unit Residence.”

Sec. [____ (*2)]. SMOKING RESTRICTIONS IN NEW AND EXISTING UNITS OF MULTI-UNIT RESIDENCES.

- (a) Smoking is prohibited in all New Units of a Multi-Unit Residence, including any associated exclusive-use Enclosed Areas or Unenclosed Areas, such as, for example, a private balcony, porch, deck, or patio. Smoking in a New Unit of a Multi-Unit Residence, on or after [*insert effective date of ordinance*], is a violation of this [article / chapter].
- (b) Smoking is prohibited in all Units of a Multi-Unit Residence that are not New Units, including any associated exclusive-use Enclosed Areas or Unenclosed Areas, such as, for example, a private balcony, porch, deck, or patio. Smoking in a Unit of a Multi-Unit Residence that is not a New Unit, on or after [*insert effective date of ordinance* + 1 year], is a violation of this [article / chapter].

COMMENT: The Smoking restrictions in existing Units become effective a year after the ordinance is adopted to allow time for people to become familiar with the new law and take the necessary steps to comply with it.

Implementing a smokefree housing law by using a reasonable phase-in period, followed by a specific date on which everyone is required to abide by the law, is generally

perceived to be the most fair approach. This strategy balances public health needs against the potential inconvenience the ordinance puts on people who smoke and those who must implement the new policy. A 12-month phase-in period takes into account both the potential legal rights of tenants under existing rental agreements and the legal authority of Landlords to modify those agreements, as this ordinance requires.

Sec. [____ (*3)]. NO SMOKING PERMITTED IN COMMON AREAS EXCEPT IN DESIGNATED SMOKING AREAS.

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

- (a) Smoking in a Common Area, on or after, [*insert effective date of ordinance*], other than in a designated Smoking area established pursuant to subsection (b), is a violation of this [article / chapter].
- (b) A Person with legal control over a Common Area, such as, for example, a Landlord or homeowners' association, may designate a portion of the Common Area as a designated Smoking area provided the designated Smoking area complies with paragraph (c) below at all times.

COMMENT: Establishing a designated Smoking area is *optional*, not mandatory. While a designated Smoking area is convenient for people to use for Smoking, a Landlord or homeowners' association may decide not to create a designated Smoking area. In this case, a person may go off-site to smoke, or remain on the property and use a smokeless tobacco product or an FDA-approved nicotine replacement therapy (e.g., nicotine gum or nicotine patch). More information on these nicotine replacement products can be found through the California Smokers' Helpline (www.nobutts.org or 1-800-no-butts).

Should a designated Smoking area be created, the following criteria are highly recommended.

- (c) A designated Smoking area:
 - (1) Must be an Unenclosed Area;
 - (2) Must be at least twenty-five (25) feet from Unenclosed Areas primarily used by children and Unenclosed Areas with improvements that facilitate physical activity including, for example, playgrounds, tennis courts, swimming pools, and school campuses;

- (3) Must be located at least twenty-five (25) feet from any Nonsmoking Area. The location of Nonsmoking Areas may change due to the new enactment of a law, execution of an agreement, or other event that affects the area's Smoking designation. If an event occurs that changes a Nonsmoking Area, a Person with legal control over a designated Smoking area within less than twenty-five (25) feet of that Nonsmoking Area must modify, relocate, or eliminate that designated Smoking area so as to maintain compliance with the requirements of this subsection (b). In the case of a Nonsmoking Area on a neighboring property established only by private agreement or designation and not by this [chapter / article] or other law, it shall not be a violation of this [chapter / article] for a Person with legal control to designate a Smoking area within twenty-five (25) feet of the Nonsmoking Area unless that Person has actual knowledge of, or a reasonable person would know of, the private agreement or designation. It shall not be a violation of this [chapter / article] for a Person to Smoke within a Nonsmoking Area if the area is erroneously designated as a Smoking area unless a reasonable person would know of the error;

COMMENT: This clause limits where a designated Smoking area can be located in order to prevent drifting Smoke from entering neighboring property. It includes areas designated as Nonsmoking either by law or by a neighboring business or homeowner by contract or private designation.

In some communities, it may be difficult to designate a Smoking area twenty-five (25) feet away from a Nonsmoking Area (e.g., where neighboring buildings are close together or when there are limited Unenclosed Areas on site). In this case, a community may reduce the distance requirement.

Another option is to remove the specific distance requirement. To do so, replace the first sentence of subsection (b)(2) "*Must be located at least twenty-five (25) feet from any Nonsmoking Area*" with "*Must be located so that Smoke does not drift into an Enclosed Nonsmoking Area. Should complaints be received, the designated Smoking area must be relocated or removed.*" In addition, the reference to twenty-five (25) feet in the second to last sentence of (b)(2) "...*within twenty-five (25) feet of ...*" should be replaced with "*near.*"

- (4) Must be no more than [ten percent (10%)] of the total Unenclosed Area of the Multi-Unit Residence for which it is designated;
- (5) Must have a clearly marked perimeter;
- (6) Must be identified by conspicuous signs; and

(7) Must not overlap any Enclosed or Unenclosed Area where Smoking is prohibited by this [chapter / article] or other law.

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

Sec. [____ (*4)]. NONSMOKING BUFFER ZONES.

(a) Smoking is prohibited in Adjacent Unenclosed Property within twenty-five (25) feet in any direction of any doorway, window, opening, or other vent into an Enclosed Area of a Multi-Unit Residence.

COMMENT: To create the most comprehensive smokefree buffer zone around Multi-Unit Residences, include this Section. Subsection (a) creates a smokefree buffer zone that extends to Unenclosed Areas on *neighboring* property that is within 25 feet of any doorway, window, etc., of the Multi-Unit Residence. This comprehensive provision can be fine-tuned. By using a version of the “Adjacent Unenclosed Property” definition to exempt certain types of neighboring property, such as property containing detached single-family homes, a community can still prohibit Smoking on other private property, such as bar patios or parking lots. If this Section is not included in your community’s ordinance, the defined term “Adjacent Unenclosed Property” in Section *1 should be deleted.

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

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

Sec. [____ (*5)]. REQUIRED AND IMPLIED LEASE TERMS FOR ALL NEW AND EXISTING UNITS IN MULTI-UNIT RESIDENCES.

COMMENT: This section requires that Smoking restrictions be included in a lease for the rental of a Unit in any type of Multi-Unit Residence (e.g., an apartment building, condominium complex, or single room occupancy facility). Note that the term “Unit” includes the defined term “New Unit,” so whenever the term Unit is used in the ordinance, it includes *all* Units, both existing and new.

By including these provisions in lease agreements, Smoking becomes a violation of both the lease and the local ordinance. Thus, Landlords may enforce the Smoking lease terms just like any other condition in the rental agreement, such as common provisions regarding noise, use of laundry facilities, and damage to common areas. Further, by including the “third-party beneficiary” provision, other residents of the Multi-Unit Residence can enforce a lease’s Smoking restrictions.

In addition to the lease restrictions, Smoking is unlawful under the ordinance (see Section *2 Smoking Restrictions in New and Existing Units of Multi-Unit Residences) and local government may enforce the Smoking restrictions pursuant to the law (see Section *8 Enforcement).

- (a) Every lease or other rental agreement for the occupancy of a Unit in a Multi-Unit Residence, entered into, renewed, or continued month-to-month after [*insert effective date of ordinance*], shall include the provisions set forth in subsection (b) below on the earliest possible date when such an amendment is allowable by law when providing the minimum legal notice.

COMMENT: This provision calls for the Landlord to amend a rental agreement at the first opportunity. It is also designed to provide tenants with adequate legal notice of the pending change in their lease terms. The overall objective is to insert the new terms into every lease as soon as legally allowable, which will generally be within one year after the effective date of the ordinance (because most standard residential leases are for one year). For multi-year leases, these terms will be added as soon as legally possible when the lease renews.

- (b) Every lease or other rental agreement for the occupancy of a Unit in a Multi-Unit Residence, entered into, renewed, or continued month-to-month after [*insert effective date of ordinance*], shall be amended to include the following provisions:

COMMENT: The following subsections contain both an explicit directive regarding the *legal effect* the required clause must achieve and a model clause to implement the directive. Because leases vary in terms, format, and language, it is not possible to provide verbatim wording that can be easily dropped into any lease. These clause requirements provide a Landlord with needed flexibility to conform an existing lease while using terms consistent with the rest of the lease. In many cases, a Landlord can probably just use the example language provided with minimal changes. Members of the

California Apartment Association may be able to use the Association's Rental Lease Addendum for Tobacco and Smoke-Free Areas.

- (1) A clause providing that as of [*insert effective date of ordinance*], it is a material breach of the agreement to allow or engage in Smoking in the Unit, including exclusive-use areas such as balconies, porches, or patios. Such a clause might state, "It is a material breach of this agreement for tenant or any other person subject to the control of the tenant to engage in smoking in the unit or exclusive use areas such as balconies, porches, or patios as of [*insert effective date of ordinance*] ."
- (2) A clause providing that it is a material breach of the agreement for tenant or any other Person subject to the control of the tenant to engage in Smoking in any Common Area of the Multi-Unit Residence other than a designated Smoking area. Such a clause might state, "It is a material breach of this agreement for tenant or any other person subject to the control of the tenant or present by invitation or permission of the tenant to engage in smoking in any common area of the property, except in an outdoor designated smoking area, if one exists."
- (3) A clause providing that it is a material breach of the agreement for tenant or any other Person subject to the control of the tenant to violate any law regulating Smoking while anywhere on the property. Such a clause might state, "It is a material breach of this agreement for tenant or any other person subject to the control of the tenant or present by invitation or permission of the tenant to violate any law regulating smoking while anywhere on the property."
- (4) A clause expressly conveying third-party beneficiary status to all occupants of the Multi-Unit Residence as to the Smoking provisions of the lease or other rental agreement. Such a clause might state, "Other occupants of the property are express third-party beneficiaries of those provisions in this agreement regarding smoking. As such, other occupants of the property may enforce such provisions by any lawful means, including by bringing a civil action in a court of law."

COMMENT: Declaring other residents third-party beneficiaries grants people living in the Multi-Unit Residence limited rights to enforce the Smoking restrictions in leases. Without the declaration, other residents usually lack the legal right to enforce the lease terms (because they are not a "party" to the agreement), and the power to enforce the terms of the lease rests solely with the Landlord.

- (c) Whether or not a Landlord complies with subsections (a) and (b) above, the clauses required by those subsections shall be implied and incorporated by law into every agreement to which subsections (a) or (b) apply and shall become effective as of the earliest possible date on which the Landlord could have made the insertions pursuant to subsections (a) or (b).

COMMENT: This is a back-up provision to ensure that the Smoking-related terms are included by law, even if the Landlord fails to comply with subsections (a) or (b).

- (d) A tenant who breaches a Smoking provision of a lease or other rental agreement for the occupancy of a Unit in a Multi-Unit Residence, or who knowingly permits any other Person subject to the control of the tenant or present by invitation or permission of the tenant, shall be liable for the breach to (i) the Landlord; and (ii) any occupant of the Multi-Unit Residence who is exposed to Smoke or who suffers damages as a result of the breach.

COMMENT: This provision provides other tenants legal standing to seek damages or possibly an injunction against someone Smoking in violation of a lease term.

There are two additional enforcement mechanisms in this ordinance:

Section *8 “Enforcement” provides for traditional enforcement by local government officials. It also contains an optional “private enforcement” provision that grants *any* member of the public the right to enforce the ordinance. Thus, a Landlord, a tenant, or a member of the public could bring a lawsuit to enforce the ordinance in either Superior Court or small claims court if the optional language is included.

- (e) This [article / chapter] shall not create additional liability for a Landlord to any Person for a tenant’s breach of any Smoking provision in a lease or other rental agreement for the occupancy of a Unit in a Multi-Unit Residence if the Landlord has fully complied with this Section.

COMMENT: This provision expressly states that the Landlord is not the guarantor of the ordinance’s enforcement. That is, the Landlord is not contractually required to enforce the no Smoking lease terms, and other residents cannot force the Landlord to act against a tenant who violates one. Including this provision can be extremely important in efforts to gain Landlord support for the ordinance.

- (f) Failure to enforce any Smoking provision required by this [article / chapter] shall not affect the right to enforce such provision in the future, nor shall a waiver of any breach constitute a waiver of any subsequent breach or a waiver of the provision

itself.

COMMENT: This is a technical legal provision designed to prevent a court from inferring a permanent waiver of a Smoking-related provision from a pattern of lax enforcement.

Sec. [____ (*6)]. **OTHER REQUIREMENTS AND PROHIBITIONS.**

(a) Every Landlord shall deliver the following, on or before [*insert effective date of ordinance + 6 months*], to each Unit of a Multi-Unit Residence:

(1) a written notice clearly stating:

(i) all Units are designated nonsmoking Units and Smoking will be illegal in a Unit, including any associated exclusive-use Enclosed Area or Unenclosed Area, such as, for example, a private balcony, porch, deck, or patio, as of [*insert effective date of ordinance + 1 year*]; and

(ii) Smoking in all Common Areas, except for specifically designated Smoking areas, will be a violation of this [chapter / article] as of [*insert effective date of ordinance*].

(2) a copy of this [article / chapter].

COMMENT: This subsection describes the information Landlords must give to residents of Multi-Unit Residences to notify them of the new Smoking restrictions.

A copy of this ordinance must accompany the notice of the smokefree housing law so that residents may assess for themselves their full rights and obligations. Alternatively, Landlords can provide residents a summary of their rights and obligations under the law instead of (or in addition to) a copy of the ordinance itself. If this approach is adopted, steps should be taken to ensure the accuracy and appropriateness of any summary, as summaries are inherently incomplete. The city/county may also want to send information directly to renters about the new smokefree housing law. Research by the American Lung Association in California finds tenants are more likely to be aware of the new Smoking restrictions when information comes from the local government.

Your community may want to provide additional recommendations or guidelines for implementing the smokefree housing law. These could include holding a tenant or building meeting to discuss the new policy and/or hosting cessation classes for residents of Multi-Unit Residences. If your community has residents who have limited English proficiency, notices regarding the smokefree housing policy could be translated. Because

smaller housing providers/managers may not have the resources to do this, the city/county could develop sample translated notices.

Communities may want additional requirements to involve tenants and landlords with implementation and enforcement of the law. These could include such things as requiring tenants to inform visitors about the no smoking requirements; requiring tenants to tell landlords promptly about drifting smoke; and/or requiring landlords to take reasonable steps to enforce the no Smoking provisions. Should your community wish to add these types of provisions, please contact ChangeLab Solutions for assistance.

- (b) As of [*insert effective date of ordinance*], every Landlord shall provide prospective tenants with written notice clearly stating that:
- (i) Smoking is prohibited in Units, including any associated exclusive-use Enclosed Area or Unenclosed Area, such as, for example, a private balcony, porch, deck, or patio, as of [*insert effective date of ordinance*]; and
 - (ii) Smoking is prohibited in all Common Areas, except for specifically designated Smoking areas, as of [*insert effective date of ordinance*].
- (c) As of [*insert effective date of ordinance*], every seller of a Unit in a Multi-Unit Residence shall provide prospective buyers with written notice clearly stating that:
- (i) Smoking is prohibited in Units, including any associated exclusive-use Enclosed Area or Unenclosed Area, such as, for example, a private balcony, porch, deck, or patio, as of [*insert effective date of ordinance*]; and
 - (ii) Smoking is prohibited in all Common Areas, except for specifically designated Smoking areas, as of [*insert effective date of ordinance*].
- (d) Clear and unambiguous “No Smoking” signs shall be posted in sufficient numbers and locations in Common Areas where Smoking is prohibited by this [article / chapter] or other law. [In addition, signs shall be posted in sufficient numbers and locations in the Multi-Unit Residence to indicate that Smoking is prohibited in all Units.] Such signs shall be maintained by the Person or Persons with legal control over the Common Areas. The absence of signs shall not be a defense to a violation of any provision of this [article / chapter]. “No Smoking” signs are not required inside or on doorways of Units [, except for hotels or motels as defined in California Civil Code section 1940, subdivision (b)(2)] .

COMMENT: If your community excludes hotels and motels from the definition of Multi-Unit Residences (Section *1 Definitions), then do NOT include the optional underlined text in the last sentence.

- (e) No Person with legal control over any Nonsmoking Area shall permit Smoking in the Nonsmoking Area, except as provided in Section [____ (*3)(a)].

Sec. [____ (*7)]. SMOKING AND SMOKE GENERALLY.

- (a) The provisions of this [article / chapter] are restrictive only and establish no new rights for a Person who engages in Smoking. Notwithstanding (i) any provision of this [article / chapter] or of this Code, (ii) any failure by any Person to restrict Smoking under this [article / chapter], or (iii) any explicit or implicit provision of this Code that allows Smoking in any place, nothing in this Code shall be interpreted to limit any Person's legal rights under other laws with regard to Smoking, including, for example, rights in nuisance, trespass, property damage, and personal injury or other legal or equitable principles.

COMMENT: The subsection spells out that the intent of this ordinance is to create new smokefree areas and enhance the right of nonsmokers to smokefree environments. This ordinance does not provide smokers with any "safe harbors" from existing laws that might already impose potential liability for Smoking.

Subsection (a) *does not* expand traditional nuisance law in any way, and should generally be included in all ordinances based on this model. Subsection (b) below does potentially expand traditional nuisance law.

- (b) For all purposes within the jurisdiction of the [City / County of ____], nonconsensual exposure to Smoke [occurring on or drifting into residential property] is a nuisance, and the uninvited presence of Smoke on [residential] property is a nuisance and a trespass.

COMMENT: The declaration in subsection (b) that Smoke is a nuisance extends far beyond the residential context, unless limited by including the optional language in brackets. Once Smoke is declared a nuisance, nuisance abatement laws can be used to address Smoke around doorways, at businesses, in public venues, and anywhere else it may occur. However, declaring Smoke a nuisance is particularly helpful in the housing context because it eliminates the need to prove that some particular level of exposure has occurred and that such exposure is an unjustified intrusion or hazard.

California Government Code section 38771 explicitly authorizes cities to declare nuisances by ordinance. Counties may declare a nuisance pursuant to the broad police power set forth in the California Constitution, article XI, section 7.

Sec. [____ (*8)]. **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 any given case. As a practical matter, all these enforcement options would not be applied in a single case, although multiple remedies might be used against a particularly egregious violator over time.

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

COMMENT: The first sentence establishes the penalty for the core type of violation: Smoking where it is prohibited. The fine amount can be modified but cannot exceed \$100 for a first infraction. (See California Government Code section 36900.) It is separated from the main enforcement provision that follows so that law enforcement officers can simply write a ticket for illegal Smoking. The second sentence, sometimes called a “wobbler,” affords the prosecuting attorney discretion whether to pursue a violation as an infraction (like a parking ticket) or a misdemeanor (a crime punishable by up to a \$1,000 fine and/or six months in County Jail). Alternatively, violations can be set as *either* an infraction or a misdemeanor in all circumstances. Misdemeanors are more serious crimes for which a jury trial is available to defendants. Fines and other criminal penalties are established by the Penal Code and are typically reflected in the general punishments provision of a local code.

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

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

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

- (d) No Person shall intimidate, harass, or otherwise retaliate against any Person who seeks compliance with this [[article](#) / [chapter](#)]. Moreover, no Person shall intentionally or recklessly expose another Person to Smoke in response to that Person's effort to achieve compliance with this [[article](#) / [chapter](#)]. Violation of this subsection shall constitute a misdemeanor.
- (e) Causing, permitting, aiding, or abetting a violation of any provision of this [[article](#) / [chapter](#)] shall also constitute a violation of this [[article](#) / [chapter](#)].

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

- (f) Any violation of this [[article](#) / [chapter](#)] is hereby declared to be a public nuisance.

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

Note that this declaration merely says that *violating* the ordinance qualifies as a nuisance (e.g., when Smoking in a nonsmoking area, the *violation* is the nuisance, not the *Smoke*). It is not the same thing as a local ordinance declaring Smoke a nuisance. Please see Section *7(b) for the declaration that nonconsensual exposure to secondhand is a nuisance.

- (g) In addition to other remedies provided by this [[article](#) / [chapter](#)] or otherwise available at law or in equity, any violation of this [[article](#) / [chapter](#)] may be remedied by a civil action brought by the [[City Attorney](#) / [County Counsel](#)], including, without limitation, administrative or judicial nuisance abatement proceedings, civil or criminal code enforcement proceedings, and suits for injunctive relief.

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

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

[(h) Any Person, including a legal entity or organization acting for the interests of itself, its members, or the general public, may bring a civil action to enforce this [article / chapter] by way of a conditional judgment or an injunction to prevent future such violations and may sue to recover such actual or statutory damages as he or she may prove.]

COMMENT: In order to get an injunction, a plaintiff would have to sue in superior court, generally with the assistance of an attorney. A plaintiff, however, could seek a conditional judgment in small claims court and represent him/herself. Note that the difference between an injunction and a conditional judgment is that an injunction directly orders the defendant to do something (or to refrain from doing something). A conditional judgment, however, gives the defendant a choice between fulfilling certain conditions (e.g., ceasing the illegal conduct) or suffering a different judgment (e.g., paying monetary damages). (See 1 *Consumer Law Sourcebook: Small Claims Court Laws and Procedures* (California Department of Consumer Affairs 2005.)) A conditional judgment could serve as an alternative to damages, or it could be in addition to damages. For example, a small claims court could order some monetary damages along with a conditional judgment giving the defendant a choice between stopping the violations or paying even more money.

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

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

SECTION III. CONSTRUCTION, SEVERABILITY.

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

COMMENT: This is standard language. Often this “boilerplate” is found at the end of an ordinance, but its location is immaterial.

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