



public health law & policy
technical assistance legal center

Smokefree Recreational Areas Ordinance

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

Revised June 2010
(Originally issued February 2007)

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.

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

Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

WHEREAS, there is no Constitutional right to smoke;³⁰

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

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

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

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

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

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

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

[9999-2m17cleanup.html](#).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A designated Smoking area:

(1) must be outside;

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

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

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

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

(6) must have a clearly marked perimeter; and

(7) must be identified by conspicuous signs.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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. |